
(2015) 10 GUJ CK 0054

In the Gujarat High Court

Case No : Criminal Appeal Nos. 347 and 351 of 2004

Vijay Bansilal Varma and Others

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 28-10-2015

Acts Referred:

Bombay Police Act, 1951 — Section 135(1)

Criminal Procedure Code, 1973 (CrPC) — Section 122, 313, 374, 427, 428

Penal Code, 1860 (IPC) — Section 143, 147, 148, 149, 302

Citation : (2015) 10 GUJ CK 0054

Hon'ble Judges : M.R. Shah and K.J. Thaker, JJ.

Bench : Division Bench

Advocate : Yogesh S. Lakhani, Advocate, for the Appellant; Himanshu Patel, Addl. Public Prosecutor, for the Respondent

Final Decision : Partly Allowed

Judgement

K.J. Thaker, J.—Both these appeals arise out of a common judgment and order rendered by the learned Additional Session Judge, Dated: 16.01.2004, in Sessions Case No. 202 of 2002, whereby, the original accused, i.e. the appellants in Criminal Appeal Nos. 347 and 351 of 2004, were arraigned as accused Nos. 2, 4, 5 and 1, and therefore, they have preferred the present appeals. It is an admitted position of fact that the original accused No. 3, namely Ravi Manubhai Barot, has neither preferred any appeal challenging the order of the trial Court nor has he undergone the sentence, as imposed by the learned trial Court, and he has been absconding since 01.07.2004, i.e. immediately after the pronouncement of the impugned judgment and order by the trial Court and after he was taken into custody. Accused No. 3 has been absconding after he was released on parole, which was granted to him and he is reported to be not nabbed by the police, till date for a period of 11 years.

2. With the above prelude both the appeals are taken-up for final hearing and disposal together, since, they arise out of the common judgment and order

passed by the learned trial Court, as above.

3. Criminal Appeal No. 347 of 2004 is preferred by the original accused Nos. 2, 4 and 5, whereas, Criminal Appeal No. 351 of 2004 is preferred by the original accused No. 1, whereby, they have challenged the impugned judgment and order passed by the Addl. Sessions Judge, Court No. 6, Ahmedabad (for short, "the trial Court"), rendered in Sessions Case No. 202 of 2002, Dated: 16.01.2004, whereby, the trial Court convicted all the accused, i.e. original accused Nos. 1 to 5, and sentenced them as under;

(1) For the offence punishable under Section 143 of the Indian Penal Code, to undergo rigorous imprisonment for three months and to pay fine of Rs. 500/- by each of them and in default to undergo further rigorous imprisonment for fifteen days;

(2) For the offence punishable under Section 147 of the Indian Penal Code, to undergo rigorous imprisonment for one and a half year and to pay fine of Rs. 1500/- by each of them and in default to undergo further rigorous imprisonment for one and a half month;

(3) For the offence punishable under Section 148 of the Indian Penal Code, to undergo rigorous imprisonment for one and a half year and to pay fine of Rs. 3000/- by each of them and in default to undergo further rigorous imprisonment for three months;

(4) For the offence punishable under Section 302 read with Section 149 of the Indian Penal Code, to undergo imprisonment for life and to pay fine of Rs. 5000/- by each of them and in default to undergo further rigorous imprisonment for six months;

(5) For the offence punishable under Section 135(1) of the Bombay Police Act, to undergo rigorous imprisonment for one month.

4. Brief facts of the case of the prosecution, as set out before the trial Court, are that the original complainant, namely Vikasbhai Naranbhai Patel, lodged a complaint before Amraiwada Police Station, Ahmedabad, on 01.02.2001, wherein, he stated that he resides along with his, family at the address mentioned in the complaint, and runs a pan shop in the name of Rajkamal Store along with his elder brother, namely Baldevbhai, and his uncle, Avsarbhai. It is alleged in the complaint that on the date of the alleged incident, i.e. 01.02.2001, at about 08:00 p.m., the complainant along with his uncle, Avsarbhai, was present at pan shop, whereas, his elder brother, Baldevbhai, was standing on the footpath outside their shop. At that point of time, two motorcycles came and stopped in front of their shop and four persons got down from the same. Out of the aforesaid four persons, two persons, who were wielding swords, went to the counter of their shop and one of them, smashed the sword held by him on the counter and due to that same was broken. At that point of time, the elder brother of the complainant, Baldevbhai, rushed into shop and one person with a

sword in his hand followed, Baldevbhai, and inflicted a blow on the thigh of his right leg. At that time, since, the complainant and others started shouting, the accused fled the scene of offence on the motorcycle on which they had come. While the accused were fleeing, one of the two motorcycles slipped and the number of the same was noted down by one Dipak Sirishbhai Mistry, who resides near the shop of the complainant, and that was a Suzuki motorcycle, bearing registration No. GJ-1-TC-63. The injured was, then, taken to hospital, where, he succumbed to the injuries sustained by him at late night. Hence, the offence punishable under Section 302 of the Indian Penal Code came to be added. On registration of the offence, police carried out investigation and on finding sufficient evidence against all the accused, filed a charge-sheet against them before the Court of the learned Metropolitan Magistrate, Ahmedabad. However, since, the case was exclusively triable by a Court of Sessions, it was committed to the Sessions Court. At the time of trial, the accused did not plead guilty and claimed to be tried.

