

(2007) 08 GUJ CK 0015

In the Gujarat High Court

Case No : Criminal Appeal No's. 956, 1010 and 1238 of 1985 and Criminal Revision Application No's. 541 and 542 of 1985

Kailash Raguvir

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 09-08-2007

Acts Referred:

Bombay Police Act, 1951 — Section 135(1)

Criminal Procedure Code, 1973 (CrPC) — Section 107, 313, 374, 378, 394

Penal Code, 1860 (IPC) — Section 100, 101, 102, 103, 300

Citation : (2007) 3 GLR 2530

Hon'ble Judges : J.R. Vora, J;Abhilasha Kumari, J

Bench : Division Bench

Advocate : A.D. Shah, in Criminal Appeal Nos. 956 and 1010/85, K.C. Shah, APP in Criminal Appeal No. 1238/85 and M.Y. Malik and Y.U. Malik, in Criminal Revision application Nos. 541 and 542/85, for the Appellant; K.C. Shah, APP for Respondent No. 1 in Criminal Appeal Nos. 956, 1010 and for Respondent No. 1 to 4 in 1238/85 and A.D. Shah, for Respondent Nos. 1 and 3 and K.C. Shah, Assistant Public Prosecutor for Respondent No. 5 in Criminal Revision Application Nos. 541 and 542/85, for the Respondent

Judgement

J.R. Vora, J.—A crime came to be registered against four accused, namely, (1) Jatashankar Asharam Pande, (2) Kailash Raghuvir Mishra, (3) Gitaben, wife of Jatashankar Asharam, and (4) Rajkumari, wife of Kailash Raghuvir, all residing at Balmukund Chawl at Shahpur Mill Compound, Ahmedabad before Karanj Police Station for the offences punishable under Sections 302, 325, 323 to read with Section 34 of Indian Penal Code. Accused were further charged for the offence punishable u/s 504 of Indian Penal Code as well as for the offence punishable u/s 135(1) of the Bombay Police Act. In pursuance of the investigation, charge-sheet was submitted by Karanj Police Station against the accused before the Court of Metropolitan Magistrate, 5th Court, Ahmedabad and the said case thereafter was committed to the court of Sessions situated at Ahmedabad. After fullfledged trial, vide judgment and order delivered by learned Addl.City Sessions Judge, 3rd

Court, Ahmedabad on 17th October 1985, the court was pleased to hold guilty accused No. 1 Jatashankar Asharam Pande for the offence punishable u/s 304 Part-1 of the Indian Penal Code and he was sentenced to undergo rigorous imprisonment for five years and to pay fine of Rs. 1000/-, in default to undergo simple imprisonment for one year. Accused No. 1 Jatashankar Asharam Pande was also held guilty for the offence punishable u/s 325 of the Indian Penal Code, for which he was sentenced to suffer rigorous imprisonment for three years. He was also found guilty for the offence punishable u/s 323 of the Indian Penal Code and was sentenced to undergo rigorous imprisonment for six months. It was directed that all the substantive sentences were to run concurrently. Accused No. 2-Kailash Raghuvir Mishra was held guilty for the offence punishable u/s 325 of the Indian Penal Code and was sentenced to suffer rigorous imprisonment of three years and to pay a fine of Rs. 500/- in default to undergo simple imprisonment for six months. He was also held guilty for the offence punishable u/s 323 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for six months. It was directed that both the sentences of imprisonment were to run concurrently. Accused No. 3- Gitaben, wife of Jatashankar Asharam, and accused No. 4 - Rajkumari, wife of Kailash Raghuvir, were held guilty for offence punishable u/s 323 of Indian Penal Code and were ordered to be released on probation on each of them executing a personal bond of Rs. 1000/- for good behaviour and for two years. It was directed that in case of violation of the conditions of bond, they would be called upon to receive the sentence. All the four accused came to be acquitted by the trial court for the charges levelled against them u/s 302 to read with Section 34 u/s 325 to read with Section 34, and u/s 323 to read with Section 34 of the Indian Penal Code. All the four accused also came to be acquitted by the trial court for the offence punishable u/s 135(1) of the Bombay Police Act and accused No. 3 was also acquitted of the charge u/s 504 of the Indian Penal Code. It was further directed that fine, if paid, by the accused Nos.1 and 2, then out of the amount of fine paid, an amount of Rs. 500/- and Rs. 300/- respectively would be paid to the widow of the deceased Pancham Harakhu in the case.

2. Criminal Appeal No. 956 of 1985 is preferred by accused No. 2-Kailash Raghuvir Mishra, u/s 374 of the Code of Criminal Procedure against his conviction and sentence, as aforesaid. Criminal Appeal No. 1010 of 1985 is preferred u/s 374 of the Code of Criminal Procedure by accused No. 1 - Jatashankar Asharam Pande, Gitaben, wife of Jatashankar Asharam accused No. 3, and Rajkumari, wife of Kailash Raghuvir-accused No. 4 against their conviction and sentence, as aforesaid. Criminal Appeal No. 1238 of 1985 is preferred by the State against all the four accused u/s 378 of Code of Criminal Procedure for acquittal of each of the accused for the offence punishable u/s 302 to read with Section 34 of the Indian Penal Code. Criminal Revision Application No. 541 of 1985 is preferred by informant complainant Shankar Bhadriprasad Maurya against all the accused and the relief is claimed against the acquittal of all the four accused for the offence punishable u/s 302 to read with Section 34 of the Indian Penal Code while

Criminal Revision Application No. 542 of 1985 has also been preferred by informant complainant Shankar Bhadriprasad Maurya for the relief to enhance the sentences awarded to each of the four accused.

3. During the pendency of Criminal Appeal No. 1010 of 1985, appellant No. 1 - accused No. 1 - Jatashankar Asharam Pande, died and in pursuance of provisions of Section 394 of Code of Criminal Procedure, his legal heir Dharmendra Jatashanker Pande, within period of limitation applied for continuation of the appeal and to replace him in the place of deceased appellant. The application was allowed by this Court vide order passed on 7th March, 2007 in Criminal Misc. Application No. 11560 of 2006. Accordingly Dharmendra Jatashanker Pande was permitted to continue Criminal Appeal No. 1010 of 1985 on behalf of deceased appellant Jatashankar Asharam Pande.

4. According to prosecution case, at the relevant juncture Jatashankar Asharam Pande accused No. 1 and accused No. 2, with their wives accused Nos.3 and 4 respectively were residing in the Chawl, named, Balmukund Chawl situated at Shahpur Mill compound, Ahmedabad. Complainant and informant Shankar Bhadriprasad Maurya, his wife Patiya, prosecution witness Fozdar Katvaru were also residing in the same Chawl as tenants. The Chawl was owned by one Harinarayan, who was residing at that juncture in Kadri's Chawl situated nearby. The prosecution witness Shivcharan also resided in Kadri's Chawl. There was only one water closet and one water tap in Balmukund Chawl for the use of the tenants. On account of this, frequently some exchanges of words and hot discussion took place between accused No. 1 and accused No. 2 on one side and complainant Shankar Bhadriprasad Maurya etc. on the other side. The incident occurred on 22nd December, 1983 at about 7.30 A.M. Son, aged about 4 years, of Shankar Bhadriprasad Maurya had been to ease himself in the water closet of the Chawl. While Shankar Bhadriprasad Maurya poured water in the water closet, accused No. 3 wife of accused No. 1 started giving abuses to Shankar Bhadriprasad Maurya and inquired as to why Shankar Bhadriprasad Maurya was throwing water on the wall of her room. Shankar Bhadriprasad Maurya told that water was poured in water closet only. Accused No. 3 was not satisfied and quarreled with Shankar Bhadriprasad Maurya. When Shankar Bhadriprasad Maurya attempted to stop accused No. 3, accused No. 1 - husband of accused No. 3, came out from his house with an iron pipe in his hand and on hearing the hot exchanges, accused No. 2 and his wife accused No. 4 also came out from their house from the door abutting to the road side. Accused No. 1 had an iron pipe in his hand while accused No. 4 had a washing club in her hands. All of them appear to be shifted themselves to the road away from water closet about 50 feet. Deceased Pancham Harakhu, who was residing in the same Chawl, also came out with his wife Parvati to support Shankar Bhadriprasad Maurya. When deceased Pancham Harakhu came out, all the four accused were directed towards Pancham and he was told that the quarrels were taking place on account of him only and saying so, accused No. 1 gave a pipe blow on the head of deceased Pancham. Pancham fell down on the ground and, thereafter, accused

No. 1 inflicted two more blows of iron pipe on the face of deceased Pancham. Accused No. 2 present there uttered to kill Pancham and gave 2 to 3 blows of pipe on the legs of deceased Pancham. When Shankar Bhadriprasad Maurya attempted to intervene, accused No. 1 inflicted a pipe blow on his head, which Shankar Bhadriprasad Maurya warded by hands and received blow of pipe on his left hand. Accused No. 2 also attempted to hit Shankar Bhadriprasad Maurya by pipe and the blow was landed on right side of his parietal region. Wife of Shankar Bhadriprasad Maurya as well as wife of Pancham also intervened and, therefore, accused No. 1 and accused No. 2 assaulted them also. Pancham Harakhu was seriously injured and was taken to V.S. Hospital and was declared dead at 9-10 A.M. Hospital Duty Constable was informed about the patient and the death of Pancham. Hospital Duty Constable in turn informed Karanj Police Station. On receipt of the information about reaching injured at the Hospital, P.S.I. Bhupatsing Incharge of Investigating Squad of Karanj Police Station immediately reached to V.S. Hospital where he learnt that Pancham was declared dead. Police Inspector Brahmbhatt received information about the death of Pancham and he also reached to V.S. Hospital at about 10.0 A.M. Before that, P.S.I. Bhupatsing had already recorded the complaint of Shankar Bhadriprasad Maurya and so the complaint was forwarded to Karanj Police station. P.S.I. Bhupatsing was instructed to hold inquest etc. While Mr. Brahmbhatt, in company of complainant, went to scene of offence and seized blood stained tar and drew panchanama of scene of offence. He, thereafter, returned to Hospital and recorded statements of Parvatiben widow of deceased Pancham, Shivcharan Teju, Bai Patiya wife of Shankar Bhadriprasad Maurya, Shankar Bhadriprasad Maurya and Fojdar Katvaru. Accused No. 1-Jatashankar Asharam Pande had received injury and was admitted as an indoor patient in the Hospital. He was arrested at about 4.15 P.M. Other accused were arrested at about 6.15 P.M. Accused Nos.3 and 4 were taken to the scene of offence. The house of accused No. 1 was searched in presence of accused No. 3 and from there an iron pipe with blood stains was seized. Blood stained Lungi and Towel were also seized under the Panchanama. Likewise, house of accused No. 2 was also searched in presence of accused No. 4 and an iron pipe and a washing club were seized under panchanama. City Survey Officer was directed to prepare a Map of scene of offence. Police Constable Ratanbhai recovered the clothes of the deceased and the same were seized under a Panchanama. Post mortem of the deceased was conducted by P.W.16 Dr. Mukeshkumar Lallubhai Patel. Muddamal was sent to Forensic Science Laboratory for opinion on 2nd January, 1984 and, thereafter, as aforesaid, charge-sheet was submitted for the above offences against all the four accused.

