IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.559 OF 2022

1. Mohd. Ali Jaan Mohd Shaikh,
Aged about 34 years,
Residing at 33-A, Tandel Street,
Ramzan Ali Macchiwala, 4th Floor,
Room No. 22, Dongri, Mumbai 400 009

2. Pranay Manohar Rane @ Nana
Aged about 45 years,
Residing at Ankur Apartments,
Room No. 406, Shastri Nagar,
Vasai (West), District Thane

Both are at present undergoing the
sentence imposed upon them at
Mumbai Central Prison, Mumbai .....Appellant
Vs. (Ori. Accused Nos.1 and 2)

1. The State of Maharashtra
2. Central Bureau of Investigation
vide RC-3(S)/2016-SCUV/SC-II,
New Delhi .....Respondents

Mr. Nitin Sejpal, with Ms. Akshata Desai, for the Appellants.
Ms. P.P. Shinde, APP for Respondent No.1-State.
Mr. Pradip D. Gharat, Special P. P. for Respondent No.2-CBI.

CORAM : REVATI MOHITE DERE &
DR. NEELA GOKHALE, JJ.

RESERVED ON : 11th MARCH 2025

PRONOUNCED ON : 15th APRIL 2025

JUDGMENT:- (*Per Dr. Neela Gokhale J.*)

1. The Appellants have assailed the judgment and order dated 25th April 2022 passed by the Special Judge (Exclusive Special Court constituted for the cases under MCOCA/TADA/POTA and other Sessions Cases against the accused - Rajendra Sadashiv Nikalje @ Chhota Rajan) at Greater Bombay in Sessions Case No.187 of 2011 arising out of CBI RC-3(S)/2016-SCUV/SC-II, New Delhi. By the impugned judgment and order, the Appellants stand convicted for the offences punishable under Sections 302, 307, 326, 120-B, 34 of the Indian Penal Code ('IPC'), 1860 and Section 27 of the Indian Arms Act, 1959. For the offences punishable under Sections 302, 34, 120-B of the IPC for committing murder of Irfan Qureshi, the Appellants are sentenced to suffer rigorous imprisonment (RI) for life with fine of Rs.8,000/- each, in default to suffer additional RI for six months each. For the offences punishable under Section 302, 34, 120-B of the IPC for committing murder of Shakil Ibrahim Modak ('Modak'), the Appellants are sentenced to suffer RI for life with fine of Rs.8,000/- each, in default to suffer additional RI for six months each. For the offence punishable under Section 307, 34, 120-B of the IPC, both the Appellants are sentenced to suffer RI for 8 years with fine of

Rs.5,000/- each, in default to suffer RI for four months each. The Appellants are sentenced to suffer RI for five years with fine of Rs.5,000/- each, in default to suffer RI for four months each for the offence punishable under Sections 326, 34, 120-B of the IPC. The Appellants are also sentenced to suffer RI for four years with fine of Rs.5,000/- each, in default to suffer RI for four months each for the offences punishable under Section 27 of the Indian Arms Act, 1959. All the substantive sentences are directed to run concurrently and both the Appellants are entitled to set off for the period of detention already undergone by them. There were three more co-accused in the same case, however, vide the same Judgment and Order, the said three co-accused were acquitted of all the offences.

2. The facts leading to the present Appeal are as follows:

(a) On 13th February 2010, the First Informant, Mohd. Asif Mohd. Rafiq Khan along with one Naushad Qureshi and Mohd. Irfan Qureshi were sitting outside the shop of Naushad Qureshi situated at Dharmashi Street, Phool Galli, Aktari Masjid Building, Mumbai. The First Informant received a phone call from one of the deceased, one Modak, informing him that he was coming to Princess Building.

