
(1998) 05 GUJ CK 0025
In the Gujarat High Court

Kantilal Kalidasbhai and Another

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 05-05-1998

Acts Referred:

Bombay Police Act, 1951 — Section 11, 19
Bombay State Reserve Police Force Act, 1951 — Section 10, 2(a), 2(b), 2(h), 5
Criminal Procedure Code, 1973 (CrPC) — Section 154, 162, 172, 172(2), 309
Evidence Act, 1872 — Section 106, 121, 122, 123, 124
Penal Code, 1860 (IPC) — Section 300, 302, 34

Citation : (1998) 3 GLR 2147

Hon'ble Judges : S.M. Soni, J;J.R. Vora, J

Bench : Division Bench

Judgement

S.M. Soni, J.—The appellants (appellant No. 1 now deceased) have filed this appeal challenging the judgment and order of conviction dated 27th June, 1991 passed by the learned Addl. Sessions Judge, Ahmedabad, Court No. 16 holding the appellants guilty of offence punishable u/s 302 read with Section 34 of the Indian Penal Code and sentenced each of them to suffer rigorous imprisonment for life and fine of Rs. 500/- in default rigorous imprisonment for two months.

2. Precisely stated, the case of the prosecution is as under:

The appellants ("accused" for short) had deposited Rs. 75,000/- with the deceased. The said amount was not paid back despite repeated demands. In the evening of 9th July, 1990, accused had gone to the residence of the deceased Hareshbhai and pressed the demand for the said amount. As the deceased denied to pay the same, accused No. 1 caught hold of the deceased and accused No. 2 inflicted knife blows. Deceased fell down. By that time, some of the neighbours of the deceased rushed to the scene of offence. One of them telephoned to Navrangpura Police Station where one Rupaji Ramaji, PW 10, was on duty as Police Station Officer received the telephone and he recorded the same in the register. The said message is that "Kantilal Kalidas Vaidya and his son have jointly seriously assaulted Harishbhai Amin residing in Pallavi

Apartment Tower and had run away. So send police immediately". After sending telephonic message to the Police Station, the neighbours removed the injured to the V.S. Hospital where he was declared dead. In response to the said telephonic message, the police reached the place of incident where they were informed that the injured is removed to the hospital. The Inspector reached to the hospital. Police Inspector recorded the complaint of one Gautambhai in V.S. Hospital and sent the same to the Police Station for registering the offence. On offence being registered, necessary investigation was carried and completed. On completion of the investigation, both the accused were charge-sheeted before the Court of Metropolitan Magistrate, 9th Court, Ahmedabad, who in his turn committed the case against the accused in the Court of Sessions at Ahmedabad.

3. The learned Additional Sessions Judge, Court No. 16, framed charge against the accused. The accused pleaded not guilty and claimed to be tried. The learned Addl. Sessions Judge after completion of trial and after hearing the learned Advocates held both the accused guilty of offence charged and imposed the sentence referred above. The said judgment and order is assailed in this appeal.

4. It is stated at the Bar by the learned Advocate for the appellants that appellant No. 1 has died on 1st May 1997 in village Manakpur, District Mehsana. He has produced the original death certificate which is taken on record. In view of this fact, appeal so far as it relates to appellant No. 1 Kantilal Kalidas Vaidya has stood abated. Appeal now, therefore, survives of accused No. 2 Ramchandra @ Manoj Kantilal, who hereinafter will be referred to as "the accused".

5. After the above part of the judgment was dictated we felt it necessary that witness Mr. Manubhai PW 9 should be recalled by the Court and witness Mr. Dahyabhai Jijibhai Patel, Investigating Officer, PW 10 as a consequent witness if necessary. We, therefore, by order recalled witness Mr. Manubhai PW 9 and Mr. D.J. Patel, PW 10, and examined them, further. In our opinion, as we had recalled the said witnesses, they need not be made available for the defence for cross-examination, yet we have afforded an opportunity to the defence Advocate to cross-examine that witness if he so desired. Learned Advocate for the defence has objected to the questions put by us to witness, PW 9. We have, however, overruled the same. The said witnesses are not cross-examined by the defence Advocate. This is how we have now with us the full evidence of PW 9, Mr. Manubhai and PW 10 Mr. D.J. Patel.

6. Learned Counsel Mr. K.J. Shethna for the accused has challenged the conviction on the ground that the prosecution has failed to prove beyond reasonable doubt that it is the accused and accused alone who has inflicted blows and caused injuries on the deceased as a result of which he has died. Mr. Shethna also contended that identity of the accused as an assailant of the deceased is not established beyond reasonable doubt by the prosecution and therefore, the learned trial Judge has erred in accepting the said evidence. Mr. Shethna further contended that the confessional statement proved through the evidence of PW 7 Mohansinh is not admissible in evidence and therefore, reliance

placed thereon is an illegality resulting into injustice to the accused. Learned Counsel Mr. Shethna contended that the confessional part even if to be accepted, then the whole of the confessional statement is required to be accepted and it cannot be dissected so as to use one part for prosecution and reject the other which is favourable to the defence. If confessional statement is required to be accepted and acted upon, it should be acted upon as a whole and if the accused is entitled to any benefit, he must get it. Mr. Shethna further contended that in the very confessional statement, it is made out that when the accused went to demand money, deceased got enraged and tried to assault the accused. Deceased had a knife in his hand and when accused No. 1 tried to snatch away the same, the clothes of accused No. 1 were torn. Deceased was asked to come to the Police Station because of the scuffle and both the accused had gone to the Police Station in a rickshaw. Mr. Shethna, therefore, contended that this part of the statement also ought to have been accepted as part of confessional statement and this may bring the case of the accused in an exception to Section 300 of the Indian Penal Code. This part of statement makes out self-defence and an injury on the person of accused No. 2, which is proved by the prosecution by producing medical certificate Ex. 27 issued by the doctor who had examined accused No. 2, corroborates the said defence. Mr. Shethna, therefore, contended that the appeal should be allowed and/or in the alternative the conviction be altered into some minor one.

