

(1998) 08 GUJ CK 0038
In the Gujarat High Court
Case No : Criminal Appeal No. 114 of 1991

Singha Magan Gamit and Others

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 24-08-1998

Acts Referred:

Evidence Act, 1872 — Section 103

Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 452

Citation : (1999) CriLJ 2111

Hon'ble Judges : J.N. Bhatt, J;A.L. Dave, J

Bench : Division Bench

Advocate : Vivek Barot, for Petitioner Nos. 1-5, for the Appellant; Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

This Judgment has been overruled by : Jayantibhai Bhenkaarbhal Vs. State of Gujarat, AIR 2002 SC 3569 : (2002) CriLJ 4734 : (2002) 7 JT 402 : (2002) 7 SCALE 72 : (2002) 8 SCC 165 : (2002) 2 SCR 255 Supp : (2002) 2 UJ 1486

A.L. Dave, J.—The present appeal arises out of the judgment and order delivered by the learned Additional Sessions Judge of Surat in Sessions case No. 169 of 1989 on 6th February, 1991, recording conviction u/s 302 read with Sections 147, 148, 149 and 452 of the Indian Penal Code in respect of the present appellants. All the appellants are ordered to undergo rigorous imprisonment for life and each of them to pay a fine of Rs. 250/- or to undergo further imprisonment for one month in case of default in payment of fine, for the offence punishable u/s 302 read with Section 149. The appellants are also sentenced to undergo rigorous imprisonment for one year for the offences punishable under Sections 147, 148 and 452 of the Indian Penal Code and are imposed a fine of Rs. 125 each or to undergo further imprisonment for one month in case of default in payment of fine. The sentences are to run concurrently.

2. The facts giving rise to the incident are that accused No. 1 appellant, Singha

Magan Gamit is a resident of village Singpur of Songadh taluka of Surat district. On the date of incident, i.e. on 6th July, 1989, he went near the house of one Lalabbai Naranbhai where Lalabbai's son and he (accused No. 1) had some altercation. Deceased-Lallubhai Naranbhai and his brother Kantibhai came there and Lallubhai asked accused No. 1 to go away from the street and not to bother the son of Lalabbai. Accused No. 1, therefore, went away at that point of time.

3. On that very day, later in the evening, Kantibhai, brother of deceased-Lallubhai noticed that accused No. 1 accompanied by a group of persons passed by his house and was heading towards the house of deceased-Lallubhai. Kantibhai, therefore, apprehended some altercation or quarrel between this group of persons and deceased-Lallubhai because of the earlier incident that had occurred in the evening. He, therefore, came out of his house along with his wife and hid himself behind Navania (a bathing place outside the house). At that time, complainant Thakorebhai, who also happens to be brother of the deceased and stays in the vicinity, was sitting near the heap of peanuts, which were recently cultivated. The accused persons went to the house of the deceased-Lallubhai and dragged him out of the house and assaulted him. Accused No. 1 Singha Magan was equipped with a knife, accused No. 3 Dina Afiniya was equipped with Dharia, accused No. 6 Digniya Rama and accused No. 9 Jayanti Bhenkara were equipped with sticks and accused No. 7 was equipped with a Parai, there were four other persons with them who were not equipped with weapons but who, according to the prosecution case, were with them and instigating the armed persons. They also gave kick and fist blows to the deceased. The deceased-Lallubhai Naranbhai was badly beaten by these persons, as a result of which, he collapsed on the ground and the group of assailants, thereafter, went away. When the deceased was dragged out of the house, his wife Shantiben and his son Ajit were in the house and they came out of the house and they also witnessed the incident. After the assailants left, Thakorbhai and Kantibhai who were witnessing the incident went to the spot, shifted Lallubhai into the house and then tried to arrange for a vehicle for taking Lallubhai to the hospital. According to the prosecution, as no vehicle was available in the village, they had to go to Ukai to fetch a vehicle. They had to go on foot to Ukai, which is at a distance of about 10 kms. When they came back with the vehicle, they noticed that Lallubhai had expired and, therefore, ultimately, Thakorebhai went to Ukai Police Station and lodged the F.I.R. The offence was registered and the investigation was initiated by the police. The investigating agency having found that there was sufficient evidence against the 9 assailants including the present five appellants filed charge sheet against all of them in the Court of learned Judicial Magistrate, (First Class), at Vyara. As the offence was exclusively triable by the Court of Sessions, the case was committed to the Court of Sessions, at Surat. The Sessions Judge, in turn, transferred the matter to Court of learned Additional Sessions Judge and the trial against the accused persons was conducted by framing a charge at Ex. 2 against all nine of them. All the accused persons pleaded not guilty and expressed their desire to face the trial.

3.1. The learned Additional Sessions Judge, Surat, after considering the evidence adduced by the prosecution, came to the conclusion that the prosecution was able to successfully prove the case against the present five appellants, i.e. original accused Nos. 1, 3, 6, 7 and 9 that the offence against original accused Nos. 2 and 4,5 and 8 was not properly proved by the prosecution. As a result, the appellants were convicted for the offences with which they were charged and original accused Nos. 2,4,5 and 8 came to be acquitted by the learned trial Judge.

3.2 The order of acquittal against accused Nos. 2,4,5 and 8 has not been challenged by the State by way of an acquittal appeal, as per statement made at the Bar by learned Additional Public Prosecutor, Mr. Shah, and has attained finality. The convict accused persons have preferred this appeal.

4. Before we proceed to discuss the merits of the appeal, at the outset, it may be noted that original accused No. 9-present appellant No. 5 Jayanti Bhenkara came out with a plea of alibi. His case was that, on the date of the incident, he had a matter pending before the Additional Development Commissioner, at Gandhinagar, and he was required to attend and, in fact, attended the office of the Additional Development Commissioner. On 6th July, 1989, he was at Gandhinagar and Ahmedabad throughout and, therefore, he was not present at the time of the incident at village Singpur and he has been falsely implicated. In order to establish his alibi, he has examined himself on oath and has also examined defence witnesses. Accused No. 9, in an endeavour to establish his alibi, has also produced certain documentary evidence in the nature of bus tickets and certain copies from the office of the Additional Development Commissioner as well as copy of the register maintained at Sachivalaya, containing record for visitors. The story of accused No. 9, in brief, is that he had a matter fixed on 6th July, 1989 before the learned Judicial Magistrate, First Class, Vyara. On the same day, he also had a matter fixed at Gandhinagar before the Additional Development Commissioner and because his Advocate at Gandhinagar insisted for his presence, he (accused No. 9) requested Advocate Mr. Dhimer, at Vyara, to seek an adjournment. In support of his case, he has also tendered a post card written by his Advocate Mr. K. C. Shah from Gandhinagar. He, thereafter, went to Gandhinagar, reached there early in the morning and got in touch with his Advocate. Thereafter, he attended the office of the Additional Development Commissioner at 11 o'clock and attended the same up to 2.15 p.m. Thereafter, he went back to Ahmedabad by bus, went to Kankaria zoo. He was accompanied by one Dineshbhai of his village till then. He again went back to Gandhinagar to meet one of his acquaintance Mr. Rahul Gamit, who was working in Sachivalaya. For his entry to Sachivalaya, he had to make an entry in the register. He saw Mr. Rahul Gamit and then came back to Ahmedabad to his sister's place at about 7.30 p.m. and started for Singpur in a bus scheduled to start at about 12 midnight falling between 6th and 7th July, 1989. The bus was late and it took off at about 1 a.m. on 7th July, 1989. He was dropped at the Bus Station by his brother-in-law, Manekbhai and Dineshbhai. He reached Songadh at about 9.30 in the morning and then went to Vyara on 7th itself to inquire about

his case before the learned Judicial Magistrate (First Class), Vyara. He learnt from his advocate Mr. Dhimar that the learned Magistrate had rejected his application on 6th July, 1989 and had issued non-bailable warrant against him. He, therefore, with the help of his advocate, tendered an application for taking the matter on Board and also tendered an application for cancellation of non-bailable warrant on 7th July, 1989. The learned Magistrate granted both the applications. On 8th July, 1989, accused No. 9 learnt about his alleged involvement in the incident through newspapers. He, therefore, consulted an advocate and tendered an application in the Court of learned Sessions Judge at Surat for anticipatory bail wherein he took the plea of alibi.

