

(Cr. A. Nos. 950, 989, 983 & 1062 of 2016)

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRIMINAL APPEAL NO. 950 OF 2016

1. Soheli Ali @ Jimmi, S/o Sultan Ali, aged about 22 years, R/o Near Sarkari Kuan Masjid Kota, P.S. Saraswati Nagar, Raipur, Tahsil & District Raipur (C.G.)
2. Sunil @ Sonu Nayar, S/o Santosh Nayar, aged about 22 years, R/o Kota Colony, House No.138, Saraswati Nagar, Raipur, Tahsil & District Raipur (C.G.)

... Appellant(s)

Versus

- State of Chhattisgarh, through: Police Station Saraswati Nagar, Raipur, District Jashpur (C.G.)

... Respondent(s)

With

CRIMINAL APPEAL NO. 989 OF 2016

- Aniket @ Nikki, S/o Late Sureshchandra Sharma, aged about 20 years, R/o Near Sarkari Kuan, Kota, P.S. Saraswati Nagar, Raipur, Tahsil & District Raipur (C.G.)

... Appellant(s)

Versus

- State of Chhattisgarh, through: Police Station Saraswati Nagar, Raipur, District Jashpur (C.G.)

... Respondent(s)

With

CRIMINAL APPEAL NO. 983 OF 2016

- Dinesh Mishra @ Monu, S/o Krishna Kumar, aged about 22 years, R/o In front of Durga Mandir Stadium, Kota, P.S. Saraswati Nagar, Raipur, Tahsil & District Raipur (C.G.)

... Appellant(s)

(Cr. A. Nos. 950, 989, 983 & 1062 of 2016)

Versus

- State of Chhattisgarh, through: Station House Officer, Police Station Saraswati Nagar, Raipur, District Jashpur (C.G.)

... Respondent(s)

And

CRIMINAL APPEAL NO. 1062 OF 2016

- Manoj Patnayak, S/o Gouri Shankar Patnayak, aged about 24 years, R/o Village Kota, near Government Well, Police Station- Saraswati Nagar, Raipur, Tahsil & District Raipur (C.G.)

... Appellant(s)

Versus

- State of Chhattisgarh, through: Station House Officer, Police Station Saraswati Nagar, Raipur, District Jashpur (C.G.)

... Respondent(s)

For Appellant No.2 in Cr.A. No.950/2016 & Appellants in Cr.A. No. 983/2016 & 1062/2016

:- Mr. Sabyasachi Bhaduri, Advocate.

For Appellant in Cr.A. No.989/2016.

:- Ms. Indira Tripathi, Advocate.

For Respondent/State

:- Mr. Sudeep Verma, Dy. Govt. Advocate.

For Objector

:- Mr. Sumit Singh, Advocate.

Amicus Curiae

:- Ms. Fouzia Mirza, Senior Advocate, assisted by Ms. Smita Jha, Advocate.

Division Bench

Hon'ble Shri Justice Sanjay K. Agrawal
Hon'ble Shri Justice Sanjay Kumar Jaiswal

Judgment on Board

[03.01.2024]

(Cr. A. Nos. 950, 989, 983 & 1062 of 2016)

Sanjay K. Agrawal, J.

1. At the outset, it would be relevant to mention that Soheli Ali @ Jimmi, who is appellant No.1 in Cr.A. No.950/2016 is absconding while in parole. By order dated 7.11.2023 of this Court, his appeal and record has already been detached to be heard separately from the present batch of appeals. Therefore, in Cr.A. No.950/2016, this Court is not considering the appeal of appellant No.1 – Soheli Ali @ Jimmi at this juncture and only the appeal of appellant No.2 - Sunil @ Sonu Nayar is being considered and disposed of by this judgment.
2. Since these four criminal appeals, under Section 374(2) of CrPC, have arisen out of the same impugned judgment passed by the Trial Court and the question of law and facts also being similar in these appeals, they have been clubbed together, heard together and are being disposed of by this common judgment.
3. Cr.A. No.950/2016 has been preferred by Sunil @ Sonu Nayar, Cr.A. No.989/2016 has been moved by Aniket @ Nikki, Cr.A. No.983/2016 has been filed by

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Dinesh Mishra @ Monu and Cr.A. No.1062/2016 is the appeal of Manoj Patnayak. The four appellants herein were accused No.1, 3, 4 and 5 respectively before the Trial Court and the absconding accused Soheli Ali @ Jimmi was accused No.2. For convenience sake, they shall hereinafter be called as A-1 Sunil, A-2 Soheli Ali, A-3 Aniket, A-4 Dinesh and A-5 Manoj.

