

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 211 OF 2015

1. Sopan @ Sopya s/o Bhagwan Gadhe
Age 26 years, occ. Labour
R/o Newasa, Tq. Newasa
Dist. Ahmednagar.
2. Dhanu @ Dhananjay s/o Govind Kale
age 26 years, occ. Labour
R/o as above.
3. Bittu @ Anil S/o Chimaji Lashkare
Age 36 years, occ. Labour
R/o as above.

Appellants

Versus

1. The State of Maharashtra
2. Halimabee w/o Yusuf Patel
Age 55 years, Occ. Household
R/o Ganganagar, Newasa, Tq. Newasa
Dist. Ahmednagar.

Respondents

Mr. S. G. Laddha, Advocate for the appellants.
Mr. A. M. Phule, APP for State/Respondent No. 1.
Mr. G. R. Syed, Advocate for respondent No. 2.

WITH
CRIMINAL APPEAL NO. 146 OF 2015

Halimabee w/o Yusuf Patel
Age 56 years, occ. Household
R/o Ganganagar, Newasa (Kh)
At present Naikwadpura, Newasa(K)
Tq. Newasa, Dist. Ahmednagar

Appellants

Versus

1. The State of Maharashtra
2. Ravindra S/o Baban Kale
Age 27 years, occ. Nil.
3. Santosh s/o Jagannath Pandure
Age 34 years, occ. Nil.
4. Rajendra S/o Karbhari Kale
Age 36 years, occ. Nil.
5. Ambadas S/o Laxman Dhotre
Age 28 years, occ. Nil.

Respondents No. 2 to 5 r/o Newasa (Kh)
Tq. Newasa, Dist. Ahmednagar.

6. Sanjay s/o Laxman Sukhdan
Age 39 years, occ. Agri.
R/o Shivajinagar, Newasa(Kh)
Tq. Newasa, Dist. Ahmednagar

Respondents

Mr. A. P. Gaikwad, Advocate for the appellant.
Mr. A. M. Phule, APP for State/Respondent No. 1.
Mr. M. A. Tandale, Advocate for respondents No. 2 to 5.
Mr. A. P. Bhandar, Advocate for respondent No. 6.

**CORAM : R. G. AVACHAT &
R. M. JOSHI, JJ.**

RESERVED ON : 22nd NOVEMBER, 2022.
PRONOUNCED ON : 2nd DECEMBER, 2022.

JUDGMENT : (Per : R. M. Joshi, J.)

1. Being aggrieved by the judgment and order dated 30th
December, 2014, passed by the learned Additional Sessions Judge,

Newasa, Dist. Ahmednagar, in Sessions Case No. 51/2014, appellants in Criminal Appeal No. 211/2015 have preferred the appeal challenging their conviction under Section 302, 341 read with Section 34 of the Indian Penal Code and Section 3, 5(25) of Arms Act, whereas appellant/informant in Criminal Appeal No. 146/2015 has preferred the appeal challenging acquittal of respondents No. 2 to 6 therein.

2. In short, case of the prosecution is as follows :-

On 13th September, 2011, at about 10.15 pm Halimabee lodged report with Newasa Police Station, stating that on 31st August, 2011, in village Newasa, communal riot occurred over the issue of tearing of flex of Eid greetings by the boys from Vadari Community. It is stated that those boys burnt the house of the informant and by naming them, report was lodged to the police. According to her, on 13th September, 2011, at about 6.00 pm, her sons Asif (deceased) and Ejaj were proceeding on motorcycle towards the agricultural field for repairing irrigation pipeline. At about 6.30 to 6.45 pm, Ejaj called her informing that when they were proceeding to the land, Bittu @ Anil Chimaji Lashkare, Ravi Baban Kale, Santosh Jagannath