7. Learned A.P.P. Mr. Divetia contended that the prosecution has proved beyond reasonable doubt the guilt of the accused from the evidence of PW 9 alone read with the evidence of PW 10 Rupaji Ramaji and PW 11, Investigating Officer. Mr. Divetia contended that there was no reason for PW 10, Rupaji Ramaji to record in his telephonic entry the name of accused No. 1 and as accused No. 2, son of accused No. 1. If PW 9 had not communicated the name, PW 10 cannot have the sixth sense to know the names of the assailants of the deceased. Mr. Divetia contended that denial of PW 9 to have stated the name, but, admits to have given the telephonic message, suggests that PW 9 is telling half-truth and suppressing the other. It can be said that he is telling half-truth. Mr. Divetia further contended that unless PW 7 was in charge of Police Station, any statement made before him cannot be hit by the provisions of Section 25 of the Evidence Act. To substantiate this contention, he relies on a judgment in the case of State of Gujarat Vs. Anirudh singhh and another, . Mr. Divetia further contended that looking to the injury on the person of accused No. 2 and looking to the injuries on the deceased as a result of which he died, this can never be a case of self-defence and even if be so, the accused has exceeded the same disproportionately. Mr. Divetia contended that the appeal should, therefore, be dismissed.

8. We will first deal with the confessional part of the evidence. The prosecution case, which is sought to be placed on record through the evidence of Mohansinh, PW 7 is, that in the evening of 9th July 1990, by about 7.45 p.m., Kantibhai and his son Manoj had gone to his house. This witness PW 7 was viewing TV

programme at that time and his uncle's son Bhupendra Vajesinh Rao was also present there. Both the accused knew him as wife of Manoj, accused No. 2 was treating him as her brother. Both the accused had blood-stained clothes. They asked Bhupendra to come out and then they talked to him while standing outside his house. Bhupendra inquired from them as to what had happened and both the accused told him that they had a scuffle. Therefore, Bhupendra called PW 7 who also then interrogated them. Accused No. 1 Kantilal told him that they had deposited Rs. 75,000/- with one Hareshbhai, who resides at Pallavi Apartment. Therefore, they had gone to demand the same and said Hareshbhai got angry and assaulted them. They also told that Hareshbhai had a knife with him and Kantibhai had tried to snatch away the same. According to them, clothes of Kantibhai were torn by the said knife. He, therefore, advised them to go to the Police Station. Mohansinh, PW 7, therefore, took them to the Police Station in company of his brother Bhupendra where Inspector D.J. Patel, PW 11, was present. These facts were revealed before the Investigating Officer, (I.O. for short) D.J. Patel, PW 11. We may state at the outset that in the whole of the case diary and its copies produced by I.O. at the time of asking for police remand which we have perused, there is no reference of the names of PW 7 and his brother Bhupendra and also that of recording the statement of this witness Mohansinh, PW 7 and his brother Bhupendrasinh Rao. Both these persons are cited as witnesses in the charge-sheet but there is no reference in case diary that they were witnesses, that they have produced the accused before I.O. and their statements were recorded. This witness PW 7 states on oath that it is he who produced the accused before the Investigating Officer, Dahyabhai Jijibhai Patel, PW 11. There is no reference of this fact in the case diary. On the contrary, in case diary it is stated that accused are found during investigation. The prosecution has not examined Bhupendrasinh Rao as a witness. In view of our direction, P.I. was present before This Court and when his attention was drawn to the fact that there is no reference as to recording of the statements of these two witnesses in case diary, the explanation advanced was that as he was under pressure of work on that day, he has forgotten to refer their names in the case diary. This explanation advanced by the P.I., in our opinion, is not acceptable because if the accused were produced by these witnesses the same could not be missed and also that the P.I. would not state in case diary that the accused were found in the course of investigation and then were arrested on drawing arrest panchnama. Names of these witnesses could not be found from the xerox copy of case diary which is found from the record. It appears that the same must have been produced at the relevant time while asking for police remand of the accused. Later on a bunch of papers paging from 1 to 39 are produced before the Court saying that the original case diary which could not be found initially is now found. In this case diary which is said to be the original, some papers are also annexed in front. Those papers appear to be the note prepared by the Investigating Officer. The find of original case diary is a surprise as only few days back a statement was made by the learned A.P.P. on instructions from the Investigating Officer Mr. D.J. Patel who was present in the Court that despite

