IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 523 of 1997
With
CRIMINAL APPEAL No. 532 of 1997
With
CRIMINAL APPEAL No. 539 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH sd/-.

HONOURABLE MR.JUSTICE H.B.ANTANI sd/-.

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	**YES**
2	To be referred to the Reporter or not ?	**YES**
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	NO
5	Whether it is to be circulated to the civil judge ?	NO

==========

THAKOR JINA VERSHI & 1 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

==========

Appearance :
Criminal Appeal No.523 of 1997.

MR BP MUNSHI for Appellants-ORIG. ACCUSED NOS.8 AND 14.
MS DS PANDIT, LD.ADDL.PUBLIC PROSECUTOR for Respondent.

==========

Criminal Appeal No.532 of 1997.

MR EKANT AHUJA for Appellants-ORIG.ACCUSED NOS.5 AND 10.
MS DS PANDIT, LD.ADDL.PUBLIC PROSECUTOR for Respondent.

==========

Criminal Appeal No.539 of 1997.

MR HARNISH DARJI for Appellant-ORIG.ACCUSED NO.3.
MS DS PANDIT, LD.ADDL.PUBLIC PROSECUTOR for Respondent.

==========

CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

and

HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 23/10/2008

COMMON CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE C.K.BUCH)

1. Criminal Appeal No.523 of 1997 is preferred by the appellants-orig. accused no.8-Jina Vershi and orig. accused no.14-Khoda Vershi (hereinafter referred to as 'accused no.8 and accused no.14' respectively) challenging the judgment and order of conviction and sentence dated 31st March 1997, passed by learned Sessions Judge, Surendranagar, in Sessions Case No.39 of 1995, whereby the learned trial Judge at the end of trial has convicted accused no.8 for the offence punishable under Section 302 of the Indian Penal Code and convicted accused no.14 for the offence punishable under Sections 302 and 326 of the Indian Penal Code. The learned trial Judge has sentenced each accused no.8-Jina Vershi and accused no.14-Khoda Vershi to undergo imprisonment for life and each of them to pay

a fine of Rs.1000/- and in default of payment of fine, further to undergo rigorous imprisonment for three months for the offence punishable under Section 302 of the Indian Penal Code. Accused no.8-Jina Vershi is further sentenced to undergo rigorous imprisonment for three years and fine of Rs.250/- and in default of payment of fine to undergo further rigorous imprisonment for one month, so far as offence punishable under Section 326 of the Indian Penal Code is concerned.

2. Criminal Appeal No.532 of 1997 is preferred by the appellants-orig.accused no.5-Dashrath Okha and orig. accused no.10-Chatur Harji (hereinafter referred to as 'accused no.5 and accused no.10' respectively) challenging the judgment and order of conviction and sentence dated 31st March 1997, passed by learned Sessions Judge, Surendranagar, in Sessions Case No.39 of 1995, whereby the learned trial Judge at the end of trial has convicted accused nos.5 and 10 for the offence punishable under Section 302 of the Indian

Penal Code and sentenced each of them to undergo imprisonment for life and to pay a fine of Rs.1000/- and in default of payment of fine, further to undergo rigorous imprisonment for three months for the offence punishable under Section 302 of the Indian Penal Code. Both the accused nos.5 and 10 are further sentenced to undergo rigorous imprisonment for three years and each to them to pay a fine of Rs.250/- and in default of payment of fine each of them is sentenced to undergo further rigorous imprisonment for one month, so far as offence punishable under Section 326 of the Indian Penal Code is concerned.

3. Criminal Appeal No.539 of 1997 is preferred by the appellant-orig.accused no.3-Dharamshi Harji (hereinafter referred to as 'accused no.3') challenging the judgment and order of conviction and sentence dated 31st March 1997, passed by learned Sessions Judge, Surendranagar, in Sessions Case No.39 of 1995, whereby the learned trial Judge at the end of trial has convicted accused no.3 for the offence punishable under Section 302 of the

Indian Penal Code and sentenced him to undergo imprisonment for life and to pay a fine of Rs.1000/- and in default of payment of fine, further to undergo rigorous imprisonment for three months for the offence punishable under Section 302 of the Indian Penal Code.

4. Total 15 persons have been prosecuted for various offences for the incident occurred on 28th February 1995 at 07-00 p.m. in village Odu, Tal. Patdi, Dist. Surandranagar. All these accused were arrested for the offences punishable under Sections 147, 148, 149 read with Sections 302 and 326 of the Indian Penal Code and also under Section 135 of the Bombay Police Act. As per the case of the prosecution, all the 14 accused persons were the members of the unlawful assembly and most of them were holding deadly weapons in their hands and they had cornered and assaulted Dharamshi Bhikha. On account of the blows inflicted upon him, Dharamshi Bhikha-brother of the complainant-Kaliben Bhikhabhai, had died on the site, more particularly on account of the blows inflicted on his head-the most

vital part of the body. The accused simultaneously caused injuries to the complainant-Kaliben who rushed to rescue her brother and also PW-3 Gomtiben, mother of Dharamshi. According to prosecution, thereby, the accused committed offences punishable under Sections 302 and 326 of the Indian Penal Code along with the offences of rioting punishable under Sections 147, 148 and 149 of the Indian Penal Code and also the offence punishable under Section 135 of the Bombay Police Act.

5. The brief facts of the prosecution case are reflected in the charge at Ex.3 framed by the learned trial Judge and initially it would be appropriate to state the facts of the prosecution case which in nutshell are that on the date of incident i.e. on 27th January 1997, the complainant-Kaliben had been to her parental home at Patdi as her mother-Gomtiben was sick to see her mother. The complainant had three brothers and Karamshi is the younger to deceased Dharmashi and Amarshi is the youngest one. Amarshi is doing labour work at

village Khara Ghoda and Karamshi is at Jamnagar. Dharamshi was serving with Hindustan Salt Company located at Small Runn of Kachchh by staying at village Odu. On the date of incident, Dharamshi had been to village Odu on his bicycle as he was to purchase baskets made of bamboos, popularly known as 'Topla' and also to arrange for daily labourers. He was standing with his bicycle near the shop of one Narottambhai at the corner of the road and he told the complainant-Kaliben to fetch flour lying at flour mill. At that time, PW-3 Gomtiben-mother of complainant was also there. When she was returning from the flour mill, at about 07-00 p.m., the accused no.14-Khoda with spear along with accused no.9-Gordhan with axe; accused no.1-Shakta Vershi with Dhariya, accused no.7-Labhu with Dhariya and accused no.10-Chatur with Dhariya; accused no.15-Sonaji Rupaji with 'Kodali' (pick-axe); accused no.3-Dharamshi Harji with axe, accused no.2-Noorbhai with Dhariya, accused no.5-Dashrath with axe, accused no.6-Bana with Dhariya, accused no.4-Kalu-brother in law of Chatur Harji with Dhariya, , had rushed

there.. All these accused assaulted victim Dharamshi (deceased), brother of the complainant-Kaliben, on his head and Dharamshi had fallen down. At that time, accused no.10-Chatur Harji had given Dhariya blow on the head of Dharamshi and accused no.3-Dharamshi (Dhama) gave axe blow on head; accused no.15-Sonaji Rupaji had given blows with pick-axe and the rest of the accused were also giving blows to Dharamshi. Accused no.8-Jina Vershi had inflicted 3 to 4 blows. Her mother was also given blow on her right leg and her leg on account of the said blow got fractured. Accused no.10-Chatur had given Dhariya blow and accused no.3-Dhama had given axe blow on the elbow joint and leg of complainant-Kaliben and thereby, she had sustained injury on left hand finger. During the incident, the lady accused no.12-Bhuri Kalu-wife of accused no.4-Kalu and sister of accused no.10-Chatur; accused no.11-Hiraben wife of Charur; accused no.13-Puriben daughter of Okha Meru, had caught hold of the complainant. Accused no.14-Khoda Vershi had given blow with reverse side of spear on her back which had resulted into

bruise. At that time PW-Kamal Khan, who was engaged to look after the outskirts and fields of village Odu, was passing through the said area and therefore, the complainant informed PW-Kamal Khan and ultimately informed the Jhinjhuwada Police Station on telephone and called the police. According to the complainant, prior to about two years, Pama Okha-real brother of accused no.5-Dashrath and Madhu-daughter of real sister of the complainant had eloped and till the date of complaint, they were not traced, So the accused were feeling inimical and assaulted Dharamshi.

6. The offence is registered at Jhinjhuwada Police Station vide C.R.No.I-8 of 1995 on 29th January 2008 at about 01-30 a.m. According to the complainant-Kaliben, she gave the complaint at Jhinjhuwada Police Station and the same was reduced into writing. On the other hand, the case of the prosecution is that the complaint was registered at Odu only as stated by the police officer who recorded the complaint, but the fact remains that the

Jhinjhuwada Police Station registered the offence in couple of hours though the distance between the said Police Station and the village Odu is of about 24 kms. Here it is relevant to note that initially there was some error in disclosing the name of one of the accused as orig. accused no.4-Lahu Vershi was named as person involved in the incident. However, vide application dated 04th March 1995, the complainant requested and informed the District Superintendent of Police that Labhu Vershi is not the real brother of accused no.1-Shakta Vershi, accused no.9-Gordhan Vershi or accused no.14-Khoda Vershi nor he is related to these accused persons. Labhu Vershi had no inimical feelings against either family and he was not carrying any motive. The person involved in the incident was Dinu alias Dilu alias Dinesh Vershi. He had played a substantial role in the incident and, therefore, this Dinesh is required to be treated as accused instead of Labhu Vershi. After investigation, the police chargesheeted Dinu alias Dilu alias Dinesh Vershi as one of the accused. There is no formal report under

Section 169 of the Cr.P.C. available on record dropping Labhu as accused. The prosecution has tried to clarify the contingency by placing the relevant record namely the application written by the complainant to the District Superintendent of Police, Surendranagar District at Ex.38 and the deposition of the Investigating Officer.

7. After investigation the Police chargesheeted 15 persons. Out of which 11 accused as alleged were armed with different types of weapons namely axes and Dhariyas. After evaluating the evidence, oral as well as documentary evidence, the learned trial Judge acquitted 10 accused from the charges levelled against them and convicted present appellants. Total 16 witnesses have been examined, including two medical officers and panch witnesses. Shri Ekant Ahuja, learned counsel appearing for the accused nos.5 and 10; Shri B.P. Munshi, learned counsel appearing for the accused nos.8 and 14; Shri Harnish Darji, learned counsel appearing for accused no.3 and Ms.D.S. Pandit, learned Additional Public Prosecutor,

have taken us through the evidence led by the prosecution and the reasons assigned by the learned trial Judge for recording the finding under challenge in these appeals.

