

(2008) 05 CAL CK 0058
In the Calcutta High Court
Case No : CRA No. 298 of 2003

Babu Roy and Others

APPELLANT

Vs

State of W.B.

RESPONDENT

Date of Decision : 13-05-2008

Acts Referred:

Arms Act, 1959 — Section 25, 27
Criminal Procedure Code, 1973 (CrPC) — Section 154, 161, 164, 231, 242
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 114, 120B, 141, 142, 148

Citation : (2008) 05 CAL CK 0058

Hon'ble Judges : Kishore Kumar Prasad, J; Girish Chandra Gupta, J

Bench : Division Bench

Advocate : Arup Ch. Chatterjee and Kausik Biswas, in CRA 330/03, Ashis Sanyal and Tushar Kanti Hore, in CRA 331/03, Sekhar Basu, Debasish Roy and Syed Shamsheer Ali, in CRA 298/03, Asok Kr. Mukherjee and Krishnendu Bhattacharyya, in CRA 334/03 and Sekhar Basu, Souvik Mitter and Kallol Mondal, in CRA 318/03, for the Appellant; A. Goswami, Ld. P.P. and L.M. Dutta and U.A. Dewan, for the Respondent

Judgement

Girish Chandra Gupta, J.—These appeals are directed against a judgment dated 16th June 2003 and an order dated 17th June 2003 passed by the learned Additional Sessions Judge, 5th Court, Midnapur, in Sessions Trial No. XLI of March 2000 convicting the appellants under Sections 148, 302 IPC read with Sections 149 and 114 thereof and under Sections 25 and 27 of the Arms Act as more fully described hereafter.

2. The facts and circumstances of the case briefly stated are as follows:

Narayan Choubey was an M.L.A. for a continuous period of 15 years, elected from Kharagpur Constituency, in the Legislative Assembly of the State of West Bengal. He was a member of the Parliament, elected from Midnapur Constituency, for 10 years. He had two sons namely Manas Choubey and Gautam Choubey. His only daughter is Kakali Behera, wife of Dr. Sanatan Behera.

Shrimati Hema Choubey is the daughter-in-law of the said Narayan Choubey. Six several criminal cases mostly for rioting were pending against Manas. On 27th June 1999 at about 11 A.M. Manas was shot dead. He suffered as many as eight bullet injuries. Three bullets were extracted from his dead body during postmortem examination. One Swapan Saha (P.W. 2), aged about 39 years, also suffered a gun shot injury on his right hand. After the police had filed a charge sheet, an application was made on 20th November 2000 by the prosecution seeking to examine Gautam Choubey, Debasis Chowdhury and Kakali Behera as and by way of additional witnesses which was granted by the Trial Court. The order was challenged in the High Court on behalf of the defence. The challenge was, however, ultimately rejected by an order dated 12th February 2001. On 11th September 2001 Goutam Choubey, one of the witnesses sought to be examined as an additional witness was murdered. We are told that the persons accused for the murder of Gautam are by and large the same as those accused for the murder of Manas. Debasis Chowdhury, a local Councilor of Kharagpur Municipality, was ultimately examined as P.W. 12. Shrimati Kakali Behera, a sister of the deceased Manas Choubey was examined as P.W. 9.

Nine accused persons namely 1) K. Siva @ Shiba, 2) Sunil Sharma, 3) Ranjit Ghosh, 4) K. Chinna, 5) B. Ramesh, 6) Manoj @ Suresh Singh, 7) K. Gopirao, 8) H.N. Pandey and 9) Babu Rao @ Ray were charged under Sections 148, 302 read with Section 149 alternatively Section 34 IPC, Section 326 read with Section 149 IPC and Section 307 read with Section 149 IPC. Further two accused persons namely Rakesh Kr. Sinha and R. Manohar Rao were similarly charged. The accused K. Chinna, Suresh Singh and B. Ramesh were charged additionally under Sections 25 and 27 of the Arms Act. Accused B. Rambabu was charged u/s 302 read with Section 120B IPC as also u/s 114 and 302 IPC. Out of the 12 accused persons Ranjit Ghosh, B. Ramesh and K. Gopirao absconded after framing of charge. Accused R. Mohan Rao was acquitted. Seven accused persons namely K. Siva @ Shiba, Sunil Sharma, K. Chinna, Manoj @ Suresh Singh, H.N. Pandey, Babu Rao @ Ray, Rakesh @ Rajib Sinha were held guilty of the charges under Sections 148, 302 IPC read with Section 149 thereof. Accused K. Chinna and Suresh @ Manoj Singh were also held guilty of the charge under Sections 25/27 of the Arms Act. Accused B. Rambabu was held guilty of the charge under Sections 148, 302 IPC read with Section 149 and 114 thereof. All the accused persons were acquitted of the charge under Sections 326 and 307 of the IPC. All the convicts except for B. Rambabu were sentenced to suffer rigorous imprisonment for two years for the offence punishable u/s 148 of the IPC and further sentenced to suffer life imprisonment as also to pay fine of Rs. 5000/- each, in default to suffer rigorous imprisonment for further two years for the offence punishable u/s 302 IPC read with Section 149 thereof. All the sentences were directed to run concurrently. The convict B. Rambabu was similarly sentenced to suffer rigorous imprisonment for two years for the offence punishable u/s 148 of the IPC. He was further sentenced to suffer life imprisonment and to pay a fine of Rs. 5000/-, in default to suffer rigorous

imprisonment for further two years for the offence punishable u/s 302 of the IPC read with Sections 149 and 114 IPC. Both the sentences were directed to run concurrently. The convicts K. Chinna and Manoj @ Suresh Singh were also sentenced to suffer rigorous imprisonment for one year for the offence punishable u/s 25 of the Arms Act and were also sentenced to suffer rigorous imprisonment for further five years for the offence punishable u/s 27 of the Arms Act in addition to the sentence for offences punishable u/s 148, 302 IPC read with Section 149 IPC. All the sentences were directed to run concurrently.

3. The convict Babu Rao @ Ray, Sunil Sharma and K. Shiba have together filed an appeal which has been registered as CRA 298 of 2003. The convict H.N. Pandey has independently filed an appeal which has been registered as CRA 318 of 2003. K. Chinna has also filed an independent appeal which has been registered as CRA No. 330 of 2003. Similarly Manoj @ Suresh Singh has filed an independent appeal which has been registered as CRA No. 331 of 2003. B. Rambabu also known as Basab Rambabu and Rakesh @ Rajib Sinha have together filed an appeal which has been registered as CRA No. 334 of 2003. These are the five appeals which have come up for hearing.

4. The written complaint was filed by Shrimati Hema Choubey (P.W. 1), sister-in-law of the deceased Manas, which was received at the police station at 17.30 hrs on the date of incident. The written complaint was scribed by Shrimati Kakali Behera (P.W. 9). Extensive submissions were made assailing the written complaint. Before considering those submissions it would, in our view, be appropriate to notice the written complaint, Ext. 1, in extenso which reads as follows:

I Smt. Hema Choubey, w/o Sri Goutam Choubey, residing at Kharida Bidhanpally, Kharagpur dohereby lodge complain to the effect that today (27.6.99) at about 11 A.M. when I returned from Guptamoni after performing Pooja I got down from the car near Jhantu's Pan shop, on the main road just adjacent to my house, suddenly I heard sound of firing & saw that my brother-in-law Sri Manas Choubey, s/o Late Narayan Choubey, Ex. M.P. was surrounded by 6/7 persons namely i) K. Shiba, s/o K. Simachalan of Ghatarpara, ii) Shri K. Nag Raju, s/o K. Simachalan of do, iii) Sri Sunil Sharma, s/o not known of Saheb Bari, Kharida, iv) Sri Babu Roy (nick name), s/o Shankar Roy of North Bidhan Pally (Chatterjee gali) Kharida alongwith 2/3 other unknown persons though I know them by face, being armed with deadly weapons like Pistol, Revolver and other fire arms, started firing aiming Manas Choubey on various parts of his body. I saw Manas fell down on the drain beside Jhantu's Pan Shop. Seeing this I started running in order to rescue him and also shouted like anything for help but the panic stricken pedestrians, nearby shop owners didn't turn up out of fear of their life. One Swapan Saha of Kharida Bidhanpally who was also with Manas sustained bullet injuries on his person when he tried to save him. As a result of such brutal-attack, mybrother-in-law Manas Choubey died on the spot. All the above named assailants are the close associates of one Sri B. Rambabu, N. Tarakeswar Rao

alias Tarki and others of Mathurakati who are the noted notorious Mafias of Kharagpur. Be it noted here that the said B. Rambabu...torn) Tarki have threatened my husband Sri Goutam Choubey and my brother-in-law Manas Choubey on...(torn) occasions and even in my house with dire consequences for highlighting and objecting their criminal activities at Kharagpur. Manas Choubey have brutally murdered at their instances became the victim of their conspiracy. I pray that the culprits who are involved in this brutal murder be punished.

5. The salient features of the written complaint may thus be summarised.

a) On 27th June 1999 at about 11 A.M. when P.W. 1 Smt. Hema Choubey alighted from the car near Jhantu's Pan Shop on the main road she heard sound of firing and saw that her brother-in-law Shri Manas Choubey was surrounded by 6/7 persons namely I) K. Shiba, II) K. Nagraju, III) Sunil Sharma, IV) Babu Roy and 2/3 others whose names were not known to the de facto complainant but she knew them by face.

b) These 6/7 persons were armed with deadly weapons like Pistol, Revolver etc.

c) They fired at Manas on various parts of his body.

d) Manas fell down in the drain beside Jhantu's Pan shop.

e) Hema ran to rescue him and shouted at the top of her voice.

f) Swapan Saha suffered a gun shot injury when he had tried to rescue Manas.

g) Manas died on the spot.

h) The assailants were the associates of notorious B. Rambabu and N. Tarakeshwar Rao who were inimical to her husband Goutam and her brother-in-law Manas and had previously threatened them of dire consequences.

