

Sidharth, Etc. Etc vs State Of Bihar on 30 September, 2005

Equivalent citations: AIR 2005 SUPREME COURT 4352, 2005 AIR SCW 5010, 2005 AIR - JHAR. H. C. R. 2515, 2005 (3) BLJR 2097, 2005 CRILR(SC&MP) 2 822, 2005 (10) SRJ 309, (2006) 1 JCR 1 (SC), 2006 (1) SCC(CRI) 175, 2006 ALL MR(CRI) 888, (2006) 37 ALLINDCAS 152 (SC), 2005 (7) SLT 352, 2005 (7) SCALE 700, 2005 (12) SCC 545, 2005 CRILR(SC MAH GUJ) 2 822, 2005 BLJR 3 2097, (2006) 1 PAT LJR 241, (2003) 1 JCR 272 (JHA), 2005 BLJR 3 2341, (2005) 3 RECCRIR 626, 2005 CHANDLR(CIV&CRI) 324, (2006) SC CR R 994, MANU/SC/949/2005, (2005) 4 RECCRIR 651, (2005) 7 SCJ 218, (2005) 7 SCALE 700, (2006) 38 ALLINDCAS 896 (PAT), (2005) 4 CURCRIR 91, (2005) 7 SUPREME 38, (2005) 3 ALLCRIR 2912, (2006) 54 ALLCRIC 561, (2005) 3 CHANDCRIC 256, (2006) 1 ALLCRILR 158, (2006) 1 EASTCRIC 1, (2005) 32 OCR 842, (2005) 4 PAT LJR 178, (2005) 4 JLJR 104, (2005) 4 CRIMES 135, 2005 (3) ANDHLT(CRI) 308 SC, 2006 (1) ALD(CRL) 234, (2005) 3 ANDHLT(CRI) 308, 2006 (54) ACC (NOC) 65 (PAT)

Author: K.G. Balakrishnan

Bench: K.G. Balakrishnan, B.N. Srikrishna

CASE NO.:

Appeal (crl.) 688 of 2003

PETITIONER:

Sidharth, etc. etc.

RESPONDENT:

State of Bihar

DATE OF JUDGMENT: 30/09/2005

BENCH:

K.G. Balakrishnan & B.N. Srikrishna

JUDGMENT:

J U D G M E N T With CRIMINAL APPEAL NOS. 689 OF 2003 AND 736 OF 2003 K.G. BALAKRISHNAN, J.

All the three appellants were found guilty by the Sessions Court for various offences. Appellant Arnit Das was found guilty of the offence under Section 27 of the Arms Act as also for the offence under Section 302 read with Section 120B IPC and sentenced to death. Appellant Sidharth was convicted

for the offence under Section 302 read with Section 34 and Section 120B IPC and appellant Rohan Prakash was convicted for the offence under Section 302 read with Section 120B IPC. The two appellants who were sentenced to undergo imprisonment for life, filed separate appeals before the High Court of Patna and their conviction on all counts was confirmed. In the appeal preferred by Arnit Das, his conviction was confirmed but the sentence of death imposed on him was commuted to life imprisonment.

