IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL NO. 399 of 2007
With
CRIMINAL APPEAL NO. 525 of 2007
With
CRIMINAL APPEAL NO. 714 of 2007
With
CRIMINAL REVISION APPLICATION NO. 209 of 2007

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 ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?	No
5	Whether it is to be circulated to the civil judge ?	No

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ASHOK @ HASMUKH PUNAMCHAND CHHOVALA &
3....Appellant(s)
Versus
THE STATE OF GUJARAT....Opponent(s)/Respondent(s)

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Appearance:
CRIMINAL APPEAL NO.399 of 2007

MR DIVYESH SEJPAL with MR SATYAM Y CHHAYA, ADVOCATE for the Appellant(s) No.1-4
MR KP RAVAL, APP for the Opponent(s)/Respondent(s) No.1.

CRIMINAL APPEAL NO. 525 & 714 of 2007

MS SADHANA SAGAR, ADVOCATE for the Appellant(s) No.1.
MR KP RAVAL, APP for the Opponent(s)/Respondent(s) No.1.

CRIMINAL REVISION APPLICATION NO.209 of 2007

MS SADHANA SAGAR, ADVOCATE for the Appellant(s) No.1.
MR KP RAVAL, APP for the Opponent(s)/Respondent(s) No.1.
MR ADIL MIZA, ADVOCATE for the Respondent(s) No.2-3.

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

Date : 29/04/2014

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

1. As all the above captioned Appeals and Revision application arise from a common judgment and order passed by the Additional Sessions Judge, 4th Fast Track Court, Surat dated 29th January, 2007 in Sessions Case No.223 of 1993 those were heard analogously and are being disposed by this common judgment.

2. The Criminal Appeal No.399 of 2007 is at the instance of four convicts–original accused nos.4, 6, 7and 8. The Criminal Appeal No.525 of 2007 is at the instance of a convict-original accused no.2, whereas the Criminal Appeal No.714 of 2007 is at the instance of a convict–original accused no.3.

3. It appears from the materials on record that in all nine accused were put on trial on the charge of having committed offence under Sections 302, 323, 324, 504, 147, 148, 149 r/w sec. 34 and 114 of the Indian Penal Code. It also appears that during the pendency of the trial before the Sessions Court, the original accused nos.1, 4 and 9 passed away and resultantly the trial abated so far as those accused are concerned.

4. <u>Criminal Appeal no.399 of 2007</u> :

4.1 The Criminal Appeal no.399/2007 is at the instance of four convicts of the offence under Sections 302, 324, 323, 147, 148 read with Section 149 and Section 34 of the Indian Penal Code and is directed against the order of conviction and sentence passed by the Additional Sessions Judge, 4th Fast Track Court, Surat dated 29th January, 2007 passed in Sessions Case No.223/1993. By the aforesaid order, the learned Additional Sessions Judge found the appellants guilty of the offence punishable under Sections 302, 324, 323, 148 read with Section 149 and Section 34 of the Indian Penal Code and consequently, sentenced them to suffer Life Imprisonment and a fine of Rs.5,000/- each for the offence punishable under sec.302 read with Section 34 of the Indian Penal Code. The

learned Additional Sessions Judge also found the appellants guilty of the offence punishable under Section 148 read with Section 149 of the Indian Penal Code and consequently, sentenced them to suffer Rigorous Imprisonment for 2 years and fine of Rs.1000/-. In default of payment of fine, the appellants were directed to undergo further Rigorous Imprisonment for 3 months. The learned Additional Sessions Judge also found the appellants guilty of the offence punishable under Section 323 of the Indian Penal Code and consequently, sentenced them to suffer R.I. for six months with fine of Rs.1,000/-. In default of payment of fine, the appellants were directed to undergo further Rigorous Imprisonment for one month. The learned Additional Sessions Judge also found the appellants guilty of the offence punishable under Section 324 of the Indian Penal Code and consequently sentenced them to suffer Rigorous Imprisonment for a period of 2 years with fine of Rs.2,000/-. In default of payment of fine, the appellants were directed to undergo Rigorous Imprisonment for four months.

Criminal Appeal No.525 of 2007 :

4.2 This appeal is at the instance of a convict of the offence as enumerated above and is directed against the order of

conviction and sentence dated 29th January, 2007, passed by the learned Additional Sessions Judge, 4th Fast Track Court, Surat in Sessions Case No.223/1993. By the aforesaid order the learned Additional Sessions Judge found the appellant guilty of the offences as enumerated above and consequently, sentenced him to suffer imprisonment as enumerated above in the case of the other co-accused in Criminal Appeal No.399 of 2007.

Criminal Appeal No.714 of 2007 :

4.3 This appeal is at the instance of a convict of the offences as enumerated above and is directed against the order of conviction and sentence dated 29th January, 2007, passed by the learned Additional Sessions Judge, 4th Fast Track Court, Surat, in Sessions Case No.223 of 1993. By the aforesaid order the learned Additional Sessions Judge found the appellant guilty of the offence as enumerated above and consequently, sentenced him to suffer imprisonment as enumerated above in the case of other co-accused in Criminal Appeal No.399/2007.

CRIMINAL REVISION APPLICATION No.209 of 2007

4.4 The Criminal Revision Application No.209 of 2007 is at the instance of Ashwinkumar Mohanbhai Chhowala (original

accused No.3) i.e. the appellant of Criminal Appeal no.714 of 2007 challenging the judgment and order dated 29th January, 2007 passed by the Presiding Officer, 4th Fast Track Court, Surat in Sessions Case No.224 of 1993 (Cross case) whereby the respondent nos.2 and 3–original accused persons were acquitted of the offences punishable under Sections 323, 324, 504, 427 read with Section 114 of the Indian Penal Code.

5. Case of the Prosecution :

5.1 On 11th March,1993 the convict appellants of the three Criminal Appeals captioned above, at around 10.45 in the night formed an unlawful assembly by gathering at the house of the two deceased persons, namely, Vasantbhai Rangildas and Hasmukhbhai Rangildas situated at Lal Darwaja, Chhowala Sheri, House No.7/4057. It is the case of the prosecution that the original accused nos.5 and 7 caught hold of the deceased Vasantbhai whereas the original accused nos.2 and 3 inflicted injuries on the body of the deceased with a Gupti and Sword. At the same time, the original accused nos.4, 6 and 8 caught hold of Hasmukhbhai, the deceased, and thereby facilitated the original accused no.1 to inflict injuries with a knife on the body of Hasmukhbhai. In this manner, according to the

prosecution, the accused-appellants committed offence punishable under Sections 302, 147, 148, 149, 504 read with Section 114 and Section 34 of the Indian Penal Code. It is also the case of the prosecution that on the same date and time, the original accused no.1 (since deceased) inflicted injuries on Dinesh with a knife whereas the original accused nos.4, 5 and 9 inflicted simple injuries on the witnesses, namely, Chandresh and Naresh and thereby committed the offence under Sections 323, 324, 147, 148, 149, 504 read with Section 34 and Section 114 of the Indian Penal Code.

5.2 The First Information Report, Exh.110, was lodged by Rangildas Chhotubhai Chhowala, the father of the deceased Vasantbhai, on 11th March,1993 at 23.40 hours which was registered on 12th March, 1993 at 0:15 hours. The complainant in his complaint Exh.110 has stated that he resided with his sons, namely, Amrutbhai, Hasmukhbhai, Vasantbhai, Rameshbhai and Dineshbhai together in one house. He has stated that he was carrying-on business in the name of Ramkrishna Tea Hotel. His younger brother Mohanbhai Chhotubhai (A-12) and his sons Pankajbhai, Ashwinbhai, Mahshbhai (accused persons) reside in the house, nearby his house in the same locality. According to the complainant,

there was a long standing dispute between the two families regarding a property as a result the relations were highly strained. He has stated that on 2nd December, 1989, his brother's sons Ashwinbhai Vinubhai, Dalpatbhai and Kanubhai had assaulted his son Vasant due to enmity for which a complaint was lodged at the Mahidharpura Police Station. Thereafter, once again on 28th December, 1989, his brother Mohanbhai and his sons had picked up a quarrel for which a complaint was lodged at the Mahidharpura Police Station. He has stated that on 11th March, 1993 at around 9 O'clock in the morning his daughter-in-law, namely, Jayaben w/o Hasmukhbhai (deceased) after sweeping had gone outside the house to throw the garbage in the dustbin and at that time, his brother Mohanbhai's wife Shantiben also came out to throw the garbage in the dustbin. Both the ladies had an altercation at that point of time. However, according to the complainant nobody spoke to anyone at that time. Thereafter in the night hours the complainant and his sons were sitting in the house and talking with each other. His two sons, namely, Vasantbhai and Hasmukhbhai were talking with each other standing on the otta of the house. The complainant heard sounds of quarrel due to which he came out of the house and saw that his brother's sons Pankaj and Ashwin were quarreling with his sons

