
(2012) 05 BOM CK 0091
In the Bombay High Court
Case No : Criminal Appeal No. 1155 of 2005

Shivaji Satuppa Gavade-Patil

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 10-05-2012

Acts Referred:

Arms Act, 1959 — Section 25(1)(3), 27
Penal Code, 1860 (IPC) — Section 120B, 141, 147, 148, 161

Citation : (2013) ALLMR(Cri) 579

Hon'ble Judges : Hari P. Davare, J; B.R. Gavai, J

Bench : Division Bench

Advocate : A.P. Mundargi, instructed by Mr. Ganesh Gole Appellant in Appeal No.1155 of 2005 and Mr. S.V. Kotwal instructed by Mrs. Anjali Patil, Contractor Appellant in Appeal No. 1156 of 2007, for the Appellant; P.S. Hingorani, Assistant Public Prosecutor State in Both Appeals, for the Respondent

Final Decision : Allowed

Judgement

Gavai, J.—Since both these appeals, though arising out of different Sessions trials, since arise out of the same incident, are heard together and disposed of by this common judgment and order. The prosecution story in brief as could be gathered from the evidence placed on record is thus :-

Complainant Gopal Tukaram Bandivadekar is the resident of Naganwadi, Tal. Chandgad, Dist. Kolhapur. He had three sons, namely, Ashok, Namdeo and Janba and they were residing with him. The complainant's elder brother is Satappa who had five sons, namely, Maruti, Pundalik, Suresh, Prakash and Ramchandra. It is the prosecution case that, out of these five sons, Dr. Prakash used to reside at Chandgad, Ramchandra, who is an advocate, used to reside at Kolhapur and rest of them used to reside with him. There was a long standing rivalry between Gopal and Satappa and their sons on account of agricultural lands as well as political reasons. One of the sons of Satappa, namely, Maruti came to be murdered on 25th May, 1998. The younger son of the complainant, namely,

Janba was arrested by the police on suspicion of his involvement in the said murder. The said investigation was carried out by PSI Chandrakant Ombase. It is further the prosecution case that Ramchandra, who is one of the sons of the complainant, had addressed representation to the authorities contending therein that PSI Ombase was not conducting the investigation in a fair manner, and therefore, it should be transferred to an independent agency. Accordingly, the investigation was transferred to the Local Crime Branch at Kolhapur (hereinafter referred to as the L.C.B. for the sake of brevity). It is the prosecution case that, in regard to that enquiry, P.I. Pawar and A.P.I. Bhagwan Patil came to Shirgaon Government Rest House and recorded the statements of witnesses in regard to murder of the deceased Maruti. It is the prosecution case that, on 1st June, 1998, various witnesses including the deceased Namdeo, the son of complainant Gopal, and some of the witnesses in that crime had come to Shirgaon Government Rest House to give their statements. It is further the prosecution case that, after the statements of the witnesses were recorded at around 3 to 3.15 p.m., one TATA Sumo vehicle of blackish colour came from Vengurle road and stopped at the corner of the road and sons of Satappa, namely, Suresh, Prakash, Shivaji Gavade and Bansilal and 4-5 other persons came in the said vehicle. Out of them, Shivaji and two others came down from the said vehicle. At that time, Suresh and Prakash were shouting "finish all". It is the prosecution case that, out of two persons, one fired bullets towards Pandurang Gondhali and another person fired bullets towards Masjid Jamadar. It is the prosecution case that, Shivaji fired bullets from his pistol on Namdeo and Namdeo fell down. Thereafter Prakash and Suresh alighted from the vehicle with sickle and chopper and assaulted the deceased Namdeo on his face and stomach. It is further the case of the prosecution that, after assuring themselves that Namdeo had died, they kicked him and boarded TATA Sumo vehicle. It is further the case of the prosecution that they had taken out pistol from the vehicle and fired in the air, threatening the persons. Thereafter the vehicle proceeded in the high speed towards Chandgad. It is further the prosecution case that, hearing the shouts API Bhagwan Patil came outside and made an attempt to shoot at the running vehicle. It is further the prosecution case that, thereafter API Patil came out of the rest house and directed the police party to chase the vehicle in jeep. It is further the prosecution case that thereafter PI Pawar. API Patil and one another constable went in the same direction following the route on which the TATA Sumo plied. It is further the case of the prosecution that, on the way they picked up PSI Ombase who was in his uniform and armed with pistol and went in the same direction. Further the prosecution case is that, after travelling for about 50 to 60 kms. they saw some armed persons standing on the road. After the vehicle was stopped, there was exchange of fire between the said persons and the police party. After the firing, which according to the prosecution, was going on for some time, they noticed in the sugarcane mill that one dead body was found and the same was identified to be that of Suresh.

