

(2024) 12 GUJ CK 0048
In the Gujarat High Court

Case No : Criminal Appeal (Against Conviction) No. 1482 of 2017, Criminal Miscellaneous Application (Regular Bail) No. 1 of 2023, Criminal Miscellaneous Application (Temporary Bail) No. 1 of 2024, Criminal Appeal No. 1476 of 2017, Criminal Appeal No. 1781 of 2017

Guddu Rajkumar Sakhichand Bharti Versus APPELLANT
Vs
State of Gujarat RESPONDENT

Date of Decision : 19-12-2024

Acts Referred:

Code of Criminal Procedure, 1973 — Section 102, 207, 209, 313, 374
Indian Penal Code, 1860 — Section 114, 300, 302, 394, 504
Bombay Police Act, 1951 — Section 135

Citation : (2024) 12 GUJ CK 0048

Hon'ble Judges : Ilesh J. Vora, J;S.V. Pinto, J

Bench : Division Bench

Advocate : Dipak H Sindhi, Kartikkumar K Joshi, Dr. Hardik K Raval, Jay Mehta

Final Decision : Dismissed

Judgement

S.V. Pinto, J

1. These appeals have been filed by the appellants - original accused under Section 374 of the Code of Criminal Procedure against the judgement and order dated 22.08.2017 passed by the learned 5th Additional Sessions Judge, Ankleshwar (hereinafter referred to as the "learned Trial Court") in Sessions Case No. 89 of 2013. The appeals have arisen out of the same impugned judgement and order and hence, are disposed of by this common judgement.

The appellants are referred to as the accused in the rank and file as they stood in the original case for the sake of convenience, clarity and brevity.

2. The brief facts necessary to decide the appeal are in a nutshell as under:

2. 1 As per the case of the prosecution on 04.02.2012 at 20:15 hours, the deceased Kanubhai Motibhai Padhiyar was going on his Bajaj Discovery

motorcycle No. GJ-16-AE-7596 with his wife Kailashben, daughter Nikitaben and son Darshan from Petrofils Colony, Ankleshwar and while they reached Centre Point, all the accused with the intention of committing a robbery were armed with a wooden handle of a spade, halted their motorcycle and tried to rob the motorcycle. Kanubhai Motibhai Padhiyar did not give the motorcycle and the accused no. 2 - Shivshankar @ Shankar Jogeshwar Khokha Yadav gave a blow with the wooden handle of the spade on his back and the accused no. 3 - Guddu @ Rajkumar Sakhichand Bharti took the weapon from the accused no. 2 and assaulted Kanubhai on his face and head and at that time, the complainant intervened and a blow was given on her right hand. The motorcycle fell down and accused no. 1 - Brijbhushan @ Butlu Mithiladhish Ramdhari Pande took the motorcycle and all the accused sat on the motorcycle and fled away. Kanubhai Motibhai Padhiyar had sustained serious injuries on his head and was immediately taken to the hospital where he succumbed to his injuries during treatment on 06.02.2012. The complaint was filed by Kailashben Kanubhai Padhiyar at Ankleshwar GIDC Police Station under Sections 302, 394, 504 and 114 of the IPC and Section 135 of the Bombay Police Act and was registered at C. R. No. I - 22 of 2012.

2.2 The Investigating Officer drew the necessary panchnamas, recorded the statements of the connected witnesses and the motorcycle number GJ-16-AE-7596 was seized under Section 102 of the Code of Criminal Procedure in the presence of independent panch witnesses. After the accused were arrested, Test Identification Parades were conducted by the Executive Magistrate wherein the complainant Kailashben Kanubhai Padhiyar and eye witness Nikitaben Kanubhai Padhiyar identified all the accused in the presence of independent panch witnesses. After the FSL Analysis reports were received, a charge-sheet came to be filed before the Court of the learned Judicial Magistrate First Class, Ankleshwar and as the case was exclusively triable by the Session Court, Ankleshwar, an order was passed by the learned Judicial Magistrate First Class, Ankleshwar under Section 209 of the Code of Criminal Procedure and the case was registered as Sessions Case No. 89 of 2013

2.3 Pending the proceedings the accused no. 1 - Brijbhushan @ Butlu Mithiladhish Ramdhari Pande absconded and hence, by an order dated 05.09.2013, a separate trial against the accused no. 1 - Brijbhushan @ Butlu Mithiladhish Ramdhari Pande was ordered to be conducted and the trial against the other three accused i.e. (2) Shivshankar @ Shankar Jogeshwar Khokha Yadav, (3) Guddu @ Rajkumar Sakhichand Bharti and (4) Amit @ Billu Kailash Banarasi Jaiswal was conducted.

