

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

CRIMINAL APPEAL NO.303 OF 2013

1. Balasaheb Baban Waghere
Age : 50 yrs, Occu: Milk Business
R/at: Babanrao Waghere Chawl,
Pimparigaon, Dist.: Pune
2. Jainath Sureshrao Fadtare
Age : 24 yrs, Occu : Rikshaw Driver,
R/at : 1437, Kasba Peth, Pune.
3. Sudhir Sopan Kshirsagar
Age : 28 yrs, Occu : Service,
R/at : Nhavi Aali, Pimparigaon,
Dist.: Pune.
4. Satish Shriranga Jadhav
Age : 28 yrs, Occu : Portar
R/at : Dattanagar, Urulikanchan,
Tal.: Haveli, Dist.: Pune.
5. Baban Prashant Ranavare
Age : 31 yrs, Occu.: Business
R/at : Ambedkar Nagar, Banergaon,
Dist.: Pune.
6. Sanjay Gopal Shinde
Age : 35 yrs, Occu: Driver
R/at : Bhimnagar, Pimparigaon,
Dist.: Pune

(At present all lodged in Yerwada
Central Jail, Pune)

... Appellants
Orig. Accused Nos.1,2,3,5,6 & 7

versus

State of Maharashtra
(At the instance of
Khadki Police Station, Dist.:Pune)

... Respondent

WITH

CRIMINAL APPEAL NO.113 OF 2013

Dilip Namdeo Bharne
Age : 32 yrs., Occu: Nil
R/at : Man, Tal.: Mulshi,
Dist.: Pune.
(At present lodged in Yerwada
Central Jail, Pune)

... Appellant/
Orig. Accused No.8

versus

State of Maharashtra
(At the instance of
Khadki Police Station,
Dist.: Pune)

... Respondent

.....

- Mr.C.B. Shirke a/w Vaishali C. Dhotre, Mr.Baburao Shinde and Mr.Sunny Punamia, i/b. SSP Legal, Advocate for the Appellants in both the Appeals.
- Mr.V.V. Gangurde, APP for the State/Respondents.

**CORAM : B. R. GAVAI &
SARANG V. KOTWAL, JJ.**
DATE : 04th JULY, 2018

JUDGMENT (PER : SARANG V. KOTWAL, J.) :

1. These two Appeals are preferred by the original accused in Sessions Case No.62/08 on the file of learned Additional Sessions Judge, Pune. The Criminal Appeal No.303/13 is preferred by the original accused Nos.1, 2, 3 5, 6 and 7 and the Criminal Appeal No.113/13 is preferred by the original accused No.8. Original accused No.4 had absconded during trial and therefore the trial proceeded in his absence. For the sake of convenience the Appellants in these Appeals are referred to hereinafter by their status as accused in the aforementioned Sessions Case.

2. The accused/appellants have preferred these Appeals against the Judgment and Order dated 16/01/2013 passed by the learned Additional Sessions Judge, Pune in Sessions Case No.303/13. The accused are convicted and sentenced as under :

(1) Accused Nos.1, 2, 3, 5, 6 and 7 were convicted for the offence punishable u/s 302 r/w 149 and 120-B of IPC and were sentenced to suffer rigorous

imprisonment for life and to pay a fine of Rs.5,000/- each and in default of payment of fine, were sentenced to suffer rigorous imprisonment for six months.

- (2) Accused No.8 was convicted for the offence punishable u/s 120-B r/w 302 of IPC and was sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs.5,000/- and in default of payment of fine, was sentenced to suffer rigorous imprisonment for six months.*
- (3) Accused No.1, 2, 3, 5, 6 and 7 were also convicted for the offence punishable u/s 148 of IPC and were sentenced to suffer rigorous imprisonment for three years.*
- (4) Accused Nos.1, 2, 3, 5, 6 and 7 were also convicted for the offence punishable u/s 201 r/w 149 of IPC and were sentenced to suffer rigorous imprisonment for five years and to pay a fine of Rs.1,000/- each and in default of payment of fine, were sentenced to suffer rigorous imprisonment for three months.*

