

(2008) 11 GUJ CK 0060

In the Gujarat High Court

Case No : Criminal Appeal No's. 831 and 1125 of 1999

Narayanbhai Babulal Bhosle and Others

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 19-11-2008

Acts Referred:

Bombay Police Act, 1951 — Section 135(1)
Criminal Procedure Code, 1973 (CrPC) — Section 154, 354, 374, 386
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 114, 143, 144, 147, 148

Citation : (2009) 1 GLH 91

Hon'ble Judges : Dhirubhai Naranbhai Patel, J;C.K. Buch, J

Bench : Division Bench

Advocate : Yatin Soni and Mr. Hitesh B. Patel, for the Appellant; H.L. Jani, Assistant Public Prosecutor, for the Respondent

Judgement

Mr. C.K. Buch, J.—Both these appeals are against the judgment and order dated 24th July, 1999 passed by the learned Additional City Sessions Judge, (Court No. 19), Ahmedabad in Sessions case No. 270 of 1998. The appellants of Criminal Appeal No. 831 of 1999 are convicts who have been held guilty of the charge of offence punishable u/s 302 read with section 34 of the Indian Penal Code and Second Appeal i.e. Criminal Appeal No. 1125 of 1999 is by the State of Gujarat challenging acquittal of original accused No. 5 Shardaben Naranbhai Bhosle and also against the order of acquittal of all the accused from the charge of offence punishable under sections 143, 147, 148, 149 of the Indian Penal Code as well as u/s 135(1) of the Bombay Police Act. The appellants of Criminal Appeal No. 831 of 1999 are original accused Nos. 1 to 4. Accused No. 1 is the father and accused Nos. 2, 3 and 4 are sons of accused No. 1. All the four have been held guilty for the offence punishable u/s 302 of the Indian Penal Code read with section 34 and also u/s 324 of the Indian Penal Code and they have been inflicted life imprisonment and ordered to pay fine of Rs. 2000/- each, in default, punishment imposed is simple imprisonment for two months.

2. We have heard learned advocate Mr. Yatin Soni for the convicts and learned Additional Public Prosecutor Mr. H.L. Jani for the State. Learned counsel appearing for the appellants in both these appeals and have taken us through the evidence, oral as well as documentary, recorded during the course of the trial of sessions case, registered after investigation of the crime bearing Cr. No. I 261 of 1998 with Amraiwadi police station of city Ahmedabad.

3. The prosecution case, in nutshell is reflected in charge exh. 1. Of the five accused, four have been held guilty and one original accused No. 5 Shardaben has been acquitted by the learned trial Judge. Accused were put to trial on the allegation that on 12th April, 1998 at about 10.30 p.m. the accused formed an unlawful assembly, with common object and intention to kill Rajendra Amrutlal Modi and Balkrishna Modi, both real brothers. Accused Nos. 1 to 4 were armed with deadly weapons like knife, gupti and iron pipe and inflicted various blows to both these brother's and ultimately both these brothers succumbed to the injuries. It is alleged that all these accused, in the meantime also inflicted certain, blows to Gautam Modi (P.W. 2), one another brother, as he attempted to intervene to save lives of these two brothers. Thus, Gautambhai was given blows of knife, gupti and pipe. This Gautambhai was seriously injured and was removed to hospital but he escaped death after surgical treatment. When these three brothers were being assaulted, complainant Dakshaben was present, she had rushed at the spot of quarrel and she had also sustained injuries between middle and rib finger with gupti. This injured Dakshaben lodged the complaint against all the five accused with Police Inspector of Amraiwadi police station when she was being treated by Doctors at L.G. Hospital. The police registered offence. According to prosecution, during investigation, a cross complaint came to be filed by original accused No. 1 against both the deceased and injured witness Gautambhai Amrutlal Modi and Amraiwadi police station registered the offence vide C.R. No. I-266 of 1998. On completion of the investigation, police found sufficient evidence against accused of both the sides. The learned trial Judge, on conclusion of the trial, held four accused as mentioned earlier, guilty, and decided to acquit alleged accused Shardaben, wife of accused No. 1 and mother of accused Nos. 2 to 4. We are informed that the accused of cross case and witness in the case against convicts have been acquitted. However, there is no appeal against the order of acquittal by the State or any Criminal Revision Application on behalf of the original complainant. FIR of cross case has not been produced during the course of the trial in the case tried against convicts. Of course, the prosecution produced injury certificates issued by Civil Hospital, Ahmedabad, of all the four convicts. Here, it will be relevant to note that as Doctor who examined and treated all the four convicts has not been examined by the prosecution and therefore, these four injury certificates have not been exhibited. Mr. Yatin Soni had, at the initial stage of his arguments, submitted that appellants have no objection if these injury certificates are considered. As none of the appellants disputes the fact that they had sustained injuries during the incident, they can be looked into. Blood stained clothes of all the five accused

recovered during investigation of present case, were also sent for Forensic examination.

4. It is submitted by Mr. Soni that the order of conviction and sentence passed by the learned trial Judge is erroneous and is not sustainable in the eye of law and the conviction recorded by the learned trial Judge requires to be quashed and set aside. The learned trial Judge ought to have acquitted all the five accused observing that the prosecution has attempted to suppress the genesis of the crime. The accused, actually, were victims of planned assault of all the three brothers i.e. two deceased brothers and Gautambhai Modi (P.W. No. 2.). But ultimately they suffered on account of strong retaliation from the other side. The entire incident, so far as appellants are concerned, was a sudden and result of pro(sic)coation made by the conduct and act of assault by both the deceased as well as Gautambhai. The learned trial Judge has grossly erred in appreciating the evidence. Certain basic principles of appreciation of evidence have been ignored by the learned trial Judge. The learned trial Judge has also attempted to read a piece of evidence which, according to Mr. Soni, is inadmissible. By pointing out certain interim orders passed by the learned trial Judge and the notes made by the learned trial Judge while recording the evidence of prosecution witnesses: - P.W. No. 1 and P.W. No. 2, it is submitter that it appears that the trial has been conducted and concluded under a tense situation because on one day during the trial, the advocate had left the court room and had not even cared to appear in the Court in the rest of the part of the day. Of course, Mr. Soni has not submitted positively that the finding recorded by the learned trial Judge is prejudicial. But Mr. Soni, submitted that this Court being the Court dealing with criminal appeal u/ s 374 read with section 386 of the Code of Criminal Procedure, may give a fresh look on the entire set of evidence led during the course of trial. Certain errors committed by the learned trial Judge in appreciating evidence have resulted into the conviction. While pointing out various aspects, Mr. Soni has drawn our attention on certain aspects that the trial Court has wrongly considered the complaint i.e. exh. 65 given by Dakshaben as FIR within the meaning of section 154 of Criminal Procedure Code and has considered certain contents of the complaint as substantive piece of evidence of this document exh. 65. The absence of fairness on the part of the investigating officer and to an extent by the prosecuting agency also has been ignored by the learned trial Judge. Non-production of FIR of cross case or copy of the station diary entry of Amraiwadi police station, after receipt of vardhi from LG Hospital are relevant documents that could have been produced for substantive justice. It is emerging from the evidence that original accused No. 1 had been to Amraiwadi police station personally, immediately after the incident and after recording his version, all the accused persons were referred to LG Hospital by Amraiwadi police station with police yadi. These documents were crucial and important in the fact finding mission of trial and these documents could have established that FIR is not an FIR in the eye of law, but the same is a statement recorded during the course of investigation and therefore, inadmissible. Without assigning good, sound, legal