2. In the meantime, the deceased Namdeo was brought to Government Rural

Hospital at Chandgad and was given the emergency treatment and later on said Namdeo and Prakash were sent to Belgaum Civil Hospital. The complainant along with other persons went to Chandgad Police Station, therefore, the complainant narrated the incident to P.S.O. Desai who recorded his complaint (Exh.43) on the basis of which Crime No.36 of 1998 under Sections 307, 147, 148, 141, 120B of I.P.C. and Section 25(1)(3) of the Arms Act came to be registered at 16.25 hrs. on 1st June, 1998. Namdeo died on the same night at Belgaum General Hospital and, as such, the said crime came to be converted into the offence punishable u/s 302 of Indian Penal Code (hereinafter referred to as "I.P.C." for the sake of brevity).

3. Insofar as the incident regarding the encounter is concerned, the crime was registered at the instance of Bhagwan Patil being C.R. No.37 of 1998.

4. According to the prosecution, during the course of investigation, they arrested accused No.1 in Sessions Case No.193 of 2002, namely, Rajesh Gavari. According to the prosecution, said Rajesh had given a disclosure statement u/s 27 and on his memorandum a pistol was recovered. According to the prosecution, accused No.2 Shivaji Gavade, who is appellant in Criminal Appeal No.1155 of 2005 was named by the eye witnesses.

5. For the very same offence, three sessions trials were conducted. The first one was Sessions Case No.164 of 2000, in which four accused persons, namely, Pundalik, and Ramchandra, who are the brothers inter se and sons of Satappa were tried along with Atul and Shekhar. All the four accused came to be acquitted by the learned Sessions Judge.

6. Insofar as the second sessions case, i.e. Sessions Case No.193 of 2002 is concerned, two accused, namely, Rajesh Bhalchandra Gawari and Shivaji Satappa Gawade were tried. In the said case, the prosecution has examined as many as 24 witnesses. After considering the evidence on record, the learned Trial Court had acquitted accused No.1 Rajesh and convicted accused Shivaji for the offence punishable u/s 302 of I.P.C. and sentenced to suffer life imprisonment and to pay a fine of Rs.1000/-, in default to suffer R.I. for one month. The accused has been acquitted for all the other offences. Being aggrieved by the said judgment and order, accused No.2 Shivaji has approached this Court by way of Criminal Appeal No.1155 of 2005.

7. The third trial i.e. Sessions Case No.43 of 2006 has been conducted against Dr. Prakash Satappa Bandiwadekar, who, according to the prosecution, was absconding and arrested on 10th December, 2005. In the said case also the prosecution has examined as many as 18 witnesses. At the conclusion of the trial, the learned Trial Judge has convicted accused Dr. Prakash for the offence punishable u/s 302 read with 34 of Indian penal Code and sentenced to pay a fine of Rs.1000/- and in default to suffer R.I. for three months vide judgment and order dated 12th September, 2007. Being aggrieved thereby, the accused Dr. Prakash has filed Criminal Appeal No.1156 of 2007.

