



**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 223 OF 2013

1. Rizwan Farooq Shaikh,
Age 27 years, Occu. Labourer,
R/o. Fakirwada, Ward No. 1,
Shrirampur, Dist. Ahmednagar.
2. Shoheb @ Sayyad Usman Sayyad,
Age 30 years, Occu. Labourer,
R/o. Parimal Hsg. Society,
Ward No. 1, Shrirampur,
Dist. Ahmedganar.

**....Appellants.
(Ori. Accused Nos. 1 & 2)**

Versus

The State of Maharashtra
Through Complainant
P.I. Shrirampur City Police
Station, Tal. Shrirampur,
Dist. Ahmednagar.

....Respondents.

Mr. V.D. Sapkal, Advocate h/f. Mr. N.R. Bhavar, Advocate for appellants.

Mrs. V.S. Choudhari, APP for respondent/State.

WITH
CRIMINAL APPEAL NO. 616 OF 2018

The State of Maharashtra
Through the P.I. Shrirampur
Police Station, Tal. Shrirampur,
Dist. Ahmednagar.

**....Appellant.
(Ori. Complainant)**

Versus

1. Juber Ashpak Shaikh,

Age 23 years, Occu. Labourer,
R/o. Near Municipal School No.4,
Ward No. 1, Shrirampur,
Dist. Ahmednagar.

2. Abdul @ Bhaiyya Abbaskhan Pathan,
Age 23 years, Occu. Labourer,
R/o. Near Municipal School No.4,
Ward No. 1, Shrirampur,
Dist. Ahmednagar.
3. Bala @ Ravindra Rajendra Tribhuvan,
Age 23 years, Occu. Labourer,
R/o. Sonwane Wasti, War No. 1,
Gondhavani Road, Shrirampur,
Dist. Ahmednagar.
4. Raju @ Rajendra Bhanudas Bhalerao,
Age 23 years, Occu. Labourer,
R/o. Opp. Church, Ward No. 1,
Shrirampur, Dist. Ahmednagar.
5. Sandeep Baburao Waghmare,
Age 22 years, Occu. Labourer,
R/o. Near Water Tank, Gonddhavani
Road, Ward No. 1, Shrirampur,
Dist. Ahmedngar.
6. Nilesh Suresh Alhat,
Age 28 years, Occu. Labourer,
R/o. Mangalwar Peth, Pune,
Dist. Pune.

**....Respondents.
(Ori. Accused Nos. 3 to 8)**

Mrs. V.S. Choudhari, APP for appellant/State.

Mr. M.P. Shinde, Advocate for respondent No. 3.

Mr. N.V. Gaware, Advocate for respondent No. 4, 6, 7 & 8.

(Leave is granted against respondent Nos. 1 & 2 only to file appeal vide order dated 27.8.2018.)

WITH
CRIMINAL APPEAL NO. 617 OF 2018

Muzaffar Papabhai Shaikh,
(PW5-Brother of deceased)

Age 49 years, Occu. Agri.,
R/o. "Sarkar", Subedar Basti,
Ward No. 2, Shrirampur,
District Ahmednagar.

....Appellant.

Versus

1. Rizwan Farooq Shaikh,
Age 24 years, Occu. Labourer,
R/o. Fakirwada, Ward No. 1,
Shrirampur, Dist. Ahmednagar.
2. Shoheb @ Sayyad Usman Sayyad,
Age 27 years, Occu. Labourer,
R/o. Near Municipal School No. 4,
Ward No. 1, Shrirampur,
Dist. Ahmedganar.
3. Juber Ashpak Shaikh,
Age 23 years, Occu. Labourer,
R/o. Near Municipal School No.4,
Ward No. 1, Shrirampur,
Dist. Ahmednagar.
4. Abdul @ Bhaiyya Abbaskhan Pathan,
Age 23 years, Occu. Labourer,
R/o. Near Municipal School No.4,
Ward No. 1, Shrirampur,
Dist. Ahmednagar.
5. Bala @ Ravindra Rajendra Tribhuvan,
Age 23 years, Occu. Labourer,
R/o. Sonwane Wasti, Ward No. 1,
Gondhavani Road, Shrirampur,
Dist. Ahmednagar.
6. Raju @ Rajendra Bhanudas Bhalerao,
Age 23 years, Occu. Labourer,
R/o. Opp. Church, Ward No. 1,
Shrirampur, Dist. Ahmednagar.
7. Sandeep Baburao Waghmare,
Age 22 years, Occu. Labourer,
R/o. Near Water Tank, Gondhavani
Road, Ward No. 1, Shrirampur,
Dist. Ahmedngar.

8. Nilesh Suresh Alhat,
Age 28 years, Occu. Labourer,
R/o. Mangalwar Peth, Pune,
Dist. Pune.
9. The State of Maharashtra
Through Complainant
P.I. Shrirampur City Police
Station, Tal. Shrirampur,
Dist. Ahmednagar.

....Respondents.

Mr. S.T. Shelke, Advocate for appellant.

Mr. V.D. Sapkal, Advocate h/f. Mr. N.R. Bhavar, Advocate for
respondent Nos. 1 & 2.

Mr. M.P. Shinde, Advocate for respondent No. 3.

Mr. N.V. Gaware, Advocate for respondent No. 4, 6, 7 & 8.

Mrs. V.S. Choudhari, APP for respondent No. 9/State.

(Appeal of respondent No. 1 & 2 is already admitted. Leave is
granted against respondent Nos. 3 & 4 only to file appeal vide order
dated 27.8.2018.)

**CORAM : T.V. NALWADE AND
S.M. GAVHANE, JJ.**

RESERVED ON : 21/11/2019.

PRONOUNCED ON : 12/12/2019

JUDGMENT : [PER T.V. NALWADE, J.]

