

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.729 OF 2001

Nizam Habibulla Shaikh	...Appellant
v/s.	
The State of Maharashtra	...Respondent

**ALONG WITH
CRIMINAL APPEAL NO.1010 OF 2001**

The State of Maharashtra	...Appellant
v/s.	
Nijam Habibullan Shaikh	Respondent

Ms. Vrishali Raje, for the Appellant in Appeal No. 729 of 2001
and Respondent in Appeal No. 1010 of 2001.
Mrs. P.P. Shinde, A.P.P. for the State.

**CORAM : SMT SADHANA S. JADHAV &
N.J. JAMADAR, JJ.**

**JUDGMENT RESERVED ON : 29th SEPTEMBER, 2020
JUDGMENT PRONOUNCED ON : 22nd OCTOBER, 2020**

JUDGMENT (Per N.J.Jamadar, J.)

. These Appeals are directed against the judgment and order dated 5th September, 2001 passed by the learned Ad-hoc Additional Sessions Judge, Thane in Sessions Case No. 268 of 2000 whereby and whereunder Nijam Habibullan Shaikh (Appellant in Appeal No. 729 of 2001 – original accused No. 1) came to be convicted for the offence punishable under section

304 Part I of the Indian Penal Code, 1860 (the Penal Code) and sentenced to suffer rigorous imprisonment for seven years and pay fine of Rs. 10,000/- with default stipulation.

2. Shorn of unnecessary details the background facts leading to these Appeals can be stated as under:-

a] Mukhtar Shaikh (the first informant) was residing at Shaikh compound, Karalo Nagar, Thane along with his maternal uncle Ahmad Ali Shaikh (deceased), who was dealing in the business of screen printing under the name and style of "Saibaba Art". Kamaluddin was the neighbour of the deceased. Kamaluddin had commenced construction of his shop (gala). Accused No. 1 Nijam Shaikh and accused No. 2 Harun Shaikh, who were also neighbours of the deceased, had raised objection to the said construction. The deceased took the side of Kamaluddin in the latter's said dispute with accused Nos. 1 and 2. Thus, the accused Nos. 1 and 2 had a grudge against the deceased.

b] On 15th June, 1999 at 3.00 pm while the first informant was standing in front of the gala of Kamaluddin and the deceased was present at his shop, which is across the road, one

Ashraf, the son of accused No. 2 came there and had a recee. After a while Ashraf returned to the said spot accompanied by accused No. 1 Nijam, accused No. 5 Ganesh and Aslam Shaikh. Accused No. 1 Nijam was armed with a revolver, accused No. 5 Ganesh had a chopper and Aslam Shaikh was armed with a sword. As the above named persons were making inquiry about the deceased Ahmad, sensing the trouble the first informant rushed to the place where Ahmad was sitting and sounded him off. The deceased Ahmad ran towards Indira Nagar. Whereupon, accused No. 9 Noorjahan, the wife of accused No. 2 Harun Shaikh, who was in window of their house, informed the above named persons that the deceased was running towards Indira Nagar and exhorted them to chase the deceased. The deceased was thus chased by the above named persons. While the deceased was near a bridge over a nullah (drain), accused No. 1 Nijam fired at the deceased. The later fell down. The informant rushed to Karvalo Nagar police post and returned along with two policemen to the spot where the deceased was lying. The deceased was shifted to Singhania Hospital. However, the deceased succumbed to firearm injury. Hence, the informant lodged report at Vartak Nagar police station, Thane.

c] Crime was registered at C.R. No.I-157 of 1999 for the offences punishable under sections 147, 148, 149, 120A and 302 of Indian Penal Code, 1860 and section 3 read with 25 of Arms Act, at Vartak Nagar police station, Thane. During the course of investigation, the investigating officer visited the scene of occurrence and drew panchanama. Inquest was held. The body of the deceased was sent for postmortem examination. The blood stained clothes which the deceased wore at the time of occurrence were seized. The accused came to be arrested. Incriminating articles were seized from the possession of accused No. 5. Specimens of handwriting of accused No. 5 Ganesh Singh were collected and sent for the opinion of the handwriting expert. After completion of investigation and finding the complicity of the accused, charge sheet was lodged against nine accused in the Court of jurisdictional Magistrate.

3. Upon committal, the learned Sessions Judge framed charge for the offences punishable under sections 147, 148, 149, 120A and 302 of Indian Penal Code. The accused abjured their guilt and claimed for trial.

