

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.61 OF 2016

Ajim Shah @ Ajju s/o Amir Shah
Age: 31 years, Occu.: Rickshaw Driver,
R/o. Samta Nagar, Galli No.5,
Aurangabad.

.. Appellant

Versus

The State of Maharashtra

.. Respondent

...
Mr. N. S. Ghanekar, Advocate for appellant.
Mrs. V. S. Choudhari, APP for respondent – State.
...

**CORAM : SMT. VIBHA KANKANWADI AND
Y. G. KHOBRAGADE, JJ.**

DATE : 3rd April, 2023

JUDGMENT :- (Per Smt. Vibha Kankanwadi, J.)

. Present appeal has been filed by the original accused challenging his conviction by learned Additional Sessions Judge, Aurangabad on 11.01.2016 in Sessions Case No.281 of 2013 for the offence punishable under Section 302 of Indian Penal Code.

2. The prosecution story in short is that one Rajendra Uttamrao Khandagale is the Police Head Constable posted at Kranti Chowk Police Station, Aurangabad. He was on duty in the intervening night

of 05.05.2013 to 06.05.2013. A person introducing himself as Ajim Shah (present accused) went to police station around 4.45 a.m. on 06.05.2013 and disclosed to P.W.5 Rajendra that he has killed one Mujju Qureshi by smashing his head by stone on account of quarrel that had taken place earlier night. He also disclosed that the said incident is happened near the construction site at Samta Nagar. Station Diary entry was taken and then P.W.5 Rajendra called Bit Marshal-1 Police Constable Admane and Police Head Constable Lokhande to Police Station. He gave them information and instructed them to go to the place and verify the fact. Police Constable Admane went to Samta Nagar and met Mukhtar Karim Qureshi – father of Mujju and made inquiry about Mujju. It was replied by P.W.2 Mukhtar that Mujju had gone to the house of his Bade Abba and assured that he would make inquiry and inform the police. P.W.2 Mukhtar then gone to the construction site and saw his son Muzaffar @ Mujju lying in pool of blood. One stone was also lying near his body. Ramjan, Wasim, Nazir, who were friends of the deceased, were sleeping by the side of Mujju. P.W.2 Mukhtar had awaken those friends and then all of them carried deceased Mujju to Ghati Hospital, where he was declared dead. P.W.2 Mukhtar then made inquiry with those friends and then lodged first information report with the police station. On the basis of his report, offence vide

Crime No.187 of 2013 came to be registered for the offence punishable under Section 302 of Indian Penal Code. In the meantime, the accused was in the custody of police.

3. After the investigation was handed over to P.W.12 Ashok Sonawane, he executed spot panchanama Exhibit-65 with the help of two panchas and seized articles with the help of experts from the office of Assistant Director of Forensic Lab. He also prepared the inquest panchanama and body was sent for postmortem. He thereafter arrested the accused and seized his clothes. The blood sample of the accused was taken. There was seizure of clothes of deceased. Further the investigation appears to have been conducted by P.W.11 Balaji Sontakke. Statements of witnesses were recorded and after the investigation, charge-sheet came to be filed. After the committal of the case, charge was framed against the accused and when he pleaded not guilty, trial has been conducted. Prosecution has examined in all 12 witnesses to bring home the guilt of the accused and tried to prove many documents. After considering the evidence on record and hearing both sides, the learned Trial Judge hold the accused guilty of committing offence punishable under Section 302 of Indian Penal Code and, therefore, sentenced him to suffer imprisonment for life and to pay fine of Rs.2,000/-. The said conviction is under challenge in this appeal.

4. Heard learned Advocate Mr. N. S. Ghanekar for the appellant and learned APP Mrs. V. S. Choudhari for the respondent - State.

