

(2014) 02 GUJ CK 0103
In the Gujarat High Court
Case No : Criminal Appeal No. 1647 of 2008

Kabhaibhai

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 04-02-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 209, 313
Evidence Act, 1872 — Section 27, 6, 8
Penal Code, 1860 (IPC) — Section 302, 307, 324, 326

Citation : (2014) 1 GLH 574 : (2014) 2 GLR 1651

Hon'ble Judges : Bhaskar Bhattacharya, C.J.; J.B. Pardiwala, J

Bench : Division Bench

Advocate : Harnish V. Darji, Advocate for the Appellant No. 1, Advocate for the Appellant; Maulik Nanavati, APP for the Respondent No. 1, Advocate for the Respondent

Judgement

J.B. Pardiwala, J.—The present appeal is at the instance of a convict accused for the offences punishable under Sections 302, 307, 326 and 324 of the IPC and is directed against order of conviction and sentence dated 5/5/2008 passed by the Additional Sessions Judge, Kheda at Nadiad in Sessions Case No. 96/2007. By the aforesaid order, the learned Additional Sessions Judge, Kheda at Nadiad found the appellant guilty of the offence punishable U/s. 302 of IPC and consequently sentenced him to suffer Life Imprisonment with fine of Rs. 5,000/-, in default of payment of fine, further R.I. for 2 years. The learned Additional Sessions Judge also found the appellant guilty of the offence punishable U/s. 307 IPC and consequently sentenced him to suffer 10 years of R.I. with fine of Rs. 1,000/-, in default R.I. for 2 years. The learned Addl. Sessions Judge also found the appellant guilty of the offence punishable U/s. 326 of the IPC and consequently sentenced him to suffer R.I. for 3 years with fine of Rs. 500/-, i/d 6 months R.I. The learned Additional Sessions Judge also found the appellant guilty of the offence punishable u/S. 324 IPC and consequently sentenced him to suffer R.I. for a period of 1 year with fine of Rs. 300/-, in default R.I. for 3 months. The

learned Judge directed that all the sentences shall run concurrently. Case of the Prosecution:

1.1 The deceased, namely, Mojisbhai alias Bhagabhai Philipbhai Christi was residing with his family consisting of his wife Ramilaben, his mother Vinaben and a minor son at village Sodhpur. The deceased and his family was at inimical terms with the accused due to a long standing dispute regarding a fence. The house of the accused is adjoining the house of the deceased and in between there is a fence. On 23/5/2007 at around 1.45 a.m. when the deceased, his wife Ramilaben and their minor son were sleeping on the terrace of their house, the accused armed with a scythe inflicted injuries on the body of the deceased and thereafter inflicted injuries on the body of his wife Ramilaben. It is the case of the prosecution that in the process the minor son of the deceased also sustained an injury on his forehead. It is also the case of the prosecution that at the relevant point of time, the mother of the deceased Vinaben was sleeping in the Courtyard of the house and she was also assaulted by the accused with a scythe. After the assault, the wife of the deceased Ramilaben raised shouts as a result people from the neighbourhood gathered near the house of the deceased. At that point of time, the wife of the deceased Ramilaben was shouting stating that Kaliya-the accused residing in the neighbourhood had inflicted injuries on the entire family with a scythe. Some of the neighbours thereafter went on the terrace and found that the husband of Ramilaben i.e. the deceased was lying in a pool of blood with injuries all over the body.

1.2 The injured witnesses, namely, Ramilaben and Vinaben were immediately rushed to the Nadiad Civil Hospital for treatment and after receiving some treatment, were referred to the Ahmedabad Civil Hospital. It is the case of the prosecution that a person named Ramanbhai Somabhai residing in the neighbourhood of the deceased informed about the incident to the Sodhpur Outpost Police Station and a Police Officer at Sodhpur Outpost in turn informed about the same to the PSI who was In-charge of Chaklasi Police Station. Thereafter Ramanbhai lodged a First Information Report about the incident in the early morning of 23/5/2007 at Chaklasi Police Station which was registered as C.R. No. 1-83/2007 for the offences punishable under Sections 302, 307 and 326 of the Indian Penal Code.

1.3 On completion of the investigation, the investigating officer filed charge-sheet against the accused in the Court of the JMFC, Nadiad. As the case was exclusively triable by the Sessions Court, JMFC, Nadiad committed the case to the Sessions Court u/s 209 of the Criminal Procedure Code vide committal order dated 23/7/2007. On the case being committed to the Court of Sessions, the same was registered as Sessions Case No. 96/2007.

1.4 The Sessions Court framed charge against the accused at Exh. 6 for the offences punishable U/Ss. 302, 307 and 326 of IPC and the statement of accused was recorded. The accused did not admit the charge and claimed to be tried.

2. The prosecution adduced the following evidence in support of its case.

3. The following pieces of documentary evidence were adduced by the prosecution.

3.1 After completion of oral as well as documentary evidence of the prosecution, the statement of the accused u/s 313 of Criminal Procedure Code was recorded in which the accused stated that the complaint was a false one and he was innocent.

3.2 At the conclusion of the trial, the learned Trial Judge convicted the accused for the offences under Sections 302, 307 and 326 and 324 of IPC and sentenced him as stated herein before.

