REPORTABLE

IN THE SUPREME COURT OF INDIA

INHERENT JURISDICTION

REVIEW PETITION (CRL.) NOS. 286-287 OF 2012
IN
CRIMINAL APPEAL NOS. 98-99 OF 2009

MOHD. ARIF @ ASHFAQ .....Petitioner(s)

VERSUS

STATE (NCT OF DELHI) .....Respondent(s)

J U D G M E N T

Uday Umesh Lalit, CJI

1. These review petitions arise out of the judgment and order dated 10.8.2011[1] passed by this Court in Criminal Appeal Nos. 98-99/2009.

2. According to the prosecution, on the night of 22.12.2000 some intruders entered the area where the Unit of 7 Rajputana Rifles of the Indian Army was stationed inside the Red Fort, New Delhi. In the firing that was opened by the intruders, three Army jawans lost their lives. The intruders then left by scaling the rear-side boundary wall of the Red Fort. This led to the lodging of FIR

[1] Mohd. Arif alias Ashfaq vs. State (NCT of Delhi), (2011) 13 SCC 621

No. 688/2000 registered with Kotwali Police Station, New Delhi in respect of offences punishable under Sections 302, 307, 186, 353, 120-B, 121, 121-A, 216 and 201 of the Indian Penal Code, 1860[2] read with Sections 25, 27, 54 and 59 of the Arms Act, 1959, Section 14 of the Foreigners Act, 1946, Sections 4 and 5 of the Explosive Substances Act, 1908 and Sections 420, 468, 471, 474 and 34, IPC. In the investigation, the involvement of the present review petitioner was made out.

3. The review petitioner, who was tried for said offences, was awarded death sentence vide judgment and order dated 31.10.2005 passed by the Court of Additional Sessions Judge, Delhi in Sessions Case Nos. 1/2005, 2/2005, 5/2005, 7/2005, 8/2005, 9/2005, 10/2005 and 11/2005, which arose out of the aforestated FIR. The award of death sentence was subject to confirmation by the High Court.

4. The matter was thereafter considered by the High Court in Death Sentence Reference No. 2/2005 with Criminal Appeal Nos. 891/2005, 892/2005, 907/2005, 927/2005, 944-945/2005, 946/2005, 273/2006 and 504/2006. The view taken by the trial

[2] "IPC" for short

Court was affirmed by the High Court vide its judgment dated 13.9.2007[3].

5. The matter then reached this Court in the form of Criminal Appeal Nos. 98-99/2009 at the instance of the review petitioner. However, the challenge was negated by this Court and the award of death sentence to the petitioner was affirmed vide judgment dated 10.8.2011, which has resulted in filing of the instant review petitions.

6. The instant review petitions had initially come up before the Bench of two Judges and by order dated 28.8.2012, the review petitions were dismissed. Curative Petition (Crl.) Nos.99-100/2013 filed by the review petitioner sought to challenge the view taken by the Division Bench of this Court in dismissal of the appeals, as well as, the review petitions. However, the curative petitions were also dismissed by this Court vide order dated 23.1.2014.

7. Soon thereafter, Writ Petition (Crl.) No. 77/2014 was preferred by the review petitioner submitting *inter alia,* that the review petitions in matters arising out of award of death sentence be heard by a Bench of three Judges and in open Court. The

[3] (2007) SCC Online Del 1259

Constitution Bench of this Court by its judgment dated 2.9.2014[4] concluded that in all cases in which death sentence was awarded by the High Court, such matters be listed before a Bench of three Judges. The relevant observations in paragraph 39 were as under:

> "39. Henceforth, in all cases in which death sentence has been awarded by the High Court in appeals pending before the Supreme Court, only a bench of three Hon'ble Judges will hear the same. This is for the reason that at least three judicially trained minds need to apply their minds at the final stage of the journey of a convict on death row, given the vagaries of the sentencing procedure outlined above. At present, we are not persuaded to have a minimum of 5 learned Judges hear all death sentence cases. Further, we agree with the submission of Shri Luthra that a review is ordinarily to be heard only by the same bench which originally heard the criminal appeal. This is obviously for the reason that in order that a review succeeds, errors apparent on the record have to be found. It is axiomatic that the same learned Judges alleged to have committed the error be called upon now to rectify such error. We, therefore, turn down Shri Venugopal's plea that two additional Judges be added at the review stage in death sentence cases."

8. A question still arose: whether in matters where the review petitions had already stood rejected when the aforementioned decision was rendered by the Constitution Bench of this Court, could there be reopening of the matter and the review petition be reheard? A subsequent Constitution Bench in its order dated 19.1.2016[5] observed as under: -

> "9. In the circumstances therefore and especially in view of the fact that the petitioner is perhaps the only person that will

[4] Mohd. Arif alias Ashfaq vs. Registrar, Supreme Court of India & Ors., (2014) 9 SCC 737
[5] Mohd. Arif alias Ashfaq vs. Registrar, Supreme Court of India & Ors., (2019) 9 SCC 404

> suffer the denial of the right to an open court hearing, we are inclined to modify the judgment on review and direct that the petitioner shall also be entitled to seek reopening of the dismissal of the review petitions for an open court hearing within one month from today. We permit the petitioner to raise all such additional grounds in support of the said review petition as may be legally permissible to him."

9. In this backdrop, the instant review petitions are listed before us for rehearing.

10. At this stage, we may set out certain circumstances which were found to have been proved by the High Court and this Court. In paragraph Nos. 182-191 of the judgment which is presently under review, it was observed as under: -

> "182. The High Court has held proved the following circumstances against the appellant:
>
> "(*a*) On the night of 22-12-2000 there was an incident of firing inside Lal Quila when some intruders had managed to enter that area of Lal Quila where the unit of 7th Rajputana Rifles of the Indian Army was stationed.
>
> (*b*) In that incident of shooting the intruders had fired indiscriminately from their AK-56 rifles as a result of which three army jawans received firearm injuries and lost their lives.
>
> *(c)* The death of three army jawans was homicidal.
>
> (*d*) Immediately after the quick reaction team of the army fired back upon the intruders as a result of which the intruders escaped from the place of occurrence by scaling over the rear side boundary wall of Lal Quila towards the Ring Road side and when the place of occurrence was searched by the army men many assault rifle fired cartridge cases were recovered from the place of occurrence.
>
> *(e)* Immediately after the intruders who had resorted to firing inside the army camp had escaped from there, calls were made by someone on the telephones of two BBC

correspondents one of whom was stationed at Srinagar and the other one was stationed at Delhi office of BBC and the caller had informed them about the shooting incident inside Lal Quila and had also claimed the responsibility of that incident and that that was the job of Lashkar-e-Toiba, which the prosecution claims to be a banned militant organization indulging in acts of terrorism in our country.

(*f*) On the morning of 23-12-2000 one AK-56 rifle was recovered from a place near Vijay Ghat on the Ring Road behind Lal Quila.

(*g*) On 23-12-2000 when the policemen conducted search around Lal Quila in the hope of getting some clue about the culprits they found one piece of paper lying outside Lal Quila near the rear side boundary wall towards Ring Road side and on that piece of paper one Mobile Phone No. 9811278510 was written.

(*h*) Mobile Phone No. 9811278510 was used for making calls to the two BBC correspondents (PWs 39 and 41) immediately after the shooting incident inside Lal Quila and the caller had claimed the responsibility for that incident and had informed them that the incident was the job of Lashkar-e-Toiba.

(*i*) The aforesaid mobile phone number found written on a piece of paper lying behind Lal Quila had led the police up to Flat No. 308-A, Ghazipur, New Delhi where accused Mohd. Arif alias Ashfaq was found to be living and when on being suspected of being involved in the shooting incident he was apprehended on the night of 25-12-2000/26-12-2000 one pistol and some live cartridges were recovered from his possession for which he did not have any licence.

