

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

CRIMINAL APPEAL NO.997 OF 2009

1 Rajesh Samaydin Chaudhari @ Gupta,
Aged 25 years, Occ. Tailor,
Resident of Plot No.35/T/3, Baignwadi,
Govandi, Mumbai.

2 Mohammed Irfan Istiyakh Shaikh,
Aged 22 years, Occ.Student,
Resident of Western Railway Colony,
Bandra(West), Mumbai.

(Presently in Arthur Road Central Prison)
...Appellants.

Versus

The State of Maharashtra. ...Respondent.

WITH
CRIMINAL APPEAL NO.806 OF 2010

Irfan Babu Shaikh,
Aged about 24 years,
Occupation A.C.Mechanic,
Residing at Mahakali Nagar,
Ramanday Pada, Near Military Road,
Marol, Andheri,
Mumbai 400 059.
At present in Nashik Road Central Prison.

...Appellant.

Versus

State of Maharashtra,
(At the instance of
Senior Inspector of Police,
N.M.Joshi Marg Police Station
vide C.R.No.30 of 2007).

...Respondent.

WITH
CRIMINAL APPEAL NO.863 OF 2009

Mohamed Hasan Salim Shaikh,
Aged 24 years, Indian Inhabitant,
Serviceman by profession,
Permanent resident of Room NO.DMT-171,
New Afroz Road, Tulsiwadi Hutment area,
Tardeo, Mumbai 400 035.
Presently lodged at Kalyan District Prison as
an under trial prisoner in the present matter.

...Appellant.

Versus

The State of Maharashtra,
(At the instance of N.M.Joshi Marg
Police Station through C.R.No.30/2007.

...Respondent.

.....

Mr. Amin Solkar with Ms. Misbaah A. Solkar, Advocate for the
Appellant-original accused No.3 in Criminal Appeal No.997 of
2009.

Mr. Nitin Pradhan i/by S.D.Khot, Advocate for the Appellant-
original accused No.1 in Criminal Appeal No.997 of 2009 and
original accused No.2 in Criminal Appeal No.806 of 2010.

Ms. Anjali Patil with Ms. Naima Shaikh and Mr. Arun Rajput,
Advocate for the Appellant-original accused No.4 in Criminal
Appeal No.863 of 2009.

Ms.R.M.Gadhvi, APP. for the State.

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**CORAM : SMT V.K. TAHILRAMANI, Acting C.J.&
A.S. GADKARI, J.**

Reserved on : 19th October 2015.

Pronounced on : 20th November 2015.

JUDGMENT : (PER A.S. GADKARI, J.)

The appellant Rajesh Samaydin Chaudhari @ Gupta
(Original accused No.1), Irfan Babu Shaikh (original accused

No.2) Mohammed Irfan Istiyakh Shaikh (original accused No.3) and Mhammed Basan Salim Shaikh (original accused No.4) have impugned the judgment and order dated 30.7.2009 passed in Sessions Case No.670 of 2007 thereby convicting them under Section 302 read with 34 of the Indian Penal Code and each of them have been sentenced to suffer imprisonment for life and to pay a fine of Rs.1000/- each and in default of payment of fine to further suffer simple imprisonment of one month each, by preferring the aforesaid three separate appeals.

By the same judgment and order dated 30.7.2009 the original accused No.5 (Ghashirm Kanhayalal Solanki) has been acquitted from all the charges framed against him.

For the sake of brevity the appellants named hereinabove will be referred to with their original accused numbers as they were before the Trial Court.