4. All the appellants herein faced trial before the Sixth Additional Sessions Judge, Raipur, in Sessions Case No.240/2012 wherein each of them has been convicted and sentenced by the impugned judgment dated 27.6.2016 in the following manner:-

| Conviction | Sentence |
|---|--|
| 1. U/Ss 147 & 148 of IPC but sentenced only U/s 148 of IPC | R.I. for 3 years |
| 2. U/s 302 r/w s.149 of IPC | Imprisonment for Life and fine of Rs.500/- and in default of payment of fine amount, to undergo additional R.I. for one month. |
| 3. U/s 326 r/w s.149 of IPC | R.I. for 10 years and fine of Rs.500/- and in default of payment of fine amount, to undergo additional R.I. for one month. |
| With a direction to run all the substantive sentences concurrently. | |

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5. Background facts as projected by the prosecution and accepted by the Trial Court, in a nutshell, are as follows :-

- (i) On 27.8.2012, at 11:10 p.m., the complainant Sunil Yadav (PW-1) lodged an oral FIR at Police Station Saraswati Nagar alleging that he used to sell eggs near Vandana Auto and at about 9:30 p.m. when he was closing his egg shop, near Join Bar he heard some altercation with raised voices and abuses and when he reached there, he found four persons were hurling abuses to Sonu Sindhi @ Sunil (deceased) and Aju Thakur @ Abhijeet Singh (PW-10) and they were threatening them to life and one hefty person who was holding knife in his hand and the three other persons who were there with the said person, raised their voices saying that Nikki kill them both with knife and the said person inflicted injuries on Aju Thakur with knife on his chest and other parts of his body and when Sonu Sindhi tried to intervene, the said person also made incessant attack on Sonu Sindhi with knife on his chest and other parts of his body. Thereafter, they fled away from the spot. The incident is said to have witnessed by Sawan (PW-4), Sheikh Ahmad (PW-2) and other persons of the vicinity. The injured Sonu Sindhi and Aju Thakur were taken to Dr. Bheem Rao Ambedkar hospital by the police where Sonu Sindhi succumbed to his

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injuries. On the basis of the said report, FIR (Exhibit P-1) was registered against the accused persons at Police Station Saraswati Nagar for the offences punishable under Sections 302, 307, 294, 506 (II)/34 of IPC.

- (ii) The bed head ticket of injured Aju Thakur (PW-10) issued by Dr. Ambedkar Hospital where he was treated, is Exhibit P-33C. Inquest proceeding in respect of the death of Sonu Sindhi was conducted vide Exhibit P-13 and his post-mortem (Exhibit P-16) was conducted by Dr. Shivnarayan Manjhi (PW-11) who opined the cause of death of Sonu Sindhi due to hemorrhage and shock and the nature of his death was homicidal. The knife which was embedded in the dead-body of Sonu Sindhi was removed, sealed and seized vide Exhibit P-14A. Spot Map was prepared vide Exhibit P-10. Statements of Sunil Yadav (PW-1), Sheikh Ahmed (PW-2), Sawan (PW-4) and Vishal Gupta (PW-13) were recorded under Section 161 of CrPC vide Exhibits P-3, P-9, P-11, P-24. Statement of the injured Aju Thakur (PW-10) was also recorded under Section 161 of CrPC. A-1 Sunil was arrested at the place of incident itself. Memorandum statements of A-3 Aniket, A-4 Dinesh and A-5 Manoj were recorded vide Exhibits P-14, P-18 & P-21 respectively. At the instance of A-2 Sohel Ali, a knife was recovered vide Exhibit P-19. Seizure of bloodstained clothes, mobile phone, motorcycles

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and other articles were made vide Exhibit P-6 & P-7. All the accused persons were apprehended vide respective Arrest Memos i.e. Exhibits P-8, P-15A, P-20, P-28 and P-33.

