

(2008) 10 GUJ CK 0014
In the Gujarat High Court
Case No : Criminal Appeal No. 653 of 1999

Chimanbhai Chhaganbhhai Gamit and Others	APPELLANT
Vs	
State of Gujarat	RESPONDENT

Date of Decision : 17-10-2008

Acts Referred:

Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 157, 313, 374, 386
Penal Code, 1860 (IPC) — Section 114, 302, 304, 323, 504

Citation : (2008) 3 GLH 678

Hon'ble Judges : H.B. Antani, J;C.K. Buch, J

Bench : Division Bench

Advocate : MJ Buddhbhatti,s Nos. 1 - 3, for the Appellant; DS Pandit, Ld. Addl. Public Prosecutor for Opponents No. 1, for the Respondent

Final Decision : Allowed

Judgement

C.K. Buch, J.—The present appeal is preferred by the appellants-orig.convicts u/s 374 read with Section 386 of the Code of Criminal Procedure, 1973, challenging the legality and sustainability of the judgment and order of conviction and sentence dated 05th June 1999 passed by the learned Additional Sessions Judge, Surat camp at Vyara, in Sessions Case No.109 of 1996, whereby the learned trial Judge has held appellant No. 1-Chimanbhai Chhagabhai Gamit guilty for the offence punishable under Sections 323 and 504 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for 6 months and to pay fine of Rs.100/- on each count; in default of payment of fine, to undergo rigorous imprisonment for two months and three months respectively for both the offences. The learned trial Judge has further held appellant nos.2 and 3-orig. accused nos.2 and 3 guilty for the charge of offence punishable u/s 302 read with Section 114 of the Indian Penal Code and sentenced each of them to undergo rigorous imprisonment for life and to pay a fine of Rs.800/- each and in default of payment of fine, to undergo simple imprisonment for 4 months by each of them.

2. Appellant No. 1 is the father of appellant nos.2 and 3 and obviously, appellant nos.2 and 3 are the real brothers. The judgment and order of conviction and sentence is challenged on various grounds mentioned in paragraph No. 2 of the memo of the appeal. At present appellant No. 1-orig. accused No. 1 is enjoying bail.

3. Heard Shri M.J. Budhbhatti, learned Counsel appearing for the appellants and Ms. D.S. Pandit, learned Additional Public Prosecutor, appearing on behalf of the respondent-State, at length. Firstly, it would be appropriate to state the facts of the case placed by the prosecution in brief so as to appreciate the evidence led by the prosecution and the arguments advanced. According to the prosecution, PW-2-complainant-Taraben widow of Nanubhai Chhagabhai along with her husband Nanubhai Chhagabhai (deceased) was at her residential premises situated in Pradhanwadi Faliya of village Bedchit, Tal. Vyara. That 10 days prior to 01st September 1995, which is the date of incident in question, there was some hot exchange of words and the said Nanubhai Chhagabhai-husband of complainant had snubbed appellant No. 1 for getting his bullocks grazed the rice crop from the field of Nanubhai Chhagabhai. Since then, the ill-feeling was there between the said two families. Appellant No. 1 is the real brother of deceased Nanubhai Chhagabhai. On 01st September 1995 at about 07-30 p.m., the said Nanubhai Chhagabhai along with his family was in his house. At that time, appellant No. 1 had gone there and started abusing Nanubhai and attempted to give stick blow. At that time, Nanubhai tried to escape but he was caught hold off by appellant nos.2 and 3. Appellant nos. 2 and 3 had brought axes with them from their house. Appellant No. 2 inflicted 2 to 3 blows of axe on the head of Nanubhai. In the same way, appellant No. 3 also gave two blows with the axe on the head of Nanubhai. According to prosecution, the complainant intervened in the quarrel; that too during the act of assault and at that time, appellant No. 2 gave blow by reverse side of the axe to the complainant. The basic case of the prosecution is that actually there were 4 accused persons. Dinuben-wife of appellant No. 1, who was orig. accused No. 4, was also there. She was also abusing Nanubhai as well as complainant; and she had also given kick and fist blows to Nanubhai as well as complainant. The injured Nanubhai was thereafter taken to hospital, where he succumbed to the injuries inflicted on his head.

4. It is alleged that Soma Chhagabhai, Chiman Chhagabhai (appellant No. 1) and Gamanbhai Chhagabhai are three real brothers of Nanubhai Chhagabhai (deceased). Nanubhai was the youngest. All the four brothers were given agricultural lands by their father dividing the land owned and held by their father equally. Nanubhai had cultivated rice crop in the field. The field of Nanubhai was grazed by bullocks of appellant No. 1 and on that very count, there was hot exchange of words between these two brothers and the first blow was given by appellant No. 1 with stick when Nanubhai was trying to escape to save himself from the assault. The complainant, therefore, shouted. At that time, orig. accused No. 4 had reached at the spot and gave kick and fist blows. On account of hubbub, one Dalu Puniya Gamit reached the spot and tried to intervene and

thereby, tried to save Nanubhai. At that time, appellant No. 2 inflicted two blows with reverse side of the axe to the said Dalu Puniya Gamit; one on the head and another on the left hand. On arrival of other residents of Pradhanwadi Faliya, the accused persons fled away with weapons. The injured Nanubhai was lying there near the house of Manilal in an unconscious condition and from there he was shifted to hospital.

5. The complaint is lodged on 02nd September 1995 at about 04-15 a.m. with Vyara Police Station. The police started investigation and thereafter arrested the accused. The learned trial Judge at the end of trial, acquitted orig. accused No. 4 from all the charges levelled against her, including from the charge of offences punishable under Sections 304 read with Section 114 of the Indian Penal Code.

6. All the orig. accused were charged for the offence punishable u/s 135 of the Bombay Police Act, however, they have been acquitted from the charge of the said offence. There was no charge on any of the accused, including appellant No. 2 for the act of giving blows with reverse side of the axe on the body of PW-Dalu Puniya Gamit.

7. Shri M.J. Budhbhatti, learned Counsel appearing for the appellants, has taken us through the evidence of all the 14 witnesses examined by the prosecution, including two minor daughters of deceased and complainant namely PW-8 Shakeela and PW-10 Heena.

8. The injured PW-9-Dalu Puniya Gamit has turned hostile and has not supported the case of the prosecution. Nanubhai was found lying in an injured and bleeding condition near the house of one Manilal. However, the said Manilal has not been examined by the prosecution. On reading of the evidence of PW-4 Shukar Manilal and certain questions put to other witnesses examined, including the complainant, it appears that the said Shukar Manilal is the son of Manilal.

9. According to prosecution, one PW-5-Mahesh Somabhai had reached the spot immediately after the incident. This PW-5 Mahesh is the real nephew of deceased Nanubhai and appellant No. 1. This Mahesh Somabhai has been examined as PW-5 vide Ex.24.

