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BALIYA@ BAL KISHAN

v.

STATE OF M.P.

(Criminal Appeal No. 2001 of 2008)

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OCTOBER 5, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

PENAL CODE, 1860:

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ss. 302 and 120-B – Murder – Circumstantial evidence – Held: In the absence of credible ocular evidence, the prosecution in order to succeed has to establish circumstances adverse to the accused from which an inference to guilt can reasonably follow – In the instant case, one of the two eye-witnesses has been declared hostile and the evidence of the other has not been found credible – Prosecution has not been able to prove the ingredients of ‘criminal conspiracy’ —Further, there is serious discrepancy in the statements of prosecution witnesses about the deceased last seen in the company of accused – Therefore, conviction of the accused not being sustainable, they are acquitted – Circumstantial evidence.

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ss. 120-A – ‘Criminal conspiracy’ – Ingredients – Explained – Held: In the instant case, though it has been established that one of the accused asked the other two to do away with the deceased, but what is conspicuous by its absence is the essential meeting of minds amongst the accused, to commit the murder of the deceased – There is no evidence to show as to what was the response of the latter two accused to the statement made by the former to the effect that the author of the pamphlet must be done away with — In the absence of any material to establish the said fact, the vital chain or link with regard to an agreement or meeting of minds

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amongst the accused to commit the murder of the deceased is lacking. A

A Head Constable of Police (PW 7) found one 'P' lying injured by the road side. He took him to the hospital where he was declared dead. The investigation led to the arrest of four persons, namely, accused-appellants 'B' and 'G', accused 'M'(died during trial) and accused 'Chh'. The prosecution case was that on the day of occurrence, in the afternoon, one Dr. 'SS' complained to accused 'B' that a pamphlet indicating her relationship with him and casting doubt on her character was circulated. 'B' was stated to have told her that he knew as to who authored/published the pamphlet, and asked accused 'G' and 'M' that 'P' should be killed. Thereafter in the evening 'P' was found by PW7 lying injured. The trial court convicted accused-appellants 'B' and 'G' of the offences charged. Accused 'Chh' was acquitted. B C D

Allowing the appeals, the Court.

HELD: 1.1. In the absence of any credible ocular evidence, the prosecution in order to succeed has to establish circumstances adverse to the accused from which an inference of guilt can reasonably follow. In the instant case, though two alleged eye-witnesses were examined by the prosecution, not much reliance can be placed on the testimony of either. PW 3, had been declared hostile whereas the evidence of PW 4, suffers from material discrepancies if read with the evidence of PWs 1 and 5, particularly, in respect of the role of accused, 'B'. While PWs 1 and 5 did not mention about the presence of accused 'B' at the place of occurrence, PW 4 had identified the said accused in court as one of the assailants. The said witness, however, could not identify any of the accused while they were in police custody. In such circumstances, it will not be safe and E F G

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A prudent to place any reliance on the evidence of PW 4. [Para 9-10] [1162-H; 1163-A-C]

B 1.2. A scrutiny of the prosecution evidence, would show that in so far as the charge of criminal conspiracy is concerned, the prosecution has sought to establish that a pamphlet authored / published by the deceased was in circulation casting doubt on the character of Dr. 'SS' and her relationship with accused 'B'. The said pamphlet though seized in the course of investigation was not exhibited in the trial. [Para 10] [1163-D-E]

C 1.3. The offence of "criminal conspiracy" is defined in s. 120A of the Indian Penal Code, 1860 whereas s.120B thereof provides for punishment for the said offence. The foundation of the offence of criminal conspiracy is an agreement between two or more persons to cooperate for the accomplishment / performance of an illegal act or an act which is not illegal by itself, through illegal means. Such agreement or meeting of minds creates the offence of criminal conspiracy and regardless of proof or otherwise of the main offence to commit which the conspiracy may have been hatched, once the unlawful combination of minds is complete, the offence of criminal conspiracy stands committed. [Para 12] [1164-G-H; 1165-A-B]

