

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No.807 of 2013**

- Jitendra Singh S/o Narendra Aged About 24 Years R/o Torwa, Civil And Rev. Distt. Bilaspur C.G. , Chhattisgarh

---- Appellant**Versus**

- State Of Chhattisgarh Through Distt. Magistrate, Korba, Distt. Korba C.G. , Chhattisgarh

---- Respondent**CRA No.895 of 2013**

- China @ Deepak Pandey S/o Late Rakesh Pandey Aged About 24 Years R/o Purani Basti, Korba C.G. , Chhattisgarh

---- Appellant**Versus**

- State Of Chhattisgarh Through The Distt. Magistrate, Korba C.G. , Chhattisgarh

---- Respondent**CRA No.951 of 2013**

- Manish @ Bala Soni S/o . Jagnarayan Soni Aged About 19 Years R/o. Purani Basti, P.O. Korba, P.S. Korba, Distt. Korba C.G., Chhattisgarh

---- Appellant**Versus**

- State Of Chhattisgarh Through The District Magistrate, Korba, Distt. Korba C.G., Chhattisgarh

---- Respondent**CRA No. 1055 of 2013**

- Arpit Agrawal S/o Late Ramkishan Agrawal Aged About 19 Years R/o Near Shyam Mandir, Mission Road, Korba C.G. , Chhattisgarh

---- Appellant**Versus**

- State Of Chhattisgarh Through The Distt. Magistrate, Korba, C.G. , Chhattisgarh

---- Respondent

CRA No.607 of 2016

- Mausam Mishra S/o S/o Ranjan @ Rajan Mishra Aged About 19 Years
R/o Village Devrikhurd, Torwa, Thana Torwa, Tehsil And District Bilaspur,
Chhattisgarh., Chhattisgarh

---- Appellant**Versus**

- State Of Chhattisgarh Through District Magistrate Korba, District Korba,
Chhattisgarh., Chhattisgarh

---- Respondent**PRESENT:-**

Shri Pramod Verma, Senior Advocate with Shri Virendra Verma, Shri Sachin Singh Rajput, Shri Mahendra Dubey, Smt. Kiran Jain, learned counsel for respective appellants.

Shri Anil Pillai, Deputy Advocate General for State.

D.B.: Hon'ble Shri Justice Manindra Mohan Shrivastava
Hon'ble Smt. Justice Rajani Dubey

Order on Board**Per Manindra Mohan Shrivastava, J.****29/11/2018**

These five appeals have been preferred by the appellants-accused of Crime No.773 of 2012 tried for alleged commission of offence under Section 302/34, 379/34, 109/34, 120-B/34 of IPC as also under Section 25 & 27 (1) of the Arms Act read with Section 34 of IPC.

Initially, namely Jitendra Singh, Arpit Agrawal, Manish @ Bala Soni, China @ Dipak Pandey and R. Meenakshi Rao were tried for alleged commission of offence and except R. Meenakshi Rao, convicted vide judgment dated 08-08-2013 in Sessions Trial No.99/2012. The appellant-accused Mousam Mishra was later on arrested on 28-08-2004 and was tried for the commission of offence as stated above under the same crime number and he

was convicted by the separate judgment of conviction and order of sentence dated 18-02-2016 in Sessions Trial No.13 of 2015. As all of the accused persons have been convicted by separate judgment, but arising out of the same incident and same crime number, these appeals have been heard together.

Vide judgment of conviction and order of sentence dated 08-08-2013, the appellants Jitendra Singh, Arpit Agrawal, Manish @ Bala Soni and China @ Dipak Pandey have been held guilty of commission of offence and sentenced as described below :-

302 /34 & 109/34 of IPC	Life Imprisonment, fine of Rs.5,000/-, in default of payment of fine, additional R.I. for one year
379/34 of IPC	R.I. for two years, fine of Rs.1,000/-, in default of payment of fine, additional R.I. for two months
120-B/34 of IPC	Life Imprisonment, fine of Rs.5,000/-, in default of payment of fine, additional R.I. for one year
Section 25 of Arms Act read with Section 34 of IPC	R.I. for three years, fine of Rs.1,000/-, in default of payment of fine, additional R.I. for two months
Section 27(1) of the Arms Act read with Section 34 of IPC	R.I. for five years, fine of Rs.2,000/-, in default of payment of fine, additional R.I. for four months

Mousam Mishra has been convicted vide judgment of conviction and order of sentence dated 18-02-2016 passed in Sessions Trial No.13/2015 and he has been held guilty of commission of offence and sentenced as described below:-

302 /34 & 109/34 of IPC	Life Imprisonment, fine of Rs.5,000/-, in default of payment of fine, additional R.I. for one year
379/34 of IPC	R.I. for two years, fine of Rs.1,000/-, in default of payment of fine, additional R.I. for two months

120-B/34 of IPC	Life Imprisonment, fine of Rs.5,000/-, in default of payment of fine, additional R.I. for one year
Section 25 of Arms Act read with Section 34 of IPC	R.I. for three years, fine of Rs.1,000/-, in default of payment of fine, additional R.I. for two months
Section 27(1) of the Arms Act read with Section 34 of IPC	R.I. for five years, fine of Rs.2,000/-, in default of payment of fine, additional R.I. for four months

2. The prosecution story, as unfolded from the impugned judgment and records of the case is that on 23-07-2012, the police at Korba received an information that some anti-social elements have gathered near the house of one Kailash Chand Agrawal. Upon receipt of the said information, Constable Kirit Ram Patel, along with his colleague police official of Police Station City Kotwali, Korba, proceeded to the aforesaid location. It is said that when they reached at the location and knocked at the door of the house, where anti-social elements were suspected to be present, one Chunnu Garg along with his associates R. Meenakshi Rao, Mousam Mishra attempted to run away and having seen the Constable, fired gun shot and killed him and then ran away from the spot in a motorcycle. The other accused Jitendra Singh, China @ Dipak Pandey, Manish @ Bala Soni and Arpit Agrawal also escaped from the spot in different directions. During treatment, injured Kirit Ram Patel died. Crime No.773/2012 was registered for alleged commission of offence under Section 307, 379, 302, 216, 109, 120-B/34 of IPC against all the accused and matter was taken up in investigation. It is further case of the prosecution that during investigation, the police encountered Chunnu Garg and he was killed in the encounter and all other accused were arrested and it is said that their memorandum statements were recorded and on that basis, seizure of incriminating articles, including fire arms, is said to be made. Charge sheet was filed and the case was committed

for trial before the Court of Sessions against all the accused including R. Meenakshi Rao. The learned trial Court framed charges for commission of offence as stated above. In the meantime, as R. Meenakshi Rao moved an application for grant of pardon offering her to become approver and she was granted pardon by the learned trial Court vide its order dated 15-01-2013. She was examined as prosecution witness. Relying upon the evidence led by the prosecution, particularly relying upon the evidence of the associate police officer Sanjay Lahre, PW-7, who had accompanied Kirit Ram Patel, a police constable, also the evidence of approver, the learned trial Court convicted the appellants. It is relevant to mention here that one of the appellant-accused-Mousam Mishra was arrested only after the conclusion of trial of remaining accused and he is claimed to have been identified by Sanjay Lahre, PW-7 and R. Meenakshi Rao, PW-10 both.

3. The learned trial Court held all the appellants guilty of commission of offence of murdering Constable Kirit Ram Patel and attempting to murder other constable and it is said that the appellants hatched a conspiracy with the deceased accused namely Chunnu Garg and approver R. Meenakshi Rao, PW-10 and in furtherance of that conspiracy, Kirit Ram Patel was killed by shooting.

4. Learned counsel appearing for the respective appellants(except appellant Mousam Mishra) argued before this Court that in so far as prosecution case with regard to hatching of conspiracy is concerned, there is no evidence and what has been stated by Sanjay Lahre, PW-7 and R. Meenakshi Rao, PW-10 completely belies the prosecution story of conspiracy. They would submit that even the prosecution witnesses have stated that when the police personnel reached at the spot and knocked at the door, there was a panicky amongst those, who were inside the room and they all started running away from the spot

in different directions. It is further argued that as per prosecution, when Chhunnu Garg was trying to escape from that place along with Mousam Mishra and R. Meenakshi Rao, Kirit Ram Patel intercepted and then abetted by Mousam Mishra, Chunnu Garg fired gun shot on Kirit Ram Patel, due to which, Kirit Ram Patel sustained bullet injury in the abdomen and he succumbed to death. It is further argued that even according to the entire prosecution story, all happened all of sudden only after arrival of police personnel, therefore, element of conspiracy is completely absent. Further submission is that even if the evidence of Sanjay Lahre, PW-7 and R. Meenakshi Rao, PW-10 is to be believed, as against all the appellants including Mousam Mishra, no case is made out, because they all alleged to have run away in different directions and there is no allegation that any of them either caught hold of the police personnel or in any manner aided in commission of overt act, in which, Chunnu Garg is alleged to have fired on police personnel Kirit Ram Patel. Therefore, it is argued that the present is a case of no evidence against the appellants Jitendra Singh, Arpit Agrawal, China @ alias Deepak Pandey and Manish @ Bala Soni.