8. There is no serious dispute as to the time and place of incident. We are told that village Odu is a small and the complainant as well as local resident know one another, including the accused persons by name. The date of incident is 28th January 1995. So it must not be total dark and it is possible to identify the known person in the evening. According to prosecution, the motive is specifically pleaded by the prosecution of taking away the sister of the complainant by Pama Okha, brother of accused no.5. It is pointed out to us that out of 15 accused arrested by the police as they are named in the FIR belong to the family of Pama Okha, who was not traced with the girl till the date of incident, accused no.5-Dashrath Okha, accused no.6-Bana, accused no.7-Labhu, accused no.13-Puriben, four of them are from the family of Vershi i.e. accused no.1-Shakta Vershi, accused no.8-

Jina Vershi, accused no.9-Gordhan Vershi and accused no.14-Khoda Vershi. Three accused belong to the family of one Harji i.e. accused no.3-Dhama Harji, accused no.10-Chatur Harji and accused no.11-Hiraben Chatur (wife of Chatur Harji). Accused no.12-Bhuri is the wife of Kalu Ratu and accused no.4-Kalu is brother-in-law of accused no.11-Hiraben Chatur i.e. husband of sister of Hiraben Chatur. Out of total accused, 11 accused persons alleged to have been armed as mentioned in the FIR, if are classified, six accused were holding Dhariya, four accused were holding axe and one was holding spear. The Investigating Agency has not recovered all the weapons mainly the axe allegedly used in the offence. Two blood-stained axes, allegedly recovered from accused no.3-Dhama Harji and accused no.5-Dashrath Okha, were sent for analysis to the Forensic Science Laboratory. In the same way, one Dhariya allegedly recovered from accused no.10-Chatur Harji was also sent for analysis to the Forensic Science Laboratory along with eight other articles, including the clothes of the deceased.

9. It is submitted by learned counsel appearing for the appellants that the finding recorded by the learned trial Judge is mainly based on conjectures and if the judgment and order of conviction and sentence is read closely, the conclusions have been drawn in last three to four paragraphs of the judgment and order of conviction and sentence after discussing the evidence and, therefore, such an order of conviction is not sustainable in the eye of law. The learned trial Judge has discussed the evidence of prosecution elaborately and has referred to the improvements made by prosecution witnesses and the contradictions emerging from the oral evidence led by crucial witnesses examined by the prosecution posed as eye-witnesses to the incident, but ultimately the effect of this infirmity has not been appreciated correctly. If the submissions of the learned counsel appearing for the appellants are mentioned in nutshell, they are as under :

9.1 The learned trial Judge has ignored the over all evidence led by the eye-witnesses with the

medical evidence materially, which has resulted into serious prejudice to the appellants. As per the rule of the best evidence, the medical evidence qua the injury found on the body of the eye-witnesses, PW-3 Gomtiben-mother of complainant and deceased, was required to be led. The tendency to implicate maximum number of family members of a family by the complainant and her mother PW-3 Gomtiben ought to have been condemned by the learned trial Judge and all the accused were required to be acquitted. There is reference in the documents produced by the prosecution, including police Yadi at Ex.31 page no.291 of the paper-book as “Maramari” (scuffle). So only one side appears to have been prosecuted by keeping curtain on the entire incident which might have occurred at village Odu.

9.2 Three different persons have investigated the offence and all the three have left material lacuna while investigating the offence which has resulted into serious prejudice to the

accused and thus, the investigation has not been fair to the accused.

9.3 Somebody educated or literate was behind curtain of the entire case placed by the prosecution, otherwise a scholarly application to the District Superintendent of Police could not have been preferred by a rustic illiterate lady complainant-Kaliben using the legal words to see that one of the accused in the FIR is dropped and another person is implicated vice the accused dropped. One of the submissions is that complainant-Kaliben was born and brought up at village Odu. She was able to identify all the accused, even then the said confusion had cropped up qua the identity of one of the accused. So this is a complaint which ought to have been planned as arranged complaint at the instance of persons inimical to the accused and there was no reason for the Police to chargesheet all the accused persons, more particularly in the background of number of injuries and nature of injuries found on the body of the person deceased as well as two injured eye-witnesses.

9.4 From record it is possible to infer that cataract in both the eyes of PW-3 Gomtiben-mother of complainant, who is posed to be an eye-witness. Her conduct in the Court and certain admissions made by her in her deposition itself make this witness unreliable qua involvement of all 15 accused in the complaint or the accused named by her. At the most, she can depose qua the persons who were allegedly nearer to her and allegedly inflicted the blows. So this witness Gomtiben could not have been considered as an important witness corroborating the version of complainant-Kaliben, another injured eye-witness.

9.5 The independent witnesses, except PW-Kamal Khan has not been examined by the prosecution. When it is the say of the prosecution that complainant-Kaliben had rushed to the house of a person resident of village Odu, running the Post Office in his house, so that she could make a telephone call and that man who had helped her and PW-Kamal Khan in making a

telephone call to the Police Station, has not been examined.

9.6 In the same way, Narottam-shopkeeper near whose shop or at the corner of whose shop, Dharamshi was killed by a mob of 15 persons, is supposed to know the number of persons being the resident of village, has not been examined. It was not late night. So there was scope of collection of group of persons within no time. True it is that a mob may not gather in a small village but at least four to five persons must have seen the incident, but the Police has not investigated at all in that direction. So no such witnesses have been examined and the case of the prosecution rests on the evidence of complainant-Kaliben, PW-3 Gomtiben-mother of complainant, PW-Kamal Khan and the medical evidence led by the prosecution.

9.7 The prosecution also relies on the report of the Forensic Science Laboratory. The Serological examination report shows that both the axes as well as Dhariya, recovered during investigation, were stained with blood and

blood group found on these three weapons is similar to the blood group found on the clothes of the deceased.

9.8 According to the learned counsel appearing for the appellants, the prosecution is supposed to lead convincing evidence qua the mode of recovery of these weapons and the evidence to the satisfaction of the Court that a particular article was in the hand of a particular accused named in the FIR and the complaint. If the evidence as to recovery of weapon is found hazy or not trustworthy, it would not be appropriate to link the accused with the crime when as per the case of the prosecution total four accused were holding axe at the time of incident. When it is the case of the prosecution that all had given blows with their respective weapons which they were holding, the learned trial Judge was supposed to give convincing reasons as to how two accused have been segregated from other two axe holders for inflicting blows either on the deceased or on any of the injured witnesses.

9.9 The accused holding spear has been wrongly convicted as such there is no injury on the body of any of the persons injured, including the deceased as injury which can be caused by spear. These persons were holding Dhariya and when only one Dhariya has been recovered, the accused no.10-Chatur could not have been linked with the crime for giving fatal blow to the deceased.

9.10 The medical evidence if is read along with the evidence of injured eye-witness Kaliben, it is clear that the case of prosecution is in clear conflict with the opinion evidence. In number of cases, this Court as well as the Apex Court have given advantage to the accused where the opinion evidence is not in conformity with the evidence given by the eye-witness. True it is that the evidence of an eye-witness whose version is found trustworthy and is able to stand all the test including the test of cross-examination, then undue weightage ought not to have been given to the opinion evidence and the Court can even ignore the opinion evidence to link the accused with the crime.

But when the evidence of eye-witness is found full of infirmities, contradictions and omissions and when there is infirmity as to identity and authorship of real fatal blow found on the body of the deceased, the medical opinion expressed by the learned trial Judge was required to be given due weightage by the learned trial Judge. In this fact situation, the appellants may be acquitted observing that the nature of evidence available on record is not either cogent or convincing.

9.11 A number of decisions have been cited by Shri Ekant Ahuja, learned counsel appearing for the appellants, in this regard and he has taken us through the relevant observations made by the Apex Court from the following decisions in the case of ***Rajaram v. State of M.P. and other allied appeals, reported in 1994 Supp(2) SCC 153***, and in the case of ***Balakrushna Swain v. The State of Orissa, reported in AIR 1971 SC 804***.

9.12 It is submitted by Shri Ekant Ahuja that the observations made by the Apex Court in the

case of Rajaram (supra) squarely helps the accused persons. In this cited decision, there was only one injury on the deceased which was found to be fatal. There were a number of injuries on the body of the person deceased but they are contusions on the legs, arms and palms. The accused were chargesheeted accordingly and convicted by the learned trial Judge for the charge of offence punishable under Section 302 read with other Sections of the Indian Penal Code, as there were injuries also on the body of the persons claiming to be eye-witnesses. Shri Ekant Ahuja has taken up through paragraph nos.5 and 6 of the cited decision which read as under :

“5. We have perused the evidence of PWs 1 and 2. Each one of the witnesses have named number of accused persons, and out of them, according to these witnesses, about 19 persons including the appellants are alleged to have inflicted blows on the deceased. However to start with, it were Phoolsingh and Bhaiyaram who felled down the deceased and attacked him with axe and lethal weapons.

But by way of omnibus allegation the witnesses deposed that all the other accused about 19 in number also inflicted injuries. The medical evidence does not support such an omnibus allegation. On this aspect we do not see any reasons given by the High Court as to how those appellants alone could be convicted by separating them from the rest. The High Court, however, pointed out by way of a passing reference that all of them formed into an unlawful assembly. We do not see any firm basis for the conclusion. The High Court also held that Kiratsingh came and joined the unlawful assembly a little later and therefore, he was not held responsible for the offence under Section 302 read with Section 149 IPC. In that view of the matter, the High Court convicted him only under Section 326 read with Section 149 IPC in respect of the offence of pouring acid in the eyes of two witnesses. This finding in respect of Kiratsingh also does not appear to be of any reasonable basis because both PWs 1 and 2 have deposed in a general way that he was also one of the assailants

who attacked the deceased. If that is the position, we think it is also highly unsafe to confirm the conviction of these appellants under Section 302 read with Section 149 IPC, particularly, when the medical evidence does not fully support such an allegation made by the two witnesses. As noticed above, only one injury on the deceased is found to be fatal which was a multiple contusion on the back. The Doctor found only one incised injury and that was not a serious one. The rest of the injuries were by contusions on legs, arms and on the palms. Therefore, it is also difficult to hold that the common object of the unlawful assembly was to cause death. Phoolsingh and Bhaiyaram accused, who are not before us, were the two persons who fell down the deceased and attacked him with lethal weapons. They were rightly convicted under Section 302 read with Section 34 IPC.

