

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1304 OF 2011

**WITH
CRIMINAL APPLICATION (APPA) No.1331 of 2017
IN
CRIMINAL APPEAL NO. 1304 OF 2011.**

1. Mohammad Salim Wali Mohammad Qureshi, Aged 41 years, Occ: Business, Resident of house No. 536, Near Corporation School No. 39, Qureshinagar, 2nd Nijampura, ... Separate appeal No. 129 of 2021 filed.
Bhiwandi, District Thane.
2. Taj @ Subhan @ Tajuddin Sherali Lal Mohammad Qureshi, Aged 31 years, Occ. Labour, Resident of 188, Near Corporation School, No. 39, Qureshinagar, 2nd Nijampura, ...Separate appeal No. 129 of 2021 filed.
Bhiwandi, District Thane.
3. Guddu @ Rizvan Jilani Shaikh, Aged 24 years, Occ. Labour, Resident of own house, behind Khijra Masjid, 2nd Nijampura, ... Abated as per Court's order dated 12/01/2022.
Bhiwandi, District Thane.
4. Luvli @ Anwar Moiddin Pathan, aged 26 years, Occ. Labour, resident of 344, Salim Qureshi Chawl, Kasaiwada, 2nd Nijampura, ... Abated as per Court's order dated 12/01/2022.
Bhiwandi, District Thane.
5. Nadeem Naeem Qureshi, aged 35 years, Occ. Labour, resident of House no. 26, Kasaiwada, Qureshinagar, 2nd Nijampura, Bhiwandi, District Thane.
6. Mohammad Naeem Habibulla Qureshi, Aged 26 years, Occ. Labour, resident of House no. 204, Qureshinagar, 2nd Nijampura, Bhiwandi, District Thane.
7. Mohammad Umar Ibrahim Pinjari, Aged 34 years, Occ. Labour, Resident of 78,

Kasaiwada, 2nd Nijampura, Bhiwandi, District Thane.

8. Haji Firoz Mohammad Rafiq Qureshi, Aged 54 years, Occ. Business, resident of House no. 514, Masjid Building, Kasaiwada, 2nd Nijampura, Bhiwandi, District Thane.

9. Ismail Haji Ibrahim Qureshi @ Sadar, ... Abated as per aged 62 years, Occ. Business, resident of 631, Court's order dated Wada road, Nadi naka, Bhiwandi, District 18/8/2016. Thane.

10. Mohammad Laik Hanif Qureshi, aged 34 years, Occ. Labour, resident of 278, Qureshinagar, Kasaiwada, 2nd Nijampura, ... Separate Appeal Bhiwandi, District Thane. No. 129/2021 filed.

11. Abdul Hamid @ Hamid Hajjam Abdul Rashid Momin, Aged 26 years, Occ. Barber, Resident of House no. 25, Near Javvad Hotel, 4th Nijampura, Bhiwandi, District Thane.

12. Rijju @ Rizvan Shabbir Pathan, Aged 22 years, Occ. Fruit Vendor, Resident of Own House, Qureshinagar, 2nd Nijampura, ...Appellants Bhiwandi, District Thane. (Presently lodged at (Orig. Accused nos. Kolhapur Central Prison) 1& 3 to 13)

V e r s u s

1. The State of Maharashtra

2. Firoz Jumman Chaudhari, Aged 27 years, Occ. Driver, Resident of Samantnagar, Bhiwandi, Thane. ... Respondents.

WITH CRIMINAL APPEAL NO. 129 OF 2021

1. Mohammad Salim Wali Mohammad Qureshi, Aged 49 years, Residence of house No. 536, Near Corporation School No. 39, ... Orig. Accused Qureshinagar, 2nd Nijampura, Bhiwandi, No.1/Applicant in Presently incarcerated at Nasik Open Prison, custody

Nashik, Maharashtra.

2. Taju alias Subhan alias Tujuddin Sherali
Lal Mohammad Qureshi, Aged 39 years,
Residence - 188, Near Corporation School No.
39, Qureshinagar, 2nd Nijampura, Bhiwandi, ... Orig. Accused
Presently incarcerated at Yerawada Central No.3/Applicant in
Prison, Pune, Maharashtra. custody

3. Mohammad Laik Hanif Qureshi, aged 42
years, residence of 278, Kureshinagar,
Kasaiwada, 2nd Nijampura, Bhiwandi, ...Orig. Accused
Presently incarcerated at Yerawada Central No.11/Applicant in
Prison, Pune Maharashtra. custody

V e r s u s

The State of Maharashtra(through Nizampura ... Respondent
P.S.)

**WITH
CRIMINAL APPEAL NO. 1037 OF 2012**

1. Chandbi Mohammad Haneef Qureshi, Age
38 years, Occ. Household, R/o. 597, Gr. Floor, ... Appellant
Room no.3, Patel Nagar, Opp. Badar Masjid, (sister of Deceased
V. P. Naka, Bhiwandi, Dist. Thane. victim)

V e r s u s

1. Gulamnabi Jalil Ahmed Ansari, Aged about ... Respondent no.1
53 years, r/o. House no. 69, Islampura, (Ori. Accused No.2)
Bhiwandi, Thane.

2. State of Maharashtra, Through P.P. High ... Respondent no.2.
Court, Mumbai.

AND
CRIMINAL APPEAL NO. 719 OF 2012

1. The State of Maharashtra

... Appellant
(Orig. Complainant)

V e r s u s

1. Mohammad Salim Wali Mohammad Qureshi, Aged 41 years, Residence of house No. 536, Near Corporation School No. 39, Qureshinagar, 2nd Nijampura, Bhiwandi.

2. Gulamnabu Jalil Ahmed Ansari, Aged about 53 years, r/o. House no. 69, Islampura, Bhiwandi.

3. Tajul alias Subhan alias Tujuddin Sherali Lal Mohammad Qureshi, Aged 31 years, Residence - 188, Near Corporation School No. 39, Qureshinagar, 2nd Nijampura, Bhiwandi.

4. Guddu alias Rizvan Jilani Shaikh, Aged 24 years, Residence of own house, behind Khijra Masjid, 2nd Nijampura, Bhiwandi.

5. Luvli alias Anwar Moiddin Pathan, aged 26 years, residence of 344, Salim Qureshi Chawl, Kasaiwada, 2nd Nijampura, Bhiwandi.

6. Nadeem Naeem Qureshi, aged 35 years, residence of House no. 26, Kasaiwada, Qureshinagar, 2nd Nijampura, Bhiwandi.

7. Mohammad Naeem Habibulla Qureshi, Aged 26 years, residence of House no. 204, Qureshinagar, 2nd Nijampura, Bhiwandi.

8. Mohammad Umar Ibrahim Pinjari, Aged 34 years, Residence of 78, Kasaiwada, 2nd Nijampura, Bhiwandi.

9. Haji Firoz Mohammad Rafiq Qureshi, Aged 54 years, residence of House no. 514, Masjid Building, Kasaiwada, 2nd Nijampura, Bhiwandi.

10. Ismail Haji Ibrahim Qureshi alias Sadar, ... Abated as per aged 62 years, residence of 631, Wada road, Court's order dated Nadi Naka, Bhiwandi. (Abated as per Court's 18.8.2016. Order dated 18.08.2016)

11. Mohammad Laik Hanif Qureshi, aged 34 years, residence of 278, Kureshinagar, Kasaiwada, 2nd Nijampura, Bhiwandi.

12. Abdul Hamid alias Hamid Hajjam Abdul Rashid Momin, Aged 26 years, residence of House no. 25, Near Javvad Hotel, 4th Nijampura, Bhiwandi.

13. Rijju @ Rizvan Shabbir Pathan, Aged 22 years, Residence Own House, Qureshinagar, 2nd Nijampura, Bhiwandi.

... Respondents

Dr. Yug Mohit Chaudhary, Advocate for Appellant in Appeal No.129 of 2021 and for Respondent nos. 1, 3 and 11 in Criminal Appeal No.719 of 2012.

Mr. Chetan Agrawal, Advocate for Appellant in Criminal Appeal No. 1037 of 2012.

Mr. Aamir Shaikh for Appellant in Criminal Appeal No. 1304 of 2011 and for Respondent Nos. 5 to 9, 12 and 13 in Appeal No. 719 of 2012.

Mr. Sanjay Patil for Respondent no.2 in Appeal No. 719 of 2012 and Appeal No. 1037 of 2012.

Mr. Ajay Patil, Addl. Public Prosecutor for Respondent-State in Criminal Appeal No. 1304 of 2011, 129 of 2021 and 1037 of 2012 and for Appellant-State in Criminal Appeal No. 719 of 2012.

**CORAM: A. S. GADKARI AND
PRAKASH D. NAIK, JJ.**

RESERVED ON : 11th JANUARY 2023.

PRONOUNCED ON : 7th SEPTEMBER 2023.

JUDGMENT - (Per : Prakash D. Naik, J.) :-

1. The appellants in Criminal Appeal No.129 of 2021 and Criminal Appeal No. 1304 of 2011 along with original accused no. 2,4, 5 and 10 were tried for the offences punishable under sections 143, 144, 147, 148, 149, 302, 34, 120B , 323 and 506 IPC. Section 37(1) read with Section 135 of Bombay Police Act.
2. Vide judgment and order dated 11.8.2011 the appellants and accused nos. 4,5 and 10 were convicted for the offence punishable under Section 302 read with Section 149 of IPC and sentenced to suffer imprisonment for life. They were also convicted for offence under Section 135 of Bombay Police Act and sentenced to suffer imprisonment for one year. Accused no.2 was acquitted of all the charges. All the accused were acquitted for the offence punishable under Section 323 read with Section 149 of IPC and 506 read with Section 149 of IPC.
3. Initially accused no.1 and 3 to 13 preferred Criminal Appeal No. 1304 of 2011, challenging the judgment of conviction. During the pendency of appeal accused no.4 Guddu alias Rizvan Jilani Shaikh, accused no.5 Luvli alias Anwar Moiddin Pathan and accused no.10 Ismail Haji Ibrahim Qureshi alias Sadar had expired and their appeal was abated. Accused nos.1, 3 and 11 separated from above appeal and filed Criminal Appeal No. 129 of 2021.

3.1 Criminal Appeal No.719/2012 is preferred by State of Maharashtra challenging the judgment of acquittal of accused no.2 from all the offences and acquittal of other accused for the offences under Section 323 read with Section 149 of IPC, 506 read with Section 149 IPC and Section 143, 148, 120-B read with Section 34 of IPC.

