

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

**CRIMINAL APPEAL No. 209 of 1998
With
CRIMINAL APPEAL No. 203 of 1998**

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE R.H.SHUKLA

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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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DALPATSINH GAMBHIRSINH BARAD - Appellant(s)

Versus

STATE OF GUJARAT - Respondent(s)

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Appearance :

Criminal Appeal No. 209 of 1998.

Mr. KJ Shethna, for the appellant.

Mr. RC Kodekar, APP for the respondent - State of Gujarat.

Criminal Appeal No. 203 of 1998.

Mr. RC Kodekar, APP for the appellant - State of Gujarat.

Mr. Adil Mehta, for the respondent Nos. 1 and 3 to 6.

Respondent No.2 - since died appeal is abated.

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE R.H.SHUKLA

Date : 31/01/2008

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. Nine accused persons ('A-1' to 'A-9' for short) were charged and tried by the learned Additional Sessions Judge, Ahmedabad City, in Sessions Case No. 97 of 1992 for the offences under Sections 302/34, 201/34 and 193/34 of the Indian Penal Code ('the IPC' for short) on the accusation that on 10.1.1989 A-1 had taken Navinchandra Dahyalal Dholakia on police remand in connection with an offence of theft and during the remand period, A-1 and other accused persons had interrogated the deceased and during the course of the interrogation, by sharing common intention to cause death of Navinchandra Dahyalal Dholakia, all the accused persons tortured him and inflicted multiple injuries

with lathi (stick) and committed his murder (custodial death).

1.1. At the end of the trial, A-1 was found guilty of the offences with which he was charged. Therefore, the trial Court, vide judgment and order dated 13.1.1998, convicted A-1 for the offences under Sections 302, 201 and 193 IPC and sentenced to imprisonment for life and fine of Rs.5,000/- i.d., RI for three months for the offence under Section 302 IPC, RI for three months for the offence under Section 201 IPC and RI for one month for the offence under Section 193 IPC. It is also ordered that all the substantive sentences shall run concurrently. The trial Court found A-2 to A-9 not guilty to the offences with which they were charged, therefore, they were acquitted of the said offences by giving benefit of doubt.

1.2. Aggrieved by the aforesaid judgment and order of conviction and sentence, A-1 has filed

Criminal Appeal No.209 of 1998 with the aid of Section 374 of the Code of Criminal Procedure ('the Code' for short) challenging the order of conviction and sentence recorded against him whereas State of Gujarat has filed Criminal Appeal No.203 of 1998 challenging the judgment and order of acquittal recorded in favour of A-2 to A-7 by the aid of Section 378 of the Code.

1.3. It may be noted that the State of Gujarat has not filed appeal challenging the acquittal of A-8 and A-9.

2. The prosecution case as disclosed from the FIR and unfolded during trial is as under:

2.1. On 10.11.1989, DB Chauhan, Deputy Superintendent of Police, CID Crime, Gujarat State, Ahmedabad, filed a complaint before the Deputy Commissioner of Police, CID Crime, Ahmedabad, alleging that on 9.1.1989, the Surveillance Squad of Naranpura Police Station

consisting of PSI D.G. Barad and other staff members i.e., Head Constable Omkarrao Sankarlal, Badge No. 5142, Head Constable Ramlal Parsottamdas, B. No. 4425, Police Constable Ratilal Surajdhan, B.No. 4917, Police Constable Jesabhai Kabhai B. No. 5011 and Police Constable Vijaysinh Diluba B. No. 2310 had, while on their surveillance duty, at about 17:30 hours intercepted a person named Navinchandra Dahyalal Dholakia, a resident of Lathi, Dist. Amreli, at Navdeep Building Compound, and recovered a Philips transistor radio and camera and on inquiry, as he could not reply satisfactorily, a personal search was carried out from which 3 keys and one scissors was recovered from his possession and, therefore, under Section 102 of the Code, the articles recovered from him were seized and he was arrested under Section 41 (1) (b)(d) of the Code. Thereafter, further investigation was made and during the interrogation said Navinchandra Dahyalal Dholakia had confessed about having involved in theft cases in the area under the Naranpura Police

Station and also showed the Akashganga Apartment. He had committed the offence of theft and the camera which was recovered was stolen by him. It was stolen from Block No. 17/204 of Akashganga Apartment wherein one Sudhir Madhavlal was residing. It was also confirmed by Sudhir Madhavlal that he had lodged C.R. No.I-558/88 for offence under Sections 454 and 380 IPC for incident of theft occurred on 13.9.1988 at his premises in the afternoon. Therefore, on the basis of the camera which was recovered from Navinchandra Dahyalal Dholalkia and the place which he had shown for the alleged offence, PSI Barad had arrested him for the said offence on 9.1.1989 at 19:40 hours and proceeded with further investigation. During further inquiry, Navinchandra Dahyalal Dholakia is said to have stated about other muddamal having been kept at Sonal Society, Bungalow No. 17 at Mehsana and, therefore, on the same day in the night PSI D.G. Barad took him with the other members of the staff in Government vehicle. Other members of the staff, i.e., Head Constable Omkarrao Shankarrao,

Police Constable Vijaysinh Diluba, Police Constable Jesabhai Kabhai, Police Constable Ashokkumar Dahyabhai had accompanied in a Government vehicle No. GBA 814 which was driven by Yuvraj Uttam and Rajaram Vittal and proceeded to Mehsana. From Sonal Society, Bungalow No. 17 at Mehsana of Navinchandra Dahyalal Dholakia, Barad had recovered muddamal worth Rs. 23,570/- as per muddamal pavti No. 17/89 dated 10.1.1989 in connection with CR No.I-558/88 for offence under Sections 454 and 380 of IPC.

2.1.(i) On 10.1.1989, Navinchandra Dahyalal Dholakia was produced before the Chief Judicial Magistrate at Mirzapur by PSI D.G. Barad within the prescribed period and as other muddamal of other offences was required to be recovered, an application for police custody/remand for a period of 10 days was applied for and the court had granted the remand of accused Navinchandra Dahyalal Dholakia for a period of 7 days i.e. upto 16.1.1989 11:30 hours. Thus, accused Navinchandra Dahyalal Dholakia was in the police

custody for the remand.

2.1.(ii) After obtaining the remand as sated above, PSI D.G. Barad accompanied by his staff members, Head Constable Omkarrao Shankarrao, B. No. 5142, Police Constable Vijaysinh Diluba, B. No. 2310, Police Constable Ashokkumar Dahyabhai B. No. 7171 and Police Constable Mansinh Kesarisinh B. No. 4460 and Police Constable Ratilal Surajdhan B. No 4917 took the accused in Government vehicle - Jeep bearing No. 814 with the driver Yuvraj Uttam and Rajaram Vittal from Ahmedabad to Junagadh and had proceeded to Junagadh and reached on early morning 4 O' clock on 11.1.1989. On reaching Junagadh, while making an inquiry for the brother-in-law of Navinchandra Dahyalal Dholakia and as they were not available at the residence and having informed that they had proceeded to Ahmedabad, they again proceeded towards Ahmedabad from Junagadh at 9:30 hours. When they reached near Sarkhej at about 17:30 hours, Navinchandra Dahyalal Dholakia had complained about chest pain

and therefore was taken to V.S. Hospital where the doctor on duty declared him dead at 18:00 hours.