5. It has been vehemently submitted on behalf of the appellant that the prosecution story rests on circumstantial evidence as well as the alleged information given by the accused himself by going to the police station. The case of the prosecution is that the deceased and accused were friends. They had gone to the construction site along with other friends. There was quarrel between deceased and accused when the deceased had checked the pant of accused. They all had consumed liquor. It was further submitted that there is no dispute that the death is homicidal, but whether the accused was the author of the crime and whether the alleged confessional statement can be considered against the accused, are required to be considered. Thus, the prosecution theory has rested on four facts, (i) homicidal death, (ii) quarrel (iii) presence of accused at the night time and (iv) accused was not found on the spot in the morning. In this case, the evidence would show that the behaviour of the police is strange. If it is to be accepted that accused had gone to the police station and informed about the fact that he has killed somebody and then he gives the place also, then what prevented the police from going directly to the place and confirm the said fact. Rather, it shows that the Police Station Officer, to whom the alleged information was given

by the accused, gave call to the Bit Marshal-1 and then asked him to go to the place for inquiry. The said Bit Marshal Admane then goes to the house of deceased and makes inquiry with father of the deceased. Father was unaware about the place where the son has gone or rather it was informed by the deceased to the father that he would be going to the house of Bade Abba and, therefore, that was the information which he passed to the Police Constable Admane. Police Constable Admane does not take pains to take P.W.2 Mukhtar to the place of construction. It is rather mystery as to how P.W.2 Mukhtar came to know about the construction site. Interestingly, Police Constable Admane does not accompany Mukhtar to the place of construction. P.W.2 Mukhtar had stated that when he went to the spot, he found the deceased in injured condition. The stone was also lying near the head and also the three other friends of the deceased were still sleeping. P.W.2 Mukhtar was required to wake them up. Therefore, though they were present there, they are not the eye witnesses. P.W.4 Nazir has deposed about the fact that he as well as accused and others were with deceased and says about the quarrel between accused and the deceased, but says that other friends namely Feroz and Baba had left the place at 2.00 a.m. itself, which is contrary to P.W.2 Mukhtar. P.W.2 states that he found Feroz and Baba on the spot. P.W.6 Feroz has been examined on the point of quarrel

and then he says that he left the spot before the others went to sleep. Same is the case of P.W.7 Shaikh Amir. There are contradictions and omissions. Surprisingly, the police had not made inquiry in respect of those friends, which were found at the spot. How the needle of suspicion had not gone towards them. Further the statements of P.W.6 Feroz and P.W.7 Shaikh Amir as well as P.W.4 Nazir have been recorded belatedly. There is no explanation for the same by the investigating officer for such belated statement under Section 161 of the Code of Criminal Procedure. That means sufficient time was given for building the story. P.W.5 Police Head Constable Rajendra Khandagale is the person to whom the accused had allegedly given the information. He states that he had taken the station diary entry, however, what has been produced on record is the extract of Station Diary at Exhibit-36. It cannot be said to have been proved properly, as the station diary entry was not produced for the inspection of the Court. He has not given any explanation as to why the information given by the informant was not reduced into writing and why the signature of the accused was not taken on such information. He has also not given any explanation as to why the police officer did not go to the spot. P.W.8 Admane is the police officer, who went to the house of P.W.2 Mukhtar, but surprisingly he has been declared as hostile. How a police officer can turn hostile is a question. P.W.10 Vinayak

Shinde is also the police officer, who visited the house of deceased. He has not given the time of his visit to the house of deceased and it is not cleared as to whether he was along with P.W.8 Admane. The learned Trial Judge failed to consider that the alleged quarrel was petty and, therefore, it cannot be said to be the motive to commit crime. Further, the accused was made to sit in the police station and then it is stated that his clothes were seized by police. Testimony of P.W.5 Rajendra is silent on the point that he had seen blood stains on the clothes of the accused. Rather P.W.1 has stated that the clothes were not seized in his presence. He also does not say that there were blood stains on the clothes of the accused. Therefore, there was no such circumstance, which has been brought on record to hold that the accused had committed the said crime. The burden was not discharged by the prosecution beyond reasonable doubt, yet he has been convicted. The reasons given by the learned Trial Judge are perverse and, therefore, the said conviction needs to be set aside.

6. Per contra, the learned APP supported the reasons given by the learned Trial Judge and submitted that the testimony of the prosecution witnesses is corroborative to each other. P.W.4 Nazir, P.W.6 Feroz, P.W.7 Shaikh Amir have stated that they have stated about the quarrel that had taken place and the fact that accused did not like the act of the deceased to check his pant. Accused himself

had gone to the police station to give information and, therefore, the circumstances were properly proved. The postmortem report shows that death was homicidal and even the stone, which was used as a murder weapon, had blood stains. Therefore, there was ample evidence against the accused to hold that he is the author of the crime. He has been rightly convicted and, therefore, no interference is required.