3.3 Being dissatisfied, the accused appellant has come up with the present Appeal.

4. Contentions on behalf of the accused-appellant:--

4.1 Mr. Harnish Darji, the leaned Advocate appearing for the accused, vehemently submitted that the trial judge committed a serious error in convicting the accused for the offence of murder punishable U/s. 302 IPC by placing implicit reliance on the evidence of the two injured eye-witnesses, namely, P.W. 8 Vinaben-mother of the deceased and P.W. 10 Ramilaben-wife of the deceased.

4.2 Mr. Darji submitted that immediately after the incident, both the eye-witnesses i.e. Ramilaben and Vinaben were taken to the Nadiad Civil Hospital for treatment. At that point of time, the Doctor at Nadiad Civil Hospital had inquired with both the injured witnesses as to who had inflicted the injuries and with what type of weapon. In reply to the same, both the witnesses had stated before the Doctor that they had no idea as to who was the assailant and with what object they were assaulted. According to Mr. Darji both the injured eye-witnesses further stated before the Doctor at the Nadiad Civil Hospital that there was one male and one female and while sleeping on the terrace of their house they were assaulted.

4.3 Mr. Darji further submitted that after receiving some medical treatment at Nadiad Hospital both the injured eye-witnesses were referred to and shifted to the Ahmedabad Civil Hospital. Even at the Ahmedabad Civil Hospital the Doctor who attended both the injured witnesses had inquired about the incident and in reply both the witnesses had stated that a person residing in the neighbourhood had inflicted injuries. Mr. Darji laid much stress on the fact that even before the Doctor at Ahmedabad Civil Hospital, the name of the accused was not disclosed.

4.4 Mr. Darji submitted that both the injured eye-witnesses had no idea about the identity of the true assailant and since they were at inimical terms with the accused, they must have presumed that it could be none-else but the accused and that's how they disclosed the name of the accused as the assailant in their police statements.

4.5 In such circumstances, according to Mr. Darji, the trial Court ought not to have placed reliance on the evidence of the two injured eye-witnesses.

4.6 Mr. Darji further submitted that the first information report was lodged by a person residing 4 to 5 houses far from the house of the deceased. Although the first informant, in his deposition has stated that he heard Ramilaben-the wife of the deceased shouting and stating that it was the accused who had inflicted the injuries on her and her family members with a scythe, yet if Ramilaben and Vinaben were aware of the assailant, then in such circumstances there was no reason for both the injured witnesses to state before the Doctor at the Nadiad Civil Hospital that they had no idea as to who was the assailant and with what object they were hit. Therefore, according to Mr. Darji, no reliance could have been placed on the evidence of the first informant P.W. 6, Exh. 27.

4.7 Mr. Darji further submitted that the Trial Court committed a serious error in relying on the evidence of the discovery of the scythe and the shorts worn by the accused at the time of the incident. Mr. Darji submitted that no reliance could have been placed on the evidence of the panch witnesses because even if the entire evidence of the panch witness is accepted, it could not be said that the discovery has been proved in accordance with law. Mr. Darji laid much stress on the fact that the statement alleged to have been made by the accused leading to the discovery of the muddamal article scythe and the shorts worn by the accused at the time of incident, does not suggest that the appellant indicated anything about his involvement in concealment of the weapon. According to Mr. Darji mere discovery cannot be interpreted as sufficient to infer authorship of concealment by the person who discovered the weapon.

4.8 Mr. Darji submitted that that once the discovery is held to be not in accordance with law, the presence of blood on the scythe and the trousers would be of no avail to the prosecution.

4.9 Mr. Darji lastly submitted that it is a settled law that the evidence of an injured witness must ordinarily be ranked high and should receive credence but such evidence must be examined by applying the test of probability. Before the evidence of an injured witness can be accepted by a Court, it should be satisfied that he is a truthful witness and the account furnished by him is in consonance with the probabilities. Mr. Darji submitted that there is no rule of appreciation of evidence which requires that because a witness is injured his evidence ipso facto should be accepted as a gospel truth.

5. Contentions on behalf of the State:--

5.1 Mr. Maulik G. Nanavati, the learned APP appearing for the State, vehemently submitted that the trial Court rightly recorded the finding of guilt of the accused for the offence of murder punishable U/s. 302 IPC and for the offence of attempt to commit murder punishable U/s. 307 IPC. Mr. Nanavati submitted that the trial Court committed no error in convicting the accused by placing reliance on the oral evidence of the two injured eye-witnesses, namely, Ramilaben and Vinaben.

5.2 Mr. Nanavati submitted that the P.W. 6 - Ramanbhai Rohit-first informant, Exh. 27, could be termed as a res gestae witness. This principle of res gestae is embodied in Sec. 6 of the Evidence Act which is an exception to the general rule where under the hearsay evidence become admissible. According to Mr. Nanavati the P.W. 6-Ramanbhai in his deposition has stated in clear terms that in the midnight on hearing the commotion, he woke up and went at the place of the incident and heard Ramlaben w/o the deceased shouting and stating that Kaliya residing next to her house had assaulted them with a scythe.

5.3 Mr. Nanavati submitted that assuming for the moment that the exact words uttered by the accused before the panch witnesses at the time of drawing of the discovery Panchnama U/s. 27 of the Evidence Act may not be very clear, but at the same time the fact that the accused led the panch witnesses and the police party to a particular place from where the scythe and the trousers were discovered would be admissible U/s. 8 of the Evidence Act as the conduct of the accused. Such conduct of the accused is a relevant fact U/s. 8 of the Evidence Act. Mr. Nanavati submitted that not only the conduct should be taken into consideration but the fact that on the scythe and the trousers which the accused had worn at the time of incident blood stains were found matching with the blood group of the deceased according to the serological test report lends credence to the circumstance of discovery.

