

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.

CRIMINAL APPEAL NO. 266 OF 2018

1. Shaikh Ayyub @ Babar Sk. Kadar,
Age : 29 years, Occu : Business,
R/o. Land No.28, Baijipura, Indira Nagar,
Aurangabad, Tal. and Dist. Aurangabad
 2. Shaikh Akbar s/o. Sk. Kadar,
Age : 33 years, Occu : Business,
R/o. Land No. 28, Baijipura, Indira Nagar,
Aurangabad, Tal. and Dist. Aurangabad.
- .. Appellants
(Orig. Accused)

Versus

The State of Maharashtra
Through the Police Station Officer,
Jinsi Police Station, Aurangabad.
Tal. and Dist. Aurangabad.

.. Respondent

.....
WITH

CRIMINAL APPLICATION NO.3972 OF 2022

IN

CRIMINAL APPEAL NO.266 OF 2018

...
AND

CRIMINAL APPEAL NO.124 OF 2023

Joharabegum w/o. Shaikh Akhtar
Age : 65 years, Occu : Household,
R/o. Indira Nagar, Baijipura, Aurangabad

.. Appellant
(Orig. Complainant)

Versus

1. The State of Maharashtra
Through Police Inspector,
Jinsi Police Station, Aurangabad
2. Mustak s/o. Sayyed Pasha,
Age : 39 years, Occu : Mechanic,
R/o. Hari Masjid, Old Mondha,
Tq. & Dist. Aurangabad.

3. Shaikh Kadar s/o. Shaikh Daud,
Age : 58 years, Occu : Business,
R/o. Lane No. 28, Indira Nagar,
Baijipura, Aurangabad

.. Respondents
(Respdt Nos.2 & 3/Orig. Accused
Nos.3 & 4)

...

AND

APPLICATION FOR LEAVE TO APPEAL BY STATE NO.145 OF 2018

The State of Maharashtra,
Through Police Station Officer,
Police Station Jinsi, Aurangabad

.. Applicant
(Orig. Complainant)

Versus

1. Mustak s/o. Sayyad Pasha
Age : 36 years, Occu : Mechanic,
R/o. Hari Masjid, Mondha,
Aurangabad.

2. Shaikh Kadar s/o. Sk. Daud,
Age : 54 years, Occu : Business,
R/o. Lane No. 28, Baijipura,
Indira Nagar, Aurangabad.

.. Respondents
(Orig. Accused Nos.3 and 4)

...

Shri. V. D. Sapkal, Senior Advocate h/f. Shri. Santosh B. Bhosle,
Advocate for the Appellant in Criminal Appeal No.266 of 2018 and for
the Applicant in Criminal Application No.3972 of 2022

Smt. V. S. Chaudhari, APP for the State in all the matters.

Shri. Rajendra Deshmukh, Senior Advocate a/w. Shri. Vishal Chavan and
Shri. Rajat P. Untwal, Advocate i/by. Shri. Patel Khizar and Shri. Devang
Deshmukh, Advocate for the Appellant in Criminal Appeal No.124 of
2023

Smt. V. S. Chaudhari, APP for the Applicant / State in ALS No.145 of
2018

Shri. Nilesh S. Ghanekar, Advocate for Respondent No.1 in ALS No.145
of 2018 & for Respondent No.2 in Criminal Appeal No.124 of 2023

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**CORAM : R. G. AVACHAT AND
NEERAJ P. DHOTE, JJ.**

**RESERVED ON : 05.02.2024
PRONOUNCED ON : 26.03.2024**

JUDGMENT : [Per NEERAJ P. DHOTE, J.]

1. Criminal Appeal No.266 of 2018 is filed under Section 374 (2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Cr.P.C.') against the conviction and sentence recorded by the learned Additional Sessions Judge, Aurangabad, in Sessions Case No.261/2013 dated 09.02.2018 against the Appellants (Accused Nos.1 and 2) for the offence punishable under Section 302 and 323 r/w. Section 34 of the Indian Penal Code.

2. Criminal Appeal No.124 of 2023 is filed under Section 378 (4) of the Cr.P.C. by the Informant against the aforementioned Judgment by which Respondents No.2 and 3 (Accused Nos.3 and 4) are acquitted of the aforesaid offence.

3. Application for Leave to Appeal by State No.145 of 2018 is preferred by the State under Section 378 (1) (b) of the Cr.P.C. against the aforementioned Judgment acquitting Respondents No.1 and 2 (Accused Nos.3 and 4) of the aforesaid offence.