6. Mr. Ashoke Kumar Mukherjee, learned Advocate appearing on behalf of B. Rambabu and another, submitted that the occurrence took place at 11 A.M. whereas the written complaint was lodged at 5.30 P.M. The interval of more than 6 hrs., according to him, has not been properly explained and the possibility of false implication cannot be ruled out regard being had to the fact that there was admittedly previous enmity between the parties and there was political rivalry too. B. Rambabu is a leader of Forward Block whereas Goutam, brother of Manas was a leader of Trinamul Congress. According to him false implication of the accused persons is further probablised by the fact that a large number of criminal cases were pending against the deceased Manas which is a pointer to show that he may have been murdered by some unknown criminal or criminals. His second submission in this regard was that there was an earlier information lodged with the police which should have legitimately been treated as the First Information Report. He drew our attention to the evidence of P.W. 21 who deposed as follows:

I am now posted as C.I. Kharagpur. On 27.6.99, I was I.C. of Kharagpur Town

P.S. On that day, at about 11.35 A.M., I was at the police station. I received a telephonic information that Manas Choubey was murdered by some persons. Informant could not give any further details of such murder. That information was noted in G.D. No. 2141 dt. 27.6.99 of my P.S. This is that G.D. entry, noted & signed by me, marked as exbt.15.

7. Mr. Mukherjee submitted that the police deliberately did not treat the earliest information received at 11.35 A.M. in order to falsely implicate the accused persons. The G.D. entry recorded at 11.35 A.M. on 27th June 1999 marked Ext. 15 reads as follows:

This time one Sunil Ghosh, s/o Late P.P. Ghosh of Kharida, P.S. KGPT, inform over telephone that some persons murdered Manas Choubey. He could not give any further details. After receiving the information myself along with S.I. S. Das, S.I. Majumdar, S.I. R.N. Singha, A.S.I. Mr. Guha, S.I. S.S. Roy and force left for the P.O. Charge of P.S. left with A.K. Pal with no accused. G.D. will remain as before.

8. Therefore the questions which arise for determination are-

(a) whether Ext. 15 the G.D. Entry should have been treated as an F.I.R?

(b) whether the delay of about 6 hrs. in lodging the written complaint would take away the character of statement recorded u/s 154 of the Code of Criminal Procedure? and

(c) whether there is any chance of falsely implicating the accused persons?

9. Insofar as the first question is concerned it may be pointed out that the cryptic telephonic message appearing from Ext. 15 does not fulfil the requirement of Section 154 Cr.P.C. and therefore could not have been treated as an F.I.R. Reference in this regard may also be made to the judgment in the case of Saroop Singh v. The State reported in AIR 1964 P&H 508 wherein the following view was expressed following an earlier Division Bench judgment:

The correct view appears to be that whether a particular information amounts to first information report or not, is essentially a question of fact depending upon the circumstances of each case Gurusami Naidu alias Chinnasami Naidu Vs. Villis Guruswami Naidu, . It would probably not be correct to say that a telegram or a telephone message received in the police-station, within the jurisdiction of which a certain offence has been committed, can in no case, be treated as the first information report, if in the telephone or telegram sufficient details such as the names of the informant, the victim and the culprits and the manner of the commission of the offence, are stated, and investigation starts thereon. In such cases the requirements of Section 154 of the Code of Criminal Procedure would appear to be substantially complied with. The telephone message in the present case (Exhibit P.W. 43/A) is, however, very exiguous. Neither the name of the victim nor the names of the culprits are given and the man who has purported to send the message does not claim to be an eyewitness. It is no doubt true that

the learned Judges ruled out the telephonic message in the case with which they were dealing principally on the ground that there was a fundamental objection in treating that report as a first information report because it was not given to the office-in-charge of the police station which was one of the essential requirements of Section 154, Code of Criminal Procedure. However, the decisions in *Chiramel Varied Devassikutty v. State* AIR 1953 Trav-Co. 275; *Meherali Lalji v. Emperor* AIR 1931 Sind 13; *The Public Prosecutor Vs. Chidambaram and Another*, and *Kachi Hazam Vs. Seraj Khan*, clearly lay down that telephonic or telegraphic messages cannot be treated as first information reports. We are in respectful agreement with the rule laid down in the aforesaid decisions. No case to the contrary has been brought to our notice by the learned Counsel for the appellants. It must, therefore, be held that the learned Additional Sessions Judge was in error in ruling out Exhibit P.C./1 from consideration altogether. It is no doubt true that "the first information report is not substantive evidence, but can only be used to corroborate or contradict the evidence of the informant given in Court or to impeach his credit." See the *The State of Bombay Vs. Rusy Mistry and Another*, .

10. The view expressed by the Division Bench has now been endorsed by the Apex Court in the case of *Mundrika Mahto and Others Vs. State of Bihar*, wherein the following view was expressed:

Similarly, the telephonic conversation also could not be treated as FIR, as contended, as it was a cryptic information that was received and recorded in the daily diary regarding the commission of offence.

11. As regards the question regarding delay, of about 6 hours, in lodging the F.I.R. law is well settled that the delay simpliciter is not fatal. The question is whether the time taken can be treated as reasonable. In determining the reasonableness the Court must consider plausibility of the explanation. If any authority is needed reference may be made to the judgment in the case of *Munshi v. State of Bihar* reported in 2002 SCC 175 wherein Their Lordships quoted the following passage from an earlier judgment in the case of *Apren Joseph*.

11. Now first information report is a report relating to the commission of an offence given to the police and recorded by it u/s 154, Cr.P.C. As observed by the Privy Council in *Emperor v. Khwaja* ILR (1945) Lah 1 the receipt and recording of the information report by the police is not a condition precedent to the setting in motion of a Criminal Investigation. Nor does the statute provide that such information report can only be made by an eyewitness. First information report u/s 154 is not even considered a substantive piece of evidence. It can only be used to corroborate or contradict the informant's evidence in Court. But this information when recorded is the basis of the case set up by the informant. It is very useful if recorded before there is time and opportunity to embellish or before the informant's memory fades. Undue or unreasonable delay in lodging the FIR, therefore, inevitably gives rise to suspicion which puts the Court on

guard to look for the possible motive and the explanation for the delay and consider its effect on the trustworthiness or otherwise of the prosecution version. In our opinion, no duration of time in the abstract can be fixed as reasonable for giving information of a crime to the police, the question of reasonable time being a matter for determination by the Court in each case. Mere delay in lodging the first information report with the police is, therefore, not necessarily, as a matter of law, fatal to the prosecution. The effect of delay in doing so in the light of the plausibility of the explanation forthcoming for such delay accordingly must fall for consideration on all the facts and circumstances of a given case.

12. Their Lordships thereafter concluded as follows:

the statutory obligation warrants utmost promptitude and in the event of the delay not being unreasonable one and in the event of availability of some explanation therefore which is otherwise acceptable as well, question of prosecution being tainted would not arise.

13. Therefore what we have to find out is whether the delay of 6 hours has been properly explained.

14. The de facto complainant P.W. 1 deposed that Manas was shot. He fell down in the adjoining drain. The miscreants ran away in two opposite directions. The body was lifted. He was found dead. The female members of the locality took her to her house and she narrated the incident to her sasuri Gouri Choubey. Hearing the incident her sasuri became senseless. In her cross-examination she deposed that Dr. Sanatan Behera, son-in-law of Smt. Gouri Devi, treated her when she had become senseless.

15. Mr. Basu, learned Counsel appearing in support of the appeals being CRA No. 298 of 2003 and CRA No. 318 of 2003, drew our attention to the following portion of the deposition of the P.W. 1 from the cross-examination.

Police came to the P.O. and my husband for the first time at about 12.00 noon. We made no statement at that time before the police about the occurrence.

16. He also drew our attention to the following portion of the deposition of P.W. 1 in cross-examination.

At about 1/1.30 P.M. Police came to the P.O. on the date of incident. Police did not come to our house at that time. I was called by police.

17. Mr. Basu contended that the de facto complainant had opportunity to make statement at 12 noon and thereafter at 1/1.30 P.M. on the date of incident but she chose to make no statement at that stage which according to him can lead to legitimate inference that the de facto complainant was gaining time for the purpose of concocting a story.

18. We are unable to agree with the learned Counsel. A young member of the family had been shot dead. The mother of the deceased was lying senseless. The mere fact that no statement was made to the police at 12 noon and 1/1.30 P.M.

by the de facto complainant cannot establish that she was gaining time in order to concoct a story. She is an ordinary housewife. No one has suggested that she herself had any criminal background. The family was naturally overtaken by an invincible shadow of grief arising out of the loss of a young member of the family. It does not appear to be probable to us that she was deliberately delaying to make a statement. There is nothing to show that the police wanted to take her statement which she refused to make. She was not questioned in the cross-examination as to why was no statement made to the police at 12 noon or 1/1.30 P.M. She also was not questioned as to the purpose for which the police came at 12 noon and 1/1.30 P.M. Mr. Basu drew our attention, in support of his submission that the belatedly filed F.I.R. was made after due deliberation, to the judgment in the case of State of Rajasthan v. Taran Singh reported in AIR 2004 SC 1080. It may be pointed out that the Apex Court was hearing in that case an appeal against an acquittal. The evidence of the P.Ws. 1 and 2, who were projected as the eyewitnesses, was in conflict with the sketch map exhibited by the prosecution. The evidence of the P.Ws. 1 and 2 was inherently defective and not believable. It is in that view of the matter that Their Lordships held that the fact that F.I.R. was lodged belatedly was a circumstance operating against the prosecution. This judgment has no manner of application to the facts of this case. The police was itself in great difficulty tackling the law and order problem. Reference in this regard may be made to the evidence of P.W. 21 who after receiving the telephonic message had proceeded to the place of occurrence. P.W. 21 deposed as follows:

On receiving that information, I along with S.I. S. Das and some other officers got out from the P.S. in order to verify the information. On the way, to Kharidah, we came to know that the dead body and injured were taken to Chakraborty Nursing Home at Giri Maidan. We at once went there. There was a mob which demolished our vehicles and set fire on it. Out of that mob, some persons were arrested. We requisitioned further force. We returned to P.S. with those arrested persons of the mob. We returned P.S. at 17.45 hours on that day and noted down G.D. entry No. 2147 in my own handwriting & signature. I started suo motu case No. 182/99 dated 27.6.99 as against those arrested persons. It was noted in the G.D. No. 2147 dt. 27.6.99. This is that G.D., written and signed by me, marked as exbt.16.

