

(2016) 05 BOM CK 0066
In the Bombay High Court
Case No : Criminal Appeal No. 278 of 2010

Vishvash Machhinder Saptal	Vs	APPELLANT
State of Union Territory		RESPONDENT

Date of Decision : 06-05-2016

Acts Referred:

Evidence Act, 1872 — Section 8
Penal Code, 1860 (IPC) — Section 302

Citation : (2016) ALLMRCri 3282 : (2016) 3 BomCR(Cri) 273 : (2016) 3 MhLJCrI 634

Hon'ble Judges : Naresh H. Patil and A.M. Badar, JJ.

Bench : Division Bench

Advocate : Mr. C.M. Kothari, Advocate, for the Appellant; Mrs. P.H. Kantharia, PP with Mrs. Sangeeta Shinde, APP, for the Respondent

Final Decision : Allowed

Judgement

A.M. Badar, J.—This is an appeal by the appellant/accused, who is convicted for an offence punishable under section 302 of the Indian Penal Code, 1860 and sentenced to suffer Rigorous Imprisonment for life and to pay a fine of Rs. 5,000/- in default to suffer Rigorous Imprisonment for a period of one month for challenging the said judgment and order dated 30th July 2009 passed by the learned Sessions Judge, Daman in Sessions Case No. 10/2007.

2. Shorn of unnecessary details, facts leading to the prosecution of the appellant/accused are thus :-

(a) On the day of incident i.e. on 13th September, 2007, accused Vishvash Machhinder Saptal, deceased Naresh Ramashrey Pandey, Sunilkumar Shyamlal Sahoo (PW1), Vilash Babushaeb Shinde (PW3), Meena Patel (PW4) and Shantaben Dhawal (PW5) were working with M/s.V.P.Plastic Company situated at Kachigam, Nani Daman. PW3 Vilash Shinde was the Supervisor, PW1 Sunilkumar Sahoo was the helper, accused Vishvash Saptal was Machine Operator, whereas PW4 Meena Patil and PW5 Shantaben Dhawal used to do work in Finishing

Section of the said company.

(b) According to the prosecution case, the incident occurred in the Machine Room of M/s.V.P.Plastic company at about 10.30 a.m. on 13th September, 2007. PW1 Sunilkumar and Naresh Pandey (since deceased) were working on the machines in the Machine Room. According to the prosecution case, PW3 Vilash Shinde, Supervisor came and told the Naresh Pandey (since deceased) that he is not giving good production, he should give quality production, else he would be removed. Thereafter, accused Vishvash Saptal came and started talking with Naresh Pandey. Then, accused Vishvash Saptal started assaulting Naresh Pandey with a wooden log. Naresh Pandey (since deceased) started shouting "Jai Shri Ram". Hearing the shouts, PW3 Vilash Shinde reached the spot of incident and tried to separate the accused from Naresh Pandey. Due to successive blows on his head and face, Naresh Pandey (since deceased) fell down with bleeding injuries. Hearing the shouts of Naresh Pandey (since deceased), PW1 Sunilkumar who was working in the same Machine Room also rushed to the spot to witness the incident. He had pressed the wounds on head of Naresh Pandey by his palms and thereafter rushed to the place of residence of Naresh Pandey, situated outside the company premises for informing the incident to Santosh Pandey (PW2) - brother of deceased Naresh Pandey. Thereafter, Santosh Pandey and others came to the spot of incident. Injured Naresh Pandey was then taken to Janseva Hospital, Vapi where he was declared dead. By that time, PW3 Vilash Shinde brought police to the spot of the incident. After Naresh Pandey was declared dead, his brother Santosh Pandey (PW2) lodged report to police on 13th September, 2007 itself which has resulted in registration of crime No. 28/007 at Nani Daman Police Station.

(c) On registration of the crime, wheels of investigation started moving. The spot was inspected by police in presence of panchas and spot panchanama was drawn. Wooden log, blood stained cement and control sample of cement came to be seized. Inquest notes were taken and dead body of Naresh Pandey was sent for autopsy. Statements of witnesses came to be recorded. On 16th September, 2007 the accused was arrested. Clothes of deceased Naresh Pandey came to be seized. Sample of blood of accused was collected. Seized articles were sent to the Chemical Analyser and on completion of investigation, charge sheet for an offence punishable under section 302 of the Indian Penal Code came to be filed in the Court in the Court of the Judicial Magistrate First Class.

