

(1990) 04 GUJ CK 0011
In the Gujarat High Court

Case No : Criminal Appeals No"s. 520 of 1988 and 5 of 1989

State of Gujarat

APPELLANT

Vs

Panubhai and Another

RESPONDENT

Date of Decision : 10-04-1990

Acts Referred:

Bombay Police Act, 1951 — Section 35(1)
Criminal Procedure Code, 1973 (CrPC) — Section 162
Penal Code, 1860 (IPC) — Section 300, 302, 304, 34

Citation : (1991) CriLJ 2226 : (1990) 2 GLR 499

Hon'ble Judges : K.J. Vaidya, J;G.T. Nanavati, J

Bench : Division Bench

Advocate : S.T. Mehta, app, for the Appellant; B.S. Supehia and D.B. Dholakia, for the Respondent

Judgement

K.J. Vaidya, J.—These two criminal appeals, one by the State of Gujarat being Criminal Appeal No. 520 of 1988 (Acquittal) in the matter of offences under Sections 302 323 326 read with 34 of the I.P.C. against the respondent-accused viz. (i) Panubhai alias Paniya Kolaji; and (ii) Premji Gora; and another by the accused No. 1 only being Criminal Appeal No. 5 of 1989 against the impugned order of conviction and sentence under Sections 304 325 read with Section 34 of the I.P.C. are directed against the common judgment and order dated 18-4-1988 rendered in Sessions Case No. 20 of 1988 by the learned City Sessions Judge, IInd Court, Ahmedabad.

1.1 The learned Sessions Judge while convicting each of the accused for offences Under Sections 304-II 325 read with Section 34 of the I.P.C. has awarded the sentences as tabulated hereunder:

Sr. Name of the Convicted for Substantive Fine In-default No. accused offences sentence Rs. to undergo 1. Panubhai Paniya (i)Under Section 304 R.I. for Rs. 25/- Further RI Kolaji II r. w. s. 34 four years for 7 days I.P.C. (ii)Under Section 325, R.I. for one --do-- --do-- r.w.s. 34 I.P.C. year 2. Premji Gorabhai (i)Under

Section 304- R.I. for 3 Rs. 25/- Further RI II r.w.s. 34 years for 7 days " (ii)Under Section 325, R.I. for 6 --do-- -- do-- r.w.s. 34 months IPC. 1.2. The substantive sentences awarded on different counts against each of the accused were directed to run concurrently.

1.3 Both the accused were declared not guilty for the offences u/s 302, read with Section 34 of the I.P.C.

2. As stated above, since both these appeals arise out of the common judgment and order, they are heard together and disposed off by the common judgment.

3. The prosecution case, as briefly summoned up and reflected in charge Exh. 3 was that the incident in question wherein Naresh came to be murdered and his father Chandrasen received greivous hurt, took place on 18-9-1987 at about 8-15 p.m. near Shorabji compound situated at Old Wadaj, Ahmedabad. The two respondent-accused herein along with one another accused Tajia (since deceased) armed with pipes and sticks assaulted Naresh and his father Chandraseh, as a result of which, Naresh ultimately succumbed to injuries in the hospital on 20-9-1988 at 12-15 a.m. The injured Chandrasen thereafter gave a complaint in the hospital naming the accused as assailants. He also named Tagia as one of the assailants. Tagia who happened to be the brother of the accused No. 1 Punubhai, as stated by P.S.I. 1 U. N. Malvi committed suicide on 23-9-87 at the house of the sister of his mother. It further appears that P.S.I. Barad arrested accused Nos. 1 and 2 on 21-9-87 and handed over them at Naranpura Police Station at 11-45 a.m. After the investigation was over, the accused persons came to be charge-sheeted for offences under Sections 302 325 326 read with Section 34 of the I.P.C. and u/s 35(1) of the Bombay Police Act, to stand trial before the Sessions Court.

4. At the trial, the accused pleaded not guilty and claimed to be tried. In defence, they pleaded that at the relevant time, they were at different places -in Ahmedabad for securing and attending their respective works. They returned home at about 10 to 10-30 p.m. In defence, though the accused have pleaded alibi, none of them have either examined themselves or lead any defence evidence in support of their case.

5. In order to bring home the charge against the accused, the prosecution in all has examined 13 witnesses.

6. The trial Court after duly appreciating the prosecution evidence and defence version, convicted and sentenced the accused as stated earlier in para 2 of this judgment and hence aggrieved by the same, these appeals.

7. Mr. B. S. Suphia and Mr. B. D. Dholakia, learned advocates (appointed) for the accused, while challenging the impugned judgment and order of conviction and sentence, have taken us through the evidence of all the prosecution witnesses and reasons for conviction and sentence given by the trial Court. They have, in fact, made the very submissions which were made on behalf of the

accused before the trial Court. The said contentions are as under:

(1) That the evidence adduced by the prosecution regarding motive is too meagre to impel the accused to commit murder of Naresh.