(iii) Test Identification Parade (TIP) in respect of A-2 Soheli Ali was conducted vide Exhibit P-4 in which Sunil Yadav (PW-1) and the injured Ajju Thakur (PW-10) identified him. Vide TIP (Exhibit P-5), A-3 Aniket was identified by the said witnesses. Similarly, A-5 Manoj was identified by the said witnesses in the TIP conducted vide Exhibit P-31. The F.S.L. report is Exhibit P-37 in which human blood was found on the seized knife.

6. After completion of the investigation, all the accused persons were charge-sheeted before the concerned jurisdictional Criminal Court for the offences punishable under Sections 147, 148, 302/149, 307/149, 294, 506 (II) of IPC and the matter was committed to the Sessions Court, Raipur from where the case was transferred to the Court of Seventh Additional Sessions Judge, Raipur for trial and its disposal in accordance with law, in which the appellants abjured their guilt, took a plea of false implication and entreated for trial. However, due to wrong framing of charges, the aforesaid charges were

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amended and fresh charges were framed by the Sixth Additional Sessions Judge, Raipur on 3.6.2016.

7. During the course of trial, in order to bring home the offence, the prosecution has examined as many as 23 witnesses and exhibited 37 documents. In defence, Deepak Yadav and Rashmi Sharma have been examined as DW-1 and DW-2 respectively and 24 documents have also been relied upon. The accused persons were examined under Section 313 of CrPC in which they denied the circumstances appearing against them in the evidence brought on record by the prosecution, pleaded innocence and false implication.
8. After conclusion of the trial, the Trial Court, by impugned judgment dated 27.6.2016, on appreciation of oral and documentary evidence available on record, has convicted all the appellants for the offences punishable under Sections 147, 148, 302/149 & 326/149 of IPC and sentenced them in the manner as mentioned at the table shown in para-4 of this judgment, against which the present four appeals have been filed by the respective appellants calling in

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question the legality, validity and correctness of the impugned judgment.

9. Ms. Indira Tripathi and Mr. Sabyasachi Bhaduri, learned counsels appearing for the respective appellants, would submit that A-4 Dinesh and A-5 Manoj have not been identified by the prosecution witnesses in the TIP conducted and the prosecution has not been able to bring home the offence against the appellants herein beyond reasonable doubt and no sharp edged weapon has been seized from the possession of the appellants herein and therefore they are entitled to be acquitted on the basis of benefit of doubt.
10. Ms. Fouzia Mirza, learned senior counsel appearing as amicus curiae along with learned counsel, Ms. Smita Jha, has brought before this Court the correct factual position and also brought out the case against each of the four appellants herein.
11. Mr. Sudeep Verma, learned Deputy Government Advocate, would submit that the prosecution has been able to bring home the offence against the appellants herein beyond reasonable doubt and in

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view of the statements of the eye-witnesses PW-1 Sunil Yadav, PW-2 Sheikh Ahmad as well as the injured eye-witness, PW-10 Aju Thakur, the Trial Court has rightly convicted the appellants herein for the aforesaid offences and as such they are not entitled to be acquitted from the said offences on the basis of benefit of doubt and their appeals deserve to be dismissed.

12. We have heard learned counsels for parties, considered their rival submissions made herein-above and also gone through the records with utmost circumspection.
13. The first question as to whether the death of deceased Sonu Sindhi was homicidal in nature, has been answered by the Trial Court in affirmative relying upon post-mortem report (Exhibit P-16) proved by Dr. Shivnarayan Manjhi (PW-11) who opined the cause of death of Sonu Sindhi due to hemorrhage and shock and the nature of his death was homicidal, which, in our considered opinion, is a correct finding of fact based on the evidence available on record and it is neither perverse nor contrary to the record.