and logical reasons, the learned trial Judge has ignored two crucial documents, one i.e. Vardhi recorded by the police official on duty at the LG Hospital given on the strength of the information provided by Dr. Firoz who was treating the injured witnesses including PW. 2 Gautambhai and PW. No. 1 Dakshaben, in which detailed description as to the occurrence is found mentioned. This very vardhi proved by competent witness clearly indicates that all the details recorded in the register maintained by police at LG Hospital were given to the police officer in charge of Amraiwadi police station telephonically and document at exh. 64 is a document of Amraiwadi police station, wherein the details of the occurrence is sufficiently reflected. If the document exh. 65 is not an FIR, the same could not have been considered while evaluating the strength of the evidence of Dakshaben. Only FIR can be looked into by the Court, for limited purpose of corroboration and contradiction while examining and evaluating the evidence of the complainant person who lodged the FIR, and evaluating the evidence in reference of substratum of the story of the prosecution. According to Mr. Soni, name of one of the accused i.e. accused No. 4 Rajeshbhai is not reflected in any of the Vardhi, one written at L.G. Hospital and other at Amraiwadi police station and the same is found in the complaint exh. 65 recorded by police at belated stage. Time gap between 10.30 p.m. and 1.00 a.m. (after midnight) does not look to be a long gap but when it is in evidence that parties were enemical to each other, accused persons had also reached with their blood stained clothes at LG Hospital to get treatment when prosecution witnesses including Gautambhai and Dakshaben were in the hospital. Recording of complaint thereafter ought to have been considered as belated FIR. There was enough scope for the complainant to make deliberations with relatives and family members who were there in the Civil Hospital while giving the complaint. There is nothing in the evidence nor in the case of the prosecution that on 12th April, 1999, something had happened between the parties more particularly immediately prior to the incident that had taken place. This element of sudden quarrel which is being reflected in the evidence led by the prosecution has not been appropriately considered by the trial court. The trial court has not correctly appreciated the crucial aspect that there was enough blood near the entry door of the bungalow No. 54 i.e. the bungalow occupied by accused side. Samples were taken of the blood by the investigating officer. A thread was also collected of the blood lying at the bungalow of the accused side and these samples were also sent for Forensic examination and this indicates that the quarrel had started at the bungalow of the accused side. When the learned trial Judge has observed that the prosecution has not produced a detailed map of the society and its internal road, in this situation, the learned trial Judge ought not to have impliedly observed that the accused side was the assailant or deceased as well as injured Gautambhai P.W. 2 or Dakshaben were the victims. On the contrary, close reading of evidence of Dakshaben indicates that injured brothers who ultimately succumbed to injuries, were taken at the bungalow No. 75 before the mobile van had reached on the strength of the telephone call by somebody. So, blood found at the bungalow No. 75 was because all the three injured brothers were taken

there at the bungalow No. 75 prior to the time when mobile van reached at the spot of incident i.e. Avnish society and took the injured persons to LG Hospital. Injuries on the body of the persons accused, if are considered, one wound is incised wound on the body of the accused person Jitendra. More than one accused i.e. Narayan as well as Jitendra had sustained injuries which have been described as contused lacerated wound. Injury on the leg of accused No. 1 Narayanbhai Bhosle was of enough length and that is reflected in the arrest panchnama of the accused tendered in the evidence of Investigating Officer. Contused lacerated wound on the body of the person accused No. 2 Jitendra was on parietal region. This accused No. 2 had sustained three injuries. Accused Rajesh had sustained two injuries and one of such injuries was on interscapular region. The accused Rajesh had sustained three injuries. Clothes of the accused were sent for forensic science examination and none of these clothes is found stained with blood of the victim side. Blood of accused persons was also sent for analysis and it is clear that all the accused persons were having the same group i.e. group "O" and their clothes also having sufficient blood stains. But blood on the clothes of the accused, on analysis, is found of group "O", meaning thereby that their clothes were stained with their own blood. Even clothes of accused No. 5 Shardaben were also found with blood of group "O". It is very likely that she may have actively participated in shifting her injured husband and bleeding sons. No extraordinary injury or marks of violence was found on the body of this accused No. 5. Absence of blood of deceased or injured Gautambhai on the clothes of the accused is a circumstance that the author of the blows given to both the deceased or Gautambhai may be some other person and not the accused as alleged. There is reference of a mob in the evidence. It is alleged that the persons from the mob are responsible for the injuries found on the persons deceased as well as Gautambhai. As the accused were beaten suddenly by the deceased Balkrishna and his two brothers, furious society members ultimately may have fished them. The complainant herself has accepted certain crucial aspects as to the nature and character of deceased Balkrishna in her deposition and his political activity. So, accused could have been given benefit of doubt. All these aspects have not been appropriately considered by the learned trial Judge. It is further argued that investigating agency has decided to take a "U" turn and to create a case against the accused. There is clear reference of use of one bat. There is no reference of use of cricket bat. If a word "bat" simpliciter is used, therefore, according to Mr. Soni, should not be considered as bat used for playing base ball. The length of the bat has been described by police in the forwarding letter addressed to the Forensic Science Laboratory. It was more than 2. 1/2 ft in length and according to police, this bat was stained with blood. In the same way, one stick was also recovered. It was also found stained with blood. But the prosecution has not attempted to explain that who was actually holding these two articles at the time of occurrence. There is no reference in the report of Forensic Science Laboratory that what happened to the blood stained bat sent for analysis. In the same way, iron pipe also has been recovered during investigation by police, but there is no reference in the report of Forensic Science Laboratory

as to whether the same was received for examination or what is the result of the same. Though there is incised wound on the body of the accused No. 2 Jitendra, it appears that no weapon has been sent for analysis by police, recovered from the accused of the cross case. At least one sharp cutting weapon has been used while inflicting incised injury to accused Jitendra. When police charge-sheets two groups of accused for one incident and both these groups are required to be tried as accused of cross case, then all such documents are required to be produced in both the cases simultaneously. Otherwise it may result into some serious prejudice. It is submitted by Mr. Soni that in the present case, the accused have suffered such prejudice for want of certain such documents, by investigating agency. This is unfair.

5. One more submission by Mr. Soni is that the learned trial Judge ought to have acquitted persons only on the ground that both the eye witnesses, that too, injured eye witnesses have failed to explain visible injury that could have been inflicted by a weapon found on the body of the persons accused. There are number of decisions, especially when an eye witness is interested in the result of the case and is a close relative of the victim, then non-explanation of the injury on the body of the person accused remains unexplained, then version of such witness should not be accepted. The Apex Court has observed that this fact is nothing but an attempt to suppress genesis of the crime and the idea may be to implicate the accused falsely for the reason best known to such witnesses. In the present case, enmity terms were there between the parties. It also emerges that some political rivalry is also there and therefore, brutal act done by the members of the mob has been there under the shelter of the accused by the family members of both the deceased and injured Gautambhai. Only Dakshaben has supported, to an extent, the case of the prosecution. Version of Gautambhai P.W. 2 ought not to have been accepted as trustworthy. In the examination-in-chief, he has supported the case of the prosecution to material extent. During the cross-examination, he has given a complete go by to the facts stated by him on oath in examination-in-chief. The learned trial Judge has decided to issue notice for perjury. When the trial Judge has decided that the witness Gautambhai P.W. 2 is lying before the Court then any part of his version ought not to have been used as sound piece of evidence either direct or corroborative, to link the accused with the crime. Another witness including P.W. 8 Hansaben, wife of Gautambhai Mody has turned hostile. The prosecution was mainly relying on the evidence of Dakshaben, Gautambhai and Hansaben. Gautam and Hansaben have been treated hostile by prosecution. Hansaben has been posed as an eye witness. She was capable of explaining injuries on the body of the persons accused. But she has not supported the case of the prosecution. On the contrary it is on record that this Hansaben had made a telephonic call to police control room with a view to seek help from police and for necessary protection. On receipt of such call, police mobile van had moved towards place of incident and ultimately had reached in a couple of minutes at the place of incident. Prosecution witness Hansaben has denied in her deposition that she had

ever made such telephonic call. But this fact, has emerged from the record that first caller was Hansaben who informed the police about the incident. In such a situation, non-explanation of the injury on the body of the persons accused by the prosecution ought to have been treated vital and the learned Judge has grossly erred in appreciating the evidence of prosecution in this background.

6. The material panch witnesses have turned hostile and the learned trial Judge has placed reliance on the version of police officer who has drawn the panchnama. Panchnama has been tendered in evidence and has been exhibited. True it is that the Court can place reliance on the evidence of Investigating Officer or police officer who has drawn panchnama, but such police witness is supposed to prove the contents of the panchnama to the satisfaction of the court. The approach of two police witnesses who have been examined to prove panchnama and slips allegedly found by panchas are found casual. No serious weightage ought to have been given by the learned trial Judge and this material error goes to the root of ultimate finding.

7. There is conflicting evidence of Dakshaben as well as police officer who had taken the injured persons to the hospital for treatment including two deceased i.e. Balkrishnabhai and Rajendrabhai. Dakshaben claims that she was also taken in police mobile van to LG Hospital for treatment with Gautambhai, Balkrishna and Rajendrabhai where Balkrishna and Rajendra were declared dead by the doctor. But police officer who has been examined to prove this aspect has stated that he had taken only three who had sustained grave injuries in the mobile van. It is in evidence that family members had rushed to LG hospital and they were there in the hospital, when Police Inspector reached LG Hospital on receipt of intimation from his Amraiwadi police station. The injury between two fingers of Dakshaben appears to be superfluous. It is very likely that she may have sustained these injuries while managing the weapon that may have been there in the hands of either any of the two deceased or Gautambhai because there is incised wound on the body of the person accused Jitendra. This probability has not been even considered. It appears that as medical certificates were not there on record being documents exhibited, the Court may not have dealt with this aspect so minutely, but this Court at least, can appreciate the matter as these injury certificates are very well there on the record with list exh. 11. Surprisingly objection raised by defence counsel when these medical certificates were tendered in evidence was overruled by the learned Presiding Judge, but the learned Presiding Judge decided not to exhibit these documents on the ground that Doctor has not been examined by the prosecution. These documents are material documents. They were produced with list with specific purpose. The Public Prosecutor did not act fairly, otherwise, the Doctor could have been called as a witness to prove these injury certificates showing the nature and number of injuries on the body of the persons accused.