5. Learned trial Judge framed charge against all the accused vide Exh. 3 on 17th October, 1984 for the aforesaid offences to which each of the accused pleaded not guilty. Prosecution examined as many as 16 witnesses and produced documents to prove its case. Thereafter learned trial Judge recorded statements of all the four accused u/s 313 of the Code of Criminal Procedure. Denying the evidence of the prosecution, the accused set up the defence that accused No. 1

saw that deceased Pancham and other prosecution witnesses were quarreling with accused No. 2 and, therefore, accused No. 1 went there. Sensing trouble, accused No. 1 in an attempt to pacify the parties stated that difficulty of water was affecting every one and there was no reason to quarrel amongst each other. At that time Pancham inflicted a stick blow on his left hand and a pipe blow was also given to him on his head by complainant Shankar Badriprasad. On apprehending aggravating circumstances, accused No. 2 snatched away pipe from Shankar Badriprasad and accused No. 1 snatched stick from deceased Pancham and both accused made an attempt to save themselves. The defence of the accused is to this extent and no further explanation is found that how prosecution witnesses received injuries. Learned trial Judge, thereafter, heard learned APP as well as defence counsel and came to the above conclusion and hence these appeals. It is necessary to mention that cross case was filed against prosecution witnesses for the injuries caused to accused Nos.1 and 2, which resulted in acquittal and no appeal is preferred by the State against that acquittal.

6. As all these appeals and revisions arise out of common judgment and order, we propose to dispose of all these appeals and revisions by this common judgment and order.

7. Criminal Appeal No. 956 of 1985 and Criminal Appeal No. 1010 of 1985 are filed against the conviction and sentence. Therefore, it is necessary for this Court, being first appellate court, to re-appreciate the evidence recorded during the trial independently and dispassionately. Accordingly, we have undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to the broader and reasonable probabilities of the case was considered alongwith the contentions raised by learned APP as well as learned senior counsel Mr. A.D. Shah for the accused.

8. Before re-appreciating the evidence, it is necessary to mention the gist of evidence recorded during the trial of Sessions Case No. 115 of 1984. There were in all five eye witnesses and out of them, four were injured witnesses. Their evidence is required to be considered carefully and with caution.

9. P.W.1-Shankar Bhadriprasad Maurya, examined at Exh. 10 deposed that he was serving as helper in Electricity Company at the time of the incident and was residing in Balmukund Chawl. There was one water tap only for water facility of the tenants of said Chawl. There was only one water closet. There was quarrel between him and the accused about the water tap. In pursuance of the quarrel, there was cross Chapter Cases filed and were pending against each party. On 22nd December, 1983 at about 7.30 A.M. the incident occurred. According to him his son aged 4, had been to water closet and, thereafter, he poured water in the closet. Accused No. 3 warned him that why was he pouring water on the wall. He stated that he had not poured water on the wall but he had poured water in the closet. Accused No. 3 thereupon started giving abuses. The wall of water closet and the house of accused No. 1 was common. Accused No. 1, being husband of

accused No. 3, at that time came out with pipe. Behind him accused No. 2 Kailash also came with pipe in his hands. When exchange of words took place, deceased Pancham also reached there and accused No. 3 and accused No. 4 also came out from their respective houses. Accused No. 4 had a washing club in her hand. On seeing Pancham, accused No. 1 stated that "finish him" and accused No. 1 inflicted a pipe blow on the head of Pancham. Pancham fell down and, thereafter, accused No. 1 gave two blows of pipe on the face of Pancham. Accused No. 2 also uttered that "finish him" and he also inflicted two blows by pipe on the legs of Pancham. According to witness, when he intervened, accused No. 1 inflicted one pipe blow but he warded that blow with his two hands and received injuries on his hand. Accused No. 2 also gave a blow which he received on right side of his head. Accused No. 4 gave blows to his wife Bai Patiya with washing club. Accused No. 3 started pelting stones at that time. Thereafter, accused No. 1 and others ran away from the spot. Parvati, wife of Pancham, Fojdar Katvaru and Shivcharan Teju took Pancham to V.S. Hospital in rickshaw, while he and his wife followed them in other rickshaw. The incident occurred at about 50 ft. away from water closet. The incident took place on public road. At about 10.0 A.M. police reached at V.S. Hospital and recorded his complaint. He identified his complaint and stated that accused Nos.1 and 2 also received injuries in the said incident and those injuries were on account of pelting of stones. He identified muddamal article No. 8 containing pant and bush shirt worn by deceased Pancham.

He has been cross-examined in detail by the defence wherein he admitted that between the parties, there was dispute about water tap, which resulted in filing of Cross Chapter cases. He was asked about the location of scene of offence and also the location of the house of witness Shivcharan and witness Fojdar. Defence has asked questions about the incident, whether the same had occurred in two parts, but witness denied the suggestion. This witness also denied that at that time he had pipe with him and Harinarayan and Pancham both had sticks with them. He denied that on reaching at the road, he started quarrel with Kailash and started giving abuses. He denied that at the time accused No. 1 stated that why they were quarreling. He denied the fact that therefore Pancham inflicted a stick blow on accused No. 1 on left leg. He also denied that he inflicted a blow with pipe on the head of Jatashankar. He also denied that Kailash intervened and tried to save Jatashankar and, therefore, he (witness) inflicted a pipe blow on his head. He denied that at that time Harinarayan also inflicted a stick blow on left hand of Kailash. He also denied that he had relations with witness Fojdar and one Laxminarayan. He denied that Fojdar and Laxminarayan attempted to catch hold of Jatashankar. He denied that at the time Fojdar gave a tooth bite on the right leg of Jatashankar. He denied the fact that Harinarayan inflicted a stick blow on left shoulder of Jatashankar. He denied the fact that Pancham also tried to inflict a stick blow on Kailash. He denied that Harinarayan also tried to give stick blow to Kailash. He denied that at that time Kailash (accused No. 2) snatched pipe from him (witness) and Jatashankar also snatched stick from Harinarayan and

attempted to save themselves. This is all the gist of evidence of complainant Shankar Bhadriprasad Maurya.

10. P.W.2 Sabirali Masoomali examined at Exh. 20 is Panch of Panchanama of scene of offence and in his evidence, panchanama of scene of offence is produced at Exh. 15. P.W.3 Ibrahim Rajmohammed Shaikh examined at Exh. 21 is second panch of scene of offence. Panchanama of scene of offence is proved through these two witnesses. P.W.3 Ibrahim Rajmohammed Shaikh is also Panch of seizure panchanama Exh. 22 by which a pipe was seized from the house of accused No. 1 alongwith a Lungi and one Kerchief. P.W.4 Ghulamhussain Ghulamnabi examined at Exh. 24 is panch of Panchanama Exh. 22 and Exh. 25. Vide Exh. 25 panchanama, from the house of accused No. 2 one pipe and one washing club was seized by police through this panchanama. P.W.5 Trivendra Mulshankar Dave examined at Exh. 26 is City Survey Officer and he prepared a Map of scene of offence, which is placed on record at Exh. 28. P.W.6 Raisangbhai Chhaganbhai examined at Exh. 30 is Head Constable who was on Hospital Duty on 22nd December, 1983 who was informed by Dr. Manan Sureshbhai Shukla about reaching of Pancham Harakhu at the Hospital for treatment and, thereafter, he was informed at about 9.10 A.M. by R.M.O that Pancham Harakhu had died. Those Vardhis, which were recorded, are placed on record vide Exh. 31 and 32. P.W.7-Dr. Manan Sureshbhai Shukla is examined vide Exh. 33. According to him he was serving as Casualty Officer in V.S. Hospital on 22nd December 1983. At about 9-10 A.M. Shankar Bhadriprasad Maurya was brought to him for treatment. On examination, he was fully conscious and he had 2 injuries; (1) abrasion 4 x 2 cm. on right cheek and, (2) swelling on left hand upper portion. He was sent to Orthopaedic Registrar for further examination. Injuries were simple and could be caused by hard and blunt substance. He produced certificate on record at Exh. 34. Witness further stated that at 10.20 A.M. he examined Patiyanen Shankerbhai. She had complaint of pain on left hand and one abrasion on right hand near thumb. There was no fracture and injuries were simple. According to Doctor, these injuries were possible by washing club. He produced certificate in this respect at Exh. 35. The witness further stated that he examined Parvatiben at 10.25 A.M. She had two injuries; (1) she had injury marks on her back measuring 12 x 1/2 cm. (2) complaint of pain on right hand. Doctor stated that the injuries were not possible by stick but was possible by some hollow substance. He produced on record certificate in this respect at Exh. 36. Doctor further stated that he also examined one Kailash (accused No. 2) at 8.25 A.M. The patient was conscious. He had one C.L.W. 3 x 1 x 1 cm. on back of the head. Swelling on left lower arm and had one abrasion. He was forwarded to Orthopaedic Registrar and to Neuro Surgery Department for further examination. According to Doctor those injuries were possible by hard and blunt substance.

In cross, the witness stated that in history given by the patient Bhadriprasad he has stated that injuries were caused by stick. The patient was without Police Yadi. He was asked about the other swelling injury of Bhadriprasad. The Doctor further stated in his examination in cross that patient Parvatiben stated that she

had received injuries by a pipe. A suggestion was denied by the Doctor that complaint by the patient about pain was imaginary. The Doctor further stated that Parvatiben also stated before him that the injuries were caused by pipe. Doctor admitted that injuries received by Parvatiben were possible by a fall also.

11. P.W.8 Dr.Devendra Rewabhai Patel examined at Exh. 37 stated that on 22nd December, 1983 he was serving as Registrar, Neuro Surgery Department of V.S. Hospital. On that day at about 9.15 A.M one Jatashankar Asharam was brought before him. He examined the patient. The patient was fully conscious. He had four injuries; (1) C.L.W on left parietal region of the size 5 x 1 x 1/2 cm.; (2) one abrasion of the size of 1 cm. on right temporal region, (3) an injury on left hand of the size of 1 x 6 cm. and (4) on right thigh marks of tooth bite. According to the witness on X-ray no fracture was found and the injuries were simple. According to witness, the injuries were possible by pipe or stick.

In cross-examination, he stated that he could not say whether after discharge on 23rd December, the patient was re-admitted in the hospital on 29th.

12. P.W.9 Parvatiben, examined at Exh. 38 is an eye witness. She stated in her deposition that on 22nd December 1983 the incident occurred when Dinesh, son of Shankar, had been to water closet. The witness deposed that thereafter Shankar had been to pour water in the closet. At that time accused No. 3 inquired from Shankar as to why he poured water on the wall. Shankar replied that he had thrown water in the closet and not on the wall. At that time accused No. 1 came out with pipe and accused No. 2 also came out of his house with pipe. Therefore, according to witness she and her husband Pancham both came out. Jatashankar stated to Pancham that on his ("Pancham"s") account always quarrel took place and accused No. 1 Jatashankar inflicted one pipe blow on the head of Pancham. Pancham fell down on the ground. Thereafter, Jatashankar inflicted two more blows of pipe on the face of Pancham. Kailash uttered that "finish him" and he also gave 2 - 3 pipe blows on the leg of Pancham. Shankar intervened and he received pipe blow on his left hand. Thereafter, Kailash inflicted a pipe blow to Shankar, which was landed on the forehead of Shankar. According to witness, she caught hold of the legs of Jatashankar and gave a tooth bite on the legs of Jatashankar. Wife of Jatashankar started throwing stones at that time and wife of Kailash i.e. Rajkumari started beating her with washing club, which blows were given to her on her back and on her legs. Thereafter, she snatched washing club from the hands of accused No. 4 and inflicted 3 to 4 blows of washing club to Jatashankar and two blows to Kailash. Thereafter, accused ran away from the scene of offence and in company of Fojdar and Shivcharan she brought Pancham to Vadilal Sarabhai Hospital in rickshaw. Pancham died in the hospital in the morning. At scene of offence, blood was poured. Police had recorded her statement. At the time of incident, persons were gathered and amongst them Fojdar and Shivcharan were there. Muddamal Article 8 was shown to her as she identified the said article to be clothes worn by Pancham at the time of the incident.

