
(1995) 09 GUJ CK 0029

In the Gujarat High Court

Case No : Criminal Appeal No's. 474 and 474A of 1991

Rataniya Bhima Bhil and Others

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 06-09-1995

Acts Referred:

Penal Code, 1860 (IPC) — Section 143, 147, 148, 149, 302

Citation : (1997) CriLJ 891

Hon'ble Judges : K.R. Vyas, J; K.J. Vaidya, J

Bench : Division Bench

Advocate : J.B. Pardiwala, for the Appellant; D.N. Patel, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

K.J. Vaidya, J.—These two appeals from the Jail - first one by Raniya Bhima Bhil and 8 others, and second one by Shankar Bhima Bhil

respectively are filed against the common judgment and order dated 27-5-1991, rendered in two Sessions Case Nos. 214/90 and 227/90

respectively, passed by the learned Additional Sessions Judge, Surat, wherein on their coming to be tried for the alleged offences punishable under

Sections 302 323 143 147 148 and 149 of IPC, were at the end of the trial, ordered to be convicted for the same and sentenced to undergo

imprisonment for life and other minor sentences as stated in detail in the impugned order.

1.1 When these two appeals came up for admission before this Court (Coram: B.S. Kapadia and D.G. Karia, JJ.) on 27-11-1991, while

admitting the same, notice for the enhancement of sentence was issued against appellant-accused No. 2 viz., Vania Bhima Bhil only which stands

now duly numbered as Misc. Criminal Application No. 3958/91.

2. To give the synopsis of prosecution case, the incident in question took place on 19-5-1990 at 1 -00 p.m. near the house of Vania Bhima Bhil

(accused) at village Sarvala, wherein as many as five persons viz., Jaysing Rupsing, Rupsing Bhailal, Tarachand Sukhlal, Bhaising Rupsing and

Ramu Gonja were instantaneously done to death, and five others viz., Silkuben.

Miraben, Bansi Bania, Savitriben and Karan received injuries at the hands of 15 accused persons who were armed with axe, Dangora (wooden),

sticks, knife, sickle, etc. The initial prosecution version, as it gets unfolded from the FIR (Exh. 34) filed by Silkuben is to the effect that the accused

Nos. 1 and 2 were members of the milk dairy at village-Sarvala. It is alleged that the persons who were supplying milk to the said dairy were not

made the payment for the same for two months. In this regard, Jay sinh Rupsinh (husband of Silkuben) had also made a grievance against the said

accused Nos. 1 and 2 inquiring as to why they were not making the payment of the milk sold to them. It is because of this that the accused Nos. 1

and 2 were bearing grudge against them. Because of this dispute over payment of milk money, she and her husband were beaten about 4 to 5

times, regarding which complaint was filed before the police, and pursuant to the same, action was also taken against respondent Nos. 1 and 2. It

is further alleged in the FIR that on 18-5-1990 at 3-00 p.m. Shankar Bhima (appellant-accused No. 9) who happens to be the elder brother of the

accused Nos. 1 and 2 had come to the house of Jaysing Rupsing in a drunken condition with a stick in this, hand and had given abuses. As a result

on 19-5-1990, Jaising Rupsing, her husband, Bhaising Rupsing-brother of her husband; Rupsing Balaji - her father in law; and Tarachand Sukhlal-

her brother-in-law had gone to the house of Shankar Bhima just to reprimand him taking exception as to why he had come to his house in their

absence and give filthy abuses yesterday. Thereafter, after sometime on hearing some quarrel, Silkuben went there, where she saw Rania Bhima,

Vaniya Bhima, Bhima Soniya, Pratap Jamalia (absconding). Jamalia Chhania, Magan Balsing, Jagan Palsing. Shankar Bhima. Deva Balji (all

accused persons) and six other female members of the accused forming an unlawful assembly, they started beating. Jaysingh Rupsing, Bhaising and

Tarachand with the respective weapons in their hands. Not only that but Jaysingh

and Bhaising when they tried to escape, they were chased and assaulted, as a result of which they fell down. At that time, Shankar Bhima gave 3 to 4 stick blows to Karan and thereafter Vimlaben Sidi gave a blow with a Sickle, while Dagiben Raniya, Lilaben Vaniya and Somiben gave kicks and fist blows to Silku, as a result, thereof Siluken and her son Karan escaped and hide themselves in the standing crop of sugar cane. Thereafter, since all these accused persons were searching them for beating, she and her son Karan made good their escape and went to Nizer Police Station for filing the complaint. At that time, Lalsingh Rupsing who happens to be brother in law of Silku met her there and informed that Jaysing and Tarachand were murdered and that Miraben, Bansi Maniya and Savitri Rupsing were further beaten and they were lying injured in the house. On the basis of these facts, Silkuben filed a complaint (Exh. 34) before PS I Nizer Police Station, which was at a distance of 9 kms. from the scene of offence on 19th May, 1990 at 5-40 hours for the aforesaid alleged offences against 15 accused persons.

3. After the investigation was over, the present 9 appellant-accused persons and six other female accused came to be chargesheeted to stand trial

for the aforesaid alleged offences; and on the basis of which the learned Additional Sessions Judge, Surat, framed the charge alleging that all the

accused persons formed an unlawful assembly with a common object to murder five persons and to injure five persons as stated in detail above.

