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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 653 OF 2013

Anand Gonsalo Fos
Age 30 years,
R/o Ghaas Gaon, Nallasopara (W),
Tal-Vasai, Dist. Thane.

.. Appellant
(Org.Accd.No.1)

Versus

The State of Maharashtra

.. Respondent

WITH
CRIMINAL APPEAL NO. 1044 OF 2013

Mr. Ernest Felix Tuscano
Age 22 years, Occ: Education
R/at Gaas Gaon, Fathima Mata Shejole
Post Nalasopara (W), Tal. Vasai,
Dist. Thane.

.. Appellant
(Org.Complainant)

Versus

1. The State of Maharashtra
Through Sr. Inspector of Police
Nalasopara Police Station
Vasai, Thane.
2. Anand Gonsalo Fos
Age 30 Years, Occ: Service
R/at Gaas Gaon, Nalasopara (W),
3. Praful Gangaram Pawar
Age 45 years, Occ: Service
Manvelpada Road, Virar (E),
Tal: Vasai, Dist. Thane.

.. Respondents
(Nos.2 & 3 Org.Accd.
Nos.1 and 2)

WITH
CRIMINAL APPEAL NO. 1108 OF 2013

The State of Maharashtra
(At the instance of Nalasopara Police Station
Tal. Vasai)

.. Appellant
(Org. Complainant)

Versus

1. Anand Gonsalo Fos
Age 30 Years,
R/at Gaas Gaon, Nalasopara (W),
Tal-Vasai.

2. Praful Gangaram Pawar
Age 45 years,
R/at 102, Sadguru Apartment,
Manvelpada Road, Virar (E),
Tal: Vasai, Dist. Thane.

.. Respondents
(Org. Accd. Nos.1 & 2)

Mr. S. R. Chitnis, Senior Advocate a/w Mr. Aashish Sawant and Mr. Shantanu Phanse for appellant in Criminal Appeal No. 653 of 2013, for respondent nos.2 & 3 in Cri. Appeal No. 1044 of 2013 and for respondent nos.1 and 2 in Criminal Appeal No. 1108 of 2013.

Mr. A. P. Mundargi, Senior Counsel a/w Mr. Prakash Naik a/w Mr. Jayant Bardeskar for appellant in Cri. Appeal No. 1044 of 2013.

Mrs. Sangeeta D. Shinde, APP for respondent in Cri. Appeal No.653 of 2013, for respondent no.1 in Cri. Appeal No. 1044 of 2013 and for appellant – State in Cri. Appeal No. 1108 of 2013.

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

RESERVED ON: MARCH 26, 2015

PRONOUNCED ON: APRIL 08, 2015.

ORAL JUDGMENT [Per P. V. Hardas, J.].

1. Criminal Appeal No. 653 of 2013 has been filed by the appellant/Original Accused No.1, who challenges his conviction for offence punishable under Section 304 Part II of the IPC and sentence of RI for ten years and fine of Rs.10,000/-, in default of which to undergo SI for six months, by the Adhoc District Judge -1 and Additional Sessions Judge, Vasai, District – Thane, by judgment dated 3/5/2013, in Sessions Case No. 17 of 2012.

Criminal Appeal Nos.1108 of 2013 has been filed by the State of Maharashtra questioning the acquittal of the Original Accused Nos.1 and 2 for the offences with which they were charged. Criminal Appeal No. 1044 of 2013 has been filed under Section 372 of the Cr. P.C. also challenging the acquittal of the Original Accused Nos.1 and 2. Since all the three appeals arise from the same judgment, these appeals are being decided by this common judgment.

2. Facts in brief as are necessary for the decision of these appeals may be stated thus :-

PW 14 – PI Ajit Dalavi, who was attached to the Nalasopara Police Station as a Police Inspector in April 2011, was entrusted with the investigation of Crime No. 230 of 2011, which had been registered by PSI Jadhav on the basis of the report of PW 1 – Ernest Tuscano at Exh. 16.

On being entrusted with the investigation, he proceeded to the Alliance Hospital at Nalasopara, where injured Swapnil had been admitted. On reaching the hospital, he learnt that injured Swapnil had been pronounced dead before the starting of the treatment. PW 14 – PI Dalavi, therefore, drew the inquest panchanama of the dead body of deceased Swapnil in the presence of panchas at Exh. 26. The dead body was thereafter handed over to police constable Sanap for handing it over to the Medical Officer for conducting the postmortem examination. On the same day, at about 6.30 a.m. he visited the scene of the incident, which was pointed out by PW 1 – Ernest. In the presence of two panchas, the scene of the offence was inspected and the scene of the incident panchanama was drawn at Exh. 42. The scene of the incident was located in village Gaas near a lake and the scene was known as “Nananani Park”. One blue coloured Yamaha motorcycle was parked on the side stand in the middle of

the road. The registration number of the motorcycle was MH-04/DX-4888. About one foot from the motorcycle, one yellow coloured metal chain was noticed, the length of which was 40 cms. To the West of the motorcycle and beyond the road, there were broken branches of the coconut tree and one identity card was noticed on the broken branches, which had been issued by New India Insurance Company to the appellant. The identity card bore the number as well as the photograph of the person to whom it was issued. Some empty liquor bottles were found near the wall by the side of the scene of the incident which was also noted in the panchanama.

