

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

CRIMINAL APPEAL NO.446 OF 2012

1. Yusuf Mustak Khan
Age: 25 years, Occ: Service
R/at Ahmed Umar Building,
2nd Floor, R.No.6, M.S. Ali Road,

2. Irfan Abdul Rauf Shaikh @
Irfan Chaina
R/at 303, Rose-wood Garden,
A Wing, Near Shiwar Garden,
Mira-Bhayandar Road,
Mira Road, Dist.: Thane

.... Appellants
(Orig. Accused
Nos.1 & 2)

versus

The State of Maharashtra
(At the instance of J.J. Marg Police Station
vide C.R.No.76 of 2009)

... Respondent

**WITH
CRIMINAL APPEAL NO.447 OF 2012**

1. Suleman Moiddin Shaikh @ Pape
Age : 32 years, Occ.: Driver
R/at Nawab Chawl No.5,
Room No.80, 1st floor, Jairajbhai Lane,
Nagpada, Mumbai – 400 008.

2. Mohd. Ibrahim Subhan Sayyed @ Batla
Age : 26 years, Occ.: Service
R/at Khetwadi, 10th lane,
Opp. Rambharose Hotel Footpath,

V.P. Road, Mumbai – 400 004,
A Wing, Near Shiwar Garden,

3. Mohd. Taufik Shafi Shaikh
Age : 20 years, Occ.: Service
R/at, Tahir Manzil, 3rd Floor, R.No.33,
Chandramani Buddhavihar Marg,
Nagpada, Mumbai – 400 008.

.... Appellants
(Orig. Accused
Nos.3, 6 & 7)

versus

The State of Maharashtra
(At the instance of J.J. Marg Police Station
vide C.R.No.76 of 2009)

... Respondent

**WITH
CRIMINAL APPEAL NO.459 OF 2012**

1. Shakir Ahmed Abdul Hamid
Khan @ Kalu
Aged : 64 years, Occ : Business
2. Jakir Ahmed Shakir Ahmed Khan
Aged : 35 years, Occ : Business,
Both residing at 51/53 Kokani Chawl,
1st floor, Room Nos.31 and 32,
Chandramani Buddha Vihar Marg,
Nagpada, Mumbai 400 008

.... Appellants
(Orig. Accused
Nos.4 & 5)

versus

The State of Maharashtra
(At the instance of J.J. Marg Police Station,
vide C.R.No.76 of 2009)

... Respondent

.....

- Mr A P Mundargi along with Mr Sudeep Pasbola, Mr Bhavesh Thakur, Mr Rahul Arote and Mr Ganesh K Gole, Advocate for Appellant No. 1 and 2 in Appeal No.459/2012 (Original Accused No. 4 and 5);
- Mr Ganesh K Gole with Mr Ateet Shirodkar, Advocate for the Appellant No.1 and 2 in Appeal No.446/2012 (Orig. Accused Nos.1 and 2) and for Appellant Nos.1 to 3 in Appeal No.447/2012 (Orig Accused No.3, 6 and 7).
- Mr H J Dedhia, APP for Respondents/State all Appeals;
- Mr Parvez Memon with Mr Shine Mohammad, Advocate for the Original Complainant - Father of deceased.

CORAM : **B. R. GAVAI &
SARANG V. KOTWAL, JJ.**
RESERVED ON : **20th JULY, 2017**
PRONOUNCED ON : **14th AUGUST, 2018.**

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

1. The Appellants in these Appeals have challenged the Judgment and Order dated 28/02/2012 passed by the Ad-Hoc Additional Sessions Judge at Sewree, Mumbai, in Sessions Case No.414/09. Since in all these Appeals, the same judgment is challenged, they are disposed of by this common Judgment. For the sake of convenience all the Appellants, in these three Appeals are referred hereinafter by their status as accused in the said Sessions Case.

2. Criminal Appeal No.446/12 is preferred by the original accused No.1 Yusuf Mustak Khan and accused No.2 Irfan Abdul Rauf Shaikh @ Irfan Chaina. The Criminal Appeal No.447/12 is preferred by the original accused No.3 Suleman Moiddin Shaikh @ Pape, accused No.6 Mohd. Ibrahim Subhan Sayyed @ Batla and accused No.7 Mohd. Taufik Shafi Shaikh. The Criminal Appeal No.459/12 is preferred by the original accused No.4 Shakir Ahmed Abdul Hamid Khan @ Kalu and accused No.5 Jakir Ahmed Shakir Ahmed Khan.

3. By the impugned order, all these accused were convicted and sentenced as under;

(1) *For the offence punishable u/s 120-B of IPC, the accused were sentenced to suffer rigorous imprisonment for one year each and to pay a fine of Rs.1,000/- each and in default to suffer rigorous imprisonment for one month each.*

(2) *For the offence punishable u/s 144 of IPC, they were sentenced to suffer rigorous imprisonment for six months each and to pay a fine of*

Rs.1,000/- each and in default to suffer rigorous imprisonment for one month each.

- (3) For the offence punishable u/s 148 of IPC, they were sentenced to suffer rigorous imprisonment for one year each and to pay a fine of Rs.1,000/- each and in default to suffer rigorous imprisonment for three months each.*
- (4) For the offence punishable u/s 449 of IPC, they were sentenced to suffer rigorous imprisonment for one year each and to pay a fine of Rs.1,000/- each and in default to suffer rigorous imprisonment for three months each.*
- (5) For the offence punishable u/s 452 of IPC, they were sentenced to suffer rigorous imprisonment for one year each and to pay a fine of Rs.1,000/- each and in default to suffer rigorous imprisonment for three months each.*
- (6) For the offence punishable u/s 302 r/w 149 of IPC, they were sentenced to suffer life imprisonment and to pay a fine of Rs.3,000/- each and in default to suffer rigorous imprisonment for six months each.*

- (7) *For the offence punishable u/s 4 r/w 25 of the Evidence Act, the accused were sentenced to suffer rigorous imprisonment for three months each and to pay a fine of Rs.500/- each and in default to suffer rigorous imprisonment for one month each.*
- (8) *For the offence punishable u/s 37(1) r/w 135 of Bombay Police Act, they were sentenced to suffer rigorous imprisonment for one month each and to pay a fine of Rs.500/- each and in default to suffer rigorous imprisonment for 15 days each.*
- (9) *All the sentences were directed to run concurrently and the accused were given benefit of set off u/s 428 of Cr.P.C.*

4. The prosecution case in brief is as follows;

The accused No.4 Shakir Ahmed Abdul Hamid was the owner of Firdos Guest House, Arab Galli Nagpada. Accused No.5 Jakir Ahmed Shakir Ahmed Khan is his son. Accused No.4 was suspecting that one Mohd. Irfan Maqbool Hasan Khan @ Irfan Chindhi was a police informer. The accused No.4 suspected that the said Irfan Chindhi used to supply information to the police,

due to which the accused No.4 and his associates were continuously harassed. According to prosecution case, the aforesaid Irfan Chindhi had employed two drivers. One was Guddu, who was working in the day time and the other was Mohd. Akil Abdul Salam Qureshi, who used to be on duty from 05.00 p.m. to 04.30 a.m. According to the prosecution case, after about 12.00 a.m. in the night between 02/04/2009 and 03/04/2009, the aforementioned Irfan Chindhi, one Aslambhai and others were sitting near Taj Tower. At that time, the accused No.5, 6 and others were present across the road. The deceased Irfan Chindhi (Irfanbhai) went to them for a talk. There were some verbal exchanges between them. The accused Nos.5 and 6 left the place. Thereafter Irfanbhai, his two drivers and his friends went to Liberty Hotel for dinner. After dinner Irfanbhai and others first went to Mahim Darga and then to a Darga near Marine Lines. Thereafter at about 04.30 a.m. they came to M. Raza Co-operative Housing Society. As per usual practice, Irfanbhai used to park his car near his brother Aslam's building and used to go to his house on a motorcycle of one Haji Sufiyan. At that time, the accused

