
(1998) 07 GUJ CK 0001
In the Gujarat High Court

State of Gujarat	Vs	APPELLANT
Gambhirsinh Narubha Jadeja		RESPONDENT

Date of Decision : 03-07-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313, 378
Penal Code, 1860 (IPC) — Section 302, 378, 452

Citation : (1998) 3 GLR 2043

Hon'ble Judges : J.N. Bhatt, J;Arunkumar Kantilal Trivedi, J

Bench : Division Bench

Judgement

J.N. Bhatt, J.—In our opinion, the main question is - should the doctrine of benefit of doubt to the accused being one of the cardinal principles of criminal jurisprudence be permitted to be elevated to the point of charter of an acquittal and it is of the important questions to be adjudicated upon in this acquittal appeal by the State, u/s 378 of the Code of Criminal Procedure, 1973 ("the Code") against the order of acquittal against the respondent-accused recorded by the learned Additional Sessions Judge, Jamnagar in Sessions Case No. 11 of 1990, on 21-7-1990.

2. With a view to appreciating the merits of this acquittal appeal and the challenge against it, let us first have a skeleton of material facts of the prosecution case which has given birth to this appeal.

3. The respondent is the original accused, hereinafter referred to as "the accused" for the sake of convenience. The accused was charged, at Ex. 2, on 3-5-1990, by the trial Court in Sessions Case No. 11 of 1990 for having committed offences punishable under Sections 302 and 452 of the I.P.C., on the ground that he committed criminal trespass intentionally being prepared to commit murder of deceased Anandkunverba and after entering the house of the deceased, on 19-9-1989 at about 7-30 a.m., inflicted various blows with knife on various parts of the body including neck, throat and chest and committed her murder. Upon this charge, the accused came to be tried as he pleaded not guilty.

4. Complaint was lodged by one Bhikhubha Hathisinh, son of the deceased. They were staying in village Jalia Devani of Dhrol Taluka of Jamnagar District and the venue of the incident is the house of the complainant. It was alleged that the accused lost his mother and also his cow eight days before the incident. He, therefore, entertained a doubt that the deceased was a witch and she was practising and employing witch-craft. The accused had, therefore, entertained an apprehension that death of his mother and cow, a week prior to the date of the incident, was nothing but the outcome of black magic and witch-craft employed by the deceased. The deceased was aged 75. She was totally blind and when she was given as many as 27 serious blows with the help of knife, she was sitting on a cot in the front portion of her house on 19-9-1989 at about 7-30 a.m.

5. The accused on account of the aforesaid serious doubt, had a motive to commit crime and according to the prosecution case, on the day of the incident, in the morning at about 7-30 a.m. he entered the house of the complainant Bhikhubha, son of the deceased with a naked knife and inflicted various blows, after entering the house, after committing criminal trespass. The deceased succumbed to the said injuries and the accused fled away from the house of the complainant. The incident occurred in the fali portion of the house and daughter of the complainant Ansuya and Vinuba, wife of the complainant were in the fali portion. Vinuba was fetching water from the well in the fali of the complainant. Ansuya who was sweeping the fali portion had seen the accused coming with the knife and entering the house. She, therefore, shouted and which attracted the attention of Vinuba and both of them had seen the accused giving various knife blows on the person of the deceased mercilessly and then running away.

6. It is also the prosecution case that the accused, before giving knife blows on the person of the deceased who was totally blind and in December years of life, had shouted saying that she was witch and by using black magic, she had killed his mother and cow. One witness Tilakba was also present and she had also witnessed the incident.

7. The complaint came to be lodged by Bhikhubha, son of the deceased. He had gone to the railway station to give send-off to his sister. On return from the railway station, he was informed by the Sarpanch about the incident. He, therefore, immediately rushed to his residence and found his mother drowned in the pool of blood. His wife immediately narrated the incident as she had seen. He found that his mother was dead. Therefore, he started for lodging complaint at Dhrol Police Station which is about 30 Kms. away from his house. He started on cycle and thereafter he got an autorickshaw and he went to Dhrol Police Station and lodged a complaint before in-charge P.S.I., Dhrol. In-charge P.S.I. Chavda was not present when the complainant went there. Therefore, a message was sent to him as he wanted to lodge a complaint. On coming back to the police station, P.S.I. Chavda noted down the complaint as given by the complainant on 19-9-1989 at 12.20 p.m. (noon). The complaint is produced at Ex. 65.

Upon the strength of the complaint lodged by the complainant, investigation

started and the charge-sheet followed which in turn resulted into framing of charge at Ex. 2 against the accused for the offences punishable under Sections 302 and 452, I.P.C.

