

(1999) 03 GUJ CK 0053

In the Gujarat High Court

Case No : Criminal Appeal No's. 857, 985, 987, 1004 and 1005 of 1995

Kavasjhangir Mamabuvala

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 16-03-1999

Acts Referred:

Bombay Police Act, 1951 — Section 135

Criminal Procedure Code, 1973 (CrPC) — Section 157, 162, 307, 82

Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 364

Citation : (2000) 1 GLR 418

Hon'ble Judges : K.R. Vyas, J;A.M. Kapadia, J

Bench : Division Bench

Advocate : M.R. Barot and Krishna V. Barot in Criminal Appeal No. 857 of 1995, Y.N. Oza, in Criminal Appeal No. 985 of 1995, Raju K. Shah and K.C. Panwala, in Criminal Appeal No. 987 of 1995, P.M. Thakkar, for Thakkar Associates in Criminal Appeal No. 1004 of 1995, R.R. Marshal, in Criminal Appeal No.1005 of 1995, for the Appellant; M.A. Bukhari, Additional Public Prosecutor in Criminal Appeal Nos. 857, 985, 987, 1004 and 1005 of 1995, for the Respondent

Final Decision : Dismissed

Judgement

K.R. Vyas, J.—Five appellants, original accused in Sessions Case No. 193/99, have filed five separate appeals challenging the judgment and order of conviction and sentence dated 21-8-95 passed against them by the learned Additional Sessions Judge, Surat convicting them:

(i) for the offences punishable under Sections 147, 148 and 302 read with Section 149 of the Indian Penal Code and sentencing each of them to undergo Life Imprisonment and to pay a fine of Rs.1000/-, in default to undergo S.I. for one year;

(ii) for the offence punishable u/s 323 read with Section 149 of the Indian Penal Code and sentencing each of them to undergo S.I. for six months and to pay a fine of Rs.250/-, in default to undergo S.I. for fifteen days; and

(iii) for the offence punishable u/s 135 of the Bombay Police Act and sentencing each of them to undergo S.I. for six months and to pay a fine of Rs.250/-, in default to undergo S.I. for fifteen days.

The sentences imposed on each of the appellant have been ordered to run concurrently.

2. Since all these appeals arise out of the aforesaid judgment and order dated 21-8-95, we have decided to hear and dispose them of by this common judgment.

3. It may be noted that original accused Nos. 3,4 and 5 have not surrendered to the jail authority after the expiry of the furlough leave granted to them and have remained absconding. Therefore, Mr. M.A.Bukhari, learned Additional Public Prosecutor has raised an objection against the hearing of the appeals of the absconding appellants. Since this Court, while admitting the appeals on 24-6-96, refused bail on the sole consideration that the matter would be heard in the month of June, 1997, and that if the appeals are not heard and decided by the said outer time limit, liberty was reserved to the appellants to move this Court for bail, on behalf of the appellant of Criminal Appeal No. 857/95, it was pointed out to us that for no fault of his, he has to remain in jail and merely because other accused are absconding, that is not a ground not to take up the hearing of his appeal. Considering the facts and circumstances of the case, we have decided to hear all the appeals together by over-ruling the objection of the learned Additional Public Prosecutor in view of the decision of this Court in *State of Gujarat vs Narubhai Amrabhai Chunara*, 1997 (1) Crimes, 197, wherein it is laid down that the Appellate Court can hear and decide the appeal against acquittal in absence of the accused when provisions contained in Section 82 of the Criminal Procedure Code were duly complied with. That was a case wherein appeal against acquittal was filed and the accused got declared proclaimed offender in appeal and the question involved was whether appeal could be said to be ready for purpose of same being enlisted on the final hearing board ? While answering the question in affirmative, this Court held that even though the case was of acquittal but the principle remains the same.

4. All the above accused have been convicted for the offence of forming unlawful assembly having common intention to cause murder of deceased Dinky @ Hosedar Rohington Bhujwala and in furtherance of the said common intention, on 14-6-94 at about 10.30 a.m. when the deceased and the complainant, Rakesh @ Rocky Champaklal Rana (PW 1, Ex.16), were going on a motor cycle driven by the deceased and the complainant as a pillion rider, the motor cycle was stopped and the deceased was attacked by all the accused having deadly weapons like gupti, knife and stick on the main road in the busy locality of Nanavat area of the city of Surat with the result the deceased and the complainant fell down. The prosecution has alleged that the deceased was a Karate Champion having black belt. It is also the prosecution case that the accused side were also engaged in the profession of Karata and, therefore the motive alleged was that of

professional rivalry. The complainant Rakesh also sustained certain minor injuries. The complainant immediately left the place on the motor cycle to inform the parents of the deceased about the incident. However as the house of the deceased was locked, he returned to the spot and later on gave complaint to Chowk Bazar Police Station.

5. Police Inspector Mohmad Sadiq Suleman (PW 24, Ex.63) after making detailed investigation in the case, submitted a chargesheet against the accused. Charge, Ex.6, was framed against all the accused by the learned Additional Sessions Judge, Surat to which the accused pleaded not guilty and claimed to be tried. The defence of all the accused was of total denial of their involvement in the offences alleged against them. The learned Additional Sessions Judge, Surat, after considering the evidence on record, including the further statements of the accused, accepted the prosecution case and convicted and sentenced the accused as stated hereinabove.

