

(2014) 09 CAL CK 0019

Calcutta High Court

Case No: C.R.A. Nos. 71, 74 and 82 of 2005

Khokan Das

APPELLANT

Vs

State of West Bengal

RESPONDENT

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**Date of Decision:** Sept. 17, 2014**Acts Referred:**

- Arms Act, 1959 - Section 25, 27, 35
- Criminal Procedure Code, 1973 (CrPC) - Section 161, 164, 313
- Penal Code, 1860 (IPC) - Section 107, 109, 114, 120B, 302

**Citation:** (2014) 4 CALLT 82**Hon'ble Judges:** S. Chatterjee, J; Nishita Mhatre, J**Bench:** Division Bench**Advocate:** Y.J. Dastoor, Sr. Adv., Rupa Bandyopadhyay and Musharof Hossain, Advocate for the Appellant; Saibal Bapuli and Rudradipta Nandy, Advocate for the Respondent

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**Judgement**

Nishita Mhatre, J.

The appeals are directed against the judgment and order of the Additional Sessions Judge, 5th Court, Alipore, South 24 Parganas, in Sessions Trial No. 2(9)2000 dated 8th December, 2004. While 6 out of 11 persons accused in this case have been acquitted by the Trial Court, all the 5 appellants have been convicted and sentenced to suffer imprisonment for life and to pay fine Khokan Das, Basudeb Majumder @ Basu and Ajoy @ Harey Ram Singh, i.e., the appellants in Criminal Appeal No. 71 of 2005 have been found guilty of the charge punishable under section 120B of the IPC read with section 302/ 34 of the IPC. Tarak Haider @ Buro, the appellant in Criminal Appeal No. 74 of 2005 has been found guilty of the charge punishable under section 120B read with section 302 of the IPC. Lalu Shaw the appellant in Criminal Appeal No. 82 of 2005 has been convinced of the charges punishable under sections 109 and 120B of the IPC read with section 302/ 114 of the IPC. Each of them has been sent need to suffer life imprisonment and payment of fine of Rs. 2000/- and in default of such payment to suffer rigorous imprisonment for two months.

## FACTS

Gurupada Bagchi, an activist of the CPI(M) Party was shot on 23rd January, 2000 at about 7.30 a.m. in the C.I.T. Market, Kasba. PW 1, Tumba Chanda filed a complaint to that effect with the Kasba Police Station on the same day at about 7.45 a.m. He filed the complaint after learning of the incident and being told in the market that some miscreants encircled Gurupada Bagchi while he was purchasing fish and shot him beside his ears. He was taken to the police station by the complainant, Nemai Purkait and Nepal Saha in a (sic)xi and thereafter to the SSKM Hospital. On examination by the doctor at the hospital the victim was declared dead. Kasba P.S. Case No. 30 dated 23.01.2000 was started against unknown accused persons under section 302 read with section 34 of the IPC and under sections 25 and 27 of the Arms Act. The investigation was later taken over by the CID. The appellants and six other persons were arrested on different dates. They were charged for having conspired in December, 1999 to murder Gurupada Bagchi. The charge-sheet was submitted against all the 11 accused. The case was committed to the Sessions Court. All the accused claimed to be tried and the trial commenced before the Sessions Court.

## CHARGE

2. The charge indicates that the accused persons including Khokan Das, Basudeb Majumder, Harey Ram, Tarak Haider and Lalu Shaw in or about the month of December, 1999 conspired to murder Gurupada Bagchi with others and in pursuance of that agreement and conspiracy, some of them had committed the offence of murder of Gurupada Bagchi and were liable to be punished with death or imprisonment for life and because they were part of the conspiracy they had committed an offence punishable under section 120B of the IPC. The second charge was that in pursuance to the agreement and criminal conspiracy and as a member of the conspiracy some of the accused had committed the murder of Gurupada Bagchi on 23rd January, 2000 aided and abetted by the accused and had thereby committed an offence punishable under section 120B read with section 302 of the IPC. Khokan Das, Basudeb Majumder and Harey Ram have been accused of committing murder of Gurupada Bagchi in furtherance of their common intention and in pursuance of a criminal conspiracy punishable under section 302 of the IPC read with section 34 of the IPC. Another charge-sheet has been filed where Tarak Haider has been charged along with other accused including Naresh Jain, Shyam Raut etc. for abetting the commission of the offence of murder of Gurupada Bagchi by Khokan Das, Basudeb Majumder and Harey Ram. Thus committing an offence punishable under section 109 read with section 302 of the IPC. Lalu Shaw has been charged with abetting Khokan Das, Basudeb Majumder and Harey Ram in murdering Gurupada Bagchi. The charge mentions further that since he was present when the murder was committed in pursuance to the abetment and conspiracy, he must be deemed to have committed the offence of murder

punishable under section 302 read with section 114 of the IPC.

3. In order to bring home the charges against the appellants the prosecution has examined 32 witnesses. PWs 6, 7, 9 and 10 claimed to be eye-witnesses. PWs 24 and 25 have been examined because according to the prosecution they were witnesses to the conspiracy. However, PW 25, whose statement was recorded under section 164 of the Cr.P.C., has been declared hostile. PW 3 is the wife of the deceased. PWs 4, 5 and 6 are the brothers of the deceased. PWs 2 and 11 are post-occurrence witnesses and were members of the CPI(M) Party. PW 17 is the Judicial Magistrate who held the Test Identification Parade in respect of Khokan Das and Basudeb Majumder @ Basu which was witnessed by PWs 7 and 9. PWs 13, 14, 15 and 20 are witnesses to the seizures made of fire-arms and a maroon coloured shawl. PW 18 had filed a civil suit against the accused Naresh Jain who has been acquitted by the Trial Court. PW 22 is a promoter and claimed to be a close associate of the deceased. PW 30 is the doctor who conducted the post mortem examination. PW 21 is the police photographer. PW 27 is the Judicial Magistrate who recorded the statement of Anup Bag @ Kochi Bag (PW 25) who was initially arrested and later discharged. PW 29 received the written complaint from PW 1. PWs 31 and 32 are the Investigating Officers. PW 12, who has been declared hostile, was the fish vendor from whom the deceased was allegedly purchasing fish when he was shot.