2) The facts which are enumerated from the record and necessary to decide the present appeals can be briefly stated as under:-

i) The incident in question occurred on 28.1.2007 at about 7.15.a.m. at Circle No.11, Barrack No.1, Ground floor of Arthur Road Jail, Mumbai. The name of the deceased is Ali Ajgar Bakar Mehandi.

ii) Deceased Ali Ajgar Bakar Mehandi was under trial

prisoner and was lodged in Circle No.11 Barrack No.1, Arthur Road Jail, Mumai. The accused Nos. 1 to 4 and the original accused No.5 were also under trial prisoners in different crimes and were also lodged in the same barrack. That, on 28.1.2007 at about 7.15.a.m. the accused Nos. 1 to 4 pushed the deceased on the ground and stabbed him with weapons. That, accused No.1 Rajesh stabbed on the chest, accused No.2 Irfan stabbed on the hand, accused No.3 Mohammed Irfan stabbed on the back and accused No.4 Mohammed Hasan stabbed on the left side of the waist of the Ali Ajgar Bakar Mehandi.

iii) Hari Shankar J. Gupta (P.W.2) heard the commotion and immediately informed Shri. Lahu T. Kanaskar (P.W.1) Jailer of the said prison. Lahu T. Kanaskar (P.W.1) immediately rushed to the barrack and found that Ali Ajgar Bakar Mehandi, (deceased) was injured and was standing amongst four accused persons. Shri. Lahu Kanaskar (P.W.1) then blew whistle and caused alarm. Upon enquiry with the deceased Ali Ajgar Bakar Mehandi he came to know that accused Nos. 1 to 4 had assaulted him and caused injuries. Therefore, the accused persons were kept separately and handed over in the custody of security guard and concerned officers. Ali Ajgar Bakar Mehandi (Deceased) was immediately sent for medical treatment to Sir J.J. Hospital. Lahu Kanaskar (P.W.1) was knowing the said injured by his name

because the injured was an accused in the murder case of John Robert D'souza which took place in the said circle No.11 on 22.4.2006. The N.M. Joshi Marg Police Station was informed about the incident. Police rushed on the spot immediately. Shri. Mehhoob A. Inamdar (P.W.No.17) then attached to N.M. Joshi Marg Police Station prepared the spot panchanama in presence of the panchas. He also seized the weapons stained with blood on the spot. He also recorded the statement of certain witnesses. Shri. Sunil Prabhakar Temkar (P.W.18) then attached to N.M. Joshi Marg Police Station as Sr. Police Inspector also rushed to the spot of incident with API-Deepak R. Chavan and other staff and started investigation.

iv) Shri. Hanumant R. Darekar (P.W.6) went to the hospital and recorded the dying declaration of the victim Ali Ajgar Bakar Mehendi at 9.15 a.m. The said dying declaration is at Exh.45. In the said dying declaration the victim Ali Ajgar Bakar Mehendi named the four accused persons and also ascribed specific role with weapons to them. The statement recorded by Hanumant R. Darekar (P.W.6) of the victim Ali Ajgar Bakar Mehendi was treated as first information report and on the basis of the same crime bearing No.30/2007 came to be registered under Section 307 read 34 of the Indian Penal Code and under Section 135 of the Bombay Police Act. The victim Ali Ajgar Bakar Mehendi

succumbed to the injuries at about 2.00p.m. on 28.1.2007 and therefore, Section 302 of the Indian Penal Code was applied to the said crime. During the course of investigation the name of the original accused No.5-Ghashiram Solanki was surfaced on record and he was also arraigned as an accused in the said crime. The Investigating Officer sent the seized articles to the Chemical Analyzer.

v) Dr. Gajanan Sheshrao Chavan (P.W.12) conducted the post mortem examination of the deceased Ali Ajgar Bakar Mehendi on 29.1.2007 and found following injuries on his person.

- 1) Stitched wound 2x1 cm. horizontally placed over left side of front of chest, 2 cm to left of mid line and 6 cm below left clavicle. On removing the stitches, it was an incised penetrating injury directed above downwards and laterally with clean cut red margin and both angles acute. Internally, the injury passed through 2nd left intercostal space to perforate the the medical border of the upper lobe of left lung. The wound of entry of this lung injury on interior surface of the medial border was 1.1/2 cm. long and stitched. The wound of exit of this lung injury on posterior surface of the medial border was 1 cm

long and stitched. There was retro-sternal hematoma of size 6x5 cm. corresponding to this injury.

