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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: August 18th, 2023

Pronounced on: October 12th, 2023

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CRL. A. 9/2022
ARIZ KHAN

.....Appellant

Through: Mr. M. S. Khan, Mr. Prashant Prakash, Ms.
Qausar Khan, Mr. Rahul Sahani, Advocates.

versus

STATE OF DELHI

.....Respondent

Through Mr. Rajesh Mahajan, Special Counsel for
the State alongwith Ms. Asha Tiwari, Ms.
Jyoti Babbar, Mr. Ranjeeb Kamal Bora and
Mr. Kuldeep Chauhan, Advocates.
Inspector Daleep Kumar, P.S: Crime Branch

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DEATH SENTENCE REF. 1/2022
STATE

..... Petitioner

Through Mr. Rajesh Mahajan, Special Counsel for
the State alongwith Ms. Asha Tiwari, Ms.
Jyoti Babbar, Mr. Ranjeeb Kamal Bora and
Mr. Kuldeep Chauhan, Advocates.
Inspector Daleep Kumar, P.S: Crime Branch

versus

ARIZ KHAN ALIAS JUNAID ALIAS ANNA ALIS SALIM

..... Respondent

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Through: Mr. M. S. Khan, Mr. Prashant Prakash, Ms. Qausar Khan, Mr. Rahul Sahani, Advocates.

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MR. JUSTICE AMIT SHARMA

JUDGMENT

AMIT SHARMA J.

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Introduction

1. The present judgment disposes of the aforesaid appeal and death sentence reference. Details of the appeal and the death sentence reference are as under:

1.1. Criminal Appeal No. 9/2022 titled ‘Ariz Khan v. State of Delhi’ - This appeal under Section 374 of the Code of Criminal Procedure, 1973 (hereinafter referred to as ‘CrPC’) assails the judgment of conviction dated 08.03.2021 and order on sentence dated 15.03.2021, passed by Sh. Sandeep Yadav, ASJ-02, South-East, Saket in Sessions Case No. 212/18, arising out of FIR No. 208/08, P.S. Jamia Nagar, titled’ State v. Ariz Khan @ Junaid @ Anna @ Salim’; whereby Ariz Khan



has been convicted for offences under Sections 186/333/353/302/307/34 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC'), Section 27 of the Arms Act, 1959 and Section 174A of the IPC and has been sentenced as under:

- i. Sentenced to death (hanged by the neck till he is dead) alongwith a fine of Rs. 10,00,000/- and in default, simple imprisonment for 06 months for offence under Section 302 of the IPC.
- ii. Further rigorous imprisonment for 03 months for offence under Section 186 of the IPC;
- iii. Further rigorous imprisonment for 10 years alongwith a fine of Rs. 20,000/- and in default, simple imprisonment for 06 months for offence under Section 333 of the IPC;
- iv. Further rigorous imprisonment for 02 years for offence under Section 353 of the IPC;
- v. Imprisonment for life alongwith a fine of Rs. 20,000/- and in default, simple imprisonment for 06 months for offence under Section 307 of the IPC;
- vi. Simple imprisonment for 07 years alongwith a fine of Rs. 10,000 and in default, simple imprisonment for 03 months for offence under Section 174A of the IPC;
- vii. Simple imprisonment for 03 years alongwith a fine of Rs. 50,000/- and in default, simple imprisonment for 01 month for offence under Section 27 of the Arms Act.
- viii. The sentences awarded under Sections 186/333/353/307/174A of the IPC and Section 27 of the Arms Act were ordered to run consecutively.



1.2. Death Sentence Reference 1/2022 titled ‘State v. Ariz Khan alias Junaid alias Anna alias Salim’ - The present death sentence reference has been sent to this Court through the learned District and Sessions Judge, South-East, Saket, New Delhi seeking confirmation of the order on sentence dated 15.03.2021 passed by Sh. Sandeep Yadav, ASJ-02, South-East, Saket in Sessions Case No. 212/18, arising out of FIR no. 208/08, P.S. Jamia Nagar, titled ‘State v. Ariz Khan @ Junaid @ Anna @ Salim’ whereby the respondent therein has been sentenced to death and directed to be ‘hanged by his neck till he is dead’ for offence committed under Section 302 of the IPC.

Background

2. After conclusion of investigation in FIR No. 208/2008, registered at PS Jamia Nagar, chargesheet was filed *qua* one Shahzad Ahmed @ Pappu. Ariz Khan (hereinafter referred to as ‘the appellant’) was arrayed in the said chargesheet as a Proclaimed Offender. The trial with respect to Shahzad Ahmed @ Pappu concluded *vide* judgment on conviction dated 25.07.2013 and order on sentence dated 30.07.2013 passed by Sh. Rajender Kumar Sharstri, ASJ-02, South-East, Saket in Sessions Case No. 42/10. The appellant, Ariz Khan was subsequently arrested and a supplementary chargesheet *qua* him was filed and the trial with respect to him concluded *vide* judgment of conviction dated 08.03.2021 and order on sentence dated 15.03.2021, which have been assailed by him in CRL.A. 9/2022. It is pertinent to observe that two appeals bearing numbers CRL.A. 1196/2013, titled ‘Shahzad Ahmed v. State’ and CRL.A. 1459/2013, titled ‘State v. Shahzad Ahmed’ arising out of the same FIR No. 208/2008, registered at PS Jamia Nagar, as in the present appeal and death sentence reference, were also filed on behalf of



co-accused Shahzad Ahmed and the State respectively. However, Shahzad Ahmed @ Pappu passed away during the pendency of these appeals and therefore, the proceedings in CRL.A. 1196/2013 and CRL.A. 1459/2013 abated in terms of Section 394 of the CrPC and were accordingly disposed of *vide* order of this Court dated 10.03.2023.

3. Briefly stated, the facts leading up to the filing of the present appeal and death sentence reference are as under:

- i. It is the case of the prosecution that there was a series of bomb blasts which took place in Delhi on 13.09.2008 at different places, i.e., Connaught Place, Karol Bagh, Greater Kailash and India Gate, resulting in the death of 39 persons and injuries to 159 others. Different FIRs were registered with respect to each of these blasts at different police stations. It is alleged that an outfit – ‘Indian Mujaheddin’ took responsibility for these blasts by sending e-mails to various electronic and print media. It is further stated that the Special Cell of the Delhi Police was assigned the task of investigating these cases.
- ii. On 19.09.2008, at 08:05 PM, a DD Entry No. 3 (Ex. PW-8/A) was lodged by Sub-Inspector (‘SI’) Rahul Kumar (PW-13) regarding receipt of telephonic information to Inspector Mohan Chand Sharma that one Mohd. Atif Ameen, who was allegedly involved in the Delhi serial blasts was residing at Flat No. 108, L-18, Batla House, Delhi alongwith his associates. The said DD Entry reads as under:

“DD No. 3 Dated 19.09.2008, Special Cell/NDR, Lodhi Colony, ND
SI Rahul Kumar Information

iii. Thereafter, on 19.09.2008, at 09:30 AM, a DD Entry No. 4 (Ex. PW-8/B) was lodged by SI Rahul Kumar (PW-13) regarding departure of nine members of the Special Cell of the Delhi Police with arms and ammunition in one private car and two two-wheelers. The said team comprised of SI Rahul Kumar, SI Ravinder Kumar Tyagi, SI Rajesh Malik, Constable ('Ct.') Balwant, Head Constable ('HC') Satender Kumar, HC Vinod Gautam, HC Manish Kumar, Ct. Sandeep and Ct. Virender Negi. The said DD Entry reads as follows:

At 9.30 AM it is lodged that as per the directions of senior officers to take action at information vide DD NO. 3 dated 19.09.2008, I along with SI Ravinder Kr Tyagi, SI Rakesh Malik, HC Balwant Singh, HC Satender Kumar No. 397/SB, HC Vinod Gautam, HC Manish Kumar, Ct. Sandeep, Ct. Birender Negi depart from the office of Special Cell/NDR with arms/ammunition in 1 private car and 2 two-wheelers. Other team members have been directed accordingly.”

“DD No. 6 Dated 19.09.2008, Special Cell/NDR, Lodhi Colony, ND
Insp. Mohan Chand Sharma Departure



At 10.15 AM it is lodged that as per the directions of senior officers to take action at information vide DD No. 3 dated 19.09.2008, I along with SI Dharmender Kumar, SI Dalip Kumar, SI Devender Singh, ASI Anil Tyagi, HC Rajbir Singh, HC Satender Kumar No. 391/SB, HC Udaibir Singh, and Ct. Rajeev depart from the office of Special Cell/NDR with arms/ammunition in 2 private cars. A team consisting of SI Rahul Kumar and others has already left vide DD No. 4 and remaining team members have been directed to reach the spot immediately.”

The aforesaid DD Entry, although a part of relied upon documents annexed with the chargesheet, was not exhibited in the present case.

- v. On 19.09.2008, at 11:13 AM, vide DD Entry No. 10A (Ex. PW-50/B) information about firing at Batla House, Khalilullah Masjid was received at P.S. Jamia Nagar.
- vi. On 19.09.2008, at 11:27 AM, vide DD Entry No. 14A (Ex. PW-50/C), it is recorded that Inspector J.S. Joon, Ct. Ramphal, Ct. Satender, HC Subhash, depart from P.S. Jamia Nagar acting upon the information received *vide* DD Entry No. 10A (Ex. PW-50/B).
- vii. On 19.09.2008, at 12:50 PM, *vide* DD Entry No. 23B (Ex. PW-50/E), information was received at PS Jamia Nagar that Inspector Mohan Chand Sharma had been admitted to a hospital on account of a bullet injury.
- viii. Subsequently, it is the case of prosecution that SI Rahul Kumar (PW-13) lodged a complaint (Ex. PW-8/C) with regard to the incident which is reproduced as under:

“Today (19.09.2008) at around 8.00 am, a specific information was received to Inspector Mohan Chand Sharma that Bashir @ Atif alongwith associates is residing in the top floor Flat No. 108 of L-18, Batla House, Delhi. This information was lodged in Daily Diary and discussed with senior officers. After discussion with senior officers,



as per their directions, a team led by Inspector Mohan Chand Sharma consisting of Inspector Sanjay Dutt, SI Dharmender, Kumar, SI Ravinder Kumar Tyagi, SI Dalip Kumar, SI Rakesh Malik, SI Devender Singh, ASI Anil Tyagi, HC Balwant Singh, HC Rajbir Singh, HC Satyender Kumar (No. 391/SB), HC Satyender Kumar (No. 397/SB), HC Vinod Gautam, HC Hansraj, HC Udaivir Singh, HC Manish Kumar, Ct. Gurmeet, Ct. Sandeep, Ct. Birender Negi and Ct. Rajeev including me, was formed to act upon the information. At about 9.30 am, the team left the office of Special Cell NDR with arms and ammunition in our private cars and two two-wheelers to apprehend him and his associates. At about 10.30 am, the team of special cell reached Batla House and requested 7-8 passerby persons to join raiding party after apprising them about contents of information, but none joined by giving genuine excuses. Without wasting further time. Inspector Mohan Chand Sharma briefed the entire team and the team reached at L-18, Batla House, Delhi and surrounded the building. At about 11.00 am, Inspector Mohan Chand Sharma alongwith SI Dharmender Kumar, SI Ravinder Kumar Tyagi, HC Balwant Singh, HC Udaivir Singh, HC Satyender (No. 397/SB) and myself entered into the building to conduct raid at flat No. 108, L-18, Batla House, Delhi, whereas other team members were deployed at ground floor to cover the building. Inspector Mohan Chand Sharma knocked at the main door of the flat by disclosing his identity, but when the occupants of the flat did not respond, then the team tried to enter into the flat. The main door was found bolted from inside, but the side door was found not to be bolted and it was pushed. Immediately, the team members went inside the flat in order to apprehend the suspects. No sooner did the team entered inside the flat, the occupants of the flat opened fire upon police party. The team members also fired in self defence to apprehend the terrorists. In between, Sh. Sanjeev Kumar Yadav, ACP NDR alongwith Inspector Ramesh Chandra Lamba, SI Bhoop Singh, SI Harender Kumar, ASI Satish Kumar, ASI Shahjahan and other staff also reached at the spot. During the cross firing, Inspector Mohan Chand Sharma and HC Balwant Singh sustained bullet injuries. Two militants also sustained bullet injuries in cross firing, while two other militants managed to escape from the flat while firing on the police party. The injured police officers and the militants were immediately removed to hospital. One of the militants namely Mohd. Saif son of Sh. Shadab

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Ahmad, resident of Village & PO Sanjarpur, PS Sarai Meer, Tehsil Nijamabad, District Ajamgarh (UP) surrendered before the police party. The names of the escaped militants were revealed by Mohd. Saifas Junaid and Pappu. During the cursory search of the flat, one A.K. Series rifle along with two magazines containing 30 live rounds each was recovered from the far end right side room of the militants besides two pistols of .30 bore lying near the two injured militants. The militants have obstructed the police party in discharging their official duties and fired with intent to kill the police officials.”

- ix. On the aforesaid complaint, Inspector J.S. Joon (PW-81) directed the registration of FIR *vide a rukka* dated 19.09.2008 at 4:00 PM (Ex.PW66/A) which is reproduced as under:

“To The Duty Officer P.S Jamia Nagar,
On receipt of the information through DD No. 10A I alongwith HC Subhash No 328/5D, Ct. Ram Phal No 2239/5D, Ct. Satender No 3389/5D reached flat No. 108, L-18 Batla House Delhi where the team of Spl Cell was present. SI Rahul of special cell told me that he alongwith staff led by Insp. Mohan Chand Sharma had come to this flat acting upon a specific information about presence of militants. Inp. Mohan Chand Sharma and HC Balwant Singh sustained bullet injuries in the shoot out. Two militants have also been injured who have been sent to hospital. During spot inspection of the flat, blood is lying on the floor in the drawing room, near front door and .30 bore pistol is lying at the spot. In the other room on the left side far end attached to toilets blood is lying on the floor and another .30 bore pistol is lying on the floor. One A.K series rifle alongwith two loaded magazine containing 30 live cartridges each is also lying covered with folded mattress in the right side room. Spent cartridges of .9 mm bore, .30 bore and A.K Series rifle are lying in the flat. Senior officers have reached at the spot. Large gathering is present near the spot. Hence extra force may be sent at the spot immediately. In the meantime, SI Rahul Kumar...me a complaint. From the contents of the complaint, spot inspection and recoveries thereof a case u/s 186/353/332/307/34 IPC and 25, 27 Arms Act is made out. Hence the rukka is being sent through Ct. Ram Phal No 2239/5D. Case be registered and



investigation be handed over to me. Crime team and photographer be sent at the spot. I alongwith staff present at the spot.

Date and time of occurrence: 19.09.08 at about 11 AM

Place of occurrence: Flat No 108, L-18, Batla House ND

Date and time of sending Rukka: 19.09.08 at 4:00 PM”

- x. It is the case of the prosecution that Inspector J.S. Joon (PW-81) conducted an investigation at the spot, including inspection of the site, preparation of a siteplan (Ex. PW-66/B), photography of the crime scene, inspection of the scene by the crime team and by the draftsman, seizure of blood samples, seizure of empty cartridges, seizure of weapons, seizure of bullet proof jacket worn by HC Rajbir Singh, seizure of blood stained mattresses from the drawing room and swab of the holes made by the impact of bullets.
- xi. On the same day, Inspector Mohan Chand Sharma succumbed to his injuries suffered in the shootout and therefore, Section 302 IPC was added in the subject FIR. Two injured persons who were occupants of the flat, were later on identified as Mohd. Atif Ameen @ Basir and Mohd. Sajid. The said persons were declared as brought dead at AIIMS hospital.
- xii. Inspector J. S. Joon (PW-81) continued with the investigation of the present case till 01.10.2008, when the investigation was transferred to crime branch and thereafter, Inspector Satish Sharma (PW-86) continued with the investigation.
- xiii. Investigation *qua* two persons, i.e., Shahzad Ahmed @ Pappu and the appellant, who, as per the statement made by SI Rahul Kumar (PW-13), had escaped continued and the Investigating Officer – Inspector Satish Sharma (PW-86) got non-bailable warrants issued against them.



- xiv. On 22.09.2009, process under Section 282 of the CrPC. was initiated against Shahzad Ahmed @ Pappu and the appellant. On 03.07.2009, Shahzad Ahmed @ Pappu as well as the appellant were declared proclaimed offenders by the concerned Court. On 01.02.2010, Shahzad Ahmed @ Pappu was arrested by the Anti Terrorist Squad, Lucknow, Uttar Pradesh.
- xv. Upon completion of investigation, Crime Branch filed a report under Section 173 of the CrPC *qua* Mohd. Atif Ameen @ Basir, Mohd. Shazid (both deceased), the appellant, Ariz Khan (proclaimed offender) and Shahzad Ahmed @ Pappu for offences punishable under Sections 186, 353, 333, 307, 302, 34, 201 and 174A of the IPC and Sections 25 and 27 of the Arms Act. Accused Mohd. Saif @ Rahul @ Sameer was kept in column no. 12 as no offence was found to have been committed by him in the present FIR.
- xvi. The trial *qua* Shahzad Ahmed @ Pappu concluded with the judgment of conviction and order on sentence dated 25.07.2013 and 30.07.2013 respectively passed by Sh. Rajender Kumar Shastri, ASJ-02, Saket, in Sessions case bearing No. SC 42/10 titled 'State v. Shahzad Ahmed @ Pappu'.
- xvii. On 23.02.2018, an information was received from Special Cell that the appellant had been arrested in case FIR No. 50/14, dated 21.10.2014, under Section 18 of the Unlawful Activities (Prevention Act) read with Section 120B of the IPC, registered at P.S. Special Cell and that he will be produced before the Court of the learned Additional Sessions Judge, Patiala House for judicial remand. Further investigation of this case was assigned to Inspector R. Srinivasan (PW-88).



- xviii. On 23.02.2018, the appellant was produced by the Special Cell before the learned Additional Sessions Judge in the aforesaid FIR No. 50/14 in muffled face. The Investigating Officer – R. Srinivasan (PW-88) moved an application seeking direction of the Court to produce him before the concerned Court of the learned Chief Metropolitan Magistrate (South-East), Saket. Pursuant to the said application, the learned Additional Sessions Judge, passed an order dated 23.02.2018 (Ex. PW-88/B) directing the Special Cell to produce the appellant before the Court of learned Chief Metropolitan Magistrate (South-East), Saket in muffled face. Consequently, the appellant was produced before the concerned Court and permission for his interrogation was obtained.
- xix. It is the case of the prosecution that during interrogation, the appellant corroborated the sequence of events that happened on 19.09.2008 as also stated hereinabove. On 23.02.2018, after completion of all necessary formalities, the appellant was arrested in the present FIR.
- xx. An application was filed seeking application seeking his TIP was moved by the Investigating Officer. However, the appellant refused to participate and hence, no TIP could be conducted. Subsequently, the appellant was remanded to police custody for 10 days. As per the case of the prosecution, a detailed disclosure statement of appellant was recorded, wherein, *inter alia*, he disclosed as to how he got radicalized and agreed to participate in terrorist activities leading to his association with Indian Mujaheddin.
- xxi. During police remand, on 28.02.2018, the appellant lead the investigation team to Nehar Bridge of Upper Ganga Canal, Barotta Village situated at the



Aligarh-Ramgat road and pointed out the place where he had thrown the weapon of offence in the canal. However, despite best efforts, no such weapon was recovered. On 04.03.2018, the appellant pointed out the place of occurrence of the incident from outside Flat No. 108, L-18, Batla House, Jamia Nagar, Delhi.

- xxii. It is the case of the prosecution that further investigation revealed that Ariz Khan was also using the mobile number +91-9811004309 belonging to Mohd. Atif Ameen @ Basir till 19.09.2008, while they were staying at the flat. Ariz Khan's voice sample was obtained in case FIR No. 130/08, registered at PS Greater Kailash. Copies of the relevant documents and transcripts of the intercepted calls pertaining to the said mobile number, Call Detail Record ('CDR') and cell-ID chart were obtained from ACP Govind Sharma (PW-71) through a notice under Section 91 of the CrPC. As per the case of the prosecution, an analysis of the said documents pointed towards the involvement of the appellant in the incident that took place on 19.09.2008.
- xxiii. Upon completion of investigation, a supplementary chargesheet was filed *qua* the appellant under Sections 186, 353, 333, 307, 302, 34, 201 and 174A of the IPC and Sections 25 and 27 of the Arms Act.
- xxiv. The prosecution examined 100 witnesses. After his statement under Section 313 of the CrPC was recorded, the appellant examined 01 defence witness.
- xxv. The learned trial Court, after examining the record of the case, pronounced the impugned judgment of conviction and order on sentence.