- (5) *Accused Nos.1, 2, 3, 5, 6 and 7 were also convicted for the offence punishable u/s 307 r/w 149 of IPC and were sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.1,000/- each and in default of payment of fine, were sentenced to suffer rigorous imprisonment for three months.*
- (6) *Accused Nos.1, 2, 3, 5, 6 and 7 were also convicted for the offence punishable u/s 506(2) r/w 149 of IPC and were sentenced to suffer rigorous imprisonment for 7 years.*
- (7) *Accused Nos.1, 2, 3, 5, 6 and 7 were also convicted for the offence punishable u/s 364 r/w 149 r/w 120-B of IPC and were sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.1,000/- each and in default of payment of fine, were sentenced to suffer rigorous imprisonment for three months.*
- (8) *Accused No.1 was also convicted for the offence punishable u/s 3 r/w 25 of the Arms Act and was sentenced to suffer rigorous imprisonment for 2 years and to pay a fine of Rs.500/- and in default*

of payment of fine, was sentenced to suffer rigorous imprisonment for one month.

(9) Accused No.8 was acquitted for the offence punishable u/s 143, 147, 148, 201, 307, 364 and 506(2) of the IPC and for the offence punishable u/s 3 r/w 25 of the Arms Act.

(10) Accused Nos.2, 3, 5 and 7 were acquitted for the offence punishable u/s 3 r/w 25 of the Arms Act.

(11) Accused Nos.1, 2, 3, 5, 6, 7 and 8 were granted set off u/s 428 of Cr.P.C. for the period already undergone.

(12) All the sentences were directed to run concurrently.

3. The prosecution case in brief is as follows:

One Pintya @ Kiran Ramchandra Suryavanshi (the deceased in this case) and one Prashant Bhimrao Gaikwad (P.W.1) were friends. On 29/09/2007 at about 09.00 p.m. they were standing in Ambedkar square Khadki and were talking

with each other. At that time Pintya received a phone call. After 10-15 minutes one Scorpio Jeep with 6-7 persons came there. Pintya and Prashant sat in the jeep. Pintya sat next to the driver and Prashant sat on the back seat in the third row. It is the prosecution case described through P.W.1 that the accused No.1 Balasaheb Baban Waghere, who was sitting in the middle seat, was known to both Pintya and Prashant. As they proceeded further, the accused No.1 pointed revolver at Pintya and took away his mobile. The jeep was taken to Kothrud. The driver of the jeep got down and bought six bottles of beer from a wine shop. The accused No.1 confronted Pintya as to why he was helping one Rakesh in a Court case. Thereafter the jeep was taken towards Katraj. In the Jeep Prashant was assaulted. They crossed a toll booth. They did not pay toll and drove further. Thereafter one of the persons assaulted the deceased on his head with a beer bottle. Vehicle was stopped at a secluded place. The accused No.1 then fired shots from his pistol on the deceased on his head, back and stomach. Two of the persons then dragged Pintya and threw him in the grass by the road side.

Then all of them went away from there. On his desperate pleadings, Prashant was dropped at Chinchwad, but with threats that if he disclosed the incident to anyone, all his family members would be killed. In the morning at around 09.00 a.m. Prashant went to Khadki Police Station with his father and narrated the incident to the police. He also informed the brother of the deceased Pintya. Though the police took down his statement, the FIR was not immediately lodged as the police wanted to verify the story. Therefore he was taken towards the place where the murder was committed. Prashant was unable to point out the place and the dead body was not found. They came back at the police station and the FIR was lodged at 07.45 p.m. on 30/09/2007. Prashant was sent for medical examination with the police. On 01/10/2007, the accused Nos.1, 2, 3, 4 to 7 were arrested. They were taken to Khadki Police Station. On 02/10/2007 their clothes were seized. It is alleged that the clothes of the accused Nos.1 and 4 as well as two pistols were recovered at the instance of the accused No.1 from his house. The accused No.8 was arrested subsequently and his mobile

