HIGH COURT OF MADHYA PRADESH: BENCH AT INDORE

D.B: HON'BLE SHRI JUSTICE P.K. JAISWAL & HON'BLE SHRI JUSTICE VIRENDER SINGH

CRIMINAL REFERENCE No.01 of 2017

STATE OF M.P.

Vs.

Munna @ Shahnwaj

&

CRIMINAL APPEAL No.696 of 2017

Munna @ Shahnwaj

Vs.

STATE OF M.P.

&

CRIMINAL APPEAL No.447 of 2013

Baliram

Vs.

STATE OF M.P.

&

CRIMINAL APPEAL No.461 of 2013

Juber Khan & Another

Vs.

STATE OF M.P.

&

CRIMINAL APPEAL No.514 of 2013

Chunnilal & others

Vs.

STATE OF M.P.

&

HIGH COURT OF M.P., BENCH AT INDORE

CRIMINAL REFRENCE No.01/2017,

CRA Nos.447, 461, 514, 521, 560, 625, 1600 of 2013 & 696/17

CRIMINAL APPEAL No.521 of 2013

Ramjan @ S/o Ibrahim

Vs.

STATE OF M.P.

&

CRIMINAL APPEAL No.560 of 2013

Mohammad & another

Vs.

STATE OF M.P.

&

CRIMINAL APPEAL No.625 of 2013

Shafeeq S/o Tasrif

Vs.

STATE OF M.P.

&

CRIMINAL APPEAL No.1600 of 2013

Ramjan S/o Kallu Khan

Vs.

STATE OF M.P.

Ms. Archana Kher, learned Public Prosecutor for the appellant in **CRRFC No.01/2017.**

Shri Vijay Singh, learned counsel for the respondent in **CRRFC No.1**.

Shri Vivek Singh learned counsel for the appellants in **CRA Nos.447/13 & Cr.A. 461/13**.

Ms. Seema Sharma, learned counsel for the appellants in **CRA Nos.514/13.**

Mr. K.C. Kabra, learned counsel for the appellant nos.2 and 3 in **CRA No.514/13.**

Mr. R. Shrivastava and Mr. Amit Dube, learned counsel for the appellant in **CRA No.521/13.**

HIGH COURT OF M.P., BENCH AT INDORE

CRIMINAL REFRENCE No.01/2017,

CRA Nos.447, 461, 514, 521, 560, 625, 1600 of 2013 & 696/17

Mr. Vivek Singh, learned counsel for the appellant no.1 and Mr. Gulab Sharma, learned counsel for the appellant no.2/Babloo in **CRA No.560/13.**

Ms. Seema Sharma, learned counsel for the appellant in **CRA No.625/13**.

Mr. Manish Shankhla, learned counsel for the appellant in **CRA No.696/2017.**

Mr. M.M. Joshi, learned counsel for the appellant in **Cr.A. No.1600/2013**.

Mr. Mukesh Kumawat and Ms. Archana Kher, learned Public Prosecutor for the respondent/State in all the criminal appeals **except Criminal Reference no.01/2017.**

J U D G M E N T

(Delivered on 15/03/2018)

Per: Virender Singh, J.

1. This criminal reference and all the criminal appeals, which we propose to dispose off by this common order, are directed against two separate judgments passed in S.T. No.63/10 (***State vs. Juber and others***) and S.T. 35/12 **(*State vs. Munna @ Shahnwaj*)** arise out of Crime No.436/10 under Sections 396 read with 120-B, 397 read with Section 120-B and 412 of IPC and 25 (1B)(a) and 27 of the Arms Act, 1959 of Police Station- Khargone, District – West Nimar.

2. In **S.T. No.35/12**, vide **judgment dated 21/02/2017,** learned trial Court (4th ASJ, Khargone) has awarded death penalty to the accused ***Munna @ Shahnwaj*** and referred the matter to this Court for confirmation of the same. The trial Court further held the accused ***Munna @ Shahnwaj*** guilty for the offences punishable under Sections, and awarded punishment as given below:-

Offence u/S.	Imprisonment	Fine	In default of Fine
396 r/w 120-B of IPC	Death Sentence	Rs.1,000/-	2 Years R.I.
397 r/w Section 120-B of IPC	10 Years R.I.	Rs.10,000/-	2 Years R.I.
Under Section 412 of IPC	10 Years R.I.	Rs.20,000/-	2 Years R.I.
25 (1) (a) of Arms Act, 1959 (Correct 25(1B)(a)	5 Years R.I.	Rs.5,000/-	6 Months R.I.
27 of Arms Act, 1959	5 Years R.I.	Rs.10,000/-	1 Year R.I.

3. In **S.T. No.63/10,** vide **judgement dated 05/03/2013**, the learned trial Court (2nd ASJ, Khargone) has held the accused persons guilty for the offences punishable under Sections, and awarded punishment as given below:-

Accused/appellant-Juber S/o Kale Khan

Offence u/S.	Imprisonment	Fine	In default of fine
396 r/w 120-B of IPC	Life imprisonment	Rs.25,000/-	2 years RI
397 r/w Section 120-B IPC	7 years RI	NIl	
412 of IPC	10 years RI	20,000/-	1 year RI
25(1)(A) of Arms Act (Correct 25(1B)(a)	5 years RI	5,000/-	6 months RI
27 of Arms Act	5 years RI	10,000/-	1 year RI

Accused/appellant-Shafeeq

Offence u/S.	Imprisonment	Fine	In default of fine
396 r/w 120-B of IPC	Life imprisonment	Rs.25,000/-	2 years RI
397 r/w Section 120-B IPC	7 years RI	Nil	
412 of IPC	10 years RI	20,000/-	1 year RI
25(1)(A) of Arms Act (Correct 25(1B)(a))	5 years RI	5,000/-	6 months RI
27 of Arms Act	5 years RI	10,000/-	1 year RI

Accused/appellant-Ramjan S/o Kalu Khan

Offence u/S.	Imprisonment	Fine	In default of fine
396 r/w 120-B of IPC	Life imprisonment	Rs.25000/-	2 years RI
397 r/w Section 120-B IPC	7 years RI		
412 of IPC	10 years RI	20,000/-	1 year RI
216 -A of IPC	5 years RI	10,000/-	1 year RI

Accused/appellant-Mohammad Patel

Offence u/S.	Imprisonment	Fine	In default of fine
396 r/w 120-B of IPC	Life imprisonment	Rs.25,000/-	2 years RI
397 r/w Section 120-B IPC	7 years RI		
412 of IPC	10 years RI	20,000/-	1 year RI
216-A of IPC	5 years	10,000/-	1 year RI

Accused/appellant-Ramjan S/o Ibrahim

Offence u/S.	Imprisonment	Fine	In default of fine
396 r/w 120-B of IPC	Life imprisonment	Rs.25000/-	2 years RI

397 r/w Section 120-B IPC	7 years RI		
412 of IPC	10 years RI	20,000/-	1 year RI
216-A of IPC	5 years	10,000/-	1 year RI

Accused/appellant-Baliram

Offence u/S.	Imprisonment	Fine	In default of fine
216-A of IPC	5 years RI	10,000/-	1 year RI
412 of IPC	5 years RI	20,000/-	1 year RI
201 of IPC	3 years RI	2000/-	6 months RI
25-1(A) of Arms Act (Correct 25(1B)(a))	5 years RI	5000/-	6 months RI

Accused/appellant-Bablu @ Taslim

Offence u/S.	Imprisonment	Fine	In default of fine
396 r/w 120-B of IPC	Life imprisonment	Rs.25,000/-	2 years RI
397 r/w Section 120-B IPC	7 years RI		
412 of IPC	10 years RI	20,000/-	1 year RI

Accused/appellant-Abdul Aziz

Offence u/S.	Imprisonment	Fine	In default of fine
216-A of IPC	5 years RI	10,000/-	1 year RI
412 of IPC	5 years RI	20,000/-	1 year RI
201 of IPC	3 years RI	2000/-	6 months RI

Accused/appellant-Chunnilal

Offence u/S.	Imprisonment	Fine	In default of fine
216-A of IPC	5 years	10,000/-	1 year RI
412 of IPC	5 years RI	20,000/-	1 year RI

Accused/appellant-Bihari

Offence u/S.	Imprisonment	Fine	In default of fine
216-A of IPC	5 years	10,000/-	1 year RI
412 of IPC	5 years RI	20,000/-	1 year RI

Accused/appellant- Sildar

Offence u/S.	Imprisonment	Fine	In default of fine
216-A of IPC	5 years	10,000/-	1 year RI
412 of IPC	5 years RI	20,000/-	1 year RI

4. Back ground facts sans unnecessary details are that on 12.12.2009, at about 11:30 A.M., the owner of Rajshree Ginning Factory sent his cashier Lala @ Balmukund Gupta with his driver Manish Raghuvanshi by his car bearing registration No.M.P.10-3311 to Bank of Baroda Branch, Khargone for encashing the cheque of Rs.50,00,000/- (Fifty lacs). They both came back factory with the cash kept in a bag at about 12:15 P.M. Balmukund alighted from the car, took out the bag containing cash from dickey of the car and proceeded toward office, where owner Suresh and his father Ratanlal alongwith staff Anurag Dalal, Manoj Shikari, Ramkrishan Mahajan and peon Jitendra were also present. As he entered in the office, suddenly a tall, lean and thin, dark complexioned scoundrel with a pistol in hand, entered in the office and tried to snatch the bag containing cash from Balmukund. On his resistance, he fired 3-4 rounds gun shots on him. He fell down. The persons present in the office rushed towards him, but the scoundrel fired on them also and ran outside with the cash. Suresh sustained injury in right thigh, Ramkrishan at back, Manoj on left calf muscles and Ratanlal on his right knee. They all saw that his three companions were waiting

outside the office with two Motorcycles. Out of them, one was wearing red shirt and having dark complexion and another was wearing black T-shirt. The person who snatched the bag sat on a motor cycle and they all fled away from the scene. When they were crossing the gate of the factory, Sunil *(Choukidar*) came on the front, he tried to close the gate, but they fired on him also. He sustained injuries on right hand and left thigh.

