

(2014) 02 GUJ CK 0102
In the Gujarat High Court
Case No : Criminal Appeal No. 1965 of 2008

State of Gujarat

APPELLANT

Vs

Khatubhai Limbabbhai Pagi

RESPONDENT

Date of Decision : 04-02-2014

Acts Referred:

Bombay Police Act, 1951 — Section 125, 134
Criminal Procedure Code, 1973 (CrPC) — Section 209, 313
Penal Code, 1860 (IPC) — Section 109, 114, 302, 323, 324

Citation : (2015) 1 Crimes 235 : (2014) 1 GLH 683 : (2014) 3 GLR 1919

Hon'ble Judges : Bhaskar Bhattacharya, C.J.; J.B. Pardiwala, J

Bench : Division Bench

Advocate : A.N. Shah, APP for Appellant No. 1, Advocate for the Appellant; Vijay H. Patel for H.L. Patel Advocates, Advocate for the Respondent

Final Decision : Dismissed

Judgement

J.B. Pardiwala, J.—This Appeal is at the instance of the State of Gujarat and is directed against the judgment and order dated 25th April 2008 passed by the Additional Sessions Judge, Fast Track Court No. 1, Panchmahals, Godhra, in Sessions Case No. 109 of 2007, whereby the original accused Nos. 2 and 3, viz. Kantibhai Devabhai Pagi and Limbabbhai Lakhabbhai Pagi were acquitted of the offences charged under Sections 302, 323, 324, 326, 504 and 506(2) read with Section 114 of the Indian Penal Code and Section 125 of the Bombay Police Act.

Case of the Prosecution

The daughter of the deceased named Jaya, aged about 19 years, had eloped with the son of the respondent No. 3 herein named Vigalbhai on 13th March 2007 and their whereabouts could not be traced despite a frantic search. On 8th April 2007, the deceased Balvantbhai Gulabbhai Pagi informed his family members that a message had been conveyed to him from the house of the respondent No. 3 that his daughter had returned home and that he should come and take away his daughter from the house of the respondent No. 3.

2. Accordingly, the deceased and others had gone to the house of the respondent No. 3 at around 9:30 in the late evening, and at that point of time, the other family members of the respondent No. 3 were also present. The deceased enquired with the respondent No. 3 as to where was his daughter, and in reply, the respondent No. 3 herein and the other co-accused uttered filthy abuses to the deceased and asked him as to why they had come as the daughter was not at their place and further, they were asked to leave immediately. At that point of time, the original accused No. 1 viz. Khatubhai Limbabbhai Pagi had a sword in his hand. The respondent No. 2 herein had an iron pipe in his hand and the respondent No. 3 herein had a stick in his hand. All the three accused charged towards the deceased and his companions and the original accused No. 1 Khatubhai Limbabbhai Pagi is alleged to have inflicted fatal injuries on the neck of the deceased with a sword, whereas the respondent Nos. 2 and 3 herein are alleged to have indiscriminately hit blows on the body of the deceased. At that point of time, the original first informant Somabhai Vechat and another person named Vikramsinh Vagha tried to intervene, and in the process the accused No. 1 Khatubhai Limbabbhai Pagi inflicted grievous injuries on the left hand wrist of the first informant. In the same manner the accused No. 1 Khatubhai Limbabbhai Pagi also inflicted grievous injuries on the hand of Vikramsinh Vagha, as a result, the thumb of his left hand got cut and severed. All the three accused, thereafter, left the scene of occurrence and went away towards their house. It is also, the case of the prosecution that Kantibhai, the respondent No. 2 herein had inflicted injuries with iron pipe on the hand of Vikramsinh Vagha. On account of serious injuries sustained by Balvantbhai Gulabbhai Pagi, he was found to be dead at the place of occurrence itself. The other two injured witnesses were taken to the Government Hospital for necessary treatment.

3. In connection with the incident, a First Information Report Exh: 28 was lodged by Somabhai Vechat, and on the strength of such Report lodged, the Investigation had commenced. The dead body of the deceased was sent for the postmortem examination. The inquest panchnama was also drawn. The scene of offence panchnama was drawn. The muddamal articles collected during the course of investigation were sent to the Forensic Science Laboratory for chemical analysis. The accused persons were arrested and the panchnamas of the person of the accused were drawn.

