

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 691 OF 2023

Najim Salim Khan ..Appellant
Versus
The State of Maharashtra ..Respondent

**WITH
CRIMINAL APPEAL NO. 692 OF 2023**

Farhan Salim Khan ..Appellant
Versus
The State of Maharashtra ..Respondent

**WITH
CRIMINAL APPEAL NO. 719 OF 2023**

Mohammad Salim Nawab Khan ..Appellant
Versus
The State of Maharashtra ..Respondent

**WITH
INTERIM APPLICATION NO. 3636 OF 2025
IN
CRIMINAL APPEAL NO. 719 OF 2023**

Mr. Gaurav Bhawnani i/b. Khan Abdul Wahab for Appellant in Appeal No.691 and 692 of 2023.

Mr. Vipul Dushing a/w. Sana R. Khan and Tanmay Kate for Appellant in Appeal No.719/2023.

Ms. Kranti Hiwrale, APP for the State.

**CORAM : SARANG V. KOTWAL &
SANDESH D. PATIL, JJ.**

DATE : 23 JANUARY 2026

JUDGMENT: (*PER SARANG V. KOTWAL, J.*)

1. All these three appeals are decided by this common Judgment and order, because they arise out of the same impugned Judgment and order.

2. The Criminal Appeal No.719 of 2023 is filed by Mohammad Salim Nawab Khan who was the original Accused No.1. The Criminal Appeal No.691 of 2023 is filed by Najim Salim Khan who was the original Accused No.2 and Criminal Appeal No.692 of 2023 is filed by Farhan Salim Khan who was the original Accused No.3. The Accused Nos.2 and 3 are the sons of the original Accused No.1. For the sake of convenience, the Appellants are referred to by their status before the trial Court.

3. The Appellants faced the trial before the Additional Sessions Judge, Borivali Division, Dindosi, Mumbai, in Sessions Case No.229 of 2018. All of them were convicted and sentenced vide the Judgment and order dated 07.06.2023, for commission of the offence punishable U/s.302 r/w. 34 of the I.P.C. They were

sentenced to suffer rigorous imprisonment for life each and to pay a fine of Rs.5000/- each and i.d. to suffer S.I. for one month each.

4. Heard Mr. Gaurav Bhawnani, learned counsel for the Appellants in Criminal Appeal No.691 of 2023 and 692 of 2023, Mr. Vipul Dushing, learned counsel for the Appellant in Criminal Appeal No.719/2023 and Ms. Kranti Hiwrale, learned APP for the State.

5. The prosecution case is that, the Accused No.1 and Abdul Kayyum Sayyad (deceased in this case) were neighbors. The Accused No.1 had extended some construction of his house, which, according to the deceased, was unauthorized. He had made complaints to the authorities. Unauthorized part of the structure was demolished. On 16.04.2018, a survey was being conducted in that area for their eligibility. In the meantime, the deceased had left that area and had started residing elsewhere. He had given his room on rent. On that day, at 2:30p.m. when the survey was going on, the deceased came to his house in that area. He again complained to the authorities about the unauthorized construction made by the accused No.1. Because of this complaint, the Accused

No.1 got angry. According to the prosecution case, he went inside his house and brought a knife. Other two accused held the deceased and the Accused No.1 inflicted blows on the abdomen of the deceased. Initially, the prosecution case was that, the wife of the Accused No.1 also instigated the other accused, but she was not prosecuted. The deceased suffered serious injuries on his abdomen. His intestine was protruded. A piece of his intestine fell at the spot. In that condition he walked towards the police chowky. On the way, he met Police Naik Sachin Sonmali who was on the beat marshal duty. He put the injured Abdul in a rickshaw. After some time, police Naik Sonmali saw a police van. With the help of others, he put the severely injured Abdul in that police van and took him to Trauma Care Center, Jogeshwari. It is the prosecution case that, on the way, the injured Abdul described the incident to P.N. Sonmali. According to the prosecution case, PW-5 Suresh Jadhav who was knowing the injured had accompanied them to the hospital. When they reached the hospital, there were other police officers who also inquired with the injured and took his version in writing. But before the injured Abdul could sign it, he

was immediately taken for surgery.

6. Police Naik Sonmali's statement was recorded. He then went to the police station and gave his F.I.R, at Andheri police station vide the C.R.No.212 of 2018. In the meantime, the Accused No.1 on his own had gone to the police station with the murder weapon. He was arrested and the murder weapon was seized. The investigation was carried out. The statements of the witnesses including the statements of the eye witnesses were recorded. The spot panchanama was conducted. After the death of the deceased, postmortem examination was conducted. The clothes of the deceased were seized. The articles were sent for chemical analysis. At the end of the investigation, the charge-sheet was filed and the case was committed to the Court of Session.

7. During trial, the prosecution examined 13 witnesses, including two eye witnesses PW-3 Mohammad Amin Shaikh and PW-6 Hasrat Gullu Badshah Shaikh, two witnesses for the oral dying declaration i.e. PW-1 P.N. Sachin Devidas Sonmali and PW-5 Suresh Jadhav, panchas for various panchanamas, the Medical Officers and the Investigating Officers. Apart from this oral

evidence, the C.A. report produced on record showed presence of human blood on the knife and on the clothes of the Accused; but the blood group was inconclusive.