All these appellants were tried by the Sessions Court alleging that they entered into a conspiracy on 4.9.1998 to do away with one Abhishek. Deceased Abhishek, along with appellant Rohan Prakash, and two others, namely, Shweta and Anvesh, used to attend tuition classes at the residence of Prof. J.C. Banerjee from 5.00 p.m. to 6.00 p.m. and again from 7.00 p.m. to 8.00 p.m. Another student by name, Pallavi, used to get tuition from Prof. J.C. Banerjee from 6.00 p.m. to 7.00 p.m. Appellant Sidharth told appellant Arnit Das that appellant Rohan Prakash was in love with Pallavi but she was not responding and instead she had expressed her love towards deceased Abhishek and, therefore, he is to be killed. According to the prosecution, appellant Sidharth told appellant Arnit Das that all arrangements had been made to kill Abhishek and if appellant Arnit Das kills him, he would be introduced to veteran criminals, including one Suraj Bhan. Appellant Sidharth gave the description of deceased Abhishek to appellant Arnit Das and on 4.9.1998, he promised to provide a firearm to appellant Arnit Das. On 5.9.1998 at about 5.00 p.m, appellant Arnit Das came to the room of appellant Sidharth where the latter provided him with a double barrel country- made pistol, and loaded two cartridges in the pistol in his presence. Two extra cartridges were also given. Appellant Arnit Das was directed to go to the house of Prof. J.C. Banerjee and request the deceased, Abhishek to come out of the tuition class. He was told that appellant Rohan Prakash would help him to identify Abhishek. As part of the conspiracy thus hatched by these three appellants, at about 7.15 p.m. on 5.9.1998, appellant Arnit Das went to the house of Prof. J.C. Banerjee. His wife Rekha Banerjee was in an adjoining room and appellant Arnit Das told her that he wanted to meet Abhishek. Abhishek came out of the tuition class followed by appellant Rohan Prakash. The further case of the prosecution is that appellant Arnit Das took Abhishek ten to twelve steps away from the gate of the house of Prof. Banerjee, caught hold of him and fired a shot at him from a close range. Appellant Arnit Das fired one more shot, but it did not hit the deceased. Appellant Rohan Prakash, who had, in the meanwhile returned inside Prof. Banerjee's house, wanted to go to the gate, but on hearing the shot, Mrs. Rekha Banerjee caught hold of his hand and advised him not to go out as she had heard the sound of firing of a shot. But appellant Rohan Prakash came out of the house and saw Abhishek lying on the ground with bleeding injury. He saw the assailant making good his escape on a bicycle. It is pertinent to note here that the prosecution case was that though appellant Rohan Prakash was one of the abettors in this murder, he pretended to be ignorant and after the incident, to mislead the police, he himself gave the F.I .Statement. Appellant Rohan Prakash looked at injured, Abhishek, and took him to the hospital in the car which incidentally belonged to Dr. Neel Kamal, father of Pallavi. Abhishek, was taken to Shahi Clinic where he underwent a surgery but died on the next day. Appellant Rohan Prakash stated in the FI Statement that deceased Abhishek was being threatened by some students of the college and this had caused some tension to him.

Based on the First Information Report given by appellant Rohan Prakash, a case was registered, the inquest report prepared and the 'Fardebeyan' recorded. The police could not get any clue regarding

the murder and they suspected the involvement of appellant Arnit Das. On 13.9.1998, PW 21, the Investigating Officer raided the house of appellant Arnit Das. On interrogation by the police, appellant Arnit Das made a clean breast of the entire incident to the police. He showed the wearing apparels worn by him at the time of the incident and the cycle he had used to escape from the scene of occurrence. The pants, shirt and the cycle were taken into custody. Appellant Arnit Das was arrested and he was produced before the Chief Judicial Magistrate on the next day. PW 21, the Investigating Officer gave an application before the Chief Judicial Magistrate stating that appellant Arnit Das wanted to make a confession before the Magistrate. The Chief Judicial Magistrate directed PW7 Deepak Kumar Singh, the Judicial Magistrate to record the confession of appellant Arnit Das. PW-7 recorded the statement and on the basis of the information furnished by appellant Arnit Das, the other appellants were arrested and after completion of the Investigation, the final report was filed before the court.

Before the Sessions Court, 21 witnesses were examined. The main evidence relied on by the prosecution was the confession made by appellant Arnit Das before PW 7 Judicial Magistrate, as also his extra-judicial confession made to PW 8 Arko Pratim Bannerjee. The prosecution also relied on the F.I. Statement given by appellant Rohan Prakash to show his involvement in the conspiracy and the attempt made by him to mislead the police and to prevent the police from tracing out the real culprits. To prove the motive, the prosecution relied on the evidence of some of the prosecution witnesses, mainly the evidence of the father of the deceased, Dr. Ajit Singh, and the evidence of one hostile witness.

Appellant Sidharth had set up a plea of alibi and stated that at the relevant point of time, he was receiving tuition from DW 2 Mohan Prasad and examined witnesses to prove the alibi. Appellant Rohan Prakash completely denied any part in the conspiracy and alleged that he was falsely implicated by the father of the deceased. Though appellant Arnit Das had given a statement at the time of questioning under Section 313 Cr.PC that he had not made any confession before the Magistrate, he filed an application stating that he was severely tortured by the police and was taken to the Magistrate for his confession, and alleged that the police had prepared the confession. The Sessions Court accepted the prosecution version and convicted the appellants accordingly.

