

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**BENCH AT AURANGABAD**

**CRIMINAL APPEAL NO.353 OF 2016  
WITH  
CRIMINAL APPLICATION NO.3912 OF 2022**

Rahul S/o Gokul Shinde,  
Age-28 years, Occu:Agri.,  
R/o-Vaidyakini, Tq-Patoda,  
District-Beed.

**...APPELLANT  
(Orig. Accused No.1)**

**VERSUS**

The State of Maharashtra

**...RESPONDENT**

...  
Mr. Nilesh S. Ghanekar Advocate for Appellant in Criminal  
Appeal No.353 of 2016 and for Applicant in Criminal  
Application No.3912 of 2022.  
Mr. A.V. Deshmukh, A.P.P. for Respondent – State.  
...

**AND**

**CRIMINAL APPEAL NO.352 OF 2016  
WITH  
CRIMINAL APPLICATION NO.3913 OF 2022**

Ashok s/o Shahadeo Shinde,  
Age-23 years, Occu:Agri.,  
R/o-Vaidyakini, Tq-Patoda,  
District-Beed.

**...APPELLANT  
(Orig. Accused No.2)**

**VERSUS**

The State of Maharashtra

**...RESPONDENT**

...  
Mr. Govind Kulkarni Advocate appointed for Appellant in  
Criminal Appeal No.352 of 2016 and for Applicant in  
Criminal Application No.3913 of 2022.  
Mr. A.V. Deshmukh, A.P.P. for Respondent – State.  
...

**CORAM: SMT. VIBHA KANKANWADI AND  
ABHAY S. WAGHWASE, JJ.**

**DATE : 12<sup>th</sup> JUNE, 2023**

**JUDGMENT [PER SMT VIBHA KANKANWADI, J.] :**

1. Both these appeals are filed by original accused Nos. 1 and 2 challenging their conviction in Sessions Case No.39 of 2012 by the learned Additional Sessions Judge, Beed on 12<sup>th</sup> May 2016 after holding them guilty of committing offence under Section 302, 326 read with Section 34 of the Indian Penal Code.

2. It is the prosecution story that an information was received by Neknoor Police Station that the person was murdered and his dead body was lying in Kacharwadi Ghat. Therefore, police inspector Dinkar Damble, PW-21 went to the spot. He prepared inquest panchnama as well as spot panchnama. One motorcycle bearing No. MH-U-5909, one Samsung mobile, pair of sleeper, were seized from the spot along with the blood stained soil as

well as plain soil. Dead body was sent for postmortem. The call details in respect of the mobile were taken and during the investigation it was revealed that the said mobile belongs to deceased Yeshwant Mohite. In the said mobile there were some objectionable photographs of deceased Yeshwant with accused No.4. Accused No.4 is the wife of accused No.1. The said incident had taken place on 22<sup>nd</sup> December 2011.

3. It is the further prosecution story that it was then revealed that one Pandurang Markad was along with the deceased Yeshwant. He was admitted in Civil Hospital, Beed as injuries were received by him. Till 11.00 p.m. on that day i.e. 22<sup>nd</sup> December 2011, he was in the Civil Hospital, however, thereafter he was shifted to Dr. Bembde Hospital, Aurangbad, where he was admitted for about seven days. When he was in Civil Hospital, Beed, at that time his statement was recorded by police and it has been treated as First information Report (for short "FIR"). In the said FIR, he had given names of the accused assailants as - 1) Gajanan Sajgane, 2) Sakharam Mohite, 3) Krishna Mohite and 4) Sunil Mohite, and two unknown persons. On the basis of said statement, the offence vide Crime No.149 of 2011 came to be registered and investigation was started. Thereafter supplementary statement of Pandurang has

been recorded on 7<sup>th</sup> January 2012 and in the said supplementary statement he told that the persons whose names he had disclosed in the FIR were not the assailants but, Rahul Gokul Shinde, Ashok Shahadeo Shinde, Nilesh Raosaheb Pawar were the assailants and therefore, those persons came to be named as accused. Accused No.1 came to be arrested on 24<sup>th</sup> December 2011 and accused No.4 came to be arrested on 25<sup>th</sup> December 2011. Accused Nos. 2 and 3 came to be arrested on 26<sup>th</sup> December 2011. In the meantime panchnama of the spot came to be executed and the statements of the witnesses were recorded. After the arrest of accused persons, weapon came to be seized under the discovery panchnama and identification parade has been held. Some electronic evidence also tried to be collected and the prosecution came with the story that there was love affair between the deceased and accused No.4, prior to her marriage with accused No.1. Even after the marriage the relationship continued and accused No.4 used to meet deceased, therefore, with the common intention accused No.4 had called the deceased to meet her at village Vaidyakini. When the motorcycle of deceased was in Kacharwadi Ghat, at that time a white Vista car came from behind and gave dash to the motorcycle. As a result of which Pandurang literally got jumped

and fell on the road towards left side and deceased Yeshwant, who was driving the motorcycle, was dragged by car at a distance. Thereafter the accused persons got down from the car, went towards the deceased and assaulted him by sword. Injured Pandurang had tried to go towards the deceased but he was assaulted and therefore in order to rescue himself, he jumped into the valley and went down. However, while going down he had seen towards the deceased and found that the accused were assaulting him. After he went down to the valley, he gave phone call to Shivaji Mohite, who is the uncle of the deceased and informed him about the incident. He had also met some villagers from Kacharwadi and disclosed the incident to them. As per the prosecution story, the uncle of the deceased and brother-in-law of injured Pandurang went there and took Pandurang to Phoenix Hospital, Beed. The postmortem report and injury certificates have been collected. The seized articles were sent for Chemical Analyzer and the reports have been received and thereafter the charge-sheet was filed.