5. Learned counsel appearing for the appellant-accused Mousam Mishra argued in extenso. He contended that no reliance could be placed on the testimony of R. Meenakshi Rao, PW-10 as approver witness, because the learned trial Court granted her pardon on the basis of her statement recorded by none other than the Investigating Officer of the case, though she was neither examined by the trial Court for the limited purpose of recording satisfaction that she is making voluntary statement nor she was produced before the Magistrate for recording her statement under Section 164 Cr.P.C. Therefore, it is argued, the evidence of R. Meenakshi Rao, is highly doubtful and could not be used to implicate Mousam Mishra in the alleged commission of offence. Further submission is that as far as identification of Mousam Mishra is concerned, the

same is highly doubtful and under shadow of doubt, because according to the evidence of Sanjay Lahre, PW-7 itself, he does not know Mousam Mishra and the incident as is stated to have happened, by the prosecution witness, was in a flash of moment, having occurred in the night, without there being proper light at the spot so as to give Sanjay Lahre, PW-7, an opportunity to recognize the face of Mousam Mishra. In the FIR lodged at the instance of Sanjay Lahre, PW-7, nothing has been stated as to what were the specific features for identification of Mousam Mishra. The next submission is that Mousam Mishra was arrested only on 28-08-2014, but he was not put to identification till he was examined in the Court on 27-10-2015. In the background of the present case, prosecution witness-Sanjay Lahre himself being the police official, non-holding of test identification parade, soon after arrest of Mousam Mishra, until his examination for a period after approximately 14 months, renders the identification itself extremely doubtful.

6. Next submission of learned counsel for the appellant is that as far as evidence of Sanjay Lahre, PW-7 is concerned, his statement, as in the examination in chief and what has been elicited in his cross-examination renders it doubtful whether alleged words of abetment to kill police constables were spoken by Mousam Mishra prior to firing or thereafter. He would also argue that in the cross-examination, this witness has also stated that he has given a different story that some person came out and called Chunnu Garg to open fire on the police constable. Therefore, without independent corroboration with regard to the role alleged to be played by Mousam Mishra, which according to him, is not present in the present case, appellant Mousam Mishra is entitled to be given benefit of doubt with regard to alleged role of abettor of commission of offence. In support of his submission, learned counsel appearing for appellant-Mousam Mishra has placed reliance on ***Bhiva Doulu Patil vs. State***

of Maharashtra, AIR 1963 SC 599, Narayan Chetanram Choudhary and another vs. State of Maharashtra, AIR 2000 SC 3352, Bhushan Lal vs. State of Madhya Pradesh, 1987 SCC Supp. 243, Santosh Kumar Satishbhushan Bariyar vs. State of Maharashtra, (2009) 6 SCC 498, Suresh Chandra Bahri vs. State of Bihar, 1995 SCC Supp. (1) 80, Mohan Singh and another vs. State of MP (decided on 28-01-1999), Arvind Kumar Singh and others vs. State of Bihar, (1990) 1 BLJR 393, Nathu Singh and another vs. State of M.P. through P. S. Porsa, 2008 Cr.L.J 770, Rameshwar Singh vs. State of Jammu and Kashmir, 1971(2) SCC 715, Hem Singh alias Hemu vs. State of Haryana, 2009(3)SCC Cri. 28, Jainul Haque vs. State of Bihar, AIR 74 SC 45 and Matadin vs. State of Maharashtra decided by the Supreme Court on 04-08-1998.

7. On the other hand, learned State counsel supported the impugned judgment of conviction and order of sentence by submitting that the prosecution evidence and the established circumstances are sufficient to draw a reasonable inference of conspiracy hatched by the appellants to murder the police personnel who reached at the spot in the night and the appellants were confronted with him. He argues that the evidence of Sanjay Lahre, PW-7 and R. Meenakshi Rao, PW-10, who are the witnesses of the incident one of them being the Police Constable accompanying Kirit Ram Patel, have clearly stated that the appellants had gathered in the place where the two police officials reached to verify the alleged activity of anti-social elements. When these appellants along with deceased Chunnu Garg found that the police personnel have arrived at the spot, conspiracy was instantaneously hatched. Chunnu Garg was possessed of Revolver and when police people came inside to take stock of situation as to what was going on, Chunnu Garg fired on one of the police official, who died due to gun shot injury. The very presence of the appellants at

the spot and after assault, all of them running away in different directions proves their conduct of having conspired to eliminate the police official, who reached at the spot to arrest them. Next submission is that even though, while granting pardon to one of the accused R. Meenakshi Rao, the learned trial Court has not scrupulously followed the mandate of Section 307, as the appellants were allowed to cross-examine the said witness to impeach her credibility, her evidence could be relied upon for limited purpose of corroboration, though, not as substantive evidence. He would then hasten to add that the case of the prosecution stands proved from reliable evidence of the police officer Sanjay Lahre, PW-7, who has elaborately stated regarding the incident when he and Kirit Ram Patel, upon receipt of information regarding gathering of anti-social elements, reached at the spot and attempt was made by Kirit Ram Patel to stop them from running away, Chunnu Garg took out his pistol and abetted by Mousam Mishra, that police officer may be shoot, gun shot was fired on Kirit Ram Patel, as a result of which, police officer succumbed to death. Learned State counsel further argued that the very fact that all the appellants had gathered in one place and then, in response to attempt made by the police officer to stop them from running away, firing was opened, proves the common intention of the appellants, in addition to the conspiracy which was already hatched by them. Learned State counsel also argued that even in the FIR, Sanjay Lahre, PW-7 has clearly stated that he had seen Mousam Mishra along with Chunnu Garg, who fired gun shot, a lady, who abetted Chunnu Garg to open fire at the police constable. This witness has described the physical appearance and during trial, when Mousam Mishra was produced, this witness Sanjay Lahre, PW-7 has clearly identified him and has remained firm on the statement regarding he having seen and identified Mousam Mishra as one of those three persons, including Chunnu Garg. He further argued that as far as

identification is concerned, test identification parade during investigation is held only to lay credence to substantive evidence, in the Court, regarding dock identification and necessity for corroboration would arise only when the dock identification of the accused by the witness is doubtful for some reasons. In the instant case, right from the beginning, Sanjay Lahre, PW-7 has remained firm on the aspect of identification and R. Meenakshi Rao, PW-10 as approver, has clearly stated regarding involvement of Mousam Mishra, therefore, doubt, if any, stands removed with regard to his identification.

8. Learned State counsel also argued that the evidence of Sanjay Lahre, PW-7, is fully reliable with regard to role alleged to be played by the appellant-Mousam Mishra, who had clearly deposed that he abetted Chhunnu Garg to shoot the police constable. This clearly proves that the present is a case where Mousam Mishra would be liable for commission of offence as abettor of the crime and deemed to have been committed offence as he himself was present at the scene of incident, as provided under Section 134 of IPC, held by the Supreme Court in the case of ***Mathurala Adi Reddy vs. The State of Hyderabad, AIR 1956 SC 177***. Discrepancies, which have been pointed out, are not very material, as this witness has repeatedly stated in his cross-examination that it is Mousam Mishra, who abetted commission of offence.

9. We have heard learned counsel for the parties and perused the records.

10. FIR lodged by Sanjay Lahre, PW-7, in Ex.P-25 has been proved from the evidence of Sanjay Lahre, PW-7. The prosecution case, as stated in the FIR, is that upon receipt of information in the police station City Kotwali, Korba, at about 23 hours from the Mukhbir that one Arpit Agrawal (appellant) has given shelter to some boys and girls in his house in suspicious circumstances, Sanjay Lahre, PW-7 along with Head Constable Kirit Ram Patel (No.346) proceeded to the spot to verify the information. It has been further stated in the FIR that when

he reached near the house of Arpit Agrawal, it was locked and the side door was locked from inside. Upon being knocked, some one peeped from the window and it was closed. On road, they found China Pandey and Manish @ Bala Soni and one another boy coming on a motorcycle and trying to know the reason for their arrival. Thereafter, China Pandey and others talked to someone over the phone and it looked like to inform those, who were inside the house. At this moment, Kirit Ram Patel went towards "gali" (narrow passage) by the side of the road which could possibly be used to escape and there, three persons including a girl were seen. When Kirit Ram Patel obstructed and attempted to stop them, one of the companion of middle height asked Chunnu Bhaiya to shot police personnel, whereafter, person wearing blue shirt took out weapon and fired at Kirit Ram Patel. Thereafter, Kirit Ram Patel fell down and the other person wearing blue shirt and his companions namely R. Meenakshi Rao and another also escaped in different directions. It was alleged that China Pandey had informed to those, who were hiding inside the house of Arpit Agrawal.