6. Complainant Rakesh @ Ricky Champaklal Rana (PW 1, Ex.16) is the sole eye witness in the present case. His evidence is attacked by all the learned counsel appearing for the appellants. The substance of the arguments is that complainant Rakesh is a got up witness. We will refer to the circumstances pointed out before us by the learned counsel to show that the complainant was not at all present at the time of the incident while appreciating his evidence. However, before we discuss the evidence of the complainant as well as other supporting prosecution witnesses, it is necessary to refer to the medical evidence.

7. Dr. Mohmad Iqbal Hussain Qureshi (PW 6, Ex.28) was at the relevant time Tutor in Forensic Medicine Department, Medical College, Surat, who performed post mortem examination of the deceased Dinky. Dr. Qureshi in his evidence, Ex.28, has stated that he received the dead body of Dinky at about 2.30 p.m. on 14-6-94 and he started post mortem examination at about 2.50 p.m. and completed the same at 4.15 p.m. on the same day. He found the following external injuries on the person of the deceased:

1 An incised wound seen present on the frontal region of middle of top of head, 8 cm above inner level of Rt eye on brow 8 x 1 cm x scalp deep.

2 A contused lacerated wound seen present on left temple pretext gone 8 cm above the left over semi luster in shape 6 x 1 cm in size scalp deep.

3 A stab wound seen present on the top of left shoulder region, 9 cm above anterior axillary fold, vertical in direction 4.5 cm x 2 cm x muscle deep.

4 A stab wound seen present over the lateral side of left shoulder joint 3 cm x 2 cm x muscle deep.

5 An incised wound seen present on the posterior aspect of middle 1/3 of left arm 5 cm x 1.5 cm x skin deep.

6 A stab wound seen present in front of Rt side of chest 13.0 cm above the Rt

heel, 4.5 cm away from middle in vertical in direction 2 x 1.5 cm x thorax cavity deep, roughly surrounding in shape.

7 A stab wound seen present over the lateral aspect of theroax in mid axially live 11.0 cm above the Rt heel on Rt side , vertical in direction 3 cm x 1.5 cm x throax cavity deep.

8 A stab wound present just lower and middle to injury No.7 4 cm midial to inuury No.7 109 cm cavity deep.

9 A stab wound sen present over Rt oxoin 4 cm below the injury No.8, 3 cm x 1 cm x abdominal cavity deep. 105 cm above the Rt heel.

10. An incised (dettence wound) over the palmer aspect of root of Rt index size 2 cm x 1 cm x skin deep.

11 An incised wound (dettence wound) over the palmer aspect of Rt hand 1.5 cm x 02 cm x skin deep.

12 A stab seen present over the middle aspect of left knee joint 47 cm above the heel 4 cm x 1.5 cm x bone deep.

13 An incised wound seen present over the left knee joint over the pattella and pattella bone seen from this wound. 2 cm x 1.5 cm x skin deep.

14 An incised wound seen present over the middle of Rt thigh, over anterio lateral aspect 71 cm above Rt heel 4 x 1 cm, transverse.

15 A stab wound seen present over the back of left lumbar region, 11.5 cm above the heel 3 cm x 1.5 cm x cavity deep, 8 cm left intral from mid line.

Dr. Qureshi also found the following internal injuries on the person of the deceased :

1 A stab wound corresponding to external injury No.3; enter into the theroax cavity from Rt side cutting the 5th Rt costal till entering tharoax cavity by cutting pressa and Rt lung on its middle aspect 2 x 0.5 cm passing through and through right lung.

2 The stab wound corresponding to injury No.7 enter into cavity throax 7th Rt costal castilose stab on Rt lung 2 x 1.5 x 1.5 cm.

3 The stab wound corresponding to injury No.8 enter into Rt cavity throax cutting 11th inter costal space and enter into Rt lobe of lever on lateral aspect 3 x 1 x 2 cm size.

8. According to Dr. Qureshi all the above injuries were ante-mortem in nature. According to Dr. Qureshi, the cause of death of the deceased was due to shock and haemorrhage due to multiple stabs over lung and lever. Moreover, the doctor has stated that injury No.2 was possible by stick while injuries Nos. 3 to 15 were possible by gupti whereas according to him injury No.1 could be possible either

by gupti or knife and injuries Nos. 3,4,5 and 12 could be possible by knife. In view of the medical evidence on record, it can safely be said that the death of the deceased was a homicidal one.

