IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 560 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI and
MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

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RAMANBHAI GOVINDBHAI VASAVA

Versus

STATE OF GUJARAT

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Appearance:
MR KR RAVAL for Petitioner
MR BD DESAI, APP for Respondent No. 1

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CORAM : MR.JUSTICE S.M.SONI and
MR.JUSTICE M.C.PATEL

Date of decision: 30/12/97

ORAL JUDGEMENT ( Per Soni,J.)

Appellant-original accused ( hereinafter referred to as accused) has filed this appeal against the judgment and order of conviction under Section 302 of the Indian Penal Code by the learned Addl. Sessions Judge, Nadiad

in Sessions case no.58/89 of 7th August, 1989. Few facts to appreciate how the accused came to be charge-sheeted and the contentions to challenge the conviction are as under:

One Ramanbhai Govindbhai Vasava(accused) had married Lilaben sister of one Narvat Ragabhai P.W.4 and grand daughter of Gajaraben Bhayjibhai, P.W.3. After marriage their relations were strain as accused suspected fidelity of Lilaben. In the evening of 16th December, 1988 Lilaben in company of her younger brother Narvat had gone to market for purchase of vegetables. After purchase of vegetables while they were on their way from the market towards their home situated behind Patel Quarry Quarters of Village Sevaliya, Tal. Thasra, District Kheda,the accused started beating Lilaben. Having seen Lilaben being beaten by accused, Narvat P.W.4 shouted calling upon Gajaraben,P.W.3 to see that. Gajaraben, P.W.3 intervened and brought Lilaben to her house. Accused then ran away. The accused after some time came back with a dagger(Katari) and assaulted Lilaben. She was given one blow on the belly, one on the chest and one on the back side below the neck. Lilaben fell down and died. When Ragabhai P.W.1 came home after bath he found Lilaben lying dead in the courtyard. His mother-in-law, P.W.3 informed him that accused has assaulted Lilaben with dagger and has run away. P.W.1 therefore went to Thasra Police Station and filed complaint. On complaint being recorded the offence against the accused was registered and was investigated. On completion of the investigation, the accused was charge-sheeted in the Court of Judicial Magistrate, First Class, Thasra from where he was committed to the Court of Sessions of District Kheda at Nadiad. The learned Additional Sessions Judge framed charge against the accused. Accused pleaded not guilty. The prosecution led necessary evidence to prove the charge. On completion of the prosecution evidence, further statement of the accused was recorded. The accused has led no evidence in defence. The learned Additional Sessions Judge after hearing the prosecution and defence recorded conviction of the accused under Section 302 of the Indian Penal Code and awarded sentence of rigorous imprisonment and fine of Rs.100/-, in default, R.I. for one month.

This order of conviction is challenged by the learned Advocate Mr.K.R. Raval on the grounds, namely, that the evidence of the prosecution as relied on by the learned Addl. Sessions Judge is not reliable in as much as the medical evidence and occular evidence are contrary to each other. He also contended that in medical

evidence it is found that there are five injuries on the person of the deceased while the occular evidence reveals three injuries on the person of the deceased. He also contended that the prosecution relied on the dagger as the weapon used for causing injuries which has a curved edge as per the say of the witness while medical evidence does not show any injury having any curve. Thus when there is a conflict between occular evidence and medical evidence, medical evidence should be preferred being a technical one and a more scientific one than the occular evidence. Learned Advocate Mr. Raval also contended that the scene of offence alleged by the prosecution is not the scene of offence as it transpires from the evidence of Panchas and Investigating Officer. According to the Panchas, Panchnama of scene of offence was drawn late at night on the very day while according to the Investigating Officer, Panchnama of scene of offence was drawn in the early morning of next day. Mr. Raval further contended that the find of dagger from the scene of offence is a concoction as no Investigating Officer will allow the weapon used for commission of offence to remain at the scene of offence atleast for seven to eight hours and that too unattended. Mr. Raval also contended that in view of the strained relations between accused and deceased the possibility of his being wrongly roped in cannot be ruled out. Occular evidence is of the persons who are very much interested and therefore their evidence has been wrongly relied on by the learned Additional Sessions Judge. Mr. Raval, therefore, contended that the appeal should be allowed and the accused should be set at liberty.

