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(1999) 07 GUJ CK 0016

In the Gujarat High Court

Case No : Criminal Appeal No. 184 of 1992

State of Gujarat — APPELLANT

Vs

Chavda Manaji Chelaji — RESPONDENT

Date of Decision : 20-07-1999

Acts Referred:
Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 106, 11
Penal Code, 1860 (IPC) — Section 147, 148, 149, 300, 302

Citation : (2000) CriLJ 1091 : (2000) 1 GLR 13

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

Bench : Division Bench

Advocate : Amee Yagnik, app, for the Appellant; K.B. Anandjiwala, for Respondent Nos. 1, 2, 3, 4, 5, 6 and 7, for the Respondent

Final Decision : Allowed

Judgement

R.K. Abichandani,J.

1. This acquittal appeal has been preferred against the judgement and order dated 12.12.1991 passed by the learned Additional Sessions Judge, Mehsana in Sessions Case No. 186 of 1990, acquitting all the seven respondents - accused persons, for the offences punishable under Sections 302, 504 read with Section 149 and/or Section 34 and Sections 147, 148 and 447 of the Indian Penal Code and Sec. 135 of the Bombay Police Act.

2. All these accused persons were alleged to have formed an unlawful assembly with a view to commit murder of Hariji Mongaji Chavda and in pursuance of such common object, they are said to have attacked Hariji with lethal weapons like dharias and sticks and caused his death by inflicting multiple injuries on him, around 4.45 P.M on 28th May, 1990 in the field of Hariji, bearing Survey No. 1720 in village Kada, which is in Tal. Visnagar of Mehsana District. The prosecution version is that on 27th May, 1990, there was a quarrel over

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removing a part of the hedge lengthwise on the side of the field of the accused No.3 - Jivanji Chelaji bearing survey No. 1719, which was adjoining the field of Hariji. According to the prosecution, when a part of the hedge was broken by cultivating it lengthwise, Hariji had objected in the evening on 27th May, 1990. That quarrel had taken place between the deceased Hariji and the accused No.3 Jivanji Chelaji, accused No.7 Ranjitsinh Jivanji and the accused No.1 Manaji Chelaji. Thereafter, on coming to know about this quarrel, Manuji Madhaji , brother of the deceased, went to Hariji''s field and questioned him about the quarrel. Hariji told him that he should go and see the damage caused to the hedge and then he would know who was at fault. Therefore, the informant Manuji Madhaji saw the hedge and noticed that the hedge of his brother''s field was broken. Manuji however advised Hariji not to make an issue of it. Thereafter, on 28th May, 1990, when Manuji went in the afternoon to his field for tethering buffaloes, and his son Ranjit Manuji had followed after some time, according to the prosecution, Hariji Mongaji and his son Ganpatsinh were present at the tubewell which belonged to Hariji. At about 4''O Clock in the afternoon, Manuji heard some commotion from near the tube-well of Hariji and therefore, he and his son Ranjit went in that direction and at that time they saw that these seven accused persons armed with dharias and sticks were abusing Hariji and the accused No. 3 - Jivanji Chelaji and accused No.4 - Pratapji Chelaji shouted to finish him off, and all of them started giving blows with their weapons to Hariji. The accused No.3 Jivanji Chelaji gave a dharia blow on the head of Hariji, who was wearing a turban (fenta).Hariji therefore started running shouting for help. The other accused persons rounded him up and gave blows as a result of which Hariji fell down. Ganpatsinh, son of Hariji was also present at the scene of offence. According to the prosecution, the accused Nos. 2, 3, 6 and 7 were having dharias, while the accused Nos. 1, 4 and 5 were having sticks. All of them had given blows to Hariji and had thereafter gone away. The informant and his son Ranjit and Ganpatsinh who had seen the incident did not intervene when Hariji was assaulted because they were unarmed and were outnumbered. After these assailants went away, the informant Manuji and his son Ranjit went nearer Hariji and saw that he was dead. At that time Ganpatsinh was also present. The informant Manuji then proceeded to Visnagar for filing the complaint, leaving Ganpatsinh and Ranjit near the dead body. The FIR Ex.52 was filed in the Police Station around 5.45 P.M on the same day. Thereafter, at about 6.15 P.M, PSI Kishorsinh Vaghela and PSI Prakash Bhalia and other police persons proceeded to the place of the offence, alongwith the informer and inquest of the dead body of Hariji Mongaji was drawn. Thereafter, the dead-body was sent to the Civil Hospital, Visnagar, where it was received at about 9.00 P.M. The postmortem was done on the next day morning i.e. on 29.5.1990 between 6.15 A.M and 8.15 A.M. The accused Nos. 1 to 5 were arrested on 28.5.1990 itself and on 29.5.1990 at about 4.45 P.M, the accused Nos. 6 and 7 appeared before the Police with two dharias. According to the prosecution, even the accused Nos. 1 to 5 had produced muddamal weapons. The accused Nos. 1 to 4 are brothers and the accused No.5 Hemtaji Pratapji is son of the accused No.4 Pratapji Chelaji, the

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accused No.6 Pravinji Manaji is son of the accused No.1 Manaji Chelaji and the accused No.7 Ranjitsinh Jivanji is son of the accused No.3 Jivanji Chelaji. As per the postmortem report, there were as many as nine injuries found on the body of Hariji, which were all ante-mortem. The cause of death was extensive haemorrhage due to injuries to right upper limb. The medical officer opined that the death might have taken place 5 to 6 hours after taking of the last meal.

