

(2008) 06 GUJ CK 0034

In the Gujarat High Court

Case No : Criminal Appeal No. 2289 of 2005 and Criminal Revision Application
No. 55 of 2008

State of Gujarat

APPELLANT

Vs

Amarsing Rupsing Mahida and Others

RESPONDENT

Date of Decision : 16-06-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 195, 262, 313, 340, 344
Penal Code, 1860 (IPC) — Section 114, 193, 300, 302, 307

Citation : (2008) 06 GUJ CK 0034

Hon'ble Judges : M.R. Shah, J;J.R. Vora, J

Bench : Division Bench

Advocate : A.J. Desai, APP 1 in Criminal Appeal No. 2289 of 2005, for the Appellant; M.B. Gohil, for Opponents 1 - 3 in Criminal Appeal No. 2289 of 2005 and Maria Dalal, for Yatin Soni, for Opponents 2 - 3, for the Respondent

Final Decision : Allowed

Judgement

M.R. Shah, J.—Facts of this case illustrate a disquieting feature as to how the trial Court has committed a grave miscarriage of justice in recording the acquittal of the respondents accused by playing in the hands of the witnesses who were admittedly relatives of the respondents - accused.

2. As observed by the Hon'ble Supreme Court in the case of Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others, and in the case of Zahira Habibullah Sheikh and Another Vs. State of Gujarat and Others, "A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to met out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted

under such rules as will protect the innocent, and punish the guilty. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine, by becoming a participant in the trial evincing intelligence, active interest and eliciting all relevant materials necessary for reaching the correct conclusions, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to the proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators". The Hon"ble Supreme Court has further observed "the Courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice often referred to as the duty to vindicate and uphold the "majesty of law". It is further observed that "due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as to court of law in the future as in the case before it." It is further observed by the Hon"ble Supreme Court that "Courts have to ensure that the accused persons are punished. A criminal trial should not be reduced to be mock trials or shadow-boxing or fixed trials."

3. Present Criminal Appeal being Criminal Appeal No. 2289 of 2005 is filed by the State of Gujarat u/s 378(1)(3) of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") against the Judgment and order dated 04.03.2005 passed by the learned Presiding Officer, 3rd Fast Track Court, Nadiad in Sessions Case No. 260 of 2002 acquitting the respondents herein original accused for the offences punishable under Sections 302, 307, 323, 504 read with Section 114 of the Indian Penal Code.

4. Criminal Revision Application No. 55 of 2008 is registered pursuant to the order dated 17.12.2007 passed by this Bench wherein respondent Nos. 2 and 3 in the said Revision Application i.e. PW-1 Takhatsinh Bhikabhai Mahida and PW-2-Chhatrasinh Bhikabhai Mahida were directed to show cause as to why they should not be punished for perjury and giving false evidence on oath and why appropriate proceedings against them should not be initiated considering provisions of Section 344 of the Cr.P.C. which permits the Court to try the accused/witnesses who have given false evidence on oath summarily, aforesaid two witnesses and the respondents are tried summarily and are given reasonable opportunity as contemplated u/s 344 of the Cr.P.C.

5. Briefly stated the facts are as follows:

Original complainant Takhatsinh bhikhabhai Mahida son of the deceased victim, resident of the village Navagam gave complaint before the Mahelav Police Station on 11.08.2002 which was recorded by one Jasosing Ratansing Head Constable against the accused persons for the offences punishable under Sections 302, 307, 323, 504 read with Section 114 of the IPC alleging inter-alia that he is

residing with his parents at village Navagam and on 11.08.2002 in the evening at about 7.00 p.m., the accused persons came there and started quarreling with his father and his sister's son Bhimsing. At that time father of complainant requested them not to quarrel and abuse and at that time Amarsing Rupsing Mahida original accused No. 1 was shouting that why he is harassing his daughter Lilaben and at that time original accused No. 1 Amarsing Rupsing gave "Pavda blow" on the right side of the head above ear of his father and his father got injured and other accused Danaben Amarsing, Lilaben Amarsing and Akbarbhai Amarsing were giving filthy abuses and were giving fist blows to his father and at that time his elder brother intervened and they were also abused. It was further alleged in the complaint that thereafter, all the accused went to their residence who were staying in the same faliya and as his father sustained injuries he was taken to hospital. It is required to be noted at this stage that at the time when the complaint was given father of the complainant was alive and was taken to hospital. However, subsequently he succumbed to injuries, therefore, accused persons were charged for the offences punishable under Sections 302, 307, 323, 504 read with Section 114 of the IPC.

6. The complaint was recorded by Head Constable of Mahelav Police Station Jasosingh Ratansing. That thereafter, injured Bhikabhai father of the complainant died in the hospital and necessary entry to that effect was made in the station dairy. Arvinbhai Ravjibhai Patel P.S.I., Mahelav Police Station reached the hospital. Inquest Panchnama was carried out in the presence of two panchas. Investigation was carried out by him. Panchnama of place of offence was also drawn by him in presence of two Panchas. Panchnama of recovery of weapon was also drawn by him in presence of two panchas. Postmortem was carried out by Dr. Jignesh Kachralal. During investigation, Investigating Officer, P.S.I. - Arvinbhai Patel recorded the statement of witness/eye-witnesses who were present at the time of incident such as Takatsing Bhikabhai original complainant son of deceased; Kesarben Bhikabhai widow of the deceased; Mohamedsing Mahida; Ashwinbhai; Bhimsing @ Tinabhai; Sukhben Chatrasing Mahida and others. Investigating Officer also collected other documentary evidences such as injury certificate issued by Dr. Vipul Shah of Urvis Hospital who treated the deceased in the hospital; PM note; FSL report; Serological report, etc. That thereafter, having found that there is case made out against the accused persons, he filed charge-sheet against the accused persons for the offences punishable under Sections 302, 307, 323, 504 and 114 of the IPC in the Court of learned JMFC, Petlad. As the case was sessions triable, the case was committed to the learned District and Sessions Court, Nadiad which was numbered as Sessions Case No. 260 of 2002 and it was sent to the Court of Additional Sessions Judge, Nadiad. Charge was framed against the accused persons vide Exh. 4 by the learned Presiding Officer, 6th Fast Track Court, Nadiad on 04.06.2004 against all the accused persons for the offences punishable under Sections 302, 307, 323, 504 and 114 of the IPC. All the accused persons pleaded not guilty and therefore, they were put to trial. During trial, prosecution

