

(2017) 04 GUJ CK 0135
In the Gujarat High Court
Case No : 280 of 2015

Ajim Yusufbhai Suryamemon

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 07-04-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 313](#), [Section 209](#), [Section 374](#) - Power to examine the accused - Commitment of case to Court of Session when offence is triable exclusively by it - Appeals from convictions
[Indian Penal Code, 1860](#), [Section 302](#) - Punishment for murder
[Evidence Act, 1872](#), [Section 27](#) -
Gujarat Police Act, 1951, Section 135(1)

Citation : (2017) 04 GUJ CK 0135

Hon'ble Judges : S.R. Brahmbhatt, A.J. Shastri

Bench : Division Bench

Advocate : A.D. Shah, L.R. Poojari

Final Decision : Allowed

Judgement

1. The present Criminal Appeal is filed by the appellant-original accused under section 374 of the Code of Criminal Procedure, 1973 ("Cr.P.C." for short) against the judgment and order dated 23.1.2015 passed in Sessions Case No.37 of 2012 by the learned Additional Sessions Judge, Jamnagar, whereby original accused was convicted and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 5000/- and in default of payment of fine, to undergo further simple imprisonment for six months for the offence punishable under section 302 of the Indian Penal Code and also ordered to undergo simple imprisonment for three months for the offence punishable under section 135(1) of Gujarat Police Act. Both these sentences were ordered to run concurrently. The accused was given set off for the period already undergone in jail. 2. The brief facts of the case are that on account of dispute between the appellant accused and the complainant side, though Shoeb and the appellant-accused were good friends,

the accused was demanding the amount from Shoeb. As per the case of prosecution, as the appellant has picked up a quarrel with Shoeb in connection with the monetary dispute resulting in scuffle, a complaint came to be filed before Pradhyuman Nagar Police Station by appellant accused Ajim against Shoeb alleging infliction of a knife injury, but from that day onwards, strained relations existed between the appellant and the complainant. It is further the case of the prosecution that thereafter, appellant accused Ajim used to administer threat time and again to Shoeb and his brother. 2.1 The prosecution case has further travelled by asserting that on 25.11.2011 at about 11 p.m. to 11.15 p.m., Shoeb Gafar received a telephonic message from one Imran Iqbal Banani informing that his brother Imran had been inflicted a knife blow by somebody near Mohammadbhai's Lati on road and is lying in bleeding condition. It is further the case of the prosecution that Imran Banani informed Shoeb Gafar that they are taking Imran, the victim, to the Government hospital in Cruiser car of Riyas Iqbalbhai Parekh and he was informed to come down to the Government Hospital. Pursuant to that, at about 11.45 p.m., the complainant Shoeb Gafar went to the Government Hospital where he saw his brother in a bleeding condition with sharp cutting wound on his neck and the doctor pronounced him dead. This incident in question was registered as a complaint before Kalavad Police Station being C.R.No.182 of 2011 for the offence punishable under section 302 of IPC read with section 135 of Bombay Police Act. After registering the complaint, the Investigating Officer has conducted investigation and the appellant accused came to be arrested on 4.12.2011. Investigating Officer has recorded statements of relevant witnesses, drawn panchnama of scene of offence, executed arrest panchnama, collected muddamal articles and sent the body to FSL for further examination and for performing post mortem. After collecting every particulars during the course of investigation, a detailed charge sheet came to be submitted on 18.2.2012 against the appellant accused in the Court of learned Judicial Magistrate First Class, Kalavad, for the offence punishable under section 302 of IPC read with section 135(1) of Gujarat Police Act. 2.2 As the criminal case, which came to be registered, is triable by the Court of Sessions, in exercise of power under section 209 of Cr.P.C., learned Judicial Magistrate First Class was pleased to commit the case to the Court of Sessions and the same was then registered as Sessions Case No.37 of 2012 which has come up for consideration before the learned 2nd Additional Sessions Judge, Jamnagar. 2.3 Record indicates that pursuant to committal of the case, a charge came to be framed vide Exh.11 which was read over to the appellant accused and his plea was recorded vide Exh.12 wherein the appellant accused has denied the offence being committed and claimed to be tried. Resultantly, the prosecution was given an opportunity to lead the evidence. In response to that, the prosecution has led oral evidence of as many as 24 witnesses and has produced approximately 29 documentary evidence in the following manner: ORAL EVIDENCE

P.W. No.	Name of witness	Exh. No.
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1	Dr. S.D.Mandviya	15
2	Dr. Rohit Popatbhai Nakum	19
3	Aarif Azizbhai Memon	24
4	Imranbhai Kadarbhai Bavani	26
5	Bhavesbhai Umakantbhai Maheta	28
6	Kadar Satharbhai Akbani	29
7	Ashrudin Ismailbhai Multani	31
8	Dilavar Gafarbhai Odiya	34
9	Jusabbhai Dawoodbhai Multani	35
10	Haji Iqbal Mamadbhai	36
11	Shoeb Gafarbhai Patel	38
12	Sohil Iqbalbhai	46
13	Imran @ Rahul Iqbal Banani	51
14	Hussainbhai Abubhai Shama	58
15	Riyaz Iqbalbhai Parekh	64
16	Mahmadhusen Sattarbhai Chagda	65
17	Gafarbhai Haji Ibrahim Patel	66
18	Bhola Varvabhai Bharvadiya	67
19	Gafar Musabhai Ghanchi	71
20	ASI Karim Dawoodbhai Makwana	72
21	Nalinkant Narsingbhai Vyas	74
22	Circle Officer Punitdas Keshavadas Sarbaddiya	78
23	PI Mulubhai Kogabhai Der	80
24	Maganbhai Savabhai Solanki	92

DOCUMENTARY EVIDENCE

Sr. No.	Description	Exh. No.
1	OPD case papers for taking blood sample of accused	16
2	Yadi for taking blood sample of accused	17
3	Yadi taking blood sample of accused	18
4	P.M.Report	20

5	Marnotar form	21
6	Police yadi for performing P.M.	22
7	Panchnama of place of incident	25
8	Discovery panchnama	26
9	Panchnama of seizure of clothes of the deceased	30
10	Panchnama of arrest of accused	32
11	Inquest panchnama	37
12	Original complaint	39
13	Gazette notification of District Magistrate prohibiting carrying of arms	68,69
14	Station dairy entry	73
15	Yadi for FSL primary opinion on the spot	75
16	Primary opinion of mobile investigation van	76
17	Office copy of primary opinion of mobile investigation van	77
18	Yadi for map of scene of offence	79
19	Police yadi for registration of offence	81
20	Police yadi for filling inquest	82
21	Certificate for adding serious offence	83
22	Yadi for entering arrest of accused in the station diary	84
23	Yadi for preliminary opinion of muddamal	85
24	Certificate relating to position	86
25	Receipt of muddamal by FSL	98
26	Preliminary opinion of muddamal along with forwarding letter	88
27	Preliminary opinion on muddamal of Serological Department	89
28	Yadi for obtaining permission to file charge sheet	90
29	True copy of FIR being C.R.No.142/11 at Pradhyuman Nagar Police Station	91

2.4 After leading the evidence, a closure pursis came to be filed by the prosecution vide Exh.96 and with a view to given an opportunity, a further statement of the accused was also recorded under Section 313 of Cr.P.C. In the further statement, the accused reiterated that he has wrongly been roped in the case and has not committed any offence. Resultantly, the case was put up for

further adjudication by framing issues as contained in paragraph No.7 of judgment. 2.5 After examining the evidence as a whole and upon hearing both the sides and considering the material on record, learned 2nd Additional Sessions Judge, Jamnagar, by the impugned judgment and order was pleased to hold the appellant as guilty for the offence punishable under section 302 of IPC read with section 135(1) of Gujarat Police Act and sentenced him as aforesaid in the earlier part of this judgment. It is against this judgment and order passed by the learned 2nd Additional Sessions Judge, Jamnagar, that the appellant accused has preferred the present Criminal Appeal. 2.6 A Division Bench of this Court was pleased to admit the appeal on 26.3.2015 which later on has come up for final hearing and accordingly, the same is heard by this Court on 6.3.2017 finally. 3. Learned advocate, Mr. A.D.Shah appearing for the appellant accused, has vehemently contended that the judgment and order of conviction passed by the learned trial Judge is not in consonance with the material on record and the findings arrived at for convicting the appellant are perverse to the record. Mr. Shah has further contended that though there are several witnesses examined by the prosecution to prove the case, few of them are very relevant to consider the present case. For that purpose, on an analytical view of the evidence, Mr. Shah, taking this Court through the medical evidence of Medical Officer- Dr.Rohit Popatbhai Nakum-P.W.No.2 examined at Exh.19, Medical Officer-Dr.S.D.Mandviya-P.W.No.1 examined at Exh.15 and FSL Officer-Nalinkant Narsingbhai Vyas-P.W.No.21 examined at Exh.74 in co-relation with documentary evidence in the form of panchnama of collection of blood sample, panchnama with respect to arrest of the accused, post mortem note reflecting on page 503 of paper book compilation, inquest panchnama reflecting on page 551 and FSL report which is part of paper book compilation on pages 651 and 663, has contended that the conclusion arrived at by the learned trial Judge is not in consonance with the medical evidence. 3.1 So far as ocular evidences are concerned, Mr. Shah has drawn our attention to the evidence of Shoeb Gafarbhai Patel, the complainant, who has been examined as P.W.No.11 at Exh.38 and eye witness Sohil Iqbalbhai, who has been examined as P.W.No.12 at Exh.46 and contended that the case has not been proved beyond reasonable doubt. Mr. Shah has further contended that medical evidence appearing to be in contrast to ocular evidence and the panchnamas, which have been drawn by Investigating Officer, have not been supported by any of the panch witnesses. By referring to the evidence of panch witnesses, Mr. Shah has contended that as the case has not been proved beyond reasonable doubt, the learned trial Judge has materially erred in passing the order of conviction. The entire documentary evidences are brought to the notice of the Court with a view to substantiate his arguments and ultimately, Mr. Shah has contended that the reasons which are assigned by the learned trial Judge are not germane to law. 3.2 Mr. Shah has further contended specifically that the motive, which has been attributed, would no longer survive after the compromise which had been attempted by father Gafarbhai and since the compromise has taken place, nothing appears on record which can attribute any motive against the appellant accused. Mr. Shah has further contended that as regards animosity