10. Shri Buddhbhatti while developing his arguments has submitted that the learned trial Judge has wrongly placed reliance on the evidence of PW-2 Taraben and it was not safe to hold the appellants guilty on the evidence of either complainant or any other witness, more particularly, PW-5 Mahesh Somabhai; PW-8-Shakeela and PW-10-Heena. PW-2 Taraben has made a number of improvements creating contradictions in the basic story placed by the prosecution and PW-5 Mahesh has attempted to pose himself to be an eye-witness to the incident. Though none of the daughters of the complainant namely Shakeela and Heena, is named as witnesses to the incident, they have been introduced as eye-witnesses to the incident. On account of this attempt made by the prosecution to implicate all the three appellants in a serious offence, a number of contradictions have emerged and the story of the prosecution has

become improbable.

11. It is the duty of the prosecution to prove the case as placed and pleaded to the satisfaction of the Court and beyond all reasonable doubts. When neither PW-Dalu Puniya Gamit has supported the case of the prosecution nor the probable eye-witness Shukar Manilal has led any evidence which can be said to be incriminating against the appellants, the appellants were deserving acquittal. The learned trial Judge has ignored the basic principle of appreciation of evidence and has placed reliance on the evidence of partisan witnesses.

12. According to Shri Budhbhatti, the evidence of complainant-Taraben if is read, it clearly emerges that she may not have seen the incident or actual act of assault. The place of incident is comparatively far and there is nothing on record to show that the place of incident can be seen which is near the house of Shukar Manilal from the doorsteps of house of complainant-Taraben. The map produced by the prosecution clearly suggests that a person standing at the house of complainant-Taraben cannot see the place where the deceased was lying in the injured condition. There is no evidence of presence of blood stains near the house of deceased or anywhere between the house of the deceased and the place where deceased was found lying in the injured condition.

13. The complainant-Taraben has attempted to introduce her two daughters as eye- witnesses to the incident and so also PW-5 Mahesh, real nephew of the deceased. This PW-5 Mahesh, as per the story of the prosecution, was not an eye-witness but he had reached to the spot after sometime and he was only a party in shifting Nanubhai to hospital after making certain arrangements. No mark of violence was found on the body of the complainant. So the theory placed by her that she was present when Nanubhai was assaulted and the assault made on her by orig. accused No. 4 gets falsified. The evidence of this witness PW-2 Taraben is in conflict with the evidence given by PW-5 Mahesh and also the evidence of daughters of complainant i.e. PW-8 Shakeela and PW-10 Heena. If this conflict in evidence or disharmony in evidence of these four witnesses i.e. PW-Taraben, PW-Mahesh, PW-Shakeela and PW-Heena, leaving the hostile witness PW-9 Dalu Puniya, is scanned closely, it is possible to observe that the evidence of PW-Taraben does not get corroboration which can be said to be sufficient in the eye of law.

14. By reading evidence of PW-Taraben, Shri Budhbhatti has pointed out that PW-Taraben was not aware about the event which might have taken place immediately prior to the assault made on Nanubhai. The victim was Nanubhai as his field was grazed and when it is the say of PW-Taraben that Nanubhai had not taken the incident of getting his field grazed seriously and had felt satisfied by some words to his elder brother i.e. appellant No. 1, there was no scope for the accused to rush to the residence of Nanubhai. Nobody from the neighbourhood has been examined that appellant No. 1 alone initially had gone to the resident of Nanubhai and was giving abuses to him. This witness i.e. PW-2 Taraben has made material improvement saying that Nanubhai was called outside his house

by appellant No. 1 saying that he i.e. Nanubhai, has become smarter and, therefore, he (appellant No. 1) would punish him (Nanubhai). The conversation which had taken place between Nanubhai and appellant No. 1 at the doorsteps of the house of Nanubhai communicated by PW-2-Taraben is a material improvement and no such story is found in the complaint given by PW-2-Taraben.

15. The story of involvement of orig. accused No. 4-Dinuben narrated by this witness has not been believed by the learned trial Judge.

16. Though it is claimed by PW-5-Mahesh that he is an eye-witness to the incident, according to PW-Taraben, he had reached to the spot only after the incident. Though according to PW-Taraben, PW-Shukar Manilal was not an eye-witness, the prosecution has examined Shukar Manilal as an eye-witness to the incident. As mentioned earlier, though none of the two daughters of PW-2-Taraben has been described as an eye-witnesses in the complaint, they have been introduced as eye-witnesses to the incident by PW-Taraben. She has admitted in her cross-examination that there are two houses between her house and the house of Shukar Manilal; and the map produced by prosecution shows that on the opposite side of the house of PW-2 Taraben, near the house of Shukar Manilal, the injured Nanubhai was lying.

17. It is not the case of the prosecution that the deceased Nanubhai was physically able to narrate the incident and it is also not the case that the accused were named by Nanubhai at any point of time prior to he succumbed to the injuries. It is claimed by PW-Taraben that at the time of incident, her two daughters i.e. PW-Shakeela and PW-Heena and PW-Mahesh as well as herself were already there near the house of Shukar Manilal and, therefore, there was no reason to rush to the open land (Aangan) of Shukar Manilal. Meaning thereby, it is the say of PW-Taraben that all the four are eye-witnesses to the incident but this story is found unreliable if the evidence of PW-Mahesh and two daughters of complainant, is evaluated closely. On the contrary, she has admitted that when they reached in the open land (Aangan) of Shukarbhai Manilal, Nanubhai-her husband was lying there. They had raised shouts and thereafter the people residing in the neighbouring area had gathered. Initially this witness has attempted to state that Manilal is residing separately, but thereafter she has admitted that Shukarbhai and Manilal, father and son, are residing in one house only.

18. The number of blows narrated by PW-Taraben is not corroborated by the medical evidence. It is stated by this witness in her examination-in-chief that appellant No. 2 had inflicted four blows with axe on the head of the deceased. According to the complainant, appellant No. 3 had inflicted blows with axe on the head of the deceased. When these blows were being inflicted, Nanubhai was caught hold off by orig. accused No. 4-Dinuben. At that time, this PW-Taraben had intervened. The implication of orig. accused No. 4-Dinuben of catching hold off Nanubhai, has not been believed by the learned trial Judge. The story told by this witness in the examination-in-chief that Nanubhai was caught hold off by

orig. accused No. 4 is found to be of material improvement to implicate orig. accused No. 4 in a serious offence. She has denied the suggestion that appellant nos. 2 and 3 have not inflicted blows with axe on her husband. But none of the daughters of the complainant has stated in her deposition that appellant No. 3 had assaulted Nanubhai with axe or he had inflicted axe blow to Nanubhai. Meaning thereby, when PW-Taraben is not getting corroboration qua involvement of appellant No. 3 in the incident with axe in his hand or any overt act by appellant No. 3 with axe in the entire incident, the learned trial Judge ought to have discarded the evidence of this witness, stating that if the version of this witness Taraben is believed, the basic case of the prosecution will not be able to stand on its own legs.

