

(1)

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

CRIMINAL APPEAL NO.794 of 2014

Nurul Shamsul Haq Shah,
Aged about 24 Yrs., occu.
Fabrication, Indian inhabitant
of Mumbai, residing at
Room No.34, Mahatma Kabir Nagar,
Milan Welfare Society,
Near New Masjid, Shahar Road,
Chakala, Vile Parle (East),
Mumbai – 400099.

(At present Kolhapur Central
Jail, Kalamba)

= **APPELLANT**
(orig. Accused No.2)

VERSUS

The State of Maharashtra
(at the instance of Vile Parle
Police Station)

= **RESPONDENT**

AND

CRIMINAL APPEAL NO.788 of 2014

1. Imtiyaz Mohammed Saahid Shaikh
Age: 26 Yrs., R/o Behind Cafe
Sahar Hotel, Badi Bawadi,
Bihari Mohalla, Chakala
Cigarette Co.,
Mahatma Kabir Nagar,
Andheri (East) Mumbai
At : Convict Prisoner No.cl
Kolhapur Central Prison,
Kolhapur – 416 007.

2. Mohammed Sahil Rabban Khan,
Age: 29 Yrs., R/o Pande Nagar,
Near Shankar Mandir,
Nalasopara (West), Dist. Thane,
At : - Convict Prisoner No.cl
Kolhapur Central Prison,
Kolhapur – 416 007.

= **APPELLANTS**
(Appellant No.1 is
orig. Accused No.1
& Appellant No.2
is orig. accused No.3)

VERSUS

The State of Maharashtra

(at the instance of Vile Parle
Police Station, Mumbai)

= RESPONDENT

Dr. Yug Mohit Choudhari, Advocate for Appellant (in
Criminal Appeal No.794/2014);

Ms. Payoshi Roy, (Appointed), Advocate for Appellant
(in Criminal Appeal No.788/2014);

Ms. M.M.Deshmukh, APP for Respondent-State.

**CORAM : SMT. SADHANA S.JADHAV &
PRITHVIRAJ K.CHAVAN, JJ.**

RESERVED ON : 03/02/2022
PRONOUNCED ON : 04/05/2022

JUDGMENT (PER :- PRITHVIRAJ K.CHAVAN, J.)

1. Feeling aggrieved with and dissatisfied by the impugned judgment and order of conviction passed by Additional Sessions Judge, Greater Bombay, on 12th February, 2013, convicting the appellants of the offence punishable under Section 302 of Indian Penal Code and sentencing them to suffer life imprisonment, present appeals have been preferred.

2. Prosecution story goes like this.

i) Deceased Mohd. Yusuf Mohd. Shahid Shaikh (for short "the deceased"), who was working as a labour on contract basis in 'Bisleri Company', had been to Andheri – Sahar road near "Gol Building" to watch "Garba" dance on 13.10.2010 at about 9.30 pm along with his friends. While returning home at about 10.40 pm, he was accosted by accused No.1 – Imtiyaz Mohd. Shahid Shaikh and his brother (original accused No.4) - juvenile in conflict with law and accused No. 2 – Nurul Shamsul Haq Shah on a footpath of Nagori Ajmeri Dairy. All of them picked up quarrel with the deceased on account of some previous dispute. Deceased was beaten by kicks and fists blows. Meanwhile, accused No.2 – Nurul, by a telephonic message, called accused No.3 – Mohd. Sahil Rabban Khan, who was a companion of one Nirmal Singh, a known bully. No sooner did accused No. 3 – Mohd. Sahil Rabban Khan reached the spot, he whipped out a sharp edged weapon and inflicted its blows on the chest and stomach of the deceased. There was a lot of hue and cry. People in the vicinity gathered there. The assailants made their escape good from the spot. The deceased was admitted in Cooper hospital by his friend

(4)

Mushtaq and neighbours. He was in I.C.U.