7. We would like to begin our discussion with the testimony of P.W.5 then Police Constable Rajendra Khandagale, who was on duty as Police Station Officer in the intervening night of 05.05.2013 to 06.05.2013 at Kranti Chowk Police Station. He is the person to whom the accused had disclosed about the incident for the first time. He has deposed that a person came to police station around 4.45 a.m. and disclosed that he has assaulted one Mujju in night hours when they were consuming liquor and the said assault was by stone. P.W.5 Rajendra says that he asked the said person about the place of occurrence and the said person told that it was in Samta Nagar at the construction site. P.W.5 Rajendra then took detailed entry in the station diary about the information given by that person and then called Police Constable Admane and Head Constable Lokhande to Police Station. After informing the information to them, he asked them to go to the spot and verify the information. He then says that

after sometime Police Constable Admane came to police station and informed him that he had gone to Samta Nagar and made inquiry with the father of Mujju, who told him that Mujju has gone to the house of his Bade Abba and then Head Constable Shinde also came to police station and told that Mujju was admitted to Ghati Hospital by his uncle. Again the station diary entry in respect of the same was taken and the fact was informed to the control room as well as other higher police officers of the police station. MLC was received around 8.40 a.m. stating that Mujju has expired while undergoing treatment. Entry in respect of that MLC was also recorded in station diary and, thereafter, he says that Mukhtar – father of the deceased gave report. Copy of the station diary entry was shown to P.W.5 Rajendra and it has been exhibited as Exhibit-36, though there was objection stating that the original station diary has not been produced and the witness is not the author of the document. Before we proceed we would like to say that the objection was properly taken. The said document ought not to have been exhibited. Even if it would have been tentatively exhibited, it ought to have been stated so. The law requires that if an objection is taken while recording the evidence, then it should be decided by the concerned presiding officer. We would like to say that even if such exhibit is given on the basis of ratio laid down in ***Bipin Shantilal Panchal Vs. State of Gujarat***

and another, [AIR 2001 SC 1158], yet what has been laid down is that the Court should make note of the objection, but mark the objected document tentatively, but decide the objection at the final stage. We do not find that such exercise has been taken by the learned Trial Judge. There was no hurdle for the prosecution to produce the original station diary for the perusal of the Court. What was produced was the extract. That means it was the secondary evidence as contemplated under Section 65 of the Indian Evidence Act. Another fact to be noted is that it appears to be the prepared document in a sense that it is only in respect of the incident about Mujju and not the station diary of the police station, which goes minute by minute. Therefore, the primary evidence ought to have been produced in this case.

8. The testimony of P.W.5 does not explain as to why no person was sent to the place of occurrence and even though P.W.5 Rajendra says that he had given instructions to Police Constable Admane and Head Constable Lokhande to go to the place of occurrence and verify the information. What was reported back to him by Police Constable Admane was that he has gone to the house of Mujju and made inquiry with Mukhtar. Then P.W.5 does not say that he asked Admane as to why he had not gone to the place of occurrence. He has then stated that he had also given the said information to Bit

Head Constable Shinde on mobile. Police Head Constable Shinde arrived at the police station after Admane arrived and told that Mujju was admitted in Ghati Hospital by his uncle. Now, intentionally the timings are not stated by P.W.5 Rajendra. Though we have already held that Exhibit-36 is not properly exhibited and cannot be read in evidence, yet the testimony of P.W.5 Rajendra, P.W.8 Admane and P.W.10 Shinde would give an impression that the possibility of Admane and Shinde going to the house of deceased almost at the same time cannot be ruled out. P.W.8 Admane also does not give any reason that why he had not gone to the place of occurrence to get the first hand information. Even P.W.10 Shinde has stated that he went to Samta Nagar and made inquiry with uncle of Muzaffar i.e. Mujju, but then he has not stated where that inquiry was made and then said uncle Jakir Qureshi told him that Mujju has been admitted to Ghati Hospital. Therefore, we can certainly say that the police officers have not dealt with the case with utmost sensitivity. When according to them the accused himself had come to the police station and gave the information, a thorough inquiry ought to have been made. They had got the idea that by smashing the stone on the head, Mujju was murdered and still energy has been wasted by the police to make different inquiry than required. P.W.5 Rajendra appears to be the most insensitive police person in this matter, because he had

