Bombay High Court State Of Maharashtra vs Ahmed Gulam Nabi Shaikh And Others on 2 September, 1996 Equivalent citations: 1997 CriLJ 2377 Author: V Sahai Bench: V Datar, V Sahai JUDGMENT Vishnu Sahai, J. 1. A Judgment of acquittal dated 15-7-1982, passed by the Additional Sessions Judge, Greater Bombay, in Sessions Case No. 536 of 1980, acquitting the respondents for an offence punishable under section 302 r/w Section 34 IPC, has prompted the State of Maharashtra to file an appeal under section 778(1) Cr.P.C. in this Court. 2. The factual matrix from which this appeal arises is as follows :- The deceased Mohis (Moiz) Asgarali Gari was living with his parents, brothers and one sister in Ghiya Compound, 2nd Hasnabad Lane, Santacruz (West) Bombay-54. He had a twin brother by the name of Mohammad @ Mamu who was similar in appearance to him. He had a sister Shamima PW 2 and a brother Zainuddin PW 4. He, Shamima and Zainuddin used to run a chappal stall (stall of slippers) at Linking Road, Bandra. The evidence is that for the said stall, they used to leave their house at about 9 to 9.30 a.m. every day by bus which they used to catch from the bus stop near the Convent, on S.V. Road. On 9-7-1980, the twin brother of the deceased Mohammad @ Mamu had assaulted Ibrahim brother of respondent No. 1 Ahmed Gulam Nabi Shaikh on account of which respondent Ahmed and the other two respondents were nursing a grudge against Mohammad @ Mamu. On 30-7-1980, at about 9 a.m. Mohis (Moiz) Asgarali Gari, the deceased and Zainuddin left their house for the chappal stall on the Linking Road, Bandra. In the compound, where they resided, there was a dispensary. Zainuddin stopped there because as per his evidence he knew the doctors very well and sometimes used to assist them in taking out the necessary papers etc. Mohis alias Moiz however, proceeded ahead. When he had reached in front of the shop of one Bhayya' in 2nd Hasnabad Lane, Santacruz (West) Bombay-54, where clothes used to be ironed, all of a sudden he received a blow on his back. He immediately turned around and saw that respondents Ahmed Gulam Nabi Shaikh and Salauddin Allauddin Qureshi, one Bhayya (from the evidence it emerges that he was respondent Sheshnarayan Tiwari) and a boy who was the brother of one Gullu (in the evidence his name has come as Bilal) were assaulting him with choppers on his legs and other parts of body. Since he had no enmity with the respondents and instead there was enmity between Ibrahim, brother of respondent Ahmed Shaikh and his twin brother Mohammad alias Mamu, he shouted that he was not Mamu. He also cried for help. Hearing his cries, Ashok Bhandare PW 5 rushed to the place of the incident and along with Ali Nimachwala PW 3 who as per his (Ali's) evidence was accompanying Mohis alias Moiz at that time saw the respondents and Gullu's brother assaulting Mohis with choppers. In the meantime, two boys reached the dispensary and informed Zainuddin, PW 4, brother of the deceased about the assault on his brother. Understandably, Zainuddin rushed to the place of the incident. Shamima PW 2, sister of Mohis who at the time of the incident was on the way to market, heard cries of "Bachav, Bachav" and saw persons running helter-skelter in the second Hasnabad Lane. The cries were coming from near Bhayya's shop. She went near Bhayya's shop. By that time, the assault on the deceased was over. However, she and Zainuddin saw the respondents, along

with another, running with choppers in their hands. 3. Shamima with the help of Zainuddin and Ali Mohamad Nimachwala took Mohis to Cooper Hospital in a private car. Mohis at that time was conscious and on the way told them that the three respondents and Gullu's brother had assaulted him with choppers. At about 10 a.m. i.e. an hour later, Mohis along with Shamima and others reached Cooper Hospital. There, an entry in the Emergency Police Register (EPR) was made by Constable Vithal Malve, PW 10 on the information given by Mohis. In the said entry, it is mentioned that five to six persons, who included respondents Ahmad Shaikh and Salauddin Qureshi. Pinto and Aiye had assaulted Mohis with choppers and sword. This EPR entry the prosecution relies upon as a dying declaration. 4. About the same time, in the Cooper Hospital, PW 7 Dr. Jayalal Mehra who was in the Casualty Department examined Mohis and found on his person the following injuries :- 1. Multiple incised wounds on dorsum of both hands and wrists. 2. Amputation of index and middle finger right side. 3. (a) Incised wound 2" x 1 1/2" bone deep on left elbow. (b) Incised wound 1" x 1/2" skin deep left forearm (c) Incised wound 2" x 1" bone deep on right leg and (d) Incised wound 2" x 1" bone deep both knee joints. 4. (a) Incised wound 1" x 1/2" over terminal phalange of right, 2nd, 3rd, 4th and 5th toe and (b) Incised wound 1 1/2" x 3/4" bone deep on left leg. Dr. Mehra has stated that detailed examination was not done. The reason which we are able to fathom is that Mohis was in a critical condition and required immediate surgery. An elaborate medical examination of Mohis was done by Dr. Bhansali, PW 8 who at that time was posted in the Cooper Hospital as a House Surgeon in the Orthopaedics Department. Dr. Bhansali found 24 incised wounds on the body of Mohis. They were distributed between hands and legs. 5. Dr. Bhansali also found that Mohis had sustained the fractures enumerated below :- 1. Right lower end of radius 2. Right lower end of ulna 3. Base of right index finger 4. Base of left ring finger 5. Base of the left little finger 6. Left tibia. In the opinion of Dr. Bhansali, all the incised wounds were possible with a butcher's chopper having a blade of about 12" in length. 