

(1998) 05 GUJ CK 0019
In the Gujarat High Court
Case No : Criminal Appeal No. 693 of 1991

Asifkhan Haiderkhan Pathan and Others	APPELLANT
Vs	
State of Gujarat	RESPONDENT

Date of Decision : 02-05-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 27, 32
Penal Code, 1860 (IPC) — Section 114, 148, 149, 300, 302
Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 3

Citation : (1998) CriLJ 4458

Hon'ble Judges : S.M. Soni, J;J.R. Vora, J

Bench : Division Bench

Advocate : Pitamber Abichandani, for Vivek Barot, for the Appellant; S.R. Divetia, APP, for the Respondent

Judgement

S.M. Soni, J.—Appellants original accused in Sessions Case No. 21 /89 have assailed the judgment and order dated 7th August, 1991, passed by the learned Sessions Judge, Nadiad holding them guilty of offence punishable u/s 302 read with Section 114 of Indian Penal Code and sentenced to rigorous imprisonment for life and a fine of Rs. 750, in default RI for two months to each of them.

2. Facts of the prosecution case are as under:

One Gopaldas Tulsidas Raval (now deceased) was an ordinary resident of Ravalia vas, Khambhat, District Kheda. Accused are also ordinary residents of that town. Gopaldas had a friend Harshadkurnar Dasradhbhai Raval. One Trikambhai Pujabhai Raval had a tea-stall near Ravalia Pith bazar, Cambay. Two to three days prior to 2nd July, 1989, accused Asif Haiderkhan Pathan (appellant No. 1 herein) and few of his friends had gone to take tea at the stall of Trikambhai. Tea was ordered and the amount for the same remained due. Thereafter on 1st July, 1989, accused No. 1 again came in company of one Rafiq Alu and some others at the tea-stall of Trikambhai for tea. After having taken tea, when Trikambhai

demanded money for the tea and also for the previous dues, accused Asif and his associates became angry and went away without making payment. On the next day morning i.e. 2nd July, 1989, when Trikambhai opened his stall, he found two of his earthen water pots broken. At that time, Gopaldas Tulsidas Raval had come there to take tea and he was informed that it may be that Asif Pathan and his friends might have broken the said pots. By that time, Asif has also come there with his friends for tea and they were reprimanded by Gopaldas and Trikambhai saying that why damage is caused by breaking earthen water pots. This caused verbal exchange and Gopaldas gave a fist blow to Asifkhan and his friends. They were, therefore, annoyed and in fact on hurling abuses went away. At about 10.30 night on that very day, Gopal and his friend Harshadkumar (complainant) had gone to chew pan at the pan shop of one Damodar Bhagwandas. They had ordered for pan and Damodar was just preparing the same, Gopalbhai and Harshadkumar heard shouting "Kaunhai, tumari benko" (who is there, your sister). Both of them, therefore, looked back and ? saw two to three persons" rushing towards them. From amongst them, they identified accused Asifkhan Pathan. Other two persons were not known by name. Asifkhan caught, hold of Gopaldas from collar and told him "Tu dada thayi gayo chhe" (you have become bully). By this time, from amongst other persons who accompanied him, one who had put on safari caught Gopaldas and both of them tried to drag him. Third person also helped them in dragging away Gopaldas. Complainant, Harshadkumar, intervened to rescue Gopaldas. By that time, accused Asifkhan took out from his pocket a razor with saffron handle. Other person who had put on safari of almond colour took out knife with brass handle. Both of them inflicted blows indiscriminately on the person of Gopaldas while the third person had caught hold of Gopaldas. They were trying to drag him towards Mehboob hotel. Complainant Harshadkumar got feared and fell down and shouted "Gopal is assaulted" and ran towards his locality. By that time, both the persons had caused number of injuries to Gopaldas who fell there in bleeding condition. All the three then ran away. By that time, persons from Ravalia vas locality reached there and one Kantibhai Jadavji Raval removed Gopaldas to the hospital in a rickshaw. It appears that news spread and the police reached the place of incident. Harshadkumar, therefore, gave complaint and the offence was registered against the appellants as accused. Appellants will be referred to respective accused hereinafter.

3. Laxmansinh, PSI (PW 13) recorded the complaint through his writer Narpatsinh at the scene of offence and sent it to Cambay City Police Station for registration and the same is registered at 23.30 hours on that very day i.e. 2nd July, 1989. He then started investigation and further investigation was carried on by Devsing Lajorsing Solanki, PW 16 from 3rd July, 1989. On completion of the investigation, he submitted charge-sheet against the accused in the Court of Judicial Magistrate, First Class, Cambay. Learned Judicial Magistrate, First Class, in his turn committed the case to the Court of Session of District Kheda at Nadiad.

4. It appears that immediately after this incident, one other incident of riot took place which the Police appears to have investigated in continuation of this incident or in succession to the present incident. When the charge-sheet was submitted in the Court of Judicial Magistrate, First Class, at Cambay who in his turn had committed the same to the Court of Session of District at Nadiad, the learned Sessions Judge after hearing the advocates for the accused and the prosecution framed charge against as many as 11 persons. Charge against them was u/s 302 read with Section 114 of the Indian Penal Code and under Sections 148 and 149 of the Indian Penal Code. They were also charged u/s 3 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA for short). Accused being aggrieved by the said charge appealed before the Supreme Court as the order was passed by the Designate Court. The Hon''ble Supreme Court set aside the impugned order to frame charge by the Designated Court and remitted the case back to the Designated Court to separate the two cases and reframe charges if already framed after reconsidering the application of Section 3 of TADA afresh without being influenced by the impugned order. In the said order, the Hon''ble Supreme Court has found that the incident involving accused Nos. 4 to 11 was distinct and different from the incident involving accused Nos. 1 to 3. In view of the said order of the Hon''ble Supreme Court, separate charge against these accused was framed by the learned Joint'' District Judge, Nadiad on 10th January, 1991 u/s 302 read with Section 114 of the Indian Penal Code. Accused pleaded not guilty and claimed to be tried. The prosecution, therefore led necessary evidence to prove the charge levelled against the accused. On completion of the same, statement of each of the accused u/s 313 of the Code of Criminal Procedure, 1973 (Code for short) was recorded. From the cross-examination of the, prosecution witnesses and further statements of the accused, it appears that the defence of the accused is of total denial. They have declined to examine any witness in defence. The learned Sessions Judge after hearing the learned Prosecutor and the learned advocate for the defence has held the accused guilty of the offence charged and awarded sentence referred to above. This judgment and order is assailed in this appeal.

