IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 663 of 1991

with

CRIMINAL APPEAL No 1147 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS and
MR.JUSTICE A.M.KAPADIA

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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?

KOLI GOBAR NANNA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 663 of 1991

MR AD SHAH for appellant.

MR MA BUKHARI APP for Respondent No. 1

2. Criminal AppealNo 1147 of 1991

MR MA BUKHARI for appellant

MR AD SHAH for Respondents

CORAM : MR.JUSTICE K.R.VYAS and
MR.JUSTICE A.M.KAPADIA

Date of decision: 29/01/99

COMMON ORAL JUDGEMENT (Per A.M. Kapadia, J.)

1. Criminal Appeal No. 663 of 1991 is filed by appellant, Koli Gobar Nanna, original accused No.1 in Sessions Case No. 1 of 1986, under Section 374 of the Criminal Procedure Code, 1973 ('the Code' for short hereinafter), challenging the judgment and order dated 4.9.1991 rendered by learned Additional Sessions Judge, Bhavnagar, Camp at Mahuva, whereby the appellant was held guilty and has been convicted for the offence punishable under Section 304 Part II of the Indian Penal Code ('IPC' for short) and sentenced him to suffer simple imprisonment for three years and to pay fine of Rs.1,000/- and, in default of payment of fine, to undergo simple imprisonment for further period of one month and also held him guilty and has been convicted for the offence punishable under Section 135 of the Bombay Police Act and sentenced him to suffer simple imprisonment for a period of 15 days and to pay a fine of Rs.100/- and in default, to undergo simple imprisonment for a further period of five days.

1.1 Criminal Appeal No. 1147 of 1991 is filed by State of Gujarat against the respondents, who were the accused Nos.1 and 3, challenging the same judgment and order whereby the learned Additional Sessions Judge was pleased to acquit both the accused of the offence punishable under Section 302 of IPC.

1.2 As both the appeals arise out of a common judgment and order passed by the learned Additional Sessions Judge in Sessions Case No. 1 of 1986, both the appeals are heard together and they are being disposed of by this common judgment.

2. For the purpose of disposal of these appeals, the prosecution case, in nut shell, may be stated as under:

2.1 It was alleged by the prosecution against both the accused Nos.1 and 3 and deceased accused No.2, Koli Dhiru Lakha, who died during the course of trial, that on the day of the alleged incident, 28.9.1985, at about 3.15 P.M., while complainant Husainmiya Akbarali was returning after answering the call of nature, accused No.1 Koli Gobar Nanna met him on the way and abused him using filthy language. Thereafter accused No.1 left the place and complainant also went to his house where he informed his cousin Mohmed Husain who came to his house, about the incident. Thereafter, the complainant in company of Mohmed Husain went to the shop of Mansukhbhai for eating

pan where accused was standing. The complainant scolded accused No.1 for abusing him and inquired as to why did he abuse him. Immediately, accused No.1 got excited. Meanwhile, accused No.2, deceased Dhiru Lakha and accused No.3, Madhu Laxman came there and caught hold of complainant. Thereafter accused No.1 caught hold the deceased Mohmed Husain by neck and took out a knife from his waist and inflicted a blow on the left side of the chest of deceased Mohmed Husain as a result of which he fell down. Thereafter again accused No.1 gave 3-4 blows with the knife on the back of Mohmed Husain. During that time, the complainant tried to snatch away knife from accused No.1 and at that time he also received injury on his palm. At that time, mother of complainant Kulsambibi, sister Banubha and Zehrabanu came there. Thereafter all the accused ran away towards the shop of Velabhai. After some time, a crowd assembled near the shop of Mansukhbhai. In the complaint, motive ascribed was that eight months prior to the incident, his maternal uncle Vilayathusain had a quarrel with accused No.1 and deceased Dhiru Lakha with respect to a house and on the day of the alleged incident, all the three accused persons inflicted injuries to deceased Mohmed Husain with knife and thereby committed the offence of murder.