11. Kirit Ram Patel died due to gun shot injury, which is proved from the evidence of Dr. P. P. Singh, PW-16, who conducted postmortem and prepared postmortem report in Ex.P-54. Following injuries were found by the Dr. P. P. Singh, PW-16 in the postmortem, as deposed by him the court during his examination:-

4. "शव परीक्षण करने पर पाया कि मृतक मर्चुरी में चित अवस्था में रखा गया था। उसके दोनो आंख बंद थे, मुंह थोड़ा खुला हुआ था। दोनो हांथ और दोनो पैरों में अकड़न मौजूद था। मृतक के पेट के बांये साईड में बंदूक की गोली प्रवेश करने का निशान था जिसका आकार 3ग5x 5 से.मी. था। उपरी हिस्सा छितराया हुआ था। जिसका प्रारंभिक ईलाज कराया गया था। घाव अंडाकार था। रक्त स्राव मौजूद था। घाव के अंदर 13 नग गॉजपिश मौजूद था। उक्त गॉजपिश से घाव को भरा गया था।

5. आंतरिक परीक्षण पर पाया कि पेट के अंदर खून भरा हुआ था। पेट में छोटे-

छोटे काले रंग के टुकड़े मौजूद थे । छोटी और बड़ी आंत में मल्टीपल कन्ट्रैक्चर था उसके दाहिने तरफ इलियक वेसल्स में पिनिट्रेटिंग वुन्ड (छिदा हुआ घाव था) । सेक्ट्रम बोन के पास बुलेट के टुकड़े फंसे हुए थे ।“

According to the doctor, cause of death, deposed by him in his evidence, was excessive bleeding caused due to gun shot injury leading to failure of heart and he opined that death was homicidal in nature and the incident may have occurred 24-48 hours before the postmortem. This evidence of the doctor has remained uncontroverted and therefore, death of Kirit Ram Patel by gun shot injury is proved reasonable doubt.

12. The prosecution has come out with a case that a conspiracy was hatched by the appellants and the deceased accused Chunnu Garg as also R. Meenakshi Rao, one of the accused, who was granted pardon and examined as approver. In order to prove its case of conspiracy, the prosecution has come out with two important prosecution witnesses, who are said to be present at the spot where the entire incident happened. One of them is Sanjay Lahre, PW-7, Constable, who had accompanied Kirit Ram Patel and other is R. Meenakshi Rao, PW-10, one of the accused, who was granted pardon and then examined as prosecution witness of the case. The entire case of the prosecution rests on these two prosecution witnesses, which has been relied upon to hold the appellants guilty for alleged commission of offence on proof of conspiracy.

13. The very admissibility and veracity of the evidence of R. Meenakshi Rao, PW-10 has been very seriously objected to by learned counsel for the appellant, particularly by the counsel appearing for the Mousam Mishra by submitting that the learned trial Court granted pardon without following the mandatory procedure prescribed under Section 307 of Cr.P.C. to arrive at due satisfaction that the approver has given her statement voluntarily. He would argue that the

learned trial Court, while granting pardon vide order dated 15-01-2013, took into consideration the statement recorded by the Investigating Officer of the case. Detailed submissions have been made, which is referred to hereinabove. In order to appreciate this submission, we consider it necessary to examine the relevant provisions, as laid down in Cr.P.C. with regard to grant of pardon.

14. Section 306/308 of Cr.P.C. make provision with regard to grant of "Pardon" to an accomplice and Section 307 of Cr.P.C. makes provision with regard to grant of grant of pardon by the Court, to which, the case is committed. Since in the present case, on facts, pardon has been granted during trial, we would confine our consideration to the statutory scheme of Section 307 of Cr.P.C. and the said provision, is therefore, extracted hereinbelow:-

307. Power To Direct Tender Of Pardon.

At any time after commitment of a case but before judgment is passed, the Court to which the commitment is made may, with a view to obtaining at the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender a pardon on the same condition to such person.

A perusal of the aforesaid provision would reveal that after commitment of the case, but before passing the judgment, the Court may, with a view to obtaining at the trial, the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender a pardon on the same condition to such person. The words 'same condition' refers to conditions which have been referred to in Section 306(1) of Cr.P.C. Relevant provision is extracted, as below:-

306. Tender of pardon to accomplice.

(1) With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into or trying the offence, at any stage of the inquiry or trial, may tender a pardon to such person on condition of his making a full and true disclosure of the whole of

the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

(2) ----- xxx -----

(3) ----- xxx -----

(4) ----- xxx-----

(5) ----- xxx-----

This provision came up for consideration of Their Lordship in the Supreme Court as also the value that could be attached to the evidence of approver, in the case of **Suresh Chandra Bahri** (supra).

15. The ambit and scope of provision contained in Section 306, 307 of Cr.P.C. in the matter of grant of pardon to approver was explained thus:

42. “We have already reproduced above [Section 306](#) of the Code the provisions of which apply to any offence triable exclusively by the Court of Special Judge to any offence punishable with imprisonment extending to seven years or with a more serious sentence. [Section 306](#) of the Code lays down a clear exception to the principle that no inducement shall be offered to a person to disclose what he knows about the procedure (sic). Since many a times the crime is committed in a manner for which no clue or any trace is available for its detection and, therefore, pardon is granted for apprehension of the other offenders for the recovery of the incriminating objects and the production of the evidence which otherwise is unobtainable. The dominant object is that the offenders of the heinous and grave offences do not go unpunished, the Legislature in its wisdom considered it necessary to introduce this section and confine its operation to cases mentioned in [Section 306](#) of the Code. The object of [Section 306](#) therefore is to allow pardon in cases where heinous offence is alleged to have been committed by several persons so that with the aid of the evidence of the person granted pardon the offence may be brought home to the rest. The basis of the tender of pardon is not the extent of the culpability of the person to whom pardon is granted, but the principle is to prevent the escape of the offenders from punishment in heinous offences for lack of evidence. There can therefore be no objection against tender of pardon to an accomplice simply because in his confession, he does not implicate himself to the same extent as the other accused because all that [Section 306](#) requires is that pardon may be tendered to any person believed to be involved directly or indirectly in or privy to an offence.”

16. The Supreme Court also delineated the spirit of the aforesaid provisions relating to grant of pardon, in the light of the provisions contained in Sections 133 and Section 114(b) of the Evidence Act, as below:-

43. "The evidence of an approver does not differ from the evidence of any other witness except that his evidence is looked upon with great suspicion. Consequently in the event the suspicion which is attached to the evidence of an accomplice is not removed his evidence could not be acted upon unless corroborated in material particulars. But where the suspicion is removed and the evidence of an approver is found to be trustworthy and acceptable then that evidence may be acted upon even without corroboration and the conviction may be founded on such a witness. Here in this connection it would be appropriate to make reference to the provisions of [Section 133](#) of the Evidence Act which deal with the testimony of an accomplice. It contemplates that an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. The first part envisages that an accomplice, in other words, a guilty companion in crime, shall be a competent witness while the second part states that conviction is not illegal merely because it is based on the uncorroborated testimony of an accomplice. But if we read [Section 133](#) of the Evidence Act with illustration (b) of [Section 114](#) of the Evidence Act it may lead to certain amount of confusion and misunderstanding as to the real and true intention of the Legislature because quite contrary to what is contained in [Section 133](#) illustration (b) to [Section 114](#) of the Evidence Act lays down "that an accomplice is unworthy of credit, unless he is corroborated in material particulars". A combined reading of the two provisions that is [Section 133](#) and illustration (b) of [Section 114](#) of Evidence Act goes to show that it was considered necessary to place the law of accomplice evidence on a better footing by stating in unambiguous terms that according to [Section 133](#) a conviction is "not illegal or in other words not unlawful" merely because it is founded on the uncorroborated testimony of an accomplice while accepting that an accomplice is a competent witness. But at the same time the Legislature intended to invite attention to illustration (b) of [Section 114](#) of the Evidence Act with a view to emphasise that the rule contained therein as well as in [Section 133](#) are parts of one and the same subject and neither can be ignored in the exercise of judicial discretion except in cases of very exceptional nature. However, the difficulty in understanding the combined effect of the aforementioned two provisions arises largely due to their placement at two different places

of the same Act. It may be noticed that illustration (b) attached to [Section 114](#) is placed in Chapter VII of Evidence Act while [Section 133](#) is inserted in Chapter IX of the Act. The better course was to insert illustration (b) to [Section 114](#) as an explanation or in any case as a proviso to [Section 133](#) of the Act instead of their insertion at two different places and that too in different chapters of the [Evidence Act](#). In any case since an approver is a guilty companion in crime and, therefore, illustration (b) to [Section 114](#) provides a rule of caution to which the courts should have regard. It is now well settled by a long series of decisions that except in circumstances of special nature it is the duty of the court to raise the presumption in [Section 114](#) illustration

(b) and the Legislature requires that the courts should make the natural presumption in that section as would be clear from the decisions which we shall discuss hereinafter.