4. At trial, the respondents pleaded not guilty and claimed to be tried. Their case was of the total denial.

5. The trial Court after duly appreciating the prosecution evidence brought on the record, convicted and sentenced all the male members

(appellant-accused herein) for the alleged offences as stated above in para 1 of this judgment, giving rise to the present two criminal appeals and

suo motu notice that is Misc. Criminal Application for the enhancement of sentence, against the original accused No. 2. It may incidentally be

stated that so far as the female accused are considered, they came to be acquitted by the trial Judge giving them benefit of doubt on the ground that

there was. no dependable material on the basis of which they can be held either vicariously liable u/s 149 of the IPC or even individually.

6. Mr. J. B. Pardiwala, the learned Advocate (appointed) for the appellants while

challenging the impugned judgment and order has attacked the same making the following submissions :-

(1) That having regard to the strained relations between the deceased and injured prosecution witnesses on the one hand and the accused Nos. 1

and 2 on the other, in absence of any independent corroboration supporting their evidence forthcoming on the record, to accept such vulnerable

evidence and convict as many as 9 accused persons and that too applying the principle of vicarious liability u/s 149 of the IPC would indeed be

quite risky and hazardous and that the Court should carefully examine and eschew that part of the reasoning in the overall interest of justice.

(2) That further taking into consideration on the one hand the ocular and on the other medical evidence on record, the evidence of the prosecution

witnesses implicating all the accused persons should not be taken at its face value risking life for as many as 9 persons, for what ought we know

that some of the prosecution witnesses though partly right, were not tempted in falsely implicating them all out of sheer blind instinct of revenge and

vendetta borne out of impulsive reaction to as many as five deaths and five injured on the spot from their side! Further still, so far as accused No. 2

Vania Bhima Bhil is concerned, the ocular evidence given against him is indeed rendered quite doubtful when the same is examined in the light of

the medical evidence.

(3) That the evidence of the prosecution witnesses even otherwise suffers from omissions and contradictions making it quite vulnerable for

acceptance more particularly in a serious case like the present one where the fate of as many as 9 accused persons depends upon the set of

interested testimony of the witnesses. That taking into consideration the manner and the lightning flash in which the incident in question flared up

and was over, bringing about the heavy toll of five killed on the spot and five injured, applying Section 149 of the IPC embodying the common

object to all the accused persons as having sharing the common object to bring about the death of as many as 5 persons and injuring five, is simply

out of question as it is difficult to determine with mathematical precision as to at what point of time, to what extent the common object developed

and was shared by all.

7. As against the above, Mr. D. N. Patel, the learned APP adopting the very same

reasonings given by the learned trial Judge submitted that the points urged before this Court on behalf of the appellants have been meticulously considered and squarely dealt with by him, and accordingly, the same do not call for any interference whatsoever in these appeals. On the contrary, according to the learned APP, having regard to the facts and circumstances of the case that where on the alleged slightest pretext and provocation, without there being any just, grave rhyme or reason, five persons came to be done to death on the spot and other five injured that is something which is indeed quite an exceptional and unusual manner where accused behaved like a maniac, the same clearly brings the case squarely within the fold at least the case of the original accused No. 2 within the "rarest of the rare case". The learned APP further submitted that it was this initial axing down to death of Jaysinh and Tarachand immediately on the spot by accused No. 2 which let lose the orgy of further crime bringing about the ruthless death of other three and injuries to five persons and accordingly, to take such an incident casually and lightly ignoring Section 149 of the IPC, would be simply injudicious, and in that view of the matter, there is nothing on the basis of which, the submissions of Mr. Pardiwala in the alternative can be accepted that the accused persons should be held at the most guilty for their respective individual liability. On the basis of the above submission, the learned APP finally urged that while undoubtedly confirming the impugned order of conviction and sentence against all the appellant convicts, so far as original accused No. 2 Vania Bhima is concerned, his case squarely calls for the capital punishment just to set an object-lesson to the maniac like him who are out to take the human life on any ground.

8. Taking into consideration two circumstances viz., that on the one hand there were as many as 15 accused persons armed with different weapons having caused five instantaneous death and injured as many as other five persons, and on the other hand, notice for enhancement of the sentence, i.e., capital sentence issued against the appellant No. 2, it is indeed quite necessary first of all to have a graphic picture of the alleged prosecution case on the mental screen of this Court as regards the weapons attributed to each one of the accused and role played by them in bringing about five deaths and injuring five others. For this purpose, first of all, it is indeed

necessary to reconstruct the entire incident by picturing the prosecution case so as to enable this Court to assess the liability of each one of the accused persons individually as well as their being the members of the unlawful assembly to arrive at the just decision. Accordingly, for the overall sake of brevity and convenience instead of reproducing the point-wise evidence in extenso inexactness what is stated in para 52 of the impugned judgment is just adopted and succinctly produced hereby which shows that (i) as far as accused No. 1 Raniya Bhima Bhil is concerned, he is said to have assaulted Jaisinh, Rupsinh, Bhaisinh and three eye-witnesses, with stick and a dangora; (ii) Accused No. 2 Vaniya Bhima Bhil is said to have inflicted fatal blows with an axe on the head of Jaisinh, Roopchand and Tarachand. He is also said to have assaulted other eye-witnesses; (iii) Accused No. 3 Jamaliya Soniya Bhil is said to have given stick blows on deceased Rupsinh; (iv) Accused No. 4 Bhima Bhil assaulted Rarriu Goniya and Rupsinh; (v) Accused No. 6 Jaganpal Sinh is said to have inflicted dangora blows on Jaisinh and Bhaisinh; (vi) Accused No. 7 Deva Bhalji is said to have given stick blows; (vii) Accused No. 9 Shanker Bhima is said to have assaulted the two deceased persons with a dangora and a stick and has also assaulted other eye-witnesses.

