

\$~
*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+

CRL.A. 72/2015

Reserved on: 5th March 2018

Date of decision: 15th March, 2018

ANKUR KUMAR

..... Appellant

Through: Mr. R.M.Tufail with Ms. Astha,
Mr. Farooq Chaudhary, Mr. Equebal Nasir,
Advocates.

versus

STATE OF NCT OF DELHI

..... Respondent

Through: Mr. Amit Chadha, APP and
Ms. Radhika Kolluru, APP.

With

+

CRL.A. 1630/2014

ANWAR AND ANR.

..... Appellants

Through: Mr. R.M.Tufail with Ms. Astha,
Mr. Farooq Chaudhary, Mr. Equebal Nasir,
Advocates.

versus

STATE OF NCT OF DELHI

..... Respondent

Through: Mr. Amit

Chadha, APP and
Ms. Radhika Kolluru, APP.

With

+

CRL.A. 904/2015

ASIF

..... Appellant

Through: Mr. B S Choudhary and Ms. Sneh Lata
Rana and Mr. Yogender, Advocates.

versus

STATE (NCT) OF DELHI Respondent
Through: Mr. Amit Chadha, APP and and
Ms. Radhika Kolluru, APP.

With

+

CRL.A. 1375/2015

KHALID

..... Appellant
Through: Mr. B S Choudhary and Ms. Sneh Lata
Rana and Mr. Yogender, Advocates.

versus

STATE (NCT) OF DELHI Respondent
Through: Mr. Amit Chadha, APP and and
Ms. Radhika Kolluru, APP.

With

+

CRL.A. 917/2016

TASLEEM

..... Appellant
Through: Ms. Sunita Arora, Advocate for
Mr. Krishan Kumar, Advocate

versus

STATE OF NCT OF DELHI Respondent
Through: Mr. Amit Chadha, APP and
Ms. Radhika Kolluru, APP.

And

+

CRL.A. 90/2015

HASARAT

..... Appellant

Through: Mr. B S Choudhary and Ms. Sneh Lata
Rana and Mr. Yogender, Advocates.

versus

STATE THROUGH SECRETARY (HOME)

..... Respondent

Through: Mr. Amit Chadha, APP and
Ms. Radhika Kolluru, APP.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE I.S. MEHTA

JUDGMENT

%

Dr. S. Muralidhar, J.:

Short summary

1. Seven persons were charged with stealing and transporting three cows, a buffalo and a calf, purportedly to a slaughterhouse, in a stolen truck across Delhi in the early hours of 19th January 2013. Four police vehicles gave the truck a chase for over 30 minutes during which exchange of fire took place between the accused and the police. The dramatic chase ended with the rear tyres of the truck getting shot. When the truck stopped, four persons who tried to escape were arrested. One was found in the rear of the truck seriously injured and was brought dead at the hospital. Three others, who according to the police, escaped were later arrested.

2. The trial that ensued ended in all seven accused being convicted by the

trial Court for a range of offences including criminal conspiracy, attempt to murder the policemen, injuring one policeman and preventing the police from performing their public duty, transporting cattle for slaughter, damaging public property and carrying illegal arms. Each of them was sentenced to a range of sentences, the maximum being imprisonment for life, apart from fine amounts.

3. By this judgment, this Court affirms the conviction of two of them for the offences punishable under Section 307 IPC (attempt to murder) read with Section 34 IPC (sharing a common intention to commit such offence) and for the offences under Sections 25 and 27 of the Arms Act. Their conviction for injuring one policeman and preventing the police from performing their public duty has also been affirmed. They have been sentenced to the period undergone by each of them thus far. The remaining five have been acquitted of all the offences.

The present appeals

4. These appeals are directed against the common judgment dated 22nd September 2014 passed by the learned Additional Sessions Judge-II (North-West), Rohini Courts, Delhi ('ASJ') in Sessions Case No.103/2013 arising out of FIR No.32/2013 registered at Police Station ('PS') Subhash Place convicting the seven Appellants Ankur Kumar (Accused No.1:A-1), Anwar (A-2), Sanwar (A-3), Khalid (A-4), Tasleem (A-5), Hasrat (A-6) and Asif (A-7) for the following offences:

- i. Section 120-B Indian Penal Code (IPC).
- ii. Section 120-B IPC read with Section 5 of Delhi Agriculture Cattle

Preservation Act (DACP Act) and also under Section 5 of DACP Act.

- iii. Section 120-B IPC read with Section 186 IPC and also under Section 186 IPC.
- iv. Section 120-B IPC read with Section 332 IPC and also under Section 332 IPC.
- v. Section 120-B IPC read with Section 353 IPC and also under Section 353 IPC.
- vi. Section 120-B IPC read with Section 307 IPC and also under Section 307 IPC.
- vii. Section 120-B IPC read with Section 3 of Prevention of Damage to Public Property Act (PDPP Act) and also under Section 3 of the PDPP Act.

5. Further A-2, A-3, A-6 and A-7 were held guilty of the offences under Sections 25/27 Arms Act. However, no findings were given on the charge under Section 482 IPC. The trial Court observed that the investigation and trial with regard to the said offence was required to be conducted by the competent Court before which the offences under Sections 379 and 411 IPC were being tried as regards the theft or recovery of the vehicle, i.e. TATA 407 bearing registration HR-38-AS-2616.

