



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on : 29th August, 2022

Pronounced on: 12th October, 2022

+ **CRL. A.189/2018**

SALIM Appellant

Represented by: Mr. Manu Sharma, Mr. Kartik Khanna, Mr. Abhyuday Sharma and Mr. Kartikay Mathur, Advs.

versus

STATE GOVT. OF NCT OF DELHIRespondent

Represented by: Mr. Prithu Garg, APP for State with Insp. Ravindra Dagar, PS Kamla Market.

+ **CRL.A. 395/2018**

ALAM@ MADARI @ ASGAR ALAM Appellant

Represented by: Mr. Piyush Pathak, Adv.

versus

THE STATE (GOVT. OF NOT DELHI) Respondent

Represented by: Mr. Prithu Garg, APP for State with Insp. Ravindra Dagar, PS Kamla Market.

+ **CRL.A. 396/2018**

MOHD. UVESH Appellant

Represented by: Mr. Manu Sharma, Mr. Kartik Khanna, Mr. Abhyuday Sharma and Mr. Kartikay Mathur, Advs.

versus

STATE Respondent

Represented by: Mr. Prithu Garg, APP for State with Insp. Ravindra Dagar, PS Kamla Market



CORAM:

NEUTRAL CITATION NO: 2022/DHC/004220

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MR. JUSTICE ANISH DAYAL

JUDGMENT

ANISH DAYAL, J.

1. These connected appeals assail the following:

(i) Impugned judgment dated 14th December, 2017 passed by the learned Trial Court convicting the appellants Salim, Mohd. Uvesh and Alam for the offence punishable under Section 394 read with Section 34 IPC; appellant Salim and Mohd. Uvesh for offence punishable under Section 302 read with section 34 IPC, Section 397 read with Section 34 IPC and Sections 25/27 of the Arms Act; appellants Salim, Mohd. Uvesh and Alam for the offence punishable under Section 120B read with Section 394/397/302 IPC; and

(ii) Order on sentence dated 15th December, 2017 awarding the following sentences to the three appellants:

1. Appellant Salim

Sl. No.	Section	Sentence	Fine	Sentence in default of payment of fine.
1.	394 r/w Section 397/34 IPC	Imprisonment for life.	Rs. 1000/-	Simple imprisonment for one month.
2.	302/34 IPC	Imprisonment for life.	Rs. 1000/-	Simple imprisonment for one month.
3.	25 Arms Act	Rigorous Imprisonment for 3 years	Rs. 1000/-	Simple imprisonment for one month.



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4.	27 Arms Act	Rigorous Imprisonment for 7 years	Rs. 1000/-	Simple imprisonment for one month.
5.	120B r/w Section 394/397/302 IPC	Imprisonment for life.	Rs. 1000/-	Simple imprisonment for one month.

2. Appellant Mohd. Uvesh

Sr. No.	Section	Sentence	Fine	Sentence in default of payment of fine.
1.	394 r/w Section 397/34 IPC	Imprisonment for life.	Rs. 1000/-	Simple imprisonment for one month.
2.	302/34 IPC	Imprisonment for life.	Rs. 1000/-	Simple imprisonment for one month.
3.	25 Arms Act.	Rigorous Imprisonment for 3 years	Rs. 1000/-	Simple imprisonment for one month.
4.	27 Arms Act.	Rigorous Imprisonment for 7 years	Rs. 1000/-	Simple imprisonment for one month.
5.	120B r/w Section 394/397/302 IPC	Imprisonment for life.	Rs. 1000/-	Simple imprisonment for one month.

3. Appellant Alam @ Madari @ AsgarAlam

Sr. No.	Section	Sentence	Fine	Sentence in default of payment of fine.
1.	394/34 IPC	Imprisonment of life.	Rs. 1000/-	Simple imprisonment for one month.



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2.	120B r/w Section 394/397/302 IPC	Imprisonment for life.	Rs. 1000/-	Simple imprisonment for one month.

All sentences of all the convicts were to run concurrently.

Two other accused viz. Munavvar and Mehboob were acquitted by the impugned judgment dated 14th December, 2017 by the learned Trial Court

The Incident

2. As per the case of prosecution, Mohd. Shakeel (the complainant) carried on the business of handicraft on 3rd Floor of a rented house bearing P-165, Zakir Hussain College, Shakur ki Dandi, Delhi where he used to reside along with his co-workers Mohd. Hasibul Alam, Devanand Kumar Sharma, Mohd. Feroz, Govind and Mohd. Shahid. On 8th October, 2012, at about 11:30 a.m. while all these persons were doing their work, one person 22-23 years of age came into the room and went away and later during the day was accompanied along with three other persons who entered the room and closed the door by bolting it from inside. One of the persons took out his pistol, pointed it at them and asked them to give whatever was with them. Mohd. Shakeel and the other occupants stated that they had nothing with them. Upon hearing this, the intruders started beating them and snatched mobile phones of Mohd. Shakeel, Mohd. Hasibul Alam and Govind and beat up Mohd. Shakeel due to which he received injuries on his left foot. The intruders searched the clothes which were hanging in the room and took out around Rs. 7,000 or



8,000/- and left the house after closing the door from outside. Monu. NEUTRAL CITATION NO: 2022/DHC/004220

Shahid, one of the occupants came out from the window, unbolted the door from outside and raised a hue and cry. Many public persons collected in the street and tried to catch the intruders. One of the public persons chased the intruders and caught one of them but was shot in the head by them, due to which he fell, and the intruder was able to run away while firing. SI Pradeep (PW-42) was posted at PS Kamla Market and around 11:45 a.m. received DD No.14A that brother of the caller had received a bullet injury. He reached Shakur Ki Dandi along with PW- 10 Constable Lokpal and found a crowd of people. He found that blood was scattered on the street near the chowk at Shakur ki Dandi and found two empty cartridges and one live cartridge. PW-42 called the Crime Team and later found another empty cartridge near the wall of MTNL office at a distance of 5-6 ft. from the spot. When he reached LNJP Hospital he came to know that one injured namely Mohd. Sultan had died whereas another injured PW-27 Nawab Ali was admitted in the emergency ward. After collecting the MLCs, when PW- 42 reached the spot, he found that Crime Team was already there and conducting their inspection. PW-42 recorded the statement of PW- 19 Mohd. Shakeel and after making an endorsement handed it over for registration of FIR to PW-10, on the basis of which FIR No. 116 of 2212 was registered. The investigation was assigned to Inspector (Investigation) Binod Kumar. While the investigation was continuing SI Pramod Anand PW-35 received secret information on the basis of which PW-35 along with PW-36 conveyed the information at the office Inspector, Special Staff upon which ACP (Operation), Central District formed a raiding party. At around 3:50 p.m. they reached DDU Park, DDU Marg and