Mr. B.D. Desai, learned A.P.P supports the judgement and order of conviction. Mr. Desai contends that there is no variance much less substantial variance between the medical evidence and occular evidence which requires either of the evidence to be rejected and not relied upon. Mr. Desai also contended that so far as the time of Panchnama is concerned, other circumstances on record specifically suggest that the Panchnama was drawn late at night on the date of incident and not on the next day morning as alleged. To substantiate this he relies on inquest removal of dead body for postmortem examination and evidence of both the Panchas of scene of offence and the inquest Panchnama. Mr. Desai also contended that the shape of dagger has nothing to do with the nature or shape of injury, particularly when no specific question is put to the Doctor about the same. He also contended that the Doctor has stated that the alleged injury can be caused by the dagger produced or recovered in the instant case. Mr. Desai also contended

that the dagger was also found with seathe lying there and both were found with stains of human blood of the deceased. Mr. Desai, therefore, contended that the judgment and order does not call for any interference by this Court.

All these questions raised by the learned defence counsel as well as A.P.P. can be answered by referring to the evidence of Gajaraben P.W.3 and Narvat, P.W.4. We would first refer to the evidence of Narvat, P.W.4. Narvat, P.W.4 is a boy aged about eight years and learned Addl. Sessions Judge on being satisfied of the fact that the witness is able to understand the sanctity of oath was given oath. In our opinion, when the learned Addl. Sessions Judge had a witness before him and when he has put certain questions in his own way to appreciate and understand whether the witness is able to understand the sanctity of oath and when the learned Addl. Sessions Judge has come to the conclusion that he is able to understand the sanctity of oath, we do not find any reason to disturb that conclusion of the learned Addl. Sessions Judge that the witness understands the sanctity of oath. This apart, in our opinion, the relevant and material aspect is that he himself has seen the witness in the box which opportunity is not available to us. Preliminary evidence in the question and answer form before giving oath to the witness was read over before us and we do not find any reason not to accept the decision of the learned Judge to give the witness an oath. Mr. Raval, learned Advocate very seriously contended that the witness is a boy of eight years who has not gone to school and who does not know the day and time or the place where he was standing which suggests that the witness is of a very low I.Q. and his evidence should not have been accepted by the learned Judge. Questions put by the learned Additional Sessions Judge and the answer given by the witness shows , in our opinion, that he understands as to if he speaks something lie or false he is answerable to someone. Philosophy of sin may not be explained by even learned people but one can feel or say that if we do a particular act , it may amount to sin. The witness knows that to tell a lie on oath in the name of God amounts to sin, and therefore, in our opinion also, evidence of witness Navrat P.W.4 can be accepted and has been rightly accepted. To rely on the evidence of this witness is a different thing but it is not required to be rejected straightaway on the ground that he is a child witness having no proper understanding as alleged by the learned defence counsel. This witness Narvat P.W.4 is real younger brother of deceased Lilaben. Lilaben and Narvat had lost their mother and are staying

besides Gajaraben, P.W.3. Narvat, P.W.4 has stated that he had gone with Lilaben for purchase of vegetables and when they were coming back, the accused caught hold of Lilaben's braid and assaulted her heavily. He then ran to call her grandmother Gajaraben. When he went back in company of Gajaraben, the accused-Ramanbhai had run away. Lilaben was brought home and was offered glass of water. All the vegetables had fallen down. Gajaraben collected the same and at that time when she went in the hut to place the said vegetables, Ramannbhai-accused came and gave blows with dagger - one in the chest, one on the back and one on the belly. The accused then immediately went to his home after throwing the dagger. In the cross-examination of this witness an attempt is made to show that when accused came back with dagger, Lilaben was lying flat on Otta and when the blows were given, the blows were given only on the front portion. It is contended by Mr. Raval that in view of this fact, the fact of blow on the back of Lilaben shows that Narvat has not seen anything. Mr. Raval contended that if a person is lying flat , no blow can be given on the back of that person. Find of blow on the back of Lilaben suggests and shows that Narvat had not seen the incident as alleged by him. Mr. Raval has further relied on the evidence of Narvat, P.W.4 in the cross-examination which reads as under:

