

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 683 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL and

MR.JUSTICE M.H.KADRI

=====

1. Whether Reporters of Local Papers may be allowed
to see the judgements?No

2. To be referred to the Reporter or not?
No

3. Whether Their Lordships wish to see the fair copy
of the judgement? No

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?
No

5. Whether it is to be circulated to the Civil Judge?
No

LALLUBHAI BHAVBHAI CHUNARA VAGHRI

Versus

STATE OF GUJARAT

Appearance:

MR PM VYAS for Petitioners

Mr.L.R. Pujari, APP, for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL and
MR.JUSTICE M.H.KADRI

Date of decision: 31/07/97

ORAL JUDGEMENT (Per : Panchal, J.)

In this appeal, which is filed under Section 374
of the Code of Criminal Procedure, 1973, appellants Nos.
1 and 4 have challenged their conviction under Section
302 as well as 323 read with Section 114 of the Indian
Penal Code and appellants Nos. 2 and 3 have challenged

their conviction under Section 323 as well as 302 read with Section 114 of the Indian Penal Code, recorded by the learned Additional Sessions Judge, Nadiad, vide judgment and order dated August 31, 1989, in Sessions Case No. 238 of 1988.

Deceased Bhagubhai Madhabhai Chunara was resident of village Dedarada, Taluka Borsad, District Kheda. The appellants are also residents of village Dedarada. Deceased Bhagubhai and appellant No.2 had jointly purchased a male calf of a buffallow for Rs.700/-. Appellant No.2 had sold the same for Rs.951/-, but, appellant No.2 had not given share in profit to deceased Bhagubhai as well as Rs.51/- which deceased Bhagubhai was claiming as commission for sale of the male calf of buffallow. The incident in question took place on July 20, 1998. At about 9.30 a.m. in the morning of the date of the incident, deceased Bhagubhai had approached appellant No.2 to get amount of commission and appellant No.2 promised deceased Bhagubhai to pay commission, as a result of which deceased Bhagubhai returned his house. Thereafter, at about 10.30 a.m. deceased Bhagubhai went on a cycle to a place known as 'chara' for answering call of nature. After some time, Govindbhai, who is the son of deceased Bhagubhai, and Jashiben, wife of Govindbhai, went to collect fodder for their goats. When they reached a raised place known as Oghani-na-tekra, appellant No.2 taunted Govindbhai saying that Govindbhai had come to collect commission amount and it would be given to him. After taunting Govindbhai, appellant No.2 gave blow with a vansi (a bomboo with a hook fixed at one end) on the left shoulder of Govindbhai. Govindbhai, therefore, moved a little, but Jashiben, wife of Govindbhai, was surrounded by all the appellants and appellant No.3 dealt stick blows on her. Thereupon, Govindbhai and his wife raised shouts, as a result of which deceased Bhagubhai, who had gone to answer the call of nature, came to the place where Govindbhai and his wife Jashiben were being assaulted. Deceased Bhagubhai wanted to know from the accused as to why his son and daughter in law were being beaten. Thereupon, appellant No.1 gave a blow with an axe on the head of deceased Bhagubhai. Deceased Bhagubhai started bleeding and fell down on the ground. Thereafter, appellant No.4 gave blow with a chisel on the head of deceased Bhagubhai. The deceased was thereafter dragged by all the accused and brought in the oseri of the house of appellant No.2. After killing the deceased, the appellants ran away towards village Singalam. Govindbhai in the company of his wife went to Borsad Police Station where he lodged first information report at about 11.45 a.m. Information

given by Govindbhai was recorded by Mr. V.D. Kharadi, PSI, Borsad Police Station. The investigating officer, after requisitioning service of the panch witnesses, held inquest on the dead body of deceased Bhagubhai at village Dedarada. The dead body was found lying in the oseri of the house of appellant No.2. After holding the inquest, the investigating officer sent dead body for autopsy and prepared panchanama of place of occurrence in presence of panch witnesses. From the place of occurrence, earth soaked with blood and control sample earth were seized. Thereafter, the investigating officer recorded statements of witnesses, who were found to be conversant with the incident in question. On July 21, 1988, appellant No.1 surrendered at Borsad Police Station. It was found that he had sustained injuries and, therefore, his complaint was noted down by the investigating officer. Appellant No.1 in presence of panch witness indicated willingness to show the place where he had concealed the axe. Therefore, after drawing a preliminary panchanama, the investigating officer, in the company of panchas and others, went to the place, which was shown by appellant No.1. Appellant No.1 took out the axe from a peludi tree. The axe was found to be blood stained, which was seized in presence of panchas. On that very day, accused Nos. 2,3 and 4 surrendered at the police station. Appellant No.2 produced vanshi, appellant No.1 produced stick, appellant No.4 produced chisel which was blood stained. The weapons produced by accused Nos. 2, 3 and 4 were seized under a separate panchanama. The articles seized during the course of investigation were sent to Forensic Science Laboratory for analysis. Autopsy on the dead of body of deceased Bhagubhai was performed by Dr. David Fernandes at Dahod Primary Health Center. On completion of investigation, the appellants were chargesheeted in the court of the learned Judicial Magistrate (First Class), Borsad, for the offences punishable under Sections 302, 323, 114 of the Indian Penal Code.

