

## IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

## CRIMINAL APPEAL No. 370 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MR.JUSTICE KS JHAVERI

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

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy  
of the judgment ?

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 ?

5 Whether it is to be circulated to the civil judge  
?

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**RABARI DEVA JIVA - Appellant(s)**

**Versus**

**STATE OF GUJARAT & 1 - Opponent(s)**

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**Appearance :**

MR KB ANANDJIWALA for Appellant(s) : 1 - 6.

MR HL JANI, APP for Opponent(s) : 1,

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**CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA**

**and**

**HONOURABLE MR.JUSTICE KS JHAVERI**

**Date : 31/01/2008**

**ORAL JUDGMENT**

**(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)**

1.The present appellants-original accused Nos.1

to 5 and 7 of Sessions Case No.211 of 1999 were facing charge for the offences punishable under Sections 147, 148, 149, 323, 307, 302 and 504 of IP Code and Sec.135 of B.P.Act. During the course of trial, original accused No.6-Rabari Hama Jiva died and, therefore, qua him, Sessions Case became abated. Ultimately, at the end of trial, present appellants-original accused Nos.1 to 5 and 7 were convicted for the charge under Sec.147, 148, 323 and 302 of IPC by the learned Additional Sessions Judge, Veraval, vide judgment and order dated 16-3-2000. For the charge under Sec.302, they were sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.500, in default, to suffer rigorous imprisonment for a further period of one month and for the charge under Secs.147, 148 and 323 of IPC, they were sentenced to suffer rigorous imprisonment for one month. Both the sentences were ordered to run concurrently. Being aggrieved and dissatisfied therewith, present appellants-original accused Nos.1 to 5 and 7 have preferred the present appeal.

2.The short facts of the prosecution case are that on 3-1-1996 at about 2.30 p.m., Valaiben-the complainant, her son Laxman and their daily wage labourer Ramanik Kala were preparing bundles of grass in their Vada. At

that time, Raiya Ram, husband of the complainant and one Harigar Devgar were grazing their cattle in the gaucher land. As the complainant heard shouts of her husband, she, her son Laxman and labourer Ramanik went there when they saw her husband being abused by Rabari Deva Jiva, who was armed with axe and his nephew Saja Amba, who was armed with stick. In the meanwhile, Deva Jiva gave axe blow on the head of her husband due to which, he fell down. Before they could reach there, Deva Jiva and Saja Amba fled from the scene of offence. As there was profuse bleeding from the head of Raiya Ram, all the three brought him to a bus-stand situated very near to the Village School and were waiting for a vehicle to take the victim to the hospital. Meanwhile, present appellants and one Hama Jiva, who were hiding themselves very near to the School compound, came out with weapons in their hands namely, Deva Jiva and Hama Jiva with axe, Saja Amba, Hamir Hama, Ganga Hama and Mesur Hema with sticks and Galiben, wife of Deva Jiva with sword. They assaulted Raiya Ram and his family members namely, his wife (the complainant) and her son Laxman causing them injuries. Upon their shout, the accused fled from the scene of offence. When the complainant and her son were searching for a vehicle, Forest Guard, Amar Raja Rama

came there with motor cycle. He was requested by the complainant to bring a vehicle and, therefore, he brought an autorickshaw of Amir Ali Asan Ali in which all were taken to Talala Community Health Centre where on examination, Raiya Ram was declared dead by the doctor while the complainant was treated there. As the son of the complainant, Laxman sustained serious injuries, he was referred to Junagadh Civil Hospital and, therefore, relatives of Laxman took him to Junagadh Civil Hospital. Meanwhile, as the doctor informed the police about the incident, PSI came to Talala Hospital and made arrangements for inquest panchnama of the deceased, filled up Marnotar form, gave yadi for post mortem of the deceased and recorded the complaint of the complainant and sent the same for its registration. He has taken over further investigation as directed by PSO and recorded statements of various witnesses. He then went to the scene of offence, drew panchnama of scene of offence and seized muddamal as mentioned in the panchnama. Thereafter, he made a search for the accused and accused were arrested by drawing arrest panchnama. The clothes worn by the accused were also attached under a panchnama. As one of the accused expressed willingness to produce the muddamal weapons alleged to have

been used in the crime in question, same were seized under a panchnama drawn under Sec.27 of the Indian Evidence Act and sent the same to FSL with a forwarding letter for analysis. The accused were then sent to judicial custody. Meanwhile, as Laxman was able to give his statement, his statement was recorded by I.O. He also collected injury certificates, post mortem note etc. from the hospital and on receiving the FSL report, same was kept in investigation file. At the end of investigation, the I.O. submitted the charge sheet into the Court of learned Judicial Magistrate (First Class), Veraval.