It may be noticed at this juncture that appellant Arnit Das when produced before the Chief Judicial Magistrate stated that he was below 16 years of age; therefore, he was entitled to the benefit of the Juvenile Justice Act, 1986. As per Section 2(h) of the Juvenile Justice Act, 1986, 'Juvenile' is defined as "a person who has not attained the age of 16 years." According to appellant Arnit Das, he had not attained the age of 16 years as on the date of occurrence. This question was considered by the Juvenile Court and appellant Arnit Das gave oral and documentary evidence before the Juvenile Court. The Juvenile Court came to the conclusion that appellant Arnit Das was above 16 years of age as on the date of the occurrence and therefore not entitled to the benefit of the Juvenile Justice Act, 1986. Appellant Arnit Das preferred an appeal against the order passed by the Juvenile Court before the Sessions Judge, Patna. The Sessions Judge, Patna dismissed the appeal and the appellant thereafter filed a Criminal Revision before the High Court of Patna. The High Court held that the appellant was above 16 years of age as on the date of occurrence, i.e., on 5.9.1998, and therefore not entitled to invoke the provisions of Juvenile Justice Act, 1986. The appellant thereafter preferred a

Special Leave to Appeal (Criminal) No. 729 of 2000 (Criminal Appeal no. 496 of 2000) which was considered and this Court came to the following finding:-

"So far as the finding regarding the age of the appellant is concerned, it is based on appreciation of evidence arrived at after taking into consideration of the material available on record and valid reasons have been assigned for it. The finding arrived by the learned A.C.J.M. has been maintained by the Sessions Court in Appeal and the High Court in Revision. We find no case having been made out for interfering therewith. "

The appellant thereafter filed a Review Petition and it was contended that the finding of the two Judge Bench of this Court was in conflict with the view taken by this Court in Umesh Chandra Vs. State of Rajasthan 1982(2) SCC 202 wherein it was held that the relevant date for consideration of the age to determine the applicability of the Juvenile Justice Act is the date of occurrence and this view was in conflict with the earlier decision where the crucial date for determining the question whether the accused was a juvenile or not was the date on which he was brought before the competent authority. In view of this conflict of opinion, the matter was referred to a bench of five judges and the bench dismissed the review petition filed by appellant Arnit Das.

Despite these findings entered into by the Court against the appellant regarding the applicability of the Juvenile Justice Act, 1986, the learned Counsel for the appellant contended that the appellant is entitled to the benefit of the Juvenile Justice (Court & Protection of Children) Act, 2000 (hereinafter being referred to as "Juvenile Justice Act, 2000") which came into force on 30th December, 2000. The learned Senior Counsel Shri Sanyal made a fervent plea before us that the appellant was a "juvenile" as per the definition of Juvenile Justice Act, 2000 and thus entitled to the benevolent provisions of Section 20 of that Act. It was contended that no sentence of imprisonment for life could have been passed against this appellant. Learned Counsel for the State, on the other hand, pointed out that appellant Arnit Das is not entitled to the benefit of the Juvenile Justice Act, 2000 as he had already completed 16 years as on the commencement of the Act. So he could not be held to be a "Juvenile" within the meaning of Section 2(k) of the Juvenile Justice Act, 2000.

The learned Counsel for this appellant urged before us that the documents produced by the appellant before the Juvenile Court were not properly considered and there was a serious error in the finding of the Chief Judicial Magistrate regarding the determination of the age of this appellant. Appellant Arnit Das challenged the finding of the Chief Judicial Magistrate, but he could not succeed and at this stage the appellant cannot challenge that finding as the decision has become conclusive and final and the Juvenile Justice Act 2000 also cannot be applied as he would not be a "juvenile" as defined under that Act.

As noticed earlier, the main evidence adduced by the prosecution is the confession made by appellant Arnit Das before PW 7 Judicial Magistrate as also the extra-judicial confession made by him before PW 8 Arko Pratim Bannerjee. The question before us is whether the confession made by appellant Arnit Das could be made use of against the other two appellants as a substantive evidence and what is the evidentiary value of that confession in view of Section 30 of the Evidence Act. The

learned Counsel appearing for the State of Bihar submitted that the confession made by appellant Arnit Das, to a great extent, was admissible under Sections 10 and 30 of the Evidence Act. It was argued that there was a prima facie evidence of conspiracy against all the appellants, and as appellants Sidharth and Rohan Prakash were participants in this conspiracy, the confession made by appellant Arnit Das could be made use of against the other two appellants as well.

