

(1998) 08 GUJ CK 0016
In the Gujarat High Court
Case No : Criminal Appeal No. 18 of 1991

State of Gujarat

APPELLANT

Vs

Allarakha Khamisa Mansuri and Another

RESPONDENT

Date of Decision : 19-08-1998

Acts Referred:

Bombay Police Act, 1951 — Section 135

Criminal Procedure Code, 1973 (CrPC) — Section 154, 160(1), 161, 161(1), 161(2)

Penal Code, 1860 (IPC) — Section 100, 114, 299, 300, 302

Citation : (1999) CriLJ 4937 : (1999) 2 GLR 773

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

Bench : Division Bench

Advocate : A.J. Desai, app, for the Appellant; K.B. Anandjiwala, for No. 1, for the Respondent

Final Decision : Allowed

Judgement

J.N. Bhatt, J.—The sole but substantial question which has come up in focus in this appeal before us is, as to whether the acquittal of the respondent-original accused No. 1 ("A-I") from the main charge of Section 302, IPC is valid and justified? Thus this is an acquittal appeal u/s 378 of the Code of Criminal Procedure, 1973 ("Code") at the instance of the State.

2. The skeleton projection of material and relevant facts leading to the rise of this appeal may be shortly articulated at this juncture with a view to appreciating the merits of this acquittal appeal and challenge against it by the defence.

3. According to the prosecution case, on 27-3-1989, at about 7.30 p.m., near Bhachau bus stand, in Bhachau Town of Kutch District, respondent No. 1 (A-I) and respondent No. 2 ("A-2") went to the tea stall of deceased Abdul Karim Ali Mohamed. At that time, A-1 was holding a Dharia and A-2 started giving abuses to the deceased to which the deceased told not to give abuses. At that time, A-1 inflicted four dharia blows there and then on and around head portion of the deceased, as a result of which, the deceased Abdul Karim sustained serious

injuries on head and parietal as well as face portion of his body which proved fatal. Injured was shifted to the Government Hospital.

4. Bhachau Police Station received a message, at about 7.45 p.m., from the medical officer of Bhachau Govt. hospital wherein, it was stated that one Abdul Karim had sustained serious injuries who was brought to the hospital for treatment and since the injuries sustained by him were serious in nature, he was being shifted to Bhuj Civil Hospital. This intimation by the medical Officer of the person in charge of the police station, Bhachau came to be recorded as Crime Entry 20/89, in the police station diary. Firstly, P.W. No. 10, PSI Makwana Deputed police personnel for patrolling in the area around S. T. bus stand, the venue of offence, to see that nothing untoward recurs and for protection of law and order. PSI Makwana, thereafter started going towards to venue of offence. When he was about to come out of the police station, he had an occasion to meet the complainant Ali Mohmed. Therefore, he recorded his complaint in the police station as narrated by him and after taking his signature, offence came to be registered. The said complaint is produced, at Exh. 30. In the course of evidence of PSI Makwana, an objection was raised by the defence about the admissibility of the complaint of complainant-Ali Mohmed, as the police had already recorded the intimation and information as per the information given by the medical officer of Bhachau hospital. However, in the course of his evidence, the trial Court, it appears, after hearing the parties when an objection was raised by the defence, thought it fit to exhibit it and it came to be exhibited and it was given Exh. No. 30.

5. In view of the serious injuries. The deceased was shifted to Bhuj Civil Hospital. The muddamal articles - clothes of the deceased etc. collected after the panchnama of the scene of offence were forwarded to the forensic science laboratory for opinion and report. The reports are produced at Exhs. 34 and 35.

6. On completion of the investigation, charge sheet followed and accused persons were charged in sessions case No. 57/89 in the sessions Court at Bhuj, u/s 302 of the IPC against A-1 and under Sections 504 and 302 read with Section 114, IPC against A-2. A-1 was also charged u/s 135 of the Bombay Police Act for committing violation of the notification of the District Magistrate. The charge came to be framed on 15-2-1990 which the accused denied and claimed to be tried. In order to substantiate the charges, the prosecution placed reliance on the evidence of the following prosecution witnesses :

Exhibit No. P.W. 1 Ramnikgiri Goswami, 12 P.W. 2 Dr. M. R. Jadeja, 14 P.W. 3 Dr. C. M. Acharya 16 P.W. 4 All Mamad Husein 17 P.W. 5 Rajesh Velji - 18 P.W. 6 Shashikant 19 P.W. 7 Ramniklal B. Chavda 24 P.W. 8 Hakim Jusab 26 P.W. 9 Mamudo alias Abdulla 28 and P.W. 10 Kanaiyalal S. Makwana 29

7. The prosecution also placed reliance on the following documentary evidence :

Exhibit No. Charge, 1 Map 11 Map of scene of offence, 13 P. M. Note, 15 Inquest report, 20 Panchanama of clothes of accused 21 Panchanama of clothes Handing

over to police 22 Panchanama of Scene of offence 25 Complaint (Mark A) 30 Opinion regarding muddamal of FSL 34 Serologist's report, 35 Police Station diary, 36

8. The defence also placed reliance on the evidence of the following two defence witnesses :

D.W. 1 Haji Khamisha, Exh. 41 D.W. 2 Ayub Sumar, Exh. 42

9. Upon assessment and evaluation of the prosecution evidence, the learned trial Judge acquitted the accused of all the charges against them by the impugned judgment recorded on 11-9-1990. Therefore, the State has come up before us in this appeal challenging its legality and validity by filing this appeal u/s 378 of the Code against acquittal of the accused persons.

10. At the time of admission, against respondent No. 2, original - A-2, the appeal came to be dismissed. Therefore, in this acquittal appeal, we are called upon only to consider as to whether original A-1 is responsible for committing murder of the deceased Abdul Karim and liable to be convicted u/s 302, IPC or not.