4. At the trial, the prosecution examined in all 8 witnesses including Mukhtar Shaikh (P.W.1); the first informant, Shafiq Ahmad (P.W.2), Mohd Arastu (P.W.3), the brother of the deceased, Abdul Raheman (PW. 5) and Atik Raheman (P.W.6) as eye witnesses, Dr. Aparna Amrut (PW. 4), the autopsy surgeon, and Girish Tandalekar (PW. 7) who had conducted part of the investigation. The defence of the accused was of denial and false implication.

5. After considering the evidence led by the prosecution, the learned Sessions Judge was persuaded to hold that there was no evidence against the accused Nos. 2 ,3, 4, 6, 7 and 8 and thus those accused were acquitted vide section 232 of Code of Criminal Procedure, 1973. Thus for all intent and purpose the trial thereafter proceeded against accused Nos. 1, 5 and 9.

6. The learned Sessions Judge by the impugned judgment was persuaded to enter the finding of guilt against accused No. 1 Nijam holding that the accused No. 1 had fired at the deceased and thus the authorship of homicidal death suffered by the deceased was established. The learned Sessions Judge

was, however, of the view that accused No. 1 had not caused fire arm injury with intent to cause the death of the deceased and thus the accused No. 1 was liable to be convicted for the offence punishable under section 304 Part I of the Penal Code and accordingly proceeded to impose the punishment indicated above. Accused No. 5 Ganesh Singh and No. 9 Noorjahan Shaikh were found not guilty of any of the offences for which they were arraigned.

7. Being aggrieved by and dissatisfied with the impugned order of conviction and sentence for the offence punishable under section 304 Part I of the Penal Code, the accused No. 1 Nijam has preferred Appeal No. 729 of 2001. The State has also come in appeal being dissatisfied with the finding that the act of the accused of causing death by firearm falls within the dragnet of section 304 Part I of the Penal Code and the resultant inadequacy of the sentence, being Appeal No. 1010 of 2001.

8. We have heard Ms. Vrishali Rajee for the Appellant in Appeal No. 729 of 2001 and Respondent in Appeal No. 1010 of

2001, and Mrs. P.P. Shinde, A.P.P. for the State in both the Appeals, at considerable length. With the assistance of the learned counsels, we have carefully perused the evidence and material on record.

9. Ms. Vrishali Raje, learned counsel for the accused mounted a multi-pronged challenge to the impugned judgment of conviction. Firstly, the testimony of first informant Mukhtar Shaikh (P.W.1) and Mohd Arastu (P.W.3) could not have been relied upon by the learned Sessions Judge to return the finding of guilt. Amplifying the challenge, it was submitted that, on the one hand, Mukhtar Shaikh (P.W.1) and Mohd Arastu (P.W. 3), being the nephew and brother of the deceased, respectively, are highly interested witnesses. On the other hand, presence of Mukhtar Shaikh (PW. 1) and Mohd Arastu (P.W.3) at the scene of occurrence to witness the alleged firing at the deceased is doubtful. Secondly, there are inherent contradictions in the testimony of Mukhtar Shaikh (P.W.1) and Mohd Arastu (P.W. 3). If the evidence of Mukhtar Shaikh (P.W.1) and Mohd Arastu (P.W. 3) is eschewed from consideration, which is warranted by the nature of their testimony, then there is next to no evidence

to establish the authorship of crime. Thirdly, the circumstantial evidence is extremely unsatisfactory. The weapon of offence i.e. gun, by which the deceased was fired at, has not been recovered. The nexus between the gun, with which accused No. 1 was allegedly armed, and the bullet which was found lodged in the body of the deceased has not been established. In the absence of such cogent evidence, the learned Sessions Judge could not have convicted the accused on the basis of surmises and conjectures. Thus, the impugned judgment of conviction, being legally unsustainable, deserves to be quashed and set aside, canvassed Ms. Raje.

10. Per contra, Mrs. P.P. Shinde, learned A.P.P strenuously urged that there is overwhelming evidence to support the finding that accused had fired at the deceased post a chase. Mukhtar Shaikh (P.W.1) and Mohd Arastu (P.W. 3), according to learned A.P.P, were the natural witnesses and had the opportunity to observe the assault by lethal weapon by accused No. 1 Nijam. The fact that the deceased died on account of firearm injuries is established beyond the pale of controversy. In this backdrop, the testimonies of Mukhtar Shaikh (P.W.1)

and Mohd Arastu (P.W. 3) that they had seen the accused shooting at the deceased squarely proves the guilt of accused No. 1, urged Mrs. Shinde. The submissions advanced on behalf of accused No. 1, according to the learned A.P.P, do not demolish the core of the evidence led by the prosecution. The failure to account for the firearm, in the backdrop of the overwhelming ocular account, according to the learned A.P.P., fades in significance.