5. Learned advocate Mr. Abichandani for the appellants contends that the complaint, the basis of initiation of the prosecution, is not believable inasmuch as the same has been given after either deliberations or discussions with the persons of the locality and much later in time than it is alleged in the prosecution and it is preponed in to make it acceptable. Mr. Abichandani contended that if the basis of the prosecution i.e. complaint, if not reliable, names of the accused do not stand disclosed and the whole prosecution must fail. Mr. Abichandani further contended that the prosecution has produced dying declaration of the deceased which neither discloses the names of the accused nor ascribes or confirms the injuries on the deceased as referred by the complainant in his complaint. Mr. Abichandani contended that when a dying declaration is produced by the prosecution, it is assumed that the prosecution has relied on the same. The dying declaration, if discloses story totally in opposition to the version of the

prosecution witnesses then the prosecution case if not rejected in toto, at least same suffers from a doubt and the benefit of doubt should have been given to the accused. Mr. Abichandani further contended that the evidence of the prosecution as on record does not warrant infliction of any injury on the back of the deceased. It is the case of the prosecution that accused No. 3 had caught hold of the victim from back and if it be so, the injuries on the back, external injury No. 10 in particular, could never be caused much less without any injury to the accused who caught hold of the victim. Mr. Abichandani further contended that the identity of accused Nos. 2 and 3 is not established by the prosecution beyond reasonable doubt. He further contended that identification parade held is not only faulty, but is improper and appears to be simply a farce and cannot be relied upon. Mr. Abichandani further contended that the evidence as to identification parade is required to be rejected and it will entitle accused Nos. 2 and 3 the benefit of doubt. Mr. Abichandani further contended that on accused Nos. 2 and 3 being entitled to the benefit of doubt, the charge levelled against them being integral part of the prosecution case, the case against accused No. 1 should have also been rejected. Mr. Abichandani, in the alternative, contended that the case of the prosecution is that it is accused Nos. 1 and 2 who inflicted injuries and it is not known who caused which injury by which weapon and which injury has become fatal, accused No. 1 cannot be convicted u/s 302 of the Indian Penal Code. At the most, the case may fall u/s 304, Part II of the Indian Penal Code. Mr. Abichandani, therefore, contended that the appeal be allowed and the accused be set at liberty forthwith.

6. Learned APP Mr. Divetia supports the judgment of the learned Sessions Judge. Mr. Divetia contended that there is no substance in the contention of the appellant that the complaint is preponed in time and this contention is not warranted by the evidence on record more particularly the evidence of complainant PW 2. Mr. Diveua further contended that the dying declaration Ex. 77 though produced by the prosecution cannot be acted upon and relied on as the evidence on record warrants its rejection inasmuch as the prosecution has failed to prove that the victim was in a fit state of mind to make dying declaration. As there is contradictory version about his mental condition, the same cannot be acted upon and it cannot help even the defence/accused. Mr. Divetia further contended that so far as the identification parade is concerned, the prosecution has been able to establish that all the necessary formalities and care have been taken and it has been rightly accepted by the learned Sessions Judge. Mr. Divetia further contended that the identification in Court room is a substantive evidence and that has been relied upon by the learned Sessions Judge. Mr. Divetia contended that the evidence of test identification parade is a corroborative piece of evidence and if it is weak, it may not corroborate the substantive evidence of identity of the accused. Simply because the corroborative piece of evidence is weak or irregular, it does not adversely affect the substantive evidence. Mr. Divetia contended that sufficient motive is supplied by the prosecution, if it is found necessary. Mr. Divetia also contended that the

contention raised about the improbability of injury on the back of the deceased is also not warranted by the evidence on record. Mr. Divetia also contended that each of the accused is charged u/s 302 read with Section 114 of the Indian Penal Code. Then, even if accused Nos. 2 and 3 are to get the benefit of doubt, accused No. 1 can be convicted for offence punishable u/s 302 read with Section 114. Mr. Divetia further contended that the evidence of Dr. Devendra, PW 1, read with the evidence of Dr. Himanshu Shah, PW 14, warrants the conviction u/s 302 read with Section 114 as the injuries which can be subscribed to accused No. 1 are proved to be sufficient in the ordinary course of nature to cause death and the case of the accused does not fall, under any of the exceptions to Section 300 of the IPC. Mr. Divetia, therefore, contended that the appeal be dismissed.

7. We will first deal with the contention of Mr. Abichandani that the complaint though recorded late is preponed in the time and this fact can be established from the evidence of complainant, PW 2 and the investigating Officer, PW 13, read with the evidence of Trikambhai PW 11. Mr. Abichandani contended that this fact of complaint being prepared in time will reflect on the credibility of the Investigating Agency and if the complaint is not reliable the whole of the prosecution case must fail. Mr. Abichandani contended that PW 2 complainant and PW 3 Pan-shop owner are alleged to be eye-witnesses, but they have in fact not identified the assailants. To name the assailants, the complainant in particular had deliberated or discussed with the community persons and then name of accused No. 1 and some description of other is concocted or cooked up and the complaint is given. Mr. Abichandani contended that this fact is also supported by dying declaration Ex. 77. To substantiate this contention, Mr. Abichandani has relied on the evidence of PW 2. PW 2 in this complaint Ex. 71 has referred to motive. True (free hand) translation of the relevant part of his evidence reads as under:

Cause of the incident, as I came tomorrow, is that, aday prior to yesterday, someone had broken the earthen water pots filled with water at the tea-shop of their community person one Trikambhai Raval Chawla. In relation to that there was verbal exchange between one Muslim and Trikambhai. Bearing enmity for the same and we belong to Ravalia community and this Gopalbhai is also belonging to our community, he is assaulted by inflicting blows of knife and razor. Gopalbhai is inflicted six to seven blows of razor and knife by the persons referred above. On this ground at that time mobs of persons of Muslim community and our community had gathered opposite to each other and there was pelting of stones.

PW 2 in his cross-examination had stated that "I do not know whether or not Gopal knew Asif. However, I came to know that Gopal had quarrel with Asif. I was told by Trikambhai about that quarrel. I was told after the incident of injury by razor to Gopal". Based on this statement, Mr. Abiehandani contended that when the witness admits that he came to know about the quarrel of Asif with Gopal through Trikambhai only after the present incident took place reference to

previous quarrel in the complaint, suggests deliberation or discussion by PW 2 about the incident with his community persons. According to the prosecution, the incident took place at about 10.30 p.m. of 2nd July, 1989. As per the police papers, FIR is registered at 11.30 p.m. of 2nd July, 1989. As per the evidence of Trikambhai, PW 11, he had not met PW 2 in that night. Mr. Abichandani, therefore, contended that the fact which is referred in the complaint had come to the knowledge of the complainant subsequent to the incident and not during the night of incident suggests that the complaint was recorded not during the night, yet the time is wrongly stated of the night. This is suggestive of writing preponed time on the same. In our opinion, this contention requires to be rejected on two grounds. The Police Station Officer after recording the complaint at 11.30 p.m. of 2nd July, 1989 has sent the copy of the First Information Report to the Judicial Magistrate, First Class, at 4.00 a.m. on 3rd July, 1989 practically within 4 hours of recording of the complaint. When the learned Judicial Magistrate, First Class, has received the copy of the FIR at 4.00 a.m., it must have been at least despatched a little earlier than the time mentioned therein. This is one ground to reject the above contention. 8. Second ground to reject this contention is revealed from the proper reading of the evidence on which the defence has relied on to say that the complaint is preponed in time. The quarrel which supplied the motive to the present incident had taken place some two to three days prior to the present incident. In the cross-examination, PW 2 has stated that he came to know about the quarrel later on. Later on means after that quarrel took place. Later on does not mean after the present incident of 2nd July, 1989. It is further stated in his evidence that he was told about that quarrel by Trikambhai. This statement does not suggest or mean to read that PW 2 had no previous knowledge about that quarrel. The fact of reference of this quarrel in the complaint Ex. 71 suggests that PW 2 has knowledge about that quarrel after that incident of quarrel took place, but before the present incident. Thus the complainant PW 2 was not informed about that quarrel by Trikambhai after the present incident took place. Therefore, in no manner the evidence of PW 2 can be read that he came to know about the fact of that quarrel only after the assault on Gopalbhai took place on 2nd July, 1989.

9. If one refer to the evidence of Laxmansinh, PSI 13, he has categorically stated that "I was discharging my duties as PSI in Cambay City Police Station on 2nd July, 1989.... I came to know by about 10.30 at night that there is hubbub by crowd in Pith Bazar. PSI Jhala, myself and three to four police constables, therefore, as per our convenience immediately reached Pith Bazar.