3.As the offences alleged against the accused were exclusively triable by the Court of Sessions, learned Judicial Magistrate (First Class), Veraval, committed the case to the Sessions Court and it was transferred to the Court of learned Addl. Sessions Judge, Veraval, for disposal on merits where it was numbered as Sessions Case No.211 of 1999. On production of the accused, learned Addl. Sessions Judge framed charge against the accused. The accused pleaded not guilty to the charge and claimed to be tried.

4.To prove the charge against the accused, the prosecution examined in all following 18 witnesses namely, Dr.Dhirajlal Laljibhai Thummer, Medical Officer, Talala, P.W.1,

Ex.18; Dr.Govindji Muljibhai Makwana, Medical Officer, Civil Hospital, Junagadh, P.W.2, Ex.24; Lalabhai Kuberbhai Kharadi, P.W.3, Ex.25; Gopal Narshi Patel, P.W.4, Ex.29; Hamir Nathabhai, P.W.5, Ex.30; Tulsidas Mohanlal Lohana, P.W.6, Ex.32; Karsan Bhoja, P.W.7, Ex.33; Popat Pitha Harijan, P.W.8, Ex.34; Raja Lakha, P.W.9, Ex.36; Suleman Fatemamad, P.W.10, Ex.39; Valaiben, P.W.11, Ex.41; Laxman Raiya, P.W.12, Ex.44; Lakhiben Raiya, P.W.13, Ex.45; Ramnik Kalabhai, P.W.14, Ex.46; Hiragar Devgar, P.W.15, Ex.47; Ameer Ali Hasam, P.W.16 Ex.48; Dayashanker Rajabhai Bhatt, P.W.17, Ex.49 and Khumansinh Devubha Parmar, P.W.18 Ex.56. The prosecution also produced and proved various documentary evidence namely, complaint Ex.57, inquest panchnama Ex.31, panchnama of scene of offence Ex.40, police station diary entry Exs.54 & 55; panchnama of recovery of weapons-four sticks and an axe at the instance of accused-Seja Hama Ex.37, discovery panchnama of axe at the instance of accused No.1-Mark 8/7; discovery panchnama of sword at the instance of accused No.2-Galiben Ex.35; seizure of clothes of deceased and blood samples of Raiya Ram & Laxman Ex.42; Janvajog entry Ex.54; station diary entry for registration of offence at C.R.No.I-2/96 Ex.55; muddamal list Ex.9; seizure of blood

sample bottle sent by CJC, Talala Ex.14; FSL receipt Ex.15; injury certificate of Laxman Raiya Exs.16 & 19; FSL report Ex.17; injury certificate of Valaiben Raiya Ex.20; post mortem note of Raiya Ram Ahir Ex.21; injury certificate of accused-Saja Hama Ex.22; injury certificate of accused-Deva Jiva Ex.23; map Ex.28 etc.

5. On submission of closing pursis by the prosecution, learned Addl. Sessions Judge recorded further statement of the accused under Sec.313 of Cr.P.C. qua incriminating evidence. Upon affording opportunity of hearing to the learned advocates appearing for the respective parties, learned Addl. Sessions Judge, Veraval, delivered the impugned judgment and order of conviction and sentence as narrated in the earlier part of this judgment giving rise for the appellants-original accused Nos.1 to 5 and 7 to prefer the present appeal.

6. We have heard learned counsel for the appellants Mr.K.B.Anandjiwala and learned APP for the respondent-State, Mr.H.L.Jani.

7. It is mainly argued by learned counsel for the appellants, Mr.Anandjiwala, that the appellants are totally innocent and have been falsely involved in the crime in question. As such, at the time of incident, they were not there at all. According to him, no two

incidents have taken place but only one incident, which is first in point of time, has taken place. Taking us through the details of panchnama, evidence of various witnesses and other aspects, it is argued that even as per the say of the prosecution, only two persons i.e. the appellant No.1 Deva Jiva and his nephew Seja Hama were there. Since the persons allegedly involved in the crime in question were below five in number, charge for the offences punishable under Sections 147, 148 and 149 of IPC may not be sustained at all. If the case as put up by the prosecution is believed to be true, then, only one blow has been given by Deva Jiva which is not a fatal blow. In that view of the matter, it cannot be said that there was any intention on the part of Deva to kill the victim. It is also argued that the second incident is concocted. There are no independent witnesses who have supported the case of the prosecution and the witnesses who have supported the say of the prosecution are interested witnesses being relatives of the deceased and, therefore, their evidence is required to be scrutinized thoroughly. Since their evidence are not trustworthy, they are required to be discarded. In the absence of any other evidence connecting the accused with the crime in question, they are required



to be released forthwith.

