

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 27.01.2021

+ **CRL. A. 331/2017**

CHHOTU KUMAR @ CHOTE FAUJIAppellant

Versus

STATE (GOVT. OF NCT OF DELHI)Respondent

Advocates who appeared in this case:

For the Appellant : Mr. Akshay Bhandari and Mr. Digvijay
Singh, Advocates.

For the Respondent : Mr. Amit Gupta, APP for State.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The appellant has filed the present appeal impugning a judgment dated 30.11.2016, whereby the appellant, Chhotu Kumar @ Chote Fauji, was convicted of the offences punishable under Sections 186, 353 and 307 of the Indian Penal Code (hereinafter 'IPC') and Sections 25 and 27 of the Arms Act, 1959 (Arms Act). The appellant also impugns an order on sentence dated 20.12.2016, whereby he was sentenced to (i) rigorous imprisonment for a period of ten years along with a fine of ₹25,000/- and in default of payment of fine, to undergo simple imprisonment for a further period of one year for committing

an offence punishable under Section 307 of the IPC; (ii) rigorous imprisonment for a period of two years along with a fine of ₹5,000/- and in default of payment of fine, to undergo simple imprisonment for a further period of one month for committing an offence punishable under Section 353 of the IPC; (iii) rigorous imprisonment for a period of three months along with a fine of ₹500/- and in default of payment of fine, to undergo simple imprisonment for a further period of ten days for committing an offence punishable under Section 186 of the IPC; (iv) rigorous imprisonment for a period of three years along with a fine of ₹5,000/- and in default of payment of fine, to undergo simple imprisonment for a further period of three months for committing an offence punishable under Section 25(1B)(a) of the Arms Act; and (v) rigorous imprisonment for a period of five years along with a fine of ₹15,000/- and in default of payment of fine, to undergo simple imprisonment for a further period of six months for committing an offence punishable under Section 27(1) of the Arms Act. All the sentences were directed to run concurrently.

2. The case of the prosecution is that on 05.07.2015, SI Krishan Kumar received secret information in the office of Special Cell to the effect that the appellant, a Constable with Sashatra Seema Bal (SSB), who was absconding, would come at about 7.30-8.00 P.M, in a Maruti Wagon-R vehicle (bearing registration no. 3444) for delivering illegal arms and ammunition, for distribution in Delhi and Haryana with the aid of a friend, at Rajiv Nagar Bus Stand near the under-construction Signature Bridge, Delhi. He also informed that the appellant is a

resident of Uttar Pradesh and is involved with gangsters and in various criminal cases including murder, attempted murder, looting, smuggling of weapons. And, he is quite capable of attacking the police as well.

3. The information received was entered as DD No. 13. The secret informer was produced before Inspector Govind Sharma and on his instructions, a team comprising of ten officials – ASI Ajaibir, SI Krishan Kumar, HC Rajkumar, HC Umesh, HC Sandeep, HC Rajiv, HC Sanjeev, HC Surender, HC Narender, and Ct. Anshu – was constituted.

4. The said team left for the spot along with arms and ammunitions as well as the IO kit. The secret informer accompanied the said team. The police team used three vehicles –a Government police gypsy, a private car and one motorcycle. The team reached the spot and SI Krishan Kumar briefed the members of the team and deployed them at various spots.

5. According to the prosecution, a Maruti Wagon-R vehicle bearing registration No.DL-3CZ-3444 arrived at the spot at about 07.35 p.m. from the direction of Khajuri and was going towards Rajiv Nagar Bus Stand and stopped about 15/20 meters from where the police vehicle (Gypsy) was stationed. One person got out from the said vehicle. The secret informer identified the said person as the

appellant (Chhotu Kumar @ Chote Fauji). Thereafter, the secret informer left the spot. According to the police official, the appellant appeared to be waiting for someone. SI Krishan Kumar, who was travelling in the police gypsy got out of the same and signaled to the other members to surround the appellant. The prosecution alleges that the accused apparently sensed their presence and immediately got into his car and started driving towards the Signature Bridge. The police team pursued the appellant in the police gypsy and intercepted his car at a distance of about 250 to 300 yards. SI Krishan Kumar allegedly warned the appellant; however, he did not heed to the warning. He came out of the vehicle; took out a pistol from his dub and loaded it. He was warned once again and asked to surrender but he did not do so and he fired from his pistol. The first bullet hit the mudguard of the left wheel of the police vehicle.

6. Thereafter, SI Krishan Kumar and HC Raj Kumar got down from the police vehicles and went towards him but he fired at them. The second bullet hit SI Krishan Kumar in his chest but he remained unharmed as he was wearing a bullet proof jacket. The appellant also fired at HC Raj Kumar and that bullet also hit his bullet proof jacket. Thereafter, ASI Ajaibir and HC Umesh Kumar also came forward to apprehend the appellant but he fired upon them as well. The bullets fired at them also hit their bullet proof jackets. In all, one bullet each hit the bullet proof jackets worn by SI Krishan Kumar, HC Raj Kumar, ASI Ajaibir and HC Umesh Kumar. They also fired in their self defence but their bullets neither hit the appellant nor the vehicle

(Wagon R), which he was using to take cover. The police officials alleged that there was a moment when the appellant attempted to change the magazine of his pistol and he was overpowered at that moment. SI Krishan Kumar snatched his pistol and he found that the pistol still contained one live round in its chamber. He also snatched the magazine from the appellant, which had six live cartridges.

