
(2015) 11 GUJ CK 0014
In the Gujarat High Court
Case No : Criminal Appeal No. 998 of 1995

State of Gujarat	Vs	APPELLANT
Pratapbhai Babarbhahi Rathod and Others		RESPONDENT

Date of Decision : 06-11-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 114, 302, 304, 323, 326

Citation : (2015) 11 GUJ CK 0014

Hon'ble Judges : M.R. Shah and Kaushal Jayendra Thaker, JJ.

Bench : Division Bench

Advocate : Himanshu Patel, Addl. Public Prosecutor, for the Appellant; Dhaval N. Vakil, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Kaushal Jayendra Thaker, J.

1.0 This is an appeal by the appellant-State, challenging the judgment and order passed by the learned Additional Sessions Judge, Nadiad (for short, "the trial Court"), Dated: 19.11.1994, whereby, the trial Court acquitted all the accused of the offence punishable under Section 302 read with Sections 323 , 504 and 114 of the Indian Penal Code.

2.0 At the outset it is required to be noted that at the time of admission, at the time of admission, i.e. on 23.01.1996, the appellant-State pressed the present appeal qua Respondent No. 1-original accused No. 1 only, whereas, the State did not press the present appeal qua Respondent Nos. 2 and 3, i.e. the original accused Nos. 2 and 3. Hence, this Court has to consider the present appeal qua Respondent No. 1-original accused No. 1 only, namely Pratapbhai Babarbhahi Rathod.

3.0 The brief facts of the case of the prosecution, as set out before the trial Court, are that on 16.05.1994, in the evening at about 04:00 p.m., all the

original accused, who were three in numbers, Respondent Nos. 1 to 3, herein, went to the house of the deceased, Raisingbhai Jijabhai Rathod, hurled abuses at him, and then, accused No. 1, Pratapbhai Babarbhai Rathod, inflicted knife blows on the deceased. Accused No. 1 was also alleged to have inflicted a stick blow on the hand of the brother of the deceased, namely Amrabhai Jijabhai. Further, accused No. 2, Kalabhai Babarbhai is alleged to have slapped the complainant on the face. It is stated in the complaint that the reason for the alleged incident was that accused No. 1 was married to niece of the deceased Raisingbhai, namely Radhaben, whom accused No. 1 used to beat and harass and due to that the deceased used to reprimand accused No. 1. Later on, the wife of accused No. 1, Radhaben, went to her parental house before about seven months of the alleged incident, where she expired. Therefore, the accused were keeping doubt that Radhaben had expired due to the deceased and as a consequence to the same the alleged incident took place. One Kalabhai, who happened to be the nephew of the deceased, lodged a complaint against all the three accused in that regard. On registration of the offence police carried out investigation in to the matter. On completion of the investigation, there being sufficient evidence against the accused persons, police filed charge-sheet before the Court of the learned JMFC, Thasara. However, since, the case was exclusively triable by a Court of Sessions, same was transferred to the trial Court. At the time of trial, all the accused did not plead guilty and claimed to be tried, and therefore, the trial was conducted against them.

3.1 In order to prove its case beyond reasonable doubt, the prosecution examined the following witnesses;

3.2 Over and above the aforesaid oral evidence, the prosecution also adduced the following documentary evidences through the aforesaid witnesses;

3.3 At the end of the trial, the trial Court recorded the further statements of the accused persons, and then, passed the impugned judgment and order, as stated herein above. Hence, the present appeal.

4.0 Shri. Patel, learned APP on behalf of the appellant-State, submitted that the trial Court committed a grave error in passing the impugned judgment and order of acquittal, inasmuch as it failed to appreciate the material on record in its proper perspective. He submitted that the trial Court ought to have believed the evidence of the eye-witnesses, including the injured eye-witness. He, further, submitted that the trial Court ought to have relied on the dying declaration of the deceased. He submitted that the trial Court erred in not believing the D.D. of the deceased and which was recorded by the Executive Magistrate, which stands corroborated by the statement of the deceased recorded by the IO, on the ground that the said Executive Magistrate was not examined by the prosecution. According to the learned APP, the trial Court also committed a grave error in giving more weightage to the minor omissions and contradictions in the evidence of the witnesses and by not believing the evidence of the panchas to the discovery panchnama. He, therefore, prayed that the present appeal be allowed.

5.0 On the other hand, Mr. Vakil, learned Advocate appearing on behalf of the accused, strongly opposed the appeal and submitted that the prosecution failed to prove not only the involvement of the accused in the alleged offence but also the D.D. of the deceased recorded by the Executive Magistrate and the statement of the deceased recorded by the IO beyond reasonable doubt. The trial Court, therefore, rightly come to the conclusion that the prosecution failed in establishing its case, and thereby, rightly acquitted the accused of the charge framed against them. In support of his submission, Mr. Vakil placed reliance on a decision of the Apex Court in the case of "DHANPAL v. STATE OF MADRAS", 2010 (1) GLH 119, wherein, the Apex Court hold that the prosecution has to prove its own case and the Court cannot shift the burden of proof on accused.

6.0 Heard learned Advocates for the respective parties and perused the material on record, oral as well as documentary, as also the impugned judgment and order.

