
(2013) 09 GUJ CK 0014
In the Gujarat High Court
Case No : Criminal Appeal No. 211 of 2010

Kanubhai Virjibhai

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 25-09-2013

Acts Referred:

Citation : (2014) 1 GLR 655

Hon'ble Judges : R.P. Dholaria, J; Akil Kureshi, J

Bench : Division Bench

Judgement

R.P. Dholaria, J.—The present criminal appeal has been preferred under Sec. 374(2) of Cr.P.C. against the Judgment and Order dated 29-12-2009 passed by the learned Additional Sessions Judge, Rajkot in Sessions Case No. 63 of 2009 convicting the accused-appellant under Sec. 302 of I.P.C. and sentencing him to suffer life imprisonment and to pay a fine of Rs. 25,000/-, in default of payment of fine to undergo further two year simple imprisonment. The prosecution version in brief, is that the accused Kanubhai Virjibhai was having doubt about illicit relations of deceased Sureshbhai Rayabhai Vasani with his wife, and therefore, the accused inflicted blow on the head of the deceased with dhariya and he died. The brother of the deceased Parshottambhai Rayabhai Vasani lodged complaint at Vinchhiya Police Station Crime Register No. I. 48 of 2008. Thereafter, investigation was carried out. The Investigating Officer recorded statement of various witnesses panchnamas were drawn post-mortem of the dead body was carried out. Muddamal articles recovered was sent for analysis at Forensic Science Laboratory and finally the charge-sheet was filed before the Court of competent jurisdiction. The accused was committed to the Court of Sessions which charged the accused for the offences punishable under Sec. 302 of I.P.C. and Sec. 135 of Bombay Police Act. The accused was tried in accordance with law and by judgment dated 29-12-2009, the Additional Sessions Judge, Rajkot found the accused guilty for the offence punishable under Sec. 302 of I.P.C. and sentenced him to suffer life imprisonment with fine.

2. Being aggrieved with the said judgment of conviction and sentence, the accused-appellant has preferred present appeal.

3. The learned Additional Sessions Judge framed charge against the accused-appellant at Exh. 1 and he pleaded not guilty and claimed to be tried. On behalf of the prosecution, following witnesses were examined:

4. In addition to the above, prosecution also produced following documentary evidence:

5. Heard Shri Yatin Soni, learned Advocate for the appellant and Shri H.L. Jani, learned Additional Public Prosecutor for respondent-State.

6. Shri Yatin Soni, learned Advocate for the appellant submitted that alleged incident occurred all of a sudden to save Madhuben wife of the appellant from the deceased who had made attempt of rape on her. This fact is supported by the statement of Madhuben recorded by the Investigating Officer and further statements of the accused and also column 21 of the post-mortem note wherein it is mentioned that "semen ejaculated on penis". The complaint filed by Parsottambhai Dahyabhai Vasani, brother of the deceased also mentioned the fact that the alleged incident occurred due to doubt in the mind of the appellant that the deceased had illicit relation with his wife. The complainant is not an eye-witness and he has changed the cause of incident in his deposition. The presence of Janakben, wife of the deceased, at the time of alleged incident is doubtful. The Counsel further argued that police station entry Exh. 36 recorded on 28-12-2008 at 22-00 hours discloses information with regard to cognizable offence, and therefore, the said entry is required to be treated as F.I.R. whereas F.I.R. at Exh. 38 recorded on 28-12-2008 at 23-30 hours is not required to be treated as F.I.R. The Counsel further argued that due to one blow, injury No. 1 of column 17 of the postmortem note occurred and injury No. 2 is pertaining to internal injury of the first injury. There is no other injury on the body of the deceased. Child-witness Haresh Vasani, P.W. 11 deposed that the accused inflicted dhariya blow on the deceased, and thereafter, Gordhanbhai inflicted dhoka (club) on the deceased, but there is no injury caused by dhoka-blows. Hence, genesis of evidence of P.W. 11 is doubtful and he cannot be said to be an eye-witness. Therefore, the appellant-accused is entitled for benefit of private defence under Secs. 96, 97 and 100 of Indian Penal Code and this case also falls under Exception 1 of Sec. 300 of the Indian Penal Code, alternatively, to convict the accused-appellant for the offence punishable under Sec. 304 Part-II of the Indian Penal Code and to impose minimum sentence looking to the peculiar facts of the case. In support of his argument, learned Counsel relied on the decisions reported in (1) 1988 (2) GLR 1057 (Mer Vaja Meraman v. State of Gujarat), (2) Yeshwant Rao Vs. State of Madhya Pradesh, , (3) Vishwanath Vs. The State of Uttar Pradesh, , (4) Bishna @ Bhiswadeb Mahato and Others Vs. State of West Bengal, and (5) State of U.P. Vs. Ashok Dixit and Another, .

7. Per contra, Shri H.L. Jani, learned Additional Public Prosecutor argued that the

accused has been rightly convicted based upon sufficient evidence available against him. Evidence of the eye-witness is consistent, cogent and uniform and there is no reason to disbelieve them. There appears no lacuna. Learned A.P.P. also argued that the motive is established. Therefore, no interference is required in the judgment of conviction passed by the learned Additional Sessions Judge, Rajkot.

8. To decide the present appeal in its proper perspective, it is necessary to narrate the evidence on record of present appeal in brief.

9. In order to prove that the death of the deceased Sureshbhai Rayabhai Vasani was homicidal, the prosecution examined Dr. Rakeshbhai Markandray Maitri - P.W. 2, Exh. 8, who had carried out post-mortem of the deceased. He deposed that injuries were sufficient to kill any person by dhariya since the blow was upon the head which is vital organ of the body and the injuries were ante-mortem. In his opinion, the cause of death is "hemorrhagic shock due to head injury". Upon examination, he noticed following injuries on the body of the deceased:

(a) C.L.W. at occipital region at scalp (size 4 x 1 x 1 cm. long)

(b) Fracture of occipital region of scalp.

10. The opinion rendered by the doctor in light of aforesaid injuries over the body of deceased clearly indicates homicidal death. Consequently, the death of the deceased as homicidal is established.

11. The case of the prosecution is that the appellant accused committed murder of the deceased by inflicting dhariya blow on his head. To prove the aforesaid accusation, the prosecution inter alia examined following witnesses:

12. Complainant Parshottambhai Dahyabhai Vasani - P.W. 10 was examined at Exh. 29. In his examination-in-chief, he deposed that he is the younger brother of the deceased. He further deposed that on the date of incident he had gone to his field where his cousin brother Haresh came and informed him that Kanubhai, Gordhanbhai and Sureshbhai (deceased) are fighting. When he reached to the gate of the field of Virjibhai, he saw Kanubhai running away from the field after hitting Sureshbhai. Gordhanbhai was standing there and his brother Sureshbhai had fallen down on the ground. Blood was oozing out from the head, ears and mouth of Sureshbhai. He thereupon asked Gordhanbhai as to what they did? In reply, Gordhanbhai told that he and his brother Kanubhai both had killed Sureshbhai. Thereafter, he shouted and his aunt Gauriben and other persons gathered and Sureshbhai was taken to a hospital at Vinchhiya in auto-rickshaw. After examining Sureshbhai, the Doctor declared him dead. He thereupon lodged his complaint before the police. The witness further deposed that, since last 10 days, Kanubhai and Sureshbhai were quarreling for shedha. He also deposed that he had not given illicit relationship as the cause of the incident in the complaint recorded before the police.

