

(2014) 05 GUJ CK 0020

In the Gujarat High Court

Case No : Criminal Appeal Nos. 1013, 1132, 1158 and 1245 of 2007

Samim Imam Akbar Imam Kadri

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 07-05-2014

Acts Referred:

Bombay Police Act, 1951 — Section 135

Criminal Procedure Code, 1973 (CrPC) — Section 209, 313

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

Citation : (2015) 1 GLR 193

Hon'ble Judges : Bhaskar Bhattacharya, C.J.; J.B. Pardiwala, J

Bench : Division Bench

Advocate : Pratik B. Barot, Advocates for the Appellant; Chetna M. Shah, Addl. P.P, Advocates for the Respondent

Judgement

J.B. Pardiwala, J.—As all the captioned four Appeals arise from a common order of conviction and sentence passed by the Additional Sessions Judge, 6th Fast Track Court, Gondal, Camp: Jetpur dated 12th July, 2007 in Sessions Case No. 55 of 2006, those were heard analogously and are being disposed of by this common judgment and order. Criminal Appeal No. 1132 of 2007 has been filed by the original accused No. 6, namely, Rahimsha Rafiksha Kadri, Criminal Appeal No. 1158 of 2007 has been filed by the original accused No. 2, namely, Muzufar Imam @ Guddu Akbar Imam, Criminal Appeal No. 1245 of 2007 has been filed by the original accused No. 1-Akbar Imam Mazhar Saiyed, the original accused No. 2-Muzufar Imam @ Guddu Akbar Imam, the original accused No. 4-Manzar Imam Akbar, the original accused No. 5-Shabbir Yusufbhai Kadri and the original accused No. 6-Rahimsha Rafiksha Kadri, Criminal Appeal No. 1013 of 2007 is a successive Appeal filed by the original accused No. 4, namely, Shamim Imam Akbar Imam Kadri.

2. The present Appeals are at the instance of six convicts of me offence under Sec. 302 read with Sec. 34 of the Indian Penal Code and is directed against the order of conviction and sentence dated 12th July, 2007 passed by the learned

Additional Sessions Judge, 6th Fast Track Court, Gondal, Camp at Jetpur in Sessions Case No. 55 of 2006. By the aforesaid order, the learned Addl. Sessions Judge found the appellants guilty of the offence under Sec. 302 of the Indian Penal Code, read with Sec. 34 of the Indian Penal Code and consequently sentenced them to suffer life imprisonment and a fine of Rs. 10,000/- each for the offences punishable under Sec. 302 of the Indian Penal Code. In default of payment of fine, the appellants were directed to undergo further simple imprisonment for one year. The learned Addl. Sessions Judge found the original accused Nos. 5 and 6 guilty also of the offence punishable under Sec. 135 of the Bombay Police Act, and consequently sentenced them to suffer rigorous imprisonment for four months and a fine of Rs. 500/- each. In default of payment of fine, the original accused Nos. 4 and 5 were directed to undergo further simple imprisonment for one month.

3. At this stage it may not be out of place to state that the original charge framed by the trial Court at Exh. 15 against the appellants, was one of the offences under Secs. 147, 143, 149, 337, 302 and in the alternative of the offence under Sec. 302 read with Sec. 34 of the Indian Penal Code. It appears that the trial Court acquitted all the appellants of the offence under Secs. 143, 147, 149 and 337 of the Indian Penal Code. The learned Additional Sessions Judge also acquitted the original accused Nos. 1, 2, 3 and 4 of the offence under Sec. 135 of the Bombay Police Act. However, ultimately convicted all the appellants of the offence under Sec. 302 read with Sec. 34 of the Indian Penal Code.

4. The case of the Prosecution:

"5.1. Shorn of the facts, the case of the prosecution, as could be unfolded from the charge Exh. 15 is that the mother of the complainant, the P.W. 12, namely, Mariyamben had passed away and 2nd February, 2006 i.e. date of the incident, was the 40th day of the death of the mother of the P.W. 12-complainant. Ordinarily on the 40th day of the death of the person in the Muslim community a ritual known as Milad (Molud), is performed and the same was organised at the house of the P.W. 12-complainant on 2nd February, 2006 at 20-00 hours. The ritual was to be performed at the Ghetawala Plot, Near Hanuman Temple at Jetpur City. Many persons had gathered to attend the ritual of Milad. It is the case of the prosecution that at that time a quarrel ensued between Irfan aged 10, the son of the complainant's brother and one Hyder Yusuf, the brother of the accused No. 5 on the issue of sitting on a chair. As the two minors were fighting with each other, the brother of the complainant i.e. the deceased, gave one slap to each of the two minor boys. The act of the deceased giving a slap to the brother of the accused No. 5 was not liked by the accused persons and they all left the place in protest where the ritual of Milad was to take place. It is the case of the prosecution that thereafter the accused persons again came at the place where the ritual was to be performed by forming an unlawful assembly armed with deadly weapons. It is the case of the prosecution that a knife blow was hit

by the accused No. 5 on the body of the deceased and the accused No. 3 hit a blow on the chest of the deceased with a stone. The deceased succumbed to the injuries.