After drawing the scene of the incident panchanama, PW 14 – PI Dalavi went to the J.J. Hospital at Mumbai and submitted a report at Exh. 65 to the Medical Officer for taking photographs and to record the postmortem on video. The photographs are at Articles G1 to G35 and the compact disk is Article – H. Vide Exh. 58, the clothes of deceased Swapnil were seized which comprises of a black coloured half sleeve T-shirt and green coloured Bermuda and black coloured underwear, which are Articles B, A and C. On completion of the postmortem examination, six sealed bottles, three X-ray plates and one brown coloured envelope were sent to

PW 14 – PI Dalavi. The articles received from the J.J. Hospital along with other property was referred to the C.A. under requisition at Exh. 66. Statements of witnesses were recorded under Section 164 of Cr.P.C. Statements of police constable Sanap and the photographer were also recorded.

PW 10 – API Babarao Hangirge, who was also attached to the Nalasopara Police Station was entrusted with the investigation due to the transfer of PW 14 – PI Dalavi. He visited the scene of the offence and searched for the accused. On 8/8/2011, PI Koregaonkar informed PW 10 – API Hangirge about the arrest of the appellant by the LCB, Thane. PW 10 – API Hangirge obtained the custody of the appellant from the LCB under panchanama at Exh. 47. On 12/8/2011 during the custodial interrogation, the appellant expressed his willingness to point out the place where a country made revolver had been concealed in the Nalla. A memorandum to that effect was drawn in the presence of panchas at Exh. 38. The appellant led the police and the panchas to the Sopa Nalla and after searching, nothing was found. Accordingly, a panchanama at Exh. 39 was drawn. On information being furnished by the appellant, accused no. 2 – Praful was arrested under arrest panchanama at Exh. 48. On 14/8/2011, in

the presence of panchas, the house of accused no.2 was searched and during the search, a soiled T-shirt was found. The panchanama is at Exh. 49. On 4/11/2011, the seized property was referred to the C.A. under requisition and further to the completion of investigation, a charge-sheet against the accused was submitted.

Postmortem on the dead body of deceased Swapnil was performed by PW 11 – Dr. Bhalchandra Chikhalkar, who noticed the following external injuries :-

- (i) Firearm injury, wound of entry of bullet situated over right thoraco abdominal region transverse oval measuring 1.8x2 cm. opening into thoraco abdominal cavity, situated 10 cm. right lateral to ventral mid-line 38 cm. below shoulder blade, 17 cm. below nipple and 23 cm. above anterior superior iliac spine, blackening present around wound with burning, which is having breadth of 1.5 cm. towards supero lateral part and breadth of 1 cm. abrasion collars .1 cm. to .2 cm. all around the wound of entry present. Linear pressure imprint 5 cm. long curved over supero lateral aspect minimal tattooing inferior to the wound, omentum and other tissues protruding from the wound, blood coming out.

- (ii) Firearm injury, wound of exit of a bullet, situated over right para spiral region lower thoracic almost circular measuring 0.8 cm. x 1 c.m. everted margins. Situated 3x2 cm. right lateral to mid dorsal line, 24 cm. below shoulder blade and 28 cm. above posterior, superior iliac spine, blood coming out.
- (iii) Friction lacerations involving antero medial aspect of right great toe and second right toe measuring 4x2.5 cm. and 3.5 x 1.2 cm. respectively. Great toe nail loss partially, skin deep blackish injury.
- (iv) Contusion right shoulder anteriorly 2 x 3 cm.
- (v) Abrasion right knee mid lateral 1 x 1 cm. and adjacent and below knee 0.2 x 1 cm.
- (vi) Abrasions left shoulder laterally 0.1x0.1 cm. and 0.1 x 0.1 cm.two in number.
- (vii) Sub cutaneous transverse contusion adjacent and above wound of exit 0.8 x 2.5 cm.

On internal examination, he noticed the following internal injuries:-

- (i) Corresponding to wound of entry right 7th 8th ribs fracture with loss of fractured piece in an area 2x2 cm. contusion over right lower ribs antero laterally 10x12 cm. right intercostal muscle pleura lacerated correspondingly. Right hemothorax fluid blood

approximately 2 lit.

- (ii) Blood stained fluid in lumen of traceha.
- (iii) Lower lobe of right lung antero laterally near inferior border shows through and through penetrating injury 0.8 cm. in diameter with exit from inferior aspect of lung 1 cm. in diameter, surrounding lung parenchyma contused.
- (iv) Right dome of diaphragm lacerated.
- (v) Penetrating wound with surrounding extra pleural hemorrhage and contusion of soft tissue due to bullet circular 1 cm in diameter situated in right 10 intercostal space adjacent to spine over posterior thoracic oval, externally communicates with the wound of exit.
- (vi) Right lobe of liver burst lacerated, contusion almost completely along path of the bullet.
- (vii) Right perenephric hematoma at upper pole. Hemo peritoneum mainly right side.

He therefore, opined that all the injuries were antemortem and fresh and the external injuries corresponded with the internal injuries and were sufficient in ordinary course of nature to cause death. PW 11 – Dr. Chikhalkar, therefore, opined that deceased Swapnil had died due to hemorrhage and shock due to firearm injuries. He has further opined that the firearm injuries may be caused due to close range as he had noted the

blackening with burning tattooing around the wound of entry with abrasion collar. He has further opined that the injury could have been caused due to firearm like revolver or country made firearm. The postmortem report is at Exh. 54.