12.1. In his cross-examination, the witness deposed that he has not read the

complaint as the police had not given a copy of the same to him. He also denied that he had not given the fact in the complaint that since last 10 days quarrel regarding shedha (boundary) was going on between Kanubhai and deceased Sureshbhai. He also admitted that the fact of quarrel regarding shedha is disclosed for the first time in the Court. He denied the suggestion of the defence that the character of his brother was not good. He admitted that at the time of incident, the wife of the accused i.e. Madhuben was pregnant. He also denied the suggestion of the defence that the incident happened because Sureshbhai had tried to rape Madhuben. He also denied that he had not taken Sureshbhai to the hospital. He further deposed that instrument like dhariya are usual agricultural instrument and agriculturist are keeping such instrument with them in their farm.

13. Haresh Chanabhai Vasani - P.W. 11 has been examined at Exh. 33. This witness appears to be a child of 12 years at the time of recording of his evidence. The trial Court found him capable to give deposition. He deposed that he is studying in 7th Standard. Sureshbhai was his cousin brother. The incident happened before about six months. He saw the incident. When Sureshbhai came to the field at that time Kanubhai fell Sureshbhai on the ground, and thereafter, first inflicted dhariya blow on his head and then inflicted blows by a dhoka (club) Gordhanbhai also inflicted blows by wooden log. Blood was oozing out from the head of Sureshbhai. Thereafter, he rushed to Parshottambhai and informed him about the incident. In his cross-examination, the witness denied that the incident happened as Sureshbhai tried to catch the shoulder of Madhuben, wife of the accused.

14. Janakben - P.W. 12 has been examined at Exh. 34. This witness is widow of Sureshbhai (deceased). She deposed that on the date of incident, her husband came to the field on motorcycle where Kanubhai inflicted dhariya blow on his head. She was following her husband on foot. She saw Sureshbhai dying. She shouted and people gathered and took Sureshbhai to the hospital. She came back to the village and sent a rickshaw (chhakdo) at the place of incident.

14.1. In her cross-examination, the witness deposed that there was no quarrel for shedha (boundary) with Kanubhai. She admitted that while she was following her husband on foot, she heard a loud noise and she rushed to that direction. She also admitted that on the date of incident she had seen Madhuben on the said field. She denied that Sureshbhai had tried to catch the shoulder of Madhuben and tried to lay her down. She further deposed that the police had not recorded her statement properly. She further deposed that instrument like dhariya are usual agricultural instrument and agriculturist are keeping such instrument with them in their farm.

14.2. The learned Counsel Mr. Yatin Soni doubted her presence at the scene of occurrence. In her cross-examination, it is established that she had seen Madhuben in the field. Similarly, it is also established that while accused inflicted blow upon the deceased, at that time deceased bend down. The defence itself has established her presence and having viewed the incidence in her cross-

examination.

15. Harisingh Laljibhai Rathod, Investigating Officer - P.W. 14 has been examined at Exh. 43. He deposed that while working at Vinchhiya Police Station and on receiving information that one man had received head injuries in Amrapur village, they went to said village and found that Sureshbhai had died and he was taken to Vinchhiya Government Hospital in 108 ambulance. He went there and recorded complaint made by his brother. In the complaint, the complainant had stated that the alleged incident occurred due to doubt in the mind of Kanubhai that the deceased Sureshbhai had illicit relation with his wife.

15.1. In his cross-examination, the witness deposed that he had recorded statement of Madhuben, wife of the accused. He admitted that during the course of investigation, most of the witness had deposed that the alleged incident occurred due to illicit relation of Sureshbhai with Madhuben. He denied that it was revealed during the investigation that the deceased had tried to catch the shoulder of Madhuben and tried to lay her down and therefore such incident occurred. However, he admitted that Madhuben had stated before him that the deceased had caught her shoulder and tried to lay her down. He also admitted that the deceased had committed cognizable offence. He admitted that in the complaint it was mentioned that Sureshbhai and Kanubhai were quarrelling for the last 10 days. He also admitted that the fact regarding 108 Ambulance van was not recorded at that time. He further admitted that Hareishbhai had stated before him that he came to know that the alleged incident occurred as Sureshbhai had tried to catch the shoulder of Madhuben.

16. Mithabhai Mohanbhai Vasani - P.W. 3 was examined at Exh. 14. He is the panchas for the Inquest panchnama. He has submitted the Inquest panchnama at Exh. 15. He deposed that on the date of incident he had taken the dead body of Sureshbhai in rickshaw (chhakdo) to the hospital. He supports the version of the complainant.

17. The prosecution also examined Rameshbhai Vashrambhai Solanki - P.W. 4 at Exh. 16. He is the panchas for the scene of offence. He has admitted his signature. He was not cross-examined by the defence and he has not turned hostile and he supported the version of the complainant.

18. During the course of recording evidence, the prosecution has brought on record the discovery panchnama made at the instance of the accused at Exh. 19. The accused had shown willingness to find out the murder weapon used for committing the offence. Panch witness Sagrambhai Karsanbhai Khambalia has been examined as P.W. 5 at Exh. 19. He deposed that the accused had shown willingness to find out the dhariya used for committing the offence and he was taken to the place where dhariya had been concealed by the accused and at the instance of the accused dhariya was found out. The aforesaid panch has supported the case of the prosecution and he has also identified the accused as well as the murder weapon during the course of trial.

19. The prosecution also examined Ashvinbhai Khimjibhai - P.W. 8 at Exh. 25. In his presence, muddamal article No. 4, i.e. shirt and pants were recovered. However, he turned hostile.

20. On perusal of the aforesaid evidence of the complainant Parshottambhai Dahyabhai Vasani - P.W. 10; eye-witness Haresh Chanabhai Vasani - P.W. 11; Janakben - P.W. 12 widow of deceased Sureshbhai and Harisingh Laljibhai Rathod, Investigating Officer - P.W. 14, it is evidently seen that their evidence regarding accused Kanubhai inflicting blow by dhariya upon the deceased Sureshbhai are coherent, cogent, consistent and identical.

21. Shri Yatin Soni, learned Counsel for the appellant has based his contentions on mainly following points:

(a) Discrepancy in F.I.R. - as to whether F.I.R. at Exh. 38 can be said to be valid F.I.R. under the law;

(b) Contradictions in the evidence of child witness as well as eye-witness Haresh Chanabhai Vasani - P.W. 11;

(c) Panchnama was not read over.

(d) Right to private defence as the accused tried to rape Madhuben, wife of the accused. This fact is supported by the prosecution witnesses, further statement of the accused and post-mortem notes wherein it is mentioned that semen was ejaculated on penis; or in the alternate to convict the accused-appellant for the offence punishable under Sec. 304, Part-II of the Indian Penal Code and to impose minimum sentence looking to the peculiar facts of the case.