5.2. The complaint Exh. 62 was lodged by the P.W. 12 Arif - brother of the deceased at the Jetpur City Police Station regarding the incident inter alia stating that he had three brothers and two sisters. The eldest sister Nasimben was married to Manzar Akbarbhai Saiyed (A-3) residing at Jetpur, Navagadh. The complainant's second brother, namely, Asif is younger to him and the deceased Altaf is also younger to the complainant. The complainant's father had died three years back from the date of the incident and his mother Mariyamben had died on 25th December, 2005. He has stated that it was the 40th day of the death of his mother, and therefore, a Milad (Molud) ceremony was arranged in the night. Many relatives and neighbours had come to hear the Milad. He has stated that Irfan aged 10 years, the son of the deceased and Hyder aged 10 years, the son of Yusuf of Navagadh quarrelled with each other on the issue of sitting on a chair. At that time the deceased gave a slap each to both the boys. On account of the deceased giving a slap to both the boys, the Mama (maternal uncle) of Hyder residing near Navagadh Samiyana Dyeing i.e. one of the absconding accused viz. Vajir Akbar, got annoyed and left the place along with others stating that they did not want to hear the Milad. After the Milad ceremony was over, the complainant saw Vajir Akbar Saiyed (absconding accused and yet to be put on trial) with a hockey stick in his hand, the A.5-Shabbir Yusufbhai Kadri with a knife in his hand, A.6-Rahimsha Kadri with a hockey stick in his hand, A.1-Akbar Saiyed, A.2-Muzufar Imam @ Guddu, A.4-Shamim Kadri and A.3-Manzar Imam Akbar near the shop of one Kavabhai Khant situated at the distance of about 20 ft. from his house at around 12-00 O'clock in the night. He has stated that he himself and his younger brother Asif went there to talk and at that time they all started saying that they had come to beat his brother Altaf (deceased) and wanted to kill him. He has stated that while they were persuading the accused persons, his brother Altaf (deceased) also arrived at the place. He has stated that thereafter A.5-Shabbir ran with the knife behind the deceased and hit a knife blow on the chest as a result Altaf fell down. He has further stated that in the meantime A.3-Manzar picked up a stone and hit a blow with the same on the chest of his brother Altaf. He has stated that Altaf shouted that he had been hit with a knife blow. As Altaf stated so by shouting, the complainant's uncle Iqbal Kadar Abdulkadar, his sisters Banuben and Nasimben, his niece Salmaben, his paternal aunty, his mother-in-law Aminaben, his wife Mumtaz and his brother-in-law Rafiq all reached at the place of occurrence. Thereafter the accused persons ran away from the place of occurrence. He has stated that thereafter he himself and his brother Asif took Altaf in a rickshaw of one Munnabhai Ghanchi residing in the same locality to the Jetpur Government Hospital as Altaf was bleeding profusely. At the Jetpur Government Hospital, the doctor, after giving some preliminary treatment, advised the complainant and his brother to take the injured Altaf to the Rajkot Government Hospital. The complainant and his brother thereafter took

the injured Altaf in an Ambulance to the Rajkot Government Hospital where the Medical Officer on duty declared his brother Altaf as brought dead.

5.3. On the complaint being lodged by the brother of the deceased, the investigation had commenced. The inquest panchnama of the dead body Exh. 36 was drawn in presence of the panch witnesses. The panchnama of the place of the occurrence Exh. 41 was drawn in presence of the panch witnesses. The dead body of the deceased was sent for the post-mortem examination and the post-mortem report Exh. 34 revealed that the cause of death was due to injuries on the vital organ like heart. The blood stained clothes of the deceased were collected by drawing a panchnama Exh. 58 in presence of the panch witnesses. The discovery panchnama of the weapon of offence Exh. 45 was drawn in presence of the panch witnesses. The arrest panchnama of the accused persons Exh. 43 was drawn in presence of the panch witnesses. The statements of various witnesses were recorded. Finally, the charge-sheet was filed against the accused appellants in the Court of the J.M.F.C., Jetpur.

5.4. As the case was exclusively triable by the Sessions Court, the J.M.F.C., Jetpur committed the case to the Sessions Court under Sec. 209 of the Criminal Procedure Code. The Sessions Court framed charge against the accused Exh. 15 and statements of the accused persons were recorded. The accused persons did not admit the charge and claimed to be tried.

5.5. The prosecution adduced the following oral evidence in support of its case:

The following pieces of documentary evidence were adduced by the prosecution:

5.6. After completion of oral as well as documentary evidence of the prosecution, the statements of the accused persons under Sec. 313 of Cr.P.C. were recorded, in which the accused persons stated that the complaint was a false one and they were innocent."

5. At the conclusion of the trial, the learned trial Judge convicted the accused persons of the offence punishable under Sec. 302 read with Sec. 34 of the Indian Penal Code and sentenced them as stated herein before.

6. Being dissatisfied, the accused-appellants have come-up with their respective appeals.

7. Oral evidence on record:

"8.1. The P.W. 1-Dr. Nikita Padiya in her evidence has deposed that on 2-2-2006 she was on duty as a Medical Officer at the Jetpur Government Hospital. At that time at around 11-50 in the night, one Altafbhai Jusabbhai Shaikh was brought at the hospital by his elder brother Arif Jusabbhai (P.W. 12). The P.W. 1 has deposed that on inquiring with the elder brother of the injured regarding the history of assault, it was stated before her that one Vajirbhai, Shabbirbhai and 8 to 10 other persons had assaulted the injured near the Ghetawala Plot at their house. The P.W. 1 has deposed that the clothes of the injured were drenched

with blood. The injured was unconscious, his pulse was 25 per minute, his blood pressure was 106/67. The P.W. 1 has deposed that the external examination of the injured revealed the following injuries:

(i) There was a stab wound on the upper part of the chest on the right hand side 1.5" above the nipple oblique and 2 x 1 x cavity deep. It had sharp margins and its upper end was inside and lower end was outside.

(ii) There was a 3 cm. abrasion near the nostril on the left cheek.

She has deposed that the injured was admitted and was given some primary treatment. Thereafter the injured was sent to the Civil Hospital at Rajkot for further treatment. The P.W. 1 has deposed that she has issued a medical certificate Exh. 29 in her own handwriting regarding the injuries noted above. She has deposed that the injury sustained by the patient can be caused by a sharp weapon like a knife. In her cross-examination she has deposed that the patient was brought at the hospital at 11-50 hours. The P.W. 1 denied the suggestion given to her that when there are many persons in a group, then more than one injury is likely to be caused to the person assaulted. The P.W. 1 has stated that the injured had sustained only one injury i.e. Injury No. 1 as stated in the medical certificate Exh. 29. She has deposed that the solitary injury was on a vital part of the body sufficient in the ordinary course of nature to cause death. The P.W. 1 has deposed that in the history given by the brother of the injured, the name of Rahimsha (A.6) had not been disclosed.