19. The evidence of P.W. 21 read with Ext. 16 establishes that there was commotion in the area and police had a trying time in tackling the situation. P.W. 9 who scribed the written complaint deposed as follows:

On that day we did not come outside the house, but we went to the P.S. at 5 P.M. The complaint was written at my father's house. I and Hema went to P.S. Police did not interrogate me on that day. I cannot recollect as to whether Hema was interrogated by police on that day.

20. P.W. 20 S.I. R.N. Baxi received the written complaint in the police station. His evidence in this regard is as follows:

On 27.6.99 I was posted at KGP(t) P.S. as S.I. of Police. T.D. Lai was the I.C. of that P.S. at that time. On 27.6.99 at 17.30 hrs. I was in-charge of the Duty Officer of the P.S. At that time no superior officer was present at the P.S. On 27.6.99 one Hema Choubey lodged a written complaint at KGP(T) P.S. at 17.30 hrs. I received that complaint and made my endorsement thereon. This is my signature and endorsement on the written F.I.R., marked Ext. 1/3 and I registered Kharagpur (T) P.S. Case No. 181/99 dt. 27.6.99, u/s - 326, 302, 34, 120B I.P.C and 25/27 Arms Act. I drew up the formal F.I.R. This is that formal F.I.R., drawn and signed by me, marked Ext.13. After returning P.S. I.C., Sri T.D. Lai deputed S.I. R.N. Singha for holding investigation on this case.

21. For the reasons noticed above we are of the view that the written complaint was lodged within a reasonable time and the interval of about 6 hours, between the incident and lodgment of the complaint, has been adequately explained. The submission that filing of the written complaint was deliberately delayed in order to concoct a story is without any substance whatsoever. Insofar as the submission of Mr. Mukherjee that there is a chance of false implication, we are emboldened to say that any such possibility arising out of delay of 6 hrs. has to be ruled out altogether for reasons already indicated.

22. Mr. Mukherjee assailing the F.I.R. further contended that not a single eyewitness has been mentioned in the F.I.R. This obviously is not a correct criticism. Swapan Saha (P.W. 2) who also suffered a gunshot injury has been referred to in the F.I.R. The de facto complainant has also indicated her own role while the incident was in progress. The fact that the P.W. 2 turned hostile and went back on his statement made to the police would not denude him of the character of an eyewitness. Moreover the psychic trauma which the de facto complainant underwent has to be taken into account while finding fault with the written complaint as regards the omission of the names of the witnesses. Reference in this regard may be made to the case of Shri Bhagwan Vs. State of Rajasthan, . We are supported in our view by the observations made by Their Lordships in paragraph 7 of the judgment. In the case of State of M.P. v. Mansingh reported in 2007(2) SCC 390. Their Lordships held

There can be no hard and fast rule that the names of all witnesses, more particularly eyewitnesses, should be indicated in the F.I.R.

23. We now proceed to examine the evidence as regards the incident and the involvement of the accused persons therein.

24. P.W. 1 Shrimati Hema Choubey deposed as follows:

When I was returning home from the road at about 10.30/11 a.m. then I heard firing sound. I at once stopped there and turned up. I saw Manas standing near the Jhantur Pan stall. saw 4/5 young men to gherao him and shouting "Mar Shalako, Mar Shalako". All of them were armed with revolver and fire arms. They shot Manas. Manas fell into the drain in blooded condition. I shouted and came near manas in order to save him. Swapan Saha friend of Manas was also

standing there. He received one bullet injury on his right hand. My husband and his friend namely Debasis Chowdhury Counsellor and others came there. The miscreants then left the place. Goutam and his friends then chased those miscreants. But they cannot catch them. I saw K. Shiba, Sunil Sharma, Nagraju and Babu Ray to shoot Manas along with other. I know accd. B. Rambabu. He is present on dock. Accd. is identified on dock. Nagraju is not present on dock. K. Shiba is present on dock (identified). Accd. Sunil Sarma is identified on dock. Accd. Babu Ray is present on dock (identified). The above named persons previously used to threat Manas and my husband over telephone and they also came to threat in shop also. The above named accd. persons used to threat my husband and Manas because of the fact that Manas and Goutam used to protest their illegal activities. They also damaged our shop and for that there was a case.

25. Mr. Basu, learned Advocate submitted that the P.W. 1 Hema saw Manas for the first time when he already had fallen in the drain. According to him this would go to show that she could not have witnessed the assault on Manas. We are unable to accept this submission of Mr. Basu for the simple reason that Hema in her evidence deposed "I saw Manas standing near the Jhantu's Pan shop". Assailing the evidence of P.W. 1 Mr. Basu added that Hema in her evidence in Court introduced Debasis Chowdhury (P.W. 12) who allegedly took active part in chasing the alleged miscreants. This according to him is conspicuous by its absence from the written complaint and the statement u/s 164 Cr.P.C. made by the P.W. 1. Written complaint is not intended to be an Encyclopedia of all the facts. Reference in this regard may be made to the judgment in the case of Manoj @ Bhau and Others Vs. State of Maharashtra, . In the statement made u/s 164 Cr.P.C. the P.W. 1 did, in fact, refer to her husband and his friends. According to her statement u/s 164 they had come running on hearing her shout for help. P.W. 12 Debasis was a friend of her husband Goutam. It is, therefore, not correct to say that there is no foundation in the statement made u/s 164 as regards the presence of Debasis (P.W. 12). It may also be pointed out that a witness, when examined in Court by trained practitioner, has the advantage of answering to questions which is not available when a suo motu statement is made u/s 164 Cr.P.C. No other submission as regards the evidence of P.W. 1 was made except that the police did not investigate as to the truth of the story narrated by the P.W. 1 in her written complaint that she had gone to offer a Puja in the temple of Guptomani by a Maruti Car accompanied by her husband. The police also did not investigate into the truth of the allegation that the P.W. 1 Hema after the incident was taken inside her house by the female members of the locality. These, in our view, if at all, are lapses on the part of the investigating agency. This would make us more vigilant in assessing the evidence of the witness but this cannot be a reason for discarding it altogether.

26. P.W. 2 Swapan Saha was at the relevant point of time accompanied by the deceased Manas. He also suffered a gun shot injury. He unfortunately turned hostile. However before he was declared hostile he deposed as follows:

Manas Choubey was known to me. He was murdered on 27.6.99 at about 10.45 a.m. At that time I was at the Jhantur Pan Dokan which is in front of the house of Manas. Santu was at that time in the pan stall. He is brother of Jhantu. I went to that Pan stall for taking pan. Manas was there. He was reading the newspaper then. Suddenly I heard firing sound. I saw 8/9 persons to shoot Manas. Manas fell down in the drain as a result of shooting. The miscreants used revolver to shoot Manas. One of them also attempted to shoot me. I received one shot on my right hand. I fell down. I saw Hema Choubey, Boudi of Manas to come to the P.O. running. The miscreants left the place. I do not know any of the miscreants who shot Manas and me. They left towards Babu Park. Thereafter I also took shelter in a house nearby the P.O. Manas was taken to nursing home of Kanu Chakraborty. I was also taken to that nursing home. I was in the nursing home for that day. On the following day I was taken to P.G. Hospital in Calcutta. I was admitted there for about one month. Manas expired.

27. After he was declared hostile he was cross-examined by the prosecution with the leave of Court and the material portion of the evidence taken in cross-examination by the prosecution is as follows:

Not a fact that I stated to police officer that on receiving bullet Manas fell down on the drain or that he was ghera owed by Shiba, Babu Ray, Nagraju, Sunil Sarma, K. Chinna, Manoj Singh and others or that they were shooting Manas and killed him.

Not a fact that I stated to police officer that R. Mohan Rao, B. Ramesh, Rakesh Sinha and other were found standing at a little distance from the P.O.

Not a fact that I stated to police that after killing Manas 3/4 miscreants ran away through the main road or that they left the place by a Tata Safari car. Not a fact that I stated to the I.O. that some of the miscreants ran away towards Babu Park. Not a fact that I stated to I.O. that two out of them left the place with the help of one red colour motor cycle.

Not a fact that I stated to I.O. that many people assembled there or that they took Manas and myself to Nursing home for treatment.

Not a fact that I stated to I.O. that Rambabu and Tarakeswar Rao made conspiracy for murdering Manas or that there was threatening to Manas Choubey for murdering him for long time.

Not a fact that I know all the accd. persons. Not a fact that I am influenced by the accd. persons or that in order to save them I am suppressing the fact.

28. Mr. Basu, learned Advocate, assailing the evidence of P.W. 2 submitted that (a) the P.W. 2 in his cross-examination on behalf of the defence admitted that he had not told the investigating officer that he had seen Hema running towards the P.O. and (b) he had not disclosed the name of H.N. Pandey to the investigating officer. Insofar as the fact that Hema had come running towards the P.O. is concerned it would appear from the evidence of the P.W. 2 in Court that he has

repeated the same on oath. Sight cannot also be lost of the fact that besides this part of the evidence which he gave in Court many more facts, narrated above, he had disclosed to the investigating officer on which he went back in Court. As regards the presence of Hema at the place of occurrence we have no doubt in our mind. Her presence at the place of occurrence has been fully corroborated by the P.W. 2 who is the best person to tell about the incident. As regards the involvement or non-involvement of H.N. Pandey we shall express our views at the appropriate time.

29. Admission of the P.W. 2, a hostile witness, as regards the presence of Hema (P.W. 1) at the place of occurrence lends additional assurance to the Court for relying on her evidence. Reference in this regard may be made to the judgment in the case of Rajesh Kumar Alias Kala Vs. State, where the Division Bench opined as follows:

The other facts proved in the case give due corroboration to her testimony. Even the hostile witnesses admit her presence at the time of the occurrence and thus we have no reason to discard her testimony on the ground that there was some lapse by the investigating agency in not strictly complying with the aforesaid provisions of statute.

30. P.W. 3 Saibal Sarkar, another hostile witness deposed in Court as follows:

I have a jewellery business. My jewellery shop is on Malanch road of Kharagpur. Malanch road is east-west long. My shop is at the south side of the Road. I know Jhantur Paner Dokan.