4. The Prosecution's case, in brief, as revealed from the papers on record is as under:

4.1. The Informant / (PW No.1) Joharabegum was the resident of Galli / Lane No.32, Indira Nagar, Baijipura, Aurangabad. She was having five (05) sons. They all were residing jointly. On 22.04.2013 at about 05:30 p.m. when she came out of her house after offering *Namaz* and reached near Hotel Patel, she saw the Appellants and acquitted Accused Nos.3 and 4 assaulting her son Mohammad Azar @ Ajju Builder with deadly weapons and stone. Her son sustained severe injuries. When she asked the assaulters about the said act, they pushed her and she fell down. Her another son Sk. Mohammad Athar (PW No.4) came and intervened. He was also assaulted by them. The assaulters were known to her and after the assault they left. Her injured son Ajju Builder was taken to hospital, where he was declared dead. She lodged the Report with the Jinsi Police Station and Crime *vide* No. I-55/13 came to be registered against the assaulters for the offence punishable under Sections 302, 307, 143, 147, 148, 149 Indian Penal Code (for short 'I.P.C').

4.2. During the course of investigation, the Police conducted the spot panchanama, prepared Inquest, sent the body for Postmortem, recorded statement of witnesses, arrested the accused persons, seized the muddemal property such as clothes of deceased, witnesses and

accused persons, seized the weapons of assault from the accused persons pursuant to the disclosure under Section 27 of the Indian Evidence Act, sent the muddemal property for examination to the Chemical Analyzer, collected the relevant documents such as Post-mortem Report, Chemical Analyzer Report etc., and on completion of investigation, submitted the Charge-sheet.

5. The learned Additional Sessions Judge, Aurangabad framed the Charge against the Appellants - accused and two acquitted accused under Sections 302 and 307 r/w. Section 34 I.P.C. at Exh.6, to which the Appellants and the acquitted accused pleaded not guilty and claimed to be tried.

6. To prove the Charge the Prosecution examined in all Seventeen (17) witnesses and brought on record the relevant documents. After the prosecution closed its evidence, statements of the Appellants and acquitted accused came to be recorded under Section 313 (1)(b) of the Cr.P.C. They denied the prosecution's case and evidence. On appreciation of evidence available on record, the learned Trial Court passed the impugned Judgment and order convicting the Appellants and acquitting the Accused Nos.3 and 4.

7. Heard all the sides. Scrutinized the evidence on record.

8. It is submitted by the learned Advocate for the Appellants that though the prosecution examined four (04) eye witnesses, there are material inconsistencies in their testimony. There is delay in recording their statements by the police. The evidence available on record do not firmly establish that the Appellants committed the said crime and submitted that the Prosecution has not explained as to why more injuries were seen in the Postmortem Report as compared to the injuries noted by the doctor where the deceased was initially taken. It is submitted that the evidence on record do not establish the Charge against the Appellants and they be acquitted as the Accused Nos. 3 and 4 have been acquitted on the basis of the same evidence. He relied on the Judgments which would be considered in the later part of this Judgment. It is submitted that the Appeal be allowed.

9. It is submitted by the learned APP that the evidence available on record sufficiently proved the Charge against the Appellants as well as the acquitted accused. It is submitted that there is consistency in the testimony of the eye witnesses on the material aspects. There is discovery / recovery of the weapons of assault at the instance of the accused. It is submitted that the learned Trial Court has rightly convicted the Appellants, however has wrongly acquitted Accused Nos. 3 and 4 though there is evidence against them. The medical evidence corroborate the testimony of the eye witnesses and the Chemical

Analyzer Report show the blood on the clothes of the Appellants and the weapons. It is submitted that the Appeal against Conviction be dismissed and the Appeal against Acquittal be allowed. The judgment relied upon by the learned APP would be considered in the later part of this Judgment.

10. It is submitted by the learned Advocate for the Informant that the evidence on record is consistent and proved the Charge. Though the learned Trial Court convicted Accused Nos.1 and 2, it has acquitted Accused Nos.3 and 4 on the same set of evidence. It is submitted that the Appeal against conviction be dismissed and the Appeal against acquittal be allowed.

11. The convicted accused are referred as Appellants No.1 and 2. The witnesses examined by the prosecution can be categorized as follows:

(a) **Eye witnesses :-** PW No.1 - Joharabegum w/o. Shaikh Akhtar,
PW No.2 - Shaikh Yunus s/o. Shaikh Laddu,
PW No.3 - Shaikh Javed Abdul Gani,
PW No.4 - Shaikh Mohammad Athar Shaikh Akhtar

(b) **Medical evidence :-** PW No.12 - Dr. Bhavna Santosh Takalkar,
PW No.13 - Dr. Kailas Ukhardaji Zine,
PW No.14 - Dr. Pushpa Sherichand Rajan.

(c) **Panch witnesses :-** PW No.5 - Mohammad Khairuddin Abdul Kadar,
PW No.6 - Zuber Kajid Patel,
PW No.7 - Syed Sadek Syed Aref,
PW No.8 - Shaikh Haroon Shaikh Rauf,
PW No.9 - Shaikh Babu Shaikh Miya.