8. In the present case, the trial of the accused has not been proceeded in a fair manner and that has also resulted into serious prejudice. It is settled that cross

case should be tried simultaneously and by the same Judge. We had insisted that the learned Additional Public Prosecutor appearing for the State should obtain a copy of the judgment of acquittal in the cross case alongwith the copy of the charge and the proceedings drawn. The hearing prolonged for some time and our idea was to provide an opportunity to the learned Additional Public Prosecutor so that these documents can come before the Court. In absence of copies of these documents, we have to accept the word of the learned counsel appearing for the parties being a responsible officer of the Court and we are told that till the day on which examination-in-chief of PW No. 2 was taken, material witnesses in the cross case were remaining to be examined. Practically trial had not begun in stricto sensu because all material eye witnesses and injured witnesses were required to be examined. It is a normal practice to conclude recording of evidence and arguments in one case and to begin with the cross case. Some Courts are recording evidence in both the Sessions cases being cross cases and hear final arguments one after another and judgment is pronounced on the same day. According to the learned Additional Public Prosecutor Mr. Jani, in the present case also, the learned trial Judge decided both the cases on the same day. This statement has not been resisted by learned counsel Mr. Soni and therefore, it has to be accepted. But we are informed that after examination-in-chief and some cross-examination, the Court could not complete the cross-examination of PW No. 2. The day on which PW No. 2 was declared hostile by the prosecution and the learned Additional Public Prosecutor appearing for the prosecution, tendered an application vide exh. 20 to permit prosecution to cross-examine this witness PW 2 but the cross case was conducted in the midst of deposition of PW 2 and the accused persons were examined and showed they showed hostility to the case of the prosecution meaning thereby they deposed in favour of the accused of the case registered on the strength of the complaint by accused No. 1 Naranbhai. As all the injured accused and material witnesses turned hostile in the cross case, it appears, P. W 2 decided to enter witness box, by that time he had managed to remain away from the witness box. The learned counsel representing the accused thereafter, cross-examined PW 2. It is very likely that parties may have settled the matter out of the Court in such a serious case where two persons have lost their lives. Be that as it may. But the say of learned counsel Mr. Soni is that the trial against the present accused-appellants cannot be said to have proceeded and conducted by the prosecution in a most fair manner and in such a situation, the learned trial Judge was supposed to evaluate the evidence and totality emerging from the record and the failure on the part of the learned trial Judge in doing so has resulted into an erroneous order of conviction. Learned counsel Mr. Soni has touched other aspects in reference to the infirmities emerging from the evidence and ultimately has submitted that the accused were required to be acquitted. Now this Court by allowing present Appeal may acquit the accused.

9. Without prejudice to above submissions made by Mr. Soni, one alternative argument is also advanced by Mr. Soni that there is one probability that perhaps,

the prosecution witness Gautambhai and his brothers Balkrishna and Rajendra may have tried to assault accused No. 1 or any one of them by going to bungalow No. 54 when accused persons were preparing to go to bed and the incident had started from bungalow No. 54 at the instance of deceased Balkrishna and his brothers, then the accused, at least, deserve to be acquitted from the charge of offence punishable u/s 302 of the Indian Penal Code. It was possible for the trial court to convict accused Nos. 1, 2 and 3, at the most, for the charge of offence punishable u/s 304 part I looking to the number and nature of injuries found on the body of both the deceased persons. Undisputedly, quarrel must have started suddenly and during retaliation to the assault made by Balkrishna and his brother, perhaps, the accused have exceeded their right of private defence. The learned Trial Judge has not properly dealt with this submission considering the nature of evidence and circumstances emerging from the record. So, as per alternative argument. Mr. Soni has submitted that conviction may be altered from section 302 read with section 34 to section 304 part I of the Indian Penal Code.

10. The submission of learned Additional Public Prosecutor Mr. Jani, if, are encompassed, then could be narrated that, finding of the learned trial Judge is based on sound reasons and the learned Judge has applied his mind to all the three different probabilities pointed out by the learned counsel for defence and the Court was satisfied that there is no merit in the theory of defence. When the finding of the learned trial Judge is based on detailed discussion of facts and element of perversity is missing, the order of conviction does not require to be interfered with. In the present case, ultimately two persons have lost their lives and Mr. Jani has drawn attention of the Court as to injuries that were found on the body of both the deceased persons from their post mortem notes exh. 43 and 45 respectively. There are injuries on the vital part of the body. Dangerous weapons like knife and gupti have been used by the accused persons. One of the accused was holding iron pipe. Dr. Hasumati Patel, PW 11 exh. 42, who performed autopsy has stated that injuries were on the vital part and they were sufficient in the ordinary course of nature to cause death. On the body of deceased Balkrishna, total 16 injuries were there. Out of 16 injuries, injury Nos. 1, 2, 3, 8, 9, 12 and 15 were possible by a sharp cutting instrument i.e. article No. 18 (knife) and injury Nos. 4, 5 and 7 were possible by article No. 19 (gupti) and injury Nos. 6, 10, 11, 13, 14 and 16 were possible by Article No. 20. Thus, this is a case of brutal murder and the same does not reflect anything like retaliation of the assault made by the deceased. Though number of injuries were less on the body of Rajendrabhai, even though there were six injuries. Two blows were given on his head as well as injury by knife was also inflicted on the left side chest. These weapons i.e. knife as well as gupti, on analysis were found stained with blood group "A". The clothes of the deceased recovered during the investigation also had the blood of the same group. So it is possible to infer that these three weapons are stained with blood of the deceased persons and/or of PW Gautambhai. If the Court ignores the version of Gautambhai qua injury

inflicted on him, then also the accused can be said to have been held guilty rightly by the trial Judge for committing murder of Balkrishna and Rajendrabhai.

11. It is further argued by learned Additional Public Prosecutor that according to prosecution, two brothers had been to bungalow No. 75, i.e. at the residence of his real brother and it was a social visit and when they were returning, they were intercepted by the accused near their bungalow and for no fault on their part, they have been killed. As per the case of the prosecution, they were armed and a person who intends to go to bungalow No. 44 of the society, from bungalow No. 75, then he has to pass through bungalow No. 54 i.e. residence of the accused. So this is a case of interception of both the deceased. Gautambhai thereafter, had rushed there and therefore, he was also assaulted is the say of the prosecution and the prosecution has led the evidence to that effect through PW 1 Dakshaben. The learned trial Judge has rightly recorded the finding that Dakshaben being an injured eye witness is a trustworthy witness. She has unfolded the correct story. She has stood to the test of cross-examination. According to learned APP Mr. Jani, there was no reason for the trial court to discard her evidence. It is further submitted by Mr. Jani that this injured witness Dakshaben needs no corroboration. On the strength of her evidence only, the accused have been held guilty. But she being related to the persons deceased and injured Gautambhai, the learned trial Judge has attempted to seek corroboration and she is found corroborated by some part of evidence of Gautambhai PW 2 who has been declared hostile. The learned trial Judge has rightly discussed that merely because witness has been declared hostile, his evidence has not to be discarded in toto and the prosecution as well as Court can make use of evidence of a hostile witness if any part of the version given by hostile witness is found acceptable. Keeping in mind totality and other facts and circumstances and keeping this principle in mind, the learned trial Judge has observed that facts stated by Gautambhai PW 2 in his examination-in-chief are, useful to prosecution in bringing home the charge. Merely because this witness Gautambhai has been served with notice for purgery under the scheme of section 354 of the Code of Criminal Procedure, his evidence is not required to be taken out from the set of evidence as if the same is not led or available on record. If the Court is satisfied that a particular part of evidence of hostile witness is true and reliable, then that part of evidence can be looked into. In the present case thus, this Court also may observe that the injured eye witness Dakshaben is amply corroborated by the evidence of PW Gautambhai. It is also submitted by Mr. Jani that PW 1 Dakshaben gets corroboration not only from FIR exh. 65 but also from the Vardhi recorded by police who was present at LG Hospital and the report received by PSO, Amraiwadi police station, telephonically. The prosecution is consistent that the accused have used sharp cutting instruments like knife, gupti and a weapon i.e. iron pipe. These are deadly weapons. Indiscriminately successive blows have been given in the present case and therefore, the Court has held the accused guilty of the charge of offence punishable u/s 302 of the Indian Penal Code. There is no evidence on record to show that any of the

persons from the complainant side, more particularly, the deceased had provoked the accused. The assault does not appear to be sudden. On the contrary, it smacks a planned assault. Enemical terms between the parties is a double edged weapon and the learned trial Judge has rightly appreciated this aspect emerging from the record. The number of injuries found speak about the intention and at least knowledge of the persons accused. Merely because the accused of cross case have been acquitted, would not make the difference qua the conviction recorded against the present accused persons.