(d) On committal of the case, the trial for an offence punishable under section 302 of the Indian Penal Code commenced and in order to bring home the guilt to the accused, the prosecution has examined in all eight witnesses in support of the charge for the offence punishable under section 302 of the Indian Penal Code levelled against the accused. They are:-

(i) PW1 Sunilkumar Shaymlal Sahoo, the helper working in the Machine Room and sole supporting eye witness to the alleged incident;

(ii) PW2 Santosh Ramashray Pandey - the informant, who is the brother of the deceased;

(iii) PW3 Vilash Babusaheb Shinde, Supervisor who had also allegedly witnessed the incident in the midst of its happening;

(iv) PW4 Meena Suresh Patel, employed in the Finishing Section of M/s.V.P.Plastic Company who reached the spot immediately after the incident from the Finishing Section;

(v) PW5 Shantaben Gokul Dhawal, employed in the Finishing Section of M/s.V.P. Plastic Company, who allegedly reached the spot soon after the incident;

(vi) PW5 Dr.Sudharshan Chandravanshi Thakur, Autopsy Surgeon;

(vii) PW7 Arun Brijbihari Shukla, panch witness of the spot panchanama; and

(viii) Harilal Jasabhai Chavan, P.S.I., the Investigating Officer.

(e) After recording evidence of the prosecution as well as upon examination of the accused under section 313 of Code of Criminal Procedure, 1973 and upon hearing the learned Public Prosecutor as well as the learned defence counsel, by the impugned judgment and order the learned Sessions Judge came to the conclusion that on 13th September, 2007 at M/s. V.P. Plastic Company, Kachigam, the accused committed murder of deceased Naresh Pandey by assaulting him by means of wooden log on head. Accordingly, he was convicted and sentenced, as stated in the opening para of this judgment.

3. Heard Mr. Kothari, the learned counsel appearing for the appellant/accused. By taking us through the evidence of sole supporting eye witness PW1 Sunilkumar, the learned counsel for the appellant argued that evidence of this sole eye witness is as cryptic as it can be. Learned counsel for the appellant argued that this witness has not at all seen the assailant and he has not specified as to what was the work done by the accused and where was his place of work. Learned counsel Mr. Kothari further argued that the vague evidence of PW1 Sunilkumar does not show from where the accused came and why the accused assaulted the deceased. Evidence of PW1 Sunilkumar goes to show that merely upon hearing shouts, he has pointed out accusing finger at the accused as the place where the incident has happened was not visible from the spot where this witness PW1 Sunilkumar was working. Learned counsel further argued that conduct of PW1 Sunilkumar in not intervening in the alleged assault and not shouting for help is totally unnatural. This witness was from the native place of the deceased and was having close relations with the deceased as well as his brother PW2 Santosh. Learned counsel for the appellant further argued that no motive is attributed to the appellant/accused. There is delay in recording the statement of PW1 Sunilkumar by the Investigating Officer which makes the prosecution case doubtful. According to the learned counsel for the appellant, non seizure of clothes of PW1 Sunilkumar makes the prosecution case doubtful and this was not done as PW1 Sunilkumar is not an eye witness to the incident. Learned counsel

for the appellant further argued that except the interested version of PW1 Sunilkumar, there is no evidence against the accused. In the submission of the learned counsel for the appellant, there are numerous discrepancies in the evidence of PW1 Sunilkumar including falsity in identification of clothes and, therefore, his interested version cannot be accepted. Learned counsel for the appellant placed reliance on the rulings in the cases of (2014) (12) SCC 410, Jhaptu Ram v. State of Himachal Pradesh, 2014(12) SCC 670 Balbir v. Vazir and others and (2013) 15 SCC 325 Thammu Panduranga Rao and Another v. State of Andhra Pradesh for making alternate submission that there is no evidence to show that the accused had any intention to commit murder of Naresh Pandey and, therefore, even if it assumed that the accused assaulted the deceased, the offence would fall at the most under Part II of the Section 304 of the Indian Penal Code.

