A

MALKIAT SINGH AND ORS.

*v.*

STATE OF PUNJAB

APRIL 10, 1991

B [A.M. AHMADI, V. RAMASWAMI, K. RAMASWAMY, JJ.]

*Terrorist Affected Areas (Special Courts) Act, 1984—Sections 14, 15—Conviction under Section 307 I.P.C. read with Section 34, IPC—F.I.R. ocular defence evidence, circumstantial evidence, memos sent to Medical Officer, case diary—Appreciation of—Principles to be followed indicated.*

C

*Code of Criminal Procedure, 1973—Sections 174, 175, 162—Police Officer—Powers of—"Previous statement"—Meaning of—Object of Section 162 indicated—Statement of witness examined during inquest—Evidential value of.*

D

*Terrorist Affected Areas (Special Courts) Act, 1984—Sections 14, 15—Conviction under Section 307 read with Section 34, IPC—Sentence—Awarding of—Sufficient opportunity to be given to prosecution and accused—Awarding sentence on the same day of finding guilt—Whether contravenes Section 235, Code of Criminal Procedure, 1973.*

E

**The case of the prosecution was that at about 9.00 p.m. on June 4, 1984, A-1 and A-3 came to the liquor shop of D-3 wherein PW-3, D-1, D-2 and PW-4 were also present and were vending the liquor. They sold one bottle of liquor to A-1 and A-3 on credit. After its consumption A-1**

F **and A-3 demanded another bottle to which D-3 refused to sell on credit. Thereon A-1 and A-3 abused them and a quarrel ensued. Both left the shop in anger. D-1 and D-2 slept on wooden takthposh in front of the liquor shop. PW-3 and PW-4 climbed the roof of the shop and slept there. During past mid-night of June 4-5, 1984 at about 12.30 a.m., PW-3 and PW-4 heard gun shot fire and got up and saw with the**

G **vigibility of electric light emanating from the house of one Gurbax Singh, the father of DW-2 that A-1 was firing with rifle at D-1 to D-4 and A-2 and A-3 hitting them with Gandasas (sharp edged weapons). Seeing PW-3 and PW-4 on the terrace A-1 fired at them but they escaped uninjured and they jumped down. PW-3 jumped towards back side of the shop and ran towards the village and hid in the school. PW-4**

H **jumped to the front side and ran towards the village. A-1 fired at PW-4**

and A-2 hit him. He received seven bullet injuries fired by A-1 on the backside, of right leg, thigh and left side of the abdomen while he was running. A-2 hit him on the right shoulder and had incised injury. He ran to the house of PW-3 with bleeding injuries, knocked the door and fell down unconscious. On June 5, 1984 at about 9.00 a.m. the Chowkidar of the village reached Kotli Police Station and reported to PW-5, S.H.O. who reduced F.I.R into writing.

In the F.I.R. the chowkidar stated that he had heard gun-shot firing from the side of the liquor shop. Due to fear and the prevailing tense situation he did not come out. Next day morning he saw several people collected at the liquor shop and saw the dead bodies of D-1 to D-4 and PW-4 was lying unconscious in the house of DW-3 and he was asked to report the matter accordingly.

The defence consented to mark F.I.R., the affidavits of the panch witnesses and constables, the fire arms licence of A-1 under Ex. p-17 and also the reports of the ballistic expert and chemical examination reports without oral evidence.

The lower court believed the direct evidence of PW-3 and PW-4 and the prosecution case that A-1 fired at the deceased with MO 11 rifle, A-2 and A-3 also participated in the attack.

The first accused was convicted under s. 302 read with s. 34, I.P.C. for causing the deaths of D-1, D-2, D-3 and D-4 and sentenced to death subject to confirmation by this Court. He was also further convicted under s. 307 read with s. 34, I.P.C. and sentenced to undergo rigorous imprisonment for 5 years for attempt to murder PW-4. A-2 and A-3 were convicted under s. 302 read with s. 34, I.P.C for causing deaths of D-1 to D-4 and sentenced to undergo imprisonment for life. A-2 and A-3 were convicted under s. 307 read with s. 34 I.P.C. for attempt to murder of PW-4 and were sentenced to undergo rigorous imprisonment for 5 years, all the sentences to run concurrently, against which the accused filed appeal u/s. 14(1) of the Terrorist Affected Areas (Special Court) Act, 1984.

The appellants contended that the evidence of PW-4 was highly artificial, unbelievable and untrustworthy; that barring their evidence, there was no other evidence to connect the appellants with the commission of the crime; that the omission of the names of the accused in the case diary and memos would belie the theory of witnesses; that the appellants were implicated by suspicion and the prosecution had not

established the guilt of the appellant beyond reasonable doubt; that the conviction and sentence by the special court was on the same day, which contravened the mandatory provision of s. 235 of the Code.