11. The learned Addl. P. P. Mr. Desai forcefully, contended that the trial Court has committed serious error of law and fact in passing the acquittal order against A-1. It is also contended that the evidence of the eye witnesses is wrongly discarded and the benefit of doubt is wrongly given to the accused. It was, therefore, submitted that A-1 is proved to be guilty for the offence punishable u/s 302 for having committed murder of the deceased.

12. Learned advocate Mr. Anandjiwala for A-1 in defence, has fully supported the impugned judgment of acquittal. He also submitted that the view taken by the trial Court is quite just and reasonable and this Court should not interfere by exercising its power u/s 378 of the Code. He also lastly submitted that this Court cannot interfere with the impugned acquittal judgement merely because different perception of evidence can be taken by this Court.

13. The last submission raised on behalf of the accused in defence. We propose to take first. In this acquittal appeal u/s 378, on assessment of evidence, if the Court finds that the view taken by the trial Court is one of the possible views, then only on that ground, this Court will be loathe to reverse the acquittal into conviction. Thus, although in appeal from the order of acquittal, the powers of the High Court to assess the evidence and reach its own conclusion are as extensive as in appeal against the order of conviction, yet, as a rule of prudence, it should always give proper weight and consideration to the following aspects :

- (i) the view of the trial Court as to credibility of witnesses;
- (ii) presumption of innocence in favour of the accused and presumption certainly not weakened by the fact that he has been acquitted by the trial Court;
- (iii) right of the accused to benefit of any doubt;

(iv) slowness of the appellate Court in disturbing the finding of fact arrived at by the learned judge who had the advantage of seeing the witnesses which finding would not certainly be disturbed if two reasonable views can be arrived at on the strength of same evidence on record;

14. Although, we are conscious of the fact that the jurisdictional sweep in acquittal appeal u/s 378 is circumscribed to the extent, in view of the settled proposition of law, the following aspects ought to be borne in mind while entertaining and determining merits of an appeal u/s 378 of the Code.

(i) when the findings recorded by the trial Court are patently wrong and perverse, the High Court is entitled to or obliged to reverse the acquittal and convict the accused;

(ii) even otherwise, the evidence of the hostile witness does not stand wholly discredited;

(iii) omission and contradictions which are insignificant or at very micro level cannot be said to be sufficient to discard the prosecution case.

(iv) minor contradictions between the evidence before the Court and statement recorded by the police u/s 161 are not sufficient to dislodge or discredit the evidence.

(v) conviction on the basis of sole testimony of a single witness can be founded upon if the evidence is found fully creditable or trustworthy.

15. After having considered in extenso the testimonial collections and documentary evidence on record and having heard the learned advocate for the accused in defence and the learned Addl. P. P., we have no hesitation in finding that the reasons and ultimate conclusion recorded by the learned trial Judge in acquitting A-1 are not only perverse but palpably and manifestly wrong.

16. The trial Court has mainly placed reliance on the following aspects in order to pass order of acquittal:

(i) That Exh. 36, entry No. 20/1989 in the police station diary which came to be recorded on the information given by the medical officer of Bhachau Hospital is the first information report u/s 154 of the Code and not the com-plaint-FIR lodged by the complainant Ali Mohamed at Exh. 30.

(ii) That the time of death of the deceased Abdul is not established. Hence, prosecution story is doubtful;

(iii) Identity of the muddamal articles is doubtful as the witnesses have not been shown such items and have not identified.

(iv) Identity of one more witness Mamudo is also doubtful and in his place somebody is placed as Mamudo in view of the evidence led by the accused persons.

(v) The investigation carried out by the investigation officer Mr. Makwana is not truthful but is shaky and, therefore, it creates cloud of doubt.

(vi) Statements of some of the witnesses by the police u/s 162 are recorded late and therefore, there was chance for manipulation.

(vii) Non-cognizable complaint lodged by A-1 and produced at Exh. 33 is not admissible in evidence as it was given to the police officer investigating officer during the course of investigation;

(viii) the contradictions in the evidence of witnesses are also creating doubt on the veracity of the prosecution case.

17. Initially, it may be stated that homicidal death of Abdul Karim on account of the incident which occurred on 27-3-1989 in the evening is, as such, not questioned. However, the prosecution has, successfully, established that the deceased died homicidal death at 7.30 p.m. on 27-3-1989 near his tea stall.

18. The main question which is required to be examined is as to who is the author of complicity in question. As per the prosecution case, A-1 and A-2 went to the tea-stall of the deceased in the evening at 7.30 p.m. on 27-3-1989. At that time, A-1 was armed with dharia and A-2 abused the deceased to which the deceased resisted and asked A-2 not to abuse. At that time, A-1 being indignant inflicted four dharia blows on and around the head portion of the body of the deceased which culminated into his death. The prosecution has also ascribed the motive for commission of the crime.

19. In order to substantiate its version, the prosecution has placed reliance on the evidence of three eye witnesses. P.W. 4-Ali Mohmed is examined at Exh. 17. The following aspects have remained unimpeachable from his testimony.

(i) He (Ali Mohmed) was a partner of deceased Abdul Karim insofar as business of tea selling at the tea stall was concerned.

(ii) He had witnessed the incident;

(iii) Both the accused came to the tea stall at about 7.30 p.m. on the day of the incident and A-2 started abusing the deceased. Thereafter, A-1 inflicted dharia blows on or around the head portion of the deceased. He has also identified the accused persons who, immediately after the incident, fled away from the place of the incident, he along with others had taken the deceased to the hospital and returned to his tea stall. At that time, a police van came there and took him to the police station where he lodged his complaint/FIR which is produced at Exh. 30.

20. Evidence of Ali Mohmed is fully corroborated by the medical evidence of Dr. Jadeja who had performed the autopsy. Dr. Jadeja, P.W. 2 is examined at Exh. 14 and according to his evidence, the deceased had sustained serious injuries on and around the head. It is very clear from his evidence that the deceased had sustained the following injuries and it is also supported by the post mortem

report, Exh. 50:

- (i) Incised wound on scalp 11 1/2cm x 2 cm. X 2 cm transverse"
- (ii) Incised wound on left temporal region 6V2 cm x 1 1/2cm. bone deep
- (iii) Incised wound on right side face, 21 cm x 4 cm x 5 1/2cm deep.
- (iv) Incised wound on nose, wide deep 11 1/2 cm x 4 cm x 5 1/2 cm.