2.2 On the basis of the aforesaid complaint, offence was registered at Mahuva Police Station and investigation was commenced. During investigation, statement of various witnesses was recorded, inquest panchnama and panchnama of the scene of offence and recovery of the weapon was drawn. Dead body of the deceased was sent for post-mortem examination and muddamal knife and blood stained clothes were sent to Forensic Science Laboratory for examination and report. After receipt of post-mortem report and report from the Forensic Science Laboratory, both the accused Nos.1 and 3 and deceased accused No.2 were charge-sheeted for commission of the alleged offence, as mentioned hereinabove.

2.3 On committal, charge was framed against the accused. As accused No.2 Dhiru Lakha died during the course of trial, case against him was abated. Both the accused Nos.1 and 3 pleaded not guilty to the charge levelled against them and stated that they are innocent and the case filed against them was false. Hence, they were put on trial.

2.4 In order to bring home the charge levelled against the accused, prosecution has placed reliance on the evidence of 19 witnesses so also on the documentary evidence produced by them.

2.5 The learned trial Judge, after recording the evidence of the witnesses and considering the documentary evidence such as, post-mortem report and report of Forensic Science Laboratory and after appreciating and evaluating the same, came to the conclusion that homicidal death of Mohmed Husain was proved but it was a case of culpable homicide not amounting to murder and, therefore, he held the accused No.1 guilty for the commission of the said offence and acquitted the accused No.3 holding that he has not played any role in the said crime. The learned trial Judge further found accused No.1 having committed offence punishable under Section 135 of the Bombay Police Act for possessing arm in violation of the notification of the District Magistrate and held him guilty for the commission of the said offence. Thus, the learned trial Judge came to the conclusion that accused No.1 has committed both the above mentioned offences and accordingly he was sentenced as aforesaid. Against the said judgment and order, the appellant/accused No.1 has filed Criminal Appeal No. 663 of 1991 challenging his conviction and sentence as mentioned above while State of Gujarat has filed Criminal Appeal No. 1147 of 1991 challenging the judgment and order recording of acquittal of the offence under Section 302 of IPC qua both the accused Nos.1 and 3.

3. Mr. A.D. Shah, learned advocate for the appellant/ accused No.1 canvassed theory of self-defence and by putting a theory of grappling between the accused and deceased, submitted that the complainant has not given the true version of the incident. According to the complainant, all the witnesses came after the incident was over. According to him, there was no reason for the complainant and the deceased to come to the pan shop where the accused No.1 was standing. The complainant and deceased both came to quarrel with the accused No.1 and at that time deceased was having knife with him and while trying to assault the accused No.1, he snatched away the knife from the deceased and gave knife blow to the deceased in self-defence. Therefore, learned trial Judge has wrongly disbelieved the story of self-defence and recorded conviction for the offence punishable under Section 304 Part II, which requires to be quashed and set aside by acquitting accused No.1. He further submitted that all the so-called eye witnesses came after the incident and, therefore, no reliance whatsoever can be placed upon their oral testimony. According to him, the judgment and order of conviction of accused No.1 cannot be sustained in view of the settled position of law as the accused has exercised right of private defence and,

therefore, he prayed that by allowing the appeal the appellant/ accused No.1 may be acquitted.

4. As against this, Mr. M.A. Bukhari, learned A.P.P., tried to convince us that the judgment and order recording conviction against original accused No.1 for the offence under Section 304 Part II is bad in law and it cannot be sustained in view of the clear evidence of the complainant and other eye witnesses who were very much present at the place of occurrence. He submitted that as per the story propounded by the prosecution, the accused picked up quarrel with the complainant and deceased Mohmed Husain and the accused were having common intention to kill deceased Mohmed Husain as there was previous enmity between the two groups. He further submitted that the accused came at the scene of offence pre-planned to commit murder of deceased Mohmed Husain and the accused No.3 shared the common intention with accused No.1 to kill deceased Mohmed Husain, by catching hold the complainant so that accused No.1 could inflict blows on the deceased with knife without any obstruction. He further submitted that accused No.1 took the panchas and police party to the place where he had hidden the knife and showed them the knife and it was discovered by drawing panchnama which is also an important circumstance showing the culpability of accused No.1. Under these circumstances, by allowing the appeal filed by the State of Gujarat i.e., Criminal Appeal No. 1147 of 1991, both the respondents/ original accused Nos.1 and 3 may be convicted for commission of the offence of murder under Section 302 read with Section 34 of IPC.

