

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.61 OF 2013

RASHID AHMED ABDUL BASHAR SHAIKH)
Aged 21 years, Occupation : Service,)
Residing at Diamond Garden, Opp. K Star,)
Unnati Mandal, Road No.5, Plot No.301,)
Chembur, Mumbai – 400043.)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)
At the instance of Chembur Police Station)
Vide C.R.No.532/2010)...RESPONDENT

WITH

CRIMINAL APPEAL NO.292 OF 2014

NAUSHAD BADRUDDIN SHAIKH)
Age 20 years, Indian Inhabitant,)
Residing at Kena Market Zopadpatti,)
Tata Nagar Haji Beef Shop, Govandi,)
Mumbai – 400043.)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)
At the instance of Chembur Police Station)
Vide C.R.No.532/2010)...RESPONDENT

Mr.Daulat Khamkar, Advocate, for the Appellant in Appeal No.61 of 2013.

Dr.Yug Choudhary, Advocate for the Appellant in Appeal No.292 of 2014.

Smt.S.V.Sonawane, APP for the Respondent – State.

**CORAM : S. S. SHINDE &
V. G. BISHT, JJ.**

**DATE : RESERVED ON : 4th OCTOBER 2021
PRONOUNCED ON : 14th OCTOBER 2021**

JUDGMENT : (PER : V. G. BISHT, J.)

1 The present appeals have been preferred against the judgment and order of conviction and sentence dated 30th November, 2012 passed by the learned Additional Sessions Judge at Sewree, Mumbai, in Sessions Case No.318 of 2011, wherein the learned trial Court was pleased to convict the appellants under Section 302 read with 34 of the Indian Penal Code (IPC), Section 324 read with 34 of the IPC and Section 506 (II) read with 34 of the IPC and sentenced them to suffer life

imprisonment and to pay fine of Rs.10,000/- each, in default to suffer simple imprisonment for 6 months for the offence punishable under Section 302 read with 34 of IPC, sentenced them to suffer imprisonment for 1 year and to pay fine of Rs.1,000/- each, in default to suffer simple imprisonment for 1 month for the offence punishable under Section 324 read with 34 of IPC and also sentenced to suffer imprisonment for 6 months and to pay fine of Rs.1,000/- each, in default to suffer simple imprisonment for 15 days for the offence punishable under Section 502 (II) read with 34 of IPC. The substantive sentences, however, are directed to run concurrently.

2 The prosecution was initiated on the basis of a complaint filed by Smt.Shamshad Maqsood Khan (informant). Appellant Rashid Ahmed Abdul Bashir Shaikh (A-2) is a neighbour of informant. On 20th November 2010 at about 6.30 a.m. Nasreenbanu, sister-in-law of informant, visited latter's house and informed that the tin sheets of her house are missing and expressed doubts that A-2 might have taken it. According to

the prosecution, the informant and said Nasreenbanu visited the house of A-2 but he was not there. They met A-2's sister and brother and enquired about the tin sheets. At that time, a heated exchange of words took place and the siblings of A-2 asked informant and her sister-in-law that they should ascertain it from A-2.

3 The prosecution next contends that at about 11.00 p.m. somebody knocked the door of the house of the informant. The informant opened the door and saw A-2 standing there along with a person who was wearing green coloured half-shirt and black jeans. The prosecution alleges that A-2 then asked the informant to send her husband namely Maqbool (since deceased) outside as he wanted to have words with him. The deceased got up to tell A-2 from inside the house that he will have a word with him on the next morning. It is alleged that A-2 caught hold of the hand of deceased and dragged him outside. At the relevant time, the informant's daughter namely Kausar was also standing near the door. It is further alleged that all of a sudden A-2 took out a

chopper which was concealed around his waist and gave a blow of the same on the neck and shoulder of the deceased. The unknown person, who was wearing green half shirt, also gave a blow of chopper on the head of the deceased. When informant's sister-in-law namely Nasreenbanu came running, she was also assaulted by the person wearing green half shirt by means of chopper on her left hand. The informant and family members then raised commotion as a result of which the neighbours woke up and tried to apprehend A-2 and other unknown persons. However, all of them brandished their weapons at neighbours and threatened that whosoever comes near would be killed and then fled away in an autorickshaw. However, the person wearing green half shirt was apprehended on the spot and the people from the locality gave him a beating. The deceased was then rushed first to Shatabdi hospital and then to Sion hospital. It appears that during the course of treatment the deceased succumbed to the injuries.

4 The informant, later on, lodged the First Information Report (FIR) with Police Station Chembur on the basis of which Crime No.532 of 2010 for offences punishable under Section 302, 307, 324, 506(2) and 34 of Indian Penal Code, Section 4 and 25 of Arms Act as well as Section 37(1)(a) and 135 of the Bombay Police Act came to be registered. The investigation was, firstly, taken up by PW8 Sunil Kadam who arrested the A-1, namely, Naushad Badruddin Shaikh and was brought in the Police Station itself. He also seized clothes viz. green shirt and black jeans of A-1 and a chopper which was concealed in the pant. He also recorded supplementary statement of the informant after the death of the deceased and drew Inquest Panchnama. He further visited the spot of occurrence and prepared Spot Panchnama, seized clothes of deceased and later on handed over the investigation to Police Inspector Kasar (PW10).