21. Dr. Jadeja has clearly testified that the aforesaid injuries were ante-mortem and were sufficient in the ordinary course of nature to cause death and were possible by a sharp cutting instrument like dharia, produced as Article No. 9. According to his medical evidence, the cause of death was shock due to head injuries. Thus, the medical evidence fully corroborates the version of eye witness complainant-Ali Mohamed.

22. The evidence of the complainant and the eye witness is also supported by the evidence of another eye witness P.W. 6 Shashikant Pitambar who is examined at Exh. 19 who has also a tea cabin which is at a distance of 50 to 60 feet from the place of incident and who was present at the time of the incident. It becomes very clear from his evidence that A-1 inflicted dharia blows on the head of the deceased near his tea stall. The distance between the tea stall of the deceased and that of the eye witness Shashikant is about 60 to 70 feet.. The topographical and geographical situation of both the cabins and the distance between them has been clearly shown in the panchanama of the scene of offence and the map produced at Exh. 30. We have no hesitation in holding that he was in a position to witness the incident and he is a truthful witness who had no axe to grind against the accused persons. Thus the evidence of the complainant is also fully reinforced by the evidence of eye witness Shashikant.

23. P.W. 9 Mamudo is examined at Exh. 28 and his evidence has also corroborated the version of eye witnesses and the story of prosecution. An attempt was made by leading evidence of two defence witnesses that P.W. 9 Mamudo is not the real Mamudo and somebody else is examined by the prosecution who is as such the elder brother of Mamudo alias Abdulla.

24. After having considered the entire testimony of P.W.9-Mamudo and the evidence of investigating officer PSI Makwana at Exh. 29, we have no hesitation in finding that the defence version that elder brother of Mamudo is examined in his place is an afterthought and is unsustainable. The trial Court has also committed a serious error in holding that there are some doubts as to whether P.W. 9 was real Mamudo. The approach of the trial Court is totally perverse and cannot be sustained.

25. The defence has led evidence of two defence witnesses, viz. Haji Khamisha, Exh. 41 and Ayub Sumar, Exh. 42.

26. After having dispassionately examined the evidence of these two witnesses, we find that their evidence does not take the defence version any farther nor

does it in any way affect the prosecution case and the evidence of three eye witnesses supported by the medical evidence and other circumstances. Defence witness Haji Khamisha is the brother of A-1 and defence witness 2 Ayub Sumar has clearly admitted in his evidence at Exh. 42 that not only he had good relations with the accused persons but he had bad relations with the deceased. The evidence of these two witnesses is not only not reliable but is an afterthought and is unsustainable. They are examined as an afterthought to explain away or to get rid of complicity of A-1. Obviously, such persons would try to oblige A-1 in his bid as it is obvious that a drowning person will try to catch a straw. We have no hesitation in finding that the evidence of both the defence witnesses is not creditworthy and dependable.

27. The trial Court has placed reliance on entry No. 20/89 at Exh. 36 recorded in Bhachau police station made on the strength of information given by the medical officer Dr. Acharya who had initially treated the deceased in Bhachau hospital treating it as first information report u/s 154 of the Code in preference to the complaint lodged by complainant Ali Mohmed before the PSI Mr. Makwana which is produced at Exh. 30. In our opinion, the trial Court has committed a serious error in treating Ex. 36 an entry in the police diary upon the basis of the information of the medical officer on phone as FIR. The trial Court preferred Exh. 36 as FIR u/s 154 of the Code on the following grounds :

- (i) it was recorded first in point of time in Bhachau Police Station on telephonic information given by the medical officer of a cognizable offence;
- (ii) upon basis of such entry, PSI had deputed some personnel for investigation who also visited the venue of offence.

28. In our opinion, the conclusion of the trial Court on this score is factually and legally clearly not only incorrect but illegal. Factually, we have found that no investigation as such had been carried out by any person pursuant to entry No. 20/89 which came to be given Exh. 36, except that, a constable had gone to the venue of offence for the purpose of maintaining law and order which is otherwise a duty of the police. This is amply clear from the testimony of PSI Makwana, P.W. 10, investigating officer, Exh. 29. Thus, nothing was proceeded with or performed on or done in consequence of recording of entry No. 20/ 89 Exh. 36. Merely because in view of peculiar situational reality, one person is deputed to go to the venue of offence for maintenance of law and order, it cannot be said that it would tantamount to commencement of the investigation. Nothing has been shown pursuant to Exh. 36. No investigative action or step is taken and again, the complaint lodged by complainant Ali Mohmed at Exh. 30 came to be recorded by PSI Makwana immediately in the police station after entry Exh. 36 came to be recorded.

29. It transpires from the testimony of the investigating officer PSI Makwana at Exh. 29 that the complainant on his return from hospital after leaving the injured Abdul Karim in the Bhachau hospital came back to the venue of offence to close

the shutter of tea stall. At that time, PSI on asking, found that he was the eye witness and therefore, he took the complainant along with him to the police station and he recorded the complaint as narrated by him. It is a correct truthful version of the complainant as testified by him which is in all material particulars and details as to who were the assailants, what role was played and pursuant to the complaint at Exh. 30, investigation had commenced. We have, therefore, no hesitation in finding that the approach of the trial Court in rejecting Exh. 30 as FIR is based on erroneous factual consideration and by passing salient features of Section 154 of the Code which provides for FIR in cognizable cases. It is also a settled position of law that incidental fact on telephonic message howsoever it may be in first in point of time recorded in the police station or information given by a stranger under which no offence is registered and no investigation has commenced, cannot be characterised as FIR as required u/s 154 of the Code. Therefore, the view of the trial Court on this score also is factually and legally erroneous. In reality and in terms of the relevant proposition of law, Exh. 30 ought to have been treated and taken as FIR in place of Exh. 36 which was a mere cryptic entry upon telephonic communication.