6. Taking all these circumstances into consideration, we set aside the conviction of Rajaram, Parma, Balloo, Dina and Gulab who are

the appellants in Criminal Appeal No. 497 of 1982 and Criminal Appeal No. 468 of 1984 and the 156 sentences of life imprisonment awarded against each of them for the said offences. Instead we convict them under Section 326 read with Section 149 IPC and sentence each of them to undergo 7 years' RI. We confirm the conviction of Kiratsingh, the appellant in Criminal Appeal No. 555 of 1983 under Section 326 read with Section 149 IPC and the sentence of 7 years' RI awarded thereunder. Munna, the other accused who is also convicted by the High Court under Section 302 read with Section 149 IPC is not before us. But in our view, this benefit should also go to him. Accordingly, we set aside his conviction under Section 302 read with Section 149 IPC and the sentence of life imprisonment awarded thereunder. Instead we convict him under Section 326 read with Section 149 IPC and sentence him to 7 years' RI. The other convictions and sentences awarded by the High Court against all the appellants and Munna are confirmed.”

9.13 The facts of the present case are just similar to the case before the Apex Court and the accused, therefore, may be given advantage and may be acquitted.

9.14 It is argued that the prosecution has failed in justifying the delay caused in recording the statement of PW-3 Gomtiben being an injured eye-witness and though she was available to the Investigating Agency her statement came to be recorded after several days. So as such PW-3 Gomtiben is posed as an eye-witness subsequently. In reality, she might not have witnessed the entire incident and it is highly probable that while running towards the place of incident on hearing about the assault made on her son in the bazaar, she might have fallen down as it was practically dark and also on account of developing cataract. Thus, the fracture injury sustained by her has been projected as an injury sustained during the course of said incident. Thus, she has been planted as an eye-witness to the incident, even otherwise also, she was sick as per the case of the prosecution. The

complainant-Kaliben had visited village Odu on account of illness of PW-Gomtiben. So the learned trial Judge ought to have appreciated the medical evidence available on record qua the fractured leg of PW-Gomtiben in a different perspective. Insufficiency of medical evidence in this regard also gets relevance.

9.15 One more point advanced by the learned counsel appearing for the appellants is that none of the accused has been held guilty for the charge of offences punishable under Sections 147, 148, 149, 34 or 114 of the Indian Penal Code. The respondent-State has not preferred any appeal against the order of acquittal. Each accused has been held guilty for his individual act and also imposed sentence for his personal criminal wrong. Such a judgment and order of conviction and sentence cannot sustain unless the finding recorded by the learned trial Judge is a well reasoned finding naming the accused for causing a particular injury to a particular person, including the deceased. Unless the Court is able to write

the name of the author of the blow on each blow given to the accused, the accused ought not to have been held guilty individually mainly for the offence punishable under Section 302 or Section 326 of the Indian Penal Code, as the case may be.

9.16 It is pointed out to the Court on behalf of the appellants that as per the postmortem note the deceased had following injuries :

(1) Incised wound 10.5 c.ms. X 1 c.m. on right of face from internal angle of eye starting from internal angle of eye and extending upto middle part of right ear deeply cutting bone.

(2) Incised wound 14 c.ms. x 2 c.ms. on right side of head from middle of forehead to middle of right ear about 3 c.ms. merged with injury no.(1) bone is cut brain matter is seen.

(3) Incised wound 6 c.ms. x ½ c.m. skin deep on right shoulder top and posterior part.

(4) Contusion 13 c.ms. X 3 c.ms. on right side of back in intercastal space.

(5) Contusion of 8 c.ms. x 3 c.ms. right arm internal impact midway left elbow and shoulder, transverse skull bone cut below injury nos.(1) and (2).

9.17 As per the medical evidence, the complainant-Kaliben had sustained following injuries as mentioned in the medical certificate issued by the Medical Officer who has initially examined and treated her :

(1) Incised would 2 c.ms.x ½ c.m. x ½ c.m. on right elbow internal impact.

(2) CLW 1 c.m. x ½ c.m. x ½ c.m. left middle finger dorsal impact fist inter phalangeal joint.

(3) Incised wound 1 c.m.x ½ c.m. x ½ c.m. right foot 4 c.m. above toes, swelling around injury.

(4) X-ray shows # 1st phalanx land IInd right toe.

9.18 The injury found to another eye-witness Gomtiben-mother of the complainant, is an injury of fracture of leg right but there is confusion. At one place, it is mentioned that she sustained fracture of Tibia and at another

place, it is found that she sustained fracture of both the bones of leg i.e. Tibia and Fibula. Indisputably, there was no external injury mark on the leg where the fracture was noticed. Neither the Radiologist is not examined nor the report of the doctor was available before the learned trial Judge. True it is that the X-ray plate is there but it is not found clear as to who took the X-ray and where the same was taken. Initially she was taken to Patdi Community Health Centre and she was advised to go to Ahmedabad as the doctor had noticed fracture on her leg. But instead of going to Ahmedabad, she preferred to go to Surendranagar. Therefore, somebody must have taken her to Surendranagar. Thereafter, from Surendranagar she was shifted to Ahmedabad for further treatment under some reference note. The chronology of event which was required to be produced in the present case to prove the genuineness of the injury of PW-3 Gomtiben being injury sustained during the said incident by producing convincing medical evidence as under :

(1) Injury Certificate or case papers issued by Community Health Centre at Patdi.

(2) Reference Note issued by Community Health Centre at Patdi.

(3) Either Certificate or case papers from Government Civil Hospital, Surendranagar or any document from a private doctor.

(4) Case papers of Civil Hospital at Ahmedabad or the Medical Certificate issued by the doctor, who examined this witness qua the fracture injury found on her leg.

9.19 It is submitted that the prosecution should also explain as to why there is conflict in the medical evidence qua the number of bones which were found fractured. The best evidence was required to be led, but the same has not been led in this regard. In this fact situation, the late recording of the state of PW-3 Gomtiben as eye-witness was required to be considered while scrutinising her evidence as eye-witness to the incident vis-a-vis the

other relevant aspects and Shri Munshi has placed reliance on one judgment of the Apex Court in the case of ***Balkrishna Swain v. State of Orissa, reported in AIR 1970 SC 804***.

9.20 The most important witness as per the story unfolded by the prosecution was PW-Kamal Khan, who according to prosecution, had reached to the place of incident and had assisted Kaliben in informing the Police. So this Kamal Khan must be the first person either he might have witnessed the incident or whom the complainant might have narrated the incident first of all. This PW-Kamal Khan has been examined by the prosecution and he has not supported the case of the prosecution and he has been declared as hostile. This infirmity in the evidence of prosecution makes the case of the prosecution highly improbable against all the convicts before the Court and, therefore, they deserve acquittal.

10. It is submitted by Ms. D.S. Pandit, learned Additional Public Prosecutor, that the judgment and order of conviction and sentence

recorded by the learned trial Judge is based on good sound reasons. The evidence led by prosecution has been discussed thoroughly, more particularly, two important eye-witnesses namely PW-2 Kaliben and PW-3 Gomiben, have been believed as truthful witnesses. Their presence at the spot was natural. None of these witnesses had good sound reasons to falsely implicate large number of accused persons in such a serious offence. These two witnesses more particularly, the complainant and PW-Gomiben, are the injured eye-witnesses having corroboration from medical evidence of PW-1 Dr.Gopalbhai Makwana. The injuries found on PW-2 Kaliben do not appear to be self-inflicted injuries so that she can pose herself to be an eye-witness. Indisputably, PW-2 Kaliben and PW-Gomiben, both belong to a very small village of a backward Taluka Patdi, Dist. Surendranagar. Both of them are illiterate and rustic villagers. The learned trial Judge was, therefore, supposed to separate grains from chaff as per the settled legal position and that exercise is found to have been taken care of by the learned trial

Judge. The minor contradictions amongst these two witnesses as well as certain improvements have been made by Kali during her deposition before the Court from her initial version recorded in the FIR, are not significant or grave in nature. So the same may not be considered as material infirmity.

10.1 In response to the query raised by the Court, the learned Additional Public Prosecutor has fairly accepted that no external mark of violence was found on the body of PW-Gomiben and there is also conflict in medical evidence as to whether she had sustained fracture of one bone namely Tibia or both the bones namely Tibia and fibula. Surendranagar being the district headquarter, the close relatives of PW-Gomiben might have decided to take her to Surendranagar instead of Ahmedabad, though they were asked to go to Ahmedabad for further treatment. So this mistake committed under anxiety is not required to be viewed seriously. It seems that the Government Hospital, Surendranagar authorities must have asked PW-Gomiben to go to Ahmedabad as she

was referred to Civil Hospital, Ahmedabad by the Doctor of Patdi Hospital. This has resulted into delay in recording of her statement and the appellants have attempted to enlarge this minor discrepancy as material infirmity in the case of prosecution. This by itself does not give an impression that the prosecution has remained unfair in recording the statement of injured eye-witness PW-Gomiben for some days. It would not be either legal or proper to infer, considering the facts emerging from record that she must have been planted as eye-witness to the incident.

10.2 It is submitted that the said PW-Gomiben had some problem at the relevant point of time on account of development of cataract in her one of the eyes. There is nothing on record to show as to what was the power in her vision at the relevant time of incident, but it is clear that on the date of deposition, she was not able to see the persons sitting or standing in the near vicinity and she committed error in identifying the persons. She also admitted in her deposition that at the relevant time of

incident, she had cataract and on the date of deposition also, after a lapse of reasonable good period, it was not removed. Meaning thereby, no operation was performed for removal of cataract. This may be an act of negligence on her part or lethargy or even the financial crunches may also be a case. The learned trial Judge has rightly not condemned this witness. Even certain infirmities have emerged from her deposition as well as during her cross-examination.