F 1.4. A conspiracy would rarely be hatched in the open and, therefore, direct evidence to establish the same may not be always forthcoming. Proof or otherwise of such conspiracy is a matter of inference and the court in drawing such an inference must consider whether the basic facts i.e. circumstances from which the inference is to be drawn have been proved beyond all reasonable doubt, and thereafter, whether from such proved and established circumstances no other conclusion except that the accused had agreed to commit an offence can be drawn. Naturally in evaluating the proved

circumstances for the purposes of drawing any inference adverse to the accused, the benefit of any doubt that may creep in must go to the accused. [Para 14] [1165-E-G; 1166-A]

E. K. Chandrasenan v. State of Kerala 1995 (1) SCR 277 = 1995(2) SCC 99; *Kehar Singh & Ors. v. State (Delhi Administration)* 1988 (2) Suppl. SCR 24 = 1988 (3) SCC 609; *Ajay Aggarwal v. Union of India* 1993 (3) SCR 543 = 1993 (3) SCC 609; *Yash Pal Mittal v. State of Punjab* 1978- (1) SCR 781 = 1977 (4) SCC 540 – referred to

1.5. In the instant case, the prosecution had proved by the evidence of PWs 8 and 11, the conversation between Dr. 'SS' and accused 'B'. However, even accepting the prosecution version what reasonably follows therefrom is that Dr. 'SS' had complained to accused 'B' that her reputation has been smeared because of the pamphlet; that accused 'B' had stated that he knew who was the author of the pamphlet and further that he had stated to accused 'M' and 'G' that the author of the pamphlet (deceased 'P') should be killed. But what is conspicuous by its absence is the essential meeting of minds between accused 'B', 'M' and 'G' to commit the murder of the deceased. No evidence is forthcoming as to what was the response of accused 'M' and 'G' to the statement made by 'B' to the effect that the author of the pamphlet must be done away with. In the absence of any material to establish the said fact, the vital chain or link with regard to an agreement or meeting of minds amongst the accused to commit the murder of deceased 'P' is lacking. The alleged participation of the accused in the commission of the actual act of murder cannot be the evidence of the conspiracy in as much as the commission of murder must be the result of the conspiracy already hatched. The alleged acts attributed to the accused insofar as the offence of murder is

A concerned, naturally, has to be considered separately in order to determine the liability of the accused for the said offence. [Para 15-16] [1166-B; 1167-A-E]

B 1.6. Though from the evidence of PWs 1 and 5, the prosecution has also sought to prove that the deceased was seen in the company of accused 'M' and 'G' riding a red motorcycle belonging to accused 'M' shortly before his death. There is a serious discrepancy in the evidence of PWs 1 and 5 with regard to the presence of accused 'G' in the company of the deceased immediately before the crime. The prosecution version of last seen together even if it is hypothetically accepted in its entirety, at the highest, would establish only a solitary incriminating circumstance against the accused, which in the considered view of this Court cannot give rise to the conclusion that accused 'G' must be held liable for the murder of the deceased. [Para 11 and 17] [1164-D-E; 1168-B-C]

E 1.7. Recovery of the blood stained clothes of accused 'G' at his instance, by itself, again will not be sufficient. [Para 17] [1168-C-D]

F 1.8. Therefore, the conviction of the appellants u/s. 120B read with s.302 IPC is not legally sustainable. The judgment and order passed by the High Court is set aside and both the appellants are acquitted of the offences charged. [Para 18] [1168-D-E]

Case Law Reference:

G	1995 (1) SCR 277	referred to	Para 13
	1988 (2) Suppl. SCR 24	referred to	Para 13
	1993 (3) SCR 543	referred to	Para13
	1978 (1) SCR 781	referred to	Para 13

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal A
No. 2001 of 2008.

From the Judgment & Order dated 20.4.2007 of the High
Court of Judicature for Madhya Prades at Indore Bench in
Criminal Appeal No. 394 of 1998. B

WITH

Crl. Appeal No. 2002 of 2008.

