

(1999) 07 GUJ CK 0020

In the Gujarat High Court

Case No : Criminal Appeal No's. 360 and 361 of 1992

State of Gujarat

APPELLANT

Vs

Dharsing T. Vaghela and Others

RESPONDENT

Date of Decision : 06-07-1999

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 304 Part II, 34

Citation : (2000) 1 GLR 313

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

Bench : Division Bench

Advocate : D.N. Joshi, APP in Criminal Appeal Nos. 360 and 361 of 1992, for the Appellant; S.V. Raju, for Respondent Nos. 1, 2, 4 in Criminal Appeal Nos. 360 and 361 of 1992, for the Respondent

Judgement

R.K. Abichandani, J.—These two appeals are filed by the State against the judgment and order dated 9.9.1991 of the Addl. Sessions Judge, Banaskantha at Palanpur in Sessions Case No. 10 of 1988. The Criminal Appeal No. 360 of 1992 is for enhancement of the sentence imposed on the original accused no. 1- Dharsing Tikubha Vaghela for offence punishable u/s 304 Part II of the IPC and the other appeal being Criminal Appeal No. 361 of 1992 is against the acquittal of the original accused no. 1 Dharsing Tikubha Vaghela for offence punishable u/s 302 of the IPC and the acquittal of accused nos. 2, 3 and 4 i.e. Jenubha Tikubha, Hematsing Kubersing and Tikubha Kubersingh for offences punishable u/s 302 read with section 34 of IPC.

2. The prosecution version is that on 17.8.1987, which was the day following the day of Gokulashtami, a festival was being celebrated in the honour of Lord Krishna by one Vinubha Cheharsing who had invited young girls of the community for dinner in the evening. This function was arranged by Vinubha Cheharsing in his "Madh" (a "Madh" is an upper storey over the entrance to a street). Inside the Madh, there was an open chowk and beyond that open chowk was the house of Vinubha Cheharsing. In that open chowk, young girls were

playing garba. The incident is said to have occurred between 7.00 and 8.00 p.m. At that time, Manharba and Kevdaba, daughters of Pansing Pratapsing who were invited were also participating in playing garba. There was one Mayaba, daughter of Babaji Makamsing who was also playing garba with them and other girls. At that time, some quarrel took place between Manharba and Mayaba. Mayaba was related to the accused persons. At that time, the accused no. 2 Jenubha gave a slap to Manharba while taking side of Mayaba. Therefore, Kevadaba i.e. the sister of Manharba went and complained to their father Pansing Pratapsing whose house was nearby the locality. Pansing Pratapsing, therefore, came to the site and chided the accused no. 2 for having slapped Manharba who was a girl of about 18 years of age. According to the prosecution, the accused persons, therefore, became furious over Pansing and abused and attacked Pansing. Accused nos. 2, 3 and 4 caught hold of Pansing outside the entrance of the Madh and the accused no. 4 Tikubha who is the father of accused no. 1 Dharsing and accused no. 2 Jenubha shouted that Pansing should be killed. Thereupon, the accused no. 1- Dharsing took out a knife from his waist and gave a blow to Pansing Pratapsing on his chest. Pansing fell down. The witness Vinubha Cheharsing who was near the entrance of the Madh and had seen the incident, as per the prosecution version, immediately went near Pansing who had fallen down. At that time, Pansing's wife Hetba also came from her house. Some other persons who were in the Madh also came out. The injured was lifted and carried to be placed on an "otla" of his brother Shantubha's house. From there, he was taken to the hospital at Thara. From Thara, he was taken to Radhanpur hospital and from Radhanpur, he was carried to the Civil Hospital, Ahmedabad where he died in the morning of 18.8.1987 at 6.15. According to the prosecution, immediately after receiving the knife blow on his chest, the injured Pansing had disclosed the names of the assailants and the part played by them, to his wife Hetba and the witness Chakubha and others who were present. The prosecution case is that Manharba and Vinubha had witnessed the incident. The prosecution relied upon the history which was recorded by Dr. V.R. Dabhi in the case paper at Ex. 23 in which also, the injured Pansing is said to have narrated the incident involving the accused nos. 1, 2 and 3. The prosecution also relied upon the FIR said to have been given by the injured at Radhanpur hospital at around 1.00 o'clock in the night in which the prosecution version reflects against all these accused persons.

3. The defence of the accused persons was of total denial. The trial court held that the prosecution has established that the accused no. 1 Dharsing had caused fatal injury to Pansing by a knife. It was, however, held that the injury could not be said to have been caused with the intention of causing death of Pansing, but it was caused with the knowledge that it was likely to cause his death and, therefore, the accused no. 1 -Dharsing had committed an offence u/s 304 Part II of the IPC. As regards the other three accused persons, the trial court held that it was not proved beyond reasonable doubt that they had shared the common intention of the accused no. 1. The accused nos. 2,3 and 4 were, therefore,

acquitted of the offences levelled against them. While acquitting the accused no. 1- Dharsing of offence u/s 302 of the IPC and convicting him of the offence u/s 304 Part II of the IPC, the trial court sentenced him to undergo Rigorous Imprisonment for a period of five years with a fine of Rs. 300/-, in default, to undergo S.I. for one month.

4. The learned APP contended that the evidence of eye witnesses Manharba and Vinubha coupled with the evidence of supporting witnesses Hetba and Chakubha proved beyond any shadow of doubt that all the accused had acted in a concerted manner and in the process, while the accused nos. 2, 3 and 4 held Pansing and accused no. 4 who is father of accused nos. 1 and 2 and brother of accused no. 3, had shouted to finish him off, the accused no. 1- Dharsing gave a blow from a weapon which is described as a knife which had a blade nearly 7" long and a handle of 4". That blow was given on the chest and it pierced the body upto nearly 4" deep, causing haemorrhage and other internal injuries which resulted in the death of Pansing. It was argued that the history recorded by Dr. V.R. Dabhi was a reliable piece of evidence and was an authentic dying declaration in which Pansing is said to have given the version of the attack by these accused persons. That dying declaration clearly refers to the part played by the accused nos. 1,2 and 3. While the accused nos. 2 and 3 held Pansing, accused no. 1 gave a knife blow to him. In the oral dying declaration before the witnesses, the names of all the four accused persons were given by Pansing and, therefore, even if the accused no. 4 was not specifically referred to in the dying declaration recorded by Dr. V.R. Dabhi, the evidentiary value of other witnesses which showed that even the accused no. 4 had played a vital role could not be diminished. The learned APP relied upon the decision of the Supreme Court in Abdul Majid Abdul Rahman Vs. State of Gujarat, in which the Supreme Court held that the Doctor is the best person to opine about the fitness of the deceased to make the statement and that where the Doctor found that life was ebbing fast in the patient and that there was no time to call the police or a Magistrate, he was justified, indeed duty bound to record the dying declaration of the deceased.

