



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

CRIMINAL APPEAL NO.464 OF 2018

Shaikh Shahbaj s/o. Shaikh Sami  
Age : 19 years, Occu : Nil,  
R/o. Islampura Peth Beed,  
Tq. & Dist. Beed

.. Appellant

**Versus**

1. The State of Maharashtra  
Through Police Inspector,  
Police Station, Peth Beed,  
Tq. & Dist. Beed

2. Shaikh Shamshad Shaikh Javed  
Age : 30 years, Occu : Nil,  
R/o. Baba Chowk, Islampur Peth,  
Dist. Beed

.. Respondents

.....  
WITH

CRIMINAL APPLICATION NO.2267 OF 2019

IN

CRIMINAL APPEAL NO.464 OF 2018

...  
WITH

CRIMINAL APPEAL NO.785 OF 2018

Shaikh Nasir Shaikh Lalu  
Age : 27 years, Occu : Labour  
R/o. Islampura Peth, Beed,  
Tq. & Dist. Beed

.. Appellant

**Versus**

1. The State of Maharashtra

2. Shaikh Shamshad Shaikh Javed  
Age : 28 years, Occu : Household,  
C/o. Islampura, Beed, Tal. & Dist. Beed

.. Respondents

...

WITH

**CRIMINAL APPEAL NO. 560 OF 2022**

Shaikh Ansar Shaikh Isaq  
Age : 32 years, Occu : Nil,  
R/o. Islampura, Peth Beed,  
Taluka and Dist. Beed

.. Appellant

Versus

1. The State of Maharashtra
2. Shaikh Shamshad Shaikh Javed,  
Age : 27 years, Occu : Household,  
R/o. Islampura, Beed .. Respondents

...

WITH

**CRIMINAL APPEAL NO.786 OF 2018**

Shaikh Feroz s/o. Shaikh Moinuddin  
Age : 35 years, Occu : Business,  
R/o. Baba Chowk, Islampura, Peth, Beed,  
Tal. & Dist. Beed

.. Appellant  
(Informant)

Versus

1. State of Maharashtra
  2. Sayyed Amer s/o. Sayyed Chand  
Age : 24 years, Occu : Labour,  
R/o. Islampura, Peth, Beed,  
Tq. & Dist. Beed .. (Respondent No.2 /Orig.  
Accused No.2)
- .. Respondents

...

Shri. Nilesh S. Ghanekar, Advocate for the Appellant in Cri. Appeal Nos. 464 of 2018, 560 of 2022, for Applicant in Cri. Appln No.2267 of 2019 & for Respondent No.2 in Criminal Appeal No.786 of 2018

Ms. Ashwini Lomte h/f. Shri. Sudarshan J. Salunke, Advocate for the

Appellant in Criminal Appeal No.785 of 2018

Shri. S. D. Ghayal, Addl. PP for the Respondent / State

Shri. Rajendra G. Hange & Shri. A. R. Hange, Advocate for the Appellant in Criminal Appeal No.786 of 2018, for Respondent No.2 in Criminal Appeal No.464 of 2018 and for Assist to PP in Criminal Appeal No.785 of 2018.

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

**RESERVED ON : 30.01.2024  
PRONOUNCED ON : 21.02.2024**

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

. These are the three Appeals (Criminal Appeal Nos.464 of 2018, 785 of 2018, 560 of 2022) under Section 374 (2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Cr.P.C.') against the Judgment and order dated 22.06.2018 passed by the learned Additional Sessions Judge, Beed in Session Case No.52 of 2016 convicting the Appellants for the offence punishable under Sections 302 r/w. Section 34 r/w. Section 120B of the Indian Penal Code, 1860 (for short, 'I.P.C.') and sentencing them to suffer Rigorous Imprisonment for Life and fine of Rs.10,000/- each, in default to undergo Rigorous Imprisonment for two (2) years and one Appeal (Criminal Appeal No.786 of 2018) against the acquittal of Accused No.2 by the same Judgment and order.

