

(2007) 01 GUJ CK 0061
In the Gujarat High Court

Case No : Criminal Appeal No's. 513, 544 and 663 of 1999

Munaf Sha alias Ghayal Jaman Sha Fakir	APPELLANT
Vs	
State of Gujarat	RESPONDENT

Date of Decision : 25-01-2007

Acts Referred:

Penal Code, 1860 (IPC) — Section 114, 120B, 302, 323, 395

Citation : (2007) 01 GUJ CK 0061

Hon'ble Judges : R.P. Dholakia, J;M.B. Shah, J

Bench : Division Bench

Advocate : A.R. Saikh, 1 in Criminal Appeal Nos. 513 and 544 of 1999 and K.B. Anandjiwala, 1 in in Criminal Appeal No. 633 of 1999, for the Appellant; R.C. Kodekar, for Opponent 1, for the Respondent

Judgement

R.P. Dholakia, J.—The original accused No. 1-Abbaskhan Sebajkhan Bhatti, the original accused No. 2-Maheshkumar @ Salim Amritlal Patel, the original accused No. 3-Munafsha @ Ghayal Jamansha Fakir, the original accused No. 4-Navsadbkhan AbdIkhan Pathan, the original accused No. 5-Malek Bhikhumiya Hussainmiya and the original accused No. 6-Agarnath Tilaprasad Bihari were tried for the offences punishable under Sections 395, 397, 302, 323, 120B and 114 of the Indian Penal Code.

2. The learned Addl. Sessions Judge, Mehsana, vide judgment and order dated 16-4-1999 held the accused No. 1 guilty and sentenced to suffer R.I. for life and fine of Rs. 5,000/-, in default, to suffer two months RI for the offence u/s 302 IPC, 10 years RI and fine of Rs. 5,000/-, in default, to suffer two months RI for the offence u/s 395 IPC and 7 years RI and fine of Rs. 5,000/-, in default, to suffer two months RI for the offence u/s 397 IPC.

3. The learned Addl. Sessions Judge held the accused No. 2 guilty and sentenced to suffer SI for 6 months and fine of Rs. 200/-, in default, one week SI for the offence u/s 323 IPC, 10 years RI and fine of Rs. 5,000/-, in default, to suffer two months RI for the offence u/s 395 IPC and 7 years RI and fine of Rs. 5,000/-, in

default, to suffer two months RI for the offence u/s 397 IPC.

4. The learned Addl. Sessions Judge held the accused No. 3 also guilty and sentenced to suffer R.I. for life and fine of Rs. 5,000/-, in default, to suffer two months RI for the offence u/s 302 IPC, 10 years RI and fine of Rs. 5,000/-, in default, to suffer two months RI for the offence u/s 395 IPC and 7 years RI and fine of Rs. 5,000/-, in default, to suffer two months RI for the offence u/s 397 IPC.

5. Learned Addl. Sessions Judge however acquitted the original accused Nos. 4, 5 and 6 for the charges levelled against them.

6. Being aggrieved with the aforesaid judgment and order of conviction and sentence, the original accused No. 3-Munafsha @ Ghayal Jamansha Fakir preferred Criminal Appeal No. 513 of 1999, the original accused No. 1-Abbaskhan Sebakhan Bhatti preferred Criminal Appeal No. 544 of 1999 and the original accused No. 2-Maheshkumar @ Salim Amritlal Patel preferred Criminal Appeal No. 663 of 1999.

7. As all these Criminal Appeals arise out of the same judgment and order, they were heard together and are being disposed of by this common judgment.

