

(2003) 07 GUJ CK 0001
In the Gujarat High Court
Case No : Criminal Appeal No. 581 of 2003

Musa Ahmad Haji Vali

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 10-07-2003

Acts Referred:

Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 107, 161, 162, 313
Evidence Act, 1872 — Section 145, 155
Penal Code, 1860 (IPC) — Section 143, 147, 148, 149, 161

Citation : (2003) 07 GUJ CK 0001

Hon'ble Judges : J.R. Vora, J

Bench : Single Bench

Advocate : B.S. Patel, for Petitioner No. 1-5 and Ranjan B. Patel, for Petitioner No. 1-5, for the Appellant; I.M. Pandya, Ld. APP for Respondent No. 1 and L.R. Pathan, for the Respondent

Final Decision : Dismissed

Judgement

J.R. Vora, J.—This appeal is preferred by the appellants co-accused No. 1 to 5 in Sessions Case No. 148/1993 and Sessions Case No. 143/1999, against the judgment and order of conviction recorded by Id. Addl. Sessions Judge, Fast Track Court No. 2, Bharuch, convicting present appellants for the offences proved against them under sec. 143, 147, 148, 307, 324, 323 read with section 149 of the Indian Penal Code. The present appellants who are sentenced to suffer R/I of one year for the charges proved against them under sec. 143, 147, 148 read with section 149 of IPC and fine of Rs. 1000/-, in default, to undergo S/I for one month. The present appellants were also sentenced to suffer R/I for 7 years for the offence proved against them under sec. 307 read with sec. 149 of IPC and with fine of Rs. 3000/-, in default, to undergo S/I for six months. The present appellants were also sentenced for the imprisonment of one month for the offence proved against them under sec. 323 read with sec. 149 of IPC and with fine of Rs. 100/-, in default, to undergo imprisonment of 5 days. The present

appellants were also sentenced to imprisonment of one year for the offence proved against them under sec. 324 read with section 149 of IPC and with fine of Rs. 1000/-, in default, to undergo imprisonment of one month. The Id. Trial Judge directed that all the sentence of imprisonments shall run concurrently. The judgment and order under challenge is dated 29.4.2003. In the above said sessions cases, there were seven accused in all, and by the judgment impugned in this appeal, ori. accused No. 6- Shehnaj Musa and Ori. accused No. 7 Jaheda Adam Ahmad were acquitted of all the charges levelled against them by the Id. Trial Judge. Against this acquittal, it appears that no appeal has been preferred by the State.

2. It further appears that when charge-sheet of Sessions Case No. 148/1993 was submitted to the court, ori. accused No. 3- Daud Ahmad Haji was not available and then he made himself available. Further charge-sheet i.e. Sessions Case No. 143/1999 was submitted in respect of ori. accused No. 3- Daud Ahmad Haji and hence, both these Sessions Case No. 148/1993 and Sessions Case No. 143/1999 were tried together by the Id. Addl. Sessions Judge, Bharuch.

3. PW-1 - Ibrahim Umarji, resident of Kurchan, Tal. Amod, Dist. Bharuch, lodged a First Information Report at 7.45p.m. in Amod Police Station before Sakarabhai Ramjibhai Parmar, PW-24, the then Police Sub Inspector, Amod Police Station, against in all, seven accused persons on 28.9.1992 for the offence committed by the accused under sec. 307, 143, 147, 148, 324, 323 and 504 of IPC and sec 135 of the Bombay Police Act.

4. Accordingly, it appears that incident has taken place near Bus stand of village Kurchan at about 6.00pm. On the day of incident i.e. 28.9.1992, PW-1 Ibrahim Umarji Isap along with his wife Huriben had been to Bharuch at Patel Welfare Hospital for treatment and medicines for Huriben. After taking medicines from the hospital, they boarded the tempo from Bharuch and came to village Samani at about 5.15p.m. A bus coming from Vaghra going to Koli came to village Samani, the said bus was boarded by PW-1 Ibrahim Umarji and his wife Huriben, PW-7. In the same bus, Mahmad Umarji, PW-4, elder brother of Ibrahim Umarji, also boarded. At the same time, accused No. 1 Musa Ahmad and his son Makbul Gabbar accused No. 5 also boarded in the same bus. Accused No. 5 Makbul pushed Mahmadbhai- PW-4, in the bus. So, PW-4 Mahmad scolded accused No. 5 about pushing him. Thereafter, on scolding, accused No. 5 started giving first blow to PW-4 Mahmadbhai. PW-1 Ibrahim Umarji attempted to intervene in the quarrel and, therefore, accused No. 1 and accused No. 5 Musa Ahmad and Makbul Musa, respectively uttered abuses to PW-1. On account of this quarrel, PW-4 - Mahmad Umarji got down from the bus and bus started for the onward journey. Accused No. 1 - Musa Ahmad and accused No. 5 Makbul also got down from the bus before it started from village Samani. While, this bus reached at the bus-stand of village Kurchan at about 6.00 PM, accused No. 1 Musa Ahmad who preceded the bus in Rickshaw, was present at bus-stand with Tabal (A weapon like an Axe), his son Makbul accused No. 5 with hockey, Daud Ahmad accused

No. 3 with Sword, Adam Ahmad Haji - accused No. 4, with stick and brother of accused No. 1 Ismail @ Sulemamad with stick. Daughter of accused No. 2 - Jubeda- ori. accused No. 7 with knife and Shehnaz daughter of accused No. 1, ori. accused No. 6, with knife, were present. All accused were uttering abuses and were saying that "kill Ibrahim." They started to inflicting blows on the bus, and, therefore, other passengers sitting in the bus got down and ran away. Accused No. 1 and his brother accused No. 2 climbed up in the bus and accused No. 1 inflicted a blow with "Tabal" on the head of PW-1 Ibrahim Umarji and they started to scuffle with PW-1. PW-1 Ibrahim Umarji was also injured above his right eye and blood started oozing. They also gave feast and kicks blow to Huriben- PW-7. When this scuffle was going on, Mustak Ibrahim PW-5 son of PW-1 and Inayat Ibrahim PW-6, other son of PW-1 and daughter of PW-1 Sayara were near the bus. Accused No. 5 inflicted blow of "Tabal" to PW-5 Mustak. Accused No. 4 inflicted stick blow on the leg of Mustak. Accused No. 3 Daud inflicted sword blow to PW-6 Inayat on leg and Accused No. 2 -Ismail @ Suba inflicted hockey blow to PW-4 Inayat. Accused No. 7 and 8 acquitted by the Id. Addl. Sessions Judge, alleged to have given knife blow to Sayara daughter of PW-1. Dinmohamad Gul Mohamad- PW-11 and Janmohmad Gulmohmad PW-20, reached to the spot and rescued PW-1 and other witnesses from further beating. In the same bus, injured were taken to Amod Police Station from Kurchan where PW-1 Ibrahim Umarji as said above, recorded First Information Report at 7.45pm before PW-24 Shakarabhai Ramji Parmar, PSI. After recording of the complaint by police Yadi, all the injured i.e. PW-1 Ibrahim Umarji, PW-4 Mahamad Umarji, PW-8 Shaheraben Umarji, PW-6 Inayat Ibrahim, PW-5 Mustak Ibrahim, PW-7 Huriben and PW-9 Salim Mohmad went to Community Health Centre, Amod, who were treated by Medical Officer PW-22 Dr. Rajesh Kumar. He treated injuries of the injured, in all seven, except Huriben who had not received noticeable external injury. Mohmad Umar PW-4, Ibrahim Umarji PW-1, Inayat Ibrahim PW-6, Mustak Ibrahim PW-5, were referred to Civil Hospital at Bharuch, where, except, PW-1 Ibrahim Umarji, all were treated by PW-3 Dr. Vijaychandra Lalubhai Patel, who also gave certificate of injuries. According to him, as per prosecution case, PW-5 Mustak sustained fracture of left femur along with other injuries, while PW-1 reached at Civil Hospital, Bharuch at 400P.M. on 29.9.1992 and was examined by PW-2 - Lalitbhai Bhagubhai Patel who treated him and gave certificate. After investigation as said above, the charge-sheet was submitted against the present appellants and two other accused and the case was committed to the Court of Sessions at Bharuch.

5. Both the cases i.e. Sessions Case No. 148/93 and Sessions Case No. 143/1999 were tried together and in both the cases a common charge vide exh. 64 was framed by Id. Addl. Sessions Judge, Bharuch on 1.4.2000 for the offence punishable under sec. 143, 147, 148, 307, 324, 323 and 504 of Indian Penal Code as well as under sec. 135 of the Bombay Police Act. All the seven accused pleaded not guilty. The prosecution, therefore, was asked to produce evidence on record. The prosecution examined as many as 24 witnesses and a bulk of

documentary evidences to prove the case of the prosecution. After recording the evidence and statements of the accused under sec. 313 of Code of Criminal Procedure, the Id. judge vide order impugned in this appeal which is dated 29.4.1993 pleased to convict the present appellants and acquitted ori. accused No. 6 and 7, as aforesaid.

6. Being aggrieved by the above said judgment and order of conviction recorded by the Id. Addl. Sessions Judge, Bharuch, this appeal is preferred by the appellants i.e. ori. accused No. 1 to 5. The appeal was at the admission stage, Id. advocate for the appellants Mr. BS Patel and Id. APP in-charge of the case Mr. IM Pandya requested this court that having regard to the circumstances of the matter and since the admission hearing as well as bail hearing is likely to take time, requested this Court to hear the matter finally. The request was granted. The record and proceedings of the trial court was called for and was referred. Id. advocate Mr. BS Patel for the appellants has taken care to prepare a complete paper-book and supplied a copy to this court as well as to Id. APP Mr. Pandya, in advance. So, both the Id. advocates for the parties have addressed this court in detail. Thus, the matter is decided finally.

7. Before we enter into the contentions raised by both the sides and appreciation of evidence, it is necessary to have a sufficient perusal of the prosecution evidence. The prosecution examined injured eye witnesses PW-1 Ibrahim Umarji at exh. 83, PW-4 Mahmad Umarji at ex. 96, PW-5 Mustak Ibrahim at ex. 103, PW-6 Inayat Ibrahim at ex. 104, PW-7 Huriben Ibrahim at ex. 110, PW-8 Shayaraben Ibrahim at ex. 111 and PW-9 Salim Mahamad at ex. 113. Therefore, in fact, seven injured eye witnesses are examined to prove the prosecution case.

8. The prosecution examined three medical experts with regard to the injuries caused to the injured. PW-22 Dr. Rajeshkumar Mehta is examined at ex. 128, who examined and treated five injured witnesses in first point of time at Community Health Centre, Amod and, according to the prosecution case, soon after the incident in the bus, the injured were shifted to Community Health Centre, Amod. The injured were referred to Civil Hospital, Bharuch where, except PW-1 Ibrahim Umarji, other four injured eye witnesses were examined by PW-3 Dr. Vinaychandra L. Patel, who had been examined at exh. 89, while PW-1 Ibrahim Umarji Isap was examined by PW-2 Dr. Lalitbhai Patel, who had been examined at exh. 87.

9. In addition to this evidence, the prosecution also examined four eye witnesses i.e. PW-10 Bhikhabhai Govindbhai Solanki at exh. 114. According to the prosecution case, this PW-10 Bhikhabhai Govindbhai Solanki at exh. 114 and PW-11 Din Mahmad Gul Mahamad Sindhi at exh. 115 were the witnesses who intervened and the prosecution witnesses could be escaped from further beating, however, PW-10 Bhikhabhai Govindbhai Solanki and PW-11 Din Mahmad Gul Mahamad have not supported the prosecution case. The prosecution obtained permission from the court to cross-examine them. PW-12 Mahmad Karim Malek, driver of the Bus bearing No. GRR-8491 of State Road Transport Corporation, has

been examined at exh. 116, wherein according to the prosecution case, the quarrel took place and prosecution witness PW-13 Ahmadali Zulfikarali is examined at ex. 117, who was the Conductor of the said Bus. It is the prosecution case that both the PW-12 and 13 were the eye witnesses of the incident and they in their above said bus, shifted the injured to Community Health Centre, at Amod. However, both these witnesses i.e. PW-12 and PW-13 i.e. Mahmad Karim Malek and Ahmadali Zulfikarali did not fully support the prosecution case and made improvement to the extent that an attack was lodged by a mob and not by the accused on injured though they admitted that the injured were shifted by them to Community Health Centre, Amod. PW-20 Jan Mahmad Gul Mahmad Sindhi who is examined at exh. 124 who is also an eye witness according to the prosecution case, but did not support fully to the prosecution case and stated that a mob attacked the injured and not accused.

10. PW-14 Gulam Ibrahim Chimra ex. 118, PW-15 Anwar Mahmad Isap ex. 119, PW-16 Arvind Bhagwan Patel ex. 120, PW-17 Ibrahim Ahmad Isap ex. 121, PW-18 Ismail Isap Mota ex. 122, PW-19 Valibhai Musabhai ex. 123 and PW-21 Maganbhai Becharbhai ex. 126 are panchas of the panchanama produced on record, which is at ex. 158 panchnama of the scene of the offence, exh. 159 a panchanama of seizure of clothes of the complainant, ex. 160 a panchanama by which ori. accused No. 6 and 7 produced weapons before the police, ex. 161 panchanama by which police seized weapons from the other accused, ex. 157 is the panchanama of the Bus of Gujarat State Road Transport Corporation, involved in the incident.

11. In addition to this, the prosecution also examined PW-23 Dinesh Hirabhai Patel, Circle Inspector of Revenue Department, at ex. 145, who failed to produce the map of scene of offence because one Mr. K.G. Pandya, the then Circle Inspector, who had prepared the map of the scene of the offence had expired in 1994. As last witness, the prosecution examined PW-24 Sakarabhai Ramjibhai Parmar at ex. 155 who recorded the complaint of PW-1 Ibrahim Umarji at Amod Police Station and investigated the crime. It is the prosecution case that from the scene of the offence injured were first reached at Police Station, Amod and then at Community Health Centre, Amod.