(*j*) At the time of his arrest in case FIR No. 688 of 2000 one mobile phone having No. 9811278510 was recovered from his possession and it was the same mobile number from which calls had been made to the two BBC correspondents for informing them about the incident and Lashkar-e-Toiba being responsible for that incident.

(*k*) Immediately after his apprehension accused Mohd. Arif alias Ashfaq admitted his involvement in the shooting incident inside Lal Quila and also disclosed to the police about his another hide-out at G-73, Batla House, Muradi Road, Okhla, New Delhi and pursuant to his disclosure the police had gone to that hide-out where the occupant of that house started firing upon the police team and when the police team returned the firing, that person, who was later on identified by accused Mohd. Arif alias Ashfaq to be one

Abu Shamal alias Faizal, died because of the firing resorted to by the policemen. From House No. G-73, where the encounter had taken place, one AK-56 rifle and some live cartridges and hand grenades were recovered.

(*l*) Accused Mohd. Arif alias Ashfaq while in police custody had also disclosed to the police that one assault rifle had been thrown near Vijay Ghat after the incident. The police had already recovered one AK-56 rifle from Vijay Ghat on the morning of 23-12-2000. Accused Mohd. Arif alias Ashfaq had thus the knowledge about the availability of that AK-56 rifle at Vijay Ghat.

(*m*) Accused Mohd. Arif alias Ashfaq had also got recovered one AK-56 rifle and some ammunition from behind Lal Quila on 26-12-2000.

(*n*) Accused Mohd. Arif alias Ashfaq had also got recovered three hand grenades from some place behind his computer centre in Okhla on 1-1-2001 pursuant to his another disclosure statement made by him while in police custody.

(*o*) When the assault rifle fired cartridge cases which were recovered from the place of occurrence by the army men after the intruders had escaped from there were examined by the ballistic expert along with the AK-56 rifle which was recovered at the instance of accused Mohd. Arif alias Ashfaq from behind Lal Quila on 26-12-2000 and the AK-56 rifle which was recovered from Vijay Ghat on 23-12-2000 it was found by the ballistic expert (PW 202) that some of the assault rifle fired cartridge cases had been fired from the rifle recovered from behind Red Fort and some had been fired from the other rifle Ih was recovered from Vijay Ghat.

(*p*) Appellant-accused Mohd. Arif alias Ashfaq was a Pakistani national and had entered the Indian territory illegally.

(*q*) After making illegal entry into India appellant-accused Mohd. Arif alias Ashfaq had been representing to the people coming in his contact during his stays at different places that he was a resident of Jammu and was doing the business of shawls while, in fact, he had no such business and he had been collecting money through hawala channels.

(r) Accused Mohd. Arif alias Ashfaq had obtained a forged ration card, Ext. PW-164/A wherein not only his house number mentioned was not his correct address but even the name of his wife shown therein was not Rehmana Yusuf Farukhi. He had also forged his learner driving licence, Ext. PW-13/C as well as one document, Ext. PW-

13/E purporting to be a photocopy of another ration card in his name with his residential address of Ghaziabad where he admittedly never resided and he submitted that document with the Ghaziabad Transport Authority for obtaining permanent driving licence. In the learner driving licence also he had shown his residential addresses where he had never actually resided. All that he did was to conceal his real identity as a militant having entered the Indian territory with the object of spreading terror with the help of his other associate militants whom unfortunately the police could not apprehend and some expired before they could be tried."

183. In addition to these circumstances, there is another circumstance that a message was intercepted by BSF vide Exhibit PW-162/A and proved by PW 162 Inspector J.S. Chauhan dated 26-12-2000 wherein there was a specific reference to the accused. Still another circumstance would be that the accused had no ostensible means of livelihood and yet he deposited Rs 29,50,000 in three accounts, namely, Standard Chartered Grindlays Bank, Connaught Place (known as ANZ Grindlays Bank) bearing Account No. 32263962 of M/s Nazir & Sons, Standard Chartered Grindlays Bank bearing Account No. 28552609 of Bilal Ahmad Kawa and Standard Chartered Bank bearing Account No. 32181669 of Farooq Ahmed Qasid and also deposited some amounts in the account of Rehmana Yusuf Farukhi and he had no explanation of these huge amounts, their source or their distribution. Lastly, the appellant gave a fanciful and a completely false explanation about his entering in India and his being a member of RAW and thereby, his having interacted with Nain Singh (PW 20).

184. We are in complete agreement with the findings regarding the incriminating circumstances as recorded by the High Court. On the basis of the aforementioned circumstances, the High Court came to the conclusion that the appellant was responsible for the incident of shooting inside Lal Quila (Red Fort) on the night of 22-12-2000, which resulted in the death of three soldiers of army. It has also been held by the High Court that this was a result of well-planned conspiracy between the appellant and some other militants including deceased Abu Shamal alias Faizal who was killed in an encounter with the police at House No. G-73, Batla House, Muradi Road, Okhla, New Delhi. The High Court has also deduced that it was at the instance of the appellant that the police could reach that spot.

185. The High Court has further come to the conclusion that it was in a systematic manner that the appellant came to India illegally and collected highly sophisticated arms and ammunition meant for mass destruction. The High Court further held that he chose to select Red Fort for an assault along with his other associates, Red Fort being a place of national importance for India. The High Court has also recorded a finding that the chosen attack was on the army camp which was stationed there to protect this monument of national importance. The High Court has, therefore, deduced that it was an act of waging war against the Government of India. It is further held that the associates, with whom the appellant had entered into conspiracy, had attacked the army camp, which suggests that there was a conspiracy to wage war against the Government of India, particularly, because in that attack, sophisticated arms like AK-47 and AK-56 rifles and hand grenades were used.

186. The High Court also took note that this aspect regarding waging war was not even argued by the learned counsel appearing for the defence. It is on this basis that the appellant was held guilty for the offences punishable under Sections 120-B, 121-A, 121 IPC, Section 120-B read with Section 302 IPC and Sections 468/471/474 IPC and also the offences under Sections 186/353/120-B IPC. He was also held guilty for the offence under Section 14 of the Foreigners Act, since it was proved that the appellant, a foreigner, had entered the territory of India without obtaining the necessary permissions and clearance. Similarly, the appellant was also held guilty for the offences under the Arms Act as well as the Explosive Substances Act on account of his being found with a pistol and live cartridges.

187. The law on the circumstantial evidence is, by now, settled. In *Sharad Birdhichand Sarda* v. *State of Maharashtra* (1984) 4 SCC 116 this Court drew out the following test for relying upon the circumstantial evidence: (SCC p. 185, para 153)

> "*153*. … (*1*) the circumstances from which the conclusion of guilt is to be drawn should be fully established.
>
> (*2*) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,
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> (*3*) the circumstances should be of a conclusive nature and tendency,

(*4*) they should exclude every possible hypothesis except the one to be proved, and

(*5*) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

The principle of this judgment was thereafter followed in a number of decisions, they being *Tanviben Pankajkumar Divetia* v. *State of Gujarat* (1997) 7 SCC 156, *State (NCT of Delhi)* v. *Navjot Sandhu* (2005) 11 SCC 600, *Vikram Singh* v. *State of Punjab* (2010) 3 SCC 56 and *Aftab Ahmad Anasari* v. *State of Uttaranchal* (2010) 2 SCC 583, etc.

188. It is to be noted that in the last mentioned decision of *Aftab Ahmad Anasari* v. *State of Uttaranchal* (2010) 2 SCC 583, the observation made is to the following effect: (SCC p. 589, paras 13-14)

"*13*. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact must be proved individually and only thereafter the court should consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of the guilt. If the combined effect of all the facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified *even though it may be that one or more of these facts, by itself/themselves, is/are not decisive*. The circumstances proved should be such as to exclude every hypothesis except the one sought to be proved. *But this does not mean that before the prosecution case succeeds in a case of circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever extravagant and fanciful it might be*.