3.2 Criminal Appeal No. 1037/2012 is preferred by sister of the deceased under Section 372 of IPC challenging the impugned judgment of acquittal of accused no. 2 from all the offences.

4. Brief facts of the prosecution case are as under :- PW12 Firoz Chaudhari is a friend of the deceased Akhil Qureshi. Brother in law of the deceased was contesting election of Bhiwandi Nizampur Municipal Corporation. Election was on 27.5.2007 and the counting was scheduled on 28.5.2007. Accused no.1 contested election against brother in law of the deceased Akhil Qureshi. On 28.5.2007 at about 10.15 to 10.30 am, Firoz Jumman Chaudhari and Akhil Qureshi were proceeding on motorcycle. Firoz Chaudhari was driving the motorcycle and Akhil Qureshi was pillion rider. The accused obstructed Akhil and Firoz. They pulled down Akhil Qureshi and Firoz Chaudhari. They assaulted Firoz Chaudhari and Akhil Qureshi. Firoz Chaudhari was threatened and asked to leave from the place. Accused assaulted Akhil Qureshi mercilessly. Some of them were armed with weapons. Akhil Qureshi was severely injured.

He was taken to hospital by Firoz Chaudhari along with one Shehjad Ansari. Dr. Kishor Vishnu Naik (PW5) examined Akhil Qureshi. Condition of Akhil Qureshi was critical. He succumbed to the injuries. Medical certificate was issued. Dead body was taken to IGM hospital Bhiwandi. Post mortem was conducted. Medical officer noticed about 23 injuries. He issued Post mortem Note and cause of death Certificate. Complainant went to police station. He wrote his complaint in his own hand writing. Offence was registered. Investigation proceeded. Statement of witnesses were recorded. The accused were arrested. On completion of investigation chargesheet was filed.

5. Charge was framed by an Order dated 12.3.2010. Prosecution examined 39 witnesses. Accused no.1 examined five defence witness. Accused no. 2 examined five defence witnesses. Defence of alibi by accused no.2 was accepted by the trial Court and he was acquitted.

6. PW12 Firoz Chaudhari is the complainant and eye witness to the incident. PW13 Mohammad Sharif Shaikh, PW14 Mohammad Javed Faruki and PW20 Shehjad Ansari are eye witnesses to the incident. PW21 Sarfraj Ansari saw blood stains on the shirt of accused no.3 and saw him wielding knife. PW26 Zuber Ansari saw accused no.3 with blood stains on shirt and knife. PW1 Dr. Jayashri Mhaske is the autopsy surgeon. PW2 Mehruz Ansari is panch witness for seizure of two knives at the instance of accused no. 3. PW3

Mohammad Farukh Qureshi is panch witness for recovery of knife from accused no.10. Witness did not support the prosecution case and was declared hostile. PW4 Shafiq Ansari is panch witness for recovery of knife at the instance of accused no.1. PW5 Dr. Kishor Naik is the Medical Officer at Siraj hospital. He examined the deceased. PW6 Yasin Shaikh is the panch witness for seizure of clothes of accused no.1. PW7-Mohammad Umar Shaikh is the panch witness for seizure of clothes of accused no.2. PW8 Mohammad Rafiq Khan is panch witness for inquest panchanama. PW9 Asif Momin is panch for seizure of footwear of accused no.5. PW10 Ansari Ahmed is the panch witness for seizure of clothes and chappal from accused nos.12 and 13. PW11 Nanu Wagdhi is panch witness for recovery of chappal of accused no. 8 and 10. PW15 Mumtaz Ansari is panch witness for spot panchanama. PW16 Munavar Rangrez is panch for seizure of pant and shirt of the deceased. PW17 Kiran Ghavri is panch witness for seizure of clothes from PW12 and PW20. PW18 Salman Ansari is panch for seizure of footwear of accused nos.12 and 13. PW19 Mohammad Wasim Qureshi is panch witness for seizure of footwear from accused nos.6 and 7. PW22 Sanjay Punyarthi was working as Senior Clerk in Bhiwandi Nizampur Municipal Corporation. PW23 Ravindra Kasare was working in Municipal Corporation of Bhiwandi Nizampur. He was on election duty. PW24 Suresh Kamuni is photographer. PW25 Ashfaq Ansari is panch witness for seizure of

knife at the instance of accused no.10. PW27 Irfan Ansari was the witness for seizure of footwear from accused nos. 8, 9, 10 and 11. Pw28 Vishwanath Surve is the Head Constable who carried the body for post mortem. PW29 Shrikant Pawar is police who published proclamation under Section 37(1) and (3) of the Bombay Police Act. PW30 Ashok Khare is ASI who carried muddemal articles to CA Mumbai. PW31 Tabrej Ansari is hostile panch for seizure of shirt and footwear from accused nos.3 and 4. PW32 Ajmat Shaikh sold his motorcycle to accused no.1. PW33 Raghunath Gharte recorded inquest panchanama, spot of panchanama, seizure panch of clothes of PW12 and PW20. PW34 Motigir Gosavi recorded FIR dated 28.5.2007 and seized clothes of deceased. PW35 Prakash Sawant is Head Constable which received keys of motorcycle. PW36 Rajendra Chikale is the Investigating Officer. He arrested some of the accused. PW37 Sukhaji Mule is the Assistant Police Inspector . He arrested accused nos. 8, 9, 10 and 11 and seized their footwear. PW38 Abhay Yeole is the Investigating Officer. PW39 Bhimrao Sonavane is the Investigating Officer.

7. Accused no.1 examined five defence witnesses viz. DW1 Javed Dalvi, DW2 Mehmud Shaikh, DW3 Shaikh Mohammad Khalid @ Guddu, DW4 Wajid Khan and Dw5 Parvez Amin.

8. Accused no. 2 examined five defence witnesses viz. DW1 Gulam Ansari, DW2 Farukh Momin, PW3 Malik Momin Kitabi, DW4 Parvez Amin and DW5 Sultan Qureshi.

9. Accused no. 2 was acquitted by the trial Court by accepting his defence of alibi whereas defence of alibi and other defence urged by accused no.1 was rejected and he was convicted for the aforesaid offences.

10. Dr. Yug Mohit Chaudhary appearing for the appellants in Criminal Appeal No. 129 of 2021 submitted that, evidence adduced by the prosecution is full of discrepancies and the appellants are entitled for benefit of doubt. Evidence of eye witnesses does not inspire confidence. Their version is doubtful. Their statements were recorded belatedly. There is evidence to show that the accused no.1 was not present at the scene of offence. The trial Court has accepted defence of alibi put up by accused no.2 whereas similar defence put up by accused no.1 was rejected. Some of the defence witnesses examined by the accused no.2 whose evidence was accepted by trial Court had referred to presence of accused no.1 at Gajangi hall which establishes that he could not have been at scene of offence. Defence witnesses examined by accused no.1 clearly establishes that accused no.1 could not have been present at the scene of offence. Statement of the witnesses were recorded belatedly. There is no explanation for delay in recording statements. Prosecution relied on chance

witnesses. The complainant who is prime eye witness to the incident have not supported the prosecution case. There is no other corroborative evidence involving accused nos.1, 3 and 11. There are contradictions and omissions in the evidence of the witnesses. There is no independent corroborative evidence to support the prosecution case against the appellants. The recovery of weapon and other articles is doubtful. There were no reason for discarding the evidence of defence witnesses adduced by accused no.1 while it is accepted qua accused no.2. The evidence of defence witnesses examined at the instance of accused no.1 is reliable. There is reason for them being present at the place where they had seen accused no.1. On the contrary purported eye witnesses were not supposed to be at the place of incident and they are chance witnesses. Although the police station was closer to the place of incident the eye witnesses did not approach the police immediately. Version of the eye witnesses is vague. There was no motive for appellants to kill the deceased. Evidence on record discloses that accused nos. 1 and 2 were at Gajangi hall at the time of incident as counting of votes were going on for the municipal election in which accused no.1 was a winning candidate and accused no.2 was election agent of another person. By accepting the version of the defence witnesses adduced by accused no.2, the trial Court had disbelieved the evidence of eye witnesses. Same eye witnesses cannot be relied upon for convicting other

accused. The evidence of defense witnesses has to be treated on par with prosecution witnesses.

10.1 Dr. Chodhary further submitted that, it was the burden on the prosecution to put up the best possible evidence. Prosecution failed to produce CCTV footage of the compound of Gajangi hall. Accused no. 2 while examining himself as defence witness has deposed that there was videography at waiting hall as well as counting centre at Gajangi hall. He demanded copy of the CD with the police and corporation. He received CD only of videography at counting hall and the CD of videography of ground floor was not given to him. There was no cross examination on that issue by the prosecution. Accused no. 2 has been acquitted by the trial Court and thereby his version has been accepted. Thus, the prosecution was in possession of CCTV footage of the ground floor of Gajangi hall, where accused no.1 claims that he was present at the time of offence. Pw13 was close friend of brother of deceased. He did not inform the family of the deceased about the incident. He did not inform the police about the incident. Police station was 7 minutes by foot from the spot of the offence. His statement was recorded after four days. PW13 has admitted that he did not go to the police station voluntarily. He was called by police. Acquittal of accused no. 2 has dented the evidence of PW13. Evidence of PW14 does not inspire confidence. He could not explain his presence at the spot. There is delay in recording his statement. He

was friend of the deceased. He attended funeral. He did not inform family of the deceased about the incident. He did not inform the police about the incident. Police station was at a close distance. Acquittal of accused nos. 2 has also affected the evidence of PW14. His present at the spot of offence is doubtful. Evidence of PW20 is shaky. It suffers from doubt. He is chance witness. His presence at the spot cannot be corroborated. Although the police came to the spot, he did not inform anything to them. PW21 and PW26 are not reliable witnesses. There was no motive for accused to threaten PW21. His presence and encounter with the accused is fabricated by the prosecution. PW26 did not quarrel with the accused before or after the incident. He did not know about the assault. He is not the friend of the deceased. There was no question of threatening him. There are contradiction between PW21 and PW26. Accused no.1 has established his presence at Gajangi hall at the time of the incident through defence witnesses. Defence witnesses examined by accused no. 2 viz DW2, DW4 and DW5 also established that accused no.2 was present at the Gajangi hall and also establishes that accused no.1 was present at the said spot. Counting of election was on 28.5.2007. Accused no.2 was required to be present at the Gajangi hall during the counting. Defence witnesses have stated that accused no.1 was at Gajangi hall at 10.00 am to 12 p.m. DW2 was with accused no.1 from 9.00 am to 1.00 pm, DW3 saw accused no.1 at Pandal before 10.00

