

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

CRIMINAL APPEAL NO. 257 OF 2013

Rakesh @ Pintya Ramesh Rane
Aged about 31 years,
Occupation: Business
A-4, Ganeshkrupa Society,
Near Mohan Nagar, Hill Road,
Sion, Chunabhati, Mumbai-22.
(Presently in Kolhapur Central
Prison, Kolhapur).

... Appellant
(original Accused No.5)

V/s

The State of Maharashtra
(at the instance of Senior Inspector
of Police, Uran Police Station).

... Respondent.

**WITH
CRIMINAL APPEAL NO. 259 OF 2013**

Sumedh @ Sumit @ Pappu
Chandrakant Yerunkar,
Age 39 years,
Resident of Gaikwad Chawl,
In front of Mohan Nagar, Hill Road,
Chunabhatti, Mumbai-22.
(Presently in Taloja Central Jail,
District- Thane).

... Appellant.
(original Accused No.4)

V/s.

The State of Maharashtra
(at the instance of Uran Police
Station, Dist. Raigad).

... Respondent.

**WITH
CRIMINAL APPEAL NO. 359 OF 2013**

Mr.Ajay Kashinath Thakur,
Age: 46 Years. Occupation Service,
R/o. J.N. P.T. Township,
Tal. Uran, Dist. Raigad.

... Appellant
(Brother of deceased)

V/s.

1. The State of Maharashtra .
2. Satish Yashwant Patil,
Age 38 years, R/o. A-Wing,
Israni Tower, Room No.1104,
Belapur, Navi Mumbai.
3. Atul Suresh Thakur,
Age 24 years, R/o. House No.35,
Bori, Tal. Uran, Dist. Raigad.
4. Krishna Kashinath Patil,
Age 36 years, R/o. Kalpataru
Apartment, 102, 1st Floor,
Uran-Mora Road, Bori Naka,
Tal. Uran, Dist. Raigad.
5. Pradeep Mahadeo Mali,
Age 30 years, R/o. Nikharge Chawl,
No.85/2, S. M. Road, Taravadi,
Chunabhatti, Mumbai- 400 022.

... Respondents.
(Resp.Nos.2 to 5 –Original
Accused Nos.1 to 3 & 6)

WITH

CRIMINAL APPEAL NO. 919 OF 2013

The State of Maharashtra
(Through Uran Police Station,
District Raigad).

... Appellant

V/s.

1. Satish Yashwant Patil,
Age 38 years, R/o. A-Wing,
Israni Tower, Room No.1104,
Belapur, Navi Mumbai.
2. Atul Suresh Thakur,
Age 24 years, R/o. House No.835,
Bori, Tal. Uran, Dist. Raigad.
3. Krishna Kashinath Patil,
Age 36 years, R/o. Kalpataru
Apartment, 102, 1st Floor,
Uran-Mora Road, Bori Naka,
Tal. Uran, Dist. Raigad.
4. Pradeep Mahadeo Mali,
Age 30 years, R/o. Nikharge Chawl,
No.85/2, S. M. Road, Tarvadi,
Chunabhatti, Mumbai- 22.

... Respondents.
(Orig.Accused Nos.1 to 3 & 6)

Mr.Shirish Gupte, Senior Advocate i/b.
Ms.Supriya Kak for the Appellant in Cr.Appeal
No.257/2013 i/b. Mr.Aniket U. Nikam with
Mr.Aashish I. Satpute for the Appellant in
Cr.Appeal No.259/2019.

Mr.Nitin Sejpal with Ms.Akshata Desai and Mr.Hiren Mehta for the Respondents in Cr.Appeal No.919/2013 and for the Applicant in I/A No.1149/2020.

Mr.Amin Solkar with Ms.Misbaah Solkar and Mr. Pratik Karande for Respondent No.3 in Cr.Appeal Nos.359/2013 and 919/2013.

Mrs. M.M.Deshmukh, APP for the Appellant-State in Appeal No.919/2013 and for the Respondent-State in Cr.Appeal Nos.257/2013, 259/2013, 359/2013 & I/A No.1149/2020.

Mr.Shekhar Ingawale for the Appellant in Cr.Appeal No.359/2013.

**CORAM : NITIN JAMDAR AND
C. V. BHADANG, JJ.**

DATED : 1 OCTOBER 2021.

JUDGMENT: (Per Nitin Jamdar, J.)

These four criminal appeals arise from the judgment and order passed by the learned Additional Sessions Judge, Raigad-Alibaug dated 28 August 2010 in Sessions Case No. 104 of 2010.

2. Six persons, (1) Satish Yashwant Patil (2) Atul Suresh Thakur (3) Krishna Kashinath Patil (4) Sumedh @ Sumit @ Pappu Chandrakant Yerunkar (5) Rakesh @ Pintya Ramesh Rane and (6) Pradeep Mahadeo Mali were accused in Sessions Case No.104/2010 and charged for the offences punishable under section 302, 307, 120-B and 34 of the Indian Penal Code and sections 3, 25 of the Indian Arms Act, 1959.

3. Accused No.4- Pappu @ Sumedh Yerunkar and Accused No.5- Rakesh @ Pintya Rane have been convicted under section 302 read with section 34 of the IPC. Accused No.5 has filed Criminal Appeal No.257/2013, and Accused No.4 has filed Criminal Appeal No.259/2013 challenging their conviction.

4. Accused No.1- Satish Yashwant Patil, Accused No.2- Atul Suresh Thakur, Accused No.3- Krishna Kashinath Patil and Accused No.6- Pradeep Mahadeo Mali have been acquitted. Criminal Appeal No.359/2013 is filed by Ajay Thakur, brother of the deceased and Criminal Appeal No.919/2013 is filed by the State of Maharashtra challenging the acquittal of these four original accused.

5. These appeals have been heard together and are disposed of by this common judgment and order.

6. The prosecution case, in short, is as under:

There were many businesses at Uran dealing in sludge oil generated from the Jawaharlal Nehru Port. They formed an association of which Santosh Thakur was an office bearer. Accused No.4- Pappu Yerunkar, Accused No.5- Pintya Rane, Accused No.6- Pradeep Mali, Accused No.1- Satish Patil, and Accused No.3- Krishna Patil at Center Mall, Vashi entered into a criminal conspiracy to kill Santosh Thakur. The conspiracy was hatched to eliminate Santosh Thakur because Santosh Thakur did not give them No Objection to enter in the sludge oil business at Uran. To eliminate Santosh Thakur, Satish Patil gave Rs.50,000/- to accused Pappu Yerunkar through accused Krishna Patil. Atul and Krishna provided a motorcycle and a car.

ii) Rashad Humaji, Ajarad Pathan, Maksud and Santosh Kelkar (Fitter) have their garages at Kotnaka-Uran. On 26 April 2010, at about 6.15 p.m., Santosh Thakur came to the garage of Ajarad Pathan at Uran- Kotnaka, Kaladhonda, for car repair work. Santosh Thakur gave work of cleaning the number plate of his vehicle to Rashad Humaji. Santosh Thakur and Rashad Humaji were sitting in front of the garage. Ajarad Pathan, his brother-in-law of Masum Ijaz Pathan, was sitting there on a pipe. Three unknown persons came there on a black coloured Unicorn make motorcycle and stopped at a tea stall

nearby. Two persons sitting as pillion riders got off and walked near Santosh Thakur from the backside. They were around 25 to 30 years old. One of them had curly hair. They took out their pistols and fired on Santosh Thakur. The pistol of one of them was locked and did not fire. The bullet fired by the curly-haired person hit Santosh Thakur. Santosh Thakur started running, calling for help. The curly-haired person again fired 3 to 4 rounds. One bullet hit the left leg of Rashad Humaji. Santosh Thakur received the bullets in his chest, back and gluteal region. Santosh Thakur collapsed in front of shop No.10. Then the unknown persons sat on the motorcycle waiting with the rider and went away towards Panvel side. Masum Ijaz Pathan, Santosh Fitter, Maksud rushed towards Santosh Thakur.