diligent search and having exhausted all the sources and means case diary is not traceable. However, when it was ordered to recall the witness and on the date of recording of evidence, witness was present and Investigating Officer had also remained present. On this day learned A.P.P. had stated that he had brought with him the original case diary referred above bearing page Nos. 1 to 39 as the same is now traced and allowed him to produce the same on record. We have ourselves compared the xerox copy of the case diary which was already on record with the original now produced. It appears that the original which is now produced is tampered with. It appears that the same is tampered with a view to show that the names of those witnesses, namely, Mohansinh and Bhupendra as one disclosed during investigation on that very night of incident. When a person carries out interpolation deliberately with mala fide intent it is rightly said it leaves the marks to show that wrong is committed. Apparent and glaring wrong by interpolation is committed by the Investigating Officer with a view to make the Court to accept his explanation. He has thus interpolated the case diary to show that the aforesaid two witnesses have produced the accused and their statements were recorded. However, in the xerox copy of the case diary which is found in the original record such interpolated statement is not at all stated there. What is stated is that the accused were found on 30th July, 1990 by about 2-00 to 3-00 a.m. and arrest panchnama was drawn which is produced on record vide Ex. 17. In the arrest panchnama also it is specifically stated that the accused are present before the Investigating Officer. It is not stated that they are produced by someone. This interpolation, in our opinion, is only with a view to misdirect the Court and this amounts to hampering the course of administration of justice and tampering with justice. We, therefore, propose to issue notice of contempt against the Investigating Officer. We will pass hereinafter necessary orders for the same.

9. Reverting back to the subject-matter, witness Mohansinh PW 7 before whom the confessional statement is made is a police constable discharging his duties in Crime Branch. Mr. Shethna, learned defence Counsel relying on the judgment in the case of *Vijaysing Dharamdas Thakar Vs. State of Gujarat*, , contended that the confessional statement as made before the Police Officer is not admissible in evidence in view of the provisions of Section 25 of the Evidence Act. In the case of *Vijaysingh (supra)*, a confessional statement was made before the police patel of a village and it is held that police patel is a police officer within the meaning of Section 25 of the Evidence Act and that confessional statement is not admissible in evidence. Relevant observations relied on by Mr. Shethna of that judgment reads as under:

Mr. Mehta, the learned Addl. Public Prosecutor, has emphasised much on the confessional statement alleged to have been made by the appellant before Bajirao Jadavbhai whose evidence is recorded at Exh. 16. What appears from his evidence is that the appellant met him near the bank of the village-pond with the axe in his hand and informed him ironically that he killed a goat, and then on being asked to be clear, he told that he killed Ramdas Fojiya by giving axe blows.

This witness then advised him not to run away, but to go to the police station and surrender. The appellant then went to the police station, surrendered himself to the police and also gave the complaint. Thus, no doubt a confessional statement was made, but we are not inclined to accept the same and base our conclusion thereon. It may be stated that Bajirao Jadavbhai is the police patel of the village. Wherein a confessional statement made by the accused before the police patel is admissible in evidence is required to be examined. Section 25 of the Evidence Act interdicts against admissibility of the confessional statement made to a police officer. Whether the police patel of a village is a "police officer" within the meaning of the words "police officer" appearing in Section 25 of the Evidence Act, is the point that now arises for consideration. We are of the view that the words "police officer", appearing in Section 25 of the Evidence Act carry the same meaning as they carry in the Police Act, but it can be extended beyond the definition given in the Police Act to cover also those persons who like police officers coming within the definition are much more so interested in obtaining the conviction and they exercise the same powers as that of the police officer of the police station in respect of the investigation. The powers of the police patel are regulated by the Bombay Village Police Act No. VIII of 1967. The police patel of the village has to furnish the written information called for and keep constantly informed as to the state of crimes and all other matters connected with the village police. He can, therefore, be termed as the police officer within the meaning of the words "police officer" appearing in Section 25 of the Evidence Act". Our view is fortified by few binding decisions. As back as in 1892, the question arose before the High Court of Bombay in the case of Queen Empress v. Bhima ILR 17 Bom. 485 wherein discussing relevant provisions it is held that the police patel is a "police officer" within the meaning of Sections 25 and 26 of the Evidence Act, and a confession if made to a police patel is inadmissible in evidence. Thereafter, a similar question arose before This Court in the case of Amarsingh Gija v. State of Gujarat 1980 Cri. LJ (Guj.) 154, wherein a similar view has been taken in words couched as follows:

The words "Police Officer" used in Section 25 of the Evidence Act are to be very widely construed and that a Police Officer would remain a Police Officer whatever may be his other capacity. A Police Patel exercising statutory powers under the provisions of the Bombay Police Act is a Police Officer within the meaning of Section 25 of the Evidence Act.

Then again the question arose before This Court in the case of Sukhabhai alias Sakha Dhamjibhai Chaudhary v. State of Gujarat 1985 GLH 882, wherein also it is held, that the police patel of the village is police officer within the meaning of Section 2 of the Evidence Act and the confession made before him is inadmissible in evidence. Incidentally, while dealing with the questions raised on the case of Sainik Kanaiyalal Kalumal v. State 1962 GLR 739, This Court had the occasion to deal with the point, and it is observed that the police patel of a village is a member of the village police force and therefore, he is a member of the statutory police force by the statute itself. Thus, the law made clear on different occasions

in past unequivocally clarifies that the police patel of a village is covered within the ambit of the word "police officer" appearing in Section 25 of the Evidence Act, and so a confessional statement made to him by the accused is inadmissible in evidence. The confessional statement made by the appellant before Bajirao Jadavbhai being inadmissible in evidence cannot be taken into account. The contentions advanced on behalf of the prosecution, therefore fails. The learned Judge below has erroneously admitted the same in evidence, and further fell into error by making it to the foundation of his conclusions; in fact the evidence of Bajirao Jadavbhai is of no value and help to the prosecution.