#### EVIDENCE

4. It would be advantageous to consider the evidence of the eyewitnesses first. PW 6, the elder brother of the deceased, has stated that he had purchased fish in the market and was buying other provisions at a distance from the spot where his brother was shot. The deceased was also purchasing fish from the same vendor. While he was sitting across the fish vendor, he noticed that one person who had covered himself with a shawl took out something in his hand. There was a flash and it was followed by a sound. According to this witness there was pandemonium in the market thereafter and he noticed that the deceased had fallen on the floor of the market. The witness claimed to have rushed to the deceased and noticed a hole on the right parietal region of his head which was bleeding profusely. He told the crowd, including one stationery vendor who had approached the spot, to inform the police. The witness then informed the family of the deceased telephonically about the incident. When he returned to the spot after making the telephone call he was informed that the body of the deceased was taken away by the party-men. After the police arrived there, he proceeded to his residence. The witness has stated that he was interrogated by the CID on 24th January, 2000. In his cross-examination he has admitted that despite his deep love and affection for his brother he did not embrace him when he fell to the ground after being shot. He has also admitted that he did not rush to the hospital. He has conceded that he did not file the complaint although he had visited the Kasba Police Station in search of the body of the deceased.

5. PW 7 was a customer in the market. He has stated that while he was at the chicken vendors stall, three persons went past him and encircled the deceased who was purchasing fish; one on either side of the deceased and the third one behind him. The person on his right was covered with a maroon shawl. This witness claimed to have seen the three persons brandishing their fire-arms and the person who was on the right of the deceased covered with a maroon shawl placed his fire-arm at the ear of the deceased and shot him. The witness saw the deceased falling to the ground after the gunshot and also found that one person beside him lending him support. This witness identified two of the miscreants in the T.I. Parade, i.e., Khokan Das and Basudeb Majumder. He has stated in his evidence that Khokan Das was armed with a firearm and was standing -on the right side of the deceased. He had shot the deceased. Basudeb has been identified as being armed with fire-arm and standing on the left of the deceased. According to him, Harey Ram Singh was also armed was standing behind the deceased. He has then stated that the assailant Khokan Das flung the maroon shawl to Lalu Shaw. The witness has conceded that he did not disclose to anybody in the market that the main assailant had thrown his shawl to Lalu Shaw who was a vendor in the market. The CID officers visited the witness's residence about 3/4 days after the incident and questioned him. The witness has stated that he did not inform either the CPI(M) Party or the local people or the persons in the market or the police that he had witnessed the incident. He has also stated that he did not describe the miscreants except to state that he thought one of the persons was a non-Bengali or a person from Bihar. The witness also claims that the maroon shawl had some embroidery on it and that is why he was able to identify the same in the Court.

6. The third alleged eye-witness examined by the prosecution is Siddheswar Singh, PW 9, a customer in the market on that day. He claims to have noticed three persons surrounding the victim; one to his left, the other to his right and the third behind him. He claims that the victim bent down to pay for the fish that he had purchased when the person on his right shot him by placing the fire-arm just near the victim's ear. The witness then reiterated the same story as was narrated by PW 7 about the assailant, who was wrapped in "a reddish colour shawl with embroidery work", throwing it to the fish vendor, Lalu Shaw. Thereafter the assailant and the other two persons who were with him fled from that place. The witness has stated that he did not chase the assailants although he was of the view that it was necessary. He claimed that an aged person lent support to the victim when he fell to the ground and laid him on the floor of the market. The witness claims that the victim's body was lying in the market for about 25 minutes. This witness identified two persons in the Test Identification Parade before the Magistrate who has been examined as PW 17. The witness has identified the accused in Court and described the position in which they were standing vis-à-vis the victim in the market. The witness has conceded in his cross-examination that although he had witnessed the incident, he did not narrate it to the police who came to the market 45 minutes after the

incident. He also did not disclose the particulars of the incident to anybody in the market or his locality or the persons in the party office. According to this witness, he was examined by the Investigating Officer at his residence about 2/3 days after the incident. He has also admitted that he had not described the assailants to the Investigating Officer. Though the witness in his examination-in-chief had stated that one of the assailants was an outsider, i.e., a Bihari, he was unable to identify in Court as to how many persons in the dock were Bihari.

7. Debdas Paik PW 10 is the fourth eye-witness to the incident and was present (sic) the market as a customer. He has spoken about seeing Basudeb Majumder Khokan Das and Harey Ram talking to Lalu Shaw near his stall in the fish market when he entered there at about 7 a.m. on 23rd January, 2000. He passed by them and proceeded towards the meat shop. He noticed the victim, a veteran CPI(M) leader of the locality, purchasing fish from a vendor. He then saw Khokan Das on the right of the victim, Basudeb Majumder on his left and Harey Ram behind him, all armed with fire-arms. He reiterated the version of the other eyewitnesses that Khokan, who was wearing a maroon coloured shawl, shot the victim at a close range, above his right ear. When the victim was about to fall to "he ground a person nearest to him helped him and laid him on the floor. The witness had also seen Khokan Das flinging the shawl to Lalu Shaw who was in his stall after which the assailants escaped. The witness identified the accused in Court. He claimed that he was acquainted with them for three years prior to the incident and he knew Lalu Shaw was running a fish stall in the market. The witness like other eye-witnesses has conceded that he did not inform the Kasba Police Station which was nearby, although he was aware of the manner in which the incident had occurred. He did not inform the party leaders or any other persons about the incident. He has spoken about the plan of the market and the place where the stalls were situated. We will refer to this at a later stage when we consider the credibility of the testimony of these witnesses. He has denied informing the address of any of the accused persons to the Investigating Officer.