12. According to Mr. Jani, the learned trial Judge has not committed any error in observing that the injuries on the body of the persons accused were superfluous and were minor injuries and the prosecution witnesses were not supposed to explain these injuries. The decisions therefore, cited by learned advocate Mr. Soni appearing for the accused would not help the accused. In the same way, the learned trial Judge is also right in relying upon the document exh. 65, i.e. FIR because according to Mr. Jani, Vardhi recorded by police was of cryptic nature and the Vardhi received by police or telephonic message received by mobile van cannot be considered as FIR merely because there is disclosure of cognizable offence and in support of his argument, Mr. Jani has also placed reliance on the following decisions. (1) 2004(4) GLR 3575 (2) 1980(1) GLR 533

13. Mr. Jani has also placed reliance on the decision in the case of Swarupsinh Hathuji and Others Vs. State of Gujarat, and submitted that station diary entry also should not be given weightage of FIR because normally, such entries are cryptic in nature and the same are disclosing formal information suggesting commission of a criminal offence.

14. It is further argued that there was no reason for the learned trial Judge to discard the evidence of injured eye witness Dakshaben PW 1 and the reliance has been rightly placed by the learned trial Judge while considering the version of PW 2 Gautambhai though he has been declared hostile. The material witness like Hansaben. wife of injured Gautambhai Modi PW 2 has turned hostile. But that would not go to the root of the case of the prosecution. The learned trial Judge was right in convicting the accused because it is clearly held that the evidence available on record is sufficient to link the accused with the crime as the prosecution, even may not have examined Dakshaben because no duplication of examination is required in a criminal trial. As there is no perversity in the finding recorded nor any error in appreciating the evidence led by the prosecution, the order of conviction and sentence be upheld.

15. While evaluating rival contentions and evidence available on record, we have considered oral evidence led by all 16 witnesses and more particularly injured witnesses Dakshaben as well as Gautambhai i. e PW 2. This witness has initially supported the prosecution case. However, after gap of some days, he turned hostile to the prosecution and therefore, the learned trial Judge permitted the prosecutor to cross-examine this witness. On plain reading of deposition of Gautambhai, initially, we were of the view that the evidence of Gautambhai

should not be considered at all because defence advocate was not permitted to complete cross-examination and in the midst of cross-examination, the learned trial Judge had permitted the Public Prosecutor to cross-examine this PW 2 Gautambhai. True it is that the evidence of PW 2 has not been recorded methodically, otherwise the learned trial Judge ought to have recorded specifically at a particular stage that the cross-examination of PW 2 Gautambhai is over, and then endorsement ought to have been there on completion of the examination. After cross-examination by defence counsel, Public Prosecutor is permitted to cross-examine the witness. Questions were never asked as if re-examination is permitted. It was the privilege of the prosecution to treat the witness as hostile to prosecution even after cross-examination on the strength of the version of the witness given during the course of cross-examination. But on careful reading of the proceeding drawn by the Court, when it is clear that cross-examination by the defence counsel was over and only thereafter application exh. 20 was tendered, we are inclined to ignore the irregularity emerging from exh. 18 i.e. deposition of PW 2 Gautambhai. The learned trial Judge, of course, ought to have offered the defence counsel an opportunity to put certain questions to witness Gautambhai even after completion of cross-examination by the Public Prosecutor made on the strength of the order passed below exh. 20. But as it is not possible for us to reach to a conclusion that this has resulted into any way prejudicial to the accused, we treat the deposition of Gautambhai as a complete examination of a witness irrespective of technical flaws and therefore, we have no hesitation in offering the evidence of Gautambhai though there is resistance from the counsel appearing for the accused.

16. The evidence of PW 3 Kanaiyalal Nenuram Sharma leads to one development because he is a witness who was on duty on mobile van and had shifted the injured Gautambhai, Rajendrabhai and Balkrishna to LG Hospital. This witness has not stated that Dakshaben or any other family member had accompanied these three injured but Dakshaben has categorically stated in her deposition that she was also taken by police to LG Hospital. The evidence is clear on the point that Dakshaben was very well present in LG Hospital when PW Gautambhai was taken for treatment and the doctors were examining other two injured Rajendrabhai and Balkrishna. It is in evidence that other relatives and some people residing in the neighbourhood were also there in the LG Hospital and all of them had reached in couple of minutes to LG Hospital. So Dakshaben even if may not have accompanied three injured persons and PW 3 Kanaiyalal Sharma, may have stated correct facts, but this contradiction in evidence of Kanaiyalal and Dakshaben would not go to the root of merit of the case because the evidence available from LG hospital clearly indicates that Dakshaben was treated for the injury sustained by her. Dakshaben has also stated in her deposition about scenario which was there in the hospital at the relevant time. It is not possible for us to say that Dakshaben was not at all an eye witness to the incident and the injury found on her body was either very superfluous or self inflicted. Of course, she is a literate lady and at the relevant point of time was

serving with a private company manufacturing colour Television and electronic articles at Gandhinagar. But it would be too much for us to stretch our imagination and say that by inflicting the injury on her finger, she must have rushed to hospital so that she can pose herself to be an eye witness to the incident. But while evaluating evidence of Dakshaben as an injured witness, the Court is also supposed to concentrate on the formalities and other aspects that are automatically emerging in the background of other set of evidence led by the prosecution. On reading the deposition of PW Dakshaben as well as of Gautambhai, it is clear that husband of PW Dakshaben i.e. Hitendrabhai are six brothers. Eldest Jagdish. at the relevant point of time was residing in Kagwad area of the city of Ahmedabad. Other brothers Rajendra, Balkrishna and Rashesh were residing in bungalow No. 75, the only two storey building in the society where incident occurred. The Avnish society where the incident occurred is having about 100 houses, all twin type of small tenements. In the very society, where victims were having two storey building i.e. bungalow No. 75. P.W. 2 Gautambhai, husband of Hansaben PW 8 was residing separately in bungalow No. 44. According to P.W. 1 Dakshaben, deceased Balkrishna had been to the house of Gautambhai so it was necessary for Balkrishna to pass via bungalow No. 54, that is, bungalow occupied by the accused. It appears that nothing had happened when Balkrishna went to the residence of Gautambhai. It is the prosecution case that when two brothers were returning they were intercepted and assaulted near bungalow No. 54. As mentioned earlier, there is no dispute on the point that quarrel had started first at bungalow No. 54, i.e. bungalow occupied by accused persons. When PW 2 Gautambhai claims that on hearing of shouts, he had rushed to the spot of the incident, suggests one thing clear that as per claim of this witness Gautambhai. he was not in the company of Balkrishna when he was passing bungalow No. 54. Say of Dakshaben is that her two brother-in-laws were out and had been to Gautambhai's place and both were returning to bungalow No. 75 where they were assaulted. But if we look to either exh. 65 complaint which according to the prosecution is the FIR, within the meaning of section 154 of the Criminal Procedure Code, or the entry recorded by PSO, it emerges that all the three brothers were there together when alleged assault was made by the accused. If two brothers had been to the residence of Gautambhai and that too, at 10.30 p.m., for what reason Gautambhai was simultaneously accompanying two other brothers is a question required to be explained by the prosecution. PW 1 Dakshaben has made material improvements while deposing before the Court. Her say is that she witnessed the incident and when she realised that there is some quarrel near bungalow No. 54 between accused and her family members. She came down from terrace because she claims in her deposition that she had been in the bed and for some minutes, she had heard about some hubbub that was going on in the society. It is claimed by this witness that when she got up and tried to see, she saw that her brother-in-law i.e. Balkrishna is being assaulted by accused No. 1 Narayanbhai. She does not state anything about presence of other two brothers, Gautambhai and other brother who had gone to Gautambhai's place. Undisputedly, bungalow No. 75 is

