

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 82 OF 2017
WITH
INTERIM APPLICATION NO. 1655 OF 2023
IN
CRIMINAL APPEAL NO. 82 OF 2017

Imran Ayub Shaikh

.. Appellant

Versus

The State of Maharashtra

.. Respondent

....

Mr. Rahul Arote i/b Mr.Prajog Srivastav for the appellant/
applicant.

Mr. S.R. Agarkar, APP for the State.

CORAM: BHARATI DANGRE, J.

RESERVED ON: 6th OCTOBER, 20223

PRONOUNCED ON: 8th JANUARY 2024

JUDGMENT:-

1] The appellant Imran Ayub Shaikh, who faced Sessions Trial No. 624/2012, for an offence punishable under Section 302 r/w Section 143, 147, 148, 149 of the IPC and Section 4 along with Section 27 of the Arms Act has filed the present Appeal, being aggrieved by the impugned judgment

dated 24/1/2017 delivered by Sessions Court for Greater Mumbai, convicting him for an offence punishable under Section 304 II of the IPC, and sentencing him to suffer RI for a period of five years and to pay fine of Rs. One lakh, out of which Rs.25,000/- was directed to be paid to the wife and the daughters of the deceased. In default, he was directed to undergo further SI for three months.

By an order dated 14/2/2017, the sentence imposed upon him was suspended and he was directed to be released on bail on furnishing personal bond and a surety, by recording that the appellant/accused no.1 has undergone sentence of about 4 years and 8 months, out of the sentence of five years.

Since then, the appellant is on bail and he has almost undergone the entire sentence imposed against him.

2] The appellant moved Criminal Application No.1655/2023, praying for stay of the conviction imposed upon him, vide the impugned judgment on the ground that he was desirous of contesting election from Ward No.130 at Ghatkopar and the conviction imposed upon him, unless suspended, would disqualify him to file the nomination for the said elections.

Though the application was pressed into service, the counsel for the appellant agreed to argue the Appeal finally, since it is ready for final hearing. The Appeal is therefore, heard finally.

Heard Mr.Rahul Arote, Advocate for the appellant and the learned APP Mr.Agarkar for the State.

3] The prosecution case against the appellant who was arraigned as accused no.1 along with three accused persons is, that the accused nos.1 to 4 along with 10 to 12 persons, on 4/6/2012 at about 20.45 hours at Gangawadi near Rambha Tower, Ghatkopar, Mumbai, formed an unlawful assembly which had the common object to commit murder of one Imtiyaz Isaq Shaikh and the members of the unlawful assembly indulged themselves into rioting punishable u/s.147 of the IPC. The appellant is alleged to be a member of the Unlawful Assembly, the members of which were armed with deadly weapons like sword, koyta, iron rod, sticks, stone, bamboo, and in prosecution of the common object, they caused death of Imtiyaz Isaq Shaikh and hence, they were charged for an offence punishable u/s.302 r/w Section 149 of the IPC.

Apart from this, it is the case of the prosecution that the members of the unlawful assembly voluntarily caused grievous hurt to one Hussain Iqbal Shaikh and thus committed an offence u/s.326 r/w Section 149 of the IPC for being in possession of deadly weapons, the accused persons also faced charge u/s.4 read with Section 27 of the Arms Act.

Worth it to note that of all the alleged members of the Unlawful assembly, four accused persons were subjected to trial for committing the offence punishable u/s.302, 143, 147, 148, 149 of the IPC and Section 326 r/w Section 149 and Section 4

r/w Section 27 of the Arms Act. Since all the four accused pleaded not guilty, they were subjected to trial.

In order to establish the charge against the accused, prosecution examined 21 witnesses, but largely the witnesses have turned hostile.

The only witnesses who supported the case of the prosecution, are PW 1 Mohd. Issak Faiyaz Shaikh (complainant), PW 3 Firoz Ahmed Shaikh, one of the injured and one Prakash B. Ahire, PW 11, an eye witness. The other witnesses who were cited by the prosecution being the eye witnesses i.e. PW 4, PW 5, PW 6, PW 7 and PW 8 did not support the case of the prosecution.

The two medical experts are examined as PW 17 and PW 18 and three Investigating Officers are examined as PW 19, PW 20, and PW 21. PW 9, the panch, on recovery of the weapons as well as PW 12 the panch, on arrest panchnama, has turned hostile.

4] The case of the prosecution against the present appellant is therefore, to be appreciated only in the wake of the witness who had supported the prosecution case.

I shall now turn to these witnesses in seriatim.