Pandure, Sopan Bhagwan Gadhe, Dhanu @ Dhananjay Kale, Sonya @ Suil Mohan Pardeshi, Sanjay Laxman Sukhdan and Rajendra Karbhari Kale came on three motorcycles from behind and they prevented Asif and Ejaj from proceeding further. They all had country-made pistols in their hand and by alleging as to why complaint was made against them for burning the house, they abused and threatened them. Ejaj also informed her that Sopan Gadhe, Bittu Lashkare and Dhananjay Kale fired three bullets from the country-made pistol on Asif in which he was injured. He also informed that he fled away from the spot and concealed himself. After receipt of the said information from Ejaj, she informed about the same to Altaf Pathan. Thereafter, police staff went to the spot and took Asif for treatment to the hospital where he was found dead. On the basis of the said report, offence came to be registered vide C.R. No. I-186/2011 against the accused. Her supplementary statement was recorded wherein she claimed presence of other accused at the spot of incident.

3. During investigation, police visited the spot and panchanama was drawn showing recovery of one empty cartridge, simple soil and soil stained with blood. At the spot it was also

noticed that in the cotton field blood was found scattered. The spot was shown by Firoz on 14th September, 2015 at about 8.40 am. Inquest on the dead body was done and the corpse was sent for post mortem and it was opined by the Medical Officer that the cause of death is fire arm injury to vital organ. Accused came to be arrested. Statement was made by accused Sopan while he was in police custody and pursuant to his memorandum statement, there is discovery of country-made pistol which came to be seized. On completion of investigation, charge-sheet came to be filed and the case was committed for trial to the Sessions Court.

4. The learned trial Court framed charge against the accused vide Exhibit 110 and 137. Prosecution examined ten witnesses to prove the charges against the accused. In short, the testimonies of these witnesses can be summarised as follows :-

Halimabee (PW 1) is mother of the deceased who lodged First Information Report (Exhibit 140) on the basis of information received over phone from Ejaj. Sharif Patel (PW 2) is the panch witness to the spot panchanama (Exhibit 145). Ejaj Yusuf Patel (PW 3) is the eye-witness to the incident and he gave account of the

incident occurred at the relevant time in which Asif sustained injuries with fire arm. Altafkhan Imamkhan Pathan (PW 4) is the person who after receiving information from Halimabee, went to the spot with Advocate Pathan from where the deceased was taken to the hospital. To prove inquest panchanama, the prosecution has examined Monin Jainoddin Shaikh (PW 5). Dr. Kailas Zine (PW 6) deposed about conducting of autopsy on the dead body of Asif and opined cause of death. ASI Rathod (PW 7) recorded report given by Halimabee. Recovery of country-made pistol at the instance of accused Sopan was sought to be proved through Afsar Patel (PW 8). Investigation Officers Gawade (PW 9) and Ugale (PW 10) shed light on the investigation conducted in this crime.

5. Mr. Laddha, learned counsel for appellants in Criminal Appeal No. 211/2015 submitted that evidence of eye-witness Ejaj is not trustworthy as from his admissions in the cross-examination, it can be inferred that he was not at all present at the spot and is planted eye-witness. To support his contention he drew attention of this Court not only to the cross-examination of this witness but also has taken this Court through the testimony of Halimabee (PW 1) to state that their evidence goes contrary on material aspects with

regard to the previous complaint against the accused and also creates doubt about the whole story sought to be narrated by Ejaj. According to him, conduct of Ejaj is absolutely unnatural which makes his testimony not reliable. He further submitted that perusal of spot panchanama and seizure of motorcycle stained with blood contradicts the version of eye-witness about the occurrence of incident. Attention of this Court is also drawn to the testimonies of Altaf and Investigation Officer which shows that inspite of being informed by Halimabee about the report given to her of the incident by Ejaj, Altaf did not disclose the names of the assailants to the police officer who was present at the spot and had taken deceased to the hospital. It is submitted that investigation in this crime is not honest as the very important evidence regarding conversation on mobile phone of Halimabee by Ejaj is not proved by calling CDR and SDR. It is submitted that evidence of the existence of person whose mobile phone was used to communicate with Halimabee is also absent and this, according to him, is a serious lapse in the investigation. As far as ballistic report is concerned, it is submitted that the bullet recovered from the dead body of Asif was never sent to ballistic expert in order to ascertain that the same was fired from the country-made pistol allegedly recovered at the instance of accused

