

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 327 of 1998

For Approval and Signature:

HON'BLE MR.JUSTICE H.H.MEHTA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
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 concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

YAKUB ISMAILBHAI PATEL

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 327 of 1998
MR KJ SHETHNA for Petitioner No. 1-3
Mr.P.R.Abichandani, learned A.P.P.for Respondent No. 1
-

CORAM : HON'BLE MR.JUSTICE H.H.MEHTA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 29/08/2003

C.A.V. JUDGEMENT

(Per : HON'BLE MR.JUSTICE SHARAD D.DAVE)

1. The appellants-original accused, by filing this appeal under Section 374(2) of the Code of Criminal Procedure, 1973 (to be referred to as the Code for the sake of brevity) have challenged the judgment and order dated 13th February, 1998 rendered by the learned Addl.Sessions Judge, Ahmedabad City in Sessions Case no. 101 of 1996 by which judgment and order the appellant no. 1 was convicted under Sec. 302 of the Indian Penal Code and appellant nos. 2 & 3 were convicted under Sec. 302 read with Sec. 34 of the Indian Penal Code and sentenced them to imprisonment for life.

2. The brief facts of the present case are as under:

On August 25, 1995 at about 13-15 hrs. the Ahmedabad Railway Police received a Vardhi from one Abdulmajid containing that "knife blow is inflicted on Nazim at Kankaria Loco Shed." In this regard entry no. 24/95 was recorded in police station diary. On the strength of the said entry, P.S.I. Prajapati of Ahmedabad Railway police station went to the scene of occurrence, prepared inquest report of dead body and also drew panchanama of scene of occurrence. In the meantime, at about 17.40 hrs. complaint was given by Munna @ Gheti Mohamadshafi Shaikh. In the said complaint, it is stated that he happens to be a friend of Nizamuddin Ismailbhai (deceased) for the last 15 years and said Nizamuddin has been allotted one quarter in B scale colony of Kankaria railway colony but he was not residing there. He gave the quarter to his relative. Nearby the quarter of Nizamuddin, Yakubbbhai Patel (accused no. 1) was residing. The complainant also used to visit the said quarter along with Nizamuddin. On 24.08.1995, there was altercation/dispute and quarrel in between accused no. 1 and deceased in respect to the said quarter, as he wanted to get it evicted. On 25.08.1995 (the day of incident) while said Munna @ Gheti was returning from the house of his friend, somewhere near Kankaria railway colony, he saw accused no. 1 and accused no. 2 along with other person. They were running. There was Jamaiya (kukari) in the hand of accused no. 1. There was also Jamaiya in the hands of accused no. 2. Therefore, he went towards fuel room of diesel shed, where he saw the dead body of Nizamuddin in a pool of blood lying near railway tracks. One Raju (witness) was also there. In the inquiry, he could gather from said Raju that accused no. 1 & 2 along with one another person had inflicted injuries on the person of Nizamuddin and thus has resulted into his death. Said Munna had also seen the injury on the throat

and on face of Nizamuddin. His said FIR/complaint was registered as I C.R.No. 223/95 with Ahmedabad Railway police station.

3. During the investigation, police recorded the statements of witnesses, panchanamas were drawn in respect of the clothes of deceased, discovery of weapons at the instance of accused persons and post mortem note of deceased was collected. Incriminating articles were also collected for having scientific examination. Police also arrested accused no. 1 & 2 and Tapan @ Tondi Shashdhar accused no. 3 on 19.09.1995. After completion of investigation, accused came to be chargesheeted on 16.12.95 before the learned Metropolitan Magistrate, Court no. 5, Ahmedabad. The said chargesheet was for the alleged offences punishable under Sec. 302, 34 of I.P.C. and Sec. 135 of the Bombay Police Act. It was numbered as Criminal case no. 2833/95.

4. As the alleged offence punishable under sec. 302 of I.P.C. is exclusively triable by the Court of Sessions, the learned Metropolitan Magistrate court no. 5, Ahmedabad in turn committed the said criminal case no. 2833/95 of his file to the Court of Sessions Ahmedabad on 01.02.1996 and it was numbered as Sessions Case no. 101/1996.

5. Charge was framed against all the three accused. They pleaded not guilty to the charge and claimed to be tried.

6. In order to prove the charge against the accused, the prosecution examined 14 witnesses ; (1) P.W.no. Munnabhai @ Gheti Mohammadsami exh. 11, (2) p.w. 2 Akbarkhan Abbaskhan exh. 14, (3) p.w.3 Parshottambhai Motibhai exh. 15, (4) p.w. 4 Gulamyuddin Abdulrahman exh. 16, (5) p.w. 5 Yusufkhan Rahimkhan exh. 18, (6) p.w. 6 Mohammadshafi Mohammadyusuf Shaikh exh. 20, (7) p.w. 7 Ajijkhan Usman Khan exh. 22, (8) p.w. 8 Mohammadaiya Mohammadfaruqui exh. 24, (9) p.w. 9 Ramjibhai Koyabhai Parmar exh. 25, (10) p.w. 10 Kamleshbhai Vijaybhai Rathod exh. 28, (11) p.w. 11 Vinayakarao Vasudevrao Patil exh. 30, (12) p.w. 12 Govindbhai Parsottamdas Prajapati exh. 37, (13) p.w. 13 Babliben Jumlabhai exh. 45, (14) p.w. 14 Mohammadbeg Sardarbeg Mirza and also relied on documentary evidence which consisted of FIR, panchanama of place of incident, recovery of weapons panchanama from the present appellants etc. The appellants have also examined D.W. no. 1 Munna @ Gheti Mohammadsami Shaikh at exh. 71 and produced documentary evidence, exh. 39 receipt in

respect of dead body received by Kamaluddin Ismailbhai, exh. 40 Yadi sent to fire brigade officer by P.S.I., Ahmedabad railway station, exh. 41 Yadi for calling dog squad, exh. 33 and exh. 42 two death reports sent to Civil surgeon along with dead body by police and exh. 66 xerox copy of Muster roll of Loco Shed office, K.K.F. Western railway.