8. The prosecution placed reliance on as many as 30 prosecution witnesses as under:

1. Dr. R.N. Vachhani, Ex. 8
2. Rajendrasinh Jadeja, Ex. 14
3. Bhikhubha Jadeja, Ex. 18
4. Vinuba Bhikhubha, Ex. 19
5. Ansuyaba Bhikhubha, Ex. 20
6. Dilakba Jadeja, Ex. 21
7. Dilubha Jadeja, Ex. 22
8. Ashokba Jadeja, Ex. 23
9. Pradyumansinh Jadeja, Ex. 24
10. Jayaba Jadeja, Ex. 25
11. Vasantba Jadeja, Ex. 26
12. Surajba Jadeja, Ex. 27
13. Diguba Jadeja, Ex. 28
14. Manchha Puna, Ex. 29
15. Sevadas Gangaram, Ex. 30
16. Habibbhai Hasambhai, Ex. 31
17. Babubhai Motibhai, Ex. 34
18. Ghanshyamsinh Jadeja, Ex. 35
19. Ramilaba Vikramsinh, Ex. 40
20. Navinchandra Bhagwanji, Ex. 42
21. Akbarali Pyarali, Ex. 43
22. Punabhai Rudabhai, Ex. 45
23. Gandubhai Rupabhai, Ex. 46
24. Aziz Daudbhai, Ex. 48
25. Kalyanji Vashrambhai, Ex. 49
26. Bahadursinh Chandubha, Ex. 54

27. Rameshchandra Bhuwa, Ex. 58

28. Farooq Aziz, Ex. 61

29. Siyaramsinh Bhardwaj, Ex. 63

30. Chhatrasinh Chavda, Ex. 64

The prosecution also relied on the following documentary evidence:

1. Charge-sheet
2. Post-mortem notes
3. Discovery panchnama
4. Inquest panchnama
5. Report of forensic science laboratory
6. F.I.R.

Upon appraisal and assessment of evidence, the trial Court acquitted the accused holding him not guilty of both the charges by his judgment and order dated 21-7-1990. Hence, this acquittal appeal u/s 378, I.P.C.

9. We have extensively, examined the evidence of prosecution and heard the learned Additional Public Prosecutor and the learned Advocate for the respondent dispassionately.

10. The trial Court has acquitted the accused mainly on the following grounds and considerations:

(1) that there was serious discrepancy about the number of injuries sustained by the deceased and eye-witness account given by P.W. Vinuba who was examined at Ex. 19 and evidence of P.W. Ansuya, who was examined at Ex. 20. It is also observed by the trial Court in para 33 of the judgment that since there is difference and discrepancy about the number of knife blows given by the accused, one of them may be true and one of them may not be telling the truth. Therefore, it was thought by the trial Court that it is a circumstance creating a doubt about the veracity and authenticity of the prosecution case.

(2) Both the eye-witnesses Ansuya and Vinuba did not intervene or render any help though they had witnessed the incident as per their evidence which creates material doubt about the truthfulness of their version.

(3) Muddamal knife produced, at Ex. 12, was not shown or identified in the course of evidence of the said eye-witnesses and therefore, also, the version of the prosecution is doubtful.

(4) P.W. Vinuba could not have seen the accused. Therefore, it was, doubtful, and benefit of doubt should be given to the accused.

11. In addition to the aforesaid grounds on which acquittal came to be founded upon by the learned trial Judge, the learned Advocate Mr. Budhbhatti for the accused also highlighted the following aspects in support of the impugned judgment of acquittal:

(1) statements of material witnesses came to be recorded by the police late and therefore, doubtful circumstances are created about authenticity of the prosecution witnesses, in that, he contended that in order to wrongly implicate and create the fake and false case against the accused, statements came to be recorded late.

(2) the jurisdictional sweep of This Court while sitting in an appeal u/s 378 of the Code is very much circumscribed and even in case of another plausible view other than the one taken by the trial Court, is no ground for interference with the impugned judgment and order of acquittal.

(3) the discovery of knife is not proved and the panchnama is also not proved and, therefore, there is no evidence that the muddamal knife was used in the commission of offence and that too by the accused.

12. After having extensively examined the testimony of Vinuba, the wife of the complainant, the same is found quite trustworthy and radiating an imprint of real version of the prosecution. Her evidence ought to have been relied on by the prosecution and ought not to have been discarded upon minor discrepancies in her evidence with regard to number of blows inflicted by the accused. It is true that she has stated in chief-examination that on hearing shouts of her daughter Ansuyaba, at the time when she was fetching water for cow, she found that the accused was seen with a black bag. She, therefore, hurriedly threw the water bucket and went near the house from well and found that the accused was inflicting knife blows saying that she (deceased) is a witch and is playing black magic because of which, his mother and cow had died. It is also, further, testified by her that the accused further stated while giving knife blows to the deceased that now, it was her and her son's turn. It is very clear from her testimony that she had seen the accused giving knife blows on the person of the deceased. She has narrated that knife blows were given on the chest and neck. Blows were given consecutively. It was also seen by her daughter Ansuyaba and therefore, both of them started crying. Thereafter, the accused fled away with knife and the black bag through the kitchen portion.