5. In view of the aforesaid submissions of learned advocates for both the sides, let us examine as to whether the trial Court has correctly appreciated the evidence on record and recorded the finding of conviction for the offence punishable under Section 304 Part II of IPC qua accused No.1 only and acquitted accused No.3 or the learned trial Judge has committed error in law and facts both in not recording conviction for the offence under Section 302 of IPC against both accused.

6. So far as homicidal death of Mohmed Husain is concerned, same cannot be disputed even by the defence in view of the clear evidence of P.W.18, Dr. Kishore Kumar, whose evidence was recorded at Ex.63. He was medical officer at the relevant time at Municipal Hospital, Mahuva who performed the autopsy. He has stated in his evidence that on 28.9.1985 at 5.45 P.M. dead body of Mohmed was brought by constable with police yadi and during the course of performing autopsy he found

following external injuries on the dead body of Mohmed:

(1) An oblique stab wound on left fifth intercostal space just lateral to sternum and medial to mind clavicular line anteriorly cutting the 5th left rib at lower margin - spindle shaped - size 3 1/2" x 1/2" (tissue deep)
Penetrating left lung and heart.
Directed below upwards.

(2) 2nd oblique stab would posteriorly on left side in the 11th intracoastal space in scapular line.
Spindle shaped size 3" x 1/2" (tissue deep).
Penetrated - stomach posteriorly.
Directed below upwards.

(3) 3rd an oblique incised spindle shaped wound on back (posteriorly) in scapular line below 12th rib - size 2" x 1/2" (tissue deep).

(4) 4th a horizontal incised wound spindle shaped on the back of neck size 3 1/2" x 1/2" (tissue deep)

Probable age of all wounds at a time, 2 to 3 hours before the body was received for post mortem and antemortem.

He also found following internal injuries:

Lt. lung stabbed and collapsed lower lobe - stab wound size 1" x 1/2" on anteriorly.
Penetrated anteriorly.
The heart stabbed anteriorly both ventricles- size 1/2" x 1/2cm and both chambers empty and collapsed.
Stab wound on Lt. side posteriorly.
Pierced posteriorly on Lt. side.
Stomach is stabbed posteriorly and semi digested food debars was coming out through the stab wound size 1/2" x 1/2 cms. in posterior walls.

7. According to him, external as well as internal injuries were antemortem and all the external injuries were corresponding with the internal injuries. According to doctor, cause of death was shock and haemorrhage following penetrating injury to vital organs (left lung and heart). He has prepared post mortem note which is produced on record at Ex.64. On the basis of the aforesaid oral evidence of the medical officer and the

post mortem note, we are of the opinion that the learned trial Judge has very rightly concluded that deceased died a homicidal death.

8. We will now deal with the contention raised by Mr. A.D. Shah, learned advocate for the original accused that the evidence of complainant does not inspire any confidence as it does not get corroboration from the circumstantial evidence and in support of his aforesaid contention, he showed us following circumstances:

(a) The absence of cut mark on the bush-shirt of the deceased suggests grappling.
(b) Direction of wounds on the deceased was from downward to upward;
(c) Scattered blood marks in the area of 5 ft. on the ground and also in the area of 4 ft. on the wooden pillar.

(d) The complainant, after the first incidence of abusing was over, went to his house and informed the deceased about the same. Thereafter both of them went to the Pan galla and picked up quarrel with the accused No.1 and at that time deceased was having knife in his hand.