3. On committal of the case to Court of Sessions, trial Judge vide Exh. 8 framed charge against the appellant for offence punishable under Section 302 of IPC and against accused no. 2 for offence punishable under Sections 176 and 212 of the IPC and against accused no.1 for offence punishable under Section 3(1) r/w 25, 4/27 of the Arms Act. The accused denied their guilt and claimed to be tried. Prosecution, in support of its case, examined 14 witnesses. The trial court accepted the evidence of the prosecution witnesses and convicted and sentenced the appellant/Original Accused No.1 for offence punishable under Section 304 Part II of the IPC on the ground that there was some scuffle between the appellant and deceased Swapnil and indirectly, therefore, gave the benefit of exception 4 of Section 300 of IPC to the appellant. The appellant being aggrieved by his conviction and sentence, has filed Criminal Appeal No. 653 of 2013, while the State and the complainant being aggrieved by the acquittal of the accused have filed appeals i.e. Criminal Appeal Nos.1044 and 1108 of

2013. All the three appeals are, therefore, being decided by this common judgment.

4. We have heard Mr. S. R. Chitnis, learned Senior Counsel for the appellant/accused no.1 in Criminal Appeal No. 653 of 2013 and on behalf of the respondents/accused in Criminal Appeal Nos.1044 and 1108 of 2013. We have heard the learned APP on behalf of the State and we have also heard Mr. A. P. Mundargi, learned Senior Counsel for the appellant/complainant in Criminal Appeal No. 1044 of 2013. In order to effectively deal with the submissions advanced before us by the learned counsel for the parties, it would be useful to refer to the evidence of the prosecution witnesses.

5. The entire prosecution case revolves around the testimony of the eye witnesses and, therefore, we propose to refer to the testimony of the eye witnesses. Prosecution has examined PW 1 – Ernest Tuscano, the first informant as well as the eye witness. According to him, deceased Swapnil was his cousin as deceased Swapnil was the son of the maternal uncle of PW 1 – Ernest. Ernest further deposes that deceased Swapnil and the appellant were friends. He has also deposed that PW 5 – Aldrin was a

common friend of the appellant and deceased. One Leena Rodrigues was a friend of PW 5 – Aldrin, but could not state if she was friend of the appellant. PW 1 – Ernest described the friendship between the appellant and deceased Swapnil as very thick and claims that they were fast friends. According to Ernest, on 26/4/2011, he had purchased a second hand motorcycle and he and his friend Ajit had gone to Royal Ambiance Bar and had consumed beer. PW 1 – Ernest then dropped Ajit at his residence, while PW 1 – Ernest was wandering in village Gaas on his motorcycle. According to him, one Glades is his friend, who telephoned him on the mobile of Ernest at about 12 to 12.30 in the night. His friend Glades and PW 5 – Aldrin were waiting for him at the Nananani Park near the lake and, therefore, PW 1 – Ernest went to that spot. He also noticed deceased Swapnil to be present there. All of them insisted on Ernest to host a party for celebrating the purchase of the motorcycle. Because of the insistence of his friends, PW 1 – Ernest returned home along with Glades and fetched two bottles of liquor and thereafter went to the Takipada area for purchasing snacks and then returned to the Nananani Park.

When he returned to the Nananani Park, he noticed Aldrin leaving on his own vehicle and thereafter also noticed the appellant

following Aldrin on the vehicle of the appellant. PW 1 – Ernest and Glades, therefore, followed them on the motorcycle of Ernest. The appellant, however, returned and was questioned by PW 1 – Ernest and Glades as to why he had followed Aldrin. The appellant abused PW 1 – Ernest and went away. Meanwhile PW 1 – Ernest and Glades returned to the Nananani Park and noticed a scuffle between the appellant and deceased Swapnil. Both of them were separated by Ernest and Glades and the appellant left the park saying that he would “see Swapnil”. Swapnil then telephoned Aldrin and called him at the Nananani Park and after arrival of Aldrin, Ernest, Swapnil, Aldrin and Glades sat there. After about 5 to 10 minutes, the appellant again came to the Nananani Park and the time was approximately 1 to 1.15 a.m. The appellant was armed with a revolver and he fired one shot in the air. PW 1 – Ernest and others were frightened and, therefore, stood up. Deceased Swapnil went towards the appellant and talked to him. The appellant immediately shot Swapnil in the abdomen. Deceased Swapnil then rushed to his house and Aldrin and Glades also fled from the spot to their houses. Appellant also left the park and PW 1 – Ernest thereafter also went away. According to PW 1 – Ernest, the appellant had also fired in the direction of Glades and Aldrin.

PW 1 – Ernest then telephoned PW 6 – Dorson, who was the son of his maternal uncle and cousin of deceased Swapnil, who informed Ernest that Swapnil had been taken to the Alliance Hospital. Swapnil succumbed to his injuries. According to PW 1 – Ernest, he along with his brother went to the hospital, where his report was scribed by the police at Exh. 16.

