

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.1000 of 2013

Arising Out of PS.Case No. -231 Year- 2011 Thana -BUXAR District- BUXAR

Dinbandhu Singh Son Of Late Ram Naresh Singh Resident Of Village- Dullahpur,
P.S.- Semari, District- Buxar.

.... Appellant/s

Versus

The State Of Bihar

.... Respondent/s

with

Criminal Appeal (DB) No. 1068 of 2013

Arising Out of PS.Case No. -231 Year- 2011 Thana -BUXAR District- BUXAR

Chandan Mishra Son Of Sri Kant Mishra @ Mantu Mishra Resident Of Village-
Sonbarsa, P.S. Buxar (I), District- Buxar

.... Appellant/s

Versus

The State Of Bihar

.... Respondent/s

with

Criminal Appeal (DB) No. 17 of 2014

Arising Out of PS.Case No. -231 Year- 2011 Thana -BUXAR District- BUXAR

Surendra Mishra @ Chhotu Mishra Son Of Harendra Mishra At Shohanpatti
(Buxar), P.S. - Buxar, (T), District - Buxar

.... Appellant/s

Versus

The State Of Bihar

.... Respondent/s

Appearance :

(In CR. APP (DB) Nos. 1000 of 2013, 1068 of 2013 and 17 of 2013)

For the Appellant/s : Mr. Ashok Kumar Mishra, Advocate

Mr. K.P. Singh, Advocate

Mr. Varun Kumar, Advocate

Mr. Rais, Advocate

Mr. Rajiv Verma, Advocate

For the State : Mr. S.C. Mishra, APP

Mr. Ashwani Kr. Sinha, APP

Mr. Abhimanyu Sharma, APP

For the Informant : Mr. Jagdish Prasad, Advocate

Mr. Anirudh Mishra, Advocate

**CORAM: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP
SINGH**

and

HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI)

Date: 25-11-2016

Since all these three appeals arise out of common judgment and order of conviction, as such have been heard together and are being decided by a common judgment.

2. In Cr. Appeal No. 1000/2013, Dinbandhu Singh is the appellant, in Cr. Appeal No. 1068/2013, Chandan Mishra is the appellant, in Cr. Appeal No. 17/2014, Surendra Mishra @ Chhotu Mishra is the appellant who have been found guilty for an offence punishable under Sections 302/120B, 212, 386, 465, 468, 471, 302/34 of the IPC and 27 of the Arms Act vide judgment of conviction dated 29/09/2012 and vide order dated 03.10.2013, each one has been directed to undergo RI for life as well as slapped with fine appertaining to Rs. 10,000/- each in default thereof to undergo imprisonment for one month additionally relating to offence under Sections 302/120B IPC, appellant, Chandan Mishra has been directed to undergo R/I for life as well as fine of Rs. 10,000/- and in default thereof, to undergo imprisonment for one month under Section 302/34 IPC, appellant, Deen Bandhu Singh, RI for three years as well as fine of Rs.2000/- in default thereof, to undergo imprisonment for 15 days additionally under Section 212 IPC, Chandan Mishra and Surendra Mishra @ Chhotu Mishra each has been sentenced RI for ten years as well as also slapped with fine of Rs. 2000/- in default thereof, to



undergo imprisonment for 15 days additionally under Section 386 IPC, RI for two years under Section 465 IPC, RI for seven years as well as also fine of Rs. 2000/- in default thereof, to undergo imprisonment for 15 days additionally under Section 471 IPC and RI for two years under Section 468 IPC. Chandan Mishra has further been directed to undergo RI for seven years as well as fined Rs. 3000/- in default thereof to undergo imprisonment for 15 days under Section 27 of the Arms Act with a further direction to run the sentences concurrently by the learned Sessions Judge, Buxar in S. Tr. No. 244/11 arising out of Buxar Town PS Case No. 231/2011

3. As per the Fard-e-beyan of Anand Kasri (PW 1) recorded on 21.08.2011 at about 10:30 a.m. is to the effect that his cousin brother Rajendra Kesri who was proprietor of Bhojpur Chuna Bhandar was sitting in his shop. He had gone to the shop of his cousin brother to purchase paint. While he was engaged therein, three persons riding on motorcycle came at 9:05 AM and stopped in front of shop. Two persons got down, and came at the shop. Out of them, one person stood facing road, another who was armed with pistol in his both hands, came and made indiscriminate firing over his brother. Third person remained seated over motorcycle. Thereafter, they left the place making firing and escaped over motorcycle. From perusal of the Fard-e-beyan, it is also apparent that proper identification by way

of divulging physical feature of the culprits have been disclosed therein. Informant further claimed that he would identify the culprit. Subsequently thereof, they took the deceased to Sadar Hospital where he was declared dead. Police came and in presence of Gopal Kesri (PW 2), Fard-e-beyan was recorded by the police at the Hospital.

4. After registering Buxar Town PS Case No. 231/2011 against unknown on the basis of aforesaid Fard-e-beyan, the investigation proceeded and as is evident from the evidence of the Investigating Officer, investigation is still pending against other co-accused while charge-sheet was submitted against accused, Dinbandhu Singh, Chandan Mishra, Surendra Mishra @ Chhotu Mishra, Raushan Pandey @ Chhotu Pandey and Sheru Singh @ Onkar Nath Singh whereupon cognizance of the offences against them were taken. It is further evident that identifying accused Raushan @ Chhotu Pandey to be juvenile, his trial was separated and accordingly, sent to Juvenile Justice Board. It is also evident from the record that after framing of charge against remaining accused as well as after examination of five witnesses, one of the co-accused, Sheru Singh @ Onkar Nath Singh escaped from judicial custody whereupon his trial was separated and proceeded separately. However, he was apprehended subsequently and his trial also concluded along with original trial, though separately. Separate appeal is pending on his behalf which

could not be taken up conjointly as plea of juvenility has been raised which is yet to be decided. The original trial proceeded against remaining three accused who have been found guilty and accordingly, sentenced in terms as disclosed above the subject matter of the instant appeals.

5. The defence case, as is evident from mode of cross-examination as well as statement having been recorded under Section 313 of the Cr.P.C. is that of complete denial of the occurrence as well as of their false implication. However, neither any DW nor any kind of document has been adduced/exhibited on their behalf.

6. In order to substantiate its case, the prosecution had examined altogether 13 PWs out of whom PW-1, Anand Kumar Keshri, PW-2, Gopal Keshri, PW-3, Rakesh Kumar Keshri, PW-4, Rahul Keshri, PW-5, Pradeep Kumar Oha, PW-6, Govind Kumar Keshri, PW-7, Dr. Anil Kumar Singh, PW-8, Dr. Ram Prasad Singh, PW-9, Dr. Harish Chandra Hari, PW-10, Rajesh Prasad, PW-11, Dwijendra Kumar, PW-12, Awadhesh Kumar and PW-13, Uday Chandra Jha.

