VERDICTUM.IN

1 **IOIN-CRA-D-101-DB of 2014 in**
CRA-D-101-DB of 2014 and

IOIN-CRA-AD-30 of 2016 in
CRA-AD-30 of 2016

Sheela Vs. Brahamjit and others

Present: Mr. A.P.S.Deol, Senior Advocate
with Mr.Vishal Rattan Lamba, Advocate
for the appellant in CRA-D No.101-DB of 2014.

Mr. Ankur Mittal, Addl.AG., Haryana
with Mr. Saurabh Mago, DAG., Haryana and
Ms. Kushaldeep K.Manchanda, Advocate
for the appellant in CRA-AD No.30 of 2016.

Respondents No.1 and 6 since expired.

Mr. Vinod Ghai, Senior Advocate
with Mr. Arnav Ghai, Advocate
for respondents No.2, 3, 5, 8, 9, 10, 11, 12, 13 and 14.

Mr. Rakesh Dhiman, Advocate
for respondent No.4 in CRA-D-101-DB of 2014.

Mr. Gaurav Singla, Advocate
for respondent No.7.

****

1. Accused-respondents were acquitted in FIR No.955 dated 27.12.1999 under Sections 302/201/323/312/170/120B/364/212/148 read with Section 149 IPC, registered at Police Station Central, Faridabad vide judgment dated 16.11.2013 passed by the learned Additional Sessions Judge, Faridabad.

2. Six connected matters, i.e. two appeals arising out of said judgment dated 16.11.2013 and four other matters pertaining to FIR No.955 were pending before Division Bench of this Court. CRA-D No.101-DB-2014 was filed by the complainant whereas, CRA No.AD-30 of 2016 has been filed by the State of Haryana challenging acquittal of the accused/respondents. CRR No.2948 of

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VERDICTUM.IN

2013 was filed by accused/respondents – Harender and Dinesh, challenging order dated 30.07.2013 passed by the trial Court vide which their application for treating them juveniles was rejected. CRR No. 2444 of 2011 was filed by accused Sanjay @ Teeta against order dated 19.09.2011 vide which his application to decide his case alongwith co-accused, namely, Brahamjit and others was dismissed by the learned trial Court. CRM-67225-M-2005 and CRM-3273-M-2006 were filed by accused Satish, Sanjay, Mahavir and Devki Nandan against summoning order dated 12.11.2005 passed by the learned trial Court. All these matters were decided by the Division Bench on 29.01.2020.

3. The Division Bench of which one of us (Archana Puri,J.) was a Member, found that prosecution had successfully established its case against accused-respondents. Accordingly, CRA-AD No.30 of 2016 and CRA-D No.101-DB of 2014 filed by the complainant and State, respectively, were allowed, impugned judgment dated 16.11.2013 was set aside. Accused-respondents were held guilty of the offences punishable under Sections 302/201/120B/364/148 read with Section 149 IPC. Criminal Revision No.2948 of 2013 was dismissed. Criminal Revision No.2444 of 2011 and CRM No.67225-M of 2005 alongwith CRM No.3273-M of 2006 were dismissed as having been rendered infructuous. In CRA-AD No.30 of 2016 and CRA-D No.101-DB of 2014, it was directed that accused be produced to be heard on the quantum of sentence on 17.02.2020. The State was directed to produce the respondents in Court on 17.02.2020. All the private respondents, except respondents No.13 and 14, were present on 17.02.2020 and following order was passed on 17.02.2020:-

> "All the private respondents except respondent Nos. 7, 13 & 14 are present in person.

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VERDICTUM.IN

Respondent No.7 has not been served. Respondent Nos. 13 & 14 are stated to be lodged in Neemka Jail, Faridabad. They be summoned through production warrants. Fresh notice to respondent No.7 be issued through concerned CJM for the date fixed. Post again on 02.03.2020

All the remaining respondents are directed to remain present in the Court on the next date of hearing.

Photocopy of this order be placed on the file(s) of other connected case(s)."