8. The best witness to the incident would have been the fisherwoman from whom the victim was purchasing fish when he was shot. She has been examined as PW 12. However, this witness has been declared hostile. She has stated in her deposition that she knew Khokan Das as he used to run a fish stall in the same market.

9. PW 1, the complainant, claims that on 23rd January, 2000 at about 7.30 a.m. when he was about to leave his residence one Anath Pal (PW 11) informed that Gurupada Bagchi had been shot in the market. He rushed to the market and he found the victim lying on his back in a pool of blood on the floor of the market. He has spoken about the presence of PW 8 Nepal Saha, Nemail Purkait, Gopal Mukherjee and many others who had arrived at the scene of offence before this witness reached there. He called the taxi and then he and the others took the victim to the Kasba Police Station. A jeep was ready at the police station as information had already been received by the police. The jeep then escorted the taxi in which the victim was placed

to the SSKM Hospital. On reaching the hospital the doctor who examined the victim declared him dead. This witness claims that while the others remained in the hospital with the body, he rushed to the Kasba Police Station and lodged a written complaint. He claims that Sankar Bhadari (PW 23), Chandra and Anup Bag @ Kochi (PW 25) of Kasba market reported to him that Khokan Das had fired the shot at the victim while Harey Ram and Basudeb had accompanied him. According to this witness the injury was just beside the victim's ear and the bullet had pierced both his ears. The witness has also claimed that in September, 1999 there was an attempt on the life of the victim. He stated that no police personnel accompanied him to the place of occurrence after he submitted his complaint. This witness was a member of the CPI(M) just as PW 11 and other witnesses. Surprisingly although this witness was aware of the names of the assailants because he claims that PWs 23 and 11 and one Chandra informed him, he did not mention the names in the FIR.

10. PW 2 is another member of the CPI(M). He is a post-occurrence witness. He claims that he went to fish market on being informed about the attack on Gurupada Bagchi. He has spoken about the presence of PW 1 at the SSKM Hospital. This witness has deposed that Gurupada Bagchi had stopped construction work on a plot of land at 2B, Bosepukur Road, in which Naresh Jain, one of the accused persons, was involved. He claimed that Naresh Jain conspired to eliminate Gurupada Bagchi with Tarak Haider, the appellant in CRA 74 of 2005. He has also spoken about the victim receiving threatening anonymous telephone calls. The witness identified the accused person Naresh Jain, Tarak Haider, Rangalal, Lalu, Basudeb and Khokan in the Court. He was not able to identify Harey Ram. He claimed that he was not interrogated by the police of Kasba Police Station. But a CID officer visited his house on 26th January, 2000. The witness has denied the suggestion put to him that the victim and his henchmen used to extract money from the stallholders in the C.I.T. Market. He has also denied the suggestion that the death of the victim was due to intra-party rivalry.

11. PW 8 was a party worker who learnt of the victim being killed in the market. He rushed there and found PW 1 and others at the spot. He has corroborated the story of PW 1 that they took the victim first to the Kasba Police Station and then to the hospital. According to this witness he was told the names of the assailants when he went to the fish market after the deceased was cremated. Though at one stage he stated that he had informed their names to the Police, he has contradicted himself and denied giving any such information.

12. PW 11 Anath Pal is another post-occurrence witness. He claims to have learnt from one Kaberi Pain about Gurupada Bagchi being murdered in the market. He was also a member of the CPI(M) and after learning of the incident he went to the party office to inform the party bosses. According to him he learnt the names of the assailants from the crowd at the market when he returned there for the second time. This witness has stated that he did not disclose the details of the incident to

anybody else but the CID officer. He has conceded that he did not point out to the Investigating Officer the names of the persons from whom he had learnt the names of the assailants.

13. PW 3 is the wife of the victim. She has not seen the incident. She has spoken about disputes which arose between her husband and Naresh Jain in respect of a boundary wall on a property at Bosepukur Road. She claims that she had received threatening telephone calls from Tarak Haider and Omray. She claims that she did not inform the police about receiving telephonic threats but that she had told her husband. Later she contradicted herself and stated that the police were intimidated regarding the threatening calls. The witness has then stated that the CID interrogated her on the night of the incident in the presence of her brothers-in-law and party workers. The CID officers called on her again, after 2/3 days, to record her statement. She has stated in her deposition that her brother-in-law PW 4 told her the names of her husband's assailants on the same day, i.e., 23rd January, 2000.

14. The other witnesses, namely, PWs 13, 14, 15 and 20 are all witnesses to different seizures made in respect of fire-arms and the maroon shawl.

15. PW 30, the doctor who conducted the post mortem examination, has stated that the injuries sustained by the deceased were as follows:

(i) "One gun shot injury of entrance, on the left temporomandibular joint, 1" x 3/4". Oval in shape with evidence of burning, singeing and blackening. On dissection and tracing the track it is found to pierce through and through transversely piercing frontal lobe of the brain substance, produced a wound of exit on the right temporal region of head, with a lacerated wound, 3" x 1 1/2" averted margin just behind the right ear. No pellet was found.

(ii) On dissection, bruise 3" x 2" on the right parietal region of the skull.

(iii) Bruise on the occipital region on the skull 2 1/2" x 2".

(iv) Fracture of the base of the skull and sphenoid bone.

(v) Fracture of the left side of the mandible and both temporal bones."

16. The doctor opined that the death was due to gunshot injury and was ante-mortem and homicidal in nature. According to the witness the injuries (ii), (iii) and (iv) can be sustained if a person, after receiving a gunshot injury, suddenly fell on a cemented floor. He has also stated that if the deceased had been shot at a close range on his right ear, the injuries noted in the post-mortem report would not have been found. He has further stated that if a person was shot with the fire-arm touching him, more damaging injuries would be sustained than those which were found on the deceased.