5. In order to prove his case of alibi, accused No. 9 has examined the Chitnis from the office of Additional Development Commissioner, one Ramanbhai. He has also examined advocate Mr. K. C. Shah to show that he was at Gandhinagar up-to 2.30 p.m. on the date of the incident. He has produced tickets to show that he had visited Kankaria Zoo at Ahmedabad. He has examined Manekbhai to prove that he was dropped by Manekbhai at the Ahmedabad Bus Station at about 1 a.m. on 7th July, 1989 and that from 7.30 p.m. on 6th July, 1989 to 1 a.m. on 7th July, 1989, he was at Ahmedabad and tried to show that he could not have remained present and, in fact, he was not present at the place of incident, i.e. at village Singpur on 6th July, 1989 at about 8.30 p.m. when the incident allegedly took place as per the prosecution version.

6. After considering the evidence on record, the learned Additional Sessions Judge came to the conclusion that the case against the present appellants was established by the prosecution and recorded their conviction as stated above. The learned Additional Sessions Judge also came to the conclusion that the case against accused Nos. 2,4,5 and 8 was not satisfactorily proved by the prosecution and, therefore, acquitted these accused persons. The appellants, being aggrieved by the judgment and order passed by the learned Additional Sessions Judge, Surat, have preferred this appeal.

7. Mr. V. M. Barot, learned Advocate appearing for the appellants has assailed the judgment and order mainly on the following grounds :-

7.1 Mr. Barot submitted that the incident is alleged to have taken place at about 8.30 p.m. in the evening. But the medical evidence, if properly seen, indicates that the incident could not have taken place at 8.30 p.m. The medical evidence and the ocular evidence do not go hand in hand and give rise to a reasonable suspicion. Highlighting this aspect, he submitted that the doctor who had performed the post-mortem has stated in his deposition, that the death must have occurred about 12 hours prior to his undertaking the postmortem. The postmortem was conducted between 12.15 p.m. and 1.45 p.m. on 7th July, 1989 and, therefore, the death can be estimated to have occurred around 12 midnight between 6th and 7th July, 1989. He further submitted that, according to the prosecution witnesses, the deceased had not taken his meals. There is specific assertion on the part of the prosecution witnesses that the deceased had not

taken his evening meals. On the other hand, if the postmortem notes are perused, column No. 20 indicates that there was presence of semi-digested rice and dal in the stomach of the deceased. This indicates that the prosecution witnesses are not telling the truth and the incident had not occurred at the time when it is alleged to have occurred, i.e. at about 8.30 p.m. Possibility is that the deceased had taken his meals in the evening and, thereafter, after some time, he has expired. If medical jurisprudence is referred to, it would indicate that the death occurred after about 3 hours of the deceased having his meals. Mr. Barot, therefore, submitted that there is direct conflict between the ocular and medical evidence and, therefore, the evidence of other witnesses need to be closely scrutinized.

7.2 It was urged on behalf of the appellants by Mr. Barot that the incident, admittedly, took place at about 8.30 p.m. It is in the outskirts of a small village and, therefore, it would be dark at that point of time. An attempt is made by the prosecution to improve its story by bringing into existence electric lights. The witnesses, who have earlier nowhere stated about the existence of light near the place of the incident, have come out with a case that there was an electric light. No proof of legal electrical connection is produced on record. On the contrary, the witness admits to have illegally taken a connection from the electric pole. Mr. Barot submitted that electric pole is nowhere to be found in the vicinity, if Panchnama of the place of incident is perused. A map of the place of incident is also silent about the same. The witnesses have tried to improve the prosecution version by stating that there was moonlight. Of course, the witness then states that he had identified the assailants not in the moonlight but in the light of the electric lamp. Mr. Barot stated that, according to the Indian calendar, it was Ashadh Sud-3 i.e. the 3rd day falling after the no-moon night and, therefore, the moonlight could not have been of any assistance to anyone trying to witness the incident and trying to identify the assailants.

7.3 Mr. Barot then submitted that the witnesses have tried to improvise the prosecution version and those improvements are deliberate and conscious attempts made to falsely implicate the accused persons. The changes are made to suit the prosecution story and cannot be regarded as a casual contradiction or omission or improvement.

7.4 Presence of witness-Thakorebhai and Kantibhai at the place of incident becomes doubtful from the evidence of Shantiben and Ajit because both of them say that after the assailants went away, Thakorebhai and Kantibhai came to the spot.

7.5 Mr. Barot then submitted that, according to eye-witness, accused No. 3 was equipped with a Dharia and he gave a Dharia blow on the head of the deceased. This witness, in cross-examination, categorically asserts that the blow was given with the sharp edge of the Dharia. Against this, if the medical evidence is perused, it does not indicate any incise injury on head of the deceased that could have been caused with a sharp edged weapon. Mr. Barot, therefore, urged that

the witnesses, if they could commit a mistake in identifying the weapon or in identifying the site of injury or in identifying the position of the weapon, they could as well have committed a mistake in identifying the original assailants, moreso when the trial Court has come to the conclusion that these witnesses have committed a mistake in identifying accused Nos. 2,4,5 and 8, who have been acquitted.

7.6 Mr. Barot has then urged that the house of complainant-Thakorebhai is so located and if he was sitting in the front of the house, he could not have witnessed the incident, because the house facing south and the incident had taken place towards the north of his house. Admittedly, there is no opening towards the north in the house of witness-Thakorebhai and, therefore, Thakorebhai has woven a story of him guarding the peanut heap lying in his field. Assuming that there was an electric lamp in the front of the house of the deceased, because of that light, witness-Thakorebhai's eyes would be dazzled and he could not have seen the incident occurring beyond the electric light.

7.7 Same way, all the witnesses improved the story and added up the version that the deceased was pulled out of his house and was pulled with his hair. This is done only to bring them into the house, so that they could be identified: Mr. Barot, therefore, urged that these improvements need to be viewed very seriously by the Court before accepting the evidence of these witnesses. Witness-Shantiben and Ajit appear to be natural witnesses and their presence at the place cannot be disputed. But Mr. Barot submitted that neither of these witnesses inspire any confidence. They seem to be in habit of adding to and altering their versions. Shantiben improves in her version and states that she had prepared vegetable and bajra roti for dinner, which were yet to be taken by the deceased. Contrary to this, rice and dal are found in semi-digested condition from the stomach of the deceased. Shantiben asserts about Dharia blow having been given by accused No. 3, which is falsified by medical evidence. She asserts that banian of the deceased was torn because of dragging, but the panchnama does not indicate the same and same is the case with witness-Ajit.

