

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO.289 OF 2009**

|                                          |   |                   |
|------------------------------------------|---|-------------------|
| 1) Anees Ahmed Hanif Ahmed Shaikh,       | ] |                   |
| Age : 35 Yrs., Indian Inhabitant,        | ] |                   |
| Occ.: Service, permanent resident of     | ] |                   |
| Dr. Baba Sahab Ambedkar Nagar,           | ] |                   |
| Shatabdi Nagar, Near Kalubai Temple,     | ] |                   |
| Sion, Dharavi, Mumbai – 400 017.         | ] |                   |
|                                          | ] |                   |
| 2) Ajij @ Langda Banne Shaikh,           | ] |                   |
| Aged 50 Yrs., Indian Inhabitant,         | ] |                   |
| Occ. Service, Dr. Baba Sahab Ambedkar    | ] |                   |
| Nagar, Shatabdi Nagar, Near Kalubai      | ] |                   |
| Temple, Sion, Dharavi, Mumbai – 400 017. | ] |                   |
|                                          | ] |                   |
| Both presently lodged at Nasik Road      | ] | .... Appellants / |
| Central Prison, Nasik.                   | ] | (Org. Accused     |
|                                          | ] | Nos.3 & 4)        |

***Versus***

|                                      |   |                 |
|--------------------------------------|---|-----------------|
| The State of Maharashtra,            | ] |                 |
| Thru' Dharavi Police Station, Mumbai | ] | .... Respondent |

**WITH**  
**CRIMINAL APPEAL NO.392 OF 2009**

|                                    |   |                  |
|------------------------------------|---|------------------|
| Suraj @ Surya Murgesh Pille,       | ] |                  |
| Age : 23 Yrs., Occ.: Service,      | ] |                  |
| R/o. Room No.512, Bldg. No.16,     | ] |                  |
| MHADA Building, Vashi Naka,        | ] |                  |
| Chembur, Mumbai.                   | ] |                  |
|                                    | ] |                  |
|                                    | ] | .... Appellant / |
| At present lodged at Nasik Central | ] | (Org. Accused    |
| Prison, Nasik.                     | ] | No.2)            |

***Versus***

|                                      |   |                 |
|--------------------------------------|---|-----------------|
| The State of Maharashtra,            | ] |                 |
| Thru' Dharavi Police Station, Mumbai | ] | .... Respondent |

**AND  
CRIMINAL APPEAL NO.1311 OF 2013**

|                                   |   |                  |
|-----------------------------------|---|------------------|
| Abdul Gani @ Raju Kakdi Ali       | ] |                  |
| Chawaas Khan,                     | ] |                  |
| Age : 38 Yrs.,                    | ] |                  |
| R/at Room No.34, Dr. Baba Saheb   | ] |                  |
| Ambedkar Nagar, Shatabdi Nagar,   | ] |                  |
| Dharavi, Mumbai – 400 014.        | ] |                  |
|                                   | ] | .... Appellant / |
| At present in Nashik Road Central | ] | (Org. Accused    |
| Prison, Nashik.                   | ] | No.1)            |

***Versus***

|                                      |   |                 |
|--------------------------------------|---|-----------------|
| The State of Maharashtra,            | ] |                 |
| Thru' Dharavi Police Station, Mumbai | ] | .... Respondent |

Ms. Naima Shaikh a/w. Mr. Khan Abdul Wahab for  
Appellant No.1/Original Accused No.3 in Cr. Appeal  
No.289 of 2009 and for Appellant/Original Accused  
No.2 in Cr. Appeal No.392 of 2009.

Mr. Aniket Vagal for Appellant No.2/Original Accused  
No.4 in Cr. Appeal No.289 of 2009 and for Appellant/  
Original Accused No.1 in Cr. Appeal No.1311 of 2013.

Mrs. S.D. Shinde, A.P.P., for the Respondent-State.

**CORAM : P.V.HARDAS &  
DR. SHALINI PHANSALKAR-JOSHI, J.J.**

**DATE : 21<sup>ST</sup> JANUARY, 2015.**

**ORAL JUDGMENT [Per Dr. Shalini Phansalkar-Joshi, J.] :**

1. Criminal Appeal No.289 of 2009 has been filed by Original Accused No.3 Anees and Original Accused No.4 Ajij, while Criminal Appeal No.392 of 2009 has been filed by Original Accused No.2 Suraj and Criminal Appeal No.1311 of 2013 has been filed by Original Accused No.1 Raju. Since all these Appeals arise from the same Judgment of the Trial Court, these Appeals are being decided by this common Judgment.