5 PW10 Investigating Officer on his part recorded the Disclosure Statement of accused Rashid Ahmed Abdul Bashar

Shaikh (A-2) under Section 27 of the Indian Evidence Act and seized his clothes and weapon used in the offence at his instance. He also forwarded all the seized articles to the Forensic Science Laboratory and after completion of investigation forwarded the charge-sheet against all the accused under Section 302, 307, 324, 506(2) and 34 of Indian Penal Code, Section 4 and 25 of Arms Act as well as Section 37(1)(a) and 135 of the Bombay Police Act and the case was committed to the Court of Sessions, Sewree, Mumbai.

6 To substantiate the Charges against the appellants and other accused, the prosecution examined as many as ten witnesses and exhibited number of documents. The present appellants were questioned under Section 313 of the Code of Criminal Procedure (Cr.P.C.) about the incriminating evidence and circumstances and the appellants-accused denied all of them as false and also expressed ignorance. A-2 expressed his desire to examine defence witness in support of his defence and accordingly has examined two defence witnesses in support of his case.

7 Dr.Yug Chowdhary, learned Counsel for appellant-A-1, has submitted written submissions in support of the appeal. Perused. The learned Counsel also advanced oral submissions which are nothing but reiteration of the written submissions. The learned Counsel also placed reliance on **Kanan vs. State of Kerala¹**, **Ramesh vs. State of Karnataka²**, **Hari Nath vs. State of Uttar Pradesh³**, **Raja Ram vs. State of Rajasthan⁴** and **Assoo vs. State of Madhya Pradesh⁵**. We would be considering the submissions of the learned counsel and the reliance placed on the various decisions as and when required and at an appropriate stage.

8 Mr.Khamkar, learned Counsel for the appellant-A-2, submits that the alleged incident took place in a thickly populated area. There were witnesses as claimed by the prosecution but despite that not a single independent witness is examined by the prosecution. The whole evidence adduced by

1 (979) 3 SCC 319

2 (2009) 15 SCC 35

3 (1988) 1 SCC 14

4 (2005) 5 SCC 272

5 (2011) 14 SCC 448

the prosecution is quite shaky and does not inspire confidence. The learned Counsel during the course of argument invited our attention to various portions of the cross-examination of material witnesses, namely, PW1 and PW2 and termed them highly interested and got up witnesses. The learned Counsel forcefully submitted that the defence of plea of “alibi” taken by the accused is duly proved by examining defence witnesses. In such circumstances, according to the learned Counsel, the benefit or doubt should be extended in favour of appellant- A-2.

9 Ms.Sonawane, learned APP, on the other hand, vehemently opposed submissions of the learned Counsel for the appellants-accused. According to the learned APP, PW1 to PW3 are natural eye witnesses and therefore, they cannot be termed as interested witnesses. Moreover, except there being very minor contradictions, which are bound to occur after such a long time, there has been consistency throughout amongst the versions of witnesses. Moreover, according to the learned APP, all the injuries as noted in the postmortem notes correspond to the

ocular evidence and as also Injury Certificates issued by the concerned Medical Officer. There being no infirmity in the impugned judgment and order of conviction, the same should not be interfered with by this Court, argued learned APP

10 Before looking into the evidence of material witnesses, we propose to refer to the postmortem report prepared by PW11 Dr.Rajesh Chandrakant Dere (Exh. 44).

11 PW11 testifies in his evidence that on 21st November 2010 he performed an autopsy over the dead body of Maksud Makbul Khan (deceased) in between 12.55 p.m. to 2.30 p.m. According to him, the deceased had sustained following external injuries :

“1. Vertical chop injury present over forehead and frontal area on right side of size 10 cm x 1 cm, bone deep with cutting of outer table of underlying bone, with bevelling on left side, red in colour.

2. Chop injury present over right parietal and temporal area, 9 cm below injury no.1, of size 8 cm x 1 cm, bone deep with cutting of outer table of underlying bone, with bevelling on upper side, red in colour.
3. Chop injury present over right parietal area, 10 cm left to injury no.1 of size 7 cm x 3 cm, bone deep with cutting of outer table of underlying bone, with bevelling on upper side, red in colour.
4. Vertical incise injury present over antero-superior aspect of shoulder on right side of size 10 cm, 0.8 cm, muscle deep with downward tailing of injury, red in colour.
5. Incise injury present over shoulder at the base of neck 5 cm medial and parallel to injury no.4, of size 4 cm x 0.8 cm, muscle deep, with tailing of injury on anterior aspect, red in colour.
6. Chop injury present over poster-superior aspect of shoulder on right side, of size 8 cm x 2 cm, muscle deep with bevelling on right side, with tailing of injury on anterior aspect, red in colour.

7. Incise injury present over the base of neck on left side, of size 14 cm x 2.5 cm, muscle deep, with tailing of injury on anterior aspect of injury, red in colour.
8. Chop injury present over postero-superior aspect of shoulder on left side, 2 cm medial and posterior to injury no.7, of size 15 cm x 2 cm muscle deep with bevelling on right side, red in colour.
9. Incise injury present over shoulder on left side, 2 cm lateral to injury no.7 of size 17 cm x 1.5 cm subcutaneous deep, with tailing of injury on anterior aspect, red in colour.
10. Oblique incise injury present over shoulder on left side of size 7 cm x 0.8 cm., subcutaneous deep, middle part merging into injury no.9 with tailing on lower end, red in colour.
11. Chop injury present over anterior aspect of left shoulder joint, of size 9 cm x 2 cm, muscle deep, with bevelling of injury on left side, red in colour.

