

(2013) 12 CHH CK 0016

In the Chhattisgarh High Court

Case No : Criminal Appeal No's. 143 and 157 of 2008

Wasim Khan and Others

APPELLANT

Vs

State of Chhattisgarh

RESPONDENT

Date of Decision : 13-12-2013

Acts Referred:

Citation : (2014) 1 CG.L.R.W. 1

Hon'ble Judges : Yatindra Singh, C.J; Manindra Mohan Shrivastava, J

Bench : Division Bench

Advocate : Surendra Singh, Mr. Gautam Khetrapal, Mr. A.C. Sahu, Mr. Vijay Sahu in Criminal Appeal No. 143 of 2008, Mr. Raman Patel and Mr. Siddharth Rai in Criminal Appeal No. 157 of 2008, for the Appellant; Kishore Bhaduri, A.A.G. and Shri R.R. Sinha, for the Respondent

Judgement

Manindra Mohan Shrivastava, J.—These two criminal appeals are directed against the impugned judgment of conviction and order of sentence dated 7th December, 2007 passed by learned Sessions Judge, District-Jagdalpur in S.T. No. 311/05 and S.T. No. 536/05, whereby and whereunder, the appellants have been held guilty of commission of offence alleged against them and sentenced as below:

Story of the prosecution and factual backdrop giving rise to these two appeals:

On a report lodged by Mateen Khan (P.W. 1) in Police Station-Kanker on 22-4-2005 at 20:30 hrs., FIR in Ex. P-1 was registered under Crime No. 164/05, registering offence u/s 302/34 and 25 & 27 of the Arms Act against two unknown motorcyclists. In the FIR, Mateen Khan stated that on 22-4-2005, he along with Ravi (the deceased) was going to farm house of Ravi at Singarbath. At about 8:00 p.m., on the main road NH-43 near Garhbichhwari turning, a motorcycle approached from behind and he heard two gunshot fire and applied brakes. Ravi stated that he has sustained gunshot injury and started falling. By that time, the motorcyclists, two in number, overtook and he saw the person sitting behind holding a revolver like weapon in his hand and turning his face towards him. When he hurled abuses and gave a call, motorcycle turned and started

approaching towards him. Out of fear, he started coming back towards township and at that time, in the light of a truck coming from opposite direction, he looked at the spot, where Ravi was lying and he also saw those persons in the motorcycle and stated that he would identify them. He stated that those two persons murdered Ravi by gunshot injury. Thereafter, he went to inform the police and Ravi was taken to the hospital and thereafter he lodged a report. After recording FIR, a mere intimation in Ex. P-2 was also recorded. Inquest over dead body was prepared in the hospital in the presence of witnesses vide Ex. P-3. Spot map in Ex. P-4 was prepared. Post mortem of the dead body was conducted by a team of doctors consisting of Dr. Pradeep Cladius (P.W. 25), Dr. R.C. Thakur (P.W. 32) and Dr. V.K. Shukla and report in Ex. P-44 was prepared. Upon examination of internal and external injuries, it was opined by the team of doctors that the death occurred due to severe hemorrhagic shock along with injury to vital organs (lungs, liver heart) caused by gunshot injury and death was homicidal in nature. Duration of death was stated to be within 12 hrs of autopsy. From the spot, blood stained soil and ordinary soil and an empty cartridge was recovered and seized in Ex. P-5. Wearing apparels of the deceased, a bullet extracted from the dead body, sample skin of bullet burn injury brought to the police station by constable Someshwar (R-323) from the hospital were seized by the Investigating Officer-Pramila Mandavi (P.W. 45) vide Ex. P-24.

2. During investigation, police suspected murder of Ravi under a conspiracy hatched against him involving the appellants.

3. On 27-4-2005, a mobile set Nokia-1100 with SIM card No. 98263-61776 was seized from appellant No. 1 Wasim Khan vide Ex. P-13.

On 28-4-2005, a mobile set Nokia-7260 with SIM card No. 94252-59788 was seized from appellant No. 3 Md. Javed in Ex. P-14.

Details of received calls, dialed calls, missed calls and contact number registered in the mobile seized from Wasim was recorded in panchnama in Ex. P-26. Details of received calls, dialed calls, missed calls and contact number registered in the mobile seized from Md. Javed were recorded in panchnama in Ex. P-25.

On 28-4-2005, a diary was recovered and seized from appellant No. 3-Raju @ Tribhuvan Gosai vide Ex. P-15.

On 28-4-2005, Wasim Khan and Mohd. Javed were arrested.

On 28-4-2005, memorandum statements of Raju @ Tribhuvan Gosai and Wasim Khan were recorded in Ex. P-16 and P-17 respectively and on their disclosure, cash amount was recovered from Raju @ Tribhuvan Gosai in Ex. P-21 and from Wasim in Ex. P-22.

On 3-5-2005, appellant-Pamma @ Paramjeet was interrogated. His memorandum statement in Ex. P-27 was recorded and on his disclosure, a RIM LG set Model No. 2030, No. 9300484455 was recovered and seized in Ex. P-28. Cash was recovered and seized from his house in Ex. P-29. Appellant Pamma's

Accent Car was also seized vide Ex. P-30 on 4-5-2005. On 5-5-2005, three SIM cards one of BSNL and two of Idea of different numbers were recovered on the memorandum from the house of Pamma and seized vide Ex. P-18.

Another accused Rajesh was taken into custody on 3-7-2005 and on his memorandum (Ex. P-45), a Pulsar motorcycle, certificate, delivery challan, manual book and a Nokia mobile set model No. 3315 with SIM card No. 98261-20771 was seized vide Ex. P-46.

On 17-9-2005, Mangal was taken into custody and on his memorandum statement (Ex. P-34), a pistol, a mobile set, two live cartridges were recovered from the courtyard of his house. The call details of the mobile sets and SIM No. were also obtained during investigation from different mobile phone service provider company (BSNL, Idea etc.)

4. The wearing apparels, dry skin scratched from the injury of the deceased, blood stained soil were sent for chemical examination to State FSL, where from report dated 23-7-2005 in Ex. P-167 and Ex. P-168 was received. Firearm (pistol), live cartridge and bullet were also sent to Central FSL, wherefrom a report dated 22-11-2005 in Ex. P-169 was received. During course of investigation, police recorded diary statements of 51 witnesses u/s 161 of Cr.P.C. Some of the witnesses were produced before the Magistrate whose statements u/s 164 of the Cr.P.C. were also recorded by the Magistrate and prosecution also collected as many as 194 documents. After completion of investigation, charge sheet was filed in the Court of Chief Judicial Magistrate, North Bastar, Kanker against all the appellants alleging commission of offence u/s 302/34, 120B of the IPC as also offence under Sections 25 & 27 of the Arms Act, who in turn, committed the case for trial to the Court of Sessions, North Bastar, Kanker. Later on, under orders of this Court, the trial of the case was transferred to Sessions Judge, Bastar, Jagdalpur.

5. In the charge sheet, the case made out by the prosecution was that on 10-2-2005, shop of Raja Parts belonging to one Haji Mohammad, brother of Haji Gulam Bhai was searched upon receipt of information regarding illegal storage of explosive, but nothing was found. Thereafter, under the leadership of Haji Gulam Bhai, a group of Muslim community staged rally of protest against administration demanding action for lodging false report. Collector recommended to S.P. for action against Mateen. Mateen was under patronage of deceased Ravi. Therefore, Ravi along with his supporters staged protest on national highway in front of police station-Kanker and at that time, group led by Gulam Bhai clashed, where appellant-Javed Khan was also present. Ravi hurled abuses on Gulam and publicly humiliated and there was altercation between appellant Javed and deceased Ravi. Javed felt highly insulted and, therefore, in order to take revenge of insult of his father, hatched conspiracy to murder Ravi and contacted Wasim and Raju @ Tribhuvan Gosai persons of criminal antecedent. Wasim and Raju contacted another local resident Manoj Sahu to become part of conspiracy, which was refused by Manoj, whereupon, Tribhuvan contacted the appellant Pamma @

Paramjeet, who in turn contacted shooter Mangal and a contract of killing for Rs. 2.5 lacs with other expenses was settled. Under that conspiracy, Mangal, Pamma, Tribhuwan, Rajesh reached Raipur on various occasions, planned murder. Motorcycle of Rajesh was used by Mangal. Conspiracy to murder Ravi was finalized in the house of Tulsiram, which place was arranged by Wasim from the then tenant Mujib Khan. On 22-4-2005, the appellant Mangal Singh along with Govind (since deceased) chased Ravi, using motorcycle of Rajesh Arora and at an appropriate time and opportunity fired gunshot on Ravi, who was going to his farm house along with Mateen (P.W. 1) and then absconded. It is relevant to note that while appellant of Cr. A. No. 143/08 were tried in S.T. No. 311/05, appellant Mangal in Cr. A. No. 157/08 was tried in S.T. No. 536/05.

6. On the basis of material contained in the charge sheet, learned trial Court framed charges against all the appellants of hatching conspiracy and committing murder of Ravi and thereby committing offence under Sections 302/34, 120B/302 of IPC. Appellants in Cr. A. No. 143/08 were held guilty of commission of offence under Sections 302/34 and 120B/302 of the IPC for committing murder of Ravi under conspiracy with the other accused, whereas appellant in Cr. A. No. 157/08 was held guilty of commission of offence u/s 302 and 120B/302 of the IPC. He was also charged for commission of offence under Sections 25 & 27 of the Arms Act. In order to prove its case, the prosecution examined as many as 51 witnesses and relied upon 194 documents. Each of the Appellants were examined u/s 313 of the Cr.P.C. in respect of incriminating circumstances appearing against them in the evidence led by the prosecution. They denied having committed offence. Appellant-Mangal in support of his defence examined two witnesses namely Mohd. Yunus Khan as D.W. 1 and Ashish Kumar Soni as D.W. 2. Relying upon the evidence led by the prosecution and proved conspiracy, learned trial Court held the appellants guilty of commission of offence alleged against them and sentenced them as described above.