Vasant and Hasmukh. According to the complainant, Pankaj had a sword in his hand whereas Ashwin had a Gupti in his hand. Both these persons were hurling filthy abuses standing near his house. At that time his brother Mohanbhai (A-1) with a knife in his hand came rushing, followed by his son Mahesh with a glass bottle and sons of his brother-in-law, namely, Ashok Punamchand and Dhansukh Punamchand along with Dalpat Jamnadas, Raju Hiralal, Bharat Hiralal and around 10 to 12 other persons at the house of the complainant. He has further stated that his son Vasant was caught hold of by Raju and Ashok whereas Ashwin with a Gupti inflicted injuries on the chest of his son Vasant. He has stated that Pankaj inflicted injuries with a sword on the head of his son Vasant. Due to the injuries sustained, Vasant got knocked down. At that time his other sons, viz., Dinesh, Hasmukh and son of Hasmukh, viz., Chandresh and son of Vasant, namely, Naresh intervened to separate them. He has stated that Hasmukh was also caught hold of by the accused persons and Mohanbhai (A-1) inflicted injury on the body of Hasmukhbhai with a knife. As Dinesh intervened he was also inflicted injury with a knife by Mohanbhai A-1. He has stated that the other accused, namely, Dalpat,Mahesh and Ashok gave fisticuffs to Naresh and Chandresh. In the meantime, others arrived at the place of

occurrence, as a result, all the accused ran away from the place of occurrence with weapons in their hands. He has stated that as his son Vasant was bleeding profusely, his other two sons Dinesh and Mahesh took him to the Maskati Hospital in a rickshaw. As Hasmukhbhai was also seriously injured, he was taken by Nitin on his scooter to the Maskati Hospital. Thereafter, all the other family members also reached at the Maskati Hospital. He has stated that his son, namely, Vasant succumbed to the injuries. He has stated that the motive behind the commission of the crime was a property dispute for which a Civil Suit was pending in the Civil Court.

5.3 On complaint being lodged by the father of the two deceased persons, the investigation had commenced. The Inquest Panchnama of the dead body of Vasantbhai Exh.37 was drawn in presence of the panch witnesses. The Inquest Panchnama of the dead body of Hasmukhbhai Rangildas Exh.42 was drawn in presence of the panch witnesses. The scene of offence Panchnama Exh.47 was drawn in presence of Panch witnesses. The dead body of both the deceased persons, namely, Vasantbhai and Hasmukhbhai were sent for postmortem examination. The postmortem report, Exh.34, of the deceased Hasmukhbhai revealed the cause of death as

Peritonitis as a consequence of the injuries sustained by him, whereas the postmortem report, Exh.35, of the deceased Vasantbhai revealed the cause of death as shock due to hemorrhage as a result of injuries to the vital organs like heart and lungs. The clothes of the deceased persons were collected by drawing Panchnamas and were sent to the FSL for chemical analysis. The statements of various witnesses were recorded.

5.4 Finally, the charge sheet was filed against the accused appellants in the Court of the learned Judicial Magistrate, First Class, Surat.

5.5 As the case was exclusively triable by the Sessions Court, JMFC, Surat committed the case to the Sessions Court under Section 209 of the Criminal Procedure Code. The Sessions Court framed charge against the accused-appellants, Exh.9, and the statements of the accused appellants were recorded. The accused-appellants did not admit the charge and claimed to be tried.

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

Eye-witnesses:

(1) PW-16 –Nitinbhai Khimjibhai Mistry, Exh.56 who took the deceased Hasmukhbhai to the hospital on scooter.

(2) PW-17 –Nareshbhai Vasantbhai Chhovala, Exh.57 injured and eye-witness.

(3) PW-18 –Rakeshbhai Karmalbhai, Exh.58 injured and eye-witness.

(4) PW-19 –Dineshbhai Rangildas Chhovala, Exh.59 injured and eye-witness.

Panch-witnesses:

(5) PW-6 –Narendrabhai Jayantilal Limbachiya, Exh.44 Pancha of the Exh.120 Panchnama.

(6) PW-7 –Raijibhai Jivrajbhai, Exh.45 Pancha of the Exh.67 Panchnama.

(7) PW-8 –Hasmukhbhai Rangildas Gheewala, Exh.49 Pancha of the Exh.47 Panchnama.

(8) PW-9 –Pravinbhai Jaikishandasbhai, Exh.48 Pancha of the Exh.121 Panchnama.

(9) PW-10 –Nitinkumar Mohanlal Kandara, Exh.49 Pancha of the Exh.121 Panchnama.

(10) PW-11 –Rameshbhai Chhotubhai Mistry, Exh.50 Pancha of the Exh.67 Panchnama.

(11) PW-12 –Manharlal Narandas Rana, Exh.56 pancha of the Exh.68 Panchnama.

(12) PW-13 –NavnitlalBhogilal Rana, Exh.52 pancha of the Exh.68 Panchnama.

(13) PW-14 –Govindbhai Tulsibhai Patel, Exh.53 pancha of the Exh.69 Panchnama.

(14) PW-15 –Jayantibhai Homabhai Patel, Exh.54 pancha of the Exh.69 Panchnama.

Medical Witnesses :

(15) PW-1 –Dr. Kusumben Bhagubhai Patel – Exh.21, Medical Officer.

(16) PW-2 –Dr. Mukesh Devidas Surti, Exh.27 –Medical Officer.

(17) PW-3 –Dr. Shantilal Lallubhai Patel, Exh.29, M.O.

(18) PW-4 –Dr. Rajiv Mehta, Exh.33 Doctor who performed autopsy.

(19) PW-5 –Dr.Ilyas Ishak Mohmed Shaikh, Exh.36, Assistant Professor who performed autopsy.

(20) PW-20 –Dr.Homi Dudhwala, Exh.62 Medical Supdt., who operated the deceased Hasmukhbhai.

(21) PW-24 –Dr. Nisar Usmanbhai Mansuri –Exh.75, Medical Officer who examined the deceased Vasantbhai.

Government Witness :

(22) PW-21 –Naranbhai Paljibhai, Exh.23, Circle Engineer who prepared the map of scene of offence.

Police Witnesses :

(23) PW-22 –Vivek Shrivastav, Exh.66, Investigating Officer.

(24) PW-23 –Ramesh JUashwantsingh Vadvi –Exh.72 regarding copy of the station diary.

(25) PW-25 –Chhotalal Babulal Jadav, Exh.109 –Writer.

(26) PW-26 –Mayurdas Gokuldas Kaneriya, Exh.119 Investigating Officer, PI.

(27) PW-27 –Dilipbhai Durlabhbhai Pawar, Exh.126, Writer.

5.7 The following pieces of documentary evidence were adduced by the prosecution :

(1) Injury Certificate of Chandreshbhai Hasmukhbhai – Exh.22.

(2) Injury Certificate of Hasmukhbhai Rangildas –Exh.23.

(3) Documents regarding treatment of deceased Hasmukhbhai –Exh.25.

(4) Injury Certificate of accused Ashwinkumar – Exh.28

(5) Injury Certificate of accused Bharatkumar Hiralal –Exh.30.

(6) Injury Certificate of accused Rajeshbhai Hiralal –Exh.31.

(7) Injury Certificate of accused Pankajkumar Mohanlal – Exh.32.

(8) P.M.Note of deceased Hasmukhbhai Rangildas -Exh.34.

(9) P.M. Note of deceased Vasantbhai Rangildas –Exh.35.

(10) Inquest Panchnama of deceased Vasantbhai Rangildas, Exh.37

(11) Panchnama of taking blood stained clothes of deceased Hasmukhbhai into custody, Exh.38.