14. There must be a chain of evidence so far complete as not to leave any reasonable ground for conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability, the act must have been done by the accused. Where the various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the court."

(emphasis supplied)

189. The Court further went on to hold that in applying this principle, distinction must be made between the facts called

primary or basic, on the one hand, and the inference of facts to be drawn from them, on the other. The Court further mentioned that: (*Aftab Ahmad Anasari case* (2010) 2 SCC 583, SCC p. 590, para 15)

> "*15*. … In drawing these inferences or presumptions, the court must have regard to the common course of natural events, and to human conduct and their relations to the facts of the particular case."

To the similar effect are the observations made in *Vikram Singh* v. *State of Punjab* (2010) 3 SCC 56.

190. There can be no dispute that in a case entirely dependent on the circumstantial evidence, the responsibility of the prosecution is more as compared to the case where the ocular testimony or the direct evidence, as the case may be, is available. The Court, before relying on the circumstantial evidence and convicting the accused thereby has to satisfy itself completely that there is no other inference consistent with the innocence of the accused possible nor is there any plausible explanation. The Court must, therefore, make up its mind about the inferences to be drawn from each proved circumstance and should also consider the cumulative effect thereof. In doing this, the Court has to satisfy its conscience that it is not proceeding on the imaginary inferences or its prejudices and that there could be no other inference possible excepting the guilt on the part of the accused.

191. We respectfully agree with the principles drawn in the abovementioned cases and hold that the prosecution was successful in establishing the abovementioned circumstances against the appellant, individually, as well as, cumulatively. There indeed cannot be a universal test applicable commonly to all the situations for reaching an inference that the accused is guilty on the basis of the proved circumstances against him nor could there be any quantitative test made applicable. At times, there may be only a few circumstances available to reach a conclusion of the guilt on the part of the accused and at times, even if there are large numbers of circumstances proved, they may not be enough to reach the conclusion of guilt on the part of the accused. It is the quality of each individual circumstance that is material and that would essentially depend upon the quality of evidence. Fanciful imagination in such cases has no place. Clear and irrefutable logic would be an essential factor in arriving at the verdict of guilt on the basis of the proved circumstances. In our opinion, the present case is such, as would pass all the tests so far devised by this Court in the realm of criminal jurisprudence."

11. Some of the other features of the matter, as noted by this Court, were: -

> "151. The prosecution proved 9 cash deposit slips of Grindlays Bank, the total amount being Rs 29,50,000. According to the prosecution, these were in appellant's handwriting while the depositors' names have been mentioned as Aslam, Salim Khan, R.K. Traders and Rashid. We have already discussed about the fake residential address given by the appellant while opening the account with HDFC Bank. The details of this account were proved by Sanjeev Srivastava (PW 22). He proved Exhibits PW-22/B, C and F. Exhibit PW-22/F is a copy of the account statement of Rehmana, the wife of the accused which suggests that from 15-9-2000 onwards up to 14-12-2000, on various dates, amounts like Rs 10,000, Rs 40,000, Rs 50,000, Rs 1,50,000, Rs 2,00,000, etc. were deposited in cash. The total amount deposited was Rs 5,53,500. There is absolutely no explanation by the appellant about the source from which these amounts came.
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> xxx xxx xxx
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> 153. The most important link with the HDFC account as also with the deposit slips of Standard Chartered Grindlays Bank came to light. Dr. M.A. Ali (PW 216), SSO, CFSL, CBI, New Delhi, on the basis of his report, deposed that the account opening form of HDFC Bank of the appellant, 9 deposit slips of Standard Chartered Grindlays Bank as also deposit slips of State Bank of India account of Rehmana Yusuf Farukhi bore the handwriting of the appellant. This clinches the issue about the account opened in HDFC Bank. It is to be noted that there were three accounts in Standard Chartered Grindlays Bank in the name of M/s Nazir & Sons, Farooq Ahmed Qasid (A-4) and Bilal Ahmad Kawa (A-18) which had Account Nos. 32263962, 28552609 and 32181669 respectively. The investigating agency collected the documents from Standard Chartered Grindlays Bank including 9 cash deposit receipts as also documents regarding the Account Nos. 32263962, 28552609 and 32181669. 9 cash deposit slips are purportedly in the name of Aslam, Salim Khan, R.K. Traders and Rashid and all these have been proved to be in the handwriting of the appellant.
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> xxx xxx xxx
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> 159. The argument of Ms Jaiswal, learned counsel appearing on behalf of the appellant, that Nazir Ahmad Qasid (A-3) and Farooq Ahmed Qasid (A-4) have already been acquitted, is of no consequence. We may point out that there is absolutely no

> explanation by the appellant either by way of cross-examination of the witnesses or by way of his statement under Section 313 CrPC as to where all these amounts had come from and why did he deposit huge amounts in the three accounts mentioned above. Rs 29,50,000 is not an ordinary sum. Also, there is no evidence that in his account in HDFC Bank, the appellant has Rs 6 lakhs. Further, a very sizeable amount is shown to have been paid to Rehmana Yusuf Farukhi in her account in State Bank of India. How did the appellant receive all these amounts and from where, are questions that remain unanswered in the absence of any explanation and more particularly because the appellant had no ostensible means of livelihood. It would have to be held that the appellant was dealing with huge sums of money and he has no explanation therefor. This is certainly to be viewed as an incriminating circumstance against the appellant. The silence on this issue is only telling of his nefarious design.
>
> 160. It is obvious that the appellant was a very important wheel in the whole machinery which was working against the sovereignty of this country. All this was supported by the fact that 9 deposit slips, the bank forms for opening the accounts, the slip through which the amount was deposited in the account of Rehmana Yusuf Farukhi, were all proved to be in the handwriting of the appellant. We have absolutely no reason to reject the evidence of the handwriting expert. All this suggests that the appellant was weaving his web of terrorist activities by taking recourse to falsehood one after the other including his residential address and also creating false documents."

12. In these review petitions, the challenge is raised principally on four grounds: -

(a) The concerned Courts committed error in allowing call records to be admitted in evidence, in the absence of an appropriate certificate under Section 65B of the Indian Evidence Act, 1872[6].

[6] "the Evidence Act", for short.

(b) The disclosure statements of the review petitioner must be taken to be inadmissible on account of ill-treatment meted out to him during the intervening night between his actual arrest and his formal arrest.

(c) The recovery of ammunition or the encounter of one Abu Shamal, who was stated to be the accomplice of the petitioner, at Batla House, New Delhi, could not be associated with the disclosure statement of the review petitioner.

(d) Any possibility of retribution and rehabilitation of the review petitioner, or that he would continue to be a threat to the society, was not considered by the Courts.

13. On the other hand, it is submitted on behalf of the State, that the scope of a review petition even in matters arising out of award of death sentence would be extremely limited. Reliance has been placed on the decisions of this Court in ***Vikram Singh alias Vicky Walia & Anr. vs. State of Punjab & Anr.***[7] and specially the following paragraph: -

[7] (2017) 8 SCC 518

> "23. In view of the above, it is clear that scope, ambit and parameters of review jurisdiction are well defined. Normally in a criminal proceeding, review applications cannot be entertained except on the ground of error apparent on the face of the record. Further, the power given to this Court under Article 137 is wider and in an appropriate case can be exercised to mitigate a manifest injustice. By review application an applicant cannot be allowed to reargue the appeal on the grounds which were urged at the time of the hearing of the criminal appeal. Even if the applicant succeeds in establishing that there may be another view possible on the conviction or sentence of the accused that is not a sufficient ground for review. This Court shall exercise its jurisdiction to review only when a glaring omission or patent mistake has crept in the earlier decision due to judicial fallibility. There has to be an error apparent on the face of the record leading to miscarriage of justice to exercise the review jurisdiction under Article 137 read with Order 40 Rule 1. There has to be a material error manifest on the face of the record with results in the miscarriage of justice."