ii) PW 10 – B.B.Rane, who was attached to Vile Parle police station as Police Inspector, upon receiving information about the assault, rushed to the Cooper hospital and recorded statement of the deceased in the presence of the Medical Officer. On the basis of the said statement, he registered a crime, vide CR No.578/2010 under Sections 307, 504 read with 34 of IPC. However, on 14.10.2020 around 21.30 hrs. the deceased succumbed to the injuries on his person. It is the case of the prosecution that at the time of recording his statement, the deceased had disclosed each of the assailants by naming them in particular to PW 10 – Rane. The Investigating Officer conducted investigation into the crime. He visited the scene of occurrence. He drew a spot panchanama in the presence of panch witnesses. He had recorded the statements of the witnesses. Clothes on the person of the deceased, which were at the time of the incident, were seized under a panchanama. During the course of investigation, on the basis of a voluntary statement of accused No.3 Mohd. Sahil, had collected samples of blood-stained soil from the

spot by drawing a panchanama (Exh.20). Meanwhile, deceased succumbed to the injuries and, therefore, Section 302 of IPC came to be added. The accused were arrested. During custody of accused No.3 – Mohd. Sahil, pursuant to his voluntary statement, the weapon used in commission of the offence came to be recovered at his instance by drawing a panchanama under Section 27 of the Evidence Act. The muddemal property was sent for chemical analysis to the forensic laboratory. After the investigation and as a result of investigation, charge sheet has been laid in the Court of 10th Metropolitan Magistrate, Andheri against the four accused.

3. The learned Magistrate committed the case to the Court of Sessions as the offences were exclusively triable by the Court of Sessions.

4. All the accused were produced before the Additional Sessions Judge on 20.12.2011.

5. Charge (Exh.-9) was framed under Section 302 read with 34 of IPC. It was read over and

(6)

explained to each of the accused in vernacular, to which, they pleaded not guilty and claimed to be tried.

6. Defence, as emerged from the line of cross-examination as well as from their statements made under Section 313 of Cr.P.C., is that they have been falsely implicated in this case. No defence evidence has been adduced on their behalf.

7. To substantiate the charge, the prosecution examined as many as 11 witnesses coupled with some documentary evidence in the form of autopsy report of the deceased, report of the forensic laboratory, discovery panchanama etc.

8. The learned Additional Sessions Judge, after going through the evidence of the prosecution witnesses and after hearing the prosecution and the defence, by the impugned judgment, convicted and sentenced the appellants of the offence punishable under Section 302 read with 34 of IPC. Each of the appellants were sentenced to suffer R.I. for life and fine of Rs.5,000/-, in default, S.I. for six

months.

9. We heard Mr. Yug Choudhari and Ms. Payoshi Roy, learned Counsel for the appellants in respective appeals and learned APP for the Respondent-State. We have also perused written submissions on behalf of the appellants.

10. The factum of death of the deceased as a homicidal one has not been disputed by the defence. PW 9 – Dr. Viren Vinayak Chewle, who was attached to Cooper Post Mortem Center on 15.10.2010, conducted an autopsy over the dead body of the deceased between 11.45 am and 1.00 pm. On external examination, he noticed 18 injuries, which are described in column No.17 of the autopsy report in the following manner, -

“(1) Suture wound seen at the midline measuring 30 cm in length, extending vertically from xiphoid process to 4 cm below umbilicus. Sutures made up to of stainless steel material.

(2) CLW spherical in shape 5 cm x 4 cm with intestine protruding out (colostomy)

(3) Suture wound, when opened, stab wound measuring 2.5 cm x 1 cm x 5cm one angle acute, margins reddish, regular, wound located transversely.

(8)

(4) Suture wound, when opened, stab wound measuring 4 cm x 1 cm x 4.5 cm located 5 cm lateral and 1 cm below left nipple.

(5) Suture wound, when opened, stab wound measuring 3 cm x 1 cm x 4 cm located 6 cm lateral to right nipple, on angle acute, margins reddish, well defined. Wound transverse in change.

(6) Suture wound, when opened, stab wound measuring 1 cm x 0.5 cm x 2.5 cm located 9.5 cm from midline on the left side in left hypochondrium inferior aspect, one angle acute margins reddish, well defined. Wound oblique in shape.

(7) Suture wound, when opened, stab wound of 2 cm x 0.5 cm x 1 cm located 4 cm laterally and 1.5 cm below injury No.6, one angle acute, margins reddish, well defined.

(8) Suture wound, when opened, stab wound of 3.5 cm x 1.5 cm x 3 cm located 2 cm inferior to injury no. 7, one angle acute, margins reddish, well defined.