9. Since the prosecution has heavily relied on the testimony of the sole eye witness complainant Rakesh (PW 1) , it is necessary to refer to and appreciate his evidence first. According to complainant Rakesh, he was taking training of Karate from the deceased and was knowing him since 4 to 5 years. A Karate tournament was arranged in 1993-94 and, therefore, on 14-6-94 the complainant as well as the deceased had gone on a bullet motor cycle at about 10.00 a.m. to the house of one Ismailbhai Kasambhai Amla (PW 8, Ex.31) who was Announcer of the programme and had a discussion with him for about 10 to 12 minutes. After returning from the house of Ismailbhai, when the deceased was driving the motor cycle and when they reached Pratap Press, Nanavat, they saw all the five accused standing on the road. Accused No.1 had raised hand-signal to stop the motor cycle. When the deceased stopped the motor cycle, all the five accused intercepted and encircled the deceased. Accused No.1 then inflicted gupti blow on the chest of the deceased. On receiving the blow, the deceased and the complainant both fell down on the ground. Thereafter the remaining four accused started giving indiscriminate blows with the weapons they had with them. According to the complainant, accused Nos. 1 to 3 had guptis with them while accused No.4 had a knife and accused No.5 had a stick with him and they all inflicted blows on the deceased with their respective weapons. Thereupon the deceased gave a signal to the complainant to run away and when the complainant tried to run away with the motor cycle, accused No.5 gave a stick blow resulting into injury on the right shoulder as well as on the middle finger of the left hand of the complainant. The complainant straight way went to the house of the deceased with a view to inform his parents. However, as the house of the deceased was locked, he returned to the scene of offence. According to the complainant, when he returned, the police had come there. At that time the complainant came to know about the death of his mentor who was then immediately taken to the hospital. Police Inspector Mohmad Sadiq Suleman Kara (PW 24, Ex.63) took the complainant to the police station where he had given the complaint, which was recorded into writing. The police again returned to the scene of offence with the complainant and a panchnama of the scene of offence was drawn. The complainant identified the weapons used by the accused. The complainant has further stated that after the death of his mentor, he was running Karata school and on 3-2-95 he was also attacked by the brothers as well as friends of the accused and for that he filed a complaint before the police. The complainant has stated that in view of the constant threats given by the kith and kin of the accused, he stopped running Karate classes. According to the complainant, he saw injury on the hands of accused No.1 when accused No.1 tried to take out gupti from the chest of the deceased. Similarly accused No.3 also sustained injury by his own gupti. The complainant was taken to New Civil Hospital for the purpose of taking treatment under a Police Yadi.

10. The complainant is cross-examined at length. He has denied the suggestion that he had stated in the complaint that sword was also used at the time of attack by the accused. In answer to the question regarding the complaint filed by him against the brothers and friends of the accused, he has stated that he had not identified one of the accused viz Ashok in the identification parade even though he knew him since six months. However, he identified the brother of accused No.2 and 3. He has thereafter given details about the Karate training he has received so far and the usefulness of the same in defence at the time of attack. According to him he is a brown belt holder. He had not seen the weapons carried by the accused and since he was frightened, he did not think of self-defence. He and deceased both fell down on the opposite direction and even the motor cycle had also fallen on the ground. He has admitted that the attack was all of a sudden and as far as he recollects his mentor received nine blows. However, he has denied the suggestion that all the nine blows were given by knife. He has admitted that after lodging the complaint when he returned to the scene of offence with the police, the police had recovered one bent gupti and a stick from the scene of offence. He has stated that Chowk Bazar Police Station is at a distance of about 1 km from the scene of offence. He has been contradicted regarding the injury sustained by accused No.3 when he admitted that he had not stated so in his police statement. According to him although the incident happened in the middle of the road, the traffic continued. He has admitted that accused No.1 is not running Karate school and he also does not know whether accused No.1 was concerned with Karate training or not. He also does not know whether accused No.1 was a member of Karate or whether accused No.1 had taken any part in Karate championship. According to him, there are 6 Karate schools in the city of Surat and he does not know whether accused No.1 is a member of any of such school. He has denied the suggestion that he would pardon the accused if he is offered bribe. He has pleaded ignorance about the fact that the father of Ashok Shantilal Damaniya, who is one of the accused in the complaint filed by him is a big builder. He has also denied the suggestion that because he received money from him he had not identified Ashok Damaniya in the identification parade. According to him when he lifted the motor cycle for the purpose of running away from the spot, the machine of the motor cycle was on. He has denied the suggestion that he recognises one Alibhai Taherbhai as a black belt and he has also pleaded ignorance about the fact that Alibhai Taherbhai and his mentor were fast friends. He has denied the suggestion that since he was frightened he had gone to Alibhai Taherbhai for the purpose of taking his advice and both of them returned to the hospital together. He has also denied the suggestion that the parents of the deceased and Mr & Mrs Chokshi met him at the hospital and they suggested him to disclose the name of accused No.1. He has further denied that after the inquest report as well as post mortem examination were over, the remaining part of the complaint was recorded at 3.00 pm and that the police had recorded in his name the remaining portion of the complaint.

11. Regarding the injuries caused by the accused to the deceased, the complainant has remained consistent to what he has stated in the examination-in-chief. According to the complainant, the police took him in a jeep car leaving his motor cycle at the scene of offence for the purpose of recording his complaint and in the jeep car he had narrated the incident to the police. According to him, the police started recording his complaint at about 11.00 am and was completed in about 10 to 15 minutes.

12. In the cross-examination on behalf of accused Nos. 3 and 5, he has stated that accused No.3 was running a Karate class in Soni Falia and he used to meet the deceased also. According to him, he had received two stick blows on his shoulder and he is not sure whether he had sustained bruise injury or not. He had taken the motor cycle belonging to his mentor on the previous day and at that time it was agreed that the complainant will meet the deceased on the next day at about 9 or 9.15 a.m. In the morning the deceased met him on the road at Timaliyawad. He has admitted that he does not possess licence to run motor cycle.