8. Short facts of the prosecution case are that the complainant Bachubhai Kachrabhai Patel, his uncle Ambalal Shivdas Patel and persons of his Village namely, Patel Ambalal Punjaldas and Atmaram Venidas Patel are partners of a money lending firm namely Pari Mukeshkumar Atmaram situated at Gandhi Chowk, Kadi. On 18-4-1998 when the complainant and his uncle were returning home after closing the shop, his uncle entrusted him the cash of the firm and he kept the same in the dicky of the scooter. They were proceeding to Nandasan on scooter and when they reached near a slope of Utava at about 5.15 p.m., one of the five persons standing on the left side of the road came suddenly on the road and gave a blow with a log to the complainant as a result of which, they fell down. Of the said persons, 2-3 persons aged between 20 and 25 years were having weapons like knife in their hands and they started inflicting blows on his uncle and also on him. As they shouted, they ran away towards Kadi taking away the tiffin bag hooked on the scooter. Since his uncle had sustained grievous injuries, he was taken to Government Hospital at Kadi. The doctor on examination declared him dead at the hospital. Hence, a complaint was lodged by the complainant before Kadi Police Station and it has been registered as Kadi Police Station I.C.R. No. 150 of 1998 for the offences punishable under Sections 395, 397, 302, 323, 34 and 120B of IPC and police started investigation. The police prepared inquest panchnama as well as panchnama of scene of offence in presence of panchas and also made arrangements to send the dead body of the deceased for post mortem. The appellants were arrested and muddamals were discovered in presence of panchas at the instance of the accused Nos. 1,2 and 3. Some of the muddamals were sent to FSL for analysis. Upon receipt of post mortem and FSL reports, same were kept with the investigation papers. On

completion of investigation, charge sheet was submitted into the Court of learned J.M.F.C., Kadi.

9. As the offences alleged against the accused were exclusively triable by the Court of Sessions, learned Judicial Magistrate (First Class), Kadi, committed the case to the Court of Sessions at Mehsana for trial where it was numbered as Sessions Case No. 155 of 1998 and placed in the Court of learned Addl. Sessions Judge, Mehsana. The charge was framed against the accused at Ex.5 by the learned Addl. Sessions Judge. The charge was read over and explained to the accused. Accused pleaded not guilty to the said charge and claimed to be tried.

10. To prove the charge against the accused, the prosecution examined the following witnesses namely, P.W. No. 1 Bachubhai Kachrabhai Patel Ex.22; P.W. No. 2 Atulbhai Parsottamdas Ex.23; P.W.3 Gulamhussain Kalumiya Saiyed Ex.24; P.W.4 Bachuji Piraji Ex.25; P.W.5 Bharatkumar Bhalabhai Patel Ex.27; P.W.6 Sureshbhai Vishnubhai Gajjar Ex.28; P.W.7 Shaileshkumar Ramshankar Raval Ex.34; P.W.8 Kirtikumar Dasarathbhai Ex.36; Dr.Kalabhai Madabhai Bajadiya Ex.37; P.W.10 Harshadbhai Narottamdas Patel Ex.43; P.W.11 Mahendrabhai Ambaram Darji Ex.46; P.W.12 Girishbhai Ranchhodbhai Barot Ex.47; P.W.13 Dhirajbhai Naranbhai Mokani Ex.48; P.W.14 Shaileshkumar Babulal Darji Ex.49; P.W.15 Rambhai Shankarlal Patel Ex.51; P.W.16 Rajendrakumar Ranchhodlal Patel Ex.53; P.W.17 Jivanji Ranchhodji Ex.59; P.W.18 Arvindbhai Vittalbhai Patel Ex.60 and P.W.19 Mogjibhai Kesabhai Chaudhary Ex.64. The prosecution also relied on various documentary evidence such as Vardhi sent by PSO, Kadi Police Station Ex.16; Copy of telephone vardhi Ex.17; complaint Ex.65; inquest panchnama Ex.19; report sent to Civil Surgeon for Post-mortem Ex.20; panchnama of scene of offence Ex.66; discovery panchnamas Exs.68 and 69; panchnama of place planned by accused Ex.72; seizure panchnama of knife; discovery panchnama; panchnama of test identification parade Ex.44; seizure panchnama of muddamal articles; arrest report of the accused Agarnath Dhila Prasad Ex.29; Medical Certificate of the complainant given by the Kadi Community Health Centre Ex.38; post mortem report of the deceased - Ambalal Shivdas Ex.39; cause of death certificate Ex.40; note sending muddamal Ex.76; receipt of muddamal by FSL Ex.77; forwarding letter of FSL Ex.78; FSL reports Exs.79 and 80 and seizure panchnama of clothes of the deceased Ex.21.

11. On submission of closing purshis, learned Addl. Sessions Judge, Mehsana, vide judgment dated 16-4-1999 convicted the accused Nos. 1,2 and 3 while accused Nos. 4 to 6 were acquitted. Being aggrieved with the aforesaid judgment and order of conviction and sentence, the appellant-original accused No. 3- Munafsha @ Ghayal Jamansha Fakir preferred Criminal Appeal No. 513 of 1999, the appellant-original accused No. 1-Abbaskhan Sebakhan Bhatti preferred Criminal Appeal No. 544 of 1999 and the appellant-original accused No. 2- Maheshkumar @ Salim Amritlal Patel preferred Criminal Appeal No. 663 of 1999.