examined as many as 15 witnesses and produced on record voluminous documentary evidence. Takatsing Bhikabhai original complainant and son of the deceased PW-1 came to be examined at Exh. 10 initially on 06.07.2004; his examination-in-chief was recorded on 06.07.2004 and he was partly cross examined on the very day and that thereafter, the trial was adjourned and he came to be further cross examined on 09.08.2004. He was thoroughly cross examined. He fully supported the prosecution case and stick to what was stated by him in the complaint as well as whatever he stated before the police during investigation. Another witness Chatrasingh Bhikabhai, son of the deceased and elder brother of the original complainant came to be examined by the prosecution as PW-2 vide Exh. 14 on 27.08.2004. He fully supported the prosecution case and stick to what was stated by him before the police during investigation. It appears that settlement was arrived at between the parties between 27.08.2004 and 04.11.2004 and the defence gave one application at Exh. 40 on 04.11.2004 before the learned trial court requesting to recall the aforesaid two witnesses with a view to prove contradictions in the complaint and deposition of PW-1 as well as contradictions in the police statement of the PW-2 and his deposition. Learned trial Court granted the said application on the very day mechanically. On 19.11.2004 both the aforesaid two witness who earlier fully supported the case of the prosecution came to be further cross examined by the defence and surprisingly they turned hostile and they deposed contrary to what was deposed by them in examination-in-chief and earlier cross examination recorded on 27.08.2004 and even contrary to what was stated by the complainant in the complaint as well as contrary to their own statements recored by the Investigating Officer during investigation. Both of them for the first time stated that at the time of incident they had gone to their sister's residence at village Kanjari and they returned at about 7.30 p.m.; they came to know that their father got injured when they reached their residence and many persons had gathered. It was further deposed by aforesaid two witnesses that other persons staying in the said faliya told him that their father fell down and sustained injury by Otli. They further deposed that they have not seen how the incident had taken place and what happened. Prosecution gave application at Exh. 55 to recall aforesaid two witnesses in light of their further cross examination recorded on 19.11.2004. Said application came to be allowed and the aforesaid two witnesses came to be recalled for further examination-in-chief. They deposed that whatever they have deposed in further cross examination is correct though in examination-in-chief and at the time of earlier cross examination it is deposed by them that at the time of incident they were at their home. However denied what was stated by them during examination-in-chief recorded earlier. However, both of them admitted that they have deposed earlier as per their statement before the police which was at the instance of other persons and having realized, they stated correct facts in the further cross examination. That thereafter, prosecution examined other witnesses, relatives of deceased who were also relatives of accused persons, all of them turned hostile. Even panch-witnesses also turned hostile. Prosecution examined Dr. Vipul Shah who treated deceased at his Urvish

Hospital. In the examination-in-chief he has stated that he was informed that his relatives have given "Pavda blow". He was also cross examined. Prosecution further examined Dr. Jignesh Kachralal who conducted postmortem. As per postmortem report cause of death was stated to be Cardiorespiratory arrest due to intracranial hemorrhage. Prosecution also examined head constable Jasosingh Ratansing who recorded the complaint given by Takatsing Bhikabhai. He stated in examination-in-chief that the complaint was given by Takatsing Bhikabhai Mahida in his presence and same was signed by Takatsing in his presence and he also signed as Police officer. He is not cross examined. Prosecution further examined Investigating Officer PSI Arvindbhai Ravjibhai Patel, he fully supported the prosecution case and deposed that he recorded statement what was stated by the witnesses. In the cross examination he has specifically deposed that it is not true that he has not recorded the statement as per their say. That thereafter, attention of the accused persons were drawn to the incriminating material found against them and statement of accused persons u/s 313 were recorded on 13.01.2005. That thereafter, learned Presiding Officer, 3rd Fast Track Court, Nadiad solely relying upon the further deposition of the aforesaid two witnesses Exh. 10 and 14 acquitted the respondents - accused by the impugned judgment and order by observing that it is true that the prosecution has proved the statement of those witnesses made before the police during investigation who have turned hostile before the Court by examining PSI Arvindbhai Patel PW 15 examined at Exh. 52, however, as the witnesses are not supporting the case of the prosecution, said proved statements cannot be used against the accused persons and thereby acquitted the accused persons for the offence punishable under Sections 302, 307, 323, 504 and 114 of the IPC. Being aggrieved and dissatisfied with the same, State has preferred the present appeal u/s 378(1)(3) of the Code.

