

(2009) 10 GUJ CK 0077
In the Gujarat High Court

Case No : Criminal Appeal No's. 1395, 1445, 1491, 1557, 1760 and 2165 of 2006

Rajendra Bharatbhai Raval and Others

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 01-10-2009

Acts Referred:

Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 313, 377
Penal Code, 1860 (IPC) — Section 120B, 143, 147, 148, 149

Citation : (2009) 10 GUJ CK 0077

Hon'ble Judges : K.A. Puj, J;A.L. Dave, J

Bench : Division Bench

Advocate : BB Naik and DP Kinariwala, in Criminal Appeal Nos. 1764 and 1491/2006, AD Shah, in Criminal Appeal No. 1395/2006, Shakeel Qureshi, in Criminal Appeal Nos. 1445 and 1557/2006 and LR Pujari, APP in Criminal Appeal No. 2165/2006, for the Appellant; LR Pujari, APP, BB Naik, for Respondent Nos. 1 and 5 AD Shah and Shakeel Qureshi, for Respondent Nos. 3 and 4 in Criminal Appeal No. 2165/2006, for the Respondent

Final Decision : Allowed

Judgement

A.L. Dave, J.—This group of criminal appeals arises out of a judgment and order rendered by the Sessions Court, Surat, in Sessions Case No. 19/2003, on 31.7.2006. By the said judgment, the appellants in Criminal Appeal Nos. 1764/2006, 1395/2006, 1445/2006, 1491/2006 and 1557/2006 came to be convicted for the offences punishable u/s 304 Part-I and Section 304 Part-I read with Section 34 of the Indian Penal Code ["IPC" for short]. These appellants were accused before the Sessions Court. They were charged with the offences punishable under Sections 302, 143, 147, 148, 149 & 120B of IPC and Section 135 of the Bombay Police Act. On being convicted, as stated above, they have preferred these appeals.

1.1 The accused persons came to be acquitted for the charges punishable under

Sections 302, 143, 147, 148, 149 & 120-B of IPC and Section 135 of the Bombay Police Act. The State of Gujarat has preferred Criminal Appeal No. 2165/2006 u/s 377 of the Code of Criminal Procedure for enhancement of sentence awarded to the accused persons by the Trial Court.

2. The brief facts of the prosecution case can be stated thus:

2.1 The alleged incident occurred on 5.8.2001 at about 5.45 P.M in the by-lane, near Panjara Pole, on Ghoddod Road at Surat. It is the case of the prosecution that accused Pawankumar @ Pintoo Jitendra Patel, Vijay Babubhai Naidu, Vishal @ Bittu Champakbhai Kothari and Hemant Bharatbhai Raval caught hold of victim Roshan Udhawala and Accused No. 1 Rajendra Raval inflicted knife blows in the abdomen and chest of victim-Roshan. Roshan was immediately taken to hospital, where he was declared dead.

2.2 As per the prosecution case, PW.1 Sunny Chandrakant Udhawala, the first informant, who stays at Lambe Hanuman Road, Varachha, Surat, was studying at Amroli College. He had studied in Standards 11 & 12 at Divine School on Ghoddod Road. There, Vishal @ Bittu Kothari was studying and through him, he happened to know Hemant Raval, Pawan Patel, Vijay Babubhai Naidu and elder brother of Hemant.

2.3 On 4th August, 2001, his friend Montu met him and told him that Bittu Kothari had met Montu and told him that Sanny, i.e., first informant, was behaving in an arrogant manner at the College also and, therefore, he was told to convey to the first informant that if he (the first informant) did not improve, he would break his legs. Montu, therefore, inquired of Sunny as to what was the nature of the dispute. First informant, Sanny, told him that there was no dispute at all and thereafter, first informant Sanny went to a place where Bittu Kothari and his friends usually used to sit at Ghoddod Road. At that time, besides Bittu, Hemant Raval, Pawan Patel, Vijay Naidu, Vishal Kothari and 5 - 6 other boys were there. The first informant then told Bittu that he had no dispute or quarrel with Bittu and why Bittu should talk of breaking his legs. At that time, Pawan Patel suddenly got annoyed and, therefore, the first informant told him that he came only to clear the issue. As per the first informant, at that time, Hemant Raval told him that the place was their area and it was the place of meeting for them; how did the first informant dare to come there and then Bittu gave the first informant a slap. Hemant Raval then told the first informant to go away and further asked him to come next day if he wanted to compromise. Therefore, first informant Sanny went away. On the next day, i.e. 5.8.2001, Sanny received a telephone call from Bittu at about 11.00 A.M and asked him to come down for a compromise if he so wanted. Sanny told him that he would go there after about couple of hours, as he was busy. Bittu asked him to come at about 5.30 P.M. Sanny then told about the episode to his cousin Roshan Amrutbhai Udhawala, who advised him to go and settle the issue. He also volunteered to go with him. Therefore, in the evening at about 5.30 P.M, Sanny went to the place where Bittu used to sit. There, he found Bittu Kothari, Pawan Patel, Hemant Raval, Hemant

