

(2003) 07 GUJ CK 0062
In the Gujarat High Court

Case No : Criminal Appeal No"s. 555, 681 and 693 of 1994

Mohmad Salim Abdul Razaq

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 04-07-2003

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 374(2)
Evidence Act, 1872 — Section 25, 26, 6
Penal Code, 1860 (IPC) — Section 302, 323

Citation : (2003) 23 GLH 584

Hon'ble Judges : M.H. Kadri, J;H.H. Mehta, J

Bench : Division Bench

Advocate : J.M. Panchal orig. accused No. 1 in Criminal Appeal No. 681 of 1994, T.S. Nanavati, for orig. accused No. 3 in Criminal Appeal No. 555 of 1994 and J.C. Sheth orig. accused No. 2 in Criminal Appeal No. 693 of 1994, for the Appellant; K.T. Dave, APP, for the Respondent

Judgement

H.H. Mehta, J.—As these three appeals are arising from a judgment dated 21/5/1994 rendered in Sessions Case No. 102 of 1992 by the learned Additional Sessions Judge, Panch Mahals at Godhra, Camp at Dohad (who will be referred to hereinafter as the learned Judge of the trial Court), at the request of learned Advocates for both the parties in these three appeals, they are heard together and decided and disposed of by this common judgment.

2. The original accused Nos. 1, 2 and 3 have, by preferring their respective appeals namely Criminal Appeal Nos. 681 of 1994, 693 of 1994 and 555 of 1994 respectively under Sec. 374(2) of the Criminal Procedure Code, 1973 (for short "Cr.P.C."), challenged the legality and validity of judgment of conviction and sentence rendered by the learned Judge of the trial Court in Sessions Case No. 102 of 1992 dated 21-05-1994 by which (1) original accused No. 1 is convicted under Sec. 235(2) of Cr.P.C. for an offence punishable under Sec.302 of the Indian Penal Code, 1860 (for short "I.P.C"). and is sentenced to undergo Rigorous Imprisonment for life and to pay a fine of Rs. 250/- and in default, to

undergo further Simple Imprisonment for seven days. He is also convicted for an offence punishable under Sec. 323 of I.P.C. and also for offence punishable under Sec.135 of the Bombay Police Act, 1951 (for short "B.P. Act") but no separate sentences are inflicted for said two offences; (2) the accused No. 2 is convicted for an offence punishable under Sec.302 of I.P.C. read with Sec.114 of I.P.C. and is sentenced to undergo Rigorous Imprisonment for life and to pay a fine of Rs.250/- and in default, to undergo further Simple Imprisonment for seven days; and (3) accused No. 3 is convicted for an offence punishable under Sec. 323 of I.P.C. and is sentenced to undergo Simple Imprisonment for six months and to pay a fine of Rs.250/and in default, to undergo further Simple Imprisonment for seven days.

3. The facts leading to these three appeals which are unfolded by the complainant P.W.2 Harishchandra Chunilal Sharma in his complaint Ex.18 dated 13-1-1991 can be summarised as follows:-

3.1. The complainant P.W.2 Harishchandra is residing with his wife and two sons - one Jaydeep aged about 23 years (deceased) and another P.W.9 Sandeep aged about 17 years in Railway Quarters situated in Freeland Ganj area at Parel in Dohad Town of Godhra District. His married daughter Sunita had come to her parents house before three days. On 13/1/1991 at about 5-30 p.m. one P.W.3 Vijay Narendralal Kshatriya who is a son of old neighbourer of the complainant and friend of Jaydeep had come to the house of the complainant. Jaydeep and Vijay saw the movie on Television in the house of the complainant for sometime and when they found that there was disturbance in Television, Jaydeep and Vijay left the house of the complainant for Darshan at Sanatan Temple on foot at about 6-30 p.m.

3.2 On that very day, at about 7-30 p.m. when complainant in company of his wife, son Sandeep and his daughter Sunita, was present in his house, P.W.3 Vijay came running to him and asked him as to whether Guddu alias Jaydeep had returned the house. Thereupon, the complainant replied Vijay by saying that "you both had gone together". Thereafter, Vijay informed the complainant that after having Darshan at Sanatan Temple, Jaydeep and he (Vijay) were returning and at about 7-00 p.m. when they reached near Hindi Higher Secondary School, they saw that Rajesh Ramchandra Varma (accused No. 3 -appellant of Criminal Appeal No. 555 of 1994), Chuna alias Raghunath Dolatsinh Shishodia (accused No. 2 -appellant of Criminal Appeal No. 693 of 1994) and one young boy were coming on foot from direction of Marathi School. When these three persons came near Vijay, accused No. 3 addressed Vijay as "Gaando" (mad). Thereupon Vijay asked him as to why he addressed him as "Gaando" (mad). Rajesh told Vijay that he did not address him as "Gaando". And on saying so, third young boy who was with them inflicted fist blow on face of Vijay and accused No. 3 also inflicted fist blow on face of Vijay. Mean while, Jaydeep (deceased) asked Vijay to run away from the place. As per complaint Ex.18, the boy who had come on foot and one another boy who was on cycle and accused No. 2 Chuna alias Raghunathsinh

ran behind Jaydeep who ran towards Hindi Higher Secondary School. As per evidence of Vijay, Jaydeep ran towards west, while Vijay ran towards east-south corner. While running towards east-south corner, Vijay heard shrieks of Jaydeep shouting "O.....MAA.....MAR.....GAYA. O.....MAA..... MAR.....GAYA ". As it reveals from evidence of Vijay, Vijay did not go near Jaydeep but he directly came to the house of the complainant and narrated the incident.

3.3 The complainant i.e. the father of Jaydeep and Sandeep (P.W.9), on receiving such information from Vijay, rushed near Hindi Higher Secondary School and they found that Jaydeep was found supinely in unconscious condition, on road opposite to that school. They also found that there was bleeding from chest portion of Jaydeep. They saw that there was one wound on chest of Jaydeep which appeared to have been caused by some sharp edged weapon. The complainant, by taking help of his son Sandeep and other persons, took Jaydeep in Rickshaw of one Dinesh Kadu and brought him to hospital situated at Hillock. On reaching the hospital, it was declared that Jaydeep was dead.

3.4 Immediately thereafter, the complainant went to Dohad Town Police Station and lodged his complaint against accused No. 3, accused No. 2 and other two unnamed persons. As per evidence of P.W.10, Police Jamadar Punjabhai Kalubhai who was P.S.O. of Dohad Town Police Station, the complainant lodged his complaint at 9-00 p.m. on 13/1/1991. That complaint came to be registered as CR.No. I 5/91 for offences punishable under Secs. 323-302-114 of I.P.C. and also for an offence punishable under Sec. 135 of B.P. Act. On registering the crime, P.W.10 Head Constable Punjabhai entrusted the police investigation to P.W.13 P.S.I. Narendrasinh Chhatrasinh Rajput. Mr. Rajput went to the scene of offence and then went to the hospital to see the dead body. As it was a night time, he decided to hold an inquest of the dead body on the next day. He recorded the statement of P.W.3 Vijay Narendralal.

3.5 Thereafter on 14/1/1991, he held an inquest of dead body by drawing a panchnama during the period between 9-00 a.m. and 10-15 a.m. Mr. Rajput sent dead body of Jaydeep along with necessary documents to Medical Officer of Government Hospital, Dohad for its autopsy. Thereafter, he drew a panchnama of scene of offence during the period between 11-00 a.m. and 12-30 a.m. on 14/11/1991. As per that panchnama of scene of offence, the place of scene of offence was shown by P.W.3 Vijaykumar Narendralal. Thereafter, he recorded the statements of witness Bhupendra and other persons who were conversant with the facts of the case.

3.6 On 15/1/1991, he recorded the statements of other witnesses. Thereafter he handed over the police investigation on 16/1/1991 for further progress to P.W.14 -Police Inspector Mr. Chandrashekhar Maneklal Mundaliyar. Mr. Mundaliyar received papers of investigation including complaint, inquest panchnama, and panchnama of scene of offence. Thereafter through other Police Officers and also personally by himself, he inquired for the accused. On 17/1/1991, he recorded the statements of witnesses residing near by the place of scene of offence. On

18/1/1991, he continued the search of accused. On 19/1/1991, while he was on patrolling duty, two persons under suspicious condition were found coming. They were made to halt. On making inquiries about their names and places of residence, one of them informed Mr. Mundaliyar that he was Raghunath Dolatsinh Shishodiya (accused No. 2) and another second person informed him that he was Mohmad Salim Abdul Rajak Mansuri (accused No. 1). Mr. Mundaliyar questioned two persons with regard to murder of Jaydeep. He also inquired from them as to who were with them on the date of incident. On making inquiry, they informed Mr. Mundaliyar that one Subhash Hirabhai Bariya and Rajesh Ramchandra Varma (accused No. 3) were with them. Hence Mr. Mundaliyar took that two persons with him to the house of Subhash, where Subhash was found out. Mr. Mundaliyar interrogated Subhash. Thereafter Mr. Mundaliyar brought that two persons along with Subhash to the office of Executive Magistrate. He gave Yadi to the Executive Magistrate requesting him to hold an identification parade of Mohmad Salim and Subhash Hirabhai through witness Vijay. Thereupon P.W.12 Bhagwandas Gulabsinh Barkamthi who was Executive Magistrate at Dohad, received Yadi given by Mr. Mundaliyar and made an arrangement for holding an identification parade. He called two independent persons who can act as panch witnesses while holding identification parade. As per evidence on record, P.W.12 Bhagwandas held identification parade in presence of two panch witnesses by keeping Mansuri Mohmad Salim Abdul Razak in a line of 15 persons and witness Vijaykumar identified Mansuri Mohmad Salim Abdul Razak as an offender in the identification parade. Said Mansuri Mohmad Salim Abdul Razak is the accused No. 1 who is appellant of Criminal Appeal No. 681 of 1994. Thereafter Mr. Mundaliyar obtained a copy of panchnama of identification parade. Thereafter, he arrested accused Nos.1 and 2 at 17-45 hrs on 19/1/1991.