4. After committal of the case, all the accused appeared before the learned Additional Sessions Judge. Charge was framed for the offence punishable under Section 302, 326, 120-B read with Section 34 of the Indian Penal Code, Section 4

punishable under Section 25 of the Indian Arms Act. The trial has been conducted. Prosecution has examined in all 24 witnesses. After considering the evidence on record and hearing both the sides, the learned Additional Sessions Judge held accused Nos. 1 and 2 guilty of committing offence under Section 302 and 326 read with Section 34 of the Indian Penal Code. They have been sentenced to suffer imprisonment for life and to pay fine of Rs.1000/- each, in default to suffer simple imprisonment for three months, for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code. Further, they have been sentenced to suffer rigorous imprisonment for five years and to pay fine of Rs.1000/- each, in default to suffer simple imprisonment for one month, for the offence punishable under Section 326 read with Section 34 of the Indian Penal Code. The accused persons were never released on bail from the date of their arrest and therefore, set off under Section 428 of the Code of Criminal Procedure has been granted. Accused Nos. 1 and 2 came to be acquitted of the offence punishable under Section 120-B of the Indian Penal Code and Section 4 punishable under Section 25 of the Indian Arms Act. Accused Nos. 3 and 4 were acquitted of all the offences. Therefore,

original accused Nos. 1 and 2, being aggrieved by the said conviction, filed the present Appeals.

5. It will not be out of place to mention here that accused No.2 had, later on, given a letter saying that he is unable to afford fees of the Advocate who he had appointed earlier and therefore, learned Advocate Mr. Govind Kulkarni came to be appointed to represent him, by order dated 17<sup>th</sup> April 2023.

6. Heard learned Advocate Mr. Ghanekar, appearing for the appellant in Criminal Appeal No.353 of 2016, learned Advocate Mr. Govind Kulkarni, appointed to represent the appellant in Criminal Appeal No.352 of 2016 and learned APP Mr. Deshmukh, appearing for the State. Perused the Record and Proceedings.

7. It has been vehemently submitted on behalf of both the appellants that the prosecution says that it's case is based on direct as well as circumstantial evidence. The postmortem report of Yeshwant, Exhibit-39 came to be proved through PW-16 Dr. Pravin Deshmukh. He has found eleven external injuries and four internal injuries on the dead body of Yeshwant, as noted down in the postmortem report. Therefore, the medico legal expert says that all the injuries were sufficient, in the ordinary course of

nature, to cause death and the probable cause of death was "due to haemorrhagic shock due to injuries to vital organs like liver." It can be fairly said that the prosecution had proved that death of Yeshwant is homicidal in nature. Further, the injuries of PW-10 Pandurang came to be proved through PW-17 Dr. Pramod Shinde, who was attached to Civil Hospital, Beed. He has stated that around 7.50 p.m., on 22<sup>nd</sup> December 2011 he had examined Pandurang and found four injuries, as per medical certificate Exhibit-106. PW-17 Dr. Pramod Shinde says that injury No.1 is possible by sword. In the cross-examination this witness admitted that injury No.1 cannot be gathered about its exact location on the forearm. Colour of the injury was not mentioned in Exhibit-106 as well as in MLC register which was brought by this witness on the day of evidence. He has admitted that injury Nos. 2 to 4 were minor and superficial and were possible while rolling in valley if there are shrubs, trees, stones etc. Though injury No.1 is stated to be grievous, it has been submitted by learned Advocate for the appellants that it will not attract Section 326 of the Indian Penal Code.

8. It has been further submitted on behalf of the appellants that PW-10 Pandurang is the informant who had given FIR when he was in conscious state of mind. He had specifically named the

persons, who, according to him, were the assailants. If we peruse the FIR Exhibit-78, then it can be seen that specific role is also attributed to each of the accused mentioned therein. Further, it has come on record that PW-10 Pandurang was educated person. Under said circumstance, why there was thumb impression on FIR Exhibit-78, is not explained. In his examination-in-chief, Pandurang has not stated as to how he was knowing those persons whose names he had disclosed in Exhibit-78, because he is resident of a different village and the alleged assailants were from different place. In fact according to his testimony, he had given the names of the assailants on the basis of the information given by the relatives of the deceased. Then he says that when he was discharged from Bembde Hospital, Aurangabad, he had returned to his village Tartewadi and then, after about 2 to 3 days P.I. Damble and one Thadkari constable from Neknoor police station came and recorded his statement. Informant says that at that time he narrated the real incident before police. He had no idea and was not knowing the four persons whose names he had given in the FIR Exhibit-78. Those names were mentioned on a chit given to him by one person and then he says that prior to the incident he had not seen the persons who had committed the offence. Pandurang