1) The first appeal bearing Criminal Appeal No. 223/2019 is
filed by accused Nos. 1 and 2 of Sessions Case No. 24/2010, which
was pending in the Court of learned Ad-hoc Additional Sessions
Judge, Shrirampur, District Ahmednagar. The Trial Court has
convicted and sentenced these accused/appellants for the offences
punishable under section 302 r/w. 120-B etc. of Indian Penal Code
(hereinafter referred to as 'I.P.C.' for short) and also for the offences

punishable under sections 3, 5 r/w. 25 of Arms Act. The sentence of imprisonment of life is given and fine amount of Rs.10,000/- is imposed on each of them. Criminal Appeal No. 616/2018 is filed by the State against accused No. 3 Juber Ashpak Shaikh and accused No. 4 Abdul @ Bhaiyya Abbaskhan Pathan as they are acquitted of the aforesaid offences. Criminal Appeal No. 617/2018 is filed by the informant against accused Nos. 3 and 4 to challenge the acquittal given to them. Both the sides are heard.

2) In short, the facts leading to the institution of the appeals can be stated as follows :-

The incident in question took place on the night between 8.1.2010 and 9.1.2010 near Government godown wall which is situated at Azad Chowk, Shirampur, District Ahmedngar. Informant Manoj Gupta (PW 1) sells snacks called as 'Bhel' on his hand cart bearing name Laxmi Farsan in the evening at this spot. His cart remains there from 1.00 p.m. onwards till late hours of night. As usual, on that day also he was present with his hand cart at the spot of offence. Deceased Ayub Papabhai Shaikh was known to Manoj.

3) At about 11.30 p.m. of 8.1.2019 deceased Ayub came to the hand cart of Manoj and he sat on the bench kept by Manoj. The deceased started applying tobacco powder (Mishri) to his teeth. After some time he asked Manoj to give a glass of water to rinse the

mouth. In the meantime, Iqbal Memon, another person, who was also known to both Manoj and Ayub came there and there was some talk between Iqbal and the deceased. After that the deceased rose from the bench to rinse mouth. Within no time, two motorcycles came from Gondhavani road towards the hand cart. There were three persons on one motorcycle and there were two persons on second motorcycle. These motorcycles stopped near the stall of Manoj.

4) Manoj (PW 1) knew accused No. 1 Rizwan Shaikh and accused No. 2 Sayyad Usman out of the five persons who had come there on two motorcycles. Manoj noticed that the riders of the two motorcycles remained on their seats and they kept the engines of the motorcycles in running condition. The other three persons from the two motorcycles got down from the two vehicles and they came towards deceased Ayub. Then accused No. 1 Rizwan held neck of Ayub and gave abuses to Ayub and said that he was there to finish Ayub. Then he shot bullet by using pistol on the abdomen of Ayub. Accused No. 2 Sayyad was also there and he shot another bullet from his pistol on the head of Ayub. When accused Nos. 1 and 2 were firing bullets at Ayub, the third man, who was having little bit less height and who was having medium built was showing his fire arm, pistol to the shop owners of the vicinity and he was asking them to leave the spot. When Ayub collapsed due to the aforesaid firing, accused Nos. 1 and 2 and other three persons who were in their

company, left the spot on the same two motorcycles and their motorcycles went towards Shivaji Chowk. Manoj could see the three persons who were in the company of accused Nos. 1 and 2 though they were not known to him prior to the date of incident. Manoj noticed that one of the two motorcycles was of Unicorn Honda Company.

5) When the aforesaid five persons left the spot, Manoj shouted for help. Ayub Poptiya and Maulana Akbar Ali were in the vicinity and they rushed to the spot. They shifted Ayub to hospital on motorcycle. They first took Ayub to German Hospital and then to other private hospital. But in both the hospitals, doctors were not available and so, they took the deceased to Sakhar Kamgar Hospital. After examining Ayub, the doctor from Sakhar Kamgar Hospital declared that Ayub was already dead. Manoj (PW 1) gave report to police about the incident and on the basis of his report, the crime came to be registered in Shirampur City Police Station at 1.30 a.m. on 9.1.2010 at C.R. No. 8/2010.

6) Police Inspector Shri. Pardeshi (PW 17) took over the investigation of the case. He prepared inquest panchanama in the presence of panch witnesses in the aforesaid hospital. Police Officer Shri. Nikam of this police station went to the spot for preparation of spot panchanama and spot panchanama came to be prepared. From

the spot, two caps, empty cartridges and earth mixed with blood were taken over and a pair of Chappals which were lying there also were taken over under panchanama. Some investigation was made by Police Inspector Shri. Padole (PW 16). The dead body was referred for post mortem (P.M.) examination. The clothes of the deceased were taken over under panchanama.

7) After making some investigation, and recording some statements, Shri. Padole (PW 16) got information about some persons, who were involved in the offence like accused Ravindra Tribhuwan (accused No. 5) and Rajendra Bhalerao (accused No. 6). Steps were taken to collect C.D.R. record in respect of those persons. Ravindra and Rajendra came to be traced on 12.1.2010 and they came to be arrested.

8) On the basis of information collected by police on 13.1.2010 accused Nos. 1 to 4 came to be arrested after tracing them at Chakan Phata, Talegaon Dhabhade Chowk, District Pune. When personal search of accused Nos. 1 and 2 was taken in the presence of panchas at this spot, two fire arms came to be recovered from accused Nos. 1 and 2. These fire arms came to be seized under panchanama. Two live cartridges were also recovered from the possession of accused No. 2 and they were seized.

9) During investigation police received information against accused No. 8 Nilesh Alhat. It transpired that Nilesh was arrested in Pune by Pune police as he was found in possession of fire arm and he was history sheeter. Name of accused No. 7 Sandip Waghmare also transpired during investigation. He also came to be arrested. It transpired that Wasim Gulab Shaikh one more accused was involved in the offence in addition to the eight accused who came to be arrested in the crime, but he could not be traced and he is shown as absconding accused. C.D.R. record in respect of mobile phones of these accused came to be collected.

10) Test identification (T.I.) parade came to be arranged to give opportunity to witnesses who were present on the spot to identify the arrested accused persons. It was held on 20.3.2010. Some witnesses identified accused No. 3 and some witnesses identified accused No. 4. The two motorcycles which were used for going to the spot of offence by accused, came to be discovered and they came to be seized.