2.1.(iii) Thus, Navinchandra Dahyalal Dholakia was in the police custody from 9.1.1989 and on 11.1.1989 at 18:00 hours, when he was taken to V.S. Hospital wherein medical officer declared him dead and therefore an Accident Death Case No. 2/89 as per Section 174 of the Code was registered at Naranpura Police Station, which was investigated by S.P. K.K. Patel, D.C.B. Crime, Ahmedabad. However, as death of the deceased occurred in the police custody, City Sub-Divisional Magistrate, Ahmedabad had also started investigation and after preparing the inquest report, the dead-body was referred to the V.S. Hospital for post-mortem but no exact cause of death was given and as the doctor who performed post-mortem did not disclose the cause of death, viscera was sent to the FSL. Thereafter, the investigation was handed over to CID Crime, Gujarat State as per order of DGP and IGP,

Gujarat State, Ahmedabad, vide Order No. G-1/1909/1/Ahmedabad City/89/2175 dated 6.5.1989. Therefore, investigation was started by CID Crime during which the viscera report was received from the FSL. It was sent to the Medical Officer, who performed the post-mortem and the professor of Forensic Medicines of NHL Municipal Medical College, Ahmedabad vide letter F.M.65/89 dated 6.7.1989 stating "the cause of the death is due to the hemorrhage as a result of the injuries. The death is caused 24 hours before the post-mortem was made and the dead body was brought to the hospital after 8 hours after he expired. The injuries were caused within one day." Therefore, the post-mortem was performed at 09:45 hours on 12.1.1989 as stated in the post-mortem note and on that basis the death of the deceased had occurred on 11.1.1989 at about 09:45 hours as could be definitely believed. Moreover, vide letter No. F.M. 68/89 dated 11.7.1989 it has been further informed and stated that the injuries caused to the deceased were on the head above nose, face, neck, chest, right hand and both

elbow/wrist and the legs as well as all over the body and all these injuries were caused with lathi, danda or such solid substance. Thereafter, by another letter bearing No. F.M. 76/89 dated 25.7.1989 it was also confirmed that death of deceased Navinchandra Dahyalal Dholakia was caused on 11.1.1989 at about 10:00 hours and after about 8 hours, when he expired on 11.1.1989 at about 06:00 in the evening the dead body was brought to the V.S. Hospital.

2.1.(iv) Therefore, on the basis of the FSL report, as stated above, the deceased Navinchandra Dahyalal Dholakia was in the police custody when he died and that it could be definitely believed that due to custodial violence by the police and injuries caused he succumbed to death.

2.1.(v) On the basis of the facts stated hereinabove, the investigation revealed that deceased Navinchandra Dahyalal Dholakia was caught from Navdeep Building compound on 9.1.1989

and at that time he tried to run away and was caught near the compound fencing and during the altercation he fell down and had sustained minor injuries and had abrasions for which a panchnama was made by PSI Barad. However, in the report regarding the arrest of the accused made on 9.1.1989 when he was arrested as per Section 41(1)(b)(d) of the Code, no such mention has been made nor any entry has been made in the station diary of Naranpura Police Station. Further, it is also revealed that the deceased is said to have received minor injuries when he fell down for which he was taken by PSI Barad to a private doctor. Therefore, if he had fallen down on 9.1.1989 when he was first caught and arrested by PSI Barad, then it should have been mentioned by PSI Barad in his report for the arrest and should also have sent it with the yadi to the government hospital for treatment. However, when he was taken for investigation after the death, in order to create a defence the panchnama regarding the injuries have been got up and thereby it is subsequently got up to create a

false evidence. Similarly, the say about the treatment by the private doctor also cannot be believed and it is false. Moreover, when the deceased was produced before the Court of Chief Judicial Magistrate, Mirzapur with the report on 10.1.1989, at that time the deceased had not complained about any ill-treatment before the Court as it could be found from the record of the Court. Further, on 9.1.1989 when Police Inspector G.S. Ahuja had seen the deceased at Naranpura Police Station, at that time also the deceased had not complained of any ill-treatment as disclosed to him. Therefore, looking to the injuries it is not believable that such injuries could be caused by falling and therefore viewed from this angle, the injuries were caused to the deceased during 9.1.1989 and 10.1.1989 by police as it is revealed from the record.

2.1.(vi) During the investigation PSI Barad had returned from Junagadh to Ahmedabad on 11.1.1989 and he started in the morning from Junagadh and at that time he had talked to Police

Inspector G.S. Ahuja at his residence telephone No. 78202 and this talk was for about 516 seconds, that is, 12 minutes consuming 129 units. This talk could be regarding the death of the deceased. This telephone talk was from the public call booth which is situated near/just behind Junagadh City Police Station and District Police Control is also having STD facility. Therefore, if the talk was a routine matter, then PSI DG Barad could have talked to Police Inspector Ahuja from there. Therefore, the time about death of the deceased mentioned in post-mortem report by the doctor is consistent and believable.

2.1.(vii) Moreover, it is also revealed during the investigation that the father-in-law of the deceased, Ishwarsinh Hemaji Chauhan, had gone from Palanpur to Mehsana on 8.1.1989 to see his daughter Veenaben, wife of the deceased, and at that time it was learnt that the police had come from Ahmedabad accompanied by deceased Navinchandra Dahyalal Dholakia to Mehsana on the

same day afternoon. Therefore, deceased Navinchandra Dahyalal Dholakia was in fact detained illegally on 8.1.1989 or before and was shown as arrested as per Section 41(1)(b)(d) of the Code on 9.1.1989 at 17:30 hours in connection with C.R. No.I-558/88, Naranpura Police Station, for offence under Sections 454 and 380 and on the same day on the basis of showing his arrest at 19:40 hours on 10.1.1989, he was produced before the Court of Chief Judicial Magistrate, Mirzapur, for remand and obtained remand for 7 days till 16.1.1989 11:30 hours and while in police station, after obtaining the remand on 10.1.1989 at about 17:30 hours, was taken to Junagadh for investigation and on 11.1.1989 at about 10:00 hours in the morning he died. During this time at any place he was beaten by danda, stick or any blunt substance for eliciting information and/or confession about the offences causing injuries to the deceased all over his body and thereby causing his death and thereafter on 9.1.1989 a false panchnama was got up to bring on record the

fact of deceased having fell down to show that the deceased had died as a result of injuries sustained when he fell down and concealed true facts about the death and thereby, in connivance with each other, the accused persons have committed the offence under Sections 342, 302, 330, 114, 196, 201, 202 and 217 of IPC.

2.1.(viii) According to the complainant, the multiple injuries caused by the accused persons in furtherance of their common intention to cause death of the deceased while he was in custody and being interrogated resulted into his death and, therefore all the accused persons have committed the aforesaid offences.

2.2. Pursuant to the filing of the complaint, offence was registered against the accused persons as per the allegations made in the complaint and the investigation was put into motion. On conclusion of the investigation and on receipt of autopsy report as well as report from the Assistant Professor, Pathology and as

sufficient incriminating evidence was found against the nine accused persons, charge-sheet came to be filed against nine accused persons for commission of the offences alleged against them in the complaint in the Court of learned Metropolitan Magistrate, Ahmedabad.