...Harshadbhai Dasrathbhai gave complaint before me about this incident.... Thereafter I sent this complaint for registration to Cambay City Police Station." In the cross-examination, he has affirmed that the complaint was taken on the spot. He has denied that he has taken the complaint on the basis of the information received by him from the people talking there. He has denied that Harshad, friend of the deceased, is a got up complainant. Not a single question is put to this witness PW 13 to the effect that complaint is a preponed in time

alleging that though it was given much later yet it is shown to have registered at 11.30 p.m. Thus on reading the evidence of PW 2 and PW 13, it is clear that the complaint was given on the spot immediately on the happening of the incident. Even from the evidence of Trikambhai, PW 11, we are not able to read that PW 2 had no knowledge about the quarrel of Gopal with Asif at tea stall prior to the date of incident and PW 2 came to know about that incident only after PW 11 informed him after the assault on Gopal took place. Thus, we do not find any substance in the contention that the time of complaint is preponed than its real one as it is given after due deliberation or discussion with the community persons and the names of the accused are wrongly introduced subsequently.

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10. Learned advocate Mr. Abichandani also seeks support from the dying declaration Ex. 77 to substantiate his say that the complaint is filed after necessary deliberation and discussion with the members of the community and the same is preponed in time. He wants to substantiate this contention by saying that even in the dying declaration, the deceased has not given the names of any of the accused nor has given any reason for assault on him by whosoever has assaulted him. It is true that Ex. 77, dying declaration, had not disclosed the name of any of the accused. In dying declaration Ex. 77, the injured has specifically stated number of times, at least 3 times, that he does not know the assailants. It is also stated by him in the dying declaration that he had no previous quarrel with those persons and he does not know who brought him to the hospital. If the contention of Mr. Abichandani is read in light of the dying declaration, one can say that his contention should find favour with us. But this would be acceptable only if the dying declaration is acceptable and reliable. What is a dying declaration. Dying declaration is a statement made by a person as to the cause of his death or ? as to any of the circumstances of the transaction which resulted in his death in apprehension that he is likely to die. Such statement would ordinarily be hearsay evidence on the demise of the person making statement, which is not admissible in law. However, by special provision of Section 32 of Evidence Act any exception to the rule that hearsay evidence is not admissible is made and the same is made admissible in law. Such statement to be made admissible in law, should also be proved to have been made by a person in a fit state of mind and/or when was conscious and/or oriented. The statement made in mental condition which is doubtful as to its fitness, then it suffers from the vice of incredibility. Any incredible statement is not a reliable evidence. Keeping this in mind, we have to consider whether dying declaration, Ex. 77, was made by the deceased in a fit state of mind ; in conscious state of health and he was mentally oriented. We may make it clear at this juncture that the Investigating Officer has not recorded the statement of this injured and in our opinion rightly as explained by the Investigating Officer himself. The Investigation Officer himself has stated in the cross-examination in an answer to a question put by the defence as to whether he has made any attempt to record the statement of victim Gopalbhai and reply is that when he visited him, he was

not able to speak. In cross-examination, the witness has said that he had learnt that the victim was unconscious when he had reached hospital. However, he has learnt that the Executive Magistrate has recorded statement of Gopalbhai. It is very clear from the evidence of the prosecution witnesses that when I.O. saw the victim for the first time, he saw him in the hospital. He has stated that when he visited the victim, the victim was not able to speak and that is the reason why the statement of the victim was not recorded. The question is, if the victim was not able to speak when he was removed to hospital then how the Executive Magistrate could record his statement which is now presented as a dying declaration Ex. 77. Whether the victim who was not able to speak when the I. O. visited him, was able to speak later in time whether he had regained consciousness, and whether physical and mental conditions prevalent at the time inspires confidence to accept the say that he was in a fit state of mind, conscious and oriented to give any statement or answer any inquiry or questions. Though the hospital case papers are shown to the doctor and referred in his evidence, unfortunately, they are not made part of record. We, therefore, direct that the original case papers being papers of hospital and referred to by the doctor at the instance of the defence in the cross-examination be taken on record and read in evidence.

11. In the case paper page 1 which is numbered as MLC No. 459 of 2nd July, 1989, the victim appeared to have been brought on 2nd July, 1989 at 11.00 p.m. On examination, the doctor has stated that general condition very poor. Afebrile (non-feverish). Pulse not palpable (radial). BP unrecordable. Then on that very day, on page 2 of the papers under the caption "operative notes and anaesthetic" it is stated that inter-costal tube inserted in right 6th ICS in the midaxillary line through CIW (wound No. 9 as described on separate sheet). Five bottles of blood drained out from the right haemothorax. In the case papers, history is recorded on 2nd July, 1989 at 11.00 p.m. as under:

Multiple stab wounds over abdomen, chest and loin. Prognosis explained to patient's attendants.

Against time of 11.30 p.m, BP recorded is 80/60, Pulse recorded is 130/minute. Then against time of 11.40 p.m. it is mentioned that on examination, patient conscious, anxious, dyspnoeic, severely anaemic. T.M.P. 144 mm R.M. BP 120/50, mm of mercury. Respiration shallow 40 per minute. There is also mention of abdomino thoracic. Then against the time of 1:30 a.m. of 3rd July, 1989, it is stated that patient semi-conscious, chynels stokes breathing. Pupil both of normal size and shape fixed not reacting to light. LCD. fresh blood coming out. T. N. Peripheral arterial. Pulse feeble. H. R. 156 per minute. Against the time 1.45 a.m. it is stated, cardiac arrest. It is also stated that no improvement, no heart beat felt. No pulse traceable. B. P. not recordable. No response to deep painful stimulus. Pupil, both fixed to light. Right normal size and left semi dilated. Respiration, gasping. Generalised muscle flaccidity. Against the time of 2.00 a.m., it is shown, respiration gasping, cardiac arrest as it is.

Pupil left dilated more right semi-dilated. Both fixed to light. Against the time of 2.05 a.m. it is stated that no respiratory movements visible. Pupils fixed and dilated and the patient is declared dead.

