

(2012) 09 GUJ CK 0106
In the Gujarat High Court
Case No : Criminal Appeal No. 778 of 2007

Laliya Bhadiyabhai Nayka

APPELLANT

Vs

State of Gujarat and 1

RESPONDENT

Date of Decision : 06-09-2012

Acts Referred:

Bombay Police Act, 1951 — Section 135(1)
Criminal Procedure Code, 1973 (CrPC) — Section 172(2), 209, 225, 313
Evidence Act, 1872 — Section 137, 138, 165
Penal Code, 1860 (IPC) — Section 302, 323, 324, 504

Citation : (2012) 3 GLH 455 : (2013) 1 GLR 331

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

Bench : Division Bench

Advocate : Gajendra P. Baghel and Mr. Y.M. Thakore 1, for the Appellant; K.P. Raval, APP for Opponent 1, for the Respondent

Final Decision : Dismissed

Judgement

Honourable Mr. Justice J.B. Pardiwala

1. The present Appeal is at the instance of a convict accused for the offences punishable under Sections 302, 324 and 323 of the Indian Penal Code, and is directed against an order of conviction and sentence dated 21st April 2007 passed by the learned Additional Sessions Judge, Fast Track Court-I, Chhotaudepur, District Vadodara in Sessions Case No. 19 of 2006. By the aforesaid order, the learned Additional Sessions Judge found the appellant guilty of the offence punishable u/s 302 of the Indian Penal Code and, consequently sentenced him to suffer Life Imprisonment and a fine of Rs. 100/-. In default of payment of fine, the appellant was directed to undergo further Rigorous Imprisonment for one month. The learned Additional Sessions Judge also found the appellant guilty of the offence punishable u/s 324 IPC and consequently sentenced him to undergo Rigorous Imprisonment for a term of 2 months. The learned Additional Sessions Judge also found the appellant guilty of the offence punishable u/s 323 IPC and, consequently sentenced him to undergo Rigorous

Imprisonment for a period of one month. All the sentences were ordered to run concurrently.

I. Case of the Prosecution :

(i) It is the case of the prosecution that on 23rd March 2006 at around 11:00 O'clock in the night, the deceased Revaliben had a verbal fight with the accused on the issue of a bangle which was given by the deceased to the accused for the purpose of pawning the same as the accused was in need of money and wanted to go for work of labour. The sum and substance of the prosecution case is that on the fateful day of the incident i.e. on 23rd March 2006 the deceased was inquiring with the accused as to what he intended to do with the bangle which she had given to the accused and when the accused would get it released.

(ii) It is the case of the prosecution that in this regard there was an altercation in words between the deceased and the accused. At that point of time the accused is said to have gone in the house and brought a sharp edged object ("vansi") and inflicted injuries on the chest and neck of the deceased, as a result of which the deceased died instantaneously at the spot. It is also the case of the prosecution that at the time of incident when the assault took place, the deceased was breast-feeding her two years old daughter Geeta and in the process Geeta also sustained injury in the nature of an incised wound on the parietal region. It is also the case of the prosecution that the first informant - Sadiyabhai who happens to be the brother of the deceased tried to intervene but on his intervention the accused also assaulted Sadiyabhai by giving fisticuffs.

(iii) First Information Report - Exh.24 was lodged by Sadiyabhai Chhaganbhai - brother of the deceased on 24th March 2006 at 5:30 hours. On FIR being registered investigation commenced with sending of the dead body of the deceased for postmortem. The postmortem report revealed the cause of death to be haemorrhagic shock due to stab injury in the chest. As investigation revealed that two years old daughter of the deceased, named Geeta, was also injured she was sent for treatment to Chhotaudepur Government Hospital. The daughter of the deceased was treated and a Medical Certificate in that regard was issued which is Exh.38. The Inquest Panchnama of the dead body was drawn at Exh.19. Thereafter the scene of offence panchnama - Exh.27 was drawn. On accused being arrested, arrest Panchnama was drawn and his clothes were recovered under a Panchnama Exh.32. Samples of blood stained soil, the weapon of offence, clothes of the deceased were sent for chemical analysis to the Forensic Science Laboratory. On conclusion of the investigation, charge-sheet was filed against the accused for the offences punishable under Sections 302, 504, 323, 324 IPC and also for the offence punishable u/s 135(1) of the Bombay Police Act. Charge-sheet was filed in the Court of Judicial Magistrate, First Class, Chhotaudepur.

(iv) As the case was exclusively triable by the Sessions Court, the JMFC, Chhotaudepur committed the case to the Sessions Court u/s 209 of Cr.P.C. The

Sessions Court framed charge against the accused Exh.2 and the statement of the accused was recorded. The accused did not admit the charge and claimed to be tried.

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

PW.1

Kanubhai Malabhai Rathwa Exh.15 (Circle Inspector who prepared Map)

PW.2

Nitaben Jangaliyabhai -Eye Witness (Daughter of the deceased)

Exh.16

PW.3

Ramanbhai Naklabhai -Neighbour

Exh.17

PW.4

Ramsingbhai Mathurbhai Rathwa - Panch witness.

Exh.18

PW.5

Dutiyabhai Keshlabhai Rathwa - Panch witness.