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surrounded the park where they apprehended the appellant Salim while he was trying to flee. He took out a country made pistol and pointed it towards Constable Satbir PW-36 but before he could fire, the constable caught hold of him. Constable Rakesh PW-37 apprehended the appellant Mohd. Uvesh while he was fleeing from the other side of park. He too took out a pistol and was about to fire when the constable caught hold of him. Two other associates were apprehended by the members of the raiding party whose names were revealed as Mohd. Shadiq and Mohd. Shamim and from their possession one country made pistol and live cartridges were recovered. However, since they were not the accused in the present case, recovery from them is not relevant. Later, on information provided by appellant Salim, Munavvar was arrested from the location behind Delite Cinema and cashbox was recovered from him. After completion of the investigation, chargesheet was filed and charges were framed against all the accused. The prosecution during trial led evidence of 43 witnesses, statements of the accused were recorded under Section 313 Cr.P.C. and the evidence of one witness was led in defence.

Submissions by the Appellant

3. The appellants through their counsel submitted that credibility of the eyewitness PW-19 Mohd. Shakeel was doubtful since crime scene report prepared on 8th October, 2012 in PW-19's presence didn't mention any offence of robbery/dacoity. The counsel for the appellants contended that even as per the case of the prosecution, the firing happened by only one assailant when the incident of robbery was over and when the accused persons were making good their escape. Therefore, shots were fired at the point of time of when Alam



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and Manzar were caught and not when the offence was committed and thus common intention under Section 34 IPC would not apply since there was no pre-meditated plan to fire. Further there were discrepancies in the ballistic evidence and the chain of the custody since crime visit report mentioned 3 empty and 1 live cartridge whereas the seizure memo of the bullets mentions 2 empty and one live cartridge and bullets recovered from the body of the deceased and the appellants are of different dimensions. Besides, the chain of custody of firearm was vitiated because there was no record of safe custody between 18th October, 2012 to 1st November, 2012, between seizure and deposit in the *maalkhana* and between 18th March, 2013 to 2nd April, 2013 between return of the firearms to the PS with FSL report and deposit in the makhana. The appellant contended that they had been convicted solely based on constructive liability and the prosecution was unable to prove beyond reasonable doubt as to how Section 397/302/304 would be applicable to Mohd. Uvesh and Salim as their presence on the spot itself was not proven. The counsel for the appellant Alam argued in addition that there was serious doubt as to who had opened fire which had killed the deceased and therefore benefit of doubt should be given to the appellant Alam. The counsel contended that prosecution has failed to establish a coherent story regarding involvement of appellant and it could be safely concluded that PW-19 and his other co-workers, as also PW-27 Nawab Ali, were not eyewitnesses to the incident of firing. Reliance was placed on the first information recorded in Call Report Ex. PW-16 which notes that Sultan's brother Rizwan had called mentioning that Asif and Fahad had shot his brother Sultan with whom he had an earlier quarrel. Since no investigation regarding Asif and Fahad had been carried out, their



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participation in the situation cannot be ruled out. Prosecution was not sure with respect to number of persons involved in the incident of shooting as well as about the fact that who had fired. A perusal of the testimonies of PW-18 and PW-25 would show that PW-19 was not the witness of the incident of firing and that it was quite improbable that having bolted the door from outside to flee the spot, Shahid was able to unbolt the room and then go down from the 4th floor where the room was situated and then chase the assailants. Besides there was no recovery effected from the appellant Alam.

Submissions by the Prosecution

4. Learned APP for the State has contended, countering the arguments led by the appellants' counsel that *post mortem* report of the deceased categorically opined that death was consequent upon firearm ammunition injuries to the head and the chest which were sufficient in the ordinary course of nature to cause death and that injuries were sustained by PW-19 and PW-27; PW-19 sustained simple injury on the left foot while PW-27 sustained grievous injury on the forearm. PW-19 was the main eyewitness and he had deposed that he was at the place where the armed robbery took place where he ran the workshop. PW-25 is also an eyewitness, being co-worker of PW-19, and identified the appellants Salim, Alam and Mohd. Uvesh as the assailants who committed the armed robbery. The fact that Alam had opened fire from his revolver and so had another fourth companion of the assailants was confirmed in the deposition of PW-19. There was recovery of weapon from appellant Salim and ballistic evidence showed firing from the same weapon which resulted in the death of the deceased. There was also a recovery of weapon from the appellant Mohd. Uvesh, also forensically connected with the death of



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the deceased. Learned APP for the State stated that the armed robbery was pre-meditated and pre-planned, and all the three appellants were armed. During commission of robbery and their escape from the crime scene when their fourth companion was caught by the deceased, the appellants fired shots at the deceased and this was the cause of death of the deceased and grievous injury to PW-27 Nawab Ali. All three appellants have common intention of killing the deceased since they all opened fire after seeing that their fourth companion had been caught by the deceased. PW-19 was an injured eyewitness and therefore his deposition ought to be given additional weight and prosecution sought conviction of appellant Alam under the same provisions as the other two appellants and sentence to be awarded accordingly.