44. [In Bhiva Doulu Patil v. State of Maharashtra](#)⁶ this Court took the view that the combined effect of [Sections 133](#) and [114](#), illustration (b) may be stated as follows. According to the former, which is a rule of law, an accomplice is competent to give evidence and according to the latter which is a rule of practice it is almost always unsafe to convict upon his testimony alone. Therefore, though the conviction of an accused on the testimony of an accomplice cannot be said to be illegal yet the courts will as a matter of practice, not accept the evidence of such a witness without corroboration in material particulars. There should be corroboration of the approver in material particulars and qua each accused. Similar observations were made by this Court in [Ram Narain v. State of Rajasthan](#)⁷ in the following words: (SCC headnote)

"[Section 133](#) expressly provides that an accomplice is a competent witness and the conviction is not illegal merely because it proceeds on uncorroborated testimony of an accomplice. In other words, this section renders admissible such uncorroborated testimony. But this section has to be read along with illustration (b) to [Section 114](#). The latter section empowers the court to presume the existence of certain facts and the illustrations elucidate what the court may presume and make clear by means of examples as to what facts the court shall have regard in considering whether or not the maxims illustrated apply to a given case before it. Illustration (b) in express terms says that an accomplice is unworthy of credit unless he is corroborated in material particulars. The statute permits the conviction of an accused person on the basis of uncorroborated testimony of an accomplice but the rule of prudence embodied in 6 AIR 1963 SC 599 :(1963) 1 Cri LJ 489 :

1963 All LJ 253 7 (1973) 3 SCC 805 : 1973 SCC (Cri) 545 illustration (b) of [Section 114](#) strikes a note of warning cautioning the court that an accomplice does not generally deserve to be believed unless corroborated in material particulars. In other words, the rule is that the necessity of corroboration as a matter of prudence except when it is safe to dispense with such corroboration must be clearly present to the mind of the Judge."

17. The rule of caution was emphasized, as below:-

45. "Further in [Ravinder Singh v. State of Haryana](#)⁸ this Court while considering the approver's testimony within the meaning of [Section 133](#) of the Evidence Act made the following observations: (SCC headnote)

"An approver is a most unworthy friend, if at all, and he, having bargained for his immunity, must prove his worthiness for credibility in court. This test is fulfilled, firstly, if the story he relates involves him in the crime and appears intrinsically to be a natural and probable catalogue of events that had taken place. The story if given of minute details according with reality is likely to save it from being rejected *brevi manu*. Secondly, once that hurdle is crossed, the story given by an approver so far as the accused on trial is concerned, must implicate him in such a manner as to give rise to a conclusion of guilt beyond reasonable doubt. In a rare case, taking into consideration all the factors, circumstances and situations governing a particular case, conviction based on the uncorroborated evidence of an approver confidently held to be true and reliable by the court may be permissible. Ordinarily, however, an approver's statement has to be corroborated in material particulars bridging closely the distance between the crime and the criminal. Certain clinching features of involvement disclosed by an approver appertaining directly to an accused, if reliable, as determined by the touchstone of other independent credible evidence, would give the needed assurance for acceptance of his testimony on which a conviction may be based."

Thus it is clear that a definite rule has been crystallized to the effect that though a conviction can be based on uncorroborated evidence of an accomplice but as a rule of prudence it is unsafe to place reliance on the uncorroborated testimony of an approver as required by illustration (b) of [Section 114](#) of the Evidence Act."

18. In a subsequent decision in the case of ***Narayan Chetanram Choudhary*** (supra), the aforesaid rule of caution was again reiterated, as below:-

34. [In Jnanendra Nath Ghose vs. The State of West Bengal](#)

[1960(1) SCR 126] this Court observed that there should be corroboration in material particulars of the Approver's statement, as he is considered as a self- confessed traitor. This Court in [Bhiva Doulu Patil v. State of Maharashtra](#) [AIR 1963 SC 599] held that the combined effect of [Sections 133](#) and [114](#) illustration (b) of the [Evidence Act](#) was that an accomplice is competent to give evidence but it would be unsafe to convict the accused upon his testimony alone. Though the conviction of an accused on the testimony of an accomplice cannot be said to be illegal, yet the courts will, as a matter of practice, not accept the evidence of such a witness without corroboration in material particulars. In this regard the court in Bhiv Doulu Patil's case observed:

"In coming to the above conclusion we have not been unmindful of the provisions of S.133 of the Evidence Act which reads:

S. 133 "An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice".

It cannot be doubted that under that section a conviction based merely on the uncorroborated testimony of an accomplice may not be illegal, the courts nevertheless cannot lose sight of the rule of prudence and practice which in the words of Martin B. in R v. Boyes, (1861) 9 Cox CC 32 "has become so hallowed as to be deserving of respect" and the words of Lord Abinger "it deserves to have all the reverence of the law". This rule of guidance is to be found in illustration (b) to S.114 of the Evidence Act which is as follows:

"The court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars."

Both sections are part of one subject and have to be considered together. The Privy Council in [Bhuboni Sahu v. The King](#), 76 Ind App 147; (AIR 1949 PC 257) when its attention was drawn to the judgment of Madras High Court in In re Rajagopal ILR (1994) Mad 308: (AIR 1944 Mad 117) where conviction was based upon the evidence of an accomplice supported by the statement of a co-accused, said as follows:

"Their Lordships..... would nevertheless observe that Courts should be slow to depart from the rule of prudence, based on long experience, which requires some independent evidence implicating the particular accused. The danger of acting upon accomplice evidence is not merely that the accomplice is on his own admission a man of bad character who took part in the offence and afterwards to save himself betrayed his former associates, and who has placed himself in a position in which he can hardly fail to have a strong bias in favour of the prosecution; the real danger is that he is telling a story which in its general outline is true, and it is easy for him to work into the story matter which is untrue."

The combined effect of Ss.133 and 114, illustration (b) may be

stated as follows:

According to the former, which is a rule of law, an accomplice is competent to give evidence and according to the latter which is a rule of practice it is almost always unsafe to convict upon his testimony alone. Therefore though the conviction of an accused on the testimony of an accomplice cannot be said to be illegal yet the courts will, as a matter of practice, not accept the evidence of such a witness without corroboration in material particulars. The law may be stated in the words of Lord Reading C.J. in *R. v. Baskerville* 1916-2 KB 658 as follows:

"There is no doubt that the uncorroborated evidence of an accomplice is admissible in law (*R. v. James Atwood*, (1787) 1 Leach 464). But it has been long a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice, and in the discretion of the Judge, to advise them not to convict upon such evidence, but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence (*R. v. Stubbs*, (1855) Dears CC 555; in re, *Meunier*, 1894-2 Q.B. 415)."

Again in [Dagdu & Ors. v. State of Maharashtra](#) [1977 (3) SCC 68] this Court declared:

"There is no antithesis between [Section 133](#) and illustration (b) to HYPERLINK "<https://indiankanoon.org/doc/731516/>"Section 114 of the Evidence Act, because the illustration only says that the Court 'may' presume a certain state of affairs. It does not seek to raise a conclusive and irrebuttable presumption. Reading the two together the position which emerges is that though an accomplice is a competent witness and though a conviction may lawfully rest upon his uncorroborated testimony, yet the Court is entitled to presume and may indeed be justified in presuming in the generality of cases that no reliance can be placed on the evidence of an accomplice unless that evidence is corroborated in material particulars, by which is meant that there has to be some independent evidence tending to incriminate the particular accused in the commission of the crime. It is hazardous, as a matter of prudence, to proceed upon the evidence of a self-confessed criminal, who, in so far as an approver is concerned, has to testify in terms of the pardon tendered to him. The risk involved in convicting an accused on the testimony of an accomplice, unless it is corroborated in material particulars, is so real and potent that what during the early development of law was felt to be a matter of prudence has been elevated by judicial experience into a requirement or rule of law. All the same, it is necessary to understand that what has hardened into a rule of law is not that the conviction is illegal if it proceeds upon the uncorroborated testimony of an accomplice but that the rule of corroboration must be present to the mind of the Judge and that corroboration may be dispensed with only if the peculiar circumstances of a case make it safe to dispense with it.

In *King v. Baskerville* (1916 2 KB 658), the accused was convicted for committing gross acts of indecency with two boys who were treated as accomplices since they were freely consenting parties. Dealing with their evidence Lord Reading, the Lord Chief Justice of England, observed that though there was no doubt that the uncorroborated evidence of an accomplice was admissible in law it was for a long time a rule of practice at common law for the Judge to warn the Jury of the

danger of convicting a person on the uncorroborated testimony of an accomplice. Therefore, though the Judge was entitled to point out to the Jury that it was within their legal province to convict upon the unconfirmed evidence of an accomplice, the rule of practice had become virtually equivalent to a rule of law and therefore in the absence of a proper warning by the Judge the conviction could not be permitted to stand. If after being properly cautioned by the Judge the Jury nevertheless convicted the prisoner, the Court would not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated.