3. All the accused persons pleaded not guilty to the charges. The defence was of total denial. The defence of the original accused No.7 - i.e. the respondent No.7 herein Ranjitsinh Jivanji, was that on the relevant day he was serving as a watchman at Hajipura. The defence is put up in the cross-examination of the investigating officer. The accused persons also examined defence witness Mafabhai Lallubhai at Ex.77, to show that on 28.5.1990, the accused No.7 had attended a dinner party in Hajipura at about 2.00 P.M. The muster-roll in respect of the accused No.7 was got produced at Mark 50/1, to show that on 28.5.1990 he was on duty as a daily wager watchman. That muster-roll did not indicate whether he was on day-time duty or night duty. The defence version also is that Hariji had disputes with several persons and that he might have been killed by one of his enemies and his body might have been thrown in his field.

4. The trial Court held that the eye-witnesses Manuji Mongaji, Ganpatsinh Hariji and Ranjit Manuji were all closely related to the deceased and they were partisan witnesses, whose evidences were required to be tested with care and caution. It was held that since the stomach of the deceased was found to be empty and nothing was found from the intestine, the medical officer had committed some mistake in calculating the time of death, when he opined that the death might have occurred around 5 to 6 hours after the last meal was consumed. From the fact that the stomach was found empty and faecal matter was not found in the large intestine and the state of rigor mortis appeared partially in the upper limbs and in the lower limbs, the trial Judge concluded that more than 24 hours must have elapsed after the death of Hariji when the postmortem was performed and that the doctor had committed an error even when he reiterated in the cross-examination that the death had occurred about 14 to 16 hours before he started the post-mortem examination at 6.15 A.M on 29.5.1999. On the basis of this reasoning, the trial Court held that all the three eye witnesses who were relatives of the deceased stood falsified. The trial Court did not even find it necessary to discuss the evidence of the eye-witnesses and simply brushed it aside by referring to the medical evidence on the question of time of death and on the ground that they were closely related to the deceased and therefore interested witnesses. Observing that it was unlikely that the complainant Manuji who was brother of the deceased would be unaware of the litigation that Hariji had filed in the past claiming a right of pre-emption in respect of survey No. 1719, the trial Court observed that he was not a witness of truth and implicit trust cannot be reposed in him. For the other two eye witnesses, the trial Court simply observed that "similarly the other two eye-witnesses are pliable witnesses and no wonder if they come forward to falsely implicate the accused at the instance of the

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complainant because of this land dispute". All the accused were therefore, acquitted.

5. When the hearing of this appeal commenced, it was brought to our notice that the accused No.1 Manaji Chelaji died on 2.1.1994 while the accused No.2 - Gajaji Chelaji died on 20.1.1996. True copies of their death certificates have been produced on the record of this appeal by the learned Counsel appearing for the respondent accused persons. The learned Additional Public Prosecutor also submitted that these two accused persons - Chavda Manaji Chelaji and Chavda Gajaji Chelaji are dead as per the death certificates placed on record. Therefore, the acquittal appeal stood finally abated so far as these two accused persons are concerned, on their death. The hearing of the appeal has therefore, proceeded against the remaining accused Nos. 3 to 7 i.e. respondents Nos. 3 to 7.

6. The learned Additional Public Prosecutor contended that the trial Court had, without any justifiable reason, ignored the positive evidence of three eye-witnesses, which clearly showed that all these accused persons had on 28th May, 1990, at about 4.45 P.M, inflicted severe injuries on Hariji by dharias and stick which resulted in his death. It was argued that all these accused persons bore a grudge against Hariji, who had requested the accused No.3 Jivanji Chelaji and others in the previous evening for having broken the hedge belonging to Hariji''s field by cultivating it lengthwise on the side of Jivanji''s field. It was submitted that prosecution has positively established that the accused Nos. 2, 3, 6 and 7 were armed with dharias and the accused Nos. 1, 4 and 5 were armed with sticks and that all of them had come together to the field of Hariji near his tube-well, started abusing him and taking revenge of the previous day''s quarrel pounced on him with lethal weapons, resulting in his death on the spot. After the incident, all these accused persons went away together. It was submitted that the facts clearly indicated existence of a common object to kill Hariji among all these seven accused persons. They therefore had constituted an unlawful assembly with the common object of its members to kill Hariji. It was also submitted that having regard to the number of assailants and the types of weapons, as also to the nature of injuries caused, it was clear that the common object of the members of this unlawful assembly was to commit murder of Hariji. It was further submitted that the medical evidence fully supported the version of the three eye-witnesses and merely because they were related to the deceased Hariji, they cannot be brushed aside as partisan or interested witnesses. It was further argued that the medical opinion on the time of death was positive and the doctor had in the postmortem notes and also on oath, clearly opined that the death of Hariji had occurred in about 5 to 6 hours after the deceased had taken his last meal. This opinion was based on the fact that his stomach was empty and also keeping in view the facts which were mentioned in the postmortem notes including the state of rigor mortis and presence of gas in the intestines. It was contended that the doctor had no axe to grind against these accused persons. Moreover, certain material from the medical text books, which was referred to by the trial Court, was not even put to the doctor. The learned

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Additional Public Prosecutor further argued that the accused No.7 had not discharged the burden of proving his alibi and that it did not stand discharged merely because a muster-roll was summoned for showing that he was on duty on 28.5.1990. It was submitted that in view of the direct medical evidence and particularly when the doctor had no reason to give a false opinion, the trial Court was not justified in observing that the death might have occurred 24 hours before the postmortem examination was done.