7.0 In order to prove that the death of Raisingbhai Jizabhai Rathod was homicidal one, the prosecution examined Dr. Rakesh Narendranath Tandon, who had carried out PM on the body of the deceased, as PW-7. PW-7, in his deposition Exhibit-41, stated that on 08.06.1992, while he was discharging duties at SSG Hospital, at about 02:40 p.m., the dead body of Raisingbhai was brought for PM along with a memorandum of Raopura Police Station. PW-7 stated that he commenced PM at about 02:45 p.m. and completed the same at 03:45 p.m.. During the course of PM, PW-7 had noticed following external injuries on the body of the deceased;

"1. One stitched surgical wound about 25 cms. long, ranging from the front middle portion, going 2.5 cms. towards right side and was reaching upto hipbone from below chest cage. On opening the stitches, it was found to be cavity deep. There was septic in the said wound.

2. One stitched stab wound about 3.5 cms. Long, 3.5 cms. left towards the chest from the middle portion and about 4 cms. below chest cage on the front portion of the abdomen. On opening the stitches, said wound was found to be slightly healed.

3. One stitched stab wound about 2.0 cms. X 0.5 cms. long, which was 11 cms. below the right side under arm. It was a surgical wound. Tube was installed on the chest.

4. One stitched surgical wound about 2.0 cms. X 0.7 cms. long, on the left side of the abdomen and which was cavity deep. This surgical wound was made with a view to install tube on the abdomen.

5. One stitched stab wound about 3.5 long, on the internal lower portion of the right side leg. This surgical wound was made with a view to administer medicines.

6. One stitched stab, semi-healed wound of about 2.3 cms. X 0.3 cms. long, which was on the right backside of the chest and was 33 cms. Below the right

side shoulder and was 5 cms. Towards right from the middle portion.

7. One stitched, semi-healed wound of about 2.5 cms. X 0.4 cms. long, which was on the left backside of the chest and it was about 6 cms. towards left from the middle back portion and about 29 cms. below the left side shoulder.

8. One stitched, semi-healed wound of about 2.5 cms. X 0.3 cms. long, which was on the left backside of the chest and it was about 12 cms. towards left from the middle back portion and about 25 cms. below the right side shoulder."

7.1 Further, PW-7 had noticed following internal injuries on the body of the deceased Raisingbhai;

"1. It was corresponding to external injury No. 7. There was incised fracture of 10th rib on the left side.

2. It was corresponding to external injury No. 2. There was a healed wound on the lower portion of the left side lung and it was in dry form. There was a healed injury found on the left lobe of liver. There was a healed wound on portal vein.

3. There was a healed wound with two stitches in liver.

All the aforesaid injuries were corresponding to injury No. 2.

4. There was a wound with two stitches in liver.

5. There was a stitched wound of about 2.5 cms. on the front portion of liver.

6. There was concentration of blood in the chest."

7.2 According to PW-7, the cause of death of the deceased Raisingbhai was shock & hemorrhage, consequent to penetrating stab injuries to internal organs, i.e. stomach, liver, lungs and portal vein along with infection and septic. PW-7 also opined that all the injuries were ante-mortem in nature and could have been caused before about a week from the date of PM. PW-7 stated that the injury Nos. 2 and 7 could be caused by a sharp edged weapon and they were sufficient enough, in general course of nature, to cause death. This witness was thoroughly cross-examined by the learned Advocate for the accused, but, his testimony could not be shaken.

7.3 Under the circumstances, the trial Court rightly came to the conclusion that the death of Raisingbhai was homicidal one and we concur with the same.

8.0 Now, this Court has to examine, as to whether the prosecution can be said to have proved its case beyond reasonable doubt against the accused or not.

9.0 In order to prove that the original accused committed the alleged offence, the prosecution examined the complainant, Kalabhai Amrabhai Rathod, as PW-1. PW-1, in his deposition Exhibit-27, stated that on the date of the alleged incident, i.e. on 01.06.1992, he had gone to take haystacks from Desai's farm along with Bhalabhai Raisingbhai and Bhaijibhai Jijabhai. They did two rounds of

taking haystacks from farm to home and back. When for the third time, they went to take haystack at the farm, they heard some commotion near their house, and therefore, they ran back towards their house. On reaching at the place of offence, this witness found that original accused Nos. 1 to 3 were hurling abuses and were inflicting blows with stick on the deceased Raisingbhai. Then, original accused No. 1 pulled out a knife from his person and inflicted the injuries on the deceased. When PW-1 and others tried to save the deceased, accused No. 1 inflicted a stick blow on the left hand of the father of the complainant, namely Amrabhai Jijabhai-PW-2, whereas, accused No. 2, Kalabhai Babrbhai, slapped the complainant in face. Thereafter, on hearing the commotion, when other persons arrived at the place of offence, the accused fled from there. According to PW-1, when he inquired from his father-PW-2 about the reason for the alleged offence, he was told that the reason for the alleged incident was that accused No. 1 had married the niece of the deceased Raisingbhai, whom accused No. 1 used to harass, and due to that the wife of accused No. 1 went to her parental house, where she expired, and on account of that the accused were keeping grudge against the deceased Raisingbhai, which culminated into the alleged incident took place. This witness, then, took the deceased to SSG Hospital, Vadodara. This witness, then, stated that accused No. 1 inflicted blows with a knife, which was straight and about 9" inches long and was having a wooden handle. This witness stated that on the next day, when he went to the hospital, he found that the police was recording statement of the deceased, Raisingbhai, and therefore, he was not allowed to remain present there, at that time.