12. Chop injury over chest on left side, 3 cm above and lateral to left nipple, of size 8 cm x 4 cm, muscle deep, with bevelling on inferior aspect of injury, red in colour.
13. Vertical incise injury present over anterior aspect of middle part of left arm, of size 10 cm x 5.5 cm. muscle deep with tailing of injury on inferior aspect, red in colour.
14. Oblique chop injury over postero medial aspect left forearm, of size 9 cm x 7 cm, muscle deep with bevelling of injury on inferior aspect, and tailing on right side, red in colour.
15. Vertical incise injury present over back on left in upper 1/3rd part, of size 27 cm x 1.5 cm, muscle deep, with tailing of injury on superior aspect, red in colour.
16. Incise injury over dorsal aspect of left middle finger, 1 cm x 0.2 cm, muscle deep, red in colour.
17. Incise injury over antero-medial aspect of left ring finger, of size 2.5 cm x 1 cm, bone deep with cutting of underlying bone, red in colour.

18. Abrasion over posterior aspect of right elbow joint, 2 cm x 2 cm, red in colour.”

It is his further evidence that all injuries were ante-mortem. Except injury no.18, rest of the injuries were possible by either butcher’s knife (Article F) or dagger (Article C). According to him, the cause of death was “hemorrhagic shock due to multiple chop injuries.” He then proved postmortem report at Exh. 45.

12 Although this witness was cross-examined by the A-2 and other accused but nothing material could be extracted in the cross-examination. There is also no dispute as to the homicidal death of the deceased. Having regard to the evidence in respect of injuries found on the dead body of the deceased by means of weapons, as is deposed by Autopsy Surgeon, we do not entertain any doubt in our mind that the deceased met a homicidal death.

13 We have carefully gone through the prosecution evidence with the help of the learned counsel and the learned APP. Eye witnesses to the incident in question are admittedly

only family members of informant including herself. There are three eye witnesses, whom the learned counsel for defence have termed as highly related and interested witnesses. How far their respective testimonies are to be believed or not will be looked into closely, cautiously and guardedly and whether in the facts and circumstances of the case they really can be termed as highly interested witnesses. We, therefore, propose to quote their testimonies chronologically followed by appreciation.

14 PW1 Smt. Shamshad Maqsood Khan, informant, states in her evidence (Exh. 18) that she knows Rashid Ahmed Abdul Bashir Shaikh (appellant – A-2) who is her neighbour. On 20th November 2010, at about 6.30 p.m., her sister-in-law i.e. Nasreen Maqbool Noor Mohd. Banu (PW2) had been to her house and enquired about her teens which were allegedly kept by her. The informant pleaded ignorance and suggested her to ask about the same to appellant – A-2 as prior to two months, he had taken her teens from her mother-in-law for his house and thought in a like way he might have taken the teens. PW2 then went to the house

of appellant – A-2 along with informant. They enquired with Rahim and Shaheen who were present in the house of appellant – A-2. However, Shaheen started quarreling with PW2 and asked her to enquire with her brother i.e. appellant – A-2.

15 It is her further evidence that at about 8.00 p.m. her husband (deceased), who was sleeping, woke up. She apprised him about the aforesaid incident. Her husband thereafter went to the house of Nasreen Maqbool Noor Mohd. Banu i.e. PW2. She also accompanied her husband. Both of them asked Nasreen Maqbool Noor Mohd. Banu to keep mum and not to quarrel.

16 The informant's evidence then shows that at about 11.00 p.m. somebody knocked the door. She opened the door and noticed appellant – A-2. Appellant – A-2 told her that he wanted to talk to her husband i.e. deceased. She asked him to come in the morning but he insisted to send her husband for two minutes. One person wearing green coloured half shirt i.e. appellant – A-1 was also with him and he also insisted to send

her husband out. Her husband accordingly woke up and went near the door and asked appellant – A-2 to come in the morning. The informant alleges in her evidence that appellant – A-2 then caught the hand of the deceased and pulled him outside the house. Appellant – A-2 thereafter removed a chopper which was hidden by him and gave blows on the shoulder as well as throat. The person wearing green shirt then removed a dagger and assaulted the deceased with the same on the head. According to the informant she and her daughter (PW3) who were standing at the door started raising hue and cry. There were two other persons with appellant – A-2 and that persons were wearing half green shirt. They were in all four and started giving continuous blows with the chopper and knife on the person of the deceased.

17 It is her further evidence that her sister-in-law (PW2) after hearing her cries came running. The person wearing half green shirt (appellant – A-1) then assaulted her sister-in-law (PW2) with chopper on the left hand. The neighbours had gathered. The assailants then started running and also gave

threats with the weapons they had by saying that nobody should interfere, otherwise they would commit murder. The persons from the area chased those assailants. One rickshaw was standing on the road. Three persons boarded the said rickshaw and fled. However, the person wearing half green shirt (i.e. appellant – A-1) was caught by the persons from the locality and was assaulted.