9. On the above circumstantial evidence, Mr. Shah tried to convince us that there was grappling between accused No.1 and the deceased and in that process, accused No.1 snatched away knife from the deceased and gave him blows and caused injuries which were proved fatal. Therefore, according to him, accused is entitled to the benefit of right of self-defence.

10. In this connection, let us examine the evidence on record. Adverting to the evidence of P.W.4, Husainmiya, whose testimony was recorded at Ex.17, he has, inter alia, testified that on the day of the incident, while returning after answering the call of nature, accused No.1 met him on the way and abused him using filthy language. Thereafter the complainant went to his house where he met his maternal cousin Mohmed. The complainant informed him that accused No.1 abused him. Thereafter both of them - the complainant and deceased Mohmed - went to the shop of Mansukhbhai for eating pan. At that time accused No.1 was standing there. The complainant asked accused No.1 as to why did he abuse him. Accused No.1 told him that he did not abuse him and thereafter immediately he got excited. Meanwhile, accused No.2, deceased Dhiru Lakha, and accused No.3 Madhu Laxman came there from the shop of

Velabhai and both of them caught hold of the complainant. Accused No.1 caught hold of the neck of the deceased and took out knife from his waist and inflicted a blow on his chest. As the deceased fell down, accused No.1 again inflicted 3-4 blows on the back portion of the deceased. Thereafter accused No.1 also inflicted knife blow on the complainant. As the complainant raised his right hand to ward off from assault, injury was caused on his palm. Thereafter as people gathered and lady members from the family of the complainant came there, the accused fled away. Thereafter the injured was removed to hospital in a rickshaw where he was declared dead. So far as the motive is concerned, he has testified that there was a previous enmity between the father of deceased Vilayatkhan and accused with respect to a house.

11. In cross-examination, he has admitted that when accused No.1, Gobar Nanna abused him for the first time there was no one except both of them. He has admitted that there was enmity between them for the last eight years. He has also stated that the said enmity was because of the enmity with his uncle. He has unequivocally admitted that all the witnesses came at the scene of offence after Mohmed fell down. Even his relatives came there after Mohmed fell down and prior to the lady members of his family reaching there, infliction of injuries on Mohmed was over and thereafter accused fled away. He has admitted that when the accused caught hold of neck of Mohmed, button of his shirt got open but it was not broken.

12. On perusal of the complaint, Ex.18, he has stated similar version as testified by him before the Court. On overall appreciation of the aforesaid oral evidence of the complainant, Husainmiya, coupled with the complaint, it is seen that the incident of abusing had taken place prior to the incidence of inflicting injuries on deceased Mohmed with knife. Thereafter the complainant and accused No.1 both went to their respective houses and when accused No.1 was standing near the Pan Galla of Mansukhbhai, the complainant alongwith Mohmed came there and scolded him for the abuse which he had given to him before some time. Accused No.1 clarified that he had not abused him and he got angry. In the meantime, accused Nos.2 and 3 came there and caught hold of complainant while accused No.1 after taking out knife from his waist inflicted injuries to deceased. It is also seen that when the incident has taken place, as per the complaint, no-one was there except the complainant, deceased and accused, and all the witnesses came there after the incident was over and thereafter the family members of

complainant also came there. Therefore, we have to appreciate the evidence of the sole eye witness Husainmiya. The prosecution has examined P.W.8, Kantibhai Arjan, at Ex.39, P.W.9, Ahmedhusain Bhikhumiya, at Ex.40, P.W.10, Banuben Bhikhumiya, at Ex.41, P.W.12, Vilayathusain Bhikhumiya, at Ex.44 and P.W.13, Bhagwan Lakhman, at Ex.45 as eye witnesses to the occurrence. However, in view of the evidence of the complainant they can never be said to be eye witnesses to the incident because all of them came after the incident was over. Moreover, P.W.8, Kantibhai Arjanbhai and P.W.13, Bhagwan Lakhman, have not supported the prosecution case and, therefore, they were declared hostile. In these circumstances, no reliance whatsoever can be placed on the oral testimony of the aforesaid witnesses who came to be examined as eye witnesses. Therefore, we do not deem it expedient much less imperative to discuss their evidence with a view not to burden the judgment.