5. Factory owner Suresh managed to send all the injured to the District Hospital, Khargone and chased the crooks, but they managed to escape towards *Bistan.* Suresh came back and reached District Hospital, where he came to know about death of Balmukund. He lodged *Dehati Nalashi* (Ex.P-1) at Police Outpost, situated in District Hospital campus, Khargone, which was sent for registration of crime at Police Station – Khargone. The Police registered FIR Ex.P.19 against unknown culprits.

6. Dr. R. Joshi also informed the Police Outpost, District Hospital, Khargone about the death of Balmukund (Ex.P-26) and injury to Manoj (Ex.P/27) and Dr. Jaikishore Singh informed the police regarding admission of other injured persons Ratanlal, Suresh, Sunil vide Ex.P/36, 39 and 42 respectively.

7. The Police reached in the hospital, issued notice Ex.P/14 to the witnesses, prepared memo of corpse Ex.P/15 and requested the doctor for post-mortem vide Ex.P/34. Dr. Govind Gupta performed autopsy and submitted report Ex.P/34. The police submitted applications for examination of the injured persons and obtained their injury reports from the hospital. Injury reports of Ratanlal, Suresh and Sunil are Ex.P/38, 41 and 44 respectively. The police also obtained X-ray reports Ex.P/43 to

49 of Manoj, Sunil, Ratanlal and Ramkrishan and obtained treatment file of Ramkrishan Ex.P/52 and 53 from CHL Hospital.

8. The police visited the spot, prepared spot map Ex.P/4, sized empty shells of cartridges used in the incident Ex.P/18, received and seized blood stained shirt and *Baniyan* of Ramkrishan from CHL Hospital vide Ex.P/5. The police also seized cheque of Rs.50 lacs Ex.P/6, which was sent by the owner to encash, from V. Gupta, Manager, Bank of Baroda, Branch, Khargone and obtained statement of accounts showing withdrawal of Rs.50 lacs Ex.P/8 from the bank.

9. The police arrested accused Juber Khan vide arrest memo Ex.P/10, seized Nokia mobile, currency notes, one pistol and 6 live cartridges vide seizure memo Ex.P/11, 12 & 17 on the basis of his memorandum statements Ex.P/13 & 16. On disclosure of Juber, the police took the other co-accused persons in the custody, interrogated them and on their disclosure, recovered currency notes, pistols, motorcycles and some other articles.

10. The police sent a letter Ex.P/3 for identification of the seized bag and the accused persons. Sub Divisional Officer (SDO) Mr. Dodiya conducted identification in which Suresh and other witnesses identified both the bag and the miscreants. The Police got identified the currency notes seized from the appellants from cashier of Bank Sunil vide Ex.P/9. Superintendent of Police sent a letter Ex.P/32 to the District Magistrate for granting sanction for prosecuting the offenders, which was granted (Ex.P/33). Letter Ex.P/46 was sent to the Security Inspector for mechanical inspection of the seized pistol and received its report vide Ex.P/47. During investigation, statements of prosecution witnesses

Suresh, Manoj, Jitender @ Jittu, Ramkrishan, Manish and Ratanlal were recorded. After completing the investigation, the police filed charge-sheet against the accused persons except the accused Munna @ Shahnawaz, as he was absconding at that time.

11. The police arrested accused ***Munna @ Shahnwaz*** vide Ex.P/54 and on his disclosure (Ex.P/22 ST35/12), seized guest register from manager of the hotel Metro showing his stay with co-accused Shafeeq in the hotel (Ex.P/19,20 ST35/12). The police also recorded his statement u/s 27 of Evidence Act and prepared verification memo of place of incident (Ex.P/23,24 & 25 ST 35/12). A request was made to the Executive Magistrate Tehsildar, Khargone Vivek Sonkar PW-32 (ST 35/12) for his identification, who sent a letter Ex.P/54 dated 17/10/2011for making necessary preliminary arrangements and conducted identification. The witnesses identified him also (Ex.P/55). The police filed supplementary charge-sheet against him (***Munna @ Shahnwaj*****),** which was registered as ST No. 35/2012.

12. The appellants were charged with offences under Sections 396 read with 120-B, 397 read with 120-B, 201, 216-A and 412 of IPC and under Sections 25 (1-a) and 27 of the Arms Act, 1959 (Correct S.25 (1B) (a)). They abjured their guilt. They were tried and convicted as stated in para nos.2 and 3 above. The accused Mohammad Patel and Chunnilal were acquitted from the charges under section 118 of IPC and accused persons Chunnilal, Bihari and Sildar were also acquitted from charges under Section 201 of IPC.

13. All the appellants have preferred separate appeals almost on similar grounds. The appeals are preferred mainly on the grounds that

judgment and order of the trial Court is contrary to law and facts available on record. It is neither legal nor proper or correct. The learned trial Court committed error in not considering the material contradictions and omissions appeared in the statements of prosecution witnesses and also in discarding defence version. The appellants have falsely been implicated in the present case. The learned trial Court failed to consider the fact that the initial FIR was registered against unidentified persons. The entire case of the prosecution is based upon the circumstantial evidence and the circumstances could not be established beyond reasonable doubt. The identification of the appellants is also suspicious and have been conducted after a remarkable delay and there are no proceeding to show that the present appellants were kept and produced before the Court "Baparda". Therefore, they prayed that the impugned judgment and order be set-aside and they be acquitted.

14. The prosecution has opposed all the grounds raised by the appellants and prays for dismissal of the appeals.

15. We have considered the rival contentions of all the parties and have gone through the record.

16. The appellants have not challenged the alleged incident, the death of Lala @ Balmukund Gupta by gunshot injuries sustained in the alleged incident, gunshot injuries sustained by the other injured and registration of the crime at Police Station, Khargone and their arrest in the same. We also reappraised them and found that all these facts are well proved by unrebutted testimony of Suresh Mahajan, Ratanlal Mahajan, Anurag Mahajan, Bihari, Jitu @ Jitendra, Ramkrishna, Manish Raghuvanshi, Sunil Bhilala, Manoj Shikari, Dr. Govind Gupta, Dr. Mujalda, Dr.

Rajendra Joshi and IO Akhilesh Dwivedi, which are also well supported by the documents proved by them. The learned trial Court has dealt with them in detail and we are in consensus with it and therefore, we need not to ink several pages for this purpose.

17. Owner Suresh Mahajan, Driver Manish Raghuvanshi and other witnesses have stated that the deceased Balmukund and driver Manish had gone to encash the cheque of Rs. 50 lacs of Rajshri Cotton Fibers and came back to the factory with the cash. Branch Manager of Branch Khargone of Bank of Baroda Vivek Gupta, Accountant Deepak Bomanvar (only in ST 63/10) and Cashier Sunil Karmveer have confirmed this fact stating that on 12/12/2009 they have cleared this cheque no. 501765 of Rs. 50 lacs. Their statements are supported by cheque Ex.P/6 and account details Ex.P/7. Lengthy cross examination could not shatter their testimony on this point and the learned trial Court has rightly held this fact proved. Again this does not need much detail discussion at our level.

18. Investigating officer, the then SHO, Akhilesh Dwivedi (PW-52) has stated that immediately after the incident, he launched a search operation to find out the perpetrators. On 16.12.2009, he received information that Juber and Mohammad, who were involved in the incident, are dissipating booty at the bus stand, Kharogne. He with the help of force immediately cordoned the area, arrested Juber and interrogated him. He, besides admitting his involvement, disclosed names of accomplice.

19. On 16/12/2009, the police arrested Juber (Ex.P/19), Babloo @ Tasleem (Ex.P/23), Mohammad patel (Ex.P/27), Ramjan @ Chhota

Ramjan S/o Kallu Khan (Ex.P/30), Abdul Aziz (Ex.P/33), on 17/12/2009 Baliram (Ex.P/36), Chunnilal (Ex.P/39), Ramjan @ Ramju S/o Ibrahim (Ex.P/43), on 21/12/2009 Bihari (Ex.P/13) and Sildar (Ex.P/16), interrogated them and on their disclosure, recovered Rs.10,00,000/- (Ten lacs) from Juber, Rs. 10.55 lacs from Mohammad Patel, Rs. 1.5 lacs from Tasleem, Rs. 7,53,600/- from Ramjan S/o Ibrahim, Rs. 4.00 lacs from Abdul Aziz, Rs. 1.9 lacs from Rs. 1.9 lacs each from Ramjan S/o Kallu and Baliram, Rs. 10,000/- from Chunnilal and Rs. 20,000/- each from Bihari and Sildar. Some of the packets of these currency notes were having seal and date of Bank of Baroda. Independent witnesses Mahesh, Devendra and Prakash have supported the statement of IO Akhilesh Dwivedi and their unrebutted statements are well corroborated by the memos of Arrest, disclosure and seizure Ex.P-13 to Ex.P-43. Nothing contrary could be brought on record.

20. I.O. Akhilesh Dwivedi PW/52 has stated that in response to the questions of the police, the appellant Juber disclosed that he handed over the bag robbed in the incident to the co-accused Baliram for disposal and Baliram disclosed that after filling the bag with the stones, he threw that in the river. The bag was recovered from the Umarkhali River on the pointing of Baliram. Independent witnesses Kamal PW/20, Shiva PW/21, and Rohit PW/24 have supported the statement of Sh. Dwivedi and their unrebutted statements are well corroborated by the memos 27 of Juber Ex.P/49 and Baliram Ex.P/50 and seizure memo of bag Ex.P/45. Nothing is on record to disbelieve all this evidence.

21. IO Akhilesh Dwivedi PW/52 has stated that during investigation, he made a request to the Sub Divisional Officer (SDO) to conduct identification of currency notes recovered from the appellants. SDO Sh.

G.S. Dodiya has stated that in response to the request of the police, he conducted identification of currency notes. Cashier, Bank of Baroda, Branch- Khargone Sunil Karamveer (PW-8), who had delivered the cash looted in the incident, has stated that on 01.02.2010, he identified the currency notes on the basis of their numbers and seal of the Bank of Baroda. It is also important to note that most of these packets of currency notes bears date of their preparation from 7 to 10 December 2012, i.e. just prior to the incident.

