

## **Girja Shankar Misra vs State Of U.P on 3 September, 1993**

**Equivalent citations: 1993 AIR 2618, 1994 SCC SUPL. (1) 26, AIR 1993 SUPREME COURT 2618, 1993 AIR SCW 3384, 1993 ALL. L. J. 1273, 1994 UP CRIR 158, (1993) 5 JT 124 (SC), 1993 (5) JT 124, 1994 (1) SCC(SUPP) 26, 1993 (2) UJ (SC) 632, (1993) 3 ALLCRILR 258, (1993) 3 RECCRIR 521, (1993) 3 ALL WC 1846, (1994) SCCRIR 45, 1994 SCC (CRI) 214, (1993) 3 CURCRIR 335, (1993) 3 CRIMES 270, (1993) ALLCRIC 677, (1993) ALLCRIR 594, (1994) 1 EASTCRIC 311, 1994 CHANDLR(CIV&CRI) 275**

**Author: G.N. Ray**

**Bench: G.N. Ray**

PETITIONER:

GIRJA SHANKAR MISRA

Vs.

RESPONDENT:

STATE OF U.P.

DATE OF JUDGMENT 03/09/1993

BENCH:

REDDY, K. JAYACHANDRA (J)

BENCH:

REDDY, K. JAYACHANDRA (J)

RAY, G.N. (J)

CITATION:

1993 AIR 2618

1994 SCC Supl. (1) 26

JT 1993 (5) 124

1993 SCALE (3) 623

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by K. JAYACHANDRA REDDY, J.- These two appeals are filed against the judgment of High Court of Delhi in Criminal Appeal No. 324 of 1976 in which State

of U.P. was the appellant. The said appeal was filed against the judgment of acquittal passed by the 1st Additional Sessions Judge, Delhi in Sessions Case No. 2 of 1974. It may be mentioned here that though the occurrence took place in the State of U.P., the case was transferred to the Court of Additional Sessions Judge, Delhi by the Supreme Court in view of the special circumstances. In the said case six accused were tried for offenses punishable under Sections 120-B and 302 read with 34 IPC. The trial court acquitted all of them. In an appeal filed by the State against the said acquittal, the High Court convicted accused Girja Shankar Misra and Nathu Singh under Sections 120-B read with 302 IPC and sentenced each of them to undergo imprisonment for life. Nathu Singh was further convicted under Section 302 IPC and sentenced to imprisonment for life. One Girdhari, accused died during the pendency of the appeal. The acquittal of the remaining accused was confirmed. Accused Girja Shankar Misra has filed Criminal Appeal No. 272 of 1984 and accused Nathu Singh has filed Criminal Appeal No. 340 of 1984 in this Court under Section 2(a) of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act. Since these are regular appeals, the learned counsel for the appellants and the learned counsel for the State have taken us through the entire voluminous record and advanced elaborate arguments.

2. Briefly stated, the prosecution case is as follows:

Shri Raj Narain Mishra, the deceased in the case, was married to Smt Sushila, PW 54 and was residing at Orai, District Jalaun. PW 54 gave birth to five children. She was a double M.A. and an active social and political worker. The deceased, though by profession an advocate, was a politician. In 1962 he contested the general elections to the Legislative Assembly, Uttar Pradesh and got elected. In 1967 however he lost the election. Girja Shankar Misra, one of the appellants, was a Police Officer posted as a Station Officer, Sikendra within the Rajpur constituency from where the deceased contested the election. During the elections PW 54 came into contact with Girja Shankar Misra and she developed illicit relations with him. The deceased came to know about this and deprecated the same but acted prudently making possible endeavors to bring an end to the affair. He got Girja Shankar Misra transferred to a distant and difficult station. Therefore Girja Shankar Misra bore a grudge and he conspired to get Raj Narain Mishra killed. The trial court as well as the High Court have elaborately referred to the illicit relations between Girja Shankar Misra and PW 54 and have also referred to various letters exchanged between them and it has been ultimately held that Girja Shankar Misra had sufficient motive. The further case of the prosecution is that Girja Shankar Misra enlisted the services of the other accused and conspired to get Raj Narain Mishra killed. On February 12, 1973 the deceased and his wife PW 54 had gone to Kanpur and returned from there on the evening of February 13, 1973. The deceased got down at Sankat Mochan Devi Sthan where some Yagava was being performed. PW 54 reached home at about 5.15 p.m. and got ready to go to Sankat Mochan with the children. PW 1, Ram Chander who was known to the family, came to meet the deceased and he was told by PW 54 that the deceased would be coming after some time and that he should wait. So saying she left in a jeep. PW 9 Ram Devi, widowed sister of the deceased and his son Vivek, PW 7 stayed back at the house. After some time the deceased also returned home. PW 1 and the deceased