Before going into this question, it is to be considered whether the confession made by appellant Arnit Das is genuine and voluntary or whether it was caused by any inducement, threat or promise. The learned counsel for the appellants strongly urged before us that the judicial confession made by appellant Arnit Das is tainted with so many legal infirmities. Firstly, it was contended that the confession has already been retracted by appellant Arnit Das; therefore, it is not admissible. It was argued that appellant Arnit Das was severely beaten up and the alleged confession is not voluntary in nature and that the police extracted the confession and got it prepared with the connivance of the Magistrate. The learned Counsel for the appellants contended that the learned Magistrate failed to comply with the mandatory guidelines issued by the High Court of Patna for recording the confession statement under Section 164 Cr. PC. It was argued that the Magistrate failed to give sufficient time for reflection and the accused was produced virtually from the police custody and he had been under the supervening influence of the police and was not having free mind to give any statement before the Magistrate. In view of the serious contentions raised by learned Counsel for the appellants against this judicial confession, we have considered these items of evidence with meticulous detail and given our thoughtful consideration as to whether the confession made by appellant Arnit Das is vitiated by any legal infirmities.

The confession of the accused Arnit Das was recorded by PW 7. PW 7 complied with all the requisite formalities contemplated under Section 164 of the Code of Criminal Procedure. The accused when produced before PW 7 had no complaint that he was tortured by the police. When he was produced before the Chief Judicial Magistrate for the purpose of remand, then also he had no complaint of any torture by the police. PW 7 put series of questions to accused Arnit Das to find out whether he was making a voluntary confession. Learned Counsel for the appellant contended that the Magistrate had not put any questions to find out the mental condition of the accused. This plea is not correct as the Magistrate had specifically ascertained from the appellant whether he was making a voluntary statement. Appellant, Arnit Das was told by the Magistrate that he was not bound to make any statement and that in case he makes a statement, it would be used against him. PW 7 had recorded in the proceedings paper that two hours' time was given to accused Arnit Das for reflection. The learned Counsel for the appellant contended that it is incorrect and that the accused was not given any time for reflection and straightaway produced before the Magistrate to give the statement. The defence had adduced some evidence to show that the entry made in the register of the remand home would prove that the accused was not given enough time for reflection for making the confession before the Magistrate. This evidence of PW7, PW8 and PW9 was discussed in detail by the Sessions Court and it was found that the entries were not genuine and contained interpolations and the evidence of these witnesses was not sufficient to prove that the Magistrate had not given two hours time before the accused made the confession.

The learned Counsel for the appellant contended that even if two hours time was given to the accused it was not sufficient. He further contended that this Court in *Sarwan Singh Rattan Singh Vs. State of Punjab* AIR 1957 SC 637 had observed that accused person should at least be given 24 hours time to decide whether or not he should make a confession. It may be noted that in the very same judgment it was stated that it would naturally be difficult to lay down any hard and fast rule as to the time which should be allowed to an accused person in any given case before recording his confession under Section 164 Cr.P.C.