am. DW4 for accused no.1 saw accused no.1 at Gajangi hall from 9.00 am to 10.am. DW4 saw accused no.1 at Gajangi hall upto 11.30 a.m. DW5 was with accused no.1 from 9.00 am to 5.30am, at Gajangi. Thus DW2, 4 and 5 were with accused no.1 when the offence took place. Thus accused no.1 could not have participated in assaulting the deceased. All the defence witnesses examined by accused no.1 has reason to be present at Gajangi hall. Their cross examination by prosecution did not yield any results to demolish them. Evidence of PW22 and P23 does not help the prosecution to show that accused no.1 was present at Gajangi hall only between 12.00 to 12.20 pm. PW22 has admitted that he was in counting hall on the first floor and did not come out till evening. People entering had to sign on the entry of their dairy. Entry for accused no.1 is at 12 to 12.20 noon. This means accused no.1 had entered the first floor of the counting hall between this time and that he was not present at the Gajangi hall before that. PW23 can only state whether accused no.1 was present on the ground floor between 12.00 to 12.10 pm. He could not confirm or deny the presence of accused no.1 at Gajangi hall. It was not possible for PW22 and PW23 to keep track on everyone present at the hall. Evidence of seizure and recovery is not incriminating. There are serious discrepancies in the panchanama of seizure. Recovery is at fraught with irregularities and the appellants in Criminal Appeal No.129 of 2021 may be acquitted.

10.2 Dr.Chaudhary has relied upon following decisions:-

- 1 *Jarnal Singh and others vs State of Punjab*¹
- 2 *Tahsildar Singh and another Vs State of U.P*²
- 3 *Shri Gopal and another Vs Subhash and others*³
- 4 *Dudh Nath Pandey Vs State of U.P.*⁴
- 5 *Balak Singh and others Vs The State of Punjab*⁵.
6. *Bhagirath Vs State of Madhya Pradesh*⁶

11. Learned Advocate for the appellants in Criminal Appeal No. 1304/2011 submits that appellants are falsely implicated in this case. There is no evidence to establish their presence at the scene of offence. They were not armed with any weapon. Accused nos. 4, 5 and 10 have expired during the pendency of the appeal and thus appeal stands abated. There are contradictions in the evidence of the eye witnesses. Complainant has not supported the prosecution case. Evidence of eye witnesses suffers from serious discrepancies. They are got up witnesses. No specific overt act is attributed to the appellants. The allegation about assaulting the deceased by all the accused is vague. Undisputably, applicants were not attributed the role of assaulting with weapon. Accused no.2 has been acquitted by

1 (2009)9 SCC 719

2 AIR 1959 SC 1012.

3 2004 CRI. L. J. 3349.

4 AIR 1981 SC 911

5 1975 SCC(Cri) 601

6 (1976) 1 SCC 20.

the trial Court. According to the prosecution, he has played a vital role. It is established that he was not present at the scene of offence. Trial Court has thus disbelieved the evidence of eye witnesses while acquitting him. However, appellants to whom no specific role was attributed were convicted.

12. Mr. Agrawal, appearing for the appellant in Criminal Appeal No. 1037 of 2012 submitted that accused no. 2 ought not to have been acquitted. There is sufficient evidence against him. The trial Court has not assigned any reason for giving finding of acquittal. Plea of alibi has been mechanically accepted. Prosecution has led evidence of eye witnesses which could not have been disbelieved on the basis of evidence adduced by defence. Order of acquittal is contrary to the evidence on record. Appellate Court can re-appreciate the evidence. If the appellate Court finds that judgment of acquittal is perverse, it can be reversed and the accused can be convicted by setting aside the order of acquittal. There was no reason to discard the evidence of eye witnesses which has been considered for convicting other accused. Acquittal of accused no.2 is therefore required to be set aside.

13. Learned Addl. Public Prosecutor Mr.Ajay Patil appearing for the appellant in Criminal Appeal No.719/2012 and respondent/State of Maharashtra in other appeals submitted that, the judgment of acquittal is erroneous. Accused no.2 ought not to have been acquitted

by the trial Court. Prosecution have adduced strong evidence. The trial Court has rightly convicted all the accused except accused no.2. Plea of alibi adduced by accused no. 2 is weak piece of evidence. Judgment of the trial Court is cryptic. It does not assign any reason for accepting the defence of accused no. 2. Although PW12 has not supported the prosecution case, there is sufficient evidence on record to establish charge beyond reasonable doubt. PW12 had given handwritten complaint. Other witnesses corroborates the complaint by PW12. Evidence of PW13, PW14, PW20, who were eye witnesses to the incident cannot be discarded. There is consistent versions of these witnesses showing involvement of all the accused. Prosecution has established that all accused were gathered with common object and participated in crime in assaulting the deceased. Deceased had suffered several injuries. Some of the accused were armed with weapons. Deceased was brutally assaulted. He succumbed to the injuries. Accused had motive to commit crime. Deceased was brother in law of the candidate who contested the election against accused no.1. Judgment of acquittal based on erroneous finding is required to be set aside.

13.1 Learned Addl. Public Prosecutor relied upon following decisions :-

1. *Dudh Nath Pandey Vs State of Uttar Pradesh*⁷
2. *Adalat Pandit and another Vs State of Bihar*⁸

7 (1981) 2 SCC 166

3. *Pillu alias Pralhad Vs State of Madhya Pradesh*⁹
4. *Rana Pratap and others Vs State of Haryana*¹⁰
5. *The State of Maharashtra Vs Firoz Jumman Chaudhary*¹¹

14. Learned Advocate Mr. Sanjay Patil appearing for the respondent no.2/original accused no.2 in Criminal Appeal No. 719 of 2012 and Criminal Appeal no.1307 of 2012 submitted that order of acquittal is not required to be interfered with. Accused no.2 has been acquitted giving benefit of alibi. He has examined five defence witnesses which have established that he was present at different place rather than the place of incident. DW1 Gulam Ansari was election agent for DW4 Parvez Amin. DW2 Farukh Momin is an Advocate and winning candidate from ward no. 21. He was with accused no. 1 and 2 from 9.30 to 12.30 hours. DW3 Malik Momin Kitabi is candidate from ward no. 24. He was with accused nos.1 and 2 from 9.00 am to 12.30 hours. PW4 Parveez Amin contested election. He was with accused no.1 and 2 from 9.00 to 13.00 hours at Gajangi hall. DW5 Sultan Qureshi is the reporter for Dainik Hindustan newspaper. He stated that he saw accused nos. 1 and 2 at 10.15 -10.30 hours at Gajangi hall. Evidence of these witnesses was sufficient to discard the evidence adduced by the prosecution. Case of the prosecution is false. Judgment of acquittal can be interfered with only in the exceptional

8 (2010) 6 SCC 469

9 (2022) 9 SCC 283

10 (1983) 3 SCC 327

11 Misc. Application No. 199 of 2011

cases. Strong defence evidence has resulted in acquittal of accused no.2. On account of acquittal presumption of innocence of the accused is further reinforced by his acquittal by the trial Court and the findings of the trial Court which had advantage of seeing the witness and hearing their evidence which can be reversed only for very substantial and compelling reasons.

14.1 Learned Advocate Mr. Sanjay Patil for respondent no. 2 relied upon following decisions:-

1. *Mohd.Akhtar @ Kari and others vs State of Bihar and another*¹²
 2. *Ravi Sharma Vs State (Government of NCT of Delhi) and another*¹³
 3. *Subramanya Vs State of Karnataka*¹⁴
15. PW12 Firoz Chaudhari, is the complainant. He was riding his motorcycle. Deceased Akhil Qureshi who is friend of PW12 was pillion rider. All the accused encircled them. Pulled the complainant down from the motorcycle and brutally assaulted deceased Akhil Qureshi. It is prosecution case that immediately after the incident, the complainant took Akhil Qureshi to Siraj hospital. PW5 Dr. Kishor Vishnu Naik corroborated the fact that complainant Firoz Chaudhari brought Akhil Qureshi and his condition was critical. PW5 told the complainant about the condition of Akhil and asked him to take Akhil to IGM hospital. Akhil was taken to IGM hospital. However, he died.

12 2019(2) SCC 513

13 (2022) 8 SCC 536

14 2022 SCC online SC 1400

It is the prosecution case that, complainant went to the police station, gave his complaint in his own handwriting in which role of accused is mentioned with their names. Complainant (PW12) has not supported the prosecution while deposing before the Court. Complaint of PW12 was corroborated by PW13. He has disclosed how the incident took place. Complaint is supported by PW14 Mhd. Javed Faruki, PW20 Shehjad Ansari. PW21 Sarfraj Ansari has stated that he was passing through the road accused Taju, Guddu, Rijju, Anwar Luvli, Raju. were passing through showed dagger having blood stains on the shirt of Taju.

16. PW26 has deposed that, accused Taju showed him sura and threatened him and he noticed blood stains on the sura and the shirt. PW13, 14 and 21 deposed about assault on Akhil Qureshi. The trial Court in the impugned judgment has referred to certain circumstances. Writ Petition No.740/2010 was filed by PW12 before the High Court which indicates that he was interested in getting justice and that the Court was ordered to change the Addl. Public Prosecutor. PW12 made an application to the District Court that the accused are threatening him and address a letter to the Director of Prosecution dated 28.2.2008. Complainant had made various NC cases against the accused alleging that he was threatened. Documents in that regard were pointed out to the trial Court.

17. Although the trial Court had convicted accused no.1 and 3 to 13 for the offence under Section 302 read with section 149 of IPC, accused no. 2 was acquitted. In paragraph 90 of the judgment the trial Court has referred to the defence witnesses examined at the instance of the accused no.2 and in paragraphs 91 and 92 it was observed that, all these witnesses have deposed that accused no. 2 was present at the Gajangi hall at the time of counting and he has no concern either with other accused or with deceased. There is name of accused no.1 mentioned in the complaint and that is the only evidence against him. There is possibility that his name was mentioned at the instance of the police, therefore, accused no.2 is entitled to benefit of doubt. While giving such finding, the trial Court has not applied its mind to the evidence on record adduced by the prosecution showing involvement of accused no.2.