2) An incised perforating injury 1.2x1c.m. horizontally oblique over anterior aspect of left arm, 14cm. below the top of left shoulder, directed upwards and medially with clean cut red margins and both angles acute. The wound was traces upto an exit wound 0.3 x0.2 cm. over medial aspect of left arm, 8 cm. below the axilla. The tract was dissected along its course. It was hemorrhagic and measured 8 cm. along its length.

3) A penetrating incision of size 3 x 1 cm. with sharp, red margins and both angles acute in the left 5th intercostal space, 16 cm from axilla and 18 cm from anterior mid-line, consistent with the site of thoracic drain.

4) Thoracotomy incision, 27 cm. long, horizontal across the left side of chest with 24 metallic stitches, starting from 1 cm below left nipple and extending horizontally along the curvature of left side of thorax to reach left side of

back upto left scapular region.

5) An incised wound over left ankle joint, horizontal, just above and medial to malleolus, 4x1.1.2 cm with clean cut red margins, corresponding with the site of venesection (a surgical procedure)

6) A stitched wound 1.5 x 0.5 cm in the 11th left inter costal space over left side of back, 8 cm. to left of mid line and 26 cm below the shoulder. On removing the stitches, it was having clean cut red margins and both angles acute. Internally it penetrated into left thoracic cavity, to enter the left lung over its posterior aspect of lower lobe, 2 cm above the lower border of left lung. The lung injury was 2 x 0.5 cm. size 2 cm deep (into the left lung).

7) Contusion 0.5 x 0.5cm over left chest red colored, 5 cm below left nipple and 8 cm to left of mid line.

8) An incised penetrating injury 4x2 cm. over lateral aspect of right arm, vertically oblique with clean cut red margins and acute angles, 8 cm deep, directed posteromedially, located 10 cm

below right shoulder. There was a contusional $\frac{1}{2}$ x 0.5 cm. which was continuous with the upper angle of the wound.

9) A stitches wound (single stitch) over the back in mid line 11 cm below nape of neck. On removing the stitches it was having clear cut red margins with both ante 1.5 x 0.5 cm in site, directed forwards and could be traced upto the vertebra, vertebra was intact.

10) An incised penetrating wound 6x2 cm. over lateral aspect of right lumbar region placed horizontally with clear cut red margins and both angles acute, 4 cm. above right posterior superior iliac spine, muscle deep.

11) A contusion over an area of 5 x 3 cm. located 8 cm above injury No.10.

During the internal examination Dr.Gajanan Chavan (P.W.12) also found corresponding internal injuries on the body of the victim Ali Ajgar Bakar Mehendi to the aforesaid injuries. Dr. Gajanan Chavan thereafter opined the cause of death was due to hemorrhagic shock and due to multiple stab injuries due to sharp pointed and sharp edged weapon. He further opined that all the injuries were anti mortem and found recently caused. The

manner of causation of injuries is only homicidal. He further opined that Injury Nos. 1 to 6 were individually sufficient to cause the death in ordinary course of nature.

viii) Shri. Sunil Prabhakar Temkar (P.W.18) Investigating Officer after receipt of the Chemical Analyser's report, post mortem notes and after completion of the investigation submitted charge sheet in the Court of Metropolitan Magistrate. 29th Court, Dadar, Mumbai mainly under Section 302 and other alleged offences. As the offence punishable under Section 302 was exclusively triable by the Court of Sessions, the learned Metropolitan Magistrate committed the said case to the Court of Sessions for trial vide its committal order dated 17.8.2007. After committal, the learned Trial Court framed the charge below Exh.8 against the accused persons. The contents of the said charge were read over and explained to the accused to which they pleaded not guilty and claimed to be tried. The defence of the accused persons was of total denial. The prosecution in support of its case examined in all 18 witnesses. The learned Trial Court after recording the evidence and after hearing the parties to the said case was placed to convict the original accused Nos. 1 to 4 by its impugned judgment and order dated 30.7.2009 as stated herein above.

