

## Shahzad Ahmed vs State on 9 February, 2018

**Author: S. Muralidhar**

**Bench: S. Muralidhar, I.S. Mehta**

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\* IN THE HIGH COURT OF DELHI AT NEW DELHI

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SHAHZAD AHMED

CRL.A. 1196/2013

..... Appellant

Through: Mr. Satish Tamta, Senior Advocate with  
Mr S. Qamar, Mr. Shariq Iqbal and Mr. Abhishek  
Vikram, Advocates

versus

STATE

..... Respondent

Through: Mr. Dayan Krishnan, Senior Advocate  
with Mr. Rajesh Mahajan, ASC and Ms. Radhika  
Kolluru, APP and Ms. Aakash, Advocates for  
State

CORAM: JUSTICE S. MURALIDHAR  
JUSTICE I.S. MEHTA

ORDER

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09.02.2018

Dr. S. Muralidhar, J.:  
Crl.M.A.1533/2018 in Crl.A.1196/2013

1. This is an application by the State under Section 391 of the Code of Criminal Procedure, 1973 („Cr PC ) for permission to lead additional evidence before the trial Court, against the impugned judgment dated 25th July 2013 and order on sentence dated 30th July 2013 of which the present appeal has been filed by the Appellant accused.

2. It must be noted at the outset that, against the same impugned order on sentence dated 30th July 2013, the State has filed Crl. Appeal No. 1459 of 2013 praying for enhancement of the life imprisonment awarded to the Appellant to the death sentence.

3. The judgment by which the Appellant was convicted by the learned Additional Sessions Judge-02, South East District, Saket Court, New Delhi, was delivered in Sessions Case No.42/2010 arising out of the FIR No.208/2008 registered at Police Station („PS ) Jamia Nagar. The Appellant was convicted for the offences under Sections 186, 353, 333, 307 and 302 Indian Penal Code („IPC ) read with Section 34 IPC and for the offence under Section 201 IPC and Sections 27, 54 and 59 Arms Act, 1959. The Appellant was acquitted of the offence under Section 174A IPC. The Appellant was sentenced for the aforementioned offences by a separate order on sentence dated 30th July 2013. For the offence under Section 302 IPC read with Section 34 IPC, the Appellant was sentenced to

imprisonment for life together with the fine of Rs.50,000/- and, in default of payment of fine, to undergo one year's simple imprisonment.

### Background

4. For the purposes of the present application, it is necessary to briefly recount the background to the trial. On 13th September 2008, at four different locations in Delhi, viz. Connaught Place, Karol Bagh, Greater Kailash and India Gate, there were bomb explosions in which 26 people were killed and 133 people suffered injuries.

5. Five FIRs were registered in relation to the said incidents of bomb blasts. FIR No.168/2008 was registered at PS Karol Bagh; FIR No.138/2008 at PS Greater Kailash; FIR No.293/2008 at PS Tilak Marg; and FIR Nos.418/2008 and 419/2008 at PS Connaught Place.

### Encounter at Batla House

6. It is claimed by the State that while investigating the aforementioned instances of bomb blasts, the Special Cell of the Delhi Police received secret information that one of the key suspects in the bomb blast cases, i.e. Bashir @ Atif, was residing at Flat No.108 of L-18, Batla House, Delhi along with his associates. Acting on the said information, Inspector Mohan Chand Sharma („deceased ) along with a posse of 18 policemen including Sub- Inspector („SI ) Rahul Kumar (PW-8) proceeded towards Batla House in two teams on the morning of 19th September 2008.

7. The prosecution claims that the first team, led by the deceased and comprising SI Dharmender Kumar (PW-22), SI Ravinder Kumar Tyagi (PW-15), Head Constable („HC ) Balwant Singh (PW-14), HC Uday Veer Singh (PW-11) and HC Satender (PW-7) and SI Rahul Kumar (PW-8), entered Flat No.108 at around 11 am on 19th September 2008 through an open side door after its occupants failed to open the main door despite the deceased knocking upon it and disclosing his and his team s identity.

