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**(2012) 09 GUJ CK 0111**  
**In the Gujarat High Court**  
**Case No : Criminal Appeal No. 748 of 2006**

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|---------------------------|----|------------|
| Bhursing Kaljibhai Dhanuk | Vs | APPELLANT  |
| State of Gujarat          |    | RESPONDENT |

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**Date of Decision :** 06-09-2012

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 209, 313  
Evidence Act, 1872 — Section 27, 8  
Penal Code, 1860 (IPC) — Section 147, 148, 149, 161, 302

**Citation :** (2012) 09 GUJ CK 0111

**Hon'ble Judges :** J.B. Pardiwala, J; Bhaskar Bhattacharya, J

**Bench :** Division Bench

**Advocate :** P.B. Goswami, for the Appellant; K.P. Raval, APP, for the Respondent

**Final Decision :** Allowed

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## Judgement

Honourable Mr. Justice J.B. Pardiwala

1. The present Appeal is at the instance of a convict accused for the offences punishable u/s 302 of the Indian Penal Code, and is directed against an order of conviction and sentence dated 4th April 2006, passed by the learned Presiding Officer and Additional Sessions Judge, Fast Track Court No. 2, Chhotaudepur, District Vadodara in Sessions Case No. 39 of 2004. By the aforesaid order, the learned Additional Sessions Judge found the appellant guilty of the offence punishable u/s 302 of the Indian Penal Code and consequently, sentenced him to suffer Life Imprisonment and a fine of Rs. 100/-. In default of payment of fine, the appellant was directed to undergo further Rigorous Imprisonment for one month. It deserves to be stated that a charge-sheet was filed against four accused persons which included the accused appellant herein, for the offences punishable under Sections 147, 148, 149, 302 and 504 of the Indian Penal Code. The trial Court acquitted the other three co-accused of all the charges, whereas the accused - appellant herein was acquitted of the offences punishable under Sections 147, 148, 149 and 504 IPC. Thus, the trial Court held the accused

appellant guilty of the offence punishable u/s 302 of the IPC simplicitor.

I. Case of the Prosecution :

2. It is the case of the prosecution that the deceased in company of his two friends, Suresh and Vechat, had gone to a fair at village Timla on the date of the incident. The deceased and his two friends left at around 2 O'clock in the afternoon, and after enjoying the fair, were returning home at around 4 O'clock in the evening. While on their way to home, the deceased and his two friends met the accused and the other three co-accused who were in company of the accused appellant. At that point of time the accused is alleged to have asked the deceased as to why the deceased had not brought the "Dhol" (a Drum). Saying so, the accused and the other three persons caught hold of the deceased and the accused is alleged to have inflicted injuries on the neck of the deceased with a "paliya" (a sharp cutting object). The deceased Ramesh fell down in a field of corn. It is the case of the prosecution that thereafter the accused and the three others ran away from the place of incident. The two friends of the deceased, Sureshbhai Rathwa and Vechatbhai Rathwa, thereafter returned to their home, but both of them maintained silence and did not disclose to anyone about the incident. It is the case of the prosecution that on the next day when the police came in the village to inquire about the incident, at that point of time, the eye-witness Suresh Rathwa is said to have informed the father of the deceased and others about the incident. This is the sum and substance of the prosecution case.

3. It appears that the incident in question occurred in an agricultural field of one Chamarbhai Gungariabhai, a resident of village Hansda, Khacheli Falia, Taluka Chhotaudepur. On 10th March 2004, Chamarbhai, in company of one Mangabhai Naykabhai, had gone to a fair at village Timla and were returning home at around 6 O'clock in the evening. While on their way home, Chamarbhai thought to visit his agricultural field where he had sowed corn. Chamarbhai noticed that there was a pair of slippers lying in the field and few drops of blood were also noticed. Chamarbhai and his friend Mangabhai thought fit to take a close look and, therefore, went deep inside the field and found a dead body of an unknown person lying in the field. Chamarbhai noticed that there were injuries on the neck caused by any sharp cutting weapon or an instrument. Chamarbhai also noticed that there was a bangle worn by the person who was murdered. Thereafter, Chamarbhai and his friend Mangabhai went home and talked about the dead body lying in the field, to his sons. Chamarbhai, thereafter, thought fit to go to the police station in company of Mangabhai and, accordingly lodged a First Information Report Exh. 19.