13. Reading the evidence of complainant Rakesh, it appears to us that he is a natural eye witness and barring some contradictions, which are not material, he has remained consistent all throughout regarding the identity of the accused and the part played by them. He has remained faithful to the prosecution case. However, his evidence has been criticised by the defence by branding him as a liar and a got up witness. It was contended that in the case filed by him against one Ashok Damaniya and other kith and kin of the accused for the offences punishable under Sections 307, 364, 365, 147, 148, 149 and 506(2) of the IPC, the complainant himself turned hostile to the prosecution with the result that all the accused were acquitted. It was, therefore, submitted that the complainant has no respect for the truth and therefore no reliance can be placed on his evidence. In support of this submission, our attention was invited on the certified copy of the judgment delivered by the learned Additional Sessions Judge, Surat in Sessions Case No.197 of 1995. Without going into the controversy whether we can look into the judgment delivered in another criminal case, filed by the very complainant, we can only say that merely because the complainant received injuries and had turned hostile in the said case, that fact by itself is no ground to discard his evidence, and in the present case by branding him as a liar and untruthful witness. The fact that the complainant was required to close down the Karate School which was continued by him after the death of his Mentor during the pendency of the present case for which he sustained murderous assault by the kith and kin of the accused and the fact that he was required to close down the Karata class, the possibility of his getting consistent threat from the kith and kin of the accused cannot be ruled out. We are not prepared to accept that the complainant is a witness who can be won over. The evidence of the complainant is challenged on the ground of his conduct for the purpose of showing that he was not at all present when the incident had taken place. It was pointed out to us that except sustaining minor injuries, he did not receive any serious injuries

inspite of the fact that the accused started indiscriminate assault with deadly weapons. It was further contended that it would be too much for a boy of 19 to lift the heavy motor cycle and to run away from the scene of offence and thereafter to go to the parents house and to return without conveying the message of the incident to them and even thereafter also not to go to the hospital immediately with a view to pay last respect to the departed soul. On behalf of the accused, the learned counsel wanted to suggest that this is not the natural conduct on the part of the complainant. We see no unusual thing about the conduct of the complainant . One should bear in mind that as per the prosecution case the accused had a professional rivalry of Karate classes with the deceased and, therefore, their target was only the deceased. The incident took place all of a sudden. As per the evidence of the complainant, the deceased was mercilessly beaten and, therefore, if a signal is given by the deceased to the complainant to run away and with a view to save himself if the complainant had at that spur of moment lifted the motor cycle and in fact run away, we feel that the complainant has not done any unusual thing. It is true that normally one would not like to spare a person who is an eye witness to the incident. However, before he is attacked, the complainant decides to free himself, not before sustaining minor injuries on his person is a natural conduct which suggests the presence of mind. Merely because the complainant did not inform about the incident even to the neighbours of the parents of the deceased, when he found the house of the deceased locked and parents not present there, that circumstance itself is not sufficient to discard the evidence of the complainant. One has to visualise the mental condition of the complainant when in his presence his mentor was mercilessly beaten with lathel weapons and he was terribly frightened. His immediate concerned was to inform the parents of the deceased. Since they were not there in the house, that does not mean that he would go on informing every one. At that time he was also not sure about the physical condition of the deceased and, therefore, he returned immediately with a view to see that in whatever manner he can help out the deceased. He came to know about the death of his mentor who died in the hospital. Now, once the fact of the death of the deceased is disclosed, there was nothing for him to do thereafter as he was thereafter assisting the police in the investigation. He remained busy with the police for the purpose of lodging the complaint, helping preparing of panchnama of the scene of offence etc. When one is with the police , he cannot think of leaving the police without the permission while the investigation is going on and in any case once the deceased was declared dead in the hospital, there was practically no purpose for the complainant to go to any other place in the midst of the investigation.

14. Ismailbhai Kasimbhai Amla (PW 8 Ex.31) in his evidence has clearly stated that the deceased in company of one gentleman had come to his house at about 10.00 or 10.15 a.m. and had discussion with him for about 10 to 12 minutes about Karate programme where Ismail was to act as an announcer. The incident in question had taken place at about 10.30 a.m. As per the say of the

complainant, immediately after meeting Ismail, the present incident had taken place. In view of the evidence of this witness, it is clear without any manner of doubt that the complainant accompanied the deceased and had discussion about arranging the Karata programme with Ismail and thereafter the incident had taken place. Thus, the complainant was there when the incident had taken place. It was contended on behalf of the accused that Ismail has not referred to the motor cycle when the deceased and the complainant met him before the incident. This contention is rejected on the ground that one is required to park the vehicle outside the house and then to enter the house and it is therefore not necessary that the person would mark everything of the person visiting him. Therefore, here in the instant case also the complainant as well as the deceased after parking the vehicle had gone to the house of Ismail. Therefore, merely because Ismail has not referred to the existence of the motor cycle in his evidence, that would not go to suggest that the deceased and the complainant had not gone together to the house of Ismail. The evidence of Ismail totally corroborates the say of the complainant that before the incident he in the company of the deceased had in fact gone to the house of Ismail.