Jhantur Paner Dokan is at a distance of about 60 ft. east from my shop on the same side Malancha road. It is on the south side of the road also. Milani Cinema is at a distance of 70 ft. west from my shop on Malancha road.

Manas Choubey was known to me. I have heard that he shot to dead on 27.6.99. At that time I was at my shop. On that day at about 10.30/11 a.m. I heard firing/ bomb sound. I came out of my shop room at that time. I saw one Halla and Jatala at east of my shop. Some persons ran away towards Babu Park. I cannot recollect further matters which I saw. I at once entered into my shop.

After 20/25 minutes I learned that Manas was shot to dead by some persons. He was shot to dead in front of Jhantur Paner Dokan. Like other people, I had been to the P.O. also after sometime. I cannot recollect as to whether I saw Manas at the P.O. on reaching or not.

31. He had earlier made a statement u/s 164 Cr.P.C. wherein he had stated that at the Pan Shop of Jhantu Manas was reading a newspaper. Hearing sound of firing he came out of his shop room and saw Shiba and three others with revolvers in their hands running along the road and Debasis chasing them. Shiba and his associates were picked up by Rambabu in a Tata Safari car. P.W. 3 in Court owned his statement u/s 164 Cr.P.C. but denied material part thereof when he was cross-examined by prosecution with the leave of Court. He was cross-

examined on behalf of the defence when he deposed that he did not make the statement u/s 164 Cr.P.C. voluntarily whereas the statement recorded by the learned Magistrate u/s 164 contains a recital that he had made the statement voluntarily. Be that as it may the evidence of this hostile witness (P.W. 3) corroborates the evidence of the P.W. 1 insofar as the factum of firing is concerned as also as regards the escape of the miscreants towards the Babupark is concerned. It also goes to corroborate the evidence of P.W. 1 to the extent that the place of occurrence is in front of Jhantu's Pan shop. It also corroborates the time of incident deposed to by Hema. It also points to another significant factor that Milani Cinema is situate at a distance of 70 ft. from the shop room of the P.W. 3 which is at a distance of 60 ft. from the place of occurrence which establishes that the place of occurrence is in close vicinity of the Milani Cinema. Mr. Mukherjee submitted that the Police did not collect any blood from the P.O. That may or may not have been a lapse on the part of the Police but as regards the place of occurrence we have the evidence of P.W. 1 corroborated by two hostile witnesses.

32. P.W. 4 Balai Bhattacharjee deposed, inter alia, as follows:

On 27.6.99 Manas Choubey was murdered at about 11 A.M. At that time I was in front of Milani Cinema. I know Jhantur paner dokan which is ata distance of about 200 ft. east from Milani Cinema. At that time I saw one Tata Safari vehicle standing opposite to Milani Cinema. Milani Cinema is on Malancha Road.

There were four persons in that Tata Safary vehicle out of them three persons are known tome. One of them is B. Rambabu, another N. Tarakeswar Rao @ Tarki and other is Tuntun Choudhuri and other 2/3 persons were in the vehicle. Out of those three named persons only B. Rambabu is present in accd. dock. (Witness identifies the accd. B. Rambabu on dock). After sometime I suddenly heard a hue and cry and I saw K. Shiba and other 2/3 persons were returning with revolvers in their hands and put up in the Tata Safari vehicle. K. Shiba is present on accd. dock. K. Shiba is identified on dock. After riding Tata Safary Car, K. Shiba shouted "Manas ko murder ker dia". At once the Tata Safary vehicle started and left the place through Malancha Road towards west. At that time I became panic and perplexed. Thereafter, after sometimes I went to the place of occurrence. At the material point of time I was talking with Ranjit Singh, an employee of Milani Cinema. The place of occurrence is in front of "Jhantur Paner Dokan" which is at the east from Milani Cinema.

33. Mr. Basu assailing the evidence of P.W. 4 submitted that the P.W. 4 had no explanation to offer as to why he was standing near the Milani Cinema Hall. From the evidence of P.W. 4 it appears that he was a contract labourer at the material time working under one Sri Sangam Jaiswal. As to the question of the learned Counsel "why was he there?" it may be pointed out that persons belonging to the poorer section of the society have their own ways of life. A cinema hall is frequented not only by the persons intending to watch a movie but also by others including persons interested in seeing the still highlights of the movie, displayed

on boards in the cinema halls, on the basis of which they decide whether they would watch the movie. Persons having nothing to do or the persons having enough leisurely time are not always guided the same way as an educated person well placed in life would do. Regard being had to the common course of human conduct particularly those belonging to the poorer section of the society it is not very difficult to follow why was he there at the Milani Cinema Hall. He has deposed that he was talking to Ranjit, an employee of the Milani Cinema hall and that explains why he was there. Ranjit (P.W. 5) in his cross-examination deposed "Balai Bhattacharya is my friend and he was with me at the relevant time".

34. The second submission made by Mr. Basu in assailing the evidence of P.W. 4 is that the P.W. 4 was not examined for more than 48 hours. He referred to a judgment in the case of Maruti Ram Nayak v. State of Maharashtra reported in 2004 SCC 958. He relied on paragraphs 6 and 7.

35. The judgment relied on by Mr. Basu has no manner of application to the facts and circumstances of this case. In the aforesaid case of M.R. Nayak (P.W. 3) was an interested witness. He also was injured in the incident. He in his statement made u/s 161 belatedly, did not disclose names of the accused persons. In that view of the matter the Apex Court held that "we think it is not safe to place reliance on the evidence of P.W. 3 to find the appellants guilty of the offence charged without there being any material corroboration from other independent acceptable source".

36. Mr. Basu then relied on a judgment in the case of Jagjit Singh @ Jagga v. State of Punjab reported in 2005 SCC 893. He drew our attention to the paragraph 30 of the judgment wherein delay of three days in recording the statement of the witness by the investigating officer was criticised by Their Lordships. It may be pointed out that judgments have to be read in the facts of their own case. Observations are made in the context of the peculiar facts of individual cases. Any observation divorced from the context cannot be pressed into service. The question for consideration in the case of Jagjit Singh was whether the evidence of the P.W. 6, a minor, aged about 7 years on the date of the incident, was trustworthy. It would appear from paragraph 13 of the judgment that the father of the P.W. 6 by a leading question at the initial stage had obtained name of the accused Jagga which the witness of her own volition did not mention. Three days thereafter the statement of the minor (P.W. 6) was recorded u/s 161 of the Cr.P.C. At that stage overt acts were attributed to Jagga. Three days thereafter a statement was recorded before the Judicial Magistrate u/s 164 Cr.P.C. At that stage she further improved her statement as regards the complicity of Jagga. It was therefore a case where improvement was made at stages consistently whereas at the time of the first statement the name of the accused Jagga was obtained from the P.W. 6 by a leading question. The observations made by Their Lordships in paragraph 30 of the judgment relied upon by Mr. Basu have to be read in that context. We are emboldened to say that this judgment has no manner of application to the facts and circumstances of

this case.

37. Mr. Basu then cited the judgment in the case of *Bijoy Bhai v. Nabneet Bhai* reported in 2004 SCC 2032 wherein Their Lordships held "the delay in questioning these witnesses by the investigating officer is a serious mistake on the part of the prosecution. We do not think that the High Court erred in disbelieving these witnesses". It may be pointed out that Their Lordships were considering an appeal from an order of acquittal. From paragraph 5 of the judgment it would appear that the evidence of the P.Ws. 4 to 7 failed to disclose any cogent reason as to why was the deceased pulled out of his house and was killed near a Babul tree when the accused were already armed. This mystery left by the prosecution probalised the case of the defence that the deceased who had an affair with a woman must have been killed by some other assailants near the Babul tree. What had added further suspicion to the case of the prosecution was the evidence of the P.W. 11 who gave a graphic picture of the assault by the accused in Court whereas in his examination u/s 161 Cr.P.C. he had stated that he came to the scene of occurrence after the incident had already happened.

38. Therefore it was a case of inherent weakness of the evidence adduced by the prosecution based on which the High Court had acquitted the accused and the Apex Court did not interfere. It is not correct to say that the order of acquittal was recorded merely because there was delay of two days in examining the witness as urged by Mr. Basu.

39. Mr. Basu then drew our attention to an unreported judgment of a Division Bench of this Court in CRA No. 151 of 2001 (*Dipak and Ors. v. State of W.B.*). Even in this judgment the view expressed by the Division Bench was that "it becomes transparent that these witnesses did not see anything and their evidence relating to dragging away or kidnapping or abduction of Ratan by the appellants are shrouded with doubts and no reliance can be placed on the evidence of these witnesses". Therefore this judgment has not laid down any principle of law. It may further be pointed out that the learned Judges themselves referred to a judgment in the case of *Ramesh v. State of M.P.* reported in 2000 SCC (206 for the proposition that delay in examining the witness by the police, by itself is not a ground to discard their testimony.

40. P.W. 4 in the present case is not even remotely connected with the deceased. He has no personal axe to grind. He deposed in the examination-in-chief that after witnessing the incident he went back home out of fear. In his cross-examination he disclosed that he came out of his house only on the following day in the morning. In assessing the evidence of witnesses Court can ill-afford to loose sight of the fact that in our country people generally are reluctant to come forward to give evidence. That goes a long way to show the difficulties encountered by the police in effectively investigating cases. Therefore it is not for us to forge fetters for ourselves. We do not agree with the learned Counsel that 48 hours from the time of incident constitute enormous delay. We also are of the view that where there has been real delay in examining a witness u/s 161 Cr.P.C.

all that the Court, in its wisdom, is bound to do is to keep this factor in mind while attaching value to the evidence of the witness in question. Reference in this regard may be made to the judgment in the case of Dr. Krishna Pal and another Vs. State of U.P., wherein an identical submission made on behalf of the appellants before the Apex Court was repelled. Their Lordships held as follows:

In the instant case, no explanation has been given by the prosecution as to why eyewitnesses had not been examined shortly after the incident and from the materials on record it appears that there had been inordinate delay in examining the eyewitnesses. But simply on that account, the convincing and reliable evidence adduced in this case should not be discarded. The Investigating Officer in his deposition has also admitted that through mistake he omitted to mention the Crime No. in the inquest report. It appears to us that the Investigating Officer had not been diligent enough but for that reason we do not feel that reliable and clinching evidence adduced in this case by the eyewitnesses particularly by Dr. Rajveer Singh should be discarded. In this connection, we may refer to a recent decision of this Court in Karnel Singh Vs. State of M.P., . In the said decision, it has been indicated by this Court that in case of defective investigation, it would not be proper to acquit the accused if the case is otherwise established conclusively because in that event it would tantamount to be falling in the hands of an erring Investigating Officer. As we do not find any reason to disbelieve the testimonies given by eyewitnesses of this case, we do not find any reason to take a contrary view and to interfere with the impugned judgment.