12. Bearing this health condition of the victim, we will now refer to the evidence of Dr. Himanshu, PW 14. In examination -in -chief he has stated that because of the low blood pressure, circulation of blood in brain and other parts of the body was reduced and, therefore, workability of the brain was also reduced. In the cross-examination he has deposed that the patient was mainly conscious but was not fully conscious. He has no knowledge that during the time when the victim was under his treatment, his dying declaration was recorded. He further stated that he does not remember whether the dying declaration was recorded or not. He has denied to have stated in the case papers that it is not stated that patient is not fully conscious. However, it is stated in the case papers that patient is semiconscious and the same is stated at 1.30 a.m. He has stated that it is not stated in the case papers that between 11.30 to 1.30 a.m. the patient was not fully conscious. He admits that the history of the patient at 11.40 a.m. was recorded by some another doctor and he cannot say whether it was written at the dictation or reply given by the patient or someone else. Thus, in view of the evidence of Dr. Himanshu, it cannot be conclusively said that the patient was fully conscious and oriented. In our opinion, the first requirement of patient being conscious and oriented to record the dying declaration is not satisfied in the instant case. Apart from this, if we refer to the evidence of the Executive Magistrate, PW 15, who has recorded the dying declaration, it cannot be said to have been established that the deceased was in a fit state of mind and fully conscious and oriented. PW 15, Hakimhai, Executive Magistrate, has stated that doctor orally informed him that the patient is conscious. However, he admits that Dr. was not present at the time when the dying declaration was recorded. 13. Bearing in mind the above state of affairs, we will now refer to the dying declaration Ex. 77 and yadi Ex. 76 sent by the PSI to the Executive Magistrate to record dying declaration of Gopalbai. Ex. 76 yadi bears the date of 2nd July, 1989. Date of 2nd is overwritten by another date which appears to be 3rd. The said yadi is received by the Executive Magistrate, PW 15 at 0.30 a.m. However, "0" is overwritten by 12. In the figures 1 and 2 of 12, one appears to be in different ink than that of 2. Keeping this in background, we will now refer to Ex. 77, the dying declaration. In the dying declaration, time of receipt of yadi by the Executive Magistrate is shown to be 0.30 hours where "0" is overwritten by 12 and 2 of that 12 appears to have been overwritten. Time of commencement of recording dying declaration is shown to be 0.45 hours where "0" is overwritten on figure 12 while figure 4 of 45 minutes is overwritten on some other figure which appears to be 3. Occupation of the victim is shown to be service, but on bare reading with naked eye it appears that it has been inserted later on. In the margin, doctor has endorsed "patient has been conscious throughout". We find this endorsement of the doctor despite the Executive Magistrate has denied in his evidence that doctor was present when dying declaration was recorded. Doctor

himself has admitted that he has no knowledge that the dying declaration of the patient was recorded while the patient was under his treatment. He has then stated that he does not remember whether dying declaration was recorded or not. Before recording dying declaration, it is the duty of the Executive Magistrate to see that the patient is in a fit state of mind, conscious and oriented. This can only be said by the concerned doctor. In the instant case, Executive Magistrate, PW 15 has admitted that doctor was not present when the dying declaration was recorded. Dr. PW 14, has no knowledge whether dying declaration was recorded or not. Investigating Officer PW 13 has stated that when he saw the patient in the hospital, the patient was not able to speak and that is the reason that he has not recorded his statement. If this be the state of affair, recording of dying declaration, in our opinion, is in a highly suspicious circumstances and it is not proved beyond doubt that the patient was in fit state of mind, conscious and oriented.

14. We get further support to our conclusion from the dying declaration itself. In the dying declaration as many as three times, it is alleged that the victim has stated that he does not know who assaulted him. He had no quarrel with them earlier. He does not know who brought him to the hospital. From the case papers of the hospital, it is not made specifically clear as to what was his physical and mental condition between 11.40 p.m. to 1.30 a.m. The doctor has referred to the condition of the patient at 11.40 as under :

Patient conscious, anxious, dyspnoeic, severely anaemic.

The meaning of word "dyspnoeic" as we read from the dictionary appears to be dysphasia or dysphemia. Dysphasia as per Stadman's Medical Dictionary 21st Edition means lack of coordination in speech and failure to arrange words in an understandable way; related to cortical damage. Dysphemia means hoarseness; difficulty or pain in speaking. Now, when the patient suffers from lack of coordination in speech and failure to arrange words in an understandable way or has difficulty or pain in speaking as certified by the doctor and also supported by the Investigating Officer at the relevant time, how could he have made such a long dying declaration. It will be relevant to state that in dying declaration there is reference of three persons. In dying declaration it is repeatedly stated three times, that he does not know the assailants. In view of his physical condition so far as speech is concerned, the patient could not have spoken anything even if we take that he may be conscious. The corrections in the dying declaration about which we have referred to hereinabove as well as correction as to time in yadi sent to the Executive Magistrate and the physical condition of the patient as discussed above, we are of the opinion that the dying declaration Ex. 77 even if recorded, then is recorded in highly suspicious circumstances and cannot be relied upon and would be of no help to the defence as contended by the learned advocate.

15. It is not that any document or evidence produced by the prosecution must be used or is required to be used by or against the prosecution. Unless a document

or evidence satisfies the necessary requirement of proof, admissibility and reliability then only it is a legal evidence. It is only legal evidence which can be relied on and acted upon. We may say that it is not the duty of the prosecution to produce any evidence that they have procured or collected. However, if the prosecution produces on record any such evidence in fairness on its part unless it is legal evidence, the same need not be used for or against prosecution. The dying declaration Ex. 77 does not satisfy the basic requirements as to mental fitness and capacity to make statement and that it should be above board and genuine. Thus the document, dying declaration, Ex. 77 does, not help the defence to support the contention that the complaint was given late and is preponed in time.

16. The complainant has in the complaint named only one of the three accused. In the complaint, it is mentioned that there were two others with Asif Haider and one of those two had put on almond colour safari who took out knife with brass handle and other had held Gopalbhai. Two who had weapons inflicted blows indiscriminately. The complainant has stated that he knows the other two by face and names have not been stated therefor. On their arrest, an identification parade was held and only complainant was asked to identify. The Investigating Agency did not hold identification parade for these two accused for other witnesses. PW 2, complainant has in the identification parade identified the two accused. PW 2 has also identified these two accused in the Court room during trial which is a substantive piece of evidence. Identification of the accused in the identification parade is a corroborative piece of evidence. The learned advocate Mr. Abichandani has challenged the acceptability of this identification parade contending that necessary precautions to see that the accused are not seen by the witness nor there was any probability to see the accused prior to identification parade. Identification parade is held to find out whether the suspect is the perpetrator of the crime alleged. To establish these facts, test identification parade is held. In the instant case, we may see whether necessary precautions so as not to adversely affect the credibility of the witness on the question of identity are taken, whether identification parade held is fool proof and whether there was any possibility for the witness to see the accused any time prior to holding of identification parade. If the defence is able to show that there was any such possibility, then the evidentiary value of such identification parade is lost as it would be a tainted evidence.

17. It is contended by Mr. Abichandani that the prosecution has not been able to clearly rule out the possibility of accused being seen by the witness and therefore that part of evidence should not be accepted and relied upon. To substantiate this contention, he has first referred to the evidence of the Executive Magistrate, PW 8, who held the identification parade. Whether we are able to satisfy our conscious that necessary precautions required to be taken by him are taken? If not what is the effect on this evidence ?

18. Before we discuss the evidence about the holding of test identification

parade, we would like to place on record certain glaring facts in the light of which the evidence as to test identification parade may be appreciated. It is not disputed that the Investigating Officer wrote yadi Ex. 56 to the Taluka Executive Magistrate, Cambay to hold identification parade for two of the accused by one witness Harshadkumar PW 2. Time when yadi Ex. 56 is written is not mentioned. There is nothing on record to show at what that time this yadi Ex. 56 was written on 9th July, 1989. There appears an endorsement in the margin Which we are not able to read and understand except the date mentioned there. We assume this endorsement to be for the receipt of the yadi by the Executive Magistrate. He has not mentioned the time when he received the said yadi. The Executive Magistrate, PW 8 has then not written to IO as to when and where the test identification parade would be held. However, from the oral evidence of IO, PW 16, and Executive Magistrate, PW 8 and the panchnama of test identification parade, it appears that identification parade commenced at about: 9.00 O'clock in the morning on 9th July, 1989 and was over at 10.00 O'clock in the morning of that day. In view of these facts, following questions arise in our mind which stare while appreciating the evidence of test identification parade.