8.2. The P.W. 2-Dr. Paresh Gamara, in his evidence has deposed that on 3-2-2006 he was on duty as the Medical Officer at the Rajkot Civil Hospital. On 3-2-2006 at around 4-00 O'clock in the morning a dead body was received from Rajkot Pra. Nagar Police Station. It was brought by Police Constable, Buckle No. 598 for the purpose of post-mortem. The dead body was identified by the brother of the deceased, namely, Asif Jusabbhai Shaikh. He has deposed that the following injuries were found on the body of the deceased:

(i) There was a stab wound on the right hand side of the chest near the nipple level. Its right end was 3 cm. inside from the right nipple. Its size was 1.5 x 0.8 x cavity deep. Its shape was horizontal as indicated by drawing in column No. 17 of the post-mortem report. Its margins were sharp and its direction was from right to left, downward and backward.

(ii) There was one superficial abrasion of about 3 cm. in length near the nostril on the right cheek.

He has further deposed that the injuries mentioned in Column No. 17 of post-mortem report were ante-mortem. He has deposed that the internal examination revealed that there were cuts in the muscles corresponding to the injury No. 1 mentioned in column No. 17. No abnormality was found in the larynx, trachea and bronchia. Both the lungs were pale. There were blood clots in Mediastinum. He has deposed that there was a puncture in the right wall of the right atrium on

upper part about 1.5 cm. vertical. Pericardium was full of blood, all the chambers of the heart were empty. He has further deposed that semi-digested food and stool was found in the small intestine and large intestine. He has further deposed that the cause of death was due to the injury sustained on the heart. The P.W. 2 has further deposed that the blood was drawn from the body of the deceased and was collected in a sealed bottle. The sealed bottle of blood sample was forwarded to the P.I. of the Jetpur City Police Station. He has deposed that the injury No. 1 mentioned in Column No. 17 of the post-mortem report was sufficient in the ordinary course of nature to cause death. In his cross-examination he has deposed that if any person falls down while running and gets himself hit with a sharp edged rod or a pointed glass then the injury No. 1 sustained by the deceased could not be caused. He has deposed that the deceased had no other external injury than the one mentioned in Column No. 17 of the post-mortem report. He has deposed that he had not found any injury on the body of the deceased which could have been caused by a stone.

8.3. The P.W. 3-Kadvabhai Gobarbhai has been examined by the prosecution as one of the panch witnesses of the scene of offence. The P.W. 3 in his evidence Exh. 40 has deposed that he was explained by the police that he had to act as a panch witness for the purpose of drawing panchnama of the place of the incident. He has deposed that one Iqbalbhai had shown the place of the incident and the same was a road opposite the Khodiyarkrupa House. He has deposed that one stone was lying at the place of occurrence and the same was seized by the police. He has also deposed that some blood-stained soil was collected from the place of the occurrence by digging a portion of the earth. In his cross-examination he has deposed that he had not dictated anything to the police. The panchnama was reduced into writing by the police and he had just put his signature on the ready made panchnama.

8.4. The P.W. 4-Imtiyazbhai Ghanchi has been examined by the prosecution as a second panch witness of the panchnama of the scene of offence. The P.W. 4 has deposed practically on the same line with that of the P.W. 3 regarding the panchnama-Exh. 41. He has further deposed that he was residing at the Ghetawala plot, Jetpur at the time of the incident. On 2nd February, 2006 he was fast asleep and at that time at around 12-00 O'clock in the night some unknown persons knocked at his door and told him that Altafbhai (deceased) had sustained a knife injury in a scuffle and they all wanted to go to the Hospital. Therefore, the P.W. 4 tookout his rickshaw and took the injured Altaf to the Jetpur Hospital. He has deposed that his brother Arif (P.W. 12) and Asif along with maternal uncle Iqbalbhai were also there in the rickshaw. After dropping Altaf (deceased) to the hospital he returned back to his home. He has deposed that later on he learnt that Altaf was shifted to the Rajkot Civil Hospital where he succumbed to the injuries.

8.5. The P.W. 5-Sadiq Ahmedbhai Belim has been examined as one of the panch witnesses to prove the discovery panchnama of the weapon of offence Exh. 45.

However, the P.W. 5 in his evidence Exh. 44 failed to support the case of the prosecution and was declared as a hostile witness.

8.6. The P.W. 6-Faruk Sattarbhai Nagariya has also been examined by the prosecution as one of the panch witnesses to prove the discovery panchnama Exh. 45. However, the P.W. 6 as a second panch witness in his evidence Exh. 46 failed to support the case of the prosecution and was declared as a hostile witness.

8.7. The P.W. 7-Asif Yusuf Shaikh is the younger brother of the deceased Altaf. The P.W. 7 in his evidence Exh. 48 has deposed that his mother Mariyamben had passed away in December, 2005. The incident had occurred on 2nd February, 2006 which happened to be the 40th day of the death of his mother. A ritual of Milad was organised at the house of his elder brother Arif (P.W. 12). He has deposed that he was present at that time. He has deposed that Irfan, the son of Altaf (deceased) and Hyder Khurshid, the son of Yusufbhai of Navagadh fought with each other on the issue of sitting on a chair at around 9-00 O'clock in the night. He has deposed that as the two boys fought with each other, his brother Altaf (deceased) gave a slap each to the two boys. This was not liked by Vajir Akbar (absconding accused), Guddu Akbar A.2, Samir Akbar A.4 and Akbar Saiyed, A.1. He has deposed that they all left the house in protest. The P.W. 7 has deposed that thereafter all the accused persons came back late in the night at the place where the function of Milad was organised. He has deposed that Vajir had a knife in his hand, Rahimsha Rafik (A.6) and Shabbir Yusuf (A.5) had hockey sticks in their hands. The other accused persons were also present. He has deposed that the accused persons were standing near the shop of one Kavabhai Khant. He has deposed that the accused persons called his brother Altaf, and therefore, Altaf went to talk with the accused persons. At that time Arif (P.W. 12), his maternal uncle Iqbal Kadar, Banuben, Umarbhai, Rafiqbhai, his sister Salma and he himself were all standing on the road. He has deposed that at that time Vajir Akbar (absconding accused) hit a knife blow on the chest of Altaf. Manzar Akbar (A.3) lifted a stone and hit the same on the chest of his brother Altaf. He has deposed that at that time Shabbir Yusuf and Rahim Rafiq were armed with hockey sticks and the other accused persons were shouting loudly stating "beat him, beat him". He has deposed that thereafter Altaf came near the house and fell down. He was bleeding profusely from his chest. Thereafter Altaf was taken to the Jetpur Government Hospital in a rickshaw of one Munna. From the Jetpur Hospital, Altaf was shifted to the Rajkot Civil Hospital where he succumbed to the injuries. In his cross-examination he has deposed that Yusufbhai and Karimbhai had come to recite the Milad. The ritual of Milad was at the house of his brother Arif (P.W. 12) and there are residential houses surrounding the house of his brother Arif. He has deposed that the house of Akbarbhai and the accused persons are situated behind the Navagadh Samiyana Dyeing. The ritual of Milad got over at about 11-45 in the night. After the ritual of Milad was over, the persons who participated in the same were offered Prasadi. He has deposed that many persons from his family had come to