In her cross-examination she stated that she knew Shivcharan for 18 to 20 years because Shivcharan was serving in Electricity Company. Owner of the Chawl was one Harinarayan Balmukund. She denied the suggestion that accused No. 1 and accused No. 2 and other persons had filed a complaint against Pancham and others. She stated that water tap was closed and cut off before 2 - 3 months and an investigation by police was carried on. She admitted that a case filed by accused No. 1 and accused No. 2 against Harinarayan, Shankar and Pancham was then pending. She also admitted that the said case was in respect of cutting of water facility. She further stated that when Shankar and Gita were exchanging words, she and her husband were coming out of their house from road side. The exchange of words between Shankar and Gita lasted for five minutes near the water closet. She could not say whether other persons came there. According to witness when they came out of their room, Jatashakar and Kailash were standing out with pipes. Shankar was also present. There was exchange of words on road. When she and her husband reached near the road, there was quarrel going on between Shankar, Gita, Patiya, Jatashankar and Kailash. Other persons also were gathered there including Shivcharan and Fojdar. Till she and her husband reached at the road, none was injured. When they reached at the road, on seeing her husband Pancham, Jatashankar uttered that on account of Pancham only all the quarrels were taking place. She denied that Jatashankar had not told those words. She stated that first injury was caused to Pancham and, thereafter, to Shankar. She denied that accused No. 2 stated that "finish him". She denied the suggestion that at that time, there were sticks with her husband Pancham and Harinarayan and Shankar had a pipe with him. She stated that when she caught hold of the legs of Jatashankar, Shankar had received injuries. She denied the suggestion that she did not state before police that she caught hold of the legs of Jatashankar. She denied the suggestion that she did not state before the police that she snatched washing club from accused No. 4 and inflicted injuries to Jatashankar and Kailash by washing club. She stated that Shankar was present there and he attempted to save but he did not inflict any injury to anyone. When she caught hold of the legs of Jatashankar, nobody inflicted any blows upon Jatashankar. While Jatashankar was beating her husband, she caught hold legs of Jatashankar. She stated that at that time nobody attempted to snatch pipe or any weapon from Jatashankar or Kailash. Nobody else, except her, gave blows by washing club to Jatashankar and Kailash. Many persons were present at that time. According to her she left washing club at the scene of offence and accused run away. Shivcharan and Fojdar tried to arrest and apprehend the accused but they run away. Her husband was profusely bleeding. She alongwith Fojdar and Shivchanran took her husband to hospital. Police had inquired from her. She could not say whether police recorded her statement. Clothes of Shivcharan or Fojdar were not stained with blood. She denied the suggestion that on inquiry by the Doctor at the hospital in history of her injuries she stated that she had received injuries by pipe. She admitted previous litigation but denied the fact that the dispute which started near the water closet was ended when they came out of their house. She stated that when they came out, Shankar and Gita were

quarreling. She denied that about three days prior to the day of incident, water tap was cut off and, therefore, her husband and Harinarayan, with sticks and Shankar with pipe, all had been to the house of Kailash. She denied that all the there persons abused Kailash. She denied the fact that all of them came on road and Jatashankar inquired that why had they been quarrelling. She denied the suggestion that therefore, her husband gave a stick blow on the leg of Jatashankar. She denied the fact that Shankar gave a pipe blow on the head of Jatashankar. She denied the fact that Kailash intervened to save Jatashankar and, therefore, Harinarayan, inflicted one stick blow on left hand of Kailash. She denied the fact that Fojdar and other persons attempted to catch hold of Jatashankar and Fojdar gave a tooth bite on right leg of Jatashankar. She denied the suggestion that at that time Harinarayan, inflicted one blow by stick on shoulder of Jatashankar. She denied the suggestion that at that time Pancham aimed one blow by stick on Kailash. She denied the suggestion that at that time Harinarayan also aimed one stick blow on Kailash. She denied the suggestion that, therefore, Kailash snatched pipe from Shankar and Jatashankar snatched a stick from Harinarayan. She denied the suggestion that Jatashankar and Kailash apprehended danger of their life and they defended themselves. She further stated that she inflicted blows by washing club on the head of Kailash, which were hit on his forehead. She further stated that she inflicted 3 - 4 blows by washing club to Jatashankar before she gave a tooth bite to him. She denied the suggestion that at the time of the incident Shivcharan was not present.

13. P.W.10 Shivcharan Tejupal resided in Kadri's Chawl, situated near Balmukund Chawl, is also an independent eye witness. On 22nd December, 1983 according to witness he was standing in his balcony as his house which was situated on the first floor. He noticed that Shankar and his wife and Jatashankar and his wife had been quarrelling with each other and came on road. Jatashankar had a pipe in his hand and his wife was holding bricks. House of Pancham had two doors, one was abutting to the Chawal while the other on the road. Pancham and his wife came out of their house from the road side door. Kailash also came out of his house from the door opening on the road. He had a pipe with him. Pancham inquired why they were speaking abuses in the morning. Jatashankar replied that only because of him (Pancham) quarrel took place. Jatashankar inflicted one blow of pipe on the head of Pancham and Pancham had fallen down. Kailash uttered "finish him". Jatashankar, thereafter, inflicted two more blows of pipe on the face of Pancham and Kailash inflicted two blows by pipe on right leg of Pancham. Shankar tried to save Pancham and Jatashankar inflicted pipe blow on left hand of Shankar while Kailash inflicted a blow by pipe on right side of the head of Shankar. Wife of Pancham had caught hold of the legs of Jatashakar and was giving tooth bites. Wife of Kailash had a washing club in her hand. She inflicted blows by washing club upon wife of Shankar and, thereafter, to wife of Pancham. Wife of Pancham released legs of Jatashankar and snatched washing club and inflicted 3 to 4 blows to Jatashankar by washing club; one blow on head, second on back and, thereafter, the blows were inflicted by her on legs of

Jatashankar. She also inflicted one blow by washing club on the head of Kailash. Crowd was gathered and, therefore, accused started running. Witness stated that he was on the corner of the balcony and from there he came down and reached at the scene of offence and took Pancham to the Hospital in company of Fojdar and wife of Pancham, and he was admitted in Hospital. At the scene of offence the earth was blood stained. Police had recorded his statement.

In his examination in cross, the witness stated that the dispute about water was going on for about 2 to 4 months. Harinarayan, owner of Balmukund Chawl, was staying adjoining his house. He came to know about the dispute in respect of water through Harinarayan. He stated that he knew Shankar and Jatashankar for about 15 to 20 years and also to Pancham. He denied that he had thick relationship with Pancham and Shankar. He denied the allegation that on account of instigation by Harinarayan, there was quarrel in Balmukund Chawl. Witness stated that other persons were also noticing the incident like him. One Anand was also watching the quarrel. He admitted that to come down from his house, he was not required to go to the balcony. He admitted that unless he came out of the house and reached to the road, quarrel could not be seen by him. He denied the suggestion that at the time of the incident he was going for his job from his house. He admitted that he stated before the police that on that day at about 7.30 A.M. he was ready to go for his job and was standing in the balcony. He stated that when he came down from gallery, dispute was going on. There were 2 - 4 other persons and one of them was Fojdar Katvaru. When he came in Balcony, on road Shankar and his wife and Jatashankar and his wife were quarreling and at that time it was restricted up to exchange of words. The exchange of words between Shankar and Jatashankar lasted for about five minutes. Both were abusing each other and during that period persons residing in neighbourhood came there. During this exchange of words, both of them were excited. He denied the suggestion that after the exchange of abuses between Jatashankar and Shankar, Jatashankar brought a pipe from his house. While this verbal exchange was continuing, wife of Jatashankar did not pelt any bricks. When Pancham was injured and had fallen down, pelting of bricks was started. From a distance of 5 spaces one brick was hit in the back of Patiya. Bricks were pelted when Pancham was being hit. Nobody was injured before Pancham and his wife reached at the scene of the offence. When Pancham came at the scene of offence, he inquired that why they were quarreling and Jatashankar stated that on account of Pancham only the quarrel had taken place. Right after Pancham, Kailash and his wife came. After coming of Kailash, there was no talk between Pancham and Kailash. He stated that he could not think of going at the scene of offence and to intervene in the dispute during the whole incident. He denied the suggestion that when Pancham came he had a stick with him and Harinarayan also had a stick with him when he visited the scene of offence. He further stated that wife of Pancham caught hold of leg of Jatashankar and at that time beating was started. When he came down, accused had run away and many persons were gathered to whom he did not know. When he went to the Hospital, his

clothes were not blood stained nor the clothes of Fojdar got blood stained. He caught hold of Pancham from center of his body. No blood was smeared on his hand while Pancham was bleeding from his head, mouth and legs. Shankar was injured after wife of Pancham caught hold of Jatashankar. At that time Shankar received 2 blows of pipe. Police recorded his statement at about 10.30 to 11.00. He denied the suggestion that he did not state before the Police that wife of Pancham caught hold of legs of Jatashankar and was giving tooth bites and, thereafter, she snatched washing club from wife of Kailash and inflicted blows to Jatashankar and Kailash. He denied the suggestion that he deposed about the incident on account of relationship with Pancham and Harinarayan. Some contradictions in respect of Police statement were asked to him, which he denied. He denied the suggestion that he was not present at the scene of offence and did not witness the incident.

14. P.W.11 (Exh.40) Fojdar Katvaru is also an eye witness. He was a resident of Balmukund Chawl. According to him in the Chawl, there was only one water tap and one water closet and on account of this dispute was going on between accused No. 1 and accused No. 2 and deceased Pancham and Chapter cases were filed against each other. On 22nd December, 1983 Dinesh, son of Shankar Bhadriprasad, had been to water closet and, thereafter, Shanker was pouring water. Accused No. 1 and accused No. 3 were standing there and stated to Shankar that why was he pouring water on wall. At that spot between them there was exchange of hot words and abuses. Therefore, accused No. 1 came out with pipe and went to the road. In the meantime Pancham and his wife Parvati both also came out from their road side door. Accused No. 2 and his wife accused No. 4 have also come out of their house and Shankar as well as his wife also came out. Witness stated that he also went to the road and witnessed that as soon as Pancham reached there, Jatashankar addressing Pancham stated that on account of Pancham only quarrel had usually taken place and with that, Jatashankar inflicted a blow of pipe on the head of Pancham. Pancham had fallen down and, thereafter, Jatashankar inflicted two blows of pipe on the face of Pancham. Kailash also inflicted blows of pipe on the legs of Pancham. Thereafter, Parvati caught hold of the legs of Jatashankar and gave tooth bite and wife of Kailash started beating Parvati with washing club. So Parvati stood up and snatched washing club from the wife of Kailash. With that washing club, Parvati gave blows to Jatashankar on the head and on the leg and to Kailash as well. Gita, wife of Jatashankar, pelted stones. Shankar tried to intervene and at that time he received injuries by pipe on the hands of Jatashankar. Shankar tried to save Pancham and Kailash wielded pipe at that time, but the blow was landed on the head of Shankar. Kailash uttered that "finish Pancham" and thereafter, he started beating Pancham. Floor was sprinkled with blood at the scene of offence and, thereafter, Pancham was shifted to V.S. Hospital by Parvati, Shivcharan and by this witness. He identified the accused in the court.