The learned APP further argued that on evaluation of totality of the facts and circumstances which are established by the prosecution, the offence of murder is clearly established to have been committed by these accused persons. According to him, the accused nos. 2,3 and 4 shared the common intention with the accused no. 1 of intentionally causing death of Pansing by giving a knife blow on his chest and, therefore, the other accused persons are also liable for the offence of murder u/s 302 read with section 34 of the IPC. He contended that all these three accused persons participated in the crime along with the accused no. 1 and the act of causing death of Pansing was committed in furtherance of the common intention of all the accused persons. He, therefore, submitted that the trial court has committed an error in convicting the accused no. 1 only for offence u/s 304 Part II of the IPC and acquitting him for the offence u/s 302 of the IPC as also in acquitting the three other accused persons for offence u/s 302 read with section 34 of the IPC.

5. The learned Counsel appearing for the original accused nos. 1,2 and 4 who are the respondents nos. 1,2 and 4 in Criminal Appeal No. 361 of 1992, has contended that the so-called eye witnesses Manharba and Vinubha Cheharsing could not have witnessed the incident. He argued that according to Vinubha, his statement was not recorded by the police which fact was borne out from other evidence which showed that Vinubhai could not have been available for recording of the statement by the police because after Pansing was discharged from Radhanpur hospital at around 1.55 a.m., on 18.8.1987, he had gone along with others taking Pansing to the Civil Hospital, Ahmedabad. It was contended that if the police statement of Vinubha Cheharbha was not recorded as stated by him, then the police had obviously concocted his statement. He submitted that the fact that Vinubha's statement could not have been recorded created a doubt about his having witnessed the incident. In any event, his version appearing for the first time while giving the deposition after four years from the date of the incident cannot be accepted. As regards witness Manharba, it was contended that she cannot be relied upon as she had improved her version as regards the place where the incident had occurred. It was submitted that it appeared from her police version that the incident had taken place inside the Madh while in the Court, she had stated that the incident had taken place outside the Madh and, therefore, her evidence should be discarded. The Counsel further argued that the history given by Pansing which is described as a dying declaration Ex. 23 taken down by Dr. V.R. Dabhi was not consistent with the dying declaration recorded by the Executive Magistrate. He submitted that in the dying declaration which was recorded by the Deputy Mamlatdar-cum- Executive Magistrate at Ex. 19, he gave a version which was different from the one which reflected in Ex. 23 recorded by Dr. V.R. Dabhi. In the dying declaration at Ex. 19, it was stated that the accused no. 2 Jhenio and his uncle Hemla i.e. accused no. 3 had caught hold of Pansing and he was given a knife blow. He had stated that these two persons had caught hold of and Jhenio i.e. the accused no. 2 gave a knife blow. He thereafter stated that Jhenia had hit him with a dharia and his uncle Hemla had held him. This dying declaration is said to have been recorded between 11.40 p.m. and 12.00 midnight on 17.8.1987. Relying upon the decision of the Supreme Court in Smt. Kamla Vs. State of Punjab, , the Counsel argued that when there is more than one dying declaration and there is inconsistency in them, no conviction can be based on such dying declarations. The Counsel also relied upon the decision of the Supreme Court in State of Gujarat Vs. Khumansingh Karsan Singh and others, , in support of his contention that conviction cannot be based on inconsistent dying declarations. The Counsel, therefore, contended that when the presence of the so-called eye witnesses was doubtful and the dying declarations were inconsistent, the benefit of doubt must go to the accused persons. He then contended that if the death of Pansing is held to have been caused by a knife blow given by the accused no. 1- Dharsing, then since it was a single blow, no intention to kill could be attributed to him as held by the trial court and at the most, the knowledge of the injury likely to result in death could be attributed relegating his case to section 304 Part II of the IPC. He submitted that, in any

event, the case fell in exception 4 to section 300 of the IPC, since the incident can be said to have occurred in a sudden fight in a heat of passion and that there was nothing to show that the accused no. 1- Dharsing had acted in any unusual or cruel manner. He further argued that the prosecution has failed to establish that the other accused persons had shared the common intention to kill with the accused no. 1. He submitted that the accused no. 1 had taken out a knife from his waist. Therefore, the other accused persons may not be knowing about his possessing the knife. Hence, they could not be attributed the common intention of causing death of Pansing by giving a knife blow even if it is held that the accused no. 1 had given such a blow. He submitted that in any event, none of these accused could be held guilty of offence u/s 302 of the IPC.

6. We may take a note of the fact that the notice of the appeal which was reissued had returned unserved so far as the accused no. 3- Hematsing Kubersing Vaghela is concerned with a report that he had died. The PSI Radhanpur, by his report dated 19.4.1999, addressed to the Court Registry, as regards the service of notice, has reported that while the original accused nos. 1,2 and 4 were served with the notices, it was found that the accused no. 3 had died and his death certificate was forwarded. That certificate dated 19.4.1999 which is taken on record is issued by Talati-cum-Mantri of village Panchayat Vada. It is certified therein that Vaghela Hematsing Kubersing of Village Vada has died in the year 1996. The learned APP also states that he is also informed that the original accused no. 3- Hematsing Kubersing Vaghela who is respondent no. 3 in the Criminal Appeal No. 361 of 1992 has passed away. Obviously, therefore, the appeal has finally abated so far as the original accused no. 3 Hematsing Kubersing Vaghela is concerned.

7. The medical evidence clearly establishes that Pansing died as a result of the injury caused to him by a knife blow and that he died at 6.15 p.m. on 18.8.1987 in the Civil Hospital, Ahmedabad. Initially, soon after the incident, he was carried to the Primary Health Centre at Thara. According to Dr. Pareshbhai Patel, P.W. 5, Pansing Pratapsing was brought to the Primary Health Centre, Thara on 17.8.1987 and he had noted a stab wound on his chest below the left nipple which was deep upto vital organs. He advised the patient to be carried to Radhanpur Referral Hospital and had given a transfer chit to that effect which is at Ex. 21. The distance between Thara and Radhanpur is 28 k. ms. He had given a letter in which it was noted that the patient was discharged at 10.30 p.m. for being taken to the Radhanpur hospital. At Radhanpur Referral Hospital, the patient was received by Dr. Vijay Ratubhai Dabhi, who in his deposition at Ex. 20 has stated that Pansing Pratapsing was brought to the hospital at 11.30 p.m. At that time, he had examined Pansing who was conscious. He had asked the name of the patient and other particulars. According to him, since the condition of the patient was serious, he had asked about the history of the injury and at that time, whatever was stated by Pansing was noted down by him in his own words in the case papers. He too had noted the stab wound on the chest of Pansing which was 3" x 1/4" to 3/4" cavity deep in the stomach from which the internal