(12) Panchnama of clothes of deceased Vasantbhai taken into custody, Exh.39.

(13) Panchnama of the physical condition of the accused Pankajkumar Mohanlal, Rajeshbhai Hiralal, Bharatkumar Hiralal, Maheshkumar Mohanlal, Exh.40.

(14) Panchanma of the physical condition of the accused Mohanbhai Exh.41.

(15) Inquest Panchnama of the deceased Hasmukhbhai Rangildas, Exh.42.

(16) Copy of notification as per section 37(1) of Mumbai Police Act, Exh.43.

(17) Panchnama of the scene of offence, Exh.47.

(18) Death Certificate of complainant Rangildas, Exh.60.

(19) Map of the scene of offence in the deposition of PW-1 on both documents the exhibit is Exh.64, but there is no mention in the rojkam. Exh.64.

(20) Discovery Panchnama of weapon gupti by the accused Maheshbhai Mohanbhai used by Ashwinbhai Mohanbhai at the time of incident, Exh.67.

(21) Discovery Panchnama of the knife by the accused Mohanbhai Chhotubhai used at the time of incident, Exh.68.

(22) Discovery panchnama of the sword used by the accused Pankajbhai at the time of incident, Exh.69.

(23) Report by the FSL, Exh.70.

(24) Serological report, Exh.71.

(25) Copy of the Mahi.Police Station diary entry No.20/1993 dated 11/3/1993, Exh.73.

(26) Injury certificate of deceased Vasantbhai Rangildas, Exh.76.

(27) Injury certificate of Dineshchandra Rangildas, Exh.77.

(28) Injury certificate of Nareshchandra Vasantbhai, Exh.78.

(29) Injury certificate of accused Mohanbhai Rangildas, Exh.79.

(30) Panchnama of taking clothes of Dineshchandra Rangildas into custody, Exh.120.

(31) Panchnama of the physical condition of the accused Ashok alias Hasmukh Punamchand, Ashwinbhai Mohanbhai, Dhansukhbhai and Dalpatbhai Jamnadas, Exh.121.

5.8 After completion of oral as well as documentary evidence of the prosecution, statements of accused persons under Section 313 of Criminal Procedure Code were recorded in which all the accused persons stated that the complaint was a false one and they were innocent.

5.9 At the conclusion of the trial, the learned Trial Judge convicted the accused appellants for the offences punishable under Sections 302, 324, 323, 504, 147, 148, 149 read with Section 34 of Indian Penal Code and sentenced them as stated herein before.

5.10 Being dissatisfied, the accused-appellants have

come-up with their respective appeals.

6. At this stage it may not be out of place to state that the materials on record indicate that there were cross cases filed by both the sides. As the cross complaints were filed we deem it appropriate to first consider the medical evidence on record.

(A) Medical Evidence :

(1) The PW-1, Dr.Kusumben Bachubhai Patel, in her evidence, Exh.21, has deposed that on 12th March, 1993 at around 3.20 hours while on duty as a Medical Officer at Maskati Hospital a patient, named, Chandreshbhai aged around 18 was brought for treatment. The PW-1 has deposed that in the history of assault it was stated by the patient that he was injured with knife. The PW-1 has deposed that he had one superficial injury on his left hand between the index and middle fingers admeasured 1 cm long and 1/4th cm. wide. The PW-1 has further deposed that there was no other injury on the body of Chandreshbhai. The PW-1 has further deposed that on 11th March, 1993 a patient named, Hasmukhbhai was brought at the hospital at around 11.25 hours. The patient gave history of assault by knife. He was fully conscious and normal. The PW-1 has deposed that Hasmukhbhai had sustained the following

injuries :

i) On the left side of the chest anterior fold sixth inter coastal [injury between two ribs] Its length was 2cm and 0ll cm wide.

ii) On the thigh above the abdomen on the right side there was injury. Its length was 1cm and width was 0ll cm.

iii) Third injury was on the back left side above the scapula corner 0ll cm long and 0ll cm wide.

iv) Fourth injury was on the left side on the neck 0ll cm long and 0ll cm wide.

v) On the right shoulder joint there was swelling and on pressing it was paining.

The PW-1 has deposed that Hasmukhbhai was operated by Dr.Homi Doodhwala. She has deposed that Hasmukhbhai all of a sudden fell unconscious and passed away on 23rd March, 1993 i.e. after 12 days from the date of hospitalization. The PW-1 has deposed that none had come to the hospital to record his statement/Dying declaration during 12 days of the hospitalization. The PW-1 produced two medical certificates Exh.22 and Exh.23 with regard to the injuries sustained by Chandresh and the deceased Hasmukhbhai.

(2) The PW-2, Dr. Mukesh Devidas Surti, in his evidence, has

deposed that on 12th March, 1993 he was on duty as a Medical Officer at the Maskati Hospital and at that time at around 8 O'clock in the night a patient named Ashwinbhai Mohanbhai Chhovala had come to the hospital and was examined by him. The PW-2 has deposed that Ashwinbhai (A/3) had one injury on the left foot on the upper part admeasuring 2 x 0ll cm muscle deep- one clean lesion. There was no bleeding. He was given treatment as an outdoor patient and was discharged. The patient did not give any history regarding the injury. The PW-2 has deposed that the injury can be caused by an accident or by a sharp object or even due to bite by an animal. The Medical Certificate issued by the PW-2 with regard to the injuries on the body of Ashwinbhai (A.2) was exhibited and marked as Exh.28.

(3) The PW-3, Dr.Shantilal Lallubhai Patel, in his evidence, Exh.29, has deposed that on 14th March, 1993 while he was on duty at the Maskati Hospital, Surat as a Medical Officer, a patient, namely, Bharatkumar Hiralal had come at around 7.45 hours for treatment. The PW-3 has deposed that Bharatkumar Hiralal (A-8) had stated in the history that he had received injury while playing cricket. The injuries were in the nature of small abrasions over the right forearm dorsal part red in colour.

The PW-3 deposed that the injuries could be 3 to 4 days old. He produced the medical certificate, Exh.30, with regard to the injuries sustained by Bharatkumar, A-3. He has further deposed that on the same day and at the same time a patient named, Rajesh Hiralal (A-7) was also brought to the Hospital. The patient had multiple small red colour abrasions over the right forearm dorsal part and over the upper right chest. The PW-3 produced the Medical Certificate of Rajesh Hiralal, Exh.31. He further deposed that the injuries sustained by A-7 can be caused by a hard and blunt substance. The PW-3 has also deposed that on the same day and at the same time, the other person, namely, Pankajbhai Mohanlal had also come to the hospital for treatment. In the history of assault, he had stated that he was assaulted by someone. The PW-3 has stated that he had multiple small abrasions over the left leg and over back portion reddish in colour. The PW-3 produced a medical certificate of the injuries sustained by Pankaj Mohanbhai (A-3), Exh.32. He has deposed that the injuries can be caused by coming into contact with a hard and blunt substance.

(4) The PW-4, Dr. Rajiv Mehta, in his evidence, Exh.33, has deposed that he had performed the Postmortem of the deceased Hasmukhbhai Rangildas on 23rd March, 1993 at the

New Civil Hospital, Surat. The Postmortem report is Exh.34. The PW-4 described the external injuries found on the body of the deceased Hasmukhbhai as under :

i) On removing the bandage over ant. Part of the abdomen, there is a surgical stitched (Mid line) wound with 25 stitches – 25cms in depth. Bandage is socked with pus at lower portion.

ii) A stitched wound in 6th intercostals space lateral to the mid cleavicular line on left side with two stitches 3.5 cm in length oblique and liner in shape.

iii) 1 x 1 cm oval drainage wound over the left side of the abdomen 106 cm above the heel in ant axillary line.

iv) 2cm healed wound over the right iliac fossa, linear in shape.

v) Venesection mark on the left ankle.

vi) 24 x 5 cm bruise on right axillary region extending upto upper limb brownish yellow in colour.

The PW-4 described the internal injuries to be Peritoneum stitched (torn) corresponding to the external surgical wound over the abdomen peritoneum reddened anplanmed, muneches of abdomen wall contused corresponding abdanteamed to external injury, peritoneum vacuity contain 50 ml of this fluid. Stomach stitched with three stitches as its greater aervatune empty. The PW-4 deposed that the cause of death was Peritonitis as a consequence of the

injuries. He opined before the Court that the injuries can be caused with a sharp cutting weapon like a knife, sword or gupti. However, he deposed that an appropriate opinion could be given only by the Doctor who had performed the surgery on the deceased.