13. Reliance is also placed on the portion of statement made in para 6 of her deposition in cross-examination that she saw the accused giving 7 to 8 blows with knife. According to the medical evidence, there were about 27 injuries. Her statement was recorded late in the night. Upon these two grounds, it was contended that her evidence is not free from doubt.

14. The difference between the medical evidence and oral evidence of eyewitness Vinuba has weighed very much with the trial Court. The discrepancy or difference in number of blows, actually, found on the person of the deceased as per the

medical evidence and oral evidence of Vinuba could not be said to be sufficient to discredit her evidence much so, when her presence at the venue of offence was quite natural. It is a matter of common understanding that when serious offence is being committed, rustic female witness, upon seeing dear ones of the family being done away with by an assailant with a weapon, cannot be expected to observe and narrate exact incidents alongwith full exactitude. Ordinarily, in such situation, a person who has seen the assailant giving merciless knife blows would not attentively and precisely go on counting the number of blows. Again, she has stated in her chief-examination that the accused had given knife blows but even in cross-examination, she has stated number of blows given were about 6 to 8. The anxiety of Court while appreciating the evidence of the prosecution should be to see as to whether the main substratum of the story of prosecution is established without any doubt or not. Micro-level contradictions would not be sufficient to, totally, discredit the evidence of eyewitness. After having read the evidence of Vinuba, we are satisfied that her evidence is quite natural, radiates an imprint of truth and the learned Additional Sessions Judge should not have discarded it upon taking the view that there are some doubtful circumstances. The difference in number of blows itself would not be sufficient to discredit her evidence as her evidence is quite dependable and reliable, more so when her presence was natural and cannot create any doubt or cloud on the veracity of the prosecution case.

15. P.W. No. 5 Ansuyaba examined at Ex. 20 is the daughter of the complainant. Her evidence is also criticised before us by the learned Advocate for the respondent and the trial Court has not placed reliance on her evidence holding that a doubt is created about her presence and more so, when she has stated that the accused had inflicted about 25 to 26 blows to the deceased by a knife, which is in direct contradiction with eye-witness Vinuba. The trial Court has considered this aspect and has held that she came to the venue subsequent to Vinuba and whereas Vinuba has testified that she saw 6 to 8 blows, Ansuyaba has stated that she witnessed 25 to 26 knife blows given by the accused. The trial Court, therefore, found that it is, inherently, impossible and therefore, doubtful circumstances are there and benefit of doubt should be given to the accused.

16. It appears that the trial Court has not correctly appreciated the sequence of events and the evidence of prosecution brought on record. On the day of the incident on 19-9-1989 in the morning at 7-30 a.m. Ansuyaba was sweeping and cleaning Ota portion of the fali and she found the accused. As at that time, her mother Vinuba was near the well in the fali as she wanted to fetch water for the cow. Ansuyaba shouted which drew attention of Vinuba. It is, therefore, very clear from the evidence of Ansuyaba that she had seen the accused coming with knife and a black bag as she was sweeping the Ota portion of the fali before the incident occurred and she raised shouts which drew attention of her mother Vinuba. She also saw the accused going away through the kitchen portion after inflicting knife blows on the person of the deceased. Therefore, the reasoning

given by the trial Court that evidence of Ansuyaba is not believable, is nothing but manifest misreading of the evidence.

17. After having given our anxious thought to the testimony of Ansuyaba, we are fully satisfied that her evidence is quite natural and trustworthy. Her presence at the venue of offence was also quite natural. Be it noted that the accused was the neighbour at the relevant time and is also a known person to this witness. In our opinion, as such, there is no serious discrepancy worth the candle in her testimony warranting rejection of her evidence in toto. The trial Court ought to have placed reliance on the evidence of this witness also.

18. No doubt, both the eye-witnesses, viz., Vinuba is the daughter-in-law of the deceased and wife of the complainant and Ansuya is the granddaughter of the deceased and daughter of the complainant. Therefore, they are related witnesses. Evidence of relatives or related witnesses ipso facto cannot be thrown overboard. At best, evidence of such persons requires closer scrutiny. Whereas in the present case, upon closer scrutiny of evidence of both these witnesses and other corroborative circumstances, interestedness pales into insignificance. It may also be mentioned that ordinarily, a close relative would not be interested to implicate innocent in place of the real assailant as he/she is interested to bring the real culprit to book. It is not interestedness or relationship but the reliability which matters in evaluating and appreciating the evidence.

19. It is true that the trial Court has rightly observed that both these witnesses did not intervene at the time of the incident when they saw the accused inflicting successive knife blows on the person of the deceased. Both of them admitted this. However, we are not in agreement with the trial Court that non-intervention by the witnesses will while witnessing capital or serious crime being committed is no ground to discard their testimony. The view taken by the trial Court on this score is manifestly perverse.

