Bombay High Court Mohd. Aslam Alias Sheru vs State Of Maharashtra on 25 June, 1999 Equivalent citations: 1999 CriLJ 4876 Author: V Sahai Bench: V Sahai, T C Das JUDGMENT Vishnu Sahai, J. 1. The appellant aggrieved by the Judgment and Order dated 19th/ 20th December, 1988 passed by the Additional Sessions Judge, Greater Bombay, in Sessions Case No. 658 of 1986, convicting and sentencing him to undergo imprisonment for life, for the offence under Section 302 read with Section 34, IPC, has come up in appeal before us. 2. Shortly stated the prosecution case runs as under:- Sometimes before the incident, Aslam, the elder brother of the deceased Mohammed Asif, had murdered the brother of the appellant and since then relations between the appellant and Mohammed Asif were strained. On 20th April, 1985, at about 10.15 p.m. the deceased Mohammed Asif was sitting on a bakda (bench) in front of Aziz Tea Stall facing 2nd Cooper Street, near the junction of Pakmodia Street within the limits of Dongri Police Station District Bombay. At that time, Abdul Kadar Abbas Nalwala PW 1 was standing at the pan-shop of Iliasbhai and chewing pan, at a distance of about 15 to 20 feet from Azizbhai's teastall. Samad Usman Dudhwala PW 2 at the said time, was standing in front of a mutton shop which was situated at a distance of 8 to 10 feet from the tea-stall of Azizbhai. At the said time, they (PWs. 1 and 2) heard the sound of firing. They saw the appellant along with co-accused Channu who died during the course of investigation, armed with a revolver/pistol. They were pointing the revolver/pistol at Mohammed Asif. Channu was standing behind Mohammed Asif and the appellant was standing in front of him. Abdul Kadar Nalwalla PW 1 saw Channu firing two shots at Mohammed Asif and Samad Dudhwala saw the appellant firing towards Mohammed Asif. As a consequence of the firing, Mohammed Asif fell down from the bakda. There was a commotion. Thereafter, the appellant and Channu ran away. Thereafter, Abdul Kadar Nalwala and Samad Dudhwala ran towards the office of one Iqbalbhai which was situated very near by. Iqbalbhai arranged for a car and on the same, Abdul Kadar Nalwala and Samad Dudhwala took Mohammed Asif to J.J. Hospital. At J.J. Hospital, Mohammed Asif was taken to the emergency. 3. Evidence of P.I. Haribhau Kumbhare PW 8 shows that at about 10.40 p.m., same night, a telephonic call was received at the Dongri Police Station from J.J. Hospital informing that one Mohammed Asif had been admitted having suffered bullet injuries. On the said information, P.I. Kumbhare PW 8 along with S. I. Vasant Karande PW 9 rushed to J.J. Hospital., On reaching J.J. Hospital, P.I. Kumbhare learnt that Mohammed Asif had been admitted in Ward No. 4. On reaching the said ward, he found that Mohammed Asif was unconscious. He met Abdul Kadar Nalwala PW 1 and directed PSI Karande PW 9 to record the FIR. In his presence, PSI Karande recorded the FIR Exhibit 11, on the information given by Abdul Kadar Nalwala. After recording the FIR, Abdul Kadar Nalwala signed it and P.I. Kumbhare also counter-signed it. Evidence of P.I. Kumbhare further shows that while Abdul Kadar Nalwala was giving out his FIR, Mohammed Asif breathed his last. 4. Evidence of P.I. Kumbhare PW 8 also shows that after the FIR was recorded, he came to police station Dongri and registered the offence under Section 302 r/w 34, IPC and Section 25 of the Arms Ac, vide C.R.No. 224

of 1985. After registering the case, P.I. Kumbhare proceeded to the place of the incident via J.J. Hospital where he took charge of the clothes of the deceased. He prepared the panchanama of the scene of the offence Exhibit 15, took blood scrapping in two plastic packets and one empty cartridge which was lying at a distance of about 6 feet from the bakda of Aziz Tea Stall. After preparing the spot panchanama, he recorded the statement Of Samad Dudhwala PW 2 under Section 161, Cr. P.C. and also the statements of the some others. He tried to trace out the appellant and co-accused Chennu but, could not trace them out till 19-5-1986, on which date, he handed over the investigation to P.I. Maner. 5. Evidence of P.I. Shivraj Patil PW 7 who on 13-6-1986, was attached to the Dadar Railway Police Station is that on the said date, at 2.30 p.m. P.C. Satpute caught two persons at the entrance of platform Nos. 7 and 8 of Dadar Railway Station and produced them before him. On interrogation, he found that they were, the appellant and Mamu alias Iqbal. Both of them were carrying handbags. Since he felt suspicious, he called the panchas one of which was Dnyaneshwar Awad PW 6. In the presence of the panchas, the appellant was searched and from the bag, a loaded pistol of 7.65 calibre and 29 cartridges was recovered. While examining the pistol, the same got accidently fired. The recovery from the appellant was made under a panchanama which was prepared by Inspector Wadkat under his directions and he was conversant with the handwriting of Inspector Wadkat. He registered the offence under Section 25 of the Arms Act against the appellant. 