

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL NO. 1268 of 2006
With
CRIMINAL APPEAL NO. 1075 of 2006
With
CRIMINAL APPEAL NO. 883 of 2006

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE A.L.DAVE
and
HONOURABLE MR.JUSTICE PARESH UPADHYAY

- =====
- 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 ?
- =====

DINESH SANGRAM KHATANA & ORS ...Appellants
Versus
STATE OF GUJARAT Respondent

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Appearance:

MR S.V. RAJU with MR JAYPRAKASH UMOT for Accused No.1
 MR S.B. TOLIA for Accused No. 2 & 3
 MS. KRUTI M SHAH for Accused No. 4 & 5
 MR. K.L. PANDYA APP for the Respondent

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CORAM: HONOURABLE MR.JUSTICE A.L.DAVE
and
HONOURABLE MR.JUSTICE PARESH UPADHYAY

Date : 30/11/2012

CAV JUDGEMENT

(PER : HONOURABLE MR.JUSTICE PARESH UPADHYAY)

1. By these three appeals, challenge is made to the judgment and order passed by learned Additional Sessions Judge, 6th Fast Track Court, Surat, dated 31.3.2006 in Sessions Case No. 93/2004, by which five accused persons came to be convicted for the offence punishable under sec. 302, 34 and 120B of IPC, and are sentenced to undergo R/I for life. Fine of Rs. 5000/- is imposed against each of the convict and in default, R/I for five months is ordered.

2. Criminal Appeal No. 883/2006 is filed by Mukesh Arjanbhai Rabari, who was original accused no. 4, Criminal Appeal No. 1075/2006 is filed by Raju Pratapbhai Vala, who was original accused no. 3 and Criminal Appeal No. 1268/2006 is filed by three persons, namely Dinesh Sangram Khatana-original accused no. 1, Anak Chaprajbhai Udak-original accused no. 2 and Sanjay @ Choti Pundlik Kheir-original accused no. 5. Since all these three appeals are arising out of the same judgment of the learned

Sessions Judge, they are considered and decided by this common judgment, and for the sake of convenience, the appellants are referred to as their original status before the trial Court. These five accused were arrested on 10.7.2003, for the offence which had taken place on 22.6.2003, the accused were produced before the 3rd Judicial Magistrate First Class, Surat, who committed the case to Court of sessions vide order dated 18.12.2003 (Criminal Case No.4253 of 2003) and the same came to be registeed as Sessions Case No.93 of 2004. Charge was framed against these accused vide Exh.12 to which the accused pleaded not guilty and they came to be tried and ultimately, the order of conviction and sentence, as recorded above, came to be passed.

3. We have heard Mr.S.V.Raju learned Senior Counsel with Mr. Jayprakash Umot for Accused no. 1, Mr. S.B.Tolia learned advocate for Accused no. 2 & 3, Ms.Kruti Shah learned advocate for Accused no.4 & 5. Mr.K.L.Pandya learned Additional Public Prosecutor is heard for the State. At the

outset, it is recorded that, it is indicated that out of five accused, one, A-5 is at present absconding and therefore at least qua him the appeal be not heard. In this regard, learned counsel for the said appellant has relied on the decision of the Division Bench of this Court in case of Bhimsingbhai Varjubhai Rathwa and Anr. vs. State of Gujarat, decided on 25.07.2012, in Criminal Appeal No.1066 of 2006, wherein the view is taken that for the abscondance of a convict, he may be tried for his abscondance but his appeal has to be heard on merits. Keeping this decision of the coordinate Bench of this Court in mind, we have taken up this appeal also for hearing, alongwith the appeals of other appellants.