18 Her evidence then shows that they took her husband to Shatabdi hospital but on advise of doctors, shifted him to Sion hospital. Thereafter, she and her sister-in-law (PW2) went to the Police chowky and they saw that person wearing green coloured half shirt was sitting there. She then apprised the police that the said person had assaulted her husband on his head. The police then revealed his name as Naushad i.e. appellant – A-1. She also gave the description of other two assailants and accordingly lodged the report. She then proved her report at Exh. 19.

19 PW2 Nasreen Maqbool Noor Mohd. Banu, sister-in-law of the informant, in her evidence (Exh. 20) has supported the evidence of PW1 informant. She has deposed all about her visits to the house of informant and the enquiry made by her in respect of teens followed by her and the informant visiting to the house of appellant – A-2. Her evidence further corroborates the evidence of the informant to the effect that at about 11.00 p.m. while she was watching television, she heard hue and cry of informant who was saying “bachav bachav”. When she went there she noticed appellant-A-2 and three others were indiscriminately assaulting her brother with chopper and knife. When she tried to intervene, the person wearing green half shirt (i.e. appellant – A-1) tried to assault her on her neck and in order to protect her, she raised hand due to which she sustained injury on the left hand. The appellant – A-1 was having a knife in his hand and with that knife he wanted to give blow on her neck.

20 The rest of her evidence is in consonance with the evidence of the informant regarding conduct of the appellants

and other accused, shifting of the deceased to Sion hospital and then their visit to the police station wherein she also found appellant – A-1 sitting in the police station. Her evidence also shows that they then apprised the police that it was the appellant – A-1 who also had assaulted the deceased.

21 The last witness, namely, Kumari Kausar Maqsood Khan, a child witness and daughter of the informant, states in her evidence (Exh. 21) that on 20th November 2010 she was sleeping in the house. She heard knocking of the door. When she woke up she noticed that her mother was opening the door. She also noticed appellant – A-2 with one person wearing green coloured half shirt. They were outside the door. According to her, appellant – A-2 asked her mother to send her father as he wanted to have a word with him. When her father went near the door, the person wearing green shirt had caught the hand of her father and pulled him. She followed her father in the lane and noticed that there were two other boys as well in the lane. It is her further evidence that appellant – A-2 then gave a blow with a

chopper on the head of her father. She raised hue and cry and called her mother. Her mother came there. She also noticed that the appellant – A-2 and the person wearing green shirt were assaulting her father with the chopper which is always used for cutting beef. She then identified both the accused before the Court.

22 Reading of evidence of witnesses particularly PW1 and PW2 as a whole, we are more than satisfied that their substantive evidence is in consonance with the contents of the FIR. We have also carefully gone through the cross-examination of PW1 and we note here that there is no specific and precise denial as to the version of the informant that the appellant-A-1 along with appellant-A-2 had been to her house and had assaulted deceased by means of chopper and dagger. The only suggestion given in the cross-examination by the learned counsel for the appellant- A-1 is that, which is termed as incorrect, she has deposed falsely that appellant – A-1 had assaulted her husband.

23 Similarly, a suggestion was given by the learned counsel for the appellant-A-2 that neither appellant-A-2 was present on the spot nor he had assaulted her husband by any weapon which is again stoutly denied by the informant. From this line of suggestion it is apparent that the appellant-A-2 has taken a plea of “alibi”. Interestingly, we may note here that while the incriminating circumstances appearing in the evidence of prosecution witnesses against him were put to him, surprisingly no such plea of alibi is taken by the appellant-A-2. On the contrary, Question Nos.9, 10, 11, 12 and 13 pointing out not only his presence on the spot but his act of assaulting the deceased by means of a chopper and then fleeing from the spot in a rickshaw are termed as false. While answering these questions, the appellant-A-2 had ample opportunity to clarify that since he was not present on the spot, as is claimed by him through the line of cross-examination, there could not have been any occasion to visit the house of the informant and indulge in murderous assault, as is alleged by the prosecution. Therefore, this becomes an incriminating circumstance against the appellant-A-2.

24 Similarly, the appellant–A-1 was posed two questions in his statement recorded under Section 313 of the Code of Criminal Procedure. Question No.7 is to the effect that one person wearing green coloured half shirt who was with appellant-A-2 was none else than he and then he was asked to respond to that circumstance. The appellant–A-1 replied that he does not know as he had consumed alcohol. Question No.8 was to the effect that in the evidence of the informant it has come that he assaulted her husband with a dagger on head to which he replied that he does not know. Thus, there was no specific denial not only as to his very presence and as also the assault by a dagger on the head of the deceased by him. Even otherwise, we have already pointed out that there is no specific denial to the version of the informant that the appellant–A-1 along with appellant-A-2 had been to the house of the informant and had launched a murderous assault on the person of the deceased.

25 The evidence of PW2 i.e. sister-in-law of the informant also shows that when she tried to intervene, she was

also assaulted by the appellant-A-1 by means of a chopper. Infact, according to her, appellant-A-1 wanted to give a blow of chopper on her neck but as she raised her hand in her defence, she sustained injury on her left hand. PW9 Dr.Sanjaykumar Dattatray Punde in his evidence (Exh. 37) was asked in the cross-examination to which he admitted it to be correct by saying that on 20th November 2010, he had examined Nasreen Maqbool Noor Mohd. Banu who had sustained superficial incise cut injury on left hand and accordingly issued Medical Certificate (Exh. 41). This is apparent from the Medical Certificate at Exh. 41 and thus the evidence of PW9 corroborates the version of PW2 in respect of the injury sustained by her because of the assault at the hands of appellant-A-1.