The Evidence

5. The evidence, as gleaned from the records and relevant for the assessment of this matter, is *inter alia* as under:

5.1 PW-19, Mohd. Shakeel deposed that on 8th October, 2012 when he was working with his co-workers at the 3rd floor premises, one boy (identified as appellant Alam) came to that room and upon PW-19 enquiring on purpose of his visit, appellant Alam left. About 25-30 minutes later, appellant Alam accompanied by three others came to that room, and PW-19 identified two of them as appellants Salim and Mohd. Uvesh, whereas he did not identify the fourth companion who was not present in Court. He stated that the appellants bolted the room, started beating them and asked them to deliver whatever they had and also threatened to kill them. He further stated that they were armed with *kattas* (country made weapons) and appellant Alam was armed



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with a revolver. He suffered injuries on his left toe as a result of beating and the assailants left with money worth Rs. 7,000/- to Rs. 8,000/- and four mobile phones taken from them. While leaving they bolted the door from outside which was opened by Shahid by climbing out of the window and thereafter, they rushed down the stairs and raised an alarm. A person in the locality had caught hold of the fourth companion (who was not present in the Court for identification). Then, appellant Alam opened fire from his revolver at the person who had captured their companion and the fourth companion also opened fire at the person who had nabbed him. The person who had caught hold of the fourth companion of the appellant was later identified as Sultan (deceased) who died subsequently. In his cross-examination PW-19 stated that when the appellants entered the room, they were not holding weapons but while they were beating, they had weapons. He stated that the appellants ran away towards Zakir Hussain College and the crossing where the incident happened was about 100 steps from the building where the robbery had taken place.

5.2 PW-25, Mohd. Shahid corroborated the version of the incident as was narrated by PW-19 and stated that when he went down the stairs with PW-19 and reached the street they found one person lying on the ground with bullet injury. He identified appellant Alam and Salim as those who had committed the crime of robbery at their room/factory. PW-25 was cross-examined by the APP since he was resiling from the statement he had made to the police. In his cross-examination he stated that the assailants so apprehended had opened fire at the person who had captured one of them and the shot had hit that person whereupon the assailants escaped and that he could identify the said assailants when produced.



5.3 PW-26, Mohd. Feroz was also one of the occupants of the room where the robbery was committed and was an eyewitness who corroborated the version of the incident narrated by PW-19. He also stated that a person from the public had tried to capture the assailants and was shot by one of the assailants, who he was not able to identify in the Court. Learned APP cross-examined him since he was resiling from his earlier statement. In his cross-examination he stated that he was unable to identify the assailants because the occurrence had taken place in a very short time.

5.4 PW-42, SI Pradeep deposed that upon receiving DD No. 14A he reached the spot and found blood scattered on the street as well as two empty cartridges and one live cartridge, and one empty cartridge was found later near the wall of the MTNL office. He had summoned the Crime Team who did their inspection and he made endorsement of the statement by PW-19 based on which FIR was registered. Parts of the blood-stained earth control had been taken by the Inspector Binod Kumar and duly sealed.

5.5 PW-32, Sh. Hasibul Alam was also one of the co-workers of PW-19 who corroborated what had been stated by PW-19. While he testified to the events relating to the robbery at the room, he could not provide any account relating to what had happened in the street during the chase since he was inside the room.

5.6 PW-12, Dr. Anju Rani senior resident of Maulana Azad Medical College conducted the *post mortem* of the deceased Sultan and in her opinion the cause of death was due to cranio-cerebral damage (head injury) consequent upon firearm ammunition injuries to the head and chest which were individually and collectively sufficient



to cause death in the ordinary course of the nature. She stated that all injuries were *ante mortem* in nature and the injuries to the head and chest were caused by ammunition of a rifled firearm.

5.7 PW-14, Dr. Shweta Senior Resident of Lok Nayak Hospital had conducted the MLC of Shakeel PW-19 and stated that she had found a wound measuring 1cm x 0.5 cm on the dorsum aspect of the left foot and opined that the injury was simple.

5.8 PW-1, Dr. Yusuf Azad working as Junior Resident Lok Nayak Hospital had medically examined PW-19 and observed two injuries on PW-19 including a lacerated wound on the left foot.

5.9 PW-4, Dr. Anshul Goyal Senior Resident Lok Nayak Hospital testified that MLC of injured Nawab Ali had been prepared by Dr. Aman Goyal who had left services of the hospital, but he could not identify the handwriting of Dr. Aman Goyal and as per the injury on forearm of Nawab Ali was grievous in nature.

5.10 PW-5, Manoj Kumar Martolia also had medically examined Nawab Ali and noted a wound on the forearm and another one on the right thigh.

5.11 PW-24, Constable Nitesh Kumar was on duty in the CCTV room of PS Kamla Market as CCTV operator. On being enquired by the police team regarding CCTV footage of the area outside Zakir Hussain College he stated that three CCTV cameras had been installed and he provided the CCTV footage to Inspector Binod Kumar Singh in the form of a CD. The CCTV footage on being displayed showed four boys running away and crossing the road with the cash box with one of them.



5.12 PW-21, Mohd. Rizwan the brother of the deceased stated that at about 11:15 a.m. on 8th October, 2012 when he reached Dhalan Chowk he heard the noise of firing and saw public people running helter-skelter. He then noticed his brother had sustained injuries and he took him to the LNJP Hospital in a cycle rickshaw. On the way, his brother passed away.

5.13 PW-43, Sh. Puneet Puri Assistant Director, Ballistics, FSL deposed that he had received the parcels with the cartridges and weapons recovered. The relevant part of his opinion is as under:

- a) *The improvised pistol 9 mm bore marked Ex.F1 was in working order. Test fire was conducted successfully using the cartridges marked A1, A2.*
- b) *The improvised pistol 7.65 mm bore marked Ex. F2 was in working order. Test fire was conducted successfully by using cartridges A7, A8.*
- c) *The improvised magazine marked Ex. M1 could be used in the improvised pistol 9 mm marked Ex. F1.*
- d) *The 7.65 mm cartridge case marked EC1, EC3 were fired empty cartridges and had been fired through the improvised pistol 7.65 mm bore marked Ex. F2. The individual characteristics of firing pin marks and breech face marks present on Ex. EC1, EC3 and on the test fired cartridges cases marked A7 and A8 were found identical.*
- e) *The 9 mm cartridge case marked Ex. EC2 was a fired empty cartridge and had been fired through the improvised pistol 9mm bore marked Ex. F1 as the individual characteristics of firing pin marks and breech face marked on Ex. EC2 were same as those tests fired through cartridges A1 and A2.*

The detailed report of the PW-43 was exhibited as Ex.43/A.