8. The case of the prosecution is that as soon as the team, led by the deceased, entered the flat through the side door, they came under gun fire from all directions. The further case of the prosecution is that as a result of the cross-firing, the deceased and HC Balwant Singh were injured and had to be removed from the scene for urgent medical attention. The prosecution claims that there were, in all, at the time of the cross-firing, five persons in the flat, two of whom, Atif and Sajid, were killed in the police firing. Mohd. Saif, who had locked himself in a toilet in the said flat, surrendered subsequently. The prosecution claims that the two other persons in the flat firing upon the police were Shahzad Ahmed (the Appellant) and Junaid (who is absconding till date). The claim of the prosecution is that even while the firing was going on, and even before the injured policemen could be removed from the scene for medical attention, the Appellant and Junaid escaped through the main door of the flat.

### Voice sample compared with recorded conversations

9. An important fact, as far as the present application is concerned, is that the mobile number of one of the deceased persons, i.e. Atif (9811004309), was kept under surveillance by the police. This was done under an order dated 10th September 2008 of the Principal Secretary, Home, Government of National Capital Territory, Delhi. The calls and messages on that mobile number were permitted to be recorded for 60 days between 1st September 2008 and 30th October 2008. The calls recorded included conversations between the mobile number used by Mohd. Atif (9811004309) and the mobile number 9793066723 stated to be registered in the name of Siraj Ahmed, the father of the Appellant. According to the prosecution, the last such call between the two numbers that was recorded was at 4.27 am on the morning of 19th September 2008.

10. The Appellant was arrested on 2nd February 2010 in FIR No.208/2008 (Ex.PW-33/B) which pertains to the Batla House encounter i.e. at Flat No.108 of L-18, Batla House. The Appellant is also an accused in the five FIRs registered in respect of the bomb blasts that took place at four locations in Delhi on 13th September 2008. The Investigating Officer („IO ) in FIR No.293/2008 registered at PS Tilak Marg took a specimen sample of the Appellant's voice. In the trial arising from FIR No.293/2008, a report dated 10th August 2011 of the Central Forensic Science Laboratory („CFSL ), CBI, New Delhi analysing and comparing the specimen voice sample of the Appellant with the questioned voice heard in the conversations between the aforementioned mobile numbers, was led in evidence.

11. In the charge-sheet filed on 28th April 2010 in the present case, concerning the Batla House encounter, it was mentioned that the IO of FIR 293 of 2008 registered at PS Tilak Marg had taken the specimen voice sample of the Appellant to get it matched with the questioned voice obtained during the monitoring of the mobile number of Atif (9811004309). It was further stated that the scrutiny of the call detail records („CDR ) of the aforementioned mobile number confirmed its location at Batla House. However, the report of the CFSL purportedly confirming the matching of the specimen voice sample of the Appellant with the questioned voice was filed, not in the FIR in the Batla House encounter case, but in FIR No.293/2008 concerning the bomb blast at India gate.

In the trial Court

12. The charge sheet in FIR No.208/2008 (the Batla House encounter case) was filed on 28th April 2010 and the charges were framed on 4th February 2011. The trial Court delivered the impugned judgment on 25th July 2013 and the order on sentence on 30th July 2013.

13. During the trial in the Batla House encounter case, the prosecution examined 70 witnesses. The eye witnesses to the encounter, who spoke of the presence of the Appellant in the flat, were all police personnel. Those who spoke about the raid at the Batla House were also police personnel.

14. Additional DCP Bhisham Singh (PW-26) was the Investigating Officer (IO) in FIR No.293/2008 registered at PS Tilak Marg (the India gate bomb blast case). He deposed in the present Batla House encounter trial with regard to the arrest and search of the Appellant in the India Gate bomb blast case. In his examination-in-chief on 24th May 2012, PW-26 stated inter alia as under:

"I interrogated said accused in that case. During his interrogation as well as by analyzing the call details of phones, it was revealed that accused Shahzad was using a mobile no.9811004309 to speak to his mother and father while he was staying in Batla House. It was also revealed that the above said mobile number was in the name of accused Atif Ameen. I had handed over ownership detail, CDR of this mobile number to IO of this case."