8. Drawing our attention towards the oral evidence of P.W.11, the complainant, Valaiben, Ex.41, he has argued that Valaiben is not a witness to the incident as her presence at the time of incident is doubtful. As far as the injuries sustained by her are concerned, it is argued that her injuries are self-inflicted. Alternatively, it is argued that she is an agriculturist working in the field and, therefore, there are all possibilities of receiving this type of injuries while working in the field.

9. Drawing further our attention towards the oral evidence of son of the deceased and complainant, Laxman Raiya, P.W.12, Ex.44, it is argued that his evidence is not believable at all. Moreover, his presence at the time of incident is also creating doubt as he has not received any serious injuries in the crime in question.

10. In this regard, he has taken us through the medical evidence and argued that as per the evidence of prosecution, the complainant, her son Laxman and daily worker, Ramanik all were working in their courtyard doing the work of preparing bundle of grass. The incident however has not taken place there but at a distance and, therefore, they could not have seen the incident at all from their place of

work.

11. Taking us through the evidence of all the aforesaid three witnesses namely, complainant, her son Laxman and her daughter Lakhiben, P.W.13, Ex.45, it is argued that all the three witnesses are got up ones. Now the only witness available to the prosecution is P.W.15, Hiragar Devgar, Ex.47. However, witness Hiragar has not supported the say of the prosecution at all. In absence of any other cogent evidence available on record, it is submitted that the appellants are required to be released.

12. Mr. Anandjiwala has also raised the contention regarding delay in lodgment of FIR. He has taken us through the FIR Ex.57, oral evidence of all the three aforesaid interested witnesses, evidence of I.O., PSI, Khumansinh Devubha Parmar, P.W.18, Ex.56 and argued that as per the wardhi, PSI went to the Community Health Centre, Talala and even though the complainant and her son Laxman were there, the complaint has not been lodged for a considerable period. According to him, as the said delay has not been satisfactorily explained by the prosecution, the case of the prosecution becomes fatal.

13. He has also raised doubt regarding the injuries sustained by Laxman contending that though mental and physical conditions of

Laxman were good and though he was able to give statement, then also, his statement was not recorded by PSI but it has been recorded after a considerable time at Junagadh which also create doubt in the mind of all concerned.

14.As far as muddamal is concerned, he has taken us through the discovery panchnama and evidence of panchas and argued that it is not a discovery panchnama under Sec.27 of the Indian Evidence Act as the alleged discovery is a joint discovery of all weapons by one person.

15.Taking us through the FSL report, Mr.Anandjiwala has argued that cumulative effective of all evidence is that the incident has not taken place as alleged by the prosecution. According to him, only a single incident involving two persons has taken place and rest of the allegation regarding second incident has been concocted for the purpose of falsely implicating other relatives of the accused into the crime in question as well as for attracting Sections 147, 148 and 149 of IPC. According to him, no panchas have supported the panchnama as well as the case of the prosecution. In view of the aforesaid also, it is prayed that the appellants may be acquitted by quashing and setting aside the impugned judgment and

order.

16.Learned APP, Mr.Jani, taking us through the oral as well as the documentary evidence upon which reliance has been placed by the learned counsel for the appellants together with the impugned reasoned judgment delivered by the court below, has argued that the offence alleged against the present appellants have been proved beyond reasonable doubt and they have been convicted for the offence under Secs.147, 148, 149, 323 and Sec.302 of IP Code. Once the offence against the accused has been proved beyond reasonable doubt being members of illegal assembly and having remained there as such till the end, individual act of each other accused is not required to be considered. It is further argued that it happens among illiterate people in Villages that when an incident has taken place, the persons, who witnessed the incident, they being independent persons and members of other community, would not have a tendency to support the case of the prosecution during trial. Same thing is happened in this case also wherein independent witnesses namely, Hiragar Devgar and daily worker Ramanik have not supported the say of prosecution. Now the witnesses, who supported the say of the prosecution, are the nearest relatives of the deceased. Merely

because the witnesses are relatives of the deceased, their evidence cannot be discarded. However, their evidence are required to be scrutinized keeping in mind that they are interested witnesses and relatives of the deceased and if their evidence are found to be trustworthy and reliable, then it can be relied upon. In this case, the evidence of those related witnesses are trustworthy as they are injured witnesses and, therefore, their presence at the time of incident cannot be discarded.