hear the Milad and he had distributed the Prasadi. He has further deposed that me persons (Maulanas) who had come to recite the Milad were sitting in the house thereafter. He has deposed that when the accused persons called for Altaf, the two Maulanas who had come to recite the Milad had left the place. The two persons who had come to recite the Milad were residing at Navagadh. The P.W. 7 denied the suggestion given to him that at the time of incident the persons who had come to recite the Milad were present. He has deposed that he had no idea as to who had gone at the house of Akbarbhai (A.1) to invite him for the Milad. He denied the suggestion given to him that he was at inimical terms with the Accused No. 1 since a long time. He has deposed that Manzar Akbar (A.3) is his brother-in-law (sister's husband). He has deposed that he has no dispute nor any animosity with him. The house of Arif (P.W. 12) and the shop of Kavabhai Khant are quite nearby i.e. at a distance of about 15 to 20 ft. He denied the suggestion given to him that at the time of the incident he was at his residence. He has deposed that at me time of incident he was standing on me road. He has deposed that Yusufbhai happens to be the Nandoi (husband's sister's husband) of his sister. He has deposed that Yusufbhai was in no manner annoyed with regard to me fight that had ensued between me two boys as he was not present at that time. He denied me suggestion that there was a long standing dispute going-on between Yusuf and Arif (P.W. 12). He has deposed that Yusufbhai had divorced his wife. He denied the suggestion given to him that as Yusuf was at good terms with Akbarbhai (A.1) the entire story of the incident had been fabricated. He has deposed that there was a tube-light at me place of the occurrence. In the cross-examination of this witness on behalf of accused No. 6 he has deposed that all the relatives are to be invited on the 40th day after the death for the Milad ritual. He has deposed that Iqbal, the son of his aunty had gone to invite all the relatives to participate in the Milad. He has deposed that the two Maulvis who had come to recite the Milad were sitting with them in a house. The female members were sitting outside me house during me ritual while the male members were sitting inside me house. He has deposed that the incident of quarrel between me two boys regarding a chair had occurred before the ritual of Milad had started. The chairs were brought from the house of Manzar Imam (A.3). He denied the suggestion that at 9-00 O'clock in me night none was present at the place where ritual was to be performed. He denied me suggestion that no such quarrel had ensued between me two boys regarding me chair. He has further deposed that the shop of Kavabhai was closed at me time of the occurrence. The P.W. 7 was standing with other persons on the road near me house. It is only after the injured Altaf came near him that he could realise that Altaf had sustained an injury. He denied the suggestion given to him that when Altaf came near him he was unable to speak. He denied the suggestion given to him that thereafter he had called other persons to help him. He has deposed that when he had gone to call for the rickshaw, the persons who had gathered looked after Altaf. He has deposed that at that time he had not conveyed anything to any other person. He has deposed that as Altaf sustained an injury caused by a knife, he came near them and then fell down. He denied the suggestion given to

him that he had falsely implicated Rahimsha (A.6) in the crime.

8.8. The P.W 8-Iqbalbhai Shaikh in his evidence has deposed that Mariyamben was his sister. Mariyamben had passed away. He has deposed that the incident had occurred on 2nd February, 2006 which was the 40th day of the death of his sister Mariyamben. He has deposed that as the ritual of Milad was to be performed he had come to Jetpur. He has deposed that Arif (P.W. 12) is his nephew. The ritual of Milad was kept at the house of Arif. At around 9-30 in the night, when all were sitting on a chair after having dinner, Vajir Akbar (absconding accused) was also sitting on the chair next to the chair of me P.W. 8 and one chair next to the chair of the P.W. 8 was empty. The son of Altaf and the son of Vajir Akbar's sister, namely Hyder quarrelled with each other as both wanted to sit on the empty chair. As both the boys started fighting with each other, Altaf came and slapped both the boys. At that time Vajir who was sitting nearby, got angry and left the place. As Vajir left the place being annoyed as Altaf gave a slap to his sister's son, namely Hyder, the others also followed Vajir. The ritual of Milad started at late night. At around 11-45 the sister of the deceased Altaf, namely, Nasimbanu came and told the father-in-law of the P.W. 8 that the accused persons had come to quarrel, and therefore, kindly persuade them not to quarrel. He has deposed that thereafter Arif (P.W. 12), Banuben, Nasimben, Umarbhai, Aminaben all came near the grocery shop of Kavabhai. He has deposed that the accused persons were standing at that place. He has deposed that at that time Vajir hit a knife blow on the chest of Altaf and the others were shouting "kill him, kill him". He has deposed that Altaf shouted that as he had been hit with a knife blow, the persons who were standing near the grocery shop should not go near the accused persons. He has deposed that Manzar (A.3) hit a stone on the back of the deceased Altaf. He has deposed, that thereafter, all the accused persons ran away towards the Chandni Chowk. Altaf came and fell down near the house of Arif. He has deposed that there was profuse bleeding from the chest of Altaf. In his cross-examination he has deposed that he has been living at Ahmedabad past 15 years. He is familiar with Jetpur and its surrounding area. He has deposed that Akbarbhai A.1 is the father-in-law of his nephew. He has deposed that he had no idea as to who had gone to extend the invitation to attend the Milad ceremony. He has deposed that 8 to 10 persons had come to attend the ritual of Milad. He had no idea as to who all were there in the ritual of Milad. The ritual of Milad got over at 11-45 in the night. The Prasadi was distributed after completion of the ritual of Milad. The deceased Altaf had distributed the Prasadi. He denied the suggestion that the accused persons and Altaf had an altercation in the past. He has deposed that people residing in the surrounding area had gathered at the time of the occurrence of the incident. However, he was unable to identify anyone of those. In his cross-examination he has further deposed that it was not true to suggest that he had not dictated in his statement before the Police that Vajir had a knife and Shabbir and Rahim had hockey sticks in their hands. He has deposed that it was true that he had not stated in his police statement that Altaf had shouted stating that he had been hit

