

(2013) 12 GUJ CK 0045
In the Gujarat High Court

Case No : Criminal Appeal No"s. 2106 and 2740 of 2008

Osman Aliyas Bhagaad and Others

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 16-12-2013

Acts Referred:

Citation : (2013) 12 GUJ CK 0045

Hon'ble Judges : Z.K. Saiyed, J; Akil Kureshi, J

Bench : Division Bench

Advocate : H.S. Tolia for Mr. Aftabhusen Ansari, for the Appellant; Maithili Mehta, APP, for the Respondent

Final Decision : Dismissed

Judgement

Akil Kureshi, J.—These appeals arise out of judgment dated 15th May 2008, rendered by learned Additional Sessions Judge, Khambhaliya, in Sessions Case No. 82/05. Originally there were 10 accused. They were all charged with offences punishable under sections 302 and 120B read with section 149 of the Indian Penal Code, under sections 143, 147, 148 read with section 149 of the Indian Penal Code, u/s 323 read with section 149 of the Indian Penal Code and u/s 135(1) of the Bombay Police Act. During the trial accused Nos. 1, 8 and 10 died. Remaining accused were convicted and sentenced to life imprisonment. They therefore preferred these criminal appeals. During the pendency of these appeals, accused No. 9 died. Qua him, therefore, Criminal Appeal No. 2106 of 2008 abates. We are, therefore, concerned with original accused Nos. 2 to 7. Briefly stated, the prosecution version was that original accused belong to clans of fishermen community, viz. Gandhar family and Bhagad family. These families had disputes and quarrels with the Sanghar clan of fishermen of the same region. Previously, there were cross cases of murders. Their disputes had also led to cross allegations of setting fishing boats on fire. On 20th May 2005, three brothers, Adam Dawood, Karim Dawood and Hussain Dawood had to appear before a criminal court at Khambhalia in connection with one of the boat burning

cases. They were accompanied by their brother-in-law Salemohmed, PW-3 who was also accused in the same case. Their sister, Zarina Arifbhai, PW-2 had also come to meet them. After the court proceedings, the three brothers, Salemohmed and Zarina left Khambhalia and reached Salaya cross-roads where they stopped. At 5 "O clock, in the evening, when the said three persons, their sister Zarina and their mother Zulekhaben were sitting by the road side at the cross-roads, and Salemohmed and their advocate Manek were at a pan-shop, ten accused arrived there armed with deadly weapons, such as, knives, swords, pipes, dhoka, etc. and assaulted the three brothers Adam Dawood, Karim Dawood and Hussain Dawood repeatedly with such deadly weapons. At that time, Zarina, their sister tried to intervene but was pushed away and was given a blow with a stick. All the 10 accused immediately left in a chhakdo rickshaw in which they had come. The three injured persons were shifted to Community Health Center at Khambhalia where all the three died in a short while. The accused were therefore, under charge Ex.17, charged with offence punishable under sections 302, 323, 143, 147, 148, 149 read with section 120B of the Indian Penal Code and u/s 135 of the Bombay Police Act.

2. Zarinaben Arifbhai, PW-2, Ex.73, deposed that about 2? years back, her nephew Juma Adam was murdered by the Gandhar and Bhagad families of Salaya. They were headstrong people. The four brothers and sisters had therefore, shifted from Salaya to Arambhda village. The incident took place about 1? years back when she had gone to meet her brothers at Khambhalia where their case of fishing boat burning was fixed for hearing on that day. They stayed at Khambhalia till about 4.30 p.m. After adjournment of the case, she along with her three brothers, brother-in-law, Salemohmed, an advocate from Dwarka and her mother reached Salaya crossroads in two autorickshaws. At Salaya cross-roads, they were waiting for the bus. They were sitting at a tea-stall. Salemohmed and the advocate went to a pan shop for pan and tobacco. She herself, her mother and her three brothers were still sitting. At that time, a chhakdo rickshaw came from Salaya carrying 9 to 10 persons with deadly weapons. They started beating her brothers repeatedly with their weapons. They had weapons, such as knives, swords, pipes, axes, and dhokas. She gave description of different weapons carried by different accused, such as knives, dhokas, axe, pipe, etc. They started giving blows repeatedly to her brothers. She started screaming and tried to intervene. She was pushed away. She got hurt on the right hand. After that all the accused went towards Salaya in the rickshaw. She identified all the accused before the Court by names. She also identified the weapons used at the time of the incident.

She further deposed that many people gathered at the spot. Her brothers Karim Dawood and Hussain Dawood were taken to hospital in a rickshaw. Thereafter, ambulance and police arrived. Her brother Adam Dawood was still lying there. In the ambulance, she, her mother and Salemohmed carried him to the hospital.

At the hospital, doctor after examining, declared Adam Dawood dead and started

treatment of Karim Dawood and Hussain Dawood. A little while later, the doctor came and said that Karim Dawood had also died. They tried to shift Hussain Dawood to Jamnagar Hospital in an ambulance, but in the ambulance itself Hussain Dawood died. After the death of Hussain Dawood, FIR was recorded.

According to the witness, due to previous quarrels and the animosity, the incident had taken place.

In the cross-examination, she agreed that quarrels were going on between Bhagad family and Sanghar family since long. One Musa Kasam of Gandhar family was killed in which some people of Sanghar family were shown as accused. She agreed that murders of Musa Kasam and Juma Adam took place on the same day.

In the Khambhalia court, she met her brothers under a banyan tree. At about 3 O' clock, the advocate informed that the case was adjourned. She was carrying lunch in a tiffin box from which all of them ate.