6. Evidence of P.I. Maner PW 10 shows that on 23-6-1986 he arrested the appellant in the instant case. On 25-6-1986 and 26-6-1986, he recorded the statement of Abdul Nalwala PW 1 and Samad Dudhwala PW 2 respectively. 7. On 18-9-1986, P.I. Maner submitted the charge sheet against the appellant. As mentioned earlier, co-accused Chennu died while the case was pending investigation. 8. Going backwards, the autopsy on the corpse of the deceased Mohammed Asif was conducted on 21-4-1985 between 3 p.m. to 5 p.m. by Dr. Chandrakant Kapse PW 3 who found on it the following ante-mortem injuries :- On left hand wound of entry at base of thumb no tatoo mark no singeing 1.5 cms in diameter, wound of exit at hypothenial base 8 x 07 cms no tatoo in, no singeing averted margin. 2. Wound of entry on chest, midline at level of 3rdinterostal space0.5 cms, diameter abrasion collar along left side, no tatoo no singeing on dissection of body, (breast) brat bone intact, chest cage intact, a track found in chest muscle from wound of entry to right shoulder front, bullet was retrieved from that side, bullet was felt on paltpation externally. Direction of wound left to right block-wise. 3. Wound of entry on left side back 2 cms from midline at lower part of shoulder blade region 1.5 cms diameter no tatoo in, no singeing abrasion collar around the entire circumference. On dissection on the body, I found following internal injuries corresponding to external injury No. 3. (i) Left lung lower lobe, upper part perforated near inner aspect. (ii) Right upper chamber of heart, bullet was retrieved from muscle at lowest part of breast bone level, direction of wound back to front downwards. Dr. Kapse also took out two bullets which he sent to Forensic Science Laboratory. In the opinion of Dr. Kapse, the injuries sustained by the deceased were necessarily fatal and the deceased died on account of shock and haemorrhage due to injury to trunk.

In his cross-examination, he stated that the fatal injury was injury No. 3. 9. The case was committed to the Court of Sessions in the usual manner. The evidence of P.I. Kumbhare PW 8 shows that it was notified for trial in July, 1988 and while he was going through the case papers, he came to know that a pistol had been seized from the appellant-Sheru. He obtained the possession of the said pistol and forwarded it to the Forensic Science Laboratory, the report of which was received on 28-10-1988. In the trial Court, the appellant was charged for offences punishable under Section 302 and under Section 302 read with Section 34, IPC. He pleaded not guilty to the charges and claimed to be tried. During the trial, in all the prosecution examined ten witnesses. Two out of them namely PW 1 Abdul Nalwala and Samed Dudhwala PW 2 were examined as eye-witnesses. Abdul Nalwala PW 1 was declared hostile because from two averments which he had made in his FIR, he wriggled out, they being :- (i) the appellant standing at a distance of 10 ft from the deceased Mohammed Asif and firing at Mohammed Asif; (ii) seeing appellant at police station Dongri about one and a quarter year after the incident. When he was confronted with these averments in the FIR he categorically stated that he had not mentioned the said facts in the FIR. In other respects, Abdul Nalwala PW 1 supported the prosecution. Samad Dudhwala PW 2 supported the prosecution in entirety. The learned trial Judge believed the evidence of PW 2 Samad Dudhwala in entirety and that of Abdul Nalwala PW 1, excepting the two aspects about which he had mentioned in the FIR and had wriggled out during the trial. The learned trial Judge also believed the evidence of the Ballistic Expert. He convicted and sentenced the appellant in the manner stated above. Hence, this appeal. 10. We have heard learned counsel for the parties and perused the entire material on record. We are constrained to observe that we do not find any merit in this appeal. The evidence on which the conviction of the appellant is founded, can be broadly classified under two heads :- (i) the ocular account rendered by Abdul Nalwala PW 1 and Samad Dudhwala PW 2; and (ii) the evidence of the Ballistic Expert Arutla Malleshwar Rao PW5. 