4. The matter was listed again on 02.03.2020, but as requisite report of the concerned Chief Judicial Magistrate, pursuant to order 17.02.2020 had not been received and respondent No.7 in Crl.Appeal-D No.101-DB of 2014 was not present, the matter was adjourned for 17.03.2020 with the following order being passed:-

"Pursuant to the order dated 17.02.2020, requisite report of the Chief Judicial Magistrate concerned, has not been received. Respondents, who are present in the Court, undertake to remain present before this Court on the next date of hearing. Respondent Nos.13 and 14, namely, Jai Parkash and Parmod, have been produced before the Court today in pursuance of the production warrants issued against them. They be produced in the Court on the next date of hearing.

Post again on 17.03.2020.

The State is directed to ensure that respondent No.7 in CRA-D-101-DB-2014, is produced before this Court on the date fixed.

Let the concerned Chief Judicial Magistrate be informed about the order passed.

Respondent Nos.13 and 14, namely, Jai Parkash and Parmod are stated to be lodged in Neemka Jail, District Faridabad. They be produced on the date fixed. Their production warrants be issued again.

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VERDICTUM.IN

Photocopy of this order be placed on the file of the connected case."

5. Thereafter, it is recorded in order dated 17.03.2020 that as per office report, respondent No.1 had died, respondent No.7 was again not present on which bailable warrants in the sum of Rs.50,000/- with one surety in the like amount was issued and the following order was passed on 17.03.2020:-

> "As per office report, respondent No.1 is stated to have died.
>
> Respondents Nos.2 to 6 and 8 to 12 are present in the Court. Respondent Nos.13 and 14, namely, Jai Parkash and Parmod, have been produced, in pursuance of the protection warrants issued against them. Respondent No.7, namely, Sham Singh, has not come present.
>
> Bailable warrants in the sum of Rs.50,000/- with one surety in the like amount be issued against him.
>
> State is further directed to produce respondent Nos.13 and 14 on the next date of hearing i.e. 17.04.2020.
>
> The bailable warrants of respondent No.7 be sent through CJM concerned. Respondents, who are present in the Court, undertake to remain present before the Court on the next date of hearing. Fresh protection warrants of respondent Nos.13 and 14, be issued for the date fixed.
>
> Photocopy of this order be placed on the file of the connected case."

6. Thereafter, it is a matter of record that due to outbreak of pandemic, COVID-19 there was restricted hearing of matters before the court and present appeals for the purpose of sentencing could not be listed before the Bench. In the interregnum, one of the members of the Bench, namely, Justice Jitendra Chauhan demitted office after attaining the age of superannuation. The matters were ultimately listed before another Division Bench and various orders to ensure presence of the respondents were passed.

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VERDICTUM.IN

7. Coordinate Bench on 21.09.2022 expressed an opinion that as one of the members of the Bench, who had rendered judgment dated 29.01.2020 was still in office as on date, the matter be heard by a Bench of which she is a Member. It was further directed that as and when the matter is listed after obtaining appropriate orders from Hon'ble the Chief Justice for hearing on the quantum of sentence, fresh notice be issued to the respondents for their appearance on the date fixed, before the said Bench. Accordingly, under orders of Hon'ble the Chief Justice, a Division Bench including one of the member of the Bench rendering judgment 29.01.2020 was constituted and the matter listed before the said Bench on 04.11.2022. One of the judges of the said Bench (other than the one who was a member of the Bench rendered judgment dated 29.01.2020) also demitted office in the meanwhile and the matter is now listed before this Bench.

8. When the matter came up before this Court on 21.04.2023, learned counsel for the respondents raised a plea that as decision dated 29.01.2020 convicting the respondents is not a complete judgment and composition of this Bench is different from the one delivering judgment of conviction dated 29.01.2020 inasmuch as one of the members of that Bench has since demitted office, therefore, the appeals should be heard afresh.