However, Modak replied that he was himself coming to the Phool Galli. Modak reached Phool Galli at 20:15 hours and sat on the chair next to the Informant. While they were talking, a person came from the front side and fired at him with a revolver held in his right hand with an intention to kill him. The Informant received an injury on the left side of his chest. Three other persons came along with the first assailant and started firing at Modak and Qureshi. In order to save his life, the Informant ran towards Bhendi Bazar and went to his friend's shop near Metro Optician and narrated the incident. His friend took him to Sir JJ Hospital. In the firing, Modak and Qureshi received bullet injuries and were also taken to Sir JJ Hospital but they succumbed to their injuries. In the firing, another woman namely, Smt. Gangubai Eknath Sonawane also sustained a bullet injury while she was walking on the Dharamshi street. She was also admitted to Sir JJ Hospital.

(b) The Informant narrated the entire incident to the police while in the hospital. His statement was recorded on the basis of which, C.R. No.26 of 2010 was registered at the Sir JJ Marg Police Station against four unknown persons for the offences punishable

under Sections 307 and 34 of the IPC and Section 3, 25, 27 of the Indian Arms Act, 1959. Spot Panchanama was prepared in the presence of panchas; blood, blood mixed with earth and, earth were collected from the spot. Three lids were also found. Three white coloured plastic chairs out of five chairs having bullet holes were also seized. Inquest panchanama was prepared. Statements of witnesses were recorded, seized muddemal was sent to Forensic Science Laboratory ('FSL'). Supplementary statements of the witnesses were recorded. In September 2010, the CA Report was received from the FSL and thereafter in October, 2010, investigation was transferred to DCB CID, Unit 1, Mumbai.

(c) The Appellants were arrested on 23rd October 2010 by PSI Anil Gangawane (PW/24), who was working in DCB, CID in the Motor Vehicle Anti Theft Department in another crime. While in his custody, the 2nd Appellant, Pranay Rane gave a statement regarding the place where the weapon used in the present crime, was kept. Accordingly, the said weapon was recovered along with four live cartridges under the provisions of Section 27 of the Indian Evidence Act, 1872.

(d) Thereafter, under the orders of Additional Chief Metropolitan Magistrate ('ACMM'), 37th Court, Ballard Pier, Mumbai, PI Sudhir Sawant got the custody of the Appellants and they were arrested on 12th November 2010 in the present crime. On 15th December 2010, Test Identification Parade ('TIP') was conducted at Mumbai Central Prison, Mumbai.

(e) Upon completion of investigation, charge sheet against these Appellants was submitted. The learned ACMM took cognizance of the offences. Upon committal, charges were framed against the Appellants and others on 25th January 2017 for the aforesaid offences and under Section 37(1)(a) of the Maharashtra Police Act. The Appellants entered their plea of 'not guilty' and claimed to be tried.

(f) In the meantime, separate charges were framed against Rajendra Nikalje @ Chhota Rajan. Pursuant to the orders passed by Lt. Governor New Delhi, this Accused was directed not to be moved out of Tihar Jail, New Delhi and he remains there till date.

(g) In support of their case, the Prosecution examined 37 witnesses. The defence did not lead any evidence. The statements of

the Appellants and the other acquitted accused under Section 313 of The Code of Criminal Procedure, 1973 ('Cr.P.C.') were recorded. The defence of the accused was of total denial, innocence and false implication. However, vide judgment and order dated 25th April 2022, the Special Judge convicted the Appellants and sentenced them as noted in paragraph 1 above. Being aggrieved by their conviction, they have preferred the present Appeal.

3. Mr. Nitin Sejpal, learned counsel appeared for the Appellants, Mr. Pradip Gharat, learned Special Public Prosecutor represented the CBI and Mrs. P. P. Shinde, learned APP represented the State.