Raval's elder brother Rajendra Raval, Vijay Naidu, Sagar and 2 - 3 other boys. He told Bittu that he reached there as per previous day's talk. At that time, Hemant Raval, Rajendra Raval, Bittu Kothari, Pawan Patel and Vijay Naidu accosted him in a rude manner. He, therefore, got scared and felt that those people might not enter into any compromise. He, therefore, called his cousin Roshan by telephoning. Victim Roshan, Prashant Gandhi, Mehul Patel, Nitesh Patel, Jiten Kheradiya and Ritesh Pragjibhai Patel came in a Maruti-Van and a Maruti Fronty Car. No sooner did they get down from the vehicle than Bittu Kothari, Hemant Raval, Pawan Patel, Vijay Babubhai Naidu and Rajendra Raval rushed towards them, and at that time, Hemant's elder brother had a Gupti in his hand. Before one could realize as to what was happening, Hemant Raval, Pawan Patel, Vijay Naidu and Bittu Kothari caught hold of Roshan and Hemant's elder brother, who had a Gupti with him, inflicted two blows, one on abdomen and another on chest of deceased-Roshan, as a result of which, Roshan fell to the ground in a bloodshed condition. The five assailants thereafter ran away. Therefore, first informant took Roshan in the Van to the Civil Hospital, where doctor examined Roshan and declared him dead. Sanny, therefore, lodged an F.I.R with Umarao Police Station, Surat. On the basis of that information, offence was registered and was investigated. Upon investigation, the police, having found sufficient material against the accused persons, filed charge sheet in the Court of learned J.M.F.C., Surat, who, in turn, committed the case to the Court of Sessions, as the offences, with which the accused persons were charged, were triable exclusively by the Court of Sessions, and Sessions Case No. 19/2003 came to be registered.

3. Charge against the accused persons was framed at Exhibit 26 for the offences punishable under Sections 302, 143, 147, 148, 149 & 120B of IPC and Section 135 of the Bombay Police Act. The accused pleaded not guilty to the charge and claimed to be tried.

4. The prosecution led evidence, both documentary and ocular. The Trial Court, after considering rival sides' submissions and evidence on record, came to the conclusion that the prosecution was not able to prove the charge. The Sessions Court further held that the prosecution was successful in proving the charges punishable u/s 304 Part-I and Section 304 Part-I read with Section 34 of IPC and recorded conviction for those offences and sentenced accused No. 1 to undergo rigorous imprisonment for a period of ten years with fine of Rs. 10,000/-, in default, further imprisonment for a period of two years, and accused Nos. 2, 3, 4 & 5 to undergo rigorous imprisonment for a period of five years with fine of Rs. 5000/-, in default, further imprisonment for a period of one year; whereas recorded acquittal for the offences punishable under Sections 302, 143, 147, 148, 149 & 120-B of IPC and Section 135 of the Bombay Police Act. Hence, these appeals - one by the State, bearing Criminal Appeal No. 2165/2006, for enhancement of sentence, and the other appeals by the accused persons.

5. Accused Nos. 1 & 5, who are appellants in Criminal Appeal Nos. 1764/2006

and 1491/2006, respectively, are represented by learned Senior Advocate Mr B.B. Naik, accused No. 2, who is appellant in Criminal Appeal No. 1395/2006, is represented by learned Advocate Mr A. D. Shah; whereas accused Nos. 3 & 4, who are appellants in Criminal Appeal Nos. 1557/2006 & 1445/2006, are represented by learned Advocate Mr Shakeel Qureshi. Except Accused No. 1, Accused Nos. 2, 3, 4 & 5 are released on bail during the pendency of the appeal. Accused No. 1 is in jail.

6. We have heard learned Advocates M/s. B. B. Naik, A. D. Shah and Shakeel Qureshi for the appellants-convicts, and learned A.P.P., Mr. Pujari, for the State.

7. Following contentions are raised on behalf of the convicts-appellants by their learned Advocates:

(1) Out of five eye-witnesses, namely, P.W.1-Sanny Chandrakant, P.W.2-Prashant Kishorbhai Gandhi, P.W.3-Mitesh Shashikant Patel, P.W.15-Bunty Chandrakant Patel and P.W.16- Kalpesh Tukaram, P.W.15 & P.W.16 have not supported the prosecution case and have been declared hostile. Out of the three eye-witnesses, who have supported the prosecution case, P.W.1 & P.W.3 are relatives of the victim, i.e., their cousin; whereas P.W.2 Prashant is a childhood friend and, therefore, the three witnesses, who have supported the prosecution case, are interested witnesses.

(2) The prosecution has not been able to establish the genesis and the sequences of the incident in a satisfactory manner. The genesis and the sequences of the incident are improbable.

