

(2012) 04 PAT CK 0046

In the Patna High Court

Case No : Criminal Appeal (DB) No. 1066 of 2006

Ajay Chauhan @ Gautam Singh and Rambrikh Singh @
Rambrikh Chauhan

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 25-04-2012

Acts Referred:

Constitution of India, 1950 — Article 21, 22, 22(1), 39A
Criminal Procedure Code, 1973 (CrPC) — Section 273, 303, 304, 304(1), 304(2)
Penal Code, 1860 (IPC) — Section 120B, 364A

Citation : (2013) 2 PLJR 232

Hon'ble Judges : Navaniti Prasad Singh, J;Ashwani Kumar Singh, J

Bench : Division Bench

Advocate : Durgesh Nandan, Mr. Ram Nath Saran and Mrs. Kiran Sinha, in Cr. Appeal No. 1066 of 2006 and Mr. Krishna Deo Raj in Cr. Appeal No. 71 of 2008, for the Appellant; Ashwini Kumar Sinha, APP In Cr. Appeal No. 1066 of 2006 and Mr. Dilip Kumar Sinha, APP in Cr. Appeal No. 71 of 2008, for the Respondent

Final Decision : Allowed

Judgement

Honourable Mr. Justice Ashwani Kumar Singh

1. Cr. Appeal No. 1066 of 2006 (DB) has been filed on behalf of appellants Ajay Chauhan @ Gautam Singh and Rambrikh Singh @ Rambrikh Chauhan against the judgment of conviction dated 5.7.2006 and order of sentence dated 7.7.2006 passed in Sessions Trial No. 107 of 2005/ 9 of 2005 by learned Additional District and Sessions Judge, F.T.C.-II, Nawada holding them guilty for the offence punishable under sections 364A and 120B of the Indian Penal Code and sentencing them to undergo rigorous imprisonment for life. Cr. Appeal No. 71 of 2008 has been filed on behalf of Dilip Ram against the judgment of conviction dated 17th December, 2007 and order of sentence dated 18.12.2007 passed by learned Additional District and Sessions Judge, F.T.C.III, Nawada, in Sessions Trial No. 09-A of 2005/133 of 2007 convicting him for the offence punishable u/s 364A read with section 120B of the Indian Penal Code and sentencing him to

undergo rigorous imprisonment for life. Since both the appeals arise out of two split up sessions trial from Nawada Town P.S. Case No. 211 of 2004, they have been heard together and are being disposed of by a common judgment.

2. The prosecution case in brief, according to the informant Rajdeo Prasad (P.W.4) whose written report dated 10.7.2004 submitted to the Officer Incharge Town Police Station, Nawada, is the basis of the first information report, is that his son namely Ajit Kumar @ Karu aged about 22 years was kidnapped by some unknown criminals from Nawada Bazar regarding which an information was made earlier to the police on 16.5.2004 and a station diary entry was already made in that regard. On 17.5.2004 for the first time he received a ransom call from telephone no. 233896 by which a demand of Rs. five lakh was made from him for release of his abducted son who was in the captivity of the caller. On enquiry he came to know that ransom call was made from a telephone booth of appellant Ajay Chauhan @ Gautam Singh situated at village Purani Rajauli. It is further alleged that the informant kept contacting the miscreants on telephone. The informant contacted appellant Dilip Ram, who was then lodged in Nawada jail. Dilip Ram gave a letter to the informant which was in the name of appellant Ajay Chauhan. Ajay Chauhan was requested to release the victim after receiving ransom money. The informant paid rupees seventy thousand to appellant Ajay Chauhan on 19.6.2004 but the victim was not released. Thereafter on 27.6.2004 Rs. 30,000/- was paid by the informant through one Shankar Prasad Singh to whom the victim was also shown but not released. On 29.6.2004 again P.W.3 Satyadeo Prasad the brother of the informant and one Shankar Prasad Singh jointly went and paid Rs. 30,000/- to the kidnapper but the informant's son was not released. Being aggrieved a complaint was made in this regard to Dilip Ram who called appellant Rambrikh Chauhan in court premises. The informant and others followed Rambrikh Chauhan who came in court campus on 9.7.2004. It is further alleged that Rambrikh Chauhan met Dilip Ram in the court where he gave some money to Dilip Ram. The informant and others kept on following appellant Rambriksh Chauhan till Rajauli where Sub.divisional Police Officer was informed after apprehending Rambrikh Chauhan. The SDPO immediately rushed there and arrested Rambrikh Chauhan and on his disclosure appellant Ajay Chauhan was also arrested and handed over to Nawada Town Police Station. Appellant Ajay Chauhan made a confession before the police in which he disclosed the name of eleven persons involved in the alleged offence. On the basis of said written report the officer incharge of Nawada Town Police Station drew a formal first information report being Nawada Town P.S. Case No. 211 of 2004 dated 10.7.2004 u/s 364A and 120B of the Indian Penal Code and handed over the investigation to one Ashok Mahto, a Sub.Inspector of Police.