22. SDO, G.S. Dodiya (PW-44) has further stated that on 29.01.2010, at the request of the police, he conducted identification of bag at his office and the complainant Suresh Chandra Mahajan (PW-1) correctly picked up his bag out of five bags mixed with the bag of the complainant. The statements of these witnesses could not be scratched in the cross examination and they are supported by memo of identification Ex. P/3.

23. I.O, Mr. Dwivedi (PW/52) has stated that at the time of arrest, he recovered mobile phones with SIMs from the accused Juber, Tasleem and Ramjan S/o Ibrahim vide seizure memo Ex.P/20,24,44 respectively. He also recovered mobile numbers of other accused persons which were either found in their possession or registered in their names and obtained their call details from their service providers. As per call details during the period from 10.12.2009 to 15.12.2009, Mohammad Patel contacted Juber 54 times out of which 36 time they called each other on the date of the incident. During the same period, he contacted Shafeeq 14 times, Ramjan S/o Ibrahim 6 times, Ramjan S/o Kallu 13 times and Bablu @ Tasleem 13 times out of which 1, 6, 3, 2 and 3 times they had contacted each other on the date of the incident.

24. During the same period, Juber contacted Shafeeq 7 times, with Ramjan S/o Kallu 21 times, with Ramjan S/o Ibrahim 1 time, with Babloo 33 times and with Abdul Aziz 2 times out of which 3,6, 7, 3,1,16 and 2 times they talked with each other on the date of incident.

25. Shafeeq contacted Juber on 8 times, Mohammad Patel on 19 times, Ramjan S/o Ibrahim on 8 times, Ramjan S/o Kallu on 13 times out of which they remained in touch on 8,9,1,1 times respectively on the date of incident.

26. Babloo @ Tasleem remained in contact with Juber on 36 times with Mohammad Patelon 16 times, with Ramjan S/o Kallu on 13 times, with Baliram on 2 times, out of which 18, 8, 4 times respectively they remained in touch on the date of incident.

27. Nothing could be brought on record to rebut this documentary and trustworthy evidence which obtained from neutral source and all this evidence is more than sufficient to show that the accused persons hatched a conspiracy for a common object and they constantly remained in touch with each other from 10.12.2009 to 15.12.2009 i.e. pre & post time of the incident. This very well proves their involvement in the alleged crime.

28. It is argued that all these call details are inadmissible as no certificate as required by Section 65B(4) of the Evidence Act is produced by the prosecution and therefore this evidence cannot be used against the appellants. Learned counsel has placed reliance on ***Anwar P V. vs. P.K. Basheer and Other*** reported in ***AIR 2015 SC 180*** where it is held that electronic record is inadmissible unless requirements of Section 65B of the Evidence Act are satisfied.

29. We have considered the objection raised by the appellants. It would be germane to state that the objection regarding admissibility of the call details was not raised by any of the appellants during the trial when the prosecution proposed it for admission. Even no questions either regarding its admissibility or regarding its genuineness or authenticity were asked during cross-examination of the IO Akhilesh Dwivedi, who proved the document before the trial Court. In a recent judgement in **Sonu alias Amar v. State of Haryana, AIR 2017 SC 3441,** the Hon'ble Supreme Court has held that CDRs of mobile phones recovered from accused and exhibited before the Trial Court without objection from defence amounts to waiver of necessity for insisting formal proof of documents. Such waiver from accused permissible even in criminal cases. The objection that the CDRs are unreliable being marked without certificate as required by S. 65-B(4) cannot be raised at belated stage since it relates to mode or method of proof of document. Relevant paras of the judgement reads thus:

> 26. That an electronic record is not admissible unless it is accompanied by a certificate as contemplated under Section 65-B (4) of the Indian Evidence Act is no more res integra. The question that falls for our consideration in this case is the permissibility of an objection regarding inadmissibility at this stage. Admittedly, no objection was taken when the CDRs were adduced in evidence before the Trial Court. It does not appear from the record that any such objection was taken even at the appellate stage before the High Court. In Gopal Das v. Sri Thakurji, AIR 1943 PC 83, it was held that:
>
> > "Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the

record. A party cannot lie by until the case comes before a Court of Appeal and then complain for the first time of the mode of proof."

In RVE Venkatachala Gounder (AIR 2003 SC 4548), this Court held as follows:

"Ordinarily an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes:

(i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The later proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of

> the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the later case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in superior Court." [Emphasis supplied]

It would be relevant to refer to another case decided by this Court in P.C. Purshothama Reddiar v. S. Perumal (1972) 1 SCC 9 : (AIR 1972 SC 608). The earlier cases referred to are civil cases while this case pertains to police reports being admitted in evidence without objection during the trial. This Court did not permit such an objection to be taken at the appellate stage by holding that:

> "Before leaving this case it is necessary to refer to one of the contentions taken by Mr. Ramamurthi, learned Counsel for the respondent. He contended that the police reports referred to earlier are inadmissible in evidence as the Head-constables who covered those meetings have not been examined in the case. Those reports were marked without any objection. Hence it is not open to the respondent now to object to their admissibility."

27. 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 65B (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 of the Cr. P.C., 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.

28. Another point which remains to be considered is whether the accused is competent to waive his right to mode of proof. Mr. Luthra's submission is that such a waiver is permissible in civil cases and not in criminal cases. He relies upon a judgment of the Privy Council in Chainchal Singh's case (AIR 1946 PC 1) in support of the proposition. The Privy Council held that the accused was not competent to waive his right. Chainchal Singh's case may have no application to the case in hand at all. In that case, the issue was under Section 33 of the Evidence Act, and was whether evidence recorded in an earlier judicial proceeding could be read into, or not. The question was whether the statements made by a witness in an earlier judicial proceeding can be considered relevant for proving the truth or facts stated in a subsequent judicial proceeding. Section 33 of the Evidence Act allows for this inter alia where the witness is incapable of getting evidence in the subsequent proceeding. In Chainchal Singh, the accused had not objected to the evidence being read into in the subsequent proceeding. In this context, the Privy Council held that in a civil case, a party can waive proof but in a criminal case, strict proof ought to be given that the witness is incapable of giving evidence. Moreover, the Judge must be satisfied that the witness cannot give evidence. Chainchal Singh also held that:

> "In a civil case a party can, if he chooses, waive the proof, but in a criminal case strict proof ought to be given that the witness is incapable of giving evidence".

The witness, who had deposed earlier, did not appear in the subsequent proceeding on the ground that he was unable to move from his house because of tuberculosis, as deposed by the process server. There was no medical evidence in this regard. The Court observed that the question of whether or not he was incapable of giving evidence must be proved in this context, and in the proof of such a fact it was a condition that statements given in an earlier proceeding can be taken as proved in a subsequent proceeding. Chainchal Singh's case therefore, does not lay down a general proposition that an accused cannot waive an objection of mode of proof in a criminal case. In the present case, there is a clear failure to object to the mode of proof of the CDRs and the case is therefore covered by the test in R.V.E. Venkatachala Gounder (AIR 2003 SC 4548).

29. We proceed to deal with the submission of Mr. Luthra that the ratio of the judgment of the Bombay High Court in Shaikh Farid's case (1983 Cri LJ 487 (Bom) (FB)) is not applicable to the facts of this case. It was held in Shaikh Farid's case as under:

> "6. In civil cases mode of proof can be waived by the person against whom it is sought to be used. Admission thereof or failure to raise objection to their tendering in evidence amount to such waiver. No such waiver from the accused was permissible in criminal cases till the enactment of the present Code of Criminal Procedure in 1973. The accused was supposed to be a silent spectator at the trial, being under no obligation to open his mouth till the occasion to record his statement under section 342 (present S. 313) of the Code arose. Even then he was not bound to answer and explain the circumstances put to him as being appearing against him. In the case of Chainchal Singh v. Emperor, AIR 1946 PC 1 it was held by the Privy Council that the accused was not competent to waive his right and the obligation of the prosecution to prove the documents on which the prosecution relied. Resultantly, the prosecution was driven to examine witnesses even when the accused was not interested in challenging the facts sought to be proved though them. The inconvenience and the delay was avoidable.
>
> 7. Section 294 of the Code is introduced to dispense with this avoidable waste of time and facilitate removal of such obstruction in the speedy trial. The accused is now enabled to waive the said right and save the time. This

is a new provision having no corresponding provision in the repealed Code of Criminal Procedure. It requires the prosecutor or the accused, as the case may be, to admit or deny the genuineness of the document sought to be relied against him at the outset in writing. On his admitting or indicating no dispute as to the genuineness, the Court is authorised to dispense with its formal proof thereof. In fact after indication of no dispute as to the genuineness, proof of documents is reduced to a sheer empty formality. The section is obviously aimed at undoing the judicial view by legislative process.

8. The preceding Section 293 of the Code also dispenses with the proof of certain documents. It corresponds with Section 510 of the repealed Code of Criminal Procedure. It enumerates the category of documents, proof of which is not necessary unless the Court itself thinks it necessary. Section 294 makes dispensation of formal proof dependent on the accused or the prosecutor, not disputing the genuineness of the documents sought to be used against them. Such contemplated dispensation is not restricted to any class or category of documents as under section 293, in which ordinarily authenticity is dependent more on the mechanical process involved than on the knowledge, observation or the skill of the author rendering oral evidence just formal. Nor it is made dependent on the relative importance of the document or probative value thereof. The documents being primary or secondary or substantive or corroborative, is not relevant for attracting Sec. 294 of the Code. Not disputing its genuineness is the only solitary test therefor.