7. After being apprehended, the appellant disclosed his name and address. The vehicle (Maruti Wagon-R) used by him was checked and a travelling bag containing thirty pistols was found kept on the rear seat. The appellant allegedly disclosed that he had brought the same at the instance of one Lokender from Khargaun, Madhya Pradesh for delivering the same in Delhi. Each of the pistols had magazines inside them. The pistols, seven live cartridges and two magazines were recovered from the appellant and their sketches were prepared. The police officials claimed that the magazines and the pistols were kept in separate plastic containers with two pistols each. They were then sealed with the help of a doctor tape.

8. SI Krishan Kumar prepared a *rukka* and sent the same through HC Raj Kumar for registration of the FIR. After the FIR was registered, the investigation was assigned to SI Amrik Singh.

9. SI Amrik Singh prepared a site plan of the spot at the instance of SI Krishan Kumar. Five empty cartridges were also recovered,

which allegedly pertained to the bullets fired by the appellant. They were kept in a separate sealed container. Four empty cartridges from the bullets fired by the members of the police team were also recovered from the spot and were sealed and seized. The bullet proof vests allegedly worn by the four police officials (SI Krishan Kumar, HC Raj Kumar, ASI Ajaibir and HC Umesh Kumar) were also seized and sealed.

10. The vehicle (Wagon-R) used by the appellant was found to be stolen and a subject matter of FIR No.2645, registered with PS Crime Branch, Delhi. The same was seized under Section 201 of the Cr.PC. Thereafter, the accused was taken for his medical examination to All India Institute of Medical Sciences (AIIMS). Swabs from both his hands were taken separately for tracing any gunpowder residue.

11. The case property was deposited in the *malkhana*. The case property as well as the chemical hand wash swabs of the accused were sent to CFSL, CBI for forensic examination. The bullet proof vests were also sent for forensic examination.

12. During the trial, the prosecution examined eleven witnesses. The statement of the appellant was also recorded under Section 313 of the Cr.PC. He claimed that he had been falsely implicated and the police had planted their illegal weapons and framed him.

Evidence (other than eyewitnesses)

13. Shri Pramod Kumar Mendiratta, the owner of the Wagon-R vehicle bearing registration No.DL-3CZ-3444 was examined as PW6 and he proved that he was the owner of the vehicle and the said vehicle was stolen on 25.05.2015. He also testified that at his instance, an FIR regarding theft of his vehicle had been registered.

14. HC Rajesh was examined as PW1 and he testified that he had driven a police gypsy bearing no.DL-1CJ-3486 to CFSL, CBI for his forensic examination by the Ballistics Department/Division at CGO Complex. He testified that the said vehicle was examined and thereafter, he drove the vehicle back to the Special Cell on 08.07.2015.

15. Ct. Anshu Choudhary was examined as PW8. He testified that on 09.07.2015, he was posted with the Special Cell, Lodhi Colony and on that date, he had collected 22 *pullandas* from the *malkhana*. 16 *pullandas* were sealed with the seal of SPL CELL NDR 31 and 3 *pullandas* were sealed with the seal of SPL CELL NDR 21. The remaining 3 *pullandas* were sealed with the seal of AIIMS. He testified that he had also collected the FSL Forms and he deposited the said 22 *pullandas* with CFSL, CBI, CGO Complex, Lodhi Road. He had transported the same under RC Number 84/21/15. He deposed that

he had secured a receipt of the *pullandas* from the CFSL, CBI, CGO Complex and had deposited the same to MHC(M), HC Sanjeev.

16. The three reports received from CFSL, CBI, New Delhi – which were marked as Ex.PX1, Ex.PX2 and Ex.PX3 – were not disputed by the appellant. The report, marked as Ex.PX1, indicated that one country made pistol, which was sealed in parcel No.A, was an arm and seven 7.65 mm cartridges included in the said parcel were ammunition. The CFSL report marked as Ex.PX2 indicated that the fifteen parcels received by CFSL contained country made pistols and magazines which were firearms. The CFSL report marked as Ex.PX3 indicated that the three parcels, which contained the cotton swabs taken from the accused had traces of nitrite, which is one of the main constituents of gunshot residue.

17. SI Mahipal Singh, who was posted as the General Store In-charge of PS Special Cell was examined as PW2. He testified that he had issued four bullet proof jackets to HC Umesh for his team on 03.07.2015. He also produced the relevant entries made in the B.P. Jacket Article Register for issuance of the said jackets. In addition, he testified that on 05.07.2015, he had issued one Glock Pistol No.AADP081 with ten rounds of 9 mm to SI Krishan Kumar (No. 4226); one 9 mm pistol No.1621-2041 with butt no. 5159 with 10 rounds to HC Umesh Kumar (No. 750/SB); one 9 mm pistol No.1621-2074 with butt no. 5192 with 10 rounds to SI Ajayveer Singh (No.

1180SB) and one 9 mm pistol No.1621-2065 with butt no. 5183 with ten rounds to HC Raj Kumar (No.794/SB). He also produced the relevant entries made for the issuance of arms and ammunitions in the Arms Ammunition Distribution Register (Ex.PW2/A and Ex.PW2/B).