4. On the strength of the first information report lodged by Chamarbhai, police started investigating the crime. Inquest Panchnama of the dead body was drawn in presence of two panch-witnesses. The dead body of the deceased was sent for postmortem examination and the postmortem examination revealed that the deceased had sustained an incised wound on the neck somewhere at mid-thyroid level 10cm x 10cm, one incised wound was also noticed on the back of skull on

occipital area 4cm x 3cm, muscles of trachea esophagus were cut. The cause of death was assigned to be shock due to cut on right carotid vessels. It appears that from the bangle which was worn by the deceased on his hand on which the name of the deceased was inscribed including the name of the village, the investigating agency got a clue that the deceased belonged to village Mithali, and accordingly, the police reached the village on the next day in the morning and told about the recovery of dead body of a person. No sooner, the police officer disclosed about the dead body lying in the field of Chamarbhai, the father of the deceased named Versing Rathwa went to the field and saw that his son, the deceased, was lying dead. Scene of offence panchnama was also drawn in presence of two panch witnesses. Soil stained with blood as well as control soil was collected for chemical analysis. Thereafter, a call form Exh.34 was filled up and was forwarded to the District Superintendent of Police. On the strength of such call form, a dog named Prince was sent at the place of the incident. A panchnama of dog tracking was drawn - Exh.35. The accused herein was arrested from his house. Arrest panchnama of the accused - Exh.36 was drawn. After the arrest of the accused, the accused herein is said to have voluntarily desired to show the clothes concealed at a particular place, worn at the time of the incident, as well as the weapon used in the commission of the offence. The discovery panchnama of recovery of clothes and the weapon of offence was accordingly drawn - Exh.47. Thereafter, the other three co-accused were arrested and their arrest panchnama was drawn - Exh.37. The clothes of the deceased were collected under a panchnama - Exh.49. The Circle Inspector was asked to draw a map of the scene of offence - Exh.33. Statements of two eye-witnesses, namely, PW2 Sureshbhai Tersingbhai Rathwa and PW6 Vechatbhai Bachubhai Rathwa were recorded. Statements of other witnesses were recorded. Ultimately, a charge-sheet was filed against the accused and four other persons, out of which one was shown as absconding in the charge-sheet. Charge-sheet was filed for the offences punishable under Sections 147, 148, 149, 302 and 504 IPC in the Court of Judicial Magistrate First Class, Chhotaudepur.

5. As the case was exclusively triable by the Sessions Court, the JMFC, Chhotaudepur, committed the case to the Sessions Court u/s 209 Cr.P.C. The Sessions Court framed charge against the accused and other three co-accused - Exh.16 and the statements of accused were recorded. All the accused did not admit the charge and claimed to be tried.

6. The prosecution adduced the following oral evidence in support of its case.

PW1

Chamarbhai Bhodari yabhai Rathwa original first informant.

Exh.18

PW2

Sureshbhai Tersingbhai Rathwa Eye-witness.

Exh.38

PW3

Bachubhai Teri yabhai Rathwal panch-witness.

Exh.39

PW4

Versingbhai Ratani yabhai Rathwa Father of the deceased.

Exh.40

PW5

Dr. Purshottamdas Kanjibhai Vankar Medical Officer who performed Postmortem.

Exh.41

PW6

Vechatbhai Bachubhai Rathwa. 2nd eye-witness.

Exh.45

PW7

Meghjibhai Fuli yabhai Rathwa. panch-witness.

Exh.46

PW8

Lalubhai Indersing Rathwa. panch-witness.

Exh.48

PW9

Kalidas Chhaganbhai Bari ya Investigating Officer.

Exh.51

PW10

Vikramsing Narendrasing Solanki Police Officer.

Exh.52

7. The following pieces of documentary evidence were adduced by the prosecution.

1)

Inquest Panchnama.

Exh.32

2)

Call form for Dog tracking.

Exh.34

3)

Panchnama of Dog tracking.

Exh.35

4)

Panchnama of the search of the house of the accused.

Exh.36

5)

Postmortem Report.

Exh.43

6)

Map of the scene of offence.