17. We have noted the evidence of the Investigating Officers in this case. PW 31 was appointed as the first I.O. He went to the scene of offence accompanied by PW 1. He

drew the sketch of the place which has been exhibited. He has admitted that between 23.01.2000 and 25.01.2000 when he was dealing with the investigations in this case he did not examine any shopkeepers or stall holders of the market. He admitted that though the CPI(M) members and supporters had visited the Police Station during this period none of them disclosed the names of the assailants to him.

18. PW 32 was entrusted with the investigation of this case thereafter, being an officer from the Criminal Investigation Department. He recorded the statements of several persons under section 161 of the Cr PC, including those of PWs 3, 4, 7, 9, 23 and 25. He has stated that he came across the name of PW 24 a taxi driver at a taxi stand. He contacted the owner of the taxi and traced the driver almost a month after the incident. Surprisingly though the Investigating Officer examined some shopkeepers in the market on 25th January, 2000, none of them were examined in Court. He claimed that he had obtained the names and addresses of the witnesses who have been examined before the Trial Court during the course of the investigation and went to their respective houses to record their statements. The Investigating Officer has conceded that PW 25 was arrested and in police custody for 14 days. His statement was recorded initially on 25th January, 2000 under section 161 of the Cr.P.C. Later his statement was recorded under section 164 of the Cr.P.C. by the learned Magistrate and his application for bail was made the next day. The witness has admitted that the statement of Shyam Raut was recorded and recovery of gun and shawl were made from him. It was sent to Sonarpur Police Station for recording a new case.

19. Mr. Dastoor, the learned Counsel appearing for the first two appellants in CRA 71 of 2005, has drawn our attention to various inconsistencies and discrepancies in the evidence of the witnesses before the Court. He has pointed out that the evidence of PW 24, the taxi driver, has rightly been discarded by the Trial Court and that he was the only witness who claimed that there was a conspiracy between the appellants to do away with Gurupada Bagchi. The learned Counsel also submitted that the photographer, PW 21, who was attached to the CID, reached the scene of offence even prior to lodging of the FIR. The photographer claimed that when he reached the place of occurrence at around 8.10 a.m., no police personnel was present inside the market. According to him, no members of public were also present in the market. But there were several people outside the market. Our attention has also been drawn to the testimony of PW 20 who was a witness to the seizure of a maroon coloured shawl. According to the learned Counsel, the testimony of this witness discloses that he had agreed to depose before the Court as a quid pro quo as he did not have a trade licence for running a tea-stall and selling snacks. The learned Counsel also submitted that the evidence of PW 3, the wife of the deceased, was unbelievable with respect to the alleged phone calls wherein she was threatened if her husband did not stop resisting the construction of Naresh Jain. The learned Counsel further submitted that the ballistic report also does not support the



prosecution case. In these circumstances, he urged that the prosecution has failed to establish its case against the appellants.

20. There are several contradictions and discrepancies in the evidence of the Investigating Officer, PW 32. It is not possible to accept that he came across a taxi driver, PW 24, during the course of his investigation after the incident had occurred who revealed to him that Tarak Haider and Naresh Jain (accused who had been acquitted by the Trial Court) entered into a criminal conspiracy to kill Gurupada Bagchi. The manner in which the Investigating Officer has carried out the investigation leaves much to be desired. It is surprising that none of the witnesses disclosed to him immediately on 23rd January, 2000 when the incident had occurred the names of the assailants, though some of them had been told in the fish market who had killed Gurupada Bagchi. The manner in which the search and seizure has been carried out by the Investigating Officer is also replete with defects. Seizure witnesses were asked to sit in one place while the weapons of assault and the maroon coloured shawl were recovered. If the Investigating Officer is to be believed that the gun and shawl were recovered on 18th March, 2000 from Shyam Raut after his arrest, we are unable to see why the Investigating Officer was required to recover any further weapons when the allegation against the appellants was that Khokan Das had shot the victim.

21. Mr. Bapuli, the learned Counsel for the State, has argued that merely because the investigation was not carried out properly and in accordance with law, this Court should not discard the testimony of the witnesses and the evidence on record. He has relied on the judgment of the Supreme Court in the case of [C. Muniappan and Others Vs. State of Tamil Nadu](#), . The Supreme Court has observed in this case that a defective investigation cannot by itself result in the acquittal of the accused. The Court has observed that the conclusion of the trial in a case cannot be allowed to solely be dependent upon the probity of the investigation. There can be no quarrel with aforesaid principal enunciated by the Supreme Court. In the present case however, besides the defective investigation the evidence of the witnesses examined by the prosecution is not believable as we have mentioned earlier. The testimonies of the witnesses are not credible and do not support the case of the prosecution. The witnesses appear to be tutored and their depositions are not plausible.

22. Another issue raised by Mr. Dastoor is that the conduct of the eyewitnesses, one of whom was the brother of the deceased, was not natural. He pointed out that instead of lodging complaint with the police immediately, the brother of the deceased who was in the market at that point of time and has been examined before the Court admitted that he did not disclose the event of 23rd January, 2000 for about 3 days. In fact all the so-called eye-witnesses had suspiciously remained silent about the names of the assailants and waited for the police to find them out and to reveal the names of the assailants. The best persons who could have

deposed before the Court, namely, the stall-holders or shopkeepers in the market who had their stalls near the scene of offence were not examined in Court. The learned Counsel has relied on the judgment in the case of [Lahu Kamlakar Patil and Another Vs. State of Maharashtra](#), in support of his submission that the conduct of the witness including the so-called eyewitness was not natural. In the aforesaid case the Supreme Court has observed that although there cannot be uniformity in the human reaction to an event or incident, the principle to be borne in mind is that if the conduct of the witness is so unnatural that it is not in accord with acceptable human behaviour allowing for variations then his testimony becomes questionable and is likely to be discarded.