then says that he has taken part in the identification parade and he says that he had identified the accused persons. However, in the cross-examination political angle has been brought on record and the informant has clearly stated that he does not know who had given the chit containing names of the persons which he had mentioned in FIR Exhibit-78, but he was certain that the said chit was given. According to him, that person, who gave the chit, was present in the hospital when his FIR was recorded. Therefore, it shows that the said injured is absolutely not believable. In the cross-examination, informant has further admitted that he had given names of four persons in the FIR on the basis of the information given by the relatives of Yeshwant and the relatives later on told him that Rahul, Ashok and Nilesh had beaten Yeshwant. Eye witnesses are not required to be told by somebody. Further, it has come on record that the police had shown Pandurang the photographs of accused Nos. 1 to 3 prior to the identification parade. Testimony of PW-10 Pandurang, therefore, ought to have been discarded by the trial Court. The remand report dated 25<sup>th</sup> December 2011, after accused Nos. 1 and 4 were arrested, makes a mention that CDR of the calls on Mobile No. 9822156361 have been collected and it shows that prior to the incident, deceased had contacted on Mobile

No. 9561479768. This CDR have not been produced and proved at all by the prosecution, which according to the investigating officer, led to the connection of the accused to the crime.

9. It has been further submitted on behalf of the appellants that PW-11 Shaikh Yunus Shaikh Mehboob has been posed as eye witness, but his testimony would show that he is a chance witness. It is absolutely not coming on record from him as to how he was knowing the accused persons. If he had seen the alleged incident from some distance, the natural conduct would have been different. PW-11 Shaikh Yunus has not informed the incident to anybody and his statement has been recorded belatedly. Statement of PW-11 Shaikh Yunus has been recorded on 23<sup>rd</sup> December 2011 and he had given different names of the assailants in his statement under Section 161 of the Code of Criminal Procedure than the names given by the informant Pandurang in his FIR. It appears that investigating officer has given more importance to the statement of PW-11 Shaikh Yunus than the FIR lodged by PW-10 Pandurang, because Pandurang is disclosing names of the present accused only on 7<sup>th</sup> January 2012 when his supplementary statement has been recorded. Therefore, the prosecution story itself is unbelievable, unreliable.

Major witnesses have turned hostile. PW-12 Krishna Mohite appears to be the friend of deceased Yeshwant. He gives a different story. Admittedly, he was not present at the spot but the enmity has been brought on record. Same is the case with PW-14 Shivaji Mohite, to whom the information about dead body lying at Kacharwadi Ghat, was given. In fact his testimony is contrary to PW-11 Shaikh Yunus. Shaikh Yunus says that he took the call which had come on the Mobile of deceased and told that deceased has been murdered, but then he does not say that he has disclosed his name to PW-14. But PW-14 Shivaji Mohite says that he had called on the Mobile of deceased and call was received by PW-11 Yunus. PW-1 Kadri Sayed is the panch to the recovery panchnama, but in the cross-examination he admits that they had reached along with the weapons, which were taken out from the well, near the vehicle and the weapons were kept under the seat of the vehicle and then they went to the police station. That means the weapons were not sealed at the spot. PW-1 Kadri Syed in his examination-in-chief says that weapons were taken out on 27<sup>th</sup> December 2011, from the well. That means from 22<sup>nd</sup> December 2011 to 27<sup>th</sup> December 2011 those weapons were in the well, having water, yet the CA Report shows that blood was detected on the weapons. Thus, possibility of

tampering of the evidence cannot be ruled out. All these things were not seen by the learned trial Judge and therefore, there is miscarriage of justice when accused Nos. 1 and 2 have been convicted. Further, with the acquittal of accused Nos. 3 and 4, the motive has also gone and it is not brought on record by the prosecution that there was love affair between accused No.4 and deceased Yeshwant, even prior to her marriage with accused No.1 and that then it was accused No.4 who had called the deceased, as a plan of trap, to Vaidyakini. Both the learned Advocates prayed for acquittal by allowing the Appeals.

10. Per contra, the learned APP strongly supported the reasons given by the learned trial Judge. It is submitted that though the FIR alleged involvement of four other persons, yet the informant, PW-10 Pandurang has corrected himself and given supplementary statement on 7<sup>th</sup> January 2012. He himself has sustained injuries and had sufficient time to observe the accused persons who were assaulting Yeshwant as well as informant himself. When the accused have admitted the spot panchnama as well as the fact that Yeshwant was murdered, then the only question was, who had committed the said murder and caused grievous hurt with sword to PW-10 Pandurang. PW-11 Shaikh Yunus has witnessed the incident from some distance. There is

no question of planting him as a witness. He had picked up a phone call which was given by PW-14 Shivaji and gave information as to where exactly the incident had taken place. The weapons have been discovered by the accused. Accused were the only persons who were knowing where they have kept the weapons and therefore, the discovery has been properly proved under Section 27 of the Indian Evidence Act. Sword has been discovered by accused No.2 and dagger has been discovered by accused No.1. The prosecution had proved the offence beyond reasonable doubt. There is no merit in the Appeals and the same deserve to be dismissed. Accordingly, it is prayed that both the Appeals be dismissed.