2.3. As the offence under Section 302 IPC is exclusively triable by a Court of Sessions, the learned Metropolitan Magistrate, Ahmedabad committed the case to the City Sessions Court, Ahmedabad where it was numbered as Sessions Case No.97 of 1992. Thereafter the said case was transferred to the learned Additional Sessions Judge, Court No.3, City Sessions Court, Ahmedabad. The learned Additional City Sessions Judge, Ahmedabad to whom the case was made over for trial, framed charges against the accused persons for the offences under sections 302/34, 201/34 and 193/34 IPC. The charges were read over and explained to the accused persons. The accused persons pleaded not guilty to the charges and claimed to be tried and, therefore, they were

put to trial.

2.4. To prove the culpability of the accused persons, the prosecution has examined as many as 20 witnesses and relied upon their oral testimonies, details of which have been given in paragraph 8 of the impugned judgment and order. The evidence of the relevant witnesses would be discussed hereinafter as and when required.

2.5. In order to prove the charges levelled against the accused persons, the prosecution has also produced 15 documents and relied upon the contents of the same, details of which have also been given in paragraph 8 of the impugned judgment and order, which shall be referred to hereinafter in this judgment as and when required.

2.6. After recording of the evidence of the prosecution witnesses was over, the trial court explained to the accused persons the

circumstances appearing against them and recorded their further statements as required under Section 313 of the Code. In their further statements, all the accused persons denied the case of the prosecution in its entirety and stated that a false case has been filed against them. However, they have neither produced any evidence nor did they examine any witness in support of their defence.

(i) A-1 has filed his detailed written explanation at Ex.102. In his written explanation he has inter alia stated that on account of aggressive action of the mob, the deceased was injured before his arrest. He and his colleagues provided treatment to the deceased from a private doctor only with an intention that he might get best medical treatment. He and his colleagues have not tried to get any medical advise previously and in any circumstances though it is necessary to obtain instructions considering the age of a young person, he and his colleagues

have taken immediate action to see that the deceased might get top most medical treatment and advise. If they have committed breach of any so-called rules of the Government it is only with over humanitarian intention to see that the best medical advise is received at the earliest from an expert doctor who has worked in a Government hospital. The physical checkup of the deceased was made from an expert private doctor, Dr. BT Patel before the deceased was taken on remand in police custody from the Court by ignoring the Government rules only on humanity and started for Junagadh. He has stated that it was his humbly belief that the deceased had apprehension that his relatives would know about his unlawful activities. But they had no other way to make his family members aware about his such sordid acts. Therefore, he humbly prayed to consider and examine the chronology of incidents in this case.

(ii) A-1 pointed out that the sister of the deceased was residing at Junagadh. So her

residence was inquired about by the persons with them. On inquiring whether the deceased's sister was found and she agreed to hand over the stolen muddamal Golden Ornaments?, the deceased felt that his sister was appraised of his such sordid acts and all his relatives would also know about the same. Therefore he was silent and nervous while stating about the same. He came to know about such nervousness in Junagadh. He informed about the same to superior officers at Ahmedabad. They immediately started for Ahmedabad from there as per the instruction of the Officers.

(iii) He has further stated that they targeted by night-time when it was the coldest day of the year and the cold was excessive while returning. The deceased was asking them on the way as to "whether his sister was met? What was she saying? Were the ornaments handed over? Was she saying anything for him? etc." and he was becoming nervous.

(iv) While returning to Ahmedabad, they could not know about his death due to cold as he became nervous. Such a habitual criminal sentenced for about thirty offences of theft, is behaving deceitfully sometimes. He was asking aforesaid question again and again by remaining silent many a times. So they brought him to a well equipped Vadilal Sarabhai Hospital at Ahmedabad and got him examined. Only after medical examination they came to know that the person whom they thought to be unconscious was travelling with them dead for any unknown reason from an unknown nearby place.

(v) He has further stated that it was impossible that they have beaten the deceased when he was eating. It was also requested as to whether was it possible that they may severely beat a person while giving food to any person for eating..? If they have an intention to harass the deceased, to keep him hungry is not only a physical but the best mental harassment too. It is a medical evidence that food was served upon

him sometime prior to death.

(vi) He wants only to establish by this fact that his aforesaid act shows his honest awareness towards Government rules as against the allegation of causing harassment.

(vii) In the aforesaid circumstances, he respectfully prayed that when the prosecution makes an attempt to refute his flawless character from heresy medical evidence, a chance may be given to prolong flawless career by accepting this evidence. He and his colleagues are innocent. He was produced as an accused for a charge of an unknown death for any unknown reasons. He has stated that it was his humbly belief that it does not transpire from the medical evidence that sudden untimely death has taken place on account of his act. He also believed that ill-intent is endured from the evidence of a Government officer intentionally by collecting the evidence in so-called

investigation.

(viii) Initially the incident was conveyed to Ahmedabad City Police at Naranpura Police Station. The City police made an inquiry. Then a higher officer assigned this investigation to the City Crime Branch. In the meantime he was transferred to P.T.S. Branch Vadodara, and he filed a petition for stay before the High Court. So an order was passed to assign the investigation to CID Crime Branch. Thereafter the post mortem note for an exact reason of death was obtained after a long time by arrogance of Dr. Kothari and the Superintendent Shri Shah of the V.S. Hospital and an offence of murder was registered against him. He has become victim of the groupism among the higher police officers and doctor's arrogance.

(ix) Under the aforesaid circumstances, he has stated that he is innocence. He also stated that indisputably the prosecution has not been able to

prove, beyond doubt, the case against him and his colleagues.

However, to substantiate any of the explanation, he has not produced any evidence nor did he examine any witness.

2.7. On appreciation, evaluation, analysis and scrutiny of the evidence on record, the trial court held that the prosecution has been able to establish that deceased Navinchandra Dahyalal Dholakia died a homicidal death. It is also held that deceased Navinchandra died when he was in the physical custody of A-1. It is also held by the trial Court that A-1, with a view to obtain confession from deceased Navinchandra with regard to the offence of theft, tortured him and inflicted multiple injuries with lathi and as a result of the multiple injuries, he succumbed to the same. It is also held by the trial court that A-1 gave false evidence in judicial proceedings and also tried for the disappearance of the

evidence of the offence/gave false information to screen the offender. However, it is held that rest of the accused persons have not done anything and thereby did not share the common intention with A-1.

2.8. On the aforesaid findings, the trial court has held that complicity of A-1 for commission of offence alleged against him has been duly established. The trial court, therefore, convicted A-1 for the offences under Sections 302/34, 201/34 and 193/34 IPC and imposed sentences on him to which reference is made in earlier paragraphs of this judgment. The trial court gave benefit of doubt to rest of the accused persons and acquitted them of the offences with which they were charged.

2.9. It is this judgment and order which has given rise to instant two appeals, one filed by A-1 being Criminal Appeal No.209 of 1998 against his conviction and sentence and another filed by

the State of Gujarat being Criminal Appeal No.203 of 1998 against the acquittal of A-2 to A-7. As stated above, State of Gujarat has not filed appeal against the acquittal of A-8 and A-9.