5.4 In such circumstances, according to Mr. Nanavati no interference is called for in this appeal and the conviction deserves to be confirmed.

6. Oral Evidence on record:--

6.1 The prosecution examined Dr. Shyam Gogle (P.W. 1/Exh. 10) who had performed the Postmortem of the dead body of the deceased. According to the P.W. 1-Dr.Gogle he was on duty at the Public Health Center, Mahorel on 23/5/2007 and at that point of time the dead body of a person named Mojis alias Bhago Philipbhai Christi was brought for postmortem. Since no adequate facilities were available at Mahorel PHC for performing the postmortem, the dead body was taken to the Alindra Community Health Center, where the postmortem was performed. According to Dr. Gogle, at the time of Postmortem he noticed the following external injuries on the dead body of the deceased:--

(1) Incised wound on left shoulder and extending upto left nipple.

- 20 C.ms. x 4 1/2 C.ms. x 4 c.ms. deep.

- Clavicle Cut.

- Left side three ribs are cut.

- Deep muscles and Blood Vessels cut.

(2) Incised wound on left side of face and upper lip. 6 C.m. x 2 C.ms. x 1 1/2 c.ms., muscles cut.

(3) Incised wound semicircular shape extending from 2nd injury to posterior of left ear.

- Flap of skin seen hanging.

- 14 C.ms. x 4 C.m. x Bone deep.

(4) Incised wound on distal 1/3rd of left forearm.

- 5 c.ms. x 2 c.m. x 1 c.m.

(5) On chin transverse linear abrasion seen.

- 2.5 c.m. x 0.1 c.m.

(6) On middle of scalp extending from frontal to occipital region.

- 14 c.ms. x 1 1/2 c.m. x bone deep.

Cut fracture of frontal skull bone 7 c.ms. in length skull cavity was approachable with probe.

All the injuries were ante mortem in nature.

According to the P.W. 1-Dr. Gogle, the following were noticed as internal injuries:--

(1) Frontal bone fractured 7 c.ms. x ? c.m. x cavity deep. The injury correlates injuries No. (6).

(2) Blood stain seen on surface of brain.

(3) On left side 3 ribs are cut.

6.2 According to the P.W. 1-Dr. Gogle, the cause of death was Hypovolemic shock due to hemorrhage leading to cardio respiratory failure. Dr. Gogle in his evidence has deposed that all the injuries were sufficient in the ordinary course of nature to cause death and were possible by a sharp edged weapon. The P.W. 1-Dr. Gogle was shown the muddamal article scythe at the time of his examination-in-chief and upon seeing the same, he deposed that the injuries which were sustained by the deceased were possible by such a scythe. Accordingly the P.W. 1 Dr. Gogle proved the P.M. Report Exh. 12.

6.3 The prosecution examined Dr. Shanatan Vaishnav (P.W. 2), Exh. 15. In his deposition P.W. 2 Dr. Vaishnav stated that on 23/5/2007 he was on duty as a Medical Officer at the Ahmedabad Civil Hospital and at that point of time, the Chief Medical Officer, Civil Hospital, Nadiad referred two patients, namely, Ramlaben Mojisbhai Christi and Vinaben Philipbhai for treatment. Dr. Vaishnav in his deposition has stated that Ramlaben was brought for examination at 4.55 in the morning and in the history of assault Ramlaben stated that between 2 and 2.30 in the night while asleep on the terrace of her house, her neighbour inflicted injuries with a scythe. According to Dr. Vaishnav the patient was conscious and

upon examination the following injuries were revealed:--

- i) Incised wound 10 c.m. x 5 c.m. x muscle deep over Lt. scapular region.
 - ii) 2 C.m. x 0.5 c.m. linear, Red abrasion present on Lt. middle finger, distal Phalanx.
 - iii) 1 x 0.5 c.m. Linear, Red abrasion present on Lt. Ring finger, distal Phalanx.
- Restriction of abduction and adduction movement of Lt. shoulder.

In his evidence Dr. Vaishnav has stated that the clothes of the injured were stained with blood and she was referred for further treatment to the Ward of Dr. C.J. Patel in the Civil Hospital. He stated that the injury No. 1 sustained by Ramilaben was possible by the mudammal article scythe. He stated that accordingly he issued a medical certificate Exh. 17.

The P.W. 2-Dr. Vaishnav in his deposition has further stated that on the same day at around 4.50 in the morning one Vinaben Philipbhai Christi was also brought at the hospital and upon asking as regards the history of the assault, Vinaben stated that between 2.00 and 2.30 in the night her neighbor inflicted injuries with a scythe. He further stated that the injured was conscious and her clothes were fully drenched with blood. Upon examination of Vinaben, the following injuries were noted:--

- i) 20 c.m. x 2 c.m. x cutting the deep muscles, Incised wound over left side of the neck, 2 c.m. above and lateral to sterno clavicular notch, extending upto the posterior, midline, both end sharps.
- ii) Cut off left pinna (Lt. ear).
- iii) Cutting injury 5 c.m. x 1.5 c.m. x exposed cut illegible Metacarpophalangeal jts, 2nd, 3rd, 4th Lt. sided.

Diagnosis: Left side Brachial plexus injury - Injury over Neck Lt. Side, left hand injury.

(X-ray Lt. hand (56095) : # 2nd, 3rd, 4th MPJ)

Operation:- (1) Left C5, C6, C7, C8 Nerve root cut repaired, Neck wound closed.

