

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1286 OF 2019
WITH
INTERIM APPLICATION NO.1507 OF 2021
AND
INTERIM APPLICATION NO.1508 OF 2021
IN
CRIMINAL APPEAL NO.1286 OF 2019

Subhan Usman Shaikh	]
Age – 33, Adult, occ – Rikshaw Driver	]
Indian Inhabitant, Presently in Jail, C-11682	]
Nashik Road Central Prison, Nashik	]
AND	]
Anandwadi, Kate Manivali,	]..... Appellant/Applicant.
Near Bhavar Kirana Store, Kalyan (E), Thane	](Orig. Accused)

Versus

The State of Maharashtra,	]
Through Sr. Inspector of Police	].... Respondent
Kolsewadi Police Station, Kalyan (East)	](Orig. Complainant)

Ms. Payoshi Roy I/by Dr. Yug Mohit Chaudhry for the Appellant/Applicant.
Mr. S S Hulke, APP for the Respondent/State.

CORAM : S. S. SHINDE,
N. R. BORKAR, JJ
Reserved on : 01st March 2022
Pronounced on : 11th March 2022

JUDGMENT : (PER S. S. SHINDE, J)

1 The Appellant – Accused No.1 has preferred this appeal against the judgment and order dated 26/04/2018 passed by the learned Additional Sessions Judge, Kalyan, thereby convicting the Appellant-original Accused No.1 for the offence punishable under Section 302 of the Indian Penal Code, 1860 (for short ‘IPC’) in Sessions Case No.161 of 2009 and sentenced to suffer

imprisonment for life and to pay a fine of Rs.10,000/- and in default to suffer further imprisonment for two years.

2 The prosecution story in nutshell can be summarized as under-

The Appellant herein, who is original Accused No.1, and other Accused Nos. 2 to 6 have been charged by the trial court for the offence punishable under Sections 147, 148, Section 302 r/w Section 149 and in the alternative under Section 302 r/w 34 of the Indian Penal Code. There is one trust viz Kadariya Chistiya Madrasa and a Masjid/Mosque of said Trust is at Anandwadi, Kalyan (East). Due to non-satisfactory work of earlier Trustees, the Board of Trustees of said Trust was changed and the new members were introduced as trustees in that Trust. One of the trustees was Iqbal Ayub Siddiqui. He and his colleagues were handling the state of affairs of the said trust in proper manner. The Appellant - accused No.1 along with other original Accused Nos.2 to 6 were the supporters of earlier trustees and some of them were the trustees in earlier board of the trustees. Due to this change in the trustees, the Appellant – accused No.1 and other accused Nos.2 to 6 had grudge in the mind against the new trustees and especially against Iqbal Ayub Siddiqui – the Managing Trustee of the said Trust.

On 01/03/2009 in between 6 pm and 7 pm a quarrel took place between Appellant – Accused No.1 and the said Iqbal Siddiqui in front of or near the Masjid at Anandwadi. It is alleged that the Appellant – Accused No.1

came from behind of Iqbal Siddiqui and gave axe blow on the head of the said Iqbal Siddiqui. Iqbal Siddiqui fell down. Even thereafter Appellant – Accused No.1 gave axe blow on the neck and on the head of Iqbal Siddiqui. At that time other accused persons were also present there with deadly weapons in their hands and they were insisting Appellant – Accused No.1 to kill Iqbal Siddiqui. At the same time they were creating terror amongst the people gathered there saying them not to intervene, otherwise they would also be treated like Iqbal. It is further alleged that in the said incident initially Iqbal Siddiqui sustained grievous injuries. He was taken to Rukhminibai Hospital and then he was shifted to Shridevi Hospital Kalyan. At about 9.00 pm Iqbal Siddiqui succumbed to the injuries.

3 It is further the case of the prosecution that, complainant Mukaddar Daulat Sayyad, who is the resident of the same locality, was fetching water from water tap in front of the Mosque/Masjid at the relevant time. At that time he heard loud noise as “Ya Allah”, therefore, he turned to see what had happened. He saw Iqbal Siddiqui was lying near Masjid, in front of the house of Ismail Shaikh on road. There was injury on the head of Iqbal Siddiqui and blood was oozing. He went near to Iqbal Siddiqui. At that time, Accused No.1 Subhan Shaikh again came to Iqbal Siddiqui with an axe in his hand and gave axe blows on the neck and on the head of Iqbal Siddiqui and thereafter Accused No.1 ran away. Thereafter complainant Mukkadar Sayyed lodged a

complaint against the accused persons in Kolsewadi police station on the same day at about 10.35 pm.

4 On the basis of the complaint lodged by the complainant, crime was registered. Senior Police Inspector of Kolsewadi Police Station Mr. D D Gavare carried out the investigation in the said crime. He visited the spot of incident and prepared spot panchanama. He collected blood accumulated on the spot of offence as well as simple soil and blood mixed soil. He also prepared rough sketch of the spot of offence. On 02/03/2009 the accused persons were arrested. On the same day Appellant – Accused No.1 Subhan gave his memorandum admitting to produce weapon. The Investigating Officer recorded memorandum of Accused No.1 and recovered one axe at his instance. On 03/03/2009 the Investigating Officer recorded the memorandum of Accused No.1 wherein he has shown his willingness to produce his clothes worn by him at the time of incident, and accordingly he produced the clothes, which were seized by the Investigating Officer under a panchanama. During the course of investigation, the IO recorded the statement of witnesses and also recorded supplementary statements of the witnesses. The muddemal seized during the course of investigation was sent to FSL Kalina Mumbai for chemical analysis. The IO also prepared panchanama of damaged rickshaw in presence of panch witnesses. After completion of investigation, the IO submitted the charge-sheet.

5 The trial Court framed charge under Sections 147, 148, Section 302 r/w Section 149 and in the alternative under Section 302 r/w 34 of the Indian Penal Code against all accused at Exhibit-47. The charge was read over and explained to the accused persons in vernacular. The accused pleaded not guilty and claimed to be tried. Their defence is of total denial. After a full fledged trial, the trial Court convicted the Appellant – Accused No.1 under Section 302 of the Indian Penal Code, and acquitted the Accused Nos. 2 to 6 of the offences punishable under Sections 147, 148, 302 r/w Section 149 in the alternative Section 302 r/w Section 34 of the Indian Penal Code. Hence this Appeal is filed by the Appellant – Accused No.1 Subhan Usman Shaikh against his conviction.

6 To bring home the guilt of the accused, during the trial the prosecution has examined in all thirteen witnesses in support of its case. The Trial Court has recorded statements of accused under Section 313 of the Criminal procedure Code. No evidence is adduced by the accused persons in their defence. The learned Additional Sessions Judge, after considering the entire oral and documentary evidence available on record, came to a conclusion that the prosecution has succeeded to prove the guilt of accused No.1 Subhan Shaikh under section 302 of the Indian Penal Code, and the prosecution evidence does not inspire confidence regarding alleged

participation of accused Nos.2 to 6 in the crime or the offence, therefore it cannot be said that the prosecution has succeeded to prove the offence u/sec. 147 or 148 or 302 r/w 149 or sec. 302 r/w sec. 34 of IPC against accused Nos.2 to 6.

7 We have heard the learned counsel appearing for the Appellant – Accused No.1 and the learned APP appearing for the Respondent-State. With their able assistance perused the grounds taken in the Appeal Memo, the entire notes of evidence, the documents produced on record, and the findings recorded by the learned Additional Sessions Judge in the impugned judgment.

