

(2011) 04 GUJ CK 0138
In the Gujarat High Court

Case No : Criminal Appeal No's. 571, 573 and 2460 of 2005

Ibrahimbhai @ Dada

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 29-04-2011

Acts Referred:

Penal Code, 1860 (IPC) — Section 114, 188, 302, 307, 323

Citation : (2011) 04 GUJ CK 0138

Hon'ble Judges : R.M. Chhaya, J;A.L. Dave, J

Bench : Division Bench

Advocate : S.H. Tolia, for the Appellant; K.L. Pandya, APP, for the Respondent

Final Decision : Allowed

Judgement

R.M.Chhaya, J.—The present appeals are filed against common judgment and order passed by learned Additional Sessions Judge, Fast Track Court No. 10, Rajkot on 10.01.2005 in Sessions Case No. 130 of 2004, convicting the Appellants-accused for the offences punishable under Sections 302, 307, 323, 188 and 114 of the Indian Penal Code, 1860 ("IPC" for short), and sentencing them-- (i) to suffer imprisonment for life and to pay a fine of Rs. 500/- each, in default to undergo simple imprisonment ("S.I." for short) for two months for the offences punishable u/s 302 read with Section 114 of the IPC; and (ii) to undergo imprisonment for five years and to pay a fine of Rs. 500/- each, in default to undergo S.I. for two months for the offences punishable u/s 307, 114 and 188 of the IPC. No separate sentence is awarded u/s 323 of the IPC. The sentences were ordered to run concurrently.

2. Before us, three criminal appeals have been filed. Criminal Appeal No. 2460 of 2005 has been filed by Iqbal Bachu Shaikh and Mohammed s/o. Bachu Shaikh (for short "A1" and "A2" respectively). Criminal Appeal No. 571 of 2005 has been filed by Ibrahim @ Dada s/o. Jumabhai Vajugara (for short "A3"). Criminal Appeal No. 573 of 2005 has been filed by Ibrahim @ Ibho Sidiqbhai Dalvani (for short "A4"). All these three appeals arise out of the aforesaid impugned

judgment and order dated 10.01.2005 and as such, they have been heard together and are being disposed of by this common judgment.

3. The case of the prosecution in brief is that PW-4, Kamalnath Ramjatannath Tiwari, the first informant, his son-Amit Kamalnath Tiwari (the deceased) and PW-15, Chandresh Mohanlal Ahuja, the injured witness, are ordinary residents of Sindhi Colony, Behind Gayakwadi Plot of Rajkot City. On 13.06.2004, they went to purchase vegetable to Jubilee Vegetable Market, situated in the midst of Rajkot City. That about 11:15 hrs. they reached vegetable market and intended to purchase mangoes from the hand-cart (rekdi) of A3, which was stationed outside Jubilee Vegetable Market, Opp. Gumansinhji Shopping Center. That the deceased noticed some mischief in weighing of the goods and he, therefore, objected to it. This resulted into altercation between A3 and the deceased, because of which A3 got enraged and slapped the deceased and his father (PW-4). He also assaulted them with the weighing scales. On such altercation A1, A3 and A4 assaulted the deceased with knife and also caused injuries to PW-15, Chandresh Mohanlal Ahuja, who is an eye-witness. It is the case of the prosecution that thereafter the deceased and PW-15 were taken to Government Hospital, Rajkot where, ultimately, the deceased succumbed to the injuries.

4. An FIR came to be lodged with "A" Division Police Station, Rajkot City at 2:00 p.m. on 13.06.2004 for the aforesaid incident against the present accused-Appellants. On the basis of the FIR above-mentioned, the police started investigation and during investigation A1 and A2 were arrested on 14.06.2004 and A3 and A4 were arrested on 25.06.2004. On completion of investigation, police submitted charge-sheet against the accused-Appellants for the aforesaid offences.

5. Learned Judicial Magistrate, First Class, Rajkot on receipt of such charge-sheet, so submitted by the police, committed the case to the Court of learned Sessions Judge, Rajkot as the case was being exclusively triable by the Court of Sessions and the same was registered as Sessions Case No. 130 of 2004.