It is true that accused Arnit Das had retracted the confession made by him before PW7. At one stage, he made a statement that he had not given any confession at all before the Magistrate and it was all cooked up by the police to support the prosecution. The confession made by accused Arnit Das is a detailed confession giving out so many facts connecting him with accused Sidharth and Rohan Prakash. He has divulged all details regarding the conspiracy and the way in which the murder had taken place. The very nature of the confession given by accused Arnit Das would show that it was voluntary in nature and was not at the instance of the police. In the confessional statement, he stated that accused Sidharth, himself and Rohan Prakash were good friends and Rohan Prakash and Sidharth were boys of rowdy character and that accused Sidharth used to visit his house with country-made pistol and other fire arms. On 1.9.1998, accused Sidharth asked him to assault Abhishek, the deceased, but he refused to do so and on 4.9.1998, at about 5.00 p.m., he went to the house of accused Sidharth. Accused Rohan Prakash and Lakshman, the servant of accused Sidharth were present and they all gathered in a room on the ground floor of the house of accused Sidharth, and on that day, accused Sidharth told him that Rohan Prakash was in love with a girl named Pallavi, but Pallavi liked Abhishek, the deceased, and therefore, Abhishek is to be killed. Accused Arnit Das was told that he should kill Abhishek and that all settings had been done to kill him. He was further told that if he killed Abhishek, he would get him acquainted with veteran criminals, including one Suraj Bhan. Accused Arnit Das spent about two to three hours in that room and he was instructed to go to the residence of Prof. J.C. Banerjee at 7.00 p.m. on 5.9.1998 as Abhishek would be getting tuitions there. Accused Arnit Das was further told to call him out of the class and shoot him. On 5.9.1998, accused Sidharth gave him a two bore country-made pistol loaded with two cartridges and two extra cartridges were also given. Accused Arnit Das kept the country-made pistol in the right side pocket of his jeans and covered the same by his T-Shirt. Accused Arnit Das left the house of Sidharth at about 6.00 p.m. on 5.9.1998 and reached the gate of the house of Prof. J.C. Banerjee at about 6.30 p.m. The house was shown to him by accused Sidharth. Deceased Abhishek had come to the house of Prof. J.C. Banerjee alongwith another boy. The wife of Prof. J.C. Banerjee was sitting in the verandah. Accused Arnit Das in his confession further stated that he was in two minds as to whether he should kill Abhishek or not. At that time, accused Sidharth came to him and told him that the boy who had come alongwith deceased Abhishek had returned and that he should now go, call Abhishek out and kill him. He was warned that if he did not kill him, he (Arnit) would be killed. Accused Arnit Das went to the house of Prof. J.C. Banerjee and asked Mrs. Banerjee about Abhishek. Deceased Abhishek and accused Rohan Prakash came out and accused Rohan Prakash pointed towards Abhishek. Accused Arnit Das then told Abhishek to come out for a minute as accused Sidharth was calling him. When Abhishek came out, he took him 10 to 12 steps away from the gate on the pretext of meeting Sidharth and told him that he was having affairs with girls of Science College and spoiling their career, and saying so, he caught hold of Abhishek but Abhishek

managed to get himself released by a quick jerk and caught hold of the left hand of accused Arnit Das. However, using the right hand, accused Arnit Das took out a country-made pistol from his pocket and shot at him. As Abhishek tried to run from there, Arnit Das fired a second shot but it did not hit him. Abhishek fell down and accused Arnit Das ran towards his bicycle with the pistol and the remaining cartridges and saw Sidharth standing at a distance. He heard accused Rohan Prakash shouting there. He stated that after the incident he was very much afraid. At about quarter past eight on that day, Sidharth came to his house and told him that he had done the job well. On the next day, Lakshman came to his house and told that Sidharth 'bhaiyya' had asked him to go out of Patna, but he declined to do so on the ground that the school was scheduled to re- open on 14.9.1998. Lakshman also told that if accused Sidharth was implicated, accused Arnit would be shot. Arnit Das gave the country- made pistol and two cartridges to Lakshman. At that time, his friend Arko Pratim Banerjee was also present. Taking the country-made pistol and cartridges Lakshman went away. On 13.9.1998, accused Arnit Das was picked up by the police for interrogation and he disclosed the entire facts to police.

The genuineness of the confession is to be decided on the basis of the extensive evidence, which lends corroboration to the confession. In the case of confession made by accused Arnit Das, it is amply corroborated by the following material evidence.

1. The fact that deceased Abhishek died of a firearm injury is proved by the satisfactory evidence given by PW 3 Dr. Arvind Kr. Singh, who conducted the post-mortem examination. He deposed that there was a firearm injury on the body of deceased Abhishek and that he must have been shot at from a close range, as there was blackening and charring of the wound. The medical evidence is in consonance with the confession made by accused Arnit Das. The accused was arrested on 13.9.1998 and on the very same day, the cycle used and the clothes allegedly worn by him at the time of committing the murder, were recovered by the Investigating Officer.

2. The evidence of PW-5 is also relevant. PW-5 BM Shahi is a teacher residing in the vicinity of the place of incident. He heard the sound of two rounds of firing and also the voice saying "Arnit ab bhago". PW-6 is another witness who saw appellant Sidharth running away from the place of occurrence. He too heard the sound of firing.

3. Another important evidence which is consistent with the confession made by appellant Arnit Das is the evidence of Arko Pratim Banerjee, who was examined as PW-8. PW-8 is a friend of Arnit Das. On 5.9.1998, that is, on the date of the occurrence at about 7.30 P.M. he had gone to the house of appellant Arnit Das. He found Arnit Das in a state of nervousness and made enquiries.