As offence under Section 302 of the Indian Penal Code is exclusively triable by a court of sessions, the case was committed to the Sessions Court for trial, where it was numbered as Sessions Case No.238/88. The learned Additional Sessions Judge framed necessary charge against the appellants at Exh.10. The charge was read over and explained to the appellants who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) Dr. David Fernandes, P.W. No.1, Exh.16, (2) Govindbhai Bhagubhai Chunara, P.W. No.2, Exh.18, (3) Dr. Amrutlal B. Upadhyaya, P.W. No.4, Exh.23, (4) Chhotabhai Ranchodbhai, P.W. No.4, Exh.28,

(5) Ayubhbhai Ibrahim Vora, P.W. No.5, Exh.29, (6) Natubhai Chhanabhai, P.W. No.6, Exh.31, (7) Jashiben Govindbhai, P.W. No.7, Exh.35, (8) Ishwarbhai Bhagubhai, P.W. No.8, Exh.37, (9) Vinodbhai D. Karadi, P.W. No.9, Exh.38, and (10) Jannasinh A. Thakor, P.W. No.10, Exh.40, to prove its case against the appellants. The prosecution has also produced documentary evidence such as complaint filed by Govindbhai, inquest report, post-mortem notes prepared by Dr. Fernandes, panchanamas which were prepared during the course of investigation, etc. to substantiate the charge framed against the appellants. After recording of evidence of prosecution witnesses was over, the learned Judge questioned each of the appellants generally on the case and recorded statements under Section 313 of the Code of Criminal Procedure, 1973. In their statements, the appellants denied the case of the prosecution, but did not lead any evidence in defence.

On appreciation of the evidence led by the prosecution, the learned Additional Sessions Judge convicted the appellants as mentioned earlier and imposed sentence of life on each accused. The appellants are also sentenced to rigorous imprisonment for one month for the offence punishable under Section 323 read with Section 114 of the Indian Penal Code. However, substantive sentences are ordered to run concurrently.

Mr.P.M. Vyas, learned counsel appearing for the appellants, has taken us through the entire evidence on record. The learned counsel submitted that the evidence of eye witness, Govindbhai, is inconsistent with the evidence of eye witness Jashiben and, therefore, the impugned judgment deserves to be set aside. It was claimed that the evidence of the eye-witnesses is also contradicted by medical evidence on record and, therefore, the learned Judge committed an error in convicting the appellants under Section 302 of the Indian Penal Code. It was pleaded that the incident, in fact, had happened at 9.30 a.m. on July 20, 1988 and it was never witnessed either by Govindbhai or by Jashiben, as a result of which, the conviction recorded by the learned Judge should be set aside. The learned counsel for the appellants drew the attention of the court to the contradictions appearing in the evidence of the prosecution witnesses and pleaded that the prosecution having failed to adduce satisfactory evidence to bring home the guilt of the accused, the appeal should be allowed. In the alternative, it was claimed by the learned counsel for the appellants that no reliable evidence is led by the prosecution to establish that

appellants Nos. 2 and 3 had abetted commission of offence punishable under Section 302 of the Indian Penal Code and, therefore, in any view of the matter, the benefit of doubt should be given to them.

Mr. L.R. Pujari, learned Additional Public Prosecutor, submitted that the prosecution has proved its case beyond reasonable doubt by leading evidence of injured Govindbhai as well as injured Jashiben and, therefore, it cannot be said that any error is committed by the learned Judge in convicting the appellants under Section 302 of the Indian Penal Code more particularly when the medical evidence shows that the injuries sustained by the deceased were sufficient in the ordinary course of nature to cause death. It was argued by the learned Additional Public Prosecutor that two eye-witnesses being close relatives of the deceased, would not allow the real culprits to go scot free and involve the innocent persons in the case and, therefore, their evidence deserves acceptance. After referring to the evidence of two eye-witnesses, the learned Additional Public Prosecutor submitted that the appellants Nos. 2 and 3 had actively participated in the incident and abetted appellants Nos. 1 and 4 in commission of offence punishable under Section 302 of the Indian Penal Code and, therefore, the impugned judgment should not be interfered with by the court in the present appeal.