7. The learned Counsel appearing for the respondent accused persons contended that the origin of the incident was shrouded in mistery and there was no motive for commission of the crime. He submitted that the alleged motive of the quarrel over breaking of the hedge (Shedha) was a sheer concoction because there was no mention of the state of hedge in the panchnama of the scene of offence. It was submitted that Hariji had several enemies and anyone of them could have caused his death. It was also submitted that the incident must have taken place elsewhere because the body was found stained with blood and mud. The Counsel further argued that all the three alleged eye-witnesses were interested witnesses because they were closely related to the deceased Hariji. Manuji was the brother of the deceased and Ganpatsinh, his son, while Ranjit was the nephew of the deceased. The Counsel further argued that the fact that the stomach was empty and nothing was found from the intestines and that there was no faecal matter in the large intestine, showed that the deceased did not have any meals after he had passed stools and this indicated that his death must have occurred in the morning of 28th May, 1990 after he passed stools. It was submitted that if the deceased Hariji had taken his meals at noon time on 28.5.1990, as deposed to by one of the eye-witnesses, Ganpatsinh, there would have been found semi-digested food and faecal matter and the stomach would not have been empty. The Counsel further argued that the accused No.7 Ranjitsinh Jivanji was on duty on the day of the incident as a watchman in Hajipura and there was no possibility of his having been present at the scene of the offence at the time of the alleged occurrence. It was submitted that since these three eye-witnesses were falsely implicating the accused No.7 Ranjitsinh, they were wholly unreliable and could not be trusted even as regards their version against the other accused persons. It was also argued that the story of assault on Hariji was inherently improbable because most of the injuries were caused on the left side of his body, which would not have been the case if all the accused persons, who were said to have been rounded him, had given blows which would have in that event resulted in injuries on different parts of the body and not mainly on the left side. The Counsel contended that the conduct of the eye-witnesses was highly unnatural because soon after the incident they did not proceed to inform the other relatives. It was also argued that the investigation was not fair because while, according to the investigating officer, he had noticed blood stains on one dharia, blood stains of the deceased''s blood group was noticed, as per the FSL report, on other weapons also. The Counsel contended that if his contentions for confirming the acquittal are not accepted, then in the alternative, he was

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contending that the case would fall in exception 4 of Section 300 of the Indian Penal Code and that the offence would be that of culpable homicide not amounting to murder. It was also contended during the course of the judgement, that the trial Court had not put each and every circumstance which was against the accused to them while recording their statement u/s 313 of the Code of Criminal Procedure.

7.1. The learned Counsel for the accused relied upon the decision of the Supreme Court in Kanbi Purshottam Ladha Vs. State of Gujarat, , in support of his contention that the High Court should not reverse the order of acquittal in appeal because another view was also possible. He also relied upon the decision of the Supreme Court in B.N. Singh and ors. Vs. State of Gujarat and ors., reported in 1990 (1) GLH 256, in which it was held that the evidence of interested witnesses should be subjected to a close scrutiny. The Supreme Court had found in that case that one of the accused was falsely implicated which rendered the evidence of the interested witnesses highly suspicious. He also relied upon the decision of the Supreme Court in Raghunandan Vs. State of U.P., , in which it is laid down that it is the duty of the Court to see that essential questions are not so far as reasonably possible, left unanswered. In that case, the post-mortem examination took place at 2.40 P.M on 13.12.1969, and the intestines were found distended with gas and the Court observed that it did not know whether this could be their condition at 1.00 P.M on 12.2.1979 or its effect.

8. The fact that death of Hariji was homicidal, is clearly borne out from the medical evidence. There were nine external injuries found on his body, which are narrated in paragraph 17 of the post-mortem notes. These injuries were of the following nature:-

(1) Incised wound, 2" proximal to (Lt.) Wrist jt. - obliquely placed - skin deep 3" x 1" size.

(2) Incised wound, 3" x 2" bone deep - through middle of (Lt.) forearm - forearm is attached to proximal part C tag of 2" skin on palmar and lateral aspect.

(3) 4" x 2" part of skin is avulsed through sharp cut on antero-lateral aspect of lower part of (Lt.) upper arm - upto antero-lateral aspect of (Lt.) elbow joint.

(4) Incised wound, - cutting through upper part - head of Lt. humerus - below greater taberosity - cutting through lateral surface of upper arm - skin, muscles, bones, artery and vein (axillary). The part below the cut is hanging through lateral fold of (Lt.) axillary fossa through a tag of skin of 3" long.

(5) Incised wound on back of scalp - occipital region 1" x 1/2" scalp deep.

(6) Contusive lacerated wound 1 1/2" x 1/2" on (Lt.) parietal region transverse - scalp deep.

(7) Weal mark - reddish - lateral wall of abdomen (11) - 3" x 1".

(8) Weal mark - back of Rt. chest across scapula 6" x 1" - reddish.

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(9) Weal mark on (Lt.) buttock verticle - 4" x 1" reddish.