Arnit Das told him that he had committed the murder of Abhishek. He told him that he had fired a shot at Abhishek in front of the house of Prof. Banerjee. Then appellant Arnit Das showed a double barrel pistol and two cartridges and gave the cartridges to him and asked him to return the same on the next day. PW-8 could not believe this and he returned to his house. On the next day he read the newspaper and came to know that Abhishek had been shot. PW-8 got frightened and went to the house of Arnit Das and returned the empty cartridges which he had received on the previous day. PW-8 further deposed that the parents of Arnit Das came to know that Arnit Das had been

concealing something. In the evening, PW-8 again went to the house of Arnit Das and there he saw Lakshman, the servant of Sidharth. PW-8 heard Lakshman saying that "Sidharth bhaiya had advised Arnit Das to flee away to Bengal". This witness again went to the house of Arnit Das on 7.9.98.

Lakshman was present again and all the three went to the terrace of the building. Arnit Das handed over a double barrel pistol and empty cartridges to Lakshman. Though PW-8 went to the house of Arnit Das on 9.9.98, he could not meet him. Police came to his house on 14.9.98 and took his statement and later his evidence was recorded by the Magistrate. PW-8 was cross-

examined by the counsel for appellants Sidharth and Arnit Das, but the evidence of this 17 years old boy could not be shaken to any extent. The unimpeachable evidence of PW-8 gives complete corroboration to what had been stated by Arnit Das in his confessional statement.

4. It is also important to note that appellant Arnit Das mentioned in his confession that he himself along with accused Rohan Prakash and Sidharth assembled in a room in the house of Sidharth. He gave detailed description of the room. The investigating officer later visited this room and prepared the report and the description of that room tallied with the description given by Arnit Das in his confessional statement.

The confession made by appellant Arnit Das is voluntary and is fully corroborated by the above items of evidence. The Sessions Judge was perfectly justified in relying on the confession made by appellant Arnit Das.

The learned Counsel for the State extensively relied on Section 10 of the Evidence Act and contended that the confession made by appellant Arnit Das fully implicates appellant Rohan Prakash and Sidharth and as the charge of conspiracy made against all the three accused persons is satisfactorily proved, the confession made by appellant Arnit Das is admissible under Section 10 of the Evidence Act. The learned Counsel for the appellant, on the other hand, contended that the words used in Section 10 of the Evidence Act are not capable of being widely construed. He argued that the statements made in the confessions related to the past acts done by the accused and they were made after the object of conspiracy had been accomplished. It was argued that things said, done or written while the conspiracy was afoot are relevant as evidence of the common intention once reasonable ground has been shown to believe in its existence, but it would be a very different matter to hold that any narrative or statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist, is admissible against the other party. Reliance was placed by the appellant's learned Counsel on the decision of the Privy Council in *Mirza Akbar Vs. The King-Emperor* 1940-41(45) C.W.N. 269 and also the decision of this Court in *Mohd. Khalid Vs. State of W.B.* (2002) 7 SCC 334. The learned Counsel for the State on the other hand, relied on the decision in *Ammini & Ors. Vs. State of Kerala* (1998) 2 SCC 301 and also in *State through Superintendent of Police, CBI/SIT Vs. Nalini and Others*(1999) 5 SCC 253. The confession made by appellant Arnit Das was made after the common intention of the parties was no longer in existence. There is some force in the contention advanced by the learned Counsel for the appellant; therefore, we do not propose to invoke Section 10 as against appellants Sidharth and Rohan Prakash.

The counsel for appellants Sidharth and Rohan Prakash further submitted that the confession made by Arnit Das shall not be used against these two accused as the confession of a co-accused shall not be the basis for a conviction. It was submitted that the confession of a co-accused is not an evidence and it cannot be taken into consideration as against other accused persons. It was submitted that the confession made by a co-accused cannot be sufficient to convict the other accused and the confession statement can only be treated as a corroborative piece of evidence. It was argued that in the absence of other reliable evidence against Sidharth and Rohan Prakash, the confession made by Arnit Das shall not be used against them.

It is true that the confession made by a co-accused shall not be the sole basis for a conviction. This Court in *Kashmira Singh vs. The State of Madhya Pradesh* AIR 1952 SC 159 held that the confession of an accused person is not evidence in the ordinary sense of the term as defined in Section 3. It cannot be made the foundation of a conviction and can only be used in support of other evidence. The proper way is, first, to marshall the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands, even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept.

This view was later followed in *Haricharan Kurmi & Anr. vs. State of Bihar* AIR 1964 SC 1184. The Constitution Bench held that the confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the Court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence.