the last bungalow and there is a dead end, is the evidence. As mentioned earlier, while narrating an argument advanced by the learned counsel for the parties that comparatively sufficient quantum of blood was found near bungalow No. 54 and the accused persons had bleeding injuries and one of the injuries on the body of Jitendra was incised wound. This fact suggests that one of the persons from these three brothers i.e. Gautam, Balkrishna and Rajendra must be holding a sharp cutting/edged instrument (weapon). It is also suggested that one of them was holding Dharia. Of course, suggestions have been denied. But the prosecution has not satisfactorily explained that how the incised wound was found on the body of Jitendra, who had other two injuries on his body and how all the four accused had bleeding injuries on their body. It is rightly submitted by Mr. Soni that the prosecution has not explained that what happened to the bat seized by police which was prima facie found stained with blood. There is no FSL report of on examination of bat which was seized. Similar is the situation qua Lathi referred as "Lakdi" in the Forensic Science laboratory's report exh. 72. Exh. 72 is the report in reference to chemical analyses as well as serological examination of Muddamal sent by the Investigating Officer. Dakshaben does not explain anything qua the use of bat, Lakdi or any sharp cutting instrument from any of these three brothers who, according to initial information given to police were together. There is conflict as to the clothes put on by both the deceased as well as Gautambhai. If version of Dakshaben is believed, then it is easy for us to infer that they were prepared and they had put on full clothes. On the other hand, the clothes of the accused persons seized by police indicate that all of them were practically in night dresses. One of that, i.e. accused Jitendra was in Burmada short. It is very likely that passers by three brothers including two deceased and PW Gautambhai may have commented something on accused No. 1 and that comment may have resulted into sudden quarrel. But in such type of quarrel, nobody would have found that weapon that has been seized during the investigation by police in the present case. As per the case of the prosecution and the evidence led. three sharp cutting instruments have been recovered as weapons used by the accused. Two of them were holding knife and one was holding Gupti. The fourth one was holding an iron pipe. This iron pipe is not found stained with blood otherwise, it could have been reflected in exh. 72 i.e. report of the Chemical Analyser, meaning thereby that the pipe may not have been used at all in the incident. The method of seizure of weapon is also not found satisfactory because three weapons have been seized from open area during the course of investigation and therefore, according to us, the evidentiary value of seizure of these weapons should not be equated with any discovery of fact within the meaning of section 27 of the Indian Evidence Act. It appears to be a simple recovery. These weapons are found stained with blood having blood group of the persons injured i.e. Gautam and both the deceased. It appears that all the three brothers have the same group of blood. It is likely that accused persons are also having blood of the same group i.e. group "O". Considering the size of wounds, more particularly length, that were found on the persons deceased as well as Gautambhai, vis-a-vis length of two knives used in the

incident, there was ample scope that the clothes of the accused would have got blood stains from the body of the injured victims. Serological examination does not speak anything about presence of blood of group "A" on the clothes of any of the accused. It is therefore, likely that the incident might have occurred in bit different manner than described by the trial court. Balkrishna had visited the house of Gautambhai found in the version of Dakshaben is an improvement. It is neither reflected in the complaint exh. 65 nor in the Vardhi received by Amraiwadi police station from the hospital. If version of this witness in the complaint is considered, it is clear that all the three brothers were there in the company and they were assaulted when they were near bungalow No. 75, meaning thereby, near their residence. The basic case of the prosecution is that victims were assaulted near bungalow No. 75 by the accused persons whereas Dakshaben claims in her deposition that Balkrishna and his brothers were intercepted by the accused when they were passing through bungalow No. 54. In response to a query raised by us, as mentioned earlier, the learned Additional Public Prosecutor has also accepted that the quarrel had started from bungalow No. 54. The learned trial Judge ought not to have given too much weightage to profused blood found near bungalow No. 75 because it is in evidence of Dakshaben that both the injured brothers who were ultimately declared dead by LG Hospital authorities, were taken to bungalow No. 75 and thereafter, mobile van reached near bungalow No. 75 and they were taken by the police so that the injured can avail medical treatment.

17. Hostility of Hansaben has some relevance according to us because it is in evidence that according to prosecution, this Hansaben is the first person who had informed the police about the incident and sought for help of protection. The police control van was informed about the incident telephonically and in response to that telephonic call only mobile van had taken direction of Avnish society which otherwise might not have been on normal duty. However, this Hansaben is not an injured witness. She is the wife of Gautambhai. How she could witness the incident and how she was able to make a telephonic call to the police control is a question which could have been explained by this witness Hansaben. It is not the say of PW 2 Gautambhai that he was the person who unfolded the incident to Doctor Firoz or to Doctor on duty. Other two injured were declared dead. The prosecution could not examine Dr. Firoz as he was out of India, but it is possible for us to infer that unless Dr. Firoz is informed about the incident, he could not have asked the hospital duty police official about details of the incident. Only Dakshaben or Hansaben might have unfolded the story to Dr. Firoz. When PW 1 Dakshaben claims that she had been to hospital, she was there in the hospital immediately after the incident, then it would not be improper to infer that this information must have been given to either Dr. Firoz or hospital duty police either by Dakshaben or by Hansaben or by any of the family members who had witnessed the incident.

18. (i) Non-examination of other two witnesses, that is, two young girls who were there and it is in evidence that one of them had sustained injury also, she

could have been taken to hospital. Necessary medical certificate could have also been obtained and this witness being a material witness could have been examined by the prosecution. Dakshaben does not disclose anything about presence of any of these two girls i.e. Toral and Lina and the fact that one of them, i.e. daughter of deceased Rajendra had sustained the injury in the incident.

(ii) After hostility shown by PW Gautambhai on one of these two witnesses, more particularly injured girl, could have thrown some light. When document exh. 64 discloses that Gautambhai and both the deceased were there together when incident occurred, then version of Dakshaben should be viewed with doubt that two brothers had gone temporarily to the residence of Gautambhai for socialising at 10.00 to 10.30 p.m. with Gautambhai and his family. Thus, there is clear conflict or inconsistency in the version of Dakshaben and Gautambhai about arrival of Gautambhai during occurrence.

(iii) It emerges that Dakshaben has not witnessed the incident or at least initiation of the quarrel and therefore, she was tempted to improve during her examination in the Court as to how quarrel started and where started. The basic story of the prosecution is that Gautambhai and two deceased were assaulted when they were near bungalow No. 75 (exh. 65 and exh. 64) and the case placed before the Court while leading evidence is that quarrel had started near bungalow No. 54, is a material contradiction. The learned trial Judge ought not to have ignored this conflict in the background of the fact that all the four accused persons had received injuries. There is enough force in the argument of Mr. Soni that injuries that were found on the body of the accused persons are of the nature that can be caused by use of some weapon and therefore, the prosecution could have explained how these injuries were there on the body of the accused. Non-explanation of the injury is not found always fatal. As per settled legal position, in all cases, the prosecution is not supposed to explain injuries on the body of the person accused, but injuries are bleeding injuries or otherwise visible injuries and there is material conflict as to the actual occurrence and sequence of happening, then the Court is supposed to consider that what attempts have been made by the prosecution to explain injuries on the body of the persons accused. It is rightly submitted that if Dakshaben was really an eye witness of the entire incident, she could have stated clearly about the persons with stick and using sharp cutting instrument by any of these three, may be Gautam or any of the two deceased. It is not possible for us to observe that incised wound found on the body of Jitendra was self inflicted injury because as mentioned earlier, the accused persons had been to police station immediately after the incident, they had obtained police yadi and thereafter they reached LG Hospital. It is in evidence of police witness i.e. Police Inspector that to avoid conflict in the hospital between two groups, two accused persons were sent to Civil Hospital for treatment. The prosecution ought to have disclosed before the Court formally that what facts were disclosed by the injured persons, more particularly accused No. 1 when they had been to Amraiwadi police station for getting police help and Yadi so that they can get treatment under Medico-Legal case. This material

document has been suppressed like FIR of the cross case as observed earlier while referring the submissions made by Mr. Soni for the appellants-accused. The clothes of the accused are having blood stains but the blood is of their body as they had bleeding injuries. Even acquitted accused Shardaben was having blood stains on her clothes. It is very likely that while helping her husband and sons, she might have received these blood stains. No role has been attributed, specifically by any witness to the acquitted accused Shardaben. No mark of violence or injury were found on the body of Shardaben. It appears that other side had lost two persons. Investigating agency tried to lean in favour of the family of two victims and therefore, only the material explanation as to seizure of the weapon, detailed map of the society, facts disclosed by the accused persons etc. have not been placed on record of this case. It clearly emerges that the prosecution witnesses and even investigating agency have admitted to have suppressed genesis of crime. Mr. Soni has placed reliance on number of judgments on this point and it is rightly submitted that document exh. 65 ought not to have been looked into as FIR while evaluating evidence of Dakshaben because register maintained by police LG Hospital or Amraiwadi police station i.e. exh. 64 taken up by PSO at 0.20 hours disclosed each detail of the incident. The report recorded by PSO gives complete narration and disclosure of cognizable offence. It was reduced in writing. It is not necessary that such information should be given by either victim or by complainant side. The information reflected in this document exh. 64 does not appear to be either cryptic information or hearsay information by a third party. So, the ratio of the judgment relied upon by Mr. Jani would not help the prosecution. On the contrary, observations made by Apex Court in the case of Ramsinh Bavaji Jadeja Vs. State of Gujarat, relied on by Mr. Soni would help the defence side.