S.K. Bhattacharya, Suresh Bharti for the Appeallant. C

C.D. Singh, Sakshi Kakkar for the Respondent.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. Criminal Appeal No. 2001/2008 D
has been filed by accused Baliya whereas Criminal Appeal
No.2002/2008 has been filed by co-accused, Gopal. Both the
appellants are aggrieved by the common order dated 20.4.2007
passed by the High Court of Madhya Pradesh by which the
conviction of the appellants under Section 120B read with E
Section 302 IPC and the sentence imposed has been affirmed.

2. The short case of the prosecution is that on 11.10.1991
Head Constable, Mukesh Kumar (PW 7), of Police Station
Balwada, while returning from the Court where he had gone to
attend the hearing of a case, found a person lying unconscious F
on the road side on Indore road. As the person was profusely
bleeding PW-7 sent information to the police station, Balwada,
which was entered in the General Diary of the police station.
Thereafter, the victim was brought to the hospital where he was
declared dead. As there were injuries on the person of the G
deceased, PW 14, S.S. Tomar (Inspector of Police) registered
an offence under Section 302 and took up investigation of the
case. On completion of investigation, the two appellants'
alongwith co-accused Manish (since dead) and Chhotu
(acquitted) were charge sheeted for the offence under Section H

A 120-B read with Section 302 IPC. The offences being triable
 by the Court of Sessions, the case was committed to the court
 of the learned Special Sessions Judge, West Nimar
 Mandaleshwar (M.P.). Charges under the aforesaid Sections
 of the Penal Code were framed against all the accused to
 B which they pleaded not guilty and claimed to be tried. In the
 course of the trial prosecution examined as many as 14
 witnesses besides exhibiting a large number of documents.
 Accused Manish died in the course of the trial whereas the
 remaining accused including the two appellants contested the
 C charges framed against them. At the conclusion of the trial,
 while accused Chhotu was exonerated of the charges levelled,
 the accused-appellants have been convicted as aforesaid and
 sentenced to undergo, inter alia, rigorous imprisonment for life.
 The said conviction and sentence has been maintained by the
 D High Court in the two separate appeals filed by the appellants
 giving rise to the present appeals.

E 3. We have heard Shri S.K. Bhattacharya, learned counsel
 for the appellants and Shri C.D. Singh, learned counsel on
 behalf of the respondent-State. We have also considered the
 evidence of the key witnesses examined by the prosecution as
 well as the several documents exhibited in the course of the
 trial. We have also perused the orders of the learned Trial Court
 as well as of the High Court.

F 4. The deposition of PWs 1,4,5,6,8 and 11 who are the
 key witnesses examined by the prosecution may now be
 noticed:

G According to PW 1, the first informant, on the day of the
 occurrence, in the late afternoon, he was returning from the
 factory alongwith two lineman of the M.P. Electricity Board who
 had gone to the factory to carry out an inspection of a fault that
 had occurred in the electric connection. All the three were
 coming back from the factory in one scooter. According to PW
 1, from the other side, accused Manish, deceased Pradeep
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and accused Gopal were coming on a red motor cycle belonging to the accused Manish. As deceased Pradeep had asked him to stop PW-1 stopped the scooter and on being asked by the deceased he informed him that they were coming from the factory after getting the electric fault inspected. According to PW 1, at that point of time accused Gopal went away in the direction of the Gayatri Market and the deceased alighted from the motor cycle and after talking to PW 1, he drove away in the motor cycle with the other accused i.e. Manish. According to PW 1, the scooter by which he had brought the lineman belonged to the deceased and he was going to return the same. However, the brother of the deceased, one Mukesh (PW 5), asked for the scooter and as the house of PW 1 was near the Gayatri Market both of them i.e. PW 1 and PW 5 Mukesh rode the scooter together up to a certain point. Thereafter, PW 1 went to his house and shortly thereafter he came to know from one Satya Vijaya that the deceased Pradeep had been stabbed by somebody with a knife.