8. The specific defence of the Accused No.1 was that, there were number of cases between the deceased and himself. On the day of the incident, there was BMC survey. The deceased was telling the Survey Officers to demolish his house. When he questioned the deceased, he was abused by the deceased. When he tried to pacify the deceased, the deceased held his collar and started assaulting him. When he tried to push away the deceased, the deceased pulled out a knife from his waist. He tried to push the deceased away to rescue himself. He started grappling. Both of them fell on the floor and continued grappling. There was a knife in the hands of the deceased. Due to the chaos while grappling, he did not see what happened exactly. He got up and ran to the police station to lodge the F.I.R. But he was made as an accused and the police arrested him. This is the specific defence taken by the Accused No.1 in his statement recorded U/s.313 of the Cr.P.C.

9. The defence of the other two accused was of total denial.

They denied that, they were present at the spot of the incident. According to them, they were falsely implicated at the behest of the family members of the deceased.

10. The learned Judge disbelieved the defence of the accused. He relied on the evidence of oral dying declaration and the evidence of the eye witnesses. Based on this evidence, the learned Judge convicted and sentenced all the Accused-Appellants, as mentioned earlier.

11. The evidence of eye witnesses is an important piece of evidence in this case. PW-3 Mohammad Amin Shaikh was the first eye witness examined by the prosecution. He deposed that, he used to reside in Hawaldar chawl. The Accused No.1 was residing at Khairunisa chawl which was adjacent to Hawaldar chawl. PW-3 knew both, the deceased and the Accused No.1. The deceased's house was situated in Hawaldar chawl, but at the time of the incident, the deceased was residing at Mira road and his house at Hawaldar chawl was rented out by him. The deceased and the Accused No.1 were on inimical terms because of the dispute regarding construction of a room. The room constructed by the

Accused No.1 was demolished. The incident occurred on 16.04.2018 between 2:00p.m. to 2:30p.m. A Government survey was going on. Around 2:20p.m., PW-3 started going to Hawaldar chawl for taking lunch. On the way, he met the wife of one Nazir Bhai. The deceased came there. He also started talking with Nazir's wife. At that time, the Accused No.1 came there. He pushed the deceased. PW-3 and Nazir's wife stepped back. The deceased also pushed the Accused No.1. PW-3 further deposed that the Accused No.1 took out a knife from the right side of his waist and tried to give a blow on the abdomen of the deceased. But the blow did not touch the deceased. After that, the Accused No.1 pushed the deceased, who fell down. The public gathered at the spot were trying to stop the Accused No.1, but he did not listen to anybody. He started moving the knife. He showed it to the public. Then he stabbed the deceased with the knife on his abdomen causing bleeding injury. Everybody started running away. The deceased caught the knife and asked the Accused No.1 to leave him. At that time, the deceased had caught the knife. But when the deceased left the knife, the Accused No.1 dragged the knife into left right

direction in the abdomen of the deceased from the penetrated portion. PW-3 further deposed that the Accused Nos.2 and 3, as well as, the public started running away. PW-3 himself ran away and went to the office of Umar Khan. He made a phone call to Umar Khan and informed him about the incident. Then he returned back to the spot of incident. The deceased was lying at that spot. The wife of the Accused No.1 came there and said that the deceased deserved this assault as he had troubled the family for many years. The deceased went to the police outpost by keeping his hands on his abdomen.

In the cross-examination, he stated that, all the accused and their family members were known to him. After the incident, he went to Andheri police station on 24.04.2018 and met API Kamble. At that time, he narrated the incident. That was his first statement recorded in the case. His signature was obtained on the statement on 24.04.2018. The statement dated 16.04.2018 on the record did not bear his signature.

From the record of the case, it can be seen that this witness's statement dated 16.04.2018 is a part of the charge-sheet.

There is no statement dated 24.04.2018.

12. In the further cross-examination, specific questions were put to bring out the omissions from PW-3's police statement. The defence tried to make out a case that PW-3 Mohammad had not stated the important aspects in his police statement which he deposed in his deposition before the Court. The cross-examination in that behalf projects as if this witness had not described the incident of the accused No.1 inflicting blows with the knife on the abdomen of the deceased.

13. We were very surprised to read this cross-examination as it projected as if this witness had not stated so in his police statement. Ordinarily, at the Appellate stage, the Appellate Court ought not to have read the police statement. Since this was an important issue, we decided to verify whether, in fact, PW-3 Mohammad had not said anything about the assault of the deceased and the accused No.1. We had to verify from the police statement as to whether the omissions are brought on record correctly. This was important in the context of the cross-examination to prevent abuse of process of law. We must note

here that the omission was wrongly recorded by the learned Judge. PW-3 Mohammad had not only described the assault by knife on the abdomen of the deceased, but had added many more things. When we specifically asked the defence counsel appearing before us regarding this incorrect recording of omission in the cross-examination, both the learned counsel submitted that, they were not relying on this particular omission; which was projected as if PW-3 Mohammad had not stated anything about the assault in his police statement. We dictated this Judgment in the open Court in presence of both the defence counsel appearing for the Accused, as well as, in presence of the learned APP. We specifically recorded the submission of the learned counsel for the Appellants that they were not relying on this part of the cross-examination which purportedly was an omission from the police statement of PW-3 Mohammad Amin Shaikh.