organs were visible. As the injury was of a serious nature and the condition of the patient was poor, he had advised him to be taken to the Civil Hospital, Ahmedabad. He referred the patient to the Civil Hospital, Ahmedabad on 18.8.1987 at about 1.55 a.m. and issued the certificate Ex. 22. The case paper in which the history of the injury is said to have been given by Pansing is at Ex. 23. According to this witness, the Deputy Mamlatdar had come and recorded the dying declaration of the patient which is at Ex. 19 and he had put his endorsement below it. According to this doctor, the injury was possible by a sharp cutting instrument like a knife, article no. 8 which was shown to him. In the medical case paper which is at Ex. 24, it is recorded that Pansing was admitted in the hospital at 11.30 p.m. on 17.8.1987 and that he was discharged at 1.55 a.m. on 18.8.1987. This document records the condition of Pansing at 11.40 p.m. on 17.8.1987 and it was recorded that at that time, he was conscious, but restless. His skin was cold, he was having perspiration; his radial pulse was not palpable and his B.P. was not recordable. It is also written that his tongue was dry and he had giddiness. At 0.15 hours on 18.8.1987, there is an endorsement about his general condition being poor. Thereafter, there is a writing " Dying Declaration taken, 23.40 to 24.00 by Mamlatar". Thereafter there is time noted 0.45 a.m. against which it is stated that his general condition had improved, and his pulse and B.P. are mentioned. It appears from the medical papers produced by Dr. J.K. Bhatt, in his deposition Ex. 25 at Ex. 26 and 27 that Pansing was brought to the Civil Hospital at Ahmedabad on 18.8.1987 at about 5.45 a.m. He was urgently treated, but he died at 6.15 a.m. The P.M. notes Ex. 29 describe the external and internal injuries. In column no. 17, the following injuries were noted:-

(1) A stab wound on mid clavicular line, 22 cm below mid of clavicle, 4 cm left to midline of body at level of Xyphoid Sterna. Wound is oblique, upper end is ecchymosed and lower end edges are sharply cut. Wound is 2.5 cm sized with lower end tapering for 5.5 cm. Omentum tissue coming out of wound.

(2) Venesection done on right ankle joint.

(3) Abrasion on back of left elbow 1 x 0.5 cm size.

These injuries are described as antemortem injuries.

In column no. 20, it is recorded that lower two ribs were cut on the left side for 2.5 cm under wound no. 1. Ecchymosis was noted on posterior part of sternum.

On internal examination, it was found that " the external wound no. 1 of column no. 17 was passing through the skin, subcutaneous tissue and lower two ribs on left side for 2.5 cm., and then passing to anterior wall of stomach and posterior wall of stomach near lesser curvature of stomach, then passing through liver. Wound is passing backward, medially and upwards. The track of wound is 10 cm long. Stomach contains 100 cc of blood. Abdominal cavity contains 500 cc of blood clots and 1.5 liter of blood." The cause of death was shown as " death occurring due to shock, due to haemorrhage as a result of stab injury". The

medical evidence, thus, satisfactorily establishes that the death of Pansing was caused because of the knife blow given on his chest which caused the above external and internal injuries resulting in shock due to the stab injury and extensive haemorrhage.

Dr. Gaurang Kothari, in his deposition at Ex. 28 has clearly opined that the injury caused to Pansing was possible by a knife blow and that such injury was in the ordinary course of nature, sufficient to cause death. He has stated that the blade of the knife must have gone at least 10 cm inside the chest. He has also stated that the liver was damaged due to this injury. It is evident from the medical evidence that the injury was caused by a sharp cutting instrument like knife having a long blade and that the blow was so fiercely given that it cut two lower ribs and cut through the anterior and posterior wall of stomach and also liver. The death obviously resulted due to this injury.

7.7.1999:

8. The prosecution witness Manharba in her deposition at Ex. 56 has stated that she knew all the four accused persons. On the day of the incident, there was a religious function arranged for celebrating the day after the Janmashtami day by Vinubha Cheharsing near his house. Vinubha had invited young girls for dinner. She and her younger sister Kevadaba were also invited. One Mayaba who is the cousin sister of the accused persons was also invited. After the dinner, the girls were playing garba in the "chowk" opposite Vinubha's house. There was some exchange of words between this witness and Mayaba, when they were playing garba and at that time, the accused no. 2 Jenubha had given her a slap. This witness had identified the accused no. 2 Jenubha as the person who had slapped her. On being slapped by the accused no. 2, she stopped playing garba and her sister Kevadaba went to call her father Pansing. Manharba came out of the Madh and the accused no. 2 Jhenubha also came out. She has stated that at that time, three other accused persons i.e. accused no. 4 Tikaji, accused no. 3 Hematsing and accused no. 1 Dharsing were also present outside the Madh. She identified all these accused persons in the Court. In the meantime, her sister called their father Pansing who, on coming there, chided the accused no. 2 Jhenubha. Thereupon, all the four accused started abusing her father and on her father objecting to their abuses, the accused no. 2 Jhenubha Tikubha, accused no. 3 Hematsing Kubersing and accused no. 4 Tikubha Kubersing caught hold of him and the accused no.4 Tikaji told the accused no.1 to kill him. The accused no.1 whipped out a knife from his waist and gave a blow to her father. Her father fell down. She and her sister started shouting and, therefore, her mother Hetba and Vinubha Cheharsing came there. The accused persons ran away after the knife blow was given to her father. Dharsing had taken away the knife. After her mother and Vinubha reaching the spot, other persons, namely Vanubha Punjaji, Chakubha and Ninubha also came there. These three were catering the girls for dinner. When her mother asked her father about the incident, he narrated the same in presence of these persons. He was then carried to the "otla" of her uncle