Submission on behalf of the appellants in Cr. A. No. 143/08

7. Shri Surendra Singh, learned senior counsel for the appellants argued in extenso laying challenge to the conviction of six appellants who have been convicted with the aid of Section 120B of the IPC holding conspiracy proved. It has been contended that the prosecution has failed to prove conspiracy by leading clinching and reliable evidence. Even according to the prosecution, the appellants No. 1 to 6 were not present at the scene of murder. Therefore, their conviction with the aid of Section 34 is illegal. The circumstantial evidence led by the prosecution to prove conspiracy, have failed to prove that there was a strong motive sufficient for the appellant Mohd. Javed to get the deceased murdered. The evidence led by the prosecution only establishes that there was some altercation and nothing more happened. Such small and trivial incident by itself, without any other strong motive, is not sufficient to draw a reasonable inference that Mohd. Javed, son of Haji Gulam Bhai would go to such an extent to hatch the conspiracy along with other appellants, hire a contract killer-Mangal to get

Ravi murdered. The circumstance that Mohd. Javed had motive to eliminate the deceased is a weak piece of evidence and insufficient even for the purpose of making a charge. It is next contended that so called confession of the accused made to the police officer during investigation and discovery statements recorded u/s 27 of the Evidence Act are inadmissible in the evidence as they are hit by Section 25 of the Evidence Act and Section 162 of the Cr.P.C. It is further argued that the evidence of Shiv Bhan Singh (P.W. 2) is wholly improbable, concocted and, therefore, liable to be rejected. He being resident of a distant village, there is no reason why he would leave food-joint situated nearby his residence and go for dinner to a distant dhaba. This is most unlikely that the two accused namely Wasim and Raju Gosai would openly converse regarding conspiracy of hatching murder of deceased before a stranger. Owners and waiters of the said dhaba have not been examined to corroborate statement of Shivbhan. Moreover, his conduct of not giving any report of the matter to the police station immediately renders his testimony liable to be disbelieved. It is also submitted that as the conspiracy was no longer on foot, the evidence of Shivbhan Singh regarding the conversation about conspiracy is inadmissible u/s 10 of the Evidence Act. Moreover, there is no material to establish prima facie evidence of conspiracy. Learned senior counsel further argued that the evidence of Madan Mohan (P.W. 3) that Javed had made a telephone call from public booth of Manoj on another phone (mobile) No. 98263-71776 does not by itself prove that there was a conversation between Javed and Wasim. The evidence of conversation that Javed was giving an assurance for payment is incapable of any definite conclusion as to whom such assurance was given. Even this fact was deposed only after the witness was declared hostile. A person of ordinary prudence having a mobile phone and a land line, is not expected to come to a PCO and then not to make any call. Therefore, there is no reliable evidence of Javed conversing with the appellant-Wasim and giving him an assurance to make payment for murder of Ravi under so called conspiracy. Learned counsel for the appellant next contended that though the prosecution has come out with the case that the appellants No. 1 & 2 first met Manoj Sahu (P.W. 15) for contract killing of Ravi, it is not supported as Manoj has been declared hostile. Statement u/s 164 of the Cr.P.C. recorded before the Magistrate is not by itself substantive piece of evidence but could be used only either to contradict or to corroborate evidence given in the Court. Learned counsel then argued that the circumstantial evidence of mobile calls made to each other is an innocuous circumstances. The details of the conversation have not been heard by anybody nor is there any evidence led by the prosecution to prove contents and nature of those telephone calls. Therefore, such an evidence, if any, by itself is not sufficient to prove the existence of conspiracy, but remains a mere conjecture and speculation. In support of his submissions, learned counsel for the appellants has relied upon several authorities.

Submission on behalf of appellant in Cr. A. No. 157/08

8. Shri Raman Patel and Shri Siddharth Rai, counsel for the appellant Mangal

Singh submitted that the prosecution has failed to prove beyond reasonable doubt, identification of the appellant Mangal by Mateen (P.W. 1). It has been argued that the evidence of Mateen Khan (P.W. 1) itself makes out that incident happened at about 8:00 in the night on a main road while Mateen was going on motorcycle with Ravi. According to Mateen, shooter sitting in another motorcycle which took over, fired gunshot. Thus, even according to this witness, he claims to have seen the murder in a flash of moment. The other evidence that the shooter came back and his face was seen in the light of truck is an afterthought story. Moreover, while lodging FIR in the police station, Mateen did not say regarding appearance of murderer from which he could identify. The identification was done by Mateen Khan (P.W. 1) after a period of more than 5 months. Therefore, the identification itself loses its evidentiary value and becomes highly doubtful. There is contradiction in the identification made in the T.I. parade and what has been stated in the Court. The conduct of the witnesses itself is not natural as he did not inform the incident to the wife/family members of the deceased. Deceased-Ravi was a person of criminal antecedent and the witness-Mateen himself is a person of criminal background and a convict. In the circumstance, the witnesses, who himself is a politically aspirant, killed Ravi. It is further contended that there are serious contradictions with regard to the place where from recovery of pistol, two live cartridges and mobile set is said to be made on the disclosure statements of appellant-Mangal. The story that all these articles kept in bag were buried under the ground itself is highly improbable. Those articles were not kept inside, but were found from an open place. The testimony of seizure witnesses is not reliable and contradictory. Learned counsel for appellant-Mangal further contended that the evidence of ballistic expert S.S. Murthy (P.W. 46), Sr. Scientific Officer does not conclusively prove that bullet recovered from the body of the deceased and empty cartridges recovered from the place of incident was fired from the pistol alleged to be recovered on the disclosure statement given by Mangal. In support of his submission, reliance has been placed on the several authorities.

Submissions of State counsel

9. Shri Kishore Bhaduri, learned Additional Advocate General has supported the judgment of conviction and order of sentence of the appellants in two criminal appeals by submitting that in so far as the appellant Mangal is concerned, his involvement in the incident is proved by truthful and reliable evidence of Mateen (P.W. 1), who has identified him in valid and reliable T.I. parade conducted in the presence of Tahsildar B.R. Jurri (P.W. 13). Mateen (P.W. 1) has clearly stated that he saw the face of the murderer in the light of truck when he was going back and also when the motorcycle was crossing through and gunshot fired and thereafter also in the light of the truck when the murderer came back in his motorcycle. On the dock also, he has identified the appellant Mangal. The recovery of pistol and two live cartridges on the disclosure statement given by Mangal has been fully proved by the prosecution and there is nothing to disbelieve their statement. The ballistic expert S.S. Murthy (P.W. 46) has clearly deposed that the bullet

recovered from the body of the deceased was fired by the pistol recovered from the house of Mangal and has clearly deposed that empty bullet and cartridges were fired. He has proved his report in Ex. P-169. Learned counsel for the State further argued that the prosecution has led reliable evidence establishing and proving circumstances from which it can be safely inferred that a conspiracy was hatched by Javed because his father, a reputed personality of the township, was publicly abused and humiliated by deceased Ravi. Thereafter, he contracted Javed and Tribhuwan Gosai @ Raju Gosai to murder Ravi. Wasim and Raju Gosai, in turn, contacted other accused namely Pamma and, thereafter, Pamma hired contact killer Mangal and in this conspiracy, other accused Rajesh provided his motorcycle and Raju Dharikar @ Khanjar was also involved in the conspiracy. The evidence regarding conversation proved by Shiv Bhan Singh (P.W. 2), conversation between Javed and Wasim regarding payment of money under contact killing proved by Madan Mohan Singh (P.W. 3), call details proved by prosecution by leading cogent and reliable evidence, clearly establish that all the accused were frequently talking to each other before the incident from their respective mobile sets using different SIM numbers. Learned State counsel further argued that the evidence led by the prosecution has not only proved that the accused had very frequency conversation amongst themselves, those calls made from different places involving Kanker and Raipur, but it has also been proved that the appellants/conspirator exchanged mobile SIM as also mobile sets, wherein Javed engaged Wasim and Tribhuwan @ Raju, who, in turn, contacted Pamma and other accused. Thereafter, Mangal, the contract killer was engaged, who came to Kanker to closely watch the moments of Ravi and finding an appropriate time, translated conspiracy into action by shoot down Ravi. The circumstances are incapable of any other reasonable explanation compatible with innocence of appellant. He submits that as the conspiracy is always held in secrecy, the conviction of the appellant on the basis of number of circumstantial evidence of conspiracy is in accordance with law and does not warrant any interference.

Homicidal death of Ravi

10. FIR (Ex. P-1) has been proved by the eye witness of the incident and informant Mateen Khan (P.W. 1). He has deposed in para-2 of his evidence that while he was going along with Ravi in his motorcycle, which he was driving and Ravi sitting behind, a motorcycle came from behind, in which two persons were sitting and they fired gunshot on Ravi, whereafter Ravi fell down. He has stated that Ravi was taken to the hospital with the help of others and then he went to police station to lodge FIR and has proved his signature on Ex. P-1, FIR, and has stated that he lodged his report in the police station. Pramila Mandavi (P.W. 45), the Investigating Officer, has clearly deposed that on 22-4-2005 at 8:30 in the night Mateen reported regarding murder of Ravi in the police station, on which she had recorded FIR in Ex. P-1 and Pramila (P.W. 2) has also proved merg intimation in Ex. P-2. Both Mateen Khan (P.W. 1) and Pramila (P.W. 45) have proved their signatures in Ex. P-2, the merg intimation. Mateen is also witness to

inquest prepared in Ex. P-3 in which he has proved his signature. Pramila (P.W. 45) has deposed that she had prepared panchnama of deceased-Ravi on 23-4-2005 in the District Hospital, Kanker who died due to gunshot, after giving notices in Ex. P-157 to the witnesses. She has also proved inquest. The inquest report (Ex. P-3) records that blood was oozing out from the mouth of the deceased. There were seen hole like injuries. It was on shoulder which was bleeding. There was one hole injury on right shoulder, which was also bleeding and in all, three holes were found in the body of the deceased.

11. The aforesaid evidence of lodging of report regarding death due to gunshot injury, merg intimation, panchnama proved by the aforesaid two witnesses has not been impeached in their cross-examination.

12. Post mortem report in Ex. P-44 prepared by a team of doctors has been proved by Dr. Pradeep Cladius and Dr. R.C. Thakur, who along with Dr. V.K. Shukla conducted and authored the post mortem report. Dr. Pradeep Cladius (P.W. 25) has deposed that upon examination of the dead body, following injuries were found:

He has further deposed that the aforesaid injuries were antemortem and caused by gunshot. As per his statement, as bullet was also found inside the body which was extracted through post mortem, sealed and handed over to constable Devram Bhaskar No. 423, Police Station-Kanker. In para-14, he has clearly stated that the cause of death was due to severe hemorrhage shock, excessive bleeding on account of injuries in the lungs, heart and liver caused by gunshot injuries and the death was homicidal and the death taken place 12 hrs. before post mortem. He has proved his signature on the post mortem. Doctor has been subjected to a detailed cross-examination, but nothing has been elicited to doubt correctness of the post mortem report, injuries" nature and extent thereof and the cause of death. Moreover, the evidence that the injuries were gunshot injury has also not been controverted in the cross-examination. Dr. R.C. Thakur (P.W. 32) has supported the evidence of Dr. Pradeep Cladius (P.W. 25) that he along with Dr. V.K. Shukla had conducted post mortem and upon examination of injuries, a detailed post mortem report (Ex. P-44) was prepared and signed by all of them. He has proved his signature. He has clearly stated that according to their opinion, the cause of death was excessive bleeding and shock on account of gunshot injury which was homicidal. His evidence on this aspect could not be impeached despite detailed cross-examination.