18. SI Mahender Singh was examined as PW3. He testified that on the intervening night of 05.07.2015/06.07.2015, he was posted at PS Special Cell as a Duty Officer from 12:00 midnight to 08:00 a.m. He testified that at about 12.30 am, he had received a *rukka* (Ex.PW3/B) sent by SI Krishan Kumar through HC Raj Kumar and on the basis of the said *rukka*, an FIR bearing no. 46/2015 (Ex.PW3/A) was recorded in his presence.

19. HC Sanjeev Kumar was examined as PW11. He testified that on 06.07.2015, he was posted at PS Special Cell as MHC(M). He testified that the IO, SI Amrik Singh, had deposited fifteen plastic containers containing pistols and cartridges, which were sealed with a doctor tape and were bearing the seal of SPL CELL NDR 31. In addition, SI Amrik Singh had also deposited three other plastic containers sealed with a similar seal along with the FSL Form. The said containers contained empty cartridges. One of them also contained a pistol and a magazine. He further stated that SI Amrik Singh had also deposited four bullet proof jackets marked as BP1, BP2, BP3 and BP4, which were kept in two white plastic sacks and were duly sealed with the seal of SPL CELL NDR 21.

Evidence of the eyewitness

20. SI Krishan Kumar deposed as PW-4. He deposed that prior to the incident in question; the officers of Special Cell had raided and arrested several accused persons, who had been involved in supplying arms and ammunitions. He stated that by conducting such raids, more than one hundred accused persons had been arrested and arms and ammunitions in large quantities had been recovered. He stated that on 05.07.2015, he was present in the office of Special Cell, when one secret informer informed him that one absconding constable from Sastra Seema Bal, who was engaged in supplying arms and ammunitions to miscreant elements, will bring illegal arms and ammunitions from Khargaun, Madhya Pradesh in a Wagon-R vehicle (bearing registration number 3444). He stated that the secret informer had further informed him that the constable will come between 7:30-8:00 pm in the said car near Rajiv Nagar Bus Stand, under-construction Signature Bridge, behind Nanaksah Gurudwara, Delhi for the purpose of supplying the same. The secret informer had further stated that the accused would not be afraid to attack the police team and further, he had been involved with gangsters as well as in cases of dacoities, murder, attempt to murder and other crimes. He deposed that he produced the secret informer before Inspector Govind Sharma and was asked by him to take action regarding the said information. He stated that he reduced the said information into writing in the *rojnamancha* and thereafter, he had organised a raiding team, under the supervision of Inspector Govind Sharma, which comprised of ASI

Ajaybir, HC Rajkumar, HC Umesh, HC Sandeep, HC Rajiv, HC Sanjeev, HC Surender, HC Narender, Ct. Anshu and himself. He further deposed that at about 06:00 pm, they had left the office of Special Cell along with the secret informer in a government gypsy, one private vehicle and one motor cycle. He deposed that they had also carried the IO kit, bullet proof jackets and arms and ammunitions. He further deposed that on the way to the spot, he contacted few public persons to become witnesses to the raid but none agreed. He deposed that he had briefed the members of the raiding team and deployed them at the spot. He testified that at about 7:35 pm, the said Wagon-R vehicle came from the side of Khajuri towards Rajiv Nagar Bus Stand and stopped there and thereafter, one person alighted from the said car, who was identified by the secret informer to be the accused Chhotu @ Fauji. The said accused appeared to be waiting for someone. He stated that thereafter, he (PW4) came out from the gypsy and gave a signal to the raiding team to surround the accused. He deposed that the accused smelled their presence and immediately got into his Wagon-R vehicle and drove the same towards the Signature Bridge. He stated that they chased the said Wagon-R vehicle in the gypsy being driven by HC Umesh and intercepted the said Wagon-R after a distance of about 250-300 yards. He stated that they warned the accused (the appellant) that he was surrounded by the police team and they had information that he was carrying illegal arms. Upon hearing this, the accused had come out from his car and took out a pistol from his dub and loaded the same. PW4 further deposed that they had warned the accused to not use the weapon, however, he fired a shot,

which had hit the mudguard of the left wheel of the gypsy. He stated that thereafter, he and HC Rajkumar alighted from the gypsy and took out their respective weapons and moved towards the accused. He stated that upon moving ahead to apprehend the accused, the accused fired by taking an aim towards him and the bullet hit his bullet proof jacket in the chest portion. He deposed that he also fired a shot from his service revolver in his self defence. Thereafter, HC Rajkumar tried to overpower him but the accused also fired at him, which had resulted in the bullet hitting his bullet proof jacket in the chest portion. He stated that ASI Ajaybir and HC Umesh Kumar came forward while covering for them but the accused fired on them as well. The bullets fired by the accused resulted in hitting their bullet proof jacket. He affirmed that in their self defence, ASI Ajaybir, HC Rajkumar and HC Umesh Kumar also fired one shot each. He deposed that they overpowered the accused when he paused to change the magazine of his pistol. He deposed that he snatched the pistol from the hands of the accused and upon checking it, one live round was found in the chamber. He stated that he had also snatched the magazine from the hands of the accused and six live cartridges were found in it. He further deposed that he interrogated the accused and the accused disclosed his name and address as Chhotu Kumar @ Chhote Fauji, S/o Shaligram, R/o Village Kacchotpora, PS Gonda, Dist. Aligarh, U.P. He stated that he had also conducted a cursory search of the accused but no other weapon or ammunition was found on him. He further stated that one red colour trolley travelling bag was recovered from the rear seat of the said car and upon checking the bag, thirty pistols