When we came home after purchasing vegetables, Lilaben lay down on Otta and was taking water while lying down. I was standing near Lilaben. My face was towards Lilaben. When I was standing, Raman came from behind. The man who came from behind gave blow to Lilaben. I, therefore, closed my eyes with both my hands . When the person who assaulted went away, I opened my eyes. A further suggestion is put which is denied that her grand mother came from there after he opened the eyes. The witness has further stated: I have seen the face of the person who assaulted Lilaben. When Lilaben was assaulted, I was standing there and there. He has then said, " I have not seen which person assaulted Lilaben." Mr. Raval relying on this evidence contended that Narvat has not seen the person who assaulted Lilaben(deceased(, and therefore, evidence of Narvat should have been rejected. But learned Addl. P.P. has put certain questions in re-examination. Thereafter, learned A.P.P. sought permission of the Court to ask questions in the nature of cross examination without declaring the witness as hostile. On such permission being granted, questions were put and replies thereto are relevant for our purpose which are as under:

" After Lilaben had drunk water, Ramanbhai had come there. Ramanbhai gave dagger blows to Lilaben. I had seen the same. After giving dagger blows, Ramanbhai ran away towards his house. In the further cross-examination after that question by the defence lawyer the witness has replied: " It is not true that I have seen the face of the person who assaulted. I am not taught anything by the police personnel. Police has not asked me anything about the injuries to Lilaben till date." It is true that in the cross examination the witness has stated that when the person was giving blows to Lilaben he has covered his eyes with his hand and he removed the same after the man had gone away. However, he admits in that very cross-examination that he has seen the face of the person who has assaulted Lilaben. In our opinion, the defence has tactfully and wisely not put up the question whether he knows the man who assaulted Lilaben or not. By not putting that question, defence has tried to create the situation that the person who assaulted Lilaben was not seen by Narvat, and therefore, when he refers the name of accused, his evidence cannot be relied upon. This witness Narvat, in our opinion, is a witness who can be relied upon and has been rightly relied upon by the learned Additional Sessions Judge in view of the answer given in the further cross-examination by the defence and that is, that he is not taught anything by the police. The answer given by this witness is that he has closed his eyes with both his hands when the person who came from behind gave blows to Lilaben. So act of putting the hands over the eyes to close the eyes, in our opinion is a subsequent act to assault. Simply raising the dagger to give a blow has not created a fear in the mind of Narvat to close his eyes, but he has closed his eyes after the blows were given. He has stated that he has seen the man who had given blows and that man is Ramanbhai. Ramanbhai is his brother-in-law and the time of the accident is evening at about 5.30 p.m. of 16th December, 1988 when there is supposed to be sufficient light. Thus, we do not find any reason not to accept the evidence of Narvat, P.W.4. When Narvat, P.W.4 was coming back in company of Lilaben from the market, Lilaben was assaulted by her husband Ramanbhai and Narvat ran home and called Gajaraben, P.W.3. Gajaraben, P.W.3, brought Lilaben home and offered her water and when she had gone inside the house to put the vegetables brought by Lilaben after collecting from the floor, she again heard shouts and came out of the hut. She has deposed that when I was offering water to Lilaben, Ramanbhai came back with dagger and gave blow of dagger on the belly of Lilaben. One blow of dagger was given on the chest of Lilaben and another blow was given on the back of Lilaben

by Ramanbhai. When I tried to intervene I was given a push and I was put aside. Lilaben died there. We are not able to find anything in the cross-examination of Gajaraben to hold that this witness cannot be relied upon. According to her she has also informed of the incident to the father of Lilaben, that is, her son in law. According to Gajaraben, police had come at 11 O'Clock night and had stayed upto 3 O'Clock. She has denied that she has not seen who assaulted Lilaben. She also denied that she is wrongly involving the accused.

