

(2001) 04 DEL CK 0086

In the Delhi High Court

Case No : Criminal Appeal No. 185 of 1985, 214 of 1985, 202 of 1985 and 175 of 1985

Maj. Gen.(Retd.) F.D. Larkins, AVM (Retd.) K.H. Larkins and
Lt. Col (Retd.) Jasbir Singh and Jaspal Singh

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 30-04-2001

Acts Referred:

Citation : (2001) 4 AD 1018 : (2001) 92 DLT 5 : (2001) 60 DRJ 833 : (2001) 2 JCC 193

Hon'ble Judges : R.S. Sodhi, J

Bench : Single Bench

Advocate : Sunil Mehta, Dr. B.L. Wadhwa, Mr. Herjinder Singh and Mr. Sushil Bajaj, for the Appellant; B.R. Handa Special Public Prosecutor and Mr. U.L. Watwani, for the Respondent

Judgement

R. S. Sodhi. J

1. Criminal Appeals 185/85, 214/85, 202/85 and 175/85 seek to challenge the judgment and order dated 24.7.1985 of the learned Additional Sessions Judge in Sessions Case No. 33/84 whereby the learned Judge held the appellants guilty as under :

2. Maj. Gen.(Retd.) F.D.Larkins (for short "A-1"), AVM (Retd.) K.H.Larkins (for short "A-2"), Jasbir Singh (for short "A-3") and Jaspal Singh Gill (for short "A-4"), all the accused were convicted u/s 120B of the Indian Penal Code. A-1, F.D.Larkins was further convicted under Sections 3(c) and 5(b) of the Official Secret Act (for short "the Act"). A-1 was further convicted u/s 25 of the Indian Arms Act and u/s 61(i)(a) of the Punjab Excise Act A-2, K.H.Larkins was further convicted u/s 3(c) of the Act. A-3, Jasbir Singh, was further convicted u/s 3(c), 5(3) and 6(d) of the Act. A-4, Jaspal Singh Gill was convicted u/s 3(c) of the Act for having been found in possession of a restricted document i.e. the defense Telephone Directory, Ex.PW-14/A.

3. The prosecution case, as has been put up in the report submitted u/s 173 of the Code of Criminal Procedure also as noted by the learned Additional Sessions Judge is follows :

4. On 9.11.1983 A.V.M. S.Raughvandran of Air Headquarters New Delhi sent a complaint to the Commissioner of Police, New Delhi alleging therein that on 24.3.1984 Gp.Capt. Jasjit Singh informed him that for the last few days A-2, under whom he served earlier, was inducing him to pass on secret manuals Aircrafts used by Indian Air Force. For that purpose A-2 prepared to pay Rs.20,000/- per document to the said Jasjit Singh. The said Jasjit Singh was further informed that the (SIC)documents were required by some foreign country. The matter brought to the notice of the superior officer and with the approval Gp. Capt. Jasjit Singh was permitted to pass on see manual pertaining to Aircraft 75 bids entitled "Instrument Oxygen Equipment & Electronic" to A-2 so that full ramification of the matter and the details of the foreign intelligence could be ascertained. On 2.4.1983 around 12.05 p.m., A-2 visited the office of Gp. Capt. Jasjit Singh at Air Headquarters and took from him the said secret manual. On 4.4.1983 around 8.28 a.m. A-2 visited the residence of Gp. Capt. Jasjit Singh and returns the said manual to him along with Rs.10,000/- in two bundles of Rs.50/- notes. At that time A-2 informed Jasjit Singh that he would get in touch with him after a few days and collect from him a few more similar manuals. The contents of the said manual could be used for a purpose prejudicial to the safety and interest of the country. However, as decided, no legal action was sought to be initiated at that stage and it was considered advisable to wait for another contract so as to obtain details of the foreign intelligence agency and other Indians involved in that network. For certain unknown reason A-2 did not contract Gp. Capt. Jasjit Singh again to collect any more document from him.

5. Meanwhile, a reliable secret information was received by the special branch that A-2 was indulging in espionage activities and accordingly a secret watch was maintained on him. During that period it was found that he had been contacting A-1 his brother in real life, on different occasions. On 4th April, 1983 A-2 visited Syndicate Bank at Shakuntala Apartments and came out from there after 15-20 minutes. He was also seen visiting Syndicate Bank at Dhaula Kuan for about 15 minutes. On the same day at 1645 hours A-1 left his residence by his car along with a brief case towards Gurgaon Road. On a vacant patch of land near Subrato Park a-1 was seen giving a packet to a foreigner. On the same day at 1925 hours A-1 left his residence by his car and drove towards Purvi Marg Vasant Vihar. At 1930 hrs. the aforesaid foreigner again met A-1 and gave him a packet and thereafter A-1 drove towards his residence. At 2110 hrs. A-2 along with his wife visited the residence of A-1 and they remained there for 40 minutes.