9. Now turning to the submissions made by Mr. Pardiwala, the same is point-wise dealt with and answered as under :-

9.1 Turning to the first submission of Mr. Pardiwala, we are indeed quite conscious of the fact that the relations between accused Nos. 1 and 2

were quite strained so far as with the deceased Jaysinh Rupsinh is concerned, which appears to be the epicenter of the entire incident. We are also

equally conscious of the fact that three independent witnesses viz., (1) PW-12, Kantilal Ramdas; (2) PW 13 Ramdas Gujaria; and (3) PW 15

Kamliben Ramsing have not supported the prosecution. The net result of all this is the fact that entire prosecution evidence hinges upon the

allegedly thin interested evidence of partisan witnesses ! But then merely because the evidence in question is alleged to be tainted with the label of

enmity and partisan witnesses, if the same was required to be mechanically scored-off at the bidding of learned Advocate appearing for the

appellant with just stroke of pen; then in that case, no court would ever be able

to reach the source of truth and thereby do justice. Under the circumstances, when it is alleged that the prosecution evidence is tainted one because of the interestedness, then in that case, the Court has to apply an extra-caution and appreciate the evidence of the said witnesses quite guardedly with microscopic scrutiny that is to say with extreme care, caution and circumspection as far as it is possible and if after doing the said rigid honest exercise, if the conscience of the Court still stands duly satisfied beyond any manner of doubt that despite the fact that the witnesses are partisan witnesses, there is an absolute ring of truth in what they had deposed before the Court and accordingly are found to be wholly dependable enough. ½ then the Court can certainly place implicit reliance upon the same and pass the necessary order of conviction and sentence for the alleged offence. In this view of the matter, merely because either the independent witnesses are not examined, or if examined and yet not supported the prosecution case, that by itself will not be sufficient to cry-halt to the Court to make in-depth scrutiny to trace out the truth lying at the bottom of the case. Keeping in focus this highly illuminating principle, we have carefully examined the evidence of all the prosecution witnesses. We have also found these witnesses to be related to the deceased bearing some enmity but at the same time having regard to the facts and circumstances of the case, the time and the place of incident further coupled with the fact that the witnesses were injured, their presence being absolutely natural and indisputable, and their evidence not rendered improbable on any just count, it is indeed not at all possible for us to ignore and discard their evidence merely because they are branded as partisan witnesses. In this view of the matter, the first submission of Mr. Pardiwala deserves to be rejected and is rejected accordingly.

9.2 Turning to the next submission of Mr. Pardiwala, it clearly appears that the whole argument of Mr. Pardiwala proceeds on an unwarranted assumption that the medical evidence brought on the record is contrary to the ocular evidence. In our opinion, we fail to understand as to how the medical evidence brought on the record can be said to be contrary to the ocular evidence ! In fact, while carefully screening the evidence to start with in FIR, it is specifically alleged that the axe was used in commission of offence !! On the same line, the witnesses have also deposed before

the Court that axe was used while commission of the offence, the part of the story which during their cross examination, has not at all been

challenged. Furthermore, even the concerned PW 27 Medical Officer viz., Dr. S. S. Desai also in unmistakable terms has stated quite forthright

that particular injuries on the persons of Jaysinh and Tarachand were possible by axemuddamal weapon before the Court and shown to him in his

examination-in-chief. Despite these tell-tale facts, Mr. Pardiwala not giving up the point easily, vehemently insisted that injuries cause to Jaysinh and

Tarachand do not correspond with the nature of the weapon viz., axe and accordingly, the same going to the root of the evidence given by the

prosecution witnesses, makes them unworthy of credit. Mr. Pardiwala further submitted that in case as alleged had indeed the axe been used while

causing injuries to the aforesaid two deceased persons, then in that case, the prosecution should have been forthright clear enough before the Court

and for that purpose through the concerned eyewitnesses by clearly deposing to the effect that while giving the blows, the accused No. 2 in

particular has used the blunt side of the axe and not the sharp one !! According to Mr. Pardiwala the witnesses are conspicuously silent on this

material aspect and rather have chosen to make a general allegation that axe was used. Such an evidence according to Mr. Pardiwala cannot

sustain further the prosecution case even for a minute further. In support of this contention, Mr. Pardiwala has relied upon a decision of the

Supreme Court rendered in case of Hallu and Others Vs. State of Madhya Pradesh, , which reads as under:-

11. The post-mortem report prepared by Dr. N. Jain that on the body of Jagdeo were found three bruises and a hematoma. On the body of

Padum were found four lacerated wounds and two bruises. According to the eye-witnesses the two men were attacked with lathis, spears and

axes but that clearly stands falsified by the medical evidence. Not one of the injuries found on the person of Jagdeo and Padum could be because by a

spear or an axe. The High Court however refused to attach any importance to this aspect of the matter by saying the witnesses had not stated that

the miscreants dealt axe blows from the sharp-side or used the spear as a piercing weapon"". According to the High Court axes and spears may

have been used from the blunt side and therefore the evidence of the eye-witnesses could safely be accepted. We should have thought that

normally when the witnesses says that an axe or a spear is used there is no warrant for supposing that what he witness means is that the blunt side

of the, weapon was used. If that be the implication it is the duty of the prosecution to obtain a clarification from the witness as to whether a sharp-

edged or a piercing instrument was used as a blunt weapon.