11) The articles seized during investigation came to be sent to forensic laboratory and ballistic expert for getting opinion. After completion of investigation, chargesheet came to be filed against eight accused and the case was tried against eight accused. Chargesheet was filed for the offences punishable under sections

302, 143, 147, 148, 149, 120-B, 504, 506 etc. of I.P.C. and also for the offence punishable under sections 3, 5 r/w. Section 25 of Arms Act. Charge was framed and plea was recorded. All the accused pleaded not guilty. The prosecution examined in all 18 witnesses to prove the offences. Accused did not examine any witness and they took the defence of total denial.

12) Manoj Gupta (PW 1) is the main witness of prosecution and he was having the best opportunity to witness the entire incident. The deceased was present at his stall at the relevant time. In view of this circumstance, the Trial Court has given more weight to the evidence of Manoj (PW 1). There is another eye witness like Maulana Sayyad (PW 2), but he had rushed to the spot after starting of the incident. The Trial Court has held that only accused Nos. 1 and 2 were known to Manoj and evidence of Manoj on identification of accused No. 3 is doubtful in nature. Manoj had not identified accused No. 4 even in T.I. parade. As there is inconsistency in the evidence given by PW 1 and PW 2 with regard to role played by accused Nos. 3 and 4 and the evidence as regards the identification of these accused is doubtful in nature, the benefit of doubt is given to accused Nos. 3 and 4. As appeals are filed by accused Nos. 1 and 2 and appeals are filed against accused Nos. 3 and 4, this Court is considering the evidence given only against these accused persons.

13) Manoj (PW 1), the main witness of prosecution has given evidence that the time of his business was 1.00 p.m. to 12 hours of night. He has given evidence that on 8.1.2010 also he was present on the spot of offence with his hand cart for the business, selling snacks, Bhel. He has deposed that the deceased came to his stall at about 11.15 p.m. and after sitting on the bench, he started applying Mishri to the teeth. He has deposed that Iqbal Memon came there and he had some talk with the deceased. He has deposed that the deceased then asked for a glass of water from him and when deceased was rising from the bench, two motorcycles came from the side of Gondhavani road to his stall. He has deposed that both the motorcycles stopped near his stall and from these two motorcycles three persons got down and came towards his stall. He has deposed that the two persons who were riding the motorcycles remained on the motorcycles and they had kept the engines of the motorcycles in running condition. Manoj (PW 1) has deposed that from prior to the date of incident he knew accused No. 1 Rizwan and accused No. 2 Sayyed. He has deposed that accused No. 1 held the deceased by his neck and said that he had come there to finish the deceased. Abusive language which was used by accused No. 1 is given in the deposition by Manoj and the words uttered are that, “ Tere Bahen Ki Chut, Tuze Mar Dalunga’ (तेरे बहेनकी चूत, तुझे मार डालुंगा). Manoj (PW 1) has deposed that accused No. 1 then fired one shot of his pistol on the abdomen of the deceased and then accused No. 2 Sayyed fired

one shot by using his pistol on the head of the deceased. Manoj (PW 1) has deposed that the third person who had also got down from the motorcycle was holding another pistol and by showing that pistol, he was giving threats to the persons in the neighbourhood including the shop owners and he was asking them to leave the place by closing their shops. Manoj has deposed that deceased Ayub collapsed due to the aforesaid firing at him and then all the five persons went away on the same motorcycles.

14) Manoj (PW 1) has deposed that he shouted for help and then persons like Ayub Popatiya and Maulana Akbar Ali rushed to his stall and they shifted the deceased to hospital. His evidence shows that he had not gone with these two persons. He has deposed that when he learnt that Ayub was taken to Sakhar Kamgar Hospital, he went there and there he learnt that Ayub was dead. He has deposed that he then went to police station and he gave report about the incident. His report is proved as Exh. 136.

15) In examination in chief, Manoj (PW 1) has stated that he was knowing all the accused persons and he has further deposed that accused Nos. 1 to 3 and accused No. 7 had come there along with one more person for committing the offence.

16) Exh. 136, the F.I.R. is consistent with substantive

evidence of Manoj (PW 1) so far as it is in respect of firing done by accused Nos. 1 and 2. In the F.I.R. also, he has mentioned that he knew accused Nos. 1 and 2 from prior to the date of this incident. In F.I.R., Manoj had not given the names of other three persons who had come there on two motorcycles. Though he had described the third person who had got down from the motorcycle, his name was not given. On the other hand, in F.I.R. it was specifically disclosed by Manoj (PW 1) that only accused Nos. 1 and 2 were known to him and they had come there with three unknown associates. This portion of F.I.R. was confronted to PW 1 during cross examination and he has stated that he had wrongly mentioned in the F.I.R. that there were three other persons, unknown associates of accused Nos. 1 and 2. Thus, the evidence given in the Court that accused Nos. 3 and 4 were known to Manoj is hit by omission in F.I.R.

17) Manoj (PW 1) has deposed that in the past, there was quarrel between accused No. 3 Juber and family of the deceased over the transaction of sale of mobile hand set. He has given evidence on other incident in which accused Nos. 1 to 3 were involved and they had kidnapped one lady from other station for ransom. He has given evidence that deceased Ayub had rescued that lady and in that incident deceased Ayub and his persons had assaulted accused Nos. 1 to 3. He has given evidence that due to these incidents enmity was developed between the deceased on one

side and accused Nos. 1 to 3 on other. He has given evidence that from prior to the date of incident, these accused had kept watch on the movements of Ayub and the accused had vowed to finish Ayub. All this part of evidence is hit by omission in the F.I.R.

18) It appears that T.I. parade was held on 20.3.2010 after about 70 days of the incident. In T.I. parade, opportunity was given to many witnesses including PW 1 and PW 2 to identify the persons involved in the incident. In the Court, Manoj has not given evidence that he had identified either accused No. 3 or accused No. 4 in T.I. parade. Though for the reasons given afterwards, the record of T.I. parade (Exh. 251) cannot be used in evidence, it can be said that the record shows that Manoj could not identify accused No. 4 in T.I. parade. As per the record he had identified accused No. 3 in T.I. parade.

