

(2008) 01 GAU CK 0025
In the Gauhati High Court

Goutam Das and Another

APPELLANT

Vs

State of Tripura and Another

RESPONDENT

Date of Decision : 29-01-2008

Acts Referred:

Arms Act, 1959 — Section 27
Criminal Procedure Code, 1973 (CrPC) — Section 161, 162, 306, 307
Evidence Act, 1872 — Section 114, 133, 145, 155
Penal Code, 1860 (IPC) — Section 120B, 302, 306, 307, 34

Citation : (2008) 3 GLT 625

Hon'ble Judges : I.A. Ansari, J;A.B. Pal, J

Bench : Division Bench

Judgement

A.B. Pal, J.—The challenge, in these two appeals, is to the judgment dated 19.04.2005, rendered by the Additional Sessions Judge, West Tripura Khowai in ST. 54 (WT/K)/2002, convicting Tapan, Das and Gautam Das u/s 302 of the Indian Penal Code (for short, IPC) and 27(3) of the Arms Act, but acquitting ten other accused persons. The two convicts have been sentenced to suffer imprisonment for life and to pay fine of Rs. 3000/- each and, in default, to suffer simple imprisonment for three months. They have challenged their conviction and sentences by instituting Criminal Appeal No. 47 of 2005. The State is before us, in Criminal Appeal No. 90 of 2005, challenging the acquittal of ten accused persons. We propose to dispose of both the appeals by this common judgment.

2. Prosecution Version:- The factual matrix first. On 31.08.2000, at about 6.30 pm, one Tapan Chakraborty was done to death by a group of miscreants. He was the leader of the Democratic Youth Federation of India (DYFI), a youth front affiliated to the Communist Party of India (Marxist). In the backdrop of the grisly murder, there was a students' agitation triggered by kidnapping of three students and one labourer by an extremist outfit. The protesting students raised road-blockade. Tapan Chakraborty, being a local leader of the party in power, was opposing the agitation and, thus, earned wrath of the agitators. Thirteen accused persons including the two convicts-appellants herein met, on 30.08.2000, in the

house of the convict. Tapan Das, and conspired to eliminate their betenoire Tapan Chakraborty. On the following day (31.08.2000), there was a public meeting organised by the CPI(M) party at Shantinagar, where Tapan Chakraborty was present. The meeting commenced at 3 PM and ended at 5.30 PM. After the meeting, at about 6 PM. Tapan Chakraborty, accompanied by Babul Dey (P.W.-1), Ganesh Kol (P.W.-2), Nitai Das (P.W.-3), Ramakanta Paul (P.W.-10), Benu Ranjan Dhupi (P.W.-11) and Prabir Biswas (P.W.-12) came to cross the river on way home, at Kalayanpur, on the other side of the river. The boat-man (P.W.-2) sailed them to the other bank, where the assailants were waiting with fire arms to do away with Tapan Chakraborty.

There was another group of persons waiting in the passenger shed, a little away from the group of assailants. They were Nihar Ranjan Deb (P.W.-4), Bidhu Urang (P.W.-7), Pranab Chakraborty (P.W.-8) and Satyendra Tanti (P.W.-9) waiting for Tapan Chakraborty to cross the river for escorting him home as his life was under serious threat from his political rivals, particularly, after the students' agitation. Pranab (P.W.-8) is the brother of the victim.

The moment Tapan disembarked from the boat, accused Ratan Sukladas, who later came to become approver (P.W.-6), dragged the victim down. When the victim fell on the ground, the two convicts, Tapan Das and Goutam Das, shot at him causing severe bullet injuries. Just at that time, a bomb also exploded. The four witnesses, who were waiting in the passenger-shed, ran to the spot and saw the victim with bullet injuries bleeding to death. All the accused persons, after finishing their job, fled unscathed. The victim was, immediately, taken to the local hospital; but as he was sinking, the doctor advised to, immediately, shift him to the GB. Hospital at Agartala. But before the journey to the GB. Hospital could complete, the victim's journey of life had ended in huff. After his death, Babul Dey (P.W.-1) lodged the First information in the same evening at 8.35 PM. It, was written by Sunil Deb (P.W.-5) as dictated by the informant setting thereby in motion the criminal investigation.

3. Defence version:- The simple defence version brought on record is that none of the accused persons was present at the scene of murder. They have been falsely implicated out of political rivalry.

4. Investigation and trial:- The police investigation came to conclude that 13 accused persons, including the two convicts-appellants herein, were responsible for the murder and on that basis, the Trial Court charged them u/s 302 read with 34 IPC. Section 27 of the Arms Act and Section 120B IPC. To bring home the charges, prosecution examined 19 witnesses of whom 11 were eye witnesses.

5. Eye-witnesses at a glance:- A closer scrutiny of the depositions of the witnesses would show that out of the six eye-witnesses, who had accompanied the deceased and crossed the river together by the same boat, Ramakanta (P.W.-10) and Prabir (P.W.-12) turned hostile.

Satyendra Tanti (P.W.-11), who was a member of the escort party and witnessed

the occurrence, was also declared hostile. Thus, the prosecution had to rely on other eight eyewitnesses including the approver, namely, Babul Dey (P.W.-1), Ganesh Kol (P.W.-2), Nitai Das (P.W.-3), Nihar Ranjan Deb (PW-4), Bidhu Urang (PW-7), Pranab Chakraborty (PW-8), Benu Ranjan Dhupi (P.W.-11) and the approver, Ratan Sukla Das (PW-6). There is complete unanimity among them that on the fateful evening, when Tapan along with others crossed the river by boat, a group of 10 to 15 assailants were waiting on the other side of the bank and the moment, he disembarked, they shot him dead.

6. Identification: Under the circumstances, the only question, which the Trial Court was called upon to decide is whether the assailants could really be identified by the eye-witnesses and whether such identification could be the basis for conviction in the given facts that the murder had occurred between 6 and 6.30 pm, when day light was fading and darkness was setting in. The question of identification came under closer scrutiny for the reason that none of the eye-witnesses could identify all the assailants. Though there is near unanimity that the assailants were more than 10 in number, none of the witnesses could definitely say the role played by each of the assailants except saying that some of them had shot at the deceased. It is significant to note that the eyewitnesses did, nowhere, even whisper that light was insufficient for identification.

Babul Dey (PW-1) claimed that he could identify accused Ashim Bhattacharjee, Subal Deb, Sailendra Das, Pradip Das, Somesh Das, Mrinal Das, Tapan Das and Goutam Das.

But Nitai Das (PW-3) has identified only Ratan Sukla Das (approver), Radhakanta Das and Bikash Das.

Nihar Ranjan Deb (PW-4) has claimed to have identified Anil Das, Goutam Das (convict), Pradip Das, Tapan Das (convict) and Mrinal Das.

Ratan Sukla Das (PW-6), who was one of the 13 accused persons and came to be approver, names all the 13 charged accused persons including himself.

Bidhu Urang (PW-7) has identified Tapan Das (convict), Goutam Das (convict) and Somesh Das.

Pranab Chakraborty (PW-8), brother of the victim, identified Tapan Das (convict), Pradip Das and Goutam Das (convict).