(9) Suture wound, when opened, stab wound of 3 cm x 1 cm x 3.5 cm located 2 cm below injury no.2 oblique in nature. One angle acute, margins reddish, well defined.

(10) Suture wound, when opened, stab wound measuring 2.5 cm x 1 cm x 3 cm located 6 cm lateral to injury no. 2 oblique, one angle acute, margins reddish, well defined.

(11) Suture wound, when opened, stab wound measuring 2.5 cm x 1 cm x 4 cm located 2 cm lateral to injury no. 10 one angle acute, well defined.

(12) Suture wound, when opened, stab

(9)

wound measuring 2.5 cm x 1 cm x 5 cm located 4 cm right of xiphoid process, one angle acute, margins reddish, well defined.

(13) Suture wound, when opened, stab wound measuring 2.5 cm x 1 cm x 7.5 cm located 4 cm below injury no. 12 one angle acute, margins reddish, well defined.

(14) Suture wound located 8 cm from midline, 5 cm below right nipple when opened stab wound of 3 cm x 1 cm x 5 cm one angle acute, margins reddish, well defined.

(15) Suture wound, when opened, stab wound of 2 cm x 1 cm x 3 cm located 1 cm before umbilicus, one angle acute, margins reddish, well defined.

(16) Suture wound, when opened, stab wound of 2.5 cm x 0.5 cm x 4.5 cm located at dorsum of left hand, one angle acute, margins reddish, well defined.

(17) Suture wound at the base of 4th finger of left hand 2.5 cm x 0.5 cm x 1 cm, one angle acute, margins reddish, well defined (stab wound).

(18) Suture wound between 3rd and 4th fingers, when opened CLW of 3 cm x 1 cm x 1 cm margins reddish, well defined.

All the above said injuries were ante-mortem in nature."

11. On internal examination, he noticed the following internal injuries, -

"(1) Contusion in 5th inter coastal space right antero lateral.

(10)

(2) CLW 4th IC space left 3 x 3 cm reddish and 7th IC space left 4 x 3 cm, reddish. “

He categorically opined that cause of death was due to stab wound (unnatural). According to the expert, the injuries could have been caused by a sharp pointed weapon having one sharp edged side and one blunt side. When the weapon was shown (Article -A), he opined that the said injuries could have been caused by Article A. The autopsy report is proved at Exhibit-38. There is no effective cross-examination of this witness.

12. The prosecution case revolves around the testimonies of mainly three eye-witnesses, viz. PW 1 – Mohammad Gufran Dawood Shaikh; PW 3 – Mohammad Moosa Shaikh; and PW 6 – Mohammad Akram Jamir Shaikh coupled with a statement recorded by the Investigating Officer, which was treated as a dying declaration of the deceased, which is at Exhibit-41.

13. Before scrutinizing the evidence of the aforesaid witnesses of the prosecution, it would be expedient to note an important admitted fact. All these three eye witnesses knew all the accused

since all of them are residents of the same locality including the deceased. Evidence of PW 1 – Mohammad Gufran indicates that on 13th October, 2010, he along with the deceased, Accused No.2 – Nurul and Accused No.1 – Imtiyaz and accused No. 4 - Juvenile in conflict with law (for short, “the juvenile”) along with one Ramji had been to Gol building, Kabir Nagar to participate in Garba dance. While returning from the programme, the juvenile had received a phone call from someone, who made fun of him on mobile. The juvenile slapped one Ramji. However, the deceased intervened and asked the juvenile as to why he had slapped Ramji. The scuffle ensued between them, which was pacified by the deceased as well as accused No.1 – Imtiyaz and accused No. 2 – Nurul. Again, there was a scuffle on the way, which was pacified by the deceased and this witness. It is testified by PW 1 - Mohammad Gufran that accused No. 2 – Nurul had made phone call to one Nirmal, who was a *Bhai* of that area (Goon). At that time, accused No. 3 – Mohammad Sahil - the main assailant, came over there. Accused No.2 – Nurul pointed out his finger towards the deceased. Thereafter accused No. 3 –

Mohammad Sahil whipped out a dagger from his pocket and started stabbing the deceased by inflicting blows on his chest and stomach. The deceased tried to ward off the blows. PW 1 – Mohd. Gufran got frightened. He further testified that accused Imtiyaz and Nurul caught hold of the deceased when accused No.3 Mohd. Sahil was assaulting the deceased. He further testified that he could not see other injuries on the person of the deceased. However, the deceased fell down. Persons in the vicinity gathered on the spot. Nobody came forward for rescuing the deceased. The assailants ran away from the spot.