(2) That the evidence of complainant, namely P. W. 3 Chandrasen Mohanlal Exh. 13 is of highly interested nature being that of the father of the deceased Naresh. Moreover, the story narrated by him pertaining to the incident is very unnatural and unconvincing. It suffers from material inconsistencies and improvements. The medical evidence brought on the record also, to a certain extent, is found to be at variance with evidence of the injured complainant creating overall doubt in the prosecution case.

(3) That the evidence of P. W. 4 Shanker Chhotumal Exh. 15 being the evidence of a "chance-witness" as well as that of the friend of Naresh (deceased) ought not to have been accepted and relied upon at its face value by the trial Court.

(4) That the trial Court committed a serious error in not holding that there was an inordinate delay in filing of F.I.R. Not only that, but the alleged F.I.R. Exh. 14 in the facts and circumstances of the case was merely a statement of the complainant recorded in the course of the investigation and hence the same was inadmissible in evidence being clearly hit by Section 162 of the Code of Criminal Procedure 1973.

(5) That since the prosecution having failed to examine independent witnesses though available, the trial Court ought to have drawn an adverse inference against the prosecution.

(6) That the non-examination of another injured witness Bhanraj who received the injury during the course of same incident, ought to have been held as creating sufficient doubt in the prosecution case, the benefit of which ought to have been resolved in favour of the accused.

(7) That having regard to the aforesaid submissions the accused deserve at least the benefit of doubt.

8. In order to make good above submissions, the learned defence advocates have taken us through the relevant prosecution evidence. To start with P. W. 3 Chandrasen Mohanlal Exh. 13, an injured witness and complainant in the present case, is the father of the deceased Naresh, round whom revolves the case and the fate of the prosecution. In his evidence before the Court, in substance, he has stated that he was residing in Shorabji compound with his family and was running a grocery shop wherein his son Naresh (deceased) was assisting him. Before he started grocery business, he was doing the business in Video shows. That continued for about four-five months. However, since the accused Nos. 1, 2 namely Panubhai, Premji and Tagiya (deceased accused) and three-four others, after taking liquor were committing mischief and also seeing Video shows freely, he was constrained to close down the said business. These accused persons were known to him. The incident in question took place on 18-9-1987 at about 7-30

p.m. According to the complainant, round about that time Naresh had gone to purchase Pan Masala from the shop namely "Bholenath Pan Centre" situated at a distance of about 100 to 150 Mtrs. away from his shop. Naresh on returning from the said Pan Centre, informed him that accused No. 1 and Panubhai had slapped him saying "why have you come on this side?" Naresh further informed him that when he was at the said Pan Centre, son of Chimanbhai complained that his V.C.R. was not working properly and, therefore, he went to his house to check up the same. While returning the accused No. 1 Panubhai met him and gave a slap saying "why have you come on this side?" On hearing this, the complainant along with Naresh went to the house of the accused No. 1 to rebuke him, but he was not found there. Thereafter, when both the complainant and Naresh were returning home, on way, accused No. 1 Panubhai, Premji and Tagiya (i.e. a deceased-accused) met them with pipes and sticks. On seeing the complainant and Naresh, accused No. 1 shouted "Salaone Mara". So saying accused No. 1 Panubhai started giving pipe blows on the head of the complainant; while Tagiya also gave two-four pipe blows on the back and the left leg of the complainant. When accused No. 1 Panubhai and Tagiya were beating the complainant, Naresh, his son intervened to save him, whereupon accused No. 1 Panubhai gave pipe blows on the head of Naresh, Tagiya and accused No. 2 Premji also joined accused No. 1 in beating Naresh and gave him blows with sticks and pipes on head, face, chest, back and both legs. As a result of this assault, both the complainant and Naresh shouted for help. Because of these injuries, the injured fell down. Even thereafter, accused No. 1 Panubhai gave a pipe blow on the nose of the complainant. Both accused No. 1 Panubhai and Tagiya (deceased) gave pipe thrusts on the face of Naresh. On hearing shouts, crowd collected in which Shanker Chhotumal, Haresh, Murli, Dhanraj, Shanker, Ashok, etc. were found present. All these persons had come to rescue the injured. But as these accused chased the aforesaid persons, they ran away. Thereafter, the accused also went away with respective weapons. The complainant has further stated in his evidence that the place at which the incident took place is a public road and there mercury street-lights were on. Not only that, but round about the scene of offence there were Pan Gallas, Tea Lorries, Milk and Cycle shops, wherein also the lights were on. After the incident the injured went to the house of the one Kuntiben residing in Shorabji Apartments situated at a distance of 150 ft. away. Thereafter the Ambulance was called for and in which the injured were removed to the V. S. Hospital and admitted in a Casualty Ward as an indoor patient. At about 11.00 p.m. the police recorded the complaint which is produced at Exh. 14. Naresh expired at 12.15 a.m. on 20-9-1987.

8.1 This complainant has been cross-examined at length without any success. The only thing that has been taken out in Para 20 of his evidence is that he in his complaint before the Police, had not stated that the accused Nos. 1, 2 and Tagiya had run after those 5 persons who came to rescue. Further, in Para 24 of his evidence it has been elicited that he did not remember as to whether the Doctor had inquired of him about the history -of injuries. The complainant had

categorically denied the suggestion namely of having informed the Doctor of being assaulted by sword and Dharia over and above by pipe. It has also been denied that it was only accused Tagiya who had caused injury to him and Naresh and that the names of the present two accused as assailants were given out of enmity.