(d) **The Policemen :-** PW No.10 - Yunus Shah Daulat Shah,
PW No.11 - Manik Bhaurao Hiwale,
PW No.15 - Gafur Sadruddin Patil,
PW No.16 - Archana Supadu Patil,
PW No.17 - Shaikh Rehman Shaikh Jabbar.

HOMICIDAL DEATH

12. The evidence of PW No.15 – Gafur Sadruddin Patil show that on 22.04.2013 he was attached to the Jinsi Police Station as the Police Inspector and at about 05:30 p.m. he was on patrolling duty in Katkat Gate area. He received the information on the phone that fighting was going on in Galli No.10 of Baijipura. He conveyed the information to the DCP Zone and ACP and reached on the spot of incident. He learnt that the injured was shifted to Apex Hospital and so, he went to Apex Hospital and there he saw the dead body of Ajju Builder. Photographs of dead body was taken through the Photographer. The dead body was stained with blood and there were injuries on the dead body. The MLC at Exh.93 was already sent to the Jinsi Police Station. He called two panchas for the inquest. Exh.67 inquest was

prepared by him in the presence of the panchas. The body was referred to Ghati hospital, Aurangabad for postmortem *vide* letter at Exh.114. His cross-examination show that after receipt of information, within twenty (20) minutes he reached on the spot and he was there for ten (10) minutes. His evidence show that he conducted the spot panchanama at Exh.65, where blood was found and *Jambiya* cover and Stones were seized in the presence of panchas.

13. The evidence of PW No.6 – Zuber Majid Patel show that on 22.04.2013 he was called by the police at the Apex Hospital at about 07:00 to 07:30 p.m. The dead body of Ajju was in the hospital. There were many injuries on the dead body. The inquest at Exh.67 was prepared. There is no challenge to the evidence of this witness. The inquest at Exh.67 corroborate the evidence of this panch witness and the Police Officer.

14. The evidence of PW No.5 – Mohammad Khairuddin show that on 22.04.2013 at about 10:00 to 10:30 p.m. when he came in Galli No.28/29 of Baijipura he saw the crowd near the hospital of Dr. Shah. He went there. PW No.15 – Gafur Sadruddin Patil called him for panchanama. Khalil was the another panch. The spot was in front of Shah Hospital. There was blood on the ground. The handle of *Jamiya*, two stones, cotton stained with blood, impression of hands stained with

the blood were seen on the spot of incident. Police collected the articles and prepared the spot panchanama, which was at Exh.65. Nothing has come in his cross-examination to discard his evidence. His evidence is corroborated by the evidence of PW No.15 – Gafur Sadruddin Patil.

15. The evidence of PW No.12 - Dr. Bhavna Santosh Takalkar show that she was running Apex Super-speciality Hospital at Aurangabad. She was the qualified doctor. On 22.04.2013 at 08:00 p.m. one Sk. Azar Sk. Akhtar @ Ajju Builder was brought to her hospital and he was declared dead on admission. She noted ten (10) injuries on the dead body.

16. The further evidence of PW No.12 - Dr. Bhavna Santosh Takalkar show that she sent the MLC, a copy of which is at Exh.93, to the Jinsi Police Station. The medical papers prepared by her during the course of the medical examination of the body, are at Exh.96. The history was given by the brother of deceased and it was noted in the papers. Her not knowing the brother of deceased prior to the incident is inconsequential. Not mentioning in the medical papers as to who gave the history does not lead to discard her evidence. The aforesaid exhibits corroborate the evidence of this doctor witness.

17. The evidence of PW No.13 – Dr. Kailas Ukhardaji Zine show

that he was the Head of the Department in the Government Medical College and Hospital, Aurangabad having long experience in the field as he conducted more than ten thousand postmortem examinations. On 23.04.2013 the dead body of Shaikh Azar Shaikh Akhtar @ Ajju Builder was brought for post-mortem examination by PI. G.S. Patil of Jinsi Police Station (PW No.15). Team of doctors comprising himself, Dr. S.A. Waghmare, Dr. V. P. Meshram and Dr. C. S. Bujare conducted the postmortem examination between 01:40 p.m. to 02:40 p.m. on the same day. The body was well nourished and well built. The face showed the dried blood cells and injuries. There were blood stains on hands, right arm, forearm, left hand arm, both thighs, shoulders, back and pelvic regions. On external examination, they found 30 injuries in the nature of lacerated wounds, stab wounds, abrasions and incised wounds. On internal examination, he noted severe injuries in the nature of under scalp contusion, under scalp hematoma, undisplaced fracture, displaced fissure fracture, etc.

18. The further evidence of PW No.13 – Dr. Kailas Ukhardaji Zine show that the blood was preserved for detection of blood grouping and gave the cause of death as “**Shock and hemorrhage due to multiple stab and incised injuries.**” He deposed that the injuries mentioned in Column No.17 and 19 of the postmortem report were sufficient to cause death in ordinary course of nature. On receipt of the report from the

Chemical Analyzer, the opinion regarding cause of death was fortified. The Postmortem Report at Exh.104 corroborate the evidence of this witness.