30. Next, it brings into sharp focus, the appreciation of the complaint Exh. 33 lodged by A-1. The trial Court has reached the conclusion that it is not admissible in evidence, as it is hit by Section 162 of the Code. After having read the reasons assigned by the trial Court on this score, we have found that Exh. 33 is discarded and resultantly excluded from consideration merely on account of certain presumptions and unwarranted conjectures. The trial Court has also failed to appreciate the correct proposition of law in this regard. Factually, we have found that Exh. 33 given by A-1 for non-cognizable offence of having received injuries cannot be said to be a statement in course of investigation. Of course, it is by the accused person. It is equally true that it came to be lodged by A-1 even after commencement of investigation. Provisions of Section 162 will come into play and the complaint lodged by the accused, will be hit thereunder provided it is successfully shown to the satisfaction of the Court that it came to be lodged by the accused in course of the statement u/s 162 or in course of the investigation conducted by the investigating officer so as to proceed even in case of counter complaint.

31. Our attention was invited by the learned advocate Mr. Anandjiwala for the accused to the decision of this Court in Khima Ganda v. State (1979) 20 GLR 847. After having dispassionately examined the proposition of law laid down therein, in light of the facts of the case, we are at great loss to understand as to how that case would come to the rescue of the accused of this case. The Division Bench consisting of D. P. Desai, J. (as he then was) and A. M. Ahmadi, J. (as he then was), had lucidly expounded the fine and thin distinction between the two contingencies as to when complaint lodged by the accused would be hit by provisions of Section 162 of the Code and the complaint lodged by the accused independently of investigative process. In para 11, the following positions are very well explained and elucidated :

(i) a counter complaint in all cases may not be given out of volition of the accused;

(ii) it may be that the version is the result of intensive interrogation and questioning by the police officer in charge of investigation.

(iii) it may happen that the accused person may break down and with a view to save his own skin may give out a gambled version containing some incriminating statement of fact and justifying the act done by him;

(iv) a clever investigating officer may as well get it recorded as a counter complaint and such a counter complaint cannot be said to have arisen out of the volition of the accused; and remains all the same a statement by the accused made to investigating officer during the course of investigation as regards the versions that he has been obliged to bring out though he was not willing to do so initially.

(v) On the other hand, if the accused gives out his version regarding the incident of his own volition without being questioned in that behalf by the investigating officer, such a counter complaint may become admissible in evidence. This appears quite clear in view of the distinction between the first information report and the statement u/s 161.

(vi) A first information report u/s 154 is different from a statement made to a police officer in the course of investigation; whereas, the former is a voluntary disclosure of facts constituting a cognizable offence by a party, the latter is communication of facts to an investigating officer on examination u/s 161, whether the accused is willing to give it out or not;

(vii) the accused, when examined by an investigating officer is bound to answer all questions relating to the case put to him by the investigating officer, other than questions the answer to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture (vide Section 161(2) of the Code).

32. It is, therefore, very clearly propounded in the said decision that when the accused gives involuntary version or which is not of his own volition or when the accused is obliged to give not out of his free will or wish but because of the mandate contained in Section 161(2), obviously would be a statement of course, containing the version of the accused made, however, in the course of investigation and such a statement cannot be admitted in evidence at the trial of the accused. One thing, therefore, appears fairly clear. The counter complaint by an accused person given voluntarily and not in the course of examination of the accused u/s 161(1), if given with a view to action being taken on it by police, would amount to a first information report u/s 154 of a different cognizable offence, notwithstanding the fact that investigation against the accused has already started on a complaint made by the other side. Whereas, on the other hand, if he, in answer to questions put to him gives out his version containing a complaint against the other side, it would be a statement recorded u/s 161(1). In

the former case, the counter complaint would not amount to a statement in the course of an investigation because the accused has not been examined by the investigating officer u/s 161(1); while in the later case, it would be a statement made in the course of examination u/s 161(1) and as such, one made in the course of an investigation and, therefore, it will be hit by provisions of Section 162 and it would become inadmissible in evidence against the accused person.

33. In the present case, we have noticed that A-1 lodged the complaint, of course, of non-cognizable offence u/s 323 and other offences not as a sequitur to recording of statement u/s 161 but even in the course of investigation, as a statement of incident of his having sustained injuries which would tantamount to complaint u/s 154 of the Code and it is not hit by Section 162.

Court time is over. Hence, tomorrow.

Resumed.

19-8-1998

So the fine distinction which has been drawn between a statement in the nature of first information report or a complaint even in a cross case and the recording of a statement by the Investigating Officer u/s 161 of the Code is very important and this distinction must be borne in mind. We have noticed from the record of the present case that the complaint lodged by accused No. 1 Allarakha though pertaining to the offence arising out of the same incident, but not as a statement by the Investigating Officer u/s 161(1) of the Code. Reading Sections 161(1) and 162(1) of the Code conjointly, it is evident that the statement made in course of the investigation contemplated by Section 162(1) of the Code is a statement made by the offender or an accused when he is examined u/s 160(1). The expression in Section 161 "in course of an investigation" does not refer merely to the period of time between the beginning and the end of investigation. Therefore, the fact that the investigation has started on the information lodged by a person is not determinative or decisive of the question whether a counter complaint lodged by the accused is a statement made in the course of the investigation.

34. The words "in the course of occurring in Section 162(1) of the Code import that the statement in question must be made as a step in the pending investigation to be utilized in that investigation. Obviously, therefore, they do not merely refer to the period of time which elapses between the beginning and the end of the investigation. The trial Court has failed to appreciate that Exh. 33 in its correct perception. A report or a complaint in a case for an offence arising out of the same incident, in view of the evidence recorded quite independently of and in no relation to any pending investigation and obviously further not end it to prompt a pending investigation in any way, but to start one having no reference at all to the investigation which has in fact already commenced could not be said to have been made "in the course of the investigation of the case.