iii) Baba, the driver of the maternal uncle of Santosh Thakur, who was driving past, stopped seeing the crowd. Ajay Thakur, brother of Santosh Thakur, came to the spot after receiving the information on the phone. Santosh Thakur was put in the car driven by Baba and was taken to Dake hospital at Uran. On the way, Ajay Thakur asked Santosh Thakur about the incident. In the presence of Maksud, Santosh Fitter, Rashad and Baba driver, Santosh Thakur told that accused Satish Patil, Pappu and Krishna Patil 'made his game' as he did not give No Objection for their sludge oil business. The doctor at the Dake hospital referred injured Rashad to Uran Rural Hospital and

advised to take Santosh Thakur to a hospital with advanced facilities. Ajay Thakur and others took Santosh Thakur to Suraj Hospital, Sanpada.

iv) Pursuant to the message received in Uran Police Station about the incident, PSI Bangar informed PI Kothavale to visit the spot. He came to know that injured Santosh Thakur and Rashad were taken to the hospital. PI Kothavale, along with PSI Bangar, went to Dake Hospital and was informed that Rashad was taken to Uran Rural Hospital and Santosh Thakur was taken to Suraj hospital at Sanpada. PI Kothavale and PSI Bangar went to Uran Rural hospital. PSI Bangar received information that Masum had seen the actual incident. PSI Bangar went to spot and reduced the report of Masum into writing and registered the offence vide Crime No.45 of 2010. PSI Bangar, prepared spot Panchanama. He seized one live cartridge and three empty cartridges, sample of soil stained with blood. Injured Rashad Humaji gave a statement that Santosh Thakur told Ajay Thakur that Satish Patil, Pappu Yerunkar and Krishna Patil made his game as Santosh had not issued no objection certificate for their sludge oil business. Santosh Thakur succumbed to the injuries. Inquest panchanama of the dead body of Santosh Thakur was prepared. Dr.Bhushan Jain conducted an autopsy on the dead body of Santosh Thakur on 27 April 2010. He found three firearm wounds of entry No.1 to 3 located at a

left back upper portion near spine, right chest laterally in mid maxillary line and right gluteal region. The post-mortem report showed the cause of death as haemorrhage and shock due to multiple firearm injuries. Rashad was shifted to Arunodaya Hospital, Panvel, where he was treated.

v) Police seized the clothes of injured Rashad and of deceased Santosh Thakur vide seizure panchanama. Police recorded the statement of Ajay Thakur and of the persons who took Santosh to the hospital. On 28 April 2010, accused- Satish Patil was arrested. On 28 April 2010, seized muddemal was sent to the chemical analyzers' office.

vi) Accused Krishna and Atul were arrested on 2 May 2010. On 4 May 2010, accused- Krishna, while in police custody, showed his readiness to produce the motorcycle used in the crime. The motorcycle was seized at the instance of accused Krishna vide seizure panchanama. On 5 May 2010, accused- Atul showed his readiness to produce the Alto car used in the crime, and PI Kothavale prepared a memorandum of accused- Atul and the Alto car was seized at the instance of accused- Atul vide seizure panchanama.

vii) On 17 May 2010, Chembur Police station informed Uran Police Station that accused- Pappu, Pintya and Pradip were

arrested in connection of a crime with the seizure of 3 pistols and ammunition and that these three accused admitted their guilt and actual participation in the present offence. Uran Police obtained custody of the accused- Pappu, Pintya and Pradip. On 21 May 2010, Uran Police obtained Maruti Omni car bearing No.MH05/6012 and the clothes seized from accused Pappu, Pintya and Pradip. Weapons seized from accused Pappu, Pintya and Pradip were sent to C. A. office, by the Chembur police Station.

viii) On 25 May 2010, accused- Pappu showed his readiness to produce the remaining cash amount out of cash given to him by accused- Satish. An amount of Rs.5,000/- at the instance of accused- Pappu was seized from his house vide seizure panchanama. Sheetal Jadhav, Nayab Tahasildar and Executive Magistrate, Uran conducted identification parade of accused- Pappu and Pintya on 2 July 2010 at Uran Tahasil office. The witnesses identified the accused- Pappu and Pintya during the identification parade. Statements of witnesses, office bearers of the Sludge Oil Association, Uran were recorded, and documents were collected as regards the Association. After completion of the investigation, a charge sheet was filed.

7. Charge under Section 302 read with Section 120-B of IPC, under Section 307 read with Section 34 of IPC and under Section 3(25) of Arms Act was framed.

8. The learned Sessions Judge, after considering the evidence on record and the arguments, held that the prosecution has proved the Accused Nos.4 and 5 committed murder of deceased Santosh Thakur. The learned Sessions Judge held that this aspect is not proved against Accused Nos.1, 2, 3 and 6. The learned Sessions Judge held that Accused Nos.4 and 5 hatched conspiracy with the remaining accused to commit murder of deceased Santosh Thakur.

9. Accordingly, the learned Sessions Judge convicted Accused No.4- Sumedh @ Pappu Yerunkar and Accused No.5- Rakesh @ Pintya Rane for the offences punishable under section 302 read with section 120-B of IPC and sentenced them to suffer rigorous imprisonment for life and fine of Rs.5,000/-, in default to pay fine, to suffer rigorous imprisonment for six months.

10. Accused No.4 and Accused No.5 were further convicted for the offence punishable under section 307 read with section 34 of IPC and were sentenced to suffer rigorous imprisonment for five years and a fine of Rs.1,000/-, in default to suffer further imprisonment for three months. Accused Nos.4 and 5 were also convicted under sections 3 and 25 of the Arms Act and sentenced to suffer rigorous imprisonment for six months and a fine of Rs.500/-, in default to suffer further

imprisonment of one month. The sentences were directed to run concurrently.

11. Accused Nos.1, 2, 3 and 6 were acquitted under section 235(1) of the Criminal Procedure Code of the offence punishable under section 302 read with section 120-B of IPC.

12. Accordingly, Accused Nos.4 and 5 are before us with their appeals against conviction and the State and the brother of the deceased with their appeals against acquittal of Accused Nos.1, 2, 3 and 6.

13. We have heard Mr.Shirish Gupte, Senior Advocate, Mr.Sejpal, Mr.Solkar, learned advocates for the accused, Mrs. M.M.Deshmukh, APP for the State and Mr.Ingawale for the Appellant- brother of the deceased.

14. The main contention advanced by Accused Nos.4 and 5 is that the prosecution has failed to establish the assailants' identity, and Accused Nos.4 and 5 have been falsely implicated in the crime. The argument of the original accused, who have been acquitted, is that there is no evidence of any conspiracy, and the theory of prosecution of Santosh Thakur giving an oral dying declaration is not believable and Accused Nos.1 to 3 and 6 have been rightly acquitted by the learned Sessions, Judge.

15. The learned APP supports the conviction of Accused Nos.4 and 5 and as regards the appeals against the acquittal, learned APP contends that the oral dying declaration is trustworthy, so also charge of criminal conspiracy was established, however, the view taken by the learned Sessions Judge acquitting these accused is perverse.

16. Mr.Ingawale appearing for the Appellant in Criminal Appeal No.359/2013, stated that the Appellant- Ajay Thakur has taken away the papers from him some years ago and has made no alternate arrangement, in the circumstances, he adopts the arguments of the learned APP.