Now as against this decision, the Supreme Court in yet one another decision rendered in the case of Sone Lal and Others Vs. The State of U.P., in

para 20 has observed as under -

20... Normally a sharp pointed weapon would cause a punctured wound but the weapon like banka or ballam can cause incised wounds

provided instead of the pointed end the source of the weapon is used. In the melee that followed it would have been difficult for the witnesses to

say .with exactitude that injuries were caused by the surface or by the pointed end. The injuries found on the deceased persons would, therefore,

be sufficient evidence of the nature of the assault. In these circumstances, we are unable to find any real inconsistency between the medical and the

ocular evidence and the learned Sessions Judge was not at all justified in rejecting the prosecution case on this ground.

Having carefully perused both the aforesaid decisions of the Supreme Court, in our view, each one of them appear to be good law in the

background of the. respective facts and circumstances of the said cases. As a matter of fact, in our respectful opinion in the matter of appreciation

of evidence, there indeed cannot be any matter of precedent, as each case has its own distinct background, characteristics and attending sets of

circumstances and accordingly has to be decided upon the bais of the peculiar facts and circumstances of that particular case in which the weapon

in question came to be used. In the case at hand, the lightening manner in which as many as 15 accused persons armed with different weapons,

having encircled the deceased and the injured, went on delivering as many as 49 blows resulting into instantaneous five deaths and injuries to five

others persons, it is humanly inconceivable that witnesses would remember exactly as to what side of the weapon viz., axe was used. Not only that

but in a given case, they would just broadly notice sharp-cutting instrument used without being definite by what side Not only that but taking into

consideration the medical evidence on the record, PW 27 Dr. S. S. Desai in an

unmistakable terms has stated that the injuries caused to the two deceased persons viz., Jaysinh and Tarachand were possible by blunt side of the axe. Under the circumstances, to the said extent, it cannot be said that the medical evidence is contrary to the ocular evidence. In fact, only legitimate criticism that can be made of such a prosecution witness is that he was not exact in deposing before the Court as regards what side of it was used. In fact, while appreciating this part of the medical evidence, the learned trial Judge has quite rightly observed that in the cases like the present one where five persons came to be done to death on the spot and five persons injured as a result of in all 49 blows by 15 accused persons, merely because the evidence on that point viz., whether the sharp or blunt side of axe was used, was not clear, it cannot be said that the prosecution evidence was contrary to the medical evidence and therefore brand them as liar as unworthy of credit !! The reason is that the muddamal axe is quite heavy and weighty weapon and accordingly when such a weapon is used in the commission of the offence, it is but natural that the resultant injury marks left by way of wound caused may at time not give the appearance of incised wounds e.g., the wound caused by comparatively light weapons like knife. According to the learned trial Judge, many a time, wounds caused by the axe give out an appearance of the contused lacerated wound also! In support of this the learned trial Judge has rightly relied upon the recital from Modi's Medical Jurisprudence, page 204 (17th Edition of 1971) which reads as under:-

CHARACTER OF AN INCISED OR SLASH WOUND

The edges of a wound made by a heavy cutting weapon, such as an axe, hatchet or shovel, may not be as smooth as those of a wound caused by a light cutting weapon, such as a knife, razor, etc., and may show signs of contusion.

In this regard of course taking objection to this unusual practice of the learned trial Judge in straightway relying upon the recital in the aforesaid

Medical Jurisprudence, Mr. Pardiwala submitted that the learned trial Judge was clearly in error. According to Mr. Pardiwala no Court can

straightway adopt and rely upon stray recitals, observations made by the expert in his treatise unless of course the attention of the concerned

expert (in the instant case Medical Officer) is invited to the quoted recital in

question and obtained answer there to it. Since this has not been done in the instant case, the trial Court was clearly debarred in placing implicit reliance upon the aforesaid recital in Modi's jurisprudence !! In support of this, Mr. Pardiwala has invited our attention to the Supreme Court decision rendered in the case of Piara Singh and Others Vs. State of Punjab, para 7 reads as under :-

7. It is true that the High Court has relied on a number of books on medical jurisprudence to support the evidence of Dr. Jatinder Singh. We feel that it was not necessary for the High Court to do so unless the books were put to the expert. Recitals in the books do not provide a sufficient guide to determine the truth or falsity of the testimony of an expert. Having regard to the facts and circumstances indicated above we are clearly of the opinion that the evidence of dr. Jatinder Singh corroborated as it is by the evidence of the recovery of the bullet, the evidence of the ballistic expert and the evidence given by P.W. Balbir Singh regarding the extra judicial confession made before him must be accepted. The trial Court was therefore not justified in throwing out the prosecution case merely on the basis of the evidence of Dr. Paramjit Singh. We have carefully perused the aforesaid Supreme Court decision also and in our opinion, with utmost respect, the principle laid down therein will not be applicable to the facts and circumstances of the present case. The reason being in the aforesaid Supreme Court case, the prosecution had examined two medical officers who had given two conflicting opinions, and at the time of writing the judgment, the Court had relied upon some recitals in the Medical Jurisprudence without giving an opportunity to other concerned medical officer whose evidence did not concur with the said recital, In the instant case, the facts are very simple viz., which side of the axe was used whether sharp or the blunt side. Now this is an aspect simply of the appreciation of evidence, which indeed does not and cannot necessarily call for the expertized knowledge. When that is the position, the decision of the Supreme Court in Piara Singh (supra) with utmost respect does not command any acceptance from this Court. Taking into consideration the axe used and the injuries found on the persons of two deceased persons it can certainly be said with all experience in life that when a weapon like axe is used even with the sharp side of it, then the very weight of the axe added