Partly allowing the appeal, this Court,

HELD: 1. The First Information Report is not substantive evidence. It can be used only to contradict the maker thereof or for corroborating his evidence and also to show that the implication of the accused was not an after-thought. [266B-C]

2. Since the examination of first information was dispensed with by consent F.I.R. became part of the prosecution evidence. [266B-C]

3. Ocular defence evidence, if it is not subjected to critical cross-examination, is entitled to the same weight as prosecution evidence. But merely because the prosecution, as usual, made insipid cross-examination, the defence evidence is not to be believed automatically. [267A-B]

4. Witnesses may be prone to speak lies but circumstances will not. So even though the burden of the defence is not as heavy as of the prosecution, the oral evidence tendered by the defence must also be subjected to critical scrutiny and be considered in the light of the given facts and attending circumstances of the case and human probabilities. [267A-C]

5. Corroboration is not a rule of law, but one of caution as an assurance. The conviction could be made on the basis of the testimony of a solitary witness. The occasion for the presence at the time of occurrence, opportunity to witness crime the normal conduct of the witness after the incident, the nearness of the witness to the victim, his pre-disposition towards the accused, are some of the circumstances to be kept in view to weigh and accept the ocular evidence of a witness. It is not the quantum of the evidence but its quality and credibility of the witness that lends assurance to the court for acceptance. [267H-268B]

6. The case diary is only a record of day to day investigation of the Investigating Officer to ascertain the statement of circumstances ascertained through the investigation. Under Section 172(2) the Court is entitled at the trial or enquiry to use the diary not as evidence in the case, but as aid to it in the inquiry or trial. Neither the accused, nor his agent, by operation of sub-s. (3), shall be entitled to call the diary, nor shall he be entitled to use it as evidence merely because the Court

referred to it. Only right given thereunder is that if the police officer who made the entries in the diary uses it to refresh his memory or if the Court uses it for the purpose of contradicting such witness, by operation of s. 161 of the Code and s. 145 of the Evidence Act, it shall be used for the purpose of contradicting the witness, i.e., Investigation Officer or to explain it in re-examination by the prosecution, with permission of the Court. It is, therefore, clear that unless the investigating officer or the court uses it either to refresh the memory or contradicting the investigating officer as previous statement under s. 161 that too after drawing his attention thereto as is enjoined under s. 145 of the Evidence Act. The entries cannot be used by the accused as evidence. [269C-G]

7. The memos sent to the Medical Officer are not evidence except as record of investigation. It is not a rule of law that the memo should bear names with cause title of accused. It is enough if the name of the injured is mentioned in the memo. [269H-270A]

8. Section 174 of the Code empowers a police officer to investigate in the presence of two or more respectable witnesses and report only the cause of death and the person if known, that has committed the offence. Section 175 empowers him to summon any person who appears to be acquainted with the facts of the case and every person so summoned shall be bound to attend the inquest and answer truely all the questions other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture. The statement made by such person is a "previous statement" within the meaning of s. 162 and it shall not be signed. So the statement made by such a person to police officer is in the course of the investigation, and when reduced to writing, it shall be used only by the accused to contradict such witness in the manner provided by s. 145 of the Evidence Act or with the permission of the court the prosecution could use it for re-examination only to explain the matter referred to in his cross-examination. [270B-E]

9. S. 162 was conceived to protect an accused creating an absolute bar against the previous statement made before the police officer being used for any purpose whatsoever. The obvious reason is that the previous statement under the circumstances was not made inspiring confidence. It enables the accused to rely thereon only to contradict the witnesses in the manner provided by s. 145 drawing attention of the witness of that part of the statement intended to be used for contradiction. It cannot be used for corroboration of a prosecution or defence witness or even a court witness, nor can it be used contradicting a

A **defence or a court witness. The investigating officer is enjoined to forward the inquest report to the Magistrate alongwith the statement recorded at the inquest, so that the court would see the record, at the earliest of the circumstances leading to the cause of the death of the deceased and the witness examined during the inquest. [270E-G]**

B **10. The statement of witness PW-3 recorded during inquest is not evidence. It is a previous statement reduced to writing under s. 162 of the Code and enclosed to the inquest report and cannot be used by the prosecution for any purpose including to show the names of the accused except to contradict the maker thereof, or to explain the same by prosecution. [270G-H]**

C **11. On finding that the accused committed the charged offences, s. 235(2) of the Code empowers the Judge that he shall pass sentence on him according to law on hearing him. Hearing contemplated is not confined merely to oral hearing but also intended to afford an opportunity to the prosecution as well as the accused to place before the** D **Court facts and material relating to various factors on the question of sentence and if interested by either side to have evidence adduced to show mitigating circumstances to impose a lesser sentence or aggravating grounds to impose death penalty. Therefore, sufficient time must be given to the accused or the prosecution on the question of sentence to show the grounds on which the prosecution may plead or the accused** E **may show that the maximum sentence of death may be the appropriate sentence or the minimum sentence of life imprisonment may be awarded, as the case may be. If the accused declines to adduce oral evidence, it does not prevent to show the grounds to impose lessor sentence on. [273A-D]**

F **12. The sentence awarded on the same day of finding guilt is not in accordance with the law. [273C-D]**

***Allauddin* v. *State of M.P.*, J.T. (1989) 2 SC 171 and *Anguswamy* v. *State of Tamilnadu*, J.T. (1989) 2 SC 184, referred to.**

G CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 490 of 1985.