12. It may be stated that against the acquittal of original accused Nos. 4, 5 and 6, State also preferred Criminal Appeal No. 524 of 1999. However, said appeal

was separated from this group of appeals in view of the fact that bailable warrant issued against the original accused No. 6-Agarnath Dhilaprasad Bihari in pursuance of non-appearance in the Court was returned back as unserved and also in view of non-availability of High Court Bundle (HB) by the office so as to verify the remarks of unserved.

13. We have heard Mr. K.B.Anandjiwala, learned Counsel for the appellant of Criminal Appeal No. 544 of 1999 and learned APP, Mr. R.C.Kodekar, for the respondent-State. Learned counsel for the appellants of Criminal Appeals Nos. 513 of 1999 and 663 of 1999, Mr. A.R.Shaikh, has however stated that he would be adopting the arguments advanced by learned Counsel, Mr. Anandjiwala and, therefore, we are dealing with only the arguments advanced by learned Counsel, Mr. Anandjiwala.

14. Mr. Anandjiwala has taken us through the oral evidence of following witnesses:

1. P.W.1, Bachubhai Kachrabhai Patel, who is the injured witness and the complainant who was driving the scooter in which deceased Ambalal Shivdas Patel was sitting as a pillion rider at the relevant point of time when one of the accused gave wooden log blow on his hand as a result of which, both fell down and received injuries. He filed the complaint Ex.65 at the earliest on the same day with Kadi Police Station and also took treatment at Kadi Government Hospital.

2. P.W.2, Atulbhai Parsottamdas Ex.23, a permanent resident of Kadi serving as Supervisor in a factory at Nandasan. At the time of incident, he was coming from Nandasan to his residence on scooter and saw the accused standing on the road at a considerable distance. He identified two accused namely Abbaskhan and Maheshkumar. As he was in a hurry to reach home, he did not go to the scene of incident but later on tried to contact the Police Officer of Kadi Police Station, Mr. Chaudhary 2-3 times. In his statement recorded by the concerned Officer, he narrated the names of these two accused.

3. P.W.3 Gulamhussain Kalumiya Saiyed Ex.24, the person who was driving the tempo which was passing near the scene of incident at the time of incident. According to him, he is the witness of incident.

4. P.W.4, Bachuji Piraji Ex.25, a panch of test identification parade.

5. P.W.5, Bharatkumar Bhalabhai Patel Ex.27, one of the panchas in whose presence the muddamal knife has been identified by the complainant.

6. P.W.6, Sureshbhai Vishnubhai Gajjar Ex.28, a panch of discovery panchnama wherein at the instance of original accused No. 1, Abbasbhai Pathan, muddamal article No. 14 knife has been discovered. Along with him, one other person, Khimjibhai, was also a panch.

7. P.W.7, Shaileshkumar Ramshankar Raval Ex.34, a panch of panchnama Ex.68

wherein place of incident has been planned by the accused.

8. P.W.8, Kirtikumar Dasarathbhai Ex.36, a panch of discovery of muddamal at the instance of accused.

9. P.W.9, Dr.Kalabhai Madabhai Bajaniya Ex.37, who examined and treated the complainant Bachubhai Kacharabhai Patel as well as the deceased Ambalal and performed post mortem on the deceased and through him, prosecution has proved the death of the deceased as homicidal.

10. P.W.10, Harshadbhai Narottamdas Patel Ex.43, the Executive Magistrate, who conducted the test identification parade of accused.

11. P.W. No. 11, Mahendrabhai Ambaram Darji Ex.46, another panch witness.

12. P.W. No. 12, Girishbhai Ranchhodbhai Barot Ex.47, a panch witness in whose presence tiffin bag of the complainant seized has been identified by the injured witness.

13. P.W. No. 13, Dhirajbhai Naranbhai Mokani Ex.48, another panch.

14. P.W.14, Shaileshkumar Babulal Darji Ex.49, a panch of discovery panchnama wherein at the instance of accused Munaf, muddamal knife was discovered.

15. P.W.15, Rambhai Shankarlal Patel Ex.51, one of the panchas in whose presence wooden log has been discovered at the instance of accused Mahesh @ Salim.