Left axillary artery and vein were cut off and the death was caused due to shock as a result of extensive haemorrhage caused by these injuries.

8.1. Dr. Kantilal M. Parmar who had performed the post-mortem examination, in his deposition Ex.26, referring to these injuries, has stated that all of them were ante-mortem and that the humerus, radius and ulna bones of left hand had broken. In paragraph 5 of his deposition he has stated that the stomach of the deceased was found empty and his bladder was also empty. The death, according to him, had occurred 5 to 6 hours after the taking of the last meal. In paragraph 6 of his deposition, he stated that the injuries Nos. 1 to 5 were possible by a weapon like muddamal dharias, while injuries Nos. 6 to 9 were possible by a hard and blunt substance like muddamal sticks. According to him, the injuries numbers 1, 2 and 3 were grievous injuries and injury No.4 itself was sufficient in ordinary course of nature to cause death. Even injury No.2 would cause death if proper treatment was not given. In his cross-examination he reiterated paragraph 14 of his deposition that the death could have been caused about 14 to 16 hours before he performed the post-mortem examination. In his cross-examination, he had stated that after the death, the muscles relaxation continued for one or two hours. He was at that point of time confronted with the opinion in Modi''s Medical Jurisprudence & Toxicology, Twenty-Second Edition, in which it was opined that: this stage lasts from 3 to 6 hours, but the average was two or three hours. One hour fiftyone minutes was the average period of duration as found by Mackenze. No other opinion was put to the doctor either from Modi''s or from Parikh''s book, which were referred to by the trial Court, despite the fact that he had referred to the state of stomach being empty, intestines having gas, and the state of rigor mortis on the body and despite his asserting in the cross-examination that the death may have occurred about 14 to 16 hours prior to his doing the post-mortem examination between 6.15 A.M and 8 A.M. on the morning of 29th May, 1990. The medical evidence on the time of death both oral and documentary indicates that death of Hariji had occurred after 5 to 6 hours after consuming his last meals. The trial Court has brushed aside the evidence of three eye-witnesses merely on the ground that because the stomach of the deceased was found empty and there was gas in the intestines, the death must have occurred about 24 hours prior to the making of the post-mortem examination i.e. somewhere in the morning of 24th May, 1990, after the deceased passed his stools.

8.2. The food passes from the mouth down the oesophagus to the stomach, from the stomach it proceeds to the duodenum, jejunum and ileum (small intestine); and the unabsorbed residue passes via the caecum, ascending, traverse, descending and sigmoid colons (large intestine) to the rectum and anal canal. The emptying of stomach depends on various factors such as consistency of food, motility of the stomach, osmotic pressure of the stomach contents, quantity of food in the duodenum, surroundings in which food is taken, emotional

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factors and residual variations. A meal containing carbohydrates generally leaves the stomach early and the one containing protein, later. The emptying of stomach thus, takes place anywhere between 3 to 6 hours. When the doctor found Hariji''s stomach empty, he opined that the meals must have been taken 5 to 6 hours before Hariji died. The contention on behalf of the accused was that from intestines nothing was found. The postmortem note indicates that there was gas in the small and the large intestines. In the cross-examination, the doctor has stated that there was no faecal matter in the large intestine. According to the doctor''s opinion, after passing from the stomach the food remains in the small intestine for about 4 to 5 hours and thereafter in the large intestines for 3 to 4 hours. The faecal matter and waste are dealt with in the large intestines. The doctor, keeping in view all his observations on the examination of the dead-body of Hariji, had categorically opined that his death has occurred 5 to 6 hours after he had consumed his last meal. This expert opinion on the basis of the data which he was having, cannot be doubted on the basis that faecal matter has not found in the large intestines and the stomach was empty and that the death may have taken place 24 hours prior to the making of the post-mortem examination. There was no reason for the doctor to give any false time of death. In the cross-examination, he was generally questioned as to the manner in which the food passes through stomach, the intestine and it''s duration, but he was not confronted specifically on the question as to whether there was any material in the small intestine besides gas. Merely from the fact that in postmortem notes, the word gas is written against the item of small intestine, it cannot be inferred that there was nothing else therein especially in view of the fact that doctor was not questioned specifically on that aspect while having clearly opined that the death must have taken place 5 to 6 hours after the taking of the meal because the stomach was empty.

8.3. The time of death cannot be viewed with any mathematical accuracy. As held by the Supreme Court in Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra, , stomach contents cannot determine with precision, the time of death and there are imponderables which make the digestive testimony inconclusive and therefore, insufficient to contradict positive evidence, if any, about the time of death. To impute exactitude to a medical statement oblivious to variables noticed by experts and changes in dietary habits is to be unfair to science. As held by the Supreme Court in Tanviben Pankaj Kumar Divetia Vs. State of Gujarat, at page 179, in the absence of any convincing evidence that the doctor holding post-mortem examination had deliberately given a wrong report, his evidence is not liable to be discarded. Where there is positive direct evidence about the time of occurrence, it would be wrong to make conjectures about such time on the basis of the presence of faecal matter in the intestines and come to the conclusion that the deceased would normally have evacuated early in the morning. As held by the Supreme Court in Sheo Darshan Vs. State of U.P., , even the presence of faecal matter in the intestines would not be conclusive. In the present case, the fact that the stomach of the deceased was empty, lends

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assurance to the prosecution version that the occurrence took place at around 4.45 P.M because it has come in evidence that he had taken his meal at noon time on that day. Even in the case of Masji Tato Rawool and Others Vs. State of Maharashtra, , it was held by the Supreme Court that the contents of the stomach found at the time of postmortem are not a safe guide to determine the time of the incident. It was also observed that it was not proper and fair to a medical witness to discard his evidence by referring to passages of experts on medical jurisprudence without bringing the reference to the notice of the witness. In Abdul Razaq Vs. Nanhay, reported in 1984 (Suppl.) SCC 15, where the stomach of the deceased was found empty as revealed by post-mortem report, it was held that inference that incident took place early in the morning would be a pure speculation.

