

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

%

Reserved on: 04th November, 2022

Pronounced on: 06th January, 2023

CRL.A. 568/2018

MOHD. SABIR AND ORS.

..... Appellants

Represented by: Mr. Ashok Aggarwal and Ms. Aditi Saraswat, Advs. Mr. Dhruva Bhagat, Adv. for A-3.

versus

STATE (GOVT. OF NCT OF DELHI)

.... Respondent

Represented by: Mr. Mukesh Kumar, APP for State with Inspector Sachin Kumar Verma, P.S. Krishna Nagar & Inspector K.K. Tiwari, Traffic Police.

CRL.A. 384/2018

MOHD. ASLAM

.... Appellants

Represented by: Mr. Vishal Raj Sehijpal & Mr. Anwar A. Khan, Advs.

versus

STATE (GOVT. OF NCT OF DELHI)

.... Respondent

Represented by: Mr. Mukesh Kumar, APP for State with Inspector Sachin Kumar Verma, PS Krishna Nagar & Inspector K.K. Tiwari, Traffic Police.

CRL.A. 530/2018

RUSTAM

..... Appellant

Represented by: Mr. Murari Tiwari, Adv., Mr. Rahul Kumar, Adv. and Ms. Nimisha Gupta, Adv.

versus

STATE

..... Respondent

Represented by: Mr. Mukesh Kumar, APP for State with Inspector Sachin Kumar Verma, PS Krishna Nagar

& Inspector K.K. Tiwari, Traffic Police.

CRL.A. 591/2018
SOHRAB

.... Appellants

Represented by: Mr. Ashok Aggarwal and
Ms. Aditi Saraswat, Advs.

versus

STATE (GOVT. OF NCT OF DELHI)

.... Respondent

Represented by: Mr. Mukesh Kumar, APP for
State with Inspector Sachin
Kumar Verma, P.S.Krishna Nagar
& Inspector K.K. Tiwari, Traffic
Police.

CRL.A. 554/2018
SALEEM

.... Appellants

Represented by: Mr. Ashok Aggarwal and Ms.
Aditi Saraswat, Advs.

versus

STATE (GOVT. OF NCT OF DELHI)

.... Respondent

Represented by: Mr. Mukesh
Kumar, APP for State with
Inspector Sachin Kumar Verma,
P.S. Krishna Nagar & Inspector
K.K. Tiwari, Traffic Police.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA
HON'BLE MR. JUSTICE ANISH DAYAL

JUDGMENT

ANISH DAYAL, J.

1. These appeals assail the impugned judgment dated 15th February, 2018 convicting the appellants, Mohd. Sabir, Pradeep Kumar Saini and Shan Mohd. (Crl. A. 568/2018), appellant Saleem (Crl. A. 554/2018), appellant Rustam (Crl. A. 530/2018), appellant Sohrab (Crl. A.

591/2018) for offence punishable under Section 396/412 IPC and convicting Mohd. Aslam (Crl. A. 384 of 2018) for offence punishable under Section 412 IPC.

2. The said appeals of Mohd. Sabir, Pradeep Kumar Saini, Shan Mohd., Saleem, Rustam and Sohrab further challenge the order of sentence dated 22nd March, 2018 awarding life imprisonment and fine of Rs. 20,000/- each (imprisonment for one year in default of payment of fine) for offence punishable under Section 396 IPC and all the seven appellants, rigorous imprisonment of seven years and fine of Rs. 10,000/- each (imprisonment for one year in default of payment of fine) for offence punishable under Section 412 IPC.

The Incident

3. The case of the prosecution arises from the registration of FIR No. 56 of 2011 under Sections 302/394/397/34 IPC registered at P.S. Krishna Nagar on the statement of Ms. Pooja Kapoor (PW-2) for dacoity and murder at Gambhir Jewellers, C-2/6, Lal Quarter, Krishna Nagar, Delhi. On receipt of information attended by Inspector K.K Tiwari (PW-45), the complainant (PW-2) stated that PW-2 was sales girl at the jewellery shop and on 23rd February, 2011 at about 5:00 p.m., she was present in the shop with another sales girl Ms. Reena (PW-3) and the proprietor Sh. Gaurav Gambhir who was sitting on his chair near a counter in the shop. Three boys having helmets on their heads entered in the shop and one of the boys went to where Gaurav Gambhir was sitting, put a pistol on the counter and threatened him to remain quiet. The other two boys came to the counter, where the complainant and Reena were pointed pistol and were made to sit behind the counter. The two boys removed gold jewellery from the counter and display