8 The learned counsel appearing for the Appellant – Accused No.1 submits that the prosecution has miserably failed to establish the guilt of the Appellant beyond reasonable doubt. She submits that the medical evidence does not support the prosecution case as according to the Medical Officer the injuries could not have been caused by axe. It is further submitted that the medical evidence of PW-12 falsifies the evidence of eye witnesses in so far as assault by axe is concerned, and therefore, the trial Court ought not to have convicted the appellant for the alleged offence of murder of Iqbal. There is a delay in recording the statements of material witnesses and, none of the witnesses or even the IO is able to give explanation for the said delay. She submits that so far as PW-7, PW-8 and PW-9 are concerned, they did not

support the prosecution and therefore they were declared hostile. None of the prosecution witnesses discloses the name of the Appellant in their statements recorded under Section 161 of the Cr.PC. There are omissions and improvements in the testimonies of the prosecution witnesses. It is submitted that there is 5 hours delay in lodging the FIR, which according to her, is fatal to the prosecution case. The evidence of eye witnesses is not believable that the Appellant – Accused No.1 is the author of the injuries to the deceased. It is submitted that the evidence on record is not enough to convict the Appellant under Section 302 of the IPC. It is further submitted that the trial Court did not appreciate the evidence in proper manner. There is absolutely no evidence to connect the Appellant with the alleged incident as also there is no evidence sufficient to show the involvement of the Appellant in the alleged offence. Though as many as 13 witnesses have been examined by the prosecution, none of them has deposed against the Appellant in respect of the commission of offence, and therefore, trial court is not justified in convicting the Appellant under Section 302 of IPC. She further submitted that there was previous enmity between the accused and the deceased, and therefore, the Appellant-Accused No.1 is falsely implicated in the crime. The learned counsel appearing for the Appellant invited our attention to the Post-Mortem Notes, and the deposition of Medical Officer (PW-12) and submitted that the medical evidence completely falsifies the ocular evidence. In support of her aforesaid submissions, the learned counsel appearing for the Appellant placed reliance

on the following judgments :-

1] Balakrushna Swain v. State of Orissa¹ 2] Ganesh Bhavan Patel v. State of Maharashtra² 3] Raja Sharnappa Zinge v. State of Maharashtra³ 4] Vijaybhai Patel v. Navnitbai Patel⁴ 5] State of Orissa v. Bhraman Nanda⁵ 6] Alil Mollah and anr v. State of WB⁶ 7] Kantilal v. State of Gujarat⁷ 8] D D Suvarna v. State of Maharashtra⁸ 9] Abdul Sayeed v. State of MP⁹ 10] Mahavir Singh v. State of Madhya Pradesh¹⁰ 11] Mahadeo Kundalik Vaidya v. State of Maharashtra¹¹ 12] Ganga Prasad v. State of UP¹² 13] Balaka Singh and others v. The State of Punjab¹³. Therefore, the learned counsel appearing for the Appellant – Accused No.1 submitted that this Appeal may be allowed.

9 On the other hand, learned APP appearing for Respondent-State invited our attention to the findings recorded by the trial Court and submitted that the findings recorded by the trial Court are in consonance with the evidence brought on record and there is no perversity as such. There are eye witnesses to the incident who deposed against the Accused. It is submitted that the axe used in the commission of offence was recovered at the instance of

1 AIR 1971 SC 804

2 AIR 1979 SC 135

3 1996 (2) Crimes 314

4 2004 ALL MR (Cri) 2822 SC

5 1976 SCC (Cri) 596

6 (1996) 5 SCC 369

7 (2002) 10 SCC 39

8 1994(4) Bom. CR 85

9 (2010) 10 SCC 259

10 (2016) 10 SCC 220

11 2001 Cr. L. J. 4308

12 (1987) 2 SCC 232

13 1975 SCC (Cri) 601

Appellant – Accused No.1 so also his blood stained clothes were recovered at his instance. All these factors show the involvement of the Appellant-Accused No.1 in the crime. It is submitted that deceased Iqbal Ayub Siddiqui being the new Managing Trustee of the said Trust and, the Appellant – accused No.1 and other accused Nos.2 to 6, being the supports of earlier trustees, had grudge in the mind against the new trustees and, there is sufficient evidence on record to show the motive of the Appellant-Accused behind the murder of Iqbal Siddiqui. The act of Accused in committing the murder in public place at 5.00 pm created terror in the mind of people and has serious impact upon the society, and therefore, there is a delay in recording the statement of witnesses and lodging the complaint. Though PW-7, PW-8 and 9 did not support the case and declared hostile, there is other corroborative evidence in the form of PW-3, 5, 6 and 11 from which it is proved that the assault is from the sharp side of axe and the Appellant – Accused No.1 is the author of the injuries to the deceased. The statement of PW-3 was recorded immediately after the incident. Therefore, relying upon the documents as also the notes of evidence, learned APP submits that the appeal may be dismissed.

10 As stated herein above, in order to prove its case, the prosecution has examined as many as 13 witnesses. Firstly we will deal with the medical evidence. The prosecution has examined Dr. Pradnya Purshottam Tike as PW-12, who conducted autopsy on the dead body of Iqbal Siddiqui. She stated that

on 2/3/2009 she was attached to Rukhminibai Hospital, Kalyan as Medical Officer. On that day, a dead body of one Iqbal Hasan Ayub Siddiki was brought to hospital by Kolsewadi police station. She conducted autopsy on the said dead body, and found following injuries on the dead body.

- i stab injury on back right side lumber region 2 cm x 1 cm x 1 inch deep.
- ii 4 linear superficial abrasions on back 12, 7, 8 & 8 cm. Long
- iii C.L.W. below right ear 20 cm long 5 cm. Deep and 2.5 cm wide
This injury was already sutured at Shridevi Hospital. 17 stitches were there. Internal jugular vein and muscle was cut. This injury was also sutured. Haematoma was found near the injury.
- iv C.L.W. above left ear 12 cm. Long. It was sutured would having 13 stitches.
- v Multiple skull fractures, mid-line skull fracture from left frontal to right parietal region. There was C.L.W. of same dimensions over this fracture.
- vi Left parietal and temporal fracture with C.L.W. and laceration.
- vii Irregular superficial abrasion above right eye brow.

During autopsy, the Doctor found the following head injuries :-

- i CLW on right parietal region 13 cm. Mid-line skull 1 cm. And left parietal region 10 cm.

- ii multiple skull fractures
 - a left frontal to right parietal region
 - b mid-line skull fractures
 - c right parietal fracture.

Subdural haematoma right 10 cm.

According to Dr. Pradnya Tike (PW-12), the cause of death was neurohaemorrhagic shock due to multiple skull fracture in a case of polytrauma. She further stated that, all injuries were ante-mortem and caused by sharp and hard object. According to PW-12, the death was unnatural or homicidal. She stated that the injuries found on the dead body are possible if assaulted by axe, like an axe in the muddemal. She further stated that the injuries mentioned in the column nos. 17 & 19 as mentioned in her P.M. report are sufficient to cause the death. The post mortem report (Exhibit-172) is proved through PW-12 .

The Dr. Pradnya (PW-12) was cross examined by the advocate for Accused No.1. In her cross examination she stated that, rigor mortis was present on some part of the body, however, she has not specifically mentioned those parts in the P.M. report. PW-12 stated that rigor mortis starts immediately after death, it completes within 12 hours, it remains for 12 hours, thereafter it starts disappearing and disappearance completes within further 12

hours. She noticed some semi digested food in the stomach of the dead body, and the death might have been caused within 4 hours of his last meal. Last food might have been taken by the deceased at around 5 to 5.30 p.m. According to PW-12 the C.L.W. can be caused by sharp and hard object and stab injury can be caused by sharp object, however, she stated that stab injury is not possible by an axe. According to her, irregular abrasions can be caused due to fall on hard object and even by stone and, C.L.W. can also be possible if assaulted by rear side of an axe. PW-12 admitted that before starting post-mortem she had gone through inquest panchanama, and found injuries mentioned in the inquest panchanama on the dead body. She also admitted that, if the medical officer found any discrepancies in the injuries mentioned in the inquest panchanama and appearing on the body, medical officer can insist for another inquest. According to her, the injuries mentioned in column No.19 are corresponding to injury No.5 & 6 in column No.17 of P.M. report. Width and depth of injury no.5 & 6 in column no.17 is not mentioned. The injury no.5 & 6 in column no.17 is caused by hard and heavy object.