3) Heard the learned counsel Mr. Nitin Pradhan with Ms. S.D.Khot for the original accused Nos. 1 and 2, Shri. Amin Solkar with Ms. Misbaah Solkar for the original accused No.3 and Ms. Anjali Patil with Ms. Naima Shaikh for the original accused No.4 and Ms. R.M. Gadhavi, learned A.P.P. appearing for the State at length and with their assistance we have minutely perused the entire evidence pertaining to the present case.

4) The leading counsel Mr. Nitin Pradhan submitted that the dying declaration Exh.45 of the deceased Ali Ajgar Bakar Mehendi which was recorded on 28.1.2007 at 9.15 a.m. cannot at all be relied upon because in view of the medical documents which are at Exh.78 (collectively), it was impossible for the victim to give such a statement to P.W.6- Hanumant R. Darekar. That, the patient was not in a condition to give such a statement. He submitted that though the medical papers disclose that the victim was put on oxygen mask on his face and there is no evidence on record to show that the said mask was removed at the time of recording the dying declaration. According to him, the said dying declaration could not have been recorded and it is a concocted piece of evidence. He further submitted that the dying declaration is not at all a clinching circumstance against the appellants as the same is not in conformity with the contemporaneous document at Exh.78 (Medical record), as the

said medical record has to be read along with EPR (Exh.52) at Page 128 and Station diary entry No.7 dated 28.1.2007 (Exh.52) at Page 129. He submitted that these two documents are only to be relied upon while arriving at the proper conclusion as these two documents are first in point of time wherein the names of the appellants have not been mentioned at all. Mr. Pradhan contended that as per the medical report the condition of the victim Ali Ajgar Bakar Mehandi between 8.00 to 9.00 a.m. was very serious and therefore, he could not have given the statement (Exh.45-Dying Declaration). He also contended that the endorsement of the Doctor on the said Exh.45 is highly improbable and he therefore, submitted that the dying declaration (Exh.45) is extremely doubtful. Mr. Pradhan thereafter submitted that the incident occurred on 28.1.2007 and the accused persons were arrested on 3.3.2007 with bruises and injuries on their body and therefore, the delay in taking the custody of the accused persons creates doubt in mind. The prosecution case, which according to him, is a case of false implication and he therefore, submitted that delay caused in taking the accused persons in custody by the Investigating Officer though their names were known to the Investigating Agency and the appellants were very much available in the Jail, leads to the inference of false implication. He therefore requested

the court to draw adverse inference about the bonafide of the investigating agency. Mr. Pradhan therefore, urged before this court that the present appeals may be allowed and the accused persons may be acquitted from all the charges.

5) Ms. Anjali Patil, learned counsel appearing for the original accused No.4 apart from reiterating the submissions advanced by Shri. Nitin Pradhan further submitted that though there were about more than 100 prisoners in the said barrack, no other eye witness has been examined by the prosecution. She further submitted that the Investigating Officer (P.W.18) has failed to prove the panchanama of the clothes of the accused persons. She submitted that the accused persons since beginning have taken categorical defence that they have been falsely implicated in the present case and according to her dying declaration Exh.45 itself was a concocted document and therefore, the appellants have been falsely implicated in the present case. She lastly submitted that the appeal preferred by the accused No.4 may be allowed.

6) Ms. R.M.Gadhavi, learned A.P.P., per contra submitted that in the present case the deceased Ali Ajgar Bakar Mehandi has given his statement to the police immediately after the incident and the said statement has been treated as dying declaration is a substantive piece of evidence. She further

submitted that immediately after the incident the deceased had pointed out his finger towards the accused persons in presence of P.W.Nos. 1 to 3 though there were more than 100 prisoners present in the said barrack. She further submitted that there is no evidence on record to show that despite there being mask on the face of the victim he was unable to speak and give his statement. She further submitted that Dr. Satyajit G. Patrikar (P.W.15) has specifically mentioned on the dying declaration that the victim was conscious and well oriented while recording his statement. She submitted that apart from the dying declaration the evidence of witnesses adduced by the prosecution is wholly reliable and trust worthy. She therefore, urged before us that in view of the cogent and reliable evidence, the conviction and sentence of the appellants may be maintained and the appeals may be dismissed.