In examination in cross, he stated that it was not true that a case was going on against him for beating Jatashankar and Kailash. He stated his ignorance as to

whether there were bleeding injuries to accused No. 1 and accused No. 2, but according to witness, Jatashankar had received blows by washing club on head and legs. Jatashankar had worn Lungi and had wrapped a handkerchief on head. Kailash was in Khakhi pant. Kailash had received injury on head. He did not know if any other injuries were received by him. He denied the suggestion that Municipality had cut off the water supply before 2 - 3 days of the incident and on that account, accused No. 1 and accused No. 2 filed case against himself, Pancham and Harinarayan. He denied that to record his statement in that criminal case, he was called by the police at Khanpur Police Station. He did not know about any such application and no reply was recorded in this respect. When quarrel took place about water on the day of incident, he was in his house. Water closet was situated 7 to 8 feet away from his house. He denied the suggestion that his house had only one door to come out. When quarrel took place near water closet, Shankar, his wife and Jatashankar and his wife were present. Kailash was standing at the door of his house and Jatashankar had a pipe in his hand. Kailash was standing near door of his house. At that time he had no pipe in his hand. The actual quarrel did not take place near water closet nor the dispute ended near water closet. The quarrel was continuing till all of them reached near the road. The distance between water closet and the scene of offence according to witness was about 50 to 60 ft. and in between, there were houses of other persons. On the road, Pancham as well as Shankar were also present and Kailash also came there. On the road initially there was exchange of words between Shankar and Jatashankar and on seeing Pancham, Jatashankar stated that the quarrel usually took place on account of Pancham. There was exchange of abuses for two to three minutes there. Kailash also came there but Kailash did not say anything. He denied the suggestion that Jatashankar had already inflicted a pipe blow on Pancham before Kailash reached at the scene of offence. According to witness, he had been out on road before Pancham received injuries and he had followed Kailash. He denied the suggestion that Parvatiben and Patiyaben came to the spot after Pancham had fallen down on the ground, but he stated that Parvatiben and Patiyaben both were present when he reached at the scene of offence. At the scene of offence, except one Narayan residing in his Chawl, he did not notice any one. He had no talk with Pancham nor with Shankar. He denied the suggestion that Pancham had been to road with stick. He denied the suggestion that first Kailash come out of his house and, thereafter, Shankar followed him with pipe. He denied the suggestion that Harinarayan also was present at the scene of offence with stick. When Jatashankar inflicted blows to Pancham, Parvati caught hold of the legs of Jatashankar. The witness stated that he did not do anything and on account of fear he did not go near those persons and witnessed the incident at the distance of 5 to 6 ft. He also noticed that Parvatiben gave a tooth bite on leg of Jatashankar and, thereafter, Rajkumari inflicted 2 - 3 blows of washing club to Parvati and Parvati stood up and snatched washing club. Jatashankar did not receive any injury after Parvati gave tooth bite to Jatashankar. At that time whether blood was oozing from the wounds of Kailash and Jatashankar, he could not say. He had seen Jatashankar on the

hospital on the same day. He did not know anything about any injuries to Kailash. According to witness his statement was recored by police in Hospital and before that he had seen Jatashankar in Hospital. According to witness he has stated before the Police that how Jatashankar was injured and who had beaten him. Suggestions were asked to this witness about the incident which he denied. About the tooth bite given by Parvatiben etc., he denied that he did not state before the police about tooth bite and giving blows by Parvati by washing club to Jatashankar and Kailash. Witness further stated that in quarrel stones were pelted and stone pelting was done by accused No. 3. He did not know whether stones were hit to any one. He denied the suggestion that on account of Harinarayan and Pancham, he did not state truth before the court and fabricated the story about washing club. Again suggestions were put to him about the incident in the manner the witness stated but he denied all those suggestions. He was specifically asked that in fact Pancham and Shankar both started beating Jatashankar and Kailash and Shankar inflicted a blow by pipe on the head of Kailash, the witness denied this suggestion also. He was asked that Harinarayan inflicted a stick blow to Kailash, but the witness denied the suggestion. The witness also denied the suggestion that he himself and other persons tried to catch hold of Jatashankar and in that process the witness gave a tooth bite to Jatashankar. The witness denied the suggestion that Harinarayan had inflicted a stick blow to Jatashankar. He denied the suggestion that Pancham also gave a stick blow to Kailash. He denied the suggestion that at that time Kailash snatched a pipe form Shankar and Jatashankar snatched stick from Harinarayan and both of them attempted to save their lives and in that process Pancham etc. were injured. He denied the suggestion that wives of Pancham and Shankar were not present.

15. P.W.12 (Exh.41) Patiya Shankar is an eye witness and she stated that on the day of the incident at about 7.30 A.M. her son had been to water closet and while her husband was pouring water, Gitaben-wife of Jatashankar came out of her house giving abuses and stating that why Shankar was pouring water on the wall. Jatashankar also came out of the house giving abuses. He had a pipe with him. Shankar replied that he did not sprinkle water on wall but he was pouring water in the closet. Thereafter, Kailash come with pipe and Rajkumari came with washing club. Pancham and Parvati came out of their house from road side door and Jatashankar seeing Pancham stated that quarrels always took place on account of Pancham and saying that he inflicted one blow of pipe on the head of Pancham. Pancham had fallen down on the road and, thereafter, Jatashankar inflicted two blows of pipe on the face of Pancham. Kailash uttered that "finish him" and he also inflicted 2 to 3 pipe blows on the leg of Pancham. Shankar tried to intervene but Jatashankar inflicted a pipe blow on the hands of Shankar and Kailash inflicted a pipe blow on the head of Shankar. Rajkumari inflicted 2 to 3 blows by washing club to witness and to Parvati. Parvati was trying to remove Jatashankar from her husband having caught the legs of Jatashankar but Jatashankar was not moving from there and, therefore, Parvati gave tooth bites

on the leg of Jatashankar. Gitaben was pelting stones. Fojdar also was present at the time of incident and Shivcharan was witnessing the incident from his house. He also came down. Accused thereafter ran away and Pancham was shifted to Hospital. She herself and Shankar also went to the Hospital in other rickshaw and received treatment. Police recorded her statement. She stated that in the incident Jatashankar and Kailash both were injured, because Parvati had inflicted blows by a washing club upon Jatashankar and Kailash. She had snatched the said washing club from Rajkumari.

In her examination in cross, she stated that she was also a party in a Chapter case, which was initiated by Kailash and Jatashankar. She stated that Jatashankar reached at the road with pipe and Kailash reached at the road with pipe. When she noticed Kailash, she was on the road. At the road Shankar talked to Jatashankar and Shankar told that he had not poured water on the wall and that ensued in exchange of abuses to each other. Shankar stated that when he had not poured water on the wall, why was he being abused by Jatashankar. On seeing Pancham, Jatashankar inflicted blows on Pancham. Shankar stated to Jatashankar why Pancham was being beaten. Jatashankar and Kailash both had started beating Pancham and when Shankar tried to intervene he was also beaten. About 20 to 25 other persons were watching this quarrel but none intervened. She denied the suggestion that on seeing Pancham, Jatashankar stated that on account of Pancham only quarrel took place and that Kailash stated to "finish Pancham". There was pelting of stone and she was hit by a stone on left hand. Before that Shankar had received injuries. She denied the suggestion that on receiving the injuries Shankar had run away to his house. She stated that neither Shankar nor she herself did nothing to save themselves. Accused had run away thereafter. No attempt was made to apprehend the accused. Witness stated that she noticed injuries on accused No. 1 and accused No. 2 after Pancham had fallen down on ground. Both were bleeding from head. When Parvati caught hold of the legs of Jatashankar, Pancham had fallen down and at that time Shankar received injuries. After Parvati caught hold of Jatashankar neither Pancham nor Shankar received any injuries. She had noticed tooth bite given by Parvati to Jatashankar. Jatashankar was wearing a Lungi. Jatashankar had attempted to get himself released from the hold of Parvati. Parvati had received stone injuries. Her statement was recorded after she received treatment in the Hospital. She denied the suggestion that Doctor had asked about the history and she stated that she had received injuries by pipe. She admitted that a criminal case was pending against them for the injuries to accused. She stated that she did state before the police about how accused No. 1 and accused No. 2 got injuries in the incident. In para 8 of her deposition she was asked about the defence theory that how Jatashankar and Kailash snatched pipe and stick from Pancham and Shankar and defended themselves but the witness denied all those suggestions and denied the fact that to defend themselves, accused No. 1 and accused No. 2 snatched weapons and in this process Pancham was injured.

16. P.W.13 (Exh.42) Pratapsinh Dajivbhai is a witness, who was the then Police Station Officer of Karanj Police Station and had recorded Wordhies received from Vadilal Hospital. Those Wordhies are produced on record vide Exh. 43 and Exh. 44. P.W.14 Bupatsinh Gavabhai (Exh.45) is the witness who was serving as P.S.I. in the investigation squad from the day of the incident and on receiving Wordhies from the Hospital he rushed at V.S. Hospital and recorded the complaint of Shankar. He came to know that Pancham had died while he was preparing to record the complaint. He draw the inquest panchanama and according to him he forwarded the complaint to Police station for registration and at that time P.I. also had reached at the Hospital. P.W.15 (Exh.46) Somnath Gopalbhai Brahmbhatt is Investigating Officer and was the then P.I. of Karanj Police Station and according to him in pursuance of Wardhi received from V.S. Hospital, he visited V.S. Hosptial and came to know that P.S.I. Shri Mori had already recorded the complaint of Shankar Bhadriprasad and had forwarded the same to Police Station. He directed to draw inquest and he then drew the panchanama of scene of offence. He came to know that Pancham had expired. He continued with the investigation in the matter and filed charge-sheet. According to him, in his investigation he came to know that in the incident accused No. 1 and accused 2 both were injured. P.W.16 (Exh.48) Dr. Mukeshkumar Lallubhai Patel was serving as a Lecturer in Pathology Department, Municipal Medical College, Ahmedabad on 22nd December, 1983. At 2.0 P.M. on 22nd December, 1983 he received body of Pancham Harkhubhai for post mortem. He conducted post mortem during 2.50 P.M. to 3.15 P.M. He narrated the external injuries on the body of Pancham Harkhubhai and internal injuries as well. According to his opinion, the cause of death was due to shock following extensive intra cranial haemorrhage by fracture of skull bones and haemorrhage due to fracture of right tibia bone, right metacarpal bone, mandible bone and ribs. Doctor opined that all these injuries were possible by hard and blunt substance like pipe and all injures were anti-mortem and were on vital part of the body. He produced on record post mortem note at Exh. 49.