14. Reliance has further been placed on the decision of this Court in ***Akshay Kumar Singh vs. State (NCT of Delhi)***[8], where it was observed by this Court as under: -

> "7. In this review petition, the petitioner prays for review of the judgment dated 5-5-2017 [*Mukesh* v. *State (NCT of Delhi)*, (2017) 6 SCC 1]. In the review petition before us, the petitioner has again sought to assail the merits of the prosecution case and the findings rendered thereon which cannot be permitted.
>
> 8. It is no longer res integra that scope of review is limited and review cannot be entertained except in cases of error apparent on the face of the record. Article 137 of the Constitution of India empowers the Supreme Court to review any judgment pronounced or made, subject, of course, to the provisions of any law made by Parliament or any rule made under Article 145 of the Constitution of India.
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> 9. Order 47 Rule 1 of the Supreme Court Rules, 2013 dealing with review reads as follows:
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> > "*1.* The Court may review its judgment or order, but no application for review will be entertained in a civil

[8] (2020) 3 SCC 431

> proceeding except on the ground mentioned in Order 47 Rule 1 of the Code, and in a criminal proceeding except on the ground of an error apparent on the face of the record."
>
> As per the Supreme Court Rules, review in the criminal proceedings is permissible only on the ground of error apparent on the face of the record.
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> xxx xxx xxx
>
> 11. Review is a not a rehearing of the appeal over again. In a review petition, it is not for the Court to reappreciate the evidence and reach a different conclusion. The scope of review jurisdiction has been elaborately considered by this Court in number of cases and the well-settled principles have been reiterated time and again……"

15. The basic submission in the instant matter, as advanced by Mr. Siddharth Agarwal, learned senior counsel on behalf of the review petitioner is about the admissibility of electronic record being Call Data Records (CDRs) (Exhibit PW-198/B1-B3), CDRs (Exhibit PW-198/E) and CDR (Exhibit PW-229/A). It is submitted that on the strength of the law declared by this Court in ***Anvar P.V. vs. P.K. Basheer & Ors.***[9], as affirmed by this Court in ***Arjun Panditrao Khotkar vs. Kailash Kushanrao Gorantyal & Ors.***[10], certification under Section 65B of the Evidence Act would be a pre-requisite for admissibility of an electronic record such as CDRs; that there being total non-compliance of this mandatory requirement, the afore-stated CDRs

[9] (2014) 10 SCC 473
[10] (2020) 7 SCC 1

would be inadmissible and must be eschewed from consideration at every juncture. The extension of the submission is that the entire fulcrum of the prosecution case rested on these CDRs and minus this evidence, there is hardly anything which could prove the identity and involvement of the petitioner in the crime in question.

16. The submission advanced on behalf of the review petitioner on the first ground as set out in the Note given by the learned Senior Counsel is as under: -

> "A. Admissibility of electronic records
>
> (i) The central feature of the Prosecution case permeating the entire Judgment under Review are circumstances and inferences that have been drawn on the strength of anlysis of electronic records (CDRs). Specifically, Circumstance H, I and J deal with this issue.
>
> (ii) Case involves analysis of Call Detail Records ("CDRs") of 9811278510 ("8510") & 9811242154 ("2154"). Prosecution Case is that PW-229 MC Sharma conducted investigation pertaining to CDRs of these two numbers.
>
> - PW-229 (@ 305-308 of Vol. II)
>
> (iii)In respect of 8510, Prosecution produced CDR which is Ex.PW-198/ B1-B3 (@ 57-59 of Vol.III) whereas for 2154 prosecution has produced CDRs Ex.PW-198/E (@67-75 of Vol.III) & Ex. PW-229/A (@ 48-52 of Vol.III). None of these have any certificate as required under Section 65B in IEA.
>
> (iv)The number 8510 (sim card) was never recovered and the handset in which it was used from 26.10.2000 to 14.11.2000 (IMEI ending with "0240") was also not recovered. No Customer Application Form (CAF) or any other document that establishes ownership or possession was produced. Not a single person known to the Petitioner was sked to provide his mobile number (despite multiple being examined) [See: PW-20 (@ 12 of Vol.I), PW-31 (@ 4 of Vol.I) PW-37 (@ 50 of Vol.I), PW-56 (@ 60 of Vol.I), PW-232 (@ 415 of Vol.II)]. Police never

accessed the instrument to examine call logs, message etc. (PW-148 @ 96 of Vol.I) and the sole link to all inferences is the purported CDRs.

(v) CDRs provided by PW-198 Rajiv Pandit in February/ March 2001 (Ex. PW-198/A @ 63 of Vol.III; Ex.PW-198/D @ 89 of Vol.III) were not and could not have been the basis for analysis by PW-229. The Court has acted upon oral testimony of PW-229 as to the contents of CDRs of 8510, and Ex.PW-229/A (@ 48 of Vol.III) – unauthenticated secondary evidence of secondary evidence – with respect to contents of CDRs of 2154. This is the teeth of S.65B IEA, S.63/65 IEA as well as S.59 IEA. Even otherwise, the contents of the CDRs are different from the oral testimony of PW-229 whereas the Supreme Court has proceeded relying upon the oral testimony [@ Para 97 (p.525) of Compilation of Judgments and Orders Pertaining to Petitioner]

- *Tomaso Bruno & Anr. v. State of UP,* (2015) 7 SCC 178 (Paras 20-27)

(vi) Certification under S.65B IEA is a pre-requisite to admissibility of an electronic record such as CDRs. There is no compliance with this mandatory requirement. As such, CDRs are inadmissible and necessarily must be excluded from consideration."

17. On the issue of admissibility of call records without there being appropriate certificate under Section 65-B(4) of the Evidence Act a bench of two Judges of this Court in ***State (NCT of Delhi) vs. Navjot Sandhu alias Afsan Guru***[11], had observed:-

"148. It is contended by Mr Shanti Bhushan, appearing for the accused Shaukat that the call records relating to the cellular Phone No. 9811573506 said to have been used by Shaukat have not been proved as per the requirements of law and their genuineness is in doubt. The call records relating to the other mobile numbers related to Gilani and Afzal are also subjected to the same criticism. It is the contention of the learned counsel that in the absence of a certificate issued under sub-section (4) of Section 65-B of the Evidence Act with the particulars enumerated in clauses (a) to (c), the information contained in the electronic record cannot be

[11] (2005) 11 SCC 600

adduced in evidence and in any case in the absence of examination of a competent witness acquainted with the functioning of the computers during the relevant time and the manner in which the printouts were taken, even secondary evidence under Section 63 is not admissible.

149. Two witnesses were examined to prove the printouts of the computerised record furnished by the cellular service providers, namely, AirTel (Bharti Cellular Limited) and ESSAR Cellphone. The call details of Mobile No. 9811573506 (which was seized from Shaukat's house) are contained in Exhibits 36/1 to 36/2. The covering letters signed by the Nodal Officer of Sterling Cellular Limited are Exts. P-36/6 and P-36/7 bearing the dates 13th and 18th December respectively. The call details of Mobile No. 9811489429 attributed to Afzal are contained in Ext. P-36/3 and the covering letter addressed to the Inspector (special cell) — PW 66 signed by the Nodal Officer is Ext. 36/5. The call details of 9810081228 belonging to the subscriber S.A.R. Gilani are contained in Ext. 35/8. The above two phones were obtained on cash-card basis. The covering letter pertaining thereto and certain other mobile numbers were signed by the Security Manager of Bharti Cellular Limited. The call details relating to another Cellphone Number 9810693456 pertaining to Mohammed is Ext. 35/5. These documents i.e. Ext. 35 series were filed by PW 35 who is the person that signed the covering letter dated 17th December bearing Ext. 35/1. PW 35 deposed that "all the call details are computerised sheets obtained from the computer". He clarified that:

> "the switch which is maintained in the computer in respect of each telephone receives the signal of the telephone number, called or received and serves them to the server and it is the server which keeps the record of the calls made or received. In case where the call is made and the receiver does not pick up the phone, the server which makes a loop of the route would not register it."