3.6 On 20/1/1991, accused No. 1 had shown his willingness to take out weapon which was used in the crime from ceiling beam of Flour Mill Shop, and therefore, Mr. Mundaliyar discovered and seized muddamal knife at the instance of accused No. 1 by keeping two persons present as panch witnesses, and thus he discovered knife by drawing panchnama under Sec.27 of the Indian Evidence Act during the period between 10-15 a.m. and 11-15 a.m. on 20-1-1991. During the investigation, on 21-1-1991, he arrested accused No. 3 at 9-00 a.m. On 21/1/1991, and sent incriminating articles, control earth and blood stained clothes to Forensic Science Laboratory, Ahmedabad (for short "F.S.L.") and thereafter on 25/3/1991, on his transfer Mr. Mundaliyar entrusted the police investigation of the case for further progress to P.S.I. Mr. J.K.Gohil. Mr. Gohil conducted further police investigation and on completion of it, he filed a chargesheet against three accused persons in the Court of the learned J.M.F.C. Dohad. That chargesheet came to be registered as Criminal Case No. 1561 of 1991. As one of the offences was exclusively triable by the Sessions Court, learned J.M.F.C., Dohad by passing a committal order under Sec.209 Cr.P.C. on 8/4/1992, committed the case to the Court of Sessions, Panch Mahals at Godhra. The case committed to the Court of Sessions, Panchmahals at Godhra came to be

registered as Sessions Case No. 102 of 1992.

4. As the learned Judge of the trial Court was holding Camp at Dohad, the accused were tried at Dohad. Initially, on the basis of material on record, Shri H.R. Thakar, the then Additional Sessions Judge, Panch Mahals at Godhra framed charge against three accused persons at Ex.5 on 13/9/1993. On recording pleas of accused persons, they have pleaded not guilty to the charge and claimed to be tried. Thereafter, that Sessions Case was placed for trial before the learned Judge of the trial Court.

5. In order to prove the case against the accused persons for which a charge was framed at Ex.5, the prosecution examined following 14 witnesses:-

(1) P.W.1 Dr. Babulal Badriprasad Mittal Ex.15 (Doctor who examined injured witness Vijay) (2) P.W.2 Harishchandra Chunilal Sharma Ex.17 (Complainant who is father of deceased). (3) P.W.3 Vijaykumar Narendralal Ex.19 (he is posed as an eye witness) (4) P.W.4 Subhashbhai Virabhai Bariya Ex.20 (5) P.W.5 Ajaykumar Bishanswaroop Ex.21 (6) P.W.6 Shivprakash Chandrabalising Ex.26 (One of the panch witnesses for discovery panchnama) (7) P.W.7 Virendrakumar Parasnath Ex.27 (Second panch of discovery panchnama) (8) P.W.8 Dr.Rajendrakumar Khishorilal Ex.28 Srivastava (Doctor who performed P.M. of dead body of deceased Jaydeep) (9) P.W.9 Sandeepkumar Harishchandra Ex.30 (brother of deceased Jaydeep). (10) P.W.10 Police Jamadar Punjabhai Kalubhai Ex.37 (P.S.O. of Dohad Town Police Station who received complaint) (11) P.W.11 Dilipkumar Kantilal Ex.34 (One of panch witnesses for panchnama of Identification Parade) (12) P.W.12 Bhagwandas Gulabsinh Barkamthi Ex.35 (Executive Magistrate who held Identification Parade) (13) P.W.13 P.S.I. Mr. Narendrasinh Chhatrasinh Ex.39 Rajput (Investigating Officer) (14) P.W.14 P.I. Mr. Chandrashekhar Maneklal Ex.40 Mundaliyar (Second Investigating Officer).

6. The prosecution has also produced and proved certain documents in support of its case against the accused. They are -

(1) Inquest panchnama Ex.13

(2) Panchnama for clothes recovered from dead body of Jaydeep and which were produced by Medical Officer, Cottage Hospital, Dohad Ex.14.

(3) Medical Certificate for injury sustained by Vijaykumar Narendralal Ex.16.

(4) Complaint Ex.18. (5) Panchnama of scene of offence Ex.22. (6) Report of FSL Ex.24. (7) P.M. Notes Ex.28. (8) A Yadi written by Investigating Officer to Executive Magistrate for holding Identification Parade Ex.36.

(9) Panchnama with regard to Identification Parade which was held by Executive Magistrate Ex.37.

(10) Discovery Panchnama under Sec.27 of the Indian Evidence Act under which muddamal knife was discovered and seized at the instance of accused No. 1

Ex.41.

(11) Copy of notification under Sec.37(1) of the Bombay Police Act prohibiting to hold and possess the weapons in public place at Ex.42.

7. On recording of evidence of the prosecution witnesses was over, the circumstances appearing against the accused persons were brought to the notice of and explained to each accused separately. Whatever the replies were given by accused persons were recorded below their respective pleas at Exs.6,7 and 8, as a result of which their further statements were recorded under Sec.313 of Cr.P.C. The defence of all the accused is of general denial. It is their case that at the instigation of police, a false case has been lodged against them. The accused have neither examined any person as their defence witness, nor have they produced any documentary evidence in their defence. However the accused No. 1 got produced one xerox copy of Registration Certificate Ex.43 of establishment issued under the provisions of the Bombay Shops and Establishments Act 1948 through Mr. Mundaliyar in his cross-examination.

8. Thereafter, after hearing the arguments of the learned Advocates for both the parties and after making scrutiny, examination and appreciation of evidence on record, the learned Judge of the trial Court came to a conclusion that accused No. 1 committed murder of deceased Jaydeep -son of the complainant and accused No. 2 abetted accused No. 1 while accused No. 1 committed murder of Jaydeep. He also came to a conclusion that accused No. 3 inflicted fist blow on the face of witness Vijaykumar Narendralal. On reaching said conclusions, he rendered the judgment of conviction against the accused on 21/5/1994. Thereafter, he heard the accused persons on the question of quantum of punishment and thereafter he passed an order of sentence against the accused on that very day and inflicted different sentences on the accused as stated hereinabove in Para No. 2 of this judgment.

9. Being aggrieved against and dissatisfied with the said judgment of conviction and sentence, the accused Nos.1, 2 and 3 have preferred their respective Criminal Appeal Nos. 681 of 1994, 693 of 1994 and 555 of 1994, respectively.

10. We have heard Shri J.M. Panchal, learned Advocate for accused No. 1 - appellant of Criminal Appeal No. 681 of 1994, Shri T.N. Nanavati, learned Advocate for accused No. 2 -appellant of Criminal Appeal No. 693 of 1994, Shri J.C. Sheth, learned Advocate for accused No. 3 -appellant of Criminal Appeal No. 555 of 1994 and Shri K.T. Dave, learned APP for the State -respondent in all the Criminal Appeals in detail, at length.

11. Shri J.M. Panchal, learned advocate for accused No. 1 has assailed the judgment of conviction and sentence so far as it relates to accused No. 1 on the ground that the learned Judge of the trial Court has not correctly appreciated the evidence in its proper perspective in consonance with the settled principles of law with regard to appreciation of evidence, and therefore, on the basis of such incorrect appreciation of evidence, he has come to a faulty conclusion which has

resulted into wrong findings. He has contended that for want of complete evidence, the learned Judge of the trial Court could not come to a conclusion that particular accused played a particular role in committing the crime. As per his arguments, the whole case rests on four types of evidence; (1) evidence of P.W.3 Vijaykumar Narendralal; (2) evidence with regard to Identification Parade held by P.W.12 Bhagwandas Gulabsinh Barkamthi; (3) Discovery Panchnama Ex.41 of muddmal knife which was discovered and seized at the instance of accused No. 1; and (4) as per report Ex.24 of FSL, knife was found to have stained with human blood of "A" group.

12. He has further contended that the entire process of Identification Parade fails to give any credence because from the record it can be said that purposely identification parade was held for only one suspected person, though two suspected persons were sent. He has submitted that looking to the evidence on record, it can be said that not only the investigation was improper and illegal but it can be said that it was dishonest investigation on the part of the Investigating Officer as well as the Executive Magistrate who had held the Identification Parade. On reading evidence of the complainant together with the complaint and the evidence of P.W. 3 Vijaykumar who is posed to be an eye witness, he has argued that the evidence led by the prosecution is self-contradictory from each other and on reading evidence as a whole, it can be said that there is lack of consistency in the case advanced by the prosecution and genesis of incident is suppressed.

13. So far as evidence of P.W.3 Vijay is concerned, Shri Panchal has vehemently argued that this witness who is posed to be an eye witness is not at all trustworthy and dependable and his evidence does not inspire confidence of the Court. Shri Panchal has then contended that the evidence of Vijay is contrary to the evidence of the complainant as well as that of P.W.9 Sandeep -brother of the deceased. His conduct and behavior is found to be unnatural, and therefore, his sole evidence cannot be relied on to base a conviction.

14. By reading the complaint, Shri Panchal has argued that from the very beginning, the prosecution has come before the Court with the case that in all four persons were involved in the incident and out of these four persons, two persons were named and two persons were unnamed. In F.I.R. two persons who are named, are accused Nos. 2 and 3 and rest of two persons were unnamed. The Investigating Officer had sent these two unnamed/suspected persons along with Yadi Ex.36 to the Executive Magistrate for holding Identification Parade for identifying the real culprit through P.W.3 Vijaykumar. In spite of sending two suspected persons having been sent for identification to the Executive Magistrate by the Investigating Officer, for the reasons best known to the Executive Magistrate, the Executive Magistrate held the Identification Parade for only one suspected person for identifying him through P.W.3 Vijaykumar and as per the case of the prosecution, the person who was identified by Vijay in the Identification Parade was the accused No. 1. He has argued that this is a case in

which the Investigating Officer was having with him the FIR in which it is clearly mentioned that four persons had taken part in commission of the crime but the Investigating Officer dropped one of those two unnamed persons at the stage of identification parade and ultimately he filed a chargesheet against only three persons and thus, entire investigation is shrouded with doubt for which a benefit of doubt be given to the accused.

15. So far as evidence with regard to discovery of muddamal knife under Sec.27 of the Indian Evidence Act is concerned, Shri Panchal has argued that evidence in the form of discovery panchnama does not satisfy the requirements of Sec.27 of the Indian Evidence Act, because at the initial stage, accused No. 1 had disclosed the place where muddamal article was kept and therefore this is nothing but a recovery panchnama and in no case, it can be said that panchnama Ex.41 is a relevant piece of evidence connecting accused No. 1 with the crime.

