
(1999) 11 GUJ CK 0059
In the Gujarat High Court
Case No : Criminal Appeal No. 820 of 1991

Harijan Parbat Bijal and Another

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 02-11-1999

Acts Referred:

Penal Code, 1860 (IPC) — Section 107, 110, 148, 149, 302

Citation : (2000) 1 GLR 193

Hon'ble Judges : M.S. Parikh, J;H.R. Shelat, J

Bench : Division Bench

Advocate : P.M. Thakkar, for the Appellant; K.P. Raval, APP, for the Respondent

Judgement

M.S. Parikh, J.—This conviction appeal is directed against judgment and order dated 4th September 1991 passed by the learned Additional Sessions Judge, Jamnagar, in Sessions Case No. 25 of 1991, convicting the appellants, referred to herein as accused No. 1 & 2, as the case may be, for the offences punishable u/s 302 and 114 of the Indian Penal Code ("IPC" for short), and ordering them to suffer imprisonment for life and to pay fine of Rs. 100, in default to suffer rigorous imprisonment for two months and one month respectively. The prosecution case, in brief, as flowing from the mouth of the complainant, is:-

On October 29, 1990, the complainant Rameshbhai Jethabhai and his brother deceased Dhanji Jethabhai were working in the field from 8 o'clock in the morning. At around 10 O'clock in the morning, their father Jethabhai visited the field and after inquiring about the work going on there, went back. Some time thereafter the complainant went to serve grass to the bullocks, whereas the deceased was taking bath in a basin. Both the complainant and the deceased observed `fast" on that day and therefore they were not to take food. At around 2.30 in the afternoon, the accused No. 1 Parbat Bijal accompanied by accused No. 2 Harijan Khakha Naran, both of whom happened to be the cousins of the complainant (mother's sister's sons), reached the place where deceased was taking bath. The accused No. 2 caught hold of the deceased and the accused No.

1 inflicted two knife blows which ultimately resulted into the death of deceased Dhanji. Upon hearing the shouts of the deceased, the complainant and others viz., Baghubha Rupsinh, Pravinsinh Rupsinh and some female workers ran towards the scene of offence. They caught hold of accused No. 2, whereas the accused No. 1 could escape with knife. The deceased was lying on the ground with injury on the right side of his stomach and in the right side of his lungs. The deceased was lying unconscious at that point of time. It has been alleged that one Manilal was passing by the field with his rickshaw. The complainant party therefore took the deceased in that rickshaw. They first went to Bhanvad Government Hospital, but since the Doctor was not available there, they went to Dr. Varothriya's hospital where the Doctor declared Dhanji as having died. Upon the advice of the Doctor the deceased was taken to the Government hospital and the complainant went to lodge the complaint at Bhanvad police station and produced before the police, accused No. 1 who was caught hold of and taken by the complainant party all throughout. The accused No. 1 who was allegedly absconding was arrested and the weapon of offence - the knife, attributed to him, was recovered from him.

2. After conclusion of investigation and filing of chargesheet, the accused persons were charged with the offences punishable as aforesaid before the learned Additional Sessions Judge. They pleaded not guilty to the charge and at the conclusion of the trial, their defence was one that of denial of the prosecution case saying that they were innocent and were falsely implicated.

3. At the conclusion of trial, and after hearing the learned advocate for the accused persons and the learned APP for the State, the learned Additional Sessions Judge upheld the prosecution case and rendered conviction and sentence to the accused persons, as aforesaid. That is how they are before this Court. It has been reported to this Court, that accused No. 1 is in jail, whereas accused No. 2 came to be bailed out after he had been in jail for a period of around two years.

4. We have heard the learned advocate appearing for the accused persons as well as the learned Addl. Public Prosecutor for the State. The prosecution relied upon the evidence of PW 2 the complainant - Rameshbhai Jethabhai Ex.13, P.W.11 Ugha Dana Ex.25, PW 12 Ex.26 Deviben Jethaba, and PW 1 Ex.9 Dr. Sashikant Vallabhdas Sapariya, who performed the post mortem. The prosecution also examined other witnesses to prove the panchnamas of scene of offence, including the inquest panchnama, person of both the accused, and recovery of knife in question. The prosecution also examined Baghubha Rupsinh, Pravinsinh Rupsinh, Bachu Naran, Bahadursing Jagatsing, P.W. 3, 4, 5, and 6, Exhibits 15, 16, 17 and 19 respectively, but they have turned hostile and not supported the prosecution. We have gone through the respective pieces of evidence and we would deal with the salient features thereof on which reliance has been placed by the respective learned counsel.

5. In the first place, it has been submitted on behalf of the accused persons that

the prosecution has exaggerated the facts of the prosecution story through the mouth of the aforesaid prosecution witnesses. It has been submitted that the concerned eye witnesses ran to the scene of offence after some time and hence they did not have the opportunity of seeing the accused persons more particularly the accused No. 1 with the knife running away from the scene of offence. It might be noted from the evidence of prosecution witness Rameshbhai Jethabhai - complainant Ex.13, Ugha Dana Ex.25, and Deviben Jethaba Ex. 26 that they were all present either in the field in question or the adjacent field. The road approaching the field in question was passing by their respective fields and they were within the sight of the respective witnesses as per the facts narrated by them. It would be farfetched and too much to accept the submission that the prosecution witnesses did not see the accused persons at all, particularly the accused No. 1 who had given the knife blows to the deceased and who ran away from the scene of offence before he could be caught hold of by the witnesses and other persons who were working in their respective fields. In our opinion, the prosecution story has run consistent in so far as appearance of two accused persons at the scene of offence is concerned. It is from this stage that the scrutiny of facts set out by the prosecution would need examination and consideration. It might be noted from the evidence of complainant Ex. 13 that he was working in the same field in which deceased Dhanji was taking bath at around 2.30 in the afternoon as aforesaid. He was at a distance of around 200 feet as admitted by him in his cross-examination. However, deceased Dhanji was within his sight. He has deposed that accused No. 2 had caught hold of his brother Dhanji and accused No. 1 gave two knife blows, one landing on the back of Dhanji ultimately rupturing right side of the lungs and another landing on the abdomen. Upon hearing the shout of his brother Dhanji, he left his work and ran to the scene of offence. Baghubha Rupsinh, Pravinsinh Rupsinh and three female workers also rushed there. They caught hold of accused No. 2 Khakha Naran, but accused No. 1 Parbat Bijal escaped with his knife. They all brought the deceased as well as accused No. 2 nearby the road at the place known as Patine Road where he could locate Manibhai driving the rickshaw. The witness has then narrated the facts as noted hereinabove. It would therefore appear from the evidence that deceased Dhanji was clearly within the sight of this witness and therefore it cannot be said that it was impossible for him to see accused No. 1 giving knife blows to deceased Dhanji. In so far as his evidence regarding he having seen accused No. 2 catching hold of deceased Dhanji is concerned, that needs further scrutiny, in the light of the circumstances which have been disclosed from the prosecution evidence itself. That, a little later. The fact that accused No. 1 gave knife blows has been set out in the evidence of the complainant and he has been corroborated by other two witnesses. However, the variation in evidence with regard to catching hold of deceased Dhanji by accused No. 2, has come to light in the evidence of other witnesses. The complainant has deposed that the accused No. 2 caught hold of deceased Dhanji by embracing him (deceased) from the front. In other evidence, it has appeared that accused No. 2 had gripped the hands of deceased Dhanji. It would be interesting to note

from the evidence of this witness, that he has described the clothes which the two accused persons had put on. According to complainant, the clothes of accused caught bloodstains on account of the injuries which deceased Dhanji sustained, whereas according to the evidence of other witnesses, the clothes which the accused No. 2 had put on did not catch the bloodstains. This is a very important circumstance which we will consider soon hereafter when we are required to deal with the defence of accused No. 2. What is important to be noted from the evidence of these witnesses is that they had an occasion to witness accused No. 1 having given knife blows to deceased Dhanji as well as having run away with the knife from the scene of offence. One important fact, which has been brought to light in the cross-examination of this witness, needs a mention here itself, lest it might be lost sight of. It has been stated by the witness in Para 5 of his cross-examination that after Dhanji was given the knife blows by accused No. 1, Dhanji had walked a distance of around 30 to 35 feet.

6. Then, there is the evidence of PW 12 Deviben Jethaba Ex.26. She was one of the three female workers, the other two persons being her sisters Soniben and Manjuben present at the time of incident in the nearby field. When they were sitting after taking their meals in the afternoon of the fateful day they saw two persons coming from the road side and they were the two accused persons. We need not repeat the rest of the story. It is no doubt true that the witness has stated that they did not see the accused No. 1 giving knife blows to deceased Dhanjibhai and when they ran to the scene of offence, they saw accused No. 2 having caught hold of the deceased and accused No. 1 having run away. Thus, even this female witness also corroborates the prosecution case with regard to accused No. 1 having gone to the scene of offence and having run away therefrom. She has also stated in her cross-examination that she had an occasion to see them when they reached the basin where Dhanji was taking bath. She has however admitted a very important fact, and in fact we may state that fact here itself, that accused No. 2 rendered assistance to Baghubha and complainant Ramesh in lifting injured Dhanji and taking him to the road side and rendering assistance in seeing that Dhanji was taken in rickshaw to the hospital. That a little later. The prosecution however has led aforesaid evidence which has consistently displayed that accused No. 1 was concerned in approaching the deceased Dhanji in the field where he was taking bath in a basin exchanging words with deceased Dhanji (in so far as accused No. 1 is concerned) and giving knife blows to deceased Dhanji (in so far as accused No. 1 is concerned). The evidence of all the three witnesses finds support from the medical evidence in the form of oral evidence of Dr. Sashikant Vallabhdas Sapariya, PW 1 Ex. 9 and the post mortem report Ex. 11. Exhibit 11 recites that the cause of death was due to haemorrhage and shock on account of injury to vital organ being right lung. This refers to the first blow alleged to have been inflicted by the first accused. Second blow is described to be a stab wound 2.5 cms X abdominal cavity deep at 5.0 cm right and 4.0 cm above to umbilicus on anterior abdominal wall through which small intestine is protruded. In fact, the injuries described in

Column No. 13 are five in number. Over and above the aforesaid injuries, there are abrasions, one on lower part of left arm and second on lateral aspect of left knee joint. The stab wound which has damaged the lung appears to have been described as injuries No. 2 & 3. It would, therefore, appear that the prosecution story about accused No. 1 giving two principal blows finds support from the description of injuries appearing in post mortem report, Exhibit 11. Dr. Sashikant Vallabhdas Sapariya, PW 1 Ex. 9 has spoken about the injuries and the cause of death as recited in post mortem report Ex. 11. However, it has appeared from both the pieces of evidence, Ex. 9 and Ex. 11, that the deceased had taken some food about an hour before the time of his death. It was submitted on behalf of the accused persons that this fact runs counter to the prosecution evidence, inter alia, saying that the deceased had observed 'fast' on the fateful day. In our considered opinion, this discrepancy cannot be said to be vital inasmuch as although the deceased and his brother (the complainant) observed fast on the fateful day, it was quite possible for the deceased to take some permissible item of food taken during fast. The contents of food which were noticed in the stomach were hardly 300 M.L. as can be seen from the medical evidence. It would, therefore, clearly appear that prosecution story as appearing in the evidence of the aforesaid witnesses finds support from the medical evidence also.

7. We might note here, that the prosecution version, about hurling of abuses by both the accused persons at the deceased at the time of the incident, appears to be doubtful, inasmuch as all the aforesaid witnesses were at such a distance from the scene of offence that they could hardly have heard the words used during the conversation between the deceased on one side and the accused persons on the other side. It is possible that they might be loudly talking. Nothing beyond that can be inferred from the ocular account of the aforesaid witnesses. There is one more circumstance which deserves to be noted in so far as accused No. 1 is concerned. It has clearly appeared in the prosecution evidence of the complainant and one of the eye witnesses that accused No. 1 had taken the contract of a School at Kalavad and deceased Dhanji was attending to the labour work under the contractor, i.e., accused No. 1. Accused No. 1 owed labour charges to deceased Dhanjibhai who was frequently reminding accused No. 1 for paying him his dues. This circumstance clearly appears to have supplied a cause for accused No. 1 to go to the field where deceased was taking bath in the basin in the field where he was working at the relevant point of time. It was submitted on behalf of the accused No. 1 that the case of 'motive' with regard to deceased having illicit relation with the wife of accused No. 1 has been given up by the prosecution by dropping witness, Deviben, wife of Karsan Mega. It has further been submitted that the motive alleged to be emanating from the outstanding amount of labour charges would ordinarily result in the deceased going to the place of accused No. 1 and not accused No. 1 going to the field where deceased was working. Human nature as it is takes different shape under different situations. It is not improbable that the accused No. 1 might not be wanting deceased to make reminders to him about his labour charges. It would

therefore be quite natural for him to go to the deceased for telling him not to remind him for payment of his outstanding labour charges. The facts with regard to outstanding labour charges of the deceased due and payable by the accused No. 1 appear from the prosecution evidence as aforesaid and therefore the cause and the motive clearly appear from the evidence of the aforesaid witnesses. As a result of the aforesaid facets of the prosecution evidence, it would clearly appear that the guilt of the accused No. 1 appears to have been established beyond reasonable doubt by the prosecution.

8. It has been submitted on behalf of the accused persons that at best the accused No. 1 could be held responsible for the offence of culpable homicide not amounting to murder as envisaged by Section 304 of the Indian Penal Code. In support of this submission, reference has been made to Surinder Kumar Vs. Union Territory, Chandigarh, . Our attention is drawn to following observations appearing in Head Note from Para 6 of the citation:-

"To invoke Exception 4 to S. 300 four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not acted cruelly. Thus where in case of quarrel between the deceased and the accused regarding possession of premises, it was reasonable to infer from the facts that the deceased must have intervened on the side of his brother and in the course of the scuffle he received injuries, one of which proved fatal, the accused would be entitled to the benefit of the Exception 4 to S. 300. Merely because three injuries were caused to the deceased during the scuffle it could not be said that he had acted in a cruel and unusual manner. Under such circumstances, the accused could be convicted under S. 304, Part I."

9. So far as the present case is concerned, it cannot be said to be one involving sudden quarrel. The accused No. 1 approaches the deceased with a knife. He had in his mind frequent demands/reminders of outstanding amount of labour charges owed to the deceased. Therefore, this is not a case where it could be said that there was lack of premeditation. There also does not appear to be a sudden quarrel between the accused No. 1 and the deceased at the time of the incident. That even is not the defence surfacing at any point of time during the course of trial. The accused No. 1, with the state of mind as we have noticed from the evidence, had inflicted blows as aforesaid and one of the blows has proved to be fatal. As a matter of fact, even the second blow has also landed on

the vital part of the deceased's body. In that view of the matter, aforesaid observations will hardly apply to the present case. We are unable to accept the submission of the learned counsel appearing for the accused for invoking Section 304 Part 1 or Part 2 of the Indian Penal Code for the purpose of holding that homicidal death of deceased Dhanji was culpable homicide not amounting to murder.

10. That would take us to the prosecution case in so far as accused No. 2 is concerned. We have noticed following circumstances from the prosecution evidence : The accused persons and the persons on the side of the complainant and deceased were close relations. There has been no case set out against the accused No. 2 for showing that he had any motive in accompanying accused No. 1 to the field where deceased was working on the day of the incident. As a matter of fact, prosecution witness, Rameshbhai Jethabhai, PW 2 Ex.13 - the complainant, admitted in Para 8 of his deposition that accused No. 2 was in no way concerned or connected (as a partner) in the matter of contract which was taken by accused No. 1. It would, therefore, appear that accused No. 2 was in no way concerned with the outstanding amount of labour charges which accused No. 1 owed to the deceased. There is no evidence worth the name for showing that accused No. 2 knew about some disputes/differences in the matter of outstanding amount of labour charges owed by accused No. 1 to the deceased. There is no fact alleged by the prosecution so as to be attributed to accused No. 2 for aiding or abetting accused No. 1 in the commission of the offence as aforesaid. It is a fact that accused No. 2 accompanied accused No. 1 and he was present at the time of incident in question. However, his conduct all throughout would point at his innocence rather than at his guilt. PW 12 Deviben Jethaba Ex. 26 has in terms deposed that accused No. 2 assisted the complainant and other persons in lifting injured Dhanji for being placed into the rickshaw and taken to the hospital. It has consistently appeared in the prosecution evidence that accused No. 2 has not tried in any manner to escape. Besides, although it has appeared in the evidence of the complainant that the clothes which the accused No. 2 had put on had caught bloodstains on account of the injuries caused to the deceased, no such bloodstains could be noticed by any of the police authorities and we could notice this circumstance also from the evidence of prosecution witnesses. Ugha Dana, Deviben Jethaba and PW 18 Khimjibhai Somabhai Ex. 39, who was at the relevant point of time performing his duties as PSI, Bhanvad police station. The arrest panchnama, in so far as accused No. 2 is concerned, appearing at Ex. 44 also indicates that there were no blood marks or bloodstains on the clothes which the accused No. 2 had put on. It has consistently appeared in the prosecution evidence that accused No. 2 remained present all throughout with the complainant party and then with the concerned police authority. Under such circumstances, the prosecution story, that accused No. 2 had caught hold of the deceased at the time of the incident, becomes highly doubtful and cannot be accepted. Thus, the prosecution has failed to establish any overt act on the part of the accused No. 2 during the course of commission of crime by accused No. 1.

There is no circumstance or fact set out by the prosecution which would indicate that accused No. 2 knew about accused No. 1 being in possession of the knife with which he inflicted blows to the deceased. All these circumstances clearly go to indicate that accused No. 2, though was present at the time of incident, could not be said to have any intention of aiding accused No. 1 in commission of the crime in question. Reference has been made to the provision contained in Section 107 of the IPC, which would read as under;

"107. Abetment of a thing. ___ A person abets the doing of a thing, who ___

Firstly, ___ Instigates any person to do that thing; or

Secondly, ___ Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly, ___ Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1. ___ A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing."

Mr. K.P. Raval, the learned APP pointedly read before us third clause of the above provision which speaks about intentional aiding by any act or illegal omission, the doing of a particular thing. In our considered opinion, the circumstances noted above from the prosecution evidence clearly negate the requisite intention on the part of the accused No. 2.

Mr. Raval referred to a Bench decision in the case of Dineshkumar Becharbhai Gameti and Another Vs. State of Gujarat, . Even there, the Bench has observed, that the surrounding set of facts and circumstances, the manner and mode in which the incident occurred, the type of blow inflicted by accused and the role which the abettor played at the time of incident would assume importance for drawing inference with regard to common intention as envisaged by Section 34 of the IPC. The Bench has also noted the animosity and deep-seated motive being visible from the prosecution story. In our opinion, the observations read from Para 16 of the citation would hardly apply to the present case where nothing more than mere presence of accused No. 2 could be shown by the prosecution. In contrast, it emerges from the prosecution evidence itself that the accused No. 2 lent assistance in seeing that the injured was lifted for being taken to the hospital. Thus, there are circumstances which would point at the probable innocence on the part of accused No. 2. There are no circumstances which would indicate drawing of inference of intentionally aiding the act attributable to the first accused.

Mr. Raval then referred to the decision of Hon"ble Supreme Court in the case of Jivan Lal & Ors. Vs. State of Madhya Pradesh 1997 (1) Cri 1. There, it was

submitted that the conviction of the appellants by the courts below for offences u/s 148 and 302/149, IPC, could not be sustained. The Apex Court upheld the argument but observed that the prosecution evidence did reveal common intention on the part of the concerned accused and no prejudice could be caused to the accused persons if provision of Section 34 of IPC was applied. In our opinion, this decision could hardly have any application to the present case. There is no question of applying Section 34 read with 302 of the IPC in so far as accused No. 2 before us is concerned. In the present case, there is no evidence worth the name for showing required intention on the part of the accused, much less common intention. Reference in this respect has been made to a decision of the Hon'ble Supreme Court in the case of Shri Ram Vs. The State of U.P., . There, it has been held, "In order to constitute abetment, the abettor must be shown to have "intentionally" aided to commission of the crime. Mere proof that the crime charged could not have been committed without the interposition of the alleged abettor is not enough compliance with the requirements of Section 107." It has been observed, "A person may, for example, invite another casually or for a friendly purpose and that may facilitate the murder of the invitee. But unless the invitation was extended with intent to facilitate the commission of the murder, the person inviting cannot be said to have abetted the murder. It is not enough that an act on the part of the alleged abettor happens to facilitate the commission of the crime. Intentional aiding and therefore active complicity is the gist of the offence of abetment under the third paragraph of Section 107". In Trilok Chand Jain Vs. State of Delhi, , the Supreme Court has in no uncertain terms pointed out that the intention to aid the commission of the crime is the gist of the offence of abetment by aid. Reference has also been made to a decision of the Apex Court in the case of Sushil And Others Vs. State of U.P. 1995 SCC 388, where, in para 11, following observations appear:-

"The appellant Tapeswar has been found guilty u/s 302 with the aid of Section 34 of IPC. Learned counsel for the appellants vehemently urged that Hoshiyar Singh, PW 1 had made the written report Ext. Ka-1 after Charan Singh, PW 3 and Hoshiyara, PW 2 had narrated the incident to him when he arrived on the spot and it was on the basis of the information received from these two persons that he lodged the written report Ext.Ka-1 wherein he stated that the appellant "Tapeswar ne Jai Prakash ki kauli bhar li tatha Sushil or Ram Niwas ne apne apne hathon main liye chakuon se Jai Prakash per war kiye" meaning thereby that the appellant Tapeswar caught hold the deceased Jai Prakash all around the waistline and accused Sushil and Ram Niwas caused knife injuries with their respective knives to his son Jai Prakash. The learned counsel submitted that there is no mention in the report that the appellant Tapeswar had raised both the hands of the deceased so as to enable the accused Sushil and Ram Niwas to inflict knife injuries on the abdomen, stomach and chest and knee of the victim. He urged that it was after seeing the medical report that the prosecution presumably thought that it may not be possible to inflict those injuries, if appellant Tapeswar had caught the deceased all around his waistline, the

evidence was laid in the court that Tapeswar had raised the hands of the deceased as deposed by Hoshiyara, PW 2. It was further submitted that the appellant Tapeswar has been falsely roped in the occurrence due to enmity by stating that he had caught hold the deceased. It is true that the informant Hoshiyar Singh, PW 1 has stated in his written report that Tapeswar had caught hold the deceased around his waistline from the front and he also deposed that when Tapeswar raised both the hands of the deceased the other two accused assaulted with their respective knives. As against this, the independent eyewitness Charan Singh, PW 3 simply stated that the appellant Tapeswar had caught hold the hands of the victim Jai Prakash. Dharampal, PW 5 another eyewitness also stated that the accused Sushil and Ram Niwas inflicted knife injuries when appellant Tapeswar was catching hold the victim. There is thus some inconsistency and discrepancy with regard to the actual part attributed to the appellant Tapeswar. The appellant Tapeswar was not armed with any weapon nor is he alleged to have made any assault on the deceased. There is no evidence that Tapeswar was aware of the fact that the co-accused Sushil and Ram Niwas were armed with knives which may be used by them in the crime. The prosecution evidence is also silent on the point whether these two accused took out the knives suddenly with or without the knowledge of Tapeswar or came with knives openly and visibly and inflicted knife injuries on the victim. In these facts and circumstances it is difficult to say with certainty as to what extent, if at all, the appellant Tapeswar shared the common intention with the other two appellants Sushil and Ram Niwas. In view of these facts and circumstances in our opinion the appellant Tapeswar is entitled to the benefit of doubt."

In *Ajay Sharma Vs. State of Rajasthan* 1999 SCC 74, it was held that the instigation was only to strike but the appellant might not have known that the co-accused was having kirpan under his stockings and therefore he was found liable to be convicted u/s 324/110 of the IPC and not u/s 302 read with Section 34 of the IPC.

It would, therefore, be clear that mere presence of the person at the time of commission of offence without anything more in the background of subsequent conduct on his part pointing at his innocence, would hardly amount to he having committed any offence as defined in Section 107 of the IPC.

11. In our considered opinion, the learned Additional Sessions Judge has clearly erred in convicting and sentencing accused No. 2 by having recourse to Section 114 of the IPC which even otherwise would not be applicable in the present case. Section 114 reads as under :-

"114. Abettor present when offence is committed.____ Whenever any person, who if absent would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of that act or offence for which he would be punished in consequence of the abetment committed, he shall be deemed to have committed such act or offence."

On a plain reading of the aforesaid provision, the facts of the prosecution case hardly call for applying it against accused No. 2. In fact, he could have been charged u/s 302 read with Section 109 of the IPC. However, even if so charged, the prosecution has not been able to bring home such charge. In that view of the matter, the conviction and sentence of accused No. 2 would merit reversal.

12. In the result, we pass following order :-

The conviction and sentence of accused No. 1, Harijan Parbat Bijal will stand confirmed and the present appeal, in so far as accused No. 1 is concerned, will stand dismissed. So far as conviction and sentence of accused No. 2 Harijan Khakha (Khakhanaran) Agadiya, is concerned, the same will stand set aside, and in so far as his appeal against the impugned judgment and order of conviction and sentence relating to him is concerned, the same shall stand allowed. Order accordingly.