5. In order to prove its case against the accused persons beyond reasonable doubt, the prosecution examined the following witnesses;

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

At the end of the trial, the further statements of the accused, under Section 313 of the Code of Criminal Procedure, came to be recorded. Then, the trial Court passed the impugned judgment and order convicting and sentencing the accused, as stated herein above.

7. Mr. Thakkar, learned Advocate appearing on behalf of the appellants, original accused Nos. 2, 4 and 5, in Criminal Appeal No. 347 of 2004 and Mr. Agrawal, learned Advocate appearing on behalf of accused No. 1-the appellant in Criminal Appeal No. 351 of 2004, submitted that the trial Court committed a grave error in convicting the original accused Nos. 1, 2, 4 and 5, inasmuch as it failed to appreciate the material on record in its proper perspective. It was submitted that the trial Court ought to have appreciated the fact that the complainant has not attributed any overt act to original accused Nos. 2, 4 and 5 either in his complaint or in his statement before police. It was submitted that the trial Court committed a serious error by relying on the evidence of the highly interested witnesses, since, the story of dashing of the head of the deceased was neither narrated in the complaint by the complainant nor by any of the witnesses in their statements before police. It was submitted that the trial Court ought to have appreciated the fact that the prosecution has not been able to prove the motive. It was submitted that the complainant did not name any of the accused in the complaint, though, it is the specific case of the prosecution that the accused used to come to the shop of the complainant. It was lastly submitted that there are a number of contradictions, omissions and improvements in the evidence of the witnesses examined by the prosecution, and therefore, it was prayed that the present appeals be allowed and accused Nos. 1, 2, 4 and 5 be acquitted. It was

alternatively submitted by the learned Advocates, Shri. Thakkar and Shri. Agrawal that as the prosecution has not been able to establish the motive, the trial Court ought to have held the accused guilty for the offence punishable under Section 326 and or 304 (Part I or II) of the IPC.

8. Shri. Agrawal, learned Advocate, appearing on behalf of the original accused No. 1, lastly submitted that the trial Court ought to have appreciated the fact that accused No. 1 is not named in the complaint. He, further, submitted that in fact the identification of accused No. 1 was never established, as no test-identification parade was held.

No other submission was made.

9. Heard learned Counsels for the appellants-original accused Nos. 1, 2, 4 and 5 as well as the learned APP on behalf of the State and perused the material on record.

10. These being appeals under Section 374 of the Code of Criminal Procedure, as per the ratio laid down by the Apex Court in a number of decisions, we shall have to reconsider the evidence of each of the witness as well as the documentary evidence and we have given full opportunity to all the parties to make out a case in their favour.

11. The factual scenario, as it emerges, goes to show the charge, which is produced at Exhibit-3 and which is as under;

"-:: Charge ::-

...

1. On 01.02.2001, at about 20:30 p.m., you, i.e. all the accused, formed unlawful association near the entrance of Shankarpark Society, Rajkamal Store, Parasnath Society, Division-2, Amraiwadi, Ahmedabad, falling within the jurisdiction of the Amraiwadi Police Station and with a view to cause death of the deceased, Baldevbhai Narandas Patel, and with a view to achieve your common object, in connivance with each other, though, you fully knew that it was an unlawful association you all became a part of the same, and thereby, committed the offence punishable under Section 143 of the Indian Penal Code.

2. Further, on the aforesaid date and time with a view to achieve the common object of the aforesaid unlawful association by exerting force and causing violence, you, i.e. the accused No. 1 and accused No. 2 wielded swords, the weapons which could cause death and attacked the brother of the complainant, namely Baldevbhai, with a view to cause his death and caused serious injuries to him and caused his death, and thereby, you, all the accused committed the offence punishable under Sections 147, 148 and 149 of the Indian Penal Code.

3. Further, on the aforesaid date and time with a view to achieve the common object of the aforesaid unlawful association with a view to cause death of the brother of the complainant, namely Baldevbhai, accused No. 1 inflicted a blow of

sword on the thigh of right side leg of Baldev Narandas and cause serious injury. Further, you accused Nos. 1 to 3 dashed the head of the deceased, Baldev Narandas, with the wall near the shutter and cause serious injuries, whereas, accused Nos. 4 and 5 remained standing in front of the shop with open knives so that nobody would come to save the victim, and thereby, you, i.e. all the accused, caused death of Baldevbhai Narandas Patel and committed the offence punishable under Section 302 read with Sections 147, 148, 149 of the Indian Penal Code.