At the tea-stall where she and others were sitting on the date of the incident, there was a temporary shed from where the pan shop was situated about 30 feet away. When the rickshaw (carrying the accused) arrived, her brothers and mother were sitting right next to her. The passengers from rickshaw got down and without saying anything started giving blows. The engine of the rickshaw was kept on at that time. The incident lasted for about 5 to 10 minutes. As soon as the assault was over, the assailants returned in the same rickshaw.

She reiterated that she had seen the accused assaulting her all the three brothers. She also gave the description of the nature of blows given by them to different persons. However, with respect to which persons were assaulting Karim Dawood and Hussain Dawood, she could only say that they had surrounded them and were giving random blows but could not precisely state as to which accused gave which blows on these persons. She stated that after the assault was over, Salemohmed and advocate Manek came to the spot. The intestine of her brother Hussain Dawood had come out. A piece of cloth which she was wearing was used to wrap it around his stomach. To the doctor at the hospital, she had disclosed that 8 to 10 people had carried out the assault. She was pushed away by Osman Aliyas.

The first information report lodged by Zarinaben, PW-2 was produced at Ex.164. The police started recording the complaint at 18.05 and was completed at 19.10. In the FIR also, the complainant referred to the murder of her nephew Juma Adam and migration of the family from Salaya to Arambhda. She had gone to Khambhalia court on 20th May 2005. While coming back from the court in two auto-rickshaws, they stopped at Salaya crossroads. Her three brothers, herself and her mother was sitting at a tea-stall, while her brother-in-law Salemohmed and advocate Manek had gone to a pan shop when 9 to 10 people in a chakda rickshaw came where they were sitting. Before they could understand what was going on, these people got down with weapons such as, knives, swords, pipes,

axe and dhoka and started assaulting her three brothers repeatedly. She gave the names of all the accused and the respective weapons which they were carrying. After the assault, these persons went back towards Salaya in the same rickshaw. Her brothers were shifted to the hospital where one after another, all three died. As per report Ex.157 u/s 157 of the Criminal Procedure Code, the incident took place at 17.00 hours and was declared at 17.20 hours.

3. Salemohmed Subhaniya, PW-3, Ex.93 was supposed to be another eyewitness. He deposed that he lived at Arambhda village with his family. On the date of the incident, he along with his brothers-in-law Adam Dawood, Karim Dawood and Hussain Dawood travelled to Dwarka by bus where they met advocate Manek. They reached Khambhalia by bus at about 11.30 from where they travelled in an autorickshaw to the court at Khambhalia and reached their at about 12 O'clock. They had come to the court in connection with the boat burning case. At the court they met his sister-in-law Zarinaben and mother-in-law Zulekhaben. They were in the court till 3.30 p.m. After the recess, the case was adjourned. They then hired two rickshaws and reached Salaya crossroads and got down at a tea-stall. He and advocate Manek went to get pan and tobacco. Rest of the people sat at the tea-stall. This was at about 5 O'clock in the evening. When he was at the pan shop, there was shouting at the place where his brothers-in-law and others were sitting. He heard his mother-in-law and sister-in-law screaming for help. He saw that the deceased were being assaulted on the head, in the stomach, etc. He was too scared to go near. He saw Bachu Hassan had a pipe, Amin Hassan had an axe, Razak Musa had a sword, Osman Alias was carrying a dhoka, rest of the accused were carrying knives in their hands. All these persons were assaulting Adam Dawood, Karim Dawood and Hussain Dawood. Bachu Harun, Ali Harun, Abraham Kasam, Umar Kasam and Jusab Kasam were carrying knives. There were 10 to 12 people in all. The rickshaw engine was still on in which the assailants went away with their weapons towards Salaya. He identified the accused as well as the weapons before the Court.

Because of the shouting and screaming, many people had gathered. They got a rickshaw and shifted Hussain Dawood and Karim Dawood to the Government Hospital at Khambhalia. Karim Dawood died before reaching the hospital. Sometime thereafter, the police people came with Hussain Dawood. They tried to shift him to Jamnagar hospital in an ambulance. But he also died soon. At that time Adam Dawood was brought. During treatment Adam Dawood also died. According to him, the incident took place because of burning of the boat of Ibrahim Kasam.

In the cross-examination, he agreed that in the boat burning case, he himself and the three accused were shown as accused. He also referred to the cloth of sister of Hussain Dawood which was used for tying around his waist.

The pan shop where he was standing was facing southern direction and he himself was standing facing western direction. The fighting was taking place in

that direction.

4. Naranbhai Sida Ladhva, PW-4, Ex.97 was a social worker having his activities in the region. Though he turned hostile, in the deposition he did say that on the date of the incident, he had gone to Salaya crossroads in the evening. Many people had gathered there. He, therefore, went to the spot and found two people lying in unconscious condition and one person had already died. He, therefore, went to the STD booth nearby and called the PSI of Khambhalia police station and informed him about the incident. The police officer thereupon told him to shift the injured to the hospital upon which he carried two persons in an autorickshaw. On the way, he met the police in a jeep. Two persons were brought to Khambhalia hospital. He, however, did not support the prosecution with respect to the dying declaration allegedly made by one of the injured persons before he died.

Majority of the panch witnesses and other witnesses also turned hostile and did not support the prosecution. Many of these witnesses were supposed to be eyewitnesses, for example, Sukshdevsinh Vadher,, PW-25, Ex.154, Sureshbhai Bhimabhai, PW-26, Ex.146, etc.

5. We may now refer to the medical evidence. Dr. Harunbhai Hajibhai Bhaya, PW-1, Ex.43, was the Medical Officer at Khambhalia General Hospital. He deposed that on 20th May 2005, when he was on duty, two patients were brought to him out of whom on examination, he found Karim Dawood had already died. Another, Hussain Dawood had serious injuries. On being asked, he told that near Salaya crossroads, he was assaulted by 6 persons including Abu (accused No. 1), Ali (accused No. 2) and Bachu (accused No. 4) etc. During treatment he also died. However, when the patient was brought to him, he was able to speak. He noted down the history as disclosed by the patient. He produced the case papers containing such history at Ex.44.