17. According to him, FSL report, medical reports and panchnama of scene of offence support the case of the prosecution. Panchnama of scene of offence shows blood stains at both the places and, therefore, it cannot be said that incident has taken place at one place only. It is argued that it is true that in the first incident, only the deceased received injuries but thereafter when victim was taken to the bus-stand for carrying him to a hospital for treatment, assailants on seeing them were not satisfied with their previous act and they came with deadly weapons and assaulted on the victim on the vital part of the body of the victim and also on both the witnesses, who are wife and son of the deceased causing them injuries. They were immediately taken to Talala

Community Health Centre wherein they were admitted and treated and at the earliest, complaint has been filed and, therefore, it cannot be said that the complaint is concocted or that there is any delay in filing the FIR.

18.As far as joint discovery panchnama is concerned, it is contended that at the most, Court may not accept it to be a discovery panchnama under Sec.27 of the Indian Evidence Act but it can be said to be a recovery panchnama at the instance of one of the accused.

19.We have gone through the oral as well as the documentary evidence shown to us by the learned counsel for the respective parties together with the reasoned judgment delivered by the court below. We have also considered the contentions raised and arguments advanced by the learned counsel for the respective parties.

20.In order to prove the aspect of homicidal death, prosecution has placed reliance mainly upon the evidence of Dr.Dhirajlal Laljibhai Thummer, Medical Officer, Talala, P.W.1, Ex.18, the doctor who performed post mortem on the dead body of the deceased. He has proved the post mortem note Ex.21. He has narrated external mark of injuries in column No.17 of post mortem note and internal mark

of injuries in column No.20. He has also narrated cause of death therein which has not been challenged by the other side. Not only that, the eye witnesses have also categorically deposed that the accused No.1 Deva Jiva has given axe blow and accused Seja Hama gave stick blows on the deceased. Same has been proved by the concerned doctor by stating that the injuries mentioned in the post mortem note are anti-mortem and can be possible by way of muddamal articles. The doctor has also opined that it is a case of homicidal death. FSL report also support the same. Same has not been objected by the learned counsel for the appellants also. We also share the same view that death of the deceased is homicidal. Now the question comes who can be held guilty for the same.

21. In order to prove the guilt against the accused, the prosecution examined in all 18 witnesses out of which, five witnesses namely, P.W.11 Valaiben, wife of the deceased, P.W.12 Laxman Raiya, son of the deceased, P.W.13 Lakhiben Raiyabhai, daughter of the complainant who was in her house and after hearing the shouts, she also came out of her house, P.W.14 Ramnik Kalabhai, a daily wage worker who was working with the complainant and her son Laxman in their courtyard and were preparing bundle of

grass, P.W.15 Hiragar Devgar, the person who was also grazing his cattle in the gaucher land along with the deceased, have been examined as eye witnesses. Out of these five witnesses, P.W.14-Ramnik Kalabhai and P.W.15-Hiragar Devgar have not supported the say of the prosecution and have been declared as hostile and prosecution was permitted to cross-examine them. However, P.W.11 Valaiben, wife of the deceased, P.W.12 Laxman Raiya, son of the deceased and P.W.13 Lakhiben Raiyabhai, daughter of the complainant have fully supported the say of the prosecution.

22.It is further to be noted that out of these five witnesses, prosecution witness No.11-Valaiben and 12-Laxman Raiya have sustained injuries in the incident in question and have been treated at Talala Community Health Centre by Medical Officer, Dr.Dhirajlal Laljibhai Thummer, together with the victim Raiya Ram. It is Dr.Thummer of Talala Community Health Centre who has advised to take Laxman to Civil Hospital, Junagadh where Laxman was admitted as an indoor patient and treated for four days. Since he was not able to speak, his statement was not recorded by the I.O. at that time but it has been recorded four days after occurrence of the incident. However, P.W.13, Lakhiben Raiyaben, came to the place after occurrence of the



incident.