From the Judgment dated 29.5.1985 of the Judge, Special Court, Ferozepur in Case No. 62/84, Trial No. 23/85 and FIR No. 154 of 1984.

H U.R. Lalit and Prem Malhotra for the Appellants.

N.S. Das Behl and R.S. Suri (NP) for the Respondent. A

The Judgment of the Court was delivered by

**K. RAMASWAMY, J.** This appeal under s. 14(1) of the Terrorist Affected Areas (Special Courts) Act, 61 of 1984 for short 'the Act' the reference under s. 15(3) thereof and s. 366 of the Code of B Criminal Procedure, 1973 for short 'the Code' for confirmation of the death sentence of Malkiat Singh, accused No. 1 in Sessions case No. 62 of 1984, Trial No. 23 of 1985 on the file of the Special Court, Ferozepur. The first accused was convicted under s. 302 read with s. 34, I.P.C. for causing the deaths of Ram Babu, D-1, Sunder Lal, D-2, Ram Nath, D-3 and Ram Chand, D-4 of each death and C sentenced to death subject to confirmation by this court. He was also further convicted under s. 307 read with s. 34, I.P.C. and sentence to undergo rigorous imprisonment for 5 years for attempt to murder Ashok Kumar, PW-4. Sukhdev Singh A-2 and Sohna Singh, A-3 were convicted under s. 302 read with s. 34, I.P.C. for causing deaths of D-1, to D-4 and sentenced to undergo imprisonment for life. A-2 and D A-3 were convicted under s. 307 read with S. 341 I.P.C. for attempt to murder of PW-4 and were sentenced to undergo rigorous imprisonment for 5 years, all the sentences to run concurrently.

Ram Avtar, PW-3 and D-3 Ram Nath, first cousin, had liquor contract in the village Kotli Ablu from 1983 and 1984. D-2 and PW-4 E were working in the liquor shop. The wives of D-2 and D-4 are sisters. D-4 came to see D-2. D-1 was working in the liquor shop at Ablowhad. Since the liquor therein had exhausted he came to Kotli Ablu to sell the liquor in the shop of D-3. A-1 and A-2 are brothers and are residents of Kotli Ablu and Sohna Singh, A-3 is their maternal uncle (mother's brother) and a resident of Rameana situated at a distance of F 8 km. to Kotli Ablu. These are the admitted facts. It is the case of the prosecution that at about 9.00 p.m. On June 4, 1984, A-1 and A-3 came to the liquor shop of D-3 wherein PW-3, D-1, D-2 and PW-4 were also present and were vending the liquor. They sold one bottle of liquor to A-1 and A-3 on credit. After its consumption A-1 and A-3 demanded another bottle to which D-3 refused to sell on credit. G Thereon A-1 and A-3 abused them and a quarrel ensued. Both left the shop in anger. D-1 and D-2 slept on a cot in front of the liquor shop. D-3 and D-4 slept wooden takthposh in front of the liquor shop. PW-3 and PW-4 climbed the roof of the shop and slept there. During past midnight of June 4-5, 1984 at about 12.30 a.m. PW-3 and PW-4 heard gun shot fire and got up and saw with the visibility of electric light emanat- H

A ing from the house of one Gurbax Singh whose son was examined on DW-2 that A-1 was firing with rifle at D-1 to D-4 and A-2 and A-3 hitting them with Gandasas (sharp edged weapons). Seeing PW-3 and PW-4 on the terrace A-1 fired at them but they escaped uninjured and they jumped down. PW-3 jumped towards back side of the shop and ran towards the village and hid in the school. PW-4 jumped to the front B side and ran towards the village. A-1 fired at PW-4 and A-2 hit him. He received seven bullet injuries fired by A-1 on the backside, of right, leg, thigh and left side of the abdomen while he was running. A-2 hit him on the right shoulder and had incised injury. He ran to the house of Gurmail Singh, PW-3 with bleeding injuries, knocked the door and fell down unconscious. On June 5, 1984 at about 9.00 a.m. Jit C Singh, the Chowkidar of the village reached Kotli Police Station and reported to PW-5, S.H.O. who reduced Ex. P-24 into writing. In the F.I.R. he stated that he had heard gun-shot firing from the side of the liquor shop. Due to fear and the prevailing tense situation he did not come out. Next day morning he saw several people collected at the liquor shop and saw the dead bodies of D-1 to D-4 and PW-4 was lying D unconscious in the house of DW-3 and he was asked to report the matter accordingly. PW-5 after issuing F.I.R. to all the concerned, went alongwith police party to the spot at noon and saw the dead bodies. He went to the house of DW-3 and found PW-4 under shock and unconscious. He sent him for medical examination by PW-2, the Doctor as his condition was serious. PW-3 on coming to know the E arrival of the police and the military people at noon mustered courage and came out from the school and went to the shop. He was examined at the inquest and he also attested the statement recorded by the police at the inquest. PW-5 enclosed the copies of his statement to the inquest reports Ex. P-4, P-6, P-8 and P-10 and sent the dead bodies with the reports for post-mortem by PW-2 Doctor. He also prepared F rough sketch of the scene under Ex-P1/A. He recovered the blood stained earth and cots etc. under Ex. P-16. He recovered 7 empty and two live cartridges Ex. M 0/1 to M 0/9 under panchnama Ex. p-18. He remained on the spot till 10.30 p.m. and saw the light emanating from the house of Gurbax Singh and falling at the scene of occurrence. He sent requisition twice to the hospital to find whether PW-4 was in a fit G condition for recording his statement. On June 7, 1984 at about 7.00 a.m. he received an endorsement that PW-4 was in a fit condition to make the statement. Accordingly he recorded the statement. He sent M.O.S 1 to 9 cartridges and pellets recovered from body of D-4 under Ex. P-25 to ballistic expert for report. on June 15, 1984 when he was picketing on the drain of village Chand Bhan at about 3.30 a.m. he H arrested the appellants and recovered from the person of A-1. Ex.