19) The record of the case shows that record of T.I. parade, Exh. 251, is not admitted by the defence. On Exh. 251, it is mentioned that due to the order made by the Trial Court Judge dated 25.3.2013 the record was given exhibit. This Court has carefully seen the record including the Roznama. As per the practice in Mofussil Courts of this State, order could have been made on some application or on chargesheet. There is no such order dated 25.3.2013. In Roznama, there is only mention that there was

direction of the Court to give exhibit to this record and so, Exh. 251 was given to this record. The officer before whom the T.I. parade was conducted is not examined. Manoj (PW 1) has not referred the incident of T.I. parade. As there is no evidence from Manoj (PW 1) about T.I. parade and as there is no evidence even of the concerned officer to prove the record, this record cannot be used as evidence under section 3 of the Evidence Act.

20) There are more circumstances which make it necessary to discard the record of T.I. parade. The evidence of Manoj (PW 1) shows that on 25.1.2010 his supplementary statement was recorded by police. The evidence given by PW 1 on the motive of accused persons including accused Nos. 1 to 4 is already mentioned. There was no mention of such motive in the F.I.R., but in supplementary statement, such motive was collected and in that statement, Manoj contended that he knew accused Nos. 1 to 4 and also the absconding accused Wasim Shaikh from prior to the date of incident. The circumstance that such supplementary statement came to be recorded on 25.1.2010 and after that T.I. parade was held on 20.3.2010 shows that the investigation was not in competent hands. In view of the supplementary statement dated 25.1.2010 it cannot be said that there was any necessity for arranging T.I. parade to enable Manoj (PW 1) to identify the accused persons.

21) The evidence of Manoj (PW 1) shows that Iqbal Memon was present at his stall just before the incident of firing. His evidence shows that he had engaged labour to assist him at the stall. His evidence shows that there were other hand carts of hawkers selling eatables in the vicinity. Those witnesses are not examined. Maulana Sayyad (PW 2) who had come in the vicinity by chance is examined by prosecution as the other eye witness.

22) Maulana (PW 2) has deposed that he and Ayub Poptiya were in the vicinity of the spot of offence by chance. He has deposed that prior to coming to the spot of offence where he was sitting with Poptiya, he had crossed the food stall of PW 1 and at that time, he had said hellow to the deceased. Maulana (PW 2) has deposed that at tea stall he heard noise of breaks applied by motorcycles and then he paid attention towards the side of the stall of PW 1. He has deposed that he noticed that one person was showing revolver and asking to owners of the stalls to go away. He has deposed that he then noticed that accused No. 1 was holding neck of deceased Ayub and he was telling Ayub that he was there to finish Ayub. He has given the sentence uttered by accused no. 1 at that time on which evidence is given by PW 1 also. Maulana (PW 2) has given evidence that accused No. 1 then fired bullet in the abdomen of deceased. He has deposed that accused No. 2 fired bullet on the head of the deceased by using his fire arm. He has deposed that at the relevant

time, there were three persons sitting on two motorcycles on which accused Nos. 1 and 2 had come there. This part is inconsistent with the previous part of evidence in which he had stated that one person was holding other revolver and he was keeping the shop keepers away from the spot. Maulana (PW 2) has given evidence that he and Ayub Poptiya rushed to the spot when firing was over and they shifted the deceased first to German Hospital and then to Anarase Hospital and then to Sakhar Kamgar Hospital. The evidence shows that as doctors were not available at German Hospital and Anarase Hospital, the deceased was taken to Sakhar Kamgar Hospital and there doctors declared that Ayub was dead. There is M.L.C. prepared by Sakhar Kamgar Hospital showing that the time of death was mentioned as 12.45 hours of that night.

23) In examination in chief itself, Maulana (PW 2) has deposed that the person who was giving threat to stall owners was accused No. 3. He has deposed that the accused who were sitting on the motorcycles were Bhaiyya (accused No. 4) and Wasim (absconding accused). Maulana identified accused Nos. 1 to 4 in the Court as the persons who were involved in the incident. Maulana has given evidence that in T.I. parade he identified the accused, but he has not specifically stated as to which accused was identified by him.

24) Maulana (PW 2) has deposed that his supplementary

statement was recorded. Like in case of PW 1, he had not stated in first police statement recorded on 9.1.2010 that he knew accused Nos. 3 and 4 and absconding accused. In supplementary statement dated 25.1.2010 he took names of not only other three accused, but also the remaining accused and he informed to police that there was motive for the crime for all the accused. The omission in police statement dated 9.1.2010 in respect of the name of accused Nos. 3 and 4 and absconding accused was confronted to Maulana. He admitted the omission in respect of accused No. 3, but he did not admit the omission in respect of accused No. 4 and absconding accused. The record shows that the omission in previous statement in respect of accused No. 4 and absconding accused was not proved in the evidence of Investigating Officer (PW 18), who had recorded the first statement of Maulana. There are many other circumstances showing that the APP and the defence counsel did not properly conduct the matter and even the Trial Court did not follow the proper procedure for giving exhibits to many documents.

25) Evidence of PW 1 and PW 2 shows that PW 1 took the name of Sandeep (accused No. 7) as the fifth person when PW 2 took the name of Wasim (absconding accused) as the fifth person. The evidence of PW 1 shows that only when the incident of firing was over, he shouted and after that Maulana and Poptiya came towards his stall. These circumstances need to be kept in mind as it has not

come in the evidence of PW 1 that he had seen these two persons in the vicinity when the firing had taken place.

26) The aforesaid evidence shows that the evidence as against accused Nos. 3 and 4 is hit by material omission in the previous disclosures made to police on 9.1.2010. While considering the evidence given as against accused No. 4 by Maulana (PW 2), more weight needs to be given to the evidence of PW 1 in view of the aforesaid circumstances. Further, the evidence of Police Officers also does not show that they had convincing information as against accused Nos. 3 and 4 on 9.1.2010. It is already observed that the investigating agency has virtually destroyed the important piece of evidence like the evidence of T.I. parade by recording the statements of the witnesses as supplementary statements on 25.1.2010.