8. Shri Mundargi, the learned senior counsel appearing on behalf of the appellants submitted that the prosecution case is full of lacuna. It is submitted that the prosecution case is rested on 11 eye witnesses and the testimony of these witnesses is not trustworthy for more than one reason. It is submitted that the star eye witness is complainant Gopal. He further submitted that rest of the eye witnesses are either employed with complainant Gopal or having close relations with him or under obligation of Gopal on some count or the other. It is further submitted that the presence of the eye witnesses itself at the spot of the incident is unbelievable. He submits that when alleged enquiry was completed around 1.00 to 1.30 hours, there was no necessity for the complainant and the other witnesses to remain at the rest house till 3.00 o'clock. He further submitted that as to whether really an enquiry was conducted or not itself is doubtful, inasmuch as the prosecution has not placed any summons on record calling upon the witnesses to attend the enquiry conducted by L.C.B. Officer on 1st June, 1998 nor has it placed on record any statement of the witnesses who are examined in the enquiry. He further submits that PW-1 has also not immediately named the assailants when he went first to the police station as is evident from the evidence of PW-21. It is further submitted that even in the incident of encounter which has taken place around 50 kms. away from the place of occurrence of the first incident, the F.I.R. registered by PW-23 only names deceased Suresh. He further submits that there is inordinate delay in recording the statements of the witnesses. The learned counsel further submits that the medical evidence would show that the weapons used in the crime were pistol and a gun. He submits that the medical evidence shows that the pillates were recovered from the dead body. It is, therefore, submitted that this can be done only if a gun having 12 bores is used. He further submits that though the prosecution has recovered two weapons, no attempt was made to send the same along with bullets and empties to ballistic expert and obtain his report so as to establish the complicity of the accused. It is further submitted that the accused from whom the pistol is recovered, has been acquitted, whereas the appellant Shivaji from whom there is no recovery of whatsoever nature has been convicted. It is, therefore, submitted that the prosecution case is totally unbelievable, untrustworthy, and as such, appellants/accused are entitled to be acquitted. The learned senior counsel Mr. Mundargi in this regard relied on the judgment of the Apex Court in the case of Lakshman Prasad Vs. State of Bihar, .

9. Shri Kotwal, the learned counsel appearing on behalf of the appellant/accused in Criminal Appeal No.1156 of 2007 also submits that the evidence of the prosecution witnesses itself is sufficient to discard their testimony. He submits that the witnesses are not only closely related to the complainant but are also having criminal antecedents. He further submits that the prosecution witnesses themselves have given certain admissions which would shake the veracity of the truthfulness of the prosecution case. It is submitted that, insofar as the circumstances regarding the appellant being absconding is concerned, the evidence of PW-11 itself would show that after the brother of the appellant

Prakash had died, the appellant had taken shelter with him and thereafter moved to Indore in Madhya Pradesh. No sincere efforts have been made by the prosecution to find the appellant. He further submits that, on the contrary, the appellant was doing medical practice in Madhya Pradesh and not hiding away anywhere. He, therefore, submits that the appellant in the said case is also entitled to be acquitted. The learned counsel in this regard relied on the judgment of the Apex Court in the case of Matru alias Girish Chandra Vs. The State of Uttar Pradesh, .

10. Mr. Hingorani, the learned A.P.P., on the contrary, submits that the prosecution has fully established its case beyond reasonable doubt by examining various eye witnesses. He submits that the testimony of all the eye witnesses is consistent. It is submitted that the omissions are minor in nature. The learned A.P.P. further submits that merely because the witnesses are interested witnesses, cannot be a ground for discarding their testimony. He submits that merely because the prosecution has not sent the pistol and the bullets and empties to the ballistic expert and not recovered anything from the accused, cannot be a ground for their acquittal. The learned A.P.P. therefore submits that the appeals are without merits, and as such, are liable to be dismissed.

11. The prosecution case mainly rests on the testimony of eye witnesses. Most of the eye witnesses, except PW-4 Satturam Patil, are common in both the cases, and therefore, we will examine the evidence of these eye witnesses together as is recorded in both the trials. Insofar as the evidence of Satturam Patil is concerned, the same has been disbelieved by the learned Trial Court itself, and therefore, it is necessary to consider the same.

12. The star witness in Criminal Appeal No.1155 of 2005 is PW-6 Gopal, father of the deceased. The evidence of the said witness is at Exh.42. In his evidence he states that the police had called them for enquiry on 1st June, 1998. He stated that the police had called him, Namdeo, Pandu Gondhali, Masjid Jamadar, Krishna Konduskar, Parashram Krishna Mengane, Subhash Pundlik Gavade, etc. He states that he had reached the rest house at Chandgad Phata at about 10 to 10.30 a.m. In his examination-in-chief he states that the police were making enquiry by calling witnesses one by one. At that time, he noticed that the brother of Maruti, namely, Pundalik and one more person came from Chandgad side and went towards Belgaum side. He states that thereafter within 15 minutes to half an hour one vehicle came which was a black-blue coloured TATA Sumo. The said vehicle stopped at Chandgad Phata facing towards Chandgad side. Two to three persons alighted from the said vehicle. They were holding pistol in their hands. Out of these 2-3 persons, he was knowing one of them and his name was Shivaji Gavade, resident of village Savarde. He states in his evidence that he knows Shivaji Gavade as he was visiting Naganwadi. He states that after alighting from TATA Sumo, accused Shivaji Gavade fired bullet from his pistol towards Namdeo. Due to this pistol fire shot by accused Shivaji, Namdeo fell down. However, two persons who alighted from vehicle had fired bullet of pistol, one towards Masjid