11. We would like to begin with the occular account. As mentioned in the preceding para, it has been furnished by Abdul Nalwala PW 1 and Samad Dudhwala PW 2. Abdul Nalwala PW 1 stated that on the date of the incident namely 20-4-1985 at about 10.15 p.m. he was chewing pan at the thela of Iliasbhai near the junction of Pakmodia Street and 2nd Cooper Street Dongri-9. At a distance of about 15 to 20 feet, on a bench (bakda) was sitting the deceased Mohammed Asif in front of the Tea-stall of Azizbhai. He suddenly heard the sound of firing and saw that Mohammed Asif had been struck by a bullet. He rushed towards Mohammed Asif and noticed that at that very moment, another bullet struck him. He saw co-accused Chennu standing at a distance of 3 to 4 feet behind Mohammed Asif and the appellant standing at a distance of about 30 to 40 feet from Mohammed Asif. He stated that the appellant was holding a revolver and was pointing the same towards Mohammed Asif and Chennu fired two shots from his revolver. He also stated that on receiving one of the shots, Mohammed Asif fell down from the bakda. He also stated that from 1 1/2 years, he was knowing the appellant and Chennu. During the trial, he identified the appellant as the person who

was holding a revolver. He stated, that he immediately called Iqbalbhai who arranged for a car and on the same, he along with Samad Dudhwala PW 2 took Mohammed Asif to J.J. Hospital. He also stated that his FIR was recorded. He was declared hostile by the prosecution because, he resiled from the two averments in the FIR namely :- (i) the appellant standing at a distance of 10 ft from the deceased Mohammed Asif and firing at Mohammed Asif; (ii) he saw the appellant at police station, Dongri about one and quarter year after the incident. He candidly stated that he had not stated the averments contained in (i) and (ii) in his FIR and assigned no reason for their being mentioned in the FIR. 11 A. We have gone through the statement of Abdul Nalwala PW 1 and we make no bones in observing that he has been won over and consequently, was rightly declared hostile by the prosecution. We find it rather amusing that in one breath, in para 10 of his statement, he stated that the first information report was correctly recorded but, in spite of that, he had the temerity to wriggle out from the two averments made by him in the FIR. Be that as it may, all is not lost to the prosecution. What is lost at the best are only the two averments made by him in his FIR. In other words, the rest of his evidence survives, much to the discomfiture of the appellant. 12. We have considered the entire statement of Abdul Nalwala PW 1 and we find from it that the following things are established :- (a) the date, time and place of the incident; (b) presence of the deceased, at the place of the incident; (c) presence of the appellant and Chennu at the place of the incident; (d) someone firing a shot at Mohammed Asif which resulted in his rushing towards Mohammed Asif; (e) the appellant-Sheru standing at a distance of 30 to 40 feet from Mohammed Asif pointing a revolver towards him; (f) Chennu firing two rounds from the revolver at Mohammed Asif; (g) his immediately going and calling Iqbalbhai and Iqbalbhai arranging for a car; (h) Mohammed Asif being taken in the said car by him and Samad Dudhwala PW 2 to the J.J. Hospital; and (i) his dictating the FIR Exhibit 11. 13. In our view, even if the recitals in the FIR to the effect that the appellant fired at Mohammed Asif from a distance of 10 to 12 feet are excluded, there is sufficient incriminating evidence in the statement of Abdul Nalwala PW 1 for sustaining the conviction of the appellant for the offence under Section 302 read with Section 34,IPC. 14. It is too late in the day to urge that the evidence of a hostile witness is wholly useless. The Apex Court on the question as to what value can be attached to a evidence of a hostile witness has categorically and repeatedly laid down that the whole testimony does not stand condemned and his evidence on aspects which are corroborated from the other evidence can be relied upon. The learned trial Judge in para 11 of the impugned Judgment has referred to two authorities of the Apex Court wherein the said ratio has been laid down, they being :- (i) (Bhagwan v. State of Haryana) (ii) (Satpaul v. Delhi Administration) The said authorities are binding on us. 14A. The evidence of Abdul Nalwala is substantially corroborated by Samad Dudhwala PW2. 15. We now take up the evidence of Samad Dudhwala PW 2. He stated that on 20-4-1985 at about 10-15 p.m. after having his meals in a mutton shop, he was standing in front of the said shop. He heard the sound of firing from the tea stall which was situated at a distance of about 8 to 10 feet from where he