13. Mr. A.D. Shah, learned advocate for the original accused submitted that in the said incident accused also received injuries and in that connection he had lodged a complaint before the concerned police station. The said complaint was lodged for the commission of offence under Section 323 of IPC and it being N. C. case it was not further investigated. The prosecution has produced the said complaint at Ex.47 and placed reliance on the said complaint.

14. On perusal of complaint Ex.47, it is divulged that the said complaint was lodged by accused No.1 on the same day, i.e., 28.9.1985 at about 9.45 P.M. wherein, inter alia, it was stated that at about 3 P.M. when he was standing near the shop of Mansukhbhai for eating pan, the complainant Husainmiya also came by that side. The complainant Husainmiya abused him and he also abused the complainant Husainmiya. Thereafter he went from that place. After some time, Husainmiya came with Mohmed and both of them started abusing him and he told them not to abuse him. On this, both of them excited and tried to give him knife blow. At that time accused No.3 and deceased accused No.2 who were also there, caught hold of the complainant. Accused No.1 snatched away the knife from the deceased as a result of which he also received injury on his index finger and little finger. Thereafter also as deceased Mohmed abused him, he got excited and gave him blow with the said knife. Meanwhile, on seeing that uncle's son of the deceased coming towards him, accused No.1 again inflicted 3-4 injuries with the knife on the back of the deceased and thereafter he ran away. In the said complaint he had also ascribed the motive and

in that he stated that they had quarrel in past in respect of a house.

15. It may be appreciated that in this connection, prosecution has examined one witness P.W.14, Vijaysinh Mulsinh Parmar, whose evidence was recorded at Ex. 46. He was a Police Head Constable at the relevant time, thorough whom, the said complaint was produced on record.

16. Referring to the said complaint, learned advocate Mr. A.D. Shah for the original accused, with all vehemence at his command, tried to convince us that complaint at Ex.47 unequivocally shows the theory of grappling between both of them and in absence of the circumstances which he has canvassed, theory of self-defence appears to be more probable.

17. We are not at all convinced and impressed by the aforesaid submission of Mr. Shah. It is true that as per evidence there was no cut mark on the bush-shirt of the deceased. But that factor alone is not decisive for the purpose of propounding theory of grappling. The complainant has unequivocally testified that when the accused No.1 caught hold of deceased Mohmed by his neck, the button of his shirt was open and thereafter he inflicted injury and in that circumstances there cannot be any cut mark on the bush-shirt of the deceased. Therefore, the submission canvassed by learned advocate Mr. A.D. Shah cannot be accepted.

18. The second contention of Mr. A.D. Shah, learned advocate for the original accused, that the circumstance that the direction of the wound was from downward to upward is also ruled out because it must have happened that after receiving first blow deceased might have fallen down and thereafter accused No.1 must have inflicted blows on the back side and the injury which was from downward to upward suggests the fact that injury must have been inflicted from lower part to upper part and this may be the situation under which, blood marks were seen in the area of 5 ft. on the ground and 4 ft. on the wooden pillar is also ruled out as in view of the evidence after receiving first injury deceased must have run with a view to save himself and the accused must have chased him and when the injured fell down on account of the injury, he must have inflicted injuries on the back portion of deceased.