11. The learned A.P.P. further submitted that the learned Sessions Judge committed a manifest error in observing that accused No. 1 did not intend to cause the death of the deceased and, therefore, the offence fell within the tentacles of section 304 Part I of Penal Code. It was urged that the case at hand is clearly covered by clause “thirdly” of section 300 of Penal Code and thus there was no escape from the conclusion that accused No. 1 had committed the offence punishable under section 302 of Penal Code. This legal infirmity vitiated the reasoning and finding of the learned Sessions Judge, urged Mrs. P.P. Shinde. Thus, accused No. 1 deserves to be convicted for the offence punishable under section 302 of Penal Code and sentenced to

suffer imprisonment for life, canvassed learned A.P.P.

12. To start with the aspect of homicidal death. No serious endeavour was made on behalf of the accused to assail the nature of death which the deceased met. On the contrary, an endeavour was made during the course of cross examination of the prosecution witnesses to draw home the point that the deceased had earned a number of enemies and thus was shot at by one of those enemies.

13. It would be contextually relevant to note that Dr. Aparna (P.W. 4) the autopsy surgeon claimed to have found a firearm wound of entry over left side of back, and, upon dissection, noticed that the injury perforated, inter alia, lower lobe of left lung through and through, pericardium through and through, right ventricle through and through, and that a deformed bullet was found lodged on left side of xiphistennum. In the opinion of Dr. Aparna (P.W. 4) the cause of death was hemorrhagic shock as a result of firearm injury over the back causing injury to vital organs.

14. The aforesaid nature of the injury thus makes it beyond cavil that the deceased met homicidal death. This propels us to the pivotal question of authorship of the homicidal death.

15. The learned Sessions Judge was of the view that the testimony of Mukhtar Shaikh (P.W.1) and Mohd Arastu (P.W. 3) was worthy of credence. Drawing support and sustenance from the evidence of Shafiq Ahmad (P.W.2), Raheman (PW. 5) and A.R Atik Raheman (P.W.6), as regards core of the occurrence of firing at the deceased, though the said witnesses did not subscribe to the prosecution version that the accused No. 1 fired at the deceased, the learned Sessions Judge proceeded to return the finding of guilt against the accused No. 1 holding that the testimony of Mukhtar Shaikh (P.W.1) and Mohd Arastu (P.W. 3) was sufficient to establish the authorship. Evidently, the fate of the prosecution case hinges upon the quality and reliability of the evidence of Mukhtar Shaikh (P.W.1) and Mohd Arastu (P.W. 3).

16. Before adverting to evaluate the credibility and trustworthiness of the evidence of Mukhtar Shaikh (P.W.1) and

Mohd Arastu (P.W. 3) it may be apposite to deal with the challenge forcefully raised on behalf of the accused No. 1 on the ground of failure to seize the firearm by which the accused No. 1 allegedly fired at the deceased and lead expert evidence establishing the nexus between the bullet found lodged in the person of the deceased and the said weapon. Mrs. Raje urged with a degree of vehemence that the failure of the prosecution to seize and produce the alleged weapon of assault in the circumstances of the case, dismantles the very substratum of the prosecution. It was submitted that, even if the prosecution case is taken at par, the prosecution cannot be said to have succeeded in establishing that the bullet which was found lodged in the body of the deceased was fired from the weapon with which the accused No. 1 was allegedly armed.

17. To bolster up this submission, the learned counsel for the Appellant placed a strong reliance on the judgment of the Supreme Court in the case of **Pankaj vs. State of Rajasthan**¹ wherein, in the facts of the said case, it was, inter alia, observed that there was no material on record to connect that the

¹ 2016 AIR (SC) 4150

gunshot injury suffered by the deceased was due to shot fired from the firearm of the Appellant- accused and that though the bullet was recovered the same has not been connected with the weapon.

18. The aforesaid submission has two facets. One, failure of the investigating officer to recover the firearm by which the accused No. 1 shot the deceased. Two the failure of the prosecution to obtain the opinion of the ballistic expert, though the bullet found stuck in the body of the deceased was apparently sent for analysis and opinion.

19. On the first count, the legal position is absolutely clear. It is not an immutable rule of law that in every case the prosecution shall seize the weapon of offence to connect the accused with the crime. Undoubtedly, the seizure of the weapon either direct or pursuant to the discovery made by the accused, is a vital component of investigation. However, it does not imply that in all the cases where the prosecution fails to recover the weapon of offence, the prosecution shall end in an acquittal. Such a broad proposition would cause grave prejudice to the

administration of criminal justice. The consequences which emanate from the failure of the prosecution to seize the weapon of assault would depend upon the attendant facts of the case.