6. Going backwards, SI Waghmare PW 12, the Investigating Officer in the instant case, at about 9 a.m. the same day received a telephone call from a member of the public at Police Station Santacruz that some persons were assaulting a person in the 2nd Hasnabad Lane and immediately thereafter, along with a constable proceeded to 2nd Hasnabad Lane. He found a chappal lying on the place of the incident. He made enquiries from near the place of the incident and learnt that the victim had been removed to the Cooper Hospital. Consequently, he immediately returned to Santacruz police station, made an entry in the station diary that he was leaving for Cooper Hospital and left for Cooper Hospital. When he reached the said hospital, he learnt that the victim had been taken for X-ray. He waited outside the ward for about an hour. Thereafter, he went and saw the victim Mohis in the ward. At that time, both his hands were completely bandaged up to the wrist. Mohis was fully conscious and was talking without any difficulty. Hence, between 11 a.m. to 11-15 a.m. he recorded his FIR as per the version spelt out by him. After recording the FIR, he read over the same to him. Thereafter, he obtained the endorsement of Dr. Bhansali PW 8 to the effect that Mohis was fully con-

scious and was in a proper condition to make a FIR. That endorsement which is also signed by Dr. Bhansali is incorporated in the FIR itself. On the basis of the FIR, a case under Section 326 r/w 114 IPC was registered against the respondents and brother of Gullu at 12 noon the same day at police station Santacruz. After recording the FIR, SI Waghmare took Zainuddin to police station, Santacruz and there recorded his statement under section 161 Cr.P.C. After recording Zainuddin's statement SI Waghmare proceeded for the place of the incident for preparing panchanama of the scene of the offence. He called two panchas, one out of whom was S. M. Kulkarni and drew up panchanama of the scene of offence. He took into possession chappals which were said to be of the deceased. After preparing panchanama of the scene of offence, he returned to police station Santacruz. On the way he met Mohis's brother Mohammad @ Mamu and Ashok Bhandare PW 5. He took Ashok Bhandare to the police station and recorded his statement under section 161 Cr.P.C. Thereafter, he again went to the place of the incident made enquiries with the object of finding out whether independent witnesses were available but, he discovered that none was coming forth. Sometimes between 6 p.m. to 8 p.m. Shamima PW 2 came to the police station and he recorded her statement. Meanwhile, he directed the Detection Staff to trace out the respondents. The evidence is that they were not available at their houses. On 18-8-1980, the respondents came to Santacruz police station and surrendered themselves. He arrested them. Next day, he produced them before the Metropolitan Magistrate, 24th Court, Bandra Bombay, who remanded them to police custody. On 11-9-1980, Mohis succumbed to his injuries at the Cooper Hospital and consequently, the case was converted from Section 326/114 IPC to one under section 302/34 IPC. On 1-12-1980, he sent the blood stained clothes of the victim and pair of the chappals to the Chemical Analyst. He received the report of the Chemical Analyst on 27-2-1981. 7. After completing the investigation on 8-12-1980, SI Waghmare submitted a charge sheet against the respondents in the 21st Court, Bandra, Bombay. The fourth accused who in the FIR was described as Gullu's brother during the course of investigation was discovered to be one Bilal but as he was absconding, he could not be arrested. 8. Once again going backwards, the post mortem examination of the dead body of Mohis was conducted on 12-9-1980 between 11 p.m. to 12.40 p.m. by Dr. Subhash Gupta PW 9. On the corpse, Dr. Gupta found in all six injuries; their break up being thus :- 2 infected wounds, 3 sutured wounds and 1 multiple abrasion. On internal examination, he found compound fractures of tibia and fibula at upper 1/3 part of right leg and of radius and ulna at lower 1/3 rd right hand. He also found the little finger and ring finger of the left hand and index finger of the right hand were missing. In the opinion of Dr. Gupta, the deceased died on account of complications following multiple injuries on the limbs. He also opined that the grievous hurts sustained by him were likely to cause his death. 9. The case was committed to the Court of Sessions in the usual manner. In the trial Court, the respondents were charged for an offence under section 302 r/w 34 IPC. To the said charge, they pleaded not guilty and claimed to be tried. In the trial Court, apart from tendering and proving voluminuous documentary evidence, the prosecution examined as

many as 12 witnesses. Two out of them, namely PW 3 Ali Mohamad Nimachwala and PW 5 Ashok Bhandare were examined as eye-witnesses. Two others namely Shamima PW 2 and Zainuddin PW 4, gave evidence admissible under the caption of res gestae, under section 6 of the Indian Evidence Act. In addition, the prosecution heavily relied upon the dying declarations of the deceased. In defence, no witness was examined. After recording the evidence adduced by the prosecution and hearing the learned counsel for the parties, the learned trial Judge came to the conclusion that the prosecution had failed to prove the guilt of the respondents beyond reasonable doubt and consequently, acquitted them. It is this acquittal of the respondents which has been impugned by the State of Maharashtra in this appeal. 10. We have heard Mr. D. A. Nalawade, Additional Public Prosecutor for the State of Maharashtra-Appellant, and Mr. A. H. Ponda, for the respondents. We have also perused the depositions of the prosecution witnesses; the material exhibits tendered and proved by the prosecution; the various dying declarations attributed to the deceased; the statement of the respondents recorded under section 313 Cr.P.C., and the impugned judgment. After thoughtfully, reflecting over the matter, we are of the opinion that there is no merit in this appeal and it deserves to be dismissed. 