14. When this witness was cross-examined, several vital admissions surfaced from which a reasonable doubt arises as to the authenticity of his version. Admittedly, the incident occurred around 10.00 pm. If it is an admitted fact that all the accused along with 15 more persons had been to the said place for participating in Garba dance, why names of rest of the persons have not been clarified by the prosecution ? PW 1 had testified that he was unaware whether the deceased and

accused were playing Garba dance. There was a crowd, as it is obvious, when there is a festival of Garba dance. He admits that he was standing separately at some distance from the deceased and the accused near the stall of one Nagori Chaiwala. He also admits that there was dim light when accused No.3 arrived on the spot. Admittedly, the deceased was a good friend of this witness. The fact that the deceased, accused Nos. 1 and 2 had been to participate in Garba dance near Gol building, is proved to be an omission, which is, in fact, a material omission. Even the fact that accused No.3 took out a dagger from his pocket and started stabbing the deceased is also proved to be an omission.

15. These material facts indeed go to root of the prosecution case. His further vital admission surfaced in cross renders his testimony unworthy of credit when he admits that when he noticed accused No.3, taking out a dagger, he got frightened and ran away from the spot. He did not know as to what had happened thereafter. He admits that thereafter he had left the city from 13.10.2010 to 15.10.2010.

When the police arrived on the spot on the same night, he was not present over there. It is strange that though he being close friend of the deceased, instead of helping him or approaching the police, not only he left the spot but also left the city of Mumbai. He admits that after running away from the spot he had never been to the police station on his own. This also creates a doubt as to what had been the exact cause of fight, resulting into death of the deceased and whether he had actually seen the accused No.3 stabbing the deceased. He is not firm on his stand. His further categorical admission that before his statements were recorded by the police at the police station, he had discussed about it with other witnesses, which obviously means that the statements under Section 161 of Cr.P.C., which came to be recorded by the Investigating Officer, are quite identical and tailor-made.

16. None of the aforesaid three eye-witnesses, viz. PW 1 – Mohammad Gufran Dawood Shaikh; PW 3 – Mohammad Moosa Shaikh; and PW 6 – Mohammad Akram Jamir Shaikh, have testified about

the presence of each other even though they are related and knew each other. They had even met in the hospital and had decided to give their statements to the police. It is apparent from the record that each of these eye-witnesses have played prominent and significant part in the incident. PW 1 – Mohd. Gufran and PW 3 – Mohd. Moosa Shaikh claimed to have separated the scuffle and PW 6 – Mohammad Akram Jamir Shaikh claimed to have chased the assailants. Had there been substance in the same version of these witnesses, at least one of them could have noticed the presence of other two witnesses at the relevant time. Silence of each of them as regards the presence of the others creates suspicion about the veracity of their testimonies.

17. The dying declaration of the deceased (Exh. 41) does not find mention of the presence of any of these three witnesses claimed to have intervened and separated the assailants and the deceased. In fact, in the last statement of the deceased, there is no reference of PW 1 – Mohd. Gufran, who claims to have intervened twice in the dispute. This assumes significance in light of the

fact that the deceased had only named one Mohd. Mushtaq, as amongst those, who took him to the hospital. The deceased has not whispered anything about the presence of the aforesaid three witnesses. We shall discuss the dying declaration qua the deceased in the later part of the judgment.

18. PW 1 – Mohd. Gufran admits of knowing one Mushtaq and PW 6 – Mohd. Akram Jamir Shaikh; yet he does not mention their presence at the spot either in Court or to the police station. PW 3 – Mohd. Moosa, on the other hand, testified that he had seen PW 1 – Mohd. Gufran at the hospital. It is unfathomable as to why PW 1 – Mohd. Gufran does not say anything as regards his visit to the hospital where the deceased is alleged to have given history of assault by unknown persons. This would indeed expose falsity of the evidence of PW 1 – Mohd. Gufran.