Sopan. It is pointed out that accused made application to the trial Court for calling ballistic expert for cross-examination on the report. However, said application came to be rejected by the trial Court and thereby accused are denied fair opportunity to defend themselves. In support of his contention, he placed reliance on the following case laws :-

- i) Brijesh Mavi vs. State of (NCT of Delhi) reported in (2012) 7 Supreme Court Cases, 45.*
- ii) State of Gujrat vs. Adam Fateh Mohmed Umatiya and others reported in (1971) 3 Supreme Court Cases 208*
- iii) State of H.P. vs. Jai Lal and others reported in (1999) 7 Supreme Court Cases 280*
- iv) Madan Singh vs. State of Rajasthan reported in (1978) 4 Supreme Court Cases 435.*
- v) State of U.P. vs. Noorie (Smt.) Alias Noor Jahan and others reported in (1996) 9 Supreme Court Cases 104.*
- vi) Lachhman Singh and Two others vs. State reported in 1952 SCR 839*
- vii) Badam Singh vs. State of M.P. reported in (2003) 12 Supreme Court Cases 792*
- viii) State of Uttar Pradesh vs. Om Pal and others reported in (2018) 5 Supreme Court Cases 805.*

6. Learned APP filed written notes of arguments in addition to the oral submissions wherein it is contended that the guilt of all

the accused is duly established with testimony of Ejaj who has identified the accused in the Court and has described in detail the incident in question in which bullets were fired at Asif by the accused. It is submitted that the the evidence of Medical Officer supports the case of prosecution of death due to fire arm injury to the vital organs. It is stated that the conduct of the eye witness of informing the incident immediately to his mother Halimabee is normal and pursuant thereto presence recorded by Altaf Pathan with Advocate Pathan at the spot cannot be doubted. With regard to ballistic expert's report, it is submitted that in view of provisions of Section 293 of the Code of Criminal Procedure, the said report without formal proof has been rightly accepted by the learned trial Court and no cross examination of ballistic expert was essential. Thus, according to him, no case is made out for causing interference in the conviction of accused and on the contrary, acquittal of the other accused deserves to be reversed.

7. Mr. Gaikwad, learned counsel for appellant/informant in Criminal Appeal No. 146/2015 opposed the appeal challenging conviction of the accused and supported the appeal against acquittal of rest of the accused. He drew attention of this Court to the

evidence on record in order to submit that the First Information Report in this case is lodged immediately and the case of the prosecution is based on the testimony of eye-witness and there is no reason to discard his evidence. He submitted that the previous incident of riot and burning of house of informant and complaint lodged against the accused was the motive for eliminating the deceased. It is argued that the conduct of Ejaj of saving himself from the assault and running away from the spot cannot be termed as unnatural conduct. It is also argued that there are criminal antecedents against the accused. He placed reliance on judgment of the Hon'ble Apex Court in case of Gulab vs. State of Uttar Pradesh reported in **2022 ALL MR(Cri) 390**, to submit that the report of ballistic expert is sufficient to connect the accused to the death of deceased, considering ocular statement of eye witness and medical evidence on record coupled with recovery of country-made pistol at the instance of one of the accused. He also relied upon following case laws :-

- i) Rakesh and another vs. State of U.P. and another reported in 2021 AIR (Supreme Court) 3233*
- ii) Himanshu Mohan Rai vs. State of U.P. and another reported in 2017(4) SCC 161.*

iii) Pravin Sheshdhar Mishra @ Sachin and others vs. The State of Maharashtra reported in 2021(3) AIR Bom.R.(Cri) 357.

8. Learned counsel for acquitted accused submitted that there is no reason for causing interference in the findings recorded by the learned trial Court as prosecution and the victim were unable to show any perversity therein. It is also argued that the place of incident is on road and it is inconceivable that no one else has witnessed the incident in which Asif died. According to them, it is unsafe to place reliance on the testimony of Ejaj for the reason that he is interested witness and his evidence is full of contradictions in comparison with other material on record.