19. Though, it is brought in the cross-examination of PW No.13 – Dr. Kailas that the signatures of all the doctors are not appearing on each page of the postmortem report, he deposed that signature of one of the doctors was appearing on each page of the postmortem report. He denied that the incised wound and stab injury were possible due to fall on hard or blunt object or on knife or sword. Not taking the clinical notes while giving the opinion regarding the injuries, non-examination of the clothes of deceased and weapon at the time of the postmortem, non-mentioning of time of death, manner of death and method adopted in causing the death in the postmortem report will not affect his testimony.

20. One of the contention of learned Advocate for the Appellants is that if we see the evidence of the doctors i.e. PW No.12 – Dr. Bhavna Santosh Takalkar and PW No.13 – Dr. Kailas Zine there is variance in the number of injuries present on the deceased and it is for the prosecution to explain the same. If we see the evidence of both the said witnesses including inquest, PW No.12 – Dr. Bhavna examined the body and declared dead on admission, whereas the evidence of

PW No.13 – Dr. Kailas Zine show that he conducted the postmortem and found thirty (30) injuries, which obviously was a deeper examination. This variance cannot be said to be fatal for the prosecution.

21. The cross-examination of the above referred witnesses show that the Homicidal Death of Shaikh Mohammad Azhar @ Ajju Builder due to the injuries found on the body is not seriously disputed by the defence. Thus, in view of the above discussed evidence, it is established by the prosecution that Shaikh Mohammad Azhar @ Ajju Builder died homicidal death.

EYE WITNESSES TO THE INCIDENT

22. PW No.1 – Joharabegum is the mother of the deceased Ajju Builder. She was the resident of Baijipura and residing jointly with her sons including the deceased. PW No.2 – Shaikh Yunus was the resident of Galli No.26, New Baijipura and working in one tailoring shop situated on the corner of Galli No.26. PW No.3 – Shaikh Javed was the resident of Kiradpura and working in one tailoring shop which was near Galli No.12, Baijipura. PW No.4 – Shaikh Mohammad is the brother of deceased Ajju Builder. He was residing in Baijipura with PW No.1 – Joharabegum and four (04) brothers. These aspects in the evidence of the aforesaid witnesses are not in dispute.

23 (a). One of the contention of learned Advocate for the Appellants is that there is delay in recording the statement of PW No.3 - Shaikh Javed. He placed reliance on the Judgment in the case of **Deoraj Deju Suvarna and others vs. State of Maharashtra, 1994 (4) Bom.C.R. 85** wherein the observations in the case of **Ganesh Bhavan Patel and another vs. State of Maharashtra, AIR 1979 SC** regarding delay have been reproduced wherein it is observed that:

“22. The Apex Court in the case of (Ganesh Bhavan Patel and another v. State of Maharashtra), reported in A.I.R. 1979 S.C. pg. 135 has observed:-

"Delay of few hours, simplicitor in recording the statements of eye witnesses may not by itself amount to serious infirmity in the prosecution case. But, it may assume such a character if there are concomitant circumstances to suggest that Investigator was deliberately marking time with a view to decide about the shape to be given to the case and the eye witnesses to be introduced. Thus, under the facts and circumstances, of the case delay in recording the statements of the material witnesses casts a cloud of suspicion on the credibility on the entire warp and woof of the prosecution story."

In para 18 of the same decision, the Apex Court observed :

"Normally, in a case where the commission of the crime is alleged to have been seen by witnesses who are easily available, a prudent investigator would give to the examination of such witnesses precedence over the evidence of other witnesses".

For the reasons stated above, we have no hesitation in holding that Sunil Shirsat did not see the incident. The learned Trial Judge erred in even believing him with respect to the date, time and place of incident."

(b) He further relied on the judgment in the case of **Bhagwan Babu Ghotkar and Ors. vs. The State of Maharashtra, 2001 ALL MR (Cri) 1569** wherein there was unexplained delay of eleven (11) days in recording the statement of the witness under Section 161 and it was

held that '*it will be unsafe to accept the evidence*'.

24. Admittedly, the statement of PW No.3 - Shaikh Javed was recorded on the 9th day from the date of incident. His evidence show that from the date of incident till recording his statement he was present in Aurangabad. He also attended the funeral of deceased. After the incident and prior to recording his statement, the police persons were coming in the area for enquiry. Till recording his statement he had no talk with anybody about the incident. This delay of nine (09) days has not been satisfactorily explained by the Prosecution. Considering the extent of delay in recording statement of PW No.3 - Shaikh Javed, his evidence is required to be kept out of consideration and is kept so.