(5) The PW-5, Dr. Iliyas Ishak Mohmad, in his evidence, Exh.36, has deposed that he had performed the Postmortem of the deceased Vasantbhai Rangildas Chhovala on 12th March, 1993. The postmortem note is Exh.35. He described the external injuries as under :

i) Incised wound over right frontal region 5 x 1 cm transverse bone exposed, just below this line, margins clean cut angles acute.

ii) Stab wound over left side of cheek 1.5 x 0.3 cm – bone deep 1.0 cm lateral to also nose, oblique. Margins clean cut angles acute.

iii) Incised wound over left side of chest 6.0 cm from midline transverse 7.0 cm above left nipple 133 cm. lateral end blunt medial and acute with tailip on left side 3.0 cm.

iv) Stab wound in left line in 6th rib 2 x 1 cm size, 118 cm from left heel, margins acute cut one end blunts one end acute.

v) Stab wound one lateral aspect of left arm, lower third area 1.0 cm above coil 2 x 1 cm both end acute.

vi) Three abrasions transverse 2.5 x 1.0 cm, 0.5 x 0.5 cm and 1.0 x 0.5 cm size in lower third area on anterior aspect of left leg. 20 cm above left heel total area 0 x 6 cm.

The PW-5 described internal injuries corresponding to external injuries narrated above as the lung, heart and diaphragm were damaged. The cause of death is written as "Shock due to haemorrhage as a result of injury to vital organs heart and lung.

According to the PW-5 the injuries can be caused by weapon like Gupti and a sword. The injuries Nos.1, 2, 3 and 5 can be caused by a knife.

(6) The PW-20, Dr.Homi Doodhwala, in his evidence, Exh.62 has deposed that he had performed surgery on the body of the deceased Hasmukhbhai at the Maskati Hospital on 13th March, 1993. He had found the following injuries sustained by the deceased Hasmukhbhai.

i) One the left side of the abdomen 3 cm long injury.

ii) Anterior surface of the stomach 1 x 2 cm injury.

iii) In the stomach food and blood had mixed. The blood had come into the stomach because of the injury.

iv) As per the x-ray, on his right shoulder above the bone there was a fracture and on the left side of the chest fracture was seen on the seventh rib.

He has deposed that the injury on the abdomen and in the stomach can be caused by a sharp cutting instrument. The Injuries were serious and were sufficient in the ordinary course of nature to cause death. He has deposed that the patient had not given any history as regards the assailants.

7) The PW-24, Dr. Nisar Usmanbhai Mansuri, in his evidence, Exh.75 has deposed that Vasantbhai Rangildas was brought at the hospital on 11th March, 1993 and was declared as brought dead. He has deposed regarding the external and internal injuries sustained by the deceased Vasantbhai as indicated in the P.M.Report. The PW-24 has further deposed that he had also examined Dineshbhai Rangildas (injured witness-brother of the deceased) on 11th March,1993 at around 00.15 hours. According to the PW-24 Dineshbhai had a superficial CLW over the left glucal region of ½ x ½ x ½ cm in size. He had one more superficial CLW over left side of the chest at 1st

intercostals space of some ½ x ½ x ½ cm. He was treated as an outdoor patient and discharged immediately. The first two injuries were possible by a sharp cutting instrument and the third injury can be caused by any hard and blunt substance. The Certificate issued by the PW-24 is Exh.77.

The PW-24 had also examined the other injured witness viz. Nareshbhai on 12th March, 1993 at 3.20 hours. He gave history of assault by a wooden log on 11th March,1993 at 23:00 hours. According to the PW-24, he had a tender defused swelling over right side of the chin, tenderness over left shoulder, Linear abrasion of 5 x ½ cm over left lower part of the chest, tenderness all over the chest and small fresh abrasions over dorsal of the great toe. The PW-24 produced the certificate of injuries Exh.78. He deposed on being shown the muddamal article no.9 the wooden log that the injury can be caused by such a wooden log. The PW-24 has deposed that he had also examined Mohanbhai Chhotalal Chhovala (A-1) on 11th March, 1993. In the history of assault it was stated by Mohanbhai that he was attacked and beaten by a hockey stick at around 23:00 hours. Mohanbhai had a contused lacerated wound over the right side of his forehead 3 x 1 x 1 cms. Tenderness over left hip with painful movement and fresh

abrasion over skin of the left leg. The medical certificate of Mohanbhai, Exh.79, was produced by the PW-24.

Thus, on a close scrutiny of the medial evidence on record it appears that the accused persons had also sustained injuries as deposed by the Doctors. It appears that Mohanlal A.1 had sustained a serious injury on his head in the form of a contused lacerated wound. He was discharged from the hospital on 15th March,1993. It also appears from the materials on record that a cross complaint was lodged by the accused persons against the prosecution witnesses for the offences punishable under Sections 323, 324, 504, 427 read with Section 114 of Indian Penal Code and for the offence under Section 135 of the Bombay Police Act. The cross complaint lodged by Ashwinkumar Chhovala (A-2) culminated in Sessions Case No.224 of 1993 and the Sessions Court vide judgment and order dated 29th January, 2007 acquitted the two accused of that case, namely, Dinesh Chhovala and Nareshkumar Vasantbhai Chhovala by extending the benefit of doubt.

B) We shall now consider the oral evidence of the eye witnesses on record.

1) The PW-17, Nareshbhai Vasantbhai Chhovala-the son of the deceased Vasantbhai Rangildas Chhovala has been examined by the prosecution as an eye-witness to the incident. In his evidence, Exh.57, he has deposed that the incident took place on 11th March, 1993 at around 11 hours while returning home from a walk. He has deposed that he saw Mohanbhai, Pankaj, Ashwin, Ashok, Bharatbhai, Rajubhai, Dalpat and 2 to 3 other persons assaulting his father. He has deposed that all those persons were assaulting his father with a sword, gupti and knife. The incident occurred opposite the house of Jasabhai. He has deposed that Ashwinbhai was carrying a Gupti, Pankaj was carrying a sword and Mohanlal had a knife in his hand. He deposed that Ashwin hit a blow with the gupti on his father, Pankajbhai hit a blow with the sword as a result his father Vasantbhai got knocked down. He has also deposed that Hasmukhbhai (deceased) was hit a blow with the knife by Mohanbhai (A-1). Mohanbhai (A-1) thereafter hit a knife blow on the body of Dinesh. According to this witness he had intervened and at that time Ashok gave fisticuffs on his face and right shoulder. In the meantime other people arrived at the spot of occurrence and, therefore, the assailants ran away. He has deposed that Bharat and Raju while running away, fell down and accordingly had sustained injury on their hand. He

has deposed that his father Hasmukhbhai was thereafter taken to the Hospital. In his cross-examination, the PW-17 admits that he had not given the names of the assailants to the concerned Doctor. He has also deposed that he had never stated before the Doctor that he was beaten up with a wooden log. According to this witness, the incident had lasted for around two minutes. He deposed that his father was assaulted by Ashwinbhai and Pankajbhai and had no idea as to where the other accused persons were at that time. He has deposed that the other accused, although, were present at the place of occurrence, yet were not to be seen. In his cross-examination he has further stated that Ashwin hit a gupti blow on his father, Pankaj hit a blow with a sword and thereafter Vasantbhai was caught hold of by Raju and Ashok from his shoulders. He has deposed that at the time of incident, the first informant i.e his grandfather Rangildas was present at his house. He has deposed that his grandfather, Dineshbhai, Chandreshbhai and he himself had not intervened to save the deceased. He has further deposed that the deceased Hasmukhbhai was inflicted injuries with the knife by A-1 Mohanlal. He has deposed that after inflicting injuries on Vasantbhai he had not seen Ashwinbhai and Pankaj. He also did not see them running away from the place of incident. Regarding the motive he

deposed that in the year 1989 his grandmother had instituted a Civil Suit and therefore, there was enmity between the two families.