4. Further, on the aforesaid date and time, though, the notification of the Commissioner of Police, Ahmedabad, prohibiting carrying of weapons in public was in operation, you, i.e. all the accused wielded deadly weapons in public, and thereby, committed the offence punishable under Section 135(1) of the Bombay Police Act. ..."

12. Having gone through the charge framed against the accused persons, now, this Court has to examine as to whether, the trial Court was justified in coming to the conclusion that the death of the deceased, Baldevbhai, was homicidal. In order to prove that the death of the deceased, Baldevbhai, was homicidal, the prosecution examined Dr. Sumanlal Bholanath Shrimali, Medical Officer, Civil Hospital, Ahmedabad, who had conducted post mortem on the body of the deceased Baldevbhai, as PW-7.

13. PW-7 in his deposition Exhibit-40 stated that on 02.02.2001, while he was on duty, one dead body was brought by Amraiwadi Police Station personnel. He had commenced the post mortem on the dead body same day at about 07:00 p.m. and completed the same at about 08:30 p.m. PW-7 stated that during the course of P.M. he had noticed the following injuries on the body of the deceased, which are mentioned in Column Nos. 17, 18 and 19 of the PM Note (Exhibit-41) of the deceased and which reads as under;

"17. Nature of external injury, its type, condition, size and its direction be specifically stated. Age of the injury and the reasons for the same be also stated: (1) Oblique I.W. over lateral aspect of (Rt.) upper arm., 3 cms. X 0.5 c.m. X muscle deep.

(2) I.W., oblique on lateral aspect of (Rt.) lower thigh 4 c.m. X 0.5 c.m. X 3 cms. Deep.

XXX XXX XXX

18. Fracture or any other injury, if any found, which could be perceived by external examination or by touch: (1) # of (Lt.) 4th to 6th ribs in midclavicular line.

(A) As to whether, can it be said with certainty that the injuries mentioned in column Nos. 17 and 18 are ante mortem in nature?: Ante mortem.

XXX XXX XXX

19. Head:

(1) Injuries below the skin and their type:

(1) 6 c.m. X 3 c.m., anterior to posterior full thickness contusion on (Rt.) parietal region part lateral to midline. Diffuse Haemetony laser the skin found.

(2) 5 c.m. X 3 c.m. Full thickness contusion on (Lt.) parietal region (Lt.) to middle & parallel to injury No. (1). Diffuse haemotony laser skin found.

(3) 8 c.m. X 4 c.m., transverse full thickness contusion on occipital protrabrance. Diffuse haematony laser skin found.

(2) Upper and lower portion of the skull, fracture, its position, size, direction etc., be mentioned: NAD

(3) Brain: Internal appearance of brain, size, weight and the normal condition of the said organ and irregularity, if any, found be carefully mentioned. (Weight of male brain 3 lbs., weight of female brain 2.75 lbs.: Massive EDH over middle of both parietal area causing compression to brain.

SAH on middle of both parietal & occipital region extending to middle & inferior."

According to PW-7 the cause of death of the deceased was shock & hemorrhage due to head injury.

14. Under the circumstances, the trial Court rightly came to the conclusion that death of Baldevbhai was homicidal one.

15. Having held that the deceased Baldevbhai died of homicidal death, now, this Court has to examine as to whether the trial Court was justified in coming to the conclusion that accused Nos. 1 to 5 are the perpetrator of the alleged offence. In order to examine the aforesaid aspect, here, it would be relevant to refer to the evidence of the complainant, who happened to be the brother of the deceased Baldevbhai and was an eye-witness of the incident. The complainant was examined by the prosecution as PW-1.

16. PW-1, in his deposition Exhibit-15, stated that on the date of the alleged incident, i.e. on 01.02.2001, he along with his uncle, Avsarbhai, was present at his shop. At that time, at about 08:30 p.m., one motorcycle came from the direction of Slum Quarters and stopped in front of his shop, followed by another motorcycle. Then, two persons wielding swords got down from the motorcycle and entered into his shop and went to the counter of the shop. Then, one of the persons holding swords, smashed it on the counter. At that point of time, the deceased Baldevbhai started shouting and came into shop and at that point of time, one of the persons holding the sword, inflicted a blow on the right side thigh of the deceased Baldevbhai. At that time due to commotion, people gathered there and the accused fled and while fleeing one of the motorcycles slipped and the number of the said motorcycle was noted by one Sureshbhai Mistry, who resides in the same vicinity. Thereafter, the injured Baldevbhai was