13. Therefore, from the aforesaid evidence, it is proved that Ravi died homicidal death due to gunshot injury.

Appellant/accused Mangal is guilty of murder

14. The conviction of all the accused is based on finding of conspiracy hatched by appellants to murder Ravi in execution of which Mangal Singh traced and chased Ravi and fired gunshot on him at appropriate time when Ravi was going to his farm house along with Mateen (P.W. 1). Along with Mangal, all other accused

have been convicted being co-conspirators. Therefore, before examining the legality and validity of conviction of six appellants namely Wasim Khan, Raju alias Tribhuvan Gosai, Mohd. Javed, Pamma alias Paramjit, Raju Dharikar alias Raju Khanjar and Rajesh Arora alias Golu, we shall first examine whether the conviction of Mangal Singh is legally sustainable in law.

15. Mateen Khan (P.W. 1), who is the informant and author of FIR has stated in his evidence that on 22-4-2005, he was called by one Prabhat Chopda at about 8:00 in the evening that Ravi is waiting in the bus stand and he is to be dropped in his farm house. Thereafter, he went to the bus stand, where he met Ravi and after some time he along with Ravi proceeded to farm house situated at Singarbhat. He has further deposed that when at about 8:00 p.m. they reached near Garhbichwari turning and proceeded little further, a motorcycle came from behind in which two persons were sitting and they fired two gunshots on Ravi and thereafter took a march over them. In the light of the motorcycle, he saw them. At this time, despite his attempt to hold, Ravi fell down and motorcycle was also switched off. He again started his motorcycle and saw the shooter in the light and abused. At that time, the motorcycle with shooters, which had gone ahead, again turned back and then he again saw the shooters who were coming towards him. Thereafter, he turned his motorcycle towards Kanker. Shooters approached up to the place where Ravi was lying on the road and saw him in the light. At that time, he was looking on them from some distance. In the light of a truck which was going from Kanker to Keshkal, he again saw the faces of those two motorcyclists. He has further deposed that while returning, he sought help and then saw that those motorcyclist (shooter) went towards Keshkal. In para 5 of his evidence, this witness has identified Mangal on the dock stating that he is the person who had fired gunshot on Ravi while sitting behind in the motorcycle. In para-13, he has stated that he was taken to Bhilai to identify Govind and he has identified dead body of Govind Vishwakarma in respect of which a panchnama in Ex. P-8 was prepared on which he proved his signature also. This witness has also stated that in Tahsil Office, Tahsildar got T.I. parade conducted in which appellant was made to stand along with 5 to 6 persons and he had identified appellant-Mangal from those who were mixed with him in the identification parade stating that he is the person who had fired gunshot on Ravi. He has proved his signature on identification panchnama Ex. P-9. This witness has been subjected to detailed cross-examination. On the evidence regarding this witness going along with Ravi in the motorcycle towards Ravi's farm house at Singarbhat, seeing the faces of shooters and motorcyclists in the light, firing of gunshot again seeing the faces of shooters, nothing could be elicited in his cross-examination to bring out any material contradiction and omission. In para-35 of his cross-examination also, he has stated regarding the incident. In para 36, he has stated that he informed the police that he has identified the shooters. Therefore, the un-controverted evidence of this witness on this particular aspect seeing the faces of shooters on motorcycle proves that the appellant had seen the shooters four times during the incident, first when after

firing gunshot, the shooters-motorcyclists marched ahead of this witness; second, when he again started his motorcycle he saw the shooters on motorcycle in the light, third when after abusing, the shooters/motorcyclist turned back and when they approached towards witness and fourth, in the light of the truck which happened to pass through the place of incident. In the cross-examination, this witness has further stated that on the date of incident itself he had lodged FIR in the police station and during that period, he came to know that Ravi died in the hospital, therefore, this fact was stated by him and, thereafter, his diary statement was also recorded in the police station on that very date. The clinching statement of this witness with regard to manner in which and the circumstances in which, he witnessed the incident and saw appellant Mangal Singh and the motorcyclist, has remained un-controverted either by giving suggestion that it was not possible to identify the shooters either due to darkness or absence of light or on account of they being on running motorcycle.

16. Mateen Khan (P.W. 1) also deposed that he had gone to Tahsil office. In para-50 of his cross-examination, Mateen Khan stated that he does not know when and wherefrom Mangal Singh was brought to Ranker and he does not know when Mangal was brought in Tahsil office. He has denied suggestion that he was informed by the police that Mangal had been brought to police station and he may come and identify in the police station or that Mangal was shown to him in the police station and stated that he is to identify this person. In para-51, he has further stated that he reached Tahsil office at 12:00 to 12:30 noon and has denied that identification was held outside. He has stated that identification had taken place inside a room. Identification parade was conducted in the Court of Tahsildar. It was further deposed that he does not know wherefrom persons were brought and they were standing in a line. He has denied suggestion that Mangal was made to stand separately. He has further denied suggestion that persons mixed up with Mangal were already known to him. Suggestion that no identification parade was conducted has been specifically denied. In para-52, he clearly deposed that he identified Mangal as he had seen Mangal shooting the deceased. Tahsildar, B.R. Jurri (P.W. 43) in para-2 of his testimony has deposed that on 19-9-2005, he had conducted. T.I. Parade of Mangal Singh. At that time, five persons with similar appearance were mixed with him and Mateen was asked to identify. Mateen Khan, by putting his hand on the head of Mangal had identified stating that Mangal had fired gunshot on the deceased. Panchnama of identification proceedings (Ex. P-9) in which accused Mangal Singh was identified has been proved by both Mateen Khan (P.W. 1) and B.R. Jurri, Tahsildar (P.W. 43). On the point of identification in the T.I. parade both Mateen Khan (P.W. 1) and B.R. Jurri, Tahsildar (P.W. 43) have been subjected to detailed cross-examination, but except certain minor contradictions, nothing could be elicited to either dispute the factum of test identification or any irregularity in the test identification, much less any probability that even before T.I. parade Mangal was shown to Mateen or that during identification, Mangal was made to stand separately. Use of whitener in T.I. proceedings (Ex. P. 55) more relates to

identification of Pamma alias Paramjeet by one Mujib and it does not affect identification of Mangal by Mateen Khan (P.W. 1). Nothing has come on record either in the cross-examination of these two witnesses or any other evidence led by the defence to raise a doubt that persons who were mixed with Mangal Singh were already known to Mateen Khan (P.W. 1). T.I. Parade was conducted in the presence of responsible government officer and in the absence if there being any serious contradiction in the statement of Mateen Khan (P.W. 1) and B.R. Jurri (P.W. 43) with regard to the conduct of T.I. parade. T.I. parade corroborates dock identification of the appellant Mangal by Mateen as the person who had fired gunshot on the deceased while sitting in the motorcycle. It is relevant to note that Mangal was arrested on 15-9-2005 and thereafter he was brought to Kanker and T.I. parade was conducted at the first available brought opportunity on 19-9-2005.

17. Veracity of identification of Mangal by Mateen Khan (P.W. 1) has been vehemently assailed mainly on the ground that though the date of incident was 22-4-2005, Mangal was put to identification by Mateen Khan on 19-9-2005 i.e. after almost 4 months. Learned counsel appearing for Mangal placed heavy reliance on the decision of the Supreme Court in the case of Musheer Khan @ Badshah Khan and Another Vs. State of Madhya Pradesh,

18. There can be no quarrel with the well settled legal proposition that T.I. parade is inherently weak in character and is meant for helping investigating agency with the assurance that their investigation was proceeding on right lines. Nevertheless, such T.I. parade can be used for corroboration. What weight is to be attached thereto is a matter to be considered for the Court in the light of the facts and circumstances of a particular case and no straight jacket formula can be applied to categorize cases where test identification must necessarily be rejected or accepted. The aforesaid principle has been reiterated by the Supreme Court in the case of Musheer Khan (supra). In the case of Musheer Khan, the T.I. parade was disbelieved mainly for the reason that the presence of concerned witness at the place of occurrence itself was doubtful, he had extremely limited opportunity of seeing the hired criminals who were not local and unknown to him. T.I. parade was held after a long gap, accused to be identified was kept in open place custody in the intervening period, there were discrepancies discernible in his identification and also vital contradiction between the identifier identifying the witness and one who conducted T.I. Parade. There was no explanation for T.I. parade conducted after more than a month of the arrest. Thus, taking into consideration host of circumstances, one of which being delay of several months in T.I. Parade that in that particular case, T.I. parade was disbelieved. However, in the present case, except a gap of about 4 months, other circumstances considered in the case of Musheer to disbelieve his test identification are not present. The presence of Mateen Khan (P.W. 1) could not be doubted. Uncontroverted evidence is that during short time, Mateen had seen the shooter, at least for times and it cannot be said that only once, in a flash of moment, he could only get the glimpse of the shooter. In the present case, T.I.

parade was conducted within 3 days of arrest and it is not a case where after arrest, the accused was put to identification after more than one month, nor is there any material to show that the accused was kept in open police custody in the intervening period. It cannot be said as a proposition of law that where identification conducted after a lapse of period of about 4 months, the identification has to be necessarily disbelieved.

19. The veracity and credibility of the evidence of Mateen Khan (P.W. 1) is sought to be impeached on the submission inter alia that the conduct of the witness is unusual, because he being a friend of deceased did not go to the house of the deceased to inform his wife and relatives soon after the incident, deceased and witness had some political enmity and in all probability, the witness murdered the deceased, both the witness as well as deceased are persons of criminal antecedent, witness did not take the deceased to hospital, and that the witness had identified the person who was alleged to have shot the deceased, as it was published in the newspaper from which he identified Mangal. The conduct of a person immediately after the incident of murder cannot be said to be composed and cool. The manner in which the incident is stated to have happened that the witness Mateen was driving and Ravi who was sitting behind was shot dead by gunshot injury by shooter moving on another motorcycle, definitely created shock, frightening and bewilderment. The witness has clearly stated that he had returned in his motorcycle, called for help, came to the police station, got a report lodged also arranged for sending the injured to hospital. If amidst these unusual circumstances, the witness did not immediately go to the house of the deceased, there may be several reasons for such conduct, but that cannot cloud the veracity of his statement of having seen the incident. May be that the witness and the deceased both had certain criminal antecedent, but that does not by itself is an explanation to render probable that the witness was telling lie. Curiously enough, in the cross-examination suggestion of both enmity as well as closeness between the witness and deceased have been given. Mere fact that the witness was the Corporator at the time when the deceased was President of Local body by itself cannot be made a basis to disbelieve the testimony of the witness. Therefore, the suggestion given that because of any enmity the witness himself has murdered the deceased, does not affect the credibility of the witness. Publication of news in the newspaper and confirmation of the person who murdered the deceased and this news report having not been controverted by the witness is hardly a ground to disbelieve the testimony of witness. At no point of time, the witness stated to anyone that it was Govind Vishwakarma who fired gunshot and not Mangal. It is pertinent to mention here that the witness Mateen Khan (P.W. 1) had identified the dead body of Govind Vishwakarma and the panchnama in Ex. P-8 was prepared. In that panchnama, it is nowhere stated that Govind was the person who fired gunshot on the deceased.