Jamadar and another towards Pandu Gondhali. He stated that after this, Masjid Jamadar and Pandu Gondhali ran away from that place. Thereafter, absconding accused Prakash and Suresh alighted from TATA Sumo vehicle and both of them started shouting, "kill all of them". He states that accused Prakash was holding weapon i.e. sickle and deceased Suresh was holding a chopper. He further states that Prakash and Suresh caused injuries on person of Namdeo by weapon in their hands. He states that, thereafter Suresh and Prakash gave kick blows to Namdeo and all of them sat in TATA Sumo vehicle and went towards Chandgad side. He states that, thereafter he stopped one vehicle and took Namdeo in the tempo to Chandgad Rural Hospital. He states that the doctor checked Namdeo and provided primary medical treatment and asked him to remove Namdeo to Belgaum Rural Hospital. He was accompanied by Masjid Jamadar. He further states that the father-in-law of Namdeo was present at Rural Hospital at Chandgad, and he sent Namdeo along with to Belgaum Hospital. Thereafter he went to Chandgad Rural Hospital at around 4.00 p.m. He states that he narrated the whole incident to Chandgad police and police wrote down the complaint as per his say. The complaint is marked as Exh.43. He states that thereafter to effect the spot panchanama, police brought him to Chandgad Phata and he had shown the spot of the incident where the blood of Namdeo was fallen on earth, to the panchas and police.

13. In his cross-examination the complainant has admitted that he was arrested in connection with murder of Sanjay Shedekar. It is to be noted that, in his evidence though he has given the names of various persons, who were accompanying him to the rest house for giving statement and who have been subsequently examined as witnesses, they have not been mentioned in the F.I.R. It is further to be noted that though in his deposition he has stated that Appaji and Satturam disclosed that all the brothers of Maruti had taken oath that they will take revenge of murder of Maruti, the said is not disclosed in the F.I.R. It is further to be noted that in the entry No.18 of station diary which was taken on 15.35 p.m. on the basis of telephonic call of the complainant, it is only stated that at Chandgad Phata, Namdeo Bandiwadekar has been shot and was in an injured condition. This longstanding enmity between this witness and his brother Satappa and his children is not disputed by any one. The testimony of such an interested witnesses will have, therefore, to be scrutinized with a greater cautious.

14. On the same line is the evidence of Masjid Jamdar - PW?7. Masjid Jamdar is the resident of Gadhinglaj, which, according to him, is situated at the distance of 50 kms. away from Naganwadi. In his examination-in-chief he has totally supported the prosecution case. The statement of the said witness has been recorded on 3.6.1998. Though in his statement recorded u/s 161 it is stated that he was in the police station for the entire day of 1st June, 1998, he has denied the same in his deposition. The said accused was serving in Police Department for three years and thereafter left the job. In his cross-examination he has categorically admitted that he was having dispute with Ramchandra

Bandivadekar who is son of Satappa, since 1995. He has also admitted that Ramchandra Bandiwadekar had filed criminal complaint against him in Shahupuri Police Station alleging that he has committed theft of the truck. In his evidence he has also admitted that he is closely associated with complainant Gopal due to Zilla Parishad elections which took place in the year 1992. In his evidence though he has stated that he was called by Gadhinglaj Police on the previous day and asked him to remain present for enquiry on 1st June, 1998, he has stated that no summons was served on him for enquiry. He has further admitted that he was involved in the murder of Maruti. It can thus be seen that according to his own admission he has inimical terms with Ramchandra and is also having close relations with Gopal. The presence of this witness at the time of incident appears to be unnatural, inasmuch as, his residence is 50 kms. Away from the place of occurrence of the incident. It is further to be noted that this witness in Sessions Case No.43 of 2006 has also admitted that he was arrested in connection with murder of one Tanaji and admission that he is with inimical terms with Ramchandra Bandiwadekar, is also reiterated in the said sessions case. This witness has stated that, after the incident regarding the firing of bullets had taken place, he ran away towards Chandgad Phata, however, he has given his version that he saw backward when the firing was stopped and at that time Prakash and Suresh delivered blows of weapons on the person of Namdeo. However, the omission has been duly proved insofar as his version regarding seeing backward as firing stopped is concerned. It is thus doubtful as to whether this witness has really witnessed the assault by Prakash on the deceased Namdeo. In any case, perusal of the deposition of this witness in both the trials would lead an undoubtful conclusion that he was in inimical terms with Ramchandra who is brother of accused Prakash and that he has close relationship with complainant Gopal.