15. No mention, however, was made by PW-26, during his deposition, of the specimen sample of the Appellant's voice being taken and sent to the CFSL for comparison with the questioned voice in the recorded conversations between the mobile numbers of Atif and the Appellant's father's mobile phone.

16. One of the critical issues in the present case concerns the presence of the Appellant at Flat No.108, L-18, Batla House at the time of the encounter in which Inspector Mohan Chand Sharma and Head Constable Balwant Singh received firearm injuries as a result of which the former subsequently expired. The case of the Appellant is that he was not present in the said flat at the time of the encounter. In support of this contention, he examined two other occupants of the flat, i.e. Mohd. Saif (DW-1) and Zeeshan (DW-2).

17. The trial Court has, in the impugned judgment, accepted the version of the prosecution that the Appellant was one of the persons who fired upon Inspector Mohan Chand Sharma and HC Balwant Singh using a country-made firearm. The trial Court agreed with the prosecution that the said weapon was subsequently thrown in a canal by the Appellant after escaping from Flat No.108 along with the absconding accused, Junaid.

#### Application for leading additional evidence

18. The present appeal was admitted by this Court by an order dated 20th September 2013. Subsequently the State's appeal for enhancement of the sentence awarded to the Appellant was admitted. The final hearing of both appeals has been in progress since 28th November 2017.

19. The arguments of Mr. Satish Tamta, learned Senior Counsel appearing on behalf of the Appellant, were heard till 4th December 2017. Thereafter, the arguments of Ms. Radhika Kolluru, learned APP for the State, were heard till 12th December 2017, on which date the following order was passed:

"1. When this matter was called out today, Mr. Sanjay Lao, the learned Senior Standing Counsel (Criminal) on behalf of the Respondent informed the Court that orders have been obtained from the Lieutenant Governor of the National Capital Territory of Delhi for engaging a special counsel to present arguments on behalf of the State in the present matter. He accordingly requested for an adjournment.

2. The Court considers it appropriate to record that this Court has been ably assisted thus far over several days of hearing of these appeals, on behalf of the state by Ms.

Radhika Kolluru, the learned APP. Her preparation and total involvement in the case deserves appreciation. Nevertheless, since a request of the above nature has been made, and there is no opposition by Mr. Satish Tamta, learned Senior Counsel appearing for the Appellant in CrI A 1196/2013, list on 22nd January, 2018. The matter be not treated as 'part heard'."

20. Thereafter, the hearing resumed on 22nd January 2018 with the State now being represented by Mr. Dayan Krishnan, learned Senior Counsel, who was assisted by Ms. Radhika Kolluru, learned APP, and Mr. Rajesh Mahajan, learned Additional standing counsel. On that date itself, Mr. Krishnan mentioned that he would be filing an application under Section 391 Cr PC for permission to lead additional evidence. Mr Krishnan nevertheless proceeded with his arguments for the State till 31st January 2018.

21. The present application was first listed on 23rd January 2018 when notice was issued to the Appellant/Non-Applicant. In the said application, an affidavit dated 31st January 2018 was filed by Inspector Satish Sharma who was the IO in FIR No.208/2008 and who has also been examined as PW-68. He enclosed with the said affidavit the list of witnesses (Annexure A) whom the State proposes to examine as well as a list of documents and CDs / DVDs (Annexure B) which they intended to exhibit. Written submissions have been filed by Mr. Tamta in response to the above application.

#### Submissions on behalf of the State

22. The application states that the aforementioned evidence could not be led due to inadvertence and further because "the investigating agencies were different in the blast cases and the present case". A further explanation has been offered in para 8 of the application that:

"8. ...since the concerned investigating officer of the case herein got transferred as SHO, PS Chanakyapuri in June 2010, the CFSL report dated 10.08.2011 could not be placed on record in the present case or exhibited."

