

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.429 OF 2009

- | | | |
|------------------------------------|---|-------------------------|
| 1. Kamru @ Javed Haniflala Khan |] | |
| Age : 32 years, Occ.: Business, |] | |
| R/of Room No.28, |] | |
| 4/3 Chhotubhai Chawl, |] | |
| Opp. Municipal Corporation, |] | |
| Partsite, Vikhroli, Mumbai-400079. |] | |
| |] | |
| 2. Salim Gous Mohammed Shaikh |] | |
| Age : 29 years, Occ.: Business, |] | |
| R/of Aminabi Chawl, Room No.03, |] | |
| Pankeshababa Darga, |] | |
| Ghatkopar (West), Mumbai. |] | |
| |] | |
| 3. Juber Ahmed Bashir Ahmed |] | |
| Age : 35 years, Occ.: Business, |] | |
| R/of Simla Nagar, B.M.C. Colony, |] | |
| Behind Bldg. No.1, Parksite, |] | |
| Vikhroli (West), Mumbai-400079. |] | |
| |] | |
| 4. Anwar Sayyed Basumiya @ Annu |] | |
| Age : 25 years, Occ.: Tailor, |] | |
| R/of Sindhu Society, Road No.1, |] | |
| Room No.139, Opp. Shivsena Office, |] | |
| Vikhroli (West), Mumbai-400079. |] | Appellants / |
| Charni Road, Mumbai – 400 002. |] | (Org. Accu. Nos.1 to 4) |

Versus

The State of Maharashtra	]	
Through Parksite Police Station,	]	
Vikhroli (West), Mumbai.	]	 Respondent

Mr. M.S. Mohite, i/by Mr. Ashish S. Sawant, for
the Appellants.

Mrs. A.S. Pai, A.P.P., for the Respondent / State.

CORAM : **SMT. V.K. TAHILRAMANI, ACTING C.J. & DR. SHALINI PHANSALKAR-JOSHI, J.**

RESERVED ON : **17TH DECEMBER 2015.**

PRONOUNCED ON : **22ND DECEMBER 2015.**

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

1. The Appellants, who are convicted by the 3rd Ad-Hoc Additional Sessions Judge, Mumbai, by Judgment and Order dated 31st March 2009 in Sessions Case No.745 of 2007, for the offence punishable under Section 302 r/w. 34 of IPC and sentenced to suffer imprisonment for life and to pay fine of Rs.1,000/- each, in default to suffer R.I. for three months, by this Appeal challenge their conviction and sentence.

2. Brief facts of the Appeal can be stated as follows :-

PW-1, the Informant Farida Shaikh is the sister-in-law of deceased Mohammad Rafiq. On 12th June 2007, at about 5:00 pm,, when she had taken her niece Heena for hair-cut to Goodluck Hair Cutting Saloon and was standing in front of the said Saloon, she saw her brother-in-law deceased Mohammad Rafiq was coming from his house on the motor-cycle. At that time four persons, coming from the opposite direction, intercepted him and assaulted him with sharp-edged weapons like knives. Due to the assault, Mohammad Rafiq fell down from the motor-cycle. The

assailants ran away therefrom. PW-1 Farida rushed to Mohammad Rafiq and asked him what had happened. Deceased told her the names of the Appellants as the assailants. PW-1 Farida was knowing them by their faces and on coming to know their names, in the hospital, where Deceased was taken in injured condition, she disclosed their names to PW-16 Investigating Officer API Liyakat Shaikh, who recorded her detailed complaint and upon obtaining crime number on phone from Parksite Police Station, got registered C.R. No.170 of 2007 on her complaint (Exhibit-15) against the Appellants.

3. Meanwhile, PW-2 Neha Shaikh, wife of Deceased Mohammad Rafiq, her brother PW-3 Rohit Rambhiya, who had rushed to the spot on hearing the commotion and shouts, reached there and, along with PW-1 Farida, took injured Mohammad Rafiq to Sonagra Nursing Home and from there he was directed to be taken to the Rajawadi Hospital. He was declared dead at the time of admission in Rajawadi Hospital. PW-16 API Shaikh then carried out Inquest Panchanama (Exhibit-71) and seized the blood stained clothes on his person under Panchanama (Exhibit-31). Along with PW-1 Farida, PW-16 API Shaikh then went to the spot of incident and drew the Scene of Offence Panchanama vide Exhibit-72. On returning to the Police Station, he filled up the printed format of F.I.R. at about 2 am in the night. The Appellants herein were arrested on the next

day and the blood stained clothes on their persons came to be seized under Arrest Panchanama (Exhibit-26).