17. The prosecution has examined 26 witnesses. For the sake of clarity, they have been grouped instead of narrating serially.

a) PW-2- Masum Pathan (FIR Exhibit 68/C), PW-3- Shaikh Maksud Ahmed and PW-7- Rashad Humaji were examined by the Prosecution as eyewitnesses to the incident of firing.

b) PW-8- Supharant Latif Raj @ Baba, the driver of a vehicle and PW-20- Ajay Thakur were examined by the Prosecution as, according to the Prosecution, they arrived on the

spot immediately after the incident and took the deceased to the hospital.

c) PW-1, PW-11, PW-12 and PW-15 are the medical officers. PW-1- Dr.Bhushan Jain conducted the postmortem, PW11- Dr.Ravindra Pujari attached to Suraj Hospital where the deceased Santosh Thakur was admitted and subsequently expired. PW-12- Dr.Sandip Patil was attached to Suraj Hospital. He was examined as he gave information to the police station; and PW-15- Dr.Amod Divekar examined PW-7- Rashad Umaji at Arunodaya Hospital, New Panvel.

d) P.W.13- Prasad Govari, PW-14- Tushar Thakur were examined by the Prosecution to establish conspiracy and motive. P.W.21- Deepak Bhoir was examined to establish conspiracy.

e) P.W.19- Sheetal Jadhav, Nayab Tahasildar was examined as she conducted an identification parade regarding Accused Nos.4 and 5.

f) P.W.4 was examined as panch witness for the spot panchanama (Exh.82/83). P.W.5- Jitendra Bhore was examined for panchanama of seizure of clothes of Rashad Humaji (Exh.86), inquest panchanama (Exh.88), panchanama of seizure of clothes of the deceased (Exh.89). P.W.6- Dilip Patil was examined as panch witness for the seizure of motorcycle at the instance of Accused No.3- Krishna Thakur (Exh.91). P.W.9- Imtiyaz Shaikh was examined as panch witness for memorandum of panchanama of Accused No.4- Pappu Yerunkar (Exh.103) and seizure

panchanama (Exh.104). P.W.10- Chandrakant Gaikwad was examined as panch witness for memorandum panchanama (Exh.106) and seizure panchanama (Exh.107) in respect of Alto Car at the instance of Accused No.2- Atul Thakur, arrest panchanama of Accused No.2 and Accused No.3 (Exh.109).

g) P.W.22- Gonduram Bangar; P.W.23- Ravindra Daunkar; P.W.24- Ramkrishna Kothavale were examined as investigating officers. P.W.26-Seema Jadhav, Judicial Magistrate First Class was examined before whom the statements were made.

18. P.W.1- Dr.Bhushan Jain deposed that he was working as Medical Officer in Navi Mumbai Municipal Corporation. He received the inquest panchanama along with the dead body of Santosh Thakur on 26 April 2010 at 10.00 am. He conducted a post-mortem on 27 April 2010. Upon examining the dead body, he found a firearm wound located at the left back upper portion at a distance of 7 cm. from the C-7 spine and 7 cm. lateral to the mid-line. The second firearm wound was located at the right chest lateral in the mid-maxillary line. Third firearm wound of entry No.3 located at right gluteal region upper medial quadrant and contusion over left chest. He found three wounds of entry and no wound on exit, and three bullets were recovered. He opined that the cause of death was haemorrhage and shock due to multiple firearm injuries. Since it is the defence of the Appellants/accused that they were not the assailants; that they

have nothing to do with this incident; and that they have been wrongly identified as assailants, Mr.Gupte, the learned Senior Advocate for the Appellants/accused, submitted that they are not seriously contesting the assertion of P.W.1 that Santosh Thakur died of firearm injuries. He, however, submitted that his evidence would be referred to for other aspects. The learned counsel for the Respondents/original accused also did not seriously contest the evidence that Santosh Thakur died of bullet wounds. Therefore, that the death of Santosh Thakur was homicidal is proved.

19. Next aspect is of the spot of the incident. The Prosecution examined P.W.4- Ajdar Ashfaq Pathan, panch witness for spot panchanama (Exh.82) and also examined P.W.2, P.W.3, P.W.7, P.W.8 and P.W.20, the eyewitnesses, and those arrived subsequently on the spot. P.W.4- Ajdar Pathan deposed that P.W.2- Masum Pathan, the Complainant showed him the spot of the incident. The spot was on the road going from Uran to Panvel. Three empty and one live cartridge were found lying on the spot. Blood was found on the spot in front of the garage owned by one Santosh, some distance from where empty and live cartridges were found. The spot panchanama is at Exh.83, which shows 10 to 15 shops parallel to the Uran-Panvel Road. P.W.3- Shaikh Maksud, P.W.4- Ajdar Pathan and P.W.7- Rashad Humaji were having their workshops at the spot. The road in front of the

shops is a road with traffic. The Prosecution has proved that the homicidal death of Santosh Thakur occurred at the spot brought on record.

20. Now, we will consider the evidence of the witnesses P.W.2, P.W.3, P.W.7, P.W.8 and P.W.20. Through their evidence, the Prosecution seeks to establish the identity of Accused Nos.4 and 5 and the motive behind the crime and the oral dying declaration. We will also consider the evidence regarding the test identification parade and the identification in Court, in respect of Accused Nos.4 and 5, the Appellants. It is the contention of the Appellants that if the evidence regarding the identity of Accused Nos.4 and 5 is discarded, and there is no evidence to connect Accused Nos.4 and 5 to the crime and the other aspects which the Prosecution relied upon would not be of any relevance. According to the original accused, the oral dying declaration is not proved by the Prosecution, then there is nothing to connect the original accused with the crime, and there is no evidence of conspiracy or motive.

21. The FIR was lodged by P.W.2- Masum Pathan. It is at Exh.68. FIR records that on 26 April 2010, Santosh Thakur had visited the garage, and Santosh Thakur and Rashad Humaji were sitting on plastic chairs in front of the shop when around 6.30 pm. a black colour motorcycle arrived from Uran side.

There were three riders. They halted the motorcycle. Two persons came walking towards the garage. Both removed pistols from their waist and, without speaking, anything fired in the direction of Santosh Thakur. The pistol of one person did not fire. The bullet fired by the curly-haired person hit Santosh, and he started running towards the road direction, then that person fired four bullets, and Santosh Thakur collapsed at that place. Rashad Humaji was hit by a bullet in his left leg and was injured. The said two persons went running to the motorcycle and went away. P.W.2 then stated that he, along with one Fitter named Santosh and Shaikh Maksud, took Santosh Thakur and Rashad Humaji to Dake Hospital. After that, Santosh Thakur was taken to Vashi Hospital and Rashad Umaji to the hospital at Uran. FIR was lodged against unknown persons.

22. P.W.2- Masum Pathan, in his deposition, stated that on 26 April 2010, Santosh Thakur came to his garage at 6.00 pm. He was sitting on a plastic chair in front of his garage. Rashad Umaji also sat in front of his garage on a plastic chair. Three persons came on a black colour motorcycle at 6.30 p.m. Two persons got down from the motorcycle. He deposed that he did not know any of these three persons. He described the driver of the motorcycle as stout and healthy. The two persons who got down from the motorcycle were 25 to 30 years old. One of them had curly hair and was wearing a black and white colour T-shirt.

The other person was wearing a white colour full shirt. They took out the pistols. The person with curly hair fired on Santosh Thakur, and the other's pistol did not work. The person with curly hair fired again. one bullet hit Rashad Umaji on his leg. He chased Santosh Thakur and fired four to five rounds, and Santosh Thakur collapsed. He deposed that he went along with Maksud, Santosh Kelkar (Fitter) and Rashad to the place where Santosh Thakur was lying. A four-wheeler vehicle belonging to the maternal uncle of Santosh Thakur driven by P.W.8- Baba came there, and they all kept Santosh Thakur in the vehicle, and then he returned to his garage. Rashad Umaji also went to the hospital. P.W.2 deposed that he showed the spot of the incident to the Police, and the FIR was prepared wherein he signed as complainant.

23. P.W.3- Shaikh Maksud deposed that he was running a welding workshop near the place of the incident. He deposed that on 26 April 2010, deceased Santosh Thakur had come on a two-wheeler and sat in front of shop premises No.1 and talked to P.W.7- Rashad Humaji. That time he heard the noise of firing. He saw two persons were firing bullets. He described assailants similar as given by P.W.2. He stated that out of two persons, the person with curly hair was holding a steel colour pistol. When Santosh Thakur was trying to run away, the curly hair person fired bullets at Santosh Thakur, and he collapsed in front of shop

premises No.10. One person was waiting on the motorcycle, and the persons who fired bullets ran away on the motorcycle. He deposed that P.W.8- Baba and P.W.20- Ajay Thakur came there by another vehicle. Santosh Thakur was shifted in the Endeavour Car driven by P.W.8- Baba. P.W.3- Shaikh Maksud, P.W.7- Rashad Humaji, P.W.20- Ajay Thakur took Santosh Thakur to Dake Hospital.

24. P.W.3- deposed that P.W.20- Ajay Thakur asked Santosh Thakur as to what had happened. He deposed that Santosh Thakur said, "*Satish, Krishna Patil and Pappu did not get No Objection Certificate in respect of sludge oil business and therefore they played my game*" He deposed that he took Santosh Thakur to Dake Hospital and the doctor there referred him to Suraj Hospital at Sanpada, and then he was taken in the same vehicle to Suraj Hospital. Rashad Umaji was admitted to the Government Hospital at Uran.