23. We have minutely scrutinized the oral evidence of above three eye witnesses keeping in mind that they are interested witnesses being nearest relatives of the deceased and we find that P.W.11 Valaiben, wife of the deceased and P.W.12 Laxman Raiya, son of the deceased were preparing bundle of grass along with P.W.14, daily wage worker, Ramanik and victim Raiya Ram was grazing cattle near the courtyard. After hearing the shouts, they all went to the scene of offence and during that process, Deva Jiva who was having axe in his hand gave blow with it while Saje Hama who was stick in his hand gave stick blow to the deceased and thereafter they fled from the scene. It is established from the evidence of P.Ws.11, 12 and 14 that the victim fell down and was profusely bleeding and, therefore, they were taking the victim to the hospital. However, since vehicle was not available, they were searching for it. Meanwhile, the accused who were hiding with deadly weapons near the school compound came out and assaulted all the three persons wherein deceased received further injuries on vital part of the body from the deadly weapon sword and other weapons while the complainant and Laxman received severe injuries. Laxman received severe injuries on head. Meanwhile,

as Forest Guard, Raja Rama came there with motor cycle, the complainant requested him to bring a vehicle and, therefore, he brought the rickshaw of Ameerali Hasam in which all the three persons were taken to Talala Community Health Centre where on examination, victim Raiya Rama was declared dead while both the injured were treated by Dr.Dhirajlal Laljibhai Thummer. In view of the above, we are unable to accept the arguments advanced by the learned counsel for the appellants that both of them have received simple injuries and they are self-inflicted.

24.Apart from the above, both the injured witnesses have categorically given detailed account of the incident along with weapons held by them. They also deposed that the assailants are from their Village and know each other since long. It was an incident which has taken place in broad day light and, therefore, they were able to see the assailants along with their respective act. The accused have been identified by the witnesses into the Court with their respective weapons. It is also revealed that both of them have received injuries in the incident and hence, presence of P.Ws.11 and 12 at the time of incident is fully established. Since their evidence are found to be natural, trustworthy and inspiring

confidence, their evidence can be relied on. Merely because they are relatives of the deceased, their evidence cannot be discarded. If Court wants to rely upon the evidence of witnesses who are relatives, it should evaluate their evidence to find out the truth and if found satisfactory and trustworthy, then reliance can be placed on them. Reliance is placed on the judgment of the Apex Court reported in AIR 2006 S.C. p.3010 in the case of Pulicheria Nagaraju alias Nagaraja Reddy Vs. State of Andhra Pradesh more particularly para 11 wherein it has been observed by the Apex Court as under:

"Evidence of witness cannot be discarded merely on the ground that he is either partisan or interested or closely related to the deceased, if it is otherwise found to be trustworthy and credible. It only requires scrutiny with more care and caution, so that neither the guilty escape nor the innocent wrongly convicted. If on such careful scrutiny, the evidence is found to be reliable and probable, it can be acted upon. If it is found to be improbable or suspicious, it ought to be rejected. Where the witness has a motive to falsely implicate the accused, his testimony should have corroboration in regard to material particulars before it is accepted. In the instant case nothing had been elicited in the cross-examination of eye-witnesses to discredit their evidence. Their evidence finds corroboration in complaint and the evidence of the Doctors and the Mos seized on the disclosures made by the accused. Therefore, the evidence of said eye-witnesses could not be rejected, even though they were

closely related to the deceased and inimically disposed towards the accused."

25. Now the only question to be dealt with by this Court is as to whether two incidents have taken place or one incident has only taken place. To decide question, the importance evidence is the evidence of panchnama of scene of offence, Suleman Fatemamad, P.W.10, Ex.39. This aspect has been proved by the evidence of this witnesses and nothing contrary has come out in his cross-examination.

26. We have also gone through the details of panchnama of scene of offence and it shows that there were blood stains at both the places. All the three witnesses have categorically deposed that two incidents have taken place. If we accept the arguments of learned counsel for the appellants that only one incident has taken place in which victim Raiya Ram was there, then question comes about causing of injuries to two eye witnesses namely, P.W.11 Valaiben, wife of the deceased and P.W.12 Laxman Raiya, son of the deceased. In this respect, learned counsel for the appellants has tried to convince us that injuries received by Laxman are simple in nature and injuries to Valaiben are self-inflicted injuries.

27. We have also gone through the same and we

believe that injuries sustained by Laxman are not simple but serious deep injuries. In this regard, prosecution has examined Dr.Thummer at Ex.18. Dr.Thummer has deposed that when patient named Laxman was brought for treatment, he was unable to speak. He has also deposed that injuries received by Laxman were possible by hard and blunt substance like stick and back portion of axe. He has also produced and proved medical certificate Ex.19. Laxman was also treated by Dr.Makwana, Medical Officer at Junagadh Civil Hospital, who had stated that till he was discharged from the hospital, he remained as an indoor patient. Therefore, we are unable to accept the arguments advanced by the learned counsel for the appellants that only simple injuries have been received by Laxman.