25. Evidence of PW No.4 - Shaikh Mohammad Athar show that his statement was recorded on the 4th day from the date of incident. His evidence show that he was injured witness and was in the hospital till 02:00 to 02:30 a.m. of 23.04.2013. His evidence further show that when he was in the Ghati Hospital, police had come to him for enquiry about his injuries and he had given information to the police regarding his injuries, but police did not reduce into writing the information given by him. He was in Aurangabad after the incident till his statement was recorded. He was not knowing that after the incident police were coming in their area for making enquiry. The evidence of PW No.15 -

Gafur Sadruddin Patil show that no explanation is sought by the defence in respect of the said evidence of PW No.4 – Shaikh Mohammad Athar. Thus, recording of delayed statement of this injured witness will not be fatal for the prosecution.

26. The evidence of PW No.1 - Joharabegum show that she went to the police station and lodged the report at Exh.29 at about 10:30 p.m. The evidence of PW No.16 – Archana Supadu Patil show that on 22.04.2013 between 09:00 to 09:30 p.m. one lady had come to the police station. Report of one lady was taken in respect of the incident and she made entry in the station diary at 22:50 hours. Her evidence show that Exh.29 was the same report which was in her handwriting and under the signature.

27. The cross of PW No.16 – Archana Supadu Patil is on the point of sending copy of the FIR to the Court and the omissions. Recording of the FIR in the presence of the relatives of the informant cannot be reason to discard the FIR. Though there is cross on the point of delay, the crime took place at 17:30 hours and the crime was registered at 22:30 hours, it cannot be said that there was delay when it has come in the evidence of the Informant that she had gone to the hospital where her deceased son was taken.

28. The learned Advocate for the Appellants relied on the judgment in the case of **Audumbar Digambar Jagdane and Another vs. State of Maharashtra, 1999 Cri. L.J. 1936** wherein the omissions in the testimony of the witness in the case therein were taken into consideration. He further relied on the judgment in the case of **Hem Raj and Others vs. State of Haryana, 2005 Cri. L. J. 2152** wherein the testimony of the eye witness was not found reliable.

29. Learned APP relied on the Judgment in the case of **Narayan Chetanram Chaudhary vs. State of Maharashtra, 2000 AIR (SC) 3352** wherein it is observed that,

“Only such omissions which amount to contradiction in material particulars can be used to discredit the testimony of the witness. The omission in the police statement by itself would not necessarily render the testimony of witness unreliable. When the version given by the witness in the Court is different in material particulars from that disclosed in his earlier statements, the case of the prosecution become doubtful and not otherwise. Minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and the sense of observation differ from person to person. The omissions in the earlier statement if found to be of trivial details, as in the present case, the same would not cause any dent in the testimony of PW2. Even if there is contradiction of statement of a witness on any material point, that is no ground to reject the whole of the testimony of such witness.”

30. Coming to the evidence of three (3) eye witnesses i.e. PW No.1 - Joharabegum w/o. Shaikh Akhtar, PW No.2 – Shaikh Yunus s/o. Shaikh Laddu and PW No.4 - Shaikh Mohammad Athar, they knew the accused persons i.e. Appellants and the acquitted accused. Their

evidence show that deceased Ajju Builder contested the election of the Aurangabad Municipal Corporation which were held in the year 2010. The said election was also contested by acquitted accused no. 3 - Mustak s/o. Sayyed Pasha. They both lost the election. Due to the said defeat in the election, quarrel had taken place between the Appellants and acquitted accused on one side and deceased Ajju builder on the other side. The report / complaint in that regard was given by deceased Ajju Builder with the Jinsi Police Station. Though in the evidence of PW No.15 – Gafur Sadruddin Patil it has come that during investigation it was not found that deceased Ajju Builder filed any complaint against Mustak builder, the evidence of these three witnesses is consistent on this aspect which established inimical terms between both the sides and it remained undiluted.

31. The evidence of said three eye witnesses show that at about 05:30 p.m. on 22.04.2013 the incident of assault on deceased had taken place in Baijipura area. According to PW No.1 – Joharabegum after the *Namaz* she came out of her house to bring vegetables and at that time she witnessed the incident. According to PW No.2 – Shaikh Yunus he offered prayer in the *Noor Masjid* and after that when he was on his way towards his house by walk, he witnessed the incident. According to PW No.4 – Shaikh Mohammad, he was standing in the gallery of his house and he noticed the incident and so he immediately came down and

reached the spot of incident. As regards the spot of incident and time of incident is concerned, there is consistency in the evidence of these four witnesses.

32. Though it is the contention of the learned Advocate for the Appellants that PW No.1 – Joharabegum was the Chance Witness. Admittedly, she was the resident of area where the incident had taken place, therefore her presence cannot be said to be unnatural. Even though she happened to be near the spot of incident by chance, her evidence cannot be discarded on the ground that she was the Chance Witness.