19. It is significant that the statement of PW 1 – Mohd. Gufran came to be recorded by the police two days after the incident. Why his statement could not be recorded when he was present

in the hospital itself, has also not been clarified by the prosecution. If he was in the hospital, why he had escaped out of the city, is also an unsolved mystery. Evidence of PW 1 – Mohd. Gufran, therefore, does not inspire confidence as it is quite apparent that he has suppressed certain material facts. The learned Counsel for the appellant has, therefore, rightly argued that false implications of the accused in the case, cannot be ruled out in view of the fabricated evidence of PW 1 – Mohd. Gufran. It is the evidence of PW 3 – Mohammad Moosa that he had taken the deceased to the hospital. However, during trial he denied that he had taken the deceased to the hospital, for, his role as alleged eye-witness would have been exposed as being false. It is evident from the record that at the time of recording the evidence of PW 3 – Mohammad Moosa, the accused were not produced in the Court from the jail. As a result, there was no occasion for this witness to identify the accused in the dock. It would also be in violation of the rights of the accused under Section 273 of Cr.P.C.. Even if it is the evidence

of PW 3 - Mohd. Moosa that he had noticed accused No.1 - Imtiyaz, accused No.2 - Nurul, scuffling with the deceased and later on noticed accused No.2 - Nurul calling one Nirmal Bhai, it is surprising as to how if the phone call was made by accused No. 2 Nurul to Nirmal Bhai, accused No.3 - Mohd. Sahil arrived on the spot with the dagger ? During cross it was suggested to this witness that he is facing trial under Section 302 of IPC in the Court at Calcutta, which he denied.

20. In so far as testimony of PW 6 - Mohd. Shaikh is concerned, there is no reference of his name in the testimonies of PW 1 or PW 3. As already stated, even PW 6 nowhere states as regards the presence of PW 1 and PW 3. Interestingly, PW 6 admits that he does not know PW 1. However, PW 1 has already stated that he knew PW 6, who also resides in the same locality and that they are on visiting terms. PW 6 however, categorically admits that he is a history-sheeter against whom an order of externment was in existence when he adduced evidence before the Trial Court. He had taken permission from the

police to enter into the district of Mumbai for giving evidence in the trial Court. His evidence is untrustworthy for the reason that during cross-examination he admits pending four criminal cases against him since 2005. He was arrested in all the criminal cases and was on bail. It is, therefore, difficult to place implicit reliance upon the testimony of such witness. Thus, it is apparent that PW 6 is clearly under the control of Mumbai police and, therefore, he cannot be said to be an independent witness, giving evidence on oath as per his free will. He can be said to be an extremely vulnerable witness. He had stated before the police about his relations with the deceased but in the court during trial, he took a "U" turn. His evidence is also, therefore, required to be considered with utmost caution and cannot be accepted at its face value. It is difficult to accept his version as truthful.

21. The versions of the three eye-witnesses as regards the incident in question is concerned are so identical that in normal course, it could not have been so in such a chronological order.

The versions are tailor made. As such, the evidence of all these witnesses will have to be accepted with a pinch of salt. The defence has succeeded in rebutting their testimonies to a considerable extent and has created a dent in the authenticity of their testimonies. We say so even for the reason that if the dying declaration is juxtaposed vis-a-vis the versions of these witnesses, falsity of the prosecution case is quite apparent.

22. Turning to the aspect of dying declaration of the deceased, according to the prosecution, the deceased in his dying declaration (Exh.41) had stated that he was produced at the hospital by his friend and a neighbour – Mushtaq, who has not been examined by the prosecution. According to the prosecution, Mushtaq was an eye-witness of the incident. Why the prosecution has not examined said Mushtaq ? Withholding his evidence would result in drawing an adverse inference, as per Section 114(g) of the Evidence Act. Had he been examined, perhaps, he would have deposed the real story behind the incident. This

is significant in light of the fact that the prosecution has not succeeded in bringing on record the genesis of the crime. This aspect also would go to the root of the prosecution case. It is surprising that when the said Mushtaq was present at the time of admission of the deceased in the hospital, why he did not utter a single word as regards the identity and presence of the assailants at the relevant time.