9. Learned counsel for the respondents vehemently argued that judgment dated 29.01.2020 not being a judgment, as the order of sentence has not been passed, the appeals should be heard afresh. Subsequent Division Bench, it is urged, cannot pass an order of sentence to complete the judgment because there has to be application of mind for the purpose of sentencing. Severity of sentence will necessarily have to be considered and the same cannot

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VERDICTUM.IN

be done without affording an opportunity of being re-heard to the parties. It is submitted that this gains much more importance in a case where a judgment of acquittal has been set aside, as is the position in the present case. It is vehemently argued that in terms of Section 353 Cr.P.C., decision dated 29.01.2020 whereby the respondents have been convicted for the offences punishable under Sections 302/201/120B/364/148 read with Section 149 IPC cannot be termed to be a "judgment". Mere passing of a decision of conviction of the respondents while setting aside an order of acquittal without passing the order of sentence cannot be defined to be a judgment. Learned counsel for the respondents has relied upon judgment of the Hon'ble Supreme Court by the Constitutional Bench in **Sukhpal Singh Khaira v. State of Punjab**, ***(2023) 1 SCC 289*** to buttress the case of the respondents. It is, thus, prayed by learned counsel for the respondents that the appeals be heard afresh by this Bench while ignoring decision dated 29.01.2020 as it is only the same Bench having the same composition which would be able to pass the order of sentence.

10. Per contra, learned counsel for the appellants i.e., the complainant as well as the State, while negating the arguments as raised on behalf of the respondents, have submitted that judgment of conviction was passed on 29.01.2020 in open court and same has been duly signed by both the then members of the Bench. The matter was adjourned to afford an opportunity of hearing to the respondents before sentencing. Due to absence of some of the respondent(s), the order of sentence could not be passed. In the interregnum, unfortunately due to outbreak of pandemic, COVID-19, the matter could not be taken up and in the meanwhile, one of the judges of the said Division Bench demitted office. Merely because of this reason, it cannot be said that present

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VERDICTUM.IN

Bench cannot pass the order of sentence or that decision dated 29.01.2020, convicting the respondents has to be set aside.

11. Learned senior counsel for the complainant argued that any re-hearing of the appeals would amount to review which is not permissible. Reference has also been made to Section 326 Cr.P.C. to submit that the subsequent Bench and especially the one in which one of the members is the same as the earlier Bench, is entitled to pass the order of sentence. Judgment of the Hon'ble Supreme Court in **Sukhpal Singh Khaira (supra)**, it is submitted, is not applicable in the facts and circumstances of the case. It is, thus, prayed that order of sentence pursuant to conviction of the respondents on 29.01.2020 be passed in accordance with law.

12. We heard learned counsel for the parties at length and have gone through the file as well as the judgments relied upon.

13. Argument raised by learned counsel for the respondents is that sentence is an integral part of the judgment and decision of conviction without the order of sentence is incomplete. It is urged that once one of the members of the Bench which had pronounced decision dated 29.01.2020 convicting the respondents, is no longer available, it is not open for the present Bench to pass the order of sentence and 'complete' the judgment as such. Learned counsel for the respondents has primarily relied upon judgment of the Hon'ble Supreme Court in **Sukhpal Singh Khaira's case (supra)** to submit that a judgment is not complete until the order of sentence is also passed. The Hon'ble Supreme Court in the abovesaid matter was considering the power of the trial court under Section 319 Cr.P.C. for summoning additional accused and the stage at which the same could be done, as to whether the trial court has the power under

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VERDICTUM.IN

Section 319 Cr.P.C. for summoning additional accused when trial in respect of certain other absconding accused is ongoing/pending, having been bifurcated from the main trial and regarding the guidelines which the competent court must follow while exercising powers under Section 319 Cr.P.C. The questions formulated for consideration before the Hon'ble Supreme Court read as under:-

> "I. Whether the trial court has the power under Section 319 of CrPC for summoning additional accused when the trial with respect to other coaccused has ended and the judgment of conviction rendered on the same date before pronouncing the summoning order?
> II. Whether the trial court has the power under Section 319 of the CrPC for summoning additional accused when the trial in respect of certain other absconding accused (whose presence is subsequently secured) is ongoing/pending, having been bifurcated from the main trial?
> III. What are the guidelines that the competent court must follow while exercising power under Section 319 Cr.PC?"