4. Further investigation of the case was taken over by PW-17 PI Janardan Thorat. During the custodial interrogation of the Appellants, he seized the weapons of assault, i.e. four knives, in pursuance of the disclosure statement given by each of the Appellants, under Section 27 of the Evidence Act. All the seized muddemal articles were sent to Chemical Analyzer along with the forwarding letter (Exhibit-79). C.A. Reports are produced in the Court at Exhibits-61 to 66. The Test Identification Parade of the Appellants was conducted on 25th July 2007 by PW-13 Special Executive Officer Raju Ambekar, in which PW-1 Farida identified all the Appellants. Further to completion of investigation, Charge-Sheet came to be filed in the Court of Metropolitan Magistrate, 34th Court, Vikhroli, Mumbai.

5. On committal of the case to the Sessions Court, the Trial Court framed charge against the Appellants vide Exhibit-4. Appellants pleaded not guilty and claimed trial, raising the defence of false implication on account of suspicion.

6. In support of its case, the prosecution examined in all 20 witnesses,

whereas, the Appellant No.1 Javed examined himself and led evidence of two more Defence Witnesses by name DW-1 Mohammad Iqbal Rafique Khan and DW-3 Pralhad Sitaram Koli. On appreciation of their evidence, the Trial Court was pleased to hold the guilt of the Appellants to be proved beyond reasonable doubt and convicted and sentenced them, as aforesaid.

7. In this Appeal, we have heard learned counsel for the Appellants and learned A.P.P. for the Respondent-State. In our considered opinion, before adverting to the rival submissions advanced by them at bar, it would be useful to refer to the evidence on record.

8. In this case, to prove the homicidal death of Mohammad Rafiq, prosecution has examined PW-14 Dr. Pravin Bagul, who had conducted postmortem examination on his dead body. According to him, at the time of postmortem, he noticed following external injuries :-

- Incised wound right deltoid shoulder region, posterior and anterior transverse sharp edges site 7 cm x 0.75 cm, muscle deep with reddish haemorrhage noted;

- Incised wound right side chest 4 cm above right nipple transverse, sharp deep chest size 4 cm x 4 cm, muscle deep and further dissection shows deep into Intracostal Space (I.C.S.) and lungs piercing with blood oozing out;
- Incised wound right elbow region anterior lateral aspect size 2 cm x 1 cm, muscle deep sharp reddish;
- Incised wound right forearm middle lateral sharp edges size 2 cm x 1 cm muscle deep reddish;
- Incised wound right wrist oblique 2 cm above wrist muscle deep upto tendon size 4 cm x 0.75 cm with haemorrhage;
- Incised wound left arm region lateral oblique, sharp, muscle deep with haemorrhage size 2 cm x 0.75 cm;
- Left arm incised wound below injury No.6, 3 cm below, oblique, sharp muscle deep size 2 cm x 0.75 cm;

- Incised wound left side dorsal spine 2.5 cm away oblique 3 cm x 1 cm sharp muscle deep only;
- Deep chest incised wound left side above scapula and medial to spine adjacent to injury No.8, 1.5 cm away oblique wound size 3 cm x 1 cm muscle deep into posterior aspect of lungs piercing deep with haemorrhage;
- Deep chest incised wound below tip of scapula left side oblique size 2.5 cm x 1 cm muscle deep with sharp edge with piercing into posterior wall and entering into left lung lower pole;
- Deep chest incised wound lateral to injury No.10, sharp edges, oblique size 3 cm x 1 cm muscle deep into posterior wall and entering into lung haemorrhage;
- Deep about incised wound posterior back lumber region left size 3.5 cm away from spine oblique direction size 5

cm x 4 cm sharp edges, muscle deep into abdomen with haemorrhage, posterior away perforating and into large interior perforation;