2. The Appellants, who are the Original Accused, namely, Accused No.1 Raju, Accused No.2 Suraj, Accused No.3 Anees and Accused No.4 Ajij, stand convicted for the offence punishable under Section 302 r/w. Section 34 of the IPC and sentenced to suffer imprisonment for life and to pay fine of Rs.3,000/- each, in default to suffer R.I. for one year, by the Ad-Hoc Additional Sessions Judge, Sewree, Mumbai in Sessions Case No.119 of 2007 by Judgment dated 3<sup>rd</sup> March, 2009, by this Appeal challenge their conviction and sentence.

3. Facts, which are necessary, for deciding this Appeal can briefly be stated thus :-

On 4<sup>th</sup> November, 2006, at about 8:25 p.m., Farooq, since deceased, left the house informing his elder brother PW-1 Informant Abdul Kalam that he was called by Accused No.4 Ajij Langda and hence, after

going to toilet, he would meet Accused No.4 Ajij. However, within five minutes, PW-5 Sajjad Shah, brother-in-law of the Informant PW-1 Abdul, came running to the Informant and told him that Farooq has been assaulted and was lying in injured condition in a lane in front of the house of Accused No.4 Ajij. Hence, Informant PW-1 Abdul, along with PW-5 Sajjad started proceeding to that spot. There, they noticed that Informant PW-1 Abdul's brother-in-law Siraj Ahmed, one Wasim Ahmed, one Maksood and PW-4 Maqbul Ahmed, were carrying Farooq in injured and bleeding condition. Informant then along with those four persons took injured Farooq in rickshaw to Sion Hospital. On the way, injured Farooq told Informant PW-1 Abdul that he was assaulted by Accused No.1 Raju, Accused No.2 Suraj and Accused No.3 Anees by sword and sticks (Gupti and Chopper). Then he became unconscious in the rickshaw itself. When he was brought to the Sion Hospital, he was declared dead. Information was given by Sion Hospital to the Police. PW-12 PSI Dattatray Sawant came to the Sion Hospital along with PW-13 PI Lalasaheb Shetty and other staff. He recorded the complaint of Informant PW-1 Abdul in the hospital itself and obtained Crime No.237 of 2006 from Dharavi Police Station on phone.

4. Accordingly, C.R. No.237 of 2006 came to be registered against the Accused for the offences punishable under Section 302 r/w. Section 34 of

the IPC, Section 4 r/w. Section 25 of the Arms Act and Section 37(1) r/w. Section 135 of the Bombay Police Act.

5. During the course of investigation, the Inquest Panchanama (Exhibit-31) and the Spot Panchanama (Exhibit-37) were made. On 6<sup>th</sup> November, 2006, Accused No.1 Raju and Accused No.3 Anees came to be arrested and at their instance, in pursuance of the disclosure statement made by them vide Memorandum Panchanama (Exhibit-56), the weapons of assault, namely, chopper and gupti came to be seized, which were concealed behind the wall and electric D.P. On 7<sup>th</sup> November, 2006, at the instance of Accused No.2 Suraj, vide his Memorandum Panchanama (Exhibit-50), one more gupti came to be seized under Panchanama (Exhibit-51).

6. Further investigation was taken over by PW-13 PI Shetty. He has sent the blood stained clothes of the Accused, which were seized at the time of their arrest on 5<sup>th</sup> November, 2006, and the weapons of assault to Chemical Analyzer. The C.A. Reports were received vide Exhibits 40 to 43. The statements of the witnesses were recorded as and when they were available and after completion of due investigation, PW-13 PI Shetty filed Charge-Sheet in the Court against the Accused.

7. On the case being committed to the Sessions Court, the Trial Court framed charge against the Accused vide Exhibit-7. The Accused abjured the guilt and claimed trial raising the defence of total denial and false implication. In support of their defence that F.I.R. is being ante-time, Accused examined two Defence Witnesses, namely, DW-1 Rajendra Thakur, Constable attached to Dharavi Police Station, who has produced the Station Diary Entry, and DW-2 Dinkar Kumbhar, attached to the Court of Metropolitan Magistrate, Bandra, where copy of F.I.R. was received vide Exhibit-83 bearing the date of receipt as 6<sup>th</sup> November, 2006.

