IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL NO. 854 of 2009

FOR APPROVAL AND SIGNATURE:

HONOURABLE THE CHIEF JUSTICE MR. BHASKAR BHATTACHARYA
and

HONOURABLE MR.JUSTICE J.B.PARDIWALA

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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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RAMANBHAI BHIKHABHAI MACHHI....Appellant(s)

Versus

STATE OF GUJARAT....Opponent(s)/Respondent(s)

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Appearance:

MR PRATIK B BAROT, ADVOCATE for the Appellant(s) No. 1

MS CHETANA M.SHAH, APP for the Opponent(s)/Respondent(s) No. 1

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CORAM: **HONOURABLE THE CHIEF JUSTICE MR. BHASKAR BHATTACHARYA**
and
HONOURABLE MR.JUSTICE J.B.PARDIWALA

Date : 29/04/2014

CAV JUDGEMENT
(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)

The present Appeal is at the instance of a convict accused of the offence under Section 302 of the Indian Penal Code and is directed against the order of conviction and sentence dated 15th April 2009 passed by the Additional Sessions Judge, Anand, in Sessions Case No.102 of 2008.

By the aforesaid order, the learned Additional Sessions Judge found the appellant guilty of the offence punishable under Section 302 of the IPC and consequently sentenced him to suffer life imprisonment and a fine of Rs.1,000/-. In default of payment of fine, the appellant was directed to undergo further simple imprisonment for six months. The learned Additional Session Judge also found the appellant guilty of the offence punishable under Section 135 of the Bombay Police Act and consequently sentenced him to suffer imprisonment for one month.

I. Case of the Prosecution :

The PW8 Maheshbhai Melabhai Bharwad, brother of the deceased, lodged a First Information Report Exh.34 on 20th March 2008 at the Anand Town Police Station, stating that he resides at the address stated in the complaint along with his mother viz. Rasuben and two brothers viz. Satishbhai and Shaileshbhai. He has further stated that he himself and his brother Shailesh, the deceased, were running a tea stall at the 80 feet road at Anand. He has stated that his brother Shailesh, the deceased, was handicapped from his leg since his birth. He has stated that on the day of the incident he himself and his elder brother Shailesh, the deceased, were present at their tea stall and were carrying on the business. At around 3:30 in the afternoon, Ramanbhai, the accused, residing at Sakar Eklav situated opposite the tea stall, picked up a quarrel with an unidentified person, due to which his brother Shailesh intervened to separate the accused and the unidentified person. He has stated that as his brother Shailesh intervened in the fight between the accused and the unidentified persons, the accused got enraged and brought a sickle somewhere from the near, and while trying to hit a blow, the pointed portion of the sickle got hit in the left eye of Shailesh, as a result Shailesh started bleeding profusely. As a result of such incident and due to commotion, many people from the nearby place

gathered at the place of the occurrence. He has further stated that thereafter he himself along with one Rajubhai Bhagabhai Bharwad immediately took Shaileshbhai to the Anand Adarsh Hospital in the Maruti car of Rajubhai Bhagabhai Bharwad. The doctor at the Anand Adarsh Hospital advised them to take the injured to the Karamsad Medical Hospital. Accordingly, an ambulance 108 was called for, and in the same, Shailesh was taken to the Karamsad Medical Hospital. While the treatment was being given to the deceased Shailesh at the Karamsad Medical Hospital, the First Information Report Exh.34 was lodged.

It appears that on 23rd March 2008 during the course of the treatment, the deceased succumbed to the injuries. On the strength of the complaint lodged by the PW8 Maheshbhai, the investigation had commenced. The FIR lodged by the PW8 was registered for the offence under Section 326 of the Indian Penal Code and Section 135 of the Bombay Police Act vide C.R. No.I-143 of 2008. As the injured succumbed to the injuries on 23rd March 2008, Section 302 of the Indian Penal Code was subsequently added.

The inquest panchnama of the dead body Exh.12 was

drawn in presence of the panch-witnesses. The scene of offence panchnama Exh.20 was drawn in presence of the panch-witnesses. The dead body of the deceased was sent for the postmortem examination and the postmortem report Exh.10 noted the cause of death to be shock and hemorrhage due to head injury. The clothes of the deceased were collected by drawing the panchnama Exh.57 and the same were sent to the FSL for chemical analysis. The accused was arrested and the arrest panchnama Exh.55 was drawn in presence of the panch-witnesses. The statements of various witnesses were recorded. Finally, charge-sheet was filed against the accused appellant in the Court of learned Chief Judicial Magistrate, Anand.

As the case was exclusively triable by the Sessions Court, the Chief Judicial Magistrate, Anand, committed the case to the Sessions Court under Section 209 of the Code of Criminal Procedure. The Sessions Court framed charge against the accused Exh.4 and the statement of the accused was recorded. The accused did not admit the charge and claimed to be tried.