2. The Prosecution's case as revealed from the Police Report is

as under:

2.1. The Informant – Shaikh Feroz Shaikh Mainoddin is the brother of deceased Javed @ Chandu. They all reside in Beed. Deceased Javed was in the work of centring (construction work) at Shevgaon in District Ahmednagar. He used to visit his family at Beed two to three times in a month. Deceased Javed had come to Beed on 14.12.2015 for *Sandal Urus of Shahenshawali Dargah* at Beed. On 18.12.2015, deceased Javed went out of his house around 06:00 p.m., however he did not return though it was 01:00 a.m. His brother Sadeq called over his mobile, which was switched off. Since deceased Javed used to come home in the late hours at night, they did not search for him.

2.2. On 19.12.2015 at around 09:00 a.m. the Informant's younger sister Tabassum received a phone call from her friend Heena who was the resident of Beed that, one body similar to that of her brother Javed was lying in the *Kabrastan* (graveyard) which was opposite to Chandansha Dargah. On getting the said news from Tabassum, the Informant immediately went to the *Kabrastan*, where people had gathered. The Police had also reached the spot as one Amjad had informed the Peth Beed Police Station about the dead body and necessary entry was made in the Station Diary. The face of dead

person was deformed and the body was lying in pool of blood. From the appearance of the dead body, clothes on the dead body and chappel, the Informant identified the dead body as that of his brother Javed. Next to the dead body, one broken wooden log stained with blood was lying. There was blood on the footpath and nearby *Kabar*. At some distance one blood stained sharp stone was lying. The Police prepared the Inquest and Spot Panchanama and sent the dead body for Post-mortem.

2.3 On prior occasion, the Informant's brother Javed had a dispute with Shaikh Ansar Shaikh Isaq (Appellant / Accused No.1) and at that time Shaikh Ansar threatened his brother to kill. The Informant suspected that it was Shaikh Ansar Shaikh Isaq who killed his brother Javed and therefore, lodged the Report with Peth Police Station, Beed in the night and Crime bearing No.127/2015 came to be registered for the offence punishable under Section 302, 120B r/w. Section 34 of the I.P.C.

2.4. During the course of investigation, the Appellants came to be arrested, the statements of the witnesses came to be recorded, the muddemal articles came to be seized and were sent for Chemical Analysis and on completion of investigation, the Appellants along with acquitted Accused No. 2 – Sayyed Amer came to be charge-sheeted. The learned Trial Court framed the Charge against them for the offence punishable under Sections 302 r/w. Section 34 and 120B of the I.P.C.

*vide* Exh.23, to which the Appellants and acquitted accused pleaded not guilty and claimed to be tried. To prove the Charge, the Prosecution examined in all sixteen (16) witnesses and brought on record the relevant documents. After the Prosecution closed its evidence, statements of the Appellants and the acquitted accused came to be recorded under Section 313 (1)(b) of the Cr.P.C. Their defence was that of total denial. After hearing the parties, the learned Trial Court passed the impugned Judgment and order.

3. Heard the learned Advocates for the Appellants, the learned Additional PP for the State and the learned Advocate for Respondent – Informant. Scrutinized the evidence on record.

4. It is submitted by the learned Advocates for the Appellants that the two witnesses examined by the Prosecution as the eye witnesses to the incident, are the Chance witnesses. Though they claimed to be the eye witnesses and the police station is near to their residence, they did not report the incident to the police. There is delay in recording their statements. Their testimony is not trustworthy. It is submitted that the incident is of night time and the evidence on record nowhere show that there were lights at the spot of incident. It is submitted that the Informant though learnt about the incident, he did not lodge the Report immediately. It is submitted that the other evidence brought on record

do not corroborate the evidence of the Chance witnesses. The result of analysis of the Articles, which were sent for Chemical Analysis, is 'inconclusive'. It is submitted that the evidence available on record is not trustworthy and the Appellants are entitled for acquittal.