23. Mr. Bapuli, the learned Counsel for the State, has submitted that conduct of witnesses should not deter the Court from holding the appellants guilty of the charges levelled against them. He has relied on the judgment of the Supreme Court in the case of [Israr Vs. State of U.P.](#), . The Supreme Court has observed that the relationship of the witnesses to the accused is not a factor to affect the credibility of the witnesses.

24. In this case as we have noted earlier, the brother of the deceased who claimed that he was an eye-witness did not disclose to the police the incident for 3 days. In fact he has stated that he learnt all the names and yet he did not reveal these names to the police. The names of the miscreants were unearthed by the police during the course of investigation. Despite the fact that the witnesses including the complainant PW 1 further stated that they learnt all the names of the miscreants after visiting the market the same day after the cremation of the deceased. It is unnatural and unbelievable that the witnesses who had seen the incident would keep quiet about it and not named the miscreants to the police despite the fact that they knew their names. There is no doubt that the relationship of the witnesses and the deceased need not be a factor while testing the credibility of a witness. However, when the witness behaves unnaturally and not in accord with normal human conduct then his testimony becomes questionable as we have already discussed.

25. Mr. Dastoor then submitted that prior to the test identification parade being held, the witnesses to the T.I. parade were shown photographs of the accused. According to the learned Counsel, two accused persons were kept together in the parade with 20 under trial prisoners. The learned Counsel, therefore, submitted that the evidence on record does not support the case of the prosecution. As regards the queries put to the appellants under section 313 of the Cr.P.C., the learned Counsel pointed out that the evidence of PW 5 was not put to the accused and, therefore, it could not be relied on. On scrutinising the record we are convinced that there are many contradictions and discrepancies in the evidence on record before the Trial Court. There are several omissions in the depositions of the witnesses which have been elicited through the Investigating Officer. It is now well settled that the

examination of the accused under section 313 of the Cr PC is not an empty formality. The accused is entitled to an opportunity to explain any material on record which is against him in consonance with the principles of natural justice. No material or circumstance which is against the accused can be used to convict him unless he has an opportunity to explain it. Therefore the evidence of PW 5 cannot be used to the prejudice of the appellants as no opportunity was afforded to them to explain the circumstances against them.

#### MEDICAL EVIDENCE AND OCCULAR EVIDENCE

26. Mr. Y.J. Dastoor, the learned Counsel appearing for the appellants, i.e., Khokan Das and Basudeb Majumder @ Basu in CRA 71 of 2005 urged that the ocular evidence must be ignore as it is contrary to the medical evidence on record. To fortify this submission he relied on the judgments of the Supreme Court in the case of [Ram Narain Singh Vs. State of Punjab](#), [Subhash and Another Vs. State of U.P.](#), [Sri Niwas Vs. Ram Bharosey and others](#), . The Supreme Court in all these judgments has considered the manner in which the oral testimony is to be assessed if it is totally inconsistent with the medical evidence on record. The Court has observed that if the medical evidence on record completely falsifies the story of the prosecution, it must be given due weightage.

27. On this aspect Mr. Saibal Bapuli, the learned Counsel for the State relied on the judgments of the Supreme Court in the case of [Darbara Singh Vs. State of Punjab](#), [Gangabhavani Vs. Rayapati Venkat Reddy and Others](#), where the Supreme Court has observed that where the question of inconsistency between the medical evidence and ocular evidence is concern, the law is well-settled that unless the oral testimony available is totally irreconcilable with the medical evidence, the oral evidence would have primacy. In the event of contradictions between medical and ocular evidence, the ocular testimony of a witness will have greater evidentiary value vis-à-vis medical evidence. It is only when the contradictions between the two is so extreme that the medical evidence completely rules out all possibilities of the ocular evidence being true at all, that the ocular evidence is liable to be disbelieved.

28. The medical evidence completely belies the version of the so-called eye-witnesses. Each of the witnesses who claim that they had seen the deceased being shot has repeated the story that he was shot at close quarters on the right side just below his ear. One of the witnesses has stated that the bullet exited from the left side of the deceased. The doctor in no uncertain terms has opined that the injuries sustained by the deceased could not have been possible, had he been shot in the manner described by the so called eye-witnesses. Furthermore, the postmortem report indicates that the deceased sustained fractures at the base of the skull and the sphenoid bone and the left side of the mandible and both temporal bones. The doctor has opined that these injuries could occur if the victim falls on a cemented floor suddenly after receiving the gunshot injury. Obviously therefore the deceased could not have been crouching in front of the fisher-woman while

purchasing fish. The version of the eye-witnesses that an old man standing next to Gurupada broke his fall and lay him on the cemented floor of the market is also unbelievable, given the injuries sustained by the deceased. Had the fall of the deceased been broken as claimed by the eye-witnesses, he would not have sustained any fractures on the skull. Moreover, as seen from the testimony of the doctor that such fractures would occur if the deceased collapsed to the ground after receiving the gunshot wound. Thus, the credibility of these eye-witnesses is at stake. All the eyewitnesses are either relatives of the deceased or party workers. They are all residents of Swinhoe Lane. It is indeed surprising that the only "eyewitnesses" who could be found all resided in the same locality, especially when the market was abuzz with activity at 7 a.m.