Exh.20

PW.6

Kalubhai Devjibhai Rathwa - Panch witness.

Exh.22

PW.7

Sadiyabhai Chhaganbhai Eye Witness - First Informant & brother of the Deceased.

Exh.23

PW.8

Joyebbhahi Jabirbhai (Person with whom the bangle was Pawned.)

Exh.24

PW.9

Kantibhai Chuniyabhai (Sarpanch of the village)

Exh.25

PW.10

Rameshbhai Mohanbhai Nayak - Panch witness.

Exh.32

PW.11

Bhursingbhai Ramabhai - Panch witness.

Exh.34

PW.12

Dr. Babulal Kalidas Patidar (Doctor who treated the two Months old daughter of deceased)

Exh.36

PW.13

Dr. Swayamprakash Narmedeshwar Pande -Medical Officer who performed postmortem of the dead body of the deceased.

Exh.39

PW.14

Bharatbhai Madhabhai Patidar - Investigating Officer.

Exh.42

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

1)

Map of the scene of offence

Exh.17

2)

Inquest Panchnama.

Exh.19

3)

Panchnama of Recovery of clothes of the Deceased.

Exh.21

4)

Original Complaint.

Exh.24

5)

Scene of offence Panchnama.

Exh.27

6)

Panchnama of Recovery of clothes wore by the deceased at the time of incident.

Exh.32

7)

Injury certificate of minor Geetaben Issued by Chhota Udepur Referral Hospital.

Exh.38

8)

Postmortem Report.

Exh.41

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

5. At the conclusion of the trial, the learned trial Judge convicted the accused for the offence u/s 302, 324 and 323 of IPC and sentenced him as stated herein before. The trial Court also convicted the accused for the offence punishable u/s 135(1) of the Bombay Police Act and sentenced him as stated herein before. However, the learned trial Judge acquitted the accused of the offence punishable u/s 504 IPC.

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

II. Oral Evidence on record :

(i) The prosecution has examined Kanubhai Rathwa at Exh.15. This witness at the relevant time was a Circle Inspector and he prepared a map of the scene of offence. The map was proved by this witness which was given Exh.16.

(ii) The prosecution examined PW. 2 Nitaben Jangaliyabhai Exh.16. This witness is one of the important witnesses. PW. 2 is the daughter of the deceased. This witness, at the time of her deposition, was 8 years old. After testing her competency to depose, oath was administered and thereafter her examination-in-chief was recorded. This witness deposed that her mother has been killed. She has deposed that her mother was killed by Laliya Dada -the accused. The accused assaulted her mother with a sickle on her breast. It has been noted in her deposition by the learned trial Judge that this witness voluntarily on her own showed her chest to indicate part of the body on which injuries were inflicted on

her mother - the deceased. This witness identified the accused in the Court-room as the assailant. This witness also identified the sickle as the same weapon which was used at the time of commission of the offence. This witness further deposed that the incident occurred at around 11 O'clock in the night. When the incident occurred, this witness was at a distance of around 8 ft. to 10 ft. from her mother - the deceased. She further deposed that the name of her younger sister is Geeta and Geeta also sustained an injury on her head due to assault by the accused on her mother as her mother - the deceased was breast-feeding her younger sister Geeta. PW. 2 further deposed that the accused killed her mother because of bangle which belonged to her mother. She also deposed that at the time of incident her mother - the deceased was wearing a yellow petticoat. In her cross-examination PW. 2 deposed that she is studying in 2nd Std. She also deposed that she had no idea how to read time in a watch. She deposed that it was true that before the police she had stated that at the time of incident she was standing at a little far of place. She denied the suggestion that as she was standing near "Adari" she was unable to witness her mother - the deceased. She deposed that it is true that at the time of incident she did not witness the accused inflicting injuries on the body of her mother - the deceased. She denied the suggestion that no quarrel ensued between her mother - the deceased and the accused. She further deposed in her cross-examination that as she learnt through someone that it was the accused who had killed her mother - the deceased and that is the reason why she has deposed so before the Court. She denied the suggestion that the accused and her mother - the deceased were quarreling with each other. She also denied the suggestion that the accused had not assaulted her mother - the deceased. She deposed that as it was night time, she did not witness anyone assaulting her mother - the deceased. She deposed that she only witnessed the altercation in words which took place between the accused and the deceased regarding the bangle.

(iii) The prosecution examined PW. 3/Exh.17 Ramanbhai Naklabhai. This witness is the neighbour of the deceased. This witness did not support the case of the prosecution and was declared hostile. The evidence of this witness is of no significance to both, the prosecution and the defence.

(iv) PW. 4 Ramsingbhai Rathwa - Exh.18. This witness is a panch-witness of the inquest panchnama. This witness has proved the inquest panchnama - Exh.19.

(v) PW. 5 Dutiyabhai Rathwa - Exh.20 is a panch witness. This witness was declared hostile. This witness is a panch-witness of the panchnama of the clothes of the deceased. The panchnama was exhibited at Exh.21 only to the extent of the signature of this witness as a panch-witness.

(vi) PW. 6 Kalubhai Rathwa Exh.22 is also a panch-witness. This witness has proved the panchnama Exh.21 referred to above. However, this witness in his cross-examination has deposed that he was called at the police station and one small bag containing clothes were shown to him. Thereafter his thumb impression was taken on the panchnama. Exh.21 is the panchnama of the

recovery of the clothes of the deceased.