(3) There are discrepancies, omissions and improvements in the evidence of eye-witnesses, i.e. P.Ws. 1, 2 & 3.

(4) The prosecution has failed to explain the injury found on the head of Accused No. 5. There was no enmity between the deceased and the Accused. In fact, the Accused did not know the deceased, even as per the prosecution case.

(5) Investigation is faulty, inefficient and not independent.

(a) No blood stains or other incriminating circumstances were found at the place of the incident. Admittedly, the deceased was taken in a Maruti-Van and there were bloodstains in it , but, the Maruti-Van has not been seized by the investigating agency. In fact, there is no investigation in that direction.

(b) The clothes of the witnesses were bloodstained and were shown to the police, but, they have not been seized by the police, nor have they been sent to F.S.L for analysis.

(6) The trial Court has ignored the evidence favourable to the accused, viz, evidence of two hostile eye-witnesses as well as evidence of Dr. Kalpesh, who had treated accused No. 5 for head injury.

(7) The Trial Court has failed to put certain incriminating circumstances to the

accused while recording their further statements u/s 313 Cr.P.C.; whereas they have been used by the Trial Court in recording conviction. This has resulted in causing prejudice to the interest of the accused, as they had no opportunity to explain the circumstances.

(8) The Trial Court has failed to appreciate that the Panch witnesses, in whose presence Test Identification Parade is claimed to have been conducted, were not examined. The Panch witnesses were not of local area.

(9) Independent witnesses, though available, have not been examined by the prosecution. This aspect is overlooked by the Trial Court. The discovery of weapon allegedly made by accused No. 1, is from an open premises in the municipal-garden, adjacent to the main road, easily accessible by any one.

(10) The eye-witnesses suffer from a convenient loss of memory when they were asked an important question.

(11) The fact that P.W.2 does not speak of the presence of Panch witnesses at the time of T. I. Parade, coupled with the fact that the said Panch witnesses are not examined, has not been properly considered by the Trial Court.

(12) The evidence of I. O is inconsistent with the prosecution case itself. When he asserts that the Van was seized, Panchnama (Exhibit 52) speaks otherwise.

(13) There is no evidence worth a name as to what led the Investigating Officer to go to the hospital and record F.I.R. According to the I.O., he was informed about the incident by Mr. Shaikh. The said Mr. Shaikh is not examined, there is no material on record to know as to who informed Mr. Shaikh and, as such, the whole prosecution story becomes doubtful. P.S.O., Mr. Prakash Chaudhary (P.W.26), has claimed to have noted a Vardhi in respect of the injury to accused No. 5 Hemant Raval, but, he has not received any Vardhi from the hospital about the principal incident of assault on Roshan. He has not given any Vardhi to P.I., Mr. Ramani, and, therefore, the question is, who put the police into motion.

(14) The medical evidence negatives the possibility of injury with the weapon alleged to have been used in the commission of the crime. Absence of blood at the spot is sought to be explained for the first time in the Court. There is no specific evidence of rain in that area after the incident.

(15) The complaint by Accused No. 5 about his injury was taken as information of a non-cognizable offence and the same has been used by the Trial Court against the accused, which could not have been done.

(16) The fact that eye-witnesses do not speak of any injury to Accused No. 5 in the incident, coupled with the fact that Accused No. 5 received injury in this very incident and left the place would make the evidence of eye-witnesses suspicious.

(17) The complainant side was the aggressor. They came all the way from Varachha side to the place of incident, which is at a distance of 7-8 Kms. Admittedly, P.W.1-Sanny had come first to the place and he was there all alone

till the deceased and others arrived, but, he was not attacked by any of the accused. The deceased was attacked without any altercation or quarrel, which makes the version of the eye-witnesses doubtful. The theory of four persons catching hold of the deceased is negated by the medical evidence. Even otherwise, it is not possible.

(18) Accused No. 4 Vishal @ Bittu was a minor at the time of the incident and should not have been convicted by the Trial Court. This plea was taken before the Trial Court, but, turned down.

The learned advocates relied on several decisions in support of their contentions, which would be dealt with at the appropriate stage.

8. Learned A.P.P., Mr. Pujari, submitted that Accused No. 5 was taken to hospital by his father and not by Accused No. 1 and therefore, Accused No. 1 was present at the place of the incident, as stated by the eye-witness. Mr. Pujari submitted that the evidence of all the three eye-witnesses is consistent and free from loophole. There is no reason to disbelieve their version only because they are interested witnesses. The learned A.P.P further submitted that the evidence of Bunt Patel and Kalpesh Tukaram, though they are hostile witnesses, can be examined, as their contradictions are proved. The learned A.P.P submitted that minor contradictions and inconsistencies are bound to crop up when the witnesses depose after a lapse of time and they are to be ignored, unless they affect the prosecution case in the main. It was also submitted that the Trial Court has taken all relevant aspects into consideration while recording conviction. Involvement of all the five convicts- appellants is established and their appeals, therefore, do not merit acceptance and may be dismissed.