CONVICTION

4. The present appeal has been preferred by the appellant against the judgment of conviction and order on sentence dated 08.03.2021 and 15.03.2021 respectively.

Submissions on behalf of the Appellant/Ariz Khan

5. Learned counsel appearing on behalf of the appellant submitted that the impugned judgment suffers from factual and legal infirmities. It was vehemently argued that the participation of the appellant in the shootout and his escape from the place of incident has not been proved by the prosecution beyond reasonable doubt. Learned counsel for the appellant submitted that the prosecution has sought to establish the presence of the latter at the spot at the time of incident by way of the following:

- i. Ocular testimony of eye-witnesses, including an injured eye-witness – corroborated by scientific evidence (ballistic and medical).
- ii. Recovery of articles belonging to the appellant from the flat, immediately after the shootout at the instance of Mohd. Saif, who was present in the flat at the time of incident but was not made an accused in the present case.
- iii. CDR of the mobile number 9811004309, allegedly belonging to deceased Mohd. Atif Amin @ Basir, and in particular, the call alleged to have been made by the appellant using the said mobile number on 18.09.2008 at 17:42:56 hours, which did not mature but the appellant was heard talking in the background.
- iv. Comparison of voice sample of the appellant with the voice recorded in the background while the aforesaid outgoing call was made using the mobile number 9811004309 belonging to deceased Mohd. Atif Amin @ Basir.



Ocular testimony of eye-witnesses not reliable

6. The prosecution had examined HC Santender (PW-33), SI Rahul Kumar (PW-13), HC Udai Veer Singh (PW-37), HC Balwant (PW-36), SI Ravinder Kumar Tyagi (PW-85) and SI Dharmender Kumar (PW-20) who were part of the raiding team lead my late Inspector Mohan Chand Sharma and in whose presence the said team was alleged to have been attacked by the occupants of the flat, resulting in the death of Inspector Mohan Chand Sharma and injuries to HC Balwant (PW-36). Learned counsel for the appellant submitted that on an analysis of the testimonies of the aforesaid witnesses, the following issues need consideration:

- a) No physical description
- b) Deployment of police officers around the building
- c) Improbability of escape amidst constant firing
- d) No evidence that the appellant was an occupant of or was visiting the flat.
- e) Ballistic evidence does not support the eye-witness account
- f) No evidence that the appellant was known by the alias 'Junaid'
- g) Delay in lodging the FIR
- h) Discrepancies in seized clothes of injured and deceased persons

No physical description -

6.1. It was argued that none of the aforesaid witnesses gave any description with regard to the appearance of the allegedly escaped occupants of the flat in their statements recorded under Section 161 of the CrPC. To substantiate his argument, learned counsel drew the attention of this Court to the testimonies of the aforesaid six eye-witnesses, and more specifically to portion of their cross-examinations



where they admit that they did not give any description regarding the physical appearance or clothes of the two occupants who had allegedly escaped.

Deployment of police officers around the building -

6.2. It was further submitted that there is no eye-witness account of the alleged escape of the two occupants from the flat. Learned counsel for the appellant submitted that House No. L-18, Batla House, New Delhi was a four storeyed building. The parking lot was at the ground floor and the flat in question, i.e., Flat No. 108 was at the fourth floor, with only one stairwell going up and down. It was submitted that all the members of the raiding party, in their statements recorded before the learned Trial Court, testified that the area around L-18, Batla House was cordoned off before the operation. Learned counsel drew the attention of this Court to the statement of SI Rahul Kumar (PW-13), wherein he stated that seven police officials were members of the advance team (raiding party) and six police officials covered the front and back lanes of the building. Learned counsel further took this Court through the statements of SI Rahul Kumar (PW-13), SI Dharmender (PW-20), HC Santender (PW-33), HC Balwant (PW-36), HC Udai Veer Singh (PW-37), SI Anil Tyagi (PW-44), SI Ravinder Kumar Tyagi (PW-85), SI Dharmender (PW-97), Inspector J.S. Joon (PW-81) and Inspector Satish Sharma (PW-86) to demonstrate that the members of the police party had positioned themselves in the front lane as well as the back lane adjoining House No. L-18, Batla House. It was further sought to be demonstrated that the police party had positioned themselves at various positions around the said building and in view of such deployment, the escape of the two occupants including the appellant was highly improbable. It was further submitted that it was also not possible for the occupants to escape from the



roof. The only way out was through the ground floor, around which, admittedly, several members of the police party were deployed. Lastly, it was submitted that it is an admitted case of the prosecution that all the aforesaid eye-witnesses have testified that two occupants had escaped from the flat where the shootout took place, however, there is no witness who states that they saw the said occupants, including the appellant escaping from the building.

Improbability of escape amidst constant firing -

6.3. Learned counsel appearing on behalf of the appellant submitted that it is an admitted case of the prosecution that as soon as the police party entered the flat, the occupants started firing at them. In view thereof, it was urged that the escape of the two occupants was highly improbable for the following reasons:-

- i. SI Rahul Kumar(PW-13), in his cross-examination, stated that while the occupants were opening the door, the police party fired at them but missed. However, it was submitted that no bullet marks were found either on the iron door or the wooden door of the apartment.
- ii. It was submitted that admittedly, the door from which the two occupants had allegedly escaped was in the lobby area. As per the prosecution's own case, seven persons were already present in the said area and since the lobby was a small, presence of seven persons meant that it was crowded.
- iii. It was further submitted that the deceased occupant, i.e., Mohd. Atif Amin @ Basir fell on the ground after sustaining a bullet injury near the door and in such a situation, amidst constant firing, it would be highly improbable for two persons to escape after opening two doors.



No evidence that the appellant was an occupant or was visiting the flat -

6.4. Learned counsel for the appellant further submitted that nothing has been brought on record by the prosecution to show that the appellant was an occupant of the flat or was visiting at the time of the incident. The attention of this Court was drawn to the testimony of Mohsin Nisar (PW-52), the owner of the flat in question, who stated that he was not aware of who the occupants of the flat were. Learned counsel took this Court through the testimonies of Inspector Satish Sharma (PW-86), DCP Sanjeev Kumar Yadav (PW-95), SI Rahul Kumar (PW-13), SI Dharmender (PW-20), HC Santender (PW-33) and HC Udai Veer Singh (PW-37) to demonstrate that no attempt was made to ascertain the total number of occupants in the flat and their identities and that no attempt was also made to ascertain the total number of apartments and the occupants in the entire building. Therefore, it was submitted that it cannot be said with certainty that the two escaped occupants, including the appellant, were in fact residents of the flat where the incident took place.

Ballistic evidence does not support the eye-witness account –

6.5. Learned counsel for the appellant submitted that as per the ballistic examination report, the bullets fired by the police party as well as the two deceased occupants tally with the empty cartridges/projectiles recovered from the spot. Therefore, there is no empty cartridge or a projectile which could be attributed to a weapon alleged to have been used by the appellant in the shootout while escaping from the said flat. It was submitted that had the appellant fired in the shootout, then the same would have been accounted for, either as an empty cartridge or as a bullet swab or a projectile. In view of the aforesaid circumstances, learned counsel



submitted that there is no clarity about which bullet caused the fatal injuries to late Inspector Mohan Chand Sharma. In these circumstances, it was submitted that the ocular testimony of the eye-witnesses cannot be relied upon.

6.6. It was further contended that the Fire-Arms Examination Report (Ex. PW-36/B) dated 06.01.2009 is silent on the point of non-matching of a bullet contained in Parcel No. 43. Further, the report also doesn't speak about the matching of the bullets recovered from the body of Mohd. Atif Amin @ Basir contained in Parcels No. 12 and 13. It was submitted that when the bullets contained in Parcels No. 12 and 13 could not be matched (presumed to be fired by the Police officers) hence bullet contained in Parcel 43 cannot be attributed to the appellant when there is no observation in the Fire-Arms Examination Report to that effect.

6.7. Learned counsel for the appellant further pointed out a contradiction in the case of the prosecution to the effect that charges were framed *qua* the appellant under Section 27 of the Arms Act for allegedly using a revolver. Attention of this Court was drawn to the subsequent opinion given by a board of doctors (Ex. PW-27/B), wherein in response to Question No. 1, it has come on record that the injuries caused to late Inspector Mohan Chand Sharma and the two deceased occupants can be attributed to 9 mm Pistol/.30" Pistol/7.62 mm Assault Rifle. It was argued that the said injuries have not been attributed to a revolver. It was further submitted that there is no exhortation on the part of the appellant and assuming that he was not present at the spot, he cannot be prosecuted with the aid of Section 34 of the IPC.



No evidence that the appellant was known by the alias 'Junaid'

6.8. Learned counsel for the appellant submitted that in his complaint (Ex. PW-8/C), SI Rahul Kumar(PW-13) stated that the “*names of these escaped militants were revealed by Mohd. Saif as Junaid and Pappu*”, but no attempt was made by the prosecution to prove that the appellant, Ariz Khan was also known by the alias ‘Junaid’ or that the appellant and Junaid are one and the same. It was submitted that in any case, the disclosure with regard to the alleged alias of the appellant made by Mohd. Saif is hearsay. Reliance was placed on **Kalyan Kumar Gogoi v. Ashutosh Agnihotri and Another** reported as (2011) 2 SCC 532 and in particular, paragraphs 35 to 38 thereof.

Delay in lodging the FIR –

6.9. Learned counsel for the appellant further submitted that there was a delay of five hours in lodging the complaint (Ex. PW- 8/C at 04:00 PM), despite the fact that the concerned police station was only a kilometer away from the place of incident. It was submitted that it was an extraordinary situation where the senior officers had arrived at the spot and the information relating to the shootout had already been received at the police station at 11:13 AM, *vide* DD Entry No. 10A (Ex.PW-50/B). It was urged that the aforesaid delay of five hours has not been sufficiently explained by the prosecution and therefore, creates a doubt about the veracity of the account of the eye witnesses as stated in the complaint (Ex.PW-8/C). In these circumstances, it was submitted that the said complaint was made after due deliberation and manipulation by way of introducing the story of the alleged escape of the appellant and co-accused Shahzad Ahmed.



Non-joining of public witnesses –

6.10. It was urged on behalf of the appellant that the place of incident, i.e., Batla House was an extremely crowded place and there was no attempt by the police party, before or after the operation, to involve any person from the locality to join the investigation. Non-joining of public witnesses, as per the submission made by the learned Counsel, creates a doubt in the prosecution story.

Discrepancies in seized clothes of injured and deceased persons –

6.11. Learned counsel for the appellant submitted that the ocular testimony of the eye-witnesses cannot be relied upon in view of the material discrepancies in the documents in relation to the clothes of late Inspector Mohan Chand Sharma and the injured witness HC Balwant (PW-36). Attention of this Court was drawn to the seizure memos of the clothes of the aforesaid persons (Ex. PW-35/A and Ex. PW-35/B), the forwarding letter by which the clothes were sent to CFSL (Ex. PW-36/C) and the report of the CFSL in that regard (Ex. PW-68/A) to demonstrate that the set of clothes seized and the set of clothes examined by the CFSL are not the same and therefore, the evidence in that regard may have been fabricated to corroborate the version of the prosecution and hence is not reliable.

Recovery of articles allegedly belonging to the Appellant is doubtful

7. Learned counsel for the appellant submitted that the recovery of articles allegedly belonging to the appellant is doubtful on account of the following factors:-

7.1. Learned counsel for the appellant submitted that even though the said articles were recovered in the presence of SI Rahul Kumar (PW-13) and SI Ravinder Kumar Tyagi (PW-85), they did not disclose the factum of the said



recovery in their statements under Section 161 of the CrPC. Learned counsel further drew the attention of this Court to the cross-examination of DCP Sanjeev Kumar Yadav (PW-95) wherein he stated that he had not informed Inspector J.S. Joon (PW-81) about the recovery of the articles. The said fact is also confirmed by Inspector J.S. Joon (PW-81) in his cross examination and also stated that no person, including the police officials, had informed him that some personal belongings of the appellant had been recovered.

7.2. It was submitted that recovery of the articles allegedly belonging to appellant was effected at the instance of Mohd. Saif. However, the first investigating officer, Inspector J.S. Joon (PW-81), in his cross examination, admitted that he did not examine Mohd. Saif till the investigation remained with him. The aforesaid Mohd. Saif has not been examined as a prosecution witness either.

7.3. To substantiate his argument that the articles were not recovered from the flat on the day of the incident and was in fact subsequently planted by the prosecution to establish the presence of the appellant at the spot, learned counsel for the appellant further drew the attention of this Court to the statement of Dr. Mirza Azam Beg (DW-1), uncle of the appellant. The said witness had testified that on 19.09.2008, after he returned home from work, some police officials came to his house and enquired about the appellant. He stated that the said police officials demanded photographs of the appellant and took all of the appellant's belongings away.



Call Detail Record

8. Learned counsel for the appellant submitted that the CDR of the mobile number 9811004309 belonging to deceased Mohd. Atif Amin @ Basir (Ex. PW-23/G) has been relied upon by the prosecution to establish the presence of the appellant at the spot on the day of the incident. It was submitted that a call was made from the said phone to a mobile number on 18.09.2008 at 17:42:56 hours which did not mature but the applicant was allegedly heard talking in the background while it was ringing. It was submitted that the said call was made a day prior to the incident and even if the fact that the appellant was heard speaking in the background is taken on its face value, it is not sufficient to establish that he was still there at the flat the next day, when the incident took place. It was further submitted that the cell ID of the call, i.e., Batla House, is indicative of a larger area and does not pin-point an exact location.

8.1. It was further submitted that the certificate under Section 65B of the Indian Evidence Act, 1872, in support of the said CDR does not fulfill the requirements of Section 65B of the Indian Evidence Act. In support of the said argument, attention of this Court was drawn to the cross-examination of Sh. Deepak, Nodal Officer, Vodafone Mobile Services (PW- 64), who had prepared the said certificate. Sh. Deepak (PW- 64), in his cross-examination, had stated that he did not mention his own name, date, period of CDR, details of computer/device, model of printer used in the certificate prepared by him.

8.2. In support of his contentions, learned counsel for the appellant placed reliance on **Anvar P.V. v. P.K. Basheer and Other** reported as (2014) 10 SCC 473, and in particular, paragraphs 14 to 22 thereof wherein the requisite conditions



for admissibility of electronic records and certificate under Section 65B of the Indian Evidence Act have been laid down. It is submitted that the certificate under Section 65B of the Indian Evidence Act furnished in the present case does not comply with the said conditions.

Voice Comparison

9. Learned counsel for the appellant submitted that the Forensic Voice Examination Report (Ex. PW-71/G) is not reliable. For purpose of comparison with the intercepted call, the voice sample of the appellant was taken on 27.03.2018, i.e., nearly ten years after the call in question and therefore, the sample cannot be accurately matched with the intercepted phone call.

9.1. It was further submitted that SI Manjeet Sharma (PW-80) who downloaded the intercepted conversations in the two DVDs from the server had not given a certificate under Section 65B of the Indian Evidence Act. at the relevant time, i.e. at the time of downloading the intercepted conversations. It was submitted by learned Senior Counsel that the subsequent certificate under Section 65B of the Indian Evidence Act will not salvage the consequence of the non-compliance of Section 65B certificate by the prosecution at the relevant time. It was, therefore, submitted that in absence of certificate under Section 65B of the Indian Evidence Act at the relevant time of downloading the intercepted conversations, the same cannot be relied upon and thus the prosecution evidence with respect to the voice analysis cannot be looked into by the Court.

Submissions on behalf of the Respondent/State

10. Learned Special Counsel appearing on behalf of the State submitted that the case of the prosecution is primarily built on the testimonies of six eye-witnesses,



i.e., HC Santender (PW-33), SI Rahul Kumar (PW-13), HC Udai Veer Singh (PW-37), HC Balwant (PW-36), SI Ravinder Kumar Tyagi (PW-85) and SI Dharmender Kumar (PW-20). It was submitted that a key piece of evidence in the case was the dock identification of the appellant by each of the aforesaid eye-witnesses. The appellant has been attributed the specific role of shooting at the police party by the aforesaid eye-witnesses. It was further submitted that the appellant was also identified by HC Balwant (PW-36), and being an injured eye-witness, his testimony is to be kept on a higher pedestal. It was further the contention of the learned Special Counsel that no reason has been brought forth on record to demonstrate that the appellant has been falsely implicated by the aforesaid eye-witnesses and effectively, the real culprits have been allowed to go unpunished. Learned Special counsel submitted that the prosecution successfully proved its case beyond all reasonable doubt and the impugned judgment does not suffer from any factual or legal infirmity. The presence of the appellant at the spot at the relevant point in time has been sought to be proved by the prosecution on the basis of the following evidence:

- i. Ocular testimony of the eye-witness, including the injured eye-witness.
- ii. Corroborative evidence through:
 - a) Recovery of articles belonging to the appellant from the flat.
 - b) Call Detail Records
 - c) Voice comparison between the conversation recorded from the intercepted calls and the voice sample of the appellant.
 - d) Refusal to participate in Test Identification Parade ('TIP')
 - e) Abscondence of the appellant



- f) Corroboration of the ocular testimony of eye-witnesses through ballistic examination report.
- g) Corroboration of the ocular testimony of eye-witnesses through the medical examination reports.

Ocular testimony of the eye-witness, including the injured eye-witness

11. Learned Special Counsel has submitted that the testimony of the eye witnesses, as mentioned hereinbefore, was credible, cogent and trustworthy. It was urged that the same could not be shaken despite lengthy cross-examination on behalf of the appellant. It was further argued that the *bona fide* of the prosecution case is borne out from the fact that despite finding Mohd. Saif present in the flat, he was not made an accused in the present case, as he was not involved in the shootout at the police party. Similarly, Zeeshan Ahmed, who also was staying in the same flat was not made an accused in the present case as he had left the place of incident before the shootout.

11.1. It was been submitted that the investigating agency kept looking for the two escapees since 2008 and the appellant was finally arrested in 2018. This, according to the learned Special Counsel, is an additional and important factor which demonstrates that the testimony of the eye-witnesses was truthful.

11.2. Learned Special Counsel further submitted that the fact that the eye-witnessed did not give any physical description of the two occupants who had escaped in their statements under Section 161 of the CrPC does not, in any manner, affect the credibility of the dock identification of the appellant by the said eye-witnesses before the learned Trial Court.



11.3. It was further pointed out that articles belonging to the appellant were recovered and seized by DCP Sanjeev Kumar Yadav (PW-95) in FIR No. 166/08, registered at PS Karol Bagh. Learned Special Counsel further submitted that since the seizure of the said articles was made in a parallel investigation of case FIR No. 166/08 at PS Karol Bagh, therefore, the same was not seized in the present case by the initial Investigating Officer, Inspector J.S. Joon (PW-81), till the investigation remained with him, i.e., till 01.10.2008.

11.4. It was the submission of the learned Special Counsel that the names of the escaped militants, as Junaid and Pappu, were given by Mohd. Saif during his initial interrogation, however, subsequently during the investigation of the FIR No. 166/08, registered at PS Karol Bagh, when the articles belonging to the appellant were recovered, his real identity was known. It was submitted that no such plea was taken during the cross-examination of any of the witnesses and as such, this plea cannot be agitated or raised at this stage without any cross-examination on this point on behalf of the appellant.

11.5. As far as the non-joining of public witnesses is concerned, it was submitted that the testimony of SI Rahul Kumar (PW-13) shows that attempts were made to join public witness but no one agreed to join the proceedings. Without prejudice, it was submitted that the nature of the operation and raid which was to be carried out involved an element of high risk the life of any public person.

11.6. With regard to the escape of the appellant from the spot, it is argued that once the prosecution was able to establish the presence of the appellant at the scene of the crime, a presumption under Section 106 of the Indian Evidence Act would be attracted and consequently the onus would shift on the appellant to establish the



reverse, i.e., that he was never present at the time and date of the incident. In this view of the matter, learned Special Counsel submitted that the argument on behalf of the appellant that it was for the prosecution to demonstrate as to how and in what manner the appellant escaped, is misplaced.