4. At the end of the investigation, charge-sheet was filed for the offences punishable under Sections 302, 323, 324, 326, 504 and 506(2) read with 114 of IPC in the Court of Judicial Magistrate, First Class, Shahera. As the offences were exclusively triable by the Court of Sessions, the JMFC, Shahera, committed the case to the Court of Sessions u/s 209 of the Criminal Procedure Code.

5. The sessions Court framed charges against the accused persons being Exh: 2, and the statement of the accused persons were recorded. The accused persons did not admit the charge and claimed to be tried.

6. The prosecution adduced the following oral evidence in support of his case:-

1. Dr. Belaben Rayjibhai Patel, Medical Officer who had treated the injured witness Vikramsinh Vaghabhai at Godhra Civil Hospital, Exh: 9.
 2. PW-2 Jayeshkumar Shambhubhai Patel Exh: 12.
 3. PW-3 Dr. Rajivnayan Shrisharatuprasad Exh: 18, Medical Officer who had performed the postmortem of the dead body.
 4. PW-4 Somabhai Vechatbhai, Exh: 27.
 5. PW-5 Vikramsinh Vaghabhai, Exh: 29 (injured witness).
 6. PW-6 Ranjitsinh Gulabbhai, Exh: 32.
 7. PW-7 Bhimsingbhai Kankabhai, Exh: 45.
 8. PW-8 Prabhatsinh Abhesinh, Exh: 54.
 9. PW-9 Dharmendrasinh Jaswantsinh Chavda, Exh: 56 (Investigating Officer).
7. The following pieces of documentary evidence were adduced by the prosecution:-
1. Original Complainant, Exh: 28.
 2. The Office-copy of medical-list of the injured Somabhai Vechatbhai, Exh: 21.
 3. The Office-Copy of medical-list of the injured Vikramsinh Vaghabhai, Exh: 22.
 4. The office-copy of the Yadi written to the Executive Magistrate, Shahera, Exh: 34.
 5. Inquest-Panchnama, Exh: 35.
 6. Police Report sent with the investigation of the dead body, Exh: 36.
 7. The Original Primary report of F.S.L., Exh: 37.
 8. The panchnama of the place of the offence, Exh: 38.
 9. The panchnama of the physical condition of the accused persons, Exh: 46.
 10. The list of the clothes seized from the dead body at the time of P.M., Exh: 67.
 11. Cause of death certificate, Exh: 24.
 12. The panchnama of the seizure of clothes from the dead body, Exh: 39.
 13. The application written by the applicant Jayaben Pagi to the P.S.I. Shahera, Exh: 40.
 14. The certificate copy of the advertisement of marriage, Exh: 41.
 15. The copy of the affidavit of Jayaben, Exh: 42.
 16. The copy of the School Leaving Certificate of Jayaben, Exh: 43.

17. The Original posted envelop, Exh: 44.
 18. The Office copy of the yadi written to Dr. Jayest Patel for taking blood samples, Exh: 57.
 19. The panchnama of the seizure of the clothes of the injured witness Vikrambhai, Exh: 55.
 20. The panchnama of the seizure of the clothes of the complainant, Exh: 49.
 21. Yadi written for taking the blood sample of the complainant, Exh: 58.
 22. The M.L.C. Certificate of the injured complainant, Exh: 11.
 23. The M.L.C. Certificate of the injured Vikrambhai, Exh: 10.
 24. Yadi Written for giving the certificate of muddamal analysis to F.S.L. Vadodara, Exh: 59.
 25. Muddamal despatch note, Exh: 60.
 26. The original certificate regarding Authority, Exh: 61.
 27. P.M. Note, Exh: 23.
 28. The Injury certificate of the injured Vikrambhai, Exh: 13.29.
 29. The acknowledgment receipt given by F.S.L. Vadodara as to the receipt of the parcels of muddamal, Exh: 62.
 30. The certificate given of the injured Vikrambhai by Shahera Hospital, Exh: 20.
 31. The certificate given to the complainant by Shahera Hospital, Exh: 19.
 32. Yadi written to Executive Magistrate to prepare the map of the place of the offence, Exh: 66.
 33. The report of muddamal-examination, Exh: 64.
 34. Report of Serological Examination, Exh: 6.
 35. Closing Pursis, Exh: 67.
8. After completion of oral as well as documentary evidence of the prosecution, the statement of the accused persons were recorded u/s 313 of the Criminal Procedure Code, in which the accused persons stated that the complaint was a false one, and they were innocent.
9. At the conclusion of the trial, the learned Trial Judge convicted the original accused No. 1 Khatubhai Limbabhai Pagi for the offences punishable under Sections 302 and 324 of the Indian Penal Code, and sentenced him to undergo life imprisonment with fine of Rs. 1,000/- and in default of; payment of fine, further simple imprisonment for a period of one month. In the same manner, the learned Trial Judge sentenced the original accused No. 1 to undergo two years of