M 0/11 rifle, 351 bore (semi automatic) of U.S.A. make loaded with two cartridges M 0/12 and M 0/13 under panchnama in the presence of panch. Pursuant to a statement made under s. 27 Evidence Act by A-3 leading to discover Gandasa M 0/14 was recovered under ex. P-27 and sent them to the chemical examination and the ballistic reports. Under Ex. P-28, the Ballistic expert found that the empties Ex. M 0/1 to M 0/9 had been fired from rifle Ex. M 0/11. Gandasa was stained with human blood as per the report Ex P-29. PW-2 who conducted the post-mortem on D-1 and D-2 found on each of the dead bodies two gun-shot entry and exit wounds. D-3 and D-4 were found to have 4 gun-shot lacerated and two incised injuries and 5 lacerated and two incised injuries respectively. He removed M.O.S. 16 and 17 pellet from the body of D-4. He issued post-mortem certificates Ex. P-3, P-5, P-7 and P-9 respectively. He also examined PW-4. He found as many as 7 lacerated gun-shot injuries and one incised injury and issued medical certificate Ex. P-2. Injuries 1 to 7 were caused by gun-shot fire and injury 8 by a sharp weapon. PW-5 sent two pellets recovered by him from the body of D-4 to the Ballistic and Chemical Examination. The defence consented to mark F.I.R., the affidavits of panch witneses and constables; the fire arms licence of A-1 under Ex. P-17 and also the reports of the ballistic expert and chemical examination reports without oral evidence. PW-6, the Deputy Superintendent of Police supervised the investigation conducted by PW-5. The prosecution examined 6 witnesses and defence examined 3 witnesses and marked the documents. The accused were examined under s. 313 and denied their complicity and examined DW-1 to DW-3 to prove that the bulb of Gurbax Singh was not burning and PW-3 was residing at Medhak and he was brought to Kotli Ablu by the Police and PW-4 was conscious and did not disclose the names of the appellants at that time. The lower court believed the direct evidence of PW-3 and PW-4 and the prosecution case that A-1 fired at the deceased with M 0/11 rifle, A-2 and A-3 also participated in the attack. If also found that M 0/11, the rifle belongs to A-1 and he fired the deceased and PW-4. Accordingly convicted them for an offences under ss. 302/34 and 307/34 I.P.C. When they were asked under s. 235(2), they declined to lead evidence and the Sessions Court awarded sentence to the accused as refered to earlier.

Shri Lalit, the learned senior counsel for the appellants contended that the evidence of PW-3 and PW-4 is highly artificial, unbelievable and untrustworthy; barring their evidence, there is no other evidence to connect the appellants with the commission of the crime. The story that PW-3 and PW-4 climbed on the terrace and were sleeping is

A false as they cannot climb to a height of 8/1/2 ft. PW-3 did not disclose his witnessing the occurrence to any one till noon. DW-3 the Sarpanch of Madhok spoke that PW-3 alongwith the panch witnesses were brought from Madhok in a Jeep by the police, so he is a planted witness. In support thereof he contends that the specific evidence of DW-3 in this regard was not challenged in cross-examination. PW-4 B was not examined at the inquest though he was conscious. The police requisitioned the dog squad to sniff the scene of offence to identify the unknown accused. PW-5 and PW-2 the Doctor admitted that the omission of the names of the accused in the case diary and memos would belie the theory of witnesses. The omission of the names of the accused in the cause title (Banam) would clearly show that PW-3 and C PW-4 were not direct witnesses and PW-3 was introduced at a later stage and he was not examined at the inquest and that PW-4 did not identify the appellants. This was also further corroborated from the fact that admittedly Ex. P-24, recited that three unknown assailants had killed the deceased. Admittedly the dog squad was requisitioned. The appellants were falsely implicated. As regards PW-4, he further D contended that as per the evidence of DW-2 son of Gurbux Singh and DW-3, Gurmail Singh, PW-4 was conscious at that time of his coming to the house of DW-3 and remained to be conscious. The police did not examine him till June 7, 1984 as the assailants were not known. There was no light in the house of DW-1 and PW-3 and PW-4 could not have identified the assailants. The theory of liquor vending is E doubtful for the reason that the entire State was under curfew on that day due to blue star operation on June 3, 1984 and no vending would take place when there is a curfew. If really the appellants 1 and 3 had taken the liquor on credit, nothing prevented the prosecution to produce the chit admittedly taken by D-3. The theory of burning the shop shows that it is an act of terrorists as was noted in the case diary by F PW-6. Thus the appellants were implicated by suspicion and the prosecution had not established the guilt of the appellant beyond reasonable doubt. The conviction and sentence by the special court was on the same day, namely May 29, 1985 which contravenes the mandatory provision of s. 235 of the Code. In view of the decision of this court in *Allauddin* v. *State of M.P.*, J.T. (1989) 2 SC 171 and *Anguswamy* v. G *State of Tamilnadu*, J.T. (1989) 2 SC 184 the sentence of death awarded to A-1 is illegal. A-2 had no axe to grind against the deceased. He neither went for drinking at 9.00 p.m. on that day nor had a quarrel. He bears no motive to kill the deceased or attack PW-4. No recovery of Gandasa was made from him. PW-3 and PW-4 have no prior acquaintance with him. Therefore, it was highly doubtful H whether A-2 had participated in the offence. As regards to the third