4. As against this, Ms. Kantharia, the learned Additional Public Prosecutor appearing for the respondent-state vehemently argued that accused Naresh Pandey and PW1 Sunilkumar were working at the same place where the incident had happened. By pointing out the statement of the accused recorded under section 313 of the Code of Criminal Procedure, 1973, the learned Prosecutor further argued that presence of accused on the scene of occurrence is well established and evidence of other witnesses recorded by the prosecution also establishes presence of the accused on the spot. By drawing our attention to the scene of occurrence, the learned Prosecutor pointed out that PW1 Sunilkumar and the deceased were working in the same machine room and the incident happened well within the sight of PW1 Sunilkumar and, therefore, his testimony needs to be accepted. Learned Prosecutor further argued that evidence of autopsy surgeon goes to show that at least 3 to 4 blows were given on head as well as face of the deceased by the accused and, therefore, the prosecution has established the guilt of the accused for the offence punishable under section 302 of the Indian Penal Code, 1973.

5. With the assistance of the learned counsel appearing for the parties, we have carefully gone through the record and proceedings. We have minutely perused the evidence adduced by the prosecution in support of the charge levelled against the accused.

6. At the outset, let us examine whether Naresh Ramashray Pandey died a homicidal death on 13th September, 2007. It is in evidence of PW2 Santosh Pandey - brother of deceased Naresh Pandey, that upon being informed by PW1 Sunilkumar, he along with others rushed to M/s. V.P. Plastic Company and found his brother Naresh Pandey lying on the floor of the Machine Section/Room with bleeding injuries. His evidence further shows that Naresh Pandey was then taken to Janseva Hospital, Vapi where he was declared dead Evidence of PW8 Harilal Chouhan also shows that Naresh Ramashray Pandey was declared dead at Janseva Hospital, Vapi. Dead body of Naresh Pandey was then shifted to the Government Hospital, Marwar, Nani Daman where PW8 Hiralal Chouhan took

inquest notes (Exhibit-8). This admitted document shows that there were injuries on the head and face of deceased Naresh Pandey. As seen from evidence PW8 Harilal Chouhan and PW6 Dr.Sudarshan Thakur, postmortem examination on the dead body of Naresh Pandey was conducted on 14th September, 2007. Postmortem report is at Exhibit-16. Evidence of PW6 Dr.Sudarshan Thakur shows that apart from other injuries on head and face, deceased Naresh Pandey had also suffered fracture injuries to his skull. Evidence of this autopsy surgeon shows that Naresh Pandey died because of terminal cardio respiratory failure due to hemorrhagic shock with fracture of skull with open head injury. Evidence of this autopsy surgeon is fully corroborated by postmortem report Exhibit-16 which is a document not disputed by the accused. As seen from evidence of PW6 Dr. Sudarshan Thakur, injury No.5 i.e. fracture of skull is sufficient in the ordinary course of nature to cause death of a human being. Considering this unimpeachable evidence, it needs to be put on record that the prosecution has proved that Naresh Ramasharay Pandey died a homicidal death on 13th September, 2007.

7. Now, let us examine whether the prosecution has proved that it was the accused who had caused the homicidal death of Naresh Pandey by intentionally and knowingly assaulting said Naresh Pandey for committing his murder. Undisputedly, PW1 Sunilkumar and deceased Naresh Pandey were working in Machine Section/Room at the time of the incident in question. PW3 Vilash Shinde was working as Supervisor in the said M/s. V.P. Plastic Company. It is not in dispute that on 13th September, 2007 i.e. on the day of incident, PW1 Sunilkumar, deceased Naresh Pandey, accused Vishvash Saptal and PW3 Vilash Shinde were on duty. Keeping in mind these undisputed facts, which are also reflected from the statement of the accused under section 313 of the Code of Criminal Procedure, 1973, let us further peruse the evidence on record in order to determine whether evidence of the prosecution establishes the guilt of the appellant/accused for the charge levelled against him.

8. At the outset, it needs to be mentioned here that though PW3 Vilash Shinde is stated to be an eye witness to the alleged incident of assault by the accused, he has not supported the prosecution case in respect of the alleged assault. PW4 Meena and PW5 Shantaben were employees working in the Finishing Section and they reached the spot after the incident in question. Both these witnesses are not eye witnesses to the incident in question. Therefore, now only evidence available on record to give an eye witness account of the incident is that of PW1 Sunilkumar.