which has been pleaded by the case of the prosecution also, there appears to be no complaint filed against the appellant accused by the brother of the deceased at any point of time and therefore, a bare assertion reflecting on record about the appellant accused administering threat to the complainant and his brother all throughout prior to incident has not been established by the prosecution by any cogent material. 3.3 In addition thereto, Mr. Shah has contended that evidence of Shoeb Gafarbhai Patel, P.W.No.11, has clearly disclosed that at about 11.15 p.m. on 25.11.2011, he received an information from one Imran Iqbal that near Mohammadbhai's Lati, somebody had inflicted knife blow to Imran, who is brother of the complainant and he is lying on the road in a bleeding condition. Mr. Shah has contended that upon receipt of said information, the complainant has not gone to the spot immediately and though the distance from his residence to the hospital or the spot on motor bike is approximately 5 minutes only, he reached the Government dispensary at about 11.45 p.m. 3.4 Mr. Shah has further contended that the version of the complainant is not establishing any confidence in the case of the prosecution. In his cross-examination, he has clearly admitted that at the time of giving the complaint, he had not disclosed to the police about he having talked to anybody about the complaint, so much so that this witness has clearly admitted that he had already lodged complaint prior in point of time before meeting Sohil @ Raju in the hospital. 3.5 Mr. Shah has further contended that in cross-examination, the complainant has admitted that he has not mentioned about names of 2-3 persons who disclosed having seen Ajim running away from the place and therefore, the version of the complainant is raising a serious doubt about the case of the prosecution. This complainant is not an eyewitness as stated by Mr. Shah but has disclosed the name only on account of the fact that prior to the commission of crime, there was one complaint lodged before Pradhyuman Nagar Police Station at Rajkot. 3.6 Mr. Shah, learned advocate representing the appellant accused, has further contended that the prosecution is substantially relying upon the evidence of one eye witness, Sohil Iqbalbhai, who is examined as P.W.No.12 at Exh.14. The version of this eye witness as contended by Mr. Shah is that when he reached near the shop of "chalta-firta pan shop", deceased Imran shouted "Raju come here". This witness, while going on his M80 vehicle, upon hearing the shouting, has stopped his vehicle near New Ali Timber Turning gate when he saw accused Ajim inflicting knife blow on the neck of Imran and running away towards Murila Gate. This so-called eye witness, as contended by Mr.Shah, has seen deceased Imran walking two steps and then falling down. The entire narration of this witness, as per the say of Mr. Shah, is not inspiring any confidence. The actual occurrence of incident does not appear to have been seen by this witness and therefore, Mr. Shah has contended that it is not safe to rely upon completely this version so as to justify the conviction. On the contrary, this witness has not cogently established or corroborated the theory of motive which is tried to be canvassed by the prosecution. The unnatural part of this witness, according to Mr. Shah, is that though he is claiming to have seen the actual occurrence of incident, he has not stopped his vehicle at that place though was away at a

distance of only about 5 feet. But then, as per his deposition, he saw causing knife blow from a distance of about 7-8 feet. description given by this witness, according to Mr. Shah, is imaginative rather than realistic. The eye witness has not established and taken the case of the prosecution to its logical end whereby the only circumstance of guilt against the appellant accused can be established. On the contrary, the entire version of this eye witness is not inspiring any confidence as the evidence is the reflection of lot of improvements. 3.7 Mr. Shah has further contended that this eye witness has claimed to have seen the actual occurrence of incident even though there was no light in his vehicle and surrounding shops were closed and there was complete darkness. It was difficult to believe that this witness has actually seen the knife as well as the blow being inflicted on the deceased. The entire cross-examination of this witness, therefore, has not cogently supported the case of the prosecution. 3.8 Mr. Shah has further taken us through the evidence of Imran @ Rahul Iqbal Banani-P.W.No.13 examined at Exh.51 and thereby tried to develop the case that order of conviction is not sustainable in the eye of law. Mr. Shah has pointed out from cross-examination of this witness that the shop of Raju & Sohil was found to be closed when they were sitting near the place of bonfire. This witness has also admitted that he has seen Imran lying opposite to the shop of Marvadi and not opposite to "chalta-firta" shop and if that fact is written, it is untrue. Mr. Shah has, therefore, contended that this witness has not substantiated the case of the prosecution any more. Mr. Shah has further contended that when he along with other witnesses were sitting near the place of bonfire, the appellant accused has come from the direction of the shop of Rohani with a cigarette and after lighting the cigarette at the bonfire place, the appellant accused has gone away. According to this witness, when the accused has covered his body with shawl and did not talk to anybody sitting near the place of bonfire, then the version of he actually having seen Ajim committing the crime can hardly be believed more particularly when nobody has run after the accused while fleeing away from the spot nor has nobody even tried to catch hold of the accused. This unnatural conduct is not inspiring any confidence in the case of the prosecution and therefore, if his entire version is looked into, it demolishes the presence of this eye witness at the place of incident. By referring to this witness, Mr. Shah has further contended that the case has not been proved beyond reasonable doubt by the prosecution and these material witnesses, who were pressed into service by the prosecution, ought to have been examined in their proper perspective before passing an order of conviction. The entire evidence has not been appreciated in their proper perspective and thereafter by laconic reasons, the learned trial Judge has passed the order of conviction and this being the position prevailing on record, it cannot be said that order in question deserves to be sustained in the eye of law. 3.9 Mr. Shah has further contended by referring to some of the other witnesses that medical evidence has clearly demolished the case of the prosecution in its entirety. A close reading of doctors' witnesses would make it clear that the knife, which has been recovered as a muddamal said to have been used by the accused, can never inflict such kind of cut blow as

has been described in the medical evidence and therefore, Mr. Shah has contended that medical evidence has completely ruled out the story of the prosecution as attempted to be proved by ocular evidence and when the medical evidence is completely ruling out the case of the prosecution, the ocular evidence has got no significance or predominance. In this context, Mr. Shah, upon analysis, has brought to our notice silent features emerging from the record of the case in a summarized form. Medical Evidence: P.W.No.2/Exh.19-Dr. Rohit Popatbhai Nakum: This witness has noticed stab wound of the size of 2" x 0.5" x 8" on left side of neck with muddamal article No.5-knife. After detailed cross-examination about the nature of injuries noticed at the time of post mortem report and examining the muddamal article, this witness has admitted that the said injury sustained by the deceased is not possible by Muddamal Article No.5 knife. Reasons: a) Length of the blade is 6.5" whereas depth of the injury is 8". b) Edges and margin of the injury were absolutely sharp cut and that would require sharp edges on both the sides of the blade of the knife. Muddamal article No.5-knife is having one edge as sharp side and other side as blunt. Thus, both the edges and margin of injury being sharp cut with tapering ends on both sides, such weapon could not have caused the injury. Note: This positive evidence in cross has not been challenged in re-examination. Complainant : P.W.No.11/Exh.38 Shoeb Gafarbhai Patel: This witness received information at about 11.15 pm. over phone from Imran Iqbal that "your brother Imran is lying on road in bleeding condition near Mohammadbhai's Lati due to someone giving knife blow and they are taking him to Government dispensary in Cruiser car of Riyaz Iqbalbhai Parekh and you should come to Government Dispensary immediately". This witness reached Government Hospital on his vehicle at 11.45 P.m. Exh.39/P.491 Complaint: He categorically states that the incident happened during 11.00 p.m. to 11.15 p.m. and due to previous incident and animosity with Ajim Yusufbhai Surya, his brother while returning from shop to his house was intercepted on road and inflicted blow with sharp cutting weapon. Important features from Cross-examination: Witness in para-5 of examination-in-chief has clearly stated about the cause for giving name of Ajim Yusuf in compliant on account of the fact that a) Ajim used to tell time and again to kill the complainant and his brother; b) At dispensary, 2-3 persons stated that Ajim had run away from there. The witness clearly admits on page 449 that in his complaint, he did not state, "I gave name of Ajim Yusuf in my complaint as he used to tell time and again to kill me and my brother and 2-3 persons told at dispensary that Ajim had run away and hence his name was given in the complaint". Further admission is that he did not give names of 2- 3 persons to police as those 2-3 persons had not met him at the time when the complaint was given. Improvement upon the version about 2-3 persons had told Imran about accused running away and that information being given on phone by Imran. Further admission is that he did not state in the complaint that Imran told him on phone that they had seen accused running away. Ultimately, he admits that Imran only told on phone about "your brother is lying in bleeding condition near Lati of Mohammadbhai only and nothing more." On page 143 of paper book

compilation, this witness stated that when he reached the dispensary, Sohil had not come but he had seen him. Sohil had gone and met him but there was no conversation between them. Sohil's alias name is Raju. Sohil had not asked anything about the incident. The police had interrogated him at about 12.45 am to 1.00 am. on that night at dispensary for 10 to 15 minutes. Sohilbhai had met him before police inquired from him. Before interrogation by the police, he had no occasion to talk to anyone about the incident. Note: These admissions and factual aspects emerging from evidence of the complainant and complaint clearly prove that the complaint was recorded during 12.45 a.m. and 1.00 a.m. and that fact is clearly emerging from the report (Exh.81/Page 641) disclosing the factum of disclosure of offence at 1.00 am. P.W.No.12/Exh.46 - Sohil Iqbalbhai: This witness claims to be an eye-witness and when he was proceeding to his residence after closing his shop, he heard shouts of Imranbhai (deceased) near Chalta-firta Pan Shop and he stopped his M-80 vehicle near New Ali Timber Turning gate. After parking his vehicle, he has proceeding towards Imranbhai and he saw Ajim inflicting knife blow on the neck of Imranbhai and running towards Murila Gate. He reached there and when Imranbhai was falling down, he caught him and made him to lie down. He saw one Kasam Musabhai and Samir Ada of Chaltafirta Pan shop sitting there and he told them "my brother Imran is given knife blow and Samir Ada shouted to boys sitting near fire-place and Imran Thutho, Hussain Sama, Maqbul and Avesh reached at that place." Before arrival of 108 vehicle, Riyazbhai was passing in his Cruzer car and all told him to take Imran to Government dispensary in Cruzer car and hence, Riyaz took Imran in Cruzer car to Government Hospital. He went to his residence on M-80 vehicle in frightened condition. He reached hospital after taking lift from one Sattarbhai and brother of Imran was at the dispensary. At that place, he learnt from Shoebbhai and other persons that "Imranbhai has been murdered by sharp cutting weapon and this injury is caused by Ajim, who was known to me and complaint was given to police." Salient features from his cross : On page 155 of paper book compilation, he states that when he was passing on his Bajaj M-80, his attention was drawn for the first time on Imran and he was grappling at that time. He had seen grappling by catching hold of collar portion of the shirt from a distance of 5 feet, however, he had not stopped his Bajaj M-80 and proceeded further to park his vehicle. On page 157, he states, "When I saw my bother Imran and stopped Bajaj 80, I had not seen any person exchanging words with Imran and Imran had fallen at two places away from the place where he was grappling." He waited at the scene of offence for 10 to 12 minutes and Hussain and Imran along other persons who came at the place inquired as to what happened to him. During that period, he had not known any relation of Imran. On page 159, he states, "I had reached hospital at about 12.15 a.m. and met brother Shoeb at Hospital. He had talked with Shoeb at 12.15 a.m. Shoeb did not ask him anything, but I had questioned Shoeb. When he met Shoeb at Hospital he had also seen police." After reaching the hospital, police inquired as to who is Raju and he told to police that "I am Raju". He was interrogated for about 5 to 10 minutes about the incident. Upon reaching the Hospital, he had no