9. The prosecution has also examined another eye-witness namely P. W. 4 Shanker Chhotumal Exh. 16 who in his evidence before the Court in substance has stated that both two injured as well as three accused were known to him and that he had witnessed the alleged incident. In short, this witness has broadly supported the evidence of the injured complainant i.e. P. W. 3 Chandrasen Mohanlal Exh. 13. In cross-examination of this witness, it was alleged that since he was the friend of the deceased Naresh, he has come forward to support the prosecution case. Now though this allegation of being friend of Naresh has been denied by this witness, the fact remains that he had stated so before the P. W. 13, P.S.I. Mr. U. N. Malvi Exh. 53 and thus the contradiction stands proved.

10. The prosecution in support of its case, in all, has examined four doctors from V. H. Hospital, Ahmedabad. They are-- (i) P. W. 7 C.M.O. Dr. R. L. Tavia, Ex. 32, who had examined two injured Chandrasen and his son Naresh when they were brought to the hospital at 8-30 p.m. on 18th September, 1987. He on examining noticed five injuries on Chandrasen; and two injuries on Naresh. Medical certificates recorded are at Exs. 32 and 34 P. W. 1 Dr. Sandi Agrawal, Ex. 9, Registrar of Neuro Surgery, within an hour examined Chandrasen and noticed four injuries on him, one of which was a linear fracture of the left frontal bone. Medical certificate issued in this regard is at Ex. 10; (iii) P. W. 3 Dr. Nirod C. Zala, Ex. 11, who performed post-mortem of the deceased Naresh and recorded following injuries on his person:

(i) A stitched wound of size 6 x 1 cm. with five stiches taken in left occipital region just above the external occipital protuberance.

(ii) A stitched wound of a size 4 cms. over left parietal region, 4 stiches taken in line of parietal eminence.

(iii) A contused lacerated wound of size 2 x 1 x 1 cm. over left parietal region, 2 cms. below injury No. 2.

(iv) A bruise of size 3 x 2 cm. over forehead in the midline, bluish purple in colour.

(v) A contused lacerated wound of size 2 x 1 x 0.5 cm. below the right eye on its outer aspect bluish purple in colour.

(vi) A stitched wound over bridge of the nose, one stitch taken.

(vii) A stitched wound over chin on the right side one stitch taken.

(viii) Three stitches in inner as well as outer aspect of the lower lip on left side.

- (ix) A stitched wound of size 1.5 cm. over left side of cheek bone.
- (x) A stitched wound of size 2 cm. in length seen over pinna of left ear opposite to tragus, two stitches taken.
- (xi) A bruise of size 10 x 2 cms. bluish purple in colour in the right hypochondriac region. Lateral end of the bruise is 4 cms. from midline and 40 cms. from the clavicle in mid clavicular line. Laterale end of the bruise was 8 cms. from midline and was 47 cms. from the clavicle.
- (xii) A bruise 5 x 1.4 cms. bluish purple in colour over posterior aspect of the left upper arm.
- (xiii) A bruise 25 x 1 cms. over left ulnar border of forearm, bluish purple in colour and 4 cms. from the olecranon process of radius.
- (xiv) A bruise 11 x 1 cms. bluish purple in colour over left side of scapula starting 3 cms. from the scapular spine going down 11 cms. vertically.
- (xv) A bruise 9 x 2 cms. bluish purple in colour over left side on the back, 2 cms. below the inferior angle of scapula and 4 cms. from midline.
- (xvi) A contused lacerated wound over patella on the left side 2 cms. x 1 cms. dark brown in colour.
- (xvii) A contused lacerated wound over shin of left tibia 4 x 3 cms. dark brown in colour 13 cms. below the tibial tubercle.
- (xviii) Fracture of bridge of nose.
- (xix) Fracture of the mendible in the centre with four lower central teeth dislocated and mendible in parties.

The said Dr. Zala, in his deposition, has further stated as under:

"On internal examination of scalp head, haematoma was found over frontal bones and haematoma was also found over left parietal and occipital bones. While on internal examination of skull in the head, it was found that there were two linear fractures of right frontal bone of size 7 cms. and 4 cms. There was a depressed fracture of the left occipital bone of size 2 x 2 cms. There was also a fracture of cribriform plates of ethmoid bone in the base of skull in anterior cranial fossa. While on internal examination of brain in the head, subarachnoid haemorrhage was found present over frontal and temporal lobes of the brain on left side."

"All the above injuries were ante mortem and external injuries were possible by any hard and blunt substance. They were also possible by inflicting blows with muddamal iron pipe and muddamal wooden stick vide articles Nos. 11 and 12 shown to me. All the external injuries were the result of distinct blows. All the internal injuries were the result of external injuries Nos. 1 to 4 and 18 and 19 were grievous in nature. The external injuries Nos. 1 to 4 and 18 and 19 coupled

with their internal injuries were sufficient in the ordinary course of nature to cause death. The death was due to shock following multiple fractures over face and head with inter-acraneal haemorrhage."