9. Trial is an attempt to ascertain guilt or innocence of the accused and for reaching to a correct conclusion, the Court is required to adopt a rational approach by evaluating the evidence by its intrinsic worth. Crime might have been committed in presence of many witnesses but there are cases where the testimony of a single witness is only available in proof of the crime. As a general rule, the Court can and may act on the testimony of a single witness even

though it is without corroboration. Section 134 of the Evidence Act, 1872 makes it clear that our legal system does not insist of plurality of witnesses and, therefore, the credibility of a sole witness can outweigh the testimony of number of other witnesses of indifferent and hostile character. If the testimony of such a single witness is found by the Court to be wholly reliable, there is no legal impediment to the conviction of the accused on such proof. In the present case, this Court is required to weigh carefully the testimony of single witness PW1 Sunilkumar and if it is satisfied that evidence of this witness is reliable and free from all taints leading to suspicion, his version can be accepted and by confirming the conviction recorded by the trial Court, the appeal can be dismissed. That apart, in the case in hand, we will have to scrutinise evidence of PW1 Sunilkumar - sole eye witness to the alleged incident carefully and minutely in order to judge whether he passes the test of reliability and trustworthiness for basing conviction in respect of major offence as he seems to be an interested witness. Let us, therefore, scrutinise his evidence in detail.

10. It is in evidence of PW1 Sunilkumar that he as well as deceased Naresh Pandey were working in Machine Section/Room of M/s.V.P.Plastic Company. PW1 Sunilkumar has stated that he was working as a helper. His testimony is conspicuously silent about the capacity in which deceased Naresh Pandey was working in the Machine Section. However, his evidence goes to show that he used to work on a big machine in the Machine Section which is located in the middle whereas deceased Naresh Pandey was working on a small machine. PW1 Sunilkumar has not claimed that accused Vishvash Saptal who was Machine Operator, used to work in the same Machine Section/Room of M/s.V.P.Plastic Company. On the contrary, material elicited in cross-examination of PW1 Sunilkumar goes to show that on 13th September, 2007, he was working on one out of the three big machine whereas deceased Naresh Pandey was working on one of the total seven machines in the Machine Section/Room. Evidence of PW1 Sunilkumar goes to show that out of total seven machines in that section, only two machines which were occupied by them were functioning and rest of the machines were not functioning. This goes to show that accused Vishvash Saptal was not working in Machine Section/Room on the day of the incident i.e. 13th September, 2007. At what place accused Vishvash Saptal was working on 13th September, 2007 is an aspect shrouded in mystery, as entire prosecution evidence does not show the exact place of work of accused Vishvash Saptal on that day of incident. Even evidence of alleged eye witness PW1 Sunilkumar is conspicuously silent on this aspect.

11. Now, let us see what PW1 Sunilkumar states about the alleged incident. As per his version, on the day of incident he as well as deceased Naresh Pandey were working in the Machine Section. Big machine was being operated by him, whereas deceased Naresh Pandey was operating small machine. PW1 Sunilkumar further testified that when the work was going on, PW3 Vilash Shinde, Supervisor came and told Naresh Pandey (since deceased) that he is not giving good production and, therefore, he would be removed. PW1 Sunilkumar further

deposed that PW3 Vilash Shinde told Naresh Pandey (deceased) to change the trend and give quality production. Evidence of PW1 Sunilkumar goes to show that then PW3 Vilash Shinde, Supervisor left the spot and went to the Finishing Room. Thereafter, as claimed by PW1 Sunilkumar, accused Vishvash Saptal came and started talking to Naresh Pandey. According to version of PW1 Sunilkumar, he was working at a distance of 15 to 20ft. away from Naresh Pandey. PW1 Sunilkumar further deposed he heard sound of assault and therefore, stood up on the spot to see accused Vishvash Saptal assaulting Naresh Pandey with a wooden log. As per version of PW1 Sunilkumar, then, PW3 Vilash Shinde, Supervisor reached to the spot and tried to separate the accused. PW1 Sunilkumar claimed that he also went to the place of assault and saw Naresh Pandey collapsed near the machine with bleeding injuries to his head and face. PW1 Sunilkumar further testified that he pressed the wounds of Naresh Pandey and thereafter left for residential room of Naresh Pandey which was situated outside the company. He then brought Santosh (PW2) - brother of the deceased and others to the place of incident and then Naresh Pandey was shifted to the hospital.

12. While in the witness box, PW1 Sunilkumar was shown the seized articles. Upon inspecting Article 3A maroon shirt and 3B full pant, 3C waist belt and 3D Baniyan which was stained with blood, PW1 Sunilkumar identified Article 3A shirt and Article 3B full pant as clothes of accused Vishvash Saptal, worn by him at the time of the incident in question.