17. This is all the evidence of the prosecution.

18. In Criminal Appeal No. 956 of 1985 and in Criminal Appeal No. 1010 of 1985 for appellants, in Criminal Appeal No. 1238 of 1985 for respondents and for opponents in both the Criminal Revision Applications learned senior counsel Mr. A.D. Shah submitted that the judgment and order in Criminal Appeal No. 956 of 1985 and Criminal Appeal No. 1010 of 1985 requires to be set aside as the same is the result of erroneous appreciation of evidence. It is submitted that going through the record it clearly emerges that there was a dispute and enmity between parties. Complainant Shankar Bhadriprasad, deceased Pancham and Harinarayan owner of the Chawl was called by the Police on 21st December 1983. There was no premeditation in the whole incident and even according to prosecution case, there was exchange of abuses between witnesses and accused. It is also an established fact that accused No. 1 and accused No. 2 sustained injuries in the said incident but prosecution witnesses came forward with the

explanation that after assault by accused No. 1 and by accused No. 2 on Pancham, Parvatiben wife of Pancham, gave teeth bite to accused No. 1 and she also gave blows by washing club to Jatashankar and Kailash. Learned Counsel was emphasizing that when it is established that accused had injuries on their body, it becomes the duty of the prosecution to explain those injuries, but these injuries were not properly explained by the prosecution witnesses before the police and, thereafter, an attempt was made by the prosecution witnesses to explain those injuries. According to learned senior counsel this resulted in improvement of the prosecution case and created doubt. It was submitted that theory of inflicting blows by Parvati and teeth bite was not stated by any of the witness before the police and even the complainant Shankar Bhadriprasad did not say anything about this in his deposition before the court or in his complaint. Learned senior counsel submitted that according to complainant, Pancham might have received injuries due to pelting of stones and use of washing club, as accused No. 3 and accused No. 4 were pelting stones and caused injuries by washing club respectively. It is submitted that however, as regards the injuries caused to accused No. 1 and accused No. 2, the same were noticed by complainant when accused No. 3 and accused No. 4 were pelting stones and using washing club. According to learned senior counsel, accused No. 4 was having washing club in her hand, accused No. 1 and accused No. 2 had also sustained injuries and, therefore, the explanation given by the witnesses about the injuries cast doubt on the prosecution case and particularly it clearly emerges that the prosecution witnesses suppressed the genesis of the incident. The complainant gave history before the Doctor in the Hospital about the assault, while according to his deposition he received injuries by pipe. In respect of the deposition of Parvatiben (P.W.9), learned Counsel submitted that the witness stated that she caught hold of the leg of accused No. 1 and gave a bite and, thereafter, accused No. 4 came with washing club and inflicted blows on her back and leg and, thereafter, the witness snatched washing club and gave blows to accused No. 1 and accused No. 2. It is, according to learned Counsel, noteworthy that about her injuries she has given the history before the Medical Officer that she was assaulted by pipe. She also could not properly explain the injuries received by accused No. 1 and accused No. 2. The story of explaining injuries is an improvement as the same was not stated before the police and, therefore, no reliance can be placed upon such witness in respect of occurrence of incident.

19. In respect of witness Shivcharan Tejupal (P.W.10), learned senior counsel submitted that according to this witness after accused No. 1 and accused No. 2 inflicted injuries on deceased Pancham and complainant Shankar, Parvati caused injuries to accused No. 1 and accused No. 2. It is nobody's case through prosecution witnesses that when Parvati caused injuries, the accused No. 1 and accused No. 2 any of the accused inflicted injuries either on the person of deceased Pancham or complainant Shankar and, therefore, this witness has also deposed in complete contradiction with what is deposed by the other witnesses.

It is further submitted that this witness also omitted to state before the Police the role played by Parvati in inflicting injuries to accused No. 1 and accused No. 2 and, therefore, also this witness cannot be believed. The witness also omitted to state before Police that accused No. 3 was pelting stones and Patiyawife of Shankar had sustained injuries on that count.

20. In respect of Fojdar Katvaru (P.W.11) learned senior counsel submitted that this witness also omitted the role played by Parvati, wife of Pancham, before Police. In contradiction to deposition of other witnesses, this witness stated that pelting of stones was simultaneously taking place when others were causing injuries. According to this witness, when Parvatiben caused injuries to accused No. 1 with washing club, accused No. 1 inflicted pipe blows on complainant Shankar, which is quite contrary to the evidence of other witnesses. Learned senior counsel submitted that according to the defence case, this witness was responsible for tooth bite to accused No. 1 and involved in cross case and also had relationship with the deceased and complainant, being an interested witness, he posed himself to be an eye witness. At least, it is submitted that, the witness suppressed the genesis of the incident and is not credit worthy.

21. In respect of Patiya Shankar (P.W.12), learned senior counsel submitted that according to the evidence of this witness in cross-examination, she stated that when accused No. 1 and accused No. 2 were inflicting blows on deceased Pancham, pelting of stones was going on and she had sustained injuries due to pelting of stones and this is in contradiction to the prosecution case. She also admitted that accused No. 1 and accused No. 2 had bleeding injuries, which she noticed when Pancham had fallen down. She also stated that after Parvatiben caught hold of leg of accused No. 1, accused No. 1 and accused No. 2 had not caused any injury to deceased Pancham and Shankar and according to prosecution case, Parvati caught hold of leg of accused No. 1 as soon as Pancham had fallen down on the ground. Thus, according to learned senior counsel, the prosecution witness invented new story each time in contradiction of each other and none of the witness is reliable. She had also given a history of pipe blows before Doctor and she omitted to state before the police role played by Parvatiben in causing injuries to accused No. 1 and accused No. 2. Learned senior counsel submitted that, therefore, considering the evidence, as stated above, there is consistent improvement by witnesses as to the role played by Parvati, wife of Pancham, to explain the injuries on the person of the accused. While complainant and injured eye witnesses offered different versions to explain injuries of accused No. 1 and accused No. 2, nothing is stated by complainant in complaint i.e. F.I.R. at Exh. 53 in this respect. The prosecution witnesses had grudge and grievance against accused No. 1 and accused No. 2 because on the previous day accused No. 1 and accused No. 2 had approached the Police against the prosecution witnesses and prosecution witnesses were called by the police and, therefore, the prosecution witnesses have tried to suppress the origin of the incident and concocted the version to explain injuries on person of accused No. 1 and accused No. 2. The prosecution witnesses are undoubtedly interested

witnesses, belonging to opposite group and they have tried to minimise the role played by them and attempt is made to improve their statements consistently. No corroboration is found to these witnesses from independent source and, therefore, none of the witness is trustworthy. There were, according to prosecution case, many persons gathered but none of the neighbourhood could be examined by the prosecution to prove its case by such independent evidence. It is submitted that, therefore, the version given by the prosecution witnesses is not reliable and trustworthy and the version given by them is otherwise unnatural and improbable. From the evidence, as it emerges from what is narrated by the witnesses, it become clear that it was the prosecution witnesses, who tried to assault accused No. 1 and accused No. 2 and in the process of saving themselves they snatched pipe and sticks from prosecution witnesses and defended themselves. This theory, according to learned senior counsel, is more probable than the prosecution case and the accused have stated this in their further statements as well as each witness has been put to this suggestion. However, the learned trial Judge erred in arriving at the conclusion that accused were not entitled to right of private defence in view of it being a case of sudden fight. Learned trial Judge erred to keep in mind the background of the incident wherein the accused No. 1 and accused No. 2 had to resort to law for Chapter Cases and there were previous incidents as well and that was the cause for the prosecution witnesses to pick up the quarrel in which accused defended themselves, but this fact could not be properly appreciated by the trial court in its proper perspective. The observations of learned trial Judge in respect of accused No. 1 that She being of a giant personality and with a stick in his hand, he might look and work like fire arm is totally irrelevant. The observation further made by the learned trial Judge in this respect is against the evidence recorded during the trial and this is merely a personal opinion of the trial court, which ought not to have been taken into consideration while arriving at the conclusion in such trial. It is submitted that the theory of explaining the injuries on accused No. 1 and accused No. 2, that too afterwards, is highly improbable because Parvatiben would not have given a teeth bite on the thigh of accused No. 1. The story, according to the learned senior counsel, is improbable because this is the prosecution case that initially a quarrel and hot exchange took place near water closet and the second part of the incident took place on road at about 50 ft. away. This theory itself is improbable and the version given by each witness in this regard is utterly improbable and hence does not stand to reason. It is submitted that the prosecution has not been able to prove its case beyond reasonable doubt on account of infirmities in the prosecution case and the contradictions in the evidence of eye witnesses. Even if it is established that the prosecution has proved its case, then accused are entitled to right of private defence and are entitled to acquittal and according to learned senior counsel, as aforesaid, what is stated by the accused in their defence is more probable, than the story narrated by the prosecution witnesses. The case of the prosecution, according to learned senior counsel, is full of contradictions and doubtful. The trial court erred in appreciating the evidence and on account of fallacy of

reasoning, reached to wrong conclusion. It is, therefore, submitted that both the appeals against the judgment and order of conviction i.e. appeal being Criminal Appeal No. 956 of 1985 and Criminal Appeal No. 1010 of 1985 are required to be allowed and conviction awarded to each of the four accused is required to be set aside and the appeal filed by the State against acquittal i.e. Criminal Appeal No. 1238 of 1985 is required to be dismissed alongwith two Criminal Revision Applications. In respect of right of private defence, learned Counsel placed reliance on decision of the Apex Court in the matter of Krishnan Vs. State of Tamil Nadu, as well as upon the decision of the Apex Court in the matter of Subramani and Others Vs. State of Tamil Nadu,

22. As against the above contentions, the learned APP Mr. K.C. Shah as appellant In Criminal Appeal No. 1238 of 1985 and as respondents in Criminal Appeal No. 956 of 1985 and Criminal Appeal No. 1010 of 1985, alongwith Criminal Revision Applications, vehemently submitted that the appreciation of evidence, as undertaken by the trial court, in respect of incident is proper and ocular evidence, which is trustworthy, is required to be accepted. It is submitted that by raising the contention by the accused of right of private defence, it has been established that the incident has occurred and then it is to be decided how and in what manner the incident took place. It is submitted by learned APP Mr. Shah that the evidence of prosecution is not the evidence of interested witnesses only but independent witnesses i.e. Fojdar Katvaru and Shivcharan Tejupal, both are examined. It is submitted that injured eye witnesses produced before the court reliable account of the incident except minor variations here and there. It is further submitted that if this evidence is considered in toto and as a whole, the intention of the accused to commit murder of deceased Pancham clearly emerges from the origin of the dispute and the previous enmity. It is submitted that to that extent, appreciation of evidence by the trial court and conviction of the accused separately for their respective individual act is improper. Advancing the grounds taken by the State in appeal against the acquittal of the accused i.e. Criminal Appeal No. 1238 of 1985, it has been vehemently submitted that all the accused are liable for the murder of Pancham u/s 34 of the Indian Penal Code. It is further submitted that in all cases, it is not necessary that prosecution must explain the injury found on the person of the accused. It is not a universal law that in all cases when prosecution fails to explain injuries on the person of the accused, automatic inference is drawn that prosecution witnesses suppresses the genesis of the incident. Learned APP further submitted that where the evidence of prosecution witnesses is found truthful, credit worthy, reliable and unambiguous, the question of explaining injuries on the person of accused would not assume any significance. Learned APP for his contentions relied upon a decision of the Apex Court in the matter of Surendra Paswan v. State of Jharkhand as reported in AIR 2004 SC 742. He further submitted that the accused are not entitled to right of private defence as has been set up by the accused and trial court rightly rejected their plea. Learned APP submitted that as the evidence of eye witnesses is appreciated in its real perspective, it emerges

that accused picked up the quarrel and they might have received superficial injuries thereafter. It is submitted that when the case of prosecution is established by cogent and credible evidence as to the manner of the incident, there is no reason to believe that the incident took place in some different manner entitling the accused to claim right of private defence. Learned APP, therefore, urged that both the appeals filed by the accused against their conviction be dismissed and appeal filed by the State against the acquittal of the accused by the trial court for the offence punishable u/s 302 to read with Section 34 be allowed.