7. Mr. A.J. Desai, learned Additional Public Prosecutor appearing on behalf of the State has vehemently submitted that the learned trial Court has materially erred in relying upon the further cross examination/further deposition recorded after cross examination was over. It is submitted that the learned trial Court ought not to have relied upon the deposition (cross examination recorded on 19.11.2004 after they were recalled). It is submitted that the learned trial Court ought to have relied upon deposition recorded prior to the application Exh. 40 (recalling of the witnesses). It is submitted that the learned trial Court has not considered and/or discussed deposition of other witnesses on record i.e. deposition of Dr. Vipul Shah who has stated that he was told that deceased sustained injury by "Pavda" by relatives and deposition of Head Constable Jasosingh Ratansing at Exh. 34 who recorded the complaint given by Takatsing PW-1. It is submitted that even the trial Court has not considered and discussed deposition of Arvindbhai Patel Investigating Officer, PSI Mahelav Police Station who recorded the statement of the witnesses, who subsequently turned hostile. It is submitted that he has specifically deposed that he has recorded the statements of the witnesses during investigation as per and whatever was stated by those

witnesses. It is submitted that the learned trial Court ought to have become more vigilant and alert after aforesaid two witnesses i.e. PW-1 and PW-2 turned hostile after they were recalled by further realizing that said witnesses and other witnesses who have turned hostile are all relatives of accused persons. It is therefore, submitted that the learned trial Court ought to have relied upon other independent witnesses and ought to have reached the truth rather than acquitting the accused persons relying upon further cross of the witnesses at Exh. 10 and 14. It is submitted that the learned trial Court has become mute spectator and acquitted the accused persons by playing in the hands of the witnesses who are relatives of the accused. It is submitted that the learned trial Court has failed in its duty to convict the accused persons. It is submitted that evidence of Dr. Vipul Shah, Postmortem report, injury sustained by the deceased, evidence of head constable Jasosingh Ratansing and evidence of Arvindbhai Patel, Investigating Officer are sufficient to convict the accused persons. However, the learned trial Court has not discussed and/or considered the evidence of aforesaid witnesses as well as aforesaid documentary evidence and has acquitted accused persons which has resulted into miscarriage of justice. It is submitted that even the learned trial Court has also observed that the prosecution has proved the statements of the witnesses who turned hostile in the Court, still solely relying upon those witnesses who have turned hostile and that too after they were recalled, the learned trial Court has acquitted the accused persons, which requires to be quashed and set aside.

Mr. Desai, learned APP has relied upon decision of the Hon''ble Supreme Court in the case of State of Madhya Pradesh Vs. Badri Yadav and Another, as well as decision of the Hon''ble Supreme Court in the case of Zahira Habibulla Sheikh (supra) in support of his prayer to allow the present appeal, quashing and setting aside the judgment and order of acquittal and convict the accused persons for the offences punishable under Sections 302, 307, 323, 504 and 114 of the IPC and to impose appropriate sentence. So far as Criminal Revision Application No. 55 of 2008 is concerned, Mr. Desai, learned APP has submitted that considering deposition of two witnesses PW-1 and PW-2 recorded prior to 19.11.2004 and subsequent deposition recorded in cross examination dated 19.11.2004, it is clear case of perjury and even in the statement recorded before this Court, Chattrasing Bhikhabhai PW-2 has admitted that he has given false evidence. Therefore, it is requested to appropriately punish aforesaid two witnesses respondents of Criminal Revision Application No. 55 of 2008 so as to curb such type of practice as in recent days incident of witnesses turning hostile has increased day by day.

8. Mr. M.B. Gohil, learned Advocate has appeared on behalf of the respondents accused. It is submitted that on appreciation of evidence and considering evidence of deposition of PW-1 and PW-2 who were examined at Exh. 10 and 14, when it was found by the learned trial Court that witnesses who were examined by the prosecution to prove the case have not supported the prosecution case and thereby acquitted the accused persons, same is not required to be interfered

with by this Court in an appeal against the order of acquittal u/s 378 of the Code. It is submitted that the impugned judgment and order passed by the learned trial Court cannot be said to be so perverse which requires interference of this Court in an appeal u/s 378 of the Code. It is submitted that as held by the Hon"ble Supreme Court in catena of decisions when there are two versions possible and one which is in favour of the accused has been accepted by the learned trial Court and that accused persons are acquitted, the High Court in an appeal u/s 378 of the Code should not interfere with the same. Therefore, it is requested to dismiss the present appeal.

9. Ms. Maria Dalal, learned Advocate appearing for Mr. Yatin Soni, learned Advocate appearing for two witnesses PW-1 and PW-2 i.e. Takatsing Bhikabhai and Chhatrasinh Bhikabhai whose evidence was recored at Exh-10 and 14 and who are respondents in Criminal Revision Application No. 55 of 2008, has vehemently submitted that if this Court is of the opinion that aforesaid two witnesses are liable for perjury by giving false evidence, in that case, appropriate remedy is to follow procedure as required u/s 195 of the Code and this Court cannot assume criminal jurisdiction and convict them without trial. She has heavily relied upon the decision of the Hon"ble Supreme Court in the case of Randhir Singh Vs. State of Haryana and Another, and in the case of M.S. Ahlawat Vs. State of Haryana and Another, By making above submissions, she has requested to discharge notice issued in Suo-moto Revision Application No. 55 of 2008. On merits she has addressed the Court by submitting that said witnesses have not committed any offence of perjury as whatever was found to be true, they have stated in the subsequent cross examination and therefore, it is requested to dismiss the Criminal Revision Application.