Exh.44

7)

Discovery Panchnama of the Recovery of Clothes and the weapon of offence.

Exh.47

8)

Panch nama of the clothes of the deceased as well as silver bangle.

Exh.49

9)

Scene of offence Panchnama,

Exh.50

10)

Chemical Analysis Report.

Exh.55

8. After completion of oral as well as documentary evidence of the prosecution, the statements of the accused herein and other three co-accused u/s 313 of Criminal Procedure Code were recorded, in which the accused herein and the three other co-accused stated that the complaint was a false one and they were

innocent.

9. At the conclusion of the trial, the learned trial Judge convicted the accused for the offence u/s 302 of IPC and sentenced him as stated herein before. As stated earlier, other three co-accused were acquitted of all the offences punishable under Sections 147, 148, 149, 302 and 504 IPC.

10. Being dissatisfied, the accused-appellant has come up with the present Appeal.

## II. Oral Evidence on record :

i) The prosecution has examined PW1, Chamarbhai Rathwa, Exh.18. PW1 is the original first informant. PW1 has deposed that on the date of the incident i.e. on 10th March 2004 he had gone to a fair along with his friend Manga Na yaka at around 2 O'clock in the afternoon. While returning in the evening at around 6 O'clock, PW1 decided to visit his field. PW1 noticed that there was a pair of slipper lying under a mango tree and also noticed few drops of blood nearby the slippers. PW1 has deposed that thereafter he called his friend Mangabhai and went deep inside the field and noticed that a dead body of an unknown person was lying in the field of corn. PW1 has further deposed that he noticed that the deceased had sustained a deep wound on his neck. The deceased had worn a pant and a shirt and on his right hand wrist there was a silver bangle. PW1 has further deposed that as they could not identify the dead body, he along with his friend, returned home and talked about the same to his sons. Thereafter, the PW1 and his friend Manga went to the police station where a report was registered. The PW1 has proved his First Information Report - Exh.19. He has further deposed that on the next day once again police recorded his statement. He has deposed that a name was inscribed on the silver bangle which was on the right hand wrist of the deceased and the police got some clue, and accordingly, reached village Mithali to inquire further into the matter. He has further deposed that one Versingbhai Ratani yabhai of village Mithali came to his field to have a look at the dead body, and after having a look at the dead body, identified the same to be his son Ramesh. The PW1 has further deposed that at that point of time the father of the deceased is said to have learnt that his son, the deceased, along with his nephews Suresh and Vechat, had gone to village Timla to enjoy a fair. It appears that after deposing to this extent, the Public Prosecutor thought fit to seek permission of the Court to cross-examine PW1 Chamarbhai and prayed before the trial Court to declare PW1 Chamarbhai as a hostile witness. In his cross-examination by the Public Prosecutor, the PW1 has deposed that when the father of the deceased Versingbhai came at his field to look at the dead body, at that point of time, Versing had not disclosed the names of the assailants. He denied the suggestion that Versing had disclosed the names of the assailants before him. The PW1 deposed that it was not true that in his police statement dated 11th April 2004 he had stated that the father of the deceased Versing Ratani ya disclosed before him that the accused and other three co-accused together had inquired with the deceased as to why the deceased had not brought

the drum, and at that point of time, there was some altercation between the deceased and the accused persons, as a result of which the three co-accused caught hold of the deceased, whereas the accused herein inflicted injuries on the deceased causing his death. In the cross-examination by the defence counsel nothing substantial was elicited.