29. As we have noted earlier considering the ocular evidence on record and the medical evidence, we find that the ocular testimony is completely inconsistent with the medical evidence on record. Therefore, it is difficult to accept the version of the prosecution that Khokan Das had shot the deceased at a close range near his right ear and the bullet exited through the left ear. The gunshot wound as described by the doctor in the postmortem report leaves no manner of doubt that the entry point was on the left side and the exit was behind the right ear with averted margins on the wound. The blackening, burning evidence on the left side temporomandibular joint which was evidence of the bullet piercing through transversely till it exited on the right temporal region of the head of the deceased. The very fact that the bullet exited at a higher level than the entry point also indicates that the prosecution story that the deceased was bending down or had crouched in front of the fisherwoman cannot be believed. As we have already mentioned the fractures on the skull also do not lend credence to the prosecution theory that the deceased shot when he was sitting on his haunches.

#### SEIZURE

30. The fire-arm which was allegedly used for shooting the deceased has been recovered and seized according to the police. Similarly a maroon coloured shawl, which Khokan had allegedly worn, has also been seized. Let us now test the credibility and genuineness of these recoveries. When Shyam Raut, one of the accused before the trial Court who has been acquitted, was arrested on 18th March, 2000, an improvised fire-arm and .303 ammunition was seized from his accommodation. A maroon shawl was also recovered and seized. Now if these articles were recovered at the instance of Shyam Raut on 18th March, 2000 there is no evidence to connect the other witnesses to this fire-arm and the shawl. A case was started against him under the Arms Act by the Sonarpur P.S. Surprisingly, the prosecution claims that after the arrest of Tarak Haider on 30th March, 2000, he led the police to recover an improvised fire-arm loaded with one .303 cartridge which was recovered from his possession. After the recovery of the fire-arm from Tarak Haider, a case was started under sections 25 and 27 of the Arms Act against Tarak

Haider being Liluah Police Station Case No. 39 dated 30th March, 2000. No effort was made by the prosecution to link the firearm allegedly seized from Tarak Haider after his arrest to the present case and the death of Gurupada Bagchi. On 8th April, 2000, Khokan Das and Lalu Shaw were arrested. The Investigating Officer, PW 32, claims to have recovered a maroon shawl with embroidery work at the instance of Khokan Das from the storeroom of Lalu Shaw's house. This recovery was witnessed allegedly by PWs 14 and 15. Another gun was recovered from the house of Tarak's mother-in-law. It was placed in a polythene bag in a box under the staircase. This seizure was made at the instance of Khokan Das and PWs 14 and 15 were the seizure witnesses. Again, the alleged recovery of the firearm led to a case being registered under sections 25, 27 and 35 of Arms Act in Sonar Police Station case No. 29 dated 11th April, 2000 against Tarak Haider and Khokan. On 8th June, 2000 Harey Ram was arrested and a .303 revolver and "one live ammunition" wrapped in a polythene paper was recovered at his instance. This fire-arm was not seized in connection this case but a separate case under sections 25 and 27 of the Arms Act being Kasba Police Case No. 167 dated 8th June, 2000 was started against Harey Ram.

31. It must be noted here that Shyam Raut, from whom a fire-arm was recovered on 18th March, 2000 after his arrest, was acquitted. The firearms recovered allegedly at the instance of Tarak Das, Khokan Das and Harey Ram have not been related to the present case. Separate complaints were filed under the Arms Act in respect of the recoveries and those cases are still pending. No fire-arm or ammunition was recovered at the instance of Basudeb Majumder or Lalu Shaw. Moreover, from the evidence on record it does not appear that PWs 14 and 15, who have been examined as seizure witnesses, have actually witnessed the seizure. In his evidence PW 14 has stated that at the time of seizure in Tarak's mother-in-law's house he was shown a revolver being material Ext.V. He signed the label attached to the revolver and the label on the bullet. In his cross-examination he has admitted that he had no knowledge about the particular place from where the fire-arm and bullet were seized. He has also admitted that the police party which was conducting the search did not request either him or Biswajit Chakraborty, PW 15, to search the police personnel before they conducted the search. The police also did not disclose to them that none of them possessed a firearm, before they carried out the search. PW 15 is even more specific in his testimony where he states that he and PW 14 were made to sit on a sofa in the room while the police conducted the search. One policeman came to them with a fire-arm and bullet and stated that those articles were recovered behind the staircase of the house. A seizure list was prepared and he was asked to sign the same. He also signed the label affixed to the fire-arm and the bullet. This witness has stated that he did not see any other person except PW14 with the police party. Therefore, the presence of Khokan Das and Tarak Haider during this seizure has not been established by the prosecution. This witness has also stated that he did not see the place from where the recovery was made. He has

also corroborated the version of PW 14 that the police did not request them to search them to ascertain whether they were in possession of any firearm. The testimony of PWs 14 and 15 has, in a sense, belied the entire prosecution case. Neither of them has been declared hostile. These witnesses have in their depositions admitted that neither of them witnessed the actual recovery and seizure. They were made to sit on a sofa while the police conducted their search. The witnesses have stated that no other persons but the police personnel were present when search was conducted. Despite the nature of this evidence the prosecution has not thought it fit to declare these witnesses hostile.

32. Mr. Saibal Bapuli, learned Counsel appearing for the State, has pointed out that the seizure lists at Ext. 4/5 and 4/6 have been signed by Tarak Haider and Khokan Das. He, therefore, submits that this is contrary to the evidence of PWs 14 and 15. This submission of Mr. Bapuli cannot be accepted because PWs 14 and 15 have not been declared hostile. They have both categorically asserted that when the search and seizure took place no other person was present but the police personnel and themselves. Whether the signatures of Tarak Haider and Khokan Das were obtained on the seizure lists during the seizure is very much in doubt.