The prosecution adduced the following oral evidence in support of its case :

PW1	Dr.Sanjay Kedarlal Gupta	Exh.8
PW2	Sajid Najirbhai Vora	Exh.13
PW3	Dhunabhai Simabhai Bhavad	Exh.16
PW4	Idrishbhai Adambhai Vora	Exh.21
PW5	Hafiz Haji UsmanbhaiVora	Exh.24
PW6	Firoz Valimahmad Vora	Exh.31
PW7	Lalabhai Dineshbhai Vanzara	Exh.32
PW8	Maheshbhai Melabhai Bharvad (Eye-witness)	Exh.33
PW9	Gitabahen Ramanbhai Thakor (Eye-witness)	Exh.35
PW10	Kiritbhai Parshottambhai Dave	Exh.36
PW11	Lakshmanbhai Shankarbhai.	Exh.39
PW12	Valjibhai Dudhabhai Makwana	Exh.44
PW13	Dr.Mukeshbhai Maheshbhai Patel	Exh.50
PW14	Mohanbhai Mangalbhai Parmar	Exh.54
PW15	Gopinathbhai Narnarayan Rao	Exh.56
PW16	Dr.Sunil Mulvantray Vyas.	Exh.68
PW17	Dr.Sharadchandra Kantilal Shah	Exh.70

The following pieces of documentary evidence were produced by the prosecution.

1) Yadi Exh.8

2)	Post Mortem Note	Exh.10
3)	Cause of death certificate	Exh.11
4)	Inquest Panchnama	Exh.12
5)	Slips of clothes on the dead body of the deceased.	Exh.14/15
6)	Slips on the scythe/clay/control clay seized from the place of the offence.	Ex.17/18/19
7)	The panchnama of the place of offence	Exh.20
8)	Slip on seized clothes of the accused.	Exh.22/23
9)	Slip on seized pent/quilt (bed cover) of Exh.25/26A the deceased.	
10)	The complaint.	Exh.34
11)	Yadi made to the Mamlatdar.	Exh.37
12)	Map of the place of offence.	Exh.38
13)	The panchnama of piece of cloth of yellow shirt of the deceased.	Exh.40
14)	Telephone wardhi dated 23/3/2009.	Exh.41
15)	Transcript of note in station diary.	Exh.42
16)	Yadi to fill up inquest of the dead body of the deceased.	Exh.43
17)	Transcript of station diary note of offence admitted.	Exh.45
18)	Order of investigation handing over of offence.	Exh.46
19)	Telephone wardhi by the doctor of Karamsad Hospital.	Exh.47
20)	Transfer sheet.	Exh.51

21)	Case paper.	Exh.52
22)	X-ray.	Exh.53
23)	Panchnama of physical condition of the accused.	Exh.55
24)	Panchnama of seized clothes of the the deceased.	Exh.57
25)	Postmortem Form.	Exh.58
26)	Notification of prohibition of possession of the weapon.	Exh.59
27)	Muddamal despatch note.	Exh.60
28)	Report to add Section 302	Exh.61
29)	Receipt of F.S.L.	Exh.62
30)	Letter of F.S.L.	Exh.63
31)	Report of FSL.	Exh.64
32)	Serological Report.	Exh.65
33)	Case papers.	Exh.71

After completion of the oral as well as the documentary evidence of the prosecution, the statement of the accused under Section 313 of the Criminal Procedure Code was recorded, in which, the accused stated that the complaint was a false one and he was innocent. At the conclusion of the trial, the learned trial Judge convicted the accused of the offence punishable under Section 302 of the Indian Penal Code and

Section 135 of the Bombay Police Act and sentenced him as stated herein before.

Being dissatisfied, the accused-appellant has come up with this appeal.

II. Submissions on behalf of the accused-appellant:

Mr.Pratik Barot, the learned advocate appearing for the accused, vehemently submitted that the trial Court committed a serious error in finding the accused guilty of the offence of murder by placing implicit reliance on the evidence of the PW8 Maheshbhai Exh.3, and the PW9 Gitaben Exh.35. Mr.Barot submitted that the evidence of the PW8 Maheshbhai, the brother of the deceased, who claims to be an eye-witness to the incident does not inspire confidence. Mr.Barot submits that many contradictions in the form of material omissions have surfaced in the evidence of the PW8 Maheshbhai. In the same manner, the PW9 Gitaben also could not be termed as an eye-witness to the incident as the PW9 has admitted in her cross-examination that by the time she could reach the place of occurrence, Shaileshbhai, the deceased, had already fallen down. Mr.Barot submits that except the evidence of the PW8

and the PW9, there is no other evidence to connect the accused with the crime. According to Mr.Barot, the case at hand is one in which the benefit of doubt deserves to be extended in favour of the accused.

In such circumstances, Mr.Barot prays that there being merit in the appeal, the order of conviction and sentence imposed by the trial Court be set aside.

III. Submissions on behalf of the State :

Ms.Chetana M.Shah, the learned APP appearing for the State, has vehemently opposed this appeal and submits that the trial Court committed no error in finding the accused guilty of the offence of murder. Ms.Shah submits that the PW8 Maheshbhai, brother of the deceased, is an eye-witness to the incident, and at the time of occurrence, was present along with the deceased at their tea stall. Ms.Shah submits that there is no reason to disbelieve the evidence of the PW8 Maheshbhai. Ms.Shah further submits that even the PW9 Gitaben, in her evidence Exh.35, has deposed regarding the presence of the accused at the place of occurrence. Ms.Shah submits that the trial Court, on a close scrutiny of the entire evidence on record, has rightly reached to the conclusion that the accused had hit

a blow with a sickle on the head of the deceased.

In such circumstances referred to above, Ms.Shah prays that there being no merit in the appeal, the same may be dismissed.