- (1) At what point of time IO wrote yadi to the Executive Magistrate concerned to hold test identification parade?
- (2) At what point of time, the Executive Magistrate received that yadi?
- (3) What was the time fixed by the Executive Magistrate to hold test identification parade?
- (4) Where was the place fixed by the Executive Magistrate to hold test identification parade?
- (5) If time and place to hold test identification parade was fixed, how was it communicated to all concerned?
- (5) If time and place to hold test identification parade was not fixed, how the witness remained present at the time and place of test identification parade?
- (6) If place and time was not fixed, how and who brought the witness before the Executive Magistrate for identification parade.
- (7) How the Investigating Officer was communicated to bring the accused persons who were to be identified for test identification parade ?
- (8) At what time the accused Salimbhai was removed from judicial custody to present for test identification parade?
- (9) Who and when the Judicial Magistrate was moved to remove accused Salimbhai from judicial custody for identification parade?
- (10) When there is a mention in yadi Ex. 56 that necessary action has been taken to obtain permission to remove accused Salim from judicial custody, then how such an action could have been taken when time and place for test

identification parade was not fixed?

Bearing in mind all these questions, we will examine the evidence of identification parade. As it appears from the record, it commenced at 9 O'clock and was completed at 10 O'clock. From the record it appears that the accused Salim was arrested on 7th July, 1989 at 9.30 hours and was on police remand up to 10 O'clock of 9th July, 1989 and he was produced before the Judicial Magistrate at 10.00 a.m. of 9th July, 1989. We do not know nor there is any material on record to know the topography of Cambay town. But one thing would be certain that if the accused is produced at 10 O'clock in the morning, it must be at the residence of the learned Magistrate. We will now refer to the evidence of the witnesses through whose evidence prosecution has tried to prove the test identification parade.

19. Kantibhai, PW 8, has slated in his evidence that "I was discharging my duties as Executive Magistrate at Cambay on 9th July, 1989. In the morning of that day, I was served with yadi from the police that test identification parade is to be held in Raval murder case. I therefore called two panchas in my chamber. I also called two accused namely, Ibrahim and Salimbhai through a stair besides my chamber from Police custody at downstairs so that they may not be seen by the witness. Thereafter, they were introduced to panchas saying that these are accused whose identification parade is to be held. Thereafter through my peon I called 16 persons of the age group of the accused from outside the compound of my office. Then a north-south row of these persons was made. Thereafter, accused Ibrahim and Salimbhai were asked to stand in the row wherever they liked. Thereafter I called Harshadbhai Raval through my peon Hirabhai and he (Harshadbhai) was asked to bring out of the row by catching hand the person whom he knows as the accused.... This identification parade commenced at 9 O'clock in the morning and was over by 10 O'clock". In the cross-examination, this witness has stated that "It is not true that I was knowing that identification parade is to be held for one witness only". He has then stated that it is true that he knew that two accused were to be identified by one witness. "...it is true that at 9 O'clock when panchnama commenced, I was not knowing where the witness is...it is true that peon went to call panchas. Pancha also brought the witness. Now I say that that peon came with an information that witness is in Police Station. ... it is true that I had no knowledge as to since when the witness was present and who called him. I had not inquired about the same...I knew for the first time that witness is in Police Station. It is true that the accused were in custody in that very Police Station. (Witness volunteers that rooms where accused were sitting and witness was sitting were different). Distance between Ravalia vas and the Police Station is of 1/2 k.m. After I asked the Police to call the witness, the Police did not ask for time to call him." In reply to a question that in the identification parade work of calling the witness and produce before him was done by the Police, the answer given is that the Police has done the activity of only bringing the witness. He stated that" I cannot say who went to call the witness. It is true that I was knowing that prior to "commencement of

identification parade, witness was in Police Station. It is not true that I informed the panchas that the witness is called in advance and is present in the Police Station".

20. The important aspect to appreciate the evidence as to identification parade is to find whether there is any probability of accused being seen by the witness? The Office of the Executive Magistrate is at the first floor of the Police Station which is at the ground floor. Prior to the commencement of the identification parade, accused were in custody of the Police and lodged in that very Police Station. Witness had also come for identification parade in that very Police Station and was sitting there till his call to go for identification parade was received. It is not known at what point of time, the witness has reached the Police Station, whether the witness has reached the Police Station before the Executive Magistrate, PW 8, called the accused in his office from the rear stairs of his office or they were called before the witness has reached the Police Station. If we read the evidence of witness, PW 2, he has stated that when he went to the office of the Executive" Magistrate, he was asked to wait in a gallery outside the office of the Executive Magistrate. He has also admitted that while standing in, the gallery, he can see the entrance of the office of the Executive Magistrate. There is nothing on record to show that the accused were called in the office of the Executive Magistrate prior to the witness was asked to wait in the gallery. May be, that witness might have reached little early before the Executive Magistrate .called the accused from his adjoining room to be mixed up with other similar persons. May be, at that point of time, the witness might have seen the accused entering the office of the Executive Magistrate. May be that witness might have seen the accused while he was sitting in the Police Station when the accused were being taken upstairs as called by the Executive Magistrate. Burden to rule out these possibilities is on the prosecution. Unless the same is ruled out by prosecution, the benefit thereof must go to accused.

21. When the police requests the Executive Magistrate through yadi to hold identification parade, Executive Magistrate would normally put on the office copy of that yadi, the time and place to hold identification parade. At that place and time, the witness and the accused are to be produced with sufficient time gap to rule out possibility of their seeing each other. May be the witness is produced first or accused is produced first. In any case the simultaneous production is to be avoided. Normally such instructions are given by the Executive Magistrate. Whoever comes first is asked to sit in a room which cannot be seen by anyone who comes in the office of the Executive Magistrate. Whoever comes later is required to be seated at a place which cannot be seen by one who has come earlier and sitting in the room. Then necessary formality of holding parade is carried out and through panch witness, witnesses are called. There are many other particulars which are required to be taken care of, but we do not refer to the same as we do not think it relevant for the purpose of this case. However, in every case of test identification parade, the important aspect is to see that either witness or accused has no opportunity nor there is any probability to see each

other prior to holding the parade. In the instant case, it appears that witness and accused have been there in the Police Station. It is not stated specifically that when witness reached the police station, accused were already called by the Executive Magistrate and were not there in the Police custody. There is nothing on record to show that while sitting in police station the witness could not see the persons sitting in the police lock-up. It is also not on record that a person waiting in the gallery of the office of the Executive Magistrate cannot see one who comes upstairs from the rear portion of the office of the Executive Magistrate. Keeping in mind all these aspects and the questions posed hereinabove by us, the prosecution, in our opinion, has¹ failed to rule out the possibility of accused being seen by witness. Therefore, in our opinion, the evidence-as to test identification parade is not worthy of credence and cannot be relied upon. As the evidence as to test identification parade is not reliable one, it is required to be considered whether there is any other evidence to establish the identity of the accused in particular of accused Nos. 2 & 3.