was standing. He saw Mohammed Asif sitting on a bench (bakda) in front of the tea stall; Chennu standing behind him holding a revolver; and the appellant-Sheru also armed with a revolver standing in front of him at a distance of 10 to 15 feet. He candidly stated that he saw Sheru firing towards Mohammed Asif and as a consequence of the firing, there was a commotion and he ran towards Iqbalbhai's office. He further stated that when he came back with Iqbalbhai on the spot, he saw Abdul Nalwala PW 1 standing in front of apanshop. In the Court, he identified him as the person who had deposed before him. He stated that he and Abdul Nalwala PW 1 lifted Mohammed Asif, put him in a car and took him to J.J. Hospital. He also deposed about the motive in terms that before the incident, Mohammed Asif's elder brother-Aslam had murdered the appellant-Sheru's brother and since then relations between the appellant and Mohammed Asif had become very strained. 15A. We have gone through the evidence of Samad Dudhwala PW 2 and we find that it inspires confidence. He has explained his presence at the place of the incident. The manner of firing as given out by him is corroborated by the medical evidence inasmuch as Dr. Kapse PW 3, the Autopsy Surgeon found on the corpse of the deceased, three fire arms wounds of entry and candidly opined that they were caused by fire arms. Earlier, we have set out verbatim the ante-mortem injuries received by the deceased. During the course of autopsy, Dr. Kapse extracted two bullets and sent them to the Forensic Science Laboratory. During the trial, he stated that the report of the Forensic Science Laboratory shows that they were fired from a pistol of 7.65 calibre. Another circumstance which shows that Samad Dudhwala PW 2 was present is that he along with Abdul Nalwala PW 1 took the deceased Mohammed Asif immediately after the incident to J.J. Hospital. It is significant to point out that Abdul Nalwala PW 1 has also admitted this. A seal of assurance is forthcoming to his ocular account by the circusmtance that his statement under Section 161, Cr. P.C. was recorded about 2Vi hours after the incident, the same night. He has stated this, in his cross-examination, in para 6. Criminal Courts attach great importance to the prompt interrogation of a witness under Section 161, Cr. P.C. because, the same eliminates very largely possibility of embellishments and a tutored account creeping in, in the said statement. It is true that since in cross-examination he stated that he knew the deceased Mohd. Asif since the last 5 to 6 years and since Asif brother Aslam had murdered the appellant's brother, he was a interested witness but, the law is that the testimony of a interested witness has only to the evaluated with caution and not mechanically rejected. Having exercised that caution, we are implicitly satisfied that his evidence inspires confidence. 16. We now take up the second piece of evidence which has been adduced by the prosecution against the appellant namely the evidence of the Ballistic Expert PW 5 Arutla Malleshwar Rao. Earlier, we have mentioned the circumstances in which the recovery of the weapon used in the incident, namely 7.65 pistol, was made from the appellant. P.I. Shivraj Patil PW 7 stated that on 13-6-1986, while he was on duty at Dadar Railway Police Station, at 2.30 p.m., police Constable Satpute along with two suspects came. One of them was the appellant. He was Carrying a hand bag. Its search revealed a loaded pistol of 7.65 calibre and 29 cartridges. While

examining the pistol, it accidently went off. The pistol and the cartridges were seized and a panchanama was prepared by Inspector Watkat under his directions and he was conversant with his handwriting. In the trial Court, he identified the pistol seized from the appellant. It is pertinent to point out that although he was cross-examined but, not a single question was put to him regarding the seizure of the pistol and the cartridges. We may also mention that neither any question with regard to the seizure of pistol and cartridges was put to Public Panch Awad PW-6. As a matter of fact, his cross-examination was declined. As mentioned earlier, the said pistol along with the two bullets extracted by the Autopsy Surgeon were sent to the Ballistic Expert. The evidence of the Ballistic Expert PW 5 Malleshwar Rao has been discussed elaborately by the learned trial Judge in paras 18 to 21 of the impugned Judgment. To eschew proloxity we do not intend verbatim re-producing the details in his evidence. We can only say that we are in agreement with the finding of the learned trial Judge recorded in para 21 of the impugned Judgment as regards the evidence of the Ballistic Expert. Para 21 of the impugned Judgment reads thus :- 21. The finding of the Ballistic Expert that the pistol article-6 (recovered from the accused) was used for firing the bullets article-4 colly before the Court which was retrieved from the dead body of Mohammed Asif and as these bullets article-4 colly before the Court tally with the test fired bullets article-5 colly which came to be test fired from the pistol article-6 before the Court and I having found that the pistol article-6 came to be seized from the accused Sheroo alias Mohmed Aslam from the evidence on record in my opinion the prosecution has established the case against the accused beyond reasonable doubt. 