IV. Oral Evidence on record :

As immediately after the incident the deceased was taken to a private hospital, viz. Adarsh Hospital at Anand, we start with the oral evidence of the PW17 Dr.Sharadchandra Shah Exh.70, who had the occasion to examine the deceased first in point of time.

The PW17, in his evidence, has deposed that he is running a hospital by name “Adarsh” past 15 years at Anand. On 20th March 2008 at around 4:30 in the afternoon, one Shailesh Melabhai Bharwad, the deceased, was brought at his hospital by two persons, viz. Raju Bhagabhai Bharwad and Shailesh Bhimabhai Bharwad for treatment. The PW17 has deposed that the persons who had brought the injured at the hospital had given the history, stating that a fight had ensued at around 3 O’clock in the afternoon. The PW17 has deposed that on examination of the patient, his pulse was 59 per

minute, his blood pressure was 130/80, the pupil of his left eye had got stretched and the light reaction was slow. He has deposed that on examination of the injured, he found a sharp cut wound 5cm x 3cm bone deep on left frontal area. The PW17 has deposed that after giving primary treatment, on the very same day at around 5:05 p.m., the injured was referred to the Shree Krishna Hospital at Karamsad. In his cross-examination, the PW17 has deposed that in the case papers Exh.71 he had not noted the name of the person who had given the history. He has deposed that all that was told to him was that a fight ('maramari') had ensued. He has deposed that the name of the person with whom the fight had ensued was not disclosed before him. He has deposed that the patient had also not given any information regarding the incident. He has deposed that all that he was able to do was some dressing over the wound sustained by the injured. He has also deposed that the injury sustained by the injured can be caused if a person dashes himself with a tin sheet. This witness produced the original medical certificate Exh.71 regarding the injuries.

The PW16 Dr.Sunil Vyas, in his evidence Exh.68, has deposed that on 20th April 2006 he was on duty as a Medical Officer (Professor) at the Shree Krishna Hospital, Karamsad.

He has deposed that between 20th March, 2008 and 23rd March, 2008, the deceased Shaileshbhai was treated by him. He has deposed that in the team of doctors, Dr.Srivastava was the Head assisted by Dr.Kulkarni and a Resident Doctor Arora. He has deposed that Dr.Kulkarni had gone to a foreign country and had no idea about the exact place. He has deposed that the patient was brought at the hospital on 20th March 2008 at 17:47 hours. On examination, he found a cut wound above the left eye admeasuring 3.5 x 1 cm. The injury at one place was bone deep whereas the other part of the injury was muscle deep. He has deposed that the muscles were visible. He has deposed that the patient was put on a ventilator and thereafter was referred for the CT Scan. He has deposed that the injury sustained by the patient was quite grievous.

The PW13 Dr. Mukeshbhai Patel, in his evidence Exh.50, has deposed that he was serving as a Medical Officer at the Shree Krishna Hospital, Karamsad, past four and a half years. He has deposed that he is an MBBS by qualification. He has further deposed that on 20th March 2008 at around 17:47 hours a person by name Satishbhai Melabhai Bharwad had come at the hospital with Shaileshbhai Melabhai Bharwad, the deceased, without a Police Yadi for the treatment of

Shaileshbhai Bharwad. He has deposed that the injured was brought at the hospital with a referred chit issued by Dr.Sharadchandra Shah of the Adarsh Hospital, Anand. He has further deposed that Satishbhai Melabhai Bharwad, who had brought the injured at the hospital, in the history, had stated that on 20th March 2008 at around 3:30 in the afternoon, a known person had inflicted injuries with a sickle. He has deposed that on examination of the injured, he found one CLW 3.5 cm x 1 cm. muscle deep. The injured was completely unconscious. The injured was referred to the surgical department after primary treatment. In the surgical department, the injured was treated by Dr.Srivastava, Dr.Sunil Vyas and Dr.Nikhil. He has deposed that the injury sustained by the patient can be caused by a sharp cutting weapon. On being shown the muddamal article No.3, the weapon of offence i.e. the sickle, he deposed that the injury can be caused by such a sickle. In his cross-examination, he has deposed that in the history of assault, the name of the appellant was not disclosed by the persons who had brought the injured at the hospital.

The PW1 Dr.Sanjay Gupta performed the postmortem of the dead body of the deceased. The PW1, in his evidence

Exh.8, has deposed that he was working with the Forensic Medicine Department at the Karamsad Medical Hospital – College past two years as an Additional Professor. He has deposed that he holds an MBBS degree and an M.D. degree in the Forensic Science. On 23rd March 2008, a dead body of a person viz. Shaileshbhai Melabhai Bharwad was brought at the hospital with a written yadi issued by the Anand Town Police Station for the postmortem examination. He has deposed that on 23rd March 2008 at around 11:35 he had commenced with the postmortem and completed the same at 12:50 hours. He has deposed that the postmortem examination revealed the following external injuries on the body of the deceased :

i) Penetrating wound present just outer to outer cantus of (L) eye, 4 cm x 0.5cm long, 5 black thread stitches over lt., After removing margins adherent to each other.

ii) Reddish brown colour contusion present over back of (L) forearm 4cm x 3cm in size, 5cm below the elbow joint.

iii) Reddish brown colour contusion present over front and outer aspect of (R) forearm, 5cm x 2cm in size, 3cm below the elbow joint.

iv) Reddish brown colour contusion present over top of

(L) shoulder 4cm x 3cm in size.

v) Reddish brown colour contusions present over front of (L) elbow 6cm x 4cm in size.