10. Heard the learned Advocates appearing on behalf of the respective parties.

11. We have minutely considered the deposition of all the witnesses in detail. PW-1 Takatsing Bhikabhai son of the deceased initially gave complaint at Mahelav Police Station which is at Exh. 11 which was recorded by the Head Constable Jasosingh Ratansingh. In the complaint he has specifically alleged that Amarsingh Mahida original accused No. 1 gave "Pavda blow" on the right side of the head near ear of the deceased and other accused persons Dhanaben Amarsing Mahida and Lilaben Amarsingh Mahida were giving filthy abuses and giving fist blows to the deceased. Head Constable Jasosingh Ratansing who recorded the complaint at Exh. 11 is examined by the prosecution as PW-14 at Exh. 34. He has deposed that the complaint was given by Takatsing Mahida in his presence which is at Exh. 11 and same was signed by Takatsing in his presence and he also signed on the same as Police Officer. Said witness is not cross examined by the defence. Thus prosecution has proved beyond doubt the complaint at Exh. 11. No question is asked to the said witness against recording of the said complaint. During trial prosecution examined Arvinbhai Patel Investigating Officer who investigated the case and who recorded the statements of the witnesses during investigation who subsequently turned hostile. He is

thoroughly cross examined. He specifically deposed that whatever was stated by the witnesses their statements were recorded. He has also deposed what was stated by the said witnesses in their statement during investigation. Though said witness was cross examined the defence has failed to prove any contradiction. It is required to be noted at this stage that even the learned Trial Court has also specifically observed and held that by examining Arvindbhai Patel Investigating Officer at Exh. 52, the prosecution has proved in Court, statements of those witnesses who have subsequently turned hostile such as Takatsing Bhikabhai, Chatrasingh Bhikabhai, Kesarben Bhikabhai etc. Prosecution has also examined Dr. Vipul Shah who treated the deceased at his Urvish Hospital. It is specifically deposed by him that he was told that his relative has given "Pavda blow". No question is asked to him so far as that aspect is concerned in the cross examination. Medical certificate of the said Doctor is at Exh. 17 in which also it is alleged that injury is due to assault by "Pavda". In spite of above overwhelming evidence on record, the learned trial Court has not considered and dealt with and/or discussed said evidences at all. Takatsing Bhikabhai original complainant and son of the deceased eye witness PW-1 came to be examined at Exh. 10. His examination-in-Chief and some cross examination was recorded on 06.07.2004. He was fully and thoroughly cross examined by the defence on 09.08.2004. He fully supported prosecution case and stick to what was stated by him in the complaint as well as in his statement before the police during investigation. He has specifically deposed in the cross that he has seen the incident and injury caused to his father. It is also specifically deposed by him in the cross that except original accused No. 1 Amarsing nobody has caused any injury to his father and there was only one injury sustained by his father. He has also specifically denied in the cross that it is not true that his father fell down during scuffle and he sustained injury by falling down on Otli. That PW-2 Chatarsing Bhikabhai elder son of the deceased and elder brother of the complainant also eye witness came to be examined by the prosecution at Exh. 14 on 27.08.2004. He has also fully and thoroughly cross examined by the defence. He fully supported the case of the prosecution and statements made by him before the Investigating Officer during investigation. It appears that something happened after 27.08.2004, after deposition of the aforesaid two witnesses were over. At this stage it is to be noted that accused persons are also relatives of aforesaid two witnesses. Original accused No. 1 Amarsing Mahida is the maternal uncle (mama) of the aforesaid two witnesses. It is equally true that the deceased was their father. However, it appears that they choose to be with the living persons rather than dead persons and not with the real truth. Defence gave application at Exh. 40 on 04.11.2004 requesting the learned trial Court to recall the aforesaid two witnesses by submitting that through oversight certain questions to prove contradiction in the complaint by PW-1 and deposition are not asked; question to prove contradictions of the statement of PW-2 and deposition are not asked and therefore, with a view to prove contradictions in the police statements and deposition and complaint and deposition of PW-1, it was requested to recall the aforesaid two witnesses. Learned trial Court without realizing hard reality

mechanically accepted the said application immediately and passed order to recall the aforesaid two witnesses. Aforesaid two witnesses came to be cross examined by the defence on 19.11.2004; exactly that has happened what was in the mind of the accused persons and the defence and the aforesaid two witnesses. Aforesaid two witnesses deposed just contrary to what was stated by them earlier on 09.08.2004 and 27.08.2004 respectively and deposed just contrary to what was stated by PW-1 in the complaint as well as statements before the police. PW-2 also came to be cross examined on 19.11.2004 pursuant to the order passed below Exh. 40 and he also on subsequent cross examination deposed just contrary to what was stated by him before the police and just contrary to what was stated by him during his cross examination on 27.08.2004. They have stated that they were not present at the time of incident and they had been to sister's village Kanjeri and returned at about 7.30 p.m. At that time they came to know that their father was injured and came to know from others that their father had fallen down on Otli and sustained injury. Relying upon the cross examination recorded on 19.11.2004 after aforesaid two witnesses came to be recalled, the learned trial Court has acquitted the accused persons. It is required to be noted at this stage that it is not the case of any of the accused in their statement recorded u/s 313 that deceased sustained injury by falling down on Otli. For the first time aforesaid two witnesses i.e. PW-1 and PW-2 stated in further cross examination (after they were recalled) that their father sustained injury by falling down on Otli.