with a knife blow and that they should not come near the place of occurrence.

8.9. The P.W. 9-Mukeshbhai Madhubhai Parmar has been examined as one of the panch witnesses to prove the inquest panchnama, Exh. 36. However, the P.W. 9 in his evidence Exh. 55 has been declared as a hostile witness as he failed to support the case of the prosecution.

8.10. The P.W. 10-Suresh Kunadiya has been examined as the second panch witnesses to prove the inquest panchnama Exh. 36. However, the P.W. 10 in his evidence Exh. 56 has failed to support the case of the prosecution and has been declared as a hostile witness.

8.11. The P.W. 11-Girish Manubhai Vaghela has been examined as one of the panch witnesses to the panchnama of collection of the clothes of the deceased Exh. 58. He has deposed that the police had reduced the panchnama in writing and he along with the other panch witness had put their signatures.

8.12. The P.W. 12-Arifbhai Jusabbhai Shaikh is the brother of the deceased Altaf. The P.W. 12 in his evidence Exh. 61 has deposed that he has three brothers and two sisters. The name of the eldest sister is Nasimben. Nasimben's marriage was solemnised with Manzar Sharif (A.3) living at Navagadh. Altaf, the deceased was his younger brother. Younger sister Banuben is married and is residing at Gondal. He has deposed that his father Jusabbhai had died before three years and his mother Mariyamben had passed away on 25th December, 2005. He has deposed that on the date of the incident a ritual of Milad was organised as it happened to be the 40th day of the death of his mother. He has deposed that relatives and neighbours had come at his house to listen the Milad. He has deposed that at 9-30 in the night Irfan, the son of his brother Altaf and Hyder, the son of Yusuf of Navagadh started quarrelling with each other as both wanted to sit on an empty chair. He has deposed that Altaf gave a slap each to me boys due to which Vajir Akbar, the maternal uncle of Hyder living at Navagadh, Akbar Shaikh, Shamim Akbar Shaikh, Manzar Saiyed, left the place stating that as the boys were quarrelling they did not wanted to listen the ritual of Milad. He has deposed that after the ritual of Milad got over, he saw Vajir Akbar with a knife in his hand, Shamim Yusuf with a hockey in his hand and Rahim also with a hockey in his hand standing near the shop of Kavabhai. He has deposed that Akbar Saiyed, Guddu Saiyed and his brother-in-law (sister's husband) were also standing. He has deposed, that thereafter, he himself along with his brother Asif and maternal uncle went near them. The accused persons started saying that they had come to kill Altaf. He has deposed that while they were persuading the accused persons, Vajir Akbar hit a knife blow on the chest of his brother Altaf, due to which Altaf fell down. He has deposed that his brother-in-law (sister's husband) indicating towards A.3 picked up a stone and hit the same on the chest of his brother Altaf. He has deposed that thereafter as his brother altaf shouted that he had been hit with a knife blow, the uncle of the P.W. 12, his sister Banuben, Nasimben, his niece Salmaben and others reached the spot of occurrence. The accused persons thereafter ran away. He has deposed that Altaf

thereafter was taken to the Jetpur Government Hospital for treatment in a rickshaw of one Munnabhai Ghanchi residing in the neighbourhood. He has deposed that after giving some primary treatment at the Jetpur Hospital, Altaf was shifted to the Rajkot Civil Hospital where he was declared as brought dead by the doctor. In his cross-examination he has deposed that Iqbalbhai Kadarbhai @ Abdulbhai is his maternal uncle. He has deposed that he had dictated the complaint first and thereafter his further statement was recorded by the police. The further statement was taken by the police at his house. He has deposed that the quarrel which had ensued between the two minor boys was a very petty issue. He has deposed that when the accused persons left the place stating that they did not want to listen to the Milad, at that time there was no altercation with the accused persons. He has deposed that they are having good relations with the accused persons right from the beginning. He has deposed that if an incident occurs at the distance of 150 ft. then it is difficult to witness the same. He has deposed that his maternal uncle had shown him the place. He has deposed that when Altaf came running at his house, he was standing near his house. He has deposed that at that time Banuben and Nasimben were in the room. As Banuben and Nasimbanu learnt about the incident, they came out running. He has deposed that the name of Altaf s wife is Farzana. He had not asked Farzana to lodge the complaint. Farzana had also not told the P.W. 12 that she wanted to be the complainant. He denied the suggestion given to him that Farzana had told him not to file a complaint without her permission. He denied the suggestion that as he was on inimical terms with the accused, he had falsely implicated him in the crime. He has deposed in the cross-examination on behalf of A.6 that at the time of the incident he was standing near his house. He has also deposed that me deceased came running from the place of occurrence to the place where he was standing. He has deposed that the female members and other persons also came over there at that time. He has deposed that till the rickshaw came he was standing next to Altaf to take care of him. He has also deposed that after reaching the Jetpur Hospital, he had not disclosed the names of the assailants to anyone. He denied the suggestion given to him that he had not disclosed the names of the assailants as he was not knowing as to who were the assailants.