6. The learned Judge, on appearance of the accused-Appellants and on perusal of the materials available on record, including the police papers as well as also upon hearing the learned Counsel for the parties, framed charges at Exh.5 against the accused for offences punishable under Sections 302, 307, 323, 188 and 114 of the IPC. The entire charges were read over to the accused-Appellants to which they pleaded not guilty and claimed to be tried.

7. The trial court proceeded with the trial and after considering all evidence led by the prosecution, came to the conclusion that the prosecution has successfully established the charges leveled against the present accused-Appellants and specifically believed the case of the prosecution, which is based on chain of circumstances, being complete and uninterrupted. Relying upon the same, the learned trial Judge had reached to the conclusion that the offences alleged in the present case were duly established against the accused-Appellants. The learned

trial Judge, therefore, had recorded conviction of the accused-Appellants, as aforesaid, by the impugned judgment and order dated 10.01.2005. Hence, the present appeals.

8. Heard Mr. S.H. Tolia, learned advocate appearing on behalf of the accused-Appellants, while the Respondent-State has been represented by the learned A.P.P. Mr. K.L. Pandya.

9. Learned advocate Mr. S.H. Tolia has submitted that the prosecution has totally failed to prove the case against the accused. It was submitted that even oral testimonies of eye-witnesses PW-4, (father of the deceased), PW-9, (Niteshbhai Visandas Mirani), and injured witness PW-15 (Chandresh Mohanlal Ahuja) are unbelievable. It was submitted that the alleged incident as such has not taken place at the place of the hand-lorry (hand cart) of A3 but the same has taken place in a street, which is popularly known as "Lottery Bazaar Sheri (Street)" and the geographical location of the same is such that it was impossible for a person standing near Gumansinhji Shopping Center to view the alleged incident, which was stated to have occurred at the said sheri. Mr. Tolia has further relied upon the map of scene of offence (Exh.66) and submitted that the alleged incident took place at such a geographical location that the eye-witness could not have seen the occurrence. It was further pointed out that the area described is a busy commercial area and from the other evidence on record, more particularly the evidence regarding the Test Identification Parades ("T.I. Parade" for short), which were carried out by the investigation authorities on two different occasions, the eye-witnesses of the alleged incident had not been able to identify the accused. Mr. Tolia has further pointed out that the first T.I. Parade has been conducted after 11 days of the arrest of A1 and A2, so as to say, that A1 and A2 were arrested on 14.06.2004 and the first T.I. Parade was conducted on 25.06.2004. Similarly, the second T.I. Parade was conducted on 08.07.2004 wherein the PW-9 was not able to identify any of the accused. It was also further pointed out that the T.I. Parades were conducted in presence of the police personnel and, therefore, no reliance can be placed upon them by the prosecution.

10. Mr. Tolia has further submitted that it has specifically come on record that on the date of the alleged incident there was by-election of Ward No. 16 of Rajkot Municipal Corporation and the injured witness PW-15, Chandresh Mohanlal Ahuja, was at Rukhadia Colony near Popatpara area and he was busy in propaganda of the Congress Party at about 11:30 a.m. to 11:45 a.m. It was further pointed out that on receiving phone call on mobile phone of his friend, Niteshbhai Visandas Mirani, (PW-9) from the deceased, he came to know about the alleged incident and thereafter he left Rukhadia Colony and came to the scene of offence. It was pointed out that even if one comes on a vehicle from Popatpara area to the scene of offence, which is approximately 2 Kms., in ordinary course, it takes at least 10-15 minutes and hence, the very presence of the injured eye-witness PW-15 as well as PW-9 is doubtful and physically