The post-mortem notes are at Ex. 12; and (iv) P. W. 10, C.M.O. Dr. S. C. Chandarana, Ex. 45, who examined accused No. 1 Panubhai on 21st September, 1987 at 7-35 p.m. who came with police-Yadi, and noticed following injuries (i) Swelling over right thumb and dorsum of right hand; (ii) Abrasion over right shoulder; (iii) Tenderness was also seen over the right scapular region, shoulder region and right parital region. X-ray revealed that there was an old fracture of neck of the second metacarpal bone and base of the first metacarpal bone. Medical certificate issued in this regard is at Ex. 46.

11. The prosecution has also examined the various police witnesses. They are-- (i) P. W. 9 Narayansing Ramsing, Ex. 39, who on the date of the incident, was on duty at V. S. Hospital and passed on information given to him by Dr. Tavia to Naranpura police station, as reflected in Vardhi, Ex. 39; (ii) P.W. 2 Manubhai Thakore, Ex.50, P.S.O. Naranpura Police Station, who received the aforesaid information from P. W. 9 Narayansing Ex. 38 from V. S. Hospital; (iii) P. W. 8, R. A. Deora, Ex. 35, P.S.I. on duty at Naranpura Police Station, who on the basis of the Vardhi proceeded to V. S. Hospital to inquire into the matter and ultimately recorded a complaint of P. W. 3 Chandrasen Mohanlal, Ex. 13, which is produced at Ex. 14; (iv) P. W. 11, Mavjibhai Chandrasing, Ex. 47, serving as police constable in the police control room. It is this witness who received a telephonic information at 7-55 p.m. from one Ravibhai L. Parma (not examined) to the effect that a big quarrel has taken place in Sorabji compound, two persons are lying in bleeding condition and therefore police be sent. This information was duly noted down and is produced at Ex. 49; (v) P. W. 13, U. N. Malvi, Ex.53, P. I. Naranpura police station, who on the basis of the wireless message received from Central Control Room, proceeded to Sorabji compound to make on the spot inquiry at 3-25 p.m.

12. x x x x x x x

13. Turning to the submissions made by the learned defence advocates, their first submission was regarding the proportionate inadequacy of the motive for the accused to commit murder of the deceased Naresh. The trial Court has fairly dealt with this aspect in Paras 39 and 40 of its judgment by holding on the one hand that there was sufficient motive for the accused to commit murder of Naresh and on the other hand, in the alternative that even if motive was held to be not sufficient or strong enough to impel the accused to commit murder of Naresh, even then, it was not possible to discard the prosecution case in toto particularly in the light of the reliable injured eye-witnesses evidence on the record.

13.1. We entirely agree with the alternative view taken by the trial Court. Once the Court is having before it the clinching evidence of the complainant who was

seriously injured in the incident and duly corroborated by other attendant evidence on the record, the alleged inadequacy of motive loses all its significance. In this view of the matter, first submission made on behalf of the accused has got to be rejected.

14. Referring to their second submission, the learned defence advocates vehemently urged that the trial Court has committed a serious error in accepting and relying upon the evidence of P. W. 3 Chandrasen Mohanlal, Ex. 13, which suffered from certain infirmities like (i) absence of names of accused in Vardhi Ex. 39 based on medico-legal case report made by P. W. 7 Dr. L. K. Tavia, Ex. 32 to P. W. 9 Narayansing Ramsing, Ex. 38, a police constable on duty at V. S. Hospital, Ahmedabad; (ii) discrepancy regarding hockey in place of iron pipes and stick as weapons used in commission of offence in Vardhi Ex. 39; (iii) variance as regards number of injuries noticed by P. W. 7 Dr. Tavia, Ex. 32 and other two doctors on persons of the deceased Naresh as well as the injured complainant Chandrasen.

14.1. We have carefully considered the relevant evidence on the point as well as reasons given by the trial Court for not accepting the alleged infirmities. As a matter of fact, the trial Court has "ably dealt with and discussed this argument in its judgment paragraphs 47 and 48 and we instead of unnecessarily repeating the same, simply say that we are in complete agreement with the same. The trial court has rightly discarded these infirmities as having no substance while placing the implicit reliance upon the evidence of the injured complainant.

14.2. In our view, the learned defence advocates while laying undue emphasis on the aforesaid infirmities, have clearly overlooked the following glaring features making the evidence of P.W. 3 Chandrasen Mohanlal, Ex. 13 intrinsically sound and reliable beyond doubt:

(i) That the injured P. W. 3 Chandrasen Mohanlal, Ex. 13, in all has received as many as four injuries out of which, one was of a very serious nature being a lianer fracture of the left frontal bone. This fact clearly establishes the presence of the injured at the relevant time and place when the incident took place.

(ii) All three accused were previously known to the injured complainant since pretty long time.

(iii) That there was sufficient light (at the place of incident) as street-lights as well as lights on Pan-Gallas, Tea-Larries, Milk and Cycle shops situated at and round about the scene of offence were very much on.