7) With a view to appreciate the submissions advanced by the learned counsel appearing for the appellants and the learned APP, it is necessary to advert in brief the evidence of the relevant prosecution witnesses.

8) P.W.1 is Lahu T. Kanaskar- a Jailer, then was working at Mumbai Central Prison. P.W.1 has deposed that the incident in question occurred on 28.1.2007. He resumed his duty at about 6.30 a.m. On that day, Mr. Joma P. Patil (P.W.2) and Mr. Hari

Shankar J. Gupta (P.W.3) were on duty in Circle No.11. He took search of the kitchen with the help of employees of night duty. Thereafter, he came at the Gate of Circle No.11 at about 7.a.m. In the mean time, P.W.3 Hari Shankar Gupta came running and informed him that something was going on in Circle No.11 in Barrack No.1. P.W.1 therefore, rushed to that place by making the noise of whistle. After reaching to the barrack P.W.1 noticed that one prisoner was standing in barrack No.1 in injured condition. He made enquiry with him .The injured prisoner pointed out the finger towards the accused persons by stating their names and that they assaulted him. The clothes of the injured were full of blood. P.W.1 Lahu Kanaskar saw injuries on the chest, back side near waist, backside near neck and on both the hands of the victim. By that time other jail staff also reached there. P.W.1 Lahu Kanaskar sent the injured victim to Sir J.J. Hospital for treatment and he took the custody of the four accused persons. The accused persons were handed over to other jail employees for producing them before the Jail Superintendent. After arrival of the police he showed the spot of incident to them and police prepared panchanama of scene of offence and seized the weapons which are lying on the spot/scene of offence. This witness had identified the weapons and other articles such as clothes which were on the person of the accused persons at the

relevant time. Uniform of P.W.1 was also stained with blood and therefore, the same was also seized by the police.

In the cross examination of this witness material omissions have been brought on record. The omissions are to the effect, that he ran towards Barrack No.11, that, victim had told him the names of the accused persons and pointed out the fingers towards them, that he had seen the injuries on the chest, waist, neck and both the hands of the victim which have been brought on record.

9) P.W.2- Joma P. Patil and P.W.No.3 Hari Shankar Gupta are the witnesses who were on duty at the relevant time at Mumbai Central Prison (Arthur Road Jail). These two witnesses have stated that after they reached to the spot they saw that Jailer Mr. Kanaskar and the injured prisoner was standing in centre inside the barrack No.1. Jailer Mr. Kanaskar made enquiry from the said injured. The said injured by pointing out the finger towards the accused persons stated that these persons have assaulted him and therefore, he sustained injuries. That, other staff also came there due to alarm of whistle. The injured was sent to hospital for treatment. The name of the injured was Mr. Asgar Bakar Mehendi. In the cross examination of these two witnesses no material omission or admission which is beneficial to the appellants have been elicited.

10) P.W.4 Ashok Vishnu Ghugare is the panch witness to the spot of panchanama. P.W.5 Sunil Waghchore -Police Constable who was serving as Rakshak in the Mumbai Central Prison. He carried the injured Ali Ajgar to the J.J.Hospital. P.W.No.7-Ritesh Shirishkar is a panch witness to the seizure of clothes of the deceased. The said panchanama is at Exh.55. P.W.8- Shaikh Iqbal is a panch witness to the inquest panchanama to the deceased Ali Ajgar. P.W.10 Pravin Rathod is a panch witness to the arrest of the accused persons on 3.2.2007. The said arrest panchanama is at Exh.65. P.W.12 is Dr. Gajanan S. Chavan who conducted the autopsy on the body of the deceased Ali Ajgar on 21.3.2007 as stated herein above. P.W.14 Soma Laxman Khaira is a prisoner who was also lodged in the same barrack and was examined as an eye witness by the prosecution, however he did not support the prosecution case and was declared hostile by the learned A.P.P. P.W.16 is Deepak R. Chavan-Assistant Police Inspector then attached to the N.M. Marg Police Station. This witness has seized the clothes of the Jailer Mr. Kanaskar (PW-1) and the accused persons. The said panchanama is at Exh.81.