7. Side by side prosecution had also exhibited the following documents:-

Ext-1, Signature of Anad Kumar Keshri on Fard-e-beyan, Ext-1/1, Signature of Gopal Keshri on Fard-e-beyan, Ext-1/2,

Signatures of Gopal Keshri and Govind Keshri on the carbon copy of postmortem report, Ext-1/3, Signatures of Gopal Keshri and Sanjay Kr. Chaurasia on the seizure list, Ext-1/4, Signatures of Gopal Keshri and Sanjay Kr Chaurasia on the sealed container in which empty cartridge is kept, Ext-1/5, Signature of Gopal Keshri on the statement under Section 164 Cr.P.C. Ext-2, Signatures of witness, Rakesh Kumar and pagination on the statement under Section 164 Cr.P.C., Ext-2/1, Signatures of witness, Mandal Keshri and pagination on the statement under Section 164 Cr.P.C, Ext-2/2, Signatures of witness, Govind Keshri and pagination on the statement under Section 164 Cr.P.C, Ext-3, Postmortem report of Rajendra Prasad Keshri, Ext-1/6, Signature of Dr. Bhupendra Nath on the postmortem report of Rajendra Prasad Keshri, Ext-1/7, Signature of Harish Chandra Hari on the postmortem report of Rajendra Prasad Keshri, Ext-4, Statement of Rahul Keshri under Section 164 Cr.P.C , Ext-4/1, Statement of Gopal Keshri under Section 164 Cr.P.C, Ext-4/2, Statement of Govind Keshri under Section 164 Cr.P.C, Ext-4/3, Statement of Rakesh Kumar under Section 164 Cr.P.C, Ext-1/8, Signature of Chief Judicial Magistrate, Sri Manoj Kumar upon the request letter under Section 164 Cr.P.C, Ext-1/9, Signature of Chief Judicial Magistrate, Sri Manoj Kumar regarding TIP, Ext-5, Name of Sri Jitendra Kumar on the said TIP, Ext-6 to 6/5, six documents regarding TIP, Ext-1/10 to



1/15, Signature of Sri Manoj Kumar Sinha, Jail Superintendent on aforesaid six documents relating to TIP, Ext- 7-7/2, three torn seizure list in carbon copy, Ext-8, Fard-e-beyan of Buxar (T) P.S. Case No. 231/2011, Ext-9, Pagination and signature on the Fard-e-beyan, Ext-10, Carbon copy of P.M. Report of Rajendra Keshri, Ext-7/3, Seizure list, Ext-11, empty cartridge of 9 m.m., Ext-12, formal FIR of Buxar (T) P.S. Case No. 231/2011, Ext-9/1, Pagination and signature of APP on the request letter sent to Incharge P.S., Ext-13, (One page) Call details of Mobile No. 7654801458, Ext-13/1, (five pages) Call details of Mobile No. 8235646458, Ext-13/2, (One page) Call details of Mobile No. 9163676540, Ext-7/4, torn seizure list, Ext-11/1, Writing and signature upon Ext-VI, Ext-14, Request letter for TIP, Ext-14/1, Application tendering statement under Section 164 Cr.P.C., Ext- 13/3, Call details of Mobile No. 8420249125, Ext-13/4, Call details of Mobile No. 7209646684, Ext-13/5, Call details of Mobile No. 9031387524, Ext-13/6, Call details of Mobile No. 9088667946, Ext-13/7 to 13/9, Call details of Mobile No. 8601009263, 9128068086, 7295392753, Ext-13/10, Call details of Mobile No. 9507268475, Ext-15, page nos. 117, 118 of the case diary, Ext-16-16/15, Final form of prosecution party regarding different cases, Ext-I to III, three packets of seized articles, Ext-IV to IV/IV, empty cartridge of 9 m.m., Ext-V, seized motorcycle, Ext-VI, seized motorcycle.

8. As indicated above, neither any DW nor any kind of document has been exhibited on behalf of defence though during course of cross-examination of the Investigating Officer, PW-13 certain paragraphs of the case diary have been brought up on record.

9. During course of argument primarily the learned respective counsels have jointly pleaded that the finding recorded by the learned lower court happens to be wrong, illegal and perverse in the background of the fact that neither the same is supported by the oral evidence nor fulfils the requirement of law. Afterwards, they proceeded independently pleading individual status of the respective appellant whereupon their submissions are accordingly dealt with.

10. It has been submitted on behalf of the appellant/convict, (A) Dinbandhu Singh that though he has been found and held guilty for an offence punishable under Sections 302/120B of the IPC as well as under Section 212 of the IPC but the prosecution failed to substantiate the same. In order to buttress his submission, it has been submitted on behalf of appellant that none of the material witnesses has spoken even a word against the appellant. Whatever is there, that happens to be based upon evidence of PW-13, the Investigating Officer who on his own failed to investigate with regard to the allegation or disclosure whichever may be, based upon inculpatory extra judicial confessional statement of a co-accused,



Surendra Mishra @ Chhotu Mishra as well as Raushan @ Chhotu Pandey. It has also been submitted that the aforesaid inculpatory extra judicial confessional statement of Surendra Mishra @ Chhotu Mishra as well as Raushan @ Chhotu Pandey happen to be inadmissible in the eye of law because of the fact that as per evidence of PW 13, it was given before a police official. That being so, the status of inculpatory extra judicial confessional statements allegedly made by the Surendra Mishra @ Chhotu Mishra as well as Raushan @ Chhotu Pandey lost its identity as well as relevance in the eye of law.

11. Furthermore, it has been submitted that in order to substantiate a charge under Section 120B IPC, there should be an agreement amongst the culprits to do an illegal act or an illegal act by an illegal means as laid down under Section 120A of the IPC. From the evidence available on the record as stated above even PW 13 failed to divulge the evidence satisfying mandate of law whereupon, conviction and sentence of the appellant under Section 302/120B of the IPC is found not at all legally maintainable.

12. In likewise manner, with regard to Section 212 of the IPC, it has submitted that none of the prosecution witnesses save and except PW-13 had stated that appellant was harbouring habitual offender more particularly, relating to Chandan Mishra as well as Sheru. Again to substantiate the same, the prosecution had relied upon



inculpatory extra judicial confessional statement of co-accused, Surendra Mishra @ Chhotu Mishra, Raushan @ Chhotu Pandey but without any substance as PW-13 did not care to investigate on that very score and even during course of trial, could be able to substantiate. That means to say, the inculpatory extra judicial confessional statement of Surendra Mishra @ Chhotu Mishra, Raushan @ Chhotu Pandey are found without any substance, moreover, happens to be inadmissible in the eye of law in terms of Section 25 of the Evidence Act. Therefore, the conviction and sentence recorded for an offence punishable under Sections 212 IPC is also found unsustainable.

13. (B). Surendra Mishra @ Chhotu Mishra. It has been submitted on behalf of appellant/convict that he has been convicted and sentenced under all the Sections save and except 212 of the IPC and accordingly, sentenced therefor. However, from the facts and circumstances of the case, it is apparent that none of the Sections whereunder convictions have been recorded really attract against him. To substantiate the same, it has been submitted that after appellant's apprehension, he was not at all put on TIP and for that, no explanation has been offered at the end of the prosecution, more particularly by the PW-13, Investigating Officer. In same sequence, it has been submitted that in the Court, PW-2 had claimed identification of the



appellant claiming that three days prior to the occurrence, he came at his shop and succeeded in getting mobile number of the deceased family to inquire about the plumber whom he was going to engage. The aforesaid piece of evidence will keep the prosecution in stale condition against the appellant because of the fact that identification for the first time in the court would not be accepted in the background of the fact that in spite of availability of the appellant during course of investigation being under judicial custody, could have been taken to identify the appellant being involved in the occurrence.

14. In likewise manner, it has also been submitted that prosecution had not succeeded in bringing the relevant material on record that there was pre-meeting of mind in order to be agreed upon to commit murder of the deceased, Rajendra Kesri, in case, he fails to pay Rangdaari. Furthermore, it has been submitted that at the time of occurrence only three persons were identified, out of whom one was engaged in keeping motorcycle ready for escape, another was keeping watch over the activity of the locals and further, forbidding them as well as for terrorizing them was engaged in firing, keeping his presence outside the shop and the last one intruded inside the shop and pumped bullet to the proprietor of the shop namely, Rajendra Kesri. Therefore, there was no scope for him to be present at the same time during course of commission of occurrence as alleged nor the

witnesses deposed attracting presence of appellant apart from the fact that appellant's connectivity is found completely missing and that being so, charge under Section 302/120B as well as 302/34 IPC are not at all attracted.

15. Now coming to the remaining offences, it has been submitted that during course of investigation, his voice has not been tested to connect that appellant was the person who contacted the prosecution party or telephoned them asking for payment of ransom. In likewise manner, none of the witnesses has come forward to say that by impersonating them, appellant had prepared forged and fabricated document and succeeded in getting relevant SIM of the concerned Mobile. So, none of the offences whereunder appellant has been held guilty as well as sentenced for are sustainable in the eye of law. Consequent thereupon, is fit to be acquitted.