8. In support of its case, Prosecution examined 13 witnesses including PW-12 PSI Sawant and PW-13 PI Shetty, the Investigating Officers, PW-10 Dr. Ramesh Savardekar, who conducted the post mortem, the various Panchas to the Memorandum and Seizure Panchanamas of the Accused and the Spot Panchanama. The main reliance of the Prosecution, however, was on the evidence of PW-1 Abdul, the Informant, PW-4 Maqbul, the eye witness, and PW-5 Sajjad, witness to the oral Dying Declaration given by the deceased.

9. On appreciation of this evidence, the Trial Court held the guilt of the Appellants to be proved for the offence punishable under Section 302 r/w. Section 34 of the IPC and convicted and sentenced them as stated above.

The Trial Court acquitted them for the offence punishable under Section 4 r/w. Section 25 of the Arms Act and Section 37(1) r/w. Section 135 of the Bombay Police Act.

10. This Judgment of the Trial Court is being assailed in the present Appeal by the learned Counsel for the Appellants on several counts. However, before advertng to the submissions made by them and by the learned A.P.P., it would be useful to refer to the evidence on record, especially, that of the post mortem and the ocular account of witnesses.

11. PW-10 Dr. Sawardekar has conducted the post mortem on the dead body of Farooq on 5<sup>th</sup> November, 2006 and he found the following external and internal injuries, which he has noted in the Post Mortem Report (Exhibit-48) :-

- “(i) Incised wound on right side of sterum 4.5 cm x 2.5 cm x 1 cm extending from lateral side of sternum obliquely places.*
- (ii) Surgical wound extending from injury no.(1) above right nipple extending towards midiaxillary line horizontally situated with 10 sutured intact (surgical incision was taken from injury no.1).*
- (iii) Incised wound on epigastrium 2.5 cm x 1.5 cm x 1 cm seminular in shape at both ends narrow with gaping – transversely placed with crescent over epigastrium.*

- (iv) *Incised wound over lateral aspect of left arm 10 cm below shoulder joint and 19 cm above elbow joint – 4.5 x 2.5 x muscle deep x gaping – margins are narrow at both end.*
- (v) *Incised wound over left back 4 x 2 x thoracic cavity deep, obliquely placed with narrow margins on both sides.*
- (vi) *Linear abrasion over the left chest, horizontally placed 10 cm. length, 3 mm breadth, 10 cm below left nipple.*

*On internal examination, the following injuries were noticed :-*

- (i) *In thorax and abdomen, no fracture of ribs, 1.5 lit. blood, blood clot was present in thoracic cavity.*
- (ii) *Right lung - upper lobe collapsed, surface pale.*
- (iii) *In Pericardium – present in upper portion 1.5 cm.*
- (iv) *In heart – empty two sutured present on right atrium on opening of sutured tear of 2 cm x 0.5 cm x cavity deep.*
- (v) *In abdomen :- contusion underneath external injuries over the abdomen.”*

12. According to him, all these injuries were ante-mortem and sufficient to cause death in the ordinary course of nature. He has further opined that the cause of the death was “*shock following hemorrhage and hemorhorax in case of alleged history of stab injury (unnatural)*”. Though this witness is cross-examined on behalf of the Defence Counsel, his evidence relating

to the cause of death has remained unshattered and it proves the homicidal death of Farooq as a result of the stab injuries.

13. The real issue for consideration is whether Prosecution has proved the involvement of the Appellants in the cause of his death? The main reliance of the Prosecution in the case is on the evidence of the solitary eye witness PW-4 Maqbul, who has deposed that he was knowing the deceased, his brother PW-1 Abdul, the Informant, and also the Accused. On the date of incident, at about 8:30 p.m., he was sitting in the Pan Shop of PW-1 Abdul, the Informant. After some time, Farooq came there and sat with him. At that time, one small boy came and told Farooq that he was being called by Accused No.4 Ajij. Hence, Farooq left the place to see Accused No.4 Ajij and told his brother PW-1 Abdul that he was coming back after meeting Ajij. Thereafter, according to the evidence of this witness, he left that place. While he was coming back, he saw the quarrel going on between Farooq and Accused No.1 Raju. Accused No.3 Anees was also present there. Accused No.1 Raju was having sharp edged weapon in his hand and he assaulted Farooq with that weapon in stomach. Accused No.3 Anees and Accused No.2 Suraj were also present there. All of them were beating Farooq. When he tried to save Farooq, they threatened to kill him. He has further stated that Accused No.3 Anees and Accused No.2 Suraj had held Farooq and Accused No.1 Raju and

Accused No.3 Anees stabbed him with knife, whereas Accused No.4 Ajij pushed Farooq and fell him down. Due to threats given to him, he fled from the spot. He met Siraj and Maksood near the Pan Stall. Thereafter, PW-1 Abdul and PW-5 Sajjad took Farooq to the Sion Hospital. He also went to the Sion Hospital after some time. There, Police recorded his statement and then took him to the spot, where, in his presence, Police collected the mud from the spot and clicked some photographs.