6. Later on it was learnt that A-2 was about to leave the country and so complainant A.V.M. S.Raghvandran requested for taking legal action against A-1, A-2 and others. On the basis of that complaint case FIR No.237 dated 10.11.1983 u/s 3, 5 and 9 of the Act was registered at P.S. Tuglak Road, New

Delhi. Investigation of the case was taken over by Inspector R.S.Khurana of the Espionage Cell, Special Branch of the Delhi Police.

7. After the registration of the case on 10.11.1983 residential premises of A-1 at D-1/21, Vasant Vihar on the first floor was searched. That search resulted in recovery of two incriminating books marked "restricted" and two photostat leaflets marked "secret". Besides, 18 bottles of foreign liquor and 12 bore gun without license were also recovered from there. Regarding the recovery of those liquor bottles a sample case FIR No.330/1983 u/s 61 of the Punjab Excise Act was registered at Police Station Vasant Vihar and the investigation thereof was taken up by S.I. Amar Singh. Regarding the recovery of that unlicensed gun a separate case FIR No.331/83 u/s 25 of the Arms Act was registered at the same Police Station and the investigation thereof was taken over by SI Girdhari Lal of the Special Branch. A-1 was arrested on the same day in all the said three cases.

8. Meanwhile, it was learned that A-2 along with his wife had left for Lucknow. Consequently, a police party headed by inspector Shiv Lal was sent to Lucknow where A-2 was arrested on 10.11.1983 and was brought to Delhi on 11.11.1983. Both A-1 and A-2 were produced on 11.11.1983 before the Ld. ACMM, New Delhi from where they were remanded to police custody till 19.11.1983.

9. On 19.11.1983 A-1 moved an application before the Ld. ACMM, New Delhi expressing a desire of making a confessional statement. Accordingly, on 21.11.1983 confessional statement of A-1 was recorded by Shri Brajesh Kumar, Ld. Addl. Chief Metropolitan Magistrate, New Delhi to whom the application dated 19.11.1983 of A-1 was marked. In that confessional statement A-1 admitted having hatched a conspiracy with A-2 and A-3 for monetary gain in collusion with U.S. Officials namely Jockey Ben, John & Bud. He also admitted there having passed on secret/classified defense documents/information which he has obtained through A-2 and A-3 as also collected through his own efforts to US Intelligence Operators posted at New Delhi on covert assignments. A-1 was offered a sum of Rs.30,000/- per month the aforesaid Jockey as compensation for the services so rendered by him. It was further revealed that in September 1978 the said Jockey again contacted him and gave him a questionnaire which contained the following questions :-

- i) Who is going to be the next Chief of Army Staff?
- ii) Are any night conveyances playing between Sri Nagar and Leh?
- iii) Details about officers and their ranks sent abroad for specialised training especially in connection with New Equipment to be used in the Arms &
- iv) Details about the Russian technicians stationed in India for the purpose of training Indian Army Personnel in the new Russian Equipment.

10. Investigation further revealed that A-1 had been supplying information about the above questions to the said foreign agent from time to time for monetary consideration. Around November/December, 1982 one of the foreign agents by

the name "John" asked A-1 about Air Force technical manual pertaining to MIG-21, MIG-23 and MIG-25. The value of those manuals was indicated to be Rs.20,000/- to Rs.40,000/- per manual. In early 1983 A-1 informed A-2 that certain manuals in respect of MIG 21 were urgently needed regarding which he gave A-2 a list of such manuals. On the evening of April 2nd, 1983 around 1730 hours A-2 went to the residence of A-1 and handed over a secret manual of MIG 21 to him. On the evening of 24th April, 1983 A-1 delivered that manual to Bud a foreign national. Later the same evening after about 2 hours the said foreign national Bud dropped an envelope containing that manual and Rs.20,000/- into the car of A-1. Subsequently, on the same evening A-1 returned that manual to A-2.