19. Close reading of oral version of PW Dakshaben is indicative of one fact that she was not telling whole truth before the Court, otherwise, she would not have stated that she is not even aware that her brother-in-law Balkrishna serving as a stenographer at Gandhinagar is in which Government department and she is not aware about it because she herself was serving at Gandhinagar. This witness was not a newly married wife in the family. She was with the family since more than 20 years. She has also shown ignorance whether her brother-in-laws, i.e. younger brother of her husband and elder brother of her husband (Diyer and Jeth) as well as her husband are accused in number of complaints registered in Astodia police station. True it is that the accused could have brought certified copies of the complaint, but when this witness has not denied suggestion about the complaints registered against practically three members of the family, is indicative of at least one fact that the quarrel that had taken place on the date of incident must not be a new thing for them. She has admitted a suggestion made during the course of cross-examination that her brother-in-law Jagdishbhai and one Nainesh Bhatt had a quarrel and there were cross complaints and the police had registered the offence punishable u/s 307 of the Indian Penal Code. This witness has admitted that her family and more particularly her brother-in-laws

are politically leaning towards Congress party but she has shown ignorance whether they were involved in an assault on a procession taken out by winning candidate in the election of Municipal Corporation, one Mr. Harin Pathak. She has also shown ignorance as to whether any formal complaint was registered in Astodia police station against them or not. She has admitted that accused No. 1 was handling the activities of RSS in Avnish society. Certain crucial aspects that this witness either could have denied or admitted have been replied in the manner that the Court can get an impression that she is not willing to tell the whole truth. True it is that criminal background of a victim is not relevant and on such count, the accused could not be given advantage of such situation, but when evidence of an eye witness needs close scrutiny, the conduct of a witness and each answer given by such witness needs to be concentrated. At the time of accepting some part of evidence of such witness, the Court should be more cautious and therefore, at initial stage of her deposition, her demeanour recorded by the Court automatically gets relevance. Her abnormal conduct in the witness box was perhaps considered by the Court that she must have been given some threat by the other side. It may be true or it may not be true, but the manner in which the accused No. 2 has given complete go-bye to the earlier version given by PW 2 in examination-in-chief, it appears that PW 1 Dakshaben made material improvements so that the accused can be posed as assailants in the entire incident. When the learned Additional Public Prosecutor Mr. Jani, in response to our query, accepted that quarrel initially had begun at bungalow No. 54, then the presence of all the three brothers at the spot of incident at the doorstep of bungalow No. 54 changed the entire picture significantly. It is possible to infer that it must be three against four. Age of accused No. 1 obviously gets relevance including clothes put on by the accused persons at the relevant point of time. It appears that they must have been taken by surprise and therefore, only they may have started retaliating against all the three brothers i.e. Gautambhai, Balkrishna and Rajendra. When the learned trial Judge has decided to acquit the accused No. 5 Shardaben and when it emerges that she was not a party as member of unlawful assembly, she was included in the set of accused. This conscious effort makes the say of prosecution witnesses Dakshaben and Gautambhai more doubtful. It appears that as family of Gautambhai and Balkrishna being active in politics and aware about court proceedings, they might have decided to implicate Shardaben in the offence so that a grave offence punishable under sections 143, 144, 147, and 149 of the Indian Penal Code can be registered by police. It appears that the police has not acted objectively while charge-sheeting all the five accused by placing entire set of documents and details of FSL report, if any, in cross case in the trial against the present accused persons. Transparency requires to be shown by the investigating agency at each stage of investigation and it appears to be lacking to some extent in the present case.

20. FSL examination report and physical examination indicate about cut marks that were there on the clothes of both the deceased allegedly to be of victim

side. But there is controversy as to victim side had put on all the clothes. The cut marks show that victim side had put on full clothes as discussed earlier and on the other hand as mentioned by us, the accused were not even properly dressed and they were in the clothes as if they were ready to go to their beds. The learned trial Judge has given inappropriate weightage to the words of Dakshaben about the visit of deceased at the house of PW 2 and the evidence that they were returning after socialising. This part of evidence as discussed earlier, is found materially improved considering exh. 64 as FIR and this was not even the case of Dakshaben when her first statement, that is, exh. 65 came to be recorded when she was in the hospital. Some facts of cross case also have been considered impliedly by the learned trial Judge for reaching to a conclusion in the present case, that has resulted into gross error and incorrect finding of fact.

21. While accepting version of injured eye witness Gautambhai PW 2, after his hostility, his convenient absence from the Court for unreasonable period, is not required to be ignored. True it is that he may be trying to settle the case out of Court with the accused or he may have some apprehension about his own conduct/guilt in the cross case in which he was the accused. So before exposing himself to a cross-examination of the defence counsel, he may have attempted to see that deposition of witness in cross case registered against him are recorded. In absence of documents, it would not be possible for us to comment on this aspect and it would not be safe to make any comment as to the method of conducting trial in cross case, otherwise we could have made some observations in this regard. But it would not be appropriate at all to comment on this aspect on some oral submissions made by the learned counsel appearing for the parties more particularly of Mr. Soni appearing for the appellants. It is very likely that learned APP Mr. Jani may have tried to obtain a copy of the proceedings of the cross case and FIR also, but till date, the same is not made available to us.

22. Non-examination of independent witness is also one of the points, which needs consideration because it is in evidence that on account of quarrel or say fight between the two small groups, people from the society had gathered. It was 10.30 p.m. and that too, in summer days. It is in evidence that most of the people in the society were stretching their beds on terrace. So it was possible for the prosecution to bring cogent evidence as to which party was the real assailant or how the incident occurred, how it started and which event had occurred immediately prior to the incident. It appears that investigating agency has not attempted to lift curtain on this entire aspect. All these facts situation, emerging from the evidence led by the prosecution was required to be considered in the background of the decisions cited by the defence counsel while submitting before the trial Judge that the prosecution witnesses have tried to suppress genesis of the crime.

23. It is not necessary to refer and discuss the decisions cited by Mr. Jani whereby he has attempted to point out that the learned trial Judge was legally

right in accepting the evidence of PW 2 Gautambhai though he was declared hostile because evidence of hostile witness even can be read and considered by the trial court, if the Court is able to find that set of evidence as trustworthy. But the observations made by the Apex Court in the case of Lakshmi Singh and Others Vs. State of Bihar, shall have some bearing on the facts of the present case. This decision has been referred in one comparatively recent decision of the Apex Court in the case of Shaikh Majid and Another Vs. State of Maharashtra and Others, where Apex Court has dealt with the aspect, where the prosecution witnesses failed in explaining injuries on the body of the persons accused. It would be beneficial to reproduce the relevant paragraphs of the judgment reported in the case of Shaikh Majid and Another Vs. State of Maharashtra and Others, :

"9. In Mohar Rai case it is made clear that failure of the prosecution to offer any explanation regarding the injuries found on the accused may show that the evidence related to the incident is not true or at any rate, not wholly true. Likewise, in Lakshmi Singh case, it is observed that any non-explanation of the injuries on the accused by the prosecution may affect the prosecution case. But such non-explanation may assume greater importance where the defence gives version which completes in probability with that of the prosecution. But where the evidence is clear, cogent and credit worthy and where the court can distinguish the truth from falsehood, the mere fact that the injuries are not explained by the prosecution cannot by itself be a sole basis to reject such evidence, and consequently, the whole case. Much depends on the facts and circumstances of each case. These aspects were highlighted by this Court in Vijayee Singh and others Vs. State of U.P., .