16. (C.) Chandan Mishra. It has been submitted on behalf of appellant that he has fallen victim of the circumstances. Furthermore, it has also been submitted that being under judicial custody and having no close relative to look after his interest, he failed to protect himself by properly instructing his counsel as a result of which witnesses were not at all cross-examined during course of trial and that happens to be the reason that the testimony of the witnesses could not be tested by way of cross-examination.



17. It has also been submitted that at an earlier occasion Cr.Misc. was filed before this Court and the same was allowed permitting the appellant to cross-examine the witnesses and for that witnesses were directed to be recalled but, unfortunately, before the order could have been received at the end of learned lower court, the judgment was pronounced holding the appellant along with others guilty for the offences as indicated above. Subsequently thereof, the learned lower court had referred the matter to this Court under Section 395 Cr.P.C and the same was decided adverse to the interest of the appellant followed with order of sentences which, in the facts and circumstances of the case, happen to be fit to be set aside by giving an opportunity to the appellant to cross-examine the witnesses who, unfortunately, in spite of their due diligence and sincerity could not be cross-examined on account of want of proper instruction to the learned counsel.

18. Furthermore, it has also been submitted that principle of natural justice has to be followed which demands that no one should be penalized unless and until is given opportunity to defend himself and is governed by the maxim *Audi Alteram Partem*. Referring Article 21 on this very score, it has also been submitted that no one could be convicted and sentenced contrary to the spirit of law. Because of the fact that witnesses could not be cross-examined on

account of some sort of missing link in getting the learned counsel properly instructed, could not be considered the trial as a fair trial.

19. It has also been submitted that according to Sections 137, 138 of the Evidence Act, evidence constitutes examination-in-chief, cross-examination as well as re-examination, if any. Whenever, examination-in-chief is recorded without any cross-examination, then in that event, the evidence would not be acknowledged as an admissible evidence because of the fact that by way of absence of cross-examination, requirement of law is not at all fulfilled and so, the legal of evidence is found duly entrapped. Furthermore it has been submitted that once, it is found that accused could not be able to defend himself, then in that event, it would not be a fair trial and on account thereof, the whole trial will become *non est* in the eye of law. From the facts of the case, it is apparent that it has suffered from same malady whereupon the judgment impugned would not survive. So, submitted that after setting aside the same, the matter be remitted to the learned lower court to proceed afresh with the trial summoning the witnesses for cross-examination.

20. It has further been submitted that on account of such lapses, as the witnesses could not be cross-examined, their evidences admittedly, is found encircling the appellant including others and that being so, on merit of the case, nothing remains to be argued.



21. Rebutting the argument having been made on behalf of appellant, it has been submitted on behalf of learned APP that the accused persons have endeavoured tooth and nail to frustrate the trial when they have seen that they could not succeed in yielding the ultimate result of threat having been given to the respective witnesses during course of trial who by their appearance stood firm, identified the appellant to be culprit, succeeded in instructing their counsels not to cross-examine the witnesses and further, after examination of majority of the material witnesses, one of the co-accused, Sheru Singh escaped from judicial custody whose trial, on account of such illegal activity, got separated, however was apprehended subsequently, and had also met with conviction and sentence for which, Cr. Appeal apart from Death Reference is also pending separately relating to him.

22. Because of the fact that it happens to be an intentional act of the accused, therefore, the prayer whatsoever been made on their behalf for remitting the matter after setting aside the judgment of conviction and sentence directing the learned lower court to proceed afresh will be nothing but an attempt to frustrate the fair trial because by elapse of time as well as having notoriety of the appellant which could overshadow the prosecution party, ultimately befitting with the ill desire of the appellants in getting their acquittal. So the submission having on this score at the end of appellant, Chandan Mishra is not at

all acceptable.

23. It has also been submitted that so far appellant, Chandan Mishra is concerned, he was one of the participants during course of commission of the crime and was identified during TIP as well as in the dock in the same status. Furthermore, it is also apparent that this Chandan Mishra had threatened PW-3, son of the deceased on account of non payment of Rangdaari. Therefore, his complicity is found duly exposed by way of cogent, reliable and trustworthy evidence. With regard to status of Surendra Mishra @ Chhotu Mishra as well as Dinbandhu Singh, it has been submitted that criminal conspiracy is always planned behind the curtain and so, its fragrance is to be smelt by the conduct of the culprits having been indulged before the commission of occurrence, during commission of occurrence and after commission of occurrence. In majority of the cases, it is hard to trace out direct evidence and so, the case of the criminal conspiracy is to be perceived by way of appreciating the circumstantial evidence. When the circumstantial evidence is perceived, there happens to be inculpatory extra judicial confessional statement of appellant, Surendra Mishra @ Chhotu Mishra, Raushan @ Chhotu Pandey on the basis of which a mobile set with SIM was found from the possession of his father which was used by him during course of conversation with accused Chandan and Sheru, before

occurrence, after the occurrence and even during their hideout at Kolkata wherefrom they were apprehended after putting their SIM on surveillance.

24. Furthermore, during course of evidence, PW-2 had identified Surendra Mishra @ Chhotu Mishra to be the person who had come to his shop three days prior to the occurrence and succeeded in getting the mobile number of deceased and his son for providing a plumber. That part of evidence is not at all found shaken at the ends of the appellant. So having proper scrutiny of the evidence in its totality, involvement of Surendra Mishra @ Chhotu Mishra is found duly exposed.

25. With regard to the status of Dinbandhu Singh, it has been submitted that inculpatory extra judicial confessional of Surendra Mishra @ Chhotu Mishra, Raushan @ Chhotu Pandey is admissible in the eye of law because of the fact that on the basis of the aforesaid confessional statement, mobile set was recovered from the possession of his father which was used for the purpose of conversation with accused, Chandan and Sheru who were identified to be the main accused and that being so, presence of Dinbandhu Singh giving shelter to the accused Chandan and Sheru, notorious criminal, is found duly surfaced as well as supplying of 9 M.M cartridges have also been disclosed, which could be used against appellant in terms of

Section 30 of the Evidence Act and so his conviction accounted therefor, is also sustainable. Thus, none of the appeal is maintainable.

26. Truly, no one could be punished without fair trial. Fair trial means, apart from having opportunity to the prosecution to adduce evidence to its best of quality in order to bring home the charge against an accused, simultaneously, the accused should have adequate opportunity to defend himself and for that, in case the accused is found incapable on account of financial crunch even found entitled to amicus curiae. So, in either way, the present form of governance, that of democratic country, the State is under obligation to discharge both the functions.

27. Advocates, who are to be identified in terms of Indian Advocate Act are duly recognized as part and parcel of the court and having such kind of recognition, they are expected apart from representing the case of their clients, to assist the court in proper way to arrive at the truth.

28. In Chander Prakash Tyagi v. Benarsi Das reported in (2015) 8 SCC 506, it has been held as follows:-

14. In *O.P. Sharma v. High Court of P&H*[(2011)6 SCC 86, this Court has made following observations in paras 37 to 39 relating to ethical standards in the judicial system, and the same are reproduced as under: (SCC p. 101)

“37. A court, be that of a Magistrate or the Supreme Court is sacrosanct. The integrity and sanctity of an institution which has bestowed upon itself the responsibility of dispensing justice is ought to be maintained. All the

functionaries, be it advocates, Judges and the rest of the staff ought to act in accordance with morals and ethics.

Advocate's role and ethical standards

38. An advocate's duty is as important as that of a Judge. Advocates have a large responsibility towards the society. A client's relationship with his/her advocate is underlined by utmost trust. An advocate is expected to act with utmost sincerity and respect. In all professional functions, an advocate should be diligent and his conduct should also be diligent and should conform to the requirements of the law by which an advocate plays a vital role in the preservation of society and justice system. An advocate is under an obligation to uphold the rule of law and ensure that the public justice system is enabled to function at its full potential. Any violation of the principles of professional ethics by an advocate is unfortunate and unacceptable. Ignoring even a minor violation/misconduct militates against the fundamental foundation of the public justice system.