22. The prosecution has examined one Kanubhai Raval, PW 6, to show that along with accused No. 1, there was one Salimbhai who had taken out knife and a third person who held the deceased is driving rickshaw. PW 6 has stated in his evidence that On his way home from his shop, he had stood near Pith bazar with one Ranchhodbhai. At that time, one Gopal and Harshadbhai had come to the shop of Oamodarbhai for chewing pan. At that time, three Muslim boys came suddenly and caught hold of Gopal from neck and asked Gopal, "you have become bully". He stated "we thought that there will be quarrel. Therefore, we went there to see. Now I say that we went near to that place to see what happened. They were at a distance of about 6 to 7 feet. Asif Pathan, whom I knew very well took out razor, One Salim was with him, he took out knife and third man who is not known to me but when seen properly was a rickshaw driver. He caught the hand of Gopal and dragged him. At that time, Harshadbhai tried to rescue Gopal. At that time, Asif inflicted two liner blow with razor on Gopal. Harshadbhai had, therefore, moved away and fell down. One blackish boy whose name was not known to me drew away near the pan shop of Ramanbhai Pabali and there Asif and Salim inflicted blows indiscriminately and Gopal was bleeding and they left him there". The name of this witness was not disclosed initially. But his statement was recorded on 7th July, 1989. This witness is a pancha of scene of offence. According to this witness, he did state to the police at the time of drawing panchnama that he has seen the incident. His statement was not recorded on 7th July, 1989. It is surprising that if this witness has seen the incident and did tell the Police that he had seen the incident while acting as pancha for scene of offence, yet the Police has not recorded his statement as a witness to the incident. This very fact puts us on guard to accept his evidence as an eye-witness. When this witness PW 6 states that he did tell the Police in the evening of 2nd July, 1989 that he has witnessed the incident, PW 13, Investigating Officer who was up to 3rd July, 1989 has referred to this witness at all. He has not stated that Kanubhai PW 6 has disclosed before him that he has

seen the incident. Even when the statement of this PW 6 was recorded by PW 16, there also this witness is an eye-witness of incident is not referred to in his statement. In his statement before the Police he has said that he did tell the Police at the time when he was acting as panch to the scene of offence that he has witnessed the incident. This in our opinion, reflects on the credibility of this witness. If this witness PW 6 has seen the incident, he must have seen PW 2 had intervened to rescue Gopal. Yet he has admitted that he has not stated that Harshadbhai PW 2 intervened to rescue Gopal at the time when Asif was inflicting razor blow on Gopal. In the cross-examination, he has admitted that he did remember that Harshadbhai had intervened to rescue Gopal when his statement was recorded on 7th July, 1989, yet he has not stated this fact in his Police statement. If this witness has seen the incident, then as a necessary consequence, he must have stated before the Police that when Asif inflicted razor blow on Gopal, Harshadbhai intervened to rescue him and Harshad then fell down. Omission of this fact suggesting the presence of Harshad casts doubt on the reliability of this witness. We are, therefore, of the view that this witness cannot be relied upon not only for the purpose of providing the case against the accused No. 1 but also against accused No. 2 whom he has named as a second person from amongst the three who assaulted Gopal. No doubt, this witness has identified the accused in the Court room, but that identification in our opinion is of no effect as in our opinion, it is doubtful that he is an eyewitness to the incident.

23. The prosecution has also relied on the evidence of Kantilal Raval, PW 4, to establish the identity of accused Nos. 2 and 3. This witness has carried the injured to the hospital in a rickshaw. According to this witness, he was standing near the Ota opposite to the pan stall of Damodarbai and one Shivabhai was also sitting opposite to that pan stall. He has stated that by about 10.15 p.m., Gopalbai and Harshadbhai had come to the pan stall of Damodarbai and they were standing there. In a short while, three Muslim boys rushed at the pan stall of Damodarbai and started hurling abuses. Asif Haiderali Pathan caught Gopal from neck and told him that he has become bully. One Muslim boy with him also caught hold of Gopal and tried to drag him and immediately Asif Pathan took out razor from his pocket and other one who had put on almond colour shirt took out knife. Third one had caught the hands of Gopal. They started inflicting knife and razor blows and drew him upto the pan-stall of Ramanbai. Thereafter they left him there in bleeding condition. Thereafter this witness lifted the injured bodily up to Pith Naka from where he took him to hospital in a rickshaw. This witness has not named accused Nos. 2 and 3. No identification parade was held for this witness to identify "accused Nos. 2 and 3. This witness has only identified the accused in the Court room. No doubt, identification of the accused in the Court room is a substantive piece of evidence, but in the particular facts and circumstances of the case, it should not be the sole evidence to act upon. Surprising is that this witness has seen the accused Nos. 2 and 3 on 2nd July, 1989 at about 10.30 p.m. when accused Nos. 1 and 2 were inflicting blows on

Gopal and accused No. 3 had caught hold the hand of the deceased. Thereafter, for the first time on 16th March, 1991, the witness has seen the accused in Court room where in the accused dock there were only three accused as the trial had proceeded with. Identification in Court room should not remain empty formality, more particularly when there are one or two persons as accused. In our opinion, some attempt should be made by the learned Judge either by mixing them with some other persons or asking them to sit with other person who are present in the Court room and then test the witness to see whether he can identify the accused or not and if the witness identifies, some greater reliability can be attached to his say. Apart from this, accused are hand-cuffed when brought in Court. Till the entrance of the Court room, they are in hand-cuff. They are brought by the police and when they enter the accused dock, their hand cuffs are removed. There is no prohibition for the witness to move in the corridor of the Court room and the witness may have an opportunity to see the accused in particular when brought to Court. Thus, though the identification of the accused in the Court room is a substantive piece of evidence there should be some independent corroboration to that evidence of identity to make it more reliable. The corroboration may be in form of description of the accused if they are unknown persons. In this case witnesses have not given any description or mark of identity, in particular of accused Nos. 2 and 3. There must be some reason for a decision to save it from the charge of arbitrariness. To reach to a decision without any reason would only be a guess work. Thus any identification of the accused in accused dock without any mark of identity is hazardous to accept in the eye of law. Witness must have said in advance the grounds which enable him to identify the accused. Such identification would be just and proper. In absence thereof, any identity of the accused by witness in a Court room, in our opinion, would be arbitrary and may be bluff and should not be accepted as a conclusive piece of evidence though it is a substantive piece of evidence.

24. Mr. Divetia, learned APP, has referred to a judgment in the case of Somappa Vamanappa Madar and Shankarappa Ravanappa Kaddi Vs. State of Mysore, . Therein it is held that because of some defects in proceedings relating to the identification parade, we may not be justified in rejecting the evidence of the eye-witness regarding participation of the accused. To appreciate this conclusion, it is necessary to refer to some facts of the case (At Pp. 1359-60, Para 5 of Cri LJ):

. . . The incident is claimed to have been witnessed by eye-witnesses, P.Ws. 4 to 7 and 11 to 14. The witnesses rushed towards the accused, surrounded A-1 and A-2 and caught hold of them with weapons in their hands. PW 7 Nazeer Ahmed Maniyar snatched the sickle from the hands of A-2 Shankarappa. P.W. 5 Sahablal snatched the axe from the hands of A-1 Somya. A-2 who was being held by P.W. 7 and P.W. 14 managed to escape from their grip and ran away. A-3 also escaped.

...

...

... The deceased gave out his name and told him the names of the two assailants and stated that all of them belonged to Ingalgeri village.

... While under their custody witnesses also questioned the first accused and he told the witnesses that the person who was standing on the road was Ningappa Polici A-3 and also gave particulars about himself and the second accused

Bearing in mind these facts, the Supreme Court has held (Para 13 of Cri LJ):

Considering all these circumstances, we think much reliance cannot be placed on the identification parade regarding the establishment of the identity of the third accused. As far as A-1 and A-2 are concerned it is clear that both of them were apprehended and the witnesses had ample opportunity to note their features at that time and identify them. The proceeding in the identification parade discloses that A-2 was identified by most of the eye-witnesses.

This is the reason why the Supreme Court has accepted the evidence of identification of A-2.