(vii) PW. 7 Sadiyabhai Chhaganbhai Exh.23 is the first informant and the brother of the deceased. PW. 7 deposed that the incident in question occurred on the 12th day from the date of death of her mother. He deposed that at the relevant point of time, the deceased was breast-feeding her daughter. The deceased was sitting on the ground. He has further deposed that the deceased had four daughters, the eldest named Ajma, second named Nita, the third named Kukadi and fourth named Geeta. He has also deposed that the third daughter, named Nita, was along with the deceased at the time of the incident. PW. 7 has deposed that at the time of incident he was near a hand-pump which is outside the house. The accused came at the time of incident. On arrival of the accused there was an altercation of words with the accused and the deceased regarding the bangle. This witness has deposed that the bangle belonged to the deceased and the accused had brought the bangle from the deceased and had pawned it for which the deceased was insisting that the accused must get it back for her. On account of this, the accused got enraged and inflicted injuries on the chest of the deceased. This witness has further deposed that at that point of time, the accused also assaulted him with the sickle, but PW. 7 could save himself from being hit with sickle. He deposed that however, he fractured one of his ribs. He has deposed that he was also assaulted by the accused as the accused might have felt that he would inform the police being an eye witness to the incident. This witness has further deposed that the accused happens to be the son of his natural brother. This witness deposed that he was at a distance of around 4 ft. at the time of incident and there was sufficient light at the place of incident, he was able to witness the injuries sustained by the deceased, injuries sustained by minor Geeta as well as injuries sustained by himself. This witness, in his cross-examination, has deposed that the hand-pump where he was standing at the time of incident is at a distance of around 10 ft. to 12 ft. He deposed that it is true that as he was sleeping near the hand-pump he could not see as to who is in the house. He deposed in his cross-examination that it is true that he did not witness the incident. He deposed that he learnt about the incident after some time. He has also deposed that as he was sleeping outside, he went at the place of the incident after having learnt about the same. He has also deposed that as he reached at the place of incident after some time, he could not witness the incident. He has also deposed that he had not seen Nita as she was in one of the corners of the house. He has deposed that he did not even see the accused at the place of occurrence. He agreed to the suggestion that sickle and "vansi" are such equipments or objects which could be found in most of the houses of "Adivasis". He has also deposed that as he was sleeping near the hand-pump, he did not see the accused. He learnt about the incident after around one and a half hours. He has also deposed that he did not take any treatment from a Doctor despite the fact that he had sustained injuries at the time of incident. He denied the suggestion that in his FIR Exh.24 he has not stated that he also sustained injury. This witness further deposed voluntarily that the accused inflicted kicks on

his body.

(viii) PW. 8 Joyebbhair Jabirbhai - Exh.25 is the witness at whose place and with whom the bangle was pawned. This witness has deposed that the accused had come at his shop and had pawned one bangle for Rs. 1,000/-. On the said bangle name of Revaliben - the deceased was embossed. He has further deposed that he is into the business of grocery. This witness has deposed that he is not into the business of money lending. He has also deposed that he has no documentary evidence to show that he had paid Rs. 1,000/- to the accused by accepting the bangle. He has deposed that one person named Kantibhai of village Dhakapura had come along with the accused to pawn the bangle. This witness deposed that one Sugriben had come and had got released the bangle. This witness has no idea as to how the accused is related with Sugriben. This witness has further deposed that on the said bangle name of Revaliben i.e. the deceased was embossed, however, he had handed over the same to one Sugriben as Sugriben had come to get the bangle released from this witness. This witness also deposed that on the say of one Kantibhai he had handed over the bangle to Sugriben.

(ix) PW. 9 Kantibhai Chuniyabhai Exh.26 was the Sarpanch of the village at the relevant point of time. PW. 9 has deposed that on 23rd March 2006 at around 10 O'clock in the night Sadiyabhai had come to him that his sister Revaliben has been murdered by the accused - Laliya. This witness has deposed that he was also told by Sadiyabhai that the accused committed murder with a "vansi". Sadiya had sustained some injuries on his chest with few abrasions but nothing more was stated by Sadiyabhai to this witness. This witness was thereafter called by the police on 24th March, 2006 as a panch witness. This witness is the panch-witness of the scene of offence Panchnama.

(x) PW. 10 Rameshbhai Nayak Exh.31 is the Panch witness. This witness is the panch witness of the panchnama of recovery of clothes worn by the deceased at the time of incident. This witness did not support the case of the prosecution and was declared hostile.

(xi) PW. 11 Bhursingbhai Ramabhai Exh.34 is also panch witness. This witness also did not support the case of the prosecution and was declared hostile.

(xii) PW. 12 Dr. Babulal Patidar Exh.36 is the Medical Officer. This witness has deposed that on 24th March 2006 he was on duty at Government Hospital. On that day PSO of Chhotaudepur came with a Yadi in which it was stated that Geeta - minor daughter of the deceased be treated. This witness has deposed that on medical examination of Geeta at around 7 O'clock in the morning of 24th March 2006 he noticed that Geeta had sustained one incised wound 3cm x 1/4 x 1/4 on left parietal region. This witness has deposed that the injury was possible by a sharp cutting object. He has also deposed that the relatives got Geeta discharged within two hours from the hospital against medical advice. He also deposed that the injury on Geeta was simple in nature and at the time when Geeta was at the

hospital she was conscious and calm.