(2) Left 3 layers extensor tendon repair, K. wiring 4A.

He further deposed that a surgery had to be performed on Vinaben. He had accordingly issued a medical certificate Exh. 18. Dr. Vaishnav stated in his deposition on being shown the muddamal article scythe that the injuries which were sustained by Vinaben were possible by the Scythe. In the cross-examination of Dr. Vaishnav, he stated that Ramilaben was fully conscious. She had not sustained any fractures and her injuries were simple in nature. He further deposed that considering the nature of injuries, the same could have been sustained before around 6 to 12 hours from the time of examination. Dr.

Vaishnav further deposed in his cross-examination that Vinaben was fully conscious at the time of her medical examination.

6.4 The prosecution examined Dr. Girishkumar Ratilal Thakkar (P.W.-3), Exh. 20. This Medical Officer was on duty at the Nadiad Civil Hospital on 23/5/2007. In his examination-in-chief he has deposed that at around 3.15 in the early morning, Ramilaben Mojisbhai Christi was brought for treatment. On examination she was found to be conscious and she stated before the witness that she had no idea as to who had assaulted her and with what object. However, she stated before this witness that there was one male and a female. She further stated before the doctor that while asleep on the terrace of her house she was assaulted. This witness noted one injury as reflected in the medical certificate Exh. 21 issued on 23/6/2007. He further deposed that the injury which was noted on the body of Ramilaben was possible by a sharp edged weapon. This witness has further deposed that at the same time he also examined Vinaben Philipbhai Christi. Vinaben was also conscious and on asking Vinaben as to who had assaulted her and with what, it was replied by Vinaben that she had no idea as to who had inflicted the injuries and with what object. However, she clarified that there was one female and a male. This witness noted three injuries on the body of Vinaben as reflected from the medical certificate Exh. 22 issued on 23/6/2007. In the cross-examination of the P.W. 3-Dr. Thakkar he has stated that both the patients were conscious and whatever was stated by them was noted down in the medical certificates-Exh. 21 and Exh. 22 respectively.

6.5 The prosecution also examined Dr. Prashant Yadav P.W. 4/Exh. 23. This Medical officer, at the relevant time was serving as a resident Doctor at Ahmedabad Civil Hospital. In his deposition he has stated that on 23/5/2007 a patient, namely, Vinaben Philipbhai was brought at the hospital and Dr. Soni had performed surgery on her on 24/5/2007. This witness was examined to prove the medical papers which were prepared by Dr. Soni, more particularly the certificate Exh. 18 indicating injuries and the nature of surgery which was performed.

6.6 The prosecution examined Vinubhai Rohit (P.W. 5), Exh. 25 as a panch witness to prove the Panchnama of the clothes of the injured witnesses which were collected by the investigating agency.

6.7 The prosecution examined Ramanbhai Rohit as P.W. 6 Exh. 27. In his examination-in-chief he has deposed that he was a resident of Rohitvas, situated at Village Sodhpur. At the relevant time he was rendering his services as Sergeant in the Unit of Home Guard. On 22/5/2007 he was sleeping on the terrace of his house and at around 1.45 in the morning of 23/3/2007 he heard a commotion in the locality and found that his parents had also come out of the house. He has deposed that in the adjoining house one Ramilaben and her husband Mojisbhai were residing and Ramilaben was shouting. He has deposed that Ramilaben was shouting that Kaliya residing next to her house had assaulted them with a scythe. This witness has deposed that even Vinaben - the mother-in-law of Ramilaben and mother of the deceased Mojis had sustained injuries on her

neck. On enquiring with Vinaben as to what had happened, Vinaben is said to have informed this witness that the accused had assaulted her with a scythe. This witness has further deposed that on reaching the terrace along with the others he found Mojis lying dead having sustained number of injuries. This witness has also deposed that Vinaben-mother of the deceased had stated before him that there used to be frequent quarrels with the accused and due to that Kaliya-the accused had inflicted injuries on all the family members. In his cross-examination he has deposed that he had lodged the first information report at around 5.30 in the morning. He denied the suggestion put to him that Ramilaben was not able to speak due to the injuries which she had sustained. He also denied the suggestion that Vinaben was also not able to speak due to the injuries which she had sustained. He stated that it was true that both, Vinaben and Ramilaben were bleeding profusely. He further deposed that at the place of incident there was no light and it was absolutely dark. He also denied the suggestion that he was deposing against the accused as Ramilaben and Vinaben happened to be his neighbours. He deposed that he had informed about the incident to the Sodhpur outpost. He has deposed that around 3 O'clock in the morning he had informed Sodhpur outpost regarding the incident from his mobile. He has also deposed that on his mobile he had informed to the Sodhpur outpost that Ramilaben had told him that Kaliya had inflicted injuries. According to this witness, the police arrived at the scene of incident within 10 minutes thereafter.

6.8 The prosecution examined Bhupendrabhai Patel as witness No. 7, Exh. 28. This witness was examined as a panch witness. This witness proved the Panchnama Exh. 29 of collection of the clothes of the injured witnesses.