11.7. Learned Special Counsel further submitted that the submissions on behalf of the appellant with regard to the sequence of the alleged escape of the two occupants, including the present appellant, as sought to be demonstrated is again misplaced as the same has not come in evidence of the witnesses. It is further submitted that it has not come in the evidence of any of the witnesses as to whether the deceased occupant fell down after the escape of the other two occupants or before their escape, as sought to be argued by learned counsel for the appellant. Learned Special Counsel submitted that in the post-mortem report of Mohd. Atif Ameen @ Basir (Ex. PW-19/A), it has come on record that entry wounds were in the back of Mohd. Atif Ameen @ Basir (the deceased occupant who fell down in the lobby area), which points towards the fact that occupants were trying to escape from the flat with their back towards the police party.

11.8. Learned Special Counsel further submitted that there was no inordinate delay in lodging the FIR and in any case, no question with regard to delay had been put to any witnesses during the course of prosecution evidence in order to elicit any explanation.

Corroborating Evidence

12. Learned Special Counsel submitted that the testimonies of the eye-witnesses are cogent, reliable and credibility thereof has not been shaken in spite of the extensive cross-examination by the defence. Moreover, in the facts of the present



case, there are further corroborative evidence to establish the presence of the appellant as stated by the eye witnesses. These are as follows:

- a) Recovery of articles belonging to the appellant from the flat.
- b) Call Detail Records
- c) Voice comparison between the conversation recorded from the intercepted calls and the voice sample of the appellant.
- d) Refusal to participate in Test Identification Parade ('TIP')
- e) Abscondence of the appellant
- f) Corroboration of the ocular testimony of eye-witnesses through ballistic examination report.
- g) Corroboration of the ocular testimony of eye-witnesses through the medical examination reports.

Recovery of articles belonging to the appellant –

12.1. The articles belonging to the appellant were seized on the same day, i.e., 19.09.2008 in the presence of the witnesses SI Rahul Kumar (PW-13) and SI Ravinder Kumar Tyagi (PW-85) in case FIR No. 166/08 registered at P.S. Karol Bagh by DCP Sanjeev Kumar Yadav (PW-95). According to learned Special Counsel, once the recovery has been proved, it was for the appellant to explain the possession of the said articles with the prosecution. It is urged that in view of Section 106 of the Indian Evidence Act, the burden of proof shifts upon the appellant to explain the recovery of the said articles from the place of occurrence after the shootout.



Call Detail Record –

12.2. It is the case of the prosecution that the mobile number of the deceased Mohd. Atif Ameen @ Basir, i.e., 9311004309 was being used by the appellant while staying at Batla House. It was submitted that the appellant made the last outgoing call from the said number on 18.09.2008 at 17:42:56 hours. It was submitted that the call in question did not mature but the appellant was clearly heard speaking in the background. It was submitted that this corroborates that the ocular testimony of the eye-witnesses in relation to the presence of the appellant at the spot. It was further urged that even if there is a time gap between the last call and the incident, the same would not give any benefit to the appellant. It was for the appellant to explain the said incriminating circumstance against him.

Voice comparison between the conversation recorded from the intercepted calls and the voice sample of the appellant -

12.3. Learned Special Counsel submitted that the order of interception (Ex. PW-67/A) for the mobile number 9311004309 belonging to Mohd. Atif Ameen @ Basir was obtained and SI Manjeet Sharma (PW-80) downloaded the intercepted calls in two DVDs and handed over the same to ACP Sanjeev Kumar Yadav (PW-95) in case FIR No. 166/08 registered at P.S. Karol Bagh. SI Manjeet Sharma (PW-80) gave a certificate under Section 65B of the Indian Evidence Act, 1872 (Ex. PW-77/A) with respect to the said DVDs. The appellant's voice sample was taken at the CFSL by Sh. Ingarsal (PW-69) on 31.03.2010, in case FIR No. 166/08 registered at P.S. Karol Bagh. It is submitted by the learned Special Counsel that the forensic voice examination report regarding matching of the specimen voice of the appellant with the intercepted calls (Ex. PW-71/G), prepared by Sh. Amitosh



Kumar, (PW-74) records that the voice from the intercepted conversation is similar to the specimen voice of the appellant.

Refusal to participate in Test Identification Parade -

12.4. It was submitted that the appellant was arrested in case FIR No. 50/2014 under Section 18 of the Unlawful Activities (Prevention) Act, 1967 and Section 120B of the IPC registered at PS Special Cell on 14.02.2018 at 03:00 AM (Arrest Memo - Ex. PW-71/A). He was formally arrested in the present case on 23.02.2018 (Arrest Memo - Ex. PW 76/A). The application for conducting TIP was moved before the learned Chief Metropolitan Magistrate, wherein it is recorded that the accused was produced in muffled face (Ex.PW-47/A). The learned Magistrate *vide* order dated 23.02.2018 recorded that the appellant has refused to participate in the TIP (Ex.PW-47/B). Learned Special Counsel submitted that refusal on part of the appellant to participate in the TIP leads to an adverse inference against the appellant.

Abscondence of the appellant -

12.5. It is the case of the prosecution that the appellant escaped from the scene of the crime after committing the offences that he is charged with and that he concealed himself. Learned Special Counsel submitted that on 20.02.2009, process under Section 82 CrPC was initiated against the appellant. The complaint under Section 195 CrPC with regard to the offence under Section 174A of IPC was registered *qua* the appellant. Learned Special Counsel submitted that this would be an additional circumstance corroborating the ocular evidence.



Corroboration of the ocular testimony of eye-witnesses through ballistic examination report -

12.6. It is the case of the prosecution that a total of 30 empty cartridges (19 with marking KF-04 9mm, 8 with marking 7.62x25 and 3 with marking KF-01 A7) were recovered *vide* seizure memo dated 19.09.2008 (Ex. PW8/J). 13 fired bullets were seized from the spot by the local police on 19.09.2008 (Ex. PW-8/K). In a subsequent inspection conducted by a team of CFSL on 13.10.2008, one fired bullet was recovered from in front of the kitchen, one from the wall of the drawing room and one fragmented piece of fired bullet was seized from the spot (Ex. PW-56/A). The parcels were sent to CFSL (Ex. PW-36/C) for forensic examination and the Fire Arms Examination Report in this respect was received (Ex. PW-36/B). During the course of arguments, the learned Special Counsel handed up a chart to establish the correlation of the fired bullets with the weapons recovered in the case. The learned Special Counsel relied on the said chart to show that one fired bullet in a mutilated condition recovered on 19.09.2008 and three small pieces of fired bullets recovered on 13.10.2008 contained in parcels no. 39 and 43 respectively did not match any of the recoveries, thus refuting the arguments on behalf of the appellant that all bullets found at the spot matched the weapons used either by the police officers or by the two deceased persons, i.e., Mohd. Atif Amin @ Basir and Mohd. Sajid. The learned Special Counsel argued that since these bullets could not match with any of the weapon recovered, they could have been fired either by the present appellant or by co-accused Shahzad Ahmed. The learned Special Counsel further argued that the Fire Arm Examination Report further shows the presence of gunshot residue on the right hands of late Inspector Mohan Chand Sharma, Mohd.



Atif Amin @ Basir and Mohd. Sajid which corroborates the eye witness testimony to the effect that weapons had been used by the aforesaid individuals.

Corroboration of the ocular testimony of eye-witnesses through the medical examination reports -

12.7. The post-mortem report of late Inspector Mohan Chand Sharma (Ex. PW-19/C) concluded that his cause of death was haemorrhagic shock due to a firearm injury. Injury no.1 was an entry wound on his left shoulder, injury no.2 was the exit wound; injury no.4 was the entry wound on left hypochondriac region, of which injury no.6 was the exit wound. It is the case of the prosecution that subsequent opinion dated 27.04.2010 on his post-mortem (Ex. PW-27/D) confirmed that the tears on his clothes (parcel no. 22) corresponded with the injuries described in the post-mortem report. In reply to questionnaire (Ex. PW-27/B), it was further confirmed that the injuries sustained by Insp. Mohan Chand Sharma could have been caused due to passage of bullets fired from 9 mm pistol/.30 bore pistol/7.62 mm assault rifles and thus could have been caused by any of the exhibited weapons. It was further concluded that none of the entry wounds mentioned in the post-mortem report were caused by ricochet of a firearm projectile. Learned Special Counsel further stated that another reply received to a questionnaire (Ex. PW-27/C) stated that all entry wounds were located on the front side of Insp. Mohan Chand Sharma's body and therefore, there was no possibility of any accidental firing by a police officer. Learned Special Counsel argued that the aforestated medical evidence with respect to Insp. Mohan Chand Sharma corroborates the ocular testimonies of eye witnesses with regard to the incident.

12.8. The MLC of HC Balwant (Ex. PW-19/E) shows that he was admitted to the



hospital at 11:49 AM. The injuries mentioned in his MLC show one entry wound at his right forearm and one exit wound. The nature of the injury was described as grievous. It is the case of the prosecution that subsequent opinion dated 27.04.2010 on his MLC (Ex. PW-27/D) confirmed that the tears on his clothes (parcel no. 23 and 24) corresponded with the injuries described in the MLC. The post-mortem report of Mohd. Atif Ameen @ Basir (Ex. PW-19/A) concluded that the cause of death was haemorrhagic shock due to multiple firearm injuries, as described therein. In the reply to questionnaire (Ex. PW-27/B) it was answered that the firearm injuries could have been caused due to passage of bullets fired from the exhibited weapons and none of the wounds were suggestive of being caused by ricochet of firearm projectile. The learned Special Counsel argued that the Fire Arm Examination Report (Ex. PW-36/B) confirmed presence of gunshot residue on the right hand of Mohd. Atif Ameen @ Basir and thus corroborated the ocular testimony of eye witnesses that he was firing at the police party. The post-mortem report of Mohd. Sajid (Ex. PW 19/B) concluded that his cause of death was cranio-cerebral damage caused due to gunshot wound to the head. In the reply to questionnaire (Ex. PW-27/B) it was answered that the firearm injuries could have been caused due to passage of bullets fired from the exhibited weapons and none of the entry wounds were suggestive of being caused by ricochet of firearm projectile. It was further answered that one injury no. 6 could have been caused by re-entry of firearm projectile (injury no. 1). The learned Special Counsel argued that the Fire Arm Examination Report (PW-36/B) confirmed presence of gunshot residue on the right hand of Mohd. Atif Ameen @ Basir and thus corroborated the ocular testimony of eye witnesses that he was firing at the police party.



Judgments relied upon by learned Special Counsel for the State

13. In support of the above contentions, learned Special Counsel for the State has placed reliance on the following judgments:

Credence to be given to the evidence of an injured witness –

- i. Abdul Sayeed v. State of Madhya Pradesh, (2010) 10 SCC 259.
- ii. Mohar v. State of Uttar Pradesh (2002) 7 SCC 606.
- iii. State of Uttar Pradesh v. naresh and Ors., (2011) 4 SCC 324.

Appreciation of evidence of a police witness and non-joining of independent witnesses –

- i. Karamjit Singh v. State (Delhi Administration), (2003) 5 SCC 291.
- ii. Girja Prasad v. State of Madhya Pradesh, (2007) 7 SCC 625.
- iii. Rohtash Kumar v. State of Haryana (2013) 14 SCC 434.

Evasive answer or a false reply to a question asked under Section 313 CrPC can be used as an additional link in the chain of circumstances against the accused –

- i. Vasa Chandrashekar Rao v. Ponna Satnanarayam Rao, (2000) 6 SCC 286.
- ii. State of Punjab v. Karnail Singh, (2003) 11 SCC 271.
- iii. Pudhu Raja v. State (2013) 11 SCC 196.

Evidence of voice matching –

- i. Ritesh Sinha v. State of Uttar Pradesh, (2019) 8 SCC 1.

Requirement of certificate under section 65B of the Indian Evidence Act, stage of raising the objection and whether the certificate can be given subsequently –

- i. Sonu alias Amar v. State of Haryana, (2017) 8 SCC 570.



- ii. Vikram Singh alias Vicky Walia and Anr. v. State of Punjab and Anr., (2017) 8 SCC 518.
- iii. Kishan Tripathi @ Kishan Painter v. The State, 2016 SCC OnLine Del 1136.
- iv. Anvar P.V. v. P.K. Bahseer, (2014) 10 SCC 473.
- v. Md. Rashid v. State, 2017 SCC OnLine Del 8629.
- vi. Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal, (2020) 7 SCC 1
- vii. State of Karnataka v. M.R. Hiremath, (2019) 7 SCC 515.

Scope of Section 106 of the Indian Evidence Act –

- i. Sabitri Samantaray v. State of Odisha, 2022 SCC Online SC 673.
- ii. Trimukh Maroti Kirkan v. State of Maharashtra, (2006) 10 SCC 681.
- iii. State of Rajasthan v. Kashi Ram, (2006) 12 SCC 254.
- iv. Prithipal Singh v. State of Punjab, (2012) 1 SCC 10.

Liability under Section 34 of the Indian Penal Code –

- i. Mahbub Shah v. King Emperor, AIR 1945 PC 118.
- ii. State of Madhya Pradesh v. Deshraj, (2004) 13 SCC 199.

Non-Recovery of weapon of offence not fatal to case of prosecution –

- i. Ram Singh v. State of Rajasthan, (2012) 12 SCC 339.
- ii. State of Rajasthan v. Arjun Singh, (2011) 9 SCC 115.
- iii. Mritunjoy Biswas v. Pranab, (2013) 12 SCC 796.

Minor inconsistencies in evidence not relevant –

- i. Rohtash Kumar v. State of Haryana, (2013) 14 SCC 434.
- ii. Kuriya v. State of Rajasthan, (2012) 10 SCC 433.



iii. Shyamal Ghosh v. State of West Bengal, (2012) 7 SCC 646.

No cross-examination/suggestion to the witness – testimony remains unchallenged –

- i. State of Uttar Pradesh v. Nahar Singh, (1998) 3 SCC 561.
- ii. Gian Chand & Ors. v. State of Haryana, (2013) 14 SCC 420.
- iii. Vinod Kumar v. State of Haryana, (2015) 3 SCC 138.

Abscondence –

- i. Shyamal ghosh v. State of West Bengal, (2012) 7 SCC 646.

Lapses or defects in the investigation are of no advantage to the accused –

- i. Ram Bali v. State of Uttar Pradesh, (2004) 10 SCC 598.
- ii. Dayal Singh & Ors. v. State of Uttaranchal, (2012) 8 SCC 263.

Seals on samples intact, no tampering –

- i. Hardip Singh v. State of Punjab, (2008) 8 SCC 557.
- ii. State of Haryana v. Asha Devi & Anr., (2015) 8 SCC 39.
- iii. Manmohan v. State, (2020) 5 SCC 782.
- iv. Gulsher Mohammed v. State of Himachal Pradesh, (2015) 17 SCC 682.

Section 65B of the Indian Evidence Act -

- i. Sonu alias Amar v. State of Haryana, (2017) 8 SCC 570.
- ii. Vikram Singh alias Vicky Walia and Anr. v. State of Punjab and Anr., (2017) 8 SCC 518.
- iii. Kishan Tripathi @ Kishan Painter v. The State, 2016 SCC OnLine Del 1136.
- iv. Anvar P.V. v. P.K. Bahseer, (2014) 10 SCC 473.
- v. Md. Rashid v. State, 2017 SCC OnLine Del 8629.
- vi. Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal, (2020) 7 SCC 1.



vii. State of Karnataka v. M.R. Hiremath, (2019) 7 SCC 515.

Rejoinder on Behalf of the Appellant

14. By way of rejoinder, learned counsel for the appellant submitted that:

- i. It was submitted that the omissions and contradictions in the testimonies of the eye-witnesses, as demonstrated, go to the root of the case of the prosecution and are thus, a vital factor to be construed in favor of the appellant. Suspicion regarding commission of an offence, however grave it may be, cannot take place of the proof. Reliance in that regard was placed on **V.K. Mishra and Another v. State of Uttarakhand and Another** reported as (2015) 9 SCC 588 and in particular, paragraphs 18 and 19 thereof. Reliance was further placed on paragraph 13 of **Sujit Biswas v. State of Assam** reported as (2013) 12 SCC 406.
- ii. The report of the CFSL does not specify the caliber of the bullets which are not accounted for.
- iii. Fatal injuries caused to late Inspector Mohan Chand Sharma and injuries caused to HC Balwant could have been caused by any of the recovered weapons.
- iv. The factum of recovery of articles belonging to the appellant was not disclosed to Inspector J.S. Joon (PW-81) by any of the eye-witnesses in their statements under Section 161 of the CrPC, which means that the documents were not recovered at the place of incident.
- v. The original Investigating Officer of the case, i.e., Inspector J.S. Joon (PW-81) testified that he was not informed about the recovery of articles allegedly belonging to the appellant.



- vi. In view of the facts that the building which was surrounded by police personnel, had only one entry and exit, the escape of the appellant was not plausible. The prosecution has not sufficiently proved the escape of the appellant, meaning thereby that his presence was never established.
- vii. The CDR of the mobile number 9811004309 cannot be relied upon as the certificate under Section 65B of the Indian Evidence Act in support thereof does not comply with the requirements of the said section.
- viii. As far as the argument of the State with regard to the appellant's refusal to participate in the TIP proceedings is concerned, it was submitted that it is an admitted case of the prosecution that before the appellant's arrest, the Investigating Officer had his photographs. It was submitted that the appellant was arrested on 14.02.2018 in case FIR No. 50/14 registered at PS Special Cell by ACP Govind Sharma (PW-71). Therefore, from 14.02.2018 till his arrest in the present case on 23.02.2018, the appellant remained in police custody at the police station where the eye-witnesses are also posted and thus, they had ample opportunity to look at him. It was submitted that Inspector R. Srinivasan (PW-88) specifically deposed about the members of the raiding party visiting the police station and identifying the appellant during police custody, which thrown the dock identification into doubt. Reliance in that regard was placed on **Ravi @ Ravichandran v. State Represented by Inspector of Police** reported as **(2007) 15 SCC 372**, and in particular, paragraphs 14, 15 and 18 to 23 thereof.
- ix. It was further submitted that the argument of learned Special Counsel for the State also sought to establish the appellant's guilt on the ground that after the



date of incident, he absconded. It was submitted that even if the fact that the appellant absconded is taken at its face value, the same does not *per se* establish his guilt. Reliance in that regard was placed on **SK. Yusuf v. State of West Bengal** reported as (2011) 11 SCC 754 and in particular, paragraph 31 thereof.

Analysis and Findings

Ocular Testimony of the Eye-Witnesses

15. The prosecution has examined HC Santender (PW-33), SI Rahul Kumar (PW-13), HC Udai Veer Singh (PW-37), HC Balwant (PW-36), SI Ravinder Kumar Tyagi (PW-85) and SI Dharmender Kumar (PW-20) who were a part of the raiding team led by late Inspector Mohan Chand Sharma and in whose presence the said team was alleged to have been attacked by the occupants of the flat, resulting in the death of Inspector Mohan Chand Sharma and injuries to HC Balwant (PW-36).

15.1. As per the case of the prosecution, the incident can be separated into two parts: the first part relates to the entry of the team led by late Inspector Mohan Chand Sharma into Flat No. 108, L-18, Batla House and the shootout, resulting in - (i) fatal injury to late Inspector Mohan Chand Sharma, (ii) Injury to HC Balwant (PW-36), (iii) Fatal injury to one of the occupants of the flat, i.e., Mohd. Atif Ameen @ Basir and (iv) Escape of the other two occupants of the flat (including the appellant). The second part of the incident relates to the shootout which took place after the team led by DCP Sanjeev Kumar Yadav (PW-95) enters the flat and the second assailant, i.e., Mohd. Sajid is shot down.



15.2. For the sake of completeness of the entire incident, the relevant portion of examination in chief of SI Rahul Kumar (PW-13, the complainant), is reproduced hereinbelow:

“In the month of September, 2008, I was posted as SI at Special Cell NDR Lodhi Colony. New Delhi. On 13.09.2008 a serial blast rocked in National Capital-resulting in casualties and injuries to several persons. The said blasts were reported from the area of police stations of Connaught Place, Greater Kailash, Karol Bagh and Tilak Marg. Seeing the magnitude of the terrorist attacks, services of the Special Cell were also roped in to help the investigation. Later the investigation of the said cases was transferred to Special Cell.