with force exerted behind it will generate forceful momentum and accordingly the resultant blow was bound to give an appearance of the injury as a contused lacerated wound and not that of an incised wound depending upon force, exerted!! In this regard, there is not even an iota of doubt in our mind. Under the circumstances apart the above quoted recital from Modi's Jurisprudence supports the ocular evidence even the common sense approach and the experience of life commands that the injury caused by muddamal heavy axe with all force and the momentum at its back was bound to cause and bring about an appearance of the contused lacerated wound !! In fact, when the axe blow lands in the head and when it first contacts the skin with the sharp side if there is no much force than it may cause and also leave behind appearance of incise wound but as against this if with the heavy weight of the axe and the force behind it, the blow is delivered than even if with the first contact, it causes an incised wound, but instantaneously in inseparable moment the weight and the force makes the further impact, it is bound to ultimately give a look of the contused lacerated wound. Once again at the cost of repetition, this is entirely a matter of experience of life and not necessarily a matter strictly falling within the purview of the expert knowledge. To illustrate this aspect little further, for example, in a given case where death of a person is brought about by a blow of a dagger which runs through and through piercing the lungs and/or heart and or any other vital organ apart, and in case for whatever reasons the medical officer while giving evidence before the Court fails to depose that the injuries in question were sufficient in the ordinary course of nature to cause death, then can under the circumstances, a Court would be rendered powerless and prevented to appreciate and hold that the said injury was not sufficient in the ordinary course of nature to cause death because the Doctor has not stated so? The answer to this is definite ""No"". Once again the obvious reason for this is that it is a matter of life experience where even without the assistance of the expert knowledge, a just decision can be safely arrived at on the facts as they are on the record as no expertise knowledge is indeed needed for the said purpose.

9.3 Turning to the third submission of Mr. Pardiwala, no doubt, the evidence of the injured eye-witnesses whose presence at the time of the

incident cannot be ruled out is not that pink of perfection and suffers from very many omissions and contradictions, but then the question is can the same be discarded at the very outset merely on that count alone, without taking into consideration the overall fact-situation emerging where such omissions and contradictions would be quite human and natural and certainly not improbable !! For this purpose, one can quite understand the case wherein on the one hand only one or few accused persons are involved and on the other hand one or two deceased and injured were involved and the Court was called upon to evaluate the evidence of the eye-witnesses, under the said circumstances, with some omissions and contradiction, but as against that, when in a case wherein there are number of accused persons as many as 15 armed with different weapons, attacking from all the directions all of a sudden, delivering as many as 49 blows, bringing about five deaths and as many injured witnesses on the spot as in the present case, in such an extraordinary heat, dust and din of circumstances to expect each and every witness to depose before the Court with a photogenic or so to say that the video-graphic precision memory would be expecting indeed quite extraordinary and therefore unnatural!! The difference between man and the machine has got to be appreciated!! In fact, when there are number of accused persons, number of deceased persons and number of injured persons, the number of weapons used, number of blows delivered and number of diversifying account of injuries, it would be quite natural in the very nature of things that the witnesses have been attacked and attacked suddenly and injured and rendered terrified in pointing out certain omissions and contradictions, but the same to our mind, as in facts and circumstances of the case, as alleged, are not such as to persuade us that they are liars and accordingly not dependable at all. The injuries to these witnesses are proved beyond doubt as they stand duly corroborated by the medical evidence on the record. Their houses being in the neighbourhood adjoining to each other, their presence was absolutely natural. All the accused persons were quite well known to them. Their statements were recorded soon after the alleged incident. When under such circumstances the prosecution witnesses of whom some are ladies and illiterate Adivasis coupled with little discrepancies here and there, they witness the incident and accordingly while attributing some role to the accused persons, if they commit some

honest, bona fide mistakes or make some omnibus statements involving all the persons armed with respective weapons, then in that case, it cannot be said that they are liars for the purpose of rejecting their evidence from being (taken into) consideration. Not only that but while appreciating the evidence of any witness, the Court cannot afford to be oblivious to the fact that there are two different type of witnesses. Firstly, that types of witnesses who are not related to the injured/deceased and had therefore seen the incident from little distance without emotionally not much disturbed. and secondly, that type of witnesses who are actually injured, and therefore bearing in, mind the instinct of self-preservation, and gripped with terror and fear their attention would stand focussed and consumed only in saving himself rendering it imposible to account entire and graphic scenario of the incident and thirdly the quality and degree of observation, memory, importance of event necessity of narration varies from witness to witness and accordingly there may not be exact precise exhaustive description of event. Besides all these factors, time factor that is to say the time gap between the recording of statement by police and giving evidence before the Court is also certainly one of the circumstances which many a times dilutes the memory of witness has also got to be kept in mind while judging their veracity. Bearing all these quite obvious indisputable natural phenomena in mind, we have no difficulty in holding that though the evidence of some of the prosecution witnesses do suffer from pinpoint precision, none the less they appear to be quite honest and truthful as regard the allegation that as many as 5 persons came to be injured and five persons lost their lives instantaneously on the spot at the hands of the concerned accused. Further on being taken through the appreciation of evidence made by the learned trial Judge from para 32 onwards, it must be stated that the exemplary clarity with which the evidence of all the prosecution witnesses came to be threadbare appreciated, calls for no interference by this Court and further by way of brevity and convenience, we would like to adopt the very said reasonings as a part of this judgment.