16. P.W.16 Rajendrakumar Ranchhodlal Patel Ex.53, a panch in whose presence and at the instance of accused No. 6, Agarnath Tilaprasad Bihari, knife and the tiffin bag were discovered and panchnama to that effect was prepared.

17. P.W.18, Arvindbhai Vittalbhai Patel Ex.60, a panch of panchnama of scene of offence Ex.66.

18. P.W.19, Mogjibhai Kesabhai Chaudhary, Ex.64, the Investigation Officer of this case.

15. Taking us through the evidence of the afore referred witnesses as well as through the reasoned judgment, Mr. Anandjiwala has argued that even as per the say of the prosecution, except the complainant Bachubhai Kacharabhai Patel, there are no other witnesses of incident. He has drawn our attention towards the evidence of two witnesses of incident viz., tempo driver, Gulamhussain Kalumiya Saiyed, P.W.3 and a resident of Kadi, Atulbhai Parsottamdas, P.W.2, who, according to him, are not trustworthy witnesses. Even court below has also not placed reliance upon the evidence of these two witnesses, and, therefore, if their evidence are ignored, then, only the evidence of complainant Bachubhai Kacharabhai Patel upon whom the prosecution has placed reliance remains on record.

16. Much weight has been put on the test identification parade which, according

to him, was not natural and was not in the manner required to have been held. In this connection, Mr. Anandjiwala has taken us through the panchnama and argued that prior to holding of test identification parade, the complainant had an opportunity to witness the accused. According to him, the complainant had reached for the test identification parade at the office of Mamlatdar at about 10.30 a.m. and he was called by the Mamlatdar at about 12 O' clock and during that period, he had an opportunity to see the accused. Taking us through the evidence of I.O., it is argued that I.O. in his cross examination has produced daily vernacular newspaper "Sandesh" wherein photographs of all the accused have been published and through that also, the complainant had an opportunity to see the accused and, hence, according to him, the test identification parade is not trustworthy. He has placed reliance on a judgment of the Apex Court reported in 1999 SCC (Cri) 378 in this respect which we will discuss later on.

17. Mr. Anandjiwala has also argued that the panchnama drawn in this case cannot be said to be a panchnama discovered at the instance of accused because the place from where the muddamals alleged to have been discovered is a public place accessible to all and, therefore, discovery panchnama is required to be discarded. Thus, prosecution is not in a position to prove the guilt against the accused.

18. It is further argued that ingredients of offence under Sections 395 and 397 of IPC are not proved. In this regard, he has drawn our attention towards the chief examination of P.W.3, Gulamhussain Kalumiya Saiyed, Ex.24 wherein he has deposed that he has seen four persons running from the scene of offence.

19. Regarding finding of bloodstains on the knife, it is argued that once the discovery panchnama appeared to be unbelievable, rest of the evidence though trustworthy would not be believed as they are insufficient to connect the accused with the crime in question.

20. Learned APP for the State relying upon the oral as well as the documentary evidence relied on by the learned Counsel for the appellants has argued that the evidence of the complainant is trustworthy and believable. His presence cannot be doubted especially when he himself has received injury in the incident and was treated at Kadi Government Hospital along with his uncle. Injury certificate and post mortem report have been proved by the prosecution through the evidence of Dr.Kalabhai Madabhai Bajaniya, who treated the injured complainant and also performed post mortem on the body of the deceased.

21. According to him, test identification parade is also trustworthy. There is no evidence on record to show that before holding test identification parade, the complainant had any opportunity to see the accused. On the contrary, witnesses including the Mamlatdar in the cross examination stuck to their version given in chief examination. Evidence on record shows that the complainant was kept in one room till he was called by the Mamlatdar while the accused were kept separately in another room and, therefore, it cannot be said that the complainant

had an opportunity to see the accused. Over and above, nothing adverse has come out in the cross examination of complainant, police officer and other witnesses in this regard. Not only that, evidence on record also shows that the complainant had not seen the newspaper. Hence, since the test identification parade is trustworthy, reliance can be placed on it.

