

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.160 OF 2007

Munir Rustum Shah,
Age-24 years, R/o-Domegaon,
Tq-Gangapur, Dist-Aurangabad

...APPELLANT
(Orig. Accused No.2)

VERSUS

The State of Maharashtra

...RESPONDENT

...

Mr. A.S. Shelke Advocate appointed for
Appellant.

Mr. S.B. Yawalkar, A.P.P. for Respondent-State.

...

WITH

CRIMINAL APPEAL NO.97 OF 2008

Bhimrao Shekha Salam,
Age-20 years, R/o-Dahegaon,
Tq-Kinwat, Dist-Nanded

...APPELLANT
(Orig. Accused No.3)

VERSUS

The State of Maharashtra

...RESPONDENT

...

Mr. A.S. Shelke Advocate appointed for
Appellant.

Mr. S.B. Yawalkar, A.P.P. for Respondent-State.

...

WITH

CRIMINAL APPEAL NO.391 OF 2008

The State of Maharashtra,
Through Police Station,
Newasa, Dist-Ahmednagar.

...APPELLANT

VERSUS

- 1) Ravindra Baban @ Bhagwan Mhaske,
Age-20 years, R/o-Shivar,
Tq-Aarni, Dist-Yeowatmal,
- 2) Mahesh Pralhad Kale,
Age-20 years, R/o-Dhorgaon,
Tq-Aarni, Dist-Yeowatmal,
- 3) Dipak Bhagwan Madawi,
Age-20 years, R/o-Shivar,
Tq-Aarni, Dist-Yeowatmal

...RESPONDENTS

(Orig. Accused Nos.4 to 6)

...

Mr.S.B. Yawalkar, A.P.P. for Appellant-State.

Mr.G.J. Mote Advocate for Respondent Nos.

1 to 3 (**Absent**).

...

**CORAM: S.S. SHINDE AND
R.G. AVACHAT, JJ.**

DATE OF RESERVING JUDGMENT : 04TH JANUARY, 2019

DATE OF PRONOUNCING JUDGMENT: 11TH JANUARY, 2019

JUDGMENT [PER S.S. SHINDE, J.] :

1. Criminal Appeal No.160 of 2007 and Criminal Appeal No.97 of 2008 are directed against the Judgment and Order dated 10th April, 2007, passed by the Additional Sessions Judge, Shrirampur in Sessions Case No.29 of 2005 thereby convicting accused No.2 – Munir Rustum Shah and accused No.3 – Bhimrao Shekha Salam for the offence punishable under Section 395 read with 397 of the Indian Penal Code [for short 'IPC'] and sentencing them to suffer rigorous imprisonment for seven years and to pay a fine of Rs.1,000/- each, and in default of payment of fine to suffer further rigorous imprisonment for six months. The trial Court also convicted accused No.3 – Bhimrao Shekha Salam for the offence punishable under

Section 4(25) of the Arms Act and sentenced him to suffer rigorous imprisonment for two years and to pay a fine of Rs.500/-, in default to suffer further Rigorous Imprisonment for three months. All the sentences were directed to be run concurrently.

2. The trial Court also convicted and sentenced accused No.1 – Rajendra Jalinder Ghewande for the offence punishable under Section 395 read with 397 of the IPC. However, it appears that accused No.1 – Rajendra has not filed Appeal against his conviction and sentence.

3. Criminal Appeal No.391 of 2008 is filed by the State against the acquittal of original accused No.4 – Ravindra Baban @ Bhagwan Mhaske, accused No.5 – Mahendra Pralhad Kale and accused No.6 – Dipak Bhagwan Madawi from the offence punishable under Sections 395, 397 read with

section 34 of IPC and Section 4 and 25 of Arms Act.

4. All these Criminal Appeals are arising out of one and the same Judgment and Order passed by the trial Court, hence the same are being decided by this common Judgment.