10. Non-prosecution of injuries by the prosecution will not affect the prosecution case where injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it outweighs the effect of the omission on the part of the prosecution to explain the injuries. As observed by this Court in Ramlagan Singh and Others Vs. State of Bihar, the prosecution is not called upon in all cases to explain the injuries received by the accused persons. It is for the defence to put questions to the prosecution witnesses regarding the injuries on the accused persons. When that is not done, there is no occasion for the prosecution witnesses to explain any injury on the person of an accused. In Hare Krishna Singh and Others Vs. State of Bihar, it was observed that the obligation of the prosecution to explain the injuries sustained by the accused in the same occurrence may not arise in each and every case. In other words, it is not an invariable rule that the prosecution has to explain the injuries sustained by the accused in the same occurrence. If the witnesses examined on behalf of the prosecution are believed by the court in proof of guilt of the accused beyond reasonable doubt, question of obligation of the prosecution to explain injuries sustained by the accused will not arise. When the prosecution comes with a definite case that the offence has been committed by the accused and

proves its case beyond any reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and under what circumstances injuries have been inflicted on the person of the accused. It is more so when the injuries are simple or superficial in nature. "

24. One another judgement in the case of Dattu Shamrao Valake and Another Vs. State of Maharashtra, cited by Mr. Soni is also found relevant. Facts of the cited decision are bit different but the following observations made by the Apex Court, according to us, are relevant, wherein the Apex Court has stated:

"18. What remains is the fact that the injuries were caused to some of the accused which remained unexplained. Whereas the accused No. 1 received a minor injury viz., contusion over left fore-arm 2"xl", the injuries received by accused Nos. 2 and 3, though simple, are fairly severe. Accused No. 2 had received an axe injury and accused No. 3 had received an injury with some other dangerous object such as cycle chain. One person by name Sadashiv suffered a lacerated wound over occipital region, scalp deep with a fracture of skull. According to the appellants, he was their associate. He was examined by the Medical Officer-PW5. There was no explanation for these injuries received by the accused and some others in the course of the same incident. In fact, the incident as such has not been denied by either of the parties. It is not possible to say with reasonable certainty as to which party provoked the other and how the fight was initiated. In the circumstances, a reasonable inference based on a high degree of probability could be drawn that there was a sudden quarrel and free fight between the parties. The attack by the appellants on the prosecution party in the course of this fight cannot be said to be a premeditated affair. It is not the prosecution case that the accused anticipated the arrival of the prosecution party and they were lying in wait to cause harm to the deceased. Though A-I had a fire-arm, he did not use it against the deceased. He fired a shot or two in the air. After that there is nothing to show that he tried to reload and use it against the deceased. In fact initially only one accused was having an axe. It is only later on that the accused No. 4 is alleged to have joined the fight armed with an axe which is also indicative of the fact that there was no preconcert amongst the accused to attack the members of the prosecution party. Though he is alleged to have attacked PW-10 with an axe, no severe injury was inflicted on PW-10. Above all, the incident was a short duration and the accused fled from the scene immediately after the fight. These events could probabalize the fact that there was no premeditation and the attack was in the course of free fight. There is, therefore a case to apply Exception 4 to Section 300 provided the ingredients of the last clause that is to say, "without the offender having taken undue advantage or acted in a cruel or unusual manner" are satisfied. There is no difficulty in holding that the offenders have not taken undue advantage of the situation. Both parties, who were armed, engaged themselves in a fight and both inflicted injuries against the other.

19. The only doubt that arises is whether A-3, in causing three axe injuries to the

deceased-Bajirao, acted in cruel manner? In examining this point, we have to take note of the fact that A-3 (2nd appellant), in spite of having an axe with him, had suffered quite a severe injury viz., contusion of 8"xl" over chest which could have been caused, according to the Doctor, by an object like cycle chain. It is not possible to say at what stage A-3 had received such injury. At any rate, there was no clarification bearing on this aspect from the prosecution side. The deceased-Bajirao was wielding an axe. The 2nd appellant, probably already injured, might have become apprehensive that he would be attacked by Bajirao with the axe. Though three injuries were noted, they are all on the left parietal region causing the fracture of skull bone. Looking at the nature of injuries, it is quite possible to say that all the injuries would have been caused by one or two axe blows, but not necessarily three. In fact, PW-6 states in cross-examination that she had seen one axe blow being given by accused No. 3 on the neck of Bajirao. No doubt he had used excessive force against Bajirao by causing injury with the axe on a vital part, may be more than once. However, taking an overall picture, we cannot say beyond doubt that the 2nd appellant acted in a cruel or atrocious manner by attacking the deceased with the axe once or twice. We are, therefore, not inclined to deprive the 2nd appellant of the benefit of Exception No. 4. At the same time, we are of the view that it would be appropriate to convict him under Part I of Section 304, IPC because having regard to the gravity of the injuries caused with a dangerous weapon, each one of which was fatal, the 2nd appellant must be imputed with the intention to cause such bodily injury as was likely to cause death, if not the intention of causing death. Accordingly we convict the 3rd accused-appellant No. 2 u/s 304, Part I and we are of the view that in the circumstances, a sentence of eight years" R.I. and fine of Rs. 1,000/- would be sufficient. In default of payment of fine, appellant No. 2 will suffer imprisonment for four months. "

25. On case factually similar to the present one before us is of Rajasthan High Court and in the case (Abdulkhan vs. State of Rajasthan) reported in 2007(3) Cri LJ, 2671 Rajasthan High Court, referring the decision of Laxmi Singh (Supra) and other number of decisions has observed that:

"36. The Apex Court in Laxman Singh Vs. Poonam Singh and Others, held that number of injuries is not always a safe criteria for determining who was the aggressor. It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probalilises the version of the right of private defence.

37. Recently, in Vajrapu Sambayya Naidu and Others Vs. State of A.P. and Others, , three accused persons received injuries in the same incident. The prosecution failed to explain the said injuries. The Apex Court, on facts held: "Accused could not be said to be the aggressors, if at all it was the prosecution party which could have attempted to dispossess the accused appellants by use of

force. "

39. In *Triloki Nath and Others Vs. State of U.P.*, the Court held (para 66), "No decision relied upon by the appellants lays down a law in absolute terms that in all situations injuries on the persons of the accused have to be explained. Each case depends upon the fact situation obtaining therein. "

40. Recently in *Jalaram Vs. State of Rajasthan*, the contention with respect to the non-explanation of the injuries on the person of the accused was raised. Considering the material on record the Apex Court found that it was a case of exceeding the right of private defence, thus convicted the accused appellant of offence u/s 304(1) instead of S. 302. I.P.C.

41. Upon a conspectus of the decisions of the Apex Court, we are of the view that it is a misnomer that ratio laid down in *Mohar Rai and Bharath Rai Vs. The State of Bihar*, does not hold good. The broad proposition laid down, in the said case has been provided bounds by way of explanation given in three Judges Bench in *Vijayee Singh and others Vs. State of U.P.*, and later on in *Rajendra Singh and Others Vs. The State of Bihar*, . Thus, it emerges that in a case where the accused has sustained injuries grievous in nature, caused in the same course of occurrence and the prosecution fails to explain the injury, the Court is supposed to put itself on guard, and make an effort to search out the truth, how much the prosecution case was proved beyond reasonable doubt and was worthy of being accepted as truthful. Non-explanation of injuries assumes greater significance when the evidence consists of interested and partisan witnesses. It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption much necessarily be raised that accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probablises the version of the private defence. Even if it is found to be a case of right of private defence. It is further required to be considered, it is a case of exceeding the right of private defence. "

True it is that the decision of Rajasthan High Court has only persuasive value, but when the ratio is found based on number of Supreme Court judgments, the same is required to be looked into consciously and the judgment of other High Court normally should not be ignored by making one line observation that the same has only persuasive value. Ultimately our country having federal structure should try to keep maximum harmony so far as legal principles and therefore, while dealing with the judgment of other High Court, a High Court needs to consider the principle propounded by other High Court and the aspects taken into consideration while propounding or reiterating the principles of law sensitively. This is a case where the prosecution has failed in explaining the injury on the body of the persons accused. It is not possible for us to agree with the findings recorded by the learned trial Judge that the injuries on the body of the persons accused were minor and superfluous, and therefore, non-explanation of these injuries would not come in the way of the case of the prosecution and the

evidence of prosecution witnesses, that is, Dakshaben and Gautambhai is not required to be ignored. It appears that the learned trial Judge has more concentrated on the medical evidence led by the prosecution indicating injuries that were found on the body of both the persons deceased. True it is as mentioned earlier while recording submissions of Mr. Jani that these injuries were grave and of serious nature. Successive blows may have been inflicted on both the deceased and therefore, the learned trial Judge has rightly held that this is a case of culpable homicide and it is possible to infer the intention and/ or knowledge that injuries that are being inflicted may cause death. But when one of the victims, out of these three brothers, appears to be holding a sharp cutting instrument and other two at least Lakdi and Danda in their hand, capable of causing serious injuries and these weapons were actually used, and indiscreet retaliation may have resulted into unfortunate death of two. It is the experience of the society and even of courts that in number of cases, real assailants suffer more than their assessment. So death of two by itself would not make the case of the prosecution stronger or defence version weak because the accused are required to be linked with the offence keeping in mind the nature of evidence led by the prosecution.