impossible and, therefore, it was submitted that they were not present when the alleged incident occurred and they were not the eye-witnesses. It was further pointed out that similarly, from the deposition of PW-9 it is clearly borne out that he was not present at the scene of offence at 11:30 on 13.06.2004 but came on a motorbike, which was driven by his cousin brother-Rajesh. Mr. Tolia pointed out that there are material contradictions as regards the time at which this witness reached at the scene of offence. He has further pointed out that on one hand the witness had deposed that the incident has taken place at 11:15 a.m. on 13.06.2004 in his presence and at the same time he has deposed that he came by a motorcycle driven by his cousin brother-Rajesh on receiving a phone call from his friend i.e. the deceased about the incident. Mr. Tolia has, therefore, submitted that the very fact of he being eye-witnesses is doubtful. He has further submitted that the eye-witnesses have given no description regarding marks of identification of any of the assailants during the course of police investigation. Mr. Tolia has submitted that the prosecution has failed to prove the offences alleged against the accused and the learned trial Court has wrongly passed the order of conviction and sentence against the present Appellants-accused and, therefore, the same deserves to be set aside and the present appeals deserve to be accepted and allowed.

11. As against this, learned A.P.P. Mr. K.L. Pandya, has opposed the present appeals and has supported the impugned judgment and order passed by the learned trial Court and contended that the learned trial Court was perfectly justified in its judgment of conviction and sentence looking to the evidence on record of the case. He has taken us through the oral evidence of PW-4, PW-9, PW-15, who are the eye-witnesses of the incident, as well as PW-22, Bharatsinh Madhubha Vaghela. He has further submitted that the learned trial Court has rightly accepted the oral testimonies of the aforesaid three eye-witnesses. He has further pointed out that the prosecution has proved beyond any doubt the fact that all the accused have cumulatively assaulted the deceased as well as PW-15 with a deadly weapon like knife with an intention, knowledge and motive to cause such serious injuries which, in ordinary course of nature, would cause death. Learned A.P.P. has further pointed out that the medical evidence on record as well as the serological report of FSL also support the case of the prosecution and, therefore, submitted that the present appeals deserve to be dismissed.

12. We have examined the record and proceedings in context of the rival submissions made by both the sides.

13. The case of the prosecution is mainly based upon the oral testimonies of PW-4, Kamalnath Ramjatannath Tiwari i.e. father of the deceased (Exh.24), PW-9, Niteshbhai Visandas Mirani (Exh.36), and PW-15, Chandresh Mohanlal Ahuja (Exh.46).

14. PW-4 is the first informant as well as the eye-witness. He has deposed in his oral testimony that on 13.06.2004 approximately at about 10.30 hrs. in the morning he left home and proceeded towards Jubilee Vegetable Market with his

son-Amit (the deceased) and PW-15, Chandresh Mohanlal Ahuja, for purchasing vegetables. He has further stated that after purchasing vegetable, his son-Amit (the deceased) expressed his desire to purchase mangoes and, therefore, PW-4 himself, the deceased and PW-15 proceeded towards the hand-carts, which were stationed just opposite Gumansinhji Shopping Center. He has further stated that he enquired about the price of mangoes and the deceased ordered 6 kgs. mangoes from one of the mango vendors. He has further stated that at the time of taking delivery, the deceased smelt some mischief in the weighing. There was some hollow space in the weighing scale and when the deceased objected to take delivery of the mangoes, the vendor got enraged, which resulted into some grappling. Immediately thereafter, three persons came with knives and attacked with them. The very witness has specifically attributed that A1 inflicted one blow with knife in the stomach of PW-15 and also inflicted two blows of knife on the deceased, one on the left part of the stomach and one on the left part of the chest and, thereafter, all of them fled away. He has further narrated that thereafter, the deceased became unconscious and, therefore, the deceased along with the injured witness PW-15, were shifted to Government Hospital, Rajkot. The very witness has further stated that he had identified A1 as well as A4 in the first T.I. Parade held in the office City Mamlatdar before the Executive Magistrate on 25.06.2004 and had identified A3 in the second T.I. Parade on 08.07.2004. In cross-examination PW-4 has stated that all the three i.e. PW-4, the deceased and PW-15, after the aforesaid incident, went to the civil hospital in one rickshaw and has also denied certain major assertions made by the defence.