6. In cross-examination, he has admitted that he was not friendly with Leena and does not know with whom Leena was having an affair. He has reiterated that Swapnil and the appellant were friends and had never heard that they had quarreled. He has admitted that he does not know if Leena was having an affair with Aldrin. He has admitted that he does not know whether the appellant was having affair with any girl. He has admitted that deceased Swapnil owned a motorcycle, but has denied the suggestion that Swapnil had installed certain structure on his motorcycle where he could keep small articles. He has also denied the suggestion that deceased Swapnil used to keep the country made revolver. He has admitted that he cannot differentiate between a country made revolver, pistole and a revolver as he had not seen these articles.

He has denied the suggestion that deceased Swapnil had an affair with the elder daughter of Bavtis. He has admitted that he does not know if the deceased had damaged the windshield and the T.V. of Bavtis. He has admitted that his house was at 15 minutes walking distance from the scene of the incident. He was confronted with portion marked "A" from his report that in the Royal Ambiance Bar they had not consumed beer but had consumed liquor. He admitted to have brought two bottles of whiskey from his house. Omission has been elicited that he had not stated in his report that deceased Swapnil had talked to the appellant after the appellant had fired in the air and had attempted to convince him. Omission has also been elicited that he had not stated in his report that the appellant had fired in the direction of Aldrin and Glades. An admission is elicited from him that he had not shown the scene of the incident to the police and had not seen any marks of scuffle on the ground. The omission in respect of the appellant firing the third shot is restricted only to the words "in the direction of Aldrin and Glades".

7. Prosecution has examined PW 7 – Glades Pane, who deposes that he knew Swapnil (deceased), Aldrin, PW 1 – Ernest and the appellant. In respect of the incident, he deposes that on 26/4/2011 at about 9.30 p.m.,

he along with deceased Swapnil and Aldrin was sitting in the Nananani Park and consuming liquor. At about 12.30 a.m. he telephoned PW 1 – Ernest and called him at the Nananani Park. After arrival of PW 1 – Ernest at the park, deceased Swapnil demanded a party for celebrating the purchase of the motorcycle. PW 1 – Ernest told them that he would celebrate it on the next day, but deceased Swapnil insisted on the party on that day. PW 7 – Glades, therefore, accompanied PW 1 – Ernest and went to his house and brought two bottles of liquor and also purchased some snacks and some cold drink. While they were returning to the Nananani Park, they noticed Aldrin going to his house on the motorcycle driving it at high speed. They also noticed the appellant following him on his motorcycle and, therefore, PW 1 – Ernest and PW 7 – Glades also followed the appellant. After some time, the appellant returned to where PW 1 – Ernest and Glades were. The appellant asked PW 1 – Ernest as to why PW 1 – Ernest was not receiving the calls of the appellant and abused him and went to the main road. They, therefore, followed the appellant and returned to the Nananani Park where they noticed some altercation between the appellant and deceased Swapnil. Glades and PW 1 - Ernest intervened and told the appellant to go back. While the appellant was leaving the Nananani Park, the appellant threatened all of them that he would “see

them”.

Deceased Swapnil telephoned Aldrin and asked him to come to the park and accordingly Aldrin had come to the park. The appellant came at the park at about 1 to 1.15 a.m. armed with a gun. The appellant fired a shot in the air. According to PW 7 – Glades, “Swapnil had been to him for self defence and we all fled from the spot”. The vernacular recording of the depositions of PW 7 - Glades indicates that they did not flee from the scene of the incident when Swapnil had gone towards the appellant, but had hidden themselves. PW 7 – Glades further deposes that thereafter they heard the sound of a second shot and also heard Swapnil crying out in pain. Deceased Swapnil then rushed towards the main road, while Glades and Aldrin also ran towards the house of Aldrin. When they were going, they had heard the sound of third shot. PW 7 – Glades then telephoned PW 6 – Godson and informed him about the entire incident and questioned him as to whether Swapnil had reached home. Godson informed Glades that Swapnil had reached and was injured and was being taken to the Alliance Hospital. According to Glades he and Ernest went to the Alliance Hospital and while on the way, they received a call from PW 6 – Godson that Swapnil had succumbed to his injuries.

8. In cross-examination, he has admitted that he, deceased Swapnil, PW 1 – Ernest and Aldrin were fast friends. He has admitted that they used to visit each other's house. He has also admitted that his relations with the appellant were cordial and the relations of the appellant with others were also cordial. He has admitted that often they used to sit in the Nananani Park for consuming liquor. He has admitted that on account of consumption of liquor, they were somewhat under influence of liquor. He has admitted that there were two glasses and they had left the empty bottles and the glass on the scene of the incident. Empty packets of the snacks were also lying there. He has admitted that they had brought additional two glasses also when he and PW 1 – Ernest had gone for brining the liquor bottles. In cross-examination, an omission is elicited that he had not stated in his previous statement that the deceased had rushed at the appellant in self defence. Omission is also elicited that he had not stated in his previous statement the words of Swapnil when he had cried in pain.