trays and put them in a bag. The boy standing near Gaurav asked him to remove the jewellery he was wearing on his person, upon which Gaurav requested him to let the personal bracelet be with him. This triggered scuffle with the boy who fired at Gaurav with his pistol, and the three ran away from the shop, while Gaurav chased them. Their helmets were left behind and when the complainant approached Gaurav, they saw Gaurav lying down outside the shop near the stairs with his face down. All three escaped on two motorcycles towards Friends Centre. Pursuant to the FIR being registered, the crime team inspected the spot and prepared their report including taking chance prints. Pursuant to the investigation, it was revealed that the father of the deceased, Sh. Vijay Gambhir (PW-11) had seen his son coming out of the shop chasing the assailants, when the assailant shot him on the head and sat on the motorcycle and ran away. The elder brother of PW-11, Sh. Narender Gambhir (PW-18) was standing in the balcony of the first floor of the premises, where the shop was located, and he also witnessed the assailants escaping after firing on the head of Gaurav Gambhir. Subsequently, Mohd. Sabir was first arrested, then the other accused persons, Pradeep Kumar Saini, Saleem, Rustam and Sohrab (who were already arrested in another case FIR No. 32 of 2011, Special Cell, Delhi). Further, accused Shan Mohd. and Aslam were also arrested. Recovery was affected of various items of jewellery from the appellants. *Post mortem* was done on the body of the deceased and articles were seized at the spot of incident. Judicial TIP was done of the accused persons and articles recovered and statement of witnesses were recorded. Pursuant to a charge-sheet filed against all seven appellants, charges were framed under Section 396/34 IPC (against all appellants except Mohd. Aslam) and under Section 412 IPC against all seven

appellants. The appellants pleaded not guilty and claimed trial. The prosecution examined 45 witnesses in support of their case, and, statements of the appellants were recorded under Section 313 Cr.P.C. and none of the appellants led evidence in defence.

Submissions on behalf of the Appellants

4. The appellants led by the respective counsels submitted that the case of the prosecution stood on three main pillars, i.e., testimonies of the alleged eye witnesses, recovery of the weapon and other case material, forensic report of ballistic, DNA and fingerprint. As per the learned counsel for the appellants, all categories of evidence were with flaws and contradictions. PW-3 and PW-2, the two sales girls, who were inside the shop had failed to identify the appellants, as, the assailants were wearing helmets and the faces could not be seen. The other two eye witnesses PW-11 and PW-18, the father and the uncle of the deceased, had given testimonies which were inconsistent throughout. According to the appellants, this would prove the likelihood that the said eye witnesses were planted to solve the blind case. As per the statement of PW-2 and PW-3, recorded under Section 161 Cr.P.C., the family members of the deceased were present at the spot outside the shop when the assailants fled away which would discredit the testimonies of the alleged eye witnesses PW-11 and PW-18. The presence of PW-11 and PW-18 at the hospital, thereafter, was also in question. There were serious inconsistencies between the testimonies of PW-11 and PW-18 as regards to the number of assailants which they saw, as also the number of motorcycles which were used, as also the identification of the assailants and their roles in the incident. Learned counsel for the appellants had pressed another argument at the very threshold that appellants Saleem, Sohrab and Rustam had been first arrested in FIR No.

32 of 2011 by P.S. Special Cell and recoveries of weapon were made in that FIR, which were apparently also involved in this present incident. Neither the officer who seized the weapons, and was responsible for the recoveries, was produced by the prosecution in this case, nor were the weapons exhibited. The learned Trial Court had acquitted all three appellants Saleem, Sohrab and Rustam and disbelieved the story of arrests and the recoveries from them. Since, no appeal had been preferred by the State against the acquittal, the acquittal in FIR No. 32 of 2011 stood confirmed and would act as *res judicata* qua the three appellants and the recovery of weapons from them. Therefore, it cannot be established that the weapon of the crime, i.e., the revolver marked W-1 by CFSL, was in possession of appellant Saleem or was recovered from him. Counsel for the appellant pressed that there were serious procedural lapses in the DNA profile and comparison of the hair sample collected *inter alia* in the inordinate delay of over four months in sending the samples, the selective sampling/testing of the hair sample (i.e. hair samples of the three out of six accused persons were collected and out of that only two were sent for testing), the unscientific methodology applied while examining the hair sample and obtaining DNA material and other grave lapses in the profiling process. This would exculpate appellant Sohrab who was being implicated on account of the DNA match with the hair samples that was found there. As regards the implication from the match of the chance fingerprints with appellant Saleem, the counsel for the appellant stressed that the fingerprint analysis report was poorly analysed and suffered abysmal quality, as the protocols followed were not standard and would be liable to be discarded. The counsel for the appellant had extensively elaborated on each of the submissions with respect to the conclusion and