10.3 Prima facie the hostility of PW-Kamal Khan appears to be vital, but the evidence of Kamal Khan otherwise was not of very important nature. It is not the case of the prosecution that the PW-Kamal Khkan had witnessed the entire incident or any part thereof. As per the case of the prosecution, PW-Kamal Khan was narrated about the incident occurred by the complainant-Kaliben. So he is the person before whom the first version of complainant-Kaliben was unfolded and he attempted to help the complainant-Kaliben in making a telephone call so that she could inform the Police

Station about the incident and also about the murder of her brother. However, when learned trial Judge has found, on evaluation, that safe reliance can be placed on the version of two injured eye- witnesses, some duplication of evidence by PW-Kamal Khan would not have any material difference. PW-Kamal Khan has been examined by the prosecution during trial to see that the evidence of the injured complainant-Kaliben gets some corroboration in reference to her subsequent conduct after the incident. It is settled legal position that uncorroborated testimony of an unreliable witness also can be accepted and the accused can be linked with the crime on such evidence. Here the complainant-Kaliben gets corroboration, to some extent from other injured eye-witness i.e. PW-Gomiben, her mother. True it is that both these witnesses are closely related since PW-Gomiben is the mother of complainant-Kaliben and the deceased Dharamshi was brother of complainant-Kaliben and son of PW-Gomiben. So considering the relations between the deceased and these two witnesses, they being the kiths and kins, the

duty of the learned trial Judge was to scan the evidence of these witnesses very closely. This exercise has been undertaken by the learned trial Judge carefully.

10.4 Ms.D.S. Pandit has fairly accepted that the detailed reasons are not found in the conclusive paragraphs of the judgment and order of conviction and sentence. The learned trial Judge could have assigned sound reasons for accepting the evidence of these two injured eye-witnesses i.e. complainant-Kaliben and PW-3 Gomiben; and also for ignoring the infirmities emerged in the form of contradictions and improvements while recording the conclusion. In the same way, the effect of hostility of PW-Kamal Khan also could have been discussed in an appropriate manner vis-a-vis the delay aspect in recording the statement of PW-Gomiben.

10.5 It is submitted that the learned trial Judge could have linked and convicted the accused by holding them guilty also for the charge of offence punishable either under Section 34 or Section 114 of the Indian Penal Code read with

graver charges framed against them for the offence punishable under Sections 302 and 326 of the Indian Penal Code. In absence of such charge also, as the charge of rioting punishable under Sections 147, 148 and 149 of the Indian Penal Code was already there, these very convicted persons could have been held guilty for the charge of offence punishable under Section 34 of Section 114 of the Indian Penal Code as the convicts are found involved in the incident having some common thing in their mind.

10.6 Ms.D.S. Pandit, in response to the query raised by the Court, has accepted that for want of an acquittal appeal against the judgment and order of acquittal by the Government, it will not be possible legally for the Court to award punishment to the appellants for the offences from which they have been acquitted. The principle of minimum liability has been applied by the learned trial Judge and keeping in mind this principle, there is sufficient evidence against all these convicts. It is pointed out

by the learned Additional Public Prosecutor that as per the evidence led by the prosecution, the accused no.3 had given axe blow; accused no.5 had given Dhariya blow; accused no.8 had given Dhariya blow; accused no.10 had given Dhariya blow and the accused no.14 had given spear blow.

10.7 It is submitted that the learned trial Judge was supposed to look into the nature of injuries found on the body of the person deceased, the evidence of complainant-Kaliben and injured PW-3 Gomiben and the same have been considered rightly by the learned trial Judge. So the evidence of these two injured witnesses gets corroboration from the medical evidence. The medical evidence may not be exactly similar to the facts narrated by the witnesses like complainant-Kaliben and PW-Gomiben, who are the rustic and illiterate villagers. So some corroboration from medical evidence is sufficient and, therefore, this Court may not discard the evidence of two injured eye-witnesses and the conviction

recorded by the learned trial Judge is required to be upheld.

10.8 It is submitted that the dropping of one of the accused namely Labhu by approaching the District Superintendent of Police would not make the prosecution case doubtful. It is very likely that this very accused Labhu Vershi might have successfully persuaded PW-Kaliben that on account of error committed by her, he was likely to suffer and he might be victimised by the police. Thereafter, on realization the complainant agreed that she did commit a mistake in naming the accused as 'Labhu'. Merely because the letter addressed to the District Superintendent of Police is a well versed letter, it would not make PW-Kali a tutored witness or a witness acting at the instance of somebody because the person who has been wrongly named in the FIR might have helped complainant-Kaliben. So some favour, if the Investigating Agency intends to show can show towards Labhu while submitting final report. So during investigation only this exercise has been done by the complainant and

this exercise thus would not make the case of the prosecution hopeless.

10.9 It is also submitted that the decision cited by learned counsel appearing for the appellants are based on facts of that particular case and the facts of those cases are materially different than the facts of present case. So the ratio propounded in these two decisions or the observations made would not help appellants in the present case.

11. We have considered the rival contentions raised by the parties. The learned counsel appearing for the parties have taken us through the oral as well as documentary evidence, including the report of the Forensic Science Laboratory analysis received in respect of muddamal sent as well as the report of serological examination made by the Forensic Science Laboratory expert. On touchstone of cross-examination and in reference to the other evidence led by the prosecution, oral as well as documentary, the credibility of PW-Kaliben is required to be evaluated and in the same manner, the evidence

of another injured eye-witness PW-Gomiben needs to be discussed to some extent. The close reading of evidence of these two witnesses gives one clear impression that the complainant-Kaliben and PW-Gomiben, both have made some exaggerations in their depositions recorded during the course of trial. In the same way, it also appears that the complainant-Kaliben had tendency to implicate maximum number of accused in the offence and she had an ample opportunity for doing so. If the say of complainant-Kaliben is believed, her complaint was recorded at Jinjhuwada Police Station. However, as per the case of the prosecution and the say of the PW-Police witness, who recorded the complaint, the complaint of PW-Kaliben was recorded at village Odu and practically in couple of hours from the time of incident. If really the complaint of complainant-Kaliben was recorded at Odu Police Station as stated by her, it is very likely that the Investigating Agency might have attempted to put ante-time on the complaint because there was an entry in the Police Station diary about the incident which

was recorded on the strength of the telephonic message received from village Odu. The entry in the Police Station diary produced by the prosecution does not speak anything about the number of accused, more particularly about the involvement of accused; and no clue is found about the exact occurrence of the incident. The message recorded by the police received on telephone is of cryptic nature. Of course, it did refer that some scuffle had taken place at village Odu and, therefore, the Police should reach the spot. Indisputably, the Police Sub-Inspector In-charge of the Police Station was not available on duty. So the Police Station Officer (PSO) arranged to see that some police force rushes to village Odu. The incident has occurred at about 07-00 p.m. So by the time the police could have reached, it must be complete dark. The evidence shows that nothing substantial was done by the police. There is no evidence of convincing nature as to when and how the body of the person deceased was lifted from the spot of incident and was taken to the Government Hospital for carrying out the postmortem examination. This lacuna of

evidence has been enlarged by the learned counsel appearing on behalf of appellants while submitting that after a lapse of good reasonable period, somebody insisted having grudge against the accused persons instigated complainant-Kaliben to implicate maximum number of persons in the complaint and a deliberate complaint came to be recorded at Jhinjhuwada Police Station after a lapse of several hours. So there was scope for the complainant to make deliberations with her relatives and other village people and the say of the police may not be accepted that her complaint was accepted at village Odu immediately after arrival of police at village Odu. If as per the prosecution, the complaint recorded at village Odu, then the recorder of the complaint was not there in the team which had reached at earlier point of time at village Odu. The officer who recorded the complaint has posed himself to be a person In-charge of Jhinjhuwada Police Station. The Yadi at Ex.31 sent to Medical Officer, Patdi shows such endorsement. The buckle numbers of two Police Constables are mentioned and there are

three signatories at Ex.31 and it appears that the body was either taken or handed over to the Medical Officer, Patdi at or after 08-15 p.m. on 29th January 1995 i.e. on the next day morning. On the other hand, the Yadi sent to the Medical Officer, Government Hospital, Patdi at Ex.33 sending complainant-Kaliben and PW-Gomiben for treatment bears the date as “28th January 1995”. Meaning thereby, both these injured witnesses were sent to Patdi Hospital on 28th January 1995 and this Yadi was signed by the Police Officer, Jhinjhuwada Police Station camping at village Odu. The complaint at Ex.54 indicates that the complaint was recorded by Police Head Constable of Jhinjhuwada Police Station camping at village Odu. As discussed earlier, the complainant-Kaliben herself has stated in her deposition that she gave her complaint at village Jhinjhuwada Police Station and her thumb impression was taken below the said complaint. Thereafter, the dead-body of Dharamshi was taken to Patdi Hospital. There is no reference as to distance between Jinjhuwada Police Station and Patdi Hospital,

but it emerges from record that before forwarding the dead-body of Dharamshi to Patdi Hospital, the complaint must have been recorded in time. So the conflict in evidence of recorder of the complaint and the complainant itself makes the evidence as to recording of time and place of complaint doubtful and in this background the evidence of injured complainant-Kaliben requires to be appreciated. The complainant-Kaliben had three brothers and on the date of incident only, Dharamshi had stayed at village Odu, who was serving with Hindustan Salt. The Industrial Unit of Hindustan Salt is located in Small Runn of Kutch. The complainant had gone to Bharuch to earn his livelihood with her husband, but as her mother was sick, incidentally she was there at village Odu. What was the nature of sickness which compelled the complainant to come down to ask her about her health, has not come on record. According to this witness, Dharamshi had been to village Odu on the date of incident at 03-00 p.m. as he was to arrange for about 11 casual labourers and to purchase baskets made

of bamboos. He was also to carry stock of flour of about 7.5 kgs. and, therefore, millet (Bajri) was to be ground at the flour mill and she was to fetch the same. According to complainant-Kali, the incident occurred near the shop of one Narottambhai. So according to this witness, her mother, her brother and herself, all the three were near the shop of Narottam and at that time her brother (victim-deceased) was assaulted by the accused as named in the FIR. She has narrated the incident in detail and according to her, accused no.5-Dashrath Okha had given blow with scythe (Dhariya) on the right side of head of Dharamshi. Thereafter, accused no.10-Chatur Harji had inflicted blow with scythe. At that time, Dharamshi had fallen down. Accused no.3-Dhama Harji had given blow with axe on the hand. Accused no.14-Khoda Vershi tried to give blow with spear to Dharamshi, but at that time the complainant intervened and placed her hand in between to save the blow and she sustained injury, which was inflicted by Khoda Vershi. Dharamshi had also sustained some injuries with spear. Accused no.8-Jina Vershi had

inflicted blow to her mother on her leg and therefore, she sustained fracture. It is the say of this witness that the accused Bhuri, Hira and Punji had caught hold of her brother Dharamshi and at that time, accused no.10 Chatur Harji had inflicted Dhariya blow on her right hand and accused no.5 Dashrath Okha inflicted blows with axe.