No evidence of palpable fracture.

He has further deposed that the following internal injuries were noted in the Postmortem report Exh.10 :

Extravasation of blood present over (L) frontal–temporal–parietal region size 10cm x 6cm.

Linear fracture of skull vault present over (L) fronto-temporal region, 6cm long.

Meninges - intact.

Subdural hemorrhage present over (L) frontal – temporal – parietal region.

Sub arachnoid hemorrhage present all over the brain surface.

Pinpoint sized brain stem hemorrhage present.

The above takes us now to consider the oral evidence of the two eye-witnesses to the incident.

The PW8 Maheshbhai Bharwad is the brother of the deceased. The PW8, in his evidence Exh.3, has deposed that he resides with his family along with his mother Rasuben and three brothers, Hajabhai, Satishbhai and Shaileshbhai (deceased) next to Nani Khodiyar Temple at Anand. He has deposed that he himself and his brother Shailesh, the deceased, were running a tea stall at the 80 feet road, next to 27 Village School, in the name of Shailesh Tea Center. The PW8 has deposed that his brother Shailesh was handicapped due to deformity in his left leg and used to walk with the support of a stick. He has deposed that he used to start the business at around 7:30 in the morning and wind up at around 8:30 in the night. The PW8 has deposed that the incident had occurred on 20th March 2008 at his tea stall. He has deposed that at the time of the incident he himself and his brother Shailesh were present. At around 3:30 in the afternoon, the accused and one other person were fighting with each other. He has deposed that as the accused was fighting with an unidentified person, his bother Shailesh, the deceased, with the help of his stick went near them so as to separate them. He has deposed that his brother told the accused and the other persons that they should not fight at the place where they

were fighting, as it was a place of his business. He has deposed that the intervention of his brother was not liked by the accused and the accused left the place of occurrence with lot of anger. He has deposed that after about half an hour, the accused came back and, while his brother Shailesh was sitting on a bench, the accused hit a blow on the left eye of his brother with a sickle. His brother started bleeding profusely and fell down unconscious. He has deposed that thereafter he himself and one Rajubhai Bharwad took Shailesh to the Adarsh Hospital in the Maruti Zen car of Rajubhai and from there the deceased was shifted to the Karamsad Hospital in a 108 ambulance. He has deposed that his brother was treated at the Karamsad Hospital for three days. On 23rd March 2008, his brother passed away and the police was informed accordingly. The PW8 was shown the muddamal article no.3 i.e. the weapon of offence, a sickle, which the PW8 identified the same to have been used by the accused in the commission of the crime. In his cross-examination, he denied the suggestion given to him that there are no residential houses nearby his tea stall. He has deposed that in the eastern side from the place of his stall there is an open plot. He has deposed that he himself and his maternal uncle Revabhai had gone to lodge the complaint. He denied the suggestion given to him that the complaint was

dictated by his maternal uncle Revabhai. He has deposed that in his complaint he had not stated that his brother Shailesh used to walk with the help of a stick. He has also deposed that he had not stated in the complaint that his brother had told the accused and the other person with whom the accused was fighting that they should not fight near the tea stall as he had to carry on with the business. He has also deposed that he had not stated in the complaint that at that time the accused got excited and left the place of occurrence and returned back after half an hour. He has deposed that he had no occasion to meet the accused before the incident. He has also deposed that he had no idea regarding the residence of the accused and his native place. He denied the suggestion that he had no idea as to where the accused was residing. He deposed that the accused was residing in a room situated next to a common plot opposite the tea stall. He has deposed that he had no occasion to visit the room where the accused was residing. He has deposed that he had no idea regarding the name of the father of the accused. He has also deposed that the deceased bled from only one place and there was no bleeding in any other part of the body. He has deposed that his brother, the deceased, became unconscious no sooner he sustained the injury. He has deposed that it was told to him by some other

person that the name of the accused was Ramanbhai Machhi. He has admitted in his cross-examination that at the time of the incident he was not knowing the name of the accused. He has also deposed that before the incident he was not knowing the accused. He denied the suggestion that the accused had not inflicted any injuries on the head of his bother with a sickle. He also denied the suggestion given to him that at the time of the incident, he was not present. He admitted in his cross-examination that no identification parade of the accused was carried out through him.

The PW9 Gitaben Thakor, in her evidence Exh.35, has deposed that she resides in a hut past 20 years next to the 80 feet road at Anand with her husband and children. She has deposed that the incident occurred on 20th March 2008 between 3:00 and 3:30 in the afternoon. At the time of the incident she was washing utensils outside her hut. At that time, the PW9 heard some commotion due to a fight. She has deposed that she had no idea as to who all were fighting. She has deposed that she ran at the place of occurrence and saw that the quarrel was going on at the tea stall of Shaileshbhai, the deceased. She has deposed that at the time of the incident Maheshbhai, the PW8, and his brother Shaileshbhai,