26 We have already pointed out from the evidence of PW9 Medical Officer who carried out the autopsy over the dead body of the deceased, the number of injuries found on his person and which in our opinion correspond to the evidence of PW1 and PW2.

27 The learned counsel for the appellant-A-1 has vigorously assailed the approach of the Investigating Officer by contending that appellant-A-1 was identified in the police station. Though there is evidence to that effect but the same cannot be accepted for the simple reason that no Test Identification Parade was conducted in as much as and admittedly the appellant-A-1 was unknown to PW1 and PW2. Moreover, since appellant-A-1 was not apprehended on the very spot of the offence in front of the eye witnesses, a Test Identification Parade was very much necessary and since appellant-A-1 was shown to PW1 and PW2 in the police station, the police committed a major illegality which has severally prejudiced the appellant-A-1 by depriving him, of his right for a Test Identification Parade. Similarly, it is not clear from where the appellant-A-1 was apprehended and the time of his apprehension was not known. In this regard, the learned counsel placed reliance in **Kanan vs. State of Kerala (supra)**, **Ramesh vs. State of Karnataka (supra)** and **Hari Nath vs. State of Uttar Pradesh (supra)**.

28 In **Kanan vs. State of Kerala (supra)** the Hon'ble Apex Court held as under :

“1.....It is well settled that where a witness identifies an accused who is not known to him in the Court for the first time, his evidence is absolutely valueless unless there has been a previous TI Parade to test his powers of observation. The idea of holding TI Parade under Section 9 of the Evidence Act is to test the veracity of the witness on the question of his capability to identify an unknown person whom the witness may have seen only once. If no TI Parade is held then it will be wholly unsafe to rely on his bare testimony regarding the identification of an accused for the first time in Court.”

29 Similarly, in the case of **Hari Nath vs. State of Uttar Pradesh (supra)** the Hon'ble Apex Court held as under :

“The conduct of an identification parade belongs to the realm and is part of the investigation. The evidence of test identification is admissible under S. 9. But the value of the test identification, apart

altogether from the other safeguards appropriate to a fair test of identification, depends on the promptitude in point of time with which the suspected persons are put up for test identification. If there is unexplained and unreasonable delay in putting up the accused persons for a test identification, the delay by itself detracts from the credibility of the test.”

30 Similarly, in the case **Ramesh vs. State of Karnataka (supra)** the Hon'ble Apex Court held that the identification of A-3 by PW3 in the Court cannot be held to be trustworthy. In a case of this nature, the Test Identification Parade would have been meaningless as A-3 was shown to PW3 in the police station.

31 With respect, we are in agreement with the above quoted observations propounded by the Hon'ble Apex Court. However, with respect, we do not find the applicability of ratio laid down in those cases supra to the case in hand, for the reasons to follow.

32 In the case in hand it is not the case of the prosecution that the incident took place in a dark night. It must be kept in mind that the appellant-A-2 is the neighbour of the informant. Admittedly, appellant-A-1 was not known to the witnesses as claimed hereinabove. However, the informant and the PW2 had amply opportunity to see the appellant-A-1. As already pointed out, it is not the case that the incident occurred in a pitch-black night. The incident occurred over a period of time wherein these appellants participated and indulged in assaulting the deceased. Therefore, in our considered view, the identity of miscreants i.e. appellant-A-1 was fully imprinted in their memories. More so, when they visited the police station for lodging the report, appellant-A-1 had already been there. If we go by the contents of the FIR and the evidence of these two witnesses, the appellant-A-1 was apprehended on the spot and thus, as a necessary corollary, he found his way to the police station. When PW1 and PW2 visited the police station they found the appellant-A-1 sitting there and in a fraction of second or without losing any time, both of them identified the appellant

–A-1 as the assailant then and there only with all promptitude and informed the police that it was he who had also assaulted the deceased. It is not the case or rather the evidence that the police had shown them appellant–A-1 as an accused arrested by them as a sequel to the incident in question. This being so, in our studied view, there was no necessity of conduction of Test Identification Parade and this being so, it would be far-fetched to say that non-conduction of the Test Identification Parade has severally prejudiced the appellant–A-1. We outrightly reject the submission of the learned counsel.

33 Coming to the testimony of PW3 – child witness, we at the very outset may note that there is a slight deviation appearing in her evidence in as much as her evidence shows that it was appellant–A-1 who had pulled the deceased from the house to the outside, whereas according to prosecution and as also the evidence of PW1 and PW2, it was appellant–A-2 who had pulled the deceased out from the house. Be that as it may, it may not be that fatal in as much as the fact remains that the

presence of both the accused is duly established from the evidence of PW1 and PW2 and as also their roles in the incident.