7.8 Mr. Barot then submitted that accused No. 9 has come out with a case of alibi from the beginning. He tendered an application for anticipatory bail with the same version. He had also tendered an application to the Investigating Officer and requested him to inquire about the same and collect evidence in that regard. Accused No. 9 had also forwarded a copy of the same to Senior Police Officials of the district. It is also on evidence that the Investigating Officer had inquired into it. It is also on record that there was material evidence on record to indicate that accused No. 9 was present at Gandhinagar on the day of the incident. The Investigating Officer has recorded the statement of Rahulbhai whom accused No. 9 claims to have met in the evening on 6th July, 1989. Despite all this, the Investigating Officer has made a report that there is no evidence in support of the alibi as claimed by accused No. 9, Mr. Barot, therefore, urged that the investigating agency has not acted independently and has acted only to help one

side of the case.

7.9 Mr. Barot, therefore, submitted that the learned trial Judge has committed an error in evaluating the evidence. He submitted that the defence version, which is supported by documentary and oral evidence in respect of accused No. 9, has been erroneously discarded by the trial Court. Relying upon several decisions, he urged that the prosecution witnesses and defence witnesses deserve equal treatment in evaluation of evidence and, therefore, the defence version ought to have been accepted by the trial Court. The defence witnesses are no less than Government servants and practising advocates and their depositions could not have been discarded leaving aside the deposition of interested witnesses like Manekbhai.

7.10 Lastly, Mr. Barot submitted that, if the eye-witnesses could have committed a mistake in identifying original accused Nos. 2, 4, 5 and 8, the possibility of the same witnesses committing a mistake in identifying original accused Nos. 1, 3, 6, 7 and 9, i.e. present appellants, cannot be ruled out and if that be so, that probability which favours the accused need to be accepted.

7.11 Mr. Barot has placed reliance on the following decisions in support of his arguments :-

- (1) The State of Uttar Pradesh Vs. Hari Prasad and Others, ; (2) State of Uttar Pradesh Vs. Ashok Kumar and Another, ; (4) Dudh Nath Pandey Vs. State of Uttar Pradesh, ; (5) Shankarlal Gyarasilal Dixit Vs. State of Maharashtra, .
- (6) Gurcharan Singh and Another Vs. State of Punjab, .

8. Mr. K. C. Shah, learned Additional Public Prosecutor, appearing for the respondent-State has opposed this appeal. He submitted that the defence of alibi taken by accused No. 9 has been, at length, dealt with by the learned Additional Sessions Judge. It is evident from the deposition of advocate Mr. K. C. Shah that the defence version has been tried to be improvised showing that the accused was present at Gandhinagar from 11 a.m. to 2.30 p.m. as against the original version of him being present at Gandhinagar from 11 a.m. to 1 p.m. The witness examined from the Additional Development Commissioner's office, Shri Ramanbhai is not able to throw any light as to when the matter was taken up and upto what time the accused and his advocate were present in the office. The evidence regarding remaining part of the day of the accused being present at Gandhinagar/Ahmedabad is not properly established by the defence. Rahulbhai, whom the accused claims to have met on that day, has not been examined. The register which is produced on record does not give time as to when the accused visited Sachivalaya to meet Rahulbhai. The tickets from Kankaria Zoo produced do not bear either the name of the person or the time when it was purchased and, therefore, the possibility of accused having attended the office of the Additional Development Commissioner at Gandhinagar and, thereafter, having gone to the native and reached the place of incident by evening cannot be ruled out in light of the fact that four witnesses have seen the accused at the time of

the incident. Mr. Shah then submitted that witness Manekbhai, and accused himself cannot be believed on the point that on the date of the incident, the bus from Ahmedabad started at about 1 a.m. on 7th July, 1989. In light of the fact that the Conductor Purshottambhai states that his bus started from Ahmedabad at about 11.45 p.m. on 6th July, 1989. The defence witnesses are, therefore, improving the version so as to suit the case of the defence.

8.1 Explaining the absence of any mention about existence of electric lamp while drawing the Panchnama of the place of offence, Mr. Shah submitted that it may not have been found to be significant for the purpose of the offence while the Panchnama was drawn. The factum of existence of light has come on record not by way of any improvement from the prosecution side, but it has come on record during the cross-examination of the witnesses and, therefore, simply because there is no proof of official connection of electricity, it cannot be said that there was no electrical connection. The trial Court has not committed any error in accepting this version of these witnesses emerging during the cross-examination of these witnesses.

8.2 As regard the argument that, if the witnesses could have committed a mistake in identifying the four acquitted accused persons, they could as well have committed a mistake in identifying the present appellants, Mr. Shah submitted that the learned trial Judge has rightly dealt with this aspect by recording that because the attention of these witnesses must have been gone towards the present five assailants/appellants, it could not have been focussed with the same intensity towards the other assailants and, therefore, they may have committed some mistake in identifying those assailants.

8.3 Mr. Shah then submitted that there is no discrepancy about the time of death. The postmortem was conducted from 12.15 p.m. on 7th July, 1979 and the doctor has stated that death must have occurred 12 hours prior to the postmortem. The same doctor has stated that the death must have occurred between 8 and 10 p.m. on the previous day. All these timings are based on generalized study and exact timing cannot be ascertained and, therefore, only on this count, the prosecution story could not be doubted.

8.4 Mr. Shah tried to explain the delay in lodging of F.I.R. by stating that, after the incident occurred, the vehicle was required to be fetched. Vehicle was not available in the village and witnesses had to walk down to Ukai, which is at a distance of about 10 kms. When they came back with the vehicle, they found that the deceased had expired.

The witnesses have stated categorically that they thought over the action to be taken in the matter and, thereafter, started for Ukai for lodging the F.I.R. This procedure must have taken time. Besides this, Mr. Shah submitted that the timings, as given by the witnesses, could not have been exact as the incident has taken place in a small village and the witnesses are rustic villagers. The delay, therefore, has been rightly accepted by the learned trial Judge as having been

properly explained. In the circumstances, Mr. Shah urged that the verdict of the trial Court need not be interfered with and the appeal may be dismissed.

9. Mr. Barot, in reply to the arguments advanced by Mr. Shah, submitted that the Investigating Officer has gone to the length of saying that, in his investigation, no supporting evidence as regards the case of alibi of accused No. 9 is found and, therefore, adverse inference may be drawn against the prosecution and in favour of the accused, when there is ample evidence on record to show that the accused was present at Gandhinagar. Signature of accused No. 9 was obtained by the Investigating Officer but was not sent for comparison to the hand writing experts and no explanation is tendered by the prosecution in this regard and, therefore also, it may be held that the prosecution has not acted in an unbiased manner. The appeal, therefore, may be allowed and the accused persons/appellants may be acquitted.

10. Before we proceed to discuss the merits of the matter, it may be stated that there is no dispute about the legal position that *falsus in uno, falsus in omnibus* is now no more an acceptable principle in criminal jurisprudence and, therefore, simply because some of the accused persons who were alleged to have been involved in the incident as per the case of the eye-witnesses have been acquitted, it cannot be held that no reliance whatsoever can be placed on the depositions of these eye-witnesses qua the present appellants. The learned trial Judge has also in detail discussed the reasons for not accepting the version of the eye-witnesses as against those acquitted accused persons i.e. original accused Nos. 2,4,5 and 8 and for accepting the evidence against the appellants and we are in full agreement with the reasoning adopted by the learned trial Judge in that regard and the principle that simply because these witnesses are not believed qua those accused persons, their depositions cannot be discarded against other accused persons, i.e. the present appellants, if otherwise their evidence is found to be reliable.