3. Mr. K.J. Shethna, learned advocate for A-1, the appellant of Criminal Appeal No. 209 of 1998, has submitted that there are three eye witnesses in this case who saw Navinchandra falling down while trying to escape from the police and while running he fell down and received multiple injuries. They have been examined by the prosecution and they have deposed before the Court as per their statements. The trial court has failed to appreciate the effect of the evidence of so-called eye witnesses which gives a clean bill to A-1. He has also submitted that before bringing home the guilt of murder and by proving to the hilt there must be the evidence of nexus between the act of A-1 committing an offence of murder or if not murder even of committing an act on his part resulting into the

injury on the person of deceased Navinchandra. From the evidence of the so-called eye witnesses what is proved is not the assault at the hands of A-1 or any other accused on the person of Navinchandra but, on the contrary, what is proved is the resultant injuries because of the deceased having dashed against the iron fencing, then A-1 cannot be punished for the offences with which he was charged. It is also highlighted by him that there are no eye witnesses to the acts of beating the deceased by A-1. It is also emphasized by him that in Ex.82, the inquest report of deceased drawn by P.W.18, Ashokkumar Mathurji Thakor, Ex.81, 13 injuries are recorded. Therefore the factum of these 13 injuries is consistent with the prosecution's own case coming forth from the aforesaid three eye witnesses that on the day on which deceased was apprehended by the police, he received such injuries while trying to make good his escape. By referring to the evidence of P.W.6, Dr. Dhanraj Jashraj Kothari, Ex.42, it is submitted by Mr. Shethna that his evidence is

only an opinionated evidence and not an evidence of fact. However, the trial court has considered that opinionated evidence and has recorded an erroneous finding. In support of the contention that an opinionated evidence cannot be considered for the purpose of recording conviction, Mr. Shethna has relied upon the following three judgments of the Supreme Court:

- (i) Ram Bali v. State of U.P. (2004) 10 SCC 598;
- (ii) Vishnu alias Undrya v. State of Maharashtra (2006) 1 SCC 283;
- (iii) Krishnan and another v. State, represented by Inspector of Police, (2003) 7 SCC 56.

3.1. It is also contended by him that if the judgment and order passed by the trial court acquitting A-2 to A-9 of all charges is confirmed by this Court then in the absence of any charge indicating any particular overact on his part for commission of any offence, as the original charge against him and his co-accused was read with

Section 34 IPC, he cannot be convicted of any substantive offence. Therefore, if his participation in the alleged offence is accepted by his Court, then assuming without admitting the same, he can be held guilty only on the basis of minimum liability and in support of this submission, he relied upon the following two judgments of the Supreme Court:

- (i) Mohansingh and another v. State of Punjab, AIR 1963 SC 174;
- (ii) Krishna Govind Patil , AIR 1963 SC 1413.

3.2. He, therefore, urged that the judgment and order convicting and sentencing A-1 is recorded without any substantive evidence and therefore the same may be quashed and set aside by allowing the appeal and thereby acquitting A-1 of the offences with which he was charged.

3.3. Alternatively it is submitted by him that if A-1 is convicted for a lesser charge then he

may not be sent to jail and he is ready to pay compensation which he can pay to his utmost capacity to the heirs and legal representatives of deceased Navinchandra Dahyalal Dholakia and thereby prayed for mercy. Mr. Shethna, therefore, urged to pass appropriate orders in this regard.

4. Per contra, Mr.R.C. Kodekar, learned APP for the respondent - State of Gujarat in Criminal Appeal No.203 of 1998 submitted that the impugned judgment and order convicting and sentencing A-1 does not require any interference of this court. According to him, there is ample evidence that A-1 has taken police remand of deceased Navinchandra in connection with the theft case being CR No.I-558 of 1988 on 10.1.1989 upto 16.1.1989 and the deceased died on 11.1.1989 and thus he died while he was in physical custody of A-1. A-1 sought for the police custody remand to extract the confession about the disclosure of muddamal worth Rs.40,000/- as well as to get the

recovery of muddamal in respect of undetected offences. The remand application was granted upto 16.1.1989. Thus from 9.1.1989 to 10.1.1989 till 02:35 the deceased Navinchandra was conscious enough to represent himself before the learned Chief Judicial Magistrate and he was not having visible marks of injuries over his person. A-1 and his staff left for Junagadh with the deceased on 10.1.1989 at about 17:30 hours and reached Junagadh on 11.1.1989 at about 4 O' clock. This is evident from the record produced at Ex.93 i.e., the logbook of the vehicle in which they proceeded for Junagadh wherein it is specifically reflected that they proceeded from Ahmedabad at about 4:30 and reached Junagadh at 4:30. They left Junagadh on 11.1.1989 at about 9:30 and reached V.S. Hospital at about 6 O' clock. The logbook also suggests that purpose of journey was in respect of investigation in connection with CR No.I-588 of 1988. He has also emphasized that the post-mortem report suggest 33 external injuries which were ante-mortem. The cause of death shown

to be the shock and haemorrhage on account of multiple injuries all over the body; time since death was about 24 hours and the dead body was brought after about 8 hours of the death of the deceased to V.S. Hospital as well as injuries were fresh to about one day duration. According to Mr. Kodekar, this proves the fact that after reaching Junagadh, the deceased was mercilessly beaten up at night and as per the medical report he must have died at Junagadh and the dead-body was brought after about 8 hours of his death and as per the logbook of vehicle they proceeded for Ahmedabad at about 9:30 and reached at about 8 0' clock in the evening.

4.1. In short, according to Mr. Kodekar, the Navinchandra had already dead when A-1 returned from Junagadh and he brought dead-body of Navinchandra from Junagadh. But this fact was not disclosed by A-1 at any point of time either to the control room or to any of his superior officers. Even no medical treatment was provided

to the deceased in between.

4.2. The sum and substance of the submission of Mr. Kodekar is that the deceased was in exclusive custody of A-1 when he was found dead and more than 33 external injuries were found at the time of inquest panchnama. The inquest panchnama also discloses the external marks of injuries over the person of the deceased. The report submitted by the P.W.19, I.P. Gautam, Sub-Divisional Magistrate, Ex.84 is produced at Ex.87 which is proved by his deposition P.W.19, Ex.84 and referring to this report and oral testimony of the Sub-Divisional Magistrate, Mr. Kodekar has submitted that the prosecution has successfully established the charges levelled against A-1 and therefore the impugned judgment and order of conviction and sentence passed against A-1 does not call for any interference of this Court. He, therefore, urged to dismiss the appeal filed by A-1.

4.3. So far as Criminal Appeal No.203 of 1998 filed by the State of Gujarat challenging the acquittal of A-2 to A-7 is concerned, according to him the deceased had 33 external injuries as is established by the PM note and the deposition of the medical officers and all the injuries are found to be ante-mortem. All the injuries, in the opinion of the medical officers, are caused either by danda/lathis and the multiple injuries go to establish the fact that A-2 to A-7 were also instrumental in causing these injuries. It is also highlighted by him that the logbook of the vehicle also goes to suggest that there were total six persons other than the drivers in the vehicles and the station diary produced at Ex.76 mentions the name of Head Constable Omkarrao Shankarrao, Police Constable Ratilal Surajdhan, Police Constable Jerambhai Danabhai and other staff members. It also goes to show that the accused persons were the staff members in the Surveillance Squad headed by A-1 at the time of arrest of deceased under Section 41 (1) (b) (d)

of the Code and subsequently for Sections 454 and 380 IPC and thereafter procured police custody remand. The deceased was subjected to merciless beating which resulted in his death on account of multiple injuries sustained by him. It is also emphasized by Mr. Kodekar that in custodial death rarely evidence of eye witnesses would be possible and the circumstances under which exclusive custody of the deceased was established in the possession of A-1 and his staff members, the burden of proving the case in such kind of heinous offence is shifted to the accused persons under Section 106 of the Evidence Act. Therefore, it is clear that they were the members of the squad or they have participated in the said act and hence the judgment and order of acquittal passed in favour of A-2 to A-7 which is passed ignoring substantive evidence on record deserves to be quashed and set aside. Therefore, the appeal filed by the State of Gujarat being Criminal Appeal No.203 of 1998 deserves to be allowed by convicting the accused for the

offences with which they were charged.