9.1 PW-1 was cross-examined at length by the learned Advocate for the accused. In his cross-examination, PW-1 stated that Radhaben, i.e. the wife of accused No. 1, had expired before about 8-10 months of the alleged incident. During the course of his cross-examination, in answer to a question by the Court "As to whether the deceased was inflicted knife blows, subsequent to infliction of stick injuries on him?", this witness replied that "After inflicting stick blows, Pratapbhai inflicted knife blows." In his cross-examination, PW-1 denied the suggestion that when they reached the place of incident, the deceased Raisingbhai was lying in injured condition. PW-1 also denied the suggestions that his father, i.e. PW-2, was not inflicted any stick injury and that Raisingbhai sustained injuries near the grocery shop of Bhura Shabhai, and then, he came and fell down outside his house. PW-1 also denied the suggestion that they had gone to the house of the accused persons with sticks and that his father PW-2 sustained injuries, when the accused retaliated in self-defence. This witness also denied the suggestion that he had not seen the police recording the statement of the deceased Raisingbhai at hospital. This witness, at the end of his cross-examination, denied the suggestion that he had not witnessed the incident with his own eyes.

10.0 Amrabhai Jijabhai, who happened to be the father of PW-1-the complainant and the elder brother of the deceased Raisingbhai, was examined as PW-2. PW-2, who is an injured eye-witness, in his deposition Exhibit-29, stated that accused No. 1 was married to niece of the deceased Raisingbhai, namely

Radhaben. There used to be frequent quarrels between Pratapbhai and Radhaben after their marriage and due to that the deceased Raisingbhai used to reprimand accused No. 1. PW-2 stated that on the date of the alleged incident, he was at his home and at that time he heard some commotion near the house of the deceased and he found that the accused were quarreling with the deceased Raisingbhai. The accused, then, inflicted stick blows on the deceased and accused No. 1 inflicted knife blows on the deceased and when this witness tried to intervene, accused No. 1 also inflicted a stick blow on the left hand of this witness and caused fracture injury. This witness, then, identified muddamal article No. 7 as the weapon used by accused No. 1 in committing the offence.

10.1 In his cross-examination, PW-2 stated that his house as well as the houses of his brothers Bhajibhai and Raisingbhai are adjoining to each other. This witness denied the suggestion that when he reached the place of offence, deceased Raisingbhai was lying in front of his house in injured condition and instead, PW-2 stated that when he reached the place of offence, the accused were inflicting stick injuries on the deceased. This witness stated that after the deceased was inflicted stick injuries, accused No. 1 inflicted a blow of knife on the deceased and while he was falling down, accused No. 1 inflicted two more blows on the deceased. This witness also denied the suggestion that the incident had taken place in front of the house of the accused and that the complainant side had gone to the house of the accused to attack them and that he had sustained injury, when the accused retaliated in self-defence.

11.0 The evidence of another eye-witness, Kapilaben Juwansinh, who was examined as PW-4 at Exhibit-33, are also to the same effect. PW-4 stated that on the date of the alleged incident, while she was in her house, in the evening at about 04:00 p.m., all the accused came to the place of offence, hurling filthy abuses and when she came out, she found that the accused were inflicting stick blows on the deceased, and then, accused No. 1 inflicted knife blows on the deceased. When PW Nos. 1 and 2 tried to intervene, accused No. 2 slapped the complainant-PW-1, whereas, accused No. 1 inflicted a stick blow on the hand of PW-2. This witness, then, stated that the knife used by accused No. 1 was made from iron and was having curve. This witness, then, identified muddamal article No. 7, i.e. the knife, before the Court.

11.1 In her cross-examination, this witness stood firm on her ground and reiterated that accused No. 1 had inflicted stick and knife blows on the deceased Raisingbhai and a stick blow on PW-2, whereas, accused No. 2 had slapped PW-1, the complainant, in the face. PW-4 denied the suggestion that no incident, as stated by her in her examination-in-chief, had taken place and that the complainant side had gone to the place of the accused with a view to attack them.

12.0 PW-3, in his deposition Exhibit-30, stated that on 14.05.1994, he had gone to the place of offence and had prepared the map on the basis of the panchnama of place of offence. In his cross-examination, this witness denied the suggestion

that the place of offence is, though, shown to be at a distance of 13 feet from the house of Raisingbhai, it is actually situated at a distance of about 40 feet from the same. If, we peruse the map of place of offence, Exhibit-31, it is apparent that the houses of the accused, more particularly, house of accused No. 1 is situated at a distance of about 300 feet from the place of offence. Thus, the evidence of PW-3 supports the case of the prosecution that an incident had taken place and that too, near the house of the deceased Raisingbhai.

12.1 The evidence of PW-5, who was a panch witness to the panchnama of place of offence, also supports the case of the prosecution. PW-5, in his deposition Exhibit-35, stated that on 01.06.1992, police had called him near the house of the deceased Raisingbhai to act as a panch and that police had seized blood stained sand etc. after sealing the same properly and after placing the slips signed by the panchas with the same. PW-5, then, identified his signature on the said panchnama. In his cross-examination, this witness stated that the house of deceased Raisingbhai has a door in western direction and the blood stained were found at a distance of about 13 feet from the said door. Thus, the evidence of this witness fully supports the case of the prosecution on the aspect of panchnama of place of offence.