11. Testimony of PW-16 Dr. Pravin Shankarrao Deshmukh who had conducted the autopsy of the dead body of Yeshwant on 22<sup>nd</sup> December 2011 had found about 11 external injuries, as follows:-

- "1) Abrasion over right side of eye, 2 x 2 cm.
- 2) Incised wound over right lumbar region, 3 x ½ x 6 cm.  
Stab wound,
- 3) Incised wound over mid spine, 3 x ½ x 4 cm. stab wound,
- 4) Incised wound over left upper quadrant of abdomen  
stab wounds,  
A. 2 x ½ x 8 cm.  
B. 2 x ½ x 7 cm.  
C. 2 x ½ x 9 cm.

- 5) Incised wound over right lateral side of back 2 x ½ x 10 cm., stab wound,
- 6) Incised wound over right mid forearm, 15 x 4 x ½ cm.
- 7) C.L.W. over right dorsem of hand near thumb, 3 x 2 x ½ cm.
- 8) Abrasion over left knee 3 x 2 cm.
- 9) Abrasion over right shoulder 5 x 3 cm.
- 10) Abrasion over left shoulder 5 x 3 cm.
- 11) Abrasion on little finger of left hand, 2 x 2 cm. "

12. Further, PW-16 Dr. Pravin Deshmukh had found following 4 internal injuries on the dead body of Yeshwant:-

- "1) Haemoperitonum means blood collected in abdomen.
- 2) Small intestine, Haemoperitonum (plus) intestine come out through penetrating injury.
- 3) Small and large intestine having perforation injury.
- 4) Liver ruptured due to penetrating injury right lobe. "

13. PW-16 Dr. Pravin Deshmukh therefore says that the probable cause of death was "due to haemorrhagic shock due to injuries to vital organs like liver." Accordingly, he had issued postmortem report Exhibit-102. There is no serious cross-examination of this witness. Therefore, taking into consideration the testimony of this witness, we can definitely say that death of Yeshwant is homicidal in nature. Now it is required to be seen, as

to whether accused Nos. 1 and 2 were the authors of the crime and whether they had committed offence punishable under Section 326 read with Section 34 of the Indian Penal Code in case of injuries to PW-10 Pandurang Markad.

14. The case of the prosecution is based on two eye witnesses, PW-10 Pandurang, who is the informant as well as injured and PW-11 Shaikh Yunus, who is said to have being the passer-by at the relevant time. If they are establishing the appellants as authors of the crime, then only there is necessity to consider the other evidence on record which is corroborative in nature.

15. PW-10 Pandurang's FIR Exhibit-78 is against four different persons than those four persons against whom the charge-sheet was filed. Therefore, it was for the prosecution to prove as to how the other accused persons emerged as assailants. Perusal of the FIR Exhibit-78 would give a clear picture that Pandurang was knowing those four persons and he says that there were two more unknown persons. In FIR Exhibit-78 Pandurang gives the names of those persons who committed the offence as -  
1) Gajanan Sajgane, 2) Sakharam Mohite, 3) Krishna Mohite and 4) Sunil Mohite. Important point to be noted is that he has assigned a specific role to Gajanan Sajgane. According to him,

Gajanan had assaulted Yeshwant. He himself was assaulted by unknown person by sword. Then he says that he fell in the valley and went down in the valley itself in a field. The persons from the field lifted him and took him to village. He, thereafter made phone call, whereupon his family members came and took him to hospital. He then says that he was brought to Phoenix Hospital by one Krishna Mohite and Deepak. He has not clarified in the FIR as to whether he wanted to say that Krishna Mohite as assailant or along with the assailants was different from Krishna Mohite who brought him to Phoenix Hospital. The fact has to be noted that in his substantive evidence Pandurang has not named those four persons. He says that he has given a phone call to his brother-in-law Kalyan Kapse and uncle of Yeshwant – Shivaji Mohite who had then come to take him. He was then taken to Phoenix Hospital. According to him, a chit was given by unknown person from Jirewadi containing the names of four persons i.e. above four persons named in the FIR and he says that as he was mentally disturbed, he gave the said names to the police but the chit fell in the hospital itself. He has then stated that he was shifted to Civil Hospital, Beed on the same night and then he was taken to Bembde Hospital, Aurangabad, where he was admitted as indoor patient for about seven days. Thereafter he

says that he came to know about the love affair between deceased Yeshwant and accused No.4 and also about the fact of husband of accused No.4 i.e. present accused No.1 getting the knowledge of the said love affair. Then he says that he came to know about the names of the real assailants thereafter. This conduct on the part of the informant is absolutely not natural.