9.4 That takes us now the last and fourth submission of Mr. Pardi wala that having regard to the facts and circumstances of this case, it will be

simply too risky and hazardous to straightway attract the vicarious liability u/s 149 of the IPC convicting all the appellants u/s 302 of IPC and

sentencing each one of them to life, it may be stated that he is indeed quite right so far as the general submission is concerned. In fact, while

embarking upon appreciating the prosecution evidence on this point, we have sounded enough caution to ourselves to see as to how the evidence

of the prosecution witnesses should be appreciated so as to not to take in its blind sweep all the accused persons rendering them liable u/s 302 of

IPC unwarrantedly dazzled by Section 149 of IPC. Accordingly, whenever any Court is called Upon to decide the vicarious liability of any

individual as member of unlawful assembly sharing common object u/s 149 of the Code, it has to be extra-cautious and has got to guard against the

factors which may in some unguarded moment surreptitiously make in roads! influencing the objective process of reasoning by the Court in

reaching ultimate decision !! They are-- (1) in cases like the present one where as many as, 5 persons are done to death and five injured, the very

gruesomeness of the dastardly offence in its initial first reaction sweep may sometimes to some inexperienced PP or the learned Judge prejudice

their factuality of viewing and appreciating the prosecution evidence and thereby reaching the ultimate decision!! Accordingly, when there are grave

casualties like the one in the present case the Court itself must scrupulously guard not to be victim of the "Reason back Process" that is to say that

merely because five persons are murdered and five persons injured, therefore, all the persons must have been there to hold each one Of them

vicariously liable! If this is done, then the Court is likely to reach a wrong decision. (2) it is indeed too well-known that when any person who is

murdered when belongs to a family or group of enemy fraction, then a witness belonging to such a family or rival group but of sheer desperation and

the spirit of vengeance and vendetta, which reigns their blood, nerves and reasons, the alleged eye-witnesses many a time even go on involving

innocent and as many persons of the accused family as possible to satisfy their thirst for the blood and harassment of the opponent/enemy group !!

This one may approve it or not, but it is found to be quite human, natural weakness and overwhelming tendency in many witnesses. What we

apprehend and have said above is in fact noticed and warned even by the Supreme Court in a decision rendered in the"" case of Muthu Naicker

and Others Vs. State of Tamil Nadu, , wherein in para 6, it has been observed as under:-

6. Where there is a melee and a large number of assailants and number of witnesses claim to have witnessed the occurrence from different places

and at different stages of the occurrence and where the evidence as in this case is undoubtedly partisan evidence, the distinct possibility of innocent

being falsely included with guilty cannot be easily ruled out. In a faction ridden society where an occurrence takes place involving rival factions it is

but inevitable that the evidence would be of a partisan nature. In such a situation to reject the entire evidence on the sole ground that it is partisan is

to shut one's eyes to the realities of the rural life in our country. Large number of accused would go unpunished if such an easy course is charted.

Simultaneously, it is to be borne in mind that in a situation as it unfolds in the case before us, the easy tendency to involve as many persons of the

opposite faction as possible by merely naming them as having been seen in the melee is a tendency which is more often discernible and is to be

eschewed, and therefore, the evidence has to be examined with utmost care and caution....

9.5 Many a times, sometimes quite rightly and .most of time falsely, it is alleged by the defence that the dishonest investigating agency is also in

habit of falsely implicating as many persons as accused as possible from the family members of the accused persons or locality for too well known

ulterior motive !! Of course, we are not at all inclined to accept this wild general allegation in each and every case to be true. But nonetheless at the

same time, once a while, in a given case, the possibility of this type of allegations, also to be true cannot be ruled out and certainly the Court has to

make some hard, honest efforts to search out truth of allegation, May be it is quite so in the case it is handling and in that view of the matter, this

factor must also be at the backdrop of the mind of every Court while appreciating the evidence in matter of deciding vicarious liability !! From

these observations, it could be seen that the material on which the vicarious liability is to be decided is indeed quite slippery and treacherous and

accordingly if for a moment even the Court is caught napping and unguarded and allows itself to drift away to the mechanical sweep and

evaluation, it can bring about any disastrous result where instead of doing and bringing about the justice, the Court itself would be guilty of doing

injustice in convicting innocents imposing maximum punishment sometimes even of life imprisonment With this background only, we now proceed

to decide whether having regard to the facts and circumstances of the present case, Section 149 of the Code is attracted or not !

9.6 Many a times, while appreciating the liability u/s 149 of the IPC, in some unguarded moment the Court slips into an error as if it was

considering the question of common intention u/s 34 of IPC. The respective field of Sections 34 and 149 are overlapping and confusing and if the

Court is not alert, such a mistake would be an obvious one. In fact, as laid down by the Supreme Court in Chikkarange Gowda and Others Vs.

State of Mysore, , the leading features of Section 34 is the element of participation in action, whereas membership of the assembly at the time of

the commission of the offence is the important element in Section 149. The two sections have a certain resemblance and may be to a certain extent

overlap, but it cannot be said that both have the same meaning. Further, while applying Section 149 of IPC, the Court has to bear in mind that the

same is divided into two parts viz., (1) if an offence is committed by any member of unlawful assembly; and (2) such member of that assembly

knew to be likely to be committed in prosecution of the common object. In substance, while reaching the ultimate decision holding each accused

vicariously liable u/s 149 of the Code, the concerned Court has to remain throughout conscious of the aforesaid undercurrents, trickeries and traps

of the situations and thereafter further applying the test of ordinary common sense, the course of natural conduct i.e., the test of the prudent, man

with utmost with utmost care, concern and anxiety, the ultimate decision should be reached in holding a person guilty of sharing the common object

of unlawful assembly.