20. The evidence of Mateen Khan (P.W. 1) that Mangal fired gunshot and murdered the deceased is substantially corroborated by another important piece of evidence i.e. recovery of a pistol, two live cartridges and a mobile set from the

courtyard of the house of Mangal on the basis of memorandum statement given by Mangal.

21. Memorandum statement Ex. P-34 of Mangal has been duly proved by memorandum witness Kuldeep Singh (P.W. 17) and Investigating Officer Ajay Sharma (P.W. 51). It has been recorded that a mobile set model Nokia 2600 used before and after the incident, pistol used to shoot Ravi was buried in the back part of his house at Bhilai. On said disclosure statement given by Mangal, a mobile set of Nokia model, one pistol along with two live cartridges kept in a black bag was recovered from the house of appellant Mangal which was dug-out from the earth. Seizure memo in Ex. P-34 has been proved by I.O. Ajay Sharma (Ex. P-51), who has deposed in para-10 that Mangal stated that the pistol was kept in a black bag buried in the back part of his house and on his memorandum, a black bag was extracted from the land behind the house of the appellant and pistol, one mobile set, two live cartridges removed from the bag were seized vide Ex. P-35 and he has proved his signature. Kuldeep Singh (P.W. 17) who is the witness of seizure has deposed that Mangal had given memorandum statement to the police in his presence that a pistol, Nokia mobile set kept in a black bag has been buried in the back part of his house and he has proved his signature both on memorandum statement as well as memorandum of seizure (Ex. P-35). He has further identified Mangal in the Court and has clearly stated that he along with the police team had gone to Bhilai in the house of Mangal, where Mangal pointed out a particular spot in the courtyard wherefrom pistol and mobile were dug out. He states that Mangal himself dug out the articles. The pistol was loaded with magazine. Testimony of this eyewitness is sought to be impeached on the submission that this witness in his cross-examination is unable to give clear description of the house of Mangal with regard to the nature of its roof, number of rooms etc. A long-drawn arguments was made by learned counsel for the appellant that aangan (courtyard) means from of the house and therefore there is contradiction in the evidence and disclosure statement as to the place wherefrom recovery was made. The submission on this aspect hardly creates any doubt on the veracity of the prosecution case with regard to memorandum statement and recovery of pistol, live cartridges, bag and mobile set at the instance of the appellant Mangal Singh. The fact remains that recovery was made from the place as disclosed by the Mangal in his disclosure statement. Use of word "aangan" does not lead to any material contradiction and it can be used not only to indicate front open part of the house, but also back part. Moreover, the details of the make stated in the seizure memorandum clearly match the make, number and name of the pistol.

22. Seizure of empty cartridge of used bullet has been proved vide Ex. P-5. I.O. Pramila Mandavi (P.W. 45) in para-5 of her testimony deposed that an empty cartridge along with blood stained soil and ordinary soil was seized by her from the spot of crime on 23-4-2005 at 10:30 hrs. and she has proved her signature. In that cartridge K-F and 7.65 have been inscribed. In cross-examination, the I.O. has stated that the I.O. reached at the spot of crime at 9:00 to 9:15 a.m.

She has specifically denied that no empty cartridge or blood stained soil was recovered from the spot. It has been clarified by the I.O. that the spot of crime was secured in the night itself. Seizure of cartridge from the spot of crime has been proved by seizure witnesses namely Mateen (P.W. 1), who has stated that in his presence empty cartridge was recovered from the scene of crime and he has proved his signature thereon. Thus, the evidence of seizure of empty cartridge from the spot is reliable and creditworthy.

23. Dr. Pradeep Cladius (P.W. 25), in para-11 of his testimony, has deposed that a bullet was extracted from the dead body which was sealed and handed over to Devram Bhaskar, Constable No. 423, P.S.-Kanker. He has also identified the bullet so recovered by him and another doctor as Article-P and has identified his signature on the packet. This evidence of recovery of bullet from the body of the deceased and handing over to Constable-Devram has not been impeached in his cross-examination. Lalji Darro (P.W. 26), in his testimony, says that sealed packet received from the hospital were seized vide Ex. P-24 and has proved his signature thereon. Someshwar Singh (P.W. 27), Constable No. 323 states in his evidence that the articles received from the hospital were seized by the Investigating Officer (P.W. 45) in Ex. P-24 and he has proved his signature in Ex. P-24. I.O. Pramila Mandavi (P.W. 45) has deposed that she had seized vide Ex. P-24, the sealed packets received from the hospital and in para-24 of the evidence, it has been stated that sealed packet received from the hospital were sent to FSL Raipur in Ex. P-164 under receipt Ex. P-165 and Ex. P-166. Thereafter, FSL report Ex. P-167, Ex. P-168 and Ex. P-169 were received. Report from Central FSL in Ex. P-169 dated 21-11-2005 is prepared by S.S. Murthy, Sr. Scientific Officer (Ballistic) Central FSL, Chandigarh, who states that on 27-9-2005, three sealed parcels (sealed intact) were received and tallied with the specimen seals under reference memo dated 24-9-2005 from S.P. North Bastar, Kanker (under subject: FIR No. 164/05 dated 22-4-2005, P.S. Kanker). The opinion upon examination, records that the pistol was found in working order and upon thorough examination, conclusion was arrived at that the crime cartridge case had been fired through the pistol and it could not have been fired through any other firearm because every firearm has its own individual characteristic marks. It has also been stated that the crime bullet was fired through the pistol and it could not have been fired through any other firearm because every firearm has its own individual characteristic marks. S.S. Murthy (P.W. 46), who is the Senior Scientific Officer (Ballistic, CFSL) Chandigarh and the author of ballistic report (Ex. P-169) has proved his report and has very categorically stated that the crime bullet (extracted from the body of the deceased) was fired from the Pistol A (the pistol A has been proved to be recovered on the memorandum of appellant Mangal from his house). He has further stated that the empty cartridge recovered from the spot of crime was fired from Pistol-A. Evidence of Ballistic Expert in respect of the articles could not be impeached and the suggestion and the evidence that the ballistic report was prepared in the presence of SHO has been specifically denied. Seal of police

station and of doctor being intact has also been categorically stated. He has further stated that sample seal was tallied and it was found correct. From the aforesaid clinching, reliable and trustworthy evidence, it is proved beyond all reasonable doubt that the bullet recovered from the body of the deceased was one which was fired from the pistol recovered on the memorandum of Mangal from his house which has been duly proved. Thus, it is proved that Mangal Singh fired gunshot on the deceased on his vital part due to which deceased died at the spot. Mateen Khan (P.W. 1) in his evidence has clearly stated that he had identified the dead body of Govind vide identification panchnama (Ex. P-8) being the person who was driving the motorcycle in which Mangal was sitting as pillion rider and fired gunshot while deceased was going on motorcycle on the highway along with Mateen Khan (P.W. 1).

Proof of Conspiracy

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

(A)

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

(B)

275 Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence

of acts of various parties to infer that they were done in reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial. But the court must enquire whether the two persons are independently pursuing the same end or they have come together in the pursuit of the unlawful object. The former does not render them conspirators, but the latter does. It is, however, essential that the offence of conspiracy requires some kind of physical manifestation of agreement. The express agreement, however, need not be proved. Nor actual meeting of two persons is necessary. Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient. Gerald Orchard of University of Canterbury, New Zealand explains the limited nature of this proposition:

Although it is not in doubt that the offence requires some physical manifestation of agreement, it is important to note the limited nature of this proposition. The law does not require that the act of agreement take any particular form and the fact of agreement may be communicated by words or conduct. Thus, it has been said that it is unnecessary to prove that the parties "actually came together and agreed in terms" to pursue the unlawful object; there need never have been an express verbal agreement, it being sufficient that there was "a tacit understanding between conspirators as to what should be done" *Kehar Singh and Others Vs. State (Delhi Administration)*,

(C)

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

25. The aforesaid broad principles have been invariably applied by the Courts in varying circumstances of a given case involving commission of offence under a conspiracy.

Motive

26. The prosecution has come out with the case that there was allegation and report made that one Mohd. Farukh, brother of Haji Gulam Bhai, had illegality and unauthorizedly stored huge quantity of explosive in his shop which led to raid by administration, but nothing was found. Haji Gulam Bhai was a respectable and politically influential inhabitant of the locality and it gave rise to sharp reaction by the community/group lead by said Haji Gulam Bhai. There was agitation and as a counter blast, the other rival political group led by deceased Ravi also came on the road. On 11-2-2005 there was clash of these two groups in open public, wherein deceased abused, offended and openly insulted Haji Gulam Bhai. Javed, one of the appellants, is the son of Haji Gulam Bhai and it is the case of the prosecution that this incident gave rise to serious enmity on the part of Javed to eliminate deceased Ravi which led to hatching of conspiracy, in execution of which, deceased was murdered by a hired contract killer-Mangal.

27. Mateen Khan (P.W. 1) has deposed that he is one of the Corporators of the Municipality and a complaint was received that explosive have been illegality stored in the shop of Haji Mohd Farukh, which was informed to the Collector and on his information, the Dy. Collector conducted raid and he came to know that nothing was recovered. On the next dated i.e. 11-2-2004, on the call of Mohd Farukh, muslim community raised a protest, closed shops and demanded arrest of Mateen Khan. Thereafter, large number of residents stood in his favour, which included deceased also. When the procession of Gulam Bhai and Mohd. Farukh was coming, deceased scolded them that they were harassing poor muslims, but there were altercation and deceased severely hurled abuses on Gulam Bhai and at that time the appellant Javed was also present. This evidence has remained un-controverted.

Ajay Sharma (P.W. 51), S.I. has also proved the incident of clash of two groups on 11-2-2005 by deposing that at about 10:00 to 11:00 in the night, crowd had gathered in which Mateen, Javed and Ravi and members of Masjid Committee were present. Members of Masjid Committee were demanding arrest of Mateen. The members of the Masjid Committee included Mohd. Farukh and others. Gulam Bhai, the appellant Javed were also present. Members of Masjid Committee were demanding arrest of Mateen and Ravi alleging that they got false report lodged and raid conducted and if Mateen is not arrested, dharna would be staged. Mateen and Ravi were raising slogan and shouting against Masjid Committee members. Both the groups were advised to cool down and report in rojnamcha sanha dated 11-2-2005 was recorded in Ex. P-192-C. He has further deposed in para-5 that they all were hurling abuses to each other. Ravi was abusing Gulam Bhai and others. In his cross-examination he has stated that he had advised the fighting groups and no further action was taken. He has denied suggestion that there was no exchange of abuses and hot talks between the deceased and Gulam Bhai.