examination of forensic evidence, including the hair sample and the chance prints, and, also the ballistic analysis. In essence, the counsel for the appellant assailed the identification of Mohd. Sabir as the person who used the fire arm, since, the fire arm itself was not recovered in this FIR and was disbelieved as recovered in the other FIR No. 32 of 2011 from the other three appellants, the DNA match of the hair sample found in the helmet connecting with the appellant Sohrab and the fingerprint match from the helmet connecting with the appellant Saleem. As regards the bullets, the counsel for the appellants submitted that no bullets were recovered from inside the shop nor were any empty cartridges recovered, despite three bullets which were recovered from the body of the deceased. As per the counsel for the appellant, careful examination of the testimonies of eye witnesses PW-11 and PW-18, who were outside the shop, and PW-2 and PW-3, who were inside the shop, would show various grave inconsistencies that would not be enough to implicate the other appellants as well. While the counsels for the other appellants substantially adopted the arguments led by Sh. Ashok Aggarwal, learned Counsel for appellant Mohd. Sabir, certain submissions were made to supplement particular aspects relating to the other appellants. Counsel for the appellant Shan Mohd., submitted that the phone number of appellant Shan Mohd. was 8447602621 for which the CAF and CDR was proved by PW-16. It was proved he was having conversation with appellant Sohrab on his mobile No. 8447602746 and one female, namely, Shahrnissa, mobile number being 9811300705. It was asserted that despite having the location numbers in the CDR, the prosecution failed to exhibit any location chart, neither was it sought by the investigating officer nor was the lady Shahrnissa interrogated as accused or is a witness who is allegedly the mother of Sohrab, Saleem

and Rustam. As regards the conviction for offence punishable under Section 412 IPC, it was argued that it is based on the testimonies of PW-11 and PW-12, the wife of the deceased who allegedly identified the pieces of jewellery recovered from the appellants. It was contended that the identification of the jewellery items was purely on the basis of “GJ Mark” on such articles and those articles which did not have the GJ Mark were not so identified. Further, PW-11 stated in his cross-examination that he had not given the description of the ring to the police but had given the list to the police only on 09th June, 2011. The counsel for appellant Rustam, contended that for three and a half months even though the list of robbed articles was not given to the police, the police not only investigated a case of robbery and cracked the case and recovered the jewellery articles. PW-11 was stated to have been identifying some articles of jewellery despite him stating that the jewellery shop was the business started by his son and was not a family business and he did not know the day-to-day affairs of the business run in the jewellery shop. The fact that the jewellery was identified by PW-11 and PW-12, merely on the basis of “GJ Mark”, it would not confirm whether the said jewellery had been legitimately purchased by somebody from Gambhir Jewellers and could have been easily supplied by the family members to the police from the remaining stock of Gambhir Jewellers in order to plant on the appellants, and, also, “GJ Mark” is not a registered trademark which would distinguish it from other trademarks. It was further contended that while the photographs in the LCR show only two helmets, the prosecution had contended that three helmets have been recovered.

Submissions on behalf of the Prosecution

5. The learned Additional Public Prosecutor (APP) submitted, countering the submissions made by the appellants that the case of the prosecution was based on conclusive pieces of evidence. The learned APP submitted that the appellants were hardcore, notorious and habitual criminals, and it was possibly for that reason that PW-2 and PW-3 could not gather the courage to depose against them fully, and turned hostile, and did not identify them even though they narrated the incident of the robbery from the shop. As per the learned APP, based on a Tihar Jail Report, appellant Saleem was involved in 51 cases, Sohrab in 23 cases, Shan Mohd. in 7 cases, Rustam in 15 cases, Mohammad Sabir in 23 cases, Pradeep Saini in 3 cases, Aslam in 1 case and most cases the crime was committed together by them. The list of the criminal records submitted by Superintendent of Prison, Tihar, New Delhi before the learned Trial Court was already part of the record. Besides, PW-11 and PW-18 were both natural witnesses being residence of the same house and had witnessed the scene which had occurred in front of the shop and identified the assailants. PW-11 had identified appellant Mohd. Sabir in judicial TIP conducted on 19th March, 2011 since he had claimed to have seen the entire incident. PW-2 had also given a description regarding appellant Saleem and appellant Mohd. Sabir who had gone inside the shop along with the appellant Sohrab when their helmets had fallen down, when they were running on the way out, however, she did not identify the appellants as she had turned partly hostile. As per the scientific evidence given by PW-28, the chance prints recovered by the crime investigation team matched with the finger impression of appellant Saleem. The hair which was recovered from the helmets which were left over in the shop matched with the DNA of appellant Sohrab.

The weapon of offence was revolver which had been recovered from one of the appellants in FIR No. 32 of 2011, and the bullet found in the body of the deceased matched with this weapon as per the ballistics report of FSL. There was recovery of various jewellery articles from each of the appellants thereby proving the case of the prosecution. With respect to the CDR, which were exhibited, the learned APP submitted that it showed that the appellants were in touch before and after the incident till the arrest in furtherance of common intention.