3. After institution of the case, the same was investigated and charge-sheet was submitted by the investigating officer. Upon cognizance being taken of the offence, the case was committed to the court of Sessions for trial. In all four persons including three appellants apart from one Dilip Yadav were put on trial. Charges were framed against them under sections 364A and 120B of the Indian

Penal Code to which they denied and claimed to be tried. Accordingly, the trial commenced.

4. In course of trial the prosecution examined altogether five witnesses to substantiate its case. They are P.W.1 Appu Kumar, P.W.2 Sukhdeo Raut, P.W.3 Satyadeo Prasad, P.W.4 Rajdeo Prasad and P.W.5 Ashok Kumar Mahto, who is investigating officer of the case. Apart from oral testimony of the aforesaid witnesses the prosecution brought on record three documents which were marked as exhibits. They are letters of Dilip Ram marked as Ext.1, written report marked as Ext.2 and the formal first information report marked as Ext.3.

5. Before discussing the evidence it is important to note that in Nawadah Town P.S. Case No. 211 of 2004 dated 10.7.2004 registered under sections 364A and 120B of the Indian Penal Code four persons namely, 1. Dilip Ram, 2. Dilip Yadav Lulha, 3. Ajay Chauhan @ Gautam Singh and 4. Rambrikh Singh were sent up for trial. Their case was committed to the court of sessions by a Judicial Magistrate, Nawada by order dated 29.3.2005. On 25.8.2005 charges were framed against all the four accused persons. The witnesses were examined in the case and on 30.5.2006 the prosecution evidence was closed. The statements of the accused persons u/s 313 of the Cr.P.C. were to be recorded on 13.6.2006. In the meantime, the trial court was informed that the appellant Dilip Ram was sent to Central Jail, Muzaffarpur pursuant to the order of the government in some other case and considering the delay which could have occurred due to absence of Dilip Ram his case was split up by the trial court and statements of three other accused persons who were already in custody were recorded by the trial court and by judgment dated 5.7.2006 co-accused Dilip Yadav was acquitted of the charges whereas Rambrikh Chauhan and Ajay Chauhan @ Gautam Singh were convicted. Subsequently, appellant Dilip Ram was produced from jail on 19.9.2006 in split up trial being Sessions Trial No. 9A of 2005. The trial court recorded the statement of appellant Dilip Ram u/s 313 Cr.P.C. on 27.11.2007 and thereafter two defence witnesses were examined on behalf of appellant Dilip Ram on 28.11.2007 and 29.11.2007. After the defence witnesses were examined, the case was closed after hearing arguments of both sides and the appellant Dilip Ram was convicted by judgment dated 17.12.2007 separately in split up trial.