22. As regards point (a), Shri Yatin Soni, learned Counsel for the appellant questioned as to whether F.I.R. at Exh. 38 is an F.I.R. in the eyes of law. Police Station Entry at Exh. 36 recorded on 28-12-2008 at 22-00 hours discloses information with regard to cognizable offence. F.I.R. at Exh. 38 was recorded at 23-30 hours on 28-12-2008, i.e. subsequent to the said Police Station Entry. Therefore, said entry is required to be treated as F.I.R. and F.I.R. at Exh. 38 is not required to be treated as F.I.R.

23. As second F.I.R. for the same incident or occurrence is not permissible and is contrary to the provisions of Sec. 162 of the Criminal Procedure Code, firstly, we may examine the question whether F.I.R. at Exh. 38 can be treated as the First Information Report and if so, what is the effect of Police Station Entry at Exh. 36 in law, keeping in view the facts and circumstances of the present case.

24. We have noticed that such issue is often considered by the Hon''ble Supreme Court. Recently, in the case of Yanab Sheikh @ Gagu Vs. State of West Bengal, , the Hon''ble Supreme Court has considered all aspects relating to the aforesaid issue and it would be profitable to reproduce the same here. In the above case, the Hon''ble Supreme Court observed as under:

10. In the case of Sidhartha Vashisht @ Manu Sharma Vs. State (NCT of Delhi), ,

a Bench of this Court took the view that cryptic telephone messages could not be treated as F.I.Rs. as their object is only to get the police to the scene of offence and not to register the F.I.R. The said intention can also be clearly culled out from the bare reading of Sec. 154 of the Code which states that the information if given orally should be reduced to writing, read over to the informant, signed by the informant and a copy of the same be given to him, free of cost. Similar view was also expressed by a Bench of this Court in the case of State of A.P. Vs. V.V. Panduranga Rao, , where the Court observed as under:

10. Certain facts have been rightly noted by the High Court. Where the information is only one which required the police to move to the place of occurrence and as a matter of fact the detailed statement was recorded after going to the place of occurrence, the said statement is to be treated as F.I.R. But where some cryptic or anonymous oral message which did not in terms clearly specify a cognizable offence cannot be treated as F.I.R. The mere fact that the information was the first in point of time does not by itself clothe it with the character of F.I.R. The matter has to be considered in the background of Secs. 154 and 162 of the Code of Criminal Procedure, 1973 (in short "the Code"). A cryptic telephonic message of a cognizable offence received by the police agency would not constitute an F.I.R.

11. Thus, the purpose of telephone call by P.W. 6, when admittedly he gave no details, leading to the recording of Entry, Exh. 7, would not constitute the First Information Report as contemplated under Sec. 154 of the Code. The reliance placed by the learned Counsel appearing for the appellant upon the provisions of Sec. 162 of the Code, is thus, not well-founded. Even in the case of Ravishwar Manjhi and Others Vs. State of Jharkhand, , another Bench of this Court took the view that:

32.....we are not oblivious to the fact that a mere information received by a police officer without any details as regards the identity of the accused or the nature of the injuries caused to the victim, name of the culprits, may not be treated as F.I.R., but had the same been produced, the nature of the information received by the police officer would have been clear.....

12. On this principle of law, we have no hesitation in stating that the second F.I.R. about the same occurrence between the same persons and with similarity of scope of investigation, cannot be registered and by applying the test of similarity, it may then be hit by the proviso to Sec. 162 of the Code.

13. In the case of Anju Chaudhary v. State of U.P., [Criminal Appeal @ SLP (Crl.) No. 9475 of 2008 decided on the 6th December, 2012], this Court held:

12. Sec. 154 of the Code requires that every information relating to the commission of a cognizable offence, whether given orally or otherwise to the officer-in-charge of a police station, has to be reduced into writing by or under the direction of such officer and shall be signed by the person giving such information. The substance thereof shall be entered in a book to be kept by such

officer in such form as may be prescribed by the State Government in this behalf.

13. A copy of the information so recorded under Sec. 154(1) has to be given to the informant free of cost. In the event of refusal to record such information, the complainant can take recourse to the remedy available to him under Sec. 154(3). Thus, there is an obligation on the part of a police officer to register the information received by him of commission of a cognizable offence. The two-fold obligation upon such officer is that (a) he should receive such information and (b) record the same as prescribed. The language of the Sec. imposes such imperative obligation upon the officer. An Investigating Officer, an officer-in-charge of a police station can be directed to conduct an investigation in the area under his jurisdiction by the order of a Magistrate under Sec. 156(3) of the Code who is competent to take cognizance under Sec. 190. Upon such order, the Investigating Officer shall conduct investigation in accordance with the provisions of Sec. 156 of the Code. The specified Magistrate, in terms of Sec. 190 of the Code, is entitled to take cognizance upon receiving a complaint of facts which constitute such offence; upon a police report of such facts; upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

14. On the plain construction of the language and scheme of Secs. 154, 156 and 190 of the Code, it cannot be construed or suggested that there can be more than one F.I.R. about an occurrence. However, the opening words of Sec. 154 suggest that every information relating to commission of a cognizable offence shall be reduced to writing by the officer-in-charge of a Police Station. This implies that there has to be the first information report about an incident which constitutes a cognizable offence. The purpose of registering an F.I.R. is to set the machinery of criminal investigation into motion, which culminates with filing of the police report in terms of Sec. 173(2) of the Code. It will, thus, be appropriate to follow the settled principle that there cannot be two F.I.Rs. registered for the same offence. However, where the incident is separate; offences are similar or different, or even where the subsequent crime is of such magnitude that it does not fall within the ambit and scope of the F.I.R. recorded first, then a second F.I.R. could be registered. The most important aspect is to examine the in built safeguards provided by the legislature in the very language of Sec. 154 of the Code. These safeguards can be safely deduced from the principle akin to doubt jeopardy, rule of fair investigation and further to prevent abuse of power by the investigating authority of the police. Therefore, second F.I.R. for the same incident cannot be registered. Of course, the investigating agency has no determinative right. It is only a right to investigate in accordance with the provisions of the Code. The filing of report upon completion of investigation, either for cancellation or alleging commission of an offence, is a matter which once filed before the Court of competent jurisdiction attains a kind of finality as far as police is concerned, may be in a given case, subject to the right of further investigation but wherever the investigation has been completed and a person is found to be prima facie guilty of committing an offence or otherwise, re-

examination by the investigating agency on its own should not be permitted merely by registering another F.I.R. with regard to the same offence. If such protection is not given to a suspect, then possibility of abuse of investigating powers by the Police cannot be ruled out. It is with this intention in mind that such interpretation should be given to Sec. 154 of the Code, as it would not only further the object of law but even that of just and fair investigation. More so, in the backdrop of the settled canons of criminal jurisprudence, reinvestigation or de novo investigation is beyond the competence of not only the investigating agency but even that of the learned Magistrate. The Courts have taken this view primarily for the reason that it would be opposed to the scheme of the Code and more particularly Sec. 167(2) of the Code. [Ref. Reeta Nag Vs. State of West Bengal and Others, and Vinay Tyagi v. Irshad Ali @ Deepak, (S.L.P. (Crl.) No. 9185-9186 of 2009 of the same date).