19. When it emerges that something must have happened with Nanubhai immediately prior to the incident, it may be with accused persons or any one of the accused, or any third person, but the prosecution has not remained successful in unfolding that part of story. The conflict in medical evidence qua number of blows inflicted on the head of the deceased makes the version of PW-Taraben not only doubtful but it was possible for the learned trial Judge to say that PW-Taraben must not have seen the incident. For the reasons best known to him, though the case of the prosecution is that PW- Shukar had seen the incident, PW-Taraben had never attempted to state with clarity that PW- Shukar had witnessed the incident. The time of incident does not indicate that Shukar and his family members might have gone to bed. This Shukar has been examined as eye-witness to the incident but has not supported the case of the prosecution. It was possible for the prosecution to lead convincing evidence through this Shukarbai Manilal. When the case was resting practically on the sole evidence of PW-Taraben, the learned trial Judge ought not to have held all the three appellants guilty.

20. Here it will be appropriate to refer to the nature of visible injuries found on the body of the person deceased as mentioned in the postmortem note, which are as under :

(1) Stitch wound on Lt side of the hand about 7 complainant. (5 cotton) stitch oblique just part to Lt. Ear. Above about 5 c.m.

(2) Stitch wound on Rt side of gentially on head "Cotton stitches about 13 c.m. oblique shape.

(3) C.L.W. about 3x1 c.m. x bone deep posit. to Rt. Depressed fracture Temporal Bone palpable.

(4) Stitched wound on Rt. Side of the head near IInd injury. (2) cotton stitched wound about 2 c.m. Oblique.

(5) Stitch wound Rt. And 4 stitched cotton oblique about 5 c.m. after around all stitch wound shows C.L.W. in midline Bone Deep.

21. Considering the gravity of the aforesaid injuries, it emerges that the first

blow must have been inflicted when Nanubhai was at the very spot where he was lying in an injured condition. No injury was found by the Doctor on any other part of the body than head. One Contused Lacerated Wound (CLW) found on the head was of 3 cms. x 1 cm. bone deep near right ear and that one had caused depressed fracture of temporal bone. So if any blow inflicted with stick by appellant No. 1 was there on the head, that could be only this CLW described in the postmortem note; but with that one the deceased could not have reached near the house of Shukar and other spot could have been found at the doorsteps of house of deceased Nanubhai. This makes one thing clear that no incident of assault had occurred when the deceased was either in the house or at the doorsteps of his house. The presence of PW-Taraben and two daughters can be said to be probable or natural in or near their house. So the prosecution story ought to have been held as unreliable so far as initiation of quarrel or assault is concerned. It is clear that something must have happened which can be said to be sudden or spontaneous when Nanubhai was assaulted. The element of pre-meditation of assaulting deceased, more particularly with an intention to kill him, according to Shri Budhbhatti, is found improbable. In that situation, the Court ought not to have held any of the appellants guilty for the charge of offence punishable u/s 302 of the Indian Penal Code.

22. The evidence of PW-Shukar Manilal does not help the prosecution because he has not supported the case of the prosecution. It emerges clearly that PW-Mahesh is not an eye-witness to the incident and he has rushed to the spot after the incident and it is not the say of this witness that he had seen the accused persons fleeing away from the spot. On the contrary, he has posed himself to be an eye-witness which is not even the case of PW-Taraben in the complaint lodged before the police. The complaint is lodged after some hours. The complainant at least could have stated that Mahesh-real nephew of Nanubhai i.e. son of eldest brother of Nanubhai, is an eye-witness to the incident.

23. PW-8-Shakeela, one of the daughters of the complainant, has not attributed any overt act with Axe to appellant No. 3; and PW-10-Heena has not attributed any role which can be said to be a role for which appellant No. 3 could have been held responsible u/s 114 of the Indian Penal Code and hence, Appellant No.3 was required to be acquitted by the learned trial Judge. When both appellant nos.2 and 3 are implicated in the offence for giving blows with axe and when it is the say of complainant that one of them had inflicted 4 blows and another was also inflicting blows with axe, the learned trial Judge ought to have acquitted all the four accused saying that PW-Taraben-complainant has given exaggerated version though she is not an eye-witness to the incident to implicate all the four members of family of appellant No. 1 in such a serious offence, merely on the ground that there was some hot exchange of words prior to 10 days of the incident in question between Nanubhai (deceased) and appellant No. 1, it is very likely that some persons for their own reasons might have assaulted Nanubhai and the complainant being unaware about the entire thing which might have taken place with Nanubhai, and the complainant would have presumed that the

incident occurred prior to 10 days may be the cause of the assault and, therefore only, she posed herself to be an eye-witness and implicated the accused.

24. It is further submitted by Shri Buddhbhatti that as per the basic story of the prosecution, appellant No. 1 was holding stick and appellant nos.2 and 3 were holding axes. The orig. accused No. 4 was not holding any weapon. The evidence led by the prosecution itself creates shadow of doubt qua the involvement of appellant No. 3 because two eye-witnesses examined i.e. PW-8 Shakeela and PW-10 Heena, daughters of deceased, have not involved appellant No. 3-Nitin in the incident by any overt act, more particularly of inflicting the axe blow on the head or any other part of the body of Nanubhai. Even though surprisingly two axes have been recovered by the police. Both, according to prosecution, were stained with blood and as per the report of serological examination of both the axes, the same were found stained with human blood of Group "B". The earth collected from the spot as well as the clothes of the deceased were also found stained with human blood of Group "B".

25. The prosecution, thus, has failed in establishing the case as per the substratum of the story and, therefore, all the accused deserve benefit of doubt. When appellant No. 1 has been acquitted from the charge of offence punishable u/s 302 read with Section 114 of the Indian Penal Code and has been held responsible for the offence punishable under Sections 323 and 504 of the Indian Penal Code and orig. accused No. 4-wife of appellant No. 1 herein, has been given fair acquittal though a specific role has been assigned to her by the complainant, and the version of the complainant has not been believed qua the active participation of orig. accused No. 4 in the incident, her version ought not to have been accepted as reliable qua other three accused persons also. For short, the appeal is required to be allowed by quashing and setting aside the judgment and order of conviction and sentence under challenge.