A team under supervision of Inspector Mohan Chand Sharma (now deceased) was formed to investigate the matters. Informers were deployed and technical surveillance was also mounted. During this course, an information was received that one Bashir @ Atif R/o Azam Garh UP was involved in the said serial blast and was residing in the area of Batia House, Jamia Nagar, New Delhi. Informers were deployed in that area to further develop the said information.

On 19.09.2008 at about 8.00 a.m., while I was present in my office at Special, Cell, Inspector Mohan Chand Sharma telephoned me and informed me that, he had received an information through informer that the said Bashir @ Atif along with his associates was staying in Flat no. 108, L-18, Batia House, Jamia Nagar, New Delhi. Inspector Mohan Chand Sharma further asked me to reduce the said information into writing by lodging the relevant DD entries and also to constitute a team of the police official to conduct raid at the said place. Accordingly, I lodged DD no. 3 about the said information. Copy of the same is on record and already marked as Ex.PWB/A. A team comprising myself, Inspector Sanjay Dutt, Inspector Mohan Chand Sharma, SI Dharmender, SI Ravinder Tyagi, SI Devinder, SI Dalip Kumar and other police officials was constituted.

I alongwith the available staff in the office i.e. SI Ravinder Tyagi, HC Balwant, HC Satender, Ct. Sandeep, SI Rakesh Malik, HC Manish, HC Vinod Gauam and Ct. Birender Negi left the office at 9.30 a.m. in one private car belonging to SI. Ravinder Tyagi and 2 two wheelers. We were also carrying arms and ammunition and Bullet proof jacket issued to us as per register maintained in our office. Before leaving the office I also recorded DD no. 4 regarding departure to the aforesaid place. True copy of



the DD entry is on record and same is already Ex.PW8/B. Firstly, we reached Abassi Chowk, Batla House, Jamia Nagar, New Delhi. SI Rakesh Malik and HC Manish were sent to Shaheen Bagh, Jamia Nagar to verify some address as directed by Inspector Mohan Chand Sharma. After reaching Abassi Chowk I requested 6-7 passersby to join the raid and its purpose but they declined to join the raid by giving reasonable and genuine excuses and left the place without giving their names and addresses. No action was initiated against the said passersby due to paucity of time and urgency of the raid.

In between 10:40-10:45 a.m. a team led by inspector Mohan Chand Sharma comprising SI Dharmender, SI Dalip, HS Satyender, SI Devender, HC Rajeev, HC Rajbir, ASI Anil Tyagi and HC Udai Veer also reached Abassi Chowk in two private cars belonging to SI Dharmender and SI Devender. Inspector Mohan Chand Sharma briefed the member of both the raiding teams. All members of the team were in mufti's (civil dress). From there we proceeded to the said place. After reaching there an advance team comprising myself, Inspector Mohan Chand Sharma, SI Dharmender, SI Ravinder Tyagi, HO Satender, HC Udai Veer and HO Balwant was formed to go upstairs and conduct the raid at Flat no. 108, L-18, Top Floor, Batla House Jamia Nagar. Out of remaining member of the team, HC Rajbir was deployed in the lane on the side of Khalilullah Masjid, SI Devender was deployed at the opposite corner of the lane, HC Vinod Gautam was deployed in the back lane at Masjid side corner and Ct. Rajiv was deployed in the opposite corner of the backside lane. SI Dalip and ASI Anil Tyagi was deployed on the road facing to L-18 Building and remaining members were deployed at the vehicles where AK-47 Rifles and bullet proof jackets were kept. No specific nakabandi was done nor the area was cordoned off at the time of raid. Thereafter we the member of the advance team assembled near the staircase leading to the top floor of the building. Inspector Mohan Chand Sharma directed SI Dharmender to go upstairs posing him as vodafone execute to find the presence of the suspected terrorists in the flat in question. SI Dharmender went there and returned within a few minutes and informed us regarding the presence of some persons in the flat. Then, we the members of the advance team also went upstairs to the said flat at top floor of the building. Out of seven members of advance team, myself, Inspector Mohan Chand Sharma, SI Ravinder Tyagi and HC Balwant were remaining members were not having any arms with them. **Inspector Mohan Chand Sharma knocked the main door of the flat disclosing the identities of the team and further asked the**



occupant to open the door stating that “darwaja kholo police hai” but none of them responded the call. Then we first tried to open the main door but it was found bolted from inside. There were two doors in the flat in question. The other doors was on the left side of the main door which was knocked by inspector Mohan Chand Sharma. Since the main door was found bolted from inside we checked the other door on the left side of the main door but it was found shut but not found bolted from inside. We immediately entered the flat through that door. As soon as we entered the flat, the occupant in the flat stated firing on the police party from two sides. One from the side of drawing room and other from the left side room of the flat. We got trapped in the drawing room and had to resort firing in our self defence. During the shoot out inspector Mohan Chand Sharma and HC Balwant sustained bullet injuries. The terrorists present in the drawing room were trying to escape by opening the main door while continuously firing on the police team. One of the terrorist present in the drawing room also sustained bullet injury and two of them manage to escape from the flat through its main door while continuously firing on the police party. During the shoot out we could not assume any specific position in the drawing room rather kept on changing our position to save ourself and during this course while taking advantage of melee two of the terrorists manage to escape from the flat through its main door.

Accused Ariz Khan @ Junaid @ Anna @ Salim present in the court was one of terrorists who manage to escape from the flat in question along with his associate. Accused Ariz Khan @ Junaid @ Anna @ Salim is the same person who had fired on the police party front the side of drawing room as soon as we entered the flat.

Thereafter, I asked the member of the team to stop the firing. Since the terrorists who had fired on the police party from the left side room of the flat were still there, HC Satender who was not carrying any arms took the pistol of HC Balwant and assumed position to confront the terrorist present there.

SI Dharmender and HC Udia Veer brought injured Inspector Mohan Chand Sharma downstairs and took him to Holy Family Hospital. SI Ravinder Tyagi brought injured HC Balwant downstairs and handed him over to HC Gurmeet for taking him to hospital. SI Ravinder Tyagi returned to the place of incident.

When SI Ravinder Tyagi returned to the place of incident, I tried to find out and locate the two escaped terrorists and made search for them on



the roof top of the building and in the adjoining flat. 4-5 boys were present in the said adjoining flat but the said terrorists were not found present in that flat. I further asked the said boys to shut the door of the flat and not to come out of the flat.

SI Ravinder Tyagi also informed the police on telephone no. 100 regarding the incident. In the meantime, Sh. Sanjeev Yadav, ACP Special Celt along, with police officials namely SI Dalip Kurnar, HC Rajbir, HC Vinod Gautam and Ct. Rajiv & other staff also reached the place of occurrence. **I briefed him about the incident and further informed him that some terrorists were still hiding themselves in the left side room of the flat. ACP Sanjeev Yadav, myself and HC Rajbir tried to entered the left side room to apprehend the terrorists present there and during this course one of the terrorists fired on us while moving from the left side of the room to apprehend the terrorists present there and during this course one of the terrorists fired on us while moving from the left side of the room towards the door leading to balcony. In order to save ourselves ACP Sanjeev Yadav also fired in self defence on the said terrorist. He fell down. Then we again tried to enter inside the room but the terrorist who had fell down again fired on us and two of the bullets hit HC Rajbir but he did not sustain any injuries as he was wearing bullet proof jacket. We again fired in our self defence and the said terrorist sustained bullet injuries. Then we searched the flat and during that course one Mohd. Saif was found present in the toilet attached with left side room of the flat. He came out of the toilet raising his hands and surrendered before the police party. He was taken into custody by ACP Sanjeev Yadav, Special Cell and was arrested in case FIR no. 166/08 PS Karol Bagh (Special Cell). On interrogation of the said Mohd. Saif he revealed the names of two escaped terrorists as Ariz Khan @ Junaid and Shahzad @ Pappu. Mohd. Saif also revealed that the said terrorists belong to Indian mujahiddin and they were involved in the recent serial blasts happened in Delhi, Jaipur and Gujarat.**

In the meantime, police officials from local police station Jamia Nagar including IO Inspector J. S. Joon and Senior police officials also reached the place of occurrence. PCR van also reached the spot. Both the injured terrorists were removed to hospital by PCR van.

I prepared written complaint which was written by SI Dharmender on my narration as he had returned from the hospital by that time. I handed over the said complaint to inspector B. S. Joon for necessary action. The



said complaint is on record which is already Ex.PW8/C bearing my signature at point A.

Q You had stated in your earlier examination in chief that as soon as the advance team entered the flat in question, its occupants-started firing on the police party from two sides i.e. from the side of drawing room and from the side of left side room. Can you specify the number of occupants and their identity present in the drawing room and on the left side room?

Ans. There were three persons in the drawing room who resorted fire on the police party. One of them was Atif @ Bashir who had sustained bullet injuries and other two occupants were accused Shahzad @ Pappu and present accused Ariz @ Junaid. The name of the person on the left side room was revealed to be Chhota Sajid who had also sustained bullet injuries.

Q You have stated in your earlier examination in chief that when advance team got trapped in the drawing room, you fired in your self defence. Can you specify the name of the member of the team who fired in their self defence?

Ans. As soon as we confronted the occupants present in the drawing room, myself, Inspector Mohan Chand Sharma, SI Ravinder Tyagi and HC Balwant fired in our self defence. During this course, Inspector Mohan Chand Sharma sustained bullet injuries and fell down, then SI Dharmender took his pistol and also fired in self defence. Two member of the advance raiding team namely HC Satender and ASI Udai Veer who were not having any arm, they entered the right side room of the flat to save themselves.

During the cursory search of the flat after the shoot out, one AK-47 Assault rifle with two loaded magazines having total 60 rounds were found in the right side room of the flat. It was kept underneath of one mattress kept in the room.

One .30 bore mouser of star mark having stuck one live round in its chamber was found lying in the drawing room near the injured Atif @ Bashir. The word "made China by Norin Co." was engraved on the body of the said pistol. It was the same pistol which was used by the accused Atif to fire on the police party.

One .30 bore pistol having word "A1 International A1" engraved on its body was also found lying on the left side room where other terrorist had sustained injuries and the same was used by him for firing on police party.

The said arms and ammunition were taken into possession by Inspector J. S. Joon. He also prepared sketches of the said arms and ammunition.

Signature Not Verified

Digitally Signed
By: RANJU BHALLA
Signing Date: 12.10.2023
17:10:01

9/2022 and DEATH SENTENCE REF. 1/2022



Total 30 empty cartridges including: 19 cartridges of 9mm, 8 cartridges of .30 bore and three cartridges of AK-47 Assault Rifle and 13 led of fired cartridges were also found scattered in the flat.

On the day of incident after shoot out, accused Mohd. Saif was arrested by ACP Sanjeev Yadav in case FIR no. 166/08 PS Karol Bagh and during the investigation of that case an intensive search was also made by ACP Sanjeev Yadav who was IO of that case at the instance of accused Mohd. Saif and during that course different articles and different documents belonging to different, accused persons were seized by ACP Sanjeev Yadav through separate seizure memo.

During the aforesaid search one passport of accused Shahzad @ Pappu already marked as Ex.PW8/V was also recovered from the place of occurrence which was seized by ACP Sanjeev Yadav in case FIR no. 166/2008 PS Karol Bagh vide separate seizure memo. Copy of the same is on record and already marked as Ex.PW8/U bearing my signature at point A. (Original seizure memo seen and returned as the case file containing the original seizure memo has been produced by Sh. Pankaj Bharti, Ahlmad in the court of Sh. Satish Kumar Arora, Ld. ASJ-02, Patiala House Court, New Delhi)

During the aforesaid search one light brown colour purse containing Rs.160/-, two photographs of present accused Ariz @ Junaid, his two original mark sheets of UTP University Lucknow of B.Tech First year (2005-06) and of Second year (2006-07) having roll no. 05083133007, his original character certificate dated 02.06.2003 issued from Jyoti Niketan School, Azam Garh, UP, his original 10th class passed certificate from Jyoti Niketan School Azam Garh, UP, his original 12th class passed certificate from Jyoti Niketan School Azam Garh, UP and his original 12 class statement of marks from Jyoti Niketan School Azam Garh, UP were also recovered from the place of occurrence which was seized by ACP Sanjeev Yadav in case FIR no. 166/2008 PS Karol Bagh vide separate seizure memo. Copy of the seizure memo is on record and already marked as Ex.PW23/C bearing my signature at point B. (Original seizure memo seen and returned as the case file containing the original seizure memo has been produced by Sh. Pankaj Bharti, Ahlmad in the court of Sh. Satish Kumar Arora, Ld. ASJ-02, Patiala House Court, New Delhi).

Copies of two mark sheets of UTP University Lucknow of B.Tech First year (2005-06) and of Second year (2006-07) having roll, no.

Signature Not Verified

Digitally Signed
By: RANJU BHALLA
Signing Date: 12.10.2023
17:10:01



05083133007, character certificate dated 02.06.2003 issued from Jyoti Niketan School, Azam Garh, UP, 10th class passed certificate from Jyoti Niketan School Azam Garh, UP, 12th class passed certificate from Jyoti Niketan School Azam Garh, UP and 12th class statement of marks from Jyoti Niketan School Azam Garh, UP of present accused Ariz @ Junaid are on record of the supplementary charge-sheet filed qua him. The copies of the said documents running into 6 pages are marked as Ex.PW13/A (colly). (Originals of the said documents are seen and returned as the case file containing the original of those documents has been produced by Sh. Pankaj Bharti, Ahlmad in the court of Sh. Satish Kumar Arora, Ld. ASJ-02, Patiala House Court, New Delhi).

On 18.10.2008, I again joined investigation of the present case with IO. On that day, Inspector Satish Sharma then IO seized my official Glock 9 mm pistol bearing no. LBZ-149 and its magazine which I was carrying and used at the time of shoot out in question. I had fired five rounds from that pistol during the shoot out in our self defence. Inspector Satish Sharma had converted the said pistol and magazine into cloth parcel, sealed the same with the seal of 88 and seized them vide seizure memo Ex.PW8/T bearing my signature at point A. One 81 Naresh Solanki of Crime Branch had also witnessed the said proceedings.

On 05.01.2009 my statement was recorded by the IO Inspector Satish Sharma u/sec.161 Cr.P.C.

On 07.02.2010, I had identified the accused Shahzad @ Pappu before IO Inspector Satish Sharma while he was in custody of ACP Bhisham Singh, Special Cell NDR in case FIR no. 293/08 PS Tilak Marg.

On 31.03.2010, on the instructions of ACP Bhisham Singh I had gone to CFSL (CBI) CGO complex for getting voice specimen of accused Shahzad was to be taken in case FIR no. 293/08 PS Tilak Marg. I went there, met Sh. Ingersal, SSO-II Photo Division CFSL New Delhi. Accused Shahzad was also produced before him. Specimen voice of accused Shahzad was recorded in the CD make Pleomax by Sh. Ingersal. The said CD was handed over to me. I kept the same in a CD mailer envelop and sealed the same with the seal of RKS and seized it vide seizure memo which is on record and already marked as Ex.PW8/W bearing my signature at point X. Copy of the sad CD containing specimen voice of accused Shahzad is also on record and already marked as, Ex.PW26/D.

Some time in the month of July 2009 I had joined the investigation of this case. I was also called by the Board comprising experts from CFSL and doctors of AIIMS Hospital, constituted to give subsequent opinion qua



the injuries sustained by two deceased terrorists and deceased Inspector Mohan Chand Sharma. I had attended said proceedings and explained the circumstances of the events witnessed by me. A CD was also prepared containing animated reconstruction of the sequence of events pertaining to this case.

On 26.02.2018, I was called by the present IO of this case at the office of STF/Crime Branch Sun Light Colony Delhi where I had identified the accused Ariz @ Junaid present in the court to be the same person who on 19.09.2008 had fired on the police party and managed to escape from the place of occurrence.

Inspector R. Srinivasan, present IO of the case, recorded my supplementary statement in the present case on 26.02.2018. “

(emphasis supplied)

15.3. To appreciate the case of the prosecution, it is also pertinent to examine the testimony of the injured eye-witness, i.e., HC Balwant (PW-36). His examination-in-chief is reproduced hereinbelow:

“On 19.09.2008, I was posted as HC in Special Cell Lodhi Colony, New Delhi. On that day at about 8.00AM when I was present in the office, SI Rahul Kumar received information from Inspector Mohan Chand Sharma and briefed officials present in the office that he had received an information regarding presence of one Basheer @ Atif along with associates at Flat no. 108, L-18, Batla House, Jamia Nagar, New Delhi;. Accused Basheer @ Atif was involved in serial blasts happened in Delhi on 13.09.2008. SI Rahul recorded the said information in the roznamcha vide DD no. 3. Thereafter, he constituted a team comprising himself. Inspector Sanjay Dutt, Inspector Mohan Chand Sharma, SI Dharmender, SI Ravinder. Tyagi, SI Dalip Kumar, SI Rakesh Malik, SI Devender and other police officials. SI Rahul Kumar also briefed the police officials present in the special cells regarding the said Information. Thereafter, a raiding team comprising myself, SI Rahul Kumar, SI Ravinder: Tyagi, SI Rakesh Malik, HC Manish, HC Vinod, HC. Satender, Ct. Virender Negi, Ct. Sandeep to conduct raid at the aforesaid address. We left the office at about 9.30AM in



a private Wagon-R car belonging to SI Ravinder Tyagi and on two motorcycles. Officials of the raiding party were carrying arms and ammunition and bullet proof jacket issued to them as per register maintained in the office of Special Cell. I was also carrying service pistol. Before leaving, the office of Special Cell SI Rahul Kumar also recorded DD entry in this regard but I do not remember its number.

Firstly we reached Abassi Chowk at about 10.15 a.m. On the instructions of Inspector Mohan Chand Sharma, SI Rahul Kumar sent SI Rakesh Malik and HC Manish to Saheen Bagh Jamia Nagar for verification of some address. While we were present at Abassi Chowk, SI Rahul Kumar requested 6/7 passersby to join the raid and the purpose of raid but all of them declined to join the raid giving their reasonable and genuine excuses and left the place without disclosing their names and addresses. No action was initiated against those persons due to paucity of time and urgency of raid. During this course, another raiding team consisting of Inspector Mohan Chand Sharma along with other police officials of his team also reached Abassi Chowk. Inspector Mohan Chand Sharma briefed the police officials of both the raiding team. The said team reached Abassi Chowk at about 10.30 a.m. All the members of raiding team were in civil dress. We all proceeded to L-18 Building Balia House Jamia Nagar, New Delhi and reached there at about 11.00 a.m. When we reached the said building an advance team comprising myself. Inspector Mohan Chand Sharma, SI Dharmender, SI Rahul Kumar, SI Ravinder Tyagi, HC Satender and HC Udai Veer was formed to conduct the raid at flat in question. The remaining members of the team were deployed outside the building on its back and front land. Some members of the raiding team were also deployed on the vehicle parked on the main road along with Masjid Khalilullah. Inspector Mohan Chand Sharma asked SI Dharmender to go upstairs posing himself as Vodafone executive to find-out the presence, of the terrorists In the flat. Accordingly, SI Dharmender reached there and returned within 2-3 minutes and informed the member of advance team regarding presence of some person in the flat. Thereafter we all member of advance team also went upstairs to the said flat. Inspector Mohan Chand Sharma was leading the team. He knocked the main door of Flat No. 108, Top Floor, L-18 Batla



House, Jamia Nagar disclosing the identity of the police officials. Inspector Mohan Chand Sharma further asked the occupants of the flat to open the door stating that “darwaja kholo police hai” but none of them responded the said call. We tried to open the said main door of the flat but it was found bolted from inside. There were two doors in the flat. Accordingly, we checked the second door on the left side of the flat. It was found shut but not bolted from inside. We, the member of advance team entered the flat through the second door. Inspector Mohan Chand Sharma was ahead of all of us. As soon as we entered the flat occupants of the flat started firing on the police party from both the sides i.e. left and right sides of the flat. There were three persons in the drawing room who started firing on the police party. We got trapped in the drawing room and had to resort to firing in our self defence. Since HC Satender and HC Udaiveer were not carrying any weapon, they took shelter in the room situated in the right side of the flat. From the said firing of the occupants of the flat myself and Inspector Mohan Chand Sharma sustained bullet injuries. One of the occupants present in the drawing room of the flat also sustained bullet injury and fell on the floor of the drawing room and remaining two occupants present in drawing room of the flat started trying to escape from there by opening the main gate of the flat while continuously firing on the police party and they somehow managed to escape from the main gate of the flat. After sustaining injuries Inspector Mohan Chand Sharma had fallen down on the ground and his service pistol had also fallen down on the ground and SI Dharmender had picked it up from there. Since I had sustained bullet injuries in my right hand, my service pistol had also fallen down on the ground but I somehow picked it up by my left hand. Thereafter, I handed over my pistol to HC Satender.