11. During investigation it was further revealed that A-2 had been making frequent visits to Air Headquarters, New Delhi and there he contacted his juniors or erstwhile colleagues and had discussions with them on topic about which he was asked to furnish information by A-1. None of the officers so contacted by A-2 suspected his intention at that time and with whatever information he was so able to collect, he was able to reply to some of the queries of the US intelligence. In the beginning of 1983, A-1 gave a list to A-2 pertaining to technical manuals of MIG 21 and asked him to arrange for it indicating that such of the manuals to be arranged was worth Rs.20,000/- which could be paid to him in addition to his monthly remuneration. For obtaining that manual A-2 contacted Gp. Capt. Jasjit Singh as discussed above, on 2.4.1983 the said Gp. Capt. Jasjit Singh supplied one such secret manual pertaining to MIG 21 Air Craft to A-2. On 5th April A-2 returned that manual along with Rs.10,000/- to Gp. Capt. Jasjit Singh and promised to get in touch with him after a few days though thereafter he never contacted Gp. Capt. Jasjit Singh.

12. On 13.11.1983, on the basis of a disclosure made by A-1, the house search of A-3 was conducted. Nothing incriminating was recovered from that house. However, from the personal search of A-3, his Army identity card was recovered which showed A-3 as a serving officer though he had retired as far back as 1977. A-3 was arrested on the same day. During investigation, it was revealed that A-3 had maintained contacts with A-1 and towards the end of 1979 he was asked by A-1 to collect information on various Russian equipment which were being supplied to the Indian Army. From the beginning of 1980 A-3 started receiving Rs.1,000/-, per manual from A-1 in lieu of giving information to various questions which were put forth by A-1 to him. Around February-March, 1981, A-1 asked A-3 to furnish technical details/service manuals of T-72 Russian Tanks which were being supplied to Indian Army. In his search for defense armaments literature, A-3 used to visit Saina Bhawan, South Block, defense Library and Desidoc Matcalf House Library of DGI (Vehicle) and DGI, Armaments. In that pursuit he was helped by Brig. D.K. Kapoor, DI (V) who allowed A-3 to make use of that defense Library and further asked his Staff Officer Maj. Shanoy to take him to that library and instruct the Librarian to provide necessary help and assistance to A-3 there. Consequently, A-3 with the help of Brig. J.K. Kapoor and

his own service identity card, secured entry inside the defense Library and started taking out books of sensitive nature from those libraries. After his arrest, on 18.11.1983 A-3 was taken to the G-Block, defense Library and there he pointed out to the books as also the loan register through which those books were issued to him. Those books and the register were then taken into possession by the police through a seizure memo. In pursuance of his disclosure, A-3 was then taken to Dehradun by a police party headed by Inspector Dal Chand and there the house search of his parental residence at 11, Inder Nagar, Dehradun on 21.11.1983 resulted in the recovery of incriminating documents. It was also revealed that A-3 had secured entry in the defense Library of D-Block through the introduction of Brig. Sushil Kumar and Lt. Col. R.R.Chakarvarti. On 24.11.1983, at the instance of A-3, the books/manuals he had obtained from that D-Block defense Library along with the issue card, were taken into possession by the police through a seizure memo.

13. On 19.11.1983, A-3 made a further disclosure that he had passed on some documents including a defense telephone director to A-4, a resident of 82, Sunder Nagar, which he could get recovered. On that disclosure, on 19.11.1983 search of the aforesaid premises at 82, Sunder Nagar, New Delhi, was conducted and a defense telephone directory along with some other secret documents, invitation cards out of which 13 were from the American Embassy, were recovered from there. They were duly seized. On the same day, A-4 was arrested in the case.

14. Earlier on 15.11.1983 the secret manual titled "Technical Publication Aircraft/75 B.I.S." book-IV and Part-II "Aircraft Equipment" along with Rs.10,000/- and list of 13 documents, were taken into possession by the police from Air Vice Marshal M.L.Sethi, Director Intelligence, Air Headquarters, New Delhi. During investigation expert opinion regarding all the seized manuals/documents were obtained. Those opinions disclosed the leakage of information/contents of those books and documents was prejudicial to the safety, security and interest of the country. The relevant extracts of the visitors register pertaining to the visits of A-1 and A-2 to the Army and Air Headquarters respectively were obtained.