9. Now the post-mortem report is also a document as any other document. Primary evidence of such a document is the report itself. It is a contemporaneous record, prepared in the prescribed form, of what the doctor has noticed in the course of post-mortem of the dead body, while investigation the cause of the death. It being relevant, it can be proved by producing the same. But production is only a step towards proof of it. It can be received in evidence only on the establishment of its authenticity by the mode of its proof as provided under sections 67 to 71 of the Evidence Act. Section 294(1) of the Code enables the accused also, to waive this mode of proof, by admitting it or raising no dispute as to its genuineness when called upon to do so under sub-section (1). Sub-section

> (3) enables the Court to read it in evidence without requiring the same to be proved in accordance with the Evidence Act. There is nothing in Section 294 to justify exclusion of it, from the purview of "documents" covered thereby. The mode of proof of it also is liable to be waived as of any other document."
>
> 30. Section 294 of the Cr. P.C. 1973 provides a procedure for filing documents in a Court by the prosecution or the accused. The documents have to be included in a list and the other side shall be given an opportunity to admit or deny the genuineness of each document. In case the genuineness is not disputed, such document shall be read in evidence without formal proof in accordance with the Evidence Act. The judgment in Shaikh Farid's case (1983 Cri LJ 487 (Bom) (FB)) is not applicable to the facts of this case and so, is not relevant.

30. Thus, in view of the facts of the case in hand, the objection raised by the defence has no force. The Judgment of **Anwar P.V. (Supra)** cited by the learned defense counsel is distinguishable on the facts, therefore, it has no help for the appellants. Apart from that, even only for the sake of the arguments, if we consider this evidence inadmissible, then also there is ample evidence to prove the guilt of the appellants.

31. I.O. Mr. Dwivedi (PW/52) has also recovered one pistol each from accused Juber, Baliram and Shafeeq and six cartridges from Juber on the basis of their disclosure. Shiva PW/21, Purushottam PW/22 and Rohit PW/24 have supported the statement of IO Mr. Dwivedi and their statements are corroborated by the memos 27 of Juber Ex.P/49, memo of Baliram Ex.P/50 and memo of Shafeeq Ex.P/83-C and seizure memo of pistol Ex.P/46, 51 & 52. The defence tried hard to make the statements of these witnesses doubtful but in vain. Their testimony remained intact even after lengthy cross-examination.

32. I.O. Mr. Dwivedi has stated that he had sent all the three pistols and cartridges and clothes of the deceased, empty cartridges collected from the spot and other articles seized during investigation to the FSL for comparison and chemical analysis vide letter dated 28.01.2010 Ex.P/105. Articles which were sent by the police to the FSL, are as under:-

क्र.	जप्त प्रदर्श का विवरण	जप्ती स्थान	जप्ती दिनांक	मार्क	सील
1	एक सील बंद पैकेट में पिस्टल ग्रीप कत्थई रंग की	आरोपी बलिरामें के पेश करने ग्राम उमरखली	25.12.09	ए	थाना
2	एक सील बंद पैकेट में पिस्टल ग्रीप कत्थई रंग की	आरोपी शफीक के पेश करने ग्राम सिनखेड़ा	25.12.09	बी	–''–
3	एक सील बंद पैकेट में पिस्टल ग्रीप स्लेटी रंग की	आरोपी जुबेर के पेश करने पर ग्राम उपरखली जाम के बगीचे से	–''–	सी	–''–
4	एक सील बंद पैकेट में जीवीत कारतूस 3	घटना स्थल से	12.12.09	डी.ई.एफ	–''–
5	एक सील बंद पैकेट में फायर किये गये कारतूस 9	–''–	–''–	जी से ओ तक	–''–
6	एक सील बंद पैकेट में फायर किया बुलेट मृतक के शरीर से	जिला अस्पताल खरगोन	12.12.09	पी	अस्प.
7	एक सील बंद पैकेट में मृतक के कपड़े	–''–	–''–	क्यू	–''–
8	एक सील बंद पैकेट में घायल मनोज की पेण्ट	–''–	13.12.09	आर	–''–
9	एक सील बंद पैकेट में घायल सुरेशचंद के कपड़े	–''–	–''–	एस	–''–
10	एक सील बंद पैकेट में घायल सुनिल के कपड़े	–''–	–''–	टी	–''–
11	एक सील बंद पैकेट में घायल रतनलाल के कपड़े	–''–	–''–	यू	–''–
12	एक सील बंद पैकेट में घायल रामकृष्ण महाजन के कपड़े	अपोलो अस्पताल इन्दौर	16.12.09	वी	थाना
13	एक सील बंद एल्यूमिनीयम पार्टीशन का निचला टूकड़ा जिसमें छेद है	घटनास्थल	12.12.09	डब्ल्यू	थाना
14	एक सील बंद पैकेट में फर्श पर लगे खून की रूई में की गई पोछन	–''–	–''–	एक्स	–''–
15	एक सील बंद पैकेट में सादा रूई	–''–	–''–	व्हाय	–''–

16	एक सील बंद पैकेट में कमरे में फर्श पर डेन्टमार्क में फंसा धातु का टुकड़ा व खुरचन	–''–	–''–	झेड	–''–
17	एक सील बंद पैकेट में बुलेट का उपरी हिस्सा	–''–	–''–	झेड–1	–''–
18	एक सील बंद पैकेट में चले हुए कारतूस का अगला हिस्सा (बुलेट)	–''–	–''–	झेड–2	–''–
19	एक सील बंद पैकेट में जीवित कारतूस 3 सी पिस्टल से मिले	आरोपी जुबेर के पेश करने पर ग्राम उमरखली के बगीचे से	25.12.09	सी–1, सी–2, सी–3	

33. After thorough examination and comparison, the experts of the FSL opined that all three pistols were operational, they were recently used, the empty cartridges were fired from these pistols and clothes of the deceased were having corresponding gunshot marks. The opinion of the FSL Ex.P/107 reads as under:-

> ''**<u>अभिमत</u>**
>
> प्रदर्श – A–1 से A–3 तक तीन देशी निर्मित पिस्तौल है जिन्हे 9 MM केलीबर के कारतूस चलाने के लिए बनाया गया है। ये तीनों पिस्तौल चालू हालत में है। इनकी बैरल में इन्हे पूर्व में चलाए जाने के अवशेष पाए गए। इन्हे अंतिम बार चलाए जाने की संभावित अवधि, वैज्ञानिक निश्चितता से बताना संभव नही है। प्रदर्श – A–1, A–2 अथवा A–3 के फायर से प्राणघातक चोटें आना संभव है।
>
> प्रदर्श LR1 से LR6 तक छह 9 MM केलीबर के पिस्तौल कारतूस है जो यहां जीवित अवस्था में प्राप्त हुए। इनमें से LR_1, LR_2 व LR_3 को यहां क्रमशः पिस्तौल प्रदर्श A–1, A–2 व A–3 से टेस्ट फायर किया गया। इसी प्रकार LR4, LR5 व LR6 को भी पिस्तौल प्रदर्श A–1, A–2 अथवा A–3 से फायर किया जा सकता है।
>
> प्रदर्श Ec_1 से Ec9 तक नौ 9 MM केलीबर के चले हुए पिस्तौल कारतूसों के खोखे है। इन्हे कम्पेरीजन–माइक्रोस्कोप द्वारा, फायरिंग–पिन 1 ब्रीच–फेस के निशान के लिए, आपस में एवं टेस्ट कारतूस –TC (A1) तथा TC (A2) तथा TC (A3) से मिलाने पर –Ec_1, Ec_3, Ec_5, Ec_6, तथा Ec_7 आपस में एक समान पाए गए एवं ये TC (A3) के समान पाए गए। अतः Ec_1, Ec_3, Ec_5, Ec_6, तथा Ec_7 को पिस्तौल प्रदर्श A3 से चलाया गया है।
>
> Ec_2, Ec_4, Ec_8, तथा Ec_9, आपस में एक समान पाए गए एवं ये TC (A2) के समान पाए गए। अतः Ec_2, Ec_4, Ec_8 तथा Ec_9 को पिस्तौल प्रदर्श – A2 से चलाया गया है।
>
> प्रदर्श – Eb_1 तथा Eb_4 दो 9 MM केलीबर कारतूस की, चली हुई, कापर–जैकेटेड बुलेट है। इन दोनो पर बैरल मार्क्स उपस्थित पाए गए। इन पर बैरल मार्क्स का उपलब्ध डाटा निर्णायक मिलान हेतु पर्याप्त नही है। बैरल–मार्क्स की उपस्थिति के आधार पर, इन्हे स्मूथ बोर और बगैर रेगुलर राइफलिंग वाले फायर मार्क्स जैसे कि प्रदर्श A_1, A2, व A3, से चलाया गया है परन्तु निर्णायक मिलान के अभाव में यह अभिमत देना संभव नही है कि इन्हे पिस्तौल प्रदर्श A_1, A2, अथवा A3 से चलाया गया है अथवा नही।
>
> कापर तथा लेड धातु के टुकड़े प्रदर्श – Eb_2 तथा Eb_3 कोड कोर युक्त कापर जैकेटेड बुलेट जैसे कि प्रदर्श – Eb_1 तथा Eb_4 की विखंडित जैकेट एवं कोर के टुकड़े होना चाहिए।

कपड़ों प्रदर्श C1 से C13 तक पर चिन्हित छिद्र एवं धातु के बार प्रदर्श –W पर चिन्हित छिद्र गनशाट छिद्र है। ये छिद्र कापर जैकेटेड बुलेट जैसे कि प्रदर्श Eb1 तथा Eb4 के लगने से बने है। इनमें से शर्ट प्रदर्श–C1 पर H1 चिन्हित छिद्र के आसपास ब्लैंकनिंग की उपस्थिति के आधार पर, इस छिद्र के सापेक्ष, पिस्तौल प्रदर्श– A1, A2 अथवा A3 के द्वारा फायर किए जाने की स्थिति में, फायर करने की दूरी लगभग 1 1/2 फीट से कम रही होगी।"

34. I.O. Akhilesh Dwivedi PW-52 has stated that after the incident, he arrested the accused persons on 16 & 17/12/2009 and Chhatrpal Singh Parihar PW/29 (ST 35/12) has stated that he arrested the accused Munna @ Shahnawaz on 27/09/2011. These arrests have not been challenged by the appellants. IO Mr. Dwivedi PW/52 and S.D.O., Khargone G.S. Dodia PW-44 (both in ST 63/10) have stated that Mr. Dwivedi sent a request to Mr. Dodiya to conduct identification of the accused **Juber, Ramjan S/o Kallu @ Chhota Ramjan and Shafique**. After arrest of the accused **Munna @ Shahnwaj,** the Executive Magistrate Tehsildar, Khargone Vivek Sonkar PW-32 (ST 35/12) conducted his identification. On 18/10/2011 and submitted its report to the SHO alongwith letter Ex.P/55. On both these occasions, the witnesses Suresh Mahajan, Bihari and Ramkrishna (PW-1,3,5 ST No.63/10) identified them (EX.P-88, 89 & 90). These witnesses have also identified them (Juber, Ramjan S/o Kallu @ Chhota Ramjan, Shafique and Munna @ Shahnwaj) in Court. Apart from that the eye-witnesses Jeetu @ Jitendra Kushwaha and cotton broker Manoj Shikari (PW-11 & 14) have identified accused Shafeeq, Sunil Bhilala (PW-12) has identified accused Shafeeq and Juber and driver Manish Raghuvanshi (PW-13) has identified Shafeeq, Juber, Chhota Ramjan and Munna @ Shahnwaj also in the Court giving details of the part played by all of them. Eye-witness Ratanlal (PW-8, ST No.35/12) has also identified accused Munna @ Shahnwaj in Court. Despite adroit efforts to testify their testimony from all possible angles

on the anvil of the cross-examination, their credibility could not be shaken.