5. The prosecution case, in brief, is as under :-

(A) On 7th April, 2005, an informant Ramdas Bhau Kothule, resident of Khadki, Tq. Nagar, a driver and owner of truck bearing No. MTG-1591 lodged First Information Report at Newasa Police Station. According to him on 5th April, 2005, he loaded wooden logs in his truck at Nagpur and started to come to Pune. In the night of 7th April, 2005, he was proceeding by Aurangabad-Ahmednagar road. At about 3.30 a.m., he came to Anand Dhaba

near Chinchora Phata, and parked his truck there for answering the nature's call. When he came back to his truck and was examining his loaded truck, he saw some persons were assaulting other truck drivers who had halted at Anand Dhaba. 4-5 persons also came to him. One of them caught hold color of his shirt and asked him whether he was driver. When he replied affirmatively, one of them abused him and asked him to take out money and put a pistol on his forehead. One of them hit on his head with some hard object. Therefore, the informant got afraid of and he took out money from his pocket and handed over the amount of Rs.1,000/-. According to him, he saw the dacoits in the light in front of Dhaba. The person who put pistol on him, was wearing blackish jin pant and blue half T-Shirt. The person who took amount from him was wearing green full pant and bluish T-shirt and white shoes. The person who assaulted him on his head, was wearing blackish full pant, blackish

shirt and shoes. Others were wearing full pant and bluish T-Shirt. Thereafter, all the said persons went towards another truck driver and robbed him. They robbed the informant as well as other truck drivers. They all were in the age group of 20 to 25 years. Within short time, they left the place.

(B) Thereafter, owner of the Dhaba gave a telephonic message to Newasa Police Station. Newasa Police informed the control room. They gave intimation to all night round police parties by wireless. A night round police party was near Newasa Phata. They received information about the said dacoity, therefore they were proceeding towards the spot of incident. When they were searching for the culprits, they found that six persons were moving on two motorcycles, three on each. The police party gave signal to stop, but the motorcycles in the process, collided with each other and slipped. The persons traveling thereon,

ran away in dark. While chasing them, police party found shoes, banyan etc., which were collected.

(C) The police declared Nakabandi of the area and nabbed six accused, who were found traveling in a jeep. Police took search of their person and found some cash, a knife, country-made pistol and other articles from the accused. Police also conducted identification parade with the help of dog squad. They arrested the accused and also seized two motorcycles which were left by the accused. The accused were identified by the witnesses at the police station.

(D) Before that, the informant had been to Newasa Police Station and lodged a report against unknown persons for having committed dacoity and for having robbed him and other tuck drivers at the point of knife and revolver. At his instance, CR No. 69 of 2005 came to be registered at Newasa

Police Station for the offences punishable under Section 395 read with 397 of IPC. The accused were nabbed at Taklibhan. Their clothes were attached under panchanama. The injured accused were sent for medical examination. The Investigating Officer also visited the spot of incident, prepared spot panchanama. He recorded statements of the witnesses and also sent the country-made revolver to forensic expert for examination.

(E) After completion of the investigation, the Investigating Officer filed charge-sheet under Section 395, 397 of IPC and under section 4 and 25 of the Arms Act, in the Court of the Judicial Magistrate, First Class, Newasa. The Judicial Magistrate, First Class, Newasa has committed the case to the Court of Sessions, Shrirampur in due course.

6. A charge for an offence punishable under Section 395, 397 of IPC, and under sections 4 and 25 of the Arms Act was framed against all the accused and the same was explained to them. The accused persons pleaded not guilty and claimed to be tried, with the defence of total denial.

7. After recording the evidence and conducting full-fledged trial, the trial Court convicted accused Nos. 1 to 3 for the offences afore-stated. Hence, Criminal Appeal No. 160 of 2007 is filed by original accused No.2- Munir Rustum Shah and Criminal Appeal No. 97 of 2008 is filed by accused No.3 Bhimrao Shekha Salam. The trial court acquitted accused Nos. 4 to 6 from all the offences with which they were charged. Hence, the State has filed Criminal Appeal No. 391 of 2008 against the acquittal accused Nos. 4 to 6.

8. Learned counsel appearing for the

Appellants in Criminal Appeal Nos.160 of 2007 and 97 of 2008 submits that both the Appellants had been falsely implicated in the crime and they are innocent. It is submitted that initially the First Information Report (FIR) was lodged against 5-6 unknown persons. The incident took place on 7th May, 2005, at about 3.30 a.m., and the accused were apprehended at about 7.00 a.m. There is no conclusive evidence against the Appellants that really they had committed the crime. All the accused persons were strangers and they were not known to any of the prosecution witnesses. The Investigating Officer has not carried out the investigation in proper manner. When the prosecution case is that some unknown persons had assaulted and robbed truck drivers at Anand Dhaba, it was incumbent upon the investigating officer to conduct test identification parade so as to identify the culprits beyond reasonable doubt, but in the present case in hand, no test