8.1 The learned A.P.P further submitted that the Trial Court has been unduly liberal while awarding sentence. The State was, therefore, constrained to prefer an appeal for enhancement. A man has lost his life, when he was concertedly attacked and brutally done to death and, therefore, higher sentence ought to have been awarded by the Trial Court. The State appeal for enhancement, therefore, may be accepted.

9. We have examined the record and proceedings and have assessed the evidence in context of the submissions made by rival sides.

10. The prosecution has examined, in all, five eye-witnesses. Out of these five witnesses, two witnesses have not supported the prosecution case. They are P.W.15, Bunti Chandrakant Patel (Exhibit 176) and P.W. 16, Kalpesh Tukaram (Exhibit 177). However, P.W.1-Sanny Chandrakant (Exhibit 110), P.W.2-Prakashant Kishorebhai Gandhi (Exhibit 126) and P.W.3-Mitesh Shashikant Patel (Exhibit 131) have supported the prosecution case. These three witnesses are related to the deceased victim. P.W.1 and P.W.3 are cousins of the deceased and P.W. 2 is a childhood friend of the deceased. Their evidence, therefore, would call for a close scrutiny before being accepted or rejected But, certainly, it cannot be looked upon with doubt merely because they are connected with the deceased

victim. Their evidence, therefore, will have to be examined to know whether what they are telling is the truth, as has been accepted and held by the Trial Court.

11. If we examine the three depositions one after the other, it is found that, prima facie, they seem to be very consistent with each other, but, at the same time, they give an impression that they have deposed in a parrot like manner. They have been tested on the touchstone of cross-examination and there are circumstances which will have bearing on trustworthiness of their claim of being eye-witnesses.

11.1 P.W.1-Sanny, in his deposition, refers to the incident on the previous day, i.e. on 4th August, 2001, when he was informed by Montu that Accused No. 4-Vishal (Bittu) had told him to convey to P.W.1 that he was behaving in an arrogant manner and that his legs would be broken. Montu inquired as to there was any dispute with Bittu and P.W.1 told him that they had none. Thereafter, P.W.1 went to the usual place where Accused No. 4 use to sit, but there he was given a slap by Accused No. 4. At that time, Accused No. 5 intervened and asked him to go away and come on the next day, if he wanted to thrash out the problem. On the next day, Accused No. 4 telephoned P.W.1 and invited him for negotiations. But P.W.1 had some work and he, therefore, told Accused No. 4 that he would come after two hours and, therefore, he was told to come around 5.30 in the evening at the usual place of meeting, which is incidentally the place of incident.

11.1.1 In this context, it may be noted that the prosecution has not examined any witness to support the case of P.W.1, that on the previous day, Montu conveyed to him the message from Accused No. 4 and that P.W.1 went to the usual place of meeting where he was given a slap by Accused No. 4.

11.2 Now, coming to the incident, P.W.1 stated that he went to the place of incident at about 5.30 P.M. where he found Accused Nos. 1, to 5 and others and when he started talking about the compromise, they all responded in a high handed and rowdy manner. He, therefore, feared an attack and, therefore, phoned his cousin, the deceased. After some time, deceased-Roshan, P.W.2-Prashant Gandhi, Mehul Patel, Nitesh Patel, Jitesh Kherabhai, Ritesh Pragjibhai, etc. came in a Maruti Van and a Maruti Fronti and when they were just getting out of the vehicles, suddenly, the accused persons rushed towards them. Accused No. 1 had a Gupti in his hand. Accused Nos. 2, 3, 4 and 5 caught hold of Roshan, the deceased, and Accused No. 1 inflicted Gupti blows on chest and abdomen of deceased-Roshan. As a result, Roshan fell down and the five accused persons ran away. They took Roshan in the Maruti Van to Civil Hospital, where he was declared dead. The police came there and recorded his F.I.R.

11.3 Without firstly going into the cross-examination aspect of the witnesses, what emerges is that none of the witnesses say anything about any injury to anyone else except the deceased. They do not speak of any injury to accused No.

5-Hemant Bharat Raval. The factum of injury having been suffered by Hemant Raval has come on record of the case. The doctor, who gave treatment to Accused No. 5, has been examined. His medical case papers are brought on record, which would reveal that he was attacked by a group of persons at the place where the present incident is alleged to have occurred. Accused No. 5 was required to be hospitalised for a few days because of the injury. The injury was in the nature of C.L.W. on occipital region, which was required to be sutured. His clothes were bloodstained. The arrest of Accused No. 5 was made after he was discharged from the hospital and, at that time also, he was found with medical dressings on the injury. The photographs taken at the time of arrest are part of the record. All these facts would go to show that Accused No. 5 suffered injury at the place of incident. The injury was not of a trivial nature, which may have gone unnoticed and, therefore, when the witnesses do not speak of any injury having been caused to Accused No. 5, it reflects badly on the veracity of the evidence.