18. The trial Court has not given finding on evidence of PW 12, PW13, PW14, PW20, PW21 and PW26 and the evidence of other witnesses regarding recovery and seizure qua accused no.2. Order of acquittal of accused no. 2 is perverse on the face of the record. Merely on the ground that accused had examined defence witnesses, there was no reason to believe version of the witnesses. Judgment of the trial Court is silent as to why the trial Court believed the evidence of defence witnesses which runs counter to the deposition of eye witnesses to the incident. The judgment of the trial Court qua

accused no.2 is contrary to material on record. There is complete non application of mind. The trial Court has not appreciated the evidence adduced by the prosecution. In the light of the evidence of eye witnesses, the trial Court could have assigned the reasons for not considering the strong evidence relied upon by the prosecution. There is sufficient evidence to establish involvement of accused no.2 in the crime. The defence evidence adduced by accused no.2 was not enough to demolish the version of prosecution witnesses.

19. PW1 Dr. Jayashri Mhaske was working as medical officer at IGM hospital, Bhiwandi. Dead body of Akhil Qureshi was taken to IGM hospital on 28.5.2007 by Nizampura Police Station. She performed post mortem on the dead body of the deceased. She found following external injuries which are recorded in column no.17 of the post mortem note. There were 23 external injuries.

- “1] Incised wound below rib number 10 about 5” x 1/2” x 1/2” laterally with bleeding present.*
- 2] Incised wound below left nipple 1” x 1”*
- 3] Incised wound below left nipple on lateral side 5” x 1.5”*
- 4] Incised wound lateral to umbilicus about 2” x 2”*
- 5] Incised wound below right nipple about 1” x 1/2”*
- 6] Incised wound over right arm medially 1.5” x 1.5”*
- 7] Incised wound below injury no. 6, 1.5” x 1.5”*
- 8] Incised wound over left thigh laterally 6 1/2” x 2” bleeding present.*
- 9] Incised wound over left thigh medially 1” x 1/2”*
- 10] Incised wound below injury no. 9, 1” x 1/2”*
- 11] Incised wound over right thigh laterally 1 1/2” x 1/2”*
- 12] Incised wound below injury no. 11, 1 1/2” x 1”*
- 13] Incised wound over left axilla 1” x 1/2”*
- 14] Incised wound below injury no. 13, 2” x 1/2” with expulsion of intestines.*

- 15] Incised wound over left axilla posteriorly near scapula 2" x 2 cm
16] Incised wound over left scapula 1 1/2" x 1/2"
17] Incised wound over left shoulder 1" x 1 1/2"
18] Incised wound below right shoulder near anterior part of arm of size 1 1/2" x 1"
19] Incised wound below injury no. 18, 1/2" x 1/2"
20] Incised wound over right scapula 1" x 1/2"
21] Incised wound over left thigh posteriorly 1/2" x 1/2"
22] Incised wound over left thigh postero-laterally 1" x 1/2"
23] Laceration over lower lip 1 x 0.5 cm."

Corresponding internal injuries to the thorax were as under:-

"Puncture wound below rib number 10 laterally as per injury no. 1 of column no. 17 with fracture of rib number 10.

Puncture wound as per injury no. 14 of column no. 17. There is presence of haemoperitonium 500 to 700 ml of blood. The peritoneum is ruptured over right side and left side below lower ribs. Also in liver there is incised wound over right upper lobe 2" x 1" deep with profuse blood oblique in nature. These all internal injuries. Stomach was empty."

According to this witness cause of injury was by hard and sharp object. Age of injury within 4 to 6 hours. All injuries were ante mortem. Death caused within 3 to 4 hours of last meal. Cause of death was cardio respiratory failure due to haemorrhagic shock due to injury to liver along with multiple injuries over body by hard and sharp object.

19.1 This witness further deposed that, these injuries could be caused by weapons like knife, Chopper. Muddemal Object no.1, muddemal article no.3, muddemal object no.4, muddemal object nos.1 to 4 were shown to her. These injuries are possibly by weapon.

Injury nos.1 to 14 of column no.17 are grievous in nature for causing death. Due to all these injuries there was bleeding in abdomen and chest. In the cross examination she stated that she had not received injury certificate of Siraj Hospital. Except injuries no. 1 and 4 remaining injuries were not on the vital part of the body. Injury no. 14 could be caused by Muddemal no.4. All the injuries were caused by forceful use of weapon. Forcefully blood would come out after injuries. She cannot say by which weapon what sort of injuries are possible because weapon was not shown to her by police. All the injuries were simple in nature except injury nos.1 and 14. No chopper is produced in the MO before the Court. Injury no. 23 is possible by fall. No opinion was taken by the police by showing her the weapon in this case. It is general opinion about weapon used in the assault. If MO no. 4 is used by person, there might also be injury in the assault.

20. PW5 Dr. Kishor Naik has stated that Akhil Qureshi was admitted in Siraj Memorial Hospital on 28.5.2007 with history of assault with sharp weapon. Patient was in gasping condition. Following injuries were noticed by him after examining the patient:-

- “1] Incised wound over left hypochondrium 3 cm x 2 cm x peritoneal deep x active bleed x intestine protruding out.*
- 2] Incised wound along left anterior axillary line 2 cm x 1 cm x muscle deep x active deep at Xiphoid level.*
- 3] Incised wound over left mid clavicular line at level of Xiphoid 2 cm x 1 cm x subcutaneous deep x active bleed.*

- 4] Incised wound over right costal region 4 cm x 1 cm x peritoneal deep x active bleed at the level of anterior axillary line.
- 5] Incised wound over right posterior axillary line just above illiac creast 3 cm x 1 cm x peritoneal deep x active bleed.
- 6] Incised wound over right mid clavicular line 1 cm x 1 cm x subcutaneous deep x active bleed at the costal region.
- 7] Penetrating wound over right middle thigh Anterior lateral Anterior medial
 - a] 3cm x 1cm a] 1cm x 1cm x active bleed
 - b] 3cm x 1cm b] 2cm x 1cm
- 8] Incised wound over left thigh lateral aspect, upper third, 4 cm x 2 cm x muscle deep x active bleed.
- 9] Incised wound over left posterior axillary line 2 cm x 1 cm x muscle deep x active bleed.
- 10] Incised wound over mid spinal region 3 cm x 1 cm x muscle deep x active bleed.
- 11] Incised wound over left sub scapular region 1 cm x 0.5 cm x subcutaneous deep x active bleed.
- 12] Incised wound just above left elbow joint posterior aspect 3 cm x 1 cm x muscle deep x active bleed.
- 13] Incised wound over right arm anterior aspect 3 cm x 1 cm x muscle deep x active bleed.
- 14] Incised wound over posterior aspect of right arm through and through, posterior lateral 4 cm x 1 cm posterio medial 1 cm x 1 cm x active bleed.
- 15] Incised wound over posterior aspect of right forearm below elbow joint 1 cm x 0.5 cm x subcutaneous deep x active bleed.”

20.1 According to him, all these injuries were internal injuries. Medical certificate was issued by him. Injuries mentioned in the certificate are possible by sharp edged weapon. These injuries could be caused by MO No.1 to 4. In the cross examination he stated that one Shehjad and Firoz brought the gasping person to hospital. All the injuries were incised wounds. It is not possible to say which injuries are fatal and which are not fatal. He did not notice any other injuries

except 15 injuries. He did not notice injury size 5 X 1.5 cm X 0.5 inc. He did not notice injury of 12 cms X 3 cms and 5 cms X 2.5 cms. Injury depends upon how weapon is used and what was the position of the injured. It is not possible to state which weapon is used unless beginning of the injury, middle of the injury and end part of the injury is proved. Injuries are possible by these weapon.

21. PW12-Firoz Chaudhari has deposed that deceased was his friend. They had taken education together. He was having a motorcycle. There was counting of election on 28.5.2007. Hanif Qureshi who is the brother in law of deceased Akhil Qureshi was contesting the election. Salim Qureshi and Dr. Shahid were also contesting the election. During the election Akhil Qureshi was making propaganda and he was with him. It was municipal council election. On 27.5.2007 there was election and on 28.5.2007 there was counting. Counting was near Kuwari service centre. He was proceedings towards Kuwari centre with deceased on motorcycle. Quarrel took place between him and the person from that vicinity. There was also quarrel of his friend with them. Akhil Qureshi was beaten by knife, pen knife and Mardanda. Incident took place near Panjrapol. There were several persons. They are not present before Court. He cannot say who was having knife, pen knife and danda. Due to attack Akhil Qureshi died. He took him to Siraj hospital. He lodged complaint. It is in his handwriting. It bears his signature. He

produced clothes before the police. They were having blood stains. He showed scene of offence to the police.

Since the witness resiled from his complaint, Addl. Public Prosecutor requested the Court to allow him to put leading questions as witness is not deposing according to his statement. Permission was granted to put leading questions. He did not revert to his version in statement. However, he admitted that he was friend of the deceased. The deceased is relative of Hanif Qureshi. Deceased was making propaganda and he was accompanying him. There was election and counting. He was along with deceased on the date of the incident. The deceased was assaulted. He had lodged the complaint and it was in his handwriting. Its contents are true and correct. He admitted that deceased was assaulted with weapon and he died due to attack. His clothes were blood stained. The handwritten complaint was marked as Exh. 196. It provides names of the accused and the assault attributed to them.

22. PW13 Mohammad Sharif Shaikh is eye witness to the incident. According to him he is running shop of beam pipe. On 28.5.2007 at about 10.30 hours he was proceeding towards Ibrahim Pipewala. He saw Firoz and deceased Akhil Qureshi. Firoz Chaudhari was on the front seat and Akhil Qureshi was on back. He saw accused Salim (accused no.1), Taju(accused no.3), Guddu (accused no.4) Gulam Nami (accused no. 2) Anwar Lavli (accused no. 5) Nadeem(accused

no.6), Naeem(accused no.7), Laik(accused no.11) Hazi Firoz(accused no. 9), Umar Pinjari(accused no.8) Nadeen Hajjam (accused no.12), Rijju-Raju(accused no.13), Ismail Sadar(Accused no.10). They had surrounded Firoz and Akhil. Accused Salim and accused Gulam Nabi abused Firoz and Akil and proceeded towards them for assaulting. Accused Salim and Taju had knife with them. Accused Guddu had a knife. Raju had Mardanda. Accused no.1 Salim was abusing and instigating others to catch the victim and kill him. Accused no.2 stated that person should be finished on the spot. Remaining persons snatched Akhil from motorcycle. Firoz and Akhil fell down from the motorcycle. Accused assaulted Akhil Qureshi by fist blows and kicks. Other accused Salim, Guddu, Taju, Ismail Sadar was having weapons in their hands and they were beating Akhil by weapon. Raju was beating by Mardanda. Persons from the vicinity started running, shop owners pull their shutters. He left the place. He know all the accused. They are present before the Court. Raju is not present before the Court.