15. The third important witness is PW-9 Pandurang Gondhali, the alleged injured witness. It is to be noted that both the appellants have been acquitted insofar as charge of assault on this injured witness is concerned. This witness has also given identical evidence in his examination-in-chief as that of complainant Gopal and PW-7 Masjid Jamdar. It is to be noted that though the incident has occurred on 1st June, 1998, the statement of this witness has been recorded on 9th June, 1998. The said witness had gone to Belgaum Hospital along with the deceased Namdeo and had taken treatment there. In his evidence, there is omission insofar as that part of his evidence which states, "I told police that bullet brushed to my left hand and sustained injury". He has also admitted in his evidence that he was in jail in connection with murder case of Harshad Pilankar. He also states that though the blood was dropped on his clothes and though the police had seen those clothes, the same have not been seized. He further admitted that, prior to discharge from Government Hospital, he came to know that Namdeo died and in spite of that he had not gone to the police station for a period of eight days. Though in his statement before the police he has stated that Gopal Bandiwadekar tried for his and Krishna Koduskar's bail in the murder case of Harshad Pilankar,

he retracted from the same and denied of having said the same. Said contradiction has been duly proved. It is not in dispute that the said witness is employed by complainant Gopal on his grain-shop. Insofar as his evidence in Sessions Case No.43 of 2006 is concerned, it is admitted that he was employed with complainant Gopal for a period of four years prior to the incident. Though in his evidence in Sessions Case No.193 of 2002, he has denied of complainant Gopal has tried in getting the bail for him in the murder case of Harshad Pilankar, he has admitted in Sessions Case No.43 of 2006 that Gopal had made an attempt to secure bail for him. In his evidence he also admits that, after he had received injury from bullet, he had become frightened and ran away from the spot. In view of this categorical admission, it is difficult to believe the version of this witness that he has seen the assault by Prakash on deceased. The said witness who is an employee of complainant Gopal, and who was completely under the obligation of complainant, inasmuch as he had tried for him in getting the bail in murder case of one Harshad Pilankar, does not appear to be a witness whose evidence would inspire confidence in the Court.

16. There are five other eye witnesses. PW-8 Krishna Konduskar is one of them. The evidence of PW-8 is at Exh.49. Needless to say that, insofar as his examination-in-chief is concerned, the evidence of this witness is also identical that of the other witnesses. However, in his evidence, he has categorically admitted that his statement was recorded after 5-6 days from the day of the incident. It is to be noted that though PW-6 Gopal, in his examination-in-chief states that the said witness had accompanied him when they had gone to rest house, his name is not reflected in the F.I.R. Apart from that, his evidence contradicts the evidence of three police officers. Whereas, PW-23 API Bhagwan Patil, PW-24 PI Dhairyashil Pawar, PW-20 PSI Chandrakant Ombase, state that they had gone to chase the vehicle used by two accused in Maruti Esteem, he states that he saw police officer Ombase going in police jeep. He further states that though initially he did not tell anything to PSI Ombase, he has admitted in his evidence that he had come to the Court in police jeep. He further admitted that he is accused in murder case of Harshad Pilankar. He further admitted that Gopal Bandiwadekar tried for his bail in the said case. In his cross-examination he has admitted that, when he had been arrested in the murder case of Harshad Pilankar, complainant Gopal and other people used to visit him in the jail. He further admitted that it was the allegation of Ramchandra Bandiwadekar that Masjid Jamadar and Pandu Gondhali and the others were involved in the murder of Maruti and PSI Ombase has not conducted the enquiry properly. Though in his evidence he has stated that Shivaji had fired one bullet from pistol, his statement before the police is that Shivaji had fired 5 to 10 bullets from his pistol. It is further to be noted that, in his evidence in Sessions Case No.43 of 2006, this witness had admitted that Harshad Pilankar was murdered by relative of Pandurang Gondhali. It is thus clear that the said witness is also under obligation of complainant Gopal, inasmuch as, he was helped by Gopal in getting him bail in one murder case.