were talking. While so they saw four persons, two armed with rifles and two armed with guns coming out of the gate of Girja Shankar Misra, whose house was nearby and entering the house of Raj Narain Mishra. They fired at the deceased who cried "run" and so crying he ran inside the house followed by PW 1. The deceased after passing the gallery tried to bolt the door but was unable to do so because of the stoppers. The assailants ran after Raj Narain Mishra and one of the assailants (later identified as Nathu Singh, appellant in Criminal Appeal No. 340 of 1984) fired at Raj Narain Mishra at close quarters and the bullet hit him on the chest. Another assailant later identified as Girdhari, who died during the pendency of the appeal, also fired his gun from a close range at the deceased. PW 9 rushed to the room at the back of the kitchen and from the door of that room, she saw the assailants. PW 7 was reading a magazine in the verandah. Seeing the assailants he ran inside the inner courtyard and from there he saw the assailants. According to the prosecution, PWs 1, 7 and 9 witnessed the occurrence. The assailants after shooting at the deceased came out and ran into the street. PW 1 met PW 2, Devi Deen Yadav going on a bicycle and informed him as to what has happened. PW 2 went to Kotwali Police Station, met PW 12, Jagdish Singh, the Station Officer and gave him the information. PW 12 rushed to the place of occurrence. Meanwhile, PW 6, Davinder Singh, an advocate who lived close by, hearing the sound of gunshot, picked up his gun and ran outside. He was told by some children that the assailants were running away. Then he ran to the house of one Baba Gandharv Singh and took a rifle from him to be more effective. Just then a bus also came and driver also got down. PW 6 along with the driver ran after the assailants but it is alleged that the assailants fired at these people who were chasing them. There was also return of fire. The assailants, however, succeeded in escaping. PW 55, Deputy Superintendent of Police on receipt of the report of occurrence rushed to Orai and reached the place of occurrence at about 7.50 p.m. He recorded the statement of PW 1 and also seized some empty cartridges. He held the inquest over the dead body and sent the same for postmortem. It was not known as to who the assailants were since they were strangers to PWs 1, 7 and 9, the eyewitnesses. On February 16, 1973 investigation was taken up by PW 56 and he examined other witnesses. On February 18, 1973 he arrested Bimla Devi wife of Girja Shankar Misra and on February 19, 1973 Girja Shankar Misra surrendered himself. Nathu Singh, Girdhari and Batte Singh, accused were arrested on February 19, 1973 and a rifle along with live bullets was seized from Nathu Singh accused. Balbir Singh accused was arrested on May 7, 1973. The investigating officer made an application for arranging an identification parade on March 15, 1973 but it was postponed several times and ultimately it was held on June 4, 1973. In the said identification parade, PWs 1 and 7 identified Nathu Singh and Girdhari accused and PW 9 identified only Nathu Singh. PW 56 sent the cartridges and bullets to the expert who gave his report. The prosecution examined as many as 56 witnesses. To prove the conspiracy the prosecution relied on the evidence of PWs 13, 14, 15, 16, 32 and 42. The prosecution also relied to some extent on the evidence of the investigating officers.

3. The trial court in an elaborate judgment has discussed the evidence of all the witnesses regarding the conspiracy and held that the same is not proved. Regarding the actual occurrence, the trial court pointed out several infirmities in the evidence of PWs 1, 7 and 9 and was not prepared to rely on the test identification parade proceedings held by PW 45, Sub-Divisional Magistrate for various reasons. The trial court also held that the medical evidence does not support the version given by the eyewitnesses. It also held that the evidence of Ballistic Expert would go to show that the weapons seized could not have been used in the occurrence. For these and other reasons the trial court gave the benefit of doubt to the accused.

4. The High Court, on the other hand, accepted some part of the evidence in respect of the conspiracy and held that Girja Shankar Misra and Nathu Singh and Girdhari accused entered into a conspiracy to kill the deceased. The High Court held that the presence of PWs 1, 7 and 9 could not be doubted at the time of occurrence and the identification of some of the accused by them could be accepted. The High Court held that the reasons given by the trial court are not convincing and in that view of the matter convicted these two appellants as stated above.

5. Learned counsel for the appellants submitted that the prosecution has miserably failed to prove the conspiracy and that the High Court on some suspicion and surmises has held that the conspiracy charge was proved. His further submission is that the identification of Nathu Singh as one of the assailants by PWs 1, 7 and 9 cannot be relied upon at all. Learned counsel pointed out various irregularities in the test identification parade held and severely commented that the long and unexplained delay in holding the test identification parade throw any amount of doubt on the authenticity of the proceedings and the complaint of the accused that they were shown to the witnesses before being put up for the parade is well founded. Learned counsel further submitted that the view taken by the trial court is quite reasonable and no interference was called for and that even otherwise if the High Court was of the view that yet another view also was possible, on that ground it ought not to have interfered in an appeal against acquittal.