15. It has to be examined on the merits of each case whether a subsequently registered F.I.R. is a second F.I.R. about the same incident or offence or is based upon distinct and different facts and whether its scope of inquiry is entirely different or not. It will not be appropriate for the Court to lay down one straight-jacket formula uniformly applicable to all cases. This will always be a mixed question of law and facts depending upon the merits of a given case.

16. In the case of Ram Lal Narang Vs. State (Delhi Administration), , the Court was concerned with the registration of a second F.I.R. in relation to the same facts but constituting different offences and where ambit and scope of the investigation was entirely different. Firstly, an F.I.R. was registered and even the charge-sheet filed was primarily concerned with the offence of conspiracy to cheat and misappropriation by the two accused. At that stage, the investigating agency was not aware of any conspiracy to send the pillars (case property) out of the country. It was also not known that some other accused persons were parties to the conspiracy to obtain possession of the pillars from the Court, which subsequently surfaced in London. Earlier, it was only known to the Police that the pillars were stolen as the property within the meaning of Sec. 410 I.P.C. and were in possession of the accused person (Narang brothers) in London.

17. The Court in Ram Lal Narang declined to grant relief of discharge to the petitioner in that case where the contention raised was that entire investigation in the F.I.R. subsequently instituted was illegal as the case on same facts was already pending before the Courts at Ambala and Courts in Delhi were acting without jurisdiction. The fresh facts came to light and the scope of investigation broadened by the facts which came to be disclosed subsequently during the investigation of the first F.I.R. The comparison of the two F.I.Rs. has shown that the conspiracies were different. They were not identical and the subject-matter was different. The Court observed that there was a statutory duty upon the Police to register every information relating to cognizable offence and the second F.I.R. was not hit by the principle that it is impermissible to register a second F.I.R. of the same offence.

18. The Court held as under: (SCC pp. 337-38, Paras 20-22)

20. Anyone acquainted with the day-to-day working of the criminal Courts will be alive to the practical necessity of the police possessing the power to make further investigation and submit a supplemental report. It is in the interests of both the prosecution and the defence that the police should have such power. It is easy to visualize a case where fresh material may come to light which would implicate persons not previously accused or absolve persons already accused. When it comes to the notice of the investigating agency that a person already accused of an offence has a good alibi, is it not the duty of that agency to investigate the genuineness of the plea of alibi and submit a report to the Magistrate? After all, the investigating agency has greater resources at its command than a private individual. Similarly, where the involvement of persons who are not already accused comes to the notice of the investigating agency, the investigating agency cannot keep quiet and refuse to investigate the fresh information. It is their duty to investigate and submit a report to the Magistrate upon the involvement of the other persons. In either case, it is for the Magistrate to decide upon his future course of action depending upon the stage at which the case is before him. If he has already taken cognizance of the offence, but has not proceeded with the enquiry or trial, he may direct the issue of process to persons freshly discovered to be involved and deal with all the accused in a single enquiry or trial. If the case of which he has previously taken cognizance has already proceeded to some extent, he may take fresh cognizance of the offence disclosed against the newly involved accused and proceed with the case as a separate case. What action a Magistrate is to take in accordance with the provisions of the Cr.P.C. in such situations is a matter best left to the discretion of the Magistrate. The criticism that a further investigation by the police would trench upon the proceeding before the Court is really not of very great substance, since whatever the police may do, the final discretion in regard to further action is with the Magistrate. That the final word is with the Magistrate is sufficient safeguard against any excessive use or abuse of the power of the police to make further investigation. We should not, however, be understood to say that the police should ignore the pendency of a proceeding before a Court and investigate every fresh fact that comes to light as if no cognizance had been taken by the Court of any offence. We think that in the interests of the independence of the magistracy and the judiciary, in the interests of the purity of the administration of criminal justice and in the interests of the comity of the various agencies and institutions entrusted with different stages of such administration, it would ordinarily be desirable that the police should inform the Court and seek formal permission to make further investigation when fresh facts come to light.

21. As observed by us earlier, there was no provision in the Cr.P.C., 1898 which, expressly or by necessary implication, barred the right of the police to further investigate after cognizance of the case had been taken by the Magistrate. Neither Sec. 173 nor Sec. 190 lead us to hold that the power of the police to further investigate was exhausted by the Magistrate taking cognizance of the

offence. Practice, convenience and preponderance of authority, permitted repeated investigations on discovery of fresh facts. In our view, notwithstanding that a Magistrate had taken cognizance of the offence upon a police report submitted under Sec. 173 of the 1898 Code, the right of the police to further investigate was not exhausted and the police could exercise such right as often as necessary when fresh information came to light. Where the police desired to make a further investigation, the police could express their regard and respect for the Court by seeking its formal permission to make further investigation.

22. As in the present case, occasions may arise when a second investigation started independently of the first may disclose a wide range of offences including those covered by the first investigation. Where the report of the second investigation is submitted to a Magistrate other than the Magistrate who has already taken cognizance of the first case, it is up to the prosecuting agency or the accused concerned to take necessary action by moving the appropriate superior Court to have the two cases tried together. The Magistrates themselves may take action suo motu. In the present case, there is no problem since the earlier case has since been withdrawn by the prosecuting agency. It was submitted to us that the submission of a charge-sheet to the Delhi Court and the withdrawal of the case in the Ambala Court amounted to an abuse of the process of the Court. We do not think that the prosecution acted with any oblique motive. In the charge-sheet filed in the Delhi Court, it was expressly mentioned that Mehra was already facing trial in the Ambala Court and he was, therefore, not being sent for trial. In the application made to the Ambala Court under Sec. 494 Cr.P.C, it was expressly mentioned that a case had been filed in the Delhi Court against Mehra and others, and therefore, it was not necessary to prosecute Mehra in the Ambala Court. The Court granted its permission for the withdrawal of the case. Though, the investigating agency would have done better if it had informed the Ambala Magistrate and sought his formal permission for the second investigation, we are satisfied that the investigating agency did not act out of any malice. We are also satisfied that there has been no illegality. Both the appeals are, therefore, dismissed.

19. In the case of *M. Krishna Vs. State of Karnataka*, , this Court took the view that even where the article of charge was similar but for a different period, there was nothing in the Code to debar registration of the second F.I.R. The Court opined that the F.I.R. was registered for an offence under Secs. 13(1)(e) and 13(2) of the Prevention of Corruption Act related to the period 1-8-1978 to 1-4-1989 and the investigation culminated into filing of a report which was accepted by the Court. The second F.I.R. and subsequent proceedings related to a later period which was 1st August, 1978 to 25th July, 1978 under similar charges. It was held that there was no provision which debar the filing of a subsequent F.I.R.

20. In the case of *T.T. Antony Vs. State of Kerala and Others*, , the Court explained that an information given under sub-sec. (1) of Sec. 154 of the Code is

commonly known as the First Information Report (F.I.R.). Though, this term is not used in the Code, it is a very important document. The Court concluded that second F.I.R. for the same offence or occurrence giving rise to one or more cognizable offences was not permissible. In this case, the Court discussed the judgments in Ram Lal Narang (*supra*) and M. Krishna (*supra*) in some detail, and while quashing the subsequent F.I.R. held as under: (T.T. Antony case, SCC 198-99 & 204, Paras 23-25 and 35).