39. An advocate should be dignified in his dealings to the court, to his fellow lawyers and to the litigants. He should have integrity in abundance and should never do anything that erodes his credibility. An advocate has a duty to enlighten and encourage the juniors in the profession. An ideal advocate should believe that the legal profession has an element of service also and associates with legal service activities. Most importantly, he should faithfully abide by the standards of professional conduct and etiquette prescribed by the Bar Council of India in Chapter II, Part VI of the Bar Council of India Rules."

15. In *Dhanraj Singh Choudhary v. Nathulal Vishwakarma*[(2012)1 SCC 741, discussing the nobility of the profession of lawyers, this Court has made following observations: (SCC p. 747, para 25)

"25. Any compromise with the law's nobility as a profession is bound to affect the faith of the people in the rule of law and, therefore, unprofessional conduct by an advocate has to be viewed seriously. A person practising law has an obligation to maintain probity and high standard of professional ethics and morality."

29. The Bar Council of India, Rules, 1975 Part-VI,

Chapter-II provide for a 'Standard Of Professional Conduct And Etiquette' to be observed by all the Advocates under the Advocate Act 1961 and for better appreciation the same is quoted below:-

“An advocate shall, at all times, comport himself in a manner befitting his status as an officer of the Court, a privileged member of the community, and a gentleman, bearing in mind that what may be lawful and moral for a person who is not a member of the Bar, or for a member of the Bar in his non-professional capacity may still be improper for an advocate. Without prejudice to the generality of the foregoing obligation, an advocate shall fearlessly uphold the interests of his client and in his conduct conform to the rules hereinafter mentioned both in letter and in spirit. The rules hereinafter mentioned contain canons of conduct and etiquette adopted as general guides; yet the specific mention thereof shall not be construed as a denial of the existence of others equally imperative though not specifically mentioned.”

30. In State of (NCT of Delhi) v. Shiv Kumar

Yadav as reported in (2016) 2 SCC 403, it has been held as follows:-

11. It is further well settled that fairness of trial has to be seen not only from the point of view of the accused, but also from the point of view of the victim and the society. In the name of fair trial, the system cannot be held to ransom. The accused is entitled to be represented by a counsel of his choice, to be provided all relevant documents, to cross-examine the prosecution witnesses and to lead evidence in his defence. The object of provision for recall is to reserve the power with the court to prevent any injustice in the conduct of the trial at any stage. The power available with the court to prevent injustice has to be exercised only if the Court, for valid reasons, feels that injustice is caused to a party. Such a finding, with reasons, must be specifically recorded by the court before the power is exercised. It is not possible to lay down precise situations

when such power can be exercised. The Legislature in its wisdom has left the power undefined. Thus, the scope of the power has to be considered from case to case. The guidance for the purpose is available in several decisions relied upon by the parties. It will be sufficient to refer to only some of the decisions for the principles laid down which are relevant for this case.

16. The interest of justice may suffer if the counsel conducting the trial is physically or mentally unfit on account of any disability. The interest of the society is paramount and instead of trials being conducted again on account of unfitness of the counsel, reform may appear to be necessary so that such a situation does not arise. Perhaps time has come to review the Advocates Act and the relevant Rules to examine the continued fitness of an advocate to conduct a criminal trial on account of advanced age or other mental or physical infirmity, to avoid grievance that an Advocate who conducted trial was unfit or incompetent. This is an aspect which needs to be looked into by the concerned authorities including the Law Commission and the Bar Council of India.

17. In *State (NCT of Delhi) vs. Navjot Sandhu*[(2005) 11 SCC 600], this Court held:

“167. we do not think that the Court should dislodge the counsel and go on searching for some other counsel to the liking of the accused. The right to legal aid cannot be taken thus far. It is not demonstrated before us as to how the case was mishandled by the advocate appointed as amicus except pointing out stray instances pertaining to the cross-examination of one or two witnesses. The very decision relied upon by the learned counsel for the appellant, namely, *Strickland v. Washington* makes it clear that judicial scrutiny of a counsel's performance must be careful, deferential and circumspect as the ground of ineffective assistance could be easily raised after an adverse verdict at the trial. It was observed therein:

“44. Judicial scrutiny of the counsel’s performance must be highly deferential. It is all too tempting for a defendant to second-guess the counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court, examining the counsel’s defence after it has proved unsuccessful, to conclude that a particular act of omission of the counsel was unreasonable. Cf. *Engle v. Isaac* [456 US 107 (1982) at pp. 133-134]. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of the counsel’s challenged conduct, and to evaluate the conduct from the counsel’s perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge in a strong presumption that the counsel’s conduct falls within the wide range of reasonable professional assistance;....”

31. In *Swarna Singh v. State of Punjab* as reported in (2000) 5 SCC 668

“ It has become more or less fashion to have a criminal case adjourned again and again till the witness tires and gives up. It is the game of unscrupulous lawyers to get adjournments for one excuse or the other till a witness is won over or is tired”.

32. In *T. H. Hussain v. M.P. Mondkar* as reported in AIR 1958 SC 376, it has been held as follows:-

“ An accused person, by his conduct, cannot put a fair trial into jeopardy, for it is the primary and paramount duty of the criminal courts to ensure that the risk to the fair trial is removed and criminal courts are allowed to proceed with the trial smoothly and without any interrogation or obstruction.”



33. The aforesaid references have been made only to show the anxiety of the court that fair trial is not at all confined to relating to the accused rather it is also to be attached with the interest of the victim. Furthermore, the obligation of the court in terms of Section 309 of the Cr.P.C. has also to be duly acknowledged whereunder frequent adjournments are not to be granted in routine manner at the whims of the defence counsel just to give a death nail to the prosecution case by barricading the witnesses, who are eye and ear of the court, to depose and further such activity, if taken up at the end of defence counsel with same oblique motive, then in that event, the same should be discredited.

34. We made thorough inspection of the records in order to see whether the learned lower court had shown callousness towards the appellants during course of conduction of trial by not allowing an adjournment, whereupon the witnesses were not at all cross-examined.

35. From perusal of the record what transpires that accused persons coupled themselves in two groups, the first group that of Dinbandhu Singh as well as Surendra Mishra @ Chhotu Mishra, while the other is of Chandan Mishra and Sheru Singh. It is pertinent to note that Chandan and Sheru are along with one another whose trial has been bifurcated, identifying as juvenile, heroes of the scene out of



whom, Sheru shared the crown by putting the deceased to death. They were, as is evident, not named in the Fard-e-beyan but during course of investigation, their involvements were found during commission of crime, more particularly, in the background of inculpatory extra-judicial confessional statement of Surendra Mishra @ Chhotu Mishra, Raushan @ Chhotu Pandey, whereupon their mobile set were put under surveillance, locations were traced out and then raid was conducted at Kolkata wherefrom they were apprehended, brought up and then were put on TIP having proper identification. Their active presence during course of trial by cross-examining the witnesses were found upto PW-2, who were not adverse to their interest but subsequently thereof, as the witness stood firm over identification having been made at their end, since thereafter there happens to be connivance at their end whereunder they withdrew themselves from cross-examining the witnesses. Chandan Mishra continued with his activities while Sheru Singh after examination of PW-5 succeeded in his escape from judicial custody.

36. Section 207 of the Cr.P.C is obligatory on the part of the prosecution to serve copy of the documents, statement whereupon it intends to rely with a exception in case documents being voluminous. Till examination of PW-2, no such grievances were at the end of the accused that they were not handed over copy of the T.I



Chart. Even though having endorsement at their end over receipt of police paper. Because of the fact that appellants were aware since before that they were identified during investigation on TIP by the witnesses, on account thereof, they should have properly armed on that very score. It is also apparent that no step was taken at the end of the defence counsel at least to recall PW-3 at an earliest who was discharged as, the learned defence counsel declined to cross-examine on the pretext of opening T.I Chart. However, they allowed the situation to sail till statement under Section 313 of the Cr.P.C. was recorded and then asking for recall, though allowed by this Court at that very moment would not be said to be in the interest of the fair trial because of the fact that interest of witnesses inconsonance with the nature of the offence while permitting so, were not taken into consideration.