Mr. Divetia, learned A.P.P., relying on the judgment in the case of State of Gujarat Vs. Anirudh singhh and another, contended that if the police officer was not invested with the power of investigation, then the statement made before him would not be a statement before a Police Officer as contemplated u/s 25 of the Evidence Act and would be admissible in law. In our opinion, there is a misreading on the part of Mr. Divetia of the judgment of the Supreme Court in the case of Anirudhsing (supra). Relevant portion for our purpose reads as under:

In this behalf, it is relevant to note the provisions of the Bombay State Reserve Police Force Act, 1951 (for short, S.R.P.F. Act). Section 2(a) of the Act defines "active duty" to mean a duty to prevent or investigate offences involving a breach of peace or danger to life or property and to search for and apprehend persons concerned in such offences and who are so desperate and dangerous so as to render their being at large hazardous to the community etc. Section 2(b) defines "Commandant and Assistant Commandant" to mean respectively persons appointed to those offices by the State Government u/s 5. Section 2(h) defines "reserved police officer" to mean any member of State Reserve Police Force established under the Act. Section 5 postulates appointment of Commandant and Assistant Commandant and an Adjutant. It provides that "The State Government may appoint for each group a Commandant who shall be a person eligible to hold the post of a Superintendent and an Assistant Commandant and an Adjutant who shall be persons eligible to hold the post of an Assistant or a Deputy Superintendent". Section 10 enumerates general duties of the personnel of the State Reserve Police Service. It postulates that "Every reserve police officer shall for the purpose of this Act be deemed to be always on duty in the State of Bombay, and any reserve police officer and any member (number) or body of reserve police officers, may, if the State Government or the Inspector-General of Police so directs, be employed on active duty for so long as and wherever the services of the same may be required". Under Sub-section (3), "[A] reserve police officer employed on active duty under Sub-section (1), or when a number or body of reserve police officers are so employed, the officer-in-charge of such number or body, shall be responsible for the efficient performance of that duty and all police officers who, but for the employment of one or more reserve police officers or body of reserve police officers, would be responsible for the performance of that duty, will, to be (the) best of their ability, assist and co-operate with the said reserve police officer or officers-in-charge of a number or

body of reserve police officers. Section 19 of the Act empowers every reserve police officer to be the "police officer" as defined in Bombay Police Act, 1951; the details thereof are not material for the purpose of this case. Section 11 of the Act postulates that reserve police officer shall be deemed to be in charge of a police station. Sub-section (1) envisages that "when employed on active duty at any place under Sub-section (1) of Section 10, the senior reserve police officer of highest rank, not being lower than that of a Naik present, shall be deemed to be an officer-in-charge of a Police Station for the purposes of Chapter IX of the Code of Criminal Procedure, 1898, Act 5 of 1898, which is equivalent to Chapter X of the Criminal Procedure Code. Chapter X deals with "maintenance of public order and tranquillity". The Chapter relating to investigation is Chapter XII of the Criminal Procedure Code starting with Section 154 dealing with laying of the First Information Report etc.

In the case of Anirudhsing (supra), the question was whether an oral confession made before a reserve police constable who was on duty at the place of occurrence would be admissible in law or not. The Hon'ble Supreme Court after considering the provisions of the Bombay State Reserve Police Act, 1951 has held, in the facts of the case, that the police officer before whom the oral confessional statement was made was not a police officer as contemplated u/s 25 of the Evidence Act. There the point was that in view of the provisions of Bombay State Reserve Police Act, 1951, every officer under that Act is not a police officer unless he is on active duty as defined in Section 2(a) of the said Act. Here, in this case PW 7 being a police officer under the Bombay Police Act had powers to investigate as like other police officer. Therefore, PW 7 was a police officer contemplated u/s 25 of the Act. Be that he may not be on duty, a police officer would remain a police officer till he is in employment. A police officer remains a police officer irrespective of the relation with the accused, be it a relation, a friend or an acquaintance as in the instant case.

10. The expression "police officer" is not to be construed in a narrow sense, but in a wide and proper sense. Any confession is required to be without any inducement, threat or promise having reference to the charge against the accused persons. The object of Section 25 of the Evidence Act is to prevent confessional statement from accused persons through any undue influence. If a confessional statement is made to a police officer, the law says that such confession shall be absolutely excluded from the evidence because the person to whom it was made is not to be relied on for proving such a confession and is more susceptible of employing coercion to obtain confession. Thus, confessional statement made by the accused before PW 7, in our opinion, is not admissible in evidence and therefore, it cannot be acted upon. Hence, that statement should be inadmissible as a whole and should be excluded from the evidence. We, therefore, do not rely on the statement made before PW 7. We do not rely on the evidence of PW 7 also in view of the fact that it is not above suspicion as to fabrication or concoction thereof cannot be ruled out with certainty. Possibility of these two witnesses as being introduced for some ulterior motive in the course of

investigation cannot be ruled out. However, we are of the view that any illegality, any irregularity, any dishonesty any mala fide on the part of investigating agency should not make course of administration of justice to suffer. Any agency who tries to play mischief with administration of justice should not be looked upon lightly and must be dealt with strictly. Bearing this aspect of this case, we will now decide whether there is any other evidence against accused in the instant case.