17. The next eye witness is PW-10 Mahadeo Ragade. The said witness states that he wanted to purchase bricks from Naganwadi, and therefore, had gone there to meet Namdeo. He further states that when he went to Naganwadi, family members of Namdeo told him that he had gone to Shirgaon rest house, and therefore, he again came back to Shirgaon rest house and he has witnessed the incident there. Insofar as the incident is concerned, his narration is also ditto as that of other witnesses. However, the testimony of this witness has been thoroughly shattered in the cross-examination. The defence has brought on record that the Chandgad Phata is located between Adkur and Naganwadi and if a person has to travel from Adkur to Naganwadi, he has to cross Chandgad Phata. In his evidence he clearly admitted that Namdeo met him at Chandgad Phata. He further admitted that he met Namdeo at the rest house at around 1.00 o'clock. The presence of this witness after his work is over at around 1.00 o'clock, appears to be totally unnatural. In any case, when he already had talk with Namdeo at around 10.00 a.m. while he was going to Naganwadi to Adkur, at Chandgad Phata, there was no occasion for him to again come to the rest house. His evidence also contradicts the evidence of police personnel, inasmuch as, he said that the police personnel came on the road after the assailants had ran away. This is in total contradiction with the evidence of PW-23 Bhagwan Patil who states that he had come outside the rest house before the assailants had fled away and also admitted to have fired the bullets to stop the vehicle.

18. The next witness is PW-11 Subhash Gavade. Though the said witness is employed as a driver of PW-6 Gopal, his name is not mentioned in the F.I.R. as to the persons who were accompanying the complainant for giving statement in the enquiry conducted by L.C.B. officials. In his evidence, he has stated that at Shirgaon rest house, he was standing below a tree near the hotel belonging to Murdekar. He has also admitted that he was an accused in a murder case of Sanjay Shedekar. He has also admitted that police had not served any summons upon him to remain present in the enquiry. It is thus clear that said witness is also an interested witness, inasmuch as, he was employed with the complainant Gopal PW-6.

19. The next witness is PW-12 Parshuram Mengane. He was working as a Cleaner on complainant Gopal's truck. As already stated, his name is not in the F.I.R. In his evidence, he has stated that though he had gone to police station to record his complaint, the police officers refused to do so. He also states in his evidence that he has not seen the police outside the rest house after hearing the sound of bullet firing. In his evidence, in Sessions Case No.43 of 2006, he has clearly admitted that after he heard the shouts of firing he had got frightened and therefore he ran away from the spot and came near Namdeo after the TATA Sumo vehicle had left. It is thus difficult to believe that this witness had witnessed the assault by the accused Prakash.

20. It can thus be seen that all these witnesses are either having inimical terms with the family of Satappa or having close relations with complainant Gopal. As

such, the only independent witness could be PW-13 Mahadeo Murdekar. The said witness has been declared hostile and thoroughly cross-examined by the learned A.P.P. However, it is to be noted that in his evidence he had admitted that his hotel is situated away from road in the ditch and the ditch is having depth of 10 ft. to 12 ft. He has further stated that, in between his hotel and road there are trees like Jambhul and Phanas and one cannot see anything from his hotel to the road side.

21. In the light of this evidence, we will examine the evidence of police officers. PW-20 PSI Chandrakant Ombase, was the in-charge of the Chandgad Police Station at the relevant time. Though he has given the entire narration of chasing the vehicle of the assailants and the encounter which happened near the village Tudey, he has stated in his examination-in-chief that out of eight persons, he was knowing Suresh Bandiwadekar, Prakash Bandiwadekar and Shivaji Gavade. He has further admitted that due to complaint of Ramchandra Bandiwadekar who is brother of Prakash Bandiwadekar, the investigation of murder case of Maruti was transferred to Dhairyashil Pawar from him. However, the F.I.R. registered by A.P.I. Bhagwan Patil regarding the second incident of encounter only narrates the name of deceased Suresh. If PSI Ombase was knowing the assailants and he had seen them, there is no reason as to why in the F.I.R. the names of these two persons are not mentioned.

22. It is relevant to note that, in his evidence recorded in Sessions Case No.43 of 2006, this witness has categorically admitted that serious allegations were made against him that he was a supporter of Gopal Bandiwadekar and one ex-M.L.C. Shri B.S. Patil.