He has cross examined. In the cross examination he deposed that he do not know whether accused Salim Qureshi being declared elected and Hanif Qureshi was declared defeated. He was knowing Akhil Qureshi for last five years. When he reached the spot he saw Akhil Qureshi and Firoz Chaudhari with their motorcycle. He did not inform the police by going to the police station. He did not

narrate the incident to the police upto four days. He narrated it to his father. He was called by Nizampura Police station. He was called by police. He did not suo moto gone to the police station. On 28.5.2007 till 1.6.2007 he was at Bhiwandi. He do not know full names of the accused. He has no relation with the accused. He did not state that some person pulled victim down.

23. PW14 Md. Javed Faruki stated that he knows all the accused by their names. He know accused no.1, Taju Qureshi, Guddu, Gulam Nabi Ansari, Haji Firoz, Ismail Sadar, Nadeem, Naeem, Laik, Hamid Hajjan, Anwar Lavli, Umar Pinjari, Rijju, Raju. Accused are present before the Court. On 28.5.2007 he saw Akhil Qureshi and Firoz Chaudhari on motorcycle. They were stopped. All the accused were standing there. Accused Salim Qureshi and Gulab Nabi Ansari was shouting in loud voice. Gulab Nabi Ansari were saying that victim should be finished on the spot. Salim Qureshi was abusing and stated that victim should be assaulted. Akhil was pulled down from the vehicle. Firoz Chaudhari also fell down. Accused beat Akhil by fist blows. Accused Salim Qureshi had a knife. Guddu had a knife. Raju had a stick. Ismail Sadar had a knife. They were also assaulting by kicks. They also poked with the instruments they had. There was pool of blood. Passers by ran away.

In the cross examination he stated that he did not go to the police station to inform them. Akhil Qureshi was familiar to him.

He did not go to the police station up to 31st. He intimidated said fact to his father. His statement was recorded by police. He attended the funeral of the deceased. He did not try to see family members of Akhil Qureshi. He did not state to them that he had seen the incident. He do not know house of the accused persons.

24. PW20 Shehjad Mustaf Hussain Ansari has deposed that on 27.5.2007 there was corporation election at Bhiwandi. Hanif Qureshi contested election. Zuber Ansari, Firoz Chaudhari and Akhil Qureshi were helping Hanif Qureshi. Salim Qureshi was opponent candidate. His nephew Raju, Ismail Sadar, Hazi Firoz, Malik Qureshi, Gulam Nabi, Taju, Guddu, Rijju Pathan, Ahmid Hajjan, Naeem Qureshi, Nadeem Qureshi, Omar Pinjari, Haji Firoz, and Salim Qureshi were spreading terror action in his vicinity. These persons were helping Salim Qureshi. On the next date there was result of counting. He was going to hall where there was result of counting. He saw Salim Qureshi, Gulam Nabi, Ismail Sadar, Haji Firoz, Laik Qureshi, Tajo, Guddu, Rijo Pathan, Raju Anwar, Lavli, Hamid Hajjam, Naeem Quereshi, Nadeem Qureshi, Omar Pinjari. He saw Firoz Chaudhari and Akhil Qureshi on motorcycle. Accused obstructed Akhil's motorcycle. Salim Qureshi and Gulam Nabi were abusing Akhil Qureshi. Salim Qureshi instigated others to catch the victim and kill him. Galam Nabi stated that victim should be killed at the spot. Accused beat Akhil by fist blows. Salim had knife used for cutting

animals. Taju had something, Guddu also had something. Ismail Sadar had a knife, Raju had mardanda. Akhil Qureshi fell down. Salim crushed knife, Tajju, Guddo, Ismail Sadar crushed him, Akhil Qureshi was assaulted by knife on his chest and other parts of the body. Accused Raju beat Akhil with mardanda. Other persons beat him by kicks and blows. Akhil Qureshi tried to get up. Laik Qureshi caught his head and fell him down. Thereafter remaining accused beat him by kicks blows and by weapons. Firoz Choudhari tried to intervene. He was threatened. He was beating and separated from that place. Salim Qureshi left the place by motorcycle. Witness took help of Firoz and took Akhil to the hospital. He went to the police station along with Firoz. He saw Firoz writing FIR in his own handwriting. Police took Firoz with them. He was asked to seat there. He knows all the accused. They are present before the Court. Police recorded his statement. His clothes were stained with blood. MO No. 4 was in the hand of Ismail Sadar, MO No.3 was in hand of Guddu, MO No. 2 was in hand of accused Taju and Mo no.1 was in hand of Mohammad Salim, and MO No. 13 was in hand of Raju.

In the cross examination, he stated that he did not know where Hanif is residing. He do not know the residence of Firoz Chaudhari. He is his friend. Akhil was his friend. Distance between his house and spot offence is 500 mts. He is not interested in election. He knows Salim Qureshi since 20 years. On 28.5.2007 Salim was

declared elected. He did not state to the police that he picked up Akhil Qureshi and sustained blood stains on his shirt.

25. PW21 Sarfraj Samiulla Ansari has deposed that on 28.5.2007 he was standing with his friend. Five persons namely Taju, Guddu, Rijju, Anwar Luvli, Raju came there. They are from his vicinity. Taju stated that he had assaulted one person and now it is his turn and he showed the dagger. There were blood stains on the shirt of the Taju. Five persons went towards Hijra hotel. His friend told him that Taju and his friend killed brother in law of Hanif Qureshi and he has been admitted to Siraj hospital. He learnt that Akhil Qureshi is dead. There was a public announcement if anybody wants to say anything about the incident they may come to the police station. He went to the police station. He stated to the police the incident. On 1.6.2007, he was called by crime branch. He identified the weapons. Taju, Guddu, Anwar Luvli, Rijju were shown to him.

In the cross examination he has stated that he has no enmity with the accused. He know Hanif Qureshi. Akhil Qureshi is not his friend. He did not make inquiry with Mehtab as to whose phone he received. He did not work for any candidate. He did not make inquiry how and when Akhil Qureshi died. He did not lodged complaint against the accused about threats.

26. PW26 Ziber Moinulla Ansari deposed that on 28.5.2007 he and his friend were standing near saloon. He saw accused Taju and

his associates coming from Bardi Mohalla. Guddu, Rijju, Raju, Anwar Luvli were coming with Taju. Accused Taju showed him sura and threatened him. He told him that one person has been assaulted by them and next is his number. There were blood stains on sura. Shirt on his person were having blood stains. After threatening they went towards tea stall. He was afraid and went towards Jawahar hotel. He came to know that brother in law of Hanif Qureshi was killed and taken to Siraj hospital. He went to hospital. At about 4.00p.m he went to Nizampura Police Station. His statement was recorded. On 1.6.2007 he was called at police station along with Sarfraj. His statement was read over to him. Taju, Guddu, Anwar, Luvli and Rijju were present. He was shown the weapon by which he was threatened. He has no acquaintance with the accused. He had no quarrel with the accused.

27. PW22 Sanjay Shantaram Punyarthi has stated that he was working as Senior Clerk in Bhiwandi Nizampura Municipal Council. He was working as a supervisor during the election period of 2007 of Bhiwandi Nizampura Municipal Corporation. On 28.5.2007 there was counting of votes of ward nos. 5, 16 and 25 in Gajangi Hall. He was there as counting supervisor. He was there from 7.00 am to 1.30 p.m. It was his duty to take the signature of the candidate and their polling agent and to show sealed ballot box. Actual counting started at 9.00 am. There were total three rounds. He knows independent

candidate Salim Qureshi. He came to that hall at about 12.00 or 12.20 noon. His agents were with him. He obtained their signatures on the register. He was shown photo copies of result sheet. It was certified by Assistant Commissioner. It bears his signature and signature of Salim Qureshi and returning officer. It was marked as Exh. 216, 217, 218 and 219.

In the cross examination he stated that Salim Qureshi was elected twice as member of Corporation. He was not present on the ground hall at the time of counting of votes. He did not come to ground floor till the counting of three wards were completed. He was at the first floor at the place of counting. He did not know whether Salim Qureshi was present on ground floor till 12.30 noon. They have obtained signatures on Exh.216, 217, 218 and 219 when they called the candidates and their agent on the first floor. Time mentioned in these four exhibits and in his statement is related with the entry into counting hall. It has no concern with the person came at Gajangi hall. He cannot say opponent of Salim Qureshi was present at the counting process. No public was allowed to enter the hall except candidates and agents. There is only one entry placed to that place which is towards road.

28. PW23 Ravindra Shantaram Kasare, was working in Municipal Corporation of Bhiwandi Nizampura since 1996. During the result of the election on 28.5.2007 he was appointed for election work. It was

his duty to take signatures of the candidates as well as their agents. He was on the ground floor for duty of Gajangi hall. He know Salim Qureshi. Salim Qureshi came to the ground floor at 12.00 to 12.10 noon. Accordingly, he took signatures on his register. He was shown certified copy of the extract. It bears signature of Salim Qureshi.

In the cross examination he stated that Sanjay Punyarthi, Dadaram Jadhav and others were deputed on election work at Gajangi hall. They were asked to remain present at 7.00 am. While going on the first floor Salim Qureshi made his signature on the ground floor. No general public was allowed to enter the hall. I do not know prior to taking note of arrival of the candidates and his agents whether they appeared outside prior to the timings. He cannot say whether Salim Qureshi and his agents were present till the decision of the election. He cannot say whether Salim and his agents were present from 9.00 am because he had not seen them. Timing mentioned at Exh.221 is with regards to entry into into the Gajangi hall. From the evidence of PW22 and PW23 it can be seen that both the witnesses have referred presence of accused no.1 at the counting hall at about 12.00 noon. The documents register signed by him indicates his presence at the counting hall at 12.00 noon. PW23 has stated that he saw him on the ground floor at 12.00 noon and he has signed while entering the upper floor at 12.00 noon. PW22 saw him at counting place at 1.00 noon.