Further he opined that on opening of parcel No. 9, one bullet and one deformed bullet were taken out. The deformed bullet marked Ex.EB2



were corresponding to the bullet of 9 mm cartridge discharged through the improvised pistol 9 mm bore while the bullet mark was corresponding to the bullet of 7.65 mm cartridge could not be identified with the discharge of improvised pistol 7.65 mm bore since the individual characteristics were found insufficient for comparison. It was further opined that gunshot residue particles were detected in hole marked H1 on the backside of the T-shirt marked C1, hole marked H2 on the back side of the *baniyan* Ex.C2, holes marked H4 and H5 on the *lungi* marked Ex. C6 and hole marked H6 on the front side of the right sleeve of *kurta* marked Ex. C5 and H8 on the front side of underwear marked Ex. C7.

5.14 DW- 1, Suhaib Hassan Khan stated that he did not know any of the accused person except Munnavar whom he had met in the end of 2014 or beginning 2015 when he had come to his property to enquire about his owner. There is nothing else in his evidence which is relevant or useful for the case of the appellants.

Analysis

6. Having examined in detail the evidence on record and on an assessment and appreciation of the contentions of the parties, the following points are relevant in order to reach a conclusion by this Court:

6.1 The incident which was prior in time is the armed robbery which occurs at 3rd Floor of a House bearing No.P-165, Zakir Hussain College, Shakur Ki Dandi, Delhi where PW-19, Md. Shakeel was doing business of handicraft alongwith six co-workers. PW-19 and PW-25 are the main eyewitnesses on which the case of the prosecution rests. PW-19 has given a detailed account of the sequence of events



which occurred on 8th October, 2012 at about 10.30 a.m. when four persons came to that room armed with weapons i.e. *kattas* and revolver. PW-19 categorically identifies appellant Alam in the Court and appellants Salim and Mohd. Uvesh as companions of appellant Alam. PW-25, Md. Shahid, one of the co-workers corroborates the testimony of PW-19 and identifies appellants Alam and Salim in the Court. As regards appellant Mohd. Uvesh, PW-25 stated that he appeared to be one of the offenders who were involved in the commission of crime but on the day of the occurrence Mohd. Uvesh had a small beard. The fourth offender Manzar was a proclaimed offender and therefore the issue of his identification did not arise. PW-25 also confirmed that the offenders had weapons and had aimed the same at PW-19.

6.2 As regards the other co-workers viz. PW-29 Govind, PW-32 Hasibul Alam and PW-33 Devanand, they resiled from their earlier statements and were therefore declared hostile. PW-26 Md. Feroz, also a co-worker and present on that day testified to the extent of the robbery having occurred on that day however refused to identify the accused appellants. PW-32 did testify that on the day of the incident five people had entered into the room and put pistol upon them, started beating PW-19 who was their employer and looted the money of PW-19 before fleeing away from there. However, he also refused to identify the accused appellants in the Court.

On the issue of Section 394/34 and 397 IPC

6.3 It is also evident from the testimony of prosecution witnesses that assault by the robbers on that day resulted in injuries to PW-19. This is corroborated by the testimonies of PW-25, PW-26 and PW-32,



all of them having confirmed the act of the robbers beating PW-19. PW-1, the doctor who examined PW-19 and prepared the MLC (Ex. PW-1/A) on 8th October, 2012 reported the following two injuries on PW-19: (a) lacerated wound measuring 1cm x 0.2 cm situated medially on the left foot, and (b) swelling over upper lip i.e. towards the right side of the face. PW-14 also submitted her report, the other doctor who had examined PW-19 on that day (noted as part of her report Ex. PW-14/A) that injury on PW-19 was simple in nature.

6.4 As regards the items which have been stolen during the said robbery, PW-19 stated that the robbers took out Rs.7,000/- to Rs.8,000/- in cash from their clothes which were hanging from the pegs and in addition took away a cashbox containing coins and also four mobile phones from the occupants of the room. This is corroborated by PW-25 (to the extent of the cash from the clothes and the cashbox). The cashbox is later identified in TIP proceedings by PW-19 (Ex. PW-39/D) conducted before the learned Metropolitan Magistrate PW-39 on 21st November, 2012. PW-24, Constable Nitesh Kumar, who was on duty in CCTV room of PS Kamla Market deposed that the CCTV footage from which a CD Ex. P-6 was prepared showed four boys running away and crossing the road with a cashbox with one of them. The time stamp on the recording was from 11:40 a.m. to 11:42 a.m. of 8th October, 2012.

6.5 Support for the testimonies of the eyewitnesses to the armed robbery is also provided by the testimony of PW-18 Momin Khan who ran a workshop of fancy lights at the first floor of the same building where the robbery had occurred. He testified that about 11:00-11:15 a.m. on that day, four people had come to the first floor. When he



asked them about the purpose of the visit one of them mentioned that they had come to meet PW-19 Mohd. Shakeel and then went to the fourth floor. About 15 minutes thereafter, PW-18 saw those four persons going downstairs and 2-3 minutes thereafter, PW-19 came rushing down and crying that they had been robbed and that he had an injury on the toe.

6.6 On the basis of the above evidence on record and consistent, cogent and credible testimony principally of the injured eyewitness PW-19, Mohd. Shakeel, corroborated to the extent of robbery by PW-25, PW-32, PW-26 and as regards identification of at least 2 of the appellants, by PW-25, this Court is of the considered view that the three appellants identified namely Salim, Mohd. Uvesh and Alam were all collectively and with common intent guilty of the offence of armed robbery. Therefore, they are liable to be convicted for offences punishable under Sections 394 read with Section 34 IPC. The prosecution has proved beyond reasonable doubt that there was common intent to commit robbery, and voluntarily causing hurt in committing the robbery. In addition, they were all brandishing deadly weapons i.e. *kattas* and a revolver and had threatened to kill the victims if they raised an alarm, as per the eyewitnesses. This fact of being in possession of a deadly weapon and using it to terrorize the victims would bring in within the scope of Section 397 IPC. Section 397 IPC is relatable to an “offender” who “uses” a “deadly weapon” during a robbery and attempts to cause death or grievous hurt to any person. Each of the offenders who were in possession of such a deadly weapon and “used” it so in the robbery, would individually be liable to be convicted for offence punishable under Section 397, Common intent under Section 34 IPC would not therefore apply to an offence



under Section 397 IPC. These aspects are clear from the decision of the learned Hon'ble Supreme Court in ***Phool Kumar v Delhi Administration*** (1975) 1 SCC 797, where the Hon'ble Court in dealing with a robbery at a petrol pump where the appellant was brandishing a knife, held that:

4. The last submission on behalf of the appellant was that sentencing him to undergo rigorous imprisonment for seven years under Section 397 of the Penal Code was illegal and he ought to have been convicted under Section 392 simpliciter which would have enabled the Court on the facts of this case to pass a lesser sentence of imprisonment. Reliance was placed upon the majority opinion of the Full Bench of the High Court of Punjab & Haryana in the case of State v. Chand Singh [ILR (1970) 2 Punj and Har 108]. The argument was attractive at the first sight but did not stand our careful scrutiny

5. Section 392 of the Penal Code provides:

“Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.”

The sentence of imprisonment to be awarded under Section 392 cannot be less than seven years if at the time of committing robbery the offender uses any deadly weapon or causes grievous hurt to any person or attempts to cause death or grievous hurt to any person: vide Section 397. A difficulty arose in several High Courts as to the meaning of the word “uses” in Section 397. The term “offender” in that section, as rightly held by several High Courts, is confined to the offender who uses any deadly weapon. The use of a deadly weapon by one offender at the time of committing robbery cannot attract Section 397 for the imposition of the minimum punishment on another offender who had not used any deadly weapon. In that view of the matter use of the gun by one of the culprits whether he was accused Ram Kumar or somebody else, (surely one was there who had fired three



shots) could not be ~~and has not been the basis of~~ sentencing the appellant with the aid of Section 397. So far as he is concerned he is said to be armed with a knife which is also a deadly weapon. To be more precise from the evidence of PW 16 "Phool Kumar had a knife in his hand". He was therefore carrying a deadly weapon open to the view of the victims sufficient to frighten or terrorize them. Any other overt act, such as, brandishing of the knife or causing of grievous hurt with it was not necessary to bring the offender within the ambit of Section 397 of the Penal Code.

6. Section 398 uses the expression "armed with any deadly weapon" and the minimum punishment provided therein is also seven years if at the time of attempting to commit robbery the offender is armed with any deadly weapon. This has created an anomaly. It is unreasonable to think that if the offender who merely attempted to commit robbery but did not succeed in committing it attracts the minimum punishment of seven years under Section 398 if he is merely armed with any deadly weapon, while an offender so armed will not incur the liability of the minimum punishment under Section 397 if he succeeded in committing the robbery. But then, what was the purport behind the use of the different words by the Legislature in the two sections viz. "uses" in Section 397 and "is armed" in Section 398. In our judgment the anomaly is resolved if the two terms are given the identical meaning. There seems to be a reasonable explanation for the use of the two different expressions in the sections. When the offence of robbery is committed by an offender being armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in his mind, the offender must be deemed to have used that deadly weapon in the commission of the robbery. On the other hand, if an offender was armed with a deadly weapon at the time of attempting to commit a robbery, then the weapon was not put to any fruitful use because it would have been of use only when the offender succeeded in committing the robbery.

7. If the deadly weapon is actually used by the offender in the commission of the robbery such as in causing grievous hurt, death or the like then it is clearly used. In the cases of Chandra Nath v. Emperor [AIR 1932 Oudh 103] ;Nagar



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Singh v. Emperor [AIR 1933 Lah 339] and Inaer Singh v. Emperor [AIR 1934 Lah 522] some overt act such as brandishing the weapon against another person in order to overawe him or displaying the deadly weapon to frighten his victim have been held to attract the provisions of Section 397 of the Penal Code. J.C. Shah and Vyas, JJ. of the Bombay High Court have said in the case of Govind Dipaji More v. State [AIR 1956 Bom 353] that if the knife

“was used for the purpose of producing such an impression upon the mind of a person that he would be compelled to part with his property, that would amount to ‘using’ the weapon within the meaning of Section 397.”

In that case also the evidence against the appellant was that he carried a knife in his hand when he went to the shop of the victim. In our opinion this is the correct view of the law and the restricted meaning given to the word “uses” in the case of Chand Singh [ILR (1970) 2 Punj and Har 108] is not correct.

(emphasis supplied)

6.7 Therefore, each of the appellants in this case who were brandishing a deadly weapon during the robbery and within the visual sight of the victims who were terrorized into not resisting, ought to be convicted for the offence punishable under Section 397 IPC. However, the learned Trial Court, while convicting appellant Salim and Mohd. Uvesh for the offence punishable under Section 397 (maybe because weapons were recovered from them later when arrested) convicted appellant Alam for conspiracy under Section 120(B) inter alia for the offence under Section 397 IPC but not the offence itself. This Court is of the considered view that considering that that PW-19 specifically identified that Alam had wielded a revolver, and which was a deadly weapon during the act of robbery, it would attract the substantive offence punishable under Section 397 IPC as well and not merely with the aid of Section 120B IPC, for which substantive offence charge



under Section 397 IPC was also framed. The conviction of Salim and Mohd. Uvesh is sustained under Section 25/27 of the Arms Act for being found in possession of the weapons and having used the weapons at the time of commission of offence.

On the issue of separation of the robbery and the firing

6.8 As regards the second incident of the firing in the street by some of the robbers in order to make good their escape and in the process killing the deceased Sultan and injuring another Nawab Ali, both passersby, the contention of the learned counsel for the appellants that the act of robbery and the act of firing in the street should be seen as two separate transactions and events does not, in the facts and circumstances of this case, find approval of this Court. There was a ceaseless, inexorable *continuum* in the act of robbing by the appellants armed with deadly weapons and then decamping with the loot and in the process of being resisted by persons in the street, using their weapons to cause injury and death in order to make their escape successful. In such a situation, it would be difficult for this Court to accept that these two acts of robbery and firing be severed and examined with two different lenses. The definition of “*robbery*” in Section 390 IPC itself provides that the act of robbery includes within its scope the act of carrying away or attempting to carry away the stolen property and causing or attempting to cause in that process death/hurt/wrongful restraint or fear thereof. For ease of reference Section 390 IPC is extracted hereunder:

“390. Robbery. - In all robbery there is either theft or extortion.