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5. PW 3, Asha, examined as an eye witness was declared hostile. PW 4 Gangabai who was examined as another eye witness of the occurrence had deposed that on the day of the occurrence she alongwith PW 3 were returning from the factory after the day's work. This was at about 5 p.m. When they had reached Chor Bavadi she saw three persons quarreling and one person being stabbed. PW 4 also deposed that there was a red colour Motorcycle on which the persons were seated. The deposition of PW 4 further indicates that though she could not identify any of the alleged assailants in police custody, she had identified accused Baliya and Gopal in the court.

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6. PW 5, Mukesh, is the brother of the deceased. According to this witness, after the deceased Pradeep and PW 1 had completed their conversation, the deceased had left towards Indore road alongwith accused Gopal and Manish. This part of the evidence of PW 5 is discrepant with the evidence of PW 1 who had stated that at this point of time

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A accused Gopal had parted company and had gone in the direction of the Gayatri Market, while the deceased had gone away in the Motorcycle with accused Manish. Furthermore, according to PW 5, after PW 1 had dropped the linemen and alongwith PW 5 had come to Gayatri Market accused Gopal had again appeared and had taken away the scooter. Shortly, thereafter, he was informed about the incident.

7. PW 6 Shantilal is a witness to the recovery and seizure of the wearing apparels of accused Gopal from the house of co-accused Chhotu (since acquitted). He is also a witness to the recovery of a knife at the instance of the accused Manish.

8. PW 8, Kamlesh Kumar Sharma, is another brother of the deceased. According to this witness at about noon time on the day of the occurrence while he was going home for his meal, he had seen one Dr. Sandhya Swami with the two accused appellants and accused Manish. PW 8 has deposed that Dr. Sandhya Swami, in a loud voice, was blaming accused Baliya that her reputation has been smeared because of him and that a pamphlet has been published with regard to her relationship with the accused Baliya. This witness has also deposed that the accused Baliya had stated that he knew the identity of the author of the pamphlet and had told accused Gopal and Manish that the said person should be done away with. Similar is the deposition of PW 11, Mansoor Khan. According to PW 11, when he was going to the market he found Dr. Sandhya Swami and accused Baliya talking in the course of which Dr. Sandhya Swami was telling Baliya that she has suffered in reputation on account of him and that a pamphlet has been published against her and others. According to PW1, he had heard accused Balia telling accused Manish and Gopal that Pradeep should not be spared and that he should be killed.

9. A consideration of the evidence adduced by the prosecution witnesses, the core of which has been noticed above, would go to show that though two alleged eye witnesses were examined by the prosecution not much reliance can be

placed on the testimony of either. PW 3, Asha, had been declared hostile by the prosecution whereas the evidence of PW 4, Gangabai, suffers from material discrepancies if read with the evidence of PW 1 and 5, particularly, in respect of the role of the accused, Baliya. While PWs 1 and 5 does not mention about the presence of accused Baliya at the place of occurrence, PW 4 had identified the said accused in Court as been one of the assailants. The said witness, however, could not identify any of the accused while they were in police custody. In such circumstances, it will not be safe and prudent to place any reliance on the evidence of PW 4.

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10. In the absence of any credible ocular evidence, the prosecution in order to succeed has to establish circumstances adverse to the accused from which an influence of guilt can reasonably follow. A scrutiny of the prosecution evidence, noticed above, would go to show that in so far as the charge of criminal conspiracy under Section 120B IPC is concerned, the prosecution has sought to establish that a pamphlet authored/published by the deceased was in circulation casting doubt on the character of Dr. Sandhya Swami and her relationship with the accused Baliya. The said pamphlet though seized in the course of investigation was not exhibited in the trial. From the evidence of PW 8 and PW 11 it transpires that in the afternoon of the day of the occurrence they had over heard a conversation between Dr. Sandhya Swami and Baliya with regard to the pamphlet distributed in the course of which the accused Baliya had stated that he knew who is the author of the pamphlet. From the evidence aforesaid two witnesses i.e PWs 8 and 11, it further transpires that Baliya had informed accused Manish and Gopal that it is Pradeep who was responsible for the pamphlet and that he should be killed. Shortly thereafter, the dead body of Pradeep was found lying on the road. From the evidence of PWs 1 ad 5 the prosecution has sought to establish that a little while before his death the deceased was seen in the company of accused Manish and Gopal and that the deceased was seen by PWs 1 and 5 riding

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A on a red motorcycle belonging to accused Manish. Over and
 above the aforesaid circumstances, from the evidence of PW
 6, the prosecution has tried to establish that blood stained
 clothes of accused Gopal was recovered at the instance of the
 said accused whereas a knife was recovered at the instance
 B of accused Manish. The aforesaid blood stains, according to
 the prosecution, stood proved by the F.S.L. Report which was
 duly exhibited in the trial.