9. The Hon'ble Apex Court in the matter of State of Uttar Pradesh vs. Noorie (supra) has observed that the credibility of witness has to be tested by referring to his evidence and finding out how he has fared in cross-examination and what impression is created by his evidence taken in other context of the case and not by entering into the realm of conjecture and speculation. While assessing and evaluating the evidence of eye-witnesses, the Court must adhere to two principles, namely, whether in the circumstances of the case it was possible for the eye-witness to be present at the

scene and whether there is anything inherently improbable or unreliable.

10. In the instant case, the entire gamut of prosecution story rests upon acceptance of the testimony of solitary witness Ejaj who is brother of the deceased. According to him, on 31st August, 2011, persons from Vadari community had set his house on fire and riot occurred at that time. He further deposed that on 13th September, 2011, at 6.00 pm, he along with Asif was proceeding to the field for repairing pipeline and when they reached near Balu Patil Vasti, accused came on motorcycle from behind and blocked their way. According to him, accused abused and threatened them for the reason as to why complaint was made against them alleging setting their house on fire. All accused had country-made pistols in their hands and Bittu, Sopan and Dhananjay fired bullets at Asif. He further stated about being scared and ran away. He claims that thereafter he informed the incident to his mother on phone and their relatives and police went to the spot and took Asif to Newasa and from there to the hospital at Ahmednagar.

11. As far as previous dispute for the reason of which incident in question is alleged to have occurred, Halimabee claimed in her testimony that she lodged complaint against accused and others for setting her house on fire, however, the same is found to be an improvement as it is not so mentioned in the First Information Report (Exhibit 140). She admitted acquaintance of accused Raju Kale since his childhood but has refused to answer question about having good relations with his family. She further accepted Asif and Ejaj being seen together with Raju Kale in photographs (Exhibit 142 and Exhibit 143), wherein Asif is seen with Raju and Anna Lashkare. According to her, accused might have visited to her house as friends of her sons.

12. In the cross examination, Ejaj accepted that there was no quarrel with the accused prior to the incident in question either with him or Asif nor any complaint was made by them against accused. Though he claimed that accused were not in visiting terms to his house but that claim runs contrary to testimony of Halimabee. He denied contact with accused Raju Kale, Dy. Sarpanch of Newasa Gram Panchayat, but when he was shown photograph (Exhibit 142), he accepted to be seen with Asif and Anna Lashkare therein. He

further accepted Asif seen in photograph (Exhibit 143) congratulating accused Raju. Testimonies of both witnesses reveal that they unsuccessfully tried to hide their cordial relations with the accused.

13. The appreciation of evidence of these two witnesses is sufficient to hold that there was no previous dispute between Asif or Ejaj or their family with accused herein and no complaint was lodged against them prior to the incident in question. There is thus no evidence to indicate any reason for the accused to cause assault on Asif. If the case of prosecution is accepted that owing to previous complaint lodged by Halimabee, the incident of accused firing bullets at Asif to kill him has been given effect, then in absence of any specific dispute been shown only against Asif, it does not stand to any reason as to why the assailants made no efforts to assault Ejaj too. no shot is fired at him nor even any attempt is made to prevent his escape, though number of assailants was more. This question assumes great importance when there is no evidence on record to show any reason for the accused to kill deceased. Prosecution, therefore, was expected to place adequate material to explain the said situation.