wrapped in newspapers and covered by cloth were found. He stated that upon interrogation, the accused disclosed that he brought the said pistols at the instance of one Lokender from Khargaun, Madhya Pradesh and the same had to be supplied in Delhi with the assistance of Lokender. He stated that he had prepared the sketch of one pistol, seven live cartridges and two magazines recovered from the accused (Ex PW4/A) and thereafter, he had kept the pistol cartridges and magazines in a transparent plastic container and sealed the same with the help of a doctor tape and applied the seal of SPL CELL NDR 31 and marked the same as Mark A. He seized the same vide seizure memo (Ex PW4/B). He stated that he separated the magazines from the pistols (thirty in number), which were recovered from the said car and prepared sketches of the pistols and magazines and marked them as SI No. 1 to 30 (Ex PW4/C1 to Ex PW4C/30) and thereafter, he had kept the pistols in fifteen transparent plastic containers and marked the container as SI No. 1 to 15 and sealed the same with the help of doctor tape and applied the seal of SPL CELL NDR 31. He seized the same vide seizure memo (Ex PW4/D). He affirmed that he filled the FSL forms at the spot. He deposed that he had prepared the *rukka* (Ex PW4/E) and handed over the same to HC Rajkumar for registration of the FIR. He further deposed that he had handed over the seizure memos, sketches, 16 containers and FSL forms along with the accused to SI Amrik Singh and he had prepared the site plan, at his instance. He deposed that during the course of the investigation, the IO had collected 5 empty cartridges of the bullets fired by the accused from the ground and had kept the same in a transparent *dabbi*/container

sealed with the seal of SPL CELL NDR 21 and had marked the *pullandas* as F1. He seized the same vide seizure memo (Ex PW4/F). He further deposed that the IO had also collected four empty cartridges of the bullets fired by the police team and kept the same in a transparent container sealed with the seal of SPL CELL NDR 21 and marked the *pullanda* as F2. He seized the same vide seizure memo (Ex PW4/G). He stated that he had also handed over the bullet proof jackets (BP1 and BP2) to the IO and ASI Ajaybir and HC Umesh handed over the bullet proof jackets (BP3 and BP4) to the IO. Thereafter, the IO prepared two *pullandas* of the jackets and sealed the same with the seal of SPL CELL NDR 21 and marked them as K1 and K2. He took the same into possession vide seizure memo (Ex PW4/H). He also stated that he handed over the red colour travelling bag recovered from the Wagon-R vehicle to the IO and thereafter, the IO sealed the same with the seal of SPL CELL NDR 21. He seized the same vide seizure memo (Ex PW4/I). He further deposed that the said Wagon-R vehicle along with key was seized vide seizure memo (Ex PW4/J), under Section 102 of the Cr.PC by the IO as the same was found stolen in a case bearing FIR no. 2645 registered with PS Crime Branch, Delhi. The IO also arrested the accused and conducted his personal search vide search memo (Ex PW4/K and PW4/L). He stated that thereafter, they came back to the office of Special Cell and the IO got the accused medically examined and deposited the case property in the *malkhana*. He put the accused behind bars and recorded his statement. PW4 correctly identified the accused in open court. PW4 also identified the case property in question in open court.

21. HC Raj Kumar was examined as PW10. ASI Ajaibir was examined as PW7 and HC Umesh Kumar was examined as PW9. The examination of PW7, PW9 and PW10 is identically worded as the examination in chief of PW4.

22. On 06.10.2016, the appellant's statement was recorded under Section 313 of the Cr.PC. He claimed that he has been falsely implicated. He stated that nothing incriminating had been recovered from him and he was not present at the spot as alleged. He claimed that the police officials had implicated him at the instance of one Lokender.

23. The Trial Court evaluated the evidence and concluded that the appellant had fired at PW4, PW5, PW7 and PW9. One bullet each had struck the respective bullet proof jackets worn by them. The Trial Court accepted that there was evidence to show that the bullets found from three of the bullet proof jackets were fired from the pistol recovered from the accused. The Trial Court also accepted that the appellant had fired five bullets and the same was established as five cartridges were recovered from the spot. They were also found to have been fired from the pistol recovered from the appellant.

Submissions

24. At the outset, Mr. Akshay Bhandari, learned counsel appearing for the appellant stated that the appellant was limiting the challenge in the present appeal to his conviction for committing an offence punishable under Section 307 of the IPC. He submitted that the appellant had already served more than five years of his prison sentence and thus, had served the sentence awarded to him in respect of all offences other than the offence punishable under Section 307 of the IPC.

25. He contended that insofar as the offence punishable under Section 307 of the IPC is concerned, there was a serious doubt as to the case set up by the prosecution. He submitted that the appellant had been convicted for the said offence on the premise that he had fired bullets at the police officials. The said bullets had struck the bullet proof vests worn by them in their chest region. He submitted that the very description of the event, as narrated by the concerned police officials (PW4, PW7, PW 9 and PW10), was highly improbable. He stated that in all, the appellant is alleged to have fired five bullets. The first had hit the police vehicle at the mudguard. The next four bullets had allegedly struck the four concerned police officials constituting a part of the raiding team that had accosted the appellant with each police official being struck by one bullet. He submitted that none of the police officials were hurt. They allegedly retaliated and each of

them fired shots at the appellant but none of the shots struck the appellant or the vehicle.