11. Having considered the evidence adduced by the
 prosecution witnesses we find that in so far as the publication
 C of the pamphlet; the conversation between Dr. Sandhya Swami
 and the accused Baliya and the statements attributed to
 accused Baliya along with the instructions to accused Manish
 and Gopal that Pradeep should be killed had been proved by
 the prosecution. Though the prosecution has also sought to
 D prove that the deceased was seen in the company of accused
 Manish and Gopal shortly before his death there is some
 amount of discrepancy in the evidence of PWs 1 and 5, in this
 regard, as already noticed. That the accused Manish owned a
 red colour motorcycle and the use of such a motorcycle by the
 E accused and the deceased shortly before the death had
 occurred have also been proved by the prosecution. There is
 also no doubt with regard to the recovery of blood stained
 clothes of the accused Gopal at the instance of the said
 accused and also the recovery of a knife at the instance of the
 F accused Manish. What has fallen for our determination is
 whether on the aforesaid proved circumstances, the appellants
 are liable for the offences alleged against them?

12. The offence of "criminal conspiracy" is defined in
 Section 120A of the Indian Penal Code whereas Section 120B
 G of the Code provides for punishment for the said offence. The
 foundation of the offence of criminal conspiracy is an agreement
 between two or more persons to cooperate for the
 accomplishment/performance of an illegal act or an act which
 is not illegal by itself, through illegal means. Such agreement
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or meeting of minds create the offence of criminal conspiracy and regardless of proof or otherwise of the main offence to commit which the conspiracy may have been hatched, once the unlawful combination of minds is complete, the offence of criminal conspiracy stands committed. A

13. More often than not direct evidence of the offence of criminal conspiracy will not be forthcoming and proof of such an offence has to be determined by a process of inference from the established circumstances of a given case. The essential ingredients of the said offence; the permissible manner of proof of commission thereof and the approach of the courts in this regard has been exhaustively considered by this Court in several pronouncements of which, illustratively, reference may be made to *E.K. Chandrasenan v. State of Kerala*¹, *Kehar Singh & Ors. v. State (Delhi Administration)*², *Ajay Aggarwal v. Union of India*³ and *Yash Pal Mittal v. State of Punjab*⁴. B C D

14. The propositions of law which emanate from the above cases are, in no way, fundamentally different from what has been stated by us hereinabove. The offence of criminal conspiracy has its foundation in an agreement to commit an offence or to achieve a lawful object through unlawful means. Such a conspiracy would rarely be hatched in the open and, therefore, direct evidence to establish the same may not be always forthcoming. Proof or otherwise of such conspiracy is a matter of inference and the court in drawing such an inference must consider whether the basic facts i.e. circumstances from which the inference is to be drawn have been proved beyond all reasonable doubt, and thereafter, whether from such proved and established circumstances no other conclusion except that the accused had agreed to commit an offence can be drawn. E F G

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1. 1995 (2) SCC 99.
 2. 1988 (3) SCC 609.
 3. 1993 (3) SCC 609.
 4. 1977 (4) SCC 540.

A Naturally in evaluating the proved circumstances for the purposes of drawing any inference adverse to the accused, the benefit of any doubt that may creep in must go to the accused.