The accused Ariz @ Junaid present in the court was one of the three persons present in the drawing room who along with his two more associates including co-accused Shahjad @ Pappu had fired on the police party including myself and inspector Mohan Chand Sharma and we both sustained bullet injuries and thereafter he along with co-accused Shahjad @ Pappu managed to flee from there.



SI Dharmender with the help of HC Udaiveer brought Inspector Mohan Chand Sharma downstairs. SI Ravinder Tyagi brought me downstairs. On the instruction of SI Ravinder Tyagi took me to Trauma Centre AIIMS in a vehicle. Later I came to know that Inspector Mohan Chand Sharma was taken to Holy Family hospital by SI Dharmender and HC Udaiveer.

On the instructions of SI Ravinder Tyagi, Ct. Gurmeet had taken me to Trauma Centre AIIMS New Delhi where I was operated upon and remained admitted for about 15-20 days.

On 07.02.2010, I also joined investigation of this case and on that day, I had identified the co-accused Shahzad @ Pappu before the then IO Inspector Satish Sharma. Accused Shahzad @ Pappu was in the custody of ACP Bhisham Singh in case FIR no. 293/08 PS Tilak Marg.

On 01.03.2018 I again joined investigation of this case and I had identified the accused Ariz @ Junaid present in the court (correctly identified by the witness) to be the same person who along with co-accused Shahzad @ Pappu and their associates had fired on the police party on 19.09.2008 during the shoot out at Flat no. 108, L-18, Batla House, Jamia Nagar New Delhi and manage to flee from the spot.”

15.4. At this stage, it is pertinent to note that on a pointed query from this Court, learned counsel for the appellant submitted that the actual encounter/incident, inasmuch as it related to the two deceased occupants is not in dispute. It is the presence of the appellant and his subsequent alleged escape from the flat at the relevant point of time that is being contested.

15.5. It may be noted HC Santender (PW-33), HC Udai Veer Singh (PW-37), SI Ravinder Kumar Tyagi (PW-85) and SI Dharmender Kumar (PW-20) have deposed on similar lines as the aforesaid two eye-witnesses. The ocular testimony has been challenged by learned counsel for the appellant, *inter-alia*, on the ground that the aforesaid witnesses, in their statements recorded under Section 161 of the



CrPC, have not given any description regarding the appearance of the two occupants who escaped the flat. It has been further urged that in the FIR, the two escaped occupants were named as 'Pappu' and 'Junaid' by Mohd. Saif. The appellant has referred to as the person with the alias 'Junaid', however, the prosecution has not been able to establish that the present appellant is the one who is claimed to be known as 'Junaid'. On the other hand, learned Special Counsel for the State submitted that the primary evidence against the appellant is the dock identification by the eye-witnesses, including the injured eye-witness. It was also urged on behalf of the State that if the prosecution had to falsely implicate a person, it would have been most convenient for them to implicate Mohd. Saif, who was found present at the spot on the day of incident. It is pertinent to note that the complaint (Ex. PW-8/C) clearly gives an account of the escape of two occupants named 'Pappu' and 'Junaid', as named by Mohd. Saif. It is not the case of the appellant that the prosecution was aware, at that time, of his existence or that he was a suspect in any of the ongoing investigations in the serial blasts that took place in Delhi. It is further not the case of the appellant that members of the raiding team or subsequently, the investigating team were in any way, inimical towards the appellant or had known him, in any manner.

15.6. The question, therefore, is why would the prosecution introduce the story of escape of two occupants of the said flat? What possible benefit would the prosecution have obtained by introducing the story of the escape. So far as not giving of description of the present appellant as well as the other co-convict is concerned, we find force in the arguments of learned Special Counsel for the State that the dock identification of the appellant by the eye witnesses and especially the



injured eye witnesses is the primary evidence. The law relating to the testimony of eye witnesses is well settled and Hon'ble Supreme Court in **Abdul Sayeed v. State of M.P.** reported as **(2010) 10 SCC 259** has held that special status is to be accorded to the testimony of an injured eye witness. It has been held as under:

“28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. “Convincing evidence is required to discredit an injured witness.” [Vide *Ramlagan Singh v. State of Bihar* [(1973) 3 SCC 881 : 1973 SCC (Cri) 563 : AIR 1972 SC 2593] , *Malkhan Singh v. State of U.P.* [(1975) 3 SCC 311 : 1974 SCC (Cri) 919 : AIR 1975 SC 12] , *Machhi Singh v. State of Punjab* [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] , *Appabhai v. State of Gujarat* [1988 Supp SCC 241 : 1988 SCC (Cri) 559 : AIR 1988 SC 696] , *Bonkya v. State of Maharashtra* [(1995) 6 SCC 447 : 1995 SCC (Cri) 1113] , *Bhag Singh* [(1997) 7 SCC 712 : 1997 SCC (Cri) 1163] , *Mohar v. State of U.P.* [(2002) 7 SCC 606 : 2003 SCC (Cri) 121] (SCC p. 606b-c), *Dinesh Kumar v. State of Rajasthan* [(2008) 8 SCC 270 : (2008) 3 SCC (Cri) 472] , *Vishnu v. State of Rajasthan* [(2009) 10 SCC 477 : (2010) 1 SCC (Cri) 302] , *Annareddy Sambasiva Reddy v. State of A.P.* [(2009) 12 SCC 546 : (2010) 1 SCC (Cri) 630] and *Balraje v. State of Maharashtra* [(2010) 6 SCC 673 : (2010) 3 SCC (Cri) 211] .]

30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.”



15.7. It is well settled law that the deposition of an injured eye witness is at a higher pedestal. In the present case, HC Balwant (PW-36), who was injured in the first part of the encounter, has clearly identified the appellant in the Court. It is further noted that despite cross-examination, his testimony with regard to the identification could not be impeached. In view of the aforesaid discussion, this Court finds no reason to disbelieve the testimony of the injured eye-witness, HC Balwant (PW-36).

Recovery of the articles belonging to the appellant

16. So far as the recovery of articles belonging to the appellant is concerned, it is the case of the prosecution that the same were recovered at the instance of Mohd. Saif and was seized by DCP Sanjeev Kumar Yadav (PW-95) *vide* seizure memo (Ex. PW-23/C) in case FIR No. 166/08 registered at PS Karol Bagh.

16.1. It is the case of the prosecution that the following articles were recovered:

- i. A light brown colour purse containing Rs. 160/-
- ii. Two passport size photographs of the appellant.
- iii. Two original marksheets of the year 2005-06 and 2006-07 of B.Tech course at University of Lucknow.
- iv. Original character certificate dated 02.06.2003 issued from Jyoti Niketan School, Azamgarh, Uttar Pradesh.
- v. Original 10th Class passing certificate from Jyoti Niketan School, Azamgarh, Uttar Pradesh.
- vi. Original 12th Class passing certificate Jyoti Niketan School, Azamgarh, Uttar Pradesh.



16.2. It is the case of the prosecution that the said articles were recovered at the instance of Mohd. Saif and were seized by DCP Sanjeev Kumar Yadav (PW-95) in case FIR No. 166/08, registered at P.S. Karol Bagh. Learned counsel for the appellant submitted that the aforesaid articles were seized in the present case by Inspector Satish Sharma (PW-86) only on 05.01.2009, despite the fact that the aforesaid articles, as per the case of prosecution, had already been recovered on the date of the incident. Attention of this Court was drawn to the testimonies of SI Rahul Kumar (PW-13), SI Dharmender (PW-20), DCP Sanjeev Kumar Yadav (PW-95), Inspector JS Joon (PW-81) and Inspector Satish Sharma (PW-86) to demonstrate that there are material contradictions in the case of the prosecution in relation to the recovery of the articles. It was sought to be demonstrated that the aforesaid articles were never seized from the spot and had been subsequently planted and in support of the said contention, Mirza Azam Beg (DW-1), i.e., uncle of the appellant deposed that the latter was his nephew. He deposed that police officials had come to his house and had made enquiries with regard to him as well as family members and his nephew, i.e. the present appellant. He further deposed as under:

“First they inquired about the occupants. They also demanded the photographs of accused Ariz but I told that I did not have any such photographs and I further told them they may check his belongings which were lying in my house. They took away all his belongings and no documents were prepared in this regard. I also came to know that police had conducted a raid at the native place of accused Ariz and taken over the belongings of the accused, (obj. to by Ld. Addl. PP being hearsay). 2-3 police officials in civil dress used to guard my house for many months and also they used to visit my house for inquiries. Even I used to be called by the police officials several times.”



16.3. The witness to the recovery of the aforesaid articles, SI Ravinder Kumar Tyagi (PW-85) has categorically stated that the said articles were recovered at the instance of Mohd. Saif on the date of the incident. It is admitted case of the prosecution that the articles were recovered by DCP Sanjeev Kumar Yadav (PW-95) in case FIR No. 166/2008 registered at PS Karol Bagh. It is further pertinent to note that the raiding party reached Batla House in pursuance of the investigation in the aforesaid FIR. Nothing has come on record, by way of any explanation or suggestion as to how these articles belonging to the appellant came to be in the possession of the police officials. At this stage, it is relevant to point out that no explanation was put forth by the appellant in his statement under Section 313 of the CrPC regarding the recovery of the aforesaid articles. The question put to the appellant under Section 313 of the CrPC is being reproduced as under:

“Q.25. It is further in evidence against you through the deposition of PW 95 Sanjeev Kumar Yadav that at the instance of Mohd. Saif, PW 95 also recovered your light brown colour purse containing Rs.160/-, your two passport size photographs Ex.P13/L, your two original mark sheets of UTP University Lucknow of B.Tech First Year (2005-06) and of second year (2006-07) having roll no.05083133007, your original character certificate dated 02.06.2003 issued from Jyoti Niketan School, Azamgarh, UP, your original 10th class pass certificate from Jyoti Niketan School, Azam Garh, UP, your original 12th class pass certificate from Jyoti Niketan School, Azam Garh, UP and your original 12th class statement of marks from Jyoti Niketan School, Azam Garh, UP Ex.P-13 (colly)from the place of occurrence and seized the same vide seizure memo Ex. PW23/C. What do you have to say ?
Ans. It is incorrect.”

16.4. In view of the aforesaid circumstance, the statement of Dr. Mirza Azam beg (DW-1) given in support of the appellant cannot be accepted. The averments made therein seem to be an afterthought, which is further clarified from the fact that the



witnesses to the recovery, i.e., SI Rahul Kumar (PW-13) and SI Ravinder Kumar Tyagi (PW-85) were not cross-examined regarding the factum of police officials visiting the home of Dr. Mirza Azam beg (DW-1) and taking away articles of the appellant. No such plea was taken by the appellant in his statement under Section 313 of the CrPC either. It is also relevant to note that the said defence witness, in his cross-examination, stated as under:

“XXX by Sh. A.T.Ansari, Ld. Addl.PP for state.

The distance between the place of incident and my house must be about one and half kilometer. During those days, I was working at Fortis Hospital, Noida. There used to be no fixed time for going to my hospital in the morning hours sometimes I used to leave at 9.00 AM or 9.30 AM or even 10:00 AM depending upon the call received from the hospital. On that day, I had left the house at about 10:00 AM. I did not know the names of the friends of the accused living in Delhi at that time as I used to leave the house for the hospital in the morning and used to return later in the evening. I never used to interfere in day to day life of the accused including what times he leaves the house and at what time he return back. Vol. Most of the times he used to remain at house for studies. He had not taken any admission in any regular course during those days. Vol. He was preparing for his further competitive examinations. I do not know what articles/items were there in the alleged bag which was taken away by the police from my house. Personally I did not approach any authority nor I brought the facts that accused was at my house when I left for hospital on that day, into their notice. I was informed about the arrest of the accused. Even thereafter I did not approach any authority\ to bring the said facts into their notice. “

16.5. It is not the case of the appellant that he had given any complaint with regard to the said articles being lost or stolen or that the same were taken by the police officials at any point of time. In view thereof, there is no cogent reason for this Court to disbelieve recovery of the said articles belonging to the appellant on the date of incident, i.e., 19.09.2008 from Flat no. 108, L-18, Batla House.



Call Detail Records and Voice Comparison

17. The presence of the appellant at Flat No. 108, L-18, Batla House on the day of the incident has been further sought to be established by way of CDRs of the mobile number 9811004309 belonging to Mohd. Atif Ameen @ Basir.

17.1. It is the case of the prosecution that the appellant made an outgoing call from the said mobile number on 18.09.2008 at 17:42:56 hours. It is the case of the prosecution that the call in question did not mature, however the appellant was heard speaking in the background. The prosecution has proved on record that the mobile number 9811004309 belonged to Mohd. Atif Amin @ Basir by way of a Customer Application Form (Ex. PW-25/B to Ex. PW-25/H). By way of the Cell-ID Chart (Ex. PW-71/E), it has come on record that the relevant outgoing call at 17:42:56 hours on 18.09.2008 was made from Batla House.

17.2. The aforesaid call at 17:42:56 hours is further sought to be established by way of voice comparison of the appellant's specimen voice sample with intercepted conversations recorded by the prosecution during the course of investigation. At this juncture, it is pertinent to take note of the sequence of events with respect to the evidence with regard to the CDR and subsequent voice comparison sought to be proved by the State:

- i. 10.09.2008 – Sh. G.S Patnaik (PW-53), the then Principal Secretary, Home, Government of NCT of Delhi ordered the interception of cell phone numbers 9811004309 and 353541021762780 for a period of 60 days with effect from 01.09.2008 to 30.10.2008. A copy of the said order has been exhibited as Ex. PW-67/A.



- ii. 19.08.2009 – SI Manjeet Sharma (PW-80) downloaded the intercepted call record of the mobile number 9811004309 onto two DVDs (Ex. PW-26/C) having the same contents, which were seized by DCP Sanjeev Kumar Yadav (PW-95) .
- iii. 27.03.2018 – Sh. Arun Kumar Gupta (PW-70) recorded the specimen voice of the appellant on an SD Card (Ex. PW-70/P). The said SD Card was seized by SI Manoj Kumar (Ex. PW-8/W).
- iv. 16.04.2018 - The parcels containing the SD Card of the specimen voice of the appellant and the DVD of the intercepted calls were received at CFSL for voice comparison.
- v. 11.06.2018 – In the Forensic Voice Examination Report (Ex. PW-71/G), Sh. Amitosh Kumar (PW-74) gave his findings regarding the voice matching of the appellant with the intercepted phone calls.

17.3. It has further come on record that SI Manjeet Sharma (PW-80) downloaded the intercepted conversations into two DVDs (Ex.PW26/C). He has further stated that these two DVDs having the same contents were sealed in two separate parcels and seized by DCP Sanjeev Kumar Yadav (Ex. PW-15/C). He has further testified about the condition of the servers at the time when the conversation were downloaded in the aforesaid DVDs and has given a certificate under Section 65B of the Indian Evidence Act (Ex.PW-77/A) to that effect. It is further case of the prosecution that Sh. Ingarsal, Senior Scientific Officer (PW-69) has deposed that he took the voice sample of the appellant on 31.03.2010 on a CD which was seized by SI Rahul Kumar (PW-13) in the presence of Sh. Krishan Kumar (PW-68) and Sh. Ingarsal (PW-69).



17.4. Learned counsel for the appellant has urged that the aforesaid electronic evidence by way of voice sample could not be looked into because the certificate under Section 65B of the Indian Evidence Act (Ex. PW-77/A) furnished by SI Manjeet Sharma (PW-80) did not relate to the period when the conversation were actually downloaded on to the DVDs. It is also argued that the certificate under Section 65B of the Indian Evidence Act does not satisfy the requirement of the said Section. It was submitted by the learned counsel appearing on behalf of the appellant that the intercepted calls were originally recorded on a server and the primary evidence in that regard would be the hard disk of the said server, which has not been produced in the present case. The case of the prosecution is that the said calls were transferred from the said server to the said two DVDs by SI Manjeet Sharma (PW-80). The certificate under Section 65B of the Indian Evidence Act, as per learned counsel for the appellant, ought to be of the contemporaneous time and date, i.e., 19.08.2009, when the data was downloaded from the server to the DVDs. However, the certificate under Section 65B of the Indian Evidence Act (Ex. PW-77/A) is admittedly dated 09.03.2018, and was prepared by SI Manjeet Sharma (PW-80) before his examination in this case.

17.5. *Per contra*, learned Special Counsel for the State has submitted that in terms of **Anvar P.V. v. P.K. Bahseer** reported as **(2014) 10 SCC 473**, the DVDs itself have been exhibited and thus, there was no requirement of Section 65B of the Indian Evidence Act. It is further submitted, without prejudice to the above that the Hon'ble Supreme Court in **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal** reported as **(2020) 7 SCC 1** has clarified the law relating to Section



65B of the Indian Evidence Act in Para 73.2 of the aforesaid judgment, in which it is recorded as under:

“73.2. The clarification referred to above is that the required certificate under Section 65-B(4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the device concerned, on which the original information is first stored, is owned and/or operated by him. In cases where the “computer” happens to be a part of a “computer system” or “computer network” and it becomes impossible to physically bring such system or network to the court, then the only means of providing information contained in such electronic record can be in accordance with Section 65-B(1), together with the requisite certificate under Section 65-B(4). The last sentence in para 24 in *Anvar P.V. [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108]* which reads as “... *if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act ...*” is thus clarified; it is to be read without the words “*under Section 62 of the Evidence Act,...*”. With this clarification, the law stated in para 24 of *Anvar P.V. [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108]* does not need to be revisited.”

17.6. In order to appreciate the submissions made on behalf of the parties regarding the certificate under Section 65B of the Indian Evidence Act in relation to the DVDs, it is relevant to examine the testimony of SI Manjeet Sharma (PW-80) who downloaded the relevant conversation on to the DVDs. SI Manjeet Sharma (PW-80), in his examination before learned Trial Court has stated as follows:

**“Statement of SI Manjit Sharma (now retired as inspector) S/o Sh. Late Sh. Lajpat Rai Sharma, R/o 615, Bank Colony, Near Hardayai Public School, Bahadurgarh, Haryana (recalled for examination qua trial of accused Ariz Khan @ Junaid @ Anna @ Salim)
ON S.A**



On 19.08.2009, I was posted as SI at Special Cell, NDR Lodhi Colony, New Delhi and was serving as Incharge, Interception Exchange. My duty was to feed/put the landline telephone/mobile numbers on computer server meant for interception pursuant to an order issued by competent authority received from PHQ, Delhi in this regard.

On 19.08.2009, Sh. Sanjeev Kumar Yadav, the then ACP Special Cell NDR came to me and asked me to provided intercepted call records pertaining to mobile number 9811004309 belonging to Vodafone company for the period from 01.09.2008 to 19.09.2008. The said mobile number was already on interception pursuant to an order received from competent authority in this regard.

Pursuant to the said request made by Sh. Sanjeev Yadav, ACP, I directly transferred the data of intercepted calls pertaining to the said mobile number from the computer server, make HP Proliant ML 350 G 4P install in the office of NDR for the interception purposes in two DVDs. I marked the said DVDs as DVD-I and DVD-II and handed over the same to Sh. Sanjeev Kumar Yadav, the then ACP Special Cell, NDR in the presence of SI Ravinder Tyagi. The contents/dates of both the said DVDs were the same. I had provided the said Datas in two DVDs for the reason that if one DVD failed to play, the other may be played for the analysis of its contents. Sh. Sanjeev Kumar Yadav, the then ACP Special Cell Ndr converted the said DVDs in two separate cloth pullandas, sealed them with the seal of SKY and seized the same vide seizure memo already Ex. PW15/C bearing my signature at point Y.

The said DVDs were taken into possession by the said ACP in case FIR no. 166/08 PS Karol Bagh Delhi.

The said two DVDs were of make WRITEX, Recordable Media 4.7 GB/120 MIN.