11. At the very outset, we would like to mention that we are seized of the matter in an appeal against acquittal. It is well-settled that in an appeal against acquittal, unless the conclusions reached on facts are unreasonable or the impugned order is vitiated by any illegality, the Appellate Court would not interfere. The Apex Court has gone to the extent of saying that the circumstance that left to itself, the Appellate Court would have taken a different view of the evidence from that taken by the trial Court, would be no ground for interfering in an appeal against acquittal. (See Khedu Mohton v. State of Bihar, and , Tota Singh v. State of Punjab.) In this connection, it would be pertinent to refer to the decision of the Apex Court State of Punjab v. Ajaib Singh, wherein in para 7 Their Lordships of the Apex Court observed thus :- "We agree that this Court is not precluded or the Court hearing the appeal against acquittal is not prevented from examining and re-appreciating the evidence on record. But, the duty of a Court hearing the appeal against acquittal in the first instance is to satisfy itself if the view taken by acquitting Court exercising appellate jurisdiction was possible view or not. And if the Court comes to conclusion that it was not, it can on reappreciation of evidence reverse the order." An analysis of the decisions of the Apex Court and that of the Judicial Committee of the Privy Council in the case (2), Sheo Swaroop v. King Emperor, which if we may so say is the parent case on the angle of approach of the Appellate Court in an appeal against acquittal, would in substance show that if the view of acquittal is a possible view, the Appellate Court would not interfere. On the converse, if it is not, it should. 12. The bone of contention between counsel for the parties is whether the view of acquittal is a possible view or not ? While in the contention of Mr. D. A. Nalawade, counsel for the appellant, it is not a possible view, in fact it is a perverse view, in that of Mr. A. H. Ponda, counsel for the respondents, it was not only a possible view but, a wholly plausible view. Which out of them is right is for us to decide. 13. In the instant case, the evidence adduced by the prosecution can be classified

under three heads :- (A) Dying declarations : (i) FIR lodged by the deceased; (ii) EPR entry made by constable Vithal Malve, PW 10 on the information given by the deceased; (iii) Dying declaration contained in Exhibit 32 prepared by the Psychiatrist Registrar on duty on 12-8-1980 at Cooper Hospital; and (iv) The oral dying declaration made by the deceased to Shamima, Ali Nimachwala and Zainuddin which has been deposed to by the said witnesses in their their statements in the trial Court. (B) Ocular account furnished by Ali Mohammed Nimachwala, PW 3 and Ashok Bhandare PW 5; and (C) Evidence under section 6 of the Indian Evidence Act furnished by Shamima PW 2 and Zainuddin PW 4, the sister and brother of the deceased respectively. 14. We would first like to take up the FIR. The evidence of SI Waghmare PW 12 who recorded it on the dictation of Mohis alias Moiz is that it was lodged between 11 a.m. to 11-15 a.m. A perusal of the FIR and the evidence of SI Waghmare shows that the same was neither signed nor bears the thumb impression of Mohis @ Moiz. Section 154(1) Cr.P.C. mandates thus :- "Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf" ..... 15. We may straight away mention that the expression "Officer in charge of a police station" used in Section 154(1) Cr.P.C. includes any officer who records the FIR under the directions of such an officer. Therefore, the mandate of this section would apply to any officer who records the FIR. Apart from such a construction being in consonance with common sense, it is backed by the observations contained in the decision of a Division Bench of our Court in the case reported in 1985 Cri LJ 1933, Dasu v. State of Maharashtra. In paragraph 9 of the said decision, it was observed thus "Under the provisions of Section 154 Cr.P.C. it is not incumbent that the Station House Officer himself should record the FIR. It can be written by him or by any other officer under his direction". 16. A perusal of Section 154(1) Cr.P.C. would show that the said provision would only be applicable if the FIR pertains to a cognizable case. In the instant case, since the FIR was registered under Section 326/114 IPC, which is a cognizable offence, SI Waghmare who recorded it was duty bound to carry out the mandatory obligations contained in Section 154(1) Cr.P.C. 17. The mandatory obligation cast on the Officer recording the FIR under Section 154(1) Cr.P.C. is after recording it and reading it to the informant, is to take the signatures of the informant on it. 18. There can be no quarrel with the proposition that the word signature as used in Section 154(1) Cr.P.C. would also include thumb impression. Signature in dictionaries has also been defined as a distinctive mark or sign. 19. In the instant case, SI Waghmare did not take either the signature or thumb impression of Mohis on the FIR. In this context, it would be necessary to refer to the evidence of PW 8 Dr. Bhansali who had medically examined Mohis in Cooper Hospital. In his examination-in-chief (para 6) he stated "Although the patient was not in a fit condition to make a signature at the time when I made the endorsement, his