26. Next, he submitted that apart from the improbability of such an event, the testimonies of PW4, PW7, PW9 and PW10 were not similar but absolutely identical. This included the sentences, punctuation and also the spelling errors. He stated that it was evident that the testimony of a witness had been copied as testimonies of other witnesses and the only changes made were regarding their names.

27. Next, he submitted that all of the aforesaid police officials were from the same police station and despite the seriousness of the event as alleged, the crime team had not been called. Further, he submitted that in addition to the testimonies of PW4, PW7, PW9 and PW10, the Trial Court had also based the decision on the FSL reports, which indicated that the bullet recovered from the bullet proof vests worn by the officers, were fired from the pistol used by the accused. However, the said report was never tendered and therefore, could not have been considered as evidence. He submitted that while such evidence may be admissible under Section 293 of the Cr.PC, it nonetheless is required to be tendered. He relied on the decision of the Division Bench of this Court in *Dharampal and Anr. v. State: Crl. A. 140/1999, decided on 28.07.2011*, in support of this contention.

28. Lastly, he contended that the sentence awarded to the appellant was harsh and onerous. The impugned order on sentencing indicates that the Trial Court had awarded a higher sentence on the ground that the appellant was involved in other cases. However, the appellant had not been convicted in any case and therefore, taking an adverse view against him on the ground that he was being prosecuted was not permissible. He stated that the Cr.PC only permits taking previous convictions into account and not merely FIRs, which are in the nature of mere allegations.

29. He referred to the decision of the Division Bench of this Court in *State v. Bashir Ahmed Ponnu and Ors.: Crl. A. 1065/2014, decided on 08.12.2014*, whereby the role attributed to the co-accused Shahid Gafoor, was similar to the allegations against the appellant. Although the court had convicted him, it had sentenced him to five years of rigorous imprisonment for an offence punishable under Section 307 of the IPC. He submitted that in that case, the co-accused was stated to be involved in terrorist activities. Therefore, in the event the appellant's conviction is sustained, the sentence awarded to him ought to be reduced.

30. Mr. Amit Gupta, learned APP appearing for the State countered the aforesaid submissions. He submitted that it was not open for the appellant to now object to the manner in which the evidence of PW4, PW7, PW9 and PW10 was recorded. He submitted that the Trial Court

had considered their testimonies and had apparently copied the same while making certain necessary changes regarding the names of the witnesses and the officers involved. He submitted that this was well within the knowledge of the counsel of the appellant but no objection was raised in this regard. He also relied on Section 465 of the Cr.PC and submitted that the appellant cannot challenge the judgment convicting him in view of the manner in which the evidence was recorded, unless he is able to establish that he has been prejudiced by the same.

Reasons and Conclusion

31. As noticed above, the learned counsel appearing for the appellant has restricted the present appeal to impugn the appellant's conviction for an offence punishable under Section 307 of the IPC, only. Therefore, this Court has confined its examination to the said aspect alone.

32. It is relevant to note that the appellant had admitted certain documents including the Ballistic Report CFSL-2015/F-978 (Ex.PX1); CFSL-2015/F-979 (Ex.PX2) and CFSL-2015/F-981 (Ex.PX3) and the same has been recorded by the Trial Court in its order dated 19.10.2015. However, it appears that thereafter, two other CFSL reports were received: (i) Report bearing no. CFSL-2015/F-973 dated 15.10.2015 and (ii) Report bearing no. CFSL-2015/F-980 dated

16.10.2015. The said reports were not marked and the appellant had not admitted to the said documents. The additional statement of the appellant under Section 313 of the Cr.PC was recorded on 22.11.2016 and all the CFSL reports were put to him. He responded by stating that no firearms were recovered from his possession but the contents of the reports were a matter of record.

33. The appellant's conviction under Section 307 of the IPC is premised on the basis that he had fired four shots at the police officials – SI Krishan Kumar (PW4), HC Raj Kumar (PW10), ASI Ajaibir (PW7) and HC Umesh Kumar (PW9). The bullets fired by him had struck each of the said officials on their chest region of the bullet proof vest, which they were wearing. However, none of them had been hurt, obviously, on account of them wearing the bullet proof vest. Concededly, the appellant's conviction is based primarily on the testimonies of the said four police officials. As pointed out by the learned counsel for the appellant, the examination-in-chief of all the said four police officials are identical. It is obvious that the Trial Court has merely copied the examination-in-chief of one of the said witnesses as the examination-in-chief of the other three witnesses as well. The only changes made in their examination-in-chief are their names and the consequential changes, where they mention the names of other police officials.

34. At this stage, it is relevant to refer to Section 276 of the Cr.PC, which reads as under: -

“276. Record in trial before Court of Session.—(1) In all trials before a Court of Session, the evidence of each witness shall, as his examination proceeds, be taken down in writing either by the presiding Judge himself or by his dictation in open Court, or under his direction and superintendence, by an officer of the Court appointed by him in this behalf.
(2) Such evidence shall ordinarily be taken down in the form of a narrative, but the presiding Judge may, in his discretion, take down, or cause to be taken down, any part of such evidence in the form of question and answer.
(3) The evidence so taken down shall be signed by the presiding Judge and shall form part of the record.”

35. As it is apparent from a plain reading of Section 276(1) of the Cr.PC., the evidence of each witness is required to be taken down “*as his examination proceeds*”. Plainly, this has not been done in this case.