11.3.1 It is an attempt on the part of the witnesses to suppress certain facts relating to the incident, may be relating to the genesis or may be relating to the sequential events thereafter or there is a possibility that the eye-witnesses were, in fact, not the eye-witnesses and have not seen the incident. Fact remains that the prosecution has failed to explain the injury on part of the person of the accused.

11.4 Now, coming to the evidence again, it emerges that the deceased was not known to any of the accused. They never had any encounter earlier. There was no animosity with the deceased and, as such, there was no motive to cause his death for any of the accused.

11.4.1 Now, in this context, we are conscious of the fact that where there is a direct evidence, lack of motive may not be so significant. But, if the direct evidence of eye-witnesses does not inspire confidence, then lack of motive would be a major and decisive factor.

11.4.2 If we examine the version of the eye-witnesses, it would surely appear to be nowhere near the natural conduct. If the accused persons had no animosity or reason to attack the deceased, there was no reason for them to attack the deceased. It is nobody's case that there was any altercation or dispute between the deceased and the accused. The case of the prosecution is that the moment the deceased got down from the car, he was attacked by the accused. It is further the case of the prosecution that it is not only Accused No. 1, who attacked the deceased, but the accused persons made a concerted assault on the victim where Accused Nos. 2 to 5 caught hold of the deceased and Accused No. 1 gave knife blows. It is difficult to comprehend as to how four persons could have caught hold of the two hands of the deceased without being injured or that his clothes getting bloodstained. This story of catching hold calls for examination from another angle also. It has come in evidence of eye-witnesses that the deceased struggled to free himself from the clutches of Accused Nos. 2 to 5, but in doing so, he did not seem to have suffered any injury or any marks of injury

on his person. There is medical evidence that there would be such marks on person of the deceased in such circumstances, but there was none noticed by the doctor at the time of postmortem.

11.5 It is nobody's case that P.W.1 disclosed to the accused that he had called his cousin and others for negotiations. The accused persons did not know the deceased. They had no animosity with him and, therefore, had no ostensible reason to attack the victim on his arrival and still it is alleged that they attacked the deceased.

11.5.1 The second aspect that needs to be considered is that it has come in evidence that the deceased struggled to free himself from the clutches of the accused to defend himself. If that be so, it has also come in medical evidence that there would be marks of struggle to be found on his arms and/or biceps, which were absent. This renders the deposition of the eye-witnesses about the concerted assault by the accused persons doubtful. The incident occurred suddenly. The accused persons had no reason to attack. It is not the case that any attempt was made by the deceased or his companions even to speak to the accused nor it is the case of any provocation being offered to the accused persons by the victim and his companions. There is no material to infer that the accused persons apprehended attack. If that be the case, then the accused would have tried to prevent the entire group accompanying the deceased, who were summoned by P.W.1. It is not the case that the accused persons knew about the fact that P.W.1 had called his cousin and others to support him for negotiations in settling the dispute.

11.5.2 The conduct of the eye-witnesses, therefore, is not natural. Their story suffers from defects which render them doubtful. It is also worth a note that the incident is projected to have occurred in a manner as if the accused group wanted to attack the deceased only. The moment he got out of the car, Accused Nos. 2 to 5 caught hold of him and Accused No. 1 attacked him with Gupti. None of the accused turned to anyone else of the group accompanying the deceased nor did they try to chase them. It is alleged that after inflicting fatal blows, all the accused persons ran away. The evidence of the eye-witnesses, therefore, does not speak anything about injury to Accused No. 5, which is a proved fact. It speaks of only an attack on the deceased in a concerted manner as if it was a preplanned attack, but, in fact, it can be deduced from the evidence of these witnesses, as emerging from their examination-in-chief, that nobody had any plan to go to the place of incident. It was only upon a telephone call to the deceased that the deceased and his companions came to the spot. For that matter, it can even be said that P.W.1 himself did not know about the likely arrival of others because he had called only the deceased. Accused Nos. 2, 3, 4 and 5, therefore, had no reason straightaway to attack the deceased victim. If they apprehended an assault by the deceased and his companions, the normal tendency would be to prevent all of them and Accused Nos. 2 to 5 would have turned to each of the companions of the deceased individually to prevent an

assault by them. It is also to be noted that the deceased never made any attack to provoke or to prompt the accused for an assault. The story of the eye-witnesses, therefore, rolls under a cloud of doubt for the reason of non-disclosing the genesis of the incident.

11.5.3 It is also to be noted that the dispute, if any, even as per the prosecution case, that the accused had was with P.W.1. He went to the place first and having found a rowdy attitude, he moved away from them and called his cousin, the deceased. Thereafter, he waited at the spot, admittedly, for about 25 minutes till the deceased and his companions arrived. The deceased and his companions stay in the Varachha area of Surat, which is at a long distance of about 8 kms. from the place of incident, which is on Goddod Road, Surat. In the evening hours they would need at least that much time to arrive at the place. Therefore, P.W.1 was all alone for about 25 minutes with the accused persons. It was he who had some dispute, if any, with the accused. The accused persons had that opportunity since he was all alone, unarmed and was, therefore, a soft target. If they had that intention, they would have certainly assaulted P.W.1, which they have not. This would go to show that the accused persons had no intention or motive to attack the deceased immediately on his arrival.