14. In the further cross-examination, he stated that the police did not show the knife to him on 24.04.2018. Nobody had accompanied him when he had gone to the police station on 24.04.2018. He further stated that the deceased died after three

days from the incident while he was under treatment in the hospital. He had not attended the funeral. He had not visited the deceased in the hospital. He had not informed the family members of the deceased. He was specifically asked whether the Accused No.1 had sustained bleeding injury and blunt injury because of the attack made by the deceased. PW-3 Mohammad stated that no injury was sustained by the Accused No.1. He further stated that the Accused No.1 and the deceased had a scuffle and the people were trying to separate them. The deceased sustained injury after he fell down. He added that the injury was sustained due to a single blow. He denied the suggestion that the Accused No.1 was trying to snatch the knife from the hands of the deceased. He denied the suggestion that the deceased sustained bleeding injury while the Accused No.1 was trying to snatch the knife from the hands of the deceased when the deceased was in standing position. He denied the suggestion that he did not witness any incident.

15. PW-6 Hasrat Shaikh is the other eye witness. He deposed that, he was running a paan shop. He knew the deceased. The

deceased had left Hawaldar chawl and had shifted to Mira road and his room in Hawaldar chawl was given on rent. He knew the accused. He identified the accused before the Court. He deposed that the relations between the Accused No.1 and the deceased were not cordial because of construction of the room by the Accused No.1. The incident took place on 16.04.2018. Government Survey was going on regarding those houses. The deceased came there. He met this witness. The deceased approached the chawl owner i.e. Nazir's wife. They were talking with each other. At that time, the Accused No.1 came near the deceased. There was a quarrel which resulted in a fight. The Accused No.1 inflicted blow of knife on the right side of the abdomen of the deceased. The people started running away. He also ran away. He made a phone call to the police. The police came there. On the way, the police met the deceased. The police carried the deceased. He added that the Accused Nos.2 and 3 had arrived there after the public had started running away.

16. On these answers, PW-6 Hasrat was declared hostile. Learned APP cross-examined him. It appears that, there were some

contrary portions in his police statement which were marked as portions A, B, C and D. He denied having made those statements before the police. Here again, the learned APP did not take care to show those portions to the Investigating Officer. Therefore, those portions are not proved properly. He denied the suggestions that the Accused Nos.2 and 3 had held the deceased and that the Accused No.1's wife was instigating him. He denied the suggestion that, after that the Accused No.1 inflicted several blows of knife on the abdomen of the deceased.

In the cross-examination conducted on behalf of the accused, he accepted that, he had not seen the Accused Nos.2 and 3 taking part in the incident. He accepted the suggestion that from the beginning of the quarrel, the Accused No.1 and the deceased were abusing each other and that both of them started hitting each other. He denied the suggestion that the deceased took out a knife from his waist, which was caught by the Accused No.1. He accepted the suggestion that the Accused No.1 was trying to snatch the knife from the deceased. Looking at the answers given by him, it can be seen that he is not a reliable witness.

17. The other important piece of evidence is in the nature of oral dying declaration. For that purpose, PW-1 Police Naik Sachin Sonmali was the first witness. He had lodged the F.I.R. He deposed that he was attached to Andheri police station as a Beat Marshal. On 16.04.2018, he was on duty. At about 2:45p.m. he received a phone call about the incident at Hawaldar chawl. He went there. He came to know that one person was stabbed and he learned that the injured had proceeded towards the police outpost. PW-1 then went towards Mograpada Beat No.3 police outpost. He saw the injured there. He made enquiries with the injured. He gave his name as Abdul Kayyum Sayyed. At that time, his intestine had protruded out. One rickshaw was passing thereby. PW-1 stopped that rickshaw. He carried the injured in that rickshaw. After about 100 meters he saw one police mobile van. PW-1 stopped that mobile van and carried the injured to Trauma Care hospital in that police van. The injured was shifted to the van on a stretcher. He tried to get more information from the injured while the injured was being taken to the hospital in the police van. At that time, the injured told him that he was a resident of Mira Road. He had gone

to the slum area at Mograpada for the purpose of attending a survey. He owned Room No.12 at Hawaldar chawl. The Accused No.1's room was in front of his room. The Accused No.1 had raised some unauthorized construction. Therefore, his room was demolished and because of that there was a dispute between the Accused No.1 and the injured. At the time of survey, the injured told the Authorities that the Accused No.1's room was illegal and, therefore, the Accused No.1 was not entitled to get an alternative room. There was an altercation between the injured and the accused No.1. The Accused No.1 went to his house and brought a knife. The injured further told that the Accused Nos.2 and 3 also came there. Again, an altercation took place between the injured on one side and all the accused on the other. The Accused Nos.2 and 3 were telling the Accused No.1 that the injured had troubled them enough and that they would kill him. The Accused Nos.2 and 3 held the injured and the Accused No.1 gave blows of knife on the abdomen of the injured. After the assault, the injured fell down on the ground. He sought help from the people present there, but nobody came forward to help him as they were frightened.