35. After having carefully examined the fact and the contents of Exh. 33 in the factual background emerging from the record of the present case, we have no hesitation in finding that the said complaint by accused No. 1 Allarakha Khamisa Mansuri was filed which is volitional and voluntarily without his being questioned or examined in the course of the investigation would be dehors the inquiry, in as much as, the intention of the accused appear to be to "initiate inquiry or investigation and to put the law in motion with regard to the offence committed against him by the complainant party. Unfortunately, this fine distinction has not been properly with due respect appreciated by the trial Court which has culminated into a serious legal deficiency and in result, the trial Court came to be trapped to treat Exh. 36 entry No. 20 of 1989 which came to be incorporated in the Police Station Diary upon the instruction and information of a Medical Officer which was only in the nature of cryptic message or a communication, under which even no investigative step had been taken, instead of the complaint lodged by the complainant Ali Mamad PW-4 at Exh. 17 produced at Exh. 33. Trial Court has also committed serious mistake in respect of complainant (conviction) of A-1 at Exh. 31. Therefore, in our opinion, the approach of the learned trial Court Judge is not only wrong, but is perverse and totally legally erroneous.

36. It would be also interesting to have a close look into a decision of the Hon'ble Apex Court rendered in case of Soma Bhai Vs. State of Gujarat, which again enlightens the Court about the distinction between a statement u/s 154 and a statement u/s 162 of the Code of Criminal Procedure. In that case, u/s 154 of the Code of Criminal Procedure, the first information was earliest report made to the police officer with a view to his taking action in the matter. In the case before the Apex Court, the complainant had made the report regarding the occurrence having taken place to the P.S.I., who, however before reducing it into writing by way of abundant caution tried to seek further instructions by a telephone message from the main Police Station at Bhachau. In the light of the facts, it was held that the facts narrated to the P.S.I, which were reduced into writing a few minutes later undoubtedly constituted the first information report in point of time made to the police in which necessary facts were given. Hence, the telephonic message to the Police Station at Bhachau which was too cryptic could not constitute the F.I.R. lodged in the present case as inadmissible in evidence. It becomes, therefore, crystal clear that a cryptic telephonic communication by a Medical Officer to a Police Officer compared to the complaint made by the complainant with regard to the offence in question with a view to take action and start investigation could be treated as first information report. So the view which we are inclined to take on the principle is very much reinforced by the decision of the Hon'ble Apex Court. This view has been taken in Soma Bhai's case (supra). In short, we have no hesitation in finding that the trial Court has committed serious error in discarding the complaint Exh. 31, lodged by the accused and recorded by the police independently unconcerned with the investigation into the offence in the light of the complaint-FIR lodged by the complainant Alimamad as at Exh. 33.

37. The prosecution has also successfully established the motive. Of course, when complicity or the guilt is successfully established by the very vetripotent (sic) and vital evidence without doubt, motive becomes insignificant. However, in the present case, motive is also proved. It is successfully established by the prosecution that an open plot was purchased by the father of the accused and one brother had raised a tea stall which is near to the tea stall of the deceased. In fact, it is also shown from the record that there was a dispute on account of it as it was likely to conflict with the economic interest of the deceased party and the complainant party. The deceased was going in a partnership work of tea selling in a tea stall, which ultimately became settled since long and the father of the accused after having purchased the plot, constructed a tea cabin which was a bone of contention. Therefore, it could safely be concluded that the A-1 (appellant) was prompted or allured or induced to commit the capital crime by giving successive dharia blows on the head of the deceased Abdul Karim and what for? For pecuniary advantage and the gain so that a man who has settled and who was running a tea stall since long may not stand any longer for the competition, that was likely to be created, for the reason of accused party having constructed a tea stall near the tea stall of the deceased. So, we have no hesitation in finding that motive is established and motive was for economic gain which is really a heart stealing.

38. The trial Court has given weightage to the following aspects and factors which are strongly supported and reiterated by the learned advocate appearing for the accused which are required to be highlighted.

1. Difference in type and number of injuries sustained by the deceased. Complainant has said and Dr. Acharya has also said that the deceased had sustained 3 injuries, whereas the evidence of Dr. Jadeja, who conducted the autopsy clearly stated that the deceased has sustained 4 injuries.

2. It may be noted that apart from this discrepancy being immaterial and insignificant, it is as such not a discrepancy or a contradiction in real terms when one goes into the reality of the evidence dispassionately. Dr. Acharya has only clinically examined the injured who subsequently died and he advised for shifting of injured to the Bhuj Civil Hospital in view of the seriousness of the injuries. The complaint and complainant also have not stated any material discrepancy. At this stage, it may be noted in the backdrop of the fact with regard to number of injuries sustained by the deceased on the head on account of the violent infliction of the dharia blows by A-1 (respondent before us), Dr. Jadeja, who had examined thoroughly for the purpose of giving his opinion, after holding post-mortem examination, has stated that the deceased had sustained four injuries. In our opinion, as such there is no difference in number of injuries in the evidence of Dr. Acharya of Bhachau Hospital and Dr. Jadeja of Bhuj Hospital, in view of the nature of injuries on the head, on the parietal region, on the nose and on the left side of the face. From one angle it could be said to be four injuries, whereas, if injuries on head and on the left side portion of the jaw,

running upto forehead, could be also stated to be one. It is not a case that four injuries on four vital parts of the body and one of them is missing. Therefore, in our opinion, factually also there is no contradiction. Otherwise also, mere contradiction in number of injuries is not material as there is direct, trustworthy and succinct evidence of the three eye-witnesses.