37.Be that as it may, the aforesaid opportunity was not at all availed by the accused on account of some sort of restrain as, till then the judgment was already pronounced whereupon the matter was referred to this Court under Section 395 Cr.P.C. and the same was answered withdrawing the liberty as given earlier. As such, the intentional, willful conduct of the accused/appellant is found very much exposed whereupon, the court should not lean sympathetically in order to frustrate the event of trial which sailed in accordance with law.

38. Before coming to material evidences on the score of factual aspect, first of all, postmortem report of the deceased has to be seen to ascertain the cause of death. PW-7, PW-8 and PW-9 were the team of doctors who conducted post mortem over dead body of deceased, Rajendra Keshri and found following antemortem injuries:-

(i) Entry wound- Oval shaped lacerated wound near right deltoid region 1"x ½" x communicating with chest cavity with injury no.2 margin inverted and blackening around present.

(ii) Exit wound-Lacerated wound 1 ½"x1" chest cavity deep near right side of sternum on chest margin everted.

(iii) Entry wound- Lacerated wound on chest over sternum upper part size 1" x ¼" x chest cavity deep margin inverted and blackening around is present.

(iv) Exit wound- Lacerated wound on left scapular region on back size 1 ½ x 1/2" x chest cavity deep margin everted.

(v) Entry wound- Lacerated wound on right palm size ½" x 1/4" x muscle deep margin inverted and blackening around is present.

(vi) Exit wound-Lacerated wound on posterior aspect of right hand near base of the thumb and index finger 1 ¼" x 1/2" x muscle deep communicating with injury no.5 margin everted. The postmortem report divulges cause of death by means of fire arm and the number of injuries speaks, that deceased was ruthlessly targeted

having no hope of survival. As such, it shows the intention of the assailant to have a lesson as well as to create terror amongst other, in case they dare to oblige then in that event, will be treated in same way without having any ray.

39. So for P.O. is concerned, there happens to be no controversy over the same as appellants have not challenged. Apart from this, there happens to be consistent evidence of PWs-1, 4, 6 that the P.O. happens to be Bhojpur Chuna Bhandar which, by way of objective finding of the Investigating Officer, PW-13 is found duly substantiated. From perusal of the same, it is evident that apart from presence of blood, large number of woods were found and seized therefrom which are exhibits of record. Now the individual case of each of the appellant is being taken up for consideration.

40. Chandan Mishra. Coming to the plea of Chandan Mishra, it is evident that on account of non cross-examination of the material witnesses, the factum of identification having during course of TIP along with being substantiated during course of trial by way of dock identification by PW-2 as well as PW-4, PW-6 is found unrebutted whereupon the inference by the learned lower court regarding his involvement during course of commission of an occurrence whereunder deceased Rajendra Keshri was pumped with bullet ultimately costing his life and at that very moment to facilitate the



crime, the appellant was actively guarding the event by having his presence at the outside shop duly armed and further threatened and fired at the witnesses so that they be prevented to come near in rescue of deceased. The factum of conduction of TIP also goes out of controversy on account of examination of judicial magistrate, as PW-11. Possibility of those witnesses to see the occurrence as well as culprit is found duly substantiated after going through topography of the place of occurrence as detailed under para-11 of PW 13 (I.O.) showing presence at the shops of aforesaid witness in surrounding of the place of occurrence, Bhojpur Chuna Bhandar.

41. At the present moment, the status of PW-1 is also to be noted down who happens to be informant. From his Fard-e-beyan, along with his evidence before the court, although he had vividly picturised the occurrence, gave physical features of the assailants at an earliest in the Fard-e-beyan but, as is evident, neither participated during course of TIP nor identified any of the accused during course of trial, really could affect the prospect of the prosecution version. To adjudge, first of all, evidence of PW-1 has been gone through wherefrom it is evident that this witness has not been cross-examined on that very score. Furthermore, he had explained his status during course of examination-in-chief itself stating that on account of such horrifying activities, he became stunned, nervous and hidden himself



to save his life and so was unable to identify the assailants. That part of the evidence was not at all tested by way of cross-examination and so, his explanation having been given in evidence is found probable one. With regard to submission having been made, that being a simple case of murder for which motive has been assigned as non payment of Rangdaari is found not at all substantiated whereupon, the learned lower court should have disbelieved the whole prosecution case, is found duly explained from the evidence of PW-3 who, while was away from his place, Gaya where his sister was married, a telephonic call from SIM No. 7654801458 having been made to him asking for payment of Rangdaari followed with threats of dire consequences from appellant Chandan Mishra along with divulgence of a group who was responsible therefrom followed with the incidence of murder on the following day morning along with evidence of PW 13, the Investigating Officer substantiating the same have rightly been considered by the learned lower court.

42. Now coming on the score of delay in holding T.I.Parade in **Chandra Prakash v. State of Rajasthan** as reported **2014 Cr. L. J. 2884**, it has been held by the Hon'ble Apex Court under para 31, 32, 33, and 34 as follows:-

31. The next issue, to which we should advert to, pertains to the delay in holding the test identification parade. The submission of Mr. Balaji Srinivasan, learned counsel appearing for accused Abdul Hamid and Raies

Beg, is that there has been enormous delay in conducting the test identification parade in respect of accused Abdul Hamid and Raies Beg. There is no dispute that both of them were arrested on 8.6.1997 and the test identification parade was held on 25.6.1997. Thus, it is evident that they were arrested long after the occurrence but the test identification parade was held within a period of three weeks from the date of arrest. As the analysis of the trial court shows, they could not have been arrested as the materials could not be collected against them and things got changed at a later stage. In this regard, we may refer with profit to the decision in [Ramanand Ramnath v. State of M.P.](#) [(1996) 8 SCC 514], wherein identification parade was held within a period of one month from the date of arrest. This Court observed that there was no unusual delay in holding the test identification parade.

32. That apart, the witnesses, namely Prem Prakash Gupta, PW-78, and Mohit Jain, PW-30, have identified them in the Court. [In State of Maharashtra v. Suresh](#) [(2000) 1 SCC 471], it has been held as follows: -

“We remind ourselves that identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting a test identification parade is twofold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence.”

33. The said legal position has been reiterated in [Anil Kumar v. State of U.P.](#) [(2003) 3 SCC 569]. Recently, in [Munna Kumar Upadhyay alias Munna Upadhyaya v. State of Andhra Pradesh](#) through Public Prosecutor, Hyderabad, Andhra Pradesh [(2012) 6 SCC 174], a two-Judge Bench has observed thus: - “66. There was some delay in holding the identification parade. But the delay per se cannot be fatal to the validity of holding an identification parade, in all cases, without exception. The purpose of the identification parade is to provide corroborative evidence and is more confirmatory in its nature. No other infirmity has been pointed out by the

learned counsel appearing for the appellant, in the holding of the identification parade. The identification parade was held in accordance with law and the witnesses had identified the accused from amongst a number of persons who had joined the identification parade.”

34. In view of the aforesaid, the submission that there has been delay in holding the test identification parade does not really affect the case of the prosecution. It is also noteworthy that the witnesses had identified the accused persons in court and nothing has been elicited in the cross-examination even to create a doubt. Thus, we repel the submission advanced by the learned counsel for accused Abdul Hamid and Raies Beg.

43. Furthermore, it is evident from the evidence of PW 12 that the appellant Chandan Mishra along with Sheru was apprehended jointly at Kolkata by him with assistance of Kolkata police tracing out their location on the basis of surveillance of respective SIM being used by them, known to the prosecution on the basis of inculpatory confessional statement of co-accused Surendra Mishra @ Chhotu Mishra as well as Roshan Pandey @ Chhotu Pandey. On search, from possession of appellant, mobile set bearing IMEI No, 358411043356, SIM No. 82916270992 was seized, apart from mobile set from the possession of Sheru.

44. From the evidence of PW 13, (Para-40), different SIM No. being used by Sheru Singh as well as the appellant been located, and as per para 43, 45, 47, it is evident that the appellant as well as Sheru Singh were using their SIM by exchanging their Mobil Set and

those SIM numbers have connectivity with the SIM No. possessed by appellant Surendra Mishra @ Chhotu Mishra. Furthermore, ownership of aforesaid SIM No. has also been traced out which did not stand in name of appellant.