13.0 Dr. Dineshbhai Manubhai Parikh, who was discharging duties as Medical Officer, Thasara and who was examined as PW-8 at Exhibit-46, in his examination-in-chief stated that on 01.06.1992, at about 06:05 p.m., Amrabhai Bhajibhai- PW-2 and Raising Jijabhai were brought before him. On examining PW-2, this witness had found swelling on his left hand, whereas, on examining the deceased Raisingbhai he found that there was a stab wound on his abdomen of about 7 cms. X 4 cms. X 10 cms., the patient was under shock and was bleeding.

13.1 In his cross-examination, this witness stated that he found no injuries on the body of the deceased made with hard and blunt substance. PW-8, then, specifically stated that the injury found by him on the body of Raisingbhai could be caused with muddamal Article No. 7. This witness, then, conceded that on 02.06.1992 he had examined original accused Nos. 1 and 2, also.

14.0 Thus, from the evidence of PW-1 it transpires that the alleged incident had taken place on 01.06.1992 in which the deceased Raisingbhai was inflicted stick and knife blows, whereas, his father-PW 2 was also inflicted a blow of stick, due to which he sustained fracture injury. From the evidence of PW-2, i.e. the father of the complainant, who is an injured eyewitness, the evidence of PW-1 that the alleged incident, involving the original accused persons, had taken place on 01.06.1992, stands corroborated. Further, from the evidence of PW-2, it also becomes clear that the accused, herein, had gone to the place of the deceased Raisingbhai and had inflicted injuries on him as well as other witnesses.

14.1 The evidence of PW Nos. 1 and 2 that the alleged offence took place near the house of the deceased, also gets support from the evidence of PW-3,

Punambhai Chaturbhai Zala, who was discharging duties as Revenue Circle Officer at Taluka Panchayat Office, Thasra, at the relevant point of time, and who had prepared the map of the place of offence. Here, it may be noted that this witness during his cross-examination clearly denied the suggestion that the place of offence is situated at a distance of about 300 feet from the house of the deceased Raisingbhai. If, we peruse the map of place of offence, Exhibit-31, it is clearly stated, therein, that the house of the deceased is situated at a distance of just 13 feet from the place of offence, whereas, the houses of the accused, more particularly, house of accused No. 1 is situated at a distance of about 300 feet from the place of offence. Thus, the evidence of PW-3 supports the case of the prosecution that the alleged incident had taken place and that too, near the house of the deceased Raisingbhai. Therefore, the suggestions put to the witnesses by the learned Advocate for the accused, at the time of trial, that the complainant side had gone to the house of the accused with sticks to attack them and when the accused retaliated in self-defence, the deceased Raisingbhai and other witnesses sustained injuries. Even the evidence of PW-5, who was a panch witness to the panchnama of place of offence, also supports the case of the prosecution on the aspect that the alleged incident had taken place and that too near the house of the deceased Raisingbhai.

14.2 Now, if, we examine the evidence of PW-8, who was, at the relevant point of time, discharging duties as Medical Officer at Thasra, he has clearly stated in his evidence that on 01.06.1992, while he was on duty, Amrabhai Jijabhai-PW-2 and the deceased Raising Jijabhai were brought before him at about 06:05 p.m. along with a police memorandum, Exhibit-47. Further, if, we peruse the memorandum, Exhibit-47, sent by police at the time of sending the father of the complainant-PW2 and deceased Raisingbhai to the hospital on 01.06.1992, it is clearly mentioned, therein, that the injured sustained injuries due to infliction of knife and stick blows. Here, it may be noted that the incident is alleged to have taken place at about 04:00 p.m., whereas, PW-8 examined the injured PW-2 and the deceased Raisingbhai at about 06:00 p.m.. Thus, it appears that soon after the incident, the complainant firstly went to the police station, and then, he took the injured to hospital along with police memorandum, Exhibit-47. In other words, the complaint of the incident as well as the history before the doctor were given soon after it took place. Therefore, it cannot be said that the complainant gave complaint after due deliberations and only with a view to involve the accused in the alleged offence.

14.3 Despite the above, here, it is pertinent to note that the trial Court, came to the conclusion that the prosecution failed to prove its case beyond doubt. Therefore, now, we have to examine, as to whether the reasonings given by the trial Court, while acquitting the accused from the charge framed against them, is just and proper or not.