12. As observed by the Hon"ble Supreme Court in the case of Zahira Habibulla Sheikh (5) and Anr. (supra) "witnesses" as Bentham said: are the eyes and ears of justice. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors, like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by the courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations." It is further observed by the Hon"ble Supreme Court that "right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice." It is further observed that "the concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interest of society is not to be treated completely with disdain and as persona non grata." It is observed that "it has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. It will not be correct to say that it is only the accused who must be fairly dealt with." As observed that "it would be turning a Nelson's eye to the needs of society at large and the victims." It is observed that the Courts have vital role to play. Cause of the community deserves equal treatment

at the hands of the courts in discharge of its judicial function. It is emphasized in catena of decisions that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crime being public wrong in breach and violation of public rights and duties, which affects the whole community as a community and is harmful to society in general. Dealing with the role of Presiding Judge, in a criminal trial, the Hon'ble Supreme Court in the said decision has observed that the purpose and role of the Presiding Judge in a criminal trial is discovery, vindication and establishment of truth and therefore, trial should be a search for the truth and not a bout over technicalities. Presiding Officer must cease to be a spectator and a mere recording machine. He must become a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion to find out truth and administer justice with fairness and impartiality both to the parties and to the community.

13. Complete ignorance on the part of learned trial Judge of basic principle of criminal law and criminal justice system has resulted in gross failure of justice affecting the society at large. Forgetting all the statutes, and law to conduct criminal trial and dispensation of criminal justice system the judgment impugned on face of it appears to be mere opinion of individual as if arbitrating small dispute of private individual. More than century old criminal justice system structure of our country is standing erect today because of faith of the people in justice system and expectation of ordinary citizens from the trial Courts at least to discern truth and extricate falsehood ultimately to establish law and order in society. System of adducing evidence by the parties and rules to appreciate such evidence is a system evolved to extract truth, even if it is coted by grave falsehood. If such an endeavour on the part of linchpin link i.e. trial Court to search for truth is jettisoned overboard, law lessness society could be the only result. While considering a criminal case, the Court cannot resort to conjunctures and must not abandon laborious exercise to find out the truth, but must examine carefully the legal material placed before it in order to find that the offence with which the accused is charged has been made out by such material and then come to its own conclusion. Ring of truth in the evidence adduced, if any, must be found out having regard to the evidence as a whole and the general tenor of the prosecution case. Direct evidence of witnesses should not be brushed aside in any circumstances unless such evidence renders the whole of the prosecution case improbable by the standard of prudence of the ordinary person. It is the prime function of the criminal Courts to separate the grain from the chaff and accept what appears to be true and reject the rest. Therefore, the criminal Courts have to do their best in the trials before them and it is their duty to shift the evidence carefully and decide which part of each is true and which is not. Total repulsion of the evidence, in cases like one on hand is doing injustice to the society as a whole especially when scheming parties before the Court attempt to defraud the Courts of justice for their selfish purposes. To keep the fountain of justice pure, it becomes pious duty of a criminal Court to consider the evidence

from the point of view of trustworthiness, if this element is satisfied this must inspire confidence in the mind of the Court to accept the stated evidence. It is known principle of criminal law that falsus in uno, falsus in omni bus is not applicable to our criminal justice system. The witnesses may embroider prosecution case and attempt to spoil the very object of criminal trial but instead of being conducive to this mischief, criminal Courts must apprise itself in each case as to what extent the evidence is worthy of acceptance and merely because in some respect falsity deliberately created is found and when it does not affect the substratum of the prosecution case, and such falsity is brought for only purpose of thwarting the course of justice, the same must be treaded upon. Only because witnesses have resiled from the statement earlier given and thus, attempts to divert the path of justice, it must not necessarily follow as a matter of law that the evidence of such witnesses must be discarded in all respect which is done by the trial Court. Even if a major portion of the evidence is found to be deficient and in a given case residue is sufficient to prove guilt of an accused conviction must follow and, therefore, it is said that it is the duty of the Court to separate the grain from chaff because Judge does not preside over a criminal trial merely to see that no innocent man is punished but a Judge also presides to see that a guilty man does not escape and both are public duties. We have examined that how failure of justice has occasioned in the present case and how pervert is the judgment and order impugned.

14. Looking to the facts of the case on hand and evidence on record and looking to the judgment and order of acquittal passed by the learned trial Court, it appears that the learned trial Court has turned blind eye and has failed to perform its duty as a Presiding Judge to reach to the truth. Though there was ample material and/or evidence on record such as evidence of Dr. Vipul Shah, Head Constable Jasonsing Ratansingh who recorded the complaint at Exh. 11 and evidence of Investigating Officer, learned trial Court has not considered, dealt with and discussed the same at all and on the contrary relying upon subsequent cross examination of PW-1 and PW-2 who were recalled, has acquitted the accused persons by observing that witnesses have not supported the prosecution. As stated above, it is to be noted that the concerned Presiding Judge has specifically observed and held that prosecution has proved the statements of the witnesses recorded during investigation by examining Investigating Officer in the Court and they are proved in the Court, still the learned Judge has acquitted the accused persons. It appears to us that even the deposition of witness PW-1 and PW-2 recorded prior to they were recalled were sufficient to convict the accused persons. Said depositions are required to be considered along with deposition of other witnesses i.e. Head constable who recorded the complaint as well as the Investigating Officer who recorded the statements during the investigation and which are proved in the Court. The learned Judge ought not to have given weightage to that part of the evidence (cross examination) which was recorded after they were recalled. In the present case PW-1 was examined by the prosecution as eye-witness on 06.07.2004. He