4. The case of the prosecution essentially rests upon direct evidence of an injured eye witness, i.e. PW/1 the First Informant namely, Mohamed Asif Khan. He deposed about the entire incident as it happened in his presence. He has stated that while he was sitting with Modak and Qureshi, four persons arrived and started firing the revolver. He sustained a bullet injury on the left side of his chest. So also, Irfan and Modak sustained bullet injuries, which resulted in their death. He further stated that he ran away taking support of his bike,

through the Masjid Galli- Bhendi Bazar and reached near Metro Opticians, where he met his friend. His friend took him on his bike to the hospital. He further stated in his substantive evidence that he narrated the incident to the police in the hospital and after he was discharged from ICU, the police again recorded his statement. This witness described the Appellants in detail. He was also subjected to TIP. He has given a lucid description of the conduct of the TIP. He identified the Appellants. Thereafter, this witness also identified the Appellants in the Court. PW/1 was subjected to a rigorous cross-examination, however, he stood his ground and did not budge from his testimony.

5. Mr. Sejpal tried to suggest that at the time of giving his statement to the police, PW/1 was semiconscious and that he gave the description of only one person, who fired at him. In fact, PW/1 has reiterated and volunteered to say that he described both the persons. It was also suggested to this witness that he did not see the face of the assailants as he left the spot immediately. Mr. Sejpal also doubted the TIP by saying that the parade was delayed and PW/1 saw the Appellants before the parade. Mr. Sejpal contended that delay in

holding a TIP renders it fatal and this witness had identified the Appellants without specifying their individual roles. It was repeatedly suggested to this witness that since he was injured, he ran away from the spot and hence, did not see the assailants. Despite, repeated questioning on this aspect, this witness spoke with precision and consistently identified the Appellants. He was able to narrate the entire sequence of events cogently. Nothing fruitful was elicited from his cross examination.

6. Per contra, Mr. Gharat justified the alleged delay in conducting the TIP and says that the delay, if any, should be seen from the date of arrest of the accused and not from the date of the incident. Admittedly, the incident took place on 13th February 2010 and the Appellants were first arrested on 23rd October 2010 by the Motor Vehicle Anti Theft Department. They were arrested in the present crime on 12th November 2010 and the TIP was conducted on 15th December 2010. Thus, according to Mr. Gharat, there was no unreasonable delay in conducting the TIP. Moreover, he submits that PW/1 has attributed specific roles to the Appellants. So also, the witness has identified the Appellants as accused before the Court,

which is, the substantive evidence. He thus submits that even for the sake of arguments, if the TIP was ignored, the testimony of PW/1 is of sterile quality and there is no reason to disbelieve the same.

7. Mr. Gharat took us through the procedure laid down for conduct of TIP, which is prescribed in the Criminal Manual. On this aspect this witness deposed as under:

> *"6. I received a letter from police on 14.12.2010 and by the said letter I was called in a Arthur road jail on 15.12.2010 for the purpose of identification parade. Accordingly, I had gone in the Arthur Road jail on 15.12.2010. I was told by one of the policeman belonging to the crime branch to go inside and identify the person who made assault on me. When I went inside saw that there were two rows having seven persons, each in the row. I identified the persons who had fired on me and he was standing in between persons at number 3 & 4 in the first row. I also identified the person who was firing at the time of occurrence and standing in between person at number 2 & 3 in the second row. He had fired on Shakil Modak and Irfan Qureshi. The persons to whom I identified in the first row and had made assault on me was Mohd. Ali Jan Mohd. Shaikh. The person to whom I identified and standing in the second row was Pranay Rane. The Nayab Tahsildar told me the name of*

> *two persons to whom I identified. I can identify Mohd. Ali Jan Mohd. Shaikh and Pranay Rane, if shown to me. (The witness pointed his finder towards accused Mohd. Ali Jan Mohd. Shaikh and Pranay Rane are present in court). Again my statement was recorded in the office of Crime Branch on the day of identification parade."*

The sequence narrated by PW/1 of conducting the TIP is in consonance with the prescribed procedure. We thus have no reason to disbelieve the testimony of the eye witness PW/1. He has clearly identified the Appellants in the TIP as well as before the Court. PW/21 one, Nandkishor Deoo Palav, the Executive Magistrate (Retd) also deposed regarding the procedure that was followed while conducting the TIP. He stated that he took all the necessary precaution to ensure that the witnesses do not come in contact with each other after the first TIP. His testimony also remained intact on the cross-examination.