25. P.W.7- Rashad Humaji deposed that he was running a motor car electrician workshop at Uran. Santosh Thakur used to come to his workshop. He deposed that the incident took place on 26 April 2010. As like P.W.2 and P.W.3, he deposed that he was sitting with Santosh Thakur on a chair. P.W.2 was sitting on a pipe. At about 6.30 pm., two persons came on a motorcycle, and then he corrected the statement that three persons came on

the motorcycle. Two persons got down and came to the backside of Santosh Thakur and fired bullets. Pistol of one person did not fire. P.W.7 received an injury on his leg. Santosh Thakur received an injury on his back. Both he and Santosh Thakur started running when Santosh Thakur collapsed due to bullet injuries. He deposed that P.W.8- Baba and P.W.20- Ajay Thakur came on the spot. He deposed that Santosh Thakur was put in the jeep and was taken to Dake hospital. P.W.7 stated that when P.W.20 asked as to how the incident took place, Santosh Thakur told him that it was because of the No Objection not given in the sludge oil business. Satish Patil, Accused No.1, Krishna Patil, Accused No.3 and Pappu Yerunkar, Accused No.4/Appellant had "played the game". P.W.7 stated that he was taken to Dake hospital and then referred to Government Hospitals.

26. On the aspect of the assailants' identity, these three witnesses, i.e. P.W.2, P.W.3 and P.W.7, have categorically stated that they did not know the assailants. They have given the general description about age, height and built and clothes of the assailants. The FIR is also against unknown assailants. The Prosecution has sought to establish the assailants' identity through a test identification parade and identification in the Court which aspect will be dealt with later.

27. P.W.8- Baba deposed as follows: He was working as a driver on an endeavour make vehicle owned by Daulat Gharat, the uncle of Santosh Thakur. On 26 April 2010, he was going from Navghar to Uran. At about 6.30 pm, he saw a crowd of people near an auto garage. He stopped the car and went near the garage. He saw Santosh Thakur and Rashad were lying in injured condition. He communicated this to P.W.20- Ajay Thakur and Daulat Gharat on the phone. P.W.20- Ajay Thakur came there. P.W.20 sat near Santosh Thakur in the car. P.W.2- Masum, P.W.7- Rashad, Santosh Kelkar (Fitter), and he took Santosh Thakur to Dake Hospital. On the way, P.W.20- Ajay Thakur asked Santosh Thakur as to what happened to which Santosh Thakur stated that told Accused Nos.1, 3 and 4 had "played the game". Santosh Thakur was taken to Dake Hospital at Uran and then was taken to Suraj Hospital at Sanpada.

28. P.W.20- Ajay Thakur brother of the deceased deposed as follows: He worked as a heavy-duty driver at Jawaharlal Nehru Port Trust. The deceased Santosh Thakur was his younger brother. Santosh Thakur worked with Bobby Saluja, Director of Gulmohar Hydro Carbon Pvt. Ltd., taking sludge oil from the ships. He, along with others, was also working in the contract work of taking sludge oil. He, along with Satish Patil, Krishna Patil and Rakesh Mhatre, was working together on a contract basis. There was a dispute between P.W.20 and Accused No.1-

Satish Patil regarding vehicle used and in respect of charging of bills of the vehicle used. There were eight companies engaged in the work of taking sludge oil. There was competition between the companies. Eight companies decided to form an association called Nhava Sheva Sludge (Waste) Oil Prakalpagrasta Sanghatana. Santosh Thakur was elected as Chairman of the said Association. Accused No.1- Satish Patil brought Accused No.4- Pappu Yerunkar in the meeting and pressurized deceased Santosh Thakur for issuing NOC to Accused No.3- Krishna Patil and Accused No.4- Pappu Yerunkar. At that time, Accused No.1, Accused No.3 and Accused No.4 threatened to kill Santosh Thakur. Santosh Thakur informed this incident to P.W.20. On 26 April 2010, when P.W.20 was at his residence, he received a call on his cellphone at about 6.30 pm. from P.W.8- Baba that two persons fired on Santosh Thakur at Kala Dhonda. He went to the spot. He saw P.W.2, P.W.3 and P.W.8 and three-four others lifting Santosh Thakur in the Car. He took Santosh Thakur first to Dake Hospital at Uran and after that to Suraj Hospital, Sanpada. On the way, when he asked Santosh Thakur as to who fired and Santosh Thakur named Accused No.1, Accused No.4 and Accused No.3 of having committed the act since he did not give NOC for their sludge oil business.

29. Mr.Gupte submitted that P.W.2, P.W.3, P.W.7 are the only persons who have been examined as eyewitnesses who

actually saw the incident. He submitted that the identity of Accused Nos.4 and 5 is sought to be established through a test identification parade and the identification in the Court. The test identification parade was held in complete violation of norms and was a farce, and in the facts and circumstances, identification in the Court cannot form basis of conviction. He submitted that as per the prosecution case itself, there is no evidence other than the identification parade and the identification in the Court connect Accused Nos.4 and 5 with the actual assault. Mr.Gupte submitted that there is a delay in holding the test identification parade, which causes serious doubt on the veracity. He submitted that the test identification parade had to be done as per the Criminal Manual issued by the High Court of Judicature and that the test identification parade was not held according to the provisions of the Criminal Manual but in gross breach thereof. He relied upon the decisions of the Supreme Court in the case of *Ravindra v. State of Maharashtra*¹ and *Hasib v. State of Bihar*²; decisions of this Court in the case of *State of Maharashtra v. Rajesh Alias Kaka Madanlal Soni*³ and *Balu Shravan Ahire v State of Maharashtra*⁴ and the decision of the Allahabad High Court in the case of *Ashrafi and another v. The State of Maharashtra*⁵.

1 AIR 1998 SC 3031

2 AIR 1972 SC 283

3 1998 ALL MR (Cri) 471

4 2001 (2) Mh.LJ. 76

5 AIR 1961 Allahabad 153

30. On the aspect of identification of the assailants, the learned APP submitted that even assuming the test identification parade is not to be relied upon, the witnesses have identified Accused Nos.4, 5 and 6 in the court and, therefore, in the facts and circumstances, the identity of Accused Nos.4 and 5 accompanying Accused No.6 is established.

31. The FIR is filed against unknown persons. P.W.2 specifically deposed that he did not know any of the three persons. He deposed that he was called to the Tahasildar office after two months of the incident. He did not describe the motorcycle except that it was a Unicorn motorcycle of black colour. He admitted that he had stated before the Police on 26 April 2010 that a person with curly hair took the pistol and fired on Santosh Thakur, and he did not know why the same was not mentioned in the statement. The defence has also brought out the omission from the statement before the Police that as regards person with curly hair chasing Santosh Thakur and firing bullets. He admitted that assailant backs were facing him when the assailants were standing between him and Santosh Thakur. He also admitted that when the assailants fled away, their backs were towards him. He admitted that the incident was a sudden surprise for him. P.W.3- Shaikh Maksud admitted that his statement, that person with curly hair fired bullets on Santosh Thakur, was not appearing in his statement before the Police. He

also deposed that he did not know the assailants. P.W.7- Rashad also deposed that he did not know the assailants. He deposed that after receiving injury, he rushed to the shop and was there for about five minutes. He then deposed that when the assailants came to the spot, they had helmets on their heads and removed them while fleeing away.

32. Therefore, it is quite clear that none of the eyewitnesses knew the assailants. The incident took place suddenly, which did not last for more than five minutes, wherein the deceased and the eyewitnesses were shocked and surprised. The assailants were wearing helmets. P.W.7 had deposed that the assailants were wearing helmets to which P.W.2 and P.W.3 do not refer as to whether they were carrying helmets on their heads and how they removed them when they were fleeing away.