19. After the incident of abusing, both accused No.1 and complainant went to their respective houses and thereafter the complainant alongwith deceased Mohmed went

to the pan shop and picked up quarrel is the only circumstance which appeals to us in view of the clear cut evidence of complainant himself. But the theory of grappling cannot be swallowed and is not gulpable in view of the evidence of the complainant himself. So far as the complaint at Ex.47 is concerned, it may be appreciated that it was lodged belatedly at about 9.45 P.M., i.e., 6 hours after the incident. Therefore, probability cannot be ruled out that just with a view to fabricate evidence and to put a theory self-defence this complaint must have been lodged. Therefore, we are not prepared to place any reliance on this complaint.

20. Another important aspect of the case is that the theory of self-defence propounded by the defence is canvassed for the first time in this Court only. It was never stated by the defence before the lower Court nor a single question was asked to witnesses during their cross-examination and it was also not stated in their further statement recorded under Section 313 of the Code. In this view of the matter, we are not prepared to accept the theory of self-defence put forward by the defence for the first time before this Court.

21. So far as the evidence of panch witnesses is concerned, we need not discuss about the same as the panchnama in respect of recovery of the knife so also panchnama of scene of offence was proved. Therefore, it is clear that the incident has taken place as narrated by the prosecution witness- the complainant.

22. On over all appreciation of the oral evidence coupled with the documentary evidence, we are of the opinion that as homicidal death is proved, accused No.1 was the author of the injuries which were found on the deceased and as a result of the said injuries the deceased died a homicidal death. There is no positive evidence in respect of any part played by other accused.

23. In view of the aforesaid state of affairs, the question that assumes importance is as to whether the culpability of accused No.1 can be called murder as defined under Section 300 of IPC or culpable homicidal not amounting to murder?

24. We are very much conscious about the fact that State Government has also preferred appeal against acquittal of the accused of the offence of murder punishable under Section 302 of IPC. Mr. M.A. Bukhari, learned A.P.P. tried to persuade us contending that the crime committed by accused No.1 was nothing but murder

punishable under Section 302 of IPC and accused No.3 and deceased accused No.2 both shared the common intention for the commission of the said offence by catching hold of the complainant so that accused No.1 could inflict injuries on the deceased without any obstruction. There was motive for this as a dispute was going on in respect of a house. Therefore, all the accused including deceased accused No.2 can be held liable for the commission of offence of murder punishable under Section 302 read with Section 34 of IPC as other two accused also have shared common intention.

25. We have discussed the evidence on record at length and we are of the opinion that accused No.3 and deceased accused No.2 have not taken any part or role in the commission of the said crime. Both of them came subsequently on seeing dispute between accused No.1 on the one hand and the complainant and deceased Mohmed on the other hand and caught hold of the complainant and during hot exchange of words between accused No.1 and deceased, accused No.1 got excited and inflicted an injury on the chest of deceased and when he fell down he again inflicted 3-4 injuries on the back of the deceased. The aforesaid evidence is suggestive of the fact that accused Nos.2 and 3 cannot be held liable as they never shared common intention alongwith accused No.1. It was not a pre-planned murder. Accused No.1 was just standing near the pan shop and accused Nos.2 and 3 were standing at some distance when complainant alongwith deceased Mohmed came there. There is clear evidence to show that both the complainant and deceased Mohmed came there with a view to pick up quarrel and in fact they picked up quarrel and during the hot exchange of words, accused No.1 inflicted knife injuries on the deceased and meanwhile complainant was caught hold by accused Nos.2 and 3 and in this manner the crime was committed. Therefore, we are of the clear opinion that the said act on the part of accused No.1 would not amount to murder as defined under Section 300 of IPC but it would come within the definition of Section 299, culpable homicide not amounting to murder and it falls under exception IV of Section 300 of IPC.