15. During investigation it was ascertained that the U.S. officials who handled A-1 under the cover name of Jockey was, in fact, Fafeal Mariani, an Attache of the U.S.Embassy. The U.S. official who handled A-1 under the cover name of Ben was, in fact, Raynold Frederick Stellch, III Assistant Attache of U.S.Embassy. The U.S. official who handled A-1 under the cover name of John was, in fact, Harry L. Wetherbe, another Attache of U.S.Embassy. The U.S. official who handled A-1 under the cover name of Bud was, in fact, Major Pal Mockinly Pittman, Jr. The photographs of the said four U.S. Diplomats were obtained from Ministry of External Affairs in a sealed cover, who were working as Intelligence Officers. During investigation, specimen writing/signatures of A-3 obtained and were sent along with the writings and signatures appearing on the different issue cards and

registers etc. for comparison to the Government Handwriting Expert.

16. Statements of different witnesses were recorded. Requisite sanction u/s 13(3) of the Official Secrets Act was obtained for launching prosecution against the four accused persons.

17. On 27.1.1984, a formal complaint under Sections 13(3), 3, 5, 6 and 9 of the Act read with Section 120B of the Indian Penal Code along with the report u/s 173 of the Criminal Procedure Code were filed in the Court of the learned ACMM, New Delhi. The learned ACMM committed the case to the Sessions on 16.4.1984.

18. The prosecution examined in all 60 witnesses. The case against A-1 Major Gen. F.D.Larkins is that in his confession statement, Ex.PW-26/H, recorded by the learned Addl. Chief Metropolitan Magistrate Mr. Brijesh Kumar, PW-26, which is proved by PW-26, he has admitted his guilt as also disclosed the conspiracy. PW-26 deposed to the effect that on 19.11.1983 on an application, Ex.PW-26/C, of A-1, he recorded the confession statement after complying with the requirements of law. He has stated the steps taken to ensure that the confession statement was made voluntary without any inducement, fear or favor. This was challenged before me on the ground that A-1 was arrested on 10.11.1983. He was ill treated and forced into making a statement which was otherwise untrue.

19. PW-26, Brijesh Kumar, has deposed that he has taken all pre-cautions which he thought necessary and which were required by law to be followed to ensure that A-1 was making a voluntary confession. He has stated that upon an application being received by him, A-1 was produced from judicial custody on 19.11.1983 at which time A-1 was given two days' time to consider and re-think. On 21.11.1983, A-1 was produced before the Magistrate and was identified by PW-59, G.K. Bakshi. Statutory warning was administered to the effect that A-1 was not bound to make confession and if he volunteered such, it could be read against him in evidence. After ensuring and satisfying himself about the voluntary nature of the confession sought to be made, recorded Ex.PW-26/H which was read over and admitted to be correct by A-1 and his signatures were appended thereon into its correctness.

20. The aforesaid confession was challenged on the ground that A-1 was not allowed to communicate with any one nor provided any legal aid and for that reason Ex.PW-26/H cannot be held to be voluntary. From the record I find that at no point of time before recording of the statement, had A-1 ever required services of a lawyer nor made any application to this effect to the Magistrate. No prejudice, Therefore, can be claimed to have been caused on this account. It was next contended before me that the accused was always under police influence and, Therefore, is should be deemed that fear of police brutality cannot be rule out while making confession. This argument of the learned counsel holds no water for the fact that when A-1 appeared before the Court of PW-26, Brajesh Kumar, on 19.11.1983 and thereafter on 21.11.1983, he made no grievance of any sort of brutality nor did he complain of any pressure that he was under which

compelled him to make the confession. I am, Therefore, not impressed by the argument of the learned counsel regarding police brutality. Learned counsel also argued that the confession statement is not corroborated by any independent material so as to show that the same is genuine. The recovery of Ex.PW-32/A, Ex.PW-36/B-1 and Ex.PW-36B-2 from the residence of A-1 during the house search that was conducted there on 10.11.1983. The aforesaid documents recovered find mention in the confession statement, Ex.PW-26/H. There is deposition of Amar Nath, PW-57, that A-1 met foreign national whose photograph was ultimately identified by A-1 in the Court before PW-26, Brajesh Kumar, and the same has been proved to be of Major Pal Kinley Pittman. The communication between A-1 and the foreign agent would certainly raise a presumption that such a communication was prejudicial to the safety and interest of the State or otherwise useful to an enemy. PW-38, C.F.Rozaric Protocol Officer, from the Ministry of External Affairs, Government of India has testified that Ex.PW-26/2-26 is the photograph of Major Paul Mockinly Pitman who arrived in India on 2.1.1983 and left India on 3.6.1983 and was holder of a diplomatic passport. PW-57, Amar Nath, saw A-1 in the company of aforesaid Major Paul Mockinly Pittman in New Delhi.