14.4 First of all, the learned trial Court rejected the submission of the learned Advocate for the accused that there is considerable distance between the farm

and the place of offence, and therefore, the complainant could not have heard the commotion, which was going on at the place of offence, by observing that the complainant, himself, in his evidence stated that with the load of haystack, it would take about 10 minutes from farm to reach home, whereas, without the load of hay-stack, it would take only two minutes to reach there, if, one runs. However, the trial Court, then, recorded the finding that the evidence of the complainant, i.e. PW-1, cannot be believed, since, PW-1 in Paragraph-12, during his cross-examination, stated that when they reached at the place of offence from the farm by running, they found that the deceased was swinging the cradle and the baby was sleeping, therein, whereas, in his examination-in-chief, PW-1 had stated that when they reached home, the accused were hurling abuses and inflicting stick blows on the deceased. It is also true that PW-1 also stated that the knife used by accused No. 1 was about 9" inches long, straight and was having a wooden handle, whereas, the muddamal article No. 7, i.e. the knife, has curve and has no wooden handle. However, on account of that the entire evidence of PW-1 cannot be thrown away. At the most same can be said to be omission, improvement or exaggeration by the said witness. PW-1 clearly stated that accused No. 1, firstly, inflicted stick blows and then inflicted knife blows on the abdomen and backside of the deceased, which gets support from the medical evidence in the form of deposition of PW-7, who had carried out PM on the body of the deceased, and who, in Paragraph-7 of his examination in chief, firmly stated that injury Nos. 2 and 7 could be caused by muddamal article No. 7. So far as the identification of the weapon is concerned, as stated above, it is true that PW-1 could not properly describe the weapon of offence, but, PW-2, who is an injured eyewitness, perfectly narrated the weapon of offence in Paragraph-5 of his examination-in-chief, stating that the knife used by accused No. 1 had curve and was having an iron handle. Not only that, even PW-4, who is another eye-witness, also described the weapon of offence in Paragraph-7 of her examination-in-chief, stating that it was an iron knife with curve and iron handle. Therefore, the trial Court could not have brushed aside the evidence of PW Nos. 1, 2 and 4 in that regard and it apparently erred by holding the same in favour of the accused. The trial Court also recorded the finding that PW-1 in Paragraph-2 of his examination-in-chief stated that when they reached at the place of offence, the accused were inflicting stick blows and then accused No. 1 inflicted knife blows on the deceased, and then, my father also came there, whereas, in Paragraph-13 of his cross-examination, PW-1 stated that when they reached the place of offence his father was in the house and the accused were present at the place of offence, and thereby, rejected the evidence of PW-1. Now, if, we peruse the above findings recorded by the trial Court in light of the evidence of PW-2, then, PW-2, in Paragraph-3 of his examination-in-chief, has stated that the accused came and started hurling abuses at the deceased Raisingbhai, and then, started inflicting stick blows and at that time I was in verandah of my house, the daughter-in-law of the deceased Raisingbhai, namely Kapilaben-PW-4, was present there. Thus, from the evidence of PW-2, it becomes clear that at the time of commencement of the offence, i.e. when the accused were hurling

abuses at the deceased Raisingbhai, he was standing in his verandah and when the accused started inflicting stick blows, he went to the place of offence. Further, the learned trial Court also noted that PW-2, then, stated that after that accused No. 1 inflicted knife blows, and then, my son, i.e. the complainant-PW-1, Bhaijibhai and Bhalabhai came to the place of offence. On the basis of this piece of evidence, the learned trial Court came to the conclusion that both PW-1 as well as PW-2 are not telling true facts and discarded their entire evidence in its entirety. Here, it may be noted that the incident took place during the broad day light, at about 04:00 p.m., and at a place, which is well within sight from all four directions, as is evident from the map of place of offence, Exhibit-31. Therefore, when PW-2 says that after accused No. 1 inflicted knife blows on the deceased Raisingbhai, PW-1 along with others reached the place of offence, it does not mean that PW-1 or for that matter others did not witness the alleged incident. It is highly superficial to construe that when one says he or she witnessed certain incident, he or she was just inches away from the place of such happening. Therefore, it is not necessary to presume that PW-1 should have been standing at a hand's reach from accused No. 1, when he says that he found accused No. 1 inflicting blows on the deceased Raisingbhai and it is possible that he might have seen the accused No. 1 inflicting knife blows from some distance, say for example at a distance of 20 or 30 feet. From that distance or even from slight more distance than that, it would have been possible for PW-1 to see accused No. 1 inflicting knife blows on the deceased Raisingbhai, on account of the ground situation existing at the place of offence, at the relevant point of time, as per the map of place of offence, Exhibit-31. Therefore, it would definitely not be possible for PW-1 to intervene and save the deceased Raisingbhai from infliction of knife blows, as he was at some distance from the deceased. Hence, the argument of the learned Advocate for the accused that, though, PW-1 found accused No. 1 inflicting knife blows on the deceased Raisingbhai, he did not try to intervene would go to show that he did not witness the incident, cannot be accepted and the learned trial Court ought not to have given the benefit of the same to the accused.

14.5 So far as the aspect of non-finding of any injury on the body of the deceased by PW-7 is concerned, it is pertinent to note that the alleged incident took place on 01.06.1992, whereas, the PM, on the body of the deceased Raisingbhai, was performed by PW-7 on 08.06.1992. It is, therefore, possible that the injuries caused by the accused with the stick on the body of the deceased being simple in nature, might not have been found by PW-7 after a period of about one week. Under the circumstances, the trial Court committed a grave error in coming to the conclusion that, since, the infliction of stick blows by the accused on the body of the deceased does not get any support from medical evidence, the evidence of PW-1, PW-4 and PW-2, who is an injured eye-witness, cannot be believed. In view of the fact that P.W.-2 is an injured witness, here, it would be relevant to refer to a decision of the Hon'ble Apex Court in the case of State of U.P. Vs. Naresh and Others, , wherein the Hon'ble Apex Court

observed that the evidence of an injured witness is accorded special status, since, his presence at the place of occurrence is beyond doubt and it is unlikely that he has spared the actual assailants in order to falsely implicate someone else, and therefore, his evidence should be relied upon, unless there are major contradictions and discrepancies, therein. In the case on hand also, there are minor omissions and contradictions in the evidence of PW-2, but, this witness hold his ground in his examination-in-chief as well as his cross-examination that it was accused No. 1, who inflicted knife blows on the deceased Raisingbhai. The trial Court, hence, erred in discarding the evidence of the eye-witnesses-PW Nos. 1 and 4 and more particularly, the evidence of PW-2, who is an injured eye-witness.