8.4. The direct evidence of Dr. Kantilal M Parmar is that Hariji must have taken his meals 5 to 6 hours prior to his death. On the question of the existence of rigor mortis also the doctor was not specifically asked as to how he could opine that the death took place after 5 to 6 hours after the meals were consumed, in relation to the state of rigor mortis, which he noticed. The state of rigor mortis and the state of contents of stomach and intestine were all before the doctor and he has been firm in his opinion that the death took place after 5 to 6 hours of Hariji having consumed his last meal. We have no reason to doubt the veracity of this medical evidence. The medical evidence therefore on the question of time of death supports the prosecution version that Hariji was killed around 4.45 P.M on 28.5.1990. The evidence discloses that he had his last meal around 12 noon on 28.5.90. Therefore, by the evening the food would have gone from stomach to the duodenum, jejunum and illinium (small intestine) where it will remain for nearly 3 to 4 hours. The doctor has in his cross-examination stated that the death must have occurred between 14 to 16 hours before the post-mortem examination, which again coincides with the time of occurrence of death given by the prosecution witnesses. The stomach being empty or the large intestine not having any faecal matter would not falsify the positive evidence on the question of time of death. Therefore, the evidence of eye-witnesses as regards the time of occurrence of the incident and of the doctor as regards the time of death, cannot be discarded merely on a theoretical consideration of the process of digestion of food.

9. This takes us to the oral evidence of the eye-witnesses. The eye-witnesses were related to the deceased and therefore it was submitted that they were interested witnesses. The term "interested" postulates that the witness must have some direct interest in having the accused somhow or the other convicted due to some animus or other reason. A close relative who is a natural witness, cannot be regarded as an interested witness. The word "related" is not equivalent to "interested". Close relationship of witness to the deceased would be no ground for rejecting his testimony, if it is otherwise reliable. In fact a close relative would normally not spare the real assailant and falsely implicate an innocent one. As held by the Supreme Court in Dalipsingh Vs. State of Punjab,

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reported in 1953 S.C 364, ordinarily a close relative would be the last person to screen the real culprit and falsely implicate an innocent person and hence, the mere fact of relationship far from being the foundation for criticising of the evidence, is often a sheer guarantee of truth. We are therefore not prepared to discard the testimony of the eye-witnesses simply because they are relatives. Their presence near about the scene of the offence was quite natural.

9.1. The field of six survey numbers which are referred to by witness Manuji admeasuring 22 bigas, belong to these brothers and there was no hedge in between those survey numbers. The deceased Hariji owns in S.No. 1720, the tube-well from which he was supplying water to the surrounding lands on payment. There was a hedge between survey No. 1720 and 1719 belonging to the accused No.3 Jivanji. Though it was not mentioned in the panchnama, there was a clear reference to existence of such hedge, in the deposition of an independent witness, Circle Inspector Kashiram Patel, who has stated that there was a hedge between these two survey numbers.

9.2. Manuji in his deposition at Ex.35 has stated that on 27.5.1990 while he was at his house, he come to know in the evening that accused No.3 Jivanji alongwith the accused No.7 Ranjitsinh and the accused No.1 Manaji had broken the hedge between these two survey numbers. He had thereupon gone to his brother Hariji to advise him not to pick up any quarrel, but Hariji told him to go and see the damage caused to the hedge. This witness then saw the damage. On the next day in the afternoon, he had gone to the field where Hariji had also gone for starting the tube-well. He had seen that Hariji and Ganpatsinh were present near the tube-well. This witness started tethering the cattle and cutting grass. Around 4''O Clock, he heard a commotion and saw Ganpatsinh running. Ranjit who had come soon after he had gone to the field also ran. This witness saw at that time that the accused No.3 Jivanji gave a dharia blow on the head of Hariji on its left side. According to him, alongwith Jivanji, all the other accused persons armed with dharias and sticks were also there. He has named them. He has stated that the accused No.7 Ranjitsinh was having a dharia, the accused No.6 Pravinji Manaji and the accused No.2 Gajaji Chelaji were also having dharias. Accused No.1 Manaji Chelaji, accused No.4 Pratapji Chelaji and accused No.5 Hemtaji Pratapji were all having sticks. He had heard them shout at the time when commotion took place, that Hariji was to be finished. As soon as the accused No.3 Jivanji Chelaji gave the blow, Hariji started running towards the Nalia. All other accused persons thereafter surrounded Hariji and finished him off, meaning thereby killed him. He has stated that he and his son Ranjit and Ganpatsinh were without arms and they ran away due to fear. These accused persons had, after the incident, run away beyond the Nalia. After some time, these three witnesses came there and found that Hariji was lying dead. This witness therefore, went to Visnagar which is about 5 K.M from Kada, in a jeep car and reported the matter at the Police Station, where his complaint Ex.52 was taken down around 6''O Clock. In his lengthy cross-examination some suggestions are made to the effect that Hariji had disputes with some people, but on the material aspects of the

