
(2013) 10 BOM CK 0071

In the Bombay High Court

Case No : Criminal Appeal No"s. 315, 357 of 2011 and 330 of 2012

Sikandar Ali Yawar Ali Mirza

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 21-10-2013

Acts Referred:

Citation : (2014) ALLMR(Cri) 290

Hon'ble Judges : K.U. Chandiwal, J;A.I.S. Cheema, J

Bench : Division Bench

Advocate : R.N. Dhorde, instructed by Mr. V.R. Dhorde in Criminal Appeal No. 315 of 2011 and Mr. B.V. Wagh, APP in Criminal Appeal No. 330 of 2011 and Mr. Satej S. Jadhav, in Criminal Appeal No. 357 of 2011, for the Appellant; R.N. Dhorde , instructed by Mr. V.R. Dhorde in Criminal Appeal No. 330 of 2012 and for Respondent Nos. 2 to 4 in Criminal Appeal No. 357 of 2011 and Mr. B.V. Wagh, APP for Respondent State in Criminal Appeal Nos. 315 and 357 of 2011, for the Respondent

Judgement

K.U. Chandiwal, J.—Appeal No. 315/2011 is preferred by Sikandar challenging his conviction recorded in Sessions Case No. 81/2010 for offense u/s 302 of IPC directing to undergo imprisonment for life and to pay fine of Rs. 1,000/-. The acquittal of original accused No. 2 Shahajan, original accused No. 3 Javed and original accused No. 4 Sigva Ali is questioned by wife of deceased Sarfraj Hussain (accused No. 2, 3, 4) and such appeal (No. 357/2011) is admitted by this Court on 2nd August, 2011.

The State has also preferred appeal (No. 330/2012) and it was admitted on 27th April, 2012, with a direction to hear Appeal Nos. 315/2011, 357/2011 and 330/2012, together.

2. Sadiq Hussain (P.W. No. 3, Jafar Ali (P.W. No. 4) are cousins residing at Nagpur. Their maternal uncle Sarfaraj (since deceased) was resident of Jamkhed. All the three decided to carry business in selling of Goggles around Ahmednagar city and they reached Ahmednagar on 9th/10th Jan., 2010. On 11th January,

2010, these three persons left Hotel/Lodge and in order to sell goggles, reached Chaudhari Dhaba to sell goggles to truck drivers near Vilad Ghat in vicinity of village Nimbalk on Nagar Manmad Road. After truck drivers leaving, they eased for tea. Appellant Sikandar and his three brothers (Accused Nos. 2, 3 & 4 respondents) came to said Dhaba, asked Sarfaraj to join them, and carried him to backside of Dhaba. Within a short span of time, owing to commotion, P.W. Nos. 3 and 4 rushed to backside. They noticed that, respondent Sigwa (accused No. 4) and Javed Ali (Accused No. 3) had caught hold of Sarfaraj and Sikandar Ali (accused No. 1) with a knife in his hand, assaulted Sarfaraj at his left side of neck. Accused Shahjahan (Accused No. 2) was abusing and he also dealt fist and kick blows. P.W. Nos. 3 and 4 started shouting. They controlled Sikandar Ali. P.W. No. 4 Jafar caught hold of Shahjan. Attempt to sneak away by Sikandar were aborted. However, Javed and Sigwa succeeded in escaping and decamping. Sarfaraj was lying unconscious; he was bleeding profusely. These events were witnessed by employee at Dhaba, P.W. No. 7 Amol Sasane.

3. FIR vide Crime No. I.-6/2010, of M.I.D.C. Police Station, for offense u/s 302 read with Section 34 of IPC against original accused Nos. 1 to 4 was recorded. Accused Nos. 1 and 2 came to be arrested immediately after the FIR at 16.45 hours. Spot Panchnama was drawn as spot was shown by the complainant. Inquest was drawn on body of Sarfaraj. At 17.50 hours, appellant Sikandar Ali made a voluntary disclosure of concealment of knife, the weapon of assault and it was taken charge from near the vicinity of Chaudhari Dhaba in two pieces between 17.20 to 19.20 hours on 11.1.2010.