5. Mr. Adil Mehta, learned advocate who has filed his appearance on behalf of A-2 to A-7 in Criminal Appeal No.203 of 1998 filed by the State of Gujarat against the acquittal of A-2 to A-7, has contended that it is a settled principle of law that in an acquittal appeal, normally court should not interfere unless there are cogent and convincing evidence which unerringly establish that the accused and none else have committed the offence. It is also a settled principle of law that in acquittal appeal, the court interferes only when the trial court has misread the evidence or has not considered the evidence on record which is against the accused. It is also a settled principle of law that in acquittal appeal when two views are possible, the appellate court should not interfere with the view expressed by the trial court. According to him, in instant case, there is absolutely no evidence whatsoever adduced by the prosecution to show that A-2 to A-

7 were present when A-1 took the deceased to Junagadh and returned to Ahmedabad from Junagadh. There is also no evidence to the effect that A-2 to A-7 were responsible for causing the injuries on the person of the deceased. The prosecution has failed to prove that the deceased was in physical custody of A-2 to A-7. A-1 has also not stated in his police statement that he had gone to Junagadh with deceased along with A-2 to A-7 and the two drivers, A-8 and A-9. It is also emphasized by him that as per the prosecution case, in the complaint filed by the DB Chauhan, in all 16 persons were shown as accused who were responsible for death of Navinchandra. In further statement of A-2 to A-7 recorded under Section 313 of the Code, A-2, 3 and 7 have denied that they had gone to Junagadh with A-1. In their further statement under Section 313 of the Code, A-4, 5 and 6 have stated that they had not gone to Junagadh with A-1. They have denied about their going to Junagadh with A-1 and the deceased.

5.1. On the aforesaid premises, it is submitted by Mr. Adil Mehta that the trial court has recorded a finding that A-2 to A-9 have not participated in the crime and no specific role was attributed to them. There is no evidence to show that they were on duty or they were present at the time of causing injuries to the deceased and, therefore, they are given benefit of doubt and acquitted. Referring to the above findings of the trial court, it is submitted by Mr. Mehta that the acquittal appeal filed by the State of Gujarat lacks merits and deserves to be dismissed and thereby confirm the judgment and order of acquittal recorded qua in favour of A-2 to A-7.

6. This Court has considered the submissions advanced by Mr. KJ Shethna, learned advocate for A-1 who has filed Criminal Appeal No. 209 of 1998 and and Mr. R.C. Kodekar, learned APP for the respondent - State of Gujarat at length and in

great detail. This Court has also considered the submissions advanced by Mr. RC Kodekar, learned APP for the appellant - State of Gujarat who has filed Criminal Appeal No.203 of 1998 against the acquittal of A-2 to A-7 and also heard Mr. Adil Mehta, learned advocate for the respondents A-2 to A-7. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record which is read and re-read by the learned advocates for the parties with reference to broad and reasonable probabilities of the case. In light of the caution sounded by the Supreme Court while dealing with the cases in which sentence of imprisonment for life is imposed on the accused, this Court has examined the entire evidence on record for itself independently of the trial Court and examined arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether they were the accused and none else who have committed the offences as alleged against

them. We have also gone through the written submissions submitted by Messrs. K.J. Shethna, Adil Mehta and RC Kodekar learned advocates for the respective parties. We have also carefully considered the judgments cited at the bar by Mr. Shethna, learned advocate for A-1.

7. In order to establish that the deceased died a homicidal death, the prosecution has examined and relied upon the oral testimony of P.W.6, Dr. Dhanraj Jashraj Kothari, Medical Officer, who conducted the post mortem at Ex.42. He has inter alia in his oral testimony stated that at the relevant time he was working as Professor in Forensic Medicines at V.S. Hospital. On 12.1.1989 at 9:45 to 11:30 hours he and other two panel doctors i.e., Dr. Dalal and Dr. Nilesh R. Shah has performed post-mortem on the dead-body of Navinchandra Dholakia. In column No.17 of the post-mortem note, they have noted the following 34 injuries on the person of the deceased:

"(a) A lacerated wound (incised looking) on midline of the head just above the line and 8 cm above the nostrils of 3 cm x 0.4 cm size - subcutaneous deep.

(b) A lacerated wound at centre on middle of the head 5 cm behind the injury No.(1).

(c) Multiple abrasion over the head surrounding the injury (1) and (2) is of 8 cm x 13 cm in size. Size of each abrasion is 0.5 cm x 0.3 cm and all abrasions are in crust form.

(d) Multiple abrasion on the right side of the forehead and extend upto lateral side of right eye each is 0.3 cm x 0.3 cm. size.

(e) Four abrasion on the base of bridge of the nose each is 0.5 cm x 0.3 cm size.

(f) Three abrasion on the lateral aspect of left eyebrow each is 0.5 cm x 0.3 cm size.

(g) Multiple bruises all over the

anterior chest - bluish red in colour and on cut section shows blood in the tissue.

(h) A bruise on the right side of flank in midaxillary line 7 cm above the right anterior superior iliac spine. It is of 5 cm x 4 cm in size, bluish red in colour and on cut section shows blood in the tissue also surrounded by small bruises.

(i) Multiple abrasion on upper half of the right arm on lateral and medial aspect each is 0.5 cm x 0.3 cm in size.

(j) Multiple abrasion on anterior and posterior surface of right forearm more on posterior aspect - few abrasions are curved shape.

(k) Two abrasion on lateral aspect of dorsum of right hand just above the wrist joint each is 1 cm x 0.5 cm in size. Right hand is swollen - on cutting shows blood in the tissue.

(l) Multiple bruises on anterior and medial aspect of right forearm- on cutting shows blood in the tissue.

(m) An abrasion on right index finger near metacarpophalangeal joint on its dorsal aspect. It is 0.5 cm x 0.3 cm in size.

(n) An 0.2 cm x 0.1 cm abrasion over temporal phalanx of right thumb on its dorsolateral aspect.

(o) Multiple abrasion and contusion on upper half of the left arm on its anterior and lateral aspect each abrasion is 0.5 cm x 0.3 cm size. On cutting shows blood in the tissue on swollen left arm.

(p) Multiple abrasion on dorsal aspect of left forearm extending upto the wrist and also on back of left elbow. Each is 0.5 cm x 0.3 cm size.

(q) An abrasion on dorsum of left middle finger of first interphalangeal joint.

(r) An abrasion over left arm on anterior aspect at its middle. It is 2 cm x 1 cm in size.

(s) Swelling of the left shoulder region - on cutting shows blood in the tissue.

(t) Bruises on left and right upper and lower eye lids with extravasation of blood in the tissue.

(u) Bruises on anterior aspect of right thigh on gluteal region and extending upto the knee - on cutting shows blood in the tissue on upper part of the thigh on posterior aspect. These are consistent with the lathi mark.