12. In documentary evidence, the prosecution produced vide ex. 129 to 135 medical certificates of injuries of injured witnesses by PW-22 Dr. Rajesh Mehta. Medical Certificate of injured witnesses Sayara Ibrahim Umarji, Mustak Ibrahim Umarji and Inayat Ibrahim i.e. PW-8, PW-5 and PW-6 has been given by the Medical Officer, Civil Hospital, Bharuch, PW-3 Dr. Vinaychandra Lalubhai Patel, is produced at Ex. 90, 94 and 95. PW-5 Mustak Ibrahim sustained fracture injuries and the X-ray papers are produced at Ex. 92 and 93. The medical certificate of PW-1 Ibrahim Umarji has given by Medical Officer, Civil Hospital, Bharuch i.e. PW-2 Dr. Lalit Bhagubhai Patel, is produced at ex. 88. At the instance of the accused, case papers of the injured for the treatment the injured obtained from Community Health Centre, Amod were produced by PW-22 Dr. Rajesh Mehta at

ex. 136 to 142.

13. Thus, the above referred documentary as well as oral evidence were produced by the prosecution. In the statements of the accused under sec. 313 of Code of Criminal Procedure, vide ex. 180 and 181 and some documents are produced to show that there was a long standing enmity between the prosecution witnesses and the accused. It was stated in ex. 180 that the whole village was against the prosecution witnesses because PW-1 and his family members were in habit of making false applications against the citizen of the village and the accused. In that support, some documents are produced vide list ex. 181. It was the defence that the accused are innocent and falsely roped in this case on account of long standing enmity. An attempt also made by the accused to examine the defence witness i.e.. Mamlatdar or concerned person of the office of the Mamlatdar with regard to Chapter case (proceedings under sec. 107 of the Code of Criminal Procedure), however, record reveals that no such witness has been examined by the defence.

14. On scrutiny of the evidence, it clearly emerges from the record that seven injured eye witnesses have been examined by the prosecution. PW-1 Ibrahim Umarji Isap examined at ex. 83, states that the incident took place on 28.9.1992 in the evening. On that day, he with his wife Huriben PW-7 had been to Bharuch to obtain medicines for PW-7. After taking medicines from the hospital at about 4.00 pm or 5.00 pm in the evening, both of them boarded a bus to go to village Samani. From Samani they again boarded bus for going to their own village Kurchan. At that time, his brother Mahamad Umarji PW-4 also boarded the said bus. Thereafter, appellant No. 1 Musa Ahmad and his son appellant No. 5 - Maqbool @ Gabbar gave a push to PW-4 Mahmadbhai. PW-4 Mahmud Umarji estopped Maqbool and said why had he been pushed by appellant No. 5. On saying so by PW-4, appellant No. 1 Musa Ahmad and appellant No. 5 Maqbool supported to give fist and kick blows to PW-4. According to PW-1, he intervened and, therefore, appellants No. 1 and 5 gave fist and kick blows to him also. ON account of this quarrel, PW-4 get down from the bus. Thereafter, immediately the appellants No. 1 and 5 also got down from the bus. The said bus started to go to village Kurchan. The appellant No. 1 and appellant No. 5 hiring rickshaw, preceded bus and reached Kurchan village. When bus in which he and PW-7 were travelling reached at village Kurchan, all the 7 accused armed with weapons were present at bus-stand of village Kurchan and were giving blows by sticks on bus and were shouting that kill Ibrahim (i.e. PW-1). The appellant No. 1 had Tabal (a sharp edged weapon like Axe). He climbed up on bus and by the said Tabal gave a blow. He also got injury on eye. PW-7 attempted to intervene but she was beaten by fist and kicks. On receiving information from some source, his sons Mustak Ibrahim PW-5 and Inayat Ibrahim PW-6, Sayara Ibrahim PW-8 rushed at the spot. Thereafter, appellant No. 1 Musa Ahmad, appellant No. 5- Maqbool, appellant No. 3 Daud Ahmad Haji attacked his son. Appellant No. 1 Musa Ahmad gave a blow with weapon on the hand of PW-5 Mustak. The appellant No. 5 also gave blows of hockey stick to PW-5 Mustak. The appellant No. 3 Daud Ahmad

attacked PW-5 Mustak by Sword. PW-6 Inayat Ibrahim was attacked by appellant No. 2 Ismail Subbo Ahmad and appellant No. 4 assailed with stick. His daughter Sayara PW-8 received injuries on hand by knife and caused by ori. accused No. 6 Shehnaz Musa Ahmad non-appellant and ori. accused No. 7 Zaheda Adam Ahmad also attacked PW-8 Sayara by knife. Ori. accused No. 7 is also non-appellant in this appeal. At that time, PW-20 Jan Mahamd Gul Mahmad reached at the spot and rescued him. Hockey stick i.e. muddamal Article 9 was in the hands of appellant No. 5 Maqbool. Muddamal article No. 5 was in the hands of appellant No. 1 Musa Ahmad. Muddamal article No. 7 sword was with appellant No. 3 Daud Ahmad. Muddamal Articles No. 6 and 8 sticks were with appellant No. 2- Ismail @ Subbo Ahmad. Muddamal article No. 3 knife was with ori. accused No. 6 Shehnas and muddamal article No. 4 knife was with ori. accused No. 7 Zaheda. He further stated that after the incident was over, they were taken to Amod Police Station and in the said police station he recorded the complaint which was shown to him. He confirms that he had given the said complaint which was at ex. 156, and, thereafter they shifted to Community Health Centre, Amod. In examination in cross, an attempt has been made that the witnesses had been to Bharuch for obtaining medicines for his wife that is evident from para-5 of the cross-examination. In para-6 some questions were asked that how PW-4 and PW-1 got down at Samani bus-stand. In para- 7 and 8 of the cross-examination certain facts are asked about the previous enmity and proceedings between the accused and the prosecution witnesses. The proceedings were pending as admitted by the witnesses. Some facts which are not given by the complainant are asked in para-9. He has denied that he did not mention in the complaint that the appellant No. 3 attacked by sword. He also denied that appellant No. 2 and appellant No. 4 attacked PW-6 Inayat by sticks. In para-10 of the cross-examination, a question about distance from village Samani to Kurchan were asked. It is also alleged in the cross-examination that there were 70 to 80 passengers in the bus. It is also alleged in the cross-examination that, in fact, a crowd attacked near the bus-stand and prosecution witness due to enmity, he (PW-1) falsely involved the appellants in the said incident.

15. The other injured witness is examined at ex. 96 i.e. PW-4 Mahmad Umarji Kapadvanjwala. He stated that PW-1 happened to be his brother. The incident took place before 10 years from the date of the deposition. He had been to Samani on that day. He had some work at Samani. He was waiting for bus to go to his village at Samani bus-stand at about 5.15 p.m. A bus came for village Kurchan, so he boarded the said bus. In the front portion of the bus, he was standing with the support of the Angle. Immediately after him, appellant No. 5 Maqbool @ Gabbar came and pushed him. He requested appellant No. 5 not to push him and on saying so, the appellant No. 5 started abusing him and caught hold of him. He was beaten by fist and kicks on mouth, chest and on hands. At that time, PW-1 intervened to end the quarrel. Thereafter, he got down from the bus and went to the Amod Police Station where he gave the complaint about the incident. Police after recording of the complaint also gave a yadi for the medical

treatment. After obtaining that yadi, when he was coming out of the police station, he noticed that same bus was coming from the bus-stand with his brother and other injured. He enquired about the injuries received by them and PW-1 narrated the incident took place at the bus stand of village Kurchan. Vide ex. 9 he produced on record the complaint given by him to Amod Police Station. He has been cross-examined by the accused. In para-4, the questions regarding enmity between the parties has been asked in details to PW-1. He admitted that in the first incident which occurred at Samani bus-stand, appellants No. 1 and 5 had not started any quarrel with PW-1. An allegation in the cross-examination are made to show that he is a court-bird and tout of some advocates. Allegations are also levelled that he contested the panchayat election and lost. Some contradictions are also asked which will be dealt with later on.

16. PW-5 Mustak Ibrahim Umarji is examined at ex. 113 and stated before the court that the incident took place on 28.9.1992 at about 6.00 pm at the bus stand of village Kurchan. At that time, he himself, his brother PW-6 Inayat Ibrahim Umarji and his relative Salim Mahmad Umarji PW-9 and his sister Sayara PW-8, were at their residence. At that time, they noticed that appellant No. 1 with Tabal, appellant No. 3 with Sword, appellant No. 5 with hockey, appellant No. 2 with stick, appellant No. 4 with stick and ori. accused No. 6 and 7 with knife were going to the bus-stand, and in the meantime, bus came. In the said bus, his father PW-1 Ibrahim Umarji, his mother Huriben PW-7 were to come after taking medicines from Bharuch. Accused were uttering abuses and were uttering that kill Ibrahim Umarji. He saw that in the bus, his father was injured and was bleeding. At that time, he and his brother Inayat PW-6 were attacked by appellant No. 1, appellant No. 3 and his brothers. The attack was launched by them by sword, tabal and stick in his head. Appellant No. 1 Musa Ahmad inflicted two blows of Tabal, Appellant No. 3 Daud Ahmad inflicted sticks and sword blows on his head, hand and leg. PW-9 Salim Mahmad Umarji also received injury by Tabal on his left hand at the hand of appellant No. 1. He became unconscious and he was taken to hospital. He was shown muddamal article weapon No. 3 to 9 which he stated that he saw the same at the hands of the accused. He identified the accused in the dock. In the cross-examination, he was asked about his exact location when quarrel took place. He stated that he reached at the bus stand after the bus came. He stated that he saw accused going towards bus stand with weapons and, therefore, he and his brothers Inayat and Salim reached at the bus stand. He did not climbed up the bus. He admitted that there was a crowd of 50 to 60 persons. Some contradictions were asked which he denied.

17. The other injured witness Inayat Ibrahim Umarji PW-6, is examined by the prosecution at ex. 104, who stated that the incident took place on 28.9.1992 at 6.00 pm. near the village Kurchan bus stand. He himself, his brother Mustak PW-5, his cousin brother Salim Mahmad Umarji PW-9 and his sister who were at the residence because some construction work was going on. At that time, they noticed that appellants and accused No. 6 and 7, appellant No. 1 Musa Ahmad with tabal, appellant No. 5 Maqbool with hockey, appellant No. 3- Daud Ahmad

with sword, appellant No. 2 - Ismail @ Subbo Ahmad with stick, were going towards the bus stand. They suspected that some quarrel might take place and, therefore, they followed the accused persons. In the said bus, according to the witness, his parents who were to come to village Kurchan from Bharuch. The accused reached at the bus-stand and who were uttering that kill Ibrahim. Appellant No. 1 - Musa Ahmad climbed up in the bus and attacked his father by tabal. His father received tabal injury on forehead and on eyes. Thereafter, appellant No. 1 also gave fist and kicks blows to his parents. Appellant No. 3 attacked him by sword. A sword blow was given by appellant No. 3 but since he parried, the abrasion was caused on his left leg. Appellant No. 2 inflicted stick blows on his head, on hands and shoulder. They also had beaten his brother Mustak. Appellant no. 5 Maqbool inflicted hockey blow on the head of Mustak. Appellant no. 1 gave a tabal blow to PW-9 Salim Mahmud Umarji. The police has recorded his statement. He identified the weapons as muddamal Article no. 3 to 9 and identified the accused in the dock. An attempt has been made in cross-examination by the accused that the witness was not present at the scene of the offence as evident from para-3 of the cross-examination. The questions were asked that how this witness along with other witnesses came out of his house and how and in what manner they followed accused. The contradiction from the police station about his being unconscious was asked. The witness exaggerated this story and he was unconscious for half an hour. He denied the allegation that appellants and other accused were falsely roped in this case due to enmity.

18. PW-7 Huriben is also examined at ex. 110. She stated that PW-1 Ibrahim Umarji her husband and herself on the day of incident, had been to Bharuch for he medicines for her. She has supported the incident which took place at Samani bus stand in the bus. She has stated that when bus reached at village Kurchan, the accused were present. Appellant no. 1 Musa Ahmad had tabal, appellant no. 5 Maqbool had hockey, appellant no. 3 Daud Ahmad had sword, appellant no. 4 Adam Ahmad had stick and appellant no. 2 Ismail @ Subbo Ahmad had stick in their hands. They climbed up in the said bus. The appellant no. 1 inflicted a blow of tabal on the head of her husband. She was beaten and thrown on the floor. They were taken to Community Health Centre, Amod in the said bus. She stated that his son Mustak suffered fracture injury. She did not know who had beaten her. First son Inayat also received injury but who inflicted blow was not known to her. In her cross-examination, an attempt has been made to separate the incident in two parts; one which took place in the bus and other out of bus. An allegation is also levelled that at the Samani bus stand in the alleged quarrel, her husband did not take any part which she admitted. She has also admitted that there was a mod and quarrel amongst them. She also admitted that a crowd of 100 to 200 persons attacked her.