not even taken care to reduce the said information into writing on a separate piece of paper and get the signature of the accused. When he was receiving the information regarding cognizable offence, he ought to have been reduced it into writing and would have been justified if he would have treated it as FIR. In the cross-examination, he has stated that he has not taken down the FIR, nor registered offence on the basis of information given by the accused. Interesting point to be noted is that in his entire examination-in-chief, he has not disclosed the name of the accused, nor the learned APP has taken pains to get the accused identified from P.W.5 as the same person who had come to give the said information, which according to him he had reduced it into the station diary, however, in the re-examination, the said identification got done. P.W.5 Rajendra has further stated that he was knowing Mujju and his criminal background has appeared with the police station itself. The house of Mujju was at a distance of about 1 to 1.5 kms from police station. He himself had not taken pains to go to the place of occurrence. He admitted that there is overwriting when he had taken the first entry in the station diary and it is in respect of time that is mentioned. Interesting point to be noted is that he says that the person who gave that information was in his custody thereafter, but he did not take any entry in the station diary in respect of the fact that he had taken

that person in the custody. The question therefore arises under which provisions of law and for what purpose that person was taken in custody. Here, the fact remains is that FIR came to be registered around 9.00 a.m. on 06.05.2013, but when the occurrence was earlier reported, there ought to have been the FIR prior to the said time. P.W.5 Rajendra has not stated as to when he had handed over the custody of the accused to the investigating officer. Thus, we found that the alleged information given by the accused cannot be considered as admissible in this case. It cannot even be considered as conduct of the accused, as the person to whom the alleged information was given by the accused, had never gone to the place of occurrence and saw the situation thereby confirming the information. Here, the accused has not led to any kind of discovery though P.W.5 Rajendra says that accused was in his custody. There was no hurdle for him to give the custody of the accused immediately thereafter to his superior or other competent police officer and then go to the place as directed by the accused to get the confirmation about the information. Therefore, the said conduct cannot also be considered under Section 27 of the Indian Evidence Act.

9. The next in line is P.W.8 Police Naik Admane. He has been referred as Police Constable by P.W.5 Rajendra. He has stated that he received phone call from Police Station Officer Khandagale around

5.30 a.m. on 06.05.2013. Khandagale informed him that he should visit the house of Ajim Qureshi for inquiry. Accordingly, he went to the house of Ajim Qureshi. He says that he inquired with Ajim Qureshi about his son Ajju and got the reply that the son is not at home, but the son has gone to the house of Bade Abba. Then he went to police station and informed Police Station Officer accordingly. He then says that the Police Station Officer had called them to police station by telephone. Interesting point to be noted is that thereafter there was request by the prosecution to put questions in the nature of cross to this witness. Section 154 of the Indian Evidence Act gives discretion to the Court to permit a person, who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. However, this discretion is required to be exercised judiciously and not merely by asking by the prosecution or party calling such person as witness.

10. Reliance can be placed on the decision in ***Ravindra Kumar Dey Vs. State of Orissa, [AIR 1977 SC 170]***, wherein it has been observed by the Hon'ble Supreme Court that :-

“Section 154 of Evidence Act is the only provision under which a party calling its own witnesses may claim permission of the Court to cross-examine them... The Section confers a judicial discretion on the Court to permit cross-examination and does not contain any conditions or

principles which may govern the exercise of discretion. It is, however, well-settled that the discretion must be judiciously and properly exercised in the interest of justice. The law on the subject is well-settled that a party will not normally be allowed to cross-examine its own witness and declare the same hostile, unless the Court is specified that the statement of witness exhibits an element of hostility that he has resiled from a material statement which he made before an earlier authority or where the Court is satisfied that the witness is not speaking the truth and it may be necessary to cross-examine him to get out the truth.”