2) The PW-18, Chandresh Hasmukhbhai Chhovala has also been examined by the prosecution as one of the eye-witnesses. In his evidence, Exh.58, he has deposed that the incident took place at around 22:45 hours, while he was watching TV. According to the PW-18 he heard noise of a quarrel coming from outside. According to the PW-18, Ashwin and Pankaj were abusing his father Hasmukhbhai and at that time Ashwin had a gupti in his hand while Pankaj had a sword. While the quarrel was going-on, the other accused persons, namely, Ashok, Raju, Dhansukh, Bharat, Mahesh, Mohan and 2 to 4 other persons came running from the house of Mohan (A-1). According to the PW-18, while Ashok and Raju held Vasantbhai from his shoulders, Ashwin hit a gupti blow and Pankaj hit a sword blow on the head as a result Vasantbhai got knocked down. No sooner had Vasantbhai fell down, than Dhansukh and Mahesh caught hold of his father, deceased Hasmukhbhai, and at that time Mohanbhai (A-1) hit a knife blow. According to this witness, Mohanbhai (A-1) thereafter hit a knife blow on the body of Dinesh. Ashok, Raju, Bharat,

Dhansukh, Dalpat and others gave fist and kick blows to this witness and thereafter all the assailants ran away. In his cross-examination, he has deposed that although there were many houses surrounding the place of occurrence, yet no one came out to witness the incident. He has deposed that although he himself and Dinesh raised shouts for help, yet no one came out. He further deposes that after the other co-accused came running from the direction of Mohan's house they all at that time were standing on a footpath and remained standing at the footpath. He deposed that the bystanders had not done anything.

3) The PW-19, Dinesh Rangildas Chhovala, has also been examined by the prosecution as one of the eye-witnesses. In his evidence Exh.59 he has deposed on the same line with that of the PW-18 discussed above. However, in his cross-examination he deposed that when he was taken to the hospital, he had not given the names of the assailants to the Doctor. Many contradictions in the form of material omissions were brought in his evidence. Such contradictions relate to the accused no.1 and the accused nos.5 to 8 coming at the place of occurrence at a later point. He deposed that in his police statement he had stated that Mohanbhai (A-1) came out of his

house with a knife and thereafter the others came at the place of occurrence. In his police statement he has not given the names of all the accused persons. He has deposed that he did not know the other accused persons and had not stated anything regarding their presence to the police.

7. <u>Submissions on behalf of the accused-appellants</u>:

7.1 Ms.Sadhna Sagar, the learned advocate appearing for the appellants of Criminal Appeal No.525 of 2007 and Criminal Appeal No.714 of 2007 respectively, has vehemently submitted that the trial Court committed a serious error in holding her clients guilty of the offence of murder by relying on the evidence of the three eye-witnesses i.e. PW-17, PW-18 and PW-19. Ms.Sagar submitted that the prosecution has suppressed the true origin of the occurrence rendering the genesis of the entire case doubtful. Ms.Sagar further submitted that all the three eye-witnesses i.e. PW-17, PW-18 and PW-19 could be termed as highly interested witnesses being the sons of the two deceased persons. Ms.Sagar laid much emphasis on the fact that the three eye-witnesses could not be termed as reliable witnesses as they have not been in the position to explain the injuries on the body of the accused persons. Ms.Sagar submitted that the original accused no.1, Mohanbhai Chhotubhai Chhovala, passed away during the pendency of the

trial, whereas she is representing Mohanbhai's two sons, original accused no.2 Pankajkumar Chhovala and the original accused no.3 Ashwinkumar Chhovala. Ms.Sagar submitted that Mohanbhai Chhovala, the father of her two clients, had sustained serious injuries and none of the eye-witnesses have said a word regarding such injuries sustained by Mohanbhai. Ms.Sagar submitted that the case at hand is one of a sudden fight without any pre-plan or premeditation and, therefore, even if the entire version of the three eye-witnesses is accepted to be true, her clients are entitled to the benefit of the Exception (4) to Section 300 of the Indian Penal Code.

7.2 In such circumstances referred to above, Ms.Sagar submitted that there being merit in both the appeals, the same may be allowed appropriately.

7.3 Mr.Divyesh Sejpal, the learned advocate appearing with Mr.Satyam Chhaya for the appellants of Criminal Appeal No.399 of 2007 has submitted that the Trial Court committed a serious error in convicting all the four appellants for the offence of murder with the aid of Section 149 and Section 34 of the Indian Penal Code. The principal argument canvassed by Mr.Sejpal is one of free fight between the two sides. Mr.Sejpal

submitted that the medical evidence on record would definitely suggest that there was a free fight between the accused persons on one hand and the prosecution witnesses on the other. Mr.Sejpal submits that once it is established by the evidence on record that there was a free fight then in such circumstances Section 149 of the Indian Penal Code will have no application. Mr.Sejpal submits that once Section 149 has no application then the principle of constructive liability cannot be imposed. Each accused can only be convicted for the injuries caused by his individual acts. Mr.Sejpal further submitted that even if the evidence of the three eye-witnesses is believed to be true then in such circumstances the only overt act attributed to the four appellants is that of being a member of the unlawful assembly and two of those are alleged to have caught hold of the deceased Vasantbhai. The other allegations are that of giving fisticuffs. Therefore, according to Mr.Sejpal so far as the appeal filed by his clients is concerned the same deserves to be allowed.

8. <u>Submissions on behalf of the State</u> :

8.1 Mr. K.P.Raval, the learned Additional Public Prosecutor appearing for the State, has vehemently opposed all the three

appeals filed by the respective appellants. Mr.Raval submits that the Trial Court committed no error in holding the accused-appellants guilty of the offence of double murder with the aid of Section 149 and Section 34 of the Indian Penal Code. Mr.Raval submits that the Trial Court rightly appreciated the evidence of the three eye-witnesses i.e. the PW-17, PW-18 and PW-19. Each of the eye-witnesses have deposed very clearly regarding the incident and the assault laid by the accused persons on the two deceased. Mr.Raval further submits that the ocular version of the three eye-witnesses is fully corroborated by the medical evidence on record. Mr.Raval also submitted that once it is established that the accused persons were the member of the unlawful assembly and the common object of the unlawful assembly was to commit the murder of the two deceased, then in such circumstances it is not necessary for the prosecution to attribute a particular over act to each of the accused persons.

8.2 In such circumstances, referred to above, Mr.Raval prays that there being no merit in any of the appeals filed by the convicts the same deserves to be dismissed.

9. Having heard the learned counsel appearing for the

parties and having gone through the materials on record, the only question that arises for our consideration is whether in view of the facts indicated above, can it be said that the incident had exactly taken place in the manner the prosecution witnesses of the occurrence have deposed and as such the appellants are guilty of the offence under Sections 302, 149, 34 of the Indian Penal Code or it was a case of free fight in which only the persons, who directly participated, are responsible to the extent the part played by them. The clue to the material question i.e. the effect of non-explanation of the injuries on the accused persons, more particularly, A-1, Mohanbhai Chhotubhai with hockey stick can be traced from various decisions of the Apex Court.

10. To begin with the earliest case i.e. in **Mohar Rai v. State of Bihar** reported in **AIR 1968 SC 1281**, it is held therein that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence of in the case of altercation is very important circumstance from which the Court can draw the following inferences :

(1) The prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the

true version;

(2) The witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) That in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to thraw doubt on the prosecution case.

11. In **Onkarnath Singh v. State of U. P.** reported in **1974 SCC (Cri) 884**, the Apex Court dealing with the identical contention observed (Para 35) :

> "*Such non-explanation, however, is a factor which is to be taken into account in judging the veracity of the prosecution witnesses, and the Court will scrutinise their evidence with care. Each case presents its own features. In some cases, the failure of the prosecution to account for the injuries of the accused may undermine its evidence to the core and falsify the substratum of its story, while in others it may have little or no adverse effect on the prosecution case. It may also, in a given case, strengthen the plea of private defence set up by the accused. But it cannot be laid down as an invariable proposition of law of universal application that as soon as it is found that accused had received injuries in the same transaction in which the complainant party was assaulted, the plea of*

private defence would stand prima facie established and the burden would shift on to the prosecution to prove that those injuries were caused to the accused in self-defence by the complainant party. For instance where two parties come armed with a determination to measure their strength and to settle a dispute by force of arms and in the ensuing fight both sides receive injuries, no question of private defence arises."