17. The learned trial Judge has also sought assurance to the ocular account by the circumstance of motive, which as mentioned earlier was that sometimes before the incident (the exact time has not come in the evidence) Aslam, the elder brother of the deceased Mohammad Asif had murdered the brother of the appellant and on this score, relations between Mohammed Asif and the appellant had become highly strained. 18. In our view, the learned trial Judge has acted correctly in reaching a conclusion that the offence under Section 302 read with Section 34, IPC stands established against the appellant. Looking to the nature of the injuries sustained by the deceased and the opinion of the Autopsy Surgeon, Dr. Kapse PW-3, the act of the appellant would squarely fall within the four corners of clause thirdly of Section 300, IPC. The said clause provides that culpable homicide is murder if there is an intention to inflict injuries which are sufficient in the ordinary course of nature of cause death. In the instant case, in a pre-planned manner, the appellant and Chennu intentionally fired upon Mohd. Asif. The ante-mortem injuries found on the person of Mohd. Asif by the Autopsy Surgeon Dr. Kapse PW-3 reveal that injury Nos. 1 to 3 were wounds of entry. The Autopsy Surgeon opined that heart and lung had been perforated. He also opined and rightly in our Judgment, that the ante-mortem injuries suffered by the deceased were necessarily fatal. It is true that Dr. Kapse did not state that the injuries suffered by the deceased were sufficient in the ordinary course of nature to cause death but, that would make no difference. It admits of no dispute that injuries which are necessarily fatal, are also sufficient to cause death in the ordinary course of

nature. At any rate, the Supreme Court in the oft-quoted case of Brij Bhukhan v. The State of Uttar Pradesh, , has held that where per se a perusal of injuries demonstrates that they were sufficient in the ordinary course of nature to cause death, absence of the evidence of the medical witness to this effect, would be inconsequential. In the instant case, a perusal of the ante-mortem injuries of the deceased, which we have extracted above and the internal damage beneath them, would demonstrate that they were per se fatal and sufficient in the ordinary course of nature to cause death. 19. We would be failing in our fairness if, we do not refer to the submissions canvassed by the learned counsel for the appellant Mr. Shirish Gupte and Mr. Kiran Makasare. Undaunted by the fact that the evidence was insurmountable, learned counsel for the appellant proved true to their salt. Mr. Gupte learned counsel for the appellant strenuously urged that since there was a dichotomy between the evidence of the informant Abdul Nalwala PW 1 and Samad Dudhwala PW-2, the evidence of both these witnesses should be rejected. The dichotomy on which he highlighted is that whereas Abdul Nalwala PW-1 stated that Channu had fired two shots, the evidence of Samad Dudhwala PW-2 was that shot had been fired by the appellant-Sheru. We have examined this argument and we are constrained to observe that we do not find any merit in it. It should be borne in mind that the informant Abdul Nalwala PW-1 in his FIR had stated that the appellant-Sheru had fired from a distance of about 10 ft. on Mohammed Asif. It is true that during the trial, he resiled from this averment and consequently, was declared hostile, although, as observed by us earlier, he stated in his examination-in-chief, in para 10, that the first information report Exhibit-11 is correctly recorded. At any rate, simply because a witness has turned hostile, would not mean that the evidence of other witness, in the circumstances which exist in the present case, can be rejected. There is another reason as to why in our view, the statement of Abdul Nalwala PW-1 would not exclude the firing on the part of the appellant-Sheru. He, as also Samad Dudhwala PW-2, state in their examination-in-chief that their attention was only focussed on the deceased after they had heard the sound of the first fire and it may also be that the first fire was made by the appellant. At any rate, the categorical and candid statement of Samad Dudhwala PW-2 is that the appellant-Sheru fired shot on the deceased and as we have mentioned earlier, in our view Samad Dudhwala PW-2 is a wholly reliable witness. 