The Evidence

6. The evidence relevant and necessary for assessment of this case, is *inter alia* as under:

6.1 PW-2 Ms. Pooja Kapoor, the complainant, was working as a sales girl for the last one-one and a half year at Gambhir Jewellers in Lal Quarter Market, Krishna Nagar which was owned by the deceased. On 23rd February, 2011 at about 5:00 p.m., one person entered into the shop with a revolver and went straight to where the deceased was sitting and put his revolver on the counter and asked him to sit quietly otherwise, he would fire. Two more persons came thereafter who asked PW-2 and a fellow sales girl Reena (PW-3) to sit on the floor. The two people at the counter started putting jewellery articles in a white colour bag. The assailant who had first entered and standing near the deceased started abusing the deceased and demanded that he give the bracelet, chain and two rings that he was wearing at that time. The deceased refused and resisted the attempt to take those jewellery articles on his person. While they were grappling with each other, PW-2 heard a sound of a shot fired from the pistol. Thereafter, the person who was standing next to her asked her to open the counter and took out the jewellery articles from

there. She again heard the sound of firing of bullets and that person took Gaurav the deceased outside the shop holding him and were followed by the two other persons. PW-2 stated that she got up and saw that the deceased was lying outside the shop with his face down and by the time she came out three people had already left. She stated that she could not see the face of those three persons as they were wearing helmets. The police came and found two helmets and spectacle left behind and recorded her statement Ex. PW-2/A. Since, PW-2 was resiling from identifying the accused, and there were material deviations from her early statement before the police, she was cross-examined by the learned APP for the State. In her cross-examination, she admitted that she had refused to give the statement in the Court in presence of the accused persons. Though, she denied the suggestion that she had deposed falsely because of fear. In her cross-examination by the counsel for accused Rustam, she made a statement that the assailants had fled away before arrival of family members of the deceased.

6.2 PW-3 Ms. Reena, who was also working as a sales girl alongwith PW-2 at the shop of the deceased, substantially gave the same testimony regarding the sequence of events as PW-2. Although, she mentioned that she heard the sound of bullet and not multiple shots as PW-2 had stated. She also did not identify the assailants as she could not see their faces because they were wearing helmets. Since, she had resiled from her previous statement, she was cross-examined by the Additional Public Prosecutor for the State. In her cross-examination, she was confronted with her statement but she refused to identify the appellants which were present in Court and denied that she had been one over by the accused persons of the family members and had deposed falsely because of fear.

6.3 PW-11 Sh. Vijay Gambhir, the father of the deceased, testified that the shop was being on the ground floor of his house at C-2/6, Krishna Nagar. On 23rd February, 2011 at about 5:00 p.m., he was coming towards the shop when he saw that a boy was sitting on a bike outside the shop and the engine was on. Another boy came out from the shop and behind him came his son who had caught the feet of the boy who had a pistol in his hand. This boy shot at the head of his son got his feet released, sat on the pillion of the motorcycle and both the boys ran towards Friends Centre. Thereafter, two more boys came out from the shop with bags which contained goods and sat on two bikes already standing outside the shop which was one rider waiting for them and also fled towards the Friends Centre. He identified appellant Shan Mohd. as the person who was driving the bike on whose bike the assailant who shot his son fled away. He identified appellant Saleem as the person who had shot at the head of his son. He identified appellant Sabir as the person who he had seen coming out of the shop with a bag. He identified appellant Pradeep as the person who was waiting on the motorcycle outside the shop. He identified appellant Sohrab as the person who was also waiting on the outside motorcycle. Later, he also identified appellant Rustam as the person sitting on the motorcycle outside the shop. He deposed that he had brought four gold rings for gents, three gold chains and one chain of golden and platinum colour bearing Mark GJ of the shop of his son which were exhibited as Ex. P-1 to Ex. P-4 (rings) and Ex. P-5 to Ex. P-8 (chains). He further identified the golden ring exhibited as Ex. P-9 and a gent's golden colour ring Ex. P-10 both of these belonging to the shop. He further identified his signatures on the TIP proceedings of appellant Sabir as Ex. PW-11/A. He stated in his cross-examination that he was living at the first floor of that building

while his brother was living on the ground floor behind the shop and that the shop was being run by his son, while he was in the business of selling milk, ghee and cream and did not know the details of day-to-day affairs of the business carried by his son. He further stated that he had given a list of robbed articles to the police on 09th June, 2011 and the total weight of the robbed jewellery was 1,175 gms. This Court noted that the deposition by PW-11 was recorded through video conferencing from the DCP Office. He stated in his cross-examination that he saw his son being shot from a distance of about 10-15 ft. and while one motorcycle was standing in front of the shop on the other side of the road the other motorcycle was standing adjacent to each other near the shop. He further stated that appellant Pradeep was bare faced and was not wearing any helmet or spectacle.