Shantubha's house. Thereafter her uncle Ninubha came and went to bring a jeep car. Shantubha also arrived and followed Ninubha. Thereafter, Ninubha brought the jeep and Shantubha also came back. Her father Pansig was carried in the jeep to hospital and her mother and other 5 to 6 persons had accompanied him to the hospital. Thereafter, Pravinsing and Sarpanch Champaklal had returned late at night from Radhanpur and had said that her father was taken from Radhanpur to Civil Hospital, Ahmedabad. On the next day in the evening, the dead body of her father was brought by her mother and other persons. She has stated that the incident had taken place at about 9.00 p.m. and at that time, the lights were on and that she had properly seen the incident. The main criticism levelled against this witness was that she had changed her version as regards the place of the incident and that her police statement had given an impression that the incident had taken place inside the Madh. This contention is canvassed on the basis that in her police statement, she had not stated that she had come out of the Madh on the road and the accused no. 2 had followed her and that three other accused were standing outside the Madh. This omission is brought out in para 12 of PSI Hirabhai's deposition who has deposed at Ex. 64. The Madh is abutting on the road at the entrance of a small chowk beyond which there is the house of Vinubha. The defence witness Bachubha Chamansing, in his deposition at Ex. 81 has stated that the length of the Madh was about 15" x 20" and beyond that, was a small chowk in front of Vinubha's house. The map of the scene of offence which is at Ex. 32 shows the distance between the spot where the blood stains were found and the entrance of the Madh to be 7" 6". About 6 feet from that spot, there was another spot where the blood stains were noticed. It is not as if in the police statement this witness gave any contrary version to the effect that she had continued to remain inside the Madh. The place where her father Pansing was assaulted was clearly outside the Madh and not only as per the deposition of this witness, but as will be seen, the version of all other witnesses shows that Pansing was lying in the street outside the Madh after having received a knife blow on his chest and it is from there that he was lifted and carried to the "otla" of his brother Shantubha's house. It is obvious that after being slapped by the accused no. 2 Jhenubha and after having withdrawn from the garba, Manharba would not continue to stand there and would come out of the Madh. Her father's house was in the vicinity, about 50 to 60 steps away inside some lane which fell on the street and it is clear that her father on being called by Kevadaba came to that place. This witness has seen the incident and there is absolutely no reason why her version should not be accepted. Her deposition establishes that the accused no. 2 Jhenubha had given her a slap and that when her father was called by her younger sister, he came from his house and chided the accused no. 2 Jhenubha and on this, accused nos. 2,3 and 4 caught hold of him and the accused no. 1 gave a knife blow to him when the accused no. 4 had asked the accused no. 1 to finish him off. The narration of the incident by this witness shows that all the four accused acted in a concerted manner when they attacked Pansing who was questioning the accused no. 2 about his having slapped Manharba. Manharba was about 18 years of age at that

time and it is but natural that her father would get concerned on knowing that she was slapped by the accused no. 2. There is no suggestion that her father Pansing used any force or attacked any of these accused persons. Pansing was unarmed at that time.

9. Hetba, mother of Manharba, in her deposition Ex. 57 has categorically stated that on the day of the incident, her daughter Kevadaba had come at about 9.00 p.m. and told her husband Pansing that there was a quarrel between Manharba and Mayaba and that Manharba was given a slap by the accused no. 2 Jhenubha and that he should come there. Her husband, therefore, accompanied Kevadaba. When she heard some shouts, she also went there. When she reached there, she saw that her husband was lying on the road outside the Madh and he was injured on the left side of his chest and that blood was coming out from the wound. She has stated that at that time, Vinubha Cheharsing and her daughters Manharba and Kevadaba were standing there. This means when this witness reached the spot, Vinubha was already standing there. She has stated that she then asked her husband as to what had happened and he told her that the accused no. 2 Jhenubha had given a slap to Manharba and when he tried to chide him, the accused nos. 2,3 and 4 started abusing him and caught hold of him. The accused no. 1 was standing there and at that time, the accused no. 4 had told the accused no.1 Dharsing to kill him and Dharsing thereupon took out the knife from his waist and gave him a knife blow. Then they lifted Pansing and carried him to the "otla" of her brother-in-law Shantubha's house. She has stated that he was then carried to the hospital. He was first taken to the Radhanpur hospital and thereafter to the Ahmedabad Civil Hospital where he died. She has stated that when she had asked about the incident from her husband, Vinubha, Vanubha, Ninubha Madarsing and Chakubha Madhavsing were present. She has stated that a couple of months prior to this incident, when she had gone to fetch water, the accused no.2 had given a slap to her son and there was some quarrel in connection with which a police complaint was filed against the accused no.2 Jhenubha by her husband, but later on, that complaint was compromised. There is absolutely nothing in her cross examination which would create any doubt regarding the version she has given about her rushing to the spot on hearing the cries and Vinubha Cheharsing and her daughters standing near her husband who had fallen down with a stab blow on his chest and about her husband having narrated the incident to her. It was but natural for her to know as to what had happened and equally natural for her husband to disclose to her as to what had happened. The statement of Pansing before her wife was the first oral dying declaration made by the deceased and others who were standing there which shows that when Pansing came to chide the accused no.2 Jhenubha for having slapped his daughter Manharba, he was greeted with abuses and the accused nos. 2,3 and 4 caught hold of him and the accused no. 4 Tikubha had said that he should be finished off and on that his son, the accused no. 1 Dharsing took out a knife from his waist and dealt a blow on the chest of Pansing who fell down profusely bleeding. There is no valid reason to discard the testimony of this

witness and she clearly corroborates the version of the eye witness Manharba on all material particulars by narrating as to what her husband told her about the involvement of all these accused persons and the manner in which the crime was committed.

10. We now proceed to consider the deposition of Vinubha Cheharsing which is at Ex. 46. The post-janmashtami function was being held in the front of his house in a small "chowk" where the young girls were celebrating the day by playing garba during which there was exchange of words between Manharba and Mayaba. Vinubha has stated that the "Madh" belongs to his family. Inside the "Madh", on both the sides, there are houses and then there is a "chowk" and beyond the "chowk" is his house. The Madh abuts on the road on its western side. The office of the Bhavani Party was also situated on that side of the road. On both the sides of the Bhavani Office, there were streets and the one which was on the south of that building led to the house of the accused persons. The house of the accused persons was about 100 to 150 steps away from that building while the house of Pansing was at about 50 to 60 steps away from the place of the incident. He has stated that there were about 50 families belonging to the Bhavani Party and this witness, deceased Pansing and all the accused persons belong to the same Bhavani Party. Whenever there were celebrations to be made on account of any festival, the members used to meet at the office building of the Bhavani Party. He has then, while narrating the incident, stated that on the day following the day of Gokulashtami, he had held a function at his house and the girls of the community were invited to have dinner in the evening and play garba. Between 7.00 and 8.00 p.m., some girls were having their meals while the others were playing garba. He had invited Pansing's daughters Manharba and Kevadaba for the dinner. He had also invited Mayaba, the daughter of Babaji Makamsing. He has stated that Mayaba was the daughter of the uncle of accused nos. 1 and 2. At that time, while he was standing at the entrance of the Madh, he saw that Manharba and Mayaba had started quarrelling and thereafter, taking side of Mayaba, the accused no. 2 Jhenubha gave a slap to Manharba. Therefore, Manharba's sister Kevadaba went to call her father Pansing who came there. All the four accused whom he had named started abusing Pansing. Pansing told them not to abuse. All the accused thereupon became excited and gave more abuses. Then the accused nos. 2,3 and 4 caught hold of Pansing and the accused no. 4 told the accused no. 1 Dharsing to kill him. The accused no. 1 Dharsing immediately took out a knife from his waist and gave a knife blow to Pansing on his left side of the chest. Pansing fell down. At that time, Ninubha, Hetba i.e. the mother of Manharba, Vanubha Punjaji, Chakubha Madhavsing and others came there. Pansing was lifted and taken to Shantubha's house where he was placed on the "otla". He has stated that Ninubha Pratapsing, the brother of Pansing, asked him as to what had happened and Pansing had narrated the incident. Ninubha then brought the jeep and Pansing was taken to the Primary Health Centre, Thara. This witness and other persons, namely Vanubha Punjaji, Sarpanch Champaklal, Hetba, Kapurba and other persons had accompanied. At