It appears that the investigating officer (PW-13) stated in his evidence that he had shown the seized axe to the medical officer and sought her opinion, whether the injuries on the person of deceased are possible by the axe shown to him, however, the Medical Officer did not reply his query.

11 The prosecution examined Shri Mukaddar Daulat Sayed as PW-3, who is an eye witness. He deposed that at the relevant time he was serving in Maruti Paints at Vithalwadi and his office hours were from 10 am to 10 pm. There is a Mosque near his house. One Iqbal Ayub Siddiqui was managing the said Mosque. He knows the said Iqbal Siddiqui as he was working in the said Mosque and was the trustee of the said Mosque. The name of Mosque was Kadariya Chistiya Madrasa. Iqbal Siddiqui (herein after referred to as the deceased) was managing the day-today affairs of the Mosque. He was utilizing the money collected or received to the Mosque.

 He further deposed that the alleged incident took place on 01/03/2019 in between 6 pm to 7 pm. He was fetching water in front of the said Mosque and he heard noise as “Ya Allah”. Then he saw behind him. The Accused No.1 Subhan Shaikh was assaulting by an axe to Iqbal Siddiqui. Accused No.1 Subhan Shaikh was slitting Iqbal Siddiqui like wood slitting. Iqbal Siddiqui was lying on the road. Accused No.4 Abbas Shaikh was armed with gupti and he was assaulting with gupti to Iqbal Siddiqui. Accused No.2 Ismail Shaikh was assaulting the deceased with sword. The accused No.3 Firoz Shaikh was assaulting the deceased with chopper having zigzag shape. Accused No.5 Jamir Shaikh and Accused No.6 Yusuf Shaikh were threatening by saying that if somebody comes in between, they would be cut. Due to fear, this witness (PW-3) then went to his home.

PW-3 further deposed that the injured Iqbal Siddiqui was then taken to the hospital in auto rickshaw by someone. On the very same day, PW-3 narrated the incident to the police. The said contents which were narrated by him were recorded by the police and the same were treated as FIR (Exhibit 124). He further deposed that he does not recollect whether his supplementary statement was recorded thereafter by the police or not. Iqbal Siddiqui is no more and he died. PW-3 knows all the accused who assaulted the injured Iqbal Siddiqui as they are residing in Anandwadi.

He further deposed that even on the date of recording of his evidence before the Court, he was in fear of assault by the accused persons. However, he stated that after the incident till the date of recording of his evidence, no incident had occurred. He stated that he is illiterate. He had seen those weapons at the time of incident. He identified the Accused Nos.1, 3, 4 and 6 who were present before the Court. The accused No.2 was absent and Accused No.5 has claimed exemption on account of his illness. PW-3 identified the axe (Article A) which was used by accused No.1 Subhan Shaikh in the commission of offence.

In his cross examination by the learned advocate for Accused No.1, he stated that nobody was ready to lodge FIR in respect of the incident. He

accepted the suggestion of the defence that police had come to his residence and took him to the police station. He denied the suggestion of defence that Arshad was present when he had gone to lodge the FIR. However, in the 2nd breath he stated that Arshad was present in police station who was saying to the police that they should not record his (PW-3) FIR as he (PW-3) is telling lie. PW-3 further stated that police did not make any enquiry with him about the incident prior to lodging the FIR. He admitted that he did say in the FIR that, the incident occurred in between 6.30 pm to 7 pm. He did not recollect about the injured Iqbal was taken to Rukminibai Hospital in auto rickshaw, and then to Shridevi Hospital. After the death of Iqbal Siddiqui, he lodged the FIR. He did state to the concerned police officer that the incident occurred in between 6.00 pm to 7 pm. However, he cannot assign reason as to why police did not mention the said fact in the FIR. He admitted the suggestion of the defence that he never stated in the FIR that the injured Iqbal Siddiqui was assaulted by more than one assailant. He did state in the FIR that injured was assaulted by gupti, sword and chopper also. However, he cannot assign the reason as to why the police did not mention the said fact in the FIR.

It appears that the contents of the FIR were read over to him and he stated that portion marked "A" in the FIR is incorrect. He stated that it is true that the blood was oozing from the head of injured when he was lying on the ground. He further stated that it is not true that when he had heard "Ya

Allah”, at that time the injured Siddiqui was lying on the road and blood was oozing from his head, therefore, he went there and then accused No.1 Subhan arrived there with an axe. When portion marked “B” was read over to him, he stated that the said portion is false and he cannot assign the reason as to why the police did not mention the said fact in the FIR. He denied the suggestion that accused No.1 Subhan dealt blow of an axe on the neck and head of the injured Iqbal Siddiqui. He was read over the portion marked “C” from the FIR and he stated that the same was incorrect and he cannot assign the reason as to why the police did not mention the said fact in the FIR. He stated that it is not true that the deceased Iqbal Siddiqui was initially attacked with an axe. He had witnessed while assaulting the deceased by an axe. Prior to that he did not see any axe. An axe blow was dealt from the side of its sharpness. PW-3 had seen two blows of an axe dealt on the deceased. Both the axe blows were given on the head of the deceased. The incident was over within 10 to 15 minutes. Thereafter PW-13 returned to his home, and he was at his home till he was called by the police. Except police he did not disclose anything about the incident to anyone.

PW-3 deposed that the deceased Iqbal Siddiqui was lying at a distance of 10-15 paces from the water tap from which PW-3 was fetching water. Madrasa was at a distance of 10-20 paces from the place where deceased Iqbal Siddiqui was lying. He further deposed that on the day of

incident itself the police had taken him to the police station. He was in the police station for about 30 to 45 minutes. He denied the suggestion that accused No.1 Subhan never assaulted Iqbal Siddiqui by an axe. He also denied the suggestion that police made him to give complaint forcibly in this case.

PW-3 was also cross examined by the defence counsel for the Accused Nos.2, 4, 5 & 6. He accepted the suggestion that after the incident he did not go to police station but the police had come to his house, and then he was taken to the police station by them. Whatever he had seen about the incident was disclosed to the police and after recording his version, FIR was registered. The FIR was registered on 01/03/2009 and thereafter police did not enquire with him again about the said incident nor his statement was recorded. He stated that while narrating the incident, he stated that accused No.2 Ismail and accused No.3 Firoz had assaulted the deceased with sword and chopper respectively and accused Nos. 5 & 6 had also assaulted the deceased. Further he cannot assign any reason as to why these facts are not mentioned in the FIR by the police. He also stated before police that accused No.5 Jamir and accused No.6 Yusuf had threatened him by saying "Beech me ayenge to kaat dalenge". Further he cannot assign any reason as to why these facts are not mentioned in the FIR by the police. PW-3 denied the suggestion that he named the accused Nos. 2 to 6 under the influence of other persons.

It appears that PW-3 was cross examined by the advocate for accused No.3. He accepted that Anandwadi Police Chowki is at a distance of two minutes walk from the spot of the incident on the southern side. He also accepted that on the western side of Anandwadi Police Chowki, there was Kolsewadi Police Station at a distance of three minutes walk. He deposed that he had stated before the police that accused No.3 Firoz had assaulted deceased Iqbal Siddiqui by chopper having shape of saw. However, he cannot assign any reason as to why the police did not mention the said fact in the FIR. He denied the suggestion that accused No.3 Firoz never assaulted by chopper on the deceased.