The fact that deceased Bhagubhai died homicidal death is not in dispute before us in the present appeal. The evidence of eye-witness Govindbhai as well as the evidence of Jashiben indicates that the deceased had received injuries by means of axe, chisel and vansi. The investigating officer had prepared the inquest report in presence of the pancha witnesses. The inquest report is on the record of the case at Exh.19. In the inquest report also, the injuries sustained by the deceased are enumerated in detail. Autopsy of the dead body of deceased Bhagubhai was performed by Dr. David Fernandes. Dr. Fernandes has narrated in detail external and internal injuries sustained by the deceased in his substantive evidence before the court. The injuries which were found while performing autopsy are also mentioned in the post-mortem notes prepared by Dr. Fernandes and produced at Exh.17, In the post-mortem notes, cause of death is indicated to be "shock following contussion the brain resulting flame severe blow on the head and extensive haemorrhage from wounds". Having regard to the evidence of Dr. Fernandes, which is corroborated by the post-mortem notes, we are of the view that the finding of the learned Judge that the deceased

died homicidal death is eminently just and is hereby upheld.

So far as the main incident is concerned, it is unfolded by witness Govindbhai as well as witness Jashiben and, therefore, it would be relevant to refer to their evidence in detail. Govindbhai Bhagubhai, P/W. No.2, Exh.18, has stated in his evidence that his father and appellant No.2 had jointly purchased a male calf of buffallow for Rs.700/- which was sold for Rs.951/-, but, appellant No.2 had neither given the share in profit nor Rs.51/- which were due to his father as commission for sale of the male calf of buffallow. The witness has claimed that at about 9.30 a.m. in the morning his father had approached appellant No.2 and appellant No.2 had assured his father to give commission and, thereupon, his father had returned home. The witness has deposed that at about 10.30 a.m. his father had gone to a place known as 'chara' for answering call of nature and after some time, he and his wife Jashiben had gone to collect fodder for their goats. It is stated by him that, when they reached a raised place known as Oghani-na-tekra, he was taunted by the appellant No.2 and appellant No.2 gave blow with a vansi on his left shoulder, as a result of which he moved a little. The witness claimed before the court that, thereafter, all the four accused had surrounded his wife and appellant No.3 had dealt stick blow on her. The witness has further claimed that, on shouts being raised by him and his wife, his father had come to the place where they were being assaulted and tried to know from the appellants as to why they were beating the witness and his wife. According to Govindbhai, thereupon, appellant No.1 gave a blow with an axe on the head of deceased as a result of which deceased started bleeding and fell down on the ground. The witness has clearly stated that, thereafter, appellant No.4 gave blow with a chisel on the head of deceased and all the four accused dragged the deceased to the oseri of the house of appellant No.2, and, after killing the deceased, the appellants ran away towards village Singalam. The witness asserted before the court that thereafter, he in the company of his wife went to Borsad Police Station and lodged the complaint. It is relevant to note that this witness was not cross examined on behalf of appellants Nos. 1,2 and 3. During his cross examination by learned counsel for appellant No.4, the witness stated that, except the dipuste regarding payment of commission with reference to sale of male calf of buffalow, there was no other dispute between his father and appellant No.2. It was suggested to the witness that his deceased father was found dead in a drunken condition

at oghani-na-tekra, but the witness has emphatically denied the said suggestion. The witness has admitted that after the incident he had not seen the Sarpanch of the village nor informed any one about the incident. It was also suggested on behalf of appellant No.4 that his deceased father had quarrelled with others, during which, he was killed and neither he nor his wife had witnessed the incident, but, the witness has clearly asserted that he and his wife had witnessed the incident. Though the witness has been cross-examined at length, nothing has been brought on record to discredit his version as stated in examination-in-chief. Dr. Amratlal Becharbhai Upadhyaya, P.W. No.3, Exh.23, had examined witness Govindbhai on July 21, 1988 at about 7.30 p.m. and had found abrasion on his shoulder. The injuries found by the doctor are mentioned in the certificate Exh.24. Therefore, regarding injuries on his shoulder, the complaint is materially corroborated by the evidence of Dr. Upadhyaya. When a person receives injuries in the course of an occurrence, there can be hardly any doubt regarding his presence at the spot and the injured witness, who is close relative of the deceased, would not normally spare the real assailants and falsely involve innocent persons. Ordinarily, close relatives would be the best witnesses and would be the last to screen the real culprits. The evidence of Govindbhai is also corroborated by the evidence of Dr. Fernandes who performed autopsy on the dead body of deceased. Dr. Fernandes has enumerated in detail the injuries sustained by the deceased. The complaint filed by witness Govindbhai is exhibited in the case during the course of recording of evidence of the investigating officer. There are no major improvements or contradictions in the evidence of complainant Govindbhai with reference to his complaint. The evidence of Govindbhai is also materially corroborated by the evidence of another eye-witness Jashiben. Under the circumstances, we are of the view that no error is committed by the learned Judge in placing reliance on the evidence of Govindbhai.