Thereafter, yet another patient Adam Dawood was also brought to him. Upon examination, he found that he had already died. Two patients were brought around 5.30 and the third was brought around 6 O" clock. Zarina Arifbhai was brought to him at 6.45 for treatment. On being asked, she informed him that at Khambhalia cross-roads, her brothers were assaulted by Abu Bhagad, Jusab Kasam, Bachu Harun, Ali Harun, Osman Harun etc. in all 8 to 10 people with words, sticks and knives. When she tried to intervene, she got hurt with a stick. Upon examination, he found bruise on her right elbow of 2 x 3 cm. He recorded the history given in the case papers which he produced at Ex.48. He deposed that injury to Zarina would have been caused with a hard blunt substance like a stick.

The said doctor also carried out the postmortem of all the three deceased persons. In his deposition before the Court as well as in the PM report, Ex.55, he indicated following external injuries on deceased Hussain Dawood:

(1) A incised wound over lt. side of abdomen lateral to umbilicus and longitudinal

in shape 7 cm long, 2 cm wide and deep to abdominal cavity from which intestine is protruded out of abdomen.

(2) A incised wound over rt. side of chest just above to epigastrium 5 cm long and muscle deep.

(3) A incised wound over (lt) side of abdomen just below costal margin 6 cm long and deep to abdominal cavity.

(4) A incised wound over rt. side of face just above. Right ear and extended to front of ear. 5 cm long and muscular deep.

(5) A incised wound over right side of occipital part of scalp transverse in direction. 7 cm long and bone deep.

He found a fracture over right side of occipital bone of skull transverse in direction and 7 cm long. Corresponding to such external injuries, he had noted the following injuries:

Torned at wound area of abdomen 7 cm long and 6 cm long.

Splenomegaly with an incised wound over medial surface of spleen 1 x 1 cm near the splenic pole.

According to him, cause of death was cardio-respiratory failure due to hemorrhagic shock due to internal hemorrhage due to injury to spleen due to stab injury over abdomen.

He was shown the muddamal articles, swords and knives and deposed that the injuries could have been caused with such weapons. All injuries except injuries Nos. 5 and 18 could have been caused by a knife. Injuries Nos. 5 and 18 could be caused by an axe. Injury No. 3 in column 17 was sufficient in ordinary course of nature to cause death. According to him, other injuries also contributed in causing the death.

In case of deceased Adam Dawood, in the deposition and in the postmortem report at Ex.56, the doctor mentioned following external injuries:

(1) A lacerated wound over (lt) side of face just below to eye 2 x 2 cm.

(2) A read colored bruise over (rt) side of nose.

(3) A incised wound over abdomen just above umbilicus transverse in direction 10 cm long, 2 cm wide and deep to abdominal cavity from which intestine protruded outside of abdomen.

(4) A incised wound over (lt) side of chest at 5th costal space 2 cm long and muscle deep.

(5) A incised wound over (lt) nipple 1 cm long and 2 m.m. deep.

(6) A incised wound over lt. costal margin 7 cm long x 2 mm deep.

(7) A incised wound over (lt) flank of abdomen 6 cm long x 1 cm wide and 1 cm deep.

(8) A incised wound over lateral side of foot 6 x ? x 1 cm.

(9) A lacerated wound over (lt) middle toe 1 x ? x ? cm.

(10) A lacerated wound over (lt) greater toe 3 x ? bony deep.

(11) A incised wound over (lt) arm deltoid region 7 cm x ? x 2 cm.

(12) A incised wound over middle of back just left to midline 5 cm long and ? cm wide and 2 cm deep.

He also found a fracture in distal bone. Corresponding to such external injuries, he noticed following internal injuries:

A 1 cm long cut incision over anterior surface of inferior ran cava just above union of common iliac veins.

Torned at wound 10 cm long incision

According to him, the cause of death was cardio-respiratory failure due to hemorrhagic shock due to internal hemorrhage due to injury to inferior van cava due to abdominal stab injury.

According to him, injuries Nos. 1, 2, 9 and 10 could be caused by a hard blunt substance. Injuries Nos. 3 to 8, 11 and 12 could be caused by a sharp aged weapon. He agreed that injuries 1, 2, 9 and 10 could be caused by muddamal article No. 27. In his opinion, injury No. 3 was sufficient in ordinary course of nature to cause death.

In case of deceased Karim Dawood, in his deposition as well as in the postmortem report, Ex.57, the doctor noted the following external injuries:

(1) A incised wound over (rt) iliac fossa area of abdomen which is longitudinal in shape 3 cm long x 1 cm wide and deep to abdominal cavity, from which blood and faecal matter is come out and intestine is protruded outside of abdomen.

(2) A incised wound over lt. knee which is longitudinal in shape 6 cm long and deep to epidermic layer of skin.

Corresponding to such external injuries, he mentioned following internal injuries:

Rt. external artery is incised over anterior surface, 1 cm long incision which is longitudinal in shape.

Torned at wound 3 cm long incision.

3 cm long incision over loop of ilium anterior to caecum.

3 cm long incision over anterior and posterior surface at caecum from which fuecal matter came out.

According to him, the cause of death was cardio-respiratory failure due to hemorrhagic shock due to internal hemorrhage due to injury to right external iliac artery due to stab injury over right iliac fossa of abdomen.

According to him, both the injuries could be caused by sharp edged weapon. Such injuries could be caused by weapons muddamal articles 24, 28, 29 and 30 etc. Injury No. 1 was sufficient in ordinary course of nature to cause death.

He had collected the blood samples and clothes of the deceased and sent them for forensic analysis.