41. P.W. 5 Ranjit Singh, an employee of Milani Cinema which we already have noticed is situate in close vicinity of the place of occurrence, deposed, inter alia, as follows:

I knew Manas Choubey the son of Late Narayan Choubey. Manas Choubey was murdered on 27.6.99 at about 11 a.m. At that time I was standing at Milani Cinema. I was standing in front of Milani Cinema at Malancha Road. At that time I saw one Tata Safari vehicle standing just opposite to Milani Cinema. That vehicle bore the number WB02TA 2679. Tun Tun Chowdhury, K. Tarki, Rambabu and 2/3 others were in that vehicle. They were sitting inside the vehicle. Rambabu is present on dock (id.). Tuntun Chowdhury and K. Tarki are not present on dock today. Suddenly at about 11 a.m. we heard a noise coming from eastern direction. After some time K. Siba and 2/3 others being armed with Pistol came running from east side towards west side and reached near the Tata Safari vehicle. K. Siba shouted "Manaske Mar Diya" and all of them picked up in the vehicle and the vehicle ran away with high speed. The shops were closed at once. I became frighten. My friend Balai Bhattacharya with me. I did not see him at once. I then ran towards that place of occurrence. On reaching the P.O. I saw dead Manas Choubey and injured Swapan Saha were taken to Chakraborty Nursing Home. I learnt that K. Nagraju, Babu Roy, Sunil Sarma and 2/3 others shot them (with objection). I know K. Siba who is present on dock (identified).

Sunil Sarma is present on dock (id.). Nagraju is not present on dock. I do not know Babu Roy. I was interrogated by police on the following day.

42. In his cross-examination he once again deposed that Balai Bhattacharya (P.W. 4) his friend was at the relevant time with him. He could not be found after the incident. He firmly withstood the cross-examination. Therefore, his evidence can safely be relied upon. In his cross-examination he deposed that "It is fact that Rambabu is to move by that vehicle".

43. Mr. Basu submitted that the P.W. 5 claims to be an employee of Milani Cinema. Milani Cinema was closed on the date of incident. Therefore why did the P.W. 5 come to the Cinema Hall at all is not clear and that makes his evidence suspicious. It can be pointed out that there is no evidence to show that the Cinema Hall on that day was closed. It was closed subsequent to the incident because there was law and order problem in the area which we already have noticed from the evidence of the P.W. 20. Therefore, there is no substance in the submission that the P.W. 5 had no reason to be at the place of his employment at the material time.

44. P.W. 6 Sibranjana Mondal, another eyewitness, deposed as follows:

On 27.6.99 I was returning from Kharida bazar after marketing by cycle at about 10-30/11 a.m. I was returning towards my house. My house is on the west of Kharida Bazar at a distance of 60 feet. While I was returning then I saw K. Shiba, Nagraju, Sunil Sarma, Babu Roy, Ranjit Tadi, Ranjit Ghosh and others to come out from Forward Block party office which is at opposite to Hanuman Temple at Malancha Road. Hanuman Temple is at a distance of 30/40 feet from Kharida bazar. Hanuman Temple is on Malancha road. They were proceeding towards Jhantu's pan stall. Jhantu's pan stall is at south from Hanuman temple. I saw Ranjit Tadi to proceed towards Jhantu's pan stall by motor cycle. Ranjit Tadi called K. Shiba and other by an indication. Then I heard the sound of firing. I at once stopped there. I saw K. Shiba, Nagraju, Sunil Sharma, Babu Roy, Ranjit Ghosh and others being armed with pipe gun, revolver surrounded Manas Choubey and shot him. Manas Choubey being injured by firing fell down in the drain. In that event also he was being shot down. Ranjit Tadi was sitting on his motor cycle in starting condition. Ranjit Tadi shouted "Tum Sab Bhag Jau". Ranjit Ghosh ride on that motor cycle and both of them ran away towards Milani Cinema by motor cycle. Nagraju, Sunil Sarma, Babu Roy with revolver and pipegun ran away towards 36 para. K. Shiba and others ran towards Milani Cinema. I saw Hema Choubey, Goutam Choubey and Debasis Chowdhury shouted "Manaske khun Kore Dilo, Dhara, Dhara, Dhara". Debasis Chowdhury chased the miscreants. I out of fear was returning towards my house by cycle, then I saw one Tata Safari vehicle standing near the Milani Cinema. I saw B. Rambabu, H.N. Pandey, M. Tarakeswar Row and others inside that vehicle. The doors of the Tata Safari vehicle were in open condition. K. Shiba and 2/3 others came to that Tata Safari vehicle with revolver. Rambabu and others who were inside the vehicle asked them "Kam Hogia". K. Shiba and others shouted, "Bhaiya Manas Choubeko

murder kar diya". Thereafter they fled away. I returned home.

I stated to the police officer about the incident. I made statement before the Id. Magistrate. I made statement before the Id. Magistrate voluntarily. My statement was recorded in writing by Id. Magistrate. I signed that statement. The statement was read over by Id. Magistrate to me. The statement is marked as Ext. 4. (formal proof dispense with by law). This is my signature on the statement marked Ext. 4/1.

45. In his cross-examination he deposed that the accused H.N. Pandey is known as "masterji" which was admitted by H.N. Pandey during his examination u/s 313 Cr.P.C. He further has stated that Rambabu was known to him since 2/3 years prior to the date of the incident. In his cross-examination he admitted that he deposed in the Goutam Choubey murder case. He has stated in his cross-examination that he was at a distance of 20 ft. from the Tata Safari car. No serious infirmity in his evidence came to light during his cross-examination. Mr. Basu submitted that the P.W. 6 without being examined u/s 161 Cr.P.C. was sent to the Magistrate for recording his statement u/s 164 Cr.P.C. He wondered how could the police without examining him u/s 161 Cr.P.C. come to know that he was a material witness. P.W. 23 who filed the charge sheet and who had taken over the investigation from S.I. R.N. Sinha (P.W. 26) admitted that no statement of witness Sibranjana Mondal (P.W. 6) was recorded u/s 161 but at the same time denied that the said Sibranjana Mondal was not examined by him. Therefore the evidence of P.W. 23 is that P.W. 6 Sibranjana Mondal was examined by him but his statement was not reduced to writing.

46. Neither Mr. Basu nor Mr. Mukherjee did highlight any contradiction between the statement of the P.W. 6 Sibranjana Mondal made u/s 164 and the evidence given in Court. P.W. 6 in his examination-in-chief deposed that he "stated to the police officer about the incident". He further deposed in his cross-examination that "police wrote down my name and address. Police interrogated me and that was written down. My signature was obtained. Thereafter again I went to P.S. Police brought me to Court for recording my statement." The fact that the P.W. 23 deposed that there was no statement recorded u/s 161 of the P.W. 6 goes to show inefficient handling of the investigation which is no reason to discard the evidence of an eyewitness. Reference in this regard may be made to the judgment in the case of Rajesh Kumar Alias Kala Vs. State, . In paragraph 23 of the judgment relying on the decision of the Apex Court a Division Bench of Delhi Court opined as follows:

Our experience shows that for reasons unknown the police invariably commits lapses in not complying with the said provisions of law meticulously in every case. When such lapses occur in a particular case, the Court is to be on guard to examine the ocular evidence with more care in order to determine whether such ocular evidence is fully reliable and can be given credence despite such lapses on the part of the investigating agency. Where the ocular evidence is of shaky nature and a lingering doubt comes in mind about such eyewitness, where

eyewitness having not actually witnessed the occurrence, then lapses committed by the Investigating Officer assume significance and the benefit of doubt has to be given in such a case to the accused. See *State of Punjab Vs. Tarlok Singh*, *Balaka Singh and Others Vs. The State of Punjab*, *Ishwar Singh Vs. State of U.P.*, *Vijinder Singh v. State* 1984(1) Crimes 237 : 1984 Cri LJ 26 Delhi and *Arjun Marik and Others Vs. State of Bihar*, .

47. We are unable to accept the submission of Mr. Basu that the evidence of P.W. 6 is unworthy of credence. We may not be inclined to found our decision on the evidence of this witness. But we can without hesitation use his evidence for corroborating other evidence on the record. P.W. 7 Khokan Sarkar deposed as follows:

At about 11.30/11 a.m. I came to Kharida Malancha road for purchasing Biscuits. Suddenly I heard a firing sound. I turned and saw that 6/7 persons were firing Manas Choubey. Due to such firing Manas fell down inside the drain. I attempted to flee away towards my house. At that time Hema Choubey was shouting "Manaske mere dilo, mere dilo". At that time Goutam Choubey and Debasis Chowdhury chased the miscreants. At that time Ranjit Tadi was driving the motor cycle and Ranjit Ghosh was at the back seat of that motor cycle. Ranjit Tadi and Ranjit Ghosh told those miscreants "Kaj Hoyechhe, Paliea Ja". Out of fear I returned to my house. I was able to identify 4 persons out of 6/7 persons who fired Manas Choubey. They are Shiba, Nagraju, Sunil Sarma and Babu Roy. Witness identified the accd. K. Shiba, Sunil Sarma. Babu Roy who are present on dock. Nagraju is not present on dock. Ranjit Ghosh and Ranjit Tadi are also not found on dock. There was police investigation regarding murder of Manas. On the following day of murder at the morning time police came and interrogated me. I made statement before the Id. Magistrate in court. I made voluntary statement before the Id. Magistrate. That was taken down by the Id. Magistrate. Magistrate read over to me and I signed the statement. Statement is marked as Ext. 5 (objected to) and signature is marked as Ext. 5/1

48. P.W. 7 in his cross-examination deposed that he is a graduate. He was implicated in a Sessions Triable case as an accused and was acquitted. On the date of the incident he was an unemployed person and continued to be so. He was suggested on behalf of the defence that he was a yes man of Goutam and Manas which he denied. He further deposed that his mother was a pensioner. P.W. 23 deposed that "there is no statement of witness Khokan Sarkar and Krishna Rao u/s 161 Cr.P.C.". But the evidence of P.W. 7 is that he was interrogated by the police on the following day of the incident in the morning. This is another lapse on the part of the investigating agency. P.W. 7 made a statement u/s 164 Cr.P.C. which has been marked Ext. 5. Mr. Basu did not point out any contradiction in between the statement recorded u/s 164 Cr.P.C. and the evidence given in Court. Mr. Basu contended that if the deposition of the P.W. 7 that he had been interrogated by the police on the following day of the incident is discarded then it would follow that P.Ws. 6 and 7 disclosed the fact which they

claim to have witnessed only on 16th August 1999 which is more than a month from the date of the incident. Mr. Basu submitted that the evidence of this witness cannot be believed. We are unable to accept this submission. We already expressed our views while dealing with the evidence of P.W. 6 and reiterate that the evidence of P.W. 7 can be relied upon for the purpose of corroboration of the existing unblemished evidence.