After considering the ratio laid down in ***Dahyabhai Chhaganbhai Thakker Vs. State of Gujarat, [AIR 1964 SC 1563]***, it has been further observed that :-

“ It may rather difficult to lay down a rule of universal application as to when and in what circumstances the Court will be entitled to exercise its discretion under Section 154 of the Evidence Act and the matter will largely depend on the facts and circumstances of such case and on the satisfaction of the Court on the basis of those circumstances. Broadly, however, this much is clear that the contingency of cross-examining the witness by the party calling him is an extra ordinary phenomenon and permission should be given only in special cases. It seems to us that before a Court exercises discretion in declaring a witness hostile, there must be some material to show that the witness has gone back on his earlier statement or is not speaking the truth or has exhibited an

element of hostility or has changed sides and transferred his loyalty to the adversary. Furthermore, it is not merely on the basis of a small or insignificant omission that the witness may have made before the earlier authorities that the party calling the witness can ask the Court to exercise its discretion. The Court, before permitting the party calling the witness to cross-examine him, must scan and weigh the circumstances properly and should not exercise its discretion in a casual or routine manner.”

This law appears to have not been adhered to in the present case.

11. No doubt, the testimony of witness, who has been declared hostile, cannot be excluded in its entirety. In ***Gura Singh Vs. State of Rajasthan, [AIR 2001 SC 330]***, the Hon’ble Apex Court observed that :-

“The terms ‘hostile’, ‘adverse’ or ‘unfavourable’ witnesses are alien to the Indian Evidence Act. The terms ‘hostile witness’, ‘adverse witness’, ‘unfavourable witness’, ‘unwilling witness’ are all terms of English Law.... It is a misconceived notion that merely because a witness is declared hostile his entire evidence should be excluded or rendered unworthy of consideration. The evidence remains admissible in the trial and there is no legal bar to base conviction upon the testimony of such witness.”

12. Further, we may rely on the decision in ***Bhajju Alias Karan Singh Vs. State of Madhya Pradesh, [(2012) 4 SCC 327]***, wherein it

has been observed that :-

“35. Now, we shall discuss the effect of hostile witnesses as well as the worth of the defence put forward on behalf of the appellant/accused. Normally, when a witness deposes contrary to the stand of the prosecution and his own statement recorded under Section 161 of the Cr.P.C., the prosecutor, with the permission of the Court, can pray to the Court for declaring that witness hostile and for granting leave to cross-examine the said witness. If such a permission is granted by the Court then the witness is subjected to cross-examination by the prosecutor as well as an opportunity is provided to the defence to cross-examine such witnesses, if he so desires. In other words, there is a limited examination-in-chief, cross-examination by the prosecutor and cross-examination by the counsel for the accused. It is admissible to use the examination-in-chief as well as the cross-examination of the said witness insofar as it supports the case of the prosecution.”

13. Here, we would like to say that no doubt testimony of a hostile witness can be considered in the light of the ratio laid down in the above-said and other many catena of judgments, but the fact remains is that when the discretionary power vested in the Judge/Court should be exercised, is a question here. P.W.8 Police Naik Admane was the police officer. It is unbelievable that the police officer would give evidence against the prosecution story. It appears that he was

giving some wrong name as Ajim Qureshi and Ajju. Only to that extent he could not have been declared hostile. The further questions after he was declared hostile were the leading questions and, therefore, he was bound to say in the affirmative. Evidence cannot be so led by the prosecution in any criminal case. Therefore, we do not approve the procedure that was undertaken by the learned Trial Judge for declaring him hostile and then extracting those facts by the prosecution, which were as per his statement under Section 161 of the Code of Criminal Procedure.

14. P.W.8 Admane, as aforesaid, has not given any reason as to why he did not go to the construction site. In his cross-examination, he says that there was construction site in the neighbour of house of Mujju. At this stage itself, if we consider the spot panchanama Exhibit-65 then to the western boundary of the place of occurrence, there was house of informant Mukhtar. Therefore, when it was the adjoining site to the place where Admane is stated to have gone, there was absolutely no hurdle to him to go along with P.W.2 Mukhtar and get the confirmation about the information. If we consider the testimony of P.W.5 Rajendra and P.W.8 Admane, what was conveyed by P.W.5 Rajendra was that accused had murdered Mujju at the construction site in Samta Nagar. At the cost of repetition therefore we say that the matter was handled with utmost

insensitivity and seriousness by the police officers.