15. The second important witness, upon which the prosecution has relied upon, is PW-9, Niteshbhai Visandas Mirani, (Exh.36). According to the prosecution, PW-9 is an eye-witness. PW-9, in his deposition, has stated that the incident occurred on 13.06.2004 at about 11:15 hrs. in the morning. He has categorically stated that while he was in Rukhadia Colony with his cousin-Rajeshbhai, he received a phone call from his friend-Amit i.e. the deceased, requesting him to immediately come to Jubilee Vegetable Market as a quarrel had taken place between the deceased and the vegetable vendors. He has further deposed that he proceeded towards Jubilee Vegetable Market on motorbike of his cousin brother-Rajesh and reached Jubilee Vegetable Market passing through Papatpara Bridge via Railway Station at about 11:15 hrs. and stopped the bike near Gumansinhji Shopping Center. He has further stated that on reaching the said spot both, PW-4 and the deceased, informed about the quarrel and he was specifically informed by both that a mango vendor, with a beard, along with two-three other persons had made oral altercation with PW-4, father of the deceased and those four persons, in an unlawful assembly, had given fist blows to him as well as his father. This very witness has further deposed that he was informed by the deceased that after the said incident of altercation all the four persons had proceeded towards Lottery Bazaar Sheri, Opp. Gumansinhji Shopping Center. PW-9 thereafter suggested PW-4 father of the deceased, to go home in a rickshaw and at that point of time PW-15 arrived. PW-9 has further stated that

thereafter, PW-15 and he himself inquired from the other lorries holders stationed there, about those vendors, who have allegedly assaulted PW-4 and the deceased, and at that time, four persons came from Lottery Bazaar Sheri, out of which three persons were holding knives. He has further stated that one of them, who had worn a red coloured shirt, gave one knife blow in the stomach of PW-15. He has further stated that on seeing such an occurrence both, Rajesh and the deceased ran towards PW-15 to save him and the said person, who had worn a red coloured printed shirt, tried to chase the deceased and, therefore, the deceased ran in the Lottery Bazaar Sheri; those persons followed the deceased and the said person, who had inflicted blow on PW-15, also inflicted one knife blow in the stomach of the deceased. He has further stated that as Rajesh was with PW-15, he took PW-15 (injured witness) in a rickshaw to the Government Hospital.

16. PW-9 has further stated that first he went to Gumansinhji Shopping Center and from there he went to Dana Pith and then to "A" Division Police Station and thereafter he reached the Government Hospital where he noticed that the deceased as well as PW-4 were brought there for treatment and on further inquiring about the same, the medical officer on duty informed that the deceased had expired.

17. This witness PW-9 has also stated that when the incident occurred, he heard one of the accused telling "Ikudo @ Iqbal beat". This very witness has further deposed that he identified two accused i.e. A1 and A2 in the first T.I. Parade, which was held on 25.06.2004 before the Executive Magistrate.

18. It is important to note that PW-9 in his cross-examination stated that on 13.06.2004 while he was at Rukhadia Colony, engaged in by-election of Ward No. 16, Rajkot Municipal Corporation, he received a phone call from the deceased calling him at Jubilee Vegetable Market and, thereafter he left with his cousin-Rajeshbhai on motorbike towards Jubilee Vegetable Market. It is also pertinent to note that in his cross-examination PW-9 has also stated that many hand-carts were standing at the place of occurrence and some shops of Gumansinhji Shopping Center were also open and has further denied major assertions made by the defence.

19. The third eye-witness PW-15, Chandresh Mohanlal Ahuja, has also denied certain major assertions made by the defence. He has stated in his deposition that the incident took place on 13.06.2004 at about 11:00 hrs. in the morning near Jubilee Vegetable Market and Gumansinhji Shopping Center. This witness has stated that he himself, his friend (the deceased) and PW-4, father of the deceased, went to purchase vegetable. He has further stated that there was some altercation with one of the mango vendors. He has further stated that the deceased had purchased approx. 5 Kgs. mangoes and as there was some dispute in the weighing, altercation took place between the deceased and the said mango vendor, because of which the vendor gave 3-4 slaps to the deceased and also assaulted father of the deceased (PW-4) with weighing scale and thereafter he