- Incised wound left side dorsum and hand posterior oblique size 2 cm x 1 cm muscle deep;
- Incised wound left dorsum of hand wet space of index and middle finger size 5 cm x 2 cm muscle deep haemorrhage;
- Incised wound left hand between middle finger and ring finger cut sharp edge size 2 cm x 1 cm haemorrhage;
- Incised wound left hand palm aspect laceration wound size 7 cm x 2 cm wide in muscle and far exposed with haemorrhage with reddish blood clots;
- Incised wound right lower abdomen about pelvis iliac crest oblique direction size 8 cm x 4 cm with intestine popping outside with sharp edge deep and dissection

shows deep internal section intestine laceration noted at two places with haemorrhage and cutting posterior muscle wall of abdomen and piercing outside;

- Incised wound right side posterior back lateral to spine 5 cm away and middle size 4 cm x 1 cm deep into posterior wall and entering into lung lower lobe;
- Incised wound right side posterior back lateral to spine 2.5 cm oblique wound size 4 cm x 1 cm deep into muscle under entering into right lung lower pole with haemorrhage noted;
- Incised wound right arm posterior region transverse 2 cm x 0.75 cm muscle deep.
- Abrasion posterior neck region transverse size 3 cm x 0.5 cm reddish;
- Incised wound post scalp region occipital lateral curve sharp size 4 cm x 2 cm bone deep with haemorrhage.

- Incised wound right side back lumber region oblique size 4 cm x 1 cm muscle deep into abdomen walls.

9. He found following corresponding internal injuries :-

- Laceration right side chest deep into wall and sharp with further deep into lungs with haemorrhage.
- Left side posterior wall deep perforation noted left side medial aspect piercing inside size 3 cm x 1 cm upto lungs;
- Left side posterior wall perforation noted size 2.5 cm x 1 cm further deep into lungs with haemorrhage;
- Left side lungs internally size 3 cm x 1 cm with haemorrhage deep into lungs.

10. According to him, the cause of the death was on account of *“multiple stab injuries with internal hemorrhage due to sharp-edged*

weapons". The Postmortem Report is produced on record at Exhibit-57. He has further opined that these injuries were antemortem and sufficient in the ordinary course of nature to cause the death. In evidence before the Court, he was shown the weapons of assault, the knives; recovered at the instance of the Appellants, and he has opined that the injuries sustained by the Deceased are possible due to the assault by these weapons.

11. There is absolutely nothing in his cross-examination to disbelieve the cause of the death. The very fact that about 23 external injuries, some of which were penetrating and deep, were found on the dead body is more than sufficient to prove the cause of death as homicidal and use of the sharp edged weapons like knives in the commission of the assault. It further proves the involvement of more than one person in commission of the assault, because the extensive injuries found on his dead body cannot be possible with assault by one or two persons. From this angle, in our considered opinion, his evidence is of significance.

12. The prosecution case, against the Appellants stands on the evidence of an eye-witness PW-1 Farida. She is, as rightly claimed by learned A.P.P., the star witness for prosecution. However, before adverting to her evidence, it would be necessary to look at the back-ground or the genesis of the incident. As deposed by PW-1 Farida, Deceased was

younger brother of her husband and he was implicated as one of the accused in the murder case of Hanif Lala, father of Appellant No.1 Javed, prior to about 18 years. In the said case, he was acquitted and, therefore, there was animosity between the parties. The immediate reason for the assault was the acquittal of the Deceased in the Hanif Lala's murder case. Appellant No.1 Kamru @ Javed has examined himself as a Defence Witness No.2 and this fact he has admitted in his cross-examination also. Therefore, it has to be held that the prosecution has sufficiently established the genesis of the incident and also the motive on the part of the Appellants to commit the assault.