No.3 Suleman Moiddin Shaikh @ Pape and accused No.6 Mohd. Ibrahim Subhan Sayyed @ Batla came there and confronted Irfanbhai as to why he used to supply information to the police in respect of accused No.4. Accused No.6 Ibrahim Batla claimed that Irfanbhai had told him to give information to the police. As Irfanbhai was refuting those claims, all the other accused came there with deadly weapons like choppers and big knives and started assaulting Irfanbhai. Due to the assault, Irfanbhai started running towards Raza Building. His driver Akil Qureshi and Haji Sufiyan sat in his Santro car and went to J.J. Marg Police Station and brought the police to the spot. When the police, Akil Qureshi and Haji Sufiyan came back to the spot, it was seen that Irfanbhai was lying dead inside the Raza building near the staircase on the ground floor. He was taken to J.J. Hospital, but he was declared dead before admission. Akil Qureshi gave his statement in the hospital which was treated as the FIR and offence was registered vide C.R.No.76/09 at J.J. Marg Police Station. The deceased Irfanbhai's brother Aslam was residing in the said Raza building. According to him, he had come down to the ground floor after

hearing the commotion and had seen the assailants assaulting his brother. Aslam's statement was also recorded. Haji Sufiyan's statement was recorded at 04.30 p.m. on 03/04/2009. In the meantime accused Nos.1, 2 and 3 were arrested as they were travelling on the same two wheeler in suspicious circumstances. They were accosted by the officer on patrolling duty attached to Nagpada Police Station at about 06.30 a.m. They were formally put under arrest under the Panchanama and then at about 01.00 p.m. they were handed over to J.J. Marg Police Station. The investigation was carried out. Various Panchanamas were conducted. Post-mortem was conducted on the dead body of Irfanbhai. The remaining accused were arrested. Different weapons were recovered at the instance of different accused and the clothes of the accused were seized. Statements of various witnesses were recorded and at the conclusion of the investigation, the charge-sheet was filed. The case was committed to the Court of Sessions, as it was exclusively triable by the Court of Sessions.

5. We have heard the learned Counsel Mr.Sudeep Pasbola

i/b. Mr.Ganesh K. Gole Advocate for Original Accused Nos.1, 2, 3, 6 and 7, learned Senior Counsel Mr. A. P. Mundargi for Original Accused Nos.4 and 5 and Mr. H. J. Dedhia, the learned Additional Public Prosecutor for the State of Maharashtra. We have also heard Mr.Parvez Memon, Advocate for the - Father of deceased. With their assistance we have read the evidence and have gone through the record and proceedings of the case.

6. During trial, the prosecution examined 18 witnesses and the defence examined one witness. P.W.1 Mohd. Akil Abdul Salam Qureshi, P.W.2 Haji Mohd. Sufiyan Bilal Kapadia and P.W.3 Hajiaslam Maqbul Hasan Khan claimed to be the eyewitnesses to the incident. According to the prosecution case, P.W.1 Akil and P.W.2 Haji Sufiyan had seen the assault outside Raza building and P.W.3 had seen the assault inside Raza building. P.W.12 Dr.Sunanda Ravindra Katke had conducted the post-mortem examination. P.W.13 Manoj Jairam Katpara was the Special Executive Officer, who had conducted the Test Identification parade, where according to the prosecution, the accused Nos.1 and

2 were identified by P.W.1 and P.W.2. P.W.16 PI Vishwanath Tukaram Kolekar had arrested accused Nos.1, 2 and 3 while he was on the patrolling duty. P.W.17 API Bandu Dada Bansode attached to J.J. Marg Police Station had recorded the FIR and the statements of the eyewitnesses. He had conducted the initial part of the investigation. P.W.18 Sr.PI Ramrao Mahadev Desai was the Investigating Officer. P.W.4 Mohd. Anis Atemohd. Siddiqui was a Pancha for the inquest Panchanama and the P.W.5 Yusuf Abdul Rehman Qureshi was a Pancha for the spot Panchanama. P.W.6 to P.W.11 were the Panchas for different Panchanamas for recovery of weapons. The other witnesses were formal witnesses. Their evidence would not impact the decision of the case.

7. The evidence of P.W.12 Dr.Sunanda Katke shows that the deceased had suffered as many as 38 injuries on his face, shoulder, chest, abdomen, hands, legs etc. In short, the deceased had suffered serious incised and stab wounds all over his body. The cause of death given by this witness was “death due to haemorrhage and shock due to cut throat with multiple injuries

with head injuries (unnatural)”. The Medical Officer opined that except for three injuries mentioned in the list, all other injuries were grievous and were sufficient to cause death.

8. The FIR in this case was lodged by P.W.1 Mohd. Akil Abdul Salam Qureshi. He has deposed that he was working as a driver with the deceased Irfan Khan. P.W.1 had his duty hours from 05.00 p.m. till 04.30 a.m. on the next day early morning. During day time one Guddu was working as a driver with the deceased. On 02/04/2009, P.W.1 joined the duty at 05.00 p.m. After 11.00 p.m., the deceased Irfan Khan came to Arab Galli near Taj Tower. They were joined by Irfan Khan's friend Irfan Dongri and Haji Sufiyan (P.W.2). Around that time, one person, whom P.W.1 named as Papa, was standing nearby and had verbal altercation with Irfan Khan. P.W.1 has not deposed about the exact subject of their heated discussion. P.W.1 has further deposed that thereafter all of them had dinner at Liberty Hotel. Then they visited Mahim Darga and thereafter went to the Darga near Bombay Hospital. Irfan Khan and P.W.1 Akil then went to Raza