14.6 The trial Court, further, come to the conclusion that the evidence of PW-10, who was a panch witness to the panchnama of discovery of weapon used in committing the offence at the instance of the accused, cannot be believed, since, this witness, in his cross-examination, stated that he was known to police and he frequently used to go to police station. If, the evidence of PW-10 are examined in detail, he has narrated the entire procedure of panchnama, Exhibit-54, stating as to how he was called at the police station, and then, as to how he along with the accused and the police personnel proceeded in government vehicle on the way, as shown by the accused persons, and then, as to how the accused produced the weapon, from the place which were known to them and them alone. Had PW-10 was a got-up witness, then, he could not have described the entire procedure in detail with such a precision. If, we look at the reasoning give by the trial Court for not believing the evidence of PW-10, then, it has recorded a finding that PW-10 in his cross-examination stated that he is known to police and police had told him that weapons were to be discovered from dhunga, his evidence cannot be believed. However, while coming to such a conclusion, the trial Court appears to have lost sight of the fact that before discovering the weapon, the police had to obtain the information from the accused and have to brief the panchas about the procedure as to what is to be seized and from where. Further, when PW-10 was deposing before the Court, the panchnama was already recorded. Meaning thereby, at the time of recording of evidence, PW-10 was already knowing as to what was seized and from where, and therefore, if, he stated that police had informed him that certain weapon were to be recovered from a place, it cannot be said that police and for that matter, this witness was knowing beforehand, the place where the weapons in question were hidden. Thus, such a finding of facts recorded by the trial Court is apparently erroneous and cannot be sustained.

14.7 The trial Court has, then, next refused to believe the statement of the deceased, Mark 10/26, recorded by the IO on the ground that the statement of the deceased is stated to have been recorded on 02.06.1992, whereas, the endorsement with regard to fitness of the deceased Raisingbhai to make a statement is alleged to have been obtained on 03.06.1992. In order to prove the said statement, the prosecution examined Dr. Paul Thomas as PW-9. Here, it may be noted that PW-9 had not made the alleged endorsement on the statement of

the deceased, recorded by PW-11, but, since, the concerned doctor had gone abroad, at the relevant point of time, and there was no possibility of his coming back to India in near future, Dr. Paul Thomas was examined by the prosecution as PW-9, since, he had examined the deceased Raisingbhai on 02.06.1992, when the deceased was brought to SSG Hospital. PW-9, in his examination-in-chief, stated that he can identify the hand writing of the endorsement, i.e. "Patient is conscious", as that of Dr. Chandresh Dave, but, he failed to identify the signature made, thereunder. It is mainly on this count that the trial Court did not believe the statement of the deceased. However, while doing so the trial Court lost the sight of the fact that PW-9 is an independent witness and he had nothing either in favour of the deceased Raisingbhai or against the accused persons, and therefore, when he says that he can identify that the endorsement on the statement of the deceased, i.e. "Patient is conscious", is in the handwriting of Dr. Chandresh Dave, it becomes clear that PW-11 had obtained necessary endorsement with regard to fitness of the deceased Raisingbhai to make a statement, before recording the same. It is possible that through oversight or inadvertence Dr. Chandresh Dave might not have signed the same or PW-11 might not have taken the signature of Dr. Chandresh Dave on the same at that point of time, and therefore, PW-11 might have made an attempt to obtain the signature of the concerned doctor under the said endorsement and due to that variation in date and in signature, might have occurred. But, the fact remains that as per the evidence of PW-9, the endorsement that the "patient is conscious" is in the handwriting of Dr. Chandresh Dave, and therefore, it stands proved that PW-11 had obtained necessary endorsement, with regard to fitness of the deceased Raisingbhai to make a statement, before recording the statement of the deceased Raisingbhai. The trial Court, hence, ought to have relied on the same and by not doing so it has committed a grave error.

14.8 Here, it would also not be out of place to mention that the D.D. of the deceased Raisingbhai was also recorded by the concerned Executive Magistrate, which was produced on record by the prosecution vide Mark- 10/9. However, the prosecution did not examine the concerned Executive Magistrate, who had recorded the same, at the time of trial. When the trial Court inquired from the concerned learned Public Prosecutor for not examining the Executive Magistrate, it was stated by the concerned learned Public Prosecutor, as is recorded by the learned trial Court in Paragraph-31 of the impugned judgment and order, that the prosecution does not want to rely on the same. The trial Court, therefore, ought not to have taken into consideration the said document, but, what the trial Court did instead is that it observed that the prosecution does not want to rely on DD, Mark 10/9, since, name of only one accused, i.e. accused No. 1, figures, therein, and the prosecution wants to implicate all the three accused. Such an observation, in our opinion, is unnecessary and cannot be sustained. Since, the prosecutor-State has neither any friendliness with the complainant side nor any animosity with the accused persons.