ii) Prosecution has also examined PW2, Sureshbhai Rathwa, Exh.32. PW2 Sureshbhai is an important witness for the prosecution being an eye-witness to the incident. It appears that PW2 is the cousin of the deceased. The PW2 deposed that on the date of incident, he along with the deceased and Vechatbhai Rathwa, had gone to village Timla to enjoy a fair. All three of them left at around 2 O'clock in the afternoon, and after enjoying the fair, were returning home at around 4 O'clock in the evening. The PW2 has deposed that the incident occurred at around 4:30 in the late evening in the field of Chamarbhai. Chamarbhai's field is situated at village Hansda. The PW2 has deposed that at the time of incident, the accused asked the deceased as to why he had not brought the drum, and saying so, the deceased was caught hold of by the three co-accused, whereas the accused inflicted injuries on the neck of the deceased, as a result of which the deceased fell down in the field of corn and died. The PW2 has further deposed that, thereafter, all the accused persons ran away to their respective houses. This witness identified the accused persons sitting in the Court-room, except one co-accused who was absconding. The PW2 also identified the accused herein as the person who had actually inflicted injuries on the deceased. The PW2 has further deposed that the accused persons had threatened him not to disclose about the incident to any other person and, therefore, being frightened the PW2 as well as Vechat Rathwa returned home. On the next day in the morning, the police came at the village and at that point of time, for the first time, the PW2 disclosed before the father of the deceased about the incident. The PW2 has deposed that thereafter police recorded his statement. In his cross-examination, he has deposed that at the fair many people from village Hansda and village Mithali were present at the fair. He has deposed that on the date of the incident many people of village Mithali were travelling on Timla Gunata Road. He has further deposed that it was true that on both the sides of the road there were agricultural fields. He has further deposed that it was true that he had gone to the fair along with the deceased Vechat Bachu. He has deposed that after the incident he himself and Vechat both reached village Mithali at around 5 O'clock in the evening. On reaching the village, the PW2 did not disclose anything about the incident to the father of the deceased. However, the PW2 has deposed that he did inform his father about the incident. He has also deposed that his house and the house of his uncle Versing, the father of the deceased, is common. He has deposed that after talking about the incident to his father, his father along with father of the deceased had gone at the place of the occurrence. He has also deposed that he pointed out the place to his father as well as to the father of the deceased. He has also deposed that Vechat also accompanied them. Thereafter, his uncle i.e. the father of the

deceased, went to Rangpur Police Station. Police officials of Rangpur Police Station came at the place where the dead body was lying and the police inquired with him as well as Vechat. He has further deposed that thereafter the dead body was taken to a hospital. In his cross-examination, a contradiction was recorded in the form of an omission, wherein he deposed that it was not true that he had not stated before the police that the accused told the deceased as to why he had not brought the drum. He has also deposed that it was not true that he had not stated before the police that he was threatened by the accused not to disclose to anyone about the incident, otherwise he would also be killed. He has also deposed that it was not true that he had not stated before the police that the deceased was caught hold of from his two hands and the accused herein inflicted injuries on the neck of the deceased. He denied the suggestion that while returning home from village Timla a quarrel ensued between him, Vechat and the deceased and, therefore, he and Vechat together inflicted injuries on the deceased and committed murder of the deceased. He also denied the suggestion that as he and Vechat were the assailants, both together concealed about the incident for two days. The PW2 also denied the suggestion that with a view to save himself from the offence of murder he had given names of five innocent persons as the assailants.

iii) PW3, Bachubhai Rathwa, Exh.39, is a panch-witness of the scene of offence panchnama Exh.50. This witness has deposed that he was called at Rangpur Police Station on 11th March 2004 to act as a panch-witness. He has deposed that he had gone to the field of Chamari ya situated at village Hansda. On reaching the field he saw a dead body lying in the field. He has deposed that sample soil was collected from nearby place where the dead body was lying. The PW3 has also deposed that he was also called by the police for the second time to act as a panch-witness when dog squad was called for at the place of the incident. He has deposed that the dog, after sniffing at a particular place, led the police at the place where a slipper was lying in the field. He has also deposed that on the date of the incident the deceased had gone to village Timla to attend a fair. Along with the deceased Suresh and Vechat had also gone to attend the fair. The police came at the house of the PW3 at around 7 O'clock in the morning on the next day and showed a silver bangle on which name of the deceased was inscribed as well as a name of the village Mithali was also inscribed. Thereafter, this witness, in company of the father of the deceased Suresh and Vechat, went to village Hansda and saw the dead body of the deceased lying in the field. This witness has deposed that Suresh had told him about the accused inflicting injuries on the deceased with a "pali ya". The PW3 has also deposed that this fact was disclosed by Suresh on the next day at 7 O'clock in the morning. He has deposed that Suresh had not disclosed about the incident after returning home in the evening as Suresh was threatened by the accused. This witness has further deposed that he had no other idea or any further knowledge about the incident. He has deposed that it was not true that he had not stated before the police that Suresh had informed him at 7 O'clock in the morning about the incident.