appellant (A-3), it is his contention that he is a resident of Rameana. PW-3 or PW-4 do not know A-6 at all. Therefore, he may not be able to have participated in the crime. It was resisted by Mr. Das Bahl, learned counsel for the State.

The acceptance of the prosecution case rests on the evidence of PW-3 and PW-4. PW-3 and D-3 had the licence to vend liquor at Kotli Ablu. PW-4 and D-2 were vending liquor under them. D-4 came to see D-2 as they were married sisters. D-1 came and was vending on the fateful day in the shop. D-1 to D-4 were killed in the intervening night of June 4-5, 1984 is practically admitted from the evidence of DW-3. During the course of the same transaction PW-4 sustained 7 lacerated gun-shot injuries and one incised injury is also admitted through the evidence of DW-2 and DW-3, PW-2. the Doctor's evidence conclusively established that D-1 and D-2 died due to gun-shot injuries. D-1 and D-2 each had two entry and exit wounds due to gun-shots. D-3 and D-4 also had gunshot lacerated as well as incised injuries. They also died on the spot due to the injuries which are sufficient to cause death in the ordinary course of nature. Seven empty and two live cartridge fired from M 0/11 rifle of 351 bore of U.S.A. make belonging to A-1 were recovered from the scene of occurrence. Therefore, the deaths of D-1 and D-2 due to gunshot injuries and D-3 and D-4 due to gunshot and incised injuries are proved beyond doubt. Equally PW-4 sustained injuries is also established.

The only question is whether the appellants are assailants. The conviction of the appellants hinges upon the acceptability of the testimony of PW-3 and PW-4. Let us first take the evidence of PW-4, the injured witness whose presence at the time of occurrence stands confirmed. He is aged about 19 years. He was working in the liquor shop of D-3 and PW-3 at Kotli Ablu. He is residing in that village was not disputed. As stated earlier he sustained 8 injuries (7 gunshot and one incised) during the course of the same transaction is also indisputable, and in fairness, was not disputed by Shri Lalit. His serious attack is that PW-4 did not disclose the names of the assailants for two days which would show that he did not either see the assailants or the assailants were not known him. We find it difficult to accept. His case that he jumped from the terrace in front of the shop and he was attacked by the assailants was not disputed in the cross-examination. The suggestion that he was sleeping alongwith D-4 would show that he could see A-1 who fired at him while he was running away and it receives corroboration from medical evidence of PW-2 that the injuries are on the backside while he was chased by the accused. So he

could clearly identify his own assailants as the occurrence did not take place at a fleet or glimpse. In the F.I.R. at the earliest, it was specifically stated that PW-4 was not in a condition to speak. It would mean that he was either under shock or unconscious.

The First Information Report given by the Chowkidar was admitted in evidence with the consent of the defence. It is settled law that the First Information Report is not substantive evidence. It can be used only to contradict the maker thereof or for corroborating his evidence and also to show that the implication of the accused was not an after-thought. Since the examination of first informant was dispensed with by consent Ex. P-24, F.I.R. became part of the prosecution evidence. Under s. 11 of the Evidence Act read with s. 6 the facts stated therein namely, PW-4 was not in a speaking condition, could be used only as a relevant fact of prior existing state of facts in issue as *res gestae* of "the earliest information". It is not used to corroborate the prosecution case, but can be looked into as an earliest information of the existing condition of PW-4 at 9.00 a.m. on June 5, 1984 i.e. when the report was given in Ex. p-24, PW-4 was still unconscious. When PW-4 had stated that he became unconscious as soon as he came and tapped the door of DW-3, and fell down, by operation of s. 11 of the Evidence Act it may be relevant fact of the previous existing condition that PW-4 continued to remain unconscious till the report was given. Therefore, the F.I.R. could be used as relevant existing state of fact namely the continuous unconscious condition of PW-4 till PW-5 S.H.O. reached and saw him within the meaning of s. 11 read with s. 6 of the Evidence Act. When PW-4 received 7 gun-shot injuries and one incised injury and ran for life to a distance with bleeding injuries, it would be quite likely that he would be under severe shock and his evidence that after reaching the home of DW-3 and knocked the door he fell down unconscious appears to be quite natural and probable. The evidence of PW-5, that on seeing PW-4 in critical unconscious condition he sent him to the Doctor for medical examination and the doctor administring sadation appear to be human probabilities and there is nothing intrinsic to suspect their evidence. Thus PW-4 was not in a fit condition to give statement till June 7, 1984 at 7.00 a.m. PW-4's evidence that he was residing at Kotli Ablu and that he knew the accused was not disputed in the cross-examination. It is not uncommon in normal human probability that he was not expected to know the names of the relations of A-3. When A-1 and A-3 came in that very night to the shop and quarrelled for non-supply of liquor on credit, it would be fresh in the memory of PW-4 and as he saw the assailants he could have easily recognised A-3.