8.13. The P.W. 13-Bhimjibhai Limbasiya is the Investigating Officer. The P.W. 13 in his evidence Exh. 63 has deposed regarding the various stages of the investigation. The P.W. 13 has deposed that all the six accused were arrested and after the arrest, the accused No. 5-Shabbir Yusuf had expressed his willingness to pointout the place where the knife and hockey sticks were concealed. The P.W. 13 has deposed that the further statement of the P.W. 12-Arif Yusuf Shaikh i.e. the complainant was recorded on 3rd February, 2006. In his further statement the P.W. 12 stated that in his compliant he had stated that Vajir Akbar had a hockey stick and Shabbir had a knife. But in fact the same was dictated in a hurry as he was in a state of shock due to the death of his brother. In his further statement he clarified that Vajir Akbar Saiyed had a knife in his hand and

Shabbir (A.5) had a hockey stick and Rahim of Navagadh had a hockey stick. The P.W. 13 has deposed that the P.W. 12 in his further statement clarified that Vajir caused the injuries to the deceased Altaf with the knife and Manzar Akbar (A.3) had picked up a stone which was lying on the road and had hurled it on the chest of the deceased Altaf. The P.W. 13 has stated that in the further statement the P.W. 12 clarified that the other accused persons were exhorting by saying that "kill him, kill him". In his cross-examination he has deposed that the P.W. 12 had lodged his complaint on 3rd February, 2006 at 10-50 hours. He has stated that in the complaint it has been stated that Shabbir (A.S) ran with a knife and came at the place of deceased Altaf and hit a knife blow on the chest of the deceased. The P.W. 13 has stated that Iqbal Kadar is the Mama (mother's brother) of the P.W. 12-complainant and Arif Jusab is the brother of the complainant. He has further stated in his cross-examination that the place of occurrence is a residential area. The P.W. 13 has deposed that he had not recorded the statements of the two Maulvis who had come to recite the Milad. The P.W. 13 had not carried out any investigation as to whether the Maulvis had actually come to recite the Milad. The ritual of Milad was recited on a public road i.e. just outside the house of the P.W. 12-the complainant. He denied the suggestion that no such discovery panchnama was drawn and the evidence of the discovery of knife and the hockey sticks was a fabricated piece of evidence."

8. Contentions on behalf of the accused appellants:

"Mr. Pratik Barot the learned Advocate appearing for the appellant of Criminal Appeal No. 1013 of 2007, Mr. M.A. Bukhari and Mr. Kartik Pandya, the learned Advocates appearing for the appellants of Criminal Appeal No. 1245 of 2007 and Mr. Y.S. Lakhani, the learned Senior Advocate appearing with Mr. Pravin Gondaliya for the appellants of Criminal Appeal No. 1158 of 2007 vehemently submitted that the trial Court committed a serious error in holding the accused persons guilty of the offence of murder. The learned Counsel appearing for the respective appellants submitted that the genesis of the prosecution case is highly doubtful and the prosecution has tried to suppress the true origin of the occurrence. The learned Counsel further submitted that the motive behind the commission of crime as put forward by the prosecution appears to be highly doubtful. The learned Counsel further submitted that the trial Court ought not to have placed implicit reliance on the oral version of the three eye-witnesses i.e. P.W. 7, P.W. 8 and P.W. 12. It has, been submitted that a close scrutiny of the evidence of all the three eye-witnesses would suggest that all the three versions are contradictory to each other."

9. The principal contention canvassed on behalf of the accused appellants is that the trial Court committed a serious error in convicting the accused appellants of the offence of murder punishable under Sec. 302 read with Sec. 34 of the Indian Penal Code, more particularly when the trial Court acquitted all the accused persons of the offence punishable under Secs. 147, 148 and 149 of the Indian Penal Code. According to the learned Counsel appearing for the accused

appellants, once the trial Court came to the conclusion that there was no common object then in such circumstances, the trial Court could not have convicted the accused persons with the aid of Sec. 34 of the Indian Penal Code in the absence of any specific charge in that regard on the premise that each of the accused persons shared a common intention to commit the murder of the deceased.

In such circumstances referred to above, the learned Counsels appearing for the appellants submit that mere being merit in the respective appeals of the appellants the same may be allowed.

10. Contentions on behalf of the State:

"Ms. Chetna Shah, me learned Additional Public Prosecutor appearing for the State has vehemently opposed these appeals and has submitted that me trial Court committed no error in finding the accused persons guilty of the offence of murder punishable under Sec. 302 read with Sec. 34 of the Indian Penal Code. Miss Shah submits that although the accused persons have been acquitted by the trial Court of the offence under Secs. 147, 148 and 149 of the Indian Penal Code yet the trial Court is justified in convicting the accused persons for the offence of murder with the aid of Sec. 34 of the Indian Penal Code as in the Charge Exh. 15 there is a reference of Sec. 34 of the Indian Penal Code in the alternative.

Ms. Shah submits that there are three eye-witnesses to the incident and all the three eye-witnesses have deposed that the accused persons had formed an unlawful assembly and Vajir Akbar (absconding accused) hit a blow with a knife on the chest of the deceased. Miss Shah submits that in view of the clear evidence of the three eye-witnesses, the appeals deserve to be dismissed."

11. Having heard the learned Counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration in these appeals is whether the trial Court committed any error in finding the accused persons guilty of the offence of murder punishable under Sec. 302 read with Sec. 34 of the Indian Penal Code.

12. Before we proceed to consider the oral evidence of the three eye-witnesses we propose to deal with the principal contention canvassed on behalf of the accused appellants that the trial Court having acquitted the accused appellants of the offence under Sec. 147, 148 and 149 of the Indian Penal Code could not have convicted the accused persons of the offence of murder with the aid of Sec. 34 of the Indian Penal Code.