(xiii) PW. 13 Dr. Swayamprakash Pandey - Exh.39 is the Medical Officer who performed postmortem of the dead body on 24th March 2006. The postmortem examination revealed a stab-wound 6cm x 1/4 cm x 3 cm on the skin oblique in nature. Line drawn between left breast and shoulder joint above left upper quadrant 8 cm distance literally from shoulder joint. Cut edge of wound of clean cut penetrating wound. Weapon cut skin subcutaneous tissue, muscle. IInd and IIIrd rib penetrating the anterior surface of the lung. After removal of breast tissues on chest, intercostal surface wound 4 cm x 1/2 cm and on lung tissue, penetrating all lung tissues on anterior surface. Massive collapse of left lung due to IInd and IIIrd rib fracture after opening the thorax massive blood in the thorax cavity spread to right cavity. Lung (left) push upward due to collapse and diaphragm push upward. Stomach and other content push in thorax about 800 ml blood in thorax cavity

This witness has deposed that considering the nature of the injuries sustained by the deceased a very severe and forceful blow might have been inflicted on the deceased. This witness has deposed that the cause of death was due to excessive bleeding, shock and hameorrhage.

(xiv) PW. 14 Bharatbhai Patidar Exh.42 is the Investigating Officer. This witness has deposed that after recording the FIR he started investigation of the offence, inquest panchnama was drawn, body of the deceased was sent for postmortem examination scene of offence panchnama was drawn, panchnama of recovery of the clothes of the deceased was drawn, and on accused being arrested, a panchnama of the person of the accused was drawn and the clothes of the accused were recovered. The muddamal articles were sent for chemical analysis to the FSL.

III. Contentions on behalf of the Appellant :

7. Mr. Gajendra P. Baghel, learned counsel appearing on behalf of the accused-appellant, very vociferously submitted that the trial Court committed a serious error in convicting the accused for a serious offence like murder relying on the evidence of the two eye-witnesses Ye. PW. 2 Nitaben and PW. 7 Sadiyabhai. Mr. Baghel further submitted that both these eyewitnesses could be termed as unreliable witnesses. Mr. Baghel also submitted that the trial court very conveniently discarded the evidence of both these eye-witnesses in so far as it supports the defence of the accused.

8. Mr. Baghel, learned counsel appearing for the appellant further submitted that the trial Court seriously erred in relying on the evidence of recovery of the clothes of the accused, more particularly, the pant, which, according to the prosecution, had blood-stains of the blood group of the deceased. Mr. Baghel submitted that the trial Court ought not to have relied upon such a piece of evidence, more particularly, when the panch witnesses turned hostile and even the Investigating Officer failed to prove the contents of the panchnama. Mr.

Baghel lastly submitted that the trial Court committed serious error in treating PW. 2 and PW. 7 as eyewitnesses, more particularly, when both these eye-witnesses have in no uncertain terms deposed that they had not seen the accused inflicting any injuries on the deceased. Mr. Baghel, therefore, urged that the Appeal deserves to be allowed and the judgment and order of conviction be set aside.

IV. Contentions on behalf of the Respondent :

9. On the other hand Mr. K.P. Raval, learned counsel appearing for the State very vehemently submitted that trial Court rightly convicted the accused-appellant relying on the evidence of the two eye-witnesses - PW. 2 Nitaben and PW. 7 Sadiyabhai. According to Mr. Raval, the presence of PW. 2 Nitaben being daughter of the deceased was natural at the time of the incident and PW. 2 Sadiyabhai being brother of the deceased his presence was also natural at the time of incident. Mr. K.P. Raval, learned A.P.P. further submitted that PW. 2 Nitaben as well as PW. 7 Sadiyabhai both have deposed in the examination-in-chief that they did witness the accused inflicting injuries on the chest of the deceased by a "vansi". Mr. Raval submitted that however, in the cross-examination PW. 2 Nitaben being a child witness might have fumbled and committed some mistake but that would not be sufficient to discard her entire evidence. Mr. Raval submitted that in the same manner PW. 7 Sadiyabhai has also deposed in no uncertain terms in his examination-in-chief that he saw the accused inflicting injuries on her sister the deceased with the sickle, but in the cross-examination again he might have fumbled and that is the reason why PW. 7 deposed that he did not witness the accused inflicting any injuries on the deceased as he was sleeping near the hand pump outside the house.

10. Mr. K.P. Raval, learned APP further submitted that while appreciating the evidence, the trial Court has rightly taken into consideration that part of the evidence which connects the accused with the crime. According to Mr. Raval even if a witness could be partly believed then under such circumstances the Court may be justified in relying upon the evidence of such a witness in part. Mr. Raval further submitted that even if the witness has turned hostile under such circumstances also as per the settled law if some part of the evidence of such a hostile witness is helpful to the prosecution then the trial Court would be justified in considering such evidence.