6. As stated above, apart from P.W.5 Ashok Kumar Mahto the investigating officer of the case, four witnesses were examined on behalf of the prosecution in the case. P.W.1 Appu Kumar has stated in-chief that the victim Ajit Kumar @ Karu is his neighbour. On 14.5.2004 at about 11 a.m. he went to market from his house but did not return. On 16-17 May, 2004 the father of the victim received a ransom call. It came to his knowledge that Rs. 5,00,000/- was demanded for release of the victim. Two persons were arrested in this connection and the victim was not recovered on the date of his deposition. He was cross-examined by the accused persons in which he stated that the kidnapping did not take place in his presence. He had not talked with the kidnappers. He is a hearsay witness. He did not remember as to when his statement was recorded by the police.

7. P.W. 2 Sukhdeo Raut is also a hearsay witness like P.W.1. He has simply stated that neither kidnapping nor ransom was ever made in his presence and he did not identify any accused person. He also stated that he had no knowledge as to who kidnapped the victim. Before discussing the deposition P.W.3, we think it proper to consider the deposition of P.W.4 Rajdeo Prasad, the informant. According to him, on 14.5.2004 his son went to Nawada Bazar at about 12 noon but did not return. An enquiry regarding his whereabouts was made from the friends and relatives but he could not get any clue in that regard. On 16.5.2004 his elder brother Satyadeo Prasad (P.W.3) reported the matter to Nawada Town Police Station and a Sanha entry was made by the police. On 17.5.2004 he received a call from telephone No. 233896. The caller stated that his son Ajit was in his captivity and would be released only after receiving Rs. 5,00,000/-. According to him the telephone was made from a STD booth of Purani Rajauli the owner of which was Ajay Kumar Singh. The informant expressed his inability to pay such a huge amount. He received several calls. He was told to meet Dilip Ram who was lodged in jail. He met Dilip Ram who gave him a letter and as directed he paid Rs. 70,000/- to Ajay Chauhan on 19.6.2004 but the victim was not released. Again Dilip Ram gave him a letter on 25.6.2004 which was produced and proved in court and marked as Ext. 1. P.W.4 has stated that apart from the aforesaid letter Dilip had given him two more letters. He further states that on 27.6.2004 and 29.6.2004 Rs. 30,000/- on each of the dates were given to Ajay Singh @ Gautam Singh but still his son was not released from the captivity. When complained, Dilip Ram called Rambrikh Chauhan in court on 9.7.2004. P.W.4 and others followed Rambrikh Chauhan. They saw Rambriksh Chauhan giving some money to Dilip Ram in court. Thereafter, Dilip Ram gave a letter in writing to Rambrikh Chauhan. He followed Rambrikh Chauhan till Rajauli where altercation took place between them. Then Dy.S.P., Rajauli (not examined) was informed on telephone who reached within five minutes and arrested Rambrikh Chauhan. On the same day Ajay Singh was also arrested on the lead given by Rambrikh Chauhan. He identified both Ajay Chauhan and Rambrikh Chauhan, who were present in court. It is to be noted that the date on which P.W.4 was being examined Dilip Ram was not produced from custody in court. P.W.4 has also stated in-chief that the written report was scribed by his brother Indradeo Prasad Singh (not examined) and after being read over and explained he had put his signature over the written report. He identified the signature over the written report which was marked as Exhibit-2. In cross-examination this witness admits that a Sanha was lodged prior to the institution of the written report on 16.5.2004. He also admits that the letters received by him were never handed over to the Dy. S.P. He further states that three letters were written by the appellant Dilip Ram in his presence which were handed over to him in court but he did not mention about any of the letters in his written report. He handed over photo copies of the letters to the Investigating Officer in course of investigation. He admits that both Ajay Chauhan and Rambrikh Chauhan were apprehended near the old bus stand by the police of Rajauli police station. There were large number of shops on both sides of old bus stand Rajauli and when

accused persons were apprehended several people were present.

8. It is to be noted here that the trial court has clearly recorded in paragraph 12 that no cross-examination was conducted on behalf of appellant Dilip Ram and the lawyer concerned walked out of the court.