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incident which he had narrated, there is nothing brought out in his cross-examination which would create any doubt as regards the veracity of what he has stated. The complaint Ex.52 on all material particulars corroborates the version of this witness. The complaint was given within a short time after the incident and the part played by all these accused persons in committing the assault and killing Hariji was clearly mentioned. Even the incident of 27.5.1990 about the breaking of the hedge by the accused No.3 - Jivanji Chelaji and his son accused No.7 Ranjitsinh and accused No.1 - Manaji Chelaji, was also mentioned. There is absolutely no reason to doubt the fact that this complaint was given soon after the incident had occurred. The argument that the investigating officer had first gone to the site, inspected everything and then come back to the Police Station for taking down the FIR is purely in the realm of conjectures. The evidence of Manuji Ex.35 is that of natural witness whose presence around the scene of offence was expected. His evidence discloses that on the prior day there was a quarrel because the three accused persons named by him had broken the hedge which was between the field of the accused No.3 and the field of the deceased. Merely because there is no reference to the hedge in the panchnama of the scene of the offence, it cannot be inferred that no such incident occurred. As noted above, there is clear evidence of the existence of the hedge in the evidence of the Circle Inspector. Moreover, since the panchnama was drawn of the scene of offence which was in survey No.1720 and as per the evidence one third hedge was lengthwise broken down on the side of survey No. 1719, that part could not have been recorded in the panchnama of the scene of offence. It will also be noted that the incident regarding breaking of a portion of the hedge had taken place on 27th May, 1990 while the panchnama was drawn on 28.5.1990 of the scene of the offence, which was a field bearing survey No. 1720 where Hariji had been found lying dead near about his tube-well in his own field with multiple injuries.

9.3. Ganpatsinh, son of Hariji in his deposition at Ex.47, after narrating that he and his uncles were having adjoining fields, refers to the incident of 27th May, 1990 when in the evening around 6''O Clock the accused No.3, the accused No.7 and the accused No.1 are said to have broken the hedge between the fields of survey Nos. 1719 and 1720. He has stated that there were abuses given and at that time the accused No.3 Jivanji and others had threatened them. He had therefore gone and told his uncle Manuji who came to the field and asked Hariji not to quarrel over the matter. Manuji had at that time seen the hedge. On the next day he and his father had in the morning gone to the field. This witness had brought fodder to the house and while Hariji remained on the tube-well. At noon time this witness had taken the tiffin for his father. According to him at about 2.45P.M his uncle Manuji had come and after that Ranjit, son of Manuji had also come there after in ten minutes. Manuji and Ranjit were tethering the buffaloes. This witness was attending to cotton crop. At around 4 to 4.15 P.M, he heard a commotion near the tube-well. He and his uncle Manuji started running towards the tube-well where he saw the accused No.3 Jivanji Chelaji, the accused No.1 -

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Manaji Chelaji, the accused No.4 Pratapji Chelaji, the accused No.2 Gajaji Chelaji, the accused No.5 Hemtaji Pratapji, the accused No.6 Pravinji Manaji and the accused No.7 - Ranjitsinh Jivanji who were all armed with weapons. They were armed with dharias and sticks. When he was about 100 ft. away, he saw that the accused No.3 - Jivanji Chelaji gave a dharia blow on the back of the head of his father. His father shouted for help and started running. All the other accused persons thereafter surrounded him and the accused No.7 Ranjitsinh gave a dharia blow on the left hand of his father. The accused No.2 Gajaji and the accused No.6 - Pravinji also gave dharia blows on the left hand of his father. On receiving these blows, his father fell down. The accused No.5 Hemtaji Pratapji, the accused No.4 Pratapji Chelaji and the accused No.1 Manaji Chelaji were also giving stick blows to his father. He has stated that he and the other witnesses were not having weapons and therefore, they stood a little away. After the incident the accused persons had gone towards their own fields. When he, Manuji and Ranjit, son of Manuji came near his father, they had found him dead. He and Ranjit, son of Manuji sat near the deadbody of his father while his uncle Manuji had gone to Visnagar Police Station to lodge the complaint. He had stated that after an hour, Manuji had come there alongwith the Police. In his cross-examination in paragraph 9 he has stated that the hedge which was broken was common. He had seen the hedge being broken. It was broken in the width of one "vhent" and in the length of 50 to 60 ft. on the side of the field of Jivanji. The hedge was of 2 or 3 "vhents". In his cross-examination, he has stated that he had taken the tiffin at 12''O Clock noon for his father, which consisted of one and a half "rotla", vegetable and buttermilk. He has reiterated in his cross-examination that he had seen the incident from a distance of about 100 ft. In his cross-examination, nothing is brought out which would throw any doubt on his positive version as regards all these accused persons having given blows by dharias and sticks to Hariji on 28.5.1990, which resulted in his death.