6. So far as the motive aspect is concerned, both the courts below have held that there were serious misunderstandings between the deceased and Girja Shankar Misra because of the illicit relationship between Girja Shankar Misra and PW 54, wife of the deceased. PW 54 herself has admitted about the illicit relations between her and Girja Shankar Misra and how the deceased objected and deprecated the same. We have gone through the evidence on this aspect and it can be accepted that there were serious misunderstandings between the accused Girja Shankar Misra and the deceased and therefore it is probable that Girja Shankar Misra had a motive. But motive by itself cannot be a proof of conspiracy.

7. The High Court after discussing the evidence of relevant witnesses in respect of conspiracy as well as evidence in respect of the occurrence and other circumstantial evidence, reached the following conclusions:

"We have carefully gone through the record and for the reasons stated we are of the view that the conclusions reached by the trial Judge on evidence are not reasonable and this compels us to interfere with the judgment of acquittal.

Our findings are-

- (a) That Girja Shankar Misra was at Hamirpur from 10th to 12th February.
- (b) That on 12th February, 1973, at about 6 a.m. Girja Shankar along with Nathu Singh, Girdhari, Batte and another person had left Hamirpur by a bus driven by PW 17 and they got down at Jolupur Mor.
- (c) That on the night of 12/13th February, PW 3 had seen four persons armed with rifles and guns entering the house of Girja Shankar and a few minutes before that Girja Shankar was seen entering his house.
- (d) That the plea of Girja Shankar that on 12th February at about 6.30 p.m. he had left by a bus for his village Sarawan and he was at Sarawan on the night of 12/13th February is not proved.
- (e) That on 13th February at about 6 p.m. four persons, two armed with rifles and two with guns were seen coming out of the house of Girja Shankar and they entered the house of Raj Narain.
- (f) That one of the assailants had fired a gun hitting Raj Narain in the neck.
- (g) That Raj Narain died as a result of the rifle and gunshot injuries received by him.
- (h) That PW 1 Ram Chander, PW 7 Vivek and PW 9 Ram Devi were in the house and they had witnessed the occurrence.
- (i) That on 19th February Nathu Singh, Girdhari and Batte were arrested at Sayar along with the rifle Ex. P-67 and 20 rifle cartridges, a double barrel gun 0.69 along with 21 gun cartridges and the licences for the possession of the said firearms and ammunitions in the name of Nathu Singh.
- (i) That the crime cartridges P-2 and P-3 were fired through the gun Ex. P-69 and the crime cartridge P-14 was fired through rifle Ex. P-67.
- (k) That in the identification parade held on 4th June PW 1 had identified Nathu Singh and Girdhari, PW 7 also had identified Nathu Singh and Girdhari and PW 9 had identified Nathu Singh.
- (1) That the plea of alibi of Nathu Singh, Girdhari and Batte was rightly rejected by the Additional Sessions Judge and this would prove that Nathu Singh, Girdhari and Batte were at the place where the prosecution alleges they were.
- (m) That Girja Shankar had before Sushila admitted his guilt.
- (n) That even if the testimony of PW 3 and the identification evidence are kept out of account the remaining findings are sufficient to hold Girja Shankar and Nathu Singh guilty of offenses charged with.

We have earlier held that the identification part of the prosecution case as against Batte Singh and Balbir Singh has not been established. We are of the view that there are very strong reasons to believe that Batte Singh and Balbir Singh were involved in the crime but we could give them benefit of doubt and maintain their order of acquittal. We find hardly any evidence against Bimla Devi and her acquittal is also maintained. We find that the prosecution has brought the charges home to Girja Shankar, Nathu and Girdhari accused/respondents beyond any doubt.

Girdhari has died during the pendency of the appeal and, therefore, the appeal against him abates."

8. Learned counsel for the appellants submitted that the High Court having given the above conclusions grossly erred in holding that the charge of conspiracy has been proved against Girja Shankar Misra. His further submission is that the identification of Nathu Singh accused and Girdhari, the deceased accused by PWs 1, 7 and 9 is wholly unacceptable and therefore their participation in the crime has not been established at all. When once the prosecution case fails against them then Girja Shankar Misra alone cannot be convicted for the offence of conspiracy to commit murder. Therefore his conviction under Section 120-B read with Section 302 IPC cannot be sustained inasmuch as for an offence of conspiracy an agreement is essential and that can be only among persons who are more than one.