As far as PW 36 is concerned, he identified the signatures of the General Manager of his Company who signed Ext. P-36 series. He testified to the fact that the call details of the particular telephone numbers were contained in the relevant exhibits produced by him. It is significant to note that no suggestion was put to these two witnesses touching the authenticity of the call records or the possible tampering with the entries, although the arguments have proceeded on the lines that there could have been fabrication. In support of such argument, the duplication of entries in Exts. 36/2 and 36/3 and that there was some discrepancy relating to the cell

ID and IMEI number of the handset at certain places was pointed out. The factum of presence of duplicate entries was elicited by the counsel appearing for Afsan Guru from PW 36 when PW 36 was in the witness box. The evidence of DW 10 a technical expert, was only to the effect that it was possible to clone a SIM by means of a SIM programmer which to his knowledge, was not available in Delhi or elsewhere. His evidence was only of a general nature envisaging a theoretical possibility and not with reference to specific instances.

150. According to Section 63, secondary evidence means and includes, among other things, "copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies". Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. It is not in dispute that the information contained in the call records is stored in huge servers which cannot be easily moved and produced in the court. That is what the High Court has also observed at para 276. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in sub-section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65.

151. The learned Senior Counsel Mr Shanti Bhushan then contended that the witnesses examined were not technical persons acquainted with the functioning of the computers, nor do they have personal knowledge of the details stored in the servers of the computers. We do not find substance in this argument. Both the witnesses were responsible officials of the companies concerned who deposed to the fact that they were the printouts obtained from the computer records. In fact the evidence of PW 35 shows that he is fairly familiar with the computer system and its output. If there was some questioning vis-à-vis specific details or specific suggestion of fabrication of printouts, it would have been obligatory on the part of the prosecution to call a technical expert directly in the

know of things. The following observations of the House of Lords in the case of R. v. Shephard 1993 AC 380 are quite apposite : (All ER p. 231b-c)

> "The nature of the evidence to discharge the burden of showing that there has been no improper use of the computer and that it was operating properly will inevitably vary from case to case. The evidence must be tailored to suit the needs of the case. I suspect that it will very rarely be necessary to call an expert and that in the vast majority of cases it will be possible to discharge the burden by calling a witness who is familiar with the operation of the computer in the sense of knowing what the computer is required to do and who can say that it is doing it properly."

Such a view was expressed even in the face of a more stringent provision in Section 69 of the Police and Criminal Act, 1984 in the UK casting a positive obligation on the part of the prosecution to lead evidence in respect of proof of the computer record. We agree with the submission of Mr Gopal Subramanium that the burden of prosecution under the Indian law cannot be said to be higher than what was laid down in *R.* v. *Shephard* 1993 AC 380.

152. Although necessary suggestions were not put forward to the witnesses so as to discredit the correctness/genuineness of the call records produced, we would prefer to examine the points made out by the learned counsel for the accused independently. As already noted, one such contention was about the presence of duplicate entries in Exts. 36/2 and 36/3. We feel that an innocuous error in the computer recording is being magnified to discredit the entire document containing the details without any warrant. As explained by the learned counsel for the State, the computer, at the first instance, instead of recording the IMEI number of the mobile instrument, had recorded the IMEI and cell ID (location) of the person calling/called by the subscriber. The computer rectified this obvious error immediately and modified the record to show the correct details viz. the IMEI and the cell ID of the subscriber only. The document is self-explanatory of the error. A perusal of both the call records with reference to the call at 11 : 19 : 14 hours exchanged between 9811489429 (Afzal's) and 9811573506 (Shaukat's) shows that the said call was recorded twice in the call records. The fact that the same call has been recorded twice in the call records of the calling and called party simultaneously demonstrates beyond doubt that the correctness or genuineness of the call is beyond doubt. Further, on a

> comparative perusal of the two call records, the details of the cell ID and the IMEI of the two numbers are also recorded. Thus, as rightly pointed out by the counsel for the State Mr Gopal Subramanium, the same call has been recorded two times, first with the cell ID and IMEI number of the calling number (9811489429). The same explanation holds good for the call at 11 : 32 : 40 hours. Far from supporting the contention of the defence, the above facts, evident from the perusal of the call records, would clearly show that the system was working satisfactorily and it promptly checked and rectified the mistake that occurred. As already noticed, it was not suggested nor could it be suggested that there was any manipulation or material deficiency in the computer on account of these two errors. Above all, the printouts pertaining to the call details exhibited by the prosecution are of such regularity and continuity that it would be legitimate to draw a presumption that the system was functional and the output was produced by the computer in regular use, whether this fact was specifically deposed to by the witness or not. We are therefore of the view that the call records are admissible and reliable and rightly made use of by the prosecution."

18. A bench of three Judges of this Court in ***Anvar P.V.***[9] did not approve the view taken in ***Navjot Sandhu***[11] and observed –

> "20. Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65-A of the Evidence Act, read with Sections 59 and 65-B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed under Section 65-B of the Evidence Act. That is a complete code in itself. Being a special law, the general law under Sections 63 and 65 has to yield.
>
> 21. In *State (NCT of Delhi)* v. *Navjot Sandhu*, (2005) 11 SCC 600 a two-Judge Bench of this Court had an occasion to consider an issue on production of electronic record as evidence. While considering the printouts of the computerised records of the calls pertaining to the cellphones, it was held at para 150 as follows: (SCC p. 714)
>
> > "*150*. According to Section 63, "secondary evidence" means and includes, among other things, 'copies made from the original by mechanical processes

> which in themselves insure the accuracy of the copy, and copies compared with such copies'. Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. It is not in dispute that the information contained in the call records is stored in huge servers which cannot be easily moved and produced in the court. That is what the High Court has also observed [Ed.: Reference is to *State* v. *Mohd. Afzal*, (2003) 71 DRJ 178] at para 276. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in sub-section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65."

It may be seen that it was a case where a responsible official had duly certified the document at the time of production itself. The signatures in the certificate were also identified. That is apparently in compliance with the procedure prescribed under Section 65-B of the Evidence Act. However, it was held that irrespective of the compliance with the requirements of Section 65-B, which is a special provision dealing with admissibility of the electronic record, there is no bar in adducing secondary evidence, under Sections 63 and 65, of an electronic record.

22. The evidence relating to electronic record, as noted hereinbefore, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. *Generalia specialibus non derogant*, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65-A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record;

> the same is wholly governed by Sections 65-A and 65-B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in *State (NCT of Delhi)* v. *Navjot Sandhu*, (2005) 11 SCC 600, does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible."

19. In ***Tomaso Bruno & Anr. v. State of Uttar Pradesh***[12], another bench of three Judges however struck a slightly different chord and made following observations:

> "24. With the advancement of information technology, scientific temper in the individual and at the institutional level is to pervade the methods of investigation. With the increasing impact of technology in everyday life and as a result, the production of electronic evidence in cases has become relevant to establish the guilt of the accused or the liability of the defendant. Electronic documents stricto sensu are admitted as material evidence. With the amendment to the Evidence Act in 2000, Sections 65-A and 65-B were introduced into Chapter V relating to documentary evidence. Section 65-A provides that contents of electronic records may be admitted as evidence if the criteria provided in Section 65-B is complied with. The computer generated electronic records in evidence are admissible at a trial if proved in the manner specified by Section 65-B of the Evidence Act. Sub-section (1) of Section 65-B makes admissible as a document, paper printout of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfilment of the conditions specified in sub-section (2) of Section 65-B. Secondary evidence of contents of document can also be led under Section 65 of the Evidence Act. PW 13 stated that he saw the full video recording of the fateful night in the CCTV camera, but he has not recorded the same in the case diary as nothing substantial to be adduced as evidence was present in it."

[12] (2015) 7 SCC 178.