35. It is pertinent to mention here that the accused Munna @ Shahnwaj and Shafeeq are residents of U.P. (Munna Village- Karoli Khurd, Police Station Saraimir district Aajamgarh & Shafeeq Village Pahadpur, P.S. Purva Bazar, District Gorakhpur). Soon before the incident, they came and stayed in a hotel at Khargone. The then SHO, Chhatarpal Singh Parihar and Manager of Hotel Metro, Khargone, Gulsher Khan and witness Santosh (PW-29, 16 & 17 ST No.35/12) have stated that after disclosure of Munna @ Shahnwaj that before committing the incident he stayed in Metro Hotel, Khargone for two days, Shri Parihar seized guest register of Hotel Metro, Khargone. As per entry of this register dated 09.12.2009, the accused Munna @ Shahnwaj stayed in room no.204 for two days with Shafeeq. In identification parade conducted by the Tehsildar Vivek Sonkar (PW-32), Manager Gulsher Khan was also called to identify Shahnwaj and he identified him during identification parade in jail and also during his examination before the Court. Their statements, which are supported by identification memo (Ex.P/2) also, remained intact even after cross-examination.

36. It is vehemently argued by the learned defence counsels that to constitute offence under section 396 of the IPC presence and participation of 5 or more persons is necessary, while in the present case presence of only 3 persons is mentioned in the Dehati Nalishi and in the FIR. The eye witnesses have stated presence of only 4 persons. In that case, the offence charged with, cannot be constituted. It is further contended that charge under section 302 IPC is not framed against the

accused persons; therefore, in case of failure of charge under section 396 IPC, they cannot be punished under section 302 IPC also. The learned counsels placed reliance on **Manmeet Singh Vs. State of Punjab 2015 Cr.L.J. 2355 and Rajkumar @ Raju Vs. State of Uttranchal, 2008 (11) SCC Page No.709, Ibrahim and Others vs. State of Punjab AIR 1926 SC 374, Kallu @ Rajkumar v. State of M.P., MPLJ (1992) Page No.558** and **Reechchoo vs. State of M.P., 1981 JLJ Page-183.**

37. In view of the argument of the learned counsel, we revisited the evidence produced by the prosecution before the learned trial court. Sub-Inspector Surya Dutt Tiwari (PW-50) has stated that on the date of incident he received information through control room that some incident of loot is going on at Rajshree Ginning Factory and the robbers are also firing there. On receiving this information, he with Station In-charge Akhilesh Dwivedi, ASI Dixit, ASI Solanki some head-constables and constables immediately rushed towards the place of incident. The police launched search operation. Different police parties spread in different areas. Some police personals started searching the culprits on Nagjhari road, some on Amarkhali road and some on Bistan road. Amar Singh (PW-23) has stated that on 12.12.2009, at about 12:30 – 12:45 he was preparing his farm for sowing wheat he saw that two motorcycles with pillion rider were coming at abnormal high speed, which may be 80-90 kmph from Khargone side and going towards Piperkhedi. On one motorcycle, pillion rider was holding a grey colour bag in his hand. After 15-20 minutes, he saw that Mohammad Patel was also coming from Khargone and going towards Piperkhedi. He was also in hurry. He identified him in court as he was known to him because he used to come at the factory in relation to his business of packaging bags (*bardana)*

with the factory. So far as relation of Mohammad with the factory is concern, Manoj (PW-15) has also supported the statement of Amar Singh and further by giving a suggestion to the IO Mr. Dwivedi (para 68 of the cross examination), he has admitted that he is in the business of *Bardana*. They both have remained intact even after cross-examination.

38. I.O. Akhilesh Dwivedi has stated that immediately after the incident the police cordoned the area. Various police parties were deployed on all possible escape routes of the culprits. On 16.12.2009, he received information that Juber and Mohammad Patel are dissipating the booty. He cordoned the area and took Juber in custody from bus-stand. On interrogation, he disclosed names of his accomplices. After completing recovery and other necessary formalities, he arrested Babloo @ Tasleem and thereafter took Mohammad Patel in custody from his house. They all revealed that they hatched conspiracy of the loot at the house of Juber. Mohammad Patel, who was acquainted with the working of the factory due to his business of packaging bags (*Bardana),* gave full information to his accomplices regarding functioning and money transactions of the factory. He was assigned duty to support the culprits from outside. It is apposite to keep in mind that the accused Munna @ Shahnwaj and Shafeeq who invaded the factory were from Azamgarh and Gorakhpur of district U.P. They were not aware of the locality and were in need of a local assistance, which Mohammad provided them and he worked for them as a guide or pointer.

39. Mohammad Patel received Rs. 10.55 lacs in the looted cash for the part played by him, which were recovered later from his possession on the basis of information given by him. Packets of currency notes

recovered from his house were later identified by the cashier of the bank, who had delivered those packets to the accountant of the factory. This established that the currency notes recovered from the house of Mohammad were stolen property. No explanation is submitted by him. This all establishes his involvement in the crime. From all this chain of circumstances, it emerges that behind the curtain, Mohammad Patel was also present on the spot at the time of the incident. Therefore, it cannot be said that at the time of the incident five or more persons were not conjoint in committing the offence.

40. Manoj PW/15 has stated that Mohammad was not present on the spot, but at the time of incident, he (Manoj) was sitting in the office cabin of the factory with owner Suresh Mahajan, while presence of Mohammad appears to be at the outside of the factory, therefore, his statement does not affect adversely the statement of Amar Singh.

41. Suresh Mahajan, who lodged *Dehati Nalashi* was sitting inside the office. Only one miscreant entered in the office, he fired gun shots on the deceased, snatched bag from him, fired gun shots on the persons who tried to intervene and ran outside with the bag containing Rs.50 lacs. Entire incident happened within 4-5 minutes. Suresh has first seen the incident happened inside the office. It is quite possible that he could not see all the culprits standing outside from the window of his office. It has come in the evidence that at the time of the incident the factory was in operation and many people were present in the premises of the factory in respect of their routine business. It is quite natural that in an unexpected incident one cannot recognize as to who among the many persons present there is companion of the culprits. Suresh himself was injured;

even then he immediately tried to chase the offenders, but did not find them. He came back, made arrangements to send the injured and the deceased to the hospital and thereafter lodged the report. All the witnesses who have seen the incident from outside the office when they were standing in the factory premises were in a position to see all the persons who were involve in the attack. Their testimony was well tested on the anvil of the cross-examination, but they stand up with their statements. Fifth miscreant was guided the way to the accomplice, he did not enter in the factory and he disappeared from the scene of incident after his job was over. His presence on the spot was proved by another witness Amar Singh as discussed in preceding paras. Thus, ostensibly some discrepancy in the number of miscreants appears in the statement of the witnesses, but in fact that is not a discrepancy as all the witnesses have revealed the true facts which they had seen and total effect of their statement is neither contradictory nor unbelievable.

42. Though, in the peculiar facts of the present case, it is not necessary to consider as to whether the appellants can be convicted for the offence punishable under Section 302 even in absence of specific charge, as in the present case presence of 5 dacoits, necessary to constitute the offence under Section 396 of the IPC, is well established, but we think it proper to satisfy the question raised before us. The reply can be gathered from the judgement of the constitutional bench of Hon'ble the Supreme Court. In **Shyam Behari v. State of Uttar Pradesh, AIR 1957 SC 320,** the bench held that:

> "15. It is, however, unnecessary to do so because in the facts and circumstances of the present case the appellant is liable to be convicted of the offence under Section 302

Indian Penal Code without anything more. The charge under Section 396, Indian Penal Code comprised of two ingredients:-(1) the commission of the dacoity, and (2) the commission of the murder in so committing the dacoity. The first ingredient was proved without any doubt and was not challenged by the learned counsel for the appellant. The second ingredient also was proved in any event as regards the commission of the murder because the attention of the accused was focused not only on the commission of the offence while committing the dacoity but also on the individual part which he took in the commission of that murder. So far as he was concerned, he knew from the charge which was framed against him that he was sought to be made responsible not only for the commission of the dacoity but also for the commission of the murder in committing such dacoity. The evidence which was led on behalf of the prosecution specifically implicated him and he was named by the prosecution witnesses as the person who shot at Mendai while crossing the ditch of the Pipra Farm. His examination under section 342 of the Criminal Procedure Code also brought out that point specifically against him and he was questioned in that behalf. Both the Courts below recorded their concurrent findings of fact in regard to the part taken by the appellant in the commission of the murder of Mendai. Under these circumstances it could not be urged that the appellant could not be convicted of the offence under Section 302, Indian Penal Code if such a charge could be made out against him (Vide our decision in Willie (William)

Slaney v. State of Madhya Pradesh, Crl. App. No. 6 of 1955 d/-31-10-1955 ((S) AIR 1956 SC 116) (F)"

43. The Hon'ble Apex court has again consider the question as to whether the accused, who charged for offence u/S. 396 alone can be convicted for offence u/S. 302 without alteration of charge and as to whether murder is integral part of the offence under section 396 IPC in **Rafiq Ahmed @ Rafi v. State of U.P., AIR 2011 SC 3114** and answered affirmatively stating that if **c**ircumstances constituting offence u/S. 302 put to the accused and no prejudice demonstrated by the accused qua his right to defence, fair trial etc., the accused can be convicted u/S. 302 even in absence of alternate charge u/S. 302. But in the present case, as discussed above, 5 persons conjointly committed dacoity, therefore, no finding on this issue is required at our level.