23. Mr. Krishnan explained that the report of the CFSL on the voice comparison is a critical piece of relevant evidence to enable the prosecution to prove that it was the Appellant who was making/receiving the calls in question. According to Mr Krishnan the CDRs of the said mobile number show its presence at the flat in Batla House, where Atif was killed in the encounter. He further submits that since the CFSL report purportedly matches the specimen voice of the Appellant with the questioned voice in the conversations between the mobile number of Atif and the Appellant's father's mobile number, the last one being at 4.27 am on 19th September 2008, the presence of the Appellant in the flat in question at the time of the encounter is established. According to Mr Krishnan, the CFSL report was even otherwise admissible as evidence under Section 293 Cr PC.

24. The main plank of Mr. Krishnan's submissions is based on the decisions of the Supreme Court in *Zahira Habibullah Sheikh v. State of Gujarat* (2004) 4 SCC 158, *Sudevanand v. State* (2012) 3 SCC

387 and *State Of Gujarat v. Mohanlal Jitamalji Porwal* (1987) 2 SCC 364. He submitted that this Court may subject the prosecution to terms and bind it down by a definite timeframe. Further, Mr. Krishnan assured the Court that, before the trial Court to which the matter would have been sent for the purposes of recording the additional evidence, the prosecution would not seek any adjournment; would line-up all its witnesses as mentioned in Annexure A including the documents mentioned in Annexure B and be prepared to proceed on a day-to-day basis. He urged that the present appeal should be kept part-heard by this Bench awaiting the completion of the aforementioned exercise. He pointed out that since the final arguments in the present appeal were almost concluded, the further arguments would be confined to the additional evidence.

#### Submissions on behalf of the Appellant

25. In reply, Mr. Satish Tamta, learned Senior Counsel appearing for the Appellant, pointed out that the power of this Court under Section 391 Cr PC was discretionary in nature. It had to be used sparingly and with great caution and subject to the facts and circumstances of each case. Relying on the decision in *Ashok Tshering Bhutia v. State of Sikkim* (2011) 4 SCC 402, Mr. Tamta pointed out that the object of Section 391 Cr PC was not to enable the prosecution to fill-up the lacuna left by it in the course of the trial. Section 391 Cr PC was normally invoked when formal proof of some document was necessary. He submitted that the charge-sheet did not state that the CFSL result in respect of the voice samples was awaited and that it would be filed along with the supplementary charge-sheet under Section 173 Cr PC.

26. According to Mr Tamta, the decision in *Zahira Habibullah Sheikh v. State of Gujarat* (supra) was not applicable in the present case because of the extraordinary circumstances in which the Supreme Court ordered a re-

trial in that case. According to him, the specimen voice samples were taken in FIR No.293/2008 and a conscious decision had been taken not to lead in evidence in the present trial the CFSL report of voice comparison. Mr. Tamta pointed out that even in the trial arising out of the FIR No.293/2008 registered at PS Tilak Marg only some part of the said evidence had been led. Without prejudice to his submissions questioning the admissibility and reliability of the above additional evidence sought to be led by the prosecution, Mr. Tamta disputed that it could probablise the presence of the Appellant in the flat in question at the time of the encounter.

27. Mr Tamta submitted that the present application is an abuse of the process of law having been filed nearly four years after the present appeals were filed and nearly five years after the trial in the case was concluded. According to him, it would result in an unnecessary waste of time and delay the decision in the present appeal even further. He pointed out that the Appellant had remained in custody for over eight years now.

#### Analysis and reasons

28. This Court has considered the above submissions. In the first instance, the Court proposes to examine the scope and ambit of Section 391 Cr PC which reads as under:

"391. Appellate Court may take further evidence or direct it to be taken.

(1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry."