22. Showing us the FSL report and discovery panchnama together with the evidence in that regard, it is argued that it is a panchnama of discovery as panchas have fully supported the same. Moreover, the place from where the muddamal knife and tiffin bag were recovered was inaccessible to all. Even if it is accessible, then also, muddamals have been kept in such a way as would not generally be found out by any other person than the person having the knowledge or who hid the same and, therefore, according to him, discovery panchnama is trustworthy. Moreover, blood- stains were found on the muddamal knife which, in the opinion of FSL, are of human blood. According to him, it is a serious offence of dacoity with murder. Conspiracy also surfaced in view of the fact that the deceased, complainant and others were running the business of money lending and the accused had a knowledge that the complainant and deceased Ambalal regularly used to go from Kadi to Laxmipura and back also and hence, as a part of conspiracy, the accused have intercepted them on State Highway and uncle of the complainant has been killed and robbery has been taken place. Since the incident had taken place on the highway, one would not expect the presence of other independent eye witnesses because highway robbery takes place within no time and there would not be any witness to support the case. Hence, this incident cannot be compared with the incident of robbery taking place in the village or city wherein witnesses would be available and wherein mostly the victim and the accused might be of the same village or city. Here in this case, the robbers are from different city or village and the complainant is not knowing the accused and, therefore, their evidence are required to be evaluated keeping in mind the above aspects. In view of the above, it is submitted that it is a fit case wherein the appeals filed by the appellants are required to be dismissed.

23. We have also gone through the oral as well as the documentary evidence shown by the learned Counsel for the respective parties as well as the reasoned judgment and have given thoughtful consideration to the arguments advanced by the learned Counsel for the respective parties.

24. It is required to be noted that the present appellants were facing the charge of conspiracy along with other charges. The court below has dealt with the point of conspiracy in para 29, page 34 of the judgment and came to the conclusion that the prosecution has failed to establish the charge of conspiracy and hence, court below has decided the matter on the basis of evidence on record.

25. It is also required to be noted that court below has dealt with the evidence of Dr.Kalabhai Madabhai Bajaniya, P.W.9, Ex.37 at length along with the evidence on record as well as the post mortem note Ex.39 and primary death certificate

Ex.40. The doctor has also narrated the injury in his evidence by stating that deceased was having 8 external injuries as per column No. 17 of the post mortem report and cause of death has been mentioned to be shock due to hemorrhage due to injuries on vital organs like heart, liver and lung as well as due to multiple injuries. Similar version has been given by said doctor in his evidence and deposed that the deceased received eight injuries out of which, seven injuries are of puncture wounds and eighth injury is a cut mark injury and hence, it was held by the court below that it is a case of homicidal death which has not been disputed by the learned Counsel for the appellants and, therefore, we are not discussing further in that respect.

26. Now the question comes whether the prosecution is able to connect the accused with the crime in question or not. For that, learned Counsel for the appellants has taken us through the oral evidence of P.W. No. 1 Bachubhai Kachrabhai Patel Ex.22, who is the prime witness of the incident. There are two other witnesses of incident upon which reliance has been placed by the prosecution i.e. P.W. No. 2 Atulbhai Parsottamdas Ex.23 and P.W.3 Gulamhussain Kalumiya Saiyed Ex.24. However, court below has not given any weightage to the evidence of these two witnesses and, therefore, the only witness of incident remains to be seen is P.W. No. 1 Bachubhai Kachrabhai Patel, who is the injured eye witness and who has filed the complaint Ex.65 at the earliest opportunity on the same day. He has categorically deposed in his oral evidence in paragraph 1 that he along with his uncle deceased Ambalal Shivdas Patel and other partners were doing the business of money lending in the name and style of Pari Mukeshkumar Atmaram situated at Gandhi Chowk, Kadi. He has further deposed that his uncle, deceased Ambalal, was the main person actively looking after the business of money trading and he was assisting him. As they stay at Laxmipura and as their place of business is situated at Village Kadi, they used to commute from Laxmipura to Kadi on scooter. He has further deposed that on 18-4-1998 they were coming after closing the shop at 5.15 p.m. towards Laxmipura on scooter driven by the complainant in which his uncle was a pillion rider and when they reached near Utva slop on Nandasan-Kadi Highway, one of the five persons standing on the left side of the road gave wooden log blow on his left hand as a result of that, he could not control the scooter and they fell down from the scooter. Immediately, all other persons gathered and started assaulting his uncle Ambalal with knife other articles. Therefore, he and his uncle shouted for help but before anybody could come to their rescue, the assailants ran away with the bag which was booked on the scooter. Meanwhile, one matador driven by P.W.3 Gulamhussain Kalumiya Saiyed came there. S.T.bus also came in the meanwhile and before his uncle was to be lifted in the S.T.Bus, since one fiat car reached there, his uncle was shifted to a Government Hospital at Kadi in the said car wherein on examination, the doctor declared him dead. As he also received injuries on his left hand, he was also treated by said doctor. He has also given the description of the assailants and categorically deposed that they were of 20-25 years of age and if he sees them, he would be able to identify them. About