16. He has then argued that here in this case, the complainant lodged his complaint on the basis of information given by Vijay and that information was given immediately after the commission of the crime, and therefore, the complaint is a relevant piece of evidence and is admissible in evidence under Sec.6 of the Indian Evidence Act. He has further argued that even if the case of the prosecution is accepted as it is, the prosecution has not proved beyond reasonable doubt that accused No. 1 inflicted blow of knife on the person of the deceased. Merely because the Muddamal knife stained with human blood of "A" Group was discovered at the instance of accused No. 1, no inference can be drawn that accused No. 1 committed murder of Jaydeep. As per his argument, some third person might have committed murder of Jaydeep and that third person might have concealed the muddamal article and that concealment was seen by the accused No. 1. He has then contended that if it is accepted that the accused No. 1 concealed that muddamal knife, then at the best, it can be said that he has committed an offence punishable under Sec.201 of I.P.C. At this stage, he has argued that here in this case, the learned Judge of the trial Court has not framed charge against accused No. 1 for an offence punishable under Sec.201 of I.P.C. and therefore, now accused No. 1 can not be convicted and punished for an offence punishable under Sec.201, I.P.C.

17. Shri Panchal lastly argued that on over all appreciation of the evidence on record, the prosecution has miserably failed to prove the case against the accused No. 1 and therefore he has submitted that accused No. 1 be acquitted by allowing his appeal.

18. Shri T.N. Nanavati, learned Advocate appearing for accused No. 2 has adopted the arguments of Shri J.M. Panchal. He has assailed the judgment of conviction and sentence on the ground that here in this case, there is no eye witness coming forward with the evidence attributing any case against any of the accused. He has argued that accused No. 2 is convicted for an offence punishable under Sec.302 of I.P.C. with the aid of Sec.114 of I.P.C. Sec.114 of I.P.C. speaks for abettor present when offence is committed. As per his argument, the

prosecution was required to prove a principal offence first and then an offence of abetting prime accused committing principal offence for abetment by accused No. 2. Shri T.N. Nanavati has argued that the prosecution has not advanced any case by leading cogent and convincing evidence as to how and in what manner, accused No. 2 abetted accused No. 1 in committing the offence of murder of Jaydeep, and therefore, there is absence of evidence with regard to attribution of a particular role played by accused No. 2. He has further argued that the evidence of Vijay is very much doubtful and inconsistent looking to the facts and circumstances of the case, and therefore, evidence of Vijay cannot be made a sole basis for conviction. He has argued that looking to the nature of evidence led by the prosecution, it can be said that the prosecution has miserably failed to prove the case against the accused No. 2 for which a charge was framed against him. Lastly, he has submitted that accused No. 2 be acquitted by allowing his appeal.

19. Shri J.C. Sheth, learned Advocate for accused No. 3 has adopted the arguments advanced by Shri J.M. Panchal and Shri T.N. Nanavati. He has further argued that only evidence against accused No. 3 is to the effect that he gave one slap on the face of Vijay, as a result of which his two teeth had fallen down. He has further argued that accused No. 3 has been acquitted by the learned Judge of the trial Court for an offence punishable under Secs.302 - 114 of I.P.C. and as against said acquittal, the State Government has not preferred any appeal. He has argued that accused No. 3 has, after conviction undergone sentence of about 16 days and that period of sentence is adequate for an offence punishable under Sec.323 of I.P.C. It is his argument that the case against accused No. 3 is such that benefit of doubt should be given to him. He has further argued that after lapse of about 10 years, it would not be justifiable in the interest of justice to send accused No. 3 in Jail to serve out the unserved sentence. Lastly, he has submitted that accused No. 3 be also acquitted by allowing his appeal. Alternatively, he submitted that whatever the sentence has been undergone by accused No. 3 be treated as adequate sentence.

20. Shri K.T. Dave, learned APP for the Respondent -State in all the three appeals has supported the judgment of conviction and sentence throughout and argued that the learned Judge of the trial Court has correctly appreciated the evidence and come to a right conclusion and in no case, it can be said that the judgment is wrong. He has argued that the whole case is based on circumstantial evidence and there is complete chain of circumstances which connect all the accused with the crime. He narrated following circumstances and according to him, the following circumstances are sufficient to hold the accused guilty for the offences for which they are convicted and sentenced:

(a) On 13/1/1991, 20 to 25 minutes before 7-00 p.m. deceased Jaydeep and Vijay went together outside the house of the deceased for Darshan at Sanatan Temple.

(b) As per complaint, at about 7-00 p.m. deceased and Vijay were returning from

Sanatan Temple and when they reached near Hindi Higher Secondary School, there was a melee (an altercation) in between deceased and Vijay on one side and three persons on other side and this incident establishes first part of the episode.

(c) As per complaint, when such a melee was going on, a young third boy (other than accused Nos.2 and 3) inflicted fist blow on the face of Vijay and second fist blow was inflicted by accused No. 3 Rajesh on the face of Vijay.

(d) During such an altercation, deceased Jaydeep immediately asked Vijay to run away from the place, and therefore, deceased Jaydeep and Vijay started running and as per evidence of P.W.3 Vijay, accused Nos.1 and 2 chased the deceased and accused No. 3 chased him. While running away from the place, on the way P.W.3 Vijay heard the shrieks of the deceased Jaydeep O....MMA....MAR...GAYA. MAR.....GAYA, when he was being chased by accused No. 3.

(e) As per complaint, Vijay straight way went to the house of the complainant and inquired as to whether Jaydeep had reached his house. He narrated the incident to both -the complainant and Sandeep. Immediately thereafter the complainant in company of Sandeep and Vijay came to the place from where Vijay heard the shrieks of Jaydeep and they saw Jaydeep supinely on the road opposite to Hindi Higher Secondary School and at that time Jaydeep had sustained injuries on his body.

(f) Doctor has opined that such injuries could be possible by muddamal knife.

(g) Said muddamal knife was discovered at the instance of accused No. 1 under Sec.27 of the Indian Evidence Act.

(h) That muddamal article was found with blood stains of human blood of "A" Group.

(i) Blood group of deceased was found to be "A" group.

By quoting aforesaid circumstances, he has vehemently submitted to this Court that the prosecution has proved the case against the accused on the basis of complete chain of aforesaid circumstances and the learned Judge of the trial Court has rightly convicted the accused Nos.1 and 2 for committing murder of Jaydeep.

21. On the point of Identification Parade, he has argued that P.W.3 Vijay was knowing accused No. 1 and therefore, it was not necessary to hold Identification Parade and on this point, Mr. Dave has cited a decision in the case of Vikram Singh Vs. Raj Singh and Others, reported in 1998 SSC 578.

22. Shri K.T. Dave, learned APP has argued that accused No. 3 is rightly convicted for an offence punishable under Sec.323 of I.P.C. because he gave a fist blow on the face of the Vijay as a result of which two teeth of Vijay had fallen down. He has further argued that for injury sustained by Vijay, the prosecution has examined P.W.1 Dr. Babulal Mittal at Ex.15, and therefore, the case of Vijay

with regard to injury sustained by him gets corroboration from medical evidence also, and therefore, the accused No. 3 is also rightly convicted by the learned Judge of the trial Court. He has lastly argued that all these three appeals are devoid of merit and they all deserve to be dismissed, and therefore, these appeals be dismissed, confirming the impugned judgment of conviction and sentence.

23. We have dispassionately considered the submissions of the learned Advocates for both the parties. We have carefully examined and scanned the evidence on record. For our conclusions, we have reappreciated the evidence keeping in mind the well settled principles of law with regard to appreciation of evidence. We have perused the impugned judgment challenged in these three appeals. We have also examined the record and proceedings of the case which have been called for from the trial Court.

24. The fact that the deceased Jaydeep died a homicidal death is not seriously in dispute from any of the accused. As per the case of the prosecution, on receipt of information from P.W.3 Vijay, P.W.2 Harishchandra father of the deceased, P.W.9 Sandeep and P.W.3 himself rushed to the place of incident as narrated by Mr. Vijay. They saw that Jaydeep was lying supinely on the road and portion of chest was injured. Immediately thereafter they brought the deceased Jaydeep to the hospital which is popularly known as Hospital on Hill-lock" As per the evidence of Mr. Vijay, in the hospital Jaydeep was declared to have been died. Thereafter Mr. Vijay and Harishchandra father of the deceased went to the Dahod Police Station and Harishchandra lodged his complaint Ex.18. As per evidence of P.W.13 PSI Mr. Rajput, P.S.O. he was entrusted with handed over the investigation of the crime for which a complaint was lodged by the complainant. Immediately he went to the hospital to see the dead body. As it was a night time, he decided to hold an inquest on the next day. Accordingly, inquest on the dead body of the deceased was held in presence of panch witnesses on 14/1/1991 for which an inquest panchnama Ex.13 was drawn during the period between 9-00 a.m.and 10-15 a.m. As this document was admitted by the learned Advocates for the accused, it was admitted in evidence and it was read as proved document. As per inquest panchnama Ex.13, there was one wound caused by some sharp cutting instrument in between the portion of neck and chest slightly on left side and its dimension was 1/2" in length and 1/4" in width. As per inquest panchnama Ex.13, another wound caused by pointed sharp cutting instrument was found between the portion of back of the body and the waist on left side and it was about 5" away from spinal cord. Its dimension was 3/4" in length and 1/4" in width. As per evidence of Mr. Rajput, after drawing inquest panchnama, he immediately sent dead body together with necessary documents to the hospital for autopsy. The prosecution has examined P.W.8 Dr. Rajendrakumar Kishorilal Srivastava (Ex.28) who performed Post Mortem of dead body of Jaydeep. He has produced and proved P.M.Notes at Ex.29. As per the evidence of P.W.8 Dr. Srivastava, he performed Post Mortem on the dead body of Jaydeep on 14/1/1991 during the period between 10-30 hours and 11-45 hrs. and he found

following external injuries:-

(1) Oblique penetrating wound over left side of clavicle from mid line reaching upwards and laterally along the lower margin of clavicle size about 3/4" x 1/3" (illegible) deep upto sternum and (illegible) about 1/2" deep. On opening, wound runs in between 2/3rd of clavicle and IIInd rib deep into chest cavity.

(2) Penetrating wound about 3/4"-1" oblique directs upwards and laterally from mid Axillary line towards post Axillary line at level of 9th and 10th rib. 3/4 " x 1/3 " deep upto abdo-cavity.

He has also deposed for corresponding internal injuries which he had found as follows:- "Penetrating wound reaching between lower end clavicle and 9th rib into chest about 1/2" deep internal vessels cut and clotted blood present in cavity & between layers of pleura".

As per Column No. 23 of P.M.Notes Ex.29, the cause of death as stated by Dr. Srivastava was as follows:-

"Cardia respiratory failure due to internal and external haemorrhage following penetrating injury to spleen (abdominal) and chest cavity".

He has also opined that external injury Nos.1 and 2 and internal injuries were sufficient in the ordinary course of nature to cause death of human being. He has also opined that aforesaid injuries were caused by infliction of two blows. He was shown muddamal article No. 8 i.e. knife and he has opined that said injuries could be possible by muddamal article No. 8.