We have elaborately discussed the evidence of PW-3 in the foregoing paragraphs. PW-3 stated that he himself did not go to police station to lodge the FIR but the police had come to his residence and then he went to police station and narrated about the incident, and accordingly the police registered the FIR. He admitted that while recording the FIR, Arshad was present in the police station. He also admitted that the contents of the FIR were read over to him and he has signed the said FIR. In his deposition PW-3 stated about the involvement of accused No.1 and also the other accused Nos.2 to 6. However, the Investigating Officer (PW-13) deposed that, the allegations in the FIR only mention the role of Accused No.1 and the injuries sustained by the injured, and nothing is mentioned about Accused Nos.2 to 6.

It is argued by the learned counsel appearing for the Appellant that if the contents of the FIR are carefully perused, and if the evidence of PW-13 i.e. the Investigating officer is carefully perused, it is abundantly clear that PW-3 stated in the FIR about the presence of accused No.1 and the manner in which the accused No.1 assaulted the deceased Iqbal Siddiqui. However, PW-3 did not utter a single word about the accused Nos.2 to 6 in the FIR as it is evident from the evidence of PW-13 – IO.

It appears that PW-3 stated that Accused No.1 Subhan Shaikh was assaulting deceased with sharp side of an axe, and was slitting Iqbal Siddiqui as if one was slitting the wood. However, the autopsy surgeon (PW-12) stated that the fatal blow injury suffered by the deceased was a stab injury which could not have been caused by the axe. The autopsy surgeon (PW-12) further stated that the other contusion lacerated wounds (CLWs) suffered by the deceased could not have been caused by sharp side of axe but only by blunt side and, could be possible if assaulted by rear side of an axe. It is therefore evident that the injuries suffered by the deceased were not caused by the sharp side of an axe. Therefore the medical evidence on record completely falsifies the evidence of PW-3.

12 At this juncture, it would apt to refer to the evidence of PW-13 –

Dnyandeo Dhondiram Gavare, who was the Investigating officer in Crime No.46 of 2009 registered against the Appellant and other co-accused Nos. 2 to 6. In his evidence before Court, PW-13 stated that on 01/03/2009 he was attached to Kolsewadi Police Station as Incharge Officer, and then he registered the aforesaid FIR upon narrating the details about the incident by PW-3. He stated that he read over the contents of the said FIR to PW-3, and thereafter he begun the investigation and arrested the accused and carried out further investigation. He also stated about the incriminating articles recovered at the instance of accused No.1.

During his cross examination, PW-13 stated that he cannot state whether first information regarding the incident was given by wife of deceased Iqbal. However, there is station diary entry to that effect. The extract of the said station diary entry was produced in the charge-sheet at Exhibit 183. It appears that at about 8.30 pm on 01/03/2009 PW-13 came to know that Iqbal Siddiqui is injured and admitted in the hospital, and accordingly he deputed PSI Tadvī to the hospital.

It appears that before PW-3 was taken to the police station, PW-13 received information from the wife of Iqbal Siddiqui that Iqbal Siddiqui was injured in the said incident. As already mentioned herein above, Arshad was present during recording the FIR. It has come on record that Arshad who, was

present in the police station while recording the FIR, was telling to the concerned police officer not to register the FIR as PW-3 is telling lies and not stating about the manner in which the incident had happened. At the later stage while discussing the evidence of said witness, we will make the reference to the relevance of interruption by the said Arshad while recording the FIR at the instance of PW-3.

PW-13 further stated in his evidence that he had shown the seized axe to the medical officer and sought her opinion, whether the injuries on the person of deceased are possible by the axe shown to him. He stated that it is true that initial allegation was of assault by axe only.

So it is clear from the evidence of PW-13 that initial allegation was assault by axe only. The said initial allegation would relate to the contents of the FIR which was recorded/registered upon the narration of the incident given by PW-3. PW-13 admits that even though the first information about the offence was given by the wife of the deceased, the same was not registered as the FIR.

Coming back to the evidence of PW-3 and in particular to his cross examination wherein he has admitted that, "he never stated in the FIR that the injured Iqbal Siddiqui was assaulted by more than one assailant". As already

observed, the said FIR has been signed by PW-3, and even the contents of the FIR, which were read over by PW-13 to PW-3, would make it clear that all the allegations in the FIR are confined to the role of accused No.1 and not to any other accused. It appears that for the first time before the court PW-3 stated that deceased Iqbal Siddiqui was assaulted with Gupti, Sword and Chopper by other accused. When the Investigating Officer (PW-13) stated in his deposition that the contents of the FIR were read over to PW-3 and thereafter only PW-3 has signed the same, and those allegations as stated by PW-3 in his deposition were confined to the role of accused No.1 and assault of two blows given by him on the head of the deceased, then the question of accepting the evidence which was given first time before the Court thereby attributing the overacts to other accused would not arise.

Keeping in view the aforesaid discussion, whether to believe the PW-3 or not, and in our opinion, the PW-3, who has exaggerated and assigned role to accused Nos.2 to 6 for the first time before the Court, cannot be considered as trustworthy witness and consequently no implicit reliance can be placed on his testimony. He (PW-3) did not voluntarily come forward to give FIR but it was after the police had come to his residence and he was taken to the police station and, then he had narrated the incident to the police which was recorded/registered as FIR, though Arshad - the brother of deceased, who was present at that time in the police station, objected for registering the FIR at

the instance of PW-3, saying that PW-3 is telling lies and not telling the names of all the culprits. It is important to note that PW-3 and also other prosecution witnesses deposed before the Trial Court that Accused Nos. 2 to 6 were involved in the alleged offence of murder of Iqbal Siddiqui, nevertheless the Trial Court has acquitted the Accused Nos. 2 to 6. We, therefore, find considerable force in the submission of the learned counsel appearing for the Appellant that, it is highly probable that statement of PW-3 naming the accused No.1 was an afterthought only with a view to implicate the accused. In these circumstances, PW-3 is not a trustworthy witness and no reliance can be placed on his testimony.

13 The next witness examined by the prosecution is PW-5 Sharif Arif Shaikh. He deposed that deceased Iqbal Siddiqui was his uncle. On 1/3/2009, it was holiday i.e. Sunday. He was at his home. At 5.30 p.m. he had gone to offer Namaj in Mosque. Deceased Iqbalbhai was coming towards Masjid. The accused No.1 Subhan dealt blow of an axe from his (deceased) backside. Accused No.1 Subhan dealt blows more than four times on his head. One Abbas Shaikh (accused No.4) was also present there who was armed with sword. Accused No.3 Firoz Shaikh was also present there who was armed with sword. The accused No.2 Ismail Shaikh who was present there was armed with a weapon like chopper having saw on its sharp side.

PW-5 further deposed that the accused No.1 Subhan rushed towards him and threatened by saying that, "if he comes in the way, he would be done like Iqbal Siddiqui. One auto rickshaw was parked on which the accused No.1 Subhan hit by an axe and damaged the said auto rickshaw. The accused No.1 was shouting that nobody should come in his way or else he will do the same thing. After some time father of PW-5 arrived there who then removed the injured Iqbal in an auto rickshaw and went away. The injured was initially removed to Rukminibai Hospital and then PW-5 came to know that the injured has been shifted to Shridevi Hospital. Then injured died in between 9.20 to .9.30 p.m. PW-5 identified the accused No.3 Firoz and accused No.4 Abbas present before the Court, and also identified accused No.5 Jamir and accused No.6 Yusuf who were before the Court. PW-5 knows the accused No.1 Subhan.