Housing Society at Surti Mohalla. At that time, P.W.2 Haji Sufiyan came there on motorcycle. P.W.1 has deposed that it was their practice that he used to park the car there and handover the keys to Irfanbhai and thereafter P.W.2 Haji Sufiyan used to drop Irfanbhai at his house situated at Duncan Road on his motorcycle. Since the road was under construction, the deceased used to park his car near his brother's house. After giving this background, P.W.1 has deposed about the incident. He has stated that he was parking the car and the deceased was guiding him. P.W.2 Haji Sufiyan was present on his motorcycle. At that time, the accused No.3 Suleman @ Pape and accused No.6 Ibrahim Batla came there on their motorcycle around 04.30 a.m. The accused No.3 Pape stopped his motorcycle in front of the car and asked the deceased regarding his enmity with accused No.4 Shakir Ahmed. According to P.W.1 accused No.3 Pape asked the deceased as to why he often caused arrest of the accused No.4. The deceased denied his allegations. They continued talking about their dispute and at that time P.W.1 saw some boys coming towards them. At that time, P.W.1 was in the car and the deceased was taking motorcycle to

one side. P.W.1 has further deposed that he was taking the car in the reverse direction for going near the deceased. That time, one Tempo obstructed P.W.1. He has further deposed that he saw accused No.5 Jakir Ahmed was coming there and accused Nos.3 Pape and 6 Ibrahim Batla were on their two wheeler. He saw that those boys were having weapons in their hands and they ran towards the deceased. P.W.1 has further deposed that he got frightened. He was sitting in the car and even P.W.2 Haji Sufiyan was present nearby. P.W.2 sat in the car and both of them drove away in the said Santro car to save their own lives and to get help from the police. P.W.1 has further deposed that, they then went to J.J. Marg Police Station. One police officer and one constable sat in their car. Thereafter they came to the police chowky and took a van with them and came to the spot. When they reached there, they saw that Irfan Khan was lying injured in front of the building. P.W.1 Akil then called the brother of the deceased. The deceased was put in the car and was taken to J.J. Hospital, where the Doctor examined him and declared him dead. P.W.1 has categorically denied having seen the actual assault on the deceased. He has

stated that he lodged his FIR. The FIR is produced on record at Ex.58, 59 colly. The FIR was lodged at 06.15 a.m. The proforma of the FIR shows that the time of incident was 04.40 a.m. and information was received by police station at 05.30 a.m. on 03/04/2009. P.W.1 has further deposed that he was called for Test Identification Parade at Arthur Road Jail, where he had identified the accused Nos.1 and 2. However, he has also stated that he had identified the accused on the basis of the description given by the police and on the basis of photographs which were shown to him before the Test Identification Parade. During his deposition, he has stated that he knew names of the accused Nos.3, 5 and 6. It appears that in the FIR, this witness had described the actual assault on the deceased in detail attributing particular weapons to a particular accused. However, during deposition he resiled from that part of his FIR and therefore the prosecution sought permission to cross-examine him by declaring him hostile.

9. In the cross-examination conducted on behalf of the prosecution, the Prosecutor confronted him with his statement

from the FIR wherein he had described the actual assault on the deceased. He has deposed that he had mentioned that particular portion in the FIR, because he was assaulted by deceased's brother Aslam and deceased's nephew and therefore he had narrated the facts as per their say. In the cross-examination, P.W.1 has admitted that he was detained at the police station and that he named the accused on the say of the police. He has reiterated in the cross-examination that as soon as the incident started, he went towards the police chowky due to fear. The distance between the spot and the police station was about 2-3 minutes. He has also admitted that police had put handcuffs on him and only after the FIR was lodged, they were removed.

10. P.W.2 Haji Mohd. Sufiyan Bilal Kapadia is an important eyewitness in this case. He has deposed that he was working with the deceased since about 2 years before the incident. The deceased was in the business of construction and garments. The deceased was having a Santro car and he had employed two drivers namely Guddu and P.W.1 Akil. P.W.2 in his deposition has

further described the events which took place during that night. He has deposed that in the midnight the deceased had a talk with the accused Nos.3 to 7 and two unknown persons near D.B. Marg Beat Chowky. After that, the deceased with his friends went to Liberty Hotel and had dinner. Thereafter they went to two Dargas as mentioned by P.W.1. At about 03.45 a.m. the deceased told P.W.2 to bring milk from Gol Mandir. P.W.2 has further deposed that he returned at around 04.00 a.m. and gave milk, which he had brought, to a servant of the deceased and thereafter P.W.1 and the deceased started to go to their house. P.W.2 has further deposed that he was on his motorcycle. P.W.1 was driving the car. P.W.1 was parking the car near Surti Mohalla at about 04.30 a.m. P.W.1 parked his car on the site and got down. P.W.2 further deposed that at that time accused No.3 and 6 came on a scooter near the deceased and started quarreling with him on the ground that the deceased was causing arrest of the accused No.4. At that time, the accused No.4 Shakir Ahmed and No.5 Jakir Ahmed came on a motorcycle. P.W.2 has further deposed that accused No.4 abused the deceased and told others that he should be killed

otherwise he would get them arrested. At that time, the accused No.7 came there and was taking round. According to P.W.2, thereafter two more unknown persons came on a motorbike. P.W.2 has thereafter described the incident in detail. He has deposed that accused No.5 was having a chopper in his hand and assaulted the deceased on his chest. The accused No.3 assaulted the deceased with a knife on his stomach. Two persons who were not named, had a steel rod and a chopper in their hands and they also assaulted the deceased with their weapons. Accused No.4 assaulted the deceased on his face with a knife. Due to the assault the deceased started running towards Raza building and the assailants ran behind him. P.W.2 has further deposed that the deceased gave shouts for help. Thereafter P.W.1 and P.W.2 went to J.J. Marg Police Chowky for seeking help. They returned back with the police. At that time, they saw that the deceased was lying injured. He was taken to J.J. Hospital, where he was declared dead. He had identified the accused before the Court. His statement was recorded on 03/04/2009. The evidence shows that it was recorded at about 04.30 p.m. on that day. P.W.2 has further

deposed that on 24/04/2009 Test Identification Parade was conducted where he identified two accused namely Yusuf, who was holding a steel pipe and other accused Raju. In the cross-examination P.W.2 has admitted that the deceased was paying him a fixed salary. He further admitted that he was in the J.J. Hospital from 05.00 a.m. to 12.30 p.m. and then he went to his house. Thereafter he went to the police station at about 04.30 p.m. He has stated that he met API Bansode at the police station and told him that he had witnessed the incident. He has admitted that before that he had not stated about the incident to any person. He has also admitted that while he was in the hospital, police from J.J. Marg Police Station, were making enquiry about the incident with the persons who were present in the hospital. He further deposed that the police did not make any enquiry with him in the hospital and he did not tell them about the incident in the hospital. In his cross-examination he has explained that they were awake the whole night and therefore he had gone to his house for sleeping and on 03/04/2009 in the evening at about 04.30 p.m. he went to the police station to inform them about the incident. According to him,

the deceased was taken to the hospital in a police vehicle and he along with P.W.1 went to the hospital in the car. He has further deposed in his cross-examination that, his motorbike was not seen when he returned to the spot with the police after the assault. From the hospital he had directly gone to his house. He has deposed that the incident of assault took place on the road and that he was 1 ft away from the deceased when the first blow was given to the deceased. P.W.2 could not name the police officer who was present in the J.J. Marg Police Station when he and P.W.1 went there. He has deposed that at the police station he and P.W.1 gave information to the police and at that time he had told the names of the persons who had assaulted the deceased. But the said information was not recorded in writing. He has stated that he had seen the blood in the passage. He was confronted with a few omissions from his statement, but those omissions were not very material. In his further cross-examination he has stated that he had informed the police that public was assaulting the deceased but he did not mention the names of the assailants and at that time his statement was not recorded by the police. He has deposed that his

clothes were blood stained because of blood of the deceased. He did not produce the clothes before the police, but had given those clothes to beggars.