At this stage, it would be relevant to refer to the evidence of Jashiben which is recorded at Exh.35. She is daughter in law of deceased Bhagubhai, and all the four appellants are known to her as the appellants not only belong to her caste but also reside in village Dedarada. This witness in her deposition has stated that, on the date of incident, her father in law had gone to a place known as 'chara' for answering call of nature and after some time, she and her husband Govindbhai had gone to collect fodder for their goats. It is stated by her that, when they reached near the house of appellant

No.2, appellant No.2 started abusing them saying as to why she and her husband had come for demanding money. She has clearly stated that appellant No.2 gave blow with a vansi on the left shoulder of her husband and in order to avoid other blows, her husband had moved a little. The witness claimed before the court that, thereafter, all the four accused had surrounded her and appellant No.3 had dealt stick blow on her left shoulder and heel of left leg. The witness has informed the court that on shouts being raised by her and her husband, her father in law had come to the place where they were being assaulted and tried to know from the appellants as to why she and her husband were being beaten. The witness has asserted that thereupon appellant No.1 gave a blow with an axe on the head of her father in law whereas appellant No.4 gave blow with a chisel on the head of her father in law. The witness has further asserted in no uncertain terms that, thereafter, all the accused picked her father in law and took to the oseri of the house of appellant No.2, where he was killed. In her cross examination, the witness has stated that appellant No.1 had given five to seven blows with the axe on the head of the deceased. She has also claimed that appellant No.2 had given seven to eight blows with vansi on her father in law. The witness has clearly asserted in her cross examination that after taking the deceased to the oseri of the house of appellant No.2, all the appellants had assaulted the deceased by means of chisel, vashi, axe, stick, etc. She has admitted that, after the incident, they had not met anyone in the village and had straightaway proceeded to Borsad Police Station for lodging the complaint. During her cross examination, the defence has proved contradiction which would show that she had not stated in her police statement that all the four accused had assaulted her father in law in the oseri. Except the abovereferred to contradiction, the defence has failed to bring on record any contradiction in her evidence with reference to her earlier police statement. For her injuries, witness Jashiben was also examined by Dr.Upadhyaya on July 21, 1988 and the certificate about her injury is produced by the said witness at Exh.25. The prosecution has amply proved that Jashiben was injured during the course of incident. Submission that the Doctor, who performed post-mortem on the dead body of the deceased, found only one blow which could have been caused by means of vansi whereas Jashiben has stated that seven blows were given with vansi and, therefore, the evidence of Jashiben should be disbelieved because of exaggeration made by her in her evidence, cannot be accepted. In the case of State of U.P. vs. Anil Singh, AIR 1988 Supreme Court 1998, the Supreme Court has made

following pertinent observations regarding appreciation of evidence.

"In the great majority of cases, the prosecution version is rejected either for want of corroboration by independent witnesses, or for some falsehood stated or embroidery added by witnesses. In some cases the entire prosecution case is doubted for not examining all witnesses to the occurrence. The indifferent attitude of the public in the investigation of crimes could also be pointed. The public are generally reluctant to come forward to depose before the Court. It is, therefore, not correct to reject the prosecution version only on ground that all witnesses to occurrence have not been examined. It is also not proper to reject the case for want of corroboration by independent witnesses if the case made out is otherwise true and acceptable. With regard to falsehood stated or embellishments added by the prosecution witnesses, it is well to remember that there is a tendency amongst witnesses in our country to back up a good case by false or exaggerated version. It is also experienced that invariably the witnesses add embroidery to prosecution story, perhaps for the fear of being disbelieved. But that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, the case should not be rejected. It is the duty of the Court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies of falsehood are so glaring as utterly to destroy confidence in the witnesses. It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform."