25. In the present case, this witness has simply seen the commission of incident from a distance. After the incident is over, he goes to the scene of offence and removes the injured to the hospital. According to him, though he has disclosed to the police that he is an eye-witness to the incident, his statement is not recorded till 7th July, 1989. In his statement of 7th July, 1989, he has not referred to the presence of PW 2 who was very much present with the victim and has also intervened and tried to rescue the victim. Thus the very fact of absence of reference of PW 2 in his statement makes his evidence of his being an eye-witness a doubtful one and therefore his identifying the accused also, in our opinion, cannot be accepted. Thus witness is also not able to establish the identity of accused Nos. 2 and 3. So far as the identity of accused No. 3 is concerned, except the identification parade held for PW 2, Harshadbhai, no other witness has been called to identify accused Nos. 2 and 3.

26. So far as the evidence of Shivilal Jadav, PW 6 is concerned, he has identified the accused only in the Court room, but there is no other circumstance to support his say as to the identity of the accused Nos. 2 & 3. We are not impressed by the argument of the learned Advocate that in absence of any description given by the witnesses about the accused it will be unsafe to accept the identification by such witnesses. It all depends on the persons ability to describe a person. One may not be able to describe the person minutely but may be able to identify the person because of some broad perceptions. Therefore, simply because description is not given, it cannot be said that they cannot identify the person. However, as we do not accept the evidence of test identification parade as reliable and acceptable and beyond doubt, simply because description of the person is not disclosed by the witnesses would not adversely affect if the identification evidence, otherwise would be acceptable. However, in the instant case as stated earlier, the evidence of test identification parade is not above doubt . We therefore do not accept the same.

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27. This brings us now to consider whether there is any evidence against accused No. 1 and if so what is that evidence and whether the same is acceptable or not. So far as PWs 5 and 6 are concerned, their names as witnesses are disclosed very late and we are not able to find from the record how their names as witnesses are disclosed. It is said that PWs 5 and 6 have seen the occurrence. However, they were neither seen by PW 2 or PW 3 nor even by the deceased and we do not find any reference of their name in the evidence of PW 2 or PW 3 or assuming that the dying declaration was acceptable, their names are not disclosed. Their evidence, therefore, is not above suspicion and therefore we do not accept the same as discussed above even for accused No. 1.

28. PW 2 in his evidence has stated that at about 10.30 at night of 2nd July, 1989, he had gone in company of his friend Gopal to chew pan. They have gone to the pan stall of Damodardas in Pith bazar. Gopal had ordered for pan. Damodardas was preparing the same. In the meantime, a noise came from behind "kaun hai tumari benko". When they saw behind they found three Muslim youngsters. One of them was Asif Haider Pathan, accused No. 1. They rushed towards them and Gopal was caught from the neck and was told that you have become a bully. Among the other two who were with Asif, one has put on almond colour safari. He caught Gopal. Then all the three tried to drag Gopal and when this witness, PW 2, intervened to rescue him, Asif Hiderkhan Pathan took out razor. The said razor had saffron colour handle. One who had put on almond colour safari took out knife with brass handle. Asif inflicted blows on chest of Gopal. He was confused and fell down. Then Asif and one who had put on almond safari assaulted Gopal and the third person caught hold of Gopal. This witness has identified Asifkhan Haiderkhan Pathan in the Court room. He has named Asif in his police statement. Name of Asif is also mentioned in the complaint given by him and Asif was arrested immediately on the third day i.e. 4th July, 1989 at about 23.50 hours. In the cross-examination he has stated that Gopal was dragged by about 25 to 30 feet and he was dragged by catching his hands. When they tried to drag Gopal, Gopal himself tried to escape and the witness also tried to rescue the victim. This witness further stated that he tried to rescue Gopal for about 4 to 5 feet and then he fell down and when he stood, he saw Gopal being assaulted. According to him, persons at the stall came to their rescue and they were Damodarbai and Bhivabhai. Gopal was then removed to hospital by Kantibhai. After Gopal was removed to hospital, he went to Police Station and it was about quarter to 11.00 at that time. Police was not there. So he again went to Police Station after about 20 minutes when the police was present and his complaint was recorded. An attempt is made to show that the complaint is not given on the spot immediately, however we have discussed the same in the beginning of our judgment. It is alleged that he has given the complaint after discussion and deliberation with Trikambhai and others. However, he has denied the same. Evidence of this witness, in our opinion, is corroborated by the evidence of Damodar Bhagwan, pan stall owner, PW 3.

29. If we refer to the evidence of Damodardas, PW 3, he has stated practically verbatim as stated by PW 2. We may mention at this juncture that it is not disputed by the defence and is duly proved by the prosecution that the incident took place in front of the shop of Damodardas. It does not appear to have been disputed and in our opinion it is proved by the medical evidence that the incident took place at about 10.30 p.m. of 2nd July, 1989. It is also not disputed and duly proved that Damodardas, PW 3 had a pan stall at that very place. It is not the suggestion of the defence that the pan stall was closed on the day of incident. It is a matter of common knowledge that pan shops are normally open till late night. It is also a matter of common knowledge that when a shop is open till late night there is bound to be necessary provision for light. Accordingly, there must be a light in the shop of PW 3 Damodardas. It is also a matter of common knowledge that pan shops are normally more illuminated than other shops. If there is electric supply in the town, the illumination may be by electricity. If there is no electric supply in the town, then they will use more than one petro-max and have sufficient light in the shop. There are street lights also near about and these facts apart from common knowledge, are duly proved by the prosecution through panchnama of scene of offence which is at Ex. 49. However, in the cross-examination of PW 2 and PW 3, an attempt is made to show that they have not stated before the Police that there was light at the time when they saw the incident. If there would be light, there is no reason or necessity to specifically state that there was light. At night, near a shop, which is undisputedly open, the presumption is that there is light. If one wants to show that there was no light, the burden is on the party who alleges that there was no light though the shop was open and running. Therefore, the omission to state that there was light in the evidence of PW 2 and PW 3, in our opinion, is of no consequence and is redundant.

30. Keeping in mind the above facts, we will now appreciate the evidence of PW 3, Damodardas. PW 3 has stated that on 2nd July, 1989 at about 10.30 night, one Shivabhai Jadav and he were at the Pan galla. By about 10.30 p.m. three Muslim boys, Gopalbhai Tulsidas and Harshadbhai came to chew pan at his pan stall. One of the three Muslim boys, Asif Hussain, caught Gopal by neck and asked whether he had become bully. The other two boys who were with him dragged Gopalbhai towards the pan stall of Ramanial. By that time, Asif Hussain by razor and one another who had put on almond safari by rampuri knife started inflicting blows. By that time, Harshadbhai Dasradhbhai tried to fetch Gopal towards his side and rescue him. By that time, these persons caused injuries by razor and knife on Gopal. One of them who was blackish in colour had caught hold of Gopal. As Gopalbhai was injured and bleeding and as Harshadbhai could not succeed in rescuing him, Harshadbhai had gone away and the three Muslim boys also took Gopalbhai towards Nagina Masjid. This witness has identified all the three accused in the Court room, In the cross-examination, he has denied that there is a pan galla of one Ravjibhai in their locality. He has admitted that the pan galla of Ramanial is at a distance of about 15-20 feet from his stall. He

has denied that market gets closed in the town at about 9 O'clock. He has stated that market may be closed, but pan gallas remained open till 11 O'clock. He has stated that there are about 5 to 6 gallas between his galla and the Nagina Masjid. He has then stated that injured Gopal was lifted and put aside by Kantibhai. However, he did not go to help Kantibhai. In reply to a question whether he felt it necessary to call a rickshaw, he has replied that he was very much confused. He specifically remembers that three accused dragged Gopalbai, assaulted him and Kantibhai lifted him. He had then gone home and got composed in the morning. He has also stated that razor blow was inflicted as if one gives linear blow and knife blow was inflicted and third man had caught hold of him. There is nothing in the cross-examination of this witness to reject his evidence or not to accept the same on the point that he has seen three Muslim boys, one of them was accused No. 1 who had inflicted razor blows, another inflicted knife blows and third had caught hold of Gopal. This part of evidence corroborates the say of Harshadbhai, PW 2. Thus the fact that accused No. 1 inflicted razor blows and another person has inflicted knife blows when third person had caught hold of Gopal is proved by the evidence of PW 2 and PW 3.