21. There is evidence of PW-11, Air Comodore Jasjit Singh, to show that he supplied the manual relating to MIG aircraft which finds reference in the confession statement.

22. At no point of time did A-1 complain to the ACMM, PW-26, that he had been forced into making a confession. On the evidence available, I am satisfied that the confession statement, Ex.PW-26/H, is voluntary. Its retraction cannot cause any dent, the confession statement is corroborated by other independent material.

23. Having held that the confession statement is voluntary, a bare perusal of the same would show the activities of A-1 as also the manner in which he got A-2 involved in the object of passing on information to foreign agents. A-1 narrates that from July, 1981 to September, 1982 A-2 worked for him for supplying the verbal information in relation to Russian aircraft for which a sum of Rs.1,000/- per month was paid to A-2, this was later enhanced to Rs.2,000/- per month. He stated that in July, 1981 A-2 delivered to him one classified manual relating to MIG 21 BI Aircraft for which A-2 was paid Rs.20,000/-. He admits himself being on the pay roll for Rs.3,000/- per month for passing military information to foreign agents which amount was subsequently increased to Rs.5,000/- per month.

24. The other evidence pressed into service to show A-1 conduct, is PW-31, Major Gen. (Retd.) Kailash Chander, PW- Brig. Harjit Singh and PW-50, Brig. Har Mohan Singh. PW-31, Maj. Gen. Kailash Chander, testified that after his retirement, A-1, on various occasions during meetings with him, enquired of him of the manner in which procurement of equipments is made by the Army. PW-43, Harjit Singh, deposes to the effect that during 1980-81, a-1 met him in his office

three or four times when A-1 enquired as to the requirements of the Army as regards pistols and the likely source. PW-50, Har Mohan Singh, deposes to the effect that in 1980, A-1 met him in his office and made various enquiries relating to classified material. From the aforesaid depositions it is evident as to the nature of information sought to be derived or collected by A-1 from whatever source it could be made available. The confession statement coupled with the recovery of documents Ex.PW-32/A, Ex.36/B-1 and Ex.PW-36/B-2 from his house on 10.11.1983 which have been deposed to by PW-36, Harish Malik, PW-37, J.M.Malhotra, PW-40, SI Bhawani Parshad, PW-45, SI Chaman Lal, PW-56, SI Girdhari Lal, PW-57, SI Amar Nath, PW-59, G.K.Bakshi and PW-60, R.S.Khurana, leave no doubt to my mind about the nefarious activities of this accused. Various classified material recovered from the house of the accused which has been deposed to by witnesses as also the recovery of unlicensed gun and foreign liquor beyond permissible limits which stands amply proved from the material on record, I am satisfied that A-1 is guilty u/s 3(2) of the Act for having in his possession the restricted documents Ex.PW-32/A, Ex.PW-36/B-1 and Ex.PW-36/B-2. I also find him guilty u/s 5(b) of the Act for having kept such classified information in his possession and having used the same for the benefit of a foreign power. He is also guilty u/s 25 of the Arms Act and u/s 61(1)(a) of the Punjab Excise Act for being found in unauthorised possession of 18 bottles of foreign liquor.

25. Coming to the case of A-2, the prosecution has relied upon the evidence of Air Commodore, Jasjit Singh, PW-11, Air Vice Marshal Raghvandran, PW-22. Jasjit Singh testifies that in the year 1968 he was subordinate for A-2 and served under him from November, 1968 till 1970 and from June, 1974 to January, 1975. He deposed to the effect that on 21.3.1984 while posted as Director (Operation), Aircraft Instruction at Air Headquarters, he received a telephonic call from A-2 inviting him for lunch at Ashoka Hotel on 23.3.1983. During lunch, A-2 handed over a list, Ex.PW-11/A, and proposed that PW-11, Jasjit Singh, deliver these publications mentioned in the list to A-2 against monetary consideration. Upon enquiries made by the witness as to the purpose for which these publications were required, A-2 informed him that the same were to be passed on to Israel. A-2 offered a sum of Rs.20,000/- per document to this witness. A-2 informed this witness that documents whenever available, if given to A-2, would be returned the following day in his office, time was given to consider till 28.3.1983. This fact was reported by PW-11 to his superior, PW-22 Air Marshal, S.Raghvandran on 24.3.1983 which has been corroborated by PW-22 in his statement. PW-11 was then taken by PW-22 to Air Vice Marshal, Brar, where PW-41, Director of Intelligence, M.L.Sethi, was called. This has been corroborated by PW-41. On 25.3.1983, PW-11 was asked by PW-41 to obtain some documents mentioned in the list, Ex.PW-11/A and to inform A-2 of its procurement. PW-11 further testified that as agreed between him and A-2, A-2 came to his office on 28.3.1983 which is supported by Ex.PW-16/C-3, copy of the relevant entry of the reception register of the Air Headquarters of that date which is proved by PW-16,