14. In his cross-examination, it is brought out that he was at the distance of 8 ft. to 10 ft. away from the spot. Several other persons were also gathered there. In the cross-examination, he has clarified that Police only made enquiry with him in the hospital, but did not record his statement. On the next day, Police called him, PW-1 Abdul, PW-5 Sajjad and others at the Police Station and recorded their statements one by one. In further cross-examination, some omissions are brought out in his evidence like he has not stated before Police that Accused No.3 Anees and Accused No.2 Suraj caught hold of deceased and, that, when he tried to intervene, he was threatened. Further, it is also brought out that he has not stated before the Police that Accused No.4 Ajij pushed Farooq and fell him down. According to his further cross-examination, in the Sion Hospital, Informant PW-1 Abdul did not ask him as to who has assaulted his brother, neither he informed PW-1 Abdul about it.

15. This PW-4 Maqbul is the only solitary eye witness to the incident, but his evidence fails to inspire confidence in the judicial mind, especially, as regards the delay in recording of his statement. There is no consistency at all on this aspect. If Police had made enquiry with him in the hospital itself, there is no explanation why his statement is recorded on the next day. Further, though he deposes that Farooq had come to his shop and while both of them were together, one small boy came and informed that Farooq was called by Accused No.4 Ajij and then Farooq left the place to see Accused No.4 Ajij, is not at all supported from the evidence of PW-1 Abdul.

16. At this stage, the evidence of PW-1 Abdul becomes relevant because he has not at all spoken about the presence of PW-4 Maqbul with him. Conversely, as per his evidence, when he was sitting in the Pan Shop, his brother Farooq sat with him for a while and then was leaving the Pan Shop. At that time, he asked him where he was going and Farooq told him that he would go to toilet and thereafter meet Accused No.4 Ajij. Thus, this witness is not speaking of the presence of PW-4 Maqbul at all at his Pan Shop. He is also not speaking of one small boy coming to call Farooq and then he leaving the Pan Shop.

17. As per his evidence, after about five minutes, PW-5 Sajjad came and informed him that Farooq was beaten by somebody and was lying injured near the house of Accused No.4 Ajij. Then he went there and with the help of other persons, he took his brother Farooq to the hospital in the rickshaw.

18. The Prosecution has relied on the evidence of PW-1 Abdul mainly, to prove the oral Dying Declaration of the deceased Farooq. As per the evidence of this witness, on way to the hospital, he asked Farooq by whom he was beaten and Farooq told him that Accused No.4 Ajij called him and then Accused No.4 Ajij, Accused No.1 Raju, Accused No.3 Anees and Accused No.2 Suraj beat him with chopper and gupti. It is further his evidence that then Farooq stopped talking and by the time they reached in the hospital, the Doctor declared him as "brought dead". Thereafter, his statement came to be recorded in the hospital vide Exhibit-22, which is treated as F.I.R.

19. Prosecution has then placed reliance on the evidence of PW-5 Sajjad to prove the oral Dying Declaration of Farooq. This witness has deposed that, while he was watching T.V. In his house, he heard some noise of talking. Hence, he came out and he was informed that Farooq was killed by somebody and was lying in front of the house of Accused

No.4 Ajij in an injured condition. Then, he himself and his brother-in-law PW-1 Abdul came to the spot. They saw Farooq in injured condition. His condition was bad. Then he himself with PW-1 Abdul took Farooq in rickshaw to the hospital. On the way, Farooq told them that Accused No.1 Raju, Accused No.2 Suraj, Accused No.3 Anees and Accused No.4 Ajij beat him with weapons. Then he kept mum.

20. In the cross-examination, he has admitted that, in his statement recorded by Police, the name of Accused No.4 Ajij is not mentioned. Hence, it follows that his evidence to the effect that Farooq told him that all the four Accused beat him with weapons is in the nature of improvement.