19. PW-8 Sayaraben, injured eye witness has been examined at ex. 111. She stated that complainant PW-1 Ibrahim Umarji happened to be his father. On the day of the incident, she was at village Kurchan. The incident took place at about 5.30pm. At that time, some construction work was in progress. At that time, she,

his brother Mustak, his cousin brother Salim were present. They noticed that appellant no. 1 with tabal, appellant no. 3 with sword, appellant no. 4 with stick, appellant no. 2 with sticks and ori. accused no. 6 and 7 with knife, were going towards the bus stand and uttering abuses. They followed accused. At about 5.40pm, a bus came to bus stand. After the passengers got down from the bus, the appellant no. 1 climbed up in the bus and gave fist and kick blows to her mother Huriben and a blow by tabal on the head of her father. After getting down from the bus, the appellant no. 1 gave a blow of tabal on the head of her brother Mustak. The appellant no. 4 inflicted stick blows on Mustak. Inayat her brother, received injury on the back side of the head by hockey which was caused by appellant no. 5. She received knife injuries at the hands of ori. accused no. 6 and 7 (non-appellants). She identified the weapons and the accused. She denied the suggestions that the incident never occurred in the manner in which she stated. She denied that a crowd was gathered of 100 persons and attacked on her parents and others. In further cross-examination, an attempt is made to ascertain as to what exact time the quarrel took place. She has denied that though in the village, there are relatives and acquainted persons, but due to enmity, none came to rescue of parents. A contradiction from police statement is asked as to whether she stated before the police that the accused was uttering abuses, to which she denied. She also denied that in her police statement, she did not state that appellants got down from the bus and had beaten her brother Mustak. She denied the allegation that she was not present at the scene of offence.

20. The last injured witness is examined as PW-9 Salim Mahmad Umarji at Ex. 113. He is cousin brother of PW-5 Mustak and PW-6 Inayat Ibrahim. According to him, the incident took place on 28.9.1992 and at that time, in the evening he was sitting near the resident of his uncle. He noticed that the appellants who were with weapons going towards the bus stand and uttering that kill Ibrahim. They had enmity with the family and hence, he followed the accused towards the bus stand. When bus reached at the bus stand of village Kurchan at about 6.00pm in the evening, the appellant no. 1 gave a blow on the head of his Uncle and an injury was also caused on the right eye. The appellants no. 1 and 2 also inflicted fist and kick blows to her aunt Huriben. Thereafter, appellant no. 1 climbed down from the bus and gave a tabal blow on the leg of PW-5 Mustak Ibrahim. The appellant no. 3 gave a sword blow and appellant no. 2 gave a stick blow. His cousin brother Inayat Ibrahim PW-6 also received injury by tabal and by stick which were inflicted by appellants no. 2 and 4. The appellant no. 1 rushed towards him to hit tabal to him, but he parried the blow and he received superficial injury on his right shoulder. The other eye witness Din Mahmad Gul Mahmad came there and he rescued the injured. In cross-examination, he was asked about his injury which was superficial and he received treatment only from Medical Officer, Amod. He was also asked that how his aunt Huriben was beaten by appellant no. 1 by fist and kick blow when appellant no. 1 was holding tabal. He replied that he hanged his tabal in arm and inflicted fist and kick blows to

Huriben. He stated that he reached to Kurchan village before bus came to bus stand. In para-3 of the cross-examination, an attempt has been made that the bus stand was situated in crowded area and of thickly populated. He has admitted that bus stand and residence of the accused are populated between the house of PW-1 and appellant no. 1. There are 15 to 20 buildings. He has denied the allegation that the quarrel, in fact, took place between the persons gathered at the bus stand. He has been also asked in cross-examination about the enmity between the parties.

21. The above was the evidence of the injured eye witnesses, in all seven, on record. After perusing this evidence of the prosecution, now, we shall examine and peruse the evidence of medical expert who gave treatment to the injured. According to the prosecution case, all the injured after the incident were taken to Amod Police Station in the said bus. After recording of the complaint, they were shifted to Community Health centre, Amod where they were treated by PW-22 Dr. Rajeshkumar Mehta at ex. 128.

22. PW-20 Dr. Rajeshkumar Mehta stated that on 28.9.1992 he was serving as Medical Officer at Community Health Centre, Amod. Mahmad Umarji Isap was brought to him at 8.15p.m. and according to the history he stated that he was beaten by kick and fist blows. According to the witness and certificate which he produced on record at ex. 129 Mahmad Umarji had following injuries:

1. Bruise on right cheek, just below right eye 2cm x 1cm. Reddish colour.
2. Bruise on left upper arm 2cm x 2cm on antecomedial side. Reddish colour.
3. Bruise on right side of base of chest 6cm x 4cm. Reddish colour.
4. Bruise on left side of chest in its upper most part 2cm x 2cm. Reddish colour.

According to his opinion, the patient was referred to Civil Hospital, Bharuch and the injuries no. 1, 2 and 4 mentioned above could have been caused by hard and blunt substance and injury no. 3 required X-ray to be taken. He stated that injuries were fresh and could have been inflicted within 2 to 4 hours and all of simple nature.

At the same time and on the same day, he also examined Ibrahim Umarji who stated that the injuries were inflicted by Axe and Tabal. According to Doctor and the certificate which he produced at ex. 131 Ibrahim Umarji has following two injuries.

1. Lacerated wound on left side of frontal region of skull, 1cm x 0.5cm, bone deep.
2. Lacerated wound on right eye, left lateral angle area, 1cm x 0.1cm. Wound is muscle deep.

The patient was referred to Bharuch Civil Hospital for further treatment and according to him, these injuries could be caused by hard and blunt substance.

On the same day, he also examined Inayat Ibrahim Umarji with police yadi, who stated that injuries were caused by iron pipes and sticks. According to him, he had two following injuries for which he produced certificate at ex. 132.

1. Lacerated wound 2cm x 0.1cm on left side of fore head. Wound is bone deep.
2. Bruise 6 cm x 2cm on right lateral side of right thigh. Bruise is of reddish colour.

The patient was referred to Civil Hospital, Bharuch for X-ray and further treatment. The injuries were fresh.

He stated that at the same time and on the same day, he also examined Mustak Ibrahim with police yadi and he stated that he received injuries by an Axe. He had, in all, nine following injuries mentioned in the certificate at ex. 133 produced by the witness as follows:

1. Lacerated wound on right parieto occipital region. Wound is bone deep size 4 cm x 0.5cm.
2. Lacerated wound on parieto occipital region (middle party) of head. Wound is bone deep 4 cm x 0.5cm
3. Lacerated wound 1.5cm x 0.5cm on anterior side of right leg in its upper 1/3rd part. Wound is bone deep.
4. Lacerated wound 1.5cm x 0.5cm on anterior side of right leg adjacent to injury no. 3. Wound is bone deep. Advised X-ray right leg.
5. Bruise anterior side of right knee jt. 6cm x 4cm, reddish colour.
6. Lacerated wound 2cm x 1cm on antecomedial side of left leg. Wound is bone deep.
7. Abrasion 6cm x 0.1cm on medial side of right upper arm in its lower 1/3rd region.
8. Abrasion 1cm x 0.5cm on docsolateral side of right elbow.
9. Abrasion on doscolateral side of left hand 1cm x 1cm.

According to the Doctor, in respect of injuries no. 3 and 4, whether there was fracture or not could be known only after X-ray and remaining injuries, according to his opinion, could be inflicted by hard and blunt substance. The injuries were fresh.

On the same day and at the same time, he also examined Huriben Ibrahim, but there were no external or internal injuries. She stated that she received injuries in scuffle. He produced certificate in this respect at ex. 134.

On the same day and at the same time, he also examined Salim Mahmad Umarji without police yadi, who stated that the injuries were caused by tabal and sword.

According to medical certificate, which he produced at ex. 135, Salim has following two injuries:

1. Abrasion 4cm x 1cm on doscol side of right upper arm.
2. Bruise 4cm x 2cm on docsal side of right thigh. Bruise is of reddish colour.

The witness was confronted by the weapons i.e. Muddamal Articles nos. 3 to 9 and stated that the injuries which the patient received are possible by the above said weapon. He further stated that the injuries were of such a nature which were not sufficient in the ordinary course to cause death. In examination in cross, he admitted that except injuries to Mahmad Umarji and Ibrahim Umarji, the injuries received by all other injures were simple nature. At the instance of the accused, he replied that he had case papers of the injured and was ready and willing to produce the same on record. At the instance of the accused, these case papers were produced by the witness vide ex. 136 to 142. He admitted that none of the injured stated author of the injuries caused to them. Ex. 138 case papers belonged to Umarji a note has been made by him that in case history it is stated that a mob attacked him. Likewise, in case papers at ex. 139 pertaining to Inayat Ibrahim, there is a note that Inayat Ibrahim in case history said that mob attacked him. He also admitted that none of the injuries caused to any of the injured could have been caused by sharp cutting weapon.

23. To prove the case, the second medical expert which the prosecution examined is Dr. Vinaychandra Lalubhai Patel PW-9 Exh. 89. He stated that on 28.9.1992 he was on duty as Medical Officer at Civil Hospital, Bharuch from 8.00pm to 8.00am. During that period, at about 11.45pm he examined Saheraben Ibrahim and in history, she said that on the same day at 5.15pm she received injury by knife. She was without police yadi and according to certificate which he produced on record at ex. 90, Saheraben had following injuries:

1. Lacerated wound 1cm x 0.1cm on docsal side of left fore arm. Wound is muscle deep.

On the same day, almost at the same time, according to this witness, he also examined Mustak Ibrahim who was referred by Community Health centre, Amod. In history, he stated that on 28.9.1992 at 5.15pm he received injuries by weapons like sword, axe, table and hockey. According to ex. 94, injury certificate, the patient had following injuries.

1. Stitched wound 4cm long on right parital region of scalp.
2. Stitched wound 4cm long on left parital region of scalp.
3. Diffuse tender swelling on right knee jt.
4. Diffuse tender swelling on left Hand.
5. Stitched wound about 5cm long on left leg surrounded by Dittuse tender swelling.

6. Stitched wound about 4cm long on right left surrounded by Dittuse tender swelling.

7. Abrasion leaner about 6cm long on right upper arm. Red in colour.

He further stated that the left hand, right knee and thigh were X-rayed and it was found that patient Mustak had a fracture of femurs and patella bones. He had also fracture of metacarpal. He produced on record relevant X-ray at ex. 91, 92 and 93. The patient was admitted as indoor patient and was under treatment till 23.10.1992. According to Doctor, injuries no. 3 and 7 were inflicted during past 24 hours. The fracture of the femur was grievous injury and could have been caused by hard and blunt substance. When he was confronted by muddamal Articles, he stated that the injury could be caused by such weapons i.e. Muddamal Articles nos. 6, 8 and 9. He stated that by a blunt part of sword muddamal article no. 7, this injury was possible.

On the same day, at about 11.40pm, he examined Inayat Ibrahim referred to Civil Hospital, Bharuch by a Medical Officer, Community Health Centre, Amod. In history, Inayat said that he was beaten by hockey, sword and iron pipes. He also stated in that history that the incident took place at 5.15pm on 28.9.1992. According to this witness, PW-3 Inayat had following injuries as per the certificate which he produced on record.

1. Stitched wound about 3 cm long on mid of front parital region of scalp.

2. Stitched wound 3cm long on left side fore head.

3. Incised wound 2cm x 1/2cm x muscle deep left index finger. Blood and blood dots present in wound.

4. Bruise (Reddish) 5cm x 2cm on left upper arm.

5. Bruise (Reddish) 5cm x 2cm on left thigh.

6. Bruise (Reddish) 5cm x 2cm size on left leg.

The skull of Inayat was X-rayed, but no fracture was detected. On the same day i.e. on 28.9.1992 he was admitted as indoor patient and was discharged on 30.9.1992. The injuries would have been caused within past 24 hours. Injury no. 3 could have been caused by sharp cutting weapon like Muddamal Articles nos. 3 and 4 knives and muddamal article no. 7 sword. The injury could have been caused by sharp part of tabal muddamal article no. 5. Injuries no. 4 to 6 could have been caused by hard and blunt substance and could have been caused by sticks and hockey which were muddamal articles. He has been cross-examined by the defence in which he stated that injury no. 1 of Mustak was stitched wound and he was not sure as to by which weapon the same could have been inflicted. A suggestion was placed that the injuries could have been caused by or coming in contact with some other sharp cutting instrument.

24. The prosecution examined Lalitbhai Bhagubhai Patel as PW-2 at ex. 87, a

doctor who examined injured Ibrahim Umarji at Civil Hospital, Bharuch. He stated that on 29.9.1992, he was serving as Medical Officer, Civil Hospital, Bharuch at about 4.00pm, he examined Ibrahim Umarji and found following injuries for which he produced injury certificate at ex. 88.

1. Bruise over left side of chest 4cm x 3cm. posterior.
2. Lacerated wound below right eye 1cm x 0.1cm x muscle deep.
3. Redness of right eye.
4. Stitched wound over left frontal region 1cm.
5. Abrasion over neck 4 cm x 1/2c. anterior.
6. Abrasion over middle finger of left hand. 2cm x 1/2cm.

The patient was admitted as indoor patient on 29.9.1992 and was discharged on 3.10.1992. The witness stated that in his opinion, injuries no. 1, 2, 3, 5 and 6 could have been caused by hard and blunt substance. He further stated that injured Ibrahim Umarji was referred by Medical Officer, Community Health Centre, Amod. In history, the injured stated that he received injury by tabal, sticks and bites. According to Doctor, injury no. 4 was of serious nature. Except injury no. 4, remaining injuries could have been caused by Muddamal Article no. 5 by its blunt part. He stated that injury no. 4 was stitched wound and, therefore, he would not opine that by which weapon the same could have been caused. In examination in cross, it was stated that injury no. 3 can be caused by rummaging the eye by hand. A possibility also suggested that the other injuries could have been caused by fall.