23. The right of the police to investigate into a cognizable offence is a statutory right over which the Court does not possess any supervisory jurisdiction under Cr.P.C. In *Emperor v. Khwaja Nazir Ahmad* the Privy Council spelt out the power of the investigation of the police, as follows: (IA p. 212)

In India, as has been shown, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as Their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court.

24. This plenary power of the police to investigate a cognizable offence is, however, not unlimited. It is subject to certain well-recognised limitations. One of them, is pointed out by the Privy Council, thus:

If no cognizable offence is disclosed, and still more if no offence of any kind is disclosed, the police would have no authority to undertake an investigation....

25. Where the police transgresses its statutory power of investigation, the High Court under Sec. 482 Cr.P.C. or Arts. 226/227 of the Constitution and this Court in an appropriate case can interdict the investigation to prevent abuse of the process of the Court or otherwise to secure the ends of justice.

xxx xxx xxx

35. For the aforementioned reasons, the registration of the second F.I.R. under Sec. 154 Cr.P.C. on the basis of the letter of the Director General of Police as Crime No. 268 of 1997 of Kuthuparamba Police Station is not valid and consequently the investigation made pursuant thereto is of no legal consequence, they are accordingly quashed. We hasten to add that this does not preclude the investigating agency from seeking leave of the Court in Crimes Nos. 353 and 354 of 1994 for making further investigations and filing a further report or reports under Sec. 173(8) Cr.P.C. before the competent Magistrate in the said cases. In this view of the matter, we are not inclined to interfere with the judgment of the High Court under challenge insofar as it relates to quashing of Crime No. 268 of 1997 of Kuthuparamba Police Station against the A.S.P. (R.A. Chandrasekhar); in all other aspects the impugned judgment of the High Court shall stand set aside.

21. The judgment of this Court in T.T. Antony (*supra*) came to be further explained and clarified by a three Judge Bench of this Court in the case of Upkar

Singh Vs. Ved Prakash and Others, , wherein the Court stated as under:

17. It is clear from the words emphasised hereinabove in the above quotation, this Court in the case of T.T. Antony v. State of Kerala (supra) has not excluded the registration of a complaint in the nature of a counter-case from the purview of the Code. In our opinion, this Court in that case only held that any further complaint by the same complainant or others against the same accused, subsequent to the registration of a case, is prohibited under the Code because an investigation in this regard would have already started and further complaint against the same accused will amount to an improvement on the facts mentioned in the original complaint, hence will be prohibited under Sec. 162 of the Code. This prohibition noticed by this Court, in our opinion, does not apply to counter-complaint by the accused in the first complaint or on his behalf alleging a different version of the said incident.

18. This Court in Kari Choudhary Vs. Most. Sita Devi and Others, , discussing this aspect of law held:

11. Learned Counsel adopted an alternative contention that once the proceedings initiated under F.I.R. No. 135 ended in a final report the police had no authority to register a second F.I.R. and number it as F.I.R. No. 208. Of course, the legal position is that there cannot be two F.I.Rs. against the same accused in respect of the same case. But when there are rival versions in respect of the same episode, they would normally take the shape of two different F.I.Rs. and investigation can be carried on under both of them by the same investigating agency. Even that apart, the report submitted to the Court styling it as F.I.R. No. 208 of 1998 need be considered as an information submitted to the Court regarding the new discovery made by the police during investigation that persons not named in F.I.R. No. 135 are the real culprits. To quash the said proceedings merely on the ground that final report had been laid in F.I.R. No. 135 is, to say the least, too technical. The ultimate object of every investigation is to find out whether the offences alleged have been committed and, if so, who have committed it.

(Emphasis supplied)

23. Be that as it may, if the law laid down by this Court in T.T. Antony case (supra) is to be accepted as holding that a second complaint in regard to the same incident filed as a counter-complaint is prohibited under the Code, then in our opinion, such conclusion would lead to serious consequences. This will be clear from the hypothetical example given hereinbelow i.e. if in regard to a crime committed by the real accused he takes the first opportunity to lodge a false complaint and the same is registered by the jurisdictional police then the aggrieved victim of such crime will be precluded from lodging a complaint giving his version of the incident in question, consequently, he will be deprived of his legitimated right to bring the real accused to book. This cannot be the purport of the Code.

24. We have already noticed that in T.T. Antony case (supra) this Court did not consider the legal right of an aggrieved person to file counter-claim, on the contrary from the observations found in the said judgment it clearly indicates that filing a counter complaint is permissible.

25. In the instant case, it is seen in regard to the incident which took place on 20-5-1995, the appellant and the first respondent herein have lodged separate complaints giving different versions but while the complaint of the respondent was registered by the police concerned, the complaint of the appellant was not so registered, hence on his prayer the learned Magistrate was justified in directing the police concerned to register a case and investigate the same and report back. In our opinion, both the learned Additional Sessions Judge and the High Court erred in coming to the conclusion that the same is hit by Sec. 161 or 162 of the Code which, in our considered opinion, has absolutely no bearing on the question involved. Sec. 161 or 162 of the Code does not refer to registration of a case, it only speaks of a statement to be recorded by the police in the course of the investigation and its evidentiary value.

22. Somewhat similar view was taken by a Bench of this Court in the case of Rameshchandra Nandlal Parikh Vs. State of Gujarat and Another, , wherein the Court held that the subsequent F.I.Rs. cannot be prohibited on the ground that some other F.I.R. has been filed against the petitioner in respect of other allegations filed against the petitioner.

23. This Court also had the occasion to deal with the situation where the first F.I.R. was a cryptic one and later on, upon receipt of a proper information, another F.I.R. came to be recorded which was a detailed one. In this case, the Court took the view that no exception could be taken to the same being treated as an F.I.R. In the case of Vikram and Others Vs. State of Maharashtra, , the Court held that it was not impermissible in law to treat the subsequent information report as the First Information Report and act thereupon. In the case of Tapinder Singh Vs. State of Punjab and Another, also, this Court examined the question as to whether cryptic, anonymous and oral messages, which do not clearly specify the cognizable offence, can be treated as F.I.R., and answered the question in the negative.

24. In matters of complaints, the Court in the case of Shiv Shankar Singh Vs. State of Bihar and Another, expressed the view that the law does not prohibit filing or entertaining of a second complaint even on the same facts, provided that the earlier complaint has been decided on the basis of insufficient material or has been passed without understanding the nature of the complaint or where the complete acts could not be placed before the Court and the applicant came to know of certain facts after the disposal of the first complaint. The Court applied the test of full consideration of the complaints on merits. In Paragraph 18, the Court held as under:

18. Thus, it is evident that the law does not prohibit filing or entertaining of the

second complaint even on the same facts provided the earlier complaint has been decided on the basis of insufficient material or the order has been passed without understanding the nature of the complaint or the complete facts could not be placed before the Court or where the complainant came to know certain facts after disposal of the first complaint which could have tilted the balance in his favour. However, the second complaint would not be maintainable wherein the earlier complaint has been disposed of on full consideration of the case of the complainant on merit.