11. In the evening of 29th July, 1990, PW 10, Rupaji Ramaji was on duty as Police Station Officer between 12-00 noon to 8 O'clock evening in Navrangpura Police Station. He had received a telephonic message by about 7-45 p.m. from telephone No. 440840 from one Manubhai Barot informing him that one Kantilal Kalidas Vaidya and his son have jointly assaulted seriously one Hareshbhai Amin residing in Pallavi Apartment Tower No. II and have run away and to send police immediately. PW 10 recorded the said message in the vardhi book which is Ex. 31 on record. The original vardhi book was produced before the Court and after showing the original, copy thereof is produced on record. On receipt of this vardhi, PW 10 informed the Police Sub-Inspector of Hatkeshwar Chowky under Navrangpura Police Station of the said vardhi. After receipt of vardhi, P.I. had come to the Police Station and was also informed accordingly. PW 10 has specifically stated that he has recorded the message in the vardhi book as it was dictated or informed over telephone. Evidence of this witness is challenged in the cross-examination to the effect that the informant Manubhai has not given the names of the assailants of Hareshbhai in his message. However, he has denied the same. He has also denied that he has manipulated the message later on and therefore, he has not informed the city control of the same. He has also denied that the names of the assailants are stated at the instance of the Inspector. Nothing has been suggested in the cross-examination of this witness that he knew Manubhai, informant, Hareshbhai, the victim or any of the assailants prior to incident. If Manubhai was not known, Hareshbhai was not known, Kantibhai was not known to PW 10, how he entered in his telephonic vardhi book the names of all concerned which are neither imaginary nor irrelevant nor unconcerned? In the cross-examination of this witness, when the whole of the vardhi book was produced before the Court, it is in no way suggested that there is any manipulation or interpolation or correction in the vardhi recorded by this witness or is concocted subsequently. Even there is no suggestion in the cross-examination as to reason why this PW 10 has to introduce the name of accused No. 1 and refer his son in the vardhi book. A suggestion is made in the cross-examination that he has entered the name of the assailants at the instance of the Inspector. We will later on refer to the evidence of the Inspector from where also it does not appear that he has any reason to incorporate or introduce or concoct the name of the accused in the vardhi book. It is very high to expect even of this witness Rupaji that he will introduce the name of some unknown person at the instance of the Inspector without any earthly reason against the person concerned. Why Rupaji, PW 10, had to rope in wrongly this Kantibhai and

his son by introducing their names in telephonic vardhi? Therefore, in our opinion, whatever worth is the evidence of Rupaji supported by his entry in vardhi book is reliable and admissible as discussed hereinafter. The evidence of Rupaji would be hearsay evidence if not confirmed by the evidence of Manubhai. The question, therefore, is whether evidence of Manubhai PW 9 is acceptable or not and if acceptable to what extent and against whom. PW 9 Manubhai admits to have sent a telephonic message at about 7.45 p.m. He also admits that he informed the Police Station that Hareshbhai Amin is injured. However, he has not referred to the names of assailants. However, he states that he does not remember to have stated that the injured in broken words gave the names of the assailants. Unfortunately, the learned A.P.P. in trial Court did not pursue the matter to prove properly the telephonic message conveyed by him to the Police Station Officer through Rupaji Ramaji, PW 10 and also to what is stated before police by exercising his right u/s 154 of the Evidence Act. We had, therefore, to recall the witness and put necessary questions to him in the interest of justice. In the course of arguments, a question is raised as to when the learned A.P.P. before the trial Court has failed to discharge his duties, whether the same can be rectified here and if yes, how could it be rectified? However, we were not assisted properly to answer this question. We, therefore, put leading question to the learned A.P.P. here to solicit assistance. We, therefore, inquired whether the witness can be recalled to complete his evidence? And the learned A.P.P. promptly and readily replied in affirmative, however, did not bother to pick up thread from it. On failure of A.P.P. to take necessary action This Court thought it fit to recall the witness as a Court witness. We do not propose to discuss what this inaction amounts to on the part of very senior A.P.P. of This Court. The police had recorded the statement of this witness, Manubhai, PW 9 and he had admitted that his statement was recorded by the Police. In his police statement, he has stated that he had telephoned police from his telephone No. 440840 and had informed the police that one Kantibhai Kalidas Vaidya and his son have assaulted seriously one Hareshbhai Amin, resident of Pallavi Apartment Tower No. 2. It was necessary for the learned A.P.P. before the trial Court to bring on record the omission amounting to contradiction by confronting him with his said statement as he has not referred to this part of statement in his deposition before the Court. The learned A.P.P. there ought to have brought this contradiction by omission on record even without declaring him hostile or even after declaring him hostile. If in a telephonic message names of the assailants were not disclosed, there was no earthly reason for the said Rupaji to enter the names of these two persons particularly when he did not know that there is any assault on one Hareshbhai at Pallavi Apartment. In evidence before This Court, he denies to have disclosed the names of assailants in telephonic vardhy. This omission is now duly proved by the evidence of Investigating Officer who is also examined before This Court as a Court witness. The fact now required to be considered is when PW 9 admits to have sent the telephonic message to Navrangpura Police Station, however, denies to have stated the name of the assailants therein and in his police statement, which is proved to be a lie

otherwise, then how far this witness can be relied on this part of evidence. If he is telling half-truth and suppressing something, it does not preclude This Court from accepting the evidence of Rupaji to the extent of that suppressed evidence by PW 9, if we are satisfied that the witness is deliberately suppressing the truth. We hold that what PW 9 states before the Court that he has not stated the names of the assailants in his telephonic message is a deliberate lie and we do not accept his say that he has not stated the name of the assailant in the telephonic message as well as before police. From the evidence of this witness, it is further clear that after giving telephonic message from his telephone, the witness has gone back to the scene of offence from his house and has inquired from the injured who replied in broken words. Before the Court he has not said that injured replied in broken words. Again, the learned A.P.P. before the trial Court has not cared to prove the omission from his police statement. When he was asked whether he has made such a statement to which we hereinafter will refer to, he stated that he does not remember the same. In our opinion, it was the duty of the learned A.P.P. in trial Court to confront the witness with his statement before the police and bring on record that such a statement was made before police.