Data of intercepted calls contain in the said DVDs were derived from information automatically fed into the computer server in the ordinary course of activities of intercepted mobile/landline number. The said server had been in regular use for the purpose of storing such information/activities during the period when mobile phones were put on interception. The said server remained functional through out the intercepted period. It had been under my direct supervision and control being password protected. The said datas were retrieved from the said server which remained uninterrupted and were transferred in the said two DVDs without any tampering or interruption. Even the engineers from Kommlab Company used to remain present for 24x7 in order to fix any problem if developed into the system.

Signature Not Verified

Digitally Signed
By: RANJU BHALLA
Signing Date: 12.10.2023 17:10:01



I had also provided certificate u/sec.65B of Indian Evidence Act qua the intercepted calls provided by me in the said two DVDs after transferring the same from computer server in the DVDs. The said certificate is already Ex.PW77/A bearing my signature at A.

I can identify the DVDs in which I had transferred the intercepted call records and handed over the same to ACP Sanjeev Yadav.

At this stage, Ct. Ram Kishan, munshi to MHC (M), Special Cell NDR New Delhi produced a paper envelop sealed with the seal of the CFSL OBI New Delhi on the one side and the seal of Ld. District & Session Judge/SE on the other side. The parcel bears the particular of CFSL Report number and word "parcel DVD/II", Ex. "Q-1" are also written on it. The said parcel is opened from the site of the seal of the court. Out of which one torn cloth parcel containing DVD in a DVD case bearing particulars of FIR no. 166/08 PS Karol Bagh, is taken out. On the cloth parcel the word DVD-II containing intercepted calls of mobile no. 9811004309 is written and it also bears the signature of ACP Sanjeev Kumar Yadav. The DVD is make of Writex, recordable media 4.7 GB/120 min. and the particular of CFSL report and FIR number 166/08 PS Karol Bagh is written. Word Secret and Ex.PW161/C ASJ (C) dated 10.01.2013 is also written on the DVD.

The DVD is shown to the witness who identified it to be the one of the DVDs i.e. DVD II containing intercepted call record pertaining to mobile number 9811004309 and the same was handed over to ACP Sanjeev Yadav and it was seized vide seizure memo Ex.PW15/C.

Copy of the said DVD is already on record and marked as EX.PW26/C.

XXXXXX by Sh. M. 8. Khan Ld. Counsel for accused.

Before 19.08.2009, I had not handed over the intercepted calls pertaining to mobile no. 9811004309 to any police officer as the same was not demanded. I am not aware about the interception order. I am also not aware about the period for which the interception was to be done. A record of mobile number for intercepted calls were maintained. The record of such mobiles used to be maintained by the interception department and such record was also used to be maintained in the office of Joint CP/Special CP PHQ Delhi. I do not remember as to when the interception of the said mobile number was started as I personally do not use to listen such type of interception; I was attached with ACP Sanjeev Yadav, one HO was also with me to assist me. The main server of interception system was installed at PHQ. In the system of interception a log record of calls of intercepted mobile numbers was generated in the system. I did not take out the print out of log nor I know if its print out can be taken or not. It is wrong to suggest that the CD Ex. PW26/C was



manipulated at the instance of ACP Sandeep Yadav, It is wrong to suggest that I have deposed falsely.”

17.7. The certificate under Section 65B of the Indian Evidence Act (Ex. PW-77/A) with regard to the DVD (Ex. PW 26/C) in which the recordings of the intercepted phone calls were downloaded is as under:

CERTIFICATE U/S 65B OF INDIAN EVIDENCE ACT-1872

I hereby certify that intercepted calls of mobile no. 9811004309 were recorded and stored in connection with case FIR no. 166/08 dated 13.09.2008 u/s 121A/122/123/120B IPC, sec. 4/5 Explosives Substances Act, 16/18/20/23 Unlawful Activities (Prevention) Act Police Station Karol Bagh, Delhi. That said calls were initially stored on the computer server of make HP Proliant ML350 G4P installed in the office of Special Cell/ NDR.

During the relevant period, i.e. 1.9.2008 to 19.9.2008, data of intercepted calls was regularly fed into the above computer server in ordinary course of activities of the Special Cell.

On 19.08.2009, I transferred the intercepted calls of mobile number 9811004309 from said server onto two DVDs (of make Writex, Recordable Media 4.7GB/120 min) marked as DVD -I & DVD-II on the instructions of Sh Sanjeev Kumar Yadav, then ACP/Special Cell/NDR and IO of case FIR No. 166/2008 PS Karol Bagh, Delhi. The information contained in the DVDs is derived from such information fed into the above referred computer server in the ordinary course of activities of Special Cell. The above referred computer server was in regular use for the purpose of storing information for the purposes of the activities of Special Cell during the period when the calls were intercepted and subsequently copied.

The DVDs containing the data of interception were produced by the computer server referred to above, during the period over which the said computer was used regularly to store information for the purpose of interception carried out during the relevant period. The said computer server during the period of interception and during the period of recording and copying on DVDs were under my technical control, supervision and were password protected.

The computer server and other devices, used in this process, were in good working condition and operating properly before and during the period of interception and also during retrieval/transfer process. The process of data retrieval/transfer was uninterrupted and material (intercepted calls) were copied without any tampering or interruption.

The information given above is correct to the best of my knowledge and belief.

Manjeet Sharma
(Manjeet Sharma) 09/10/2018

Inspector, Office of DCP Operations and Communication, Haiderpur, Delhi

Signature Not Verified

Digitally Signed
By: RANJU BHALLA
Signing Date: 12.10.2023
17:10:01

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17.8. So far as the requirement of certificate under Section 65B of the Indian Evidence Act in the present case is concerned, we are of the view that the same would be required as the DVD sought to be proved by the prosecution is not the primary evidence. Admittedly, SI Manjeet Sharma (PW-80) had downloaded the intercepted calls from the server used for recording them to the DVDs. Thus, even as per **Arjun Panditrao Khotkar** (*supra*), since the original information was first stored on the server in the office of the Special Cell and the same could not be physically produced before the Court, the original information contained in such server downloaded to a DVD could be proved in accordance with Section 65B(1), together with the requisite certificate under Section 65B(4) of the Indian Evidence Act.

17.9. The question before this Court, therefore, is whether the certificate under Section 65B of the Indian Evidence Act (Ex. PW-77/A) satisfies the requirements of the said section? It was urged on behalf of the appellant that the aforesaid certificate was not of the contemporaneous time during which the data was downloaded from the server to the DVD (Ex. PW-26/C). Admittedly, the intercepted calls were downloaded onto the said DVD on 19.08.2009 and the certificate (Ex. PW-77/A) is dated 09.03.2018. The Hon'ble Supreme Court in **State of Karnataka v. M.R. Hiremath** (*supra*) while dealing with a situation determining the appropriate stage of production of a certificate under Section 65B of the Indian Evidence Act has held as under:

“**15.** Section 65-B(4) is attracted in any proceedings “*where it is desired to give a statement in evidence by virtue of this section*”. Emphasising this facet of sub-section (4) the decision in *Anvar* [*Anvar P.V. v. P.K. Basheer*, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] holds that the requirement of producing a certificate arises when



the electronic record is sought to be used as evidence. This is clarified in the following extract from the judgment : (*Anvar P.V. case* [*Anvar P.V. v. P.K. Basheer*, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] , SCC p. 484, para 16)

“16. ... Most importantly, such a certificate must accompany the electronic record like computer printout, compact disc (CD), video compact disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc., without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.”

(emphasis supplied)

16. The same view has been reiterated by a two-Judge Bench of this Court in *Union of India v. Ravindra V. Desai* [*Union of India v. Ravindra V. Desai*, (2018) 16 SCC 273 : (2019) 1 SCC (L&S) 225] . The Court emphasised that non-production of a certificate under Section 65-B on an earlier occasion is a curable defect. The Court relied upon the earlier decision in *Sonu v. State of Haryana* [*Sonu v. State of Haryana*, (2017) 8 SCC 570 : (2017) 3 SCC (Cri) 663] , in which it was held : (*Sonu case* [*Sonu v. State of Haryana*, (2017) 8 SCC 570 : (2017) 3 SCC (Cri) 663] , SCC p. 584, para 32)

“32. ... The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the court could have given the prosecution an opportunity to rectify the deficiency.”

(emphasis supplied)

17. Having regard to the above principle of law, the High Court erred in coming to the conclusion that the failure to produce a certificate under Section 65-B(4) of the Evidence Act at the stage when the charge-sheet was filed was fatal to the prosecution. The need for production of such a certificate would arise when the electronic record is sought to be produced in evidence at the trial. It is at that stage that the necessity of the production of the certificate would arise.”



17.10. In **Union of India v. CDR. Ravindra V. Desai** reported as (2018) 16 SCC 273, the Hon'ble Supreme Court was dealing a situation where the CDR of cellphone company was produced before the Armed Forces Tribunal without a certificate under Section 65B of the Indian Evidence Act. In view of the objection raised before the Armed Forces Tribunal, on an application filed, the learned Tribunal issued summons to the concerned Nodal Officer for production of the CDR alongwith a certificate under Section 65B of the Indian Evidence Act. The Hon'ble Supreme Court upheld the finding of the Armed Forces Tribunal with respect to the subsequent production of the certificate under Section 65B of the Indian Evidence Act by observing as under:

21. We are in agreement with the aforesaid findings. The learned counsel for the appellants rightly argued that non-production of the certificate under Section 65-B of the Evidence Act, 1872 on an earlier occasion was a curable defect which stood cured. Law in this behalf has been settled by the judgment of this Court in *Sonu v. State of Haryana* [*Sonu v. State of Haryana*, (2017) 8 SCC 570 : (2017) 3 SCC (Cri) 663] , which can be traced to the following discussion in the said judgment: (SCC pp. 584-85, para 32)

“32. It is nobody's case that CDRs which are a form of electronic record are not inherently admissible in evidence. The objection is that they were marked before the trial court without a certificate as required by Section 65-B(4). It is clear from the judgments referred to supra that an objection relating to the mode or method of proof has to be raised at the time of marking of the document as an exhibit and not later. *The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the Court could have given the prosecution an opportunity to rectify the deficiency.* It is also clear from the above judgments that objections regarding admissibility of documents which are per se inadmissible can be taken even at the appellate stage. Admissibility of a document which is inherently inadmissible is an issue which can be taken up at the appellate stage because it is a fundamental issue. The mode or method of



proof is procedural and objections, if not taken at the trial, cannot be permitted at the appellate stage. If the objections to the mode of proof are permitted to be taken at the appellate stage by a party, the other side does not have an opportunity of rectifying the deficiencies. The learned Senior Counsel for the State referred to statements under Section 161 CrPC, 1973 as an example of documents falling under the said category of inherently inadmissible evidence. CDRs do not fall in the said category of documents. We are satisfied that an objection that CDRs are unreliable due to violation of the procedure prescribed in Section 65-B(4) cannot be permitted to be raised at this stage as the objection relates to the mode or method of proof.”

(emphasis supplied)”

17.11. We have perused the statement of SI Manjeet Sharma (PW-80) who appeared as a witness before the learned trial Court, as well as the certificate under Section 65B of the Indian Evidence Act (Ex. PW-77/A). A conjoint reading of the two clearly reflects that the safeguards required under Section 65B of the Indian Evidence Act to ensure the source and authenticity of the electronic record sought to be proved as evidence were duly complied with. SI Manjeet Sharma (PW-80) has clearly deposed that he downloaded the intercepted calls from the server installed in the office of the Special Cell/NDR onto two DVDs and one of the said DVDs, having the same contents as the other, was exhibited before the concerned trial Court as Ex. PW-26/C. The cross-examination of the aforesaid witness further reflects that apart from the bald suggestion to the witness with regard to the certificate being issued at the instance of Investigating Officer, nothing substantial with regard to the defect in the certificate (Ex. PW-77/A) has come on record. Nothing has been brought on record to show that the electronic record sought to be proved through the DVD was either tampered, altered etc., in any manner. It is further pertinent to point out that no objection with regard to the mode of proof



was taken at the time when the aforesaid certificate was exhibited before the learned Trial Court. In view of the above, we hold that the certificate under Section 65B of the Indian Evidence Act (Ex.PW-77/A) is proper and therefore, the DVD (Ex. PW-26/C) shall be considered as relevant under the provision of the Indian Evidence Act.

17.12. Similarly, it was argued on behalf of the appellant that the certificate under Section 65B of the Indian Evidence Act in support of the CDR of the mobile number 9811004309 also does not conform to the requirements of the said provision. On the other hand, learned Special Counsel for the State submitted that requirement of Section 65B of the Indian Evidence Act is fulfilled in the present case. In support of his contentions in that regard, learned Special Counsel for the State relies upon the judgment of the Hon'ble Supreme Court in **Arjun Panditrao Khotkar (supra)**.

17.13. The certificate under Section 65B of the Indian Evidence Act in support of the CDR was furnished by Sh. Deepak, Nodal Officer, Vodafone Mobile Services (PW-64), who, in his examination-in-chief, stated as under:

“I had also provided the certificate u/sec.65 B of Indian Evidence Act qua the said CDR. Same is already Ex.PW25/I. The said CDR is a print out of electronic record taken out from the computer system which was under my control as Nodal Officer and password protected, when I had taken out the printout of the CDR. The said system has been functional during the period pertaining to the said CDR. It never broke down. The informations contained in the CDR i.e. electronic record or automatically fed in the system and the same are true reproduction of the original.”

During his cross-examination, the said witness stated as under:

We fetch the information contained in CDR from our system and take their print out in the format of GSV which opens in computer window system. I cannot say the name of particular software being used in the window system to



open this. file. During this process the data contained in CDR cannot be edited or formatted. Nor the same can be edited even later on.

In view of the above, this Court is of the opinion that the CDR is corroborated by the records of the intercepted phone calls. The fact that the date, time, period, details of computer device, model of printer used etc. have not been mentioned on the certificate under Section 65B of the said CDR will have no bearing on the case.

Non-Joining of Public Witnesses

18. The ground of non-joining of public witnesses by the police party before or after the operation is not tenable. This Court agrees with the submission made on behalf of the State that joining of public witness in a operation like the present one, could have jeopardized the life and security of such a witness. Although, it has been submitted on behalf of the prosecution that there were attempts to join the public witnesses, however, non-joining of any public witnesses does not affect the case of the prosecution. Further, no material has been brought on record to demonstrate that the testimony of police officer was tendered on account of any previous enmity on any other circumstance.

Delay in lodging the FIR

19. Learned counsel for the appellant has further urged that there was a delay of 05 hours in lodging the complaint (Ex. PW-8/C). It is urged that the information relating to the shootout had already been received at the police station at 11:30AM *vide* DD Entry no. 10A (Ex. PW-50/B) but the aforesaid complaint was lodged at 04:00 PM. It is submitted by the learned counsel that the aforesaid delay demonstrated the fact that the prosecution, after due deliberation manipulated the sequence of events and introduced the story of escape by the two alleged occupants



from the subject flat. On the other hand, learned Special Counsel for the state has urged that there was no inordinate delay in lodging the FIR and in any case, no question had been put to the witnesses during the course of prosecution evidence in order to illicit any explanation in that regard.

19.1. We do not agree with the submission of the learned counsel as nothing has come on record to show that the raiding party or the officers in the investigation of the present FIR knew about the existence of the present appellant or the other occupant before the investigation commenced in the present case. It is further noted that nothing has been brought on record to show that any benefit would have accrued to the prosecution case by way of introduction of the two escaped occupants from the subject flat. In fact, it is the case of the defence itself that the real name of the present appellant was not known to the prosecution at the time of registration of the FIR. In **Ram Jag and Others v. State of Uttar Pradesh** reported as **(1974) 4 SCC 201**, it was held as under:

“**16...**Even a long delay in filing report of an occurrence can be condoned if the witnesses on whose evidence the prosecution relies have no motive for implicating the accused. On the other hand, prompt filing of the report is not an unmistakable guarantee of the truthfulness of the version of the prosecution.”

Ballistic Examination Report

20. The next contention of the learned counsel for the appellant was that the ocular evidence is liable to be rejected since the same is not supported by the ballistic evidence. It was urged that since the bullets fired by the police party as well as the two deceased occupants tally with the empty cartridges/projectiles recovered from the spot, there was no empty cartridge or projectile which could be



attributed to a weapon alleged to have been fired by the present appellant. The learned Special Counsel for the State, on the contrary has submitted that one fired bullet in a mutilated condition recovered on 19.09.2008 and three small pieces of fired bullets recovered on 13.10.2008 did not match any of the recoveries, thereby refuting the aforesaid argument on behalf of the appellant. In support of his contention, learned Special Counsel placed the following chart on record:-

Signature Not Verified

Digitally Signed
By: RANJU BHALLA
Signing Date: 12.10.2023
17:10:01



CHART FROM FORENSIC & BALLISTIC REPORTS ON RECOVERED LEADS

Bullet number	Recovered from	Weapon fired from	Page no.
BC 1	Body of Sajid – AIIMS post mortem (parcel 4)	Rajbir's AK47 - W9	p.596, 600, 603,607
BC 2	Body of Sajid – AIIMS post mortem (parcel 5)	Rahul's Glock - W4	
BC 3	Body of Sajid – AIIMS post mortem (parcel 6)	Rajbir's AK47 - W9	
BC 4	Body of Atif – injury no.20 – left buttock – AIIMS post mortem (parcel 11)	Rahul's Glock - W4	p.597, 600, 604,607
Piece of copper jacket of fired bullet		Could not match	p.597, 604,607
Fragmented pieces of fired bullet/s	Body of Atif – buttock regain right pocket of trouser – AIIMS post mortem (parcel 12)	Could not match	
1 small metallic piece of copper jacket of a fired bullet	Body of Atif – AIIMS post mortem – from injury no.12 (parcel 13)	Could not match	
BC 5	Found on the ground Recovered by PS Jamia Nagar on 19.9.08 (please see attached site plan) (parcel 39)	MC Sharma, later used by Dharmender - W8	p.598, 600, 601, 606,607
BC 6		Balwant's pistol - W7	
BC 7		Ravinder Tyagi's pistol -W6	
BC 8		Rahul's Glock - W4	
BC 9		MC Sharma, later used by Dharmender - W8	
BC 10		- Do -	
BC 11		Rahul's Glock -W4	
BC 12		Atif's pistol – W2	
BC 13		- Do -	
BC 14		- Do -	
1 fired bullet in mutilated condition		Could not match	
2 metallic core pieces of 7.62 MM bullet of assault rifle		Could not match	
BC 15	Recovered by CFSL on 13.10.08 from wall in front of kitchen (parcel 41)	MC Sharma, later used by Dharmender - W8	p.598, 601, 606,607
BC 16	Recovered by CFSL on 13.10.08 from drawing room wall (parcel 42)	- DO -	
3 small pieces of fired bullets	Recovered by CFSL on 13.10.08 (parcel 43)	Could not match	p.598, 607
		Could not match	
		Could not match	
BC 17	Extracted by CFSL from bullet proof vest of Rajbir (parcel 40)	Sajid's pistol – W3	p.598, 600, 606,607

Signature Not Verified

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By: RANJU BHALLA
Signing Date: 12.10.2023 17:10:01

9/2022 and DEATH SENTENCE REF. 1/2022



20.1. A perusal of chart relied upon by the learned Special Counsel for the State clearly shows that one fired bullet in a mutilated condition recovered on 19.09.2008 and three small pieces of fired bullets recovered on 13.10.2008 were not fired from any of the weapons recovered and thus, are unaccounted for. The contention of the learned counsel for the appellant is, therefore, not tenable and cannot be used to discredit the testimony of the eye witnesses with regard to the presence of the appellant and his firing during the shootout on the said date of the incident.

20.2. So far as the discrepancy between the charge framed for the use of a revolver and the subsequent opinion (Ex. PW-27/B) is concerned, it is a matter of record that during the course of prosecution evidence, no question was put to the eye-witnesses with respect to the nature of the weapon being used by the appellant. It is further pertinent to note that the subsequent opinion (Ex. PW-27/B) is with respect to the composition of bullet, size of entry and exit wounds and their comparison with the exhibited fire-arms. A perusal of the chargesheet reflects that the factum of usage of a revolver has come on record in the disclosure statement of the appellant himself. In any case, it is not the specific case of the prosecution that the bullet fired by the appellant resulted in injuries caused to HC Balwant (PW-36) and the death of late Inspector Mohan Chand Sharma. It is also not the case of the prosecution that the appellant exhorted the other occupants of the flat to shoot at the police party. The appellant has been prosecuted and convicted with the aid of Section 34 of the IPC, for being present at the spot, being armed and for firing at the police party in furtherance of a common intention. As already noted



hereinabove, 04 bullets/shots have not matched with any of the weapons recovered from the spot.