4. It is contended on behalf of the appellants that the impugned conviction is based on the deposition of so-called eye witnesses who are got up witnesses. It is also contended that there is discrepancy in the timings of recording of FIR, including an attempt to ante time it and therefore the prosecution case is vitiated from its

inception, the conduct of projected eye witnesses is unnatural, each witness, who claims to be an eye witness; is silent regarding presence of other eye witnesses at the time of incident, independent witnesses whose statements are claimed to have been recorded by police are not examined and only interested witnesses and friends witnesses are examined. It is also contended that the prosecution has not pointed out how, after about 20 days of occurrence, all five accused came to be arrested and what led to their arrest. The manner and method of recovery of clothes of the accused and weapons alleged to have been used in the commission of offence is also high lighted to assail the prosecution theory. The identity of the accused is also contended to have been not established. Concealing the material regarding the rickshaws claimed to have been used for the commission of offence and the one in which the victim was claimed to have been taken to hospital is also highlighted on behalf of the appellants. Non examination of the persons who claimed to have accompanied the bother of the victim,

who is projected as the first informant and non recovery of his cloths; who claimed to have taken the victim to the hospital is also highlighted on behalf of the appellants. It is pointed out that the charge framed against the appellants did not show offence under Sec.149 of IPC. The appellants have contended that there is no legally acceptable material on record to connect the accused with the commission of offence and it is urged that the conviction recorded by the trial court be interfered with.

5. On the other hand, learned APP has opposed these appeals and supported the judgment and order rendered by the learned Sessions Judge. In his submission, there is ample evidence on record to bring home the charge levelled against all the accused and this Court may not interfere in the conviction and sentence recorded by the learned Sessions Judge. Reliance is also placed on the judgement of the Hon'ble the Supreme Court in the case of Sambhu Das @ Bijoy das & Anrs. Vs. State of Assam

reported in 2010(10) SCC 374 to contend that formal FIR can be lodged afterwards and investigation and inquest can start with telephonic information even prior to lodging of formal FIR and it would not affect trial and evidence in court.

6. We have examined the record and proceedings in the context of rival submissions and we find as under.

7. The offence has taken place on 22.6.2003 at about 10.30 in the morning in Surat city near Ekta Shopping Center.

8. The first document on record in this regard is in the form of the telephone Vardhy which is given by Head Constable on duty at Civil Hospital, Surat, named Jumabhai Babaria, Buckle No. 840 of Umra Police Station, Surat, who is not examined. He gave Vardhy on telephone to Kapodra Police Station at 12.00 O'clock noon that a patient named Bharat Bhikhabhai Prajapati is brought by his brother. Some unidentified persons have given 10 to 15 blows to the

victim and doctor on duty, has declared him dead. This information is taken down by the P.S.O. of Kapodra Police Station, Surat city, Navinbhai Mochalabhai PW-14 Exh. 92, in the vardhy book. This is on record at Exh. 104.

9. Soon thereafter an Yadi was sent to Executive Magistrate for inquest panchnama. Said Yadi is at Exh. 94. The said Yadi contains refrence of FIR, being CR No. I-181/2003 of Kapodra Police Station, wherein it is stated that the body of the victim whose inquest panchnama is to be drawn is killed by unknown persons near Ekta Shopping Centre. This is how, on the basis of disclosure of First Information about the commission of offence by unknown assailants, necessary actions were set in motion by police.

10. Based on the disclosure of information about the offence having taken place, the P.S.O. informed the Police Inspector Gopalbhai Bababhai Darji, about this and the Police Inspector went to the

Civil Hospital. There, he met the brother of the victim named Ghanshyambhai who gave complaint against A-1 and three to four unknown persons. The said complaint Exh. 82 is projected to be an FIR by the prosecution. Based on this documents, it is claimed that the Police Inspector Mr. Darji had recorded the complaint of the brother of the victim between 11.45 to 12.30 noon, at Civil Hospital, Surat, wherein, the name of A-1 was given and other three to four unknown persons were indicated.

11. Thus, with regard to first information about the commission of offence, a picture emerges where the brother of victim Ghanshyambhai has taken the victim to the hospital, in wounded and bleeding condition. Doctor on duty declared the patient dead, Head Constable on duty informed the concerned Police Station immediately and the said information is taken down by the PSO on duty at 12.00 O'clock noon. The first step to send yadi for inquest panchnama to the Executive Magistrate is sent by Exh. 94 with specific