26. Ms. D.S. Pandit, learned Additional Public Prosecutor, has concentrated her arguments mainly on the medical evidence, especially postmortem note. She has also concentrated her arguments on the evidence of the complainant-wife of the deceased and her two daughters namely PW-8 Shakeela and PW-10 Heena and also on the evidence of PW-5 Mahesh, real nephew of the deceased, who had reached to the spot immediately after the incident as his house is situated nearby, and also on the opinion of the Forensic Science Laboratory. It is submitted that there is nothing on record to show that the deceased had any inimical terms with anybody in the village or in the nearby area. The complainant-Taraben is the wife of deceased, who is the real brother of appellant No. 1. There is no reason for her to falsely implicate her brother-in-law i.e. appellant No. 1 and two real nephews of deceased i.e. appellant nos.2 and 3-sons of appellant No. 1, in such a serious offence. The personality of the deceased has emerged as a person docile and not of reactive nature. The incident had started at the doorsteps of house of Nanubhai Chhagabhai (deceased). The map produced by the prosecution shows that the residential premises of the accused as well as the

deceased are in close vicinity and the quarrel was firstly taken up by appellant No. 1 for no reason, is the story of the prosecution and, thereafter, it took a serious turn and appellant nos.2 and 3 also joined his father i.e. appellant No. 1. It is the say of the complainant that both appellant nos.2 and 3 had brought axes from their house. They might have taken the cause of their father but when none of the accused was found injured on his arrest, there was no scope for the learned trial Judge to infer that the other axe found blood-stained might be of the deceased. Therefore, the version of the complainant has been given due weightage by the learned trial Judge, wherein she has narrated that both appellant nos.2 and 3 gave axe blows to her husband on the head and other parts of his body. Her version gets corroboration from the medical evidence and the postmortem note. True it is that the version of complainant is an exaggerated one. She perhaps has attempted to implicate her sister-in-law i.e. orig. accused No. 4, but when it was possible for the learned trial Judge to separate grains from chaff and he has done that exercise legally by evaluating the evidence keeping in mind the basic principle of law, the judgment and order of conviction and sentence may not be disturbed.

27. It is submitted that the presence of complainant at the spot of incident is natural as she is residing in the vicinity. Merely because she is the widow of Nanubhai Chhagabhai (deceased), her evidence should not be discarded or viewed with suspicion branding her as partisan witness. The improvements made by this witness pointed out by Shri Buddbhatti and the contradictions emerging from her oral version and the FIR lodged, are not found material and if it is possible to ignore the same, the rest of the part of her version could have been accepted and thus, has been rightly accepted by the learned trial Judge. It emerges that firstly only appellant No. 1 might have gone to the house of Nanubhai in reference to the incident which had taken place prior to 10 days. The matter could have been sorted out by these two brothers. On account of quarrel, appellant No. 1 might have given some stick blows to Nanubhai Chhagabhai, but there was no reason for appellant nos.2 and 3 to rush for rescue of their father because there is nothing on record to show prima facie that Nanubhai Chhagabhai was also holding any weapon and the life and body of appellant No. 1 was in danger. On the contrary, as per the say of the prosecution, Nanubhai Chhagabhai was unarmed and he was cornered by all the three accused persons near the house of Sukarbhai when Nanubhai Chhagabhai attempted to escape from his house to save himself and was assaulted by appellant nos.2 and 3 with their respective axe. When it is the say of the prosecution and the police had collected evidence as to recovery of both these blood-stained weapons and the Investigating Officer had proved the said part of evidence, ignoring the evidence of panchas in this regard, the learned trial Judge was supposed to consider the opinion evidence of Forensic Science Laboratory and the medical evidence and, therefore, a positive finding has been recorded that both the brothers i.e. appellant nos.2 and 3 abetted each other in causing death of Nanubhai Chhagabhai. There is no element of sudden provocation, that too on account of

conduct of the deceased. So this is a case where it is not even possible to conclude that accused might have committed offence of culpable homicide not amounting to murder. The learned trial Judge has tried to consider the size of the blows and the part of the body selected for inflicting such blows. The crucial witnesses have turned hostile. The real nephew might have reached subsequently to the spot of incident. Even though this witness might have posed himself wrongly as an eye-witness to the incident during his deposition before the Court, but according to Ms.D.S.Pandit, this PW-Mahesh does not appear to be an eye-witness and he was a party in shifting his injured uncle to the hospital immediately after the incident, but this conduct or conflict of PW-Mahesh would not make the version of complainant unreliable. If one witness is found reliable and it is possible for the Court to listen to the ring of truth from the evidence of a single witness, that part of truth if is found sufficient to link the accused with the crime, the Court can hold the accused responsible for the charge qua the nature of offence.

28. In response to the query raised by the Court, Ms.D.S. Pandit has fairly accepted that in the FIR none of the two daughters of the complainant namely PW-8 Shakeela and PW-10 Heena, examined as eye-witnesses, have been named as eye-witnesses. The learned trial Judge ought to have considered the teen age of PW-8 Shakeela as she was 15 years of age and PW-10 Heena, who was only 12 years of age, at the time of incident. When it is the say of prosecution that both these witnesses are eye-witnesses, it was necessary for the prosecution and more particularly, the complainant to explain as to in what circumstances she could not name both of her daughters as eye-witnesses to the incident while giving a detailed complaint. Though there was ample scope for her to deliberate with her two daughters and Mahesh-real nephew, their names are not found in the FIR as eye-witnesses. It is very likely that they might have been planted as eye-witnesses, though there were two other eye-witnesses, as per the case placed by the prosecution, namely Sukar and injured eye-witness Dalu Puniya. PW-Dalu Puniya had sustained injury during the course of incident as he had tried to save Nanubhai (deceased). The medical certificate is also produced. Though the prosecution has proved that this witness Dalu Puniya was present at the spot when Nanubhai was being inflicted blows, this witness has not supported the case of the prosecution. The learned trial Judge could have prosecuted this witness by putting certain questions confronting this witness because it is the privilege of the Court to confront the witness irrespective of the cross-examination made by the learned Public Prosecutor. In the same way, Sukar has also not supported the case of the prosecution. Ms.D.S. Pandit has fairly submitted that the police might have apprehended that these two crucial witnesses might not support the case of the prosecution and, therefore, these two witnesses i.e. PW-Shakeela and PW-Heena, might have been introduced as eye-witnesses, but according to her, it is very likely that while lodging the complaint, the complainant might not be knowing that her daughters also might have seen the incident and it was possible for the Investigating Officer to find out

this fact and therefore, he might have recorded their statements accordingly. While replying the query raised by this Court, Ms.D.S. Pandit has submitted that the prosecution cannot now say that these two daughters of Nanubhai (deceased) might not have seen the entire incident and, therefore, there is no clear narration of the story qua the act of both the appellant nos.2 and 3 because during the cross-examination, it has come on record from the evidence of PW-10 Heena that appellant No. 3 had only a small stick, which is popularly known as "Difnu", which normally is being used to drive cattle or livestock, and the same is thinner than even a wood-log. She has not stated though specifically asked that appellant No. 3 had given axe blow to her father Nanubhai and appellant No. 3 had simply pulled out her father from "Otta" of her house and her father Nanubhai was beaten by them. This witness has specifically involved orig. accused No. 4. The act of pulling Nanubhai from "Otta" by any of the accused is found to be an improvement in the version of PW-10 Heena. This witness has said that the other neighbours had rushed to the spot of incident after the accused fled away. There is again improvement in the version of this witness that appellant No. 3 had "Difnu" in his hand.