In Rameshwar v. State of Rajasthan (1952 SCR 377), this Court observed that the branch of law relating to accomplice evidence was the same in India as in England and that it was difficult to better the lucid exposition of it given in Baskerville's case by the Lord Chief Justice of England. The only clarification made by this Court was that in cases tried by a Judge without the aid of a Jury it was necessary that the Judge should give some indication in his judgment that he had this rule of caution in mind and should proceed to give reasons for considering it unnecessary to require corroboration on the facts of the particular case before him and show why he considered it safe to convict without corroboration in the particular case.

In Bhuboni Sahu v. The King (76 IA 147), the Privy Council after noticing Section 133 and illustration (b) to Section 114 of the Evidence Act observed that whilst it is not illegal to act on the uncorroborated evidence of an accomplice, it is a rule of prudence so universally followed as to amount almost to a rule of law that it is unsafe to act on the evidence of an accomplice unless it is corroborated in material respects so as to implicate the accused; and further that the evidence of one accomplice cannot be used to corroborate the evidence of another accomplice. The rule of prudence was based on the interpretation of the phrase "corroborated in material particulars" in illustration (b). Delivering the judgment of the Judicial Committee, Sir John Beaumont observed that the danger of acting on accomplice evidence is not merely that the accomplice is on his own admission a man of bad character who took part in the offence and afterwards to save himself betrayed his former associates, and who has placed himself in a position in which he can hardly fail to have a strong bias in favour of the prosecution; the real danger is that he is telling a story which in its general outline is true, and it is easy for him to work into the story matter which is untrue. He may implicate ten people in an offence and the story may be true in all its details as to eight of them but untrue as to the other two whose names may have been introduced because they are enemies of the approver. The only real safeguard therefore against the risk of condemning the innocent with the guilty lies in insisting on independent evidence which in some measure implicates each accused.

This Court has in a series of cases expressed the same view as regards accomplice evidence. (See State of Bihar v. Basawan Singh, (1959 SCR 195); Hari Charan Kurmi v. State of Bihar (1964 6 SCR 623); Haroon Haji Abdulla v. State of Maharashtra (1968 2 SCR 641); and Ravinder Singh v. State of Haryana (1975 3 SCR 453). In Haricharan Gajendragadkar, C.J., speaking for a five-Judge Bench observed that the testimony of an accomplice is evidence under Section 3 of the Evidence Act and has to be dealt with as such. The evidence is of a tainted character and as such is very weak; but, nevertheless, it is evidence and

may be acted upon, subject to the requirement which has now become virtually a part of the law that it is corroborated in material particulars."

To the same effect is the judgment in [Balwant Kaur v. Union Territory, Chandigarh](#) [1988(1) SCC 1].

35. For corroborative evidence the court must look at the broad spectrum of the Approver's version and then find out whether there is other evidence to corroborate and lend assurance to that version. The nature and extent of such corroboration may depend upon the facts of different cases. Corroboration need not be in the form of ocular testimony of witnesses and may be even in the form of circumstantial evidence. Corroborative evidence must be independent and not vague or unreliable. Relying upon its earlier judgment in Suresh Chandra Bahri's case (supra) this Court in *Niranjan Singh v. State of Punjab* [JT 1996(5) SC 582] held that once the evidence of the Approver is held to be trustworthy, it must be shown that the story given by Approver so far as an accused is concerned, must implicate him in such a manner as to give rise to a conclusion of guilt beyond reasonable doubt. Insistence upon corroboration is based on the rule of caution and not merely a rule of law."

19. The power conferred on the trial Court to direct tender of pardon as provided under Section 307 of Cr.P.C., is not mechanical but it required to be exercised upon due application of mind. The words "on the same condition, refers to only the first sub section of Section 306 of Cr.P.C. and not other sub sections. The provisions contained under Section 306 and 307 of Cr.P.C. were considered by the Supreme Court in the case of **Narayan Chetanram Choudhary** (supra), as below:-

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"A perusal of both the Sections clearly indicates that [Section 306](#) is applicable in a case where the order of commitment has not been passed and [Section 307](#) would be applicable after commitment of the case but before the judgment is pronounced. The provisions of sub-section (4)(a) of [Section 306](#) would be attracted only at a stage when the case is not committed to the court of Sessions. After the commitment, the pardon is to be granted by the Trial Court subject to the conditions specified in sub-section (1) of [Section 306](#), i.e. approver making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof. It may be noticed that under the old Code, only the District Magistrate had the power to tender pardon, at any stage of the investigation, enquiry or trial even though he himself might not be holding such enquiry or trial. Pardon could be granted by the District Magistrate even during the pendency of the trial in the Sessions Court. [By Criminal Law Amendment](#)

[Act](#), 1952, old [sections 337](#) to [339](#) were substituted by [sections 306](#) to [308](#) of the Code of Criminal Procedure conferring the power to tender pardon only to Judicial Magistrates and the Trial Court. [Section 307](#) - in its present form - does not contemplate the recording of the statement of the approver twice as argued. Accepting the submissions made on behalf of the appellant would amount to legislate something in [Section 307](#) which the Legislature appears to have intentionally omitted.”

20. This statutory scheme was also noticed in the case of ***Santosh Kumar Satishbhushan Bariyar*** (supra), as below:-

34. “Sub-section (4) of [Section 306](#) is procedural in nature. It is necessary to be followed only by a Magistrate as he would not have any jurisdiction to try the case himself. The learned Sessions Judge before whom the case is committed for trial must be informed as to on what basis pardon had been tendered. [Section 307](#) does not contain any such condition. The power of the learned Sessions Judge is independent of the provisions contained in [Section 306](#) thereof. The condition mentioned in [Section 307](#) refers to the condition laid down in sub-section (1) of [Section 306](#), namely that the person in whose favour the pardon has been tendered, will make a full and true disclosure of the whole of the circumstances within his knowledge. The power of a Sessions Court is not hedged with any other condition.”

21. Section 306 sub section (1) of Cr.P.C. therefore, contains conditions for grant of pardon, irrespective of whether it is pre-trial or post-trial stage and whether it be a Magistrate at pre-trial stage or the trial Court during trial, obligations cast is to record its own satisfaction that the approver is voluntarily making a true and full disclosure of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof. Therefore, the exercise of this power to grant pardon is not mechanical.

22. In the cases of ***Suresh Chandra Bahri, Narayan Chetanram Choudhary and Santosh Kumar Satishbhushan Bariyar*** (supra), referred to hereinabove, it has been insisted upon that the Magistrate or the Court as the case may be, are required to duly apply their mind and record satisfaction as contemplated under Section 306(1) of Cr.P.C., before granting pardon.

23. It needs to be emphasized at this stage that the power of tendering pardon, after recording of the statement of the approver has been conferred only to the Magistrate or the trial Court and not to the Police Officer. If at any stage of trial, the accused comes out with an application for grant of pardon, the trial Court is bound to record the statement of the accused to arrive at satisfaction that the accused is becoming approver and making voluntary statement recording full and true disclosure of the commission of the offences. The basis for recording satisfaction is the statement of the accused. While applying its mind, the learned trial Court may look into other material on record, but under no circumstances, it is permissible under the law that the accused statement recorded by the Investigating officer is substituted in place of statement of accused recorded before the trial Court. This legal position was explained in the case of **Narayan Chetanram Choudhary** (supra), contained in para 25 of the decision, relevant part of which, have already been extracted hereinabove.

24. However, in the present case, which is not a case of grant of pardon by the Magistrate at pre-trial stage, the learned trial Court did not record the statement of the accomplice- R. Meenakshi Rao. On the contrary, we find that during trial, an application, Ex.P-31 was filed by the Police Officer stating that one of the accused are R. Meenakshi Rao, PW-10 has moved an application on 15-01-2013 and as directed by the Court, he has recorded the statement and filing the same before the Court. On the basis of the said statement of the accused-R. Meenakshi Rao, recorded by the Police Officer, without there being any statement recorded by the trial Court itself, the learned trial Court granted pardon. The learned trial Court recorded that in support of the application, an affidavit of the Investigating Officer has been filed, in which, the Investigating Officer has prayed for grant of pardon and making R. Meenakshi Rao as an

approver witness.

25. From reading of the previous order sheets of the learned trial Court, it is revealed that on 04-01-2013, the accused- R. Meenakshi Rao, PW-10, moved an application for her examination as a prosecution witness, whereafter on 08-01-2013, the learned trial Court, after hearing the parties, instead of recording the statement of the accused, so as to record its own satisfaction as to whether or not pardon should be granted, adopted a procedure, contrary to the scheme of Section 306 sub section (1) read with Section 307 of Cr.P.C. and the principles laid down in the aforesaid decision, that her statement be recorded and produced before the Court. For the purpose of arriving at the satisfaction whether the accused should be granted pardon or not, the learned trial Court has referred to the statement of the accused recorded by the Investigating Officer. This was wholly impermissible under the law. As has been discussed hereinabove, the law required that where an accused has applied for grant of pardon during the trial, the trial Court was obliged under the law to examine the accused for the limited purpose of recording its satisfaction whether or not it should tender pardon to the accused. The learned trial Court did not record any such statement, but the accused was left in the hands of the Investigating Officer. The order sheets would show that the Investigating Officer recorded the statement of the accused R. Meenakshi Rao on the directions given by the trial Court, which itself was completely illegal. The accompanied statement of the accused R. Meenakshi Rao, as recorded by the Investigating Officer of the case, ends up with the statement that she had disclosed the incident on the threat exerted on her. How the trial Court reached to the conclusion that statement was voluntarily made and that the accused was making full and true disclosure of whole of the circumstances within her knowledge relative to the offences and to every other person concerned,

whether as principal or abettor, in the commission of the alleged offence. The basis for satisfaction was not the statement recorded before the Court, but the statement recorded before a Police Officer, which the law does not permit under any circumstance whether it be pre-trial or post-trial stage.