2.4 The accused nos. 2, 3 and 4 appeared before the learned Trial Court and it was verified whether the provisions of Section 207 of the Code of Criminal Procedure were complied with and a charge was framed against the accused at Exh. 9 and the statements of the accused were recorded at Exhs. 10 to 12 respectively. The accused denied all the contents of the charge and the evidence

of the prosecution was taken on record. The prosecution examined 33 witnesses and produced 30 documentary evidences on record in support of their case and after the learned APP filed the closing pursis at Exh. 95, the further statement of the accused under Section 313 of the Code of Criminal Procedure was recorded. The accused mainly stated that a false case has been filed against them and refused to step into the witness box or examine witnesses on their behalf. After the arguments of the learned APP and the learned Advocate for the accused were heard, the learned Trial Court was pleased to convict the accused for the offence under Sections 394 and 302 of the Indian Penal Code and sentenced all the accused to life imprisonment and fine of ₹ 500/- each and in default, simple imprisonment for 30 days for the offence under Section 394 of the IPC and to life imprisonment and fine of ₹ 500/- each and in default, simple imprisonment for 30 days for the offence under Section 302 of the IPC. The learned Trial Court was pleased to order that the sentences shall run concurrently.

3. Being aggrieved and dissatisfied with the judgement and order of conviction, the appellant – original accused no. 2 - Shivshankar @ Shankar Jogeshwar Khokha Yadav has filed Criminal Appeal No. 1781 of 2017 original accused no. 3 - Guddu @ Rajkumar Sakhichand Bharti has filed Criminal Appeal No. 1482 of 2017 and original accused no. 4 - Amit @ Butlu Kailash Banarasi Jaiswal has filed Criminal Appeal No. 1476 of 2017.

3.1. Criminal Appeal No. 1781 of 2017 has been filed by the applicant – original accused no. 2 - Shivshankar @ Shankar Jogeshwar Khokha Yadav mainly on the ground that the learned Trial Court has not appreciated the role of the appellant in the alleged offence and there is no recovery from the appellant. The complainant is the wife of the deceased and there are no other eye witnesses or any independent witnesses to support the case of the prosecution. There are major contradictions in the allegations levelled against the appellant and no blood stains have been found on the weapon that is alleged to have been used by the appellant. Moreover, the prosecution has not clearly proved which accused has inflicted the fatal blow and the driver of the vehicle by which the injured were taken to hospital has not been examined before the learned Trial Court. The impugned judgement and order is bad in law and is required to be quashed and set aside.

3.2 The appellant of Criminal Appeal No. 1482 of 2017 – original accused no. 3 - Guddu @ Rajkumar Sakhichand Bharti has submitted that the learned Trial Court has not appreciated the role of the present appellant properly and there is no recovery from the appellant. Hence, he could not be convicted for the offence. There are no witnesses besides the wife of the deceased who is the complainant and the daughter of the complainant and deceased and there are major contradictions in the evidence of the prosecution. According to the complaint, the present appellant is shown to inflict a stick blow, whereas, in the evidence it has come on record that the blow was inflicted by a wooden dhokha. There are no blood stains found on the weapon that is alleged to have been used in the

offence and no blood stains have been found at the spot of incident and hence, it is not clearly proved as to whether the incident has occurred. According to the complaint, the son of the complainant is also said to have sustained injuries in the incident but no evidence has come on record during trial and the driver of the four wheeler who is alleged to have brought the injured to the hospital has not been examined before the learned Trial Court. The deceased has expired due to heart attack and not due to the injuries alleged to have been inflicted in the complaint and as the judgement and order is erroneous and without appreciation of the evidence on record, the impugned judgement and order of conviction must be quashed and set aside and the appellant must be acquitted for the offences.

3.3 The appellant of Criminal Appeal No. 1476 of 2017 – original accused no. 4 - Amit @ Butlu Kailash Banarasi Jaiswal has submitted that the judgement and order of conviction is bad in law and contrary to the provisions and evidence on record and the Test Identification Parade that was conducted was faulty and the same was drawn against the appellant. The panch witness has not supported the Test Identification Parade and has been declared hostile and the learned Trial Court has wrongly relied upon the Test Identification Parade and convicted the appellant. The discovery panchnama was drawn while the appellant was in judicial custody and the witnesses have not supported the case of the prosecution. Moreover, the contradiction with regard to the weapon i.e. the wooden stick or the wooden handle used in the offence for the same has not been considered by the learned Trial Court and as the prosecution has failed to prove the charge against the appellant beyond reasonable doubts, the judgement and order of conviction must be quashed and set aside.

4. We have heard learned Advocate Dr. Hardik Raval for the appellant of Criminal Appeal No. 1781 of 2017, learned Advocate Mr. Deepak Sindhi for the appellant of Criminal Appeal No. 1482 of 2017, learned Advocate Karthik Kumar K. Joshi for the appellant of Criminal Appeal No. 1476 of 2017 and learned APP Mr. Jay Mehta for the respondent State.

5. Learned Advocate Dr. Hardik Raval for the appellant of Criminal Appeal No. 1781 of 2017 - Shivshankar @ Shankar Jogeshwar Khokha Yadav has submitted that there is no recovery of any weapon from the present appellant and there are major contradictions in the evidence of the prosecution. There are no independent eye witnesses to the incident and the eye witnesses as stated by the prosecution are the wife and daughter of the deceased and they are interested witnesses and their evidence cannot be relied upon. There is no independent evidence to show the involvement of the appellant in the offence and the learned Trial Court has not appreciated the evidence properly and appeal must to be allowed.

5.1 Learned Advocate Mr. Deepak Sindhi for the appellant of Criminal Appeal No. 1482 of 2017 - Guddu @ Rajkumar Sakhichand Bharti has submitted that the complainant is the wife of the deceased and there are no independent witnesses to the incident and hence, the evidence of the eyewitness cannot be relied upon.