15. The evidence of the complainant is also corroborated by the evidence of Bipin Bhagwandas (PW 9, Ex.32). According to him he is having a shop as well his residential house in Nanavat area. The incident had taken place at about 10.15 a.m. when he opened the shop and heard the shouts. He saw that five persons were beating one Parsi gentleman. He did not identify either the deceased or any of the accused who had beaten that Parsi gentleman. Three of the accused were having weapons like Gupti, knife and stick. He identified accused No.3 in the Court. In the cross examination he has stated that after the incident many persons including the witness closed down the shops and he returned in the evening at about 5.00 p.m. He was taken by the police for the purpose of recording his statement. He had not disclosed the name of accused No.3 to the police. He has admitted that he was not knowing accused No.3 when accused No.3 was inflicting blows. He has also admitted that accused No.3 was residing in his street and was knowing him even prior to the incident by name. Bipinbhai in our opinion has corroborated the say of the complainant regarding five persons having taken part in the incident of beating by weapons like gupti, knife and stick and the place of the incident. Not only that he had identified accused No.3. It is true that he did not disclose the name of accused No.3 when his statement was recorded. However, in view of the fact that he identified accused No.3 in the court by stating that accused No.3 is residing in the same street in which he resides and that he knew accused No.3 even prior to the incident, including by name , in our opinion, the evidence of complainant, Ismail and Bipinbhai clearly establishes the presence of accused No.3 at the time and place of the incident. In our opinion, the evidence of this witness as well as the evidence of Ismail (PW 8) being independent witnesses is reliable and trustworthy.

16. Our attention is invited by the learned counsel appearing for the accused to the evidence of Vasant Digamber (PW 19 Ex.55), Police Head Constable of Chowk

Bazar Police Station and contended that the prosecution has suppressed material fact regarding the genesis of the incident by not examining the scooterist nor making any investigation regarding his whereabouts. In the submission of the learned counsel , the scooterist was the first informant about the incident to the Chowk Bazar Police Station. It was also submitted that the stranger scooterist had not disclosed the presence of the complainant at the scene of offence and therefore also the evidence of the complainant is not believable. Reading the evidence of Vasant Digamber (PW 19) it is clear that a scooterist came to the Lalgate Police Chowky where the witness was on duty at about 10.45 a.m. and informed him that near Dharam Kanta of Nanavat area one person is beaten by 4 to 5 persons with weapons and he requested the witness to rush to the spot. The witness went with the scooterist on his scooter to the spot. The scooterist left the spot after dropping PW 19 at the spot. PW 19 found deceased lying on the road profusely bleeding. The blood was oozing out from the chest as well as head. PW 19 took the deceased in a rickshaw to Maskati Hospital and the doctor declared him dead. In the cross-examination he has admitted that he has to give a complaint whenever a cognizable offence is disclosed. After staying at the hospital for about an hour he went to the police station between 12.30 and 1.00 p.m. He has stated that the relatives of the deceased came to the hospital after the deceased was admitted in the hospital. He had informed the doctor about the place from where he brought the deceased. However, he had not informed the doctor about the fact that the deceased was beaten by 4 to 5 persons. He has also admitted that there was telephone in the hospital. He has also admitted that before he informed the police station about the offence , Police Inspector reached the hospital. Even though PI inquired as to from where he had brought the deceased, he had not recorded his statement at that time. He had informed the Inspector that the information was conveyed to him by a scooterist that the deceased was beaten by 4 to 5 persons. He had not taken down the number of the scooter as he was in hurry. He has further stated that when he reached the spot, there was a crowd of about 200 persons. However, he had not inquired from any one about the offence. He has also admitted that the doctor has given a jersey and he had taken it to the police station and produced before the Panchas while drawing panchnama. Reading the evidence of this witness, it clearly appears to us that this witness had not taken sufficient care to register the offence when a cognizable offence was disclosed to him by the scooterist. It is also true that he did not bother to inquire about the name of the scooterist as well as the number of the scooter. Thus his evidence is incomplete as far as the prosecution is concerned. He, however, corroborates the say of the complainant and other witnesses regarding the presence of 4 to 5 persons taking part in beating the deceased as well as time and place of the incident. He could have taken proper care to inquire about the names of the accused as well as the complainant and other details about the offence. However, he acted as an ordinary police head constable. Apart from that before he could do anything in the matter by filing a complaint, Police Inspector had already reached the hospital and thereafter there was nothing further required to be done in the

matter. Now as per the say of this witness he was informed by the scooterist at about 10.45 a.m. and thereafter he reached the spot, it is quite obvious that he would not file a complaint on the spot as the complainant in the mean time had gone to inform the parents of the deceased. In this view of the matter merely because PW 19 does not refer to the presence of the complainant when he reached the spot, it cannot be contended that the complainant was not present when the incident had taken place.