9. We shall first consider the case against Nathu Singh and incidentally 1 against the deceased accused Girdhari also in respect of their participation in the actual occurrence. The witnesses who spoke about this part of the case are PWs 1, 7 and 9 as already mentioned. PW 1 stated that he was waiting for the deceased at his house and when the deceased arrived, they were engaged in a talk while standing in the compound outside the drawing room of the house. Just then four persons were seen coming out of the house of accused Girja Shankar Misra by opening the gate and entering the house of the deceased. Two persons were armed with guns and other two were armed with rifles and they fired at the deceased and rushed into the house. But the deceased was not hurt. The deceased saying "Bhago" ran towards the room. PW 1 also followed him but fell down. The deceased was endeavoring to close the doors which could not yield on account of stoppers and meanwhile one of the persons carrying rifle shot at the deceased which hit him on the chest and the deceased fell down on the ground. The other person armed with a gun ran forward and fired his gun at a close range. PW 1 also stated that he got up and ran towards the gate of the house and there told a cyclist that some bad characters had murdered the deceased. He claimed to have identified Nathu Singh accused and the other accused Girdhari to be the persons armed with rifle and gun respectively. He did not identify others. He was cross-examined at length and some important 7 contradictions have been elicited in his evidence regarding the manner of shooting by the culprits. The defence suggestion is that this witness was not present at the time of occurrence but was procured being an old family friend and an employee of the deceased. A postcard Ex. PW-1/DA written by him to the deceased was marked to show that he was close to the deceased family. Yet another letter filed on behalf of the defence is Ex. PW-1/DB in which he is supposed to have written that he was introduced as a false witness in the case at the instance of Deputy Superintendent of Police and PW 54. An attempt was made by the prosecution to show that these letters have been procured from the witness putting him under duress and coercion. Regarding the credibility of this witness, the trial court, however, observed thus:

"The contradictions pointed out above and the proof of the postcard and letter Exts. PW- 1/DA and PW-1/DB strike at the truthfulness of this witness considerably and would naturally detract immensely from the value to be given to his evidence regarding identification of the accused persons to be the culprits."

PW 9, the sister of the deceased deposed that she was busy in the kitchen adjoining the southern room. When she heard shots being fired she ran into another adjoining room. She also gave a similar version as given by PW 1 regarding the shouting. She, however, added that she implored the miscreants to spare her brother but they did not pay any heed and after shooting down the deceased they ran away. She ran after them up to the outer gate of the house and shouted for help. When accused went out of sight then she came back in the house. In the identification parade she identified only Nathu Singh to be the person armed with rifle who fired at the deceased. In the trial court the defence took the plea that this witness was not in the house when the occurrence took place. The trial court, however, pointed out that her statement was recorded three days after the occurrence. Deputy Superintendent of Police explained it away by saying that she was not in a fit condition to be interrogated. The trial court was not prepared to accept this explanation. With regard to her evidence the trial court observed that "conduct of this witness and the delay in making statement before the police are highly significant facts which adversely affect the credibility of what has been stated before me".

10. The remaining witness PW 7, son of the deceased, was a boy aged 13 years. Admittedly he was suffering from a serious handicap of sight as he had lost the vision of his right eye when he was a child. He deposed that he was in the house busy in looking at the magazines sitting in the courtyard. He heard shots being fired and saw his father running inside followed by PW 1 and four miscreants. The other particulars given by him are the same as those given by the other two witnesses. In the test identification parade, he identified Nathu Singh and Girdhari to be persons armed with rifle and gun respectively and who shot at the deceased. There is also considerable delay in recording the statement of this witness and no explanation was given by the prosecution. The defence, however, contended that he was not at the house and has gone away to Sankat Mochan along with other children. Regarding his eyesight some cross examination was directed and he committed some mistakes in giving the descriptive particulars of the accused persons.

11. From the above gist of the evidence of these witnesses, it can be seen that their identification of Nathu Singh and Girdhari is of utmost importance. If for any reason the test identification parade becomes suspicious, doubtful and unacceptable then the conviction of Nathu Singh cannot be upheld. Therefore we shall carefully consider the evidence regarding the test identification parade. Learned counsel cited several decisions of this Court in support of his submission that the way the test identification parade was delayed and the way it was conducted throw any amount of doubt about the authenticity of the proceedings. He also submitted that the failure on the part of the witnesses to give any descriptive particulars any time earlier to the identification parade is an important circumstance which fatally affects the very identification made by them.