9. Prosecution has examined PW 5 – Aldrin, who deposes that the deceased and the appellant were friends and according to him, the

appellant was under the impression that deceased was helping Aldrin in his relations with Leena. The appellant, therefore, had quarreled with the deceased on one or two occasions. According to Aldrin on 26/4/2011, at about 9.30 to 10 p.m. he, deceased Swapnil and PW 7 – Glades were present in the Nananani Park, consuming liquor. After consuming liquor at about 12.30 in the morning, PW 7 – Glades telephoned PW 1 – Ernest. PW 1 – Ernest came to the Nananani Park on his motorcycle and deceased Swapnil demanded a party from him, as he had purchased a new vehicle. PW 1 – Ernest promised to celebrate the purchase on the next day, but Swapnil insisted on the party on that day. Accordingly, PW 1 – Ernest and PW 7 – Glades went on the motorcycle of PW 1 – Ernest and brought liquor bottles. According to Aldrin, he was alone standing at the scene of the incident as deceased Swapnil had also returned home for some time. Aldrin thereafter started going to the house of PW 1 – Ernest and near the Takipada area he met Ernest and Glades who informed him to return to the Nananani Park as they were going for purchasing the snacks. Aldrin accordingly returned to the park on his bike. When he was on his way to the Nananani Park, he went by the side of the house near the Bhatori Stop and noticed the appellant standing there. On seeing him, Aldren was frightened and went in speed to the Nananani Park. When he reached the

Nananani Park, he noticed the appellant following him and, therefore, without stopping there, he went to his house. The appellant on seeing Aldrin entering his house, went back from there.

According to Aldrin, his house is at one minute walking distance from the park. After about five minutes he heard some noise of quarrel from the side of Nananani Park and also received a call from Swapnil who informed him about the quarrel and about appellant leaving the park and requested Aldrin to come to the park. PW 5 – Aldrin, therefore, returned to the Nananani Park and along with others started consuming liquor. At about 1 to 1.15 a.m., the appellant came there and fired one shot in the air from his country made revolver. Aldrin and others were frightened and hide in the Nananani Park. Deceased Swapnil had gone towards the appellant in order to restrain him, but the appellant fired his revolver in the abdomen of deceased Swapnil. Swapnil cried out that he had sustained injury and therefore pushed the appellant aside and started running towards his house from the main road. Aldrin and Glades also returned to their house and PW 1 – Ernest also fled from the scene of the incident. According to Aldrin when he and Glades were returning to their house, they heard the sound of another shot being fired. PW 7 – Glades

telephoned PW 6 – Godson and informed him that Swapnil had sustained the injury and questioned him as to whether Swapnil had reached home. Godson informed Aldrin that Swapnil had reached home with injuries and was being taken to the hospital. Aldrin and Glades, therefore, started towards the Alliance Hospital and meanwhile PW 6 – Godson informed Glades that Swapnil had succumbed to his injuries.

10. In cross-examination, he has admitted that the distance between his house and the Nananani Park is about 100 to 125 mtrs. He has admitted that the house of PW 1 – Ernest is about half to one kilometer from the scene of the incident and was not visible from the scene of the incident. The Bhatodi bus stop is at approximately 100 to 125 mtrs. from the scene of the incident. He has admitted that he was not having any love affair with Leena. He has also admitted that there were only two glasses from which they were consuming the liquor. He has admitted that PW 1 – Ernest had brought two liquor bottles, two glasses, ½ ltr. of soda bottle and 1 ltr. bottle of water. He has admitted that they had fled from the scene of the incident, leaving behind the bottles and the glasses as well as the motorcycle. He has admitted that he had not noticed the appellant inserting the bullet in the revolver and had also not noticed the shell of the

bullet falling on the ground after firing. He has admitted that while running they had not seen what was happening behind. Omission has been elicited that he had not stated in his previous statement about Swapnil crying out and explaining that he had sustained a bullet injury.

11. Prosecution has examined PW 2 – Paul, uncle of deceased Swapnil. PW 2 – Paul deposes that the house of deceased Swapnil is adjacent to his house. Paul was working as security guard in the Bhagwati Hospital, Mumbai. On 26/4/2011 after completing the second shift, he returned home at about 00.15 a.m. and was watching the T.V. He heard the cry of Swapnil, “uncle save me” at about 1.15 a.m. PW 2 – Paul, therefore, came out of his house and noticed Swapnil standing by the side of the wall with injuries. Paul, seeing Swapnil with injuries, also shouted for help. Paul noticed blood oozing from the stomach of Swapnil. Wife of Paul and two other boys from the other houses rushed to the house of Paul. Wife of Paul bandaged the injury sustained by Swapnil, while other two boys Elis and Syril helped Swapnil to sit on the motorbike between them and took him to the Alliance Hospital at Nalasopara. PW 2 – Paul also followed them on his motorcycle. In the hospital, Swapnil was declared dead. According to PW 2 - Paul, Swapnil had disclosed to him that the

appellant had fired a bullet at him. According to him, Aldrin and Ernest had also informed him that appellant had fired at deceased Swapnil.

12. In cross-examination, he has admitted that when he had seen deceased Swapnil, deceased Swapnil was under the influence of liquor. He has admitted that some blood stains were noticed on the wall, but could not say if the blood had oozed on the ground. He has admitted that the police had visited the spot and Paul had pointed out those blood stains to the police. He has admitted that the police had not made any panchanama of his house in his presence. He has admitted that he had not seen the nature of the injury sustained by deceased Swapnil. He has admitted that Nananani Park might be at a distance of half kilometer from his house and would require 14 minutes for an injured person under the influence of liquor to reach his house. Omission has been elicited that he had not stated in his previous statement about the disclosure made by Swapnil that the appellant had fired at him.