When theft is robbery. — Theft is “robbery” if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the



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theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

When extortion is robbery.—Extortion is “robbery” if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

Explanation.—The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.”

(emphasis supplied)

6.9 In this case, therefore, the act of stealing property from the victims premises and then decamping with the loot is a single continuous process and if death/hurt/wrongful restraint is causes or fear created thereof, then it would certainly come within the rubric of “robbery” and in its wake, offences punishable under inter alia Sections 392, 393, 394, 397, 398, 401 IPC depending on the fact and circumstances. In a decision by the Single Bench of this Hon’ble Court (delivered by one of us) viz. ***Tasleem v. State NCTof Delhi***, 2018 SCC Online Del 7541, while deciding an appeal for offence punishable under Section 392/397/34 IPC, it was held as under:

“15. Section 390 IPC which defines robbery thus provides that in order to commit theft or while carrying away or attempting to carry away property obtained by theft, if the offender voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint or fear of instant death or of instant hurt or instant wrongful restraint, the same would be robbery and not theft. In the facts of the present case while the appellant and co-accused while fleeing away with the stolen goods i.e. rickshaw and rehri



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were being chased, the weapon of offence which is a deadly weapon was shown and an instant fear of hurt was caused to the complainant and other person. Thus the offence falls within the ambit of Robbery as defined under Section 390 IPC punishable under Section 392 IPC.

Further, this Court relied upon a judgment of the Division Bench of Bombay High Court in ***State of Maharashtra v. Vinayak Tukaram Utekar*** 1997 Cri LJ 3988 where it was held that:

‘25. In our judgment inasmuch as during his act of taking away the property obtained by the theft Respondent Vinayak caused hurt to the informant, his act would fall within the ambit of section 390, Penal Code, 1860.’

26. Our view is fortified by the decision of the Apex Court reported in 1980 Supp SCC 344 : AIR 1980 SC 788, Kusho Mahton v. The State of Bihar cited by S.R. Borulkar learned counsel for the appellant in both the appeals. We intend reproducing the relevant portion from the same. It reads thus:

‘After hearing counsel for the parties, we are of the opinion that the appellants have been rightly convicted under section 395, Penal Code, 1860, because while carrying away the stolen property they exploded cracker to frighten the inmates of the house who wanted to pursue them’.

27. We are in respectful agreement with the said judgment of the Apex Court.’

(emphasis supplied)

On the issue of Section 302/34 IPC

6.10 As regards the issue of whether the act of shooting the deceased would additionally come within the rubric of Section 300 IPC and amount to murder or otherwise be an act of culpable homicide not amounting to murder, this Court is of the view that not only did the assailants use a deadly weapon which was used voluntarily to fire



against the persons trying to resist the escape, but also was fired from close range and not in air or the leg (which could have potentially scared the apprehender) but in the head and chest causing death. A bare perusal of the *post mortem* report would make it quite evident that both the firearm injuries on the deceased were grave and had caused severe internal damage leading to death. The question of it being justified under any of the exceptions in Section 300 would also not arise. Exception 4 cannot come to the rescue of the appellants since there was no sudden fight or a sudden quarrel in a heat of passion, but instead a deliberate attempt to escape and then voluntary use of weapon for the purposes of making the escape with the proceeds of crime. The conviction by the learned Trial Court of the appellants, therefore, for the offence punishable under Section 302 IPC was appropriate and correct. In a decision of this Court in ***Ramesh v State 2013 SCC OnLine Del 1885*** in a case of similar facts, it was observed and held as under:

10. We find that the facts in the case of Mohd. Aslam @ Aslam v. State (supra) and the facts of the present case bear a degree of similarity. In the said case, the Appellant and his alleged accomplices had entered the premises of the family of the deceased with the intention to commit robbery and were armed with deadly weapons. Their entry was noted resulting in hue and cry being raised. The robbery got aborted. The accomplices of the Appellant managed to flee. The Appellant was apprehended at the spot by the crowd but before he could be finally pinned down, he fired at the deceased and his younger brother from a close range. The former died and the latter was injured. The Court held that though the Appellant may have had no intention to kill but it could safely be said that he voluntarily caused the death. Dwelling upon and highlighting the definition of the word 'Voluntary' as per Section 39 of the Penal Code, 1860 and the illustration thereunder, the Court held that the fact that the accused was armed with dangerous weapon and



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the deceased was unarmed was sufficient to indict the accused with the offence of murder. For the sake of ready reference, Section 39 of the Penal Code, 1860 with the illustration are reproduced hereunder:—

“39. “Voluntarily” - A person is said to cause an effect “voluntarily” when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.

Illustration

A sets fire, by night, to an inhabited house in a large town, for the purpose of facilitating a robbery and thus causes the death of a person. Here, A may not have intended to cause death; and may even be sorry that death has been caused by his act; yet, if he knew that he was likely to cause death, he has caused death voluntarily.”