iv) Prosecution has also examined PW4, Versing Ratani yabhai Rathwa, Exh.40, who is the father of the deceased. The PW4 in his evidence has deposed that he was informed about the murder of his son, the deceased, by Police Constable named Ashokbhai at 7 O'clock in the morning on the next day of the incident. He has deposed that the Police Constable Ashokbhai showed a silver bangle on which the name of the deceased was inscribed. Thereafter, PW4, along with the Police Constable and others, went at village Hansda and saw that his son, the deceased, had been murdered by inflicting injuries on his neck. He has also deposed that the dead body was lying in the field of Chamar Gugar. He has deposed that till the time the Police Constable Ashokbhai informed about the incident, the PW4 was not knowing anything. The PW4 has deposed that the fact that his son, the deceased, had gone to village Timla to enjoy a fair was known to him on the next day i.e. on 11th April 2004. He has deposed that along with his son, the deceased, his nephew Suresh Tersing and Vechat Bachu had also gone to enjoy the fair. Vechat and Suresh both returned home to village Mithali at around 4 O'clock in the evening. He has deposed that he had inquired about his son with Suresh as well as Vechat but due to fear of the accused persons they did not disclose anything before PW4. According to PW4, Suresh as well as Vechat disclosed about the incident only after the police arrived in the village on the next day in the morning. He has deposed that Suresh told him that his son, the deceased, had been killed. The PW4 has also deposed that he was told by Suresh that due to fear of the accused persons he was unable to inform about the incident. The PW4 has deposed that he was told by Suresh that the accused - appellant herein inflicted injuries on the neck of the deceased, whereas the other four co-accused had caught hold of the deceased at the time of the assault. In his cross-examination, the PW4 has deposed that his son, the deceased, Suresh and Vechat had gone to enjoy a fair at around 2 O'clock in the afternoon. Suresh and Vechat both returned home at 4 O'clock in the evening. Suresh happens to be his nephew. The house of the PW4 is adjoining to the house of Suresh. In his cross-examination, the PW4 has deposed that he had inquired with Suresh as to where Ramesh, the deceased, had gone. PW4 was not told anything by Suresh in the evening after returning home, but disclosed about the incident for the first time on the next day at 7 O'clock in the morning. He has also deposed that on the date of incident neither Suresh nor Vechat disclosed anything to him about the incident nor the father of Suresh or Vechat told anything about the incident. It was the Police Constable Ashokbhai who came in the morning and informed the PW4 that Ramesh, the deceased, was dead. He has deposed that thereafter he himself along with his brother Tersing, Vechat Bachu and Suresh Tersing went to the place where the dead body of Ramesh, the deceased, was lying. He has deposed that one Police Officer was present and he inquired as to with whom Ramesh, the deceased, had gone to a fair. According to PW4, at that point of time, he disclosed before the police officer that his son Ramesh, the deceased, had gone to the fair along with Suresh and Vechat and both had returned home on the same day in the evening.

v) Prosecution has also examined PW5, Dr. Purshottamdas Kanjibhia Vankar, Exh.41. The PW5 is the Medical Officer who performed the postmortem on the dead body of the deceased. The PW5 has deposed that the postmortem examination revealed that there was an incised wound on the right neck somewhere near mid-thyroid and 10cm x 10cm x 9cm muscles of trachea esophagus was cut. The PW5 has also deposed that there was incised wound on the back of the skull on the occipital area of 4cm x 3cm. The PW5 has deposed that the cause of death was shock due to rupture of right carotid vessel. The PW5 was shown the muddamal "pali ya", the weapon of offence, and on seeing the said muddamal, the PW5 deposed that the injuries were possible with the same. There was no cross-examination of PW5 at the end of the defence.

vi) Prosecution also examined PW6, Vechat Bachubhai Rathwa, Exh.45. This witness, according to the prosecution, is the second eye-witness to the incident, as he was also present in the company of the deceased and the PW2 Suresh. However, the PW6 Vechatbhai did not support the case of the prosecution and was declared as a hostile witness. This witness has also deposed that he had gone to a fair along with the deceased Ramesh and Suresh Tersing. He has also deposed that in his presence the deceased had no altercation of any nature with anyone. He deposed that he separated himself at the fair and thereafter straightway proceeded at the house of his sister's brother-in-law, and Suresh as well as the deceased proceeded towards their house. The evidence of this witness is of no significance as he has not supported the case of the prosecution.