17. One more doubt has been raised on behalf of the accused about the presence of the complainant at the time of the offence when it was contended that the prosecution has not examined Ali Tahir and the father of the deceased even though their statements were recorded by the police. It was contended that in the instant case knowledge about the death of the deceased as far as the father of the deceased is concerned is lacking. As far as witness Ali Tahir is concerned, our attention is invited to the evidence of Investigating Officer Mohmad Sadiq Suleman Kara (PW 24, Ex.63) wherein he has admitted that Alibhai Tahir was an important witness for the prosecution. He has further stated that he does not know whether the complainant had met Alibhai prior to him. He has however denied that Alibhai Tahir brought the complainant to him. It appears that a question was put to the Investigating Officer in the cross-examination by referring to the statement of Alibhai Taherbhai who came to inform as to whether the complainant had come with Alibhai to the police station or not. It further appears that against the said question an objection was raised by the Additional Public Prosecutor by contending that the statement of Alibhai being u/s 162 Criminal Procedure Code, the same can be used for the purpose of contradiction and, therefore, the witness cannot be allowed to refresh his memory by referring to the statement of Alibhai Taherbhai especially when Alibhai has not been examined. The learned Additional Sessions Judge, however, after over-ruling the objection permitted the Investigating Officer to answer the question after referring to the statement. The Investigating Officer, after referring to the statement of Alibhai, stated that Alibhai had in fact brought the complainant to the scene of offence. In this back ground it was contended that the complainant was not present when the incident had taken place at the time of incident. In our opinion this submission is devoid of any merit. As far as the father of the deceased is concerned, admittedly he was not an eye witness. Admittedly the complainant had not met him immediately after reaching the hospital. How he reached the hospital is not an important question. The learned Additional Sessions Judge, in our opinion, has committed an error in allowing the Investigating Officer to refer to the statement of Alibhai especially when Alibhai has not been examined. In our opinion the statement of Alibhai being recorded u/s 162 Cr.P.C. can only be used for the purpose of contradiction. Apart from that, be that as it may, in our opinion, it will not change the situation viz as to whether Alibhai Taherbhai had brought the complainant to the scene of offence inasmuch as both were there at the scene of offence. Even if we assume that the complainant had in fact gone to inform Alibhai Taherbhai about the incident, even

though the complainant does not refer to his meeting with Alibhai after the incident in his evidence, Alibhai Taherbhai could at best have stated about the manner in which the incident had taken place as narrated by the complainant. It is always for the prosecution to select as to who are the best witnesses. Merely because the Investigating Officer Mr.Kara had stated that Alibhai is their informant that will not diminish the evidentiary value of the complainant. Thus nothing turns on the evidence of the father of the deceased as well as Alibhai Taherbhai when they are not examined.

18. It was next contended by the learned counsel for the appellant that there are number of loopholes in the prosecution case and nothing is shown as to what happened on the previous day , or just prior to the incident on the day in question which provoked the accused to commit the crime. In the submission of the learned counsel nothing is suggested by the prosecution about the arrival of the deceased, selection of the place by the accused, etc. The learned counsel by developing this point has contended that it is a normal rule of conduct that an accused would select the time and place if at all he wants to commit an offence so that his identity is not established. As far as this case is concerned, it was pointed out that it is quite unlikely that accused nos. 1 and 2 would join the other accused to risk their own lives in the incident which had taken place in a broad day light. In view of this it was finally submitted that the motive alleged by the prosecution is too weak. If this submission is accepted, in our opinion, no murder would take place in the broad day light on the public road. It is difficult to read the mind of the criminals as to how they will work. Ordinarily a person would not like to commit crime on a public road in a broad day light at the risk of their identity. However, we can only say that nothing is impossible especially when rowdyism and gundaism are taking place in the cities. It is not necessary that motive must be there in all cases. Even in absence of motive the crimes are committed. In view of the evidence of the complainant Rakesh which is duly corroborated by the evidence of other independent witnesses like Bipinbhai and Ismailbhai that 4 to 5 persons were involved in the crime in question and especially when in view of the specific evidence of the complainant regarding the part played by each of the accused, we are convinced beyond doubt that all the accsed formed an unlawful assembly and in furtherance to achieve common intention they committed the murder of the deceased Dinky in the broad day light on the public road of busy locality of Nanavat in Surat.

19. It was then contended that the evidence of the complainant does not get support from the medical evidence. Our attention was invited to the evidence of Dr. Qureshi regarding the injuries sustained by the deceased. It was contended that Dr. Qureshi has clearly admitted that injuries Nos.3,4, 5 and 12 are possible by knife. Our attention is also invited to the admission of Dr. Qureshi that the width of the weapon must be of 3 cm for causing the injuries and none of the muddamal weapons is having width of more than 3 cm. Dr. Qureshi has further admitted that as far as injury No.3 is concerned, the weapon used must be having a width of 4.5 cm In view of this evidence of Dr. Qureshi it was contended