29. A plain reading of the above section would indicate that even at the stage of hearing of an appeal before a High Court, it is possible that additional evidence is permitted to be led. However, as explained by the Supreme Court in *Ashok Tshering Bhutia v. State of Sikkim* (supra):

"15. ... such power must be exercised sparingly and only in exceptional suitable cases where the court is satisfied that directing additional evidence would serve the interests of justice. It would depend upon the facts and circumstances of an individual case as to whether such permission should be granted having due regard to the concepts of fair play, justice and the well-being of society."

30. It was further observed by the Supreme Court in the above decision that it would depend on the facts and circumstances of individual cases whether the permission should be granted "having due regard to the concepts of fair play, justice and the well-being of the society". According to the Supreme Court:

"15. ... Such an application for taking additional evidence must be decided objectively, just to cure the irregularity. The primary object of the provisions of Section 391 Cr.P.C. is the prevention of a guilty man's escape through some careless or ignorant action on part of the prosecution before the court or for vindication of an innocent person wrongfully accused, where the court omitted to record the circumstances essential to elucidation of truth. Generally, it should be invoked when formal proof for the prosecution is necessary."

31. Earlier in *State of Gujarat v. Mohanlal Jitmalji Porwal* (supra), the Supreme Court explained as under:

"...To deny the opportunity to remove the formal defect was to abort a case against an alleged economic offender. Ends of justice are not satisfied only when the accused in a criminal case is acquitted. The community acting through the State and the Public Prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the court in the discharge of its judicial functions. The community or the State is not a persona-non-grata whose cause may be treated with disdain. The entire community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the community. A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust and faith of the community in the system to administer justice in an even-handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the national economy and national interest....."

32. In *Rambhau v. State of Maharashtra* (2001) 4 SCC 759, the Supreme Court observed as under:

"Incidentally, Section 391 forms an exception to the general rule that an Appeal must be decided on the evidence which was before the Trial Court and the powers being an exception shall always have to be exercised with caution and circumspection so as to meet the ends of justice. Be it noted further that the doctrine of finality of judicial proceedings does not stand annulled or affected in any way by reason of exercise of power under Section 391 since the same avoids a de novo trial. It is not to fill up the lacuna but to subserve the ends of justice. Needless to record that on an analysis of the Civil Procedure Code, Section 391 is thus akin to Order 41, Rule 27 of the C.P. Code."

33. In *Zahira Habibullah Sheikh v. State of Gujarat* (supra), the Supreme Court explained in detail the rationale behind Section 391 Cr PC. It was held that Sections 386 and 391 "have to be harmoniously considered to enable the appeal to be considered and disposed of in the light of the additional evidence as well." The Court observed:

"47. Section 391 of the Code is another salutary provision which clothes the Courts with the power to effectively decide an appeal. Though Section 386 envisages the normal and ordinary manner and method of disposal of an appeal, yet it does not and cannot be said to exhaustively enumerate the modes by which alone the Court can deal with an appeal. Section 391 is one such exception to the ordinary rule and if the appellate Court considers additional evidence to be necessary, the provisions in Section 386 and Section 391 have to be harmoniously considered to enable the appeal to be considered and disposed of also in the light of the additional evidence as well. For this purpose it is open to the appellate Court to call for further evidence before the appeal is disposed of. The appellate Court can direct the taking up of further evidence in support of the prosecution; a fortiori it is open to the Court to direct that



the accused persons may also be given a chance of adducing further evidence. Section 391 is in the nature of an exception to the general rule and the powers under it must also be exercised with great care, specially on behalf of the prosecution lest the admission of additional evidence for the prosecution operates in a manner prejudicial to the defence of the accused. The primary object of Section 391 is the prevention of guilty man's escape through some careless or ignorant proceedings before a Court or vindication of an innocent person wrongfully accused. Where the Court through some carelessness or ignorance has omitted to record the circumstances essential to elucidation of truth, the exercise of powers under Section 391 is desirable.

48. The legislative intent in enacting Section 391 appears to be the empowerment of the appellate court to see that justice is done between the prosecutor and the persons prosecuted and if the appellate Court finds that certain evidence is necessary in order to enable it to give a correct and proper findings, it would be justified in taking action under Section 391.