information that the complaint has been filed before the police, but after 15 minutes, he learnt that Shoebbhahi has given complaint to the police as persons were talking about the same. To a specific question about his visit to the Hospital and meeting Shoebbhahi for the first time as to whether he informed Shoebbhahi about his witnessing the incident or his presence at the place of offence, the witness avoided the answer by stating that he does not remember. However, he categorically admitted by deposing, "after reaching hospital and witnessing the incident, he was disclosed for the first time when police was interrogating him. At that time, no writing was taken by the police." He categorically admitted on page 163 that on the day of incident when he was passing from Musabhai's shop and his brother Imran shouted, his attention was not drawn on his brother as there was darkness and all the shops were closed and there was no light in his vehicle. Thus, the version of he witnessing grappling with Imran would be improbable. On page 165, he states that when his brother was being taken to dispensary in Cruiser car, it was asked whether the person asked him to sit in car has injured his brother but he said no as he was afraid. The evidence of the witness and his admission that the statement was recorded on next day evening clearly casts serious doubt about his presence and witnessing the incident. This witness does not refer to shawl covered by Ajim. Another witness stated that shop of Sohil was closed at about 10.15 to 10.30 p.m. 3.10 In the aforesaid manner, Mr. Shah, learned advocate representing the appellant accused, has pointed out specifically that since medical evidence is completely ousting the impact of oral evidence, it cannot be said in any way that the prosecution has proved the case beyond reasonable doubt against the appellant accused as it is not safe to rely upon such kind of evidence which has no credence to justify the order of conviction and hence, when the specific charge levelled against the appellant accused which has been tried and adjudicated is not proved beyond reasonable doubt by the prosecution, it is a fit case to grant benefit of doubt to the appellant accused. 3.11 To support his contentions, Mr. Shah has relied upon following decisions : i. Smt. Nagindra Bala Mitra and another v. Sunil Chandra Roy and another, AIR 1960 Supreme Court 706; ii. Lallu Manjhi and another v. State of Jharkhand, (2003)2 Supreme Court Cases 401; iii. Nagin Soma v. State, GLR 1966 0 306; iv. Mahavir Singh v. State of Madhya Pradesh, (2016)10 Supreme Court Cases 220; and v. Harbeer Singh v. Sheeshpal & Ors., 2016 SCC OnLine SC 1164; By referring to these decisions and by point out such infirmities in the case of the prosecution, Mr. Shah has ultimately requested that order of conviction deserves to be quashed and set aside by allowing the appeal filed by the appellant accused. The aforesaid decisions would be dealt with in the later part of this judgment. 4. To oppose the stand taken by learned advocate appearing for the appellant accused, Mr. L.R.Poojari, learned Additional Public Prosecutor, has vehemently contended that no error is committed by the learned trial Judge in passing the order of conviction. Mr. Poojari has contended specifically that the prosecution has proved the case beyond reasonable doubt by leading ocular as well as documentary evidences and on the basis of material on record, there is no infirmity or illegality reflecting from a bare reading of the judgment and

therefore, exercise of jurisdiction by the learned trial Judge cannot be faulted with. Mr. Poojari has contended that the medical evidence is merely a piece of opinion for the Court and such opinion given by the doctor cannot be accepted as a gospel truth to discard the ocular evidence led by the prosecution. In the present case on hand, Mr. Pujari has submitted that there is ample material available to connect the appellant accused with the commission of crime and therefore, simply because there is an opinion of doctor that seized muddamal cannot cause such kind of injuries, which are reflected, that solitary circumstance cannot be the subject matter of grant of benefit of doubt to the appellant accused. Mr. Poojari has contended that there is a specific assertion coming on record in the form of evidence of the complainant, P.W.No.11-Shoeb Gafarbhai Patel examined at Exh.38 which is substantiated by the version of eye witness namely P.W.No.12-Sohil Iqbalbhai examined at Exh.46 and when the evidence of these star witnesses is corroborated by other ocular evidences in the form of P.W.No.13-Imran @ Rahul Ikbai Banani at Exh.51 and P.W.No.15-Riyaz Iqbalbhai Parekh at Exh.64, it cannot be said in any manner that the learned trial Judge has committed any error in evaluating the evidence on record. On the contrary, evidences of these four witnesses are sufficient enough to connect the appellant accused with the commission of crime and since this is not a case of grant of benefit of doubt simply because some opinion is different from the ocular evidence, Mr. Poojari has contended that there is no perversity, irregularity or illegality in the judgment and order passed by the learned trial Judge which is based upon proper application of mind and proper analysis of evidence and therefore, the appeal deserves to be dismissed. 4.1 Mr. Poojari has further contended, by drawing the attention of the Court to the evidence of FSL Officer, P.W.No.21-Nalinkant Narsingbhai Vyas examined at Exh.74 in co-relation with the FSL report submitted on record at Exh.80 reflecting on page 651 onwards of paper book compilation, that this FSL report is in consonance with the medical evidence of FSL officer. According to him, there also appears to be no contrast in the injuries which have been shown in the post mortem note with that of the inquest panchnama drawn by Investigating Officer and therefore, when the injuries reflecting on the body of the deceased are well supported by medical evidence as well as ocular evidence, it cannot be said that order of conviction is irregular in any form. Mr. Poojari has further contended that even though the accused was given a reasonable opportunity to state his defense while recording his further statement under section 313 of Cr.P.C. by disclosing and explaining the incriminating circumstance, same has not been availed of and therefore, in the absence of any contrary material, it cannot be said that there appears to be any error in exercising jurisdiction by the learned trial Judge. Mr. Poojari has further drawn our attention on the result of serological analysis in which it has been specifically found that on the controlled sand as well as on knife and clothes of the accused, blood of the deceased has been found. By referring to this evidence, Mr. Poojari has specifically submitted that simply because some of the witnesses are not supporting the case of the prosecution, it cannot be said that any error is committed in relying upon the cogent evidence which is establishing

the guilt of the appellant accused. Mr. Poojari has further contended that the prosecution is not supposed to examine several witnesses but it is duty bound to examine material witnesses and said exercise has already been undertaken by examining star witnesses and therefore, when material witnesses are specifically endorsing the case of the prosecution, it cannot be said that any error is committed by the learned trial Judge and therefore, Mr. Poojari has requested the Court to dismiss the appeal filed by the appellant accused.

4.2 To justify his submissions, Mr. Poojari has again drawn our attention to the depositions of witnesses to which we had an occasion to access at the time when we heard learned advocate for the appellant and by considering those depositions, Mr. Poojari has submitted that no error is committed by the learned trial Judge in passing an order of conviction. Mr. Poojari has contended that adequate and just reasons have been assigned after due application of mind and after considering the material evidence on record and therefore, when such kind of reasoned order is passed by the learned trial Judge by exercising jurisdiction, the same does not deserve to be interfered with. Mr. Poojari has further contended that on an overall reading of evidence on record, when no other contrary cogent evidence is available on record, solitary circumstance of opinion of doctor, which is taking the case of the prosecution to a different direction, cannot be utilised to raise a serious doubt in the case of the prosecution and in the absence of any error having committed by the learned trial Judge, no appeal be entertained.

4.3 Mr. Poojari has then tried to rely upon some of the decisions delivered by this Court as well as the Hon"ble Apex Court and contended that this is not a fit case in which the order of conviction is required to be disturbed. These decisions are : i. Chacko alias Aniyam Kunju and others v. State of Kerala, AIR 2004 Supreme Court 2688; ii. Iqbal Moosa Patel v. State of Gujarat, (2011)2 Supreme Court Cases 198; iii. Vahaji Ravaji Thakore and another v. State of Gujarat, 2003(3) G.L.H. 283; iv. Kathi Bharat Vajsur and Anr. v. State of Gujarat, AIR 2012 Supreme Court 2163; v. Gura Singh v. State of Rajasthan, AIR 2001 Supreme Court 330; vi. Darbara Singh v. State of Punjab, AIR 2013 Supreme Court 840; and vii. Kavas Jahangir Mamabuwala v. State of Gujarat, 2000(1) GLR 418(1999(2) G.L.H. 429). However, the same will be dealt with and considered at an appropriate stage in the present judgment. After referring to these decisions, ultimately, Mr.Poojari has requested the Court to dismiss the appeal by confirming the judgment and order.

5. In counter to the decisions relied on by learned APP, Mr.Poojari, Mr. A.D.Shah, learned advocate appearing for the appellant accused, has cited following two more decisions to establish the stand taken by him : i. Jagdishsinh @ Munno Ranjitsinh @ Ranubha Jadeja v. State of Gujarat, 2016(3) G.L.H. 167; and ii. Sarwan Singh and Others v. State of Punjab, AIR 1976 Supreme Court 2304.

6. Having heard the learned advocates appearing for the respective parties and having gone through the judgment and order of conviction passed by the learned trial Judge, the independent evaluation of the evidence of witnesses is required to be undertaken by the Court as a legal duty.

7. It is the cardinal principle of criminal trial that the prosecution has to establish the case beyond reasonable doubt and to bring home the guilt of the accused,

the prosecution has to lead unimpeccable material which would not give any plausible different view except the establishment of guilt and therefore, on the basis of strict proof only, the guilt of the accused can be established during the course of criminal trial. Keeping in view this proposition in mind which is settled by catena of decisions, the Court has to evaluate and analysis the evidence at thread-bed level and to arrive at a decision which would establish the guilt beyond reasonable doubt. In this context, before dealing with the evidence independently, we deem it proper to consider and go through the findings which have been arrived at by the learned trial Judge to examine as to whether such findings are in consonance with the aforesaid proposition or not. 8. The trial court, in the case on hand, has held that name of the accused has been given on the basis of mere suspicion and threat being administered by the appellant accused consistently. Of course, the trial court has then observed that there appears to be nothing on record to indicate any complaint having lodged by either the deceased or his brother before the police station against the appellant accused on account of such a threat. The trial court has also examined the conduct of the complainant and the witness but then in paragraph No.16 of judgment has found nothing unnatural in the same since the witness was of a tender age of around 20 years. 9. After narrating the evidence of P.W.No.13-Imran @ Rahul Ikbali Banani at Exh.51, the trial court has found that near the place of incident on the cement road, bloodstain was found and it was also noticed by this witness along with other persons that the appellant accused did come to the place of bonfire, but then observed that from that place, place of incident is not possible to be seen. The trial court has further found on the basis of yet another P.W.No.14-Hussainbhai Abubhai Sham at Exh.58 that this witness has seen the appellant accused armed with knife and has also information about the enmity between Ajim and Shoeb on account of occurrence of previous incident at Rajkot. The evidence of this witness has further revealed that it is only on account of shouting made by Samir Ada that he saw the accused with knife. Of course, no narration of knife of which nature is given by him before the police. On the basis of material on record, the trial court has further observed in paragraph No.17 of the judgment that there is no reason to disbelieve the testimonies of witnesses Hussain Abu, Imran, Sohail and eye witness. 10. On further appreciation of evidence, the trial court has concluded specifically that evidence of aforesaid two witnesses namely, Hussain and Imran pointing specific finger towards the appellant accused running away with knife is possible to be believed and therefore, the trial court has found that simply because the witnesses are relatives, it cannot be a solitary ground for discarding their testimonies as being interested witnesses. The trial court has also found that non-examination of Samir Ada is of no consequence as other witnesses have cogently supported the case of the prosecution and therefore, on the basis of evaluation of evidence, the trial court has found that it is not possible to believe that the appellant accused is an innocent person. 11. On further examination of evidence at the behest of the trial court about medical evidence, it has been concluded that there was a serious injury caused by the appellant accused and after