identification parade is conducted. Thus, it is doubtful whether the Appellants have really committed the crime in question. It is submitted that there is variance in the oral account of the prosecution witnesses. In respect of recovery of country-made revolver, different prosecution witnesses have given different version and thus it is doubtful whether really revolver was recovered from any of the accused person. Learned counsel submits that, so far as the recovery of the knife is concerned, the same is not at all believable, as such type of knife is easily available in the open market to anybody. There is no consistency in the evidence of prosecution witnesses and therefore the same is not at all truthful and trustworthy. Before the trial Court, there were in all six accused persons, but on the same set of evidence the trial Court has convicted and sentenced three accused persons including the Appellants, but the trial Court has acquitted

other three accused from all the offences with which they were charged. It is submitted that the findings recorded by the trial Court are perverse. Therefore, learned counsel submits that both the Appeals deserve to be allowed.

9. As against this, learned A.P.P. appearing for the State has supported the findings recorded by the trial Court while convicting and sentencing accused Nos.1 to 3. So far as Criminal Appeal No.391 of 2008 is concerned, learned A.P.P. submits that all the six accused, in furtherance of their common intention, assaulted truck drivers with dangerous weapons like knife and country-made revolver and robbed them, therefore all the accused persons should have been convicted and sentenced. It is submitted that the findings recorded by the trial Court while acquitting accused Nos.4 to 6 are perverse. Within few hours from the incident, all the accused persons were

apprehended by the police and in their personal search incriminating articles such as knife, country-made revolver, wrist watch and robbed amount was recovered. All the prosecution witnesses have conclusively identified the accused persons before the Court. Therefore, it is submitted that Criminal Appeal No.391 of 2008 deserves to be allowed. In support of his submissions, learned A.P.P. placed reliance upon the exposition of law in the case of in the case of Mukesh and another vs. State (NCT of Delhi) and others, Baiju Alias Bharosa vs. State of Madhya Pradesh¹, Mukund Alias Kundumishra vs. State of Madhya Pradesh², and ³.

10. Heard learned counsel appearing for the Appellants-accused and learned APP appearing for the State, at length. With their able assistance, we have carefully perused the entire notes of

1 1978 AIR(SC) 522

2 1997 AIR(SC) 2622

3 (2017) 6 SCC 1

evidence so as to find out whether reasons assigned and findings recorded by the trial Court are based upon proper appreciation of evidence on record or otherwise.

11. We have perused the entire notes of evidence placed on record by the prosecution. Looking to the evidence which has come on record and the submissions advanced by learned counsel appearing for the parties, there does not appear to be dispute regarding the fact that in the night of 7th April, 2005, dacoity took place at Anand Dhaba near Chinchora Phata, in which truck drivers, who had parked their trucks at the said place, were assaulted and robbed by some culprits. Similarly, the prosecution has proved that prosecution witnesses, PW-9 Ramdas Kothule (informant), PW-19 Purushottam Kadam sustained injuries during the process of dacoity. Thus, the prosecution has proved that during the process of

dacoity, the culprits have attacked on the persons of some truck drivers and robbed amount from their persons. Therefore, from the perusal of entire evidence brought on record by the prosecution, it appears that the occurrence of dacoity and in the said process, injuries sustained by the prosecution witnesses is not seriously disputed by the defence. Bt the defence has disputed the participation of accused Nos.2 and 3 in said dacoity.

12. PW-9 Ramdas Bhausaheb Kothule is the informant. His evidence shows that he is owner of a truck and he himself drives the same. He deposed that the incident occurred on 7th April, 2005 at about 3.30 a.m., at Anand Dhaba near Chinchora Phata on Nagar-Nagpur road. He parked his vehicle at Anand Dhaba for answering nature's call and when returned back, he saw that the accused had assaulted other drivers and extracted money from

their pockets. He further deposed that thereafter two or three amongst them came near him. Amongst the accused, Munir Shaha caught hold his color of shirt. Accused Bhimrao Salam came near the informant and pointed a revolver at his head and asked to take out money. His evidence further discloses that accused Bhimrao took out Rs.1000/- from his pocket and handed over to accused No.1 who caught hold his color. Some of the truck drivers then started gathering and therefore accused ran away. He further deposed that he inquired from other drivers and found that one Purushootam was also robbed for Rs.4500/-, another driver from Baramati was also robbed for Rs.5500/-. The informant has narrated about the clothes which were on the person of the accused and further deposed that they were within the age group of 20 to 22 years. He identified the accused persons in the Court.