5] PW 1 Mohd.Issak Faiyaz Shaikh is examined as an eye witness who has deposed that on 4/6/2012, while he was chit-chatting with his friend near Rambha Tower situated at Gangawadi, one boy aged 10 – 12 years acquainted with him, came running and informed him that a quarrel was going on. He accompanied with Mohsin, rushed to the spot, on being told that the boys of Imran were assaulting his brother Imtiyaz. He saw accused Imran, Ganesh, Shailesh, Mohsin and Ravi assaulting his brother and he categorically state that Imran was holding a sword, and he gave blow of that sword on left knee of Imtiyaz, as a result he fell down and then Ganesh lifted a big stone and threw it towards Imtiyaz. Mohsin and Shailesh were assaulting Imtiyaz with wooden sticks, whereas Ravi was assaulting with fist, blow and kicks.

On being specifically asked, he has stated that there were 10 to 12 assailants present on the spot and in the mean time, police van arrived and the accused ran away and the injured Imtiyaz was taken to Rajawadi Hospital. The witness clarify his statement by stating that Imtiyaz died at the spot and the police took his dead body to Rajawadi Hospital, and he along with his friend went to the Hospital. Thereafter, he lodged the FIR (Exhibit-63).

According to this witness, he also saw Hussain being assaulted by Imran, Ganesh, Shailesh, Mohsin and Ravi and he

fled away from the spot. His friends took him to Rajawadi Hospital in a rickshaw. He identified Ganesh and Shailesh, as well as Imtiyaz and Ravi who were present in the Court, though he is not sure whether he would identify the weapons, but again improve himself, by stating that if the weapons are shown to him, he would identify the same.

When a sword (Article 1) was shown to him, it is identified by him to be the same weapon which was in the hands of Imran. Similarly, when another sword was shown to him, he is unable to state who was carrying the said sword. He has also identified the stone which was in the hands of Ganesh.

6] The witness is subjected to extensive cross-examination and the role attributed to Ravi in assaulting his brother Imtiyaz is brought by way of an omission. Similarly, he assaulting Hussain is a contradiction, and he admit that he had never given name of Ravi to the police, nor he had given the description of other appellants, apart from the accused Imran. In his cross, he has deposed that when the police van arrived on the spot within 2 – 3 minutes after the incident was over, he along with Mohsin was standing at some distance. His maternal uncle Rehman was standing near the body of Imtiyaz, but neither he nor Mohsin rendered any assistance in lifting the body of Imtiyaz and according to him, the police did not allow him to go near the dead body. He further state that he did not disclose to anybody

present on the spot that he had witnessed the incident. Apart from this, he had not stated to the police that, while recording the FIR, his uncle Abdul Rehman had also gone to the hospital along with police when body of Imtiyaz was taken to the hospital, nor this fact was stated by him in the supplementary statement and for not stating so, it is his version that he had forgotten about it.

On being further cross-examined, he deposed that when the alleged incident was going on, he was standing at the distance of 2 – 3 minutes walk from the place of incident and categorically admit as under :-

“The place of incident is not visible from the place where I was standing”.

7] Apart from this, he also admit that he did not contact the police through his mobile phone seeking any help. Further, he also admit that it is in the hospital he came to know that Imtiyaz died, whereas in the examination-in-chief, he has assertively stated that Imtiyaz died on the spot and his body was taken to the hospital.

He further contradict himself when he deposed as under:

“I was present at the spot about 10 minutes when Imtiyaz was taken to the hospital”

Further omissions from his statement are to the following effect :-

“I do not know whether it is mentioned in the FIR that I saw one bamboo and scythe lying there. I had stated to the police that I saw bamboo and scythe were lying there. However, I cannot assign any reason why this fact is not mentioned in my FIR. It is not true to say that I had seen only one sword at the spot. I had not stated before the police while recording FIR that I saw one sword at the spot. It is not true to say that blow of stone was also given on the head of Imtiyaz and I had not stated before the police while recording FIR that I saw blow of stone given on the head of Imtiyaz. It is marked as portion ‘A’ in the FIR. However, I cannot assign any reason for mentioning the portion ‘A’ in the FIR”.

Another omission which is proved in his statement is as regards the appellant Imran which is as under :-

“I do not know accused Imran reside at Gangawadi. I had stated to the police while lodging FIR that accused Imran is President of Swabhimani Sanghatana. It is marked as portion ‘B’ in my FIR.”

8] Another relevant portion from his cross-examination reads thus :-

“33 I have stated before police that I saw accused Imran gave blow of sword on left knee of Imtiyaz and therefore, he fell on. I had stated before police that accused Mohsin & Shailesh were assaulting Imtiyaz with wooden stick and accused Ravi was assaulting Imtiyaz with fist blows and kicks. I had stated before police that I saw accused Shailesh, Mohsin and Ravi also assaulted my friend Hussain. I cannot assign reason for not mentioning these facts in FIR and Supplementary statement”

9] Further, the version which has appeared from the cross-examination of this witness, which grossly affect his credibility is recorded as below :-

“35 I guessed that Imtiyaz would be taken to Rajawadi Hospital and therefore, I went there. Nobody told me that Imtiyaz was being taken to Rajawadi Hospital. It did happen that I came to know that Imtiyaz and Hussain were taken to Rajawadi Hospital and therefore, I went there. Hussain himself ran away and nobody lifted him. It did happen that I came to know that my friends took Hussain to Rajawadi Hospital. I do not know their names. I saw Hussain from distance of about 10 ft’. I saw Imtiyaz also from distance of about 10 ft’ from the spot. I saw Hussain fell down at the spot and then ran away and thereafter, I did not see him. I do not know whether these facts were noted down in my FIR and supplementary statement. I cannot assign any reason for not mentioning these facts in FIR & Supplementary statement.”