6.9 The prosecution also examined Vinaben Philipbhai as Witness No. 8, Exh. 32. Vinaben is the mother of the deceased. In her examination-in-chief she has deposed that the deceased happened to be her son. On the date of the incident she was sleeping in the Courtyard of her house and at that time, she heard shouts from the terrace of her house. She has deposed that she heard shouts of help. Such shouts were raised by her daughter-in-law Ramila stating that her Mojis was killed. On hearing the shouts she woke up from her bed and went near the staircase heading to the terrace. According to her, one man came running and thereafter followed by the accused. She identified the accused in the Court room. She has deposed that there was a scythe in the hand of the accused. She has deposed that as she raised shouts, the accused inflicted injuries with the scythe on the left hand side of her neck. She also sustained injury on her hand. She has deposed that thereafter the accused ran away and Ramila ran away towards Rohitvas for seeking help from others residing in the neighbourhood. She has stated that Ramila raised shouts for help stating that her Mojis had been killed. Due to shouts raised by Ramila, people from the locality came at her house. According to her, thereafter she was taken to the Nadiad Civil Hospital for treatment. She has deposed that thereafter she was taken along with her daughter-in-law Ramila to the Ahmedabad Civil Hospital where they received

treatment for about one month. She identified the muddamal article scythe as the one which was in the hand of the accused at the time of the incident. In her cross-examination she has stated that on the date of the incident she had gone off to sleep at around 8 O'clock in the night. She denied the suggestion that on the date of the incident, more particularly at the place of occurrence there was no light and it was absolutely dark. She also denied the suggestion that there was no facility of electricity at the place of the incident. She has deposed in her cross-examination that the person who had come at the house was of dark complexion and it was the accused. She has also deposed that exactly what had happened on the terrace was not known to her. She had fallen down no sooner she sustained the injuries on her neck and hand. In her cross-examination she further deposed that it was pitch dark and all of them were taken to the hospital for treatment. She has also deposed that a doctor and a nurse had attended her and had disclosed before the doctor about the incident. She has also deposed that she had disclosed before the doctor the true facts and such facts were noted down by the doctor. She has also deposed in her cross-examination that at the time of the incident there was another dark complexioned person but she was not able to identify that person. However, she had described the physical characteristics of such person before the police. She denied a categorical suggestion put to her by the defence in cross-examination that since she was unable to identify that person she had disclosed the name of the accused as the assailant due to strained relations with the accused.

6.10 The prosecution examination Punam Punja as witness No. 9 Exh. 33 to prove the discovery Panchnama Exh. 34 of the muddamal article scythe and the shorts worn by the accused at the time of incident. This witness in his evidence has deposed that he was called at the Chaklasi Police Station for the purpose of acting as a Panch witness in a case of murder. He has deposed that at the police station there was one person sitting on the bench and he identified that person to be the one accused in the case. He has deposed that a preliminary Panchnama was drawn at the police station on which he had put his signature. Thereafter he accompanied the police in a jeep led by the accused. They all reached at the house of the accused. After reaching the house of the accused, the accused handed-over one scythe. According to this witness on being shown the muddamal article scythe he identified the same as the one which the accused had taken out from his house and handed over to the police. He has deposed that he had no idea about anything else being discovered from the house of the accused. He has deposed in his examination-in-chief that the police had shown him one shorts which was also collected by the police. In his cross-examination this witness has deposed that quite frequently the police would call him at the police station to act as a panch. He has deposed that on reaching the house of the accused, the police asked him to put his signature on the panchnama and accordingly he had put his signature. He has also deposed that when they reached at the place i.e. the house of the accused, he saw the scythe and the shorts lying over there. Since he was asked to put his signature in the

Panchnama, he willingly signed the Panchnama.

6.11 The prosecution examined Ramilaben Mojisbhai as witness No. 10/Exh. 36. Ramilaben is the wife of the deceased. In her evidence she has deposed that on the date of the incident at around 1.45 in the night she was sleeping on the terrace of her house with her husband and her minor son. Her mother-in-law Vinaben was sleeping downstairs in the Courtyard of the house. She has deposed that at around 2 O'clock she heard someone climbing the stairs and on hearing the sound, she woke-up her husband the deceased. According to this witness before her husband-the deceased could wake up the accused inflicted injuries on the head of the deceased with his scythe. This witness has also deposed that she tried to protect her son by getting on top of him and also tried to cover her son with a quilt. She has deposed that since the accused resided next to her house she knew her very well. She has also deposed that the accused had inflicted injuries on her shoulder. She has also deposed that her son Chirag also sustained injury on the forehead. She raised shouts as a result the accused got down from the staircase and ran away. On being shown the muddamal article scythe, she identified the same to be one which was in the hand of the accused at the time of incident. According to her, when she got down from the terrace with her son she realized that her mother-in-law had also sustained injuries and was bleeding profusely. She has deposed that she was informed by her mother-in-law that the accused had inflicted the injuries. This witness ran away towards the locality with her son for seeking help. She has deposed that there was a long standing dispute with the accused regarding a fence. She has also deposed that on the previous day of the incident her mother-in-law had an altercation with the accused regarding the fence. She has further deposed that there is a facility of electricity at the house and on the date of the incident there was an electric bulb which was on near the staircase. In her cross-examination she has deposed that on the night of the incident there was complete darkness but still a person could be identified. There was no light on the terrace. The police had recorded her statement at Ahmedabad Civil Hospital. She also deposed in her cross-examination that she had raised shouts from the terrace. She has deposed that till she reached Rohitvas, nobody had come at her house to save them. She has further deposed that she had not stated in her police statement that on the date of incident, the electric bulb was on, as the police had not inquired with her in that regard. She has deposed that on the date of the incident one person who was dark complexioned and bare chested was standing but she was not able to identify that person. No sooner had she raised shouts, than the said person ran away from that place. She has denied the suggestion that since she was not able to identify that person, she disclosed the name of the accused as the assailant. She has also deposed that at the Civil Hospital, Nadiad her history was recorded by the doctor and whatever had transpired was disclosed before the doctor. She denied the suggestion that before the doctor at Nadiad Civil Hospital she had stated that who was the assailant and how they were assaulted was not known to her. She deposed that she had stated before the doctor that while asleep they

were assaulted.