reference of FIR number and till that stage, the assailants were unidentified persons. Since the telephone vordhy is taken down at 12.00 O'clock noon, there was no question of sending yadi for inequest panchnama to the Executive Magistrate prior thereto. The evidence of PSO who had taken down the telephone wordhy in police station shows the presence of Police Inspector at Police Station at that time. Police Inspector claims that based on that vardhi, he had gone to Civil Hospital and had started taking complaint (Exh.82) of the brother of the victim at 11.45 O'clock. Learned counsel for the appellants contended that under normal circumstances difference of half an hour or so may not make any difference but in the peculiar facts of this case when the disclosure of information of offence was against unidentified persons, on the second thought the name of A-1 is sought to be interpolated and the space was kept to add three to four names as per their convenience by referring that A-1 and other three to four persons had committed the offence. The complainant claims that he had brought the

body of the victim in bleeding condition from the place of offence to the hospital. Surprisingly, not only his blood stained clothes are not recovered but there is positive evidence on record that his clothes were not blood stained. Reference to this shall be made in later part of the judgment. Therefore while deciding the bone contention of the appellant that it is Exh. 104, the telephone wordhy and not Exh.82 which can be accepted to be FIR, on the basis of evidence of Police Inspector Darji Exh.95, PSO Navinbhai Exh. 92, the contents of the yadi sent to the Executive Magistrate Exh. 94 and time reflected of taking down the complaint, we accept the contention of the learned counsel for the appellants that it is Exh.104 which is the FIR and not Exh.82, and reliance placed by learned APP on the decision of the Apex Court in the case of Sambhu Das *Supra* would not help the prosecution, on the face of other ingredients, as stated above. This also fortifies the arguments of learned counsel for the appellants that the attempt is made by the prosecution to ante-time the record

and therefore the investigation stand vitiated from its inception. However, we do not accept the contention of the learned counsel for the appellants that in view of this, without examining other evidence the benefit of doubt should be given to the appellants. We have thought it fit to examine in detail, other evidence on record, keeping this finding in mind that the disclosure of the evidence even by the brother of the victim was against the unknown persons and prosecution has tried to project disclosure of name of A-1 by ante-timing the document Exh. 82.

12. The brother, who gave complainant, named Ghanshyambhai Bhikhabhai PW-9 is examined at Ex. 81, and he supports the version of prosecution, as stated in the complaint. As per his evidence, about 10 days before the occurrence, A-1 had gone to deceased at the place where magic show was being conducted and demanded money, which the deceased had declined, and therefore, quarrel had taken place. A-1 had threatened the deceased that if he would not give

money, he will have to shut down his business otherwise he will have to face dire consequences, and thereafter, he had gone away. This was informed to the complainant by Himmatbhai, the other brother. Be it noted that, so far motive aspect is concerned, the prosecution has attempted to float this theory through Himmatbhai. This witness came to know about the motive attributable to A-1 through his brother Himmatbhai. Said Himmatbhai who is real brother of the victim and this witness is not examined by prosecution. This witness in his evidence further states that, on the date of occurrence, he was going from Rachana Society towards Varachha area, and at about 10.00 O'clock in the morning, when he reached near Ekta Shopping Centre, Poultry Farm, he saw motorcycle of his brother Bharat lying there; and five persons were running towards rickshaw. He claimed that he knew one of them who was A-1 and there were four other persons. At that time, he heard shouts and went near his brother and saw that his brother was lying there profusely bleeding. He stopped one rickshaw

and took his brother to Civil Hospital where his brother was declared dead. He confirms that he had given complaint to Police on 22.6.2003 Exh. 82. This witness, in his cross-examination, stated that when he was on the spot he did find any other persons whom he knew. He further stated that he had no relation whatsoever with A1. He did not know even the name of father of A1. With regard to Identification Parade also, this witness has fumbled in the cross-examination. The prosecution projected this witness as an eye witness. His evidence to the effect that when he reached the spot, the motorcycle of his brother was lying. His standing by his complaint itself would make his evidence to read that, when he reached the spot, his brother was lying and was bleeding and persons present there named Gadhvi, Pintu and Gopalbhai, on inquiry, informed this witness that it is A1 and other three to four persons who attacked the victim. Thus, by his own evidence this witness does not remain to be an eye witness but reduces himself to a hear-say witness. Further, he claimed that he had taken the

body of the victim to the Civil Hospital in rickshaw. There is positive evidence on record of noneless than the Investigating Officer himself that, the clothes of this witness in the hospital were not blood stained. This aspect would further demonstrate that there is sufficient doubt about this witness taking the victim to the hospital. If this aspect is seen in furtherance to the dispute with regard to discloser of first information and an attempt to ante-time the FIR by police, it would be unsafe to accept the say of this witness on its face value.