26. In view of the aforesaid considerations, we have to hold that the aforesaid illegality renders the testimony of R. Meenakshi Rao, PW-10 highly doubtful. Even if this Court would have reached to the conclusion that the trial Court granted pardon by due observance of law, corroboration is rule of general application. In particular, in the present case, grant of pardon on the basis of the statement recorded by the Police Officer renders the statement of the approver witness R. Meenakshi Rao, even more doubtful and the evidenciary value in such a case, would be of the lowest degree and the weakest one. The entire case of the prosecution against the present appellants-accused is mainly based on the statement of two witnesses namely Sanjay Lahre, PW-7 and R. Meenakshi Rao, the accomplice, in the background that at the spot, where main accused Chunnu Garg (since deceased) and the present appellants are said to be present, the deceased Police Officer-Kirit Ram Patel and Sanjay Lahre, PW-7 had reached in the night and while the accused were trying to run away, Kirit Ram Patel, the deceased Police Constable, attempting to intercept, was shot at by Chunnu Garg. Even according to the prosecution, Kirit Ram Patel was shot at by Chunnu Garg and there is no allegation of any other accused, except Mousam Mishra committing any overt act. It is the prosecution case that when the deceased Chunnu Garg and the present appellants came to know about the arrival of the police officers, they got panicked and started running away from the spot. The appellants have, however, been arrayed and involved on the allegation of conspiracy and common intention. It has, therefore, to be first seen whether the prosecution has succeeded in proving that the accused had

hatched conspiracy to murder Kirit Ram Patel. Before proceeding to deal with the evidence on record, it would be profitable to refer to judicially evolved principles in the matter of proof of conspiracy, as noticed by the Division Bench of this Court in the case of ***Wasim Khan and others vs. State of Chhattisgarh, (decided by the Division Bench of this Court on 13-12-2013 in Criminal Appeal No.143 of 2008)***, propounded as below:-

Proof of Conspiracy

25. “Before scrutinizing and analyzing the evidence led by the prosecution in order to find out whether the conspiracy to kill the deceased by the appellants has been proved in accordance with law so as to connect all the appellants of two appeals in the commission of offence of murder in furtherance of conspiracy, well settled judiciary evolved principles with regard to proof of conspiracy may be reiterated thus:

(A) In the case of ***Yash Pal Mittal vs. State of Punjab, (1977) 4 SCC 540***, held as under:-

“9. The offence of criminal conspiracy under [section 120A](#) is a distinct offence introduced for the first time in 1913 in Chapter VA of the Penal Code. The very agreement, concert or league is the ingredient of the offence. It is not necessary that all the conspirators must know each and every detail of the conspiracy as long as they are co- participants in the main object of the conspiracy. There may be so many devices and techniques adopted to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to achieve the real end of which every collaborator must be aware and in which each one of them must be interested. There must be unity of object or purpose but there may be plurality of means sometimes even unknown to one another, amongst the conspirators. In achieving the goal several offences, may be committed by some of the conspirators even unknown to the others. The only relevant factor is that all means adopted and illegal acts done must be and purported to be in furtherance of the object of the conspiracy even though there may be sometimes misfire or over-shooting by some of the conspirators. Even if some steps are resorted to by one or two- of the conspirators without the knowledge of the others it will not affect the culpability of those others when they are associated with the object of the conspiracy.....

(B) In the case of ***Kehar Singh and Others vs. State (Delhi Admn.), (1988) 3 SCC 609***, held as under:-

“275 Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will of ten rely on evidence of acts of various parties to infer that they were done in reference to their common intention. The prosecution will also more often rely upon

circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial. But the Court must enquire whether the two persons are independently pursuing the same end or they have come together to the pursuit of the unlawful object. The former does not render them conspirators, but the latter is. It is however, essential that the offence of conspiracy requires some kind of physical manifestation of agreement. The express agreement, however, need not be proved. Nor actual meeting of two persons is necessary. Nor it is necessary to Prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient. Gerald Orchard of University of Canterbury, New Zealand (Criminal Law Review 1974, 297 at 299 explains the limited nature of this proposition:

"Although it is not in doubt that the offence requires some physical manifestation of agreement, it is important to note the limited nature of this proposition. The law does not require that the act of agreement take any particular form and the fact of agreement may be communicated by words or conduct. Thus, it has been said that it is unnecessary to PG NO 185 prove that the parties "actually came together and agreed in terms" to pursue the unlawful object; there need never have been in express verbal agreement, it being sufficient that there was "a tacit understanding between conspirators as to what should be done."

(C) In the case of *Ajay Aggrawal vs. Union of India and others*, (1993) 3 SCC 609, held as under:-

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"[Section 120-A](#) of the I.P.C. defines 'conspiracy' to mean that when two or more persons agree to do, or cause to be done an illegal act, or an act which is not illegal by illegal means such an agreement is designated as "criminal conspiracy". No agreement except an agreement to commit an offence shall amount to a criminal conspiracy, unless some act besides the agreement is done by one or more parties to such agreement in furtherance thereof. [Section 120-B](#) of the I.P.C. prescribes punishment for criminal conspiracy. It is not necessary that each conspirator must know all the details or the scheme nor be a participant at every stage. It is necessary that they should agree for design or object of the conspiracy. Conspiracy is conceived as having three elements: (1) agreement (2) between two or more persons by whom the agreement is effected-, and (3) a criminal object, which may be either the ultimate aim of the agreement, or may constitute the means, or one of the means by which that aim is to be accomplished. It is immaterial whether this is found in the ultimate objects...."

27. Keeping in forefront, aforesaid legal position, we shall examine as to whether the prosecution has proved the conspiracy. Sanjay Lahre lodged the FIR in Ex.P-25 and the story contained in the FIR is that Kirit Ram Patel (since deceased) and he himself had proceeded to the location on the basis of

information regarding gathering of ant-social elements. When they reached at the spot and knocked at the door of the house, suspected to be occupied by the anti-social elements, the door was not opened, but some one peeped from the window, which was closed. Later on, some of the accused are said to have arrived in a motorcycle and enquired from the aforesaid two police constables then again leaving the spot and then, it is said that when Kirit Ram Patel was trying to look out from the side (narrow passage) of the house, one of the accused Chunnu Garg appeared along with accomplice witness R. Meenakshi Rao and Mousam Mishra and when Kirit Ram obstructed, he was shot at by Chunnu Garg. The evidence of Sanjay Lahre, PW-7 and that of Investigating Officer proves that the FIR was lodged by Sanjay Lahre and the said story was recorded at his instance in the police station by the Investigating Officer.

28. Sanjay Lahre, PW-7 has deposed in the Court that upon receipt of Mukhbir information at about 11 PM on 23-07-2012, when he was posted in the Police Station Kotwali, Korba that in the house of one Arpit Agrawal, some boys and girls are staying in suspicious conditions, he proceeded to the said location along with Constable, Kirit Ram Patel for making enquiry. The entire episode as to what happened after reaching the spot is contained in para 3 & 4 of the Court statement, wherein he deposes that when he reached the spot, he found that the lights were on, but the main gate was locked and the side door of the house was locked from inside and lot of noise regarding singing as well as voice of persons was coming out. At that time, Kirit Ram Patel started knocking at the door and one person opened the window, peeped out and again closed the same. Thereafter, both of them came to the road and at that time, it is deposed, appellants-China Pandey, Bala Soni and one other boy came there and started enquiring as to why they had come and whereafter, Kirit Ram Patel talked to them for some time and then, upon receiving call in his phone, China Pandey

and others left the place in their motorcycle.

29. From the aforesaid evidence, it is clear that prior to receipt of information, no other incident had taken place elsewhere and the arrival of two police constables at the spot in the night, was all of a sudden and further that all those, who were inside the house in the night, had no idea of sudden arrival of police personnel. Not only this, according to this witness, three accused, who had come on motorcycle talked to Kirit Ram Patel and then left the place.