7. After the prosecution case was over, the appellants were questioned with regard to the evidence led by the prosecution against them and their statements were recorded under Sec. 313 of the Code. In their further statements all the appellants have denied the part played by them in the alleged offence. However, they gave application to examine complainant Munna Gheti Mohamadshafi Shaikh as defence witness.

8. The learned Addl.Sessions Judge, after appreciating the oral and documentary evidence and arguments advanced by the learned counsel of the prosecution as well as the defence, held that on the day of incident i.e.25.08.1995 all the appellants had common intention to kill the deceased. It was further held that deceased Nizamuddin died a homicidal death. In light of this, the learned Addl.Sessions Judge convicted all the appellants and sentenced them as stated above which has given rise to this appeal.

9. Heard learned counsel Mr.K.J.Shethna for the appellants and Shri P.R.Abichandani, learned A.P.P. for the respondents. They have taken us through the entire record and proceedings of the case. According to learned counsel Mr.Shethna for the appellants, there is no direct evidence to indicate any connection of appellant nos. 1 to 3 with the alleged crime. The accused no. 1 was serving as railway servant in the diesel shed where Nizamuddin (deceased) was also serving. The premises of deceased Nizamuddin was near the house of accused no. 1. On the previous day i.e. on 24.08.1995 there was an exchange of words between the accused no. 1 and deceased in respect of premises. The incident took place on 25.08.1995. On that day at about 9.30 a.m. the complainant Munna @ Gheti had gone in the Government colony to meet his friend. After talking to him he was returning. At that time, he saw those persons i.e. the present appellants running. As per the deposition of witness Akbarkhan Abbaskhan p.w.2 exh. 14 he and deceased Nizamuddin left the place at about 7.30 a.m. to place sick note as he was not feeling well. In both the offices, it took 4 to 5 hours. Accordingly, the witness Akbarkhan has not stated the exact time of alleged

offence. However, as per entry no. 24/95 it seems that incident has taken place at about 13.30 hrs. on 25.08.1995. Accordingly, in submission of learned counsel for the appellants, the time of incident is not proved by the prosecution. The place of incident is also not proved by the prosecution. Though there was blood on the table, chair and floor, P.S.I. Prajapati has made panchanama near the railway track where the body was found lying. At the place of incident, the police has noted blood, one watch, goggles etc. The police has not seized anything from the room. Under the circumstances, when there is dispute regarding the place of offence, the benefit should go to the accused. According to the learned counsel for the appellants, it is the case of the prosecution that the alleged injuries sustained by the deceased were inflicted by kukari by appellant no. 1 and by knives by appellant nos. 2 & 3 but there are no witnesses to that fact. The witness Akbarkhan has stated in his deposition that Yakubkhan has given blow with jamaiya on the neck of Nizamuddin and accompanying persons also did the same. Against the aforesaid deposition of the alleged eye witness, Dr.Vinayakarao Vasudevrao Patil who performed the post-mortem of deceased Nizamuddin has stated in his deposition that incised wound no. 3 stated in column no. 17 cannot be possible by kukari but it can be possible by gupti or sword. As per the eye witness all the three appellants were having kukari in their hands but the medical evidence says otherwise. The case of the prosecution that accused no. 2 and 3 were having knives in their hands and knives were also seized from them. The stab wounds cannot be possible by kukari. It is not the case of the prosecution that the incised wounds were caused by knives. Therefore, there is contrary evidence on record regarding weapon by which the injury was caused and therefore the benefit should go to the appellants-accused.

10. According to the learned counsel for the appellants, the prosecution has only one reliable eye witness Akbarkhan Abbaskhan who has given deposition as p.w. 2 at exh. 14 who appears to be got up witness. It is the defence of the present appellants that Raju is not the eye witness and Akbarkhan is not known as Raju. He is subsequently got up and learned counsel for the appellants relied on certain facts to disbelieve the said witness. As per his say at about 7.30 a.m. on the day of incident he was standing in the corner of the street to go to mutton shop. However, the mutton shop is situated outside the lane but still he was saying that he was standing on the corner of the street. According to

this witness, when he was standing on the corner of the street, deceased Nizamuddin came and told him that let us go to the office and put sick leave and come back. According to him they went on scooter though Nizamuddin was suffering from cold and fever. Normally sick person would not go on scooter. Assuming that deceased went to mark his absence but they stayed for 2 1/2 hours each in both the offices. As per the muster roll exh. 66 it is clear that on 25.08.1995 the deceased was present on his duty. Accordingly the presence of witness Akbarkhan is very much doubtful at the place of incident and therefore there is a reason to believe that he has been got up at a later stage. Moreover, assuming for the sake of argument that Akbarkhan was with the deceased Nizamuddin at the time of incident, however he has not tried to save his best friend. Therefore also, the only alleged eye witness cannot be believed at all and benefit should go to the present appellants. According to the learned counsel for the appellants, time gap between the alleged incident and filing of FIR is not explained by the prosecution. It has come on record that from the place of incident, the police station is about 1 km. or so, however, one of the witnesses lodged the FIR before the police. After the FIR was lodged, P.S.I.Prajapati came at the place of incident and prepared inquest panchanama and panchanama of scene of offence. The witness Akbarkhan @ Raju has also not filed any FIR before the police even though he was with the deceased from 7.30 a.m. till he saw the incident. Therefore there is a reason to believe that Akbarkhan has no business to enter the railway yard. Moreover, the name of present appellant no. 3 was not known to witness Akbarkhan. Therefore, he has stated that he saw Yakubkhan and one more person running with the weapons. There is no T.I.parade. In the aforesaid circumstances also, the prosecution has miserably failed to prove the alleged guilt of the appellants. Therefore, they should be acquitted.