13. At this stage, it may also be stated that the family of Deceased and Appellant No.1 was knowing each other on account of this earlier incident of murder of father of Appellant No.1. Hence, the evidence of PW-1 Farida that she was knowing the Appellants by faces since prior to incident needs to be accepted. Her evidence goes to prove that on the date of incident, on 12th June 2007, at about 5 pm, she had gone to the Goodluck Hair Cutting Saloon in order to have the hair-cut of her niece Heena, aged 9 years. While Heena was inside the Saloon waiting for the hair-cut, PW-1 Farida was standing in front of the Hair Cutting Saloon. At that time, she found that her brother-in-law Deceased Mohammad Rafiq was coming

from his house on his motor-cycle. When he came in front of Sakhi Beauty Parlour, which was at the distance of about 50 ft. from Goodluck Hair Cutting Saloon, where PW-1 Farida was standing, she noticed that four persons came from opposite direction and intercepted the Deceased. They started assaulting the Deceased with sharp-edged weapons like knives. Due to the assault, Deceased and his motor-cycle fell down. As per her evidence, Sakhi Beauty Parlour, where this incident took place, was quite visible from the spot where she was standing. Hence, she could observe the entire incident properly. When she saw that Deceased had fell down from the motor-cycle with bleeding injuries, she started shouting. Hence, the Appellants ran away from the spot through the lane of Sakhi Beauty Parlour. She immediately rushed near the Deceased and asked how it happened. Then he told her that he was assaulted by four persons i.e. the Appellant Nos.1 to 4. In her evidence before the Court, she has deposed that she was knowing these Appellants by their faces and, after the assault, she came to know their names, from the Deceased.

14. Her further evidence proves that as she was about to call her Devrani, i.e. the wife of the Deceased, namely PW-2 Neha, she found that Neha herself was coming towards the spot from her house along with her sister-in-law Manpreet. The adjoining shop owners had, by that time,

immediately closed their shops, whereas, the passers-by had also run away from the spot. Hence, she herself went to call PW-3 Rohit, the brother of PW-2 Neha, from his house. After informing him, she went to her own house to convey information to her husband. As per her evidence, her house was situate at the distance of only two minutes walk from the spot of incident. Deceased was also residing along with his family members near her house. Then she herself, PW-2 Neha and PW-3 Rohit took the Deceased in injured condition to Sonagra Nursing Home. From there, he was referred to Rajawadi Hospital. Hence, they took him to Rajawadi Hospital. There, he was declared dead. By that time, the Police also arrived there and recorded her complaint, in which she has given all the details of the incident, including the names of the Appellants and the manner in which the incident has happened.

15. PW-1 Farida has identified all the four Appellants in the Test Identification Parade conducted by PW-13 SEO Raju Ambekar and also in evidence before the Court. In her cross-examination, it is brought on record that her husband was also one of the accused in Hanif Lala's murder case, but he was acquitted from that case. This evidence is important from the aspect that there was every reason for her to know the Appellants. The only admission which Defence could elicit from her cross-

examination is that, in her complaint, it is not mentioned that she was knowing the Appellants by faces, though, according to her, she has stated the said fact before the Police. In our considered opinion, this omission will not make any difference to the entire weight of her testimony. Her cross-examination clearly reveals that the actual incident of assault lasted for about 1½ minute. There is nothing in her cross-examination to challenge her evidence that the spot of incident was visible from the place, where she was standing. The Scene of Offence Panchanama (Exhibit-72) clearly proves that the view of the spot of incident from the place where she was standing was clearly unobstructed. Hence, she had sufficient opportunity to observe the assailants. She has also identified them in the Test Identification Parade. Not only that, she had given their names in the complaint, which is recorded immediately after the incident in the hospital itself.

16. The F.I.R. (Exhibit-15) reveals that the incident had taken place at about 5:20 pm and by the time the Deceased was taken to Rajawadi Hospital and declared dead, PW-16 API Shaikh, on receipt of information, at about 6:40 pm, from Rajawadi Hospital, had reached there and her complaint came to be recorded in the hospital itself. The strong assurance is thus coming to her evidence from the prompt lodging of the F.I.R.

Moreover, her evidence proves that the names of the assailants were told to her by the Deceased immediately after the incident. That part of her evidence has remained completely unshattered. Though the Deceased had sustained about 23 external injuries, the evidence on record proves that till he was taken to Sonagra Nursing Home and thereafter upto Rajawadi Hospital, he has not succumbed to those injuries and, therefore, the submission advanced by the learned Defence Counsel that oral Dying Declaration made by Deceased before this witness could not have been possible in view of his injured condition, cannot be accepted. It was not a case of instantaneous death, otherwise, the Doctors at Sonagra Nursing Home would not have referred him to Rajawadi Hospital.