13. With this version of PW1 Sunilkumar on record, let us examine its intrinsic worth in order to ascertain its trustworthiness. The defence of the accused is that PW3 Vilash Shinde, Supervisor had gone to PW1 Sunilkumar and Naresh Pandey to tell them both that they both would be removed from the services as they were not giving quality output and, therefore, out of anger, PW1 Sunilkumar picked up a wooden log and assaulted Naresh Pandey causing his death. It is the defence of the accused that he is falsely implicated in the crime in question by PW1 Sunilkumar.

14. Ordinarily a witness cannot be expected to recall all minute details of the events which took place in rapid succession in a short span of time. However, in the case in hand, as claimed by PW.1 Sunilkumar, he and deceased Naresh Pandey were the only occupants of Machine Section/Room where they were working on different machines at the time of the incident. PW.1 Sunilkumar as such had ample opportunity to see deceased Naresh Pandey on that day. In normal course, during the course of his duty hours starting from 8.00 a.m., PW1 Sunilkumar must have seen the clothes worn by deceased Naresh Pandey on the day of the incident. When the seized articles were shown to this witness, PW.1 Sunilkumar has identified articles 3A and 3B i.e. shirt and full pant as clothes of accused Vishvash worn at the time of the incident. In fact, as seen from the evidence of Investigating Officer PW8 Harilal Chouhan, PSI, clothes of the accused were never seized but what was seized were the clothes of deceased

Naresh Pandey which the Investigating Officer has received in sealed condition from the hospital. Evidence of PW8 Harilal Chouhan makes it clear that article 3A and 3B i.e. shirt and full pant are the clothes of deceased Naresh Pandey. Even autopsy surgeon PW6 Dr.Sudarshan Thakur has deposed to that effect and identified articles 3A to 3C as clothes of deceased Naresh Pandey. Describing the clothes of the deceased as clothes worn by the accused at the time of incident, casts a shadow of doubt on version of PW.1 Sunilkumar. This evidence of identification of clothes by PW.1 Sunilkumar raises a lurking doubt in the mind that PW.1 Sunilkumar might not have witnessed the alleged incident of assault and, therefore, he is not able to identify correctly the seized clothes shown to him while in the witness box. True it is that the maxim "falsus in uno falsus in omibus" has not received general acceptance and status as a rule of law but in the case in hand, evidence of PW1 Sunilkumar appears to be untrue on a material particular. Let us, therefore, further examine evidence of prosecution in detail and ascertain whether other part of evidence of PW1 Sunilkumar can be said to be truthful and trustworthy.

15. It is seen from evidence of PW. 1 Sunilkumar that he pressed wounds of deceased Naresh Pandey with his palm and his palm was stained with blood of the deceased. Evidence of PW2 Santosh Pandey, brother of the deceased, shows that he reached the spot of incident after disclosure of the incident to him by PW.1 Sunilkumar. Evidence of PW2 Santosh Pandey goes to show that he found his brother lying on the floor with bleeding injuries and thereafter, he himself, PW.1 Sunilkumar and Jai Thakur lifted deceased Naresh Pandey and put him in an auto-rickshaw. It is thus seen from the prosecution evidence that deceased Naresh Pandey was handled by PW.1 Sunilkumar at least on two occasions. Evidence of PW.6 Sudarshan Thakur, so also the inquest panchanama show that there was profuse bleeding from the head and face of deceased Naresh Pandey. The spot panchanama at Exhibit-20 shows that blood of the deceased was lying on the spot of the incident. Cause of death of Naresh Pandey, as reflected from the postmortem report is cardio respiratory failure due to haemorrhagic shock with fracture of skull with open head injury. Haemorrhagic shock suffered by the deceased as such also goes to show that there was profuse bleeding from head of the deceased. With this evidence on record, it is clear that clothes of PW.1 Sunilkumar, who had pressed wounds of the deceased and lifted him for putting him in an autorickshaw, must have been stained with blood. If really, PW.1 Sunilkumar had witnessed the incident and handled the deceased, his clothes would have been stained with blood and seizure of such blood stained clothes would have lend assurance to the version of PW.1 Sunilkumar. This did not happen. The Investigating Officer failed to seize the clothes of PW1 Sunilkumar worn on the day of the incident. PW.1 Sunilkumar went on denying the fact that his clothes were stained with blood. This evidence of PW1 Sunilkumar indicates that he is not the witness of truth whose version can be relied upon without corroboration.