5. It is submitted by the learned Addl. P. P. that the two eye witnesses are the independent persons and since they do not know each other, there was no scope for them to notice each other when they saw the incident. The Appellants involvement in the crime have been witnessed by the eye witnesses and only after gathering courage they disclosed the incident to the police. Mere delay in recording the statements will not be fatal for the prosecution. It is submitted that the other circumstances which are brought on record by way of corroborative evidence, supports the prosecution case. Blood was found on the clothes of the Appellants Ansar and Shahbad. The discovery / recovery of *Khanjir* (dagger) at the instance of Juvenile accused is proved. It is submitted that the learned Trial Court has rightly convicted the Appellants and the Appeals be dismissed.

6. It is submitted by learned Advocate for Respondent No.2 – Informant that, one SIM card having some clip, was known to the deceased and therefore, the crime has been Committed. The witnesses have no enmity with the Appellants and they have disclosed the truth.

The evidence on record show that there was light at the spot of incident. Delay in recording the statements will not be fatal for the prosecution as every person will react in a different manner and after gathering courage, the matter was reported to the police. It is submitted that as per the settled position under the law, lapses in investigation would not affect the Prosecution, if the Charge is proved through the evidence available on record. It is submitted that the Appeals be dismissed and the Appeal filed against acquittal of Accused No.2 be allowed.

7. The evidence of PW No.3 – Shaikh Feroz Shaikh Mainoddin show that he was the brother of deceased Javed @ Chandu and resident of Islampura, Beed. On 14.12.2015 his brother Javed had come to Beed for attending Shahenshawali Dargah Sandal Urus and left the home at 06:00 p.m. on 18.12.2015. He did not return though it was 01:00 a.m., so his younger brother Sadeq made a phone call, however the phone of Javed was switched off. Next day morning at 09:00 a.m. he learnt from his sister that she got a phone call from one of her friend by name Heena that, person resembling her brother Javed was lying dead in the graveyard in front of Chandansha Dargah. Immediately he went to the spot and found the dead body of his brother Javed. He told police that the dead body was of his brother. After the inquest and spot panchanama, the dead body was referred for the Post-mortem and thereafter it was cremated in the evening.

8. The evidence of PW No.13 - Balkrishna Dhakiya Pawara show that he was attached to the Peth Beed Police Station as Assistant Police Inspector (API) and on 19.12.2015 while he was on duty, the Police Station Officer (PSO) informed him of receiving telephonic information about one dead body lying in front of Chandanshawali Dargah in *Kabrastan* (graveyard) and PSO made station diary entry. Accordingly, along with the staff he went to the spot and found the dead body of a male person. The dead body was identified by Shaikh Firoz (PW No.3) as that of his brother Javed @ Chandu. In the presence of Panchas, he prepared the spot panchanama (Exh.46), seized the articles, prepared the inquest (Exh.49) and referred the body for Post-mortem to the Civil Hospital, Beed.

9. The evidence of PW No.1 – Sadekkhan show that on 19.12.2015 he had been to the spot of incident which was the *Kabrastan*. The dead body of Javed was lying on the spot of incident near *Kabar*. One Chappal pair, broken wooden log stained with blood were lying near the dead body. There were blood stains on the *Kabar* and on the spot of incident. The police prepared the inquest (Exh.49). His evidence further show that the police seized blood stained broken wooden log, pair of chappal, blood stained clothes, blood mixed soil and sample soil under the Spot Panchanama (Exh.46).

10. The above evidence of PW No.3 - Shaikh Feroz, PW No.13 – Balkrishna Dhakiya Pawara and PW No.1 - Sadekkhan is not seriously challenged by the defence. Their evidence show that the dead body of Javed @ Chandu was found in the *Kabrastan* (graveyard) and the said Panchanamas i.e. Spot and Inquest were drawn prior to registration of the F.I.R. / Crime, body was sent for Post-mortem and cremation was done.

11. The evidence of PW No.8 – Dr. Eknath Asaram Dhage show that on 19.12.2015 when he was attached to the Civil Hospital, Beed as Medical Officer, the dead body of Shaikh Javed @ Chandu was sent for autopsy. On examination of the dead body he found rigor mortis developed all over body, skull fractured and opened, right eye absent, left eye present in cranial cavity, nose compressed and depressed, mouth closed and half of the tipper teeth were absent. He found the following injuries which were mentioned in column No.17 of the Post-mortem Report:

“Crush injury to head is found. CLW of 22 x 10 x 20 cm over forehead and skull vault extending from left eye brows to upper forehead to right temporal to right parietal region.