Therefore, he himself proceeded towards Mograpada police outpost. PW-1 further deposed that when they reached the hospital, the duty officer API Kamble and PI Sahane had also reached there. They also made enquiries with the injured, who again narrated the incident to them in the same manner. The injured was taken for treatment and, therefore, his signature or thumb impression could not be obtained on his statement. PW-1 then lodged his F.I.R. with Andheri police station as the family members of the injured were not known. His report was treated as an F.I.R. It was brought on record at Exhibit-45.

In the cross-examination, he deposed that API Kamble and PI Sahane reached the hospital at around the same time as when PW-1 had reached there between 2:50p.m. to 2:55p.m. PW-1 gave the entire information to API Kamble who took it down in the hospital. It was read over to PW-1 in the hospital itself. PW-1 had even signed that statement. It was the first statement in this case. He further deposed in the cross-examination that the information given by the injured was taken down in the hospital. It was taken down by API Kamble. PW-1 was not aware whether any Doctor

had given his endorsement on that statement. The statement of the injured was recorded before PW-1's statement was recorded. The statement of the injured was written by API Kamble in his own handwriting. It was a single page statement. It was not signed by API Kamble. This witness was shown the entire charge-sheet in the Court, but it was accepted that said statement was not the part of the charge-sheet. He further deposed that, before stepping into the witness box, he had not gone through the contents of the F.I.R. at Exhibit-45. He returned to the police station at about 4:00p.m. on that day. API Kamble reached the police station after 10 to 15 minutes. According to him, API Kamble enquired about the incident from him in the police station and at that time, PW-1 had narrated the incident to him. The information given by PW-1 was then typed on a computer. He had signed that computerized statement. Again he was shown the entire charge-sheet. But he was unable to point out the statement recorded at Trauma Care hospital.

18. Thus, it is clear that the prosecution has not led sufficiently cogent evidence as to which of the two statements

given by PW-1 Sachin was treated as an F.I.R. It appears that, one statement was recorded in the hospital and the other was recorded at the police station.

19. In the further cross-examination, he stated that the distance between the spot of the incident and the place where the injured met him was about 5 to 7 minutes walk; meaning thereby the injured walked for 5 to 7 minutes in that condition when he met PW-1. PW-1 had not noted down the registration number of the rickshaw in which the injured was carried. He was further asked questions about Constable Ravrane, but he did not mention anything further about police constable Ravrane. According to the defence, it was police constable Ravrane who had taken the injured to the doctors. Therefore, specific question was put to this witness that the injured was taken to Trauma Care hospital for the treatment by the police constable Ravrane. To this question, PW-1 Sachin answered that Police constable Ravrane was with him. But he accepted that he was stating for the first time that police constable Ravrane was with him. He could not explain as to why his report did not mention the fact that the Accused Nos.2 and 3

also had altercation with the injured. He also could not explain as to why his report did not mention that the Accused Nos.2 and 3 uttered that they would kill the deceased.

20. The other witness on the point of oral dying declaration is PW-5 Suresh Jadhav. He deposed that, he was residing at Nurbi Usman chawl since his birth. Hawaldar chawl, Halimabai chawl and Khairunissa chawl were situated near his chawl. He knew the Accused No.1 and the deceased. According to him, the Accused No.1 used to reside in the room belonging to the Accused No.1's mother in law. Room of the deceased was adjacent to that room. The Accused No.1 had extended his shed on Abdul's property. There was a dispute. PW-5 being a social worker tried to settle the dispute between them. On 16.04.2018, SRA was conducting a survey. At about 2:30p.m. he received a phone call from one Hashrat telling him that the Accused No.1 had stabbed Abdul with a knife. Hashrat asked PW-5 Suresh to go to the spot. He rushed there. He saw that Abdul Sayyed was injured with his intestine protruding out from his abdomen. He was walking by holding his intestine with his hands. PW-5 went near him. According to him,

he himself and PW-1 Sachin took Abdul to the police outpost by holding him. Abdul told him that the Accused No.1 had taken revenge. The Accused Nos.2 and 3 had caught his hands and the Accused No.1 had stabbed him. PW-5 Suresh and PW-1 Sachin took Abdul by rickshaw to the hospital. On the way, they saw a police van. Abdul was taken in that van with the help of a stretcher and was admitted to the hospital. Abdul had told him before reaching the hospital that, as the room of the Accused No.1 was demolished because of the application made by Abdul, the Accused No.1 had taken revenge. His statement was recorded on the next day. He identified the Accused.

In his cross-examination, he deposed that he had told the police as to what he saw on 16.04.2018 itself. The police recorded his statement on 18.04.2018. It was recorded by Hawaldar Sonmali. It is to be noted here that P.I. Sahane was the I.O. and he himself did not state about recording of statement of PW-5 Suresh. PW-5 Suresh deposed that, he was out of town from 19.04.2018 to 01.05.2018. He denied that his statement was recorded by police on 02.05.2018 and he stated that his statement

was read over to him on 02.05.2018. He volunteered that, both his statements were read over to him on 02.05.2018, then his statement was finalized and then his signature was obtained. When he reached the spot, Abdul was already lying on the ground for about five minutes. PW-5 himself did not help Abdul to stand up. PW-5 gave support to the protruding intestine. He had not handed over his clothes to the police. He admitted that he had not stated in his police statement that the Accused No.1 had extended a shed on Abdul's property. He deposed that, he had stated in his police statement that the Accused Nos.2 and 3 had caught hands of the injured. But he could not give any reason as to why this fact was not mentioned in his police statement. This is an important omission and it is proved from his police statement through the evidence of PW-13 PI Suresh Sahane. He accepted the suggestion that the statement of the injured was not taken in his presence at the hospital.