17. There is also corroborating evidence of PW-2 Neha, wife of the Deceased, who has deposed that her husband has left the house on his motor-cycle at about 5 pm and soon after that, she heard the shouting of her husband. Hence, she and her sister-in-law Manpreet immediately rushed to the spot. On the way, they found the Appellants leaving the spot with knives in their hands. She found them in Sakhi Beauty Parlour's lane, from where, as per evidence of PW-1 Farida also, the Appellants ran away. She has deposed that she was knowing the Appellants and she has also identified them in the Court. Her further evidence proves that, while

she was reaching near the spot, she found PW-1 Farida crying and coming towards her. She also found that her husband was lying there in a pool of blood. Within few minutes, her brother PW-3 Rohit and other persons came there and then her husband was initially taken to Sonagra Nursing Home and from there to Rajawadi Hospital.

18. Thus, evidence of PW-2 Neha not only proves the presence of PW-1 Farida at the spot when the incident had happened, but also the fact that the Appellants were found leaving the said spot when she was coming there. The only ground on which her evidence is challenged is that her statement came to be recorded by Police four days after the incident, on 16th June 2007. However, the explanation for the same, as given by the witness that she was totally disturbed and hence unable to give her statement when the Police had come to her house to record her statement, appears completely natural and believable. Her husband has succumbed to the ghastly assault and it is but natural that when already the police machinery was set in motion by the complaint of PW-1 Farida, she might not have found the urgency or might not have been in a proper mental condition also, to give her statement. The note made by the Trial Court, while recording of her evidence, reveals that, at that time also, when the clothes of her husband were shown to her, one year after the

incident, she was weeping in the witness box.

19. Much capital is made by learned counsel for the Appellants pointing to the cross-examination of PW-16 API Shaikh that though he made enquiry with PW-2 Neha in the hospital, she did not state anything incriminating about the incident and, therefore, he has not recorded her statement on that day. In our considered opinion, this evidence of PW-16 API Shaikh is not at all contradictory to the prosecution case in any way, because PW-2 Neha was, admittedly, not an eye-witness to the actual incident of assault. She had come there after the incident was over and, therefore, from that angle, as there was complaint recorded of an eye-witness to the incident, in enquiries with PW-2 Neha, PW-16 API Shaikh might not have found anything incriminating; especially, considering the fact that PW-2 Neha might not have been in a proper mental condition to state anything about the incident.

20. There is further corresponding evidence of PW-3 Rohit, the real brother of PW-2 Neha, to whom the information of the incident was given by PW-1 Farida. He has also rushed to the spot of incident, accompanied PW-1 Farida and PW-2 Neha and took the Deceased to the hospital. According to his evidence, on the same night, at about 11 to 11:30 pm,

PW-1 Farida had come to his house and told him the names of Appellants, who had committed the assault on the Deceased. According to learned counsel for the Appellants, there was delay on the part of PW-1 Farida in disclosing the names of the assailants to PW-3 Rohit and hence the evidence that she was an eye-witness to the incident needs to be disbelieved. However, we are not inclined to accept this submission because, after the incident, immediate attention of all these three witnesses was focused in providing emergency medical help to the Deceased. Otherwise also, the complaint of PW-1 Farida has already been recorded at 6:40 pm itself by PW-16 API Shaikh and, therefore, it cannot be accepted that, as an after-thought, she has taken the names of the Appellants. Thus, evidence of PW-3 Rohit can, if looked at it from this angle, there is no question of any delay in disclosure of the names of the assailants by PW-1 Farida. The evidence of PW-16 API Shaikh proves that, at 6:40 pm itself, he has received message from Rajawadi Hospital that one person was stabbed with knives by four persons. After reaching there, he has made enquiry with PW-1 Farida and she told him the entire incident, including the names of assailants. As stated above, the complaint is recorded in the Hospital and endorsements on the printed F.I.R. form prove that the offence was registered at about 7:40 pm, whereas, the first information was received at 6:40 pm.