the test identification parade held on 27-4-1999 in the office of Mamlatdar, Kadi, he has deposed that he identified four persons as the assailants, who are accused Nos. 1,2,3 and 4. Thereafter, panchnama to that effect was also prepared by the Mamlatdar. He has further deposed that at the earliest, he filed the complaint Ex.65 narrating the incident in detail. He has also identified the muddamal and the accused in the Court. Said person has been thoroughly cross examined by the learned Counsel for the original accused Nos. 1 to 3 in detail. However, cross examination was only on the aspect of test identification parade and nothing was asked on rest of the aspects. Court below has also observed as such and we also share the same view. Except the test identification parade, rest of the things narrated by the complainant at the earliest in the FIR and thereafter before the court below has remained unchallenged.

27. It is also required to be noted that the incident has been taken place in broad day light at about 5.15 p.m. in the month of April and the complainant was able to identify the assailants. It is not the case of otherside also that as the incident had happened in darkness, the complainant was unable to identify the assailants. It is also not that the assailants have hidden their face and, therefore, he had sufficient time to note the description of the assailants and same has been narrated by him at the earliest on the same day in the FIR and, therefore, it cannot be said that the description has been given after arrest of the accused. On the contrary, we can say on the basis of evidence on record that the description has been given by the injured complainant well in advance and accused were arrested later on after filing the complaint and thus his evidence is trustworthy. The presence of the complainant at the scene of offence is there on the grounds that they are partners of a firm, they were coming from Kadi to Laxmipura after completing their business work and he himself has received injuries and has been treated by the same doctor who treated his uncle at Kadi Government Hospital. Therefore, prosecution is able to prove his presence at the place of incident as being quite natural.

28. Now it is required to deal with the contention raised by the learned Counsel for the appellants that test identification parade is not trustworthy and the complainant and injured witness had an opportunity to see the appellants before holding test identification parade. It was also contended that photographs of the assailants were published in the daily vernacular newspaper SSandesh and, therefore, test identification parade is required to be discarded. Reliance has been placed by the learned Counsel for the appellants on the judgment reported in 1999 SCC (Criminal) 378 more particularly paras 6, 7 and 8.

29. It is required to be noted that otherside is not in a position to prove the photographs appeared in the daily vernacular newspaper SSandesh through the cross examination of investigating officer. A question was asked in the cross examination to that effect to the complainant but he has categorically denied the same by stating that he has not seen the SSandesh daily newspaper. Not only that, he has also denied to have an opportunity to have seen the accused before

holding test identification parade. On the contrary, it is established from the evidence of the complainant and also from the evidence of Mamlatdar, Harshadbhai Narottamdas Patel, that complainant went to the office of Mamlatdar at 10 O'clock wherein he was made to sit in one closed room and he was called by Mamlatdar at about 12.30 at the time of test identification parade. Prior to that, all the accused were inside another room along with other members. Except that, nothing has come out in his evidence creating doubt about holding of test identification parade. Not only that, even Mamlatdar has also supported the same and nothing has come out from his evidence also. Apart from that, the complainant is able to identify the above referred accused. In view of the above, merely photographs were published in the vernacular daily newspaper SSandesh, it cannot be said that the whole test identification parade is to be discarded as argued by the learned Counsel for the appellants more particularly when they are not in a position to establish that the complainant had any opportunity to see either the accused or their photographs either from the police papers or through newspapers. As no much weight has been given on the test identification parade, we have evaluated the test identification parade keeping in mind the above aspects of the matter.

30. We have gone through the law laid down by the Apex Court in 1993 SCC 378 in the case of *Vijayan v. State of Kerala* relied on by the learned Counsel for the appellants and which has been dealt with by the court below in its judgment. It has been held by the Apex Court in the above reported judgment that the incident in question has been taken place on 9-10-1981, the accused was arrested on 7-1-1984 i.e. practically after a period of more than 3 years and test identification parade was held 3 days thereafter. Facts of the above referred reported case was also that photograph of the concerned person was shown to the witness prior to holding of test identification parade. Not only that, but before holding the test identification parade and just before she was entering to identify the accused, somebody had told her to identify the tallest person who was shown in the party as the assailant. In view of the above, the Apex Court has not given any weightage to the above parade and has not taken into consideration that she had identified the accused in the Court after many years. On the basis of the above facts, it was held that since the accused was not known to P.W.3 and the test identification parade having been discarded, the substantive evidence of identifying in the Court after many years cannot be relied upon. One of the ingredients was that it was published in a local daily newspaper and, therefore, the Apex Court has considered all aspects of the matter and came to the conclusion.