13. We have carefully perused the FIR lodged by PW-9 Ramdas Kothule. It shows that FIR was lodged against some unknown persons. The FIR shows that when the informant parked his truck at Anand Dhaba, he noticed that some unknown persons were assaulting the truck drivers, and after some time 4-5 persons came to him, assaulted him and robbed him. The informant only described about the clothes on the persons of the said assailants. Therefore, the FIR was lodged against 5 to 6 unknown assailants.

14. Thus, this is the case of assault and robbery by 5-6 unknown persons, in which proper identification of the accused is most important. The evidence of the informant shows that he identified accused No.2- Munir Shah and accused No.3 - Bhimrao Salam in the Court. No doubt, identification of the accused by the prosecution witnesses in the Court is admissible, but the same

should be conclusive. The Supreme Court in the case of Mukesh and another vs. State (NCT of Delhi) and others, cited supra, in Para 146 of the Judgment, observed as under:

"146. In Manu Sharma v. State (NCT of Delhi)⁴, the Court, after referring to Munshi Singh Gautam v. State of M.P.⁵, Harbajan Singh v. State of J&K⁶ and Malkhansing⁷, came to hold that the proposition of law is quite clear that even if there is no previous TIP, the court may appreciate the dock identification as being above board and more than conclusive."

. However, in the present case in hand if the evidence of the informant is carefully perused, in Para-2 of his evidence, informant deposed that Munir Shah (accused No.2) caught hold color of his shirt, but in another breath he specifically deposed that:

4 (2010) 6 SCC 1

5 (2005) 9 SCC 631

6 (1975) 4 SCC 480

7 (2003) 5 SCC 746

"I took out two currency notes of Rs.500/- from my pocket and handed over to accused No.1 who caught hold my color."

. It is pertinent to note that accused No.1 is Rajendra Ghewande and not Munir Shah. Thus, it appears that the identification of the accused is not conclusive and possibility of mistaken identity cannot be ruled out.

15. PW-3 Kantilal Bhagwan Nimbhore is the another truck driver, who was also robbed. His evidence shows that in the night of 6th April, 2005, he parked his truck at Anand Dhaba and at about 3.30 a.m. two persons boarded in the cabin of the truck having possessed knife and a torch. His evidence further shows that the person who possessed knife, caused injuries to his forehead and took cash amount of Rs.5500/- from his pocket. His evidence further shows that those two persons

then got down from the truck and went away. He then saw that along-with those two persons, some more persons were with them and they were total 5-6 persons. He identified accused Munir Shah in the Court. He was unable to identify the person who was possessing torch. Thus, the evidence of PW-3 Kantilal shows that some 5-6 unknown persons assaulted him and robbed him. Though this witness has identified accused No.2 Munir Shah in the Court, he was unable to identify another person who was possessing torch at the time of incident. Thus, the identification is not conclusive. When this witness was unable to identify another culprit, then it is doubtful whether his identification in respect of accused No.2 was proper.

16. PW-6 Sakharam Ananda Baraskar is the owner of Anand Dhaba, where the incident of robbery and assault took place. His evidence shows

that on 7th April, 2005, at about 3.00 a.m., he heard noise of dash to doors and saw that 2-3 persons were standing near one truck and 2-3 persons were in the cabin of the truck, talking with driver. One amongst those three persons came to him with a knife, threatened him and asked him to sleep quietly. His evidence further shows that he was watching that some persons were assaulting drivers of respective trucks, and the persons who were involved in the crime were about six in number. Those persons looted cash from the concerned drivers at the point of revolver and knife etc. and thereafter they proceeded towards Aurangabad road. His evidence further shows that the accused before the Court are same persons who have looted the drivers and threatened him. Thus, evidence of PW-6 Sakharam Baraskar shows that the accused were unknown persons and he has made general statement that the accused before the Court are same persons who have looted and

threatened them. No test identification parade was conducted when there was ample opportunity to the investigating officer to conduct the test identification parade, as after the incident within few hours the accused were apprehended, and this witness has identified the accused persons in the Court after about 1 ½ year of the incident. Even the trial Court has disbelieved the evidence of PW-6 Sakharam Baraskar in respect of identification of accused Nos.4 to 6, but accepted that this witness has identified accused Nos.1 to 3.