11. The prosecution has examined P.W.3 Hajiaslam Maqbul Hasan Khan who was the brother of the deceased and was residing in the aforementioned Raza building at Surti Mohalla. He has deposed that when he was sleeping in his house in the night, at about 04.45 a.m. he heard noise coming from the staircase. He thought that someone was calling him. He went there and saw that 6-7 persons were assaulting someone. P.W.3 has further named the accused Nos.3 to 6 whom he had seen assaulting the deceased with chopper, knife and steel rod. They all ran away on seeing him. P.W.3 has deposed that he tried to chase them in vain. When he came back, he saw the person who was assaulted was none other than his brother Irfan. He has further deposed that at that time P.W.1 and P.W.2 came there with police. The deceased was kept in the police van and was taken to J.J. Hospital, where he was declared dead before admission. In his police statement he has

deposed that he had given description of three unknown persons apart from naming the accused who were known to him. He has further deposed that after 10-12 days of the incident he had gone to Khalidabad because his father-in-law had expired. He identified all the accused before the Court as the assailants of his brother. In the cross-examination he has deposed that he came back from Khalidabad after 20-22 days. He has deposed that his statement was recorded by API Bansode in the police station between 11.00 a.m. to 12.00 p.m. on 03/04/2009. He has further deposed that police enquired with him in the J.J. Hospital, but did not reduce anything in writing.

12. After registration of the FIR, the investigation was going on, in the meantime at about 06.40 a.m. on 03/04/2009, the police officers attached to Nagpada Police Station, who were on the patrolling duty, accosted and apprehended accused Nos.1, 2 and 3, who were riding on a scooter. The prosecution has examined P.W.16 PI Vishwanath Tukaram Kolekar who was attached to Nagpada Police Station on that day and who had

apprehended the accused Nos.1, 2 and 3. He has deposed that when these three accused were intercepted, he noticed blood stains on their clothes. On enquiry they gave evasive answers. P.W.16 PI Kolekar and his companion police officers got suspicious and these three accused were detained. Panchas were called and in their presence, search of these three accused was taken. Some personal articles and cash amount was seized from them including cash and mobile phones. The articles were kept and sealed in different packets. The Panchanama was conducted between 07.05 a.m. to 09.15 a.m. on 03/04/2009. The accused were taken to police station. Thereafter P.W.16 contacted J.J. Marg Police Station and the custody of these three accused was handed over to J.J. Marg Police Station. The cross-examination of this witness P.W.16 reveals that the custody was handed over to J.J. Marg Police Station at around 01.30 p.m.

13. The prosecution has examined API Bandu Dada Bansode attached to J.J. Marg Police Station, as P.W.17, who had conducted the initial part of investigation. He has deposed that at

about 04.45 a.m. on 03/04/2009, P.W.1 came to the police station in a Santro Car and disclosed that his employer Irfan Khan was assaulted by the accused. According to P.W.17 API Bansode, P.W.1 Akil had named accused Nos.3 to 7 and had stated that there were two unknown persons with them who had also assaulted the deceased. He has further deposed that the assault was by Choppers, Sura and iron pipe. P.W.17 has further deposed that PSI Kamble and one constable proceeded to the spot along with the informant and P.W.17 himself followed them with the Detection Staff. Before P.W.17 had reached the spot, PSI Kamble informed him on the mobile phone that the deceased was removed to J.J. Hospital. P.W.17 has further deposed that he thereafter deputed two constables and asked them to remain present on the spot of the incident and he himself proceeded towards J.J. Hospital. At the hospital he enquired with the informant P.W.1 Akil and obtained crime number from the J.J. Marg Police Station. The C.R.No.76/2009 for registration was obtained. P.W.17 has further deposed that he had dictated the statement of the informant P.W.1 Akil as per his say to Police Naik Bhogale, who typed the contents

on the laptop. The statement was treated as the FIR, which was produced at Ex.59 colly. P.W.17 has further deposed that PSI Kamble carried out the inquest Panchanama. P.W.4 Mohd. Anis Atemohd. Siddiqui is examined as the Pancha, who was present during the inquest Panchanama. Inquest Panchanama is produced on record at Ex.86 through the evidence of P.W.4 Mohd. Anis. P.W.17 API Bansode has further deposed that at about 06.15 a.m. he went to the spot of incident and prepared the spot Panchanama. He had collected some knives and some pieces of broken knives from the spot. He also collected other articles, which were lying at the spot i.e. one Sandle, a pair of slippers and a steel pipe. P.W.17 has further deposed that at about 01.30 p.m., he was informed that three accused were arrested by Nagpada Police. Therefore he went to Nagpada Police Station and took charge of the accused Nos.1, 2 and 3. The accused were brought to J.J. Marg Police Station. Their clothes were seized under Panchanama. The Panchanama is produced on record at Ex.130. In this connection, the prosecution has also examined P.W.9 Mohd. Adil Iqbal Khan as a Pancha, who was present during such seizure of clothes from the

accused. At the same time, the scooter on which those three accused were travelling, was also seized. The seat and the seat cover were seen blood stained. The pieces of seat cover were cut and were sealed. After this Panchanama, P.W.17 recorded the statement of some of the witnesses including P.W.2 and thereafter handed over further investigation to PI Desai on 04/04/2009. P.W.17 has deposed that he had attended Arthur Road jail on 24/04/2009, where Test Identification Parade was conducted in a separate room. In the cross-examination of P.W.17 he has admitted that he did not look for P.W.2 in J.J. Hospital, though he came to know that he is one of the eyewitnesses, when P.W.1 had given his FIR. P.W.17 further admitted that even P.W.3 Hajiaslam Khan was an eyewitness to the incident. He has further deposed that he did not make any efforts to trace the motorcycle of P.W.2. During cross-examination P.W.17 stated that, a copy of FIR was submitted to the Magistrate on 03/04/2009 and that except the entry in column No.15 in the FIR, he had no other document to substantiate that fact. P.W.17 has categorically stated that P.W.2 did not meet him in the hospital.

14. P.W.18 PI Desai had conducted the investigation from 04/04/2009 onwards. He has deposed that on 05/04/2009, the accused No.4 was arrested. On 06/04/2009, accused Nos.5, 6 and 7 were arrested. P.W.18 has deposed that on 11/04/2009 at the instance of accused No.6 Md. Ibrahim @ Batla, a knife was recovered from the gap between an electric cabin and the wall of Rambharose Hindu Hotel, near Alfred Talkies. The prosecution has also examined P.W.6 Md. Saeed Nisar Ahmed who was present when such recovery was effected, pursuant to the statement given by the accused No.6 in the presence of this witness P.W.6. The memorandum Panchanama and the recovery Panchanama are produced on record at Ex.104 and 105.

15. P.W.18 has further deposed that on the same day i.e. on 11/04/2009 at about 05.00 p.m. the accused No.3 showed willingness to produce a chopper from a loft of the watchman's cabin in Ahmetulla Complex near Taj Tower. In this connection, the prosecution has examined P.W.8 Mohd. Shafi Mohd. Ismile

Ansari who was the Pancha, in whose presence, such statement was made by the accused No.3, which led to the recovery of the chopper. The memorandum statement and Panchanama are produced on record at Ex.126, 127 and 128. P.W.18 further deposed that on 13/04/2009 a Rambo knife was recovered at the instance of accused No.5 Zakir from the cashier's drawer at Firdos Guest House. In this connection, the prosecution examined P.W.7 Sajjad Ahmed Jarul Hasan Khan in whose presence such statement was made by the accused No.5 and subsequently the recovery was effected pursuant to the same.