When these two witnesses have referred to three blows - one on the chest, one on the belly and one on the back, medical evidence refers to five injuries. Gajaraben P.W.3 and Narvat P.W.4 are referring to blows while Doctor refers to injuries. The said injuries as per P.M. Note Exh.21 are as under:

1. A cutting wound over Rt side of chest frontside at the level of 2nd Interestal space about 3 1/2 cm x 1.9 cm x 10 cm proble inserted.

2. A cutting wound over Rt. Lypo chondriak region about 45 cm x 105 cm x 6 cm.

3. Cutting wound over Back of the Rt side of the chest at the level of the 5th Th.Var.about 4 cm away from the midline, size about 2 cm x 0.8 cm x 7.5 cm.

4. Cutting wound at the level 9th Th.Var just near midline over Rt side of Back size about 2 cm x 0.5 cm x 2.5 cm.

5. Cutting wound over Lt.side of back at the level A 8 cm Th.Var size of 2.4 cm x 0.5 cm x 4 cm.

So far as the medical evidence is concerned, there is one injury on the chest, one on the belly and three injuries on the back side. Simply because five injuries are found on the person of deceased cannot lead to an inference that when the witnesses have referred to three injuries they are falsely involving the accused as author of the injuries. May be witnesses being grandmother and brother of a very tender age they have seen causing of injuries but they may not count giving of blows. They have generally stated that one blow on the chest, one blow on the belly and one on the back. These variances in our opinion do not entitle us to reject the evidence of Gajaraben, P.W.3 and Narvat, P.W.4. This apart, Doctor has specifically stated that these injuries

can be caused by Muddammal article no.3-dagger. Dr. Sajjansingh P.W.5 has stated that the injuries on the person of Lilaben are possible by dagger- Muddammal article no.3. In the cross examination the Doctor has stated that point of dagger- Muddammal article no.3 was curved and when any injury is caused by such article the wound would be curved one as per the weapon. I have not referred in the postmortem examination that any of the wound had a curve in its depth. When the Doctor in the examination-in-chief had stated that injuries on the person of deceased can be caused by dagger(Muddammal article no.3), simply because it is not mentioned in the P.M. Note that in the depth the injury had a curve does not necessarily mean that the injuries on the person of the deceased were not caused by the dagger( Muddammal article no.3). The Doctor has nowhere stated that the injuries on the person of the deceased cannot be caused or is not possible by Muddammal article no.3-dagger. These variances as to number of blows and injuries and non mentioning in the P.M. Note about the presence of curve in the wound at its depth does not mean that the evidence of Gajaraben, P.W.3 and Navrat, P.W.4 is required to be rejected. In our opinion, evidence of Gajaraben P.W.3 and Narvat, P.W.4 is further corroborated by the evidence of Dr. Sajjansingh, P.W.5.