9.4. Ranjit Manuji in his deposition at Ex.48 has also given the particulars regarding the attack by all these accused persons with dharias and sticks on Hariji on 28.5.1990 in the evening. He has also named all these accused persons and described the weapons which were held by them. He had also heard the accused No.3 Jivanji and the accused No.4 Pratapji shouting to finish off Hariji during the assault. He had stated the accused Nos. 2, 3, 6 and 7 were having dharias while the accused No.1, 4 and 5 were having sticks. He also has stated that the accused No.3 Jivanji had given a dharia blow on the head of Hariji, who started shouting, and, when he started running, the other accused surrounded him and given dharia blows on his left shoulder and head and also stick blows. This witness was also present alongwith his father in the field and there is no reason to doubt his version, which supports the prosecution case on all material particulars.

10. The evidence of all the three eye-witnesses clearly establishes that there was some quarrel on 27th May, 1990 in the evening over the breaking of a portion of the hedge on the side of the field of accused No.3 Jivanji i.e. survey No. 1719

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and on that quarrel happening, the informant Manuji came there and soothed Hariji and told him not to pick up quarrel. However, on the next day with a view to take revenge, all these accused persons fully armed with lethal weapons went to the field of Hariji bearing survey No.1720 around 4.15 in the evening and abused him. At that time Hariji was unarmed. The accused No.3 Jivanji gave a dharia blow on his head and when he started running, all other accused persons pounced on him with dharias and sticks causing serious wounds to him on his left shoulder and arm and other parts of the body, which are referred to hereinabove. This resulted in extensive haemorrhage causing death of Hariji, on the spot. The version of all these eye-witnesses is fully supported by the medical evidence as regards the injuries which were caused to Hariji and the weapons which were used in the commission of the offence by all these accused persons. Merely because Hariji had some disputes with others in the past, it cannot be said that all these eye witnesses had cooked up a false case against these accused persons. The incident of 27th May, 1990 gave sufficient motive to these accused persons to come fully armed on the next day in an aggression, which resulted in death of Hariji. This clearly shows that there was pre-meditation, otherwise there was no need for all seven of them to go to Hariji''s field, four armed with dharias and three armed with sticks. The concerted and pre-meditated manner in which all these accused persons had gone to Hariji''s field leave no scope for their invoking Exception 4 to Section 300 of the IPC. Since all these seven accused persons had gone to Hariji''s place fully prepared with lethal arms and attacked him in a concerted and pre-meditated manner causing serious wounds, it is clear that the common object of all these persons was to kill Hariji. The way in which they carried out their plan clearly indicates that they even shared the common intention of each of them to kill Hariji.The prosecution has therefore, satisfactorily established that all these accused persons forming an unlawful assembly and also sharing common intention, attacked Hariji with an intention to kill him and caused his death.

11. The learned Counsel submitted that the accused No.7 Ranjitsinh was falsely implicated because he was on duty on the day of the incident as a watchman. The accused No.7 Ranjitsinh, son of Jivanji Chelaji has put up an alibi in a half-hearted manner. The muster-roll was summoned, but when it was produced at mark 50/1, no attempt was made to prove it. Even if one looks at the muster-roll, it only shows that the accused No.7 Ranjitsinh was present on duty on 28.5.1990. It transpires that he was a daily wager and his timings of duty did not appear anywhere. This muster-roll was maintained by the Sub-Division and it clearly mentions that it is for daily wagers. The nature of work was of laying drainage line in Sami Harij group of villages. There was other watchman also engaged for the same work as was done by the accused No.7, which fact has emerged in the evidence including in the deposition of the Sarpanch, who has been examined as a defence witness. Neither that defence witness Mafabhai Lallubhai Desai, nor the muster-roll Ex.50/1 rule out the possibility of the accused No.7 Ranjitsinh Jivanji of being around the scene of the incident at the

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time when it is said to have occurred i.e. around 4.15 P.M on 28.5.1990. The burden of proving alibi is entirely on the accused and strict proof is required for establishing an alibi. The word alibi means "elsewhere" and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. u/s 11 of the Indian Evidence Act, dealing with facts not otherwise relevant becoming relevant in certain contexts, it is inter-alia provided that facts not otherwise relevant are relevant if they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable. Therefore, once the prosecution succeeds in discharging the burden, it is incumbent on the accused who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the Court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. If the evidence to be adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would no doubt be entitled to the benefit of that reasonable doubt. As held by the Supreme Court in Binay Kumar Singh and others Vs. State of Bihar, , it would be a sound proposition to be laid down in this context that the burden on the accused is rather heavy and that strict proof is required for establishing the plea of alibi. The official record namely the muster-roll, which is sought to be relied upon, does not take away the possibility of the accused No.7 Ranjitsinh being around the scene of the occurrence, which fact is established by positive evidence of three eye-witnesses. The accused No.7 - Ranjitsinh has not been able to exclude his presence with any certainty from the place of the occurrence at the time when it is said to have taken place.

11.1. In Rajesh Kumar Vs. Dharamvir and others, , the Supreme Court reiterated that a plea of alibi must be proved with absolute certainty completely excluding presence of the accused at the time and place where the incident took place. In Vijayee Singh and others Vs. State of U.P., , the Supreme Court in paragraph 33 of its judgement, held that where the accused sets up alibi, the burden entirely lies on him and that plea of alibi does not come within the meaning of general exceptions or special exceptions in the penal code. The circumstances leading to alibi are within the knowledge of the accused setting it up, and, as provided u/s 106 of the Evidence Act, he has to establish the same satisfactorily. Judged in that context we are of the view that neither the testimony of the defence witness No.2 Sarpanch Mafabhai Lallubhai Desai, nor does the muster-roll and much less the suggestions in the cross-examination of the investigating officer substantiate the plea of alibi raised by the accused No.7 - Ranjitsinh. Therefore, the contention that an innocent persons is being involved by the three eye-witnesses and therefore their version should be discarded, is wholly misconceived.