33. The Criminal Manual of the High Court of Judicature of Bombay provides for holding the test identification parade. Clause-16 of the Criminal Manual deals with identification parades. Clause-3 lays down the procedure for identification parade wherein an elaborate procedure has been laid down. The Magistrate holding identification parades has to follow all the guidelines, which are illustrative and may not be exhaustive. After the commencement of the identification parade, everything in respect of it should take place in the presence and hearing of the

suspect, including any instruction to the witnesses attending it as to the procedure that is to be adopted. All unauthorized persons should be strictly excluded from the place of identification parade. The witnesses should be prevented from seeing the suspect before he is paraded with other persons, and no photograph or description of the suspect should be shown. The suspect should be placed among persons, if practicable eight or more, who are as far as possible of the same age, height, general appearance, even in the standard of dress and grooming and position in life. Two suspects of roughly similar appearance should be with at least twelve other persons. Two independent, respectable persons should be first called. Executive Magistrate should himself ensure that panchas are independent and of fair intellect. The Executive Magistrate/ Honorary Magistrate should acquaint the panchas with the facts of the case, who is sought to be identified and who has to come for identification. The parade is to be held in a room or place where the identifying witnesses should not be able to look into it. After the parade is arranged, the panchas should be sent up to bring the accused from the lock-up. Care should be taken that the identifying witnesses do not have an opportunity of seeing the accused. Care should be taken to see that at no stage of the proceedings police officer or any police constable comes into the room where the parade is being held. The police should not be allowed to interfere with the proceedings entirely to be conducted by the Executive

Magistrate/ Honorary Magistrate. These are the guidelines contained in the Criminal Manual.

34. That incident took place on 26 April 2010. The Appellants were arrested on 13 May 2010. The test identification parade was held on 2 July 2010. There is, therefore, a delay of two months in holding the test identification parade. This aspect will have to be kept in mind while evaluating the evidence of the prosecution witnesses regarding the identity of Accused Nos.4 and 5.

35. P.W.2 deposed that he was called to tahasildar office after two months of the incident. He was asked to sit separately. The Executive Magistrate called him within five to ten minutes. Six persons were standing in line. He identified the person with curly hair at position No.3. In the second round, eight to ten persons were standing in the line. He identified two persons out of them. One had curly hair, and the second was wearing a white shirt. P.W.3 deposed that he was called in tahasildar office after two months. Nine persons were standing. He identified two assailants at position No.3 and position No.9 as Pappu and Rakesh, the Accused Nos.4 and 5. P.W.7 deposed that he was called in the tahasildar office after two months. Eight persons were standing in a row. He identified Accused No.4- Pappu at position No.8 in the first round. In the second round, eleven

persons were standing. He identified one person at position No.6 as Accused No.5. The Prosecution examined P.W.19-Sheetal Jadhav, the Executive Magistrate who conducted the test identification parade. P.W.19 deposed that she was working as Naib Tahasildar. She held a test identification parade on 12 August 2010 and prepared a memorandum of identification parade at Exh.180 and 187. In her examination-in-chief, she has not deposed anything other than proving the memorandum of identification parade.

36. The learned APP submitted that the test identification parade was held as per the criminal manual. She submitted that merely on the ground of delay, the evidence regarding test identification could not be discarded without appreciating the reasons. The learned APP submitted that despite requisitions given by the investigating authority, the Tahasildar had not conducted the test identification parade in time. The learned APP submitted that in the given facts and circumstances, the identification in the court is permissible to be relied upon if the witnesses are found to be truthful and reliable. She submitted that all the witnesses had an opportunity to see the assailants, and even assuming that the test identification parade is not to be looked at, their identification in the Court can be sufficient to sustain the conviction. The learned APP relied upon the decisions of the Supreme Court in the cases of *Motiram Padu Joshi v.*

*State of Maharashtra*⁶; *Dana Yadav @ Dahu v. State of Bihar*⁷; and *Raja Rovindraj v. State by Inspector of Police*⁸.

37. P.W.2- Masum Pathan admitted that he was instructed to sit on the first floor of tahasildar office. The cabin where he was instructed to sit had a glass panel towards the staircase. There was a passage between the cabin where he was sitting and the room in which the identification parade was conducted. He deposed that he did not remember whether the upper portion of the cabin door was made out of glass. He admitted that when shown in the court, neither Accused No.4 nor Accused No.5 had curly hair. P.W.3- Shaikh Maksud deposed that he only identified the suspects and did not tell about them to the Tahasildar.

38. P.W.7 deposed that Vikas Koli, Abdul Ajij Shaikh, Mahimulla, Ramjan Ali, Mahamad Marul and Nikhar Shaikh, to whom he knew, were in dummy persons selected for an identification parade. He admits that those persons were not similar in appearance. Their ages were also different. Therefore, P.W.7 already knew the dummy persons. He also admitted that they were not similar in appearance. Since seven persons out of dummy persons were known to P.W.7, he recognized the Appellants as the accused by process of elimination.

6 (2018) 9 SCC 429

7 (2002) 7 SCC 295

8 2019 LawSuit(SC) 1980

39. P.W.19, apart from giving no substantive evidence, in the examination-in-chief has admitted various lapses while conducting the test identification parade. She admitted that she did not read the Criminal Manual issued by the High Court and she read only the guidelines of the Additional Collector. She admitted that the test identification parade was conducted in the chamber of Tahasildar, and there is only one way to reach the tahsildar office. She admitted that suspected accused persons were brought in the ante-chamber and, at that time, one police constable from Uran Police Station was present. She deposed that she saw dummy persons for the first time when they were called. She also admitted that her peon brought the identifying witnesses in the chamber. She admitted that she saw the identifying witnesses for the first time when they were called and brought to her chamber. She also admitted that features of dummy members and suspected accused were different to each other and not similar.

40. Mr.Gupte is justified in making a grievance that the test identification parade conducted was in complete breach of the criminal manual. The idea of conducting a test identification parade is that dummy and accused persons should be similar as much as possible and not known to the identifying witnesses. P.W.7 has admitted that seven dummy persons were already known to him. The criminal manual states that the Executive

Magistrate should remember that the Magistrate is the sole in-charge in the entire proceeding. The Magistrate should first get acquainted with the facts, the persons who are to be put in the parade and the persons who are the witnesses. There is no evidence of the arrangement of room for the parade and whether the identifying witnesses could not look into it. The defence has brought on record that there was only one staircase coming to the room. P.W.19 admitted that not only there were no independent persons, but the constable from Uran Police Station was present. There is no substantive evidence that the precautions taken to ensure that the test identification parade is fair and how it was conducted to exclude suspicion of unfairness or risk of erroneous identification. P.W.19- Sheetal Jadhav did not depose that she was acquainted with the witnesses or had seen them earlier. Nothing was stated as to whether any enquiry was made with panchas or whether the panchas were informed that the witnesses were told about the procedure of the test identification parade. As to how groups were made, which would resemble the accused, was not deposed. Nothing was deposed that the panchas were present during the test identification parade and that P.W.19 had taken precaution that the process is not visible outside. Whether the accused were asked to change clothes or not and that they could stand at any place of their choice was not deposed. It was not deposed that the panchas brought the witnesses. P.W.19 did not state that any enquiry was made as to how this witness identified

the accused. It was also not stated as to what were the height, complexion of the dummies and accused. P.W.19 did not depose that she was instrumental in preparing the groups of dummies involving the panchas.

41. The accused were first arrested at Chembur on 14 May 2020. After that, a transfer warrant was sought regarding CR No.45/2010 at Uran Police Station. Mr.Gupte submitted that it is not proved by the evidence of investigating officers-P.W.22, P.W.23 or P.W.24 that Accused Nos.4 and 5 were brought in veiled condition when they were transferred, and there is no substantive evidence that when the accused were brought from Chembur to Uran, they were veiled. The topography of the room where the test identification parade was held, which is brought on record by the defence, shows a high degree of likelihood that the accused were visible to the witnesses. Though the investigating officer had sent a requisition to the Executive Magistrate, the fact remains that the test identification parade was held after two months.

42. In the case of *Balu Shravan Ahire*, this Court held that the parade must be held in the presence of two independent witnesses. The another decision laying down principles in respect of test identification parade is of the Division Bench of the Allahabad High Court in the case of *Ashrafi and another*. In the decision of this Court in the case of *State of Maharashtra v.*

Rajesh Alias Kaka Madanlal Soni, there is a reference to the need to follow the criminal manual and procedure under Clause-16 thereof. The Court criticized the conduct of the Magistrate admitting that he was not aware of the High Court Criminal Manual. Similar is the position in the present case. The Court held that the criminal manual contains certain mandatory provisions. The Court made the following observations on the conduct of the test identification parade:

"38. But before we proceed to the operative part of the judgment, we would like to express our anguish and consternation regarding the manner in which the identification parades have been held; the investigation conducted; and the judgment written.