6.4 PW-12 Surbhi Gambhir, the wife of the deceased, deposed that she was housewife but sometimes used to look after the shop in the absence of the husband and was aware about jewellery articles lying in the shop. After the incident she had given the exact quantity of gold ornaments which were lying in the shop at the time of the incident. She stated that the gold chain and gold bracelet of her husband were also robbed and that the gold jewellery prepared at their shop used to bear the stamp of the shop. She had identified some of the recovered jewellery during the TIP and had participated five times for the identification of the jewellery articles. She testified that Ex. P-1 to P-4 (four rings) and Ex. P-5 to P-8 (chains) belong to the shop of Gambhir Jewellers as they bore the stamp of Gambhir Jewellers. She was unable to identify the ring Ex. P-9 and Ex. P-10 as they did not bear the stamp of Gambhir Jewellers. She stated in her cross-examination that she personally had

not given any list of articles to the police in writing and she had not been shown the photographs of the recovered jewellery prior to the TIP.

6.5 PW-18 Sh. Narendra Gambhir, was the uncle of the deceased and brother of PW-11, and he testified that at the time of the incident he was standing in the balcony of the first floor, and saw the deceased holding the legs of two persons and was trying to save himself. One of those persons fired from the gun on the head of the deceased and went on the bike which was waiting with a rider in front of the shop. He came down from the first floor but by that time, the three persons ran away on the bike and one of the persons was also carrying a big bag. One more bike was standing on which one rider was waiting and two boys who came out of the shop with a bag also ran away with the bag on the bike. He stated that his brother PW-11 was also present at the spot and they rushed the deceased to Hedgewar Hospital where the doctors declared him dead. He identified appellants Shan Mohd. and Saleem in Court as the persons whose legs the deceased was holding, and appellant Saleem who had fired in the head of the deceased. He further identified appellant Pradeep, as the boy who was waiting on the second motorcycle, and appellant Sohrab, as the boy who had come out of the shop with a bag. He could not identify the other two assailants who were present there at the incident. On being cross-examined by the APP for the State, he further identified appellant Rustam as the boy who was waiting on a bike and appellant Sabir who came out of the shop with a bag and sat on the bike with Rustam. In his cross-examination, he stated that he comes back from his work at about 4:00 p.m. denied that he had seen the photos of the appellants prior to the identification.

6.6 PW-22 Constable Pramod deposed that on 23rd February, 2011 he was on patrolling duty and when he reached C-2 Block, Krishna Nagar he saw a crowd in front of the shop of Gambhir Jewellers and made a call at 100 number and thereupon Inspector K.K. Tiwari and HC Satpal came at the spot and then went to the hospital. After about one-one and a half hour they returned back and Inspector K.K. Tiwari prepared the *rukka* and sent him to the police station for registration of the FIR. The IO then lifted the blood sample, blood earth and earth control from the spot which were seized alongwith three helmets and a spectacle and hair strands lying in the helmet from the shop. On 27th March, 2011, appellant Pradeep Saini was apprehended from his house in Lucknow and from him his house a gold ring and three pairs of silver *pajeb*s were recovered from a box which were duly seized and sealed.

6.7 PW-6 SI Navin Kumar of the Mobile Crime Team, deposed that upon getting the call through the control room, he reached the spot with fingerprint expert and photographer and met the IO Inspector K.K. Tiwari and the police team. He inspected the scene where the expert lifted the chance prints from the helmet as well as the glass showcase, the photographer took the photographs and the IO recorded his statement and seized the articles lying on the spot. His report exhibited as Ex. PW-6/A which shows that helmets and one specimen of hair was lifted from the spot. In his cross-examination, he stated that blood sample, earth control, helmets and hair were seized from the spot but he cannot tell their exact number.

6.8 PW-8 Dr. Reetesh Ranjan, CMO at Dr. Hedgewar Hospital, stated that the deceased was brought in the casualty in a state of unconsciousness by the father and was examined and declared dead. Two round shape penetrating wounds over the anterior chest was found

with staining of blood around the wound. The MLC was exhibited as Ex. PW-8/A which recorded that the time of arrival was at 5:40 p.m. on 23rd February, 2011 as brought by the father.

6.9 PW-9 Dr. S. Lal, Specialist in Forensic Medicine, Sabzi Mandi Mortuary, Aruna Asaf Ali, Govt. Hospital, conducted the *post mortem* of the deceased. As per his report Ex. PW-9/A, there were three firearm lacerated wounds, two of size 1 X 1 cm and one of 0.8 X 0.8 cm. One firearm entry was in the middle of the occipital area placed 13.5 cm above the back of the neck, while the other two wounds were over the middle of sternum which had entered the chest cavity by perforating the sternum and entered the lower lobe of right lung. There were three other external injuries. As per his opinion, the cause of death was haemorrhagic shock due to *ante mortem* injury to lung associated with craniocerebral damage produced by projectile of firearm. All injuries were *ante mortem* in nature and recent in duration. As per the *post mortem* report dated 24th February, 2011 at 12:10 p.m. and the time of death was noted as about 18-24 hours.