19A. There is another angle of looking at the whole thing and that is it should be remembered that the learned trial Judge has convicted the appellant under Section 302 read with Section 34, IPC. Even assuming for arguments' sake that Chennu and not the appellant fired at the deceased, as deposed to by Abdul Nalwala PW-1, still the appellant would be guilty for the offence under Section 302 with the aid of Section 34, IPC for he shared the common intention of Chennu to kill the deceased. Abdul Nalwala clearly stated that when Chennu fired two shots at the deceased, the appellant was present and was pointing a revolver towards the deceased. In our view, on the said facts, it is a tailore-made case for the application of Section 34, IPC. Section 34. IPC read thus : Acts done by several persons in furtherance of common intention - when a criminal act is done by several persons in furtherance of the common

intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. A perusal of the said section would show that where a criminal act is done by several persons in furtherance of their common intention each of such persons is liable for that act in the same manner as if it were done by him alone. In a pre-planned murder of the present type, even if it is assumed that Channu fired and the appellant was only brandishing a pistol towards the deceased, in our view, the act of murder of the deceased would be deemed to have been committed in furtherance of their common intention. It should be remembered that the learned trial Judge has convicted the appellant under Section 302 r/w 34, IPC. 20. Mr. Gupte placed reliance on the decision of the Supreme Court (Harchand Singh v. State of Haryana), to show that where there is evidence of two sets of witnesses and each set contradicts the other, both sets cannot be relied upon. A perusal of the said decision would show that the presence of both the sets of witnesses stood discredited and, therefore, the Supreme Court rejected the evidence of both the sets of witnesses. On the facts of the instant case, the said ratio would not apply. Here, we have found1 the evidence of both the eye-witnesses to be reliable, of PW-2 Samad Dudhwala in its entirety and of PW-1 Abdul Nalwala very substantially. We have mentioned earlier that excepting Abdul Nalwala's assertion in the FIR that the appellant fired on the deceased from which he wriggled out during trial and was declared hostile by the prosecution, his evidence on all other aspects of the prosecution case is reliable. In this connection, it would be pertinent to peruse para 12 of our Judgment. 21. Mr. Gupte also strenuously urged that the evidence of PW-2 Samad Dudhwala does not inspire confidence. He pointed out the following circumstances to drive home his submission :- (a) PW-1 Abdul Nalwala does not depose about his presence; (b) His statement under Section 161, Cr. P.C2. was not recorded at the Hospital; (c) The dichotomy between his statement and that of PW-2 regarding who fired; (d) Omission in his statement Under Section 161, Cr. PC; (e) Conduct in not telephoning the police; (f) He does not depose about the FIR being lodged by PW-1 at the hospital. We have examined the said circumstances and in our view, they do not impair either the credibility or the presence of Samad Dudhwala PW-2 on the place of the incident. It is true that PW-1 Abdul Nalwala does not say that he had seen PW-2 Samad Dudhwala but, from the circumstances in which the incident took place, it appears that he did not notice his presence. It should be borne in mind that PW-1 Abdul Nalwala in his examination-in-chief has stated that PW-2 Samad Dudhwala had also accompanied him to the hospital. This obviously means that PW-2 Samad Dudhwala was present. It is true that the statement of PW-2 Samad Dudhwala under Section 161, Cr. P.C. was not recorded at the hospital but, the evidence of PW-2 Sama Dudhwala shows that his statement was recorded within 2 1/2 hours of the incident. This being the position, as observed by us earlier, in our view, he was promptly interrogated under Section 161, Cr. P.C. So far as the dichotomy between the evidence of PW-2 Samad Dudhwala and PW-1 Abdul Nalwala regarding who fired is concerned, we have already dealt with it earlier. So far as the conduct of PW-2 Samad Dudhwala in not telephoning the police is concerned, we find that in his