25. By leading aforesaid medical evidence, the prosecution has proved to the satisfaction of the learned Judge of the trial Court that Jaydeep had sustained serious bodily injuries noted down in Column No. 17 of P.M.Notes Ex.29 and as a direct result of that injuries, he died, and therefore, the learned Judge of the trial Court has rightly come to a conclusion that deceased died a homicidal death. In view of aforesaid evidence which we have discussed and considered, we do not find any reason to differ from the view expressed by the learned Judge of the trial Court, and therefore, we uphold the finding given at the end of Para 11 of the judgment of the learned Judge of the trial Court that the prosecution has proved that Jaydeep died a homicidal death.

26. Now this takes us to decide as to who caused aforesaid injuries which were noted down by Dr. Srivastava in Column No. 17 of P.M.Notes Ex.29. We have narrated the facts of the incident as far as possible in detail in earlier Para 3 of this judgment, and therefore, we do not find it necessary to repeat the same. As per the case of the prosecution, on the day of fateful incident, deceased Jaydeep and P.W.3 Vijay were seeing the movie on the Television and as there was disturbance in the Television, they switched off the Television and both -Jaydeep and Vijay left residence of the complainant at about 6-30 p.m. for Darshan in Satnam Temple. As per the complaint, at about 7-30 p.m. when the complainant in company of his wife Vidyaben, son Sandeep and daughter Sunita was present

in the house, Vijay came running to him and asked him as to whether Guddu alias Jaydeep had returned home. The complainant replied to him by saying "you both had gone together" and thereafter Vijay narrated the incident as to what had happened when Jaydeep and he were returning from Sanatan Temple after Darshan and when they reached the place near Hindi Higher Secondary School at about 7-00 p.m.

27. What incident was narrated to the complainant by P.W.3 Vijay, was narrated by complainant in his complaint Ex.18. As per complaint, the incident took place at about 7-00 p.m. Vijay came to the house of the complainant at about 7-30 p.m. The complainant in company of his son Sandeep and P.W.3 Vijay went to the place of incident and found Jaydeep in unconscious and bleeding condition lying supinely on the road. Thereafter the complainant took his son Jaydeep in Rickshaw and brought him to the Hospital of Hillock at Dohad, and there, it was declared that Jaydeep was dead. Thereafter the complainant went to the Dohod Town Police Station and lodged his complaint. According to him, some scuffle took place and in that scuffle, third young boy who came along with accused Nos. 2 and 3 gave fist blow on face of Vijay and second fist blow was given to Vijay by accused No. 3. At this moment, Jaydeep who was with Vijay asked Vijay to run away from the place. As per evidence of Vijay, Jaydeep started running towards west, while he (Vijay) started running in east-south corner (looking to map Ex.25, he started running towards west-south corner). Map has been admitted in evidence at Ex.25 by admission. Admittedly, this map was prepared on the basis of panchnama of scene of offence Ex.22. The panchnama of scene of offence has also been admitted in evidence at Ex.22 by admission. If we read Ex.22 i.e. panchnama of scene of offence, we find that it was drawn during the period between 11-00 a.m. and 12-30 p.m. on the very next day i.e. on 14/1/1991. This place of scene of offence was shown by P.W.3 Vijay. Incident took place at 7-30 p.m. on 13/1/1991, and therefore, it can safely be said that the episode itself and place of incident were fresh in mind of Mr. Vijay. Map Ex. 25 was prepared on the basis of panchnama of scene of offence Ex.22. Looking to the map Ex.25, it can be said that the first part of incident took place at Point No. 1 of Explanatory Note which is shown in the middle of road leading from Sanatan Temple to Railway Crossing (south-north). As per Explanatory Note, Point No. 10 is there towards west. There was pool of blood in circle having circumference of 9" at Point No. 10, and therefore, it can be said that incident with regard to infliction of blows by weapon took place at Point No. 1. In map, just below Point No. 10, Point No. 11 is shown towards south. Point No. 6 is shown below Point No. 11 in east-south corner. Point No. 6 is at a distance of 128" away from Point No. 1. Looking to map and situation of Point No. 10 which is just above Point No. 11, it can safely be said that Jaydeep ran towards west for a distance of more than 128". As per complaint, a third young boy who came along with accused Nos. 2 and 3 from direction of Marathi School and one person who came on cycle and Chuna alias Raghunath Dolatsinh Shishodia (accused No. 2) chased Jaydeep. Thus, in all three persons ran behind Jaydeep. As per

evidence of Vijay, Rajesh Ramchandra Varma (accused No. 3) chased him while he started running towards west-south corner, and therefore, it can well be presumed that if Jaydeep ran for a distance of more than 128", Vijay must have also run the equal distance. Directions for their running were quite different. After running for a distance of about 128", Vijay heard the shrieks of Jaydeep "O...MAA.....MAR GAYAMAR GAYA". On hearing shrieks of Jaydeep, admittedly Vijay did not go to the place from where the shrieks of Jaydeep were coming. Instead of going there at the place of Jaydeep, he ran and reached the house of the complainant, and therefore, he had no opportunity to see as to what had happened at the place from where the shrieks of Jaydeep had come, and therefore, it can be said that he is not an eye witness to the incident. Admittedly, the complaint Ex.18 was lodged by the complainant -the father of Jaydeep, on the basis of narration of incident made by Vijay immediately after the incident, and therefore, the complaint Ex.18 carries much weight in view of Sec.6 of the Indian Evidence Act. Sec.6 of the Indian Evidence Act reads as follows:-

Sec.6:- Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Illustration (a) given below Sec.6 is somewhat applicable to this case. At one place, Jaydeep was assaulted, and at another place Vijay heard the shrieks of Jaydeep. He immediately rushed to the house of the complainant and narrated the incident informing complainant as to what happened near Hindi Higher Secondary School. The principle of law embodied in section 6 of the Indian Evidence Act is usually known as the rule of *res gestae* recognized in English Law. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" becomes relevant by itself. This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not applicable. The rationale in making certain statement on fact admissible u/s 6 is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue, but it is necessary that such fact or statement must be part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or atleast immediately thereafter.

28. In view of the above legal position, we find no hesitation to place reliance on the complaint Ex.18, though Vijay has tried to change the story in his deposition. It seems that Vijay has tried to change the story because the Investigating Officer has failed to bring fourth person to book along with the accused Nos. 1,2 and 3. On reading complaint Ex.18 as it is, at the initial stage of the incident, when Jaydeep and Vijay reached the place near Hindi Higher Secondary School, they saw three persons coming from direction of Marathi School. As per complaint, out of said three persons, two persons were accused Nos. 2 and 3. As Vijay did not give any description of third person, the complainant referred that

person as a third young boy in his complaint. In complaint, the complainant has stated that Jaydeep asked Vijay to run away from the place, and therefore, both started running in different directions. As per the complaint, that third young boy who was coming on foot in company of accused Nos. 2 and 3 from direction of Marathi School, accused No. 2 and one another fourth person on cycle chased Jaydeep. So in all three persons chased Jaydeep. It is not in evidence that out of four persons, some one had knife with him. Mr. Vijay is silent about any weapon with any of the four persons. As per his say, only scuffle took place and in that scuffle, first, that third young boy gave a fist blow on his face and second fist blow was given on his face by accused No. 3. So during this first part of incident, he had not seen any of the four persons with any weapon. From his evidence, it appears that Vijay was knowing accused Nos. 2 and 3 since before the incident. Vijay has deposed at the end portion of Para 10 of his deposition that he knows accused Chuno and Rajesh since last six to seven years as he had seen them while coming and going. He has specifically deposed in his evidence that third culprit, as per his say, was seen by him on that day for the first time. So he was not knowing that third culprit previously. As per his evidence, incident took place at about 7-00/7-30 p.m. It was a season of winter. He has specifically deposed that incident took place one and one half hours after sunset which took place at about 6-00 p.m. He has admitted in Para 5 of his deposition that at the place of incident, one Cyclewala had come, but he could not identify him as it was dark. If this is the say of Vijay, it was not possible for him to identify that third young boy who came on foot along with accused Nos.2 and 3 from direction of Marathi School. He has admitted that he could not identify that Cyclewala. Though this was the case in complaint. Vijay has changed his story and deposed that it was not true that Cyclewala chased Jaydeep. He has improved his story by saying that only third young boy who came on foot along with accused Nos. 2 and 3 chased Jaydeep. He has been confronted with his police statement. He has deposed in Para 5 of his deposition that he has not stated in his statement before police that a scuffle between him and three persons took place and fourth person i.e. Cyclewala was also there in the scuffle. P.S.I. Mr. Rajput who recorded the police statement of Vijay Narendralal, has deposed in Para 3 of his deposition as follows:-

"I recorded the statement of witness Vijay. He had stated in his statement before me that one boy had come on cycle and he parked his cycle and he also started to quarrel joining himself with three persons".

The statement of Vijay was recorded at the earliest point of time. He narrated the true and correct story to the father of Jaydeep. He stated the true and correct story to Mr. Rajput. In spite of this, he changed the story by eliminating presence of fourth person who came on cycle. According to the complaint, that third young boy who came on foot, the accused No. 2 and the Cyclewala chased Jaydeep. Now the prosecution has come with the case that third young boy who came on foot is nobody else but accused No. 1. The prosecution has kept silence for Cyclewala, though that fourth person was sent for identification parade to the

Executive Magistrate.