4. After regular investigation, chargesheet was filed. After committal, charge was explained to the accused below Exh. 26 by learned Additional Sessions Judge, Ahmednagar. Plea of each of the accused was recorded on 7th Jan., 2011. The accused pleaded not guilty, claimed to be tried, and their defense is of false implication owing to earlier animosity.

5. The inter se relation between P.W. Nos. 3, 4 and deceased Sarfaraj is not in dispute. Inter se relations between Sikandar and Accused Nos. 2, 3 and 4/ respondents - three brothers is also not in dispute. Acquaintance of the parties is also admitted. From tenor of cross examination, there is no serious challenge to homicidal death of Sarfaraj. Sikandar disputed his presence at the spot and equally, the other accused.

6. Prosecution has examined following eleven witnesses;

(a) P.W. No. 1 Abid Ali Shaikh Jainuddin (Exh. 36) has acted as Inquest Panch with another Panch Haribhau Diwte and proved the inquest Panchnama (Exh. 37).

(b) P.W. No. 2 Sachin Dattatraya Narode was an employee of Chaudhari Dhaba, acted as Panch to the spot panchnama drawn at the backside of the Dhaba (Exh. 39). He has identified the seized articles Nos. 1 and 2 i.e. blood mixed with soil and plain soil.

(c) PW. No. 3 Sadiq Hussain Majloom Hussain Jafari is the eye witness.

(d) PW No. 4 Jafar Ali Kismat Ali is another eye witness.

(e) P.W. No. 5 Haribhau Mahadu Diwate acted as a Panch, who identified the apparels--

one pant and one shirt which had blood stains, taken charge in his presence. He identified his signatures at Panchnama (Exh. 46). On the same day, he acted as Panch for the disclosure panchnama at the instance of accused No. 1 Sikandar. He confirmed, another Panch Bedre was also present.

(f) P.W. No. 6 Ankush Madhukar Adsare conducts Ambika General Stores at Nagar Manmad road from where on 11th Jan., 2010, in the morning accused No. 1 Sikandar had purchased knife for Rs. 15/-. He has identified the knife in broken pieces (Articles No. 7 & 8).

(g) P.W. No. 7 Amol Sitaram Sasane an employee at Chaudhari Dhaba had witnessed commotion and, consequently, the incident. He referred to three persons coming to Chaudhari Dhaba for selling goggles and taking tea. He confirms that, four persons thereafter came and out of the three persons, one of them was taken behind Dhaba. He too rushed behind owing to shouting while the two others who were taking tea, also followed. The person out of the three was caught hold by two others by making him to sit in a chair. He was injured at his neck blood was oozing. He was frightened, he called his employer on phone and also the Police. He confirms that injured was taken in a "Tamtam Rickshaw" along with the Police Constable. His statement u/s 164 Cr.P.C. was also recorded. He has identified P.W. Nos. 3 and 4 to be the two persons out of three.

(h) P.W. No. 8 Dr. Sandhya Deorao Chavan was attached to Civil Hospital, Ahmednagar and on 11th Jan., 2010, she carried post mortem between 2.30 p.m. to 3.30 p.m. on the dead body, recorded the injuries. Post mortem notes are at Exh. 55.

(i) P.W. No. 9 Pradip Shamsundar Trimukhe, Police Naik, carried Muddemal in Crime No. 6/2010 to the office of Chemical Analyzer at Nashik. Letter is at Exh. 59.

(j) P.W. No. 10 Ghansham Baburao Jawale was ASI attached to MIDC Police Station as a Police Station Officer on duty on 11.1.2010. Having received anonymous telephone call about a murder having taken place at Chaudhari Dhaba, he had sent Police Naik Gite to the spot by jeep and made an entry placed at Exh. 61. He has registered Crime No. 6/2010. He has identified original accused No. 1 Sikandar and original accused No. 2 Shahajan who were kept sitting at the Police Station. Then FIR was registered.

(k) P.W. No. 11 Milind Bhagwanrao Patil, A.P.I., attached to the MIDC Police Station, was the investigator, who effected necessary Station Diary entries, carried investigation, sent seized items to the Chemical Analyzer. Blood sample of

accused Nos. 1 and 2 was also drawn. C.A. reports are tendered at Exhs. 72 to 75.