thumb impression could have been taken by someone if desired." 20. We would like to emphasise that where a mandatory obligation is cast by a statute on an authority to record a document in a certain manner, it should be recorded in that manner alone and in no other manner. If the requirement in Section 154(1) Cr.P.C. was to take the signature or thumb impression of the informant, after recording it, SI Waghmare should have taken the informant's thumb impression on it because he was not in a position to affix his signatures. We are fortified in our view by the oft-quoted authority of the Privy Council Nazir Ahmed v. Emperor. In the said decision, in para 2. Their Lordships have observed thus :- "Where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden." 21. We would like to emphasise in unequivocal terms that whenever an authority departs from discharging a mandatory obligation enjoined on it by a statute, the onus is for it to furnish an explanation for not discharging the same. In our view, it was incumbent on the prosecution to show as to why the thumb impression of Mohis @ Moiz was not taken on the FIR after it had been recorded. This onus should have been discharged by SI Waghmare PW 12 who recorded the FIR, in his examination-in-chief itself. In the instant case, no explanation is forthcoming from the side of the prosecution for not taking the thumb impression of the informant on the FIR. We would like to point out the fallacy of a stock argument made on behalf of the prosecution in situations such as this namely that it is open for the defence to elicit an explanation from the concerned Officer as to why he has not discharged stipulated mandatory statutory obligation. Such an argument deserves to be straight away rejected. To repeat, when a statute casts an obligation on an authority to do a thing in a specified manner and the authority does not do it in that manner, it is for that authority to explain. 22. In our view, the failure of the prosecution to show as to why the thumb impression of the informant was not taken on the FIR after it had been recorded may give rise to an inference that the FIR was not dictated by the informant but, was written down by the Police Officer at the behest of someone else. In the instant case, it was suggested to SI Waghmare, though denied by him, that the FIR was actually dictated by Mamu (brother of Mohis) and not by Mohis. We find merit in this suggestion, because the recitals in the FIR are at variance with the EPR entry which was also prepared on the information given by Mohis; whereas in the FIR, it is alleged that respondents Ahmed Shaikh and Salauddin Qureshi, a bhayya and Gullu's brother with choppers assaulted the informant, the EPR entry mentions that 5/6 persons who also included Pinto and Aiya with choppers and swords assaulted him. Had the informant been the author of both the FIR and the EPR entry then in the FIR also, the names of Pinto and Aiye and the weapon sword would have been mentioned. Another circumstance which negatives the prosecution claim of the FIR being lodged by the informant is that in the same, name of Ali Nimachwala PW 3 is not mentioned. The evidence of Ali Nimachwala is that along with the informant he had gone to the place of the incident; on the way he had conversation with him; he was present there when the informant was assaulted; and he accompanied him to hospital. On the face of this evidence,

it is impossible to conceive that had the informant himself been the author of the FIR, name of Ali Nimachwala would not have been mentioned therein. It appears to us that after sustaining as many as 24 injuries which also included six fractures the informant must have become unconscious and therefore as suggested to SI Waghmare PW 12 in paragraph 20, during his cross-examination, though denied by him he must have prepared the FIR on the information given by Mamu. 23. In our view, the FIR of the instant case was not lodged by the informant Mohis alias Moiz but instead was lodged by Mamu the twin brother of Mohis who on account of the circumstance that respondent Ahmad Shaikh was the brother of Ibrahim with whom he had enmity and respondent Salauddin Qureshi was Ahmad Shaikh's friend falsely nominated them therein. 24. We would like to emphasise that the provisions contained in Section 154(1) Cr.P.C. to the effect that after recording the FIR, signatures of the informant, which also include his thumb impression, have to be taken is a very salutary provision. If it is not strictly observed, dangerous consequences may ensue. Police Officers may prepare a FIR at the instance of an arch-enemy of an accused and falsely show it to be that of the informant. The object of having the signatures or thumb impression of the informant on the FIR after reading over the same to him is to thwart the possibility of such a malaise creeping in. Another object of this is to ensure that in case there is an omission in the FIR or the informant's statement in the trial Court is contrary to the recitals in the FIR, he may not be able to state that the FIR was not lodged by him and does not contain his version of the incident. 25. However, in connection with the mandatory obligation on the part of the Officer who records the FIR under section 154(1) Cr.P.C. to have the signatures or thumb impression of the informant on it, after recording it, we would like to point out that there is no inflexible requirement in law having universal application to all situations that it is always imperative to do so. Such an obligation has to be discharged by an Officer only if the informant is in a position to either sign or affix his thumb impression on the FIR. Assuming in a given case, the evidence is that after dictating the FIR, the informant became unconscious or his hands and legs, including his palms, soles and all the fingers and thumbs attached to them were bandaged then on the principle that the law does not compel the performance of the impossible Court would not fault the Officer for not taking signatures or thumb impression on the FIR. But as said earlier it is for the Officer who records the FIR and the prosecution to squarely satisfy the Court as to why in a given case the statutory obligation of taking signatures or thumb impression of the informant on the FIR has been given a go-by. 26. We may also mention that the possibility of the FIR being anti-timed cannot be ruled out. In the Station Diary entry of Police Station Santacruz, made immediately after the recording of FIR by SI Waghmare, there is no mention that he had recorded the FIR although during his cross-examination, he admitted that recording of the FIR was the most important thing which he did at the Cooper Hospital. We feel that the FIR appears to be anti-timed. 27. In our considered view, the FIR which is in the form of a dying declaration in the instant case, does not inspire confidence. Hence we reject this dying declaration. 28. We now come to the second dying