12. The occurrence took place when the sun was setting and there was daylight meaning twilight and comparatively there was less light in the gallery which was a covered one. From the evidence of

these three witnesses it is clear that there was little opportunity to see the faces of the culprits and that too for a few moments only. It is needless to say that their minds were highly disturbed on account of the suddenness of the occurrence and the firing of a number of shots in quick succession. Vivek Kumar, PW 7, who had a defective eyesight, as already mentioned, stated that Nathu Singh had some special features like his right nostril and the ears were bored. As regards Girdhari, his moustaches and hairs were brownish, but this witness stated that his hairs were black. That apart it is also important to note that these witnesses did not mention the special features of the miscreants in the statements before the Police. Vivek Kumar, PW 7 described in a general way that all the miscreants were young and well-built. Mrs Ram Devi, PW 9, described them as all young and between 30 and 40 years. In regard to Nathu Singh, PW 9 stated in the Court that he was 'sanwla' in complexion with his thick moustaches. In regard to Girdhari, it was stated that he was also 'sanwla' with long moustaches and black hair. Mrs Ram Devi, PW 9, described the accused Nathu Singh in court as a strongly built and massive person with 'gahra sanwla' complexion and moustaches neither twisted nor dropping. PW 1 described Nathu Singh before the Police as having imposing looks and twisted moustaches and 'gahra sanwla'. In the court he stated that the accused Nathu Singh was 'sanwla' and not 'gahra sanwla', strongly built with thick lips and bored nose and ears. The accused Girdhari was described in the court as having short stature with brown moustaches and brownish hair. Thus there are any amount of variations and improvements regarding the description of Nathu Singh and Girdhari. With this background we shall now examine the test identification proceedings. There are three objections in regard to these proceedings. Firstly that there was delay, secondly the accused were not shown to the witnesses in several ways and thirdly the proceedings suffer from vital irregularities. It is true that the test identification parade is a step in investigation, but it is the identification in the court that is an evidence. But in a case of this nature the test identification parade assumes importance particularly if held within a reasonable time after the commission of the offence. As already noted there was enormous delay in holding the identification parade. For the first time an application for ordering the parade was moved on March 29, 1973. On that day the Investigating Officer sought adjournment representing that some of the witnesses had gone out and they were not available. But there is nothing to show that proper steps were taken to procure their presence for nearly two weeks. PW 45, First Class Magistrate, who ultimately conducted the test identification parade deposed that the parade was scheduled to be held on March 29, 1973, but he did not go to the Jail as he was informed that the witnesses were not present. Then he fixed the next date as April 16, 1973. When he went to the Jail, the Jailor of the District Jail, Orai submitted a report, marked as Ex. PW-45/A. In that report it was mentioned that the descriptions of the accused persons who were to take part in the parade were different and not in accordance with what was mentioned in the Jail Register and that it would take at least one month for the recorded features to tally with those of the accused persons. On this report PW 45 made an endorsement and the proceedings were not carried out on that day. PW 45, however, examined Nathu Singh and Girdhari personally and compared their descriptions with what was mentioned in the Jail Register and he noticed some differences. On the same day the counsel on behalf of the accused moved an application, Ex. PW45/C, complaining that in the proposed parade no other persons with similar appearance and features to that of the accused have been made to take part. The learned Magistrate passed an order, marked as Ex. PW-45/D. That order shows that the Public Prosecuting Officers had seen the suspects. The Magistrate, however, noted that the Public Prosecutors assured him to take all precautions not to indicate the features of the suspects to any of the witnesses. Having passed