simple imprisonment with fine of Rs. 2,000/- for the offence u/s 324 of the Indian Penal Code and in default of payment of the fine, further simple imprisonment for the period of two months. However, the original accused No. 1 was acquitted by the trial Court for the offences under Sections 323, 326, 504, 506(2) and 114 of the IPC.

10. On the other hand, the learned Trial Judge acquitted the other two co-accused viz. Kantibhai Devabhai Pagi, the respondent No. 2 and Limbabhai Lakhabhai Pagi, the respondent No. 3 herein of all the charges framed against them.

11. The original accused No. 1 Khatubhai Limbabhai Pagi challenged the judgment and order of conviction passed by the learned Trial Judge by filing Criminal Appeal No. 3180 of 2008 whereas, the State of Gujarat feeling aggrieved and dissatisfied with the judgment and order of acquittal, so far as, the other co-accused are concerned filed Criminal Appeal No. 1965 of 2008.

12. Both the appeals were admitted and ordered to be heard together.

13. When both the appeals were taken up for hearing, it was brought to our notice by the learned A.P.P. that the convict appellant of Criminal Appeal No. 3180 of 2008 had died on 18th August 2013, as he was suffering from cancer. A jail report to that effect was produced before us and such being the position, we passed an order on 8th January 2014 that the Criminal Appeal No. 3180 of 2008 had abated.

14. At this stage, it may not be out of place to mention that in this acquittal appeal, the State has also challenged the acquittal of the original accused No. 1 for the offences punishable under Sections 323, 326, 504, 506(2) read with Section 114 of the Indian Penal Code and Section 134 of the Bombay Police Act. Since, the original accused No. 1 Khatubhai Limbabhai Pagi has expired, the acquittal appeal so far as the respondent No. 1-the original accused No. 1 is concerned, stands abated.

15. We proceeded to hear the State's acquittal Appeal No. 1965 of 2008 so far as the respondent Nos. 2 and 3 are concerned. Submissions on behalf of the Appellant State of Gujarat.

16. Mr. Shah, the learned A.P.P., vehemently submitted that the learned trial Judge committed a serious error in acquitting the respondent Nos. 2 and 3 of all the charges by giving them benefit of doubt.

17. Mr. Shah submitted that the learned trial Judge committed an error in not believing the actual version of the PW-4 Somabhai (First Informant) examined at Exh: 27. According to Mr. Shah this witness has fully supported the case of the prosecution as narrated by him in his First Information Report. In such circumstances the trial Court ought not to have disbelieved the version of this witness.

18. Mr. Shah submitted that the approach of the trial Court could be said to be vitiated by manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the order of acquittal could be characterized as perverse.

19. Mr. Shah submitted that presence of both the acquitted accused at the time of the incident is established beyond doubt and once the presence of the accused is not in doubt then some minor discrepancy or contradiction between the ocular version and the medical evidence by itself would not be sufficient to extend the benefit of doubt in favour of the respondents. Submissions on behalf of the respondents.

20. Mr. Vijay Patel, the learned Advocate appearing for the two acquitted accused, vehemently submitted that the trial Court committed no error, not to speak of any error of law, in acquitting his clients by giving them the benefit of doubt.