25. This is the medical evidence produced by the prosecution of three medical experts to prove the injuries.

26. The prosecution as said above, examined 4 eye witnesses, PW-10 Bhikha Govind, PW-11 Din Mahmad Gul Mahmad, PW-12 Mahmad Karim Malek, PW-13 Saiyedali Zulfikarali. PW-10 Bhikha Govind stated that the incident took place about 10 years before when he returned to his village from sim. He heard that there was a quarrel between PW-1 and appellant no. 1, except that, he knew nothing. He was confronted with his police statement by Id. APP. It is the prosecution case that this PW-10 and 11 were the persons who rescued the injured from further beating and intervened. Likewise, PW-11 Din Mahmad Gul Mahmad ex. 115 also stated that at the relevant time he was in he sim of village and returned at 6.00pm. While he was returning to the village, he saw mob of 100 to 150 persons at the bus-stand. There was scuffle and altercation in the crowd between Vali Umar, mahmad Umar, Ibrahim Umar and his son Inayat and Mustak with the brother of Musabhai. He intervened and attempted to disperse them. Since he did not support the prosecution case, he was confronted with his police statement by the Id. APP. Likewise, PW-12 Mahmad Karim Malek and PW-13 Saiyedali Zulfikarali examined at ex. 116 and ex. 117 respectively, are the

Driver and Conductor of the S.T. Bus involved in the incident, but none of them supported the prosecution case, but both of them stated that when the bus reached near bus stand of Kurchan village, there was a scuffle and, therefore, passengers ran away. The bus was therefore, taken ahead. None of them said that who were involved in the incident and caused injuries to the injured in the said scuffle. But both of them supports the prosecution case to the extent that the injured were taken to the police station and Community Health Centre, Amod in their bus.

27. Lastly, Investigating Officer PW-24 Sakarabhai Ramjibhai Parmar is examined at ex. 155. He stated that at the relevant time, he was in Amod Police Station, where in bus PW-1 with other injured has been brought and PW-1 gave his complaint. The complaint was recorded as per the say of PW-1 and PW-1 described his signature in the said complaint in his presence. He produced the said complaint at ex. 156. He investigated the offence and submitted charge-sheet. So far as the hostile witnesses were concerned, Id. APP corroborated the statements of PW-10, 11, 12 and 13 in his Chief Examination. In cross-examination, the contradiction were proved by the defence which will be referred to later on.

28. Having perused and carefully taken into consideration and scanning the evidence of the prosecution in the case, now the contention raised by Id. advocate for the appellants Mr. BS Patel and Id. APP Mr. IM Pandya are required to be seen.

29. Id. Advocate Mr. BS Patel vehemently and extensively argued and attacked the impugned judgment. He contended that the first and foremost glaring infirmity which prosecution case carries is in respect of the conflict and variance between the medical evidence and the evidence of eye witnesses. My attention has been drawn to the injuries noticed by the PW-22 Medical Officer, Community Health Centre, Amod in respect of PW-1 and other injured. It was contended that as per the medical certificate ex. 131 of Community Health Centre, Amod, PW-1 Ibrahim Umarji Isap had two injuries, while Medical Officer, Civil Hospital, Bharuch noticed six injuries which is evident from ex. 88. It was also contended that the prosecution witness Saheraben Ibrahim has lacerated wound, as examined by the Medical Officer, Community Health Centre, Amod, while according to the Medical Officer, Civil Hospital, Bharuch, she had incised wound which is evident by ex. 90 certificate. It was also contended that so far as the injured witness Inayat Ibrahim is concerned, he also had two injuries as per certificate ex. 132 of Medical Officer, Community Health Centre, Amod. While as per the certificate ex. 95, injured Inayat Ibrahim had in all six injuries in the opinion of the Medical Officer, Civil Hospital, Bharuch. It was contended that the injured witnesses specifically and categorically stated that the weapon like tabal and sword were used in the quarrel. When according to the Id. advocate for the appellants, there were no injuries to any of the injured by sharp cutting weapon. Muddamal Article tabal is a weapon like an Axe. The say of the injured witness

therefore is not creditworthy because the say of the injured eye witness are not corroborated by the medical evidence. He relied upon a decision of the Apex Court in the matter of Hallu and Others Vs. State of Madhya Pradesh, and argued that when a witness states that an axe was used, there is no warrant for supposing that what the witness means is that the blunt side of the weapon was used. If that be the implication it is the duty of the prosecution to obtain a clarification from the witness as to whether a sharp-edged or a piercing instrument was used as a blunt weapon. Therefore, it is contended that when an eye witness states that weapon like tabal and sword were used than in absence of clarification it should be taken that sharp-edged of the weapon were used. But according to the medical evidence in this case, there are no injuries by sharp cutting weapon or incised wound. The say of the eye witnesses, according to the Id. advocate for the appellants, cannot be believed because the same is contradicted by the medical evidence. On probability, it was contended that when seven accused alleged to have attacked the prosecution witnesses with the weapons which are attributed to accused, it is difficult to believe that none of the prosecution witness would suffer grievous injuries. It was contended that only one witness i.e. Mustak had grievous injury of fracture, except that, according to the medical evidence, none of the injuries suffered by the injured witnesses was of grievous nature. The case of the prosecution, therefore, is not probable and doubtful. According to the Id. advocate for the appellants, the evidence of prosecution are in two sets, one set is of injured eye witnesses who are interested, while second set of evidence is of independent eye witnesses. It was contended that the independent eye witness PW-10 Bhikhabhai Govindbhai, PW-11 Din Mahmad Gul Mahmad, PW-12 Mahmad Karim Malek and PW-13 Saiyedali Zulfikarali have not supported the prosecution version and have stated that, in fact, a mob of 50 to 100 persons attacked the injured and caused injuries to witnesses. It was contended that the evidence of the independent witnesses is reliable and is more probable that the incident had occurred as narrated by the independent eye witnesses referred by him. It is contended that on the otherside, evidence of interested injured eye witnesses whose evidence is required thorough scrutiny. On scrutiny of the evidence of interested injured eye witnesses, it is found that the same is tainted by contradiction which lends no credits to their say. According to the Id. advocate for the appellants, the first contradiction in respect of conflict between the medical evidence as well as ocular evidence about the use of the weapon. He pointed out contradiction amongst 7 eye witnesses. It was stated that according to the prosecution witness no. 1 Ibrahim, appellant no. 5 inflicted the blow of tabal to witness Mustak and appellant no. 3 inflicted sword blow to PW-6 Inayat. This is the version of PW-1 in the complaint ex. 156, while in evidence PW-1 stated that the appellant no. 5 inflicted blows by hockey, appellants no. 4 and 2 inflicted sticks blows on witness Inayat. The appellant no. 1 inflicted blows to witness Mustak. He draw the attention of this court on deposition of PW-5 Mustak, PW-6 Inayat, PW-7 Huriben, PW-8 Sayaraben and PW-9 Salim in respect of who inflicted blows with which weapons. Some contradictions were brought to the notice, for example,

PW-1 stated in evidence that appellants no. 4 and 2 attacked Inayat with sticks but this fact has not been stated by PW-5 Mustak. While PW-5 Mustak is not stating anything about the injuries caused to Inayat and Huriben. While PW-6 Inayat attributes two injuries of appellant no. 1 by tabal to PW-1. PW-6 Inayat also makes improvement to the extent that he stated that the appellant no. 1 inflicted fist and kick blows to PW-1 Ibrahim. In respect of the use of the weapon and injury, attention was also drawn upon the deposition of PW-7 and 8. It was stated that, therefore, each witness contradicts the other in a manner that one witness did not say about particular injury, while the other witness describes the same. On that count also, the evidence of injured eye witnesses is doubtful. It was contended that important aspect in contradiction is in respect of deposition of PW-7 Huriben who, in her examination in cross admitted that she was attacked by mob of 150 to 200 persons attacked her. She also admitted that there was a crowd of 200 persons. She also admitted that in this scuffle where crowd of 150 to 200 persons were involved, she could not recognised who was fighting with whom and what weapons were used. According to the Id. advocate for the appellants, the whole prosecution case so far as it relates to injured eye witnesses destroyed by the evidence of PW-7 Huriben and this fact supports the version of independent eye witness who stated that a mob of 100 to 150 persons attacked. Likewise, it was contended that PW-5 Mustak injured witness, in his deposition stated that when he reached along with other at bus stand, the bus has already at the bus stand and he found his father in the bus blood smeared and he did not know that who caused those injuries and, therefore, it was contended that in these circumstances and with this contradiction, it is not probable at all that PW-5, PW-6, PW-8 and PW-9 were eye witnesses of the incident. The case of PW-1 is falsified by PW-7 Huriben on account of contradiction above referred. On account of probability, therefore, it is contended that PW-12 Mahmad Karim Malek and PW-13 Saiyedali Zulfikarali, driver and conductor of the said bus involved in the incident, are absolutely independent witnesses and produces true account of the incident occurred. There is no reason to disbelieve hem and above all, they are not declare hostile witnesses by prosecution. The evidence of PW-11 and PW-12 appears to be unimpeachable and in view of this evidence, the evidence of injured witnesses may not be believed. It was also contended that PW-10 Bhikha Govind and PW-11 Din Mohmad Gul Mahmad also are independent witnesses. As per prosecution case itself, both of them intervened and rescued the prosecution witnesses. But none of them supported the prosecution version though they are declared hostile witnesses. In these circumstances as contended by Id. advocate for the appellants, the evidence of injured witnesses is not creditworthy, while second set of evidence that is version given by the independent witnesses who are eye witnesses, according to the prosecution, is creditworthy. On this count, Id. advocate relied on a decision of the Apex Court in the matter of Harchand Singh and Another Vs. State of Haryana, , wherein the Supreme Court held that "in a case where the prosecution leads two sets of evidence, each one of which contradicts the other, it is difficult to found the conviction of the accused." It was,

therefore, contended that prosecution led two sets of evidence, one of the injured eye witnesses and the other about gathering of the mob and attack by the mob. In this circumstances, according to the Id. advocate for the appellants, the accused are entitled to benefit of doubt.

30. Id. advocate for the appellants further contended that it has come in the evidence of PW-12 and 13 that the bus was carrying 70 passengers and some of the passengers were sitting even on the roof of the bus. It was contended that, therefore, on probability whether a prosecution story could be believed to the extent that in the presence of these passengers the accused would climbed up in the bus and cause injuries to PW-1. Further it was contended that as aforesaid, when the evidence of injured witnesses is found weak, for corroboration, the prosecution has examined none of the persons from the mob gathered on the scene of offence and prosecution case suffers infirmity for non-examination such independent witnesses. It was contended that on the same set of evidence, even relying upon the injured witnesses, the Id. trial judge acquitted ori. accused no. 6 and 7 on the ground that the role attributed to ori. accused no. 6 and 7 who were female was not proved by the prosecution beyond reasonable doubt. Against this verdict, no acquittal appeal till date is preferred by the State. It was contended that when same set of evidence appreciated and resulted into acquittal of ori. accused no. 6 and 7 then the same set of evidence cannot be used to convict the other accused and to that extent Id. trial judge has erred in appreciating the evidence. In this respect, Id. advocate for the appellants relied upon the decision of the Supreme court in the matter of Shantilal Kashibhai Patel Vs. State of Gujarat, , wherein the Supreme Court on appreciation of evidence observed that "if a piece of evidence is disbelieved and one man is acquitted, it is improper to convict another accused on that very evidence." It was contended that the appellants are entitled to acquittal on that ground.

31. Id. advocate for the appellants pointed out that each of the injured eye witnesses offered distinct history as to assault. Some eye witnesses stated in the case history before the Medical Officer, Community Health Centre, Amod that the attack was by weapon like axe and iron pipes and, according to the prosecution case, these weapons were never used. Attention of this court was drawn to the certificate ex. 139 wherein history has been given of blows by fist and kicks Ex. 130 certificate of Saheraben gives the history of assault with knife. Ex. 131 of PW-1 Ibrahim Umarji gives the history of assault with axe and tabal, while in ex. 132 Inayat Ibrahim gives history of assault with lathi and iron rod. In ex. 133 witness Mustak Ibrahim gives history of assault with axe, while in ex. 135 Salim Mohmad case history of assault with tabal and sword. It was contended that neither before the Medical Officer of Community Health Centre, Amod nor before the Medical Officer, Civil Hospital, Bharuch any of the injured witness gave the names of the accused to the Doctors as assailants. It was contended that this fact is sufficient to come to the conclusion that the case of the prosecution is concocted as against the accused and more probably the witnesses were attacked by mob. In this respect, again my attention was drawn to the case

papers produced at the instance of the accused in cross-examination of PW-22 Dr. Rajesh G. Mehta at ex. 128 which is case papers in respect of Ibrahim Umarji, wherein it is noted by Doctor in case history that assault by axe, tabal by group of persons. Likewise, in the case papers at ex. 139 in respect of Inayat Ibrahim, it is noted by Doctor in a case history that assault by lathi and iron rod by group of persons and, therefore, it is contended that it is more probable that the prosecution witnesses conceals the real manner in which the incident occurred and due to enmity the present appellants are involved and implicated in this false case. In cross-examination, as contended by Id. advocate for the appellants that it has come that between the parties, there had been a long standing enmity. PW-1 and his family members were in habit of making applications to officials and there were proceedings in past and were pending at the time of incident between the parties. It was contended that on account of this, the whole village was deadly against the present prosecution witnesses and probably they might have attacked PW-1 and his family members which is supported by the independent witnesses. My attention is also drawn to ex. 180 explanation of the accused under sec. 313 of the Code of Criminal Procedure, wherein certain documents have been produced to show that there was a long standing enmity between the parties.

32. It was contended that these are not the only infirmity in the prosecution case, but it is astonishing that PW-1 Ibrahim Umarji was examined by PW-22 Dr. Rajesh Mehta ex. 128 on 28.9.1992 at about 8.15pm. The certificate denotes that the patient was referred to Civil Hospital, Bharuch for further treatment. It is contended that all other witnesses reached Civil Hospital, Bharuch on the same day at about 11.45p.m. which is evident by the certificate produced on record vide ex. 90, 94 and 95. However, PW-1 complainant Ibrahim Umarji reached Civil Hospital, Bharuch only on 29.9.1992 at 4.00pm. This is evident from the certificate at ex. 88 and the evidence of PW-2 Lalitbhai Bhagubhai Patel at ex. 87 who treated PW-1 Ibrahim Umarji at Civil Hospital, Bharuch. It is contended that nowhere the prosecution could explain that how and why when other witnesses reached Civil Hospital, Bharuch at 11.45pm on the same day and PW-1 Ibrahim Umarji reached on the next day at 4.00pm. It is contended that this fact is required to be appreciated with the fact that when Medical Officer, Community Health Centre, Amod who examined PW-1 and found two injuries, when on the next day at 4.00pm when Medical Officer, Civil Hospital, Bharuch examined PW-1 Ibrahim Umarji, the Medical Officer, Civil Hospital, Bharuch found as many as six injuries. No reliance, therefore, can be placed on the evidence of PW-1 according to the Id. advocate for the appellants.