taken to the hospital, where, he expired on the same day, while undergoing treatment. PW-1, in his examination-in-chief, has further stated that an incident of loot had taken place at his shop on 14.05.1998, wherein, one Shivo, Ashok, Jago and Bhavesh were involved. In the said incident the complainant and his uncle had sustained injuries. PW-1 stated that the said matter was later on compromised and that accused had given an undertaking that such an act shall not be repeated. PW-1 stated that after accused No. 1 was released in connection with the said case, he used to come to their shop along with other accused and used to say that he had to incur the expenses of the fees of advocate, thereby, he used to demand money from them towards the same. PW-1 stated that accused No. 1-Shivo and accused No. 3-Ravi Manubhai Barot used to come to their shop and used to demand money. PW-1 stated that on the date of the alleged incident Shivo and Vijay had swords with them, whereas, Bharat, Prakash and Ravi had knives with them. PW-1 stated that it was accused No. 1-Shivo, who had inflicted sword blow, on the deceased Baldevbhai. PW-1 also stated that along with accused No. 1-Shivo, accused No. 2-Vijay had entered into their shop, on the date of the alleged incident, whereas, the remaining three accused, viz. Bharat, Prakash and Ravi, were standing outside shop so that nobody comes to rescue the victim. PW-1 stated that accused No. 1-Shivo and Accused No. 3-Ravi had dashed the head of Baldevbhai with the wall. This witness, then, identified all the accused as well as the clothes of the deceased Baldevbahi, i.e. muddamal Article Nos. 4 and 5, before the Court.

17. PW-1 was thoroughly cross-examined by the learned Advocates for the accused. In his cross-examination, PW-1 stated that it is true that after the accused were apprehended by police, he along with his uncle, Avsarbhai, was called at police station. However, he denied that police had shown all the five accused to them and that they were introduced to him. PW-1 also denied that police had given the names and addresses of the accused to him. Thus, the evidence of this witness remains unshaken during his cross-examination and the defence failed to bring out anything, which would help their case.

18. PW-4, who happened to be the younger brother of the deceased and who is another eyewitness of the alleged incident, was examined by the prosecution at Exhibit-22. PW-4 also, in his examination-in-chief, stated that accused No. 1-Shivo, herein, and others had committed a loot at their shop on 14.05.1998 and a compromise was arrived at in the said matter on 20.05.1999. PW-4 stated that after the aforesaid matter was compromised, accused No. 1-Shivo and accused No. 3-Ravi used to come to shop of his elder brother and used to demand money from him, saying that they had to incur heavy expenses towards the fees of Advocate in the old case. PW-4, then, narrated the alleged incident stating that on the date of the alleged incident, he along with his nephew, Jitendra, was at some distance from their shop and at that point of time, one motorcycle stopped in front of their shop accused No. 3-Ravi was driving the motorcycle, whereas, accused No. 1-Shivo was sitting as pillion rider. Thereafter, another motorcycle came, which was being driven by accused No. 2-Vijay, whereas, accused Nos. 4-

Prakash and No. 5-Bharat were sitting as pillion riders. PW-4 also stated that accused Nos. 1-Shivo and accused No. 2-Vijay had swords with them, whereas, remaining three accused had knives with them and they were standing outside so that nobody could go to save his brother and uncle. This witness, then, narrated as to how accused No. 1-Shiva first inflicted a blow of sword on the right side thigh of his brother Baldevbhai, and then, as to how accused No. 1-Shivo and No. 3-Ravi caught hold of the injured Baldevbhai and dashed his head with the wall. This witness, then, identified the muddamal articles, i.e. weapons wielded by the respective accused as well as all the accused before the Court.

19. In his cross-examination, PW-4 stood on his ground and denied the suggestion that while shifting the deceased Baldevbhai from one hospital to another his head was dashed and due to that head injury was caused. PW-4 also denied the suggestion that he had not met or seen the accused before Amraiwadi Police showed them to him and that he wrongly identified the accused at the instance of police. This witness also denied the suggestion put forward by the learned Advocate for the accused that there were disputes going on amongst the brothers with regard to property and that there was also some dispute going on between his uncle, Avsarbhai, and his deceased brother Baldevbhai. On an inquiry from the Court, this witness reiterated that accused No. 1-Shivo was involved in the incident of loot, which took place at their shop on 14.05.1998 and in that regard a compromise was also arrived at between the parties. This witness, then, also denied the suggestion that he had not witnessed the incident with his own eyes.

20. PW-6, who happened to be the son of the deceased Baldevbhai and who is another eyewitness of the alleged incident, was examined by the prosecution vide Exhibit-37. In his examination-in-chief this witness also narrated the earlier incident of loot, which had taken place on 14.05.1998 in which accused No. 1-Shivo and others were involved. This witness, then, stated that on the date of the alleged incident, i.e. on 01.02.2001, while he along with his uncle-PW-4 was proceeding towards their shop, at that time, two motorcycles came and on one of them Accused No. 1-Shivo and accused No. 3-Ravi and on the other, accused Nos. 2-Vijay, accused No. 4-Prakash @ Pintu Girdharbhai Maratha and accused No. 5-Bharat @ Gotu Chhaganbhai Maratha were there. PW-6, then, identified all the accused by name before the Court. This witness, then, also narrated the entire incident as to how the accused came on two motorcycles, and then, as to how accused No. 1-Shivo inflicted sword blow on the thigh of the deceased Baldevbhai, and then, as to how Accused No. 1-Shivo and No. 3-Ravi dashed the head of the deceased Baldevbhai, which later on resulted into death of the accused.