39. We find that the SEM who have conducted the identification parades were not even aware of the elementary norms, principles pertaining to identification and the provisions contained in the Criminal Manual framed by the High Court pertaining to the manner in which the identification has to be held.

In our view the Honorary Magistrates who conduct identification parades should be educated persons; having thorough knowledge regarding the manner in which the identification is to be held. Their appointments should be made strictly on merit. The State Government should organize workshops wherein the law pertaining to identification should be imparted to them. It should always be borne in mind that identification conducted in a casual manner and in ignorance of the provisions contained in the Criminal Manual may result in the acquittal of those who are being prosecuted in ghastly crimes; as is the case here. When this happens, the victim is the society. For those acquitted are doubly

emboldened to commit crimes. The painful truth is for no fault of the courts, society tends to lose faith in them.

Often it is thought that acquittals are for the mere asking in our criminal courts, but why they take place, society is not sufficiently well informed. Some of those whys are answered in this judgment."

These observations aptly apply to the facts of the present case.

43. In the decision in the case of *Dana Yadav @ Dahu* relied upon by the learned APP, the Apex Court observed that the evidence of identification of the accused in the Court is a substantive evidence. There was no identification parade held and the accused were identified in the Court for the first time. The Apex Court laid down certain guidelines and observed that it is only in exceptional circumstances that evidence for the first time in the Court without the same being corroborated by the previous identification in the form of identification parade or any other evidence can form the basis for conviction. Firstly, the present case is not the case of no identification parade held at all and that the identification is for the first time. Here test identification parade was held but fundamentally flawed. Secondly, what are the exceptional circumstances that exists in the present case are not demonstrated by the Prosecution. P.W.2- Masum admitted that when shown in the Court, neither Accused No.4 nor Accused No.5 had curly hair, on which substantial weight was placed as a factor in identification. P.W.3 and P.W.7 have deposed about

dying declaration which we have found to be not trustworthy and, therefore, there is nothing to corroborate the identification of the accused for the first time in the Court by these witnesses. Further, as regards P.W.7, he deposed that upon being fired, he ran to his shop and was there for five minutes. In the test identification parade, P.W.7 identified the Appellants, by resorting to exclusion because he was knowing the other dummy persons. Thus, P.W.7 had already seen the Appellants. There is no clarity about the helmet being worn. Therefore it is not proved by the prosecution that P.W.2, P.W.3 and P.W.7 had adequate opportunity to notice all the features of the assailants. In these circumstances, the contention of the learned APP that the identification of the accused for the first time in the Court will be sufficient cannot be accepted. This decision therefore cannot be made applicable to the facts of the present case.

44. Therefore, the test identification parade which was held after two months of the arrest of Accused Nos.4 and 5 without following the mandatory procedure, wherein the identification of the eyewitnesses was not tested, where dummy accused were not selected with care, where dummy accused were already known to one of the witnesses, and they were dissimilar to the suspected accused, cannot be relied upon to base the conviction of Accused Nos.4 and 5. Neither the identification in the Court, as these witnesses had already seen the accused.

45. Now we turn to the factum of the arrest of the accused, seizure of the cars, clothes. P.W.5- Jitendra Bhore is a panch witness for attaching the clothes of P.W.7- Rashad Humaji. Nothing much turns on his evidence. P.W.9- Imtiyaz Shaikh is a panch witness for the memorandum of panchanama regarding the seizure of amount (Exh.103 and 104). According to this witness, Accused No.4 led the Police Patil to his house, where Rs.5,000/- was kept. This witness stated that Accused No.4 took them to his house and took out cash of Rs.5,000/- consisting of ten currency notes of Rs.500/-. The defence pointed out that there is no reference the figure 5,000 in the panchanama. Also that these notes were not marked. Even otherwise, we do not find that the recovery of Rs.5,000/- from the house would be an incriminating circumstance. PI Kothawale admitted in his cross-examination that Accused No.4 was arrested on 14 May 2010. He did not search the house of Accused No.4 till 25 May 2010, i.e. the date of panchanama. He also admitted that he knew the address of Accused No.4 on 19 May 2010 itself. Therefore, no importance can be attached to the recovery of Rs.5,000/- at the instance of Accused No.4 from his residence. P.W.10- Chandrakant Gaikwad was a panch witness for recovery of Alto car at the instance of Accused No.2- Atul Thakur. He deposed that Accused No.2 gave information that the Alto car is parked in front of Shankar Mandir at Bori and, accordingly, Accused No.4

showed the car. If there is no evidence connecting Accused No.2 either through evidence or dying declaration, merely because Accused No.4 showed where the car was parked, it could be of no importance. Similarly, on the same ground, the seizure panchanama cannot be relied upon against these accused by itself.

46. The next aspect is the arrest of Accused Nos.4 and 5 and recovery of the pistol at the instance of Accused No.5- Rakesh Rane. P.W.25- Sr.PI Ganesh Gaikwad deposed that the investigation of the crime was handed over to him on 18 May 2010. He stated that on 17 May 2010, Uran Police Station had received a wireless message from Unit No.6 of Crime Branch, Chembur that to take over custody of Accused Nos.4, 5 and 6 who were booked in crime under the Arms Act and who had admitted their guilt in Crime No.45/2010, i.e. the one in question. P.W.25 deposed that the police team obtained custody of Accused Nos.4, 5 and 6 on 19 May 2010. The Police Station at Chembur had seized the van in which Accused Nos.4, 5 and 6 were present. Three pistols ammunition were seized. The Prosecution has the examination report at Exh.286 that the cartridge (Exh.1) was test-fired through a pistol (Exh.5). The Prosecution has relied upon the examination report (Exh.172) that the cartridge fired from the pistol (Exh.5) and the empty shells of the cartridges with Exh.5- pistol. This aspect is put against the accused.

47. Mr.Gupte has argued at length on the aspect of anomaly between the size of bullets and the shells found on the spot as mentioned in the spot panchanama. The spot panchanama (Exh.83) has specified that there were three empty shells of size 7.65 KF written on it and one live cartridge with 7.65 KF written on it. The Forensic Examination Report (Exh.172) mentions one intact cartridge with KF 7.65 and two 7.65 KF cartridges that were successfully fired through the pistol (Exh.5). The panchanama Ex.170 was drawn when Accused No.4 was searched, and the pistol was recovered. The cartridge had KF 7.65 written on it. P.W.18- API Nana Shinde attached to Chembur Police Station admitted that 7.62 mm and 7.65 mm are different cartridges. He admitted that cartridges seized under panchanama were 7.62 mm cartridges and that 7.65 mm cartridges were not seized under the panchanama. He also admitted that he had sent the firearms to the Ballistic Expert on 17 May 2010. He admitted that the examination report showed that the cartridges test-fired are of 7.65 mm.

48. Mr.Gupte made a grievance that an application was moved by the Prosecution below Exh.66 for correction in the panchanama in respect of the size of the cartridge, stating that it was mentioned as 7.62 due to inadvertence and this application was granted by the learned Sessions Judge when the advocate of

Accused Nos.4 to 6 was absent. The Appellant stated It is to be noted that there was a mistake while panchanama was drawn at Chembur but the application was filed at the instance of Police Station, Uran. P.W.18- API Nana Shinde attached to Chembur Police Station; however, in his deposition had stressed that what was sent was 7.62 mm. He denied the suggestion that the cartridges sent were 7.65 mm in size and reiterated that they were 7.62 mm. There is, therefore, a clear anomaly between the pistols seized, cartridges found on the spot and the one sent to the forensic expert. As stated earlier, P.W.18- API Nana Shinde admitted that 7.62 mm and 7.65 mm are different cartridges. Therefore, this aspect is not conclusive as against the accused. Mr. Gupte rightly contends that even assuming that the cartridges were of 7.65 mm, all that could be put against the Appellants is that the pistol from which 7.65 mm bullets can be fired was found with Accused No.4 and this by itself will not be considered as basis for conviction.