11.6 It is the story of the prosecution that Accused Nos. 2 to 5 caught hold of the deceased. It is difficult to comprehend that a standing man would be caught hold of by four persons, two on each side, by hand. Assuming that it was so done, it is the case that the deceased struggled to free himself and the doctor says that, in such eventuality, there would be imprints of such struggle on person of the deceased, which were not found by the doctor.

11.6.1 Another aspect which requires consideration is that none of the eye-witnesses has even claimed to have tried to intervene in the incident. Normally, the conduct would be to intervene in such a situation. It is true that different persons react differently in a given set of circumstances. But they do not even claim to have to have reacted in any manner.

11.7 Now, coming to the question of veracity of the eye-witnesses, it is to be noted that it was only P.W.1 who knew the accused and his companions. It has also come in evidence that the statements of P.W.2 and P.W.3 were recorded at the hospital itself wherein they have disclosed the name of the accused persons. Witnesses No. 2 and 3 claim to know the accused persons as they have been introduced by P.W.1. But, if the evidence of P.W.1 is seen, he admits that his companions did not know any of the accused. He denies to have introduced his companions to the accused on earlier occasion. This also weakens the prosecution case.

11.8 The medical evidence, if examined, would go to show that the muddamal weapon was a Gupti with one edge sharp and the other edge blunt. Dr. Lavleshkumar Shardaprasad Sinha (Exhibit 135) has deposed that the injuries found on person of the deceased had sharp edges and both the angles were

acute. He has admitted that with the muddamal weapon, the injuries found on person of the deceased were not possible. He has also admitted that the muddamal weapon was never shown to him earlier. He saw the muddamal weapon for the first time in the Court and then gave the opinion that it was possible that the weapon might have caused the injury to the deceased. However, by virtue of his admission during cross-examination, that aspect gets negated. The story of the eye-witnesses, therefore, that the attack was with the muddamal weapon is not corroborated by medical evidence.

11.9 It is the case of the prosecution that P.W.1 telephoned deceased-Roshan, who was travelling in the front seat of the Maruti Van with other witnesses. He received the telephone call and then decided to go to the place of incident. However, if evidence of P.W.2 is seen, he admits that he was sitting in the rear seat of the Maruti Van at a distance of about 2 feet from deceased-Roshan. He states that if Roshan had talked to anyone on mobile phone, he could have heard the same. He was not sure if Roshan had talked to anyone on mobile phone while being in the car. All these factors collectively would diminish the evidential veracity of the evidence of the eye-witnesses.

11.10 This is only a part of the prosecution case, but if the other aspects of the prosecution case are seen, they would only add to the weakness of the prosecution case.

11.11 The investigation appears to have been carried out in a very superficial manner. It has come in evidence of the witnesses that the deceased was taken from the place of incident to the hospital in the Maruti Van. The Maruti Van was bloodstained. However, the Investigating Officer has not bothered to take sample of the blood from the Maruti Van and sent the same to F.S.L. or even seize the Maruti Van. However, the Investigating Officer, in his deposition went to the extent of asserting that he had seized the Maruti Van, which runs contrary to what is stated in the Panchnama (Exhibit 152).

11.12 It is the case of the prosecution that Investigating Officer, Mr. Ramani, (Exhibit 207) received information on telephone about the incident and he, therefore, went to the Civil Hospital, where he recorded the F.I.R. and the statements of witnesses. During cross-examination he states that he was informed by P.S.I., Shaikh, and was asked to reach the hospital. It is also to be noted that there is no entry made in the Police Station Diary about having received any message from Civil Hospital about the incident nor is there any entry recording intimation being given to the Investigating Officer, Mr. Ramani. This aspect is admitted by the P.S.O., Prakash Chaudhary (Exhibit 216). P.S.I., Mr. Shaikh, has not been examined as a witness. There is no evidence worth a name to know as to how P.S.I., Shaikh, came to know about the incident. Thus, the prosecution has failed to bring on record as to what set the police machinery into motion.

11.13 It is admitted by the eye-witnesses that their clothes were bloodstained

and they had shown those bloodstained clothes to Investigating Officer, Mr. Ramani. However, the Investigating Officer neither seized those clothes nor sent them to F.S.L. and we have nothing on record to support the eye-witnesses that their clothes were bloodstained. The Police Officer seems to have acted in a very casual manner. It is true that mere absence of collecting clothes of eye-witnesses and lack of sending them to F.S.L. would not render their depositions doubtful as observed by the Apex Court in Harpal Singh Vs. Devinder Singh and another, , relied upon by learned Additional Public Prosecutor, Mr. Pujari, but it assumes greater importance when version of eye-witness is found to be not trustworthy, as discussed above, and when there are many other lapses in the investigation.