. In paragraph 43, the witness admit as under :-

“43 It is true that I am Gunda of my location. It is not true to say that police have lodged many charge sheets against me. It is true that I have been released on bail in criminal cases filed by police of Ghatkopar police station. It is not correct to say that those cases were in respect of rioting, criminal intimidation and causing grievous hurts. It is not correct to say that in those cases one person by name Firoz was co-accused.”

10] In paragraph 47, he has deposed that OPD papers of Imtiyaz were taken but deny the suggestion that Imtiyaz was lying at the spot as an unknown person and therefore, there was nobody to give the history of the incident when he was admitted in the hospital.

Another relevant portion from his cross-examination reads thus :-

“51 I do not know who had taken injured Hussain to hospital from the spot. No talks taken place between me and Hussain at the spot. I am unable to state exactly at what time child informed me about the incident. I did not see that child thereafter. I do not know name and address of that child. He was of shallow complexion. I was present at spot where I was standing since 07/30 p.m before that child met me. The alleged incident took place after 8.30 p.m. I do not remember whether alleged incident took place at about 8.45 p.m. I again say that the alleged incident took place at about 8.45 p.m. I do not remember whether police arrived at spot where my brother Imtiyaz was lying at about 9.20 p.m. I do not remember whether nobody was present at the spot to disclose the incident and identity of injured Imtiyaz.”

11] The testimony of PW 1, on a careful reading reveal gross inconsistencies and omissions. He categorically admit in the cross-examination that he was unable to see the incident from the place where he was standing and thus, his evidence as an eye witness is of no significance. It is surprising to note that his brother was being assaulted and he did not offer to assist him, in addition, he is also unsure whether he was injured at the time when he was taken to the hospital or whether he was dead.

One important aspect is, he did not report the incident immediately and the FIR is lodged on 5/6/2012, though the incident had occurred on 4/6/2012 at 20.45 hours. If Imtiyaz was dead according to PW 1, his natural conduct would have been to immediately approach the police station as he had seen the persons assaulting his brother. He gives an admission that he did not contact the police through mobile phone for help and was

standing at a distance of 2 – 3 minutes from the place of incident and it is in the hospital he came to know that Imtiyaz is dead.

In short, the testimony of this witness do not inspire confidence and it was therefore, necessary to find corroboration of the prosecution case through other witnesses.

12] PW 2 Hussain Shaikh is the injured and he narrate that on the date of incident at 8.00 p.m, while he was enroute his home, he saw an incident of scuffle near the house of his aunt. He saw accused Imran sitting in the car and he approached the spot in order to pacify the quarrel, when three to four persons attacked him from the back side. He sustained injuries on his back, waist as well as left hand fingers inflicted by sword and fell down. He regained consciousness after some time and his friend Bismillah Khan took him to Rajawadi Hospital where he was admitted. According to Hussain, before he reached the hospital, Imtiyaz had reached there on having sustained injuries. As per PW 2, he regained consciousness only on the next day.

The witness is declared hostile and is cross-examined by the learned APP, where he refused to recollect recording of his statement by the police and specifically state that he had not stated to the police the contents which were marked as Portion 'A', 'B' and 'C', and he could not assign any reason for mention of the facts in his statement.

When cross-examined by Advocate for the accused, he gave the following admission :-

“It is true that when I saw accused Imraan in the car some persons were causing damage to that car by different weapons. I have clean record. It is true that that informant Faiyaz has pressure in our locality due to his criminal record. It is true that informant Faiyaz was pressurizing me for giving statement in this case”.

Another relevant admission which contradicts the version of PW 1 is to the following effect :-

“Imtiyaz was found in the hospital before I went to hospital. Imtiyaz was brought to hospital by police. I did not find informant Faiyaz in the hospital. I also did not find any relative of Imtiyaz in the hospital at that time. I instructed my friend Bismillah to inform family of Imtiyaz regarding he was admitted in the hospital. Accordingly, Bismillah phoned family of Imtiyaz and spoke to Faiyaz. I do not know whether Faiyaz thereafter arrived in the hospital”.