17. PW-19 Purushottam Vilas Kadam, is the another truck driver who was also assaulted and robbed by the culprits. His evidence shows that two unknown persons assaulted him by knife and snatched an amount of Rs.4500/- from his person. His evidence further shows that the other person snatched Casio company wrist watch from his hand

and the same person also assaulted to the cleaner of his truck and snatched his wrist watch. This witness also deposed that all six accused before the Court were present at the scene of offence when incident occurred. However, this witness has also not named any of the accused.

18. We have carefully perused the oral evidence of PW-21 Krushna Chataru Soni, PSI, Newasa Police Station, who was the investigating officer. He deposed about the manner in which he has carried out the investigation of the crime. During the course of cross-examination, he specifically stated that he has not conducted test identification parade of accused persons for identifying the accused persons through victim. He further stated that he did not carry out such parade because the victims were already in the police station when accused were brought in the police station. It is significant to note that in

his examination-in-chief PW-21, investigating officer has specifically deposed that on 21st June, 2005, he informed Taluka Executive Magistrate, Newasa to conduct identification parade, because the J.M.F.C. has permitted to take identification parade. As observed earlier, the incident took place at about 3.30 a.m. on 7th April, 2005, and on the same day at about 8.00 a.m. the accused were apprehended by the police. Thus, there was ample opportunity for the Investigating Officer to arrange for test identification parade for proper identification of the real culprits. However, for the best reasons known to the prosecution, test identification parade was not at all carried out by the Investigating Officer.

19. Upon careful perusal of the impugned Judgment and order passed by the trial Court, in Para-37 of the Judgment, the trial Court has also specifically observed that, in the case in hand it

is a fact that there was no test identification parade arranged. Thus, it appears that in the present case, the investigating officer has not carried out the investigation in proper manner. When it was the case of robbery and assault by unknown/unidentified persons, it was incumbent upon the investigating officer to hold proper test identification parade in order to identify the real culprits.

20. So far as the seizure of the cash amount from the accused persons, we find considerable force in the argument advanced by learned counsel appearing for the Appellants- accused Nos.2 and 3 that, when there were no special identification marks on the currency notes robbed from respective truck drivers, it cannot be conclusively said that the amount seized from the accused persons was the same which was robbed from the truck drivers. So far as the seizure of wrist watch is concerned,

the evidence on record does not show that any of the truck driver has specifically identified that the said wrist watch which was seized from the accused was belonged to him. Further, the evidence of PW-14 Shivappa Durgappa Mallesh, Police Inspector attached to Shrirampur Taluka Police Station at the relevant time, shows that when they apprehended accused persons, in the body search of the accused persons, accused Kale (accused No.4) was found to have possessed cash amount and one wrist watch of Casio Company, along with some other articles. Thus, it appears that said wrist watch was recovered from the person of accused No.4 Mahesh Kale. It is relevant to note that, as none of the prosecution witnesses were able to identify accused No.4 Mahesh Kale, the trial Court has acquitted accused No.4 from all the charges with he was charged, along with accused Nos.5 and 6.

21. So far as the seizure of country made revolver is concerned, there is variance in the deposition of various witnesses, from whose person the said revolver was seized and who was possessing the said revolver at the time of incident. PW-2 Nanasaheb Kundlik Pawar is the panch witness, in whose presence personal search of the accused persons was taken. His evidence shows that accused Sanjay was found to have possessed pistol. It is pertinent to note that before the trial Court, there were in all six accused persons but their names are different and none of them is having name as Sanjay. During the course of cross-examination, PW-2 stated that pistol was found with one person Madavi, but he cannot identify who is the said accused before the Court. PW-7 Arif Bhikan Shaikh is the driver of the Jeep in which the accused were travelling when they were arrested. His evidence shows that police took personal search of the accused while in