6. By a separate order on sentence dated 9th October 2014, which is also challenged in these appeals, the trial Court sentenced the Appellants as under:

- i. For the offence under Section 120-B IPC they were each sentenced to rigorous Imprisonment (RI) for 10 years with a fine of Rs.1,000/-, and

in default of payment of fine, to undergo simple imprisonment (SI) for five days.

- ii. For the offence under Section 120-B IPC read with Section 186 IPC to RI for three months.
- iii. For the offence under Section 186 IPC to RI for three months.
- iv. For the offence under Section 120-B IPC read with Section 332 IPC to RI for three years.
- v. For the offence under Section 332 IPC to RI for three years.
- vi. For the offence under Section 120-B IPC read with Section 353 IPC to RI for two years.
- vii. For the offence under Section 353 IPC, to RI for two years.
- viii. For the offence under Section 120-B IPC read with Section 307 IPC, to imprisonment for life.
- ix. For the offence under Section 307 IPC to imprisonment for life.
- x. For the offence under Section 120-B IPC read with Section 5 of DACP Act to RI for five years with a fine of Rs. 10,000/-, and in default of payment of fine, to further undergo SI for one month.
- xi. For the offence under Section 5 of the DACP Act, to RI for five years and fine of Rs. 10,000/- and in default of payment of fine, to further undergo SI for one month.
- xii. For the offence under Section 120-B IPC read with Section 3 of the PDPP Act, to RI for three years and a fine of Rs. 2,000/-, and in default of payment of fine, to further undergo SI for 15 days.
- xiii. For the offence under Section 5 of the PDPP Act, to RI for three years and fine of Rs. 2,000/- and in default of payment of fine, to further undergo SI for a period of 15 days.

7. Further, for the offence under Section 25 Arms Act, A-2, A-3, A-6 and A-7 were sentenced to RI for three years and fine of Rs. 2,000/- and, in default of payment of fine, to further undergo SI for a period of 15 days. For the offence under Section 27 Arms Act, they were sentenced to RI for five years and fine of Rs. 5,000/- and, in default of payment of fine, to further undergo SI for a period of one month.

Case of the prosecution

8. The case of the prosecution is that eight persons, i.e. the seven Appellants/accused along with Yakub (since expired) were suspected of being part of a gang of cattle smugglers called the '*mewati* gang'. In relation to an incident of alleged theft of cattle on the intervening night of 15th/16th January 2013, FIR No.20/2013 had been registered at PS Shahbad Dairy. Incidentally, A-1 to A-7 herein have been arrayed as accused in the said FIR as well, and the trial arising out of the said FIR is stated to be pending.

9. As far as the present case is concerned, information was received in the police control room ('PCR') about the movement of a Tata 407 Tempo (hereafter 'the offending Tempo') containing stolen cattle on the complaint of one Sumer Singh (PW-54). The case of the prosecution is that between 2 and 2.15 am in the early hours of 19th January 2013, A-1 to A-7 along with Yakub lifted three cows, one calf and one buffalo from the divider of the road in Sectors 16/17, Rohini and were transporting the animals in the offending Tempo for the purpose of slaughtering.

10. The offending Tempo was chased by a police Gypsy vehicle bearing registration DL-1C-J-4712 in which was seated Rajiv Ranjan, Additional Commissioner of Police ('ACP'), Alipur (PW-35), driven by Constable ('Ct.') Balkar Singh (PW-60). In the rear seat, Head Constable ('HC') Ankur Kumar (PW-67) was seated. As the Gypsy was chasing the offending Tempo, according to the prosecution, fire was opened on the police by those in the offending Tempo. The fire was returned by PW-35.

11. With continuous messages being relayed to the PCR, the aforementioned police Gypsy was joined by a police Qualis vehicle bearing registration DL-1C-H 9802 in which was seated ACP Jasmeet Singh (PW-34), Ct. Rakesh (PW-56) (who was having a glock pistol with ten rounds) and Ct. Desh Raj (who was having an AK-47 with twenty rounds). Jagtender Singh (PW-50), Civil Defence Volunteer, was the driver of the said vehicle. The police also deployed ERP Gypsy bearing registration DL-1C-M 4596 of PS Prashant Vihar which had Sub-Inspector ('SI') Kanwaljeet (PW-55) and was driven by Ct. Satender (PW-64). The fourth vehicle deployed by the police was a Tata 407 Tempo (hereafter 'the police Tempo') bearing registration DL-1L-K 9515 attached to PS Mangolpuri in which was seated SI Mukesh (PW-37) along with HC Jaipal (PW-51), Ct. Jitender (PW-52) and Ct. Umesh (PW-62) and was driven by Ct. Vijay Pal.

12. The four police vehicles chased the offending Tempo transporting the cattle and having the eight persons, i.e. A-1 to A-7 along with Yakub, and firing ensued. Ultimately, the offending Tempo while proceeding on Road No. 44, Lok Vihar, near Jheel Wala Park, hit the footpath and came to a halt.

According to the police, the 7-8 persons jumped out of the offending vehicle and ran in different directions.

13. Ct. Ankit (PW-67) is said to have caught one of the accused, i.e. Ankur Kumar (A-1) whereas SI Mukesh Antil (PW-37) and his team apprehended Sanwar (A-3) together with Anwar (A-2) and Khalid (A-4). ACP Jasmeet (PW-34) is stated to have spotted one person jumping out of the driver's cabin from the driver's side who then jumped over the wall of Jheel Wala Park and escaped. According to the prosecution, this was Tasleem (A-5). Two other persons, i.e. Hasrat (A-6) and Asif (A-7), were also said to have escaped this way. Yakub was found in an injured condition in the rear of the offending Tempo and was taken to BSA Hospital, Sector 6, Rohini where he was declared brought dead.