33. Id. advocate for the appellants also as an alternative argument, contended that there is a case against the appellants under sec. 307 of Indian Penal Code. Firstly, it was contended that according to the prosecution case, the injuries which prosecution witness suffered, except one, were simple. The injuries sustained by the prosecution witnesses were caused by hard and blunt substance and not by sharp cutting weapon. The fracture injury which prosecution witness

Mustak suffered was not on the vital part of the body but on the leg and, therefore, it can safely be said that the intention of the accused was not to kill PW-1 Ibrahim Umarji or to inflict such injury by which had the death been caused, the appellants would have been liable for murder. There is no common intention or object found from the evidence to connect the appellants with the intention, knowledge or common object of killing Ibrahim Umarji. It was contended that the genesis of the prosecution case is found from the earlier incident which occurred at Samani bus stand, wherein the scuffle had taken place between Mahmad Umarji and appellants no. 1 and 5. There was only hot exchange of words and some altercation which also took place with PW-4 Mahmadbhai and not with PW-1 Ibrahim Umarji. At Samani bus stand also, according to the Id. advocate for the appellants, neither appellant no. 1 nor appellant no. 5 attempted to beat any of the prosecution witnesses no. 1, 4 or 7. While in evidence, all the prosecution witnesses state that the appellants started from the village with weapons towards the bus stand uttering to kill PW-1 Ibrahim Umarji. It is contended that therefore, if the incident which occurred at bus stand of village Kurchan is sequel to the incident earlier took place at Samani than PW-1 was not involved in that and there cannot be a common object of the appellants to kill PW-1 because the earlier fight or scuffle took place with PW-4 Mahmadbhai. The attempt of the Id. advocate for the appellants was alternatively, if fracture injury of Mustak is attributed to appellant no. 3 at the best he can be made liable for charges under sec. 324 or 325 of IPC individually and other appellants for their individual acts for the charge under sec. 323 of IPC. It was contended that therefore, in absence of common object, in absence of required intention and knowledge to connect the accused for sec. 307 of Indian Penal Code, except appellant no. 3, all the appellants were only be held liable under sec. 323 of IPC. Id. advocate for the appellants relied on the decision of the Supreme Court in the matter of Jai Narain Mishra and Others Vs. State of Bihar, , wherein the Supreme Court observed that "where three out of four injuries sustained by that man were of simple nature and the fourth one, though endangering life could not be deemed to be an injury which would have necessarily caused death but for timely medical aid, benefit of doubt to the accused causing the fourth injury must be given and conviction was converted under sec. 326 from sec. 307 of IPC. Id. advocate also placed reliance on a decision of Supreme Court in the matter of Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others, , wherein the Supreme Court in the facts of that case observed that "in order to bring the case within the ambit of Sec. 307, it must be shown that the accused acted with such intention or knowledge and under such circumstances that if he by that act caused death, he would be guilty of murder. Id. advocate, therefore, contended that even if the prosecution case, for the sake of argument is believed, there is no case for sec. 307 IPC.

34. Id. advocate for the appellants advanced argument as an alternative argument and on summing up he contended that this is a case of clear acquittal wherein the evidence of injured witnesses being in conflict with medical evidence

and contradictory with each other, is not creditworthy, while the version of independent witness is believable and on probability the accused are implicated in this case due to enmity, when according to the independent witnesses, the mob attacked the injured witnesses. He also relied upon the decision of the Supreme Court in the matter of Deepak Kumar Vs. Ravi Virmani and Another, . It is submitted that appeal be allowed.

35. While on the other hand, Id. APP Mr. IM Pandya supporting the decision of the Id. trial judge contended that the incident has occurred at about 6.00pm. The First Information Report is lodged at about 7.45pm before the Amod Police Station. In FIR, the complainant gave complete and trustworthy account of the incident which took place including the weapons carried by each of the accused and immediately, thereafter each of the injured is examined by the Medical Officer, Community Health Centre, Amod, who has found injuries on the body of the complainant and injured witnesses. Id. APP Mr. Pandya states that upon a facts that in this circumstances when FIR is lodged in time, when the injuries were found soon thereafter by the medical evidence, there was hardly a chance for concoction a case on the part of the complainant and with witnesses. The FIR that is the complaint which is at ex. 156 is corroborated by PW-1 and Investigating Officer PW-24. NO contradiction materially affecting the prosecution case could be brought about by the defence in the FIR filed by PW-1 in his deposition. He relied upon the decision of this Court in the matter of State of Gujarat v. Bharwad Jakshibhai Nagribhai and Ors., as reported in 1989(2) GLH 263, wherein Division Bench of this Court after relying upon a decision of Supreme Court held that the evidence of the injured witness for the reasons mentioned in the judgment, must carry weigh on account of the presence of injured witness at the scene of incident because of the injuries which the witness might have received. It was contended that so appreciating the evidence of eye witnesses, there are no contradiction as have been magnified by the Id. advocate for the appellants. Each prosecution case is bound to have minor contradiction but on account of this, the case of the prosecution cannot be thrown over board unless the case of the prosecution is contradicted by the witness which affects the core of prosecution case and goes to the root as to destroy the prosecution case. Even if, according to the Id. APP the evidence of PW-12 and 13 are appreciated, it is amply clear that some incident had occurred which is corroborated by the eye witnesses. Id. APP contended that only on account of two eye witnesses being turned hostile, the version of the injured witnesses cannot be discredited. Id. advocate Mr. Pandya, therefore, urged to dismiss the appeal.

36. Having heard Id. advocate for the appellants and Id. APP for the respondent-State in detail for at least two-three days and having regard to the rival contentions, the prime issue which arises for consideration of this first appellate court is, whether the evidence of injured eye witnesses is creditworthy ? If the evidence of injured eye witnesses is creditworthy, than on appreciation of evidence what would be the effect of the evidence when two other eye witnesses

have not supported the prosecution case and two eye witnesses have narrated different story then the prosecution case. The evidence of each of the witnesses and the collective effect of the same is carefully examined, scrutinised and scanned.

37. The appreciation of evidence is a matter where the court is required to exercise due diligence and the standard of such exercise would be of a exercise by prudent person, therefore, in order to appreciate the evidence on record, especially in criminal trials, the court must bear in mind the set up and the circumstances in which the crime is committed, the quality of evidence, nature and temperament of the witnesses, the level of understanding and power of perception of individual witness, the over jealousy on the part of related witnesses to ensure that every one connected with the crime be convicted and the way of narration of each of the witness of the incident and the experience which always defers from one human being to another. This may be only illustrative broad guidelines and bearing in mind this principles, the evidence on record is required to be appreciated to find out what part of the evidence is so eloped with the ring of truth as to connect the accused with the crime and which part of the evidence requires to be discarded. In legal terminology, it is always said that it is for the courts to separated the grain from the chaff.

38. Analyse of the evidence on record to find out the truth must be undertaken by a process of dispassionate judicial scrutiny by adopting standard of realities of life and by objective and reasonable appreciation of evidence. In the case of Sardul Singh and Jagtar Singh Vs. State of Haryana, , the Apex Court observed in respect of appreciating evidences as under:

"8. There cannot be a prosecution case with a cast-iron perfection in all respects and it is obligatory for the courts to analyse, sift and assess the evidence on record, with particular reference to its trustworthiness and truthfulness, by a process of dispassionate judicial scrutiny adopting an objective and reasonable appreciation of the same, without being obsessed by an air of total suspicion of the case of the prosecution. What is to be insisted upon is not implicit proof. It has often been said that evidence of interested witnesses should be scrutinized more carefully to find out whether it has a ring of truth and if found acceptable and seems to inspire confidence, too, in the mind of the court, the same cannot be discarded totally merely on account of certain variations on infirmities pointed or even additions and embellishments noticed, unless they are of such nature as to undermine the substratum of the evidence and found to be tainted to the core. Courts have a duty to undertake a complete and comprehensive appreciation of all vital features of the case and the entire evidence with reference to the broad and reasonable probabilities of the case also in their attempt to find out proof beyond reasonable doubt."

39. Now, in the present case, there are six injured eye witnesses. They are PW-1 Ibrahim Umarji, PW-5 Mustak Ibrahim Umarji, PW-6 Inayat Ibrahim Umarji, PW-7 Huriben, PW-8 Sayaraben Ibrahim, PW-9 Salim Mahmad Umarji. Whether

the evidence of these six witnesses along with the evidence of PW-4 Mahmad Umarji with whom the first incident occurred at Samani bus stand inspires confidence as to the truthfulness and the manner in which the incident has taken place. So far as the injured witnesses are concerned, their evidence is required to be considered in a particular manner. Injured witnesses even if they are related and interested are worthy of some credence subject to strict judicial scrutiny. This is so because, when the injury is not apparently self inflicted and is found corroborated by medical evidence immediately after the incident, ordinarily, the evidence of such injured witness cannot be assessed with the air of suspicion. Once the presence of the witnesses is established by the prosecution at the scene of the offence, than only further scrutiny by the courts would be in what manner the injured witnesses reproduces in court the crime committed. So far as the injured witnesses are concerned, the Apex Court in the matter of Majju and Another Vs. State of Madhya Pradesh, , has observed as under in para-5:

"5. The counsel for the appellants contended that the evidence adduced by the prosecution was interested and therefore, it cannot be relied upon. It is important to note that the witnesses examined on the side of the prosecution were all injured in the incident. PW-6 Ramchandra sustained a grievous injury, in the sense that he lost one of his teeth. The other witnesses also sustained injuries. That is proved by the various medical certificates issued by the doctor who examined them. Therefore, the presence of these witnesses at the place of occurrence cannot be suspected. All these witnesses gave evidence to the effect that when they along with deceased Bihari Lal were coming from the temple after performing some ceremony, the accused surrounded and attacked them. We do not find any infirmity in the evidence of these witnesses."

40. In this respect, a decision by the Division Bench of this Court in the matter of State of Gujarat v. Bharwad Jakshibhai Nagribhai and Ors., as reported in 1989(2) GLH 263 can usefully be referred to as to the injured witnesses. The Division Bench of this Court established six principles to be followed while appreciating the evidence of injured witnesses. The Court observed as under in para-27 of the above said decision:

"27. In our view, the approach of the learned Judge appreciating the evidence of injured witnesses is on the face of it illegal and erroneous. For appreciating the evidence of the injured witnesses the court should bear in mind that:

- (1) Their presence of the time and place of the occurrence cannot be doubted.
- (2) They do not have any reason to omit the real culprits and implicate falsely the accused persons.
- (3) The evidence of the injured witnesses is of great value to the prosecution and it cannot be doubted merely on some supposed natural conduct of a person during the incident or after the incident because it is difficult to imagine how a witness would act or react to a particular incident. His action depends upon

number of imponderable aspects.

(4) If there is any exaggeration in their evidence, then the exaggeration is to be discarded and not their entire evidence.

(5) While appreciating their evidence the Court must not attach undue importance to minor discrepancies, but must consider broad spectrum of the prosecution version. The discrepancies may be due to normal errors of perception or observation or due to lapse of memory or due to faulty or stereo-type investigation.

(6) It should be remembered that there is a tendency amongst the truthful witnesses also to back up a good case by false or exaggerated version. In this type of situation the best course for the Court should be to discard exaggerated version or falsehood but not to discard entire version. Further, when a doubt arises in respect of certain facts stated by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story."

41. While appreciating the evidence of the injured witnesses with reference to present case, it is amply established that the incident had occurred at 6.00pm on 28.9.1992. Even according to the PW-12 Mahmad Karim Malek ex. 116 and PW-13 Saiyedali Zulfikarali ex. 117, S.T. Driver and Conductor of the bus involved supported the case that after the incident, the injured were shifted to first Police Station, Amod where PW-1 Ibrahim Umarji gave complaint to Police Sub Inspector PW-24 S.R. Parmar ex. 155. When we considered the evidence of PW-24 Investigating Officer, the fact is proved that the above seven prosecution witnesses were injured. In his evidence, we categorically find that after recording of the complaint, immediately the complainant and other injured were sent by him to Community Health Centre, Amod for the treatment of injuries with a police yadi. It is a proven fact from the record that the complaint came to be recorded by PW-24 Investigating Officer at about 7.45p.m. denoting that immediately after the incident, PW-24 noticed the injuries on the body of the injured and they were sent to Community Health Centre, Amod for treatment. The prosecution case further establishes that injured were examined by PW-22 Dr. Rajeshkumar G. Mehta ex. 128 at 8.15pm on the same day. PW-22 Dr. Rajeshkumar G. Mehta also submitted on record injury certificates vide ex. 129 to 135. The say of the witnesses has corroborated by the above said witness i.e. PW-22 and PW-24 to the extent that when PW-22 and PW-24 soon after the incident they noticed injuries on the body of the injured witnesses and, therefore, as laid down by this Court in the matter of State of Gujarat v. Bharwad Jakshibhai Nagribhai and Ors., as reported in 1989(2) GLH 263, the presence of such witnesses at the time of place of occurrence cannot be doubted.