49. Therefore, as regards Accused Nos.4 and 5, there is no trustworthy identification, and the recovery of the firearm and the cash also cannot be considered as corroborative evidence.

50. As regards Accused No.6, the eyewitnesses have stated that they did not know him. They did not know the third person waiting on the motorcycle. They had no opportunity to

see him clearly, and they have not given his proper description, and the test identification parade, as we have noted above, was not trustworthy. As regards his acquittal the State has not advanced any specific arguments. If conspiracy is not proved and the identity of Accused No.6 as the one rode the motorcycle is not established, then there is no evidence against him. As regards his acquittal, the view taken by the learned Sessions Judge on the evidence before him cannot be considered a perverse view.

51. Now, we turn to the evidence of P.W.2, P.W.3, P.W.7, P.W.8 and P.W.20 regarding taking Santosh Thakur to the hospital and the oral dying declaration made by Santosh Thakur. Mr. Gupte, the learned Senior Advocate for the Appellants and, Mr. Sejpal, Mr. Solkar, learned Counsel for the Respondents firstly submitted that the evidence of these five witnesses is riddled with contradictions as to the time of the incident, which makes their version impossible to reconcile with the evidence of doctors and the medical papers on the record. They contended that the condition of Santosh Thakur was such that he could not have given any dying declaration. They also contended that the conduct of P.W.20 of not acting upon the information given in the dying declaration makes the version of the dying declaration entirely untrustworthy. The learned APP submitted that the FIR is not an encyclopedia. It need not contain all the details.

52. The FIR mentions that P.W.2, Fitter-Santosh and Maksud took both Santosh Thakur and Rashad Humaji to Dake Hospital at Uran and, after that, to Vashi Hospital. The FIR, which was recorded immediately makes no mention of person P.W.20- Ajay Thakur and P.W.8- Baba. The FIR categorically states that only P.W.2, P.W.3 and Santosh (Fitter) took the injured to the hospital. P.W.2, in his deposition, stated that P.W.20- Ajay Thakur came for a short time, so also P.W.8-Baba appeared on the spot. He admitted that Ajay Thakur and Baba did not talk with him when they came to the spot of the incident. He did not tell them about the incident. As regards P.W.3, the defence has brought on record various omissions. P.W.3 did not state before the police that the doctor referred Santosh Thakur and was accordingly taken to Suraj Hospital, Sanpada. He did not depose that Santosh Thakur collapsed in front of Shop No.10. P.W.7- Rashad Humaji admitted that he rushed into the shop after sustaining an injury and was there for about five minutes. However, he has also stated that after sustaining the injury in his leg, he and Santosh Thakur ran away. P.W.8- Baba admitted that it was not possible to see from the road that two injured persons were lying when he came to the spot. He explained that there were people around injured. He admitted that he did not know about firing till he went into the crowd. It was argued on behalf of the accused that such conduct of needlessly stopping for enquiry only because there was a crowd is not natural.

53. Both Mr. Gupte, learned Senior Advocate for the Appellants, and Mr. Sejpal, the learned counsel for the Respondents in the State appeal, have argued at length regarding anomaly in the time and distance. According to the eyewitnesses P.W.2, P.W.3 and P.W.7, the incident occurred at around 6.15 pm on 26 April 2010. The incident took place at Kala Dhonda, Kot Naka, Uran. As per the Prosecution, after the incident, P.W.20 and P.W.8 took Santosh Thakur to Dake hospital at Uran. After that, he was taken to Suraj Hospital, Sanpada. P.W.20 had deposed that he was at home at around 6.30 pm. when he received a call. He stated that he reached the spot in ten minutes at 6.40 pm. P.W.2 deposed that P.W.20 and P.W.8 came to the spot within five to six minutes. He deposed that the house of P.W.20 is around 5 km. from the spot of the incident, and about 15 to 20 minutes are required to reach the spot. P.W.20 deposed that it is correct that containers of the JNPT Board is maintained by JNPT, and it is not correct that there is heavy traffic towards Uran in the evening. Mr.Gupte sought to contend that even after receiving the news, it would take some time, and there is a complete mismatch between the time given by the eyewitnesses and P.W.20 regarding the time of his arrival. Thereafter, according to P.W.20, they reached Dake Hospital with Santosh Thakur in the car within three minutes. He admitted that Dake Hospital is located in the main Bazar, and it is not on the highway. Thereafter Santosh Thakur was taken from Dake

Hospital, Uran, to Suraj Hospital, Sanpada. P.W.20 admitted that Sanpada is at a distance of 35 km. From Uran. He stated that they reached Sanpada around 7.45 to 8.00 pm. He stated that a doctor from Suraj Hospital declared Santosh Thakur dead at around 8.30 pm.

54. Mr.Gupte drew our attention to the deposition of P.W.1- Dr.Bhushan Jain, who was attached to Suraj Hospital. He produced the original case papers (Exhibit), which showed that Santosh Thakur was admitted to Suraj Hospital at 7.00 pm, and he died at about 7.45 pm. The admission form showed that Santosh Thakur was admitted at 7.00 pm in Suraj Hospital. As against this version, P.W.20 has stated that he reached the spot of the incident at 6.40 pm and then took Santosh Thakur to Dake Hospital, Uran, and from there they went to Suraj Hospital, Sanpada. He deposed that they reached Suraj Hospital at 7.45 pm. As per the case papers, Santosh Thakur was admitted at 7.00 pm and expired at 7.45 pm. P.W.20 admitted that Suraj Hospital is at a distance of 35 km. from Uran. He denied that there was heavy traffic on the said road. P.W.22- API Bangar however admitted that there was heavy traffic on Uran-Panvel road, and even in normal traffic, it takes about 1.5 hours to reach Sanpada from Uran. The defence has stressed this aspect. The Prosecution did not examine any doctor from Dake Hospital. There is anomaly as regards the time when Santosh Thakur was

admitted and whether P.W.20 was there with him. P.W.20 has tried to give an unrealistic time frame of travel between the three spots they visited.

55. On the prosecution evidence regarding the oral dying declaration of Santosh Thakur, the first facet of the defence argument is that Santosh Thakur was in no position to give any declaration. P.W.1- Dr.Bhushan Jain, who conducted the post-mortem, had noted three fire injuries. In the cross-examination, he has admitted that generally, every human being has five litres of blood in his body. P.W.1 stated that death might result in few minutes after sustaining bullet injury Nos.1 to 3 of the post-mortem report. He has admitted that after the loss of 1/3 of blood in the circulation, vital parameters deteriorate. The victim may become unconscious after the loss of 50% of blood. He admitted that such injuries cause loss of more than 50% blood which is found in this case. The eyewitnesses have deposed that Santosh Thakur, after being shot with three bullets, fell on the spot after going some paces. P.W.11- Dr.Ravindra Pujari deposed that Santosh Thakur was admitted at 7.00 pm in a restless conscious, oriented state. He rapidly deteriorated. He became drowsy and was gasping for breathing and was put on a ventilator. He admitted that the pulse and blood pressure was not recorded. He admitted that the condition of the patient rapidly deteriorated. Therefore, the evidence of P.W.1- Dr.Jain and P.W.11- Dr.Pujari shows Santosh Thakur's critical condition.

P.W.1- Dr.Jain has stated that there could be a loss of 50% blood and the patient would become unconscious. Santosh Thakur had received three bullet injuries and had collapsed. According to the Prosecution, he was bleeding profusely and after he was admitted, he rapidly deteriorated and was placed on a ventilator. Considering the anomalies in time and condition of Santosh Thakur when he was taken from the spot of the incident to Dake Hospital and then to Suraj Hospital, Sanpada, it is extremely doubtful that he was in a fit condition to give a clear and cogent oral dying declaration based on prosecution case itself.