14. It must be noticed at the outset that arising out of this very incident, two FIRs had been registered. FIR No.31/2013 was registered at PS KN Katju Marg under Section 307/398 IPC and Section 27 Arms Act against A-1 to A-7. The trial arising out of the said FIR ended in the conviction of A-1 to A-7 with a sentence of six years being imposed. Since the sentence was less than seven years, the appeals against the said conviction and order on sentence filed by the said A-1 to A-7 are stated to be pending before a learned Single Judge of this Court. It is pertinent to point out that the judgment in that case had not been delivered at the time of pronouncement of the impugned judgment of the trial Court.

15. The present case has arisen from the second of the two FIRs mentioned hereinbefore, i.e. FIR No.32/2013 registered at PS Subhash Place, in which,

by the impugned judgment of conviction and the order on sentence, the learned trial Court has proceeded to award sentences of life imprisonment. Therefore, these appeals have been listed before and heard by the present Division Bench.

Impugned judgment of the trial Court

16. The learned trial Court rendered a 489 page judgement in which it came to the following conclusions regarding the guilt of the accused:

- i. A-1, A-2, A-3, A-4, A-5, A-6 were residents of the same village, i.e. Village Nahal, PS Masoori, District Ghaziabad (UP) and therefore, known to each other. A-7 was a resident of an adjoining village Ajrala, PS Mundali, District Meerut (UP);
- ii. All the accused are individually and jointly involved “in a large number of criminal cases of similar nature”. This previous involvement reflects their close association “in this specialized crime of lifting and slaughtering of cattle and conclusively establish pre-planning and prior meeting of mind”;
- iii. The evidence that has come on record proves that the accused were carrying illegal arms with which they were firing on the police team chasing them. Instead of stopping, the offending Tata 407 Tempo attacked the police personnel “by throwing stones/mountain rocks and by use of firearms”. This confirmed that the accused had come prepared for all eventualities “and were determined to the extent that in case of any obstructions they would not hesitate to use these weapons even if it was to kill/commit murder”;

- iv. The speed with which A-5, A-6 and A-7 managed to escape from the spot and managed to reach the village to receive treatment confirmed “the meticulous way in which the operation was planned and executed”.
- v. The testimonies of the various police witnesses stood corroborated by the testimony of Dushyant Kumar (PW-38) which confirmed that the accused had organized themselves into a gang to give effect to this crime “in which they appear to have achieved specialization”;
- vi. The forensic report proved the presence of gunshot residues (‘GSR’) on the hand-wash of the accused apprehended at the spot, i.e. A-2, A-3, and the deceased (Yakub) and therefore, established the prior meeting of minds;
- vii. Sumer Singh (PW-54) also proved that the accused had come to the park near the house and when he raised an alarm, the accused opened fire and ran away and escaped in the offending tempo. This established the motive and object of conspiracy hatched by the accused persons to lift cattle for the purposes of slaughtering;
- viii. One pregnant cow which was being carried in the offending Tempo expired later. The other animals had injuries and had been immobilized by brutally tying their feet and necks. This also confirmed the motive and conspiracy to lift the cattle for the purpose of slaughtering;

- ix. A large quantity of illegal arms and ammunition was recovered from the offending Tempo along with the stolen cattle and therefore, the accused were “desperate criminals who do not hesitate to use firearms against anybody who come in their way”;
- x. The mechanical inspection report (‘MCR’) of the offending Tempo (Ex.PW-38/A) showed an extra steel ‘U’ type garter was fitted inside of front bumper proving that the offending Tempo has been specifically improvised so as to withstand the blunt force impact while hitting barricades or overcoming any obstructions that may be caused;
- xi. During the chase, the accused directed gun shots on the vital part of the bodies of the policemen and in that process Ct. Balkar (PW-60) received injuries on his shoulder.
- xii. According to the trial Court, the ocular evidence of the police personnel was corroborated by the photographs of the scene of the crime and Google maps. It was concluded that this was an incident of use of legitimate force by the police party which was non-excessive. The trial Court also found that the charges under the Arms Act stood proved against A-2, A-3, A-6 and A-7.

17. The trial Court thereafter by a 48 page order on sentence, proceeded to sentence the Appellants in the manner indicated hereinabove.

18. This Court has heard the submissions of Mr. R.M. Tufail, learned

counsel for A-1, A-2 and A-3, Mr. B.S. Choudhary, learned counsel for A-4, A-6 and A-7 and Mr. Krishan Kumar, learned counsel for A-5. Mr. Amit Chadha and Ms. Radhika Kolluru, learned APPs have also been heard for the State.

Cattle not shown to be stolen

19. The genesis of the present case, according to the prosecution, begins with an incident at village Shahbad Daulatpur, Delhi in the early hours of 19th January 2013. Sumer Singh (PW-54) is running a dairy at the said village. He owns a large number of cows and buffalos. At the time of the incident, he had 40 cows and 40 buffalos which he used to keep tethered in a plot adjoining his house and also in a park.