In the cross-examination, he agreed that if a person had an enlarged spleen and he was kicked in the stomach, his spleen could rupture which may cause death. He had not noted down any history given by Salemohmed and could not say with certainty what Salemohmed told him about the incident. He agreed that only because the intestine has come out, it is always not necessary that the patient would die. He agreed that injuries Nos. 1, 2, 4, 5, 6, 8 and 12 to Adam Dawood were simple injuries. He reiterated that he had recorded the history in the case papers at Ex.45 as given by Hussain Dawood who was speaking to him in Gujarati language.

6. We may now refer to the police witnesses. Gopaldas Govindram Nimavat, PW-29, Ex.156, had received the telephone call made by Naranbhai, PW-4 regarding the incident. He deposed that on 20th May, 2005, he was on duty at Khambhalia police station. He was PSO. He received a phone call from Naranbhai informing him that a fight had taken place at the crossroads and 2 to 3 people are lying there. He had, therefore, instructed wireless operator Constable Narsibhai to inform PSI Shri Manjaria. He had made an entry in the station diary at 17.10. He further mentioned that Shri Manjaria thereafter recorded the FIR on the basis of which offence u/s 302, 147, 148, 149, and 120B of the Indian Penal Code was registered and entry in the station diary was made at 19.20. Being a serious offence, further investigation was handed over to Shri Barot. He produced at Ex.159, the extracts of station diary containing such entries.

7. Ambrubhai Manjaria, PW-31, Ex.162 was the PSI of Khambhalia police station. He deposed that at 4.30 in the evening of 20.5.2005, he was patrolling in Khambhalia area in a Government vehicle. At that time, he received a message on the wireless that a fight had taken place at Salaya crossroads. He, therefore, reached the place. Upon inquiry, he found that the members of the public as well as the relatives had carried the injured to the Government hospital. He reached at the Government hospital and found upon inquiry from Zarina and her mother Zulekha that her brothers Hussain Dawood, Karim Dawood and Adam Hussain were assaulted by 10 persons from Salaya including Abu Hasam with deadly weapons. He took down the complaint of Zarina at the hospital as narrated by her. He also made the inquest and requested the doctor to carry out the postmortem. Since many people had gathered at the hospital, he also summoned additional police force. FIR was produced at Ex.164 which we have already

referred to earlier.

In the cross-examination, he stated that upon receiving information, he first went to Salaya cross-roads near Milan Hotel, but no incident had taken place there. Thereafter, from the wireless operator, he learnt that the incident had taken place at Salaya cross-roads and therefore reached there.

He had questioned the complainant in the emergency ward. She was, however, sobbing and crying and was able to give answers intermittently. He could not record the entire complaint continuously. The process of recording the complaint took about one hour.

He agreed that the complainant in the complaint has not referred to being hit with a stick.

8. Further investigation was carried out by Rajendrakumar Jentilal Barot, PW-32, Ex.169. He was the Circle Police Inspector, Khambhalia Division. He referred to the detailed steps undertaken during the course of investigation. In particular, he referred to the manner in which all the accused were arrested from different places and also referred to various discoveries of murder weapons made at the instance of respective accused.

9. Under panchnama Ex.124, he had discovered a sword at the instance of accused Razak Musa. He identified the sword shown to him as one discovered during such process. He also referred to the manner in which the accused led the police party and the panch witnesses to a fishing godown from where the sword which was hidden was taken out.

Likewise, this witness referred to the discovery of an axe, knife and iron pipe discovered at the instance of accused Hasan Bachu, Ali Hassan, and Amin Hassan under panchnama Ex.128. He referred to the manner in which these accused travelled in a police vehicle with panch witnesses and from a side of a road towards village Gareda from where out of a ditch near a babul tree, such weapons were taken by one accused after another.

He also referred to the discovery of knives at the instance of four accused, Ali Harun, Bachu Haron, Osman and Ibrahim Kasam under panchnama Ex.121. According to him, these accused led the police party and the panch witnesses to a road side ditch near an old railway station of Salaya from where out of the ditch the accused one after another took out respective weapons.

Under discovery panchnama, Ex.140, he had recovered the clothes worn by accused Umar Kasam and Jusab Kasam. He referred to the manner in which the said accused along with police party and the panch witnesses travelled as directed by the accused and arrived near an old closed tea-stall from where behind a boulder, a plastic bag was taken out from which one after another, the accused took out clothes which they were wearing at the time of offence and the knives allegedly used for commission of offence. He had sent the various articles collected during the course of investigation and the blood of the accused for

forensic analysis.

In the cross-examination, through this witness, certain improvements were extracted in the deposition of the two eyewitnesses as compared to their police statements.

10. Combined reading of the forensic analysis in conjunction with the serological report, Ex.224, would establish that all the deceased had blood of group "B". Accused No. 1,3 and 5 had blood group "B". Accused No. 2 had group "A" blood. Accused No. 4, 6, 7 and 8 had blood group "O". From the scene of the incident, soil and stones were collected which indicated presence of blood of group "B". The stick carried by the deceased which was recovered from the scene of the incident also carried such blood. Foot-wears which were lying in the scene of the incident also were covered with such blood. The shirt and pant of accused No. 1, those of accused No. 2, accused No. 3, accused No. 5, accused No. 6, accused No. 7, accused No. 8, accused No. 9 and accused No. 10 carried human blood of group "B". Likewise, pant of accused No. 4 had carried human blood of group "B". The weapons, such as, four knives, dhoka, pipe and axe, all carried presence of blood of group "B". From the rickshaw which was used for transporting the injured, cotton swabs were taken which also showed presence of group "B" blood.

This in nutshell is the evidence on record.

11. On the basis of such evidence, learned advocate Shri Tolia for the appellants submitted that the prosecution failed to establish presence of all the accused. Possibility of involving innocent persons cannot be ruled out. Such being the tendency of the prosecution witnesses, benefit should be given to the accused.