phones were seized. On 02/10/2007 at about 05.45 p.m. the statement of the accused No.1 was recorded, mentioning his willingness to show the place where the dead body was left. The police officers and the Panchas along with the accused No.1 went to the spot pointed out by the accused No.1. Initially the dead body was not found, but on further search, highly decomposed dead body was found. Certain articles viz. empty cartridges of a pistol and glass pieces of beer bottles and a leather belt were found. Doctor was called at the spot for conducting the post-mortem examination. The post-mortem examination was conducted. One bullet was recovered from the head and other bullets were recovered from the body. The investigation was carried out. Identification parade was held, wherein allegedly P.W.1 Prashant Gaikwad identified the accused Nos.2, 3, 5, 6 and 7. It was the case of the prosecution that the accused No.8 entered into a conspiracy with the other accused. All of them pursuant to the conspiracy had committed this offence. The seized muddemal articles were sent for forensic examination. At the conclusion of the investigation, charge-sheet

was filed. The case was committed to the Court of Sessions and was tried before the learned Additional Sessions Judge, Pune, vide Sessions Case No.62 of 2008.

4. During trial, the prosecution examined 20 witnesses. The defence of the accused was of total denial. After recording the evidence and statements of the accused u/s 313 of Cr.P.C. And after hearing both the sides, at the conclusion of the trial, the learned Additional Sessions Judge passed the impugned Judgment and Order as mentioned earlier.
5. We have heard the learned counsel Mr.Mr.C.B. Shirke for the Appellants and Mr.V.V. Gangurde, the learned APP for the State of Maharashtra.
6. Mr.Shirke submitted that the case is entirely based on the evidence of P.W.1 Prashant Gaikwad. He submitted that Prashant is not a reliable witness. He was a friend of the deceased, but the evidence shows that he himself was a suspect and therefore he was under the thumb of the police. Mr.Shirke

further submitted that the identification of the accused is meaningless because the P.W.1 was regularly visiting the police station, even when the accused were arrested and therefore there were opportunities for him to see them. He further submitted that there was no evidence of conspiracy between the accused and the accused No.8. Call Detail Record produced on record, in fact, supports the case of the accused. He further submitted that there are many omissions and contradictions in the evidence of P.W.1 compared to his FIR and the statement recorded by the Magistrate u/s 164 of Cr.P.C. Mr.Shirke further submitted that the conduct of this witness was highly unnatural and it was not safe to rely on his evidence. He further submitted that once his evidence is discarded, the other circumstances, which are merely corroborative in nature, cannot be taken into account and the evidence in that behalf is also unreliable.

7. On the other hand, Mr.V.V. Gangurde, the learned APP submitted that the evidence of P.W.1 was reliable. From the nature of the offence it was obvious that he must be very scared

and therefore there were bound to be some discrepancies in the FIR lodged by him because the FIR was given in a frightened state of mind. Mr.Gangurde submitted that all the corroborative pieces of evidence, in particular, the recovery of murder weapons, were strong circumstances against the accused. He further submitted that the identification parade memo was admitted by the defence and therefore the accused cannot dispute the genuineness of their identification by P.W.1. He further submitted that even the evidence of conspiracy is established by the prosecution as the call detail record of the mobile phones of accused No.8 gave sufficient indication that he was in constant touch with the other accused.

8. The prosecution indeed relies heavily on the evidence of solitary witness Prashant Gaikwad (P.W.1). He has deposed that he and the deceased Pintya were friends. Both of them went in a jeep brought by the accused on 29/09/2007 at 09.00 p.m. from Ambedkar Square. There were 6-7 persons in the jeep. The accused No.1 showed a pistol and threatened Pintya. P.W.1 has

further deposed as to how they initially stopped at one shop, where beer bottles were purchased. Thereafter they had crossed a toll booth near Katraj and thereafter they were taken to a secluded place. P.W.1 has further deposed that one of the accused hit a beer bottle on the head of the deceased. The deceased Pintya who was sitting on the front seat was pulled back on the middle seat and the accused No.1 fired his pistol on the head, back and stomach of the deceased. Pintya was thrown on the road. Accused No.4 fired his pistol on head of the deceased and then two accused persons dragged Pintya and threw him in the grass by the road side. The accused No.1 wanted to kill P.W.1 as well, but due to his fervent pleadings he was spared. P.W.1 has deposed that one of the accused got bullet injury on his leg in the entire incident. He has deposed that after committing murder, the accused No.1 asked one of his companions to call Dilip Bharne i.e. accused No.8 and told him that his work was done and that he should send money. At about 05.00 a.m. he was dropped at Chinchwad. At that time, the accused No.1 threatened him that he should not disclose this