13. There is a clear distinction between the provisions of Secs. 34 and 149 of me Indian Penal Code and the two Sections should not be confused. The principal element in Sec. 34 is the common intention to commit the crime. In furtherance of the common intention several acts may be done by several persons resulting in the commission of that crime. In such a situation Sec. 34 of the Indian Penal Code provides that each one of them would be liable for that crime in the same

manner as if all the acts resulting in that crime had been done by him alone. On the other hand, there is no question of common intention in Sec. 149. An offence may be committed by a member of an unlawful assembly and the other members will be liable for that offence although there was no common intention between that person and other members of the unlawful assembly to commit that offence provided the conditions laid down in the Section are fulfilled. Thus, if the offence committed by that person is in prosecution of the common object of the unlawful assembly or is such as the members of that assembly knew to be likely to be committed in prosecution of the common object, every member of the unlawful assembly would be guilty of that offence although there may have been no common intention and no participation by the other members in the actual commission of that offence.

14. To put it in plain words Sec. 34 of the Indian Penal Code refers to cases in which several persons, both intend to do and do a criminal act; it does not refer to cases where several persons intend to do the act and someone or more of them do an entirely different act. In the later class of cases, Sec. 149 of the Indian Penal Code may be applicable but Sec. 34 of the Indian Penal Code is not applicable.

15. Although there is a substantial difference between Sec. 34 and Sec. 149 of the Indian Penal Code, the Sections also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under Sec. 149 overlaps the ground covered by Sec. 34. If the common object which is the subject-matter of the charge under Sec. 149 does not necessarily involve a common intention, then the substitution of Sec. 34 for Sec. 149 of the Indian Penal Code might result in prejudice to the accused and ought not therefore, to be permitted. But if the fact to be proved and the evidence to be adduced with reference to the charge under Sec. 149 of the Indian Penal Code would be the same if the charge were under Sec. 34, then the failure to charge the accused under Sec. 34 of the Indian Penal Code could not result in any prejudice and in such cases, the substitution of Sec. 34 for Sec. 149 of the Indian Penal Code must be held to be a formal matter. Whether such recourse can be had or not must depend on the facts of each case. (See *Karnail Singh and Another Vs. The State of Punjab*, .

16. Having regard to the facts of the case and more particularly the case of the prosecution and the nature of the evidence adduced in our opinion no prejudice could be said to have been caused to the accused appellants herein on account of their conviction of the offence of murder with the aid of Sec. 34 of the Indian Penal Code after being acquitted of the offence under Secs. 147, 148 and 149 of the Indian Penal Code as there is a reference of Sec. 34 of the Indian Penal Code in the charge Exh. 15 and the facts to be proved and the evidence to be adduced with reference to the charge under Sec. 149 would have remained the same if the charge were under Sec. 34 of the Indian Penal Code.

17. Thus, we do not find any merit in the principal contention of the learned

Counsel appearing for me accused persons and is accordingly rejected.

18. The above takes us to consider the evidence of the three eyewitnesses.

19.1. On a close scrutiny of the evidence of the P.W. 7-Asif Yusuf Shaikh, Exh. 48, the P.W. 8-Iqbalbhai Abdul Kadarbhai Shaikh Exh. 51 and the P.W. 12-Arifbhai Jusabbhai Shaikh Exh. 61, we find that the genesis of the prosecution case is highly doubtful and the prosecution has tried to suppress the true origin of the occurrence. Although it is the case of the prosecution that the incident occurred on account of the quarrel which had ensued at around 9-00 O'clock at night between the two minors i.e. the son of the deceased Altaf and the son of sister of Vajir (absconding accused) on the issue of sitting on a chair, yet we are not ready to believe this part of the prosecution case and it appears that the motive behind the incident was something different and which has not come on record. The first impression which all the three eye-witnesses have given to us is that they are not truthful witnesses. A close scrutiny of the evidence of the three eye-witnesses would suggest that they were not able to witness the incident and their versions are contradictory to each other and it is difficult to come to the conclusion as to whose version is the correct version.

19.2. The P.W. 12-Arif is the brother of the deceased Altaf. The First Information Report Exh. 62 lodged by the P.W. 12 has altogether a different story to narrate. In his First Information Report he has stated that Shabbir Yusuf Saiyed (A-5) had a knife in his hand whereas Vajir Akbar Saiyed (absconding accused) and Rahimbhai Fakir had hockey sticks in their hands. The other accused persons were in company of the three accused persons named above. In the First Information Report it has been stated that after the accused persons left the Milad due to the quarrel which ensued between the two boys, they all returned back in the night. The P.W. 12 in his First Information Report has deposed that after seeing the accused persons standing at the place of occurrence he himself and his brother Arif went to them and at that time the accused persons told the P.W. 12 and his brother Arif that they had come to beat Altaf and wanted to kill him. In the First Information Report it has been further stated that while the P.W. 12 and his brother Arif, both were persuading the accused persons, at that time Altaf came over mere and Shabbir (A.5) ran after him and hit a blow on his chest. Due to the injuries sustained by Altaf he fell down. It has been further stated that at that time Manzar (A.3) picked up a stone and hit a blow on the chest. It is further stated that at that time Altaf shouted that he had been hit with a knife and accordingly the other persons came at the spot of occurrence.

19. It appears that all of a sudden in the further statement the P.W. 12 changed the version and stated that it was not Shabbir (A.5) who had a knife in his hand and hit a blow on the chest of Altaf, but it was Vajir who had a knife in his hand and had hit a blow on the chest of the deceased. Although an overt act has been attributed to Manzar (A.3) of having hit a blow with a stone on the body of the deceased but the post-mortem report indicates that there was only one injury and the same was the knife injury. The Doctor in his evidence has clearly

deposed that there was no other injury on the body of the deceased.