56. P.W.20 had deposed that Santosh Thakur, when he was asked, had named Accused Nos.1, 3 and 4. That it was because of No-Objection not being given. According to P.W.20, the motive was non-grant of No-Objection by Santosh Thakur to these accused. According to P.W.20, he had a dispute with Accused No.1- Satish Patil. There was an incident of when Santosh Thakur had given a complaint four years ago against Satish Patil. P.W.20 deposed that in respect of non-grant of NOC, Santosh Thakur was threatened by Accused Nos.1, 3 and 4. Thus, there was no reason for P.W.20 would have immediately alerted everyone and the Police when Santosh Thakur named Accused Nos.1, 3 and 4. However, the conduct of P.W.20 is most unnatural. P.W.20 admitted that he went to Uran Police Station on 27 April 2010 at around 7 to 8 am. for the first time after the funeral. He did not inform the police of the names of three

persons after 24 hours the first time after the incident. He also admitted that he never informed his relatives about the names given by Santosh Thakur. He admitted that he did not give any reason why he did not inform the names told by deceased Santosh Thakur. He also admitted that when he had gone to the Police Station on 27 April 2010, he did not ask the police who lodged the FIR, and the Police also did not tell him the name of the person who lodged the FIR. P.W.20 also admitted that he did not inform the hospital authorities and did not give history. He admitted that he believed that persons who fired on Santosh Thakur should be punished. He also admitted that after taking Santosh Thakur to the hospital, his feelings became stronger. He admitted that he was carrying a mobile phone when he went to the hospital. He admitted that he did not feel it necessary to inform the police of three persons' names. He also admitted that no discussion took place between him and the persons accompanying him for 45 minutes from Uran to Sanpada about the names of the persons. He admitted that he was calm and not under shock when he asked the question to Santosh Thakur. He also admitted that giving of the names by Santosh Thakur of the assailants was a critical aspect. Mr.Gupte pointed out that as per the prosecution case itself, the police were present in the hospital, where Rashad Humaji was taken. The defence has brought on record that P.W.3 has improved the version that P.W.20- Ajay Thakur asked Santosh Thakur why and how the incident took

place. Therefore, it is rightly argued on behalf of the defence that it is inconceivable that P.W.20 will not inform the names if Santosh Thakur gave the oral dying declaration, and it is only an attempt to rope Accused Nos.1, 3 and 4 through this alleged dying declaration.

57. In the light of this contradiction and discrepancy in the prosecution evidence, the learned Sessions Judge has held that the prosecution case that arrival of P.W.8- Baba and P.W.20- Ajay Thakur at the spot of the incident was not trustworthy. The learned Sessions Judge also held that looking at the condition of Santosh Thakur as per the medical evidence; it was doubtful whether Santosh Thakur was in well-oriented condition to give a statement which could be relied upon and also the conduct of P.W.20 after the alleged oral dying declaration which makes the prosecution case doubtful. P.W.24- Sr.PI Kothawale admitted that except for the oral dying declaration of Santosh Thakur, there is no other evidence against these accused.

58. Therefore, it is highly doubtful whether the deceased Santosh Thakur had given any oral dying declaration in the vehicle. The conclusion of the learned Sessions Judge that the presence of P.W.20- Ajay Thakur and P.W.8- Baba on the spot of incident and the factum of dying declaration was not established by the Prosecution cannot be said to be an impossible view to be taken on the assessment of this evidence.

59. On the aspect of conspiracy, apart from P.W.20, the Prosecution has examined P.W.13- Prasad Govari, P.W.14- Tushar Thakur, P.W.16- Panjabrao Choudhary and P.W.21- Deepak Bhoir. P.W.13- Prasad Govari did not support the Prosecution. The Prosecution cross-examined him. He denied that there was any such event as stated by him in his statement. Though he was cross-examined at length by the Prosecution, nothing has been elicited from him. He stated that Police threatened him if he did not give the statement, and therefore he gave the statement before the Magistrate under section 164 only to save himself. P.W.14- Tushar Thakur was the Manager in Car Showroom. This witness also turned hostile and did not support the prosecution. He denied that Accused No.2-Atul Thakur had taken the Alto car. P.W.16- Panjabrao Choudhary was examined by the prosecution as he was the Secretary of the Nhava-Sheva Sludge (Waste) Oil Project Affect Organization. He deposed that he did not know Accused No.4 and whether he had asked for any no-objection. He denied having witnessed what happened in the meeting on 2 April 2010. He was declared hostile by the prosecution. The minutes of the meeting (Exh.140) were brought on record. The minutes do not disclose any aspect of the conspiracy. P.W.21- Deepak Bhoir was examined as Vice-Chairman of the Sanghatana. He also turned hostile and did not

support the Prosecution. The minutes of the meeting dated 2 April 2010 does not disclose that Santosh Thakur was present in the meeting. P.W.16 and 21 have not supported the Prosecution as regards the incident in the meeting. P.W.21 also denied his previous statement regarding Accused No.1 and deceased Santosh Thakur. Therefore, the witnesses examined by the Prosecution, i.e. P.W.13, 14, 16 and 21, did not depose regarding the incident in the meeting. The facet of the non-grant of no-objection and that Accused No.2 had taken the car from the show room. Therefore, the view taken by the learned Sessions Judge that this aspect was not proved cannot be said to be an impossible view. P.W.20- Ajay Thakur, whose evidence has been analyzed earlier, is not trustworthy.

60. The learned APP contended that deposition of P.W.17- Goga More would show that when the Accused Nos.4, 5 and 6 were arrested on 13 May 2010 by the Chembur Police Station they were together in one car carrying pistols. The learned APP submitted that the fact that they were found in one car with a pistols would indicate the conspiracy. The learned APP also referred to the recovery of the car from Accused No.2 as an incriminating factor. We do not agree. That the presence of these three accused in one car by itself can be said that there was a conspiracy in the absence of any other substantive evidence.

61. Regarding the injury to P.W.7- Rashad Humaji is concerned, once the assailants' identity is not established regarding the assault on Santosh Thakur, the same will be the position in respect of injury to Rashad Humaji.

62. The Prosecution has sought to bring on record a business rivalry stated by P.W.20. Even assuming that this aspect was brought on record, that will not be a sufficient evidence to establish conspiracy and to take a different view. Once the conspiracy involving Accused Nos.1 to 3 and 4 is not proved, then it cannot be extended to Accused Nos.5 and 6 in isolation. Even otherwise, as regards Accused No.6, there is serious doubt about the identity of the assailants. The Prosecution has not proved that Accused Nos.5 and 6 were the actual assailants. There is doubt regarding the recovery of the weapon used in the crime. The evidence regarding motive because of non-grant of no-objection certificate is not brought on record by the Prosecution.

63. The law relating to the scope of an appeal against acquittal to the High Court is settled. It is when the view taken or the finding recorded by the trial court is perverse or is against the evidence on record or view taken is an impossible view that

the High Court will interfere. As our discussion would show that the conclusion of the learned Sessions Judge that the Prosecution has failed to prove the ingredients of the offence charged as against Accused Nos.1, 2, 3 and 6 is a clearly possible view on the evidence on record, and considering the parameters of appeal against acquittal which are well settled, no case is made out for reversal of the acquittal.

64. As regards conviction of Accused Nos.4 and 5 under section 302 read with sections 120-B, 307 and 34 of the IPC is concerned, it is not the case of the Prosecution that there was conspiracy only between Accused Nos.4 and 5. Therefore, once the conspiracy as alleged between all accused was held as not proved, the learned Sessions Judge could not have convicted only Accused Nos.4 and 5 under section 120-B. In view of the above discussion that the identity of the assailants has not been established, the dying declaration of the deceased Santosh Thakur has not been proved and the recovery of weapons used in the offence being doubtful, Accused Nos.4 and 5 will have to be acquitted of the offences charged. As regards punishment for the offence under sections 3 and 25 of the Arms Act i.e. rigorous imprisonment of six months, the Accused Nos.4 and 5 are in custody since 19 May 2010.

65. Accordingly, the following order:

a) Criminal Appeal Nos.359/2013 filed by Ajay Thakur, and Criminal Appeal No.919/2013 filed by the State are dismissed.

b) Criminal Appeal No.257/2013 filed by Accused No.5 and Criminal Appeal No.259/2013 filed by Accused No.4 are allowed. The conviction and sentence recorded by the learned Sessions Judge against Accused Nos.4 and 5 under section 302 read with sections 120-B, 307 and 34 of the IPC is quashed and set aside. These Appellants- Accused Nos.4 and 5 are set at liberty, if not required in connection with any other offence.

(C.V. BHADANG, J.)

(NITIN JAMDAR, J.)