15. P.W.10 Shinde is also in the same line. He says that he received the message from Police Station Officer and he called him to police station immediately. Accordingly, he went to police station. Police Station Officer asked him that accused Ajim Shah has surrendered before the police and gave the information and, therefore, he instructed him to verify by visiting the place. He says that he went to Samta Nagar and made inquiry with Mujju's uncle Jakir Qureshi and came to know that Mujju came to be admitted to Ghati Hospital. He has also not explained as to why he had not gone to the place of occurrence. He is intentionally silent about the time when he visited the police station and when the Police Station Officer had asked him to go for inquiry. If we consider the testimony of P.W.5 Rajendra he says that he had informed the said fact on telephone to Shinde. He does not say that he had called Shinde to police station. It has come on record that the distance between Samta Nagar and Kranti Chowk Police Station is about 200 to 300 meters. P.W.10 Shinde, in the cross-examination, says that Police Station Officer has not given detailed address to him as to where he is to go. This is surprising. Then it appears that Jakir Qureshi met him coincidentally, as he was standing in the lane and other people had gathered. This shows the casual approach of the police personnel of the rank of Police Head

Constable. It is unimaginable that he would not have got complete instructions and went for the inquiry to be made in the air. Such police personnel i.e. P.W.5 Rajendra, P.W.8 Admane and P.W.10 Shinde cannot be believed and they should not have been believed by the learned Trial Judge.

16. Now, we will turn to the evidence. We would like to deal with the testimony of P.W.2 Mukhtar - father of Mujju at a later point of time, but as per the prosecution story P.W.6 Ferozj and P.W.7 Shaikh Amir, who were the friends of deceased Mujju and accused, were with them in the earlier night. Both of them have stated that they used to go along with Muzaffar @ Mujju, Nazir Shaikh and accused to the construction site of one Haroon Qureshi for sleeping. They both were at the construction site at about 12.00 midnight. They were consuming liquor at that time. They say that one Wasim and Ramju were also there. When they were chitchatting, accused asked Mujju as to whether he had taken his mobile, as the mobile was missing and then accused checked the pockets of the pant of Mujju. On this action, Mujju got annoyed and slapped accused and beat him by leg and fist blows. Shaikh Amir is not saying about the physical assault by Mujju to the accused, but he is saying about the quarrel. Thereafter, all others rescued the quarrel and then slept while talking to each other. They have stated that they had taken dinner

around 2.30 a.m. P.W.6 Feroz says that Nazir slept by the side of accused and thereafter Wasim and then Mujju and Ramju slept thereafter. He himself and Amir were sitting there for about 2.45 a.m. P.W.7 Amir @ Baba then went away and thereafter P.W.6 Feroz went to his house for sleeping. On the next day around 8.00 a.m., he came to know about the incident. P.W.7 Amir is also saying about the same. Thus, it is to be noted that they both have contended that after 2.30 a.m., they were not at the said place. In the cross-examination, P.W.6 Feroz had stated that the said quarrel between the accused and deceased was usual and it was not serious quarrel. He then says that he slept in the auto rickshaw in the lane and woke up at about 8.00 a.m. He has not given any reason as to why he slept in an auto rickshaw instead of then sleeping with friends. Further acts which have come in the cross-examination of the witness are surprising. He says that there were no talks between Ramju, Nazir and Wasim in the hospital. The statement under Section 161 of the Code of Criminal Procedure has been taken after two days, whereas P.W.7 Amir, in his cross-examination, has stated that on the same day, when the incident had taken place thereafter, he had attended a marriage at Khultabad, but he was unable to remember the name of the bride groom. He does not say about the relationship between him and the bride whose name he has told. He then says that he had not come to

Aurangabad for two days and it appears that police had suspected him also. He has answered that he is unable to remember as to whether his fingerprints were taken by the police or not. From the testimony of these two persons, at the most it can be said that they wanted to canvass that they were not present when the incident had taken place. However, if we consider the testimony of P.W.2 Mukhtar, who had gone to the spot after P.W.8 Admane made inquiry about Mujju, he says that when he went to the construction site, he found Mujju in injured condition. He found that Ramjan, Wasim, Nazir and Feroz were sleeping by the side. He is saying about the presence of P.W.6 at the spot, whereas P.W.6 is denying the same. Under such circumstance, the testimony of P.W.6 is untrustworthy.