21. PW-6, in his cross-examination, denied the suggestion that he was not present at the place of offence, at time of its commission. This witness denied the suggestion that he falsely involved the accused in the alleged offence due to past animosity. Thus, the evidence of this witness also remains unshaken on

material aspects.

22. Thus, from the evidence of PW Nos. 1, 4 and 6, it transpires that accused Nos. 1 to 5 had gone to the place of offence on the date of its commission, and then, accused No. 1-Shivo first inflicted a blow of sword on the right side thigh of the deceased Baldevbhai, and then, accused No. 1-Shivo and accused No. 3-Ravi dashed the head of Baldevbhai with the wall and caused grave injuries to him, which later on resulted into his death. From the evidence of PW Nos. 1, 4 and 6, it is also borne out that at the time of alleged offence, accused Nos. 2, 4 and 5 were standing outside the shop with open knives so as to prevent anyone from helping the victim. The evidence of PW Nos. 1, 4 and 6, gets support from the evidence of PW-11, who was a witness to the panchnama of place of offence.

23. PW-11, in his deposition, Exhibit-62 stated that on 02.02.2001, while he went for morning walk at about 04:00 a.m. as usual, he was called at Rajkamal Stores situated near Shankar Park Society. PW-11 stated that the place of offence was shown by one Vikasbhai, i.e. PW-1. PW-11 stated that it was a shop admeasuring about 8 X 10 and there was a counter on which there were blood marks. Police had taken the sample of blood from the counter with the help of a piece of cotton and remaining cotton was kept as control sample. Police had seized one rusted hilt of sword and had packed and sealed all the three items separately. PW-11, then, identified the muddamal articles before the Court as well as the slips kept with it. In his cross-examination, this witness denied the suggestion that he had not gone for morning walk on the date of the alleged incident and that he was not called by the police to act as a panch and that he did not sign any panchnama. Thus, the evidence of PW-11 supports the case of the prosecution on the aspect of the place of offence.

24. PW-2 was a panch witness of the panchnama of seizure of one of the motorcycles as well as one of the weapons used by the accused in committing the offence. PW-2, in his deposition Exhibit-17, stated that on 13.02.2001, at about 09:45, he was called at Amraiwadi Police Station and he was told that accused No. 2-Vijay Bansilal wanted to show something, and therefore, he gave his consent to act as a panch. Then, PW-2 along with the accused and the police personnel went to Revabhai Estate, as per the way shown by accused No. 2, and there the accused showed a bike of Bajaj Caliber brand bearing registration No. GJ-1-BN-3439 and a sword, which was kept on its silencer. This witness, then, identified accused No. 2, aforesaid motorcycle as well as the sword, i.e. muddamal article No. 8, before the Court. From the cross-examination of this witness, defence failed to bring out anything which would help their case.

25. PW-3, who was a panch witness of panchnama of recovery of weapon at the instance of accused No. 1-Shivo, was examined at Exhibit-19. This witness, in his deposition, stated that on 12.02.2001, at about 08:45 p.m., police had called him at Amraiwadi Police Station and he was told that as accused No. 1-Shivo wanted to produce the sword used by him in committing the offence and as a panchnama in that regard was to be drawn, this witness gave his consent to act

as a panch. Thereafter, they left Amraiwadi Police Station in a government vehicle via CTM, Narol Cross Roads and Vegetable Market and came to a small room in Juhapura area. Behind the said room a dustbin and other things were lying and there accused No. 1 dug up a ditch beneath the dustbin and produced a sword. Then, PW-3 identified accused No. 1 as well as a sword without hilt, i.e. muddamal article No. 6, before the Court. The evidence of this witness on material aspect during his cross-examination could not be shaken.

26. PW-5, who is another panch witness of the panchnama of seizure of weapon used in committing the offence, was examined at Exhibit-26. PW-5, in his deposition Exhibit-26, stated that on 13.02.2001, at about 02:00 p.m., he was called at Amraiwadi Police Station and there he was told that one accused wanted to produce something and a panchnama in that regard was to be drawn, and therefore, he gave consent to act as a panch. Thereafter, some writing was done and the signatures of this witness and other panch were obtained, thereon. Then, in a government vehicle, they left police station, as per the way shown by the accused, via Azad Chowk, Hatkeshwar to Laxminarayan Old Octroi Post and there the accused asked to stop the vehicle near an apartment. Thereafter, the accused, panchas and the police staff alighted from the vehicle and the accused walked ahead and entered into bushes of babool tree and produced a knife from beneath the hip of sand. This witness, then, identified the said knife, i.e. muddamal article No. 11, as well as the said person as accused No. 3-Ravi before the Court. In his cross-examination, this witness denied the suggestion that he was deposing falsely at the instance of police and that accused No. 3-Ravi had not produced any weapon.