23. The next important evidence would be that of PW-23 Bhagwan Patil, API, who was assisting PI Dhairyashil Pawar in conducting the enquiry on the complaint of Ramchandra. In his examination-in-chief, he has categorically stated that enquiry was complete between 1.30 to 2.00 p.m. He further stated that in the enquiry he found that there was no substance in the complaint of Ramchandra, and therefore, he has sent away all the persons who had gone there for recording the statement and thereafter he heard the sound of bullets. He states that he came out from the rest house and saw one person from the TATA Sumo firing bullet towards him and he also fired one bullet shot from his pistol towards the back wheel of TATA Sumo. Insofar as the incident regarding chasing and encounter is concerned, he has narrated the version of the prosecution as given earlier. He states that, after the firing incident was over which was going on for about 45 minutes, firing was stopped and thereafter they took search of the land in cautious manner. They found one person in the injured condition due to firing. They also noticed that one pistol was near to his right hand. The said injured person was identified as Suresh Bandiwadekar. A leading question has been asked to this witness by the learned A.P.P. as to whether he came to know about other accused from PSI Shri Ombase. Though the question was objected by the defence, the objection was overruled and in the answer the

said witness has said that, from PSI Ombase he came to know the name of Shivaji Gavade. However, it is to be noted that the crime which was registered by this witness was against only Suresh Bandiwadekar and other unknown person. He has categorically admitted as under :

At Tudey, at the time of incident, if I would have gained the knowledge of name of other accused, I would have named those persons in complaint while lodging the complaint.

It is further to be noted that this witness has categorically admitted that in Sessions Case No.193 of 2002 which was for the second offence, he has stated before the learned Court that while recording his statement, he has only referred to the name of Suresh Bandiwadekar. He has also categorically admitted that though he has recorded the statements of various persons in the enquiry which was conducted on 1st May, 1990, he has not handed over the same to the Investigating Officer. He has categorically admitted that he had not identified any of the accused in the Identification Parade. In his evidence recorded in Sessions Case No.43 of 2006, this witness has stated that PSI Ombase had identified only Suresh Bandiwadekar.

25. The next witness is PW-21 ASI Yallappa Desai who had recorded the complaint of Gopal and lodged the F.I.R. and also recorded relevant entries in the station diary. This witness contradicts Pandurang Gondhali. Whereas Pandurang Gondhali states that he had gone to the police station and met PW-21 Yallappa Desai. He denies the same in his evidence. Though Pandurang Gondhali clearly states that he was given police yadi, this witness has categorically stated that Pandurang Gondhali had not come to the police station. Though various witnesses state that they had gone along with Gopal to the police station, this witness categorically states that except Gopal no other person came before him to narrate the incident. As already noted herein above, in the station diary with respect to the incident near rest house, the entry reflect another name whereas the entry pertaining to the second incident only refers to Suresh and other unknown person.

26. The last police officer whose evidence will have to be taken into consideration is PI Dhairyashil Pawar, PW-24. In his evidence also he has categorically stated that he has completed the enquiry on the day of incident at about 1.30 p.m. and he had asked the persons who were called for enquiry to go and they were about to take lunch and thereafter he heard the sound of bullets. He narrates the incident regarding chasing vehicle and the incident that had taken place near village Tudey. He stated that PSI Ombase told him that amongst the persons armed with fire arms, the other persons were Suresh Bandiwadekar and accused Shivaji Gavade. After coming back to the police station, he came to know that Deputy Superintendent of Police directed the investigation to be transferred to him. In his evidence, he gave the entire narration of the investigation as carried out by him. In his evidence, he has categorically admitted that he has not included the statements of the persons whose statements were recorded by him

on 1st June, 1998. Though he states that he came to know the name of Suresh Bandiwadekar at village Tudey, he has not stated in his evidence in Sessions Case No.193 of 2002 that he identified Shivaji Gavade at any point of time. He has also categorically admitted that though he had gone to the hospital on 3rd June, 1998 and met Pandurang Gondhali, he has not recorded the statement of Pandurang Gondhali. He also admitted that he does not know as to whether Pandurang Gondhali was in hospital on 3rd June, 1998. He has categorically admitted that he has not seized any weapon from accused Suresh in this crime nor sent it to the Ballistic Expert in connection with this case. He further admitted that Gopal has not stated before him that Masjid Jamadar, Krishna Konduskar, Parashram Mengane and Subhash Gavade accompanied him at the rest house.