29. PW-8 Shakeela in her examination-in-chief has stated that appellant No. 2 had given four blows with axe to her father Nanubhai. Appellant No.3 had not hurt or caused any injury to her father. Thus, the learned trial Judge could have held that this contradiction between the version of complainant and her two daughters, is a material conflict in the evidence of prosecution.

30. It is submitted by Ms. D.S. Pandit that the finding recorded by the learned trial Judge may not be reversed because appellant No. 3 has been held responsible for the offence punishable u/s 302 read with Section 114 of the Indian Penal Code. There is consistent evidence about his participation in the incident, but for appellant No. 3, appellant No. 2 perhaps could not have been succeeded in giving more than one blow on the vital part of the body of Nanubhai. From the papers of investigation, it emerges that appellant No. 3 was a very young boy as he was just about 17 to 18 years of age at the time of incident. When two real daughters of the complainant have not assigned any significant role to appellant No. 3 and also to appellant No. 1, who according to prosecution, was a person to initiate the quarrel, has been acquitted from the charge of offence punishable u/s 302 read with Section 114 of the Indian Penal Code, the learned trial Judge perhaps could have given some benefit to appellant No. 3, but the first submission of Ms.D.S. Pandit, is that the judgment and order of conviction and sentence is required to be upheld or at least appellant No. 3 can be given benefit of doubt. Appellant nos.1 and 2 have been rightly convicted by the learned trial Judge.

31. Having considered the rival contentions, it appears that the most crucial evidence available to the prosecution is of the complainant-Taraben. On close reading of evidence of the complainant, material improvements have been made by PW-Mahesh and contradictions emerging from the evidence of these

witnesses, make one thing clear that PW-Mahesh was not actually present at the time of incident when Nanubhai was being inflicted blows because PW-5 Mahesh in his cross-examination has accepted that after the hubbub when he reached at the residence of complainant, the complainant narrated him about the incident and this was his stand and version before the police. So there was no scope for the learned trial Judge to give any weightage to PW-Mahesh to get the guilt established. So far as actual incident of assault is concerned, the evidence of PW-Mahesh does not corroborate the complainant. In the same way, the version of two daughters posed and examined as eye-witnesses do not attribute any overt act to appellant No. 1 of giving stick blow to Nanubhai which can be accepted as trustworthy evidence against appellant No. 1 and these two very witnesses do not attribute the act of giving axe blows to Nanubhai by appellant No. 3. PW-8 Shakeela even does not say that appellant No. 3 was holding "Difnu" in his hand. On the contrary, when she had said that appellant No. 3 had not caused any injury to her father and when PW-10 Heena says that appellant No. 3 had only "Difnu" in his hand at the time of incident, it would not be safe for the Court to concur with the finding recorded by the learned trial Judge that appellant No. 3 was holding axe and he was also a party in giving blows with axe on any part of body of Nanubhai Chhagabhai, merely on the strength of evidence of sole witness Taraben. The presence of complainant-Taraben at the spot of incident also is not found natural. She being a housewife, her presence would be in the house. The map produced and proved by the prosecution in respect of spot of the incident clearly suggests that a person standing at the doorsteps of residential premises of the deceased, cannot visualize the incident. According to prosecution, the incident had occurred at or around 07-30 p.m. The place of incident is Pradhanwadi Faliya and the house of PW-Sukar is adjacent to the spot of incident. So the complainant might have reached to the spot after hearing some shouts. No blood stains were found during investigation near the house of the deceased. The time of 07-30 p.m. in the month of September may be the time of returning of agriculturists from their respective field. Though it is not in evidence but it is the experience of the society that the farmers return to their respective home in the evening approximately between 06-30 p.m. and 07-30 p.m. So on listening the shouts of her husband, the complainant might have rushed to the spot of incident. The statement of injured eye-witness has been recorded comparatively late. Though the injured witness Dalu Puniya had sustained bleeding wound, the treatment taken by him is also found comparatively late. This fact is emerging from the medical certificate at Ex.17. He was examined by the doctor on 02nd September 1995 in the morning at 03-00 a.m. So at the spot of the incident, it emerges that there were about 3 to 4 persons, including the complainant, who had rushed to the spot. So except the complainant and PW-Dalu Puniya, no one else would have witnessed the incident. The incident has occurred just adjacent the house of PW-Shukarbhai. He might also have seen the incident but when Shukarbhai and Dalu Puniya have not supported the prosecution case, the bare words of the complainant would not help the prosecution qua involvement of all the four accused. According to the

complainant, the stick blow was given by appellant No. 1 to her husband Nanubhai. It emerges that there was no initial examination of body of the person deceased and the postmortem was performed between 09-30 a.m. and 10-00 a.m. on 02nd September 1995 i.e. on the next day of the incident. PW-Dalu Puniya had been to hospital in the wee hours of the day i.e. 03-00 a.m. on 02nd September 1995. The offence has been registered by Vyara Police Station at about 04-15 a.m. When it is the say of the complainant that her husband died in the hospital, she gave complaint to the police in that respect, creates a contingency as to at what point of time the injured Nanubhai, Mahesh and the complainant had reached Vyara Hospital. In this fact situation, the time of giving complaint becomes relevant because the distance between the place of incident and the Police Station is shown to be of 22 kms. in the report submitted u/s 157 of the Code of Criminal Procedure, 1973, but the injured Nanubhai was taken in a Tempo and the complaint was given in the Police Station and not in the hospital. Even then in the complaint, the name of her two daughters namely PW-8 Shakeela and PW-10 Heena have not been disclosed as eye-witnesses to the incident. So the complainant was sure that a stick blow was given to Nanubhai by appellant No. 1. The examination-in-chief of the complainant says that appellant No. 1 had inflicted blows with stick. Meaning thereby, more than one blow was given by appellant No. 1, but no such injury was found by the doctor at the time of performing postmortem, otherwise bruise could have been seen by the doctor on the body of the deceased. So the say of the complainant does not get corroboration from the medical evidence, so far as active involvement of appellant No. 1 in the incident is concerned.

32. True it is that PW-1 Dr. Mahesh Chaudhari, who has been examined vide Ex.15, has stated in his deposition that out of total five wounds found on the body of the deceased, four wounds were stitch wounds and one which is mentioned as Injury No.3 was Contused Lacerated Wound (CLW). But it is relevant to note that as per the said Dr.Mahesh Chaudhari, all the five wounds were CLW. The Injury No.3 as described by Dr. Chaudhari was CLW of 6 cms. x 1 cm. x bone deep which had caused depressed fracture of right temporal bone. The doctor has opined that such injuries can be inflicted by a weapon such as stick, but it is possible to infer that a person sustaining injury like Injury No.3 mentioned by Dr.Chaudhari cannot walk or run for long. So Injury No.3 was not a result of the blow allegedly inflicted by appellant No. 1. As per the say of either complainant or her daughters, the same was inflicted by appellant No. 1 near their house. As mentioned hereinabove, no blood stains were found at the doorsteps or in the vicinity of of the residential premises of the complainant. So all the blows, which were seen on the head of the deceased, must have been inflicted at the spot where the deceased was found lying in an injured condition.