13. Prosecution has also examined PW 4 – Elis Alphanso, who deposes that deceased Swapnil was his nephew who used to reside behind the house of Elis. On 27/4/2011 at about 1 to 1.15 a.m. Elise was

awakened on hearing the cry and, therefore, came out of the house. House of PW 2 – Paul is adjacent to his house and noticed Swapnil sitting there. Elis, therefore, went towards Swapnil and observed that the T-shirt of Swapnil was stained with blood and blood was oozing from his body. His other cousin Syril had also arrived there. According to Elis, he took his motorcycle and with the help of Syril, took Swapnil to the Alliance Hospital where Swapnil was declared dead. According to him, after some time, Glades, Ernest, Aldrin and PW 1 – Ernest also reached the hospital and they informed him that the appellant had shot at Swapnil. According to him, PW 2 – Paul had also made that disclosure to him.

14. In cross-examination, omission has been elicited that he had not stated in his previous statement that he had seen Swapnil sitting. He has admitted that he had not seen the exact spot where Swapnil had sustained the injury. He has admitted that till reaching the hospital, Swapnil was alive. He has admitted that his clothes were stained with blood, but had not shown the blood stained clothes to the police. Omission is elicited that he had not stated about the disclosure made to him by Glades, Ernest, Paul and Aldrin.

15. Prosecution has examined PW 6 – Godson, who deposes that at about 1 a.m. on 27/4/2011, he was awakened by his father, who informed him that Swapnil had sustained injury. On coming out of the house, he noticed Swapnil sitting on the platform of his house with blood oozing from his abdomen. Aunt of Godson bandaged the injury, while Elis and Syril took Swapnil to Alliance Hospital. He deposes about receiving a telephone call from Glades, who informed him about the incident. He also deposes that Swapnil was pronounced dead on reaching to the hospital.

16. In cross-examination, an omission is elicited that he had not stated that his aunt bandaged the injury sustained by Swapnil by a piece of cloth. Omission is also elicited that he had not stated about Glades informing him about incident. He has denied the suggestion that he along with the villagers had kill deceased Swapnil near his house.

17. Mr. Chitnis, the learned Senior Counsel for the appellant has urged before us that the evidence of the eye witnesses is falsified as, (i) no blood stains were noticed at the scene of the incident and there was no trail of blood stains from the Nananani Park to the house of PW 2 – Paul, (ii) it was impossible for the deceased to have run a distance of about half

kilometer to the house of PW 2 – Paul, (iii) no panchanama of the house of PW 2 – Paul was drawn regarding finding of blood stains, (iv) if the appellant was armed with a country made revolver, it is inexplicable as to how witnesses do not refer to the appellant re-loading the country made revolver while firing the second shot, (v) in the light of the injury, death must have been instantaneous and, therefore, this would falsify the testimony of the eye witnesses, (vi) the omissions and contradictions in the evidence of the witnesses would require rejection of the testimony of the eye witnesses, (vii) no independent corroboration is available to the evidence of the eye witnesses and in the absence of independent corroboration, no reliance could be placed on the testimony of the interested witnesses and (viii) the weapon of offence was not produced by the prosecution, nor was the weapon found pursuant to the disclosure memorandum of the accused.

The learned APP as well as Mr. A. P. Mundargi, learned Senior Counsel for the complainant has urged before us that merely because the witnesses were interested and were friends of deceased Swapnil, would be no ground to discard their otherwise reliable evidence. None of the eye witnesses knew the nature of the weapon which was carried by the

appellant i.e. whether it was a pistole, revolver or a country made revolver. As soon as the appellant fired the first shot, there was a total panic and in such a situation, it would be extremely harsh to expect witnesses to observe if the appellant had re-loaded the weapon. It is also urged before us that the Medical Officer has not been questioned by the appellant if the death was instantaneous. No surmise could be drawn that looking to the injury, the death must have been instantaneous and, therefore, mere failure of the prosecution to either seize the blood stains clothes of the witnesses or failure to draw the panchanama of the house of PW 2 - Paul would not render their evidence suspicious.

18. Prosecution has examined PW 11 – Dr. Chikhalkar, who had performed the postmortem on the dead body of Swapnil. PW 11 – Dr. Chikhalkar has deposed about the entry wound as well as the exit wound and also gave in detail path of the bullet. According to him the injuries sustained by deceased Swapnil were sufficient in ordinary course of nature to cause death. Dr. Chikhalkar has not deposed about the period during which Swapnil could have been alive after sustaining the injuries. The cross-examination also does not reveal any admission on the part of PW 11 – Dr. Chikhalkar that deceased had died instantaneously. It is no doubt true

that the deceased was fired at and had sustained severe internal injuries, particularly as the bullet had exited from the body. However, in the absence of any medical evidence, it would be extremely hazardous for us to opine if the deceased had died instantaneously and, therefore, could not have run the distance of half kilometer to the house of PW 2 – Paul. The evidence of the eye witnesses as well as the evidence of PW 2 – Paul and PW 4 – Elis leaves no manner of doubt that Swapnil had reached the house of PW 2 – Paul after sustaining the injuries and was taken to the Alliance Hospital. The entry wound was obviously small. The postmortem report reveals that about 2 liters of blood had accumulated in the abdomen of deceased. Since blood had accumulated in the abdomen and the entry wound was small, the bleeding, obviously, would not be profuse in the sense that blood must not have spurted out from the wound. That was the explanation for absence of any blood stains at the scene of the incident. In any event, according to the eye witnesses, deceased Swapnil, on sustaining the injury, immediately started running and this may also account for absence of blood stains at the scene of the incident. Though Swapnil run a distance of half kilometer, in the absence of any evidence to indicate that there was profuse bleeding i.e. blood had gushed out of the wound, absence of trail of blood stains cannot be a decisive factor for disbelieving

the eye witnesses. Obviously, if the blood was not profuse and blood had not gushed out of the wound, but there was only a trickle of blood, the clothes worn by the deceased would have absorbed the oozing of blood. PW 2 – Paul has deposed about T-Shirt of deceased Swapnil being stained with blood. In our opinion, therefore, absence of blood at the scene of the incident or absence of any blood trail from the Nananani Park to the house of PW 2 – Paul cannot be grounds for disbelieving the evidence of the eye witnesses to record a finding that the incident had not occurred at the Nananani Park.