11. It was submitted by learned counsel for the appellants that Munna @ Gheti who was examined as defence witness no. 1 has resiled from the evidence which he gave as P.W. 1. Therefore, he was also disbelieved as P.W. 1 and his deposition as p.w. 1 should be discarded. His affidavit should be taken into consideration. There is no chance of influencing the defence witness Munna @ Gheti in the jail premises. What is transpired is stated by the witness and therefore also the benefit should go to the present appellants-accused.

12. In support of his submissions, Mr.K.J.Shethna

learned counsel for the appellants has relied on the following decisions :

1. Ramratan and others V/s State of Rajasthan reported in AIR 1962 S.C. 424.
2. Awadh Behari Sharma V/s State of Madhya Pradesh reported in 1956 S.C. 738.
3. Mohan Singh and another V/s State of Punjab reported in AIR 1963 S.C. 174.
4. Prabhoo V/s State of Uttar Pradesh reported in AIR 1963 S.C. 1113.
5. Krishna Govind Patil V/s State of Maharashtra reported in AIR 1963 S.C. 1413.
6. Hanumantha Ramchandra V/s The State of Gujarat reported in 1963 G.L.R. 1031.
7. Mohd.Iqbal M.Shaikh and others V/s State of Maharashtra reported in AIR 1998 S.C. 2864.

13. Against the aforesaid submissions, learned A.P.P. Shri P.R.Abichandani for the respondents has submitted that the alleged incident took place at 12.30 p.m. In the station diary it is mentioned as 13.30 hrs. and inquest panchanama and panchanama of scene of offence were carried out by P.S.I.Prajapati from 13.45 hrs. to 15.20 hrs. and 15.35 hrs. to 16.30 hrs respectively. It is true that FIR number is not mentioned in the panchanama and panchanama of scene of offence on account of FIR registered at 17.40 hrs. In submission of Mr.Abichandani learned A.P.P. for the State body was received by the doctor at about 16.30 hrs. obviously FIR was not registered till that hour. Pavti of the receiving body by brother of deceased makes the position clear that FIR was filed at a later stage. If we peruse FIR exh. 47 it only refers to making a note. It does not disclose the name of the assailants. Exh. 49 can be said to be a detailed FIR. Appellant no. 3 is described as unknown person. Therefore, runs the submission of learned A.P.P. for the State, that though the railway police station was nearer to the place of incident, on receipt of information to the P.S.I.Prajapati he immediately moved and came to the place of incident and drew panchanama of scene of offence as well as inquest panchanama. Thereafter, the body was taken for post-mortem and ultimately complaint came to be recorded at 17.40 hrs. Therefore, delay of 2 hrs. in lodging the complaint cannot be said to be fatal to the prosecution.

14. P.W.no. 2 Akbarkhan has given deposition at exh. 14 who is said to be the eye witness. His evidence is required to be read with the deposition of I.O. The deposition of I.O. ought to be accepted as he is not

interested person though p.w. 9 Ramjibhai Parmar is hostile witness. The application at exh. 26 dated 23.04.1997 requires consideration. According to learned A.P.P. for the State, witness Ramjibhai Parmar has stated that the relatives of the accused's side are strong headed persons and giving threats to him and his family and therefore prayed for police protection. On this application, the trial court Judge has also passed order directing the P.I. Karanj police station to give proper protection to the witness. Therefore, runs the submissions of learned A.P.P. for the State, that under the circumstances, though witness Ramjibhai Parmar was serving with the railway and was serving with the deceased and knew each other, he has not supported the prosecution case.

15. So far as the 'u' turn taken by the P.W. 1 who was also D.W. 1, learned A.P.P. for the State submitted that as he was in jail along with the present appellants, he was supposed to change the version after a span of more than two years. The incident took place on 25.08.1995 whereas his deposition was recorded on 19.01.1998. The witness was in jail on account of other offences under the Narcotics Act. His affidavit was read over which is at exh. 72. Therefore, assuming for the sake of argument, the deposition of p.w. 1 Munna @ Gheti is not considered at all then also the deposition of p.w. 2 Akbarkhan @ Raju inspires confidence and when evidence of one eye witness is sufficient to inspire confidence in the mind of the court then conviction can be confirmed on such deposition. In short, learned A.P.P. for the State has tried to support the judgment and order passed by the learned Addl.Sessions Judge Ahmedabad. Lastly, it is submitted that the appeal be dismissed.

16. We have gone through the depositions on record and papers produced with the paper book. Before going through the discussion, it is proper to note down the main aspects of the depositions of p.w. 1 and p.w. 2. As far as p.w. 1 Munna @ Gheti is concerned, he has stated at exh. 11 that deceased was serving as a Pointman in the railway in diesel shed and was residing at Jamalpur. He had another house in railway colony also. In the railway colony house/quarter, his relative was residing. He knows Yakub Patel-accused no. 1 on account that witness, accused no. 1 and deceased used to take tea together. In clear terms, he stated that one Safibhai gave him information that there was an altercation between the deceased and Yakub Patel. On the day of incident, while he was returning from railway colony after meeting his friend at about 12.00 noon, he

saw accused no. 1, accused no. 2 and another person running. Thereafter, he saw the body of deceased Nizamuddin lying in a pool of blood. He saw Raju standing near the body of Nizamuddin. Raju told the witness that Yakub Patel and other accused persons gave blow to Nizamuddin and ran away. Subsequently, Raju and witness went to the police station to lodge complaint which is given mark 10/1. One day, T.I. parade was held and at that time he identified accused no. 2 & 3.

17. In cross-examination of this witness, he admitted that deceased Nizamuddin was his fast friend since last 15 years. At that time, deceased was staying in Saudagar pole and before 8 years he was allotted quarter in railway colony where he stayed for 1 1/2 years to 2 years or so. The witness used to visit Nizamuddin's house in Saudagar pole as well as railway colony. The witness saw the accused persons when they were coming from Kankaria yard. It is admitted that there used to be R.P.F. police near the yard and that yard was used for loading and unloading process which goes on for 24 hours. The witness had no occasion to see accused no. 3 at any time. The distance between diesel shed and Ahmedabad railway police is about 1/2 an hour. It took 1/2 hour in dictating complaint at police station. Lastly, in clear terms he has denied that he is not knowing regarding the incident at all.