20. According to PW-54, in the early hours of 19th January 2013, at about 2 am, he heard some noise coming from the park and when he went to the park he saw 5-6 persons opening the ropes of the cows which were tied to the *khuti*. He saw a cream-coloured TATA 407 Tempo parked there and noticed that “there were cattle inside the said tempo”. He also states that there were 3-4 persons standing near the tempo. When he raised an alarm, a large number of neighbours came out with *lathi* and *dandas*. On seeing this, the said boys fired 3-4 rounds, got into the offending Tempo and escaped towards Muskan Apartments. PW-54 immediately called the 100 number and the police officials reached the spot from Sector 17, Rohini.

21. Having stated this during his deposition in the trial Court, PW-54 was asked to identify the accused persons present in Court. He could only identify Ankur Kumar (A-1) and none of the other accused.

22. The second aspect is that in his cross-examination PW-54 admitted that he never went to the jail to identify any of the accused. He further stated “it is correct that my cows were not stolen in the area”. He also admitted as correct that he could not tell “which boy was opening the rope from the *khuti* and who were standing near the vehicle”.

23. The Court fails to understand how this witness could be cited by the prosecution to prove the illegal lifting of cattle by the accused and that they were illegally transporting three cows, one calf and one buffalo for the purposes of slaughtering. This witness identified one of the accused and even that accused was not shown to be stealing anything from him. In any event, PW-54 is a witness in FIR No.24/2013 registered at PS Shahbad Dairy in which trial is still underway.

24. In order to prove that stolen cattle were being transported for the purposes of slaughtering, it had to first be proved by the prosecution that the said cattle were stolen from someone or that they did not belong to the accused. The trial Court has ignored this aspect altogether. In particular, the trial Court failed to notice that one of the buffaloes which were transported in the offending Tempo was released on a *superdari* to one Abdullah. What is strange is that in this *superdarinama* dated 1st February 2013, Abdullah states that he is the owner of the aforesaid buffalo and had furnished the *superdarinama* for the sum of Rs. 30,000. However, the said Abdullah was not produced as a prosecution witness. What is even stranger is that Abdullah never filed any complaint with the police till 1st February 2013 about a buffalo belonging to him having been stolen or going missing. In

that event, the only conclusion to be drawn is that the police failed to prove that the cattle which were being transported in the offending Tempo were stolen.

25. With regard to none of the other animals has any evidence been led by the prosecution to show that they were illegally lifted by any of the accused from any place in Delhi or elsewhere. The principal allegation against these accused viz., that they were cattle thieves and were part of a gang regularly involved in this activity has not been proved by even an iota of evidence.

Irrelevant factors considered by trial Judge

26. In para 237 of the impugned judgment, the trial Court has listed out details of the cases in a tabular form which, according to the trial Court, were of 'similar nature'. A careful perusal of the table would show that the first three cases in the said table are FIR No.24/2013 which pertained to the incident which took place on the intervening night of 15th/16th January 2013 and was registered at PS Shahbad Dairy, the trial in which is still ongoing. The other two FIRs are FIR No.32/2013 (present case) and FIR No.31/2013 which again pertain to the same transaction, but were registered as separate FIRs. These three cases, therefore, cannot be said to have established the pattern of stealing of cattle by the accused persons and therefore it could not be said to be the cases of 'similar nature'.

27. The remaining cases in the table are all pertaining to the offences under Sections 392, 379, 393, 398 etc. IPC and therefore, they could, in no way, be said to be cases of a similar nature.

28. In the impugned judgment, in para 238, two cases registered against Hasrat (A-6) in Mussoorie, UP way back in 2008 under the NDPS Act have been listed. As far as Asif (A-7) is concerned, there are two cases under the DACP Act: (i) FIR No.94/2010 at PS Kanjhawala; (ii) FIR No.151/2010 at PS Vijay Vihar. There are also two cases, i.e. FIR No.127/2010 and FIR No.149/2012, against A-7 for offences under Section 295-A IPC and Section 11 of the Prevention of Cruelty against Animals Act. Thus, only against A-7 are there cases of a similar nature from 2010 to 2012. At the same time, it is important to note that the outcome of these cases is not yet known. All the other cases against Asif (A-7) pertained to relatively minor offences in UP and PS Nangloi, Delhi.

29. The above list of cases, therefore, does not persuade the Court to conclude that all of the accused formed part of a gang of cattle thieves and that all of them were involved in previous cases of 'similar nature'. From the mere pendency of cases, the trial Court could not have concluded that these were organized crimes of criminals without probing the details further. Otherwise, the mere listing out of the cases would be treated as sufficient to conclude that a person is a known criminal with a history. If, subsequently, it transpires that the accused was in fact acquitted in those cases, as is often the case, the reliance placed on such cases for drawing an inference against such accused would be grossly unfair. It is, therefore, necessary for the trial Court to be cautious in placing reliance on the mere fact of pendency of other criminal cases which are yet to be finally decided.

30. Consequently, the Court is unable to subscribe to the conclusion drawn

by the trial Court, that merely because six of the seven accused belong to the same village, they were known to each other and that therefore, they were all involved in a “large number of criminal cases of similar nature”. There is nothing on the record which supports such a conclusion.

Illegal transportation of cattle and conspiracy not proved

31. The prosecution having failed to prove the stealing of cattle, the case of the prosecution that there was illegal transportation of such stolen cattle also is without any basis. There is not an iota of evidence to show that the cattle were being transported by the accused for the purposes of illegal slaughtering. All that has been proved is that cattle were being transported in the offending Tempo. The police have not bothered to investigate the purpose for which the cattle were being transported. There is no statement of any witness which can throw light on this aspect.