Therefore, it is necessary to assess the evidentiary value of the confessional statement of Arnit Das in the light of other evidence adduced in this case. The complicity of the other two accused persons is to be ascertained from the other items of evidence. Apart from the confession, the complicity of accused Sidharth is borne out from the other independent evidence. The evidence of PW-6 Rajeev Ranjan clearly shows that accused Sidharth was present at the place of occurrence. PW-6 had seen him running away from there. At the time of his evidence, he deposed that he was in a perplexed condition. The counsel for the appellant pointed out that this was not stated by the said witness to the police. But, nevertheless, the evidence of PW-6 would show that appellant Sidharth was present at the place of occurrence and was escaping from there immediately after the firearm was shot. The evidence of PW-6 gets corroboration from the evidence of PW-18, the father of deceased Abhishek. PW-18 deposed that on 5.9.98, PW-6 informed him that while he was returning to his house after purchasing some goods from the market, he heard the sound of firing of two shots and he just stayed there for a while after hearing the shots and saw Sidharth running from eastern side towards western side of the park. PW-6 enquired from Sidharth what had happened but Sidharth ran away towards his house without saying anything. PW-18 also deposed that PW-6 Rajeev Ranjan told him that Sidharth was running in a very suspicious manner. On the contrary, this appellant tried to

prove that he was not present at the place of occurrence and examined defence witnesses, but the Sessions court disbelieved these witnesses for valid reasons.

The evidence of PW-8 Arko Pratim Banerjee also supports the prosecution version. He saw Lakshman in the house of appellant Arnit Das and also heard Lakshman say to Arnit Das that "Sidharth bhaiya had advised him to flee away to Bengal." The involvement of appellant Sidharth in the crime is satisfactorily proved by these items of evidence. It may also be noticed that according to prosecution, there was a conspiracy between appellant Arnit Das and the two other appellants. In that view of the matter, the confession made by co- accused Arnit Das could be made use of against appellant Sidharth under Section 30 of the Evidence Act.

In the confession made by appellant Arnit Das, he has explained in detail the involvement of appellant Sidharth in the crime. He stated that on 1.9.1998, he was asked to assault Abhishek, but he refused to do so and again on 4.9.1998 he was called to the house of Sidharth and told that though he had made attempts to assault Abhishek many times, he escaped and Sidharth wanted Arnit Das to kill Abhishek. Appellant Sidharth told him that if he killed Abhishek, he would make him acquainted with notorious criminals, including one Suraj Bhan. In the confession, appellant Arnit Das explained as to how the mission was to be carried out. Description of Abhishek also was mentioned. Again, on 5.9.1998 he met Sidharth at his residence where the latter gave him a double bore country-made pistol and loaded two cartridges in his presence and two extra cartridges were also given. Arnit Das further stated in his confession that he went to the residence of Prof. J.C. Banerjee at about 6.30 p.m. and Sidharth too came and told him to call Abhishek out and kill him. Appellant Arnit Das told in his confession that he called Abhishek out of Prof. Banerjee's house and shot him with the country made pistol and at that time saw Sidharth standing at a distance. Arnit has further stated that at quarter past eight on that day, Sidharth came to his house and told him that he had accomplished the job. On 7.9.1998 Sidharth sent his servant Lakshman to Arnit Das to tell him to go out of Patna, and that if Sidharth was implicated, he would shoot him (Arnit). Therefore, the confession made by appellant Arnit Das clearly supports the other items of evidence against Sidharth and his participation in the conspiracy and his role in the crime is fully established.

But as regards appellant Rohan Prakash, his conduct and behaviour on the date of the occurrence were of highly suspicious nature. Appellant Rohan Prakash was present in the tuition class along with deceased Abhishek. Appellant Arnit Das came to the house of Prof. Banerjee at about 7.00 p.m. on 5.9.1998 and met Mrs. Rekha Banerjee and enquired about Abhishek. At that time, appellant Rohan Prakash and deceased Abhishek were attending the tuition classes. Appellant Arnit Das introduced himself as a friend of Abhishek to Mrs. Rekha Banerjee and requested to call him. Abhishek came out followed by Rohan Prakash. Shortly thereafter, PW 11 Prof. Banerjee heard the sound of firing. When the sound of firing was heard, appellant Rohan Prakash wanted to go out in that direction. Although Mrs. Rekha Banerjee tried to prevent him from going out, he managed to extricate himself and went out to the place of occurrence and later gave the F.I. statement to the police. The F.I. statement given by appellant Rohan Prakash was in a way a misleading one. It is true that there was no necessity for appellant Rohan Prakash to come out of the tuition class. In the confession statement made by appellant Arnit Das, he has mentioned that appellant Rohan Prakash is one of the conspirators. Apart from the suspicious conduct of appellant Rohan Prakash on the