7. The defense has examined Dr. Priti Arvind Kamble, Medical Officer attached to City Hospital at Ahmednagar who was on duty as Casualty Medical Officer on 11.1.2010. She proved entries in the register at Exh. 83.

8. On analysis of material, tenor of the cross examination, inquest panchnama and post mortem notes, it is established that on 11.1.2010 Sarfaraj Ali met with homicidal death amounting to murder. This is more so as could be seen from the evidence of P.W. No. 8 showing nature of injuries suffered by Sarfraj, viz.

(1) Deep incised wound on left side of neck at carotid region, horizontal, slightly curved laterally 3" length, 1" in breadth and 1.1/2" in depth. Deeper on lateral aspect than medical aspect. Edges are well defined clean and everted and deeply stained. Sprouting of blood seen on left side of chest, shoulder and back, Carotid vessel torn and retracted on leftside.

9. Mr. R.N. Dhorde, learned Senior Counsel for the appellant and also accused Nos. 2, 3 & 4 says that the evidence of P.W. No. 3 Sadiq Hussain, No. 4 Jafar Ali and PW No. 7 Amol Sasane taken together, does not establish involvement of the appellant or the respondents/Accused Nos. 2, 3 & 4. According to him, if appellant, at the time of assault to Sarfraj, was caught hold by P.W. Nos. 3 and 4, there was no chance for appellant to break the knife and throw it away, P.W. No. 3 has claimed to have travelled in an auto from Nagar but no auto driver was examined. After the incident at 9.15 a.m., the deceased was taken in an auto; then, how appellant could be arrested at 4.45 p.m. to remain with the witnesses. The FIR is silent about the appellant taken to Police Station. The conduct of P.W. Nos. 3 and 4 is unnatural; to remain at site for 40 to 45 minutes inspite of serious injuries suffered by the deceased Sarfraj. According to learned Senior Counsel, defense witness Dr. Priti Kamble, indeed, established that complainant was not present when the dead body was brought to hospital but it was Shahajan Ali and, thus, belies the theory of P.W. Nos. 3 and 4 to be at the hospital. The theory of taking tea, initially by P.W. Nos. 3 and 4, and Sarfaraj, is ruled out as, in the post mortem notes, no liquid of yellow colour was found. The investigator failed to examine any other Police personnel except the investigating officer. There is confusion about removal of deceased; either it was in the Police Jeep or by an auto rickshaw as three different stories are emerging. P.W. No. 7 Amol Sasane does not identify or points to accused No. 1 Sikandar having caused injury or assault. He has introduced a theory of deceased, while was on chair, was assaulted but, in spot panchnama no chair has been seized nor referred to by P.W. Nos. 3 and 4. P.W. No. 6 Ankush is a brought up witness who introduced theory of sale of knife. Arrest entry No. 25 at 4.45 p.m. of Shahajan is false as Shahajan was already at the hospital at 11.30 a.m. On the seized apparels and knife, presence of human blood is shown, however, results are inconclusive (Exh. 72). Seizure of Motor Cycle (No. MH05AC 679) recovered from Chaudhari Dhaba subsequently is a doubtful situation as, at the time of spot panchnama, such

motor cycle was not found. Innocent persons have been roped in.

He has relied upon following judgments:

- (1) Khima Vikamshi and Others Vs. State of Gujarat,
- (2) State of Rajasthan Vs. Taran Singh and Another,
- (3) State of U.P. Vs. Bhagwant and Others,
- (4) State of Punjab Vs. Harbans Singh and Another,
- (5) A. Shankar Vs. State of Karnataka,
- (6) Sunil Kundu and Another Vs. State of Jharkhand,

According to him, non recovery of blood stained clothes of the witnesses belies their presence. The purported eye witnesses are highly interested. Presence of eye witnesses itself is doubtful. Non examination of independent witness is fatal. The investigation was defective. The High Court, while converting acquittal into conviction, has to indicate substantial and compelling reasons for setting aside an acquittal order and making one of conviction. The appellate Court must bear in mind presumption of innocence of accused and farther that acquittal by Court below bolsters the presumption of innocence.