36. Whilst there is merit in the contention that the said procedure could have been objected to at the time when the evidence was being recorded and the fact that the learned counsel for the appellant had not done so, would be a relevant factor in determining whether there has been a failure of justice as a result thereof, however, this Court is of the view that the issue of absolutely identical examinations-in chief

not only highlights procedural irregularity but also raises a question to the credibility of the testimonies of the witnesses. The examination-in-chief of the witnesses, which are identical both in their construct and content, would in normal circumstances lead to a doubt that the witnesses may have rehearsed their testimony in consultation with one another.

37. Having stated the above, this Court is of the view that the testimony of the said witnesses cannot be disregarded or ignored only for the reason that their examination-in-chief is identical. It would be necessary to examine the evidence led as a whole before ascertaining whether the prosecution has established its case beyond any reasonable doubt. The fact that the testimonies of certain police officials are identically worded would certainly be a factor while evaluating their evidence.

38. In the present case, a raiding team was constituted on the secret information received by SI Krishan Kumar (PW4). The said raiding team consisted of ten officials (ASI Ajaibir, HC Raj Kumar, HC Umesh, HC Rajiv, HC Sandeep, HC Surender, HC Narender and Ct. Anshu apart from SI Krishan Kumar and Inspector Govind Sharma).

39. According to the prosecution, the secret information was entered as DD 13 (Ex PW4/N). PW4 testified that the secret informer had informed him that the appellant would come in a Wagon-R

vehicle (bearing registration no. 3444) “near Rajiv Nagar bus stand under construction signature bridge behind Nanaksah Gurdwara, Delhi”. However, the said entry (Ex PW4/N) merely mentions that as per the secret informer, the appellant would come to Delhi; no specific locality or place is mentioned in the entry.

40. PW4 testified that the said raiding team was under the overall supervision of Inspector Govind Sharma, who had also accompanied the team. He testified that the raiding team had left in three vehicles: A Government vehicle (Gypsy), a private car and one motor cycle. The departure of the said raiding team had been entered as DD No.15 on 05.07.2015 (Ex.PW4/O). The said entry records the registration number of the Government vehicle (Gypsy) as DL-1CJ-3486, but the particulars of the private vehicle and the motorcycle are not mentioned.

41. As noted above, the testimonies of HC Raj Kumar (PW10), ASI Ajaibir (PW7) and HC Umesh Kumar (PW9) are identical to that of SI Krishan Kumar (PW4). All four of the said officers travelled together in the police gypsy. They were all armed and wore bullet proof vests.

42. It is relevant to note that none of the other members of the raiding party, except Ct. Anshu Chaudhary, testified in the trial. Ct. Anshu Chaudhary (660SB) was examined as PW8. It is material to note that he did not testify as to him being a part of the raiding team or

any of the events of 05.07.2015. He also did not affirm that he was a part of the raiding team or was deployed to apprehend the appellant. He did not mention that he was posted at the Special Cell on 05.07.2015. He merely stated that he was posted at the Special Cell on 09.07.2015 and on the instructions of the IO, he had collected 22 *pullandas* and taken them to CFSL, CBI, CGO Complex, Lodhi Road.

43. The fact that none of the members of the raiding team travelling in the private vehicle or on the motorcycle testified to the events that transpired on 05.07.2015, does raise some doubts. These are compounded by the fact that Ct. Anshu, who according to the prosecution had travelled in the private vehicle, chose not to mention anything about the events of 05.07.2015. It is apparent that the prosecution had for reasons known to them decided not to examine any of the six police officials that had formed a part of the raiding team regarding the events leading to the apprehension of the appellant. Accordingly, Ct. Anshu, who appeared as a witness, was also not examined regarding the events of 05.07.2015 but only regarding transporting the *pullandas* to FSL.

44. According to the prosecution, the raiding team had left the office of the Special Cell along with the secret informer at about 06:00 pm. PW4 had testified that he had, on the way to the spot near Rajiv Nagar Bus Stand, contacted a few public persons to be witnesses to the raid but none of them had come forward and had left the spot

without disclosing their names and addresses. Thus, even though the raiding team was deployed at a spot, which was not isolated, no public persons were joined as independent witnesses to the proceedings. It is relevant to note that one of the police officials of the raiding team (Ct. Anshu) was in fact deputed right next to the bus stand [as is evident from the site plan (Ex.PW5/A)] yet, none of the persons standing at the bus stop, had joined the proceedings. The site plan also indicates that Gurudwara Nanaksah was located nearby. However, none of the witnesses from the said Gurudwara were also included in the proceedings. On the contrary, in the testimony, PW4 had stated that the Gurudwara was at some distance away. However, that would not prevent the officials from including witnesses from the said Gurudwara, if they wanted to include independent witnesses.

45. Although the examination of the four police officials (PW4, PW7, PW9 and PW10) are identical and all of the said witnesses had affirmed that on the way, SI Krishan Kumar (PW4) had contacted a few public persons to become witnesses, their statements in their cross-examination are not similar. PW4 in his cross-examination had stated that at the spot, he had contacted 5-6 passersby to witness the raid but none had come forward. However, it is material to note that in his examination-in-chief, he had stated that he had contacted persons on the way and not at the spot. ASI Ajaibir (PW7), in his cross-examination, further improved his testimony and stated that the IO had contacted the public persons to become witnesses to the raid thrice and in addition, also contacted public persons at the spot but none had

come forward. PW9 had stated in his cross-examination that SI Krishan Kumar had asked public persons to join the investigation at the spot but they had refused. It is well settled that evidence of the police officers cannot be rejected only on the ground that it is not supported by independent witnesses. However, non-examination of independent witnesses does cast an added duty on the court to scrutinize the evidence of the police officers (See: *Kalp Nath Rai v. State: AIR 1998 SC 201*).