11. There again also cannot be dispute about the principle that even in case where an alibi is claimed by the defence, the prosecution case has to stand on its own evidence and establish its case against the accused by cogent and reliable evidence, irrespective of whether or not the accused have made out a plausible defence.

12. We shall, therefore, have to see whether the prosecution is able to establish the case against the present appellants successfully. The prosecution case mainly depends on four eye-witnesses, namely, (1) complainant-Thakorebhai, who is the brother of deceased-Lallubhai, Ex. 19; (2) Shantiben, who is the widow of the deceased, Ex. 22; (3) Kantibhai, who is another brother of deceased-Lallubhai, Ex. 23; and (4) minor Ajit, son of deceased-Lallubhai, Ex. 26. With the help of the above mentioned witnesses, the prosecution has tried to establish the case against the accused persons. If the depositions of these witnesses are seen, they tried to implicate all 9 accused persons, but their versions vis-a-vis the acquitted accused persons have not been accepted by the trial Court and they have been

acquitted. That order of acquittal has not been challenged by the State and as such, it can be said that the said order of acquittal has attained finality.

13. In order to establish the motive, the prosecution has examined eye-witnesses-Ushniben, at Ex. 25. In her deposition, she states that she is wife of Laljibhai Rajiabhai. She stays with her husband and two sons, named Ashwin and Sunil, at village Singpur. Her house is located behind the house of deceased-Lallubhai and that is how she knew Lallubhai. On the day of the incident, at about 7 p.m., when she was at her home, accused No. 1 Singhabhai came near her house and sat on a bench near her house. Her son Ashwin was also sitting there. She was cooking in the home at that time. Accused No. 1 Singhabhai and Ashwin had an altercation for getting liquor. She, therefore, came out of the house and told accused No. 1 that no liquor is available and that he should go away. At that time, deceased-Lallubhai and Kantibhai also came and asked Singhabhai to go away. Singhabhai, therefore, went away. She does not know as to what happened thereafter during the night. Next morning, she learnt about death of Lallubhai, which frightened her. Police had interrogated her. This witness has been cross-examined and she states that accused No. 1 Singhabhai used to come to her house quite often when her son was there. Earlier, he was never driven out, but on that day, because of altercation, he was driven out. The cause for altercation was that accused No. 1 wanted her son to bring liquor for him, which her son refused to do and accused No. 1 insisted on her son to do so. Barring this, no material has come out of the evidence of this witness to disbelieve her version about the incident that occurred prior to the incident in question before us. This incident was followed by the incident in question. As can be seen from the evidence of Kantibhai, after this incident, he saw accused persons going towards the house of Lallubhai and he, therefore, felt that some untoward incident may occur because of the previous incident that had happened in the evening, when accused No. 1 was driven out of the street by the accused.

14. Now, if deposition of complainant-Thakorebhai, Ex. 19 is perused he states that he is the brother of deceased-Lallubhai. Kantibhai is also his brother and they also have a brother named Gopalbhai. Their houses are located near each other at village Sing pur. Deceased-Lallubhai was working as a driver with S. T. Corporation. Lallubhai's wife's name is Shantiben, daughter's name is Kailash and son's name is Ajit. The incident occurred on 6th July, 1989. He had returned from his service at about 7.00-7.30 p.m. His children had gone for playing and, therefore, he and his wife were alone in the house and were about to take dinner. He states that, at that time, in all 9 accused persons, namely, accused No. 1 Singha Magan, accused No. 9 Jayanti Bhenkara, accused No. 3-Dina Afinia, accused No. 7-Rupa Sing, accused No. 6-Digania Rama, accused No. 4-Abhesing Lallu, accused No. 5-Gopal Magan, accused No. 2-Rangji Chhagan and accused No. 8-Lalsingh Mangalia came. They all came for settling the quarrel with Lallubhai. At that time, he was sitting near the penut heap, which was located between his house and the house of deceased-Lallubhai. The accused persons rushed into the house of Lallubhai, pulled him out of his house by holding his hair

and then all of them started assulting the deceased. Accused No.] gave a knife blow, accused No. 9 gave a stick blow on back and chest of the deceased, accused No. 3 gave a dharia blow on the hind portion of the head of the deceased, accused No. 7 gave push injuries to the deceased with the help of a parai (an iron rod), whereas accused No. 6 caused injury with the help of a stick on the back. Accused Rangji Chhagan, Abhesing Lallu, Gopal Magan and Lalsingh Mangalia were instigating them to do him away. Deceased-Lallubhai collapsed on the ground because of the injuries sustained by him. He was bleeding from his mouth but was alive. The accused persons, therefore, went away. The witness says that he called Chhanabhai and Chhaganbhai and went for fetching the vehicle to take Lallubhai to the hospital. No vehicle was available in the village and they, therefore, went to Ukai. When they came back, they found that deceased-Lallubhai had expired. They, therefore, returned the vehicle and, thereafter, they prepared themselves to proceed for lodging the complaint at Ukai Police Station. It was about 5 o' Clock in the morning then. He says that, then he went to Ukai Police Station and lodged the F.I.R. The officer concerned recorded the F.I.R. per his say and obtained his thumb impression. The said F.I.R. is at Ex. 20. The witness then proceeds on identifying the weapons which were used by the accused persons at the time of the incident. The witness is cross-examined at length. His cross-examination on the topography corroborates the map that is produced on record at Ex. 18 which is again in consonance with the Panchnama of the place of offence produced on record at Ex. 21. He says that he was guarding the heap of peanuts and he went there at about 8 p.m. The existence of the heap of peanuts is also found in the Panchnama of place of offence Ex. 21. It may be noted that he is an illiterate man and on suggestion that there is no mention of it in the complaint, he states that he had mentioned but the police may not have recorded the same in the F.I.R. He admits that, if he was in his house, he could not have witnessed the incident. This is because the incident occurred towards the north of his house and the northern wall of his house is a blind wall. There is no exit on that side. But the witness then asserts that, at that time, he was in the lane near the heap of peanuts which he was guarding. He admits that, in his F.I.R., he has not given in detail that the accused persons went into the house of the deceased and dragged him out of the house by pulling him by his hair. He states that wife of the deceased and his children did not come to lift the deceased to the place of offence after the incident, but then volunteers that they were frightened and, therefore, they did not come. This seems to be quite a natural reaction and conduct. He admits to have stated in his complaint that, after the assailants went way, he noticed that his brother was badly injured on the hind portion of his head and other parts of his body. He, therefore, lifted him and took him to the Otlā of his house and gave him water and started to make preparation for taking him to the hospital. In the meantime, deceased-Lallubhai expired and he, therefore, approached the police for lodging the F.I.R. An attempt was made by the appellants to show that if this was so, the entire story about this witness going to Ukai for fetching the vehicle and learning about the death of the deceased after returning from Ukai and then discharging

the vehicle and then again going to Ukai for lodging the complaint is an improvement to explain the delay in lodging the F.I.R. It may hardly be stated that F.I.R. is not supposed to contain all minute details about the incident, least about what happened after the incident. But this version definitely contains an averment that they were making preparations for taking the deceased to hospital on noticing that he had sustained severe injuries. This portion is only elaborated by the witness in his deposition by giving details that because vehicle was not available in their village, they had to go to Ukai and fetch the vehicle and, therefore, in our opinion, this cannot be considered to be an improvement made by the witness so as to fit into the story of the prosecution or an improvement to explain the delay as is contended by the defence.