10. Mr. Jadhav for the widow of Sarfaraj (appellant in Appeal No. 357/2011) says, the two persons were apprehended on the spot. Evidence of eye witness has to be classified in three categories; (a) wholly reliable, (b) partly reliable, and (c) not reliable. The deceased and the accused came from lowest rung of socioeconomic strata. Justice would not be a luxurious event for them. All four accused are real brothers and cousin of the deceased.

11. Learned Counsel for the appellant has placed reliance on the decision in Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, , and particularly, seven guidelines therein. He refuted allegations of mixing of apparels to explain, timings and how the panchnama of arrest of accused No. 1 has taken place, including seizure of his apparels and apparels of deceased. Minor discrepancies in the evidence should be ignored. Homicidal death and cause of death is not disputed. As accused had been apprehended on the spot, non seizure of his blood stained apparel at the spot is immaterial. He says, that the acquittal of the respondents in the appeals was ill founded. The learned Judge did not visualize import of common intention, and controlling deceased by the respondents Accused while Sikandar was assaulting him. He has urged to dismiss appeal of Sikandar and allow his appeal and to convict the respondents/Accused Nos. 2, 3 and 4.

12. It is well settled legal position, in a matter of eye witnesses, motive becomes insignificant. The appreciation of evidence also should be in tune with mental set up of the witnesses; their capacity to understand, grasp and reproduce the same, in the manner the events have taken place. P.W. 3, 4 are from lower strata

of society, engaged in petty vending activities. P.W. No. 3 and P.W. No. 4 who were with deceased Sarfaraj, were taking tea at Chaudhari Dhaba, confirmed by P.W. No. 7 Amol Sasane in his evidence. P.W. No. 7 has identified P.W. Nos. 3 and 4 to be the persons who had come with the deceased on the date of the incident. He had seen the persons approaching these three persons and those four had taken one of the three persons to the backside of the Dhaba, followed by these persons having heard the commotion. We quite see, proper precaution was not taken by State Counsel to get accused confronted to P.W. 7.

13. P.W. Nos. 3 and 4 are consistent in their narration dated 11th Jan., 2010, at the hotel having gone there for vending goggles with deceased Sarfaraj. They are also consistent about the appellant Sikandar coming to them with his three brothers (Accused Nos. 2, 3 & 4) and under a ruse and artifice taking Sarfaraj to backside of the hotel/Dhaba. Both have witnessed Sikandar had assaulted Sarfaraj at left side of the neck by knife; while Shahajan was abusing, assaulting by fist and kick blows, Sigva Ali and Javed Ali had controlled the deceased Sarfaraj. Sensing gravity, P.W. No. 3 had controlled appellant Sikandar at the spot and they were in fact waiting for the Police as Sarfaraj was lying unconscious owing to profuse bleeding. The nature of wound on the neck was tale-telling. After incident, if P.W. No. 3 says, Sarfaraj was brought in an auto rickshaw to the hospital, it should not be doubted as independent witness P.W. No. 7 Amol has also disclosed the same; only addition is, use of term "Tumtum rickshaw". P.W. No. 7 disputed that injured was taken in a vehicle Jeep. P.W. No. 4 Jafar Ali has also stated about shifting in Rickshaw and handing over Sikdandar and Shahjan to Police. Again, mode of transport/shifting to deceased cannot be made capital to extremity. Such mode would not, remotely, distort version of P.W. Nos. 3, 4 & 7.

14. The doubt of taking tea by deceased, again, is incorrect as the event of process of sitting down for tea was in progress. It did not indicate that deceased Sarfaraj had completed his tea not it is so brought on record from any evidence. Consequently, in the post mortem notes, absence of any yellowish liquid in abdomen of Sarfaraj will not be fatal to the prosecution.

15. P.W. No. 7 though has introduced a theory of deceased to be made to sit on chair and assaulted; it should simply be ignored as it is not supported or supplemented in statement u/s 161 Cr.P.C. or in the spot panchnama as no chair was spotted and taken charge. P.W. No. 7 Amol has accepted this improvement in his cross examination in paragraph No. 4. Evidence of Investigating Officer, and spot panchnama, shows details. Seizure of motor cycle subsequently, will not create impediment. This was, due to disclosure of accused and hence Police barged to seize it.