PW-5 has been cross examined by the advocate for the Accused No.1. He stated that the incident occurred on 1/3/2009 in which his uncle was killed. The incident occurred in between 5 p.m. to 6 p.m. He had no occasion to go to Rukminibai Hospital after some time when the injured was removed to the said hospital. He admitted that his statement was recorded after two months after the incident by the police. He stated that he was read over the portion marked 'A' in his statement recorded by the police under Section 161 of the Cr.PC. showing that after some time he had gone to see his uncle in

Rukminibai Hospital is false. He stated that he did not go to Rukmini Hospital but went to Shridevi Hospital, after the injured Iqbal was shifted to that hospital. It appears that the portion marked 'B' in his statement recorded by police under Section 161 of the Cr.PC. was read over to him. He stated that the portion marked "B" is incorrect. He further deposed that the police were present in Shridevi Hospital, and he did state to the police that he had seen the actual incident in Shridevi Hospital. Police did not ask him (PW-5) to lodge the FIR. PW-5 did state to his family members that he had witnessed the actual incident. He further deposed that he had gone to the police station on his own after two days of the incident and it might be on 5th or 6th March, 2009. Police did not record his statement on that day.

PW-5 further deposed that on 24/5/2009, he had gone to the police station as police had come to him. At 5.30 p.m. on the day of incident the offering of *Namaj* was to begin. He denied the suggestion that at 5.30 p.m. his *Namaj* was over in which he himself and his uncle offered the *Namaj*. It appears that the portion marked 'C' in his statement recorded by the police under section 161 of the Cr.PC was read over to him. He stated that said portion is incorrect. He further deposed that the first attempt on his uncle took place when he was at a distance of 50-60 ft. His uncle did not run away. After hitting with an axe he (uncle) fell down by uttering as "Allah" and took a circle around him. His uncle fell down facing to the earth. There were many people

near the injured when he was attacked. The incident lasted for 5 to 7 minutes. None of his uncle was present near the deceased uncle.

PW-5 further stated about how many family members are there in the family of Iqbal Siddiqui. PW-5 denied the suggestion that PW. 3 Mukaddar Sayyad was not present on the spot of incident. He stated that he did not see Shahid chacha alongwith PW 3 Mukaddar Sayyad and his father who removed the injured to the hospital in auto rickshaw. However, he admitted that he had seen his father and PW 3 Mukaddar Sayyad who removed the injured in an auto rickshaw to the hospital. He also admitted that police had come on the spot after the incident on the very same day. It appears that a suggestion was given to him, whether on the very same day in the morning time the father of accused No.1 Subhan was attacked. He admitted that he himself and one Ajmatulla Rahematulla Khan were made an accused for the said incident. He further admitted that there was dispute in between him and his uncle's family with the accused No.1 and his family regarding the trust of Kadriya Chistiya Madrasa Trust.

He stated that in his police statement, he mentioned that accused No.1 Subhan had come towards him with an axe and threatened that if somebody comes in his way he would do the same thing. However, PW-5 cannot assign any reason as to why the said fact has not been mentioned in his

police statement. He denied the suggestion that the accused No.1 Subhan had not come to him with an axe. PW-5 also denied the suggestion that the accused No.1 Subhan did not damage the auto rickshaw by an axe.

PW-5 was also cross examined by the learned advocate for Accused Nos.2, 4, 5 and 6. He denied the suggestion that accused No.2 Ismail and accused No.4 Abbas were not present at the time of incident. He also denied the suggestion that accused No.4 was not armed with sword and accused No.2 was not armed with chopper, and accused No.5 Jamir and accused No.6 Yusuf were not present at the time of incident.

PW-5 was further cross examined by the learned advocate for Accused No.3. He stated that he did not know accused No.3 Firoz was the member of the trust prior to the incident. He stated that Kolsewadi Police Station was at a distance of 10 minutes walk from the spot of incident. He admitted that on 24/5/2009 his statement was recorded by the police. A suggestion was given to PW-5 that whether there was dispute in between deceased Iqubal and accused No.3 Firoz on account of the trust management, prior to the incident. He denied the suggestion that the first blow of weapon was given on the neck of the injured Iqubal by accused No.1 Subhan. He admitted that he stated in his police statement that accused No.1 Subhan dealt blow of an axe on the neck of the Iqubal.

14 We have carefully perused the evidence of this witness (PW-5). When he was present in Shridevi Hospital where police were present, he told to the police that he had seen the actual incident, however, the police neither registered the FIR nor asked him (PW-5) to register the FIR. Even this witness had told to his family members that he had witnessed the actual incident. It appears that, if PW-5 had ample opportunity to disclose the incident to the police when he met the police in the hospital immediately after the incident, and when he had gone to the police station 3-4 times after the offence, he did not disclose about having witnessed the incident but named Accused No.1 for the first time after two months when his statement was recorded by the police on 24/05/2009. Therefore, statement of PW-5 recorded by the police belatedly after a period of two months would certainly create doubts in the mind that the said statement is after-thought and to suit the prosecution story for the purpose of implicating the Accused. It is important to note that when PW-5 in his evidence stated that Accused No.1 assaulted the deceased with an axe, however, the autopsy surgeon (PW-12) deposed before the Court that the fatal blow injury suffered by the deceased was a stab injury which could not have been caused by the axe, and other CLWs suffered by the deceased could not have been caused by the sharp side of an axe but only by the blunt side. It appears that the evidence of PW-5 is falsified by the medical evidence on record. PW-3 in his deposition stated that two blows of axe were given on the

head of deceased, however, this witness (PW-5) stated in his deposition that four blows of axe were given on head and neck of the deceased. So there is a significant variance in the version of PW-3 and PW-5 in respect of how many blows were given and on which part of the body of deceased the said blows were given.

At this juncture it would be apt to refer to the evidence of PW-13 Investigating Officer who stated that he recorded the statement of Sharif Arif Shaikh (Pw-5). Portion marked by letter 'A' in his statement was read over to PW-13. He stated that Portion marked "A" is correct and recorded as per his say. Similarly the portion marked by letter 'B' is read over to PW-13. He stated that portion marked "B" is correct and recorded as per his say. The portion marked by letter 'C' is read over to PW-13. He stated that portion marked "C" is correct and recorded as per his say. PW-13 in his deposition further stated that for the first time he recorded the statement of Sharif Arif Shaikh on 25/5/2009, and Witness Sharif has not stated to him (PW-13) that, accused No.1 rushed to him with an axe saying that he will do same thing if anybody comes in his way. It is abundantly clear that, portions marked A, B, and C in the statement of PW-5 Sharif Shaikh recorded under Section 161 of the Cr. PC. by the Investigating Officer (PW-13) are as narrated by PW-5. It is brought on record through the testimony of Investigating Officer (PW-13) that, the statement of PW-5 Sharif was recorded on 25/05/2009 and that, PW-5 did not

state to him that the Accused No.1 rushed to him with an axe saying that he will do same thing if anybody comes in his way. Therefore, admittedly, the statement of PW-5 Sharif was recorded on 25/05/2009 and the portions marked "A., B, C" from his statement were stated by him (PW-5) and further he did not state before the IO that accused rushed to him with an axe saying that he will do same thing if anybody comes in his way. Importantly, the prosecution has not explained the delay of 55 days in recording the statement of PW-5 Sharif. In view of inordinate delay in recording the statement of PW-5 and that, at the earliest opportunity if he was ready to give statement and even ready to register the FIR when he was in Shridevi Hospital where injured was admitted, the police did not give response to him for recording his statement. Therefore, the evidence of this witness (PW-5) cannot be considered as reliable and trustworthy. It is also important to note that all the accused have been acquitted of the offence punishable under Section 149 of the Indian Penal Code.

15 The next witness examined by the prosecution is PW-11 Arif Ayyub Shaikh. He stated that he knows all the accused. Deceased Iqbal was his brother. On 01/03/2009 when he was sitting on scooter outside his house, he heard commotion from some distance. He went there and saw accused No.1 assaulting Iqbal by axe. In the mob there was Noor Alam. He was instigating accused No.1 to kill Iqbal. Other accused persons were present in the mob.