46. In the present case, the police officials had not joined any independent witnesses, but the prosecution has also not examined the police officials, who were present at the spot and were a part of the raiding team. As noticed above, only four police officials who were stated to be travelling in the Government vehicle (Gypsy) were examined regarding the events leading to the apprehension of the appellant. Curiously, they are the only officials, who had been issued bullet proof vests. The prosecution has also led evidence to establish that they were issued arms and ammunitions; however, no evidence had been led to establish whether the other members of the raiding team were also armed. PW4, PW7, PW9 and PW10 were questioned on this aspect but they stated that they were not aware whether the other members of the raiding team were carrying arms or not.

47. There is no explanation whatsoever as to why the other members of the raiding team did not come to the spot from where the

accused was apprehended, within a reasonable time. According to PW4, the raiding team was led by Inspector Govind Sharma. He remained inside the private car, which had not pursued the appellant. According to the witnesses PW4, PW7, PW9 and PW10 have varying accounts as to when the remaining members of the raiding team arrived at the spot, where the encounter with the appellant had allegedly taken place. According to PW4, the other members of the raiding team arrived at the spot after about fifteen to twenty minutes; according to PW5, the other members came to the spot after about five to ten minutes; according to PW9, Inspector Govind Sharma arrived at the spot about ten minutes after they had apprehended the appellant. PW10 stated that the staff arrived after ten to fifteen minutes. The alleged spot where the encounter had taken place is stated to be about 250 to 300 yards away from where the raiding team was initially deployed. The site plan also indicates that the spot where the encounter took place was straight ahead from where the raiding team was deployed. According to the prosecution, the entire team had left the spot to apprehend the appellant. However, there is no explanation as to why the other members of the raiding team did not immediately proceed to the spot, even though it was at a visible distance from where they were deployed. Even if the team had walked to the spot, they would have covered the distance in less than ten minutes.

48. As noticed above, the team leader (Inspector Govind Sharma) was inside a private car, which was stationed right behind the official gypsy. Yet only the gypsy pursued the appellant, when he attempted to

flee and the other members of the raiding team took fifteen to twenty minutes to cover a short distance of 250 to 300 yards/meters.

49. As observed earlier, Ct. Anshu was examined as a witness. However, he did not even mention that he was posted with the Special Cell on the date of the incident. It is, thus, clear that the prosecution had specifically ensured that none of the other members of the raiding team testify as to the incident even though they were relevant witnesses. This coupled with the fact that the official witnesses of the raiding team who did testify, did so in a manner where their examination-in-chief is identical, does raise doubts as to the evidence led by the prosecution.

50. It is also relevant to note that there are certain minor differences in the statements of their cross-examination. One of the aspects on which their statements made in the cross-examination are not consistent is related to the initial stage of the encounter. In his cross-examination, PW4 stated that the accused had driven his vehicle on a road, which was closed ahead due to construction and when he reached the end point, the accused stopped the vehicle on a *kaccha* road. It is stated that they challenged the accused and told him that they were police officials and asked him not to flee. It is stated that they had also told him that they had information that he had been carrying illegal arms. Despite stating so, the accused came out of his vehicle and suddenly fired on the members of the police team. He

stated that they did not return the fire after the first shot was fired. He volunteered that the first shot hit the police gypsy and they reversed the vehicle for about five meters. He stated that he was the first to get out of the police vehicle and just about that time, HC Raj Kumar also got down. In the examination-in-chief, which is common between PW4, PW7, PW9 and PW10, PW4 had testified that they had intercepted the Wagon-R vehicle being driven by the accused after a distance about 250-300 yards. They had warned the accused that he was surrounded by a police team and they had information that he was carrying illegal arms and ammunition. He testified that on hearing this, the accused came out of the car. He took out a pistol from his dub and loaded the same. They again warned him not to use the weapon but he did not hear them and fired a shot, which hit the mudguard of the left wheel of the gypsy. PW4 stated that he and HC Raj Kumar had alighted from the gypsy and took out their respective weapons and moved towards the accused. It is relevant to note that in the examination-in-chief, the said witnesses did not state that they had reversed the gypsy on the accused shooting the same.

51. PW7 also did not state in his cross-examination that they had reversed the gypsy vehicle after the accused had fired a shot at it. PW10 also did not make any statement to the aforesaid effect.

52. The manner in which the encounter had allegedly unfolded must be considered in the aforesaid backdrop. According to PW4, PW7,

PW9 and PW10 – who were the only persons who were examined on behalf of the prosecution to testify as to the incident – stated that the appellant had fired five bullets. Apparently on being informed that he was surrounded, the accused had got out of the vehicle, loaded his gun and then fired a shot, which hit the mudguard over the left wheel of the gypsy. PW4 and PW10 had alighted from the vehicle, but they did not fire any retaliatory shots. The accused then fired his second shot which hit PW4 in the area of his chest. However, he was unhurt because he was wearing a bullet proof jacket. At that stage, PW4 also returned fire in his defence. However, the said bullet neither hit the accused nor the Wagon-R vehicle. It is material to note that according to PW4, the accused at that stage was hiding near the bonnet of the Wagon-R vehicle. In other words, the vehicle (Wagon-R) placed between the police party and the accused was being used as a cover. PW4 was barely six meters from the appellant but the bullet fired by him neither struck the appellant nor the Wagon-R vehicle.