14.1 The witness further in his cross-examination has stated that when the incident occurred, there was moonlight. He also states, for the first time, in his cross-examination that, he saw the incident in the light of the electric bulb which was lit outside the house of deceased-Lallubhai. He categorically states that he had seen the incident not in the moonlight but in the light of the electric bulb. He states that (here is a light on the Opla of the house of deceased-Lallubhai and he had shown the lamp to the police when the Panchnama was drawn. This witness states that the connection is directly taken, i.e. the connection is not legally taken.

14.2 An attempt is made to assail the veracity of this witness on the ground that this witness has improved his version to support the prosecution case of identifying the assailants to be the accused persons, as the incident had taken place in the dark. It may be noted that the witness has voluntarily not made any improvement in his examination-in-chief. These details are given by him only on being asked in the cross-examination and, therefore, it cannot be said that the witness has made improvements in his version in order to suit the requirement of the prosecution case. On this point, it may be noted that the amount of light that was emitted from the lamp of the house of the deceased can also be judged from the evidence that is coming on record from the deposition of witness-Kantibhai. In his deposition, Ex. 23, again during cross-examination, he states that the bulb hung in the Penjari (i.e. Opla or Veranda) of the house of the deceased, was of the capacity of 60 watts.

14.3 This witness specifically denies the suggestion that accused No. 9-Jayant Bhenkara, was not present at the time of the incident and that he was at Ahmedabad. Barring this, the deposition, if perused, brings forth nothing to doubt the veracity of this witness and he categorically inculcates all the appellants.

15. Likewise, in the deposition of Shantiben, Ex. 22, she states that she was in the house. Her husband was also in the house. That day, in the evening, accused No. 1 had come to the house of Laljibhai Rajibhai and was sitting on the bench and was discussing something with the son of Laljibhai when her husband asked him not to come there and had asked him to go away. Accused No. 1, therefore,

went away saying that he will take care of the deceased. Later, that evening, at about 8 to 8.30 p.m., accused No. 1 in company of other accused persons came to their house. She and her husband were sitting on a cot in the house. One of the doors was closed and the other was ajar. Accused No. 1 and other accused persons rushed into the house, caught hold of the deceased with the banian that he was wearing and dragged him out of the house. Accused No. 1 was equipped with a knife with which he had caused injury to the deceased on his hand. Then she proceeds to give details as to which of the accused persons caused what injury to the deceased. According to her, accused No. 3 was equipped with Dharia and he gave one Dharia blow on the hind portion of the head of the deceased. The other persons were equipped with sticks or Parai and they gave push injuries to the deceased. The deceased, therefore, collapsed on the ground. She raised shouts for help, but nobody came. After the deceased collapsed on the ground, the accused persons went away. Thereafter, Thakorebhai arrived at the spot. Since no vehicle was available and the deceased was required to be taken to the hospital, he went to Ukai on foot for fetching the vehicle. When he came back, her husband had expired. Therefore, the dead body was taken for post-mortem. She does not know who took away the dead body. The police came and interrogated her. During cross-examination, she states that when the deceased was being beaten, she and her son had come out of the house. The deceased was assaulted at a distance of about 6 to 7 steps from the edge of the Penjari (i.e. Veranda or Otlā). She states that there was moonlight at that time. She denies the suggestion that she and her son had not come out of the house at that time. She says that they had prepared roti and vegetable of potato and onion and they were yet to take their meals. She, during her cross-examination, states that the sharp-edged portion of the Dharia was used for inflicting the injury by accused No. 3. About the other injuries, with the help of sticks and Parai, she states that push blows were given in quick succession indiscriminately. She asserts that she had seen accused No. 9-Jayanti Bhenkara at the time of the incident. She states that she had not seen the said accused prior to the incident on that day. Out of the deposition of this witness, it can be seen that she clearly implicates all the appellants in detail. No question is put to her about the existence or non-existence of light in her house. An attempt is made to show that she is not telling the truth because she says that they were yet to take their meals, but the post-mortem notes state that the stomach of the deceased contained semi-digested rice and dal. It was argued that the witness is exaggerating and adding salt to her version when she says that they were yet to take meals and that they had prepared Roti (Chapati) and vegetable, in this regard, it was also argued that this would also affect the time of the incident and it could not be the time as is the prosecution case. It could be somewhere later in the evening or in the night that the deceased may have died. In this regard, it may be noted that the witness is a rustic villager. It could not be expected that she can give the exact time of the incident. Even the Apex Court has recorded that truthful witnesses out of fear of being disbelieved or being labelled as false witnesses add some embroidery here and there. Some times they give answers

only to save themselves from being labelled as false witnesses and, therefore, this fringe of embroidery here and there has to be given concession. It may be noted that even according to the medical officer, who had performed the post-mortem and who was examined at Ex, 27, the death of the deceased was about 12 hours prior to his performing the postmortem. The post-mortem was preferred on 7th July, 1989 between 12.15 p.m. and 1.45 p.m. So the time would be somewhere before 12 midnight between 6th and 7th July, 1989. If the overall picture is taken, the incident has taken place around 8.30 p.m. Exact time cannot be taken to have been given by the witnesses considering the strata of the society for which they are coming and the area in which the incident has taken place. According to witness-Thakorebhai, he went to Ukai to fetch the vehicle, which is at a distance of about 10 kms. He had to go on foot to fetch the vehicle and when he came back, he learnt about the death of the deceased. If all these things are taken together, it cannot be said that the fact of mathematical accuracy in time of the death of the deceased would falsify the prosecution version which is emerging from the depositions of the eye-witnesses. It would also not falsify the witnesses on that count nor would it render the depositions guilty of exaggerations and improvements to suit the requirement of the prosecution case to make it foolproof against the accused persons.

16. Witness-Kantibhai is examined at Ex. 23. He deposes about the earlier incident on the same day and says that accused No. 1 was driven away by deceased-Lallubhai. Later, in the evening, he and his wife were sitting in the house when he saw accused No. 1 - accompanied by others passing nearby his house and going to the house of Lallubhai. He felt that because of the earlier incident in the evening something may happen and he, therefore, came out of the house and sat near the bathing place (Navania), which is in front of his house at a distance of about 5 feet. He saw that the accused persons dragged deceased-Lallubhai out of his house and started beating him. Then he gives the details of all the accused persons to who inflicted what blow. In short, he states that, accused No. 1 gave a knife blow to Lallubhai, which he sustained on his fingers. He states that accused No. 3 gave a Dharia blow and the other accused persons caused injuries to the deceased by giving push with the help of stick or Parai. He states that he went to the place after the accused persons went away. Thakorebhai also came there. They decided to take Lallubhai to hospital, but no vehicle was available and, therefore, Thakorebhai and two other persons went to fetch a vehicle. When they came back, they found that the deceased had expired. He says that Thakorebhai then went to Ukai for lodging the F.I.R. Police came next day morning at about 5 a.m. This witness is also cross-examined at length. In cross-examination, he states that he was hiding himself in the Navania. He says that there is an electric light in his house. He says that Thakorebhai does not know driving. He does not know how to ride a bicycle also. He himself knows riding a bicycle but he did not take out the bicycle because it was a dark night. This witness is also cross-examined on question of existence or non-existence of electric light near the place of incident and he states that

because of the electrical light, he could identify the weapons. He says that his brother had taken illegal connection directly from the pole. That light is located in the Penjari (Veranda or Otlā) and then he proceeds to say that the said light was fitted with an electric bulb of the capacity of 60 watts. He has been cross-examined in detail on this count, but he holds fast to his version that there is electric connection.