26. As held by us hereinabove, it was not a pre-planned murder and the crime was committed all of a sudden during the quarrel. The offender has not taken any undue advantage or acted in a cruel or unusual manner. Therefore, on the analysis of the prosecution case, following highlights would emerge:

a) Deceased Mohmed died a homicidal death.

b) There was previous enmity between the complainant and the deceased in respect of a house.

c) On the day of incident accused No.1 and complainant met each other and accused No.1 abused him.

d) When accused No.1 was standing near pan shop of Mansukhbhai, the complainant alongwith deceased Mohmedbhai came there and scolded accused No.1 for the abuse which he had given.

e) Accused No.1 inflicted knife injury to deceased as a result of which he fell down and thereafter again accused No.1 inflicted 3-4 injuries on the back of the deceased as a result of which he died.

f) Accused Nos.2 and 3 have not played any role except that they caught hold of the complainant.

g) The act on the part of accused No.1 cannot be called murder as defined under Section 300 of IPC but it is culpable homicide not amounting to murder as defined under Section 299 of IPC and it would fall within the exception IV of Section 300 of IPC.

27. In view of the above discussion, it is clear that the crime committed by accused No.1 is culpable homicide not amounting to murder punishable under Section 304 Part II of IPC and not under Section 302 of IPC. Hence, Criminal Appeal No. 1147 of 1991 filed by State of Gujarat, merits dismissal.

28. The last question which requires our consideration is as to whether the sentence imposed upon accused No.1 by the learned trial Judge is justified or warrant our interference by reducing the same. In this connection, Mr. Shah, learned advocate for original accused No.1 submitted that accused No.1 was of the age of 18 years at the relevant time and, therefore, he was entitled to have the benefit of the provisions of Section 6 (1) of the Probation of Offenders Act, 1958 ('the Act' for short hereinafter). He further submitted that prayer to that effect was made before the learned trial Judge but the learned trial Judge refused to accept the said prayer because there was an FIR filed against accused No.1 for commission of an offence under Section 326 of the IPC. Mr. Shah further submitted that mere filing of FIR against a person ipso facto does not deprive the right to have the benefit of the provisions of the Act, which is mandatory in nature, unless the previous offence is proved against him. As against this, Mr. Bukhari, learned A.P.P., pointed out that the learned trial Judge has rightly refused to accord the benefit of the Act to

accused No.1 in view of the FIR lodged against him. As per his submission, the benefit of the Act can never be given in favour of a person who is involved in criminal act, in past. According to him, though accused No.1 was not convicted, an FIR was lodged against him for commission of a serious offence and hence the learned trial Judge was right in refusing to grant benefit of the Act.

29. On our anxious and considerate thought to the contentions of the learned advocates for both the sides, we are of the opinion that the learned trial Judge has very rightly refused to accord the benefit of Probation to accused No.1 under the Act. The offence alleged to have been committed by accused No.1, as per earlier FIR, was punishable under Section 326 of IPC. On the contrary, we are of the opinion that the learned trial Judge has taken a very lenient view in convicting accused No.1 for the offence under Section 304 Part II of IPC and awarding sentence of simple imprisonment only for three years and a fine of Rs.1000 and in default of payment of fine to undergo simple imprisonment for a further period of one month. In our view, the judgment and order passed by learned trial Judge does not require any interference by this Court. On the contrary, it requires affirmation. In our view, no conclusion other than the one arrived at by the learned trial Judge was possible in the facts and circumstances of the case and in the set of evidence adduced on record by the prosecution. Accordingly, we confirm and maintain the sentence awarded to accused No.1.

30. In the result, both the appeals i.e., Criminal Appeal No. 663 of 1991 filed by original accused No.1 and Criminal Appeal No. 1147 of 1991 filed by State of Gujarat, are dismissed and judgment and order recording conviction and sentence of original accused No.1 is well merited, therefore, it is confirmed and maintained. Appellant in Criminal Appeal No. 663 of 1991/original accused No.1, Koli Gobar Nanna is on bail. Therefore, he is hereby ordered to surrender himself, within four weeks hereof, to serve out remaining period of sentence, failing which the learned Sessions Judge, Bhavnagar shall issue non-bailable warrant against him for taking him into custody and send him to jail to serve out remaining period of the sentence. Bail bonds shall stand cancelled. Sureties are discharged.

(karan)