14. With regard to the actual incident of firing of bullets, Ejaj was questioned as to the position in which deceased was when shots were fired at him. According to Ejaj, Asif was not sitting on the motorcycle and he was at a distance of about 5 to 6 feet from the said vehicle. He further accepted that a shot on the head of Asif was taken from close distance. This version about incident is not supported by spot panchanama (Exhibit 145) which indicates that motorcycle of deceased found at spot had blood stains on seat as well as engine cover. From this case of Ejaj an inevitable question arises as to if Asif was shot while he was not sitting on the motorcycle and he was at some distance, how blood stains would appear on the motorcycle. The evidence of finding blood on motorcycle may lead to a reasonable inference that Asif was shot while he was sitting on motorcycle and not as claimed by Ejaj. Learned trial Court has also noted demeanor of witness by recording that he is twisting answers. At one breath he volunteered that Asif had fallen down therefore he does not know at which side of head bullet hit. He also claimed that he does not know on which side of body. He claimed at first instance that after first shot on head Asif fell down. Then further he claimed Asif fell when shot was fired on his chest from close distance, which indicates that there is no consistency in his evidence about manner

of occurrence of incident. However, he claimed that after listening sound of first shot he started running fast to save himself and ran upto 40 ft. distance. It becomes seriously doubtful whether he could have seen the second shot taken at deceased.

15. Ejaj does not state which clothes were worn by assailants or even gives make of motorcycle on which they arrived at spot. He also has not mentioned to police on which motorcycle who and how many persons occupied seats. This information being easily noticeable by witness to the incident is not proved by him. Though such information appearing innocuous, assumes importance where presence of witness at the spot is not undisputable.

16. At one point of time, during cross examination, he claims that scuffle took place but when questioned about clothes being torn stated that no one had scuffle with him. He claimed that he was scared and hence ran away and no attempt was made to snatch pistol from assailants. No doubt, it depends on personality and reaction of an individual to a particular situation and if Ejaj being scared by the incident in question of gunshot being fired at his brother, so also his not attempting to prevent assailants running away from the spot

cannot be called as unnatural conduct. However, his further conduct in the facts and circumstances as they are brought on record is not consistent with the natural/normal conduct that of a prudent man. It is the case of Ejaj that he ran away from the spot but he does not go to Balu Patil Vasti which was near to place of incident to seek any help. Nor even after passage of some time, he tries to go the spot to ascertain the condition of Asif.

17. He gave candid admission that Khupti road is his usual way and he had acquaintance with the persons residing adjacent to the road, with whom there is no enmity, but he does not go to them. Most shockingly, he stated that he did not feel it necessary to go to those persons and ask their help to save Asif. According to him, he reached house at about 10.30 to 1.00 pm but is conspicuously silent as to where he was hiding and when left place of hiding and how went home. Though he claims to have made phone calls to his mother, Halimabee, but even she was not told where he was hiding or there was any danger to his life or to save him. Testimony of Altaf shows that though he went to the spot along with Advocate Pathan, no attempt was made to search Ejaj. After receipt of information from Halimabee about phone call of Ejaj giving narration of incident,

it was abnormal conduct not even to look around for Ejaj. This could only happen when Altaf was certain that Ejaj was never at the spot at the time of incident.

18. It is the claim of Ejaj that he made phone call to Halimabee by borrowing mobile phone from unknown person whose name is not disclosed during investigation and trial. For that sake there is no evidence even of existence of any such person. If Ejaj had spoken to his mother about the incident in the presence of said unknown person, there ought to have been some reaction from the said person and surprisingly even that evidence is absent in this case. Ejaj simply does not say anything in this regard. It was even possible for Ejaj to request said person to pay visit to spot of the incident for ascertaining situation therein which could have been helpful to save Asif, but Ejaj even does not make any attempt in this regard, which is strange and does not appeal to the conscious.

19. If the case of prosecution is to be accepted that Ejaj informed the incident in question to his mother immediately after occurrence of the incident by naming the accused and the said information is shared by her with Altaf, in that case, it would have

been obvious conduct of Altaf to disclose the same to PI Gawade who went to the spot after getting independent information about occurrence of the incident of firing. He also claimed to have informed about incident to PI Gawade near dispensary of Dr. Wagh. He, however, does not go to police after receiving information from Halimabee. It is quite understandable that he preferred to go to spot and then to hospital. But PI Gawade also makes no efforts to register First Information Report on revelation of cognizable offence. If such information was given, it was incumbent on the part of the police officer to inform same to the police station for taking entry in the station diary and registration of crime.