Accused Abbas was having a big knife in his hand. Accused Ajeem was holding a pipe. Iqbal was lying on ground. PW-11 asked his younger brother to bring rickshaw. They put Iqbal in rickshaw and took him to Rukminibai Hospital Kalyan. The doctor advised them to take Iqbal to Bombay. As Iqbal was seriously injured, he was admitted in Shridevi Hospital, Kalyan where Iqbal took his last breath. PW-11 identified the accused Nos. 2 to 6 present in the Court.

In his cross examination, PW-11 stated that, he came to know that on the same, there was beating to father of accused No.1 and his (PW-11) son is accused in that case. He further stated that, he saw accused No.1 giving axe blows on the head of Iqbal. He gave blow of axe by its sharp edged side. Some treatment was given to Iqbal in Rukminibai Hospital. Police did not go to Rukminibai Hospital. Till 7.45 pm they were in Rukminibai Hospital. By ambulance they went to Shridevi Hospital. PW-11 stated that he did not feel to go to police station. He told the incident to police on 25th March 2009. He does not know whether police had been to their area during that night. The Police had been to his house for recording his statement. He does not remember, whether his second statement was recorded on 27th June 2009. He had not stated to police during second statement that accused persons were holding sword chopper, gupti

PW-11 was further cross examined by the learned advocate for the Accused Nos.2, 4, 5 and 6. He denied the suggestion that Accused Nos.2, 4, 5 and 6 were not present on the spot of offence. He also denied suggestion that accused Nos. 2, 4, 5 and 6 were not holding any weapon in their hands.

It appears that as per the evidence of PW-11, the Accused No.1 assaulted the deceased Iqbal with sharp edged side of an axe. However, autopsy surgeon (PW-12) stated that the fatal blow injury suffered by the deceased was a stab injury which could not have been caused by the axe, and other CLWs suffered by the deceased could not have been caused by the sharp side of an axe but only by the blunt side. Therefore it is evident that the injuries suffered by the deceased were not caused by the sharp side of an axe. It is important to note that the statement of PW-11 was recorded 25 days after the offence, and therefore, such a belated disclosure casts a cloud of suspicion over the evidence of PW-11, who was the brother of the deceased having every reason to disclose the said incident to the police immediately, even though he met the police in the hospital. One more important aspect is that, in his deposition, PW-11 admits that his son was arraigned as an accused in the offence of assaulting the father of accused No.1. This fact proves that PW-11 was an inimical witness and his testimony cannot be relied on without any corroboration. Therefore, PW-11 is also not a trustworthy and reliable witness. It is also important to note that Accused Nos.2 to 6 have been acquitted by the

trial Court, though section 149 of the Indian Penal Code was invoked by the prosecution. One more aspect which falsifies the testimony of PW-11 is that when PW-11 in his evidence stated that Noor Alam was instigating accused No.1 to kill Iqbal and accused Abbas was having a big knife in his hand and accused Ajeem was holding a pipe, the other prosecution witnesses i.e. PW-3 or PW-5 did not depose about the said fact in their evidence.

At this juncture, it would be apt to refer to the testimony of investigating officer, who has stated that, he recorded the statement of PW-11 first on 25/03/2009 and second on 27/06/2009. PW-11 in his supplementary statement stated to IO (PW-13) about the weapons used by the accused persons such as gupti, chopper and sword. PW-13 stated in his cross that witness (PW-11) is the real brother of the deceased. It appears that PW-11 in his evidence stated about holding of big knife by accused Abbas and holding of pipe by accused Ajeem, however, in his supplementary statement recorded by IO (PW-13) he stated about the weapons used by the accused persons such as gupti, chopper and sword. Therefore there is complete variance in the version of the PW-11 when he made supplementary statement and before the Court about which types of weapons were used by the accused persons while committing offence. Therefore the evidence of PW-11 is not trustworthy.

16 The prosecution has also examined Shri Ajmatulla Rahematulla

Khan as PW-6. He stated that, at Anandwadi there is Kadriya Chistiya Madrasa Trust, and in the said new trust the deceased Iqbal was also one of the trustees. He further stated that the old trustees were having inimical terms with the deceased Iqbal Siddiqui. He was managing the affairs of the said trust properly. The accused No.1 Subhan, accused No.2 Ismail, accused No.4 Abbas were the persons who used to abuse Iqbal.

He further stated that, on 24/1/2009, he came late from his job. At 10 p.m. the accused No.5 Jamir was extorting money from the hawkers. Therefore, he went there to give proper understanding to accused No.5, however, accused No.5 slapped PW-6. Then PW.6 lodged the complaint against accused No.5. On the next day when PW-6 had gone to offer Namaj and thereafter came out of the Mosque, at that time accused were abusing him. PW-6 further deposed that the incident took place on 01/03/2009, in between 5.30 p.m. to 7 p.m. At that time he was at his home. He heard the shouts of the people. Therefore, he rushed to the spot. He came to know that accused Nos. 1, 2 & 4 attacking Iqbal. He saw blood and weapons lying on the spot. When PW-6 reached near Marwadi shop, at that time he noticed that accused No.1 Subhan was assaulting deceased Iqbal with an axe and other accused were standing armed with weapons. Then Iqbal fell down. Blood was lying on the spot. The injured was removed in the hospital, therefore, PW-6 returned to his home. Then PW-6 has stated further details that he spoke to Arif Shaikh.

Arif Shaikh then informed him that they are in Shridevi Hospital. PW-6 stated that while returning his home, the accused No.1 Subhan had come near the entrance of his residence who was armed with sword and damaged the rickshaw with sword. He threatened PW-6. He then went to the hospital on his two wheeler where he noticed that the condition of the Iqbal was critical. After 9.30 p.m. he came to know that Iqbal died.

In his cross examination PW-6 admitted that, no case of misappropriation against the accused persons, when working as trustee, was lodged. He also admitted that, deceased Iqbal was the trustee of the said trust from 6-7 years prior to his death. He stated that his statement was recorded by police on 09/05/2009 and his supplementary statement was recorded on 27/6/2009. In his both the statements under Section 161 of IPC before Police, he stated that he had witnessed the actual incident of assault by the accused No.1 Subhan with an axe on Iqbal. However, he cannot assign any reason as to why the police did not mention the said fact in his both the statements though he had stated so. He further stated that police explained him the contents of his statement in Hindi though recorded in Marathi. He admitted that he had demanded and collected the copies of his statements from the police. He had made complaint to Deputy Commissioner of Police (for short DCP) about non recording of his statement properly. PW-6 admitted that the name of accused No.3 Firoz is not mentioned in his statement dated 09/05/2009.

It appears PW-6 noticed that, accused No.1 Subhan was assaulting deceased Iqbal with an axe and other accused were standing armed with weapons. However, he did not speak about how an assault was taken place though, according to him, he had actually seen the incident. The Medical Officer (PW-12) stated that the fatal blow injury suffered by the deceased was a stab injury which could not have been caused by the axe, and other CLWs suffered by the deceased could not have been caused by the sharp side of an axe but only by the blunt side. Therefore, it is evident from the evidence of Medical Officer that the injuries suffered by the deceased were not caused by the sharp side of an axe. It is important to note that the statement of PW-6 was recorded by the police on 09/05/2009 i.e. after a period of two months of the incident and, after 7 years PW-6 named the accused No.1 for the first time in the court while recording his evidence. This also creates doubt about the truthfulness of the evidence of PW-6. Therefore, testimony of PW-6 is not reliable as the same appears to be concocted and after thought.