29. The case of the prosecution as advanced in the complaint Ex.18 is consistent with the deposition of Investigating Officer P.W.13 PSI Mr. Rajput. As per evidence of P.W.10, Police Jamadar Punjabhai Kalubhai, he was on duty as PSO in Dohad Town Police Station on 13/1/1991 and on that day at 9-00 p.m. the complainant Harishchandra came personally to him and lodged his complaint Ex.18. He registered that complaint in the Crime Register and PSI Mr. Rajput was entrusted with the investigation of that crime. As per evidence of P.W.13 PSI Mr. Rajput, he was entrusted with the investigation of crime registered on the basis of complaint lodged by Harishchandra Chunilal Sharma. He immediately went to the hospital to see dead body. As it was night time, he decided to hold inquest of dead body in the morning on the next day. He recorded the statement of P.W.3 Vijay Narendralal Khastriya on 13/1/1991 i.e. on the day on which the incident took place at 7-30 p.m. So the statement of P.W.3 Vijay was recorded at the earliest point of time. He has categorically deposed in Para 5 of his deposition that when he received the complaint for investigation, he found that total number of accused persons was four. He has further deposed that during his investigation, it was revealed that there were four accused persons. He has further deposed that it was revealed in his investigation that during the scuffle with Vijay, one Cyclewala boy also joined him with three other accused. Thus, at very initial stage, from complaint as well as statement of P.W.3 Vijay, it was revealed that in the initial part of the incident, there were in all four persons in the scuffle and out of those four persons, three persons viz. third young boy who had come on foot in company of accused Nos. 2 and 3 from the direction of Marathi School, accused No. 2 and Cyclewala boy ran behind Jaydeep and meanwhile Jaydeep had already covered the distance of about 128" and thereafter he raised a shriek saying " O...MAA.....MAR...GAYA. MAR.....GAYA" and as per the complaint, accused No. 3 had chased Vijay who ran towards west-south corner, and therefore, during the course of recording the evidence, Vijay developed and changed his story that there was no Cyclewala boy with an intention to help the prosecution, because the Investigating Officer has filed the chargesheet against only three accused persons. It is not the case of the prosecution that fourth person was not traceable or is absconding. That fourth person was traced out by the Investigating Officer. Chargesheet was filed against three accused only by PSI Mr. Gohil, who is not examined in this case. P.W.14 Mr. Mundaliyar has deposed in Para 8 of his deposition that he addressed a Yadi Ex.36 to the Executive Magistrate at 16-30 hrs on 19/1/1991 and along with that Yadi, he sent two suspected persons for being identified by Vijay in Identification Parade. It is interesting to note that though Mr. Mundaliyar sent two suspected persons for being identified in the Identification Parade to the Executive Magistrate, the Executive Magistrate held Identification Parade only for one suspected person. There is nothing on record as to why the Identification Parade was not held for second suspected person who was sent along with Yadi Ex.36 to the Executive Magistrate. Yadi Ex.36 is material and important piece of documentary evidence

to appreciate the evidence with regard to Identification Parade. In first paragraph of this Yadi Ex.36, Mr. Mundaliyar has stated that the complainant Harishchandra Chunilal Sharma of Dahod-Parel has given names of (1) Mr. Rajesh Ramchandra Varma; and (2) Raghunath Dolatsinh Shishodiya and also referred to two other persons in his complaint which has been registered as CR. No. I 5/91 for offences punishable under Secs. 302-323 of the Indian Penal Code and also under Sec.135 of the Bombay Police Act. In second para of this Yadi Ex.34, Mr. Mundaliyar has further stated that out of four accused referred to in Para 1, (1) Mohmad Salim Abdul Razak Mansuri of Dahod of Sanatan Temple; (2) Subhash Virabhai Bariya of Dahod-Parel and (3) witness Vijaykumar Narendralal Kshatriya of Dahod-Parel i.e. three persons are being sent separately, and their Identification Parade be held for identification of real culprit through the witness P.W.3 Vijaykumar. He also requested the Executive Magistrate to send copy of panchnama of Identification Parade. So during the course of investigation, two named persons were disclosed and for two unknown culprits, Mr. Mundaliyar had apprehended two suspected persons and that two suspected persons were sent for being identified by Vijay to the Executive Magistrate requesting him to hold an Identification Parade. As per evidence on record, P.W.12 Bhagwandas Gulabsinh Barkamthi who was an Executive Magistrate at the relevant point of time held the Identification Parade in presence of two panch witnesses and in that Identification Parade, only one suspected person was kept in the line of about 16 dummy persons and as per evidence on record, Vijay identified that suspected person in the Identification Parade. As per panchnama of Identification Parade Ex.37, that suspected person was Mansuri Mohmad Salim Abdul Razak who was ultimately sent as accused No. 1 with the Chargesheet. We will discuss the evidence with regard to the Identification Parade lateron.

30. At present, we are discussing evidence of Vijay who is a key witness in the case because in his company, Jaydeep left his house at about 6-30 p.m. for Sanatan Temple for Darshan purpose. There is no other eye witness or any other witness who had seen the actual incident of inflicting blows of weapon on the person of Jaydeep. Vijay, after hearing shrieks of Jaydeep did not go to the place from where Jaydeep had raised the shrieks. Vijay has deposed that he started running for a distance of about two to three furlongs (About 1980 feet). He has further deposed that after hearing shriek of Jaydeep, he straight way went to the house of Jaydeep and therefore, he had no occasion or opportunity to see as to who inflicted blows by which weapon on the body of Jaydeep. It is necessary to evaluate the evidence of Vijay to decide as to whether his evidence is trustworthy and dependable for coming to a conclusion that what he has narrated in his deposition inspires confidence of the Court. This witness is not a young boy. He is 26 years old. He has admitted in his evidence that one criminal case of scuffle and beating against him was pending on the date of his evidence. So he is not a normal respectable witness. As discussed earlier, he has admitted in his evidence that at the place of incident, one Cyclewala had come but he could not identify him as it was a dark. He has also admitted in his evidence that

a third culprit, as per his say, was seen by him for the first time on that day. He has also admitted that it was about 7-00 to 7-30 p.m. and it was a season of Winter. He has also admitted that incident took place one and one half hours after sunset which had taken place at about 6-00 p.m. So looking to his evidence, he was unable to identify that third person as well as that Cyclewala. When his evidence was recorded by the learned Judge of the trial Court, in opening part of his evidence, he has deposed that he knows accused, meaning thereby he knows accused Nos.1,2 and 3. In his evidence, he has nowhere stated that he was knowing accused No. 1 since before the date of incident. In his evidence, he has further deposed that he came to know about third accused subsequently and the name of that third accused is Salim. If really, he was knowing accused No. 1 since before the date of incident, while narrating the incident, he would have certainly stated to the complainant that along with accused Nos. 2 and 3 whose names he had given, one another third boy of a particular description with regard to his physique, complexion, age or height etc. was also there in the scuffle. No description was ever given to the complainant. Even he did not give such description of third accused to the police when his police statement was recorded, and therefore, on the date of incident, that third young boy was completely unknown to Vijay. He has deposed in Para 3 of his evidence that out of three persons who met them on the way, one addressed him as "Gaando" and thereupon he asked that person as to, to whom he was addressing as "Gaando". As per his evidence, the person who had spoken a word "Gaando" said that it was not addressed to him (Vijay). Immediately thereafter, one fist blow was given on his (Vijay's) face and a period of only one minute elapsed in this altercation. As per his evidence, thereafter immediately Jaydeep asked him (Vijay) to run away from the place and both of them started running. So in early part of night when there was a darkness, Vijay had an opportunity to see three persons for a minute or two. It is not his say that for all the while he was constantly seeing that third young boy. Looking to the nature of altercation, the accused No. 3 addressed him (Vijay) as "Gaando", and therefore, naturally his eyes would be towards the accused No. 3. On being asked by Vijay to accused No. 3 as to, to whom he is addressing "Gaando", the accused No. 3 replied that he was not addressing him as "Gaando". Vijay has not deposed as to what that third person was doing at that time. Hence during this short span of time, possibly he would have seen that third person for one or two minutes because of sudden altercation with the accused No. 3 and Vijay. In spite of these circumstance, Vijay has identified the accused No. 1 in the trial Court as third young boy who had come on foot along with the accused Nos. 2 and 3 from direction of Marathi School. He had seen that third young boy on that day for the first time. In view of this, the Investigating Officer thought it fit proper to hold an Identification Parade through the Executive Magistrate and in that Identification Parade, as per evidence on record, Vijay identified the accused No. 1 to be that third young boy. The evidence with regard to identification of accused No. 1 by Vijay in the Court is substantial evidence. To corroborate that substantial evidence, the prosecution has tendered the evidence in respect to the

Identification Parade.

31. The actual evidence, regarding identification, is that which is given by the witnesses in the court. The fact that a particular witness has been able to identify the accused at an identification parade, is only a circumstance, corroborative of the identification in the court. The earlier identification made by a witness at the identification parade has, by itself, no independent value. This view has now been affirmed in a number of cases by the Supreme Court.

32. It is the duty of the prosecution to produce before the court, all the evidence which should convince the court that the identification parade has been held in a full proof manner, leaving no doubt about the honesty, integrity and safety of the same. Thus, the substantive evidence, i.e., evidence on which alone the Court can base its order of conviction or acquittal, is that given by the witness before the Court. But the value of his deposition there of having identified the accused in the act of the crime is of little consequence; before the Court can accept such identification as sufficient to establish the identity of the accused, and therefore, it is very necessary that there should be reliable corroborative evidence, and the corroborative evidence which the Court is entitled to accept in such cases is that of a test identification conducted with due precautions.

33. The prosecution has examined one panch witness P.W.11 Dilip Kantilal at Ex.34 and P.W.12 Executive Magistrate Mr. Barkamthi at Ex.35. The prosecution has produced the panchnama which was drawn by Mr. Barkamthi while conducting the identification parade at Ex.37. Panch witness P.W.11 Dilipkumar turned hostile. He has not supported the case of the prosecution with regard to identification parade held by P.W.12 Mr. Barkamthi. The prosecution has proved the panchnama with regard to identification parade Ex.37 through the evidence of Mr. Barkamthi. He has produced a Yadi Ex.36 sent by Police Sub Inspector. According to the deposition of Mr. Barkamthi, only one suspected person was made to stand in a queue of 16 persons and as per his evidence, Vijay identified that suspected person and as soon as that suspected person was identified by him, he questioned that person for his name and according to the evidence of Mr. Bhagwandas, that person was "MANSURALI" The prosecution has tried to convince this Court that the suspected person who was identified by Vijay was nobody else but he was an accused No. 1. The name of accused No. 1 is Mohmad Sabir Abdul Razak Mansuri, and therefore, nexus between suspected person identified by Vijay and accused No. 1 is not established to the satisfaction of the Court because Mr. Barkamthi has deposed that the suspected person was "MANSURALI" During the course of recording of evidence in the Court, Mr. Barkamthi was asked as to whether he could identify that person from the persons present in the Court and he identified the accused No. 3 Rajesh Ramchandra Sharma as "MANSURALI". So he is not cock sure as to whether the accused No. 1 was identified or accused No. 3 was identified by Vijay in the identification parade. It may be noted that when Mr. Barkamthi was asked to identify that suspected person, who was identified by Vijay, from the accused

persons in the Court, accused No. 1 was also present amongst three accused before the Court. Thus, it is not certain as to whether in fact the accused No. 1 was identified or accused No. 3 was identified. Of course, Vijay has identified accused No. 1 to be the person who was identified by him during the course of Identification Parade. But as said earlier, evidence of identification parade is a corroborative piece of evidence and not a substantive evidence. Substantive evidence is the evidence of Vijay identifying accused No. 1 in the Court.