13] The contradiction in the statement of PW 2, the injured is very apparent as it is not his case that Imran was the assailant. Further, he admits that Imtiyaz was in the hospital before he was taken to the hospital and he was brought to the hospital by police, whereas, as per PW 1, Imtiyaz died at the spot and police carried his dead body to the hospital. Though PW 1 has stated that he along with his friend Mohsin also went to Rajawadi Hospital and his family members as well as friends were present in the hospital, in their presence, a decision was taken to lodge the report, whereas as per PW 2, he did not find any relative of Imtiyaz in the hospital and rather, he instructed his friend Bismillah to inform family of Imtiyaz that he was admitted

in the hospital and Bismillah telephoned and spoke to Faiyaz PW 1, the complainant.

From the evidence of PW 1 and PW 2, there is inconsistency in the prosecution case.

14] Another eye witness is PW 3 Firoz who was standing on the spot and depose that when two groups clashed between 8.45 p.m to 9 p.m, on 4/6/2012, he saw Imran Khan, Mohsin, Ganesh and Shailesh on the spot. According to him, there were some other persons at the spot, but he was not acquainted with them. He has stated that there were some persons with Imtiyaz who ran away and Imtiyaz had injury on his leg. He has specifically deposed that Imtiyaz was being assaulted by sword and stones. Imran Khan, Mohsin, Ganesh and Shailesh were assaulting Imtiyaz and even Hussain was being assaulted. At that time, the police arrived and took Imtiyaz along with them and Hussain was taken in rickshaw to Rajawadi Hospital.

It is pertinent to note that one of the person named by him was present i.e. Mohsin, who is not arraigned as an accused.

What is relevant to note is, according to PW 3, he went to Rajawadi Hospital at around 12 O'clock in the midnight and learned that Imtiyaz had died but his statement came to be recorded after three days i.e. on 7/6/2012. During the course of his deposition, he identified a sword, which according to him, was in the hands of accused Imran.

Surprisingly, though he was a witness to the incident, he never gave his statement to the police until 7/6/2012, on which day he himself went to record his statement along with complainant Faiyaz. In the cross-examination, he has admitted that it is only on 7/6/2012 for the first time, he had disclosed the incident and he admit that as per the say of the complainant Faiyaz, he approached the police station for giving his statement. He has admitted that it did not occur to him to file a complaint to the police in respect of the incident, either on 4/6/2012 or on 5/6/2012 and 6/6/2012, till he met Faiyaz on 7/6/2012.

Firoz, who claim to be an eye witness to the incident has given the description of the incident in the following words :

“Five to six persons were quarreling with Imran apart from Imtiyaz. One Hasaan, Saajid and Hussain were amongst them. I know that accused Imran was having Car and it bears registration no. 100. I did not see that said Car, also not splinters of glasses of Car, two bamboo sticks and scythe at the spot. It is not true to say that I could not see all these articles and Car and I was standing at long distance from the spot. It did not happen that on arrival of police at the spot I went near Imtiyaz. I saw from distance that police took Imtiyaz from the spot. I saw from distance that police took injured Hussain from the spot. I do not know name of persons who took injured Hussain in a rickshaw from the spot”.

15] In the cross-examination, he admit that for the first time in the Court, while his statement was recorded and none of the weapons shown to him was found lying at the spot and he do not know the names of the persons who were holding the sword.

Another admission in paragraph no.11 is relevant to discredit the prosecution case and the version of PW 1, to the following effect:-

“11 Twenty five to thirty persons in those groups were fighting each other. The witness volunteers that there were more persons in the group of Imran. Even though I was standing at long distance, I was able to identify who were in the group of accused Imran and who were in the group of Imtiyaz. It is true that ten to twelve unknown persons were in the group of Imran. I do not know who were remaining fifteen to eighteen persons in those groups. I do not know whether they were in the group of Imran of Imtiyaz. It is true that those persons were holding iron rods, cricket stumps and hockey sticks. I was knowing this fact on 07/06/2012 when my statement was recorded. I again say, I cannot state who assaulted whom with which weapon i.e. scythe, rods, stumps, hockey sticks”.

The presence of one Faiz Gause on the spot is brought by way of an omission.

In paragraph no.13, he categorically admit that he did not help the police for lifting Imtiyaz and he was not aware who helped to lift him. It is his version that when police arrived at the spot, the persons in both groups ran away and police made inquiry about the incident and the name of the injured lying at the spot, but he was not aware whether anyone in the crowd disclosed anything to the police.

He admit that he was not the person, who told the police that the person lying on the spot was Imtiyaz. What is more pertinent in the evidence of PW 3, is that he categorically admit in cross-examination that on the last date also, Faiyaz and his father had come to the Court and asked him to come to the Court for giving evidence and accordingly, he came to give evidence, though he was not served summons or notice in this case by the police. According to him, Faiz introduced him to the

police personnel present in the Court from Ghatkopar Police Station, and he gave evidence in the case, as per the statement which was read over to him by the police man.