16. The tenor of cross examination to P.W. No. 3 and P.W. No. 4 about selling of goggles at Ahmednagar and knowledge of the same to the accused persons dated 9.1.2010 has not been questioned.

17. The principal theme from the defense is, when Sarftaj was in a critical condition, P.W. No. 3 and P.W. No. 4 did not venture to shift him to the hospital; then, how could they control the two suspects Shahjan and Sikandar. This argument needs to be discarded. P.W. No. 3 and P.W. No. 4, though Were concerned about health of Sarfraj but, circumstances indicate, immediately help from Police was solicited and they had controlled Sikandar and Shahjan. They being new to the area, could not do anything more than what they in normal circumstances have done. It is also evident that Police reached to the spot within half an hour and deceased Was shifted in an auto rickshaw to the hospital. Thus, no unnecessary time consumption indicating doubt, could be attributed. The witnesses honestly desired to ventilate their cause against the apprehended suspects and it should not be taken with jaundiced eyes. P.W. No. 3 and P.W. No. 4 are in relations to Sarfraj; the deceased, however, that will not brand discredit to their evidence as, in normal course of vending goggles, the three had been to Chaudhari Dhaba. They had the natural interest and had nothing to prepare a mesh against accused. At morning, at Dhaba, P.W. 7 was the only employee and there was no customer. Location of Dhaba and particularly spot is secluded, hence witnesses would be wanting.

Prosecution has proved FIR of P.W. No. 3 and evidence of P.W. Nos. 3 and 4 is established in respect of their presence by P.W. No. 7. It is settled, evidence of an interested witness does not suffer from infirmity. Only requirement is close scrutiny of such evidence and to ensure lack of vindictiveness on any other count. Apart from the FIR, recovery of broken knife, blood stained soil, presence at Police Station of accused No. 1 Sikandar and accused No. 2 Shahajan adds to the prosecution case. Chemical Analyzer's reports support it. In AIR 2009 SC (Supp.) 2374 (Vishnu v. State of Rajasthan), it is observed as under:

It is clear that merely because the witnesses are related to the complainant or the deceased, their evidence cannot be thrown out. If their evidence is found to be consistent and true, the fact of being a relative cannot by itself discredit their evidence. In other words, the relationship is not a factor to affect the credibility of a witness and the courts have to scrutinise their evidence meticulously with a little care.

The reported judgments relied by appellant, about discarding evidence of interested witnesses, flows on altogether different facts as the circumstances were stretched in those cases beyond ordinary contemplation.

18. The appellant Sikandar, no sooner dealt a fatal blow to Sarfraj, had an opportunity to break the knife and throw it away. It hardly requires a minute or two for such an exercise. Consequently, breaking of knife by Sikandar while under control of P.W. Nos. 3 and 4, does not call for any disbelief. The eye witnesses cannot be referred to be stock witnesses. There is no prelude to doubt, Sarfraj was taken to backside as, P.W. No. 7, employee of Dhaba, supports it. There is no re-engineering of circumstances. The events have taken in quick succession. There cannot be photographic narration from honest witness.

Consequently, overlapping of few insignificant narration will not tantamount to discard evidence of P.W. No. 3 and P.W. No. 4.

19. P.W. 6 Ankush has proved that Sikandar had purchased a knife on 11th Jan., 2010 for Rs. 15/-. He, before the knife was confronted to him, gave description to it, it had wooden handle with a blade of 4 to 5 inches in length. It is vivid, based on statement of Sikandar, he carried Police immediately on next day to the shop of Ankush, P.W. 6, and Ankush had identified him since it was an earlier day's visit. P.W. No. 6 had identified Sikandar in Court and also identified broken piece of knife. There should not be a criticism on description of the term SURI (In Maharashtra, knife is also called "Sun") or CHAKU or knife. P.W. No. 6 has disputed that the knife was later taken charge from his shop and then broken by the Police. This is a hypothetical, and stretching too far element of cross examination. Thus, evidence of P.W. No. 6 establish purchase of knife by appellant/accused Sikandar which has been used to eliminate Sarfraj on 11.1.2010. Said knife, in ordinary course, was sufficient to cause death. Accused Sikandar, thus, had a clear motive and intention to eliminate Sarfraj.