34. It is well settled principle of law that if a suspect is to be identified in an identification parade, the most elementary precaution should be taken is that the persons similar in appearance, height, age etc. to the accused should be made to stand as dummies in that parade. Accused No. 1 was aged about 24 years when chargesheet was filed. Names of dummies who were made to stand in a line are stated in the panchnama Ex.37. Out of those 16 persons, 7 persons were of age in between 30 and 41. 3 persons were of age of 20 and 3 persons were of age of a group of 21 and 22, and therefore, a large number of dummies of age in between 30 and 41 were made to stand in a line. Accused No. 1 is a Muslim. There is nothing on record to show as to whether he was having beard or not. Out of 16 persons, only two Muslim persons were made to stand in a line. There is also nothing on record to show as to whether those two Muslim persons who were made to stand in a line had beard on their chins or not, and therefore, it cannot be said that Mr. Barkamthi had taken most elementary precaution for keeping persons present similar in appearance, height, physique, age, complexion etc. to the accused No. 1 in a queue.

35. From evidence of Mr. Barkamthi, it is revealed that at first attempt, Vijay identified the suspected person who was found to be a person, named MANSURALI. Thereafter again, Vijay was asked to go out from the room and Mr. Barkamthi asked the suspected person to change his dress if he wanted to do so and to stand at another place in the queue as per his own wish. As per evidence of Mr. Barkamthi that suspected person did not change his dress but he changed his position in a queue at the second attempt of identification. Mr. Barkamthi has deposed that he did not make any arrangement for clothes which might be used for change of dress by suspected person at the second attempt. He has also admitted that the accused had no other pair of clothes for changing his dress. Thus, the suspected person had no other alternative but to stand in a line in the same dress for want of arrangement of clothes which ought to have made by Mr. Barkamthi. We have minutely and carefully examined the panchnama of identification parade Ex.37 prepared by Mr. Barkamthi. It appears that formerly 20 persons were made to stand in a queue but subsequently only 16 persons were made to stand in a queue. Writings of words "Serial Nos. 17 to 20" were struck off from the panchnama. On second page at the bottom portion of panchnama, name "MANSURI MOHMAD SALIM ABDUL RAZAK" appears to have been written subsequently in blank space kept in the panchnama because after word "Razak", some space is kept blank. In ordinary course of business, while writing a panchnama, one would not keep any space blank in between some

words. Here in this case, during the course of writing panchnama, there would not be any space after word "Razak" kept blank, if it was written in the same transaction at same sitting. It also appears that the name of accused No. 1 appears to have been written after the panchnama was completed because mode of writing appears to have been changed. On page 2 of the panchnama Ex.37, signatures of two panch witnesses appear to have been taken on lines drawn in slanting condition which starts from south-west corner to south-east corner. These signatures do not cross third page of the panchnama. Purpose of taking such signatures on inner side of the pages is to show that writings on Pages 2 and 3 were written at the same time in one sitting. Two lines drawn for signatures of panch witnesses ought to have crossed the third page also. Thus, there seems to be some doubt about third page which could have been prepared subsequently. Looking to this nature of evidence of identification parade, this Court is not satisfied with the evidence led by the prosecution for identification of accused No. 1 by Vijay.

36. Admittedly, Police Inspector Mr. Mundiayar had sent two suspected persons along with Yadi Ex.36 to the Executive Magistrate for holding identification parade for identifying the real culprit with the help of Vijay. Admittedly, the Executive Magistrate had held the identification parade only for one suspected person. Mr. Barkamthi has admitted in his evidence that it was true that two persons were sent to him as accused for identification parade. He has further deposed that one was Mansurali and another was Dinesh. He has further admitted in his evidence that it was true that there is no reference in panchnama Ex.37 for another person other than Mansurali being kept in a line for identification parade. He has further deposed that no separate panchnama was drawn for identification parade for another suspected person and for that he has no reason whatsoever. He has further deposed that there was no pressure on him for not drawing another panchnama for second suspected person. As per the evidence of the Executive Magistrate, another suspected person was Dinesh, while as per Yadi Ex.36, that another person was named Subhash Virabhai Bariya. Whether second person was changed while sending him to the Executive Magistrate along with Yadi is a crucial question. As per evidence of Mr. Barkamthi, process of identification parade was completed at 5-30 p.m. Mr. Mundaliyar has deposed that he had taken Vijay with him to Mamlatdar and Mamlatdar gave him a copy of panchnama of the identification parade at 5-45 p.m. i.e. immediately 15 minutes after the panchnama was completed. Mr. Mundaliyar has further deposed that the copy of the panchnama was given to him in the Office of Mamlatdar and he read it. He has further deposed that it was true that on reading the copy of the panchnama, he realised that there was a reference of only one suspected person who was made to stand in a line for identification parade, though he had sent two persons for being identified by Vijay. He has further deposed that it was true that the Mamlatdar has not given him any document with regard to identification parade, if any, held for second suspected person. If this was the position then Mr. Mundaliyar could have

requested immediately the Mamlatdar to hold second identification parade for second suspected person referred to in Yadi Ex.36. He has not taken any care for doing so. It means that he was satisfied that the identification parade in which Vijay identified the accused No. 1 as a third boy was a real culprit. As per evidence of Vijay, there were four persons and out of those four persons, three had chased Jaydeep. Out of those three persons, one was the accused No. 2. The prosecution has not made it clear as to who were those two other persons along with accused No. 2 while chasing Jaydeep. The prosecution has come with a specific case that out of those three, one was the accused No. 2 and another was the accused No. 1. The prosecution has kept silence for that third person having the cycle who also chased Jaydeep. In view of this, the evidence of identification parade is not satisfactory and it does not inspire confidence of the Court. It does not lend any credence and on the basis of this type of corroborative piece of evidence, the Respondent wants this Court to believe that Vijay had identified a real culprit who ran behind Jaydeep.

37. Shri K.T. Dave, learned APP for the respondent -State, has argued that looking to the evidence on record, it was not necessary for the Investigating Officer to request the Executive Magistrate to hold an identification parade for suspected persons. He has argued that Vijay who identified the suspected person and who has been chargesheeted as the accused No. 1, was knowing accused No. 1 since before the date of incident, and therefore, the identification parade was not at all necessary to be held. He has taken us through the evidence of Vijay. By emphasizing first para of the deposition of Vijay, he has argued that Vijay was knowing all the accused. Vijay has deposed that he knows the accused and out of the accused persons who were sitting in the Court, one is named Rajeshkumar and third is Chuna alias Raghunath, while accused No. 3 is Salim whose name came to be known by him, afterwards. The evidence cannot be read in isolation or in piecemeal. The evidence should be read as a whole. What Vijay has conveyed to the Court in Para 1 of his deposition is to the effect that on the date of his evidence, he was knowing the accused. It is interesting to note that even though as per arguments of Shri K.T. Dave, Vijay was knowing accused No. 1 but he was not knowing the name of accused No. 1 but as per his say, subsequently he came to know that accused No. 1 was known as Salim. We have to read the evidence in Para 1 of the deposition of Vijay together with the evidence in Para 3 of his deposition. He has deposed that he had seen the accused as third accused on that day for the first time. Shri K.T. Dave has twisted this evidence by arguing that Vijay was knowing accused No. 1 since before the date of incident, but he wanted to inform the Court that on that very day of incident, he saw him for the first time. We are not impressed upon the arguments of Mr. K.T. Dave. If really, Vijay was knowing accused No. 1 previously, he would have certainly given some description about physique, height, complexion or age of accused No. 1 in his statement recorded by police. He would have given that information with regard to description of accused No. 1 to the complainant, when he first went to him after the incident and in turn, the

complainant would have stated the description of accused No. 1 in his complaint. This has not happened in this case, and therefore, the argument of Shri K.T. Dave that the investigation parade was not at all necessary because Vijay was knowing the accused No. 1 previously, is not accepted.

38. Looking to the nature of evidence which we have discussed on the point of identification parade hereinabove, the corroboration to evidence of Vijay in court is not satisfactory, and therefore, we outright reject the said identification parade. In absence of evidence on the point of identification parade, now we would like to appreciate the evidence of Vijay who identified the accused No. 1 in the Court. As discussed earlier, he had a little opportunity to see the accused No. 1 during first part of incident in which some altercation had taken place and he was given first blow by accused No. 3. As per the evidence on record, Jaydeep and Vijay were going from Sanatan Temple to the house of Jaydeep and at that time, three persons were coming from direction of Marathi School to the place just opposite to Hindi Higher Secondary School and at that place, some altercation took place and in that altercation, accused No. 3 addressed Vijay as "Gaando". So at that time naturally, his attention must have been drawn towards accused No. 3. It was a night time because the incident took place at about 7-30 P.M. i.e. one and one-half hours after the sunset. Meanwhile as per evidence of Vijay, a third boy who was coming along with accused Nos.2 and 3, gave him a fist blow on his face and second fist blow was given by accused No. 3. Under these circumstances, he must have been terrified, because in a trifle matter, he received two fist blows, and therefore, his mental condition would have been disturbed and in that mental condition, he saw that third young boy within a fraction of a minute because immediately thereafter, Jaydeep asked Vijay to run away from the place and both of them had started running. Looking to this evidence, there was a little opportunity for Vijay to stare at that third young boy. Thereafter, he gave evidence in the Court after about three years and four months and while giving evidence, he identified the accused No. 1 to be that third young boy who inflicted a fist blow on his face. In view of this type of evidence, it would be very risky to accept the version of Vijay.

39. As per his evidence, after hearing the shrieks raised by Jaydeep, Vijay did not go to that place but immediately he went to the house of complainant and he narrated the incident with regard to incident to the father of Jaydeep. Father of Jaydeep has narrated all the facts stated to him by Vijay in his complaint Ex.18. Evidence of complainant does not get corroboration from evidence of P.W.9 Sandeepkumar -brother of Jaydeep.