33. When two material eye-witnesses examined by the prosecution do not attribute any overt act to appellant No. 3 and none of these witnesses i.e. PW-8 Shakeela and PW-10 Heena, has stated that appellant No. 3 was holding axe and he had chased Nanubhai with axe in his hand, then before accepting the say of

complainant the learned trial Judge ought to have thought over one probability which has emerged automatically on account of version of these two witnesses that the axe found blood-stained might be of Nanubhai (deceased) himself. After all he was also an agriculturist. He might be holding axe while returning from his field and before he could reach his home, he might have been intercepted because there are material contradictions as to the presence of Nanubhai (deceased) at his residential premises and the story told by complainant-Taraben, PW-Shakeela and PW-Heena. These contradictions have come on record in the nature of improvements made by these witnesses and inconsistent facts stated by them during the course of their cross-examination. Nobody from the neighbourhood has been examined by the prosecution who can prove independently the event of quarrel which had allegedly taken place either in the house or on the abutting part of the house i.e. "Otta" of the house of the complainant, otherwise the people would have gathered there before arrival of appellant nos.2 and 3. The story of the prosecution is that initially appellant No. 1 had gone to the residential premises of Nanubhai and on account of quarrel, two sons of appellant No. 1 i.e. appellant nos.2 and 3, had rushed there by each of them taking an axe in his hand from his house and even orig. accused No. 4 joined the said quarrel thereafter. If the version of complainant is believed in toto, the learned trial Judge was required to accept her say that all the four accused had chased Nanubhai and they had intercepted him when he was near the house of Manilal. This Manilal is the father of PW-Shukarbhai. Normally the conduct of complainant would be of following all the four accused who were chasing her husband i.e. Nanubhai. There was no reason for either PW-Shakeela or PW-Heena to remain at their house. Considering their age, they also normally could have followed their mother shouting for help, but no such story is coming forth from any of these three witnesses. In such a situation, the involvement of appellant No. 1 in giving blows to Nanubhai with stick, becomes a very weak piece of evidence. In all probabilities, either both or at least one son might have taken cause of that incident of hot exchange of words between Nanubhai and appellant No. 1 and under sheer anger, Nanubhai might have been assaulted. The event of hot exchange of words between Nanubhai and appellant No. 1 might be near the house or any place in Pradhanwadi Faliya. The time is also of late evening. There was no reason for all the neighbours to be there inside their house in the late evening hours i.e. at 07-30 p.m. So appellant No. 1 ought not to have been held responsible on the sole evidence of complainant that he was a party in giving stick blows to Nanubhai or he had committed offence punishable u/s 504 of the Indian Penal Code. Here it is relevant to note that PW-1 Dr. Chaudhari has deposed that the CLW can be caused by the blunt portion of axe. In this fact situation, appellant No. 1 ought to have been given benefit of doubt by the learned trial Judge because the evidence against appellant No. 1 appears to be hazy.

34. The learned trial Judge while acquitting orig. accused No. 4 also ought to have thought about probabilities of false implication of maximum number of family

members of appellant No. 1's family. The dispute was in reference to agricultural land given for cultivation by their father and appellant No. 1 as well as Nanubhai had also got some parcel of land to their share. A jealous agriculturist, it is an experience of our society and villages of our country, would firstly try to get the field of other agriculturist grazed towards whom he has such jealousy. It is also an experience that an agriculturist gets maximum annoyance or his feeling is hurt in maximum by doing such activity by another agriculturist. In the present case, the field of Nanubhai might have been got grazed by appellant No. 1 or anybody, but ultimately the dispute does not appear to be a dispute of only grazing found in the field of Nanubhai, but qua the land occupied by them as distributed by their father. PW-5 Mahesh, son of one of the brothers of appellant No. 1, had taken the cause of Nanubhai and his family members. If PW-5 Mahesh was really an eye-witness and all the four accused were really involved in the offence, PW-5 Mahesh himself could have rushed to the Vyara Police Station for lodging the complaint, keeping the complainant-Taraben besides her husband at Vyara Hospital. So the conduct of the prosecution witnesses examined and the version given by them before the Court, are not found sufficient which can be used as strong corroborative piece of evidence to the evidence of complainant-Taraben, and therefore, appellant No. 1 and appellant No. 3 could have been given benefit of doubt.

35. So far as the involvement of appellant No. 2 is concerned, all the witnesses namely PW-Shakeela, PW-Heena and PW-Taraben, are found inconsistent that appellant No. 2 was holding axe in his hand. PW-Dalu Puniya has not supported the case of the prosecution and the evidence brought in the nature of number of contradictions in the eye of law cannot be read as substantive piece of evidence, but the injury found by the doctor on the body of Dalu Puniya was CLW. Meaning thereby, a wound similar in nature which was found on the head of Nanubhai. PW-Dalu Puniya has not attributed anything to appellant No. 2 in his deposition before the Court, but as per the case of the prosecution placed in the Court, appellant No. 2 had given axe blow on his head by the reverse side of the axe. Of course, PW-Dalu Puniya has denied the suggestion made to him in this regard by the learned Public Prosecutor. Whether Dalu Puniya himself had rushed to save Nanubhai empty handed or he was also holding any weapon like axe, is also not emerging from record. The evidence as to recovery of muddamal weapon axe from appellant No. 3 is also a weak piece of evidence. True it is that it is not the case of prosecution that one of the muddamal articles was lying near the spot, but when there is no cogent evidence that appellant No. 3 was holding axe at the relevant point of time, recovery of axe at the instance of appellant No. 3 ought to have been considered as insignificant or at least sufficient to link appellant No. 3 with the crime and this situation itself creates a contingency giving rise to a probability that the second axe found stained with blood might be of either deceased himself or PW-Dalu Puniya who tried to intervene. As discussed earlier, the daughters of the complainant have not been named as eye-witnesses in the FIR, but this fact could have been traced out by the Investigating Officer during

the investigation and recording of statement of these two girls i.e. PW-8 Shakeela and PW-10 Heena; more particularly when as per the complainant the quarrel had begun in their house, the presence of these two girls in their house was natural. So it was the duty of the Investigating Officer to investigate into the incident minutely and, therefore, the Investigating Officer was justified in recording the statement of these two girls, if these two girls ultimately claim to be the eye-witnesses to the incident. So the evidence of these two witnesses is consistent on one fact that appellant No. 2 was holding axe and he is the author of the blows which were found on the body of the deceased. So the say of PW-Taraben that appellant No. 2 had given blows to Nanubhai can be said to be a piece of evidence having some corroboration from two other witnesses namely PW-8 Shakeela and PW-10 Heena.