33. The evidence of PW No.1 - Joharabegum, PW No.2 - Shaikh Yunus and PW No.4 – Shaikh Mohammad Athar show that they witnessed the actual assault on the deceased - Ajju Builder. There is consistency in their evidence in respect of the assault by the Appellants on the deceased. It is true that according to PW No.1 – Joharabegum, Appellant No.1 was having sword in his hands, whereas according to PW No.2 – Shaikh Yunus and PW No.4 – Shaikh Mohammad Athar the Appellants No.1 and 2 were having the knives in their hands. This by itself will not be sufficient to discard their testimony on the aspect of variance of the weapon when there is consistency in the evidence on the aspect of assault on deceased by the Appellant Nos.1 and 2. In all

probability she mistook the metal rod, referred in the history given to the hospital where deceased was initially taken, as seen from the evidence of PW No.12 – Dr. Bhavna Santosh Takalkar, as the Sword. Thus, the said variance will not affect the prosecution evidence. There is further consistency in their evidence that the Appellant No.2 assaulted deceased Ajju Builder with stone in his head. The inconsistency in their evidence is in respect of body parts on which the assault was made. When there are more than one assailants, the variance in the evidence of the eye witnesses in respect of manner of assault and assault on body parts is natural.

34. Though in the cross-examination of these three eye witnesses omissions are brought on record, the core of their evidence in respect of assault by these Appellant Nos.1 and 2 on deceased Ajju Builder remained unaffected. When the witness deposes after a period of one year from the date of incident, some omissions / improvements in / from their previous statement is natural. However, the omissions / improvements brought in their evidence do not affect the very genesis of their account given in their previous statement, and thus their evidence cannot be discarded.

35. As regards the omissions or discrepancies in the evidence of three eye witnesses is concerned, it would not be out of place to refer the observations of Hon'ble Supreme Court of India in **Mritunjoy Biswas**

vs. Pranab alias Kuti Biswas and another, 2013 Cr.L.J. 4212 (SC) which reads thus:

“It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission (See *Leela Ram (dead) through Dutt Chand v. State of Haryana and another, Rammi alias Rameshwar v. State of M.P. and Shyamal Ghosh v. State of West Bengal.*”

36. It is clear from the evidence of the aforesaid three eye witnesses that the assaulters i.e. the Appellants were known to them. The incident had occurred in the broad day light. The evidence of PW No.2 – Shaikh Yunus show the presence of PW No.1 – Joharabegum and PW No.4 – Shaikh Mohammad Athar at the time of the incident on the spot. The evidence of PW No.4 - Shaikh Mohammad Athar also show the presence of PW No.2 – Shaikh Yunus and PW No.1 – Joharabegum at the time of incident on the spot. Their evidence show that when PW No.1 – Joharabegum and PW No.4 – Shaikh Mohammad Athar tried to intervene to save the deceased Ajju Builder who was their son and brother, respectively, PW No.1 - Joharabegum was pushed due

to which she fell down and PW No.4 – Shaikh Mohammad Athar was assaulted. Though these eye witnesses are cross-examined at length, their evidence in respect of the witnessing the incident of assault by the Appellant Nos.1 and 2 remained unaffected.

37. In her evidence PW No.1 – Joharabegum also named the acquitted accused no.3 – Mustak Sayyed Pasha and accused no.4 – Shaikh Kadak s/o. Shaikh Daud as the assaulters. The major omission in the evidence of PW No.1 – Joharabegum that acquitted accused no.3 – Mustak Sayyed Pasha gave blow of Sword on the chest of her son and acquitted accused no.4 – Shaikh Kadak s/o. Shaikh Daud was assaulting her son by stone are proved as seen from the evidence of PW No.16 - Archana Supadu Patil. PW No.2 – Shaikh Yunus do not attribute any role of assault to the acquitted accused. Though, in the limited cross-examination conducted by learned APP for the prosecution, PW No.2 – Shaikh Yunus deposed that he had seen the acquitted accused no.3 and 4 restraining people, his cross-examination show that his complaint was only against two persons with regard to assault on the deceased. His evidence as against the acquitted accused is shaky and not concrete. In his evidence PW No.4 – Shaikh Mohammad Athar speak of involvement of acquitted accused nos.3 and 4 in the said incident. However, his said evidence was an omission which has been duly proved. Thus, it is clear that the testimony of these three eye

witnesses is inconsistent and at variance and there is material omission with respect to the involvement of acquitted accused nos.3 and 4.

38. It is true that in the evidence of PW No.4 – Shaikh Mohammad Athar he deposed that when he saw the incident from the gallery of his house, he immediately came down and went to the actual spot of incident. That will not lead to the inference that he did not witness the incident as it has come in his cross-examination that 10 to 15 seconds were required to reach on the spot of incident from the gallery.

39. The evidence of the above three eye witnesses establish the identity of Appellant Nos.1 and 2 as the assaulters on deceased Ajju Builder and on PW No.4 - Shaikh Mohammad Athar. Their testimony against the Appellant Nos.1 and 2 is consistent, inspire confidence and thus is accepted as against the Appellant Nos.1 and 2.