(iv) That both, the complainant as well as Naresh have received number of injuries with pipes and sticks indicating that the alleged assault was not merely a hit and run affair for the simple reason that for giving as many as 23 blows, they must have taken quite good time and not only that further the two accused while giving blows must have come quite closer to the injured to expose their own recognition and identification by the injured complainant.

(v) That the matter does not rest here as the evidence further discloses that while launching the assault, accused No. 1 Panubhai shouted saying "SALAONE MARO". Now from the timber of voice even of known accused, one can certainly identify the accused.

(vi) That the names of the accused as assailants came to be disclosed by the injured complainant at the earliest in his complaint Ex. 14 recorded within three hours.

(vii) That once having known and identified these accused as their assailants, it is highly improbable to expect such a witness to allow the real culprit to go scot-free and in their place, implicate somebody else merely because he had some enmity.

14.3. We do agree that merely because a witness pauses himself as an injured witness and his evidence stands further duly corroborated by the medical evidence on the record, that by itself does not mean that whatever he says before the Courts is a gospel truth, and can be safely accepted and relied upon without being critically examined. It hardly requires to be told that the medical evidence brought on the record, at the most, strives to corroborate say of the injured witness mainly on three aspects viz. (i) that the injuries alleged to have been caused were actually found by the doctors and on examining the injured; (ii) that such injuries can probably be caused by the weapon alleged to have been used in the commission of the offence; (iii) that at best, the presence of injuries further tries to establish the presence of a witness at the time and place of the incidents. Thus far and no further. In other words, corroboration found by way of medical evidence to the injured witness cannot be further projected into evidence of the said witness as also establishing identity of the accused as well as attributing authorship of the Said injury to him. Regarding the finding viz. that the medical evidence corroborates the injured, the trial Court has still to probe ahead further scrutinising the reliability of the injured witness in a matter of identity of the accused as well as his authorship with the crime. This is imminently necessary because in a given case, it can as well happen that if some unknown person in darkness, from behind, all of a sudden attacks without any murmur and immediately makes good his escape after giving such blows then in such a case, the injured relying upon his honest, but wild imagination checking out his list of enemies who in all probabilities might have attacked, fixes the identity and name such an assailant as accused. Howsoever honest a belief may be of an injured witness, it can never be a substitute for direct evidence based on seeing, hearing and infact identifying the accused. In such matters, the truth is a matter of experience which cannot be substituted by a belief which is secondary.

14.4. Thus, before any Court can safely accept and rely upon the evidence even of an injured witness, it has got to closely scrutinize such evidence by examining it from the following angles viz. (i) Whether the alleged injury was received in the course of the same transaction incident only?; (ii) Whether the accused were

previously known to the injured?; (iii) If not, whether the accused was distinctly described in previous statement before the police?; (iv) Whether there was sufficient light at the time and place of the incident to identify the accused; (v) and whether the injury so found on the person of the witness, rules out a case of a self-inflicted injuries. Any injured witness passing these four tests carries with him an inbuilt guarantee of truth, and then in that case, the Court can certainly place implicit reliance upon such evidence.

14.5. In the present case, we have carefully examined the evidence of injured P. W. 3 Chandrasen Mohanlal, Ex. 13, in the light of the above principles and to our satisfaction, he is found to be reliable, not merely because he was injured and therefore present, but also because there are other evidences on the record.

15. Turning to the third contention raised by the learned defence Advocates, the evidence of P. W. 4 Shanker Chhotumal, Exh. 15, has been criticised on the ground that he is a chance witness and there is every likelihood of he being friend of deceased Naresh subsequently propped up as a got up witness by police. It is difficult to accept this part of argument of the learned defence advocates. Even if he may not be ordinarily present at the time and place when the incident took place, his evidence cannot be straightway rejected on the ground of he being an interested and a chance-witness. The contention that witness may not be ordinarily present at the relevant time and place does not necessarily mean he was not or cannot be present at a particular time and place. At the most, such evidence requires to be closely scrutinised in order to find out whether he was in fact present at the relevant time and witnessed the incident or not. This view of ours is duly supported by two decisions of the Supreme Court, reported in (i) Bahal Singh Vs. The State of Haryana, ; and (ii) Rana Partap and Others Vs. State of Haryana, .

15.1. In the case of Bahal Singh Vs. The State of Haryana,), the Supreme Court has observed as under (Para 10):

".....if by co-incident or chance a person happened to be at the place of occurrence at the time it is taking place he is called a chance witness. And if such a person happens to be a relative or a friend of victim or inimically disposed towards the accused then he being a chance witness is viewed with suspicion. Such a piece of evidence is not necessarily incredible or unbelievable, but it does require cautious and close scrutiny."

15.2. In the case of Rana Partap and Others Vs. State of Haryana, the Supreme Court has observed as under (Para 3):

".....if a murder is committed in a dwelling house, the inmates of the house are natural witnesses. If a murder is committed in a brothel, the prostitutes and paramours and natural witnesses. If a murder is committed on a street, only passers by will be witnesses. The evidence of street hawkers and street vendors cannot be discarded or viewed with suspicion merely on the ground that they are chance witnesses."