9. P.W. 3 Satyadeo Prasad is the elder brother of the informant. He has also stated like the informant that the victim left his house at 12 noon on 14.5.2004 and did not come back. He also states that information was given to the police on 16.5.2004 pursuant to which a Sanha entry was made. A call was received from telephone no. 233896 on 17.5.2004 claiming the victim to be in the captivity of the caller and a demand of Rs. 5,00,000/- in lieu of his release was made. On inquiry, he came to know that the telephone number by which call was made by the miscreant was of a telephone booth of old Rajauli. The owner of the booth was co-accused Ajay Chauhan. On 19.6.2004 P.W.-3 Rajdeo Prasad paid Rs. 7,000/- to accused Ajay Chauhan. He has also supported the allegation with respect to payment of Rs. 30,000/- on each of the dates, i.e. on 27.6.2004 and 29.6.2004 to Ajay Chauhan but the victim was not released. He then met Dilip Ram in jail, who told him to meet Rambrikh Chauhan. When he met Rambrikh Chauhan, he told that Dilip Ram is to be produced in Nawada Court where he would talk to him. Dilip Ram was produced in the court. He gave a letter to Rambrikh Chauhan and Rambrikh Chauhan paid him sum money. P.W.-4 Rajdeo Prasad, father of the victim, who is also informant of the case followed Rambrikh Chauhan and managed to get him arrested by the Dy.S.P. Rajauli and on disclosure made by Rambrikh Chauhan, Ajay Chauhan was also apprehended. The letters written by Dilip Ram were recovered from the possession of appellant Ajay Chauhan and Rambrikh Chauhan was the person who had carried those letters to Ajay Chauhan. In cross-examination, P.W.-3 admits that he was not a witness to the kidnapping of his nephew. He was not aware as to whether any raid was conducted by the police in telephone booth in question. From the deposition, we find that there is no cross-examination of this witness on behalf of Dilip Ram.

10. P.W. 5 Ashok Mahto is the investigating officer of the case. He has stated that on 14.5.2004 he was posted as Sub-Inspector of police in Nawada town police station. Mr. Shivchandra Singh was the Officer-in-Charge of the police station. The first information report was drawn by the Officer-in-Charge Shivchandra Prasad Singh which has been proved by this witness and marked as Ext.-3. He admits that the Officer-in-Charge of Rajauli police station (not examined) had arrested Ajay Chauhan and Rambrikh Chauhan and had handed over them to him. Subsequently, the investigation was handed over to him. He recorded the statement of the witnesses and submitted charge sheet in the case. In his cross-examination, he admits that neither any seizure was made in his presence nor anything was seized before him. The seizure of letters was made in the Rajauli police station from the pocket of Ajay Chauhan. Neither the accused persons were arrested in his presence nor their search was made in his presence. It has

been noted in paragraph 7 of his deposition by the trial court that the Advocate for the accused Dilip Ram namely Sri Suresh Prasad stated that he had no instruction from his client and he had left representing him in the case. In cross-examination on behalf of accused Ajay Chauhan and Ram Briksha Chauhan he admits that he had issued no requisition to Rajauli police for arresting accused Ajay Chauhan and Rambrikh Chauhan. No case prior to the institution of the present case was registered in the police station. He denied any knowledge regarding any station diary entry made with regard to missing or kidnapping of the victim in the police station. He also states that he never raided the house of accused Ajay Chauhan or Rambrikh Chauhan.