11. Mr. Raval further submitted that the motive is also fully established. Mr. Raval submitted that there was a dispute as regards bangle of the deceased which was pawned by the accused with PW. 8 and this is established and corroborated by the evidence of PW. 8. Mr. Raval also submitted that during the course of investigation part of the accused was recovered under a panchnama and the chemical analysis report reveals that there were blood stains matching with the group of the deceased. According to Mr. Raval under such circumstances, having regard to all relevant pieces of evidences trial Court rightly convicted the accused for the offence of murder and no interference is warranted in the present Appeal.

12. The picture that emerges from a cumulative reading and the assessment of material on record is thus :

(i) In the present case, there is evidence of two eyewitnesses, PW. 2 Nitaben Exh.16 - daughter of the deceased and PW. 7 Sadiyabhai Chhaganbhai - Exh.23 - brother of the deceased. It also appears that the motive behind the commission of the crime was the bangle of the deceased which the accused had obtained from the deceased for being pawned as the accused was in need of money and wanted to go for work of labour. It deserves to be stated at this stage that the accused happens to be the nephew of the deceased as well as PW. 7 Sadiyabhai. PW. 7 Sadiyabhai in his evidence has deposed that the accused is the son of his natural brother. This is suggestive of the fact that the deceased happened to be the aunt of the accused.

(ii) The moot question that falls for our consideration in this Appeal is as to whether PW. 2 Nitaben and PW. 7 Sadiyabhai could be termed as wholly reliable eyewitnesses to the incident and whether the trial Court was justified in basing conviction relying on the evidence of PW. 2 and PW. 7. ? Undoubtedly, PW. 2 Nitaben in her deposition has deposed that at the time of incident she was near her mother i.e. the deceased. PW. 2 has also deposed that at the relevant point of time when the incident occurred, her mother - the deceased was breastfeeding her younger sister Geeta aged 2 years. PW. 2 has also deposed that she saw the accused inflicting injuries on the chest of her mother - the deceased with a sickle. However, in the cross-examination PW. 2 took a huge somersault. We have noticed that PW. 2 has practically destroyed the entire examination-in-chief by deposing that she did not witness the accused inflicting any injuries on her mother - the deceased. PW. 2 in her cross-examination has gone to the extent of deposing that she learnt through someone about the assault on her mother - the deceased and that was the reason why she deposed as regards the assault by the accused on her mother. PW. 2 has also denied the suggestion that accused and her mother - the deceased were quarreling and were engaged in altercation of words. PW. 2 also deposed that as it was night hours she did not witness anyone assaulting her mother - the deceased. All that she has deposed is that her mother had a verbal altercation with the accused regarding the bangle. At the end of her cross-examination she deposed that she only witnessed the altercation in words. From the evidence of this witness it is very apparent that she might have tried to save the deceased who also happens to be her uncle. There are only two possibilities as to why PW. 2 deposed in her cross-examination that she did not witness the accused inflicting any injuries on her mother. First, she may have been told by the other family members not to depose anything against the accused being a family member or the second possibility could be that being a child witness she may have fumbled during the course of cross-examination. The possibility of the later deserves to be ruled out for reasons more than one. It appears that PW. 2 Nitaben at the time of her deposition was 8 years old. She was studying in 2nd standard. She has also deposed as to the nature of the quarrel between her mother - the deceased and

the accused. In her examination-in-chief she very clearly and confidently deposed that she witnessed the accused inflicting injuries on the chest of her mother - the deceased. She has also deposed that at the time of incident her younger sister Geeta was being breast-fed by her mother - the deceased. Thereafter, all of a sudden, very conveniently and very boldly she deposed that she did not witness the accused inflicting any injuries. She deposed to the extent that she has come to the Court to depose as she had learnt about the assault by the accused on her mother -the deceased through someone. Having regard to the quality of the oral evidence of PW. 2 we are of the view that PW. 2 Nitaben could not be termed as wholly reliable witness. All that could be established by the prosecution from the evidence of PW. 2 Nitaben is that her mother -the deceased had a dispute with the accused regarding a bangle and on the fateful day of the incident there was some altercation in words between the deceased and the accused.

(iii) In the same manner, PW. 7 Sadiyabhai, the first informant also could not be termed as a reliable witness. In his examination-in-chief PW. 7 in no uncertain terms deposed that on the date of the incident, the accused had come at his house and a quarrel ensued between the deceased and the accused regarding bangle. PW. 7 has also deposed that at the relevant point of time the accused inflicted injuries on the body of the deceased with a sickle and thereafter also assaulted PW. 7 with a sickle but PW. 7 did not sustain any injury. Again PW. 7 deposed that due to assault on him by the accused with the sickle, he fractured one of his ribs. There is no evidence worth the name on record to even remotely suggest that PW. 7 had sustained any injuries on his body. PW. 7 in his examination-in-chief also deposed that he witnessed the assault on her sister - the deceased by the accused as he was at a distance of just 4 ft. and there was sufficient light at the place of incident. PW. 7 has also deposed as to how the younger sister of the deceased named Geeta sustained injury on her head. However, in the cross-examination PW. 7 also took a huge somersault. Very boldly and very conveniently PW. 7 destroyed his entire examination-in-chief by deposing that he had not witnessed the incident. PW. 7 has gone to the extent of deposing that he learnt about the incident after around one and a half hours. PW. 7 deposed that he reached at the place of occurrence of the incident after some time. He did not even see the younger daughter of the deceased named Geeta at that point of time. He deposed that he could not see the accused as he was sleeping near the hand-pump.