police station and those persons were found in possession of money but he did not remember what else was found with the above persons. PW-10 Babaji Buwaji Garje is the police head constable, who was one of member of the police party who took personal search of the accused after their arrest. His evidence shows that country made revolver was seized from the person of accused No.2 Munir Shah. Then, in respect of seizure of revolver, there is evidence of PW-13 Shaikh Nijamoddin Salauddin, police constable, who was also in the police party who took personal search of the accused persons immediately after their arrest. His evidence shows that they conducted personal search of each accused in the presence of panchas. They asked each accused his name, and accused disclosed their names as Sanjay Tadavi, Munir Shah, Kale etc. His evidence further discloses that one country made revolver was found with Sanjay Tadvi. His evidence shows that accused No.3 – Bhimarao is the person

who told his name as Sanjay Tadvī and from his person said revolver was seized. The evidence of PW-13 Shaikh discloses that he was again given opportunity to identify the person by name Sanjay, and he identified accused No.2- Munir Shah from whose person revolver was seized. PW-14 Shivappa Durgappa Mallesh was the police inspector, and at the relevant time he was attached to Shrirampur Taluka Police Station. His evidence shows that after arrest of the accused, they conducted body search of each of the accused and in the body search of accused Madavi, they found country made revolver. Thus, upon careful perusal of the oral evidence of all these prosecution witnesses, it is crystal clear that there is no consistency in the evidence of these witnesses regarding the recovery of revolver from the person of particular accused. Therefore, it is doubtful whether country made revolver was really recovered from the person of any of the accused. So far as the recovery of

knife is concerned, we find considerable force in the argument advanced by learned counsel appearing for the Appellants that such type of knife is easily available in the open market.

22. In the present case in hand, though it is the case of the prosecution witnesses that they were assaulted and robbed by some unknown persons, no test identification parade was conducted. As observed earlier, though some of the prosecution witnesses have identified some accused persons before the Court, the said identification is not beyond reasonable doubt. Thus, the prosecution has not conclusively proved that the Appellants and the Appellants are the only persons who participated in the robbery. Therefore, it is unsafe to base the conviction of the Appellants – accused Nos.2 and 3, on the basis of such scanty evidence. We have discussed the evidence brought on record by the prosecution. There is no

consistency in the evidence of the prosecution witnesses and the evidence of the prosecution witnesses is not at all trustworthy and reliable.

23. We have carefully perused the impugned Judgment passed by the trial Court and we find that the trial Court has recorded perverse findings. On the same set of evidence, the trial Court has convicted and sentenced accused Nos.1 to 3. But so far as accused Nos.4 to 6 are concerned, the trial Court has recorded the finding in Para 60 of the Judgment that, from the evidence on record it appears that accused Nos.4 to 6 may be from the same gang, however, there is gap between 'may be' and 'must be' and the said gap was required to be filled up with cogent and reliable evidence on record. The trial Court further observed that, the circumstances that clothes of accused Nos.4 to 6 were of the same type as described by the witnesses and mud stains were

found thereon, are not sufficient to record conviction against rest of three accused (accused Nos.4 to 6). The trial Court further observed that, so also it is not sufficient circumstantial evidence that accused Nos. 4 to 6 were found traveling in the same jeep along with other three accused who were identified by the witnesses. The trial Court recorded the finding that, as none of the witnesses have identified accused Nos.4 to 6 nor any incriminating article was found in the possession, therefore accused Nos.4 to 6 are entitled to get benefit of doubt and they are entitled to be acquitted. As observed earlier, on the same set of evidence, the trial Court convicted and sentenced accused Nos.1 to 3, by observing that prosecution witnesses had identified accused Nos.1 to 3 having participated in the robbery. So far as identification of the accused by the prosecution witnesses is concerned, we have already observed that no test

identification parade was conducted and thus identification of accused Nos.2 and 3 was also not conclusive. So far as recovery of so-called incriminating articles from accused Nos.2 and 3 is concerned, there is variance in the evidence of prosecution witnesses, really from whose person the said revolver was recovered and therefore it is doubtful whether really such revolver was recovered. So far as recovery of knife is concerned, such type of knife is easily available to anybody in the open market. Except alleged revolver and knife, nothing incriminating material alleged to have been recovered from accused Nos.2 and 3. Therefore, we are of the considered opinion that, on such scanty evidence, it is unsafe to base conviction and sentence against accused Nos.2 and 3. Therefore, both the Appeals filed by accused Nos.2 and 3 deserve to be allowed.