Undoubtedly, ocular defence evidence, if it is not subjected to critical cross-examination, is entitled to the same weight as prosecution evidence. But merely because the prosecution, as usual, made insipid cross-examination, the defence evidence is not to be believed automatically. Witnesses may be prone to speak lies but circumstances will not. So even though the burden of the defence is not as heavy as of the prosecution, the oral evidence tendered by the defence must also be subjected to critical scrutiny and be considered in the light of the given facts and attending circumstances of the case and human probabilities. The evidence on record is clear that PW-4 was left attended, though was lying with injuries at the house of DW-3, till the investigating officer PW-5 came and saw him in critical condition. The normal human conduct, which is common in the country side, is to give immediate first aid and then to make inquire of the cause for injuries and the persons who caused the same. As DW-3 betrayed such conduct, make us to suspect the credibility and veracity of his evidence and of DW-2 that PW-4 was conscious all through and that he did not disclose the assailants' names. Therefore, the evidence of DW-2 and DW-3 that PW-4 was professed to have disclaimed the names of the assailants is unbelievable despite no specific cross-examination was directed on that aspect. That apart they did not tender themselves to be examined by PW-5, the investigating officer. As regards the shedding of the light from the house of Gurbax Singh is concerned, there is uncontroverted evidence of PW-5 that he remained in the village till 9.30 p.m. on June 5, 1984 to see whether the light was emanating from the house of Gurbax Singh and found to be so and sufficient for PW-3 and PW-4 to identify the assailants. No cross-examination on this aspect was directed. Gurbax Singh, the owner of the house was not examined by the defence. Only his son DW-2, an youngester, came into the box and perjured the evidence. Therefore, the claim that the light was not working for three months prior to the date of occurrence, cannot be believed. Even assuming that there was no light, even then, PW-4 could identify his own assailants when he was attacked and chased in the course of the same transaction. Nothing worthwhile was brought out in the cross-examination to disbelieve his testimony. He had no axe to grind against any of the accused. To motive to make false implication of the accused was even suggested. He cannot be expected to allow his own assailants to go unpunished and would implicate innocent persons. Moreover the medical evidence of PW-2 fully corroborated the evidence of PW-4.

It is settled law that corroboration is not a rule of law, but one of caution as an assurance. The conviction could be made on the basis of

A the testimony of a solitary witness. The occasion for the presence at the time of occurrence, opportunity to witness the crime, the normal conduct of the witness after the incident, the nearness of the witness to the victim, his pre-disposition towards the accused, are some of the circumstances to be kept in view to weigh and accept the ocular evidence of a witness. It is not the quantum of the evidence but its quality
B and credibility of the witness that lends assurance to the court for acceptance. Considered in this light, we have no hesitation to conclude that PW-4 is a witness of truth and inspires us to believe his evidence. He would, even in the absence of any light have identified the accused, who had attacked him and committed the murders of sleeping, unarmed and innocent D-1 to D-4.

C The evidence of PW-3, though was severly attacked by Shri Lalit, giving our anxious consideration and subjecting to careful analysis, we find that the Special Court committed no error in accepting his evidence. It is common knowledge that the villagers during summer sleep outside the house, court-yard of the house, if any, or on
D the terrace of the concrete houses. No doubt there is no stairs to the terrace of the shop whose height is only 8 and 1/2 feet. PW-4 and PW-3 being young men it is not difficult to climb up and sleep and now it was proved providential for them. Therefore, the absence of producing, the quilts or lack of steps is not a serious infirmity to doubt the presence of PW-3 and PW-4 and that they slept on the terrace of the shop.
E In view of curfew and tense condition in the State, it would be unlikely that PW-3 would have travelled in the night to Madhok at a distance of 23 km.

The evidence on record clearly shows that the defence has freely used the entries in the case diary as evidence and marked some por-
F tions of the diary for contradictions or omissions in the prosecution case. This is clearly in negation of and in the teeth of s. 172(3) of the Code. Section 172 reads thus:

> "Diary of proceedings in investigation.—
>
> G (1) Every police officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forthwith the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through
> H his investigation.

(2) Any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial.