27) There is circumstantial evidence to corroborate the evidence of PW 1. To prove the spot panchanama, prosecution has examined panch witness Shri. Dattatraya Vaidya (PW 3) and Police Inspector Shri. Sopan Nikam (PW 13). Even photographs of the spot were taken when the panchanama was prepared. But, unfortunately that record is not proved. The spot panchanama is proved as Exh. 148. The panchanama was drawn on 9.1.2010 between 1.45 p.m. and 2.40 p.m. This evidence shows that blood was found on the spot and the spot was shown by the informant Manoj (PW 1). A pair of

Chappal was lying there. Two caps of bullets, empty cartridges were found on the spot. The description of the letters appearing on the caps is mentioned in the panchanama. In view of the other circumstances which this Court is discussing at proper place, this Court is avoiding to burden the record by mentioning atleast description of the caps and weapons. Map of scene of offence was prepared on Exh. 148. The evidence of spot panchanama is consistent with the direct evidence given by PW 1 and PW 2.

28) The tenor of the cross examination of PW 1 made by the defence counsel shows that the accused did not dispute that Ayub was murdered on the spot shown in Exh. 148. It was suggested to PW 1 that the time of his business was over at about 10.00 p.m. and so, he could not have witnessed the incident. This suggestion is denied. Nothing is on the record to show that it was not open to the stall owners to do the business after 10.00 p.m. The F.I.R. was given almost immediately after the incident. The evidence of PW 1 does not show that he had deliberation with the relatives of the deceased. It is already observed that he knew only two accused persons and he gave the names of two persons in the F.I.R. and he described other three persons as unknown associates. His evidence shows that he was not that interested in the deceased and he had no reason to falsely implicate accused Nos. 1 and 2. There is nothing on the record due to which his evidence needs to be looked with suspicion

so far as his evidence given as against accused Nos. 1 and 2 is concerned. There are more circumstances like medical evidence to corroborate the version of PW 1.

29) Dr. Jame Bashir (PW 11) has given evidence on P.M. examination. P.M. report is proved in his evidence as Exh. 173. The P.M. was conducted on 9.1.2010 between 10.45 a.m. and 1.30 p.m. Dr. Jame (PW 11) has deposed that the death took place 10 to 24 hours before the time of P.M. examination. He has given opinion regarding cause of death as “death due to hemorrhagic shock due to firearm injuries (unnatural)”. Injuries are described in column No. 17 in Exh. 173 and they are as under :-

“17 (1):- A single penetrating oval shaped injury over anterior abdominal wall in left hypochondric region with anterior end slightly lower than posterior end, directed above downward towards umbilicus, injury was located at a distance of 112 cms from heel, 18 cms below the left nipple, 13 cms below and lateral to xiphoid, 12.5 cm from umbilicus and 17 cms above anterior superior illiac spine. The margins of wound are inverted with clots of blood seen in its depth. There was an abrasion collar of 0.5 cms broad along the posterior upper margin of the wound. The injury penetrates anterior abdominal wall below the coastal margin entered through the peritoneum then stomach and from stomach to messentry, from messentry to abdominal aorta and after leaving abdominal aorta the

bullet get lodged into the body of 3rd lumber vertebra from where it was recovered.

17 (2):- A single circular penetrating wound over parietal region of left side, about 12 cms above the left eye brow, 2.9 cms lateral and 22 cms anterior to mid occipital protanence and 15 cms away from left mastoid process, size of would is 1.7 cms in diameter X cavity deep with punched out, lacerated margins, through which small shattered piece of bone and brain matter seen. Circular shaped fracture skull underneath the wound above mentioned with subgial haematoma around and margins of skull fracture well demonstated with infiltrated blood at margins and inner table there is evidence of bevelling of size of 0.3 cms, then bullet penetrates dura entered into the left parietal lobe adjacent to above mentioned fractured skull passed downwards, vertically upto the base of brain matter, turned horizontally through 3rd ventricle to lower margins of corpse callousm, then pones and lodged into mid of medulla oblongata, 1.5 cm above foreman magnum and bullet base was distorted and then whole tract was haemorrhage and lacerated. (Injury No. 1 and 2 are antemortem injuries).”

Dr. Jame (PW 11) has deposed that injury No. 2 is sufficient to cause the death in ordinary course of nature. If the description of injury No. 1 is seen, it can be said that this injury also would have caused the death in ordinary course of nature. On overall medical record the opinion is given that the fire arm injuries caused the death.

30) In the cross examination of Dr. Jame (PW 11), it is brought on the record that there was no gun powder or burn of skin seen by the doctor at the entry point of both the bullet wounds. Not much can be made out due to this circumstance. It was submitted for the accused that this admission of the doctor creates a probability that the firing was done from more distance than the distance which is given by PW 1 and so, PW 1 cannot be believed. This submission is not at all acceptable. Only as against accused No. 1 evidence is given that he had held the deceased by his neck and then he had fired a bullet on abdomen of the deceased. This evidence itself shows that accused No. 2 was not at close distance when he fired at the head of the deceased. In any case, there is convincing evidence of Dr. Jame (PW 11). There is record of aforesaid nature to show that both the injuries were caused by fire arms and the defence has not suggested that these injuries were not caused by fire arms. In view of nature of injuries, it can be said that they could have been caused only by pistol or revolver and not by gun or rifle. This circumstance needs to be kept in mind. Thus, the medical evidence gives necessary corroboration to the versions of PW 1 and PW 2.

31) Shahid Khan Pathan (PW 7), panch witness and Bharat Ballayya (PW 14), panch witness have given evidence on

panchanama of seizure of clothes of the deceased. This document is proved as Exh. 62 and it was prepared on 9.1.2010. This evidence shows that shirt, tea shirt and sando banian were on the person of the deceased and at the side of abdomen on all the three clothes holes were noticed. Thus, there were atleast three garments at the place where firing was done by accused No. 1. It is already observed that evidence does not show that the firing on the head was done from close distance by accused No. 2. These pieces of circumstances explain as to why the signs which could have been noticed if there was firing from close distance could not appear on the dead body.