12. In **Lakshmi Singh v. State of Bihar** reported in **1976 SCC (Cri) 671 : (1976 Cri LJ 1736)** the accused sustained injuries in the same occurrence. No independent witness was examined by the prosecution to support the participation of the appellant in the assault. It was also found that the evidence of the witnesses of occurrence showed that they gave graphic description of the assault with regard to the order, the manner and the parts of the body with absolute consistency which gave an impression that they had given a parrot like version acting under a conspiracy to depose to one set of facts and one set of facts only. In view of the nature of evidence of the witnesses of the occurrence the Apex Court accepted the contention advanced on behalf of the accused, particularly taking the entire picture of the narrative given by the witnesses, that they had combined together to implicate the accused falsely because of long standing litigation between

them and the said witnesses. Thereafter, the Court considered the injuries that were inflicted on the person of the accused Dashrath Singh and laid down that where the prosecution fails to explain the injuries on the accused, two results follows :-

(1) That the evidence of the prosecution witness is untrue; and

(2) The injuries probablise the plea taken by the appellants.

13. The materials on record admits of no doubt that cross-complaints were filed in the present case. It appears that Ashvinkumar Chhovala, A-3, had also lodged a First Information Report in connection with the same incident at the Mahidharpura Police Station, which was registered as CR No.I-90 of 1993 of the offence punishable under Sections 323, 324, 504, 429 read with Section 114 of the Indian Penal Code and under Section 135 of the Bombay Police Act. It appears that after the investigation charge sheet was filed against the prosecution witnesses, including Dinesh Chhovala and Nareshkumar Vasantlal Chhovala which culminated in the Sessions Case No.224 of 1993.

14. It appears from the evidence on record that the First Information Report regarding the incident which occurred on 11/3/1993 was lodged by one Rangildas Chhotubhai, the father of the two deceased persons, namely, Hasmukhbhai and Vasantbhai. It also appears that during the pendency of the trial before the evidence of Rangildas Chhotubhai could be recorded, he passed away. Therefore, the prosecution admitted to prove the contents of the First Information Report through the evidence of Chhotubhai Babulal Jadav, PW-25, the Writer who had taken down the complaint of Late Rangildas. While the PW-25 was in the witness box, the FIR was produced and was taken on record by giving exhibit to the same. The same was objected by the defence, however, such objection was over-ruled and the First Information Report as a whole was admitted in the evidence being Exh.110. It also appears from the materials on record that the decision of the trial court to admit the FIR in evidence through the evidence of the Police witness PW-25 was challenged by the accused-appellants before this Court by filing Criminal Misc. Application No.5443 of 2000. The learned Single Judge of this Court vide order dated 15/2/2001 allowed the Criminal Misc. Application No.5443 of 2000 holding that the trial Court could not have admitted the FIR in evidence with a view to read the contents of the same

through the evidence of the PW-25, a Police witness, as the original first informant Rangildas passed away during the pendency of the trial. The learned Single Judge relied on the various provisions of the Evidence Act and ultimately passed an order that the First Information Report which was given Exh.110 shall not be read into evidence and directed the Trial Court to de-exhibit the same.

15. Thus, the First Information Report could not be proved by the prosecution and, therefore, the Trial Court was left with the evidence of the three eye-witnesses i.e. the PW-17, PW-18 and PW-19. The PW-17, Nareshbhai, is the son of the deceased Vasantbhai. The PW-18, Chandreshbhai, is the son of the deceased Hasmukhbhai and the PW-19, Dineshbhai is the son of Rangildas i.e. the brother of the two deceased persons.

16. It also appears that the accused persons, more particularly the original accused no.1 Mohanbhai (dead) and his two sons are related to the prosecution witnesses. The other accused persons are also related in some way or the other. It also appears that there was a long standing dispute regarding a property due to which both the sides were at inimical terms. It also appears that a Civil Suit regarding he

same was also pending in the Civil Court.

17. It appears from the evidence of the three eye witnesses that the original accused no.2, Pankaj, and the original accused no.3, Ashwin, the sons of original accused no.1 Mohanbhai armed with a gupti and a sword, entered into an altercation with the two deceased persons near their house in the night hours at around 10.45. It appears that while the altercation was going-on between the two deceased persons and the A-2 and the A-3, the other accused persons were not there at all in picture. According to the three eye-witnesses, thereafter A-1 Mohanbhai (dead) arrived at the place of occurrence with a knife and A-1 inflicted injuries on the deceased Hasmukhbhai. Thereafter, according to the three eye-witnesses, the other accused persons i.e. A.5, A.6, A.7 and A.8 came running at the place of occurrence. According to the PW-18 and the PW-19, Ashok, A-5, and Raju, A-7, had caught hold of the deceased Vasantbhai and Ashwin, A-3, inflicted injuries on the deceased Vasantbhai with a gupti. It also appears that Pankaj, A-2, inflicted injuries on the deceased Vasantbhai with a sword. So far as A-5, A-6, A-7 and A-8 are concerned who arrived at the place of occurrence at a later stage assaulted the eye-witnesses with fisticuffs. This appears to be the case of the

three eye-witnesses.

18. However, it is very doubtful that the PW-17 Nareshbhai was present at the time of the occurrence. The oral evidence of the PW-17 Nareshbhai does not inspire confidence for more than one reason. According to the PW-17 he had gone for a walk in the Mohalla and when he returned he found that the fight was going-on and the accused persons were assaulting his father. However, in his cross examination, the PW-17 has deposed that when A.2 Ashwin and A.3 Pankaj were assaulting his father he had no idea as to where the other accused persons were. He has deposed that although the other accused persons were present, but they were not to be seen. He has further deposed that neither he himself nor his cousin Chandresh or Dineshbhai or Rangildas had intervened to save Hasmukhbhai and Vasantbhai.

19. It also appears from the evidence on record that A.3 Ashwinkumar also sustained a contused lacerated wound 2cm x 0.5cm. This is evident from the medical certificate Exh.20. Bharatkumar Hiralal, A-8, had also sustained some injuries. This is evident from the medical certificate Exh.30. Rajeshbhai Hiralal, A-7, had sustained multiple abrasions. This is evident

from the medical certificate Exh.31. Pankaj, A-2 had also sustained multiple abrasions. This is evident from the medical certificate Exh.32.

20. Mohanbhai, A-1, had also sustained injuries in the nature of a contused lacerated wound and in the history before the Doctor he stated that he was assaulted by hockey sticks

21. In spite of the fact that A.1 Mohanbhai and the other co-accused had sustained injuries as reflected from the medical certificates on record, none of the three eye-witnesses have deposed a word about the same. It indicates that none of the eye-witneses were honest enough to depose the true facts before the court and gave a one sided version of the assault on the deceased Hasmukhbhai and the deceased Vasantbhai.

22. Therefore, we have reached to the conclusion that the case at hand is one of a free fight and there is no scope of application of Section 149 of the Indian Penal Code. So far as the appellants of Criminal Appeal no.399 of 2007 are concerned, their conviction for the offence of murder with the aid of Section 149 does not appear to be justifiable.

23. Section 149 creates a distinct and substantive offence. Section 149 of the Indian Penal Code consists of two parts. The first part of the section means that the offence to be

committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was a member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set-out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge i.e. the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now that common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, as generally to be gathered from the act which the person commits and the result there from. Although no hard and fast rule can be laid down under the circumstances from which the common object can be curled out, yet it may reasonably be collected from the nature of the assembly, arms

it carries and behavior at or before or after the scene of incident. The word “knew” used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of “might have been known”. Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of the Section 149 should not be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within first offences committed in prosecution of the common object would be generally, if not always, with second, viz. offences which the parties knew to be likely committed in the prosecution of the common object. [See **Gangadhar Vs. State** : **2008 Criminal Law Journal -41 (SC)**].

24. Since Section 149 imposes a constructive penal liabllity, it must be strictly construed. In order to invoke Sec. 149 it must be shown that the incriminating act was committed to accomplish the common object of the unlawful assembly or was one which the members knew to be likely to be committed. There must be a nexus between the common object and the offence committed and if it is found that the same was committed to accomplish the common object, every member of the assembly will become liable for the same.

25. However, the most important aspect of the matter is that in case of a sudden and free fight, no constructive liability can be imposed. Each accused can only be convicted for the injuries caused by his individual acts.