13. It is very apparent on plain reading of the evidence of PW. 7 that he wanted to save his nephew. PW. 7 perhaps, out of fear, may not have turned hostile but, at the same time, destroyed his entire examination-in-chief by deposing in the cross-examination that he had not witnessed the assault by the accused on her sister - the deceased.

14. A clever witness in his examination-in-chief faithfully confirms to what he stated earlier to the police, but in the cross-examination introduces statement in

a subtle way contradicting in-effect what he stated in the examination-in-chief. This is at times a very common feature and nothing is unusual about the same. However, under such circumstances there is a duty cast upon the Public Prosecutor who is incharge of the trial and also of the Court concerned to a certain extent. Section 137 gives only the stages in the examination of a witness, viz., examination-in-chief, cross-examination and reexamination. This is a routine sequence in the examination of a witness. In the present case we are of the view that the Public Prosecutor who conducted prosecution has not discharged his responsibility as he avoided putting any question to PW. 2 and PW. 7 when law permits him for reexamination under the circumstances narrated above. The very purpose of re-examination is to explain matters which have been brought down in cross-examination. Section 138 of the Evidence Act outlines the amplitude of re-examination. It reads thus :

138. Order of examinations.- Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined. The examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination.- The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

15. As observed by the Supreme Court in the case of Rammi @ Rameshwar etc. Vs. State of Madhya Pradesh, that there is an erroneous impression that re-examination should be confined to clarification of ambiguities which have been brought down in cross-examination. Supreme Court proceeded to observe that no doubt, ambiguities can be resolved through re-examination. But that is not the only function of the re-examiner. If the party who called the witness feels that explanation is required for any matter referred to in cross-examination he has the liberty to put any question in reexamination to get the explanation. The Public Prosecutor is expected to formulate his questions for that purpose. Explanation may be required either when the ambiguity remains regarding any answer elicited during cross-examination or even otherwise. If the Public Prosecutor feels that certain answers require more elucidation from the witness, he has the freedom and the right to put such questions as he deems necessary for that purpose, subject of course to the control of the court in accordance with the other provisions. Supreme Court in Rammi (supra) has also observed that the court cannot direct the Public Prosecutor to confine his questions to ambiguities alone which arose in cross-examination.

16. Even if the Public Prosecutor feels that new matters should be elicited from the witness, he can do so, in which case the only requirement is that he must secure permission of the court. If the court thinks that such new matters are necessary for proving any material fact, courts must be liberal in granting permission to put necessary questions. At this stage it would be profitable to

quote paragraphs 19 and 20 of Rammi (supra).

19. A Public Prosecutor who is attentive during cross-examination cannot but be sensitive to discern which answer in cross-examination requires explanation. An efficient Public Prosecutor would gather up such answers falling from the mouth of a witness during cross-examination and formulate necessary questions to be put in re-examination. There is no warrant that reexamination should be limited to one or two questions. If the exigency requires any number of questions can be asked in re-examination.

20. But in this case the Additional Public Prosecutor in the trial Court seemed oblivious of such a right. It is rather amazing that he did not avail himself of that right in respect of a single witness. The defence counsel would have had a free day as he was left totally undisturbed by the Public Prosecutor."

17. We are of the view that after having realized that both the witnesses - PW. 2 and PW. 7 have very cleverly introduced statements in the cross-examination practically contradicting in-effect what is stated in the examination-in-chief, the Public Prosecutor ought to have re-examined both the witnesses on material aspects. Such omission on the part of the Public Prosecutor may lead to a very serious miscarriage of justice. No crime could be allowed to go unpunished. To a certain extent we also hold the trial Court responsible. It is a settled law that it is the duty of a Presiding Judge to explore every avenue open to him in order to discover the truth and to advance the cause of justice. The trial Judge is invested by Section 165 of the Evidence Act with the right to put questions to witnesses. At this stage it would also be profitable to quote the following observations made by the Supreme Court in the case of Ram Chander Vs. State of Haryana, .

2. The adversary system of trial being what it is, there is an unfortunate tendency for a judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive elements entering the trial procedure. If a Criminal Court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth. As one of us had occasion to say in the past:

Every Criminal trial is a voyage of discovery in which truth is the quest. It is the duty of a presiding Judge to explore every avenue open to him in order to discover the truth and to advance the cause of justice. For that purpose he is expressly invested by Section 165 of the Evidence Act with the right to put questions to witnesses. Indeed the right to put given to a Judge is so wide that he may "ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact, relevant or irrelevant Section 172(2) of the Code of Criminal Procedure enables the Court to send for the police-diaries in a case and use them to aid it in the trial. The record of the proceeding of the perused by

the Sessions Judge to further aid him in the trial". (Sessions Judge, Nellore v. Intna Ramana Reddy, ILR (1972) AP 683).