20. Altaf (PW 4) does not specifically depose about disclosure of the names of accused to PI Gawade nor makes mention of Ejaj and even did not try to search of Ejaj. This fact creates serious doubt about the phone call being made by Ejaj to Halimabee after occurrence of the incident and in turn the same is disclosed to him by her. In such circumstances, the investigation agency ought to have investigated into the alleged phone call received by Halimabee by calling CDR of the relevant phone i.e. mobile phone of Halimabee and calls received by her. No efforts are taken by the investigating

agency in this regard nor even it was tried to find out as to who was the person who facilitated Ejaj to make a phone call to his mother.

21. As recorded earlier, the conduct of Ejaj of running away from the spot of save himself is quite natural. However, it does not stand to any reason that after running away from the spot, he did not make any effort to ascertain the condition of his brother who was injured with fire arm shots. He also did not try to make an attempt to go to the police station to inform about the incident to the police and to seek help. He does not go to hospital to see Asif. Even Halimabee fails to go there. PI Gawade in no uncertain terms stated that Advocate Pathan and Altaf have not told him that Ejaj was with Asif. Not only this, in this backdrop, it is suggested by the defence to this witness that on the relevant day, he was at Solapur and he is being planted as an eye-witness. Thus, close scrutiny of evidence of Ejaj does not inspire confidence and it is not found trustworthy in order to base conviction upon it. In such circumstances, it is absolutely necessary to seek corroboration to his version from independent evidence. Similarly, situation mandates that prosecution proves the important links which are found missing from the testimony of this witness.

22. Having doubted trustworthiness of testimony of Ejaj and is kept out of consideration then there remains circumstances such as motive of all accused and recovery of pistol at the instance one of the accused. The alleged motive for commission of crime for the accused is the previous complaint lodged by Halimabee in respect of setting her house on fire. There is no evidence on record to show that any such complaint was made by her against present accused. Moreover, her testimony as well as admission given by Ejaj show that there were not dispute or differences between accused and Asif or Ejaj in order to provide motive for eliminating Asif. In fact, there is reason to believe from evidence on record that the accused had friendly relations with both Ejaj and Asif and were in visiting terms to their house.

23. If at all case put forth by prosecution is to be accepted that on account of previous complaint against them the accused prevented both Asif and Ejaj to proceed further, it is not digestible as to why no attempt was made to fire any shot at Ejaj as against both Asif and Ejaj accused had same reason to cause assault and no independent motive was there to assault Asif only.

24. Prosecution has attempted to connect accused Sopan with the crime in question with recovery of country-made pistol from him pursuant to memorandum statement (Exhibit 177) and seizure of weapon vide panchanama (Exhibit 178) which was sought to be proved through Afsar Pathan (PW 8). From evidence of Afsar Pathan, it is apparent that said recovery of the weapon was done from open space and as admitted by him, anyone could have gone to the tree from where the weapon was seized. Thus, as far as said recovery is concerned, no exclusive knowledge of the said weapon can be attributed to accused Sopan. Even otherwise, in the absence of any further evidence to show that the very same weapon was used to fire bullets at deceased Asif, the said recovery could not be treated as incriminating circumstance against the accused.

25. Prosecution has placed reliance on ballistic expert's report (Exhibit 192). From said report, it can at the most be ascertained that the said weapon was in working condition. However, there is absolutely no evidence on record to show that one bullet which was removed from the dead body of Asif was ever sent to expert to ascertain that it was shot from the weapon which is seized. Absence of any such steps taken by the investigating agency makes

the evidence brought on record short to connect the seized weapon with the crime in question. It would be relevant to consider the judgment of the Hon'ble Apex Court relied upon by learned advocate for informant in the case of Gulab (supra), wherein failure to recover the weapon and examine ballistic expert was not considered fatal case of prosecution. In the said case, however, the testimonies of the eye witnesses were found trustworthy and sufficient to record conviction against accused therein. In view of this, the views expressed in the case of Gulab (supra) will have no application to the facts of the present case as the evidence of eye witness is found to be not reliable to base conviction thereupon and there is no further evidence to connect recovery of country-made pistol at the instance of one of the accused with the bullet fired at the deceased. On the other hand in case of Brijesh Mavi (supra) it is held by the Supreme Court of India that non sending of bullets extracted from dead body to ascertain that it was fired from said weapon a is serious lacuna.