narrating the size of cut wound/stab wound, the trial court has believed that it is not possible to give any benefit to the appellant accused simply because there might be some defective investigation. After examination of evidence related to the use of the knife and size thereof, the learned trial Judge has concluded that simply because the length of the knife/weapon is not complete, the said testimony cannot be discarded to give benefit of doubt to the accused. The trial court has further found that medical evidence is completely ruling out the case of the prosecution and therefore, narration of other evidence available on record as observed in paragraph No.22 of the judgment cannot be discarded. 12. The trial court, in the case on hand, has further concluded that the place of panchnama is revealing the fact that incident in question has occurred and the place of incident which is established by the prosecution is the place which cannot be disbelieved and it has been concluded on the basis of evidence on record that the place of incident is not getting changed or possible to be believed in that direction. It has also been found by the trial court that collection of sand material which has been sent for analysis is substantiating the case of the prosecution as well as the independent witnesses. Upon further examination by the trial court, it has also been concluded that the fact of previous animosity of the deceased and brother with the appellant accused is emerging from the record and therefore, the trial court, upon examination of certified copy of complaint, which has been produced at Exh.91, has come to the conclusion that there was undoubted animosity by the appellant accused with the brother and the deceased and compromise talks generated had not attained any fruitful result and therefore, this aspect had also been considered as clearly appearing from paragraph 26 of the judgment. 13. The trial court further has examined the issue of testimony of witnesses from the scene of offence and the atmosphere prevailing at the relevant point of time and has disbelieved the version of defense that there was darkness at the time when incident took place whereby it was not possible for nobody to see the faces and therefore, the trial court has believed that independent witnesses have seen the appellant accused running away from the spot which testimony is found to be acceptable and ultimate analysis of the entire evidence has led the trial court to believe and conclude finally that the appellant accused has inflicted weapon injury to the deceased which has resulted into death of the deceased and this case has been concluded to have been proved against the appellant accused as specifically held by the trial court in paragraph No.27 of the judgment. These are the findings arrived at by the trial court. Whether these findings are in consonance with the evidence on record and can be said to be proper evaluation of the same is the subject matter of controversy in the present appeal. Hence, to deal with this situation, independent analysis of evidence is also warranting in the present fact situation. 14. While dealing with a criminal trial, the court has to evaluate minutely each evidence produced on record by the prosecution since the prosecution is legally duty bound to establish the case beyond reasonable doubt. This burden cast upon the prosecution must be discharged by demonstrating the existence of aggravating circumstances and the consequential absence of mitigating circumstances. While discharging this legal duty and burden, the

prosecution has not only to establish its case beyond reasonable doubt but has also to prove the commission of crime and the aggravating circumstances leading to the inference that case falls within the established guilt of the accused. The manner in which the duty is to be performed by the prosecution has to be considered by the Court while dealing with the trial. Keeping these circumstances in mind, while coming to the conclusion, the Court has also to consider the trite law that minor variations between medical evidence and ocular evidence do not take away the privacy of latter. However, unless medical evidence in its term goes so far as to completely rule out the possibility projected by the prosecution, then testimony of witnesses has to be examined with more caution and therefore, under this set of circumstances, if the case on hand is to be viewed, each of the testimonies has its own significance in deriving the ultimate conclusion and to test whether any perversity is shown by the trial court or not.

15. The Hon"ble Apex Court in the case of Gamini Bala Koteswara Rao and Ors. v. State of A.P. reported in AIR 2010 Supreme Court 589(1) has culled out the principle in that context. While dealing with the said case, it has been interpreted that the word "perverse" in terms as understood in law, has been defined to mean "against the weight of evidence" and for that purpose, independent examination, as is permissible, is to be undertaken by the Court. First of all, if we see the medical evidence, as stated earlier, three important witnesses have to be considered as have been examined before the trial court.

16. The prosecution has examined Dr.S.D.Mandviya as P.W.No.1 at Exh.15. This doctor has deposed that while he was on duty at CAV Kalavad as medical officer on 5.12.2011, PSO of Kalavad Police Station brought accused Ajim, the appellant herein, at about 6.30 p.m. for taking his blood sample and after taking his blood sample, the same was handed over to PSO by applying seal. This medical officer in cross-examination has categorically admitted that prior to taking blood sample of the accused, though required, no consent in writing was taken. In addition to this, this medical officer was not knowing as to whether verification of the appellant accused, who was brought prior to taking the blood sample, was to be noted down in papers and hence, no such verification has been undertaken or noted down in any medical papers. This medical officer has candidly accepted that this kind of taking blood sample has occurred for the first time in his career. This witness in his testimony has further gone to state that it is true that after taking blood sample from the body, the blood is loosing its basic character within no time unless some preservative or anti-compyulent is applied. This medical officer has specifically admitted in his cross-examination that it is very necessary to add anticompyulent and preservative but the same has not been added at all nor any mention is made in the relevant papers and therefore, on the basis of this cross-examination, it is revealed that the blood sample which has been collected of the appellant accused is taken in aforesaid manner which may not be safe for ultimate analysis.

17. The prosecution has examined yet another medical officer, Dr. Rohit Popatbhai Nakum as P.W.No.2 at Exh.19. From the testimony of this witness, it is revealed that when the dead body was brought at CHC Centre on 25.11.2011, the same was brought by several relatives where the police handed

over inquest panchnama and necessary forms for conducting post mortem examination. This witness has deposed further that on 26.11.2011 at 10.40 a.m., post mortem started which completed at about 12.55 p.m. In chief examination, this medical officer has deposed that this kind of injury, which is reflected on the body of the deceased, can be caused by sharp cutting weapon. The Medical officer has further conveyed in his testimony that on the clothes of the deceased, blood stains have been found and same were also found on the face of the deceased. Injuries, which have been marked specifically by this medical officer, are in the following manner: "-Stab wound over neck, just lateral to midline. LT. Side [2 inchx 0.5 inch x 8 inch(length x width x depth)]. Direction from upper LT. Side of neck towards upper, middle part of RT chest. Profuse bleeding near stab wound internally. Edges are very sharp. Damages maximum at middle. Part of wound opened at both ends." In addition to aforesaid injuries, this doctor witness has found a cut of sternum of chest and right upto middle portion of lungs and a cut was found which is narrated in detail in post mortem examination. Looking to the aforesaid injuries, which are shown by this medical officer, the doctor has opined in chief examination that these injuries can be caused by sharp cutting weapon but no viscera is stated to have been taken from the dead body. 18. With a view to prove the case, the prosecution has placed this medical officer as prosecution witness. But in his cross-examination, which has been done in detail, following circumstances have been found from the body and the injuries thereupon. This medical officer, looking to the injuries, has specifically opined that this kind of injuries can be caused by a substance/weapon having sharp edges on both the sides. This doctor has further opined that if the used weapon is having blunt edge on one side and sharp edge on other side, then there may not be clean cut on both the edges. One side will have a clean cut injury whereas other side of wound has ruggedness or rough kind of edge. This medical officer has also clearly opined that the police had never shown the weapon nor demanded any opinion but nevertheless has specifically conveyed that the injuries, which are reflected on the body, have sharp edges and margins and he has not seen any rough or ruggedness edge and therefore, has specifically opined that this must have been caused by a weapon having sharp edges on both the sides. In furtherance of the testimony of this doctor, in paragraph No.18, it has been specifically deposed that it is true that if the weapon has pierced inside the body till its handle then, irregular injuries would be reflected which are not reflected here on the body of the deceased. The doctor has further categorically stated after examining the stab wound that depth of the wound was 8 inches and has then opined that weapon must have a length of either 8 inch or more. This doctor witness has further evaluated the muddamal knife and has stated that though he has not measured the length of the weapon but has categorically stated that with a blade of 6½ inches, knife cannot inflict a wound of about 8 inches in depth and therefore, it seems that this medical officer has clearly opined that the weapon used must have a blade of more than 8 inches and again it must have a sharp edge on both the sides and this opinion is reflected on the basis of examination of the stab wound of the deceased. 19.

Now we may correspondingly analyse the evidences of these medical officers with other materials on record namely, the testimony of FSL Officer, which is reflected on page 215 of paper book compilation. Mr. Nalinkant Narsingbhai Vyas, P.W.No.21 examined at Exh.74, has been called by the police at about 4.30 a.m. on 26.11.2011 in connection with First Information Report i.e. pertaining to this case for the purpose of looking at the scene of offence and in furtherance of this, this FSL Officer has gone to the place where, on primary examination, he found blood on the sand which was on the cement road and this sand appears to be that of agricultural sand collected as a control sand and sent for further analysis. In his cross-examination, he has stated that the blood, which has been found, was spread over a radius of about one foot, but he is not giving any opinion whether at the time of occurrence of incident, there was proper light or not. This FSL Officer has categorically admitted in his cross-examination that there was a heap of sand on the cement road and in the document at Exh.76, he has not put his signature about his meeting with PSI. Therefore, only reflection of this witness is that there was a heap of sand but he found that there was a bloodstain. Now in consideration of this medical and scientific evidence, this testimony is to be viewed in the context of related documentary evidences adduced by the prosecution and for that purpose, first of all, we have gone through the inquest panchnama, which is drawn by Investigating Officer reflecting on page 551 of paper book compilation, on which there is a reflection that approximately two inches long and half inch broad stab wound was found on the left side of neck of the deceased and profuse bleeding took place out of the said wound. On the body, there were no other marks of torture or beating. However, if the inquest panchnama at Exh.37 is compared with post mortem note at Exh.20 reflecting on page 503 paper book compilation, it would indicate that much more details of wound are narrated in column No.17 of post mortem report and this is substantially appearing in consonance with inquest panchnama drawn by the Investigating Officer. The injuries, which have been mentioned in column No.17, are to be viewed in the context of the testimony of medical officer. The stab wound which has been shown is of the size of 2"x0.5"x8" (lengthxwidthxdepth) which are very sharp. It has also been mentioned that middle portion of wound tapered on both the ends. In column No.20, the upper part of sternum is cut off which indicates that force has been applied by the accused and in column No.23, the cause of death is shown to be "due to hypovolemic and neurogenic shock due to a stab wound". Therefore, on the basis of this document, it is revealed that specifications of injuries, which were reflecting on the body of the deceased, were substantially proved by this medical officer and therefore, there appears to be no contradiction. 20. In furtherance of this material, blood sample of the accused which has been collected by the medical officer and the manner in which it has been collected has been narrated in the earlier part of the testimony of Dr.S.D.Mandviya, P.W.No.1 at Exh.15. It is revealed from the opinion of Serological Section at Exh.89 and FSL report that the knife which has been discovered at the instance of accused indicates blood stain. This analysis reflecting on Exh.89 would indicate