32) Shri. Padole (PW 16), the Investigating Officer has given evidence that on 13.1.2010 he intercepted and arrested accused Nos. 1 to 4 at Talegaon Dabhade Chowk near Chakan Phata. His evidence shows that he picked them up when they were getting down from a truck and he had gone there as there was specific information about the possibility of their arrival at this spot. He has given evidence that after taking personal search of accused No. 1, six bore revolver was recovered from his possession. After taking personal search of accused No. 2, one pistol with maxim was recovered from the possession of accused No. 2. He has deposed that two live cartridges were also found with accused No. 2. Common panchanama of seizure of these articles was prepared and it is at Exh. 191. Prosecution has not examined any panch witness to prove

this incident and there is the evidence of only interested witness PW 16. In ordinary course, when PW 16 was taking action within jurisdiction of other police station, he would have informed the other police station and other police station would have created record in respect of arrest of these accused at this spot and also about seizure of articles as made necessary under the provisions of Criminal Procedure Code (Cr.P.C.). Even the description of the truck is not given by PW 16. In ordinary course, in such case police officer would have recorded statements of truck driver and cleaner which could have lend credence to the version of PW 16. There is no record like such information was received, the entry of the accused was taken in any record and entry of movement of PW 16 along with vehicle was made in any register. Due to all these circumstances, this Court holds that the evidence of seizure of two fire arms from accused Nos. 1 and 2 cannot be used against them.

33) Shri. Padole (PW 16) has given evidence that during investigation, he collected C.D.R. record in respect of few mobile numbers of the accused. The evidence on the record shows that no sim card or no hand set was recovered from any of the accused. Further, there was no compliance of provision of section 65-B of the Evidence Act for making that record admissible. The Trial Court has not touched that record and this Court holds that such record cannot be considered. Such record ordinarily helps to prove the conspiracy,

but it appears that the investigating agency and the prosecution side did not prosecute the matter properly.

34) Three weapons are shown to be seized in the present matter and one weapon is shown to be recovered from accused No. 8 Nilesh Alhat. That weapon was shown as recovered in R.C.C. No. 1654/2010 which was filed in the Court of J.M.F.C. Pune against Nilesh. Copy of the judgment of that matter is on the record and it shows that on 18.2.2010 one country made pistol was found with Nilesh and due to that, case was filed against him for offence punishable under section 3 r/w. 25 of Arms Act. By the decision dated 30.4.2012 this accused was acquitted by the learned J.M.F.C., Pune. No evidence in respect of seizure of the weapon from possession of Nilesh is given in the present matter, though this weapon is shown to be sent to ballistic expert with empty cartridges recovered from the spot of offence.

35) Prosecution has examined one more witness like Imam Shaikh (PW 4), a pan stall owner to give some circumstantial evidence. This witness has deposed that his pan stall was situated near Minar Hotel which is in the vicinity of the spot of offence. Evidence of Dattatraya (PW 3) already discussed shows that he was present at the relevant time near the tea stall and this tea stall is situated near Minar Hotel. On that basis the prosecution wants to

show that PW 4 was also present in the vicinity of the spot of offence at the relevant time.

36) Imam Shaikh (PW 4) has given evidence that at the relevant time, he was present near his pan stall and his attention was drawn to the spot when he heard sounds of shots which appeared to him like the sounds of fire crackers. He has deposed that then he noticed that two motorcycles passed by his shop and they had come from the side from where he had heard the sounds of firearms shots. He has deposed that three persons were present on one motorcycle and two persons were present on the second motorcycle. He has deposed that out of the three persons who were present on one motor cycle, two were known to him like Juber (accused No. 3) who was riding the motorcycle and accused No. 1 Rizwan who was on extreme backside. His evidence shows that he did not know the third person who was sitting in the middle. He has deposed that on the second motorcycle, there were two other persons like Bhaiyya (accused No. 4) and Sayyad (accused No. 2). He has vaguely stated in the evidence that these five persons were having two pistols. He has stated that Saydu (accused No. 2) was saying that now it was the turn of Raju. The specific words uttered by Saydu are given by him as "Bhainchod Raju Ab Teri Bari Hai (भैनचोद राजू अब तेरी बारी है). Imam (PW 4) has tried to say that he knew at least

four persons out of five who came on that day from the side of spot of offence on two motorcycles.

37) Imam (PW 4) has deposed that he had seen the pistol in the hand of one man who was sitting in the middle of accused Nos. 1 and 3 and the other pistol was with accused No. 1. He has deposed that accused No. 2 was holding a gun. This evidence of PW 4 is not consistent with the evidence of PW 1 and PW 2. Their evidence on the persons, who were riding the motorcycles is of different nature and the evidence is also different in respect of the persons who were holding the weapons. This inconsistency is in respect of accused No. 3 Juber.

38) Police statement of Imam (PW 4) was recorded on 11.1.2010 and it was late by two days. There is no explanation given on this delay. The evidence on the record shows that this witness was also called for T.I. parade. In the cross examination, he has admitted that from prior to the date of incident he knew accused Nos. 1 to 4. Thus, the evidence of PW 4 in respect of T.I. parade could not have given corroboration to the evidence of PW 4. Like in cases of PW 1 and PW 2 the supplementary statement of this witness was recorded on 26.1.2010 and the relevant portions were confronted to PW 4 and they are portions 'B' and 'C'. Thus, in supplementary statement which was recorded prior to T.I. parade, he had stated that

he knew all the accused including Wasim Shaikh. The evidence of PW 4 in the cross examination shows that he could not explain the things and described many things asked to him and he could not stand to the test of cross examination. This Court holds that the evidence of this witness is of no use to the prosecution.