16. The next circumstances which casts a shadow of doubt on version of PW. 1

Sunilkumar is non recording of his statement by the Investigating Officer on the date of the incident i.e. on 13th September, 2007 though he was available for recording his statement. It is seen from evidence of PW8 Harilal Chouhan that on the day of the incident PW.1 Sunilkumar was available for recording his statement. Evidence of PW2 Santosh Pandey, brother of the deceased, goes to show that he along with PW.1 Sunilkumar and Jai Thakur had taken deceased Naresh Pandey to Janseva Hospital, Vapi and thereafter the dead body of Naresh Pandey was taken to Marwar Hospital for autopsy. Evidence of PW8 Harilal Chouhan shows that on the day of the incident, PW.1 Sunilkumar was present at the hospital at Marwar. Considering the fact that PW.1 Sunilkumar was claiming himself to be an eye witness to the incident in question he being the co-worker of the deceased, it was necessary for a prudent Investigating Officer to record his statement immediately. However, for the reasons best known to him, PW8 Harilal Chouhan, Investigating Officer did not record statement of PW.1 Sunilkumar on 13th September, 2007. The only reason for this lapse forthcoming from his evidence is that he was busy in recording the inquest panchanama. Perusal of the inquest panchanama at Exhibit-8 goes to show that it took time of only 45 minutes for recording the same i.e. from 17.00 hours to 17.45 hours of 13th September, 2007. Evidence of PW8 Harilal Chouhan - the Investigating Officer - goes to show that on 13th September, 2007 i.e. on the day of incident itself, he was well aware that PW.1 Sunilkumar is the sole eye witness of the incident in question. Still, PW8 Harilal Chouhan failed to record the statement of PW.1 Sunilkumar on that day. The explanation for not recording the statement of PW.1 Sunilkumar on 13th September, 2007 is not at all plausible. This delay in recording the statement of the sole eye witness amounts to serious infirmity in the prosecution case due to concomitant circumstances such as non seizure of clothes of PW.1 Sunilkumar in order to vouch his presence on the spot. It is suggestive of the fact that the Investigating Officer was taking time to decide the shape to be given to the case. This infirmity makes the prosecution case suspect.

17. It has come on record through evidence of PW2 Santosh Pandey that PW.1 Sunilkumar is from his native place. Evidence of PW2 Santosh Pandey, brother of the deceased, makes it clear that PW.1 Sunilkumar was residing with him as well as the deceased Naresh Pandey in Room No.30 of Nareshbhai's chawl. Evidence of PW2 Santosh Pandey makes it clear that deceased Naresh Pandey and PW.1 Sunilkumar did join the duty in M/s. V.P. Plastic Company together after jointly searching for job at various place. It is thus clear that PW.1 Sunilkumar was having close relations with the deceased Naresh Pandey making him an interested witness. He being an interested witness has interest in securing punishment to the accused. Relationship is not a factor which affects the credibility of a witness but Court has to adopt a careful and cautious approach for scrutinising the evidence of such witness in order to test his trustworthiness. In the case in hand, PW.1 Sunilkumar has not clarified the place of work of accused Vishvash Saptal. Though he has handled the deceased who was profusely bleeding, this witness PW.1 Sunilkumar claims that his clothes were not all

stained with blood. Those were not seized by the Investigating Officer. Though this witness PW.1 Sunilkumar was available for investigation on the day of incident itself and though the Investigating Officer was knowing that he is the sole eye witness to the incident, his statement was not recorded on the day of the incident. All these factors affect the credibility of the version of this interested witness and it is difficult to accept his version without corroboration from other evidence from independent source.

18. Now, let us examine whether some corroboration can be found to evidence of PW1 Sunilkumar as the same is not free from doubt and as such it is not possible to base conviction for a major offence on the basis of his sole testimony. According to the prosecution case, PW3 Vilash Bhausahab Shinde, Supervisor of M/s.V.P. Plastic Company is another eye witness to the incident in question. As he has not supported the prosecution case on material aspects, the learned Additional Public Prosecutor had cross-examined him. His version was accepted by the learned trial Court, as a corroborative evidence as seen from para 20 of the impugned judgment.