that blood stain is found on the clothes as well as on the knife which is stated to have been used in the commission of crime. However, there appears to be nothing emerging from the prosecution attempts to prove whether this incriminating circumstance is put to the notice of the appellant accused which, again is the subject matter of scrutiny which will be dealt with at a little later part in this judgment. However, on reading the entire medical evidence in consonance with documentary evidences related to this, the aforesaid position is emerging which cannot be unnoticed. 21. For the purpose of considering whether these documentary evidences, which have been pressed into service by the prosecution, are established through the evidence of panch witnesses or not. Now if we examine the evidence of panch witnesses, panchas, eight in number, have been examined by the prosecution and we find on the basis of their version that practically majority of them have been declared as hostile by the prosecution as they have not supported the case of the prosecution. Just to narrate those, we may first refer to the evidence of Mr.Aarif Azizbhai Memon, P.W.No.3 examined at Exh.24, who is a panch witness to the panchnama of scene of offence. He has categorically stated that while he was going to his labour work, when the police intercepted and asked for his signature, he put his signature. This witness has neither seen the place of occurrence nor has he read the panchnama. Another panch witness, Mr.Imranbhai Kadarbhai Bavani, P.W.No.4 examined at Exh.26, to the recovery panchnama has also not supported the case of the prosecution. This witness has specifically deposed that police has never recovered the weapon in his presence and he does not know what has been narrated in the panchnama and since this panch witness has been declared as hostile, his testimony cannot be used beyond a certain limit. Similar is the evidence of another panch witness of recovery of knife, Mr.Bhavesh Umakantbhai Maheta, P.W.No.5 examined at Exh.28. He has also not supported the case of the prosecution. Thus, the recovery panchnama is not established by the prosecution as is visible from the evidence. 22. The prosecution case and its evidence further revealed that panchnama of recovery of clothes of the deceased has also not been established by the panch witness, Mr.Kadar Satharbhai Akbani, P.W.No.6 examined at Exh.29. This witness on the basis of having seen the clothes at the time of execution of post mortem has identified the clothes but most material part is that all the three clothes which have been identified have neither any sign of blood nor any cut marks. This witness has further stated that he on his own has gone to the police station and signed the prepared panchnama. No other clothes except these three clothes have been seen by this panch witness. Yet another panch witness, Dilavar Gafarbhai Odiya, P.W.No.8 examined at Exh.34 has also turned hostile. Panch witnesses of arrest panchnama namely, Ashrudin Ismailbhai Multani examined as P.W.No.7 at Exh.31 and Jusabbhai Dawoodbhai Multani examined as P.W. No.9 at Exh.35 have also not supported the case of the prosecution. These panch witnesses of arrest panchnama have categorically deposed that the panchnama is not prepared in their presence nor has the appellant accused Ajim been arrested in their presence and therefore, these panch witnesses, who are hostile to the case, have

not proved the documentary evidences adduced by the prosecution. 23. In the aforesaid analytical assessment of witnesses, from the left out portion, it is be examined whether any stinking material is available to the case of the prosecution which can justify the conclusion arrived by the trial court and for that purpose, the police witnesses are also being analysed by the Court. Assistant Sub Inspector, Mr.Karim Dawoodbhai Makwana examined as P.W.No.20 at Exh.42, at the relevant point of time was serving as PSO at Kalavad Police Station on 26.11.2011 and while was on duty, at about 20.30 hours, medical officer of CHC Kalavad Hospital, Dr. Nakum telephoned this PSO and informed about the death and dead body and for that purpose, this PSO has received an information from the hospital. If the testimony of this witness is viewed, it would suggest that Kalavad Police Station was already functioning and was opened throughout which appears to be quite in contrast to the version given by the complainant who deposed that police chowki was closed. In fact, the testimony of this PSO is dismantling the version of the complainant on that issue. The evidence of the prosecution has further indicated that one Mr.Maganbhai Savabhai Solanki, P.W.No.24 examined at Exh.92 was serving as Police Inspector on 8.1.2012. He has deposed that he received further investigation papers from Police Inspector, Mr. M.F.Der, who went on privilege leave and this Investigating Officer having found the material has submitted the charge sheet on 18.2.2012 before the learned Judicial Magistrate. But this witness has specifically indicated that substantial portion of investigation has been undertaken by Police Inspector, Mr.M.F.Der who does not appear to have been examined by the prosecution and therefore, this evidence is not revealing much beyond this. Thus, on the basis of aforesaid evidence, it emerges that medical evidence has substantially dislodged the version of ocular evidence and practically if the injuries, which are reflecting in post mortem examination, are correspondingly viewed from the evidence of medical officer, a serious doubt is generated as to whether it is the appellant accused who has committed the crime with this very weapon or not and for that purpose, the Court has also further examined the documentary evidences. 24. Now if the panchnama of discovery of muddamal at Exh.27 on page 535 of paper book compilation is looked into, what has been found about knife is narrated on 537. The muddamal knife which is discovered is made in Germany with a lord mark. The total length of this knife is 12" out of which, 5½" is its handle and 6½" is its blade. Now this knife is stated to have been used by the appellant accused in the commission of crime. If the size of the knife and evidence of medical officer is looked into, it would indicate that the muddamal knife might not have been used in inflicting the blow and thus, a serious doubt is emerging in the case of the prosecution which would benefit in favour of the appellant accused. The Investigating Officer has substantially supported this discovery panchnama, nonetheless, there is no other weapon said to have been used in the commission of crime and therefore, on the basis of preponderance of probabilities, it is possible that this weapon might not have been used at all. With a view to clear the serious doubt which can go in favour of the accused, the court has further examined and cross checked as to how blood of the deceased is found on the

knife which has been discovered. For that purpose, the Court has examined the report of Serological Department placed on record at Exh.89 which reflects the blood stain of the accused on the knife but then, this incriminating circumstance, which is seriously to be proved by the prosecution, is to be put to the accused by the Court in his further statement recorded under section 313 of Cr.P.C. Now for that purpose, the Court has to look to the further statement of the appellant accused. On going through the further statement of the appellant accused which is reflecting on page 231 of paper book compilation in its entirety, it appears that this incriminating circumstance has not been put to the notice of the appellant accused and this very crucial aspect of the case is not attempted to be proved on account of such a callous approach. In the further statement, all details have to be put forth to be inquired into, but this very incriminating circumstance touching to the root of the case does not appear to have been placed before the accused and the explanation in turn of the accused is that he has been wrongly roped into on account of circumstance which has already been reflecting on record and therefore, this use of knife which has been discovered with the support of medical evidence appears to be completely ruling out the version of the prosecution that the same has been used on account of which, death of the deceased has occurred. Therefore, upon close scrutiny of the entire evidence on record, several circumstances are reflecting which have not been established by the prosecution raising a serious doubt in the case of the prosecution. 25. The Court, while dealing with the present appeal against an order of conviction, has looked, analysed and examined the entire evidence and has found that the manner in which the examination was to be undertaken by the court below does not appear to have been done. What is required to be proved by the prosecution and what is the degree of proof on which the case of the prosecution is to be analysed appear to have been lost sight of by the learned trial Judge. 26. As stated above, the record indicates that attempt has been made by the prosecution to heavily rely upon some of the testimonies of witnesses but then such ocular evidence has not generated any confidence in the case of the prosecution which can be said to have proved beyond reasonable doubt. So far as P.W.No.11-Shoeb Gafarbhai Patel examined at Exh.38 is concerned, he is not an eye witness. He has been informed by another witness Imranbhai Iqbal about the incident in question. He has admitted that he has given the name on the basis of previous animosity. In his cross-examination, he has categorically admitted that from his residence, he can reach the hospital within five minutes whereas this interested witness, who is brother of the deceased, has taken time of 30 minutes and reached the hospital at 11.45 p.m. though he was very much informed about the incident at 11.15 p.m., so much so that on reaching the hospital, he has chosen not to talk to the doctor nor even to Shoeb, who is claimed to be an eye witness. This conduct is not appearing to be a natural conduct as has been visualized even by the trial court and therefore, nothing much turns in favour of the prosecution from the testimony of this witness. Similarly, the prosecution has relied upon one another witness, who is a relative of the deceased named as Sohil Iqbalbhai, P.W.No.12, examined at Exh.46 and

who is also claiming to be an eye witness. However, close scrutiny of the evidence of this witness would indicate that not only he is an interested witness but has tried to submit as if he is an eye witness to the actual occurrence of incident. In fact, a close reading of this testimony would not convey that he could have seen the actual occurrence of incident. From his deposition, not only no motive is established but identity of weapon is also very doubtful at his instance. There was no adequate light available on the spot whereas undisputedly, the incident has occurred during night hours and this witness has claimed to have seen the knife at the spot. This witness has not generated any confidence since on one hand, he is submitting that police chowki of the nearby vicinity was closed which is not supported by any police version as pointed out earlier and on the other hand, he is deposing that when he reached at the hospital, for the first time he has conveyed that he has seen the actual incident. On going through the cross-examination of this witness reflecting on page 163 of paper book compilation as well, it is not possible to believe that he is an eye witness to the actual occurrence of incident. Although he is claiming to be an eye witnesses and had an opportunity, he did not inform the police when his statement was recorded on the next date. The presence of this witness at the place of actual incident on the contrary is ruled out by the evidence of other witnesses and therefore, credibility of testimony of this witness is highly doubtful. P.W.No.14-Hussainbhai and P.W.No.15- Riyas are not cogently substantiating the version of socalled eye witness Sohil Iqbalbhai, P.W.No.12, who again is an interested witness and whose testimony is not sounding any confidence and therefore, when his presence itself is in clout, to what extent his testimony is to be relied upon to convict a person is hardly an issue. Thus, on this solitary version of Sohil, it is not possible to hold the appellant accused guilty of actual commission of crime. At the best, this witness can be said to be a chance witness whose version unless corroborated by cogent material cannot be given undue weightage and therefore, when the prosecution case has not been strengthened adequately by this witness, it cannot be said that the case is established beyond reasonable doubt. Similar is the case with other ocular evidence in the form of examination of Imran @ Rahul Iqbal Banani, P.W.No.13 examined at Exh.51, who specifically admitted that he has not seen the person who inflicted the blow on the deceased though has stated that Ajim had come to the place of bonfire for lighting a cigarette. This witness cannot be believed to be connected so cogently to establish the guilt in the absence of any other corroboration. This witness Imran has conveyed that Samir Ada has shouted that Imran Gafarbhai was attacked. However, the prosecution has chosen not to examine Samir Ada, who shouted at the first instance. The version of this witness Imran itself is appearing to be contradictory. Similar is the case with other evidence of P.W.No.14-Hussainbhai and P.W.No.15-Riyas. Evidence of these witnesses including P.W.No.16-Mahmadhusen Sattarbhai are creating smoke against the testimony of Sohil, who is claiming to be an eye witness and therefore, the entire ocular evidence is not reflecting any clear connection of the appellant accused with the commission of crime. These witnesses are not harping upon even the weapon which is said to