N.K. Soni (P.W. 33), the joint Collector has deposed that on 11-7-2005, the police seized-the application dated 10-2-2005 of Mateen, the inspection report

dated 11-2-2005, application dated 21-2-2005 of Mohd. Firoj from the office of the Collector vide seizure memo Ex. P-48 and has proved his signature. Copy of note sheet is exhibited as Ex. P-49, Mateen's application is Ex. P-50, inspection report is Ex. P-51, Collector's memo is Ex. P-52 and Firoj's application is Ex. P-53. It is further deposed that Mateen in Ex. P-50 had reported regarding illegal storage of explosive in Raja Tractor Parts, on which raid was conducted but nothing was found and the report was given by him. Haji Mohd. Farukh is the proprietor of Raja Spare Parts who is the Chairman of Anjuman Islamiya Committee. Thereafter Haji Farukh and members of Masjid Committee held out a rally, went to the Collector and demanded action against Mateen for lodging false report. Thereafter, Mateen and Ravi along with others congregated in front of police station where other party including Haji Mohd. Farukh, Gulam Bhai and Moosa Bhai were also present and there started dispute. Ravi (the deceased) hurled abuses and threatened. In his cross-examination it has come that deceased Ravi was earlier the President of the Municipality and also that both Haji Mohd Farukh and Haji Gulam Bhai are respected members of Muslim Community. He also re-affirms that in his presence, Ravi had abused Haji Gulam Bhai, by using caste words. Manoj Kumar Khilari (P.W. 38), the then SDO (P) has proved seizure of the aforesaid documents relating to complaints, report etc.

28. From the aforesaid evidence, it is proved that in the background of allegation and counter allegation between Mateen (P.W. 1) on one hand and Haji Gulam Bhai along with Mohd. Farukh on the other hand, said to be leaders of Masjid Committee, deceased came out openly in favour of Mateen and against Mohd. Farukh and Gulam Bhai and agitation was held out. The two groups clashed in front of the police station, there was altercation, abuses were hurled on each other and deceased, in particular, abused Haji Gulam Bhai and threatened to see him. At that time, appellant-Javed was also present at the spot and involved in the incident. The police had recorded this incident in its daily diary and the administration had also taken the matter seriously. Therefore, the prosecution case of motive on the part of Javed to eliminate the deceased due to this incident in which his father was publicly abused, insulted by deceased Ravi, is proved.

29. Argument of learned senior counsel that the incident was not of such a nature so as to constitute sufficient cause for any one much less Javed to take revenge and eliminate deceased, does not render the motive part of the prosecution improbable. It would essentially depend upon the perception. A small incident may be the cause of committing a crime and it cannot be said that such incident would never constitute a motive to go to the extent of killing someone. The proved circumstances and the evidence of the prosecution and the uncontroverted evidence of the prosecution witnesses including suggestion given by the defence to the prosecution witnesses goes to show that Haji Gulam Bhai is an influential member of a particular community. He along with Mohd. Farukh was leading agitation on account of raid committed in the shop of Mohd. Farukh, who was president of the committee. It is also not in dispute that the deceased was also a person of political influence and was a past member of the Municipality. It

is not a case where the dispute arose between the deceased and Haji Gulam Bhai (father of the appellant) in isolated place away from public view. The incident happened in a particular background during clash of two groups in front of police station where Gulam Bhai was publicly humiliated and insulted by deceased so much so that abuses in the name of casts were hurled by the deceased. Therefore, the story of the prosecution that the insult, humiliation and abuse meted out to Haji Gulam Bhai, an influential personality in the presence of large number of the community constituted motive for Javed to eliminate the deceased cannot be said to be improbable, particularly in background of the entire incident.

Conversation amongst Accused

30. In order to prove that the appellants were in league with each other to translate conspiracy into action and murder the deceased, one of the important circumstances led by the prosecution is frequent calls made by the appellants to each other and their locations, exchange of SIM cards as well as mobile handsets. Seizure of call details, exchange of SIM is being dealt with head-wise as below:

Proof of seizure of SIM Card (mobile number), handset

Seizure of mobile phone and SIM from Wasim vide Ex. P-13 and seizure of mobile set and SIM from Javed in Ex. P-14, seizure of SIM cards from the house of Pamma in Ex. P-18 have been proved from evidence of Naresh (P.W. 5), the seizure witness, who has stated that the above articles were seized in his presence and has proved signatures in respective seizure memorandas prepared by the Investigating Officer. Rajesh Sharma (P.W. 15) is another seizure witness. He has also proved seizure of mobile handset from Wasim (Ex. P-13) and mobile hand set from Javed (Ex. P-14). This particular seizure witness (Rajesh Sharma) has also proved panchnama (Ex. P-24 and Ex. P-25) prepared by the I.O. Pramila Mandavi (P.W. 45). Ex. P-24 & Ex. P-25 contain details of call log including contact details stored in the mobile handset seized from Javed, whereas Ex. P-26 contains details of call log including contact details stored in the mobile handset seized from Wasim.

31. The aforesaid seizure in Ex. P-13, Ex. P-14, Ex. P-24, Ex. P-25 and Ex. P-26 have also been proved by the evidence of Pramila Mandavi (P.W. 45), who has deposed having made such seizures from the appellants Wasim and Javed.

32. Memorandum statement of Pamma in Ex. P-27 has been proved by Rakesh (P.W. 14), who stated that in his presence Pamma gave a disclosure statement. On the basis of disclosure statement of Pamma, a mobile set was seized in Ex. P-28. Seizure of three mobile SIM No. 94252-57163, 98268-02226 and 98261-95352 from appellant-Pamma vide seizure memo Ex. P-18 is proved by seizure witnesses Naresh Bichhia (P.W. 5) and Pramila Mandavi, I.O. (P.W. 45). As has already been examined herein-above, on the memorandum statement in Ex. P-34 of Mangal, duly proved by memorandum witness Kuldeep Singh (P.W. 17) and I.O. Ajay Sharma (P.W. 51), a mobile set was recovered from Mangal's

house at Bhilai vide seizure memo Ex. P-35, which has been found proved while examining the guilt of Mangal in preceding paragraphs. Mobile set was seized from appellant Rajesh Arora in Ex. P-46 along with some other articles (motorcycle registration certificate, delivery memo and manual).

33. Though the seizure witness Sonu Singh Chauhan (P.W. 28) and Sadhu Ram Mandal (P.W. 29) have not supported the case of the prosecution regarding seizure of article from Rajesh @ Golu, they have admitted their signatures in Ex. P-46, the seizure memo. They have also not supported the prosecution case with regard to memorandum statement (Ex. P-45) of Rajesh Arora. However, the I.O. Ajay Sharma (P.W. 51) has proved the memorandum Ex. P-45 of Rajesh as also seizure of mobile set along with other articles from the house of Rajesh. Therefore what is required to be considered is whether the evidence of Ajay Sharma I.O., regarding seizure of mobile set from Rajesh Arora is reliable to prove seizure. In the case of *Modern Singh v. State of Rajasthan* 1979 SCC (Cri) 56, it was held that where the evidence of the investigating officer, who recovered the material object is convincing, the evidence as to recovery need not be rejected on the ground that seizure witnesses did not support the prosecution version. Similar view was expressed in *Mohd. Aslam Vs. State of Maharashtra*, Further in the case of *Antar Singh v. State of Rajasthan* 2005 SCC (Cri) 597, it was held that even if panch witnesses turn hostile, which happens very often in criminal cases, the evidence of the person, who effected the recovery would not stand vitiated. In the case of *Rameshbhai Mohanbhai Koli and Others Vs. State of Gujarat*, also, it was observed by the Supreme Court that merely because the panch witnesses have turned hostile that by itself is not a ground to reject the evidence if the same is based on testimony of the investigating officer alone. Therefore, the ratio of law propounded in these decisions is that even in cases where the seizure witnesses have turned hostile, yet the seizure/recovery may be held proved if the testimony of police officer effecting seizure is reliable and do not suffer from any infirmity or doubt. Where the records does not reveal that there was any ill-will or animus alleged against the police officer who effected the seizure so as to infer any false implication, there is no impediment under the law in relying upon trustworthy and credible evidence of police officer who effected seizure of incriminating article from the accused even where seizure witness has turned hostile. The seizure of mobile set from Rajesh has been proved by Investigating Officer-Ajay Sharma (P.W. 51). He has deposed that between the period from August, 2003 to September, 2005, he had remained posted as S.I. in Police Station-Kanker and a part of investigation was conducted by him. In para-8 of his evidence, he has stated that he interrogated Rajesh Arora on 3-7-2005 at Aamapara, Raipur and on his disclosure, number of articles including one mobile set was recovered from his house. He has proved his signature on the seizure memo (Ex. P-46). This witness has been subjected to long-drawn cross-examination, but he has denied all suggestion against seizure of mobile set along with other articles from appellant Rajesh. No suggestion has been given to this witness that he had any ill-will or any reason to falsely implicate Rajesh in

criminal case. The articles which were seized along with the mobile set are a registration certificate of Pulsar Motorcycle, a delivery challan and a manual book in which the name of appellant Rajesh is shown. This lays credence to the veracity of testimony of Ajay Sharma (P.W. 51) that he seized four articles including a mobile set from appellant-Rajesh Arora. The Investigating Officer has also identified the articles of mobile set produced during his examination in the Court, stating that those are the articles seized from appellant-Rajesh. Therefore, in these circumstances, seizure of mobile set from Rajesh has also been proved. Though no mobile set or SIM card number has been seized from appellant-Raju @ Tribhuwan Gosai, a diary (Article "D") Ex. P-15 has been recovered on his memorandum statement (Ex. P-16). Recording of memorandum and seizure of diary from Raju has been proved by Naresh Bichhia (P.W. 5), who is both memorandum witness as well as seizure witness. In this diary, certain mobile numbers with name of the persons has been noted, they are as follow:

Mangal-- 98932-60165 and 98261-95354

Javed-- 94252-59788

Wasim-- 98263-61776 and 98266-04238

34. Vide Ex. P-176, subscriber enrollment form (Ex. P-67 and Ex. P-68) have been seized from the office of Reliance Telecom, Raipur. This contain the name of Rajesh Arora along with which a proof of identify i.e. a driving licence of Rajesh along with his photograph has been affixed. In form Ex. P-67 address of both Raipur and Kolkata have been given. In this form, mobile No. 98274-86897 has been allotted.

35. Vide Ex. P-174, RIM prepaid application form (Ex. P-177) along with copy of PAN card, electricity bill has also been seized by Pramila Mandavi (P.W. 48). The form relates to Pamma and photo is affixed. On this application, mobile phone No. 9300484455 has been allotted in the name of Paramjeet Singh.

36. Vide seizure memo (Ex. P-174), another application form (Ex. P-175) has been seized along with which driving licence, electricity bill, undertaking and booking token which contained signature "P. Singh". This form relates to Palvinder Singh, but in the electricity bill address is the same as that of Pamma. On this application, mobile No. 98291-19334 has been allotted.

37. From the aforesaid details of seizure of various mobile sets and mobile number from appellants Wasim, Javed, Pamma and Rajesh Arora and from the contents of diary (Article "D") seized from Raju @ Tribhuwan Gosai and subscriber indent form of Rajesh Arora and the mobile sets seized from Wasim, Javed, Pamma, Rajesh and Mangal Singh. It is proved that the appellants Wasim, Javed and Pamma and Rajesh were possessed of mobile sets and SIM numbers as detailed below:

38. No mobile SIM number used from mobile handset seized from Mangal has been mentioned in the above chart, because from Mangal Singh, no mobile SIM

was seized. The finding with regard to mobile SIM number, found used from mobile set seized from Mangal, shall be recorded after considering the evidence with regard to the collection of call details collected from mobile company with the combination of mobile set and mobile SIM number including call details showing calls made by using mobile handset seized from Mangal with the combination of different mobile SIM number.