45. After thorough consideration of the material available on record, it is found and held that prosecution has succeeded in proving its case beyond reasonable doubt against the appellants as a result thereof, Cr. Appeal No. 1068/2013 sans merit and is, accordingly, dismissed. Appellant is under custody, hence will serve out remaining period of sentence.

46. Before coming to the case of remaining two, that means to say, Dinbandhu Singh as well as Surendra Mishra @ Chhotu Mishra, it looks better to apprise with the relevant provisions along with judicial pronouncement connected with their plea.

47. Section 120A of the IPC defines criminal conspiracy in following way:-

Even two or more persons agree to do, or cause to be done

i) An illegal act or

ii) An act which is not illegal by illegal means, such an agreement is designated criminal conspiracy.

Provided that no agreement except an agreement to a criminal conspiracy unless same act besides the agreement is done by

one or more parties to such agreement in pursuance thereof.

Explanation:- It is immaterial whether the illegal act is the ultimate object of such agreement, or is making incidental to that object.

48. In *Gulam Sarbar v. State of Bihar (Now Jharkand)*

as reported in **2014 Cr.L.J. 34**, it has been held as follows:-

5. The essential ingredients of Criminal Conspiracy are (i) an agreement between two or more persons; (ii) agreement must relate to doing or causing to be done either (a) an illegal act; or (b) an act which is not illegal in itself but is done by illegal means. What is, therefore, necessary is to show meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means. Mere knowledge or discussion or generation of a crime in the mind of the accused, is not sufficient to constitute an offence.

The offence takes place with the meeting of minds even if nothing further is done. It is an offence independent of other offences and punishable separately. Thus, the prosecution is required to establish the offence by applying the same legal principles which are otherwise applicable for the purpose of proving criminal misconduct on the part of an accused. Criminal conspiracy is generally hatched in secrecy thus direct evidence is difficult to obtain or access. The offence can be proved by adducing circumstantial evidence or by necessary implication. Meeting of minds to form a criminal conspiracy has to be proved by adducing substantive evidence in cases where circumstantial evidence is incomplete or vague. 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 between the parties. Agreement is essential. (Vide: [Kehar Singh & Ors. v. State \(Delhi Admn.\)](#), AIR 1988 SC 1883; [State \(NCT of Delhi\) v. Navjot Sandhu @ Afsan Guru](#), AIR 2005 SC 3820; [Mir Nagvi Askari v. CBI](#), AIR 2010 SC 528; [Baldev Singh v. State of Punjab](#), (2009) 6 SCC 564; [State of M.P. v.](#)

[Sheetla Sahai & Ors.](#), (2009) 8 SCC 617; [R. Venkatkrishnan v. CBI](#), AIR 2010 SC 1812; and [S.Arul Raja v. State of T.N.](#), (2010) 8 SCC 233).

6. In [Mohmed Amin @ Amin Choteli Rahim Miyan Shaikh & Anr. v. CBI](#), (2008) 15 SCC 49, it was held that in order to come under this provision it is not necessary for the accused to know the detailed stages of conspiracy; mere knowledge of main object/ purpose of the conspiracy would suffice for this Section.

Similarly, in [Vikram Singh & Ors. v. State of Punjab](#), AIR 2010 SC 1007, this Court dealt with a case where the accused had purchased fortwin injection and chloroform. Thus, it was held that since the purchase of these materials was an initial step towards commission of offence, the presence of co-accused Sonia, though not referred to by the witnesses at the time of actual kidnapping would not imply that she was not privy to conspiracy and conviction of the accused under [Section 120-B IPC](#) was upheld.

49. In State (Government of NCT of Delhi) v. Nitin

Gunwant Singh with State(Government of NCT of Delhi) v. Om

Prakash Srivastava @ Babloo as reported in **2015 Cr.L.J 4759**, it

has been held as follows:-

16. The prosecution relies upon the existence of criminal conspiracy, which resulted into the death of Lalit Suneja. This Court has time and again laid down the ingredients to be made out by the prosecution to prove criminal conspiracy. It is now, however, well settled that a conspiracy ordinarily is hatched in secrecy. The Court for the purpose of arriving at a finding as to whether the said offence has been committed or not may take into consideration the circumstantial evidence. However, while doing so, it must be borne in mind that meeting of mind is essential; mere knowledge or discussion would not be sufficient. Yet, the prosecution has failed to prove the evidence which establishes any prior meeting of mind of the accused. The prosecution merely proved that all the

accused were present in Delhi on the date of occurrence, and that the alleged motor-bike and the car used in incident belonged to respondent No.2, Om Prakash Srivastava @ Babloo. The High Court rightly dismissed this argument, as the involvement of the said vehicles in commission of the crime were never proved. Neither any prior meeting of mind of the accused was proved, nor any action, individually or in concert, was proved against any of the accused. Needless to say that the entire foundation of the prosecution story was never established.

50. In Subhash v. State of Haryana as reported in (2015)

12 SCC 444, it has been held as follows:-

6. To make out the offence under [Section 120-B](#) of IPC, the prosecution must lead evidence to prove the existence of some agreement between the accused persons. There is no specific evidence as to where and when the conspiracy was hatched and what was the specific purpose of such conspiracy. No such evidence has been adduced in the present case. Therefore, in our opinion, the conviction and sentence of the appellants have to be set aside.

51. In Devender Pal Singh v. State N.C.T of Delhi as

reported in **2002 Cr.L.J 2035**, it has been held as follows:-

12. The element 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 means. 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 all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. (See American Jurisprudence Vol. II [Section 23](#), p. 559). For an offence punishable under [Section 120B](#), 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.

13. 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.

52. In Chandra Prakash v. State of Rajasthan as

reported in **2014 Cr.L.J. 2884**, it has been held as such:-

70. While dealing with the facet of criminal conspiracy, it has to be kept in mind that in case of a conspiracy, there cannot be any direct evidence. Express agreement between the parties cannot be proved. Circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused. Such a conspiracy is never hatched in open and, therefore, evaluation of proved circumstances play a vital role in establishing the criminal conspiracy. In this context, we may refer with profit to a passage from Yogesh alias [Sachin Jagdish Joshi v. State of Maharashtra](#)[(2008)10 SCC 394]: -

“20. The basic ingredients of the offence of criminal conspiracy are: (i) an agreement between two or more persons; (ii) the agreement must relate to doing or causing to be done either (a) an illegal act; or (b) an act which is not illegal in itself but is done by illegal means. It is, therefore, plain that meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means is sine qua non of criminal conspiracy. Yet, as observed by this Court in [Shivnarayan Laxminarayan Joshi v. State of Maharashtra](#)[(1980)2 SCC 465] a conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the common intention of the conspirators. Therefore, the meeting of minds of the conspirators can be inferred from the circumstances proved by the prosecution, if such inference is possible.”

71. The same principles have been stated in [Pratapbhai Hamirbhai Solanki v. State of Gujarat and another](#)[(2013)1 SCC 613].

72. In [Yakub Abdul Razak Menon v. The State of Maharashtra](#), through CBI, Bombay[(2013) (3) SCALE 565], analyzing various pronouncements, this Court opined thus: -

“68. For an offence Under Section 120B Indian [Penal Code](#), the prosecution need not necessarily prove that the conspirators expressly agreed to do or cause to be done the illegal act, the agreement may be proved by necessary implication. It is not necessary that each

member of the conspiracy must know all the details of the conspiracy. The offence can be proved largely from the inferences drawn from the acts or illegal omission committed by the conspirators in pursuance of a common design. Being a continuing offence, if any acts or omissions which constitute an offence are done in India or outside its territory, the conspirators continuing to be the parties to the conspiracy and since part of the acts were done in India, they would obviate the need to obtain the sanction of the Central Government. All of them need not be present in India nor continue to remain in India. The entire agreement must be viewed as a whole and it has to be ascertained as to what in fact the conspirators intended to do or the object they wanted to achieve. (Vide: [R.K. Dalmia v. Delhi Administration](#)[AIR 1962 SC 1821], [Lennart Schussler and Anr. v. Director of Enforcement and Anr.](#)[(1970) 1 SCC 152], [Shivanarayan Laxminarayan Joshi v. State of Maharashtra and Mohammad Usman Mohammad Hussain Maniyar and Anr. v. State of Maharashtra](#)[AIR 1981 SC 1062]).”