7. Corroboration:- In search of corroboration on the question of identification, it would be seen that the two convicts-appellants, Tapan Das and Goutam Das, were identified by eye-witnesses Babul Dey (PW-1), Nihar Ranjan Deb (PW-4), Ratan Sukla Das (PW-6), Bidhu Urang (PW-7) and Pranab Chakraborty (PW-8). Accused Pradip Das was identified by Babul Dey (PW-1), Nihar Ranjan Deb (PW-4), Bidhu Urang (PW-7) and Pranab Chakraborty (PW-8). Accused Somesh Das was identified by Babul Dey (PW-1) and Bidhu Urang (PW-7). Accused Mrinal Das was identified by Babul Dey (PW-1) and Nihar Ranjan Deb (PW-4). Accused Anil Das was identified by Nihar Ranjan Deb (PW-4) and Pranab Chakraborty

(PW-8). Thus, the two convicts-appellants herein and four other accused (Pradip, Somesh, Mrinal and Anil) were identified by more than one witnesses.

8. Questions other than identification: The other questions, which have fallen for consideration, are (i) Whether the evidence of the approver after a long lapse of time could be given any evidentiary value and (ii) to what extent, the evidence of the hostile witnesses could be relied on in order to discover the truth in the prosecution or the defence version.

9. Manner of confronting a witness:-We take a pause here to say that we felt disturbed by the way the learned Trial Court allowed the witnesses to be confronted with their previous statements recorded by the investigating police officer u/s 161 Cr.P.C. This is, normally, done only to test the veracity of their statements before the Trial Court. Before delving into the subject more, we may observe here that the manner in which the witnesses have been confronted with their earlier statements is not in accordance with the law laid down by the Apex Court in several decisions right from Tahsildar Singh and Another Vs. The State of Uttar Pradesh, . We shall try to trace evolution of the law on the issue including evidentiary value of the hostile witnesses as it has gradually developed through several judicial pronouncements.

10. We have heard Mr. M. Kar Bhowmik, learned Senior Counsel appearing for those, who stand convicted and/or acquitted, and Mr. D. Sarkar, learned Public Prosecutor, for the State.

11. Approver's evidence:- We first take up the appeal from conviction preferred by the two life convicts. A closer examination of the judgment impugned would show that the two appellants (Tapan & Goutam) have been held to be directly responsible for shooting down the victim mainly on the basis of the evidence of the approver (PW 6) substantiated by circumstantial evidence coming from other witnesses. Though seven eye-witnesses unequivocally corroborated each other saying that the number of assailants could be 15 to 20 of whom, at least, six including the two convicts (Tapan & Goutam) could be identified by them with certainly, the learned Trial Court refused to place reliance on their evidence to fasten four of them, viz., Pradip, Somesh, Mrinal and Anil, only because none of them could say what precise role these four assailants did actually play. It would be seen that at least, two or more than two eye-witnesses confirmed the presence of the above six persons in the large group of assailants; but mere presence of the above four accused failed to satisfy the learned Trial Court to fasten them with the aid of Section 34 taking a view that something more than mere presence was required to hold them guilty. After disbelieving the story of conspiracy taking place at the house of Tapan Das, one of the convicts, where all the 13 accused persons including the approver had assembled on 30.08.2000 and hatched a plan to eliminate Tapan Chakraborty, as narrated by the approver himself, the learned Trial Court, in its search for the particular role played by each of the assailants, turned to the evidence of the approver and, basing on his statement, believed that the two convicts, Tapan and Goutam, had opened fire

from their pistol and shot at the victim. The learned Trial Court believed only a part of the story unfolded by the approver regarding precise role of Tapan and Goutam shooting at the victim, but refused to believe the conspiracy part for want of corroboration by independent witnesses. Thus, the evidence of the approver being the foundation for conviction of the two convicts-appellants, the learned Counsel for them made a strenuous argument that the evidence coming from the approver, after a long lapse of time, has lost its evidentiary value and so, cannot be a basis for conviction. Let us, now, examine this particular aspect of the case in the light of the law relevant thereto.

12. Law of tendering pardon:- The learned Trial Court tendered pardon to the approver u/s 307 of the Code of Criminal Procedure. The said provisions read as follows:

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

The words "on the same condition" refer to the condition provided in Section 306(1), whereunder a Chief Judicial Magistrate or a Magistrate of the 1st Class may tender pardon to an accused on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof. The provisions, so made, leave no room for doubt that a Trial Court can tender pardon to an accused only if it believes that the disclosure by him is full and true of whole of the circumstances, The Court cannot tender pardon if it has reason to believe that disclosure is partly true and not entirely.

13. The object of allowing pardon:- The object of allowing pardon, in the cases, where a grave offence is committed by several persons, is to secure, with the aid of the evidence of the person pardoned, conviction of the real assailants. The essential precondition of Sections 306 and 307 of the Code is that such person must be directly or indirectly concerned in, or privy to, any such offence alleged have been committed by the accused persons. The law is well-settled that pardon, u/s 307 of the Code of Criminal Procedure, can be tendered, at any time, after commitment and before the judgment is pronounced. In the present case, the trial in the Court of Session commenced, on 11.03.2003, with the examination of the witnesses. The approver (PW-6) submitted his application to become an approver on 16.06.2004, i.e., long before the judgment was delivered on 19.04.2005. It is the definite case of the prosecution that the approver was directly or indirectly concerned in, or privy to, the offence of murder, he being one of the 13 accused persons charged with the said offence. As regards the condition that he must make a full and true disclosure of the whole of the circumstances, it is, now, to be seen what he had actually stated to comply with the requirement.

14. The version of the approver conspiracy: The approver (PW-6) focussed right from the beginning on the story relating to the conspiracy to eliminate Tapan Chakraborty which no person other than the conspirators was supposed to know. It was definitely a secret plan. The approver stated that before the present occurrence, three students and one labourer had been kidnapped from the locality by an extremist outfit, which fuelled a student-agitation. In protest, the agitators raised road-blockades. The deceased, Tapan Chakraborty, being the local leader of the CPI(M), had resisted the students' agitation. He, thus, earned the wrath of the agitators. All the 13 accused persons including the approver were spearheading the agitation. According to the approver, they assembled at the house of Tapan Das (convict) on 30.08.2000. It was decided there, in the meeting, that Tapan Chakraborty had to be eliminated. They knew beforehand that Tapan Chakraborty would attend a meeting organised by his party, on 31.08.2000, at Shantinagar. They decided to do away with the victim on that day itself, when he would be, after the meeting, on way home from Shantinagar by crossing the river. On the fateful day, the meeting commenced from 3 pm. The accused persons, as per their plan chalked out in their conspiratorial meeting held on the previous day, spread over in different groups and in different places. The accused Uttam Shil (acquitted) was deputed on the other side of the river (Shantinagar side) with instructions to inform the other assailants about movement of Tapan Chakraborty, when he would return home after the meeting. We have noticed from the deposition of Benu Ranjan Dhupi (PW-11) that accused Uttam Shil was present near the venue of the meeting at Shantinagar and he had enquired from PW-11 whether Tapan Chakraborty would attend the meeting. The witness replied in the affirmative. The statement of the approver about posting of Uttam Shil for giving information about the movement of Tapan Chakraborty stands, thus, corroborated by PW-11.

15. Planned deployment of accused:- The approver continued to state that as per their blue print, six accused persons, namely, Radha Kanta Das, Asim Bhattacharjee, Bikash Das, Mrinal Das, Sailen Das (all acquitted) and the approver himself were waiting at Bagan Bazar, where the victim would come, crossing the river, on way to his house. Another group of four accused persons, namely, Tapan Das (convict), Goutam Das (convict), Somesh Das (acquitted) and Pradip Das (acquitted) were waiting in the house of Anil Das (acquitted), which was close to the place of occurrence.