31. In the case before us, detailed description of the accused has been given by the complainant, an injured witness, at the earliest on the same day by way of complaint. Not only that, after the arrest of the accused, immediately test identification parade was held and he was able to identify the assailants in the test identification parade and that too also in the group of 26 persons. Apart from that, incident took place in a broad day light and the accused had not

hidden their face and therefore, he was able to name the accused as the assailants and, therefore, learned Counsel for the appellants will not be able to get any benefit out of the said judgment.

32. It is also required to be noted that court below has not relied upon only the test identification parade but on other corroborative evidence connecting the accused with the crime in question also more particularly two discovery panchnamas wherein at the instance of original accused Nos. 1-Abbaskhan Sebakhan Bhatti and the original accused No. 2-Maheshkumar @ Salim Amritlal Patel, knife has been discovered after following required procedure and at the instance of accused Nos. 1,2 and 3, muddamal weapons like wooden log was also discovered. It is established that the place where the said muddamal was hidden separately by the accused is such which is not known and accessible to all concerned. Moreover, the way in which the weapon was hidden, it cannot be known to others except the persons having knowledge or who have hidden the same and, therefore, court below has believed and we also believe that it is the discovery panchnama and the places where the weapons were hidden, it was known only to persons who have hidden the same and, therefore, it cannot be said that it is the place which was assessable to all. Not only that, above weapons were also having blood stains which, in the opinion of the doctor, is of human blood of the deceased. Moreover, the muddamal article knife was having the blood stains of the accused Nos. 1,2 and 3 also.

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Regarding discovery of muddamal at the instance of accused No. 2-Maheshkumar @ Salim Amritlal Patel, the prosecution has examined panch witness Rambhai Shankarlal Patel, P.W.15 at Ex.51, for discovery of muddamal at the instance of accused No. 1-Abbaskhan Sebakhan, the prosecution has examined Sureshbhai Vishnubhai Gajjar, P.W.6 at Ex.28 and for discovery of muddamal at the instance of accused No. 3-Munafsha @ Ghayal Jamansha Fakir, the prosecution has examined P.W.14 Shaileshkumar Babulal Darji at Ex.49. Not only that, prosecution was able to prove the panchnama by way of above referred panchas as well as on the basis of evidence of P.I., Shri Chaudhary, the I.O. in this case. As per the record, same muddamal along with other articles were sent to FSL for analysis and FSL has submitted the report Ex.79 wherein muddamal weapon discovered at the instance of accused Nos. 1,2 and 3 were found to have bloodstains of human blood of the group of the deceased. Prosecution is also able to prove that the muddamal plastic bag and tiffin bag were also discovered and same have been identified by the complainant in the Police Station as well as in the Court. The complainant in the test identification parade before the Executive Magistrate also has identified the accused Nos. 1,2,3 and 4 and also in the Court.

33. As discussed above, the evidence of complainant, who is the injured witness and nephew of the deceased and one of the partners of the lending firm namely Pari Mukeshkumar Atmaram situated at Gandhi Chowk, Kadi, establishes his

clear presence at the place of incident and it is quite natural. This is corroborated by the medical evidence of Dr.Kalabhai Madabhai Bajaniya, who has treated the complainant in the hospital for his injuries on his left hand and also by the medical certificate Ex.38 of said doctor. Thus, presence of all the accused Nos. 1,2 and 3 at the place of incident has been established along with the accused No. 4 beyond reasonable doubt by way of oral evidence as well as by corroborate evidence. Not only that, the weapons used by the accused in the commission of offence have also been proved by the prosecution beyond reasonable doubt.