44. In the cases of **Manmeet Singh, Rajkumar @ Raju, Ibrahim, Kallu @ Rajkumar and Reechchoo (Supra)** it is held that to constitute the offence under Section 396 essential pre-requisite is joint participation of five or more persons in commission of the offence of dacoity and the prosecution could not establish this, therefore, the appellants cannot be convicted for the offence u/s 396 IPC. But, in the present case, as discussed above, presence of five persons while committing robbery, is proved, therefore, these citations are not much helpful to the appellants.

45. The learned counsels expressed their suspicion towards the fact that the number of currency notes were written on the back of the cheque, which according to them is an unusual practice. But in this case the cheque was recovered on 13/12/2009 with the number of notes mention on the back, while the currency notes were recovered on 16,17

& 21/12/2009, therefore it cannot be said an antedated entry. Besides, leaving no room for doubts, the statements of the bank officers have remained intact in this regard.

46. The Learned counsels for the defence drew our attention toward opinion of the Add. State Examiner of Questioned Documents, Govt. of M.P., Bhopal Ex.D/14. In his report, after comparing both writings relating to denomination of the currency notes delivered and their unique numbers written on the back of the cheque, which was encashed by the bank, the State Examiner has opined that definite opinion regarding the common authorship of above said two sets of writing cannot be expressed. But this opinion does not trash the case of the prosecution as while comparing both the writings, the State Examiner observed that:

> **"The original document of this case have been carefully and thoroughly examined.**
>
> I. When the writing, written as amount, on the back of a disputed cheque marked Ex-P-6 have been carefully and thoroughly examined, under different arrangements of light, the following facts have been observed.
>
> (1) When the writing viewed under sun light, U.V. light and I.R. light, the ink emits similar fluorescence, at all the portions written as amount, means similar ink is used in the execution of writing written as amount.
>
> (2) The writing existing in column No.I, II and III, show internal consistency among it. Movement and formation of digit, 4, 5, 8, 2 and compression of zero with variation, which are commonly available for comparison, revels this fact, including the writing marked 'F to F' and this writing seemed to be differ only due to small size of digits.
>
> (3) Though the standard writing marked S1 to S10 show characteristics similarities with the questioned writing of Ex-P-6, which is written as amount on the back of a cheque, but as the admitted similar writing of the

writer of S1 to S10 is not available for comparison, specimen writing marked S1 to S10 is written mostly in combination, providing wider space giving different appearance and more over questioned writing is written with the help of letters C, S, B, V, H, T and digits only, most of them has common characteristics of writing. **Under these circumstances, definite opinion regarding the common authorship of above said two sets of writing can not be expressed."**

47. Thus, many similarities were observed by the Examiner on almost all the material parameters, and only due to technical limitations or some shortcomings definite opinion could not be given but this does not mean that both the writings were different and this makes the case doubtful particularly when we see that there was no occasion for the bank officers to mention the numbers of the currency note as the cheque was seized much prior to the seizure of the currency notes from the appellants.

48. The defence took us to the statements of the witnesses examined by the prosecution before the trial Court and submits that there are many improbabilities, discrepancies, contradiction and omissions in their depositions. It is submitted that they have not disclose phiz/features *(Huliya)* of the assailants, Ratanlal could not identify any of the accused, Jitendra had seen four person but he could identify only Shafeeq, Sunil could not identify Ramjan, Manoj has stated nothing against Ramjan S/o Kallu, Amar could only identify Mohhamad, Manish has stated that the offenders had put pistol on his neck but no other witness has stated this, witnesses of memos and seizures Devendra, Prakash, Rohit and Govind are interested witnesses. They work with the factory owner. The police did not make independent persons of the locality witness of the proceedings, memo of identification of the accused persons does not

bears signature of the persons who participated in the identification parade etc. but the similar objections were raised before the trial Court also and the learned Court has dealt with them in detail and held that looking to the evidence available on the record, the shortcomings pointed out by the defence are immaterial. We are also agree with the findings of the learned trial Court. Repetition of discussion is not required.

49. The learned defence counsels have assailed the prosecution case on the basis of several judgements of the Courts like ***Kanan and Others vs. State of Kerala*** reported ***in (1979) 3 SCC 319***, ***Thankayyan vs. State of Kerala*** reported in ***1994 SCC (Cri) 1751***, ***Raju @ Rajendra Vs. State of Maharashtra*** reported in ***AIR 1998 SC 275, Jaspal Singh @ Pali and Others vs. State of Punjab*** reported in ***1997 (1) SCC 510, Chonampara Cheliappan vs. State of Kerala*** reported in ***1979 (4) SCC 312, Bali Ahir and Others vs. State of Bihar*** reported in ***1984 (Supp) SCC 625, Subhash and Shiv Khankar vs. State of U.P.*** reported in ***(1987) 3 SCC 331, State of Maharashtra vs. Syed Umar Syed Abbas and Others*** reported in ***(2016) 4 SCC 735, Siddanki Ram Reddy vs. State of Anadhra Pradesh*** reported ***in (2010) 7 SCC 697, Rajesh Govind vs. State of Maharashtra*** reported in ***(1999) 8 SCC 428, Soni vs. State of Uttar Pradesh*** reported in ***(1982) 3 SCC 368, Wakil Singh and Others vs. State of Bihar*** reported in ***1981 (Supp) SCC 28, Babloo vs. State of Madhya Pradesh*** reported in ***2009 (5) M.P.H.T. 475, Ashish Batham vs. State of M.P.*** reported in ***2002 (2) JLJ SC 373, Lakhu @ Lakhanlal vs. State of M.P.*** reported in ***IlR (MP) 2013 934*** and ***Iqbal and Others vs. State of Uttar Pradesh*** reported in ***(2015) 6 SCC 623***. In these judgements, in the cases based on the circumstantial evidence, the

Courts held the case of the prosecution doubtful in absence of identification of the culprits during investigation or on the basis of delay or other irregularities in conducting the TI parade. But in the case in hand, no such shortcomings or irregularities could be pointed out. In this case the accused were arrested on 16,17 & 20/12/2009 and the identification parade was conducted on 29/01/2010. The accused Munna @ Shahnawaz was arrested on 27.09.2011 (Ex.P-54) and the identification was conducted on 18.10.2011 (Ex.P-55). No evidence that the witnesses got any opportunity to see the culprits before facing them in the identification parade conducted by the executive magistrates. The statements of witnesses both, who conducted the parade or who identified the culprits were tested by the defence at length, but no fault could be brought on record. Therefore, the case of the prosecution remains credible.

50. Thus, it is well established that the accused **Juber, Ramjan @ Chhota Ramjan S/o Kallu, Shafeeq**, **Munna @ Shahnwaj and Mohammad Patel** were seen by the witnesses on the spot while committing the crime and later they were identified by them**,** Pistols which were used in the crime and the bag looted in the incident were recovered from possession of the accused **Juber, Baliram** an**d Shafeeq** and the cash looted in the crime was recovered from all the appellants, which was identified by the witnesses, establishes involvement of the appellants in the alleged crime beyond all reasonable doubts.

51. Unrebutted testimony of the Arms Clerk Gajendra Singh PW/29 is sufficient to establish the sanction for prosecution of the accused person for the charge under section 25(1B) (a) of the Arms Act, 1959 granted

by the District Magistrate (Ex.P/69). No flaw in granting this sanction could be brought to the notice by the learned counsel for the appellants.

52. The appellants Juber, Mohammad Patel S/o Anwar, Chota Ramjan S/o Kallu, Shafeeq and Munna @ Shahnwaj have conjointly committed dacoity and looted Rs.50 Lacs. They were involved directly in commission of the offence of dacoity. Stolen property was found in the possession. In Section 114 of the Evidence Act illustration (a) the words "either the thief or has received the goods" and more particularly the word "or" postulate that both the presumptions cannot be drawn simultaneously. This takes us to the proposition that one cannot be convicted for both theft and for receiving or retaining stolen property. Therefore, separate conviction of the appellants Juber, Mohammad Patel, Chota Ramjan S/o Kallu, Shafeeq and Munna @ Shahnwaj under Section 412 of IPC for knowingly receiving or retaining stolen property is not sustainable.

53. The appellants Mohammad Patel S/o Anwar, Chota Ramjan S/o Kallu, Ramjan @ Ramju S/o Ibrahim, Abdul Aziz, Chunnilal, Baliram, Bihari and Sildar have been convicted for harboring the dacoits, but, no evidence in this regard is available on record except confessional statement of the co-accused persons given before the police which are without any doubt inadmissible. Therefore, their conviction can not be upheld for the offence under Section 216-A of IPC.

54. As no fire arm was recovered from possession of the appellant Munna @ Shahnwaj, therefore, he con not be convicted under Sections 25 (1B) (a) and 27 of the Arms Act, 1959.

55. In view of the aforesaid discussion, we partly allowed the appeals and acquit the appellants Juber, Mohammad Patel S/o Anwar, Chota Ramjan S/o Kallu, Shafeeq and Munna @ Shahnwaj from the charges under Section 412 of IPC. Further we acquit the appellants Mohammad Patel S/o Anwar, Chota Ramjan S/o Kallu, Ramjan @ Ramju S/o Ibrahim, Abdul Aziz, Chunnilal, Baliram, Bihari and Sildar from the charge under Section 216A of IPC. The fine amount if deposited by them in this respect be refunded to them.