the Primary Health Centre, Thara, the doctor put a bandage, gave an injection and advised that the patient to be removed to the Radhanpur hospital. Pansing was, therefore, taken to Radhanpur hospital in the jeep of Pravinsing Umedsing. He has stated that the doctor treated Pansing and thereafter the PSI had come and recorded the complaint of Pansing. He has stated that when the incident had occurred, there was sufficient light in front of his house because he had made a lighting arrangement due to the function. He has stated that even outside the Madh, there was panchayat light which was on at the time of the incident. The main attack against this witness is that according to him, his police statement was not recorded. This witness has, in the cross examination, consistently stated that his statement was not recorded by the police. It was, therefore, argued that this witness has emerged for the first time while giving his deposition before this Court nearly four years after the incident. There is no suggestion that this witness had any enmity with any of the accused persons. The function was organised by this witness in front of his house. The quarrel between Manharba and Mayaba started while they were playing garba. The presence of this witness near the Madh on the date of the incident, as stated by him, is absolutely natural and normal. As noted above, Hetba, in her deposition, has stated that when she reached the spot where her husband was lying, this witness was already there. Since the quarrel between Manharba and Mayaba started in the function he had arranged, he was naturally concerned to see as to what was happening. There is no reason why this witness should be implicating these accused persons falsely. His presence near the scene of the offence which was just outside the Madh belonging to him and his brother is quite natural and is also clearly borne out from the deposition of Manharba. We are, therefore, not prepared to discard his testimony merely because he has stated that his statement was not recorded by the police. This witness clearly was an eye witness to the incident and he has narrated the incident as he had seen it. From his deposition, it comes out that when Pansing was called from his house, after the accused no. 2 Jhenubha slapped Manharba, on his reaching that place, the accused persons abused him and accused nos. 2,3 and 4 caught hold of him and when the accused no. 4-father of accused no. 1 said that he should be finished, the accused no. 1 took out a knife and dealt a blow on the chest of Pansing which ultimately resulted in his death. This witness clearly supports the prosecution version on all material aspects.

11. Prosecution Witness Chakubha Madhavsing was not an eye witness, but he was catering the girls during the dinner and he had come immediately to the place where Pansing was lying after he received the injury. In his deposition Ex. 52, Chakubha has stated that the incident had occurred around 9.00 p.m. on the day following the day of Gokulashtami. He has stated that while he was catering food to the girls, he had heard the shouts outside the Madh and he as well as Ninubha Madarsing, Vanubha Punjaji rushed out and saw that Pansing was lying on the ground. He has then stated that they asked Pansing as to how was he injured and Pansing told them that he was injured by a knife and that the

accused no. 1 Dharsing had given a knife blow to him. Pansing had also stated at that time that there were three other persons and had named them as accused no. 2 Jhenubha, accused no. 3 Hematsing and accused no. 4 Tikubha. Pansing had also stated that two of them had caught hold of him and Tikubha, i.e. the accused no. 4 had shouted that he should be killed with the knife. Thereafter, this witness and others had carried Pansing to the "otla" of Shantubha's house. This witness has stated that when they reached the place where Pansing was lying, Vinubha Cheharsing, Hetba, Manharba and Kevadaba were already there. He has stated that when he came out of the Madh, he saw that Pansing was lying outside the Madh near the house of Rupsing. From the map, it appears that from the entrance of Rupsing's house, the spot where Pansing was lying was at a distance of ten feet eight inches. There is absolutely nothing brought out in the cross examination of this witness which would create any doubt as to the version given by him about Pansing having narrated the incident. This witness also had no enmity against any of the accused persons and there is no reason as to why he should falsely implicate them. It is clear from his evidence that Pansing named all these four accused persons as the assailants and had stated that the accused nos. 2,3 and 4 caught hold of him while the accused no. 1 Dharsing gave a knife blow at the behest of the accused no. 4 Tikubha. This witness, therefore, clearly supports the prosecution version on the material aspects by narrating as to what Pansing had stated immediately after the injury which was an oral dying declaration of Pansing. Not only individually the deposition of Manharba, Hetba, Vinubha and Chikubha is sufficient to show the role played by the accused persons in the crime, but the cumulative effect clearly establishes beyond any shadow of doubt that when Pansing started chiding the accused no. 2 for his having slapped his daughter Manharba, all the accused started abusing Pansing and the accused nos. 2,3 and 4 caught hold of him and the accused no. 4 who is the father of accused nos. 1 and 2 said that Pansing should be killed and the accused no. 1 Dharsing whipped out a knife from his waist which as per the evidence was having nearly 7" long blade and 4" long handle, and gave a blow on the chest of Pansing which pierced nearly 10 cm deep, as discussed above while referring to the medical evidence. We have reached this conclusion even without reference to any of the written dying declarations. The written dying declaration which was recorded earliest in point of time is at Ex. 23. It was recorded by Dr. V.R. Dabhi who had examined Pansing when he was brought to the Radhanpur hospital at 11.30 p.m. on 17.8.1987. Dr. V.R. Dabhi, in his deposition Ex. 20, has stated that since the condition of the patient was serious, he had asked about the history of the injury and whatever the patient had told him, he had written down in his own words in the case paper which is at Ex. 23. In the said case paper at Ex. 23, the time when the said patient Pansing was brought is noted as 11.30 p.m. on 17.8.1987. It is noted that the patient was conscious and brought in a jeep by his relatives. The patient was in a poor general condition. On the reverse of this case paper Ex. 23, the doctor has noted that the patient was conscious at 11.30 p.m. and he has also noted the questions he asked and the answers given by the patient. On being asked as to how was