12. Thus, at one place, according to this witness, accused no.5-Dashrath was holding Dhariya and had inflicted Dhariya blow to Dharamshi and at another place, in her examination-in-chief she has stated that accused no.5 Dashrath had inflicted blow with axe. Of course, it has come on record during the course of cross-examination that accused no.5 Dashrath had inflicted Dhariya blow to Dharamshi, but after throwing Dhariya he had taken axe from somebody (one of the assailants) and thereafter, he had inflicted axe blow to her. The accused no.15-Sonaji Rupaji had inflicted one blow on her back with pick-axe. The injury found on the body of the complainant-Kaliben does not get satisfactory corroboration from

medical evidence, more particularly, the medical certificate issued by the Medical Officer. This certificate is at Ex.35. As per the medical certificate, she had sustained four injuries. One of them was fracture on phalanx of second right toe. She had one incise wound on her toe and one another incise wound on the internal side of her right elbow. One injury was CLW of left middle finger. So it is clear that she is the victim of crime. When she herself was assaulted as she attempted to intervene and rescue her brother, she might not have fully witnessed the incident and might commit error in giving a detailed account of the incident. However, it is clear that she had no injuries on any vital part of her body or back portion narrated by her and the learned trial Judge has, therefore, given advantage to the present accused keeping in mind the suggestions made to this witness during the cross-examination that the family of the complainant had some animosity or reasons to have inimical feelings against some of the accused persons, including the accused no.15-Sonaji Rupaji. This accused

Sonaji Rupaji was arrested after a lapse of several days. It is also mentioned that the police personnel of Jhinjhuwada Police Station had also some grievance against the accused accused no.15-Sonaji Rupaji. Accused no.15-Sonaji Rupaji was not arrested for several days, but it is not possible for this Court to infer that she had reached to the spot at a later point of time and had not witnessed the incident of assault on her brother. She might have reached near the spot of incident after fetching the flour or she might be on her way towards her house and by the time she reached near the shop of Narottam, she saw her brother Dharamshi assaulted by a group of persons. This infirmity does not appear to be material, especially when the complainant-Kaliben was found with two incise wounds and a fracture when she was examined by the doctor. She has proved one fact that beyond reasonable doubt that she had witnessed the blows which were inflicted on the head of Dharamshi with Dhariya and other weapons which could cause incise wounds. True it is that there is conflict between her version in the Court and

complaint given by her because in the complaint her initial say was that accused no.5-Dashrath Okha was holding axe and he inflicted axe blows to her brother. However, before the Court she has deposed that accused no.5-Dashrath Okha was holding Dhariya and he inflicted Dhariya blow upon her brother. This contradiction at first sight appears to be a material emerged on account of improvements made by this witness in her deposition before the Court, but as discussed hereinabove, in the cross-examination it has come on record that that accused no.5-Dashrath had taken axe from one of the assailants and he had inflicted axe blow to injured complainant-Kaliben. It is very likely that as lastly accused no.5 was holding axe and he had taken axe from one of the assailants, she might have stated so in her complaint that accused no.5-Dashrath was holding axe at the time of incident. However, it is significant to note that the clarification made by her during the cross-examination was the second day of her deposition. The learned trial Judge has recorded her deposition on 10th December 1996

but on that day as the Court time was over, the defence counsel Shri Raval started further cross-examination of this witness from paragraph no.28 on 11th December 1996. So this witness had scope to correct the error committed by her or the conflict emerged between her deposition before the Court and the complaint, during her deposition on earlier day. She has not attributed accused no.5 Dashrath any role for specific injury sustained by her and there was no scope of commission of error in narrating the incident at the time of giving the complaint as to what role was played by accused no.5 Dashrath Okha in inflicting the blows on Dharamshi. So difference in narration as to weapon used by accused Dashrath emerges as a material conflict. This incidents that on the date of deposition, she tried to make exaggeration in the role played by accused no.5 Dashrath by showing him with Dhariya. However, she has remained consistent that accused no.5 is the person responsible for giving a blow on the head of Dharamshi when it has come in the cross-examination that accused no.5 Dashrath

was holding axe when he inflicted blow. Accused no.5 Dashrath may not claim benefit of doubt as complainant-Kaliben being a rustic villager. The doctor has already deposed that the injuries found on the vital part of the body of Dharamshi which were noticed on the head at the time of carrying out postmortem can be caused by the muddamal Dhariya and the axe recovered by the Investigating Agency. The evidence of complainant-Kaliben could have been thrown out if she herself would not have sustained any injury in the incident on account of this contradiction as to weapon used by accused no.5 Dashrath. However, the involvement of accused no.5-Dashrath in the incident with weapon which can cause incise injury has come on record and the learned trial Judge was not wrong in holding accused no.5 Dashrath responsible for the injuries found on the body of Dharamshi.

13. The claim of complainant-Kaliben at the spot of incident is proved by her and her version is corroborated by the injuries sustained by her proved by the medical evidence. This witness is also corroborated by another

witness i.e. PW-Gomiben Bhikhabhai, who is also an injured eye-witness. True it is that this PW-Gomiben had physical infirmities in her eyes on account of development of cataract. She was also sick and feeling weak. She was aged about 70 to 75 years and the complainant-Kaliben had visited village Odu just to ask about the health of her mother. It is very likely that PW-Gomi might have reached to the spot a bit later or during the occurrence when her son Dharamshi was being assaulted. It was the winter being the month of January. It was not broad day light. So it is argued by the learned counsel appearing on behalf of appellants that she might not have identified the accused as named by her. Her statement is recorded at a belated stage. There was ample scope to tutor her at the time of giving police statement and deposition before the Court, but there is no reason to discard the evidence of PW-Gomiben in respect of her presence near the scene of offence at the time of incident. She might be in the near vicinity. It is possible for a mother to identify her own children who were being

victimized by the accused persons. It is on record that she was crying and sitting near the body of her son which was lying near the shop of Narottam. The probability of sustaining any injury to PW-Gomiben on account of fall simplicitor cannot be ruled out. However, at least with the fracture injury sustained by her, she could not have ably walked even to 10 to 15 ft. with other infirmities of her body. She might have received a push from one of the accused on the site or blow on the flashy part of her leg i.e. from backside. Such injury may result into fracture of Tibia, but there is material conflict into evidence of prosecution witness as to the author of blow given to PW-Gomiben. PW-Kaliben has stated that her mother was inflicted blows with sharp cutting weapons. The blows were more than one. One of the injuries was a bleeding injury but it has come on record that PW-Gomiben had no bleeding injury nor any visible injury when she was examined by the doctor at Patdi Hospital. A fracture of Tibia was found clinically and the evidence led by the prosecution does not

disclose that any hospital or doctor had seen any external mark of falls or injury on her body. But at least this witness proves the presence of complainant-Kaliben at the spot of incident and scope of disclosing the names of real assailants by complainant-Kaliben at the spot or during incident. The complainant-Kaliben had reached hospital at 02-45 a.m. with Police Yadi. So the responsible Police Officer had reached much prior to the time mentioned in the medical certificate at Ex.35, but she has not stated in her deposition that before she was sent to hospital for treatment at Patdi, her complaint was taken. Considering the topography i.e. map of the District, it appears that Patdi and Jinjhuwada are in different directions so far as from village Odu. So after treatment, she must have given complaint as she has rightly said that her complaint was registered at Jhinjhuwada Police Station. No responsible officer was present. Only the Head Constable was there initially. The place of incident was placed under surveillance. It appears that the dead-body of Dharamshi either might be lying on the spot of

incident till early hours of next day or temporarily it might have been taken to his house and from there the Police might have taken the same to Patdi Hospital for postmortem. A detailed cross-examination of complainant-Kaliben as well as PW-Gomiben has been made. The evidence of PW-Kamal Khan, of course, would have helped the prosecution, but it does not uproot the entire case of prosecution. It appears that the attempt made by complainant-Kaliben to implicate maximum number of accused might have taken PW-Kamal Khan to take decision not to support the case of the prosecution as placed in the FIR. However, it has come on record that PW-Kamal Khan was instrumental in helping the complainant to inform the Jinjhuwada Police Station on telephone.

14. Jhinjhuwada Police Station was informed on telephone from Post Office. The village Odu being a small village, any of the residents of village Odu, it appears that, was permitted to run Post Office at his residence as Postal Authority has developed this practice to

authorize a person by paying some remuneration and commission to act as representative of the Postal Department. It emerges from the evidence that the complainant came to know that one person namely Mohanbhai belonging to Scheduled Caste is having telephone. If the evidence of Kamal Khan is read along with the evidence of complainant-Kaliben, it appears that the said Mohanbhai was working for Postal Department and he had a telephone at his residence. It is claimed by PW-4 Kantilal, who has been examined vide Ex.41, that on the request made by PW-Gomiben, who was sitting near the dead-body of her son, he had gone to residence of the said Mohanbhai to make a telephone call to Jhinjhuwada Police Station. In the cross-examination, PW-Kamal Khan has stated that complainant-Kaliben had not been to the residence of the said Mohanbhai for making a telephone call. It is claimed by PW-Kamal Khan that the Police had reached village Odu on account of the telephone call made by him. Meaning thereby, PW-Kamal Khan has attempted to support the defence version because it is the say of defence side that as

Dharamshi was in drunken condition and he was a habitual drunkard and further as he was using filthy language, the group of persons assaulted him and as the complainant had inimical feelings towards the family members of the accused persons, they have been falsely implicated. However, this defence version does not appear to be probable because during autopsy no liquor was found from the stomach of Dharamshi. Dharamshi had gone to flour mill on his bicycle and he was to return to his place of work situated in Small Runn of Kachchh in the late evening itself. The things were arranged by him negotiating with the labourers. The baskets were also purchased and kept at home by him. The flour was to be fetched by him on his bicycle and he was preparing to return at the place of his work, are the facts which have emerged from the evidence recorded by the prosecution. A person in a drunken condition would not be able to ride on a bicycle, that too with any material; otherwise Narottam, near whose shop the incident had taken place, could have been examined by the defence side to prove defence

version. True it is that it is not the duty of the defence to prove the same but the prosecution has to prove its case substantively. It appears that the prosecution has adopted to drop the said Narottam as witness. It is not in evidence that the shop of Narottam had already been closed much prior to the time of incident. Narottam who was having shop adjacent to the spot of incident, perhaps has acted like some other citizen who behave in an irresponsible manner and who is not keen to discharge his obligation to the society by assisting the Police during investigation of a criminal offence or in maintaining law and order. On account of hostility of PW-Kamal Khan or non-availability of statement of Mohanbhai, whether all the appellants deserve benefit of doubt or it is possible for this Court to record a finding confirming the order of conviction, is a crucial question. If the answer is in affirmative, then against whom the order of conviction is required to be confirmed and for which offences the respective accused should be held responsible are the crucial questions.