56. We hold the appellants guilty according to the following table:-

Offence u/S.	Imprisonment
Munna @ Shahnwaj	396 r/w 120-B & 397 r/w S.120-B of IPC
Juber S/o Kale Khan	396 r/w 120-B, 397 r/w 120-B IPC, 25(1B)(a) of Arms Act & 27 of Arms Act.
Shafeeq	396 r/w 120-B, 397 r/w 120-B IPC & 25(1B)(a) & 27 of Arms Act, 1959
Ramjan S/o Kalu Khan	396 r/w 120-B, 397 r/w S.120-B IPC
Mohammad Patel	396 r/w 120-B, 397 r/w 120-B of IPC
Ramjan S/o Ibrahim	396 r/w 120-B, 397 r/w 120-B & 412 of IPC
Bablu @ Taslim	396 r/w 120-B, 397 r/w 120-B & 412 of IPC
Baliram	412, 201 of IPC, 25(1B)(a) of Arms Act
Abdul Aziz	412 & 201 of IPC
Chunnilal	412 of IPC
Bihari	412 of IPC
Sildar	412 of IPC

57. Now we will consider the death sentence awarded to the appellant Munna @ Shahnawaz and sentence awarded to the other appellants. The Hon'ble Supreme Court in **Ramnaresh and Ors v. State of Chhattisgarh AIR 2012 SC 1357** considered the basic principles governing death penalty and in view of earlier cases of **Bachan Singh Vs. State of Punjab (AIR 1980 SC 898**) and **Machhi Singh Vs. State of Punjab (AIR 1983 SC 957)** and few other case laws observed that awarding death penalty is certainly an onerous function in the dispensation of criminal justice. The court is expected to keep in mind the facts and circumstances of a case, the principles of law governing award of sentence, the legislative intent of special or general statute raised in the case and the impact of awarding punishment are the nuances which need to be examined by the court with discernment and in depth. Relevant paras of the judgement reads thus:

> 27. In order to examine this aspect in some greater depth and with objectivity, it is necessary for us to reiterate the various guiding factors. Suffices it to make reference to a recent judgment of this Court in the case of State of Maharashtra v. Goraksha Ambaji Adsul [(2011) 7 SCC 437 : (AIR 2011 SC 2689 : 2011 AIR SCW 4208)], wherein this Court discussed the law in some detail and enunciated the principles as follows : (Paras 16 to 21 of AIR, AIR SCW)
>
> "30. The principles governing the sentencing policy in our criminal jurisprudence have more or less been consistent, right from the pronouncement of the Constitution Bench judgment of this Court in Bachan Singh v. State of Punjab (AIR 1980 SC 898). Awarding punishment is certainly an onerous function in the dispensation of criminal justice. The court is expected to keep in mind the facts and circumstances of a case, the principles of law governing award of sentence, the legislative intent of special or general statute raised in the case and the impact of awarding punishment. These are the nuances which need to be examined by the court with discernment and in depth.
>
> 31. The legislative intent behind enacting Section 354(3), Cr.P.C. clearly demonstrates the concern of the legislature for taking away a human life

and imposing death penalty upon the accused. Concern for the dignity of the human life postulates resistance to taking a life through law's instrumentalities and that ought not to be done, save in the rarest of rare cases, unless the alternative option is unquestionably foreclosed. In exercise of its discretion, the court would also take into consideration the mitigating circumstances and their resultant effects.

32. The language of Section 354(3) demonstrates the legislative concern and the conditions which need to be satisfied prior to imposition of death penalty. The words, "in the case of sentence of death, the special reasons for such sentence" unambiguously demonstrate the command of the legislature that such reasons have to be recorded for imposing the punishment of death sentence. This is how the concept of the rarest of rare cases has emerged in law. Viewed from that angle, both the legislative provisions and judicial pronouncements are at ad idem in law. The death penalty should be imposed in the rarest of rare cases and that too for special reasons to be recorded. To put it simply, a death sentence is not a rule but an exception. Even the exception must satisfy the pre-requisites contemplated under Section 354(3), Cr. P.C. in light of the dictum of the Court in Bachan Singh.

33. The Constitution Bench judgment of this Court in Bachan Singh (AIR 1980 SC 898) has been summarised in para 38 in Machhi Singh v. State of Punjab (AIR 1983 SC 957) and the following guidelines have been stated while considering the possibility of awarding sentence of death: (Machhi Singh case, SCC p. 489) : (Para 33 of AIR)

> "(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 requires to be taken into consideration along with the circumstances of the 'crime'.
>
> (iii) Life imprisonment is the rule and death sentence is an exception. ? 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." **(Emphasis supplied)**

34. The judgment in Bachan Singh (AIR 1980 SC 898), did not only state the above guidelines in some elaboration, but also specified the mitigating circumstances which could be considered by the Court while determining such serious issues and they are as follows: (SCC p. 750, para 206) : (Para 204 of AIR)

"206. ? '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 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."

35. Now, we may examine certain illustrations arising from the judicial pronouncements of this Court.

36. In D.K. Basu v. State of W.B. (AIR 1997 SC 610 : 1997 AIR SCW 233) this Court took the view that custodial torture and consequential death in custody was an offence which fell in the category of the rarest of rare cases. While specifying the reasons in support of such decision, the Court awarded death penalty in that case.

37. In Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra (AIR 2010 SC (Supp) 612 : 2010 AIR SCW 1130) this Court also spelt out in paras 56 to 58 that nature, motive, impact of a crime, culpability, quality of evidence, socio-economic circumstances, impossibility of rehabilitation are the factors which the court may take into consideration while dealing with such cases. In that case the friends of the victim had called him to see a

movie and after seeing the movie, a ransom call was made, but with the fear of being caught, they murdered the victim. The Court felt that there was no evidence to show that the criminals were incapable of reforming themselves, that it was not a rarest of the rare case, and therefore, declined to award death sentence to the accused.

38. Interpersonal circumstances prevailing between the deceased and the accused was also held to be a relevant consideration in Vashram Narshibhai Rajpara v. State of Gujarat (AIR 2002 SC 2211 : 2002 AIR SCW 2314) where constant nagging by family was treated as the mitigating factor, if the accused is mentally unbalanced and as a result murders the family members. Similarly, the intensity of bitterness which prevailed and the escalation of simmering thoughts into a thirst for revenge and retaliation were also considered to be a relevant factor by this Court in different cases.

39. This Court in Satishbhushan Bariyar also considered various doctrines, principles and factors which would be considered by the Courts while dealing with such cases. The Court discussed in some elaboration the applicability of the doctrine of rehabilitation and the doctrine of prudence. While considering the application of the doctrine of rehabilitation and the extent of weightage to be given to the mitigating circumstances, it noticed the nature of the evidence and the background of the accused. The conviction in that case was entirely based upon the statement of the approver and was a case purely of circumstantial evidence. Thus, applying the doctrine of prudence, it noticed the fact that the accused were unemployed, young men in search of job and they were not criminals. In execution of a plan proposed by the appellant and accepted by others, they kidnapped a friend of theirs. The kidnapping was done with the motive of procuring ransom from his family but later they murdered him because of the fear of getting caught, and later cut the body into pieces and disposed it off at different places. One of the accused had turned approver and as already noticed, the conviction was primarily based upon the statement of the approver.

40. Basing its reasoning on the application of doctrine of prudence and the version put forward by the accused, the Court, while declining to award death penalty and only awarding life imprisonment, held as under: (Satishbhushan Bariyar case (AIR 2010 SC (Supp) 612 : 2010 AIR SCW 1130), SCC pp. 551 and 559-60, paras 135, 168-69 and 171-73) : (Paras 140, 173,174 and 177 to 180 of AIR, AIR SCW)

> "135. Right to life, in its barest of connotation would imply right to mere survival. In this form, right to life is the most fundamental of all rights. Consequently, a punishment which aims at taking away life is the gravest punishment. Capital punishment imposes a limitation on the essential content of the fundamental right to life,

> eliminating it irretrievably. We realise the absolute nature of this right, in the sense that it is a source of all other rights. Other rights may be limited, and may even be withdrawn and then granted again, but their ultimate limit is to be found in the preservation of the right to life. Right to life is the essential content of all rights under the Constitution. If life is taken away, all other rights cease to exist.

* * *

168. We must, however, add that in a case of this nature where the entire prosecution case revolves round the statement of an approver or is dependant upon the circumstantial evidence, the prudence doctrine should be invoked. For the aforementioned purpose, at the stage of sentencing evaluation of evidence would not be permissible, the courts not only have to solely depend upon the findings arrived at for the purpose of recording a judgment of conviction, but also consider the matter keeping in view the evidences which have been brought on record on behalf of the parties and in particular the accused for imposition of a lesser punishment. A statement of approver in regard to the manner in which crime has been committed vis-?is the role played by the accused, on the one hand, and that of the approver, on the other, must be tested on the touchstone of the prudence doctrine.

169. The accused persons were not criminals. They were friends. The deceased was said to have been selected because his father was rich. The motive, if any, was to collect some money. They were not professional killers. They have no criminal history. All were unemployed and were searching for jobs. Further, if age of the accused was a relevant factor for the High Court for not imposing death penalty on Accused 2 and 3, the same standard should have been applied to the case of the appellant also who was only two years older and still a young man in age. Accused 2 and 3 were as much a part of the crime as the appellant. Though it is true, that it was he who allegedly proposed the idea of kidnapping, but at the same time it must not be forgotten that the said plan was only executed when all the persons involved gave their consent thereto.

* * *

171. Section 354(3) of the Code of Criminal Procedure requires that when the conviction is for an offence punishable with death or in the alternative with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and in the case of sentence of death, the special reasons thereof. We do not think that the reasons assigned by the courts below disclose any special reason to uphold the death penalty. The discretion granted to the courts must be exercised very cautiously especially because of the irrevocable character of death

penalty. Requirements of law to assign special reasons should not be construed to be an empty formality.