B 15. Applying the above tests we find that in the present case the prosecution had proved, through the evidence of PWs 8 and 11, the conversation between Dr. Sandhya Swami and the accused Balia to the effect that the reputation of Dr. Sandhya Swami had suffered because of accused Balia and further that a pamphlet in this regard has been published. The prosecution has also succeeded in proving that the accused C Balia had stated that he knew who was the author of the pamphlet and that Balia had told accused Manish and Gopal that the author of the pamphlet (deceased Pradeep) should not be spared. While this happened in the afternoon of the day of the occurrence, in the early part of the evening hours the D deceased Pradeep was found lying injured on the road and on being brought to the hospital, was declared dead. Whether on this evidence the conclusion that the accused appellant had hatched a conspiracy to commit the murder of Pradeep can be drawn to the exclusion of all other possible conclusions is the E question that requires our answer.

F 16. We have already held that in the present case, from the evidence of PWs 8 and 11, the prosecution has succeeded in establishing the conversation between the accused persons and Dr. Sandhya Swami details of which need not be repeated. In coming to the above conclusion, we had considered the arguments advanced on behalf of the accused that the said fact is inherently improbable as such a conversation is alleged to have occurred in a busy market place and the exchanges are reported to have been in a loud voice within the hearing of the G people in the immediate vicinity, like PWs 8 and 11. Balancing the totality of the facts and keeping in mind the strata of society to which the accused persons belong/belonged it will be difficult to disbelieve what has been stated by the prosecution witnesses in a clear and cogent manner merely on the assertion H

that such an event is impossible. However, even accepting the prosecution version what reasonably follows therefrom is that Dr. Sandhya Swami had complained to accused Balia that her reputation has been smeared because of the pamphlet; that accused Balia had stated that he knew who was the author of the pamphlet and further that he had stated to accused Manish and Gopal that the author of the pamphlet (deceased Pradeep) should be killed. But what is conspicuous by its absence is the essential meeting of minds between accused Balia, Manish and Gopal to commit the murder of the deceased. No evidence is forthcoming as to what was the response of accused Manish and Gopal to the statement made by Balia to the effect that the author of the pamphlet must be done away with. In the absence of any material to establish the said fact the vital chain or link to enable us to satisfy ourselves with regard to an agreement or meeting of minds amongst the accused to commit the murder of deceased Pradeep is lacking. The alleged participation of the accused in the commission of the actual act of murder cannot be evidence of the conspiracy in as much as the commission of murder must be the result of the conspiracy already hatched. The alleged acts attributed to the accused insofar as the offence of murder is concerned, naturally, has to be considered separately in order to determine the liability of the accused for the said offence.

17. The above would now require the Court to consider whether either of the appellants can be held to be liable for the offence under Section 302 IPC. We have already indicated that we do not find the evidence of PW 4 to be credible or reliable in so far as identification of accused Balia at the place of occurrence is concerned. If the evidence of the alleged eye witnesses (PW 4) is to be excluded, as it has to be, the accused Balia has not been implicated, in any manner whatsoever, by the circumstances that the prosecution has sought to establish by examining PWs 1 and 5. The aforesaid witnesses have nowhere mentioned that the accused Balia was present at any point of time or at the place when the occurrence

A took place. The said witnesses have, at best, implicated accused Gopal as being seen with the deceased Pradeep along with the accused Manish shortly before the incident. However, as already indicated, there is a serious discrepancy in the evidence of PWs 1 and 5 with regard to the presence of
 B the accused Gopal in the company of the deceased immediately before the crime. The prosecution version of last seen together even if it is hypothetically accepted in its entirety, at the highest, would establish only a solitary incriminating circumstance against the accused, which in our considered
 C view cannot give rise to the conclusion that the accused Gopal must be held liable for the murder of the deceased Pradeep. Recovery of the blood stained clothes of the accused Gopal at his instance, by itself, again will not be sufficient.

D 18. In view of the foregoing discussions we are of the view that the conviction of the accused appellants under Section 120 B read with Section 302 IPC is not legally sustainable. We, therefore, allow appeals, set aside the judgment and order dated 20.4.2007 passed by the High Court of Madhya Pradesh in Criminal Appeal Nos.394/1998 and 395/1998 and acquit
 E both the accused appellants of the offences for which they were charged. The accused appellants be set at liberty forthwith unless their custody is required in connection with any other case.

R.P.

Appeals allowed.