Frontal, Parietal, Temporal bones fractured and crushed.

Brain matter absent from cranial cavity.

Brain covering absent from cranial cavity.

Left eye ball present in cranial cavity.

Right eye ball absent.

Maxila bone, nasal bone fractured on both sides.

Mandible fracture on left side.

CLW of 4 x 2 x 0.5 cm at left forehead just above to maxila bone and mandible fracture.

Abrasion of 2 x 1 cm on left knee, abrasion 3 x 2 cm on left shoulder

Abrasion of 1 x 1 cm on right elbow, abrasion of 1 x 1 cm on right scapular region

The aforesaid injuries are antemortem. Crush injury to head is sufficient to cause death in ordinary course of nature.”

11.1. PW No.8 - Dr. Eknath Asaram Dhage gave the probable cause of death as ‘**cardio respiratory arrest due to hemorrhagic shock due to crush injury to head**’ and prepared Post-mortem Report (Exh.93). Though it has come in his cross-examination that there was no mention of the age of injuries in Column No.17 of the Post-mortem Report and there is no mention of probable time of death, the evidence of this witness show that the cause of death, time of death and the aforesaid injuries found on the dead body are not seriously challenged by the defence. From the evidence discussed so far, the Homicidal Death of Informant’s brother Javed @ Chandu gets established.

12. The further evidence of PW No.3 – Shaikh Feroz show that on the same day i.e. 19.12.2015, his cousin sister Rubina met with an accident and she was referred to the Government Medical College and Hospital at Aurangabad and so, after 10:00 p.m. he went to Peth Beed Police Station and lodged the Report on suspicion against Accused No.1

Shaikh Ansar as deceased Javed was threatened by Accused No.1 one month prior to the incident. The Report is brought in evidence at Exh.65. It is clear from this evidence that, the Report which came to be registered as the First Information Report (F.I.R.) was lodged on suspicion.

13. The further evidence of PW No.3 - Shaikh Feroz Shaikh Mainoddin show that on the next day he went to Aurangabad. After he returned from Aurangabad at about 08:30 p.m., PW No. 4 - Shaikh Afroz came to his house and told him that he witnessed the incident and saw five (5) to six (6) persons beating deceased Javed and he was knowing three (3) to four (4) persons out of them. He further deposed that when he came out of his house talking with PW No.4 - Shaikh Afroz, PW No.5 – Shaikh Iqbal came to his house and informed him that he had also seen the incident. Strangely, PW No.3 - Shaikh Feroz does nothing except instructing both of them i.e. PW No.4 - Shaikh Afroz and PW No.5 Shaikh Iqbal to go to the police, if they had seen the incident. His evidence nowhere show that he enquired as to who were the said known persons. Whereas, in his evidence it has come that he had not taken PW No.4- Shaikh Afroz and PW No.5 – Shaikh Iqbal to the police station when they had given the information about the incident to him. His evidence show that he admits that he had not given information to the police. It is really strange that when PW No.3 – Shaikh Feroz learnt

about the involvement of the known persons in the incident through PW No.4 – Shaikh Afroz, he neither enquired with him about the assailants nor he approached the police. Be that as it may.

14. The Prosecution's case primarily rests on the testimony of PW No.4 – Shaikh Afroz Shaikh Matin and PW No.5 – Shaikh Iqbal Shaikh Ibrahim, who are examined by the Prosecution as the eye witnesses to the incident and they are the Chance witnesses. In **Rajesh Yadav and another vs. State of Uttar Pradesh, (2022) 12 SCC 200**, which is considered in the judgment of **Ravi Mandal vs. State of Uttarakhand, AIR 2023 SC 2554**, the Hon'ble Supreme Court of India has considered the term 'chance witness' in detail. The relevant paragraphs are reproduced herein below.