23. PW 2 – Mohammad Tamanna Gulam Mohammad Shaikh has been examined as a witness on the spot panchanama. However, it appears that he has not disclosed the fact that he happened to be the grand-father of the deceased and was also present in the hospital after he came to know about his admission in Cooper hospital. He too, did not utter anything about the incident in question.

24. It has been strenuously argued by the learned Counsel for the appellants that the dying declaration (Exh. 41) is patently fabricated document as it bears name of different person other than the deceased. Secondly, the deceased did not know, as per his own admission, the names

of the assailants; thirdly, the deceased was not in a fit condition to give his last statement and fourthly, mandatory procedure for recording of the dying declaration has not been followed by the Investigating Officer. As such, the counsel would argue that there is nothing in the said statement of the deceased, which would instill confidence and would vouch as regards its genuineness and veracity.

25. Undisputedly, name of the deceased is **Md. Yusuf Shaikh Md. Shahid Hussain**. If the deceased was conscious as well as alert and mentally fit to give a dying declaration, he would have surely stated his correct name. However, name purportedly given by the deceased in the dying declaration is **Md. Yusuf Md Shahid Shaikh**. This is something which no prudent man will accept and believe. This itself gives a jolt to the veracity of the dying declaration. There is a room for doubt as to whether the so-called dying declaration is indeed genuine or a fabricated document by the police ? The deceased, in a normal course, would not have stated his incorrect name. It is something inconceivable. The dying

declaration is an exception to the hearsay rule, for, it is not subjected to cross-examination. It can, therefore, only be admitted in evidence, if there is absolutely no doubt whatsoever about its genuineness. The major discrepancies herein-above are, therefore, significant in the given circumstances.

26. Even if it is presumed for a moment that name of the deceased in Exh. 41 has been mis-spelt or mistakenly given in a way it was given, it would indicate that the deceased was not in a fit state to give his last statement since he did not state his own name correctly.

27. PW 8 – Dr. Imam Gulab Mansoori, who had personally examined the deceased on his admission, stated that, he was conscious and oriented, who had given history of assault. What has been stated in the history of assault is *“Injury by unknown persons and by unknown weapons.”* A perusal of the medical papers would clearly show that the deceased was conscious and oriented on admission. Had the assault been committed by the

accused persons, it defies logic and common sense that the deceased himself and the eye-witness (PW 3), who were present at the hospital and well acquainted with the accused would report a history of assault by unknown persons and by unknown weapons. There is one more angle to this case. As per the evidence of PW 8 Dr. Mansoori that he had endorsed at 12.30 AM on 14.10.2010 that the deceased was conscious and stable. However, it has been contradicted by other evidence on record, which would show that it was impossible for the deceased to give any dying declaration at 12.30 am and that, in fact, no such dying declaration was recorded. PW 8 -Dr. Mansoori testified that when he examined the deceased at 12.10 AM, his condition was critical. Relatives of the deceased were called and thereafter he was taken to the operation theatre. If the deceased was taken in the operation theatre at 12.10 am for emergency surgery, which according to PW 8 Dr. Mansoori, lasted for about four hours, it is inconceivable that the victims dying declaration came to be recorded at 12.30 am. PW 8 Dr. Mansoori admits that when he put an endorsement at Exh. 35, at

that time he had not seen the deceased because the deceased was taken into the operation theatre as he was in a critical condition. This again shows that when the endorsement (Exh.35) was made by PW 8 Dr. Mansoori at 12.30 am, the deceased was already inside the operation theatre and no dying declaration could have been recorded when the deceased was on the operation table. It is also clear that at the time of making the endorsement at Exh.35 by the doctor, the deceased was not before him. There is no mention in the dying declaration as to the time when it commenced and when it was completed.