Proof of call details

39. Call details of mobile No. 94252-57163 (Pamma) and 94252-59788 (Javed) in the month of February, March and April, 2005 has been proved vide call details Ex. P-57. Tower location of Cell I.D. Have been produced vide Ex.-P-60 and Ex. P-61, P-62 and P-63. These call details and tower location of Cell IDs. have been proved by Sachin Swarnkar (P.W. 34), Junior Telecom Officer of BSNL. The witness produced the office copy of call details which was tallied with call details Ex. P-57. He has also stated that the tower location in Ex. P-62 and Ex. P-63 has been given of the area where tower is situated along with Cell ID number. A conversion table from binary system to decimal system was also produced in Ex. P-17 prepared and signed by this witness. In his cross-examination, he has stated that he himself had taken out entire call details and these details were given on the demand of S.P. Kanker. He has stated that the call detail shows regarding call made from one number to another number.

40. Call details of mobiles SIM No. 98271-10215 and Mob. No. 98274-86897 for the months of February, March and April 2005 have been produced in Ex. P-65. Cell tower location have also been produced in Ex. P-66. By document Ex. P-67 and P-68, the allotment of mobile SIM 98274-86897 has been shown in the name of Rajesh Arora. This witness has deposed that on the demand made by S.P. Kanker, the aforesaid call details were supplied and this witness has verified the call details in Ex. P-65 from call details brought by him from his office. He has also clearly stated that the call details were taken out from him from the computer.

41. Call details of mobile SIM No. 98932-60165 have been produced in Ex. P-73 along with forwarding memo Ex. P-72 as also along with Cell ID Ex. P-74. This contains details of call during the month of April, 2005. Libi Vargis (P.W. 36) Engineer in Airtel Telecom, Raipur has proved these call details. He has proved his signature also. He has also stated regarding Cell ID and tower location. In the cross-examination, he has stated that all call details of Ex. P-73 have been taken out from the system by him. He further stated that he had taken out call details and Cell ID locations. In cross-examination, he has stated that no edition or deletion is done while taking out print out as per the programme fixed in the computer. He has further clarified that this programme is already loaded in the system. Nothing could be elicited from the evidence of this witness to doubt the correctness of the mobile call details proved by the prosecution.

42. Sai Dutt Bhore (P.W. 42), Nodal Officer of BTA Celcom Ltd. and Dilip Mutalik

(P.W. 50) another Nodal Officer of BTA Celcom have proved call details of Mob SIM No. 98261-95354, 98263-61776, 98266-04238, 98261-95352 and 98268-02226 in Ex. P-85 to Ex. P-141. These documents contain the seal of the company along with signature of Dilip Mutalik (P.W. 50). He has proved his signature. Ex. P-148, Ex. P-149, Ex. P-150, Ex.-P-151 and Ex.-P-152 contain information proved by Dilip Mutalik. Decoding list of Cell ID City wise and locality wise contained in Ex. P-142 to 147 has been proved by S.D. Bohre (P.W. 42) who has proved his signature on the document. Dilip Mutalik (P.W. 50) has also stated in his evidence that he had taken out the call details.

43. Anil Verma (P.W. 49) Customer Care Head from Reliance Communication has proved call details of mobile number 9300484455 and 93291-19334 for the month of April, 2005 in Ex. P-178. He has also proved decoding list in Ex. P-191 and has verified the call details from the original call details which was produced from the office stating that these call details were handed over to S.P. Kanker. In his cross-examination he has clearly stated that all the print out were taken out by him.

Electronic Evidence is admissible

44. The proliferation of computer, the social influence of information technology and the ability to store information in digital form required laws to be amended to include provision on appreciation of admissibility of digital/electronic records evidence. The Information Technology Act, 2000 amended and introduced provisions in the Indian Evidence Act, 1872 to allow admissibility of digital evidence. The law, upon such amendment, recognizes transaction that are carried out through electronic data interchange and other means of electronic communication. Admissibility of electronic evidence is now provided under a newly introduced Sections 65A and 65B in the Evidence Act under the schedule of I.T. Act, 2000 read with Section 39 of the Evidence Act. A conjoint reading of the provision contained in Section 65A and 65B of the Evidence Act, leads to conclusion that the contents of electronic records may be proved in accordance with the provisions of Section 65B and Section 65B provides that any information contained in an electronic record which is printed out on paper, stored, recorded and copied in optical or magnetic media produced by a computer shall be deemed to be also a document if the conditions mentioned in that provision are satisfied in relation to the information and the computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible. Sub-section (2) of Section 65B of the Evidence Act lays down conditions. Sub-section (4) of Section 65B lays down provision with regard to certification by stating that a certificate doing any of the things as mentioned in clauses (a)(b) and (c) and purporting to be signed by a person occupying a responsible official post in relation to the operation of the relevant device or the management of the relevant activities shall be evidence of any matter stated in the certificate and it shall be sufficient for a matter to be

stated to be best of the knowledge and belief of the person stated it.

45. In the case of State (N.C.T. of Delhi) Vs. Navjot Sandhu @ Afsan Guru, , popularly known as case of attack on Parliament, the Supreme Court had an occasion to deal with the provision and admissibility of mobile phone call records. While considering the appeal against the accused for attacking Parliament, the submissions was made on behalf of the accused that no reliance could be placed on the mobile telephone call records, because the prosecution has failed to produce the relevant certificate u/s 65B(4) of the Evidence Act. The Supreme Court, however, concluded that cross-examination of the competent witness acquainted with the function of the computer during the relevant time and the manner in which the print out of the call records were taken was sufficient to prove call records.

46. Therefore, in the light of the aforesaid provisions of the Evidence Act, if the evidence of electronic records are produced before the Court by the person occupying responsible official posts in relation to the operation of relevant device or the management of relevant activities and their certification by such person produced as witness with recording storage and taking out of prints to the satisfaction of the Court, evidence of electronic records is certainly admissible in the evidence. The evidence of electronic records relating to mobile phone calls generated by different service provider has been proved not only by witnesses, who are responsible officers operating the system, but also by producing original data of call records, who have been subjected to detailed cross-examination, which lays credence to the veracity of the evidence with regard to call records of various mobile SIM numbers with combination of mobile handset, specifying not only the number of calls, but also locations of such calls.

Call Frequency & locations of accused

47. The call details of various mobile SIM used on mobile handset with a unique IMEI number (International Mobile Equipment Identification number) recorded from number of calls details establish beyond reasonable doubt close proximity and league amongst the appellants namely-Javed, Wasim, Pamma and Rajesh, disclosed from the following call pattern:

? 32 calls made between Javed and Wasim (both incoming and outgoing) between the period from 27th March, 2005 to 27th April, 2005.

The call pattern show that numerous calls were made by the aforesaid appellants to each other during the month of March and April, 2005. As the number of calls are large in number, it is not practicable to reproduce all those call details.

The appellants have not come out with any case either by giving any suggestion in the cross-examination of any of the prosecution witnesses or in their examination u/s 313 of the Cr.P.C. or in the defence evidence that these witnesses by the reason of any association with each other either on account of any trade or business or any common activity were connected to each other and

large number of calls made by these appellants to each other during the period from February to April was in ordinary course of such transaction. There is no explanation whatsoever offered by any of the accused in that regard. It has to be noted that calls made by these accused to each other are not a few but large in number.

48. From Mangal, no SIM card was seized but only mobile handset of particular IMEI number was seized vide Ex. P-35 which seizure has been found proved by this Court in earlier paragraphs. The call records show that during the period of March and April, including the date of incident, more than one mobile SIM numbers were used from the mobile handset from Mangal, which are as under:

98932-60165

98271-10215

98261-95352

98274-86897

49. It has already been noted herein-above that the first two numbers indicated above, were found noted in the diary seized from Raju, whereas the other two numbers have been found to be that of Pamma and Rajesh, as discussed above. The call details prove that the mobile handset seized from Mangal used above said four cell numbers (SIM) and with the combination of IMEI number of the handset of Mangal calls have been made to mobile SIM number of other accused namely Javed, Wasim, Rajesh and Pamma. Frequency of calls between Mangal on one hand and other accused on other hand clearly established that till the conspiracy was executed, Mangal was in constant touch and proximity with the appellant namely Wasim, Javed, Pamma and Rajesh. There is no explanation either by Mangal or by other accused namely Javed, Wasim, Pamma and Rajesh with regard to their continuous association and conversation with each other during the period of February, March and April with increased frequency of calls when the date of murder of the deceased was approaching. The location of these calls indicated in the call records proves presence of Mangal not only at Raipur and Bhilai but at Kanker. The call details also proves that immediately before and after the incident of murder on 22-4-2005 at about 8:00 to 8:30 p.m., there were number of calls made between Wasim, Pamma and Rajesh on one hand and Mangal on the other hand. The call details also prove that on the date of incident, there was conversation between Javed and Wasim. With mobile No. 9826604238, Wasim made huge calls more than 200 in number between the period from 11-3-2005 to 22-4-2005 to Pamma, Rajesh and Mangal and Javed, which also included call made on mobile set seized from Mangal bearing No. 9893260165. It is also important to note that there are number of calls made by accused including Mangal to each other on the date of incident i.e. 22-4-2005.

50. During the course of arguments, a submission was made by the learned counsel for the appellants that the unique IMEI number of the handset seized

from Mangal vide Ex. P-35 and the IMEI set number recorded in the call records which was found using SIM No. 98932-60165, 98271-10215, 98261-95352 and 98274-86897 are not one and the same because in the mobile set seized from Mangal, the last digit of IMEI number printed in the handset is "8", whereas in the call details, the last number has been shown to be "0" in place of "8". Similar submission has been made in respect of discrepancy with regard to the last number of IMEI of handset seized from Rajesh vide Ex. P-46 by submitting that the last digit of IMEI number of the handset is "3", whereas in the call details it has been shown as "0". On the basis of this, it has been submitted that the two mobile sets are not one and the same. I.O. Ajay Sharma (P.W. 51), in reply to a question, has very categorically stated in para-2 of his evidence that at the time of taking print out, the last digit is shown as "0". This has been stated in response to a question as to what the last digit of IMEI number is treated in call details. This un-controverted statement of witness is also supported from examination of the technical aspect of IMEI programme as stated in Wikipedia and Webopedia produced before us by learned counsel for the State. The technical details given under the pages of IMEI of WEBOPEDIA and WIKIPEDIA discloses as follows:

WEBOPEDIA

? The identity of a mobile is determined by the first 14 digits of the IMEI number and not by the 15th digit;

? The 15th digit is a check digit or an identifier for the IMEI number;

? It is not transmitted though in the call details and is often shown as "0" in the call details.