6.10 PW-45 Inspector K.K. Tiwari, the Investigating Officer stated that he reached the spot upon receiving information from the duty officer and then went to the hospital where he came to know that the deceased had been declared dead. He collected the MLC of the deceased Ex. PW-8/A and came back to the spot where he made enquiries and recorded statement of PW-2 and prepared the *rukka* Ex. PW-45/A upon which an FIR was registered. Mobile crime team was already inspecting the place. Two helmets were found in the jewellery shop and blood was found lying on the road, outside. Blood from the road was lifted as well as earth control and blood-stained earth. Hair strands which were visible on the helmets were also sealed separately. A third helmet was found lying

near the gate of the shop which was also sealed. On the next day i.e., 25th February, 2011, he visited the house of the deceased and recorded the statement of Reena, and another helper Ajeet, who used to work at the jewellery shop and the statement of the father and the uncle of the deceased. During investigation, he received information that one mobile No. 9811300705 was involved in the incident and it was revealed that the subscriber of the phone is Shahrnissa. He procured the CAF and CDR of this mobile and analysed the frequently called numbers as per the details in the CDR. One of the callers was identified as Sohrab and as per the dossier of previous incidents with similar *modus operandi*, the address of Sohrab and Shahrnissa was revealed as at DLF, Dilshad Colony, Dilshad Garden, U.P. They came to know from the dossier that there was Saleem who was also involved earlier and he was residing in Lucknow. From the house of Shahrnissa, they came to know that it was vacant as the occupants of the house had left from there from the night of 23rd February, 2011 and had reached Lucknow on 25th February, 2011 and left Lucknow as well on 26th February, 2011. On 12th March, 2011, they left for Lucknow and having found the mobile number 9369660584 of one Jaggu Singh who was the owner of a Santro Car which have been earlier used by the accused whom they were identifying. He traced him to his house. After getting the details of the CDR of Jaggu Singh, he was arrested and was found wearing one chain of golden colour which had alphabets "GJ" engraved on it and it was accordingly sealed. Sabir @ Jaggu was brought to Delhi and produced before the Magistrate in a muffled face. TIP was moved of the accused who was identified by PW-11. On 26th March, 2011, on the disclosure of Sabir they went to the house of appellant Pradeep. They managed to apprehend him eventually. At his instance from a box in his room, one

golden colour ring and two or three pairs of silver *pajeb* were recovered. The silver *pajeb*s were related to other FIRs and seized by ASI S.P. Hudda while the golden colour ring was seized as per seizure memo Ex. PW-33/B. Upon disclosure of Pradeep, the hideouts of co-accused Shan Mohd., Saleem, Sohrab and Rustam were revealed but none of them could be apprehended. On 19th May, 2011 on an information received from Special Cell, Lodhi Colony about the arrest of Saleem, Sohrab and Rustam, PW-45 moved for production warrants and thereafter the investigation of the case was transferred to Inspector A.K. Singh, SHO, P.S. Krishna Nagar. He continued to participate in this investigation and the new IO arrested Sohrab, Rustam and Saleem and recorded their disclosure statements. The hair samples of accused Saleem and Sohrab were retained which were duly deposited. In July, 2011, he received information of arrest of accused Shan Mohd. in P.S. Cantonment, Lucknow in Arms Act case and he moved an application for production of the accused. On 03rd August, 2011, he received information that the DNA samples of accused Sohrab and Saleem had to be sought afresh which was duly done. Despite number of attempts of production warrants for accused Shan Mohd., he was not produced from the jail authorities at Lucknow. However, on 06th September, 2011 when he was to be produced at P.S. Jagatpuri, PW-45 formally managed to arrest Shan Mohd. and was sent in JC in muffled face and the request for TIP was moved. On 17th September, 2011, the police team left for Lucknow and reached *jhuggi* clusters in Delhi Cantonment, Lucknow where at the instance of the accused Shan Mohd., they found one tin box inside the *jhuggi* which was containing one golden colour ring with one flower engraved and two pairs of silver *pajeb*s which he disclosed was a result of commission of two different crimes. The golden colour ring from this

present case and was duly sealed. Later on, 19th November, 2011, efforts were made to trace Aslam and he was duly apprehended and was found to wearing a golden colour ring in his hand.

Aslam was arrested vide memo PW-22/F and as per his disclosure certain articles which were concealed in the house of his relative Munif were recovered including seven pairs silver pajeb, one small glass, one big glass, one small glass, one big plate, one small plate and one Laxmi Ganesh Idol.