16. Offenders' activities:- The approver's story goes to unwind that at about 6 pm, the group of four was informed by Anil Das that the meeting, at Shantinagar, had been over and the participants were approaching towards the Ferry Ghat to cross the river. At once, all the four persons, waiting in the house of Anil Das, proceeded towards the Ferry Ghat and seeing them, the other group of six joined them. Anil Das was also with them. All of them together were waiting on the bank for the boat to reach, carrying Tapan Chakraborty (victim), Ramakanta Paul (PW-10, who was declared hostile) and 9/10 others. When the boat reached the shore and the passengers started disembarking. Tapan Chakraborty was,

suddenly, caught hold of by the approver, who dragged him down. Just at that time, the two appellants, Goutam and Tapan, fired from their pistol two rounds of bullets, which pierced through the victim. A bomb also had exploded on the other side of the river. The witnesses, who were waiting in the passenger shed to escort the victim, rushed to the place of occurrence. But the assailants including the approver quickly fled towards southeast direction. They crossed the river and concealed themselves.

17. Approver's agony:- On the following day, the approver came to know that Tapan Chakraborty had died. This information had caused deep anguish in him. He was repentant and later he attempted to commit suicide by hanging in his own house. However, his attempt failed. He, then, after much pondering, decided to divulge the whole incident. Thus, he approached the Court to become an approver.

18. Condition of tendering pardon:- The obvious purpose of tendering pardon to an accused is to get from him a full and true disclosure of the whole of the circumstances within his knowledge, as the same cannot be within the knowledge of any other person including the witnesses on whom the prosecution proposes to rely. The story given by the approver brings forth the hidden part of the episode unknown to those, who had not formed part of the conspiracy to eliminate Tapan Chakraborty. In the meeting, held in the house of Tapan Das (convict), all the 13 accused persons charged with murder were present. But the learned Trial Court did not believe this part of the story for the reason that no independent witness corroborated the evidence of the approver. We are totally in disagreement. It is not at all understood how the tale of a secret conspiracy falling from the mouth of the approver could be expected to find corroboration from any independent witness if he himself is not a privy or accomplice. It would not be a reasonable proposition that a conspiracy to murder is hatched in presence of other persons, who are not concerned with or privy to, the alleged offence. The main intent and purpose of tendering pardon to an accused, as envisaged in Section 306 or 307 of the Code, is to bring to light the missing and hidden circumstances, which, though very much relevant, are not coming forth from others. Therefore, in our view, insistence for corroboration from independent source to the conspiracy part of the persecution story disclosed by the approver is improper and unreasonable. We find it difficult to approve such reasoning coming from the learned Trial Court for disbelieving the conspiracy part of the episode disclosed by the approver.

19. Corroboration to approver's disclosure of conspiracy from circumstances:

(i) While there may not be any direct evidence to corroborate the approver, the Court must reasonably search for corroboration from circumstantial evidence. A careful scanning of the evidence of the witnesses is, therefore, very much necessary. As we have noticed above, PW-11 has stated that he saw the accused Uttam Shil near the venue of the meeting of Shantinagar, Uttam Shil was enquiring about Tapan Chakraborty, the meeting was addressed by several party

leaders, but Uttam Shil was enquiring about Tapan Chakraborty only. When the witness confirmed that Tapan Chakraborty would attend the meeting, the accused vanished. This is an important circumstance providing clear support to the statement of the approver that as per the conspiracy. Uttam Shil was deployed, at Shantinagar, with instruction to inform about the movement of Tapan Chakraborty.

(ii) Nihar Ranjan Deb (PW-4) was one of the four persons, who were waiting in the passenger shed on the Bagan Bazar side of the river to escort Tapan Chakraborty. The other three were Bidhu Urang (PW-7), Pranab Chakraborty (PW-8) and Satyendra Tanti (PW-9). From the passenger shed, Nihar Ranjan noticed that accused Anil Das was hurriedly leaving the Ferry Ghat towards Bagan Bazar and within 5-6 minutes, 10 young persons proceeded towards the Ferry Ghat from Bagan Bazar. Anil Das did not come from other side of the river. He was waiting near the Ferry Ghat before his brisk walking towards Bagan Bazar. The approver stated that 10 accused persons in two groups were deployed in the Baganbari side of the river. Four of them, namely, Tapan Das, Goutam Das, Somesh Das and Pradip Das were waiting in the house of Anil Das and other six persons including the approver were waiting at Bagan Bazar. Getting information from Anil Das that the victim and his companions were coming to the Ferry Ghat after the meeting, all the 10 accused persons proceeded towards the Ferry Ghat. This witness (P.W.-4) could identify only Goutam, Pradip, Tapan and Mrinal among the ten. He did not at all try to develop his story given to the police by implicating others, whom he could not really identify. The statement of this witness has been supported by Bidhu Urang (PW-7), who was with him in the passenger shed. According to him, the number of persons proceeding towards the Ferry was 12/14. Out of them, he could identify Tapan Das, Goutam Das, Pradip Das and Somesh Das only. Like PW-4, he also made no attempt to implicate others, whom he could not really identify. Pranab Chakraborty (PW-8) was also in the passenger shed waiting with three others for his brother, Tapan Chakraborty, whose life was at risk. He could identify only Tapan Das, Goutam Das, Pradip Das and Anil Das. He also made no claim to have identified other accused persons whom he could not really identify. The fourth person, in the passenger shed, was Satyendra Tanti (PW-9), who, however, refused to say whether he could identify any of the assailants. He was declared hostile and cross-examined by the prosecution.

(iii) From the above discussion, what has finally emerges is that the statement of the approver, about the role played by accused Anil Das by informing other assailants, who, then, proceeded towards the Ferry Ghat, stands corroborated providing more credence to the story of conspiracy. The deployment of Uttam Shil near the venue of the meeting, Anil Das near the Ferry Ghat and two groups, one in the house of Anil Das, and the other in Bagan Bazar, supports with certainty the secret plan hatched by the accused persons to eliminate Tapan Chakraborty. Therefore, there is nothing to disbelieve the evidence of the approver. In fact, his evidence reflects the full and true disclosure of the

conspiracy to eliminate the said victim.

20. Evidentiary value of approver's evidence:- We may, now, turn to discuss briefly the evidentiary value of the evidence of an accomplice. Section 133 of the Evidence Act provides:

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

Though this provision is an absolute rule of law and it is not illegal to convict an accused on uncorroborated testimony of an accomplice, such conviction may not be proper if evidence of accomplice is not appreciated with due caution provided in illustration (b) of Section 114 of that Act, which is complementary to Section 133. The said illustration provides:

(b) the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars.

The combined effect of the two provisions is that though conviction on sole testimony of an accomplice is not illegal, but Court shall not accept such evidence as a matter of practice without corroboration in material particulars. The rule illustrated, under Clause (b) of Section 114, is a rule of prudence rather than a statutory inhibition and it has to be applied whenever situation, similar to those indicated therein, arises for consideration. The power, u/s 114 to draw presumption, is always discretionary, for, it is possible to conceive of a case, where the Court might consider it unnecessary to require corroboration of what an accomplice has stated, though such occasion may be very rare.