49. There is no restriction in the wording of Section 391 either as to the nature of the evidence or that it is to be taken for the prosecution only or that the provisions of the Section are only to be invoked when formal proof for the prosecution is necessary. If the appellate Court thinks that it is necessary in the interest of justice to take additional evidence it shall do so. There is nothing in the provision limiting it to cases where there has been merely some formal defect. The matter is one of the discretion of the appellate Court. As reiterated supra the ends of justice are not satisfied only when the accused in a criminal case is acquitted. The community acting through the State and the public prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the Court in the discharge of its judicial functions."

34. The principles that can be summarized from the above decisions are as under:

(i) The primary object of Section 391 Cr PC is prevention of the consequences of "some careless or ignorant action on part of the prosecution before the court or for vindication of an innocent person wrongfully accused, where the court omitted to record the circumstances essential to elucidation of truth".

(ii) Section 391 Cr PC is to prevent the ordering of a de novo trial. The doctrine of finality of judicial proceedings is not affected by the exercise of the power thereunder.

(iii) The power has to be exercised with caution and circumspection to meet the ends of justice.

(iv) Section 391 Cr PC is not to fill up the lacuna in the prosecution evidence but to serve the ends of justice. Only in exceptional and suitable cases, where the Court is satisfied that directing additional evidence would serve the ends of justice, will the

power under Section 391 Cr PC be exercised.

(v) If the Appellate Court finds that certain evidence is necessary in order to give a correct and proper finding, it would be justified in exercising the power under Section 391 Cr PC. The ends of justice have to address as much the interests of the accused as that of the community through the State and the public prosecutor.

35. For the present application, the following facts require to be noted:

(i) The fact of the phone used by Mohd. Atif being placed under surveillance was adverted to by the prosecution in the charge-sheet in the present case and was spoken to by PW-26 in his examination-in- chief.

(ii) The charge-sheet in the present case mentioned the fact that Mohd.

Atif s phone was placed under surveillance. Referring to the IO of FIR 293 of 2008 registered at PS Tilak Marg, the charge-sheet in the present case noted as under:

"During investigation he found Atif Ameen using mobile phone number 9811004309. From the scrutiny of the CDR of this number and after the interrogation of accused Shahzad @ Pappu he found Shahzad talking to his mother on mobile number 97193066723 from mobile number 9811004309. He also found out that in the morning of 19.09.08 at about 4:29:12 Shahzad had spoken to his mother through the mobile phone of Atif. I.O. of the case of Special Cell is has taken voice sample of Shahzad @Pappu to get the same matched with the voice already obtained during the monitoring of mobile phone number 9811004309 of Atif Ameen. The scrutiny of CDR also oubted

(iii) The additional evidence that is sought to be led by the prosecution in the present case already stands gathered in FIR No.293/2008 which is also a case in which the present Appellant is an accused.

36. Mr. Tamta has pointed out that in the trial arising from the FIR No.293/2008 registered at PS Tilak Marg, some of the witnesses mentioned in the list at Annexure A have already been examined. However, as he rightly points out, the said witnesses have to be again summoned in the present trial in the event the present application is allowed.

37. It appears to the Court that while the additional evidence sought to be led by the prosecution might be relevant, whether the said evidence is admissible and whether it withstands the test of reliability, will have to be decided by this Court only after the exercise of leading additional evidence is completed. The Court does not foreclose the rights and submissions of the parties in that regard. In other words, merely because the additional evidence is permitted to be recorded by the trial Court will not mean that an opinion has been expressed by this Court, even impliedly, on the admissibility and reliability of the said additional evidence.

38. The Court is not entirely convinced with the explanation offered by the State that the omission to lead the evidence as mentioned in Annexures A and B (to the affidavit dated 31st January 2018 of the IO) was due to inadvertence. Particularly since some of the officers in charge of the investigation in the FIRs in the bomb blast cases were examined in the present case as PWs. It is difficult to believe that they would have overlooked such vital evidence which according to them probablised the location of the deceased at the time of the encounter at the flat in Batla House.