13. One Gobar Devat PW-10 is examined at Ex. 83A. He in his evidence stated that on 22.6.2003, at about 10.00 O'clock in the morning, when he was going on his motorcycle from his residence to Shrijinagar Society near Kapodra poultry farm- near Ekta Shopping Centre, there was hustle and noise on the road, he stepped down from his motorcycle and saw A-1 and other four persons were there. A-1 was having sword, two others were having Chharas (knives) and

two others were having stick. He saw that his friend Bharat was being assaulted by this five persons. He also saw that about 20 to 25 blows were given by these persons. He conceded that he did not intervene in the scuffle. He claims to be friend of the victim. As per prosecution case, he was passing through that road on the motorcycle and thus he, as per the prosecution case itself, he is a chance witness. Not only he did not intervene, even after the assailants fled away, he did not take the victim to the hospital. The conduct of this witness appear to be unnatural. Be it noted that, the brother of the victim PW:9, Exh.81, does not refer to presence of this witness on the place of occurrence in the complaint. Thus, the unnatural conduct of this witness coupled with the evidence of brother of the victim PW:9 makes the evidence of this witness untrustworthy and unbelievable.

14. One Pintubhai Purshottambhai PW-11 is examined at Exh. 84. He is sought to be projected as an eye witness to the incident. He stated in his evidence that he was in

service of one lady magician named Alisha. The incident had occurred on 22.6.2003, at that time, magic show was not being done because it had closed down before couple of days. The luggage of that show was already shifted in two trucks, however, some luggage was still lying near poultry farm at Kapodra (Surat), which he used to attend by staying there. On the date of incident, he had gone to STD PCO at Ekta Shopping Centre where he had to pay the bill of Rs. 95/- which was outstanding. At about 10.30 a.m. in the morning, when he was sitting outside the said shopping centre in the chair for taking tea, at that time, from the direction of Satyanarayan Society, Bharat- the victim was coming on motorcycle, at that time, from the direction of Spinning Mill one rickshaw came, from which, the first person stepped down with sword and gave one blow with sword on the head of the victim, and therefore, the victim fell down and screamed as to why he is being beaten up. At that time, A-1 had given about 10 to 12 blows with sword on abdominal and back side of the body. As per the evidence of this witness, other two

persons were armed with knives, who also gave 10 to 12 blows on the abdominal and back side of the victim. Rest two persons, who were armed with stick, had also beaten the victim. At that time, brother of the victim Ghanshyam PW-9 Ex. 81, was passing by them, they shouted. The complainant also saw the accused persons running away. The complainant took the victim to the hospital. Thereafter, the witness learnt that the victim had died. Next day, the police had recorded his statement and he informed the police that he knew A-1 and he can identify others also who had ran away. In the cross-examination, however, very startling version the defence has been able to extract from this witness which was to the effect that no incident has happened wherein the victim was pulled down from the motorcycle and these five accused attacked him. The evidence in the cross-examination continued by further saying that it is not true that the five persons had rounded (gheraoed) the victim. This witness is projected as the eye-witness by the prosecution. This witness is not declared hostile by the prosecution,

even on this limited aspect. Prosecution cannot disown this evidence. This evidence not only creates doubt about the prosecution theory but brings on record positive evidence about the innocence of the accused. Therefore, this evidence has to weigh in favour of the accused.