21. Delay in becoming accomplice:- An argument has been placed, on behalf of the convicts-appellants, that the delay of more than a year, in the present case, to make the statement by the accomplice casts grave suspicion and unless the same is dispelled, the conviction of the two convicts-appellants on the basis of such evidence would be very unsafe and untenable. We very much appreciate this proposition, which has support from array of decisions. It is, therefore, necessary for us to examine whether strong corroboration are available in the evidence and materials on record to place reliance on the statement of the approver, in the case on hand, in order to dispel such suspicion because of the delay. Before our search for corroboration, we may conclude our discussion on the approver's evidence by saying that an approver is competent to give evidence like any other witness and the rule of prudence only requires that such evidence should not be accepted without corroboration. Again, when the statement of the accomplice comes after a long period, as is seen in the present case, a suspicion arises and such suspicion needs to be dispelled by strong corroboration.

22. Separate appreciation of prosecution evidence without approver:- We have already noticed briefly in our above discussions that all the eye-witness narrated

the occurrence of the fateful evening of 31.08.2000. We have seen how their statements about movement of the accused persons are quite consistent with the version of the accomplice in material particulars. Though the learned Trial Court confined its focus only on the evidence of the approver to decide who were directly responsible for shooting at the victim, it was, in our view, also necessary to separately appreciate the evidence of the eye-witnesses to decide whether even without approver's evidence, the convict-appellants or other accused could be held to be guilty in the given facts and circumstances. But the learned Trial Court first disbelieved the story of conspiracy disclosed by the approver only because there is no independent direct evidence to corroborate ignoring the fact that there cannot be any independent corroborating evidence to prove a secret act like conspiracy. The Court has been authorised by law to grant pardon only for the purpose of bringing into light from an accomplice certain essential hidden links of an episode for piecing together the real story and fasten the real culprits. Why the deceased was done to death and what motive had actuated the assailants to commit the grisly murder and at whose behest could be known only from an accomplice. It was impossible to know the same from any other person. So, with a view to obtaining full disclosure of the facts and circumstances of the case, the Courts have been empowered offered to tender pardon to the willing accomplice. However, as a rule of prudence, it is always necessary to see first, whether without the evidence of the approver, the prosecution case has any chance to succeed. We feel inclined to go into more detail on this issue at the risk of repetition.

23 Ten eye witnesses with three turned hostile:- There are 10 eye-witnesses (other than approver) presented by prosecution, who claim to have identified some of the assailants, whose names figured in the statement of the approver as the persons, who had jointly conspired, planned and eliminated Tapan Chakraborty. Of the 10 eye-witnesses, Satyendra Tanti (P.W.-9), Ramakanta Paul (PW-10) and Prabir Biswas (PW-12) have been declared hostile by the prosecution. They were confronted with their police statements. We shall come to discuss their evidence later. We may, first, appreciate the evidence of other seven eye-witnesses, who could identify, at least, six assailants including the two convicts-appellants.

24. First group of eye-witnesses:-According to Babul Dey (P.W.-1), the boat reached the shore of Bagan Bazar side at about 6 PM, He along with Tapan Chakraborty and others crossed the river by the said boat. The victim and other passengers, in the boat, had no reason to suspect that the group of persons waiting on the shore were there to murder Tapan Chakraborty. This is apparent from the behaviour of the victim and his associates, who, as usual, disembarked from the boat and the victim thereafter engaged himself in washing his feet. Suddenly, some miscreants grabbed the victim and hurled abuses. Then they opened fire at the victim which finally brought his end. Out of the miscreants, this witness (PW-1) could identify Tapan Das, Goutam Das, Asim Bhattacharjee, Subal Deb, Sailendra Das, Somesh Das, Mrinal Das and Pradip Das. The names

of these eight persons have been disclosed by him in the FIR lodged by him. He made no attempt to implicate any of the remaining assailants. Though it is stated by him that there were 15 to 16 assailants and according to the approver the number was 13, it is not necessary to take the number seriously as it is always possible to make error about number of persons present in a situation such as the present one. This witness has admitted that he was the secretary of the DYFI. The learned defence counsel placed an argument that because of the political rivalry, the witness falsely implicated the accused persons. We are not convinced. Political enmity cannot be a ground to spare the real assailants and secure conviction of innocent persons. Conversely, rivalry may also be a motive, on the part of the accused persons, to eliminate a political rival like the victim in the present case. We do not accept this contention.

25. Second eye-witness in the boat:-Nitai Das (P.W. 3) attended the meeting at Shantinagar and was returning to Bagan Bazar with Tapan Chakraborty and others. Like PW-1, he was also in the boat. According to him, 10/12 persons attacked Tapan Chakraborty and he could identify only Ratan Sukla Das, Radha Kanta Das and Bikash, who were members of the group of miscreants. He was examined on the same night, at about 9 pm, by the investigating police officer to whom also he disclosed the names of same accused persons. There is, thus, no contradiction with regard to identification of the three assailants. He was, however, confronted with his police-statement, where he did not state the total number of assailants or the direction in which the accused persons had fled after commission of the offence. These omissions are not at all material and should not have been allowed as contradictions. We shall discuss hereinafter more on this issue.

26. Third eye-witness in the boat:- We have noticed that six witnesses were crossing the river with the deceased by the same boat. Of them, we have seen what Babul Dey (P.W-1) and Nitai Das (P.W.-3) stated about the occurrence. Another witness, Benu Ranjan Dhupi (P.W.-11), was also in the boat. But he only stated that accused Uttam Shil was found near the venue of the meeting and Uttam Shil enquired from him whether Tapan Chakraborty would attend the meeting. Thereafter, Uttam Shil had disappeared from near the place of meeting. This witness has not said any thing about identification of the assailants.

27. Three hostile eye-witnesses in the boat:- The other three persons, who had accompanied the victim and crossed the river by the same boat, were Ganesh Kol (PW-2), Ramakanta Paul (PW-10) and Prabir Biswas (P.W. 12), all of whom turned hostile. They were declared hostile only because they refused to say before the learned Trial Court that they could identify the assailants. They however, testified to the other parts of the occurrence supporting the prosecution case that on the said date and time, a group of miscreants had done to death the victim, Tapan Chakraborty.

Ganesh Kol (PW-2) was the boatman and therefore, had the occasion to see the occurrence closely when the boat had reached the shore. He was examined by

police, in the same evening, when he stated that amongst the killers, he could recognise Goutam Das, Tapan Das, Pradip Das and Asim Bhattacharjee of Ratia. As he denied to have made such a statement, this portion of his statement was placed before him during trial and marked Exhibit-2 after being confirmed by the investigating officer.

Similarly, Ramakanta Paul (PW-10), who had accompanied the victim to the meeting at Shantinagar and returned with him by the same boat, stated to police that he could recognise Sumesh Das, Mrinal Das, Tapan Das, Pradip Das, Goutam Das, Asim Bhattacharjee, Subal Deb and Sailendra Das. Being resisted by him and others, the miscreants fled towards southeast direction. He further stated that the UBLF extremists had murdered Tapan Chakraborty. Before the learned Trial Court, he denied to have made such a statement. Therefore, after confronting him with his said previous statement, this part of his police statement was marked Ext. 5 on being confirmed by the I.O.

The other hostile witness is Prabir Biswas, who, in his police statement, claimed to have identified Sumesh Das, Mrinal Das, Tapan Das, Pradip Das, Goutam Das, Asim Bhattacharjee, Subal Deb and Sailendra Das, but disowned the same before the learned Trial Court.