It is further contended by Mr. Raval that scene of offence as alleged by the prosecution is shifted from the original place of offence. According to the defence, incident took place near the Kanazi tree at a distance of 47 feet. The Panchnama of scene of offence Exh.25 is duly proved by the evidence of both the Panchas - Mahmed Hanif Haji Husseinbhai, P.W.7 and Devraj Dalichand, P.W.8. Both the witnesses have admitted the whole of Panchnama except the time mentioned below it. The Investigating Officer, P.W.13 Dilipsingh has stated that the Panchnama of scene of offence was drawn in the early morning of next day. Learned Advocate Mr. Raval contended that this variance in the evidence as to time stated by Panchas and the Investigating Officer , creates suspicion as to correctness of time of drawing of Panchnama. As contended by Mr. Desai, evidence of P.W.7 and P.W.8 as to the time of drawing of Panchnama is corroborated by evidence of Panch of inquest report and the time mentioned in P.M. Note. There is no dispute as to the fact of drawing inquest and the time thereof. Inquest Panchnama is also proved by the very witnessesP.W.7 and P.W.8. Time mentioned in inquest Panchnama is of 20.15 to 21.00 hrs. of 16th December, 1988. This part of the Inquest Panchnama, more particularly, about time of Panchnama is not challenged

in the evidence of P.W.7 and P.W.. After the Panchnama was drawn, dead body was sent to Public Health Centre, Sevaliya and they have seen the same at 0.30 a.m. of 17th December, 1988, meaning thereby, the same is received by the Doctor after three hours of drawing of Inquest Panchnama. PWs. 7 and 8 have specifically stated that they admit the contents of the Panchnama except the time mentioned therein. They have positively stated that time of Panchnama stated to be of 7.30 to 8.00 of the morning of the next day is not correct. Both the Panch witnesses have stated that they have never come again for drawing Panchnama after Inquest Panchnama was drawn. Further an attempt is made by reading the following deposition in the cross examination of P.W.7 to show that the scene of offence is different from the one alleged by the witnesses and the prosecution. In the cross examination, P.W.7 has stated: " We have not stated the following facts in Panchnama Exh.25. From the said place of offence there is a Kanazi tree in South-West at a distance of 47 ft. Leaving the said tree on the South, there are rooms for toilets and bathrooms. Leaving those rooms there is Hariom Quarry nearby. At the said place of offence, the earth is bloodstained. Learned Advocate for the defence relying on this word of earth being bloodstained at the said scene of offence wants to read in conjunction with the early part of the evidence that the said scene of offence is near Kanazi tree. This, in our opinion, is misreading of the evidence and nothing else. In the earlier part of this statement in the cross-examination the witness has referred that said scene of offence and then at the last he has said that at the said scene of offence the earth was bloodstained. In the beginning there is a reference of scene of offence and then that of location of Kanazi tree, both rooms and toilets and Hariom quarry. In the last when he referred to the said scene of offence, it does not mean place near Kanazi tree or Hariom Quarry but the scene of offence as stated at the beginning. Thus, from the evidence of PWs 7 and 8, it is clear that the incident took place in front of the house of P.W.3 and the time mentioned in the Panchnama no doubt is not correctly stated. It is the Panchas who have to say and prove the Panchnama but if the Panchas themselves tell that the time mentioned in the Panchnama is not the correct time and on looking at the original Panchnama, it appears that time has been stated with different ink and may be at different time, we find some substance in the say of the Panchas. We can only say that the evidence of time of Panchnama as stated by the Investigating Officer is nothing but a confusion which prosecution has failed to remove by asking the Investigating officer to produce

police diary. But this failure of prosecution will not entitle the defence to have the advantage of rejecting the Panchnama and holding that the scene of offence is different from the one stated in the Panchnama. By this very Panchnama, it is proved that bloodstained dagger lying there with its seathe was seized. Mr. Raval contended that no accused will leave the dagger used by him at the scene of offence allowing the prosecution to have an evidence against him. It is difficult to assess human mind , more particularly, while committing a crime. A person after use of a weapon may throw away the weapon, may take away the weapon, may hide it somewhere else, may clean and hide it, may wash and throw it to an unknown place, but that by itself is not a circumstance to hold in favour or against the accused. From any of such conduct, it is difficult to say whether he has used the weapon or not. In the instant case, two eye witnesses have seen the accused assaulting the deceased with this very weapon. They have also seen the accused running away from the scene of offence throwing away the said weapon near the scene of offence and one can say that the accused will normally throw away the weapon considering it to be useless after use.