incident to anybody otherwise his family members would be killed. It is deposed by P.W.1 that he got frightened, but went to Khadki police station along with his father. He informed brother of the deceased and narrated entire incident to the police. The police took down his statement, which was treated as the FIR. It is produced on record at Ex.195. The prosecution evidence shows that P.W.1 was taken to the place where possibly the incident had taken place, but he could not point out the exact place and the body was not found. The FIR was lodged at 07.45 p.m. on 30/09/2007. P.W.1 further deposed that he was called to identify the suspects on two occasions i.e. 18/10/2007 and 07/11/2007. On the first occasion he could identify the accused No.2, 3, 5, 6 and 7. On the second occasion he identified the accused No.4. Before the Court he identified the weapons produced by the prosecution.

9. P.W.1 Prashant was cross-examined in detail on behalf of the defence. He admitted that the deceased Pintya was an accused in a murder case and he himself was facing two criminal

cases. He has admitted that he and Pintya were on friendly terms with one Rakesh who was facing case u/s 302 of IPC and under MCOC Act. He further admitted that there was enmity between the accused No.1 and Pintya. He has deposed that Ambedkar Chowk was at Khadki road and it was a busy road. He further admitted in his cross-examination that when the jeep was stopped at Kothrud near a wine shop neither he nor Pintya tried to get down or run away from the jeep. Neither of them sought help. Similarly even at the toll booth they did not seek any help or did not try to run away.

10. P.W.1 was confronted with his FIR for the omissions as he had improved on his version in the FIR when he deposed before the Court. He has stuck to his deposition before the Court, but pleaded ignorance as to why the same facts were not recorded by the police in his FIR, though he had narrated them before the police. The FIR did not mention that P.W.1 had told the police that accused No.1 fired the shots at the back and head of the deceased. Similarly, there was no reference in the FIR to

the phone call to Dilip Bharne after the murder was commenced. P.W.1 further deposed in the cross-examined that the deceased suffered bleeding injuries after he was shot in his stomach. He further admitted that he went to the police station whenever he was called. He has stated in his cross-examined that on 01/10/2007 he had gone to Khadki Police Station. He has admitted that he had gone to the police station as people from Chandramani area were suspecting that he was responsible for Pintya's death and out of fright he had gone to the police station. Though he has denied that after three days from 01/10/2007 he was continuously in the police station, in the same breath he has admitted that he used to visit his house to take bath and again used to go back to the police station. P.W.1's statement was recorded u/s 164 of Cr.P.C. on 04/10/2007 by J.M.F.C. Khadki.

11. Before discussing other evidence, it is necessary to test his evidence in the background of the medical evidence. The prosecution has examined P.W.10 Dr.Pravin Haribhau

Choudhari, who had conducted the post-mortem examination. He has deposed that on 02/10/2007 he was requested by the police officers to visit an agricultural field at Vadgaon Dal Shivar for conducting post-mortem on a decomposed body. On examination of the body P.W.10 was of the opinion that it was possible to conduct the post-mortem of the head of the body on the spot itself. On conducting the post-mortem of the head he noticed that the total brain matter was liquefied and one bullet was found in the head. For further examination, the body was removed to a medical centre at Bhor and the remaining post-mortem examination was conducted. P.W.10 Dr.Choudhari has deposed that the rigor mortis was absent. There was decomposition and bullous formation over the skin was present. There was cuticle peeling from the skin, maggots were present. The external genitals were partially eaten by maggots. The lower legs were semi-flexed. There was an injury over skin on right thigh, from where a bullet was recovered. There was an injury over center of scalp and another injury was on lateral left side of spine. One more bullet was recovered from the supra clavicular