39) In addition to direct evidence and circumstantial evidence discussed above, there is the evidence of one more circumstance viz. motive. Shaikh Mujaffar (PW 5), brother of deceased is examined by the prosecution to prove the motive. Not only the evidence of this witness, but the evidence of other witness shows that the deceased was in politics and in social work. He was corporator of the Local Body from the year 1996 to 2001. Wife of deceased and wife of PW 5 were corporators from the year 2001 to 2006. The deceased was Director of Mula Pravara Electricity Society. Evidence is given that in 1999 there was family matter of accused Nos. 1 and 2 and in that matter, accused Nos. 1 and 2 had suspicion that the deceased had taken the side of opposite side. Evidence is given that from that time, a grudge was developed by accused Nos. 1 and 2 against the deceased. Evidence is given that nephew Danish had dispute with accused No. 3 Juber as in the year 2007 a mobile hand set was sold by Danish to Juber and the price was not paid by Juber. Due to that transaction, there was quarrel and so, Juber had grudge against the family of deceased. Evidence is given that in the

year 2009 one lady was kidnapped by accused Nos. 1 to 3 for extortion and the deceased had intervened in that incident also and after rescuing that lady, the deceased and his persons had given beating to accused Nos. 1 to 3. Evidence is given that after the last incident, accused Nos. 1 to 3 had taken vow and they had decided not to have hair cut till Ayub was finished. There is such evidence of PW 1, PW 2 and PW 5 also. The tenor of the cross examination shows that it is not disputed that the relations between the deceased and accused Nos. 1 to 4 were strained. Due to these circumstances, this Court holds that there is no reason to disbelieve the prosecution evidence on motive. Thus, there was reason for atleast accused Nos. 1 to 3 to finish the deceased.

40) Discussion of evidence given as against accused Nos. 1 to 4 shows that there is specific evidence as against accused Nos. 1 and 2 and it can be safely relied upon to base the conviction. The evidence given as against accused Nos. 3 and 4 is hit by material omissions and there are also inconsistencies in the evidence given as against them which are already quoted. It is already observed that the evidence on circumstances like discovery of weapons by investigating agency cannot be used even as against accused Nos. 1 and 2. Even if that part of evidence is discarded, there is direct evidence as against accused Nos. 1 and 2 which has corroboration of medical evidence, evidence of spot panchanama and the evidence

on motive. When there is such direct evidence and no other possibility is there, conviction can be safely based on the direct evidence even if there is no recovery of weapons used in the incident. The law developed on this point is discussed at proper place on the basis of case laws cited by both the sides.

41) The conviction is given as against accused Nos. 1 and 2 for the offence of conspiracy also. In the case reported as **Bhagwandas Keshwani etc. Vs. State of Rajasthan [1974 CRI.L.J. 751 SC]** and also in the case reported as **Mohammad Usman Mohammad Hussain Maniyar and Anr. Vs. The State of Maharashtra [AIR 1981 SUPREME COURT 1062]**, the Apex Court has made it clear that conspiracy is often hatched in secrecy and so in most of the cases direct evidence on conspiracy is not available. It is observed that conspiracy needs to be inferred from the acts, statements and the conduct of the parties to the conspiracy. The Apex Court has laid down that if it is proved by the prosecution that all the accused pursued by their acts, the same object by the same means, then it is open to the Court to infer that all of them acted to effect the same object. It is observed that during execution of conspiracy, one accused may take one responsibility and other accused may take other responsibility and if they had completed the act or they had attained the object all of them, all of them are responsible for offence of conspiracy. Unfortunately, in the present

matter as already observed the investigating agency did not collect the material properly and the prosecution has also not conducted the case properly. There are other circumstances also due to which it is not possible to believe that accused Nos. 3 and 4 were part of conspiracy. As against accused Nos. 1 and 2, there are many circumstances due to which the conspiracy can be inferred against them and they are as under :-

- (i) The incident took place at about 11.30 p.m. in the night time at snack stall and it was not routine of the deceased to go there. The evidence on the record shows that watch was kept by accused and after learning that deceased was there, accused had gone to the spot.
- (ii) Accused Nos. 1 and 2 had carried weapons, fire arms with them. Thus, they had procured the fire arms already and they had taken decision to finish the deceased.
- (iii) Accused Nos. 1 and 2 fired the shots at the head and abdomen when the deceased was helpless and this circumstance shows that they had come there only to finish the deceased and they left the spot only when they accomplished their object.
- (iv) Accused Nos. 1 and 2 had come on motorcycles to the spot and so, they had taken care to see that they can escape from the place of offence immediately after the incident was over.

(v) Accused Nos. 1 and 2 had motive for the crime and they had taken decision to finish the deceased. The deceased was proving to be obstacle in their activities.

42) On the basis of aforesaid circumstances, this Court holds that conspiracy can be safely inferred atleast as against accused Nos. 1 and 2 and the Trial Court has not committed any error in inferring conspiracy against accused Nos. 1 and 2.

43) There is some evidence which can be called as not deserving the discussion. The evidence is given on the recovery of two motorcycles. Panchanamas of seizure of two motorcycles were prepared. PW 1, eye witness had given the description of company of one motorcycle, but the number was not noted by him. Though the motorcycles are shown to be seized, no prosecution witness has identified these motorcycles by giving substantive evidence. Further, one motorcycle was taken over from open space, though the other motorcycle was traced on the basis of information given by one accused, not by accused Nos. 1 to 4.

44) There is evidence of Irfan Pathan (PW 10) as against accused Sandeep (accused No. 7). As appeal is not as against this accused, this evidence need not be considered. Similarly, he has given evidence against other accused like Bala (accused No. 5) and

Raju (accused No. 6) and that evidence need not be discussed. That evidence is given only to show that they were seen in the company of accused on 9.1.2010 and 10.1.2010. There is evidence of Dhananjay (PW 12) which is to the effect that he knew accused Sandeep Waghmare and Raju Tribhuvan and he had given mobile hand set to Raju Tribhuvan on 8.1.2010 and it was returned to him by Mahesh Ingale on the next day.

45) For the reasons already given there is no need to discuss in detail evidence of C.D.R. C.D.R. record in respect of some sim cards is produced. But the record shows that there was no compliance of provision of section 65-B of the Evidence Act. Surprisingly, the Trial Court has given exhibits to covering letter which was sent to the concerned company for supplying the C.D.R. record and also to the entire C.D.R. record and that record is exhibited as 217 and 218.