fled away from the spot. This witness has specifically stated that thereafter the deceased had made a phone call from his mobile to PW-9, Niteshbhai Visandas Mirani, and after about 15 minutes PW-9 came with his friend Rajeshbhai and the deceased informed PW-9 that out of 4-5 mango vendors standing there, had quarrel with one of them. Thereafter, PW-15 and PW-9 inquired from the other hand-carts holders about the said mango vendor and, at that moment, four persons, three out of them were armed with knives, came from Lottery Bazaar Sheri and one of them inflicted a knife blow on my stomach and, therefore, the deceased and Rajeshbhai ran towards me. This witness has categorically stated that the person inflicted knife blow upon him has also given knife blow upon the deceased and, therefore, the deceased ran into the Lottery Bazaar Sheri and the person, who had inflicted knife, ran after the deceased and other three persons also followed them and caught hold of the deceased. This very witness has stated that thereafter he has not seen the person who had thereafter inflicted blow upon the deceased. He has also categorically stated that he did not know the person who had inflicted knife blow. However, he has stated that they were calling by names Iqbal and Ibhu Dado and he has identified two accused persons present in the court. This witness has further stated that as he was injured, he immediately sat down and his friend-Rajesh took him in a rickshaw to the Government Hospital and admitted him in emergency ward. He has further stated that even the deceased was admitted to the Government Hospital and the doctor, who treated him, informed him that the deceased passed away. He has further stated that the neighbours, who came to see him in the hospital, informed him that the deceased had received three injuries. He has also stated that while he was an indoor patient, the executive magistrate had taken his dying declaration. He has also stated that he remained present in the T.I. Parade, which was held on 08.07.2004 in the office of City Mamlatdar, along with PW-9, Rajesh Karamchandani and PW-4 wherein he identified two accused i.e. A1 and A4, who were present in the court. Similarly, in his cross-examination, apart from the fact that he has denied certain assertions made by the defence, the most important aspect, which is required to be noted is that he has stated in his cross-examination that it is true that in his dying declaration before the Executive Magistrate, he has stated that at about 11:30-11:45 when they were busy in propaganda of by-election of Ward No. 16 of Rajkot Municipal Corporation in Popatpara area, the deceased made a phone call on mobile of PW-9 and informed about the aforesaid altercation and, therefore, PW-9, Rajesh and PW-15 left together towards Jubilee Vegetable Market.

20. PW-15, who is an eye-witness and also an injured witness, gave his dying declaration (Exh.41) on 14.06.2004 at 0:05 hrs. wherein he has stated that on the date of incident as there was by-election of Ward No. 16 of Rajkot Municipal Corporation, he along with his friends were busy in propaganda of Congress Party in Popatpara area. That his friend Mitesh Mirani was also with him. That at about 11:30 a.m. to 11:45 a.m. when he was in Popatpara area he received a phone call on mobile phone of his friend, Mitesh Mirani, from the deceased and

informed about the altercation with mango vendor and requested to come immediately to Jubilee Vegetable Market, near Gumansinhji Shopping Center. Thereafter, PW-15, his friend Mitesh Mirani and another friend Raju Karamchandani went there and on reaching there they came to know that one mango vendor had given 3-4 slaps to the deceased and fled away and when they were inquiring from the other hand-carts holders about the said mango vendor, at that moment, five to six persons came there and one of them inflicted a knife blow on my stomach and as and there was profuse bleeding, my friend Raju Karamchandani brought me to the Government Hospital in a rickshaw and thereafter he became unconscious.

21. Even though PW-9 and PW-15 have stated that Rajesh Karamchandani also accompanied them to Jubilee Vegetable Market, the prosecution has chosen not to examine him.

22. The prosecution, in order to bring home the charges against the accused, has relied upon the first T.I. Parade held on 25.06.2004 before Executive Magistrate, Shri Parsottambhai Veljibhai Gundania, who has been examined as PW-21 (Exh.86). PW-21 has stated that his office had received intimation about holding of T.I. Parade on 16.04.2004 and by communication dated 21.04.2004, 26.06.2004 was fixed for holding of T.I. Parade. It is note worthy that the T.I. Parade held on 26.06.2004 was in relation to identification of A1 and A2. PW-21 has stated that the PW-4, the original complainant, could not identify any of the accused. It is further stated that even Rajesh Karamchandani did not identify any of the accused. This witness has further stated that PW-9 identified A1 and A2.