16. P.W.18 has further deposed that on 14/04/2009 statement, u/s 27 of the Evidence Act, given by the accused No.7 Md.Taufik Saikh, was recorded showing his willingness to produce the weapons used by the accused No.4 and himself. Those articles were recovered from a hole in a plywood ceiling of mezzanine floor of Taj Video Centre near Arab Galli. In this connection, the prosecution has examined P.W.10 Harun Ahmed Hamid Raja.

17. P.W.18 has further deposed that on 15/04/2009, the clothes purportedly worn by the accused Nos.4, 7 and 6 were recovered at the instance of the accused No.6 from an electricity cabin which was outside a public toilet. The prosecution has also examined P.W.11 Anwarul Huq Ansarul Huq Ansari as a Pancha in whose presence the accused No.6 made such statement and the articles were recovered.

18. P.W.18 further deposed that thereafter he sent all the articles, which were seized during the investigation for chemical analysis.

19. The prosecution has examined P.W.13 Manoj Jairam Katpara, who was Special Executive Officer and had conducted Test Identification Parade on 24/04/2009. In the said Test Identification Parade the accused Nos.1 and 2 were identified by the P.W.1 and P.W.2. The Identification Parade memorandum Panchanama is produced on record at Ex.167. The evidence of P.W.13 shows that P.W.2 identified a dummy named Raju Tahir

Hussain who was standing between the dummies at Sr.Nos.5 and 7 and further identified accused No.1, who was standing between the dummies at Sr.Nos.11 and 13. A narration in the memorandum Panchanama shows that the accused No.1 was standing between dummy Nos.10 and 11. Therefore there was a apparent inconsistency in the description regarding the exact position of the accused No.1. P.W.2 has obviously not identified the accused No.2 as he had identified the dummy named Raju Tahir Hussain instead. There is discrepancy in the identification by the P.W.1 as well. The memorandum shows that the accused No.2 stood between dummy Nos.3 and 4. The accused No.1 was standing between dummy Nos.8 and 9, P.W.1 identified the person, who was standing between dummy Nos.9 and 11, as accused No.1 . Thus, there are apparent discrepancies in the position at which dummies were kept standing when the witnesses tried to identify them.

20. Apart from these main witnesses, P.W.4 Mohd. Anis was a Pancha for the inquest Panchanama and P.W.5 Yusuf Abdul

was a Pancha for the spot Panchanama. There is not much dispute about their evidence.

21. Mr.A.P.Mundargi, the learned Senior Counsel, appearing for the accused Nos.4 and 5 submitted that the evidence of the eyewitnesses was not reliable. P.W.2 was another got up witness by the prosecution. Mr.Mundargi submitted that API Bansode has deposed that P.W.1 in his Santro car came to the police station to seek help after the incident. That means, the P.W.2 was not with him. He further submitted that it was the case of P.W.2 that he had come to meet the deceased at the spot of incident on his motorcycle and had parked the motorcycle. Thereafter he had gone to the police station and then to the hospital in the Santro car. P.W.2 has admitted that when he came back to the spot from the police station, his motorcycle was not seen at the spot of incident. He further deposed that from the J.J. Hospital, he went to his house and there is no reference to his motorcycle. The investigating officer has not thrown any light on P.W.2's motorcycle. Mr.Mundargi therefore submitted that the presence of the motorcycle at the spot could have corroborated the

version of P.W.2 and could have given support to the theory of his presence at the spot. The absence of any reference to P.W.2's motorcycle means that the P.W.2 was not there at the relevant time when the incident took place. Mr.Mundargi further submitted that there was a reference to one Irfan Dongri who was accompanying the deceased in the night, but he is not deliberately examined and therefore adverse inference should be drawn because the eyewitnesses, examined by the prosecution, are not trustworthy witnesses. Mr.Mundargi further submitted that according to version of P.W.2, he had seen the assault on the deceased which took place on the road and thereafter the deceased had run inside Raza building. However, there is nothing on record to show that blood was found on the road. Mr.Mundargi further submitted that looking at the nature of assault, it was impossible that there would be no blood on the road. The absence of blood on the road is a clear indication that the P.W.2 had not seen the assault on the road. Mr.Mundargi invited out attention to the evidence of D.W.1 Mr.Prafulla Sadashiv Keer, who was working as a Judicial Clerk in the 15th Court of Metropolitan Magistrate,

Mazgaon. This witness has stated that a copy of the FIR pertaining to C.R.No.76/09 of J.J. Marg Police Station, was received by Magistrate only on 09/04/2009, which shows that the FIR was manipulated. Mr. Mundargi further submitted that the deposition of P.W.1 shows that he was handcuffed and only after lodging of his FIR he was allowed to go. Mr.Mundargi submitted that the conduct of the investigating agency that they wanted to find some scapegoats in the offence and therefore P.W.1 was made to give the FIR, though he was reluctant to do so. Mr.Mundargi invited our attention to the admission given by this witness that the FIR was lodged at the instance of the brother and the other relatives of the deceased. Mr.Mundargi further submitted that though the brother of the deceased i.e. P.W.3 Aslam was very much available in the J.J. Hospital, the police deliberately did not record his statement as the FIR. Mr.Mundargi submitted that this fact indicates that P.W.3 had not seen the incident and therefore his statement was not recorded in the hospital and the FIR was not lodged at his instance. Mr.Mundargi further submitted that, in any case, the P.W.3 could not have witnessed the assault. His entire

conduct is unnatural. Mr.Mundargi submitted that it was quite unbelievable that when P.W.3 came down on the ground floor to see what was going on, he could identify the assailants, but could not identify his brother at the first instance. Only after coming back after chasing the accused, P.W.3 came to know that it was his brother, who was assaulted. Mr.Mundargi submitted that this fact and his deposition is quite unbelievable and which can only mean that P.W.3 had not seen the incident. Mr.Mundargi further submitted that even though P.W.2 was available in the J.J. hospital Hospital, his statement was not recorded and he had not narrated about the incident to anybody in the hospital. P.W.2's statement was recorded only at 04.30 p.m. at the police station on 03/04/2009. Therefore it was clear that P.W.2 had given his statement after having discussion with the relatives of the deceased. Mr.Mundargi further submitted that the recoveries effected by the police were not in consonance with the requirement of section 27 of the Indian Evidence Act. Mr.Mundargi further submitted that there was no recovery at the instance of the accused No.4.