WIKIPEDIA

? IMEI is a number, usually unique, to identify 3GPP (i.e. GSM, UMTS and LTE) and IDEN mobile phones, as well as some satellite phones. It is usually found printed inside the battery compartment of the phone, but can also be displayed on-screen on most phones by entering *#06# on the dial pad, or alongside other system information in the settings menu on smartphone operating systems.

...

? The IMEI (15 decimal digits: 14 digits plus a check digit) or IMEISV (16 digits) includes information on the origin, model, and serial number of the device. The structure of the IMEI/SV are specified in 3GPP TS 23.003. The model and origin comprise the initial 8-digit portion of the IMEI/SV, known as the Type Allocation Code (TAC). The remainder of the IMEI is manufacturer-defined, with an Luhn check digit at the end.

51. Therefore, the aforesaid technical aspect only supports un-controverted evidence of Ajay Sharma (P.W. 51) that the 15th digit is normally not transmitted and the first 14 digits alone are necessary and sufficient to determine the identify

of the mobile set. The last digit is normally transmitted as "0". Some time it is also transmitted as two digits to indicate software version in the mobile phone.

52. In the present case, the 15th digit of the two mobile phones shows "8" and "3" and, therefore, in their call details, these last digit do not appear and generally shown to be "0". The first 14 digit mentioned in the seizure memo in Ex. P-46 and in Ex. P-35 being that of handset seized from Mangal and Rajesh proves that the call details are of no other mobile sets than these mobile sets seized from these two accused. Therefore, the last digit change does not matter and it is the first 14 digits which provide a unique identity number of every mobile handset. This conclusion based on technical aspect clearly lays credence to the evidence of Ajay Sharma (P.W. 51) that last digit is transmitted as "0". Therefore, the submission of learned counsel for the appellants that the call details are not of those which related to used of mobile handset seized from Mangal and Rajesh are without any basis and are rejected.

Exchange of Mobile set/SIM amongst accused

53. There is yet another every striking feature which also establishes close proximity amongst the accused i.e. exchange of mobile sets and mobile SIM. Mobile set seized from Wasim was found used on SIM No. 98261-953532 which was seized from Pamma. Mobile set seized from Rajesh was used with SIM No. 94252-57163 which was seized from Pamma. Mobile set seized from Pamma was also found used with mobile SIM No. 98261-95353. SIM No. 98261-95352 was also found used in mobile handset seized from Mangal. Thus this exchange of mobile or mobile SIM number amongst Wasim, Mangal, Pamma and Rajesh also provides a link evidence of these accused acting in concert towards conspiracy. It is relevant to note that such a circumstance of exchange of mobile handset/mobile SIM number amongst accused was treated as an important circumstance to prove close proximity and concerted action of the terrorist in the case of State (NCT of Delhi) (supra).

Call logs, contract phone book of Javed and Wasim

54. Call log details of the mobile set seized from Wasim and Javed (Ex. P-24, P-25 and P-26) also establish close contact and league amongst the accused persons. These panchnamas show that in the mobile set of Javed mobile numbers 98263-61776 and 98266-04238 of Wasim was recorded and saved. From the call log panchnama of mobile set seized from Wasim, mobile number of Mangal, Javed Pamma and Rajesh was found recorded and saved. The veracity of seizure and preparation of call log panchnama by Investigating Officer Pramila Singh (P.W. 45) is not impeachable as preparation of call log panchnama in Ex. P-24, 25 and 26 has been proved by independent seizure witness Rajesh (P.W. 13) and the evidence of Pramila, the I.O. (P.W. 45).

Diary Seized from appellant-Raju Gosai

55. Seizure of diary from Raju Gosai vide Ex. P-15 has been proved by

independent seizure witnesses Naresh (P.W. 5) and Rajesh (P.W. 13). It has already been noted herein above that in the diary, certain mobile numbers with names against them have been recorded. The diary contains name of three persons who are namely-Javed, Wasim and Mangal. These particular in the diary provides link in the circumstantial evidence that Javed, Wasim, Raju and Mangal are acting in concert under the conspiracy to murder the deceased. The mention of the mobile numbers against the name of Mangal, Javed and Wasim in the diary seized from Raju not only establishes that these accused were using these numbers to make calls to each other but the recording of name of these accused together in the diary seized from Raju is strong circumstance of these appellants involved in the conspiracy.

Association and concerted action proved

56. Connectivity of the aforesaid accused proved from their call details which also shows the location wherefrom the calls were made by the caller and the location to which call was made coupled with the frequency of call amongst them and further evidence that Mangal was in constant touch and conversation with Wasim and Pamma and Javed by number of frequent calls to each other in the month of March and April, taken cumulatively along with aforesaid proved circumstance leads to a reasonable inference of conspiracy hatched by these accused in execution of which Mangal murdered Ravi, the deceased. The presence of Mangal and Pamma both at Kanker prior to date of incident and on around the date of incident, calls made by them to Wasim vice versa also goes to prove that all of them were acting in concert with each other. Mangal and Pamma both had come to Kanker during that period. They were in continuous contact and meet with Wasim, Javed and Rajesh. It is relevant to note that car of Pamma was seized from Kondagaon vide Ex. P-30 proved by seizure witness Rakesh (P.W. 14). Kondagaon is very near to Kanker. It is also relevant to note following features of call details:

Date-10-4-2005

? 14 calls between Javed and Wasim-location at Kanker

Date-12-4-2005

? 10 calls between Pamma and Mangal--location at Kanker

? 10 calls between Pamma and Wasim--location at Kanker

? More than 30 calls amongst Mangal, Pamma, Rajesh--location at Kanker

? Approximately 136 calls between Mangal, Pamma and Rajesh in the month of March, many of these calls are showing location at Kanker

1-4-2004 to 21-4-2004

? Almost 100 calls made between Mangal, Pamma and Rajesh, many location at Kanker

22-4-2005 (the date of incident of murder)

? From mobile No. 98261-95354 (using handset seized from Mangal) 5 calls were made to Wasim.

? From mobile No. 98263-61776 Wasim made 14 calls to Rajesh, Pamma and Mangal. On this date, Wasim also talked to Javed.

Thus it proved that on the date of incident, Javed Wasim, Pamma, Rajesh and Mangal talked to each other and the location of these calls is shown at Kanker.

Seizure of Motorcycle used in commission of offence from Mangal

57. A motorcycle-Bajaj Pulsar was seized from Mangal upon his arrest by the police of police station-Chakarbhata. Bilaspur. Constable-Janak Ram (P.W. 44) has deposed regarding seizure of Pulsar motorcycle from appellant-Mangal in another crime recorded in P.S.-Chakarbhata under FIR (Ex. P-15-5C). The seizure of the motorcycle made by police of Police Station-Chakarbhata in Ex. P-154-C also proves seizure of motorcycle from Mangal. This Court has already held seizure of mobile handset and another documents from Rajesh vide Ex. P-46 as a reliable and trustworthy on the basis of the evidence of I.O. Ajay Sharma (P.W. 51) in the light of corroborative circumstance that the handset seized from Rajesh used mobile number 98274-86897 recorded in the name of Rajesh proved from Ex. P-67 to P-68. The seizure vide Ex. P-46 included registration certificate, delivery challan and manual book. Seizure of these articles vide Ex. P-46 from Rajesh has been proved by Ajay Sharma (P.W. 51) and he has also identified the registration certificate as Article Z/1, delivery challan as Article Z/2 and manual book as Article Z/3. These documents contained the name of Rajesh as the owner of motorcycle Bajaj-Pulsar seized from Mangal which is said to be used by Mangal in commission of offence of murder of the deceased. Chassis number of the engine of motorcycle as shown in the registration book seized from Rajesh vide Ex. P-46 is the same as the chassis number of the engine of the motorcycle seized from Mangal vide Ex. P-154-C by Police Station-Chakarbhata.

Recovery of cash-same series of notes

58. Cash of Rs. 10,000/- was seized from appellant-Raju Gosai @ Tribhuvan vide seizure memo Ex. P-21. Memorandum statement regarding cash has been proved by Naresh Bichhia (P.W. 5) independent witness of memorandum (Ex. P-16) and seizure of cash vide seizure memo Ex. P-21 has been proved by independent witness of seizure Yasim Karam (P.W. 8). Similarly a memorandum in Ex. P-17 given by Wasim, is proved by memorandum witness Naresh (P.W. 5) on the basis of which cash of Rs. 15,000/- was recovered from Wasim vide Ex. P-21 and P-22 proved by independent seizure witness Yasin Karam (P.W. 8). The number of the notes recovered from Wasim and Raju are as under:

From Raju @ Tribhuwan Gosai

(1) 92 notes of Rs. 100/-

(2) 16 notes each of Rs. 50/-

series of numbers in notes of 100/- (52 notes-4AV 808749 to 4AV 808800)

From Wasim

(1) 148 notes each of Rs. 100/-

(2) 4 notes each of Rs. 50/-

(3) 48 notes each of Rs. 100/- with series of No. (4AV 8087001 to 4 AV 808748)

It would thus be seen that currency notes seized from one accused bear number in continuation of series number of notes seized from other. It is the case of the prosecution that from the advances taken 10,000/- was kept by Raju and 15,000/- was kept by Wasim.

Conversation of Wasim and Raju

59. Shiv Bhan Singh (P.W. 2) has deposed that he knows Raju, Wasim as also Javed. In para-4 of his evidence he has deposed that after about 3-4 days of murder of the deceased, he had come to Umrao Dhaba (a roadside food joint) at about 9:30 to 10:00 in the night. While he was sitting in one table, in another table Raju and Wasim were sitting at a distance of about 3 feet and both of them were consuming liquor. He heard conversation between them. The conversation between them was that on the instruction of Javed, his work has been done and the party at Raipur is insisting for payment. They were also heard saying that as the Raipur party had finished person like Ravi in few minutes, they could also be dealt within minutes. Therefore, they will have to talk to Javed for payment in the morning. He has further deposed that as it was late in the night and in a naxallite area, ordinarily, one is not allowed to enter police station late in the night, therefore, he went to his house and next morning at about 10:00, to 11:00, he informed regarding this conversation in the police station. This witness has been subjected to detailed cross-examination. Admissibility and veracity of the testimony of this witness has been assailed mainly on the submission that the evidence of this witness is not admissible as against Javed in view of the provision contained in Section 10 of the Evidence Act, because at that time, Ravi was already murdered on 22nd April, 2005. Therefore, conversation between Raju Gosai and Wasim with regard to past acts of conspiracy would not be admissible as against Javed. Further, in order to impeach credibility of this witness, learned senior counsel argued in extenso by submitting that the circumstances in which the conversation is said to have been overheard are highly improbable. There was no reason for this witness to have come all the way to a distant food joint leaving other food joint in between and nearby his house in the village. It is highly improbable that Raju and Wasim would unfold and reveal in open place like dhaba the conspiracy which led to murder of Ravi in the presence of stranger. The dhaba owner and waiters have not been examined. It is not a case of excessive consumption of alcohol so as to say that consumption has given them a sense of gowardo. The witness also did not immediately report

the matter to the police but waited till next morning. With regard to admissibility, it has also been argued that there is no reasonable ground to believe existence of conspiracy which is opening key of Section 10 of the Evidence Act.