39. Again the trial Court has in greater details observed: and has attached much attention and regard to the failure on the part of the prosecution to indicate exact time of death of the deceased. Well, firstly even this appears to be prima facie factually incorrect. The Police Inspector who was in charge of the investigation had received a wireless message on 27-3-89 itself about the death of deceased Abdul Karim. So, at the best, the time of death would be the mid-night on 27-3-89, the day which proved unfortunate for the deceased. Apart from that, it could not be said that even if time is not strictly and punctually proved on record would give rise to eclipse the direct, trustworthy and succinct evidence of three eyewitnesses. Not only that the Medical Officer Dr. Jadeja has clearly testified in his evidence that the injuries sustained by the deceased-Ali Mamad were of 2 to 3 hours prior to the death. Therefore, it could safely be concluded that the deceased succumbed within at least maximum 3 hours after occurrence of the incident? Where is the question of giving benefit of doubt to the accused person on this count? On the very next day the postmortem was carried out by Dr. Jadeja at 10.30 and who has clearly testified that injuries sustained by the deceased were 2 to 3 hours prior to the death.

40. It would be also interesting to mention that the trial Court has taken serious note of the fact that there is non-mention of one injury in postmortem report. This submission was vehemently raised by the learned counsel for the accused before the trial Court and was reiterated before us and was rejected for the simple reason that the nature of injuries was such that all were recovered simply because the Medical Officer Jadeja has not specifically stated in his evidence in the postmortem report at Exh. 15 that maxillary bones were cut and got out, but it must be remembered that it is specifically mentioned in the post-mortem report that the nozzle cartilage bone was cut and it was exposed, so it includes maxillary bone. Therefore, no capital can be made out of such insignificant aspects.

41. The trial Court has also observed that the PW-5 Rajesh Velji Prajapati, Exh. 18 has turned hostile and he has not supported the prosecution case and therefore, the story of murder propounded by the prosecution has weakened. We may mention at this stage that the evidence of the hostile witness cannot be totally discarded and discredited. Such witness could be believed in part, if part of his testimony reinforces the version of the prosecution. There is no legal ban on placing reliance on the evidence of hostile witness totally. Not only that, even if such a part of evidence of such a hostile witness and when it is corroborated by other evidence, hostile witness, if, is corroborated by other evidence Court can rely on it. It has been clearly established and held by the Hon'ble Apex Court in

case of Pandappa Hanumappa Hanamar and another Vs. State of Karnataka, . Following passage is quite relevant and expedient:

It cannot be contended that no conviction can be recorded on the basis of the evidence of a solitary witness. One of the tests to judge the credibility of a witness is the intrinsic quality and worth of his evidence, independent of other evidence and if such evidence measures up to the Court's satisfaction it can itself form the basis of conviction. It is only when such evidence does not pass muster that the Court seeks corroboration to draw its conclusion therefrom.

42. Thus, it becomes very clear that the Court even in case of hostile witness can consider the part which is supporting the prosecution case and therefore, it is not proposition of law that the entire evidence of a hostile witness becomes discarded and discredited. Bearing in mind this principle of law it could safely be said from the evidence of the hostile witness PW-5 Rajesh Velji Prajapathi that the presence of the accused persons is established without doubt. It is also clearly stated by him that the accused persons were holding dharia. Of course, he has not stated that there were blood-stains or not, but one thing is clear that he did see the accused No. 1 and he was holding dharia at the relevant point of time near the venue of offence. So, that part clearly reinforces the version of the prosecution. Instead, the trial Court has taken a different view which with due respect ought to be deprecated.

43. We have no hesitation in finding that the contradictions and the deficiencies and discrepancies highlighted by the trial Court in rejecting the evidence of 3 eye-witnesses supported by medical evidence and also F.S.L. report are in our opinion quite at micro level and some of them are factually not correctly stated and even if they are factually correct, would not in reality influence or affect the evidence of 3 eye-witnesses and other circumstances corroborating the evidence of eyewitnesses. The trial Court has committed thus serious error of law in placing unnecessary reliance on such insignificant, unsubstantial and micro level discrepancies and contradictions which as such do not affect the main core of the prosecution story and has failed to rely on the evidence of 3 eye witnesses whose evidence has remained unimpeachable on the main story of the prosecution that it was none else but only A-1 Allarakha who did commit murder of deceased Abdul Karim by giving him successive blows with dharia in a public place near the tea stall of the deceased and that too for a motive for pecuniary gain.

44. The trial Court has committed also serious error in giving benefit of doubt to the appellant A-1 Allarakha. We may mention at this stage that benefit of doubt if any arising from the record of the case on the main story of the prosecution which is reasonable and just in the circumstances could be given to the accused which is one of the fundamental principles of Criminal Jurisprudence. However, it must be strictly noted that the benefit of doubt should be of a reasonable average person and not of a person who is afraid of legal consequences.

45. Before we conclude, we would also like to highlight one more important aspect which also significantly corroborates and supports the prosecution case and the evidence of 3 eye-witnesses and it is the recovery of muddamal article No. 9 dharia from A-1. We have found while examining the impugned judgment that the trial Court has made certain observations and has raised certain conjectures that the accused in such a situation would not always carry incriminating dharia all the time during the period of abscondance after the incident (it may be noted that the accused persons were found from village Madi and came to be arrested and at the time when the crime weapon article No. 9-dharia was recovered in presence of panchas and the muddamal dhariya-article No. 9 had human blood-stains on the blade portion of it). It is also supported by the report of the Serologist. It is clearly found by the expert in the serological examination that it did contain the blood-stains of human blood group "B" which was of the deceased-Abdul Karim as the clothes found from the dead body contained the same blood group. The panchnama prepared in this behalf is also supporting the case of the prosecution.

46. After having given our anxious thought to the entire evidence, testimonial as well as documentary and having given marathon hearing, the following aspects have emerged unimpeachable:

(i) A-1 (respondent before us) Allarakha Khamisa is the author of murder of Abdul Karim.