20. It must be remembered that the accused was armed with deadly weapon like knife which can be said to be a butcher's knife and not a penknife in view of the panchnama of muddamal Art. No. 12. Ordinarily, in such a situation, rustic female witnesses like Vinuba and Ansuyaba would not be intervening at the time of the incident. Human conduct and natural human instinct much that in a case of rustic female witnesses cannot be lost sight of. A mere act of non-intervention in such a situation by the eye-witnesses can never be said to be sufficient to give benefit of doubt or to doubt the evidence. It is evident from the medical evidence on record that the accused had given successive 27 blows mercilessly, with knife the size of which was 14 cm. in length and 3.6 cm. in width produced at Art. No. 12. Looking to the injuries on the deceased and the manner and mode in which they were being inflicted and that too with deadly weapon like knife, one cannot expect the witnesses to risk of jumping into the incident or to intervene. Unfortunately, the trial Court has discarded the evidence of two eye-witnesses on the aforesaid four grounds and one of them is non-interference by the witnesses. With due respect, the approach of the trial Court is totally not only wrong but

perverse in evaluating the evidence of prosecution. The Court is concerned with intrinsic value of evidence. If the substratum of the prosecution case and the main core of the version is established by the prosecution, mere non-interference should not interfere in doing justice in a criminal case. It may happen even in case of honest and truthful witness who may not intervene. Can it be said that this is a ground to discredit his evidence and should be treated as doubtful circumstance?

21. No doubt, the accused is entitled to the benefit of doubt provided a reasonable doubt is seen or spelt out from the evidence. If entitlement is of reasonable doubt and if the Court is satisfied from the set of facts, benefit of doubt can be awarded if it is reasonable doubt of reasonable and prudent person and not doubt of vacillating or wavering mind or person afraid of legal consequences. It has been rightly observed that a reasonable doubt does not mean some light, airy, insubstantial doubt that may flit through the minds of any of us about almost anything at some time or other. It does not mean a doubt begotten by sympathy out of reluctance to convict, it means a real doubt, a doubt founded upon reasons.

22. In view of the settled proposition of law by catena of judicial pronouncements on this point, the following aspects may be highlighted so as to bring home the pointer that, though, it is the duty of the Court to afford the accused with celebrated principle of benefit of doubt, if it is reasonable and available from the set of facts, cannot be allowed to the extent where there is no reasonableness or justness and where there is no pointer furnished:

- (i) the doubt must be reasonable and real, not fanciful.
- (ii) the doubt must be of reasonable man, neither a weak, meek and timid man afraid of legal consequences,
- (iii) reasonable doubt is simply that degree of doubt which would permit reasonable and just person to reach conclusion,
- (iv) reasonableness of doubt must be commensurate with nature of evidence to be investigated upon. Ultimately, there is element and the degree of suspicion varies from accused to accused,
- (v) exaggerated deviation to the rule of benefit of doubt must not nurture fanciful doubts and thereby destroying social defence.
- (vi) it be remembered that justice cannot be made sterile upon doubt which is not of prudent and reasonable person.
- (vii) doubt would be called reasonable when it is uninfluenced by zest and enthusiasm for abstract speculation.
- (viii) doubt should not be mere vague appreciation.
- (ix) reasonable doubt must generate and flow from evidence on record.

(x) reasonable doubt is not an imaginary, trivial but a doubt based upon reasons and common sense.

(xi) forensic probabilities must rest on sound common sense and finally upon a trained infusions of the Judge.

(xii) while the protection affordable to the accused of doctrine of benefit of doubt from the record of the case cannot be allowed to be eroded at the same time, uninformed legitimization of trivialities obviously would culminate into a mockery of dispensation of justice in criminal trial.

(xiii) reasonable doubt must have fair basis and logic and not speculation or luck.

(xiv) it is the doubt of a reasonable astute and alert mind arrived at after due application of mind to all facts. It is not a doubt which occurs to a wavering mind.

(xv) it is the doubt which occurs to a reasonable man and which has legal recognition in the realm of criminal cases.

(xvi) the doubt which can take cognizance of not that of a weak or oscilating and vacilating capricious, indolent or confused mind.

23. We have highlighted the aforesaid aspects emerging from the settled proposition of law in series of decisions which point out that creditworthy reliable evidence of eye-witnesses or for that purpose, even circumstantial evidence from the record cannot be crucified or jettisoned by raising or inferring fanciful doubt. We have noticed that the trial Court has adopted not only unreasonable but perverse approach in discarding the reliable evidence of eye-witnesses which undoubtedly, has intrinsic quality and forensic worth. The view which the trial Court reached in discarding the testimony of two real eye-witnesses is totally, unjustified. It cannot be said even for a moment that the view taken by the trial Court for rejecting their evidence was even remotely plausible. We are, therefore, left with no alternative but to hold that the entire approach of the trial Court is not only misconceived but is manifestly perverse.