30. What has been further deposed by Sanjay Lahre, PW-7 in para 4 of his deposition is that when some of the accused started leaving the place in the motorcycle, Kirit Ram Patel began to go behind them and at that time, from the room, other persons came out running and then Kirit Ram attempted to stop them. It is further deposed that upon being intercepted, one of them stated “चुन्नु भैया उसे गोली मार दो ”. He has further deposed that the one, who was wearing blue T-shirt, told Meenakshi and Mousam to scatter here and there. He has further stated that the person, who fired gun shot, ran away in the government vehicle. An important omission from his diary statement, Ex.D-2 has been elicited that he had not disclosed regarding presence of light at the spot. He has also admitted that at the spot, he did not talk to any of the accused. On further cross-examination, nothing has been elicited to make out a case of conspiracy.

31. If the entire evidence of this witness is taken as it is, we fail to see any element of conspiracy. The evidence of this police constable, who is the star witness of the prosecution, only proves that he and Kirit Ram Patel reached the house where the appellants and the deceased Chunnu Garg were staying in the night at about 11 PM, whereafter the accused panicked by sudden arrival of police people, started running away here and there and it is only when Kirit Ram Patel obstructed Chunnu Garg with a view to catch hold of him, Chunnu Garg took out his firearm and shot at him. There is no evidence that any conspiracy

was hatched, much less, any material to show as to why the accused would hatch conspiracy to murder Kirit Ram Patel. Moreover, it is not a case where Kirit Ram Patel was held up by the accused and later on, murdered. Sanjay Lahre, PW-7 has said nothing with regard to conversation amongst the accused, which would even remotely suggest that there was a conspiracy. The evidence of Sanjay Lahre, PW-7 only shows that arrival of Kirit Ram Patel and this witness at the spot, all of a sudden without notice and knowledge of the accused, followed by a panicky amongst the accused and all of them running away having come to know that the police people have come.

32. The prosecution has made R. Meenakshi Rao, as the approver witness, who according to the evidence of Sanjay Lahre, PW-7, was running away from the spot along with Chunnu Garg, the deceased and Mousam Mishra, the appellant herein. From her entire evidence, nothing has been elicited to suggest that any conspiracy was hatched by the appellants-accused and the deceased to murder Kirit Ram Patel. According to her evidence, she was taken to the house of Arpit Agrawal, where Chunnu Garg and others were already present and consuming liquor. Her further evidence is that appellant-China Pandey, Jitendra and Bala Soni had gone to fetch food and Arpit Agrawal opened the window and having seen outside, informed Chunnu Garg that the police people are seen outside, upon which, Chunnu had asked them to talk to China Pandey over mobile phone and China Pandey told to all of them that the police people have come for checking, therefore, all of you should run away along with all their articles and weapons. Thereafter, she deposed, Chunnu Garg kept certain clothes and other articles in a bag and gave it to Arpit Agrawal and then to save themselves from the police, Arpit Agrawal and Gulli put a ladder on the back wall to facilitate exit of all and while they were attempting to run away from the gali (narrow passage), suddenly, near the gate, a police personnel was found

standing, upon seeing him, they attempted to hide under the wall and thereafter, the police personnel gave a call to come out and not to hide and then Mousam Mishra told Chunnu Garg to assault police personnel, otherwise, they will be caught. Thereafter, Chunnu Garg took out his revolver and fired gun shot. He told the accomplice and others to run away in different directions, whereafter all of them ran away.

Though, this Court has recorded a finding that the learned trial Court has committed illegality in granting pardon, even if the above statement is to be looked into as it is, it is almost similar to what has been deposed by Sanjay Lahre, PW-7. There is no element of conspiracy involved in the present case, because even this witness has stated that after arrival of police personnel, they got panicky and started to run away from the spot, Kirit Ram Patel sought to obstruct them and Chunnu Garg fired gun shot and all of them ran away in different directions.

33. The evidence of the aforesaid two witnesses only proves that an occasion to fire at Kirit Ram arose, when Kirit Ram obstructed escape of Chunnu Garg, Mousam Mishra and accomplice, R. Meenakshi Rao, PW-10. This much of evidence, without anything more, is completely lacking in the ingredients of commission of offence of conspiracy.

34. The aforesaid considerations of evidence on record also does not make out a case of sharing common intention. Section 34 deals with the construction of criminal liability by providing that where criminal act is done by several persons in furtherance of common intention of all, each of such person is, liable for that act in the same manner as if it were done by him alone. The essential constituent of vicarious liability prescribed under Section 34 is the existence of common intention. If the common intention inmates the accused persons and if the said intention leads to commission of criminal offence charged, each of the

persons sharing common intention is fastened with constructive liability for the criminal act done by one of them. Common intention denotes action in consult and necessarily postulates the existence of pre-arranged plan and that must mean prior meeting of minds. It would be noticed that cases, to which, Section 34 can be implied, discloses the element of participation in action on the part of the accused persons. The acts may be different, may vary in their character, but they all are actuated by common intention. [**Please see: *Mohan Singh and another vs. State of Madhya Pradesh***]

35. In the present case, the evidence of the prosecution witness only proves that when police men suddenly arrived in front of the house in the night, all the accused, having come to know about the sudden arrival of police men, decided to run away from the spot and in the course of their exit, towards different directions, suddenly Kirit Ram Patel, a Constable came in front of Chunnu Garg and in order to remove this obstruction, Chunnu Garg took out his pistol and fired at Kirit Ram Patel. This much of evidence is not at all sufficient, by itself, to prove that all the accused shared common intention with Chunnu Garg. It is not that the appellants sharing common intention and had gathered at a location where Kirit Ram and one of them had fired gun shot. The circumstances of the present case, as proved by the prosecution case itself, make it clear that there was hardly any time for the accused and arrival of the police men, put all of them in a panicky and they all started running away from the house where they had gathered. Therefore, none of the accused could be involved in the alleged act of killing of Kirit Ram Patel, along with Chunnu Garg with the aid of Section 34 of IPC.

36. It has also been the case of the prosecution that as far as appellant-Mousam Mishra is concerned, he has been held guilty of commission of offence of murder as an abettor of the crime. The case of the prosecution is based on

the evidence of the accompanying Constable Sanjay Lahre and evidence of accomplice R. Meenakshi Rao, PW-10 that while Chunnu Garg was running away along with Mousam Mishra and R. Meenakshi Rao, PW-10, all of a sudden, they were intercepted by Kirit Ram Patel and when they attempted to hide under the wall, Kirit Ram Patel, gave a call to come out and at that stage, Mousam Mishra exhorted by telling Chunnu Garg to shoot the police constable, else they would be stranded/caught. It is only this much of evidence, which has been made a basis to involve Mousam Mishra in the alleged crime as an abettor.

The co-accused Chunnu Garg, who actually fired gun shot at Kirit Ram Patel was, later on, killed in encounter with the police.

37. In order to hold that the appellant Mousam Mishra involved in the commission of offence of murder as an abettor, the learned trial Court has relied upon the evidence of Sanjay Lahre, PW-7 and that of accomplice witness.

38. In the FIR, Ex.P-34, lodged by Sanjay Lahre, PW-7, the overt act alleged against Mousam Mishra is that when Kirit Ram Patel attempted to stop three persons one wearing blue shirt and another thin and medium height boy and girl seen in the gali, one of them called Chunnu Bhaiya to shot police man, whereafter the person wearing blue shirt took out his weapon and fired at Kirit Ram Patel, due to which, Kirit Ram Patel fell down and they all ran away in different directions.

39. Sanjay Lahre, PW-7, in his examination-in-chief has stated that when Kirit Ram Patel attempted to intercept and stop some of the accused, who came out running from behind, one of them fired at Kirit Ram Patel. He then deposes that the medium height accused present at the spot had exhorted Chuunu to fire on him.

In his cross-examination, he admits that his statement was taken twice by

the police and he cannot say as to why his statement recorded by the Sub Inspector Rajendra Yadav was not produced before the Court. The aforesaid statement was given by the witness prior to arrest of the appellant-Mousam Mishra and when appellant-Mousam Mishra was arrested during the pendency of the trial, he was again examined by the prosecution, in which, he for the first time, states that gun shot was fired by Chunnu Garg only after call being given by Mousam Mishra to shoot. In his further cross-examination, he, however, states that upon suspicion, he followed the motorcycle, which was leaving the spot and in the meantime, some of the boys came from inside stating that police people are coming, shoot them out. He further states in his police statement, he has not stated that some of the boys had come out and stated to shoot at police man, he states that he had disclosed that one middle height accused person had come out and had asked Chunnu Garg to shoot.

40. According to R. Meenakshi Rao, PW-10, when she, Mousam Mishra and Chunnu Garg were trying to escape, after jumping from the back wall and running in the gali, they were obstructed by the police man and when they sought to hide under the wall, then Mousam Mishra told Chunnu Garg to shoot police person otherwise, they would be caught. According to her, Chunnu Garg took out his gun and shot at Kirit Ram Patel.