26. As we are of the view that the case at hand is one of the free-fight we deem it necessary to explain the concept of free fight so far as the Indian Penal Code is concerned.

27. The concept of free-fight had been examined in a series of judgments by the Supreme Court where it has found that each accused should be fastened with the individual liability in relation to the specific role attributable to each of such

individual and since in a free-fight it becomes difficult for the Court to ascertain as to who was the aggressor, the safer course of action, suggested by the Supreme Court is to pick up the individual acts, for punishing the individual accused persons. The observations of the Supreme Court in some of its celebrated judgments are quoted herein below :

28. In a case reported as **Gajanand v. State of U. P.** reported in **AIR 1954 SC 695**, it has been held that :

> "*5.....A free fight according to Harrison, J. in Ahmad Sher v. Emperor (AIR 1931 Lahore 513 (A)) is "when both sides mean to fight from the start, go out to fight and there is a pitched battle. The question of who attacks and who defends in such a fight is wholly immaterial and depends on the tactics adopted by the rival commanders*".....

29. In the case of **Abdul Hamid v. State of U. P.** reported in **(1991) 1 SCC 339**, it has been held by Supreme Court that :

> "*7. It can thus be seen that the substratum of the prosecution case has not been accepted. As to the genesis of the occurrence there is no finding. Having given a finding that it was a free fight we are unable to see as to how the High Court could convict each of the appellants under Section 304, Part II simpliciter though there was only one lacerated injury on the deceased. A person would not be guilty of a crime merely*

because he was present unless his complicity in the crime can be inferred by some act or the other or by way of constructive liability. If it was a case of free fight then different considerations would arise. In Gajanand v. State of U.P., it is observed : (Cri LJ p. 1749 : (AIR 1954 SC 695) para 5) "A free fight is one where both sides mean to fight from the start, go out to fight and there is a pitched battle. The question of who attacks and who defends in such event is wholly immaterial and depends upon the tactics adopted by the rival commanders." If that is the nature of the fight, in the instant case, then the witnesses have completely given a different and distorted version. At any rate there is absolutely no scope to convict any of the appellants under Section 304, Part II simpliciter as there is absolutely no material as to which one of them caused the single injury on the head of the deceased. Nor can they be convicted under Section 304, Part II read with Section 149 as it is not possible to hold that they were members of an unlawful assembly. Further the number is less than five. In any event the High Court has doubted the prosecution version as a whole. Thus there are any number of infirmities in the prosecution case. For all these reasons, the convictions and sentences passed against the appellants are set aside. The appeal is, therefore, allowed."

30. In another case of **Dwarka Prasad v. State of U. P.** reported in 1993 Supp (3) SCC 141 : (1993 AIR SCW 1122) it has been held that :

"*10. A free fight is that when both sides mean to fight a pitched battle. The question of who attacks and who defends in such a fight is wholly immaterial and depends on the tactics adopted by the rival party. In such cases of mutual fights, both*

sides can be convicted for their individual acts. This position has been settled by this Court in the cases of Gajanand v. State of U. P. (1954 Cri LJ 1746); Kanbi Nanji Virji v. State of Gujarat (AIR 1970 SC 219); Puran v. State of Rajasthan (AIR 1976 SC 912); Vishvas Aba Kurane v. State of Maharashtra (AIR 1978 SC 414). As such once it is established by the prosecution that the occurrence in question is result of a free fight then normally no right of private defence is available to either party and they will be guilty of their respective acts."

31. In yet another case of **Kewal Singh v. State of Punjab** reported in **(2003) 12 SCC 369**, it has been held that :

"*16. Having regard to the totality of evidence, we are also convinced that both the parties came armed and indulged in a free fight which resulted in injuries on both sides. The fact that the deceased and P.W. 7 were carrying firearms is admitted. On the other hand, Kewal Singh also came armed with a gun on hearing the commotion is not in dispute. In the fight that ensued injuries, were caused to members of both the parties. Since both the parties had come prepared to fight, it is unnecessary to go into the question as to whether any of them exercised their right of private defence and, therefore, the culpability of the accused must be determined by reference to their individual acts.*"

32. A close scrutiny of the statements of all the prosecution witnesses reveal that there was a free fight amongst the Complainant Party and the present appellants, during which

Mohanbhai (A-1) (expired) and the appellants also sustained injuries, therefore, in such a situation, it would not be a safer course, for the Court to apply the principles of Sections 147, 148 and 149 of Indian Penal Code to sustain the conviction of the present appellants under Sections 147, 148 and 149 of the Indian Penal Code in view of the specific overt acts of the appellants.

33. Having regard to the nature of the evidence on record, more particularly, the oral evidence of the PWs. 17, 18 and 19 we are of the view that the conviction of the appellants of Criminal Appeal No.399 of 2007 is concerned, i.e. original accused nos.5, 6, 7 and 8, their conviction for the offence of murder with the aid of Section 149 and Section 34 is not tenable. In our opinion the appellants of Criminal Appeal No.399 of 2007 cannot be even attributed with any common intention to cause the murder of the deceased. It is now well settled that in order to bring a case under Section 34, it is not necessary that there must be a prior conspiracy or premeditation. The common intention can be formed in the course of occurrence. To apply Sec. 34 apart from the fact that there should be two or more accused, two factors must be established, (1) common intention and (2) participation of the

accused in the commission of an offence. If common intention is proved but no overt act is attributed to the individual accused, section 34 will be attracted as essentially it involves vicarious liability. But if participation of the accused in the crime is proved and the common intention is absent, section 34 cannot be invoked.

34. We are persuaded to reach to the conclusion on the overall assessment of the material on record that so far as the original accused nos.2 and 3 are concerned, they appear to be the aggressors and they were the one who initiated the altercation which ultimately led to inflicting injuries with dangerous weapons like a gupti and a sword on the body of the two deceased persons. It appears that thereafter Mohanbhai (A.1) reached the place of occurrence and thereafter the other co-accused i.e. the original accused nos.5, 6,7 and 8 arrived at the place of occurrence.

35. We are not impressed by the submission of Ms.Sagar, the learned advocate appearing for A-2 and A-3 that the conviction of her clients of the offence of murder deserves to be altered to one under Section 304, Part-I of the Indian Penal Code with the aid of Exception (4) to Section 300 of the Indian Penal Code. The basis for such submission is the injuries on the body

of A-1, Mohanbhai, the father of A-2 and A-3. It is now well settled that the onus is on the accused to establish that the case is not of murder but one of culpable homicide not amounting to murder. We do not find any foundation laid by the A-2 and A-3 so as to bring their case within the ambit of Exception (4) to Section 300 of the Indian Penal Code. It is also not the case of the A-2 and A-3 that they had inflicted injuries on the deceased persons to protect the life of their father i.e. Mohanbhai, A-1. It is true that even in the absence of any specific plea of right of private defence the Court may consider the same if the evidence on record suggests such act on the part of the accused in right of his private defence but we do not find any such evidence so as to give the benefit of exception (2) to Section 300 of the Indian Penal Code.

36. In such circumstances, so far as the appellants of Criminal appeal No.399 of 2007 is concerned, they deserve to be acquitted of the offence under Section 302 and 324 of the Indian Penal Code and they could be held liable only for their individual acts and, therefore, their conviction of the offence under Section 323 of the Indian Penal Code is concerned, deserves to be affirmed.

37. Resultantly, the Criminal Appeal No.525 of 2007 filed by A-2 and the Criminal Appeal No.714 of 2007 filed by A-3 are

ordered to be dismissed. The order of conviction and sentence passed by the Additional Sessions Judge so far as A-2 and A-3 are concerned are hereby affirmed with the aid of Section 34 of the Indian Penal Code having shared the common intention to commit the crime.

38. The Criminal Appeal No.399 of 2007 filed by the original accused no.5 - Ashok @ Hasmukh Punamchand Chhovala, the accused no.6 - Dhansukhbhai Punamchand Chhovala, the accused no.7 - Rajeshkumar @ Raju Hiralal Jadav, and the accused no.8 - Bharatkumar Hiralal Jadav is hereby partly allowed. The order of conviction and sentence of the offence under Sections 302, 324 read with Sections 149 and 34 of the Indian Penal Code are hereby set aside, whereas the order of conviction and sentence passed by the Additional Sessions Judge against the accused nos.5, 6, 7 and 8, referred to above, of the offence under Section 323 of the Indian Penal Code are hereby affirmed and the sentence is ordered to be reduced to the period already undergone. The accused-appellants of the Criminal Appeal No.399 of 2007 i.e. the original accused nos.5, 6, 7 and 8, referred to above, are hereby ordered to be released forthwith, if not required in any other case.