(v) Bruises on upper half of right leg on its posterior aspect - on cutting shows blood in the tissue.

(w) Multiple abrasion over right knee on its anterior aspect each is 0.5 cm x 0.3 cm size.

(x) Multiple abrasion on lateral side of left leg each is 0.5 cm x 0.3 cm in size.

(y) Bruises on medial aspect of left thigh on gluteal region and on posterior aspect of thigh - on cutting shows blood in the tissue.

(z) Multiple abrasion over anterior and medial aspect of left leg each is 0.5 cm

x 0.3 cm size.

(aa)An abrasion over lateral aspect of left ankle just below lateral malleolus and also on below medial malleolus. Each is 0.5 cm x 0.3 cm size.

(ab)Left foot swollen - on cutting shows blood in the tissue.

(ac)Multiple bruises on back of chest - on cutting shows blood in the tissue.

(ad)Multiple bruises below 12th rib on left side of anterior abdomen in an area of 8 cm x 6 cm - on cutting shows blood in the tissue.

(ae)Two abrasion at back of left chest - one at aspect of suprascapular region, 2nd one near medial aspect each of 3 cm x 1 cm in size.

(af)Multiple abrasion on back of right chest at suprascapular region.

(ag)Right foot swollen and on cutting shows blood on dorsal aspect.

(ah)Red medicine present over the abrasion of

- right leg with ankle
- left leg and ankle
- Left wrist on its dorsal aspect
- right hand."

The doctors have also noted that all abrasions are crust form and are of reddish brown in colour, all bruises are bluish red in colour and all injuries are ante-mortem in nature.

7.1. The opinion column of cause of death was reserved till the chemical analysis report and HPE were received. He has prepared the post mortem report which is on record at Ex.43.

7.2. So far as the report of chemical analysis is concerned, it is on record at Ex.44, HPE report is at Ex.45 and the post-mortem report is at Ex.46. On a perusal of the report at Ex.44, it is seen that the cause of death of the deceased was due to shock and haemorrhage on account of multiple injuries all over the body, time since death was about 24 hours and the dead-

body was brought after about 8 hours of the death of the deceased to V.S. Hospital as well as injuries were fresh to about one day duration. From the report at Ex.45 it is seen that all the injuries present on head, nose, face, shoulder, chest, abdomen, right arm, left arm, both legs i.e., all over the body as mentioned in the post mortem report. Those injuries were bruises and abrasions. Those injuries were possible by hard and blunt object like lathi, stick and danda. The injury on neck was by its compression. From the report at Ex.46, it is seen that Navinchandra Dholakia must have died at about 10 a.m. on 11.1.1989 i.e., about 24 hours before the commencement of post-mortem. He was brought about 8 hours after his death to the causality department of V.S. General Hospital at 6 p.m. on 11.1.1989.

7.3. A conjoint reading of the oral deposition of Dr. Kothari, post mortem report Ex.43, and the reports of Assistant Professor of

Pathology at Exs.44, 45 and 46 there is no manner of doubt that the deceased has received in all 34 injuries on his person between 10.1.1989 to 11.1.1989 with lathi/stick or danda and, therefore, it has to be held that the deceased died a homicidal death. The trial court has recorded the finding that the deceased died a homicidal death and, therefore, we confirm the said finding and hold that the deceased Navinchandra Dholakia has died a homicidal death.

8. Having held that the deceased died a homicidal death, the next question which arises for consideration of this Court is as to whether the deceased died while he was in custody of all the accused persons?

9. There is no dispute to the fact that the deceased was in physical custody of A-1 in connection with an offence of theft on 9.1.1989. Therefore, the deceased was in his police custody. It has also come in evidence from the

oral testimony of P.W.1, Babulal Jethaji, Ex.35, P.W.2, Jayram Gandabhai Desai, Ex.36 and P.W.3, Naryana Babaldas Patel, Ex.38 that the deceased was arrested by A-1 on 9.1.1989 and while deceased was trying to escape from the police he fell down and received some injuries. He was taken to P.W.5, Dr. Bhikhabhai Thobandas Patel, Ex.40, a private practitioner, Ex.40 at 7 PM on 9.1.1989. P.W.5, Dr. Bhikhabhai Patel, has in his oral testimony stated that the deceased was brought to him on 9.1.1989 at 7 P.M. According to him, the deceased had some superficial injuries as he fell down while was trying to escape from the police. It may be noted that he has not issued any certificate to that effect nor has he prepared any case paper in this regard.

9.1. From the evidence of Dr. Bhikhabhai Patel, it cannot be held that the deceased had died because of the injuries sustained by him on 9.1.1989 when he fell down while he was trying to escape from the police. There is evidence of

P.W.6, Dr. Dhanraj Kothari, Ex.42, and reports Ex.43, 45 and 46 that the deceased died because of the injuries received by him on 10.1.1989 and all the injuries were fresh and about one day duration prior to post-mortem and, therefore, it has to be held that the deceased sustained those injuries between 10.1.1989 and 11.1.1989 and not on 9.1.1989 and all those injuries received on 10.1.1989 were fatal. It is an admitted position that the deceased was in custody of A-1 from 10.1.1989 and he was given custody upto 16.1.1989. It is therefore clear that the deceased was handed over to A-1 in connection with the offence of theft for interrogation. He might have received some injuries on 9.1.1989 which were superficial and not fatal but the fatal injuries were received by him between 10.1.1989 and 11.1.1989 while he was in custody of A-1. In view of this positive evidence, the suggestion that the deceased might have suffered the fatal injuries on 9.1.1989 when he fell down while he was trying to escape from the police

has no substance and this story can hardly be given any credence in view of the positive evidence to show that the deceased has died because of the injuries received by him between 10.1.1989 and 11.1.1989.

10. To prove that the deceased died while he was in physical custody of A-1, the prosecution has examined and relied upon the oral testimony of P.W.19, Indrajit Prasad Gautam, Ex.84. He has, inter alia, testified that on 10.1.1989 he was serving as Assistant Collector at Ahmedabad. He was also in charge of the Sub-Divisional Magistrate. On the basis of a yadi received by him, on 11.1.1989 at 10:00 hours he had been to V.S. Hospital for the purpose of holding inquest on the dead-body of Navinchandra, which was identified by his relative Naranbhai Babaldas Patel. He started inquest in the presence of two panchas. According to him, death of Navinchandra had occurred while he was in the police custody. Thereafter he started inquiry under Section 176

of the Code and prepared the report dated 11.5.1990. During the course of the inquiry he recorded statements of the relatives and considered the post-mortem report as well as the FSL report. He has produced the panchnama at Ex.86 and the report at Ex.87. According to him, the deceased died while he was in physical custody of A-1.

10.1. In view of the positive evidence, according to us, there is no manner of doubt that the deceased died while he was in the physical custody of A-1.

11. The Supreme Court in the case of State of M.P. v. Shyamsunder Trivedi, (1995) 4 SCC 262, which was a custodial death case, has observed that rarely in cases of police torture or custodial death, direct ocular evidence of the complicity of the police personnel would be available. The extract of paras 16 and 17 of the said judgment are as under:

"Rarely in cases of police torture or custodial death, direct ocular evidence of the complicity of the police personnel would be available. Generally speaking, it would be police officials alone who can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that the police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues - and the present case is an apt illustration - as to how one after the other police witnesses feigned ignorance about the whole matter.