8. The law on the point in respect of value attached to the testimony of an injured witness is settled. Such testimony is accorded a special status in law. This is, as a consequence of the fact that, injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished, merely to falsely implicate a third party for the

commission of the offence. Hence, the Apex Court in a series of its decisions has held that the deposition of an injured witness should be relied upon unless, there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein. In ***State of UP v. Kishan Chand***[1], a similar view was reiterated observing that, the witness sustaining injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence.

9. In the case of ***Abdul Sayed v. State of Madhya Pradesh***[2], the Supreme Court while discussing the value to be attached to the testimony of an injured eye witness also affirmed this view and held that the testimony of an eye witness should be viewed from broad angles. It should not be weighed in golden scales but with cogent standards. If an eye witness reproduces the incident in the same sequence as it registered in his mind, the testimony cannot be doubted as artificial on that core alone. Thus, Mohamed Asif Khan, the eye witness has given a graphic description of the entire incident. His presence on the spot cannot be doubted as he was injured in the incident. His deposition must be given due weightage and cannot be

1 (2004) 7 SCC 629
2 (2010) INSC 608

brushed aside merely on the ground that either he ran away from the spot as he received injuries or the TIP was allegedly delayed.

10. Mr. Sejpal also pointed to testimony of the 2nd witness, PW/7-Gangubai Sonawane, who was also injured in the melee to say that although she was injured, she failed to identify the Appellants. However, this does not negate the testimony of PW/1 as PW/7 has deposed that upon being hit by the bullet, she became unconscious and fell down. However, she reiterates that she was present and suffered a bullet injury due to firing.

11. There is another eye witness namely, PW/13, one Shahabaz Abdul Rehman, who was also present at the time of the incident. He suffered no injuries and identified the Appellants, who fired at the deceased. He also deposed regarding being called for identification of the accused (TIP) and he also identified the accused in the Court. The defence has not seriously doubted the presence of PW/13 but only disputes the identification made by him on the ground that he did not identify the Appellants by name in the TIP. In fact, he stated that he took the deceased to the hospital. The attempt made by the defence to suggest that he never participated in the TIP nor identified any person

has failed, as PW/13 remained consistent in his testimony. In fact, a perusal of the cross-examination indicates that there was no substantial challenge to the testimony of PW/13 regarding the identification of the Appellants and he has remained consistent with the statement given to the police.

12. PW/22 is another eye witness namely, Shakil Ismail Qureshi. He deposed that he had gone to a shop behind a mosque in Phool Galli on 13.02.2010. There he saw three to four persons firing at unknown persons. Thereafter, the police recorded his statement. He was called for the TIP. He identified the Appellants during TIP as well as in the Court. Mr. Sejpal tried to assail his testimony that it was only on the next day of the incident, pursuant to advice from his employer, that PW/22 went to the police station to give his statement. In fact, the clarification brought out in the cross examination of this witness itself corroborates his version in his chief examination. His explanation clearly brings out that he may have been apprehensive to go to the police directly and involve himself with a police matter as earlier he used to sell stolen articles to his employer Ashfaq, which were later sold in Chor Bazaar. But the witness was quick to say that

on the advice of his employer, he promptly went to the police the very next day and reported the incident as he witnessed it. It is thus, quite believable that a person witnessing an incident such as firing on the streets by three-four persons, is likely to be shocked and rattled enough that he does not go to the Police Station immediately, especially with an earlier background of selling stolen articles. There is also a fear in an ordinary person to go to the police and record his statement lest the police involve him in a long drawn investigation. However this witness identified the Appellants. He also identified the Appellants in the Court. There is nothing on record to show why this witness would falsely implicate the accused. The delay in informing the police is not so long as to disbelieve his testimony. In fact, on the very next day, PW/22 visited the Police Station and recorded his statement. Nothing fruitful was elicited from his cross examination.