21. The prosecution has examined PW-13 SEO Raju Ambekar to prove that in the Test Identification Parade held by him on 25th July 2007, PW-1 Farida has identified all these four Appellants as the assailants of the Deceased. The learned counsel for the Appellants has, however, challenged the evidence relating to Test Identification Parade on the ground that the directions laid down in the Criminal Manual for proper conduct of Test Identification Parade are not followed in this case. It is urged that only one Test Identification Parade of all the four Appellants was held by him by calling 24 dummies at one time. It is further urged that the Appellants were not asked whether they want to change their clothes or their position of standing in the line. Reliance is placed on the guidelines in Criminal Manual, especially, Guideline No.5, which provides that, *“not more than two accused should be placed in any single identification parade”*, which position is reiterated in the authority of ***Ramcharan Bhudiram Gupta & Ors. Vs. The State of Maharashtra, 1995 (1) ALL MR 122***. Further reliance is also placed on ***Rakesh Harilal Kahar Vs. State of Maharashtra, 2006 ALL MR (Cri) 3062***, to submit that, it is necessary for the Special Executive Magistrate to inform the suspect that it is open to him to change his clothes before being paraded, if he so desires, and this requirement is mandatory.

22. According to us, there is nothing on record to prove that these mandatory provisions are not followed in the present case. The evidence of PW-13 SEO Raju Ambekar proves that, though he had called 24 dummies, he has formed four groups of 6 dummies each and one suspect was made to stand in one group. Thus, the Test Identification Parade was held in four phases, each line of 6 dummies consisting one suspect. Therefore, it cannot be said that there was breach of any mandatory provision as such. As regards informing the suspects that it is open for them to change clothes before being paraded, there is nothing in the cross-examination of PW-13 SEO Ambekar to prove that he has not followed this mandatory requirement.

23. Moreover, in our considered opinion, even if the evidence relating to Test Identification Parade is excluded from consideration, that will not affect the credibility of the evidence of PW-1 Farida, because, as stated by her, she had sufficient opportunity to observe the assailants. She was knowing them by face as they were very much from the family with which the relations of PW-1 Farida and the Deceased were not cordial. Moreover, the Test Identification Parade belongs to the stage of investigation. The substantive evidence relating to identification is the witness identifying the accused in the dock at the time of trial. In this case,

the trial is held within a year from the date of incident. Therefore, identification of the Appellants at the time of trial is also sufficient, even if the evidence relating to Test Identification Parade is excluded from consideration.

24. In this case, there is also corroborating evidence relating to recovery of the weapons of assault and the clothes of the Appellants. As per the evidence of PW-16 API Shaikh, at the time of arrest, on the next day, the blood stained clothes of the Appellants were seized under Panchanama (Exhibit-26). Those blood stained clothes were sent to Chemical Analyzer by PW-17 PI Thorat vide forwarding letter (Exhibit-79). The C.A. Report, produced on record at Exhibit-59, reveals that the blood group of the Deceased was "B" and as per C.A. Report (Exhibit-94), the human blood stains were found on the clothes of all the Appellants. The blood group of the blood stains found on the clothes of Appellant Nos.2 and 3 was found to be "B", whereas the results of the grouping of blood stains on the clothes of other Appellants were inconclusive. Though, as per C.A. Reports, the blood group of Appellant Nos.2 and 3 was also "B", it is not their case that in the said incident, they had also sustained the injuries. After their arrest, they were sent for medical examination, but no such Injury Certificates are also produced on record to prove that the

blood stains found on their clothes were of their blood. The presence of, therefore, human blood stains on the clothes of the Appellants, immediately on the next day, for which no explanation is offered by the Appellants, necessarily constitutes an incriminating circumstance, which corroborates the prosecution case about their involvement in the offence.

25. The evidence of the Investigating Officer PW-17 PI Thorat and PW-7 Panch Dinkar Gaikwad proves the recovery of the blood stained knife at the instance of Appellant No.3 Juber vide Memorandum Panchanama (Exhibit-28) and Seizure Panchanama (Exhibit-29). Whereas, the evidence of PW-9 Panch Prakash Lad and PI Thorat proves the recovery of another blood stained Jambiya at the instance of Appellant No.1 Kamru @ Javed in pursuance of the Memorandum Panchanama (Exhibit-34) and Recovery Panchanama (Exhibit-35). There is also evidence of PW-10 Panch Satish Pawar and PI Thorat to prove the recovery of the Jambiya at the instance of Appellant No.2 Salim in pursuance of Memorandum Panchanama (Exhibit-40) and Seizure Panchanama (Exhibit-41). Lastly, there is evidence of PW-12 Panch Dattatray Nikam and PI Thorat to prove the recovery of knife at the instance of Appellant No.4 Anwar vide Memorandum Panchanama (Exhibit-49) and Seizure Panchanama (Exhibit-50).