11. Learned counsel for the appellants Ajay Chauhan and Ram Briksha Chauhan in Cr. Appeal (DB) No. 1066 of 2006 submits that the prosecution case is like a fairy tale. It is a cock and bull story to which no reasonable person would believe. Though the victim went missing on 14.5.2004 no information was given to the police in this regard. The alleged information given to the police on 16.5.2004 on the basis of which sanha entry is said to have been made has not been brought on record. The investigating officer in his cross-examination categorically denied the knowledge regarding existence of any Sanha entry in this regard in the police station. If the witnesses are to be believed there was a definite information on 17.5.2004 that the victim had been kidnapped for ransom but still no information was given to the police for a sufficiently long time till 10.7.2004, the date on which the first information report was registered on the basis of written report submitted by P.W.-3. There is no reasonable explanation for the delay of about two months in institution of the case. The story of payment of ransom in three instalments by the informant and others to Ajay Chauhan is also highly suspicious in view of the fact that as per first information report it is alleged that second instalment of ransom amounting to Rs. 30,000/- was paid though Shankar Prasad Singh to whom the victim was also shown but Shankar Prasad Singh has not been examined in the Court. As per first information report, third instalment of ransom amounting to Rs. 30,000/- was also paid on 29.6.2004 both by Satyadeo Prasad (P.W.3) and Shankar Prasad Singh but P.W.3 Satyadeo Prasad in his deposition has not stated a word that Shankar Prasad Singh was ever present at the time the payment of third instalment was made. The informant P.W.-4 Rajdeo Prasad has also given a go-bye to this part of story in his deposition. He has forgotten to take name of Shankar Prasad Singh who according to his first statement paid the second instalment and jointly paid with P.W.-3 the third instalment of ransom. Surprisingly the prosecution has given a complete go-bye to the story of victim being shown by the accused Ajay Chauhan when second instalment of ransom was paid in course of deposition in trial. This omission is a vital one specially in the circumstance where no one claims to have seen the victim being abducted. If the prosecution has given up this part of story, then there is nothing on record to show that the victim was ever in the captivity of the accused persons.

12. It has also been submitted that Dy. S.P. who is alleged to have arrested Ram

Briksha Chauhan first on 10.7.2004 has also not been examined in the court. The police personnel/Officers of Rajauli Police Station who are said to have arrested Ajay Chauhan even prior to the institution of the first information report have also not been examined in the court. The investigating officer admits that he had not given any requisition for arresting the accused persons Ajay Chauhan and Rambrikh Chauhan to Rajauli police station. Then, it is not known on what basis the two accused persons were arrested by the police of Rajauli police station. It is also not known in what capacity they prepared seizure list of the letters alleged to have been recovered from the pocket of Ajay Chauhan. The investigating officer has not proved the seizure list prepared by the police officials of Rajauli police station. All these facts taken together raise grave suspicion regarding the veracity of truthfulness of the prosecution case.

13. It is further submitted that according to the informant the written report was scribed by his elder brother Indradeo Prasad Singh but he has also not been examined in this case. The investigation of the case was not carried out properly. The investigating officer admits that he did not carry any raid in the house of Ajay Chauhan or Ram Briksh Chauhan. He admits that he did not visit the telephone booth. Thus, it is submitted that the story propounded by the prosecution regarding call being made from telephone booth of accused Ajay Chauhan has not been corroborated by any cogent evidence. In course of investigation, no print-out of the telephone number given by the informant or P.W.3 Satyadeo Prasad has been taken. Neither the informant nor his brother Satyadeo Prasad has given the number of telephone on which calls were being made by the kidnappers. All these facts show that the appellants were framed in a false and frivolous case. We find force in the submissions made on behalf of the appellants. We find that deposition of P.W.-1 and P.W.-2 are of no help to the prosecution case as they are neither witnesses of kidnapping nor witnesses to the fact of receiving the ransom call. They are hearsay witnesses and there evidence is of no consequence. We further find that the informant has materially changed the story in course of trial. He has given a go-bye to the story of victim being shown to one Shankar Prasad Singh through whom payment of ransom were made. He forgot to take his name in his deposition. P.W.-3 has also forgot the name of Shankar Prasad Singh with whom he is said to have made payment of third instalment of ransom amount. Shankar Prasad has also deliberately been withheld by the prosecution. The alleged sanha entry made by the police on 16.5.2004 has also been withheld by the prosecution. There is no reasonable explanation for delay of about two months in institution of the first information report. The Dy.S.P. Rajauli and the police personnels of Rajauli who are said to have arrested Ajay Chauhan and Rambrikh Chauhan have not come forward to support the prosecution case. The investigating officer admits that the seizure list of letters was prepared by the police of Rajauli Police Station. There is no explanation on behalf of prosecution as to how and why even without institution of first information report accused Ajay Chauhan and Ram Briksha Chauhan were arrested by Dy.S.P. or the police personnel of Rajauli police station and in which