11) P.W.6 is Assistant Police Inspector- Hanumant Darekar who has recorded the dying declaration (Exh.45) of the deceased Ali Ajgar which was treated as FIR in the present case. P.W.6 has

deposed that he was attached to N.M.Marg Police Station and was on duty at night officer on 27.1.2007 till 9.00 a.m. of 28.1.2007. That, at about 8.15 a.m. he received phone call from the Jail that injured prisoner had been taken to the J.J.Hospital. It was also informed to him that quarrel had taken place at about 7.15 a.m. That, after the receipt of the said message he immediately rushed to the J.J. Hospital and met Dr. Satyajit Patrikar (P.W.15). Dr. Patrikar had attended the injured prisoner. He made enquiry with the said doctor whether injured Ali Ajgar was in a position to give statement to which he was informed affirmatively. He thereafter recorded the statement of injured in the emergency ward in presence of Dr. Patrikar as per the narration of the injured. Dr. Patrikar (P.W.15) has endorsed the condition of the injured on the said statement. The said statement of the injured-Ali Ajgar is at Exhibit 45. P.W.6 API. Hanumant Darekar has further deposed that the injured has stated to him that he (victim) was lodged in the same barrack of the Jail along with other prisoners and accused persons. That, at about 7.15 a.m. in the prison all the four accused persons made him to fell down on the ground and thereafter accused No.1- Rajesh gave a knife blow on his chest, accused No.2 Irfan gave a blow of knife on his hand, accused No.3 Mohammed Istiyak Shaikh gave knife blow on his hand and accused No.4

Mohammed Hasan gave blow on left side of his waist. That, P.W.6 treated the aforesaid statement as FIR and registered the crime No.30/2007 for the offence punishable under Section-307 read with 34 of the Indian Penal Code and under Section 135 read with 37(1) of the Bombay Police Act. In the detailed cross examination of this witness apart from the immaterial admission to the effect that victim gave a statement in Hindi and it was reduced by P.W.6 in Marathi but it was not mentioned in the said statement, has been brought on record. Apart from the said admission, no material omission and/or admission has been elicited by the appellants through this witness, which is beneficial to them.

12) P.W.No.15 is Dr. Satyajit Patrikar. PW-15 has deposed that on 28.1.2007 in the morning he received patient Ali Ajgar at about 8.20 a.m. who was brought by Arthur Road Jail Police. He noticed various injuries on the person of the said victim. He administered first aid. This witness has proved the various medical case papers pertaining to the victim, Ali Ajgar, which are at Exh.78 (collectively). He has further deposed that the said patient gave his statement to the police in his presence. This witness has in detailed stated about the fact narrated by victim, of accused persons causing injuries on the specific part of the body of the victim. That, the police had recorded the said

statement (Exh.45) in his presence. He put his endorsement and made his signature on the said statement. The said endorsement is at Exh.45-B. That, victim stated to him that the assault took place between 7.00 to 7.30 a.m. in barrack No.11/1. After treatment the patient was referred to Forensic Surgeon. The said patient expired at about 2.05p.m. In his cross examination, this witness has admitted that O2 mask which was mentioned in 7th line of noting on second page for giving oxygen to the patient at 7.40 a.m., was not removed. That, the condition of the patient was serious and therefore, there was no progress between 8.30 to 9.00 a.m.

13) P.W.17 is Police Sub Inspector, Mehboob A. Inamdar. P.W.17 conducted the spot panchanama (Exh.40) and also seized the weapons used in the offence from the scene of offence which were stained with blood by effecting panchanama (Exh.83). He also arrested the original accused No.5 Gjashiram Solanki. P.W.18 is Sr. Police Inspector Sunil P. Temkar, then was attached to N.M. Joshi Marg Police Station. This witness has deposed about the various steps taken by him during the course of investigation of the aforesaid crime till filing of the charge sheet. In the cross examination of these two witnesses no material which is useful to the appellants has been elicited.