declaration, the EPR entry. The evidence of Shamima PW 2, Ali Nimachawala PW 3 and Zainuddin, PW 4 is that at the Cooper Hospital, a constable asked Mohis something. Obviously, that something was information which finds place in the EPR. The evidence of PW 10 Constable Malve is also that on the information given by the victim Mohis @ Moiz, he recorded EPR entry. In the said EPR entry, we find a case which is different from that as contained in the FIR. How it is different we have spelt in paragraph 22 and no useful purpose would be served by repeating it. The difference between the recitals contained in the EPR entry and the FIR adversely effects the weightage to be attached to both these documents. It shows that the informant on account of sustaining as many as 24 injuries, six out of which were grievous, was not fully conscious and hence the discrepancy regarding the number of assailants; the names of assailants; and the weapons of assault, crept in between the EPR and the FIR. 29. It is well-settled that where there is plurality of dying declarations and the dying declarations contain different versions, it is not safe to accept them. The rationale for such a view is that unlike ocular evidence, a dying declaration cannot be tested on the anvil of cross-examination. (See para 17 , Khushalrao v. State of Bombay). In the said decision, in para 16, the Apex Court has mentioned the circumstances to be borne in mind by Court before accepting a dying declaration one of them being "that the statement has been consistent throughout if he had several opportunities of making a dying declaration." The said view has also been reiterated by the Apex Court in para 11 of the decision Bhayani Luhana Radhabai v. State of Gujarat. 30. There is another ground for not placing reliance on EPR entry. Its perusal shows that therein there is no mention of the fact that it was recorded pursuant to the information given out by the informant. Another reason for not placing reliance on the EPR entry is that Constable Malve PW 10 who recorded it in his cross-examination admitted that his statement under section 161, Cr.P.C. was only recorded yesterday. Since the statement of this witness was recorded on 23-6-1982, this means his statement under section 161, Cr.P.C. was recorded on 22-6-1982 i.e. nearly 2 years after the incident. This alone is sufficient to throw out the EPR entry. 31. For the reasons mentioned in paragraphs 28, 29 and 30, no reliance can be placed on the dying declaration in the form of EPR entry. 32. We now come to the alleged dying declaration recorded by the Psychiatry Registrar in Cooper Hospital on 12-8-1981. That is to be found in the medical case papers Exhibit 32. We perused Exhibit 32 and found to our dismay, that there is no mention in the same that entries contained therein were made pursuant to the information furnished by the informant. We also found that therein it is mentioned that the informant was not in a position to recognise his assailants. This squarely means that he must have been unconscious. For these reasons no reliance can be placed on this dying declaration. As a matter of fact, since the entries in Exhibit 32 were not made pursuant to the information given by the informant prior to his death they would not even be admissible under section 32 of the Evidence Act. This is clear from a plain reading of Section 32. 33. We now come to the oral dying declaration. Evidence in respect of it has been furnished by Shamima PW 2, Ali Nimachwala PW 3 and Zainuddin PW 4. All of them

are highly interested witnesses; Shamima and Zainuddin because of their being the real sister and brother of the deceased respectively and Ali Nimachwala for he in his cross-examination, admits that he was a friend of the deceased. This would mean that we have to approach their evidence with caution. The evidence of the said three witnesses is that while they were taking Mohis alias Moiz, prior to his death, to the Cooper Hospital, in a car, on the way, he told them that the respondents Ahmed Shaikh, Salauddin and Sheshnarayan Tiwari had assaulted him. We have no hesitation in observing that their statement to the effect that the deceased had mentioned the name of Sheshnarayan Tiwari is a bundle of lies. Had this been so, then in the FIR, Mohis alias Moiz would not have described Sheshnarayan Tiwari as Bhayya but, would have mentioned his name. 34. We would like to emphasise that the weightage to be given to the evidence of oral dying declaration would be proportionate to the weightage to be attached to the credibility of the witnesses who depose about it. If witnesses who depose about it are found to be incredible, as is the case here, it follows as a logical imperative that their evidence in respect of oral dying declaration cannot be accepted. It may also be mentioned that oral dying declaration is a weak type of evidence and ordinarily insufficient for sustaining a conviction. We say so in view of the observations of Their Lordships of the Apex Court contained in paragraph 12 of the decision Bhagwan Das v. State of Rajasthan. In the said paragraph, their Lordships have observed thus :- “The other piece of evidence which the prosecution relied upon was the two dying declarations made by Shivlal to Gyaniram PW 4 and Jora PW 7. Besides the infirmities which the testimony of these two witnesses (Gyniram PW 4 and Jora PW 1) suffered from due to material contradictions in their respective statements made at various stages of the case and which have been pointed out by the learned Sessions Judge who said about Gyaniram :”in such a state of affairs, I refuse to put any weight and value to the statement of Gyaniram ....." their evidence cannot be a sure foundation for maintaining the conviction if the statement of Hazari the sole eye-witness is disregarded, as it must be disregarded in this case; because ordinarily a dying declaration of the kind which the prosecution has relied upon is by itself insufficient for sustaining a conviction on a charge of murder." 