Further, PW 3 admit that when the police arrived at the spot, there was nobody to give the name of the injured Imtiyaz, though police were inquiring about his name and address and even he did not feel that he should disclose the name and address of Imtiyaz. He also admit that he did not feel like disclosing the information revealed to him about the incident from the people gathered at the spot.

16] The proximity of PW 3 with Faiyaz, the complainant is obvious, since he was residing in the neighborhood of Faiyaz and used to meet Faiyaz and his family members.

17] One Prakash Ahire, an eye witness is examined as PW 11 and as per his version, on 4/6/2012, he had gone to the house of his employer in Bhim Nagar and when he was returning to his home at about 8.30 p.m, and reached Gangawadi, he saw a mob of 10 to 15 persons armed with sticks, swords and iron bar, hockey sticks, causing damage to one car bearing registration no.100 which was black in colour. He deposed that accused Imran came out of that car and the mob assaulted him and therefore, he ran away from the spot. Thereafter, the mob started threatening the people and they also ran away.

In cross-examination, he categorically admit that the car was of accused Imran and the assailants caused damage to the

car after Imran ran away. After some time, according to him, he came to know that one person was lying at the spot in an injured condition, though he was unaware who the person was and thereafter, the police van came and took the injured.

18] Apart from these witnesses, PW 4 Faiz Gause, PW 5 Mohsin, PW 6 Mohan, PW 7 vegetable vendor Mrs. Mangal Dherange and PW 8, Niraj Kumar a person running a flour mill, who were cited as eye witnesses to the incident turned hostile and did not support the case of the prosecution.

19] Coming to the other evidence of the prosecution, PW 9 is the witness who was examined by prosecution for establishing the recovery of the sword and wooden sticks and who was signatory to the panchnama at Exhibits 93 and 94, but even this witness has turned hostile and nothing useful to the prosecution is extracted from him on his cross-examination by the learned APP.

20] PW 10, the panch, on arrest panchnama (Exhibit-98) also did not support the prosecution case.

21] PW 12 Mohd Shaikh, panch on the Memorandum panchnama/disclosure statement and PW 13, Javed Abdul Ganny, Kalyankar, a panch witness, have been declared hostile.

PW 15, Milind Salekar, a Police Constable attached to Ghatkopar police station, was on night duty in the intervening night on 4/6/2012 and 5/6/2012 from 8.00 pm to 8.00 a.m.

He received a phone call of EPR Constable Police Naik in the mid night attached to Tilak Nagar Police Station (Rajawadi Hospital) and he was informed that at around 9.30 p.m at Gangawadi, Hussain Shaikh was assaulted by 3 to 4 persons by sword and bamboos, and he had sustained injuries and he was brought to Rajawadi Hospital by his cousin Noora Shaikh. Accordingly, he reduced the information into writing in EPR maintained at Ghatkopar police station which was misplaced.

Worth it to note that the information was received only in respect of the assault on Hussain.

The police naik at Tilak Nagar who transmitted the information to PW 15, is also examined as a witness and he corroborate about the information given by him about Hussain Shaikh being brought in the Casualty Department of Rajawadi Hospital by his cousin Abdul Shaikh. He also gave information to Police Constable who recorded it in EPR Register (Exhibit 76). In the cross-examination, he state that EPR Register entry (Exhibit 76) was not recovered by the Investigating Officer during investigation.

22] PW 17 and PW 18 are the medical experts examined by the prosecution and Dr. Sanjay Wathore, PW 17, the prosecution has proved that the post mortem report which had recorded 18 injuries on the body of Imtiyaz, with one internal injury in form of contusion of scalp at frontal area. PW 17 formed an opinion that the cause of death was due to

hemorrhagic shock with multiple incise injuries associated with multiple contusions/abrasions.

In the cross-examination, he has categorically admitted that injury no.3, 4, 5, 6 and 18 were not individually sufficient to cause death. These injuries are the one on left parietal area, on the pareto of occipital junction and inside injury on right parietal 2 cm x ½ cm.

23] PW 18 is the Medical Officer who first attended Imtiyaz when he was brought to the casualty department and on whose advise, the patient was taken to ICU and put on ventilator. He found the following injuries on Imtiyaz :-

- “(i) CLW at fronto-temporal region 3 x 0.5 x 0.5
Muscle deep and no active bleeding.
- (ii) Deglowing injury at the left knee region. No active bleeding.
- (iii) Abrasion on the right forearm.”

PW 18 deposed that at 11.00 p.m, condition of the patient deteriorated and on 5/6/2012 at about 12.03 am, he died.

He categorically deposed that the injuries found on body of victim could be caused by sharp weapon like sword (Article 1) and Article ‘X’ and wooden square shaped stick (Article 2) and bamboo (Article 4 colly) and Stone (Article 3) shown to him.