12. Is it that mischief of investigating agency and/or of public prosecutor should make administration of justice to suffer? Is it that the Courts have to depend totally on the prosecutor to do justice? Provisions in Code of Criminal Procedure and Evidence Act answer these questions in negative. Only thing is that in the present set of society the Courts are required to be more vigilant. Section 311 of the Code empowers any Court to summon material witness or examine person present for just decision of the case. Same reads as under:

311. Power to summon material witness, or examine person present: Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or re-call and re-examine, any person already examined; and the Court shall summon and examine or re-call and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

Section 391 of the Code empowers appellate Court to take further evidence or direct it to be taken. Section 391 reads as under:

Appellate Court may take further evidence or direct it to be taken:

(1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Sessions or a Magistrate.

(2) When the additional evidence is taken by the Court of Sessions or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry.

Section 165 of the Evidence Act empowers Judge to put any questions or order production of any document. Same reads as under:

165. The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question;

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:

Provided also that this section shall not authorise any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under Sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under Sections 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

It is clear from these provisions that to promote the interest of justice and to reach to just decision of the case and where required material for coming to a just conclusion is not placed on record, these are the provisions which empowers Courts with very wide and unbridled powers so that the Court may not feel bereft of powers and remain silent, helpless spectator. No doubt such power should be exercised with utmost care and restraint and judiciously. Keeping these provisions of law in mind and to see that unscrupulous investigating officers and public prosecutor do not frustrate the administration of justice and make Judges feel bereft of power, we have exercised powers under above referred provisions and have recalled the witnesses, PW 9 and PW 11. PW 9 in his evidence before This Court denies to have disclosed before the police the names of the assailants, i.e., accused. Before the trial Court it is stated that he does not remember to have made such a statement. Before This Court, he has stated that he has not made such a statement before the Police and said statement is as under: (free translation)

That deceased was speaking in broken words that Kantibhai Kalidas Vaidya and his son Ramchandra Kalidas Vaidya, both had come to him to demand money and as he said no, son of Kantibhai inflicted blows with knife which he had and at

that time Kantibhai had caught hold of him.

Before the police the witness has stated that the injured was speaking in broken words. But before Court he denies to have so stated. In our opinion, the witness is telling lie before the Court. We say so because the following subsequent conduct and circumstances suggest so and nothing otherwise.

13. On receipt of information by Navrangpura Police, Sub-Inspector Revar had reached the scene of offence. After Mr. Raver reached, P.I., PW 11 had also reached there. However, when he learnt that the injured is removed to V.S. Hospital, he left for the hospital directing Mr. Revar to draw the panchnama of scene of offence. In the hospital, he recorded the complaint of one Gautambhai and statements of some others. PW 11, Gautambhai Chokshi, had lodged a complaint, but he has not supported the same. But the following facts remain undisputed in his evidence. According to him, when he returned from the temple of Mataji to his apartment, he heard some saying that he had run away. By that time one rickshaw had gone. He, therefore, chased that rickshaw on his scooter. However, he has stated before the Court that he could not reach to the same. Then he has not stated anything to support the case of the prosecution. He was declared hostile and was confronted with his police statement. The fact emerging from his evidence is that a rickshaw had gone away and he heard some saying that he had run away and he chased the rickshaw. PW 3, Sanjaykumar, is a lift man. He has also turned hostile. However, he has stated that two persons came there and he does not know what talk they had. He has not seen knife in the hand of any of them. This part of his evidence can be read. He is declared hostile and he was confronted with the police statement. However, we are not concerned with that part of the evidence. Then PW 4, Bhagwatbhai, has also turned hostile. But the following part of the evidence can be read and that is, he was viewing picture in his house and he heard hubbub outside the house and he came down. Hareshbhai was lying in bleeding condition in front of his house. There was blood around there. Other persons of the society were also present. Hareshbhai was like unconscious, but was shouting. He was shouting, but he could not say what he was speaking. One Vinodbhai Shukla, PW 5 has also not supported the case of the prosecution, but the following part of his evidence can be read in evidence:

Deceased Hareshbhai was lying in injured condition near his house. At that time my friend Bhagwatiprasad and Manubhai Barot also came there. Bhagwatiprasad and Manubhai Barot and myself inquired from the injured. His lips were moving.

Except this part, rest do not help the prosecution.

14. From the evidence of above witnesses, namely, Gautambhai PW 1, Bhagwatbhai PW 4, Vinodbhai PW 5 and Sanjaykumar PW 10, it is clear that in the evening of 29th July, 1990, at about quarter to 8 O'clock two persons had come to Pallavi Apartment and they ran away in a rickshaw and simultaneously Hareshbhai is found in front of his flat in injured and bleeding condition.

15. One Hardevprasad Munsiprasad, PW 6 is also examined and he is the

rickshaw driver. He has stated that he had taken two passengers from Memnagar Fire-brigade and they have deboarded near Navrangpura Police Station and he had asked them to go to the Police Station as they had some problem. He does not remember where those person had gone. This witness has not stated before the Police that he had gone in the Police Station and has seen two persons with blood-stained clothes. In our opinion, evidence of this witness is of no assistance or of utility to the prosecution.