18. At this stage, it is worth to note that as defence witness at exh. 71, Munna @ Gheti has stated that Gheti name is given by police. The police has filed many cases of theft against the witness. He knows deceased Nizamuddin and Akbarkhan as they are his friends. The witness knows deceased Nizamuddin on account of help rendered by him in his illegal activities. On 25.08.1995, the witness was at his friend's room from 10.00 a.m. to 1.30 p.m. where he came to know that Nizamuddin died. Thereafter he came to railway crossing where police called him and told him to remain as witness. He has not seen any incident taking place nor he has seen anyone involved in the crime. The witness does not know full name of Akbarkhan. He has no alias name. The witness has read over the affidavit which was sworn before the Notary and admitted the contents of the same which is given exh. 72.

19. In cross-examination by the learned A.P.P. for the State, the witness stated that he is in jail since 31.07.1997 in Narcotics case which was filed by the nephew of deceased Nizamuddin. The witness denied the suggestion that on only national occasions the

under-trial prisoners meet each other. There were 37-38 undertrial prisoners in one barrack who used to talk with each other. In clear terms the witness admitted that his earlier deposition was recorded in March 1997 but denied the suggestion that in the said deposition he stated that he saw the body of Nizamuddin after his death and that he saw some persons running away. He clearly stated in his deposition that he wrongly identified accused nos. 1 & 3. He denied that on 25.08.1995 the witness went to police station and gave complaint. He admitted that as the witness was rickshaw driver, the traffic police used to file many cases against him. But he denied the suggestion that on account of many traffic cases, the witness had to enter into conflict with the police. The witness denied the suggestion that Police Commissioner is the authority for making grievance against the police officer. In clear terms he admitted that on 25.08.1995 after the thumb mark was taken, he has not made any complaint to higher authority. The witness does not know advocate M.I.Laliwala nor he has seen him. After the witness was examined on 27.03.1997 he has not made any complaint through this court also. The witness has signed the affidavit at exh. 72 in presence of Jailor. The witness does not know who is Notary Public. Typing of exh. 72 was done in the jail premises. The witness denied that he was knowing accused no. 1 & 3 before he went to jail and that whenever he was in jail both the accused used to meet him who forced him to execute affidavit at exh. 72. The witness also denied that today, he is under threat of accused no. 1 & 3. Lastly, he denied that he was stating that there were theft cases filed against him and cases under PASA were filed against him in order to help the accused.

20. So far as deposition of P.W.no. 2 Akbarkhan Abbaskhan is concerned, it is recorded at exh. 14. In clear terms he stated that his real name is Akbarkhan Raju. He states that he is residing at Saudagar Pole, Jamalpur and serving in mutton shop situated nearby. He knows deceased Nizamuddin who was serving in railway's diesel shed. On the day of incident i.e. 25.08.1995, the witness was standing outside his lane where Nizamuddin had come and told him that as he was down with fever, he would go with the witness and return after putting his leave. Thereafter, both of them went to the diesel shed on scooter which was driven by the witness. Both of them reached the office at 8.30 a.m. where they stayed for 2 1/2 hours and thereafter they went to adjoining office also where they stayed for another 2 1/2 hours. Whereupon accused no. 1 came and left. After some time, along with two persons accused no. 1 came.

When he was sitting on table and deceased occupied a chair and other members of the staff were also there. Accused no. 1 caught hold of Nizamuddin and told him whether he wants to vacate the house or not. To this, Nizamuddin stated in the negative. Thereupon, Yakub Patel told "take out the kukari, he has to be beaten". Thereupon, Pappu brought kukari and accused no. 1 inflicted blows on the neck of the deceased. Thereupon, the other staff members and witness ran away. One of the persons who accompanied the accused no. 1 ran after him. He hid himself in the yard for 45 minutes. He came to the place of incident when people gathered and he saw the dead body of Nizamuddin. He also saw Munnabhai p.w. 1 at the place. He told him that he saw three persons running away. To a question whether Munnabhai gave names of assailants the witness stated that Yakub, Pappu and one other person were there. To this Munnabhai also told him to go to Nizamuddin's house and convey the message. At about 7.30 p.m. Munnabhai gave complaint to the police in the presence of witness. The police also recorded the statement of the witness. The witness rightly identified accused no. 1 and accused no. 2, to whom accused no. 1 called as Pappu. The witness also rightly identified the third person but was not knowing his name. The witness also rightly identified the kukari by which the accused no. 1 gave blow to deceased Nizamuddin. The other two persons also used to beat Nizamuddin by holding him in their hands. The witness also stated that both the persons were also having kukari in their hands. The witness identified the clothes worn by the deceased Nizamuddin at the time of the incident.

21. In cross-examination by the learned advocate on behalf of the accused, the witness denied that he used to give his name as Akberbhai Shaikh. He has no documentary evidence with regard that he has been known by people as "Raju". The witness denied that he is not known as "Raju". He denied that deceased Nizamuddin was a strong headed man and he used to do business of charas, ganja and also involved in theft of railway property and on account of this, he had many enemies. The witness further stated that on the day of the incident, Nizamuddin was suffering from cold. When they went to diesel shed on scooter, Nizamuddin did not sign the muster roll. The witness cannot say as to whether the sickness report was submitted by the deceased or not. The second office is situated at a distance of 200-300 ft. The witness has no knowledge of direction. After the incident took place, the witness with other staff members ran away from the room. When witness saw three persons in the room, none of them was having any weapon with him.