21. The other evidence is in the nature of evidence of panchas who were present for various panchanamas. PW-2 Kalim Shaikh was present when the Accused No.1 was arrested at about

6:00p.m. on 16.04.2018. PW-2 deposed that he was called to the police station. The Accused No.1 was present there. He took out a knife from his waist. It was handed over to the police officer. It was kept in a packet. PW-2 signed the seizure of knife panchanama. It is produced on record at Exhibit-50. PW-2 Kalim and the police then went to the spot of the incident. The spot panchanama was conducted. The police collected the articles from the spot including broken spectacle and a pen. More importantly, a piece of intestine was lying at the spot. All the articles were seized and packed. That panchanama is produced on record at Exhibit-51.

In the cross-examination, he admitted that the police did not provide alternate clothes to the Accused No.1 in his presence. The police had shown injury marks on the person of the Accused No.1. There were two injuries; one was on the thigh and other was on the shoulder. They were fresh bleeding injuries. Exhibit-50 also mentions those two injuries. Apart from that, one more injury was on the calf.

22. PW-7 Firoz Shaikh was a pancha for inquest panchanama. PW-8 Sayyada Nusarat Jahan Sayyed Abdul Quayum

was the wife of the deceased. However, the evidence of these two witnesses is not very significant in the context of this case.

23. PW-9 Ramchandra Katkar was a pancha for seizure of the clothes of the deceased. Those clothes were seized at about 3:00p.m. on 16.4.2018. That panchanama is produced on record at Exhibit-84. The significance of this evidence is that this panchanama was conducted before the F.I.R. was registered. However, the fact that the injured was taken to the hospital and his clothes were seized is hardly in dispute. Therefore, evidence of these three witnesses is not material in the context of the case.

24. PW-10 Dr. Gaurav Sawant had treated the injured. He deposed that, he was a Consultant at Trauma Center, Jogeshwari. On 16.04.2018 at about 3:00p.m. PC 4758 attached to Andheri police station had brought the injured to the Trauma Hospital. From the evidence it appears that PC 4758 was Ravrane and not PW-1 Sachin Sonmali. The injured had an injury on the upper abdomen. He was in serious condition, therefore, he was immediately taken to the operation theater. There were four injuries on the upper abdomen. The abdomen was opened and the

intestine was outside the abdomen. The intestine was also cut into pieces and there was severe bleeding. He produced the copies of medical papers at Exhibit-91. According to him, a person could die because of those injuries.

In the cross-examination, he stated that the patient died on 19.04.2018. He accepted the suggestion that the patient was suffering from septicemia. The septicemia's progression led to septicemic shock i.e. cardiac arrest.

25. PW-11 Dr. Sandeep Eknath Ingle had conducted the postmortem examination. He observed the following injuries:

1. One stapled wound, 3cm in length obliquely placed over right epigastric area, 1cm lateral to midline, on opening the pins, incised lacerated wound cavity deep, margins clean cut.
2. One stapled wound, 15cm, obliquely placed over right hypochondriac area, 4cm lateral to midline, on opening of pins, incised perforated wound of size 15 X 2 cm peritoneal cavity deep, margins clean cut.
3. One stapled wound, length bliquely placed over left hypochondriac area, 2cm lateral to midline, on opening of pins, incised perforated wound of size 5cm X 2 cm x peritoneal cavity deep, margins clean cut.
4. One stapled wound, 23cm, placed vertically over anterior abdominal wall, on opening of pins, incised

wound, 22 cm x 2cm x cavity deep, margins, clean cut. (Therapeutic).

5. One stapled wound, 4cm in length, 15 cm obliquely placed over left hypochondriac area 15cm lateral to midline on opening of pins, incised perforated wound of size 4 x 2 cm x peritoneal cavity deep, margins clean cut.
6. One incised cut wound 2cm x 1cm x cavity deep laced over right renal area of abdomen. (Therapeutic).
7. One stitched up wound seen over, 1cm x 1cm placed at midline (Therapeutic).
8. One wound for drainage seen over left side of abdomen, (Therapeutic).
9. Incised crushed lacerated wound, 8cm x 4cm x 2cm present in web between left hand's thumb and index finger.
10. Multiple abrasions seen, size vary from 1x0.3cm to 2x0.3cm over left hand and wrist.
11. Incised wound, 2x0.4x0.4cm, present over little finger of right hand.
12. Multiple therapeutic injection marks seen over body at places.

26. Apart from the wounds corresponding to the surgery, there were four incised wounds. According to him, the cause of death was septicemic shock following multiple stab injuries over the abdomen. The PM notes are produced on record at Exhibit-99.