3. With such wide powers the Court must actively participate in the trial to elicit the truth and to protect the weak and the innocent. It must, of course, not assume the role of a prosecutor in putting questions. The functions of the counsel, particularly those of the Public Prosecutor, are not to be usurped by the judge, by descending into the arena, as it were. Any questions put by the judge must be so as not] to frighten, coerce, confuse or intimidate the witnesses. The danger inherent in a judge adopting a much too stern an attitude towards witnesses has been explained by Lord Justice Birkett:

People accustomed to the procedure of the Court are likely to be over-awed or frightened, or confused or distressed when under the ordeal of prolonged questioning from the presiding judge. Moreover, when the questioning takes on a sarcastic or ironic tone as it is apt to do, or when it takes on a hostile note as is sometimes almost inevitable, the danger is not only that witnesses will be unable to present the evidence as they may wish, but the parties may begin to think, quite wrongly it may be, that the judge is not holding the scales of justice quite evenly". Extracted by Lord Denning in Jones v. National Coal Board. ((1957) 2 All ER 155).

In Jones v. National Coal Board Lord Justice Denning observed:

The Judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of the Judge and assumes the role of an advocate; and the change does not become him well.

We may go further than Lord Denning and say that it is the duty of a judge to discover the truth and for that purpose he may "ask any questions, in any form, at any time of any witness or of the parties, about any fact, relevant or irrelevant" (Sec. 165, Evidence Act). But this he must do, without unduly trespassing upon the functions of the public prosecutor and the defence counsel, without any hint of partisanship and without appearing to frighten or bully witnesses. He must take the prosecution and the defence with him. The Court the prosecution and the defence must work as a team whose goal is justice, a team whose captain is the judge. The judge, "like the conductor of a choir, must, by force of personality, induce his team to work in harmony; subdue the raucous encourage the timid, conspire with the young, flatter the old.

18. It is no doubt true that Section 225 of the Criminal Procedure Code specifically speaks for the trial to be conducted by the prosecutor, but if the Court

finds that the public prosecutor is not properly discharging the duty to be performed by him, nothing prevents the Court from exercising its power to ensure that proper evidence is placed before the court and no mischief is played by the prosecutor which may frustrate the basic principles that the real offender must be punished and the innocent person must be acquitted.

19. However, the question for our consideration is as to whether we should discard the evidence of PW2 Nitaben as well as PW7 Sadiyabhai in toto, terming it as utterly unreliable as there can be no guarantee of truth of any statement made by the witnesses of the type of PW2 and PW7 or we should look into that part of the evidence of PW2 Nitaben and PW7 Sadiyabhai which stands corroborated by the probabilities of the case and also look into other reliable evidences which appear to be true and deserve to be accepted.

20. It appears that in accepting the evidence of the eye witnesses PW2 Nitaben and PW7 Sadiyabhai against the accused appellant, the learned Sessions Judge has been guided by the consideration that the maxim "*falsus in uno, falsus in omnibus*" is not applicable and that an evidence of an eye witness who has made an untrue statement in some respect can be accepted as regards rest of what he states and that there is no valid ground for discarding the statement of the two eye witnesses PW2 and PW7 that the accused inflicted injuries on the chest region of the deceased. In our opinion, the learned Sessions Judge was right in accepting the evidence of PW2 Nitaben and PW7 Sadiyabhai as the basis of the accused appellant's conviction. The maxim quoted above is not applicable to India where codified rules of evidence exist and it is open to a court to accept a part of the evidence of an eye witness while rejecting the rest of it. This principle on which the court so acts is not that though a witness has deliberately made some false statement, he may yet be considered to be a truthful witness as regards some other statements. The Court, however, acts on the principle that certain statements of such a witness being corroborated by the probabilities of the case and other reliable evidence appear to be true and should, therefore, be accepted. A court may again consider a part of the evidence of a witness to be not free from doubts and may think it unsafe to rely on it. But, the rejection of such a statement of a witness does not necessarily destroy the value of his other statements.

21. PW2 Nitaben in her deposition has very emphatically stated that her mother - the deceased was killed by Laliya Dada, the accused. It appears that being a nephew of the accused she must be calling the accused by the name "Laliya Dada". PW2 Nitaben has also deposed that the accused inflicted injuries on the breasts of her mother - the deceased with a sickle. During the course of her examination while in the witness-box, PW2 Nitaben pinpointed towards her chest and pointed out to the trial Court that it was the chest region on which the accused inflicted injuries on her mother - the deceased. This part of PW2 Nitaben's evidence is fully corroborated by medical evidence on record. The postmortem report suggests that there were injuries on the chest region in the

nature of stab wound with clean cut edges. The 2nd and 3rd rib penetrated the anterior surface of the lung. After removing breast tissues on chest, inter coastal surface wound 4 cm x 1/2 cm and lung tissues penetrating all lung tissues on anterior surface were noticed. A stab wound admeasuring 6 cm x 1/2 cm x 3 cm oblique in nature on the breast and shoulder joint was also noticed.