Analysis

A careful perusal of the evidence on record and pursuant to appreciation of contention of the parties, the following points would be relevant for a final assessment:

- (i) As per the testimony of PW-9, who had prepared a *post mortem* report, it was evident that of the death of the deceased Gaurav Gambhir was homicidal in nature caused by firearm injuries. There were three fire arm lacerated wounds as per the report of Ex.PW-9/A.
- (ii) The occurrence of the incident of robbery was completely corroborated by the testimonies of the two sales girls who were eye witnesses viz. PW-2 and PW-3, even though they refused to identify the assailants. As regards the sequence of events at the time of robbery, it was quite clear that three people had entered the shop and had stolen jewellery articles from the counters and weapons have been fired since the shots have been heard by both PW-2 and PW-3 although they did not see the shooter. They also testified and confirmed that when the assailants were trying to flee the deceased had gone out with them. First, one person had gone out with the deceased who was holding him and then later two other people had also left. The sequence of events outside

the shop were witnessed by PW-11 and PW-18 the father and the uncle of the deceased who corroborated the fact that they saw the deceased coming out with one person who shot him on the head and then later two other people came out as well. Therefore, it is evident from these four testimonies even though PW-2 and PW-3 were partly hostile that the crime of armed robbery was committed by the assailants acting in concert.

(iii) PW-11 and PW-18 in addition to having seen the assailants fleeing with robbed articles in their hands also managed to identify the assailants. PW-11 identified the assailant who shot in the head of his son as appellant Saleem, the person who was driving the bike on which Saleem fled away as appellant Shan Mohd. He also identified appellant Sabir as the person coming out later of the shop with a bag and Sohrab as the other person who came out of the shop with a bag. He also identified the two people to two motor bike riders who were waiting for Sohrab and Sabir and with whom they fled, as appellant Pradeep and appellant Rustam.

(iv) This identification was corroborated by PW-18, the uncle of the deceased who was standing in the balcony of the first floor who identified Saleem as the person who fired in the head of the deceased, and Shan Mohd. as also appellant Sohrab who came out of the shop with a bag and appellant Pradeep who was waiting on the second motorcycle. He could not identify the other two assailants who were present there at the incident but later identified appellant Rustam who was waiting on the bike and appellant Sabir who came out of the shop with a bag and sat on that bike.

(v) The presence of the father at that point when the incident had taken place is evident from the records of the PCR call PW-26/A where

it is recorded that Gaurav S/o Vijay Gambhir have been taken to the hospital, the first (PCR call was at 17:20 hours) and SI Kanta had been sent on the spot. The subsequent PCR record states that the assailants had fired and looted the jewellery and then fled away. The injured had already gone to the hospital and SHO had gone to the spot. Another subsequent PCR call also records that it has been told that Gaurav Gambhir aged 28 years has received two bullets in the chest and has been declared dead by the doctors. As per the MLC of the deceased Ex. PW-8/A, it is clear he was brought to the hospital by his father at 5:40 p.m. on 23rd February, 2011, with the IO as SI Kanta Prasad under DD 25A. It is therefore evident that the father was present who had immediately taken his son, who was grievously injured with the firearm injury to the hospital. The time of the arrival at the hospital i.e. 5:40 p.m. co-relates to the first PCR call which is at 5:20 p.m.

(vi) A perusal of the scaled site plan Ex. PW-11/DB also made it evident that the father PW-11 was present just about 20 feet away from the point where the deceased had been shot outside the shop and therefore, the testimony as an eye witness of the shooting would be totally credible.

(vii) Notwithstanding the identification of the assailants by PW-11 & PW-18 in the Court, various other pieces of evidence have been placed by the prosecution to prove the guilt of the accused beyond reasonable doubt.

Firstly, as regards appellant Saleem, the chance prints recovered from the place of incident and marked Q-1, as per the report of the Fingerprint Bureau, New Delhi, were found identical with the left thumb impression marked as S-6 taken from Saleem (Ex.PW-35/A).

Secondly, as per the CFSL DNA profile report (EX.PW-36/C) the DNA profile generated from Ex.5 (hair of appellant Sohrab) was found consistent with the DNA profile generated from source of Ex.1 which were 'hair recovered from the helmet found at the spot'.