the deceased, were present at the tea stall. She has deposed that while heading towards the place of occurrence, she met the person who had hit a blow on the head of Shaileshbhai midway on the road. She has deposed that Shaileshbhai was hit with a sickle on his left eye. She has also deposed that she had put a cloth on the wound of Shaileshbhai from where blood was oozing. Thereafter, Shaileshbhai was taken to the Adarsh Hospital in the Maruti Fronty car of one other person by Maheshbhai and she herself. She has deposed that while Shaileshbhai was being taken to the Adarsh Hospital, no talks had taken place with him as he was not able to speak. She has deposed that on reaching the Adarsh Hospital, a nurse on duty asked to call for 108 ambulance and take Shaileshbhai to the hospital at Karamsad. She has deposed that thereafter she returned to her home from the Adarsh Hospital. The distance between the tea stall and her hut is around 30 to 35 feet. The PW9 identified the accused in the court room as the assailant. She identified the muddamal article no.7, an orange coloured cloth, as the same cloth which she had pressed on the wound of the deceased to arrest bleeding. In her cross-examination, she has deposed that there are six to seven other huts nearby her hut. She has deposed that many people are residing in the other huts and are carrying on work of masonry. She has

deposed that in her police statement she had not stated that she was residing near a hut situated on the 80 feet road past 20 years. She has also deposed that she had not stated before the police that she owns a buffalo for the purpose of drawing milk. She has admitted in her cross-examination that she had not stated in her statement before the police that while going to the place of occurrence she had met the accused midway on the road. She has also deposed that it was not stated by her before the police in her statement that the nurse at the Adarsh Hospital had asked them to call for 108 ambulance and take Shaileshbhai to the Karamsad Hospital. She has deposed that at the place of occurrence two unidentified persons were fighting with each other. She denied the suggestion given to her that many cases under the Prohibition Act have been registered against her. She has deposed that she had seen the accused for the first time on the day of the incident and never before had any occasion to meet the accused. She has no idea regarding the residence of the accused or his business. No identification parade was carried out by the Executive Magistrate. She has deposed that she knows Maheshbhai, the PW8, very well. She denied the suggestion given to her that she had not seen the accused at the place of occurrence but was falsely deposing before the Court at the instance of one

Hajabhai and Maheshbhai.

The above takes us to consider the evidence of the panch- witnesses. It appears that most of the panch-witnesses have not supported the case of the prosecution and have been declared as hostile witnesses. The PW12 Valjibhai Makwana is one of the police witnesses. In his evidence Exh.4, he has deposed that on 20th March 2008 he was on duty at the Anand Town Police Station as a PSO. On 20th March 2008 at around 18:15 hours, a complaint was lodged before PSI Shri M.M.Parmar and the same was entered by him in the Station Diary at Sr.No.19 as C.R.No.I-143 of 2008. He has deposed in his cross-examination that the complaint which was registered on 20th March 2008 was of the offence under Section 326 of the Indian Penal Code.

The PW14 Mohanbhai Parmar, in his evidence Exh.54, has deposed that on 20th March 2008 he was on duty at the Sardarbaug Police Chowky and at that time at around 15:30 hours he was informed by the PSO Head Constable Valjibhai Dudhabhai, Buckle No.1050, on phone that one person by name Shaileshbhai Melabhai Bharwad had been hit on his head with a 'dharia' by some person. He has deposed that on the

strength of the vardhi he immediately reached to the Krishna Hospital, Karamsad. He had inquired with the doctor regarding the condition of the injured and he was told that the injured was being treated in the ICU and was unconscious. He has deposed that thereafter the complaint was lodged by the brother of the deceased i.e. the PW8 Maheshbhai.

We deem it necessary to also look into the evidence of the PW10 Kiritbhai Parsottambhai Dave. The PW10, at the relevant time, was serving as Deputy Mamlatdar of the Anand City. In his evidence Exh.36, he has deposed that on 3rd April 2008 he had received a yadi from Shri G.N.Ravna, Police Inspector of the Anand Town Police Station, to prepare a map of the scene of offence in connection with C.R.No.I-153 of 2008 registered at the Anand Town Police Station. He has deposed that on the basis of the said yadi, he had prepared the map Exh.38. In his cross-examination, he has deposed that the road towards the northern and southern direction at the place of occurrence is quite a busy road as the movement of traffic is heavy. He has also deposed that there is a straight road at the place of occurrence and there are no cross roads. He has also deposed that towards the eastern and western side of the place of occurrence, there are open plots. He has also

deposed that nearby the place of occurrence there are no residential houses. He has deposed that in the map Exh.8 he had not indicated any hutments nearby the place of occurrence.

Having heard the learned counsel appearing for the parties and having gone through materials on record, the only question that falls for our consideration in this appeal is, whether the trial Court committed any error in finding the accused guilty of the offence of murder.

On a close scrutiny of the evidence on record, it appears that the entire case of the prosecution hinges on the evidence of the PW8, Maheshbhai Bharwad Exh.3 and the PW9, Gitaben Thakor Exh.35. Both these witnesses claim to be the eye-witnesses to the incident. The trial Court has also placed implicit reliance on the evidence of both these witnesses in holding the accused guilty of the offence of murder.