26. All these four knives were sent to Chemical Analyzer and as per the C.A. Report (Exhibit-94), on all these knives human blood stains were found. Out of them, on two knives, the blood stains of “B” group, which was the blood group of the Deceased, were noticed. The C.A. Report, therefore, establishes the use of these knives in the commission of the offence.

27. The learned counsel for the Appellants has, however, challenged the evidence relating to recovery of the knives on the ground that in none of the Memorandum Panchanamas of any of the Appellants, the place of recovery is stated. The statements of the Appellants are only simplicitor, to the effect that they are ready to produce the knives used in the commission of the offence and Police and Panchas should accompany them. It is urged that such statements of Appellants cannot fall within the purview of Section 27 of IPC, to infer the knowledge on the part of the Appellants relating to concealment of the articles. It is urged that this recovery, therefore, cannot be attributed to the Appellants.

28. However, in our considered opinion, this submission is devoid of substance. The only requirement of Section 27 of IPC is that the discovery of some fact should be consequent to the information given by the

Accused. What is essential, therefore, is that discovery of some fact, in this case the knives, should be in pursuance of the information given by the Accused or as actually shown by him. In other words, the fact discovered must be one which was not within the knowledge of the Police and the knowledge of the fact was for the first time derived from the information given by the Accused. Section 27 of IPC does not state expressly or otherwise that in his statement made before Police and Panchas at Police Station, the Accused should state the place from where he was going to produce the article. What is essential is that his information has led to the discovery of the fact, which is the direct outcome of such information.

29. The law even does not contemplate that the actual discovery needs to be made by the accused himself or that the accused should personally accompany the Police Officer and Panchas to the spot. Though, in most of the cases, the accused who makes the disclosure, himself leads the Police Officer and Panchas to the place where an object is concealed and points out the same to him, it is not essential that there should be such pointing out by the accused in order to make the information admissible under Section 27. It could very well be that on the basis of information furnished by the accused, the Investigating Officer may go to the spot in the company of Panchas and recover the material object. By doing so, the

Investigating Officer is discovering the fact i.e. the concealment of an incriminating article in pursuance of the information furnished by the accused about it. Pointing out material object by the accused furnishing the information is thus not necessary concomitant of Section 27. The only essential requisite is that, the information furnished by the accused was the immediate and proximate cause of discovery.

30. Hence, in the cases where the Investigating Officer alone goes to the spot along with Panchas, without taking the accused with him to point out the place, it may be necessary that in his statement recorded at Police Station, accused should give description of the spot where the article is concealed. However, when accused himself is accompanying the Police Officer and showing the spot, the description of the said spot may not be necessary in the statement given by him at Police Station. It also happens several times that accused simplicitor states in his statement recorded at Police Station that he will produce the incriminating article, which is kept in his house. In such statement, even if he does not state the particular spot in the house, where he has concealed the article, even then the recovery in pursuance of such statement is held to be admissible, as accused himself is accompanying the Police to show the exact spot in the house, where he has kept the incriminating article.

31. The point to be stressed, therefore, is that, when accused himself is guiding the Investigating Officer and Panchas to the spot and produces the incriminating article from that spot, the recovery is in consequence of the information given by him and, therefore, it satisfies the essential requirement of Section 27 of Evidence Act. The absence of the mention or description of the spot, from where he is going to produce the incriminating article in the Memorandum Panchanama, is, therefore not fatal to affect the recovery as ultimately the recovery is in pursuance of the information given to the Police by guiding the Police and Panchas to the particular spot.