13. Prosecution also placed reliance on recovery of weapon pursuant to the statement of Appellant No.2. To corroborate this, the prosecution examined the panchas in whose presence the discovery was made. PW/16 one, Manik Kapoorchand Raja has deposed that the Appellant No.2 stated in his presence that he would show the place

where he had kept the weapon. He proved the disclosure panchanama and its contents. He also identified the Appellants in the Court. He stated that the 2nd Appellant took both the pancha witnesses to a house where the parents of the Appellants opened the door. Thereupon, the 2nd Appellant produced the revolver and four live cartridges from one plastic bag from an iron cupboard in the house.

14. Mr. Sejpal attempted to demolish this testimony of PW/16 by saying that the house from which the weapon and the cartridges were recovered belonged to a friend of the Appellants and thus, the persons opening the door were not his parents. To this, PW/16 has specifically replied that he had referred to the persons as parents of the Appellants as he did not know that the house belonged to his friend and not parents. However, PW/16 identified the revolver, as was seized and sealed in his presence.

15. PW/18 namely, Dr. Bhalchandra Gopinath Chikhalkar deposed as to the injuries suffered by the deceased. He conducted the post-mortem and affirmed that the death was on account of fire arm wounds. He also stated regarding recovery of bullets from the body of the deceased. The bullet was thereafter sent for forensic analysis. The

Doctor also opined that the bullet might have been fired at the victim from the distance of 100 cm and injuries found on the body can be associated with the victim sitting and the assailant being in standing position. The defence was unable to contradict the testimony of PW/18. His testimony also corroborated the eye witnesses testimony regarding the victims sitting on the chairs and the injuries caused by bullets fired from a revolver. The Doctor identified the post-mortem report and the bullets which were sent for forensic analysis.

16. PW/23, API Mukund Vasudeo Gorhe, is the Investigating Officer. He deposed as to the investigation done by him and the spot panchanama. He stated that all the articles seized from the spot were sealed with his signature as well as the panchas. They were deposited in muddemal room of the police station. He identified the bullets from the sealed bottle and the label on the bottle. There is nothing to suggest that this witness deposed falsely.

17. PW/25, Dr. Mohamed Aarif Rashamwala testified to the treatment given by him to the First Informant. He affirmed that one bullet was extracted from the chest of PW/1 and he was discharged on 12th March 2010. He also corroborated the testimony of PW/1

regarding that he was completely conscious when he gave statement to the police.

18. Mr. Gharat drew our attention to the CA examination reports at Exhibits 149 to 157 and Exhibit 207. Exhibit 149 is an application made by the prosecution for marking the CA reports as Exhibits under the provisions of Section 293 of the Cr. P. C. and also for marking of the corresponding articles. Mr. Gharat particularly pointed out that the defence took no objection for marking the CA Reports as Exhibits. The Application below Exhibit 149 was partly allowed and the CA Reports were placed on record and accordingly, exhibited as Exhibits 150 to 157. According to Mr. Sejpal, the CA Report at Exhibit 207 was however, not included in the documents, which were allowed to be exhibited in view of the provisions of Section 293 of the Cr.P.C. Exhibit 207 is the FSL Report pertaining to the matching of the bullets with the .38 revolver recovered pursuant to the disclosure statement made by the 2nd Appellant. The said Report clearly states that on comparison, the bullets from the body of the deceased and PW/1 injured witness match with the revolver recovered at the behest of the Appellant No.2.

19. Mr. Sejpal contended that the CA Report at Exhibit 207 was not proved by calling the Forensic Expert to testify. According to him, this report is not proved and could not have been exhibited. The application below Exhibit 149 made by the prosecution was only relating to CA Reports marked at Exhibits 150-157. It was only to the exhibition of these documents that the defence did not take any objection. Hence, the CA Report at Exhibit 207 regarding matching of the recovered revolver with bullets is not proved and cannot be read in evidence.