Before we proceed to examine the evidence of the PW8 Maheshbhai, the brother of the deceased, we propose to look into the evidence of the PW9 Gitaben. Although in the First Information report Exh.34 lodged by the PW8 Maheshbhai, the

name of the accused has been stated in the FIR and it has also been stated in the FIR that the accused was known to the first informant and the deceased very well, yet it appears from the evidence of the PW8 that till the time he lodged the FIR, he had no idea regarding the name of the accused. This is evident from the evidence of the PW8 itself. The manner in which the PW9 Gitaben Thakor has deposed, leaves us with no manner of doubt in our mind that she is a got up witness and no evidentiary value can be attached to the version of the PW9. The PW9 claims to be residing in a hut somewhere near the place of occurrence. In her evidence, she has deposed that on the date of the incident she was washing utensils and at that time she heard some commotion of a fight at the tea stall of the deceased. She has deposed that the PW8 Maheshbhai and the deceased were present at their tea stall. She has deposed that while she was on the way to the place of occurrence, she had met the accused midway on the road. She has also deposed that she had put a cloth over the wound of the deceased and thereafter the deceased was taken to the hospital by the PW8 and one other person in a Maruti Fronty car and she had also accompanied them to the hospital. It is apparent from the entire evidence of the PW9 that she had no occasion to see the accused ever before the incident. It is also

very clear from her evidence that she had actually not witnessed the assault because on her own saying she had seen the accused in the midway on the road while she was trying to reach the place of occurrence. It appears that she identified the accused as the assailant for the first time while deposing in the Court, which has been taken cognizance of by the trial Court. We fail to understand on what basis the PW9 has deposed that she had the occasion to see the accused midway on the road while the accused was leaving the place of occurrence and the PW9 was trying to reach the place of occurrence. It is not clear what made her to believe that the person she had seen midway on the road was the assailant. It is not her case that the person she had seen on the road was carrying any weapon in his hand because the sickle was recovered from the place of occurrence. If the PW9 had no occasion to witness the assault, and before she could reach the place of occurrence if the fight was over, then it is very difficult for us to accept her version of seeing the accused on the road.

In the absence of any identification parade, no evidentiary value could be attached to the identification of an accused for the first time by a witness in the Court. As regards the value of the prosecution to place the accused in the Test

Identification Parade for the purposes of identification by the PW8 and PW9, the trial Judge has observed that this, in the facts of a particular case, is not a matter of much importance because the PW8 had the opportunity of witnessing the actual assault on his bother, the deceased, while the PW9 had an opportunity to see the accused midway on the road when the PW9 was reaching the place of occurrence. It was, therefore, felt that it was possible for the witnesses to remember the features of the man who identified the accused correctly in the Court, even though it may be almost after a year. In assessing the trustworthiness by a witness identifying an accused for the first time in the Court without testing the veracity of such identification by placing the accused in a Test Identification Parade has been the subject matter of catena of decisions and the principle laid down by the Supreme Court is also now well-settled.

In the case of Budhson v. State of U.P., reported in 1970(2) SCC 128, it has been observed that as a general rule the substantive evidence of a witness is a statement made in the court. That evidence, in order to carry conviction, should ordinarily clarify as to how and under what circumstances he came to pick out the particular person and the details of the

part which the accused played in the crime in question with reasonable particularity. The decision goes on to say that the purpose of a prior Test Identification Parade, therefore, seems to be to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to look for corroboration of the sworn testimony of witness in the Court as to the identity of the accused who are strangers to them in the form of earlier identification proceedings. The decision, however, also observes that there may be exceptions to this general rule when the Court is impressed by a particular witness, on whose testimony it can safely rely without such or other corroboration. In the instant case, in view of the infirmities already referred to, we do not consider it safe to rely on the testimony of the PW9 without corroboration in the shape of a prior Test Identification Parade. This decision in Budhson's case lays down that the test identification is a rule of prudence which should ordinarily be followed. In later cases, however, the Supreme Court went a step further, short of laying down as an absolute proposition of law, that identification in the Court for the first time without a prior identification in a Test Identification Parade is not legally entertainable.

There is one more infirmity we have noticed in the evidence of the PW9. The PW9 has deposed that after the incident, the deceased was taken to the hospital by his bother, the PW8, and one other person in the Maruti Fronty car and she had also accompanied them in the car. She has also deposed that on reaching the Adarsh Hospital, a nurse on duty asked the PW8 to call for 108 ambulance and take the deceased to the Karamsad Hospital. According to her, from the Adarsh Hospital she returned back to her home. She claims to be residing at a distance of 25 to 30 feet from the place of occurrence, in a hut. She has also deposed that there are other huts nearby the place of her residence. From the evidence of the doctor, which we shall discuss a little later, it transpires that the deceased was not taken to the hospital by the PW8, the brother of the deceased, but he was taken by two other persons. There is nothing in the evidence of any other witness which suggests that the PW9 had also accompanied the deceased to the Adarsh Hospital in the Maruti Fronty car. The most disturbing feature of the evidence of the PW9 is regarding her place of residence. According to the PW9, she heard some commotion of a fight and accordingly rushed to the place of occurrence. From the evidence of the PW10, it appears that there are no huts nearby the place of occurrence.

There are no residential houses also nearby the place of occurrence and there are no cross-roads also at the place of occurrence as asserted by the PW9. This is evident from the map of the place of occurrence Exh.38 and the deposition of the PW10 Exh.36. In such circumstances, we find it extremely difficult to believe the testimony of the PW9. The PW9 has gone to the extent of deposing that she had seen the accused for the first time on the date of the incident and never before had any occasion to see him. She has also deposed that she had no idea regarding the residence or the native of the accused. Thus, on the overall assessment of the evidence of the PW9, we are quite wary in believing her to be the eye-witness to the incident.