Surjit Singh, Assistant Civilian Staff Officer, Security Office, Ministry of defense, H-Block, New Delhi. Here PW-11 informs A-2 of his willingness to supply documents. Subsequently, as per the instructions from his superior on 2.4.1983, manual, Ex.PW-11/B was delivered to A-2 by PW-11. This was witnessed by PW-40, SI Bhawani Prasad who was deputed to keep a watch on the movements of A-2. The aforesaid manual, Ex.PW-11/B was not returned the following day by A-2 but information given over telephone that the same will be returned on 5.4.1983. However, according to this witness, on 5.4.1983, A-2 returned the manual along with a sum of Rs.10,000/- in cash in two bundles, Ex.PW-11/C and Ex.PW-11/D. PW-11 thereafter reported this to Director Intelligence, PW-41, and handed over the manual, Ex.PW-11/B as also Ex.PW-11/C and Ex.PW-11/D, the money given to this witness by A-2. PW-41 in his statement fully corroborates the version of PW-11 in this connection.

26. PW-11, Jasjit Singh, goes on to say that the arrangement was terminated by A-2 on 7.5.1983, It was argued before me that Ex.PW-11/B is not an information that could be classified and material that would jeopardise the security of the State. Be that as it may, this is hardly the point. The question is that Ex.PW-11/B was, in fact, the material which was handed over by PW-11 to this accused for an object which is unlawful. Whether the document is secret or not, is hardly of any consequence. To prove further activity of this accused, the prosecution examined PW-40, SI Bhawani Prasad, and SI Amar Nath, PW-57, who were deputed to keep a watch on the activities/movements of A-2. Both these witnesses have deposed about the different visits of A-2 to the Air Headquarters and to the residence of A-1. PW-40, Bhawani Prasad, deposes to the effect that on 4.4.1983, A-2 was seen coming from the residence and giving to Syndicate Bank where A-2 withdrew money which was ultimately paid to PW-11, Jasjit Singh, on 5.4.1983.

27. PW-57, Amar Nath, deposes to the movements of A-2 on 2/3.4.1983. The said witness found A-2 reaching the house of A-1 in his own car and staying there for 45 minutes. This evidence read with the admission of A-1, as contained in Ex.PW-26/H, lends assurance to the effect that A-2 was passing on information to A-1. In order to draw attention of the Court to the conduct of this accused, the prosecution has examined, PW-13, Group Capt. D.K.Dhiman, PW-19, Air Marshal Goel, PW-20, Group Capt. A.K.Singh, PW-21, Air Vice Marshal D.E.Satur, PW-23, Air Commodore D.S.Jog, PW-29, Wing Commander A.S.Negi, PW-35, Air Commodore, L.Allen and PW-52, Group Captain Ashok Goel. PW-13 deposes that in October/November, 1982 A-2 began cultivating this witness and visit him in his office although he had no work there. He vaguely recollects the questions being asked of him by A-2 in respect of future aircraft induction. PW-19, Air Marshal goel, deposes on the basis of the entries in his diary which he maintained that A-2 visited him on 1st, 3rd and 9th March, 1982 and thereafter on 13.9.1982. A-2 wanted material from him to enable him to write an article on Procedures on Selection of defense Equipments, this witness gave him information regarding steps taken by Air Headquarters and the defense Ministry to ensure that right

type of equipments and weapons were selected. On the pretext of this article, the accused gained continuous access to the Air Headquarters. PW-20, Group Captain Singh, deposes to the effect that A-2 visited him number of times in his office in 1981 and in one of the visits A-2 wanted the Air Force list which is a restricted document. Air Marshal D.E. Satur, PW-21, deposes that in 1982, A-2 visited his office where he tried to elicit information about MIG-25 aircraft. Air Comodore D.S.Jog, PW-23 deposes that in 1981 A-2 visited his office on three occasions and wanted to elicit information about the progress of LDROP and about classifications of low level redars. PW-29, A.S.Negi deposes that in 1981, A-2 met him and wanted information about the transport aircraft which had landed at Palam. Air Commodore L.Allen, PW-35, deposes that A-2 came to his office on a number of occasions and wanted information from him regarding air to air missiles and surface to air missiles of Soviet origin which Group Captain, Ashok Goel, PW-52, deposes to the effect that A-2 reached his office and wanted information regarding operational requirement of futuristic helicopters likely to be acquired by Indian Air Force.