9.7. The learned APP Mr. Patel is undoubtedly quite right when he submitted that right from the inception, the FIR came to be filed, it is very clear

that 15 accused persons (actually named) participated in the alleged crime bringing about the death of five persons and causing injuries to five

persons, and therefore, the appellant-accused should accordingly be held guilty u/s 149 of the Code by way of vicarious liability. The learned APP

Mr. Patel is also further right in pressing hard that taking into consideration the instantaneous death of five persons and injuries to five other, more

than at least 10 persons must have participated in the crime alleged against the accused persons. This circumstances, according to the learned

APP, brings all the accused within the fold of ""forming an unlawful assembly"" undoubtedly with ""common object"" bringing :about as many as five deaths and injuries to five others.

10. Mr. Pardiwala in a way is of course undoubtedly right when he submitted that since the incident in question took place near the house of the accused persons, their presence was natural. In fact, it is an admitted position that the deceased party had gone to the house of the accused to scold accused Shankar as on the day previous to the incident he had gone to their house and picked up the quarrel under the influence of drink.

Not only that, but Mr. Pardiwala was further at pains by inviting our attention to the Panchnama (Exh. 65) wherein in terms it has been stated that

when the accused Nos. 1 and 2 came to be arrested, both had a bloodstained bandage over their persons. On the basis of these two

circumstances, Mr. Pardiwaia submitted that what ought we not know that it was the deceased party which was the trouble-shooter giving a cause

igniting the situation which ultimately boomeranged and brought about death of five persons and injuries to other five persons !! According to Mr.

Pardiwala, this circumstance renders the genesis of the entire prosecution case quite doubtful and in that view of the matter also, the prosecution

evidence should not be accepted at its face value. According to Mr. Pardiwala, it is simply unfortunate the police officers who have been examined

has given no evidence as regards the nature of injuries received by the accused persons. This patently unfair treatment by the investigating agency,

according to Mr. Pardiwala, has seriously prejudiced the defence. There is indeed no doubt that there is a serious lapse on the part of the

Investigating Officer in not getting the accused persons examined by the Doctor and producing . the medical evidence in the said regard on record.

But that circumstance standing by itself in the facts and circumstances of the present case cannot be attached over and undue importance,

minimising the gruesomeness of the death of five persons and injury to other five. Assuming for the time being that it was the deceased party which

went there to the house of the accused persons as a result of which the heated exchange of words took place and in the process, the deceased

party gave some blows to some of the accused persons, then even, that circumstance and again standing by itself could never have justified the

accused party to bring about the death of as many as five persons and injuring other five !! This comparatively trivial situation by itself can never, bring within its fold the fright of private defence"". At the relevant point of time, the accused No. 2 was armed with an axe and the rest of the persons with sticks mounted lightning assault and in process even chased two persons in the house one of them killed, bringing about in all the death of five persons" and injuring five persons, in that case, at the initial "stage, had the accused party stopped by attacking Jaysinh "and Tarachand and the matter ended there only, then the rest of accused would not have been liable u/s 149, but all the accused persons knowing full-well that the accused No. 2 was armed with axe, has already done to death two persons lying on the ground, they still continued in the said assembly and in the frenzy brought about the death of other three persons by chasing and injuring five. This clearly goes to demonstrate that all the accused persons were ultimately bent upon liquidating all the five deceased persons who came in their way by injuring other five. Under such circumstances, the submission of Mr. Pardiwala that the accused had no previous knowledge, has no substance because the case would squarely fall within the purview of the second part of Section 149 of the IPC which lays down that if the offence is committed by any group of unlawful assembly and the members of that assembly knew to be likely to commit in prosecution of that common object, every individual who at the time of committing that offence was a member of the said assembly cannot escape the ultimate liability to be guilty of that offence. Thus, having considered each and every limb of the tenacious submissions made by Mr. Pardi wala with regard to the facts and circumstances of the case, as discussed above, it is indeed not possible for us to take a view different than the one already taken by the learned trial Judge.

11. This takes us to the next important question viz., whether the sentence of life against Vania Bhima Bhil original accused No. 2 should be

enhanced to the capital punishment or not? The learned APP submitted that the way in which the accused No. 2 brought about the death of two

unarmed innocent persons on the spot in quick succession further setting in motion the orgy, death of other three persons and injuries to five speaks

volumes about the magnitude of ferocity and the most depraved manner of accused in committing the heinous crime and therefore this is one of the

fittest case which calls for the capital punishment. Vehemently opposing this submission of learned APP, Mr. Pardi wala submitted that by no

stretch of imagination, the case against the accused can be brought within the compass exception of the ""rarest of the rare case"" !! In support of

this, Mr. Pardiwala has relied upon several decisions of the Supreme Court, the principle being too well-known, they are not referred here.