19. Now, let us examine whether evidence of this hostile witness can be used in order to advance the case of the prosecution. It is well settled legal proposition that evidence of a prosecution witness cannot be rejected in to merely because the prosecution has chosen to treat him as a hostile witness and cross-examined him. Evidence of such witness cannot be treated as effaced or washed off from the record. Evidence of such witness can be accepted to the extent his version is found to be dependable on the careful scrutiny thereof. That part of evidence of such hostile witness which truthfully supports the prosecution case can be accepted. In the case in hand PW3 Vilash Shinde has deposed that on 13th September, 2007 he as well as PW1 Sunilkumar and deceased Naresh Pandey were present in the factory. As per version of PW3 Vilash Shinde, PW1 Sunilkumar and deceased Naresh Pandey were working in the Machine Working Room. PW3 Vilash Shinde has testified that at the time of incident he was at the neighbouring plant and after hearing shouts from the Machine Room within 2 or 4 minutes he reached the Machine Room. This witness further stated that he found Naresh Pandey lying on the floor with bleeding injuries and PW1 Sunilkumar as well as accused Vishvash were present in that Room at that time. Thereafter, this witness has not supported the prosecution case and he was cross examined by the learned Additional Public Prosecutor. He was confronted with his police statement recorded under section 161 of the Code of Criminal Procedure, 1973 and contradiction from his former statement came to be marked as "A" during the cross-examination. On due proof of the said contradiction through evidence of PW-8 Harilal Chouhan, PSI, the same was marked as Exh. 13-A.

20. It has come in evidence of PW3 Vilash Shinde that soon after the incident he rushed to the spot of incident i.e. Machine Room and found the deceased lying on the floor in presence of PW1 Sunilkumar and accused Vishvash. At this juncture, it is apposite to reproduce para 20 of the impugned judgment and

order on conviction recorded by the learned Sessions Judge, which reads thus :-

" As the another eye witness PW3 turned hostile portion mark "A" from the statement of PW3 was brought on record at Exh.13/A through the I.O. According to the I.O. he recorded the statement of PW3 as narrated by him and portion mark "A" was correctly recorded. In the said portion mark there is specific mention of the name of the accused. There is mention of PW3 finding the accused with wooden log in his hand and the witness snatched it from the accused and throwing it. This is corroborating the version of the prosecution. I.O. deposed about recording of statement of PW1 and other witnesses. "

21. It is thus clear that in order to seek corroboration to the version of the prosecution for convicting the appellant accused, the learned Sessions Judge has relied on duly proved contradiction (Exhibit 13-A) brought on record from the evidence of PW3 Vilash Shinde. This duly proved contradiction to the effect that PW3 Vilash Shinde had seen the accused with wooden log in his hand and PW3 Vilash Shinde had snatched that wooden log from the accused and threw it, is virtually used it as substantive evidence by the learned Sessions Judge for recording conviction by using it as a piece of admissible evidence to corroborate the case of the prosecution against the appellant accused. It is well settled that though the contradiction is proved through the evidence of the Investigating Officer, that does not translate the contradiction into substantive evidence and can at the most impeach the credibility of the witness by throwing doubt on his version. Statement recorded under section 161 of the Code of Criminal Procedure, 1973 is not and cannot be treated as substantive evidence. It needs to be reiterated that duly proved contradictions can only make substantive evidence of such witness doubtful. Duly proved contradiction cannot be used for corroborating the evidence. Unfortunately, the learned trial Court committed an error on this aspect of appreciation of evidence and used the duly proved contradiction as a substantive piece of evidence for convicting the accused.

22. PW3 Vilash Shinde has not spoken that earlier to the incident of assault on deceased Naresh Pandey, he had been to the Machine Room to tell Naresh Pandey that he is not giving good production and he should change trend for giving good quality production or else he would be removed. Thus evidence on this aspect coming on record through PW1 Sunilkumar remained uncorroborated. Even though PW3 Vilash Shinde has not fully supported the prosecution case, even contradiction to this effect from his former statement is not brought on record by the prosecution. In other words, it goes to show that PW3 Vilash Shinde had even not made any such former statement regarding this incident deposed by PW1 Sunilkumar. Thus evidence of PW1 Sunilkumar on this material aspect remained uncorroborated.

23. Statement of PW3 Vilash Shinde goes that he has not seen the incident of assault on deceased Naresh Pandey but he has reached the spot after that incident. Evidence of PW3 Vilash Shinde as such does not corroborate evidence of PW1 Sunilkumar regarding the actual assault.