14. The first question was answered by the Hon'ble Supreme Court by holding that power under Section 319 Cr.P.C. is to be invoked and exercised before the pronouncement of order of sentence where there is judgment of conviction of the accused. The summoning order, it was held, has to precede the conclusion of trial while imposition of sentence in the case of conviction. It is in this context that there was consideration of the stage at which a judgment is complete. While referring to Sections 235, 236, 353 and 354 Cr.P.C., it was held that even after conviction is ordered, specified procedure is required to be followed by the learned Judge before imposing the sentence, while considering the basis of severity of the punishment, which reflects that it is a continuation of the process requiring the learned Judge to apply her/his mind to the evidence

::: Downloaded on - 01-09-2023 14:07:41 :::

VERDICTUM.IN

available on record to assess the nature of involvement in committing the offence, gravity of the same and impose the sentence, unlike in a civil proceeding where drawing up the decree is a ministerial act though based on the judgment.

15. At this stage, it is relevant to refer to Section 235 Cr.P.C., which is reproduced as hereunder:-

> "**235. Judgment of acquittal or conviction**. – (1) After hearing arguments and points of law (if any), the Judge shall give a judgment in the case.
>
> (2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the questions of sentence, and then pass sentence on him according to law."

16. Section 353 Cr.P.C., which relates to the language and contents of the judgment, is reproduced as under:-

> "**353. Judgment. –** (1) The judgment in every trial in any Criminal Court or original jurisdiction shall be pronounced in open Court by the presiding officer immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders,---
>
> (a) by delivering the whole of the judgment; or
>
> (b) by reading out the whole of the judgment; or
>
> (c) by reading out the operative part of the judgment and explaining the substance of the judgment in a language which is understood by the accused or his pleader.
>
> (2) Where the judgment is delivered under clause *(a)* of sub-section *(1)*, the presiding officer shall cause it to be taken down in short-hand, sign the transcript and every page thereof as soon as it is made ready, and write on it the date of the delivery of the judgment in open Court.

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VERDICTUM.IN

(3) Where the judgment or the operative part thereof is read out under clause *(b)* or clause *(c)* of sub-section *(1)*, as the case may be, it shall be dated and signed by the presiding officer in open Court, and if it is not written with his own hand, every page of the judgment shall be signed by him.

(4) Where the judgment is pronounced in the manner specified in clause *(c)* of sub-section *(1)*, the whole judgment or a copy thereof shall be immediately made available for the perusal of the parties or their pleaders free of cost.

(5) If the accused is in custody, he shall be brought up to hear the judgment pronounced.

(6) If the accused is not in custody, he shall be required by the Court to attend to hear the judgment pronounced, except where his personal attendance during the trial has been dispensed with and the sentence is one of fine only or he is acquitted:

Provided that, where there are more accused than one, and one or more of them do not attend the Court on the date on which the judgment is to be pronounced, the presiding officer may, in order to avoid undue delay in the disposal of the case, pronounce the judgment notwithstanding their absence.

(7) No judgment delivered by any Criminal Court shall be deemed to be invalid by reason only of the absence of any party or his pleader on the day or from the place notified for the delivery thereof, or of any omission to serve, or defect in serving, on the parties or their pleaders, or any of them, the notice of such day and place.

(8) Nothing in this section shall be construed to limit in any way the extent of the provisions of section 465."

17. Though at first flush, argument raised by learned counsel for the respondents may appear to be attractive, but in our considered opinion, the same is devoid of any merit. This is so for the reason that question of when a judgment is complete, has been considered and decided by the Hon'ble Supreme Court in **Sukhpal Singh Khaira's case (supra)** in the context of exercise of the

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VERDICTUM.IN

power under Section 319 Cr.P.C. In our considered opinion, it is not possible to apply the ratio thereof in the present case wherein the question to be decided is whether after the judgment of conviction was passed by the Division Bench of which one of us was a member, the sentence can be passed by the present Bench with one of the Members having retired in the interregnum.