26. The crucial question which has cropped up in our mind is whether it was possible for the learned trial Judge to apply principle of minimum liability as the element of common intention is missing. There was nothing like unlawful assembly as it was a sudden event and the quarrel had started from bungalow No. 54 occupied by accused persons. The accused persons have been held guilty of the charge of offence punishable u/s 34 of the Indian Penal Code read with graver offence found proved by the trial court. But it appears that the evidence as to the incident is not found sufficient to infer that the accused were sharing common intention. It is not necessary for us to cite any decision that in what set of facts, the Court can safely infer a common intention. Here, the quarrel may be between one against one, because on one side, there were three persons i.e. two deceased and one Gautambhai and on the other side four. One person having knife may have inflicted injuries in retaliation to one of the deceased and the other accused may have concentrated during retaliation on the other person, that is, second deceased. Third one may have taken care of injured Gautambhai and 4th one may be providing cover to other three so that they can be saved from grave injuries with some hard and blunt substance. This probability emerging automatically from the evidence oral as well as documentary, has not been considered as one of the strong probabilities.

27. It is settled that it is not necessary for the accused to plead a specific defence that he should be given advantage of private defence and court may acquit him. It is the duty of the Court to appreciate the evidence from all possible angles and all probabilities are required to be looked into. Self defence was specifically pointed out by the defence counsel during the arguments advanced. The learned trial Judge has discussed this submission in detail. We have carefully gone through the judgment under challenge. But it appears that

the learned trial Judge has not considered whether accused can be held responsible for any lesser offence than punishable u/s 302 of the Indian Penal Code. Each case of culpable homicide may not be a murder. According to us, the ratio of the decision laid down by the Apex Court in the case of Laxman Sing (Supra) and other decision one of Apex Court in the case of Shaikh Majid and another (Supra) reported in JT 2008 (1), 640 and in the case of Abdul Khan and others vs. State of Rajasthan of Rajasthan High Court would be applicable in the present case. If the document exh. 65 is taken out from the documentary evidence led by the prosecution and weightage given by the trial Judge of a complaint within the meaning of section 154 of the Indian Penal Code and could have read the report recorded by PSO, Amraiwadi police station exh. 64 to evaluate oral version of Dakshaben in appropriate perspective, then the Court perhaps would have reached a different conclusion than recorded at the end of the trial.

28. It is not necessary to mention the nature of injuries that were found on the body of the deceased because they were fatal and grave injuries. When an accused exceeds his right to private defence, then he could be held guilty of offence punishable u/s 304 part-I is the settled law. The present case falls within exception of section 300 of the Indian Penal Code and therefore, the accused are required to be held guilty of the offence of the charge punishable u/s 304 part I of the Indian Penal Code. The conviction recorded for the offence punishable u/s 324 does not require interference because there was no need to inflict injuries to at least Dakshaben. Ultimately she may have attempted to intervene in the quarrel at a later stage. She may have turned violent or furious after seeing three of her family members with bleeding injuries.

29. As discussed earlier it would not be either safe or legal to link the accused with crime punishable u/s 34 of the Indian Penal Code, but as accused are found to have abetted each other during retaliation of the assault that may have been made on them, suddenly on account of enemical terms that were prevailing between two families. According to us, principle of minimum liability would not apply in the present case and as such there is no positive cogent evidence that who are the actual authors of fatal injuries inflicted on both the deceased. There is no detailed convincing evidence on this aspect. This is missing since beginning.

30. None of the witnesses are found to have been believed by the trial Judge on the point that at what point of time, the accused persons had overpowered both the deceased and out of injuries that were found on the body of the persons deceased, how many injuries were inflicted when all three were at bungalow No. 54 and which major injuries were inflicted after they reached to bungalow No. 75 because it is in the evidence of Dakshaben that before arrival of mobile van, injured persons were shifted to bungalow No. 75. Presence of blood at bungalow No. 75 appears to be on account of presence of injured persons at bungalow No. 75 till mobile van lifted them so they can be shifted to hospital for treatment. The blood stained thread collected by police during investigation does not add

any way to the case of the prosecution because this evidence simply shows the presence of blood of group "A" practically at all places including bungalow No. 54. This does not rule out the probability of self defence advanced by the accused. It is clear from the evidence that this is a case where the accused could have pleaded right of private defence and they have pleaded so, but the same is not found considered by the learned trial Judge in appropriate perspective while evaluating the evidence and the submission made before us de novo in exercise of powers conferred in the Court u/s 386 of the Criminal Procedure Code, we find that this is a case where right of private defence could have been pleaded, but it is also clear that accused have exceeded their right of private defence, so they do not deserve acquittal. But they can be held guilty for the offence punishable u/s 304 part I read with section 114 and section 324 read with section 114 of the Indian Penal Code.

31. There is no appeal against the order of acquittal qua offence punishable u/s 307 of the Indian Penal Code so it is not necessary for us to discuss this aspect.

32. In view of the discussion and the evidence available against original accused No. 5 who is respondent of the appeal preferred by the State of Gujarat, we are of the view that acquittal recorded by the learned trial Judge of accused No. 5 is legal and is not required to be interfered with at all. On the contrary, it appears that she was implicated in the offence merely because her clothes were found with some stains of blood at the time of arrest of the accused persons. The arrest panchnama of the accused persons when was drawn (exh. 68) immediately on the next day morning between 6.30 a.m. and 7.30 a.m. is indicative of one fact that the injuries on the body of the persons accused were bleeding injuries, they were visible injuries and one i.e. accused Jitendra had bandage on his head. Even after applying bandage on injuries, he was bleeding from the injuries sustained by him. This arrest panchnama ought to have been considered appropriately though there was no injury certificate available for consideration as they were not exhibited and received in evidence. But today, on the strength of the statement made by the learned counsel for the accused, we can consider the injury certificate produced with the list exh. 11 as they were tendered in evidence by prosecution itself and a proved document, that is, arrest panchnama exh. 68 was very well there on record and on the strength of this salient feature, we decided to evaluate the entire evidence de novo and re-write the judgment in accordance with law.

33. For the reasons aforesaid, we are of the view that the accused deserve acquittal from the offence punishable u/s 302 of the Indian Penal Code. The learned trial Judge ought to have held the accused guilty of the charge of offence u/s 304 part I of the Indian Penal Code because this is an incident that had taken serious mode from a sudden quarrel where the accused exceeded their right of private defence. So conviction recorded by the learned trial Judge requires to be modified accordingly. According to us, the accused have committed offence of culpable homicide not amounting to murder punishable u/s 304 part I read with

section 114 of the Indian Penal Code and all of them are required to be punished for the offence punishable u/s 304 part I read with section 114 of the Indian Penal Code. According to us, in such an incident, it is not possible for the accused to carry a common intention. So, the conviction recorded by the learned trial Judge u/s 34 of the Indian Penal Code also does not appear to be logical or legal and requires to be altered accordingly. In view of the above, Appeal No. 831 of 1999 filed by the appellants-accused is partly allowed. All the accused are declared acquitted for the offence punishable u/s 302 of the Indian Penal Code. The appellants-accused are also ordered to be acquitted from the charge of offence punishable u/s 307 of the Indian Penal Code. However, they are held guilty for the offence punishable u/s 304 part-I read with section 114 of the Indian Penal Code and they are ordered to undergo rigorous imprisonment for 10 years. No alteration is made qua quantum of fine imposed by the trial court.

All the accused persons are held guilty of the charge of offence punishable u/s 324 read with section 114 of the Indian Penal Code and for this offence, they are sentenced to undergo rigorous imprisonment for six months. Both the sentences are ordered to run concurrently. The sentence already undergone by the appellants-accused shall be given set off. The accused are also fined for the said offence as observed by the learned trial Judge. No alteration is required to be made qua imposing of fine for the offence punishable u/s 324 read with section 114 and also finding of disposal of Muddamal articles. The appellants-accused are ordered to be set at liberty forthwith if not required to be detained in any other offence.

Criminal Appeal No. 1125 of 1999 filed by the State of Gujarat challenging acquittal of accused No. 5 Shardaben Narayanbhai Bhosle obviously, in view of the discussion aforesaid is dismissed. Direct service is permitted.