15. PW-3-Gomiben, who has been examined vide Ex.40, as fairly accepted that she does not know as to who gave blows to her daughter i.e. complainant-Kaliben. PW-3-Gomiben has clarified that on the date of deposition, she had no clear vision and, therefore, she was permitted to go nearer to the place where the accused were made to sit till trial, even then she was not able to identify the accused. All opportunities were given to this witness to identify the accused persons and she could not identify. On the contrary, she wrongly identified “Labhu Vershi” as “Jina Vershi”. She had identified accused no.3-Dhama Harji. According to PW-3 Gomiben, the cataract has been developed after the death of her son. The date of incident in question is 28th January 1995 and her deposition has been recorded on 11th December 1996. So it is very likely that on the date of incident, she might not have a fully developed cataract. It is also possible that she might have opted to live with developed cataract since long. The study carried out by the World Health Organisation

as well as UNICEF says that in India large number of people are blind merely because they are not able to remove a developed cataract, however, this would be a matter of assumption and presumption. The Court normally should not adopt such assumptions or presumptions, but the fact remains that PW-3 Gomiben had successfully identified accused no.3-Dhama Harji as one of the assailants. There is no reason for the Court to disbelieve the version of this witness. She has stated that at the time of incident accused no.3-Dhama Harji had axe in his hand and accused no.8-Jina Vershi had given Dhariya blow on her hand. The accused were giving several blows to her son Dharamshi. This witness has stated that accused no.5-Dashrath had given Dhariya blow to her son Dharamshi and accused no.10-Chatur had given Dhariya blow to her son. So it can be said that the version of PW-3 Gomiben corroborates the version of complainant-Kaliben, whereby she had stated that accused no.5-Dashrath had inflicted Dhariya to her son and thereafter, accused no.10-Chatur had inflicted Dhariya blow. However, as discussed

hereinabove, the version of complainant-Kaliben qua the weapon held by accused no.5-Dashrath at the time of inflicting blows to Dharamshi is in conflict with her version in the FIR. Therefore, whether it was safe to place reliance on the version of PW-3 Gomiben qua the role played by accused no.5-Dashrath, accused no.10-Chatur and accused no.3-Dhama was the question before the learned trial Judge. The involvement of accused no.8-Jina Vershi by the evidence of PW-3 Gomiben does not appear to be trustworthy because no injury was found on her hand which can be caused by Dhariya at the time of her medical examination at Patdi Hospital after the incident not at any hospital either at Surendranagar or at Ahmedabad. No convincing evidence has been led by the prosecution qua the injury noticed by the doctor who examined PW-3 Gomiben at Civil Hospital, Ahmedabad. As such no serious attempt perhaps was made by the Investigating Officer in couple of days of the incident to obtain case papers in respect of treatment of PW-3 Gomiben at Civil Hospital, Ahmedabad. The evidence of PW-12 Dr.Kantibhai does not carry

the case of the prosecution any further. The case papers of treatment given to PW-3 Gomiben also could have been produced from Patdi Hospital, but in absence of this evidence, the Court will have to accept the arguments advanced by defence side that the evidence of PW-3 Kaliben qua the injury sustained by her does not appear to be trustworthy by itself. The absence of cogent medical evidence which can corroborate the version of PW-3 Gomiben qua her injury, makes the prosecution case against appellants doubtful, so far as the responsibility of the accused in inflicting the injuries to PW-3 Gomiben is concerned. As mentioned hereinabove, there is conflict in medical evidence also as to the nature of fracture sustained by the injured PW-3 Gomiben. She has stated that on four occasions plasters were applied on her after the injury. The doctor at Patdi Hospital had noticed the fracture of bone Tibia clinically and the evidence led by the prosecution on the other hand shows that she had sustained fracture of Tibia and Fibula, both the bones. If she had sustained fracture of Tibia and Fibula i.e.

both the vital bones, of leg, she must have been taken to all the three hospitals by lifting her as a patient. None of the witnesses has been examined to prove that at any point of time, PW-3 Gomiben had any bleeding injury or injury on her hand, which can be caused by Dhariya. The number of blows allegedly inflicted upon PW-3 Gomiben as per the version of complainant-Kaliben does not appear to be true. So the deposition of complainant-Kaliben also helps the prosecution in linking the accused for the charge of offence of inflicting injury to PW-3 Gomiben. It is very likely that practically at the time when the injured PW-3 Gomiben reached to the spot of incident, more particularly near the body of her injured son Dharamshi, she might have collapsed being an old, infirm and sick lady. The fall at an old age of 70 to 75 years might result into fracture injury of either Tibia or Fibula bone or both the bones or even the fracture of femur. It appears that but for this reason only no injury or visible mark of violence were seen on the body of PW-3

Gomiben. It is not possible to ignore this probability by the learned trial Judge.

16. We are of the view that this is a case where the accused can be linked with the offence on the deposition of complainant-Kaliben though there are material improvements and contradictions in the deposition of complainant-Kaliben as she gets some corroboration by the medical evidence, by her conduct immediately after incident and the nature of injuries sustained by her, as the same are not found self-inflicted injuries. As mentioned hereinabove, this witness has attempted to implicate maximum number of accused persons. She has tried to attribute certain blows and use of weapon by the accused persons named by her in the FIR. In such a situation, as per settled legal position, the endeavour on the part of the Court would be to see the possibility of separating grains from chaff. If it is not found possible to do so, the accused persons deserve advantage of acquittal. The number decisions have been shown to us mainly of cases where the Courts

have acquitted the accused noticing substantive conflict in the medical evidence as well as oral version of the eye-witness. But in most of the cases, the witness whose evidence has been found doubtful or untrustworthy, is not eye-witness in the cited decision or the injuries found on the injured eye-witnesses were of trivial nature which can be self-inflicted injuries or injuries caused after the incident or any time prior to the incident, but not in actual course of the incident. So these decisions would not help the accused persons. There is no dispute that Dharamshi succumbed to the injuries sustained by him, more particularly the injuries sustained by him on is head.

17. The number of injuries narrated hereinabove shows that Dharamshi must have been assaulted by more than two persons and the accused persons must be holding weapons capable of causing incise wounds as well as CLWs.

18. Merely because the Police has not recovered any bicycle or the bag containing flour, it would not make the case of the prosecution

doubtful because the Police had reached after some hours at the spot of incident. The evidence of PW-13, PSO Gangaram indicates that Jhinjhuwada Police Station was informed about the scuffle between two groups of Kolis. However, the evidence shows that an unarmed person was assaulted by more than two persons. The motive is specifically pleaded. True it is that the act of Pama Okha of eloping with Madhu-daughter of real sister of complainant-Kaliben, might have led to some inimical feeling with the family of the complainant, but the same would not lead the group of persons to assault Dharamshi because the family of Dharamshi was victimised and not the family of the accused persons. However, no inference in favour of accused can be drawn because it has come on record that Pama Okha, one of the brothers of the accused persons, had not returned to village Odu after eloping with Madhu, a girl from the complainant's side. It is very likely that the accused might be feeling that the girl might be responsible in the entire incident and at her instance,

Pama Okha might not be returning to his family.

19. There is reference of one boy in the evidence, who was also witness to the incident. The grievance of accused side is that this boy has not been examined and the Police has not investigated in that direction, but on close reading of the evidence it emerges that the boy who witnessed the incident was Vishnu. He was a tender aged boy and a close relative of the complainant's side. True it is that the prosecution ought to have examined this witness. It appears that the prosecution has not acted fairly by dropping this witness. The statement of this boy has been recorded by the Investigating Officer. It is very likely that this Vishnu might not have disclosed a number of names of the accused persons at the time of narrating the incident, but dropping of this witness was never objected to by the accused persons. The Police Inspector Shri Jhala had recorded the statement of Vishnu being an eye-witness. Non-examination of Mohanbhai from whose residence the telephone call was made,

also can be considered as lacuna because it is possible for the defence side to argue that this Mohanbhai might have listened to the talk at least the words uttered by the person who had made the telephone call. However, this infirmity would not go to the root of the prosecution case because the information found recorded by the Jhinjhuwada Police Station is of cryptic nature and the same does not reflect the names of assailants.

20. While dealing with the present appeals, we are not supposed to discuss the reasons assigned by the learned trial Judge for acquitting the number of accused as well as recording of acquittal in respect of present appellants from the charge of offences punishable under Sections 147, 148 and 149 of the Indian Penal Code.

21. So far as the judgment and order of conviction recorded by the learned trial Judge in respect of accused no.3-Dhama Harji is concerned, there is sufficient evidence is the say of the prosecution and there is sufficient evidence of complainant-Kaliben as to the role played

by accused no.3. It is the consistent evidence that accused no.3-Dhama was holding axe at the time of incident and he inflicted blow with axe to Dharamshi (deceased). This version of complainant-Kaliben gets corroboration from the evidence of doctor who carried out postmortem. PW-Gomiben also says that she had seen accused no.3-Dhama with axe. So in exaggerated version of complainant-Kaliben also there is enough consistency so far as role played by accused no.3 is concerned. The evidence, more particularly, in reference to accused no.3 is not found to be exaggerated or there is as such no material conflict. Here it is relevant to note that the axe recovered during investigation from accused no.3-Dhama was sent for Forensic Science Laboratory analysis and the same is found stained with blood and these documents i.e. Chemical Analysis and report of the Forensic Science Laboratory are at Exs.28 and 29. These documents have been received in evidence on consent. True it is that the panchas have not supported the case of prosecution qua the recovery of axe at the instance of accused

no.3. It is referred to in document at Ex.27, a forwarding letter, addressed to the Forensic Science Laboratory by Police Sub-Inspector of Jhinjhuwada Police Station that Article No.4 sent for Forensic Science Laboratory examination is axe and the same was recovered from accused no.3-Dhama. This article was marked as Mark 'C'. This document at Ex.27 has been received in evidence on admission. In this background, the deposition of Police Sub-Inspector Pruthvirajsinh Jhala at Ex.27 and panchnama proved by him at Ex.58 get significance. There is no reason to discard the evidence of Police Sub-Inspector Shri Jhala as there was recovery of blood stained axe at the instance of this accused no.3. The report of serological examination fairly shows that this axe was found stained with human blood having Blood Group 'AB'. The blood found on the spot of incident i.e. from the earth collected from the spot of incident and the clothes of the deceased collected from the body of the deceased, contain human blood of Blood Group 'AB'. The underwear and the socks put on by the deceased were also blood stained

and having blood of same blood group. Thus, it is possible to infer that the muddamal axe recovered from accused no.3 was stained with blood of the deceased. In this background, there was no reason to disbelieve complainant-Kaliben for involvement of accused no.3 in the offence. Thus, it is possible to separate accused no.3 from the persons named in the FIR and the role assigned to them by the complainant in the complaint as well as in her deposition before the Court. The medical evidence clearly supports the say of injured eye-witness Kaliben and the doctor has deposed that the visible injuries found on the body of the deceased can be caused by axe. Not only that but there are more than two incise wounds on the body of the person deceased. When the accused were giving blows to the deceased, it is very likely that on some occasion the blunt portion of the weapon also might have touched the body of the deceased with force.