39. Nevertheless, the interest of justice persuades the Court not to decline the request of the State. The reasons are these. First, as already pointed out, the additional evidence sought to be led by the prosecution has already been adverted to in the charge sheet and is therefore relevant for the case. Secondly, the said additional evidence already stands gathered in FIR 293 of 2008 registered at PS Tilak Marg in which the Appellant is an accused. Thirdly, the Court places on record the assurance given to it that the State will not seek any adjournment before the trial Court and that the recording of additional evidence will happen on a day-to-day basis. Additionally, the Court proposes to ensure that the further hearing of the present appeal, and that of the State, is not unduly delayed and will continue only from the stage where it is at present. Lastly, the Court proposes to subject the State to terms in order that Appellant is not unduly prejudiced.

40. From the point of view of the Appellant, he would be entitled to cross- examine each of the prosecution witnesses hereafter examined pursuant to this order. Thereafter, the trial Court would also have to record his further statement under Section 313 Cr PC in relation to the additional evidence. The Appellant, if he so chooses, would also be permitted to lead defence evidence in relation to the additional evidence led by the State. The Court also proposes to compensate him by way of costs.

## Conclusion

41. The Court, accordingly, allows this application of the State under Section 391 Cr PC with the following directions:

(i) The State is permitted to lead additional evidence before the trial Court confined to the list of witnesses and documents mentioned in the Annexures A and B respectively to the affidavit dated 31st January 2018 of the IO of the present case.

(ii) The State will not seek any adjournment on any ground whatsoever and be ready with its additional witnesses for being examined on a day-to-day basis before the trial Court. The right of the Appellant to cross-examine the said witnesses will be permitted in accordance with law.

(iii) The recording of the additional evidence by the trial Court of the said PWs will be completed not later than one month from the date fixed by this Court for the matter to be listed before the trial Court for the purpose.

(iv) The recording of the further statement of the Appellant under Section 313 Cr PC in regard to the additional evidence led by the State, will be completed within a period of one week after the conclusion of the recording of additional evidence of the prosecution pursuant to this order.

(v) The Appellant shall be permitted to thereafter lead additional defence evidence in relation to the additional evidence led by the prosecution. The recording of the additional defence evidence shall be completed not later than one month after the conclusion of the recording of the further statement of the Appellant under Section 313 Cr PC by the trial Court.

(vi) The entire transcript of the record of the additional evidence, including the further statement of the Appellant under Section 313 Cr PC as well as the defence evidence and the trial Court record should be submitted to this Court not later than 30th April, 2018.

(vii) Both the counsel for the State as well as the Appellant will cooperate with the trial Court to ensure that the above time lines are strictly adhered to.

(viii) The State will pay the Appellant costs of Rs.50,000 in this application not later than two weeks from today. The proof of payment of costs shall be produced before the trial Court on the date fixed by this Court for appearance of the parties.

(ix) The matter will be listed before the District and Sessions Judge (DSJ), South East District, Saket Court, New Delhi on 19th February 2018 at 2.15 pm. On that date the Appellant will be produced from judicial custody before the said Court and his counsel as well as the learned Additional PP for the State shall also remain present. If for some reason the DSJ is unable to record the additional evidence himself, he shall assign the task to an Additional Sessions Judge, South-East, forthwith keeping in view the definite time lines. At every hearing of the matter for the recording of additional evidence the Appellant shall be produced from judicial custody.

42. Nothing said in this order should be construed as an expression by this Court of any opinion on the merits of the case or on the admissibility or reliability of the additional evidence permitted to be led. The application is disposed of with the above directions.

43. A certified copy of this order together with the trial Court record shall be delivered by a Special Messenger forthwith to the learned DSJ, South-East District, Saket Court, New Delhi.

S. MURALIDHAR, J.

I.S. MEHTA, J.

FEBRUARY 09, 2018 rd