As we have taken the view that the evidence of the PW9 Gitaben does not inspire any confidence and deserves to be eschewed from consideration, we are now left with the evidence of the solitary eye-witness i.e. the PW8 Maheshbhai, brother of the deceased.

The well-known maxim that “evidence has to be weighed and not counted” has been given a statutory placement in Section 134 of the Evidence Act which provides as under :

"134. No particular number of witnesses shall in any case be required for the proof of any fact."

This section marks a departure from the English Law, where a number of statutes still prohibit convictions for certain categories of offences on the testimony of a single witness. This difference was noticed by the Privy Council in Mohamad Sugal Esa Mamasan Fer Alslan v. The King, AIR 1946 Privy Council 3, wherein it was laid down as under :

"It was also submitted on behalf of the appellant that assuming the unsworned evidence was admissible the court could not act upon it unless it was corroborated. In England, where provision has been made for the reception of unsworned evidence from a child, it has always been provided that the evidence must be corroborated in some material particularly implicating the accused. But in the Indian Act there is no such provision and the evidence is made admissible whether corroborated or not. Once there is admissible evidence a court can act upon it; corroboration unless required by statute goes only to the weight and value o the evidence. It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworned but, this is a rule of prudence and not of law."

The Privy Council decision was considered by the Supreme Court in Vadivelu Thevar v. State of Madras, AIR 1957 SC 614, in which it was observed as under :-

> *"On a consideration of the relevant authorities and the provisions of the Evidence Act, the following propositions may be safely stated as firmly established:*
>
> > *(1) As a general rule, a court can and may act on the testimony of a single witness though uncorroborated. One credible witness outways the testimony o a number of other witnesses of indifferent character.*
> >
> > *(2) Unless corroboration is insisted upon by statute, courts should not insist on corroboration except in case where the nature o the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon for example, in the case of a child witness, or of a witness whose evidence is that of an accomplice or of an analogous character.*
> >
> > *(3) Whether corroboration of the testimony of a single witness is or is not necessary, must depend upon facts and circumstances of each case and no general rule can be laid down in a matter like this a much depends upon the judicial discretion of the Judge before whom the case comes.*

In view of these considerations, we have no hesitation in holding that the contention that in a murder case, the court should insist upon plurality of witnesses, is much too broadly stated. Section 134 of the Indian Evidence Act has categorically laid it down that no particular number of witnesses shall, in any case, be required for the proof of any fact. The legislature determined as long ago as 1872 presumably after due consideration of the pros and cons, that it shall not be necessary for proof or disproof of a fact, to call any particular number of witnesses."

The Supreme Court further observed as under :

"It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence where determination of guilty depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, case where the testimony of a single witness only could be available in proof of the crime, would go unpunished. It is here that the discretion of the presiding judge comes into play. The matter thus must depend upon the circumstances of each case and the quality of the evidence of the single witness whose testimony has to be either accepted o rejected. If such a testimony is found by the court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an

accused may be proved by the testimony of a single witness, the innocence of the accused person may be established on the testimony of the single witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution. Hence, in our opinion, it is a sound and well-established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories. Namely;

(1) wholly reliable;
(2) wholly unreliable;
(3) neither wholly reliable nor wholly unreliable.

In the first category of proof, the court should have no difficulty in coming to its conclusion either way – it may convict or may acquit on the testimony of a single witness. If it is found to be above approach or suspicion of interestedness, incompetence of subordination. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subordination of witnesses. Situations may arise and do

arise where only a single person is available to give evidence in support of a disputed fact. The court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to the suspicion. It becomes its duty to act upon such testimony. The law reports contain many precedents where the court had to be depend and act upon the testimony of a single witness in support of the prosecution."

The aforenoted decision has since been followed in Ramratan and others v. The State of Rajasthan, AIR 1962 SC 424; Guli Chand and others v. State of Rajastan, AIR 1974 SC 276; Badri v. State of Rajasthan, AIR 1976 SC 560; Vanula Bhushan @ Venuna Krishnan v. State of Tamil Nadu, AIR 1989 SC 236; and in Jagdish Prasad v. State of M.P., AIR 1994 SC 1251.

On a conspectus of these decisions, it clearly comes out that there has been no departure from the principles laid down in Vadivelu Thevar's case (*supra*) and, therefore, conviction can be recorded on the basis of the statement of a single eye-witness, provided his credibility is not shaken by any adverse circumstance appearing on the record against him, and the court, at the same time, is convinced that he is a truthful

witness. The Court will not then insist on corroboration by any other eye-witness, particularly, as the incident might have occurred at a time or place when there was no possibility of any other eye-witness being present. Indeed, the courts insist on the quality and not on the quantity of evidence.