20. In ***Sonu alias Amar v. State of Haryana***[13], a bench of two Judges ruled that an objection that CDRs be not taken into consideration pertained to the mode or method of proof and if not taken at the trial, cannot be permitted at the appellate stage. It was stated: -

> "32. It is nobody's case that CDRs which are a form of electronic record are not inherently admissible in evidence. The objection is that they were marked before the trial court without a certificate as required by Section 65-B(4). It is clear from the judgments referred to supra that an objection relating to the mode or method of proof has to be raised at the time of marking of the document as an exhibit and not later. The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the Court could have given the prosecution an opportunity to rectify the deficiency. It is also clear from the above judgments that objections regarding admissibility of documents which are per se inadmissible can be taken even at the appellate stage. Admissibility of a document which is inherently inadmissible is an issue which can be taken up at the appellate stage because it is a fundamental issue. The mode or method of proof is procedural and objections, if not taken at the trial, cannot be permitted at the appellate stage. If the objections to the mode of proof are permitted to be taken at the appellate stage by a party, the other side does not have an opportunity of rectifying the deficiencies. The learned Senior Counsel for the State referred to statements under Section 161 CrPC, 1973 as an example of documents falling under the said category of inherently inadmissible evidence. CDRs do not fall in the said category of documents. We are satisfied that an objection that CDRs are unreliable due to violation of the procedure prescribed in Section 65-B(4) cannot be permitted to be raised at this stage as the objection relates to the mode or method of proof."

[13] (2017) 8 SCC 570

21. Later, another bench of two Judges of this Court in ***Shafi Mohammed v. State of Himachal Pradesh***[14] observed as under:

> "20. An apprehension was expressed on the question of applicability of conditions under Section 65-B(4) of the Evidence Act to the effect that if a statement was given in evidence, a certificate was required in terms of the said provision from a person occupying a responsible position in relation to operation of the relevant device or the management of relevant activities. It was submitted that if the electronic evidence was relevant and produced by a person who was not in custody of the device from which the electronic document was generated, requirement of such certificate could not be mandatory. It was submitted that Section 65-B of the Evidence Act was a procedural provision to prove relevant admissible evidence and was intended to supplement the law on the point by declaring that any information in an electronic record, covered by the said provision, was to be deemed to be a document and admissible in any proceedings without further proof of the original. This provision could not be read in derogation of the existing law on admissibility of electronic evidence.
>
> 21. We have been taken through certain decisions which may be referred to. In *Ram Singh* v. *Ram Singh*, 1985 Supp SCC 611, a three-Judge Bench considered the said issue. English judgments in *R.* v. *Maqsud Ali*, (1966) 1 QB 688) and *R.* v. *Robson*, (1972) 1 WLR 651 and American Law as noted in *American Jurisprudence* 2d (Vol. 29) p. 494, were cited with approval to the effect that it will be wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. Electronic evidence was held to be admissible subject to safeguards adopted by the Court about the authenticity of the same. In the case of tape-recording, it was observed that voice of the speaker must be duly identified, accuracy of the statement was required to be proved by the maker of the record, possibility of tampering was required to be ruled out. Reliability of the piece of evidence is certainly a matter to be determined in the facts and circumstances of a fact situation. However, threshold

[14] (2018) 2 SCC 801.

admissibility of an electronic evidence cannot be ruled out on any technicality if the same was relevant."

22. The last decision on the point is a three Judge bench decision of this Court in ***Arjun Panditrao Khotkar***[10] which was rendered on a reference to a larger bench because of the observations in ***Shafi Mohammad***[14]. The bench concluded in ***Arjun Panditrao***[10] as under: -

"73. The reference is thus answered by stating that:

73.1. *Anvar P.V.* v. *P.K. Basheer*, (2014) 10 SCC 473, as clarified by us hereinabove, is the law declared by this Court on Section 65-B of the Evidence Act. The judgment in *Tomaso Bruno* v. *State of U.P.*, (2015) 7 SCC 178, being per incuriam, does not lay down the law correctly. Also, the judgment in *Shafhi Mohammad* v. *State of H.P.*, (2018) 2 SCC 801 and the judgment dated 3-4-2018 reported as *Shafhi Mohd.* v. *State of H.P.*, (2018) 5 SCC 311s, do not lay down the law correctly and are therefore overruled.

73.2. The clarification referred to above is that the required certificate under Section 65-B(4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the device concerned, on which the original information is first stored, is owned and/or operated by him. In cases where the "computer" happens to be a part of a "computer system" or "computer network" and it becomes impossible to physically bring such system or network to the court, then the only means of providing information contained in such electronic record can be in accordance with Section 65-B(1), together with the requisite certificate under Section 65-B(4). The last sentence in para 24 in *Anvar P.V.* v. *P.K. Basheer*, (2014) 10 SCC 473 which reads as "*... if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act ...*" is thus clarified; it is to be read without the words "*under Section 62 of the Evidence Act,...*". With this clarification, the law stated in para 24 of *Anvar P.V.* v. *P.K. Basheer*, (2014) 10 SCC 473 does not need to be revisited.

> 73.3. The general directions issued in para 64 (supra) shall hereafter be followed by courts that deal with electronic evidence, to ensure their preservation, and production of certificate at the appropriate stage. These directions shall apply in all proceedings, till rules and directions under Section 67-C of the Information Technology Act and data retention conditions are formulated for compliance by telecom and internet service providers.
>
> 73.4. Appropriate rules and directions should be framed in exercise of the Information Technology Act, by exercising powers such as in Section 67-C, and also framing suitable rules for the retention of data involved in trial of offences, their segregation, rules of chain of custody, stamping and record maintenance, for the entire duration of trials and appeals, and also in regard to preservation of the metadata to avoid corruption. Likewise, appropriate rules for preservation, retrieval and production of electronic record, should be framed as indicated earlier, after considering the report of the Committee constituted by the Chief Justices' Conference in April 2016."

It must now be taken to have been settled that the decision of this Court in ***Anvar P.V.***[9] as clarified in ***Arjun Panditrao***[10] is the law declared on Section 65B of the Evidence Act.

23. ***Navjot Sandhu***[11] was decided on 4.8.2005 *i.e.,* before the judgment was rendered by the Trial Court in the instant matter. The subsequent judgments of the High Court and this Court were passed on 13.9.2007 and 10.8.2011 respectively affirming the award of death sentence. These two judgments were delivered prior to the decision of this Court in ***Anvar P.V.***[9] which was given on 18.9.2014. The judgments by the trial Court, High Court and this Court were thus well before the decision in ***Anvar P.V.***[9] and

were essentially in the backdrop of law laid down in ***Navjot Sandhu***[11]. If we go by the principle accepted in paragraph 32 of the decision in ***Sonu alias Amar***[13], the matter may stand on a completely different footing. It is for this reason that reliance has been placed on certain decisions of this Court to submit that the matter need not be reopened on issues which were dealt with in accordance with the law then prevailing. However, since the instant matter pertains to award of death sentence, this review petition must be considered in light of the decisions made by this Court in ***Anvar P.V.***[9] and ***Arjun Panditrao***[10].

24. Consequently, we must eschew, for the present purposes, the electronic evidence in the form of CDRs which was without any appropriate certificate under Section 65-B(4) of the Evidence Act.

25. If we consider the circumstances which were culled out by this Court in Paragraph 182 of the judgment under review, circumstances mentioned at Serial Nos. 'h' and 'j' become extremely weak as the tracing of calls received by PWs 39 and 41 to Mobile Phone No.9811278510 was possible only through CDRs. These circumstances must not, therefore, be taken into account.