20. A useful reference, in this context, can be made to the judgment of the Supreme Court in the case of **Laxmisingh vs. State of Uttar Pradesh**² wherein the legal position in the context of failure of the prosecution to establish the identity of the dead body, cause of death and seize the weapon of offence, was expounded in the following words:

16. “Undoubtedly, the identification of the body, cause of death and recovery of weapon with which the injury may have been inflicted on the deceased are some of the important factors to be established by the prosecution in an ordinary given case to bring home the charge of offence under section 302 of IPC. This, however, is not an inflexible rule. It cannot be held as a general and broad proposition of law that where these aspects are not established, it would be fatal to the case of the prosecution and in all cases and eventualities, it ought to result in the acquittal of those who may be charged with the offence of murder. It would depend on the facts and circumstances of each case. A charge of murder may stand established against an accused even in the absence of identification of the body and cause of the death.”

(emphasis supplied)

2 (2002) 7 SCC 198.

21. In the case at hand, the accused No. 1 came to be arrested on 14th October, 1999. In view of the time lag, in our view, the failure of the prosecution to seize the firearm does not necessarily justify jettisoning away the prosecution case, on that count alone.

22. The second limb of the submission based on non-availability of the expert evidence to connect the bullet found lodged in the body of the deceased with the weapon with which the accused No. 1 was allegedly armed does not carry the matter any further. Again , it is not an inviolable rule of law that in all the cases where the deceased had died on account of firearm injury the evidence of ballistic expert is a must.

23. In what cases the examination of the ballistic expert is necessary to establish the prosecution version is again fact based. We are not persuaded to accede to the submission that whenever a bullet is not sent for ballistic examination, the prosecution must fail.

24. A profitable reference in this context can be made to a

judgment of the Supreme Court in the case of **Gurcharan Singh and Anr. vs. State of Punjab**³ wherein the legal position was illuminatingly postulated.

19. “It has however, been argued that in every case where an accused person is charged with having committed the offence of murder by a lethal weapon, it is the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which, and in the manner in which, they have been alleged to have been caused; and in support of this proposition, reliance has been placed on the decision of this Court in *Mohinder Singh v. The State* 1950 SCR 821 : (AIR 1953 SC 415). In that case, this Court has held that where the prosecution case was that the accused shot the deceased with a gun, but it appeared likely that the injuries on the deceased were inflicted by a rifle and there was no evidence of a duly qualified expert to prove that the injuries were caused by a gun, and the nature of the injuries was also such that the shots must have been fired by more than one person and not by one person only, and there was no evidence to show that another person also shot, and the oral evidence was such which was not disinterested, the failure to examine an expert would be a serious infirmity in the prosecution case. It would be noticed that these observations were made in a case where the prosecution evidence suffered from serious infirmities and in determining the effect of these observations, it would not be fair or reasonable to forget the facts in respect of which the came to be made. These observations do not purport to lay down an inflexible rule that in every case where an accused person is charged with murder caused by a lethal weapon, the prosecution case can succeed in proving the charge only if an expert is examined. It is possible to imagine cases

3 AIR 1963 Supreme Court 340

where the direct evidence is of such an unimpeachable character and the nature of the injuries disclosed by post-mortem notes is so clearly consistent with the direct evidence that the examination of a ballistic expert may not be regarded as essential. Where the direct evidence is not satisfactory or disinterested or where the injuries are alleged to have been caused with a gun and they prima facie appear to have been inflicted by a rifle, undoubtedly the apparent inconsistency can be cured or the oral evidence can be corroborated by leading the evidence of a ballistic expert. In what cases, the examination of a ballistic expert is essential for the proof of the prosecution case, must naturally depend upon the circumstances of each case.”

(emphasis supplied)

25. In the case of **Vineet Kumar Chauhan vs. State of Uttar Pradesh**⁴ the Supreme Court, after following the aforesaid pronouncement in the case of Gurucharan Singh(supra), reiterated the legal position in the following words:

11. “It cannot be laid down as a general proposition that in every case where a firearm is allegedly used by an accused person, the prosecution must lead the evidence of a ballistic expert to prove the charge, irrespective of the quality of the direct evidence available on record. It needs little emphasis that where direct evidence is of such an unimpeachable character, and the nature of injuries, disclosed by the post-mortem notes is consistent with the direct evidence, the examination of ballistic expert may not be regarded as essential. However, where direct evidence is not available or that there is some doubt as to whether the injuries could or could not have

4 (2007) 14 Supreme Court Cases 660

been caused by a particular weapon, examination of an expert would be desirable to cure an apparent inconsistency or for the purpose of corroboration of oral evidence.(See Gurcharan Singh v. State Of Punjab.).”