34 The child witness also says that she saw both of them assaulting her father. The only troubling question here is as to the identification of the appellant–A-1 by this witness for the first time in the Court. On the day of her deposition on 17th January 2012 she was aged 12 years and was studying in Class 7th Standard, whereas the incident took place on 20th November 2010. That is to say, she identified the appellant–A-1 in the Court after 14 months of the incident which may not have been possible for her, having regard to her age at the time of the incident. Even if we keep aside the evidence of this child witness, we are more than satisfied with the evidence of the PW1 and PW2 that their testimonies have been quite convincing and inspiring. There is no reason to discard their evidence.

35 The submissions of the learned counsel for the appellants that since PW1 and PW2 are in close relations with the

deceased person, they should not be believed for want of evidence of any independent witness, deserves to be rejected. A survey of the judicial pronouncements of the Hon'ble Apex Court on this point leads to the inescapable conclusion that the evidence of closely related witnesses needs to be closely scrutinized and appreciated before any conclusion is made to rest upon it, regarding the convict / accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased.

36 We may usefully refer the law laid down by the Hon'ble Apex Court in **Dalbir Kaur and Others vs. State of Punjab**⁶ and **Harbans Kaur and Another vs. State of Haryana**⁷ which lays down following proposition :

“There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield actual culprit and falsely implicate the accused.”

6 (1976) 4 SCC 158 : AIR 1977 SC 472

7 (2005) 9 SCC 195 : AIR 2005 SC 2989

37 In **Namdeo vs. State of Maharashtra**⁸ the Hon'ble Apex Court further held as under :

“38.....it is clear that a close relative cannot be characterised as an 'interested' witness. He is a 'natural' witness. His evidence, however, must be scrutinized carefully. If on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the 'sole' testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one.”

38 We have also elaborately discussed the evidence of PW1 and PW2 who are none other than the wife and sister of the deceased. We have found that their evidences have a ring of truth, is cogent, credible and trustworthy. There is, thus, no reason for us to discard their evidence and rather certainly

⁸ (2007) 14 SCC 150 : AIR 2007 SC (SUPP) 100, PARA 42

should be relied upon. We follow and apply the above noted well settled principle of law in rejecting the submissions of the learned counsel for the appellants.

39 The learned counsel for the appellant–A-1 strenuously submits that there is material discrepancy between the evidence of the informant and the place of occurrence. According to the learned counsel, the examination-in-chief of the informant shows that the incident took place at or near the door step of the house whereas the spot panchnama shows place of occurrence at a distance of 23 feet. Both these facts are beyond reconciliation and therefore the testimony of the informant need not be relied upon.

40 We have gone through the evidence of PW7 Abrar Ahmed Ali Sayyed (Exh. 29) who acted as a witness on the spot panchnama and drew the spot panchnama at Exh. 30. We have also gone through the evidence of PW8 Investigating Officer (Exh. 31). According to PW8 Investigating Officer, he had been

to the spot which was identified by the informant and accordingly he drew the Spot Panchnama in the presence of panchas. None of these witnesses say as to at how much distance from the door of the house of the informant the incident took place and what is more interesting is that in the cross-examination the defence did not bother to confront these two material witnesses as to the exact location / distance of the place of occurrence from the door of the house of the informant.

41 After analysing evidence off the PW1 informant and PW2 sister-in-law of the informant, we are of the view that the presence of appellants either near the door or at a few distance away like 23 feet, as claimed in the Spot Panchanama, from the informant's house, is nowhere contested by the defence. Whether it was near or at the door or at a certain distance like 23 feet as mentioned in the Spot panchnama, by itself cannot be a ground to discard the entire inspiring evidence of PW1 and PW2.

42 We, therefore, do not wish to attach any significance to that discrepancy as pointed out by the learned counsel for the appellant–A-1. Consequently, the argument so advanced by the learned counsel for the appellant–A-1 merits no attention.

43 The learned counsel for the appellant–A-1 also invited our attention to the statement of PW4 recorded under Section 161 of the Cr.P.C. pointing out that in the said statement PW4 stated that the four persons who had come in his rickshaw returned back from the lane and he dropped them off at Panjar Pole junction. If it is so, which the statement shows, then it clearly destroys the prosecution’s claim that appellant–A-1 was apprehended while he was fleeing from the lane while the other three assailants escaped in the rickshaw driven by PW4.

44 The learned counsel invited our attention to paragraph 9 of the evidence of PW4 and paragraphs 6 and 10 from the evidence of PW10 Investigating Officer.

45 To test the above submission, we would like to go through the evidence of PW4 Ahmed Ali Makbool Ahmed Shaikh (Exh. 23), rickshaw driver. His examination-in-chief clearly shows that he had dropped three accused except appellant-A-1 near Panjar Pole signal. Now, if his cross-examination and more particularly paragraph 9 which is pointed out by the learned counsel during the course of argument is read carefully, then it would be seen that it is his specific case that he had not said before the police that he had left four boys at Panjar Pole junction. Since it was so appearing (that he had left four boys at Panjar Pole junction) he could not assign any reason as to why it is so appearing in his statement and therefore, that particular portion was marked as "A". Now this portion marked "A" has been proved by PW10 Investigating Officer in his cross-examination at paragraph 10. The Investigating Officer unequivocally and very clearly stated in his cross-examination that PW4 had not informed or stated before him that he had left four boys at Panjar Pole junction. Further, he volunteered that portion marked "A" i.e. (Exh. 43) was a typing mistake and that is

the reason as to why figure four is appearing instead of three in Exh. 43. In our considered opinion this very much clearly clears the doubt dwelling in the mind of the learned counsel for the appellant-A-1. This aspect need not detain us any more.