27. PW-9, who was a panch witness to the panchnama of seizure of weapons at the instance of accused No. 5, was examined at Exhibit-44. This witness stated that on 13.02.2001, at about 11:45, he was called at Amraiwadi Police Station and he was told that one accused wanted to produce something and as a panchnama in that regard was to be drawn, he gave consent to act as a panch. This witness stated that when the said person was asked his name, he gave his name to be Bharat Chhaganbhai Marathi, accused No.-5. Then they left police station in a jeep and via Azad Chowk, Gopalnagar, Hatkeshwar Circle, and near a wall situated near Hatkeshwar Bus Stop and Crematorium the accused asked to stop the vehicle. The accused, then, walked ahead and stopped in front of an electric box and from therein he produced two knives. One of the knives had black handle and it was about 10 inches long and it had a plastic handle. Said knife had edge on its one side, whereas, the other side was blunt. Accused No. 4-Bharat stated that at the time of incident it was with his brother-in-law, accused No. 5-Prakash. PW-9, then, identified the muddamal knives, articles Nos. 9 and 10, as well as accused No. 5-Bharat before the Court. In his cross-examination, this witness denied the suggestion that he had not gone to police station as stated by him and that accused No. 5 did not produced anything in his presence.

28. The evidence of PW Nos. 2, 3, 5 and 9, supports the evidence of PW Nos. 1,

4 and 6 as well as the case of the prosecution on the aspect of presence of the accused at the place of offence at the time of its commission and their active participation, therein. Even otherwise, in view of the fact that the accused produced the motorcycle as well as the weapons used in the alleged offence, from the place of which no one else could have any knowledge, except, for the person hiding the same, which gets support from the evidence of PW Nos. 2, 3, 5 and 9, i.e. the panch witnesses of panchnamas of seizure of motorcycle and muddamal weapons, it cannot be said that the learned trial Court committed an error in coming to the conclusion that it were the accused alone, who perpetrated the alleged offence.

29. Even the evidence of PW-10, who was, at the relevant point of time, discharging duties as PSI at Amraiwadi Police Station and who had recorded the complaint of the complainant, as well as the evidence of PW-8, who was, at the relevant point of time, discharging duties as ASI at Amraiwadi Police Station and who had registered the offence on the basis of the complaint given by PW-1, also supports the case of the prosecution that on 01.02.2001 such an incident had taken place. Further, the evidence of PW-12, IO, who carried out investigation into the alleged offence and who had recorded the statements of the relevant witnesses and had seized the muddamal weapons and arrested the accused by drawing necessary panchnamas, also supports the case of the prosecution on the aspect of commission of the alleged offence and the involvement of the original accused Nos. 1 to 5, therein.

30. Having concurred with the findings of facts recorded by the trial Court that all the accused jointly committed the alleged offence, now, this Court has to examine, as to whether the accused can be said to have committed the offence punishable under Section 302 of the IPC or not. For determining the aforesaid aspect, this Court has to take into consideration the conduct of the accused at the time of commission of offence.

31. In regard to the above, if, we examine the evidence of PW-1, the complainant, then, he stated that on the date of the alleged incident, firstly, accused No. 1-Shivo and accused No. 3-Ravi arrived on a motorcycle, followed by another motorcycle, which was being driven by accused No. 2-Vijay, whereas, accused No. 4-Prakash and accused No. 5-Bharat were sitting as pillion riders, thereon. After arriving at the place of offence, as per the evidence of PW-1, Accused No. 1 and Accused No. 3 entered into their shop and one of them smashed sword on the counter. At that point of time, PW-1 along with his uncle, Avsarbhai, was present in the shop, whereas, the deceased, Baldevbhai, was standing outside the shop. After one of the accused smashed sword on the counter, the deceased, Baldevbhai, shouted and rushed into shop, whereupon, accused No. 1-Shivo inflicted a blow of sword on the right side thigh of the deceased, Baldevbhai. It is, thereafter, alleged that accused No. 1-Shivo and No. 3-Ravi dashed the head of the deceased, Baldevbhai, with the wall. Thus, if, we look at the conduct of the accused persons, then, out of total five accused

persons, only two accused entered the shop of the deceased, Baldevbhai, i.e. accused No. 1-Shivo and No. 3-Ravi, whereas, the other accused Nos. 2, 4 and 5 were standing outside the shop. The evidence of PW-4 and PW-6 are also to the same effect. Here, it may be noted that at that point of time complainant-PW-1 along with his uncle, Avsarbhai, was very much present at the place of offence, but, none of the accused tried to inflict any injury on them. Further, PW-4, who, happened to be another brother of the deceased, Baldevbhai, was also present near the place of offence with the son of the deceased, PW-6, but, the accused also did not try to inflict any injury on them. Further, none of the accused make any attempt to cause any injury on the vital parts of the body of the deceased, though, they were carrying deadly weapons like swords and knives. Thus, it can safely be assumed that there was no intention on the part of the accused to cause death of the deceased. Since, had there been an intention on the part of the accused to cause death of the deceased, they would definitely have caused injuries on the vital parts of the body of the deceased, as they were wielding weapons like swords and knives. So far as the injury caused by accused No. 1 on the thigh of the deceased Baldevbhai is concerned, as per the evidence of the doctor-PW-7, who had performed PM on the body of the deceased, said injury could be said to be serious, but, it could have resulted into death only if had there been profuse bleeding. Meaning thereby, said injury could not have resulted into death. In fact, the PM note of the deceased, shows that cause of death of the deceased was head injury.