22. Mr.Sudeep Pasbola, the learned Counsel for rest of the accused supported the contention of Mr.Mundargi. Mr.Pasbola further added that the identification of the accused Nos.1 and 2 during parade was not proper. There was apparent inconsistency and utter confusion in respect of the position of the accused in the parade. He further submitted that P.W.2 had in fact identified one of the dummies as the accused No.2. He further submitted that in any case the P.W.1 had admitted that the police had shown photographs of the accused and had given description of the accused and therefore the identification parade had lost its sanctity and credibility. He further submitted that the prosecution has produced C.A. Reports to show that the blood group 'AB' which was of the deceased, was found on the clothes of the accused Nos.1 and 2. The learned trial Judge in the statement of the accused u/s 313 of Cr.P.C. has not put this circumstance to this accused. He further submitted that the circumstance in which the accused Nos.1, 2 and 3 were arrested, was highly suspicious and the investigation in that behalf was false. He further submitted that

the accused Nos.1, 2 and 3 were arrested by the officer of Nagpada Police Station and their arrest Panchanama was continued till 09.30 a.m. and yet their clothes were not seized immediately; instead these accused were handed over to the officers of J.J. Marg Police Station at 01.30 p.m. and there is no explanation as to what transpired between the first Panchanama conducted by the Nagpada Police Station and second Panchanama at J.J. Marg Police Station, when their clothes were seized. Therefore, even that circumstance is not proved beyond reasonable doubt against the accused Nos.1 to 3. He further submitted that the P.W.2 has made a vague reference to the accused No.7 and no weapon is attributed to him. P.W.2's deposition does not make out a strong case against the accused No.7 in respect of the participation in the crime.

23. On the other hand, the learned Public Prosecutor Mr. H.J. Dedhia and Mr. Parvez Memon, the learned Counsel appearing for the complainant submitted that the evidence of P.W.2 and P.W.3 was cogent, reliable and consistent. P.W.1

though declared hostile, yet he had named some of the accused and has described the earlier part of the incident and therefore to that extent, he can be believed. Mr.Dedhia submitted that apart from the, ocular evidence of the three eyewitnesses, there were corroborative pieces of evidence in the form of recovery of weapons and blood stained clothes. They further submitted that the evidence of the Special Executive Officer who had conducted the Test Identification Parade, was sufficient to show the involvement of the accused Nos.1 and 2.

24. Considering the evidence on record and the submissions made by both the parties, it is quite clear that the fate of this case depends on the appreciation of the evidence of P.W.1, P.W.2 and P.W.3, who claimed to be the eyewitnesses to the incident. The incident of actual assault has taken place in two parts i.e. outside Raza building and inside Raza building. The prosecution has examined P.W.1 and P.W.2 as the eyewitnesses in respect of the first part of the incident and P.W.3 is examined in respect of the assault, which had taken place inside Raza building.

The prosecution has relied on the corroborative pieces of evidence in the form of recovery of weapons, clothes and other articles. The prosecution has also relied on the evidence of Test Identification Parade for fixing the identity of accused Nos.1 and 2.

25. P.W.1 Akil is the first informant. He has deposed about some part of the incident which is also mentioned in his FIR. However, he has resiled from his statement in the FIR insofar as the actual assault on the deceased by the accused is concerned. Therefore he was declared hostile and was cross-examined by the learned Public Prosecutor in the trial Court. This witness was working as a driver in the night shift and had his duty hours till 04.30 a.m. This fact is not seriously shaken in his cross-examination. Therefore he is a natural witness who could have been present at around the time when the incident had taken place in the early morning hours. His evidence is entirely consistent with the evidence of P.W.2 Haji Sufiyan in respect of time spent by the deceased throughout the night. Both these witnesses are consistent about some verbal altercation between the deceased and some of

the accused, all of them taking dinner at Liberty Hotel, visit to two Dargas and then coming back near Raza building, where the incident had taken place. Both these witnesses speak about each other's presence with the deceased during the night and in particular at the time of incident outside Raza building. Though P.W.1 has resiled from his FIR in respect of the main incident of assault, attributing particular weapons and particular part played by the accused in the actual assault, he has still deposed about some of the accused coming to the spot with weapons and chasing the deceased. Both P.W.1 and P.W.2 have deposed about the verbal exchange between the accused Nos.3 and 6 on one side and the deceased on the other just before the incident. P.W.1 has specifically named the accused Nos.3, 5 and 6, who had come there. He has admitted that he was detained in the police station. Though in his cross-examination he has admitted that he had stated names of the accused as per say of the police, his entire evidence cannot be totally ignored. Because of his admission it is obvious that this witness is not a wholly reliable witness, but at the same time, it is to be noted that he has stuck to his story insofar as

the genesis of the incident and the chase of the deceased by some of the accused is concerned. His evidence is important for another aspect. This witness had gone to the police chowky to inform about the assault on the deceased. He was sitting in Santro car. P.W.2 joined him. Both of them were frightened for their life and therefore this witness going to the police station to seek help is absolutely natural. P.W.17 API Bansode attached to J.J. Marg Police Station has corroborated this part of the evidence of P.W.1 and has deposed that P.W.1 had come to the police station in his Santro car. P.W.1 had informed about the incident and the police had immediately rushed to the spot. Thus, the prosecution has established the fact that the police had rushed to the spot on the information supplied by the P.W.1. Therefore it can safely be concluded that the P.W.1 had actually seen the first part of the incident, where some of the accused had chased the deceased. To that extent his evidence can be accepted. In this case it is possible to separate truth from falsehood.

26. More than the first informant P.W.1, the prosecution

case, is based on the evidence of P.W.2 Haji Sufiyan. He not only has stuck to his version regarding the actual assault, but his presence is established by the P.W.1. As mentioned earlier, P.W.1 and P.W.2 have consistently deposed about their presence with the deceased throughout the night and in particular at the time of the incident. Only for some time this witness had gone to bring milk and after he came back to the spot; the incident had taken place. Apart from P.W.1, P.W.3 has also deposed about the presence of P.W.2. P.W.3 has deposed that the P.W.1 and P.W.2 came along with police on the spot. Thus, the presence of this witness P.W.2 is corroborated by P.W.1 and P.W.3 and there is no reason to discard the prosecution case that P.W.1 and P.W.2 were present when the assault took place. Mr.Mundargi submitted that API Bansode has deposed that P.W.1 alone had come to the police chowky. P.W.17 API Bansode has specifically deposed that at about 04.45 a.m. one person came in Santro car in the police station, who disclosed his name as Mohd. Akil Abdul Salam Qureshi and told that his Master Mohd. Irfan Maqbool Hasan Khan was assaulted by five named and two unknown persons. P.W.17 API Bansode's evidence was in

respect of the information which he received and therefore the emphasis was on the actual information. The information was given by P.W.1 and therefore in that context P.W.17 has deposed that one person named Akil had approached him and told about the assault. Through this stray statement it is not possible to infer or conclude that the P.W.2 was not in the Santro car with P.W.1 when they reached the police station. In this regard, we are inclined to rely on the evidence of P.W.1 and P.W.2 that both of them went together to the police station to seek help. P.W.3 has also deposed that P.W.1 and P.W.2 came with the police at the spot.

27. Mr.Mundargi has further submitted that since the motorcycle on which P.W.2 had come on the spot, was not found on the spot at the time of Panchanama or even when they came back from the police station, there is no corroboration to the story of P.W.1 regarding his presence at the spot. The defence had cross-examined the Investigating Officer about P.W.2's motorcycle. We do not think that this motorcycle was an important piece of evidence, which could have lent corroboration to P.W.2's story.