6.12 The prosecution examined Jayantibhai Khodabhai Vaghela, P.W. 11, Exh. 37, for the purpose of proving the recording of the First Information Report, Exh. 38, lodged by Ramanbhai Somabhai Rohit.

6.13 The last witness to be examined was Girirajsinh Pratapsinh Chauhan, the investigating officer, as P.W. 12, Exh. 39. In his examination-in-chief, he gave details about the manner in which the investigation was carried out. In his examination-in-chief, he deposed that he arrested the accused on 24th May 2007 and on the same date he drew a panchnama, Exh. 34, u/s 27 of the Evidence Act of the discovery of muddamal article scythe from the place pointed out by the accused. In his cross-examination, he deposed that when he had reached the scene of occurrence a bulb was live on the ground floor of the house but there was darkness on the terrace. He has deposed that Ramilaben and Vinaben had in their police statements stated that there was one another person, who was dark complexioned, however, that person could not be identified. He denied the suggestion that since the real assailant could not be identified the accused was falsely implicated in the offence.

7. Having heard the learned Counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration in this appeal is whether the learned trial Judge committed any error in holding the accused guilty for the offence of murder.

8. The picture that emerges from the cumulative reading and assessment of the materials on record is thus:--

9. On the date of the incident, the deceased was fast asleep with his wife Ramilaben and their minor son on the terrace of their house, whereas the mother of the deceased had gone off to sleep in the Courtyard of the house. At around 1:45 in the night, the accused is alleged to have inflicted injuries with a scythe on the body of the deceased and thereafter inflicted injuries on Ramilaben. The mother of the deceased Meenaben who was sleeping downstairs in the Courtyard is also alleged to have been assaulted by the accused with a scythe.

10. Both these injured eye witnesses were first taken to the Nadiad Civil Hospital for treatment and before the doctor they stated that they had no idea as to who was the assailant and with what object the injuries were inflicted on their body. Thereafter, they were shifted to the Ahmedabad Civil Hospital and there also they did not disclose the name of the accused but in the history of assault all that was stated before the doctor was that they were assaulted by their neighbour with a scythe.

11. It appears that the trial Court convicted the accused mainly relying on the ocular evidence of the two eye witnesses, namely, Ramilaben and Vinaben.

12. We propose to first address ourselves on the question as to whether the testimony of the two eye witnesses, namely, Ramilaben and Vinaben, who are

the wife and mother of the deceased respectively, inspires confidence or not? Our answer to the same is in the negative. While giving the said answer, we are conscious of the fact that Ramilaben and Veenben are injured witnesses, according to the prosecution, and normally, this Court is loath to reject the testimony of an injured witness. However, there is no immutable rule of appreciation of evidence that the evidence of an injured witness should be mechanically accepted as a gospel truth for the injuries may only at the best ensure presence of a witness but, are no guarantee of his credibility and truthfulness. It is an elementary norm of appreciation of evidence that before the testimony of even an injured witness can be accepted, it has to pass the test of truthfulness and should be in consonance with the probabilities.

13. The appreciation of ocular evidence is a hard task. There is no fixed or straight-jacket formula for appreciation of the ocular evidence. The judicially evolved principles for appreciation of ocular evidence in a criminal case can be enumerated as under:--

I While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief.

II If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate Court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial Court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details.

III When eye-witness is examined at length it is quite possible for him to make some discrepancies. But Courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the Court: is justified in jettisoning his evidence.

IV Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

V Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.

VI By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

VII Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

VIII The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

IX By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

X In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

XI Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

XII A witness, though wholly truthful, is liable to be overawed by the Court atmosphere and the piercing cross examination by Counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him.

XIII A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Unless the former statement has the potency to discredit the later statement, even if the later statement is at variance with the former to some extent it would not be helpful to contradict that witness.

[See: *Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat*, *Leela Ram v. State of Haryana* AIR 1995 SC 3717 and *Tahsildar Singh and Another Vs. The State of Uttar Pradesh*,].

14. When the evidence of an injured eye-witness is to be appreciated, the under-noted legal principles enunciated by the Courts are required to be kept in mind:--

(a) The presence of an injured eye-witness at the time and place of the

occurrence cannot be doubted unless there are material contradictions in his deposition.

(b) Unless, it is otherwise established by the evidence, it must be believed that an injured witness would not allow the real culprits to escape and falsely implicate the accused.

(c) The evidence of injured witness has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly.

(d) The evidence of injured witness cannot be doubted on account of some embellishment in natural conduct or minor contradictions.

(e) If there be any exaggeration or immaterial embellishments in the evidence of an injured witness, then such contradiction, exaggeration or embellishment should be discarded from the evidence of injured, but not the whole evidence.

(f) The broad substratum of the prosecution version must be taken into consideration and discrepancies which normally creep due to loss of memory with passage of time should be discarded.