region. He had given the cause of death as “Death due to shock, due to massive internal hemorrhage due to bullet injuries.” He was specifically cross examined on the point of establishing the time of death. The post-mortem notes produced at Ex.243 show that the post-mortem examination was conducted between 03.30 p.m. to 05.00 p.m. on 02/10/2007. P.W.10 Dr.Choudhari has deposed in the cross-examination that after the process of rigor mortis is completed, the process of decomposition begins gradually. Total 36 hours are required for the diminishing of rigor mortis. According to him, there were three stages of decomposition. In the first stage there is colour change of skin. After the rigor mortis is totally diminished, the colour change of skin occurs within 6-12 hours. In the second stage, foul smell emanates and in the third stage there is colliquative putrefaction. In the third stage maggots are formed and they become pupa and pupa become flies. He has further deposed that there is dislocation of major and minor joints in the advance stage of decomposition. He has stated that 7 days and above after death, are considered as advance stage of decomposition.

He has further admitted that in the instant case there was dislocation of major and minor joints due to decomposition. Thus, his evidence clearly shows that the body was in an advance stage of decomposition and at least 7 days had passed between the death of the deceased and the day on which the post-mortem examination was conducted. The post-mortem examination was conducted on 02/10/2007 and according to P.W.1 death had occurred in the night between 29th and 30th September 2007, which is within 3-4 days of conducting of the post-mortem examination. Thus, this medical evidence cannot be conciled with the ocular evidence. In a given case when the Court finds that the ocular evidence is fully reliable, then the contrary medical evidence can be ignored. But in the instant case if the evidence of P.W.1 is not found reliable, then the medical evidence assumes great importance. The prosecution has confirmed about the fact that it was the dead body of Pintya and it was identified by his brother. In that case, we cannot ignore the medical opinion that the death must have occurred atleast 7 days prior to 02/10/2007, which would mean that the

death must have occurred around 26/09/2007. Even giving allowance of a couple of days, the death could not have occurred after 28/09/2007. In any case it is highly doubtful that the death could have occurred between the night of 29th and 30th September 2007. Significantly there were no bullet injuries in the stomach and in fact the post mortem notes do not show any abnormality in the abdomen.

12. In this background the evidence of P.W.1 needs to be analyzed. P.W.1 is the solitary eyewitness for the prosecution and was a close friend of the deceased according to P.W.1 himself. Therefore his evidence is required to be scrutinized carefully and with caution. His evidence shows that his conduct in the entire episode was unnatural. He has admitted that the people in the locality suspected him and therefore he had approached the police on 01/10/2007. Though he has approached police on 30/09/2007 at around 09.00 a.m. and had narrated his version to the police, they did not immediately trust him and the FIR was not recorded at that time. He was

taken to the spot mentioned by him. But on their search dead body was not found and only after coming back to the police station, late in the evening, at about 07.45 p.m. the FIR was lodged. There is no evidence forthcoming as to what transpired since 09.00 a.m. to 07.45 p.m. on 30/09/2007. No explanation is offered as to what circumstance made the police change their mind and register the FIR though initially they had not believed the story given by P.W.1. Though P.W.1 has deposed that he had gone to the police station with his father and had also informed the brother of the deceased, neither of these witnesses is examined by the prosecution to corroborate his version. His conduct appears to be totally unnatural and therefore his story becomes doubtful. According to him, the accused No.1 and the deceased were on enmical terms. Therefore it is unbelievable that the deceased would simply go in the same vehicle with the accused No.1, when the accused No.1 had come with 6-7 persons in the vehicle. Further there was no reason for this witness P.W.1 to accompany the deceased. He has not deposed that the deceased insisted that he should go with them.

13. According to him, the accused No.1 had shown the pistol and had threatened the deceased in the vehicle and thereafter the vehicle was stopped at a wine shop in Kothrud. The driver got down from the vehicle to purchase the beer bottles. The deceased was sitting next to the driver. Therefore there is no reason as to why the deceased did not try to run away or did not raise shouts or did not seek help. Similarly, when their vehicle passed through the toll booth at Katraj they refused to pay the toll and had some discussion with the person at the toll booth. Even at that stage no attempt was made either by the deceased or this witness to raise shouts to seek help. This conduct we find to be unnatural. His further evidence that accused No.1 fired bullet in the stomach of the deceased is not supported by the medical evidence as there was no injury in the abdomen of the deceased. This witness has deposed that even he was assaulted by the accused. The prosecution has examined P.W.16 Dr.Dhananjay Raut who had examined this witness and the examination showed that he had two blunt traumas; one on