36. It is not possible for this Court to accept that there was any discovery of weapon, that too of an axe at the instance of appellant No. 2. It appears to be a recovery of axe at the instance of appellant No. 2. The Investigating Officer might have reached to the actual axe during the course of interrogation of appellant No. 2. There was no reason for the learned trial Judge to say that the blood-stained axe was recovered from accused or at the instance of accused. Both the axes were sent for analysis through Forensic Science Laboratory. During trial initially the report of Chemical Analyser and also the report of Serological examination were not placed as pieces of evidence. But at a later stage and after recording of statement of accused u/s 313 of the Code of Criminal Procedure, 1973, this evidence ultimately was brought before the learned trial Judge. The learned trial Judge by taking this piece of evidence on record asked the accused to explain the finding recorded by the Forensic Science Laboratory expert, while recording further statement of accused u/s 313 of the Code of Criminal Procedure, 1973. As mentioned earlier, both the axes were found stained with human blood of Group "B". Ex.48 is the letter received by Police Sub Inspector, Vyara Police Station from Deputy Director of Forensic Science Laboratory, Surat. This letter is dated 15th February 1996 and the report of Serological examination indicates that this report was prepared on 03rd February 1996. From the report produced along with the forwarding letter Ex.48, it is clear that two shirts and two pants along with blood-stained earth, sample of earth taken as control sample and two axes. Four clothes were sent for analysis by the police after recovery of muddamal and, therefore, at least one shirt and a pant must be of the accused. These two clothes were also found stained with human blood of Group "B". As discussed earlier, none of the accused was found injured at the time of his arrest. So it is possible to argue for the prosecution that the blood found on the clothes of one of the accused was of the deceased. The blood group of PW-Dalu Puniya is not coming forth. Whether the blood-stained shirt and pant sent, over and above the shirt and pant of the deceased, were really of accused or PW-Dalu Puniya, remains unexplained. To prove cogent and convincing evidence in this regard, the forwarding letter sent to the Forensic Science Laboratory and details of sample parcel packed and sent for analysis were

required to be brought on record. For the reasons best known to the learned Public Prosecutor appearing before the learned trial Judge, these documents have not been produced even in the year 1999. The crucial documents remained either with the police or in the office of the Public Prosecutor at the relevant point of time. So it would be risky for the Court to infer that the shirt and pant found stained with blood, over and above the clothes of the deceased, are of appellant No. 2. It is the duty of the prosecution to lead the best available evidence and that too at an appropriate stage. It is well settled that fairness at every stage should be there. Investigation, prosecution and the trial should remain fair. This fairness is not only required to be claimed by a person dealing with the proceedings but it should appear that all these three crucial aspects are fair. Major lack in fairness at any stage is likely to create serious prejudice to the accused. True it is that the Court should conclude that this particular infirmity or absence of fairness has created serious prejudice to the accused. When the evidence of Forensic Science Laboratory was available with the prosecution since 1996, there was no reason for prosecution to hold those documents back. It may be a mistake or mischief. The accused cannot shape his defence well in such a contingency. After recording the statement u/s 313 of the Code of Criminal Procedure, 1973, the said report comes, that too with some incomplete set of documents and it is claimed that the Serological examination report may be read against the accused and that too, as a strong corroborative piece of evidence to the evidence of complainant-Taraben, which would be the most unfair and it is likely to result into serious prejudice to the accused.

37. While evaluating the evidence of PW-8 Shakeela and PW-10 Heena, it is observed hereinabove that they might have been planted as eye-witnesses to the incident keeping in mind the conduct of PW-Dalu Puniya of not going to the Police Station or hospital immediately after the incident. Non-mentioning of name of eye-witnesses in the FIR is not considered very important but when the appellants are able to show a probability that the witnesses examined by the prosecution may not be the eye-witnesses, or there is possibility of planting these witnesses as eye-witnesses, the Court should go very slow in relying upon the evidence of these witnesses. The conduct of these two witnesses i.e. PW-8 Shakeela and PW-10 Heena, appears to be unnatural. So on the sole evidence of PW-Taraben, whether appellant No. 2-Harshad could have been held guilty, was the question before the Court. PW-8 Shakeela and PW-10 Heena might have seen appellant No. 2 with axe or might not. They might have seen appellant No. 2 inflicting axe blows or might not. The Court cannot link the appellant No. 2 with the crime when it only appears that the appellant No. 2 might have done a particular wrong. There must be cogent and convincing evidence in this regard.

38. Now the question before the Court is what is wrong if appellant No. 2 is held guilty on the sole evidence of PW-Taraben. The prosecution can lay hand, to secure conviction of accused, only on one piece of evidence and uncorroborated testimony of a witness even can be accepted by the Court as cogent and convincing evidence.

39. The question before the Court is whether it would be safe to convict appellant No. 2 on the strength of the sole oral evidence of PW-Taraben. While evaluating the quality of evidence of PW-Taraben, the Court also shall have to keep an eye on the infirmities found in the other evidence like the quality of evidence qua recovery of muddamal weapons and their examination by the FSL and the effect of evidence of PW-Shakeela and PW-Heena on the substratum of story placed by the complainant in the FIR given by her to the police. The evidence of hostile witness would not help any of the sides because it is not found safe to read the evidence of hostile injured witness Dalu Puniya though the Court is entitled otherwise to place reliance, if it is found safe to do so partially on the oral evidence of hostile witness. The complainant in her deposition at Ex.18 has said that when her husband went to his field, he found that his entire field has been got grazed and, therefore, her husband had asked appellant No. 2 as to why he got the field of her husband grazed. At that time, appellant No. 2 had raised the quarrel with Nanubhai. Thereafter, after about 10 days, in the night hours, appellant No. 1 had been to the house of complainant uttering abusive words and appellant No. 1 called Nanubhai saying, "You just come out of the house. You have become smarter. You will be done to death." In response thereof, Nanubhai had said, "a number of days have passed and I have not uttered a single word to you nor have I said anything to your son Harshad." The complainant further stated that even then appellant No. 1 dragged Nanubhai upto the door of their house by holding Nanubhai's hand and at that place the appellant No. 1, orig. accused No. 4 and appellant No. 2 had started beating Nanubhai. Appellant No. 1 was inflicting stick blows. This version is found an improved version substantially because there is nothing in the complaint about the call given by appellant No. 1 to Nanubhai asking him to come out of his house addressing him as a smart fellow. There is also nothing in the complaint that the threat to life of Nanubhai was also administered simultaneously. There is no reference of dragging Nanubhai by appellant No. 1. The complaint says that when they were preparing for their supper, Nanubhai was dragged from "Otta" by appellant No. 1 and thereafter, he gave stick blow on the back of her husband. At that time, appellant nos.2 and 3 came from their house with each of them having axe in his hand and seeing this two accused with axes, when her husband tried to escape, appellant No. 1 again gave a stick blow and her husband had fallen down. So the presence of orig. accused No. 4 and appellant No. 2 is not shown in the complaint. However, her version before the Court is thus improved one. The sequence of events narrated by this witness in her examination-in-chief and the response given to the suggestions made in the cross-examination, are found different than the complaint and the story told by two other eye-witnesses who have not been declared hostile. According to PW-Taraben, appellant No. 2 had given four blows with axe on the head of her husband and her husband had fallen down at that place only i.e. near the house of Manilal. It is observed by the Apex Court and this Court in a number of decisions that unless it is specifically told, more particularly by an eye-witness, who is in the close vicinity of the place of incident, that a blow with a sharp-cutting instrument was given, it should be