In material particulars evidence of Jashiben not only get corroboration from the evidence of her husband, but also from the evidence of Dr. Fernandes. She being the close relative of the deceased would not be tempted in any manner to allow the real culprits to go scot free and would not involve the appellants falsely in this case more particularly in absence of any enmity between her and any of the appellants. On the facts and in the circumstances of the case, we are of the opinion that the learned Judge was perfectly justified in placing reliance on the trustworthy deposition of Jashiben.

As observed earlier, the articles, which were

seized during the course of investigation, were sent to the Forensic Science Laboratory for analysis. While preparing panchanama of person of appellant No.1, it was noticed that the pant put on by the appellant was found to be blood stained and, therefore, it was attached under a panchanama in presence of panchas. The analysis report shows that pant which was worn by appellant No.1 was stained with blood having "B" group which was the blood group of the deceased. Similarly, axe and chisel were also found to be stained with blood of "B" group, which was the blood group of the deceased. Discovery of blood of the same group on the weapons of offence and on the cloth of the appellant No.1 indicates that appellants nos. 1 and 4 were in close proximity to the deceased when he was fatally wounded. Though the learned Judge has recorded statements of appellants Nos. 1 and 4 in detail under Section 313 of the Code of Criminal Procedure, no explanation worth the name has been offered by any one of them regarding finding of blood on the axe and the chisel.

Thus, the evidence, which has been led by the prosecution, establishes beyond reasonable doubt that all the appellants had assaulted witness Jashiben and when the deceased tried to intervene, appellant No.1 had dealt an axe blow on his head whereas appellant No.4 had dealt chisel blow on the head and, thereafter, all the accused had dragged him to the oseri of the house of appellant No.2 and killed him. Dr. Fernandes, in his evidence has clearly opined that the injuries sustained by the deceased on the head were sufficient in the ordinary course of nature to cause death. The doctor has also stated that external injuries Nos. 2 and 3 were independently sufficient in the ordinary course of nature to cause death. It is to be noted that it is nobody's case that either appellant No.1 or the appellant No.4 had aimed blow on some other part of the body of the deceased, but, on account of supervening cause like sudden intervention of some one or movement of the deceased, the blow had struck on the head of the deceased. It was the intention of appellant No.1 and appellant No.4 to cause those very injuries, which were found by Dr. Fernandes while performing autopsy on the dead body of the deceased. The evidence on record clearly establishes that, after the deceased had fallen down, appellant No.4 had given blow with chisel on the head of the deceased. Under the circumstances, clause 3rdly of Section 300 is clearly attracted to the facts of the present case and appellants Nos. 1 and 4 are liable to be convicted under Section 302 of the Indian Penal Code.

So far as appellants Nos. 2 and 3 are concerned, they have been convicted by the learned Judge under Section 302 with the aid of Section 114 of the Indian Penal Code. The facts discussed above clearly establish that all the four accused had surrounded Jashiben and appellant No.3 had assaulted Jashiben. Both the eye-witnesses have clearly stated that after the blows were dealt with by accused Nos. 1 and 4, all the accused had dragged the deceased to the oseri of the house of appellant No.2. According to Jashiben, all the appellants had assaulted the deceased in the oseri of house of appellant No.2 and run away after killing him. A person abets by aiding when by any act done either prior to or at the time of commission of act, he intends to facilitate and does in fact facilitate commission thereof. On the facts and in the circumstances of the case, there is no manner of doubt that the intention of appellants Nos. 2 and 3 was to aid and facilitate commission of offence by appellant Nos. 1 and 4. It is not even suggested on behalf of appellants Nos.2 and 3 to any of the eye-witnesses that they were not intending or had no reason to believe that the act which they were aiding or supporting was in itself not a criminal act. The prosecution has led cogent evidence on the record of the case to prove the fact that appellants Nos. 2 and 3 had aided and thereby abetted appellants Nos. 1 and 4 in commission of the offences punishable under Section 302 of the Indian Penal Code. Therefore, no fault can be found with the conviction of appellants Nos. 2 and 3 under Section 302 with the aid of Section 114 of the Indian Penal Code.

The evidence led by the prosecution is trustworthy and reliable. The role played by each of the appellants in the commission of the offences is clearly carved out and established. Having regard to the nature of evidence led by the prosecution, it cannot be said that any error is committed by the learned Judge in convicting the appellants and, therefore, the appeal is liable to be dismissed.

For the foregoing reasons, the appeal fails and is hereby dismissed. Muddamal be disposed of in terms of the directions given by the learned Judge in the impugned judgment.

(swamy)