have been used in the commission of crime and therefore, what is emerging from the record is that there is no link available on the record connecting the appellant accused so cogently with the commission of crime. 27. Apart from this position and analysis of ocular evidence, the material issue which is practically dismantling the case of the prosecution is the medical evidence. It is the settled position of law that if there is a conflict between medical evidence and ocular evidence, no doubt, preference is to be given to ocular evidence as medical evidence is merely an opinion. However, it is again the settled position of law that if the medical evidence is completely ruling out the case of the prosecution or creating a very serious doubt about the case of the prosecution, the same will have an adequate weightage and in that context, it has to be established whether the prosecution has proved the case of the prosecution beyond reasonable doubt or not. 28. In this context, if the evidence of Dr.S.D.Mandviya, P.W.No.1, is to be analysed, this medical officer has clearly admitted in his cross-examination that he has neither taken blood of the accused with consent nor has he mutated in papers any verification note. This medical officer has again admitted that this is the first instance in his entire career to take blood sample like this. This witness has categorically admitted that no preservative or anti-compyulent is administered with the blood taken of the accused for analysis. He has again specifically conveyed that after taking blood sample from the body, the blood would lose its basic character within no time unless some preservative or anti-compyulent is added. This would clearly suggest that there is a complete lacuna in taking the blood sample of the accused and on this clear opinion of medical officer, a serious doubt is generating on the report of FSL who identified the blood group of the accused. 29. Yet another medical officer is completely creating a serious doubt in the case of the prosecution. This medical witness, Dr. Rohit Popatbhai Nakum, P.W.No.2, has clearly pointed out that with the measurement of sharp cutting wound, it cannot be said this muddamal knife which has been discovered can cause injuries found on the body of the deceased and this medical officer has clearly ousted the version of the prosecution that the appellant accused has used the knife which has been recovered in inflicting the blow. The detailed analysis of this medical officer's version is clearly raising a serious suspicion. The injuries which are reflecting are not possible to be caused with the muddamal knife and therefore, the testimony of this medical officer is clearly ousting the case of the prosecution that the appellant accused has used this weapon in causing the injuries on the deceased and therefore, looking to the measurement of knife in corelation with the version of this medical officer, it clearly establishes that this weapon has not been utilised in causing any injury. This raises a serious doubt in the case of the prosecution. 30. In addition to the above circumstance, the blood which has been found on the knife as stated in serological report is another incriminating circumstance which was otherwise required to be put to the accused but same has not been put to the accused which is clearly visible from the further statement recorded under section 313 of Cr.P.C. and therefore, this incriminating circumstance apart from the earlier circumstance has also not been put to the accused which is a serious lacuna in

the case of the prosecution. Again, the prosecution has not established or clarified this circumstance even by reexamination of the doctor. No such attempt is visible from the entire record of the case and therefore, this suspicious circumstance going to the root of the matter appears to have completely destroyed the case of the prosecution that the appellant accused has inflicted blow with this weapon which has ultimately caused the death and therefore, when this circumstance is not generating confidence, the Court is of the opinion that this strong factor must lead in favour of the accused and accused deserves to be granted benefit of doubt. 31. Further, on an analysis of other evidence on record namely, post mortem note, injuries reflecting as per column No.17 of the post mortem note are clearly corroborating with other medical evidence and the edges are shown to be very sharp. There appears to be tapering on both the ends and the depth is about 8 inches which is visible even after sternum being cut off and this is not possible looking to the size of the weapon. Therefore, it appears that this entire medical evidence is substantially destroying the case of the prosecution and therefore, on the basis of weak piece of ocular evidence as referred to above, the Court has to consider whether this medical evidence, which has analysed in detail each circumstance, has to be given a preference as a serious doubt and suspicion is being raised in the case of the prosecution. 32. The panchas have turned hostile and if we see the discovery panchnama as well as the panchnama of scene of offence, the discovery does not appear to have been established as required under section 27 of the Indian Evidence Act and therefore, the discovery itself is also in clout as is reflecting from the record. Therefore, considering the aforesaid situation emerging from the record and close scrutiny of evidence, it is clearly indicating that the prosecution has not established the case beyond reasonable doubt and some of the incriminating circumstances are not put to the notice of the accused nor established by the prosecution and therefore, the background of facts is necessitating the Court to believe the stand taken by learned advocate representing the appellant accused. 33. From the aforesaid analysis of evidence even independent from the context of analysis of the trial court, we are of the considered opinion that the conclusion and the finding arrived at by the trial court cannot be said to be in consonance with the material on record. On the basis of such kind of weak piece of evidence and the conflict existing between ocular evidence and specific medical evidence, the conclusion arrived at by the trial court can be said to be perverse which has resulted into miscarriage of justice. The appreciation and the consideration of the trial court is not such which can be said to be just and proper. On the contrary, serious lacuna which has been emerging from the evidence is establishing that illegality is visible from the order of the trial court in holding the appellant accused guilty of offence and to visit the penalty. Accordingly, impugned judgment and order deserves to be set aside and the background of facts is such that we have to affirm the stand taken by the learned advocate for the appellant accused. 34. Now this Court is duty bound to deal with the decisions which have been cited by the respective sides. Since we are clear on the basis of facts, we may deal with and summarise in a brief manner as each case is dependent upon

its own individual background. It is a settled position of law that slight change in the fact would make a world of difference in applying the principle laid down in a decision and therefore, keeping this proposition in mind, the decisions cited are hereinafter considered. 35. Mr. A.D.Shah, learned advocate representing the appellant accused, has pointed out some of the observations made by the Hon"ble Supreme Court in Smt.Nagindra Bala Mitra and another v. Sunil Chandra Roy and another reported in AIR 1960 Supreme Court 706 regarding medical witness who has performed post mortem examination. Relevant portions appearing in paragraph No.43 of the said decision is reproduced hereunder: "43. I do not think that the direction is either correct or complete. It is incorrect because a medical witness who performs a post-mortem examination is a witness of fact, though he also gives an opinion on certain aspects of the case. Further, the value of a medical witness is not merely a check upon the testimony of eye-witnesses; it is also independent testimony, because it may establish certain facts, quite apart from the other oral evidence. If a person is shot at close range, the marks of tatooing found by the medical witness would show that the range was small, quite apart from any other opinion of his. Similarly fractures of bones, depth and size of the wounds would show the nature of the weapon used. It is wrong to say that it is only opinion evidence; it is often direct evidence of the facts found upon the victim"s person. ... " 35.1 Mr. Shah, by referring to the observations made in Sarwan Singh and Others v. State of Punjab reported in AIR 1976 Supreme Court 2304, has contended that looking to the principle laid down therein, benefit must go in favour of the accused. Relevant extracts contained in paragraph Nos.13 and 20 are reproduced hereinafter: "13. The onus of proving the prosecution case rests entirely on the prosecution and it follows as a logical corollary that the prosecution has complete liberty to choose its witnesses if it is to prove its case. The Court cannot compel the prosecution to examine one witness or the other as its witness. At the most, if a material witness is withheld, the Court may draw an adverse inference against the prosecution. But it is not the law that the omission to examine any and every witness even on minor points would undoubtedly lead to rejection of the prosecution case or drawing of an adverse inference against the prosecution. xxxx xxxx xxxx 20. Before concluding this judgment, we must refer to the inconsistency between the prosecution evidence and the medical evidence on which great reliance has been placed by the accused. Dr. Prem Nath P. W. 1 has categorically stated in his cross-examination that so far as the punctured wounds are concerned, they could not have been caused by ghop which was shown to him. In order to get out of this evidence, counsel for the prosecution suggested that the ghop recovered at the instance of the accused may not have been used by them, but some other ghop may have been used in assaulting the deceased. Normally one villager, in absence of special circumstances, does not possess more than one lethal weapon. Secondly, there is practically no re-examination of the Doctor to explain what type of ghop could have caused the injuries on the deceased. In view of the inconsistency between the direct and the medical evidence, participation of those accused persons who are said to have

caused punctured wounds with ghop becomes doubtful and they were, therefore, rightly given the benefit of doubt. The case of the appellant Mukhtiar Singh also falls within this category, because a ghop was recovered from his person and he is said to have given a ghop injury which according to the Doctor could not have been caused by the ghop shown to the Doctor and recovered from the appellant Mukhtiar Singh. On this ground alone, Mukhtiar Singh deserves the benefit of doubt and his acquittal by the Additional Sessions Judge should have been maintained by the High Court. Moreover, being a brother of the accused Sarwan Singh, the possibility that he may have been falsely roped in cannot be excluded." A bare look at the medical evidence prevailing on record of the case on hand in light of the aforesaid two decisions would reflect that benefit must lean in favour of the appellant accused.

35.2 Mr. Shah has also relied upon another decision of the Hon"ble Supreme Court in the case of Lallu Manjhi and another v. State of Jharkhand reported in (2003)2 Supreme Court Cases 401 and contended that oral testimony can be adjudged into three categories namely, (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. By pointing out this decision, Mr. Shah has rightly contended that in the third category, the Court requires corroboration to rely upon the testimony of such categorised version. In the case on hand, looking to the testimony of medical officer coupled with other materials on record, ocular evidence is hardly getting any corroboration. There appears to be a clear conflict between the two and therefore, when such a situation has arisen, in the absence of any cogent corroboration, the testimony of single witness is not possible to be relied upon to inflict the penalty. Here, P.W.No.12-Sohil appears to be a chance witness and not an eye witness as his presence itself is ruled out by other two witnesses as stated above and therefore, when other materials governing the field are not corroborating the testimony of this witness, it is not possible rather safe to rely upon said testimony to convict a person. This is more particularly in view of the fact that this very decision has again propounded that it is obligatory on the part of the trial court to examine the accused for the purpose of enabling him personally to explain any circumstance appearing in the evidence and if no such opportunity is given, such incriminating piece of evidence cannot be relied upon for the purpose of conviction. The major incriminating circumstance in the case on hand is that there is a serious doubt about utilising the knife discovered as a muddamal. Now to cross check, the left out incriminating circumstance is to inquire as to how blood stain of the deceased is found on the knife and that is the incriminating circumstance which ought to have been put to the accused by the trial court. If the further statement of the appellant accused recorded under section 313 of Cr.P.C. is verified, no such question appears to have been put to the appellant clearly creating a suspicious circumstance in favour of the appellant accused. Thus, the aforesaid decision has a specific role to play in the ultimate conclusion in this judgment. Hence, some of the relevant extracts of the said decision made in paragraphs 10, 14, 15 and 16 of the said decision are reproduced hereinafter: "10. The Law of Evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with