46 This brings us to discovery and recovery of weapons and clothes of the appellants. PW5 Smt.Tahira Abdul Salam states in her evidence (Exh. 24) that on 21st November 2010 she was called at Chembur Police Station at about 2.30 p.m. Accused Rashid Shaikh (appellant-A-2) was present there. He volunteered to discover the clothes, chopper and dagger where those were thrown. Accordingly, Memorandum Panchnama was prepared. She then proved the Memorandum Panchnama at Exh. 25.

47 It is her further evidence that accused Rashid Shaikh then took her and the Police Officer to the spot. He took them to Chembur. He asked them to stop the vehicle near the railway station and then started walking. After crossing two tracks there

was a heap of dunghill. He then removed one shirt, one pant and a dagger from there. The pant was black in colour. There were blood stains on the shirt and pant and dagger. All these articles came to be seized under Seizure panchnama. He then proved the Seizure panchnama at Exh. 26. The version of this witness is duly supported by PW10 Investigating Officer.

48 Nothing has been elicited in the cross-examination to discard evidence of this material witness. From the Chemical Analyzer's report (Exh. 47) it may be seen that the clothes and the dagger (chaku) which were seized at the instance of appellant-A-2 were having human blood, even though no group was detected.

49 The next witness in line on the above said aspect is PW6 Sayyad Mohd. Sayyad Umar. His evidence (Exh. 27) shows that he was called in Chembur Police Station at about 1.00 or 1.15 noon. Appellant-A-1 namely Naushad Shaikh was present in the police station. The police took search of that boy. During

search one dagger was found kept in the pant. He was wearing black coloured jeans and green coloured shirt. There were blood stains on the shirt as well as on pant and the pocket was torn. He was required to remove the clothes. He had sustained injuries on the chest as well as back on the wrist, on the finger as well as on toe, ankle. All the articles were seized under Seizure Panchnama. He then proved the Seizure Panchnama at Exh. 28. He then identified the butcher knife (Article 5) which was seized from his possession.

50 The learned counsel for the appellant-A-1 has assailed the evidence of this witness on the ground that the version of this witness is quite contradictory vis-a-vis the panchnama. While the panchnama claims that the arrest, search and seizure occurred at 1.40 a.m. of 21st November 2010 this witness gives quite different version and says that these events occurred in the afternoon of 21st November 2010 at about 1.00 p.m. or 1.15 p.m. i.e. about 12 hours late. According to the learned counsel, this witness ought to have been declared hostile

by the prosecution but has not been contradicted in any manner. Therefore, his evidence is binding on the prosecution. In support of his submission, the learned counsel also relied on **Raja Ram vs. State of Rajasthan (supra)** and **Assoo vs. State of Madhya Pradesh (supra)**.

51 A plain reading of the evidence of PW6 would show that he was called in the police station at about 1.00 p.m. or 1.15 p.m. on 21st November 2010 and then thereafter the clothes and knife came to be seized from the possession of the appellant-A-1. The learned counsel is quite right when he says that there is inconsistency between version of this witness and the contents of panchnama at Exh. 28 in as much as the panchnama shows that seizure occurred at 1.40 a.m. on 21st November 2010. However, we may point out that there is evidence of PW8 Investigating Officer as well in this regard.

52 PW8 Investigating Officer states in his evidence (Exh. 31) that after the arrest of the appellant-A-1 his personal search

was taken. The clothes on his person i.e. green shirt and black jeans pant came to be seized along with chopper which was concealed in the pant under the Seizure Panchnama at Exh. 28. Interestingly, this specific version of PW8 Investigating Officer is nowhere specifically assailed or challenged in the cross-examination. In our considered opinion, even if it may be that the evidence of PW6 panch witness regarding the seizure of clothes and chopper from the possession of appellant-A-1 is not satisfactory, then also we cannot overlook the evidence of PW8 Investigating Officer.

53 The Chemical Analyzer's report (Exh. 48) clearly shows that the clothes and the chopper found from the possession of the appellant-A-1 were containing human blood even though no group was detected.

54 In the case of **Raja Ram vs. State of Rajasthan (supra)** it has been held by the Hon'ble Apex Court that though the evidence of PW was not supporting the prosecution case, yet the

said witness was not declared hostile. In such circumstances, defence can rely upon the evidence of such witness and it would be binding on the prosecution. Similar observations were made in the case of **Assoo vs. State of Madhya Pradesh (supra)**. Even if we assume for the sake of argument that the evidence of PW8 is binding on the prosecution then it will be applicable to the extent of seizure of clothes and weapon found in possession of the appellant-A-1. We have already pointed out the overwhelming ocular evidence in the form of PW1 and PW2 and therefore, having regard to the totality of the prosecution case and as also the substantive evidence discussed so far, we have no hesitation in our mind to say that the said judgments, with due respect, will not in any manner come to the rescue of the appellant-A-1.

55 We are, now, on the last leg of the argument of the learned counsel for the appellant-A-2. A-2 has taken the plea of “alibi”.