31. This part is further corroborated by the evidence of two doctors, namely, PW 14 and PW 1. PW 14 is the one who has treated Gopal immediately at about 11 O'clock on that very day, i.e. 2nd July, 1989. He has found as many as 14 injuries Nos. 7 and 9 could be caused by wielding sharp edged weapon. Dr. Devendra, PW 1, who has performed autopsy has found as many as 14 injuries on the person of the deceased. According to him, except injury Nos. 3 and 4, rest of the injuries can be caused by weapon like razor. He has, however, stated that injury Nos. 5 and 7 can also be caused by razor. Dr. Himanshu, PW 14, stated that injuries Nos. 7 and 9 can be caused by knife. However, this doctor has stated that injury No. 7 also can be caused by razor and injury No. 9 can also be caused by razor. According to doctor PW 1, who has performed autopsy, injuries Nos. 3 and 4 are independently sufficient in the ordinary course of nature to cause death. When there are injuries on the person of the victim which can be caused by razor and when PW 2 and PW 3 specifically stated that accused No. 1 had a razor with him and has inflicted razor blows on Gopal, in our opinion, their say is corroborated by the evidence of doctors PW 1 and PW 14. Thus the prosecution has established beyond doubt that deceased Gopal was inflicted razor injuries by accused No. 1 whose identity is also established beyond doubt. In our opinion, when there is an ocular evidence of PW 2 and PW 3 which is cogent and convincing, even if we do not accept the evidence of discovery panchnama, it does not adversely affect the prosecution case. We, therefore, do not discuss in detail the panchnama u/s 27 of the Evidence Act as the panchas have turned hostile.

32. Thus from the above discussion it is clear that it is accused No. 1 who had razor and two others who are not identified, one of whom had a knife and the third had caught hold of the victim, caused injuries on the person of the

deceased referred in the autopsy report.

33. The fact that deceased has died a homicidal death is not disputed at all in this case. However, if we refer to the evidence of PW 1 and the post mortem notes Ex. 33, it is clearly stated that the cause of death is haemorrhagic shock due to multiple injuries. That apart out of 11 injuries, injuries Nos. 3 and 4 are independently sufficient in the ordinary course of nature to cause death. Injuries consequent to external injuries Nos. 3 and 4 are also sufficient in the ordinary course of nature to cause death. When Dr. PW 1 has stated that all the injuries are cumulatively sufficient in the ordinary course of nature to cause death should mean that all the injuries exclusive of injuries Nos. 3 and 4 are sufficient in the ordinary course of nature to cause death because external injury Nos. 3 and 4 are individually sufficient in the ordinary course of nature to cause death. If injuries Nos. 3 and 4 are the only injuries to cause death, then it was not necessary for the Doctor to say that all the injuries cumulatively are sufficient in the ordinary course of nature to cause death. Injuries Nos. 1 and 11 except injuries Nos. 3 and 4 can be caused by razor. Injury Nos. 5 and 7 also may be caused by knife. It has come out in the cross-examination of doctors PW 1 and PW 14 that injuries which are possible by razor and knife can be caused while knife is wielded. Wielding of knife will cause injuries like razor injuries as it will be a cut injury. In view of this fact, injuries caused by razor are also sufficient in the ordinary course of nature to cause death and this corroborates the evidence of PW 2 and PW 3. 34. Ordinarily, if motive is not proved, it need not necessarily adversely affect the prosecution case. Whether it is sufficient or weak, an attempt is made by the prosecution to supply the motive in the instant case and the said motive is established by the evidence of one Trikambhai PW 11. Trikambhai PW 11 in his evidence has stated that some days prior to the incident, accused and others had gone to his tea-stall for tea and price for the same remained due. On the next day when the accused in company of his friends ordered for tea, Trikambhai, PW 11, asked for money and the reply was that the amount will be paid and that he is not running away. In the evening Trikambhai went home after closing the stall. Next day morning when he came, he found that earthen water pots were broken. By that time, Gopalbhai had come and inquired as to why earthen pots are broken. Then he suspected accused No. 1 as he demanded money from him. By that time, accused No. 1 had come with his friends. Gopal asked accused No. 1 Asif as to what did he achieve by breaking earthen water pots and Asif carelessly replied that he had broken and they can do whatever they like. Therefore, there was exchange of fist blows. However, Trikambhai intervened and separated them and Gopal had gone to service and Asif had gone in the market. Immediately a day or two thereafter this incident has taken place and the motive alleged by the prosecution is that earlier day's incident as the root cause of this incident. Be it or it not, the incident has taken place. Even if that be the motive, it helps the prosecution, if that is not the motive, it does not adversely affect the case of the prosecution because motive is not a must to be brought on record by the prosecution. We may also state that

even if the prosecution comes with one motive and fails to prove the motive but the incident is proved by cogent and convincing evidence, the incident remained proved irrespective of proof of motive. However, in this case, in our opinion, the prosecution has been able to establish the motive through the evidence of Trikambhai, PW 11.

35. This brings us to the question as to what offence is committed by accused No. 1 as we have held earlier that identity of accused Nos. 2 and 3 is not established as other persons who had accompanied accused No. 1. All the three accused are charged with offence punishable u/s 302 read with Section 114 of the Indian Penal Code. On reading the facts stated in the chargesheet, it transpires that accused No. 1 is also charged individually for the act of murder of deceased Gopal. Accused No. 2 is also charged for the same offence and accused No. 3 is charged for abetment to the act of accused Nos. 1 and 2. It is also alleged that accused Nos. 2 and 3 also abetted accused No. 1. Therefore, it is evident that accused Nos. 1 and 2 are charged u/s 302 and accused No. 3 is charged u/s 302 read with Section 114. We may also read that accused Nos. 1 and 2 are charged u/s 302 read with 114. The charge shows that there is a specific charge u/s 302 of Indian Penal Code in view of the allegation of facts stated in the chargesheet.

36. In view of the above facts, it is proved beyond reasonable doubt that accused No. 1 has inflicted as many as nine injuries except injuries Nos. 3 and 4 with razor and they are sufficient in the ordinary course of nature to cause death. As the cause of death is ascribed to these injuries, accused No. 1 is guilty of offence punishable u/s 302 of the Indian Penal Code. So far as accused Nos. 2 and 3 are concerned, prosecution has failed to prove beyond reasonable doubt the identity of the accused and therefore they are entitled to benefit of doubt.

37. In the result, the appeal is partly allowed. Order of conviction and sentence of accused Nos. 2 and 3, Salimbhai Husainbhai Shaikh and Ibrahim & Kalio Nazirbhai is set aside as they get benefit of doubt. They are ordered to be set at liberty forthwith if not required in any other case. If they have paid fine, the same be refunded. Appeal of accused No. 1, Asifkhan Haiderkhan Pathan is dismissed.