20. The weapon of assault, the knife, was taken charge at the instance of accused Sikandar from near the spot indicated in spot panchnama. The boundaries of spot, covered by hilly area & 150 feet away from main road, apparently, are secluded place and barring P.W. Nos. 3 and 4 or P.W. No. 7, it could not have been barged upon by outsiders.

21. The blood stained apparels of accused were taken charge in presence of P.W. No. 5 Haribhau (Panchnama Exh. 46). It is curious, thereafter, on the same day at around 5.30 p.m. to 6 p.m. on 11th Jan., 2010, P.W. No. 5 was called at Police Station and at the instance of accused Sikandar, they went to Chaudhari Dhaba and the accused/appellant Sikandar removed the knife in two pieces lying in grass (Actually Art. Nos. 9 and 10). They were taken charge. The seizure panchnama (Exh. 48) to this effect has been proved from P.W. No. 5.

22. Chemical Analyzer's report at Exh. 72 in respect of seizure of apparels illustrate that it was stained with human blood, however, blood group is inconclusive. Exh. 73 was Chemical Analyzer's report in respect of Sarfraj (deceased), blood group was inconclusive.

23. Exh. 74, the Chemical Analyzer's report of the accused Sikandar was also inconclusive. The blood group of Shahajan (Exh. 75) is of group A. Thus, the Chemical Analyzer's report also suggests that on the knife taken charge at the instance of accused No. 1 had human blood, including his apparels. There is no defense that accused No. 1 Sikandar had any scuffle either with the deceased or with somebody and he had bleeding injuries to get smeared with such blood.

24. A controversy was created in respect of presence of Shahajan through defense evidence of Dr. Priti Arvind Kamble. However, there cannot be a situation of doubt as evidence of Dr. Kamble shows that on 11.1.2010 at 10.40 a.m., when she was working at Civil Hospital, Ahmednagar, as a Casualty Medical Officer, a

person by name Shahjahan Ali approached her with dead body, who informed the deceased to be Sarfaraj Ali Jafari. She confirmed, on examination, that Sarfaraj Ali was dead as his B.P. was not recordable, his respiration was stopped, his pupils were dilated and were not reacting to light. She has produced certified copy of medical papers/register (Exh. 83). Complete name of said Shahjahan Ali is "Shahajahan Ali Kattad Ali". Learned Senior Counsel says, how could there be presence of accused/respondent Shahajan at the hospital and, if yes, he was not at all involved in the offense. These submissions are contrary to record and facts. Name of Shahajan accused is "Shahajan Ali Yawar Ali Mirza" while name at Exh. 83 is "Shahajahan Ali Kattad Ali"; both are totally two different persons. Shahjan's father's name is Ali Yawar as can be seen from name of father of Javed's or Sikandar's or Sigva Ali's father. Defense witness was not confronted to accused Shahajan present in the Court to be the same person who accompanied with dead body. Thus, no capital can be made to the entry in hospital register at Exh. 83.

25. Learned Judge, on the afore discussed and available material held Sikandar guilty, however, has acquitted accused Nos. 2, 3 and 4 (respondents) i.e. Shahajan, Javed and Sigva Ali. We are unable to comprehend reasons assigned for acquittal as the learned Judge felt that it was only accused No. 1 Sikandar who had purchased knife and he had prepared himself for committing the crime. The learned Judge, indeed, was wrong to refer, "there is no evidence on record to suggest participation by accused Nos. 2 to 4 (respondents in the appeal) in premeditated plan causing murder of Sarfaraj, they could not be held responsible for final assault caused by accused No. 1 Sikandar, knowingly causing death of Sarfaraj".

26. Evidence of PW No. 3 and P.W. No. 4 is categoric and established role played by each of the acquitted accused (respondents in Appeal Nos. 357/2011 and 330/2012).

27. The accused/respondents had come together with Sikandar; they took Sarfaraj to backside and Sikandar dealt massive blow which was fatal for the Sarfaraj to suffer. The accused Shahajan was abusing and was assaulting by fist and kick blows while accused Javed and Sigva had caught hold hands of Sarfaraj. These exercises are caused owing to premeditation and cannot be attributed to be an act of Sikandar alone to encash his design to eliminate Sarfaraj. The record, on the contrary, suggests that it was conjoint act of the four accused/real brothers.