14) Mr. Pradhan, learned counsel appearing for the appellants strenuously argued before us that the medical case papers (Exh.78) which is contemptuous document discloses that the patient/victim himself gave the history of assault to the Doctor however, he did not give name of any accused person. That, the patient was admitted in emergency ward at 7.30 a.m. That, the oxygen mask was started at about 8.15 a.m. and therefore, it was not possible for the victim to give his dying declaration to P.W.6 in presence of P.W.15. Mr. Pradhan further contend that the evidence of the relevant witnesses is absolutely silent about the fact that the patient was not in a position to speak despite there being O2 mask. The learned APP. submitted that the victim was having O2 mask, he was audible and was able to communicate the Doctor and therefore, the said dying declaration Exh.45 has been recorded. We find substance in her submission. If the victim would not have been audible enough then certainly the recording of dying declaration was not genuine. As stated earlier the evidence on record is absolutely silent about the fact that the victim was not able to speak without there being oxygen on his face and therefore, no adverse inference can be drawn for the same.

He further contended that in view of the admission

given by P.W.15 that the condition of the patient was serious between 8.30 a.m. to 9.00 a.m. That the blood pressure of victim was not stable and was decreasing at the relevant time. The recording of dying declaration (Exh.45) becomes extremely doubtful and the endorsement given by P.W.15 that patient was conscious and well oriented is highly improbable. He submitted that taking into consideration the entire medical record (Exh.78 collectively) a safe inference can be drawn that the patient was not in a condition to give dying declaration. A close scrutiny of the various medical papers (Exh.78) demonstrate that the Doctors have made endorsements intermittently that the patient was conscious and oriented. The said endorsements are at Page 196, 197, 199 (8.15 a.m.) of the paper book. It is further to be noted that at Page No.230 of the paper book (Exh.78) further discloses that at about 9.15 a.m. the blood pressure of the victim was 100/70 and the Doctor has put an endorsement "no murmur", it means that heart bits were normal. The dying declaration (Exh.45) was recorded at 9.15.a.m. and P.W.15 has given an endorsement that the "patient is in conscious state to give statement". As stated herein above, the Doctors who were treating the said victim from to time upto 9.15 a.m. have stated in the medical reports that the patient was conscious and oriented. The Medical record (Page 200) further discloses that the

victim did not respond to the treatment after 10.00 a.m. as his pulses were not palpable and the blood pressure was not recordable. In view of the medical record, we are of the considered opinion that when the dying declaration of the victim Ali Ajgar was recorded at about 9.15 a.m. on 28.1.2007 by P.W.6 in presence of P.W.15 the said victim was in conscious state of mind and was well oriented. The dying declaration (Exh.,45) is therefore, fully reliable and trust worthy. In the said dying declaration the deceased had specifically stated that accused No.1 Rajesh stabbed on his chest, accused stabbed on his hand, accused No.3 Mohammed Istiyak stabbed on his back and and accused No.4 Mohammed Hasan stabbed on the left side of his waist. As stated earlier, we hold that the said dying declaration is fully reliable and trust worthy.

15) It is to be noted here that apart from the dying declaration (Exh.45) recorded by PW-6, there is oral dying declaration given by the deceased to Lahu Kanaskar (PW-1) immediately after the assault which is corroborated by Joma Patil (PW-2) and Hari Shankar Gupta (PW-3). After the assault on deceased by the accused persons, the PW-1 immediately rushed to the said barrack and noticed the deceased standing in injured condition amongst the accused persons. On enquiry the deceased informed him by pointing finger towards the accused

persons that they assaulted him. This oral dying declaration has remained unchallenged and is not at all controverted by the accused persons. This is an additional aggravating circumstance against the accused person.