42. Now, when the presence of the injured witnesses proved at the scene of the offence, which lend some credence to their evidence, the question would be how far and what reliance be placed on their evidence so far as the manner of

occurrence of incident is concerned and the role played by each of the accused is concerned. The injured witnesses as aforesaid, are trustworthy, unless for one or the other reason the evidence of injured witnesses is not acceptable. This happens when the witnesses contradict the original story of the prosecution case to the extent that the same affects the root of the prosecution case and disturbed the core. The evidence of injured eye witnesses is required to be carefully scrutinised in this regard because they are related witnesses. The question, therefore, requires to be answered is what are the contradictions affects the prosecution case so as to disbelieve the say of the witnesses, as aforesaid. While arguing the matter, Id. advocate for the appellants attempted to point out contradictions amongst the say of the witnesses before the court. We may classify the contradiction in two categories. One category covers the contradiction which witnesses create between the prosecution case and the deposition which they gave before the court meaning thereby that when witnesses improve version in the court from the version they gave before the police during investigation and these are the contradictions between the statement given by the witnesses before the police under sec. 161 of Code of Criminal Procedure and the deposition given in the court. It must always be an endeavor of each court to ascertain whether witnesses improve the prosecution case in this respect and contradicts the original story which they have revealed during the investigation. Defence has, therefore, right to contradict the witness under sec. 162 of Code of Criminal Procedure when a particular witness improves his version than the given before the police. At the same time, such contradiction can be proved through the Investigating Officer before whom witness might have given his version under sec. 161 of the Code of Criminal Procedure. The present case is required to be scrutinized firstly on this aspect. The relevant evidence in this respect would be the evidence of Investigating Officer PW-24. On perusing cross-examination of PW-24, we find only one para so far as the proving of the contradiction of the witness is concerned. In para-20, it is proved that PW-4 Mahmad Umarji did not state before him that the appellant no. 1 and appellant no. 5 threatened him that they would be returned with weapons. A manner of contradiction is also recorded in respect of PW-8 Sayaraben Ibrahim. So far as PW-1 is concerned, in para-21 of the evidence of PW-24 a attempt is made to prove the contradiction between the complaint filed by PW-1 and the deposition which he gave before the court. What is proved is PW-1 did not state in his complaint that he was beaten by fist and kick blows. PW-1 did not state in the complaint that the appellant no. 3 attacked PW-5 Mustak by sword. PW-1 did not state in his complaint that appellant no. 2 Ismail Subbo Ahmed and appellant no. 4 Adam Ahmad Haji attacked his son PW-6 Inayat Ibrahim. Except this, there is no other contradiction proved by the defence by which it could be said that the prosecution witnesses attempted to improve their version. The contradiction brought on record in respect to PW-4 Mahmad Umarji and in respect of complainant in para-21 of PW-24 of the prosecution case are minor in nature and by this contradiction by no stretch of reasons it could be said that the prosecution witness have improved their version meaning thereby that the

prosecution witnesses i.e. injured witnesses are consistent in their say before the court. What they said during the investigation is adhered to by them while narrating the incident in the court. This fact lends credence and creditworthiness to injured witnesses and in respect of their say about the injury they received and role played by the accused.

43. The second category of the contradiction is the contradiction amongst the witnesses. That is the contradiction in prosecution case developed by the witnesses in their deposition before the court. It has been vehemently urged on behalf of the Id. advocate for the appellants that each witness so far as the use of weapon is concerned and the role played by each of the appellant is concerned, has contradicted the other. As per the medical evidence of Medical Officer, Bharuch as contended, accused no. 1 caused only one injury on the head of PW-1 and except two injuries, according to the evidence of PW-1, all the injuries found on the body of PW-1 was not attributed to any of the appellant. This is the say of learned advocate for the appellants and, therefore, contradiction. Likewise, it was also contended that when the evidence of PW-5 Mustak is concerned, he stated that appellant no. 3 inflicted sword and stick blows on his right leg while PW-3 Medical Officer, Bharuch Dr. Vinaychandra L. Patel found fracture injuries on the left leg of PW-5 Mustak. The injuries inflicted on left leg has not been attributed to any of the accused, and therefore, contradiction in prosecution case. This is the say of Id. advocate for the appellants. Likewise, it is also contended that if the evidence of PW-6 Inayat Ibrahim and the role he attributed to the accused is concerned, the same is not corroborating with the medical evidence. In the same way, it is contended that PW-9 Salim Mahmad Umarji had also injuries of bruise on the back side of the right leg and in his deposition, he did not attributes these injuries to any of the accused and, therefore, the contention of the Id. advocate for the appellants was that the injured witnesses are not creditworthy on account of these contradiction.

44. So far as second category of the contradiction is concerned, the rule of law is clearly established that only major contradiction shall affect the core of prosecution case. There may be discrepancy in the prosecution case as pointed out by the Id. advocate for the appellants, but while appreciating the evidence what must weigh with the Court is whether those discrepancies are major contradiction, creating doubt in the say of the prosecution witnesses. It would be useful here to refer to the observation made by the Apex Court as to the duty of the court and how to appreciate the evidence in these circumstances. The Apex Court in the matter of Leela Ram (Dead) through Duli Chand v. State of Haryana and Anr., as reported in 2000 SCC 222, in para-10 has observed as under:

"10. In a very recent decision in Rammi v. State of M.P. this Court observed: (SCC p 656, para 24)

"24. When an eyewitness is examined at length it is quite possible for him to make some discrepancies. No true witness can possibly escape from making some discrepant details. Perhaps an untrue witness who is well tutored can

successfully make his testimony totally non-discrepant. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny."

This Court further observed: (SCCp.656-57, paras 25-27)

"25. It is a common practice in trial courts to make out contradictions from the previous statement of a witness for confronting him during cross-examination. Merely because there is inconsistency in evidence it is not sufficient to impair the credit of a witness. No doubt Section 155 of the Evidence Act provides scope for impeaching the credit of a witness by proof of an inconsistent former statement. But a reading of the section would indicate that all inconsistent statements are not sufficient to impeach the credit of the witness. The material portion of the section is extracted below:

"155. Impeaching credit of witness- The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the court, by the party who calls him-

(1)-(2) * * *

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;"

26. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Only such of the inconsistent statement which is liable to be "contradicted" would affect the credit of the witness. Section 145 of the Evidence Act also enables the cross-examiner to use any former statement of the witness, but it cautions that if it is intended to "contradict" the witness the cross-examiner is enjoined to comply with the formality prescribed therein. Section 162 of Code also permits the cross-examiner to use the previous statement of the witness (recorded u/s 161 of the Code) for the only limited purpose i.e. to "contradict" the witness.

27. To contradict a witness, therefore, must be to discredit the particular version of the witness. Unless the former statement has the potency to discredit the present statement, even if the latter is at variance with the former to some extent it would not be helpful to contradict that witness (vide Tahsildar Singh v. State of U.P.)."

45. Therefore, it would an unrealistic approach of judicial scrutiny to form a too serious view on mere variations falling in the narration of an incident either as between the evidence of two witnesses or as between two statements of the same witness. In the same decision i.e. Leela ram v. State of Haryana (supra) in respect of contradiction, inconsistency, the Apex court observed as under:

"9. Be it noted that the High Court is within its jurisdiction being the first appellate court to reappraise the evidence, but the discrepancies found in the ocular account of two witnesses unless they are so vital, cannot affect the credibility of the evidence of the witnesses. There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefore should not render the evidence of eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence. In this context, reference may be made to the decision of this Court in State of U.P. v. M.K. Anthony. In para-10 of the Report, this Court observed: (SCC pp. 514-15)

"10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals."

46. The Apex Court further in the same decision observed as under in para-12:

"12. It is indeed necessary to note that one hardly comes across a witness whose evidence does not contain some exaggeration or embellishment and sometimes in their overanxiety they may give a slightly exaggerated account. The court can sift the chaff from the grain and find out the truth from the testimony of the witnesses. Total repulsion of the evidence is unnecessary. The evidence is to be considered from the point of view of trustworthiness. If this element is satisfied, it ought to inspire confidence in the mind of the court to accept the stated evidence though not however in the absence of the same."

47. Yet, in another decision in the matter of State of Himachal Pradesh Vs. Lekh

Raj and Another, , the Supreme Court observed as under in para-7:

"7. In support of the impugned judgment the learned counsel appearing for the respondents vainly attempted to point out some discrepancies in the statement of the prosecutrix and other witnesses for discrediting the prosecution version. Discrepancy has to be distinguished from contradiction. Whereas contradiction in the statement of the witness is fatal for the case, minor discrepancy or variance in evidence will not make the prosecution's case doubtful. The normal course of the human conduct would be that while narrating a particular incident there may occur minor discrepancies, such discrepancies in law may render credential to the depositions. Parrot-like statements are disfavoured by the courts. In order to ascertain as to whether the discrepancy pointed out was minor or not or the same amounted to contradiction, regard is required to be had to the circumstances of the case by keeping in view the social status of the witnesses and environment in which such witness was making the statement. This Court in Ousu Varghese v. State of Kerala held that minor variations in the accounts of the witnesses are often the hallmark of the truth of their testimony. In Jagdish v. State of M.P. this Court held that when the discrepancies were comparatively of a minor character and did not go to the root of the prosecution story, they need not be given undue importance. Mere congruity or consistency is not the sole test of truth in the depositions. This Court again in State of Rajasthan v. Kalki held that in the depositions of witnesses there are always normal discrepancies, however, honest and truthful they may be. Such discrepancies are due to normal errors of observation, normal errors of memory at the time of occurrence, and the like. Material discrepancies are those which are not normal and not expected of a normal person."

48. That was the case under which the accused was facing trial for the charges under sec. 376 of Indian Penal Code, but what Supreme Court established is the normal course of human conduct would be that while narrating a particular incident there may occur minor discrepancy and on the contrary such discrepancy in law may render credential to the deposition. Parrot-like statements are disfavoured by the courts. When there is no improvement made by the witness in prosecution case, omission to state certain role of the accused which might have been stated by the other witness would be a minor discrepancy rendering credit to the witnesses instead of jettisoning their version only on account of this discrepancy. Material discrepancies are those which are not normal and not accepted by a normal person. It would be going against the rule of nature to expect a witness to depose mathematically and, therefore, natural conduct of the witness is there must be some discrepancy in version narrating an incident taken place much earlier. The Apex court, therefore, in the above said decision in the matter of State of H.P. v. Lekh Raj and Anr., (supra) observed that such discrepancy as has been pointed out by the Id. advocate for the appellant in this case are the discrepancies which are bound to occur in the version of the witnesses by rule of nature and this ordinary normal conduct must be labelled as creditworthy instead of branding a witness as liars and throwing out their

version. The criminal trials are conducted to ascertain the guilt or innocence of accused and arriving at conclusion about the innocence or guilt of the accused the courts are required to adopt rational and realistic approach. The trials cannot be thrown over board on account of hypertechnical contradiction pointed out by the defence because the same would be unrealistic and irrational approach. In the above said decision, in the matter of State of H.P. v. Lekh Raj and Anr., (supra) the Apex Court has observed as under in para-10:

"10. The High Court appears to have adopted a technical approach in disposing of the appeal filed by the respondents. This Court in State of Panjab v. Jagir Singh held: (SCC pp 285-86, para 23)

"23. A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures."

The criminal trial cannot be equated with a mock scene from a stunt film. The legal trial is conducted to ascertain the guilt or innocence of the accused arraigned. In arriving at a conclusion about the truth, the courts are required to adopt a rational approach and judge the evidence by its intrinsic worth and the animus of the witnesses. The hypertechnicalities or figment of imagination should not be allowed to divest the court of its responsibility of sifting and weighing the evidence to arrive at the conclusion regarding the existence or otherwise of a particular circumstance keeping in view the peculiar facts of each case, the social position of the victim and the accused, the larger interests of the society particularly the law and order problem and degrading values of life inherent in the prevalent system. The realities of life have to be kept in mind while appreciating the evidence for arriving at the truth. The courts are not obliged to make efforts either to give latitude to the prosecution or loosely construe the law in favour of the accused. The traditional dogmatic hypertechnical approach has to be replaced by a rational, realistic and genuine approach for administering justice in a criminal trial. Criminal jurisprudence cannot be considered to be a utopian thought but have to be considered as part and parcel of the human civilization and the realities of life. The courts cannot ignore the erosion in values of life which are a common feature of the present system. Such erosions cannot be given a bonus in favour of those who are guilty of polluting society and mankind."

49. Omissions to state a particular injury by the witnesses itself would not be fatal to the prosecution case. After relying on the observation in Satbir v. Surat

Singh, as reported in 1997 SCC 538 in the matter of Jaswant Singh Vs. State of Haryana, , the Supreme Court has observed as under:

"50. As already noted, Gurdeep Kaur's testimony in this regard was believed by both the courts. Both the trial court as well as the High Court were of the view that although Gurdeep Kaur had not given to the police particulars of who had caused which injury she had not deviated from the actual occurrence and the manner in which it had happened. This Court has also held that : (SCC p. 197, para 12)

"[A]n incident where a number of persons assaulted three persons at one and the same time with different weapons, some contradictions as to who assaulted whom and with what weapon, were not unlikely and such contradictions could not be made a ground to reject the evidence of eyewitnesses, if it was otherwise reliable."