12. In the instant case, the ocular evidence of the two eye witnesses PW 3 and PW 6, in our considered opinion, sufficiently shows that there was no sudden fight. The Appellant was armed with a katta for the purpose of robbery. There was a scuffle for the bag from the hand of the deceased and when deceased objected, the Appellant fired with the country made pistol which hit the deceased on the back side of the deceased. Thereafter, the deceased fell down and Appellant ran towards Ghazipur village after snatching his bag. When PW 3 Rajpal alongwith other persons tried to apprehend the Appellant, the Appellant made fire on him, which hit on his left hand in the wrist. The PCR officials reached the spot and the Appellant was overpowered by the public persons and the PCR officials. As reiterated by the Hon'ble Supreme Court from time to time, what has to be seen is the circumstances taken as a whole for the purpose of judging whether there was a sudden fight between the deceased and the accused. True, only a single gun shot was inflicted but there is no denying the fact that the wound was inflicted in the course of armed robbery. The autopsy report Ex. PW 1/A showed a firearm entry wound .5 × .5 cm was present on the lower middle back over the second lumbar vertebra. The edges of the wound was showing blackening. The injury had gone to the underlying vertebra and entered the abdominal cavity. The cause of death was opined as ante-mortem injuries produced by a



firearm projector and sufficient to cause death in the ordinary course of nature. The blackening of the wound clearly goes to show that the shot was fired from a short distance. The accused was armed with a dangerous weapon which he fired from close range resulting in the death of the deceased. Thus, it could safely be said that he voluntarily caused the death of the deceased, in as much as if his intention was only to run away with the booty, he could have fired the shot in the air to facilitate escape and if at all needed, to fire on a non-vital part of the body such as leg of the victim, but instead of doing so he fired from a close range on the lower middle back over the second lumbar vertebra, which proved fatal. As such, in our opinion, considering the evidence on record the appropriate conviction would be under Section 302 of the IPC. We are, therefore, not inclined to alter the order on conviction of the learned trial judge into one under Section 304, Part II IPC or Section 304 Part I.

(emphasis supplied)

6.11 As regards the contention of the appellants that there was no common intention on part of all appellants, since at best only one or two of them had fired, and that too it was not clear as to which of the appellants had fired, this Court notes the reliance of the counsel for the appellant in this regard on a decision by Division Bench of this Court in **Fayaz Ahmed v. State (NCT of Delhi)** (2018) SCC OnLine Del 9969. Even in a situation where the offenders are armed while committing robbery but only one uses it to prevent resistance to their escape and caused death, this Court held:

“55. It is a settled law that intention and knowledge to do a certain act has to be gathered from the facts and circumstances brought on record. The instant case is a case of direct eye witness evidence, and not of circumstantial evidence. The eye witnesses (PW9 & PW12) have specifically deposed against the appellants that on the day of the incident, they all were armed with deadly weapons i.e. one was armed with a sword and other accused persons



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were armed with knives. Both these witnesses have deposed that when deceased Nagender tried to resist the robbery being committed by the appellants, he was stabbed with a knife in his abdomen and as per the postmortem report, the injury sustained in the abdomen of the deceased was the cause of his death. It is also a settled proposition of law that while ascertaining intention and knowledge to commit an offence, the Court is required to see the type of weapon used, nature of injury caused, blows given to the injured and the severity of such blows, to reach to a conclusion whether it is a case of murder, or culpable homicide not amounting to murder. In the instant case, as per the deposition of PW9 and PW12, all the appellants came armed with deadly weapons at the time of committing the offence. As per post mortem report Ex. PW17/A of the deceased, the deceased had sustained three incised wounds on his body and the severity of the blow caused to his abdomen was such that it resulted into not only the cutting of the abdomen area, but perforation of inferior vena cava. The measurement of the said wound was 27 cm in length. PW17-who conducted the postmortem specifically stated that the patient may or may not have survived, as in the present case, major blood vessel had been injured and the wound was quite big which was sufficient to drain out the whole blood of the body within a few minutes. So, in these circumstances, we are of the view that the appellants had the intention and knowledge in committing murder of the deceased, and they cannot seek resort to Section 304 IPC. The prosecution has been able to establish its case against the appellants that they committed the robbery, and when they were resisted by the deceased, they have committed the murder of the deceased. Thus, the present case falls within the meaning of 'murder' as defined in Section 300 IPC, and punishable under Section 302 IPC.

56. In view of the above discussion, we do not find any merit in the present appeals. The prosecution has successfully established its case against the appellants that they have committed the robbery in the factory premises of PW3 on the day of the incident. The prosecution has also established beyond reasonable doubt that the appellants in furtherance of their common intention, committed the murder of the deceased. It has also been established beyond reasonable



doubt that at the time of commission of robbery, the appellants were armed with deadly weapons and they used the same while committing the robbery, so as to cover the case within the four corners of Sections 302/392/34 IPC, 397 IPC and under Sections 25/27 of the Arms Act. The appellants have failed to make out any case in support of their appeals.”

(emphasis supplied)

6.12 Assessing the evidence available on record in relation to the incident of firing and resultant death of Mohd. Sultan, it is evident from the depositions of the eyewitnesses to the robbery PW-19, PW-25 and the neighbour PW-18 that immediately after the incident of robbery PW-19 and PW-25 had rushed down in pursuit of the robbers. PW-19 specifically states that he met PW-18 on the staircase when he rushed out of his room and told him regarding the robbery and beatings and then PW-18 accompanied him to go after the robbers. PW-25, despite confirming that he was the one who unbolted the door by coming out through the window, and that he and PW-19 came down the stairs to reach the street, did not confirm the presence of PW-18 on the staircase when he and PW-19 were rushing down the stairs. However, in the considered opinion of this Court this would be a minor discrepancy in the otherwise consistent testimonies that PW-25 along with others did go down the stairs to the street after the robbers. A perusal of the scaled site plan Ex. PW-13/A would show that the distance between the building where the robbery had taken place and the spot where the deceased Sultan and the injured Nawab Ali were found, is about 66 meters. This is the same spot where later two empty cartridges and one live cartridge were found by the police team. It is also evident from the site plan that at another point which was further down along the lane running perpendicular to the spot



where the firing had taken place, another empty cartridge was found at a distance of about 50-100 meters. This would show that the assailants ran down from the building along the lane and continued to fire while they were running away.