(ii) A-1 gave dharia blows, four in number successively on the vital organ of the anatomy of the deceased which cut short the life of Abdul Karim within 3 to 4 hours and even during that period he remained totally unconscious.

(iii) The muddamal article No. 9-dharia recovered from the accused-Allarakhha contained blood group "B" which was the group of the deceased.

(iv) The evidence of 3 eye-witnesses namely PW-4, complainant Ali Mamad at Exh. 17, PW-6 Shashikant Pitambar, Exh. 19 and PW-9 Mamudo alias Abdulla Allarakhha, Exh. 28 undoubtedly corroborates the version of the prosecution and supports and is leading to the unerring conclusion that it was accused No. 1 Allarakhha and no one else committed the murder of deceased Abdul Karim by giving successive 4 dharia blows for which the motive is also proved.

(v) The evidence of the eye-witnesses is corroborated by medical evidence of PW-3 Dr. Acharya-Exh. 16 and PW-2 Dr. Jadeja at Exh. 14.

(vi) It is also fully reinforced by the complaint produced at Exh. 30, lodged by Ali Mamad Husen, who was the partner of the deceased in the said work of tea-stall.

(vii) The presence of all the 3 eye-witnesses namely: (i) complainant PW-4 Ali Mamad Husen who was the partner of the deceased in business of tea-stall, selling tea in the stall, (ii) PW-6 Shashikant Pitambar, who was the owner and holder of Navrang Tea Stall which is just near the venue of the offence where the tea-stall of the deceased was located and (iii) PW-9 Mamudo alias Abdulla

Allarakhha who was working with the deceased at the relevant time is quite natural. Therefore, there is very clear evidence that the presence of the eye-witnesses was quite natural at the venue of the offence at the relevant time on the day of the incident. They are reliable.

(viii) The muddamal article No. 9 contained the same blood group as that of the deceased on its blade portion, supported by F.S.L. and serological report.

The next stage would bring into consideration the nature of offence committed by respondent-original Accused No. 1. In this connection, the learned advocate in defence has raised the following contentions :

(i) That there was no premeditation, (ii) it was all of a sudden the deceased was armed with dharia and accused in his right of -self-defence inflicted dharia blows and in case if accused has exceeded the fight of private defence, it would be an offence u/s 304, Part II of IPC.

47. Relying upon the aforesaid aspects and the averments made in the complaint Exh. 30, two submissions have been raised, one that the nature of offence is covered by Exceptions 2 and 4 of the Section 300 of IPC. It was, therefore, submitted that there is no case of an offence of murder u/s 300, IPC, but it is a culpable homicide not amounting to murder. In support of this contention, reliance is also placed on the decision of Apex Court in Surinder Kumar Vs. Union Territory, Chandigarh, .

48. In order to appreciate the real nature of offence, it would be expedient to consider the provisions of Sections 299 and 300 of IPC. Section 299 provides culpable homicide. Section 300 defines the murder. So culpable homicide is murder as provided in Section 300, but when it would be culpable homicide not amounting to murder, is provided in Exceptions 1 to 5 of Section 300, IPC. In the light of the facts and circumstances of the case, the Court is now concerned with the question whether the nature of offence is murder or culpable homicide not amounting to murder. The question has to be considered at the first stage whether the accused has done the act by doing which he caused death of another. This stage is proved. The prosecution has been successful in proving the complicity without doubt. The homicidal death of deceased Abdul Karim on account of infliction of dharia blows by respondent A-1 Allarakhha is established. The prosecution has also established that it is a case of culpable homicide as defined u/s 299 of IPC. Whether this act or offence of culpable homicide is a murder or a culpable homicide not amounting to murder now needs consideration and determination.

It was contended on behalf of the respondent-accused that it falls within the Exception 2 of Section 300, IPC. Exception 2 of Section 300 provides that culpable homicide is not murder if the offender, in the exercise in good faith of private defence, exceeds the power given to him by law and causes the death of the person against whom he is exercising such rights of defence without premeditation and without any intention of doing more harm and necessary for

the purpose of such defence.

49. Reliance is also placed on Exception 4 of Section 300, IPC. Exception 4 of Section 300, IPC provides that culpable homicide is not murder if it is committed without premeditation in a sudden fight, in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

50. Insofar as the reliance on Exception 4 of Section 300, IPC is concerned, the decision of the Apex Court in *Surinder Kumar Vs. Union Territory, Chandigarh*, is also relied.

51. In order to successfully invoke Exception 4 of Section 300, IPC, four material conditions ought to be satisfied as stated hereunder that:

(i) there was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner.

It is true that the cause of fight or quarrel or who offered the provocation would not be relevant for the consideration of Exception 4 to Section 300, IPC. If it is successfully shown that all the aforesaid 4 requirements are satisfied, it would be a case of culpable homicide not amounting to murder.

52. Insofar as Exception 2 of Section 300 of IPC is concerned, it would be necessary to prove that the right of private defence was available to the accused from the proved facts on record. That even if such a right was available, it was exercised in good faith of exercising the right of private defence and it was exercised against the person whose death is committed and was exercised without premeditation. That it was exercised without any intention of doing more harm than is necessary for the purpose of such defence. It is, therefore, clear that right of private defence by its inherent connotation implies that to defend attack or the assault from the other side. No person can be allowed to take the defence of Exception 4 to Section 300 of IPC right of private defence who is the aggressor.

53. Even in order to claim the benefit of Exception 2 to Section 300, IPC, it must be shown that in exercise of right of private defence, the necessary harm injury was caused and if it exceeds, it becomes an offence punishable u/s 304, Part I of IPC. The parameters for the exercise of such right of self-defence are elaborately stated in Section 100 of the IPC. Section 100 provides that when the right of private defence of the body extends to causing death. It is a settled proposition of law that to avail the benefit of exceptions, it is for the defence to prove that the case falls within the parameters of right of private defence. No doubt, the standard of proof may not be of that high order as that of the prosecution in establishing the complicity.