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Accordingly, we hereby affirm the said finding of the Trial Court.

14. Now, the next question is, as to whether the appellants herein are authors of the crime?

15. Considering the nature of evidence which have come on record, we will first consider the appeals of A-4 Dinesh and A-5 Manoj.

Cr.A. No. 983/2016 of A-4 Dinesh & Cr.A. No.1062/2016 of A-5 Manoj.

16. The first submission that has been put forth by learned counsels appearing on behalf of A-4 Dinesh and A-5 Manoj is that they have not been identified by the prosecution witnesses in the TIP and even A-5 Manoj was not named in the FIR and therefore they are entitled to acquittal on the basis of benefit of doubt.

17. We will first consider the case of A-5 Manoj whether he has been identified by the prosecution witnesses who were present at the place of incident. PW-1 Sunil Yadav is the first informant and one of the eye-witnesses in the instant case. In para-33 of his statement before the Court, he has specifically stated that in the FIR (Exhibit P-1) as well as in his

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statement recorded under Section 161 of CrPC, vide Exhibit P-3, he has not named A-5 Manoj of assaulting the victims by means of belt. In para-40 of his statement also he has clearly stated that he has not seen A-5 Manoj assaulting anyone by means of knife, *lathi* and *danda*. Similarly, PW-2 Sheikh Ahmad, who has also been cited as an eye-witness by the prosecution, has only named A-1 Sunil and A-2 Sohail Ali but not named or identified A-5 Manoj. In para-12 of his statement also he has clearly stated that he did not know and he could not identify A-5 Manoj. However, the injured eye-witness Aju Thakur (PW-10) has proved Exhibit P-31 which is the TIP conducted on behalf of the prosecution and has also proved his supplementary statement recorded on 4.12.2014. In his statement, Aju thakur (PW-10) has specifically stated that A-5 Manoj has committed maar-peat with him and with deceased Sonu Sindhi as well. In last two lines of para-36 of his statement, he himself has clearly stated that as soon as he received notice, he knew that he has to identify A-5 Manoj. Since he already knew A-5 Manoj but the fact

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that he did not name A-5 Manoj in his statement recorded under Section 161 of CrPC and the name of A-5 Manoj also does not find mention in the FIR lodged by PW-1 Sunil Yadav, the identification of A-1 Manoj by PW-10 Ajju Thakur is of no use to the prosecution. As such, the presence of A-5 Manoj at the place of occurrence is not proved by the testimonies of PW-1 Sunil Yadav, PW-2 Sheikh Ahmad and PW-10 Ajju Thakur beyond reasonable doubt, which also finds force from the fact that A-5 Manoj was arraigned as an accused in the instant case by filing a supplementary charge-sheet under Section 173(8) of CrPC. In that view of the matter, the presence of A-5 Manoj at the place of incident is not established from the statements of eye-witnesses PW-1 Sunil Yadav and PW-2 Sheikh Ahmand and the injured eye-witness PW-10 Ajju Thakur.

18. Now, so far as A-4 Dinesh is concerned, though he has been named in the FIR (Exhibit P-1) lodged by PW-1 Sunil Yadav but the said witness Sunil Yadav (PW-1) has not proved the FIR. In para-11 of his statement, he has clearly stated that he did not read

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the FIR while putting his signature on the FIR. PW-1 Sunil Yadav has not identified A-4 Dinesh to be present at the place of incident. Similarly, PW-2 Sheikh Ahmad has also not identified A-4 Dinesh to be present at the place of occurrence. Likewise, PW-10 Ajju Thakur has also not identified A-4 Dinesh to be present at the place of incident. Though A-4 Dinesh has been named in the FIR but his presence at the place of occurrence has not been established as per the statements of the eye-witnesses PW-1 Sunil Yadav, PW-2 Sheikh Ahmad as well as PW-10 Ajju Thakur, the injured eye-witness and, according to PW-1 Sunil Yadav, the first informant, he had signed the FIR (Exhibit P-1) without reading the FIR. Thus, the presence of A-4 Dinesh at the place of incident is also not established beyond reasonable doubt.