26. However, the other circumstances stated in said paragraph 182 as well as in subsequent paragraphs remain completely

unaffected. As was stated by this Court in paragraphs 151, 153, 159, 169 and finally summed up in paragraphs 183 and 184, the findings on the issue of the receipt and disbursal of money and the fact that the police could reach the spot referred to in Paragraph 184, at the instance of the review petitioner are very relevant and crucial circumstances. One of the important circumstances is also the feature referred to in circumstance 'o' in Paragraph 182 as stated above. In conclusion, it must therefore be observed that even after eschewing circumstances 'h' and 'j' which were directly attributable to the CDRs relied upon by the prosecution, the other circumstances on record do clearly spell out and prove beyond any doubt the involvement of the review petitioner in the crime in question.

27. We now turn to grounds (b), (c) and (d) raised on behalf of the review petitioner as stated in para 12 *supra*. Grounds 'b' and 'c' are purely factual in nature. The disclosure statement, as a matter of fact, was held to have been proved by the Courts below and this Court. In our review jurisdiction, it will not be possible to enter into questions regarding admissibility of such disclosure statement on issues of fact. The disclosure statement led the police to the hide out at G-73, Batla House, New Delhi and when

the police team arrived with the review petitioner, there was firing upon the police team as stated in circumstance 'g' in paragraph 182. After the person concerned named Abu Shamal *alias* Faisal died in the encounter, certain fire arms and ammunition were recovered. The submission that such recovery of ammunition or the encounter of Abu Shamal could not be associated with the disclosure statement of the review petitioner is not quite correct. We therefore reject both the grounds taken in 'b' and 'c' as referred to in Para 12 *supra.*

28. We now turn to the last ground regarding possibility of retribution and rehabilitation of the review petitioner. On this issue, the response of the State in its Written Submissions is as follows: -

> "3. The petitioner, admittedly a Pakistani national, has been convicted *inter-alia* under Section 121,302,120B,121A,181 and 353 of the Indian Penal Code, Section 25 of the Arms Act, Section 4 of the Explosive Substances Act, Section 14 of the Foreigners Act, for waging war against the Government of India and committing murder in pursuance thereof. This Hon'ble Court has taken the view that the cases of such nature, involving acts of terror which challenge the unity, integrity and sovereignty of India can only be adequately compensated by awarding the death sentence. Reference in this regard is drawn to the judgment of this Hon'ble Court in ***State of NCT of Delhi v. Navjot Sandhu*** **(2005) 11 SCC 600 (The Parliament Attack Case)**, where it was held:
>
> > *252. In the instant case, there can be no doubt that the most appropriate punishment is death sentence. That is what has been awarded by the trial court and the High Court. The present case, which has no parallel in the history of the Indian Republic, presents us in crystal-*

clear terms, a spectacle of the rarest of rare cases. The very idea of attacking and overpowering a sovereign democratic institution by using powerful arms and explosives and imperilling the safety of a multitude of peoples' representatives, constitutional functionaries and officials of the Government of India and engaging in a combat with the security forces is a terrorist act of the gravest severity. It is a classic example of rarest of rare cases.

253. The gravity of the crime conceived by the conspirators with the potential of causing enormous casualties and dislocating the functioning of the Government as well as disrupting the normal life of the people of India is something which cannot be described in words. The incident, which resulted in heavy casualties, had shaken the entire nation, and the collective conscience of the society will only be satisfied if capital punishment is awarded to the offender. The challenge to the unity, integrity and sovereignty of India by these acts of terrorists and conspirators, can only be compensated by giving maximum punishment to the person who is proved to be the conspirator in this treacherous act. The appellant, who is a surrendered militant and who was bent upon repeating the acts of treason against the nation, is a menace to the society and his life should become extinct. Accordingly, we uphold the death sentence.

(emphasis supplied)

4. Similarly in ***Yakub Abdul Razak Memon v. State of Maharashtra*, (2013) 13 SCC 1**, this Hon'ble Court while dealing with the award of the death sentence to persons convicted *inter-alia* under various IPC offences including Waging of War against the Government of India and the Prevention of Terrorism Act, discussed the wide ambit of the term "terrorism" and held that the offence of terrorism itself was an aggravating circumstance:

"Terrorism"

809. The term "terrorism" is a concept that is commonly and widely used in everyday parlance and is derived from the Latin word "terror" which means the state of intense fear and submission to it. There is no particular form of terror, hence, anything intended to create terror in the minds of general public in order to endanger the lives of the members and damage to public property may be termed as a terrorist act and a manifestation of terrorism. Black's Law Dictionary defines terrorism as:

"Terrorism.— The use or threat of violence to intimidate or cause panic, esp. as a means of affecting political conduct." (8th Edn., p. 1512.)

810. Terrorism is a global phenomenon in today's world and India is one of the worst victims of terrorist acts. Terrorism has a long history of being used to achieve political, religious and ideological objectives. Acts of terrorism can range from threats to actual assassinations, kidnappings, airline hijackings bomb scares, car bombs, building explosions mailing of dangerous materials, computer based attacks and the use of chemical, biological, and nuclear weapons-weapons of mass destruction (WMD).

…

883.4. Crime of terrorism is in itself an aggravating circumstance as it carries a "special stigmatisation due to the deliberate form of inhuman treatment it represents and the severity of the pain and suffering inflicted"

(emphasis supplied)

5. In ***Mohd. Ajmal Amir Kasab v. State of Maharashtra*, (2012) 9 SCC 1,** this Hon'ble Court while convicting the Appellant therein for the terrorist attack of 26/11 in Mumbai, stated that facts of the case, the cross-border conspiracy, and the intention to strike fear into the heart of the victims, that the death sentence was warranted. While the court recognised that death should be the exception, this Hon'ble Court noted that as long as the death penalty remained on the statute books for crimes such as waging of war, there would be certain cases where its imposition would be justified. In this regard, attention is respectfully drawn to the following paragraphs:

573. In short, this is a case of terrorist attack from across the border. It has a magnitude of unprecedented enormity on all scales. The conspiracy behind the attack was as deep and large as it was vicious. The preparation and training for the execution was as thorough as the execution was ruthless. In terms of loss of life and property, and more importantly in its traumatising effect, this case stands alone, or it is at least the very rarest of rare cases to come before this Court since the birth of the Republic. Therefore, it should also attract the rarest of rare punishment.

…

577. Putting the matter once again quite simply, in this country death as a penalty has been held to be constitutionally valid, though it is indeed to be awarded

in the "rarest of rare cases when the alternative option (of life sentence) is unquestionably foreclosed". Now, as long as the death penalty remains on the statute book as punishment for certain offences, including "waging war" and murder, it logically follows that there must be some cases, howsoever rare or one in a million, that would call for inflicting that penalty. That being the position we fail to see what case would attract the death penalty, if not the case of the appellant. To hold back the death penalty in this case would amount to obdurately declaring that this Court rejects death as lawful penalty even though it is on the statute book and held valid by the Constitutional Benches of this Court.

34. No ground for review of the Death Sentence is made out as the three tests stand fully satisfied. All three Courts have recorded elaborate reasons for why the present case was one which warranted the death sentence, and have considered the crime, the criminal and whether the case could be said to be the rarest of the rare.

1. This Hon'ble Court has recorded elaborate findings in the judgment presently under review on sentencing as to why the present case satisfies all three tests including the "rarest of the rare" test. Firstly, this Hon'ble Court found that the nature of the crime, being an attack on the Red Fort, was nothing short of an attack on Mother India itself, secondly, that so far as the nature of the criminal was concerned, no mitigating circumstances of any kind had been brought on record and thirdly, that the nature of the crime, the fact that it was a planned pre-meditated attack on a symbol of the seat of power of the Government of India warranted nothing short of the highest punishment. The Court held:

"213. This was, in our opinion, a unique case where Red Fort, a place of paramount importance for every Indian heart was attacked where three Indian soldiers lost their lives. This is a place with glorious history, a place of great honour for every Indian, a place with which every Indian is attached emotionally, and a place from where our first Prime Minister delivered his speech on 15-8-1947, the day when India broke the shackles of foreign rule and became a free country. It has since then been a tradition that every Hon'ble Prime Minister of this country delivers

an address to the nation on every 15th August to commemorate that great event. This fort was visualised and constructed by the Mughal Emperor Shahjahan who is known as "Shahjahan the builder". It took nine years for its completion. It was here that Shahjahan ascended the throne on 18-4-1648 amidst recitation of sacred aayates of Holy Quran and mantras from Hindu scriptures. The great historical monument thereafter saw the rule of number of Mughal Emperors including Aurangzeb. It also saw its most unfortunate capture by Nadir Shah. It was in 1837 that the last Mughal Emperor Bahadur Shah Zafar II took over the throne.