The exaggerated adherence and to insistence upon the establishment of proof beyond every reasonable doubt, by the prosecution, ignoring the ground realities, the fact - situations and the peculiar circumstances of a given case, as in the present case, often

results in miscarriage of justice and makes the justice delivery system suspect. In the ultimate analysis the society suffers and a criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach of the courts because it reinforces the belief in the mind of the police that no harm would come to them if an odd prisoner dies in the lock-up because there would hardly be any evidence available to the prosecution to directly implicate them with the torture. The courts must not lose sight of the fact that death in police custody is perhaps one of the worst kind of crimes in a civilized society, governed by the rule of law and poses a serious threat to an orderly civilized society. Torture in custody flouts the basic rights of the citizens recognized by the Indian Constitution and is an affront to human dignity. Police excesses and the maltreatment

of detainees/under trial prisoners or suspects tarnishes the image of any civilized nation and encourages the men in 'Khakhi' to consider themselves to be above the law and sometimes even to become law unto themselves. Unless stern measures are taken to check the malady, the foundation of the criminal justice delivery system would be shaken and the civilization itself would risk the consequence of heading towards perishing. The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may lose faith in the judiciary itself, which will be a sad day."

11.1. Applying the principles laid down by the Supreme Court in the aforesaid judgment to the facts of instant case, it is clear that there is no direct evidence that A-1 has tortured and inflicted multiple injuries to the deceased and caused his custodial death but since deceased was

in his custody at the relevant time, this is one of the important circumstances which leads to the conclusion that A-1 has caused multiple injuries as a result of which deceased Navinchandra died during his custody and therefore it is a case of custodial death at the instant of A-1.

12. This case is, therefore, a clear case of custodial injuries and consequential death. In such cases it would be too much to expect police officers come forward as eye witnesses against their own colleagues. From the fact that the injuries were caused while A-1 was interrogating the deceased the only inference that can be drawn is that while interrogating A-1 was responsible for all those injuries which were caused to the deceased. Looking to the number of injuries to which we have made a detailed reference while discussing the evidence of P.W.6, Dr. Dhanraj Kothari who performed the post-mortem and the fact that as per the prosecution case other constables were present at the time of

interrogation, the injuries were caused in furtherance of common intention of all the concerned during interrogation by A-1. However, there is no evidence to show that A-1 to A-7 had accompanied A-1 with the deceased to Junagadh while he was taken to Junagadh for interrogation. It is, therefore, abundantly clear that the deceased was taken for interrogation in custody of A-1 throughout the period. The deceased was arrested on 9.1.1989 and at that time he was hale and hearty. He must have received some minor injuries when he fell down while trying to escape from the police but those injuries were not fatal. Even P.W.1 to P.W.3 have stated that the deceased had some minor injuries because he had fallen down but they have unequivocally stated that those injuries were in the nature of abrasion. Therefore, it has to be held that the deceased died because of the multiple injuries which were caused to him during the custody with A-1 while interrogating him and he has not informed the fact that deceased died till 18

hours on 11.1.1989 and till his body was handed over to V.S. Hospital. From the evidence on record, it is clear that deceased was hale and hearty when he was arrested except some minor injuries which he had received as he fell down when trying to scape from the police which were superficial and thereafter he received the multiple injuries between 10.1.1989 and 11.1.1989 while he was in custody of A-1 and those injuries were fatal. The doctor has unequivocally stated in the post-mortem report that the injuries were fresh about one day duration and the time of death was about 24 hours prior to the post-mortem examination and further more the injuries on the neck were possible by compression and all those injuries have caused his death. Therefore A-1 is responsible for causing the death of deceased Navinchandra.

13. Now the next question which is required to be answered by this Court is whether A-2 to A-7 were also responsible for causing the

multiple injuries to the deceased and had shared common intention with A-1.

13.1. In this connection, we have to examine as to what was the duty time of A-2 to A-7 at the police station. The police has conveniently not produced the duty list on record which could have disclosed as to whether A-2 to A-7 had accompanied A-1 along with Navinchandra to Junagadh. As per the averments made in the complaint, along with A-1, A-2, A-6, A-7 and A-4 proceeded to Mehsana. It is also proved from the complaint that A-2, 3, 4, 5, 6 and 7 had accompanied A-1 with Navinchandra to Junagadh in two government vehicles which were driven by two drivers, i.e., A-8 and A-9. Except this bald statement in the complaint there is no other evidence to prove that they had in fact participated in the crime and to establish as to what role they have played in the commission of the offence.

14. We have noticed the following discrepancies in the prosecution evidence with regard to the acquittal appeal filed by the State of Gujarat:

(i) No evidence whatsoever has been adduced by the prosecution to show that A-2 to A-7 were present with A-1 to go to Junagadh and came back from Junagadh.

(ii) No evidence whatsoever has been adduced by the prosecution to show that A-2 to A-7 were the persons responsible in causing injuries to the deceased.

(iii) No evidence whatsoever has been adduced by the prosecution to show that A-2 to A-7 were present at the time when the deceased was beaten and at what time the deceased was beaten.

(iv) No evidence has been adduced by the prosecution to show that the deceased was in physical custody of A-2 to A-7.

(v) No evidence whatsoever has been adduced by the prosecution that A-2 to A-7 were present at the time of beating and their participation at the time of injury caused to the deceased.

(vi) No definite evidence to show that the deceased was detained by A-2 to A-7 and the deceased was in their custody.

(vii) Even if A-2 to A-7 were actually present at the time of beating the deceased, it cannot be said that they had actually participated in causing injuries to the deceased.

(viii) It is not established as to whether any of A-2 to A-7 were present among those police officers who were present at the time of beating the deceased.

(ix) There is no definite evidence that A-2 to A-7 were on duty and they had gone to Junagadh and

came back from Junagadh with A-1, deceased and two drivers, A-8 and A-9.

(x) There is no acquittal appeal filed by the State of Gujarat against A-8 and A-9 because there is a specific evidence Ex.93 (page 681) log-book of the police vehicle Jeep bearing No.GBA 814 in which it was stated that A-8 and A-9 had gone to Junagadh and came back from Junagadh.

(xi) P.W.16, Gyansagar Girdharji Ahuja, P.I. of Naranpura Police Station, Ex.78 (page 177) is the superior officer of A-1 to A-9. He has not stated anything about the presence of A-2 to A-7 with A-1, the deceased and A-8 and A-9 when they had gone to Junagadh and came back from Junagadh.

(xii) Even A-1 had not stated anything in his police statement or in his further statement under Section 313 of the Code that he had gone to Junagadh with deceased Navinchandra and A-2 to A-

7 and two drivers i.e., A-8 and A-9.

(xiii) P.W.14, Shashikant Motiya, First Grade Jamadar of Naranpura Police Station, Ex.75 (page 167) and Ex.15, Vaghabhai Nanabhai, PSO of Naranpura Police Station, Ex.77 (page 175) have not stated anything about A-2 to A-7 that they were on duty and they had gone to Juangadh with A-1 and the deceased and came back from Junagadh.