19. As such, from the evidence available on record, the presence of both A-4 Dinesh and A-5 Manoj has not been established at the place of incident. No seizure has been made from the said appellants nor any incriminating material has been found proved so far as A-4 Dinesh and A-5 Manoj are concerned. Thus,

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the involvement of A-4 Dinesh and A-5 Manoj in the offence in question is not proved beyond reasonable doubt. As such, the Trial Court is absolutely unjustified in convicting the said two appellants i.e. A-4 Dinesh and A-5 Manoj for the offences in question.

20. Since the presence of A-4 Dinesh and A-5 Manoj at the place of incident is not established beyond reasonable doubt by the prosecution, consequently Section 149 of IPC would not be applicable in the instant case, as for invoking Section 149 of IPC in order to convict the accused persons with the aid of Section 149 of IPC, there must be an unlawful assembly.
21. So far as unlawful assembly is concerned, it would be relevant first to notice Section 141 of IPC, which defines “unlawful assembly” as under:-

“141. Unlawful assembly.—An assembly of five or more persons is designated an “unlawful assembly”, if the common object of the persons composing that assembly is-

(First)— xxxx;

(Second)— xxx;

(Third)— To commit any mischief or criminal trespass, or other offence; or

(Fourth)— xxx;

(Fifth)— xxxx.”

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22. Section 141 of IPC states that an “unlawful assembly” is an assembly of five or more persons, if their common object is to commit mischief, criminal trespass or any other offence. The Constitution Bench of the Supreme Court in the matter of **Mohan Singh and another v. State of Punjab**¹ held that it is only where five or more persons constituted an assembly that an unlawful assembly is born, provided, of course, the other requirements of the said section as to the common object of the persons composing that assembly are satisfied. In other words, it is one of the essential condition of an unlawful assembly that its membership must be five or more. The assembly must consist of five or more persons having one of the five specified objects as their “common object”. Further, their Lordships while dealing with as to the applicability of Section 149 of IPC in such case held that it is necessary to bear in mind the several categories of cases which come before the Criminal Courts for their decision. If five or more persons are named in the charge as composing an unlawful assembly and evidence adduced by the prosecution

1 AIR 1963 SC 174

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proves those charge against all of them it is very clear that Section 149 of IPC can be invoked.

23. Since all the appellants herein have been convicted for the offence punishable under Sections 302 and 326 with the aid of Section 149 of IPC, it would be relevant here to take notice of Section 149 of IPC , which reads as under:-

“149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.—If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.”

24. A careful perusal of the aforesaid provision would show that following ingredients are required to be established in order to convict an accused person for offence under Section 149 of IPC:-

- (i) there must be an unlawful assembly;
- (ii) Commission of an offence by any member of an unlawful assembly and
- (iii) Such offence must have been committed in prosecution of the common object of the assembly; or must be such as the members of the assembly knew to be likely to be committed.

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25. In view of the definition of "unlawful assembly" defined under Section 141 read with Section 149 of IPC, there must be an unlawful assembly of five or more persons; commission of an offence by any member of an unlawful assembly and such offence must have been committed in prosecution of the common object of the assembly or must be such as the members of the assembly knew to be likely to be committed.
26. Since in the instant case the presence of A-4 Dinesh and A-5 Manoj at the place of incident has not been proved by the prosecution beyond reasonable doubt, we will consider the case of A-1 Sunil and A-3 Aniket in view of the fact that the unlawful assembly in terms of Section 141 of IPC is not established.

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27. Now, so far as the case of A-1 Sunil is concerned, his presence at the place of incident has been established by PW-1 Sunil Yadav, PW-2 Sheikh Ahmad and PW-10 Aju Thakur. However, it is also apparent on the face of record that no seizure of any dangerous

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weapon has been made from the possession of A-1 Sunil. He was also found injured at the spot suffered with three abrasions simple in nature as per his MLC (Exhibit P-25).