15. If the P.W. 10, Ramilaben, the wife of the deceased and the P.W. 8, Vinaben, the mother of the deceased were able to identify the accused in the night as the assailant, then what was the reason for not disclosing the name of the accused before the P.W. 3, Medical Officer, Dr. Girishkumar Thakkar, when he examined them and treated them in the first instance at the Civil Hospital, Nadiad. Dr. Thakkar, in his evidence, has stated that both the witnesses were conscious and they had stated before him on a specific question put to them that they had no idea as to who had assaulted them and with what. This doctor has also deposed that both these witnesses had stated before him that they were assaulted when they were fast asleep on the terrace of their house. Dr. Thakkar, P.W. 3, also issued medical certificates relating to the injuries sustained by both the witnesses at Exh. 21 and Exh. 22 respectively. In the medical certificates, Exh. 21 of Ramilaben and in the medical certificate of Vinaben, Exh. 22, it has been stated that in the history of assault it was stated, "what was hit and who hit is not known. There was one lady and a man."

16. We are unable to appreciate the fact and so far as this aspect is concerned, there is no plausible explanation at the end of the prosecution that what was the reason for both the injured eye witnesses to state before the doctor in the first instance at Nadiad Civil Hospital that they had no idea as to who had assaulted them and with what object. The reason is quite obvious. We have no reason to dis-believe the evidence of Dr. Thakkar so far as the history given by both the injured eye witnesses is concerned. It is also not the case of the prosecution that when the two injured eye witnesses were taken to Nadiad Civil Hospital they were not in a fit state of mind or were in a state of shock. Nothing of that sort has been deposed by the doctor, on the contrary the doctor has said that both the injured persons were very much conscious.

17. Apart from the above, the P.W. 8, Vinaben, the mother of the deceased, in her examination in chief has deposed that no sooner she heard the shouts of her daughter-in-law Ramilaben, she woke up and went near the staircase and at the point of time she witnessed one man coming towards her running and thereafter a person named, Kaliya came at the place of occurrence.

18. From the evidence on record, it is evident that there was another person, who could not be identified by both the injured eye witnesses. Further the P.W. 8, Vinaben in her evidence has also deposed that at the time of the incident it was pitch dark. She has deposed in the cross-examination in no uncertain terms that she had narrated about the incident before the doctor and such narration was the true description of the incident. She also admitted in her cross-examination that the second person who was dark complexioned could not be identified by her.

19. The P.W. 10, Ramilaben, the wife of the deceased has also deposed that on the night of the incident it was very dark but still one could identify a person. She also admitted in her cross-examination that there was no light on the terrace. In her cross-examination she further deposed that on the night of the incident she had seen one man who was dark complexioned and bare chested. She was unable to identify that person.

20. In such circumstances, we are of the opinion that the evidence as regards the identity of the true assailant is very doubtful and more particularly, when both the injured eye witnesses stated before the doctor at Nadiad Civil Hospital in the first instance that they had no idea as to who was the assailant and with what object they were assaulted.

21. Apart from the above even after they were shifted to the Ahmedabad Civil Hospital for further treatment the name of the accused was not disclosed in the history of assault upon inquiry by the concerned doctor. All that was stated was that a neighbour had assaulted them.

22. According to the prosecution case, the persons residing in the neighbourhood of the house of the deceased had arranged to shift the injured eye witnesses to the hospital. It is obvious that the two ladies would not have gone at Nadiad Civil Hospital all alone. Even the first informant, who claims to have heard Ramilaben shouting at the time of the incident that it was the accused who had inflicted injuries had accompanied both the injured witnesses at the Nadiad Civil Hospital. In that context it was expected, if really the appellant was the assailant, that his name would be disclosed by all or any of them while furnishing the cause of the injuries. It can, therefore be legitimately inferred that at the earliest available opportunity the name of the appellant was not disclosed.

23. Such underlined circumstances persuade us to give benefit of reasonable doubt to the appellant. So far as the second person who was dark complexioned and bare chested as deposed by both the injured eye witnesses is concerned, remained a mystery because even at the end of the investigation the identity of that person could not be verified. Even the identity of a lady said to be involved in

the incident remained a mystery.

24. Mr. Nanavati, the learned APP very strenuously tried to convince us that the evidence of the P.W. 6, Ramanbhai Somabhai Rohit, the first informant could be treated as *res gestae*, relevant u/s 6 of the Evidence Act. According to Mr. Nanavati, the conviction of the accused-appellant could be upheld relying on the evidence of the P.W. 6, Ramanbhai, since this witness in his evidence has deposed that on inquiring with Vinaben she had disclosed before him that it was her neighbour, the accused, who had inflicted the injuries with a scythe. Even for the time being, we believe what has been deposed by the P.W. 6, Ramanbhai, still we are not getting the answer to the question as to why the name of the accused was not disclosed before the doctor on a specific inquiry by the doctor as regards the history of assault. We are conscious of the fact that the doctor is under no obligation as such to collect details from an injured person as regards the incident in question but at the same time we cannot be oblivious of the fact that if a doctor on his own inquires with the injured patient as to how he had sustained injuries and who had inflicted the injuries and in reply to such a pertinent question if the answer is that the assailant was not known then it assumes significance so far as the identity of the true assailant is concerned.

25. The trial Court has also placed reliance on the evidence of the discovery of muddamal article scythe pursuant to the statement alleged to have been made by the accused while in police custody after his arrest in the crime. The prosecution has relied on the evidence of the P.W. 9, Punambhai Punjabhai, to establish that it was at the instance of the accused that the muddamal article scythe was discovered from the house of the accused along with the shorts which the accused had worn at the time of the incident. The prosecution has also relied on the serological test report which indicates that blood-stains were found on the muddamal article scythe as well as the shorts of the accused, matching with the blood group of the deceased.