24. We are conscious of the fact that the jurisdictional sweep in acquittal appeal u/s 378 of the Code is circumscribed to the extent. We also agree with the submission raised on behalf of the accused that even if two views are possible from evaluation of evidence of prosecution, the view taken by the trial Court should not be interfered with. The principles are very well settled in case of appreciating the merits of acquittal appeal u/s 378.

25. Reliance is placed by the learned Advocate for the appellant on the decision of the Hon''ble Apex Court in Ramesh Babulal Doshi Vs. State of Gujarat, Relying on the aforesaid decision, it have been contended that, merely, on the fact that a different view could legitimately be arrived at by the appellate Court, on reappraisal of evidence in acquittal appeal, cannot constitute a valid ground for interfering with the order of acquittal. We have, carefully, examined the said decision relied on by the defence. It is, clearly, held in the said decision that

unless the entire approach of the trial Court in dealing with the case is patently illegal or the conclusion arrived at by the trial Court was wholly untenable, the appellate Court cannot interfere with the order of acquittal. The principles highlighted and enunciated in the aforesaid decision are in fact applicable to the facts of the present case. Upon assessment and examination of the evidence and the entire tenor of the impugned judgment, we have found that the ground on which acquittal is recorded is based on entire and totally untenable approach of the trial Court. The main four grounds on which acquittal came to be founded upon are found palpably wrong, perversely erroneous and fully unsustainable. In the aforesaid case, the factual scenario was different. Therefore, the said decision is of no avail to the respondent. The factual scenario emerging from the record of the present case is altogether different and we have noticed without any doubt and we are fully satisfied that rejection of the evidence of the eye-witnesses and other corroborating circumstances on the aforesaid grounds and more elaborately mentioned in the impugned judgment are manifestly unsustainable and totally perverse.

26. In fact, the propositions of law laid down in *Pandappa Hanumappa Hanamar and another Vs. State of Karnataka*, , are attracted to the facts of the present case. It was held in the said case that when the findings recorded by the trial Court were patently wrong and perverse, the High Court is justified in reversing the acquittal and convicting the accused. The following propositions are very well explained and explored:

- (i) when the findings recorded by the trial Court in favour of the accused persons are patently wrong and perverse, the High Court is entitled to reverse the acquittal and convict the accused;
- (ii) even the evidence of hostile witness does not stand wholly discredited;
- (iii) improvement and contradiction which are insignificant and at micro- level are not sufficient to discredit the prosecution case;
- (iv) minor contradictions between the evidence before Court and statements recorded u/s 161 of the Code are not sufficient to discredit and discard the evidence;
- (v) conviction on the basis of sole testimony of a single witness can be based if the evidence is found truthful;
- (vi) even in case of hostile witness, the entire evidence does not necessarily stand discredited, it can be believed, in part. There is no legal bar or ban to base conviction if corroborated by other reliable evidence.
- (vii) rustic evidence and contradictions with regard to time of occurrence cannot be said to be sufficient to discredit their evidence.

Therefore, the Supreme Court confirmed the order of the High Court reversing the acquittal into conviction. In our opinion, the ratio propounded in this decision

is, squarely, applicable to the facts of the present case.

27. According to the case of the defence, the accused was not present in the house on the day of the incident. The accused has stated so in his statement u/s 313 of the Code. In short, plea of alibi was raised which has not been proved. In view of the settled position of law, failure to prove plea of alibi operates as incriminating circumstance. Plea of alibi as such presumes physical absence of the accused at the scene of offence by reason of his presence at another place. The burden to prove the plea of alibi is on the accused. It could be shown by preponderance of probability from the set of facts on record that the plea of alibi is supportable. However, plea of alibi must be shown or proved with absolute certainty so as to completely exclude the possibility of presence of the accused at the place of incident. Plea of alibi has not been proved even on preponderance of probability. On the contrary, This Court has found that it was a false plea and the accused was present and he is the author of the crime in question. Therefore, failure on the part of the defence to show that plea of alibi is justified, is also an incriminating circumstance.

28. The trial Court has also committed a serious error in not considering the acceptable part of the testimony of Ashokba, who is examined at Ex. 23. She has clearly stated in her evidence that she saw the accused with knife going out of kitchen of the complainant. Though she has not been able to support the prosecution case fully, it becomes evident from her testimony that she did see the accused with a naked knife coming from the kitchen portion of the complainant's house. He (accused) is a family uncle of this witness. It is also, clearly, testified by her that the accused was seen with a black bag. Not only that, it becomes clear from her evidence that at the time of the incident, when she saw the accused, P.W. Vinuba and her daughter were present and were weeping. The evidence of this witness Ashokba is corroborating the version of the prosecution in the evidence of eye-witnesses insofar as presence of the accused with knife on the day of the incident in the morning was concerned. Presence of eye-witnesses is also testified. Therefore, the evidence of Ashokba lends reinforcement to the testimony of eye-witnesses to the version of prosecution.