“29. A chance witness is the one who happens to be at the place of occurrence of an offence by chance, and therefore, not as a matter of course. In other words, he is not expected to be in the said place. A person walking on a street witnessing the commission of an offence can be a chance witness. Merely because a witness happens to see an occurrence by chance, his testimony cannot be eschewed though a little more scrutiny may be required at times. This again is an aspect which is to be looked into in a given case by the court. We do not wish to reiterate the aforesaid position of law which has been clearly laid down by this Court in *State of A.P. v. K. Srinivasulu Reddy*, (2003) 12 SCC 660:

“12. Criticism was levelled against the evidence of Pws 4 and 9 who are independent witnesses by labelling them as chance witnesses. The criticism about PWs 4 and 9 being chance witnesses is also without any foundation. They have clearly explained as to how they happened to be at the spot of occurrence and the trial court and the High Court have accepted the same.

13. Coming to the plea of the accused that PWs 4 and 9 were “chance witnesses” who have not explained how they happened to be at the alleged place of occurrence, it has to be noted that the said witnesses were independent witnesses. There was not even a suggestion to the witnesses that they had any animosity towards any of the accused. In a murder trial by describing the independent witnesses as “chance witnesses” it cannot be implied thereby that their evidence is suspicious and their presence at the scene doubtful. Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere “chance witnesses”. The expression “chance witness” is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country where people are less formal and more casual, at any rate in the matter explaining their presence.”

30. The principle was reiterated by this court in *Jarnail Singh v. State of Punjab*, (2009) 9 SCC 719: (SCC p.725, paras 21-23) “21. In *Sachchey Lal Tiwari v. State of U.P* [(2004) 11 SCC 410: 2004 SCC (Cri) Supp 105] this Court while considering the evidentiary value of the chance witness in a case of murder which had taken place in a street and a passerby had deposed that he had witnessed the incident, observed as under:

If the offence is committed in a street only a passerby will be the witness. His evidence cannot be brushed aside lightly or viewed with suspicion on the ground that he was a mere chance witness. However, there must be an explanation for his presence there. The Court further explained that the expression “chance witness” is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country like India where people are less formal and more casual, at any rate in the matter of explaining their presence.

22. The evidence of a chance witness requires a very cautious and close scrutiny and a chance witness must adequately explain his presence at the place of occurrence (*Satbir v. Surat Singh* [(1997) 4 SCC 192: 1997 SCC (Cri) 538], *Harjinder Singh v. State of Punjab* [(2004) 11 SCC 253: 2004 SCC (Cri) Supp 28], *Acharaparambath Pradeepan v. State of Kerala* [(2006) 13 SCC 643: (2008) 1 SCC (Cri) 241] and *Sarvesh Narain Shukla v. Daroga Singh* [(2007) 13 SCC 360: (2009) 1 SCC (Cri) 188]). Deposition of a chance witness whose

presence at the place of incident remains doubtful should be discarded (vide *Shankarlal v. State of Rajasthan* [(2004) 10 SCC 632; 2005 SCC (Cri) 579]).

23. Conduct of the chance witness, subsequent to the incident may also be taken into consideration particularly as to whether he has informed anyone else in the village about the incident (vide *Thangaiya v. State of T.N.* [(2005) 9 SCC 650; 2005 SCC (Cri) 1284]). Gurcharan Singh (PW 18) met the informant Darshan Singh (PW 4) before lodging the FIR and the fact of conspiracy was not disclosed by Gurcharan Singh (PW 18) and Darshan Singh (PW 4). The fact of conspiracy has not been mentioned in the FIR. Hakam Singh, the other witness on this issue has not been examined by the prosecution. Thus, the High Court was justified in discarding the part of the prosecution case relating to conspiracy. However, in the fact situation of the present case, acquittal of the said two co-accused has no bearing, so far as the present appeal is concerned.”