16. Now, we would consider the testimony of PW-17 Dr. Pramod Bharatrao Shinde, who was the medical officer from Civil Hospital, Beed where PW-10 Pandurang was examined around 7.50 p.m., on 22<sup>nd</sup> December 2011. He had found following four injuries on the person of Pandurang, as per medical certificate Exhibit-106:-

- "1) Incised wound on left forearm 10 x 8 cm. Pendent deep within 12 hours, caused by sharp weapon grievous in nature,
- 2) Friction abrasion over left knee 2 x 2 cm. Within 12 hours, caused by hard and blunt object, simple in nature,
- 3) Friction abrasion over right knee 1 x 1 cm. Within 12 hours, hard and blunt object, simple.
- 4) Friction abrasion over left foot, 1 x 1 cm. Within 12 hours, hard and blunt object, simple in nature. "

17. According to this witness PW-17 Dr. Pramod Shinde, informant Pandurang had given history of assault. That means Pandurang was not in a condition not to give statement. His FIR

Exhibit-78 was taken in the Civil Hospital itself. From his cross-examination as well as FIR it can be seen that Pandurang is an educated person. If this is the background, then why he should rely upon an unknown person who alleged to have given a chit containing the names of the persons who had assaulted him. Further, it is rather surprising that before the police can take up the investigation, another person who was not eye witness would give the names of some other four persons and the informant would tell names of those persons as the persons who killed his friend Yeshwant and had also attacked him. This is all a fishy story. In his FIR Exhibit-78 Pandurang has stated that he himself and Yeshwant started their journey on 22<sup>nd</sup> December 2011 to go to the maternal aunt of Yeshwant, whereas in his examination-in-chief he comes with the said story of love affair between Yeshwant and accused No.4 and that even after the marriage accused No.4 used to talk to deceased Yeshwant. The supplementary statement of PW-10 Pandurang came to be recorded on 7<sup>th</sup> January 2012 wherein the story was entirely changed and then the present four accused came to be introduced. In his examination-in-chief PW-10 Pandurang says that after he was admitted to Bembde Hospital, he came to know from his relatives about the incident and then he realized that

names of the four persons given in the FIR were false. He was not specific to say that on which day he came to know about the names of the real assailants. In his cross-examination it has been tried to be brought on record as to whether he was aware about the fact that what will happen if he gives wrong names in the FIR. He had not discussed with anybody in respect of the names of the four persons given in the FIR. Nobody had talked to him regarding the same. Even after realizing that he has given wrong names, he has not made any attempt to call the police officer and give a clarification before 7<sup>th</sup> January 2012. He says that after his discharge, he went to his brother's house at Aurangabad and thereafter returned to Tartewadi and 2 to 3 days thereafter the investigating officer met him and recorded his supplementary statement. A citizen, especially the informant cannot be so reckless even after realizing that in his FIR he has given wrong names of the assailants.

18. Further, PW-10 Pandurang in his cross-examination admits that till the day of his testimony he had not disclosed the name of the person to the police, who had informed him those wrong names. Even the police have not made any inquiry as to who was the person who handed over the said chit to the informant. This inquiry in fact ought to have been made by the investigating

officer, who recorded the supplementary statement on 7<sup>th</sup> January 2012. In clear words, Pandurang has admitted that he had given the names of four persons in the FIR on the basis of the information given by the relatives of deceased Yeshwant and those persons later on told him that present accused Nos. 1 to 3 had beaten deceased Yeshwant. Thus, it can be seen that the supplementary statement appears to be creation of relatives of the deceased and the investigating officer.

19. Another fact which has to be connected at this stage with the testimony of PW-10 Pandurang is that as per the investigating agency, PW-11 Shaikh Yunus went to the police station and then posed himself as eye witness and then gave the names of present accused Nos. 1 and 2. He has stated about the presence of third person but it appears that he had not named him. Statement of PW-11 Shaikh Yunus was recorded on 23<sup>rd</sup> December 2011 i.e. on the next day of the incident. The record further shows that present accused Nos. 1 and 4 came to be arrested on 24<sup>th</sup> December 2011 and 25<sup>th</sup> December 2011, respectively. At that time supplementary statement of the informant was not recorded at all. The remand report dated 25<sup>th</sup> December 2011 would show that a Mobile handset of black colour was found near the dead body and on that Mobile, phone

calls from Mobile No. 9822156361 were received. It is specifically mentioned that the call records i.e. incoming as well as outgoing have been procured, which shows that prior to the incident and after the incident a person calling from Number 9561479768 was continuously contacting. The call records of Mobile No. 9822156361, which was stated to have been found near the dead body, were never produced during the trial. This shows the suppression of best evidence by the prosecution.

20. Secondly, if we consider the testimony of PW-21, the then P.I. Dinkar Damble, the same would show that he has not stated the basis on which he arrested present accused Nos. 1 and 4 on 24<sup>th</sup> December 2011 and 25<sup>th</sup> December 2011, respectively. It appears that he has given more importance to the statement of PW-11 Shaikh Yunus than the FIR Exhibit-78 lodged by PW-10 Pandurang. Here, Pandurang was not only the eye witness but was the injured eye witness and PW-11 Shaikh Yunus was only the eye witness. Therefore, the investigating officer, before arresting present accused Nos. 1 and 4, had not considered at all as to whether he should wait till the further confirmation. It appears that he was under the pressure from the relatives of deceased Yeshwant. In his cross-examination PW-21 Damble has stated that there is no entry taken by him in the station diary

that there were four accused persons, till 24<sup>th</sup> December 2011. He admitted that direction of investigation changed after the statement of eye witness Shaikh Yunus was recorded. But he has not taken entry in the station diary about recording of the statement of witness Shaikh Yunus. First of all, it has to be noted that station diary is different from case diary. In addition to that, PW-21 Damble says that there was no mention about recording of statement of Shaikh Yunus in the first *Remand Yadi*, by which accused Nos.1 and 4 were produced before the Magistrate.