11.14 A Test Identification Parade was conducted. The Panchnama of the T.I. Parade is at Exhibit 170. It was recorded by Executive Magistrate, Dahyabhai Valjibhai (Exhibit 168). If his deposition is seen, he admits that at the time of drawing the Panchnama, he had prepared a rough note, on the basis of which he later on prepared the Panchnama. That note has not come on record since the witness admits to have not given to the Investigating Officer. The witness has also admitted that he is not sure if the witnesses had seen the accused being taken to the Chamber of Halpati for T. I. Parade.

11.14.1 It is also worth a note that the prosecution has not examined the Panch witnesses of the T.I. Parade Panchnama. This aspect assumes greater importance when Witness No. 2 states that, at the time of the T. I. Parade, one Peon called them, who then waited outside. When he went into the office of the Mamlatdar, persons were standing in a que and in that room, except the Mamlatdar, there was none else. This indicates that the Panch witness was not there. This viewed with non-examination of Panch will assume greater weight.

11.14.2 The sum total of the above aspects is that the T.I. Parade Panchnama is prepared on the basis of notes, which are not placed before the Court; the Panch witness is not examined; the eye-witnesses, who were called at the T.I. Parade for identification of the assailants, do not speak of presence of Panch Witness and the Mamlatdar has not ascertained the possibility of the witnesses having seen the accused persons being brought for T. I. Parade . The entire exercise of T. I. Parade, therefore, loses its credibility.

11.15 The Panchnama of the place of incident does not show the presence of any blood marks. No sample of the soil with blood is taken from the place of incident. It is sought to be attributed to rain, but the Panchnama by itself does not speak of presence of any of the factors to show that there was rain during night of the incident and condition of the soil or presence of puddle of water, etc. is totally absent.

11.16 It is also to be noted that the incident occurred at a place, which is the usual place of meeting for the accused persons. The first informant and his companions are all staying at a place, which is at a distance of about 8 kms. The first informant goes there first and then calls the others and, therefore, the

possibility of the complainant's side being the aggressor cannot be ruled out more so when it has come on record that Accused No. 5 suffered injury in the transaction, was required to be taken to hospital and was hospitalised for about five days. A non-cognizable complaint has also been recorded in this regard. And as an icing on the cake, the prosecution witnesses fail to explain the presence of injury on Accused No. 5, which would render their version as to the occurrence, very genesis and the sequence of events of the incident doubtful. In this regard, decision in the case of Raghunath and Ram Kishan and Others Vs. State of Haryana and Others, may be referred to.

11.16.1 It is also to be noted that P.W.1, in his deposition, has stated that both the sides started running helter-skelter. If the incident occurred as per the prosecution version, there was no need for the prosecution side to run helter-skelter.

11.17 The incident occurred in the evening hours in a public place, where there were eateries around. Presence of other witnesses, therefore, can safely be inferred, but no independent witness has been examined to support the prosecution case. P.W.16-Kalpesh Tukaram Kanoje (Exhibit 177), who has been examined as an eye-witness, is an independent witness. But he has given an altogether different version. According to him, he was standing at the place waiting for his friend when two vehicles had come, out of which, some 10 to 12 boys got down and there was a fight. A boy was sitting there, who was hit by them on his head. Therefore, that boy was immediately taken in an auto-rickshaw and the quarrel continued, where a robust man was inflicted injuries with sword by someone. That man was lifted by his companions who had come there with him and he, therefore, went away. The witness says that he had left his motorcycle at the said spot, which he collected from the Police after two months.

11.18 P.W.15-Buntikumar Chandrakant Patel (Exhibit 176) is also examined as an eye-witness. But he denies to have any knowledge about the incident. He says that his motorcycle was lying at the place of incident, which the Police had taken away and he collected it later on.

12. It is, thus, clear that the prosecution case suffers from various defects. The eye-witnesses are not found to be so reliable. They initially deposed in a parrot like manner, but then succumbed to cross-examination. Even otherwise, their depositions are found not in tune with the prosecution case as well.

12.1 The investigation is done in a casual and superficial manner. Bloodstained clothes of the witnesses were not seized and sent to F.S.L., though shown to the Investigating Officer. The Van in which there were bloodstains has not been seized. No bloodstains were found at the spot. The T. I. Parade is defective and is not appropriately proved and, therefore, in our opinion, the prosecution cannot be said to have proved the case against the accused beyond reasonable doubt.