23. The second T.I. Parade (Exh.92) was held on 08.07.2004 wherein PW-4, PW-9 Rajesh Jethalal Karamchandani and PW-15 remained present and PW-9 did not identify any of the accused. Rajesh Karamchandani also did not identify any of the accused. However, PW-4 identified A3 and PW-15 identified A1 and A4.

24. It is also pertinent to note that A1 came to be arrested on 14.06.2004 at 10:55 a.m. and A2 was also arrested on 14.06.2004 at 10:30 p.m.; whereas A3 and A4 were arrested on 25.06.2004 at 6:15 a.m.

25. The prosecution has also examined PW-6, PW-7 and PW-8 as panch witnesses and more particularly the panchas in the discovery panchamas of A1, A3 and A4, however, they have not supported the case of the prosecution and in fact they have been declared hostile.

26. The prosecution has also examined PW-11, PW-12 and PW-13, who are vegetable vendors and are keeping their hand-carts outside Jubilee Vegetable Market. However, none of them have supported the case of the prosecution.

27. The maps/sketches (Exh.66 and Exh.51) indicate that the blood stains of the deceased were found from the Lottery Bazaar Sheri, which is in the form of "L" shape from where the place of hand-carts stated to have been stationed Opp. Gumansinhji Shopping Center near Jubilee Vegetable Market. It is also indicated

that on both sides of that street there is a row of shops.

28. The prosecution also examined the medical officer, who performed autopsy of the deceased as PW-20 (Exh.80). According to the evidence of PW-20 four external injuries were found on the body of the deceased. He has stated that the cause of death is shock (hypovolemic) due to stab injury on chest wall.

29. Similarly the prosecution has also examined PW-16, Dr. Dipakbhai Karshanbhai Vadodaria, Medical Officer, who examined PW-15. According to PW-16, there were two injuries - stab wound of 3 cm x 0.5 cm peritoneal cavity deep oblique from downwards and medially. 2 cm right and above to umbilicus and just medial to mid-clavicular line and some abdominal contents are visible outside the abdominal cavity.

30. As per the said witness (PW-16), while he was on his duty in Civil Hospital, Rajkot injured PW-15 was brought by his relative Rajubhai Mohanlal at about 12:06 hrs. and on inquiring it was declared that during scuffle, knife blow was inflicted at about 12 O'clock. However, no further details were given at the time of first treatment given to PW-15.

31. The prosecution has also relied upon the serological report in order to further corroborate the evidence on record.

32. Considering the totality of evidence on record, PW-4, who is the eye-witness and the first informant of the F.I.R. (Exh.96) gave information that on 13.06.2004 at about 10:30 a.m. the first informant, his son-Amit (the deceased) and PW-15 went to purchase vegetable at Jubilee Vegetable Market and that because of the dispute of not weighing mangoes properly, there was some altercation with one cart owner and, in the meantime, cart owner got enraged and started beating his son (the deceased) with the weighing scale and at that time three other persons/cart owners, whose hand-carts were stationed there, came running and assaulted the deceased as well as PW-15 with knife and inflicted blow on the stomach and on the chest, because of which his son (the deceased) was seriously injured and there was profuse bleeding. As other persons came and intervened, all the four accused fled away and, therefore, he took the deceased and PW-15 in an unknown auto rickshaw to the Government Hospital, where he was declared dead by the doctor. PW-15 was admitted in the emergency ward as he had also sustained serious injuries on his stomach. He has further stated that the incident was occurred at about 11:15 in the morning on Jubilee Vegetable Market road near Gumansinhji Shopping Center; whereas he himself in his oral deposition has stated that he reached the hand-cart of mango at about 11:00 or half past eleven.

33. Similarly PW-15 has also stated that the incident occurred near Jubilee Vegetable Market, Gumansinhji Shopping Center. PW-15 has further stated that he and the deceased were injured and PW-4 took them in a rickshaw to the hospital.