29. It is true that out of 30 prosecution witnesses, many witnesses have turned hostile to the prosecution case. Even the prosecution case that muddamal knife was recovered by the accused could not be proved in the evidence of panch witnesses. It has been the prosecution case that muddamal knife which is 14 cm. long and 3.6 cm. in breadth was also not shown to the eye-witnesses. The trial Court has, therefore, taken it as a circumstance creating doubt for veracity of the prosecution case. This approach of the trial Court is manifestly unsustainable and totally perverse. It is not necessary for the prosecution to show muddamal article invariably to the witnesses so as to succeed in proving guilt. The deceased was aged about 75 and totally blind who sustained as many as 27 knife blows and they were possible by muddamal knife. Whether the injuries given on the body of the deceased were by the same knife or not can be proved by the prosecution.

But in absence thereof, reliable evidence of eye-witnesses supported by the medical evidence cannot be said to be untrue or fake. It is not disputed that the muddamal knife contained blood group "A" which was also the blood group of the deceased as also the accused. It is not the case of the defence that the accused sustained some injuries and his blood was tainted on the muddamal knife. Apart from that, simply because the muddamal knife was not shown to the eye-witnesses cannot be said to be sufficient to dynamic intrinsic, worthy evidence of the eye-witnesses.

30. Another ground on which the trial Court has given benefit of doubt to the accused is the discrepancy in the evidence of Vinuba and Ansuyaba. The trial Court has observed that Vinuba had not seen the accused going to the kitchen side, whereas, Ansuyaba had seen him as per her evidence. This discrepancy cannot be said to be major or affecting the main substratum of the prosecution case. Needless to state that power of observation, human behaviour and conduct of the witness in observing the incident differs from person to person. A witness cannot be disbelieved merely on such minor discrepancy.

31. It was, forcefully, contended before us that the prosecution has failed to examine eye-witness Asmita. It is true that she is not examined. It is equally true that her statement was recorded by the investigating officer. Question is - mere non-examination of one of the eye-witnesses by the prosecution would render the evidence of other eye-witnesses uncreditworthy? It is the choice of the prosecution. When the prosecution finds that charge against the offender has been successfully established without doubt, it is not necessary that all witnesses should invariably be examined. The Court is required to weigh the evidence and not to count the same, which is the celebrated principle. Conviction can be founded upon solitary evidence if the same is found truthful and creditworthy. The main anxiety of the Court is to see whether the guilt for which the accused is charged is succinctly established beyond reasonable doubt or not. It is not the number of witnesses but the strength of intrinsic worth and credibility of the witnesses that matters. Therefore, plea that non-examination of eye-witness Asmita, daughter of the complainant creates doubt is unsustainable.

32. It was also contended before us that F.I.R. Ex. 65, came to be lodged late and no explanation is tendered. Firstly, it should be remembered that F.I.R. is not substantive piece of evidence. The incident in question occurred at 7.30 a.m. on 19-9-1989 in the house of the deceased and complainant in Jalia Devani and the complaint came to be recorded by the P.S.I. Chavda of Dhrol police station at 12.20 p.m. Thus, there is delay of four and half hours in lodging the F.I.R. It is, therefore, contended that the prosecution case is doubtful as the F.I.R. was lodged late.

33. After having considered the facts and circumstances of the present case, we find no substance in this contention that F.I.R. was lodged late. The following aspects will immediately dispel the clouds sought to be created by submitting that F.I.R. was delayed:

(i) complainant was not present at the house on the day of the incident as he had gone to the station to see off his sister;

(ii) on coming back from the station, he was informed on way that his mother was killed. He rushed to the venue. He found his mother in the pool of blood. Obviously, therefore, he would not straightaway rush to the police station on the next moment;

(iii) Jalia Devani is small village. After some time, he got a cycle and went to Hamirpur which is about 3 kms. from Jalia Devani. From Hamirpur, the complainant could get a rickshaw for going to Dhrol which is about 30 kms. from the venue of the offence;

(iv) the complainant reached the police station at 11.30 a.m. P.S.I, in charge Mr. Chavda was not present at the police station. Therefore, a message was sent to him to come to the police station. P.S.I. Chavda came to the police station at 12.20 p.m. and thereafter recorded the complaint Ex. 65 as narrated by the complainant.