24. PW4 Meena Patel and PW5 Shantabai Dhamal are the employees of M/s. V.P. Plastics, who at the relevant time were working in the same section i.e. Finishing Section. Their congruous evidence shows that after hearing the shouts, they reached the Machine Section and found deceased Naresh Pandey lying on the floor with bleeding injuries. They both unanimously deposed that accused Vishvash Saptal and PW1 Sunilkumar were present in the Machine Room. However, both of them have stated that PW3 Vilash Shinde was not seen by them on the spot of incident. Though both these witnesses were cross-examined by the prosecution, nothing came on record in their cross-examination to infer guilt of the accused in the crime in question. Thus, evidence of both these witnesses is not useful to corroborate version of PW1 Sunilkumar in respect of the alleged assault.

25. PW7 Arun Shukhla is a panch witness to the spot panchanama and his version read with the contemporaneous document i.e. spot panchanama Exhibit-20 goes to show that incident happened in Machine Section/Room where a wooden log of 3 to 3.5ft. length was found and it was seized by the police. Similar is the evidence of PW8 Hiralal Chouhan, who recorded the spot panchanama. The seized wooden log was subjected to the chemical analysis and human blood of "O" group was found on it. Serological Examination Report goes to show that blood of deceased Naresh Pandey as well as that of accused Vishvash Saptal belong to "O" group. That apart, mere finding of blood of the deceased or that of the accused on the wooden log cannot be said to be incriminating circumstances against the accused. The other part of evidence of PW8 Hiralal Chouhan only explains the line of investigation conducted by him.

26. It is thus clear that direct evidence as well as other evidence produced by the prosecution in support of the charge levelled against the accused is not at all reliable, cogent as well as trustworthy. In such situation, the motive, if any, with the accused to commit the crime in question becomes somewhat significant. True it is that normally there exists a motive for every crime and proof of its existence is not necessary for conviction but when direct evidence adduced by the prosecution cannot be said to be free from doubt, then, duly proved motive can be considered as a circumstance which is relevant for assessing the evidence. The motive is that which impels the accused to commit a crime. In the instance case, as per version of PW1 Sunilkumar, after PW3 Vilash Shinde, the Supervisor left the Machine Section after giving a warning to deceased Naresh Pandey, accused Vishvash came and after talking with deceased Naresh Pandey killed him by assaulting him. Evidence of PW1 Sunilkumar is conspicuously silent about the subject of conversation between the deceased and the accused. Entire evidence of the prosecution does not reflect any motive with the accused to eliminate the deceased. As such, in the case in hand, motive is shrouded in mystery.

27. Careful and meticulous reading of evidence of prosecution, thus indicates that evidence adduced by the prosecution is not of the standard required in a criminal trial for basing conviction. Upon meticulous examination of the evidence

in this case, a reasonable doubt grows out that the accused might not have committed the offence in question. With certainty, we are not in a position to give a finding that the accused must have committed murder of deceased Naresh Pandey. It is a fundamental rule of criminal jurisprudence that before a conviction could be sustained, the prosecution has to establish that evidence on record unerringly points out that its case is free from all reasonable doubt. The accused cannot be convicted on the premises that case of the prosecution may be true. In the case in hand, evidence of PW1 Sunilkumar only indicates that the accused might have committed the crime in question but with all certainty, we are not unable to persuade ourself that it is the accused and the accused only who had murdered deceased Naresh Pandey. Thus, for the reasons stated in the foregoing paras, we are of the considered view that findings of the learned trial Court for inferring the guilt of the accused cannot be sustained. On re-appreciation of evidence on record, we have recorded the compelling and substantial reasons for interfering with the impugned judgment and order of conviction. On reviewing the entire evidence of the prosecution, we are of the considered opinion that the accused is entitled to the benefit of doubt and as such, the impugned judgment and order of conviction and sentenced needs to be quashed and set aside. Hence the order :-

(i) The appeal is allowed;

(ii) The impugned judgment and order dated 30th July, 2009 passed by the Sessions Judge, Daman in Sessions Case No. 10/2007, thereby convicting the appellant/accused of the offence punishable under section 302 of the Indian Penal Code, 1860 and sentencing him to suffer Rigorous Imprisonment for life and to pay a fine of Rs. 5,000/- in default to suffer Rigorous Imprisonment for a period of one month is hereby quashed and set aside;

(iii) The appellant/accused is set at liberty forthwith, if not required in any other case and fine if any paid by him be refunded to him.