29. The version of these two witnesses refers to presence of accused no.1 at Gajangi hall at 12.00 noon. This is fortified by documents. It is the defence of the accused that he was on the ground floor since morning based on evidence of his defence witnesses. The version of defence witnesses cannot be accepted in the light of above evidence, the deposition of eye witnesses and shaky evidence of defence witnesses.

30. Accused no.1 adduced defence evidence by examining five witnesses. DW1 Javed Gulam Mohammad Dalvi has stated that he knows accused no.1. There was voting on 27.5.2007 and counting on 28.5.2007. He contested election from ward no.16. Hanif Qureshi contested election from ward no.25 against accused no. 1. He do not know Akil Qureshi. He reached Gajangi Hall at 10.00 am on 28.5.2007. There was Pandal and chairs were kept. When he reached there accused Salim Qureshi was there. Hanif Qureshi was also there. Salim Qureshi was present prior to his reaching at Gajangi Hall. On the ground floor of the Gajangi Hall there was sitting arrangement and on first floor there was counting. Counting of his ward started at 11.00 am and concluded at 12.00 noon. He had seen Salim Qureshi from his reaching there till 12.00 noon. On 13.6.2007 he became Mayor of Bhiwandi Nizampura Municipal Corporation. He know Mr. Mehaboob, agent of accused no.1. He had seen agent

Mehaboob with accused no.1 at Gajangi Hall. There was his panel and he was giving attention on those persons contesting election.

In the cross examination he stated that election was contested by him through Bhiwandi Vikas Aaghadi Ekta Manch through ward no.16. There was no candidate from his side in ward no.25 as independent candidate. He know Salim Qureshi since 1995. There was no candidate from his party in ward no.25. He requested to help accused no.1 in election. He know Hanif Qureshi since 2002. He did not go to the police station as he was not called by the police to record his statement. He learnt that accused no.1 was made accused in this case in the evening. It was decided by his party to contest election for Mayor and his name was suggested. Single vote of corporator is very important for Mayorship election. Vote of Salim Qureshi was valuable for him. First floor was reserved for the persons whose counting was going on. Second floor is kept ready to enter into the hall. There were about 40 candidates of his party. Counting was going on at five different places. He cannot say how many persons were with him. He remember counting of ward no.15, 16 and 17. He cannot say exact time required for each ward. He cannot say how many persons were sitting in Pandal and how many were outside the Pandal. He cannot say about when any person entered and left the hall in between his counting period. Initially he was sitting in Pandal from 10.00 am to 11.00 am. There were about 100 chairs in the

Pandal outside the hall. Name of the persons was called out. His signatures were taken and then he was allowed to go on the first floor. At 11.00 am his name was called at ground floor. He was at first floor from 11.00 am to 12.00 noon. Counting of ward no.25 was not with his ward. When he was at counting hall he cannot say who were outside. He did not go to police on his own to give statement. He has filed affidavit at the instance of brother of accused no.1 in the High Court. He has filed affidavit after 19 months of the incident. Nobody prevented him from going to police station.

31. DW2 for accused no.1 Mr Mehmud Mohammad Usman Shaikh stated that he knows Salim Qureshi from childhood. He is a Municipal Councillor since three years. He was counting agent of accused no.1. At 8.00 am he reached house of Salim Qureshi. He reached Gajangi hall at 9.00 am. Accused no.1 was with him at Gajangi Hall. There was counting of various wards. Their number was in third round. There was Pandal at the ground floor. Counting was on the first floor. Persons of first round were sitting at ground floor. Javed Dalvi, Khalid Guggu Rais, Parvez Momin were present there. They were called at 11.00 to 11.30 am. Counting ended at 12.30 to 1.00 p.m. Accused no.1 was declared elected. PI Javed Shaikh came there. He took Salim Qureshi with him. He was with Salim Qureshi from 9.00 am to 1.00 p.m.

In the cross examination he has stated that Salim is his friend since childhood. He is taking labour contracts. Permission of corporation is required for construction work. He has good relations with Councillor and Municipal Officers. Their number was in third round. No timing was fixed for third round. There were only two persons including accused no.1. He do not know Akhil Qureshi. Hanif Qureshi contested election from ward no. 23. He do not know whether Akhil Qureshi is brother in law of Hanif Qureshi. He do not know whether he was making propaganda of Hanif Qureshi. Police took accused no.1 from Gajangi hall. It is correct to say that it is for the first time he is saying in the Court that accused no.1 was with him from 9.00 to 1.00p.m. He did not produce any application before the police to show that accused no.1 was with him from 9.00 am to 1.00 p.m. He was supporter of the accused no.1. He didn't go to the police station to give statement. Nobody prevented him from going to police station and record his statement.

32. DW3 for accused no. 1 Mr. Shaikh Mohammad Khalid Mukhtar Ahmed alias Guddu deposed that he knows accused no.1 since 20 years. On 27.5.2007 he contested election from ward no.22. There was counting on 28.5.2007 at Gajangi hall. He was present from 8.30 am. Several persons including accused no.1 were present. Parvez Momin, Javed Dalvi were present. He saw them before 10.00 am in Pandal. He was called for counting at 12.15 noon. PSI Javed came there and called accused no.1. He knows him. He is present before the Court.

In the cross examination he submitted that he has good relations with Salim Qureshi being Councillor. Many cases are registered against him at various places. These are political cases. He had filed forgery case against DW2. When he went to Gajangi hall 8 to 10 persons were with him. He did not know who came there and who left Gajangi Hall except those persons who were with him. Police came there and took accused no.1 with them. He went to see counting. Result was declared at 1.00 pm. He learned about arrest of accused Salim. He did not go to police station to record the statement about the incident. For the first time he stated before the Court that Salim Qureshi was present at Pandal at Gajangi hall. He has filed affidavit to that effect. He filed affidavit after 19 months, when his application for bail was constantly rejected by Sessions Court and High Court.

33. DW4 for accused no.1, Mr. Wajid Ali Hassan Raza Khan has stated that he know Salim Qureshi from 1995 since he was Councillor. He contested election from ward no.4. On 28.5.2007 he was at Gajangi hall at 8.00 am along with Salim Qureshi and others. At 9.00 am they entered the counting hall. Salim Qureshi was not with him at 10.00 am as their counting started. Salim Qureshi was with him from 9.00 am to 10.00 am. Counting of his ward finished at 10.45 am. He came out. Salim Qureshi and Hanif Qureshi were there. Salim Qureshi was there up to 11.20 a.m.

In the cross examination by Addl. Public Prosecutor he deposed that counting of ward no. 1 to 6 was at first round. 50 to 60

persons were present in the Pandal. Persons who contested election were called on first floor by taking their signatures on ground floor. Candidates and his agents were allowed on first floor at 9.00 a.m. After declaration of the result, he came down after entering the counting hall. He does not know who came in the Pandal or who went out. He belongs to Samajwadi Party. Salim Qureshi was president of Samajwadi party till 2006. He has good relations with Salim Qureshi since 1995. For the first time, he is speaking about presence of Salim Qureshi in the Court. He learnt about arrest of Salim Qureshi on the second day. He did not go to the police station for giving information.

34. DW5 for accused no1, Parvez Ahmed Haji Mohammad Amin has stated that he knows accused no.1 from childhood. There was counting of election at Gajangi hall on 28.5.2007. He contested election from ward no.25. He went to Gajangi hall at 9.00 am on 28.5.2007. Accused no.1 was with him. They went to counting hall which was on the first floor at 12.00 noon. Accused no.1 was with him on the first floor. From 9.00 am to 1.30 p.m accused no.1 was with him.

In the cross examination, he deposed that accused no.1 was studying with him since childhood. He is his friend. He was arrested. He was arrested along with accused no.1 in Bhiwandi riots case. Crime No. 96/2006, 98/2006, 100/2006 are pending against him. Accused Gulam Nabi was with him. He cannot say exact number of

persons which were with him. In the evening he learnt about arrest of accused no.1. He did not go to the police station for recording statement. For the first time he is stating that Salim Qureshi was with him on 28.5.2007. Police implicate them in false cases and hence he did not go to the police station. He did not intimate this fact to the police in writing. Police threatened not to interfere in this case. He cannot give the name of the policemen who threatened him. He did not give complaint against the police.

35. From the version of these witnesses who were examined as defence witnesses at the instance of accused no.1 it can be seen that they are closely acquainted with accused no.1. Their version about presence of accused no. 1 at Gajangi hall at the time referred in their version is disclosed either for the first time in the Court while deposing as defence witnesses and or while filing affidavit supporting the bail application of accused no.1. On scrutiny of their examination in chief and cross examination, we find that these witness are not trust worthy and cannot be believed to give benefit of alibi to accused no.1. Their evidence is shaky and contradictory. It cannot be established that accused no.1 was at Gajangi hall right from 9.00 am on wards till noon. Accused no.1 was at the hall at 12.00 noon onwards which is after the incident. The place of incident is at a short distance from counting hall.

36. Accused no. 2 examined himself as DW1. He stated that in 2006 he started Bhiwandi Public Action Committee. There was a site belonging to the Government. Committee proposed the said place for girls school. Memorandum was submitted. They met CA and others. They went to Delhi on 2.7.2006. He went to Burhanpur on 4.7.2006. on 5.7.2006 he learnt that there was firing at Bhiwandi at the place which was demanded by them for school. On 6.7.2006 he came back to Bhiwandi. FIR was registered against several persons including him. Five cases were registered against him with Nizampura Police station. There were five candidates of his party contesting election on 27.5.2007. No candidate from his party contested election for ward no. 25. He knows accused no.1. He is not his friend. Voting was on 28.7.2005. He requested his candidate to reach Gajangi hall at 8.00am. He reached Gajangi hall. There was waiting hall on the ground floor. Counting was on first floor. He was sitting in a hall. Some reporters were sitting in a hall. He was counting agent of Parvez Amin Momin. He came to know that someone killed brother in law of Hanif Qureshi. He was called by police. Inquiry was made with him. He put his signatures on the register and went to first floor. He was called by police. He was taken to police station. He was arrested. There was videography at waiting hall as well as counting centre. He demanded copy of the CD from the police and also from corporation. He received CD of videography of the

counting hall and no CD of videography of ground floor was given to him.