25. The First Information Report is a very important document, besides that it sets the machinery of criminal law in motion. It is a very material document on which the entire case of the prosecution is built. Upon registration of F.I.R., beginning of investigation in a case, collection of evidence during investigation and formation of the final opinion is the sequence which results in filing of a report under Sec. 173 of the Code. The possibility that more than one piece of information is given to the police officer in charge of a police station, in respect of the same incident involving one or more than one cognizable offences, cannot be ruled out. Other materials and information given to or received otherwise by the Investigating Officer would be statements covered under Sec. 162 of the Code. The Court in order to examine the impact of one or more F.I.Rs. has to rationalise the facts and circumstances of each case, and then apply the test of "sameness" to find out whether both F.I.Rs. relate to the same incident and to the same occurrence, are in regard to incidents which are two or more parts of the same transaction or relate completely to two distinct occurrences. If the answer falls in the first category, the second F.I.R. may be liable to be quashed. However, in case the contrary is proved, whether the version of the second F.I.R. is different and they are in respect of two different incidents/crimes, the second F.I.R. is permissible, This is the view expressed by this Court expressed in the case of Babubhai Vs. State of Gujarat and Others, . This judgment clearly spells out the distinction between two F.I.Rs. relating to the same incident and two F.I.Rs. relating to different incident or occurrences of the same incident etc.

26. To illustrate such a situation, one can give an example of the same group of people committing theft in a similar manner in different localities falling under different jurisdictions. Even if the incidents were committed in close proximity of time, there could be separate F.I.Rs. and institution of even one stating that a number of thefts had been committed, would not debar the registration of another F.I.R. Similarly, riots may break out because of the same event but in different areas and between different people. The registration of a primary F.I.R. which triggered the riots would not debar registration of subsequent F.I.Rs. in different areas. However, to the contra, for the same event and offences against the same people, mere cannot be a second F.I.R. This Court has consistently taken this view and even in the case of Chirra Shivraj Vs. State of Andhra Pradesh, , the Court took the view that there cannot be a second F.I.R. in respect of same offence/event because whenever any further information is received by the investigating agency, it is always in furtherance of the First Information

Report.

14. In light of the above-settled principles, we are unable to accept that Exh. 1/3 was a second F.I.R. with regard to the same occurrence with similar details and was hit by Sec. 162 of the Code. On the contrary, Exh. 7 was not a first information report upon its proper construction in law but was a mere telephonic information inviting the police to the place of occurrence. Thus, we have no hesitation in rejecting this contention raised on behalf of the appellant.

25. In the instant case, it is clearly established on record that the occurrence took place in the evening of 28-12-2008. Harisingh Laljibhai Rathod, Investigating Officer - P.W. 14 deposed that while working as P.S.I. at Vinchhiya Police Station, he had received information regarding head injury caused to one person in Amrapur village. He immediately proceeded towards said village and found that Sureshbhai had received head injuries and he died at the spot and his dead body was taken to Government Hospital at Vinchhiya by 108 Ambulance and there he recorded complaint made by the brother of the deceased at Exh. 38. Whereas the Police Station Entry at Exh. 36 reveals telephonic information given by Dr. R.M. Maitri, Doctor of Government Hospital at Vinchhiya regarding death caused to the deceased due to head injuries and requested to come over to carry out inquest panchnama. The said communication gave no details of the commission of crime as to who had committed the crime and how the occurrence took place. A first information report should reveal basic ingredients regarding commission of cognizable offence upon which the Investigating Officer can immediately start his investigation in accordance with law. In fact, it was only upon reaching the Amrapur village he found that Sureshbhai had received head injuries and he died at the spot and his dead body was taken to Government Hospital at Vinchhiya by 108 ambulance and there he recorded the complaint made by the brother of the deceased giving name of the person who had committed the crime. In the circumstances and in view of the above settled principles of law, we are unable to accept that the Police Station Entry at Exh. 36 recorded on 28-12-2008 at 22-00 hours should be treated as F.I.R. On the contrary, it was mere a telephonic information asking the police to come over at Government Hospital at Vinchhiya to carry out inquest panchnama. The telephonic information is not satisfying the requirement/s of F.I.R. as provided under Sec. 154 of the Criminal Procedure Code. Thus, we do not find any merit in the submission of the learned Counsel for the appellant.

26. As regards point (b), the learned Counsel for the appellant argued that child witness Haresh Vasani, P.W. 11 cannot be said to be an eyewitness as his evidence is not supported by medical evidence. He deposed that the accused inflicted dhariya blow on the deceased, and thereafter, Gordhanbhai inflicted dhoka (wooden log) on the deceased, but there is no injury caused by dhoka blows. Hence genesis of evidence of P.W. 11 is doubtful. In support of his contentions, he relied upon the decision of the Hon''ble Apex Court in Ashok Dixit (supra), where the Hon''ble Apex Court observed as under:

8. P.W. 3 was a child witness and at the time of occurrence she was aged 9 years old. Occurrence took place on 8-8-1982 but her statement under Sec. 161 Cr.P.C. was recorded on 10-8-1982 though after the occurrence she was residing with her uncle which was at a stone's throw from the house of Dr. Dubey.

9. Law is well-settled that evidence of a child witness must be evaluated carefully as a child may be swayed by what others tell him and as an easy prey to tutoring. Wisdom requires that evidence of a child witness must find adequate corroboration before it is relied on.

15. No record has been produced to show that these two police officers were near the place of occurrence at the outpost of Civil Lines Police Station on patrol and checking duty. This outpost is at the distance of 100-125 yards from the place of occurrence. After arrest police officers did not go upstairs where four persons were lying injured and according to P.W. 15 he wanted to go upstairs but he was summoned by these police officers. These police officers saw P.W. 1 and his two sons going upstairs. P.W. 1 with the help of Pandey took deceased-Dr. Dubey, his wife-deceased Manorama and injured Munnu Singh and P.W. 2 through the ground floor to the hospital. If police officers were present at that time on the ground floor their immediate reaction would have been to make proper inquiries, go upstairs and see the place of occurrence but they did not do so. This behavior of these two police officers is contrary to the natural human conduct and it is difficult to believe their presence at the place of occurrence as deposed by P.W. 7.

27. Section 118 of Evidence Act, reads as under:

Section 118: Who may testify:

All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation:- A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

28. Thus, during the course of trial, it is for the trial Court to consider as to whether any witness is competent to testify. To extend the discussion further, it may be feasible to appreciate the decisions laid down by the Hon"ble Apex Court in the matter relating to child witness. In Rameshwar Vs. The State of Rajasthan, , the Hon"ble Supreme Court examined the provisions of Sec. 5 of Oaths Act, 1873 and Sec. 118 of Evidence Act, 1872 and held that every witness is competent to depose unless the Court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age, extreme old age, disease whether of body or mind or any other cause of the same kind. There is always competency in fact unless the Court

considers otherwise. The Hon''ble Supreme Court further held as under:

11.....It is desirable that Judges and Magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the Magistrate or Judge really was of that opinion can, I think, be gathered from the circumstances when there is no formal certificate....