18. At this stage, it is useful to refer to Section 326 Cr.P.C., which reads as under:-

> "**326. Conviction or commitment on evidence partly recorded by one Magistrate and partly by another. –** (1) Whenever any Judge or Magistrate, after having heard and recorded the whole or any part of the evidence in any enquiry or a trial, ceases to exercise jurisdiction therein and is succeeded by another Judge or Magistrate who has and who exercises such jurisdiction, the Judge or Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself.
>
> Provided that if the succeeding Judge or Magistrate is of opinion that further examination of any of the witnesses whose evidence has already been recorded is necessary in the interests of Justice, he may re-summon any such witness, and after such further examination, cross-examination and re-examination, if any, as he may permit, the witness shall be discharged.
>
> (2) When a case is transferred under the provisions of this Code from one judge to another Judge or from one Magistrate to another Magistrate, the former shall be deemed to cease to exercise jurisdiction therein, and to be succeeded by the latter, within the meaning of sub-section (1).
>
> (3) Nothing in this section applies to summary trials or to cases in which proceedings have been stayed under section 322 or in which proceedings have been submitted to a superior Magistrate under section 325."

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VERDICTUM.IN

19. Section 326 Cr.P.C. confers a discretion upon any judge or magistrate, who has succeeded another judge or magistrate to act on the evidence in an inquiry or trial so recorded by his predecessor. The Hon'ble Supreme Court in the case of **Narpal Singh and others v. State of Haryana, *1977 (2) SCC 131*** while upholding conviction of the accused-appellants therein under Section 302 IPC, remitted the matter to the learned trial court for hearing the matter only on the question of sentence. While dealing with contentions raised on behalf of the accused that once case is remitted to the Sessions Judge, the accused is entitled to claim a *de novo* trial on the question of conviction also, the Hon'ble Supreme Court while negating the same held as under:-

> "Counsel for the State has drawn our attention to the fact that in some cases the accused have raised the question that once the case is remitted to the Sessions Judge, then the accused is entitled to claim a de novo trial on the question of conviction also. In this connection, reliance was placed on Pyare Lal v. State of Punjab(2). In the first place, this case was based on an interpretation of ss. 251 to 259 of the Code of Criminal Procedure, 1898, and the reason why this Court held that the proceedings by a succes- sor Judge cannot be started from the stage left out by his predecessor was that a Judge who had heard the whole of the evidence before had the advantage of watching the demeanour of the witnesses which would be lost if the successor Judge was to proceed from the stage left by his predecessor. It is true that under s. 326 of the Code of Criminal Procedure, 1973, there is a discretion given to the successor Magistrate to act on the evidence already recorded and not to hold a de novo trial and no such provision is made in case of a trial by the Sessions Judge or a Special Judge. The ratio of Pyare Lal's case (supra), however, is not applicable to the present case. Once the judge who hears the evidence delivers a judgment of conviction, one part of the trial comes to an end. The second part of the trial is restricted only to the question of sentence and so far as that is concerned, when a case is remitted by us to the

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VERDICTUM.IN

Sessions Court for giving a hearing on the question of sentence under s. 235(2) of the Code of Criminal Procedure, 1973, there would be fresh evidence and the principle that the Sessions Judge may not act on evidence already recorded before his predecessor and must conduct a de novo trial would not be violated. In these circumstances, therefore, the ratio of Pyare Lal's case mentioned above cannot be applied or projected into the facts and circumstances of the present case or to cases where the trial has ended in a conviction but the matter has been remitted to the Trial Court for hearing the case only on the question of sentence."

20. Hon'ble the Supreme Court in the case of **Bhaskar @ Prabaskar v. State represented by Inspector of Police, Vellore**, ***1999 (9) SCC 551***, while dealing with a matter under the Terrorist and Disruptive Activities (Prevention) Act 1987 noted that Section 326 Cr.P.C. as it originally remained was meant to apply only to cases before courts of Magistrates. It is by the Act 45 of 1978 that the words "judge or" were also inserted just before the word 'Magistrate'. It was held that the successor judge would have the option to continue from the point as left by the predecessor and was empowered to act on the evidence already recorded in the case. It was held by the Hon'ble Supreme Court in the case of **Bhaskar @ Prabaskar's (supra)** as under:-