It is rightly pointed out by Ms.D.S. Pandit, learned Additional Public Prosecutor, that it is not impossible that three blows had

fallen on the shoulder of the deceased might have been aimed at his head and, therefore, merely because there are two injuries on the head, the say of the complainant-Kaliben could not be viewed with doubt qua accused no.3-Dhama Harji.

22. Accused no.5 who has been held guilty for the charge of offence punishable under Section 302 of the Indian Penal Code, is held responsible for inflicting fatal blow to the deceased. He is the real brother of Pama Okha who had eloped with Madhu, who is from the family of the complainant. According to prosecution and Investigating Officer PSI Jhala, one axe was recovered at the instance of accused no.3. The same was found blood stained and it was sent for Forensic Science Laboratory examination by giving it Mark “C-1”. This axe is shown at Sr.No.5 in the forwarding letter at Ex.27. Though panchas have not supported the case of the prosecution, the PSI has proved the recovery panchnama. The document at Ex.27 has been admitted in evidence on consent given by the learned counsel defending accused no.5

Dashrath Okha. This axe was found stained with blood having blood group “AB” i.e. blood group of deceased during the course of serological examination. However, when there is direct conflict in the evidence as to the use of axe by accused no.5-Dashrath in the version of complainant-Kaliben. When this witness has stated that accused no.5-Dashrath had given Dhariya blow on the head of Dharamshi-deceased, whether it would be safe for the Court to link the accused no.5-Dashrath with the crime, is a question. True it is that complainant-Kaliben is a rustic villager, but when she was able to narrate the incident in detail naming the accused with the respective weapons which they were allegedly holding at the relevant point of time, she would not have committed such a grave error while deposing before the Court. The contradiction, according to us, is a material contradiction. True it is that the nature of blows found on the head can be caused by Dhariya as well as axe. Considering the length of the wound noticed by the doctor during the course of postmortem examination, it appears that complainant-

Kaliben might have tried to improve her version. This fact is nothing but a modulation so that her oral version before the Court can receive corroboration from the medical evidence. This indirectly indicates that somebody must be there who can suggest such improvement and modulation qua accusation against accused no.5-Dashrath. It is very likely that some person holding axe in the entire group might have given blow and as the complainant-Kaliben had named accused no.5-Dashrath as a person holding axe at the relevant point of time and person responsible for giving blow with axe to the deceased, the Investigating Agency might have tried to link accused no.5-Dashrath with crime showing the recovery of axe from accused no.5-Dashrath. For the sake of argument, if it is accepted that this axe was recovered at the instance of accused no.5 and ultimately the same was found stained with blood of the deceased, even then this circumstance only cannot be equated with evidence of cogent or satisfactory nature, more particularly, in the background of the following vital facts :

(1) There is material contradiction as to use of axe by accused no.5-Dashrath in giving blow to the deceased.

(2) The complainant-Kaliben is found with a tendency to implicate maximum number of accused, that too of a particular family.

(3) The real brother of accused no.5-Dashrath was responsible for eloping with Madhu and Madhu had not returned to village Odu.

(4) On the next day of deposition, complainant-Kaliben has tried to again modulate the version saying that accused no.5-Dashrath was initially holding Dhariya and after throwing the same, he took up the axe and tried to inflict blow with the axe.

23. This indicates that somebody perhaps was interested in linking accused no.5-Dashrath with the crime. The probability of accused no.5-Dashrath holding Dhariya at the time of incident appears to be doubtful considering the conduct attributed to him by complainant-

Kaliben, which creates a situation that accused no.5-Dashrath might have or might not have used the muddamal axe when the evidence of two prosecution witnesses i.e. complainant-Kaliben and PW-3 Gomiben against accused no.5 is that he inflicted Dhariya blow and no Dhariya has been recovered at the instance of accused no.5. This further weakens the case against accused no.5.

24. The complainant-Kaliben has stated in her deposition that accused no.5-Dashrath had inflicted blow with axe on her right leg. The medical evidence corroborates this version, but as discussed hereinabove, the version of complainant-Kaliben is found doubtful as to the nature of weapon which was there with accused no.5-Dashrath and she has made material improvements and modulations in her version the involvement of accused no.5-Dashrath, it would not be possible for the Court to link accused no.5 for the charge of offence in question for the alleged injury inflicted upon complainant-Kaliben.

25. The complainant-Kaliben has attributed one blow with axe at her back portion by accused no.5. However, no injury was found on the back portion of complainant-Kaliben which can be caused by an axe, even by reverse side of the axe, then it could be inferred that there is no corroboration qua the evidence of complainant-Kaliben qua involvement of accused no.5 in the crime for inflicting axe blow to the complainant-Kaliben. So this is a case where the learned trial Judge could have said that the evidence against accused no.5 is not of cogent or convincing nature or sufficient to link the accused with the offence punishable under Section 302 of the Indian Penal Code. The learned trial Judge has not reached to a positive conclusion that accused no.5 was responsible for inflicting any vital blow to the deceased. When the accused is to be linked with the crime for his individual criminal wrong, the individual act requires to be proved beyond reasonable doubt and the same is missing in the present case against accused no.5.

26. The evidence against accused no.8-Jina Vershi is found doubtful. The material evidence against accused no.8 is that he is responsible for causing grievous injuries to PW-3 Gomiben. This accused no.8 is the real brother of accused no.9-Gordhan and accused no.14-Khoda Vershi. At the time of incident, it is alleged that he was holding axe and at his instance PW-3-Gomiben sustained grievous injury. As discussed hereinabove, this PW-3-Gomiben is not found reliable witness qua the role played by this accused as she does not get corroboration from medical evidence. There is also an inadequate evidence collected and led during the course of trial. The medical evidence collected and led from the Hospital at Ahmedabad is not found sufficient to link the accused no.8 with the offence as there was no external injury mark of violence on the body of injured PW-3-Gomiben. In all probability, she might have sustained fracture of fall at the spot of incident. Thus, there is a case where accused no.8 ought not to have been held responsible for the offence punishable under Section 326 of the Indian

Penal Code in absence of any external injury or mark of violence or bleeding injury with axe on the body of PW-3 Gomiben. The learned trial Judge at the most could have linked accused no.8 with the offence punishable under Section 326 of the Indian Penal Code, but it appears that the learned trial Judge has not applied mind as to the nature of offence that ultimately could have been found established. Though the learned Additional Public Prosecutor has drawn attention of the Court towards the opinion expressed by the doctor in his deposition (paragraph no.19 page no.87 of the paper-book) that a person may not sustain an external mark of violence if the blow is inflicted by the hard and blunt substance. But this PW-3-Gomiben has not identified the real assailant who inflicted the blow, though during her deposition before the Court twice she was given opportunity by the Court. It is settled legal position that unless it is specifically stated that the blow with blunt portion of a sharp cutting weapon is inflicted, it should be normally inferred that the say of the witness is that the blow was

inflicted with aged portion of the weapon used. Here complainant-Kaliben claims that the sharp cutting portion was used while inflicting axe blow to her mother and she had sustained bleeding injury and when no such injury was noticed by the doctor when she was initially examined, it was not safe for the learned trial Judge to link the accused no.8 for the offence punishable under Section 326 of the Indian Penal Code. The opinion of the doctor pointed by the learned Additional Public Prosecutor would not help the prosecution because it is not the case that accused no.8 inflicted injury on the leg of injured PW-3-Gomiben using reverse side or handle portion of axe. So this opinion would not help the prosecution. True it is that the complainant-Kaliben or another witness may not notice as to how the blow was inflicted to PW-3-Gomiben, but if as claimed by PW-3-Gomiben, she had not fully developed cataract on the date of incident, she could have named the accused responsible for fracture injury sustained by her and also the weapon as well as portion of said weapon used for inflicting

injury. The claim of PW-3-Gomiben is that accused no.8-Jina Vershi inflicted Dhariya blow on her leg. So she claims that accused no.8 is responsible for blows given to her and the number of blows as stated by her in the examination-in-chief are two. The contradiction in this regard has been proved by the defence side and the medical evidence also do not indicate about two injuries on this PW-3 Gomiben. So the conviction could not have been recorded for the injuries of fracture sustained by PW-3 Gomiben. Even it would not be safe for the Court to accept the oral version of PW-3 Gomiben as to the use of Dhariya by accused no.8 because it is the case of the prosecution that accused no.8 was holding axe at the relevant point of time.