The witness denied that on account of talk between Nizamuddin and Yakub Patel, Nizamuddin got excited. The witness admitted that Nizamuddin was sitting in the chair when scuffle started. The witness does not know whether on account of the attack on Nizamuddin, the witness saw blood on the floor area. The witness pointed out that he ran away from the place of incident on account of fear. The witness was sitting on the table at a distance of about 5 to 6 ft. from Nizamuddin but it is not necessary for him to cross the deceased or assailants while running away from table on which he was sitting. Stab wounds were given to deceased Nizamuddin. How many wounds were given that the witness cannot say. Neither the witness went to help Nizamuddin nor the other staff members went to help him. The witness came after some time and he saw the body of Nizamuddin at a distance of 200 ft. from the office. He did not see any blood on way to his office. Munna @ Gheti was standing near deceased Nizamuddin before witness went there. Deceased Nizamuddin was fast friend of witness and not Munnabhai. He stayed near the dead body for 15 to 20 minutes. On the day of incident, neither he saw Kamaluddin brother of Nizamuddin or met him. It was 5.30 p.m. when he went to give message at Nizamuddin's house. The witness did not tell anyone by which weapon Nizamuddin was attacked. The witness denied that on the day of incident, he and Munnabhai were falsely involved as witnesses by the police.

22. So far as p.w. 11 Dr.Vinayakarao Vasudevrao Patil at exh. 30 is concerned, he was one of the panel doctors who performed autopsy on the body of the deceased. On page 197 of the paper book the wounds stated by the Doctor are as under :

1. An incised wound is present on right cheek in center/in direction size 4.5 x 2.5 cms. It is muscle deep.
2. Two incised wounds were present on cheek oblique in direction. They were bone deep and underneath bones were sharply cut. Size each about 5.5 x 3.00 cms. and they were 2.5 cms. away from each other.
3. A horizontal large incised wound was present on middle of neck on front side. Size 7.5 x 5.5 x 5.0 cms. The tracheasophagus and muscle and bigger blood vessels of neck were sharply cut.
4. An incised wound present on left side of face 4 cms. below left ear. Size 8.5 x 3.5 x 3.5 cms. The muscles and blood vessels were sharply cut. External jaugular vein was sharply cut.
5. An incised wound was present on top of left shoulder. Size 7 x 2.5 x 3.0 cms. It was muscle

deep.

6. Five incised wounds were present on back of left forearm. They were oblique, overlapping and merging in each other. Size each about 4.5 x 2.5 to 3.5 x 1.5 cms.
7. Four oblique stab wounds were present on upper half of left side of chest. Size each 3.5 x 1.5 cms. to 2.5 x 1.5 cms. They were present about four cms. away from each other. All were cavity deep. All had sharply cut. The 3rd, 4th and 5th ribs sharply.
8. Two oblique stab wounds were present on front of chest in center at upper part. Size each 3x2 cms. and 2.5 cms. away from each other. They were cavity deep.
9. Two stab wounds were present on right side at the level of seventh rib 2.5 cms. right to midline. Size each 2 x 1 cms. Both were cavity deep. The right seventh rib was sharply cut and oblique in direction.
10. Four stab wounds were present on left side of chest. Each oblique in direction. Size 3.5 x 2.0 cms. to 3 x 1.5 cms. They were present in middle and little upper part of the chest. They were 3.5 to 4.0 cms. away from each other. All were cavity deep and underneath ribs were sharply cut.
11. Three stab wounds were present on left waist region on outer side in middle. Size each 2.5 x 1.0 cms. All were muscle deep and oblique in direction.
12. Three stab wounds were present on lower half on abdomen in middle region. Size each 1.5 x 1.0 cms. They were oblique and 3 cms. away from each other.
13. Two stab wounds were present on right side of chest in lower part in 8th intercostals space in anterior auxillary line. Size each 2.8 x 1.5 cms. They were oblique in direction and cavity deep.
14. An oblique stab wound was present on right side of abdomen in upper part 2 cms. right to midline. Size 2.5 x 1.5 cms. It was muscle deep.
15. Three stab wounds were present on right side of waist in middle region. Size each 2.2 x 1.0 cms. All were muscle deep and oblique in direction.
16. A large stab wound was present on right side of abdomen at lower end. Size 4.5 x 1.5 cms. Coils of intestine were protruding out of it.
17. A large stab wound was present on back of right

shoulder. It was coming out through axillary whole. Size 4.5 x 4.0 cms. of each wound. Two such wounds were produced by one blow only.

18. A large incised wound was present on right forearm on its back in center part. Size 5.5 x 8.0 cms. x 3.0 cms. Muscles and blood vessels were sharply cut.
19. Two stab wounds were present on back in lower part at T-twelve region level and Lumber level. (T means thorasic and L Lumbar). They were 3 cms. away from midline. Size each 5.0 x 2.5 cms. They were cavity deep and entered in abdominal cavity.
20. Four contused abrasions were present on back of left shoulder. Size each 7.5 x 1.0 cms. They were cross-crossing each other.
21. Four contused abrasions were present on back and outside of left arm. Size each 6.5 x 1.0 cms. They were overlapping each other.
22. Stab wound was present on left hip lower and inner quadrant. Size 2 x 1 cms.
23. Incised wound was present on top of head oblique in direction. Size 9.5 x 2.5 cms. It was bone deep.
24. An incised wound was present on occipital region of head. Size 4.5 x 3.5 cms. It was bone deep.

It was noted by us that margins of all the stab wound were sharply cut, one angle was sharply cut and another was slightly bruised. Margins of all stab wound were red in colour.

On internal examination, we found following internal injuries :

1. In head region there was echmosis of scalp on top of head and occipital region. No fracture could be seen.
2. The internal injuries of chest. All the stab wounds of chest which were cavity deep had entered in the thorasic cavity and the chest wall muscles and pleura were sharply cut. There was about 1500 cc of fluid blood in either pleural cavity. Both lungs were pale and collapsed. Both lungs were sharply cut at many places, due to stab wounds. All stab wounds of lungs were corresponding to external wounds as described. All stab wounds were converging towards their tips and were about 8.5 to 10.0 cms. deep.