he injured, Pansing had replied that when he went for "darshan" of "Kanuda" inside the Madh, at that time, the son of the accused no. 4- Tikaji Kubersing i.e. the accused no. 1 named Dharia inflicted the blow on him. On being asked with what weapon the blow was given, he said that he was given a knife blow and at that time, he was caught hold of by the accused no. 2 Jhenia and the accused no. 3 Hemla. On being further asked as to whether there was any quarrel, he stated that there was a quarrel with respect to the children. He also stated that a month before, there was a quarrel over drawing of water and he had filed a complaint. At that time, Jhenia who is the brother of Dharia had given three stick blows to his wife. On being asked as to whether there was any one else, he answered in the negative and had stated that these two persons had held him and Dharia (i.e. the accused no. 1- Dharsing) had given him a knife blow. On being further asked as to when did the incident take place, he had stated that it had taken place about an hour before. Then there is time noted, initially as 11.45 p.m. which is changed to 11.40 p.m. and below it, there is an endorsement made by the doctor stating that "Deputy Mamlatdar, Radhanpur was called for recording dying declaration by the Police Constable, B. No. 564 of Police Station, Thara." This would indicate that after recording the history at 11.40 p.m., Deputy Mamlatdar, Radhanpur was called for by the Police Constable of Thara Police Station for recording the dying declaration who seems to have reached the hospital when the patient was brought. The details of the injury are also noted and then there is an endorsement made by the doctor showing that the patient was referred to the Civil Hospital, Ahmedabad for necessary treatment and expert opinion. The other case paper which is at Ex. 24 which was also prepared by this doctor records that at 11.40 p.m., the condition of the patient was restless though he was conscious. It also records that his radial pulse was not palpable and BP was not recordable. His tongue was dry and there was giddiness. At 0.15 hours, it is recorded that his general condition was poor and thereafter there is a writing showing that the dying declaration was taken by the Mamlatdar with the time shown as 23.40 to 24.00 hours. If the dying declaration was taken by the Mamlatdar between 23.40 and 24.00 hours, obviously this entry should have figured before the entry which was made at 0.15 hours. The dying declaration Ex. 23 which is in the form of the history given by Pansing to Dr. V.R. Dabhi clearly shows that the accused nos. 2 and 3 caught hold of Pansing while the accused no. 1 gave him a knife blow. Obviously, it was a briefly recorded history and all the particulars cannot be expected to reflect therein. It was argued that the part played by the accused no. 4 Tikubha is not narrated in this dying declaration and, therefore, Tikubha's presence was doubtful. We have given anxious thought to this contention. As noted above, it clearly transpires from the deposition of two eye witnesses Manharba and Vinubha and from the immediate version given by Pansing to his wife Hetba and Chakubha that the accused no. 4 had played a vital role when Pansing was attacked. The presence of accused no. 4 having been established by reliable evidence cannot be doubted merely because while giving brief history, he narrated that he was given knife blow by Dharia (i.e. the accused no. 1 Dharsing) while he was caught hold of by

accused nos. 1 and 2 and has omitted the name of Tikubha. It is to be noted that nearly two hours had elapsed after the patient was injured and though he was conscious, his condition was poor. His immediate oral dying declaration which was earlier than this history given to the doctor clearly implicates the accused no. 4 Tikubha. The two eye witnesses have also stated the exact role played by the accused no. 4.

12. It was contended that the dying declaration recorded by the Deputy Mamlatdar which is at Ex. 19 demolishes the entire prosecution version because in that dying declaration, not only that there is no reference to any part played by the accused no. 4, but the injured Pansing is said to have stated that when he had been caught hold by the accused no. 2 Jhenia and the accused no. 3 Hemla, he was given a knife blow and that it was Jhenia who had given a knife blow. It was stated later in that dying declaration that Jhenia had given a dharia blow to him while Hemla had caught hold of him. This dying declaration Ex. 19 is said to have been recorded by the Deputy Mamlatdar Nanjibhai Nathubhai Parmar at 11.40 p.m. on 17.8.1987 and was completed at midnight. In the said dying declaration Ex. 19, when asked as to how was he injured, Pansing is said to have stated that when he went for the "Darshan" of "Kanuda", Jhenio and his uncle Hemla i.e. the accused nos. 2 and 3 had caught hold of him and given a knife blow. When asked as to whether there was any previous quarrel, he is said to have stated that there was a previous quarrel and these two persons had held him and Jhenia had given him a knife blow. He stated that he was not rescued by any one, but the girls who were playing in the Kanuda function, brought him to the "otla". He had stated that he did not know in which village he was at that time and also stated that he knew that he was in the hospital and was being treated. He had also stated that he was first taken to Thara hospital where he was tied a bandage and from there, he was brought at this place. He stated that his brother Shantuji and Sarpanch Valabhai had brought him to the hospital, but he did not know as to who were the other persons with them. He then stated that he was given a blow by dharia (dhariu) by Jhenia and his uncle Hemla had caught hold of him and that he did not want to say anything further. It has come in evidence that Pansing was brought to Radhanpur hospital at 11.30 p.m. on 17.8.1987. That time is recorded in the case papers at Ex. 23 and 24. The history of the patient was taken by Dr. V.R. Dabhi, at the end of which the time of 11.45 p.m. was initially written which was changed to 11.40 p.m. Below that, there is an endorsement that the Mamlatdar, Radhanpur was called for recording dying declaration by a Police Constable B. No. 564 of Thara Police Station. This would mean that the message for calling the Mamlatdar for recording the dying declaration was sent after the history was recorded at 11.40 p.m. The case paper at Ex. 24 shows that the condition of Pansing was deteriorating after 11.40 p.m. At 11.40, he was restless though conscious. His tongue was dry; his BP was not recordable; his radial pulse was not palpable, he was having giddiness. Therefore, if at all the Deputy Mamlatdar had started recording the dying declaration of Pansing at 11.40 p.m., he was in a poor state of health. It is,