32. So far as the head injury is concerned, PW-1 stated that while dashing the head of the deceased with the wall, the accused Nos. 1 and 3 were saying that you have not paid the amount of expenses towards the fees of the advocate, and therefore, we would finish you. The evidence of PW Nos. 4 and 6, who are other eye-witnesses, are also to the same effect. It has come on record that in the past, accused No. 1 had made an attempt of loot at the shop of the deceased along with other accused and the parties had arrived at a compromise in the said matter, subsequently. It has also come on the record by way of evidence of PW Nos. 1, 4 and 6 that after the aforesaid compromise took place, the accused used to come to the shop of the deceased frequently and they used to demand the money towards the expenses of fees of advocate. However, the deceased did not give any money to the accused. It, therefore, appears that on the date of the alleged incident, the accused had come to teach a lesson to the deceased, Baldevbhai, and during that the head injury was caused to the deceased, which unfortunately resulted into his death, subsequently. Here, even at the cost of repetition, it may again be noted that all the accused were armed with deadly weapons like swords and knives, and therefore, had they really wanted to do away with the deceased, they would have straight away attacked the deceased with the said weapons and would have caused injuries on the vital parts of the body of the deceased. From the medical evidence as well as from the evidence of the eye-witnesses, i.e. PW Nos. 1, 4 and 6, it is clear that only accused No. 1 had inflicted a blow of sword on the body of the deceased, Baldevbhai, that too on

the thigh, whereas, rest of the accused were, though, carrying deadly weapons did not inflict any injury on the deceased or for that matter on any other eye-witnesses, who were very much present there. Therefore, it cannot be said that accused had come at the place of offence with an intention to do away with the deceased. Nonetheless, the fact remains that the accused caused injury on the head of the deceased, which resulted into his death. Therefore, it can be said that, though, there might not be an intention on the part of the accused to cause death of the deceased Baldevbhai, there was knowledge with them that their act is likely to cause death of the deceased. We, therefore, accept the alternative submissions made by Mr. Thakkar and Mr. Agrawal, learned Advocates for the original accused Nos. 1, 2, 4 and 5, and hold that the learned trial Court committed an error in convicting the accused for the offence punishable under Section 302 read with Section 149 of the IPC and that the case of the accused would fall either under Section 326 of Section 304 (Part I or II) of the IPC. Hence, in view of the discussion and in view of the fact that the deceased succumbed to the injuries within eight hours, in the opinion of this Court, the case of the accused would not fall within the purview of Section 326 of the IPC, as submitted by the learned Advocates for the original accused Nos. 1, 2, 4 and 5, but, their would fall under Section 304 (Part-I) read with Section 149 of the IPC.

33. This takes this Court to the punishment under Section 304 (Part I) of the IPC. So far as original accused No. 1, i.e. the appellant in Criminal Appeal 351 of 2004, is concerned, the role played by him as well as taking into consideration the fact that he has criminal antecedents and that he misused even the liberty granted by this Court to him, as offences were registered against him while he was out on bail, same would not permit this Court to inflict a sentence of less than 10 years on accused No. 1 for the offence punishable under Section 304 (Part I) read with Section 149 of the IPC. Insofar as accused Nos. 2, 4 and 5 are concerned, taking into consideration the role played by them, the ends of justice would be met, if, they are sentenced to undergo incarceration for a period of five years for the offence punishable under Section 304 (Part I) read with Section 149 of the IPC.

34. So far as the conviction of the accused under Sections 143, 147, 148 and 149 of the Indian Penal Code is concerned, here, it would be relevant to refer to the relevant provisions, which read as under;

"143. Punishment: -Whoever is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six month, or with fine, or with both.

147. Punishment for rioting:--whoever is guilty of rioting, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

148. Rioting, armed with deadly weapon:-Whoever is guilty of rioting, being

armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

149. Every member of unlawful assembly guilty of offence committed in prosecution of common object:--If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members or that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

35. On the factual scenario, as it emerges, it cannot be said that the present case does not fall within the purview of Sections 143, 147, 148 and 149 of the Indian Penal Code and we concur ourselves with the finding of facts recorded by the learned trial Court in Paragraph-8 of the impugned judgment and order and the reason being that the injured, who had sustained injuries, succumbed to the same within 8 hours, while undergoing treatment at the hospital. Therefore, all the accused, i.e. original accused Nos. 1 to 5, having come to the place of offence, fully armed with the deadly weapons like swords and knives, it cannot be said that all the accused were not part of an unlawful association or were not sharing the common object or intention. Therefore, the trial Court rightly invoked the provisions of Sections 143, 147, 148 and 149 of the Indian Penal Code.