case the seizure list was prepared. There is lot of confusion as to whether the accused Rambrikh Chauhan and Ajay Chauhan were arrested by the Dy.S.P. or the police of Rajauli Police Station. The alleged seizure list has also been conspicuously withheld. Though, the informant has specifically given the telephone number through which ransom call was being made but no effort was made by the police to obtain the print out for the telephone number given by the informant. The brother of the informant who scribed the written statement has also not been examined. The telephone number on which the ransom calls were being made has not been located in course of investigation. Though, it is stated that letters were given by appellant Dilip Ram who was already in custody, in the name of Ajay Chauhan which were being carried through Rambrikh Chauhan but it is not known as to how those letters came in possession of the informant. The informant admits that he did not give the original letters to the investigating officer in course of investigation. He did not hand over those letters to the Dy.S.P. We further find that according to first information report the accused Rambrikh Chauhan was apprehended on 9.7.2004 itself but the written report was submitted to the officer incharge of Town Police Station on 10.7.2004 at 3.30 p.m. and the first information report was sent to the court on 12.7.2004. There is no reason as to why the first information report could have been registered after a day when admittedly the Dy.S.P. concerned had already taken charge of the apprehended accused on 9.7.2004 itself.

14. Reverting back to the case of appellant Dilip Ram, learned counsel for the appellant in Cr. Appeal No. 71 of 2008 submits that admittedly Ajit Kumar @ Karu had been kidnapped from Nawada market by unknown criminals on 14.5.2004. A written report in this regard was given to the officer incharge Nawada Town Police Station on 10.7.2004. There is no eye witness of the occurrence of kidnapping. In absence of any direct evidence the case rests on proof of circumstances. The prosecution failed to prove hands of the appellant Dilip Ram in the crime in question and, as such, the case is of no evidence against him. It is further submitted that when occurrence of kidnapping took place the appellant was in jail. He was remanded in the present case on 29.9.2004. He is being implicated in the present case with aid of section 120B of the Indian Penal Code. There is absolutely no material on record to hold that the appellant in any manner conspired with the other co-accused persons either in kidnapping the victim or in realizing any ransom amount. It is also submitted that the appellant has been denied a fair and impartial trial. In the trial court the appellant was not even produced from custody in court on 28.11.2005, 8.12.2005 and 4.4.2006, the dates on which P.W.3, P.W.4 and P.W.5 respectively were examined, cross-examined and discharged. In the statement recorded u/s 313 Cr. P.C. he has clearly stated that he knew nothing about alleged kidnapping of Ajit Kumar @ Karu. He did not write any letter to anyone. He declined acquaintance with Rambrikh Chauhan and Ajay Chauhan. He is in custody since 6.4.2003.

15. Two witnesses were examined on his behalf in defence. They are D.W.-1 Ram

Balak Rajbanshi and D.W.2 Suresh Ram. D.W.1 Ram Balak Rajbanshi has stated that the appellant Dilip Ram is his co-villager and he has falsely been implicated in the present case in the year 2004. He was also in custody in Divisional Jail, Nawada together with the appellant Dilip Ram. During that period, Dilip Ram did not give any letter to any person who came to meet him. D.W.2 is resident of a neighbouring village. He has simply stated that the appellant is a man of good character and there is no complaint regarding his conduct in the village.