60. In order to appreciate submission with regard to admissibility of the evidence of conversation between Raju and Wasim as deposed by Shiv Bhan (P.W. 2), it is necessary to examine the statutory scheme of Section 10 of the Evidence Act, which is reproduced as below:

10. Things said or done by conspirator in reference to common design. Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such person in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

61. From the reading of the aforesaid provision, it is clear that in order to attract the applicability of Section 10, following conditions are to be satisfied:

(A) that there shall be a reasonable ground to believe that two or more persons have conspired together to commit offence or an actionable wrong.

This requires a prima facie evidence to be led by the prosecution with regard to existence of conspiracy. It is only if such prima facie evidence states that anything said, done, or written by one of the conspirator in reference to the common intention that becomes relevant against others.

(B) The statement made by one of the conspirator in the presence of others has to be made whilst the conspiracy was on foot. This legal position is no longer res integra in view of the judgment in the case of AIR 1940 176 (Privy Council) Kehar Singh and Others Vs. State (Delhi Administration), and Mohd. Khalid Vs. State of West Bengal, , and many more authorities on this proposition all of which need not be refer to.

62. According to the case of the prosecution the conspiracy was hatched by the appellants to murder Ravi. Ravi was murdered on 22-4-2005. The conversation between Raju and Wasim, as deposed by Shiv Bhan Singh (P.W. 2) took place in Umrao Dhaba in the night on 27-4-2005 i.e. 5 days after the murder of Ravi. True it is that the conversation says that the payment which was to be made to the party was not made, as has come out in the conversation, nevertheless the conspiracy to murder Ravi stood executed on 22-4-2005 itself. The payment of money to achieve the end was only ancillary/subsidiary and therefore it cannot be said that as long as payment was not made, the conspiracy still continued. Therefore, there is considerable force in the submission of learned senior counsel for the appellants that conversation as between Raju and Wasim in the night of 27-4-2005 at Umrao Dhaba cannot be used against Javed. For this reason, it is

not necessary to go into other aspect with regard to prima facie evidence of conspiracy though this Court has considered in detail regarding conspiracy in paras hereinabove.

63. But then conversation as between Raju and Wasim is relevant and admissible as it relates to the transaction of money to be paid to hired killers towards murder of Ravi under the conspiracy. Therefore, the contents of conversation between Raju and Wasim would be admissible and relevant both u/s 7 as well as u/s 8 of the Evidence Act. The contents of conversation heard by Shiv Bhan (P.W. 2), as contained in para-2 of his deposition, is reproduced verbatim as below:

64. The aforesaid conversation clearly shows that Raju and Wasim were talking to each other with regard to payment to be made to Raipur party in connection with murder of Ravi, the deceased. The contextual and natural meaning conveyed by the conversation is that on instruction of Javed, his work was got done and Raipur party (hired killer) are insisting for payment and if they have finished a person like Ravi in minutes, they would also be finished in no time and, therefore, they will have to talk with Javed regarding payment in morning. This clearly involves Raju and Wasim in the conspiracy of murder of Ravi.

65. The above conversation without any pale of doubt refers to the conspiracy leading to murder of Ravi.

66. Attempt has been made to impeach veracity of this witness on the submission that the witness is concocted because no one would go to a distant food-joint (dhaba) leaving behind food-joint nearer to his own house. There may be many reasons for a person to choose a particular food-joint to take food and merely because he has chosen a food-joint ahead of some other food-joint, the presence of witness does not become improbable only on that count. The next submission that the two appellants-Raju and Wasim would never talk publicly regarding the conspiracy hatched in secrecy so as to disclose the secrecy, upon close scrutiny, also deserves to be rejected. It is not a case that the two appellants were loudly disclosing regarding conspiracy in a crowded restaurant of township. The place where they were found sitting is a roadside food-joint distant from the locality. The evidence of the witness shows that except this witness and the two appellants-Raju and Wasim, no other customer was there. The time was late in the night i.e. after 10 O'clock. The two appellants were taking liquor and, therefore, certainly in the state of intoxication. Therefore, all these circumstances render it probable that these two appellants found it be a remote and aloof place to consume liquor, in which process, they started disclosing about the payment of money and in that process, background in which money was demanded by Raipur party was stated. In the cross-examination of this witness though number of suggestions have been given to impeach his credibility that he knew deceased-Ravi and that he was a friend of deceased, nothing has come out to impeach reliability and credibility of the evidence of this witness. All other suggestion of any closeness with the deceased or his family members have been specifically denied. The credibility of this witness is also sought to be impeached on the

submission that this witness did not report the matter immediately to the police, but waited till next morning. This witness has stated that he did not go to the police station, it being a naxallite area and the police ordinarily does not allow any one to enter police station. The suggestion that Kanker is not a naxallite area has been specifically denied. The evidence of this witness is therefore not liable to be disbelieved only because he did not choose to go to police station in the night and preferred to come to police station next day morning at 9-10 a.m. and gave information in the police station regarding conversation. This is more so because nothing has been elicited in his cross-examination to suggest that this witness had any motive to falsely implicate two appellants Raju and Wasim.

Telephone call by Javed to Wasim

67. Madan Mohan Singh (P.W. 3) has stated that when he had gone to STD/PCO booth, four days after the incident at 9:15 in the night, appellant Javed was present and he made a call on phone No. 98263-71776. Initially this witness did not state regarding the conversation, but after being declared hostile by the prosecution he stated that Javed was giving assurance for payment of money by talking to some one on phone No. 9826371776. He has also stated that the reason for suspicion was because Javed despite having mobile phone and land-line at his house and shop, came to STD/PCO booth in the night, in the background of whisper in the town regarding involvement of Javed in murder of Ravi. Therefore, he thought it proper to inform this fact to the police. The statement of this witness was also recorded u/s 164 of Cr.P.C. before the Magistrate that Javed was talking about payment of money while speaking to some one on phone number 98263-61776. Therefore what he stated before the Court is corroborated from Section 164, Cr.P.C. statement recorded before the Magistrate. Vehement submissions have been made that this witness is wholly concocted because it is wholly improbable that someone involved in a conspiracy would commit blunder of making a call from STC/PCO booth despite he having his own mobile and land-line at his resident and office, in addition being possessed of personal mobile. Secondly the call records show that Javed had in fact made a call to Wasim on his number on that very date. Therefore, there was no reason that this witness would come out in open in the STD/PCO booth unfolding the conspiracy by talking to Wasim regarding payment. Thirdly, the submission that the witness remembered the number is highly improbable particularly when he himself did not remember what was the number of the person whom he actually intended to call. The witness has not even stated the name whom he wanted to call, as the witness actually did not make any call from the STC/PCO booth. The witness is closely associated and friend of deceased Ravi as revealed in his cross-examination. All the above circumstances stated by learned counsel for the appellants certainly require this Court to exercise due care and caution before accepting the story of call made by Javed. It is therefore necessary to look for corroboration as to whether any such call was actually made from that STC/PCO booth to the number of Wasim i.e. 98263-61776. Manish (P.W. 30) Junior Telecom Officer of BSNL has proved call details (Ex.

P-38) signed by him. He has stated that call details were taken out by the technician. In cross-examination he has stated that there is a programme and any kind of addition, deletion is not possible nor deletion is done. He has denied suggestion that there was possibility of number jump. The relevant call detail contained in Ex. P-38 prove that a call was made to Wasim in his mobile No. 98263-61776 at 21:04:49 from PCO No. 222636 and the time of call duration is recorded as 1 minutes 27 seconds. Therefore call made by Javed to Wasim from STD/PCO booth, giving assurance regarding payment is also proved.

68. The above proved circumstances of the case from a web of conspiracy. Various proved circumstances have to be appreciated not in isolation but in conjunction with other proved circumstances. All these circumstances put together lead to conclusion that a conspiracy was hatched actuated by motive of revenge due to incident of public insult of father of Javed by deceased Ravi. Wasim and Raju Gosai were contacted, who, in turn, contacted Pamma and Rajesh. Mangal was assigned role of murdering the deceased-Ravi, who murdered the deceased by gunshot. Conversation amongst the accused persons lead to inference of conspiracy, not because there were conversation but special features of those conversation like large number of calls to each other, their respective location moments, exchange of SIM and mobile handset, name of Javed, Pamma and Mangal found recorded in the diary seized from Raju, call entries in call log panchanama of Javed and Wasim, seizure of motorcycle from Mangal registered in the name of Rajesh, conversation between Raju and Wasim in the dhaba and call made by Javed to Wasim on 27-4-2005, assuring payment currency notes of same series recovered from Wasim and Raju, recovery of car belonging to Pamma from Kondagaon. It is relevant to note that none of accused has given any explanation as to how unknown and strangers had entered into conversation with each other so frequently including exchange of mobile sets and SIM. No material to show that these accused for any other reason had an association either because of their relation, friendship or any other kind of official/business or trade relation under which they were making so many number of calls to each other. Presence of the accused at Kanker on the date of incident and calls made to each other on that very date also prove conspiracy.

69. In so far as appellant-Raju Dharikar alias Raju Khanjar is concerned, his involvement in the case is based only on the prosecution case of identification by Mujeeb and that he had come to Kanker along with Pamma and stayed in the house of Tulsi. However, both Tulsi and Mujeeb have not supported the story of the prosecution and they have turned hostile. There is no evidence to show that Raju Dharikar @ Raju Khanjar had come to Kanker with Pamma and stayed in the house of Tulsi Ram or he was seen in the company of Pamma or had done any other overt act. Mujeeb has also not supported the case of the prosecution and he has clearly stated in his deposition that he did not identify Raju in the identification parade and has completely disowned the identification parade and his signature on the proceedings to test identification parade. Thus in so far as Raju Dharikar @ Raju Khanjar is concerned, present is a case of no evidence.

Therefore, the conviction of Raju is wholly unsustainable in law and he deserves to be acquitted.

70. In the result, appeal of the appellants Wasim Khan, Raju alias Tribhuwan Gosai, Mohd. Javed, Pamma alias Paramjit, Rajesh Arora alias Golu (in Cr. A. No. 143/08) and Mangal Singh alias Mangi (in Cr. A. No. 157/08) are hereby dismissed and their conviction is affirmed. Appeal of appellant--Raju Dharikar alias Raju Khanjar (in Cr. A. No. 143/08) is allowed and his conviction is set aside. Appellant-Raju Dharikar alias Raju Khanjar is acquitted of the charges. Appellant-Raju Dharikar alias Raju Khanjar shall be set free forthwith if not already required in connection with any other case, on furnishing personal bond of Rs. 10,000/-, as required u/s 437A of the Cr.P.C. He shall appear before the higher Court as and when directed. The bond shall remain operative for a period of six months.