inferred that the witness intends to say that the blows were being inflicted with aged portion of the weapon. It is, therefore, rightly argued in the present case by Shri Buddhbhatti that the learned trial Judge ought to have observed that according to PW-Taraben, four blows with axe on the head of Nanubhai were inflicted by appellant No. 2, but as no incise wound was found by doctor, it would be difficult for the Court to accept the version of PW-Taraben as gospel truth. Four blows have been attributed by PW-Taraben to appellant No. 2 and there were five injuries found by the PW-1 doctor on the body of the deceased, who performed autopsy. Two blows have been attributed to appellant No. 1, one of which according to this witness, was inflicted on the reverse side of the axe, but no such injury was noticed by the doctor at the time of performing autopsy. Out of the total five injuries noticed by the doctor, four were stitch wounds. Only Injury No.3 described by the doctor in his deposition indicating depressed fracture of right temporal bone was the CLW. The doctor who took the stitches and initially gave the treatment to Nanubhai has not been examined. This doctor has stated in his examination-in-chief that all the injuries that he had seen on the body of Nanubhai were possible by the blow of reverse side of the muddamal axe at Articles Nos.5 or 7. So this allegation of complainant against appellant No. 2 of inflicting four blows with axe on the head of her husband creates a situation whereby it can be argued legitimately that actually the event of infliction of blows on the head of husband of the complainant may not have been witnessed by her, otherwise she could have stated that appellant No. 2 had given blows with reverse side of the axe. True it is that it was a night time and there was dark and the witness may not have seen as to which portion of the axe lands on the head of her husband and, therefore, she had stated that four axe blows were given by appellant No. 2.

40. In the complaint, the complainant-Taraben has stated that both appellant nos.2 and 3 had inflicted blows with axe on the head of her husband Nanubhai one after the other and they were about four blows and on her raising shouts, her sister-in-law (orig.accused No. 4) had rushed to the spot and had started inflicting kick and fist blows. So there was hubbub and the eye-witness Dalu Puniya at that point of time had rushed there to rescue them. In her deposition before the Court, she has involved appellant No. 3 specifically saying that he was simultaneously inflicting axe blows. Appellant No. 3 has been attributed of inflicting blows with axe when Nanubhai was near his house, in the deposition of the complainant before the Court. There is also an improvement that when the accused persons were assaulting her husband to kill him, she had prayed to relieve her husband reminding the accused of her young children and she had stated that the accused did not pay any heed to her request and her husband was killed. This tenure of her version does not emerge in the complaint given to the police.

41. As discussed earlier, the attempt made by this witness to implicate orig.accused No. 4 and appellant No. 3 in the incident makes the credibility of this witness doubtful. So it is very likely that she might have witnessed the

incident from some distance while rushing to the spot or near the spot; or she might have seen the complainant fleeing away from the spot with axe, but at least it is clear that the story told by her in the complaint and unfolded before the Court do not appear to be a whole truth. On close reading of the papers available, it also emerges that the said PW-Dalu Puniya also might have accompanied the complainant and body of the injured Nanubhai to the hospital because he was treated by the doctor in the early hours on the next day i.e. after midnight at 03-00 a.m., even then this witness has not supported the case of the prosecution. It is very likely that as the complainant had attempted to involve maximum number of persons in the incident though there may be only one or two persons out of total four in committing the offence; otherwise there was no reason for this witness to show hostility in the Court. When the learned trial Judge has given advantage to appellant No. 1 segregating him from appellant nos.2 and 3 though the complainant has stated in her deposition that appellant No. 1 inflicted stick blows on the head i.e. second blow given by appellant No. 1 and has not linked appellant No. 1 with the offence punishable u/s 302 read with Section 114 of the Indian Penal Code, it is possible to infer that the allegation made by complainant in her examination-in-chief qua the role played by appellant No. 1 of inflicting stick blows on the head of Nanubhai i.e. second blow allegedly inflicted near the house of Manilal, when her husband was trying to escape, has not been accepted as whole truth because all the four wounds on head are found grievous injuries and equally they are sufficient enough in the ordinary case to cause the death of a person. Out of four injuries, Injury No.3 described in the deposition of the PW-1 doctor, was individually sufficient to cause death in an ordinary course of nature, is the say of the doctor. In the same way, the internal injury i.e. depressed fracture found was also sufficient in an ordinary course of nature to cause the death of a person. In this fact situation, it was not possible for the learned trial Judge to segregate appellant No. 1 and appellant No. 2. Thus, the learned trial Judge was not satisfied with the version given by PW-Taraben qua the role played by appellant No. 1. When the blow given by appellant No. 1 on the back of Nanubhai is not found supported by the medical evidence, it would be risky for this Court to accept the say of learned Additional Public Prosecutor that this is a case where at least this Court can confirm the judgment and order of conviction and sentence qua appellant No. 2 and it is possible to segregate grains from chaff because it emerges that PW-Taraben might not have witnessed the entire incident claimed by her, but on the strength of the quarrel taken up by appellant No. 1 with her husband and on the strength of some facts which might have been stated to her by the injured witness Dalu Puniya, she might have developed the story implicating all the four family members of appellant No. 1, his young boy appellant No. 3 and orig. accused No. 4. The shadow of doubt is found enlarged on account of material improvements made by this witness and conflict in her version vis-a-vis the version of two daughters who have been examined as eye-witnesses, more particularly injured witness has not supported the case of the prosecution. So it is not possible to agree with the finding recorded by the learned trial Judge

whereby he has held appellant nos.2 and 3 guilty for the charge of offence punishable u/s 302 504 and 506(2) read with Section 114 of the Indian Penal Code. It is not possible to segregate two accused persons i.e. appellant nos.2 and 3 and to hold appellant No. 2 guilty for the charge of offence punishable u/s 302 of the Indian Penal Code individually. The totality, therefore, leads to a conclusion that appellant No. 2 also deserves benefit of doubt as it is found risky to convict appellant No. 2 on the strength of evidence of sole eye-witness PW-2 Taraben.

42. In view of aforesaid observations and discussion, the present appeal is hereby allowed. The judgment and order of conviction and sentence dated 05th June 1999 passed by the learned Additional Sessions Judge, Surat, in Sessions Case No.109 of 1996, is hereby quashed and set aside. All the three appellants are hereby ordered to be acquitted from the charge of offences levelled against them, as the prosecution has not established guilt against them and they are ordered to be set at liberty forthwith. The bail bonds, if any, shall stand discharged.