16. We have examined the record and find that P.W.3 Satyadeo Prasad was examined on 28.11.2005, P.W.4 Rajdeo Prasad was examined on 8.12.2005 and P.W.-5 Ashok Kumar Mahto was examined on 4.4.2006 in course of trial. From the trial court's orders dated 28.11.2005, 10.12.2005 and 4.4.2006 it is apparent that on none of the dates aforementioned the appellant could be produced in court from custody inspite of the order of the trial court. On these dates, P.Ws.-3, 4 & 5 respectively were examined, cross-examined and discharged. From the deposition recorded by the court, we find that when P.W.-3 was examined, no cross-examination was made on behalf of P.W.-3. When P.W.-4 was examined, the lawyer for the appellant Dilip Ram walked out of the court. When P.W.-5 was examined the lawyer for the appellant Dilip Ram categorically stated that he has no instruction in the matter and has left the work of accused Dilip Ram. Thus, it is apparent that though Dilip Ram was in judicial custody all along when witnesses like P.W.-3, P.W.-4 and P.W.-5 were being examined in the court he was not produced from custody in the court. The trial court noticed this aspect in its order sheet but still proceeded ahead with the trial. We find that the evidence of P.W.-3, P.W.-4 and P.W.-5 were taken in complete disregard to the provisions prescribed u/s 273 of the Code of Criminal Procedure which reads as follows:-

273. Evidence to be taken in presence of accused-Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of accused, or, when his personal attendance is dispensed with, in the presence of his pleader.

17. As noted above, the trial court was fully aware of the fact that the accused was not being produced and the lawyer for the appellant either did not appear or, if appeared, walked out or, if present, clearly stated that he had no instruction in the matter and he has left representing the appellant. In such circumstance, we have no hesitation in saying that the entire trial so far as the appellant Dilip Ram is concerned, is vitiated in law.

18. We find that deposition of P.Ws.-3, 4 & 5 were recorded in absence of appellant Dilip Ram. Compliance of section 273 Cr.P.C. is imperative subject to exception otherwise expressly provided under the Code of Criminal Procedure. The witnesses examined in absence of accused invalidate a trial. When the evidence has been recorded behind the back of the accused, his conviction cannot stand. The records must show on the face that the evidence was taken in presence of the accused. It is a matter of concern that in a serious case like the

present one u/s 364A of the Indian Penal Code the accused was not produced before the court from jail on one pretext or the other.

19. As noted above, when material witnesses were being examined neither the appellant was present in the court nor his lawyer defended nor the trial court bothered to provide him legal aid at the State expense and by not doing that the trial court, in fact, failed to discharge its duty of ensuring that the accused was defended properly and effectively in course of trial. The right of the appellant in terms of Article 21 & 22 of the Constitution of India for a fair trial has thus been violated.

20. It is well-settled that every person has a right to fair trial by a competent court in the spirit of right to life and personal liberty. The object and proposition of providing competent legal aid to undefended and unrepresented accused persons are to see that the accused gets free and fair, just and reasonable trial of the charge in a criminal case. In *Md. Sukur Ali Vs. State of Assam*, , it is observed in paragraph 9 and 10, which reads as under:-

9. In *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, , it has been held by a Constitution Bench of this Court that the procedure for depriving a person of his life or liberty should be fair, reasonable and just. We are of the opinion that it is not fair or just that a criminal case should be decided against an accused in the absence of a counsel. It is only a lawyer who is conversant with law who can properly defend an accused in a criminal case. Hence, in our opinion, if a criminal case (whether a trial or appeal/revision) is decided against an accused in the absence of a counsel, there will be violation of Article 21 of the Constitution.

10. The right to appear through counsel has existed in the England for over three centuries. In Ancient Roam there were great lawyers e.g. Cicero, Scaevola, Crassus, etc. who defended the accused. In fact the higher the human race has progressed in civilization, the clearer and stronger has that right appeared, and the more firmly has it been held and asserted. Even in the Nuremberg trials the Nai war criminal, responsible for killing millions of persons, were yet provided counsel. Therefore, when we say that the accused should be provided counsel we are not bringing into existence a new principle but simply recognizing what already existed and which civilized people have long enjoyed.