49. P.W. 12 Debasis examined as an additional witness with leave of the Court, deposed as follows:

Manas was murdered on 27.6.99 at about 10.30/11 a.m. in front of Jhantu's Pan stall at Kharida Malancha road. At that time I was at a distance of about 60/70 feet from the place of occurrence. On 27.6.99 at about 10.30/11 a.m. I was walking in front of the door of Goutam Choubey's house with one para man. Then suddenly I heard firing sound and shouting of Hema Choubey "Manaske mere dilo, Manaske mere dilo". Being attracted by shouting I rushed near the P.O. at Malancha Road. I saw Manas being fell down in the drain after being shot down. I also saw Rajnit Ghosh and Ranjit Tadito leave the place by motor cycle saying "Kam Hogia" towards Milani Cinema. Some persons were seen to run away towards Babupark. They were Sunil Sarma, Nagraju, Babu Roy. K. Shiba, B. Ramesh, Rakesh and Manoj and 1/2 others ran away towards Milani Cinema. I chased them as they were fleeing after murdering Manas. Saibal Sarkar, Goutam Choubey also chased them. Milani Cinema is at the west of the P.O. We could not catch those persons. One steel colour Tata Safari vehicle was waiting just opposite the Milani Cinema. K. Shiba, B. Ramesh, Manoj and Rakesh and 1/2 other persons put up in that Tata Safari vehicle. We returned back to the P.O.

Manas was then picked by a rickshaw. I saw bullet injuries on the body of Manas. Then I noticed that Manas was not alive. I also saw Swapan Saha at the P.O. with hand injury. Swapan was taken to Chakraborty nursing home. Manas was also taken to Chakraborty nursing home.

Manas used to protest the ill activities of Rambabu and his companions and for that they used to threaten him regularly and once they attempted to kill him also. For that Manas was murdered (obj. to). Shop of Manas was ransacked (obj. to). Manas has S.T.D. booth and cold drinks business. He was dealer of products of Haldiram Bhujibala.

50. P.W. 12 Debasis was a Councilor of the Kharagpur Municipality at the relevant time. Both Manas and Goutam, he deposed in his cross-examination, were his friends ever since their childhood. His house is situate at a short distance from the house of the deceased Manas which can be walked out in 5/6 minutes. He admitted in his cross-examination that more than one criminal cases were pending in which Manas and his brother Goutam including himself were accused. He singly was also involved in many criminal cases. Mr. Basu submitted that P.W. 12 has been implanted in order to corroborate the evidence of the witnesses. We do not think this to be a fair criticism. P.W. 1 in her statement u/s 164 Cr.P.C., as

already indicated referred to her husband and his friend who had appeared hearing her hue and cry. The P.W. 1 repeated the same thing in her evidence. It was mistake on the part of the investigating agency that they did not cite the husband of the P.W. 1 and the husband's friend as eyewitnesses. They did not also cite the scribe of the written complaint as a witness. This goes to establish inefficient handling of the case by the investigating agency.

51. Mr. Mukherjee relied on a judgment in the case of Sonia Bahera Vs. State of Orissa, which in our view has no manner of application. What had happened in that case was that the Trial Court acquitted the accused whereas the High Court convicted the accused in appeal on the basis of an alleged extra-judicial confession. The Apex Court restored the judgment of the Trial Court. Mr. Mukherjee also cited a judgment in the case of State of Karnataka v. Venkatesh reported in 1992 (suppl.) (1) SCC 539 which, again, has no manner of application to the facts and circumstances of this case. What had happened there was that the ace witness had omitted to disclose the information to anyone for two days from the date of incident coupled with the fact that the evidence of the other witness was also not reliable. Mr. Mukherjee also cited the judgment in the case of Meharaj Singh (L/Nk.) Vs. State of U.P., which, again, in our opinion has no relevance to the facts of this case. What happened there was that two of witnesses examined by the prosecution named one person each to also have witnessed the incident. But those two persons were not examined by the prosecution. The Apex Court observed that they may not have agreed to support a false case. This judgment in our view supports the prosecution rather than the appellants. The observation of the Apex Court establishes that there may not be any serious objection to examine a person not cited as a witness if he can throw light on the subject matter of trial.

52. Examination of witnesses cannot be confined merely to those persons whose statements were recorded u/s 161 Cr.P.C. Sections 231, 242 and 244 of Cr.P.C. deal with "evidence for prosecution" in different types of trials. Section 231 relates to trial before Court of Sessions, while Sections 242 and 244 relate to trial of warrant cases before Magistrates.

53. In the case in hand, the trial was before the Court of Sessions. Section 231 Cr.P.C. does not confine production of witnesses by the prosecution side only to those persons whose statements had previously been recorded u/s 161 Cr.P.C. On the contrary the words "all such evidence" clearly signify that the right of the prosecution extends to the production of such persons as its witnesses during the course of trial, who may not have been named in the charge-sheet or whose statements may not have been recorded u/s 161 Cr.P.C. The prosecution side in the instant case had, in fact, obtained permission from the Trial Court to produce Goutam Chobey, Debasis Chowdhury and Kakali Behara as prosecution witnesses and after hearing the parties the Trial Court allowed it. Subsequent to grant of this application of the prosecution side, Kakali and Debasis were produced as witnesses. Their depositions were recorded by the Trial Court in accordance with

law giving full opportunity of cross-examination to the appellants. The sheer fact that on account of non-availability of any statement u/s 161 of Cr.P.C., the appellants did not have the opportunity of confronting any earlier statement of the witnesses during the course of their examination will not discredit the testimony of these witnesses who had rightly been examined as witnesses.

54. If the facts disclosed in evidence or questions put in cross-examination necessitate bringing on record the evidence of a person, Court should not hesitate in summoning him as a prosecution witness or even as a Court witness in terms of Section 311 Cr.P.C. While considering the scope and ambit of Section 231 Cr.P.C., Section 311 of Cr.P.C. has to be kept in view. Consequently the contention of the appellants side they were taken by surprise so far as the prosecution of Debasis Chowdhury and Kakali Behera as prosecution witnesses was concerned is devoid of force.

55. Now the evidence of P.W. 17 Dr. Tapas Ranjan Maity who along with Dr. K.P. Pandit and Dr. T.K. Ghosh performed the postmortem examination over the dead body of Manas Choubey may be noticed. As many as 8 injuries were found. Evidence of P.W. 17 is as follows:

In our opinion cause of death was due to shock and haemorrhage from the above mentioned gun shot injuries which are antemortem in nature. The report was prepared by we all three doctors but it was written in my own hand-writing and it bears my signature also and prepared in carbon process. The other two doctors also signed the same. It bears the official seal also. This is the p.m. report, marked Ext. 11. This is my signature on the p.m. report, marked Ext. 11/1.

56. He also deposed that "several fire arms were used; more than one person inflicted injury".

57. P.W. 18 Dr. Pandit deposed that eight gun shot injuries were found in the dead body of Manas Choubey. A concurrent joint report was prepared by them. Mr. Basu submitted that there is divergence of opinion between the P.W. 17 and P.W. 18. He drew our attention to the evidence of P.W. 17 who deposed that penetrating injury may be caused both by a sharp weapon and a gun shot injury. But that does not mean that any of the injuries found on the body of the deceased was opined to have been caused by any sharp weapon. P.W. 17 denied the suggestion, given on behalf of the defence, in these words "Not a fact that my opinion to the effect that injury Nos. 1, 6 and 7 caused by fire arms is not correct". P.W. 18 in his cross-examination deposed, inter alia, as follows:

The concurrent opinions are written down in the P.M. report. It is not possible for me (to say?) as to whether the bullet injuries were gun shot injuries or rifle shot injuries.

58. We do not think that there is any substance in the criticism of Mr. Basu that there is divergence of opinion between the doctors.

59. Mr. Basu drew out attention to the judgment in the case of Mohinder Singh

Vs. The State, wherein Their Lordships opined that it is only by the evidence of a duly qualified expert that it could have been ascertained whether the injuries attributed to the appellant were caused by a gun or a rifle. In the present case all the three doctors who combined for the purpose of conducting postmortem examination over the dead body of the deceased Manas opined that the victim was killed by gunshot injuries. During cross-examination it was suggested that a penetrating wound may also be caused by a sharp weapon to which one of the doctors answered in the affirmative. But he denied that in the present case the injury was caused by a sharp weapon. We, therefore, have not been able to follow as to how this judgment may have any relevance to the facts and circumstances of this case.

60. Mr. Basu also relied on a judgment in the case of Ram Narain Singh Vs. State of Punjab, for the proposition that where the evidence of the witnesses for the prosecution is inconsistent with the medical evidence, there is a fundamental defect in the prosecution case and unless reasonably explained it is sufficient to discredit the entire case. We have not been able to find any inconsistency between the account of the eyewitness and that given by the P.W. 17 and P.W. 18 who had conducted the postmortem examination. This judgment therefore has no manner of application to the case in hand.