34. Similarly other eye-witnesses PW-9 has stated in his deposition that the incident has happened at about 11:15 and he reached the scene of offence on receiving phone call from the deceased, along with his cousin brother-Rajesh. However, in his dying declaration, which was taken before the Executive Magistrate in the government hospital, he stated that at about 11:30 - 11:45 when they were busy in propaganda of by-election of Ward No. 16 of Rajkot Municipal Corporation in Rukhadia Colony near Popatpara area, the deceased made a phone call on mobile of PW-9 and informed about the aforesaid altercation and, therefore, PW-9, Rajesh Karamchandani and PW-15 left together towards Jubilee Vegetable Market.

35. On appreciation of these three depositions, there is material improvement by all the three witnesses. PW-4, who is the first informant, has not only changed the time of incident but has thereafter changed his version attributing particular overt act on the part of the accused. Similarly, PW-15 in his deposition has stated that he went with PW-4 as well as the deceased for purchasing vegetable at Jubilee Vegetable Market and further stated that the incident took place at about 11 O'clock; whereas in his dying declaration (Exh.41) he has stated that while he was in Popatpara area busy with propaganda of by-election of Ward No. 16 of Rajkot Municipal Corporation, between 11:30 11:45, his friend PW-9 was with him and at that time he received a phone call from the deceased requesting to come to Jubilee Vegetable Market because of the quarrel that was taken place and, therefore, he went there along with PW-9 as well as Rajeshbhai Jethalal Karamchandani. Similarly, PW-9, who is also an eye-witness, has stated that the incident occurred at 11:15 in the morning and he has further stated that he received a phone call at about 11 O'clock while he was in Rukhadia colony and, therefore, he came along with Rajeshbhai Jethalal Karamchandani. Thus all the three eye-witnesses have given different time of the occurrence of the alleged incident, though not much weightage can be given to the discrepancy or the difference in timing. Not only that PW-9 has stated that he and his cousin brother Rajeshbhai Jethalal Karamchandani came to Jubilee Vegetable Market on receiving phone call from the deceased. However, on one hand he has stated that even PW-15 came along with him and on the other hand he has stated that on reaching Gumansinhji Shopping Center he suggested PW-4, father of the deceased, to go home in a rickshaw and at that point of time PW-15 arrived there i.e. Jubilee Vegetable Market, opp. Gumansinhji Shopping Center. It therefore, transpires that there are improvements of the versions of the first informant as well as the other two eye-witnesses. The prosecution has not been able to establish the exact time and genesis of occurrence of offence.

36. We also find that there are major contradictions as regards place of occurrence of offence. As discussed hereinabove, the versions of PW-4 and PW-15 as regards the place of occurrence is also different, coupled with the fact that the body of the deceased was found at the fag end of the Lottery Bazaar Sheri, which is not on the main Jubilee Vegetable Market road. As is indicative from map (Exh.66), the place from where the blood stains of the deceased were

found is interior to the main Jubilee Vegetable Market and on both sides, shops are situated and, therefore, one standing near Jubilee Vegetable Market, opp. Gumansinhji Shopping Center cannot see the occurrence of the incident. Thus, the oral testimonies of all the three witnesses do not inspire the confidence and presence of ring of truth is absent. The prosecution has not been able to explain such major contradictions in the evidence of the eye-witnesses and the same creates doubt about its authenticity and, therefore, benefit of the same would naturally go to the accused.

37. As can be seen from the record, A1 and A2 were arrested on 14.06.2004 and intimation of the T.I. Parade was sent on 16.04.2004. However, the first T.I. Parade was held on 25.06.2004 i.e. 11 days after the date of arrest of the aforesaid two accused. The panchnama (Exh.89) indicates that PW-4 did not identify any of the accused instead of that he identified three other persons, who were placed as dummy persons during the T.I. Parade. However, in his deposition before the court he has stated that he identified A1 and A4. It is also noteworthy that PW-21 has categorically stated that PW-4 did not identify any of the accused. Furthermore, the T.I. Parade held on 25.06.2004 was over at 16:05 hrs.; whereas from the record it transpires that A4 arrested on 25.06.2004 at 6:15 p.m. and hence, A4 could not have remained present at the first T.I. Parade before his arrest. Therefore, the oral testimony of PW-4 is not trustworthy and the same creates clouds of doubt about its genuineness and therefore, the prosecution has not been able to corroborate such major discrepancies in the oral testimony of PW-4, the first informant.