16) Mr. Pradhan thereafter would contend that the date of incident was 28.1.2007 and the accused persons were arrested by the police on 3.2.2007 and therefore, there is delay in taking the custody of the accused persons by the police. He further submitted that when the accused persons were arrested by effecting panchanama (Exh.65) the three accused persons had injuries on their body. He submitted that though the names of the accused persons were known to the police they were not arrested by them and no explanation has been offered by the police for inordinate delay in arresting the accused persons. We are of the opinion that as the accused persons were already in the custody of the Jail authorities it was not incumbent on the part of the police to immediately seek their custody and only because accused persons were arrested belatedly, it makes no difference from the point of investigation. The record clearly indicates that the case was being serious one wherein deceased was assaulted in the Jail premises by other co-prisoners, the police were investigating the same diligently and no adverse inference can be drawn against the police that the accused persons were

falsely implicated in the present crime. It is to be noted here that the deceased in his dying declaration has specifically and categorically stated the names of the accused persons and therefore, there is no question of accused persons being falsely implicated in the present crime. It is also now settled position of law that defects in the investigation does not entitle the accused persons for acquittal. A useful reference can be made to the decision of the Supreme Court in the case of Karnel Singh vs. State of M.P. reported in 1995 (5) SCC 518 has held that in cases of defective investigation, Court has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating Officer if the investigation is designedly defective. In the present case in our opinion the Investigating officer has not done any act which is detrimental to the case of the prosecution which would come to the help of the accused persons for being getting acquittal from the case.

17) Ms. Anjali Patil, learned counsel appearing for accused No.4 contended that EPR register (Exh.51) and the Station diary entry (Exh.52) are the documents first in point of time and the same are only to be relied upon. She further submitted that in the said two documents the names of the accused persons have

not been mentioned by the concerned authorities and therefore, non mentioning of the names of the accused persons in the dying declaration is an after thought. A bare perusal of (Exh.51) Emergency Register maintained by the hospital discloses that the victim was brought to the hospital at about 7.40a.m. by the Jail Warden-Rakshak namely Shri. Sunil Waghchore (P.W.No.5) and it appears that the said witness has given the information to the constable who was on duty at J.J.Hospital that unknown persons have assaulted the victim. Like wise (Exh.52) Station Diary Entry dated 28.1.2007 recorded by N.M. Joshi Marg Police Station also discloses that some unknown prisoners assaulted the victim in the Jail. It is to be noted here that the station diary entry has been jotted down on the basis of the EPR entry (Exh.51). Be that as it may, even otherwise an EPR entry or entry in the station diary effected on the basis of the information given by the third person cannot stand on a higher pedestal than of the dying declaration of the deceased. The dying declaration has its own sanctity and we find that the said dying declaration is genuine, trust worthy and reliable. It is the settled position of law that if the court finds that the dying declaration is trustworthy and reliable then the same can safely be relied upon for basing conviction of the accused persons.

However, as a matter of prudence corroboration is a

general rule and not a mandate. In the present case the weapons were seized from the spot itself. The deceased had specifically named the appellants in the present crime. The clothes of the appellants which were having blood stains were seized in presence of P.W.7 Ritesh Shirishkar. The seized clothes of the accused persons and Jailer Kanaskar (P.W.1) were sent for Chemical Analyzer. As per the report of the Chemical Analyzer, the blood group of the deceased was 'O'. The blood which was found on the clothes of the appellants was also of 'O' group. Except accused No.4 other accused persons have not offered any explanation in their 313 Statement about the findings of the blood on their clothes. Accused No.4 has given an explanation that his clothes were stained with blood of the deceased when he carried the deceased out of Jail. The said explanation given by accused No.4 is contrary to the evidence of P.W.1-Kanaskar who has clearly stated that immediately after the assault he took the custody of the accused persons and kept them separately. The testimony of P.W.1 Kansakar has been supported by P.W.No.2 Joma P. Patil, and P.W.3 Hari Shankar Gupta and therefore, it appears that that the defence taken by the accused No.4 is dehorse of any merits and the same is contrary to the evidence on record.

18) In view of the above, we are of the considered opinion that the appellants alone are responsible for causing the death of Ali Ajgar Bakar Mehendi and there are no merits in the present appeal. All the Appeals are accordingly dismissed.

(A.S. GADKARI, J.)

(ACTING CHIEF JUSTICE)