PW 18 also examined Hussain Iqbal and who was brought by his friend Bismillah who gave history of assault by 10 to 15 persons by sharp object and described his injuries in the injury certificate to the following effect :

- (i) Swelling at the left leg
- (ii) CLW at knee region – 2 x 1 x 1 c.m
- (iii) CLW at left shin 2 x 1 x 1 c.m
- (iv) CLW at right lumbar region 3 x 1 x 0.5 c.m
- (v) CLW at right finger ate right side at DIP joint – 1x0.5x0.5 c.m
- (vi) CLW at third and fourth PIP palmar aspects 1x1x1 cm

He also expressed that the injuries could be possible by a sharp weapon like knife and could be caused with the weapons that were shown to him.

24] PW 19, is the SHO attached to Ghatkopar police station. In the night of 4/6/2012, when he received a phone call from API Jadhav from Rajawadi Hospital, requesting him to come to the hospital for inquiry. He made an entry in the Station diary and proceeded to the Hospital and went to the ICU Department. He was told by API Jadhav that Imtiyaz Shaikh was admitted and he was serious. One Faiyaz Shaikh was also present and he was told that he is the brother of the injured. He recorded the statement of Faiyaz as per his narration. Thereafter, he returned to the police station and according to him, Mohsin Khan was also in the hospital who was knowing the spot of incident and he also came to the police station and CR No.177 of 2012 was registered u/s.307, 326, 143, 146, 147, 148, 149 (Exhibit 63).

As per PW 19, he approached the spot of the incident and prepared a spot panchnama, when the spot was shown to him by Mohsin Khan.

On the spot, he seized broken pieces of glass of four wheeler motor vehicle, which corroborate the version of PW 11 that the car of Imran was damaged. After recording of the FIR, he received intimation of death of Imtiyaz Shaikh and he made an entry in the station diary. The procedural aspect of investigation was carried out by this witness and he proved various documents. Investigation was thereafter transferred to PI Kothmire. The investigation was carried out by PW 19 for two days but he had no occasion to apprehend the accused or to interact with them.

When his attention was drawn during the course of cross-examination to the FIR, he admit that no description was given by the informant while recording the FIR and he had only narrated about 10 to 15 unknown persons. He admit that the vehicle involved in the incident was in a compound near the spot of incident in broken condition and it was a Hyundai Verna Car bearing registration no. MH-04-FN-100. He found broken pieces of glass of that car on the spot but made no inquiry with the complainant about breaking of the glass of the motor vehicle.

He had recorded the statement of the informant and the omission in his statement, as regards the present appellant Imran, has surfaced in the following manner :

“The informant has not stated the name of accused Shailesh at the time of filing of the FIR. The informant had not stated while recording FIR that accused Imran gave blow of sword on left knee of Imtiyaz and therefore, he fell, accused Mohsin and Shailesh were assaulting Imtiyaz with wooden stick, accused Ravi was assaulting Imtiyaz with fist, blows and kicks and accused Shailesh, Mohsin and Ravi also assaulted Hussain”.

25] Mahadev Jadhav attached to Ghatkopar Police Station who had arrested the appellant (arrest panchnama exhibited as Exhibit-161), is examined as PW 20. In cross-examination, he admit that he made no attempt to search any eye witnesses to the incident and there was mob of 100 to 150 people when he visited the spot at around 10 p.m. He did not make any inquiries with the persons who were present on the spot, though he remained on the spot for two hours. He admit that PI Kothmire and API Gaikwad (PW 6) were also on the spot along with him and instructions were given to them to inquire with the persons in the neighborhood.

PW 20 admit that while he arrested Imran Accused no.1, he found injuries on this person, and he had mentioned the injuries in column 7 of Arrest Form though he had not mentioned particulars of the injuries in Exhibit 162 and 166 and he cannot assign any reason for not doing so. He admit that injuries sustained by Imran, accused no.1 were fresh, and he was sent for medical examination with police yaadi.

26] The Investigating Officer PI Kothmire is examined as PW 21 and he has deposed about the discovery panchnama upon the arrest of Imran Shaikh, which led the recovery of a sword having blood stains. The discovery panchnama is exhibited through PW 21 as Exhibit 172, and which reflected that it was recovered from the roof of a public toilet near Hussaini Masjid.

This witness recorded the statements of eye witness Faiyaz Shaikh, Faiz Gause Mohd.Shaikh and Mohsin Khan, the portion marked in their statements in form of omissions are proved through him.

It is PW 21 who had supervised the investigation and he admit that he had not seen Emergency Police Register (EPR) maintained at Rajawadi hospital in respect of CR No.177/2012. He admit that he supervised the investigation of cross case arising out of C.R. No.178/2012.

He also admit that there was no detail history of deceased Imtiyaz recorded in the medical papers and he was found lying at Gangawadi. He also admit that he had not drawn separate panchnama of Verna car of accused no.1, which was damaged during the incident and reference to which was made in the spot panchnama.

27] The accused Imran also examined a defence witness Firoz Ali, as he denied the case of the prosecution in his statement u/s.313 of the Cr.P.C.