The PW8 Maheshbhai is the original first informant. The First Information Report regarding the incident was lodged by him at the Anand Town Police Station on 20th March 2008 at around 18:30 hours. In the First Information Report Exh.34, the PW8 has given an impression that the accused was very well known to him and the deceased. The accused has also been named in the FIR. The disturbing feature in the evidence of the PW8 is his admission that the name of the accused was not known to him, nor anything regarding his place of residence or his native. In his oral version Exh.33, the PW8 has deposed that the accused was fighting with one other person and the intervention of the deceased at that time was not liked by him and, therefore, he left the place with lot of anger. He has deposed that after about half an hour the accused returned to the place of occurrence, and while the deceased was sitting on a bench, the accused hit a blow with a sickle on the left eye of the deceased. The version of the PW8

is quite contradictory to the contents of the First Information Report. In the First Information Report, the PW8 has not stated anything regarding the return of the accused after half an hour at the place of occurrence and thereafter inflicting injuries on the head of the deceased with a sickle. The manner in which the PW8 has deposed regarding the assault creates considerable doubt in our mind. According to the PW8, only one blow was hit by the accused with a sickle whereas, the postmortem report Exh.10 would indicate that there were contusions all over the body of the deceased, suggesting some grappling or a free fight. The postmortem report Exh.10 has noted contusion over back of left forearm 4cm x 3cm in size, 5cm below the elbow joint, reddish brown colour contusion present over front and anterior aspect of right forearm 5cm x 2cm in size, 3cm below the elbow joint, reddish brown colour contusion over top of left shoulder 4cm x 3cm in size and a reddish brown colour contusion over front of left elbow 6cm x 4cm in size.

We are of the view that the PW8 Maheshbhai, the brother of the deceased, was not present at the time of the occurrence and has been falsely shown as an eye-witness to the incident. The doubt in our mind regarding the presence of the PW8 at

the time of incident is further fortified by the fact that it was not the PW8 who had taken the deceased to the Adarsh Hospital immediately after the incident in the Maruti Fronty car, but the persons who had taken the deceased to the Adarsh Hospital in the Maruti car were altogether different. The evidence of the PW17 assumes much importance in this regard. The PW17 Dr.Shah was the first doctor who had treated the deceased immediately after the incident at his hospital, viz. Adarsh Hospital. In his evidence, he has deposed that on 20th March 2008 at around 3:30 one Shailesh Melabhai Bharwad, the deceased, was brought by two persons, viz. Raju Jagabhai Bharwad and Shailesh Bhimabhai Bharwad. The PW17 has also deposed that in the history it was stated by those two persons that the injuries were sustained in a fight (‘maramari’). The ordinary meaning which could be attached to the word ‘maramari’ would be a free fight between two persons. There is no reference of the PW8 Maheshbhai in the entire evidence of the PW17 Dr. Shah. On the other hand, the PW8 claims that he had taken the deceased to the hospital in the car of Rajubhai Bharwad. It may be true that the deceased might have been taken to the hospital by one Rajubhai Bharwad in his car, but it does not appear that the PW8 had accompanied Rajubhai. In such circumstances, the question

that arises is as to where was the PW8 if he was present at the place of occurrence i.e. the tea stall. At this stage, even the version of the PW9 Gitaben that she had accompanied the PW8 in the car while taking the deceased to the hospital proves to be false, because there is no reference even of the PW9 in the evidence of the doctor PW17. Again, the evidence of the PW13 creates a considerable doubt regarding the oral evidence of the PW8. It appears that from the hospital of Dr.Shah, as advised by him, the deceased was shifted to the hospital at Karamsad. According to the PW13, it was one Satishbhai Melabhai Bharwad (other brother of the deceased), who had brought the deceased to the hospital at Karamsad. Even, there is no reference of the PW8 Maheshbhai in the evidence of the PW13 Dr.Mukeshbhai Patel. Again the question arises, where was the PW8. It is not the case of the PW8 that immediately after the incident he had gone to the Police Station, whereas on the other hand his case is that all throughout he was with the deceased and had lodged the FIR in the late evening at around 18:30 hours. Even, according to the PW13, Dr.Patel, in the history given by Satishbhai Bharwad, the brother of the deceased, it was stated that the deceased was attacked with a sickle by a known person, however, the name was not disclosed to the PW13 Dr.Patel.

A close scrutiny of the evidence of the PW8 Maheshbhai Bharwad indicates that his entire evidence is full of contradictions in the form of material omissions going to the root of the matter and such omissions are relevant under Section11 of the Evidence Act. In his evidence, he has gone to the extent of deposing that his other bother had told him that the name of the accused was Ramanbhai Machhi. He has not explained how his other brother came to know about the identity of the accused and the name of the accused and which of the two brothers had told him is also not deposed by the PW8.

In the overall assessment of the entire materials on record, we have reached to the conclusion that even the evidence of the PW8 Exh.33, the solitary eye-witness to the incident, does not inspire any confidence. On the other hand, he has given us an impression that he is a concocted witness and was not present at the place of occurrence.

In the aforesaid view of the matter, we hold that the trial Court committed a serious error in finding the accused guilty of the offence of murder by placing reliance on the evidence of

the PW8 and the PW9. This is a case which creates considerable doubt as regards the complicity of the accused in the crime and it is well settled that in such circumstances the benefit of doubt should go to the accused and, we accordingly, grant such benefit of doubt.

Resultantly, this appeal succeeds and is hereby allowed. The order of conviction and sentence passed by the trial Court is hereby set aside. The accused-appellant is hereby ordered to be released forthwith, if not required in other case.

(BHASKAR BHATTACHARYA, CJ.)

(J.B.PARDIWALA, J.)

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