The Investigating Officer was concentrating on the investigation of the murder and not about missing of the motorcycle. According to P.W.2 he went to J.J. Hospital and then had gone home. The defence had not taken this line of cross-examination to its logical end and therefore cannot derive any advantage about the P.W.2's motorcycle not being near the spot of incident. Mr.Mundargi further submitted that though this witness was present in the J.J. Hospital, his statement was not recorded immediately but was recorded only at 04.30 p.m. on 03/04/2009. We do not find that this aspect is material in the present case. In the J.J. Hospital, API Bansode had taken down the statement of P.W.1 which was treated as the FIR. This witness was with the deceased throughout the night and had seen the assault on the deceased. He was there in the hospital till about noon time and therefore it was not unnatural for him to have gone home to take some rest. After taking rest he had immediately gone to the police station at about 04.30 p.m., when his statement was recorded. Therefore, we do not think that his statement was deliberately recorded belatedly at about 04.30 p.m.

28. Mr.Mundargi further submitted that there was no blood found on the road, outside Raza building, where according to P.W.2 first assault had taken place. P.W.2 was not asked in the cross-examination as to whether the first assault had taken place at some distance from Raza building. His evidence shows that he was assaulted on the road and he immediately went towards Raza building and the accused chased him. Therefore his evidence does not show that the deceased was assaulted causing serious bleeding at some distance away from Raza building. Therefore not finding of blood on the road or at least not mentioning so in the spot Panchanama, will not affect the prosecution case brought on record through the evidence of P.W.2.

29. Mr.Mundargi further submitted that the clothes of this witness were not seized by the police and therefore adverse inference should be drawn. In this connection, reference can be made to the Judgment of the Hon'ble Supreme Court in the case of *Manjit Singh and another Vs. State of Punjab, reported in*

(2013) 12 Supreme Court Cases 746. In that case the police officers not seizing the clothes of the witnesses was not held to be fatal to the prosecution. This aspect depends on the facts and circumstances of the case as well as on the quality of the evidence of the prosecution witnesses. In the instant case, P.W.2 had gone near the deceased after he came back with P.W.1 with the police at the spot. Thereafter many persons had handled the body of the deceased. Thus, the absence or presence of blood stains on clothes of such persons will not alter the prosecution case in any manner. Therefore in the instant case, we do not find that failure on the part of the Investigating Officer to seize the clothes of the prosecution witnesses will make any difference. On scrutinizing the evidence of P.W.2 carefully we are of the opinion that he is a truthful witness and had withstood very searching cross-examination. Therefore we are inclined to accept his evidence. He has deposed about the events during the night when he was with the deceased. He has corroborated the presence of P.W.1. He has deposed about the verbal exchanges between the deceased on one side and the accused Nos.3 to 7 and two unknown persons on the

other. However, P.W.2 has not thrown any light on that conversation. Thereafter, he has deposed about taking dinner and visiting Dargas. This witness had then gone to bring milk and had returned back at about 04.00 a.m. Thereafter he has deposed about the accused Nos.3 and 6 approaching deceased and accusing him of being a police informant. Thereafter he has deposed that the accused No.7 came there and he was taking a round. Two more unknown persons came there on a motorbike. Accused No.5 gave a blow with chopper on the chest of the deceased. Accused No.3 assaulted the deceased with a knife on the stomach. Two unknown persons assaulted the deceased with steel rod and chopper and the accused No.4 assaulted the deceased on his face. Thus, he has given specific roles to accused Nos.3, 4, 5 and two unknown persons. Accused No.6 was with accused No.3 when they had confronted the deceased accusing him of being a police informant. Thus, the accused Nos.3 to 6 were together and thereafter the incident of assault had taken place. Therefore it is our opinion that the accused Nos.3 to 6 along with two unknown persons had formed unlawful assembly and had assaulted the

deceased to his death. Therefore each of them is liable for the act of commission of murder by virtue of section 149 of the Indian Penal Code. We are inclined to extend benefit of doubt to the accused No.7, because P.W.2 has vaguely stated that the accused No.7 came there from behind and was taking a round there. No specific weapon or any further role is attributed to him. It is not clearly mentioned by the P.W.2 that the accused No.7 was part of the assembly when the incident of assault actually took place.

30. Insofar as the evidence against the accused Nos.1 and 2 is concerned, their involvement in the offence is based on the evidence of Test Identification Parade. As we have discussed earlier, the exact position where they were standing when they were purportedly identified by P.W.1 and P.W.2, is not properly brought on record by the prosecution. There is a serious confusion regarding the serial number on which they were standing along with the dummies in the identification parade. Moreover, P.W.1 has admitted that the police had shown their photographs and had described them before the identification parade. Therefore, in any

case, the Test Identification Parade loses all its significance. P.W.2 had identified one of the dummies wrongly. Significantly both these accused Nos.1 and 2 were arrested and were in the same police station where the statement of P.W.2 was recorded at 04.30 p.m. on 03/04/2009. The accused Nos.1 and 2 were very much present in the same police station and therefore the possibility of the accused being shown to P.W.2 is not ruled out. Thus the prosecution has not proved its case against the accused Nos.1 and 2 beyond reasonable doubt. P.W.3 had not attended the identification parade and therefore his evidence in respect of accused Nos.1 and 2 is of no significance.

31. P.W.3 has deposed about the incident which had taken place inside Raza building. He was residing in the same building. At about 04.40 a.m. at the time of incident he ran to the staircase, from where he heard some noise. He has deposed that he had seen the accused Nos.3 to 6 and other unknown persons assaulting someone. He thereafter chased the accused, but they ran away and when he came back he came to know that it was his brother, who

was assaulted. Mr.Mundargi submitted that it was quite unbelievable that he could identify the accused, but not his own brother and therefore his evidence was not reliable. We find much substance in his arguments. It was also unnatural that the accused with deadly weapon would simply run away after he tried to chase them. Having observed this, we are of the opinion that since he was resident of the same building, there is nothing unnatural in P.W.3 coming down after hearing commotion to find his brother lying injured near the staircase. He further deposed that the P.W.1 and P.W.2 reached there with police. To that extent his evidence is reliable and believable. He further deposed that after 10-15 days from the incident, he had gone to Khalidabad as his father-in-law had expired. He was not present when the Test Identification Parade was held and no efforts were made by the Investigating Agency to hold another Identification Parade on his return to enable him to identify the suspects i.e. accused Nos.1 and 2 or accused No.7, who was unknown to this witness.

32. Mr.Mundargi further submitted that prosecution has

not led any evidence to show that the copy of the FIR was immediately forwarded to the Magistrate as per the requirements of section 157 of Cr.P.C. In fact in that behalf, the defence has examined D.W.1 Mr.Prafulla Sadashiv Keer, who was working as a Clerk in the office of Metropolitan Magistrate. He has produced documents on record to show that the FIR pertaining to C.R.No.76/09 was received by the Magistrate Court on 09/04/2009. API Bansode (P.W.17) on the other hand, has stated that a copy of the FIR was immediately sent to the Court of Magistrate. In our opinion, this controversy is of no significance. The purpose of sending a copy of FIR immediately to the Magistrate's Court is to rule out any possibility of manipulation of the FIR. In the instant case, three accused were arrested immediately on the next day and the others were arrested before 09/04/2009. They were produced before the Magistrate for obtaining remand orders. Therefore the prosecution case, through the FIR, was already crystallized and therefore sending a copy of FIR to the Magistrate belatedly has not caused any prejudice to the accused in this case.