that since none of the muddamal articles is having the width of more than 3 cm, none of the muddamal weapons was used for causing the injuries to the deceased and, therefore, the evidence of the complainant is required to be rejected. It is not possible for us to agree with the submission made by the learned counsel. Reading few lines from the evidence of the doctor, it is too much to conclude that none of the muddamal weapons was used in the incident in question. As a matter of fact, instead of considering the width of the weapon, one is required to consider the length of the weapon. Reading the Panchnama of the recovery of the weapons, Ex.50 the length of one of the guptis is 12" i.e. 9" blade and 3" handle. The length of second gupti is 11.5" having 8" blade and 3.5" handle and as far as the length of muddamal knife is concerned, as can be seen from the panchnama Ex.63 it is 8" having a blade of 3.5" and 4.5" handle. Dr. Qureshi in his evidence has clearly stated that injuries Nos .3 to 15 are possible by gupti as well as knife. In view of the myultiple stab wounds which had gone deep inside the body and had pierced the lung as well as lever, we can safely conclude that the deceased died because of the injuries caused by the weapons used by the accused and the submission made by the learned counsel is therefore not sustainable. There is one more reason to believe the presence of the complainant at the time and place of the incident and that is that he himself sustained injuries , of course, minor in nature, The complainant had taken treatment under police Yadi from Dr. Amrutlal Mayavansi (PW 2, Ex.20). Dr. Mayavanshi was Medical Officer of New Civil Hospital who examined the complainant on the same day at about 2.00 p.m. and found (i) bruise on the Rt scapular region 3 x 1 cm red in colour and (ii) abrasion on the left little finger 1/4 x 1/4 cm red . These injuries, according to the doctor, were poissible by hard blunt substance like muddamal stick. Nothing substantial has been taken out from the evidence of Dr. Mayavanshi which would take the case of the defence any further.

20. In view of the aforesaid discussion, the presence of the complainant is clearly established and it is established that the deceased was beaten mercilessly by all the accused with lethal weapons and the said incident was in fact witnesses by the complainant. It is, therefore , not possible for us to accept any of the submissions advanced on behalf of the accused to raise even a doubt about the presence of the complainant at the scene of offence. In our opinion the evidence of the complainant is natural and believable.

21. Now we would like to deal with certain criticisms made against the manner in which the investigation was carried out regarding drawing the inquest panchnbama, recording of the complaint and sending copy of it to the Magistrate. By raising such contentions an attempt was made to point out that the investigation was quite dishonest, inasmuch as a deliberate attempt has been made to falsely involve the accused by fabricating the evidence . In the submission of the learned counsel in the inquest report, Ex.26, except the offence of Section 302, no other sections are mentioned. Our attention has been invited to the Panchnamas Exs. 26 and 35 wherein also offence u/s 302 IPC has

been mentioned. By placing reliance on the inquest panchnama, Ex.26, our attention has been drawn to the fact that the FIR was already registered being C.R. No.142/94 for the alleged offence under Sec.302 IPC and 135 Bombay Police Act. In the submission of the learned counsel if the alleged offence u/s 302 only was registered and other offences like sections 147 ,148, 149 were not included, in that event all the accused had not taken part in the incident in question and, therefore, the possibility of subsequently implicating the accused cannot be ruled out. It is not possible for us to accept this submission for the simple reason that it is not obligatory on the part of the Investigating Officer to mention all the sections in the inquest panchnama as the scope of section 174 Criminal Procedure Code is very limited. The law on this point is now well settled in view of the decision of the Supreme Court in Pedda Narayana and Others Vs. State of Andhra Pradesh, . The Supreme Court has held that :

"The proceedings u/s 174 have a very limited scope. The object of the proceedings is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so what is the apparent cause of the death. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of the proceedings under S.174. Neither in practice nor in law was it necessary for the police to mention those details in the inquest report."

22. It was next contended that there is a delay of one day in sending the report to the Magistrate. In the submission of the learned counsel, the Investigating Officer has concocted the entire case against the accused by preparing a false case . Our attention was invited to entry made in the station diary wherein 9 blows are mentioned. However, when the report was sent to the Magistrate, the entire story was changed. In view of this, it was submitted that the Investigating Officer has shaped the events and introduced the witnesses . We do not find any substance in this argument. The Investigating Officer Mr. Kara of Chowk Bazar Police Station in his evidence has stated that on receipt of the message from the control room at about 10.52 a.m. he reached the Nanavat main road , the place of offence and after getting information from the complainant Rakesh , placed two constables at the scene of offence and immediately took the complainant to the police station in the jeep car . As per the say of the complainant he had given details about the incident in the jeep car. However, the complaint, Ex.58, was recorded in the police station. Reading the said complaint, it is clear that the complaint was recorded at 11.15 a.m. The endorsement made below the report which was to be sent to the Magistrate u/s 157 Cr. P.C. shows that the same was sent on 14-6-94. The Police Inspector Mr. Kara in his evidence has stated that the said report was taken by the Duty Constable and was in fact delivered on the next day to the concerned Magistrate. Ex.58 also states that the report was in fact received on 15-6-94 at 2.30 p.m. Thus, the report u/s 157 was received by the Magistrate on the next day. If we see the endorsement below Ex.58 it shows that the same was sent on 14-6-94. However, for any reason the Duty Constable had in fact delivered the same not on the same day but on the next day.