As per DW 1, on the date of incident, when he reached Gangawadi between 8.00 to 8.30 p.m, many persons came there and pelted stones on his vehicle and another vehicle which was a Verna Car bearing registration no. 100, may be of maroon colour, which was being driven ahead of his car. He came out of the car to notice that Imran was driving the Verna car and even he stepped out in a frightened condition.

Imran ran away from the spot and Verna Car was damaged in the incident.

It is his version that people were running here and there with weapons and he did not see Imran assaulting anybody, but he saw Imtiyaz who used to do A.C. work for him holding some weapon. He, thereafter, left the spot.

His statement was recorded by the police and he came to know that Imtiyaz had expired in the incident. He is subjected to cross-examination by the Prosecutor and he remain consistent on his version that he saw some persons assaulting Imran who sustained injuries and there were 20-25 persons participating in the assault.

The role attributed to Imtiyaz as an assailant, is however, an omission, which has been brought on record through the cross-examination.

The above evidence was laid before the learned Sessions Court in order to prove the guilt of four persons who face the charge of murder r/w Sections 143, 147, 148, 149, 326 r/w Section 149 and Section 4 r/w Section 27 of the Arms Act.

On appreciating the evidence, the Addl. Sessions Judge, Greater Mumbai, recorded a finding of guilt against the present appellant under section 304 II of the IPC and sentenced him to suffer RI for a period of five years along with fine of Rs.One lakh, and acquitting the accused under Section 302 of the IPC.

The impugned judgment record that the defence of accused no.1 Imran that he was defending himself as he sustained an injury on palm and he ran away from the spot.

The defence witness Firoz did not see him assaulting Imtiyaz, though his car was damaged, Imran fled away from the spot.

The trial Judge has thus concluded that there is no clear evidence that Imran was defending himself. Despite the crucial witnesses on recovery on an Arrest Panchnama, the trial Judge found the evidence sufficient to believe the case of the prosecution.

The learned counsel for the appellant has placed before me a judgment delivered in a cross-case of C.R.No. 177/2012 (Sessions Case No. 624/12).

In the cross-case, nine accused persons came to be tried for an offence punishable u/s.324, 427, 506 II of the IPC, 143, r/w Section 149, 148 r/w Section 34 and 149 of the IPC on a complaint filed by Imran Ayub Shaikh, the appellant - accused no.1 in the present case. The case placed by the prosecution on his complaint was to the effect that on 4/6/2012 at 8.30 p.m, the informant came in his Hyundai Car at Gangawadi with his friends Ganesh Patil, Shailesh and Ravindra (PW 2) and when he was turning the car, one white Lancer car came from behind and dashed to it, as a result, the informant alighted and accosted the driver of the Lancer car. The driver threatened the informant and

left. Thereafter, when he had parked his vehicle opposite Shivsena Branch, Gangawadi at about 8.45 pm, the accused no.2 Tauseef and his companions accompanied with 4 to 5 unknown persons, arrived with sticks, sword, sickle and stone and they damaged the glass of his car. The deceased Imtiyaz was also one of the assailant holding a sickle, whereas accused no.4 Hussain, the injured in the present C.R, was holding a sword. The informant was assaulted by sword on his palm and others assaulted his friends by means of stick, fist and kick blows. This resulted in commotion on the spot and since accused no.2 was known to create terror in the area, the persons gathered on the spot, ran away.

This is the case of the prosecution in the cross C.R.No. 178/2012. Since accused no.1, 3 and 5 were absconding, their trial was separated and remaining accused faced the trial.

The prosecution examined six witnesses and PW 1 – informant, Imran did not support the case of the prosecution as he deposed that he had levelled allegations only against deceased/ accused Imtiyaz. Another witness PW 2 Ravindra also did not support the case of the prosecution. Ravindra Shinde proved the spot panchnama and deposed about the broken car. PW 4 was a hearsay witness, as he had not seen the incident.

PW 5 Dr. Goswami had noticed tenderness and swelling on the left wrist and tenderness on left knees on the informant and described the injuries as 'simple injuries'. The

Investigating Officer was examined as PW 6.

On conclusion of the trial, it recorded that there is no evidence of forming unlawful assembly, the common object, the common intention, and hence the accused persons were entitled for acquittal.

Juxtaposed against the case filed by Imran, accused no.1 in this case, it do not stand on any different footing as the prosecution witnesses did not support the case of the prosecution and the testimony of three witnesses do not inspire confidence and is shaky.

As far as PW 1 – Faiyaz Shaikh is concerned, he is the most deceptive witness who cannot be relied at all. He was informed by someone that boys of Imran were assaulting his brother, and therefore, he rushed to the spot and deposed that he saw Imran holding sword and giving blow of the sword on the left knee of Imtiyaz and thereafter, the said accused persons Ganesh, Mohsin and Shailesh, and Ravi assaulted him.