17. P.W.4 Shaikh Nazir is the another friend who was with deceased as well as accused prior to the incident and also after the incident, that means till he was awakened by P.W.2 Mukhtar. In order to cut short, it can be said that he has also stated about the same quarrel with addition that deceased had extended his apology to the accused. He has then stated that Feroz and Amir @ Baba left the place around 2.00 a.m. He says that father of Mujju awakened them around 6.00 to 6.30 a.m. and then they saw that the deceased was lying in the pool of blood, as his head was smashed. He says that after P.W.2 Mukhtar asked him as to what has happened, they told

that they were sleeping and even accused was sleeping along with them. He also told about the quarrel between deceased and accused. Important point to be noted is that he has not given the distance between one friend and the another friend when they were sleeping. Rather it has not been told by P.W.2 Mukhtar also as to what was the distance between deceased and another friend, who was found near. As aforesaid P.W.6 has given the chronology of the friends when they slept. At the cost of repetition, we would say that P.W.6 has said that P.W.4 Nazir was sleeping by the side of the accused. Thereafter, there was Wasim and then deceased and, thereafter Ramju was sleeping. That means, in between the accused and the deceased, Wasim was sleeping and the prosecution has conveniently not examined him. In his cross-examination P.W.4 Nazir is saying that when P.W.2 Mukhtar had come to wake them up and see the situation, he accompanied by three police persons. This is contrary to P.W.2 Mukhtar. If police had gone to the spot and seen the scene of occurrence, then why the prosecution has not examined those police persons. Those police persons were certainly not P.W.8 or P.W.10. Nazir says that his shirt was smeared with blood and there were some blood stains on his legs also. There is no explanation by him as to when and how his shirt got smeared with blood. Interestingly, police have not seized those clothes. There should have been then blood on the clothes of

Wasim and/or the bed cover/*Chaddar* which he would have been using on that night. Another aspect to be noted is that when the stone would have been thrown of course that would be when the person throwing it should have been standing, then after hitting the head it would fell on either side of the body. As per the spot panchanama, the weight of the stone was 25 to 30 kgs. Definitely, it would have created sound, yet these friends, who were sleeping by the side of deceased, did not wake up is a mystery. None of them are saying that they had consumed heavy quantity of liquor and, therefore, unable to know anything what was going on around them or could not have awakened by another sound. We are also unable to get that when such 25 to 30 kgs. stone was thrown from a height, how the deceased had not screamed. It could have also caused the friends to wake up. Therefore, the mystery as to how the incident would have happened is not solved. Merely because the accused could not be found at the said place, he cannot be said to be the culprit. Here, we are segregating the facts that the accused had allegedly informed the police about the incident. The segregation is as we have already discussed that there is no admissible evidence to prove the said fact. Further the testimony of P.W.4 Nazir is full of contradictions on the material aspects, which have been covered in paragraph No.8 of his deposition. Therefore, we would say that in

order to save themselves, P.W.4 Nazir, P.W.6 Feroz and P.W.7 Amir appears to have made the improvements and, therefore, they are untrustworthy.

18. Now, coming to the testimony of P.W.2 Mukhtar – father of deceased, he has stated that when Police Constable came to his house around 6.30 a.m. and made inquiry about Mujju. He told that Mujju has gone to the construction site of Haroon Qureshi. This is basically contradictory to the station diary entry Exhibit-36, testimony of P.W.5 Rajendra and P.W.8 Admane. As per the prosecution story when Admane went to Mukhtar's house to made inquiry, Mukhtar told that Mujju has gone to the house of his Bade Abba. Now, to whom he was referring to as Bade Abba has not got clarified. What is his relationship with Haroon Qureshi has also not been extracted. P.W.2 Mukhtar had stated that when he went to the construction site and found that Mujju was lying in the pool of blood and one stone was lying near his body, he found that Mujju was dead. Ramjan, Wasim Nazir and Feroz were found sleeping by the side and then he woke them up, asked them and then they told about the quarrel between accused and deceased earlier night. It was told to him that the said quarrel was in respect of memory card of the mobile, which is again contrary to what friends are saying. In his cross-examination, he has stated that the construction work was going on since about the year