61. The Tata Safari Car pressed into service was seized by the police. P.W. 24 S.I. Chandan Chatterjee had seized the car. His evidence in this regard is as follows:

I know S.I. Shyamal Kanti Das and S.I. R.N. Sinha. Both of them were attached to Kharagpur (T) P.S. on 29.6.99. On that day I along with S.I. R.N. Sinha and Shyamal kanti Das together with the remanded accused K. Chinna and Suresh @ Manoj Singh went to Mathurakit under Kgt (T) P.S. They were taken as they would be able to show the offending vehicle. One Tata Safari Steel colour vehicle was seized from the place beside a railway quarters as shown by the remanded accd. persons. I.O. R.N. Sinha seized it in our presence. That vehicle number is WBO2TA2679. I.O. prepared a seizure list for seizing the vehicle in my presence. I signed that seizure list. This is my signature on that seizure list marked as Ext. 19/4. Shyamal Kanti Das also signed on the seizure list like me.

Both the remand accused signed that seizure list in my presence. These are the signatures of those accd. persons. Signatures of K. Chinna and accd. Manoj @ Suresh Singh are identified.

62. Mr. Mukerjee, learned Counsel submitted that ownership of the vehicle was not proved nor was any statement u/s 27 of the Evidence Act proved. The police did not even have the vehicle tested as to whether it was in a running condition. These submission of Mr. Mukherjee are factually correct but we have trustworthy evidence which we already have discussed to show that this vehicle was, in fact, pressed into service. At the cost of repetition it may be pointed out that P.W. 5 deposed the registration no. of the Tata Safari vehicle used for the purpose of picking up the assailants. P.W. 5 in cross-examination deposed that the Tata

Safari Car occupied by appellant Rambabu amongst others was kept parked in front of the Milani Cinema Hall since prior to 10.30 A.M. on the date of occurrence. The doors of the car were kept open. After the murder was accomplished some of the assailants came running with revolvers in their hands boarded the vehicle and escaped.

63. P.W. 12 and others had chased the miscreants but they did not succeed. We have evidence before us particularly that of P.W. 5 to show that Rambabu used to move around by that vehicle. The vehicle has been identified. We under the circumstances have no manner of doubt that this vehicle was used for the purpose of commission of the crime. Whether the vehicle belonged to Rambabu is immaterial. The evidence of P.W. 5 has been corroborated by the evidence of P.Ws. 4, 6 and 12. We have gathered from the judgment under challenge that an application for release of the vehicle was made by a brother of Rambabu; the factual correctness whereof was not challenged before us. Without taking into consideration the aforesaid fact, on the basis of evidence before us, we have no manner of doubt that this vehicle was pressed into service for the purpose of commission of the crime.

64. Mr. Mukherjee submitted that motive hinted at in written complaint regarding enmity between Manas and B. Rambabu has not been proved even according to the Trial Court. That is no doubt the finding of the Trial Court. But the fact remains that the person who could have thrown greater light on the subject was Gautam the elder brother of the deceased Manas. Gautam was also killed before he could be examined as a witness. Mr. Mukherjee further submitted that if B. Rambabu were actually there in the Tata Safari Car this would have been known to the de facto complainant and she would have mentioned the same in the F.I.R. It is not the case of the de facto complainant that she lodged the complaint after consultation with her husband Gautam since deceased or his friend P.W. 12. Therefore there is no scope for this type of speculation. Mr. Mukherjee also repeated the criticism advanced by Mr. Basu as regards the evidence of P.Ws. 4, 5, 6 and 12 which we already have dealt with and need not repeat. Mr. Mukherjee submitted in particular that the P.W. 5 remembered the registration number of the Tata Safari Car allegedly pressed into service but he did not remember registration number of any other car. It may be pointed out that people usually remember only those things in life which are backed by an event. Other things fade out from the memory in the normal course of human behaviour. He also commented upon the applicability of Section 27 of the Evidence Act. The seizure list goes to show that the vehicle was seized and recovered on the basis of information given by some of the accused persons. The information given has been deposed to by the seizing official. Lastly he submitted that B. Rambabu was not charged u/s 149 IPC yet he has been found guilty thereunder which is illegal. The charge u/s 114 IPC according to him does not lie in the case of an accessory.

65. From the evidence discussed above it is clear that Swapan Saha (P.W. 2),

who had suffered a gun shot injury in the same transaction and also turned hostile, deposed that

- (a) Manas was reading newspaper in front of the Jhantu's Pan shop.
- (b) Suddenly 8/9 persons shot Manas.
- (c) Manas fell down in the drain as a result of shooting;
- (d) The miscreants had used revolvers to shoot Manas;
- (e) He also received a gun shot injury on his right hand;
- (f) He saw Hema Choubey (P.W. 1) to come to the place of occurrence running;

66. These facts have been well corroborated by the evidence of P.Ws. 1, 4, 5, 6, 7 and 12, on the basis of which we can safely infer that there was an unlawful assembly which had the common object of killing Manas. An unlawful assembly has been defined in Section 141 of the Indian Penal Code. Section 141 IPC insofar as the same is material for our purpose may be reproduced hereinbelow-

Unlawful Assembly.-An assembly of five or more persons is designated an "unlawful assembly" if the common object of the persons composing that assembly is-

First.-...

Second.-...

Third.-To commit any mischief or criminal trespass, or other offence

67. In the case of Sukha and Others Vs. The State of Rajasthan, it was held "If 5 or more shared the object and joined in the beating then the object of each would become the common object".

68. It is further well established that the prosecution is not obliged to prove individual overt acts but care at the same time has to be taken to exclude the persons who may have assembled merely as passive witnesses or as idle onlookers. Reference in this regard may be made to the judgment in the case of Ranbir Yadav Vs. State of Bihar, . In paragraph 45 Their Lordship expressed the following view:

If the above-quoted proposition of law had still operated in the field it might have been necessary for us to closely scrutinise the evidence of the eyewitnesses so far as it sought to prove the overt act allegedly committed by each of the appellants to ascertain whether the learned courts below were justified in accepting the same. But the above interpretation given to Sections 141 and 149 IPC in Baladin case was explained by a four-Judge Bench of this Court in Masalti v. State of U.P. as under:

It appears that in the case of Baladin, the members of the family of the appellants and other residents of the village had assembled together; some of

them shared the common object of the unlawful assembly, while others were merely passive witnesses. Dealing with such an assembly, this Court observed that the presence of a person in an assembly of that kind would not necessarily show that he was a member of an unlawful assembly. What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained along with the other members of the assembly the common object as defined by Section 141, IPC. Section 142 provides that however, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continue in it, is said to be a member of an unlawful assembly. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common objects specified by the five clauses of Section 141, is an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly. It is in that context that the observations made by this Court in the case of *Baladin*, assume significance; otherwise, in law, it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. In fact, Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of committing of that offence, is a member of the same assembly, is guilty of that offence, and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly. Therefore, we are satisfied that the observations made in the case of *Baladin* must be read in the context of the special facts of that case and cannot be treated as laying down an unqualified proposition of law such as Mr. Sawhney suggests.

69. The above-quoted principle was reiterated by this Court in *Lalji v. State of U.P.* with the following words: (SCC .441)

The two essentials of the Section are the commission of an offence by any member of an unlawful assembly and that such offence must have been committed in prosecution of the common object of that assembly or must be such as the members of that assembly knew to be likely to be committed. Not every person is necessarily guilty but only those who share in the common object. The common object of the assembly must be one of the five objects mentioned in Section 141 IPC. Common object of the unlawful assembly can be

gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case.

Section 149 makes every member of an unlawful assembly at the time of committing of the offence guilty of that offence. Thus this section created a specific and distinct offence. In other words, it created a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. However, the vicarious liability of the members of the unlawful assembly extends only to the acts done in pursuance of the common objects of the unlawful assembly, or to such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. Once the case of a person falls within the ingredients of the section the question that he did nothing with his own hands would be immaterial. He cannot put forward the defence that he did not with his own hand commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object. Everyone must be taken to have intended the probable and natural results of the combination of the acts in which he joined. It is not necessary that all the persons forming an unlawful assembly must do some overt act. When the accused persons assembled together, armed with lathis, and were parties to the assault on the complainant party, the prosecution is not obliged to prove which specific overt act was done by which of the accused. This section makes a member of the unlawful assembly responsible as a principal for the acts of each, and all, merely because he is a member of an unlawful assembly. While overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability u/s 149. It must be noted that the basis of the constructive guilt u/s 149 is mere membership of the unlawful assembly, with the requisite common object or knowledge.

The Court thereafter considered the facts of the case before it and observed that after having held that the appellant formed an unlawful assembly carrying dangerous weapons with the common object of resorting to violence, it was not open to the High Court to acquit some of the members on the ground that they did not perform any violent act or that there was no corroboration of their participation.

70. Now the question for determination is who the members of this unlawful assembly were.

71. From the evidence of P.W. 23 it appears that charge sheet was filed against 16 persons. At the time when charge sheet was filed Rambabu, Tarakeshwar, K. Nagraju, Babu Roy and Ranjit Tadi were absconders. Prayer for issuance of warrant of arrest against them was made by the P.W. 23. We already have noticed that charge was framed against 12 accused persons. Out of them three

accused persons absconded. Remaining 9 persons were tried. 8 of them have been convicted and the accused R. Mohanrao was acquitted.

72. The presence of P.W. 1 Hema Choubey at the place of occurrence during the incident has been admitted by the P.W. 2 Swapan Saha who eventually turned hostile. Therefore we can unhesitatingly rely on the evidence of P.W. 1. She deposed that she saw "K. Shiba, Sunil Sharma, Nagraju and Babu Rao to shoot Manas along with others". She further deposed "some of the miscreants ran away towards Milani Cinema. Some of them ran away towards Babupark". P.W. 2 who turned hostile deposed that the miscreants left towards Babupark. Therefore part of the evidence of P.W. 1 was corroborated by him. P.W. 4 has corroborated the evidence of P.W. 1 insofar as the involvement of K. Shiba is concerned. P.W. 5 has also corroborated the evidence of P.W. 1 as regards complicity of K. Shiba. P.W. 6 has corroborated the evidence of P.W. 1 insofar as the complicity of K. Shiba, Sunil Sharma and Babu Rao @ Roy is concerned. P.W. 7 has corroborated the evidence of P.W. 2 to the effect that Hema (P.W. 1) was at the P.O. He also has corroborated the evidence of P.W. 1 that Goutam and his friend chased the miscreants. He has also corroborated the evidence of P.W. 1 as regards complicity of K. Shiba, Sunil Sharma and Babu Rao @ Roy. Similarly the P.W. 12 has corroborated the evidence of P.W. 1 as regards the complicity of the said three persons viz. K. Shiba, Sunil and Babu.