15. One Gopalbhai Dhirubhai PW-12 is examined at Ex. 89. He stated that on 22.6.2003, he was going towards his sister's house, who is staying in Tirupati society. At about 10.00 O'clock in the morning, when he reached near Ekta Shopping Centre, there was a hush-up and he stopped his motorcycle there and saw that his friend Bharat was being beaten up by A-1 and three to four other persons. A-1 was having sword in his hands and other four persons were having knives and sticks in their hands. They were giving indiscriminated blows to the victim. He further stated that while his friend the victim was receiving the blows, he stood as spectator. In the meantime, the brother of the victim Ghanshyambhai (PW:9) came there and he (PW:9) took the victim to the

hospital. This witness, thereafter, as per his original route went to his sister's place. He thereafter learnt that the victim has died. In the cross-examination, he stated that he was neither afraid nor was uncomfortable when the incident took place. By evidence of this witness, whose conduct independently is unnatural, prosecution has sought to project brother of the victim PW:9 to be an eye witness and a person who had taken the victim to the hospital with more than forty stab wounds and in profusely bleeding condition, without the clothes of that witness being stained with blood. Thus, PW:9 whose presence at the place of occurrence itself is held to be doubtful as discussed hereabove, further makes the evidence of this witness (PW:12) to be more vulnerable, which even otherwise is unbelievable and shaky.

16. In above circumstances, in our view, it would not be safe to base conviction on the evidence of these four witnesses, which is projected to be the direct evidence. It is not that in absence of any direct evidence,

conviction can not be upheld at all. Even in case of circumstantial evidence if the chain is completed, conviction can be maintained. Therefore, after rejecting the evidence of witnesses who are projected to be eye witnesses, we have also examined the record from the angle as to whether circumstantial evidences are sufficient to maintain this conviction. In this regard, the following aspects are taken into consideration.

17. The Serological report is one circumstance against the appellants. By this evidence it is sought to be projected that the clothes which were recovered from the person of the accused at the time of their arrest were stained with blood which matched with that of the deceased. From record we find that all the five accused were shown arrested on 10.07.2003. The panchnama in this regard (Exh.49) is stated to have been drawn between 5.00 p.m. To 6.00 p.m. The offence is of 22.06.2003. We are unable to accept the theory of the prosecution that after about 20 days from the date of offence, all the five accused, together, in

blood stained clothes, volunteered to invite arrest for the commission of this offence and themselves appeared before Kapodra police station. Thus, the manner and method of arrest of accused, originally unidentified accused, and recovery of blood stained clothes, in our view are the circumstances which does not inspire confidence of this Court. Similarly, same taint would apply to discovery of weapons which even otherwise claimed to have been recovered from a place where other persons could also had an approach. Further, there is also discrepancy with regard to the sticks recovered and those alleged to have been used in the commission of offence.

18. The Identification Parade of accused is also a factor against which much grievance is made by the learned counsel for the appellants. Prosecution witness Gopal Talaviya (Exh.89) and Pintubhai (Exh.84) who were projected to be eye-witnesses were not kept present at the time of TI Parade. Further, there is no material on record that on what basis A2 to A5 were arrested and put

to identification parade. This is relevant because what was stated in the police *Vardhi* was unidentified persons and even if the complaint is accepted on its face value, which we have not, then also it was only A1 whose presence was known on the date of occurrence. Further, description regarding height, weight also has discrepancies. From the evidence of Dahyabhai Valjibhai (PW:8, Exh.74), the Executive Magistrate, in whose presence, the TI parade was conducted, it has come on record that the chamber, in which the TI Parade was conducted, is of the size of 12 X 14 ft. In the said chamber, total thirty persons are claimed to have been paraded. The possibility of the panchas having seen the accused before hand is also not ruled out by the evidence of this witness. In the totality, we find that, the grievance of the appellants with regard to conducting identification parade not in accordance with law, also has substantial force.

19. During the course of trial, evidence of Dr. Shailesh Jhaveri PW-7 has come on record

at Ex. 70. The postmortem report is on record at Ex. 72. From these documents, it has come on record that the victim had sustained 44 injuries which were either stab injury or incised wound. The cause of death was stated to have shock as a result of hemorrhage due to multiple injuries over the body. The doctor also opined that the injuries were possible by the sword and knives which were claimed to have been recovered from the accused. There is no dispute with regard to the fact that the deceased had died homicidal death and therefore this evidence is not discussed further. In our view this evidence does not change the case either in favour or against the prosecution, because moot question is as to whether, there is sufficient or any, legally acceptable evidence to connect the appellants or any of them, with the commission of this offence.