28. A perusal of the medical papers, more particularly the papers relating to the observations of the Officer and the prescription of the different medicines indicates that on 13.10.2010 at about 11.58 pm, i.e. 32 minutes before the dying declaration was recorded, there is an entry, recommending that the deceased should be taken to the operation theatre for emergency, for, Laparotomy for multiple stab injuries. At 12.10 am on 14.10.2010 (i.e. 20 minutes before

completing the dying declaration), there is another entry on the medical papers, stating “*High Risk Condition : Patient’s condition is not stable and the high risk has been explained to the relatives in their own language.*” A further entry at 12.10 am reads, “*Patient’s condition has been explained to the relatives and the urgent need for surgery is also explained. Relatives gave consent for the same including death on Operation Table consent as patient is a high risk.*” There is a categorical admission of PW 8 – Dr. Mansoori when his attention was drawn to the medical papers that under such circumstance when the deceased’s condition becomes more critical, with each passing minute and when the deceased is moaning in pains, the deceased is not in a position to understand whatever is spoken to him or asked to him. PW 8 Dr. Mansoori further admits that general anesthesia was administered to the deceased and, therefore, the deceased was in an unconscious state, who was then kept on a ventilator.

29. As such, a cumulative effect of the aforesaid evidence would clearly indicate that the

said dying declaration of the deceased is not a document which can be considered to be truthful, genuine and authentic statement of the deceased who was under the expectation of death. Neither PW 8 – Dr. Mansoori nor PW 10 – Bhushan Rane, the Investigating Officer, have testified that the deceased was in a fit mental state to give a statement or there is nothing on record to indicate that the deceased was well oriented with time, place and person. The endorsement of the doctor is only as regards physical condition of the deceased which is not sufficient. As such, no reliance can be placed on Exhibit-35.

30. It would be apposite to place reliance upon a judgment of the Supreme Court in case of **K.Ramchandra Reddy and Anr. Vs. Public Prosecutor – (1976) 3 SCC 618.** The relevant part is extracted below :-

“6. The accused pleaded innocence and averred that they had been falsely implicated due to enmity. Thus it would appear that the conviction of the accused depends entirely on the reliability of the dying declaration Ext. P-2. The dying declaration is undoubtedly admissible under Section 32 of the Evidence Act and not being a statement on oath so that its truth could be tested by cross-

examination, the Courts have to apply the strictest scrutiny and the closest circumspection to the statement before acting upon it. While great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person yet the Court has to be on guard against the statement of the deceased being a result of either tutoring, prompting or a product of his imagination. The Court must be satisfied that the deceased was in a fit state of mind to make the statement after the deceased had a clear opportunity to observe and identify his assailants and that he was making the statement without any influence or rancour. Once the Court is satisfied that the dying declaration is true and voluntary it can be sufficient to found the conviction even without any further corroboration. The law on the subject has been clearly and explicitly enunciated by this Court in *Khushal Rao v. State of Bombay* where the Court observed as follows:

On a review of the relevant provisions of the *Evidence Act* and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated, (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying

declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night, whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

Hence, in order to pass the test of reliability, a dying declaration has to

be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination."

The above observations made by this Court were fully endorsed by a Bench of five Judges of this Court 'in Harbans Singh v. State of Punjab – 1962 Supp 1 SCR 104 . In a recent decision of this Court in Tapinder Singh v. State of Punjab – (1971) 1 SCR 599, relying upon the earlier decision referred to above, this Court observed as follows:

"It is true that a dying declaration is not a deposition in court and it is neither made on oath nor in the presence of the accused. It is, therefore, not tested by cross-examination on behalf of the accused. But a dying declaration is admitted in evidence by way of an exception to the general rule against the admissibility of hearsay evidence, on the principle of necessity. The weak points of a dying declaration just mentioned merely serve to put the court on its guard while testing its reliability, by imposing on it an obligation to closely scrutinise all the relevant attendant circumstances."

31. According to the prosecution, the deceased had narrated the contents of his declaration in Hindi, but the same were recorded in Marathi by PW 10.- Bhushan Rane. However, PW 10 – Bhushan Rane has nowhere stated that he had read

over the statement to the deceased and ascertained from him (deceased) that it had been recorded as per his say. This is an essential requirement before placing reliance upon the said statement. A statement to this effect, which is in the form of dying declaration, will not be admissible under Section 32 of the Evidence Act, as it neither forms part of the circumstance, leading to the deceased's death, nor it is something about which the deceased alone could have deposed, nor does it pass a necessary test which is the *raison d'être* of admitting dying declaration into evidence. Absence of such oral evidence that the statement was read over and explained to the maker and that the maker agreed to its correctness assumes greater importance in the present case as the deceased was admittedly a Hindi speaker and the dying declaration was written in Marathi language.