20.3. The Hon'ble Supreme Court, in **State of Rajasthan v. Arjun Singh and Others** reported as **(2011) 9 SCC 115** held as under:

“**18.** As rightly pointed out by the learned Additional Advocate General appearing for the State that mere non-recovery of pistol or cartridge does not detract the case of the prosecution where clinching and direct evidence is acceptable. Likewise, absence of evidence regarding recovery of used pellets, bloodstained clothes, etc. cannot be taken or construed as no such occurrence had taken place. As a matter of fact, we have already pointed out that the gunshot injuries tallied with medical evidence. It is also seen that Raghuraj Singh and Himmat Raj Singh, who had died, received 8 and 7 gunshot wounds respectively while Raj Singh (PW 2) also received 8 gunshots scattered in front of left thigh. All these injuries have been noted by the doctor (PW 1) in his reports, Exts. P-1 to P-4.”

20.4. In view of the above, this Court finds no reason to disbelieve the ocular testimony of the eye-witnesses and the same are in consonance with the ballistic examination report.

Probability of Escape of the Appellant

21. Finally, the main contention of the learned counsel for the appellant was that the prosecution has not been able to establish as to how the present appellant managed to escape from the subject flat and thereafter, the building in which the said flat was located on the date of incident.

21.1. It was submitted that since the escape was highly improbable, therefore, presence of the appellant becomes doubtful. In other words, it is the case of the defence that since the prosecution has not been able to establish the manner of escape by the appellant, as a corollary, it must be presumed that he was not present



at the spot. In support of the aforesaid contention, learned counsel relied upon the testimony of the eye-witnesses who stated that immediately, upon entering the subject flat, they were fired upon, and in retaliation, they too had fired on the occupants. It was the contention on behalf of the appellant that the manner in which the incident has been narrated by the witnesses, it was highly improbable for two persons to escape after opening two doors, especially when firing was constantly on at that relevant point of time.

21.2. It was contended that the testimonies of the witnesses show that the building, i.e., L-18 Batla House in which the subject Flat no. 108 was located was cordoned off before the operation and the police party had positioned themselves in the front lane as well as the back lane adjoining the aforesaid house. It was contended that L-18, Batla House was a four storeyed building and the subject flat was at the fourth floor with only one stairwell going up and down. In view of the fact that the ground floor exit was guarded, the only other way possible for the occupants to escape was through the roof but the same was not possible as the next adjoining building was only of two floors. It was further contended that when the deceased occupant Mohd. Atif Ameen @ Basir fell down on the floor near the door, after sustaining a bullet injury, it would be highly improbable for two persons to escape as the body of the deceased occupant would obstruct in opening of the door.

21.3. On the other hand, learned Special Counsel for the State submitted that once the prosecution has proved the presence of the appellant beyond reasonable doubt, the presumption under section 106 of the Indian Evidence Act would be attracted and consequently, the onus would shift on the defence to establish the reverse, i.e., that the appellant was never present at the date and time of the incident. It was



submitted by the learned Special Counsel that the same is corroborated by medical evidence inasmuch as the post-mortem report of Mohd. Atif Ameen @ Basir (Ex. PW-19/A) shows that the entry wounds were on his back which indicates that the occupants were trying to escape from the flat with their back towards the police party. We find force in the argument of learned Special Counsel for the State since no questions were put to the eye-witnesses in the cross-examination regarding whether the deceased occupant fell before or after the escape of the other two occupants, including the appellant, it cannot be presumed that the deceased occupant had fallen down before the escape of the other two, including the appellant.

21.4. It is the case of the prosecution that the two occupants escaped from the said flat through ‘Main Door’. Upon a cumulative reading of the testimonies of the eye witnesses and the other documents on record, including the site plan, the defence of the appellant that two occupants could not have escaped in the scenario described by the prosecution cannot be simply presumed.

21.5. It is pertinent to note that except for examining two witnesses in his defence to state that he was not present at the spot, the appellant has brought no material on record to show where he was actually present at the date and time of the incident. We do not agree with the learned counsel appearing on behalf of the appellant that defence of the appellant was not of *alibi* but of a probability and since in the circumstances, it was highly improbable for the appellant to escape, his non-presence at the spot should be considered established by way of preponderance of probabilities.



21.6. In our view, since there is overwhelming evidence in the form of ocular testimony and other corroborative evidence by way of scientific and technical reports, the burden shifts on the appellant and in view thereof, it was upon him to show by way of cogent and reliable evidence that he was not present at the spot, the date and time of the incident.

Discrepancies in Seizure Memos and Biological Examination Report

22. So far as argument of learned counsel for the appellant with regard to the discrepancy in the description of clothes of late Inspector Mohan Chand Sharma and HC Balwant (PW-36) between the seizure memo and CFSL report is concerned, it may be noted that the link evidence from the point of recovery of the same and its delivery to CFSL is complete. Nothing has been brought on record by way of cross-examination that the aforesaid parcels were, at any time, tampered with. It is also pertinent to note that there has been no cross-examination on this point on behalf of the appellant.

22.1. The discrepancy, as pointed out by learned counsel for the appellant is as under:

- i. With respect to the clothes of late Inspector Mohan Chand Sharma: The colour of his pants is stated to be blue in the seizure memo (Ex. PW-32/A). In the report of the CFSL (Ex. PW-68/A), the same is mentioned as black. Similarly as per CFSL report, a sleeveless *baniyan* was also a part of the parcel, however, the same was not mentioned in the seizure memo.
- ii. With respect to the clothes of HC Balwant (PW-36): Seizure memo (Ex. PW-35/B) mentioned only a shirt, whereas, the report of the CFSL (Ex. PW-68/A) mentions *Kurta*, *Pyajama*, *Baniyan*, *Hankerchief* and *Towel*.



22.2. This Court has gone through the chain of documents from the time of seizure of the exhibits till their deposition at the CFSL. The link is complete and nothing has been brought on record to show otherwise. As rightly pointed by the prosecution that no cross examination has been done on this point to seek any explanation from the concerned witnesses. In the opinion of this Court, nothing turns on the said discrepancy.

Conclusion

23. In view of the foregoing discussion, this Court finds no reason to interfere with the judgment of conviction dated 08.03.2021 passed by Sh. Sandeep Yadav, ASJ-02, South-East, Saket in Sessions Case No. 212/18, arising out of FIR No. 208/08, P.S. Jamia Nagar, titled 'State v. Ariz Khan @ Junaid @ Anna @ Salim'. The conviction of the appellant for offences under Sections 302/186/333/353/307/34 of the IPC, Section 174A of the IPC and Section 27 of the Arms Act is confirmed.

SENTENCE

24. By way of CRL.A 9/2022, the appellant assails the judgment of conviction dated 08.03.2021 as well as order on sentence dated 15.03.2021, passed by Sh. Sandeep Yadav, ASJ-02, South-East, Saket in Sessions Case No. 212/18, arising out of FIR No. 208/08, P.S. Jamia Nagar, titled 'State v. Ariz Khan @ Junaid @ Anna @ Salim'. Death Sentence Ref. 1/2022 reference has been sent to this Court through the learned District and Sessions Judge, South-East, Saket, New Delhi seeking confirmation of the aforesaid order on sentence dated 15.03.2021 whereby, *inter-alia*, the appellant has been sentenced to death and directed to be



‘hanged by his neck till he is dead’ for offence committed under Section 302 of the IPC.

Submissions on behalf of the State

25. Learned Special Counsel for the State submitted that the offence that the appellant has been convicted of warrants award of death sentence. At the outset, learned Special Counsel drew the attention of this court to Rule 1, Chapter 19, Volume III of the Delhi High Court Rules, wherein it has been stated that the punishment in any case has to be awarded according to what is suited to the offence and the offender. The quantum punishment can depend on various factors such as motive and gravity of offence, character of the offender, age, antecedents etc. The said rule reads as under:

“1. The award of suitable sentence depends on a variety of considerations—The determination of appropriate punishment after the conviction of an offender is often a question of great difficulty and always requires careful consideration. The law prescribes the nature and the limit of the punishment permissible for an offence, but the Court has to determine in each case a sentence suited to the offence and the offender. The maximum punishment prescribed by the law for any offence is intended for the gravest of its kind and it is rarely necessary in practice to go up to the maximum. The measure of punishment in any particular instance depends upon a variety of considerations such as the motive for the crime, its gravity, the character of the offender, his age, antecedents and other extenuating or aggravating circumstances, such as sudden temptation, previous convictions, and so forth, which have all to be carefully weighed by the Court in passing the sentence.”

26. Learned Special Counsel submitted that the offence committed by the appellant is a ‘rarest of rare’ offence and in the facts and circumstances of the case, the maximum punishment permissible under law must be meted out to him. In support of his contentions, the learned Special Counsel has primarily relied upon



the judgment of the Hon'ble Supreme Court in **Bachan Singh v. State of Punjab** reported as **(1980) 2 SCC 684**, wherein, the Hon'ble Supreme Court has laid down an indicative list of aggravating and mitigating circumstances to be considered and balanced before awarding a death sentence. The Hon'ble Supreme Court has held as under:

202. Drawing upon the penal statutes of the States in U.S.A. framed after *Furman v. Georgia* [33 L Ed 2d 346 : 408 US 238 (1972)] , in general, and clauses 2 (a), (b), (c) and (d) of the Penal Code, 1860 (Amendment) Bill passed in 1978 by the Rajya Sabha, in particular, Dr Chitale has suggested these “aggravating circumstances”:

“*Aggravating circumstances:* A court may, however, in the following cases impose the penalty of death in its discretion:

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed—

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code.”

203. Stated broadly, there can be no objection to the acceptance of these indicators but as we have indicated already, we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other.

XXX



206. Dr Chitale has suggested these mitigating factors:

“Mitigating circumstances.—In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:

- (1) That the offence was committed under the influence of extreme mental or emotional disturbance.
- (2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.
- (3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.
- (4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.
- (5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.
- (6) That the accused acted under the duress or domination of another person.
- (7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.”

207. We will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence. Some of these factors like extreme youth can instead be of compelling importance. In several States of India, there are in force special enactments, according to which a “child”, that is, “a person who at the date of murder was less than 16 years of age”, cannot be tried, convicted and sentenced to death or imprisonment for life for murder, nor dealt with according to the same criminal procedure as an adult. The special Acts provide for a reformatory procedure for such juvenile offenders or children.”

27. In view of the above, learned Special Counsel for the State submitted that the appellant has been convicted for offences under Sections 186/353/333/307/302/34/174A of the IPC and Section 27 of the Arms Act, *inter-alia*, for firing at police personnel resulting in bullet injury caused to HC Balwant (PW-14) and the death of Inspector Mohan Chand Sharma. In view thereof, it was



submitted that in doing so, the appellant caused the death of a police officer during the course of his duty and thus, his actions fall squarely within category ‘(c)’ of aggravating circumstances enumerated in **Bachan Singh (supra)**.

28. Learned Special Counsel further submitted that the offence committed by the appellant is one which shook the collective conscience of the society and is a fit case for award of death sentence and that such sentence can be awarded despite the young age of the appellant. The fact that the appellant absconded further shows that he has no remorse for his actions and cannot be reformed.

29. Learned Special Counsel further submits that in case death penalty awarded to the appellant is not confirmed, he must be awarded ‘term sentence without parole’ and that his sentences must be ordered to run consecutively and not concurrently. In support of his contention, learned Special Counsel placed reliance on **Swamy Shradhananda v. State of Karnataka** reported as **(2008) 13 SCC 767**, wherein it has been observed by the Hon’ble Supreme Court that the formalization of a special category of sentence, albeit in only a very few cases shall also be of a great advantage. Learned Special Counsel also submitted that the appellant must also be directed to pay compensation to the family of the deceased Inspector Mohan Chand Sharma and to HC Balwant.

30. In support of his contentions, learned Special Counsel has placed reliance on the following judgments:

Principles for award of death penalty –

- i. **Bachan Singh v. State of Punjab**, (1980) 2 SCC 684.
- ii. **Machhi Singh v. State of Punjab**, (1983) 3 SCC 470.
- iii. **Ramnaresh v. State of Chhattisgarh**, (2012) 4 SCC 257.



- iv. Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, (2009) 6 SCC 498.
- v. Manoj Pratap Singh v. State of Rajasthan, (2022) 9 SCC 81.
- vi. Praveen kumar v. State of Karnataka, (2003) 12 SCC 199.

Death sentence awarded in cases where a public servant/police officer was murdered –

- i. Gayasi v. State of Uttar Pradesh, (1981) 2 SCC 712.

Death penalty can be awarded despite the young age of the convicts -

- i. Mohammed Ajmal Mohamed Kasab v. State of Maharashtra, (2012) 9 SCC 1.
- ii. Sevaka Perumal v. State of Tamil nadu (1991) 3 SCC 471.
- iii. Atbir v. State (NCT of Delhi), (2010) 9 SCC 1.
- iv. Vikram Singh v. State of Punjab, AIR 2010 SC 1007.
- v. Shivu v. State of Karnataka, (2007) 4 SCC 713.
- vi. Jai Kumar v. State of Madhya Pradesh, (1999) 5 SCC 1.
- vii. Ramdeo Chauhan v. State of Assam, (2000) 7 SCC 455.
- viii. Dhananjay Chatterjee v. State of West Bengal, (1994) 2 SCC 220.
- ix. Amrutlal Someshwar Joshi v. State of Maharashtra, (1994) 6 SCC 200.

Post incident conduct such as abscondence points towards absence of remorse and possibility of reformation –

- i. Praveen Kumar v. State of Karnataka, (2003) 12 SCC 199.

Being the bread winner and having a family not considered as a factor for not awarding the death penalty –

- i. Sevaka Perumal v. State of Tamil Nadu, (1991) 3 SCC 471.



Sentence which may be awarded and an alternate to death sentence –

- i. Swamy Shradhananda v. State of Karnataka, (2008) 13 SCC 767.
- ii. Union of India v. Sriharan @ Murugan. (2016) 7 SCC 1.
- iii. Jayawant Dattatraya Suryarao v. State of Maharashtra, (2001) 10 SCC 109.

Consecutive running of sentences –

- i. Muthuramalingam v. State, (2016) 8 SCC 313.
- ii. Shankar Kishanrao Khade v. State of Maharashtra, (2013) 5 SCC 546.

Compensation –

- i. Ankush Shivaji Gaikwad v. State of Maharashtra, (2013) 6 SCC 770.
- ii. Sarwan Singh & Ors. v. State of Punjab, (1978) 4 SCC 111.
- iii. Hari Singh v. Sukhbir, (1988) 4 SCC 551.

Submissions on behalf of the appellant/Ariz Khan

31. Learned counsel appearing on behalf of the appellant opposes the present reference on the ground that no exercise has been undertaken to ascertain the mitigating circumstances, as per the judgment of the Hon'ble Supreme Court in **Re: Framing Guidelines Regarding Potential Mitigating Circumstances To be Considered While Imposing Death Sentences** reported as (2022) SCC OnLine SC 1246. Learned counsel appearing on behalf of the appellant drew the attention of this Court to the chargesheet, wherein it has been recorded that the present appellant had disclosed, subsequent upon his arrest, that while he was in Nepal, he was teaching and married a Nepalese national. From the year 2015-2017, he was in Saudi Arabia and upon his return to Nepal, he began working as a Vice-Principal at a school, before he was arrested. It was further pointed out that the fact that the present appellant was teaching and was holding a position of responsibility would



be a circumstance which should be given due weightage while considering the present death sentence reference. With regard to the prosecution's submission regarding the circumstance of the death of a public servant on duty being stated in **Bachan Singh (supra)** as an aggravating circumstance, it was submitted that it is not clear from the prosecution case as to who fired the fatal shot resulting in the death of late Inspector Mohan Chand Sharma. It was stated that no evidence has come on record to conclude that the fatal shot was fired by the present appellant. Learned counsel further submitted that mitigating circumstances and the aggravating circumstances as stated in **Bachan Singh (supra)** need to be balanced. It was further submitted that the reformation and possibility of a settled life for the appellant cannot be lost sight of, and should be given due weightage. Reliance was placed on **Sanatan Goswami v. State of West Bengal** reported as **2022 SCC OnLine Cal 2425** and in particular paragraphs 72 to 91 thereof.

Analysis and Findings

32. While awarding death sentence to the appellant, *vide* order on sentence dated 15.03.2021, the learned ASJ observed as under:

“Mitigating Circumstances:

11. When one looks at the entire record and submissions of Mr M.S. Khan, Id. counsel for convict, one hardly finds any mitigating circumstance. The fact that offence was not committed in pre-meditated manner and in pursuance of a conspiracy will obviously not constitute mitigating circumstance. Age of the convict at the time of commission of crime will also not to be considered as the mitigating circumstance.

Aggravating Circumstances:

12. Deleterious impact on social order and human psyche added to the list of aggravating circumstances. Unbearable miseries inflicted by convict do constitute aggravating circumstance. Nature of offence and manner of committing the crime aroused extreme indignation to the society in this case.



13. Now as per the mandate of law in *Bachan Singh Vs. State of Punjab, AIR 1980 SC 898* it has to be seen as to whether the case falls within the category of rarest of the rare case.

14. It has been proved on record that convict alongwith his accomplices fired at police officials on duty without any provocation. It is pertinent to mention here that the police team led by deceased Inspector Mohan Chand Sharma had gone to the place of occurrence only to nab the persons involved in Delhi blast cases. Police officials had no intention to kill the occupants of the flat. This is clear from the fact that deceased Inspector Mohan Chand Sharma who was leading the police team knocked the door at the flat and disclosed his identity saying “**darwaza kholo police hai**”. Some of the members of the advance team were not even carrying arms. Secondly police officials did not fire at Md. Saif who had locked himself inside the bathroom and surrendered before the police officials. It is, therefore, obvious that convict Ariz Khan @ Junaid @ Anna @ Salim alongwith his Accomplices fired at police officials without being challenged, instinctively and while doing so killed one of the raiding police officials namely Inspector Mohan Chand Sharma and fatally injured another police official namely HC Balwant. The fact that convict along with his accomplices committed the murder of deceased Inspector Mohan Chand Sharma, a member of police team (Special Cell Delhi Police), would constitute aggravating circumstance as per the dictum of law laid down in *Bachan Singh (supra)* case.

15. It should not be forgotten that deadly weapons like AK-47 and two pistols were retrieved from the flat where the shoot out took place. The defence has not able to clarify as to for which purpose these deadly weapons were kept by the convict and his accomplices in the flat. Considering the nature of devastation that these weapons can cause, it will be safe to conclude that these weapons were kept in the flat i with a view to indulge in terrorist and anti social activities.

16. I find substance in the submission of Mr. A.T.Ansari, Id. Public Prosecutor for State that convict Ariz Khan @ Junaid @ Anna @ Salim and his associates were carrying deadly weapons which clearly suggest that they were ready to kill anyone.

17. The offence proved against accused is not an ordinary act but a crime against the State. Convict, while committing offence acted like a dreaded and well trained terrorist who does not deserve any leniency.

18. The first question that has arisen before the court while deciding the quantum of sentence is as to whether there is any chance of reformation of convict. It has been proved on record that convict after the shoot out managed



to escape and run away from the spot. The convict eluded investigating agencies for almost ten years despite coercive process against him. Convict was declared proclaimed offender way back in the year 2009 and was ultimately arrested in 2018. There is no evidence on record that convict during investigation or trial showed any signs of reformation or repentance. Thus, the natural and inescapable conclusion is that there is no chance of reformation of convict.

19. The second question to be decided is as to whether convict continues to be a threat to the society. The abhorrent and brutal act of convict in firing on police party without any provocation itself shows that convict is not only the threat to the society but is also an enemy of the state. Involvement of convict in various blast cases indicated in Ex.PW-54/A not only in Delhi but also in Jaipur, Ahmedabad and U.P. in which hundreds of innocent people were killed and injured further demonstrates that convict continues to be a threat to the society and the nation.