15. The evidence of PW No.4 - Shaikh Afroz Shaikh Matin show that he was a contractor and was graduate and resident of Beed city. His nephew (son of sister) was hospitalized and discharged from the hospital on 18.12.2015 around 09:30 to 10:00 p.m. Thereafter, he took his nephew on his motorcycle and went to his mother's house. After spending half an hour, he started for going to his residence and when he reached Chandani Chawk, it struck him that he had assured Mustaq Kadri that he will come and meet him and so he proceeded towards the Dargah by Kankaleshwar road. When he reached near the speed breaker at the Chandanshah Dargah, he noticed that scuffle was going on between five (5) to six (6) persons. He saw that Chandu (deceased brother of the Informant) was being assaulted by the Appellants by the wooden log (it is mentioned wooden rod in his testimony). Due to the

assault, Chandu fell down. The incident occurred in front of the gate of graveyard. After the incident, all the six (6) persons took Chandu inside the graveyard. At that time, it was around 11:30 to 11:35 p.m. and he witnessed the incident due to the street light on the road from the distance of 60 to 70 feet. On witnessing the incident, he got frightened and returned home.

16. His evidence show that he knew deceased Chandu four (4) to five (5) years prior to the incident as deceased Chandu was working as the Meson and he himself was in the construction field. They both were residing in the same area and in the same locality. His evidence further show that he was also doing social work and he could gather five (5) to ten (10) persons on a call from the Baba Chowk. His evidence show that this witness was having relatives and friends in Beed. His evidence show that the distance between his residence and the police station was just half ( $\frac{1}{2}$ ) kilometer. His evidence show that on reaching home he went to sleep without informing about the incident to anyone. His evidence show that on the next day he came to know that Shaikh Javed (Chandu) was murdered and his body was in the graveyard and he got more frightened. Strangely, he started his routine life. It is clear from his evidence that he was having deep roots in Beed. Despite that he remained silent and did not go to the Police Station and report the same, particularly when the person who was

being assaulted was known to him and residing in the same area. His evidence show that he was aware that one has to dial the number 100 to inform the police. However, he admits that he did not feel it necessary to inform the police and felt so on the next day of the incident. However, he did not inform the police on the next day. His evidence show that in the week following the incident he was present in Beed city and he goes to the police for giving statement after four days i.e. 22.12.2015. This conduct of PW No.4 – Shaikh Afroz requires to see his testimony with doubt.

17. PW No.5 – Shaikh Iqbal Shaikh Ibrahim deposed that he knows deceased Shaikh Javed @ Chandu prior to 5 to 6 months before the incident as he had laid slab on his latrine and bathroom. He further deposed that at about 9 p.m. on 18.12.2015 he had gone to the Medical shop of Aquib Khan and he was there till 11:30 to 11:45 p.m. Thereafter, he left the medical shop and stopped near the corner of Mohamadiya colony on the road. At that time, he noticed that 6 to 7 persons were quarreling and 5 to 6 persons were assaulting Shaikh Javed @ Chandu. He witnessed the incident in the street light focus in front of *Kabrastan* gate. The Appellants were seen assaulting Chandu. The Appellant Shaikh Ansar used wooden log in the assault by which deceased fell down. Thereafter, six (6) persons took deceased Chandu inside the *Kabrastan*. He deposed that he was frightened and he returned home.

On the next day he came to know about the death of Chandu from the viral news on the WhatsApp. He again got frightened and did not go out of the house on that day. In the midnight of 19<sup>th</sup> he came to know that the accused were apprehended. On 20<sup>th</sup> he met PW No.3 - Shaikh Feroz, brother of deceased Chandu and disclosed the incident to him.

18. The evidence of PW No.5 – Shaikh Iqbal show that he was in the business of plots and was having relatives and friends in Beed city. It is again strange that when he noticed that the accused were assaulting the deceased to whom he knew, he kept mum and went to his house without disclosing the incident to anyone. He only disclosed the incident on 20<sup>th</sup> to the brother of deceased and that too when they both met at Baba Chowk. His evidence show that he was in Beed city for a period of four days after the incident, however, he goes to the police station only after four days i.e. 22.12.2015. Further, his evidence that he was knowing the deceased prior to 5 to 6 months, after assault 6 to 7 persons carried deceased Chandu inside *Kabrastan*, that on the next day he came to know about the death of Chandu from the viral news on WhatsApp, that he did not go outside of his house on that day, that he met Firoz (brother of deceased Chandu) at the Baba Chowk on 20<sup>th</sup> and told him about the incident, was an improvement from his police statement. With the version of this witness, his testimony is required to be seen with doubt.