28. The manner in which the accused has been cultivating acquaintances with personnel posted in sensitive spots and trying to elicit information from them, can very well be taken to be relevant material in this case.

29. Learned counsel had also been at pains to attack the FIR on the ground that it was belated. Further, he submitted that the FIR dated 10.11.1983 is hit by Section 162 of the Code of Criminal Procedure. On the facts and circumstances of this case and the manner in which the investigation was required to be conducted and has been indeed conducted, it cannot be said that the FIR is defective or any investigation pursuant thereto inadmissible. The nature of the case, its sensitivity and secrecy necessitated the FIR to be recorded only on 10.11.1983. Even though in stricto sensor this cannot be an FIR, yet I am not inclined to give any benefit in this regard to the accused. From the material on record I am satisfied that the prosecution has succeeded in proving the case against A-2 in respect of the offence u/s 120B IPC and u/s 3(c) of the Official Secrets Act.

30. The prosecution's case as against Lt. Col. Jasbir Singh (A-3) is that this accused has been passing on classified and secret information to A-1 for monetary consideration. The information that was passed on to A-1 was information that was collected by A-3 from defense Library and the Army Headquarters. To substantiate the case, the prosecution has led evidence to show that A-3 was a retired personnel who used his identity card to get access to information which is secret, classified and/or restricted in nature from the defense Library. Inspector Shiv Lal, PW-49, SI Chaman Lal. PW-45 testified to the effect that on 13.3.1983 they arrested A-3 and on personal search recovered the identity card, Ex.PW-5/A. As a matter of fact, it is admitted before me that Ex.PW-5/3A is the identity card issued to A-3 while in service and that the same card continued to be used by him together with the requisite permission enabling

him to use the defense libraries. Therefore, I need not labour further on this aspect. It is also not disputed before me that A-3 at the relevant time was a retired army personnel. Further it is not disputed that A-3 used the defense library. However, what is disputed by A-3 is that he was on the pay roll of A-1 or has passed on information to A-1 for monetary consideration or otherwise after collecting the same from defense libraries or elsewhere.

31. The prosecution has pressed into service the confessional statement of A-1 as also the recovery of certain pamphlets from A-1, but there is no evidence to connect any of the pamphlets or documents recovered from A-1 with A-3. What is sought to be done is that the confessional statement of A-1 in which he states that he received information/material from A-3 for consideration is sought to be used as primary evidence which is thereafter corroborated by the visits of A-3 to the defense Library as also his having obtained access to the same by use of a serving officer's identity card. Therefore, according to the prosecution, the conduct of A-3 becomes relevant and the conspiracy established.

32. This approach, to bring home the guilt of the accused, cannot be sustained. The confession statement of A-1 cannot be used as substantive evidence u/s 10 of the Indian Evidence Act for reasons that the confession came into existence not during the conspiracy but thereafter. Therefore, anything said or done subsequent to the conspiracy cannot be used against a co-accused as primary evidence. The law on the subject is quite well defined and, Therefore, I need but give a few citations : AIR 1940 176 (Privy Council) Sardool Singh Kaveshwar vs. The State of Bombay AIR 1967 SC 747 , Kehar Singh and Others Vs. State (Delhi Administration), , State (Delhi Administration) vs . V.C.Shukla AIR 1990 SC 1382 and Mushir Mohammed Khan (Dead) By LRS. Vs. Smt. Sajeda Bano and Others, . No further learning is necessary in view of the authoritative pronouncements of the Supreme Court. The confessional statement of A-1 cannot be made the foundation of the conspiracy by recourse to Section 10 of the Indian Evidence Act. However, this confession could have been used u/s 30 of the Indian Evidence Act provided there was substantive independent material to connect A-3 with A-1 either for conspiracy or for having passed on any material to A-1. In the present case, I find that the primary evidence is missing to connect A-1 with A-3 in any manner.

33. The learned trial Judge has summed up the case against A-3 as follows :

"(1) In the present case, as discussed above, there is positive evidence of A-3 miss-using his service identity card, Ex.PW-5/A and getting its issued on its basis different restricted and secret books etc. from the two defense Libraries.