20. Convict on account of his despicable act has forfeited his right to live. After balancing mitigating circumstances against aggravating circumstances, it is concluded that it a rarest of the rare case where convict deserves maximum sentence provided under the law. It is the level of magnitude, decree of brutality, attitude and mindset of wrong doer behind the crime alongwith other factors which makes it a rarest of the rare case. Protection of society and deterring criminal is an avowed object of law and this is required to be achieved by imprisonment of appropriate sentence. The most appropriate sentence for convict like Ariz Khan @ Junaid @ Anna @ Salim will be death penalty. Interest of justice will be met if convict is awarded death penalty.”

(emphasis supplied)

33. The thrust of the prosecution case with respect to the death sentence awarded to the present appellant is primarily based on the fact that the death of public servant on duty was caused, which, as laid down in **Bachan Singh (supra), is an aggravating circumstance. Learned Special Counsel also relied upon **Gayasi v. State of Uttar Pradesh** reported as (1981) 2 SCC 712, wherein the facts were as under:**



“1. The appellant’s land was auctioned on December 26, 1976 in a revenue sale held to recover arrears of land revenue. On the same day, the land of one Mool Chand was also sold for a similar reason. The deceased Bhagwan Singh, who was an Amin, acted as an officer of the court in effecting the aforesaid sales. After the sale proceedings were over, Bhagwan Singh was returning home on a bicycle, with his peon Shripat, who is examined in the case as PW 4. The appellant, Mool Chand and the latter’s son Daya Ram lay in wait for the deceased and while he was passing along on his bicycle, Daya Ram fired three shots at him; two out of these hit Bhagwan Singh, as a result of which he fell down. A split second thereafter, the appellant emerged with a sword and chopped off the neck of Bhagwan Singh. Daya Ram is still absconding but the appellant was convicted by the Sessions Court under Section 302 read with Section 34 of the Penal Code and was sentenced to death. He was also convicted under Section 307 of the Penal Code. The sentence of death having been confirmed by the High Court, the appellant has filed this appeal by special leave. The leave is limited to the question of sentence.”

34. In the present case, the shootout which took place at Batla House was neither pre-planned nor pre-mediated. It is the case of the prosecution itself that the raid was conducted for apprehending the suspect Atif Ameen @ Basir and in pursuance thereto, the police party reached the flat and was subsequently fired upon. Similarly, in the other judgments relied upon by learned Special Counsel for the State, death penalty has been awarded in cases where the offence committed was brutal and diabolical in nature. While laying down guidelines for award of death penalty, the Hon’ble Supreme Court, in **Machhi Singh v. State of Punjab** reported as (1983) 3 SCC 470 held as under:

“32. The reasons why the community as a whole does not endorse the humanistic approach reflected in “death sentence-in-no-case” doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of “reverence for life” principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realized that every member of the community is able to live with safety without his or her



own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent for those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by “killing” a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self-preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so “in rarest of rare cases” when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:

I. Manner of commission of murder

33. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,

(i) when the house of the victim is set aflame with the end in view to roast him alive in the house.

(ii) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.

(iii) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. Motive for commission of murder

34. When the murder is committed for a motive which evinces total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (b) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust, or (c) a murder is committed in the course for betrayal of the motherland.

III. Anti-social or socially abhorrent nature of the crime

35. (a) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in



order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.

36. When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

V. *Personality of victim of murder*

37. When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

38. In this background the guidelines indicated in *Bachan Singh case* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636] will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from *Bachan Singh case* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636] :

“(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the ‘offender’ also require to be taken into consideration along with the circumstances of the ‘crime’.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.”



35. Learned Special Counsel for the State, in the alternate, argued that a fixed life sentence should be awarded in the present case as was laid down by the Hon'ble Supreme Court in **Swamy Shradhananda v. State of Karnataka** reported as (2008) 13 SCC 767. It was held as under:

“92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh *or it may be highly disproportionately inadequate*. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all.

93. Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of rare cases. This would only be a reassertion of the Constitution Bench decision in *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898] besides being in accord with the modern trends in penology.

94. In the light of the discussions made above we are clearly of the view that there is a good and strong basis for the Court to substitute a death sentence by life imprisonment or by a term in excess of fourteen years and further to direct that the convict must not be released from the prison for the rest of his life or for the actual term as specified in the order, as the case may be.”



36. Recently, the Hon'ble Supreme Court, in **Manoj and Others v. State of Madhya Pradesh** reported as **2022 SCC Online SC 677**, laid down guidelines for psychiatric and psychological evaluation be done in cases where death sentence has been awarded. It was held as under:

“Practical guidelines to collect mitigating circumstances

248. There is urgent need to ensure that mitigating circumstances are considered at the trial stage, to avoid slipping into a retributive response to the brutality of the crime, as is noticeably the situation in a majority of cases reaching the appellate stage.

249. To do this, the trial court must elicit information from the accused and the State, both. The State, must—for an offence carrying capital punishment—at the appropriate stage, produce material which is preferably collected beforehand, before the Sessions Court disclosing psychiatric and psychological evaluation of the accused. This will help establish proximity (in terms of timeline), to the accused person's frame of mind (or mental illness, if any) at the time of committing the crime and offer guidance on mitigating factors (1), (5), (6) and (7) spelled out in *Bachan Singh [Bachan Singh v. State of Punjab, (1980) 2 SCC 684 : 1980 SCC (Cri) 580]*. Even for the other factors of (3) and (4)—an onus placed squarely on the State—conducting this form of psychiatric and psychological evaluation close on the heels of commission of the offence, will provide a baseline for the appellate courts to use for comparison i.e. to evaluate the progress of the accused towards reformation, achieved during the incarceration period.

250. Next, the State, must in a *time-bound manner*, collect *additional* information pertaining to the accused. An illustrative, but not exhaustive list is as follows:

- (a) Age
- (b) Early family background (siblings, protection of parents, any history of violence or neglect)
- (c) Present family background (surviving family members, whether married, has children, etc.)
- (d) Type and level of education
- (e) Socio-economic background (including conditions of poverty or deprivation, if any)



(f) Criminal antecedents (details of offence and whether convicted, sentence served, if any)

(g) Income and the kind of employment (whether none, or temporary or permanent, etc.);

(h) Other factors such as history of unstable social behaviour, or mental or psychological ailment(s), alienation of the individual (with reasons, if any), etc. This information should mandatorily be available to the trial court, at the sentencing stage. The accused too, should be given the same opportunity to produce evidence in rebuttal, towards establishing all mitigating circumstances.

251. Lastly, information regarding the accused's jail conduct and behaviour, work done (if any), activities the accused has involved themselves in, and other related details should be called for in the form of a report from the relevant jail authorities (i.e. Probation and Welfare Officer, Superintendent of Jail, etc.). If the appeal is heard after a long hiatus from the trial court's conviction, or High Court's confirmation, as the case may be — *a fresh report* (rather than the one used by the previous court) from the jail authorities is recommended, for a more exact and complete understanding of the contemporaneous progress made by the accused, in the time elapsed. The jail authorities must also include a fresh psychiatric and psychological report which will *further* evidence the reformatory progress, and reveal post-conviction mental illness, if any."

37. Following the aforesaid judgment of the Hon'ble Supreme Court in **Manoj (supra)**, necessary reports were summoned from the concerned Jail Superintendent with respect to the appellant's psychiatric and psychological condition, along with his conduct during the period of incarceration. Consequently, a 'Social Investigation Report', a 'Psychological Assessment Report' and a 'Home-town Investigation Report' were received. The relevant portions of the said reports are as under:

Social Investigation Report:

"The period undergone including under trial period less Interim bail period (if any) is around 5 years and more than 5.5 years including remissions. Convict is over 38 years old. As per the convict, he is a divorcee and has no



children. Convict is lodged in High Risk cell and therefore, his chores and interaction are limited. Still, his conduct is found unsatisfactory during the last year for which he was punished as per Delhi Prisons Rule. Convict has not given any statement regarding the case therefore, it cannot be ascertained if he has any regrets during incarceration of his deeds. It is pertinent to mention here that the convict has 10 other cases registered against him in various states such as Delhi, Uttar Pradesh, Gujarat, NIA and Special Cell. As the family of convict resides outside Delhi, for socioeconomic conditions and neighbours' attitude, report from concerned District Probation Officer (Azamgarh) may be considered.

Above mentioned facts and circumstances are submitted for further consideration by the competent authority. Therefore, the Social Investigation Report is submitted for further consideration in view of above-mentioned facts and circumstances.”

Psychological Assessment Report:

“Findings:

His emotion, thought, perception and higher mental functions were found well within normal range on clinical mental health interview. Scores of all the scales of MPQ were within the cut off scores indicating a balanced personality without propensity for any psychological or emotional disorder. Has shown social desirability in appropriately controlled manner and not affecting his responses on the questionnaire. He tends to be sensitive in order to deal with threats in life. No evidence of any disturbances on GHQ-12.

On Rorschach Psychodiagnostic Test there is no evidence of any psychopathology. He has revealed average productivity & reaction time, adequate reality testing and ego strength, adequate control on emotions, intro-tensive personality, adequate frustration tolerance, empathy and interpersonal orientation as well as belief in social norms.

Conclusions:

On the basis of the above test findings, it is concluded that Ariz Khan has adequate intellectual and cognitive functioning, adequate control on emotion and adequate capacity to handle frustration. He has not shown any indication of psychological problems or anomalies and has adequate interpersonal acumen with reasonable empathy and regards for social conventional norms.”



Home-Town Investigation Report (English Translation):

“Economic Status -

During local enquiry, as per information received from neighbors, the elder brother of the inmate Ariz Khan has a private job in NOIDA and his younger brother has a private job at a private school in Village Naseerpur of Azamgarh. The economic status of the family seemed normal.

Social status -

During local enquiry, as per information received from neighbors, the social status of the inmate's family at house no. 232, Jalandhari was stated to be normal. Inmate Ariz Khan was a 2nd Year B.Tech student at SDIT Engineering College, Muzaffarnagar, Uttar Pradesh. After the aforesaid incident, the inmate's family had no information about him till the year 2018. In the year 2018, the inmate's family was informed by the Delhi Police about him being in judicial custody.”

38. In the present case, the admitted position is that the appellant, who was aged around 23 years at the date of incident, i.e., 19.09.2008 was an occupant alongwith other persons at Flat no. L-18, Batla House. Admittedly, the prosecution had no prior information regarding the present appellant as he was neither a suspect nor a person being investigated at that stage. The pending cases cited by the prosecution are still at the stage of trial and the appellant has not been convicted in any of the said cases so far. In the present case, we have already held that the testimony of the eye-witnesses and other corroborating material establish the presence of the appellant at the place of incident and the factum of his firing at the raiding party while fleeing from the spot. But at the same time, it is pertinent to note that there is nothing on record to attribute the fatal shot responsible for the death of late Inspector Mohan Chand Sharma to any particular accused. The facts and circumstances of all the cases cited by the learned Special Counsel on behalf of the State are distinct from the present case. At this stage, it is pertinent to note that this



Court is conscious of the fact that during the incident, the country lost a decorated police officer who sacrificed his life in the line of duty. His contribution will never be forgotten by an eternally grateful nation. However, the circumstances of the present case, as discussed hereinbefore, are not sufficient for it to fall under the category of a 'rarest of rare' case.

39. As noted hereinabove, the learned Trial Court, while imposing death sentence on the appellant observed that the fact that the appellant fired at the police party without any provocation itself shows that he is threat to the society and also an enemy of the state. The said observations were premised on the fact that the present appellant is involved in various bomb blasts which resulted in the death of hundreds of innocent people and therefore, the learned Trial Court concluded that the case of the appellant is a 'rarest of rare' case. The submission of learned Special Counsel on behalf of the State with regard to a fixed term imprisonment as an alternative to death sentence is also based on the premise that the present case falls under the category of 'rarest of rare' case.

40. In **State v. Navin Ahuja** reported as **2012 SCC OnLine Del 5783**, a learned Division Bench of this Court, while dealing with the death sentence reference of a convict who was found guilty of committing the murder of his wife and two children, noted and observed as under:

“145. It would be useful for the Court to recollect that the court's task is not lightened only by noticing the brutality of the crime, because a focus only on that aspect tends to obscure all other features, some of which might be mitigative in character. This Court recollects, in this context, the following poignant passage from *Rajendra Prasad Singh v. State of UP*, (1979) 3 SCC 646 : AIR 1979 SC 916 (that was a case leading to the reference to *Bachan Singh*):



“An easy confusion is over-stress on the horror of the crime and the temporary terror verging on insane violence the perpetrator displays, to the exclusion of a host of other weighty factors when the scales are to settle in favour of killing by law the killer who resorts to unlaw. Speaking illustratively is shocking crime, without more, good to justify the lethal verdict? Most murders are horrifying, and an adjective adds but sentiment, not argument.Did not Lord Camden, one of the greatest and purest of English judges, say

“that the discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best it is oftentimes caprice; in the worst, it is every vice, folly and passion to which human nature can be liable.” (State v. Cummings 36 Mo.263 278 (1865) When life is at stake, can such frolics of fortune play with judicial veriest?

The nature of the crime-too terrible to contemplate-has often been regarded a traditional peg on which to hang a death penalty. Even Ediga Annamma (supra) has hardened here. But ‘murder most foul’ is not the test, speaking scientifically. The doer may be a patriot, a revolutionary, a weak victim of an overpowering passion who, given better environment, may be a good citizen, a good administrator, a good husband, a great saint. What was Valmiki once? And that sublime spiritual star, Shri Aurobindo, tried once for murder but by history’s fortune acquitted....

If we go only by the nature of the crime we get derailed by subjective paroxysm.”

In the said case, the learned Division Bench did not confirm the death sentence imposed on the convict and reduced it to life imprisonment, as per the ratio laid down in **Swamy Shradhananda (supra)**.

41. The other factor relevant for determining the sentence of the present appellant is the question that whether he is incapable of reforming himself or that such reformation is totally impossible. As pointed out hereinabove, in terms of judgment the of the Hon’ble Supreme Court in **Manoj (supra)**, a psychological



assessment report with respect to the present appellant was called for and the said report does not reflect that the appellant is incapable of reformation. The social investigation report received from the Probation Officer, Prison Welfare Services, Tihar Jail, Delhi, except for one solitary act in the last one year, for which the appellant was punished under the Delhi Prison Rules, 2018 *vide* punishment ticket dated 22.04.2022, does not give much detail about the conduct of the appellant, on account of the fact that he has been lodged in a high risk prison and his interaction is limited. Further, the psychological assessment report received from the Institute of Human Behaviour and Allied Sciences, Dilshad Garden, Delhi reflects that the appellant has indicated a balanced personality, without any propensity for psychological or emotional disorder. The report further reflects that Rorschach Psychodiagnostic Test showed no evidence of psychopathology. It is further recorded that the appellant has belief in social norms. The Home-Town Investigation Report received from the District Probation Officer, Azamgarh shows the previous economic status of the applicant as normal. It is further recorded that prior to the incident, the appellant was a 2nd Year B.Tech Student at SDIT Engineering College, Muzaffarnagar, Uttar Pradesh.

42. In view of the principles discussed hereinabove and in totality of the facts and circumstances of the case, we are of the opinion that the present case does not fall under the category of a 'rarest of rare case'. Accordingly, this Court is of the considered view that the sentence of rigorous imprisonment for life would be an appropriate sentence.

43. It is pertinent to note that the learned Trial Court, in the order on sentence records that *vide* order dated 08.03.2021, it had directed the Investigating Officer



to conduct an enquiry to ascertain the financial status of the convict and his family to assess their capacity to pay compensation to the legal heirs of deceased Inspector Mohan Chand Sharma. It is further recorded that the as per the report, the mother of the convict has one piece of agricultural land measuring 1380 square meters in Village Haripur, Tehsil Sagri, District Azamgarh, Uttar Pradesh and another agricultural land measuring 5860 square meters in Village Naseerpur Fatehpur, Tehsil Sagri, District Azamgarh, Uttar Pradesh. So far as the appellant is concerned, the report records as under:

“Accused/ convict Ariz Khan has no property or agricultural land in his name or his personal family as he is not married.”

Thus, the present appellant is not capable of paying the amount of fine imposed on him for various offences totaling to Rs. 11 lakhs. In this context, the following observation of the Hon’ble Supreme Court in **Adamji Umar Dalal v. State of Bombay** reported as **1951 SCC 1106** is relevant:

“8....In imposing a fine it is necessary to have as much regard to the pecuniary circumstances of the accused persons as to the character and magnitude of the offence, and where a substantial term of imprisonment is inflicted, an excessive fine should not accompany it except in exceptional cases....”

More recently, the Hon’ble Supreme Court, *vide* order dated 28.02.2023 passed in **Criminal Appeal No. 633 of 2023** titled ‘**Deepak Kumar Ganesh Rai Manto v. State of Goa and Anr.**’, while taking note of the financial condition of the appellant therein, observed and held as under:

“...Undoubtedly, he stands convicted of offences which cannot but be termed heinous. At the same time the Court also is to be conscious of the financial condition he is placed in. Taking in cue a judgment in Shahejad Khan(supra),



the Court hereby modifies the fine amount (imposed in respect of the conviction under Section 376 IPC) from ₹ 2,00,000/- to ₹ 50,000/-. Likewise, the default sentence is reduced from three years to one year's simple imprisonment....”

44. Therefore, in view of the above discussion, the order on sentence dated 15.03.2021 is modified and the appellant is sentenced as under:

- i. Sentenced to rigorous imprisonment for life alongwith a fine of Rs. 50,000/- and in default, simple imprisonment for 06 months for offence under Section 302/34 of the IPC.
- ii. Further rigorous imprisonment for 10 years alongwith a fine of Rs. 20,000/- and in default, simple imprisonment for 06 months for offence under Section 307/34 of the IPC.
- iii. Further rigorous imprisonment for 07 years alongwith a fine of Rs. 10,000/- and in default, simple imprisonment for 06 months for offence under Section 333/34 of the IPC.
- iv. Further rigorous imprisonment for 02 years alongwith a fine of Rs. 10,000/- and in default, simple imprisonment for 01 month for offence under Section 353/34 of the IPC.
- v. Further rigorous imprisonment for 03 months for offence under Section 186/34 of the IPC.
- vi. Simple imprisonment for 03 years alongwith a fine of Rs. 10,000/- and in default, simple imprisonment for 02 months for offence under Section 174A of the IPC.



- vii. Simple imprisonment for 03 years alongwith a fine of Rs. 15,000/- and in default, simple imprisonment for 02 months for offence under Section 27 of the Arms Act.
- viii. The sentences awarded under Sections 302/186/333/353/307/34 of the IPC, Section 174A of the IPC and Section 27 of the Arms Act to run concurrently.
- ix. The benefit of Section 428 of the CrPC shall be available to the appellant.

FINAL CONCLUSION

45. In view of the foregoing discussion, the judgment of conviction dated 08.03.2021 passed by Sh. Sandeep Yadav, ASJ-02, South-East, Saket in Sessions Case No. 212/18, arising out of FIR No. 208/08, P.S. Jamia Nagar, titled 'State v. Ariz Khan @ Junaid @ Anna @ Salim'; whereby the appellant has been convicted for offences under Sections 186/333/353/302/307/34 of the IPC, Section 27 of the Arms Act and Section 174A of the IPC is upheld.

46. The sentence of death imposed on the appellant by the learned Trial Court is not confirmed. The order on sentence dated 15.03.2021 passed by Sh. Sandeep Yadav, ASJ-02, South-East, Saket in Sessions Case No. 212/18, arising out of FIR No. 208/08, P.S. Jamia Nagar, titled 'State v. Ariz Khan @ Junaid @ Anna @ Salim' is modified to the extent as stated hereinabove.

47. Death Sentence Ref. 1/2022 is answered accordingly. CRL.A. 9/2022, for the aforesaid reasons, is allowed in part.

48. The appeal and the death sentence reference are disposed of in the aforesaid terms.

49. Pending applications, if any, also stand disposed of.



50. Copy of this judgment be sent to the concerned learned Trial Court for necessary information and compliance.
51. Copy of this judgment be sent to the concerned Jail Superintendent for necessary information and compliance.
52. Judgment be uploaded on the website of this Court, *forthwith*.

AMIT SHARMA
JUDGE

SIDDHARTH MRIDUL
JUDGE

OCTOBER 12, 2023/bsr