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11.2. In view of what we have said above, the decisions cited on behalf of the accused persons by the learned Counsel reported in Kanbi Purshottam Ladha Vs. State of Gujarat, and Raghunandan Vs. State of U.P., , cannot assist the accused persons.

12. There is also no substance in the contention that the story of assault is inherently improbable because most of the injuries were on the left side of Hariji''s body. It was submitted that if all the accused persons had collectively pounced on the deceased, there would have been injuries on all sides of his body. As noted above, there were injuries on the head, on the buttock, on the back, on the stomach and three grievous injuries on the left hand including the shoulder. It is evident that on receiving blows on the head and these persons pouncing on him, the deceased Hariji had fallen down and they kept on inflicting blows even after he had fallen down. There is nothing improbable in the version regarding all the accused having given blows to Hariji, as narrated by these three eye-witnesses, which gets support from the medical evidence.

13. The contention that the conduct of the eye-witnesses in not informing the other relatives is unnatural, is without any substance. All the three witnesses conducted themselves in a normal way after having seen Hariji being assaulted by these accused persons. Manuji rightly proceeded to the Police Station at Visnagar, which was hardly 5 K.M away, leaving behind his son Ranjit and son of the deceased - Ganpatsinh near the body of the deceased and there is absolutely nothing unnatural about this conduct. It was not necessary immediately to inform Hariji''s widow that her husband was killed. The FIR was lodged within an hour and a half of the incident, narrating the part played by all these accused persons. It was more essential for Manuji who was the brother of the deceased, to proceed to Visnagar to inform the Police, rather than to proceed to Hariji''s house to inform his widow about the death of Hariji.

14. The contention that the prosecution was not fair because according to the inspector there were blood stains on one dharia while according to the FSL report there were blood stains on other weapons also, is misconceived. The examination of a scientific expert is more accurate when it is done with the aid of scientific instruments and merely from the fact that blood stains were not noticed by the inspector on some other weapons, it cannot be said that the investigation has been unfair.

15. The contention that the incident must have taken place elsewhere and the body is thrown in the field of Hariji, is also devoid of any substance. This contention was raised on the ground that mud and blood stains were found on the clothes of Hariji. There was a tube-well in the field and if mud stains were also found on the body, it was but natural. Merely because the blood group of Hariji could not be ascertained from the sample of the earth which was forwarded for analysis, one cannot jump to the conclusion that Hariji could not have been killed at the place where his body was found.

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16. The final contention which was raised, while the judgement was being dictated, that the statements of the accused persons were not adequately recorded u/s 313 of the Cr.P.C is also without any substance. On going through the statements which are recorded u/s 313 of the Cr.P.C, it is clear that all the important and substantial aspects of the matters were put to the accused persons. The contents of the complaint were put to them and then they were also asked to explain as to whether they had anything to say about the evidence of these eye-witnesses, which on all material particulars was the same as was stated in the complaint. Their attention was also drawn to the other parts of the evidence. It is clear from the record that the accused had well understood all the circumstances appearing against them and had met them squarely even in the cross-examination of various witnesses. It is clear that there was no circumstance which escaped the attention of any of these accused persons. There is no prejudice caused to the accused persons at all by the manner of the recording of their statements u/s 313 of the Cr.P.C.

17. In view of what we have held above, we find the accused Nos. 3 to 7 guilty of the offence u/s 302 read with Sections 149 and 34 and Section 447 read with Sections 149 and 34 of the Indian Penal Code. Since we propose to impose the minimum of life sentence awardable for the offence of murder and we do not propose to impose any separate sentence for the offence u/s 447 of the Indian Penal Code, it will not be necessary to hear these accused persons on the question of sentence and we therefore, pass the following order:

(a) Appeal stands abated so far as the original accused No.1 - Chavda Manaji Chelaji and accused No.2 - Chavda Gajaji Chelaji are concerned.

(b) The acquittal of the accused No.3 Chavda Jivanji Chelaji, accused No.4 Chavda Pratapji Chelaji, accused No.5 Chavda Hematji Pratapji, accused No.6 Chavda Pravinji Manaji and accused No.7 Chavda Ranjitsinh Jivanji is hereby set aside and they are all convicted for the offence u/s 302 read with Section 149 and 34 of the Indian Penal Code, and also for the offence u/s 447 read with Section 149 and 34 of the Indian Penal Code; and each one of these accused persons is sentenced to suffer imprisonment for life and pay fine of Rs. 1,000 each, in default to undergo rigorous imprisonment for a further period of three months, for the offence u/s 302 read with Sections 149 and 34 of the I.P.C.

(c) No separate sentence is imposed for the offence u/s 447 read with Section 149 and 34 of the Indian Penal Code, in view of the above sentence imposed for the offence u/s 302 read with Sections 149 and 34 of the Indian Penal Code.The appeal is accordingly allowed against the accused Nos. 3 to 7.

(d) The bail of the accused Nos. 3 to 7 stands cancelled and they should be taken in custody forthwith.

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