56 It is settled law that while raising a plea of “alibi” the burden squarely lies upon the accused person to establish the plea by leading cogent and convincing evidence. At the same time, we are also mindful of the fact that while weighing the plea of “alibi”, the same has to be weighed against the positive evidence led by the prosecution i.e. not only the substantive evidence of PW1 and PW2 but also against the scientific evidence viz. Chemical Analyzer’s Report.

57 Two defence witnesses are examined by the appellant-A-2, namely, DW1 Anand Vallabh Sharma and DW2 Javed Abdul Kayyum Deshmukh.

58 DW1 Anand Vallabh Sharma states in his evidence (Exh. 62) that he is running a business by name “Shri Ganesh Enterprises” which deals in hotel and catering business. He also provides manpower to needy persons and accordingly is providing persons to Taj and other hotels. It is his evidence that

he knows Rashid Shaikh i.e. appellant-A-2 as appellant-A-2 is employed by him and he provides his services to the hotel.

59 It is his further evidence that no record was brought by him during the course of recording of his evidence but according to him he had given the xerox copy of the register to the uncle of the appellant-A-2. The duty hours of appellant-A-2 were from 3.00 p.m. to 12.00 a.m. It is his further evidence that on 20th November 2010 appellant-A-2 was on duty at Taj Mahal hotel at Colaba. It appears that this witness produced the xerox copy of the record in the evidence which was suggestive of the fact that the boys were sent to the hotel on 20th November 2010. The xerox copy was marked as Article E.

60 From the evidence of this witness it appears that appellant-A-2 was employed by him as it was the business of the DW1 to supply manpower to the hotels. It also appears from his evidence that on 20th November 2010 he had sent appellant-A-2 to Taj Mahal hotel for services and he attended the duty from

3.00 p.m. to 12.00 a.m. in the night. The xerox copy at Article E later on came to be exhibited as Exh. 64 through DW2 as the original document was brought by DW2, who at the relevant time was a Manager in Taj Mahal Palace at Colaba.

61 On going through that Article E i.e. Exh. 64, admittedly, it nowhere shows the duty hours of the appellant-A-2 although his name appears at serial no.12. Moreover, even if the evidence of DW1 is taken into consideration, then at the most it can be held that he had provided the services of appellant-A-2 to hotel Taj Mahal on 20th November 2010. Whether, infact, appellant-A-2 attended his duties at hotel Taj Mahal from 3.00 p.m. to 12.00 a.m. in the night will have to be ascertained from the evidence of DW2 i.e. Manager of the Taj Mahal Palace, Colaba. Before that, we may note certain material pieces of evidence appearing in the cross-examination of DW1.

62 DW1 states in his cross-examination that he had no document with him to show that Rashid Shaikh (A-2) had been

to his office at 1.00 p.m. on 20th November 2010 and was then taken to hotel Taj Mahal. His cross-examination further shows that till the date of recording of his evidence, he had not been to the police station to apprise the police that Rashid Shaikh (A-2) was working with him on the date of the incident. In our considered opinion, these material pieces of evidence are in the form of admission and go against the prosecution. Be that as it may, it is time to go through the evidence of DW2.

63 DW2 Javed Abdul Kayyum Deshmukh states in his evidence (Exh. 71) that the document at Exh. 64 which is infact an outdoor list issued by Shri Ganesh Enterprises i.e. DW1 showing the evening shift of its employees wherein the name of appellant-A-2 appears at serial no.12. We have already put a comment regarding the nature of this document while discussing the evidence of DW1. This witness i.e. DW2 also states that the said document is in respect of evening shift of the staff members of dated 20th November 2010. The timing was 3.00 p.m. to 11.00 p.m. This document is prepared and maintained to show

attendance of staff members so that the contractor could get the labours contract money. Again, although this witness states that the document was in respect of evening shift of staff members and the timing was 3.00 p.m. to 11.00 p.m. but no such timings are mentioned in the said document.

64 Moreover, what is pertinent to note from his evidence is that this witness has nowhere stated in his evidence that appellant-A-2 infact attended his duties in the hotel from 3 p.m. to 11 p.m. and during that period he never left the hotel premises. In the cross-examination he states that he does not remember in which room the duty was given to appellant-A-2 and which party was attended by him but appellant-A-2 reported the duty at 3 p.m. Even if it is taken for the sake of argument that appellant-A-2 attended the duty at 3 p.m. but then there is no clear, cogent and categorical evidence of this witness that appellant-A-2 continued to perform his duties in the hotel premises till his duty hours i.e. upto 11 p.m. and had not left the hotel premises in between the duty hours even for a minute.

Thus, we are constrained to observe that the evidence of this witness is also not up to the mark and it cannot be gainfully read so as to uphold the plea of “alibi” as canvassed by learned counsel.

65 Considering the nature of evidence of “alibi” led by the appellant-A-2 against the positive evidence of the prosecution including the evidence of Chemical Analyzer’s Report, we hold that the appellant-A-2 has miserably failed to discharge his burden with precision qua his plea of “alibi”.

66 Having regard to the above discussion, we, therefore, find no infirmity or illegality in the impugned judgment. Accordingly, we uphold the conviction of the appellants. Hence the following order :

ORDER

Appeals are dismissed.

(V. G. BISHT, J.)

(S. S. SHINDE, J.)