14.9 Next, the prosecution relied on the Serological Report of FSL, Exhibit-26. As

per the Serological Report, the presence of human blood of blood-group "AB" was found on the muddamal Article Nos. 1 and 3 to 7, viz. Article No. 1-Sand, No. 3- a piece of "Dhoti", No. 4-Dhoti, No. 5-Dhoti, No. 6-Open Shirt and No. 7-Knife. However, the trial Court discarded the said piece of evidence also, recording that mere presence of blood of the deceased on the said articles would not prove the involvement of the accused in the alleged offence, as the report of FSL is only a circumstantial evidence. The trial Court also went on to record that the prosecution failed to prove the seizure of muddamal Article No. 6-open shirt of accused No. 2, and thereby, disbelieved the same. Apparently, the trial Court committed a fatal error by recording such a finding, since, it ought to have read this piece of evidence not in isolation, but, with the evidence of the eyewitnesses, i.e. PW Nos. 1, 2 and 4, who fully supported the case of the prosecution. So far as the aspect of seizure of shirt of accused No. 2-Babarbhahi is concerned, PW-6, who was a witness to the arrest panchnama of the accused Nos. 1 and 2, in his deposition, Exhibit-37, stated that on 03.06.1992, he was called at the police station to act as a panch. PW-6 stated that, at the police station, accused Nos. 1-Pratapbhahi Babarbhahi and accused No. 2-Kalabhahi Babarbhahi were present. PW-6 stated that there were blood marks on the right hand of accused No. 1-Pratapbhahi, but, there was no mark on his clothe. This witness, then, stated that accused No. 2-Kalabhahi produced the clothes put on by him and that there were blood marks on the shirt of accused No. 1. In his cross-examination, PW-6 denied the suggestion that he had found no blood marks on the hand of accused No. 1-Pratapbhahi and that he had signed ready-made panchnama. Thus, if, we read the evidence of PW-6, then, the same are simple, clear and natural. The trial Court, hence, committed a serious error in throwing away the evidence of PW-6 and also not believing the report of FSL.

14.10 Here, it would be interesting to note that PW-8, who was discharging duties as Medical Officer, Thasra, in Paragraph Nos. 13 and 16 of his cross-examination stated that on 02.06.1992, he had examined accused Nos. 1 and 2. Relying on the same, in Paragraph-35 of the impugned judgment and order, the learned trial Court has observed that the prosecution has not been able to explain the injuries caused to accused Nos. 1 and 2, and therefore, its case cannot be believed. It is very shocking and surprising that when trial Court, itself, felt that the injuries sustained by accused Nos. 1 and 2 were neither natural and accidental, it could not have discarded the case of the prosecution that they had attacked the deceased Raisngbhahi and others, as the presence of injury on the body of accused Nos. 1 and 2, itself, proves their presence at the place of offence, at the time of its commission. In the very same paragraph, the learned trial Court has, further, observed that it appears that due to incident of Radhaben, the complainant side might have attacked the accused and at that time accused must have retaliated in self-defence due to which the deceased Raisingbhahi and others may have sustained injuries. However, while making such observations the trial Court clearly appears to have lost sight of the fact that it is the specific case of the prosecution that due to incident of Radhaben accused No.

1 was harbouring grudge against the deceased Raisingbhai, which culminated into the alleged offence. We are very sorry to observe that such a finding recorded by the learned trial Court is quite contrary to the evidence on record. Had the complainant side attacked the accused persons, then, the accused would definitely have filed a police complaint. However, no such police complaint is filed or produced on the record of the case. It, therefore, appears that the plea of self defence taken by the accused in their written statement, Exhibit-56, is clearly an afterthought. If, we peruse the further statements of the accused recorded under Section 313 of the Cr.P.C., then, there is nothing except denial. Further, the accused, themselves, in their written statement have stated that when the complainant side attacked them, they retaliated in self-defence and during the said procedure, one stick blow was inflicted on the deceased Raisingbhai. This piece of evidence, itself, nullifies the finding of the learned trial Court that the prosecution is not clearly stating as to how the alleged incident took place and as to how the deceased Raisingbhai and others sustained injuries. The accused have not explained, if, they retaliated in self-defence with the sticks, how come the injuries with knife were caused on the body of the deceased. It is not the case on behalf of the accused persons that the complainant side had attacked them with sticks and knife. Under the circumstances, the learned trial Court ought to have sought clarification from the accused, as to how the knife injuries were caused on the body of the deceased Raisingbhai. It is also not the case on behalf of the accused that the Raisingbhai sustained injuries from knife wielded by one of the persons from the complainant side. This fact clearly establishes the case put forward by the prosecution that the accused persons attacked the deceased Raisingbhai by keeping grudge about the incident of Radhaben. Under the circumstances, the presence of the accused at the place of offence, at the time of its commission, and their participation, therein, stands established from their own evidence. So far as the aspect of the place of offence is concerned, we have already discussed the said issue in detail, herein above, and has held that the alleged offence took place near the house of the deceased, which is about more than 300 feet away from the houses of the accused, and therefore, the accused were required to explain their presence near the place of offence, at the time of its commission, had they really not committed the offence. So far as the decision relied on by Mr. Vakil in the case of "DHANPAL v. STATE OF MADRAS BY PP"(Supra) is concerned, it is not doubt true that the prosecution has to prove its case and the Court cannot shift the burden on the opposite side to disprove the same. In the same manner, when the accused are taking a specific defence, they, themselves, have to prove their case. The trial Court, hence, ought to have sought an explanation from the accused persons, rather than discarding the case of the prosecution for not explaining the injuries sustained by the accused persons. Thus, the trial Court apparently committed a grave error in observing that the prosecution ought to have explained the injuries sustained by the accused, by apparently misreading and misinterpreting the decision of the Apex Court in "DHANPAL v. STATE OF MADRAS BY PP"(Supra), which will not help the case of the accused.