38. In the T.I. Parade dated 25.06.2004, PW-9 identified A1 and A2. However, in his oral testimony (Exh.36) he has stated that at the time of the T.I. Parade police personnel were present in the room, along with executive magistrate as well as the accused and the dummy persons. Rajeshbhai Jethalal Karamchandani was also present during the T.I. Parade. Even though PW-9 has stated that he had accompanied with Rajeshbhai Jethalal Karamchandani on the date of occurrence, the prosecution has preferred not to examine him and that the panchnama (Exh.89) reveals that Rajeshbhai Jethalal Karamchandani also could not identify any of the accused.

39. The second T.I. Parade was held on 08.07.2004 and again four persons i.e. PW-4, PW-9, PW-15 and Rajeshbhai Jethalal Karamchandani were present wherein PW-9 did not identify any of the accused. However, in his oral testimony he stated that he has again identified A1 and A2 and has also stated that police were present in both the T.I. Parades. PW-9 could identify A1 and A4. However, in his oral testimony he has stated that he has identified A1 and A4 and PW-4 identified A3 and Rajeshbhai Jethalal Karamchandani did not identify any of the accused.

40. From the aforesaid picture it emerges that not only the T.I. Parade was held after much delay but also the eye-witnesses have in fact failed to identify the accused. It also transpires that there are material contradictions between the

description of the T.I. Parades, in the panchnamas and the oral testimonies of PW-4, PW-9 and PW-15. As stated aforesaid, PW-4, who is the first informant, in the first T.I. Parade held on 25.06.2004 has stated that he identified A4, whereas from the record it transpires that A4 was arrested on 25.06.2004 at 6:15 p.m. and hence, A4 could not have remained present at the first T.I. Parade before his arrest. Further, PW-9 as well as PW-15 on the contrary have stated in their oral testimonies that both the T.I. Parades were held in presence of police personnel. The sum total of it is that the prosecution has not been able to prove the genuineness of the T.I. Parades and, therefore, it would not be safe to rely upon such a weak piece of evidence to bring home the charges against the accused.

41. The medical evidence indicates that fatal injuries were caused on vital part of the body of the deceased. However, the prosecution has not been able to prove involvement of the accused with cogent and reliable evidence. As stated aforesaid, the direct evidence of eye-witnesses not only suffers from major contradictions and improvements but equally they cannot be treated entirely as disinterested witnesses. No doubt the prosecution has attempted to corroborate the evidence of such eye-witnesses by holding the T.I. Parade twice, however, the eye-witnesses have not been able to successfully pick out the accused in the T.I. Parades. In addition to that there are major contradictions in their oral testimonies. It is again true that the substantive evidence of a witness is his deposition before the court; the purpose of test identification is to test that evidence and the safe rule is that the sworn testimony of witnesses in court as to the identity of the accused who are strangers to the witnesses, generally speaking requires corroboration which should be in the form of earlier identification proceeding. But the prosecution, in the circumstances, fails to pick up the accused in the T.I. Parades coupled with their own version that the police personnel were present at the time of the T.I. Parades, belatedly identification by the witnesses in the court cannot be relied upon and cumulatively it creates doubt, benefit of which would go to the accused.

42. Considering all the aforesaid aspects, we are of the opinion that the prosecution has failed to prove the charge against the accused on basis of the evidence on record and the prosecution has not been able to prove the case to its hilt. Further, there are major improvements and contradictions of the oral testimonies of the witnesses and the same are not trustworthy and the same creates cloud of doubts and, therefore, benefit of which should go to the accused.

43. For the foregoing reasons, we allow all the aforesaid three appeals and acquit the Appellants-accused therein by giving them "benefit of doubt". The impugned judgment and order dated 10.01.2005, recording conviction and sentence of the Appellants by learned Additional Sessions Judge, Fast Track Court No. 10, Rajkot in Sessions Case No. 130 of 2004, is hereby set aside. All the accused-Appellants be set at liberty forthwith, unless they are required in any other case. Fine, if paid, be refunded to them.