"15. The archaic concept was that the very same judicial personage who heard and recorded the evidence must decide the case. That concept was in vogue for a long time. But over the years it was revealed in practice that fossilisation of the said concept, instead of fostering the administration of criminal justice, was doing the reverse. Very occasionally judicial officer of one court was changed and was replaced by another. As evidence had to be recorded afresh by the new officer under the old system, witnesses who were already examined in the cases at the cost of considerable strain and expenses - not only to them but to the exchequer - were re-summoned and re-

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VERDICTUM.IN

> examined. The litigation cost thereby inflicted on the parties used to soar up. The process would have to be repeated over again if such next judicial personage also was changed. Eventually it was learnt that the object sought to be achieved by such repetitions, when compared with the enormous cost and trouble, was not of much utility. Hence the legislature wanted to discontinue the aforesaid ante-diluvian practice and decided to afford option to the successor judicial officer. Legislature conferred such option only to the magistrates at the first instance and at the same time empowered them to re-examine the witnesses already examined if they considered such a course necessary for the interest of justice. As the new experiment showed positive results towards fostering the cause of criminal justice the law Commission recommended that such option should advisedly be extended to judges of all other trial courts also."

21. It was further held in the abovesaid case that any other interpretation would inflict considerable cost to the exchequer apart from wastage of time of the courts.

22. Keeping in view the position as above, it is to be noted that in the present case due opportunity of hearing was afforded to all the parties including the accused-respondents at the time of hearing of the appeal. It is only thereafter that decision of conviction was duly pronounced on 29.01.2020. It is a matter of record that present appeals were being adjourned for presence of all the accused for passing of the order of sentence. Till 17.03.2020 all the accused were not coming present before this Court. Bailable warrants had been issued to secure presence of respondent No.7. Thereafter, due to outbreak of the pandemic COVID-19 the appeals could be listed for hearing only on 25.07.2022. In the meanwhile, one of the members of the Division Bench had retired.

23. In the given facts and circumstances, in our considered opinion, it would indeed be a travesty of justice to hold that appeals should be heard afresh

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VERDICTUM.IN

while ignoring decision dated 29.01.2020 even while we feel no necessity thereof, before sentencing the respondents or that decision dated 29.01.2020 whereby the respondents have been convicted should be set to naught merely because one of the Members of the Bench delivering the decision, has demitted office on superannuation. Learned counsel for the accused-respondents has been unable to point out any ground, whatsoever, which would persuade us to adopt such a course. It is also to be noted that no prejudice, whatsoever, has been caused to the respondents. Proper and due opportunity of hearing was afforded to them before passing the judgment of conviction on 29.01.2020. We do not find any merit in the argument advanced by learned counsel for the respondents that in view of the judgment of Hon'ble the Supreme Court in **Sukhpal Singh Khaira's case** (supra), earlier judgments of the Hon'ble Supreme Court in **Narpal Singh's case** (supra) and **Bhaskar @ Prabaskar's** (supra) are set at naught and have no applicability in the present case. It is to be noted that first and foremost, the said judgments have not been set aside till date and moreover, judgment of the Hon'ble Supreme Court in **Sukhpal Singh Khaira's case** (supra) in respect to the stage at which a 'judgment' is 'complete' has been rendered in a totally different context viz., in respect to the stage at which an accused can be summoned to face trial while exercising powers under Section 319 Cr.P.C. In case the arguments as addressed by learned counsel for the respondents are to be accepted, it would lead to an anomalous situation. The question as sought to be raised has been dealt with directly by the Hon'ble Supreme Court in the earlier judgments which squarely cover the controversy sought to be raked up.

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VERDICTUM.IN

24. Keeping in view the above facts and circumstances, we do not find any ground to list the appeals for re-hearing while setting to naught decision dated 29.01.2020.

25. Learned counsel for the parties pray for some time to submit on the question of quantum of sentence.

26. At request, adjourned to 11.08.2023.

27. Let respondents No.2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13 and 14, who are present in Court, be taken in custody forthwith and be produced in Court on the next date of hearing.

28. Photocopy of this order be placed on the file of connected case mentioned above.

(LISA GILL)
JUDGE

(ARCHANA PURI)
JUDGE

August 04 , 2023.
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