Referring to the deposition of Zerineaben, PW-2, Ex.73, he contended that she was a related and interested witness. She was inimical towards the accused because of past history of animosity. Her evidence, therefore, should not be accepted without corroboration. He contended that the presence of Zarina at the scene of the incident is doubtful. She had no reason to come to the court to meet her brothers which she could have done at the residence. In none of the previous hearings, she remained present. She is thus a got up witness.

He further submitted that the deposition of this witness is inconsistent and self-contradictory. Before the doctor, she did not give the names of the accused. In the complaint, she had not mentioned about receiving injury with a stick.

According to the counsel, her evidence was even otherwise not supported by medical evidence. Her deposition conflicted with that of Saleemohmed, PW-3, Ex.93.

Referring to the evidence of Saleemohmed, the counsel submitted that he referred to some 10 to 12 persons being part of the assailants leaving scope for manipulation. His evidence is self-contradictory. Deceased Hussain Dawood referred to in all six persons, out of which he could name only two. The entire

version of these witnesses of 10 assailants was thus highly unreliable.

Counsel submitted that witness Salemohmed had failed to identify the accused correctly. According to him, names given by this witness before the Court were all jumbled up.

Counsel contended that there was considerable delay in filing the FIR leaving scope for manipulations. Referring to the discovery of weapons, counsel submitted that joint discoveries would not be valid in eye of law.

In the alternative, counsel submitted that in any case, there was no intention to cause death. Only one injury each to these persons was serious. Rest of the injuries were superficial or simple in nature. The accused cannot be stated to have the intention to cause death. Their convictions for offence u/s 302 was therefore not justified.

12. In support of his contentions, counsel relied on the following decisions:

(i) In the case of Jarnail Singh Vs. State of Punjab, where finding that the testimony of the star witness was not reliable, benefit of doubt was given to the accused.

(ii) In the case of Harjinder Singh @ Bhola Vs. State of Punjab, in which finding that the courts below had mechanically accepted the findings of two chance witnesses where there were several lapses casting doubt on the prosecution case, the accused were acquitted.

(iii) The case of Parsighbhai Galiya Macher Vs. State of Gujarat, was relied upon to contend that mere discovery of the weapons at the instance of the accused would not be sufficient to convict them. Reference in this regard was also made to the decisions in the case reported in Parsighbhai Galiya Macher Vs. State of Gujarat, and in the case of Narsinbhai Haribhai Prajapati etc. Vs. Chhatrasinh and Others,

(iv) Reference was made to the decision of this Court in the case of Meghaji Godadji Thakore and Another Vs. The State of Gujarat, in support of the contention that joint discovery of articles was not admissible in evidence.

13. On the other hand, learned APP Ms. Maithily Mehta appearing for the State opposed the appeals contending that two eyewitnesses have consistently given full accounts of the incident in question. Such eyewitness account was corroborated by other evidence and in particular medical as well forensic evidence. She drew our attention to the depositions of the Investigating Officers also.

14. Having perused the evidence on record and having heard the learned counsel for the parties, we may refer to some of the decisions touching the question of appreciation of evidence which would have a bearing in the present case. It is by now well settled that minor discrepancies would not destroy the prosecution case unless the contradictions and omissions go to the root of the matter.

14.1 In the case of *Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat*, the Apex Court observed that over importance cannot be given to minor discrepancies. Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance.

14.2 In the case of *Bhargavan and Others Vs. State of Kerala*, the Supreme Court observed that normal discrepancies in evidence are those which 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. On the other hand, 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 party's case, material discrepancies do so.

14.3 In the case of *Shyamal Ghosh Vs. State of West Bengal*, the Apex Court observed that discrepancies or omissions have to be material ones and then alone they may amount to contradiction of some serious consequence. Every omission cannot take the place of a contradiction in law and therefore be the foundation for doubting the case of the prosecution. Minor contradictions, inconsistencies or embellishments of trivial nature which do not affect the core of the prosecution case should not be taken to be a ground to reject the prosecution evidence in its entirety. It is only when such omissions amount to a contradiction creating a serious doubt the truthfulness or creditworthiness of the witness and other witnesses also make material improvements or contradictions before the Court in order to render the evidence unacceptable, that the Courts may not be in a position to safely rely upon such evidence. Serious contradictions and omissions which materially affect the case of the prosecution have to be understood in clear contra-distinction to mere marginal variations in the statement of the witnesses.

14.4 In the case of *Chaudhari Ramjibhai Narasangbhai Vs. State of Gujarat and Others*, the Supreme Court observed that section 145 of the Evidence Act applied when same person makes two contradictory statements. It is not permissible in law to draw adverse inference because of alleged contradictions between one prosecution witness vis-a-vis statement of other witnesses. It is not open to the court to completely demolish evidence of one witness by referring to the evidence of other witnesses. Witnesses can only be contradicted in terms of section 145 of the Evidence Act by his own previous statement and not with the statement of any other witness.

14.5 In the case of *Munshi Prasad and Others Vs. State of Bihar*, the Apex Court held that merely on the ground of non-examination of independent witnesses from nearby residential area would not be material when the evidence on record is satisfactory and trustworthy in nature.

14.6 Likewise, in the case of *Kanhaiya Lal and Others Vs. State of Rajasthan*, the

Supreme Court rejected the contention of the defence regarding vulnerability of the prosecution case since only related witnesses were examined. It was observed that five people had been done to death. In such circumstances, it was unexpected that other villagers would come forward to give their statements and depose in the court. Thus no exception can be taken to the fact that no independent witness was examined.