14.11 Having gone through the entire material on record, oral as well as documentary, and having heard the learned Advocates for the parties, we are of the opinion that the learned trial Court examined the case as well as the evidence of the prosecution under the microscope, instead of examining the same under the magnifying glass to find out for what it is and erroneously and arbitrarily discarded the evidence of the eye-witness-PW Nos. 1 and 4, the evidence of injured eye-witness-PW-2, independent panch witnesses including the documentary evidences such as statement of the deceased recorded by IO (Mark 10/26), Serological report etc. and wrongly acquitted the accused of the charge framed against him, which has resulted into miscarriage of justice. We, therefore, hold accused No. 1 guilty for causing death of Raisingbhai.

15.0 Having held the accused guilty for the death of Raisingbhai, now, this Court has to examine as to whether accused No. 1 can be said to have committed the offence of culpable homicide amounting to murder or not.

15.1 From the material on record it is evident that the alleged incident took place on 01.06.1992, whereas, the deceased expired on 08.06.1992, i.e. nearly after one week of the alleged offence. As per the PM note, Exhibit-14, the cause of death of the deceased Raisingbhai was shock & hemorrhage, consequent to penetrating stab injuries to internal organs, i.e. stomach, liver, lungs and portal vein along with infection and septic. It is, thus, clear from the PM note that the deceased expired due to infection and septicemia. As stated above, since, the deceased had died due to septicemia, here, it would be relevant to refer to the decision of the Apex Court in the case of "B.N. KAVATAKAR v. STATE OF KARNATAKA", 1994 SCC Supl. (1) 304, in that case, the appellants, therein, committed the criminal trespass on the land of the deceased and also inflicted severe injuries on him with deadly weapons and on account of that the deceased died after about a week due to septicemia. At the end of the trial, the trial Court acquitted all the accused, against which the State preferred an appeal, wherein, the High Court convicted the appellants for the offence under Section 304 read with Section 34 of the IPC. When the matter was further carried before the Apex Court, the Apex Court modified the order of the High Court, by recording conviction of the appellants under Section 326 read with Section 34 of the IPC, in view of the fact that the deceased had died due to septicemia.

15.2 Similar view is taken by the Apex Court in the case of Maniben Vs. State of Gujarat, , wherein, the deceased, who happened to be daughter-in-law of the accused, i.e. the mother-in-law of the deceased, expired when the accused threw a burning wick on the deceased after a quarrel, on account of which the clothes of the deceased caught fire and ultimately, the deceased sustained about 60 per cent burn injuries. In that case, the trial Court hold the accused, mother-in-law, guilty under Section 304 (Part II) of the IPC and sentenced her to undergo imprisonment for five years. However, the High Court enhanced the said sentence to imprisonment for life in an appeal preferred by the State, by holding the accused guilty for the offence under Section 302 of the IPC. When the matter

was, further, carried before the Apex Court, the Apex Court set aside the order of the High Court and confirmed the order of the trial Court, convicting the accused under Section 304 (Part II) of the IPC, concurring with the findings recorded by the trial Court that the injuries sustained by the deceased were not sufficient in general course of nature to cause death, as the deceased had died after 8 days due to septicemia.

15.3 As stated, herein above, since, the deceased expired after about one week from the date of offence due to infection and septicemia, accused No. 1 cannot be said to have committed the offence of culpable homicide amounting to murder. In other words, the accused cannot be held guilty for the offence punishable under Section 302 of the IPC, but, the case of the accused would surely fall under Section 304 (Part I) of the IPC, since, he had knowledge that his act could result into death of the deceased Raisingbhai. We, therefore, convict the accused for the offence punishable under Section 304 (Part I) of the IPC and if, accused No. 1 is sentenced to undergo rigorous imprisonment for a period of five years, same would meet the ends of justice.

15.4 In the result, this appeal is ALLOWED. The impugned judgment and order of the trial Court dated 19.11.1994, recording the acquittal of accused No. 1 is QUASHED and set aside. Accused No. 1 is held GUILTY for the offence punishable under Section 304 (Part I) of the IPC and is sentenced to undergo rigorous imprisonment for FIVE YEARS with fine of Rs. 1,000/- and in default to undergo further rigorous imprisonment for one month. The accused No. 1 is granted a period of four weeks, to surrender before the concerned jail authority to serve the sentence, from today. The accused shall be given the benefit of set-off, if any, available to him under the law. R&P be sent back to the concerned trial Court.