21. We may notice here that section 303 of the Code of Criminal Procedure gives right to any person accused of an offence before a criminal court to be defended by a pleader of his choice. Section 304 of the Criminal Procedure Code contemplates legal aid to the accused facing charge in a case tried by the court of session at State expense and the same reads as follows:-

304. Legal aid to accused at State expense in certain case-(1) where, in a trial before the court of session, the accused is not represented by a pleader, and where it appears to the court that the accused has not sufficient means to engage a pleader, the court shall assign a pleader for his defence at the expense

of the State.

(2) The High Court may, with the previous approval of the State Government, make rules providing for:-

(a) the mode of selecting pleaders for defence under sub-section (1);

(b) the facilities to be allowed to such pleaders by the Courts;

(c) the fee payable to such pleaders by the Government, and generally, for carrying out the purposes of sub-section (1).

(3) The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of sub-sections (1) and (2) shall apply in relation to any class of trials before other Courts in the State as they apply in relation to trials before the Courts of Session.

22. Thus, from the reading of the aforesaid provision of Section 304 Cr. P.C. it is evident that in a trial before the court of session, if the accused is not represented by a pleader and has no sufficient means, the court shall assign pleader for his defence at the expense of the State. The entitlement to free legal aid is not dependent on the accused making an application to that effect. As a matter of fact, the court is obliged to inform the accused of his right to obtain free legal aid and provide him with the same.

23. It is worth noticing here the observations made by the apex court in paragraphs 51 and 52 in the case of Mohd. Hussain Vs. State (Govt. of NCT of Delhi) since reported in (2012) 2 SCC 584 which reads as follows:

51. In my opinion, the right of a person charged with crime to have the services of a lawyer is fundamental and essential to a fair trial. The right to be defended by a legal practitioner, flowing from article 22(1) of the Constitution has further been fortified by the introduction of the directive principles of State policy embodied in Article 39A of the Constitution by the Forty-Second Amendment Act of 1976 enactment of Sub-section (1) of Section 304 of the Code of Criminal Procedure. Legal assistance to a poor person facing trial whose life and personal liberty is in jeopardy is mandated not only by the Constitution and the Code of Criminal Procedure but also by international covenants and human rights declarations. If an accused too poor to afford a lawyer is to go through the trial without legal assistance, such a trial cannot be regarded as reasonable, fair and just. The right to be heard in criminal trial would be inconsequential and of avail if within itself it does not include the right to be heard through counsel.

52. One cannot lose sight of the fact that even intelligent and educated men, not trained in law, have more than often no skill in the science of law if charged with crime. Such an accused not only lacks both the skill and knowledge adequately to prepare his defence but many a time loses his equilibrium in face of the charge. A guiding hand of the counsel at every step in the proceeding is needed for fair trial. If it is true of men of intelligence how much true is it for the

ignorant and the illiterate or those of lower intellect! An accused without the lawyer faces the danger of conviction because he does not know how to establish his innocence.

24. In the light of the evidence recorded in course of trial and the legal infirmities, as discussed herein above, it is apparent that apart from the trial being not reasonable, fair and just so far as the appellant Dilip Ram is concerned, the prosecution failed to prove the charges beyond reasonable doubt against the appellants of both the appeals. In the result both the appeals stand allowed. The judgments of conviction and orders of sentence in both the appeals are hereby set aside. The appellants in Cr. Appeal (DB) No. 1066 of 2006, namely, Ajay Chauhan @ Gautam Singh and Rambrikh Singh @ Rambrikh Chauhan, who are in jail, are directed to be released forthwith, if not required in any other case. So far as appellant in Cr. Appeal (DB) No. 71 of 2008, namely, Dilip Ram is concerned who is already on bail is discharged from the liabilities of his bail bonds.