53. B. Dinbandhu Singh :- From the evidence having been adduced by the prosecution concerning appellant, Dinbandhu Singh, it is evident that save and except PW 13, the Investigating Officer, none of the material witnesses have had pointed finger towards him. Now coming to the evidence of PW 13, it is apparent that the same does not stand to the test. From his cross-examination (para-112 as well as 113), it is crystal clear that Investigating Officer failed to ascertain truthfulness of discloser having been made by co-accused, Chhotu Pandey @ Raushan Pandey, Surendra Mishra @ Chhotu Mishra during course of investigation. Apart from this, his



complicity in terms of inculpatory extra-judicial confessional statement of Surendra Mishra @ Chhotu Mishra as well as Chhotu Pandey @ Raushan Pandey relate with harbouring Sheru Singh, his nephew though not substantiated by way of circumstantial evidence which the Investigating Officer could have gathered from examination of other police personnel as Dinbandhu Singh was staying at police line, to trace out whether co-accused was regular visitor or even after commission of present occurrence took shelter at his place or availed his company and so, there happens to be absence of positive evidence in conclusive manner to the effect that before commission of occurrence there was meeting of mind and under such ill design cartridges of 9 mm bore was supplied by him to Sheru Singh. True it is that conspiracy are hatched behind curtain, even then to substantiate the same, the prosecution is expected to do some exercise to expose at least probability in having agreement amongst them to do an illegal act, over which, the prosecution is completely silent.

54. So, from his evidence, it is crystal clear that on account of certain lapses having on his part to take statements other constables who were occupying the room of police line along with appellant, Dinbandhu Singh in order to expose whether there was presence of Onkar Nath Singh @ Sheru Singh since before the occurrence or after the occurrence or was a regular visitor getting asylum at his end



happens to be serious lacuna. In likewise manner, during course of investigation, neither SIM number of appellant, Deen Bandhu became known nor the call details relating to mobile phone seized from the possession of Onkar Nath Singh @ Sheru Singh divulged any kind of conversation having taken place amongst Onkar Nath Singh @ Sheru Singh as well as Dinbandhu Singh, is another circumstance giving jolt to the prosecution case with regard to complicity of Dinbandhu Singh. Therefore, mere on the basis of inculpatory extra-judicial confessional statement of Surendra Mishra @ Chhotu Mishra as well as Roshan @ Chhotu Pandey without any additional link would not justify inference at complicity of appellant with the aid of Section 120B IPC as well as under Section 212 IPC could be attracted. The learned trial court has dealt with the case of conspiracy under para-20 of the judgment wherefrom it is apparent that in casual manner, the same has been recorded against the appellant. For want of evidence as stated above, prosecution would not be entitled to take benefit of inculpatory extrajudicial confessional statement of two accused Surendra Mishra @ Chhotu Mishra as well as Raushan @ Chhotu Pandey in tune of Section 30 of the evidence Act. That being so, the finding of conviction as well as recording of sentence against the appellant is not at all found duly substantiated, whereupon, the same is set aside. Thus, Cr. Appeal No. 1000/2013 is allowed. Appellant is under

custody, hence is directed to be set at free at once if not wanted in any other case.

55. C. Surendra Mishra @ Chhotu Mishra. In order to substantiate its case against this appellant, two kinds of evidence have been adduced on behalf of prosecution. First one, through the evidence of PW-2 who in para-21 had stated that just three days prior to occurrence, the appellant came to his shop on the pretext of engaging a plumber through his nephew whereupon he had furnished the mobile number of his nephew (PW 3). It has also been disclosed that the appellant and his brother usually came to his shop for purchasing of different items. Furthermore, he identified him in the dock (not by name) whereupon on query by the court, appellant disclosed his identity as Surendra Mishra @ Chhotu Mishra.

56. The second kind of evidence having been through PW 13, the Investigating Officer who had stated that on confidential information getting through his spy regarding involvement of the petitioner, his house was searched, and he was apprehended and during course thereof, his mobile number 8235646458 as well as mobile number of Onkar Nath Singh @ Sheru Singh as well as Chandan Mishra were traced out at his instance (para 25). Call details of relevant mobile number were taken out. From the call details, as per para-31, the conversation having been in between appellant along

with Sheru Singh is found exposed (Ext-13/1). Furthermore, from para-32, it is evident that conversations amongst them were also made prior to the occurrence and details thereof have been made therein. During cross-examination at para-125, the aforesaid facts have been reiterated.

57. During cross-examination of PW-2, it is evident that appellant had not denied his presence at the shop of PW-2. In likewise manner, during course of cross-examination of PW-13, the I.O. neither the call details have been challenged nor the mobile number having been disclosed at his end, during course of inculpatory extra judicial confessional statement along with Sheru Singh as well as Chandan Mishra. Even during course of statement under Section 313 of the Cr.P.C., he had not denied the same.

58. PW-6 had also stated in the examination-in-chief at para 13 that this accused was seen at the hospital as well as near his house on the date of occurrence talking over mobile. Furthermore, he had also seen him twice or thrice at the shop of Gopal Keshri, PW-2 and had identified the same being the appellant. During cross-examination at para-15 and 19, had stated that he had seen this Surendra Mishra @ Chhotu Mishra on the date of occurrence at the hospital as well as near about his house. Because of the fact that he was not knowing this accused by name since before the occurrence as

a result of which he was not named by him. In para-18, he has stated that for the first time, he had seen the accused in the dock. During cross-examination, PW 13 at para-129, has stated that PW 6 had not disclosed regarding complicity of accused Surendra Mishra @ Chhotu Mishra during course of occurrence.

59. In inculpatory extra judicial confessional statement whereunder there happens to be discloser of mobile number possessed by him bearing 8235646458, having not been denied or controverted during course of cross-examination of PW-13 nor during course of statement recorded under Section 313 Cr.P.C. is a circumstance which would go against the appellant, more particularly, in the background of having call details substantiating the same more particularly as is evident from para-125. Apart from this, the SIM number of Sheru Singh as well as Chandan Mishra having been exposed at his end during course of inculpatory extra judicial confessional statement and further, having the aforesaid SIM number on surveillance wherefrom their locations were traced out and on the basis thereof, those two persons were arrested from their hideouts, from Kolkata who subsequently been identified during course of TIP, out of whom Sheru Singh was identified to be assailant while Chandan Mishra keeping watch having been duly armed with, is indicative of the fact that this appellant has got direct access with the main accused and further, as

the call details speak, active indulgence before as well as after commission of the occurrence and so, it happens to be a strong circumstance which goes against the appellant.

60. Much emphasis has been made on behalf of appellant over Section 25 of the Evidence Act, suggesting that the statement having been made during course of detention of the accused under police custody have been made inadmissible in the eye of law. There is no hitch over applicability of Section 25 whereunder mere inculpatory extra judicial confessional statement is found inadmissible in the eye of law but have got some exception as provided under Section 27 of the Act. As stated above, it was not mere an inculpatory extra judicial confession, rather was a disclosure regarding his activity along with activities of main accused Chandan and Sheru, which ultimately found substantiated leading to apprehension of those two from their hideout at Kolkata as well as having been identified during TIP as well as in dock. Therefore, the aforesaid statement could be admissible in terms of Section 27 of the Arms Act leading to the fact in issue and on account thereof, its acceptance is found legally permissible.