15. With this background in mind, we may appreciate the evidence on record. We may recall, Zarina Arifbhai, PW-2, sister of the deceased persons and the first informant, according to her, had gone to Khambhalia court to meet her brothers on 20th May 2005 since the case of boat burning, in which the said persons were accused, was fixed. After waiting nearly for the whole day in the court, in the later part of the afternoon when the case was adjourned, the three brothers, her brother-in-law, Salemohmed, she herself, her mother and their advocate travelled in two separate auto-rickshaws and came to Salaya crossroads. There at a tea-stall, they were waiting for the bus. Salemohmed and the advocate went to a nearby pan shop to have pan and tobacco. Rest of the persons were sitting at the tea-stall. At about 5 O' clock in the evening, 10 accused arrived in a chhakdo rickshaw armed with deadly weapons, such as, knives, swords, pipes, axe and dhoka. They immediately started assaulting the three persons causing serious injuries. Within minutes, they finished their task and returned in the rickshaw.

16. Two injured were first carried to the hospital and the third injured person, namely, Adam Dawood was carried a while later. She herself accompanied him in the ambulance. When they reached the hospital at Khambhalia, first the doctor declared Adam Dawood dead. Sometime thereafter, the doctor came out and declared Karim Dawood also dead. The third Hussain Dawood was shifted to an ambulance to go to a hospital in Jamnagar, but he also died in the ambulance.

17. According to this witness, the incident happened because of previous animosity. Admittedly, there were previous cross murder cases filed by both sides. After that, incident of boat burning had also taken place. It was in one of such cases that the three deceased had to appear before Khambhalia court on the date of the incident. This witness had given all the ten names of the accused in the FIR itself. She had in the deposition given details of weapon carried by each accused and individual role of the accused. She, of course, could not say precisely which injury was caused by which accused. She, however, referred to the weapon carried by each accused. She identified the accused as well as the weapons carried by them.

18. In her cross-examination, no major contradictions were extracted by the defence. It is true that certain minor improvements were brought out. It is also true that the FIR itself was brief which was to be expected considering the critical condition in which she had given the FIR. An FIR, it is well settled is not meant to be an encyclopedia of the full accounts of the incident. In the present case the complaint was given by a lady whose three brothers were hacked to death in

front of her shortly before the complaint was recorded.

19. The evidence of this witness was substantially in consonance with the evidence of another eyewitness Salemohmed, PW-13, Ex.93. He was also present at the time of the incident. He himself had gone to the court along with the three brothers since he was also an accused in the same case. According to his deposition, after the court proceedings were over and the case was adjourned, in two separate rickshaws, they arrived at Salaya cross-roads. He and the advocate accompanying him went across to a pan shop. Rest of the members of the group were sitting at a tea-stall at which time, the accused arrived in a chakda rickshaw from Salaya side and assaulted the three brothers. It is true that this witness had in the police statement referred to 10 to 12 persons assaulting. Nevertheless, he not only gave the names of all the accused before the Court, he also correctly identified them. This witness also attributed the weapons to each accused, the same manner in which PW-2, Zarina, had done.

20. Though vehemently contended before us, we do not find that the identification of the accused by this witness was jumbled up. He had referred to the accused by names and in the sequence in which they were sitting before the Court. This, of course, did not have to be according to accused number wise. He identified the accused in the sequence in which they were sitting and contrary to what was contended before us by the counsel, he had not wrongly identified any of the persons. Had it been so, we are confident, the Trial Court would have immediately recorded so in the deposition itself. Neither did the Trial Court so record, nor did the defence counsel raise any such grievance about wrong identification of the accused by this witness.

21. Thus, the depositions of the two eyewitnesses are completely in consonance with each other on all important and material aspects of the matter. In essence, they referred to the visit by three deceased brothers to Khambhalia court, where PW-3, Salemohmed was also with them. They also referred to sister Zarina accompanied by her mother Zulekha coming to the court to meet her brothers. After the court proceedings were over, these two witnesses referred to the unfortunate incident that happened at Salaya crossroads when three brothers were assaulted by the accused. All the accused were identified by both the witnesses along with the weapons produced before the Court.

22. Much was argued before us about the presence of Zarina, PW-2. According to the counsel for the appellants, her presence was unnatural and improbable. It was contended that Zarina could have easily met her brothers at their house and had no reason to come to the court for such purpose. There are several reasons why we must discard the contention. Firstly, Zarina in her deposition had stated that in the afternoon, once the case was adjourned, they all had lunch from the tiffin she was carrying. If Zarina, as sister of the accused, therefore, travelled to the court carrying a tiffin for her brothers, the same was a natural conduct. If we accept the contention of the defence that Zarina was not present at the scene of the incident at all, the presence of Zarina at the hospital reaching simultaneously

with the injured becomes incongruent. The fact that Zarina reached the hospital simultaneously is borne out from independent evidence. PSI Shri Manjaria, referred to the presence of Zarina when he reached the hospital. He had taken her complaint at the hospital itself. PW-1, Dr. H.H. Bhaya also referred to the presence of Zarina whose medical history he had recorded and he had treated her for minor injury. If Zarina was at home as was suggested by the counsel for the defence, it would have been impossible for her to reach the hospital simultaneously with the injured brothers. Her presence at the hospital itself substantially supports the prosecution version that she herself was present at the scene of the incident. She herself was carrying a minor bruise on her arm.

23. Zarina's version not only before the Court but in the first available opportunity before the doctor in the history given by her and soon thereafter in the FIR recorded by the police substantially converges with the version of Salemohmed, PW-3. If Zarina was not present at all as suggested, we fail to see how almost immediately, she could have been tutored to such an extent that the entire version she gave to the police matched with the deposition of another eye witness. The fact that Salemohmed was present at the place of incident cannot be seriously doubted. He himself was one of the accused along the deceased brothers in the boat burning case.