In Mangoo and another Vs. State of Madhya Pradesh, , the Hon''ble Supreme Court, while dealing with the evidence of a child witness, observed that there is always scope to tutor the child, however, it cannot alone be a ground to come to the conclusion that the child witness must have been tutored. The Court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring.

In Panchhi and others Vs. State of UP, , the Hon''ble Apex Court, while placing reliance upon a large number of its earlier judgments, observed that the testimony of a child witness must find adequate corroboration before it is relied on. However, it is more a rule of practical wisdom than of law. It cannot be held that:

The evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring.

In Nivrutti Pandurang Kokate and Others Vs. State of Maharashtra, , the Hon''ble Apex Court, while dealing with the child witness, has observed as under:

The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial Court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though, it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.

In *Himmat Sukhadeo Wahurwagh and Others Vs. State of Maharashtra*, , the Hon''ble Supreme Court observed that the evidence of a child must reveal that he is able to discern between right and wrong and the Court may find out from the cross-examination whether the defence lawyer could bring anything to indicate that the child could not differentiate between right and wrong. The Court may ascertain his suitability as a Witness by putting questions to him and even if no such questions had been put, it may be gathered from his evidence as to whether he fully understood the implications of what he was saying and whether he stood discredited in facing a stiff cross-examination. A child witness must be able to understand the sanctity of giving evidence on oath and the import of the questions that were being put to him.

In *State of U.P. Vs. Krishna Master and Others*, , the Hon''ble Apex Court held that there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the Court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill-will against any person. Therefore, there must be something on record to satisfy the Court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature.

In *Gagan Kanojia and Another Vs. State of Punjab*, , the Hon''ble Supreme Court held that part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness.

29. In view of the above, the law on the issue can be summarised to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires confidence of the Court and there is no embellishment therein, the Court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partially or fully. However, an inference as to whether the child has been tutored or not, can be drawn from the contents of his deposition.

30. In the instant case, the trial Court has found Haresh Chanabhai Vasani - P.W. 11 is capable to give deposition. He was 12 years at the time of recording of his evidence and he was studying in 7th Standard. He deposed that the accused

inflicted dhariya-blow and dhoka blow (wooden log) on the deceased, and thereafter, Gordhanbhai inflicted dhoka blow (wooden log) on the deceased. It is the case of defence that there is no injury caused by dhoka blows on the body of the deceased as mentioned in the post-mortem report. However, the defence cannot run away from the fact that the evidences of other witnesses and post-mortem report clearly establish that the death of the deceased Sureshbhai was caused due to dhariya blow inflicted by the accused Kanubhai. His presence at the scene of offence is also established on record. Thus, except for above contradiction, the evidence of Haresh Chanabhai Vasani - P.W. 11 is consistent and is corroborated by the version of other witnesses, and therefore, there is no cogent reason to disbelieve him or to discard his evidence. Thus, in view of the above discussion and in light of the above decision of the Hon'ble Apex Court, the above contention raised by the learned Counsel is not acceptable.

31. As regards point (c), the learned Counsel for the appellant argued that panchnama was not read over to the panchas. In support of his contentions, he relied upon the decision of this Court in *Mer Vaja Meraman* (supra), wherein this Court observed as under:

10. Before parting with this case, we are constrained to observe here that the evidence of the Panch Kala Karsan, P.W. 15, Exh. 39 is recorded in a very slipshod manner. Same is the case with regard to the recording of the evidence of the Investigating Officer, so far as the recovery of the rope is concerned. The learned Public Prosecutor who conducted the prosecution before the trial Court did not take pains to bring on record in the substantive evidence of these two witnesses the fact of the accused having made a statement that he had kept the piece of rope and he was inclined to show that spot, even though, it has been recorded in the panchnama, Exh. 40 that the accused made such a statement. The learned Public Prosecutor does not appear to have realised that there should be substantive evidence on record in this regard and that the panchnama can be used only to corroborate the evidence of the Panch and not as a substantive piece of evidence. It appears that the panchnama, Exh. 40, was shown to the Panch and he admitted his signature, and therefore, it was exhibited at Exh. 40. The examination-in-chief of this witness Kala Karsan does not show that he was read over the panchnama before it was exhibited. This Court has time and again impressed upon the necessity of reading over the panchnama which can be used as a piece of corroborative evidence. In spite of this, it is regrettable that the learned trial Judge did not take pains to see that the panchnama was read over to the Panch before it was exhibited. A panchnama which can be used only to corroborate the Panch has to be read over to the Panch, and only thereafter it can be exhibited. If the Panch has omitted to state something which is found in the panchnama, then after reading over the panchnama, the Panch has to be asked whether that portion of the panchnama is correct or not and whatever reply he gives has to be recorded. If he replies in affirmative, then only that portion of the panchnama can be read to corroborate the substantive evidence of the Panch. If he replies in negative, then that part of the panchnama cannot be

read in evidence for want of substantive evidence on record. It is, therefore, necessary that care is taken by the Public Prosecutor who conducts the trial to see that such a procedure is followed while examining the Panch as a witness. It is also necessary that the learned trial Judge also sees that panchnama is read over to the panch, and thereafter, the panchnama is exhibited after following the procedure as indicated above. If the learned public Prosecutor and the learned trial Judge had followed this procedure in the present case and if the Panch had stated that the accused-appellant had made such a statement as recorded in the panchnama, then it: would have been possible to convict the accused-appellant at least for the offence punishable under Sec. 201 I.P.C. It is unfortunate that the case results in acquittal because of want of care on the part of the learned Public Prosecutor as well as the learned Addl. Sessions Judge.

32. We fully agree with the above decision of this Court. The content of panchnama cannot be read as substantive piece of evidence, still, it can be used as a piece of corroborative evidence. However, in the present case, it is not the case of defence that the accused Kanubhai has not killed Sureshbhai. The learned Counsel for the appellant has raised the plea of right to private defence in causing the death of Sureshbhai and in alternate contended that the death of Sureshbhai was caused by the accused due to grave and sudden provocation. The contention that the panchnama was not read over to the panchas has no significance in this matter and does not vitiate the proceedings. We are therefore unable to accept the above contention of the learned Counsel.

33. As regards point (d), Shri Yatin Soni, learned Counsel for the appellant argued that the alleged incident occurred all of a sudden due to attempt made by the deceased to rape Madhuben, wife of the accused who was pregnant at the relevant time. This fact is supported by the prosecution witnesses, further statement of the accused and post-mortem notes wherein it is mentioned that semen was ejaculated on penis. Therefore, the accused is entitled to benefit under Secs. 96, 97 and 100 of the Indian Penal Code and this case also falls under Exception 1 of Sec. 300 of the Indian Penal Code. In support of his contention, he relied upon the decision of the Hon''ble Apex Court in Yeshwant Rao Vs. State of Madhya Pradesh, , Vishwanath Vs. The State of Uttar Pradesh, and Bishna @ Bhiswadeb Mahato and Others Vs. State of West Bengal, .