the testimony of a single witness, the Court may classify the oral testimony into three categories, namely (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon testimony of a single witness. (See *Vadivelu Thevar etc. v. State of Madras*, AIR 1957 SC 614). xxxx xxxx xxxx 14. Incidentally, it may also be stated that the manner in which the Trial Court has recorded the statements of the accused persons u/S. 313, Cr. P.C. is far from satisfactory. The entire prosecution case running into very many details has been summed up into just 5 questions asked to each of the accused persons. It is obligatory on the part of the trial Court to examine the accused for the purpose of enabling the accused personally to explain any circumstances appearing in evidence against him. If such opportunity is not afforded, the incriminating pieces of evidence available in the prosecution evidence cannot be relied on for the purpose of recording conviction of the accused persons. 15. All these aspects of the case, specially the infirmities in the prosecution evidence and the investigation, have not received the attention of the trial Court as also the High Court. We are very clear in our mind that on the state of evidence available the accused persons could not have been held guilty of the offences charged. 16. The appeal is allowed. The judgment of the trial Court as also of the High Court are set aside. The accused-appellants are acquitted of the charges framed against them. The appellants shall be released forthwith if not required to be detained in connection with any other offence." 35.3 The Court has also evaluated the case of the prosecution from another angle about the discovery issue. Now the discovery panchnama which has been drawn has to be established. When panchas are not supporting the discovery then, Investigating Officer has to prove how and in what manner such discovery is to be established. Such issue is well considered by the two decisions of this Court in the cases of *Nagin Soma v. State* reported in G.L.R. 1966 0 306 and *Jagdishsinh @ Munno Ranjitsinh @ Ranubha Jadeja v. State of Gujarat* reported in 2016(3) G.L.H. 167. After considering the detailed case law on this issue pertaining to discovery of weapon and after examining the provisions contained under the Indian Evidence Act, this Court has held that exact statement attributed to the accused be brought on record and for this purpose, the panch witness and Investigating Officer are obliged to depose in their evidence the exact statement and not merely by showing that discovery of material object be drawn as the accused was willing to point out the place of concealment. After considering several decisions of the Hon'ble Apex Court, this Court has analysed the issue of discovery, which appears to be clearly attracting in the present case looking to the manner and method in which the discovery of knife is secured by the Investigating Officer. The version of Investigating Officer is not as per the requirement of law which has been enunciated in the aforesaid decision and therefore also, this is clearly establishing a serious doubt in the case of the prosecution and thereby it is safe to hold that the prosecution has not

proved the case beyond reasonable doubt. The relevant extracts from paragraph No.2 of the decision rendered in Nagin Soma (supra) are reproduced herein below: "2. In a case of Prabhoo v. State of Uttar Pradesh, AIR 1963 supreme Court 1113, such statements relating to the discovery of an axe and the shirt were held inadmissible in evidence. The observations in that respect made by the Supreme Court run as under:- Incriminating statements made to a police officer are hit by sections 25 and 26 of the Evidence Act. The statement that the axe was one with which the murder had been committed was not a statement which led to any discovery within the meaning of Section 27 of the Evidence Act. Nor is the alleged statement of the appellant that the blood stained shirt and dhoti belonged to him a statement which led to any discovery within the meaning of Section 27. It is fallacious to treat the "fact discovered" within the Section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. It is therefore wrong to admit in evidence the alleged statement of the appellant that the axe had been used to commit murder or the statement that the blood stained shirt and dhoti were his. In fact that position in law has been well settled and we feel a little surprised that such statements were allowed to remain unbracketed from the other part of the recitals in the panchnamas." The relevant paragraph No.35 of the decision rendered in Jagdishsinh @ Munno Ranjitsinh @ Ranubha Jadeja(supra) is also reproduced herein below: "35. Emphasis laid by the learned Additional Public Prosecutor Ms. Nisha Thakore, on the panchnamas, namely the recovery panchnama and the discovery panchnama particularly the latter having been proved through the deposition of the Investigating Officer, cannot be accepted. The contents of the panchnama cannot be read as substantive piece of evidence. The evidence as to discovery may not be rejected, on the ground that witnesses have not supported the panchnama, however the evidence of the Investigating Officer who recovered the material objects has to be convincing. The requirement of law needs to be fulfilled before accepting the discovery and that is by proving the contents of the panchnama. The Investigating Officer in his deposition is obliged in law to prove the contents of the panchnama and it is only if the Investigating Officer has successfully proved the contents of the discovery panchnama in accordance with law then in that case the prosecution may be justified in relying on such evidence. It is well settled that before relying on the evidence of the discovery under section 27 of the Indian Evidence Act, 1872, the exact statement attributed to the accused, as statement made by him, be brought on record and, for this purpose, the panch witness and the Investigating Officer are obliged to depose in their evidence the exact statement and not by merely showing that the discovery of the material objects was drawn as the accused was willing to point out the place of concealment. It will be relevant to reproduce the law as enunciated by the Supreme Court in context of section 27 of the Indian Evidence Act, 1872. In the case of State of Maharashtra v. Damu S/o Gopinath Shinde and others, the Supreme Court has held thus: "35. The basic idea embedded in section 27 of the Evidence Act is the doctrine of confirmation

by subsequent events. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature, but if it results in discovery of a fact it becomes a reliable information. Hence the legislature permitted such information to be used as evidence by restricting the admissible portion to the minimum. It is now well settled that recovery of an object is not discovery of a fact as envisaged in the section. The decision of the Privy Council in *Pulukuri Kottaya v. Emperor* is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect." In the case of *Bodhraj alias Bodha and others v. State of Jammu and Kashmir*, (2002) 8 SCC 45, the Supreme Court has observed as under: "18. Emphasis was laid as a circumstance on recovery of weapon of assault, on the basis of information given by the accused while in custody. The question is whether the evidence relating to recovery is sufficient to fasten guilt on the accused. Section 27 of the Indian Evidence Act, 1872 (in short "the Evidence Act") is by way of proviso to Sections 25 to 26 and a statement even by way of confession made in police custody which distinctly relates to the fact discovered is admissible in evidence against the accused. This position was succinctly dealt with by this Court in *Delhi Admn. v. Bal Krishan*. AIR (1972) SC 3 and *Md. Inayatullah v. State of Maharashtra*. AIR (1976) SC 483. The words "so much of such information" as relates distinctly to the fact thereby discovered, are very important and the whole force of the section concentrates on them. Clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. The ban as imposed by the preceding sections was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. If all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. The object of the provision i.e. Section 27 was to provide for the admission of evidence which but for the existence of the section could not in consequence of the preceding sections, be admitted in evidence. It would appear that under Section 27 as it stands in order to render the evidence leading to discovery of any fact admissible, the information must come from any accused in custody of the police. The requirement of police custody is productive of extremely anomalous results and may lead to the exclusion of much valuable evidence in cases where a person, who is subsequently taken into custody and becomes an accused, after committing a crime meets a police officer or voluntarily goes to him or to the police station and states the circumstances of the crime which lead to the discovery of the dead body, weapon or any other material fact, in consequence of the information thus received from him. This

information which is otherwise admissible becomes inadmissible under Section 27 if the information did come from a person not in the custody of a police officer or did come from a person not in the custody of a police officer. The statement which is admissible under Section 27 is the one which is the information leading to discovery. Thus, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. In other words, the exact information given by the accused while in custody which led to recovery of the articles has to be proved. It is, therefore, necessary for the benefit of both the accused and prosecution that information given should be recorded and proved and if not so recorded, the exact information must be adduced through evidence. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any Information obtained from a prisoner, such a discovery is a guarantee that the Information supplied by the prisoner is true. The information might be confessional or noninculpatory in nature but if it results in discovery of a fact, it becomes a reliable information. It is now well settled that recovery of an object is not discovery of fact envisaged in the section. Decision of the Privy Council in Pulukuri Kotayya v. Emperor AIR (1947) PC 67, is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect. [see State of Maharashtra v. Damu Gopinath Shinde and Ors, (2000) Cri.L.J 2301. No doubt, the information permitted to be admitted in evidence is confined to that portion of the information which "distinctly relates to the fact thereby discovered.""] But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability. Mere statement that the accused led the police and the witnesses to the place where he had concealed the articles is not indicative of the information given." In the case on hand, the recovery panchnama at best can prove the fact that the mobile phone was recovered from Satyendrasinh. The Discovery Panchnama has not been proved by the Investigating Officer as he has merely shown that the panchnama is drawn. In absence of any other evidence, substantive in nature, reliance on such evidence cannot implicate the accused. As held by this Court, in the case of Patel Manabhai Mavjibhai v. State of Gujarat (supra), mere recovery of an object at the instance of the accused is a relevant fact only when it is established by other evidence and that the object recovered is connected with the accused and the offence with which he is charged. To put it plainly, the connection between the object recovered, the accused and the offence with which the accused is charged must always be established by "evidence aliunde". In the facts of the present case no substantive evidence has come on record and merely because the mobile phone is recovered from Satyendrasinh such recovery cannot be connected to charge the accused of an offence under sections 302 and 201, IPC." 35.4 Other decisions, which have been cited by learned advocate, Mr. A.D.Shah, have some

bearing on the present case. They are the cases of Mahavir Singh v. State of Madhya Pradesh reported in (2016)10 Supreme Court Cases 220 and Harbeer Singh v. Sheeshpal & Ors. reported in 2016 SCC OnLine SC 1164. Those decisions are found to be of assistance to this Court in the ultimate outcome of the present appeal. The proposition of law which has been laid down in the aforesaid decisions is about the scope of jurisdiction of the appellate court. It has also been propounded as to what would be the situation when there is a conflict between medical evidence and ocular evidence. The Court has gone into those decisions. Relevant extracts contained in paragraph Nos.12 and 13 of the decision rendered in Mahavir Singh (supra) are worth to be quoted hereinafter: "12. In the criminal jurisprudence, an accused is presumed to be innocent till he is convicted by a competent Court after a full-fledged trial, and once the Trial Court by cogent reasoning acquits the accused, then the reaffirmation of his innocence places more burden on the appellate Court while dealing with the appeal. No doubt, it is settled law that there are no fetters on the power of the appellate Court to review, re appreciate and reconsider the evidence both on facts and law upon which the order of acquittal is passed. But the court has to be very cautious in interfering with an appeal unless there are compelling and substantial grounds to interfere with the order of acquittal. The appellate Court while passing an order has to give clear reasoning for such a conclusion. 13. It is no doubt true that there cannot be any strait jacket formula as to under what circumstances appellate Court can interfere with the order of acquittal, but the same depends on facts and circumstances of each case. In the case on hand, we have to examine the rationale behind the conclusion of the High Court in convicting the accused and the compelling reasons to deviate from the order of acquittal passed by the Trial Court." Other portions of this decision reflecting in paragraph Nos.18, 19 and 22 are also taken as an assistance in the present judgment. "18. The High Court has attached a lot of weight to the evidence of the said Madho Singh (PW 9) as he is an independent witness. On perusal of the record, it appears that the said person already had deposed for the victim family on a number of previous occasions, that too against the same accused. This being the fact, it is important to analyse the jurisprudence on interested witness. It is a settled principle that the evidence of interested witness needs to be scrutinized with utmost care. It can only be relied upon if the evidence has a ring of truth to it, is cogent, credible and trustworthy. Here we may refer to chance witness also. It is to be seen that although the evidence of a chance witness is acceptable in India, yet the chance witness has to reasonably explain the presence at that particular point more so when his deposition is being assailed as being tainted. 19. A contradicted testimony of an interested witness cannot be usually treated as conclusive. The said Madho Singh (PW 9) has admitted that he has been a witness in another case against the accused for the deceased. Here it is to be seen that the said Madho Singh (PW 9) has been acting as a pocket witness for the family. Further, the credibility of this independent witness can be challenged on the fact that the commotion was only heard by the said Madho Singh (PW 9) whereas the rest of the members of the locality did not come for