32. As far as the charge of criminal conspiracy punishable under Section 120 B IPC, the trial Court has drawn on eleven circumstances which according to the trial Court established the charge. Three of these pertain to the testimony of PW-54, the other pending cases and that all of the accused were from the same village. These have already been discussed by this Court hereinbefore and found to be either not relevant or not proved. The other circumstances commented upon are that the fact one of the accused Tasleem (A-5) managed to get treatment soon after escaping, that the accused were carrying a large cache of arms and stones which they used to attack the police party, that the cattle were tied with ropes and that the offending Tempo was specially designed to withstand the blunt force of hitting

barricades.

33. In the considered view of the Court all these factors do not prove any 'criminal conspiracy' or prior meeting of minds of the accused to commit the crimes with which they were charged. That they were in fact transporting cattle is not even denied. While transporting cattle in a truck obviously some ropes to tie the animals have to be used. This is not indicative of conspiracy. The mere possession of fire arms or a bag of stones cannot immediately lead to the inference of a criminal conspiracy to attack policemen. The accused could not have anticipated that they would be chased by the policemen. Clearly the firing started at the spur of the moment. The trial Court has overlooked the settled legal position regarding what has to be proved to bring home the charge of criminal conspiracy. Illustratively reference need to be made only to the following extracts from the judgment of the Supreme Court in *Nalini v. State (1999) 5 SCC 253*:

"Under Section 120A IPC offence of criminal conspiracy is committed when two or more persons agree to do or cause to be done an illegal act or legal act by illegal means. When it is legal act by illegal means overt act is necessary. Offence of criminal conspiracy is exception to the general law where intent alone does not constitute crime. It is intention to commit crime and joining hands with persons having the same intention. Not only the intention but there has to be agreement to carry out the object of the intention, which is an offence. The question for consideration in a case is did all the accused had the intention and did they agree that the crime be committed. It would not be enough for the offence of conspiracy when some of the accused merely entertained a wish, howsoever, horrendous it may be, that offence be committed.

7. A charge of conspiracy may prejudice the accused because it is forced them into a joint trial and the court may consider the entire

mass of evidence against every accused. Prosecution has to produce evidence not only to show that each of the accused has knowledge of object of conspiracy but also of the agreement. In the charge of conspiracy court has to guard itself against the danger of unfairness to the accused. Introduction of evidence against some may result in the conviction of all, which is to be avoided. By means of evidence in conspiracy, which is otherwise inadmissible in the trial of any other substantive offence prosecution tries to implicate the accused not only in the conspiracy itself but also in the substantive crime of the alleged conspirators. There is always difficulty in tracing the precise contribution of each member of the conspiracy but then there has to be cogent and convincing evidence against each one of the accused charged with the offence of conspiracy. As observed by Judge Learned Hand that "this distinction is important today when many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders."

34. In the present case, the Court is not persuaded that the charges against the accused for entering into a criminal conspiracy to steal cattle and transport them for slaughter have been proved. For that matter, there is no evidence to show that there was any prior meeting of minds of the accused to fire upon the policemen or injure any of them. Therefore, the prosecution has failed to prove the guilt of the accused for the offences punishable under Section 120 B IPC and Section 5 DACP Act or the offences under Section 120 B read with the other substantive provisions with which they have been charged.

Remaining charges

35. Once these two charges are held to be disproved, what remains are five more charges. Of these five charges, the trial Court itself observed that the use of the fake number plate on the offending Tempo, attracting the offence

under Section 482 IPC was required to be separately tried.

36. That leaves the Court with the following charges which pertain to the following offences:

- i. Obstructing police officers from performing their public function thereby attracting Section 186 IPC.
- ii. Assaulting and using criminal force against public servants in the execution of their duties thereby committing an offence punishable under Section 353 IPC.
- iii. Voluntarily causing hurt to a public servant PW60 thereby committing an offence under Section 332 IPC.
- iv. Continuously firing upon police officials and thereby committing an offence punishable under Section 307 IPC.
- v. Causing damage to the police vehicles by firing thereby committing an offence under Section 3 of the PPDP Act.

The offence punishable under Section 307 IPC

37. The substantive charge is for the offence of the accused attempting to murder the policemen chasing them punishable under Section 307 IPC. To recall the case of the prosecution, when the police attempted to intercept the offending Tempo and asked it to stop, it not only sped away but its occupants opened fire on the chasing police vehicles. The four police vehicles were led by the gypsy bearing registration DL-1C-J 4712 occupied by PW35 and PW67 and driven by PW60.

38. The wireless transmission log and diary of the Outer District, which covered the whole chase, was marked as Ex.PW-68/A. This covered the

period from 2.02 am where the gist of the message was that “cows have been stolen from the dividing road of Sector 16-17” and that “all staff be alerted, all pickets be alerted, barricading be done”. At 2.17 am, it is stated that “they have lifted one cow and fired also. They have gone towards Sector 17”. At 2.24 am, the message was “following a tempo at KN Katju Marg. We have blared siren but it did not stop. No number on it. It appears to be the same tempo.” At 2.24 am the message was: “we have seen the vehicle. They have been firing.” Again at 2.24 am, a police Qualis is noted to have joined the pursuit. At 2.25 am, it states that the truck went towards Pitampura and the Qualis was following “we have fired at one”. At 2.25 am, it states “heavy firing from tempo”. At 2.26 am, the message has been sent from gypsy “my driver has been hurt by a bullet. Going towards Peeragarhi, Deepali”. At 2.26 am, the message is “bullet hit its tyre and it burst”. At 2.27 am, it states “back tyres have been burst. North West be informed. Offending vehicle should not run away at any cost”. At 2.30 am, the message is “vehicle persons have been firing from arms”. At the same time, the message from ‘P6’ was “tempo tyre has been coming out and tempo hit a barricade. Firing has been done from driver’s side also”. At 2.32 am, the message is from PW-24 that “vehicle has been apprehended at Mahindra Park. Tyre has been burst and dragged about 100 meters on the road towards one side of the road”. The message at 2.33 am from P-1 is that “one person has gone in the park. Park be covered.” The message at 2.38 am was “two apprehended from TATA 407 have been sent to Bhagwan Mahavir Hospital.” At 2.46 am, the message is “we have apprehended one boy” and at 3 am it states “four persons have been apprehended.”