In view of the aforesaid facts and circumstances, could it be said that there was delay in lodging the F.I.R.? In our opinion, it was quite natural and the time spent in lodging the F.I.R. after the incident accounted for and justified. Therefore, there was no delay which came to be lodged with promptness. The F.I.R. fully reinforces and corroborates the version of eye-witnesses on the main theme of the prosecution.

34. The contention that P.W. Vinuba could not have seen the incident in view of the facts of the case is also not acceptable in light of the proved facts. The incident had occurred in the house of the complainant and it is Ota portion in front - Fali - in which the well is situated. Vinuba was busy in fetching water for the cow but on shout being raised by her daughter Ansuyaba, suddenly, after throwing the water bucket, she started going towards the home. Considering the typographical situation emerging from the record and other evidence, it cannot be said that it was not possible for Vinuba to witness the incident. Therefore, such a contention also is required to be rejected being meritless.

35. The medical evidence of Dr. Vachhani, Ex. 8 who had conducted autopsy has clearly deposed in his evidence that in all, there were 27 injuries on the body of the deceased. The chest wall was, totally, out because of external injuries with a sharp cutting instrument. The deepest injury was of 6 cm. x one and half x 3 cm. on right side of the neck.

Post mortem report is produced at Ex. 10 in course of the evidence of Dr. Vachhani. According to the medical evidence and post mortem report, the injuries were ante-mortem and they were possible by a sharp cutting instrument like knife, Article 12. The cause of death was shock due to haemorrhage followed by multiple injuries.

It could very well be seen from the medical evidence that the prosecution case

is, fully, corroborated.

36. In *Solanki Chimanbhai Ukabhai Vs. State of Gujarat*, , the powers of the appellate Court in case of appeal against acquittal and appreciation of evidence are very well expounded as under:

The appellate Court while dealing with an appeal against the order of acquittal has full powers to review at large the evidence on which the order of acquittal is founded and to reach a conclusion that upon such evidence the order of acquittal should be reversed. However, in exercising that power the appellate Court should give proper weight and consideration to the following matters: (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of the appellate Court in disturbing a finding of fact arrived at by a Judge, who had the advantage of seeing the witnesses, which finding would not certainly, be disturbed if two reasonable conclusions can be reached on the basis of the evidence on record.

P.W. No. 6 Dilakba, Ex. 21, though she is declared hostile witness, has supported the prosecution case in part in respect of the version of Vinuba that she was fetching water for cow and the accused coming along with back bag and thereafter going towards the kitchen of Vinuba. So, the presence of Vinuba and the movement of the accused before the incident remained corroborated by the evidence of this witness. It may be noted that hostile witness does not necessarily mean that the entire evidence stands discredited. Such witness can be believed in part. There is no legal bar or ban even to base conviction if corroborated by other relevant evidence on record. This proposition is very well reinforced by the decision of the Hon"ble Apex Court in *Pandappa Hanumappa Hanamar and another Vs. State of Karnataka*, . It has been clearly held by the Hon"ble Apex Court that even in case of hostile witness, the entire evidence does not necessarily become diS.C.A.rded or discredited and conviction can be founded on such evidence if corroborated by other reliable evidence of prosecution on record.

37. After having given our anxious thoughts to the testimonial collection and the documentary evidence emerging from the record of the present case, the following aspects and points have remained unimpeachable:

(i) deceased Anandkunverba, mother of the complainant was aged about 80 who had lost the vision of both the eyes and she was sitting on a cot in Osri portion of the house.

(ii) in view of the topography of the venue of offence, it is very clear that the complainant and the accused were neighbours. In fact, there was common wall between the houses of the accused and the complainant.

(iii) the accused is a retired police constable aged about 59 and lost his mother

and cow.

(iv) the accused had a doubt and apprehension that death of his mother and that of his cow was on account of black magic and witch-craft employed by the deceased. Thus, there was motive for commission of the offence.

(v) the prosecution has, successfully, established that the accused had uttered, before inflicting knife blows on the person of the deceased, that the deceased was a witch and because of her black magic, he got her mother and cow sacrificed. Therefore, the accused was heard saying "now, it is your and your son's turn for sacrifice."

(vi) the evidence of eye-witness Vinuba is quite trustworthy and wrongly rejected by the trial Court. It is also clear from the record that there was a serious dispute about the property between the accused and the deceased and litigations were pending before the incident.

(vii) P.W. Ansuyaben, daughter of the complainant fully supports the prosecution case and her evidence is found quite reliable but wrongly rejected by the trial Court by adopting perverse approach.

(viii) evidence of P.W. Bhikhubha, Ex. 19 has also remained unshaken and the F.I.R. was lodged by him at Dhrol Police Station. It was lodged without any loss of time.

(ix) P.W. 6 Dilakba, Ex. 21 has partly supported the evidence of eye-witness and the case of prosecution about presence of Vinuba and the accused at the venue of offence.