Thirdly, recoveries of pieces of jewellery from appellants Sabir, Shan, Rustam and Pradeep were identified by PW-12, the wife of the deceased, while jewellery recovered from appellant Aslam was identified by PW-11. Reference in this regard has been made to: Ex. PW-12/B (identification of one golden ring seized from Pradeep vide seizure memo Ex. PW-33/B in TIP by PW-12) and testimony of PW-12 regarding this recovery from Pradeep in Court; Ex. PW-12/C (TIP identification by PW-12 of one golden ring recovered from Sabir) and testimony of PW-12 with regard to this golden ring in Court; Ex. PW-12/D (TIP identification by PW-12 of gold ring recovered from Shaan Mohd.) and testimony of PW-12 regarding this gold ring in Court; Ex. PW-12/D (TIP identification by PW-12 of one gold chain and ring recovered from Rustam) and testimony of PW-12 in this regard in Court; PW-38/A (TIP identification by PW-11 of one gold ring recovered from Aslam) and testimony of PW-11 regarding this in Court.

Fourthly, the analysis of the CDR reports (Ex. PW-15/E and B) would show that the locations of Sabir and Pradeep were similar on the morning of 24th February, 2011 and reveal that they had left on that morning and reached Lucknow same night *via* the same route.

(viii) As regards the recovery of the weapon, the contention raised by the counsel for the appellant that this recovery was not in this FIR but was in FIR No.32/2011 and cannot be relied upon since Ld. Trial Court had acquitted appellants Sohrab, Rustam and Saleem in that FIR and disbelieved the story of arrests and recoveries, needs to be examined.

The counsel for the appellant raised the issue of *res judicata* qua these three appellants in recovery of weapon since no appeal had been preferred by the State against acquittal of these three accused in FIR No.32/2011. In the considered opinion of this Court, this issue of recovery of weapon in other FIR and the consequent acquittal of these three appellants in the FIR would not serve to exculpate these three appellants or even others from the accusations made in this FIR under the consideration of the Court. In the considered opinion of this Court, there is substantial corroborative evidence besides the eye-witnesses testimony, as detailed above that proves the guilt of the appellants beyond reasonable doubt, notwithstanding the reliability of the recovery of the weapon, its use in crime committed in this FIR and consequent ballistic analysis. The issue of recovery of the weapon in other FIR and the application of the principles of *res judicata*, as contended by counsel for the appellant, would not be relevant and guilt of the appellants would stand proven and substantiated de hors analysis of the weapon in crime.

(ix) As regards submission of counsel for the appellant regarding discrepancies in the testimonies of the eye-witnesses PW-11 and PW-18 with respect to number of motorbikes which were available for the assailants to escape from scene of crime, this Court is of the opinion, this ought to be seen as minor discrepancy considering that the incident and the escape must have happened in a rapid sequence of events in a reasonably crowded area at about 5:00 PM and therefore, the testimonies of the eye-witnesses with regard to number of motorbikes ought not to be considered as diluting the otherwise consistent testimonies.

(x) As regards the fact that PW-2 and PW-3, the two sales girls working at the shop of the deceased, had been hostile while deposing to the extent that they refused to identify the appellants, this Court finds

merit in the submission of the State that clearly they were fearful from confirming identities of the appellants since, as per record, the appellants were hardened criminals having numerous previous involvements. Reference was drawn in this regard to Ex. PW-45/H-1, Ex. PW-45/H-2 and Ex. PW-45/H-3 which provide the list of involvements of appellants Saleem, Sohrab and Rustam, each of them having 30, 14 and 15 involvements respectively. Further reference is also made to PW-45/D-33 which provides the history of previous involvements (7 in number) of appellant Shan Mohd. The submission of the learned APP in this regard is further buttressed by the fact that in at least 14 involvements, all 7 appellants in different permutations and combinations had been together accused in various FIRs registered in Delhi or Lucknow. This Court also noted the fact that PW-11, the father of the deceased, deposed in Court through VC from DCP's office. Therefore, it is evident that the witnesses were fearful considering the hardened criminal backgrounds of the appellants and it was only father and uncle of the deceased who did finally identify the appellants in their testimonies, while the two sales girls described the incident but stop short from identifying them.

(xi) As regards the contention of counsel for the appellant regarding the procedure adopted by the forensic team and protocols which were followed not being standard, this Court has noted the detailed testimony of PW-36 Dr. B.A Mohapatra of CFSL, New Delhi who was extensively cross examined by the counsel for the appellant on detailed aspects of the procedures and protocols followed by the forensic and it is evident from an examination of PW-36 responses in the cross examination that he adequately and appropriately substantiated and processed the results of his analysis as recorded in his report.

Conclusion

7. In light of the above discussion and analysis, this Court finds that the guilt of the appellants for the murder of the deceased has been proved beyond reasonable doubt and duly supported by circumstantial evidence by the prosecution. Consequently, this Court finds no error in the impugned judgment of conviction and order on sentence by the learned Trial Court.

8. Appeals are accordingly dismissed.

9. Copy of this judgment be uploaded on website and be also sent to Superintendent, Tihar Jail for intimation to the appellants and updation of records.

(ANISH DAYAL)
JUDGE

(MUKTA GUPTA)
JUDGE

JANUARY 6, 2023/rk