21. Before proceeding to scrutinize further evidence of PW-10 Pandurang, the testimony of PW-11 Shaikh Yunus is also required to be considered. This witness is resident of village Charatha. That means, he is not the resident of either Jirewadi or Vaidyakini from where the other witnesses belonging to. This witness has said that on 22<sup>nd</sup> December 2011, he was on his motorcycle and was proceeding to Patoda where his brother-in-law resides. He started his journey at about 10.15 a.m. and he was supposed to go by Kacharwadi, Vaidyakini and then Bhayala. He says that he returned at about 2.15 p.m. from Patoda to come to Charatha. He took a halt for cup of tea at Vaidyakini Phata and thereafter he came in Kacharwadi Ghat at about 2.00 p.m. to 2.15 p.m. He again corrected himself that he has

reached to Ghat section around 3.00 p.m. to 3.15 p.m. When he came on the turning of the Ghat, he saw that one motorcycle was coming and behind it there was white coloured Indica car. car gave dash to the middle portion of the motorcycle and therefore he halted his vehicle near a tree known as '*Phulari*'. The pillion rider of the motorcycle fell down, then got up and proceeded towards Indica car from the right side, while running. The driver of the motorcycle fell in front of the car. One person got down from the car with sword in his hand, from the back door of the car and attempted to give blow to the person who came running. That person took the said blow on his hand and then jumped into the valley. The driver of the Indica car came out and took out a *Khanjar*. This witness PW-11 Shaikh Yunus says that he identified that person as tractor driver Rahul Shinde i.e. accused No.1 and then he says that Raul Shinde gave blow of *Khanjar* on the person of driver of the motorcycle. Shaikh Yunus then says that the person who gave blow of sword on the pillion rider of the motorcycle was Ashok Shinde i.e. accused No.2. Then he says that Rahul and Ashok, both are the resident of village Vaidyakini. The third person was having iron rod in his hand and he was looking here and there. Thereafter, all the three persons went in the car. Important point to be noted is that

Shaikh Yunus has given the vehicle Number as – MH-23-Y-720. In his examination-in-chief Shaikh Yunus has not stated as to how he was knowing accused Nos. 1 and 2. Merely by saying that they are residents of Vaidyakini, the thing does not end. When he had given their names in his statement under Section 161 of the Code of Criminal Procedure on 23<sup>rd</sup> December 2011, he should say as to how he was knowing accused Nos. 1 and 2 prior to 22<sup>nd</sup> December 2011. The prosecution has not brought this fact on record. It has come on record in the cross-examination of Shaikh Yunus that there are two roads to go between Patoda and Charatha. There are material improvements in his examination-in-chief as compared to his statement under Section 161 of the Code of Criminal Procedure, as regards the place from where he had witnessed the alleged incident. According to him, the entire incident ended within 5 to 6 minutes and he had left the spot after about 4 to 5 minutes. The further assessment of his testimony would be taken up at a later stage, but as aforesaid, suffice it to say that he has not stated as to how he was knowing accused Nos. 1 and 2 prior to 22<sup>nd</sup> December 2011. Even if we consider that he would have disclosed the names of three male persons, on what basis accused No.4 came to be added as accused and was arrested by

PW-21 investigating officer, has not been indicated by him. Till then the love triangle had not come in light in the form of statement of any witness.

22. Coming back to the testimony of PW-10 Pandurang, he has stated that after the dash was given by the car to their motorcycle, deceased Yeshwant along with motorcycle got dragged up to 7 to 8 feet on the road after he himself had fallen on the ground. If we consider this fact together with the panchnama of seizure of motorcycle, then we cannot get that much damage to the motorcycle or the dragging marks. If we consider the spot panchnama Exhibit-53 which has been admitted by the accused persons, there was distance of about 35 feet between the dead body and the motorcycle. The dead body was ahead of the motorcycle. The dragging marks are towards the left side of the motorcycle but it is in the form of damage to the fiber. As per PW-11 Shaikh Yunus he was witnessing the incident by standing near the *Phulora* tree, however the spot panchnama does not show that there was any such tree. There was a tree of Neem, that too, towards the valley. There is a cement railing towards the valley and PW-10 Pandurang says that though he jumped beyond the railing, he was standing on

the said cement railing and watched the incident from that place. PW-10 Pandurang does not speak about the presence of PW-12 Krishna Mohite, though as aforesaid he states that he was admitted to the hospital by Krishna Mohite, when in fact his FIR is also against Krishna Mohite. In his cross-examination, PW-10 Pandurang has stated that he is not aware as to how many persons by name Krishna Mohite are there in Jirewadi. Rather, he says that he does not know Krishna Mohite and that Krishna Mohite is not his friend and on the day of incident he had not met Krishna Mohite. Then against which Krishna Mohite he has lodged the report and which Krishna Mohite was accompanying him to the hospital, has been kept mystery by PW-10 Pandurang.