21. These are the only two incriminating pieces of evidence on which the Prosecution is relying; (i) that of the oral Dying Declaration made by Farooq before PW-1 Abdul and PW-5 Sajjad in rickshaw on way to the hospital and (ii) that of the evidence of the solitary eye witness PW-4 Maqbul. As regards the evidence relating to the oral Dying Declaration of Farooq, both these witnesses have deposed that condition of Farooq was so critical that he has immediately stopped speaking and when he was brought to the hospital, he was declared dead. In such a situation, the physical and mental capability of Farooq to make such oral Dying

Declaration before these two witnesses itself creates doubt about the case.

22. The serious doubt about the oral Dying Declaration of Farooq creeps-in, in view of the fact that in the O.P.D. papers of Farooq, it is stated that the assault was made by some unknown persons. This fact is admitted by PW-12 PSI Sawant also. He has deposed that he had seen the O.P.D. papers of Farooq. In the said papers, it was not mentioned by whom the patient was brought to the hospital and by which weapon he was beaten. Further, in the said papers it was mentioned that Farooq was assaulted by unknown persons. Now, if such oral Dying Declaration was made by Farooq implicating the Accused, as deposed by these two witnesses PW-1 Abdul and PW-5 Sajjad, then the contents of the case papers, that assault was made by some unknown persons, creates serious doubt about the veracity of the oral Dying Declaration. It does not appear probable that both these witnesses will not disclose the name of the Accused in the history given before the Doctor while admitting Farooq in the hospital, if really Farooq had told them that he was assaulted by these four Accused. The evidence relating to the oral Dying Declaration, therefore, has to be discarded.

23. Then there remains the evidence of solitary eye witness, which, as already held, is not inspiring confidence in the judicial mind, considering the major omissions and also not getting support from the evidence of PW-1 Abdul. There is also inordinate delay in recording of his statement.

24. As a matter of fact, in the present case, as regards registration of the F.I.R. also, there is inconsistency and discrepancy. Though PW-1 Abdul, the Informant, is stating that his complaint was written by PSI Sawant in the hospital itself, the evidence brought on record by the Accused goes to prove that there is overwriting on the F.I.R. as regards the date from "5 to 4". Three copies of the F.I.R. are produced on record and Defence has also examined the two witnesses to prove them. In one F.I.R. at Exhibit-55, there is overwriting in the date from "5/11/06" to "4/11/06". In the F.I.R. at Exhibit-55A, which was received in the Trial Court, the date mentioned is "5/11/06", whereas, as per the evidence of Defence Witness, the F.I.R. was received in the Court on 6<sup>th</sup> November, 2006. The Prosecution has failed to explain this discrepancy in the date, raising doubt about the F.I.R. being at ante-time. Thus, not only there is delay in recording of the statement of only eye witness, but there is also serious doubt about the complaint being lodged by PW-1 Abdul on the very night itself implicating the Accused.

25. As observed by the Apex Court in the case of ***Ishwar Singh Vs. The State of Uttar Pradesh, AIR 1976 SC 2423***, *“the extra ordinary delay in sending the F.I.R. is a circumstance which provides a legitimate basis for suspecting that the first information report was recorded much later than the stated date and hour affording sufficient time to the prosecution to introduce improvements and embellishments and set up a distorted version of the occurrence. In this case, the suspicion hardens into a definite possibility when the case made in court differs at-least in two very important particulars from that narrated in the F.I.R. In such a case, the evidence of the eye-witnesses “cannot be accepted at its face value”.*”

26. Though the Prosecution has also placed reliance on the evidence relating to recovery of the weapons of assault at the instance of the Accused, there is no evidence brought on record to show that those weapons were sealed with *lakh*. In respect of the C.A. Report also, blood group of the Accused being not ascertained, mere presence of human blood on the weapons or the clothes of the Accused, cannot be sufficient to connect or to form an incriminating circumstance against the Accused. Moreover, the evidence relating to recovery of weapons is only corroborating in nature. As in this case the ocular account of the incident

and evidence relating to oral Dying Declaration is not found trustworthy, there is no question of holding the guilt of Accused proved.

27. In view of these major flaws and lacunae in the Prosecution case, it cannot be said that the Prosecution has succeeded in proving its case against the Accused beyond reasonable doubt. Consequently, the Judgment and Order of the Trial Court cannot be sustained.

28. Criminal Appeals are allowed and the conviction and sentence of the Appellants is hereby quashed and set aside and they are acquitted of the offence with which they were charged and convicted. Fine, if paid by the Appellants, be refunded to them. Since the Appellants are in Jail, they be released forthwith, if not required in any other case.

**[DR. SHALINI PHANSALKAR-JOSHI, J.]**

**[P.V.HARDAS, J.]**