40. As per evidence of P.W.9 Sandeepkumar who has not been declared as hostile witness by the prosecution, has deposed that in the evening, he was at his residence and at that time his parents and sister were there with him in the house. He has further deposed that Vijay came to their house and told about the incident as to how it happened. As per evidence of Sandeepkumar, Vijay came and asked as to whether Guddu alias Jaydeep had returned home and at that

time he replied that Jaydeep had accompanied him (Vijay) while going. As per his evidence, Vijay came and told this fact 20 to 25 minutes after Jaydeep left the house in company of Vijay. Without stating anything about the incident, Vijay took Sandeep to the place where that quarrel had taken place. He has further deposed that Vijay was in frightened condition and in that frightened condition, Vijay informed him on the way while going to the place of incident that there were exchange of some abuses between them and accused. He has further deposed that Vijay gave names of accused as Chuna and Rajesh. Sandeep has also deposed that Vijay informed him that one another young boy was also there with the accused and he knew him only by seeing his face. This is the only talk which took place in between Vijay and Sandeep. He has further deposed in Para 2 of his deposition that when Vijay had come to his house, his father was there in the house but Vijay did not talk with his father. Vijay talked with him when father of Vijay was there in the compound, and thus, it appears from the record that Vijay gave first information to Sandeep and not to his father. still however, the prosecution has advanced his case that Vijay informed about the incident to the father of Jaydeep at the earliest point of time. So there is material contradiction in between the evidence of complainant and evidence of Sandeep. Had Vijay given the information to Sandeep, he would have deposed all the facts deposed by Vijay in his deposition. Looking to the examination in-chief of Sandeep, Vijay came and inquired about Jaydeep as to whether he returned home or not, and thereafter, Vijay took Sandeep to the place of incident and while going to that place, Vijay only informed that there was exchange of abuses in between them and the accused. Except this, no other information was conveyed to Sandeep. Thus, looking to the evidence of Sandeep, the evidence of complainant does not get any corroboration from the evidence of Sandeep with regard to information given to complainant by Vijay immediately after the incident. Vijay has deposed that in the scuffle, his clothes were stained with blood and he had shown that clothes to the police. He has also deposed in his evidence that he informed the police at the Police Station that his clothes were blood stained. In spite of this, the police has not recovered and seized the clothes of Vijay. It appears that Vijay is exaggerating the story of clothes having been stained with blood merely to show that a fist blow was given to him. As per the evidence of P.W.1 Dr. Mittal, half portion of left incisor tooth of upper jaw was found broken and right incisor tooth of upper jaw was found in loose condition for which a certificate Ex.16 has been given. He has opined that injuries with regard to teeth can be possible by infliction of fist blows. In cross-examination, Dr. Mittal has admitted that if a person falls down while running, there can be possibility of injury to the teeth. Here in this case, after hearing the shrieks of Jaydeep, Vijay ran and rushed towards the house of the complainant and possibly, while running, he would have fallen down and received the teeth injuries. Absence of clothes of Vijay before the Court suggests that Vijay might have received teeth injuries by fall and not by fist blows. It is interesting to note that entire episode took place in presence of Vijay and at that time, no other person was present there except Jaydeep. Jaydeep is now no more in the world. Nobody knows as to

what had happened in between Jaydeep and Vijay. This aspect is required to be considered because Sandeep has said that while going to the place of incident, Vijay was in frightened condition. Looking to the facts and circumstances of the case, some suspicion can be cast on Vijay also.

41. As found in the evidence with regard to Vijay, we find that Vijay is not an honest and trustworthy witness and his evidence does not inspire confidence of the Court. If his evidence is discarded, then there remains no material evidence to connect the accused No. 1 with the crime.

42. The prosecution has placed heavy reliance on a discovery panchnama Ex.41 and report of FSL Ex.24. It is the case of the prosecution that accused No. 1 was arrested at 17-45 hrs on 19-01-1991. Arrest panchnama of accused No. 1 does not appear to have been prepared by the Investigating Officer. It is the case of the prosecution that after arrest of accused No. 1, when accused No. 1 was kept in Police Chawky No. 4 of Dohad Town Police Station, accused No. 1 expressed his willingness that he wanted to give some information, and therefore, two panch witnesses were called. Thereafter, first part of preliminary panchnama was drawn for the information given by accused No. 1 in presence of panch witnesses during the period between 10-15 a.m. and 10-30 a.m. on 20/1/1991. Pursuant to that information given by accused No. 1, the place for which the information was given, was searched and Muddamal knife was traced out from a ceiling beam of one Flour Mill Shop and second part of preliminary panchnama with regard to discovery of knife was drawn below that earlier preliminary panchnama which was drawn during the period between 10-30 a.m. and 11-15 a.m. on 20-01-1991. The prosecution has examined first panch Shivprakash Chandrabalising as P.W.6 at Ex.26 and second panch Virendrakumar Parasnath as P.W.7 at Ex.27. Both these panchas had turned hostile and have not supported the case of the prosecution with regard to discovery panchnama Ex.41. The prosecution has proved this discovery panchnama Ex.41 through the evidence of P.W.14 PI Mr. Mundaliyar. Mr. Mundaliyar has deposed in his evidence that on 20/1/1991, accused Mohmad Salim had shown his willingness to find out weapon used in the crime from a ceiling beam of his Flour Mill Shop in presence of panch witness. He has further deposed that for this willingness shown by accused No. 1, the first part i.e. a preliminary panchnama was drawn in presence of panch witnesses and thereafter by taking accused No. 1 with the said panch witnesses, they went to the Flour Mill Shop of accused Mohmad Salim and after reaching there, accused went inside the Flour Mill Shop and took out the knife from the ceiling beam of the Flour Mill Shop and produced it before the panch witnesses and for that, a second part of panchnama was drawn and thus, he has proved that the discovery panchnama was drawn under Sec.27 of the Indian Evidence Act at Ex.41. He has deposed that the knife was found having stained with blood. That muddamal article was sent to FSL. As per report of FSL Ex.24, the knife was found with human blood of "A" group. As per evidence of P.W.8 Dr. Srivastava who performed Post Mortem on the dead body of deceased Jaydeep, he had collected the sample of blood from the dead body and that sample of blood was

sent as Article No. 3 to FSL. As per report Ex.24 of FSL, the blood of Jaydeep was found to be a human blood of "A" group. Shri K.T. Dave, learned APP for the State has argued that thus, the blood stains found on the knife was having a human blood of "A" group which tallies with blood group of the deceased and thus it matches with the blood of the deceased, and thus, this evidence of discovery panchnama at Ex.41 read with report of FSL at Ex.24 connects the accused No. 1 with the crime.

43. It is now well settled that the discovery of fact referred to in Sec.27 is not the object recovered but the fact discovered embraces the place from which the object is recovered and the knowledge of the accused as to it, and therefore, this is a relevant piece of evidence. Under Sec.27 of the Indian Evidence Act, such information is admissible on the ground of discovery of fact pursuant to statement made by person in custody and it gives a guarantee of truth to the statement made by him and the legislature has chosen to make on that ground an exception to the rule prohibiting truth of such statement. Sec.27 is a proviso to Sections 25 and 26 of the Indian Evidence Act. Such statements are generally termed as disclosure statements leading to the discovery of facts which are presumably in the exclusive knowledge of the maker. Sec.27 appears to have been based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and accordingly it can be safely allowed to be given in evidence.

44. In case of Sanjay @ Kaka Vs. The State (NCC.T. of Delhi), , the Hon"ble Supreme Court has voiced a caution for such type of discovery panchnama and it has been held in Para 18 as follows:

" As the Section is alleged to be frequently misused by the police, the Courts are required to be vigilant about its application. The Court must ensure the credibility of evidence by police because this provision is vulnerable to abuse. It does not, however, mean that any statement made in terms of the aforesaid section should be seen with suspicion and it cannot be discarded only on the ground that it was made to a police officer during investigation. The Court has to be cautious that no effort is made by the prosecution to make out a statement of accused with a simple case of recovery as a case of discovery of fact in order to attract the provisions of Section 27".

45. In view of aforesaid legal position, we have scanned the evidence of Ex.41. As said earlier, panch witnesses have turned hostile. They have not supported the case of the prosecution for Ex.41. We have to place reliance on evidence of police officer Mr. Mundaliyar. We have discussed the evidence of Mr. Mundaliyar with regard to identification parade, hereinabove. He is the Officer who sent two persons for identification parade to the Executive Magistrate and he felt satisfied with the panchnama of identification parade which was held only for one suspected person. He did not care to know as to what had happened to second suspected person who was sent along with Yadi Ex.36. Thus, in view of this evidence, Mr. Panchal has rightly argued that he is a Police Officer who can

create the evidence and later on he can destruct the evidence. This type of evidence of Mr. Mundaliyar is not reliable. With this background of evidence of Mr. Mundaliyar, if we read his evidence for Ex.41, he has deposed that on 20/1/1991, accused Mohmad Salim in presence of panch witnesses voluntarily expressed his willingness to find out weapon used in the crime from the ceiling beam of his Flour Mill Shop. This information can be admissible in evidence under Sec.27 of the Indian Evidence Act, provided pursuant to that information, accused finds out the weapon from the place unknown to the police. If the place is known to the police, then question does not arise for showing that place where the article is concealed.

46. Here in this case, accused No. 1 has shown his willingness to find out the weapon from the ceiling beam of his Flour Mill Shop. So the police came to know about the place where weapon was concealed. They could have straight way gone to that place and could have searched the place and could have found out the muddamal knife. Possibly, Mr. Mundaliyar must have straight way gone to the Flour Mill Shop and might have found out the knife, but in order to create an evidence, this panchnama Ex.41 is prepared to show that the muddamal knife is connected with the accused. This is possible because the Investigating Officer has not examined the owner or person in possession of that Flour Mill Shop on the point as to how the knife could reach the Flour Mill Shop. Mr. Mundaliyar has deposed in his evidence that the place from where the knife was found out, was situated in Railway Colony. He has further deposed that he has not inquired as to whether that property was the Railway property or private property. He has admitted that it was true that there are Railway Quarters surrounding and opposite to that building. He has further deposed that there is other building in the line of that Flour Mill Shop. He has further deposed that he has neither recorded any statement of the witness to ascertain the ownership of that Flour Mill Shop, nor had he collected any documentary evidence to establish ownership thereof. The learned Advocate who appeared for accused No. 1 in the trial Court had shown one document to Mr. Mundaliyar and on seeing that document, he has deposed that the said Flour Mill Shop is of ownership of one Fatmaben Valibhai and the accused No. 1 got that document produced on his behalf through Mr. Mundaliyar. Ex.42 is a copy of Registration Certification of establishment of Flour Mill Shop issued under the Bombay Shops and Establishments Act, 1948. As per Ex.42, the Flour Mill Shop is registered in the name of Fatmaben Valibhai Mansuri. There is nothing on record to show as to how this Fatmabai is related to accused No. 1. It was necessary for the Investigating Officer to record the statement of Fatmaben on the point as to how the muddamal knife reached the Flour Mill Shop and as to how and who concealed it in the ceiling beam of her Flour Mill Shop. Looking to this type of evidence, at the best it can be said that the accused No. 1 was knowing the place where the knife was concealed. From that evidence, no inference can be drawn that the accused No. 1 actually used that weapon (knife) in commission of the crime. While inflicting blows on the person of deceased Jaydeep, a possibility cannot be ruled out that a boy having

cycle who had also chased Jaydeep might have inflicted the blows of knife on Jaydeep and he would have concealed the knife in the ceiling beam of that Flour Mill Shop and accused No. 1 might have seen that Cyclewala boy concealing the knife in the ceiling beam, and therefore, by whatever the statement given by accused No. 1 to the Police Officer in presence of panch witnesses, he only said that he would find out the knife from the ceiling beam of the Flour Mill Shop. This evidence does not lead us any further. Merely because, the weapon was found out at the instance of accused No. 1, it cannot be inferred that he used it in the crime.