19. PW 2 – Paul claims that there were certain blood stains on the wall of the house and though he had pointed out the blood stains, the police had not drawn the panchanama. Obviously, the panchanama of the scene of the incident was drawn and panchanama of the house of PW 2 – Paul was not drawn because no incident had occurred at that place. Thus, failure of the police to envisage the importance of the panchanama of the house of PW 2 – Paul, would not, in our opinion, whittle down the evidence of PW 2 – Paul. Swapnil, having sustained the injury, was immediately shifted to the hospital where he was pronounced dead. In fact, an admission is elicited in the cross-examination from PW 4 – Elis that

Swapnil was alive till he reached the hospital. This would certainly indicate that death of Swapnil was not instantaneous and that Swapnil had survived till he was taken to the hospital. Obviously, Swapnil was declared dead when examined by the Medical Officer on reaching the hospital. In our opinion, therefore, the evidence of the eye witnesses cannot be doubted on this aspect.

20. It is true that omissions have been elicited in the testimony of PW 2 – Paul and PW 3 – Elis in respect of the oral dying declaration of Swapnil as well as information being communicated to Elis by the eye witnesses. Even if the portion which is elicited as omission is left out of consideration, in our opinion, the credibility of the witnesses is not affected. These witnesses, though they were related to deceased Swapnil, had no animus against the appellant, and, therefore, even if the oral dying declaration is left out of consideration, the evidence of the eye witnesses is not affected in any manner. The incident had occurred at about 1.15 a.m. and there is no evidence to indicate that other independent witnesses were available. The incident had occurred all of a sudden that it would be virtually impossible for the eye witnesses to have noted the presence of other independent persons. If the evidence of the eye witnesses stands the

scrutiny of the court and if the eye witnesses emerged as truthful witnesses, the reliable testimony of the eye witnesses cannot be discarded on the plea that independent witnesses have not been examined to corroborate the testimony of the witnesses. Unless the court finds that there are infirmities in the testimony of the eye witnesses and on account of the infirmities, the eye witness account cannot be accepted without corroboration, then the court may insist for corroboration to the testimony of the witnesses.

21. Prosecution has examined PW 1 - Ernest, PW 5 – Aldrin and PW 7 – Glades as eye witnesses to the incident. The evidence of these witnesses corroborate each other and we have not noticed any significant variations in their testimony which would require rejection of the evidence of these witnesses. These eye witnesses had been cross-examined and after cross-examination, they have emerged as reliable witnesses. Curiously, none of these witnesses depose about any scuffle between deceased Swapnil and the appellant after the appellant had fired the first shot in the air. One witness deposes that deceased Swapnil had gone towards the appellant in order to talk, while the other witness deposes about deceased Swapnil going towards the appellant in self defence. In the cross-examination, details have not been elicited as to the manner in which the

incident had occurred, particularly regarding the scuffle. The evidence of these witnesses, therefore, as it stand, certainly indicates that there was no scuffle between Swapnil and the appellant before the second shot was fired by the appellant. It appears that deceased Swapnil had only gone towards the appellant and it was thereafter that the shot was fired. The shot was fired from a close range and the triggeratory of the bullet appears to be upwards. In the absence of any evidence about scuffle, in our opinion, no inference can be drawn that there was a scuffle between the appellant and deceased and during the scuffle, the appellant had fired a shot at the deceased or that the bullet had been accidentally fired. The close proximity of the shot would explain the deceased going near the appellant and as PW 1 – Ernest puts it that it was to talk to the appellant. It would obviously indicate that the deceased was trying to placate the appellant to dissuade him from perhaps firing a second shot. However, as pointed out by us above, there is absolutely no evidence to indicate that there was either any scuffle or that the bullet had been fired accidentally. It is the inference of the witnesses that the deceased had gone towards the appellant in self defence as nothing has come on the record if the deceased attempted to snatch the weapon or that the deceased attempted to assault the appellant, that a scuffle ensued between them. At the close of the cross-

examination, the eye witnesses have emerged as reliable witnesses on whom implicit reliance can be placed. It is no doubt true that there are certain marginal variations in the testimony of these witnesses, but marginal variations can be expected in the testimony of persons who have witnessed the incident. These three witnesses were in seven moods celebrating the purchase of the motorcycle by PW 1 – Ernest. The appellant suddenly came at the scene of the incident, armed with gun and fired the shot in the air. The suddenness of the incident as well as the suddenness of the assault on deceased and the deceased sustaining injury is one of the major causes for slight variations in the testimony of the eye witnesses. Different persons react differently on seeing an incident and the capacity of each individual on seeing the incident to recapitulate the incident subsequently with all the details varies from individual to individual. Identical account of an incident cannot be expected from persons who have witnessed the incident. It is only in the event of major variation in the testimony that the court may require closure scrutiny of the testimony to determine if the eye witnesses were indeed eye witnesses to the incident. In the present case, in our opinion, the presence of the witnesses at the scene of the incident cannot be doubted. There is nothing in their evidence to even remotely indicate that these witnesses were not present and were

deposing falsely in order to implicate the appellant. None of these eye witnesses had any grudge against the appellant though they may have been friends of deceased Swapnil. In our opinion, therefore, the eye witnesses as well as the evidence of the prosecution clearly establishes that it was the appellant who had fired at deceased Swapnil.