Thus, the above three hostile witnesses, who had accompanied the deceased in the same boat, corroborated other witnesses with regard to the factum of murder except the identification part. But none of them did explain to the trial learned Court as to why they could not identify any of the assailants, though they placed in closer proximity, the opportunity to see the miscreants. They only stated unconvincingly that out of fear, they had fled without recognising any of the offenders. They have not assigned any other reason, which could make it difficult for them to identify any of the assailants.

28. Hostile witness-evidentiary value:-Law is well settled that even evidence of hostile witnesses need not be rejected altogether, but may be relied on for corroboration. It is trite that evidence of a hostile witness cannot be rejected in toto. It is for the Court to decide whether in spite of the witness having been discredited on one point, his testimony can be considered on another. Thus, though the prosecution has sought to discredit its own witnesses, it gained nothing by doing so. The reason is the part of their statement before police relating to identification of the accused persons cannot be availed of to support identification by other eye-witnesses. In other particulars of the occurrence, they supported the prosecution version. The prosecution has, thus, derived no benefit by declaring the above three witnesses hostile and confronting them with their previous statements before police on the question of identification of the assailants. The question of identification has, therefore, to be decided only on the basis of the evidence of other eye-witnesses, who have not been declared hostile and who are very much truthful inasmuch as they made no attempt to identify those assailants, whom they could not really recognise. They named only those assailants, whom they did really identify.

29. Second group of eye-witnesses in the passenger-shed:- We shall, now, come to the other group of witnesses, who were waiting in the passenger's shed on the opposite bank of the river. They rushed to the shore, when the assailants had attacked the victim all on a sudden. These four eye-witnesses, namely, Nihar Ranjan Deb (PW-4), Bidhu Urang (PW-7), Pranab Chakraborty (PW-8) and Satyendra Tanti (PW-9) were waiting to escort Tapan Chakraborty as they had the reason to believe that there was threat to his life. As they had run to the spot, when the victim was attacked, they had no opportunity to see who had actually opened fire. Though the first group of witnesses, who had accompanied the victim, had all the opportunity to see the entire occurrence from close range, none of them did specifically say who had opened fire. They, however, stated with certainty that some of the miscreants dragged the victim down and shot him dead. Definite evidence came from the approver (PW-6) only who disclosed that he himself had dragged the victim down, when the two convicts had shot at the victim. Like the first group of witnesses, the second group also testified same way failing to disclose who really had shot the victim dead. Confronted with this situation, the learned Trial Court turned to the approver to get definite evidence regarding direct responsibility of shooting.

30. First eye-witness of the second group:-Nihar Ranjan Deb (PW-4) has stated that he noticed from the passenger shed that accused Anil Das was hurriedly proceeding towards Bagan Bazar from the Ferry Ghat and just 5/6 minutes later, a group of ten young persons proceeded towards Ferry Ghat from Bagan Bazar. Out of them, he could identify Tapan Das, Pradip Das, Mrinal Das and Goutam Das. This part of his statement provides corroboration to the disclosure made by the approver that Anil Das was deployed, at Ferry Ghat, to give information to the other assailants, who were waiting in two groups, one in the house of Anil Das and other in the Bagan Bazar and, on being informed by him, all of them had proceeded to the Ferry Ghat as per plan to eliminate Tapan Chakraborty. This witness has further stated that except this group of miscreants, there was no other person near the river-water. The distance between the passengers' shed and the Ferry Ghat is about 100 cubits. He and his companion witnesses could distinctly see movements of the assailants. According to him, when Tapan Chakraborty got down from the boat, some miscreants from the group dragged him down and immediately, thereafter, there was sound of gunfire and bomb explosion. Though initially, they were bewildered for a while, but, immediately, they proceeded towards the Ferry Ghat and did see the victim lying with bleeding injuries.

31. Second eye witness of the second group:-Bidhu Urang (PW-7) corroborated Nihar Ranjan Deb (PW-4) by saying that he was also in the passengers' shed for the same purpose of escorting Tapan Chakraborty and noticed therefrom 12/14 persons proceeding towards Ferry Ghat. Out of them, Tapan Das, Goutam Das, Pradip Das and Somesh Das were known to him and, therefore, it was not difficult for him to identify them. He has further stated that two persons of the said group fired two shots at Tapan Chakraborty.

32. Third eye-witness of the second group:-Pranab Chakraborty (PW-8) is the brother of the deceased at whose instance other three witnesses viz. Nihar Ranjan Deb, Bidhu Urang and Satyendra Tanti had agreed to escort Tapan Chakraborty from Ferry Ghat after the meeting at Shantinagar. He has claimed that he did see good number of miscreants proceeding towards Ferry Ghat; out of whom, he could recognise Tapan Das, Goutam Das, Pradip Das and Somesh Das. He also saw Anil Das moving away hurriedly from the river side and after some time, all the accused persons proceeded towards the river side from the same direction Anil had left for.

33. Hostile witness of the second group:-The other witness Satyendra Tanti (PW-9), who was in the passengers' shed, however, turned hostile by refusing to say who was responsible for opening fire on Tapan Chakraborty. He, however, admitted that he along with Pranab Chakraborty, Nihar Ranjan Deb and Bidhu Urang came to the passengers' shed with a view to escorting the slain brother of Pranab Chakraborty. As it was drizzling then, they had taken shelter in the passengers' shed. He refused to say before the learned Trial Court that he could identify any of the assailants. In the relevant portion of his police statement, which has been marked as exhibit-4 after the same was shown to him, he had stated that he had seen Goutam Das, Somesh Das, Pradip Das, Asim Bhattacharjee, Tapan Das and others proceeding towards east and waiting, in abody, on the river side, when the victim and others were crossing the river from other side. The moment Tapan Chakraborty (victim) deboarded with others on the bank, accused Tapan Das and Somesh Das caught hold of the victim and fired at him from very close range. Tapan fell to the bullet injuries.

But by declaring this witness hostile, the prosecution seems to have gained nothing for the reason that such confronted portion has no value except diminishing credibility of the witness.

34. Three or more than three eye witnesses including approver identified 6(six) accused:-The prosecution case, therefore, has to stand on other witnesses regarding identification of the assailants. Except identification, other part of the prosecution version, stands firmly established from all eye-witnesses including the hostile eye-witnesses. It would appear from the above discussions that five eyewitnesses, viz. PW-1, PW-4, PW-6, PW-7 and PW-8 identified the two convicts-appellants. Tapan and Goutam P.W.s-1, 4, 7 and 8 identified accused Pradip Das. P. Ws 1 and 7 identified accused Somesh Das. PWs 1 and 4 identified Mrinal Das. P.Ws 4 and 8 identified Anil Das. Thus, six accused persons including the two convicts-appellants had been identified by more than one eyewitnesses. The question falling for decision is whether such identification by two or more witnesses can be basis for their conviction.

35. Standard of proof on identification:-It is, thus, seen that out of more than ten accused persons, only six could be identified by the eye-witnesses, though all of them could not identify same assailants. But, at least, two or more than two eye witnesses could identify one or more than one assailants. The general

principle of appreciating evidence of eyewitnesses, in such a case is that where a large number of offenders are involved, it is necessary for the Court to seek corroboration, at least, from two or more witnesses as a measure of caution. The Apex Court had the occasion to deal with a similar situation in *Masalti Vs. State of U.P.*, . It was observed there that it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses, who give a consistent account of the incident. The observations appearing in para 16 of that judgment are gainfully quoted below:

16. Mr. Sawhney also urged that the test applied by the High Court in convicting the appellants is mechanical. He argues that under the Indian Evidence Act, trustworthy evidence given by a single witness would be enough to convict an accused person, whereas evidence given by half a dozen witnesses which is not trustworthy would not be enough to sustain the conviction. That, no doubt is true; but where a Criminal Court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident. In a sense, the test may be described as mechanical; but it is difficult to see how it can be treated as irrational or unreasonable. Therefore, we do not think that any grievance can be made by the appellants against the adoption of this test. If at all the prosecution may be entitled to say that the seven accused persons were acquitted because their cases did not satisfy the mechanical test of four witnesses, and if the said test had not been applied, they might as well have been convicted. It is, no doubt, the quality of the evidence that matters and not the number of witnesses who give such evidence. But sometimes it is useful to adopt a test like the one which the High Court has adopted in dealing with the present case.