15.3. In fact, the credibility of P. W. 4 Shanker Chhotumal, Exh. 15 stands further vouchsafed by two eloquent circumstances emerging from the record namely; (i) that his name as a witness to the incident has figured at the earliest point of time in the complaint given by the injured Chandrasen; (ii) that his statement also came to be recorded by the investigating officer on the next day; (iii) and further it was this Shanker only who had shown the scene of offence to the panchas for drawing the panchanama of the scene of offence. If indeed the complainant had not seen Shanker, when he and the deceased Naresh came to be assaulted, his name obviously would not have figured as an eyewitness in complaint. This finding of our is also duly supported by a Supreme Court decision reported in State of U.P. Vs. Anil Singh, wherein the Supreme Court has observed as under:

".....that a person whose name is mentioned in F.I.R. as an eye-witness and whose testimony received corroboration by another eye-witness cannot be categorised as a mere chance witness."

15.4. We, under the aforesaid circumstances, are fully satisfied that P. W. 4 Shanker Chhotumal Exh. 15 is not a chance witness. Of course, it is true that he was not present throughout the incident, and had partially witnessed the incident; however, the fact remains that whatever account he has given before the Court, does corroborate the evidence of the injured complainant to certain extent. Further his evidence appears to be quite natural as he has refrained from giving any extra and added gloss to the prosecution case. If indeed the investigating agency was so minded, it could as well have given him a shape of an eye-witness of the entire incident. This precisely has not been done and this by itself lends indirect support to its intrinsic reliability.

16. Coming to the fourth contention raised by the learned defence Advocate, it is -- undisputed fact that the alleged incident took place round about 8-15 p.m. Injured were admitted in Casualty Ward at 8-30 p.m. P.W. 9 Narayansinh Ramsinh Exh. 38 on duty at V.S. hospital communicated Vardhi Exh. 39 to Naran Police Station at 8-55 p.m. on the basis of which P.W. 8 Mr. R. N. Devra, P.S.I. Exh. 35 proceeded to V. S. Hospital. He must have reached the hospital round about 9-30 p.m. when P.S.I. Mr. Devra reached hospital, on enquiry he learnt that the injured Naresh was taken in operation theatre and P.W. 3 Chandrasen Mohanlal, Exh. 13 who had a linear fracture on the frontal bone, was under treatment in Ward No. 3. If under these circumstances F.I.R. could be recorded at 11-00 p.m. and completed at 11-15 p.m. it cannot be said that there was any inordinate delay. The very fact that F.I.R. Exh. 14 which is of about 30 lines and took 15 minutes to be completed is a circumstance elequent enough to tell us that the complainant must have been under a severe pain. In this view of the matter there was no delay at all in filing the F.I.R. ruling out any question of inordinate delay.

16.1. It was next contended by learned defence Advocate that the complaint recorded by P. 1 Devra Exh. 14 legally cannot be termed as first information

report. It was further submitted that Vardhi Exh. 39 given by Police Constable Narayansinh at Naranpura Police Station being first in point of time disclosing cognizable offence should be treated as F. I. R. Now whether a particular piece of information should be treated as F.I.R. or not depends upon the facts and circumstances of each case. In our opinion, the trial Court was amply justified in holding that the Vardhi Exh. 39 merely contained a cryptic message. That was merely an information required by law to be given by a doctor to the police whenever there is a Medico legal case. In this case also, Dr. Tavia had just passed on such information about the Medico legal nature of the case to the police. Thus the information passed on by the Dr. Tavia to police constable Narayansinh on duty at V.S. hospital without ascertaining the facts in detail pertaining to the incident cannot be attached undue importance. The trial Court in the alternative was also right in holding that even if it was held that it was not a cryptic message, the said telephonic intimation sent by the police constable Narayansinh can be styled as first information report and the contents of Exh. 14 F.I.R. are required to be excluded from the consideration as it would amount to a statement recorded u/s 302 of the Criminal Procedure Code, even then, having regard to the thumping evidence of the injured complainant on the record it would be of no consequence.

17. Referring to the fifth contention, it was urged that the trial Court committed an obvious error in not drawing adverse inference against the prosecution for the simple reason that though independent witnesses were available, it did not care to examine any of them with an ulterior motive. Now on examining the evidence of P.W. 8 Rajaram Devra, Ex. 35 and P.W. 13 Police Inspector-Malvi, Ex. 53, it is very clear that they had recorded the statements of many neighbouring occupiers at the place of the incident, but they were found to be negative in character. If that is the situation, it will be unfair to condemn the prosecution for non-examination of any such independent witnesses. Further the question of examining independent witnesses arises only when the Court has some genuine doubt regarding the reliability of the witnesses already examined. Independent witness is supposed to give an independent and disinterested version which can either corroborate or contradict the witnesses already examined, facilitating the task of the Court in appreciating the overall evidence in proper perspective to arrive at just decision. Thus, the question of examining the independent witness is ultimately a question which pertains to the satisfaction of the judicial conscience of the court as to whether in given facts and circumstances of the case, corroboration is necessary to supplement and strengthen the evidence already brought on the record. It is well known that corroboration is merely a rule of prudence and not a rule of law. It is a rule which must be present to the mind of every court while appreciating the evidence in criminal trial. But in the circumstances wherein the Court feels safe and secure in accepting and relying upon the evidence of any witness, then in that case, it is not necessary that his evidence also should be corroborated by examining the independent witness. In this view of the matter, the point raised, having no substance, deserves to be

rejected.