20. Police Inspector Gopalbhai Bababhai Darji PW-15, is examined at Exh. 95. He, in his deposition, has deposed that on 22.6.2003 while he was working at Kapodra

Police Station as Police Inspector, he came to know that some scuffle had taken place near Ekta Shopping Centre, and a person who was badly wounded was taken to Civil Hospital. On hearing this, he went to Civil Hospital and found that victim Bharat was attacked by A-1 and three to four other persons. Doctor had declared the victim dead. The brother of the victim named Ghanshyam gave complaint to him personally, which he sent to Kapodra Police Station for registering the offence. He had informed his superior officers on telephone. The complaint was registered as CR No. I-181/2003 at Kapodra Police Station and the said offence came to him for investigation, and he took over the investigation. He had recorded the statements of the persons of nearby place of occurrence. He sent his subordinate to find out A-1 at the place where A-1 could be. On further investigation, he got information that over and above A-1, his nephew Mukesh Arjan and their companion Darbar, friend Raju Pratap Vala and Sanjay Choti, are involved in the offence. He had sent his official to trace

the accused. As per his evidence, on 10.7.2003, all the five accused surrendered before the police at Kapodra Police Station in the blood stained clothes, which they had put on at the time of offence and they also voluntarily showed weapons which were used in the commission of offence. Sanjay Choti told the I.O. that he had used the rickshaw of his friend Ghanshyam in the commission of offence which was left at Kuna Kumbhariya Road area. In the cross-examination, however, this witness has not been able to withstand the suggestions made by the defence about the discrepancy in the time of recording the FIR. Further on the conjoint reading of the evidence of PI and PSO, the evidence of PI from the very root as to how PI came to know about the occurrence, gets falsified and this is coupled with the fact that, as held in the earlier part of this judgment, this witness has ante-timed the registration of offence. Further his claim that after about 20 days of occurrence, the accused, all accused, together, surrendered before the police at Kapodra Police Station in the blood stained clothes, makes the

evidence of this witness unbelievable.

21. On considering the totality of the circumstances and after having discussed all the material evidences as above, in our judgment, a picture emerges where the very inception of recording of offence is ante-timed which shows that the investigation was neither fair nor unbiased, there is no direct evidence since we have held that the witnesses who were projected to be eye-witnesses were either not eye-witness at all, or their evidence does not inspire confidence or it more supports the case of the defence than that of prosecution. With these findings, the case does not remain to be that of direct evidence but stands scaled down to that of circumstantial evidence. Keeping in view the totality of the facts and evidence on record and the tests to be applied in the case of circumstantial evidence, in the present case we find that, the circumstances are neither cogent from which the inference of guilt can be drawn, nor do they point towards the guilt of the accused, and these circumstances, taken

cumulatively, does not form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. We further find that the evidence on record is not only, not complete but is capable of explanation of the hypothesis other than that of the guilt of the accused.

22. For the reasons recorded above, we arrive at the judgment and pass order as under:

- 1.The appellants have successfully demonstrated before this court that there is sufficient material on record which creates doubt about the involvement of the appellants in the commission of offence and therefore it would be unsafe to uphold the conviction recorded by the trial Court.
- 2.The conviction recorded and sentence awarded by the learned Additional Sessions Judge, 6th Fast Track Court, Surat in Sessions Case No. 93/2004 by the judgment and order dated 31.3.2006

is set aside. All the five accused, the appellants are acquitted of the charge framed against them by the trial Court.

3. Original accused no. 1, 2 and 3, who are at present in custody, they, i.e., (1) Dinesh Sangram Khatana, (2) Anak Chaprajbhai Udak and (3) Raju Pratapbhai Vala, be set at liberty forthwith, if not required for any other lawful purpose.

4. Bail bond of Original Accused no. 4 Mukesh Arjan Rabari, who is on bail, stands discharged.

5. Original Accused no. 5 -Sanjay @ Choti Pundalik Kher is reported absconding. It would be open to the State authorities to initiate appropriate proceedings against him, in accordance with law, for his abscondence. Bail bond given by him before he absconded, also stands discharged, subject to aforesaid liberty to the authorities.

6. Fine if paid, shall be refunded to the concerned appellant.

[A.L. DAVE, J.]

[PARESH UPADHYAY, J.]

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