(emphasis supplied)

26. The pronouncement of the Supreme Court in the case of **Sukhwant Singh vs. State of Punjab**⁵ underscores the circumstances in which non availability of the opinion of the ballistic expert dents the prosecution. In the said case, in the backdrop of the omission on the part of the prosecution to send the cartridges seized from the spot for the opinion of the ballistic expert, it was observed as under:

“It hardly needs to be emphasized that in cases where injuries are caused by firearms, the opinion of the ballistic expert is of a considerable importance where both the firearm and the crime cartridge are recovered during the investigation to connect an accused with the crime. Failure to produce the expert opinion before the trial Court in such cases affects the creditworthiness of the prosecution case to a great extent.”

(emphasis supplied)

27. The position which thus emerges is that where direct evidence is found to be of unimpeachable character and the evidence of the autopsy surgeon, as regards the nature of injuries is found to be consistent with the ocular account, the

5 AIR 1995 Supreme Court 1601

non-examination of the ballistic expert may not be regarded as a serious infirmity in the prosecution case. It all turns upon the quality of evidence of the witnesses who testify to the fact that the accused had caused the firearm injury.

28. In the facts of the case, in our view, the absence of ballistic opinion does not impair the prosecution as it has been firmly established that the bullet was found embedded in the xiphisternum of the deceased. The said fact indubitably establishes that the deceased had suffered a firearm injury. The question as to whether the said bullet was discharged from the firearm allegedly carried by the accused No. 1 in the facts of the instant case loses significance as the weapon with which the accused No. 1 was allegedly armed was neither seized nor recovered. Thus, there was no material on the basis of which the ballistic expert could have given his opinion as to whether the bullet had been fired from the weapon carried by accused No. 1.

29. This propels us to the consideration of the aspect of reliability and trustworthiness of the oral evidence adduced by

the prosecution in proof of authorship of firearm injury. As the prosecution principally banks upon the ocular account of Mukhtar Shaikh (P.W.1) and Mohd Arastu (P.W.3), it may be apposite to have a brief resume of their evidence.

30. Mukhtar Shaikh (P.W.1), the first informant, testified to the facts that on the day of occurrence at about 3.00 p.m. while he was standing in front of the shop/gala of Kamaluddin, his uncles, deceased Ahmad and Mohd Arastu (P.W.3) went towards the shop of Aatiqoor Rehman, in the opposite direction. After about 10 minutes of Ashraf having had a recee, the assailants again came to the said spot. Ashraf was armed with a stick. The appellant Nijam Shaikh had a revolver. Aslam was armed with a sword. Whereas Ganesh had a chopper. They made inquiry with the persons present thereat as to where the deceased had gone. Having overheard the conversation, Mukhtar Shaikh (P.W.1) claimed to have ran towards the opposite direction and apprised the deceased. Thereupon, the deceased Ahmad ran towards Indira Nagar.

31. On the core of occurrence, Mukhtar Shaikh (P.W.1) wants

the Court to believe that accused No. 9 Noorjahan Shaikh, the wife of accused No. 2 Haroon Shaikh, sounded off the assailants that the deceased was running and they should chase him. Thereupon the above named assailants chased the deceased. While the deceased was on the bridge over the drain (nuallah) the accused No. 1 Nijam Shaikh fired at the deceased. The later ran for a short distance and fell down. Mukhtar Shaikh (P.W.1) claimed to have gone to Karvalo Nagar police post (chowki) and brought two constables to the spot in front of the shop of Omprakash Yadav, where the deceased was lying. With the help of Omprakash Yadav and Mohd Arastu(P.W.3), the first informant Mukhtar Shaikh (P.W.1) claimed to have taken the deceased in an auto rickshaw to Singhania hospital, where the deceased was pronounced dead.