33. Thus, after considering the evidence of three eyewitnesses we are of the opinion that P.W.2 is a wholly reliable witness. P.W.1 and P.W.3 are only partly reliable and their evidence can be used as a corroborative piece of evidence to the factum of presence of P.W.2 at the time of incident. Therefore based on the evidence of P.W.2, we are of the opinion that, the accused Nos.3 to 6 along with two unknown assailants were a part of an unlawful assembly and the murder was committed pursuant to their common object.

34. The prosecution has further relied on the circumstance that the accused Nos.1, 2 and 3 were apprehended by the officers of Nagpada Police Station, who were on the patrolling duty around that area. P.W.16 PI Kolekar has deposed that he had apprehended these three accused at about 06.40 a.m. Their arrest Panchanama was made in the presence of Panchas. The Panchanama was over by 09.30 a.m. These accused were kept in Nagpada Police Station till about 01.30 p.m. on 03/04/2009 and thereafter they were handed over to officers of J.J. Marg Police Station. According to the prosecution case, the clothes of these accused were seized by

the officers of J.J. Marg Police Station after they were taken to the said police station and in that behalf the prosecution has relied on the evidence of P.W.17 API Bansode and P.W.9 Mohd. Adil Iqbal Khan. According to the prosecution case, the clothes of accused Nos.1 and 2 were stained with blood and C.A. report shows that they were blood stains of 'AB' group which was the blood group of the deceased. Mr.Pasbola, the learned Counsel appearing for the accused Nos.1 and 2 rightly submitted that the police have not seized their clothes immediately on their arrest. These two accused were at Nagpada Police Station for at least 3-4 hours and thereafter were taken to J.J. Marg Police Station. There was no reason as to why their blood stained clothes were not seized and sealed at the Nagpada Police Station itself. The presence of the accused in the custody of the police for atleast four hours before the seizure of clothes Panchanama was drawn, shows that the prosecution has not ruled out the possibility of tampering with their clothes. Moreover, the circumstance that the blood of the same blood group as of the deceased, was found on the clothes was not put to these two accused in their examination u/s 313 of

Cr.P.C. Because of these infirmities we are not taking into consideration this circumstance against the accused Nos.1 and 2.

35. The prosecution has relied on the evidence in the form of recovery of weapons at the instance of different accused. P.W.8 Mohd. Shafi Ansari and P.W.18 Sr.P.I. Desai have deposed about recovery of chopper at the instance of accused No.3. The said Chopper was recovered from the loft of the watchman's cabin in Ahemtulla complex. The Panchanama at Ex.128 shows that the Chopper was actually recovered from the loft of a water tank which was near the watchman's cabin. Thus, there was a discrepancy in the statement recorded u/s 27 of the Evidence Act regarding actual place of concealment of the Chopper and the place from where it was recovered. The Pancha's evidence shows that the watchman was present there. Neither the name of the watchman is brought on record, nor is he examined. The Pancha's evidence further shows that when he was called to the police station, at that time PI Desai had told him that he was to act as a Pancha in the seizure Panchanama of the weapon. Due to these

infirmities, we are not inclined to place reliance on this recovery at the instance of accused No.3.

36. It is the prosecution case that a Rambo knife was recovered at the instance of the accused No.5 from a drawer of the counter at Firdos Guest House. The prosecution has examined P.W.18 Sr.PI Desai and P.W.7 Pancha Sajjad Ahmed. Their evidence would show that after recording of the statement of accused No.5, the Panchas and the police along with accused No.5 went to Firdos Guest House. The accused No.5 pointed out the counter of the guest house. It was manned by the Manager Yashwant Jadhav. The accused No.5 took out a blue plastic bag from the left drawer of the counter containing Rambo knife. In this case, the drawer was not locked. The recovery was effected on 13/04/2009. The accused No.5 was arrested on 06/04/2009. The incident had occurred in the night on 03/04/2009. Therefore for atleast for 6-7 days, the knife was lying in the left drawer of the counter which was not locked. Therefore it was accessible to many persons. The prosecution has not examined the Manager in whose

presence, the knife was recovered. No further evidence is led to show that the said drawer was not touched by anybody during that period. Because of these factors, we are not inclined to place reliance on such recovery.

37. The prosecution has further examined P.W.10 Harun Ahmed as a Pancha and P.W.18 Sr.P.I. Desai deposed about the recovery effected at the instance of accused No.7. According to this witness, pursuant to the statement made by the accused No.7, two Choppers were recovered from a plywood ceiling on the mezzanine floor of Taj Video Centre. This recovery was effected on 14/04/2009. The accused No.7 was arrested on 06/04/2009. The said Taj Video Centre was open to public and their customers were obviously visiting the said Video Centre. Therefore the place where purportedly the accused No.7 had concealed the two Choppers, was accessible to many others. The Manager Devendrakumar Gopalji Sharma, who was present at Taj Video Centre when the weapons were recovered, is not examined by the prosecution. Therefore because of these infirmities we are not taking this circumstance against accused No.7.

38. P.W.18 Sr.PI Desai and P.W.11 Anwarul Huq have deposed about recovery of the clothes worn by accused Nos.4, 6 and 7, at the instance of accused No.6. The said recovery was effected on 15/04/2009. The accused No.6 was arrested on 06/04/2009. These clothes were recovered from the electricity cabin outside the common public toilet. This place again was accessible to all and was visited by many. Therefore, even this recovery is not free from doubt.

39. Since we have held that the recoveries made at the instance of the accused were not proved beyond doubt, in consonance with the requirements of section 27 of the Evidence Act, C.A. Report produced by the prosecution in respect of these articles loses its significance. Though on most of these articles blood is detected, the blood group was inconclusive except on the clothes of the accused Nos.1 to 2. The aspect of blood on the clothes of the accused Nos.1 and 2 is already discussed. Therefore in any case, there is no clinching evidence to connect these articles

with the murder of the deceased or with the participation of accused in the actual assault.

40. Thus, taking into account, the entire prosecution case, the evidence led by the prosecution and the arguments advanced on behalf of the accused, we are of the opinion that the accused Nos.1, 2 and 7 deserve benefit of doubt. In our opinion, the prosecution has proved its case beyond reasonable doubt as against the accused Nos.3, 4, 5 and 6. Hence, the following order :

ORDER

1. Criminal Appeal No.446/12 is allowed and the Appellants, Original Accused No.1 Yusuf Mustak Khan and Original Accused No.2 Irfan Abdul Rauf Shaikh @ Irfan Chaina are acquitted of all the charges. They shall be released forthwith if not required in any other case.
2. Criminal Appeal No.447/12 is partly allowed. The Original Accused No.7 Mohd. Taufik Shafi Shaikh is acquitted from all the charges. He shall be set at liberty if not required in any other case.

3. The Judgment and Order of conviction and sentence of Appellants, Original Accused No.3 Suleman Moiddin Shaikh @ Pape and Original Accused No.6 Mohd. Ibrahim Subhan Sayyed @ Batla is hereby confirmed.
4. Criminal Appeal No.459/12 is dismissed. The Judgment and Order of conviction and sentence of the Original Accused No.4 Shakir Ahmed Abdul Hamid Khan @ Kalu and the Original Accused No.5 Jakir Ahmed Shakir Ahmed Khan is hereby confirmed.

(SARANG V. KOTWAL, J.)

(B. R. GAVAI, J.)