this order the learned Magistrate postponed the proceedings for another one month on May 19, 1973. The Sub-Divisional Magistrate addressed a letter, Ex. PW-45/E, to the Superintendent, District Jail that the identification parade proceedings had been adjourned for May 19, 1973 hoping that the hairs of the accused would grow to the desired extent by that date, and in case there is any doubt about the growth of the hairs, the Superintendent, District Jail shall intimate him the next probable date by which the features of the accused persons could be similar to those as on the date of their entry into the Jail. PW 45 deposed that the size of the moustaches of these three accused was not going to be that what has been described in the Jail Register. On May 25, 1973 he received a letter, Ex. PW-45/F, from the Superintendent, District Jail stating that the growth of the moustaches may take some more time. Again the parade was postponed and ultimately it was conducted on June 4, 1973. PW 45 further deposed that he mixed 10 persons of similar physique and features and also took some other precautions. He admitted in his evidence that at the time of holding of the parade Shri Ajay Pal Singh, PP CID and Shri S.N. Tiwari, PP District Police were present on behalf of the State and Shri Surender Pal Singh, Advocate and two other advocates were also present. On that very day the defence counsel on behalf of the accused moved an application, Ex. PW-45/K, stating that persons with similar features should be mixed. Ex. PW-45/G contains the proceedings. In that it is clearly mentioned that the counsel for the accused moved an application to the effect that the suspects have been seen by the PP CID and PP District Police and there is every apprehension that they would indicate the appearance and the features of the suspects to the witnesses which would result in the accused persons being identified. That application was not placed on record. In the proceedings the Magistrate has further noted that he made it clear to the PP CID and the PP Civil Police not to intimate any features of the suspects to the witnesses. PW 45 asked the accused whether he had any objection and he gave a note raising several objections. In the cross examination, it was suggested to him that he gave long dates in order to facilitate the prosecution to show the accused persons to the witnesses, being an Executive Magistrate. He, however, denied the same. From the above facts, it can be seen that there was inordinate delay in conducting the proceedings. It is also rather strange that PW 45 postponed the proceedings on the basis of a letter given to him by the Jailor stating that the moustaches of the accused have not grown to the same size. PW 45's evidence itself shows that Public Prosecuting Officers were present there and they had seen the accused. Admittedly both the Public Prosecutors belong to the Police Department and were naturally interested in the result of the case. At least existence of the reasonable possibility of communicating the features of the accused to the witnesses cannot be ruled out. From the record it would also appear that Nathu Singh was wearing a white Kurta and among the persons mixed there was only one person wearing Kurta and that too was not so white. Same is the case with regard to Girdhari. Several such objections were raised by the accused. It was stated that the persons selected to be mixed did not have the similar features. PW 45, however, did not offer any comments. These are all serious infirmities in the test identification proceedings held by PW 45. As already noted PWs 1, 7 and 9 did not have the sufficient opportunity to see the culprits and the long delay in holding the parade affects their evidence. Apart from this the accused had been complaining that they were taken from place to place and ultimately were transferred to District Jail, Orai. PW 13, a local resident, stated that on the day following the arrest of these accused persons they were taken to Police Lines by PW 53 and at that time they saw the faces of the accused uncovered and at that place PWs 3, 6, 7 and 12 were also present. There was every possibility that they would pass on the information to the other witnesses. Having given our earnest consideration

we are of the view that the plea of the accused that they were shown to the witnesses is not without substance. At any rate the test identification parade loses its significance for all the above-mentioned reasons in which case the identification of Nathu Singh by PWs 1, 7 and 9 cannot be accepted.

13. The prosecution relied on the evidence of PWs 3, 6 and

12. At this juncture it is necessary to consider the evidence of PW 3. He deposed that he saw four persons armed with guns and rifles passing in front of the workshop of Baba Gandharv Singh at about 12 midnight on that night and entering the house of Girja Shankar Misra and 4 or 5 minutes later he saw Girja Shankar Misra also going to his house. He further deposed that on the day of occurrence a little before sunset, he heard the sounds of gunshots from the side of the house of Raj Narain Misra and he saw PW 1 coming out of the gate and he also saw four miscreants coming out of the house of Raj Narain Misra carrying guns and rifles and also saw them running away. He further deposed that PW 6 came running to the workshop with a gun where he took the rifle of Baba Gandharv Singh and they chased the miscreants and exchanged fire. He also claimed that he identified them in the identification parade as well as in the court. The learned trial Judge has considered his evidence extensively. He noted that PW 3 had not mentioned to anyone as having seen the four miscreants entering the house of Girja Shankar Misra till his statement was recorded by PW 45. The defence counsel relied upon a tape-recorded conversation between PW 3 and DW 18. The learned Sessions Judge found strong resemblance between the voice of PW 3 with that recorded in that cassette. In the conversation PW 3 admitted that he had not witnessed the occurrence. It reveals that PW 3 was asked to mug up the tutored statement for nearly a month and he also admitted that the accused were shown to him. We will mention here that Baba Gandharv Singh was not examined and there was no reference to alleged encounter in the earlier stages. There are a number of infirmities in his evidence and the learned trial Judge has given good reasons for not accepting his evidence. In this context reliance was also placed on the evidence of PW 6. He deposed that he on hearing the sound of gunshots came there armed with a gun and then went to Baba Gandharv Singh's workshop, took up a rifle from him and tried to chase the miscreants. This version itself appears to be artificial. Being armed with a gun there is no reason for him to again go to Baba Gandharv Singh's workshop to take his rifle. In any event Baba Gandharv Singh was not examined. As a matter of fact the High Court also was not prepared to place reliance on the evidence of PWs 3, 6 and 12 regarding the identification. The High Court observed thus:

"The learned Additional Sessions Judge has not relied upon the identification by PWs 3, 6 and 12 of the accused Nathu Singh, Girdhari, Batte Singh and Balbir Singh. Without over burdening the judgment we would agree with the Additional Sessions Judge that the identification of the assailants by PWs 3, 6 and 12 is not free from doubt."