53. Thereafter, the appellant fired a third shot, which now hit PW10 in his chest region but he remained unhurt because he was wearing a bullet proof vest. He then returned fire in his defence. This bullet neither struck the appellant nor the Wagon R vehicle, which he was using as a cover.

54. Thereafter, the accused also fired at the other two police officials, who came forward to cover PW4 and PW10. They were also

hit with one bullet each in their chest region and remained unhurt because they were wearing bullet proof jackets. They also returned fire but none of their bullets either hit the Wagon-R or the accused. In fact, there is no evidence as to where the bullets fired by the raiding team eventually struck. At that stage, the accused decided to change the magazine of his weapon, even though there was a bullet in the chamber and at that stage, the four police officials overpowered him. According to PW4, all of this happened within two minutes, which is before the other members of the raiding team fetched up.

55. It is material to note that PW4 in his cross-examination stated that while they (PW4, PW7, PW9 and PW10) were chasing the accused, the two private vehicles were behind them in which other staff members were present. He stated that they also did not fire as they had discussed earlier not to do so. As to why the private vehicles which were behind the gypsy, while it was pursuing the accused, could not cover a distance of 250 to 300 yards within a span of 15-20 minutes, raises a serious question as to the case set up by the prosecution.

56. This Court is of the view that if the question of the testimonies of PW4, PW7, PW9 and PW10 as to them being identical is viewed in the overall context of the facts that (i) no public witnesses were joined, although, there would have been a large number of them available near the site; (ii) that none of the other six members of the raiding

team, who were in two vehicles and had been deployed to apprehend the appellant, could not proceed to cover a distance of 250 to 300 yards within a span of 15 to 20 minutes; (iii) that none of the other members of the raiding team (except one), who would be relevant witnesses to the manner in which the events unfolded, were examined by the prosecution and one member (Ct. Anshu), who was examined, did not even mention that he was deployed at the police station on the given date; (iv) while four members of the team were armed and wore protective gear, there is no evidence that the other six members of the team were armed or not; and (v) the manner in which the encounter is alleged to have taken place – one bullet each in the chest region of each of the four police officials wearing bullet proof vests and the failure of the bullets fired by the police in defence (one by each of the four officials) to find any target, does raise doubts as to the prosecution's case.

57. There is also merit in the contention that the CFSL Reports, which were not tendered and exhibited in evidence (CFSL-2015/F-973 dated 15.10.2015 and Report bearing no. CFSL-2015/F-980 dated 16.10.2015) could not be relied upon. The Trial Court had taken note of a report dated 16.10.2015 as evidence that the bullets recovered from the bullet proof jackets were fired from the weapon that had been recovered from the accused. However, that report was neither tendered in evidence nor exhibited. Although the said report may be admissible under Section 293 of the Cr.PC without the author testifying to the contents thereof, however, the said report was

required to be tendered and could not be taken note of without the same being tendered and exhibited.

58. In *Dharampal and Anr. v. State* (*supra*), the Division Bench of this Court has observed as under:

“23. It is true that in view of Section 293 of the Criminal Procedure Code, the report in question need not have been proved by summoning the author thereof, but that does not mean, that during trial nobody had to tender the same in evidence and have the same exhibited by deposing that either he himself went to the FSL Laboratory and collected the report in question or deposing that during investigation he obtained the report in question and that the same pertains to the investigation conducted in the case which was being tried. It must be deposed that the report in question pertains to the case at hand.”

59. Concededly, the appellant has been convicted of an offence punishable under Section 307 of the IPC principally on the basis of the testimonies of four members of the raiding team (PW4, PW7, PW9 and PW10) and the CFSL Report evidencing that the bullets recovered from the bullet proof jackets were fired from the weapon allegedly recovered from the appellant. In view of the above, this Court is unable to accept that the prosecution has established its case that the appellant had committed an offence punishable under Section 307 of the IPC beyond any reasonable doubt.

60. In view of the above conclusion, it is not necessary to examine the contention that the Trial Court had erred in taking into account that the appellant was involved in other cases while awarding the sentence. However, for the sake of completeness, this Court considers it apposite to consider the same as well.

61. It is settled law that the presumption of innocence must be maintained until the accused is found guilty. Therefore, even though the appellant may be involved in other cases, the same could not be considered as a factor to award a harsher sentence because the appellant had not been convicted in any of the cases at the material time. This Court is of the view that the Trial Court erred in considering that the appellant was also involved in other cases, while considering the quantum of sentence.

62. In view of the above, the appellant is acquitted of committing an offence punishable under Section 307 of the IPC. The impugned judgment, to the limited extent it convicts the appellant for committing an offence punishable under Section 307 of the IPC, is set aside.

63. The appeal is allowed to the aforesaid extent. The appellant be released forthwith if he is not wanted in any other case.

VIBHU BAKHRU, J

JANUARY 27, 2021/RK