In the cross examination he stated that he knew accused no.1 since he is Councillor. Case was filed against accused no.1 regarding land dispute. He went to counting hall at 12.00 noon. He was a active member in the land dispute.

37. DW2 for accused no.2 Mr Farukh Nisar Momim has deposed that, he contested election for Bhiwandi Nizampura Municipal Council in 2007 from ward no.21 and he was elected. On 28.5.2007 he reached Gajangi hall at 9.00 am. Parvez Shaikh was his counting agent. He saw Gulab Nabi (accused no.2) who was contesting election against him. He was with him from 9.30 am till 12.30 noon. Accused no.2 is not his friend or relative.

In the cross examination he stated that he contested election for Bhiwandi Vikas Ekta Aaghadi. Javed Dalvi is the president of his party. There were 150 to 200 persons present at the Pandal. He cannot state who stayed there for how much time. He knows accused no.1 He had submitted affidavit in favour of accused no.1 in rioting case to save him. He did not know for what purpose accused no. 2 came there. When accused no. 2 made application for alibi his statement was recorded by police he denied that he has not stated anything in his statement before the police which he had deposed before Court. He was shown copy of the statement. He admitted that,

it is not mentioned in his statement that at 9.30 am Gulam Nabi was present in the Pandal at Gajangi Hall. He was shown his statement. He admitted contents of the statement as true. It was marked as Exh. 34. He did not go to the police station and stated that accused no. 2 was present at Gajangi hall at 9.30 am.

38. DW3 for accused no.2, Malik Nazir Momim alias Kitabi deposed that he know accused no.2. He is Vice-President of Lok Bharati Party of Maharashtra State. He is also Vice President of same party for Bhiwandi city. This candidate of his party contested election of 2007. There were no candidate from his party for ward no.25. He contested election as a dummy candidate. He went to accused no. 2 to take him for counting. PSI Sayyed met him at Nizampura Police station. He reached Gajangi hall at 9.00 am. Several persons were present there along with accused no.2. Accused no.1 was present along with other persons. Accused no. 2 was agent of Parvez Amin Momin. At about 10.00 to 10.45 am accused no.1 informed accused no. 2 that there was a murder of brother in law of Hanif Qureshi. No inquiry were made by the police from 28.5.2007.

In the cross examination he stated that he know accused no.2 since childhood. He is residing in the vicinity of the accused no.2. Two cases are pending against him. Crime No. 62/2006 and 98/2006 are registered against him at Nizampura Police Station. Crime no. 126/2006 is registered against him with Bhiwandi City

Police Station. He did not go to the police to intimate this fact. He did not submit written report to the police about assault. For the first time he is appearing before the Court and deposing about the fact stated in the evidence.

39. DW4 for accused no. 2 Parvez Ahmed Haji Mohammad Amin stated that he contested election of municipal corporation in 2007. He contested election from Lokbharati Party. Accused no. 2 was Vice President of said party. Accused no. 2 was his counting agent. Several persons were present at the Gajangi hall including accused no. 2. Accused no.1 was also present there. His name was called at 12.00 noon result was declared at 1.00 p.m. Three false cases are filed by police about incident of 2006. Hence he did not go to police station from 28.5.2007.

In the cross examination he stated that he know accused no. 2 since childhood. Three cases are pending against him. When he went Gajangi hall so many persons were there with him.

40. DW5 for accused no. 2 Mr. Sultan Kifyatulla Qureshi states that he know accused no.2. He is press reporter. He went to Gajangi hall and covered the news of election. He reached the hall at 10.15 to 10.30 am. He say accused nos.1 and 2. He received a call that one boy from that area was killed. He learnt that he was brother in law of Hanif Quresh. He informed this fact to accused no.2. He went to Sairaj hospital. He informed about above fact to Hanif Qureshi.

In the cross examination he has stated that accused no. 2 is Vice President of Lokbharati party for Maharashtra. He is president of Yuva Lok Bharati party for Bhiwandi. He was called for inquiry by Nizampura police station on 20.7.2007. His statement was recorded. It is marked as Exh. 345. He has not stated before the police in his statement what he has deposed in the Court. For the first time he is stating that he had seen accused Salim Quresh and Gulam Nabi at 10.15 am to 10.30 a.m at Gajangi hall. He did not inform the police by sending letter as it did not felt it necessary to intimate this fact to the police. For the first time he is stating before the Court the aforesaid fact.

41. From the version of these witnesses, it is apparent that they are acquainted with the accused. The version deposed by them was disclosed for the first time in the Court. It is difficult to believe them. Their version do not inspire confidence to override the evidence of witnesses examined by the prosecution. The trial Court has committed a patent error in accepting the version of defence witnesses examined at the instance of accused no.2.

42. From the evidence adduced by the prosecution undisputed fact would indicate that accused no.1 Salim Qureshi is a Municipal Councillor of Bhiwandi Nizampura Municipal Council. He contested corporation election thrice and won the election. There was election of Bhiwandi Nizampura Municipal Council on 27.5.2007 and the

counting was on 28.5.2007 at Gajangi Hall. Opposite candidate of accused no.1 was Hanif Qureshi. Deceased Akhil Qureshi was brother in law of Hanif Qureshi. Case of the prosecution is that, the incident took place due to political rivalry and due to election of Bhiwandi Nizampura Municipal Council. PW12 Firoz Jumman Chaudhari is a friend of deceased Akhil Qureshi and they were together at the time of incident. PW12 Firoz Chaudhari and PW13 Mohammad Sharif Shaikh took the injured Akhil Qureshi to Siraj hospital. He succumbed to the injuries.

43. Accused nos.1 and 2 examined defence witnesses. Defence of the accused no.1 is that he was present at the Gajangi hall at the time of incident. Complaint was promptly lodged in which names of the accused are mentioned. Distance between scene of offence and Gajangi hall is about 1 km. It is possible to reach Gajangi hall from the spot of offence within short span of time. Accused no.1 pleaded that he was present at the Gajangi hall from 9.00 a.m. till he was called by police. Prosecution examined PW22 Sanjay Punyarthi and PW23 Ravindra Kasare. According to PW22 accused no.1 had appeared at the hall at about 12.00 to 12.20 noon and documents to that effect is at Exh. 216, 217, 218 and 219. Situation in the hall was that there is ground floor and upper floor and that persons were called, signatures of the candidates were taken on upper floor. As soon as candidate enters he has to make signature. PW22 submitted

that accused no.1 put his signature at 12.00 to 12.20 noon much latter to the alleged time of incident. Distance between scene of offence and the Gajangi hall is not too far. Witness in cross examination has admitted that he do not know whether accused no.1 was present on the ground floor up to 12.00 noon and signatures at Exh. 216 to 219 were taken at counting hall. Witness admitted that these entries have no concern as to when persons appeared at the Gajangi hall. PW23 stated that he was on election duty Gajangi hall on 28.5.2007. His duty was on ground floor. According to him accused no.1 came on the ground floor at 12.00 to 12.10 noon and entries to that effect is at Exh. 221. He admitted that while going to first floor witness signed Exh. 221. He was present on duty from 7.00 am. He do not know any person was present outside the hall prior to the timing. He do not know accused no.1 was present there. From 9.00 am till declaration of the result he admitted timing mentioned in the Exh. 221, 222 about entering the Gajangi hall. Accused no.1 had appeared there after the incident and not prior to the incident. The defence of accused no.2 cannot be accepted. The version of eye witnesses cannot be disbelieved. The defence witnesses examined by accused no. 2 do not inspire confidence. The deposition of the defence witnesses is not true and correct. Statement of some of the defence witnesses were recorded and they had not stated the version reflected in the deposition before the Court. Defence witnesses appeared before the

trial Court after four years and deposed about alibi that accused no.1 was present at the Gajangi hall at the time of alleged incident. Statement of two witnesses were recorded by police prior to appearing before the trial Court after the incident but they did not state about this fact that accused no.1 was present at the Gajangi hall from morning till noon. Evidence of PW22 and PW23 is sufficient to indicate that accused no.1 had appeared at Gajangi hall after 12.00 noon. There is no reason to deviate from the reasoning and the findings of the trial Court for rejecting the defence of accused no.1. Surprisingly the trial Court has accepted the defence of accused no.2 which suffers from similar infirmities. The trial Court has accepted the evidence of defence witnesses and the defence of accused no.2 without elaborating reasons for discarding evidence of eye witnesses. Findings of the trial Court in acquitting accused no. 2 are erroneous, perverse and contrary to the evidence on record. Version of the defence witnesses examined by the accused no.2 ought not to have been believed by the trial Court. They have deposed for the first time before the Court or some of the witnesses have filed affidavit belatedly supporting the bail application of the accused. In the light of consistent evidence of the witnesses accused no.2 ought not to have been acquitted on the ground of alibi.

44. Prosecution has examined PW12 complainant who is eye witness to the incident. PW13, PW14 and PW20, are the eye

witnesses to the incident. Although PW12 do not support prosecution case fully, he has admitted certain facts and the other eye witnesses have supported prosecution case. Evidence of PW21, PW22, PW23 and PW26 also bears importance. They have supported prosecution case. Overt act has been attributed to all the accused. Accused no.4, 5 and 10 had died during the pendency of the appeal and their appeal stand abated. Although it was argued that accused nos. 6, 7, 8, 9, 12 and 13 were not armed with any weapon and that they have been falsely implicated, involvement of said accused is reflected right from inception. They are named by eye witnesses. They have fully participated in the crime. They were present at the scene of offence along with accused nos.1, 2, 3 and 11. Accused no.1 is the main accused who was armed with weapon. All of them gathered together with common object. They intercepted the complainant and the deceased. All of them pulled down the complainant and the deceased from the motorcycle. Overt act of assault is attributed to all the accused including the aforesaid accused who were not armed with weapon. All of them have acted in furtherance of common object and they cannot be segregated and absolved from the offence of murder. Evidence of witnesses is consistent. All the eye witnesses have attributed role to all the accused. Prosecution has established its case that all the accused have committed murder of the deceased Akhil Qureshi in furtherance of common object. Prosecution have

examined several other witnesses relating to recovery of weapons etc. Several documents are proved in evidence. Corroborative evidence has been established through the evidence of other witnesses. The trial Court has rightly observed that prosecution has established its case against accused.