vii) Prosecution has also examined PW7, Meghjibhai Rathwa, Exh.46. This witness is one of the panch-witnesses of the discovery panchnama of the weapon "palia" as well as the clothes worn by the accused at the time of incident. The PW7 also did not support the case of the prosecution and was declared hostile.

viii) Prosecution examined PW8, Lalubhai Rathwa, Exh.48. This witness is the second panch-witness of the panchnama of discovery of weapon as well as clothes of the accused worn at the time of incident. The PW8, however, did not support the case of the prosecution and was declared hostile. Thus, the contents of the panchnama Exh.47 could not be proved through the panch-witnesses.

ix) The last witness to be examined by the prosecution was PW9, Kalidas Bari ya, Exh.51 - Investigating Officer. The PW9 has deposed that on 10th March 2004, the first informant Chamarbhai came and lodged a report as regards a dead body of an unknown person lying in his field at village Hansda. He has deposed that after registering the FIR he forwarded the complaint to PSO for registering the same and, thereafter, started investigation. He deposed that an inquest panchnama was prepared Exh.32. Scene of offence Panchnama was also prepared. Thereafter, the panchnama of dog tracking was drawn - Exh.35. He has deposed that the accused was available at his house, and accordingly, was arrested and a panchnama of arrest was drawn - Exh.36. The PW9 has deposed that thereafter the accused desired to show the place where he had concealed the clothes which were worn by him at the time of incident, as well as the

weapon "pali ya" used in the commission of the offence, and accordingly, led the police party along with two panch-witnesses at the house of one Mathur Valsing. The PW9 has deposed that after reaching the house of Mathur Valsing the accused pointed out the place where he had concealed the weapon "pali ya" as well as his clothes. The weapon as well as the clothes were taken in possession. The panchnama to this effect was drawn Exh.47. Thereafter, the other three co-accused, voluntarily on their own, surrendered themselves at the Police Station. All the three were arrested and the arrest panchnama Exh.37 was drawn. The dead body was sent for the postmortem examination. Panchnama of the clothes of the deceased was drawn Exh.49. In his cross-examination, the PW9 has deposed that the incident in question had occurred between 3 O'clock and 6 O'clock on 10th March 2004. He has deposed that it was true that a complaint in this regard was lodged at 9:45 in the night. He has deposed that the complainant had no idea as to who were the assailants. He has also deposed that after registering the complaint he had gone at the place of the incident, however, in the night no inquest panchnama could be drawn. He has also deposed that the dog call form Exh.34 was filled up by him on 10th March 2004 at 21:55 hours. The proceedings were undertaken on the next day in the morning. He has also deposed that it was true that on the hand of the dead body there was a silver bangle on which name of village Mithali was inscribed. He has deposed that he had sent Police Constables to village Mithali to inquire, but the Constables returned on the next day in the morning. On the next day after the constables returned, inquest panchnama was drawn. The dead body was identified by the father of the deceased. He has deposed that at the time when the inquest panchnama was drawn, the father of the deceased had no idea about the assailants. He has deposed that after drawing an inquest panchnama, the scene of offence panchnama was drawn on 11th March 2004 at 8:55 hours in the morning. He has deposed that from the place of the incident one pair of gent's slippers and one pair of lady's slippers were recovered. He deposed that he had no idea about the gent's slippers and to whom they belonged to. He has deposed that he did not investigate about the pair of lady's slipper recovered from the place of occurrence and whose slippers it were. He has also deposed that with the help of the dog, one another slipper was recovered. He has deposed that uptill 9:45 in the morning on 11th March 2004 he had no idea or any information as to who had assaulted and committed the murder of the deceased. He has further deposed that he recorded the statement of the eye-witness Suresh Tersing. He deposed that it was true that Suresh, in his police statement, had not stated anything about informing the father of the deceased or his own father about the incident. He has also deposed that it was true that the investigation revealed that the deceased had gone to a fair along with Suresh Tersing and thereafter both together had reached upto the place of occurrence. He has deposed that it was true that Suresh Tersing had not stated in his police statement that the accused had told the deceased as to why he had not brought the drum. He has also deposed that it was true that Suresh, in his police statement, had not stated that he was threatened by the accused and was