27. So far as judgment and order of conviction and sentence qua accused no.10-Chatur Harji is concerned, the evidence is that the muddamal Dhariya was recovered at the instance of this accused no.10-Chatur Harji. The muddamal Dhariya recovered at the instance of accused no.10, reflected in the document at Ex.27 and

the deposition of the Police Officer who recorded the panchnama of recovery of Dhariya from Chatur, that this part of evidence appears to be consistent because the case of prosecution from the beginning is that accused no.10 was holding Dhariya at the time of incident. PW-3 Gomiben has said that the first blow was inflicted by accused no.5-Dashrath to her son Dharamshi by Dhariya. Thereafter, this accused no.10 inflicted Dhariya blow to her son. At that time, accused no.3-Dhama was there and he had inflicted axe blow. PW-Gomiben is an eye-witness who can be placed in the category of a witness whose entire evidence may not be discarded treating the same as unreliable. Some part of evidence of PW-Gomiben gets corroboration from medical evidence from the evidence of complainant-Kaliben and the consistency qua the case placed by prosecution. Her presence at the spot of incident is found natural as discussed hereinabove and we have considered her evidence qua our finding recorded in reference to accused no.3-Dhama. In the same way, the evidence of PW-3 Gomi is found acceptable qua

her evidence against accused no.10. Accused no.10 inflicted Dhariya blow to Dharamshi. True it is that a question can be raised here that when PW-3 Gomiben is not found reliable as to the role played by accused no.8-Jina Vershi, why her version should be believed qua the role played by accused no.10, that too when she had physical infirmities on the date of incident, even as per the say of prosecution. But this argument would not help accused no.10 because this part of evidence of PW-3 Gomiben is found consistent with the evidence led by complainant-Kaliben. The FIR can also be used as a corroborative piece of evidence qua evaluating the case of prosecution though the said document i.e. FIR, cannot be read as a substantive piece of evidence. It is also not possible for us to ignore the fact that on serological examination of the Dhariya recovered from accused no.10, it is found blood stained and that too, the blood group “AB”, which was the blood group of deceased-Dharamshi. So far as the evidence of complainant-Kaliben is concerned, she has categorically stated while

narrating the incident in her examination-in-chief that the first blow was inflicted by accused no.5-Dashrath on the right side of head of Dharamshi and after Dharamshi fell down by the first blow by accused no.5-Dashrath, accused no.10-Chatur inflicted Dhariya blow and the said blow also landed on the head. The postmortem note confirms that the deceased had two injuries on head which can be caused by a sharp cutting instrument like Dhariya. The injury nos.1 and 2 found on the head of the deceased Dharamshi indicate that both the injuries must have been inflicted by Dhariya, more particularly if the length of the wound is considered. The first wound was incise wound of 10.5 cms. x 1 cm. and the second incise wound was of 14 cms. x 2 cms., which was also no the right side of the head. It was between right side of the forehead to middle portion above right side ear and that blow was practically meeting/ touching the Injury No.1 noticed by the doctor at the time of autopsy. The third wound seen by the doctor was 6 cms. x ½ cm. and that wound was on right side shoulder and that

wound was also an incise wound. So the initial blows which were inflicted upon the deceased narrated by the complainant-Kaliben were found on the body of the deceased at the time of autopsy. As discussed hereinabove, there is some conflict in evidence of complainant-Kaliben and PW-Gomiben as to the use of weapon by accused no.5-Dashrath, but such conflict or inconsistency does not appear in the case of accused no.10-Chatur and there is no reason for us to say that the evidence against accused no.10 is either inadequate or week piece of evidence. When the doctor has opined that both the injuries found on the head of the deceased were on vital part and sufficient enough in ordinary course of nature to cause death, it was not possible to acquit accused no.10 from the offence in question. This accused no.10 is also found responsible for the injuries sustained by complainant-Kaliben on her right hand. She has categorically stated that accused no.10 has inflicted Dhariya blow on her right hand. The medical certificate at Ex.35 corroborates this version. The question of mistaken identity has

no room to play because the witnesses and accused are of a small village and they were knowing one another. No material contradiction has been found qua the injury inflicted by accused no.10 to the complainant-Kaliben. This version is also found consistent to the case placed by the prosecution. Consistency in evidence substantively helps the Court in separating grains from chaff, however, it is not possible for the Court to accept the evidence as to the role played by accused no.10 for causing any injury to PW-3-Gomiben for the reasons aforesaid.

28. Accused no.14-Khoda Vershi is also held guilty for the offence punishable under Section 302 of the Indian Penal Code. It is the case of prosecution and version of complainant-Kaliben that accused no.14 was holding spear and his intention was to kill Dharamshi and he attempted a blow to Dharamshi. It is claimed by the prosecution that accused no.14 was holding spear and it was used by him in causing injury to Dharamshi and the first blow which was given to the deceased had landed on

her hand as she had intervened by that time to save her brother. In nutshell, this is the version of complainant-Kaliben. The complainant-Kaliben claims that she sustained injury on her hand on account of blow with spear inflicted by accused no.14. The postmortem note does not reveal that the deceased had any piercing wound which can be caused by a spear, otherwise the doctor could have described that a particular injury found on the body of the deceased can be inflicted with spear only and can be said to be a grave injury. It is not easy to change or shift the side of a weapon when a group of persons is assaulting a person, which was being used earlier from the other side of the weapon. So it would be risky to presume that when the first blow with spear was inflicted, the aged portion was used and thereafter the accused no.14 might have handled spear from the piercing side and the handle portion which is like stick would have been used by the very accused. This appears to be highly improbable. No injury which can be caused by spear is found on PW-Gomiben. True it is that as

described by complainant-Kaliben, she could have sustained injury of the nature found on her hand on sudden landing of blow of spear on her hand. Considering the shape of the muddamal spear, the aged side of the spear can cause injury of the nature which was found on the hand of complainant-Kaliben. True it is that there was no intention on the part of accused no.14 to cause injury to complainant-Kaliben. The intention of accused no.14 was to inflict spear blow to Dharamshi and on account the intervention of complainant-Kaliben, she sustained injury on her hand. The argument advanced is not convincing that on sudden landing of spear on her hand, she could not have sustained CLW and the same would cause only incise injury. The measurement of the wound of Injury No.2 found on complainant-Kaliben, on the contrary, indicates a sudden landing of a blow. True it is that this injury is a simple injury. Accused no.14 is also not responsible for causing any injury to prosecution witness-Gomiben when the learned trial Judge had decided to apply the principle of minimum liability, at the time of recording

acquittal of the accused from the charge of offences punishable under Sections 147, 148 and 149 of the Indian Penal Code, evaluated against accused no.14. No fatal blow has been found on Dharamshi during postmortem examination which can be caused by spear. Accused no.14 was the only person in the entire group of accused persons narrated in the FIR, who was shown holding spear. Dhariya and axe holders are more in number. So it would be easier for a witness to identify a person holding spear. Normally, no contradiction could have emerged qua the role played by accused holding spear in such a situation and a role played if any could have been stated before the Court during the course of deposition and before the Police during the course of investigation. Here the part of version which is found reliable of complainant-Kaliben appears to be sufficient to link accused no.14 for causing injury to complainant-Kaliben on her hand. Here it is relevant to note that PW-Gomiben has not assigned any role to accused no.14. On the contrary, she has stated that she is not aware

as to who caused injuries to complainant-Kaliben and with which weapon. The crucial question would be that when the version of complainant-Kaliben is not found reliable qua the role played by accused no.5-Dashrath, whether she can be accepted as reliable witness for involvement of accused no.14? The answer would be in the affirmative because according to complainant-Kaliben, accused no.14 is responsible for causing injury to her. She has also stated as to how and in what manner she sustained injury on her hand. There is no material infirmity or contradiction which can be said to be material in this regard and, therefore, accused no.14 could have been held guilty and has rightly been held guilty. This finding recorded by the learned trial Judge holding accused no.14 guilty for the charge of offence punishable under Section 326 of the Indian Penal Code is not found sustainable. Accused no.14 has not been convicted for the injuries sustained by complainant-Kaliben. When accused no.14 has not been held guilty for the charge of offence punishable under Section 302 read with Section

114 or 34 of the Indian Penal Code, in absence of any acquittal appeal by the respondent-State, accused no.14-Khoda Vershi obviously would get acquittal because he is not found responsible for causing any fatal injury to the deceased. When accused no.14 has not been held guilty for the charge of offence punishable under Section 326 of the Indian Penal Code for causing injury either to complainant-Kaliben or deceased, it would not be either legal or appropriate for the Court to link the accused with the offence punishable under other than Section 302 of the Indian Penal Code.

29. In view of aforesaid, there is no need for us to appreciate the alternative submissions made by the learned counsel appearing for the appellants because the alternative submissions obviously are based on ifs and buts. According to us, it is not possible to uphold the judgment and order of conviction and sentence recorded by the learned trial Judge so far as accused nos.5-Dashrath Vershi, accused no.8-Jina Vershi and accused no.14-Khoda Vershi, is

concerned and the appeals preferred by these accused qua them are required to be allowed. On account of shadow of doubt and inadequacy of cogent and convincing evidence against these three accused persons, they deserve acquittal. The judgment and order of conviction and sentence recorded qua accused no.3-Dharamshi Harji and accused no.10-Chatur Harji is required to be upheld and the appeal filed by these two accused deserve to be dismissed.

30. In view of aforesaid observations, discussion and reasons, the following order is passed :

(1) Criminal Appeal No.523 of 1997 preferred by the accused no.8-Jina Vershi and accused no.14-Khoda Vershi is hereby allowed. The judgment and order of conviction and sentence dated 31st March 1997 passed by the learned Sessions Judge, Surendranaqar, in Sessions Case No.39 of 1997, is hereby quashed and set aside qua accused nos.8 and 14.

(2) Criminal Appeal No.532 of 1997 preferred

by the accused no.5-Dashrath Okha and accused no.10-Chatur Harji is hereby allowed qua accused no.5-Dashrath Okha and the same is hereby dismissed qua accused no.10-Chatur Harji. The judgment and order of conviction and sentence dated 31st March 1997 passed by the learned Sessions Judge, Surendranaqar, in Sessions Case No.39 of 1997, is hereby quashed and set aside qua accused no.5-Dashrath and the same is upheld qua accused no.10-Chatur Harji.

(3) Criminal Appeal No.539 of 1997 preferred by the accused no.3-Dharamshi Harji is hereby dismissed. The judgment and order of conviction and sentence dated 31st March 1997 passed by the learned Sessions Judge, Surendranaqar, in Sessions Case No.39 of 1997, is hereby upheld.

(4) In view of aforesaid, the accused no.5-Dashrath Okha, accused no.8-Jina Vershi and accused no.14-Khoda Vershi are hereby ordered to be acquitted from the charge in question for which they have been

convicted and they are ordered to be set at liberty forthwith, if they are in jail. The bail bond, if any, stands discharged. The accused nos.5,8 and 14 be given the benefit of set off.

(5) The amount of fine, if any, paid by accused acquitted by present judgment, be refunded to each accused acquitted respectively on his proper identification.

sd/-.
(C.K. Buch, J)

sd/-.
(H.B. Antani, J)

Aakar