16. According to the Investigating Officer, in the course of investigation, accused were found and they were arrested by arrest panchnama Ex. 17 duly proved through the evidence of PW 8, Kamlesh Natwarlal. PW 8 in his evidence has stated that he was called at night of 29th and 30th July, 1990 at Navrangpura Police Station at 2 O'clock where two accused were present who are present before the Court. Panchnama of the physical condition of the said accused was drawn and their clothes which were stained with blood were attached. The goggles, packet etc. were also attached. Accused No. 1 's purse which contained goggles, passport etc. were seized. The said articles were wrapped in a paper and sealed. The said articles are article Nos. 9 to 21 which are identified by the witness as one seized from the accused. Then articles 4, 5 & 6 are the clothes seized from the accused by the police. Article 7 is an almond colour shirt seized from accused No. 1 and article No. 8 is seized from accused No. 2. In the cross-examination, except the seizure of clothes, no other seizure of articles appears to have been disputed. So far as clothes are concerned, witness has said that the said clothes were not initialled by him nor by the Police Inspector. He has admitted that blood-stained clothes cannot be sold in the market. However, clothes like these are available in the market. In a question put to the accused in their further statement about the clothes, they have simply denied the seizure from them. Thus, clothes which were found stained with blood were sent to the Forensic Science Laboratory and as per the report, clothes and articles seized from accused No. 1 being article Nos. 8 to 11 were stained with human blood and article Nos. 8 and 9, i.e., clothes-being, trousers and bush shirt had "A" group blood. Article Nos. 6 & 7 seized from accused No. 2 are also found stained with human blood. Article No. 6 had blood group "A" while the blood group of Article 7 could not be determined. So also blood group of Art. Nos. 10 and 11 could not be determined. It is clear that blood group of the blood stains found on the clothes of deceased, is also found to be of "A" group. We do not find any difficulty in accepting the evidence of PW 8, pancha, that article Nos. 6 & 7 were seized from accused No. 2 and article Nos. 8 and 11 were seized from accused No. 1. It is surprising that in the very course of seizure, article Nos. 9 to 21 were seized from accused No. 1. If accused was called from his home and then arrested as stated by him, there was no reason for him to take with him his pouch or purse which contain very valuable documents like passport, promissory notes, some writing reflecting money transactions etc. to the Police Station. The story advanced by the accused about the clothes being purchased from the market and then stained with blood cannot be believed as victim was in hospital

and accused have not gone there. Not only this but seizure of clothes of the deceased is also later in time. Thus, the fact of find of blood on their clothes in our opinion, establishes their presence at the scene of offence.

17. It will be relevant to state that the information reached to the Police Station with name at quarter to 8 O'clock in the evening. Immediately, investigating machinery has started acting on it and accused have presented themselves before the police and are arrested at about 2.00 a.m. in the early morning of 30th July, 1990. Accused, as it appears from the charge-sheet are ordinary resident of House No. 1001, First Street, in Gomtipur locality of city of Ahmedabad. When name of accused No. 1 was disclosed to the Police Station Officer of Navrangpura his address was not disclosed. Even till late night, except after the arrest of accused there is nothing on record to show that address of the accused was disclosed before the police. However, by about 2.00 a.m. early morning of 30th July, 1990, they themselves have presented and they were sent to Doctor by about 3.00 p.m. of that day on their complaint of injury and accused No. 2 was examined by doctor as per case paper Ex. 27. The doctor who examined accused No. 2 is not examined. But the case papers are exhibited on admission of the accused and history given for the injury by accused No. 2 to the doctor reads as under:

Injuries over left hand over ulna side of palm while beating to the opposite party with knife at 7-30 p.m. on 29-7-1990.

On examination of left hand, lacerated wound of 2 x 2 cm. in size mild oozing.

The fact, therefore, remains that though name of the opposite side is not disclosed, accused No. 2 has beaten someone at 7-30 p.m. on 29th July, 1990 and as per the case papers that person, has died. Name of this accused is disclosed before the Investigating Officer through PW 9 saying that while asking the injured, he has spoken the names of accused Nos. 1 and 2 in broken words.

18. In view of the provisions of Section 106 of the Evidence Act, a person who has a special knowledge has to prove that fact. The said provision reads that "when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him." Any person referred here does not exclude accused person. If accused No. 2 had not injured the deceased, and when he has stated before the doctor that he was injured while beating the other side, he must be knowing who the other side is and he ought to have disclosed the name of that person if other side referred by him is not the deceased person. He has not stated that he was injured by some unknown person. The time and date of incident where accused is injured as stated by accused No. 2 tallies with the time and date of injuries caused on the person of the deceased. Thus, it is clear that PW 9 is deliberately suppressing the facts which were stated by him to PW 10. PW 10 had no earthly reason to manipulate the telephone vardi and add in it the name of accused. We, therefore, accept the say of PW 10 that he was telephonically informed about the incident by PW 9 and PW 9 has disclosed the

names of assailant. Nothing transpires from the evidence to show that accused No. 1 had any son other than accused No. 2, now appellant. We also accept that PW 9 has stated the names of the accused when PW 11 recorded his statement. Thus in our opinion, in the facts and circumstances of the present case, there is no reason to disbelieve PW 10 despite PW 9 not supporting him. In our opinion, PW 9 is not only telling lie before the Court but also suppressing the truth and the information conveyed by him and received by PW 10 is required to be accepted. It also stands corroborated by other circumstances referred hereinabove. Thus, in view of the evidence of PW 10 and subsequent conduct of PW 9 and other incriminating articles found supporting the case of the prosecution, we do not find any reason to accept the conclusion of the learned Addl. Sessions Judge not accepting the evidence against accused. This evidence is liable to be accepted and should be accepted and we hereby accept it in the facts and circumstances of the case. However, we do not agree with the conclusion of the learned Addl. Sessions Judge based on accepting the extra-judicial confession.