SEIZURE OF BLOOD STAINED CLOTHES OF ACCUSED NOS.1 AND 2

40. Learned Advocate for the Appellants cited the Judgment in the case of **Bhanudas vs. State of Maharashtra 2006 (1) Bom CR (Cri.) 22**, wherein it is observed that '*non sealing of the blood stained clothes of the accused is a serious infirmity because possibility of tampering cannot be ruled out.*'

41. The evidence of PW No.15 – Gafur Sadruddin Patil, Investigating Officer show that in the night of 22.04.2023 the Appellants / Accused No.1, 2 and 4 were brought by ACB staff to the police station and he arrested them under the arrest memorandum at Exhs.119, 120 and 121 before the panchas. His further evidence show that he seized the blood stained clothes of Appellants No.1 and 2.

42. The evidence of PW No.8 - Shaikh Haroon Shaikh Rauf show that he acted as the panch for seizure of clothes of Appellants No.1 and 2 in the Jinsi Police Station after the midnight. The clothes were stained with blood. The panchanamas for seizure of clothes of Appellants No.1 and 2 were at Exhs.79 and 80. Though the panch witness is cross-examined, his evidence in respect of seizure of blood stained clothes of Appellants No.1 and 2 remained unshaken. His acquaintance with the witnesses is not sufficient to discard his testimony. His evidence on record go to show that within hours of the incident the Appellant Nos. 1 and 2 were apprehended and their blood stained clothes were seized.

43. In the substantive evidence of PW No.8 – Shaikh Haroon Shaikh Rauf and PW No.15 - Gafur Sadruddin Patil, it has not come that the clothes were sealed. The clothes seizure panchanamas at Exh.79 and 80 show that the articles were packed and sealed. However, in

absence of substantive evidence for sealing of clothes, the said seizure is kept out of consideration.

DISCOVERY AT THE INSTANCE OF APPELLANTS NO.1 AND 2

44. The evidence of PW No.7 - Syed Sadek Syed Aref show that on 25.04.2013 he was called in Jinsi Police Station, wherein PW No.15 - Gafur Sadruddin Patil was present. Appellants No.1 and 2 were brought one by one from the lock up and they gave statement to show the place where *Rampuri chaku* and wooden rod (danda) respectively were kept. The memorandums to that effect were prepared which were at Exh.73 and 72, respectively. His further evidence show that Appellants No.1 and 2 led the police and the panchas in the police vehicle. At the instance of Appellant No.1 the knife having blood stains was seized from the place near a tree, which was in front of Shah Hospital. The wooden handle was broken from front side. It was sealed in a polythene. The seizure panchnanama was at Exh.75. His evidence show that at the instance of Appellant No.2 one danda (rod) was seized from near the tree near the wall of Kabrastan which was sealed in the polythene under the panchanama at Exh.74. Suggestion that the said knife was lying in the open place, is denied. The evidence of PW No. 15 - Gafur Sadruddin Patil corroborate the said evidence of the panch witness. The evidence of eye witnesses also speak of the stick as one of the weapon used in the assault in addition to use of knife and stones. The discovery of above referred articles is established.

REPORTS OF THE CHEMICAL ANALYZER

45. The evidence of PW No.10 – Yunus Shah Daulat Shah and PW No.11 – Manik Bhaurao Hiwale show that they were the Police Naik and Police Hawaldar, respectively at the Jinsi Police Station at the relevant time. Their evidence show that on the directions of the Investigating Officer, they carried the sealed packets and deposited them in the office of Chemical Analyzer. PW No.10 – Yunus Shah deposited eighteen (18) to twenty (20) sealed packets to the Chemical Analyzer, Aurangabd and PW No.11 - Manik Bhaurao Hiwale deposited one sealed packet to the Chemical Analyzer, Mumbai. They had no reason to know as to in what condition the packets were kept before handing over it to them. Non-mentioning of number of packets in the statement of PW No.10 - Yunus Shah will not be sufficient to discard his testimony.

46. The evidence of the aforesaid police persons is corroborated by the evidence of PW No.15 – Gafur Sadrudin Patil, wherein he deposed that the seized muddemal was deposited with the concerned clerk. His further evidence show that the seized articles were sent to the Chemical Analyzer. The communications to that effect are brought on record at Exh.89, 126 and 131. His further evidence show that the Chemical Analyzers' reports were received, which were at Exhs.132 to 140.

47. Exh.132 is the result of analysis of the articles such as earth (two samples), stones, lump of cement concrete, cover of *Jambia*, cotton swab and clothes of deceased and clothes of the Appellants (kept out of consideration), wooden log and knife handle, which show that except one sample of earth, human blood is detected on all the articles.