The said dagger found contained bloodstain and as per the evidence of the Forensic Science Laboratory the blood on the dagger is of the same group as that of the deceased. When the accused came to be arrested he had injuries on the first fillings of all the fingers on the left hand. According to the accused the said injury is caused while he was taken in a jeep car by the police by some iron plate of the jeep car. As he is injured the clothes of the accused are bloodstained . Whether this explanation can be accepted? This explanation is not acceptable. Even if accepted, then also, he is neither relieved nor can be exonerated from the alleged commission of offence as proved by the evidence of PWs.3 and 4. In the further statement under Section 313 of the Criminal Procedure Code he has explained the injuries saying that the same was caused while he was taken in jeep car by the police. Learned A.P.P. Mr. Desai contended that this explanation given in his statement is not correct and the injuries are an incriminating circumstance against him in view of his statement before the Doctor who has treated him for the said injuries. This is not the explanation for injuries when doctor asked him for injuries. He has given explanation for injuries before doctor. According to Mr. Desai this statement before doctor is duly proved and should be read in evidence. It is not a confessional statement, but is an admission, admissible under law. Mr. Desai to

substantiate his argument has relied on a judgment in the case of AMMINI AND OTHERS VS. STATE OF KERALA, JT 1997(9) S.C.125 and in particular paragraph 7 which reads as under:

"The next circumstance relied upon by the prosecution was that while administering cyanide to Merli, A-3 and A-4 had received injuries. A-3 was arrested on 2-7-1980 and he was taken to Dr. Abraham(PW-60) for his medical examination. The doctor has found three injuries on the fingers of his right hand. When the doctor had asked him how he had received those injuries, he had stated that" these small injuries were caused by bitting when I closed Merli's mouth to silence her at 7.30 p.m. on Monday before last" This evidence was disbelieved by the trial Court on the ground that the certificate issued by the doctor was on a plain piece of paper and not on the printed form, that no serial number was mentioned in that certificate and that when finger prints of third accused were taken by the police on 3-7-1980 the Investigating Officer had seen only scars of the wound which indicated that the wounds had healed up earlier. A-4 was arrested on 5-7-1980 and when he was taken to Dr. Vasant Kumari(PW-64) for medical examination, she had noticed that his two injuries were in the healing process. On being asked about the injuries A-4 had told her that " my left elbow and the outer part of the right hand were injured while taking Merli to the kitchen, holding her from behind with left hand, inside Merli's house at about 7.30 p.m. on Monday, 26.3.1980". The trial Court rejected her evidence on the ground that the certificate issued by her was also on a plain piece of paper and an endorsement made therein was in different ink. The High Court considered both the grounds as improper and insufficient. It observed that it was well known then that printed forms were in short supply in Government hospitals in the district of Ernakulam. The certificates were issued by the doctors, who were attached to the Government hospitals at Alwaye and Perumbavoor, both of which were situated in the same district of Ernakulam. The High Court further found that there was nothing to show that the doctors had any reason to prepare false certificates. The High Court, therefore, held that the evidence of the doctors and the certificates issued by them were true. The High Court also held that what A-3 and A-4 told the doctors amounted to an admission , and therefore, they were admissible in evidence. In fact the trial Court had also held that they being admissions were not hit by any provision of the Evidence Act."

Blood stained clothes of an accused if of the group of the deceased can be used as a circumstance against the accused. In the instant case there is an injury on the person of the accused which he has tried to explain and his clothes are found bloodstained but with his own group of blood. Therefore in our opinion this circumstance cannot be used against the accused. In view of this fact we do not deal in detail the question of admissibility of history given to doctor by the accused when examined for his injuries and where he has explained the injuries. We do not want to enter into the dispute whether the said fact before the Doctor is a confession or admission as we do not rely on this circumstance for confirming the order passed by the learned Additional Sessions Judge.

In view of the above discussion, the appeal fails and is dismissed.

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