(2) It has come in the confession statement, Ex.PW-26/H that A-1 used A-3 for obtaining secret and classified document from him between June and September, 1980.

(3) Then A-1 further mentions that during that period A-3 got for him 7 or 6 classified manuals relating to T-72 Russian tanks and for first five such manuals

he paid Rs.5,000/- per manual and for the remaining three, Rs.10,000/- per manual.

(4) It is further mentioned in the confession statement of A-1 that during that period A-3 got him restricted pamphlets related to the identification of Armed Fighting Wagon which was issued by the Army Headquarters in about June, 1970. This part of the confession statement of A-1 clearly lends assurance of positive evidence against A-3."

34. It appears to me that the learned Judge has made a mistake in using the confession statement of A-1 as substantive evidence against A-3 for there is no evidence on record to connect any material classified or otherwise relating to T-72 Russian tanks which was obtained by A-3 passed on to A-1. Even the pamphlet relating to identification of Armed Fighting Vehicles, although stated by A-1 to have been received from A-3, is not proved to be the material supplied by A-3 independent of the confession. This material also, Therefore, is putting the cart before the horse. The evidence that is against A-3 at the highest is to the effect that he has used the identity card, if at all, to get access to the libraries after obtaining permission from higher serving officials.

35. The next bit of evidence against A-3 is the recovery of Ex.PW-14/A, the telephone directory, at his instance from the office of A-4 where A-3 was an employee. This telephone directory is a restricted document. None of these pieces of evidence taken by itself satisfies the requirement of Section 5 or 6 of the Official Secrets Act. This mater may or may not be actionable under some other provision of law, but certainly cannot bind this accused to the actions of A-1 and A-2. The mere fact that A-3 got issued books/classified material from the library, cannot itself bring home an action u/s 3(c), 5 or 6(d) of the Act in which event due to lack of evidence, conviction of A-3 must be set aside.

36. The prosecution's case against A-4 is primarily that Ex.PW-14/A was recovered from the premises of which A-4 was the landlord and that the premises was being used as an office-cum-residence. The telephone directory recovered at the instance of A-3 from the premises of A-4 makes A-4 liable in the conspiracy hatched by A-1 and A-2. To link A-4 with the conspiracy, the prosecution has examined PW-14, Lt.Gen. E.C.Pattangeli to whom the telephone directory, Ex.PW-14/A was issued. This witness deposes to the fact that the directory was kept in the living room of his premises and A-3, who was acquainted with him, used to visit him. He has no ides as to who had removed this directory from his residence. It may not be out of place here to mention that this telephone directory was recovered at the instance of A-3 from the office premises of A-4. Merely because this directory was lying in the office premises of A-4 in which A-3 was an employee, cannot lead to the conclusion that A-4 had anything to do with the conspiracy of A-1 and A-2. At the highest what is proved is that the telephone directory issued to PW-14, Lt.Gen.Pattangeli was recovered from the office premises of A-4. On this evidence inference could not be drawn to bring A-4 within the mischief of Section 3(c) of the Act and further connected

with the conspiracy. It has been argued before me by the learned Public Prosecutor that a large number of visiting cards of various foreign dignitaries were found in the office of the concern M/s Emgee International, a proprietorship concern of A-4. these visiting cards would definitely show the activities of A-4 to be part of the conspiracy to supply sensitive material to foreign agents making him guilty under the provisions of the Official Secrets Act as also member of the conspiracy. I am afraid, I cannot be persuaded to accept this submission. The mere recovery of invitation cards, visiting cards, wedding cards or birthday cards or even seasons greeting cannot ipso facto prove a conspiracy or be relevant as conduct fasten liability under the Official Secrets Act. I, Therefore find it difficult to uphold the judgment of the learn Additional Sessions as regards this accused.

37. In the result, I allow Criminal Appeal No.175 of and acquit A-4, Jaspal Singh Gill, of all charges. I am Criminal Appeal No. 202 of 1985 and acquit A-3, Lt.Col. (Retd.) Jasbir Singh, of all charges, A-3 and A-4 are on bail. The bail bonds and the sureties are discharged.

38. I dismiss Criminal Appeal No.185 of 1985 of A-1, Gen (Retd.) F.D.Larkins and Criminal Appeal No. 214 of 198 A-2, AVM (Retd.) K.H.Larkins. A-1 and A-2 are on bail. bail bond is cancelled. They are directed to be taken custody to serve out the remaining portion of their sentence.