24. We must appreciate the condition in which Zarina would have given her version to the police. Even PSI Shri Manjaria stated that she was sobbing and crying inconsolably and could give replies intermittently. It was, therefore, that it took nearly one hour to take down the FIR. Right in front of her eyes, three of her brothers were mercilessly assaulted and they died one after another. Under such circumstances, if she still managed to give 10 names of the accused to the police immediately after the incident, we fail to see how it could have been possible without her presence in the scene of the incident.

25. The evidence of Salemohmed was assailed on the ground that he could not have seen the incident at all since he had gone to a pan shop and would not have witnessed the assault. Firstly, we must realize that the incident happened right on the crossroads leading to major towns/villages like Khambhalia and Salaya. There were tea-stalls and pan shops around. According to Zarinaben, the pan shop was barely 30 feet away from the place of incident. Even witness Salemohmed stated that when he was at the pan shop, he heard shouts coming from the place where Zarina and others were sitting. He saw 10 persons armed with deadly weapons assaulting the three brothers. Distance between the pan shop and the place of incident was not very far. The incident happened at 5 O'clock in the evening. Visibility was not an issue at all. If Salemohmed did not intervene and rush to help others, the same is hardly surprising. As many as 10 persons armed with deadly weapons were assaulting three persons. Salemohmed himself could have been the target. It was perhaps because he was away at the pan shop that the assailants did not notice him and that saved his life. In the deposition he admitted that he was too scared to go near.

26. It is also true that both the eyewitnesses were related to the deceased. It is equally true that there was previous enmity between the deceased and the accused sides. The evidence of the eyewitnesses, therefore, would have to be appreciated cautiously. But merely because the prosecution did not examine other witnesses or there was no eyewitness account of independent witness available would not by itself mean that the incident as narrated by these witnesses did not happen. The incident took place in a broad day light at a fairly busy junction where number of members of public were bound to be present. However, the manner in which the incident took place where almost indisputably several persons armed with deadly weapons assaulted three persons causing their deaths, it would not be surprising if members of the public and independent witnesses would not want to get involved. Whatever evidence the prosecution could come up with, the witnesses turned hostile and did not own up their police statements. Merely because there were only two eyewitnesses account to support the prosecution would not dilute the prosecution case if such evidence was otherwise reliable, believable and corroborated by other evidence. Corroboration is available in the form of deposition of Naranbhai, PW-4, Ex.97. He had helped in shifting the injured persons to the hospital. He had immediately informed police through a local PCO about the unfortunate incident. This was corroborated by Gopaldas Nimavat, PW-29, Ex.156, who had received the said phone call from Naranbhai. An entry in the station diary to this effect was made and immediately message was given to PSI Manjaria through wireless to rush to the place.

There was corroboration from medical as well as forensic evidence. To begin with Dr. Bhaya, PW-1, Ex.43 was the medical officer at Khambhalia General Hospital on the date of the incident. All the three injured were brought to him. He pointed out that one person had already died by the time he was brought to the hospital and another died during treatment and third was referred to Jamnagar Hospital, but as soon as he was put in the ambulance, he also died. Most importantly, he had recorded the history given by Hussain Dawood. In the case papers Ex.45, he had recorded the history given by him as injured by assault by sword by six people including Abu, Ali and Bachu, etc. at Salaya crossroads. Merely because this person referred to 6 assailants would not mean others were not present. He was referring to only those who had assaulted him and not to other two brothers. He had recorded multiple injuries on the bodies of the three persons. The injuries, according to him, were sufficient in ordinary course of nature to cause death. He was shown the weapons recovered by the police during the course of investigation and agreed that such injuries could have been caused by such weapons. Some of the injuries could have been caused by sharp cutting instruments, such as, knives and some could be by hard blunt substance like pipe or dhoka.

27. Various weapons carried by the accused were discovered under different panchnama to which we have already referred to in earlier portion of this judgment. Such weapons as well as clothes of the accused established presence

of human blood group B, that belonging to all the three deceased persons. It is true that some of the accused themselves had blood group "B". However, none of them had any injuries nor in the statement u/s 313 of the Criminal Procedure Code, these accused had tendered any explanation to their clothes being soiled with blood of the deceased persons.

28. In our opinion, therefore, there was more than sufficient evidence to bring home the charges against the present appellants. To reiterate, two eyewitnesses, namely, Zarina, PW-2 and Salemohmed, PW-3, gave full accounts of the assault on the three deceased by the accused persons carrying deadly weapons. Such eyewitnesses account was supported by medical evidence and forensic evidence and in particular, the weapons discovered at the instance of the accused and their clothes established presence of human blood of "B" group.

29. The contention that FIR was lodged belatedly and therefore the prosecution case must be viewed suspiciously cannot be accepted. As stated narrated above, the incident had taken place at 17.00 hours in the evening. Recording of FIR started at 18.00 hours and ended at 19.10. We may recall that PSI Manjaria stated that upon receipt of information about the incident, first he went to a wrong crossroads where nothing had happened. He, therefore, got in touch with the police constable giving wireless messages and took the correct location and reached the place. By then, the injured persons were already shifted to the hospital. He thereupon reached the hospital and recorded the FIR from Zarinaben. As stated by the PSI, she was crying bitterly and the recording of FIR, therefore, took a long time. As observed earlier, Zarina had lost three of her brothers in quick succession. Her state of mind had to be appreciated in such background. In our opinion, therefore, there was no delay in lodging the FIR.

30. It was argued that Ex.164 was not the first information and that statement of Zarina was recorded at the place of incident which should have been treated as FIR, which was deliberately suppressed. We are of the opinion that there is no evidence of any such statement of Zarina having been recorded. It is only the misreading of her deposition by the counsel. Zarina never referred to her statement in the present case. She was referring to the statement of some other persons in earlier case. She therefore clarified that she was not a witness at all. Even otherwise, it was understandable that the police and the relatives would be anxious to shift the critically injured persons to hospital rather than record FIR.