23. Learned advocate Mr. M.Y. Malik on behalf of learned advocate Mr. Y.U. Malik in both the Criminal Revision Applications adopted the submissions made by learned APP, as aforesaid.

24. We have gone through the evidence of prosecution, as aforesaid and we have re-appreciated the circumstances of the case. The prosecution examined 5 eye witnesses to prove its case. Out of this five witnesses, three witnesses i.e. P.W.1 Shankar Bhadriprasad -complainant, P.W.9 - Parvatiben Panchambhai _ wife of the deceased and P.W.12 Patiyaben - wife of P.W.1 appears to be injured witnesses and they were examined by P.W.7 Dr. Manan Sureshbhai Shukla soon after the incident. In addition to these three witnesses, two independent witnesses are also examined by the prosecution and those two witnesses are P.W.10 Shivcharan Tejupal and P.W.11 Fojdar Katvaru. Admittedly, Shivcharan Tejupal is not even the resident of the said Balmukund Chawl but resided in Kadri's Chawl situated almost adjoining to Balmukund Chawl while Fojdar Katvaru (P.W.11) is an eye witness in dependent and not related to parties but resided in Balmukund Chawl. Necessary it is to note here that against both these witnesses i.e. P.W.10 and P.W.11 suggestions are made that on account of groupism and because both the witnesses were friends and associated with complainant as well as the owner of Balmukund Chawl, both of them offered themselves for false deposition. This is also the allegation of the defence that in groupism of Balmukund Chawl, owner of the Chawl Harinarayan had a group to which the complainant and parties were supporters, while the accused were the opposing party. It is necessary also to note here that this defence placed on record by the accused finds no support from any of the circumstances of the case and all the witnesses have categorically denied those suggestions.

25. In continuance of the above situation emerging from the evidence recorded, it is necessary to look at the background in which the present incident occurred. This is necessary because from the appreciation of these circumstances, it could be certainly made out that how the balance of probability tilts either in favour of the accused or in favour of the prosecution witnesses. Prosecution has placed a map of incident alongwith topography of Balmukund Chawl at Exh. 28 and this map is prepared by P.W.5. Trivendra Mulshankar Dave, then City Survey Officer. Location of the houses situated can also be seen from the said map alongwith water closet and scene of offence is situated at a distance on road. It is an

admitted fact, surfaced from the prosecution evidence, that there was only one water tap for the water facilities of the tenants of Balmukund chawl and a dispute was going on in respect of water facility. It has also come in evidence that water facilities were cut off and for that criminal prosecutions were pending. There was only one tap for fetching water for all the tenants. It is also an admitted fact that on account of this, quarrels were taking place amongst the tenants and cross Chapter cases (i.e. proceedings u/s 107 of Code of Criminal Procedure) had been filed between the parties and families. In the above said background the present incident occurred.

26. In this background, it is necessary to consider the origin of dispute for which much has been said that prosecution witnesses have suppressed the origin of the incident. The quarrel had arisen, as has been made clear by the evidence, when prosecution witness Shankar Bhadriprasad poured water in water closet. Now considering the situation emerging from the Map at Exh. 28, the water closet in question is adjoining to the wall of house of accused No. 1. While prosecution witness Shankar, who was pouring water in water closet, it was taken by the accused No. 1 and his wife that Shankar Bhadriprasad had thrown the water on the wall of their house, which ensued in altercations. It is the allegation of defence that quarrel ended then and there and the incident, which occurred at the road, was separate. After careful consideration of the evidence led by the prosecution, it becomes crystal clear that altercations, which took place near the wall, continued and was shifted to the scene of offence at the public road, which is hardly at a distance of 50 ft. It is necessary that in appreciating the evidence, the circumstances must be taken into consideration together, that at the same moment accused No. 1 comes out of his house, accused No. 2 also comes out of his house with pipe and sticks and reaches near the scene of offence and, thereafter, deceased Pancham reached at the scene of offence and on seeing Pancham accused No. 1 got excited, saying that all quarrels took place because of Pancham only and, thereafter, blows followed. This is the only probability, which we unhesitatingly gathered from the evidence on record. Even before Pancham reached at the scene of offence, the situation was tense and there was exchange of abuses between the rival groups and this was noticed by prosecution witness Fojdar and he deposed this situation categorically and, therefore, there is no reason to doubt the origin of the dispute.

27. Now in the above background when we appreciate the evidence of prosecution witnesses, the core of prosecution case is that on noticing Pancham at the scene of offence, accused No. 1 got agitated and uttering that cause of quarrel was Pancham, inflicted a blow of pipe on the head of Pancham on account of which Pancham fell down on ground. Accused No. 1, thereafter, inflicted two more blows on the face of Pancham and accused No. 2 Kailash inflicted two blows by stick on the leg of Pancham. This prosecution case disclosed by the eye witnesses is further corroborated by medical evidence of P.W. 16 Dr. Mukeshkumar Lallubhai Patel, examined at Exh. 48. He noted external injuries on the body of deceased Pancham and corresponding internal

injuries and he deposed before the Court in this respect. Thus, prosecution case is established beyond reasonable doubt as there is nothing on record to disbelieve the version of P.W.16- Dr. Mukeshkumar Lallubhai Patel. In fact, homicidal death of deceased Pancham is not in dispute. The crux of the prosecution case about inflicting injuries to Pancham as well as to Shankar as noted by us above, has been stated by each of the five witnesses and there is no reason to doubt this version of the prosecution witnesses. There is, in fact, no material contradiction in the prosecution case as to brand these witnesses to be unreliable so far as this aspect is concerned. More so, two independent witnesses P.W.10 Shivcharan Tejupal and P.W.11 Fojdar Katvaru, both have supported the prosecution case in respect of injuries received by Pancham and Shankar Bhadriprasad. The presence of P.W.11-Fojdar, residing in the same Chawl, cannot be ruled out nor the version deposed by Shivcharan that he noticed the incident from the balcony of his house can be discarded. There is nowhere found from the record that the house of Shivcharan was so located as it was impossible for him to notice and witness the incident from his gallery. Likewise, the injuries received by P.W.12 - Patiya and P.W.9 - Parvatiben by the hands of accused No. 3 and accused No. 4 are proved beyond doubt. Washing club is a handy weapon and probability undoubtedly tilts in favour of prosecution witnesses that while Parvati was saving her husband, accused No. 3 inflicted washing club blows on her back and accused No. 4 pelted stones. At least we do not find that contradiction in prosecution case, which would go to suggest that the core of prosecution case is affected. There may be variation amongst the witnesses in the sequence of occurring of the incident but, that itself is not a fact to discard weighty evidence of five witnesses, out of which three are injured and injuries are proved by P.W.7 Dr. Manan Sureshbhai Shukla. Those injuries are not though serious, but this fact certainly lends credence to the say of the prosecution witnesses.

28. What is objected by the defence and appellants-accused is that the witnesses erred in deposing properly the sequence of the incident. More particularly, drawing the attention of this Court to the evidence of P.W.1 - Shankar Bhadriprasad at paragraph No. 11, it has been submitted that the complainant was ambiguous as to how accused No. 1 and accused No. 2 received the injuries and that according to complainant, when accused No. 4 was having washing club in her hand, accused No. 1 and accused No. 2 had already sustained injuries, which goes to suggest that witnesses are not deposing the true story before the court. About witness Parvatiben Pancham, it is stated that she made improvements in her deposition that she caught hold leg of accused No. 1 and gave teeth bites and gave blows to accused No. 1 and accused No. 2. Likewise, Shivcharan Tejupal also made improvements in his deposition and stated before the court, which he omitted to state before Police. According to further submissions, the witnesses are not creditworthy because they gave some history before the Doctor about their injuries by pipe and sticks and deposed something else in the court. These are all reasons submitted on behalf of the appellants for coming to the conclusion that all the five eye witnesses were not reliable.

29. While appreciating the evidence of witnesses in criminal trials, it must be borne in mind that court must apply the standard of common prudent person and find out the truth that may be inter-mingled with exaggeration, embroideries and variations. The set up and the circumstances in which the crime is committed, the quality of the evidence, nature and temperament of the witness, the level of understanding and power of perception of individual witness and probability in ordinary course of nature about the occurring of the incident must be judged by the standard of reality of life because crimes are real events in the life and not mere imagination. There cannot be a cast iron case of prosecution in all respects. It is for courts to analyse, sift and assess the evidence on record, and come to the finding. Dispassionate judicial scrutiny is sine quo non for appreciation of evidence in criminal trials and witnesses cannot be viewed by an air of total suspicion on account of alleged contradiction. When a ring of truth is found in the version of witnesses, so called infirmities, contradictions, variations, embellishments must not be given importance. It must be found out that whether substratum of the evidence of the prosecution witnesses are so tainted as would not stand the test of credibility in ordinary course of nature. By human nature itself, there are bound to be some discrepancies in prosecution witnesses between narration of incident when they speak on details. If those discrepancies are not of material dimension, such discrepancies must be ignored and it would be doing injustice to truthful witness, to jettison their evidence on minor discrepancies, which they might commit on account of limitations of human nature. Parrot like versions are disfavoured by the Courts and, therefore, small discrepancies, not going to the core of the prosecution case, are natural and on the contrary lends credence to the individual witness. Mathematical niceties and account of each second in its sequence are never expected in criminal trials. Therefore, there may be some discrepancy in describing the incident as pointed out by learned senior counsel for the appellants-accused, but on appreciation of evidence of these witnesses and on careful, dispassionate judicial scrutiny, we have found ring of truth in the version of prosecution witnesses to the extent of injuries received by deceased Pancham at the hands of accused No. 1 and accused No. 2 and for the injuries received by Parvatiben and Patiyaben at the hands of accused No. 3 and accused No. 4. Merely because something is not stated before police by the witness, itself would not be a ground to throw the prosecution over board. Contradiction or improvement is that if both versions are taken together, one of them would only stand and that too, such contradictions must be affecting the core of prosecution case. Omissions when comes under that category, can be said to be such contradiction fatal to the prosecution case. Merely explaining injuries on accused by the witness before Court and omitted to state before police are not contradictions affecting the core of the prosecution case.

30. As aforesaid, injuries of three witnesses may be minor and simple, but even then they are injured witnesses. The law in respect of appreciation of the evidence of injured witnesses is clear to the extent that due weightage must be

given to injured witnesses because their presence at the scene of offence is established. Therefore, until and unless circumstances warrant and are so grave as to discard the evidence of injured witnesses, injured eye witnesses carries more weight in appreciation of evidence. These principles are enunciated by the Division Bench of this Court in the matter of State of Gujarat v. Bharwad Jakshibhai Nagribhai and Ors. as reported in 1989 (2) GLH 263. We do not intend to reiterate those principles which is now established law. We do not find any serious flaw or infirmity to discard overwhelming and weighty evidence of these injured eye witnesses. Simplicity with which these witnesses have deposed before the court and natural manner, place these witnesses above board. It must be borne in mind that trial court is best Judge to conclude the credibility of the witness. That is so because the trial court has opportunity to watch the witness and his or her performance in court. We do not find any reason that how learned trial Judge erred in placing reliance on these witnesses. Irrespective of expressing opinion as to physique of accused No. 1, that if he holds a stick in his hands nobody would dare to come near him, it has no effect on over all appreciation of evidence. Likewise, even though the learned trial Judge has observed that a woman might have tendency to give tooth bites, it will not affect adversely the prosecution case. There is nothing improbable when a woman attempts to save her husband from attack and tooth bite is given by her to assailant. It cannot be said that this fact is so improbable that witnesses are not creditworthy.