28. Legal position in respect of applicability of Section 34 of IPC is eloquent. It has been indicated on the principle of joint liability in doing of a criminal act. Section 34 of IPC is only a rule of evidence and does not create substantive offense *Girija Shankar Vs. State of U.P.*, . The true spirit of Section 34 is that, if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. The existence of common intention amongst the participants in a crime is the essential element

for application of Section 34 of IPC.

To recapitulate, it is evident, Sikandar and three other accused came together to Chaudhari Dhaba. They ensured Sarfraz to backside of the Dhaba; two of the three controlled him; Sikandar dealt fatal blow, Shahajan extended kicks. It was a single event without sparing any time. The acquitted accused are consequently liable for the act which caused death of the deceased in the same manner as if for the act done by Sikandar. Learned Judge was swayed away and more influenced only due to purchase of knife by Sikandar and such purchase proved by P.W. No. 6, however, that will not allow to escape the responsibility of other accused. We are conscious, in an appeal preferred u/s 378 of Cr.P.C. the High Court has ample powers to go through entire evidence and to arrive at its own conclusions. However, following safeguards are also required to be adhered to:

- (a) Presumption of innocence of the accused.
- (b) If two views of the matter are possible, the view favourable to the accused should be taken.
- (c) The trial Court had an advantage of noticing demeanour of the witness.
- (d) Whether the accused could get benefit doubt.

29. We have re-appreciated the evidence of P.W. Nos. 3, 4 and 7. We have also examined defense evidence, the arrest panchnamas of the respective accused. All the events of investigation have taken place in quick succession without wasting time and creating embroidery to falsely book innocents. In carrying investigation quickly, as we have seen that after the FIR panchnama (Exh. 46), inquest, then panchnama Exh. 47, apparels of the accused Sikandar, drawing arrest of the Sikandar at about 1645 hours, taking his apparels immediately, ensures that there was no wedge left by the prosecution. Available evidence of P.W. Nos. 3 and 4, on mistakenly, points role of each of the accused, including Sikandar.

30. The punishment provided for offense u/s 302 of IPC is life with fine. Since we are contemplating to award minimum sentence of life and dealing with an appeal against acquittal, we are not called upon to hear the respondents in the State appeal on the point of sentence. Life imprisonment is the Rule and death sentence is an exception. Having drawn a balance sheet of aggravating and mitigating circumstances, we are of the opinion that imprisonment for life would also be required to be inflicted against original accused Nos. 2, 3 and 4 (respondents in Criminal Appeal No. 330/2012 and 357/2011). In the result, we hold that it was conjoint act of accused No. 1 Sikandar, accused No. 2 Shahajan, accused No. 3 Javed Ali and accused No. 4 Sigva Ali, with common intention to eliminate Sarfraz. Benefit of doubt cannot be extended to accused Nos. 2, 3 and 4 as has been done by the learned Judge and we hold that the accused are guilty for homicidal death amounting to murder of Sarfaraj on 11th Jan., 2010, at 9.45 a.m. punishable u/s 302 of IPC.

ORDER

(a) Criminal Appeal No. 315/2011 of Sikandar Ali Yawar Ali Mirza is dismissed.

(b) Criminal Appeal Nos. 330/2012 (State Appeal) and 357/2011 (complainant's appeal) are allowed. Original accused No. 2 Shahajan Ali Yawar Ali Mirza, No. 3 Javed Ali Yawar Ali Mirza, No. 4 Sigva Ali Yawar Ali Mirza are held guilty for the offense punishable u/s 302 of IPC arising out of Crime No. 6/2010 of M.I.D.C., Police Station, Ahmednagar. They are directed to undergo rigorous imprisonment for life and to pay fine of Rs. 1,000/-, each, in default, to suffer rigorous imprisonment for six months.

(c) Original accused Nos. 2, 3 and 4 are on bail. Their bail bonds stand cancelled. They should surrender before the learned Additional Sessions Judge-II, Ahmednagar, in Sessions Case No. 81/2010, on or before 21st November, 2013.