help. As Madho Singh (PW 9) is a chance witness as well as an interested witness herein, causes suspicion and does not inspire confidence. This admission by Madho Singh (PW 9) not only forces us to doubt the veracity of his own deposition but also has created doubts on the version of Gambhir Singh (PW 7). xxxx xxxx 22. The position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallized to the effect that though the ocular testimony of a witness has greater evidentiary value vis-a-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved [See : Abdul Sayeed v. State of M.P., (2010) 10 SCC 259]" Considering the aforesaid observations made by the Hon"ble Apex Court in Mahavir Singh (supra), we are of the considered opinion that aforesaid proposition is also attracting in the background of present case and accordingly, relying upon this decision as well, we have undertaken the exercise of re-assessment of evidence as is required and accordingly, we have found a suspicious circumstance in the present case which has not been established by the prosecution beyond reasonable doubt 35.5 In the case of Harbeer Singh (supra) as well, the Hon"ble Apex Court has dealt with an issue of interested witness and the evaluation of the testimony of such witnesses coupled with an issue as to under which circumstance, benefit of doubt is also to be considered. Relevant extracts contained in paragraph Nos.7, 11, 20, 23 and 25 are reproduced hereinafter: "7. However, the High Court gave the benefit of doubt to the Respondents and acquitted them on the ground that the prosecution was not able to prove its case beyond all reasonable doubt since the eye-witnesses were interested in the complainant and hence unreliable, while most other prosecution witnesses were chance witnesses. The evidence of the eyewitnesses both as to the fact of the alleged conspiracy and the murder of the deceased, did not inspire confidence; there were inconsistencies and improvements in the deposition of the prosecution witnesses made over their statements recorded under Section 161 Cr.P.C. Further, there was unexplained delay in recording the evidence of certain prosecution witnesses as well as many important and basic lapses in investigation that made the prosecution case suspicious. xxxx xxxx 11. It is a cardinal principle of criminal jurisprudence that the guilt of the accused must be proved beyond all reasonable doubt. The burden of proving its case beyond all reasonable doubt lies on the prosecution and it never shifts. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted.[Vide Kali Ram v. State of Himachal Pradesh, (1973) 2 SCC 808; State of Rajasthan v. Raja Ram, (2003) 8 SCC 180; Chandrappa & Ors. v. State of Karnataka, (2007) 4 SCC 415; Upendra Pradhan v. State of Orissa, (2015) 11 SCC 124 and Golbar Hussain & Ors. v. State of Assam and Anr., (2015) 11 SCC 242]. xxxx xxxx 20. However, we

do not wish to emphasise that the corroboration by independent witnesses is an indispensable rule in cases where the prosecution is primarily based on the evidence of seemingly interested witnesses. It is well settled that it is the quality of the evidence and not the quantity of the evidence which is required to be judged by the Court to place credence on the statement. xxxx xxxx xxxx 23. The defining attributes of a "chance witness" were explained by Mahajan, J., in the case of *Puran v. The State of Punjab*, AIR 1953 SC 459. It was held that such witnesses have the habit of appearing suddenly on the scene when something is happening and then disappearing after noticing the occurrence about which they are called later on to give evidence. xxxx xxxx xxxx 25. In the light of the above and other reasons recorded by the High Court, we hold that the evidence of the eye witnesses is not truthful, reliable and trustworthy and hence cannot form the basis of conviction. Their presence at the scene of occurrence at the time of the incident is highly unnatural as also their ability to individually and correctly identify each of the accused from a considerable distance, especially when it was dark at the alleged place of occurrence, is itself suspect." On an overall reading of the case law cited by learned advocate for the appellant, we found that the same are amenable to substantiate the contentions raised by the appellant. 36. As the Court is duty bound to consider the decisions which have been cited by the learned Additional Public Prosecutor, Mr. L.R.Poojari, we have also carefully considered the propositions of law laid down in those decisions. 36.1 Mr. Poojari, learned APP, has relied on the case of *Chacko alias Aniyam Kunju and others v. State of Kerala* reported in AIR 2004 Supreme Court 2688 in which the Hon'ble Apex Court has dealt with an issue as to how single witness is to be relied upon. On a comparison of the relevant paragraph relied upon by learned APP with the circumstances prevailing on record of the case on hand, as discussed above, it appears that the truthfulness contained in the testimony of the oral evidence which has been led is in serious clout on account of series of circumstances narrated herein above. However, without reiterating those circumstances, we are of the opinion that the proposition of law laid down in the said decision is not possible to be applied as a straight-jacket formula. 36.2 Another decision which has been relied upon by learned APP is the case of *Iqbal Moosa Patel v. State of Gujarat* reported in (2011)2 Supreme Court Cases 198. It may be noted that the said case was pertaining to Narcotic Drugs and Psychotropic Substances Act, 1985 wherein the Hon'ble Apex Court was dealing with an issue in the context of strengthened provisions contained under the Act and therefore, facts of said decision are quite distinct from that of the case on hand and the concept of presumption of innocence has to be viewed in the context of the crime which has been committed. The Court while dealing with a case with respect to narcotic substance had an opportunity to cull out the principle and here in the case on hand, we have seen that there is a serious conflict between medical evidence and oral evidence. Therefore, background of fact is altogether different from that of aforesaid case and therefore, with respectful agreement with the proposition, we are of the view that law laid down therein is not possible to be applied here and therefore, we are unable to accept the said submission made by learned APP.

36.3 Learned APP, Mr.Poojari, has further relied upon another decision to strengthen his submission in the case of Vahaji Ravaji Thakore and another v. State of Gujarat reported in 2003(3) G.L.H. 283 on the issue of discovery panchnama. Referring to paragraph No.35 of the said decision, an attempt is made by learned APP to indicate that the discovery has been proved but we have considered very recent decision of a Coordinate Bench which is again based upon several decisions of the Hon"ble Apex Court and therefore, we are of the view that we must go by the latest pronouncement of this Court. No doubt, the judgment is definitely laying down the proposition but facts are such, as stated earlier, that where even independent witnesses are not supporting the case of the prosecution so cogently whereupon we rely on the testimony of Investigating Officer simply to establish the discovery as required under section 27 of the Indian Evidence Act and therefore, this judgment and assistance thereof is of no avail to learned APP. 36.4 Two other decisions are also attempted to be relied upon by learned APP namely, the case of Kathi Bharat Vajsur and Anr. v. State of Gujarat reported in AIR 2012 Supreme Court 2163 and the case of Gura Singh v. State of Rajasthan reported in AIR 2001 Supreme Court 330 on the issue of testimony of hostile witnesses as well as grant of benefit of doubt when the muddamal articles have been found with bloodstains. Mr. Poojari has drawn our attention to the relevant paragraph Nos.24 and 25 of the decision in Kathi Bharat Vajsur(supra) Nos.20 and 23 of the decision in Gura Singh (supra) to indicate that the blood has been found on the knife which has been discovered and therefore, no benefit is to be granted to the accused. We are afraid that if this principle is applied as a straight-jacket formula, then the effect of the evidence emerging in the case on hand will become redundant. In fact, the material available in the present case on hand has clearly ousted the version of the prosecution as not only the medical officer has, in no uncertain terms, opined that the muddamal which has been recovered/discovered is not used in inflicting blow but at the same time the incriminating circumstance of finding blood stain on the knife has not been put to the accused in the further statement recorded under section 313 of Cr.P.C. and therefore, the background of present facts on hand is different from that of the aforesaid two decisions and therefore, those decisions appear to be of no assistance to learned APP. 36.5 Another decision which is tried to be relied upon by learned APP is the case of Darbara Singh v. State of Punjab reported in AIR 2013 Supreme Court 840. The principle which has been laid down therein is how to deal with a situation when there is inconsistency between ocular evidence and medical evidence. The head note of the said decision itself is amply clear that unless completely ruled out by medical evidence, ocular evidence has primacy. Here, as already observed above, since the medical evidence has completely ruled out the possibility of use of the weapon apart from the discovery having not been proved beyond reasonable doubt as per the requirement of the Statute, the same has distorted the effect of ocular evidence and therefore, this decision is of assistance to the side of the appellant rather than the prosecution and therefore, considering the aforesaid situation, we are of the view that this decision is of no avail to the learned APP.

36.6 Learned APP has further tried to take assistance from yet another decision of this Court in the case of *Kavas Jahangir Mamabuwala v. State of Gujarat* reported in 1999(2) G.L.H. 429. However, he has not put much harp on the said decision and therefore, since we have considered all the recent pronouncements on the issue in controversy, we are of the considered opinion that the evidence and the circumstances are sufficient enough to suggest that a serious doubt is emerging from the record which benefit must lean in favour of the appellant accused and accordingly, in the background of such suspicious circumstances, we are unable to affirm the view of the trial court whereby an order of conviction is passed and therefore, we deem it proper in our considered opinion to set aside judgment and order of conviction and to allow the appeal filed by the appellant accused. 37. We have carefully considered and compared medical evidence with oral evidence as well and by applying the rule of careful scrutiny of interested witnesses, we are of the considered opinion that the case put up by the prosecution is based upon a very weak piece of evidence upon which, no ultimate conclusion of guilt of the accused is possible to be established beyond reasonable doubt and accordingly, the conviction based upon such piece of evidence appears to be unsustainable. 38. Upon ultimate analysis of evidence as a whole, we find that the chain of circumstance is not getting so complete which may permit us to come to the conclusion about the guilt of the accused for offences alleged and therefore, in the absence of any such chain being completed to establish the guilt, it is not possible to hold the appellant guilty. Accordingly, present Criminal Appeal deserves to be allowed and by allowing the same, the impugned judgment and order dated 23.1.2015 passed in Sessions Case No. 37 of 2012 by the learned Additional Sessions Judge, Jamnagar is hereby quashed and set aside and the appellant accused is ordered to be set free forthwith, if not required in any other offences. Fine, if paid, be refunded back and the Record and Proceedings are ordered to be sent back to the concerned trial Court forthwith. Appeal Allowed.