31. True that the witnesses have attempted to improve their version to limited extent to explain the injuries received by accused No. 1 and accused No. 2. It is submitted by learned senior counsel for the appellants-accused that the prosecution witnesses have suppressed the genesis of the incident by not explaining the injuries, which accused No. 1 and accused No. 2 received in the same incident. Main thrust of submission was that the prosecution witnesses omitted to state before police about the injuries received by accused No. 1 and accused No. 2 in the same incident. It must be observed in this respect that prosecution case is to be considered in its totality. As aforesaid, first grain has to be separated and segregated from chaff and then all these issues can be considered. Even if assuming that prosecution witnesses omitted at all to state explanation as to the injuries received by accused No. 1 and accused No. 2 then even this fact would not dislodge the weighty and credible evidence of injured eye witnesses about the occurrence of the incident if the witnesses are found credible, trustworthy, reliable, cogent and consistent. Explaining injuries to the accused in the same incident loses significance and if prosecution witnesses even have by way of an improvement attempted to explain those injuries in their evidence before the court, it could not be said that by that improvement itself the version of prosecution witnesses about the occurrence of the incident becomes tainted and doubtful. It all depends upon the facts of each case. When the evidence of witnesses, as we have appreciated and discussed as above, leaves no room for doubt as to the origin and occurrence of the incident,

explaining of the injuries of the accused by the witnesses even in shape of improvement would not assume any significance in establishing the prosecution case. If the injuries are superficial and minor, it is not universal rule that injuries caused in each case is required to be explained by prosecution witnesses. In the matter of Takhaji Hiraji Vs. Thakore Kubersing Chamansing and Others, three Hon"ble Judges Bench of the Apex Court after referring to decisions of three Hon"ble Judges of the Apex Court observed as under in paragraph 17:

17. The first question which arises for consideration is what is the effect of non-explanation of injuries sustained by the accused persons. In *Rajendra Singh v. State of Bihar*, *Ram Sunder Yadav v. State of Bihar* and *Vijayee Singh v. State of U.P.* all three - Judge Bench decisions, the view taken consistently is that it cannot be held as a matter of law or invariably a rule that whenever accused sustained an injury in the same occurrence, the prosecution is obliged to explain the injury and on the failure of the prosecution to do so the prosecution case should be disbelieved. Before non-explanation of the injuries on the persons of the accused persons by the prosecution witnesses may affect the prosecution case, the Court has to be satisfied of the existence of two conditions: (i) that the injury on the person of the accused was of a serious nature; and (ii) that such injuries must have been caused at the time of the occurrence in question. Non-explanation of injuries assumes greater significance when the evidence consists of interested or partisan witnesses or where the defence gives a version which competes in probability with that of the prosecution. Where the evidence is clear, cogent and creditworthy and where the Court can distinguish the truth from falsehood the mere fact that the injuries on the side of the accused persons are not explained by the prosecution cannot by itself be a sole basis to reject the testimony of the prosecution witnesses and consequently the whole of the prosecution case.

32. Thus, when we have found the evidence of prosecution witnesses clear, cogent and creditworthy and when we have found ring of truth in the version of prosecution witnesses, non-explanation of injuries on accused No. 1 and accused No. 2 or even attempt on the part of prosecution witnesses to explain the injuries by way of improvement cannot and must not dislodge the weighty evidence of injured eye witnesses in respect of occurrence of incident. The submission, therefore, that firstly witnesses made improvements and secondly did not explain the injuries, finds no favour in view of above law laid down by the Apex Court. Therefore, the background of incident and the origin has been carefully scrutinised by us. We have also assessed the evidence of eye witnesses in this respect as aforesaid.

33. The next objection for acceptance of the prosecution evidence is made about the history given by the witnesses to Doctor i.e. P.W.7 Dr. Manan Sureshbhai Shukla. It is submitted that though witnesses Patiyaben and Parvatiben, both alleged to have received injuries by washing club and stones, before the Doctor they stated that they received injuries by pipe and stick. Our attention was

drawn to the evidence of Dr. Manan Sureshbhai Shukla and in his cross-examination in para 7 witness stated that Parvatiben stated before him that she had received injuries by pipe, likewise in para 8 he further stated that Patiyaben had also given history of injuries by pipe. Submission is this that, this contradiction goes to the root and creditworthiness of the witnesses. Now assessing the submission, it must be borne in mind that history is gathered by Medical Officer from patient for two purposes; one to treat him according to history, and secondly, to find out whether the patient was a Medico Legal case. The history is inquired for this purpose only. Even if in the process of inquiring the history, P.W.7 gathered the information that Patiyaben and Parvatiben both received injuries with pipe, it bears no importance at all on prosecution case. This is so because on appreciating the evidence of Patiyaben and Parvatiben, their consistent evidence is found credit worthy as to how both of them received injuries. Secondly, both the witnesses were confronted with this fact by the accused in their cross-examination and both the witnesses denied that they had given any such history. More important aspect is in Certificates issued by the Doctor in respect of Parvatiben and Patiya, no where he recorded the history given by both of them. Therefore, there is no reason to doubt the evidence of prosecution on this account that they had given some different history before Doctor and, therefore, their evidence was not reliable and whatever they stated was not true. This fact itself is not sufficient to dislodge for reasons stated above the weighty evidence of injured eye witnesses.

34. The next serious objection, which was raised by learned senior counsel for the appellants-accused, is in respect of the omissions made by the complainant Shankar Bhadriprasad in his complaint as well as in his deposition. It is submitted that no where in his complaint, complainant Shankar Bhadriprasad stated about the injuries received by the accused nor he has stated in the complaint that accused No. 3 and accused No. 4 pelted stones by which Parvatiben and Patiyaben both received injuries. It is also submitted that P.W.1 omitted to state this fact in his deposition as well and, therefore, the evidence of witnesses amongst them is in contradiction and none of the witnesses is truthful and gave the real account of the incident. The complainant also made improvements to the extent that accused No. 3 pelted stones. To appreciate the contention, we have discussed at length the evidence of all the witnesses in detail and as per the established norms of appreciation of evidence and when we have found ring of truth in the version of witnesses, say of injured eye witnesses cannot lightly be brushed aside unless circumstances warrant inevitable conclusion to disbelieve the version of such witnesses. Omissions here and there and contradictions not affecting the core of prosecution case cannot impair the prosecution version to which almost all the witnesses adhered to. Necessary here to refer to a decision of the Apex Court in the matter of State of Maharashtra Vs. Siraz Ahmed Nisar Ahmed and Others, wherein in paragraphs 33 and 34 the Apex Court observed as under:

33. The Designated Court has rejected the evidence of both the witnesses on

consideration of other aspect that PW 55 had stated that no search of the flat was made by the police party. While appreciating the evidence, the court must keep in mind that the power of observation differs from person to person. What one may notice, other may not. An object or thing happened might reflect in the image of a person's mind, whereas it may go unnoticed on the part of another. It has not come out in the evidence or in the cross-examination that PW 55 was also a party to the search of the flat along with PW 50 after the arms were produced by the accused who had made a categorical statement that he had made a search of Block No. 402 before the completion of the panchnama. 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 scrutinise 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 witnesses and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matter not touching the core of matter in issue, hypertechnical approach by taking sentence 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.

34. On an overall reading of the statements made by PW 50 and PW 55, we do not find that the evidence of recovery of 38 revolver and the live cartridges from the accused Gurnamsingh was in any way shaken by some of the infirmities pointed out by the Designated Court. In fact, in our opinion, those discrepancies in the statements of PW 50 and PW 55 were not infirmities, but those statements are consistent with the general tenor of evidence.

35. Thus, we do not find that omission to mention by the complainant in the complaint certain averments would make any dent in prosecution case.

36. Next contention which was in respect of right of self defence in favour of the accused. True that the provisions of Section 97 to Section 103 of the Indian Penal Code, entitles an accused right to defend his own body and property, movable or immovable in case of danger to his person or property. Certain restrictions are also carved out in those provisions. One cannot ignore principle also that right of private defence is available to the accused and continued till the danger to his person and property continued. The principle of law cannot be disputed that the burden of proving right of private defence is upon the accused but it is not that heavy which prosecution shoulders. The burden to prove the right of defence rests on preponderance of probability and that accused is not required to plead specifically the said defence. Even from the prosecution evidence and circumstances, right of private defence of the accused if emerging, can be appreciated and dealt with by the Court. These are the principles noted down by the Apex Court in two decisions submitted by learned senior counsel for the

appellants-accused, as referred to above.

37. However, what is necessary to consider the right of private defence is the circumstance very essential that property or person of the accused was in danger. In other words, to be entitled for the benefit of right of private defence, it must be clearly borne out from the circumstances of the case that it was the complainant party, which was the aggressor and to avoid further damage, the accused were compelled to use force. As aforesaid, it is not obligatory upon accused to categorically point out but right of private defence can also be made out from the prosecution evidence itself. This goes to suggest that it must be clearly established by the circumstances that there was a clear intention of the complainant party to cause injury to body of the accused or to cause damage to the property of the accused. In absence of such intention, the question of right of private defence would not arise at all. When we have re-appreciated the evidence, as discussed above, by trustworthy and reliable evidence, we have found that it was accused No. 1, on seeing Pancham, started inflicting blows and caused injuries and, therefore, we have gone through the previous background of the case and circumstances preceding the incident, which in our view clearly indicates absence of complainant party to cause harm to any of the accused. The quarrel initiated from petty matter that complainant poured water in water closet and that water closet, being attached to the wall of the house of accused No. 1, accused No. 3 wife of accused No. 1 took that complainant poured water on the wall of their house and then they prepared to fight with complainant. It is noteworthy that at that juncture deceased Pancham was not present and he came out only thereafter out of his house from the door abutting to road and in the meantime, the other accused had gathered on the road, which was hardly 50 ft. away from the water closet. What is narrated by the eye witnesses clearly indicates that none of the witnesses even attempted to cause any harm to any of the accused nor any of the prosecution witnesses had any weapon with them. It is clearly established through cogent evidence of eye witnesses the occurrence of incident which discards all probabilities of defence version that Pancham and Shankar Bhadriprasad attempted to cause harm to the accused and in the defence they snatched weapons from them and defended themselves. Had the incident occurred as narrated by the accused, it would have occurred near water closet, where Jatashankar and Shankar and Kailash were present. Along with clear version of prosecution, it must be noted that in respect of injuries received by the accused, a Cross Case was registered against the complainant party and this fact emerges from the evidence. We are told at the Bar that the said Cross Case resulted in acquittal of complainant party and no acquittal appeal came to be filed by the State against that judgment nor any Criminal Revision Application was filed against any of the accused. The acquittal of the complainant party in the said Cross Criminal Case attained finality. This is relevant circumstance and in the matter of Triloki Nath and Others Vs. State of U.P., the Apex Court took into consideration admitted facts between the parties in that case that the complainant and others who were accused in the counter F.I.R. had been

acquitted and the judgment of acquittal had been affirmed upto the Apex Court. Taking this fact with other facts into consideration, the Apex Court rejected the plea of self defence raised by the accused in the said case. When evidence is found cogent and clear, when intention of the complainant party is absent to cause any harm to the accused and when in all probability the incident would not have occurred in a manner as has been set forth by the accused, the plea raised by the accused-appellants about self defence must be rejected and trial court rightly did so.