32. This version of the first informant Mukhtar Shaikh (P.W.1) was sought to be corroborated by Mohd Arastu (P.W.3). He affirmed that while he, his deceased brother Ahamad and others were in their depot (vakhar), Mukhtar Shaikh (P.W.1) the first informant, who was initially standing in front of the shop of Kamaluddin, came to their side and informed the

deceased, in his presence, that accused No. 1 Nijam, No. 3 Ganesh, Aslam and Ashraf were coming to mount on attack. Thereupon, the deceased told him to go towards Karvalo Nagar police post, and the deceased rushed towards Indira Nagar police post. Accused No. 9 Noorjahan gave a shout that the deceased was running towards Indira Nagar and exhorted the assailants to chase the deceased. After hearing the said exhortation, Mohd Arastu (P.W.3) claimed to have turned back and noticed that the above named persons were chasing the deceased who was running towards Indira Nagar. While the deceased was crossing the bridge on the drain, accused No. 1 Nijam fired at the deceased who fell down in front of the juice center of Horilal. He claimed to have rushed to the said spot. According to Mohd Arastu (P.W.3), Mukhtar Shaikh (P.W.1) came thereat accompanied by police and thereupon the deceased was shifted to Singhanian hospital.

33. Whether the aforesaid testimony of Mukhtar Shaikh (P.W.1) and Mohd Arastu (P.W.3) is worthy of credence ? Evidently, Mukhtar Shaikh (P.W.1) and Mohd Arastu (P.W.3) claimed to have witnessed the accused No. 1 Nijam fire at the

deceased. Whether they had opportunity to witness the said act attributed to accused No. 1 Nijam is at the heart of the matter. If their evidence, tested in the backdrop of previous statements and probabilities, allures confidence and establishes their presence at the scene of occurrence then the guilt of the accused No. 1 Nijam can be sustained on the strength of their testimony.

34. We are not much impressed by the submission on behalf of the accused that the testimony of Mukhtar Shaikh (P.W.1) and Mohd Arastu (P.W.3) cannot be relied upon for the reason that they are interested witnesses. It is trite law that relationship of the witnesses with the victim by itself is not a ground to discard the testimony of such witnesses. In the case at hand, the claim of Mukhtar Shaikh (P.W.1) and Mohd Arastu (P.W.3) that they were jointly residing with the deceased could not be impeached. Nor it could be shown that the witnesses had animus to depose against the accused No. 1 Nijam. We are thus not persuaded to discard the testimony of Mukhtar Shaikh (P.W.1) and Mohd Arastu (P.W.3) as being “interested” one.

35. From the tenor of the prosecution case, it is abundantly clear that the deceased was fired at while running towards Indira Nagar. The scene of occurrence panchanama (Exhibit 52) records that the occurrence took place on Road No. 22 which connects Lokmanya Nagar to Indira Nagar. It had occurred on the bridge. After being shot at, the deceased purportedly fell down in front of Yadav dairy. The said spot was at a distance of about 100 ft from the bridge. No blood stains or other marks were found at the said place and thus nothing was seized from the said spot.

36. In the light of the aforesaid situation, as regards the scene of occurrence, the manner in which Mukhtar Shaikh (P.W.1) fared in the cross examination assumes significance. It is imperative to note that Mukhtar Shaikh (P.W.1) claimed that when he came in front of the shop of Kamaluddin the deceased and Mohd Arastu (P.W.3) were present thereat and they later proceeded in the opposite direction; in front of the shop of Atiqoor Rehman. Mukhtar Shaikh (P.W.1) claimed to have seen the assailants armed with respective weapons and overheard the assailants making inquiry with the persons about the

deceased and thereupon ran across and apprised the deceased.

37. Certain material omissions were elicited in the cross examination of Mukhtar Shaikh (P.W.1). It was brought out that the first information report does not find mention of the fact that he had seen the deceased and Mohd Arastu (P.W.3) walking towards the opposite direction i.e. in front of the shop of Atiqoor Rehman. The first information report also does not find mention of the fact that the assailants made inquiry with the people as to where the deceased had gone, and he overheard the said conversation. Another omission to the effect that the first information report does not find mention of the fact that he had rushed to the opposite side and informed the deceased that the assailants were searching for him, was elicited.

38. The aforesaid omissions are on vital aspects. The core of the prosecution case is that after being apprised by Mukhtar Shaikh (P.W.1), the deceased started to run towards Indira Nagar police post. The omission to state the facts that the first informant had seen the deceased and Mohd Arastu (P.W.3)

crossing over the road and proceeding towards the opposite direction, seen and overheard the assailants making inquiry about the deceased and, thereafter, rushed to the opposite direction where the deceased was sitting cannot be said to be immaterial or inconsequential. The omissions throw a cloud of doubt over the presence of Mukhtar Shaikh (P.W.1) at the scene of occurrence to witness the actual firing.