warned not to disclose about the incident at home, otherwise he would be killed. The PW9 has also deposed that it was true that Suresh had not stated in his police statement that after the incident was over, the accused persons went to their respective homes. Suresh had also not stated in his police statement that the deceased was caught hold of from both his hands by the other co-accused. He has deposed that his investigation revealed that on the date of the incident Suresh Tersing and Vechat Bachu both returned home to village Mithali at 6 O'clock in the evening and both of them did not disclose anything about the incident till next day morning. He has also deposed that his investigation revealed that there was no enmity between the deceased and the accused persons.

### III. Contentions on behalf of the accused :

11. Mr. P.B. Goswami, learned counsel appearing for the accused, vehemently submitted that the trial Court committed a serious error in recording a finding of guilt against the accused for the offence of murder punishable u/s 302 IPC by placing implicit reliance on the evidence of solitary eye-witness PW2, Sureshbhai Rathwa. Mr. Goswami submitted that having regard to the nature of the evidence of PW2, Sureshbhai, the trial Court ought to have discarded the evidence as the evidence of PW2 Suresh could not be termed as wholly reliable witness. According to Mr. Goswami, the PW2, Suresh, could not be termed as a reliable witness in light of major contradictions in the form of omissions emerging from his oral evidence.

12. Mr. Goswami submitted that the trial Court also committed a serious error in relying on the evidence of discovery of weapons as well as discovery of clothes of the accused, more particularly, when both the panch-witnesses turned hostile and the Investigating Officer also failed to prove the contents of such a panchnama.

13. Mr. Goswami also submitted, that the trial Court committed a very serious procedural irregularity causing grave prejudice to the accused in not giving the accused an opportunity to explain as to under what circumstances he pointed out the place where he had concealed the weapon of offence as well as his clothes, thereby leading to a discovery of fact relevant u/s 27 of the Evidence Act.

14. Mr. Goswami submitted that as such, there was no motive for the accused to commit the crime and the motive as alleged by the prosecution appears to be absolutely trivial and unbelievable. Mr. Goswami submitted that even the Investigating Officer, in his evidence, has deposed that there was no enmity between the accused and the deceased. Mr. Goswami therefore, urged that the Appeal deserves to be allowed and the judgment and order of conviction be set aside.

### IV. Contentions on behalf of the State :

15. Mr. K.P. Raval, learned Public Prosecutor for the State, vehemently submitted

that the trial Court committed no error in convicting the accused by placing reliance on the oral evidence of solitary eye-witness PW2, Sureshbhai, Exh.38. Mr. Raval submitted that only because PW2, Suresh, out of fear, did not disclose about the incident till next day morning, would not be sufficient to render his evidence doubtful. Mr. Raval submitted that PW2, Suresh, at the time of incident, was a young boy aged about 16 years and having witnessed such a ghastly murder of his own cousin brother, the deceased, and also due to threats administered by the accused, may not have been able to disclose about the incident. Mr. Raval submitted that different people behave and react differently in different situations and to discard the evidence of a witness on the ground that he failed to disclose about the incident immediately on returning home to the father of the deceased or to his own family members is no ground to reject the testimony of PW2, Suresh.

16. Mr. Raval also submitted that the ocular version of the PW2, Suresh, is fully corroborated by medical evidence on record. Mr. Raval submitted that the PW5, Dr. Purshottamdas Vankar, Exh.41, in his deposition, has stated that the injuries sustained by the deceased were possible by the weapon of offence i.e. "pali ya". Mr. Raval also submitted that the trial Court committed no error in relying on the evidence of discovery of the weapon "pali ya" at the instance of the accused as well as the discovery of the clothes of the accused stained with blood, and that too, matching with the blood group of the deceased. Mr. Raval, therefore, urged that there being no merit in this Appeal, the same deserves to be dismissed.