24. So far as Criminal Appeal No.391 of 2008

filed by the State against the acquittal of accused Nos.4 to 6 is concerned, we are of the opinion that the trial Court has taken possible view while acquitting accused Nos.4 to 6. After considering entire evidence on record, the trial Court has specifically recorded the finding that none of the prosecution witnesses have identified accused Nos.4 to 6 nor any incriminating article was found in their possession and thus by giving benefit of doubt, the trial Court acquitted accused Nos.4 to 6. Thus, we are of the opinion that while acquitting accused Nos.4 to 6 the trial Court has taken a possible view. Even from the evidence on record if two views are possible, the same is no ground to reverse the acquittal.

25. In the light of discussion in foregoing paragraphs, we are of the considered view that the evidence brought on record by the prosecution is not cogent, sufficient and convincing so as to

prove the offence against the Appellants beyond reasonable doubt. In the case of Sharad Birdhichand Sarda vs. State of Maharashtra⁸, the Supreme Court has held that, the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a Court. It is to be born in mind that the case in hand is a case of circumstantial evidence and if two views are possible on the evidence on record, one pointing to the guilt of the accused and other his innocence, the accused is entitled to have the benefit of one which is favourable to him. Thus, there is no substance in the Appeal filed by the State against the acquittal of accused Nos.4 to 6 and the same deserves to be dismissed.

⁸ (1984) 4 S.C.C. 166

26. The evidence brought on record by the prosecution is not cogent, sufficient and convincing so as to prove the offence against accused Nos.2 and 3 beyond reasonable doubt. On the whole there is no cogent, clinching and sufficient evidence showing the involvement of accused Nos.2 and 3. Under these circumstances, original accused Nos.2 and 3 are entitled for the benefit of doubt. So far as the Appeal filed by the State against acquittal of original accused Nos.4 to 6 is concerned, there is no substance in the said Appeal and the same deserves to be dismissed. Hence, we pass the following order:

O R D E R

(I) Criminal Appeal No.160 of 2007 filed by original accused No.2 – Munir Rustum Shah and Criminal Appeal No.97 of 2008 filed by original accused No.3 – Bhimrao

Shekha Salam are allowed.

(II) The Judgment and Order dated 10th April, 2007, passed by the Additional Sessions Judge, Shrirampur in Sessions Case No.29 of 2005, thereby convicting and sentencing Accused No.2 – Munir Rustum Shah and Accused No.3 – Bhimrao Shekha Salam for the offence punishable under Sections 395 read with 397 of the Indian Penal Code, is quashed and set aside.

(III) The Judgment and Order dated 10th April, 2007, passed by the Additional Sessions Judge, Shrirampur in Sessions Case No.29 of 2005, thereby convicting and sentencing Accused No.3 – Bhimrao Shekha Salam for the offence punishable under Sections 4 and 25 of the Arms Act, is quashed and set aside.

(IV) Original accused No.2 – Munir Rustum Shah and accused No.3 – Bhimrao Shekha Salam are acquitted of the offence punishable under Sections 395 read with 397 of the Indian Penal Code. Original accused

No.3 – Bhimrao Shekha Salam is acquitted of the offence punishable under Section 4 and 25 of the Arms Act. Fine amount, if deposited as per the impugned Judgment and Order, be refunded to Original accused Nos.2 and 3.

(V) The Appellants – Munir Rustum Shah and Bhimrao Shekha Salam have been released on bail during the pendency of these Appeals. Their bail bonds shall stand cancelled.

(VII) Appellants – Munir Rustum Shah and Bhimrao Shekha Salam shall furnish Personal Bond of Rs.15,000/- each and surety in the like amount, under Section 437-A of the Code of Criminal Procedure, before the concerned trial Court at Shrirampur.

(VII) Criminal Appeal No.391 of 2008 filed by the State against acquittal of original accused Nos.4 to 6 is hereby dismissed. The Order passed by the trial Court to the extent of acquitting original accused Nos.4 to 6 from all the offences with which they were charged, is hereby confirmed.

(VIII) Fees and expenses of Shri A.S. Shelke, appointed counsel for Appellants – accused Nos.2 and 3 in Criminal Appeal Nos.160 of 2007 and 97 of 2008 are quantified at Rs.8,000/- (Rs. Eight Thousand Only). We direct the High Court Legal Services Sub-Committee Aurangabad to pay the aforesaid fees and expenses to the learned appointed Counsel within four weeks from receipt of copy of this Judgment.

[R.G. AVACHAT, J.]

[S.S. SHINDE, J.]

asb/JAN19