22. The next question that falls for consideration is the offence which the appellant has committed. The trial Judge at paragraph 69 has recorded a finding which we reproduce below:-

“69. While considering this point, it is also to be noted that after first quarrel Anand had gone back and returned on the spot with weapon. According to Mrs. Moholkar with particular determination he had been there. While considering this aspect, it is also required to be considered that first he had made fire in the air. Swapnil had been to him. The scuffling had taken place between them. The witnesses are deposing the same. So the question is there, whether the fire was shot intentionally or accidentally in the course of scuffling is remained unanswered. The possibility of accidental shot is more than determined one.”

23. At the out-set, in our opinion, none of the eye witnesses have

admitted to any scuffle between the appellant and the deceased when the appellant fired at the deceased. The witnesses depose about scuffle in respect of the earlier incident when the appellant had come to the Nananani Park. In respect of the incident of firing at the deceased, none of the eye witnesses have either admitted or have obliquely referred to any scuffle. In our opinion, therefore, the finding of the learned trial Judge that there was a scuffle and in the scuffle accidentally a bullet could have been fired is a finding which is de hors the evidence.

24. During the first incident, when there was a scuffle, the appellant, while leaving the Nananani Park, had threatened the witnesses that he would “see them”. The appellant returned after some time armed with a weapon. The appellant fired a shot in the air. The firing of the shot in the air was more to establish his presence at the Nananani Park armed with a firearm than to quell any dispute. The appellant, it appears, had particular grudge against deceased Swapnil and after firing the shot in the air, it was only deceased Swapnil who went towards the appellant in order to “talk to him” which was for dissuading the appellant from taking any precipitative action. As pointed out by us, there was no scuffle and there is no possibility of the bullet having been accidentally fired and

consequently it was a deliberate shot fired at by the appellant which resulted in deceased Swapnil sustaining the injury which ultimately proved to be fatal. The injury was not an accidental injury but an intentional injury which had been inflicted. The injury was certainly sufficient in ordinary course of nature to cause death and ultimately proved to be fatal. The case of the appellant, therefore, cannot be said to be covered by 4th exception that in a sudden fight the appellant had fired the shot at the deceased in the heat of the quarrel. The intention of the appellant to commit murder of deceased Swapnil or to commit murder of witnesses was apparent as the appellant came to the Nananani Park with a firearm. The firearm was loaded and the appellant can certainly be attributed the knowledge of death ensuing in the event that the bullet was to strike someone. The appellant, in our opinion, therefore, was rightly charged for an offence punishable under Section 302 of the IPC and the conviction of the appellant for offence punishable under Section 304 Part II of the IPC, in the facts of the present case, is wholly unsustainable. It was a premeditated act of the appellant, particularly coming to the park armed with firearm and thereafter firing the first shot in the air and then firing at the deceased from close range. Since a scuffle or an accidental fire is completely ruled out, in our opinion, the appellant is guilty for an offence punishable under Section 302

of the IPC and not for an offence punishable under Section 304 Part II of the IPC. We are conscious of the fact that we are hearing an appeal against acquittal and normally this court would not interfere with the finding of acquittal and convert it into one of conviction, unless the reasons given by the trial court were wholly unsustainable and there was perversity in the reasoning. We have already pointed out the perversity in the reasoning of the trial court that there was no scuffle and there is no evidence of scuffle and there was no possibility of the gun being accidentally fired. In our opinion, therefore, the conviction and sentence of the appellant for offence punishable under Section 304 Part II of the IPC is required to be set aside and the appellant is liable to be convicted for an offence punishable under Section 302 of the IPC.

25. The learned APP as well as Mr. A. P. Mundargi, learned Senior Counsel for the appellant/Original Complainant have conceded before us that there is no evidence against Original Accused No.2. The appeals against acquittal, therefore, filed against accused no.2 deserve to be dismissed.

26. Accordingly, Criminal Appeal Nos. 653, 1044 and 1108 of 2013 are partly allowed and the conviction and sentence of accused no.1 -

Anand Gonsalo Fos for offence punishable under Section 304 Part II of IPC is set aside and instead accused no.1 - Anand Gonsalo Fos is convicted for offence punishable under Section 302 of IPC and is sentenced to imprisonment for life and to pay fine of Rs.20,000/-, in default of which to undergo further RI for two years. The appeals i.e. Criminal Appeal Nos.1044 and 1108 of 2013 are dismissed as against accused no.2 - Praful Gangaram Pawar, confirming his acquittal.

(DR. SHALINI PHANSALKAR-JOSHI,J.)

(P. V. HARDAS,J.)