27. Now, we will have to examine the medical evidence. PW-17 is Dr. Shivaji Ajetrao had given treatment to deceased Namdeo at Chandgad Rural Hospital. He states that though Namdeo had come in seriously injured situation, he had not intimated about this injured patient Namdeo to Chandgad Police Station. He has also admitted that he had not informed the police about the injuries of Namdeo to the Chandgad Police up to 16th June, 1998. He has also admitted that the case papers were neither printed nor having the seal of the hospital.

28. Insofar as PW-14 Dr. Vijay Donkari is concerned, he has stated in his examination-in-chief that injury Nos.8 and 9 are caused by bullet shots. He further admitted that bullets were removed from injury Nos.11 and 13 and were handed over to the police. He further stated that bullet was not found below injury No.8 and it might have escaped through injury No.9.

29. One more glaring fact that needs to be taken into consideration is the panchanama. Most of the panchanamas are carried out by PW-1 Vasant Gavade. In the panchanama of the spot of the incident, 2-3 brass caps, 2-3 discs have been found. The said panch was not available at the spot or nearby but he was running a hotel which was situated half a kilometer away from the place of occurrence of the incident. The hotel of the said witness is situated near the petrol pump and near the transport office of Janba Bandiwadekar who is the son of the complainant Gopal. In his evidence, he has also admitted that he knew the complainant Gopal. We do not understand the propriety of calling the witnesses who were closely associated to the complainant from the long distance when an independent panch could have been available at the spot of the incident.

30. In the totality of the circumstances, it can be seen that most of the witnesses are the interested witnesses. Either they are closely associated with PW-6 complainant as employees or associates. Most of them are having criminal antecedents having involved in the offences of not less than magnitude of Section 302 of I.P.C. Most of them are under the obligation of PW-6 who had assisted them in getting the bail after they were arrested in connection with various crimes. Evidence of the Investigating officer so also the F.I.R. would reveal that PW-6 complainant had neither mentioned the names of the persons

mentioned in the deposition in the F.I.R. nor to the Investigating Officer, that they were accompanying the complainant when the complainant had gone to the rest house to give statement with regard to the enquiry on a complaint of Ramchandra.

31. The presence of the witnesses at the time given also appears to be unnatural. The police officers have stated that the enquiry was over by 1.00 p.m. to 1.30 p.m. and the witnesses were asked to go away. As such, the presence of so many witnesses and that too closely associated with PW-6 complainant, appears to be unnatural.

32. The version of the prosecution regarding the enquiry also appears to be not being beyond the reasonable doubt. No material is available to show that the witnesses were summoned to give their statements nor their statements have been produced on record to substantiate the prosecution case.

33. The glaring aspect of this matter is that the evidence of the police officers is not of such a nature which would inspire confidence. The F.I.R. recorded by the A.P.I. Bhagwan Patil refers only to the name of deceased Suresh and other unknown person. Not only that, but in the evidence in Sessions Case No.193 of 2002, this witness who is PW-23 and PW-24 Pawar have only deposed regarding the identification of deceased Suresh and have not deposed regarding the identification of the appellants herein. If PI Ombase had really identified the persons before this Court, there is no reason as to why their names should not have been reflected in the F.I.R.

34. There is no recovery of weapons at the instance of the present appellant. The weapons alleged to have been seized have not been produced in the trial. The alleged seizure is from the deceased person and Rajesh who has already been acquitted. The prosecution though had an opportunity to send the weapons along with the bullets and empties of bullets to the ballistic expert so as to corroborate the prosecution case, for the reasons best known to it, the prosecution has not done so. No specific explanation is coming in that regard. If the said material would have been sent to the ballistic expert, either the prosecution case would have been corroborated or contradicted. Withholding such an important piece of evidence would create a doubt regarding truthfulness of the prosecution case.

35. In the totality of the circumstances, we find that the prosecution has failed to prove the case beyond reasonable doubt and, as such, the accused are entitled to the benefit of the same. We therefore pass the following order :

(I). The appeals are allowed.

(ii). The orders of conviction and sentence stand quashed and set aside.

(iii). The accused are permitted to be set at liberty forthwith, if not required in any other case.