(xiv) Complaint of DB Chauhan, Ex.80 (page 627) is proved by P.W.17, Danjibhai Ditaji Bhagora, First Grade Jamadar of Naranpura Police Station. In the said complaint, in all 15 accused were shown who were responsible for the death of deceased Navinchandra i.e., (1) PI Ahuja, (2) A-1 to A-9, (3) Panchas Jawahar and Jayhind, (4) Dashrath and Ashok and (5) Dr. Bhikhabhai. Out of them (1) PI Ahuja, (2) Panchas Jawahar and Jayhind, (3) Dashrath, (4) Ashok and (5) Dr. Bhikhabhai - a private medical practitioner against whom the prosecution had not been

launched. No reason is given by the prosecution as to why they were not prosecuted.

(xv) In the further statement of the accused persons recorded under Section 313 of the Code, A-2, A-3 and A-7 have denied that they had gone to Juangadh with A-1 whereas A-4, A-5 and A-6 have definitely stated that they had not gone to Junagadh with A-1.

14.1. In view of the above discrepancies, according to us, the prosecution has not been able to prove the charges levelled against A-2 to A-7 beyond reasonable doubt and a doubt is raised on the prosecution case and, therefore, A-2 to A-7 deserve to get the benefit of doubt and the trial court, according to us, has rightly given benefit of doubt in favour A-2 to A-7 and we confirm the said finding.

15. At this stage, Mr. Shethna, learned advocate for A-1 has raised a contention that if the

judgment and order passed by the trial court acquitting A-2 to A-7 of all the charges is confirmed by this Court then in the absence of any charge indicating any particular overact on the part of A-1 for commission of any offence, as the original charge against him and his co-accused was read with Section 34 IPC, A-1 cannot be convicted of any substantive offence. According to us, the aforesaid contention is totally merit less. It is settled position of law that even though other accused are acquitted and even though there cannot be evidence to show that the accused who is found guilty has caused one of the fatal injuries, he cannot escape conviction under the substantive provision read with Section 34 of IPC, when his participation with others has been established beyond reasonable doubt by the prosecution and no prejudice would be caused to him in view of his proved participation in the crime along with others. This proposition of law is borne out from the decision of the Supreme Court in the case of

Subhash and Shiv Shankar v. State of Uttar Pradesh, AIR 1987 SC 1222, Lokpal Singh v. State of M.P. AIR 1985 SC 891, Hazari Parida v. State of Orissa, 1979 (4) SCC 994 and Sukh Ram v. State of UP, AIR 1974 SC 323.

16. In view of the aforesaid finding, according to us, since the complicity of A-1 for commission of the offence of custodial death of Navinchandra is amply and duly established, the next question which is required to be answered by this Court is as to which offence is committed by A-1.

17. In the case of State of M.P. v. Shyamsunder (supra), the Supreme Court in a case of custodial death has converted the conviction recorded under section 302/149 to section 304 part II/34 IPC. In paragraph 19 of the said reported decision, the Supreme Court has observed as under:

"19. From the evidence available on the record both documentary and oral, we are satisfied

that Respondents 1 and 3 to 5 had participated in causing injuries to Nathu Manjara while in police custody, directly or indirectly, and even if it is not possible to say that they intended to cause the death of Nathu, and they can certainly be clothed with the knowledge that the injuries which were being caused to the deceased at the police station were likely to cause his death though probably without any intention to cause his death or even to cause such bodily injuries to him as were likely to cause death. Their offence would, thus, squarely fall under sections 304 Part II/34 IPC. Respondents 3 to 5 are also guilty of the offences under Sections 201 and 342 IPC and holding them so guilty, we convict them for the said offences."

18. A Division Bench of this Court in the case of State v. Gopalrao B. Mohite, 1997 (1) GLR 229 which was a custodial death case, while

dealing with an acquittal appeal filed by the State has recorded conviction under Section 304 Part II read with Section 34 IPC.

19. Applying the principles laid down by the Supreme Court as well as this Court in the above referred to judgments to the facts of instant case, it is duly established that A-1 has caused death of A-1 which is a custodial death and, therefore, no intention can be attributed to him however he had a knowledge and, therefore, the conviction recorded against A-1 from Sections 302/34 IPC deserves to be altered to Sections 304 Part II/34 IPC whereas conviction and sentence recorded against him under Sections 201/34 and 193/34 deserves to be confirmed and maintained.

20. Now this takes us to consider as to what sentence should be awarded to A-1. A-1 has filed affidavit showing mitigating circumstances in support of his prayer for taking lenient view in awarding sentence.

21. In the case of State of M.P. v. Shyamsunder Trivedi (supra), which was a case of custodial death, the Supreme Court considering the mitigating factors and long lapse of time and interest of the heirs of the victim, respondent No.1 Shyam Sunder was sentenced to suffer R.I. for two years and fine of Rs.50,000/- i.d., RI for further two years.

21.1. Similarly, in the case of State of Gujarat v. Gopalrao B. Mohite (supra), the Division Bench of this Court while dealing with the acquittal appeal filed by the State in a case of custodial death has convicted the accused for the offence under Section 304 Part II read with Section 34 IPC and considering the age of the convict which was 70 years and who has suffered two heart attacks has sentenced to suffer R.I. for three years and fine of Rs.10,000/- i.d., FI for further four months.

21.2. Applying the principles laid down by the Supreme Court as well as this Court in the above referred to judgments to the facts of the case and having considered the mitigating circumstances narrated by A-1 in the affidavit filed by him and also the fact that the incident had taken place prior to 19 years in the year 1989 and A-1 has gone through the ordeal of protracted trial and the appeal in the High Court and also the fact that after conviction A-1 has lost his job, we are of the view that if A-1 is sentenced to suffer R.I. for three years and fine of Rs.5,000/- i.d., R.I. for further three months, the same would meet the ends of justice.

21. Seen in the above context, Criminal Appeal No.209 of 1998 filed by A-1 against his conviction and sentence deserves to be partly allowed qua conviction and sentence and Criminal Appeal No.203 of 1998 filed against A-2 to A-7 by the State of Gujarat fails and accordingly it deserves to be dismissed.

22. For the foregoing reasons, Criminal Appeal No.209 of 1998 filed by A-1 succeeds in part and accordingly it is partly allowed. The conviction recorded by the trial Court against A-1 for commission of offence punishable under Section 302/34 IPC and sentence to imprisonment for life and fine of Rs.5,000/- i.d., RI for three months is quashed and set aside and instead A-1 is convicted for commission of offence punishable under Section 304 Part II/34 IPC and he is sentenced to suffer RI for three years and fine of Rs.5,000/- i.d., RI for further three months.

22.1. Conviction and sentence recorded against A-1 for commission of other offences is confirmed and maintained.

22.2. All the substantive sentences shall run concurrently.

22.3. A-1 is on bail. He is, therefore, directed to surrender to the jail authority within a period of eight weeks hereof failing

which the jail authority is directed to take appropriate steps to procure his presence and the learned Additional City Sessions Judge, Ahmedabad is also directed to issue non-bailable warrant against A-1 for procuring his presence and send him to jail for serving out the sentence as imposed by us.

22.4. The period of imprisonment already undergone by A-1 as an under trial prisoner and at post conviction stage shall be given set off.

22.5. Criminal Appeal No.203 of 1998 filed by State of Gujarat against the acquittal of A-2 to A-7 is dismissed.

22.6. Muddamal articles to be disposed of in terms of the directions contained in the impugned judgment and order.

22.7. Both the appeals accordingly stand disposed of.

(A.M. Kapadia, J.)

(R.H. Shukla, J.)

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(karan)