oral cavity and another on left lower leg and one abrasion on left lower back. These very minor injuries did not support his theory of assault by the accused in the vehicle. Most importantly the date and time of incident given by this witness do not match the evidence as discussed earlier. There is an inconsistent gap of atleast a couple of days between the time estimated by the medical evidence and time given by this witness. In the context of the evidence of the identification of the accused, except accused No.8, by this witness, it is important to note that P.W.1 has admitted that he was almost always at the police station, except for going home to take bath. The accused were shown arrested on 01/10/2007 and were present in the Khadki police station since 02/10/2007. Therefore there was every opportunity for this witness to have seen the accused and therefore his further evidence in respect of identification of the Appellants i.e. the accused Nos.2, 3, 5, 6 and 7 loses all its importance. With all these infirmities, we do not think that his evidence is reliable.

14. The prosecution has tried to bring on record other corroborative pieces of evidence. P.W.2 Avinash Prabhakar Bhosale was examined as a Pancha, in whose presence allegedly the accused No.1 had made a statement leading to the discovery of the body. He has deposed that on 02/10/2007 he was called by the police at Khadki police station. From the memorandum Panchanama at Ex.201 it appears that the statement was made by the accused No.1 at around 05.45 p.m. showing his willingness to point out the place where the body was thrown. The police, Panchas and the accused No.1 went upto Bhore, but the accused No.1 could not point out the spot where the body was thrown. Then they turned back from Bhore and on further search the accused No.1 was able to point out the place where the body was found. The Panchanama showing the discovery of body was produced at Ex.202. Some articles as mentioned earlier viz. empty cartridges were collected from the spot. In the cross-examination this witness has admitted that the deceased was his classmate for two years. We fail to understand as to why the police could not procure the help of an independent person

for such an important Panchanama. The selection of this Pancha itself throws sufficient doubt on the nature of statement made by the accused No.1 and the resultant discovery of the dead body. Moreover, his evidence shows that they searched for the dead body for about 2-3 hours and he was with the police for 6-7 hours, which means that the accused No.1 had not mentioned the spot where the dead body was thrown and that there are indications that the accused No.1 was not really aware about the exact location of the spot where the dead body was thrown. After exhaustive search, the dead body was found. Therefore it cannot be said that the dead body was discovered pursuant to the statement given by the accused recorded u/s 27 of the Evidence Act. Therefore we are of the opinion that the prosecution has failed to establish this circumstance against the accused No.1 beyond reasonable doubt.

15. The next circumstance, which the prosecution has relied on, is the recovery of weapons at the instance of accused No.1 and the evidence of the ballistic expert for matching the bullets recovered from the dead body with the pistols. P.W.5

Siddhardh Namdeo Shirole was examined as a Pancha in whose presence the weapons were recovered at the instance of the accused No.1. He has deposed that on 04/10/2007 at about 05.30 p.m. to 06.00 op.m. the police called him to Khadki Police Station to act as a Pancha. He has deposed that thereafter the accused No.1 made a statement that he had kept the pistol and the blood stained clothes of himself and the accused No.4, in his house and showed willingness to produce the same. Thereafter the Panchas and the police party were led to the accused No.1's house. The clothes were produced from a cupboard which was opened by the mother of the accused No.1. Thereafter the accused No.1 took them to the kitchen and from the loft, he produced one box of a Cooker. There were two pistols kept in one carry bag in that box. One of them had five bullets and the other had one bullet in their magazines. He has deposed that thereafter the police kept the clothes in a plastic bag and the pistols were kept in another plastic bag. The Articles were wrapped with brown sheets and wax seal was put on them. Signatures of Panchas were obtained. The memorandum of the

statement of accused No.1 is produced at Ex.211 and the seizure Panchanama is at Ex.212. For this important Panchanama it was expected that the police should have taken an independent person as a Pancha with them. Instead, the cross-examination of this witness reveals that he was working as a traffic warden and he has admitted that he is accustomed with the police. He has further deposed that he used to attend the duty of traffic warden whenever police called him. Thus, he was virtually working with the police and to make the matter worse, he has admitted that the house of the deceased was at a distance of only 250 ft from his house. Thus, he was also one of the neighbours of the deceased. Such a witness can hardly be described as an independent witness. The seizure and the sealing conducted in his presence cannot carry high evidentiary value. If the Pancha is available to the police and is an interested witness, the defence is justified in making the submissions that the seals can be opened at any time and labels, seals and Panchas' signatures can be put on them at any time. The investigating officer has to rule out these possibilities.