26. Evidence of PI Gawade (PW 9) shows that he came to know from the police station about the incident of fire having taken place at about 6.45 to 7.00 pm. He thereafter proceeded with the staff to the place of incident and on the way, met Altaf and Advocate

Pathan who also informed him about the incident of firing having taken place. He admits that after receipt of information from the Station House officer, no entry is taken in the station diary while leaving police station. Though he did not go to Ahmednagar when Asif was taken to hospital there but he makes no attempt to lodge First Information Report after getting knowledge of occurrence of cognizable offence. Most shocking part of his testimony is his claim that Ejaj was present near spot and gave information of incident to him. This part of the evidence of Investigating Officer is totally in contradiction to the testimony of Ejaj who never claims to have gone back to the spot and even met PI Gawade at the spot. In fact, evidence of ASI Rathod (PW 7) shows that there is no entry in station diary that when PI Gawade came to police station on 13th September, 2011, and in 24 hours on that day there is no entry about AI Gawade being present in police station or going out of police station. There is entry in station diary at serial No. 34 made at 7.25 pm about sending police staff officer to Newasa town as there was sound of something. There is also different versions of PI Gawade and Altaf as to who helped to keep Asif in van. In the light of these facts, it is even doubtful whether at 6.45 to 7.00 pm PI Gawade went to spot and met Advocate Pathan and Altaf.

27. The aforesaid evidence on record shows that it is doubtful as to whether Ejaj was really present at the spot when the incident occurred in which deceased Asif sustained bullet injuries. The conduct of Ejaj is unnatural of not bothering to even make an attempt to come back to the spot for ascertaining the condition of his brother nor asking anyone else to do so, and not even going to the hospital. Further, Police Officer of the rank of PI who got knowledge about the incident in which deceased had sustained injuries makes no attempt to record any First Information Report. Altaf though claims to have knowledge about the incident from Halimabee does not disclose names of the assailants to PI Gawade. No investigation is done about the phone from which call was made to Halimabee by Ejaj informing her about the incident including names of the accused. Ejaj does not explain as to how he went home after fleeing from the place of incident. Lastly, there is no evidence to show that bullet hit to the deceased was fired from country-made pistol allegedly recovered at the instance of accused Sopan. All these circumstances appearing on record create serious doubt about the case of the prosecution that Ejaj witnessed incident of assault on Asif with fire arm. In absence of any other cogent evidence to connect

accused with crime makes conviction recorded against them unsustainable.

28. Here in this case, evidence of Monin Shaikh (PW 5), in whose presence inquest on the dead body was conducted and evidence of Dr. Zine (PW 6) who conducted autopsy on the dead body, sufficiently shows that the deceased died due to fire arm injuries to his vital organs. This, however, is not sufficient for the prosecution to prove homicidal death but it must also be proved beyond doubt that accused are author of said injuries which led to death of deceased. That evidence is absent. In the result, for want of cogent and reliable evidence to bring home guilt of accused beyond shadow of reasonable doubt, no order of conviction can sustain against them.

29. For the aforesaid reasons, this Court finds no perversity in the findings recorded by the learned trial Court while acquitting the co-accused and hence their acquittal calls for no interference.

30. In the result, following order is passed :-

ORDER

- i) Impugned judgment to the extent of conviction of appellants is set aside and Criminal Appeal No.211/2015 stands allowed.
- ii) Appellants in Criminal Appeal No. 211/2015 be released forthwith, if not required in connection with any other crime.
- iii) Their bail bonds stand cancelled.
- iv) Criminal Appeal No. 146/2015 challenging acquittal of co-accused is dismissed.

(R. M. JOSHI)
Judge

(R. G. AVACHAT)
Judge

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