23. As regards identification parade is concerned, it is to be noted that PW-10 Pandurang says that police had shown him the photographs of the persons arrested and police gave him information that test identification parade would be conducted in jail. If this fact has occurred, then it cannot be said that the said test identification parade was conducted legally. Basic procedure in respect of conduct of test identification parade appears to have not been followed in this case. Thereafter when in cross-examination PW-10 Pandurang was asked more about the test

identification parade, he has claimed ignorance. The prosecution found, at that stage, that PW-10 Pandurang was not supporting the prosecution and therefore re-examination in the nature of cross-examination has been taken. The said re-examination is running in almost three pages. Re-examination can be allowed only to clarify or when there is any ambiguity between examination-in-chief and cross-examination. It cannot be used or allowed to be taken for reiterating what has been stated in the examination-in-chief. Thus, it can be seen that later on this PW-10 Pandurang has been almost declared as hostile and thereafter, it appears that the learned APP, who was conducting the matter before the trial Court, wanted get a clean record of himself, has put the question that he had not pressurized this witness to say anything. The learned trial Judge ought not to have allowed such re-examination. Later on, in the re-examination suggestions are given that PW-10 Pandurang is now supporting the accused because of some financial transactions. With this kind of evidence of the informant himself, the learned trial Judge ought not to have believed him. His testimony is absolutely not trustworthy. No doubt, there is murder of Yeshwant, but from the testimony of PW-10 Pandurang it cannot

be said, beyond reasonable doubt, that the said assailants were the present appellants i.e. accused Nos. 1 and 2.

24. At this stage itself, we would like to say that on the same set of facts and assessment of the evidence, the learned trial Judge has acquitted original accused Nos. 3 and 4. Neither PW-10 Pandurang or legal heirs or relatives of deceased Yeshwant nor even the prosecution have challenged the said acquittal of original accused Nos. 3 and 4. As accused No.3 was not identified by PW-10 Pandurang and PW-11 Shaikh Yunus, it appears that he has been acquitted. But when it is the prosecution story that since deceased and Pandurang started their journey, accused No.4 was constantly in touch with Yeshwant and extracted from him the route from which they would be coming, accused No.4 has been acquitted. It is also not conclusively brought on record that there was love affair between accused No.4 and deceased, then the very purpose or motive has fallen on the ground. Even if for the sake or arguments it is accepted that there was love affair between deceased and accused No.4, in that case accused No.1 would be having objection or motive to commit the crime, but then what was the motive for accused No.2. Everything appears to be, therefore, fishy.

25. Now coming back to the testimony of PW-11 Shaikh Yunus, his conduct itself is very unnatural. He says that after the accused persons left the place, he came near the deceased. He does not say that he checked deceased and found that he was already dead. Whether there was any dialogue between deceased and accused when accused started to assault deceased, or whether deceased had made an attempt to run, all has not been stated by this witness. PW-11 Shaikh Yunus says that he found a Nokia Company Mobile lying at the side of the deceased. He picked up the phone and after he heard the ring and when that person asked " धनु कोठे आहेस तू ?" (where are you Dhanu), witness informs that person that he is not *Dhanu* but he is another person. PW-11 Shaikh Yunus then says that he told that person that one boy was lying in injured condition in Kacharwadi Ghat. Thereafter the witness threw the Mobile there, waited for 2 to 3 minutes, shepherds started gathering there and therefore, he left that place. It is to be noted that if Shaikh Yunus was having so much concern, why he did not inform his name to the said person calling, is a mystery, and he reiterates in his cross-examination that he did not feel it necessary to disclose his name and address to the person who has called on Mobile. Shaikh Yunus says that the person who had called, had

insisted him to give his name but still he he did not disclose his name. Why he did not wait till the arrival of that person calling, has also not been stated.

26. Here itself, if we consider the testimony of PW-14 Shivaji Mohite, who is the uncle of the deceased Yeshwant and the person who had given the said phone call, he says that when he asked that person who picked up the call, that person told that he is Shaikh from Charatha. Therefore, there is no consistency in the testimony of PW-11 and PW-14. PW-11 Shaikh Yunus has not taken pains to stop there but he went to his house. But then he says that on the next day he went to the police station and gave statement. If Shaikh Yunus was so concern about the incident, he would have definitely waited for the relatives of the deceased to come or would have himself contacted the police. It appears that this witness PW-11 Shaikh Yunus is a got up witness and his cross-examination has shattered his examination-in-chief. If he could have identified, within the said happenings of 5 to 6 minutes, to accused Nos.1 and 2, why he failed to identify accused No.3, is also a question. His testimony is full of contradictions and omissions. He was also not a trustworthy witness.

27. Thus, the detailed scrutiny of testimony of PW-10 Pandurang and PW-11 Shaikh Yunus would create doubts about the investigation and the prosecution story also and therefore the benefit of the same should be given to the accused. On this count itself the Appeals deserve to be allowed.