It is his version that the police van arrived at the spot and Imtiyaz died at the spot and the police took his dead body to Rajawadi Hospital.

This version is completely inconsistent with PW 18, the Doctor who received Imtiyaz in the casualty department and directed him to be transferred in the ICU and according to him, he passed away at 12.03 hours.

PW 1 is not credible at all, as he did not contact the police when he saw the incident of his brother being assaulted. In the cross-examination, he gave a clear admission that when the alleged incident was going on, he was standing at a distance of 2 – 3 minutes walk from the place of incident and the place of incident is not visible from the place where he was standing and this admission entirely demolished his version about the assault by Imran. He self contradicts himself when he deposed that in the hospital he came to know that Imtiyaz died. Despite having a mobile phone and witnessing the incident, he did not report the matter to the police immediately, but according to his own version, he went to the hospital and when their relatives arrived there, it was decided to file the FIR.

28] The evidence of PW 11, the informant therefore, cannot form the basis of the conviction and the role attributed to the present appellant, Imran as he is not an eye witness to the incident as he categorically admit that he did not witness the assault and contradict himself.

29] The injured witness Hussain, who is an accused in the cross C.R has turned hostile. As far as PW 3 Firoz is concerned, his presence on the spot is doubtful, since if he had witnessed the incident on 4/6/2012, he would not have waited for giving statement to the police till 7/6/2012 and he admit that he gave the statement as per the say of the complainant Faiyaz. Even he admit that he saw from distance that police took Imtiyaz from the

spot. In the cross-examination, he has admitted that he cannot give the name of the persons who were holding the sword (Article 'X'), one square stick (Article 2) and the bamboos. He is also unable to state who was holding which weapon and according to PW 3, 25 to 30 persons in two groups were fighting with each other, though he volunteered that there were more persons in the group of Imran and his statement that he was standing at long distance, but was able to identify who were in the group of accused Imran and who was in the group of Imtiyaz, is rather baffling as he state that he did not know who were the remaining 15 to 18 persons in those groups.

30] The omission in his testimony is proved and makes his presence on the spot, doubtful.

This witness has clearly intended to help Faiyaz, PW 1, brother of Imtiyaz, the deceased and his extensive cross-examination make the prosecution case, doubtful and particularly, when his testimony is to be corroborated with the version appearing from the evidence of PW 1.

31] Out of the eight eye witnesses as per the claim of the prosecution, only two supported its case and even their versions are full of inconsistencies and contradictions and fail to establish the prosecution case conclusively.

The medical evidence do not find corroborated by the ocular evidence and in fact, PW 18 who treated the deceased when he was brought to the casualty only referred to three

injuries on his person described by him as CLW on fronto temporal region with no active bleeding and de-glowing injury at the left knee region with no active bleeding and an abrasion on right fore-arm. None of the witness has established that this injury is attributed to Imran or even if the injuries recorded in the post mortem report are concerned, there is no direct evidence on record, establishing that it is Imran who had caused these injuries, as PW 1 has stated that Imran was holding a sword and he gave blow of that sword on left knee of Imtiyaz and he fell down. He do not attribute more injuries to Imran and definitely not the one which are recorded in the post mortem report. On the other hand, it is his version that Mohsin and Shailesh assaulted Imtiyaz with wooden sticks and Ganesh lifted a big stone and threw on his chest.

No doubt, the deceased sustained multiple injuries and the cause of the death is associated with these injuries in form of multiple contusions and abrasions, but since the prosecution has failed to establish that Imran was the author of these injuries which caused the death of Imtiyaz, the finding recorded in the impugned judgment under Section 304-II of the IPC cannot be sustained.

The learned Judge has failed to take into consideration an important aspect, being it is the duty of the prosecution to prove its case beyond reasonable doubt and despite discrepancies in the ocular evidence as against the medical

evidence and the inconsistency and contradictions in the evidence of PW 1 and PW 3, the learned Judge has recorded a finding of guilt, which in my considered opinion, deserve a reversal.

32] On the date when the sentence was imposed, the appellant was in custody for more than four years and adopting a reformatory approach and considering his young age, in absence of the intention to commit the offence having been proved, he was sentenced to suffer Rigorous Imprisonment for five years.

Since the finding of conviction is not based on any cogent and reliable material placed before the trial Judge by the prosecution, the conviction and the sentence imposed, deserve to be set aside.

The impugned judgment dated 24/1/2017 passed by the Addl Sessions Judge, Greater Mumbai, is accordingly set aside.

The appellant, who is convicted under Section 304 II of the IPC and is entitled to his liberty without being directed to undergo the balance sentence imposed upon him by the impugned judgment.

Since he is on bail, the bail bonds stand cancelled.

Criminal Appeal No. 82/2017 is allowed.

In view of the disposal of Criminal Appeal, Interim Applications do not survive and is disposed off.

(SMT. BHARATI DANGRE, J.)