At this juncture it would be apt to refer to the testimony of investigating officer (PW-13), who has stated that he has recorded the statement of PW-6 on 09/05/2009 and 27/06/2009. PW-13 further stated that, PW-6 never stated before him that PW-6 is the eye witness of the incident. Now coming to the testimony of PW-6 wherein he deposed that his statement

and supplementary statement were recorded on 09/05/2009 and 27/06/2009 respectively, and he did state in his both statements that he had witnessed the actual incident of assault by the accused No.1 Subhan with an axe on Iqbal. However, he cannot assign any reason as to why the police did not mention the said fact in his statements. PW-13 in his cross examination stated that witness Ajmattula Rehmattulla (PW-6) has not stated anything to him about the accused persons except accused No.5, and has not uttered anything about accused Nos.2 to 3. In view of these material contradictions and omissions, it would be difficult to believe the testimony of this witness (PW-6).

17 The prosecution has examined Shamir Kamal Shaikh as PW-7. However, the evidence of the said witness was not believed by the Trial Court. It appears that PW-7 stated in his deposition that on 01-03-2009 at 5.00 pm he had gone to offer Namaj in the said Madarasa by his own auto rickshaw and when he came out the madarasa after offering Namaj, Iqbal Siddiqui also came out from the Madarasa and told PW-7 that, he (Iqbal) want to attend the marriage and could go in his rickshaw. Iqbal Siddiqui told PW-7 that, he would go to his home and would come back and Iqbal went to his house. He admitted that his first statement was recorded on 03/03/2009. However, he had given an application to the superior police officer that his statement was not properly recorded on 03/03/2009. In so far as this witness (PW-7) is concerned, the investigating officer (PW-13) in his deposition stated that, he

(PW-13) recorded the statement of Shamir Kamal Shaikh (PW-7) on 03/03/2009, however, he (PW-7) filed complaint that PW-13 recorded his false statement. PW-7 was declared hostile. Perhaps this witness (PW-7) has stated altogether different story than other witnesses, and therefore, the Trial Court has disbelieved his evidence.

18 The prosecution has also examined Gulam Gaus Abdul Gani Shaikh as PW-8. In his evidence he stated that on 03/03/2009 he parked his tempo near Nitin Raj Hotel in between 5.30 pm to 6.00 pm. Then he went to mosque of Kadriya Chistiya Madrasa, Anandwadi. Accused No.1 Subhan Shaikh assaulted Iqbal Siddiqui at that time. He went near Iqbal Siddiqui. The Accused No.1 Subhan Shaikh ran away. PW-8 stated that Accused No.1 Subhan Shaikh had assaulted Iqbal Siddiqui with an axe and then ran away. He lifted Iqbal Siddiqui. His statement was recorded by police on 03/03/2009. He stated that he saw only accused No.1 Subhan Shaikh at the time of incident.

It appears that, PW-8 was declared hostile and leading questions were put by the learned APP to him. He stated that he had not given his statement to the police on 14/05/2009. He also denied the suggestion given by learned APP that his statement was recorded by police on that day.

It appears from the perusal of testimony of investigating officer

(PW-13) that, he recorded the statement of witness Gulam Gaus Abdul Gani twice. PW-13 further stated, it did not happen that immediately after the incident Gaus had come to him and had narrated the incident to him.

19 The next witness is Sushila Rajaram Pawar (PW-9). She stated that on 01/03/2009 at 6.30 pm to 7.00 pm she was sleeping in her home as she was ailing. She further stated that it did not happen that in front of the room of Vaishali Dhotre one Iqbal Siddiqui had fallen down and accused No.1 Subhan Shaikh was assaulting him with an axe.

It appears that PW-9 was declared hostile and leading questions were put to PW-9 by the learned APP appearing for the State. She stated that, she does not know whether the injured is expired or not. When the portion marked "A" in her statement was read over to her, she stated it is incorrect. She further stated that her supplementary statement was not recorded by the police. It appears that the Trial Court disbelieved the evidence of this witness (PW-9).

However, the investigating officer (PW-13) in his cross examination denied the suggestion that witness Sushila had not stated portion marked by letter "A" before him.

20 If evidence of all these prosecution witnesses is considered in its entirety, it suffers from omissions, improvements and exaggeration, and makes it impossible to place reliance upon such shaky evidence to uphold the conviction of Appellant-Accused No.1 Subhan Shaikh who is in jail for last 13 years. All prosecution witnesses have stated that accused No.1 Subhan Shaikh assaulted the deceased Iqbal Siddiqui by sharp edged side of axe on the head of deceased Iqbal. However, there is variance in the evidence of the PW-3 and PW-5 inasmuch as PW-3 stated that, two blows were given on the head of Iqbal Siddiqui from the back side by sharp side of axe, whereas PW-5 stated that four blows were given on the head and neck of Iqbal Siddiqui. Though the witnesses have stated about the presence of other accused and some of them have attributed overt acts to the Accused Nos.2 to 6, nevertheless the Trial Court has disbelieved the evidence of all these witnesses and acquitted them, however, the Trial Court placed reliance on the oral testimonies of the said witnesses to convict the accused No.1 Subhan Shaikh.

21 In our opinion, the evidence of all these eye witnesses of the prosecution ought to have been totally believed or disbelieved by the Trial Court. Keeping in view, the evidence on record of the said eye witnesses, the Trial Court was not correct in partly believing these witnesses while convicting the accused No.1, and acquitting the accused Nos. 2 to 6. It has come in the evidence of Medical Officer (PW-12) that, not only there were injuries on head,

but there are injuries on the back right side lumber region and linear superficial abrasions on back of the deceased Iqbal Siddiqui. If the accused No.1 was only aggressor and he assaulted on head and neck of the deceased Iqbal, then how there were other injuries on the other parts of the body of deceased Iqbal.

22 It has come on record that the axe recovered at the instance of accused No.1 was recovered from the house of third person Mangesh Bukane, who has not been examined. Therefore, it cannot be said that the accused No.1 had either exclusive knowledge or exclusive possession of the axe. As per the panchanama, the axe recovered was not sealed. In the absence of sealing of the axe, the possibility of tampering with it cannot be ruled out. In so far as results of CA report regarding blood found on the axe is concerned, it was inconclusive. Same is the results regarding the blood stains found on the clothes recovered at the instance of Accused No.1.

23 It has come on record that the police have recorded the statement under Section 161 of the Cr.PC. of PW-5 and PW-11 after a gap of 2 months and 25 days respectively and therefore, there is inordinate delay in recording the statement of these eye witnesses of prosecution. The prosecution has not explained the said inordinate delay in recording the statement of the said witnesses, and therefore, no reliance can be placed on the evidence of such

witnesses. Hence non-explanation of inordinate delay in recording the statements under Section 161 of the Cr.PC. of the eye witnesses casts serious shadow of doubt about truthfulness of their deposition.

24 As already stated herein above, that according to the Medical Officer (PW-12), the fatal blow injury suffered by the deceased was a stab injury which could not have been caused by the axe, and other CLWs suffered by the deceased could not have been caused by the sharp side of an axe but only by the blunt side. Therefore it is evident from the evidence of Medical Officer that the injuries suffered by the deceased were not caused by the sharp side of an axe. One more thing, the injury caused by an axe with a sharp edge would be the incised wounds or cut wounds, but the injury that would be caused by axe with a sharp edge would not be contused lacerated wounds (CLW) because the contused lacerated wounds are caused by a hard and blunt object. It is well known that an axe with a sharp edge causes incised wounds and cut wounds, and cannot cause contused lacerated wounds, and, according to PW-12 the CLWs are caused by a hard and blunt object. Therefore as rightly argued by the learned counsel for the Appellant that, where the medical evidence completely rules out all possibility of the ocular evidence being true, the ocular evidence must be disbelieved.