32. Interestingly, PW 10 – Bhushan Rane, the Investigating officer admits that he was not well versed with the procedure for recording dying declaration and he even did not know that the time of its commencement and conclusion is required to

be endorsed upon the same. There is even no endorsement that before recording the declaration, the deceased was examined by the doctor certifying his fitness. PW 8 – Dr. Mansoori admits that he was not aware of the time when the police had started recording the dying declaration. He was also not aware of the time at which the dying declaration was completed. He admits that when he put his endorsement on Exh. 41, the deceased was not before him because he had already been taken in the operation theatre as he was critical. He also admits that the date written below his endorsement has been over-written and there is an interpolation. Moreover, there is no counter-signature over the over-writing.

33. A bare reading of Exh. 41 would demonstrate that originally blank spaces where the date and time of the offence were meant to be written, were left blank and the contents were interpolated later with a visibly different pen. The difference between the rest of the dying declaration and the dates and time mentioned in the dying declaration with regard to the size of the

space/gap between words and alphabets/numbers and the size as well as thickness of the alphabets/numbers make it clear that these entries have been interpolated subsequently in the gaps left in the text of Exh.41.

34. All these aspects diminishes and denudes the value of the dying declaration as well as credibility of the investigation by the police. The Investigating officer could have collected the call details of the cell phone of accused Nurul, who alleged to have made a call, upon which, accused Mohammad arrived at the spot with a dagger. This aspect would have proved the presence of accused – Nurul on the spot at the relevant time.

35. Interestingly, PW 7 – Najmakhatun Shahidhussain Shaikh, who is mother of the deceased has turned hostile. She had been to the hospital. It is the case of the prosecution that the deceased had narrated the incident to his mother, however, she categorically denied that any such information was given by the deceased to her in the form of an oral dying declaration, naming

the accused as his assailants. Had there been assault by the accused, he would have definitely stated the said fact to his mother. PW 7 – Najhmakhatun would have been the last person to shield the real murderers of her son and the first person to name the accused. PW 7's vehement denial clearly supports the submissions of the accused that they have been falsely implicated on the basis of the fabricated evidence.

36. The Directorate of Forensic Science Laboratory in its report at Exhibit-46 in respect of full open shirt, Jeans pant qua accused No.3 – Mohd. Sahil opined that human blood ABO grouping over those two articles was inconclusive. Even the ABO grouping of human blood over the knife/dagger alleged to have been discovered at the instance of the accused No. 3 – Mohd. Sahil, was inconclusive. Thus, even the discovery under Section 27 of the Indian Evidence Act does not establish any nexus between the stab injuries on the person of the deceased and the knife/dagger (Article – A).

37. The learned Trial Court has failed to

appreciate the evidence of the prosecution witnesses in its correct perspective. No independent witness came to be examined by the prosecution though at the relevant time there was a crowd on the occasion of Garba dance. There is no evidence to show that it was a pre-planned murder as the accused had a common intention and a prior concert to eliminate the deceased. No iota of evidence to that effect has been brought forth by the prosecution. The learned Trial Court has failed to appreciate the inherent and serious lacunae in the prosecution's case as well as inconsistencies and discrepancies brought by the defence on the record. The findings arrived at by the learned Trial Court are on the basis of surmises and conjectures which would not sustain in the eyes of law. The prosecution has, therefore, failed to bring home the guilt of the accused beyond all reasonable doubts. Consequently, the impugned judgment and order of conviction needs to be quashed and set aside. In the circumstances, following order is expedient.

ORDER

- a. Criminal Appeal No.794/2014 and 788/2014 are allowed.

b. The impugned judgment and order of conviction dated 12th February, 2013 passed by the learned Additional Sessions Judge, Greater Bombay, in Sessions Case No.134 of 2011, is quashed and set aside.

c. The appellants are acquitted of the offence with which they were charged.

d. Their bail bonds stand cancelled.

e. Fine amount, if paid, be refunded to them.

f. The order as regards disposal of the muddemal property is maintained.

(PRITHVIRAJ K.CHAVAN)
JUDGE

(SMT.SADHANA S.JADHAV)
JUDGE

BDV