38. After considering both the appeals filed by the appellants-accused against their conviction, now we have reached to the stage to decide as to what offence each of the accused is liable and for what sentence. Though in both the appeals against conviction it has been vehemently urged that none of the accused is liable to be convicted and sentenced for any of the offences, but for the reasons stated above, we are of the opinion that submission of appellants-accused cannot be acceded to. Then the question which arises whether any of the accused or all of them are liable to be punished u/s 302 to read with Section 34 of the Indian Penal Code and this issue is raised mostly through Criminal Appeal No. 1238 of 1985 filed by the State against acquittal of the accused for a charge u/s 302 to read with Section 34 of the Indian Penal Code. We have gone through the evidence to assess the whole incident to find out as to whether there was any common intention on the part of the accused in causing injuries to prosecution witnesses as to saddle the accused with liability u/s 302 to read with Section 34 of the Indian Penal Code. When we reviewed again the incident, as disclosed by the witnesses, we have found that on account of basic human need i.e. water there was dispute amongst tenants of Balmukund Chawl. It is also revealed that only water tap available for the facility of water was cut off and tenants were fetching water from somewhere else. There were two groups and each had filed some cases against the other. Though the root of the quarrel is very petty but it relates to the basic human facility which resulted in much higher tense circumstances in the Chawl. The incident which occurred at water closet proved to be igniting fire amongst the tenants. What we find from the evidence of P.W.10 Shivcharan Tejupal and from evidence of P.W.11 Fojdar Katvaru is that all these persons - accused party as well as prosecution party had exchange of altercations and exchange of abuses amongst themselves. In these tense circumstances, when accused No. 1 saw Pancham, he was infused and uttering that Pancham was the root of all difficulties, started beating him and the incident, thereafter, occurred, as stated above. Both the parties were tense when they gathered accidentally at the road and what appears to us is that it was a sudden fight erupted between the parties having background, as aforesaid, without premeditation on the part of the accused. Shifting of the incident from water closet to 50 ft. away itself is suggestive of absence of premeditation and instant infusion in the mind of the persons present. The crux of the fight was of very basic necessity of human being i.e. water and sanitation facilities. When person is deprived of basic necessities, he is likely to go wild and criminal

instinct, which is otherwise restricted, is raised to any level. Friendship, relationship and brotherhood even amongst the neighbours and comity amongst them is temporarily forgotten and an animal instinct takes over. This is what has occurred in the present case and hence though the death of Pancham is homicidal but it would not be culpable homicide amounting to murder. The present case, therefore, falls within exception 4 of Section 300 of the Indian Penal Code and where it is provided that culpable homicide is not murder if it is committed without premeditation, in sudden fight, in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. Though all the five ingredients engrafted in the exception must be present to fall a particular case within that exception. We have found that in no case the incident can be branded to be a premeditated murder. Advent of Pancham on the road caused sudden fight and that too in the heat of passion on account of deprivation of basic human necessity. Though accused No. 1 inflicted three blows, but from that itself it could not be said that accused had acted in cruel manner or took undue advantage of the situation. This is more so, when admittedly accused No. 1 also was injured in the said fight. We are, therefore, in complete agreement with the trial court for reasons stated above that the present incident is covered by exception 4 of Section 300 of the Indian Penal Code. The injury caused to deceased Pancham was according to medical opinion, sufficient in ordinary course of nature to cause death. Who inflicts the injury possesses such intention is the general presumption and, therefore, the act would fall otherwise in clause thirdly of Section 300 of the Indian Penal Code, but on account of the circumstance of sudden fight taking place between the parties, the incident will fall within exception four of Section 300 of the Indian Penal Code.

39. When sudden fight occurs without any premeditation, sharing of common intention between the accused as envisaged by Section 34 of the Indian Penal Code is always absent. When there is no premeditation, there is no common intention amongst the accused to do any criminal act.

40. In view of above, therefore, the trial court rightly assessed individual act attributed to each of the accused and convicted each of the accused accordingly. The conclusion of the trial court to convict the accused for each individual act is not subject to any interference. We have carefully gone through the reasons assigned by the trial court for not convicting the accused for the offence punishable u/s 302 to read with Section 34 of the Indian Penal Code, as assigned by the trial court in paras 29,30 and 31 of the judgment and order impugned in these appeals. This is plausible and possible view from the circumstances of the case and it could not be said that the trial court was palpably wrong in coming to the conclusion that the accused were not guilty for offence punishable u/s 302 to read with Section 34 of the Indian Penal Code but each accused was liable for individual act. In the facts and circumstances, when we have appreciated the evidence fully, it appears to us that there cannot be second view possible than the view taken by the trial court. For these reasons, we do not find any merit in

the appeal filed by the State against the acquittal of accused for the charge u/s 302 to read with Section 34 of the Indian Penal Code. Criminal Appeal No. 1238 of 1985 cannot, therefore, succeed.

41. Criminal Revision Application No. 541 of 1985 and Criminal Revision Application No. 542 of 1985 are preferred by original complainant Shankar Bhadriprasad, one is for enhancement of the sentences awarded to the accused and the other is against the acquittal of the accused for the offences punishable under 302 to read with Section 34 of the Indian Penal Code. In fact, both the Revision Applications become infructuous as soon as the appeal against the acquittal is preferred by the State and considered by the Court. However, it may also be noted that in Criminal Revision Applications filed by private parties by virtue of Sub-section (3) of Section 401 of the Code of Criminal Procedure, this Court is not empowered to convert a finding of acquittal into one of conviction. At the most, Court may, in proper cases, direct re-trial, that too in rarest of cases where miscarriage of justice has occasioned. However, this scope of power, as envisaged u/s 401 of the Code of Criminal Procedure, is covered by the powers of the appellate court in an appeal against acquittal filed by the State u/s 378 of the Code of Criminal Procedure. We have extensively examined the merits of the appeal filed by the State against the acquittal of the accused, which covered the scope of revisions and we do not find any merit in appeal against the acquittal. In view of this, Criminal Revision Application No. 541 of 1985 and Criminal Revision Application No. 542 of 1985 could not succeed.

42. In view of above, we come to the conclusion that Criminal Appeal No. 1010 of 1985 preferred by accused Nos. 3 and 4 and deceased accused No. 1 Jatashanker Asharam Pande and continued by Dharmendra Jatashanker Pande stands dismissed.

43. Criminal Appeal No. 1238 of 1985 preferred by the State against the acquittal of all the accused, for the reasons stated above, stands dismissed.

44. Criminal Appeal No. 956 of 1985 filed by accused No. 2 Kailash Raguvir is partly allowed. Accused No. 2 is found guilty of an offence punishable u/s 325 of Indian Penal Code and he was sentenced to suffer rigorous imprisonment of three years and to pay a fine of Rs. 500/- in default to undergo simple imprisonment of six months. He is also held guilty for the offence punishable u/s 323 of Indian Penal Code and was sentenced to suffer rigorous imprisonment for six months and substantive sentences to run concurrently. While maintaining conviction awarded to accused No. 2 for the offences punishable under Sections 325 and 323 of the Indian Penal Code, we are inclined to reduce the quantum of sentence on both the counts. Learned senior counsel for the appellants-accused has submitted that the incident in question occurred on 22nd December, 1983, almost 24 years from today. Appellant-accused No. 2 Kailash Raguvir was serving with A.E.C. at the time of incident and at present he is retired from service from June 2006 on his completing 58 years of superannuation age. He has two sons and a daughter. Out of them, one son is married and other two are still to be

married. In grave circumstances accused No. 2 suffered an attack of cerebral haemorrhage in recent past and he was hospitalised from 24th January, 2007 to 6th February, 2007 and, thereafter, also accused No. 2 Kailash Raguvir continues to be under treatment for cerebral haemorrhage. On these grounds, it is urged that so far as appellant-accused No. 2 is concerned, the sentence awarded be reduced to reasonable extent.

45. True that 24 years have elapsed in finalising these appeals but this itself i.e. long lapse of time may not be a ground for reduction of sentence. Principle of penology demands that courts should impose punishment commensurating the crime so that the courts reflect public abhorrence of the crime. A balance has to be struck between the right of the criminal and the right of the victim. Ordinarily, it is universally accepted principle that it is the nature and gravity of the crime and not criminal which are germane for consideration of appropriate punishment in criminal trial.

46. When we appreciated the circumstances of this case, we found that the incident originated from very petty skirmishes of pouring water. It must not be overlooked that the relations between the parties grew tense because of deprivation of the basic necessity of human life i.e. water. A human may go wild if it is felt by him that his basic need is withheld or refused. This is a natural consequence expected from average human being. True that in a quarrel, a precious human life is extincted. The allegations proved against the appellant-accused No. 2 Kailash Raguvir are the offences under Sections 325 and 323 of the Indian Penal Code for causing grievous hurt and fracture to the deceased and for simple hurt. Considering the crime and the circumstances surrounding the commission of the crime, alongwith other circumstances, as have been mentioned on behalf of appellant -accused No. 2 and also thereafter taking into consideration the 24 years of time, in our humble view proper grounds are made out for the reduction of sentence. Now the question is what should be the proper sentence to be awarded to appellant-accused No. 2. For the reasons recoded above in this respect and taking into consideration the nature and gravity of the crime, in our humble view the ends of justice would meet if sentence already undergone by appellant-accused No. 2 is awarded to him for both the counts with increase in amount of fine. From the record from the conviction slip it is found that appellant-accused No. 2 was in jail from 22nd December, 1983 to 19th January, 1984 i.e. exactly for 29 days and, therefore, so far as Criminal Appeal No. 956 of 1985 is concerned, we pass following order:

Appeal is partly allowed. While maintaining conviction of appellant-accused No. 2 for the offence punishable u/s 325 of the Indian Penal Code, we direct him to suffer rigorous imprisonment of 29 days (already undergone) and to pay a fine of Rs. 5000/- in default to undergo simple imprisonment for 15 days, instead of to undergo imprisonment of 3 years and to pay a fine of Rs. 500/-, in default to undergo simple imprisonment of six months, as awarded by the trial court. While maintaining conviction for the offence punishable u/s 323 of the Indian Penal

Code, we direct him to suffer rigorous imprisonment for 29 days (already undergone), instead of to suffer rigorous imprisonment of 6 months, as awarded by the trial court. Both the sentences of imprisonment as awarded by this Court for the conviction u/s 325 of the Indian Penal Code and conviction u/s 323 of the Indian Penal Code shall run concurrently. The amount of fine, if deposited by the appellant-accused No. 2, be paid to the widow of deceased Pancham. Thus, Criminal Appeal No. 956 of 1985 is allowed to the above extent of reduction of sentence of imprisonment to appellant-accused No. 2. Bail bond executed by the appellant-accused No. 2 shall stand cancelled.

47. Both the Criminal Revision Application No. 541 of 1985 and Criminal Revision Application No. 542 of 1985 stand dismissed. Rule is discharged in both the matters.

No interference, except the reduction of sentence awarded to appellant-accused No. 2 in Criminal Appeal No. 956 of 1985, is made in the judgment and order impugned in all these appeals and Revisions.