25 From the evidence of PW-11, it has come on record that his son

was arraigned as an accused in the offence of assaulting the father of accused No.1. Therefore PW-11 was an inimical witness and his testimony cannot be relied on without any corroboration. So also PW-6 admitted that, the old trustees (i.e. accused side) were having inimical terms with the deceased Iqbal Siddiqui. We, therefore, find considerable force in the arguments of the learned counsel appearing for the Appellant that, there was previous enmity between the Appellant and the deceased, and therefore, possibility that, he might have been falsely implicated in the crime cannot be ruled out. It is relevant to mention that the eye witnesses have implicated other accused Nos. 2 to 6 in the crime stating that, they were standing on the spot of incident armed with weapons. Some of the alleged eye witnesses have attributed specific role to Accused Nos.2 to 6. As already observed, the Medical Officer (PW-12) noticed the injuries not only on the head, but also on the other part of the body of deceased Iqbal Siddiqui. However, the Trial Court acquitted Accused Nos. 2 to 6. It is also important to note that all the accused have been acquitted of the offence punishable under Section 149 of the Indian Penal Code.

26 So far as enmity between the deceased and accused persons is concerned, though PW-5 deposed that he did not know whether on the very same day in the morning time the father of accused No.1 Subhan was attacked, however, in the next breath PW-5 admitted that, he himself and Ajmatulla Rahematulla Khan (PW-6) were made an accused for the said incident. PW-11

Arif Shaikh corroborated this fact by stating in his cross examination that, he (PW-11) came to know that on the same day there was beating to father of accused No.1 and his son was involved in that case. Even PW-6 Ajmatull Khan stated in his deposition that the old trustees were having inimical terms with the deceased Iqbal Siddiqui. PW-6 had lodged a complaint against accused No.5 when accused No.5 slapped him. From the testimonies of these witnesses, it is crystal clear that there were inimical terms between these witnesses and the accused persons. In the statements of the Accused recorded under Section 313 of the Criminal Procedure Code, the accused have also stated that they have been falsely implicated in the crime. Considering the deposition of aforesaid witnesses regarding the inimical terms between them and accused persons, possibility of falsely implicating the Appellant in the crime cannot be ruled out.

27 During the course of arguments, the learned counsel appearing for the Appellant informed the Court that, the Appellant (Original Accused No.1) has undergone actual imprisonment of more than 13 years and with remission more than 15 years. The said statement of the learned counsel appearing for the Appellant is not disputed by the learned APP appearing for the Respondent/State. The Appellant – Accused No.1 is in custody since his arrest in March 2009. Importantly, nothing is brought to the notice of this Court showing that, Respondent-State did file Appeal against an order of acquittal of

Accused Nos.2 to 6.

28 Now coming to the judgments cited by the learned counsel appearing for the Appellant in support of her contention that except complaint filed by PW-3 on the very same day of an alleged incident, admittedly the statements of other eye witnesses under section 161 of Cr.PC.were recorded by the police belatedly.

In so far as effect of delay in recording the statements of the prosecution witnesses under Section 161 of the Code of Criminal Procedure is concerned, it would be apt to refer to the judgment of the Supreme Court in Balakrushna Swain's case (supra). The Supreme Court in the said case has observed as under:-

“Much reliance cannot be placed on the evidence of a witness when for no justifiable reason he was not examined by the investigating officer for a number of days particularly when the witness is found to be telling falsehood on material aspects of the case and tries to conform to the evidence of other witnesses.”

In the present case, admittedly there was delay of 55 days and 25 days in recording the statement of PW-5 and PW-11 respectively, and for that inordinate delay, the prosecution has not given any plausible explanation.

For the same aforesaid proposition i.e. unjustified and unexplained delay in recording the statement will render the evidence unreliable, the learned counsel appearing for the Appellant has relied upon the judgments, in the case of Ganesh Bhavan Patel v. State of Maharashtra, Raja Sharnappa Zinge v. State of Maharashtra, Vijaybhai Patel v. Navnitbai Patel, State of Orissa v. Bhraman Nanda, Alil Mollah and anr v. State of WB, Kantilal v. State of Gujarat and D D Suvarna v. State of Maharashtra.

In so far as when medical evidence would prevail over the ocular evidence is concerned, the learned counsel appearing for the Appellant relied upon the judgment of the Supreme Court in ***Abdul Sayeed's*** case. She invited our attention to paragraph 39 of the said judgment wherein the Supreme Court has held as under :-

“39 Thus, the position of law in cases where there is contradiction between medical evidence and ocular evidence can be crystallized to the effect that though the ocular testimony of a witness has greater evidentiary value vis-a-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved.”

As already observed herein above, in the present case, the autopsy surgeon (PW-12) stated that the fatal blow injury suffered by the deceased was a stab injury which could not have been caused by the axe and the other contusion lacerated wounds (CLWs) suffered by the deceased could not have been caused by sharp side of axe but only by blunt side. It is therefore evident that the injuries suffered by the deceased were not caused by the sharp side of an axe. Therefore the medical evidence on record completely rules out all possibility of ocular evidence being true.

For the same aforesaid proposition i.e. the medical evidence completely rules out all possibility of the ocular evidence being true and therefore ocular evidence may be disbelieved, the learned counsel appearing for the Appellant has also relied upon the other judgments in the case of Mahavir Singh v. State of Madhya Pradesh, Mahadeo Kundalik Vaidya v. State of Maharashtra and Ganga Prasad v. State of UP.

29 We have already noted that, the Trial Court on the basis of the evidence and material on record convicted the Appellant-Accused No.1 under section 302 of the Indian Penal Code and acquitted all the accused of the offence punishable under Section 149 of Indian Penal Code. In the said context it is required to be noted that there are multiple injuries not only on the head but also on the other parts of the body of deceased Iqbal Siddiqui.

Some of the prosecution witnesses have attributed the role to Accused No.1 that he has assaulted on the head and neck of deceased Iqbal Siddiqui. We therefore find considerable force in the submission of the learned counsel appearing for the Appellant – Accused No.1 that, if the charge framed against original Accused No.1, and other Accused Nos. 2 to 6 is for the offence punishable under Sections 147, 148, Section 302 r/w Section 149 and in the alternative under Section 302 r/w 34 of the Indian Penal Code, and if the trial Court acquitted the Accused Nos. 2 to 6, then the charge against Appellant – Accused No.1 shall fail. The learned counsel for the Appellant sought to rely upon the judgment of the Supreme Court in ***Balaka Singh's*** case. In paragraph 8 of the said case, the Supreme Court has observed as under :-

“If the case against the four accused fails, then the entire prosecution will have to be discarded and it will not be possible for this Court to make out a new case to convict the appellants as has been done by the High Court.”

30 In the light of discussion in foregoing paragraphs, we are of the considered view that the impugned judgment and order passed by the trial Court cannot legally sustain, and therefore, inevitable conclusion is that the appellants/accused No.1 is entitled for benefit of doubt. Hence, we pass the following order-

ORDER

- a] Criminal Appeal No.1286 of 2019 is allowed.
- b] The impugned judgment and order dated 26/04/2018 passed by the Additional Sessions Judge, Kalyan in Sessions Case No.161 of 2009 is quashed and set aside.
- c] Appellant – Subhan Usman Shaikh is acquitted of the offences punishable under Section 302 of the Indian Penal Code, 1860.
- d] The Appellant is in jail. He shall be released forthwith, if not required in any other case.
- e] The Appellant shall, within one month furnish a bail in terms of Section 437-A of Code of Criminal Procedure, 1973 in the sum of Rs. 25,000/- (Rupees Twenty Five Thousand) with one surety in the like amount before the concerned Trial Court.
- f] The Appeal stands disposed of.
- g] In view of disposal of Appeal, the Interim Application No.1507 Of 2021 And Interim Application No.1508 Of 2021 do not survive and the same to accordingly stand disposed of as such
- h] A copy of this judgment shall be sent forthwith to Appellant – Subhan Usman Shaikh.

[N. R. BORKAR, J]

[S. S. SHINDE , J]