34. Sections 96, 97 and 100 of the Indian Penal Code read as under:

Sec. 96: Things done in private defence:

- Nothing is an offence which is done in the exercise of the right of private defence.

Sec. 97: Right of private defence of the body and of property:

Every person has a right, subject to the restrictions contained in Sec. 99, to defend-

First:- His own body, and the body of any other person, against any offence

affecting the human body;

Secondly:- The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.

Sec. 100: When the right of private defence of the body extends to causing death:

The right of private defence of the body extends, under the restrictions mentioned in the last preceding Section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:-

XXX XXX XXX

Thirdly:- An assault with the intention of committing rape....

35. We have considered the aforesaid submissions as also the ratio propounded by the Hon"ble Supreme Court in above-mentioned cases. After carefully going through the same, we however, find that none of the aforesaid decisions could be said to be directly applicable in the present case as the facts are quite different and so the same have no application in the facts and circumstances of the present case. In the instant case, it is the case of the defence that the alleged incident occurred all of a sudden due to attempt made by the deceased to rape Madhuben, wife of the accused who was pregnant at the relevant time. However, defence has failed to establish the said fact by bringing cogent evidence on record. None of the witnesses has testified that the deceased has at all tried to commit rape upon Madhuben, wife of accused and due to which deceased was assaulted by accused in order to save her.

35.1. Merely ejaculation of semen from penis, found while carrying out autopsy would not lead us to believe that he must have tried to commit rape upon the wife of the accused, in absence of any cogent evidence. We have noticed that in several cases, for varied reasons, there is possibility of ejaculation of semen from penis. When a person dies due to strangulation, there is possibility of ejaculation of semen from penis. In Medical Jurisprudence, Toxicology and Forensic Science for Class Room, Investigation and Court Room with Case Laws by Prof. (Dr.) A.S. Deoskar (1st Edition) which gives following information, at page 104, of autopsy findings in case of hanging:

Penile engorgement with seminal emission in males (seminal secretions will be seen at tip of penis), and discharge of blood tinged fluid from vagina in females. (These features can be mistaken for sexual activity before death i.e. a post-mortem artifact).

35.2. In Modi's Medical Jurisprudence and Toxicology (24th Edition 2011) at page 447, the following comments are to be found in case of death by hanging:

.....Turgescence of the genital organs generally occurs in both sexes from hypostasis. Seminal fluid is sometimes present at the urethral meatus, but it is not a diagnostic sign of hanging, as it has often been observed by Modi in those who suddenly died from mechanical violence.

35.3. Thus, for variety of reasons there is possibility of ejaculation of semen from penis and without any cogent evidence on record it cannot be believed that the deceased must have tried to commit rape upon the wife of the accused.

36. Nowhere, in the evidence brought on record is it established that the deceased Sureshbhai tried to rape Madhuben. If that being so, the defence ought to have examined Madhuben. The defence has failed to do so and now they cannot take umbrage on the point that Madhuben had stated before the Investigation Officer that the deceased had caught her shoulder and tried to lay her down, which is also not admissible under the law. The learned Counsel first raised the plea of right to private defence in causing the death of Sureshbhai and in alternate contended that the death of Sureshbhai was caused by the accused due to grave and sudden provocation. We have examined the conduct of the accused. It is not inspiring. He ran away from the scene after committing such an act. If he had done the act unintentionally, he should have stood there and helped the deceased. Circumstances clearly indicate that the right to self defence taken by the accused is not established on record. It cannot be said that death of Sureshbhai was caused due to any grave and sudden provocation given by him in order to save his wife from the deceased attempting to commit rape, so as to deprive the accused of the power of self-control. Case of the accused does not fall as described under Sec. 100 (thirdly) of the Indian Penal Code. In view of the above proposition laid down by the Hon'ble Apex Court and in view of the above discussion, the above contention raised by the learned Counsel as regard to right to self-defence is sans merit and deserves to be dismissed.

37. We are required to examine the facts of the present case as it stands before us whether the case of accused falls within the ambit of the exception to Sec. 300 of Indian Penal Code. We have carefully perused the records of this case. It is fully established from the evidence on record that the appellant-accused had caused the injury to the deceased Sureshbhai which proved fatal.

38. Now, the question which falls for consideration is whether on consideration of the peculiar facts and circumstances of the case, the conviction and sentence passed by the trial Court is appropriate or not? Apt sentencing is very vital function and obligation of the Court.

39. There are significant features of the case which are required to be taken into consideration in awarding appropriate sentence to the appellant-accused:

(i) It is established on record that the appellant-accused Kanubhai and deceased Sureshbhai were cousin brothers and their fields were also adjacent to each other.

(ii) On the date of incident, presence of accused and deceased and their wives at

the scene of incident are established on record.

(iii) It is also established on record that the weapon like dhariya are usual agricultural instrument and agriculturist are keeping such instrument with them in their farm.

(iv) It is also established on record that the accused was nurturing grudge against the deceased regarding illicit relationship of the deceased with his wife.

(v) It is also established on record that the accused gave a single dhariya blow on the head of the deceased which proved fatal and the second injury caused was resultant and consequent injury to the first injury.

(vi) The accused could have inflicted more blows to the deceased. However, he refrained from doing such act, which itself indicate that the incident happened on the spur of a moment without any intention of causing death.

40. Therefore, it is abundantly clear from the record that there was no pre-arranged plan or that the incident had taken place in furtherance of the intention of the accused. Though, it does not appear that the accused had killed Sureshbhai by planning out the whole incident in a methodical manner, yet the evidence disclose that he was nurturing a grudge against the deceased. When all these facts and circumstances are taken into consideration in proper perspective, then it becomes difficult to maintain the conviction of the appellant-accused under Sec. 302 of the Indian Penal Code.

41. Section 304 of the I.P.C. reads as under:

Sec. 304: Punishment for culpable homicide not amounting to murder:

Whoever commits culpable homicide not amounting to murder shall be punished with (imprisonment for life), or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death,

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

42. In the instant case, the occurrence had taken place on the spur of a moment. Only the appellant accused Kanubhai inflicted a single dhariya blow on the deceased. There is nothing on record to show that there was intention or pre-meditation in the mind of the accused to inflict fatal injuries. On consideration of the entire evidence, including the medical evidence, we are clearly of the view that the conviction of the appellant-accused cannot be sustained under Sec. 302 of the Indian Penal Code, but the appropriate Section under which the appellant ought to be convicted is Sec. 304, Part-II of the Indian Penal Code.

43. We, therefore, are of the considered opinion that although it is a case of culpable homicide not amounting to murder, but considering the facts and circumstances of the present case, we are of the considered view that the act was done with the knowledge that it is likely to cause death but without intention on the part of the appellant-accused to cause the death of the deceased.

44. We accordingly modify the conviction and sentence of the appellant from Sec. 302 of the Indian Penal Code to Sec. 304, Part-II of the Indian Penal Code and sentence him to suffer rigorous imprisonment for 10 years. The judgment of the trial Court is modified to that extent. The fine as imposed by the trial Court is maintained.

45. The appeal is partly allowed in the aforementioned terms and disposed of. Records and proceedings be transmitted back to the trial Court.