46) There is C.A. report in respect of clothes of the deceased at Exh. 236 and ballistic report at Exhs. 237 and 238. This Court is not burdening the record of decision by describing the report of experts. It is already observed that the recovery of weapons from the possession of accused Nos. 1 and 2 is not satisfactorily proved and no evidence at all is given for the recovery of third weapon.

47) The learned counsels of the appellants placed reliance on some reported cases. Similarly, the learned APP placed reliance on observations made in some reported cases and they are as under :-

(i) **Soni Vs. State of Uttar Pradesh [1983 SCC (Cri)**

4901] :- This case is on T.I. parade and the effect of delay in holding T.I. parade. In the present matter, this Court has already observed that there are many circumstances in the present matter due to which the record of T.I. parade cannot be used against the accused. So more discussion of the observations is not necessary.

(ii) **Joginder Singh Vs. State of Haryana [AIR 2013**

(SCW) 6169] :- This case is on the power of the High Court when the High Court is considering the appeal against the decision of acquittal. In this case, the Apex Court has laid down that appellate Court is expected to give proper weight to following things :-

(a) The views of the Trial Court on credibility of the witnesses.

(b) The presumption of innocence in favour of accused continues in appeal also.

(c) The right of benefit of doubt to accused needs to be considered and if the Trial Court has given such benefit, Appellate Court should not interfere lightly in that decision.

(d) The Appellate Court should be slow in interfering the decision of the Trial Court Judge as the Trial Court has advantage of seeing the witnesses.

There cannot be dispute over these propositions made by the Apex Court. This Court holds that in the present matter also, it is not desirable to interfere in the decision given by the Trial Court.

(iii) **Chandrappa & Ors. Vs. State of Karnataka (AIR 2007 (SC) 111]** :- This case is also on the power of the High Court when High Court is considering the appeal against acquittal and the observations are similar to the observations in the case of Jogindar Singh cited supra.

(iv) **State of Punjab Vs. Rajinder Singh [AIR 2010 SUPREME COURT 1428]** :- The matter is mainly on factual aspects. There were discrepancies in the description of weapons used. The weapon described was shot gun when it was riffle. There was medical evidence which was not consistent with the weapon which was said to be used. The facts were different and in the present matter, weapons of different kind like pistol or revolver were used and so, the observations made in this reported case cannot be used in the present matter.

(v) **The State Vs. Motia and Ors. [1995 CRI.L.J. 835] RAJASTAN HIGH COURT** :- In the case, the linking

evidence in respect of articles shown to be recovered and articles examined by expert was doubtful in nature. This Court has already observed that the evidence and opinion given by Chemical Analyser and also the ballistic expert cannot be used and that evidence is not considered by this Court.

(vi) **Bhanudas Bagaji Salve Vs. State of Maharashtra [2006 ALL M.R. (Cri) 67]** :- In this case this Court has discussed the effect of circumstances of not sealing the articles at the time of seizure. In the present matter, this Court has not used such expert evidence and so, no more discussion is necessary.

(vii) **Maniram Vs. State of U.P. [1994 SCC, Supl. (2) 289]** :- In this case, when direct evidence was not supported by expert evidence in the most material part, the Court held that it was difficult to base conviction.

In the present matter relevant evidence is discussed and the weapons are described as pistol and the medical evidence shows that the injuries were caused only by such weapons and it cannot be said that medical evidence is not supporting the direct evidence in the present matter.

48) The learned APP placed reliance on the observations made by the Apex Court in the case of **Kehar Singh and Ors. Vs.**

The State (Delhi Admn.) [AIR 1988 SUPREME COURT 1883].

This case is on the conspiracy hatched, on the requirements of proving conspiracy. The requirements are already quoted by this Court and so, more discussion is not necessary. The learned APP placed reliance on the case of **Bharat Singh and Ors. Vs. State of U.P. [AIR 1999 (SC) 717]**. In that case, there was possibility that the shooting by using fire arm was not done from the close range. In that case, guns were said to be used, but there were no circumstances like scorching, blackening and tattooing. There is no need to use these observations in view of the nature of weapons used in the present matter and nature of direct evidence available. In the case of **Kali Prasad Singh Vs. State of Uttar Pradesh [2019 (6) Scale 670]**, there were gun shots, but clothes like jacket were on the person of deceased and due to that it was held that the absence of blackening of skin was not a circumstance which could have created doubt about the evidence of witnesses. In the case reported as **Paramjit and Ors. Vs. State of Haryana [AIR 2000 (SC) 2038]**, there was use of double barrel gun. In this case, the Apex Court has laid down that when one trustworthy witness is examined, the circumstance of non examination of other possible eye witness cannot be considered against the prosecution and that circumstance can be ignored.

49) It was submitted for accused persons that before

registration of crime police had rushed to the spot and so, the F.I.R. given by PW 1 cannot be used for corroboration purpose under section 157 of the Evidence Act. On this point, the learned APP placed reliance on the observations made in the case of **Animireddy Venkata Ramana & Ors. Vs. Public Prosecutor, H.C. of A.P. [2008 DGLS (SC) 373]**. In this case, the Apex Court has laid down that it is not necessary that police should take step only after receipt of F.I.R. if cognizable offence is committed. If somehow police received information and proceeded to the spot, the report given by the first informant after this moment of police cannot be discarded by presuming that this was not the first information about the crime. In the present matter also, police had rushed to the spot first and thereafter, the crime came to be registered. There was use of fire arms and many persons were in the vicinity and immediately after the incident, the persons to whom the deceased was known had shifted the deceased to the hospital to save his life and so, somebody must have informed to police that there was incident of firing. F.I.R. was also given immediately and as already observed this circumstance cannot take away the importance of F.I.R. given by PW 1 in the present matter and F.I.R. can be used for corroboration purpose in the present matter.

50) In view of the discussion made above, this Court holds that there is no reason for this Court to interfere in the decision given

by the Trial Court. The conviction given to accused Nos. 1 and 2 is based on sufficient and satisfactory evidence. Similarly, the view taken by the Trial Court in favour of accused Nos. 3 and 4 is a possible view. In the result, all the appeals stand dismissed.

[S.M. GAVHANE, J.]

[T.V. NALWADE, J.]

SSC/