20. Keeping this version of the P.W. 12 in mind as narrated by him in the First Information Report, we now proceed to consider the evidence of the P.W. 7-Asif. The P.W. 7 is also the brother of the deceased Altaf. His version is altogether different than the one which has been stated in the First Information Report. From the evidence of the P.W. 7 it appears that four accused persons were present at the ritual of Milad : (1) Vajir Akbar (absconding accused), (2) Guddu Akbar (A.2), Samir Akbar (A.4) and Akbar Saiyed (A.1). It deserves to be mentioned at this stage that the accused persons and the prosecution witnesses are all inter-se related with each other. After the incident of the quarrel between the two boys the above named four accused persons left in protest, the house of the complainant where the ritual of Milad was to be performed. According to the P.W. 7, thereafter late in the night the accused persons once again came and at that time Vajir had a knife in his hand, Rahim Rafik A.6 and Shabbir A.S had hockey in their hands. The P.W. 7 has deposed that Guddu, Akbar, Samim and Manzar were also present. They were all standing near the shop of Kavabhai. According to the P.W. 7 they called Altaf, and therefore, Altaf went to talk to them. This very version appears to be highly doubtful., If the accused persons were armed with deadly weapons and if they had come to assault and kill Altaf then it is very unnatural that Altaf on mere calling by the accused persons would go to them. According to the P.W. 7 at that time he himself, his brother Arif, his uncle Iqbal and the other family members were standing on the road. At that time Vajir Akbar hit a blow with the knife and Manzar (A.3) picked up a stone and hit the same on the chest of the deceased. If the version of the P.W. 7 is to be accepted, then the entire version of the P.W. 12 as narrated by him in the complaint has to be disbelieved. In the First Information Report it has been stated that Shabbir Yusuf (A.5) had ran and had come to the house of Altaf, and thereafter, hit a knife blow.

21. We shall now consider the evidence of the P.W. 8-Iqbalbhai Shaikh. The P.W 8 is the brother of Mariyamben, therefore, it appears that the P.W. 8 is the maternal uncle of the deceased. The P.W. 8 had come to Jetpur from Ahmedabad to attend the ritual of Milad. The version of the P.W. 8 is altogether different. According to him at around 11-45 in the night the sister of the deceased, namely, Nasimbanu told the P.W. 8 that her father-in-law and all had come to quarrel, and therefore, requested the P.W. 8 to persuade them. Therefore, the P.W. 8 himself, Arif, Banuben, Nasimben, Salmaben, Umarbhai, Aminaben all together went near a grocery shop owned by one Kavabhai. All the accused persons were standing near the shop of Kavabhai. According to the P.W. 8 the accused persons were armed with weapons and at that time Vajir hit a blow with a knife on the chest of the deceased and the others were exhorting. The most interesting part of the evidence of the P.W. 8 is that Altaf, the deceased had shouted that he had been hit with a knife blow and that they all should not go mere. If Altaf had shouted that he had been hit with a knife blow and such shout was heard by all these persons who were standing, men it is very difficult to

believe that the P.W. 8 had no occasion to see the incident. In his cross-examination the P.W. 8 has deposed that the deceased had not come near them after sustaining injuries stating that he had been hit with a knife blow and that the persons gathered should not go at that place but in fact the deceased had shouted from the place where he had been hit with a knife blow.

22. The P.W. 12 i.e. the complainant has a third version to narrate. According to me P.W. 12 after the return of the accused persons, they all were found standing near the shop of Kavabhai. The P.W. 12 and his brother Asif and his uncle went near them. According to me P.W. 12 the accused persons told them that they had all come to beat Altaf and to kill him. While they were persuading them Vajir Akbar hit a knife blow on the chest of Altaf. We fail to understand from where did Altaf arrive while me P.W. 12 his brother Asif and his maternal uncle were trying to persuade the accused persons. The P.W. 12 in his cross-examination has deposed that in fact the deceased had come running at the place where the P.W. 12 was standing from the place of occurrence. If that be so, then how come the P.W. 12 could witness the knife blow being hit by Vajir or even the entire incident.

23. Thus, although the prosecution case is based on the evidence of three eye-witnesses, yet the three eye-witnesses do not inspire confidence worth the name. As discussed above, all the three have a different story to narrate and if that be so, then it necessarily implies that they are not deposing the true facts and we agree with the submission canvassed on behalf of the accused-appellants that the genesis of the case is highly doubtful and the prosecution has tried to suppress the true origin of the occurrence.

24. It may not be out of place to state at this stage that Vajir the accused, who is alleged to have actually hit the knife blow on the chest of the deceased, is yet to be put on trial as he is absconding from the date of the incident. He is the principal accused as such and the other accused persons herein i.e. the appellants have been convicted with the aid of Sec. 34 of the Indian Penal Code. It appears to us that with a view to settle some personal score, the names of as many persons as possible have been given implicating them in the crime and this is very common in this type of cases where the parties are at inimical terms. Therefore, it is very important for the Court to be cautious and a close scrutiny of the evidence is required.

25. All the panch witnesses turned hostile and have not supported the case of the prosecution. In such circumstances, the discovery panchnama of the weapons of offence Exh. 45 has also not been proved by the prosecution. At this stage we may point out one more infirmity in the case of the prosecution. If it is the case of the prosecution that Vajir, the absconding accused had hit a blow with a knife, then how come that the discovery of the knife has been shown at the instance of A.S in the discovery panchnama Exh. 45. This shows the manner in which the investigation has been carried out.

26. In the overall view of the matter we are convinced that the trial Court

committed a serious error in believing the three eye-witnesses and finding the accused persons guilty of the offence of murder. Resultantly, all the appeals succeed and are hereby allowed. The order of conviction and sentence imposed on each of the accused appellants are hereby set aside. All the accused persons are acquitted of the charges framed against them.

27. It appears that all the accused persons except the original accused No. 5-Shabbir Yusufbhai Kadri were released on bail pending the final disposal of their respective appeal.

28. We are informed by Mr. Barot appearing for the accused No. 5-Shabbir Yusufbhai Kadri that he was released on temporary bail and thereafter he failed to surrender before the Jail authority.

29. In such circumstances, it appears that the Jail authority might have registered a jail offence against the accused No. 5 for not surrendering on expiry of the period of temporary bail. However, the acquittal of the accused No. 5 of all the charges shall not preclude the Jail authority in proceeding against the accused No. 5 in accordance with law, if any, jail offence has been registered for not surrendering on expiry of the period of temporary bail. As all the accused-appellants except the accused No. 5-Shabbir Yusufbhai Kadri have been enlarged on bail pending their respective appeals, their bail-bonds stand discharged.