19. Before we part, we would like to state some facts and issue some directions as to procedural aspect, as want thereof has caused great agony to the Court while hearing this appeal and we express our concern for the same.

20. We are told that there are directions as a result of which there was practice, now in total breach, that on completion of investigation, Investigation Officer is required to produce in sealed cover copy of full text of case diary. In the instant case there is no full text of such case diary on the record of the case. In view of Sub-section (2) of Section 172 of the Code any criminal Court may send for the police diaries of a case under inquiry or trial in such Court and may use such diaries, not as evidence in the case but to aid it in such inquiry or trial. There are copies of some parts of diary on record of the present case. It appears that they were produced with an application for police remand. It is found on perusing those parts of the diary and it transpired that name of PW 7 and his brother Bhupendra are cited as witness in charge-sheet and their statements were recorded and furnished to the accused along with charge-sheet, yet their names are not disclosed in the case diary to show that their statements were recorded. If the names of the witnesses are not disclosed from case diary and yet they are cited as witnesses in charge-sheet and the statements of such witnesses are furnished to the accused along with the charge-sheet, then the allegation that these are concocted and got up witnesses gets support from the case diary itself. In this case, the question is how the accused came to be arrested by the Investigating Officer. It is the case of the prosecution that they were produced by those witnesses whose statements were recorded and supplied to the accused. However, their names are not referred to in the case diary. To do full justice to see that the police officers may not misuse their powers and the administration of justice may not suffer, we think that it will be proper to direct all the concerned police officers, who are investigating in the matter and submitting charge-sheets, through the Director General of Police that they shall submit a

duly certified xerox copy of the full case diary in a sealed cover to the Court as soon as the investigation is over or with the charge-sheet. We direct that the compliance of this direction be reported every quarter to This Court by the office of the Director General of Police.

21. Previously in every criminal inquiry or trial, once the proceedings commence provisions of Section 309 of the Code (Section 344 of old Code) were scrupulously followed. Now it is brought to our notice that provisions of Section 309 of the Code are not observed in majority of trials and where observed are in total breach. A few Sessions cases are conducted day-to-day. In our opinion, one of the reasons is that Investigating Officers who should be very much interested and answerable for success or failure of their investigation are not remaining present when the trial is going on. This has very adverse effect on the sincerity of witnesses resulting into adverse effect on Court proceedings. It is a human psychology that one would hesitate to lie in presence of person/authority before whom one fact is stated as presence of the person/authority has its own influence and awe. Absence of such person/ authority relieves him from such influence and awe. Thus, it is absolutely necessary that during trial before Courts, be it Sessions Court or a Court of Magistrate, Investigating Officer must remain present. Secondly, if the Investigating Officer is present, in all probabilities the witnesses will also remain present and opportunity to breach provisions of Section 309 of the Code would be reduced. We, therefore, also direct the Director General of Police to instruct all the Investigating Officers to remain personally present during the Sessions trial, except for very good reason to remain absent for some occasion in the proceedings and that too after communicating in advance in writing to the Presiding Officer of the Sessions case. Non-compliance of this direction would be treated as contempt of This Court. We direct that the compliance of this direction be reported every quarter to This Court by the Director General of Police.

22. We have found that case diary which originally was not traceable has now been produced at a stage when witness is recalled. We just perused it out of curiosity and it shocked it. We found that the same is tampered with to bring in consonance with the query put by the Court about the prosecution witness No. 7 and his brother. What we found to be interpolated, in original is absent in xerox copy produced before the Court on which the Court has acted upon. This in our opinion may amount to interference in the administration of justice. We therefore, directs the office to issue notice as to why contempt proceedings be not initiated against the Investigating Officer for tampering with the original case diary for the purpose of user of This Court in view of the provisions of Section 172(2) of the Code. We directs the office that the original case diary as produced by the Investigating Officer and the xerox copy which are on record along with file No. 2 be taken and placed in safe custody.

23. In the result, the appeal of appellant No. 1 stands abated. Appeal of appellant No. 2 is dismissed. If appellant No. 2 is on bail, he shall surrender to

judicial custody within 12 (twelve) weeks from today.

24. Based on the information alleged to have been given by PW 9, PW 10 has recorded the telephonic vardhi, wherein name of assailant is disclosed as that of accused No. 1 and his son. There, PW 9 has also disclosed his name as informant. Investigating Officer PW 11 has then recorded the statement of PW 9 u/s 162 of the Criminal Procedure Code. By examining PW 9 and PW 11 further before This Court, it is proved that PW 9 has stated before PW 11 that he had sent a telephonic vardhi as recorded by PW 10 and he has also informed the Investigating Officer in his statement that after giving telephonic vardhi when he came back near the injured, injured has informed him in broken words that accused No. 1 had caught hold of him and accused No. 2 had inflicted injuries. In the evidence before the Court, PW 9 denies either to have given names of the assailant in the telephonic vardhi or before the police when his statement is recorded. PW 9 does not dispute to have despatched a telephonic message and also that his statement was recorded.

25. We have in the course of discussion in the judgment as to his evidence come to the conclusion that this witness is deliberately stating lie before the Court. Thus, in our opinion, on these facts, PW 9 appears to be guilty of an offence of giving false evidence before the Court on oath, which is punishable under the provisions of Indian Penal Code. We, therefore, direct the office to issue notice to PW 9 returnable on 6-7-1998 as to why he should not be prosecuted for the same.

26. We direct the office to issue notice returnable on 29th June, 1998 as to why contempt proceedings be not initiated against the Investigating Officer, Dahyabhai Jijibhai Patel, for tampering with the original case diary produced before the Court.