28. Testimony of PW-22 Dattaram, PW-23 Ravi and PW-24 Chetan would show that they are the Nodal Officers of the Mobile companies and they have given the call records and the tower location of some of the Mobile phones. The tower location of Mobile Nos. 9561723994 and 9561479768 was in Vaidyakini area. Out of that, one Mobile is said to be standing in the name of Gokul Shinde, who is father of accused No.1 and he resides at Vaidyakini. The tower location was not Kacharwadi Ghat. The other phone is in the name of one Nilesh Pawar i.e. accused No.3 who is also resident of Vaidyakini.

29. The prosecution is also relying on the testimony of PW-1 Kadri Sayed, who is the panch to the discovery panchnama under Section 27 of the Indian Evidence Act. Panchnama Exhibit-56 and 57 have been proved by him, which shows that accused No.1 had produced sword, *jambiya*, air gun and iron rod on 27<sup>th</sup> December 2011. The place from where the *Jambiya / Khanjar*

have been discovered, is from the well, still how the blood stains were found, is a mystery. Further, the said discovery cannot be considered as against accused No.2, who alleged to have used sword. PW-2 Udhav Sapkal is the panch to the discovery of car and motorcycle on 26<sup>th</sup> December 2011, and also *Padtalni* panchnama which depicts that seizure was at the spot, but the panchnama is in the police station. Why the panchnama was not executed at the spot has not been explained by PW-21, the investigating officer. PW-3 Radhakisan Raut is the panch to the seizure of Mobile of the informant Pandurang, which came to be seized on 7<sup>th</sup> January 2012. PW-4 Bhagwan Kadam is the panch to the house search of accused No.2 that was taken on 26<sup>th</sup> December 2011. However, it can be seen that when it is house search, the investigating officer should follow Section 100 of the Code of Criminal Procedure. PW-4 Bhagwan Kadam is not the resident of Vaidyakini but he is resident of Gavari, Taluka and District-Beed. Therefore, that panchnama from wherein it is said that clothes of accused No.2 have been seized, cannot be considered as admissible. PW-4 Bhagwan has turned hostile. PW-5 Sideshwar Shelke is panch to the panchnama dated 24<sup>th</sup> December 2011, PW-6 Vikas Tate is the panch to the seizure of Mobile of accused No.4 effected on 25<sup>th</sup> December 2011, PW-7

Shaikh Masood is the panch to the panchnama dated 26<sup>th</sup> December 2011 in respect of production of articles by accused No.3 in police station, PW-8 Syed Amjad is the panch to the seizure of car on 26<sup>th</sup> December 2011. But, it is to be noted that all these witnesses i.e. PW-5 to PW-8 have turned hostile, therefore, these panchnamas have not been proved at all.

30. PW-9 Ganesh Shinde is the owner of the car involved in the incident, who has not supported the prosecution on the point that he had given the said car on hire to accused No.1. His cross-examination by the learned APP has not yielded any positive result. PW-15 is the father of accused No.1 who has turned hostile. His testimony is on the point of Mobile Number he was using. As aforesaid, even if we consider that he was using that Mobile, it was in the area of village Vaidyakini. PW-19 Abhay Maske is the Executive Magistrate who conducted the test identification parade. It can be seen from the cross-examination of this witness that he was totally dependent upon the investigating officer as well as the jail authorities and has not taken active part.

31. Therefore, taking into consideration the entire evidence, its re-assessment and re-appreciation we conclude that the learned

trial Judge totally erred in coming to the conclusion that the offence was proved beyond reasonable doubt against accused Nos. 1 and 2. All the above points were not considered by the learned trial Judge and therefore, the Judgment rendered by the learned trial Court is perverse and cannot be allowed to sustain. It is the basic principle that when the prosecution story is not supported by the cogent and unimpeachable evidence, there cannot be a conviction. If the prosecution story is creating doubts or the evidence is creating doubts, then the benefit of the same should go to the accused persons. This is not a case where merely because second view is possible, this Court is taking second view. As there are serious errors in appreciating the evidence, the interference is required. The Appeals, therefore, deserve to be allowed. In consequence thereof, the applications need to be disposed of. Hence the following order:-

### **ORDER**

(I) Both Criminal Appeals stand allowed.

(II) The conviction awarded to the appellants Ashok Shahadeo Shinde and Rahul Gokul Shinde in Sessions Case No. 39 of 2012 by the learned Additional Sessions Judge, Beed on 12.05.2016 stands set aside.

(III) Accused Nos.1 and 2 i.e. present appellants stand acquitted for the offences punishable under Sections 302, 326 read with Section 34 of Indian Penal Code.

(IV) Appellants be set at liberty, if not required in any other case.

(V) Fine amount deposited, if any, be refunded to the appellants after statutory period.

(VI) It is clarified that there is no change in the order passed by the learned Additional Sessions Judge, Beed, regarding disposal of Muddemal.

(VII) Fees of the appointed Advocate for the appellant in Criminal Appeal No.352 of 2016 is hereby quantified at Rs.10,000/- to be paid by the High Court Legal Services Sub Committee, Aurangabad.

(VIII) Both the Criminal Applications stand disposed of.

**[ABHAY S. WAGHWASE]**  
**JUDGE**

**[SMT. VIBHA KANKANWADI]**  
**JUDGE**