21. Mr. Patel submitted that even if the presence of both the acquitted accused is believed, even then that by itself would not be sufficient to hold them guilty with the aid of Section 114 of the Indian Penal Code.

22. Mr. Patel submitted that if two reasonable views on the evidence adduced are possible, the view that commenced itself to the trial Court should be accepted as the trial Court had the benefit of seeing the demeanour of the witnesses in the box. Mr. Patel submitted that the presumption of innocence gets strengthened by an order of acquittal. Mr. Patel submitted that the trial Court has rightly take into consideration the material contradictions in the ocular version of the eye-witnesses and the medical evidence on record.

23. In such circumstances, Mr. Patel would submit that there being no merit in the State's acquittal appeal, the same may be dismissed and the order of acquittal be affirmed.

24. Having heard the learned Counsel appearing for the parties and having gone through the materials on record, the only question that falls for our determination in this Appeal is, whether the learned trial Judge committed any error in acquitting the respondents.

25. By a series of decisions, the Supreme Court has laid down the parameters of appreciation of evidence on record and jurisdiction & limitations of the appellate Court, and while dealing with the appeal against the order of acquittal, the Supreme Court observed in Tota Singh and Another Vs. State of Punjab, as under:--

6. The jurisdiction of the appellate Court in dealing with an appeal against an order of acquittal is circumscribed by the limitation that no interference is to be made with the order of acquittal unless the approach made by the lower Court to the consideration of the evidence in the case is vitiated by some manifest illegality or the conclusion recorded by the Court below is such which could not

have been possibly arrived at by any Court acting reasonably and judiciously and is, therefore, liable to be characterised as perverse. Where two views are possible on an appraisal of the evidence adduced in the case and the Court below has taken a view which is a plausible one, the appellate Court cannot legally interfere with an order of acquittal even if it is of the opinion that the view taken by the Court below on its consideration of the evidence is erroneous.

Further, the Supreme Court has observed in *Ramesh Babulal Doshi Vs. State of Gujarat*, as under:-

7. This Court has repeatedly laid down that the mere fact that a view other than the one taken by the trial Court can be legitimately arrived at by the appellate Court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial Court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate Court is first required to seek an answer to the question whether the findings of the trial Court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate Court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate Court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then-and then only-reappraise the evidence to arrive at its own conclusions.

In the *State of Rajasthan Vs. Raja Ram*, , the Supreme Court observed thus:-

7. There is no embargo on the appellate Court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate Court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. (See *Bhagwan Singh and Others Vs. State of Madhya Pradesh*,). The principle to be followed by appellate Court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference. These aspects were highlighted by this Court in *Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra*, , *Ramesh Babulal Doshi Vs. State of Gujarat*, and *Jaswant Singh v.*

State of Haryana.

26. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal, the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate Court has a power to review the evidence if it is of the view that the view arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate Court, in such circumstances, to re-appreciate the evidence to arrive at a just decision on the basis of materials placed on record to find out whether any of the accused is connected with commission of the crime he is charged with.

27. In the light of the aforesaid principles laid down, we shall consider the evidence placed on record to find out, whether the trial Court committed any error in dealing with the evidence, which can be said to be patently illegal, or that the conclusion arrived at is wholly untenable, calling for interference by us.

28. It is the case of the prosecution that the daughter of the deceased had eloped with the son of the respondent No. 3. On account of the same, the relations of the deceased with the accused persons had got strained. It appears from the evidence of the PW-4 Somabhai Vechat, Exh: 27 who is the first informant, that on the date of the incident they had all gone at the house of the respondent No. 3 alongwith the deceased, as the deceased had an information that his daughter had returned and was at the house of the respondent No. 3. According to this witness, there was an altercation between the deceased and the respondent No. 3 in that regard. According to this witness, at that point of time, the original accused No. 1 Khatubhai Limbabhai Pagi (expired) inflicted injuries on the neck of the deceased with a sword and in the same manner the original accused No. 1 also inflicted injuries on the other eyewitness i.e. PW-5, Vikramsinh Vaghabhai. The PW-4 Somabhai Vechat, in his evidence, has also deposed that the respondent Nos. 2 and 3 herein assaulted the deceased with the pipe and a stick.