27. PW-12 API Ajay Baban Kamble was the first investigating officer. He deposed that, he was informed telephonically about the incident of stabbing. He went to the Trauma Care Hospital. He saw the injured. The injury was on his stomach. The intestine was protruding outside the stomach and he was shouting that the Accused No.1 and his children had assaulted him. The doctor took him for treatment. He categorically stated that the statement of the injured could not be taken due to his condition. PW-12 then recorded the statement of PW-1 PC Sachin Sonmali who had gone to the spot of the incident, and as per his say the offence was registered. PW-12 then went to the spot of the incident and conducted the spot panchanama. It is produced on record at Exhibit-51. He recorded the statements of various witnesses including PW-3 Mohammad Shaikh. He supervised the inquest panchanama after the death of the deceased.

In the cross-examination, he denied the suggestion that when he reached the hospital, the injured was already taken for surgery. He accepted the suggestion that the offence was not registered till the panchanama of seizure of clothes of the injured

at Exhibit-84 was prepared. He accepted that, in the remand report dated 17.04.2018 he had not mentioned the name of the assailant. He denied the suggestion that he had not recorded the statement of any eye witness on 17.04.2018. He surprisingly accepted that PW-3 Mohammad had not stated the omission referred to in his deposition. We have already made comments on the evidence of this police officer. We must reiterate that the learned Judge and the learned APP had not taken sufficient precaution in recording this evidence carefully.

28. PW-13 PI Suresh Sahane was the second investigating officer. He had recorded the statement of about 10 to 12 witnesses. He had arrested the Accused Nos.2 and 3. He had sent the seized articles for chemical analysis. After completion of the investigation, he submitted the charge-sheet. He did not know whether the information given by the deceased was reduced into writing. He had recorded the statement of PW-5 Suresh Jadhav. He accepted that PW-5 Suresh had not stated in his police statement about the hands of the injured having been held.

This, in short, is the evidence led by the prosecution.

SUBMISSIONS MADE BY MR. VIPUL DUSHING, LEARNED COUNSEL FOR THE ACCUSED NO.1.

The oral dying declaration contradicts the evidence of the eye witnesses. The evidence of the eye witnesses is not reliable and consistent. The genesis of the incident is suppressed. The injuries sustained by the accused which are reflected in the arrest panchanama are not explained by the prosecution. He relied on the judgment of the Hon'ble Supreme Court in the case of ***Lakshmi Singh and others etc. V State of Bihar***¹. The medical certificate of the accused was suppressed and in spite of efforts by the defence, the prosecution deliberately did not bring it on record. The deceased by his complaints was rendering the Accused No.1 and his family homeless. There were three versions as to how the knife appeared on the scene. One version mentioned that the Accused No.1 was carrying it near his waist. The other version is that the Accused No.1 went home and brought it. It is mentioned so in the alleged dying declaration. The third version is given by the Accused No.1. According to him, the deceased was carrying that knife and in the scuffle, he got injured. There is no reason to

1 AIR 1976 SUPREME COURT 2263

disbelieve the defence of the Accused No.1. The eye witnesses are not reliable. PW-6 Hasrat Shaikh was declared hostile, but he had given some answers favourable to the Accused No.1. Learned counsel submitted that, in a given case, part of the evidence, even of the hostile witness, can be accepted. Alternatively, he submitted that the offence would fall within the *Exception 2* of Section 300 of the I.P.C. At the highest, it can be said that the Accused No.1 exceeded his right of private defence. Because, according to the Accused No.1 the deceased himself was carrying a knife. This fact is supported by the injury suffered by the Accused No.1. Admittedly, it was a crowded locality and the prosecution has examined only two witnesses; out of whom, one was declared hostile. Therefore, the fact that the prosecution did not examine any other witness shows that the prosecution story is not true and non examination of other witnesses would attract adverse inference against the prosecution case. There is serious doubt about whether the deceased could be in a position to give any statement whether oral or written. As far as the oral dying declaration is concerned, PW-1's version is not supported by

PW-5 Suresh consistently. PW-1 Sachin Sonmali does not speak about the presence of PW-5 Suresh at all. Learned counsel submitted that even *Exception 4* to Section 300 of the I.P.C. would be attracted because it was a sudden quarrel.

29. According to the prosecution case, and in particular, according to PW-1 Sachin, the information given by the injured was reduced into writing but that piece of paper was never produced before the Court. He further submitted that, PW-1 Sachin stated that, his statement was recorded in the hospital, but it is not produced on record. Instead, his statement recorded on the computer in the police station was treated as an F.I.R.

SUBMISSIONS MADE BY MR. GAURAV BHAWNANI, LEARNED COUNSEL FOR THE ACCUSED NOS.2 AND 3.