There are major contradictions in the allegations levelled against the present appellant and the role of the present appellant is that he had inflicted the blows with a stick, whereas, in the evidence that has come on record, the blows are said to have been given with a wooden dhoka. It is not clear as to which of the accused has inflicted the fatal blow and the complainant has stated that she too was assaulted and was injured but no evidence to this effect has come on record during the trial. Learned Advocate further submits that the driver of the four wheeler who had brought the injured to the hospital has not been examined before the learned Trial Court and the evidence has not been properly appreciated and the appellant has wrongly been convicted, hence the impugned judgement and order must be quashed and set aside and the appeal must be allowed.

5.2 Learned Advocate Karthik Kumar K. Joshi for the appellant of Criminal Appeal No. 1476 of 2017 - Amit @ Butlu Kailash Banarasi Jaiswal has submitted that the Test Identification Parade was not conducted in a proper manner and the panch witness has not supported the case of the prosecution and has been declared hostile and hence, the evidence could not be relied upon. The witnesses of the discovery panchnama have not supported the case of the prosecution and there is a major contradiction between the wooden stick and the wooden handle which is the weapon that was used in committing the offence. The prosecution has not proved the case against the appellant beyond reasonable doubts and the appeal must be allowed and the impugned judgement and order must be quashed and set aside.

6. Learned APP Mr. Jay Mehta for the respondent State has taken this Court through the entire record and evidence of the prosecution on record and has submitted that the learned Trial Court has appreciated each and every piece of evidence on record and the complainant and her daughter are the eye witnesses and natural witnesses to the incident. Both the witnesses have identified the appellants during the Test Identification Parade that was conducted by the Executive Magistrate and there is no doubt that it was only the appellants who assaulted the deceased on the head with the intention of committing a robbery of the motorcycle. That all the appellants were together at the place of incident from the beginning and they had the intention of causing serious body injury and thereby the death of the deceased and as the deceased resisted in parting with his motorcycle; with the intention of committing the murder of the deceased, blows were given with the wooden handle of the spade on the head of the deceased which is vital part and it was well within the knowledge of the appellants that the injury would cause death. The learned Trial Court has considered all the evidence and appreciated the entire evidence in the correct perspective and there are no merits in the appeals of the appellants and the same must be rejected.

7. Before we proceed to decide the appeal, it would be appropriate to refer to the observations of the Apex Court in Para 5 in the case of Lal Mandi V. State of West

Bengal reported in 1995 Cri LJ 2659 regarding the duty of the appellate Courts in hearing of appeals in conviction matters.

5. To say the least, the approach of the High Court is totally fallacious. In an appeal against conviction, the Appellate Court has the duty to itself appreciate the evidence on the record and if two views are possible on the appraisal of the evidence, the benefit of reasonable doubt has to be given to an accused. It is not correct to suggest that the "Appellate Court cannot legally interfere with" the order of conviction where the trial court has found the evidence as reliable and that it cannot substitute the findings of the Sessions Judge by its own, if it arrives at a different conclusion on reassessment of the evidence. The observation made in Tota Singh's case, which was an appeal against acquittal, have been misunderstood and mechanically applied. Though, the powers of an appellate court, while dealing with an appeal against acquittal and an appeal against conviction are equally wide but the considerations which weigh with it while dealing with an appeal against an order of acquittal and in an appeal against conviction are distinct and separate. The presumption of innocence of accused which gets strengthened on his acquittal is not available on his conviction. An appellate court may give every reasonable weight to the conclusions arrived at by the trial court but it must be remembered that an appellate court is duty bound, in the same way as the trial court, to test the evidence extrinsically as well as intrinsically and to consider as thoroughly as the trial court, all the circumstances available on the record so as to arrive at an independent finding regarding guilt or innocence of the convict. An Appellate Court fails in the discharge of one of its essential duties, if it fails to itself appreciate the evidence on the record and arrive at an independent finding based on the appraisal of such evidence.....

8. In light of the above we have perused the evidence led by the prosecution on record of the case.

8. 1 PW1 - Kailashben Kanubhai Padhiyar examined at Exh. 15 is the complainant and wife of the deceased Kanubhai Motibhai Padhiyar and she has stated that the incident occurred on 04.02.2012 between 8:30 – 8:45 pm on Khwaja Crossroads, Near Mahendiya Peer Dargah, Ankleshwar GIDC. At the time of the incident, her son - Darshan was not well and she had gone with her husband Kanubhai Motibhai Padhiyar, daughter Nikita and son Darshan on their Bajaj Discovery motorcycle No. GJ-16-AE-7596 to the hospital near Manav Mandir. When they reached near the Khwaja Peer Mehndiya Peer Dargah, one person was standing on the road and three persons were hiding and as the vehicle came nearby, the person who was standing outside shouted and the other three persons came out and one person had the wooden handle of a spade and they assaulted her husband with it. They assaulted her husband on the head and on her hand and took the bike and fled away. Her husband was taken to Jayaben Modi Hospital and from there he was taken to Sarvajanik Hospital and was taken to Bharuch for a CT scan. As he had sustained head injuries, he was taken to

Vadodara for an operation and he expired during treatment. That she had filed the complaint and the witness has identified the accused nos. 2, 3 and 4 before the learned Trial Court and has categorically identified the accused no. 3 - Guddu @ Rajkumar Sakhichand Bharti as the person who had assaulted her husband. The accused no. 1 was absconding and hence, could not be identified before the learned Trial Court. The witness has filed the complaint which is produced at Exh. 16 and has also identified the weapon during trial. The witness has further stated that she had showed the place of incident to the police and was thereafter called to the Mamlatdar Office for the Test Identification Parade and she had identified the accused. The place where the incident occurred had a street light and she had described the accused persons before the police.

The complainant has been cross-examined at length by the learned Advocates for the accused wherein she has stated that on the day of the incident, her husband had gone to his workplace, which was at a distance of 1 to 1.5 km and they were staying near the company. Her husband used to take five minutes to come back home, and her son was ill for the past 4 to 5 days. On the day of the incident, they had left to take her son to the hospital and the road by which they were travelling was a pucca road having bushes on both the sides. There was a street light at that place and the persons who had assaulted them were standing there. The light was not too bright but it was sufficient for one to see and she was the pillion rider on the bike. That in all four persons had assaulted them and her husband had sustained injuries on his head. Her husband was first assaulted on his back and at last on his head and they fell down from the bike and the assaulters took the bike and fled away. The witness has identified the accused no. 3 - Guddu @ Rajkumar Sakhichand Bharti as the person who had assaulted her husband with the wooden handle of the spade and has stated that all the four assaulters fled on the motorcycle at the same time and thereafter, they went to the police station and gave the complaint. Her husband was taken to Jayaben Modi Hospital. He was immediately referred to another hospital and after a CT scan, he was taken to Bharuch and from there to Baroda for a brain surgery. The operation was done at night and her husband had expired at Vadodara. She was called to the Mamlatdar Office and she could identify all the accused. At the time of the incident when her husband was assaulted with the stick on his head, she was sitting on the motorcycle with the children and besides the injury on the head, her husband was also beaten on the hands and legs. Her husband was bleeding as he was injured but the blood did not fall on the ground and it fell on his clothes. They went walking to the police station and it took them five minutes to reach the police station and at that time, her husband was bleeding.

8.2 PW21 - Nikitaben Kanubhai Padhiyar examined at Exh. 74 is the daughter of the complainant and deceased and an eye witness to the incident. The witness has stated that at the time of the incident, she, her mother, her younger brother and her father were going to the hospital on a two wheeler Bajaj Discovery motorcycle and after crossing Kamator Crossroads towards old Petrofils Colony the road was lonely and one person was standing on the left side of the road and

he halted them. That he called the others and three other persons came and one person had a wooden log in his hand and they started to assault her father on his back and when her mother intervened, they assaulted her mother also. Her father was injured on the head and the vehicle fell down and she was pushed and thrown aside and as the vehicle was on, all four of them sat on the vehicle and fled from the spot. They went to the GIDC Police Station and from there, her father was taken to Jayaben Modi Hospital and Sarvajanik Hospital and from there to Bharuch, where a CT scan was done and he was taken to Vadodara, where he was operated upon on his head. The witness has identified the accused before the learned Trial Court. During the cross-examination, the witness has described the Test Identification Parade and has stated that she and her mother were called one after the other into the chamber of the Mamlatdar for the Test Identification Parade. The witness has denied that it was dark at the place of incident.

8.3 PW22 - Bhanuprasad Kodarbhai Patel examined at Exh. 76 was working in Ambika Organics with Kanubhai Motibhai Padhiyar and immediately after the incident, Nikita, the daughter of the deceased telephoned the witness and informed him about the incident and that they were taking her father to Jayaben Modi Hospital. That he had gone to Jayaben Modi Hospital and from there to Sarvajanik Hospital and as the deceased had sustained injuries, he was taken to Sevashram Hospital, Bharuch for a CT scan. From there, he was taken to Avdhoot Hospital at Vadodara and was operated upon at 1:30 am. That he had accompanied them to the hospital and Kanubhai Motibhai Padhiyar expired during treatment. During the cross-examination, the witness has mentioned his mobile number on which Nikita had called him and has stated that he does not know what had occurred before he reached the hospital. That he was with Kanubhai till he was taken to Vadodara. The witness knew Kanubhai, as he was working as an Operator in Ambika Organics Company. 8.4 PW23 - Krishnakanth Khemabhai Patel examined at Exh. 77 was also working in Ambika Organics and Chemicals as a chemist alongwith the deceased and he came to know about the incident later on.

8.5 PW27 - Dr. Deepakbhai Chimanbhai Parekh examined at Exh. 81 is the Medical Officer of Avdhoot Neurosurgical Hospital, Alkapuri, Vadodara where Kanubhai Motibhai Padhiyar was taken for treatment. The witness has stated that on 05.02.2012 at 1:45 hours, Kanubhai Motibhai Padhiyar was admitted to his hospital with alleged history of assault by unknown persons at 8:00 pm on 04.02.2012 at Ankleshwar GIDC. He had history of loss of consciousness and vomiting and a CT scan head was done at Bharuch which showed extradural haematoma Rt. 63 X 15 mm Lt. 74 X 15 mm in size with fracture involving both FTP bone extending from midline and Lt. temporal contusion. The patient was unconscious and underwent FTP craniotomy and evacuation of clot and expired during treatment on 06.02.2012 at 2:30 pm. A postmortem was done on the dead body of the deceased. During the cross-examination by the learned advocates for the accused, the witness has stated that the injuries of the patient

were grievous as the injuries were sustained on the head and the history was given by the relatives of the patient.

8.6 PW29 – Dr. Vinayakrao Vasudevrao Patil examined at Exh. 86 is the Medical Officer who has performed the post-mortem on the dead body of deceased Kanubhai Motibhai Padhiyar on 06.02.2012 between 3:35 pm and 4:35 pm and has produced the post-mortem note at Exh. 87. The witness has stated that the injuries found on the dead body of the deceased as per column no. 17 were as under :

1. Surgically stitched wound 26 cm long, starting from Rt. Temporal region, 2 cm above Rt. ear going horizontally involving both parietal Lt. temporal ending 2 cm above left ear.
2. Surgically stitched wound 4 cm long oblique on both parietal region, merging with injury No. 1 scalp hair shaved.
3. Rail Road contusion of purplish blue colours 11 cm X 1 cm, vertical in mid line of back of chest 9 cm below shoulders line.

On internal examination, a haematoma below scalp with contusion of scalp tissue was present all over. Two round surgically operated bony gaps were present in each parietal region on either side, each measuring Rt. side 6 cm X 5 cm Lt. side 8 cm X 7 cm and these bony gaps were filled by removable bony piece of same bone. Thin extra dorsal haemorrhage was present on both parietal regions and thick subdural haemorrhage was present on whole brain. A contusion with laceration on left parietal lobe of brain of size 4 cm X 3 cm X 2.5 cm was present and the whole brain was congested, edematous and swollen. The external injuries related to the internal injuries and the injuries found on the body could be caused by the muddamal stick. As per their opinion, the cause of death was shock due to head injury and the witness has produced the final cause of death certificate at Exh. 88. During the cross-examination, the witness has admitted that the size of the three external injuries were different and could be caused by the same weapon. The two internal injuries found on the head on the right side and on the left side could be caused by the muddamal stick and the external and internal injuries could be caused by hitting with force.

8.7 PW17 - Dineshkumar Karsanbhai Majetar examined at Exh. 53 is the Executive Magistrate who has conducted the Test Identification Parade of all the accused on various dates and the complainant - Kailashben Kanubhai Padhiyar and witness Nikitaben Kanubhai Padhiyar have identified all the accused. The witness has conducted the Test Identification Parade of the accused no. 4 - Amit @ Billu Kailash Banarasi Jaiswal on 28.09.2012, accused no. 3 - Guddu @ Rajkumar Sakhichand Bharti on 12.10.2012 and accused no. 1 - Brijbhushan @ Butlu Mithiladhis Ramdhari Pande and accused nos. 2 - Shivshankar @ Shankar Jogeshwar Khokha Yadav on 18.12.2012 and has produced the Test Identification Parade panchnamas at Exhs 57, 58 and 59 respectively. The witness has stated that the Test Identification Parade was conducted in the chamber of the

Executive Magistrate and has narrated in the detail the entire procedure that he had undertaken for the Test Identification Parade. He had called independent panch witnesses and ensured that the complainant and witness were seated at a different place and could not see each other. During the entire procedure of the Test Identification Parade, all the windows and doors of the chamber of the Executive Magistrate were kept closed. The dummy persons that were called were similar to the accused and after the accused was brought, he was told to stand wherever he wanted in the line and was also asked whether he would want to exchange his clothes or T-shirt with any other dummy person. After the accused stood in the line, the complainant and witness were called one after the other. The complainant and witness identified the accused from amongst the dummy candidates. During the cross-examination of the witness by the learned advocates for the accused, nothing to suggest that the Test Identification Parade was not conducted as per the proper procedure has come on record.

8.8 PW26 - Rakeshbhai Devjibhai Vasava examined at Exh. 80 and PW18 - Ibrahim Kasambhai Bahat examined at Exh. 65 are the panch witnesses of the panchnama produced at Exh. 57, the Test Identification Parade panchnama of the accused no. 4 - Amit @ Billu Kailash Banarasi Jaiswal. PW19 - Rameshbhai Lallubhai Vaghela is the panch witness of the panchnama produced at Exh. 58, the Test Identification Parade panchnama of the accused no. 3 - Guddu Rajkumar Sakhichand Bharti and PW20 - Dayalbhai Maganbhai Parmar is the panch witness of the panchnama produced at Exh. 59, the Test Identification Parade panchnama of the accused no. 1 - Brijbhushan @ Butlu Mithiladhish Ramdhari Pande and accused nos. 2 Shivshankar @ Shankar Jogeshwar Khokha Yadav.

8.9 The prosecution has produced the inquest panchnama at Exh. 18, the panchnama by which the clothes of the deceased were seized during investigation at Exh. 20, the panchnama by which the accused no. 4 showed the place of incident at Exh. 29, the panchnama of the place of offence at Exh. 32, the panchnama by which the weapon used in the incident is recovered at Exh. 36, the panchnama by which the accused no. 4 showed the place where the motorcycle was abandoned at Exh. 39, the panchnama by which the accused no. 3 showed the place of incident at Exh. 36 and the panchnama by which the accused nos. 1 and 2 showed the place of incident at Exh. 44.

9. The case against the accused has two eye witnesses who were present at the spot at the time of the incident and they have seen the accused committing the crime. The witnesses are the wife and the daughter of the deceased, who as per the case of the prosecution, were going on Bajaj Discovery motorcycle No. GJ-16-AE-7596 with the deceased to hospital as Darshan - the minor son of the deceased and the complainant, was not well. One of the arguments canvassed by the learned advocates for the accused is that as the witnesses are close relatives of the deceased and the wife is the complainant and the other eye witness is the daughter, they would naturally support the case of the prosecution and their evidence cannot be relied upon in the absence of corroborating evidence of any

independent eye witnesses. At this juncture, it would be appropriate to consider the law laid down with regard to the appreciation of evidence of witnesses, who are close relatives and eye witnesses to the crime.

10. The Apex Court has observed in *Bhagaloo Lodh & Anr. V. State of U.P.* reported in 2011 (13) SCC 206 at para 14 as under :

14. Evidence of a close relation can be relied upon provided it is trustworthy. Such evidence is required to be carefully scrutinized and appreciated before resting of conclusion to convict the accused in a given case. But where the Sessions Court properly appreciated evidence and meticulously analyzed the same and the High Court re-appreciated the said evidence properly to reach the same conclusion, it is difficult for the superior court to take a view contrary to the same, unless there are reasons to disbelieve such witnesses. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are inter-related to each other or to the deceased."

10.1 The Apex Court *State Of Rajasthan V. Smt. Kalki & Anr.* reported in 1981 (2) SCC 752 has observed at para 5A as under :

"5A. As mentioned above the High Court has declined to rely on the evidence of P. W. 1 on two grounds: (1) she was a "highly interested" witness because she "is the wife of the deceased". and (2) there were discrepancies in her evidence. With respect, in our opinion, both the grounds are invalid. For, in the circumstances of the case, she was the only and most natural witness; she was the only person present in the hut with the deceased at the time of the occurrence, and the only person who saw the occurrence. True it is she is the wife of the deceased; but she cannot be called an interested witness. She is related to the deceased. Related is not equivalent to interested. A witness may be called interested only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye witness in the circumstances of a case cannot be said to be interested. In the instant case P. W. 1. had no interest in Protecting the real culprit, and falsely implicating the respondents."

10.2 The Apex Court has in the case of *State Of U.P. V. Vinod Kumar(Dead) and Udai Bhan Singh* reported in 1992 (2) SCC 536 has observed at para 20 as under:

20No doubt that the evidence of these two witnesses is interested one. This Court on several occasions through its decided cases has ruled that mere interestedness by itself is not a valid ground for discarding or rejecting the sworn testimony nor can it be laid down as an invariable rule that interested evidence can never form the basis of conviction. What all that is necessary is that the evidence of interested or related witnesses should be subjected to a very careful scrutiny with extreme care and caution and if on such scrutiny the testimony is found to be intrinsically reliable then that evidence may be relied upon in the circumstances of the particular case to base a conviction thereon....."

10.3 The Apex Court has in the case of Chakali Maddilety & Ors. V. State of Andhra Pradesh reported in 2011 (2) SCC (Cri) 445 observed at para 9 as under:

9. ".....The depositions of close relatives cannot be discarded merely because they are relatives, but their evidence has to be considered with due care and caution. In a case like this, independent witnesses may not come forward to depose, as out of fear, people prefer to run away from the place of occurrence and avoid witnessing the crime, but that does not mean that the case can be discarded only on the ground of non-examination of independent witnesses of the locality"

11. In light of the above, we have to consider as to whether the learned Trial Court has properly and closely scrutinised the evidence of the interested witnesses with due care and caution and has come to the correct conclusion about their evidence? The complainant - Kailashben Kanubhai Padhiyar and witness Nikitaben Kanubhai Padhiyar were both going with the deceased on motorcycle number GJ-16-AE-7596 and at around 20:15 hours, the incident has occurred. The presence of both the witnesses at the place of crime is natural and as they were accompanying the deceased on the motorcycle, they have witnessed the incident. Merely because the witnesses are the wife and the daughter of the deceased, they cannot be called interested witnesses and considering the time of the offence and the place which is a lonely road, it is natural that the wife and the daughter of the deceased have witnessed the incident. We have carefully perused and closely scrutinised the cross-examination of both the witnesses by the learned advocates for the accused and we find that nothing has come on record to discard their evidence and to come to a conclusion that their testimony is not reliable. The testimony of both the witnesses seems to be natural and corroborate the testimony of each other and both the witnesses have identified the accused before the Executive Magistrate during the Test Identification Parade as also before the learned Trial Court. Even during the cross-examination, both the witnesses have stood their ground and there is no reason to disbelieve both the eye witnesses. Both the witnesses have narrated in detail about the incident and how it had taken place and also the events that had unfolded thereafter. After meticulous scrutiny we find that the learned Trial Court has properly appreciated the evidence of these witnesses and has come to a correct conclusion with regard to the involvement of the accused in the crime.

12. The accused have been convicted for the offence under Section 394 of the IPC which reads as under :

394. Voluntarily causing hurt in committing robbery.—

If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years,

and shall also be liable to fine.

13. To prove the offence under Section 394 of the IPC, the prosecution has to prove that the accused in committing or in attempting to commit robbery, voluntarily causes hurt to any person. The hurt must be caused by any of the robbers voluntarily and when one accused voluntarily causes hurt, inter alia, while attempting to commit the robbery, Section 394 of the IPC vicariously makes other accomplices who were jointly concerned in attempting to commit the offence liable for robbery punishable under Section 394 of the IPC.

14. We have minutely perused the evidence of the prosecution and find that the evidence of the eye witnesses, viz. the complainant - Kailashben Kanubhai Padhiyar and witness Nikitaben Kanubhai Padhiyar proves beyond reasonable doubts that the accused were present at the spot and they jointly committed robbery of the motorcycle Bajaj discovery number GJ-16-AE-7596 from the possession of the deceased - Kanubhai Motibhai Padhiyar and during the commission of the robbery, the accused no. 3 - Guddu @ Rajkumar Sakhichand Bharti voluntarily caused grievous hurt to the deceased on his head and he succumbed to the injuries sustained on his head during treatment. It is proved beyond reasonable doubts that all the accused were jointly present at the spot at the time of the crime, armed with a wooden handle of a spade and the injury was inflicted on the head of the deceased by the accused no. 3 - Guddu @ Rajkumar Sakhichand Bharti which caused two fractures on the head of both the front temporal parietal bones and that injury was sufficient in the ordinary course of nature to cause death. The eye witnesses have identified the accused during the Test Identification Parade before the Executive Magistrate in the presence of the panch witnesses and also during the trial and the Bajaj Discovery motorcycle No. GJ-16-AE-7956, which was robbed jointly by the accused was recovered from the place where it was abandoned and the wooden handle of the spade was also recovered from the place where it was thrown. The evidence on record proves that all the accused were present at the place of offence armed with the wooden handle of a spade and this proves that the accused had the intention to inflict bodily injury on the deceased. The accused had gathered at the place of offence with the intention of robbery of the motorcycle from the deceased and it is proved that they all had gathered there from the beginning with the common intention of committing the offence and in furtherance of their common object, assaulted the deceased and inflicted grievous bodily injuries sufficient in the ordinary course of nature to cause death on the vital part of his body i.e. the head and caused his death. There is no defence on behalf of the accused that the injury was accidental or unintentional but as discussed above, even at the cost of repetition, we can conclude that the grievous injuries were sustained only on the head of the deceased which can only lead us to the conclusion that the intention of the accused was to commit bodily injuries sufficient in the ordinary course of nature to cause death. A perusal of the text of Section 394 shows that not only the person who has actually committed the hurt to the injured but also the associates or persons present jointly concerned in committing the offence are

equally liable for the mischief contemplated by the section. It is settled law that when voluntarily one accused causes hurt, inter alia, while attempting or committing the robbery, Section 394 vicariously makes all the other accomplices who were jointly concerned in attempting or committing the robbery liable for robbery punishable by Section 394. From the factual background considered in light of the settled principles of law and the evidence on record we can safely conclude that the offence under Section 394 of the IPC jointly committed by all the accused has been proved beyond reasonable doubts.

15. The accused have also been convicted and sentenced to imprisonment for life for the offence under Section 302 of the IPC and learned Advocate Mr. Dipak Sindhi for the accused no. 3 has argued that the evidence does not disclose an offence of murder as the prosecution has not proved that there was an intention to inflict a body injury that was sufficient to cause death in the ordinary course of nature. Learned Advocate Dr. Hardik Raval and learned Advocate Mr. Kartikkumar K. Joshi have also supported the arguments and have submitted that there was no intention on the part of any of the accused to cause death of the deceased.

16. The Apex Court in *Virsa Singh V. The State of Punjab* reported in AIR 1958 SC 465 has observed as under :

It was argued with much circumlocution that the facts set out above do not disclose an offence of murder because the prosecution has not proved that there was an intention to inflict a bodily injury that was sufficient to cause death in the ordinary course of nature. Section 300, 3rdly was quoted:

" If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death."

It was said that the intention that the section requires must be related, not only to the bodily injury inflicted, but also to the clause, "and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death."

This is a favourite argument in this kind of case but is fallacious. If there is an intention to inflict an injury that is sufficient to cause death in the ordinary course of nature, then the intention is to kill and in that event, the "thirdly " would be unnecessary because the act would fall under the first part of the section, namely-

"If the act by which the death is caused is done with the intention of causing death."

In our opinion, the two clauses are disjunctive and separate. The first is subjective to the offender:

"If it is done with the intention of causing bodily injury to any person."

It must, of course, first be found that bodily injury was caused and the nature of

the injury must be established, that is to say, whether the injury is on the leg or the arm or the stomach, how deep it penetrated, whether any vital organs were cut and so forth. These are purely objective facts and leave no room for inference or deduction: to that extent the enquiry is objective; but when it comes to the question of intention, that is subjective to the offender and it must be proved that he had an intention to cause the bodily injury that is found to be present. Once that is found, the enquiry shifts to the next clause-

" and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death."

The first part of this is descriptive of the earlier part of the section, namely, the infliction of bodily injury with the intention to inflict it, that is to say, if the circumstances justify an inference that a man's intention was only to inflict a blow on the lower part of the leg, or some lesser blow, and it can be shown that the blow landed in the region of the heart by accident, then, though all injury to the heart is shown to be present, the intention to inflict ail injury in that region, or of that nature, is not proved. In that case, the first part of the clause does not come into play. But once it is proved that there was an intention to inflict the injury that is found to be present, then the earlier part of the clause we are now examining " and the bodily injury intended to be inflicted " is merely descriptive. All it means is that it is not enough to prove that the injury found to be present is sufficient to cause death in the ordinary course of nature; it must in addition be shown that the injury is of the kind that falls within the earlier clause, namely, that the injury found to be present was the injury that was intended to be inflicted. Whether it was sufficient to cause death in the ordinary course of nature is a matter of inference or deduction from the proved facts about the nature of the injury and has nothing to do with the question of intention. In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on broad lines as, for example, whether there was an intention to strike at a vital or a dangerous spot, and whether with sufficient force to cause the kind of injury found to have been inflicted. It is, of course, not necessary to enquire into every last detail as, for instance, whether the prisoner intended to have the bowels fall out, or whether he intended to penetrate the liver or the kidneys or the heart. Otherwise, a man who has no knowledge of anatomy could never be convicted, for, if he does not know that there is a heart or a kidney or bowels, he cannot be said to have intended to injure them. Of course, that is not the kind of enquiry. It is broad based and simple and based on common sense: the kind of enquiry that " twelve good men and true could readily appreciate and understand.

To put it shortly, the prosecution must prove the following facts before it can bring a case under s. 300, 3rdly " ;

First, it must establish, quite objectively, that a bodily injury is present ;

Secondly, the nature of the injury must be proved; These are purely objective

investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and, Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender. Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under s. 300, 3rdly. It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced that the injury was accidental or otherwise unintentional.

17. We have minutely perused the record of the case and find that as discussed above, the prosecution has proved that all the accused were present at the place of offence with the intention of committing robbery of the Bajaj Discovery motorcycle No. GJ-16-AE-7596. As per the evidence of the eye witness PW1 - Kailashben Kanubhai Padhiyar, the accused no. 3 - Guddu @ Rajkumar Sakhichand Bharti had assaulted the deceased with the wooden handle of the spade that he had in his possession. The accused right from the beginning came armed with the wooden handle of the spade and as per the evidence of PW27 - Dr. Deepakbhai Chimanbhai Parekh - the Medical Officer who has treated the deceased and PW29 - Dr. Vinayakrao Vasudevrao Patil - the Medical Officer who has conducted the postmortem on the dead body of the deceased, there were two injuries which were fractures on the head of the deceased and the fracture was involving both fronto temporo parietal bones on the scalp. This shows the force that was used by the accused no. 3 - Guddu @ Rajkumar Sakhichand Bharti with the handle of the spade and the velocity with which the weapon was used to fracture the vital part i.e. the scalp of the deceased, clearly shows the intention of the accused was to inflict bodily injury with the intention of causing death of the deceased. It is pertinent to note that there was only one bruise on the back of the deceased and no other injury was found on any other part of the

body of the deceased. This fact too points to the intention of the accused no. 3 - Guddu @ Rajkumar Sakhichand Bharti as, if he had the intention of only causing injury to the deceased, the blows would have been inflicted on other parts of the body of the deceased but as the intention was to cause death, repeated blows with a great force were inflicted only on the head of the deceased. The Medical Officer has opined that the injuries on the head were sufficient in the ordinary course of nature to cause death and it is also proved that the cause of death is shock following head injury. We are of the considered opinion that the prosecution has proved that the fatal blows on the head of the deceased were inflicted by the accused no. 3 - Guddu @ Rajkumar Sakhichand Bharti without any provocation by the deceased and was a premeditated act done with the intention to cause bodily injury likely to cause death and the offence under Section 302 of the IPC qua the accused no. 3 - Guddu @ Rajkumar Sakhichand Bharti is proved beyond reasonable doubts.

18. Consequently, Criminal Appeal No. 1782 of 2017 filed by appellant Shivshankar @ Shankar Jogeshwar Khokha Yadav and Criminal Appeal No. 1476 of 2017 filed by appellant Amit @ Billu Kailash Banarasi Jaiswal are partly allowed. The conviction of the both the appellants for the offence under Section 394 of the IPC is affirmed. Both the appellants are acquitted for the offence under Section 302 of the IPC.

19. Criminal Appeal No. 1482 of 2017 filed by appellant Guddu @ Rajkumar Sakhichand Bharti is without merits and is hereby dismissed.

20. Bail bonds stand cancelled. The appellants are directed to surrender before the learned Trial Court within a period of two weeks to serve out the remaining part of the sentence. In case the appellants do not surrender within a period of two weeks, the learned Trial Court shall take proper steps for arresting the appellants to serve out the remaining sentence.

21. Pending applications, if any, shall stand disposed. Registry is directed to place a copy of the order in the connected matters and to send the R & P back to the learned Trial Court.