29. We have minutely gone through the examination-in-chief of the PW-4 Somabhai Vechat. This witness has deposed that the respondent Nos. 2 and 3 herein had indiscriminately inflicted blows on the body of the deceased with a pipe and a stick.

30. Almost on the same footing is the evidence of the PW-5 Vikramsinh Vagha Exh: 29. This witness has also deposed that he had witnessed the respondent Nos. 2 and 3 herein assaulting the deceased with the stick and a pipe.

31. In the same manner the PW-6 Ranjitsingh Gulabbhai, Exh: 32 an injured

witness, has also deposed that the respondent Nos. 2 and 3 were armed with an iron pipe and stick and they had indiscriminately inflicted blows on the body of the deceased.

32. The trial Court took into consideration the postmortem report Exh: 23 and noted that the deceased had sustained only one injury on his neck which was a deep sharp cut injury below the hyoid bone 12 cm x 7 cm x 7 cm oblique in shape. The trial Court also noted that the trachea, carotid and jugular vein were cut. Except the injuries on the neck no other injuries were found on the body of the deceased as is evident from the postmortem report Exh: 23. Such a discrepancy persuaded the trial Court to disbelieve the ocular version of all the three eye-witnesses, viz. PW-4 Somabhai Vechat, PW-5 Vikramsinh Vagha and PW-6 Ranjitsinh Gulabbhai, so far as the involvement of the respondent Nos. 2 and 3 in the crime is concerned.

33. In our opinion, the trial Court rightly took into consideration the discrepancies in the ocular version of the eye-witnesses and the medical evidence on record. If the say of the three eye-witnesses is that the respondent Nos. 2 and 3 had assaulted the deceased with stick and iron pipe all over the body and if not a single abrasion is found on the body of the deceased, then it would suggest that the three eyewitnesses have falsely deposed against the respondent Nos. 2 and 3.

34. Let us assume for the moment that the respondent Nos. 2 and 3 were present at the time of the incident as vociferously urged by the learned A.P.P. According to Mr. Shah, the presence of both the acquitted accused was sufficient to hold them guilty for the offence of murder with the aid of Section 114 of the Indian Penal Code. According to Mr. Shah, the altercation in the first instance took place between the deceased and the respondent No. 3. This altercation led to the main incident and, therefore, the respondent Nos. 2 and 3 could be said to have abetted the offence of murder committed by the original accused No. 1.

35. We are not impressed with such submission canvassed on behalf of the appellant.

36. In our opinion, in the absence of any substantive and cogent evidence adduced at the trial that the respondent Nos. 2 and 3 herein had instigated the principal accused to assault the deceased, the trial Court, in our opinion, rightly acquitted the respondent Nos. 2 and 3.

37. Section 114 of the Indian Penal Code provides for the punishment of what is known in English Law as principal in the second degree. A person may remain absent at the place of occurrence and yet may abet the offence. He becomes liable u/s 109 of the IPC. He may again abet such offence and remains present at the place of occurrence. He becomes liable u/s 114 of the IPC. The principle is that if the nature of the act constitutes abetment, then if the abettor remains present he is to be deemed to have committed the offence although another man has actually committed it. In other words, a person present abetting an offence

will be deemed to have committed the offence. If a person instigates the principal offender to commit murder he abets the murder. If such abettor is away from the scene when the offence is committed he is charged u/s 109 of the IPC. If he is present, he is charged u/s 114 of the IPC. Section 114 of the IPC could be brought into operation only when the circumstances amounting to abetment of a particular crime have first been proved, and then presence of the accused at the commission of that crime is proved in addition.

38. Thus, there must be abetment of the crime, the crime must be actually committed and the abettor must be present there for the application of this Section. Only if the offence is actually committed in the presence of the abettor there can be conviction of the abettor. At the same time, it is also a settled law that mere presence of a person at the time of commission of the offence is insufficient. The act of abetment must take place at a time prior to the actual commission of the offence and it is only when the abettor happens to be present at the time of the commission of the offence, Section 114 of the IPC can be invoked. (see Jainul Haque Vs. State of Bihar,)

Sections 34 and 114 of the IPC:

Distinction

The whole object of both the Sections is to provide for cases where the exact share of each of the criminals in the offence cannot be ascertained though the moral culpability of each is clear and identical. The distinction between these two Sections is so thin. u/s 34, a criminal act is done by several persons in furtherance of common intention of all and each becomes liable as if the offence was committed by himself alone. u/s 114, a person, prior to the commitment of the act, makes himself liable as an abettor. If he remains present at the time of commission of the offence without taking any active part in the doing of the act, he renders himself liable under this Section.