36. In appropriate cases identification by less than two witnesses may be the standard:-The above ratio has been followed in several later decisions including the decision in *Krishna Mochi and Others Vs. State of Bihar*, . After quoting the ratio laid down in *Masalti* (supra), which is, as a matter of fact, a rule of caution only, the Apex Court further observed that quality, not quantity of evidence to be the rule for conviction even where the number of eyewitnesses is less than two. The relevant observations, in para 30 and 33, read thus:

30. Thus, it appears that this Court laid down that in the matter of appreciation of evidence what matter is the quality of evidence and not the number of witnesses, but sometimes, in appropriate cases, the Court may adopt a test like the one adopted by the Allahabad High Court in that case. Though in that case the basis of conviction of the appellants before this Court was credible evidence of four or more eye-witnesses, but still the Court observed that, ordinarily. In cases where there were a large number of offenders and a large number of victims it would be safe to convict only if the case is supported by two or three or more witnesses who give consistent account of the incident. This Court has

observed such a rule of caution ordinarily, which would obviously mean that there is no blanket ban or rule of universal application that if the number of eye-witnesses is less than two, in no case conviction can be upheld. That apart, as in that case the appellants were convicted on the basis of evidence of four or more eyewitnesses, as a matter of fact the Apex Court was not called upon to go into this question but even then it has made such observations. As noted above, no rule of universal application was intended to be laid down or has been laid down. The decision is, therefore, not applicable to the facts of the present case.

33. Thus, in the present case where there was more or less a caste war between the haves and the have-nots, gruesome murder of 35 persons of one community in which several persons were injured, great commotion in the locality, people became panicky as the accused persons were members of MCC, which is a very violent organisation, even if the complicity of the accused is proved by credible evidence of one or two witnesses, it would not be unsafe to convict an accused, rather a duty is enjoined upon the Court not to acquit an accused on this ground alone unless the prosecution case is otherwise found to be untrustworthy. It is well settled that in a criminal trial credible evidence of even a solitary witness can form the basis of conviction and that of even half a dozen witnesses may not form such a basis unless their evidence is found to be trustworthy inasmuch as what matters in the matter of appreciation of evidence of witnesses is not the number of witnesses, but the quality of their evidence. Thus, I do not find any substance in the submission of the learned Counsel appearing on behalf of the appellants on this Court.

37. Standard adopted in the present case: As a rule of caution, we feel that under the facts and circumstances of the present case, the evidence of two or more eye-witnesses should be the standard of proof and it would not be safe to rely on evidence of a single eye-witness. As we have already seen, with this standard of proof in mind, there are only six accused persons, namely, Tapan Das, Goutam Das, Pradip Das, Somesh Das, Mrinal Das and Anil Das identified by two or more eye-witnesses. While Tapan and Goutam could be recognised by PWs 1, 4, 7, 8 corroborated by PW-6 (approver). Somesh was recognised by PW1 and PW-7. Mrinal Das by PW-1 and PW-4 and Anil Das by PW-4 and PW-8, all of them being corroborated by PW-6 (approver). Thus, if PW-6 (approver) is included, there are, at least, three eye-witness, who could identify six offenders including two convicts-appellants.

After we have seen that the standard of proof regarding quantity by number of eyewitnesses is well met in this case, we proceed to appreciate the quality of their evidence. It is to be kept in mind that all the eye-witnesses including the approver were very close to the victim in the place of occurrence and, therefore, had every opportunity to see how things happened. But except PW-6, other eye-witnesses have merely confirmed the presence of the six accused persons in the group of more than 10 offenders; some of whom had dragged down the victim and shot him dead. None of the eye-witnesses except the approver could give

light on the exact role played by the six accused persons who were in the group of more than 10 assailants. Only the approver (PW-6) gave focus s on this aspect saying that he himself had pulled down the victim when the two convicts, Tapan and Goutam, had shot him dead. If the evidence of the eye-witnesses and the approver are taken together to conjointly read and appreciate, what stands firmly established is that the above six accused persons were definitely members of the group of assailants, who came to the bank of the river with intention to eliminate the victim, Tapan Chakraborty.

38. Whether mere presence can attract 34 IPC:-The question, which, now, has been raised is whether mere presence in the group of assailants could be enough to bind them u/s 34 IPC, when, according to the learned Trial Court, factum of conspiracy as disclosed by the approver remains unsubstantiated for want of independent corroborating evidence. We have noted the discussion of the learned Trial Court, on Section 34 IPC, in para 23 of the judgment impugned. The Court held:

In the absence of evidence of sharing the pre-concert amongst the accused persons it is not sufficient to establish the guilt of the accused persons with the aid of Section 34 IPC. According to the learned Trial Court, evidence of PWs-1, 3, 4, 7 and 8 do not establish sharing of common view and direct participation of the 10 accused persons in the crime except the accused Goutam Das, Tapan Das and the approver (PW-6). The learned Trial Court, however, is of the view that the evidence of the approver contains full and correct version of the incident so far as participation of the accused Tapan Das and Goutam Das in the crime is concerned. But the learned Court below has failed to give reason why the other part of the statement of the approver could not be believed.

It is a settled legal position that for taking aid from Section 34 IPC, it is not necessary that the individual act of the accused persons has to be proved by prosecution, though may be, in a given case, difficult to prove the common intention by direct evidence. Common intention has to be inferred from proved facts and circumstances and once there exists common intention, mere presence of the accused persons among the assailants would be enough proof of their participation in the alleged offence.

39. Part played by every individual offender is not necessary for 34 IPC:-Section 34 IPC does not create a substantive offence; it is only a rule of evidence to fix liability on one person for the offence committed by another in the course of a criminal act perpetrated by several persons. This provision intends to meet a case in which it is difficult to distinguish between the acts of individual members of a party, who act in furtherance of a common intention of all or to prove exactly what part was taken by each one of them. In the present case, if we consider the evidence on record independent of what the approver stated, it would be seen that it is not possible to decide from the materials on record what part was played by each of the accused persons exactly. The approver has come forward and given light not only on the part of the conspiracy, which was not in the

knowledge of anyone else except the conspirators, but also on the main act of actual murder. He inculpated himself disclosing that when the boat with the victim and other witnesses reached the shore, he dragged the victim to the ground and then the two convicts-appellants fired at him from close range. But the learned Trial Court did not believe the approver on conspiracy part only because there was no independent corroboration to the same. The learned Trial court has failed to explain why the other part of the evidence that the accused persons named by the approver were found present in the place of occurrence could not be believed for the purpose of invoking Section 34 IPC, particularly, when two or more eyewitnesses corroborated him specifically naming six accused persons including the two convicts-appellants. In *Manik Das and Ors. v. State of Assam* reported in AIR 2007 SCW 3959, the Apex Court has reiterated the legal position, once again, on the application of Section 34 IPC to fasten all the accused persons, whose individual acts cannot be proved on the evidence and materials on record. The observations of the Apex Court, in para 7 and 8 of the said judgment are quoted below:

7-8. Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises u/s 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of moment; but it must necessarily be before the commission of the crime. The true content of the section is that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in *Ashok Kumar Vs. State of Punjab*, the existence of a common intention amongst the participants in a crime is the essential element for application of this section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision.