The High Court further observed:

"We agree with the Additional Sessions Judge that it was not possible for PWs 6 and 12 particularly for PW 12 to have had a clear look at the assailants which could have

enabled him to identify them later on. In our view, the identification part of the prosecution case depends mainly on the identification of the assailants by PWs 1, 7 and 9. If the identification of Nathu Singh and Girdhari by PW 1 cannot be trusted then the identification by PWs 7 and 9 may also have to be ignored. Thus, in essence, the identification part of the prosecution case depends on the identification of Nathu Singh and Girdhari accused by Ram Chander."

It can thus be seen the High Court also ultimately and rather entirely relied upon the evidence of PW 1 and then proceeded to have support from the evidence of PWs 7 and 9. We have already discussed their evidence in great detail and have noted that the crucial question is whether the identification made by them can be relied upon. We feel that it is highly unsafe to rely on the said identification and we are of the view that the High Court has wrongly placed reliance on the evidence of PW 1 and thereafter on the evidence of PWs 7 and 9. The result is that the presence and participation of Nathu Singh in the said occurrence is not established beyond reasonable doubt.

14, Now we are left with the conviction of Girja Shankar Misra. The High Court appears to have relied upon the evidence of PW 54, wife of the deceased, who deposed that Girja Shankar Misra had admitted his guilt before her. The evidence of PW 54 in this context cannot be accepted at all. She is a highly interested witness. She admitted that she had illicit relations with Girja Shankar Misra. In the cross-examination she had made many admissions that she had illicit relations with Girja Shankar Misra and also used to go there for cohabitation. It is highly improbable that Girja Shankar Misra could have made such a confession before her. The defence counsel also relied upon a letter purported to have been written by PW 54 to Kirpa Shankar Misra, Advocate, Banda. In that she has mentioned that she was confident that the political opponents of the deceased had their hands in her husband's murder and the corrupt and inefficient officials of the Police and CID having failed to bring the real culprits have fabricated a false story in collusion with the rival party of Nathu Singh. PW 54 in the first instance denied that she has written any such letter. She, however, later filed an affidavit stating the circumstances in which Girja Shankar Misra, the accused had after his release obtained these letters from her. In her deposition to the Court she stated that Girja Shankar Misra threatened her and to his dictation she wrote these letters. Such explanation given by her under the circumstances is an artificial one. She was highly influential and had all the support of the police and other people in power and her version that she was threatened by Girja Shankar Misra and he made her write these letters is not at all convincing. When that is the position the above conclusions drawn by the High Court, which are extracted above, are untenable. In any event when once the identification of Nathu Singh and Girdhari is rejected then their participation in the occurrence remains unestablished and then the conspiracy charge and conviction thereunder against the sole person Girja Shankar Misra cannot be sustained for the reason that he could not be a sole conspirator by himself without having entered into an agreement with somebody else.

15. At this juncture we shall refer to the evidence regarding the conspiracy relied upon by the prosecution. The prosecution examined PWs 3, 13, 14, 15, 16, 17, 32, 33, 42, 44 and 53. The trial court has discussed the evidence of each of these witnesses in detail. PWs 13, 14, 33 and 53 stated that in that area accused Girja Shankar Misra was posted as Station Officer in Police Station Benwar and that Village Sayar fell within the territorial limits of that Police Station. However, their evidence