30. The oral dying declaration and the evidence of the eye witnesses is inconsistent. The eye witnesses have not attributed any role to the Accused Nos.2 and 3. Sufficient doubt is created regarding their participation or even their presence. None of the eye witnesses has stated that the Accused Nos.2 and 3 came there. There is no recovery of weapon at the instance of the Accused Nos.2 and 3. It is not the prosecution case that they had used any

weapon. Their clothes were not seized. He made similar submissions regarding the dying declaration and criticized the prosecution evidence regarding the oral dying declaration and the written dying declaration. In addition, he submitted that, there was 16 days delay in recording PW-5 Suresh's statement. It was recorded on 02.05.2018. The presence of Ravrane is another curious factor. PW-1 Sachin initially did not refer to PC Ravrane at all, but considering the difficulty as the medical papers showed presence of Ravrane, PW-1 Sachin had to admit that Ravrane was present. Though, PW-5 Suresh stated that the injured had stated in the oral dying declaration that the Accused Nos.2 and 3 were holding the hands of the deceased while the Accused No.1 gave blows of knife, this important fact is not stated by him in his police statement. That omission is duly proved. There is reasonable doubt as to when exactly the oral dying declaration was made. PW-1 Sachin and PW-5 Suresh have not given consistent versions regarding the same. It is also difficult to believe that having his intestine cut into pieces, how the injured could have walked for 5 to 7 minutes before PW-1 Sachin could meet him. Therefore,

PW-1 Sachin is not a reliable witness. He further submitted that, from the fact that the I.O. had not seized the clothes of the Accused Nos.2 and 3 means that they were not stained with blood; meaning thereby that the Accused Nos.2 and 3 were not present at the spot. The written dying declaration given by the injured is not produced on record. There is no trace of such written piece of paper. This also shows that the evidence is fabricated.

SUBMISSIONS MADE BY MS. KRANTI HIWRALE, LEARNED APP FOR THE STATE/RESPONDENT.

31. Learned APP, on the other hand, submitted that the dying declaration and the evidence of the eye witnesses are consistent. Though the evidence of the eye witnesses does not show any role played by the Accused Nos.2 and 3, the role of the Accused No.1 is consistent in both depositions of the eye witnesses. As far as the injuries suffered by the Accused No.1 are concerned, he himself had not stated anywhere that he had sustained those injuries. Even in the answers to the questions in his statement U/s.313 of the Cr.P.C. he had not specifically stated that he had suffered those injuries at the hands of the deceased. The eye witnesses were the independent witnesses. The enmity

and the motive is proved. There were four stab injuries. The intestine was cut into pieces. It was a brutal assault. The Accused No.1 had acted in a cruel manner.

REASONS

32. We have considered these submissions. As far as the Accused Nos.2 and 3 are concerned, sufficient doubt is raised about their participation in the offence. As mentioned earlier, the eye witnesses have not attributed any role to them. The most important witness in this case is PW-3 Mohammad. He has not attributed any role to the Accused Nos.2 and 3. He was very much present at the spot right from the inception of quarrel till the end. Even PW-6 Hasrat Shaikh who is examined as an eye witness has not attributed any role to them. While it is true that the oral dying declaration makes reference to the role played by the Accused Nos.2 and 3, it is the prosecution case that the injured had told PW-1 Sachin and PW-5 Suresh that the Accused Nos.2 and 3 had held the hands of the deceased, while accused No.1 inflicted blows. However, PW-5 Suresh had not stated so in his police statement. That omission is brought on record.

33. The next question is whether the evidence of PW-1 Sachin suffers from any infirmity. In that context, it must be noted that PW-1 Sachin has not spoken a word about the presence of PW-5 Suresh. According to PW-5 Suresh he was present throughout with PW-1 Sachin, and particularly when the deceased narrated the incident to them. In that case, it was necessary that PW-1 Sachin would have mentioned the presence of PW-5 Suresh when the oral dying declaration was made.

34. Even otherwise, according to PW-1 Sachin, the information given by the injured was reduced into writing in the hospital. Though that written paper could not be signed by the injured, the prosecution could have easily produced it on record or some endorsement of the Doctor could have been obtained on the same piece of paper that the injured was immediately taken for surgery and, therefore, his signature could not be obtained. Therefore, the first information received by the police authorities is not brought on record.

35. As far as the F.I.R. is concerned, the evidence shows that PW-1 Sachin's statement was recorded in the hospital, but it was

not treated as an F.I.R. His other statement was recorded at the police station and it was a computerised statement. The first statement is not brought on record. All this has raised a reasonable doubt about PW-1 Sachin's evidence. Moreover, it is also difficult to believe that the injured could walk a distance for 5 to 7 minutes when his intestine was cut into pieces. One piece was lying at the spot itself. Therefore, there is sufficient doubt created about whether the injured had given oral dying declaration before PW-1 Sachin and PW-5 Suresh.

36. As a result of the above discussion, the irresistible conclusion is that the prosecution has not proved its case beyond reasonable doubt against the Accused Nos.2 and 3.

37. As far as the Accused No.1 is concerned, as mentioned earlier, the oral dying declaration appears to be doubtful, but there are other important circumstances against him. Firstly, there is evidence of two eye witnesses PW-3 Mohammad and PW-6 Hasrat. Though, PW-6 Hasrat was declared hostile, in his examination in chief he had clearly stated that the Accused No.1 inflicted blow of knife on the right side of abdomen of the deceased. He had resiled

from his police statement only in respect of the Accused Nos.2 and 3. Otherwise, his evidence was not against the prosecution, as far as, the Accused No.1 is concerned. The evidence of PW-3 Mohammad is quite reliable. He has categorically named the Accused No.1 as the perpetrator of the crime. The Accused Nos.2 and 3 are the sons of the Accused No.1. PW-3 Mohammad had named the Accused No.1 as an offender. He had no reason to shield the Accused Nos.2 and 3. All the accused were from the same family. PW-3 Mohammad, therefore, is a reliable witness. As far as the main incident of assault on the deceased is concerned, there was no omission from his police statement. His evidence is also consistent with the medical evidence.