172. We have previously noted that the judicial principles for imposition of death penalty are far from being uniform. Without going into the merits and demerits of such discretion and subjectivity, we must nevertheless reiterate the basic principle, stated repeatedly by this Court, that life imprisonment is the rule and death penalty an exception. Each case must therefore be analysed and the appropriateness of punishment determined on a case-by-case basis with death sentence not to be awarded save in the 'rarest of the rare' case where reform is not possible. Keeping in mind at least this principle we do not think that any of the factors in the present case discussed above warrants the award of the death penalty. There are no special reasons to record the death penalty and the mitigating factors in the present case, discussed previously, are, in our opinion, sufficient to place it out of the 'rarest of rare' category.

173. For the reasons aforementioned, we are of the opinion that this is not a case where death penalty should be imposed. The appellant, therefore, instead of being awarded death penalty, is sentenced to undergo rigorous imprisonment for life. Subject to the modification in the sentence of the appellant (A-1) mentioned hereinbefore, both the appeals of the appellant as also that of the State are dismissed." **(Emphasis in original)**

“41. The above principle, as supported by case illustrations, clearly depicts the various precepts which would govern the exercise of judicial discretion by the courts within the parameters spelt out under Section 354(3), Cr. P.C. Awarding of death sentence amounts to taking away the life of an individual, which is the most valuable right available, whether viewed from the constitutional point of view or from the human rights point of view. The condition of providing special reasons for awarding death penalty is not to be construed linguistically but it is to satisfy the basic features of a reasoning supporting and making award of death penalty unquestionable. The circumstances and the manner of committing the crime should be such that it pricks the judicial conscience of the court to the extent that the only and inevitable conclusion should be awarding of death penalty."

28. In Machhi Singh and Ors. v. State of Rajasthan [(1983) 3 SCC 470 : (AIR 1983 SC 957)], this Court stated certain relevant considerations like the manner of commission of murder, motive for commission of murder, anti-social or socially abhorrent nature of the crime, magnitude of crime and the personality of the victim of murder. These considerations further demonstrate that the matter has to be examined with reference to a particular case, for instance, murder of an innocent child who could not have or has not provided even an excuse, much less a provocation for murder. Similarly, murder of a helpless woman who might be relying on a

person because of her age or infirmity, if murdered by that person, would be an indicator of breach of relationship or trust as the case may be. It would neither be proper nor probably permissible that the judicial approach of the court in such matters treat one of the stated considerations or factors as determinative. The court should examine all or majority of the relevant considerations to spell comprehensively the special reasons to be recorded in the order, as contemplated under Section 354(3) of the Cr.P.C.

29-32. …

33. Now, we may notice the cases which were relied upon by the learned counsel appearing for the appellants and wherein this Court had declined to confirm the imposition of capital punishment treating them not to be the rarest of rare cases.

34. In Ronny alias Ronald James Alwaris Etc. v. State of Maharashtra [(1998) 3 SCC 625 : (AIR 1998 SC 1251 : 1998 AIR SCW 1103)], the Court while relying upon the judgment of this Court in the case of Allauddin Mian and Ors. v. State of Bihar [(1989) 3 SCC 5 : (AIR 1989 SC 1456)], held that the choice of the death sentence has to be made only in the 'rarest of rare' cases and that where culpability of the accused has assumed depravity or where the accused is found to be an ardent criminal and menace to the society. The Court also noticed the above-stated principle that the Court should ordinarily impose a lesser punishment and not the extreme punishment of death which should be reserved for exceptional cases only. The Court, while considering the cumulative effect of all the factors such as the offences not committed under the influence of extreme mental or emotional disturbance and the fact that the accused were young and the possibility of their reformation and rehabilitation could not be ruled out, converted death sentence into life imprisonment.

35. …

36. The above judgments provide us with the dicta of the Court relating to imposition of death penalty. Merely because a crime is heinous per se may not be a sufficient reason for the imposition of death penalty without reference to the other factors and attendant circumstances.

37. Most of the heinous crimes under the IPC are punishable by death penalty or life imprisonment. That by itself does not suggest that in all such offences, penalty of death alone should be awarded. We must notice, even at the cost of repetition, that in such cases awarding of life imprisonment would be a rule, while 'death' would be the exception. The term 'rarest of rare' case which is the consistent determinative rule declared by this Court, itself suggests that it has to be an exceptional case. The life of a particular individual cannot be taken away except according to the procedure established by law and that is the constitutional mandate. The law

contemplates recording of special reasons and, therefore, the expression 'special' has to be given a definite meaning and connotation. 'Special reasons' in contra-distinction to 'reasons' simpliciter conveys the legislative mandate of putting a restriction on exercise of judicial discretion by placing the requirement of special reasons.

38. Since, the later judgments of this Court have added to the principles stated by this Court in the case of Bachan Singh (AIR 1980 SC 898) (supra) and Machhi Singh (AIR 1983 SC 957) (supra), it will be useful to re-state the stated principles while also bringing them in consonance, with the recent judgments.

39. The law enunciated by this Court in its recent judgments, as already noticed, adds and elaborates the principles that were stated in the case of Bachan Singh (supra) and thereafter, in the case of Machhi Singh (supra). The aforesaid judgments, primarily dissect these principles into two different compartments - one being the 'aggravating circumstances' while the other being the 'mitigating circumstances'. The Court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the Court. It will be appropriate for the Court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the Court as contemplated under Section 354(3), Cr. P.C. Aggravating Circumstances:

> (1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.
>
> (2) The offence was committed while the offender was engaged in the commission of another serious offence.
>
> (3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.
>
> (4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.
>
> (5) Hired killings.
>
> (6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43, Cr. P.C.

(9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

(10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(11) When murder is committed for a motive which evidences total depravity and meanness.

(12) When there is a cold blooded murder without provocation.

(13) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating Circumstances:

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a pre-ordained manner and

that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eye-witness though prosecution has brought home the guilt of the accused.

40. While determining the questions relatable to sentencing policy, the Court has to follow certain principles and those principles are the loadstar besides the above considerations in imposition or otherwise of the death sentence.

Principles:

(1) The Court has to apply the test to determine, if it was the 'rarest of rare' case for imposition of a death sentence.

(2) In the opinion of the Court, imposition of any other punishment, i.e., life imprisonment would be completely inadequate and would not meet the ends of justice.

(3) Life imprisonment is the rule and death sentence is an exception.

(4) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant considerations.

(5) The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime.

41. Stated broadly, these are the accepted indicators for the exercise of judicial discretion but it is always preferred not to fetter the judicial discretion by attempting to make the excessive enumeration, in one way or another. In other words, these are the considerations which may collectively or otherwise weigh in the mind of the Court, while exercising its jurisdiction. It is difficult to state it as an absolute rule. Every case has to be decided on its own merits. The judicial pronouncements, can only state the precepts that may govern the exercise of judicial discretion to a limited extent. Justice may be done on the facts of each case. These are the factors which the Court may consider in its endeavour to do complete justice between the parties.

42. The Court then would draw a balance-sheet of aggravating and mitigating circumstances. Both aspects have to be given their respective weightage. The Court has to strike a balance between the two and see towards which side the scale/balance of justice tilts. The principle of proportion between the crime and the punishment is the principle of 'just deserts' that serves as the foundation of every criminal sentence that is

> justifiable. In other words, the 'doctrine of proportionality' has a valuable application to the sentencing policy under the Indian criminal jurisprudence. Thus, the court will not only have to examine what is just but also as to what the accused deserves keeping in view the impact on the society at large.
>
> 43. Every punishment imposed is bound to have its effect not only on the accused alone, but also on the society as a whole. Thus, the Courts should consider retributive and deterrent aspect of punishment while imposing the extreme punishment of death.
>
> 44. Wherever, the offence which is committed, manner in which it is committed, its attendant circumstances and the motive and status of the victim, undoubtedly brings the case within the ambit of 'rarest of rare' cases and the Court finds that the imposition of life imprisonment would be inflicting of inadequate punishment, the Court may award death penalty. Wherever, the case falls in any of the exceptions to the 'rarest of rare' cases, the Court may exercise its judicial discretion while imposing life imprisonment in place of death sentence."

58. Keeping in view the above said principles, now, we shall consider as to whether the present case falls in the category of the 'rarest of rare' cases where the Court should find that imposition of life imprisonment would be entirely inadequate.

59. As we have seen above that when a court awards a death sentence, the judgment shall state the special reasons. But there are no special reasons assigned by the learned trial Court to record the death penalty. We have considered them in the backdrop of the facts. In the present case, the offender suddenly swooped on the bag which the deceased was carrying. On resistance he shot the resistor and fled away with the bag containing cash. He did not shot the other persons present on the spot with intent to kill them. His motive was not to cause death but was to rob the money. The co-offenders also fired gunshot to deter the persons coming in their way to make a way to escape. Their plan was not to commit murder but was to commit dacoity. Its not a case of barbaric and brutal murder. The offenders were not professional killers. They have no

criminal history. The entire prosecution case is dependent upon the circumstantial evidence. In a case of this nature, the doctrine of prudence should be invoked. Considering the nature, motive, manner and impact of the crime, culpability, quality of evidence, socio-economic circumstances, possibility of rehabilitation, we do not think that the facts and attaining circumstances of this case are sufficient to place the case in the 'rarest of rare' category where death penalty should be imposed. We do not think that the reasons assigned by the courts below disclose any special reason to uphold the death penalty and therefore, we decline to confirm the death sentence awarded to the accused Munna @ Shahnawaz. The appellant, therefore, instead of being awarded death penalty, is sentenced to undergo rigorous imprisonment for life.

60. We have carefully considered punishment awarded by the learned trial Court for the offence found proved against the appellants. In our considered view, the sentences awarded by the learned trial Court would meet the ends of justice, we are satisfied with the adequacy of the sentences, therefore, all the appeals of the appellants are allowed in part to the extent as indicated hereinabove and we are not inclined to confirm the death penalty awarded to Munna @ Shahnawaz. Consequently, the death reference is hereby **dismissed.**

61. Order of the Trial Court regarding disposal of the case property is hereby confirmed. A copy of this judgment be retained in the record of Cr.A. Nos.447, 461, 514, 521, 560, 625, 1600 of 2013 & 696/17.

(P.K. Jaiswal)
Judge

(Virender Singh)
Judge

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