Internal injuries of abdomen :

1. The stab wound present on abdomen which had entered into abdomen cavity had sharply cut the abdominal wall, as mentioned in column no. 17, there was about 1300 cc of fluid blood in abdominal cavity. Stomach was having semi digested food. Mucosa was normal. The coils of intestine were sharply cut at many places due to external injury no. 19. The left kidney was sharply cut through and through. The stab wound of external injury no. 13 had entered deep in liver. The entire liver tissue were sharply cut. All other abdominal organs were pale.

About 100 ml. blood was collected in a bottle and handed over to the Police constable on duty after labelling and sealing it.

All external injuries were antemortem in nature. In this case death was due to hemorrhage and shock as a result of multiple injuries sustained. The injuries were caused by sharp edged and tipped penetrating weapon/weapons.

After referring to muddammal articles kukari and knives, the doctor has observed that the injury could be caused by muddammal articles kukari and knives.

23. In cross-examination of the doctor by the learned advocate for the appellants-accused, has tried to bring on record that due to injury no. 3 of column no. 17 there would be profuse bleeding and the person who was standing nearby can get blood stains on his person or clothes and the injured person can hardly walk 2-3 steps. The doctor has also stated that in view of the injuries found on the body, it is difficult to find out exact weapon by which injury is caused.

24. So far as P.S.I. Govindbhai Parsotamdas Prajapati p.w. 12 at exh. 37 is concerned, he stated that on 25.08.1995 while he was in investigation squad at about 13.30 hrs. he received one entry no. 24/95 which stated that body of Nizamuddin is lying near diesel loco shed due to injury caused with the weapon. Therefore, witness went for the investigation. He saw body with many wounds on it. He held the inquest panchanama exh. 17 The body was lying near the track. He prepared the panchanama of scene of offence in presence of panchas. In the meantime, he informed his P.I.Mr.Mirza. The witness identified his/panchas signature on the panchanamas exh. 17 & 19 and articles seized thereunder.

25. In cross-examination, the witness admitted that

entry no. 24/95 was of cognizable offence and if complainant is present, complaint is recorded and if nobody is present on the complainant's side, the police officer on behalf of the State gave FIR which is said to be entry no. 24/95. There are no names of the accused in the entry no. 24/95. The witness admitted that till he recorded the panchanama of scene of offence, the names of accused were not known. The P.I. came on the spot at the place of offence at about 4.15 p.m. In the meantime, his brother Kamaluddin came to the spot and claimed the body of his brother. He did not disclose the names of assailants. The witness identified the signatures and contents of documents produced at exh. 39 to 42 which are produced by the advocate on behalf of the present appellants-accused.

26. The last witness Mohamadbeg Sardarbeg Mirza p.w. 14 at exh. 60 at the relevant time has stated that he took over the investigation from P.S.I. Mr. Prajapati and he received the papers including inquest panchanama and panchanama of scene of offence from P.S.I. Prajapati. He recorded the complaint of Munnabhai @ Gheti and obtained his left hand thumb mark which he admitted in court. The trial court has observed that the said complaint cannot be termed as FIR under Sec. 154 of the Code. The police station diary had recorded entry no. 24/95 (exh. 47) at about 13.30 hrs. which was a cognizable offence. Therefore, FIR was recorded. Thereafter, witness recorded the statements of the concerned persons and on 19.9.95 he has stated that all the three appellants were taken in police custody and all the three accused shown their willingness to show the weapons which they used in the alleged crime. Accordingly, he has recorded the panchanama by visiting the place by the said accused in presence of panchas. The witness also identified the weapons that were seized and also identified the clothes of the deceased and signature of the panchas. On 1.11.95, T.I. parade was held.

27. In cross-examination of the witness, he stated that in exh. 48 the names of appellant no. 1 & 2 and appellant no. 3 is stated as unknown. The witness has stated that T.I. parade is necessary if the name and description of the alleged accused is not stated in the FIR. In the report produced at exh. 48 the place of incident is shown as kankariya railway diesel shed. In clear terms he has stated that room, gate of the room and railway tracks are at the different place. However, he voluntarily stated that they are situated nearby. On the day of the incident, Munnabhai @ Gheti came to him at about 5.00p.m. The witness recorded the statement

Akbarkhan @ Raju on 25.08.1995 but he does not know where it was recorded. He has noted that he has no evidence to show that his name is Raju. He admitted that the name of Raju is not shown in the list of witnesses. Lastly the witness admitted that the quarter of Nizamuddin was ordered to be vacated by the authority. He admitted that he did not collect any evidence that accused no. 2 & 3 are known by their alias names. He denied that none of the accused has shown their willingness to show their respective weapons.

28. From the aforesaid depositions that have come on record, we are of the opinion that Akbarkhan @ Raju can be said to be reliable witness and that there is no reason to disbelieve him so far as the ocular aspect of prosecution case is concerned. It is true that when the evidence of a single eye-witness is to be assessed, court is required to proceed with due care and caution, not only that, but must seek adequate corroboration in respect of material aspects and vital issues. However, it may be noted that what is needed is quality of evidence and not the quantity of evidence. The evidence of a single eye-witness is natural, unbiased and trust-worthy and nothing unusual to rely on it. The witness Akbarkhan cannot be branded as a related or interested witness, because he is merely a friend of the deceased. There is nothing significant to infer that there was enmity between himself and accused persons. His conduct appears to be consistent and natural in accompanying the deceased to his office at Loco Shed on the date of incident. He stayed along with him till the accused persons attacked the deceased. On being seen, attack in a ghastly manner with deadly weapons on the person of deceased, he became helpless and frightened and ran away from office do suggest that he was very well present in the room while deceased sustained multiple injuries from all the three accused. Evaluating his substantive evidence in toto, hardly, it can be said that he has improvised his version or made an attempt to implicate wrong persons i.e. accused persons.