33. In the case of [Mukhtiar Ahmed Ansari Vs. State \(N.C.T. of Delhi\)](#), [State of Rajasthan Vs. Raja Ram](#), and [Dahyabhai Chhaganbhai Thakker Vs. State of Gujarat](#), the Supreme Court has held that the witness can be declared hostile even after the cross examination by the defence is complete. The prosecution not having declared PWs 14 and 15 hostile is bound by their evidence which, in our opinion, proves that the search and the seizure was not authentic and in accordance with law. Moreover, the ballistic expert who has been examined as PW 28 has admitted that he was not aware from where the fire-arms were seized. He has stated that he examined the articles, namely, an improvised single shot pistol, one round of 0.315 rifle cartridge and one empty fire cartridge case. The ballistic expert's reports do not demonstrate that the fire-arms seized were used to kill the deceased, nor is there any indication from where the fire-arms were seized. Considering the nature of evidence on record in respect of firearms, it is difficult to accept that the fire-arms sent to the ballistic expert were used for murdering the deceased.

#### CONSPIRACY

34. None of the prosecution witnesses have spoken about any other person shooting the deceased except for Khokan Das. Therefore, from the evidence on record it is obvious that none of the appellants have shot the deceased. None of the appellants have been charged or convicted for an offence under section 302 of the IPC by the Sessions Judge. The Sessions Court has found that the appellants were guilty of conspiring with each other to commit the murder. As regards the conspiracy, the learned Sessions Judge was of the view that there was a conspiracy between Tarak Haider and Naresh Jain to kill the deceased because the victim was obstructing the construction activity carried out by Naresh Jain at Bosepukur Road.

The trial Court has held that this alleged motive of Naresh Jain was not established and therefore, has acquitted Naresh Jain. However, Tarak Haider is convicted with the other appellants under section 120B read with 302 of the IPC.

35. Let us now consider whether the judgment of the Sessions Court in respect of Tarak Haider can be upheld. The prosecution has relied on the evidence of PWs 20, 24 and 25 to establish its theory of conspiracy between the appellants for committing murder of the deceased. Mr. Sekhar Basu, the learned Counsel appearing for Tarak Haider, has pointed out that Tarak Haider had been implicated by PWs 2, 3, 4, 8, 14, 15, 24, 25, 30, 31 and 32. He submitted that as mentioned in the charge the date of conspiracy was in the month of December, 1999 and therefore we would have to consider only that period to ascertain whether the prosecution's theory of conspiracy can be believed. PW 2 has spoken about Tarak Haider being supported by Naresh Jain for his anti-social activities in the local area. PW 3 has mentioned that she received threatening telephone calls from Tarak Haider and Omray. Surprisingly this witness has admitted that no police complaint was lodged in respect of these phone calls. She merely informed her husband, the deceased, about these calls, who also did not pursue the matter with the police. The evidence of this witness with regard to any conspiracy or understanding between the appellants is clearly inadmissible as it is based on her conviction that Naresh Jain, Tarak Haider, Omray and others had murdered her husband in a pre-planned way. She learnt about the names of Basudeb, Harey Ram and Khokan from other members of the family. She has contradicted herself in her cross-examination when she states that police were informed regarding the threat calls. Thus, the evidence of this witness regarding the calls is not substantiated at all; no call record has been produced nor is there any complaint made by her with the police in respect of these calls. Moreover, if at all there were such calls they cannot be connected to the conspiracy allegedly hatched by the appellants. PW 4, the brother of the deceased, also has admitted that the local police station was never informed that Gurupada Bagchi's life was in danger. He has also denied having informed Kasba Police Station on the next day after the incident that the deceased resisted the anti-social activities of Omray, Tarak and Rangalal. Omray and Rangalal have been acquitted by the Trial Court. PW 22 who also speaks about the receiving threat calls from Tarak has been disbelieved by the Trial Court. In fact, when there is no recording of these phone calls it is difficult to accept the version of the prosecution that Tarak Haider had made these calls.

36. PW 24 is the star witness of the prosecution to establish the conspiracy. However, this witness has been disbelieved by the Trial Court and therefore Naresh Jain has been acquitted. According to Mr. Basu, the learned Counsel for Tarak, there is no evidence on record to establish that Tarak, Khokan, Basudeb, Harey Ram and Lalu had conspired to kill the victim.



37. The theory of there being a conspiracy between Tarak Haldar and the other appellants is not proved from the evidence on record. In fact, the trial court has found that there was one conspiracy between Tarak Haider and Naresh Jain and another between Tarak Haider, Khokan Das, Basudeb Majumder @ Basu and Lalu Shaw. However the charge framed by the trial Court does not speak of a second conspiracy.

38. The prosecution, as we have already mentioned, has relied on the testimony of PWs 24 and 25 to establish the theory of a conspiracy between the appellants. PW 24 is a taxi driver who claimed that he had witnessed the exchange of money between Naresh Jain and Tarak Haider. He also claimed that this money was paid to Tarak Haider to do away with Gurupada Bagchi. The witness has asserted this fact although according to his testimony he was at a tea stall, away from the place where the alleged transaction took place. It is incredible that persons who are allegedly hatching a plot to kill someone would reveal it to a taxi driver who was only an acquaintance. It is also difficult to believe that the same taxi driver would be at the disposal of the appellants for commuting from one place to the other in the city of Kolkata. The trial Court has found this witness to be untrustworthy and we have no reason to differ from this observation. The other witness on whom the prosecution has relied to establish the theory of conspiracy, PW 25, has been declared hostile. He has admitted that he did not know Tarak Haider personally nor of the attack on Gurupada Bagchi prior to his death. He was able to identify only Lalu Shaw and Khokan Das in Court. Khokan Das, according to this witness, was also a fish vendor in the same market where the deceased died, about 3 years prior to the incident. The witness has denied knowing Basudeb Majumder and Harey Ram. This witness was arrested by the police in connection with the present case. After his statement was recorded by the learned Magistrate under section 164 of the Cr.P.C., he was released from custody. He has admitted that he made the statement before the learned Magistrate at the instance of the police because he feared them. He has also admitted that the statement was not correct. He has denied that Khokan Das, Lalu Shaw and Omray sold fish during the same time as he did in the fish market. Thus, the prosecution has been unable to prove the theory of conspiracy either through PW 24, the taxi driver or PW 25.