was cross examined at length on 09.08.2004 and was discharged. He was subjected to lengthy cross examination but nothing could be elicited to discredit the examination-in-chief. He was recalled as witness at the instance of defence subsequently on 19.11.2004 and he resiled completely from the previous statements as prosecution witness. Similar thing happened to PW-2. He was examined by the prosecution as eye-witness on 27.08.2004. He was subjected to lengthy cross examination but nothing could be elicited to discredit the examination-in-chief and he fully supported the prosecution case. Thus both PW-1 and PW-2 who were eye-witness fully supported the prosecution case and they stick to what was stated by them in the complaint as well as in their statement recorded during investigation. That thereafter, they were recalled pursuant to the order passed by the Presiding Judge on the application submitted by the defence to prove contradiction; they resiled completely from their previous statement and their deposition on oath. It therefore, clearly appears that subsequent statement in the cross examination were concocted and were afterthought. It appears that they were either won over or were under threat or intimidation from the accused. It is required to be noted at this stage that the accused persons are relatives of the aforesaid two witnesses staying in same faliya. No reasonable person, properly instructed in law, would have acted upon such statements. Still the learned trial Judge has acquitted the respondents accused relying upon the subsequent deposition (cross examination after they were recalled). It appears that submission of the application to recall PW-1 and PW-2 was clearly for the purpose of defeating the ends of justice which is not permissible under law. It is required to be noted at this stage that the application at Exh. 40 to recall aforesaid two witnesses was to prove contradictions between the complaint and statement before the police and deposition so far as PW-1 is concerned and to prove contradictions in statement before the police and deposition so far as PW-2 is concerned. However, looking to the further cross examination of the aforesaid two witnesses after they were called and the question asked it appears that not a single question is asked by the defence to prove contradictions for which they were recalled. It appears that it was clearly for the purpose of defeating the ends of justice. Identical question came to be considered by the Hon'ble Supreme Court in the case of Badri Yadav and Anr. (supra) and faced with similar situation the Hon'ble Supreme Court in a case where High Court acquitted the respondents accused, quashing and set aside the conviction of the trial Court relying upon the subsequent submission of the witnesses after they were recalled, the Hon'ble Supreme Court quashed and set aside the acquittal order passed by the High Court and convicted the accused persons by observing that the High Court should not have and ought not have relied upon the subsequent deposition of the witnesses recorded after they were recalled when they earlier fully supported the prosecution case.

15. In the result, considering the above circumstances and re-appreciating the evidence and reasonable probabilities arising out of the circumstances of the case which we have carefully considered, we are satisfied that the judgment and

order impugned in this appeal is required to be set aside. Now, it is required to be examined for what offence accused or each of the accused is guilty. The accused were charged with offences punishable under Sections 302, 307, 323, 504 to r/w. Section 114 of the Indian Penal Code. It is the allegation against the accused that accused No. 1 Amarsinh Rupsinh gave a spade blow on the head of the deceased due to which deceased Bhikhabhai died and accused No. 2 Dhanaben and accused No. 3 Lilaben both abetted accused No. 1 in the above act and also gave kick and fist blows to the deceased. It is also the allegation against the accused that all the three gave abuses to the deceased. From the evidence of P.W.1, P.W.2 and the deposition of the other witnesses i.e. Dr. Vipul Shah, Investigating Officer and other circumstances, it is proved beyond doubt that accused No. 1 Amarsinh gave a spade blow on the head of the deceased Bhikhabhai. It is necessary, therefore, to examine the incident as it is proved. It is the case of the prosecution that during altercation, accused No. 1 obtained spade from nearby and gave blow on the head of the deceased. It is amply proved through the evidence of Dr. Vipul Shah, P.W. 3, Ex. 16 that the injury on the head of the deceased which is vital part of the body was sufficient in ordinary course of nature to cause death. It is amply proved that accused No. 1 Amarsinh was author of the said injury. Therefore, the act proved on the part of the accused No. 1 Amarsinh is an act done with the intention of causing bodily injury sufficient in the ordinary course of nature to cause death. Therefore, the act of accused No. 1 Amarsinh is amply covered by the Clause thirdly of Section 300 of the Indian Penal Code i.e. culpable homicide amounting to murder. The intention to inflict such bodily injury sufficient in the ordinary course of nature to cause death is clearly emerges from the evidence recorded during the trial on the part of accused No. 1. Spade is an agricultural instrument but when it is used, as a weapon certainly spade becomes deadly weapon especially when a blow is given on vital part of body like head. It is amply proved that death was caused on account of this injury. It is also proved from the record that accused No. 1 Amarsinh fetched spade lying nearby and gave a fatal blow on the vital part of body denoting his intention to cause murder of deceased Bhikhabhai and, therefore, accused No. 1 is held guilty for causing murder of deceased Bhikhabhai and is liable to be punished for the offence punishable u/s 302 of the Indian Penal Code. It is also proved that accused No. 1 Amarsinh gave the abuses to the deceased and, therefore, he is also liable to be punished for the offence punishable u/s 504 of the Indian Penal Code.

16. Now we have to examine as to whether accused No. 2 and 3 abetted the act of accused No. 1 causing murder of deceased Bhikhabhai. When we refer to evidence of P.W. 1 and P.W. 2, it appears that all the three accused along with one person Akbar had been to their house and the accused were insisting to bring out Bhimsing who happened to be husband of accused No. 3 Lilaben and was in the house of deceased. Therefore, from the evidence of P.W. 1 and P.W. 2, it clearly appears that there was neither common intention on the part of the accused No. 2 Dhanaben or accused No. 3 Lilaben along with accused No. 1 to

cause murder of deceased Bhikhabhai. If the incident is further probed, it transpires from the evidence of the P.W. 2 that accused No. 1 Amarsinh stated to the deceased that Bhimsing was harboring suspicion about her daughter Lilaben and, therefore, altercation took place. Now during this altercation, however, accused No. 1 Amarsinh went nearby in the house of one Balvantsinh and from menger of the house fetched spade and gave a blow to the deceased. This proved fact discloses that killing deceased was individual act of accused No. 1 and the said act was not abetted by accused No. 2 and 3, no willful overt act on the part of accused No. 2 and 3 or any conspiracy or instigation, surfaces from the evidence recorded during trial and, therefore, accused No. 2 and 3 are held guilty for the offences punishable under Sections 323 and 504 of the Indian Penal Code as from the record it is proved that accused No. 2 and 3 gave kick and fist blows to the deceased and gave abuses. The act of accused No. 2 and 3 was individual of the act of accused No. 1 and, therefore, accused No. 2 or 3 could not be held liable for the charge u/s 302 to r/w. Section 114 of the Indian Penal Code and to that extent only acquittal of these two accused is confirmed that they are not held guilty u/s 302 of the Indian Penal Code, but they are held guilty for the offences punishable under Sections 323 and 504 of the Indian Penal Code for their respective individual act.