29. While arguing, Mr.K.J.Shethna learned advocate for the appellants, stated that when a close friend was attacked, he did not try to save him. On the contrary he ran away and again appeared at the scene of offence and rushed to see his friend (deceased). The police commenced investigation on the strength of Vardhi exh. 47, drew inquest report exh. 17 and also panchanama of scene of occurrence exh. 19. In the evening, his statement was recorded. According to the witness initially while they were in other office room, accused

no. 1 alone did visit the office and left. Subsequently, after some time, accused no. 1 came there with accused nos. 2 & 3. After some talk between the deceased and accused no. 1, the accused no. 1 called accused no. 2 by name Pappu in his presence. Therefore, he had an opportunity to identify both of them. He was not knowing the name of accused no. 3, however, he was known by his appearance and identified in the court room as one of the assailants. It is his evidence that the three accused inflicted blows on the person of deceased and they were having jamaiya. However, discovery of weapons at the instance of accused nos. 2 & 3 suggests that it was knife and accused no. 1 had jamaiya, kukari. It is clarified that he might be identifying knife as jamaiya. At the relevant time, under given situation, it cannot be expected of him to see minutely the description of particular weapon. However, it is a fact that all the three appellants-accused were equipped with deadly weapons wielded the same and caused multiple injuries on the person of the deceased. First blow was given by accused no. 1 on the neck of the deceased. It has been argued that to this attack witness Akbarkhan @ Raju did not make any hue & cry or try to save the deceased. But such attitude of a person depends upon his mental and physical make up. Every person cannot be expected to react in an identical manner under identical situation and atmosphere. It has also been said that deceased wanted to place his leave report to the office, as he was down with fever and therefore he along with witness Akbarkhan went to office. Copy of muster is produced at exh. 66 and it reveals that his presence was marked there. Therefore, it creates a doubt as to whether witness was present there or not. The deceased has gone to give his leave report, but he did not do so and stayed in the office premises till he took his last breath. Copy of muster produced at exh. 66 suggests that deceased was physically present in the office and it does fortify the say of Akbarkhan that they both went to the office of deceased on scooter. Situation might be such that deceased preferred not to put his leave report. Thus, the testimony of eye-witness Akbarkhan @ Raju cannot be brushed aside. He is believable and it does inspire confidence.

30. It is the case of the defence that due to injuries sustained, there should have been flow/fountain of blood, however, no such blood stains were found on the spot or clothes of witness Akbarkhan. It may be noted that it is not necessary that whenever such situation arises, it is inevitable to have blood stains on the person who is sitting nearby. It depends on many factors

viz. how he was sitting, how deceased was surrounded by the assailants etc. etc. It has come on record that witness Akbarkhan @ Raju was sitting on table, deceased had occupied chair and due to his such position, he was able to run away without crossing assailants. There might be discrepancies of trivial nature but such discrepancies would not effect the case of conviction imposed on the appellants. The evidence of eye-witness Akbarkhan @ Raju has been supported by the deposition given by p.w. no. 1 Munnabhai @ Gheti. From his evidence, it can be gathered that on the previous day there was altercation in between deceased and accused no. 1 in respect to house (quarter) and he could gather such information from one Shafibhai. Soon after the incident, he saw the present appellants running away and also saw the deceased in a pool of blood. Raju was present there. Thus, he throws light on subsequent conduct of the accused which is in consonance with prosecution story. Though witness Munnabhai @ Gheti did not see the commission of offence, such statement of said witness is relevant. However, the witness Munna @ Gheti took 'u' turn by giving evidence as D.W. no. 1 wherein he has given complete go bye to prosecution version and whatever he had done, stated and deposed, he was compelled by present appellants/police to do so. His subsequent version cannot be relied on as defence witness, because incident occurred on 25.8.95. The complaint/statement was recorded on the very day. His deposition was recorded in the court on 13.3.97. Thereafter, he submitted an application exh. 51 contending that he should be examined as court witness which was rejected by court with reasoned order on 28.11.1997. It also transpires from his cross-examination as a defence witness, that he is in jail due to his involvement in Narcotic case where the present appellants were also lodged in jail during relevant period. It can be very well presumed that witness Munna @ Gheti was induced to give contrary deposition due to his association with the accused persons in jail. Therefore, his silence from 25.8.95 to 25.9.97 does suggest that as defence witness, he has adduced false evidence before the court and thus committed perjury. Court also issued notice for perjury under sec. 193 of the I.P.C. to show cause why the witness should not be tried under Sec. 344 of the Cr.P.C. which was subsequently stayed by the trial court judge under provision of Sub-sec. 1 of Sub-sec. 4 of Sec. 344 of the Cr.P.C.

31. While adverting to medical evidence, another piece of corroboration to the version of prosecution is deposition of Dr.V.V.Patil (Exh. 30 p.w. 11) who

conducted autopsy. There were in all 24 external injuries and three internal injuries on the head, chest and abdomen region. According to him injuries were caused by sharp edged, deep penetrating weapons. The victim had sustained multiple injuries and owing to the same, there was hemorrhage which ultimately resulted into his death. The cumulative effect of injuries found on the dead body were sufficient in ordinary course of nature to cause death and the injury found out on neck, a vital part of the body alone could have caused death. It is not the case wherein ocular version of witness Akbarkhan @ Raju is at logger-head with medical evidence with respect to injuries received by the victim/deceased. It is the opinion of the doctor who conducted autopsy. The fact remains that three accused assaulted on unarmed deceased abruptly and suddenly with pointed and sharp weapons. When assault was unexpected and so sudden that it cannot be expected of a witness to observe and identify meticulously what and how the weapons were used. On this count also, ocular account prevails over medical evidence. It is true that to arrive at definite conclusion of guilt, medical evidence cannot be overlooked. But in this case, it cannot be held that medical evidence does not support the account given by eye-witness. Doctor has opined that in view of multiple injuries, he is unable to point out exact weapon for a particular injury. Due to certain discrepancies between the medical evidence and testimony of eye witness, course of throwing away prosecution case cannot be adopted. It has also come on record that the alleged offence was committed on 25.8.95 at 12.30 noon and the accused persons came to be arrested on 19.9.95 i.e. after approximately 24 days and the weapons were seized at the instance of accused persons and panchanama u/s 27 of the Evidence Act was drawn. So far as such panchanama pertaining to accused no. 1 & 3, punch witness has supported the prosecution case. The discovery at the instance of accused no. 2 has been established by prosecution through I.O. Shri Mirza. It has been argued by Mr. Shethna learned advocate for the appellants that the weapons seized are not in consonance with the medical evidence and accordingly no such reliance can be placed on such panchanamas as the places from where the weapons found are accessible to all. As such muddammal article no. 1 kukari was found at the instance of accused no. 1 from inside the house/compound of his quarter where it was concealed in one tank having stone cover and the same was brought out by him after removing the said cover. Likewise, accused no. 2 had brought out one knife, article no. 2 from drainage. Accused no. 3 had also brought out knife hidden under bush of grass. Under the