28. Similarly, the presence of A-3 Aniket has been stated by PW-10 Aju Thakur, the injured eye-witness. Though no seizure of any dangerous weapon has been made from A-3 Aniket also but PW-10 Aju Thakur has stated that A-3 Aniket has caused injuries to him and also to deceased Sonu Sindhi.
29. Though the identity of A-1 Sunil and A-3 Aniket has been established and their involvement in the offence has also been found proved but considering the fact that the incident had occurred on account of falling of a bear bottle on the ground on which a dispute arose and A-1 Sunil and A-3 Aniket along with A-2 Sohel Ali, whose appeal has been separated from the present batch of appeals, caused injuries to Sonu Sindhi resulting in his death and sustaining of grievous injuries to PW-10 Aju Thakur, there appears to be no premeditation on the part of A-1 Sunil and A-3 Aniket to commit the said offence. However,

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though there appears to be no intention on the part of the said accused persons to cause death, but they must have had knowledge that the injuries caused by them to deceased Sonu Sindhi is likely to cause his death. Therefore, in light of the decision of the Supreme Court in the matter of Arjun v. State of Chhattisgarh², we are of the considered opinion that the conviction of A-1 Sunil and A-3 Aniket under Sections 302 read with Section 149 of IPC can be converted to Section 304 (Part-II) read with Section 34 of IPC and similarly from Section 326 read with Section 149 of IPC to that of Section 326 read with Section 34 of IPC, maintaining their conviction under Sections 147, 148 of IPC, on the basis of benefit of doubt.

30. In view of the aforesaid discussion, since the presence of A-4 Dinesh and A-5 Manoj is not established and their involvement in the offence has also not been proved beyond reasonable doubt, their conviction under Section 147, 148, 302/149, 326/149 is set aside and they are acquitted of the said charges on the basis of benefit of doubt.

2 (2017) 3 SCC 247

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31. Accordingly, we set-aside the conviction of A-4 Dinesh and A-5 Manoj for the offences punishable under Sections 147, 148, 302/149 and 326/149 and the sentence awarded thereunder as well. However, we convict A-1 Sunil and A-3 Aniket for the offence punishable under Section 304 (Part-II) read with Section 34 of IPC instead of Section 302 read with Section 149 of IPC and sentence them to undergo R.I. for 10 years. Further, we also convict A-1 Sunil and A-3 Aniket for the offence under Section 326 read with Section 34 of IPC instead of Section 326 read with Section 149 of IPC, maintaining their conviction under Sections 147 & 148 of IPC as it is, and the sentences awarded to them for the said offences also stand maintained as it is. The fine amounts with its default clauses shall also remain intact.
32. Since A-1 Sunil and A-3 Aniket have already completed more than 10 years of imprisonment, the jail sentences imposed upon them is modified to that of the period already undergone by them. Since all the appellants herein, i.e., A-1 Sunil, A-3 Aniket, A-4 Dinesh and A-5 Manoj, are already are on bail, they need not surrender. However, their bail-bonds shall remain in force for a period of six months in view of the provisions contained in Section 437-A of CrPC.

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33. In the result, the appeals of A-1 Sunil and A-3 Aniket are partly allowed and the appeals of A-4 Dinesh and A-5 Manoj are allowed.
34. It is made clear that this Court has not expressed any opinion on the merits of the case of the absconding accused, A-2 Sohel Ali, whose appeal has been separated from the present batch of appeals to be heard separately and his appeal would be decided without being prejudiced with the observations made by this Court in this judgment.
35. Let a certified copy of this judgment along with the original record be transmitted forthwith to the concerned Trial Court as also the Superintendent of Jail, for information and necessary action.
36. Before parting with the record, we express our appreciation and gratitude to Ms. Fouzia Mirza, learned senior counsel and learned counsel, Ms. Smita Jha, who on a short notice appeared before this Court and made submissions as amicus curiae.

Sd/-
(Sanjay K. Agrawal)
Judge

Sd/-
(Sanjay Kumar Jaiswal)
Judge