date of the incident, there is no other evidence against him. Therefore, it is difficult to hold that there is other independent evidence to find him guilty of the murder and as there is no independent evidence against Rohan Prakash, the confession made by the co-accused Arnit Das cannot be made as supporting evidence under Section 30 of the Evidence Act. In our view, the prosecution has not succeeded fully in proving the guilt of appellant Rohan Prakash. The independent evidence is not sufficient to prove that he had actively participated in the conspiracy. The conduct exhibited by this appellant would cast serious suspicion on him, but that by itself is not sufficient to find him guilty of the offence under Section 302 read with Sections 34 and 120-B IPC. In our view, appellant Rohan Prakash is entitled to get the benefit of doubt. Criminal Appeal No. 736 of 2003 filed by Rohan Prakash is, therefore, liable to be allowed.

Appellant Arnit Das made his confession before the Judicial Magistrate and his confession is corroborated by other items of evidence. He had also made extra-judicial confession to PW-8 Arko Pratim Banerjee. The confession made by appellant Arnit Das was not under any inducement, threat or promise and is voluntary in nature. Therefore, it is perfectly admissible under the Evidence Act. The conviction and sentence entered against appellant Arnit Das on all counts are not liable to be interfered with. Criminal No. 689 of 2003 filed by appellant Arnit Das is liable to be dismissed.

Appellant Sidharth has been proved to have actually participated in the conspiracy. There is independent evidence to prove that he made all the arrangements pursuant to the criminal conspiracy and induced appellant Arnit Das to commit the murder of deceased Abhishek. Sidharth was present at the scene of the occurrence and that fact is proved by the evidence of PW-6 corroborated by the evidence of PW-18. It is proved that Sidharth abetted the commission of the murder and as he was present at the scene of occurrence at the time of commission of the crime, Section 114 of the Indian Penal Code also would apply. Section 114 IPC provides that "whenever any person, who is absent would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence." The independent evidence adduced against appellant Sidharth is further corroborated by the confession made by appellant Arnit Das. The conviction of appellant Sidharth under Section 302 read with Section 120-B and 34 IPC is only to be confirmed. Consequently, Criminal Appeal No. 688 of 2003 is liable to be dismissed.

Lastly, we may point out that in the present case, we have noticed that the entire case diary maintained by the police was made available to the accused. Under Section 172 of the Criminal Procedure Code, every police officer making an investigation has to record his proceedings in a diary setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him and a statement of the circumstances ascertained through his investigation. It is specifically provided in Sub-clause (3) of Section 172 that neither the accused nor his agents shall be entitled to call for such diaries nor shall he or they be entitled to see them merely because they are referred to by the Court, but if they are used by the police officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer, the provisions of section 161 of the Cr.P.C. or the provisions of section 145 of the Evidence Act shall be complied with. The Court is empowered to call for such diaries not to use it as evidence but to use it as aid to find out anything that happened during the investigation of the

crime. These provisions have been incorporated in the Code of Criminal Procedure to achieve certain specific objectives. The police officer who is conducting the investigation may come across series of information which cannot be divulged to the accused. He is bound to record such facts in the case diary. But if the entire case diary is made available to the accused, it may cause serious prejudice to others and even affect the safety and security of those who may have given statements to the police. The confidentiality is always kept in the matter of criminal investigation and it is not desirable to make available the entire case diary to the accused. In the instant case, we have noticed that the entire case diary was given to the accused and the investigating officer was extensively cross-examined on many facts which were not very much relevant for the purpose of the case. The learned Sessions Judge should have been careful in seeing that the trial of the case was conducted in accordance with the provisions of the Cr. P.C. In the result, we allow the Criminal Appeal No. 736/2003 filed by appellant Rohan Prakash and he is directed to be set at liberty forthwith if not required in any other case. Criminal Appeal No. 688/2003 filed by appellant Sidharth and Criminal Appeal No. 689/2003 filed by appellant Arnit Das are dismissed.