38. Learned counsel for the Accused No.1 relied on the case of *Lakshmi Singh*. The Hon'ble Supreme Court in that Judgment has considered the principles governing the facts when the injuries on the accused are not explained by the prosecution. The Hon'ble Supreme Court has held that, non explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from

which the Court can draw the following inferences:-

1. that the prosecution suppressed the genesis and the origin of the occurrence and has thus not presented the true version;
2. That the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;
3. that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

It is held that, the omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution. The Hon'ble Supreme Court further added that there may be cases where the non explanation of the injuries by the prosecution may not affect the prosecution case, particularly in cases where the injuries sustained by the accused were minor or superficial or there the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and credit-worthy, that it far outweighs the effect of the omission on the part of the prosecution

to explain the injuries.

39. In the present case, the defence could not point out as to why PW-3 Mohammad and PW-6 Hasrat were deposing against the Accused No.1. The defence has not shown any enmity between PW-3 Mohammad and PW-6 Hasrat on one hand and the Accused No.1 on the other. As rightly submitted by the learned APP, in the answer in the statement U/s.313 of Cr.p.c. the accused No.1 has not specifically stated that he had sustained injuries at the hands of the deceased. There are only indirect references through suggestions that the Accused could have sustained those injuries at the hands of the deceased.

40. The nature of injuries is also not brought on record. After the Accused No.1 had sustained some injuries it should have reflected somewhere on record. It is also not possible to believe that the deceased would carry a knife to commit assault on the Accused No.1. It was the Accused No.1 who was the aggrieved person and the angry one in their dispute because the deceased had made a complaint against him before the authorities resulting in demolishing the structure of the Accused No.1. Also there was a

strong possibility that the Accused No.1 could have been rendered homeless. On the other hand, the Accused No.1 had a strong motive to attack the deceased for the same reasons. Therefore, in the present case, it cannot be said that the prosecution has suppressed the genesis of the incident.

41. The Accused No.1 himself has practically admitted that there was a scuffle between him and the deceased. Therefore, presence of the Accused No.1 is undisputed at the scene of the offence with the deceased. The subsequent conduct of the Accused No.1 is also important. He straight away went to the police station. He was arrested there with the weapon with him.

42. Thus, the presence of the Accused No.1, his role, his subsequent conduct is sufficiently proved by the prosecution beyond reasonable doubt.

43. We are unable to agree with the submission of the learned counsel for the Accused No.1 that, his role would fall either within *Exception 2* or *4* to Section 300 of the I.P.C. The evidence shows that the Accused No.1 was the aggressor. He had carried a weapon with him. The deceased was talking with the

chawl owner. According to the eye witness PW-3 Mohammad, the Accused No.1 was carrying a knife with him. Initially, a quarrel started resulting in a scuffle. After that the Accused No.1 inflicted blow with knife on the deceased. There was no apprehension to the Accused No.1 of any serious injury to his person. Therefore, his case would not fall within *Exception 2*. We are also unable to accept that his act would fall within *Exception 4*. There was enmity between the parties. The deceased was talking to chawl owner. At that time, the Accused No.1 came there and started quarreling. The *Exception 4* can be used with certain restrictions.

Exception 4. to Section 300 of the IPC reads thus:

“Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

The benefit of this exception is available only if the offender does not act in a cruel or unusual manner. In the present case, there were as many as four stab wounds, cutting the intestine into pieces. The intestine was protruding out of the abdomen. Some part of the intestine had fallen down at the spot. Therefore,

by no stretch of imagination, it can be said that this act was not cruel or unusual. Therefore, the act of the Accused No.1 does not fall within *Exception 4* either.

44. As a result, it can safely be concluded that the prosecution has proved its case beyond reasonable doubt against the Accused No.1. However, there is sufficient doubt raised as far as the Accused Nos.2 and 3 are concerned. Therefore, the Accused Nos.2 and 3 are entitled to the benefit of doubt.

45. Hence, the following order:

O R D E R

1. The Criminal Appeal No.719 of 2023 is dismissed.
2. The Criminal Appeal No.691 of 2023 and Criminal Appeal No.692 of 2023 are allowed.
3. The Appellant Najim Salim Khan in Criminal Appeal No.691 of 2023 and the Appellant Farhan Salim Khan in Criminal Appeal No.692 of 2023 are acquitted from all the charges.
4. The part of the Judgment and order dated 07.06.2023 passed by the learned Additional

Sessions Judge, Borivali Division, Dindosi, Mumbai, in Sessions Case No.229 of 2018 convicting and sentencing the Accused Nos.2 and 3 are set aside.

5. The Accused Nos.2 and 3 are on bail. Their bail bonds stand cancelled. However, they shall execute P.R. bonds in the sum of Rs.25000/- each with one or two sureties in the like amount within a period of eight weeks from today.
6. All the Appeals are disposed of.
7. The connected interim application is also disposed of.

(SANDESH D. PATIL, J.)

(SARANG V. KOTWAL, J.)