cross-examination, PW-2 stated that he did not telephone the police from the office of Iqbalbhai as there was no time for him and Mohammed Asif was to be taken to the hospital. Finally, it is true that although PW-2 Samad Dudhwala does not depose that the FIR was recorded at the hospital but the evidence of P.I. Kumbhare PW-8 shows that the FIR was recorded outside the Ward No. 4 wherein the deceased was admitted and the evidence of PW-2 Samad Dudhwala is that he was sitting all along with Mohd. Asif in Ward No. 4. Therefore, if in these circumstances, he had no knowledge about the FIR being lodged, no capital can be made out of it. 21A. Mr. Gupte also strenuously urged that Samad Dudhwala PW-2 during the course of his cross-examination, admitted that he had told the police that Channu was standing behind Mohammed Asif and Sheru was standing in front of him, at a distance of 10 to 15 feet, from where Sheru fired a shot at Mohammed Asif but, could assign no reason as to why the said fact was not recorded in his statement. We find that this contradiction had not been put during the course of cross-examination to P.I. Kumbhare who recorded the statement of Samad Dudhwala PW-2 under Section 161, Cr. P.C. Mr. Gupte urged that since it was a vital omission, in the interest of justice, we should exercise our powers under Section 391, Cr. P.C, summon P.I. Kumbhare PW-8 and permit the omission being put to him. We have reflected over the said submission and we regret that we cannot accede to it. It was the duty of the defence to have put this omission to P.I. Kumbhare PW-8. It should be always remembered that powers of recording additional evidence should not be exercised where there is a lapse on behalf of the defence. If we were to do so, then we would be opening floodgates. In every case, where a omission is not put or something is wanting, a request for adducing additional evidence would be made and this Court would be relegated to a trial Court. For the said reasons, we reject this request of Mr. Gupte. ' 22. Mr. Gupte finally assailed the evidence of the Ballistic Expert and levelled the same criticisms levelled before the trial Court. We have earlier observed that in paras 18 to 21 of the impugned Judgment, the learned trial Judge has extensively dealt with the evidence of the Ballistic Expert. He has also considered the criticisms levelled. As we have observed earlier, we find that the conclusion drawn by the learned trial Judge in para 21 of the impugned Judgment about the evidence of the Ballistic Expert being credible to be perfectly tenable. 23. Mr. Kiran Makasare also made three submissions before us which we now intend considering. He firstly urged that PW4 Abdul Nalwala does not depose about the presence of PW4 Samad Dudhwala. We have earlier dealt with this aspect. He secondly urged that the story that the deceased was putting on a shirt is doubtful because, even though there is a wound of entry on the back of the deceased, there are no holes on the back of the shirt. We have reflected over the said submission and do not find any merit in it. Neither PW-8 P.I. Kumbhare who took the shirt into possession nor PW-4 Dinesh Boricha, Public Panch of recovery of the clothes of the deceased, were asked in cross-examination whether there was a hole in the shirt of the deceased. Hence, we feel that no capital can be made out of it. Finally, Mr. Makasare urged that the prosecution case that a pistol of 7.65 calibre was used is not acceptable. He urged that a perusal of the spot

panchanama prepared by P.I. Kumbhare shows that empties of revolver were recovered. We regret that we cannot accede to his submission. It is pertinent to mention that two bullets were extracted by the Autopsy Surgeon and sent to the Ballistic Expert. The pistol of 7.65 calibre recovered from the appellant was also sent to the Ballistic Expert. The opinion of both the Autopsy Surgeon Dr. Kapse PW-3 and the Ballistic Expert Artula Rao is that the bullets were fired from a pistol of 7.65 calibre. The latter opined that they were fired from the pistol sent to him. In these circumstances, merely because P.I. Kumbhare mentioned in the spot panchanama that empties of revolver were recovered is inconsequential. 24. For the said reasons, we do not find any merit in this appeal. Accordingly, we confirm the conviction and sentence of the appellant for the offence under Section 302 read with Section 34, IPC and dismiss this appeal. The appellant is in jail and shall be detained there till he serves out his sentence. In case an application for a certified copy of this Judgment is made, it shall be issued on an expedited basis.