**ARREST AND THE DISCOVERY AT THE INSTANCE OF
THE ACQUITTED ACCUSED**

48. The evidence of PW No.15 – Gafur Sadruddin Patil show that the acquitted accused No.3 - Mustak Sayyed Pasha and accused No.4 - Shaikh Kadar Shaikh Daud were arrested on 23.04.2013 and 04.05.2013, respectively. His evidence and the evidence of PW No.9 – Shaikh Babu Shaikh Miya show that Sword – Article 17 was seized at the instance of acquitted accused No.4 - Shaikh Kadar Shaikh Daud pursuant to the disclosure under Section 27 of the Indian Evidence Act from his house. The Chemical Analyzer Reports do not show that the clothes of the acquitted accused and the Sword were sent for chemical examination as the reports are silent on that aspects. Thus, the said seizure is of no assistance to the prosecution.

**INJURIES ON PW NO.4 – SHAIKH MOHAMMAD
ATHAR SHAIKH AKHATAR**

49. The evidence of PW No.4 – Shaikh Mohammad Athar show

that in the incident he suffered injury and he was taken to the Ghati Hospital where he was treated. The evidence of PW No.14 – Dr. Pushpa Rajan show that on 22.04.2013 she was working as the Medical Officer at Ghati Hospital and at about 06:30 p.m. Shaikh Mohammad Athar (PW No.4) was brought to the casualty with the alleged history of assault and following injuries were noticed on his person :-

- “1. CLW over left parietal of size 3 x 0.5 x 0.25 cm,
2. Blunt trauma over left elbow and
3. Contusion over left arm posteriorly of size 2 x 2 cms”

50. The said injuries were within 24 hours. The MLC in that regard is at Exh.111 which corroborate her evidence. This evidence on record show that PW No.4 – Shaikh Mohammad Athar suffered simple injuries.

INJURIES ON APPELLANT NO.2

51. The evidence of PW No.14 - Dr. Pushpa Sherichand Rajan show that when she was on the duty as Medical Officer at Ghati Hospital, Appellant No.2 - Shaikh Akbar Shaikh Kadar had come in the casualty at 06:20 p.m. with his brother Shaikh Babar Shaikh Kadar (Appellant No.1). He came with alleged history of assault one hour back at Baijipura. On his examination she found the following injuries on the person of Appellant No.2 – Shaikh Akbar Shaikh Kadar.

- “1. CLW over right parietal of size 3 x 0.5 x 0.25 cm,
2. CLW over left parietal of size 1 x 0.5 x 0.25 cm and
3. CLW over left knee of size 3 x 1 x 0.25 cm”

52. The injuries were within 24 hours. The MLC at Exh.110 corroborate her evidence. This evidence on record show that Appellant No.2 suffered minor and superficial injuries. Though this witness was cross-examined, nothing has come so as to dilute her evidence.

CONCLUSION

53. The above discussed evidence on record have established that the Appellant Nos.1 and 2 assaulted deceased Shaikh Mohammad Azhar @ Ajjju Builder due to which he suffered serious injuries to which he succumbed. The articles used in the crime came to be seized at the instance of the Appellant Nos.1 and 2. Human blood is found on the said articles. Even if the corroborative evidence in the nature of recovery / discovery of the Articles at the instance of the Appellant Nos.1 and 2 is discarded, the evidence of three eye witnesses i.e. PW No.1 - Joharabegum w/o. Shaikh Akhtar, PW No.2 – Shaikh Yunus s/o. Shaikh Laddu, PW No.4 - Shaikh Mohammad Athar inspire confidence in respect of involvement of the Appellant Nos.1 and 2 in the Homicidal Death of Ajjju Builder. The omissions brought on record do not affect their testimony as against the Appellant Nos.1 and 2. The injuries on PW No.4 - Shaikh Mohammad Athar are proved. The prosecution has also proved the injuries on Appellant No.2. It is needless to state that the Prosecution is not bound to prove the minor and superficial injuries on the person of Appellant No.2. The essential ingredients for the

offence of Murder and Simple Hurt are proved against the Appellants Nos.1 and 2. The act of Appellant Nos.1 and 2's clearly fall within the purview of Section 34 of the I.P.C. It is settled law that unless the findings of the Trial Court are perverse, no interference is called for. Perusal of the Judgment of the Trial Court show that even though the entire evidence on record has been accepted by the Trial Court, the final conclusion arrived at, cannot be faulted. On reappraisal of the evidence on record, we do not find that the acquittal of Accused No.3 – Mustak Sayyed Pasha and Accused No.4 – Shaikh Kadar s/o. Shaikh Daud requires interference. On reappraisal of the evidence on record, no interference in the conviction and sentence of the Appellant Nos.1 and 2 is called for. Hence, the following order:

ORDER

- (i) Criminal Appeal Nos.266 of 2018, 124 of 2023 and Application for Leave to Appeal by State No.145 of 2018 are dismissed.
- (ii) Record & Proceedings be sent back to the Trial Court.
- (iii) Pending Criminal Application No.3972 of 2022 stands disposed of.

(NEERAJ P. DHOTE, J.)

(R. G. AVACHAT, J.)