Sections 109 and 114 of the IPC:

Distinction

Section 109 is applicable when there is an active abetment at the time of commission of the offence. If on the other hand there was abetment previous to the commission of the offence and the abettor was present at the time of commission of the offence, Section 114 will be attracted. Active abetment at the time of the commission of the offence will attract Section 109. Section 114 has no application where the act is abetted at the time of commission of the offence.

39. Having regard to the evidence on record, we agree with the view of the trial Court that although the incident might have occurred as the son of the respondent No. 3 had eloped with the daughter of the deceased, but that by itself would not be sufficient to hold the respondent Nos. 2 and 3 guilty of having abetted the commission of the crime. None of the eye-witnesses have deposed that the respondent Nos. 2 and 3 were instigating the principal accused or aided

in any manner in the commission of the crime.

40. In this context, we may quote with profit a decision of the Supreme Court in the case of Jainul Haque (*supra*). In that case, the Supreme Court noted that there was a clear discrepancy between the evidence of the witnesses given at the trial and the version given in the First Information Report regarding the part played by the appellant. The part attributed to the appellant, according to the First Information Report was, that he had exhorted the other accused to assault the deceased, while according to the evidence adduced at the trial, the appellant had actually joined in the assault on the deceased.

The High Court had not accepted the prosecution evidence on the point that the appellant had joined in the assault on the deceased. All the same, the High Court convicted the appellant because it was of the view that the appellant had exhorted the other accused to assault the deceased.

In such circumstances, the Supreme Court, while allowing the appeal and setting aside the conviction of the appellant, made the following observation, which, in our opinion, fortifies the view we have taken in this Appeal:-

In the absence of any substantive and cogent evidence, adduced at the trial what the appellant had exhorted the other accused to assault Layaquat, the High Court, in our opinion should not have convicted the appellant for the offence u/s 323 read with Section 114 Indian Penal Code. The High Court has found the evidence of the eye witnesses to be unsatisfactory. It has also found that the eye witnesses were prone to exaggerate things and to involve as many accused as possible. In the circumstances it was, in our opinion, not safe to base the conviction of the appellant on the aforesaid evidence. The evidence of exhortation is, in the very nature of things, as weak piece of evidence. There is quite often a tendency to implicate some person in addition to the actual assailant, by attributing to that person an exhortation to the assailant to assault the victim. Unless the evidence in this respect be clear, cogent and reliable, no conviction for abetment can be recorded against the person alleged to have exhorted the actual assailant. The evidence adduced at the trial in respect of the part alleged to have been played by the appellant is contradictory and far from convincing. We would, therefore, accept the appeal, set aside the conviction of the appellant and acquit him.

41. Mr. Shah vehemently submitted that the PW-5 Vikramsinh Vagha, in his evidence Exh: 29, has deposed that prior to the actual incident of assault, the respondent No. 3 had hurled abuses and had also threatened the deceased and his companions that they would be cut to pieces. It appears that this fact has not been stated by the PW-4 Somabhai Vechat in his evidence Exh: 27. Even the PW-6 Ranjitsinh Gulabbhai in his evidence Exh: 32 has not said anything about exhortation except that abuses were hurled. As a matter of fact, the accused No. 1 is in no way related to the accused No. 3. What was the reason for the accused No. 1 to get excited and lay an assault is not clear. Be that as it may, we have

examined the oral evidence from the point of view, whether the respondents herein could be said to be in any manner the abettors. Our answer is in the negative and we do not find any error on the part of the trial Court in taking such a view. For the foregoing reasons, we do not find any reason to interfere with the order of acquittal passed by the trial Court and consequently, this appeal filed by the State of Gujarat fails and is hereby dismissed.