17. For the aforestated reasons, this appeal succeeds and allowed and the judgment and order impugned dated 04.03.2005 passed by the learned Presiding Officer, 3rd Fast Track Court, Nadiad in Sessions Case No. 260/2002 acquitting the present respondents No. 1, 2 and 3 original accused No. 1, 2 and 3 of all charges levelled against them is hereby quashed and set aside. The respondent No. 1, herein original accused No. 1 is held guilty for the offences punishable u/s 302 of the Indian Penal Code and u/s 504 of the Indian Penal Code. Accused No. 1 is sentenced to undergo imprisonment for life and to pay fine of Rs. 10,000/- [Rupees Ten Thousand Only], in default, to undergo rigorous imprisonment of one year. No separate sentence is awarded to accused No. 1 for charge of Section 504 of Indian Penal Code proved against him. The respondents No. 2 and 3, herein original accused No. 2 and 3 are held guilty for the offences punishable under Sections 323 and 504 of the Indian Penal Code and each of accused No. 2 and 3 are sentenced to undergo one year rigorous imprisonment for each of the offence under Sections 323 and 504 of the Indian Penal Code. The sentences awarded to accused No. 2 and 3 shall run concurrently. The acquittal of accused No. 2 and 3 in respect of rest of the charges including the charge u/s 302 of the Indian Penal Code is confirmed. Time to all the three accused to surrender before the trial Court for serving sentences imposed upon accused No. 1, 2 and 3 is granted to accused No. 1, 2 and 3 till 14.07.2008.

18. So far as revision application No. 55 of 2008 is concerned, the same is registered pursuant to the order passed by this Bench dated 17.12.2007 wherein the respondents in the revision application and P.W. No. 1-Takhatsinh Bhikhabhai Mahida and P.W. No. 2-Chhatrasinh Bhikhabhai Mahida were directed to show cause as to why the appropriate proceedings against them should not be

initiated. The aforesaid order came to be passed by this Bench considering the fact that there were contradictory version of the aforesaid two witnesses; one at the time of examination-in-chief and cross-examination prior to the order passed below Exh. 40 and subsequent to the order passed below Exh. 40 and having found that they have given a false evidence on oath.

19. As stated hereinabove and considering the record which is received from the trial court more particularly considering the deposition of the aforesaid two witnesses P.W. No. 1 Takhatsinh Bhikhabhai Mahida and P.W. No. 2 Chhatrasinh Bhikhabhai Mahida who came to be examined at Exh. 10 and Exh. 14 it is found that the deposition of P.W. No. 1 Takhatsinh Bhikhabhai Mahida came to be recorded at Exh. 10 which was concluded on 9.8.2004 and the cross-examination of the said witness was also over on 9.8.2004. The said witness P.W. No. 1 Takhatsinh Bhikhabhai Mahida fully supported the case of the prosecution. Similarly, the deposition of P.W. No. 2 Chhatrasinh Bhikhabhai Mahida was also concluded on 27.8.2004 and his cross-examination was also over on 27.8.2004 and he also fully supported the prosecution case. However, subsequently, after the period of almost three months the defence gave an application at Eh.40 on 4.11.2004 before the trial court requesting to recall the aforesaid two witnesses with a view to prove the contradictions in the complaint, deposition as well as contradiction in the statement of P.W. No. 2 and his deposition. The learned Judge granted the said application mechanically on the very day and on 19.11.2004 both the aforesaid two witnesses who earlier fully supported the case of the prosecution as well as proved what they have stated before the police as well as in the complaint, came to be further cross-examined by the defence and it appears that the defence had not asked any question to prove the contradictions for which they were recalled. However, surprisingly both the aforesaid two witnesses turned hostile and they deposed on oath just contrary to what was deposed by them in examination in chief and earlier cross-examination recorded on 9.8.2004 and 27.8.2004 respectively. Both the aforesaid two witnesses for the reasons best known came out with a story with respect to injury sustained by the deceased by falling down on Otli which was not even the case of the defence and the accused.

20. Considering the above and having satisfied that both the aforesaid two witnesses respondents in the revision application had given the false evidences on oath, notices came to be issued upon the aforesaid two witnesses and it was decided by the court to try them summarily considering Section 344 of the Code of Criminal Procedure. The Court gave them opportunity as provided u/s 262 read with Section 344 of the Cr.P.C. and their statements on oath came to be recorded before the Court. Attention of P.W. No. 2 Chhatrasinh Bhikhabhai Mahida was drawn to his entire deposition i.e. deposition prior to the order passed below Exh. 40 and his deposition after the order passed below Exh. 40 to recall him, and on considering the same, he has stated before the Court that he does not want to give any further explanation with regard to false evidence given by him on oath and he admits having committed the offense of giving false

evidence on oath. So far as P.W. No. 1 Takhatsinh Bhikhabhai Mahida is concerned, his statement came to be recorded by this Court and his attention was also drawn to his entire deposition i.e. deposition prior to order passed below Exh. 40 and his deposition after the order passed below Exh. 40 and he has stated before the Court that he does not want to say anything further except that a settlement is arrived at between the parties and he does not admit having committed any offense with respect to giving false evidence.