19. There is major inconsistency in the evidence of PW No.3 – Shaikh Feroz, PW No.4 – Shaikh Afroz and PW No.5 – Shaikh Iqbal on the point of PW No.4 – Shaikh Afroz and PW No.5 – Shaikh Iqbal informing PW No.3 – Shaikh Feroz. According to PW No.3 – Shaikh Feroz, PW No.4 – Shaikh Afroz and PW No.5 – Shaikh Iqbal came to his residence in the evening on the next day and informed him about witnessing the incident by them, whereas PW No.4 – Shaikh Afroz nowhere speak of the presence of PW No.5 – Shaikh Iqbal at the house of PW No.3 – Shaikh Feroz, when he had gone to inform about the incident. Moreso, PW No.5 – Shaikh Iqbal's evidence show that he informed PW No.3 - Shaikh Feroz about the incident on 20<sup>th</sup> at Baba Chowk. From this, the testimony of these witnesses on the said point is required to be seen with doubt.

20. The evidence of PW No.13 – Balkrishna Pawara show that defence had given him the chance to explain the delay of four days in recording the statements of the eye witnesses i.e. PW No.4 - Shaikh Afroz and PW No.5 – Shaikh Iqbal and he deposed that he cannot tell the reason for the same. Further, his evidence show that PW No.4 - Shaikh Afroz and PW No.5 – Shaikh Iqbal on their own accord came to the Police Station for recording their statement. It has come in his further evidence that during investigation it did not transpire that PW

No.4 - Shaikh Afroz and PW No.5 – Shaikh Iqbal saw each other at the time of the incident. Suggestion is given that PW No.4 - Shaikh Afroz and PW No.5 – Shaikh Iqbal were the Chance Witnesses as they had no reason to be there. If we see the evidence of PW No.4 - Shaikh Afroz and PW No.5 – Shaikh Iqbal, they both have claimed to have witnessed the incident from about 60 to 70 feet. At the same time, strangely they do not speak about presence of each other. Approaching the police after four days of the incident by both these witnesses, without there being explanation for delay, makes us to see their evidence with doubt.

21. The evidence of PW No.13 - Balkrishna Dhakiya Pawara, Investigating Officer show that the Local Crime Branch (LCB) arrested the Appellant – Sk. Ansar and his companion in the intervening night of 19 and 20.12.2015 and handed them over to him. His evidence further show that during personal search of accused - Sk. Ansar Samsung mobile phone was seized, during personal search of Accused No.2 – Sayyed Amer, black colour iball make mobile was seized, during personal search of Accused No.3 - Shaikh Nasir mobile without sim was seized and no article was found in personal search of Accused No. 4 – Shaikh Shahbaj. His evidence further show that he seized the clothes of Accused No.1 – Sk. Ansar on 22.12.2015 i.e. two days after his arrest. Likewise, seized clothes from Accused No. 4 – Sk. Shahbaj.

22. The evidence of PW No.10 – Ansiram Saluji Kaple show that he was the Police Naik attached to the Peth Beed Police Station and on 24.01.2016, PW No.13 - Balkrishna Dhakiya Pawara directed him to carry the seized muddemal articles in the Crime to the Forensic Science Laboratory (FSL), Aurangabad and accordingly on 25.01.2016 he had taken fifteen (15) sealed bags, one (1) sealed box, one (1) sealed envelope and a letter to the FSL, Aurangabd and deposited the same. From this evidence on record, it is clear that the muddemal was sent to the laboratory belatedly i.e. after one (1) month. As can be seen from the evidence of PW No.13 – Balkrishna Pawara, Investigating Officer, for a period of more than a month the muddemal was with the crime *Mohrir*. With this evidence on record, it is highly unsafe to rely on the C.A. Reports in respect of muddemal Articles and the same is kept out of consideration.