50. As per the prosecution case, in all seven persons attacked the prosecution witnesses out of which trial court acquitted original accused no. 6 and 7 and fastened the liability under sec. 307 of IPC in respect of present appellants. Where six-seven persons attacks with weapons and injures 6 to 7 persons, it is unrealistic to expect that the witnesses with exactness can depose the exact role played by the accused and the weapon used. In this particular case, the evidence is recorded after nine years of the occurrence of the crime and, therefore, discrepancy pointed out by the Id. advocate for the appellants in the each injured eye witness on account of some omissions or discrepancies is required to be appreciated in realistic manner. The say of the witnesses would not be unreliable only because he omitted to mention the role of one of the accused and injury caused to one of the injured, while the same is narrated by the other witness. There are no such contradictions found from the evidence of the injured eye witnesses which would go to the root of the prosecution case, so as to disbelieve the whole story. As aforesaid, the evidence of the injured eye witness can be discredited only when it is proved that despite the injuries their presence at the scene of the offence is doubtful and in all probabilities by reasonable standard of prudent person, it would be unjust to come to the conclusion that the said witnesses were present at the scene of the offence. On the contrary, in this case, it is established by the prosecution case that the incident occurred at 6.00pm. At 7.45pm on the same day, a complaint came to be lodged. The injuries were noticed by the Investigating Officer and at 8.15pm the Medical Officer, Community Health Centre, Amod also finds injuries on the body of the injured and evidently such injuries which could not be self inflicted and when no contradiction let alone major discrepancy could be found from the evidence, there is no reason to disbelieve the evidence of those eye witnesses. Id. advocate for the appellants could no show from the evidence that the circumstances were such that would be unreasonable and unjust to believe that the injured witnesses were not present at the scene of the offence and that the evidence is tainted with that untruthfulness which would render the evidence not

worthy of credence. Minor discrepancies as to the use of the weapon by any particular accused or role of accused by a particular injured witness cannot be said to be a sound cause to disbelieve the whole prosecution case.

51. The next limb of the argument which Id. advocate for the appellants advanced and much stress was put is in respect of conflict between the medical evidence and the say of the witnesses. So far as the say of the witnesses in respect of the use of weapon and the role attributed to the accused is concerned, the same is not that major contradiction which would render the whole prosecution case untrustworthy. It was contended that firstly the weapon like tabal, axe and sword, according to the prosecution case were used by the accused. As per the medical evidence, as contended on behalf of the appellants that there is no injury attributed by the medical officer which could have been caused to any of the injured by sharp cutting instrument and both the medical officers have attributed the injury to hard and blunt substance, except the injuries nos. 3 and 4 caused to PW-6 Inayat Ibrahim could have been caused by sharp cutting weapon. No other injuries of any injured is attributed to sharp cutting weapon. It was contended that the injuries which were noticed by PW-22 Dr. Rajesh Mehta, Medical Officer of Community Health Centre, Amod was possible by hard and blunt substance only and, therefore, it was contended that there is conflict between the medical evidence and ocular version of the witnesses. In this respect, Id. advocate for the appellants relied upon a decision of Supreme Court in the matter of Hallu and Others Vs. State of Madhya Pradesh, . On replying upon para-11 of the said decision, it was contended that when witness say that an axe or sword or tabal is used, there was no warrant for supposing that what the witness means is that the blunt side of the weapon was used. It was contended that if that was so, that was the duty of the prosecution to explain. The Supreme Court in the above said decision observed that "we should have thought that normally when the witness says that an axe or a spear is used there is no warrant for supposing that what the witness means is that the blunt side of the weapon was used." The case which is cited by the Id. advocate for the appellants, the Apex court found so many further infirmities in the prosecution case and the Supreme Court has observed that "normally it should be believed that when attack is by the sharp cutting weapon, a sharp portion of the weapon was used." In this regard, in a recent decision in the matter of Shamsheer Singh @ Shera Vs. State of Haryana, , the Supreme Court observed in para-4 and 8 as under:

"4. Per contra, the learned counsel for the State strongly contended that the trial court, after proper scrutiny and objective assessment of the evidence, rightly found the appellant guilty of the charge; the High Court also on consideration of the case in proper perspective did not find fault with the finding recorded by the trial court; minor discrepancies or inconsistency tried to be made out on behalf of the appellant are not sufficient to upset the concurrent finding."

8. The authorities cited by the learned counsel for the appellant, on the point

that when there is conflict between the medical evidence and the ocular evidence, the prosecution case should not be accepted, are of no help to him in this case. On deeper scrutiny of the evidence as a whole, it is not possible to throw out the prosecution case as either false or unreliable on the mere statement of the doctor that injuries found on the deceased could not be caused by a sharp-edged weapon. This statement cannot be taken in isolation and without reference to the other statement of the doctor that the injuries could be caused by Ext. P-9 axe to disbelieve the evidence of the eyewitnesses. From the evidence available in this case the possibility of the blunt head of the axe or the stick portion coming in contact with the head of the deceased cannot be ruled out. These decisions cited by the learned counsel for the appellant are related to those cases where the medical evidence and the version of the eyewitnesses could not be reconciled or that the account given by the eyewitnesses as to the incident was highly or patently improbable and totally inconsistent with the medical evidence having regard to the facts of those cases and as such their evidence could not be believed. The case on hand is not one such case."

52. In the case before the Apex Court, many decisions on the aspect of conflict between the medical evidence and the ocular version were cited. After scrutiny of the evidence when in that case also the opinion of the medical evidence was not to the effect that injuries had been caused by sharp cutting weapon. The Apex Court as above said observed that the case of the prosecution cannot be thrown out. The weapon used in that case was an axe. The Apex Court observed that in such circumstances, the court should appreciate the evidence available be scrutinised and the possibility of the blunt head of sharp cutting instrument coming into contact of the injured be ascertained. It is only when the medical evidence and ocular evidence is beyond reconciliation, the prosecution case can be disbelieved. Reverting back to the facts of this case, seven accused attacked 6 to 7 witnesses. Each of such witness received more or less injuries. The manner in which the incident has occurred as narrated by the injured eye witnesses, it is always possible that though the weapon like tabal and sword were used, the blunt part of such weapon had come in contact with the injured causing injury by hard and blunt substance. This is more so and probable because the evidence of injured eye witnesses is creditworthy and unimpeachable. Ocular evidence given by the witnesses whose creditworthy cannot be impeached upon much precede over medical evidence. When witnesses say that they were attacked by several persons by weapons like sword, axe, tabal etc. and most of the injuries are found having caused by hard and blunt substance, the version of the witnesses particularly when it is found that they received the injury in that very quarrel, cannot be thrown out on the ground that injuries which witnesses narrated are not corroborated by the medical evidence. In this respect, the Apex Court in the matter of Gangadhar Behera and Others Vs. State of Orissa, observed as under:

"20. At this juncture, it would be appropriate to deal with the plea that ocular evidence and medical evidence are at variance. It would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the

eyewitnesses" account which had to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant".

21. In Krishna Gopal case the position has been succinctly stated as follows: (SCC pp.313-14, paras 24-26)

"24. It is trite that where the eyewitnesses" account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Banthan said, are the eye and ears of justice. Hence the importance and primacy of the orality of the assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts; the "credit" of the witnesses; their performance in the witness box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."

53. The witnesses are the eyes and ears of justice and their evidence must precedes over all other evidences. Of course, when otherwise the account of eye witnesses is found credible and trustworthy in exercise of apprehension of evidence, the account of eye witnesses is required to be tested for its inherent consistency, credibility and probability. The medical evidence also must not prevail over the account of eye witnesses. At this juncture, it necessary to appreciate the contentions of the Id. advocate for the appellants about the injuries found by PW-22 Medical Officer, Community Health Centre, Amod and PW-2 Lalitbhai Bhagubhai Patel Ex. 87 and PW-3 Dr. Vinaychandra Patel Ex. 89, both Medical Officers, Civil Hospital, Bharuch. It is pointed out that all other injured, except PW-1, reached at Civil Hospital, Bharuch on the same day at about 11.45pm, while PW-1 was examined by PW-2 reached to Civil Hospital, Bharuch at 4.00pm on the next day. So far as PW-1 is concerned, PW-2 Dr. Lalitbhai Patel found more injuries on his body than found by PW-22 Dr. Rajesh Mehta. According to the Id. advocate for the appellants, this fact creates doubt in prosecution case.

54. When the prosecution evidence scanned thoroughly, merely because some minor more injuries are noticed by the subsequent Doctor on the body of PW-1 would not by itself a reason to believe that the incident did not occur as per the say of the witnesses. Secondly, there is always a probability that the first in point of time, the Doctor who examined PW-1 might not have noticed those injuries. The more injuries which noticed by the Medical Officer, Bharuch are minor injuries like bruise over left side of chest, abrasion over neck and abrasion over middle finger. By that fact itself, the case of the prosecution cannot be thrown out. In similar circumstances, the Apex Court in the matter of Majju and Another Vs. State of Madhya Pradesh, , even in case of conflict between two medical opinion, observed in para-6 that prosecution witnesses cannot be discredited on

account of it. But in the present case, there is no conflict between two doctors. Only that some injuries were found more than noticed by the first doctor and some injuries of some injured were found by sharp cutting weapon which the first doctor failed to notice. By this mere fact it cannot be said that the ocular evidence is contradicting the medical evidence and there is a conflict between the medical evidence.

55. At this juncture again, a contention as to the history given by the injured to the doctor and the contention raised in this respect by the Id. advocate for the appellants is required to be appreciated. When on the day of incident, the injured went to the Community Health Centre, Amod, they gave the history before the PW-22 that they were attacked with weapons. The injured named different weapons in the history they gave to the doctor. Some said axe and tabal, injured Inayat Ibrahim said lathi and iron rod, injured Mustak said axe, which is noted by the doctor in certificate given by him from ex. 129 to 135. Relying on the certificates, it is contended that none of the injured gave the name of any of the accused and correct weapons. To appreciate this contention on behalf of Id. advocate for the appellants, if the prosecution case is perused carefully again, it is established that soon after the incident, the injured were taken to Police Station, Amod where PW-1 Ibrahim Umarji gave a complaint which is at ex. 156 which is proved by Investigating Officer PW-24. Before giving history to the doctor, complaint at ex. 156 was recorded wherein the manner of occurrence of the incident as well as the role played by the accused along with the weapon was given in detail. It was then not necessary for any of the injured to give the names of the accused again before the doctor whom they contacted subsequently to filing of the complaint ex. 156. An attempt is made by the defence in the trial court to bring a fact on record that injured PW-1 Ibrahim Umarji and Inayat Ibrahim PW-6 gave the history before PW-22 Dr. Rajesh Mehta that they were attacked by group of persons. Surprisingly, these case papers which are at ex. 138 to 139 are produced at the instance of the accused on 5.12.2001 in cross-examination. Ex. 129 to 135 are the certificate issued by the same witness PW-22 in the court on the same day wherein in the column of history in respect of PW-1 Ibrahim Umarji or PW-6 Inayat Ibrahim it has not been mention by PW-22 that they gave history that they were attacked by the group of persons. Minutely scrutinising ex. 129 to 135 it clearly appears that wording "group of persons" appearing in case papers is interpolation. Had it been so, that is in fact, Inayat Ibrahim PW-6 and Ibrahim Umarji PW-1 had given the history of assault by group of persons than PW-22 must have mentioned such history in ex. 131 and 132 MLC certificate issued by the doctor. Be that as it may, but prosecution case is not weakened on this count. But it is obvious that an attempt is made by the defence in the trial court to convince the court that an attack was launched by the group of persons and by which they received injuries. The defence failed in this attempt through the case papers which are got produced on record at the instance of the accused. As such, therefore, there is neither conflict between the medical and ocular evidence nor the prosecution case suffers any

infirmity on account of opinion of medical experts who deposed that the injuries, except couple of injures, were by hard and blunt substance.

56. In view of the above discussion, the evidence of seven eye witnesses is found creditworthy, truthful and inspires confidence as to the manner of the incident occurred and the role played by each of the accused. Merely because the injured witnesses are related and interested witnesses, their evidence cannot be discarded or the evidence of injured witnesses cannot be thrown out merely because there were some previous proceedings between the parties or on account of enmity between the family. It always depends upon the facts of a case. Enmity has been attempted to be established through cross-examination of the witnesses tends to believe that the incident had occurred as narrated by the witnesses and the cause of that was not only the quarrel which took place at Samani bus stand but was also a previous enmity. In the above referred case of Gangadhar Behera and Others Vs. State of Orissa, the Apex Court observed as under:

"10. We shall first deal with the contention regarding interestedness of the witnesses for furthering prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse the evidence to find out whether it is cogent and credible.

13. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh case in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed (AIR p. 366 para 25)

"25. We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in Rameshwar v. State of Rajasthan (AIR at p. 59). We find, however, that it unfortunately still persists, if not in the judgments of the courts, at any rate in the arguments of counsel."

57. Therefore, the contention that the witnesses were attacked by mob and got injuries and due to enmity between the parties, the present appellants are roped in is absolutely meritless. The evidence further discloses that the group of persons gathered at the bus stand was from the village Kurchan itself. If that be so, then it is difficult to believe that why the witnesses would allow the real

culprits of their own village and made scapegoat and falsely implicate the present appellants. If we may easily believe that group gathered at the bus stand is of the persons from village Kurchan, than those persons must be known to the injured witnesses, than there is no reason that while leaving those persons aside, according to the contention, who actually inflicted the injuries, the witnesses would rope the present appellant. At least no sound reason for the false implication is found from the evidence on record.