20. Section 293 of the Cr.P.C. provides that any document purporting to be a report under the hand of a Government scientific expert to whom this Section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as a evidence in any inquiry, trial or other proceeding under the Code. Sub-clause (2) vests power in the Court to summon and examine any such expert as to the subject matter of his report, if it thinks fit. This Section applies to any Chemical Examiner or Director, etc. of a Central or State Forensic Science Laboratory. Admittedly, the Court has not summoned any such

expert who has given the said report at Exhibit 207. However, there is also nothing on record to indicate that the defence ever objected to exhibiting of said document. No doubt that the manner in which the CA Report ideally ought to have been proved through the author of the said report who has analyzed the articles. However, this by itself would not turn the case on its head, considering the provision of Section 293 of the Cr.P.C. Had the defence seriously wanted to contest the said Report, it was imperative on its part to express its objections during the trial on the basis of which the Court would have exercised its power under Sub-clause (2) and called the expert to depose as to its credibility. Having failed to take any objection in the trial, it is well within the power of the Court to exhibit the said Report given under the signature of the Assistant Chemical Analyzer to the Government of Maharashtra.

21. In this regard, Mr. Gharat canvassed a further case that without prejudice to his argument of application of Section 293 of the Cr.P.C., in fact, this document has also been proved by the Investigating Officer, i.e. PW/28 in his deposition. This witness has testified that upon recovery of that weapon, he wrote the letter to the

FSL to verify if the said weapon was used in the present crime. Furthermore, he specifically denied the suggestion given to him in the cross-examination that the fire arms recovered and seized from the discharged accused were planted on the 2nd Respondent. Mr. Gharat also pointed to the statements of the accused recorded under Section 313 of the Cr.P.C. and contended that the accused did not offer any explanation in this regard despite having opportunity to do so. Similarly, no such argument was raised before the trial Court regarding the admissibility of the CA Report.

22. Mr. Sejpal has placed reliance on various decisions of the Supreme Court and this Court on the legal aspects pertaining to omissions in testimony of eye witnesses, provisions relating to discovery under Section 27 of the Indian Evidence Act, 1872 etc. We have perused the said judgments. We agree with the legal propositions in the said decisions cited. However, the same are not applicable to the facts in the present case.

23. The present case thus, primarily hinges on the testimony of four eye witnesses. Although the prosecution has fairly succeeded in establishing the guilt of the Appellants beyond reasonable doubt on

the basis of the recovery of the weapon, evidence of the medical Doctor, panchas, and the Investigating Officer, it is settled position of law that conviction can be based on the testimony of a single eye witness and there is no rule of law or evidence which says to the contrary, provided that the said witness passes the test of reliability. It is only when the Court finds that the eye witness is a wholly unreliable witness that his testimony is discarded *in toto* and no amount of corroboration can cure that defect. In the present case, there are four eye witnesses. Even if the testimony of PW/7, who became unconscious when she received bullet injury is discarded, the other three eye witnesses inspire confidence.

24. In view of the aforesaid discussion, we find that the judgment and order impugned herein is a well reasoned and legally sound decision. The evidence on record, when assessed in its entirety establishes the guilt of the Appellants beyond reasonable doubt. The observations of the trial Court regarding reliability of the eye witnesses testimony, the corroborative evidence, etc are compelling and do not warrant any interference. Prosecution has established its case beyond all reasonable doubt against the appellants herein based on legal, admissible and

cogent evidence.

25. In view of the reasons stated above, the present Appeal fails and is accordingly, dismissed. The conviction and sentence awarded to the Appellants for the offences as stated aforesaid stands confirmed.

(DR. NEELA GOKHALE, J.) (REVATI MOHITE DERE, J.)

SHAMBHAVI NILESH SHIVGAN

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