22. PW2 Nitaben has also deposed that at the time when the accused inflicted injuries on her mother - the deceased, her mother was breastfeeding her two year old younger sister named Geeta. PW2 Nitaben has categorically deposed that at that point of time even her younger sister Geeta sustained injuries on her head. This part of Nita's evidence stand fully corroborated by medical evidence on record in the form of certificate dated 24th March 2006 Exh.38. Minor Geeta, the two year old daughter of the deceased was also treated at Referral Hospital and Community Health Center, Chhotaudepur, District Vadodara. As per the certificate Exh.38, minor Geeta had sustained incised wound of 3 x 1/4 x 1/4 cm on left parital region - vertical. In the history which was recorded, it has been stated that the assault was by Laliya - the accused. Exh.38 has been proved through the evidence of PW12 Dr. Babulal Patidar Exh.36.

23. PW2 Nitaben has also deposed that the accused killed her mother - the deceased because of a bangle. This part of her evidence is fully corroborated by the evidence of PW8 Joyebbhahi Jabirbhahi. PW8 Joyebbhahi Jabirbhahi has deposed that Laliya, the accused had come to him with a bangle and had pawned it for Rs. 1000/-. On the said bangle, name of Revaliben was embossed. There is cogent and convincing evidence on record to establish the motive behind the commission of the crime. The accused had pawned the bangle of the deceased for Rs. 1,000/- and the deceased was insisting that the accused should get back the bangle. On the date of the incident, altercation took place between the accused and the deceased, as a result of which the accused is said to have gone in the house and came out with a sharp cutting object like sickle and inflicted injuries on the body of the deceased. PW2 Nitaben has been consistent on one aspect and that is the presence of the accused on the fateful day of the incident. PW2 Nitaben has deposed that her mother - the deceased was having a verbal altercation with the accused regarding the bangle.

24. PW7 Sadiyabhai who is the brother of the deceased, in his examination-in-chief, has in clear terms deposed that at the time of the incident her sister - the deceased was breastfeeding her two year old daughter Geeta. He has also deposed that at the relevant point of time he was near the hand-pump outside the house. PW7 has also deposed that at the time of the incident her sister - the deceased and the accused were quarreling with each other regarding the bangle saying, "what should we do?", "what should we do?" PW7 has also deposed that at that point of time the accused inflicted injuries on the chest of her sister - the deceased. As discussed above, this part of the evidence of PW7 also stands fully corroborated by medical evidence on record. PW7 has also deposed regarding the injuries sustained by Geeta, the two year old daughter of the deceased. Most

importantly, immediately after the incident, PW7 went to the house of PW9 Kantibhai Chuniyabhai Rathwa Exh.26 and informed him that Laliya Bhadiya, the accused has killed her sister - the deceased. This is corroborated by the evidence of PW9 Kantibhai Chuniya who has deposed that he is the Sarpanch of the village and on 23rd March 2006 at around 10 O'clock in the night PW7 Sadiyabhai came to his house and informed him that Laliya Bhadiya - the accused has killed her sister - the deceased with a "vansi" (sickle). PW9 has also deposed that at that point of time he noticed that Sadiyabhai had also sustained some injury in the chest in the nature of an abrasion.

25. The question is if the accused was not the assailant, then what was the reason for PW7 Sadiyabhai to go at the house of PW9 Kantibhai Chuniya, the Sarpanch of the village, and inform him saying that the accused has killed her sister - the deceased. The incident occurred in a village inhabited by tribals. When such an incident occurs, people immediately rush to persons like Sarpanch holding an office of position in the hope that such a person would render some help. In the present case, PW7 Sadiyabhai had no other reason to go at the house of PW9 Kantibhai Chuniya and inform him about the incident, but being a Sarpanch of the village, PW7 Sadiyabhai might have thought fit to first inform PW9 Kantibhai Chuniya.

26. We have also noticed one another peculiar feature in this Appeal. In the Section 313 statement of the accused recorded by the trial Court, a question was put to the accused, to be precise, Question No. 15 that prosecution witness no. 7 Sadiyabhai Exh.23 in his deposition has stated that the accused with a sickle caused injuries on the deceased and her two year old daughter and PW7 identified muddamal article no. 3, a "vansi" (sickle) to be the same weapon used in the commission of the offence. To this question, very surprisingly and strangely the accused replied that, "it is not the same muddamal". This reply is suggestive of two things, first, the accused had knowledge about the nature of the weapon used being an assailant, or in ignorance, may have stated the truth that it was some other object with which he had caused injuries on the deceased. However, the answer of the accused to Question No. 15 could not be overlooked. We are of the view that this would also be one of the incriminating circumstances against the accused if taken together in consideration with the other pieces of evidences on record.

27. So far as the piece of evidence of recovery of pant of the accused worn at the time of the incident with blood stains on the same of the blood group of the deceased is concerned, could also have been taken as one of the incriminating circumstances against the accused, but this piece of evidence will have to be discarded as the panch witness turned hostile and failed to prove the contents of the panchnama. The Investigating Officer also failed to prove the contents of the panchnama Exh.32. Therefore, this piece of evidence deserves to be kept out of consideration.

28. In the overall view of the matter, having regard to the oral evidence of PW2

Nitaben and PW7 Sadiyabhai, more particularly, that part of the evidence of both the witnesses which stand corroborated by the probabilities of the case and other reliable pieces of evidence, we have no hesitation in coming to the conclusion that it was the accused who is the true assailant and none else.

29. We, therefore, do not find any reason to interfere with the judgment of the trial Court. In the result, the Appeal fails and is accordingly dismissed.