58. Again it was next contended that PW-12 and PW-13, Driver and Conductor of the bus deposed before the court that there was a group of 100 to 150 persons caused injuries to the witnesses. It was contended that in the prosecution case thus, there are two sets of evidence. One set is of injured eye witness and second set is in the shape of PW-10, 11, 12 and 13. PW-10 and 11 Bhikha Govind and Din Mahmad Gul Mahmad have turned hostile. While PW-12 and 13 stated before the police as well as before the court that there was a crowd of persons and a quarrel was going on. According to PW-12 and 13 they were informed by the village people that witnesses are injured and they are required to be taken to the hospital and, therefore, they were taken to hospital. The evidence of PW-12 and 13 is neither here nor there. Id. advocate for the appellants relied on a decision of the Apex Court in the matter of Harchand Singh and Anr. v. State of Haryana, as reported in AIR 1974 SC p. 344, the Supreme Court observed on that facts of the case that in a case whether the prosecution leads two sets of evidence, each one of which contradicts the other, it was difficult to found the conviction of the accused. Basing reliance on this observation, Id. advocate for the appellants argued that PW-12, 13, 10 and 11 is a set of evidence which is contradicting the other set of evidence of prosecution of injured witnesses. Appreciating this contention on behalf of the appellants, it becomes crystal clear that two sets of evidence on facts as was found in case before the Supreme Court in the matter of Hirachand Singh and Anr. v. State of Haryana (supra) is not present in the case on hand. The evidence of PW-10, 11, 12 and 13 is not in the contradiction of the evidence of injured eye witnesses. On the contrary, the issue is if evidence of injured eye witnesses is creditworthy, than the evidence of PW-10,11,12 and 13 can be discarded and ignored. It is a duty of a court to shift the grain from the chaff. On appreciating the evidence in this case, it clearly appears that grain is the evidence of injured eye witnesses. Firstly, there are no two sets of evidence contradicting each other as contended and secondly, on appreciation, safely the evidence of injured eye witnesses can be accepted and other evidence can be ignored. It is known law of the land that the maxim "Falsus in uno falsus in omnibus" dictum is not applicable to criminal law. Even major portion of evidence of the prosecution is found reliable the remaining part of the evidence can be ignored after relying the evidence which inspires confidence. At this juncture, the contention of the Id. advocate for the appellants that PW-7 Huriben supported in her cross-examination the crowd attacked on her is required to be appreciated. The evidence of a witness must taken into consideration as a whole. A sentence in isolation here or there is not

an evidence to discredit the witnesses. When major portion of evidence is reliable, single sentence in deposition of witness must be considered along with other major portion of evidence of the said witness. PW-7 Huriben is a reliable witness and she has narrated the incident in her chief-examination as well as in her cross-examination. An isolate answer in a sentence by a shrude cross-examiner would not render the whole prosecution case or the whole evidence of the said witness unreliable. Therefore, when major portion of the prosecution evidence is found reliable and inspires confidence for the remaining part which may not be supporting the prosecution case the evidence of prosecution cannot be discarded in toto. In the said decision of Gangadhar Behera and Others Vs. State of Orissa, , the Apex Court observed as under:

"15. To the same effect is the decision in State of Punjab v. Jagi Singh and Lehna v. State of Haryana. Stress was laid by the accused-appellants on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out the entire prosecution case. In essence prayer is to apply the principle of "falsus in uno, falsus in omnibus" (false in one thing, false in everything). This plea is clearly untenable. Even if a major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of a number of other co-accused persons, his conviction can be maintained. It is the duty of the court to separate the grain from the chaff. Where chaff can be separated from the grain, it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of a particular material witness or material particular would not ruin it from the beginning to end. The maxim "falsus in uno, falsus in omnibus" has no application in India and the witnesses cannot be branded as liars. The maxim "falsus in uno, falsus in omnibus" has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called "a mandatory rule of evidence". (See Nisar Alia v. State of U.P.) Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a court to differentiate the accused who had been acquitted from those who were convicted. (See Gurcharan Singh v. State of Punjab). The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because a witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merley because in some respects the

court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See *Sohrab v. State of M.P. and Ugar Ahir v. State of Bihar*.) An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate the grain from the chaff, truth from falsehood. Where it is not feasible to separate the truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be constructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See *Zwinglee Ariel v. State of M.P. and Balaka Singh v. State of Punjab*.) As observed by this Court in *State of Rajasthan v. Kalki* normal discrepancies in evidence are those who are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted recently in *Krishna Mochi v. State of Bihar*. Accusations have been clearly established against the accused-appellants in the case at hand. The courts below have categorically indicated the distinguishing features in evidence so far as the acquitted and the convicted accused are concerned."

59. The evidence therefore of the PW-10 and 11 who have not supported the prosecution case is required to be totally discarded and the evidence of PW-12 and 13 from the nature of their evidence, before the court cannot discard the weighty evidence of injured eye witnesses, on the contrary, it has come in the evidence that appellants are an influential family in the village and ordinarily no person would be prepared to depose against them. PW-10 and 11 are the watchman of the sim of village to whom the village appoints. This fact is required to be considered when the evidence is considered on the basis of reality and rationality.

60. The next contention which was raised on behalf of the Id. advocate for the appellants is that on the same evidence, the Id. trial judge acquitted two accused and on the same evidence, the present appellants that is remaining accused cannot be convicted. Id. advocate for the appellants placed reliance on a decision of Supreme Court in the matter of *Shantillal Kashibhai Patel v. State of Gujarat*, as reported in 1993(1) GLR p. 346. That was a case under Prevention of Corruption Act and under sec. 161 of Indian Penal Code. The same set of evidence was against all the accused and in these circumstances the Supreme

Court said that when the High Court could not find it safe to rely on the uncorroborated statement of the complainant while upholding the acquittal of accused, it was unsafe to rely on the ipse dixit evidence of the complainant which is unsupported by both the Panch witnesses and the Police Officials who formed the raiding party for upholding the conviction of accused no. 2, appellant before the Court. To appreciate this contention, suffice it to say that the facts in the case of the Apex Court in *Shantilal K. Patel v. State of Gujarat* were different, where the evidence was against accused no. 3 and was the same as it was against accused no. 2, wherein in the present case, role attributed to ori. accused no. 6 and 7 could not be proved by the prosecution and, therefore, they were acquitted. It cannot be said, therefore, that when on the same evidence accused no. 6 and 7 are acquitted, the present appellants cannot be convicted. It is important to note here that in the above said case of *Gangadhar Behera and Others Vs. State of Orissa*, above, the Supreme Court observed that merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a court to differentiate the accused who had been acquitted from those who were convicted. In the present case, the role attributed to the accused no. 6 and 7 causing injuries to daughter of PW-1 could not be proved by the prosecution. On facts, the case is of nature which can be differentiated for the present appellants from the case of the accused who are acquitted and, therefore, on account of that, the whole prosecution case in toto, cannot be thrown out.

60. The next contention and last one is in respect of whether there was a common object so as to invite conviction under sec. 149 and whether the appellants were liable to be convicted under sec. 307 of IPC. In this respect, it was contended that though seven persons attacked with deadly weapons, no serious injuries were caused to any of the injured except injured Mustak who received fracture injury and that too on leg and not on the vital part of the body. That is the only grievous injury and, therefore, it cannot be said that there was an intention and knowledge on the part of the accused to kill PW-1 Ibrahim Umarji. So far as section 149 of IPC is concerned, it was argued that the genesis of the dispute as revealed by the prosecution case rests in this scuffle which occurred between PW-1 and appellants no. 1 and 5. There was a hot exchange of words and scuffle taken place with Mahmad ad not PW-1. Therefore, according to Id. advocate for the appellants, the common object for the accused was to beat Mahmad and not PW-1 Ibrahim Umarji and, therefore, the conviction under sec. 149 is bad in law, at the most, appellant no. 3 who caused fracture injury to Mustak may be liable for the punishment under sec. 325 or 324 of IPC and others under sec. 323 of IPC. In this respect, if we again revert to the facts of the prosecution case, it is clear from the evidence that PW-1 stated that all the accused were inflicted blows on the bus and were uttering that kill Ibrahim i.e. PW-1. This is not in contradiction in the evidence of PW-1. PW-5 Mustak Umarji

ex. 103 also stated that all accused get together and passed through near the house with weapons and were uttering abuses and were saying to beat PW-1. This is also not in contradiction in the evidence of this witness. PW-6 Inayat Ibrahim also found that all the accused get together with deadly weapons and were going towards the bus stand and were uttering to kill Ibrahim. This is also not in contradiction in the evidence of PW-6. Having regard to this evidence of prosecution case, it is clearly established that the accused five or more in numbers, gathered in the village and with design and intention proceeded towards bus stand of village Kurchan uttering to kill PW-1. There may be different version of the witnesses in utterings of the accused but it is not material. What is material is that the accused formed an assembly and with intention to kill PW-1 proceeded towards bus stand and only because of the first incident took place at Samani with PW-4 it could not be said that there was no intention on the part of the accused or knowledge on the part of the accused to kill PW-1 and that is apparent from the evidence of the prosecution witness that PW-1 was the head of the family who had enmity with the family of the accused. If we appreciate this evidence of the prosecution it is crystal clear that there are ingredients in the evidence of sec. 143, 147, 148 and 149 of IPC and sec. 307 of IPC. The common object and intention of the accused is to be gathered from the circumstances established by the prosecution and prosecution has established the circumstances as above said. Even if the evidence is deficient so far as the particular accused is concerned, if the common object is established, the case under sec. 149 of IPC is proved. Merely being a member of unlawful assembly invites vicarious liability on the act done. For proving ingredients of section 307 of IPC, it is not necessary that always accused must have caused injuries likely to cause death. Intention or knowledge to cause death is sufficient for conviction under sec. 307 of IPC. There may not be any injuries sufficient to cause death, but the important is what was the intention of the accused. When accused was found going towards the bus stand with deadly weapons with the overt gesture to kill PW-1, the ingredients of sec. 307 are satisfied and they also will be liable to be punished under sec. 149. The contention that except appellant no. 3, all inflicted simple injuries in individual capacity is meritless. In this respect, the observation of Supreme Court in the matter of Ramu Gope and Others Vs. State of Bihar, are useful which are as under:

"4. Where a member of an unlawful assembly is named as an offender who committed an offence for which the members of the unlawful assembly are liable u/s 149, I.P. Code, and the evidence at the trial is insufficient to establish that the named person committed the act attributed to him, he may still be convicted of the offence, if it is proved that he was a member of the unlawful assembly and that the act was done by some member of the assembly in prosecution of the common object or which the members knew was likely to be committed in prosecution of that object. In our judgment, failure to prove the presence of the named offender among the members of the unlawful assembly will not affect the criminality of those who are proved to be members of the assembly if the other

conditions of the applicability of Section 149, I.P. Code be established. If the Court refuses to accept the testimony of witnesses who speak to the presence of and part played by a named offender, the weight to be attached to the testimony of those witnesses insofar as they involve others may undoubtedly be affected, but it cannot be said that because the testimony of witnesses who depose to the assault by the named offender is not accepted, other members proved to be members of the unlawful assembly escape liability arising from the commission of the offence the prosecution of the common object of the assembly.

5. The High Court found that on the day in question more than 30 persons formed an unlawful assembly, the common object of which was to rescue cattle detained by the villages of Mananki Khanda, and to kill those who resisted, and that members of the unlawful assembly committed an assault on the villagers and severely beat up the villagers including Budhia in prosecution of the common object. The offence being such that it was known to be likely to be committed, every person who was a member of that unlawful assembly at the time of the commission of the offence would by virtue of Section 149 I.P. Code be guilty of the offence committed. The argument that Harihar Gope alone had the object of causing the death of Budhia cannot on the evidence be accepted as correct. The object to beat up and kill those who resisted the rescue of the cattle detained was according to the case for the prosecution common to all members of the unlawful assembly, and that object was established by abundant evidence. Proof of the common object of the unlawful assembly did not depend upon the presence therein of Harihar Gope. Failure to establish that Harihar Gope was a member of the unlawful assembly did not in our judgment, affect the liability of the persons proved to be members of the unlawful assembly for the acts done in prosecution of its common object, or which they knew to be likely to be committed in prosecution of the common object thereof. When a concerted attack is made on the victim by a large number of persons it is often difficult to determine the actual part played by each offender. But on that account for an offence committed by a member of the unlawful assembly in the prosecution of the common object or for an offence which was known to be likely to be committed in prosecution of the common object, persons proved to be members cannot escape the consequences arising from the doing of that act which amounts to an offence."

61. Again in the case of Jaswant Singh Vs. State of Haryana, , the Supreme Court observed as under:

"25. As far as Section 149 IPC is concerned, in addition to the common object, merely being a member of an unlawful assembly within the meaning of Section 41 IPC may be sufficient. As held in Lalji v. State of U.P. (SCC pp 441-42, para 9)

"Once the case of a person falls within the ingredients of the section the question that he did nothing with his own hands would be immaterial. He cannot put forward the defence that he did not with his own hand commit the offence committed in prosecution of the common object of the unlawful assembly or such

as the members of the assembly knew to be likely to be committed in prosecution of that object. Everyone must be taken to have intended the probable and natural results of the combination of the acts in which he joined. It is not necessary that all the persons forming an unlawful assembly must do some overt act. When the accused persons assembled together, armed with lathis, and were parties to the assault on the complainant party, the prosecution is not obliged to prove which specific overt act was done by which of the accused. This section makes a member of the unlawful assembly responsible as a principal for the acts of each, and all, merely because he is a member of an unlawful assembly. While overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability u/s 149. It must be noted that the basis of the constructive guilt u/s 149 is mere membership of the unlawful assembly, with the requisite common object or knowledge."

62. True, it is that, though no such injuries which would vital to human life is inflicted by the appellants nevertheless from the circumstances as mentioned above, it is clearly established that their intention was to kill PW-1 which was evident from the evidence of the above said witnesses and, therefore, the above said contention that the appellants are not liable to either under sec. 149 or under sec. 307 of IPC, is meritless. Lastly, Id. advocate for the appellants cited a decision of the Apex Court in the matter of Deepak Kumar Vs. Ravi Virmani and Another, and contended that independent witness need corroboration. On going through the decision, it is clear that the Supreme Court came to the conclusion, on the fact of that case, that the evidence on record was not leading to the only conclusion of guilt of the accused and doubt had arisen regarding the prosecution case. That was the case wherein four murder took place but none of them was witnessed by the injured witnesses. It is only when injured was attacked by the accused, the prosecution attempted to link the accused with the above said murder and on this facts, the Supreme Court observed that the case of the prosecution was doubtful. In the present case, there are seven injured eye witnesses credibility of whom cannot be questioned. Their injuries are proved. There is no infirmity in the prosecution case as contended by the Id. advocate for the appellants and, therefore, this is a case wherein interference of this Court is not required.

63. For the reasons aforesaid, the appeal is dismissed.