(3) Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but, if they are used by the police officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer, the provisions of Section 161 or Section 145, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872), shall apply."

It is manifest from its bare reading without subjecting to detailed and critical analysis that the case diary is only a record of day to day investigation of the Investigating Officer to ascertain the statement of circumstances ascertained through the investigation. Under sub-s. (2) the Court is entitled at the trial or enquiry to use the diary not as evidence in the case, but as aid to it in the inquiry or trial. Neither the accused, nor his agent, by operation of sub-s. (3), shall be entitled to call the diary, nor shall he be entitled to use it as evidence merely because the Court referred to it. Only right given thereunder is that if the police officer who made the entries in the diary uses it to refresh his memory or if the Court uses it for the purpose of contradicting such witness, by operation of s. 161 of the Code s. 145 of the Evidence Act, it shall be used for the purpose of contradicting the witness, i.e. Investigation Officer or to explain it in re-examination by the prosecution, with permission of the court. It is, therefore, clear that unless the investigating officer or the Court uses it either to refresh the memory or contradicting the investigating officer as previous statement under s. 161 that too after drawing his attention thereto as is enjoined under s. 145 of the Evidence Act. The entries cannot be used by the accused as evidence. Neither PW-5, nor PW-6, nor the court used the case diary. Therefore, the free use thereof for contradicting the prosecution evidence is obviously illegal and it is inadmissible in evidence. Thereby the defence cannot place reliance thereon. But even if we were to consider the same as admissible that part of the evidence does not impinge upon the prosecution evidence.

As regards the omission of the names of the appellants in the memos sent to the Medical Officer PW-2 under Ex. D-13 and 15 it is also not evidence except as record of investigation. It is not a rule of

A law that the memo should bear names with cause title of accused. It is enough if the name of the injured is mentioned in the memo. Therefore, the omission to refer their names after the word Banam in the memos sent to the Doctor would not create any doubt that the appellants were later implicated. Equally the prosecution cannot rely on the statement of PW-3 enclosed to the inquest reports as substantive evidence, as is done and argued with vehemence by Sri Das Bahl. Section 174 of the Code empowers a police officer to investigate in the presence of two or more respectable witnesses and report only the cause of death and the person, if known, that has committed the offence. Section 175 empowers him to summon any person who appears to be acquainted with the facts of the case and every person so summoned shall be bound to attend the inquest and answer truely all the questions other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture. The statement made by such person is a "previous statement" within the meaning of s. 162 and it shall not be signed. So the statement made by such a person to police officer is in the course of the investigation, and when reduced to writing, it shall be used only by the accused to contradict such witness in the manner provided by s. 145 of the Evidence Act or with the permission of the court the prosecution could use it for re-examination only to explain the matter referred to in his cross-examination. It is settled law that s. 162 was conceived to protect an accused creating an absolute bar against the previous statement made before the police officer being used for any purpose whatsoever. The obvious reason is that the previous statement under the circumstances was not made inspiring confidence. It enables the accused to rely thereon only to contradict the witnesses in the manner provided by s. 145 drawing attention of the witness of that part of the statement intended to be used for contradiction. It cannot be used for corroboration of a prosecution or defence witness or even a court witness, nor can it be used contradicting a defence or a court wintness. The investigating officer is enjoined to forward the inquest report to the Magistrate alongwith the statement recorded at the inquest, so that the court would see the record, at the earliest of the circumstances leading to the cause of the death of the deceased and the witness examined during the inquest. Therefore, the statement of PW-3 record during inquest is not evidence. It is a previous statement reduced to writing under s. 162 of the Code and enclosed to the inquest report and cannot be used by the prosecution for any purpose including to show the names of the accused except to contradict the maker thereof, or to explain the same by prosecution.

B C D E F G H

It is true that DW-1 had stated and was not effectively cross-examined that PW-3 was brought by the police in a jeep alongwith the Panch. But he was examined at the inquest is evident from the record. PW-3 was present at 9.00 p.m. at the time of vending liquor on credit to A-1 and A-3 and the quarrel. PW-4 stated that PW-3 and himself slept together on the terrace. He was examined at the inquest is corroborated by doctor's evidence that statement of PW-3 recorded under s. 162 was enclosed to the inquest reports and sent to PW-2, the Doctor alongwith the dead bodies. There is ring of truth in the evidence of PW-3. During curfew, in the night he would not have undertaken to go to Madhok at a distance of 23 km. The attending circumstances for coming to the scene of offence appear to be natural and probable in the ordinary course of human conduct. Having seen that four of his companions were done to death, the instinct of self-preservation and the grip of fear would have made him not to stir out from the school and mustered courage only when the police and the military people arrived at the scene at noon. Thus he came to be examined at the earliest at inquest whereat he disclosed the names and the participation of the appellants. Thus the evidence of PW-3 would lend to corroborate PW-4's evidence.