35. For the said reasons, the four dying declarations do not inspire confidence and in our view have been rightly rejected by the learned trial Judge. 36. We now come to the ocular account furnished by Ali Nimachwala PW 3 and Ashok Bhandare PW 5. We begin with Ali Nimachwala. The said witness is a resident of Colaba. He has stated that on the date of the incident, he had gone to see his sister who resided in the immediate proximity of the deceased Mohis alias Moiz. He stated that he reached his sister’s place at about 8.30 a.m. He further stated he knew Mohis alias Moiz. At about 9 a.m. when he came down from the building where his sister lived, he met him. Thereafter, along with him, he came to the place of the incident. He further stated that on the way he and Mohis had a conversation and the latter told him that he was going to his chappal stall at Bandra. He also stated that while they were at the place of the incident, the respondents and another launched an assault on Mohis. If his statement is accepted, to be true, then we find no plausible justification for

his name not being mentioned in the elaborate FIR of the incident which was lodged by Mohis. Mohis certainly would not have missed mentioning his name in the FIR had he been with him and seen the incident. 37. In our view, the absence of Ali's name in the FIR clearly shows that he did not see the incident and has been introduced as a false eyewitness in the instant case by the prosecution. However, this is not the only infirmity which we find in his evidence. More follows. 38. We firstly find that there is a contradiction between Ali's evidence and that of the other eyewitness Ashok Bhandare regarding the weapons in the hands of the respondents; whereas Ali mentions that respondent Ahmed Shaikh had a sword, Ashok Bhandare states that the said respondent had a chopper. In our view, sword and chopper are two distinct weapons and since it was a broad day-light incident, there was no question on the part of Ali to have confused a sword for a chopper. Secondly, Ali stated that after the incident he along with Zainuddin and Shamima put Mohis in a car and in that process his clothes became stained with blood. He also stated that in the same clothes, he went to the police station and that when his statement was being recorded, blood stains were visible on his clothes. He further stated that the Officer who recorded his statement, SI Waghmare, asked him about the blood stains on his clothes and he told him how his clothes came to be stained with blood. We however, find that his blood stained clothes were not taken into possession by the Investigating Officer SI Waghmare. In our view, had this statement of his been true, there was no earthly reason for SI Waghmare, the Investigating Officer, for not taking his blood stained clothes in possession. Thirdly, we find the conduct of Ali to be highly unnatural. He stated that at Cooper Hospital along with him, Shamima and Zainuddin, SI Waghmare was also sitting. In our view, had he seen the incident, he would have mentioned it to SI Waghmare. In the Cooper Hospital itself Shamima and Zainuddin would have also informed SI Waghmare there that he had seen the incident. All these infirmities in the evidence of Ali have to be appreciated in the background of the fact that being the friend of the deceased he is a highly interested witness. 39. In our view, the evidence of Ali Nimachwala PW 3 does not inspire confidence. In fact we go to the extent of holding that in Ali, the prosecution has introduced a false eye-witness of the incident. To repeat had he seen the incident his name must have been mentioned in the FIR. 40. We would like to emphasise that if the Court reaches a conclusion that a false witness has been introduced by the prosecution then the presence of those witness who speak that the alleged false witness also saw the incident is also falsified. The rationale for this is that had these witnesses been actually present and seen the incident, they would not have deposed that the alleged false witness saw the incident. In this connection, it would be necessary to point out that since Shamima PW 2, Zainuddin PW 4 and Ashok Bhandare, PW 5 all depose about the presence and claim of Ali of having seen the incident, their claim of having seen the incident is also falsified. We are fortified in our view by the observations contained in para 6 of the Judgment of the Apex Court Ishwar Singh v. State of U.P. which read thus :- "The High Court accepted the evidence of the prosecution witnesses who claim to have seen the incident except the testimony of Jait Singh (P.W. 7). Jait Singh and Ram Rikh (P.W. 6) both

claim to have seen the assault together from Ram Rikh's house and both have said that they hurried to the place of occurrence. The High Court thought that Jait Singh's presence at the time of the incident was doubtful and excluded his testimony from consideration. If Jait Singh was not a truthful witness we do not see how Ram Rikh (P.W. 6) and the other two eye-witnesses examined Mahabir (P.W. 1) and Satyapal (P.W. 2) could be relied on because they have also said that Jait Singh was present at the place of occurrence." 