17. Coming to the deposition of witness Ajit, minor son of deceased-Lallubhai, he states and categorically inculcates the appellants. He says that the accused persons came into the house and dragged his father out of the house and started beating him. He states as to who was equipped with what weapon and caused what injury. He states that his father expired at about 10.00 to 11.00 in the night. He admits to have stated in his statement before the Police that after the assailants went away, both his uncles arrived at the spot. He states that accused No. 1 inflicted only one knife blow. The injury was sustained by the deceased on his fingers. He denies the suggestion that he had not come out of the house into the Penjari and that he had not witnessed the incident. Again, no question is put to this witness to ascertain the existence or non-existence of electric light near the place of incident.

18. The attempt that is made by the defence is to challenge the prosecution case mainly on the count that the time of the offence is not correctly stated by the prosecution witnesses, so also the time of death of the deceased. As discussed earlier, the witnesses could not be expected to give the timing with mathematical accuracy as they hail from an illiterate and rustic strata of society. The time of death would lose its significance once the eye-witnesses are found to be reliable so far as the incident is concerned. Likewise, whether meals were taken or not would also be of no significance. A witness may attempt to add some embroidery, but because this portion does not directly affect the veracity of this witness, it cannot be given undue weightage. It cannot be considered as anything beyond the fringe of embroidery which is accepted as a normal phenomena prevalent in our country.

18.1 However, the Dharia blow that is alleged to have been given by accused No. 3, by all these witnesses, calls for a serious consideration. The consistent version emerging from the depositions of these witnesses is that accused No. 3 gave a Dharia blow on the rear portion of the head of the deceased. During cross-examination, witness-Shantiben, Ex. 22, states that the sharp-edged portion of the Dharia was used for causing the injury. As against this, the medical evidence that is emerging from the deposition of Dr. Surendra at Ex. 27 and post-mortem notes prepared by him at Ex. 28 clearly indicate that there was no injury to match the injury that could be caused with the sharp-edge of a Dharia on the head of the deceased and this point is very seriously argued on behalf of the appellants. If the description of the injury is considered in light of its size, it is a contused lacerated wound of the size of 4 cms. x 0.5 cms. x 0.2 cms. It is found over left parietal region at a distance of about 1.3 cms. behind the left parietal

eminence. It is settled principle that evidence of witnesses is to be judged as a whole. A mistake here or a mistake there cannot be picked out to judge the overall deposition of the witness. We have considered the depositions of these witnesses and we are of the opinion that barring this, the witnesses are otherwise found to be quite reliable and trustworthy. This can be a genuine mistake on the part of witness-Shantiben in describing or ascertaining this fact that sharp edge of the Dharia was used for causing this injury. If one pauses for a while and thinks dispassionately, the bona fides and honest belief of this witness can be seen from the fact that, if the witness was either tutored or wanted to improve the version, there was ample scope for the witness to have stated that blunt portion of Dharia was used for causing the injury because the medical evidence does not describe any injury to suit the sharp edge of the Dharia. The post-mortem report was very much there before the deposition of this witness was recorded and the witness could have improved that version when the deposition was recorded after a spell of about 10 months from preparation of the post-mortem notes and, if that was done, probably that would not have left any room for argument for the defence and, therefore, this seems to be a bona fide mistake or bona fide belief of the witness. Such incidents occur in a short spell. It depends on observation power of each individual and simply because a witness commits a mistake in identifying the edge of the weapon, which caused the injury, it cannot be said that the witness cannot be believed so far as identification of the assailant is concerned.

19. As regards the possibility of the witnesses identifying the assailants, the point is vehemently argued. It is stated that the incident has taken place in a small village where the houses are scattered. The houses do not seem to have any legitimate electric connection. The incident has taken place outside the house. The incident has taken place, admittedly, at 8.30 p.m. and in July, it would definitely be dark at that hour of the day. The witnesses were at a distance and there is a possibility of these witnesses committing a mistake in identifying the assailants. They could have spun a story because of the previous incident in the evening. But these arguments are negated by the fact that the witnesses categorically state in their depositions that there was electric connection, though illegally taken, and that there was a bulb of the capacity of 60 Watts in the Penjari of the house of the deceased. The incident has taken place within 19 feet of that Penjari and, therefore, it is not possible to accept that the witnesses could have committed a mistake in identifying the assailants. It was also argued that the witnesses have improved their version and brought into evidence this light which never existed in their earlier version. As discussed earlier, it cannot be said that the witnesses have improved their version. They have only clarified the situation upon being asked in the cross-examination, and, therefore, it cannot be said that the witnesses have improved the version to support the case of the prosecution.

20. In the light of the above, we are of the firm view that the lower Court has not committed any error in accepting the deposition of these eye-witnesses.

21. Now, another and important question that requires to be considered is whether the trial Court has committed an error in not accepting the plea of alibi by accused No. 9.

21.1 In this regard, it is well-settled principle of governing of evidence that while judging the veracity of witnesses, there cannot be any different yardstick for judging the prosecution witnesses or defence witnesses. The defence witnesses are to be given equal treatment with the prosecution witnesses. This Court, therefore, would be required to consider the evidence adduced by the defence in support of the plea of alibi by accused No. 9.

21.2 It may also be noted that in order that a plea of alibi be accepted, the defence has to prove a physical impossibility of presence of the accused at the scene of offence by reason of his presence at any other place, *Dudh Nath Pandey Vs. State of Uttar Pradesh*, . The plea can, therefore, succeed only if it is shown that the accused was so far away at the relevant time and he could not be present at the place when the crime was committed. It is expected of an accused who takes the plea of alibi to prove the same with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally, the Court would be slow to believe any counter evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such quality and of such standard, then the Court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place. The accused would then no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi *Binay Kumar Singh and others Vs. State of Bihar*, . Apart from this, the burden of proving the alibi, which in Latin means "elsewhere" is on the accused who takes up such plea, as can be seen from provisions of Section 103 of the Evidence Act. The illustration (B) to the said Section very categorically shows that the burden of proving alibi is upon the accused.

22. In the instant case before us, the accused persons in their defence have adduced documentary and oral evidence. Therefore, what is required to be seen is whether the defence is able to establish beyond the core of reasonable doubt, the presence of accused No. 9 at a place other than the place of incident, at the relevant time. Can it be said to be a possibility beyond the scope of any possibility that can be contemplated. Now in the backdrop of this settled proposition of law, if the defence version is perused, it only indicates that * there was a possibility of accused No. 9 having attended the office of Additional Development Commissioner, Gandhinagar, at 11 a.m. on 6-7-1989. Accused No. 9 has deposed at Ex. 60. He states that on 6th July, 1989, he was not at Singpur, but was at Ahmedabad/Gandhinagar. He had not gone to the house of Lallubhai