31. It was argued that the clothes of the witnesses though stated to have been blood soaked were not recovered. Even if we believe this to be a minor lapse of the investigation, it is well established that such lapse in investigation would not destroy the prosecution case.

32. It was argued that joint discovery would not be permissible in evidence. We have referred to the discovery panchnamas and the deposition of the Investigating Officer in this respect. It is true that panch witnesses did not support the prosecution. It would not be impermissible to rely on the evidence of

the Investigating Officer as held by a Division Bench of this Court in the case of Vinugiri Motigiri Vs. State of Gujarat, in which it was observed as under:

24.2 It was submitted that since the panch witnesses have turned hostile, the Court cannot rely on the evidence of discovery. This submission is erroneous, because, as held by the Supreme Court in AIR 1978 1511 (SC) if the evidence of the investigating officer who recovered the material objects is convincing, the evidence as to recovery need not be rejected on the ground that seizure witnesses do not support the prosecution version. In a recent decision of the Supreme Court in State, Govt. of NCT of Delhi Vs. Sunil and Another, , while considering the provisions of section 27 of the Evidence Act, and section 114 Ill. (e) thereof, the Supreme Court has held that there is no requirement either u/s 27 of the Evidence Act or u/s 161 of the Criminal Procedure Code to obtain signature of independent witnesses on the record in which statement of an accused is written. The obligation to call independent and respectable inhabitants of the locality to attend and witness the exercise made by the police is cast on the police officer when searches are made under Chapter VII of the Code. The legislative idea in insisting on such searches to be made in the presence of two independent inhabitants of the locality is to ensure the safety of all such articles meddled with and to protect the rights of the persons entitled thereto. But recovery of an object pursuant to the information supplied by an accused in custody is different from the searching endeavour envisaged in Chapter VII of the Code. It was held that it is a fallacious impression that when recovery is effected pursuant to any statement made by the accused, the document prepared by the investigating officer contemporaneous with such recovery must necessarily be arrested by the independent witnesses. It was held that if no witness was present or if no person had agreed to affix his signature on the document, it is difficult to lay down, as a proposition of law, that the document so prepared by the police officer must be treated as tainted and the recovery evidence unreliable. The Court has to consider the evidence of the investigating officer who deposed to the fact of recovery based on the statement elicited from the accused on its own worth. The Court observed that, it is an archaic notion that actions of the police officer should be approached with initial distrust and that it is not a legally approvable procedure to presume the police action as unreliable to start with, and to jettison such action merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions. It was held that when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused, it is open to the court to believe the version to be correct if it is not otherwise shown to be unreliable.

33. In the case of State (N.C.T. of Delhi) Vs. Navjot Sandhu @ Afsan Guru, the Apex Court observed that joint or simultaneous disclosure is a myth, because two or more accused persons would not have uttered informatory words in a chorus. At best, one person would have made the statement orally and the other person would have stated so substantially in similar terms a few seconds or

minutes later on the second person would have given unequivocal nod to what has been said by the first person. One or two persons in custody may be interrogated separately and simultaneously and both of them may furnish similar information leading to the discovery of fact. In rare cases, both the accused may reduce the information into writing and hand over the written notes to the police officer at the same time. Such disclosures by two or more persons in police custody do not go out of the purview of section 27 altogether. If information is given one after the other without any break almost simultaneously, and if such information is followed up by pointing out the material thing by both of them, there is no good reason to eschew such evidence from the regime of section 27.

34. In the present case, each accused had led the police party to different weapons. It was at best a case of joint panchnama of different discoveries. It is true that under a common panchnama various articles were recovered jointly. However, this cannot take shape of a joint discovery as alleged by the defence. It was at best a case of statements leading to discovery of facts independently and individually by each accused helping the police to recover separate weapons. Mere fact that some of such discoveries were recorded in a common panchnama, in our opinion, would not give it a shape of joint discovery.

35. Identification of the accused before the Court by two eyewitnesses also cannot be doubted. It is true that no test identification parade was carried out. However, substantive evidence is the identification of the accused by the witness before the court. In the present case, when the incident lasted for about 5 to 10 minutes which took place in a broad day light when the accused were also known to the witnesses, failure to conduct test identification parade would not destroy the prosecution case. In this respect, reference may be made to a decision of the Apex Court in the case of Md. Kalam @ Abdul Kalam Vs. State of Rajasthan,

36. There was long standing enmity between the two sides. Such enmity had in fact in the past led to cross murders and burning of fishing boats by both sides. As per Zarina, PW-2, her entire family had migrated from village Salaya to Arambhda since the accused were headstrong persons. There was thus every possibility that all the assailants were known to the witnesses.

37. The contention that there was no intention to cause death must be rejected out of hand. Looking to the nature of weapons used, number of injuries and the parts of the body where blows were given and the corresponding injuries caused to as many as three persons leave us in no manner of doubt that the offence must come within the definition of murder. It is true that in some cases the precise blow given by each accused could not be ascertained. However, weapons carried by such accused were identified. Their overt acts were established. Their participation was proved. Each accused thus must share the responsibility of the act done in furtherance of the common intention of the unlawful assembly. In the case of Yunis @ Kariya etc. Vs. State of Madhya Pradesh, the Apex Court observed that presence of the accused as part of unlawful assembly is sufficient for conviction even if no overt act is imputed to him. In the result, both the

appeals must fail. Conviction and sentences recorded by the Trial Court are confirmed. Accordingly, appeals are dismissed.

Accused No. 2 is stated to be on bail. His bail bonds are cancelled. He shall have time upto 15th January 2014 to surrender.

R & P to be transmitted to the Trial Court.