16. The prosecution has further tried to connect the recovery of these weapons with the bullets found from the dead body of the deceased. The prosecution has examined P.W.12 Shamsundar Shridhar Munj, as an expert who had conducted the test on the recovered bullets and the pistols. He has deposed that on 08/10/2007, ASI Khandagale attached to Khadki Police Station deposited about 28 sealed packets, 3 sealed envelopes and 1 sealed bottle along with forwarding letter, in their Ballistic Department. He has deposed that he had carried out the physical and chemical examination of the Articles received by them which included two pistols, 7.65 mm live cartridges, empties and clothes. He has deposed that he has examined and carried out the physical and chemical examination of the bullets sent by Medical Officer, who had conducted the post-mortem examination. On examination it was revealed that three bullets retrieved by the Medical Officer from the dead body, matched with the Test bullet fired from the country made pistol at Ex.3. He further deposed that he had chemically examined the clothes

of the deceased and the accused and it was his opinion that the bullets were fired within the powder range of 3 fts. His evidence shows that, on 08/10/2007 PSI Khandagale had deposited one sealed small bottle and one plastic bottle with a covering letter of the Medical Officer. The bottle contained a bullet and skin. On the same day he received one sealed plastic bottle and one small bottle with the forwarding letter from Medical Officer, Bhor and he found that the seals were found to be intact and matching with the seal on the forwarding letter. He further deposed that the articles contained a deformed bullet and piece of skin. On the same day he had received one more plastic bottle and one small bottle with forwarding letter from Medical Officer, Bhor. The Articles which he had received from Medical Officer were numbered by him as BL 833/2007, BL 834/2007 and BL 836/2007. What is important from his evidence is that he had received the bullets from the Medical Officer under his letters. However, the Medical Officer Dr. Choudhari (P.W.10), who had conducted the port-mortem report, has not stated in his examination about sealing of those bullets and forwarding

them for ballistic examination at the Forensic Science Laboratory. Thus, we find that the crucial link of sealing the bullets and forwarding it to the Forensic Science Laboratory is missing, to rule out the possibility of tampering. In his substantive evidence, as mentioned, the Medical Officer has not deposed about the sealing of the bullets and sending them directly for ballistic examination. In view of this infirmities, benefit of doubt must go to the accused No.1 and accordingly we are discarding this circumstance against him. Consequently the offence under the Arms Act is also not proved against the accused.

17. The next circumstance which the prosecution has relied on, is the recovery of clothes, which the accused were wearing purportedly at the time of commission of offence. In this connection P.W.20 PI Pandurang Maruti Sahane, who was the investigating officer, has deposed that, on 01/10/2007, PSI Fuge of the Crime Branch had informed him that the accused in this crime were taken in custody at Barshi. The clothes of the

accused were seized in presence of P.W.8 Suraj Nandu Waghmare on 02/10/2007 between 09.00 p.m. to 10.30 p.m. That the means the accused were in the custody of police from 01/10/2007 and also on 02/10/2007 till late in the evening and yet their clothes were not immediately seized, when they were arrested. The seizure Panchanama is produced on record at Ex.224. P.W.8 Suraj has deposed that the accused persons were brought from the lock up for the Panchanama and the lock up was inside the police station. In any case, there is no further cogent evidence led by the prosecution to show that these clothes were incriminating pieces of evidence in any manner or they were having any connection with the murder.