39. The conduct of Mukhtar Shaikh (P.W.1), post firing, and the attendant circumstances are also of critical significance. After witnessing the firing, Mukhtar Shaikh (P.W.1) claimed to have rushed towards Karvalo Nagar police post and brought two police personnel therefrom to the spot where the deceased was lying. Indisputably, Karvalo Nagar police post and Indira Nagar police post were in diametrically opposite direction. Admittedly, the deceased was running towards Indira Nagar. Mukhtar Shaikh (P.W.1) claimed to have rushed to Karvalo Nagar police post, which was in the opposite direction.

40. It is pertinent to note that there is not an iota of evidence

to corroborate the claim of Mukhtar Shaikh (P.W.1) that he had brought two police personnel to the scene of occurrence. Mukhtar Shaikh (P.W.1) contended that he had apprised the incident which had transpired to those police personnel. Yet, he expressed his inability to state as to where those police personnel had gone, after the deceased was taken in the auto rickshaw. No endeavour was made to ascertain the identity of those police personnel and examine them. Their examination would have rendered unwavered corroboration to the claim of Mukhtar Shaikh (P.W.1). In contrast, this crucial fact of having brought the police personnel to the scene of occurrence and shifted the deceased in an auto rickshaw to Singhania hospital, with the assistance of those police personnel, also does not find mention in the first information report. This omission was also duly brought out in the cross examination.

41. Testimony of Mukhtar Shaikh(P.W.1) evidently bristles with improvements on the material points. Thus, testimony of Mukhtar Shaikh(P.W.1) is required to be appreciated with care & caution & it is necessary to ascertain whether there is evidence to corroborate the claim of Mukhtar Shaikh (P.W.1).

42. The testimony of Mohd Arastu (P.W.3) was pressed into service as corroborative to the evidence of Mukhtar Shaikh (P.W. 1). At the outset, it is necessary to note that the aforesaid omissions, brought out in the cross examination of Mukhtar Shaikh (P.W.1) render the presence of Mohd Arastu (P.W.3) at the scene of occurrence rather doubtful, as the first informant did not mention the name of Mohd Arastu (P.W.3) as the person who had witnessed the occurrence though the other witnesses were named, especially in the backdrop of the fact that Mohd Arastu (P.W.3) allegedly accompanied the deceased when Mukhtar Shaikh (P.W.1) claimed to have apprised the deceased about the impending attack by the assailants. Moreover, on careful evaluation of the evidence of Mohd Arastu (P.W.3), we find that his evidence also suffers from the vice of material improvements and contradictions.

43. To begin with Mohd Arastu (P.W.3) claimed to have seen the assailants following Mukhtar Shaikh (P.W.1), armed with respective weapons. This was a clear exaggeration. If the claim of Mohd Arastu (P.W.3) that he had seen the assailants armed with respective weapons, even before Mukhtar Shaikh (P.W.1)

informed the said fact, is to be believed then the substratum of the prosecution case that Mukhtar Shaikh (P.W.1) had alerted the deceased about the assailants searching him to mount the attack, gets eroded.

44. Omissions were also elicited in the cross examination of Mohd Arastu (P.W.3) to the effect that he did not state before the police that the deceased asked him to go towards Karvalo Nagar police post and the deceased proceeded towards Indira Nagar police post. On the contrary, a contradiction was brought out to the effect that he had stated before the police that after apprising the deceased about the impending attack, Mukhtar Shaikh (P.W.1) rushed towards Karvalo Nagar police post to inform the police. On the aspect of having witnessed accused No. 1 Nijam shot at the deceased, a crucial omission was brought out in the evidence of Mohd Arastu (P.W.3). He did not state before the police that he turned back after hearing the shouts of accused No. 9 Noorjahan that the deceased was running towards Indira Nagar and thereupon he saw accused No. 1 Nijam chase and fire at the deceased. This omission is of critical significance. If the claim of Mohd Arastu (P.W.3) is to be

believed, he was proceeding towards Karvalo Nagar police post, which was in the opposite direction of Indira Nagar police post towards which the deceased was running. The omission to state that he turned back after the clarion call given by the accused No. 9 Noorjahan dents the credibility of the testimony of Mohd Arastu (P.W.3) as while running in the opposite direction he would have had no opportunity of witnessing the assailant firing at the deceased.

45. The presence of Mukhtar Shaikh (P.W.1) to witness the occurrence is also pushed in the corridor of uncertainty as a contradiction was elicited in the cross examination of Mohd Arastu (P.W.3) that Mukhtar Shaikh (P.W.1) immediately rushed towards Karvalo Nagar Police post after alerting the deceased. To add to this, it was elicited in the cross examination of Mohd Arastu (P.W.3) that he was not aware as to whether Mukhtar Shaikh (P.W.1) had gone to the police post. He feigned ignorance as to whether Mukhtar Shaikh (P.W.1) stood still at the said spot, after alerting the deceased.