41. We next take up the ocular account furnished by Ashok Bhandare, PW 5. The first infirmity in his statement is that he deposes about the presence of Ali Nimachwala, who for the reasons stated earlier was not present on the place of the incident and did not see the incident. In view of the ratio laid down in (supra) this alone is sufficient to discard his testimony. We secondly find that this witness had no option but, to become a willing tool in the hands of the police. In his cross-examination, (para 11) he admitted that five to six times, earlier he had been convicted in cases under the Gambling Act and in para 12 that he had been arrested by Santacruz police station in a case of assault. A person like him having bad antecedents in our judgment, could not have mustered the courage to turn down the dictates of the police to become an eye-witness on the apprehension that his refusal to do so may cost him false implication in further cases. Thirdly, we find that his presence has also not been mentioned by the informant in the FIR. Fourthly, the conduct of this witness appears to be highly unnatural. He stated that on the date of the incident, he was interrogated under Section 161, Cr.P.C. at about 8 p.m. and till then he did not tell anyone that he had witnessed the incident. This Court in a number of cases has considered the conduct of an eye-witness in not disclosing the incident which he has seen to others soon thereafter, as an abnormal conduct and a sole ground by itself for rejecting the testimony of such a witness. In this connection, it would be useful to refer to the observations contained in para 10 of the Division-Bench decision of this Court reported in (1966) 2 Crimes 309 : (1996 Cri LJ 3147) Ashraf Hussain Shah v. State of Bombay to which one of us (Vishnu Sahai, J.) was a party. The observations in the said para read thus : "In his cross-examination Suraj Paste admitted that both he and Mahesh Tilekar remained at Ratnagiri city Police Station for about 1 1/2 hours. He further admitted that during this time P. I. Sonawane also was present there and neither P. I. Sonawane asked them about the incident nor they informed P. I. Sonawane about the same nor they lodged their F.I.R. To us this conduct of both these eye-witnesses appears to be extremely unnatural and a clear pointer to the fact that they did not see the incident. In our judgment, had these witnesses seen the incident there was no question of their sitting dumb at the police station for the entire period of 1 1/2 hours. In this connection, it would be useful to refer to the decision of the Apex Court Shivaji Dayanu Patil v. State of Maharashtra. In that case the wife of the deceased was a witness who had kept mum for two days. Castigating her conduct as highly unnatural and improbable, the Apex Court in paragraph 11, observed as follows :"A wife, who has seen an assailant giving fatal blows with a stick to her husband, would name the assailant to all present and to the police at an earliest opportunity." In this case also the informant and P.W. 2

Mahesh Tilekar were friends of the deceased and their conduct in not reporting to the police the incident, although they were at the police station for 1 1/2 hours, was highly unnatural and improbable. There is nothing in their evidence to justify it. This conduct of theirs by itself in our view is sufficient to hold that they did not see the incident." Again, the evidence of this witness is that on the date of the incident, he had gone in connection with his work (he is a hawker). During the course of his cross-examination (para 21) he admitted that it is true that he does not have to go to 2nd Hasnabad lane on which the incident took place in order to go to the place of his business but explained his presence by alleging that he had gone to Ghia Compound to take his stand and hence happened to be on the place of the incident. To our dismay, the said fact has not been stated by him in his statement under section 161, Cr.P.C. and no reason for this omission has been mentioned by him. This again detracts from the weight to be attached to his evidence. 42. In our view, the infirmities mentioned in the preceding para are sufficient to conclude that PW 5 Ashok Bhandare did not see the incident. We are constrained to observe that he is also a trumped up witness. 43. This brings us to the last leg of the evidence adduced by the prosecution that under section 6 of the Evidence Act in the form of Shamima PW 2 and Zainuddin PW 4, the real sister and brother of the deceased respectively. On account of their relationship, with the deceased, we have to scrutinise their evidence with caution. Both these witnesses have stated that immediately after the incident they saw the respondents running away with choppers in their hands from the place of the incident. We would straightway like to mention that the evidence of these witnesses cannot be accepted because apart from other reasons they depose about the presence of Ali PW 3 on the place of the incident who in our view, did not see the incident. This in view of the decision (supra) is alone sufficient to discredit their evidence. We may also mention that both these witnesses have stated that while they were taking victim Mohis to Cooper Hospital on the way, he told them that respondents Ahmed Shaikh, Salauddin, Sheshnarayan Tiwari, along with a boy, who was brother of Gullu had assaulted him. As we have observed earlier that the informant could not have told them about the name of Sheshnarayan Tiwari because had it been so then in his FIR, he would not have described him as bhayya but instead would have mentioned his name. This means that both these witnesses are trying to falsely nominate Sheshnarayan Tiwari in the oral dying declaration of the deceased, this infirmity squarely satisfies us that it would be unsafe to place reliance on their testimony. If they can falsely introduce Sheshnarayan Tiwari's name in the oral dying declaration, what is the guarantee that the residual portions of their statements are true. 44. There is another circumstance which creates doubt on the claim of Shamima of having seen the incident. The evidence is that she was not interrogated by SI Waghmare at Cooper Hospital at about 11 a.m. but, instead was interrogated by him the same evening at the police station. There is no reason as to why she was not interrogated at the Cooper Hospital. The Apex Court in the decision Ganesh Bhavan Patel v. State of Maharashtra in para 15 has observed thus :- "Delay of few hours, simpliciter in recording the statements of eye-witnesses may not