18. The prosecution has relied on the evidence of test identification parade to fix the identity of the accused Nos.2, 3, 5, 6 and 7. The identification parade memorandum is produced on record under the provisions of section 291-A of Cr.P.C. and therefore Special Executive Magistrate, who conducted the identification parade, was not examined. As per the prosecution

case the P.W.1 identified all these accused. He was already knowing the accused No.1. As discussed earlier, the evidence shows that these accused were arrested on 01/10/2007 itself and they were in the lock up of Khadki Police Station. P.W.1 was constantly visiting and was present at the police station. He has admitted that except for taking bath at his house, he was at the police station. Therefore the possibility of P.W.1 having seen these accused at the police station, is not ruled out by the prosecution. Since we have already held that the evidence of this witness is not reliable, his identification of the accused is of no significance in any case.

19. The prosecution has examined P.W.4 Irfan Khalil Khan as the Pancha witness to show that the accused No.5 had washed the blood stained jeep at Barshi. The prosecution has also examined P.W.13 PI Anil Shankar Pawar to show that the accused No.5 made a statement on 05/10/2007, to point out the place at which the Scorpio jeep was washed. P.W.4 Irfan Khan has turned hostile and has not supported the prosecution case.

P.W.13 PI Pawar's deposition shows that the place named as Sainath Washing Center at Barshi was showed by the accused No.5 where the jeep was washed. The water which was accumulated at the spot, was collected by the police and the Panchanama was prepared. However, there is no further clinching evidence to link the same with the present crime. Nobody from the Sainath Washing Center was examined and hence there is no corroboration to this circumstance. Therefore we are not inclined to take into account this circumstance in favour of the prosecution. The prosecution has further relied on the injury suffered by the accused No.2. P.W.1 has stated that in the incident one of the accused had suffered bullet injury on his thigh and therefore the prosecution wanted to show that the accused No.2 had indeed suffered bullet injury on his thigh. In this behalf, P.W.11 Dr.Risbood Yashwant Waman was examined to prove injuries suffered by accused No.2. He was treated by Dr.Chirag Beri, who had shifted to America and therefore he could not be examined. However, the MLC Register showed that the accused No.2 had suffered fracture of 5th meta-carpal and

there was gun shot wound on his left knee. The medical certificate shows that the examination was conducted on 02/10/2007. This witness had not examined the accused No.2. He has admitted that in the entry made in the MLC Register, there was no history given of any firearm wound. Age of the injury was not mentioned in any of the medical papers. In the absence of any reliable evidence in that behalf it is not possible to draw an inference that the injury was caused between 29/09/2007 and 30/09/2007 and it was caused due to any particular firearm by any of the accused. Therefore even this piece of circumstance does not help the prosecution.

20. Insofar as the accused No.8 is concerned, as per the prosecution case itself he was not present at the spot. P.W.1 has stated that after committing murder of the deceased, accused No.1 had asked his companions to call this accused No.8. Accordingly, the call was made at around 01.00 a.m. when allegedly accused No.8 was informed that his work was done and that he should pay the amount. The prosecution has

examined the Investigating Officer who had arrested this accused and had seized his mobile phones. The call detail record is produced through the evidence of P.W.17 Datta Shantaram Angre, who was a Nodal Officer working with Idea Cellular Ltd., Pune. The seized mobile phones, their phone number and the CDR produced by P.W.17 Datta Angre did not point out that the particular call mentioned by P.W.1, was made to this accused. Even the FIR lodged by P.W.1 does not mention that any such call was made by any of the accused to accused No.8 from the jeep in the presence of P.W.1 after committing the murder. This an important omission from the FIR, but was deposed by the P.W.1 in his deposition before the Court. Apart from that, there is no reference to the accused No.8 in the entire incident. There is no other incriminating circumstance against him. Therefore, we are of the opinion that even the accused No.8 is not concerned with the present crime.

21. In view of the above discussion, we are of the opinion that the prosecution has failed to prove its case against any of

the accused and hence all the Appellants deserve to be acquitted. Hence, the following order :

ORDER

- (i) Appeals are allowed.
- (ii) The Judgment and Order of conviction and sentence is quashed and set aside.
- (iii) Appellants/Accused are acquitted of the charges, charged with.
- (iv) Appellants/Original Accused Nos. 1, 2, 3, 5, 6 & 7 are directed to be released forthwith, if not required in any other case.
- (v) Bail bonds of Appellant/original Accused No.8 shall stand cancelled.

(SARANG V. KOTWAL, J.)

(B. R. GAVAI, J.)