45. Memorandum of accused no.3 is proved by P.W.2 which is at Exh.170 and recovery panchnama is at Exh.171 by which M.O. No.2 and 3 was recovered. Next memorandum is of accused no.10 which is at Exh.278 proved by P.W.36 and recovery panchnama is at Exh.225, which is proved by P.W.25, under which one pen knife M.O. No.4 is recovered. Accused no.1 was arrested vide Exh.181 and P.W.6 proved that panchnama. Vide that panchnama M.O. No.5, 6, 7 were seized. Accused no.2 was arrested vide panchnama Exh.186 which is proved by P.W.7 and M.O. No.8 was recovered under it. Only chappal M.O. No.8 were seized, but no blood was detected on chappal of accused no.2 as per Exh.292 (C.A. Report). Accused no.3 and 4 were arrested vide panchnama Exh.259 proved by P.W.38 and M.O. No.25, 30, 31 of accused no.3 and M.O. No.32, 33, 34 of accused no.4 were seized under panchnama Exh.259. Accused no.5 is arrested vide panchnama Exh.190 which is proved by P.W.9 under which M.O. No.9 was seized. Accused no.6 and 7 were arrested vide panchnama Exh.210 which is proved by P.W.19 under which M.O. No.23, 24 were seized. Accused no.8, 9, 10, 11 arrested vide Exh.194 which is proved by P.W.11 under

which M.O. No.27, 28, 29, 30 were seized. Accused no.12, 13 were arrested vide panchnama Exh.192, which is proved by P.W.10, 18 under which M.O.No.10 and 11 were seized. C.A. reports of accused no.1 are at Exh. 293, 297. Human blood is detected vide Exh.293. So far accused Taju is concerned, his report is at Exh.293 and human blood is detected of "B" group, but no blood is traced on chappal. There is no blood detected in Exh.297. In Exh.297 no blood is detected. Exh.293, 297 are of accused no.2 Gulam Nabi. Nothing is traced on his pair of chappal. Exh.293, 296 are report of accused Luvli on which human blood is traced. In Exh.293 human blood is traced on accused Nadeem Naeem. There is human blood found on accused persons namely Umar Pinjari, Haji Firoz, Ismail Haji Ibrahim and Abdul Hamid in Exh.293. As per Exh.293, blood group of the deceased is "B".

46. High Court has full power to review the evidence upon which Order of acquittal was founded. Powers of the appellate Court in considering the appeal against acquittal is extensive. If conclusion reached by the trial Court are palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand they are likely to result in grave injustice, the appellate Court can interfere with such conclusion. In the present case the judgment of the acquittal of accused no2 is based on the conclusion which are palpably wrong. From the judgment it can be seen that view of the

trial Court to the extent of acquittal of accused no.2 would result in grave injustice and required to be interfered.

47. In the case of ***Jarnail Singh and others Vs State of Punjab***(supra) it was observed that evidence of chance witnesses requires a very cautious and close scrutiny and chance witness must adequately explain his presence at the place of occurrence. Conduct of a chance witness, subsequent to incident may also be taken into consideration particularly as to whether he has informed any one else in the vicinity about the incident.

48. In the case of ***Tahsildar Singh and another Vs State of U.P***(supra) it is observed that, any contradiction found in the statement of the witness would be immense help to an accused to discredit the testimony of the witness making the statement. Section 162 of CR.P.C. was conceived in an attempt to find a happy via media namely while it enacts an absolute bar against the statements made before the police officer being used for any purpose whatsoever, it enables the accused to rely upon it for a limited purpose and contradicting a witness in the manner provided by Section 145 of the Evidence Act by drawing his attention to parts of the statements intended for contradiction.

49. In ***Shri Gopal and another Vs Subhash and others*** (supra) it was observed that for the purpose of attributing section 149 IPC, it is not necessary that overt act must be

committed by all the accused persons. What is necessary is formation of an unlawful assembly and knowledge of the persons thereof about consequences arising from doing an act which amounts to offence. The essence of the offence under Section 149 of IPC would be a common object of the persons forming the assembly. It is necessary for constitution of the offence that, the object would be common to the persons who compose the assembly that is that they should all be aware of it and concur in it. There must be some present and immediate purpose of carrying into effect the common object. Common object is different from a common intention in so far as in the former no prior consent is required, nor a prior meeting of minds before the attack would be required and an unlawful object can develop after people get there and there need not be a prior meeting of minds.

50. In the case of **Dudh Nath Pandey Vs State of U.P(supra)** it was observed that defence witnesses are entitled to equal treatment with those of the prosecution. Court's have to overcome their traditional, instinctive disbelief in defence witnesses. Quite offence, they tell lies but so do the prosecution witnesses

51. In the case of ***Balak Singh and others Vs The State of Punjab***(supra) it was held that false implication of some of the accused casts doubt on the complicity of the rest. In the said decision it was observed that if prosecution could go to the extent of implicating four innocent persons by inserting their names in the inquest report and in the FIR which was written subsequent to the inquest report they could very well have put in their names of the other five appellants also because they were equally inimical the prosecution party. Court must make an attempt to separate grain from the chaff, truth from the falsehood, yet, this could only be possible when the truth is separable from the falsehood. Where grains cannot be separated from the chaff because grain and the chaff are so inextricably mixed up that in the process of separation the Court would have to reconstruct an absolutely new case for prosecution by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, then this principle will not apply. It was further observed that, the plea of alibi postulates the physical impossibility of the presence of the accused at the scene of offence by reasons of his presence at another plea. Plea can, sufficient only if it is shown that the accused was so far away at the relevant time that he could not be present at the spot where crime was committed.

52. In the case of ***Bhagirath Vs State of Madhya Pradesh*** (supra) it was observed that it is well settled that the prosecution can succeed by substantially proving the very story it alleges. It must stand on its own legs. It cannot take advantage of the weakness of the defence. The Court on its own cannot make out a new case for the prosecution.

53. In the ***Adalat Pandit and another vs State of Bihar***(supra), it was observed that evidence of defence witnesses about alibi was doubtful as the distance between two places i.e place of incident and the village where accused was allegedly present was very short. Minor contradictions or inconsistency do not affect the prosecution case. The Court disbelieved the plea of alibi and accepted the evidence of the prosecution witnesses, more particularly the eye witness which had attributed active role to the accused.

54. In the case of ***Pillu @ Pralhad Vs state of Madhya Pradesh*** (supra) , it was observed that although it was contended by defence that one of the witness have turned hostile and another introduced in the investigation after 22 days, the trial Court had examined the entire record before arriving at the conclusion of the guilt of the accused. There was no reason to take a different view.

55. In the case of ***Ranapratab and others Vs State of Haryana***(supra) it was observed that if a murder is committed in dwelling house, inmates of the house are natural witnesses. If a

murder is committed on the street, only passers by will be witnesses. Their evidence cannot be discarded or viewed with suspicion merely on the ground that they are chance witnesses. Presence of eye witnesses cannot be judged by any pre-conceived notion of how he should have reacted at the time of occurrence. Every person should witness an assault in his own way.

56. In the case of ***Mohd. Akhtar @ Kari and others Vs State of Bihar*** (supra) the Apex Court was dealing with appeal against acquittal and correctness of the judgment of High Court which has set aside the acquittal of the accused and convicted them. It was observed that presumption of innocence of the accused is further reinforced by his acquittal by the trial Court. Interference with the order of acquittal is not permissible on the ground that a different view if possible. The Apex Court can overrule acquittal if it is substantially and compelling reasons such as conclusion of the trial Court is wrong, decision was based on erroneous view of law, trial Court judgment is likely to result in grave miscarriage of justice, approach of the trial Court in dealing with the evidence was patently illegal, trial Court judgment was not justified and unreasonable.

57. The Supreme Court in case of ***Ravi Sharma VS State(Government of NCT of Delhi)*** (supra) has taken a similar view. It was also observed that the Court of appeal has wide power of appreciation of evidence in an appeal against acquittal subject to

rider with presumption innocence continues. Appellate Court has full power to review, re-appreciate and reconsider the evidence. The CRPC puts no limitation, restrictions, or condition on exercise of power and the Court can reject its own conclusion on fact of law. In all other decisions relied upon by the learned counsel for accused no.2 similar view was taken by the Apex Court.

Applying the principles enunciated in the decisions reported herein above with regard to appeal against order of acquittal, we are of the opinion that the judgment of the Trial Court qua acquittal of accused no. 2 is perverse and would lead to miscarriage of justice and considering the evidence on record interference is required to set aside the acquittal of accused no.2.

58. State of Maharashtra has preferred Criminal Appeal No 219/2012 challenging the acquittal of accused no.2 for an offence under Section 302 read with Section 149 of IPC and also acquittal of all the accused for the offence under section 323 with section 149, 506 read with section 149 IPC. Acquittal of accused no. 2 under Section 302 read with section 149 of IPC is required to be set aside. No interfere is called for in respect to acquittal for other minor offences viz. 323 read with 149 and 506 read with 149 of IPC. Appeal preferred by sister of the deceased under section 372 of Cr.P.C. challenging the acquittal of accused no.2 is required to be allowed by setting aside Judgment to the extent of acquittal of accused no.2.

Appeal against conviction preferred by the accused are required to be dismissed.

59. Hence the following order :-

ORDER

- i. Criminal Appeal Nos. 129 of 2021 and 1304 of 2011 are dismissed;
- ii. Criminal appeal no. 719 of 2012 and Criminal Appeal No.1307 of 2012 are allowed. Judgment and Order dated 11.8.2011 passed by Extra Joint Ad-Hoc Additional Sessions Judge, Thane, at Thane in Sessions Case No. 361 of 2007 acquitting original accused no.2 Gulamnabi Jalil Ahmed Ansari is set aside and he is convicted for offence under section 302 read with section 149 of IPC. He is sentenced to suffer imprisonment for life;
- iii. The appellants who are on bail is granted 12 weeks time to surrender before trial Court for undergoing sentence;
- iv. The original accused no.2 Gulamnabi Jalil Ahmed Ansari is granted 12 weeks' time to surrender before trial Court for undergoing sentence;
- v. Criminal Misc. Applications, if any pending, shall stand disposed of.

(PRAKASH D. NAIK, J.)

(A.S.GADKARI, J.)

VINITA VIKAS
NAIK

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NAIK
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