61. Now, the question relates whether identification for the first time in the court could be held permissible or not. In the case of **Ranjit Kumar Ram v. State of Bihar** as reported in **2015 Cr.L.J.**

2944, the Hon'ble Apex Court has held as follows:- (Para 13)

13. On behalf of Chintoo Singh (A-5), it was contended that PW2's testimony is not reliable as she has not identified Chintoo Singh during the test identification parade and that PW2's identification of Chintoo Singh (A-5) in the court was not reliable. Identification of the accused by the witness soon after the former's arrest is of course important because it lends assurance to the prosecution, in addition to corroboration of the evidence of the witnesses. As noticed earlier, in the open court during the trial, Rubi Kumari (PW2) identified Chintoo Singh (A-5) and she has not identified him in the test identification parade conducted in the prison. Ordinarily, courts do not give much credence to the identification made in the court for the first time; but the identification of the accused for the first time in court is permissible in law. But the said principle has to be applied in the facts and circumstances of each case. While PW2 was examined in the court, trial court which had the opportunity of seeing and observing demeanour of PW2 found her version identifying Chintoo Singh (A-5) trustworthy and we see no reason to take a different view.

62. In Ashok Debbarama @ Achak Debbaram v. State of Tripura as reported in **2014 Cr.L.J. 1830 (para-16 and 17)**.

16. We have gone through the oral evidence of PW10 and PW13 and, in our view, the trial Court and the High Court have rightly appreciated their evidence and the involvement of the Appellant in the above incident, including the fact that he had fired at various people, which led to the killing of relatives of PW10 and PW13. We are of the view that since the accused persons were known to the witnesses and they were identified by face, the fact that no Test Identification Parade was conducted at the time of investigation, is of no consequence. The primary object of the Test Identification Parade is to enable the witnesses to identify the persons involved in the commission of offence(s) if the offenders are not personally known to the witnesses. The whole object behind the Test Identification

Parade is really to find whether or not the suspect is the real offender. In [Kanta Prashad v. Delhi Administration](#) AIR 1958 SC 350, this Court stated that the failure to hold the Test Identification Parade does not make the evidence of identification at the trial inadmissible. However, the weight to be attached to such identification would be for the Court to decide and it is prudent to hold the Test Identification Parade with respect to witnesses, who did not know the accused before the occurrence. Reference may also be made to the judgment of this Court in [Harbhajan Singh v. State of Jammu & Kashmir](#) (1975) 4 SCC 480, [Jadunath Singh and another v. State of UP](#) (1970) 3 SCC 518 and [George & others v. State of Kerala and another](#) (1998) 4 SCC 605.

17. Above-mentioned decisions would indicate that while the evidence of identification of an accused at a trial is admissible as substantive piece of evidence, would depend on the facts of a given case as to whether or not such a piece of evidence can be relied upon as the sole basis of conviction of an accused. In [Malkhansingh v. State of M.P.](#) (2003) 5 SCC 746, this Court clarified that the Test Identification Parade is not a substantive piece of evidence and to hold the Test Identification Parade is not even the rule of law, but a rule of prudence so that the identification of the accused inside the Court room at the trial, can be safely relied upon. We are of the view that if the witnesses are trustworthy and reliable, the mere fact that no Test Identification Parade was conducted, itself, would not be a reason for discarding the evidence of those witnesses. This Court in [Dana Yadav alias Dahu](#) (supra) has examined the points on the law at great length and held that the evidence of identification of an accused in Court by a witness is substantive evidence, whereas identification in Test Identification Parade is, though a primary evidence, but not substantive one and the same can be used only to corroborate the identification of the accused by witness in the Court. So far as the present case is concerned, PW10 and PW13 have identified the accused in open Court which is the substantive piece of evidence and such identification by the eye-witnesses has not been shaken or contradicted. The trial Court examined in detail the oral evidence tendered by those witnesses, which was accepted by the High Court and we find no error in the appreciation of the evidence tendered by those witnesses.

63. In Ravi Kapur v. State of Rajasthan reported in (2012) 9 SCC 284, it has been held (para 35, 36, 37).

35. In the present case, the accused had been seen by PW2 and PW4. In addition, they had also stated that the passersby had informed them that the accused was driving the bus and, in fact, he was the owner of the bus. One fact of this statement is established that the bus in question was given on superdari to the accused. It is also stated by these persons that after they had seen the accused, he had run away from the place where he parked the vehicle. These witnesses also identified the accused in the Court. It is not the case of the accused before us that he had been shown to the witnesses prior to his being identified in the Court. The Court identification itself is a good identification in the eyes of law. It is not always necessary that it must be preceded by the test identification parade. It will always depend upon the facts and circumstances of a given case. In one case, it may not even be necessary to hold the test identification parade while in the other, it may be essential to do so. Thus, no straightjacket formula can be stated in this regard.

36. We may refer to a judgment of this Court in the case of [Shyamal Ghosh v. State of West Bengal](#) [2012 (6) SCALE 381] wherein this Court has held that [the Code of Criminal Procedure, 1973](#) (for short “Cr.P.C.”) does not oblige the investigating agency to necessarily hold the test identification parade without exception. The Court held as under :

“78. On behalf of accused Shyamal, it was also contended that despite the identification parade being held, he was not identified by the witnesses and also that the identification parade had been held after undue delay and even when details about the incident had already been telecasted on the television. Thus, the Court should not rely upon the identification of the accused persons as the persons involved in the commission of the crime and they should be given the benefit of doubt.

79. The whole idea of a Test Identification Parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The

test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime.

80. It is equally correct that the [CrPC](#) does not oblige the investigating agency to necessarily hold the Test Identification Parade. Failure to hold the test identification parade while in police custody, does not by itself render the evidence of identification in court inadmissible or unacceptable. There have been numerous cases where the accused is identified by the witnesses in the court for the first time. One of the views taken is that identification in court for the first time alone may not form the basis of conviction, but this is not an absolute rule. The purpose of the Test Identification Parade is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of the witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence is, however subjected to exceptions. Reference can be made to [Munshi Singh Gautam v. State of M.P.](#) [(2005) 9 SCC 631], [Sheo Shankar Singh v State of Jharkhand and Anr.](#) [(2011) 3 SCC 654].

81. Identification Parade is a tool of investigation and is used primarily to strengthen the case of the prosecution on the one hand and to make doubly sure that persons named accused in the case are actually the culprits. The Identification Parade primarily belongs to the stage of investigation by the police. The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification in court. Thus, it is only a relevant consideration which may be examined by the court in view of other attendant circumstances and corroborative evidence with reference to the facts of a given case.”

33. In our considered view, it was not necessary to hold the test identification parade of the appellant for two reasons. Firstly, the appellant was already known to the passersby who had recognized him while driving the

bus and had stated his name and, secondly, he was duly seen, though for a short but reasonable period, when after parking the bus, he got down from the bus and ran away.

64. So, identification for the first time in court is not going to ruin its reliability in the background of the fact that the evidence before the court happens to be the substantive evidence which guides the ultimate fate of the trial.

65. Not disclosing name of appellant at an earlier occasion is not found adverse to the prosecution, as till then the prosecution was not within proper knowledge that the appellant was acting as an informer as well as keeping watch over activity of the prosecution. Virtually, as is evident from inculpatory confessional statement of appellant, facilitated the main accused to know about the steps being taken by the prosecution, facilitated in their escape as well as to go out of screen.

66. Appellant, Surendra Mishra @ Chhotu Mishra has also been held guilty for an offence punishable under Sections 465, 468, 471 of the IPC and for that, there happens to be no proper evidence at the end of the prosecution to suggest that any kind of activity was at his end to procure his SIM along with the SIM of Chandan Mishra and Sheru Singh. On account thereof, the conviction and sentence so recorded by the learned lower court relating to Section 465, 468, and

471 IPC is set aside while maintaining the finding relating to section 302/120B IPC as well as 386 of the IPC with the aforesaid modification. Cr. Appeal No. 17/2014 filed on his behalf is dismissed. Appellant who is under custody will serve out remaining part of the sentences.

(Aditya Kumar Trivedi, J)

I agree
(Samarendra Pratap Singh, J)

(Samarendra Pratap Singh, J)

Patna High Court
November 25th 2016
Perwez/AFR

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