26. We have minutely gone through the evidence of the P.W. 9, Punambhai Punjabhai, so far as the aspect of discovery u/s 27 of the Evidence Act is concerned and are of the opinion that the prosecution could not be said to have proved the same in accordance with law so as to rely on it as a corroborative piece of evidence along with the ocular version of the two injured eye witnesses. The P.W. 9, Punambhai in his examination in chief has deposed that he was called at the police station to act as a panch witness and at that point of time he noticed one person i.e. the accused sitting on the bench. Thereafter, they all left in a jeep. The jeep was being led by the accused. According to this witness, after reaching the house of the accused, the accused produced the scythe and handed it over to the police. In his cross examination, this witness has deposed that quite frequently he was being called at the police station to act as a panch witness. He has deposed that they all went to the house of the accused and the police had asked him to put his signature on the panchnama and when they reached the place he saw that the scythe and the shorts were lying over there.

Since the police asked him to put his signature he signed the panchnama.

27. In order to enable the Court to safely rely on the evidence of discovery of incriminating fact at the instance of the accused as contemplated u/s 27 of the Evidence Act, it is necessary that the exact words attributed to an accused, as statement made by him, be brought on record and, for this purpose the panch witnesses as well as the investigating officer are obliged to depose in their evidence the exact statement and not by merely stating that a discovery panchnama of weapon of offence was drawn as the accused was willing to take it out from a particular place. Neither the P.W. 9, Punambhai, has deposed anything about the statement being made by the accused nor the investigating officer in his evidence has deposed anything about such statement being made by the accused.

28. The scope and ambit of Section 27 of the Evidence Act were illuminatingly stated in AIR 1947 67 (Privy Council) , which have become locus classicus, in the following words:--

It is fallacious to treat the "fact discovered" within the Section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added with which I stabbed "A" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.

29. What emerges from the evidence is that the appellant led the panch witnesses and the police party to his house and on reaching the house he handed over the scythe and the shorts which he had worn at the time of the incident. This would not suggest that the appellant indicated anything about his involvement in the concealment of the weapon. Mere discovery cannot be interpreted as sufficient to infer authorship of concealment by the person who discovered the weapon. He could have derived knowledge of the existence of that weapon at the place through some other source. He may have even seen someone concealing the weapon and, therefore, it cannot be presumed or inferred that because a person discovered a weapon, he was the person who concealed it, least it can be presumed that he used it.

30. In the case of Narsinhbhai Dahyabhai Vaghela v. State of Gujarat, reported in 1984(1) GLR 118, this Court observed thus:--

.....When Panchnama was to be prepared accused was present and he stated that "he willingly shows a key". This would only mean knowledge of the key and

not the possession of the key. Possession and knowledge are two different aspects in law. For establishing possession the statement u/s 27 of the Indian Evidence Act would have "I have concealed a key or I have placed a key which I am willing to produce". Unless it is an admitted fact that it is he who has placed it possession cannot be imputed to him. Production can impute knowledge. If a person has a knowledge that a particular thing is lying at a particular place, that will only establish that he knew that at a particular place a particular thing is lying. This would impute knowledge and not possession.

31. In *Dudh Nath Pandey Vs. State of Uttar Pradesh*, the Apex Court took into consideration a very similar fact situation and observed in paragraph 15 that, if the case is dependent on circumstantial evidence, different considerations would have prevailed because the balance of evidence after excluding the testimony of the two eye-witnesses was not of the standard required in cases dependent wholly on circumstantial evidence (as is the case here). Their Lordships observed that evidence of recovery of pistol at the instance of the appellant cannot by itself prove that he who pointed out the weapon wielded it in offence. The statement accompanying the discovery was found to be vague to identify the authorship of concealment and it was held that pointing out of the weapon may, at the best, prove the appellant's knowledge as to where the weapon was kept.

32. Discovery evidence, by itself, is subsidiary and cannot sustain a conviction but where there is plenty of other evidence to sustain the prosecution case, discovery evidence may be treated as a valuable piece of corroborative evidence.

33. Thus, we are of the view that the trial Court committed a serious error in placing reliance on such a weak piece of evidence to hold the accused guilty for the offence of murder punishable u/s 302 of the Indian Penal Code.

34. Mr. Nanavati in this context tried to convince us that even if the discovery u/s 27 of the Evidence Act is dis-believed by this Court still the fact that the accused had led the panch witnesses and the police party to his house from where the scythe and the shorts were collected would be admissible as his conduct u/s 8 of the Evidence Act.

35. We are afraid we are not impressed by such submission of Mr. Nanavati for two reasons. First, we have dis-believed the ocular version of the two injured eye witnesses and secondly a person cannot be convicted for a serious offence like murder solely relying on his conduct which may be relevant u/s 8 of the Evidence Act. The burden to bring home the guilt of the accused beyond reasonable doubt is on the shoulders of the prosecution which the prosecution has not been able to prove in the present case.

36. In view of the foregoing discussion, we are of the view that the trial Court committed an error in holding the accused guilty of the crime and was not justified in convicting the accused appellant. In the result, the appeal is allowed. The conviction and sentence of the accused-appellant is set aside and he is acquitted of the charges framed against him. The accused-appellant is ordered to

be released forthwith, if not required in any other case.