prior to the incident and since about one week prior to the incident his son was going to the said plot for sleeping. He says that he was not knowing that his son used to go for sleeping on the said plot till the police came and made inquiry with him. He says that deceased was married and was having three daughters. He then says that his son was not having any inimical terms with the accused. There was no quarrel between Wasim, Ramjan and Nazir on one side and his son on the other side. In his cross-examination, he has further stated that as he saw police had come to his house in the morning he was disturbed. Police asked him as to whether there was quarrel at that place and asked where Muzaffar is and then he says that he told Muzaffar was sleeping on the plot. Police did not went along with him at that time, but police went away after asking about Muzaffar. This rather supports the conduct of P.W.8 Admane that he did not accompany Mukhtar to the spot. But it is contrary to what P.W.4 Nazir has said. It has come in the evidence of P.W.2, P.W.4, P.W.6 and P.W.7 that they were in Ghati Hospital and also the other friends, who were there at the night time with Mujju and accused, but police did not make any inquiry with them at that time. P.W.12 then Police Inspector Sonawane has not given any reason as to why the statements of witnesses have been recorded belatedly and no inquiry was made immediately with them. Another discrepancy which can

be found from the testimony of P.W.2 Mukhtar is that in the cross-examination he has stated that his son was having good habits, but sometimes he used to drink liquor. His friends Wasim, Nazir, Ramjan and Feroz were not having habit of drinking liquor. This is contrary to what the friends have stated. It has also been brought on record that Mujju was having criminal background. Under such circumstance, possibility of someone killing him cannot be ruled out, but the prosecution has failed to connect the accused to the crime.

19. P.W.1 Kishor is the panch witness to the spot panchanama as well as arrest panchanama of the accused and the seizure of his clothes. In his examination-in-chief, he has stated that the clothes of the accused were having blood stains, so also it is mentioned in the panchanama Exhibit-21. The blood sample of the deceased was sent to chemical analysis and the report Exhibit-73 says that the blood group of the said sample cannot be determined as the results were inconclusive. Same is the case as regards the blood sample of the accused. As regards the blood that was found on the clothes of the accused, there was blood sample of group-B and also on the mattress and the other samples which were taken from the spot. However, as aforesaid, the blood group of the deceased has not been grouped. Therefore, the CA reports are also not favourable to the prosecution.

20. P.W.9 Dr. Vikas Rathod is the medical officer, who had conducted autopsy. He had found five external injuries, which were as follows :-

- “1) Lacerated wound on right temporal region of head of size 4 cm x 1 cm x bone deep with contused irregular and blood inflicted margins, reddish.
- 2) Abrasion of size 2 cm x 1 cm on right side of forehead, just above right eyebrow, reddish.
- 3) Abrasion of size 10 cm x 8 cm on right side of face, irregular and reddish.
- 4) Two abrasions on left arm on lateral aspect of upper; one of size 1.5 cm x 1 cm and lower one of size 3 cm x 1 cm reddish.
- 5) Abrasion of size 1 cm x 1 cm on dorsal aspect of right index finger, reddish.”

Thereafter, he had also found the internal injuries to the head, skull, brain and, therefore, he has given his opinion that the cause of death is due to head injury. The stone was not shown to him while giving opinion regarding cause of death. But still we can say that from his testimony it can be said that deceased died a homicidal death, however, prosecution has failed to establish the link with the accused.

21. The prosecution was able to bring it on record that the accused

had slept with other friends and deceased, but he could not be found in the morning. Under such circumstance, when it was the construction site i.e. the building under construction, which was open and the other friends, though present at the spot, had not noticed any incident, it can be concluded that the prosecution failed to prove the guilt of the accused beyond reasonable doubt. Mere suspicion howsoever strong it would be, will not take the shape of proof and, therefore, we hold that the learned Trial Judge went wrong in convicting the accused. When the appreciation of evidence is based on wrong assumptions, leading to wrong conclusion, then the Appellate Court would be justified in interfering with such findings. We, therefore, conclude that the appeal deserves to be allowed by setting aside the impugned order. Hence, the following order :-

ORDER

- I) The appeal stands allowed.

- II) The conviction of the appellant viz. **Ajim Shah @ Ajju s/o Amir Shah** in Sessions Case No.281/2013 by learned Additional Sessions Judge, Aurangabad on 11.01.2016 for the offence punishable under Section 302 of the Indian Penal Code, 1860 stands set aside.

III) Appellant/accused stands acquitted of the offence punishable under Section 302 of the Indian Penal Code. He be set at liberty, if not required in any other case.

IV) The fine amount paid/deposited, if any, be refunded to the accused after the statutory period.

V) We clarify that there is no change in respect of order of disposal of muddemal.

[Y. G. KHOBRAGADE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm