

(2008) 09 GUJ CK 0019
In the Gujarat High Court
Case No : Criminal Appeal No. 1722 of 2005

Hasmukh Nanji Rabari and Others

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 16-09-2008

Acts Referred:

Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 313, 374
Penal Code, 1860 (IPC) — Section 143, 147, 148, 149, 307

Citation : (2009) 1 GLR 345

Hon'ble Judges : J.R. Vora, J; J.C. Upadhyaya, J

Bench : Division Bench

Advocate : Yogesh S. Lakhani, for the Appellant; Archana Raval, APP, for the Respondent

Judgement

J.R. Vora, J.—Instant Appeal is preferred by the appellants u/s 374 of the Code of Criminal Procedure, 1973, against the judgment and order delivered by Presiding Officer, Fast Track Court No. 4, District - Rajkot at Morbi, on 11th of August, 2005, in Sessions Case No. 2 of 2003, whereby the present appellants came to be convicted for the offences punishable under Sections 143, 147, 148, 323, 324, 504 and 307 of the Indian Penal Code as well as u/s 135 of the Bombay Police Act. Each of the appellants was sentenced to undergo six months imprisonment and to pay fine of Rs. 500/-, in default to undergo one month imprisonment for the offence punishable u/s 143 of the Indian Penal Code; to undergo two years imprisonment and to pay fine of Rs. 1,000/- in default to undergo one month imprisonment for the offence punishable u/s 147 of the Indian Penal Code; to undergo imprisonment of three years and to pay fine of Rs. 3,000/- in default to undergo imprisonment of six months for the offence punishable u/s 148 of the Indian Penal Code; to undergo imprisonment of one year and to pay fine of Rs. 1,000/- in default to undergo imprisonment of one month for the offence punishable u/s 323 of the Indian Penal Code; to undergo imprisonment of three years and to pay fine of Rs. 3,000/- in default to undergo

imprisonment of six months for the offence punishable u/s 324 of the Indian Penal Code; to undergo imprisonment of two years and to pay fine of Rs. 1,000/-, in default to undergo imprisonment of three months for the offence punishable u/s 504 of the Indian Penal Code and to undergo imprisonment of 10 years and to pay fine of Rs. 10,000/- in default to undergo imprisonment of one year, for the offence punishable u/s 307 of the Indian Penal Code. Each of the appellants came to be convicted and sentenced for the offence punishable u/s 135 of the Bombay Police Act and was sentenced to undergo imprisonment of one month. The learned Trial Judge also directed that all the sentences awarded to each of the appellants shall run concurrently and set off also be given to each of the appellants.

2. According to prosecution case, the incident took place at Morbi, on 21.4.2002 during 20.00 to 20.30 hours near old Octroi Office. According to the further prosecution case, complainant - PW-3 Ravubha Banubha Jhala had been to one Jagabhai Satwara, who was doing catering services and wedding of complainant was to take place in near future, he wanted to talk to said Jagabhai Satwara. When complainant Ravubha was standing near the shop of Jagabhai Satwara, accused No. 2 Hirabhai Parbatbhai Rabari was also standing there and accidentally leg of Ravubhai had struck upon accused Hirabhai Parbatbhai Rabari and, therefore, accused Hirabhai Parbatbhai got excited and started giving abuses to Ravubha. Thereafter, Ravubha came to the shop of his cousin brother Bhavansinh Agubha Jhala and the shop was situated near Octroi Office. Half an hour thereafter, all the six accused - appellants and other four persons came there and started giving abuses to Ravubha and he was told that why complainant was giving abuses near the shop of Jagabhai Satwara to accused No. 2. Brother of accused No. 1 Hasmukh Nanji inflicted a blow with stick on the head of the complainant and thereafter accused No. 2 Hirabhai Parbatbhai also inflicted a blow with stick on the head of the complainant. All the accused and other persons started beating complainant with sticks. Complainant Ravubha thereupon started shouting for help and in the meantime his other cousin Raghubha Agubha Jhala - PW-4 came there to rescue complainant Ravubha Banubha. At that time, accused No. 1 Hasmukh Nanji gave a stab wound with knife on the side of the body of Raghubha Agubha. In the meantime, other cousin brothers of the complainant, Bhavansinh Agubha and Nirubha Sabalsinh also reached there and complainant was set free from the accused. All the accused persons ran away from the spot. Raghubha Agubha was taken to hospital by Bhavansinh and Gajubha Sabalsinh and complaint came to be recorded by the Police Sub-Inspector, Morbi City Police Station, on 25th of April, 2002 at about 23.00 hours in the hospital, which is at Exhibit-27. On that day, injured Raghubha was examined by PW-2 Dr. Mahendrakumar Amrutlal Sanghvi at Civil Hospital Morbi at 21.00 hours, he was referred to Rajkot for further treatment. However, injured Raghubha preferred to take treatment from private Doctor, PW-12 Dr. Ranchhodbhai Mavjibhai Bhut and according to him, a knife wound to the injured was on the back and near spinal cord. Other three injured

i.e. PW-3 Rabubha Banubha Jhala for his simple injury, took treatment from PW-12 Dr. Ranchhodbhai Mavjibhai Bhut while PW-5 Bhavnsinh Agubha Jhala and PW-6 Nirubha Sabalsinh Jhala, both took treatment from Dr. Narendrasinh Natubha Jhala for their simple injury at Civil Hospital, Morbi, on the next day of the incident.

3. On crime being registered, the same was investigated by Kailashnath Shyamsundar Shukla, PI of Morbi Police Station and charge sheet was submitted in all against eight persons and two being juvenile offenders, were sent to appropriate court. The case being committed to the Court of Sessions, the learned Trial Judge framed charges against six accused on 18th of August, 2004, vide Exhibit-1, for the offences punishable under Sections 143, 147, 148, 504, 149, 324, 323 and 307 of the Indian Penal Code as well as u/s 135 of the Bombay Police Act.

4. All the accused - appellants pleaded not guilty and, therefore, prosecution examined as many as 15 witnesses:

PW-1 Dr. Narendrasinh Natubha Jhala Exh. 12

PW-2 Dr. Mahendrakumar Amrutlal Sanghvi Exh. 18

PW-3 Ravubha Banubha Jhala Exh. 26

PW-4 Raghubha Agubha Jhala Exh. 29

PW-5 Bhavansinh Agubha Jhala Exh. 30

PW-6 Nirubha Sabalsinh Jhala Exh. 31

PW-7 Ranjitsinh Dilubha Jadeja Exh. 32

PW-8 Karshanbhai Ramjibhai Dabhi Exh. 34

PW-9 Kalubhai Menandbhai Gajiya Exh. 35

PW-10 Kishorsinh Juvansinh Jadeja Exh. 37

PW-11 Rajendrasinh Hathisinh Jadeja Exh. 39

PW-12 Dr. Ranchhodbhai Mavjibhai Bhut Exh. 40

PW-13 Amrutlal Thakarshibhai Kasundra Exh. 44

PW-14 Balvantrav Bhikhajiraj Mohite Exh. 45

PW-15 Kailashnath Shaymsundar Shukla Exh. 49

5 In addition to this, prosecution also placed on record the following documentary evidence:

1. Medical Certificate Exh. 13

2. O.P.D. Case Papers Exh. 14

3. Medical Certificate Exh. 15
4. O.P.D. Case Papers Exh. 16
5. Police Yadi Exh. 17
6. Medical Certificate Exh. 19
7. O.P.D. Case Papers Exh. 20
8. In-door Case Papers Exh. 21
9. Police Yadi Exh. 22
10. Complaint Exh. 27
11. Inquest Panchnama Exh. 33
12. Panchnama of scene of offence Exh. 36
13. Arrest Panchnama Exh. 38
14. Medical Certificate Exh. 41, 42, 43
15. Written Complaint Exh. 46
16. Order of Inquiry Exh. 47
17. Notification for Hathiyar Bandhi Exh. 50
18. F.S.L. Report Exh. 51
19. Mudammal Receipt Exh. 52
20. Letter with Serological Report Exh. 53 to 55
- 21 F.S.L. Report Exh. 56

6. The Trial Judge thereafter recorded the statement of each of the appellants u/s 313 of the Code of Criminal Procedure wherein denying the evidence of prosecution, submitted that, in fact, complainant party was aggressor and they had attacked the accused. It is revealed during the prosecution case that for the same incident, a cross complaint came to be filed and some of the accused were injured in the same incident.

7. The learned Trial Judge thereafter heard the prosecution as well as defence and came to the conclusion as stated above and each of the appellants was convicted for the above stated offences and was sentenced and, hence, this Appeal.

8. Learned Advocate Mr. Y.S. Lakhani, submitted on behalf of the appellants that first and foremost issue which requires consideration is that the witnesses have suppressed the genesis and the origin of the incident and have failed to explain the injuries on the body of the accused and, therefore, the version of the witnesses should not be believed. It is submitted that though independent

witnesses were available as the incident took place at public place and though the statements of independent witnesses were recorded, according to the deposition of Investigating Officer, no independent witnesses were examined by the prosecution. On the contrary, the witnesses have denied in toto the fact of accused having received injuries in the same incident. It is also suppressed that a cross complaint came to be filed for the same incident, for which a cross case was conducted, in which weapons also were recovered from the present witnesses. It is submitted that injured witness Bhavansinh Agubha Jhala - PW-5 though took injured Raghubha PW-4 to the Civil Hospital for treatment but did not take treatment to his injury which he took on the next day. Before the Doctor, in the history, names of any of the accused was not mentioned by any of the injured, even who caused injuries to PW-4 Raghubha has also not been disclosed at that juncture when injured were taken to hospital for treatment. Even when two other injured witnesses - PW-5 Bhavansinh and PW-6 Niruba took treatment on the next day, at that point of time also, no names of any of the assailants were disclosed before the Doctor by these injured witnesses. Nature of injuries to PW-4 Raghubha and PW-5 Bhavansinh were simple in nature and even injury caused to Raghubha was also not serious. Though Dr. Mahendrakumar Amrutlal Sanghvi PW-2 stated that injury was on vital part and was serious, but this fact was not noted by him in the certificate issued by him while it differs from the deposition of Dr. Ranchhodbhai Mavjibhai Bhut, PW-12, who treated injured Raghubha thereafter. Dr. Ranchhodbhai Mavjibhai Bhut - PW-12 in examination-in-cross in clear terms stated that no internal organ was damaged and when internal organ were not damaged, no death could have been caused by the injuries caused to Raghubha. Incident which occurred first in point of time near the shop of Jagabhai Satwara has not been supported by any of the prosecution witnesses and Jagabhai Satwara was material witness, could not be examined by the prosecution. Injured Raghubha PW-4 admits in his deposition that he has many relatives in the Police Department and, therefore, it clearly appears that the prosecution witnesses were aggressor and they launched attack upon the accused and subsequently the false case was framed against the present appellants. Learned Advocate Mr. Y.S. Lakhani further submits that thus prosecution witnesses do not inspire confidence and the case is not proved beyond doubt. It is alternatively submitted that even if the prosecution case is taken as it is as per the evidence of the Investigating Officer, who admitted that in the same incident, accused also got injuries, it was a case of free fight and when there is a free fight, accused cannot be charged for the offences punishable under Sections 143, 147, 148 and 149 of the Indian Penal Code for unlawful assembly. It is also submitted that therefore at the most individual act of each of the appellants is required to be viewed for the culpability. It is submitted that according to the prosecution case, accused No. 1 Hasmukh Nanji gave knife blow to PW-4 Raghubha Agubha and other accused gave only stick blows, causing simple injuries to PW-3 Ravubha Banubha, PW-5 Bhavansinh Agubha and PW-6 Nirubha Sabalsinh. Therefore, while assessing the medical evidence where Dr. Ranchhodbhai Mavjibhai Bhut - PW-12 specifically stated that no vital organ of

the injured was damaged and when it was a case of free fight, no intention of killing Raghubha can be imputed upon accused No. 1 Hasmukh Nanji and to other accused with the aid of Section 149 of the Indian Penal Code. It is submitted therefore that at the most accused No. 1 Hasmukh Nanji could be held liable for the offence punishable u/s 324 of the Indian Penal Code and other accused appellants for the offences punishable u/s 323 of the Indian Penal Code for their individual act. It is submitted that accused No. 1 Hasmukh Nanji was under custody for one month during trial and after conviction accused No. 1 is undergoing sentence for about three years and, hence, the imprisonment of three years would be sufficient for the offence punishable u/s 324 for appellant No. 1. It is submitted that each of the appellants were under custody during trial for one month and after conviction also they were undergoing sentence for at least nine months and, therefore, that is sufficient imprisonment for each of the accused Nos. 2 to 6, for the offences punishable under Sections 323 of the Indian Penal Code. Accused Nos. 2 to 6 are on bail in pursuance of the order passed by this Court on 12th of April, 2006 while accused No. 1 is still convicted prisoner. All the accused are required to be set free even if they are found guilty as per the prosecution case.

9. On the other hand, learned APP Mr. Archana Raval, on behalf of the State, submitted that, according to the deposition of Dr. Ranchhodbhai Mavjibhai Bhut and Dr. Mahendrakumar Amrutlal Sanghvi, the wound which was caused by the knife was extended till 6th rib of injured Raghubha and, therefore, the same was grievous in nature and having regard to intensity of wound and since the wound was on vital part of the body, it cannot be said that there was no intention on the part of accused No. 1 to kill Raghubha. All the eye witnesses PW-3 Ravubha, PW-4 Raghubha, PW-5 Bhavansinh and PW-6 Nirubha narrated the story which was started from the shop of one Jagabhai till the end of the quarrel in which all the four witnesses got injuries. All witnesses are consistent in their say and, therefore, there is no reason to disbelieve these eye witnesses. The witnesses are injured and assumes more importance than ordinary witnesses as there was no reason for them to implicate the accused falsely in the alleged offences. The witnesses examined are natural witnesses and inspires confidence. It is submitted that it cannot be said that genesis of the incident is suppressed by the witnesses because they are so reliable in deposing before the court and they are consistent as well. Superfluous injuries on the accused requires no explanation by the prosecution witnesses and that merely there was cross complaint, it could not be said that accused Nos. 2 to 6 did not share any common object with accused No. 1 to kill injured witness Raghubha. When the witnesses are consistent and reliable in their evidence, the fact that they do not mention the names of the accused before the Doctor in the history, assumes no importance at all. Discrepancies as pointed out by learned Advocate for the appellants in the deposition of two Doctors i.e. Dr. Mahendrakumar Amrutlal Sanghvi and Dr. Ranchhodbhai Mavjibhai Bhut, is on account of the fact that when Dr. Bhut examined the injured Raghubha, the wound was stitched wound and not opened

wound. The FIR is filed promptly because the incident took place at 8.30 p.m. and FIR came to be recorded at 11.30 p.m. and, therefore, the question of booking the accused with premeditation would not arise at all. There was no attempt of concoction of case at all against the accused because Raghubha was seriously injured and he was taking treatment. It is submitted that therefore the Appeal is required to be dismissed.

10. Both the learned Advocates submitted some decisions which will be referred later on.

11. We have undertaken a complete and comprehensive appreciation of all vital features of the case. We have re-appreciated the entire evidence on record with reference to the broad and reasonable probabilities of the case. We have taken into consideration the contentions raised by both the sides. We have gone through the record and proceedings of the Trial Court in great detail.

12. Prosecution has examined PW-3 Ravubha, PW-4 Raghubha, PW-5 Bhavansinh and PW-6 Nirubha as eye witnesses and injured witnesses. Out of these witnesses, PW-4 Raghubha got injuries by knife blow while others received simple injuries. All these witnesses stated before the court that incident occurred near the shop of Bhavansinh, complainant Ravubha narrates the previous incident at the shop of Jagabhai Satwara, wherein his leg was dropped on the leg of accused No. 2 and some hot exchanges took place there. He also stated that while he was sitting at the shop of Bhavansinh, accused came there and started giving abuses to him and started beating him. PW-4 Raghubha intervened and, therefore, accused No. 1 Hasmukh Nanji inflicted a blow on the side of his waist. Injured Raghubha stated that he was sitting at one pan shop, named as "Bajrang Pan House". At that time, accused came and started beating PW-3 Ravubha, his brother. He was watching this from opposite direction. Accused No. 1 had a knife in his hand. He tried to intervene. At that time, accused No. 1 Hasmukh Nanji inflicted a knife blow on the side of his waist and his other relatives Bhavansinh and Nirubha also intervened and accused also inflicted stick blows to them. Likewise, Bhavansinh Agubha Jhala, examined at Exhibit-30, PW-5 also stated the same story and the story is corroborated by PW-6 Nirubha Salabsinh Jhala, examined at Exhibit-31. All the four witnesses are cross-examined but nothing contradictory could be brought about in their evidence so far as the incident and the injuries are concerned. When the evidence of these four witnesses is appreciated with the standard of a prudent person, they appear to be natural and truthful witnesses. The quality of their evidence and the manner in which they have deposed before the court undoubtedly inspires confidence. There may be lapses and slips here and there, but the tenor of the evidence appears to be trustworthy and truthful. Through dispassionate judicial scrutiny, no infirmity or such variations or contradictions appear from the evidence of these four witnesses which could undermine the substratum of the whole prosecution case. Otherwise also, the corroboration of evidence with mathematical nicety cannot be expected in criminal cases. What is required to be seen is whether the

evidence of the witnesses, appreciating as a whole, is contradicted with the ring of truth or not.

13. Having seen the evidence of injured eye witnesses, it is required to be seen the evidence of medical experts, supporting the eye witnesses. PW-1 Dr. Narendrasinh Natubha Jhala, examined at Exhibit-12, stated that on 22nd of April, 2002, PW-5 Bhavansinh and PW-6 Nirubha were brought before him at 6.40 p.m. with police yadi. Bhavansinh had abrasion on right middle finger while PW-6 Narendrasinh @ Nirubha had tenderness on left occipital region and tenderness on shoulder. Injuries were simple in nature. PW-2 Dr. Mahendrakumar Amrutlal Sanghvi, examined at Exhibit-18, stated that injured Raghubha was brought before him at 21.05 hours on 21st of April, 2002 when he was on duty at Morbi Civil Hospital. In history, the patient stated that when the patient intervened in a quarrel and somebody gave a blow to him over back side lower part. When the patient was examined by the witness, it was found that Raghubha had stab injuries over back higher side lower part at the level of last ribs near central line of about 3 cms on right side and size was about 5 cms x 1 cm. Depth could not be measured. The injury was bleeding and could be caused by knife. The injury was on vital part of the body and could cause death. He was referred to Rajkot Civil Hospital for further treatment. He produced on record a certificate to that extent. Though he admitted in cross-examination that in medical certificate it was not mentioned that injury was serious one. Third Doctor examined is PW-12 Dr. Ranchhodbhai Mavjibhai Bhut, at Exhibit-40 and injured Raghubha - PW-4 obtained treatment from him instead of going to Rajkot Civil Hospital. Dr. Bhut stated that he has his private Nursing Home and on 21st of April, 2002, at 11.30 p.m., patient Raghubha Agubha Jhala was brought by his relatives and was admitted to his hospital. According to him, he had a stab wound on right side below 12th rib on waist. The wound was 2" x 2" length x 5" deep till retro peritoneal space and near spinal cord the wound was fresh and was stitched. The patient had also one abrasion near 6th rib. He was admitted in hospital on 21st of April, 2002 and was discharged on 30th of April, 2002. He produced on record the medical certificate. He stated that injury No. 1 was serious and could be caused by muddamal knife. He also stated that the injury was on vital part of the body and could have caused death. This witness also examined PW-3 Ravubha - complainant of the case and Ravubha had CLW of 1.0 cm x 0.5 cm on left parietal region. The injury was simple and could have been caused by hard and blunt substance. He was treated in OP. The witness submitted on record the medical certificate of this injured at Exhibit-42. The Doctor was cross-examined in detail. In cross-examination, Dr. Bhut admitted that injury No. 1 caused to PW-4 Raghubha was opened by him through a surgery. He found that no internal organ was damaged by the injury and only muscles were cut. The Doctor also admitted in cross-examination that by merely cutting muscles by an injury, ordinarily, no death could be caused. He also admitted that the injury was such that its depth could be measured.

14. Thus, so far as the incident is concerned, which is proved by PW-3 Ravubha,

PW-4 Raghubha, PW-5 Bhavansinh and PW-6 Nirubha, which is fully supported by three Doctors. In addition to this, it is required to be noted that prosecution produced on record the panchnama at Exhibit-38. This is the panchnama of arrest of the accused by which accused No. 1 at the time of arrest, produced a knife before the police in the presence of two panchas. However, two panchas i.e. PW-10 Kishorsinh Juvansinh Jadeja, examined at Exhibit-37 and Rajendrasinh Hathisinh Jadeja, examined at Exhibit-39, did not support the panchnama, but this panchnama is proved by the Investigating Officer PW-15 Kailashnath Shaymsundar Shukla and according to Forensic Science Laboratory report, Exhibit-54, blood group of "B" belonged to the injured was found on muddamal article knife. In this view of the matter, the submission that suppression of genesis and origin of incident would not assume any importance with the contention that accused had also got injuries. It is true that there was free fight and accused side also filed a complaint. At the same time, it is to be noted that defence has played a touch-and-go game and never came forward with the defence that what injuries were sustained by the accused. What is established on record is that there was a free fight and each of the parties participated in the scuffle and both sides received injuries, for which a cross complaint came to be filed. In this case, the injuries received by the witnesses have been proved beyond doubt by the cogent evidence of the above injured eye witnesses and supported by the medical evidence, while there is nothing on the record that what injuries were received by the accused. It must also be noted that when there are cross cases, witnesses attempt to minimize their role as an accused and their evidence must be appreciated in the said perspective, but on account of that, the whole of the evidence of the injured witnesses cannot be thrown out only because there was cross case and witnesses were shrunk about their role as an accused. It becomes the duty of the court to find out the truth and give due weight to the testimony of the injured witness examined during trial and, therefore, when we have found the testimony of the eye witnesses unimpeachable, cogent, consistent as to the extent and injuries received by each of the injured only because there was cross case and the witnesses minimized their role as an accused, that fact itself is not a ground to discard the testimony of such witnesses. In the matter of Raj Kishore Jha Vs. State of Bihar and Others, in similar circumstances, the Apex Court observed that why the evidence of PW cannot be believed and can be obliterated merely because they were accused in the counter case. In a case of this nature when counter case has been registered, the court hearing the same has to scrutinize the evidence with greater detail and even in such situation, the evidence which is cogent, credible and trustworthy cannot be totally wiped out because of the only circumstance that the prosecution witnesses were accused in the counter case. In the present case, as we have appreciated the evidence as above, nothing could be brought on record to impeach the credibility of the witnesses, who are injured. Only because injured witnesses did not mention the names of the accused before the Doctor when they first examined, that fact itself would not obliterate and wipe out the testimony before the court. One can reasonably understand that after the

incident, with injuries a person is brought to the hospital, his condition may not be suitable to understand that he would be a witness in criminal trial and he would be obliged to state and narrate the details of the incident to the Doctor in the history he mentions at that juncture. It all depends that how the witness withstand the crucial test of judicial scrutiny and when he passes the said test, what is stated by the witness before the Doctor assumes no importance at all, and on that count, the evidence cannot be thrown overboard.

15. The principle that failure to explain injuries on the body of the accused by the prosecution witnesses is fatal to the prosecution case is not unqualified and universal rule of law. In each case, it has to be noted that what weight to be given to the said non-explanation would depend upon the quality of the evidence adduced by the prosecution when the injuries sustained by the accused are minor and superficial and when evidence is so clear and cogent, independent and disinterested, so probable, consistent and trustworthy that it thrashes out the effect of omission on the part of the prosecution to explain injuries. When it is found that if the evidence of the prosecution against the accused is so strong that on the basis of which alone the conviction can be recorded, failure to explain injuries on the accused is not at all fatal and more so the principle would apply only when injuries on the accused are of serious nature and it is proved that the injuries are caused at the time of occurrence in question. Especially when the prosecution case is supported by eye witnesses who were found to be truthful, mere non-explanation of the injuries on the accused would not affect the prosecution case. We are fortified by the decisions of the Supreme Court in this regard as follows:

- i) in the matter of Dashrath Singh Vs. State of U.P.,
- ii) in the matter of State of U.P. Vs. Kishan Chand and Others,
- iii) in the matter of James Martin Vs. State of Kerala,
- iv) in the matter of The State of Madhya Pradesh Vs. Kalu Ram and Another,
- v) in the matter of Surendra Paswan v. State of Jharkhand as reported at AIR 2004 SC 742; and
- vi) in the matter of Chacko @ Aniyam Kunju v. State of Kerala as reported at AIR 2004 SC 2688.

16. In the present case, the defence has not come with the specific defence that what injuries were caused to each of the accused. As aforesaid, during the whole trial, the defence has beaten behind the bushes and at the result, what is established is only to the extent that there was a cross complaint for the same incident and the accused had received some injuries. Unless, it is established by cogent evidence that accused had received serious injuries, prosecution cannot be saddled with the liability to explain the injuries on the body of the accused. The decisions cited by the learned Advocate for the appellants on this respect has no relevance at all to the facts in issue. In this case, the prosecution is not

obliged to explain the injuries upon the accused more so when the extent of injuries to prosecution witnesses, as aforesaid, has been proved beyond doubt by the prosecution by cogent, consistent and trustworthy evidence of eye witnesses, supported by each corner of the circumstances and, hence, the contention that the prosecution failed to prove the case against the accused on account of cross case, free fight and non-explanation of injuries upon the body of the accused, has no substance at all.

17. The contention that only the interested witnesses were examined and no independent witnesses, though available, were not examined and, hence, the prosecution case fails also has no substance. It is not the rule of law that case of prosecution must be established by independent witnesses only and only. It is the rule of prudence that the evidence of relatives and interested witnesses should carefully be examined. In the present case, the relatives of the witnesses examined are injured witnesses and the circumstances are proved beyond doubt that those injuries were received by each of the witnesses in the scuffle. There is no reason why the injured witnesses would allow unnecessary to drag innocent persons and let the culprit go scot-free. It must be noted that during cross-examination of witnesses, the defence has admitted to the extent that there was cross case and the presence of the accused at the scene of offence gets due support from the defence case itself. Not only that in further statement of each of the accused, the accused stated that it was the complainant party who attacked them and, therefore, the contention that no independent witnesses are examined by the prosecution, has no substance at all. Some contradictions and variations of superficial nature here and there has been pointed out by learned Advocate for the appellants, has no bearing at all on the case.

18. Thus, what is established is that following a small scuffle near the shop of Jagabhai Satwara between accused No. 1 Hasmukh Nanji and complainant Ravubha, both the parties are got together and excited towards each other at the public place near the shop of Bhavansinh and near Sanada bye-pass road and the quarrel ensued, in which injured Raghubha got injuries by knife at the hands of accused No. 1 Hasmukh Nanji while other witnesses received injuries by sticks at the hands of other accused, and to this extent, we are not interfering in the findings of the Trial Court and above facts of the prosecution are proved beyond doubt.

19. At this juncture, now we would like to deal with the contentions of the appellants which have been advanced alternatively to the main argument to acquit all the accused. It is the contention of the appellants that it was a free and sudden fight and cross complaint was preferred which is admitted by the witnesses and, hence, all the accused cannot be held liable under Sections 143, 147, 148 and 149 of the Indian Penal Code, as no common object can be imputed on all accused. It is also contended that having regard to the incident in a manner which is occurred, even Hasmukh Nanji - accused No. 1 cannot be imputed with intention to kill injured Raghubha especially with reference to two

factors - (i) it was a sudden and free fight and (ii) medical opinion is at variance.

20. Evaluating the alternative contention of the defence i.e. appellants, it must be noted that by virtue of Section 149 of the Indian Penal Code, every member of unlawful assembly at the time of the commission of the offence is guilty of offence committed by any member of the unlawful assembly. The provision creates constructive or vicarious liability of the members of the unlawful assembly for unlawful acts committed pursuant to the common object by any other members of that assembly. The basis of the constructive guilt u/s 149 of the Indian Penal Code is mere membership of an unlawful assembly. In a case u/s 149 of the Indian Penal Code, the accused, if he is a member of the unlawful assembly, the common object of which has to commit a certain crime, and if that crime is committed by one or more persons of that assembly, every person, who happens to be a member of that assembly, would be liable for that criminal act by virtue of his being a member of it, irrespective of the facts whether he actually committed the act or not. To attract Section 149 of the Indian Penal Code, the prosecution must prove that the commission of the offence was by any member of an unlawful assembly and such offence must have been committed in prosecution of the common object of the assembly or must be such that the members of the assembly knew that it was likely to be committed. Unless these three very essential elements are satisfied by the prosecution, the accused cannot be convicted with the aid of Section 149 of the Indian Penal Code.

21. Assessing the scenario as has been proved during trial in respect of the incident and even if taking the prosecution case as it is, it is amply clear that the present incident was an aftermath of simple skirmishes between complainant and accused No. 2. Prosecution witnesses and some of them have their shops nearby the scene of offence. It must be noted through the panchanama at Exhibit-36, which is duly proved by the prosecution, that the incident has occurred at public place. It must be noted that for the same incident, a cross complaint has also been preferred by accused against prosecution party. Witnesses have admitted this fact and more particularly in the evidence of the Investigating Officer, in para-1, admission is noted that in the said case, the present accused had also received injuries and, therefore, the Police Sub-Inspector Mohite was requested to record the complaint of the accused. In examination-in-cross while denying the allegation that the prosecution witnesses were aggressors, Investigating Officer in his evidence at Exhibit-49 stated that for the same incident accused have filed cross complaint against the complainant and injured witnesses and in the cross case, he had recovered a knife as well as sticks as weapons. This fact which is on record without any doubt goes to establish that on account of previous skirmishes when both the parties were within the vicinity of each other, suddenly started fighting with weapons against each other and the scenario which emerges from the evidence of prosecution is nothing but of a sudden free fight. There is no evidence that either the accused party or the complainant party premeditated the incident and after obtaining weapons in the course with certain motive and intention attacked each of the parties. It must be noted that the

incident has not taken place either at the place of the accused nor at the place of the prosecution witnesses. Incident has taken place at public road. These circumstances denote necessarily to infer that on account of previous simple dispute, sudden and free fight followed because prosecution witnesses and accused confronted themselves with each other on public road. Necessary it is, therefore, to look into the issue as to whether any of the accused was liable to be convicted under Sections 143, 147, 148 and u/s 307 with the aid of Section 149 of the Indian Penal Code. We are in agreement with the learned Advocate for the appellants when it is contended that when there is a sudden and free fight, it is only an individual role played by the accused in the incident could be punished and there cannot be a common object or intention in free fight. Learned Advocate for the appellants in this respect has submitted following decisions:

- (i) in the matter of Pundalik Mahadu Bhane and Others Vs. State of Maharashtra,
- (ii) in the matter of Ananta Kathod Pawar and Others Vs. State of Maharashtra,
- (iii) in the matter of Amrik Singh and Others Vs. State of Punjab,

22. Therefore, we are unable to sustain the findings of the Trial Court that all the accused were members of unlawful assembly and that caused rioting with deadly weapons. We do not accept the finding that being members of unlawful assembly, each of the accused was liable to be punished u/s 307 with the aid of Section 149 of the Penal Code for sharing common object with accused No. 1 to cause injuries to injured witness Raghubha. It must be noted that even the injured stated that at the time of incident, he was sitting at Bajrang Pan House, at that time, the present accused appellants and other persons came there. Accused No. 1 had a knife in his hand and others had sticks with them. Complainant - Ravubha's brother was standing in opposite direction of Bajrang Pan House and all the accused started beating with sticks to Ravubha and, therefore, injured witness Raghubha PW-4 tried to intervene. At that time, accused No. 1 Hasmukh Nanji inflicted knife blow on lower right back side of Raghubha. If we take this prosecution case as established, it necessarily lead to the conclusion that there cannot be a common object of the accused to inflict knife blow to Raghubha, who in fact was not present at the scene of offence and only intervened to rescue his brother Ravubha. We cannot attribute either common intention or common object to the accused being unlawful assembly, they intended or in furtherance of common object to kill injured Raghubha, a knife blow was given by accused No. 1 to Raghubha. It must be noted that Ravubha was standing on the road, injured Raghubha having seen the quarrel, crossed the road and he reached at the scene of offence and at the same time other relatives i.e. PW-5 Bhavansinh, one of them had a shop nearby also reached at the scene of offence and scuffle ensued and therefore this is not a case of unlawful assembly and rioting and the common object to kill Raghubha or to injure other witnesses. It therefore, really appears to be a sudden and free fight and in a sudden and free fight, having premeditation, having hatched common object or having harboured common intention by the accused, is out of

question and, therefore, individual role played by each of the accused is required to be judged from the fact situation of the incident in the manner it has occurred. It is also to be noted that it is proved that because Hasmukh Nanji inflicted knife blow from back side of the injured witness, but that was neither the furtherance of the common object of all the accused nor it can be said that accused No. 1 Hasmukh Nanji had an intention to kill Raghubha. The fact which emerges from the evidence clearly indicates that none of the accused including accused No. 1 Hasmukh Nanji can be attributed the intention to kill Raghubha by inflicting a knife blow. This is so because it is clearly established that the injured Raghubha was sitting at a distance at Bajrang Pan Shop and he intervened and accused No. 1 Hasmukh Nanji inflicted a knife blow on the lower back side of Raghubha. What is required to punish an accused u/s 307 of the Indian Penal Code is an intention to kill and causing such injury, which would have resulted otherwise in culpable homicide amounting to murder. As we have understood and appreciated, such an intention on the part of accused No. 1 while inflicting blow by knife is totally absent as it could not have been intended or premeditated by accused No. 1 to cause such injury to injured Raghubha, which would cause murder especially when Raghubha was nowhere in scenario at the inception but he intervened afterwards. When we scanned the medical opinion in respect of knife blow, it becomes clear that from variation of the opinion of two Doctors i.e. PW-2 Dr. Mahendrakumar Amrutlal Sanghvi and PW-12 Dr. Ranchhodbhai Mavjibhai Bhut, where injured Raghubha received treatment is that the injury was not even so serious as to come to the conclusion that the injury was a grievous hurt within the meaning of Section 320 of the Indian Penal Code. What is stated though by PW-2 Dr Mahendrakumar Amrutlal Sanghvi that injury was serious and could cause death, but when he was confronted with the medical certificate at Exhibit-19 he admitted that he did not mention in his medical certificate that injury was serious and was on vital part of the body. In this respect if the evidence of Dr. Ranchhodbhai Mavjibhai Bhut - PW-12 is seen, he deposed in his cross-examination that, in his medical certificate, he did not mention that injury was on vital part of the body. He also admitted that when patient came to him he had opened the stitched wound for surgery. He also admitted that while he opened the wound, he noticed that none of the internal organ was damaged on account of this injury to injured Raghubha. He also admitted that by the injury of knife blow, only muscles were cut. He also admitted that by merely cutting of the muscles, no death could have been caused by such injury. Now, having regard to the factual scenario where we do not find intention on the part of the accused No. 1 to inflict such injury to Raghubha which would cause death of the injured and while from medical opinion, it is found that injury was not serious as to cause death nor was grievous hurt, accused No. 1 could have been held liable for the offence punishable u/s 324 of the Indian Penal Code only and causing simple injuries to other prosecution witnesses, u/s 323 of the Indian Penal Code. Even as per the prosecution case, other accused i.e. appellants No. 2 to 6 caused injuries to the prosecution witnesses by sticks only and according to medical opinion, as narrated above, those were simple injuries and each accused could

be held liable for the offence punishable u/s 323 of the Indian Penal Code for causing simple injuries to the prosecution witnesses as their individual act. The learned Trial Judge, therefore, erred in this respect to come to the conclusion that each of the accused found in unlawful assembly, caused rioting and with intention to kill Raghubha, accused No. 1 caused knife blow and all the other accused were vicariously liable for this act of accused No. 1. We are unable to sustain this finding of the Trial Court.

23. In the result, conviction of each of the accused under Sections 143, 147, 148 of the Indian Penal Code and conviction of each of the accused u/s 307 of the Indian Penal Code with the aid of Section 149 of the Indian Penal Code and the conviction of each of the accused u/s 324 with the aid of Section 149 of the Indian Penal Code are required to be set aside and the accused No. 1 Hasmukh Nanji Rabari is liable to be convicted under Sections 324 and 323 of the Indian Penal Code while all other accused Nos. 2 to 6 i.e. appellants No. 2 to 6 are liable to be convicted under Sections 323 and 504 of the Indian Penal Code for their individual act and all the accused are required to be sentenced accordingly instead of each of the accused convicted and sentences by the Trial Court as aforesaid.

24. Necessary it is to be noted that the learned APP has placed on record the jail remarks of each of the accused. Accordingly, accused No. 1 Hasmukh Nanji Rabari has undergone the sentence for one month during trial and after conviction has undergone the sentence for two years, 10 months and 20 days till 18th of July, 2008; while accused Nos. 2 to 6 each has undergone one month imprisonment during trial and after conviction each of the appellants No. 2 to 6 has undergone the imprisonment for about 08 months and 06 days. This is because accused Nos. 2 to 6 were released on bail by order of this Court on 17th of April, 2006. Meaning thereby that, each of the accused Nos. 2 to 6 have already undergone the imprisonment of about nine months while accused No. 1 is still in jail and has undergone almost the imprisonment of three years. It appears that none of the accused - appellants has deposited the amount of fine. In view of above, the Appeal is allowed partly and after setting aside the judgment and order impugned in this Appeal, we substitute the conclusion and fresh findings as under:

Accused No. 1 Hasmukh Nanji Rabari is convicted for the offences punishable under Sections 323 and 324 of the Indian Penal Code and u/s 135 of the Bombay Police Act. We sentence accused No. 1 for the imprisonment which he has already undergone, which comes to about more than three years for all the aforesaid offences. We do not impose any amount of fine upon accused No. 1 and if any amount of fine is deposited by him, be refunded to him immediately. It is directed that if appellant No. 1 Hasmukh Nanji Rabari is not required to be detained for any other purpose, he should be set at liberty immediately.

Each of the accused i.e. appellant No. 2 Hirabhai Parbatbhai Rabari; appellant No. 3 - Mansukh Parbatbhai Rabari; appellant No. 4 - Ravji Parbatbhai Rabari;

appellant No. 5 - Dilip Ramjibhai Rabari and ap Ellenat No. 6 Anda Bhavan Rabari, are convicted for the offences punishable under Sections 323 and 504 of the Indian Penal Code as well as u/s 135 of the Bombay Police Act. We sentence each of the appellants - accused Nos. 2 to 6 for the imprisonment which they have already undergone till 17th of April, 2006, which comes to about more than nine months for all the above offences proved against each of the accused Nos. 2 to 6. We do not impose any fine upon any of these appellants No. 2 to 6. Amount, if any, paid by any of the accused Nos. 2 to 6, be refunded to them immediately. Bail bonds submitted by each of the appellants No. 2 to 6 stand cancelled.

Direct Service is permitted.