CRIMINAL REVISION APPLICATION

39. The Criminal Revision Application ordered to be heard with Criminal Appeal Nos.714 of 2007, 399 of 2007 and 525 of 2007 is at the instance of one Ashwinkumar Mohanbhai Chhovala, A-2, of the cross-case i.e. the appellant of the Criminal Appeal No.714 of 2007. The revisionist seeks to challenge the judgment order dated 29th January 2007 passed by the Additional Sessions Judge, 4th Fast Track Court, Surat, in Sessions Case No.224 of 1993 by which the Additional Sessions Judge acquitted the respondents-accused persons of the offence under Sections 323, 324, 504, 427 read with Section 114 of the Indian Penal Code and Section 135 of the Bombay Police Act. It appears that against such judgment and order of acquittal passed by the trial Court in Sessions Case No.224 of 1993, the State has not thought fit to file any acquittal appeal but the revisionist being the son of the original first informant Mohanbhai Chhovala, since deceased, has filed this revision application. Since the Sessions Case No.224 of 1993 is a cross-case and arising from the same incident, which gave rise to the three conviction appeals we have dealt with above, we need not reiterate the facts.

40. It appears from the judgment delivered by the Additional Sessions Judge that both the accused-respondents were acquitted as the trial Court reached to the conclusion that

there was no sufficient evidence to establish the guilty of the accused.

41. Ms.Sagar, the learned advocate appearing for the revisionist prays for retrial on the ground that the Court below failed to appreciate the evidence in its true perspective, thereby leading to serious miscarriage of justice. On the other hand, Mr.Adil Mirza, the learned advocate appearing for the respondent-accused has vehemently opposed this revision application and submits that no case worth the name for retrial of the case could be said to have been made out by the revisionist. Mr.Mirza submits that in the rarest of the rare case the Court may order retrial and that too only if public justice demands. Mr.Mirza, therefore, prays that there being no merit in this revision application, the same be rejected.

42. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration in this revision application is whether the revisionist has made out any case for retrial.

43. We have gone through the judgment passed by the trial Court and are of the opinion that the trial Court has appreciated the evidence properly and, in absence of any legal

evidence, thought fit to acquit the two respondents herein. We do not find any illegality or perversity in the order of the trial Court warranting a retrial in exercise of our powers under Section 401 of the Criminal Procedure Code.

44. It was held in the case of **Mahendra Partap Singh v. Sarju Singh** reported in **AIR 1968 SC 707** relying upon the decision in **D. Stephens v. Nosibolla, AIR 1951 SC 196** as under (Para 8) :

> "*Only two grounds are mentioned by this Court as entitling the High Court to set aside an acquittal in a revision and to order a retrial. They are that there must exist a manifest illegality in the judgment of the Court of Session ordering the acquittal or there must be a gross miscarriage of justice. In explaining these two propositions, this Court further states that the High Court is not entitled to interfere even if a wrong view of law is taken by the Court of Session or if even there is mis-appreciation of evidence. Again, in Logendranath Jha v. Polajlal Biswas, 1951 SCR 676 : (AIR 1951 SC 316 : 1951 (52) Cri LJ 1248), this Court points out that the High Court is entitled in revision to set aside an acquittal if there is an error on a point of law or no appraisal of the evidence at all. This Court observes that it is not sufficient to say that the judgment under revision is "perverse" or "lacking in true correct perspective". It is pointed out further that by ordering a retrial, the dice is loaded against the accused, because however much the High Court may caution the Subordinate Court, it is always difficult to re-weigh the evidence ignoring the opinion of the High Court*

Again in K. Chinnaswamy Reddy v. State of Andhra Pradesh, 1963 (3) SCR 412 : (AIR 1962 SC 1788) : (1963 (1) Cri LJ 8), it is pointed out that an interference in revision with an order of acquittal can only take place if there is a glaring defect of procedure such as that the Court had no jurisdiction to try the case or the Court had shut out some material evidence which was admissible or attempted to take into account evidence which was not admissible or had overlooked some evidence. Although the list given by this Court is not exhaustive of all the circumstances in which the High Court may interfere with an acquittal in revision it is obvious that the defect in the judgment under revision must be analogous to those actually indicated by this Court. As stated not one of these points which has been laid down by this Court, was covered in the present case. In fact on reading the judgment of the High Court it is apparent to us that the learned Judge has re-weighed the evidence from his own point of view and reached inferences contrary to those of the Sessions Judge on almost every point. This we do not conceive to be his duty in dealing in revision with an acquittal when Government has not chosen to file an appeal against it. In other words, the learned Judge in the High Court has not attended to the rules laid down by this Court and has acted breach of them."

45. In **Akalu Ahir v. Ramdeo Ram**, reported in **AIR 1973 SC 2145**, Hon'ble Apex Court observed as under (Para 8) :

"*This Court then proceeded to observe that the High Court is certainly entitled in revision to set aside the order of acquittal even at the instance of private parties, though the State may not have thought fit to appeal, but it was emphasized that this*

jurisdiction should be exercise only in exceptional cases when "there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice." In face of prohibition in Section 439(4), Cr. P.C. for the High Court to convert a finding of acquittal into one of conviction, it makes all the more incumbent on the High Court to see that it does not convert the finding of acquittal into one of conviction by the indirect method of ordering re-trial. No doubt, in the opinion of this Court, no criteria for determining such exceptional cases which would cover all contingencies for attracting the High Court's power of ordering re-trial can be laid down. This Court, however, by way of illustration, indicated the following categories of cases which would justify the High Court in interfering with a finding of acquittal in revision :

(i) Where the trial Court has no jurisdiction to try the case, but has still acquitted the accused;

(ii) Where the trial Court has wrongly shut out evidence which the prosecution wished to produce;

(iii) Where the appellate Court has wrongly held the evidence which was admitted by the trial Court to be inadmissible;

(iv) Where the material evidence has been over-looked only (either?) by the trial Court or by the appellate Court; and

(v) Where the acquittal is based on the compounding of the offence which is invalid under the law.

These categories were, however, merely illustrative and it was clarified that other cases of similar nature can also be properly held to be of exceptional nature where the High Court can justifiably interfere with the order of acquittal. In Mahendra Pratap Singh, (1968) 2 SCR 287 : (AIR 1968 SC 707) : (1968 Cri LJ 665) (supra) the position was again reviewed and the rule

laid down in the three earlier cases reaffirmed. In that case the reading of the judgment of the High Court made it plain that it had re-weighed the evidence from its own point of view and reached inferences contrary to those of the Sessions Judge on almost every point. This Court pointed out that it was not the duty of the High Court to do so while dealing with an acquittal on revision, when the Government had not chosen to file an appeal against it. "In other words" said this Court, "the learned Judge in the High Court has not attended to the rules laid down by this Court and has acted in breach of them."

46. Similar view was reiterated by Hon'ble Apex Court in **Bansi Lal v. Laxman Singh**, reported in **(1986) 3 SCC 444.**

47. Again, Hon'ble Apex Court, in **Ramu alias Ram Kumar**, reported in **1995 SCC (Cri) 181**, held that it is well settled that the revisional jurisdiction conferred on the High Court should not be lightly exercised particularly when it has been invoked by a private complainant. In **Vimal Singh v. Khuman Singh**, reported in **(1998) SCC (Cri) 1574** and in **Bindeshwari Prasad Singh v. State of Bihar**, reported in **AIR 2002 SC 2907**, the High Court has been reminded of its very limited jurisdiction in revision against acquittal.

48. It is well settled that unless any legal infirmity in the

procedure or in the conduct of trial or patent illegality is pointed out, the revisional Court will not interfere.

49. We find no merit in the instant revision application to interfere while exercising revisional jurisdiction and, resultantly, this revision application fails and is hereby rejected.

(BHASKAR BHATTACHARYA, CJ.)

(J.B.PARDIWALA, J.)

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