34. As far as the original accused Nos. 4,5 and 6 are concerned, they have been acquitted by the court below by discussing in paras 34 onwards of the judgment by the court below and against their appeal, an appeal being Criminal Appeal No. 524 of 1999 has been filed by the State. However, since the bailable warrant issued by the previous bench against the original accused No. 6-Agarnath Dhillaprasad Bihari has been returned back as unserved and also since High Court Bundle (HB) could not be traced out by the office so as to verify the remarks of unserved appeared in the board, said Criminal Appeal No. 524 of 1999 was separated by passing a specific order. In view of the fact that said appeal is separated and pending for final hearing, we are not discussing the evidence appearing qua the original accused Nos. 4,5 and 6.

35. Thus, the prosecution is able to prove that the original accused Nos. 1,2 and 3 and other accused were waiting for the arrival of deceased and the injured complainant as they had a knowledge that after closing the shop, they would proceed from Kadi to Laxmipura and when they reached near the scene of offence, accused No. 3 gave wooden log blow on the left hand of the complainant as a result of that, his vehicle fell down and at that time, accused Nos. 1 and 3, who were having knife and accused No. 2, who was having wooden log assaulted them while accused Nos. 1 and 3, gave several blows on vital parts of the body of the deceased causing eight injuries to the deceased resulting into his death. While leaving, the accused has taken away the tiffin bag hooked on the handle of the scooter. Ultimately the accused were arrested, muddamals were discovered at the instance of accused and were attached under panchnama after following required procedures. The muddamals were sent to the FSL and it was opined by the FSL authorities that the muddamal weapons discovered at the instance of accused Nos. 1,2 and 3 were found to have bloodstains of human blood of the group of the deceased and same were proved by the prosecution beyond reasonable doubt. Moreover, the human blood of the group of accused Nos. 1,2 and 3 was also found on the muddamal articles knife. Hence, the case of the prosecution is supported by way of scientific evidence apart from other corroborative pieces of evidence.

36. The original accused Nos. 1 and 3 were convicted for the offences under Sections 302, 395 and 397 of IPC by the Court below. However, the accused Nos. 2-Maheshkumar @ Salim Amritlal Patel has been convicted for the offence under Sections 323, 395 and 397 of IPC. The only offence alleged and proved against

the accused No. 2 is that he has inflicted wooden log blow on the complainant.

37. It is required to be noted that court below has held guilty the accused Nos. 1,2 and 3 as stated above. However, the ingredients of offence u/s 395 of IPC have not been proved by the prosecution against any of these accused because they are not in a position to prove that at the time of incident, there were more than 5 persons. As far as the ingredients of offence u/s 397 of IPC are concerned, it has been proved qua all the above three accused that they were having deadly weapons in their hands and same were used by them in the commission of offence and the deceased received grievous injuries and the complainant has also received injuries. Hence, according to us, the accused Nos. 1 and 3 are required to be held guilty for the offence under Sections 302 as well as u/s 397 of IPC while accused No. 2 is required to be held guilty for the offence under Sections 323 and 397 of IPC. Since the offence u/s 395 of IPC has not been proved against any of these three accused, they are required to be acquitted of the charge u/s 395 of IPC. In view of the above, we pass the following final order:

All the appeals are partly allowed.

As far as Criminal Appeal No. 513 of 1999 filed by the original accused No. 3- Munafsha @ Ghayal Jamansha Fakir is concerned, his conviction and sentence for the offence under Sections 302 and 397 of IPC are confirmed. However, his conviction and sentence for the offence u/s 395 of IPC are set aside.

As far as Criminal Appeal No. 544 of 1999 filed by the original accused Nos. 1- Abbaskhan Sebakhan Bhatti is concerned, his conviction and sentence for the offence u/s 302 and 397 of IPC are confirmed. However, his conviction and sentence for the offence u/s 395 of IPC are set aside.

As far as Criminal Appeal No. 663 of 1999 filed by the original accused No. 2- Maheshkumar @ Salim Amrutlal Patel is concerned, his conviction and sentence for the offence u/s 323 and 397 of IPC are confirmed. However, his conviction and sentence for the offence u/s 395 of IPC are set aside. He was sentenced to suffer SI for 6 months and fine of Rs. 200/-, in default, one week SI for the offence u/s 323 IPC and to suffer 7 years RI and fine of Rs. 5,000/- in default, to suffer two months RI for the offence u/s 397 IPC and all these sentences were ordered to run concurrently. If original accused No. 2-Maheshkumar @ Salim Amrutlal Patel has already undergone the aforesaid period of sentence, he is ordered to be set at liberty forthwith, if not required in any other offences.

Office shall place a copy of this judgment in each of the appeals.