13. The Trial Court seems to have overlooked these aspects. Our attention is

drawn to the fact that the Trial Court has relied on certain aspects of the prosecution case treating them to be adverse to the accused, but has failed to give an opportunity to the accused persons to explain those circumstances. The Trial Court has relied on the evidence of bloodstains on clothes of the accused, but that aspect has not been put to the accused while recording statement u/s 313 of the Code of Criminal Procedure. Similarly, no question is put regarding non-congnizable complaint given by Accused No. 5 or regarding evidence of P.W.16-Kalpesh Tukaram, whose evidence is used by the Trial Court against the accused, though he is a hostile witness. If that opportunity was given, the accused could have explained the same. Learned Advocates for the appellants indicated that the blood group of Accused No. 5 is "B", which is the same as that of the deceased. Therefore, the Trial Court erred in relying on this circumstance as one of the circumstances leading to the guilt of the accused.

13.1 Such lapse is held to be fatal to the prosecution case in *Ajay Singh v. State of Maharashtra* (2007) 12 SCC 341.

13.1.1 In *Ajay Singh v. State of Maharashtra*, the Honourable Apex Court, while setting aside conviction on such ground, observed :

So far as the prosecution case that kerosene was found on the accused's dress is concerned, it is to be noted that no question in this regard was put to the accused while he was examined u/s 313 of the Code.

13.1.2 In *Ganesh Gogoi v. State of Assam* AIR 2009 SCW 4720, similar mistake in recording statements of accused u/s 313 of the Code of Criminal Procedure is held to be a factor, which would vitiate the trial.

13.2 We examined the question whether the defect in recording of statement u/s 313 can be cured by recording that statement here before us or remanding the matter for that limited purpose to the Trial Court. We also considered if the case can be sent back to the Trial court or to the Chief Judicial Magistrate for holding an inquiry as to the age of Accused No. 4 and then appropriate action or the same inquiry can be held by us over here. But we do not deem it necessary or proper to resort to that remedy for the reason that even otherwise the prosecution case suffers from defect of being not beyond reasonable doubt and, in our view, the benefit of doubt has to go to all the accused. The Trial Court's judgment recording conviction, therefore, cannot be upheld even without undertaking that exercise.

14. The Trial Court has recorded conviction of Accused Nos. 2 to 5 u/s 304 read with Section 34 of the Indian Penal Code. But, if the prosecution case is seen, it is abundantly clear that even P.W.1 himself did not know before few minutes that he would be required to call his friends. He did not know till the deceased arrived at the place that the deceased was coming in a group. Obviously, the accused persons could not have made up their mind to attack the deceased. The incident occurred in a fraction of a moment as per the prosecution case. No sooner the deceased alighted from the car than he was assaulted upon by the accused,

where Accused Nos. 2 to 5 caught hold of the deceased and Accused No. 1 inflicted fatal blow with Gupti. Where did they have time to share common intention and where did they have any cause or motive to share common intention are the questions which remain unanswered, which aspect has been overlooked by the Trial Court. That apart, as discussed earlier, the evidence of eye-witnesses does not inspire confidence as to involvement of any of the accused.

15. It is also to be noted that Accused No. 4 took a plea before the Trial Court of being a juvenile at the time of the incident. That has not been accepted by the Trial Court without any inquiry. It is evident from the charge recorded on 29th August, 2003 that Accused No. 4 was shown to be 19 years old. The incident occurred two years prior thereto. Therefore, Accused No. 4 would be 17 years old at the time of the incident. It is true that Accused No. 4 did not take any plea of being juvenile at an earlier state, but whenever it is raised, it has to be at least examined and tested, which has not been done in the instant case.

15.1 In the above context, we find that the plea was taken by Accused No. 4 that he was aged 17 years at the time of the incident and the record also indicated that he was aged 17 years at the time of the incident, as discussed in the foregoing paragraph. The question ought to have been, therefore, examined by holding an inquiry or directing an inquiry, which has not been done by the Trial Court. In fact, when a minor is found to be in conflict with law, he is required to be dealt under the Juvenile Justice Act and not by ordinary law, which aspect has been overlooked by the Trial Court. However, since we find that the evidence led by the prosecution does not prove the case against the accused persons beyond reasonable doubt, we do not deem it proper to undertake such exercise. In a similar situation, even the Apex Court remitted the case to Juvenile Justice Court for disposal in accordance with law [Hari Ram v. State of Rajasthan and Anr. JT 2009 (8) SC 47].

16. In view of the foregoing discussion, we are of the view that the conviction recorded by the Trial Court is erroneous and deserves to be set aside. Criminal Appeals No. 1764 of 2006, 1395 of 2006, 1445 of 2006, 1491 of 2006 and 1557 of 2006 are allowed. The judgment and order of conviction and sentence recorded by the Trial Court is hereby set aside. All the accused-appellants are acquitted of the charges levelled against them. Accused No. 1 be set at liberty forthwith, if not required in any other case. The bail bonds of Accused Nos. 2 to 5 shall stand cancelled. Fine, if paid, be refunded.

16.1 Since the appeals against convictions are allowed, the State Appeal stands dismissed as a necessary consequence.