6.13 The contention of the appellants that it was not clear as to who had fired the bullet which led to the fatality of Sultan and the injury of Nawab Ali needs to be examined in some detail. PW-19 in his testimony states that when he came downstairs, he noticed a person of the same locality having caught hold of the fourth companion of the robbers, besides the three identified appellants. He specifically points out towards appellant Alam as the one who opened fire from his revolver at the person who captured their fourth companion and the fourth companion also opened fire at the person who nabbed him. Pursuant thereto, the said person from the public, later identified as Sultan fell down at the spot. PW-19 further stated that both Alam and the fourth companion continued to fire and yet another passer-by later identified as injured Nawab Ali also fell. PW-25 only states that when they went down, they found one person lying on the ground with a bullet injury and then returned back to his room. PW-25 to this extent was resiling from his statement made earlier and therefore was examined further by the learned APP. In his further examination, he stated that it was these four offenders which were fleeing and the fourth companion who was apprehended by the person passing-by was the one who had opened fire. Later in his continued examination by the learned APP, he again confirmed the use of a pistol by the person who opened fire though he stated that since the occurrence took place in such a short time, he was unable to identify the offenders. PW-26 stated that he chased the boys upto Dhalan Chowk alongwith PW-19



and one of the offenders was captured by a person from the public who was armed with a pistol and opened fire and resultantly the person suffered the shot and fell down, whereupon the robber who was being captured ran away through a narrow street by the side of the office of MTNL. However, he could not identify the person who opened the fire. PW-27 Nawab Ali, the injured eyewitness became hostile and refused to identify his assailants in the street. His testimony therefore is of no value to this Court except that he was injured in an incident on that day in the afternoon at that place. On the conspectus of the testimonies assessed as above, it is quite clear that while PW-25 and PW-26 do not give any specifics or identify the person who used the weapon and fired at Sultan or Nawab Ali, PW-19 clearly deposed that it was appellant Alam who had fired as well as the fourth companion who was not in the Court to be identified.

6.14 The counsel for the appellants heavily relied upon testimony of PW-16 who recorded the PCR call PW-16/A, which noted that Sultan's brother Rizwan said that the person who fired was Asif and Fahad who lived at Mata Sundari and they have had an old enmity. Rizwan deposed as PW-21 and stated that when at about 11:15 a.m. on that day, he reached Dhalan Chowk he heard the noise of firing and saw public persons running here and there. Then he saw his brother Sultan having sustained injuries in the firing and took his brother to LNJP Hospital in a cycle rickshaw. As regards the identification of those who had fired, on further examination, he stated that when he reached the spot his brother was already lying injured. In fact, in one of his cross-examinations he states that he was getting his clothes ironed when he heard the shots being fired and the place of occurrence was about 100 steps from where he was and not visible from the said



shop. His testimony that he suspected Asif and Fahad as persons responsible for the attack on his brother Sultan therefore cannot be accepted as trustworthy, credible or even remotely accurate.

6.15 It is therefore evident that since all four robbers had tried to decamp with the robbed goods as had been seen on the CCTV footage, at least two of them had fired at the passers-by who had tried to apprehend them and ran from the spot while continuing to fire. This is evident from the recovery of two empty (fired) cartridges and one live cartridge from near Dhalan Chowk where the incident had occurred and a further recovery of another empty (fired) cartridge from near the boundary wall of MTNL building. This recovery was evident from the testimony of PW-42, SI Pradeep, PW-9 SI Pankaj Kumar, PW-10 Constable Lokpal Singh and PW-30 Constable Shubh Ram.

6.16 It is therefore evident that the three appellants along with their fourth companion had attempted to make good their escape with the stolen goods from the place of robbery and each of them were armed with a weapon, and while at least two of them had fired to cause the death of Sultan and injury to Nawab Ali, the other two were part of the common intention to escape with the goods.

6.17 The ballistics evidence in this regard, post recovery of the weapons from appellant Salim and Mohd. Uvesh on 18th October, 2012 further reconciles with the recovery of the bullets and the weapons. The ballistics expert PW-43 Puneet Puri gave his report Ex. PW-43/A which established that the two pistols, one of 9 mm bore and the other of 7.65 mm bore recovered from appellant Salim and Mohd. Uvesh matched the fired empty cartridges recovered by the police



team from the place of incident. Details of the relevant part of the opinion have already been extracted above in para 25.

6.18 This Court finds that the reliance by the learned APP on the decision of learned Hon'ble Supreme Court in ***State of A.P. v. M. Sohan Babu***, (2010) 15 SCC 69 discussing Section 34 IPC in the context of armed robbery and murder is appropriate and supports the case of the prosecution. The learned Hon'ble Supreme Court held as under:

9. We find that in the facts of the case, the observations given above are not correct. It cannot be ignored that the two accused had entered the premises at midnight duly armed with the intention of committing robbery. They were also charged under Section 460 IPC on that account. It is also in evidence that the deceased had managed to pin A-2 down to the ground and A-2 had caused one injury in the stomach of the deceased while he lay on top of him. Two injuries were thereafter caused on the thigh of the deceased by A-2 and the other accused. It is also in evidence that when the neighbours arrived on the scene they too were caused injuries and threatened with dire consequences. To say, therefore, that there was no intention on the part of the accused to cause death would be carrying the matter a little too far.

10. The High Court has been influenced by the fact that there was no common intention on the part of the accused to commit murder. We see, however, that the common intention can be inferred from the circumstances of the case and that the intention can be gathered from the circumstances as they arise even during an incident. The initial purpose was to commit robbery, but as the accused were armed with knives which they had used repeatedly and effectively, they were willing to kill as well and that they could not cause more damage as they were overwhelmed and pinned down.

11. We, therefore, feel that the High Court's observation that the matter fell under Section 304 Part I and not under Section 302 IPC is erroneous. We, accordingly, set aside



this part of the High Court judgment and restore that of the trial court. The appeal is allowed..

(emphasis supplied)

Conclusion

7. In light of the above discussion and analysis, this Court finds that the prosecution has been able to prove the guilt of the appellant beyond reasonable doubt and the conviction of the three appellants is therefore sustained. In addition, appellant Alam is also convicted for offence punishable under Section 397 IPC. Sentences awarded by the learned Trial Court are sustained and Alam's sentence for offence punishable under Section 397 IPC would be the same as that for offence punishable under Section 394 IPC. This Court finds no other error in the impugned judgment of conviction and order on sentence by the learned Trial Court. Appeals are accordingly dismissed.
8. Copy of this judgment be uploaded on website and be also sent to Superintendent, Tihar Jail for intimation to the appellant and updation of records.

(ANISH DAYAL)
JUDGE

(MUKTA GUPTA)
JUDGE

OCTOBER 12, 2022/rk