by itself amount to a serious infirmity in the prosecution case. But, it may assume such a character, if there are concomitant circumstances, to suggest that the investigator was deliberately marking time with a view to decide about the shape to be given to the case and the eye-witnesses to be introduced." In para 18, of the same decision, the Apex Court has observed thus :- "Normally in a case where the commission of the crime is alleged to have been seen by witnesses who are easily available, a prudent investigator would give to the examination of such witnesses precedence over the evidence of other witnesses." 45. In the instant case, no plausible explanation has been furnished by SI Waghmare for the belated interrogation of Shamima. In our judgment, the delay in recording of the statement of Shamima was occasioned by the fact that she had not seen the respondents running away from the place of the incident as alleged by her in her statement in the trial Court and time was taken by SI Waghmare to decide as to the manner in which her presence should be shown on the place of the incident and also as to what she should be made to state in her statement under section 161, Cr.P.C. 46. We would like to emphasise that once the bona fides of an Investigating Officer are under cloud and the investigation is found to be tainted, it becomes very difficult for a court to believe the evidence of witnesses who have been belatedly interrogated under section 161, Cr.P.C. A lurking suspicion is always in the mind of the Court, that the investigator was trying to buy time in order to fix the presence of the witnesses and decide the manner in which they should be shown to have seen the incident. 47. For the said reasons, in our view it would be extremely hazardous to place reliance on the evidence of Shamima PW 2 and Zainuddin PW 4. We accordingly, reject their evidence. Even assuming that their evidence could be relied upon, still no advantage would accrue to the prosecution because at the worst their evidence would show that the prosecution case against the respondents may be true. But, as Gajendragadkar, J. (as he then was) observed in para 11 of the often quoted case of Sarwan Singh Rattan Singh v. State of Punjab, :- "but between 'may be true' and 'must be true' there is inevitably a long distance to travel and the whole of this distance must be covered by legal, reliable and unimpeachable evidence." 48. We regret to observe that some flimsy reasons assigned by the trial Judge in his judgment for acquitting the respondents have prompted the State of Maharashtra to challenge their acquittal. We regret to mention that the learned trial Judge has hardly given any reason for rejecting the FIR. In our view, there were very weighty reasons for acquittal of the respondents but, there is an ominous silence in respect of them in the impugned judgment. Recently in a Division Bench decision rendered by this Court in Criminal Appeal No. 51 of 1983, State of Maharashtra v. Balram alias Nam Amarsingh Talwar decided on 28th August, 1996 to which one of us was a party (Vishnu Sahai, J.) this Court has held that in an appeal against acquittal, the Appellate Court can and should go beyond the reasons stated in support of acquittal in the impugned judgment. The relevant observations are contained in paragraph 31 of the said Judgment and read thus :- "Some of the reasons which we have spelt out in this Judgment have not been mentioned by the trial Court in the impugned Judgment, but all the same when we are called upon as an appellate Court to

decide the question as to whether the acquittal of the respondent warrants to be reversed it is within our domain to examine all possible reasons. In fact we should examine as to what other reasons can be pressed into consideration for determining the question whether the acquittal of the respodent was rightly arrived at or not. After all a judgment of acquittal cannot be reversed on petty technicalities. It should always be borne in mind that this Court only reverses a judgment of acquittal when after the greatest circumspection, it is satisfied that the view of acquittal was not a possible view. For reaching that satisfaction it should meticulously examine the entire evidence and see whether the view of acquittal can be vindicated also by reasons other than those given by the trial Court and even after doing so, if this Court is satisfied that the view of acquittal was not a possible view, it would certainly interfere with an order of acquittal." Hence, we have pressed into service what we thought to be the most weighty reasons on which the impugned judgment could be sustained. 49. As we have mentioned earlier, the angle of approach in an appeal against acquittal should be whether the view of acquittal is a possible view or not ? After going through the evidence on record, we have not even an iota of doubt in our minds that in the instant case not only the view of acquittal was a possible view but a wholly plausible one. 50. For the said reasons, in our view, this judgment of acquittal must stand. 51. In the result, this appeal is dismissed. The acquittal of the respondents under section 302 read with S. 34, IPC recorded vide the impugned judgment is confirmed. The respondents are on bail. They need not surrender. Their bail bonds stand cancelled and sureties discharged. Before parting with this judgment, we would be failing in our fairness if we do not mention the enormous assistance which has been rendered to us by the learned Counsel for the parties in the disposal of this appeal. In case an application for a certified copy is made, the same shall be issued at an early date. Since in this judgment, we have dealt with the importance of the mandatory requirements contained in Section 154(1), Cr.P.C. we direct the Registrar to send its copy to the Chief Secretary, Home Secretary, Judicial Secretary, Mantralaya, Mumbai, the Director General of Police, Maharashtra and the Commissioner of Police, Mumbai, within 10 days from today. 52. Appeal dismissed.