32. Here in the case, it is Appellants themselves, who have guided the Police and Panchas to the spot, from where the knives were produced. Therefore, places at which the knives were concealed were within the exclusive knowledge of the Appellants and the discovery of the knives was made in pursuance of the information given by them. Even the landmark decision of ***Pulukuri Kottaya Vs. King-Emperor, AIR 1947 PC 67***, relied upon by learned counsel for the Appellants, also nowhere states that in the statement made before the Police, the Accused should state the place from where he was going to discover the fact. What is essential, as laid down in this authority, is that he should express his willingness to

show the spot from where the incriminating article is to be recovered and nothing more. If he discloses the place also in his statement made before Police and Panchas, it is well and good, but if he does not state the place in the said statement, it is not fatal, because, ultimately it is accused himself who has led the Police and Panchas to the spot, from where the fact was discovered. It is needless to state, that it was the job of the Investigating Officer to record the statement of the accused properly. If he has not done so, then the benefit of the same cannot go to the accused, in view of the settled position of law that lapses on the part of the Investigating Officer cannot result into acquittal of the accused.

33. The recovery evidence is also challenged on the ground that the recovery of the knives is made from an open place like public lavatory. It is urged that as the recovery is made from a place open to and accessible to the public, the recovery loses its evidential value. However, this submission is also of no avail, because, as per the well established legal position, the test is not whether the place is open and accessible to others, but whether it is ordinarily visible. Here in the case, the evidence on record proves that, though the recovery of knife is from the public lavatory, it was from a place which was not visible to all. As per evidence of PW-12 Panch Dattatray Nikam, Appellant No.4 Anwar removed the

knife, which was kept near the safety tank of that lavatory, which cannot be called as a public place.

34. Next, it is urged that PW-12 Panch Nikam has wrongly identified Appellant No.2 Salim as Appellant No.4 Anwar. In our considered opinion, that will not make much difference as there is corroborating evidence of Investigating Officer about proper identification of Appellant No.4 Anwar.

35. An attempt is also made to submit that, both, Appellant No.4 Anwar and Appellant No.1 Kamru @ Javed, have produced the knives from the same place i.e. public lavatory. However, again it has to be stated that Appellant No.1 Kamru @ Javed has removed the Jambiya, which was kept in the heap of wood, behind the lavatory, near one wall; whereas, Appellant No.4 Anwar has removed the knife, which was kept near the safety tank. These places, from where actually the knives were recovered, were not the same and were also exclusively within the knowledge of the respective Appellants and, hence, it cannot be said that the recovery was made from the same spot.

36. An attempt is also made to submit that there is some discrepancy relating to timings mentioned in the Memorandum Panchanama (Exhibit-

45) and Recovery Panchanama (Exhibit-46), which overlap. In our opinion, it is too minor a discrepancy, which cannot be blown out of proportion to disbelieve the entire evidence relating to recovery. Though it is always expected that Investigating Officers should be careful in discharge of their duties, every lapse committed by them cannot automatically result into benefit of the Accused, so as to suffer the prosecution case. Otherwise, the Courts and prosecution agencies would be at the mercy of Investigating Officers, which may, as often held by the Supreme Court, result into shaking the confidence of the people not merely in law enforcing agency but also in the administration of justice.

37. Though the Appellant No.1 Kamru @ Javed has examined himself as Defence Witness and also led the evidence of two other witnesses, we find that it is hardly of any help to the Appellants. Evidence of Defence Witness No.1 Mohammad Iqbal Khan is having absolutely no connection with the incident in question and nothing worthwhile is elicited in the evidence of Appellant No.1 Kamru @ Javed. Evidence of Defence Witness No.3 Pralhad Koli is again found to be totally irrelevant to the case in hand.

38. Thus, in this case, there is definite, certain, cogent and reliable

evidence of PW-1 Farida, thoroughly corroborated by the circumstantial evidence of recovery of the blood stained clothes and the blood stained knives, connecting their use in the commission of the offence. This is a fit case, therefore, wherein the Trial Court has rightly held the guilt of the Appellants to be proved beyond reasonable doubt for the offence punishable under Section 302 r/w. 34 of IPC. The Appeal hence holds no merit, therefore, stands dismissed, confirming the conviction and sentence of Appellants for the offence u/s. 302 r/w. 34 of IPC.

39. As the Appellants are in Jail, undergoing the sentence, no further orders are found necessary.

[DR. SHALINI PHANSALKAR-JOSHI, J.] [ACTING CHIEF JUSTICE]