39. All the above events have been spoken to by several police witnesses who attempted to identify the persons who jumped out ultimately from the offending Tempo that stopped.

40. The only independent witness who has spoken in this regard is PW-38. He called on the 100 number when the offending Tempo ultimately stopped. The call said "*police wallo pe goliaan chal rahe hai.*" This PCR message has been exhibited as Ex.PW-8/1 and Ex.PW-20/A. The cross-examination of PW-38 has not yielded much. Therefore, he can be safely relied upon to prove that the offending Tempo was being chased by the police vehicles and firing ensued.

41. As far as what happened when the offending Tempo came to halt, there is no independent witness. Inspector Mukesh Antil (PW-37) apprehended Sanwar (A-3) and recovered an unlicensed pistol from him. He was identified in Court not only by PW-37 but by PWs 34, 35, 51, 52 and 62 and Khalid (A-4) was apprehended by Ct. Desh Raj (PW-58) and identified in Court by, apart from PW-58, PWs 34, 35, 37, 51, 52 and 62. Ankur (A-1) was apprehended by PW-67. Apart from being identified by him, Ankur (A-1) was also identified by PWs 34, 35, 37, 51, 52 and 62. Anwar (A-2) was apprehended by PW-56 and also identified by PWs 34, 35, 37, 51, 52 and 62. Tasleem (A-5) was shot in the leg by Jasmeet Singh (PW-34) but escaped from the spot.

42. Two Crime Teams arrived at the spot and clicked photos at different times, some taken at night and some in the morning. There was a Crime Team from the Outer District which was under the charge of PW-5 and the

photographer was PW-26. This inspection was conducted between 3 and 6 am. The other Crime Team of the North West District which was under the charge of PW-4 and the finger prints were lifted by PW-7 and the photographer was PW-25. Two inspections were conducted by this team between 4 and 6 am and again between 9.30 and 11 am. From the Forensic Sciences Laboratory ('FSL') an expert (PW-40) took the hand wash of the deceased (Yakub), Ankur (A-1) and Anwar (A-2) from the Bhagwan Mahavir Hospital. PW-53 took the hand wash of Khalid (A-4) and Sanwar (A-3) from the Safdarjung Hospital where he had been shifted to from the BM Hospital.

43. A country made gun (.315 bore) having a long barrel was seized from the road in front of the offending Tempo. From the personal search of Sanwar (A-3), one country made pistol of .315 bore from dub with one live cartridge were seized. From the body of the offending Tempo, one *desi kata* of .315 bore was seized. These arms are visible in the photographs exhibited during the trial which have been perused by this Court. Inside the tempo dashboard/glove compartment of the offending Tempo, one country made improvised pistol with one cartridge in chamber and two in the magazine was recovered. From the rear of the offending Tempo, a body belt with 11 live cartridges of .315 bore were seized. In all, therefore, from the side of the accused, there were four country made firearms of .315 bore, and a belt with 11 live cartridges that were recovered.

44. As far as spent cartridges/bullets are concerned, two empty cartridges of .315 bore/8mm cartridges were recovered from the cabin of the offending

Tempo. From the Lok Vihar Bus stop, near Jheel Wala Bagh, located on the opposite side of the road from where the offending Tempo stopped, one empty cartridge of .315 bore/8mm was recovered. Near the offending Tempo, on the footpath, one empty cartridge of .315 bore/8mm was recovered. Apart from this, there were no other cartridges of .315 bore which could be traced back to the firearms recovered from the site. From the offending Tempo, a plastic bag with stones weighing around 20-25 kg was seized. Three cows, one calf and one buffalo were seized.

45. The vehicles also bore bullet marks as is evidenced from the vehicle inspection report. The GSRs were gathered from the holes in the body of the offending Tempo. There were as many as 15 holes and two dents on the police Tempo. There were two dents and one hole on the police gypsy and there was one dent and one hole on the other police gypsy.

46. What all of the above evidence shows is that there was an exchange of fire when the offending Tempo was being chased by the police vehicles. The extent of firing on the offending Tempo was far greater than the firing on the police vehicles. It is possible that the chasing police vehicles would have had their headlights on thereby making it difficult for the occupants of the offending Tempo to fire upon them. Nevertheless, firing did take place on the police vehicles.

47. There are photographs of the offending Tempo with the cattle inside, which were exhibited during trial, and have been perused by this Court. There is one photograph showing four cattle inside the truck, whereas according to the prosecution, three cows, one calf and one buffalo were

being transported. Be that as it may, it is difficult to imagine that apart from the three cows, one calf and one buffalo there could be five persons in the rear of the truck with firearms firing on the police. Further, the driver who was driving the truck could not have been firing at the police. The driver could have had, at most, two persons on his left side. Only one of them sitting near the window could have, if at all, been firing. Even for that person to be firing he would have had to have his head outside and turn to the rear to start firing. None of the police witnesses are able to precisely say how the firing from the offending Tempo actually took place. Also, there is no clarity as to who among the accused was firing from the offending Tempo.