46. There is another factor which bears upon the presence of

Mukhtar Shaikh (P.W.1) and Mohd Arastu (P.W.3) at the scene of occurrence. Both the witnesses claimed that blood was oozing from the injury sustained by the deceased and the clothes of the deceased were stained with blood. Mukhtar Shaikh (P.W.1) further asserted that in the auto rickshaw he had taken the head of the deceased in his lap. The clothes which he wore were stained with blood. Yet, neither he had shown the blood stained clothes to the police nor the police had seized the same. Mohd Arastu (P.W.3) also conceded that when the deceased was being carried in the auto rickshaw to Singhania hospital, blood was oozing from the injury sustained by the deceased. Girish Tandalekar (P.W.7), the investigating officer conceded in the cross examination that he had not seen the blood stains on the clothes of Mohd Arastu (P.W.3) nor those clothes were seized.

47. The situation which thus emerges is that the evidence of Mukhtar Shaikh (P.W.1) and Mohd Arastu (P.W.3), on a fair reading, indicates that Mukhtar Shaikh (P.W.1) and Mohd Arastu (P.W.3) were running towards Karvalo Nagar police post while the deceased was running in the opposite direction

i.e. towards Indira Nagar police post. The witnesses have made material improvements to make the Court believe that they had seen the accused No. 1 Nijam fire at the deceased who was running towards Indira Nagar police post. Furthermore, there is material inconsistency between the testimony of Mukhtar Shaikh (P.W.1) and Mohd Arastu (P.W.3) which impinges upon their claim about the presence of Mohd Arastu (P.W.3) with the deceased. Lastly, there is no other evidence which corroborates the testimony of Mukhtar Shaikh (P.W.1) on the crucial aspect of having seen the accused No. 1 Nijam fire at the deceased.

48. The learned Sessions Judge played down the aforesaid improvements, omissions and contradictions. Even the aspect of no blood being found either at the scene of occurrence or on the clothes of Mukhtar Shaikh (P.W.1) and Mohd Arastu (P.W.3) was sought to be discounted on the ground that, since the bullet was lodged in the body of the deceased blood might not have oozed from the injury. The said finding is against the weight of the evidence on record. Both Mukhtar Shaikh (P.W.1) and Mohd Arastu (P.W.3) have deposed that the blood was oozing from the injury suffered by the deceased and the

backside of the shirt of the deceased was smeared with blood.

49. The conspectus of the aforesaid consideration is that the evidence of Mukhtar Shaikh (P.W.1) and Mohd Arastu (P.W.3) does not command implicit reliance. There is a serious doubt as to whether these witnesses have had opportunity to observe the accused No. 1 Nijam fire at the deceased. It is a different matter that after the sound of gunshot the attention of the witnesses might have been drawn towards the scene of occurrence. However, in view of the material on record, which shows that the deceased and the witnesses were running in the opposite direction, it would be rather hazardous to place implicit reliance on the claim of Mukhtar Shaikh (P.W.1) and Mohd Arastu (P.W.3) that they had seen the actual firing. Once the evidence of Mukhtar Shaikh (P.W.1) and Mohd Arastu (P.W.3) is found to be not wholly reliable, there is no other evidence to connect the accused No. 1 Nijam with the crime. To sum up, the evidence on record does not induce the necessary assurance to record a finding that the prosecution has succeeded in establishing the identity of accused No. 1 Nijam as the person who shot at the deceased.

50. For the foregoing reasons, the impugned judgment cannot be sustained. The appeal against the conviction thus deserves to be allowed. As we are persuaded to hold that the conviction of accused No. 1 Nijam is legally unsustainable, the appeal preferred by the State to alter the finding and enhance the sentence fails. Hence, the following order:

ORDER

- a] The Appeal No.729 of 2001 stands allowed.
- b] The impugned judgment of conviction for the offence punishable under section 304 Part I of the Penal Code and the sentence imposed upon the appellant-accused No. 1 Nizam Habibulla Shaikh stands set aside.
- c] The appellant-accused No. 1 Nizam Habibulla Shaikh stands acquitted of the offence punishable under section 304 Part I of the Penal Code.
- d] The bail bond stands cancelled and the surety stands discharged.
- e] Appeal No. 1010 of 2001 stands dismissed.

**V. S.
Parekar**

Digitally signed
by V. S. Parekar
Date: 2020.10.22
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(N.J.JAMADAR, J.)

(SMT SADHANA S. JADHAV, J.)