(x) medical evidence of Dr. Vachhani Ex. 8 and the post mortem report, Ex. 10 also materially corroborate the case of prosecution and the eye-witnesses.

(xi) it is amply clear that the deceased had sustained as many as 27 serious injuries which were possible by a sharp cutting instrument like knife, Article 12.

(xii) the accused was seen with a naked knife tainted with profuse blood when he was returning after the offence which he committed.

(xiii) muddamal knife, Article 12 contained human blood group "A" which was the blood group of the deceased and also the accused but it is not the case that he had sustained injuries. This is also a very important incriminating circumstance.

(xiv) forensic science laboratory reports at Exhs. 67 and 68 show that clothes of the accused and knife, Article 12 contained human blood, group "A" which was also of the deceased.

(xv) plea of alibi has not been proved even upon preponderance of probability. In fact, it is found vague and false which is, according to law, by itself, an incriminating circumstance against the accused.

(xvi) the accused absconded till 8 p.m., on 20-9-1989, means, for more than 35

hours who came to be arrested on 21-9-1989.

38. In our opinion, in the light of the aforesaid facts and circumstances, this is a fit case for exercising our powers u/s 378 of the Code for interference and converting acquittal into conviction under Sections 302 and 452 of the I.P.C., as the entire approach of the trial Court in appreciating the evidence and rejecting creditworthiness of the evidence of eye-witnesses and corroborating circumstances is totally, not only unjust and perverse but also illegal. The prosecution has successfully established the guilt of the accused for offence punishable under Sections 302 and 452 of the I.P.C. beyond reasonable doubt. Upon assessment of the evidence of prosecution, the only conclusion one would reach is conviction of the accused for the offences punishable under Sections 302 and 452, I.P.C.

39. House trespass after preparation for hurt, assault or wrongful restraint is an offence punishable u/s 452. It is, successfully, established by the prosecution that the accused had committed trespass in the house of the deceased and the complainant for causing hurt to the deceased and for assaulting the deceased and to commit her murder as prescribed in Section 452. The accused is, therefore, liable for conviction u/s 452. The culpability of the accused for the offence u/s 302 is also established beyond reasonable doubt. The accused committed murder of the deceased by inflicting as many as 27 severe and serious types of knife blows. Therefore, it can, safely, be inferred that intention of the accused while committing house trespass was to commit murder. Minimum punishment for murder as prescribed u/s 302 is death or imprisonment for life and shall also be liable to fine.

40. We have, therefore, no hesitation in finding from the aforesaid discussion and factual scenario emerging from the record of the present case that the respondent-accused is guilty for the offence punishable under Sections 302 and 452. The acquittal recorded against the accused of the said charges is quashed and set aside and is converted into conviction for the offences under Sections 302 and 452, I.P.C. Here, there shall be a statutory pause for affording an opportunity of hearing to the accused on the quantum of sentence. Since the accused is on bail, non-bailable warrant is ordered to be issued returnable on 17th July 1998.

41. However, upon request of the learned Advocate for the respondent, in respect of order of warrant, the matter is adjourned to 17th July, 1998 as he will be instructed to remain present by his Advocate.

Adjourned for hearing on the quantum of sentence.

Further Order

42. Pursuant to our directions, the accused is kept present today for hearing on the quantum of sentence as he is found guilty for the offences punishable under Sections 302 and 452, I.P.C. He has also filed an affidavit narrating the grounds

and circumstances for taking a lenient view while imposing sentences for the aforesaid offences.

43. The accused is heard and upon hearing, it is found that he has three children who are adult. The daughter out of the three children is married and two sons are staying with him and he is a pensioner. He is a retired police constable.

44. Learned Advocate for the accused Mr. Budhbhatti and learned Additional Public Prosecutor Mr. Desai are also heard on the question of sentence.

45. After having considered the facts and circumstances and hearing the accused and learned Advocates for the parties and considering the peculiar facts referable to the accused, ends of justice will be satisfied if he is punished for imprisonment for life which is the minimum punishment and also fine of Rs. 500/- and in default, to undergo R.I. for one month insofar as offence u/s 302, I.P.C. is concerned and is also sentenced to suffer R.I. for seven years insofar as conviction u/s 452, I.P.C. is concerned.

46. The respondent-accused is held guilty for the offences punishable under Secs: 302 and 452, I.P.C. He is sentenced for life imprisonment and to pay fine of Rs. 500/- and in default, to undergo R.I. for one month insofar as conviction u/s 302, I.P.C. is concerned.

47. He is also sentenced to undergo R.I. for seven years for the offence punishable u/s 452, I.P.C. The substantive sentences shall run concurrently.

48. At this stage, learned Advocate Mr. Budhbhatti for the accused has requested to grant eight weeks" time to surrender and suffer imprisonment. After having heard the learned Additional Public Prosecutor on this point, six weeks" time is granted to surrender.