and had not participated in the incident as alleged. He states that he had a matter pending before the Additional Development Commissioner and he had engaged Advocate Mr. K. C. Shah to put forward his case. On earlier date, i.e. on 14th June, 1989, he did not remain present before the Additional Development Commissioner and, therefore, he was informed by his Advocate Mr. Shah that the next date was fixed on 6th July, 1989 and that he should remain present. On the same day, i.e. on 6th July, 1989, another matter relating to accused No. 9 was fixed before the learned Judicial Magistrate, First Class, Vyara, where he had engaged Advocate Mr. Dhimer to defend him. The accused, therefore, approached Mr. Dhimer along with the letter received by him from Advocate Mr. Shah and asked Mr. Dhimer to seek an adjournment on 6th July, 1989 and he proceeded to Gandhinagar on that day. On 6th July, 1989, he reached Gandhinagar in the morning, consulted his advocate and then attended the office of the Additional Development Commissioner at 11 a.m. Mr. Shah arrived at the said office at 11.30 a.m. The Chitnis had obtained signature of his advocate as well as of himself. The accused says that his work continued upto 2 to 2.30 p.m. on that day. Thereafter, he came out and departed. All throughout, he was accompanied by Dineshbhai Somhahbai. Then they went to Ahmedabad by bus. At Ahmedabad, they went to Kankaria Zoo and purchased two tickets. They visited the zoo at about 3.45 to 4 p.m. Thereafter," he left behind Dinesh Somabhai and went to see his friend Rahulbhai Gamit at Gandhinagar. He left at about 5.15 p.m. for Gandhinagar and met Rahulbhai. Thereafter, he came back to Ahmedabad and went to his bother-in-law Manekbhai's place. He was with his brother-in-law upto midnight and then at about 11.30 p.m. Manekbhai came and Dineshbhai, who was at Manekbhai's house, dropped him at the Bus Station. His bus arrived at about 1 a.m. on 7th July, 1989. The bus was heading for Ukai and was coming from Ambaji. He occupied the bus and Dinesh and Manekbhai had returned. He reached Songadh at about 9.00 a.m. on 7-7-1989. Thereafter, he went to Vyara Court and consulted his Advocate Mr. Dhimer. He was informed that his application was rejected by the learned Judicial Magistrate, First Class, Vyara, and wan-ant was issued against him. They, therefore, tendered two applications, one for taking the matter on board and another for cancellation of the warrant issued against him. The Court granted both the applications. The entire procedure consumed practically the whole day and he was in the Court upto 4 p.m. He learnt about his false implication in the incident only on 8-7-1989 when he read about it in the newspaper. He, therefore, immediately contacted Mr. Dhimer and on 10-7-1989, he tendered an application for anticipatory bail before the Sessions Court. It was fixed for hearing on 18th July, 1989. He attended the Court at Surat on that day. The Court. passed the order on 20th July, 1989 and, on that day also, he was in the Court. The application was rejected by the Sessions Court and he, therefore, approached the High Court for anticipatory bail, which was also rejected. This accused-witness has been cross-examined at length by the prosecution side. To support his version, the defence has examined Manekbhai at Ex. 83. He is witness to the effect that on 6th July, 1989, accused No. 9 and Dinesh were with him from 7.30 p.m. in the evening till

1 a.m. on 7th July, 1989 when accused No. 9 left by Ambaji-Ukai bus for Ukai. He is brother-in-law of accused No. 9. He states that the bus was late on that day and, therefore, it arrived at about 1 a.m. and the accused left in the said bus. On the other hand, another witness-Burshottambhai, who was the conductor of the bus, is examined by defence at Ex. 122. He falsifies the version of this witness-Manekbhai and states that the bus had left at 11.45 p.m. on 6-7-1989. Considering that defence witness-Manekbhai is brother-in-law of accused No. 9 and he is thereby an integrated witness, this variance raises a question as to whether he really attended the Bus Station for dropping Jayantibhai, accused No. 9, as he claims to have done or at least he seems to have made a false statement to support the case of accused No. 9.

23. The defence has examined learned Advocate Mr. K. C. Shah, at Ex. 89. Mr. K. C. Shah in his deposition states that accused No. 9 had contacted him on 6-7-1989 in the morning at about 9 a.m. and he directed him to attend the Additional Development Commissioner's office at 11 a.m. and they departed. The accused attended the said office at 11 a.m. The matter was listed on board at serial No. 4. The case came up for hearing at about 1.30 p.m. and was continued up to 2 to 2.30 p.m. and the case was, thereafter, adjourned for judgment. The Chitnis had marked presence of the accused as well as Mr. Shah and they had signed Ex. 65. This witness is also cross-examined at length by the prosecution. He is not able to assert that he can remember the details of all the cases and of the adjournments that are on his hand. He is not able to state as to whether the first three cases listed on board above the case of accused No. 9 were taken up for hearing or not. He, of course, denies the suggestion that the earlier three cases were adjourned and, therefore, their case was taken up immediately.

24. The next witness who is examined by the defence to show that the accused had attended the office of the Additional Development Commissioner is Mr. Ranmbhai, defence witness No. 5, at Ex. 102. This witness does not throw any light on the question as to up to what time accused No. 9 and his advocate were in the office of the Additional Development Commissioner. He states that the first three matters listed on the Board prior to the matter relating to accused No. 9 were adjourned as can be seen from the endorsement made by the then Commissioner on the Board (cause list). He states from the record that accused had remained present on that day.

25. It is, therefore, argued that, on the basis of this evidence, it should be accepted that the accused was in the office of Additional Development Commissioner and he could not have been at the place of the incident, which is at a distance of about 300 kms. from Gandhinagar and a bus journey, if undertaken, would consume at least 7 1/2 hours to 8 hours and if the accused was in Gandhinagar at 2.30 p.m., he could not have been present at the place of incident at about 8.30 p.m. when the incident is alleged to have been taken place and he is, therefore, falsely implicated by the eye-witnesses. In this regard, it

may be noted at the outset that the case of the defence is to be viewed as a whole. The defence case is that, after the work at the Development Commissioner's office was over, accused No. 9 and Dinesh went to Ahmedabad, visited Kankaria Zoo and accused No. 9 again left for Gandhinagar at about 5 p.m. to meet one Rahul Gamit, a friend of his working in the Sachivalaya. A copy of the register is produced to show that name of accused No. 9 was registered therein as one of the visitors. Thereafter, accused No. 9 came back to Ahmedabad to his brother-in-law's place and left Ahmedabad by Ambaji-Ukai bus for his home town at about 1 a.m. on 7th July, 1989. In this regard, it may be noted that the conduct of the accused of going to Ahmedabad after the work was over and again coming back to Gandhinagar to meet his friend-Rahulbhai is quite unnatural. If he really wanted to see Rahulbhai, as a man of ordinary prudence, he would have straightway gone to the office of Rahulbhai and met him and then come to Ahmedabad. It is also to be noted that, admittedly, he started for Gandhinagar at about 5.00 p.m. That would make him reach Gandhinagar at a time when the offices at Gandhinagar would be about to close. He had not inquired as to availability of Rahulbhai at Gandhinagar on that day before leaving for Gandhinagar as is admitted by him in his cross-examination and, therefore, this unnatural conduct needs to be taken into consideration while considering the veracity of the defence version.

25.1 The Register of visitors to the Sachivalaya, on perusal, does not state the time of visit by accused No. 9. The entry in question, Ex. 74, is last on the page and is numbered 62 whereas, at the bottom of it figure 160 appears, which probably indicates the total number of visitors at the end of the day. And, therefore, in absence of evidence of Rahulbhai Gamit, the factum of visit of accused No. 9 in the evening cannot be accepted as proved to hilt. The entry in the Register does not inspire confidence of the standard expected for accepting the plea of alibi as against the evidence of eye-witnesses.