39. The conviction of the appellants under Section 120B read with section 302 of the IPC cannot be upheld as the conspiracy has not been proved by the prosecution. The time and place of the occurrence of the conspiracy has also not been established. In the case of [Mamfru Chowdhury and Others Vs. Emperor](#), the Division Bench of this Court has held that the prosecution must establish by evidence on record that an incident which is alleged to have occurred happened at the time, in the place and under the precise circumstances narrated by the prosecution. The charge mentions that the alleged conspiracy was hatched in December, 1999. However one of the witnesses has spoken about the conspiracy taking root in the year 2000. There is no evidence on record as we have already stated about any



agreement between the appellants to kill Gurupada Bagchi. Therefore, in our opinion, the conspiracy has not been established.

40. All the learned Counsel for the appellants have submitted that the prosecution has failed to establish any motive against the appellants for entering into a criminal conspiracy to kill the deceased. They have submitted that the motive to enter a criminal conspiracy is an important facet to be considered while deciding whether the prosecution has proved the conspiracy. We find from the evidence that the prosecution attempted to establish that the motive for the criminal conspiracy was that Naresh Jain (a person acquitted by the Sessions Court) wanted the victim to be eliminated because he was obstructing the former's lawful construction activity. Naresh Jain has been acquitted by the trial Court. Therefore, the motive that the prosecution had spoken of for the conspiracy has failed. The defence has suggested that it was an intra-party rivalry which caused the death of Gurupada Bagchi. That defence raised by the appellants has not been established. Once the motive as ascribed by the prosecution has not been accepted by the Sessions Court, the reason for the conspiracy case comes to an end.

41. Mr. Ashish Sanyal, the learned Counsel appearing for Lalu Shaw, submitted that Lalu Shaw has been charged under section 109 of the IPC. He submits that the framing of the charge is itself incorrect. He urged that the charge must be specific inasmuch as it must disclose the part of section 107, which defines abetment of a thing, is attracted. Furthermore, the learned Counsel has submitted that the prosecution has claimed that a maroon coloured shawl was recovered from Lalu Shaw. He was arrested on 4th April, 2000. However, such a shawl was recovered from Shyam Raut on 18th March, 2000. Therefore, according to the learned Counsel, this recovery itself is unbelievable. In respect of Harey Ram, the learned Counsel has submitted that a fire-arm was allegedly recovered from him on 8th June, 2000. However, none of the witnesses have spoken about Harey Ram carrying a weapon when the incident occurred. All that has been mentioned is that he conceded that he was behind the market. Therefore, according to the learned Counsel Harey Ram also cannot be found guilty of participating in a criminal conspiracy.

42. We have already dealt with the aspect of the participation of all the appellants in the criminal conspiracy and the fact that such a conspiracy had not been established. Our observations would apply equally to Lalu Shaw and Harey Ram. Mr. Sanyal was right in pointing out that if the maroon coloured shawl was recovered as stated by the prosecution from Shyam Raut the question of recovering a shawl from Lalu Shaw did not arise. Shyam Raut was arrested on 18th March, 2000 when a gun and shawl were recovered from his possession; while Lalu Shaw was arrested on 8th April, 2000. The prosecution has claimed that it recovered a maroon coloured shawl from him as well. The evidence on record indicates that only one person was wearing a shawl. Therefore, the recovery of two shawls is contrary to the case of the prosecution.

43. After scanning the evidence on record critically and on assessing the same we have no manner of doubt that the appellants have been implicated falsely. The charge of conspiracy against them has failed. The charge of abetment to commit the murder has also failed to be established by the prosecution. Therefore it is not possible to accept the case of the prosecution.

## CONCLUSIONS

44. The Sessions Court has held that Khokan Das, Basudeb Majumder and Harey Ram on 23rd January, 2000 had, in furtherance of their common intention and pursuant to the conspiracy hatched by Tarak Haider, killed Gurupada Bagchi. Therefore, the Trial Court has held that the charge of section 120B read with section 302/ 34 of the IPC has been proved beyond all reasonable doubt against Khokan Das, Basudeb Majumder and Harey Ram. As against Tarak Haider, the Sessions Court held that the charge of section 120B read with section 302 of the IPC had been proved against him. Lalu Shaw, has been found guilty of the charge under sections 109 and 120B read with section 302/ 114 of the IPC. Thus, it can be seen that none of the appellants have been found guilty of the substantive charge under section 302 read with section 34 of the IPC. All of them have been found guilty of the conspiracy by the trial Court. Lalu Shaw, in fact, has been found guilty of abetting an offence, i.e., the offence of murdering Gurupada Bagchi. As we have seen from the material on record, it is not possible to conclude that there was any criminal conspiracy between the appellants. The prosecution has been unable to prove any agreement between them. The evidence on record led by the prosecution is full of holes and does not lend credence to the theory of conspiracy. The evidence also contradicts the version of the prosecution that the appellants are all guilty under section 120B read with section 302 of the IPC. Some of the accused persons before the Sessions Court have been acquitted of the same charges by that Court. The Sessions Court has rightly disbelieved the evidence of PW 24, the taxi driver, who was examined to establish the conspiracy. The seizure was not conducted in accordance with law. There is no material to connect the appellants to the seized fire-arms or the maroon shawl. Besides, the death of Gurupada Bagchi did not occur as described by the prosecution witnesses. Their evidence is untrustworthy and impossible to accept in view of the medical evidence on record as we have mentioned earlier. Therefore, it is not possible to accept the view taken by the Sessions Court. The judgment and order under appeal is quashed. The conviction and sentence imposed on the appellants by the trial Court are set aside. The appellants are acquitted. They shall be set at liberty unless they are required to be detained for any other case. Urgent certified photocopies of this judgment, if applied for, be given to the learned advocates for the parties upon compliance of all formalities.