48. Even though the police witnesses say that 7-8 persons jumped out, what is clear is that only four of them were apprehended from the spot. According to the police witnesses, three of them purportedly escaped. What is not disputed is that one of them viz., Yakub was found in a badly injured condition in the rear of the offending Tempo.

49. GSR were found on the left and right hand of the deceased Yakub, Anwar (A-2) and Sanwar (A-3) and not any of the other accused. Clearly, therefore, the other accused were not wielding weapons. It is, therefore, difficult to believe that all of them shared the common intention to fire upon the police party and that all of them were wielding firearms.

50. That bullets were fired on the police vehicles is proved by the GSR being found present on the dents and hole and the three police vehicles, i.e. Tata 407 Tempo of the police, ERS gypsy 4596 and police gypsy 4712.

That the police were firing on the offending vehicle has also been proved by the presence of the GSR on the dents and holes of the offending vehicle.

51. Further, the empty cartridges recovered from the road and from the offending Tempo have been matched with the country made revolver of .315 bore, whereas the metallic pieces of fire bullets matched with the police AK 47. Therefore, the exchange of fire between the offending truck and the police vehicles can be said to have been proved.

52. From the photographs of the offending vehicle placed before the Court, it is seen that there were blood marks on the bonnet on the left side of the vehicle and the driver's side was found to be damaged with there being bullet holes. As far as bullet holes on the windshield are concerned, it is sought to be explained that two bullets have gone from the rear through the cabin wall, one in the right wing and one on the conductor side and it could have been caused due to the bullet that has been shot from the rear going through the cabin wall and then through the windshield. The photograph also showed that the window between the cabin and near the *dabba* was opened, and the bullets could have gone from the rear through the window and through the windshield as well.

53. The seizure memo also noted that the rear right side tyre was punctured and the rear left side only had a rim. The firing on the police party is sought to be proved by the bullet hole on the windshield in Gypsy 4712 driven by Ct. Balkar (PW-60). The MLC of PW-60 however shows that he has only suffered a blunt force injury on his shoulder. Therefore, it does not appear that he suffered any firearm injury as such and in any event, the injury was

simple in nature.

54. What the prosecution has not been able to prove are the blood marks on the bonnet of the offending vehicle on the left side which, incidentally, has not been commented upon by the trial Court. The second fact is that Yakub was brought dead in the hospital yet there was no separate FIR registered for Yakub. There is an eighteen page post-mortem report in respect of Yakub which showed that there was a bullet entry wound at the back of the neck and an exit wound near the left ear. There was a firearm wound in the palm on the left hand and penetrating lacerated wound on the right side of his face. From his body two bullets both 8 mm were recovered.

55. The manner in which Yakub was shown to have suffered multiple fractures is not consistent with Yakub being simply injured in the exchange of fire between the police and the offending Tempo. What appears plausible is that Yakub was severely injured by the firearm after he was taken away from the rear of the offending Tempo.

56. The explanation offered to the Court on the failure to register a separate case for firing on Yakub is not convincing at all. Learned APP has placed before the Court the prevalent NHRC guidelines, according to which, a separate FIR need not be registered “unless a specific complaint is made against the police alleging the commission of criminal act on their part, which makes out a cognizable case of culpable homicide”. It is contended that as far as death of Yakub was concerned, a separate FIR could have given rise to multiplicity of proceedings.

57. In Yakub's case, even if the GSR has shown as a result of hand wash that he was using a firearm, the police would be exceeding the right of private defence because the mere transportation of cattle and the firing on the police vehicle did not call for elimination of the accused by firing through the head and at close range. This had to be investigated in accordance with law. It is stated that a magisterial enquiry was conducted by the Sub Divisional Magistrate ('SDM') and no disciplinary action was recommended. That report has been examined by the Court and, in the opinion of this Court, the less said about the casual treatment of the matter of the clearly homicidal killing of Yakub, the better.

58. The Court is also not satisfied with the lack of explanation by the police on the severe injuries found on Khalid (A-4) and Sanwar (A-3) as is apparent from their respective MLCs. If indeed they had jumped out of the vehicle and were apprehended in the manner as described by the prosecution, it does not explain the severe injuries that they have suffered including firearm injuries. In fact, Anwar (A-2), Sanwar (A-3) and Khalid (A-4) were referred to surgery and A-2 was referred to orthopaedics for further management. This could not have been just as a result of being in the vehicle which was moving at high speed. It appears to the Court that some third degree methods were used by the police on these accused influenced by the fact that they had dared to open fire on the police. The reaction of the police can only be described as disproportionate.

59. To summarise the conclusions of the Court from the above analysis:

(i) The offending Tempo was spotted on the road transporting cattle

(ii) The prosecution has proved (a) that there was firing between the offending Tempo and the police vehicles during the chase. First a police gypsy having the number 4712 chased the offending Tempo and was fired upon. The bullet hit its windshield and the bullet perhaps grazed the shoulder of Ct Balkar (PW-60) the driver of the police gypsy. It was a blunt force injury and a simple one at that.