41. A close scrutiny of the aforesaid evidence with regard to alleged act of appellant Mousam Mishra asking Chunnu Garg to fire at Kirit Ram Patel, two discrepancies have been noticed by us. One is that according to Sanjay Lahre, PW-7, as stated by him in examination-in-chief, Chunnu Garg fired gun shot and then Mousam Mishra stated to open fire, whereas in his later examination-in-chief, after Mousam Mishra gave a call, Chunnu Garg fired gun shot. Therefore, the doubt is created on the prosecution story as to whether Chunnu Garg fired at Kirit Ram Patel even before Mousam Mishra asked him to shoot or whether

after giving the first shot, Mousam Mishra stated regarding firing. From the evidence of Sanjay Lahre, PW-7, it is clear that only one gun shot was fired and thereafter, all the accused including Chunnu Garg ran away from the spot in different directions. From the evidence of the prosecution witnesses, it is clear that upon sudden arrival of police men, they all decided to run away and started running away in different directions, but Kirit Ram Patel came in the way of Chunnu Garg, Mousam Mishra and R. Meenakshi Rao, PW-10. In this background, even if it is accepted, for the arguments sake, that Mousam Mishra told Chunnu Garg to shoot the police man it was either to kill or merely to remove obstruction. The circumstances of the case more probablize that even if Mousam Mishra had asked Chunnu Garg to shoot Kirit Ram Patel, the object was only to remove obstruction, so that all of them may run away, rather than definite intention to kill Kirit Ram Patel. Therefore, even if it is held that in all probability, Mousam Mishra abetted Chunnu Garg to shoot Kirit Ram Patel, it was not intended to cause death but only to remove obstruction so that they could escape, in which case, as per provision contained in Section 110 of IPC, punishment of abetment could, at the most warrant under Section 324 of IPC. Almost identical situation was dealt with by the Supreme Court in the case of ***Matadin*** (supra), as below:-

“However, the case of Matadin would appear to stand on a different footing. it was submitted that when he exhorted his fellows by saying "maro sale ko" he did not intend that the deceased should be killed. It was submitted that there was no pre-meditation, no enmity and Matadin never intended to cause death of the deceased. Reliance was placed on the statement of the deceased recorded by the police and the Magistrate. The version of the prosecution that he gave blow with 'gupti' on the back of the deceased had been disbelieved. But then Matadin would be aware of the fact that Ramsingh was wearing button knife on his waist and on his exhortation he used the same by stabbing the deceased. He might not be same by stabbing the deceased. he might not be sharing a common

intention with Ramsingh to cause death of Ashok but the circumstances of the case and particularly when the trial court itself found that by his words "maro sale ko" instigated Ramsingh and others to assault Ashok, he could nevertheless be guilty for abetment of an offence under [Section 324](#) in view of [Section 110](#) IPC, which reads as under :-

"110. Punishment of abetment if person abetted does act with a different intention from that of abettor. -- Whoever abets the commission of an offence shall, if the person abetted does the act with a different intention or knowledge from that of the abettor, be punished with the punishment provided for the offence which would have been committed if the act had been done with the intention or knowledge of the abettor and with no other."

[Section 324](#) IPC reads as under:-

"324. Voluntarily causing hurt by dangerous weapons or means. -- Whoever, except in the case provided for by [Section 334](#), voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years or with fine, or with both."

On the basis of the facts as found by the trial court and High Court in the case of Matadin and law applicable thereto, he is, therefore, liable to be convicted under [Section 324](#) IPC read with [Section 110](#) IPC.

The courts below have not found that the language which Matadin used exhorting his fellows was used in such a tone as to exhort them to kill Ashok or to cause grievous hurt to him by using dangerous weapons or means. when the words "maro sale ko" are used it could mean "to beat" or even "to kill" a person. Though the witnesses have stated that these words were used by Matadin in abusive way but from that it could not be said that he exhorted his fellows to kill Ashok. We therefore, set aside the conviction and sentence of Matadin under [Section 302](#) read with [Section 34](#) IPC and instead convict him under [Section 324/110](#) IPC. It was stated before us that he has already undergone rigorous imprisonment for a period of one year and four months. We will sentence him to suffer rigorous imprisonment for the period already undergone by him and to fine."

42. Learned counsel for the appellants argued that mere statement of the exhortation would not make out a case of commission of offence of abetment, relying upon the judgment of **Matadin** (supra), the Supreme Court in the aforesaid decision dealt with the matter as to whether simple exhortation by itself, would make out a case where one gives call to other to assault by using the word “मारो”, as below:-

““मारो साले को”

(capable of meaning assault or killing both)

It would be clear from the reading of the said judgment, relevant extract of which, have already been reproduced hereinabove.

43. In yet another decision in the case of **Mohan Singh vs. State of Madhya Pradesh**, the Supreme Court while considering similar set of evidence of exhortation by using the words “मारो साले को जो कुछ होगा निपट लेंगे” (“Kill him whatever happen, we will face it”), it was held as below:-

“Next question is whether prosecution has proved its case against the accused Kailash Singh under [Section 302](#) read with [Section 34](#) or not? It is admitted case that he has not used any fire arm nor any active role is assigned to him. The role assigned to him is merely exhortation. In order to test the prosecution evidence, it is necessary to record sequence of events preceding the alleged exhortation by him to test whether his case falls under Sec. 34 [I.P.C.](#) or not? Admittedly, it is not a case of pre-determined, planned case of common intention of the three accused to kill the deceased Bhagat Singh. Prosecution story reveals that emotion developed on the spot when complainant Ram Singh and Bhagat Singh came near the house of Ajay Singh accused where two other accused, namely, their sons Mohan Singh and Kailash Singh were also there. Thus it is to be seen whether any such common intention with a common design developed also in the mind of Kailash to kill the deceased? According to Ram Singh, the eye witness when he reached the neem tree which is in front of the house of Ajay Singh the accused Ajay Singh, Mohan Singh and Kailash Singh came out from Gokh and went in turn from second floor to the third floor. After the initial

altercation with Bhagat Singh the accused Mohan Singh shouted with threatening and abusing words to Bhagat Singh deceased which were as following; Abe Sale Kutte Ab Bol Tujhe Abhi Bhi Bata Dete Hai, on which Bhagat Singh replied why are you abusing from above? It is on this the accused Ajay Singh, their father, then exhorted his son Mohan Singh with the following words Mar Sale Ko Jo Kuch Hoga Nipat Lenge (Kill him whatever happen we will face it). It is only thereafter it is alleged that his other son Kailash also exhorted Mohan Singh with the words Mar Sale Ko (Kill him) . The consequence of events clearly shows, the very language expressed by Mohan Singh first, clearly indicates, the clear intention of the accused Mohan Singh to do away with Bhagat Singh. It is expressed with rage. If there was any infirmity in his resolve it fully matured when what followed, viz., the exhortation by Ajay Singh the father of Mohan Singh. The aforesaid words of the father could infuriate anyone including Mohan Singh to do the ultimate, namely, killing of Bhagat Singh. It is at this point of time when common intention between the two accused matured, if at all. So far as Kailash is concerned he had no role. He is introduced lastly when it is said that he also said Mar Sale Ko which may mean both kill him or beat him. Except for this no other role is assigned to this accused at the point of the incidence. Looking to the preceding strong abusing and threatening language used both by the other two accused which indicates common intention if at all matured then the exhortation words attributed to this accused, does not bring home beyond doubt of common intention with common design maturing to kill the deceased so far as the participation of this third accused. Firstly, it is the weakest language used out of the three and is attributed to have been expressed in the last. We find the common intention really matured and concluded much earlier to the time when the role of this accused is introduced. On the facts and circumstances of this case and in the absence of anything more this by itself does not lead to the conclusion so far as the accused Kailash is concerned that his exhortation was also with the same common intention to kill Bhagat Singh.”

44. From the aforesaid two decisions of the Supreme Court in the cases of ***Matadin and Mohan Singh*** (supra), it is found that when in a situation of sudden event, one of the accused is attributed with the only act of saying to assault by using the word ““मारो”, no case of sharing common intention would be

made out and even if such evidence of exhortation is believed to have been made, without anything more, it would at the most, make out a case of commission of offence under Section 324 of IPC, in the light of the provision under Section 110 of IPC thereof. Even that situation would arise when the evidence of exhortation is beyond any doubt. In the present case, there are discrepancies. The incident happened all of a sudden. One gun shot was fired only by Chunnu Garg and thereafter, all the accused including Chunnu Garg, Mousam Mishra and R. Meenakshi Rao ran away in different directions. In view of the aforesaid consideration and the evidence available on record, we are unable to uphold the conviction of appellant-Mousam Mishra, as an abettor of the crime.

45. In view of our findings in earlier paragraphs, none of the accused including Mousam Mishra could be convicted on the alleged conspiracy or sharing common intention.

46. In the result, all the appeals deserves to be and are accordingly allowed. Conviction of the appellants is set aside and they are acquitted from all the charges. The appellants shall be released, if not already undergoing sentence for conviction in connection with any other offence.

SD/-
(Manindra Mohan Shrivastava)
Judge

SD/-
(Rajani Dubey)
Judge