23. The evidence of PW No.13 – Balkrishna Pawara show that *Khanjir* (dagger) and mobile phone of deceased Javed were seized at the instance of juvenile accused namely Sk. Alman Sk. Moosa and Sk. Amer, who were referred to the Juvenile Justice Board. This evidence takes the Prosecution's case no further to prove the Charge against the Appellants.

24. The other evidence on record is that of :- (a) PW No.6 -

Shaikh Rahim Shaikh Tayyabshaha, who speaks of handing over the memory card to him by deceased Javed prior to 6-7 months from the date of incident. (b) PW No.7 - Shaikh Shamshad Shaikh Javed, wife of deceased who speaks of the quarrel between her deceased husband and Sk. Ansar and threatening by Sk. Ansar to her husband prior to 6-7 months of the incident. (c) PW No.9 – Sakebkhan Masjidkhan, who acted as the panch for collection of blood samples from stone seized from the spot of incident. (d) PW No.11 - Deepali Vishwasrao Gite who was the Police Officer with the Beed City Police Station from October – 2014 to June-2016 wherein she deposed of receiving complaint application from Javed Qureshi (PW No.12) and investigating on the said complaint and handing over the papers of investigation of the said complaint which was registered as Enquiry No.18/2014 to the Investigating Officer of this Case. (e) PW No.12 - Javed Qureshi who speaks of handing over the memory card to Sk. Rahim by the deceased. (f) PW No.14 – Mandar Bhupendra Godambe, PW No.15 – Sachin Mahadeo Shinde, PW No.16 – Amit Raghunath Karkera who were the Nodal Officers with the Bharti Airtel, Idea Cellular Ltd. and Telinor Ltd., respectively in respect of collection of CDR of the certain cell numbers which includes that of the some of the accused. Again their evidence do not take the Prosecution's case any further to prove the Charge against the Appellants.

25. At the cost of repetition, the above discussed evidence on

record show that the FIR was lodged on suspicion, Appellants came to be arrested prior to the statements of PW No.4 - Shaikh Afroz and PW No.5 – Shaikh Iqbal, delayed statement to the police by PW No.4 – Shaikh Afroz and PW No.5 – Shaikh Iqbal and delay of more than one month in sending the seized articles for forensic examination. The evidence do not inspire confidence. The evidence is not concrete and cogent so as to maintain the Conviction and upset the acquittal of Accused No.2. Resultantly, the Appeals against the Conviction are required to be allowed and the Appeal against the Acquittal is required to be dismissed. Hence, the following order.

#### ORDER

(i) The Criminal Appeal Nos.464 of 2018, 785 of 2018, 560 of 2022 are allowed.

(ii) The Judgment and order dated 22.06.2018 passed by the learned Additional Sessions Judge, Beed in Session Case No.52 of 2016 convicting and sentencing the Appellants namely Shaikh Shahbaj s/o. Shaikh Sami, Shaikh Nasir Shaikh Lalu, Shaikh Ansar Shaikh Isaq is hereby quashed and set aside.

(iii) The Appellants namely Shaikh Shahbaj s/o. Shaikh Sami, Shaikh Nasir Shaikh Lalu and Shaikh Ansar Shaikh Isaq are acquitted of the offences punishable under Sections 302 r/w. Section 34 r/w. Section

120B of the I.P.C.

(iv) The Appellants namely Shaikh Shahbaj s/o. Shaikh Sami, Shaikh Nasir Shaikh Lalu, Shaikh Ansar Shaikh Isaq be released forthwith, if not required in any other crime.

(v) The Criminal Appeal No.786 of 2018 filed against the Acquittal of Accused No.2 namely Sayyed Amer s/o. Sayyed Chand is dismissed.

(vi) Muddemal be dealt with in accordance with law.

(vii) Record & Proceedings be sent back to the Trial Court.

26. Pending Criminal Application No.2267 of 2019 stands disposed of.

( NEERAJ P. DHOTE, J. )

( R. G. AVACHAT, J. )

GGP