28.As far as injuries on Valaiben are concerned, a contention has been raised by the learned counsel for the appellants that those injuries are self-inflicted injuries. Looking to the nature of injuries and the place where such injuries have been caused, it cannot be said to be self-inflicted injuries.

29.We have also taken into consideration the time factor during which time the incidents in question have occurred. It appears that there is no much time gap between two

incidents. It also appears that the deceased and other two injured persons were immediately taken to hospital by a third person, who went to help them and the details have been narrated by Valaiben before the I.O. also at the earliest opportunity by way of FIR. Therefore, question of concoction or filing the FIR after taking advice from well versed persons may not arise at all. FIR discloses the names of assailants in detail along with the weapons held by them together with their active participation in the crime in question. They have been identified by the witnesses into the Court along with their respective weapons also. Dr.Thummer has also proved the injuries received by them.

30.Thus, prosecution is able to prove the injuries received by the deceased Raiya Ram by way of oral evidence of Dr.Thummer, P.W.1, at Ex.18 as well as by way of post mortem note. Dr.Thummer has opined that external injuries Nos.1 and 2 are possible with blunt substance of axe while injuries No.3 to 5 are possible by short edged weapon like muddamal articles No.3 and 10. According to him, external injuries Nos.4 and 5 and its corresponding internal injuries are sufficient to cause death of the deceased in the ordinary course of nature.

31.It is also required to be noted that

witnesses and assailants are agriculturists and are staying very near to Gir forest. Grass being one of the products available in the forest, they use piece of land for the purpose of grazing of cattle. It reflects from the evidence of Forest Guard, Amar Raja Rama, that previously it was a piece of land possessed by the otherside for the purpose of collecting the grass. However, during that season, it was possessed by the victim Raiya Ram and when the otherside tried to bring their cattle in the above referred land, quarrel started and, therefore, on the day prior to the incident altercation took place between Raiya Ram and Deva Jiva and, therefore, motive in the commission of offence is also established by the prosecution beyond reasonable doubt. Not only that, as per the evidence of above referred two witnesses, Deva has straightaway inflicted blows to the victim without giving any opportunity which shows the clear intention. He went to the place with deadly weapon wherein Raiya Ram was grazing his cattle along with Hiragar Devgar and inflicted blows with that weapon and, therefore, intention is clearly established. Since they were not satisfied with the lesser injuries received by the victim, they waited very near the school compound with a definite

intention of causing further injuries when the victim would be taken to the hospital for treatment and when the victim was being taken to the hospital, at the bus-stand, they assaulted with deadly weapons causing fatal injuries to the victim and grievous injuries to the complainant and her son as narrated hereinabove which take the accused very near to the crime and, therefore, their presence at the time of incident cannot be discarded.

32. On going through the entire evidence available on record, we are of the opinion that the present appellants and one Hama Jiva (died during trial), all seven persons, formed an illegal assembly with an ulterior motive with deadly weapons in their hands and they continued till the end and assaulted the deceased resulting into offence under Sec.302 of IPC and caused injuries to other two persons. As they were more than five persons, prosecution has been able to prove the charge for the offence under Secs.147, 148 and 149 of IPC and, therefore, their presence has been established being members of illegal assembly and hence, individual act of each accused cannot be taken into consideration. Thus, their presence and active participation in the offence in question has been fully established by way of oral evidence of witnesses hereinabove referred to and nothing



contrary has come out from their evidence which shake their evidence. The court below has rightly appreciated the evidence on record and held the appellants guilty.

33.We also agree with the reasons given by and the findings arrived at by the court below in holding them guilty by the impugned judgment and order of conviction and sentence and hence, we do not interfere with the same in this appeal.

34.Thus, this appeal is dismissed. Judgment and order of conviction and sentence dated 16-3-2000 delivered by the learned Additional Sessions Judge, Veraval, in Sessions Case No.211 of 1999 is confirmed. The appellant No.3-original accused No.3-Rabari Ganga Hama, appellant No.4-original accused No.4-Rabari Hamir Hama and appellant No.6-original accused No.7-Rabari Mesur Hama are on bail and hence, their bail bond shall stand cancelled and they are directed to surrender before the concerned Jail Authorities within eight weeks from today.

(R.P.DHOLAKIA,J.)

(K.S.JHAVERI,J.)

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