73. Based on the evidence discussed above we hold that the appellant K. Shiba, Sunil Sarma and Babu Rao @ Roy along with others had shot Manas dead. We further hold that after shooting Manas dead some of the miscreants escaped towards Milani Cinema and some of them escaped towards Babupark. P.W. 4 deposed that he had seen K. Shiba and 2/3 others running with revolvers in their hands and were picked up in the Tata Safari vehicle which from before was occupied by the appellant Rambabu and others. He further deposed that K. Shiba shouted "Manas ko mar diya". Tata Safari vehicle left the place at once. P.W. 5, an employee of Milani Cinema deposed that Tata Safari car bearing registration No. WB02 TA 2679 was lying parked in front of the Milani Cinema hall since prior to 10.30 a.m. when he reached the Milani Cinema Hall. The appellant Rambabu and others were occupying the vehicle. After noise came from the eastern direction he saw K. Shiba with 2/3 others armed with pistol came running from the east side near the Tata Safari vehicle. K. Shiba shouted "Manas ko mar diya". All of them were picked up in the vehicle and the vehicle sped away. P.W. 5 has further deposed that Rambabu used to move around in that vehicle. P.W. 6 deposed that K. Shiba and others ran towards Milani Cinema. He also saw Goutam Choubey and Debasis Chowdhury were chasing the miscreants. He saw a Tata Safari vehicle standing near the Milani Cinema. He also saw B. Rambabu, H.N. Pandey and others inside the vehicle. The doors of the vehicle were in open condition. K. Shiba and 2/3 others came to the Tata Safari vehicle with revolvers. Rambabu and others asked "Kam ho giya". K. Shiba and others shouted "Bhaiya Manas Choubey ko murder kar diya. Thereafter they fled away". P.W. 12 Debasis deposed that the appellants Sunil Sarma, K. Shiba, B. Ramesh, Rakesh and

Manoj ran towards the Milani Cinema. He chased them but failed to catch them. One steel coloured Tata Safari vehicle was waiting just opposite of the Milani Cinema. The appellants K. Shiba, B. Ramesh, Manoj, Rakesh and 2/3 others boarded the Tata Safari vehicle and left.

74. On the basis of the evidence discussed above we can safely hold that the appellants K. Shiba, Sunil Sarma, Babu Rao @ Roy, Rambabu amongst others were the members of the unlawful assembly. The appellants K. Chinna, Suresh Singh @ Manoj and accused R. Mohonrao together with the absconder B. Ramesh were arrested by the P.W. 20 on 27th June 1999 at 6 P.M. and his evidence in that regard is as follows:

Three four persons were arrested with fire arms. Out of them there were carrying firearms. They were K. Chinna, B. Ramesh, Suresh Singh @ Manoj and R. Mohan Rao. R. Mohan Rao did not possess any fire arms at the time of arrest. K. Chinna possessed one 2 barrel loaded country made pipe gun, 12 rounds of bullets.

One two barrel country made pipe gun loaded with two bullets, one empty fired cartridge, 14 rounds bullets were received from the possession of B. Ramesh.

One single barrel country made loaded pipegun and so far I can recollect two rounds of bullets were recovered from the possession of Suresh Singh. Those were seized under seizure list prepared by S.I. Sri Debasis Ghosh. Those were seized in connection with KGP(T) P.S. case No. 183 dt. 27.6.99, u/s 25 and 27 Arms Act.

75. P.W. 1 in her evidence did not implicate the appellants K. Chinna, Manoj @ Suresh Singh, H.N. Pandey, and Rakesh nor did the P.Ws. 4 and 5 do so. On the basis of the evidence discussed above it may not be safe, although evidence is there, to hold the appellants H.N. Pandey, K. Chinna, Manoj @ Suresh and Rakesh to have been the members of the unlawful assembly. The appellant B. Rambabu has an advantage arising out of the fact that he was not charged u/s 149.

76. The submission of Mr. Mukherjee in this regard we already have noted. Now the question is in the absence of a charge u/s 149 can the conviction of the appellant B. Rambabu u/s 302 read with Section 149 and 114 of IPC be sustained?

77. In the case of Willie (William) Slaney Vs. The State of Madhya Pradesh, two persons were charged u/s 302 read with Section 34 IPC. One of them was acquitted. There was no alternative charge u/s 302 simpliciter. Question arose whether the conviction could be sustained. The answer was given in the affirmative. Their Lordships held as follows:

It is true that if it cannot be ascertained who struck the fatal blow, then the accused cannot be convicted unless the common intention is proved and in that type of case an acquittal of the co-accused may be fatal to the prosecution. But the converse does not hold good, and if the part that the accused played can be

clearly brought home to him and if it is sufficient to convict him of murder simpliciter he cannot escape liability because of the charge unless he can show prejudice.

Put at its highest, all that the appellant can urge is that a charge in the alternative ought to have been framed, which in itself imports that it could have been so framed. As was said by the Privy Council in ? AIR 1925 130 (Privy Council) and also by this Court in ? Lachman Singh and Others Vs. The State, .-

A man may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made. That is what happened here.... They were not charged with that formally, but they were tried on evidence which brings the case u/s 237.

The variation, between murder and concealing evidence after the crime, is no more than the variation between killing a man jointly with another, sharing his intention, or allowing the other to do the actual killing with the same common intention.

78. Mr. Mukherjee did not point out any prejudice suffered by the appellant B. Rambabu in the absence of a specific charge u/s 149. Section 464 of Cr.P.C. would also step in to cure the irregularity. Therefore the question has to be answered in the affirmative.

79. What is more important is the fact that the appellant B. Rambabu was charged u/s 302 read with Section 114 and 120B of IPC. Their Lordships in the same judgment also held as follows:

Sections 34, 114 and 149 of the Indian Penal Code provide for criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common object or a common intention; "and the charge is a rolled up one involving the direct liability and the constructive liability" without specifying who are directly liable and who are sought to be made constructively liable.

In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge, can be set aside, prejudice will have to be made out. In most of the cases of this kind, evidence is normally given from the outset as to who was primarily responsible for the act which brought about the offence and such evidence is of course relevant.

80. We have trustworthy evidence before us to show that Rambabu was inimical towards the deceased. He also had threatened to kill him and he took active part in facilitating escape of the assailants from the place of occurrence by the Tata Safari Car. He was stationed with his car in front of Milani Cinema since prior to 10.30 A.M. in the morning and left the place along with the assailants after Manas had been killed. In the facts of the case a criminal conspiracy between the

assailants and the appellant Rambabu can also be inferred with which Rambabu was also charged. Reference in this regard may be made to the judgment in the case Shivnarayan Laxminarayan Joshi and Others Vs. State of Maharashtra, wherein Their Lordship expressed the law as follows:

It is manifest that a conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the same. The offence can be only proved largely from the inferences drawn from acts or illegal omission committed by the Conspirators in pursuance of a common design which has been amply proved by the prosecution as found as a fact by the High Court.

81. We therefore uphold the conviction u/s 302 read with Section 114 of the Indian Penal Code. What has lent further assurance to this Court is the fact that the appellant B. Rambabu in his examination u/s 313 Cr.P.C. in answer to question No. 48 and 49 answered as follows:

Q. 48 : Would you say anything about all these?

Ans. : I am the General Secretary of Kharagpore All India Forward Block Party. The position of my party at Kharagpur was improving for this reason I have been implicated in this case falsely to hamper my position. At that time I went to Utti within Tamil Nadu State for admission of my daughter. I went there by Coromondal Express on 26.06.99. Myself, my daughter, Ranjit Tadi and his daughter all went there. Two other boys also accompanied us.

Q.49 : Would you adduce evidence in self-defence?

Ans. : Yes.

82. Records reveal that no evidence was ultimately adduced by the appellant B. Rambabu. In the case of State of Maharashtra Vs. Suresh, Their Lordship expressed the following view dealing with an incorrect/untrue alibi.

It is regrettable that the Division Bench had practically nullified the most formidable incriminating circumstance against the accused spoken to by PW 22 Dr. Nand Kumar. We have pointed out earlier the injuries which the doctor had noted on the person of the accused when he was examined on 25.12.1995. The significant impact of the said incriminating circumstance is that the accused could not give any explanation whatsoever for those injuries and therefore he had chosen to say that he did not sustain any such injury at all. We have no reason to disbelieve the testimony of P.W. 22 Dr. Nand Kumar. A false answer offered by the accused when his attention was drawn to the aforesaid circumstance renders that circumstance capable of inculcating him. In a situation like this such a false answer can also be counted as providing "a missing link" for completing the chain.

83. The conviction and sentence of the appellant K. Siva @ Shiba, Sunil Sharma, Babu Rao @ Roy and B. Rambabu are therefore upheld. The conviction and sentence of the appellants K. Chinna and Manoj @ Suresh Singh u/s 25 of the

Arms Act are upheld. They are acquitted of the charges u/s 27 of the Arms Act and the charges under Sections 148, 302 read with Section 149 of the IPC. They should therefore be released at once if not needed in connection with any other case. The conviction and sentence of the appellants H.N. Pandey and Rakesh @ Rajib Sinha are set aside. They should be released at once if not needed in connection with any other case. In the result the CRA No. 298 of 2003 is dismissed. The CRA No. 334 of 2003 is partly allowed. The CRA No. 318 of 2003 is allowed. The CRA No. 330 of 2003 is partly allowed. The CRA NO.331 of 2003 is partly allowed.

84. Let a copy of this judgment as well as the Lower Court Records of this case be sent down to the learned Trial Court forthwith for information and necessary action.

85. Urgent xerox certified copy of this judgment, if applied for by the parties, be delivered to them, upon compliance of all formalities.

Kishore Kumar Prasad, J.

86. I agree.