40. Proof of motive not essential: In a case of murder, it is not necessary for the prosecution to separately prove the motive behind the killing, though, in the case on hand, the approver has disclosed that the assailants were annoyed with the role of the victim, who, as a political leader, had opposed the students' agitation against alleged kidnapping by extremists. The learned Trial Court has, however,

observed that it is apparent from the depositions of the witnesses that there existed political rivalry between the two groups of people. The witnesses were the supporters of one political party, while the accused were of the other. We find it difficult to agree with the learned Trial Court that it is necessary for the prosecution to lead independent witnesses to prove the factum of students agitation and the role of the victim in opposing the same for the purpose of proving common intention of the accused persons in committing the offence. As has been seen above, the law is well settled that common intention has to be inferred from the proved facts and circumstances.

In the present case, the proved facts are that one accused was deployed in the place of meeting, at Shantinagar, for the purpose of giving intimation to other accused persons about the movement of the victim. Another accused was deployed on the shore of the river near Bagan Bazar. When after the meeting, the boat carrying the victim and other eye-witnesses was about to reach Bagan Bazar shore, accused Anil Das, deployed there, had hurriedly left towards Bagan Bazar and within few minute, 10 accused persons rushed to the boat from Bagan Bazar. The occurrence took place immediately thereafter. Thus, common intention can be inferred without difficulty among the accused persons including the six recognised by the eyewitnesses. We have no reason to disbelieve the disclosure made by the approver that the six accused persons, recognised by other eyewitnesses, were among the 13 assailants, who had planned and remained present on the shore of the river to eliminate the victim. Section 34 IPC has, thus, strong application. The facts and circumstances aforementioned, in our considered view, warrant conviction of six accused persons including the two convicts-appellants, namely, Tapan Das, Goutam Das, Pradip Das, Somesh Das, Mrinal Das and Anil Das.

41. Contradiction with previous statement of a witness--the manner: Noticing the wrong way the prosecution witnesses have been confronted during trial with their previous statements recorded during investigation, we take a break to focus on the correct procedure to be followed in a criminal trial. On this important aspect, the ratio laid down by the Apex Court in *Tahsildar Singh and Another Vs. The State of Uttar Pradesh*, still holds the field and must be followed by all concerned.

Before proceeding further to describe the correct path culled out from the above citation, we would briefly see how the witnesses have been confronted with their previous police statements before the trial Court.

Ganesh Kol (PW-2) was in the boat with the victim and others, while crossing the river. He has stated everything about the occurrence of murder except identification of the assailants. He has stated, in examination-in-chief, that he could not identify any of the miscreants. He was declared hostile by the learned Public Prosecutor, who confronted PW 2 with the portion in his police statement, where the witness was claimed to have stated that he could identify Goutam Das, Tapan Das, Pradip Das and Asim Bhattacharjee. The learned Trial Court recorded thus:

Attention of the witness to his previous statement recorded by I/O is drawn and such statement is found there. The said statement is marked Exbt. 2 subject to be proved by I/O.

We take a pause here to say, at the outset, that it is not the function of the presiding officer to draw attention of the witnesses to any part of his statement before police and then record that such statement is found or not found. It is the function of the Public Prosecutor to draw attention of the witness to his statement before police and, then, the Court shall record the answer exactly given by the witness. Only thereafter, the relevant portion should be provisionally marked for identification subject to confirmation by the Investigating Officer. Therefore, in our view, the matter should have been recorded in the following manner:

The learned Public Prosecutor has drawn the attention of the witness to the portion of his police statement, where he is shown to have claimed that he could identify Goutam Das, Tapan Das, Prabir Das and Asim Bhattacharjee; but the witness has denied to have made such statement as is claimed to have been recorded by the investigating officer. The relevant portion, in the police statement of this witness, is provisionally identified subject to confirmation by the Investigating Officer.

If, on his appearance, at the trial, as a witness, the Investigating Officer asserted that the witness, in question, did make the statement put to him, the Court should have, then, taken the statement, in question, as proved and marked the same as an Exhibit. As the case diary can not be handed over to the defence, such statement can be proved by noting down the statement on a piece of paper and marking the same "as proved in original".

42. Confronting hostile witness by prosecution:- Similarly, Satyendra Tanti (PW-9), Ramakanta Paul (PW-10) and Prabir Biswas (PW-12), narrated the entire incident of murder before the learned Trial Court but stated that they could not identify any of the miscreants. They too were confronted with their statements before police in the same manner as had been done in the case of PW 2 and the relevant portion were marked for confirmation by investigating officer. The correct legal procedure, thus, escaped notice of the learned Court and the prosecution.

43. The reason for the eye-witnesses failing to identify all assailants:- We have, however, noticed that there is no confrontation of the witnesses with their previous statements before police by the defence counsel. It is to be observed that even after confrontation by the prosecution, as aforesaid, and by exhibiting relevant portion of the statements before police, the prosecution gained no additional strength as those statements have no evidentiary value. Such cross-examination by way of confrontation has only one purpose, that is, to discredit or impeach the credibility of the witness. It is well settled that statement to police is not admissible in view of the provision in Section 162 of the Criminal Procedure

Code and such statement cannot be used for any purpose except for contradiction strictly in the manner provided in Section 145 of the Evidence Act. The purpose being only to impeach the witness, it is not understood how the prosecution sought to be benefited by declaring its own witnesses hostile, who, had, as a matter of fact, narrated faithfully the incident except the identification part. There are seven eye-witnesses other than the approver (PW-6), none of whom could recognise all the assailants. None of them disclosed specific reason for failing to identify all the miscreants. The reason is simple. When large number of assailants commit a crime all on a sudden, it is most natural that in the flutter of fear and confusion that would definitely follow, a witness can not recognise all the assailants. If, on the other hand, a witness claims to have recognised all the offenders, his version has to be carefully tested for reliance. However, to reiterate once again, no portion of the statement before police of a hostile witness has any evidentiary value and, therefore, cannot advance the prosecution case, it has to stand on the strength derived from other witnesses and materials on record.

44. On use of police statement:- We, now, resume our discussion on the use of police statement. Any police officer making an investigation, under Chapter- XII of the Code, may examine orally any person supposed to be acquainted with the facts and circumstances of the case and may reduce into writing any such statement. This power is given u/s 161 Cr.P.C. Section 162(1) Cr.P.C. provides that such statement shall not be signed by the person making it and shall not be used for any purpose at any inquiry or trial in respect of any offence under investigation save as provided therein. The proviso to the said section, being relevant, is quoted below:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

It would appear from above that the police statement of a witness can be used only to contradict such witness (i) by the accused; (ii) by the prosecution with the permission of the Court; and (iii) in the manner provided by Section 145 of the Evidence Act. It is, thus, clear that such statement cannot be used by the accused or prosecution for the purpose of corroboration and cannot be treated as substantive evidence in favour of or against either the accused or the prosecution.