however, difficult to accept that the Deputy Mamlatdar could have reached the hospital by 11.40 p.m. when the message to call him was sent by the Police Constable after the history was recorded by the doctor at 11.40 p.m.. It has come in the deposition of Head Constable Ganeshbhai Ramabhai, Ex. 37 that he had received a telephonic message at Radhanpur police station on 17.8.1987 at 11.30 p.m. from the PSI Thara that the condition of Pansing Pratapsing was serious and that his dying declaration should be recorded in the hospital. It is thereafter that a yadi was sent to the Deputy Mamalatdar i.e. the Executive Magistrate to his house as stated by Ganeshbhai Ramabhai in para 3 of his deposition Ex. 37. He has stated that the house of the Executive Magistrate was at a walking distance of 10 mts. from the police station. If that is so, then obviously the Executive Magistrate could never have reached the Radhanpur hospital by 11.40 p.m. so as to be able to record the dying declaration at that time. It is already noted that in the case paper at Ex. 24, the fact of dying declaration having been recorded by the Mamlatdar is mentioned after the entry regarding the general condition of the patient being poor was made at 0.15 hours. The case paper shows that the condition of Pansing had considerably deteriorated after 11.40 p.m. and that he was suffering from giddiness. It, therefore, appears that when the dying declaration of Pansing was recorded by the Deputy Mamlatdar, in view of his deteriorating condition, Pansing was not able to correctly comprehend what he was being asked. This is evident even from the statement Ex. 19 which he is said to have given. It appears that even the Deputy Mamlatdar was not sure whether Pansing was following what he was being asked. In the midst of his dying declaration, Pansing was asked by the Deputy Mamlatdar as to whether he knew in which village he was at that time to which he answered that he did not know which was the village in which he was brought. He seems to have been asked as to whether he knew he was in the hospital to which he answered that he was aware of it. He seems to have been asked as to whether he knew that he was taken to Thara hospital initially, to which he answered that he knew about it. He had stated that he was not aware as to who else other than Shantuji and Sarpanch Valabhai, accompanied him. He had initially stated that he was given a knife blow by Jhenia while later on he stated that Jhenia had given him a dharia blow. We may only note here that Pansing had described Dharsing who is the accused no. 1 as Dharia in his earlier dying declaration recorded in the form of history taken down by Dr. V.R. Dabhi. It appears from these facts that even though the patient may have been conscious as recorded by Dr. V.R. Dabhi, his level of consciousness was highly doubtful in view of his giddiness when the Deputy Mamlatdar queried him and, therefore, the authenticity of the contents of this dying declaration Ex. 19 becomes doubtful.

13. A reliable piece of evidence cannot be discarded with reference to that what is not so reliable. Once the particular evidence is found to be trustworthy and acceptable, it cannot be discarded on the ground of inconsistency with the other evidence which is not so trustworthy and is doubtful. Therefore, when it is firmly established that, the dying declaration recorded by an independent witness who

is a doctor examining the declarant, was given at an appropriate level of consciousness and understanding and is a reliable piece of evidence, it cannot be compared with the later dying declaration which was recorded by a Deputy Mamlatdar in a deteriorated mental condition of the declarant, who was in the state of giddiness and poor general condition, particularly when there was also some doubt about the time when that later dying declaration was recorded. Moreover, when the oral evidence of the eye witnesses and other supporting witnesses is found to be trustworthy, the dying declaration recorded by the doctor which is in tune with such oral evidence would add to the veracity of the prosecution case. One vitiated or doubtful piece of evidence cannot set at naught what is clearly established from the other reliable evidence. The process of appreciation of evidence is aimed at finding out the truth and for that purpose, separating the wheat from the chaff. Once the truth is ascertained from the material constituting reliable and acceptable evidence, then that result ought not to be reversed by generating doubt from the debris of unreliable and doubtful evidence and proceeding to demolish what is established as reliable and acceptable evidence. Therefore, the dying declaration Ex. 19 which was recorded by the Deputy Mamlatdar cannot set at naught the other positive evidence discussed above which establishes beyond any reasonable doubt that all the accused acted in a concerted manner while attacking Pansing and at that time, the accused nos. 2,3 and 4 had caught hold of him while the accused no. 1 gave a knife blow on his chest at the behest of the accused no. 4 who is the father of the accused no. 1 when he shouted that Pansing should be finished. The tremendous force with which a long knife was inserted in the chest cutting two ribs, going deep and cutting the liver clearly shows that the blow was given with an intention to kill. Pansing was unarmed when he came and was fully justified in questioning the accused no. 2 Jhenubha for having slapped his grown up daughter Manharba. That infuriated all these accused persons and three of them caught hold of him and the accused no. 1 gave a knife blow. As noted above, it was a big knife with a blade of nearly 7" long and a handle of 4" and, therefore, it was almost a dagger. It was tied in his waist and the accused no. 1 pulled it out and gave a blow. The concerted manner in which all these accused acted clearly shows that they shared the common intention of killing Pansing by giving him a lethal knife blow. Even though the accused no. 1 had given a knife blow, the three other accused having shared the common intention which developed on the spur of the moment would be equally liable. There is, therefore, no substance in the contention that the accused nos. 2,3 and 4 could not have anticipated the knife blow being given by the accused no. 1 because it was hidden in his waist. Since the intention developed on the spur of the moment and at the behest of the accused no. 4, the accused no. 1 whipped out the knife and gave a blow while the other accused held Pansing, it is clear that all of them equally shared the common intention to kill Pansing which was developed on the spur of moment. All the accused after causing the injury had run away from the spot. As noted above, they were related, the accused no. 4 being the father of accused nos. 1 and 2 and the accused no. 3 being their uncle. The weapon with

which the offence was committed was also taken away by the accused no. 1.

14. In the above facts, ordinarily, it would be the offence of murder which would stand established against these accused. It was, however, argued that there is some evidence to show that there was a sudden quarrel and that there was no premeditation when the act was committed. It was contended that the case would fall within the Exception 4 to Section 300 of the IPC which lays down that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel without the offenders having taken undue advantage or acted in a cruel or unusual manner.

15. In State of Andhra Pradesh Vs. Rayavarapu Punnayya and Another, , the Supreme Court, while considering whether the offence is of murder or culpable homicide not amounting to murder laid down the following proposition:-

"From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is "murder" or "culpable homicide not amounting to murder" on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of section 300, Penal Code, is reached. This is the stage at which the Court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four Clauses of the definition of "murder" contained in section 300. If the answer to this question is in the negative, the offence would be "culpable homicide not amounting to murder" punishable under the first or the second part of section 304, depending, respectively, on whether the second or the third Clause of section 299 is applicable. If this question is found in the positive, but the case comes within any of the Exceptions enumerated in section 300, the offence would still be "culpable homicide, not amounting to murder" punishable under the First Part of section 304, Penal Code."

Keeping in view the aforesaid proposition of law, we may proceed to consider whether there is any scope for invoking Exception 4 in the case of the accused persons. Manharba, in her cross examination, has stated in para 5 that when her father was rebuking the accused no. 2 Jhenubha for having slapped her, the accused no. 2 Jhenubha and his father, the accused no. 4 Tikubha, his uncle accused no. 3 Hematsing and his brother Dharsing started abusing him and when her father told them not to abuse, they got excited and they had done "Maramari" with her father. The word "Maramari" suggests that there may have been some fight between Pansing and the four accused persons. The witness Vinubha has also stated that when Pansing had questioned these accused persons, on their abusing him, they had got excited and the incident occurred.