21. Considering the aforesaid two statements recorded by this Court after the respondents were called upon to show-cause as to why they not be punished for giving false evidences and the chronological events which had taken place which is noted hereinabove, it appears that till 29.8.2004 both the aforesaid two witnesses respondents in revision application fully supported the prosecution case and whatever they have said in the complaint as well as statements before the police during the investigation P.W. No. 1 Takhatsinh Bhikhabhai Mahida is the original complainant and son of the deceased. It appears that after 29.8.2004 a settlement has taken place which had compelled the aforesaid two witnesses to turn hostile and say something just contrary to what they have stated earlier and the trial court acquitted the accused considering the subsequent deposition of the aforesaid two witnesses.

22. Learned advocate appearing on behalf of the respondents the aforesaid two witnesses has not stated anything on merits of the case. However, he has submitted that if this Court is of the view that the aforesaid two witnesses have committed any offense giving false evidence on oath before the court in that case the fully remedy available is to initiate the proceedings for the offences u/s 193 of the Indian Penal Code, and to comply with the procedure u/s 195 of the Cr.P.C., read with Section 340 of the Cr.P.C. No other submissions have been made by the learned advocate appearing on behalf of the respondents aforesaid two witnesses.

23. We have considered the matter in detail and after giving anxious thought and considering Section 344 of the Cr.P.C., we have decided to try the respondents in the revision application the aforesaid two witnesses summarily for giving false evidences on oath and have given the offenders reasonable opportunity of showing the cause why they should not be punished for giving false evidence with the intention that such evidence will be used in the criminal proceedings. We are satisfied and even P.W. No. 2 Chhatrasinh Bhikhabhai Mahida has admitted that he has committed offence of giving false evidence on oath. So far as P.W. No. 1 Takhatsinh Bhikhabhai Mahida is concerned, though he has not admitted that he has committed the offence of giving false evidence in the criminal proceedings, but he has also stated in his statement that a settlement has arrived at between the parties. Thus, it appears that because of some settlement arrived at between the parties, the aforesaid two witnesses turned hostile and stated on oath just contrary what they have stated earlier on oath while deposing prior to the order passed below Exh. 40. It appears that as some settlement had

taken place, the defence gave an application Exh. 40 to recall the aforesaid two witnesses under the guise of proving the contradiction, and thereafter the aforesaid two witnesses have turned hostile and have deposed on oath just contrary what they have stated earlier on oath. It cannot be disputed that crime is a public wrong which affects the whole community and is harmful to the society general. The fate of the criminal proceedings cannot be left entirely in the hands of the parties. The outcome of the criminal trial cannot be permitted to be in the hands of the parties. In the recent days the incidence of witnesses being turned hostile have increased day by day and thereby putting an end to the criminal proceedings by acquitting the accused persons by the trial courts without making any further efforts to find out the truth and punish the guilty. There may be number of reasons for the witness to turn hostile such as threats, coercion or surrounding social circumstances etc. As stated hereinabove, the endeavour of the Court in the criminal proceedings is to find out real truth and punish the guilty as the crime is against the society. If such hostile witnesses are permitted to play an important role in the criminal proceedings, the faith of the citizen in the criminal delivering justice will be shaken. It is experienced by this Court that in spite of the fact that the trial court comes across so many cases that the witnesses have turned hostile, without further making any efforts to reach the truth and in a race to dispose of the case hurriedly acquits the accused. Whenever it is found that any witness has turned hostile (more particularly the witness who is the relative or interested witness) and has stated something just contrary to what he has stated in the complaint or statement before the police, the trial court must become cautious and if it is found that the witness has given false evidence on oath they must be dealt with strictly and with iron hand. A settlement entered into after the commission of an offense is no ground for the witness to turn hostile and give a false evidence on oath to save the accused. He can also be said to be equally guilty and such witness should be dealt with strictly.

24. Considering the above and the entire evidence and the deposition of the aforesaid two witnesses-respondents in Criminal Revision Application and the statements given by them before this Court in the present revision application, we are satisfied that both the respondents aforesaid two witnesses are guilty of the offense of perjury i.e. giving false evidence on oath before the Court in a criminal proceedings only with a view to facilitate the accused persons.

25. It is required to be noted at this stage that both the respondents in the revision application and the aforesaid two witnesses are the real sons of the deceased who has been murdered by the accused. P.W. No. 1 Takhatsinh Bhikhabhai Mahida is the complainant and still as the settlement has taken place he has turned hostile and has given false evidence on oath to save the accused who has killed his own father. It appears that for whatever be the reason the aforesaid two witnesses chosen to be with the accused rather than to be with the truth and their deceased father. Considering the above, we are of the considered opinion that both the respondents in revision application must be dealt with

strictly.

26. For the reasons stated above, the revision application is allowed. The respondents in revision application i.e. P.W. No. 1 Takhatsinh Bhikabhai Mahida and P.W. No. 2 Chhatrasinh Bhikhabhai Mahida are held guilty for the offences of perjury for giving false evidence on oath in a criminal proceedings, and considering Section 344 of the Code of Criminal Procedure, both of them are directed to undergo rigorous imprisonment of two months with fine of Rs. 500/, and in default, to undergo 15 days further imprisonment. Time to surrender is granted up to 14th July, 2008. Rule is made absolute accordingly so far as Revision Application No. 55 of 2008 is concerned.