45. Application of Section 145 & 155 of Evidence Act:- The manner of using such statement for the purpose of contradiction only must be in terms of Section 145 of the Evidence Act, which reads as follows:

145. Cross-examination as to previous statements in writing.- A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

46. Though Section 155 of the Evidence Act provides in Clause (3) that the credit of a witness can be impeached by proof of his former statement which is inconsistent with any part of his evidence before the Court, the same is controlled by Section 145 which provides the manner of contradicting such a witness. It is well settled that if it is intended to contradict a witness by his previous statement in writing, his attention must, before the writing is proved, be drawn to that part of it which are to be used for the purpose of contradicting him. The proper procedure would, therefore, be--(i) to ask a witness first whether he made such a statement before the police officer; (ii) if the witness answers in the affirmative, the previous police statement, in writing, need not be proved; (iii) the cross examiner may, if he so chooses, leave it to the party, who called the witness to have the discrepancy, if any, explained in course of reexamination; (iv) if, on the other hand, the witness denies to have made such a previous statement attributed to him or states that he does not remember having made any such statement, and it is intended to contradict him with reference to his previous statement, the cross examiner must read out to the witness the relevant portion or portions of the record which are alleged to be contrary to his statement in Court and give him an opportunity to reconcile the same, if he can; (v) the best way of putting a statement is to put it in the actual words in which it stands recorded within quotation marks. A Division Bench of this Court, as far back as in 1963, had laid down, in the State v. Md. Misir Ali and Ors. AIR 1963 Ass 151 the procedure for putting contradiction to a witness and the manner of proving the same. to Md. Misir Ali (supra), the Division Bench, speaking through C.K. Nayudu, C.J., had observed as follows:

We also regret to note that the procedure to be followed in the case of proving the contradictions appearing in the statements made by prosecution witnesses to the police during investigation is not being followed by subordinate Courts, as well as by the counsel appearing in criminal cases. We had occasion to point out the correct procedure more than once and it would be worth while restating it. If it is intended by an accused to contradict the evidence given by a prosecution witness at the trial, with a statement made by him before the police during the investigation, the correct thing to do is to draw the attention of the witness to that part of the contradictory statement, which he made before the police, and question him whether he did in fact make that statement. If the witness admits having made the particular statement to the police, that admission will go into evidence and will be recorded as part of the evidence of the witness and can be relied on by the accused as establishing the contradiction. If, on the other hand, the witness denies having made such a statement before the police, the

particular portion of the statement recorded u/s 162. Criminal Procedure Code should be provisionally marked for identification, and when the investigating officer who had actually recorded the statement in question comes into the witness box, he should be questioned as to whether that particular statement had been made to him during the investigation, by the particular witness, and obviously after refreshing his memory from the Police Case Diary the investigating officer would make his answer in the affirmative. The answer of the investigating officer would prove the statement which is then exhibited in the case and will go into evidence, and may, therefore, be relied on as the correct procedure to be followed, which would be in conformity with Section 145 of the Evidence Act.

47. We fully agree with the above observations made in *Md. Misir Ali* (supra) and reiterate the same as the correct procedure for proving of contradictions.

48. Ratio laid down by Apex Court:- The Supreme Court, in *Tahsildar Singh* (supra), had the occasion, as back as in 1959, to elaborately deal with almost all the relevant questions as regards the use of a police statement, while contradicting a witness. The ratio laid down in *Tahsildar Singh* (supra) has since been consistently followed in all later decisions. As it is well settled that a statement u/s 161 of the Criminal Procedure Code can be used for the purpose of contradiction only, it is to be understood first as to what amounts to contradiction before allowing the defence or prosecution to use a police statement of a witness for that purpose. If a witness deposes in Court that certain fact existed but had stated u/s 161 of the Code either that the fact had not existed or that the reverse irreconcilable fact had existed, it is a case of conflict between the two depositions. In such a situation, the later can be used to contradict the former. But if he had not stated to the police any thing about that fact, which he states in his deposition before Court, there is no conflict and so the police statement cannot be used to contradict him except in some cases, whether an omission, in the statement u/s 161, may amount to contradiction of the deposition in the Court. In *Tahsildar Singh* (supra), the majority view of the Apex Court, on the question of contradiction (not being omission), has been recorded in Para 26, which reads as follows:

26. From the foregoing discussion the following propositions emerge: (1) A statement in writing made by a witness before a police officer in the course of investigation can be used only to contradict his statement in the witness box and for no other purpose; (2) statements not reduced to writing by the police officer cannot be used for contradiction; (3) though a particular statement is not expressly recorded, a statement that can be deemed to be part of that expressly recorded can be used for contradiction, not because it is an omission strictly so-called but because it is deemed to form part of the recorded statement; (4) such a fiction is permissible by construction only in the following three cases: (i) when a recital is necessarily implied from the recital or recitals found in the statement: illustration: in the recorded statement before the police the witness states that he saw A stabbing B at a particular point of time, but in the witness box he says

that he saw A and C stabbing B at the same point of time; in the statement before the police the word "only" can be implied i.e., the witness saw A only can be implied i.e. the witness saw A only stabbing B; (ii) a negative aspect of a positive recital in a statement; illustration; in the recorded statement before the police the witness says that a dark man stabbed B, but in the witness box he says that a fair man stabbed B; the earlier statement must be deemed to contain the recital not only that the culprit was a dark complexioned man but also that he was not of fair complexion; and (iii) when the statement before the police and that before the Court cannot stand together; illustration: the witness says in the recorded statement before the police that A after stabbing B ran away by a northern lane, but in the Court he says that immediately after stabbing he ran away towards the southern lane; as he could not have run away immediately after the stabbing i.e. at the same point of time, towards the northern lane as well as towards the southern lane, if one statement is true, the other must necessarily be false.

We conclude our discussion on this issue by saying that in the present case, the prosecution has not properly and legally confronted its own witnesses with their previous statements after declaring them hostile and the learned Trial Court failed to follow the law laid down by the Apex Court as discussed above.

49. Conclusions;- In our discussion, on merit of the case, before we took a break from para 41, we have seen that in the facts and circumstances of the present case, entire statement of the approver including the conspiracy part inspires confidence as it derives support from the account of the occurrence given by the eye-witnesses, particularly, regarding deployment of some of the offenders for reporting to others about movement of the victim. We see no reason not to accept his statement as full and true disclosure of the entire episode and we find strong corroboration of his evidence from the eye-witnesses. Situated thus, the conclusion, we arrive at, is that the six accused persons including the two convicts-appellants, namely, Tapan Das, Goutam Das, Pradip Das, Somesh Das, Mrinal Das and Anil Das are liable to be convicted u/s 302 read with Section 34 of the Indian Penal Code for committing the murder. We, therefore, affirm the judgment impugned to the extent it convicts Tapan Das and Goutam Das and so dismiss the Criminal Appeal No. 47 of 2005 filed by them. We, however, allow partly the Criminal Appeal No. 90 of 2005 and convict four accused, namely, Mrinal Das, Pradip Das, Somesh Das and Anil Das u/s 302 read with Section 34 of the Indian Penal Code. We sentence them with the minimum punishment of imprisonment for life and fine of Rs. 3000/- each; in default, to suffer a further term of simple imprisonment for 3(three) months. The order of acquittal of these four accused persons is, consequently, set aside and quashed.

50. Criminal Appeal No. 47 of 2005 is dismissed and Criminal Appeal No. 90 of 2005 is partly allowed to the extent aforementioned.

51. Send down the case records. The convicts, if on bail, shall surrender before the trial Court within 15 days from today failing which necessary action as per

law shall follow.