circumstances, the places from where the kukari and knives were brought out are not easily accessible to everybody. Even otherwise also, account of eye-witness coupled with medical evidence have proved the prosecution case beyond reasonable doubt.

32. So far as the submission of Mr.K.J.Shethna regarding the place of offence is concerned, the panchanama of scene of offence exh. 19 suggests that the dead body of deceased was found lying on railway tracks. According to the witness Akbarkhan @ Raju the distance between the office and railway tracks is about 200 ft. Thus, it throws doubt as to whether Akbarkhan had seen the alleged offence or not. It is true that two places are distinct, however, I.O.Shri Mirza has stated in his evidence that the fuel room, the gate of fuel room and the railway tracks can be called distinct places but they are nearby.

33. It was argued by Mr.Shethna learned counsel for the appellants-accused that vardhi exh. 47 does not disclose the names of accused or description of weapons. However, it can be said from the stages of investigation that names of the appellants-accused and description of weapons could only be gathered after the complaint of Munna @ Gheti and statement of Akbarkhan @ Raju came on record.

34. So far as authority in case of Ramratan and others (supra) is concerned, it relates to Evidence Act. However, the Apex court has held that in order to make the former statement admissible under Sec. 157 it is not necessary that the witness to be corroborated must also, besides making the former statement at or about the time the fact took place, say in court in his testimony that he had made the former statement. It further says that as a general rule court may act on testimony of such solitary witness without corroboration unless circumstances of a particular case necessitated corroboration.

35. In case of Awadh Behari Sharma (supra), the Apex Court has held that "where the statement of a prosecution witness, examined earlier, to another prosecution witness, who is examined later, is sought to be made use of by the prosecution, without the earlier prosecution witness having been asked about it in his examination, the earlier prosecution witness to whom the statement is ascribed must be given an opportunity to explain it. The witness should at least be recalled for the purpose. In the absence of such opportunity the statement of the

earlier prosecution witness is inadmissible in evidence.

36. In case of Mohan Singh and another (supra), the Apex Court dealt with Sec. 149 and 34 of the Code and held in para 8 as under : "One of the essential ingredients of Sec. 149 is that the offence must have been committed by any member of an unlawful assembly and Sec. 141 makes it clear that it is one of the essential conditions of an unlawful assembly that its membership must be five or more."

37. In case of Prabhoo (supra) the Apex Court dealt with Sec. 25, 26 and 27 of the Evidence Act wherein it was held that if the statements relating to axe and dhoti were excluded from evidence then there remained only the circumstantial evidence. But as the chain of circumstantial evidence was not complete in this case the conviction of the accused for murder of his uncle deserved to be set aside."

38. In case of Krishna Govind Patil (supra), the Apex court held in para 6 as under : " It is well settled that common intention within the meaning of Sec. 34 implied a prearranged plan and the criminal act was done pursuant to the pre-arranged plan. The said plan may also develop on the spot during the course of the commission of the offence but the crucial circumstance is that the said plan must precede the act constituting the offence. If that be so, before a court can convict a person under Sec. 302 read with Sec. 34 it should come to a definite conclusion that the said person had a prior concert with one or more other persons, named or unnamed, for committing the said offence."

39. In case of Mohd. Iqbal Shaikh (supra), the Apex Court came to the conclusion that evidence of all eye witnesses suffering from infirmities and not reliable and accordingly set aside the conviction of the accused.

40. There is no dispute as regards position of law laid down in the aforesaid judgements and we are bound by the ratio laid down in the said judgments, however, it does not apply to the facts and circumstances of the present case.

41. Before concluding, a reference deserves to be made to a few decisions of the Apex Court which are as under :

1. In case of Meharban and others V/s State of M.P. reported in (1996) 10 S.C.C. 615, it is held by Apex

Court that "It is known that what the court has to adjudge is the substratum of the case and, in doing so, grain has to be separated from chaff. It is settled law that some improvements here and some exaggerations there or some minor discrepancies in the evidence do not hurt the prosecution case."

2. In case of Kartik Malhar V/s State of Bihar reported in (1996) 1 S.C.C. 614 it is held in para 7 that "conviction can be recorded on the basis of the statement of a single eye witness provided his credibility is not shaken by any adverse circumstance appearing on the record against him and the court, at the same time, is convinced that he is a truthful witness. The court will not then insist on corroboration by any other eye witnesses particularly as the incident might have occurred at a time or place when there was no possibility of any other eye witness being present. Indeed, the courts insist on the quality, and, not on the quantity of evidence."

3. In case of State of Haryana V/s Tek Singh and others reported in AIR 1999 S.C. 1742 it is held that "it would be difficult for any witness to state exactly which accused inflicted how many blows on deceased and exaggeration with regard to inflictions of blows by witnesses to be separated by taking into consideration overall facts in record. Further evidence of prosecution was fully corroborated by medical evidence and FIR."

42. In view of the aforesaid circumstances, we find ourselves in complete agreement with the reasonings and findings of the learned trial Judge. Therefore, the present appeal deserves to be dismissed and accordingly it is dismissed. Now, the trial court is at liberty to proceed against the witness Munna @ Gheti under Sec. 344 of the Cr.P.C.

(H.H.MEHTA, J)

(SHARAD D DAVE, J)

srilatha