18. Referring to the 6th contention, it was vehemently urged that Dhanraj who was also alleged to have received injury in the course of the same occurrence, was deliberately kept back and not examined. This also, according to the learned defence advocates, created one more doubt shaking the credibility of the prosecution version. Now it is true that Dhanraj infact was injured in the same course of the occurrence and had taken treatment of a private doctor. It is also true that he is not examined. However, in our opinion, having regard to the facts and circumstances of the case, his non-examination does not appear to be in any way fatal to the prosecution case. His examination more or less would have merely repeated the evidence of the two prosecution witnesses already brought on the record namely that of (i) P.W. 3 Chandrasen Mohanlal Ex. 13, and (ii) P.W. 4 Shankar Chhotumal, Ex. 16. At the cost of repetition, it may be stated that had there been even a slightest of doubt regarding the credibility of the injured eye-witness, then in that case, the learned defence advocates would have been amply justified in insisting upon the examination of injured Dhanraj. This is exactly what has been held by the Supreme Court in its judgment reported in AIR 1980 SC 194, *State of U. E. v. Hakim Singh*. According to the said decision, once the evidence of eye-witnesses are believed, it is not necessary to multiply the witnesses to prove the case. Mere non-examination of another person receiving injuries in the same occurrence cannot cast any doubt on the prosecution case.

19. Thus, as discussed above, having carefully examined and analysed the entire prosecution evidence brought on the record as well as the reasons given by the trial Court for accepting and relying upon the said prosecution evidence, we are of the opinion, that the prosecution has proved its case beyond reasonable doubt and that there is no scope of re-appreciating the evidence in a way other than the one as done by the trial Court.

20. The question that finally remains to be considered is regarding the nature of offences and liabilities thereunder of each of the accused vis-a-vis the injuries caused by them to Naresh, who later on succumbed to the injuries. This incidentally is also a point in an acquittal appeal filed by the State submitting before us that the alleged offence squarely fell within the purview of Section 300 --Thirdly read with Section 34 of the I.P.C. and not u/s 304 read with Section 34 of I.P.C. as held by the trial Court.

20.1. The learned A.P.P. arguing the acquittal appeal, first of all invited our attention to paragraph-56 of the trial Court judgment, wherein while appreciating the aspect as to what offence was made out, the trial Court has reasoned its findings as under :

"It is quite clear from the evidence on record that these accused inflicted innumerable blows on various parts of the body of Naresh, out of which injuries received on head, forehead and face were grievous. The circumstances of the

case reveal that the accused did not intend to cause any particular injury to Naresh on a particular part of his body. No doubt he received some blows on vital parts of his body viz. head, forehead and face and that resulted in his death. But it cannot be said with any definiteness that any of these accused while giving blows aimed the same on any particular part of his body. Under these circumstances, it cannot be inferred that any of these accused intended to inflict particular injury which turned out to be fatal: In that case, it cannot be said that it has been proved that it was the intention of either of these accused to inflict that particular injury on the particular part of the body of Naresh. In any event, the probability that the accused inflicted those particular injuries over his head, forehead or face accidentally or unintentionally cannot be completely ruled out in the present case and as it is probable that either of them might have intended to cause some other kind of injury but unfortunately some of these injuries were received on vital parts of the body which ultimately resulted in his death. It also appears that the accused in the heat of excitement and passion inflicted those blows with various weapons carried by them. Of course, when they struck Naresh with weapons like iron pipe and stick, they must have known that the blows inflicted by them would land on the vulnerable parts of the human body and such blows were likely to cause death. In the circumstances, it would be quite legitimate to hold that the acts of the accused appear to have been done with the knowledge that the same were likely to cause death, but without any intention to cause death or to cause such bodily injuries which were likely to cause death. In view of the aforesaid discussion, my conclusion is that both the accused committed the offence of culpable homicide not amounting to murder punishable u/s 304 Part-II of the Indian Penal Code as none of the clauses of murder has been attracted to the facts of the present case:

20.2. Attacking the above finding, the learned A.P.P. submitted that the said view taken by the trial Court is illegal and erroneous in as much as having regard to the facts and circumstances under which the fatal injuries resulting into death of Naresh came to be inflicted, by no stretch of imagination it can be said that those injuries were accidental. He further submitted that ordinarily once the existence of an injury is proved, the intention to cause that particular injury must be held to be proved unless the circumstances brought on record warrant a conclusion in opposite direction. He further submitted that there is not even a whisper of suggestion in the cross-examination of prosecution witness No. 3 Chandrasen Mohanalal Ex. 13 that the accused persons intended to cause some injury or injuries on any other part or parts of the body and that because Naresh suddenly moved away or changed his stance or position that the blow accidentally landed on those unintended vital parts of the body resulting into his death. The learned A.P.P. submitted that examining the case either from the angle of number of injuries caused to Naresh, as discussed hereinabove, or from the line of cross-examination of P.W. 3 Chandrasen Mohanalal Ex. 13, one thing is very clear that injuries bringing about the death of Naresh cannot be said to be accidental.