214. It must be remembered that it was during the empire of Bahadur Shah Zafar II that the First War of Independence was fought. Red Fort became the ultimate goal during that War of Independence which broke out in the month of May 1857. The Fort breathed free air for a brief period. But ultimately in the month of September 1857, it was captured by the British. Red Fort is not just one of the several magnificent monuments that were built by the Mughal emperors during their reign for nearly three centuries. It is not just another place which people from within and outside the country visit to have a glimpse of the massive walls on which the Fort stands or the exquisite workmanship it displays. It is not simply a tourist destination in the capital that draws thousands every year to peep and revel into the glory of the times bygone. Its importance lies in the fact that it has for centuries symbolised the seat of power in this country. It has symbolised the supremacy of the Mughal and the British empires just as it symbolises after Independence the sovereignty of the world's largest democratic republic. It is a national symbol that evokes the feelings of nationalism amongst the countrymen and reminds them of the sacrifices that the freedom fighters made for the liberation of this country from foreign rule.

215. No wonder even after the fall of the Fort to the British forces in the First War of

Independence in 1857 and the shifting of the seat of power from Red Fort to Calcutta and later to New Delhi, Pt. Jawahar Lal Nehru after his historic "Tryst with Destiny" speech unfurled the tricolour from the ramparts of Red Fort on 15-8-1947. That singular event symbolised the end of the British rule in this country and the birth of an independent India. An event that is relived and re-acted every succeeding year since 1917, when every incumbent Prime Minister addresses the nation from atop this great and historic Fort reminding the countrymen of the importance of freedom, the need for its preservation and the values of constitutional democracy that guarantees the freedoms so very fundamental to the preservation of the unity and integrity of this country.

216. An attack on a symbol that is so deeply entrenched in the national psyche was, therefore, nothing but an attack on the very essence of the hard-earned freedom and liberty so very dear to the people of this country. An attack on a symbol like Red Fort was an assault on the nation's will and resolve to preserve its integrity and sovereignty at all costs. It was a challenge not only to the army battalions stationed inside the monument but the entire nation. It was a challenge to the very fabric of a secular constitutional democracy this country has adopted and everything that is good and dear to our countrymen. It was a blatant, brazenfaced and audacious act aimed to overawe the Government of India. It was meant to show that the enemy could with impunity reach and destroy the very vitals of an institution so dear to our fellow countrymen for what it signified for them. It is not for no reason that whosoever comes to Delhi has a yearning to visit Red Fort. It is for these reasons that this place has become a place of honour for Indians.

217. No one can ever forget the glorious moments when the Indians irrespective of their religions fought their First War of Independence and shed their blood. It was, therefore, but natural for the foreigner

enemies to plan an attack on the army specially kept to guard this great monument. This was not only an attack on Red Fort or the army stationed therein, this was an arrogant assault on the self-respect of this great nation. It was a well thought out insult offered to question the sovereignty of this great nation by foreign nationals. Therefore, this case becomes a rarest of the rare case. This was nothing but an undeclared war by some foreign mercenaries like the present appellant and his other partner in conspiracy Abu Shamal and some others who either got killed or escaped. In conspiring to bring about such kind of attack and then carrying out their nefarious activities in systematic manner to make an attack possible was nothing but an attempt to question the sovereignty of India. Therefore, even without any reference to any other case law, we hold this case to be the rarest of the rare case.

…

223. …..During the whole debate the learned defence counsel did not attempt to bring any mitigating circumstance. In fact, this is a unique case where there is one most aggravating circumstance that it was a direct attack on the unity, integrity and sovereignty of India by foreigners. Thus, it was an attack on Mother India. This is apart from the fact that as many as three persons had lost their lives. The conspirators had no place in India. The appellant was a foreign national and had entered India without any authorisation or even justification. This is apart from the fact that the appellant built up a conspiracy by practising deceit and committing various other offences in furtherance of the conspiracy to wage war against India as also to commit murders by launching an unprovoked attack on the soldiers of the Indian Army. We, therefore, have no doubts that death sentence was the only sentence in the peculiar circumstance of this case."

29. The decisions referred to in the Written Submissions show that when there is challenge to the unity, integrity and sovereignty of India by acts of terrorism, such acts are taken as the most aggravating circumstances. It is well accepted that the cumulative effect of the aggravating factors and the mitigating circumstances must be taken into account before the death sentence is awarded. In ***Vasanta Sampat Dupare vs. State of Maharashtra***[15], while dealing with a case, where death sentence was awarded in a crime relating to offences punishable under Sections 302, 363, 367, 376(2)(f) and 201 of the IPC, this Court had observed that the aggravating circumstances had clearly outweighed the mitigating circumstances. It was stated: -

> "20. It is thus well settled, "the court would consider the cumulative effect of both the aspects (namely, aggravating factors as well as mitigating circumstances) and it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes completely ignoring other classes under other heads and it is the primary duty of the Court to balance the two". Further, "it is always preferred not to fetter the judicial discretion by attempting to make excessive enumeration, in one way or another; and that both aspects, namely, aggravating and mitigating circumstances have to be given their respective weightage and that the Court has to strike the balance between the two and see towards which side the scale/balance of justice tilts". With these principles in mind, we now consider the present review petition.
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> 21. The material placed on record shows that after the judgment *Vasanta Sampat Dupare* v. *State of Maharashtra*, (2015) 1 SCC 253 under review, the petitioner has completed Bachelors Preparatory Programme offered by Indira Gandhi

[15] (2017) 6 SCC 631

> National Open University enabling him to prepare for Bachelor level study and that he has also completed the Gandhi Vichar Pariksha and had participated in drawing competition organised sometime in January 2016. It is asserted that the jail record of the petitioner is without any blemish. The matter is not contested as regards Conditions (1), (2), (5), (6) and (7) as stated in para 206 of the decision in *Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684, but what is now being projected is that there is a possibility of the accused being reformed and rehabilitated. Though these attempts on part of the petitioner are after the judgment *Vasanta Sampat Dupare* v. *State of Maharashtra*, (2015) 1 SCC 253 under review, we have considered the material in that behalf to see if those circumstances warrant a different view. We have given anxious consideration to the material on record but find that the aggravating circumstances, namely, the extreme depravity and the barbaric manner in which the crime was committed and the fact that the victim was a helpless girl of four years clearly outweigh the mitigating circumstances now brought on record. Having taken an overall view of the matter, in our considered view, no case is made out to take a different view in the matter. We, therefore, affirm the view taken in the judgment *Vasanta Sampat Dupare* v. *State of Maharashtra*, (2015) 1 SCC 253 under review and dismiss the present review petitions."

30. Coming back to the instant case, there is nothing on record which can be taken to be a mitigating circumstance in favour of the review petitioner. The suggestion that there is a possibility of retribution and rehabilitation, is not made out from and supported by any material on record. On the other hand, the aggravating circumstances evident from the record and specially the fact that there was a direct attack on the unity, integrity and sovereignty of India, completely outweigh the factors which may even remotely be brought into consideration as mitigating circumstances on record.

The submission so advanced under ground (d) does not merit any acceptance and is, therefore, rejected.

31. Consequently, we do not find any merit in the instant review petitions, which are accordingly dismissed.

.....CJI
[Uday Umesh Lalit]

.....J.
[S. Ravindra Bhat]

.....J.
[Bela M. Trivedi]

New Delhi;
November 3, 2022.