do not in any manner mention any association between accused Girja Shankar Misra and Nathu Singh, a local resident. PW 13 was also cross-examined by the prosecution only to discredit him. PW 53 proved an application made by his father Raja Bhaiya who was an enemy of Nathu Singh. It only shows that there were rival factions in the Village Sayar and that Girja Shankar Misra, who was a Brahmin, joined hands with other factions. PW 33 only stated that Raja Bhaiya was murdered in the year 1964 and after his death he received complaints against Girja Shankar Misra. In his cross examination he admitted that Raja Bhaiya was a history-sheeter and a hazardous criminal. But this application does not in any manner bring about association between Girja Shankar Misra and Nathu Singh. PW 44 deposed that he was in charge of special investigation section up to January 1974 and that Girja Shankar Misra was posted in his office as Sub-Inspector during that period. He also stated that Girja Shankar Misra made an application for leave for February 5 and 6, 1973. He has further stated that Girja Shankar Misra left the station on February 10, 1973. PW 32 was posted as Sub-Inspector, District Crime Record. He deposed that accused Girja Shankar Misra came to Police Club, Hamirpur on February 10, 1973 and expressed desire to stay in the club for the night. PW 42 deposed that Girja Shankar Misra stayed in the club and left on February 12, 1973 at 5.45 p.m. but came back during the night stating that the vehicle had gone out of order and slept during that night in the club. This witness was also cross-examined by the prosecution thereby treating him hostile. PW 6, a constable stated that Girja Shankar Misra came to the Club on 10th and left on 13th February. He was also cross-examined by the prosecution. PW 14 stated that accused Nathu Singh, Girdhari and Batte Singh became known to him 10 or 11 years ago when he was in Hamirpur Jail in a dacoity case. On 12th February he wanted to meet his counsel and traveled in a bus. He further stated that on the way, Girja Shankar Misra along with Nathu Singh, Girdhari and others got into the bus and they were carrying some weapons. This witness was cross examined at length to bring out his bad antecedents to show that he was a procured witness. He admitted that he was involved in a number of criminal cases and some cases were pending. He also admitted that he is illiterate. He could not give any reason as to how he remembered the date 12th February. PW 17 is the Driver of the bus which left Hamirpur on 12th February. He has not stated that four persons who got into the bus, were carrying any weapons and the trial court also rightly pointed out that as a Driver, he could not have noticed who got into the bus and the Conductor was not examined. The trial court has discussed the evidence of these witnesses in great detail and has given cogent and convincing reasons for not relying upon the evidence of these witnesses. Thus the evidence regarding conspiracy is wholly insufficient. There is nothing to show that there was an agreement between Girja Shankar Misra and Nathu Singh and others.

16. The High Court, however, after discussing the evidence regarding conspiracy noted the following conclusions:

"Our conclusions regarding the evidence so far discussed is that Girja Shankar was at Hamirpur from 10th to 12th February (PWs 16, 32 and 42). On 12th February at about 6 p.m. he boarded a bus going to Kapli along with four other persons (PWs 17 and 42). Girja Shankar and the four persons accompanying him had got down at Jolupur Mor at about 8.15 p.m. (PW 17). Girja Shankar and four other persons were seen entering the house of Girja Shankar at Orai at about 12 midnight on 12-13th February (PW 3). On 13th February at about 6 p.m. four persons, two armed with

rifles and two with guns were seen coming out of the gate of the house of Girja Shankar and they entered the house of the deceased, one of them fired a rifle shot hitting Raj Narain in the chest and another fired a gunshot hitting Raj Narain in the neck and thereby causing his death. We would like to repeat here that the defence of Girja Shankar that on 12th February at about 6 p.m. he had gone to Village Sarawan and he was at Sarawan from 13th to 18th February having been disbelieved, the prosecution case that on 12th February he had traveled along with four other persons from Hamirpur and he was seen going to his house on the midnight of 12th/13th February gets reinforced. On 13th February after the occurrence Girja Shankar was not found in the house. He was neither at Lucknow the place where he was posted. He was also not at Harsinghpura the place he mentioned in the letter Ex. 44/G to his son Ashok Kumar."

In the above conclusions the important one is that PW3 saw Girja Shankar Misra and four other persons entering his house on 12th February and on 13th February at about 6 p.m. Four persons armed with guns and rifles were seen coming out of the house of Girja Shankar Misra. The evidence of PW 3 was not relied upon by the two courts regarding the very identification. Likewise PW 3's evidence also has been rejected by us in this context. Apart from being highly interested witness there are a number of vital discrepancies in his evidence. If these two circumstances are not accepted then the other conclusions namely Girja Shankar Misra entered his house and he was followed by four persons does not in any manner advance the prosecution case regarding the conspiracy charge. In any event the sum and substance of the prosecution case as found in the charge is that Girja Shankar Misra, his wife Bimla Devi, Nathu Singh, Girdhari, Batte Singh and Balbir Singh conspired and agreed to commit the murder of the deceased. Many of them were acquitted by the trial court and the same has been confirmed by the High Court. Only Nathu Singh, Girdhari and Girja Shankar Misra remained in picture. The identification of Nathu Singh and Girdhari by PWs is not acceptable as discussed above. They also go out of the picture. Consequently it is not possible to convict Girja Shankar Misra alone for the offence of conspiracy particularly when the evidence regarding the said conspiracy as against Girja Shankar Misra is wholly insufficient. As discussed above the view taken by the trial court is quite reasonable. Therefore the order of acquittal passed by the trial court did not warrant any interference at all.

17. In the result the conviction and sentence awarded against Girja Shankar Misra and Nathu Singh are set aside. Both the appeals are allowed. If the appellants are on bail, they need not surrender and their bail bonds shall stand cancelled.