Therefore, the question that arises is whether there was any delay in sending the report ? And, if yes, whether that would vitally affect the prosecution case. Before we answer this question, we may first deal with the contention that in the station diary entry was made to the effect that nine knife blows were inflicted on the chest of the deceased Dinky. In other words, no description of other weapons was given, except the knife. In our opinion, entry in the station diary is only for the purposes of showing the time and place of the incident. It was a message received by the Duty Officer of the Police Station. It is expected from the Duty Officer to receive the best possible information about the commission of the crime and then to enter the same in the station diary. However, some times it so happens that no proper or further information is received and in that event the concerned officer incharge has to record whatever information he has received from the informant. Thus there are all chances of either to record incomplete information or not to record full information even though received. Therefore, merely because the Duty Officer of the Police Station had recorded the entry that the deceased sustained nine knife blows that by itself is not a circumstance, which would go against the prosecution. As stated earlier, there is hardly any difference with regard to the length of gupti and/or the knife recovered in the instant case and, therefore, it is quite possible that the informant might have given information treating all weapons alike by treating the same as knife. Ultimately one has to see the contents of the complaint. In all police stations, complaints are recorded on plain papers and thereafter they are reproduced in the register maintained by the police station. A Division Bench of this Court in *Miyana Hasan Abdulla and Another Vs. State of Gujarat*, , after reading the provisions of Sections 154 and 157 of the Criminal Procedure Code, has observed as under:

"If it is only that complaint which is reduced to writing under Sec.154 Cri.Pro.Code, that can be used for the purpose of corroboration. If the police officer in charge of the police station records, the whole complaint and subsequently enters the whole statement in the prescribed book, the entry in the prescribed book would not be a complaint, because what is to be entered in the prescribed book is to be done after the complaint has been reduced to writing. The first stage is to reduce the complaint to writing and the second stage is to enter the substance of the complaint in the prescribed book. Even if the whole complaint is entered in the prescribed book, that would not become a complaint."

23. In view of this, entry made in the station diary, which is merely a formate, cannot be treated as a complaint as one is required to see the complaint recorded by the Investigating Officer. As far as the instant case is concerned, Ex.57, is an entry made in the station diary which gives no particulars about the incident. However, Ex.64, which is the complaint which was taken on plain paper which has been reduced into writing in the register and in view of the decision of the Division Bench in *Miyana Hasan's* case (supra), we hold that although Ex.64 is a report written on a plain paper, it is the complaint. Ex.58 is a copy of Ex.64 which is a report sent u/s 157 Cr.P.C. to the Magistrate. Since Ex.58 is a copy of

the complaint giving more details about the commission of the offence, in our opinion, it cannot be considered as a document prepared at the instance of the police to shape the events and introduce the witnesses to involve all the accused. Regarding the question of sending the report late by one day to the Magistrate u/s 154 Cr.P.C. as alleged by the defence, in our opinion, that fact cannot be used against the prosecution and there is no delay in sending the report. In *Madru Singh and others Vs. State of Madhya Pradesh*, the Magistrate received a copy of the FIR three days after the incident and the Supreme Court, considering the evidence of the witness who lodged the FIR on the same day, emphatically stating that she saw the entire incident and she herself went to the Police Station in matador alongwith the dead body of the victim, held that no conclusion can be drawn on such ground that FIR was not lodged on the same day after the incident or that it was ante-dated. In this case also the complainant, who is an eye witness, lodged the FIR on the same day and even though the Magistrate received the copy of the same on the next day, in our opinion, it is not possible for us to doubt the genuineness of the FIR. Similarly, the Supreme Court in *Jinnat Mia alias Jinu Mia and Others Vs. State of Assam*, after believing the testimony of the injured complainant as credible has found that the delay of one day in forwarding the FIR cannot vitiate the prosecution case. Assuming that there was some lapse on the part of the Investigating Officer, however, the same should not weigh in favour of the accused. The Supreme Court in *Paras Yadav and others Vs. The State of Bihar*, even after noticing the omission on the part of the Investigating Officer as well as the doctor of not recording the dying declaration of the deceased even though she was conscious and in fit condition to make the statement, after considering the evidence of the prosecution witnesses, recorded a finding that the evidence of the prosecution witnesses clearly establishes beyond reasonable doubt that the deceased was conscious and was in a fit state of health to make the statement on the day of the incident and, therefore, the evidence does not suffer from any infirmity which would render the dying declarations as doubtful or unworthy of the evidence (credence). After recording this finding, the Supreme Court has observed that :

"....In such a situation, the lapse on the part of the Investigating Officer should not be taken in favour of the accused, may be that such lapse is committed designedly or because of negligence. Hence, the prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not...."

24. As far as the case on hand is concerned, we have already recorded a finding that the evidence of the complainant Rakesh is reliable, trustworthy and believable. His presence at the scene of incident is established by the injuries sustained by him at the hands of the accused and by independent witnesses. Evidence of the complainant clearly establishes the presence and participation of all the accused in the commission of the crime and, therefore, in view of this, even if there are some lapses or negligence on the part of the Investigating Officer, in not following the procedure of recording the complaint and/or not

sending the same to the Magistrate as early as possible, that would not overboard the prosecution case. Since we believe the evidence of the complainant and other prosecution witnesses supporting the prosecution case, we need not go into the other evidence of recovery of clothes of the accused having blood stained as well as recovery of weapons used in the commission of crime and duly tally with the blood report of the deceased, except accused No.1, the recovery of clothes as well as weapons from other accused is not sufficiently established by the prosecution inasmuch as the Panchas have turned hostile. However, we do not give importance to the same in view of the corroborative piece of evidence since we accept the substantive evidence of the complainant and other prosecution witnesses.

25. In that view of the matter we see no merits in these appeals. Needless to say we are in total agreement with the reasoning of the learned Additional Sessions Judge and we accordingly confirm the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge in Sessions Case No. 193/94.

26. In the result, these appeals fail and they are hereby dismissed.