(iii) After the offending Tempo stopped four of the accused were apprehended at the spot i.e. A-1, A-2, A-3 and A-4. Yakub who was found injured in the rear of the truck was brought to the hospital and declared dead on arrival. From the personal search of A-3 a country made pistol was recovered. Three other country made weapons were recovered: two from the front and rear of the offending Tempo and one from the road close to the front of the said vehicle. A belt with 11 cartridges was also recovered from the rear of the offending Tempo.

(iv) The GSR tests showed that Yakub, A-2 and A-3 alone had actually handled the weapons. The GSR residues found on the holes and dents of the offending Tempo as well as the police vehicles showed that there was an exchange of fire and that firing upon the police vehicles with firearms did take place.

(v) The prosecution has not been able to explain the blood stains on the left side front bonnet of the offending Tempo; the death of Yakub by firearm injuries to the skull, the severe injuries on A-2, A-3 and A-4.

Arrest of A-5 to A-7 and recoveries

60. As regards the three accused who are supposed to have run away and then apprehended, it is clear that their apprehension was at a subsequent point in time. Their arrests are not very convincing particularly since none of them has taken place in the presence of independent witness. While Tasleem (A-5) was arrested from outside Jagdamba Hospital on 28th January 2013 (again without any public witness being present), Hasrat (A-6) was arrested on 30th January 2013 and Asif (A-7) was arrested by officials from PS Badarpur in another FIR where he was found carrying a *katta*. The manner of these arrests is not at all convincing and therefore, the Court would not like to base its conclusion as to the guilt of these accused on this type of evidence. Consequently, the Court is also not prepared to believe the recoveries attributed to these three accused i.e. A-5 to A-7. The presence of A-5 to A-7 in the offending Tempo at the time of the incident has not been proved by the prosecution beyond all reasonable doubt. They deserve a clean acquittal of all offences.

61. The Sanjay Gandhi Hospital for animals treated the injured animals in the present case. One of the cows died on 28th January 2013. One buffalo, as already noticed, was released on *superdari*. The other animals are still in the said hospital. In any event, this had no bearing on the guilt of the accused for the offences with which they were charged.

Section 307 IPC qua A-1 and A-4

62. As far as A-1 and A-4 are concerned, their hand washes have not revealed the presence of GSR and no weapons have also been seized at their

instance. Therefore, they cannot be possibly convicted for the offence under the Arms Act.

63. However, since they were in the offending vehicle which was speeding away and from where firing was happening, the question that arises is whether they shared any common intention with the other accused to actually fire upon the police party that was chasing the offending vehicle. Unlike A-2 and A-3, no GSR was found on their hand washes. Not one of the police witnesses says that they actually saw A-1 and A-4 fire upon the police vehicles. Further, the fingerprint expert could not lift chance prints from the offending Tempo that could match the fingerprints of A-1 and A-4. It is, therefore, not possible for the Court to conclude that A-1 and A-4 shared a common intention with A-2, A-3 and Yakub to fire upon the police vehicles. A-1 and A-4 cannot be held guilty for the offence under Section 307 IPC. Correspondingly they cannot also be held liable for the offences under Sections 186, 332 and 353 IPC or Section 3 of the PDPP Act or Sections 25 and 27 of the Arms Act.

Conclusions on guilt

64. The result of the above discussion is as follows:

- i. All the accused are acquitted of the offence of criminal conspiracy punishable under Section 120 B IPC and Section 5 of the DACP Act.
- ii. As far as the offence under Section 307 IPC read with Section 34 IPC, Sections 186, 332 and 353 IPC read with Section 34 IPC, Section 3 of the PDPP Act and Sections 25 and 27 of the Arms Act are concerned, the conviction of Anwar (A-2) and Sanwar (A-3) for the said offences

is hereby affirmed. A-1, A-4 to A-7 are acquitted of all of the aforesaid offences.

Sentence

65. Turning now to the question of sentence, it is seen that both Anwar (A-2) and Sanwar (A-3) had already served more than five years of imprisonment. There are certain other factors that have to be considered. One is that barring the simple blunt force injury to PW-60 on his shoulder, not a single policeman suffered even a scratch. Secondly, the firing on the offending Tempo was far in excess of the firing on the police vehicles. Thirdly, the reaction of firing by A-2 and A-3 along with deceased Yakub appears to be a panic reaction. The severe injuries to A-2 and A-3 and the homicidal death of Yakub have not been properly explained by the prosecution. The prosecution has failed to prove that A-2 and A-3 were 'cattle thieves' and have been convicted for any similar offence.

66. Keeping in view all the above factors, the sentence of each of A-2 and A-3 for the offence under Section 307 read with Section 34 IPC is confined to the period already undergone by each of them inclusive of the default sentence for the non-payment of the fine amount as awarded by the trial Court. A-2 and A-3 have already served out the sentences awarded by the trial Court for the offences under Sections 186, 332 and 353 IPC read with Section 34 IPC, Section 3 of the PDPP Act and Sections 25 and 27 of the Arms Act.

67. Unless wanted in any other case, the acquitted accused as well as A-2 and A-3 shall be released forthwith. The bail bonds and surety bonds

furnished by the Appellants are discharged. The acquitted accused i.e., A-1, A-4 to A-7 will fulfil the requirement of Section 437A CrPC to the satisfaction of the trial Court at the earliest.

68. The appeals are disposed of in the above terms. The trial Court record be returned forthwith together with a certified copy of this judgment.

S. MURALIDHAR, J.

I.S. MEHTA, J.

MARCH 15, 2018

Rm