17. Having heard the learned counsel for the respective parties and having reappraised the entire evidence, oral as well as documentary on record, the only question that falls for our consideration in the present Appeal is, as to whether the accused could be convicted for the offence of murder punishable u/s 302 of IPC and sentenced to life imprisonment on the strength of oral evidence of solitary eyewitness, PW2, Sureshbhai Exh.32.

18. It is a settled law that conviction could be maintained even on the strength of evidence of a solitary eye-witness provided the Court finds such evidence cogent, clear and convincing. If a solitary eye-witness is found to be wholly reliable, then under such circumstances, there could be no difficulty for the Court to base conviction on the strength of such evidence. However, in the present case, we do not find the evidence of PW2, Sureshbhai, of such a quality on the basis of which it could be said that PW2, Sureshbhai, is a wholly reliable witness.

19. We do agree to a certain extent with Mr. Raval, learned APP, that different people behave and react differently in different situations and, therefore, to discard the evidence of PW2, Sureshbhai, only on the ground that he failed to disclose about the incident to anybody after returning home in the evening, by itself would lead to a miscarriage of justice. We do not propose to say that on this circumstance alone the entire evidence of PW2, Sureshbhai, deserves to be discarded. However, at the same time, the fact that PW2, Sureshbhai, kept conspicuous silence after returning home in the evening and failed to disclose

about the incident could not be overlooked and could also be one of the circumstances along with other circumstances emerging from the record to render the evidence of PW2, Sureshbhai, doubtful. It deserves to be noted at this stage that even the trial Court has disbelieved a part of the case of the prosecution, and to a certain extent, has disbelieved the evidence of PW2, Sureshbhai, so far as other co-accused are concerned who were acquitted by the trial Court. Therefore, this is not a case which could be termed as free from doubt. Under such circumstances, the Court should be much more cautious and circumspect in appreciating the evidence of a solitary eye-witness who could not be termed as a wholly reliable witness. Apart from the fact that PW2, Sureshbhai, for any reason, be it sheer fear of threats which were alleged to have been administered by the accused, kept silence and disclosed about the incident only on the next day in the morning when the police arrived in the village, PW2 also failed to disclose before the police when his statement was being recorded that the incident occurred as the accused inquired with the deceased as to why he had not brought "dhol" (a drum). If "dhol" (a drum) was the root-cause of the incident, then at least it was expected of PW2, Sureshbhai, to have stated before the police when his statement u/s 161 was being recorded about the same. In our view, this omission could not be termed as omission of no consequence, but such an omission is of a vital importance and would be a relevant fact u/s 8 of the Evidence Act. Even omission on the part of PW2, Sureshbhai, to state before the police about the threats alleged to have been administered by the accused assumes significance. If it was the case of PW2, Sureshbhai, that threats were administered by the accused and that was the reason why he kept silence and did not disclose about the incident, then at least on the next day when the police recorded his statement, this fact ought to have been disclosed by PW2, Sureshbhai, before the police. This omission also, in our view, is a relevant fact u/s 8 of the Evidence Act.

20. Apart from the aforesaid, PW2, Sureshbhai, also failed to disclose before the police that the deceased was caught hold of from his two hands by the co-accused and the accused herein inflicted injuries on the neck of the deceased.

21. Prosecution also could not prove the discovery of the weapon, namely, "palia" as well as the clothes of the accused worn at the time of the incident, as all the panch-witnesses turned hostile and even the Investigating Officer failed to prove the contents of such panchnama in accordance with law so as to make it admissible in evidence.

22. The cumulative effect of all the circumstances referred to above renders the oral evidence of PW2, Sureshbhai, susceptible to the complaint that his evidence could not be said to be of a sterling quality, on the strength of which, a Court of law could unhesitatingly record conviction for a serious offence like one of murder punishable u/s 302 of IPC and sentence the accused for life imprisonment.

23. A strong suspicion, no doubt, exists against the accused, but such suspicion

cannot be the basis of conviction, going by the standard of proof required in a criminal case. The distance between "may be true" and "must be true" shall be fully covered by reliable evidence adduced by the prosecution. But, that has not been done in the instant case.

24. Having regard to the set of available evidence, we are of the view that the accused is entitled to the benefit of doubt. In the Result, we allow the Appeal and set-aside the judgment of the trial Court. The accuse appellants shall be released forthwith from the jail if not required in any other case. Fine, if any paid be refunded.