In addition there is a strong circumstantial evidence against A-1 and A-3. On his arrest on June 15, 1984, M/0/11, rifle was recovered from A-1. As per Ex. P-17 licence, it belongs to him, the ballistic report Ex. P-20 establishes that the empty cartridges Ex. M. 1 to M. 7 were discharged from the bore of M/0/11. This evidence clearly established that M/0/11 was used by A-1 in the crime. In his examination under s. 313, no explanation was given as to how M/0/11 rifle could go out from his custody for being used, in committing the crime by third parties. From its recovery from the person of A-1, it is clear that it continued to remain in his custody from the time of user in the crime till it was recovered from him. These circumstances coupled with oral evidence of PW-4 and PW-3 clearly establish the complicity of A-1 in committing the offences of murder of D-1 to D-4. As equally A-3 accompanied A-1 to the liquor shop and had quarrel. When A-1 and A-3 left the shop in anger, it is clear that they left the shop in a huff smarting from humiliation at the hands of the contractor from out side the state and their staff. To avenge the humiliation heaped upon them, they animated to finish the prosecution party. Obviously they chose past mid-night to be sure that all would be asleep and no evidence of their crime would be available. Thus they have strong motive to kill the deceased and to make murderous attack on PW-4. Moreover gandasa was recovered pursuant to A-3's statement under s. 27 of

A Evidence Act leading to its discovery and it contained human blood though blood group could not be detected due to disintegration. The two incised injuries each on the persons of D-3 and D-4 as corroborated by medical evidence clearly establishes the participation of A-3 in attacking the deceased. He accompanied A-1 at dead of night to the liquor shop and killed D-1 to D-4 and attempted to kill PW-4. Thus
B he shared with A-1 the common intention to kill the deceased D-1 to D-4 and attempt to kill PW-4.

The production of the credit chit kept on the table in the shop would have lent corroboration to the prosecution case of the sale of liquor to A-1 and A-3 on credit. It is not the prosecution case that it
C was signed by either of the accused. It is now in evidence that it was burnt out also with the shop, though no definite evidence for cause of burning is on record, except vague suggestions but denied by the prosecution witnesses that the terrosists committed the arson and killings. From a totality of facts and circumstances it cannot be concluded that terrorists committed the offence.

D

As regards A-2 we have grave doubt of his participation in the crime. Admittedly, he had no motive to kill any of the deceased or to attack PW-4. He did not come at 9.00 p.m. on June 4, 1984 to the liquor shop for drinking. There is no recovery of gandasa from him, though he was arrested alongwith A-1 and A-3. The doubt whether
E A-2 was likely to be a participant in the commission of this grave crime of four deaths has not been removed from our minds. It is undoubtedly true that PW-4 had stated that A-2 attacked him with the gandasa but when he was attacked while he was fleeing for life the possibility of mistaken indentity of A-2 to A-3 cannot be ruled out. We make it clear that we are not doubting the veracity of PW-4. In these circum-
F stances A-2 is entitled to the benefit. Accordingly, we hold that A-1 and A-3 have shared common intention, they had motive to kill the deceased. They came together, killed the sleeping innocent four persons D-1 to D-4 and also attempted to kill PW-4.

Accordingly, we hold that A-1 committed the offence of murder
G of D-1 and D-2 punishable under s. 302; D-3 and D-4's under s. 302 read with s. 34 I.P.C. and attempt of murder of PW-4 punishable under s. 307 read with s. 34, I.P.C. A-3 shared the common intention with A-1 and also committed the said offences under s. 302 read with s. 34; s. 307 read with s. 34 I.P.C. A-3 was given the minimum sentence of imprisonment of life. The sentences were directed to run
H concurrently.

On finding that the accused committed the charged offences, s. 235(2) of the Code empowers the Judge that he shall pass sentence on him according to law on hearing him. Hearing contemplated is not confined merely to oral hearing but also intended to afford an opportunity to the prosecution as well as the accused to place before the Court facts and material relating to various factors on the question of sentence and if interested by either side to have evidence adduced to show mitigating circumstances to impose a lesser sentence or aggravating grounds to impose death penalty. Therefore, sufficient time must be given to the accused or the prosecution on the question of sentence, to show the grounds on which the prosecution may plead or the accused may show that the maximum sentence of death may be the appropriate sentence or the minimum sentence of life imprisonment may be awarded, as the case may be. No doubt the accused declined to adduce oral evidence. But it does not prevent to show the grounds to impose lesser sentence on A-1. This Court in the aforestated *Alluddin* and *Anguswamy's* cases held that the sentence awarded on the same day of finding guilt is not in accordance with the law. That would normally have the effect of remanding the case to the Special Court for reconsideration. But in the view of the fact that A-1 was in incarceration for long term of six years from the date of conviction, in our considered view it needs no remand for further evidence. It is sufficient that the sentence of death awarded to A-1 is converted into rigorous imprisonment for life. The sentences of death is accordingly modified and A-1 is sentenced to undergo rigorous imprisonment for life for causing the deaths of all four deceased. The conviction of A-1 for attempt to murder PW-4 and sentence of five years' rigorous imprisonment is also upheld and all the sentences would run concurrently. A-2 is acquitted of all charges. The bail bonds are cancelled. He shall be set at liberty unless he is required in any other case.

The appeal is allowed only to the above extent.

V.P.R. Appeal Partly allowed.