26. It is the case of accused No. 9 that, all through out, from the moment he left his home town for going to Gandhinagar till he left Ahmedabad for going to his home town, Dinesh was with him except for a short spell when he left Ahmedabad again for Gandhinagar to meet Rahulbhai. Defence has not examined this witness. Another aspect that requires consideration is that the defence has not examined Rahulbhai Gamit when accused No. 9 claims to have met at Gandhinagar in the evening after he left Ahmedabad at about 5.00 p.m. Non-examination of these two material witnesses adversely affects the case of the defence. The resultant effect is that there is nothing on record in the form of cogent evidence except oral version of accused No. 9 and his brother-in-law Manekbhai to show that accused No. 9 was in Ahmedabad from 7.30 p.m. on 6th July, 1989 to 1 a.m. on 7th July, 1989. There is nothing on record except the version of accused No. 9 and his Advocate Mr. K. C. Shah to show that accused was at Gandhinagar up to 2.30 p.m. when, admittedly, version of accused No. 9, originally, was that they were together up to 1 p.m., as emerging from the case of the accused in application Ex. 69. This improvement in the defence version

adding one and a half hours" presence of the accused at Gandhinagar calls for serious consideration. The improvement in timing, though appearing innocent at first sight, appear to be a tailor made improvement to suit the plea of the defence.

27. Accused No. 9 was the Sarpanch of the village. He says that although he went to his house in the morning of 7th July, 1989, he learnt about the incident and his implication in the incident only on 8th July, 1989 when he read the newspaper. On 7th July, 1989, admittedly, he attended the Court at Vyara up to 4 p.m. So, after 4.00 p.m., he was again at his home town. If such an incident occurs in a small village, it is difficult to accept the version of accused No. 9 that he learnt about the incident and his involvement only on the next date when he read the newspaper. The Sarpanch would definitely have a group of people whom he would know and the investigation had already started. Therefore, it cannot be said that his version about knowing about the incident and his alleged involvement came to his knowledge only on 8th July, 1989, i.e. on the third day from the day of incident can be accepted as truthful or trustworthy. Therefore, the defence version as emerging from these pieces of evidence adduced by the defence cannot be said to meet with the Standard of strict proof of impossibility of the presence of accused No. 9 at the place of incident at the relevant time, as against the depositions of four eye-witnesses categorically stating to have seen accused No. 9 actively participating in the incident. The plea of alibi, therefore, could not have been accepted by the learned trial Judge as has been done and we fully agree with the finding of the learned trial Judge in not accepting the plea of alibi taken by accused No. 9.

27.1 The outcome of the defence evidence of alibi in comparison to the evidence led by prosecution is that the defence is able to prove the presence of accused No. 9 at about 11.00 a.m., at Gandhinagar. The incident has occurred at about 8.30 p.m. with a possibility of some error in timing due to illiteracy of witnesses. Even the defence has pleaded this possibility. As a result, it cannot be accepted that the defence has proved alibi of accused No. 9 at Ahmedabad, making presence of accused No. 9 at the place of offence impossibility. The possibility of accused No. 9 having travelled to Singpur during the day time cannot be ruled out as defence is able to show the presence of accused No. 9 at Gandhinagar only up to around 11.00 a.m. The rest of the defence story of alibi inspires no confidence as discussed above. The plea of alibi, in our view, is rightly rejected by the learned trial Judge.

28. As regards the contention that the F.I.R. was lodged late, it may be taken into consideration that when such incidents take place, different people react in different manner and it takes time for people to collect their composition. In the instant case, delay is also explained by the prosecution by the fact that the complainant had to go to Ukai for fetching the vehicle. Ukai is at a distance of about 10 kins, and going there on foot on a dark night, naturally, would take some time. It is also on record that, after returning from Ukai with vehicle, when

they found that the deceased had expired, they had to think for the course of action to be taken. It cannot be overlooked that they almost were in a shock and, therefore, it cannot be said that there is inordinate and unexplained delay in lodging of the F.I.R. In this regard a decision of the Supreme Court in the case of 1997 (21) ACR 869 (SC) may be taken into consideration. Because the F.I.R. is lodged next day in the; morning, it cannot be said that it would vitiate the prosecution case.

29. It was contended on behalf of the appellants that the Investigating Agency has not acted independently and the prosecution has not examined material witnesses of whom statements were recorded by the Investigating Officer upon accused No. 9 taking the plea of alibi and tendering an application. In fact, those witnesses could have thrown some light on the truth. It may be noted that it is the discretion of the prosecution to decide as to which witnesses are to be examined. Apart from that, if the defence wanted particular witness to be examined, it was open for the defence to examine that witness, more so, when the defence has chosen to lead defence evidence in the nature of oral and documentary evidence. It may also be noted that the prosecution decided, to drop rest of the witnesses vide Purshis Ex. 48 and there does not appear to be any objection raised by the defence against dropping all these witnesses. If it was deemed proper or necessary by the defence that particular witnesses should have been examined, the defence ought to have raised an objection before the learned trial Judge when this Purshis was given, on basis of which the evidence of the prosecution was closed. Keeping this aspect in mind, we do not see any substance in the argument that the prosecution ought to have examined certain witnesses whose statements were recorded by the Investigating Officer in order to ascertain as to the correctness of the plea of alibi by accused No. 9. In fact, as discussed earlier, the settled proposition is that it is for the defence to prove beyond the core of reasonable doubt the defence of alibi and, therefore, the argument cannot be accepted.

30. Mr. Barot has placed reliance on the decision of the Supreme Court in The State of Uttar Pradesh Vs. Hari Prasad and Others, , wherein the occurrence took place on a dark night. The witnesses claimed to have identified the accused in the light of a lantern. It was found that existence of lantern was doubtful and the accused was given benefit of doubt, As discussed above, we find that existence of electric lamp is not at all doubtful and, therefore, there could be no reason to suspect any mistake in identification of the accused by the witnesses and, therefore, the aforesaid decision will not help the appellants.

30.1 In the case of State of Uttar Pradesh Vs. Ashok Kumar and Another, , the Honourable Apex Court held that according to the prosecution case, the assailants were identified by the witnesses in the moonlight. The occurrence took place in moonlight at night when the moon had already covered 3/4th distance and, therefore, it was held that it would be difficult for the witness to identify the accused from a distance of about 150 yards. The facts of the present case, in no

way, tally with that of the said case. Here, the witnesses were standing nearby. Their presence was natural as their houses were located nearby and they have witnessed the incident in the light of an electric bulb and not moonlight and, therefore, this decision is of no assistance to the appellants.

30.2 Reliance was also placed on behalf of the appellants on the decision of this Court in the case of *Lilubha Mahobatsinh v. State of Gujarat* (1991) 31 GLR 266. We have gone through the decision. We find that, in that case, a doubt was raised about the genesis of the incident. It was found that the witnesses were keeping back the genesis of the incident or it was not brought on record and, therefore, it was found by the Court to be a mystery. In the instant case, the evidence of the prosecution clearly brings on record the earlier incident to establish the motive and other details as to how the incident occurred and, therefore, the decision cannot help the appellants.

31. In the light of the above discussion, we do not find any merit in this appeal. As rightly held by the learned trial Judge, all the appellants would be liable to be convicted for the offence of murder read with Section 149 of the Indian Penal Code as they had formed an unlawful assembly before coming to the place of incident. They were equipped with weapons and they all have actively participated in the incident which has resulted into death of deceased Lallubhai. This clearly indicates the state of mind of the accused persons, which reflects forming of Unlawful Assembly and acting in furtherance of their common object. It would, therefore, be not necessary for the prosecution to establish as to who caused the fatal injury to the deceased. It stands, therefore, established that they had approached the place of incident in furtherance of their common object and to fulfil that common object, they unitedly assaulted the deceased and caused injuries to him, which ultimately resulted into his death.

32. In the result, this appeal is dismissed and the judgment and order of conviction and sentence dated 6th February, 1991, passed by the learned Additional Sessions Judge, Surat, in Sessions Case No. 169 of 1989 is hereby confirmed.