47. Our view is fortified by legal position enunciated in case of *Dudh Nath Pandey Vs. State of Uttar Pradesh*, wherein the Hon'ble Supreme Court has held as follows:-

"Evidence of recovery of the pistol at the instance of the accused cannot by itself prove that he pointed out the weapon wielded it in offence. Where the statement accompanying the discovery is woefully vague to identify the authorship of concealment, the pointing out of the weapon may at best prove the accused's knowledge as to where the weapon was kept."

48. Here in this case, Mr. Mundaliyar has not deposed that accused No. 1 had shown his willingness saying that he has concealed this weapon. He has only shown his willingness that he would find out the weapon used in the crime from the ceiling beam of Flour Mill Shop. Under these circumstances, it can only be said that he was knowing as to where the muddamal knife was kept. By no stretch of imagination, it can be said that by that very knife, he committed the crime of murder of Jaydeep.

49. In view of discussion made hereinabove, we come to the following conclusions:

(1) At initial stage of incident, two named persons i.e. accused Nos.2 and 3 and two unknown persons viz. one "third young boy" who had come along with accused Nos.1 and 2 from direction of Marathi School and another "Cyclewala boy" took part.

(2) From evidence of complainant and on reading it with complaint Ex.18, it is the case of the prosecution that out of those four, three persons viz. "third young boy", accused No. 2 and "Cyclewala boy" ran behind Jaydeep in western direction, while fourth person viz. accused No. 3 ran behind Jaydeep towards west-south corner and after running for about 128" distance, Vijay heard the shriek of Jaydeep saying " O.....MA... MAR.....GAYA, MAR.....GAYA.... Vijay did not go to that place and rushed to the house of the complainant and narrated the incident and on the facts divulged by Vijay, the complainant lodged his complaint Ex.11. Thus Vijay is not an eye witness to main part of the incident in which Jaydeep sustained serious bodily injuries.

(3) Evidence of Vijay is not satisfactory and same does not inspire confidence of

this Court.

(4) Evidence of identification parade is a weak piece of evidence and it can only be used as corroborative evidence giving corroboration to substantive evidence of Vijay who identified accused No. 1 in the Court. From the complaint, it is proved that three persons had run behind Jaydeep, but it is not proved as to out of that three persons who inflicted blows and caused injuries on Jaydeep, after covering a distance of about 128", and therefore, the case against the accused No. 1 is not proved beyond reasonable doubt.

(5) Evidence with regard to discovery panchnama of muddamal knife under Sec.27 of the Indian Evidence Act is also not satisfactory to connect the accused No. 1 with the crime.

(6) From evidence of Ex.41, reading with the report of FSL Ex.24, at the best, it can be said that accused No. 1 was only in know of the fact that at particular place, muddamal knife was kept and this fact does not lead us any further to connect the accused No. 1 with the crime. By stretch of evidence of Ex.41 read with Ex.24, possibly, a case can be said to have been proved against the accused No. 1 only for an offence punishable under Sec.201 of I.P.C. and for no other offence, but the accused No. 1 cannot be convicted for the said offence because no charge for that offence punishable under Sec. 201, I.P.C. was framed against the accused No. 1.

In view of aforesaid conclusions, we are of the opinion that the case against the accused No. 1 is not proved beyond doubt.

50. The accused No. 2 is convicted for an offence punishable under Sec.302 of I.P.C. read with Sec.114 of I.P.C. It is the case of the prosecution that accused No. 2 abetted accused No. 1 while committing the murder of Jaydeep. There is no evidence on record to show as to how and in what manner, accused No. 2 abetted the accused No. 1. At this stage, it is stated that the case against accused No. 1 for prime offence is not proved, and therefore, question does not arise for the Court to decide as to whether accused No. 2 abetted accused No. 1 or not. When accused No. 2 is convicted for offence punishable under Sec.302 of I.P.C. with the aid of Sec. 114 of I.P.C. Sec.114 is applicable to this case. Sec.114 of I.P.C. speaks for abettor's presence when offence is committed. It reads as follows:-

Sec.114:- Abettor present when offence is committed.

Whenever any person who if absent would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence."

51. In view of Sec.114 of I.P.C. a person can be convicted for an abetment of offence committed by other culprit, if Sec.107 of I.P.C. which defines abetment of a thing, is satisfied. It reads as follows:

Sec.107;- Abetment of a thing.

"A person abets the doing of a thing, who-

First- Instigates any person to do that thing; or

Secondly-Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing, or in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly- Intentionally aids, by any act or illegal omission, the doing of that thing.

52. It is not the case of the prosecution that accused No. 2 instigated accused No. 1 to inflict blows of knife on Jaydeep. It is not the case of the prosecution that there was a conspiracy amongst three persons who chased Jaydeep and ultimately after running upto a distance of 128", Jaydeep sustained injuries. As per facts of the case, till about 6-30 p.m. Jaydeep and Vijay were in the house of the complainant and watching the movie on Television. Thereafter, as there were disturbances in the Television, Jaydeep and Vijay left the house for Sanatan Temple for Darshan purpose and while returning from Sanatan Temple, when they reached near Hindi Higher Secondary School, they saw three persons coming from direction of Marathi School and as said earlier, there was altercation in between them and the accused and in that altercation, as per the case of the prosecution, accused No. 3 gave a fist blow on the face of Vijay and second fist blow was given to him by that "third young boy" who came along with accused Nos.1 and 2 and during that altercation or so to say scuffle, suddenly Jaydeep asked Vijay to run away from the place and thereafter the main incident took place. So from this evidence, it cannot be said that there was a conspiracy interse amongst three persons who chased Jaydeep because there was no altercation between him (Jaydeep) and that three persons, but the altercation took place in between accused No. 3 and Vijay, and therefore, in no case it can be said that there was a conspiracy in between three persons who chased Jaydeep, and therefore, case will not fall within the purview of Clause (2) of Sec.107 of I.P.C.

53. There is no evidence on record to show as to in what manner and how accused No. 2 aided in act of committing prime offence committed by accused No. 1. He only ran behind Jaydeep. Shri K.T. Dave, learned APP for the State has argued that this act of running by accused No. 2 behind Jaydeep itself shows that he knew the act which would be done by accused No. 1. This argument cannot be sustained on the basis of evidence on record which we have discussed hereinabove. Accused No. 2 might have run under the feelings of apprehension or curiosity or he might have run to save himself from any attack from any corner, and therefore, not a single clause of Sec.107 of I.P.C. is applicable against the accused No. 2, and therefore, he can not be held guilty for want of evidence on record for abetting the accused No. 1 in committing the prime offence punishable under Sec.302 of I.P.C.

54. Now this takes us the case against accused No. 3. Accused No. 3 is convicted for an offence punishable under Sec.323, I.P.C for giving a fist blow on the face of Vijay. As discussed earlier, Vijay is not a trustworthy witness. His evidence does not inspire confidence of this Court. We have also discussed that teeth injuries might have been caused by fall while Vijay was running. So far as case against accused No. 3 is concerned, there is only evidence of Vijay against the accused No. 3. As his evidence is not satisfactory, some other independent evidence was necessary to corroborate his say. The prosecution relies on evidence of Dr. Mittal. Evidence of Dr. Mittal is in the form of an opinion. When Dr. Mittal has opined that injuries of teeth can also be possible by fall while running, it cannot be said that the evidence of Vijay gets corroboration from the evidence of Dr. Mittal. Thus in our view, the case against the accused No. 3 is also not proved beyond reasonable doubt, and therefore, this is a fit case in which benefit of doubt should be extended to accused No. 3 also.

55. On over all view of appreciation of evidence, we come to a definite conclusion that the prosecution has totally failed to prove the case against all the accused. The evidence led by the prosecution is not satisfactory, worthy of credence and dependable. On this type of hazy and shaky evidence, the order of conviction passed against accused Nos. 1,2 and 3 cannot sustain. In our view, the learned Judge of the trial Court failed to appreciate the evidence correctly in its proper perspective. By ignoring part taken by fourth person viz. "Cyclewala" and evidence of identification parade excluding second suspected person, the learned Judge of the trial Court has come to a faulty conclusion and on the basis of that faulty conclusion, he has passed a wrong order of conviction and sentence, and therefore, three appeals i.e. Criminal Appeal No. 681 of 1994, 693 of 1994 and 555 of 1994 preferred by accused Nos.1, 2 and 3 respectively deserve to be allowed and the judgment of conviction passed and sentence imposed on them deserve to be quashed and set aside.

56. For the foregoing reasons, three appeals i.e. Criminal Appeal Nos. 681 of 1994, 693 of 1994 and 555 of 1994 preferred by accused Nos.1,2 and 3 respectively are hereby allowed. The judgment of conviction and sentence (Ex.44) rendered by the learned Additional Sessions Judge, Panch Mahals at Godhra, Camp Court at Dohad, in Sessions Case No. 102 of 1992 on 21/5/1994 is hereby quashed and set aside. Accused No. 1 Mohmad Salim Razak Mansuri is acquitted of offences punishable under Secs. 302 and 323 of the Indian Penal Code and also under Sec.135 of the Bombay Police Act, accused No. 2 Chuna alias Raghunathsing Dolatsinh is acquitted of offences punishable under Secs. 302 read with Sec.114 of I.P.C. and accused No. 3 Rajeshkumar Ramchandra Varma is also acquitted of offence punishable under Sec.323 of the Indian Penal Code. The accused Nos. 1 and 2 be set at liberty forth with, if they are not required in any custody for any other case. When appeal being Criminal Appeal No. 555 of 1994 was filed by original accused No. 3 Rajeshkumar Ramchandra Varma, at the admission stage of appeal, he was ordered to be released on bail in the sum of Rs.3,000/- with one surety of like amount, and therefore, his bail

bonds shall stand cancelled and surety is discharged. Muddamal articles be disposed of as per directions given by the learned Judge of the trial Court in the operative part of impugned judgment.