36. In view of the above discussion, since, we have already modified the conviction of the accused from one under Section 302 to Section 304 (Part I) of the IPC, so far as the conviction of the appellants, original accused Nos. 1, 2, 4 and 5, under Sections 143, 147, 148 of the IPC and Section 135(1) of the Bombay Police Act is concerned, we maintain the sentence, the amount of fine as well as default sentence, as imposed by the trial Court.

37. So far as the submission of Mr. Agrawal, learned Advocate for original accused No. 1, that identity of accused No. 1 was not established is concerned, it is an admitted fact that earlier also accused No. 1 had made an attempt of loot at the shop of the deceased and which matter was later on compromised. Further, by way of evidence of PW Nos. 1, 4 and 6, it has also come on record that after the aforesaid compromise, the accused No. 1 along with other accused persons frequently used to come to the shop of the deceased, Baldevbhai, and used to demand money towards expenses of fees of advocate. Thus, it is very natural that those witnesses would have naturally seen accused No. 1 as well as the other accused persons on a number of occasions, and therefore, the question of the mis-identification or wrong-identification of the accused No. 1 as an accused in this case does not arise. Even otherwise, not only PW Nos. 1, 4 and 6, who were the eyewitnesses, but also PW-3, who was an independent panch witness of recovery of Muddamal Article No. 6, i.e. sword, also identified accused No. 1 as well as muddamal article No. 6-sword produced by accused No. 1, before the Court. We, therefore, do not accept the submission of Mr. Agrawal that as no test-identification parade was conducted, the identity of the accused is not

established.

38. At this stage, Shri. Agrawal, learned Advocate appearing on behalf of the original accused No. 1, submitted that accused No. 1 be given the benefit of the provisions of Section 427 of the Code of Criminal Procedure.

39. Section 427 of the Code of Criminal Procedure reads as under;

"427. Sentence on offender already sentenced for another offence. (1) When a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence: Provided that where a person who has been sentenced to imprisonment by an order under section 122 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately. (2) When a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment for a term or imprisonment for life, the subsequent sentence shall run concurrently with such previous sentence."

40. In the case on hand, the appellant, original accused No. 1, was undergoing sentence for the offence punishable under the NDPS Act and in the meantime, he was convicted for the offence punishable under Section 302 of the IPC and was sentenced to undergo imprisonment for life. Further, on the earlier occasion accused No. 1 was directed to remain present before this Court, today. However, it is reported by Mr. Agrawal that accused No. 1 is not present in the court campus since morning. Hence, we make it clear that we do not propose that accused No. 1 be given the benefit of the provisions of Section 427 of the Cr.P.C. for the reason that the accused No. 1 was enlarged on bail by this Court and despite that he misused his liberty. The jail remarks sheet of accused No. 1 show that several fresh offences were registered against him, while he was on bail. Therefore, we do not propose to give benefit of Part-II of Section 427 of the Cr.P.C., namely running of sentences concurrently.

41. In the result, both the appeals succeeds in part and are PARTLY ALLOWED. The impugned judgment and order of the trial Court dated 16.01.2004 is QUASHED and set aside to the extent it records the conviction of the original accused Nos. 1, 2, 4 and 5 under Section 302 of the Indian Penal Code and the same is SUBSTITUTED with offence punishable under SECTION 304 (PART I) of the Indian Penal Code. So far as the aspect of sentence under SECTIONS 304 (PART I) is concerned, looking to the role played by original accused No. 1, he is sentenced to undergo rigorous imprisonment for TEN YEARS, whereas, taking into consideration the role played by accused Nos. 2, 4 and 5 and as they are reported to have no criminal antecedents, they are sentenced to undergo

rigorous imprisonment for FIVE YEARS for the offence under Section 304 (Part I) of the Indian Penal Code. So far as the amount of compensation, fine and default sentence inflicted on the accused Nos. 1, 2, 4 and 5 under Section 302 and the sentence as well as the amount of fine and default sentence inflicted on them for the offence under Sections 143, 147, 148, 149 of the IPC and Section 135(1) of the Bombay Police Act are concerned, same stands CONFIRMED.

42. Further, in view of the fact that original accused No. 1 has criminal antecedents and that several offences were registered against him, even after he was released on bail by this Court, the original accused No. 1 WILL NOT be given the benefit under Section 428 of the Code of Criminal Procedure. However, accused Nos. 2, 4 and 5 be given all the benefits of remission, set-off etc., as available to them under the law. All the accused, i.e. accused Nos. 1, 2, 4 and 5 are given FOUR WEEKS" time to surrender before the concerned jail authority to serve the remaining sentence, failing which it shall be open to the concerned jail authority to take appropriate action to secure their presence. R&P be sent back to the concerned trial Court, forthwith.