54. Section 96 prescribes that nothing is an offence which is done in the exercise of the right of private defence, whereas Section 97 of IPC provides right of

private defence of body and of property. Section 97 reads as under :

Every person has a right, subject to the restrictions contained in Section 99, to defend-

First - His own body and the body of any other person, against any offence affecting the human body;

Secondly - The property, whether moveable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.

55. It could very well be seen from the aforesaid provisions that a right of private defence is a defensive right. It is neither a right of aggression nor a reprisal. As stated earlier, the, onus is on the accused to establish the right of private defence of person or property on the basis of standard of proving on preponderance of probability. It is true, it is also not necessary to raise such a plea as even if Court finds from record that right of private defence exists, the benefit could be conferred. One thing safely can be concluded that the right of private defence can never be claimed by aggressor as is available in defence.

56. Section 100 provides that it must be shown that there was apprehension of death or grievous hurt if done or attempted to be done. There is no right of private defence if the act which does not reasonably cause any apprehension of death or even of grievous hurt. Therefore, in this section parameter are prescribed as to when the right of private defence of the body can be extended to causing death.

57. The evidence on record, in our opinion, not only does not justify for Exception 2 to Section 300, but also Exception 4 to Section 300. We have elaborately upon the assessment and evaluation of the evidence of the prosecution witnesses and the defence witnesses found that the offence committed by accused No. 1 Allarakha in committing murder of deceased-Abdul Karim was intentional prompted by a strong pecuniary motive. It is evident from the record that A-1 inflicted first blow of dharia on the face of deceased, as a result of which deceased fell down and who was unarmed. It was accused No. 1 who was the aggressor. Not only that, after inflicting one severe dharia blow on the face resulting into cutting of a cartilage bone which was sufficient as a result of which deceased fell down on the ground, A-1 gave a very severe blow with the help of dharia, armed with him, on the vital part of the body i.e. on the head upon a person who was lying helplessly and armlessly. Thereafter, also A-1 inflicted two more dharia blows. But for the intervention of the eye-witnesses and other persons probably there would have been some more blows. The deep seated motive is established by the prosecution by trustworthy and succinct evidence of 3 eye-witnesses. A-1, therefore, not only gave 4 severe blows of dharia which is a deadly weapon and on a vital organ of anatomy, but prompted by the motive of pecuniary gain. Deceased had not given abuses to the accused

No. 1. Deceased was without arms. Therefore, there would not arise any question for giving blows to the A-1 with deadly weapon. In the light of the factual scenario emerging from the record of the present case, we have no hesitation in finding that A-1 was the aggressor. He inflicted 4 dharia blows on the vital portion of anatomy of the deceased, three out of them when even deceased was lying on the ground who had no arms. Therefore, apart from defence proving the case either under exception to 2 or 4 to Section 300 of IPC on the strength of the preponderance of probabilities, the prosecution has led very potent and strong evidence of 3 eyewitnesses supported and corroborated by F.I.R. Exh. 30, medical evidence of Dr. Acharya and Dr. Jadeja and motive of pecuniary gain, that Exceptions 2 and 4 to Section 300 are not at all attracted in the present case.

58. The act committed, the complicity established against the accused in causing death which was with an intention with the infliction of 4 dharia blows on the vital portion-of the body without any provocation is nothing, but would amount to only and only murder as provided in Section 300 of IPC which is punishable u/s 302 of the IPC and therefore, there is no question of invoking by the accused the provisions of Section 304 Part I and II. We are fully satisfied from the evidence that A-1 did commit murder as defined u/s 300 of IPC with an intention by inflicting 4 dharia blows on the person of the deceased-Abdul Karim and therefore, he is liable for conviction u/s 302 of IPC. Accordingly, the accused is held guilty for the offence punishable u/s 302 of IPC for committing murder of deceased-Abdul Karim, by quashing and setting aside the impugned acquittal judgment and order against respondent-original A-1.

59. Here, there shall be a statutory pause to afford an opportunity of hearing on the quantum of sentence u/s 235(2) of the Code of Criminal Procedure.

60. We have heard the learned Addl. Public Prosecutor Mr. A. J. Desai and the learned advocate Mr. Anandjiwala for the respondent-original accused No. 1 on the quantum of sentence. The accused is found guilty for the offence punishable u/s 302 of IPC which provides minimum imprisonment for life. u/s 302 of IPC whoever commits murder, shall be punished for death or imprisonment for life and shall also be liable to fine. It is settled proposition of law that extreme penalty of death could also be awarded for the culpability of murder u/s 302 of IPC if the case falls within the celebrated category of "rarest of rare".

61. Learned advocate Mr. Anandjiwala for the accused has contended that this is not a case for extreme penalty of death as it does not fall within the rarest of rare category. Learned A.P.P. Mr. A. J. Desai has rightly not resisted this contention. In the facts and circumstances of the case, we are of the opinion that minimum sentence u/s 302, IPC will meet the ends of justice. Therefore, respondent-original accused No. 1 Allarakha Khamisa Mansuri is held guilty for the offence punishable u/s 302 of IPC and he is sentenced to undergo rigorous imprisonment for life and also to pay a fine of Rs. 5,000/- (Rupees Five Thousand Only) and in default, to undergo further rigorous imprisonment for 3 years.

62. Learned advocate Mr. Anandjiwala has requested to grant time to the accused to surrender. He has submitted that 10 weeks" time will serve the purpose. After having considered the facts and circumstances of the case, six weeks" time is granted to surrender insofar as substantive sentence is concerned. The amount of Rupees 5,000/- (Rupees Five Thousand only) imposed by way of fine by us hereinbefore, if deposited in the Court, shall be paid to the close family members of Abdul Karim by the trial Court upon due verification and identification under the provisions of Section 357(1)(b) of IPC. The time to pay fine is granted upto 25th August, 1998.

63. In the result the impugned judgment and order is quashed and the appeal is allowed accordingly. The bail bond shall stand cancelled. However, six weeks" period is granted to surrender.