12. Now in order to pass an order of capital punishment, Mr. Pardiwala is right that this Court must reach a definite conclusion that the case at

hand is one of the categories of that of the ""rarest of the rare case"" as repeatedly emphasized by the Supreme Court. Now it is indeed true that

merely because five persons were done to death on the spot as a result of the action initiated by the accused No. 2 by axing down two persons on

the spot and thereafter killing 3 and injuring five other that by itself cannot be said to be an exceptional case !! Further, there is indeed nothing on

the record to show that the accused No. 2 had in anyway any criminal antecedents of being professional killer, in other words, there is nothing on

the record to show that he was a person of desperate and dangerous character, living on a life of crime by indulging in such maniac murders. No

doubt, the accused No. 2 has committed two murders setting the ball of vendetta rolling further on the spot, but that by itself, as stated above,

does not bring the case within a special category of the ""Rarest of the rare case"" more particularly in view of the fact that the incident of five

murders flared up unexpectedly. There was certainly no premeditation to commit five murders or injure others. In fact had indeed deceased party

not gone to the house of accused in respect of the previous day incident, incident in question certainly Would not have taken place at all. This

indeed is one of the most important and saviour ground to save accused No. 2 from gallows of death. Further, the Supreme Court in its decision

rendered in the case of Machhi Singh and Others Vs. State of Punjab, has laid down guidelines in para Nos. 33 and 34 placing reliance upon its

earlier decision in the case of Bacchansing. Bearing in mind these guidelines, in our opinion, no case for the enhancement of sentence is made out,

and hence the suo motu notice for the enhancement of the sentence against accused No. - deserves to be dismissed.

13. While concluding and before parting with this judgment, three outstanding things deserve special mention. Firstly, the performance of the

learned trial Judge Mr. M. P. Shah. Taking a special note of the industry put in, clarity and the way in which the evidence has been appreciated making elaborate effort to separate the grain from chaff by the learned trial Judge, we would be simply failing in our duty, if we fail to place on record the word of appreciation of the dexterous manner in which the varied, complex and complicated evidence came to be appreciated by him while reaching ultimate conclusion. It is just Excellent, Congratulations, Keep-up. Incidentally, it is recommended that, be it at the stage of admission or final hearing, whenever the special mention is needed to be made about the perverse or exceptionally good quality of judgment, the remarks in said regard by the concerned learned Judge be immediately placed on the service record, so as to be easily availed on date regarding performance of the Judge for due promotion. Secondly. the performance of young learned Advocate Mr. Jamshed Pardiwala (Appointed). It must indeed be stated to his credit that though these two appeals fail, yet at the sametime, taking into consideration the fact that at the shortest possible notice, the way in which Mr. Pardiwala burning his midnight oil has put his industry with touch of all maturity and meticulousness at his command in quite bulky, labourious and otherwise tedious matter and that too in this appointed appeal, was simply idyllic, impressive and an object lesson to any young lawyer how even in appointed matter with all sincerity and devotion the heart could be put-in and appeal could be conducted. This indeed merits all deserving compliments. Further, the hearing of these appeals commenced on 2-8-1995 and it went on taking in all ten days barring some time consumed by daily admissions. Not only that but Mr. Pardiwala of his own has submitted typed charts, xerox copies of the Supreme Court judgments, etc. Under the circumstances, the nature and the record of the case and the industry put in by Mr. Pardiwala not only deserves special compliments but we feel he should surely be suitably compensated by awarding adequate fees. Thirdly, the gross inadequate outdated standard of fees given in appointed matters. In appointed matters, we are informed that the learned advocates so appointed are paid Rs. 100/-only per matter by virtue of a circular issued by the then Government of Bombay, Home Department Resolution No. LD/33-C-III, dated 20-8-1957 irrespective of the consideration of importance of matter and for how many days it was argued. Indeed, much waters have down the

aforesaid circular issued by Bombay Government!! The value of rupee thereafter has fast shrunk, dwindled and stands much depreciated after

1957!! By now, even the fees scale in the office of the GP & PP have been revised upward considerably. We have also been further informed at

the Bar that the State of Maharashtra has also subsequently substantially revised upward the fees-scale in the appointed matters. In this view of the

matter, in our opinion, Rs. 100/- in an appointed matter being more or less quite unrealistic and irrational rather nothing but the mockery and

accordingly we deem it proper to recommend the State Government to graciously and suitably enhance the same at the earliest opportunity giving it

top most time bound emergent consideration. The reason is when the Court is called upon to administer justice, the same is always done with the

active and able assistance rendered by the learned advocates. It has been reported to us that many advocates these days refuse to take the

appointed matters. In all probability because of meagre amount of Rs. 100/- only which is paid to them. Once a while when such matters are

accepted in Rs. 100/- only some learned advocate so appointed fails to put his heart to render the desirable assistance to the Court to the greatest

prejudice of poor accused languishing in jail!! In fact when an advocate accepts the appointed brief, obliging us we cannot be oblivious to the fact

that to that extent, his personal work also suffers for as many as days final hearing continues, and still if an advocate is good enough inspired by the

sense of duty, if he accepts the appointed brief, then in that case, his good sense of duty should not be taken at discount and accordingly, it is the

duty of the State Government to see that his services are properly compensated. In this view of the matter, we request the State Government to

consider this aspect at the earliest and, do the needful so as to revise the fees scale of the learned advocates in the appointed matters. In the

present case for the reasons already stated, above, we recommend the State Government to sanction atleast Rs. 2,500/- towards fees to Mr. J.B.

Pardiwala, at the earliest.

14. The Registry is directed to forward para 13 of this judgment to the Secretary, Legal Department, Gandhinagar with a request to place the

same before the Hon''ble Law Minister for immediate decision and action in the matter of revising fees scale in the appointed matters.

15. In the result both these appeals fail and are dismissed. Misc. Criminal Application No. 3958 of 1991 for enhancement of sentence also fails and is dismissed. Notice issued therein stands discharged.