20.3. There is a lot of substance in the aforesaid submissions made by the learned A.P.P. It is indeed impossible to endorse and accept the reasoning and conclusion reached by the trial Court holding that the offence alleged against the accused fell within the purview of Section 304 Part II of the I.P.C. only. It appears to us that the trial Court has not examined the question regarding nature of offence in its proper perspective. Infact, the trial Court has clearly ignored the following material circumstances which are found to be running counter to his finding that the offence made out was an offence u/s 304 Part II of the I.P.C. :--

(i) that the injured complainant and the deceased were attacked by three accused persons; (ii) that at the relevant time, when both Chandrasen and Naresh (deceased) came to be assaulted, they were totally unarmed; (iii) that three accused persons simultaneously attacked Chandrasen and Naresh; (iv) that the said attack was unprovoked; (v) that too with weapons like iron pipe and stick; (vi) that before an actual assault took place, accused No. 1 Panubhai had exhorted rest of the accused by shouting "SALAONE MARO"; (vii) that the injured Chandrasen has received as many as four injuries, out of which, one resulted into a linear fracture on the left frontal bone; (viii)(a) that the deceased Naresh received as many as 19 external injuries and each of these injuries was a result of distinct blows, (b) that the external injuries Nos. 1 to 4, 18 and 19 coupled with the internal injuries were sufficient in the ordinary course of the nature to cause death, (c) that the cause of death was shock following multiple fractures over face and head with intracranial haemorrhage; (ix) that the accused No. 1 in particular persisted in giving pipe blow on face of Naresh even after he fell down and was rendered totally helpless till of course the crowd collected there and some of the members of it tried to save the injured persons; (x) that the number of blows, force, weapons used and the seat of the injuries speaks volumes about the intention of the accused.

20.4. In view of the discussion made hereinabove, it is indeed impossible to hold that Naresh died due to the accidental injuries. To put it positively, it must be held that death of Naresh was due to the injuries intentionally caused by accused No. 1 and deceased Taghiyo. Further, it is no where case of any of the accused that they intended to cause particular injury on some other part or parts of the body and the blows accidentally fell on those vital parts of the body which were never intended and ultimately the same resulted into the death of Naresh. Under the circumstances, we are satisfied that the accused No. 1 must be held liable for committing murder of Naresh and therefore should be convicted for an offence punishable u/s 302 read with Section 34 of the I.P.C.

21. Now so far as accused No. 2 viz. Pramji Gora is concerned, his case stands slightly on the different footing. It is true that at the point of time when the alleged incident took place, he was also armed with a stick and participated in giving blows to the complainant as well as the deceased Naresh. However, there is nothing on the record to show that he also shared the common intention of

accused No. 1 in bringing about the death of Naresh. At the most he might have joined the accused No. 1 and the deceased accused Taghio initially to cause some harm to injured persons at the behest of accused No. 1 to teach them some lesson without perhaps knowing that the alleged assault would be resulting into the death of Naresh. In our opinion, the facts alleged and proved against the accused No. 2 fall little short to make the accused No. 2 liable for an offence u/s 302 read with Section 34 of I.P.C. for causing murder of Naresh. Incidentally, it may also be stated that this accused No. 2 has not challenged the order of conviction and sentence passed by the trial Court. In this view of the matter, we have no difficulty in holding that the accused No. 1 committed the murder of Naresh and therefore liable to be convicted and sentenced for an offence punishable u/s 302 read with Section 34 of I.P.C. and that so far as accused No. 2 is concerned, his conviction and sentence u/s 302, Part II read with Section 34 of I.P.C. recorded by the trial Court deserves to be confirmed.

22. In the result, Criminal Appeal No. 5/ 89 filed by the accused Panubhai alias Paniya Kolaji against his order of conviction and sentence u/s 304 Part II 325 read with Section 34 of I.P.C. fails and is dismissed.

Criminal Appeal No. 520/88 which is an acquittal appeal filed by the State of Gujarat against two respondent-accused herein, namely (1) Panubhai alias Paniya Kolaji and (2) Premji Gorabhai is partly allowed to the extent that the impugned order of conviction and sentence passed by the trial Court convicting respondent-accused No. 1 u/s 304 Part II read with Section 34 of I.P.C. is altered to the extent that the said accused will now stand convicted for the offence punishable u/s 302 read with Section 34 of I.P.C. and is sentenced to Rigorous Imprisonment for life.

So far as respondent-accused No. 2 herein Premji Gorabhai is concerned, his order of conviction and sentence passed by the trial Court u/s 304 Part II 325 read with Section 34 of I.P.C. is confirmed and to that extent acquittal appeal filed by the State against him is dismissed.