The genesis of the incident was in the initial quarrel between Manharba and Mayaba. That had occurred suddenly and at that time, there could have been no premeditation on the part of the accused persons to kill Pansing. They could not have anticipated such a quarrel and Pansing coming to the spot. It does appear that the possibility of the incident occurring without premeditation in a sudden fight in the heat of passion upon a sudden quarrel cannot be ruled out. Dharsing gave one knife blow on the left side of the chest of Pansing and thereafter all the four accused ran away. Therefore, since the case falls in the Exception 4 to section 300 of the IPC, the accused no. 1 Dharsing should have been convicted u/s 304 Part I of the IPC while the accused nos. 2,3 and 4 should have been convicted for the offence punishable u/s 304 Part I read with section 34 of the IPC. The accused no. 3 Hematsing Kubersing Vaghela is reported to have died. In the initial part of the judgment, we took a note of the certificate issued by the Talati-cum-Mantri of Gram Panchayat, Vada dated 19.4.1999 which certifies that Hematsing Kubersing Vaghela has died in 1996. Today also, the learned APP has placed on record another certificate dated 6.7.1999 which is brought by the Assistant Police Sub Inspector, Thara which records the fact that Hematsing Kubersing Vaghela died in 1996. The appeal against the accused no. 3 Hematsing Kubersing Vaghela, therefore, finally abated on his death in view of the provisions of section 394 of the Code of Criminal Procedure.

15. In view of what we have held above, we make the following order:-

The conviction of the accused no. 1 Dharsing Tikubha Vaghela is altered from conviction u/s 304 Part II of the IPC to conviction u/s 304 Part I of the IPC.

The acquittal of the original accused no. 2 Jhenubha Tikubha Vaghela and the accused no. 4 Tikubha Kubersing Vaghela is hereby set aside and they are convicted for the offence u/s 304 Part I read with section 34 of the IPC.

We direct that the original accused no. 1 Dharsing Tikubha Vaghela, accused no. 2 Jhenubha Tikubha Vaghela and accused no. 4 Tikubha Kubersing Vaghela, who are the respondents nos. 1,2 and 4 in Criminal Appeal No. 361 of 1992 be brought before us for giving them an opportunity on the question of sentence on 8.7.1999.

Criminal Appeal No. 361 of 1992 stood finally abated against the accused no. 3 Hematsing Kubersing, on his death.

8.7.1999

Pursuant to our directions, the original accused no. 1 Dharsing Tikubha Vaghela, accused no. 2 Jhenubha Tikubha Vaghela and accused no. 4 Tikubha Kubersing Vaghela have appeared before us for being heard on the question of sentence. We have heard their learned Counsel and them on the question of sentence.

It is submitted that the accused no. 1 Dharsing has already undergone the sentence of five years Rigorous Imprisonment which was awarded to him for the offence u/s 304 Part II of the IPC for which he was convicted by the trial court.

At the relevant time of the commission of the offence, this accused was a young boy of 21 years of age. It is stated that he has four minor children. He is doing the agricultural work on a small piece of land. It is stated that after he was released in April 1994, he has been peacefully living and there has not happened any incident which can speak against him. It is also submitted that he had given only one blow which had caused the death of Pansing. It is, therefore, submitted that a lenient view may be taken in view of the fact that he has settled down in life after undergoing five years Rigorous Imprisonment and since last five years, he is peacefully working for his livelihood.

For the accused no. 2- Jhenubha Tikubha Vaghela, it was submitted that at the relevant point of time, he was only 18 years of age. At present he has two minor children and he is a farmer. It is also submitted that he had remained in jail as an undertrial prisoner for four and half months. It was further submitted that he had not given any blow and the part played by him, as held hereinabove, was of holding Pansing. It is also submitted that the number of years have already elapsed after the incident and, therefore, a lenient view may be taken even for this accused.

For the accused no. 4- Tikubha Kubersing Vaghela, it is submitted that he is more than 60 years of age and he is also held vicariously liable for the act of the accused no. 1 who is his son. Even this accused had remained in jail for four months as an undertrial prisoner. It is submitted that he has not committed any crime during all these years after his acquittal in this case by the trial court. This accused had also not given any blow to Pansing, but as held above, he had only caught hold of him at the relevant time. It was submitted that looking to his domestic liabilities, old age and the fact that a number of years have already elapsed, a lenient view may be taken against this elderly man.

The learned Counsel submitted that all these accused persons are persons of ordinary means doing agricultural work. However, while taking a lenient view on the aforesaid grounds for imposing punishment of lesser than seven years, which as per the decision of the Supreme Court (Gulshan Vs. State of Punjab AIR 1988 SC 210) would be the sentence normally imposed, the Court may consider imposition of a reasonable fine which can be paid to the widow of the deceased Pansing.

Having regard to all the attendant facts and circumstances of the case, we impose the following sentence on these accused persons.

(a) Accused no. 1 Dharsing Tikubha Vaghela whose conviction is altered from section 304 Part II of the IPC to section 304 Part I of the IPC, is sentenced to suffer Rigorous Imprisonment for a period of five years and to pay a fine of Rs. 5000/-, in default, to undergo Rigorous Imprisonment for a further period of one year.

If he has undergone the sentence of Rigorous Imprisonment of five years for the offence u/s 304 Part II of the IPC which was imposed by the trial court, it is

made clear that he will not have to undergo any more sentence of rigorous imprisonment.

(b) Accused no. 2 Jhenubha Tikubha Vaghela who is convicted for the offence u/s 304 Part I read with section 34 of the IPC is sentenced to undergo Rigorous Imprisonment for a period of two years and to pay a fine of Rs. 3000/-, in default of payment of fine, to undergo further Rigorous Imprisonment for a period of nine months.

The period that this accused had remained as an undertrial prisoner will be adjusted while computing the period of imprisonment that he undergoes by virtue of this sentence.

(c) Accused no. 4 Tikubha Kubersing Vaghela who has been convicted for the offence u/s 304 Part I read with section 34 of the IPC, is sentenced to undergo Rigorous Imprisonment for a period of one year and to pay a fine of Rs. 3000/-, in default of payment of such fine, to undergo further Rigorous Imprisonment for a period of nine months.

The period that this accused may have remained in jail as an undertrial prisoner will be adjusted while computing the period of imprisonment that he is required to undergo under this sentence.

(d) The amounts of fine imposed on these three accused persons, when recovered, will be paid to Hetba, widow of deceased Pansing after proper verification.

Accused no. 1- Dharsing Tikubha Vaghela, accused no. 2- Jhenubha Tikubha Vaghela and accused no. 4- Tikubha Kubersing Vaghela to be taken in custody forthwith.

Criminal Appeal No. 361 of 1992 is partly allowed accordingly against the accused nos.1,2 and 4 and Criminal Appeal No. 360 of 1992 stands disposed of in view of the order made in Criminal Appeal No. 361 of 1992 so far as the respondent accused no.1 is concerned.