

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL NO. 1194 of 2010
With
R/CRIMINAL APPEAL NO. 1034 of 2010
With
R/CRIMINAL APPEAL NO. 1195 of 2010

FOR APPROVAL AND SIGNATURE:**HONOURABLE MR. JUSTICE ILESH J. VORA**

Sd/-

and**HONOURABLE MR.JUSTICE P. M. RAVAL**

Sd/-

=====		
Approved for Reporting	Yes	No
	Yes	
=====		

STATE OF GUJARAT

Versus

BHIKHUBHAI DULABHAI BHAMBHALA & ORS.

Appearance:

MR L B DABHI, APP for the Appellant(s) No. 1

MR BM MANGUKIYA(437) for the Opponent(s)/Respondent(s) No. 1,2,3,4,5

MS BELA A PRAJAPATI(1946) for the Opponent(s)/Respondent(s) No.
1,2,3,4,5**CORAM: HONOURABLE MR. JUSTICE ILESH J. VORA****and****HONOURABLE MR.JUSTICE P. M. RAVAL****Date : 31/07/2025****COMMON ORAL JUDGMENT****(PER : HONOURABLE MR. JUSTICE ILESH J. VORA)**

1. Since, the facts of the case and issue involved in all these appeals are identical and arise out of the same judgment, all these appeals are taken up together and are

being disposed of by this common judgment.

2. Criminal Appeal No.1034 of 2010 by the accused A1 to A5 is directed against the judgment of conviction and order of sentence dated 26.03.2010 passed in Sessions Case No.41 of 2007 by the Additional Sessions Judge, Limbdi at Surendranagar by which the appellants have been convicted for the offences punishable under Sections 147, 148, 304(1), 149, 324, 323 read with Section 149 of the Indian Penal Code and Section 135 of the Bombay Police Act and sentenced them to undergo imprisonment for 10 years and fine amount and in default of payment of fine to further undergo additional imprisonment as mentioned in the judgment. The sentence of the appellants was ordered to be run concurrently.

3. Criminal Appeal No. 1194 of 2010 has been preferred by the State under Section 377 of the Cr.P.C., against the sentenced on the ground of its inadequacy.

4. Criminal Appeal No. 1195 of 2010 has been preferred by the state under Section 378 of the Cr.P.C. against the acquittal of the accused for the charge of murder.

5. The case of the prosecution leading to file these appeals are as follow:

5.1 The accused A1 to A5 and complainant party belong to same caste and village, named Bhanejda, Taluka:

Chuda, Dist.: Surendranagar. A long dispute was going on between the parties about the government waste land, as the A2 - Kanubhai intends to fence the land adjacent to his house, which the complainant party, had the objection, as they were claiming the said land for miscellaneous purpose. In these background facts, the facts of the prosecution are to be appreciated. On 04.04.2007, in the morning at about 7:15, the A1 went to the house of the complainant Lakhubhai (PW.8) and informed the A1 - Bhikhubhai that he is going to fence the Government Land. Both of them came at the place where the fencing to be raised. On this subject, heated exchange of words being took place. Meanwhile, the A2, A3, A4 and A5 armed with lathi, farsi, scythe and wooden logs came at the place in support of A1. Again altercation took place. On hearing the shouting, the brother of complainant (PW.8), deceased Babubhai and his son Rajubhai @ Munnabhai (PW.9) came in support of complainant (PW.8). The matter did not end there as the quarrel begins, as a result, A4 - Shivkubhai Kanubhai inflicted a blow on the head of deceased Babubhai with dhariya (scythe), as a result, he fell down, whereas, A2 and A3 with the blunt side of weapon assaulted the deceased Babubhai and when the son of deceased PW.9 Munnabhai tried to save his father,

was also assaulted by A4 – Shivku Kanubhai and the brother of the deceased – complainant Lakhubhai (PW.8) was assaulted by A5 – Ravubhai. In the said scuffle, the village people namely Jilubhai Unadbhai (PW.10), Bhikhubhai Bhambhla (PW.11) and Bhojabhai Bhambhla (PW.12) came to rescue of the complainant party and separated them.

- 5.2 It is further case of the prosecution that, deceased Babubhai, injured witness Munnabhai and complainant (PW.8), taken to the Village Health Centre at Chuda and after taking primary treatment, they referred to Higher Centre at Limbdi and having regard to the nature of injuries, the Medical Officer of Limbdi referred the deceased Babubhai to Higher Centre at Ahmedabad V.S. Hospital. The condition of deceased was serious and he was in a semi state of mind because of severe head injury. In the V.S. Hospital, Ahmedabad, emergency operation carried out and his condition was deteriorated. At the V.S. Hospital, the PW.8 disclosed his complaint, inter alia, alleging that, the accused A1 to A5, raising dispute about the Government Land, formed an unlawfully assembly with a common object to kill the deceased, armed with the lethal weapons, assembled at the place of offence and assaulted the deceased and the witnesses. The initial offence was registered under

Section 307 and other provisions of the IPC. On 13.04.2007, the family members of the deceased against medical advice, took discharge from the hospital. The deceased was taken to his Village:Bhanejda where on the next day of his discharge, he succumbed to his injuries. He was cremated without informing the police. On 17.04.2007, the I.O. came to know about the death of the deceased, as a result, he made a report to the Judicial Magistrate Court for addition of Section 302 of the IPC. It is relevant to note that, in the said incident, all the accused sustained grievous injuries and complaint to this effect was came to be registered against the complainant party under Section 326 of the IPC. The accused on the same day were treated at Community Health Centre, Chuda, Limbdi Government Hospital and V.S. Hospital, Ahmedabad.

- 5.3 The Investigating Officer (PW.17) Mr. Zala drew the panchnama of place of incident, recorded the statements of the witnesses, arrested the accused, seized and recovered the weapons allegedly used in the commission of offence at the behest of A3 and A4, collected the medical case papers, sent the seized articles to the FSL for chemical analysis and after receiving the report, the I.O. found sufficient

material for the charge of murder and causing injuries to the witnesses and filed the chargesheet against the accused before the Magisterial Court. The case was committed to the court of sessions, Limbdi at Surendranagar.

6. After due framing of charge, and upon accused not pleading guilty, the trial commenced before the Sessions Court, Limbdi, Dist.: Surendranagar. The prosecution examined following witnesses and exhibited the documents:

Oral evidence

PW 1 – Exh.18	Dr. Piyush Bhogilal Seth
PW 2 – Exh.31	Dr. Geetaben Kamlesh Shah
PW 3 – Exh.39	Dr. Snehalkumar R.B. Sherekar
PW 4 – Exh.46	Ganpatbhai Somabhai, panch witness
PW 5 – Exh.50	Bharatbhai Ravjibhai Chavda, panch witness
PW 6 – Exh.51	Mohammedbhai Usmanbhai, panch witness
PW 7 – Exh.60	Kamil Ayubhbhai Chouhan, panch witness
PW 8 – Exh.67	Lakhubhai Jivabhai Bhambhala, complainant
PW 9 – Exh.71	Rajubhai @ Munno Bapbhai Bhambhala
PW 10 – Exh.72	Jilubhai Undbhai Bhambhala
PW 11 – Exh.74	Bhikhubhai Jagabhai Bhambhala
PW 12 – Exh.75	Bhojbhai Bachubhai Bhambhala
PW 13 – Exh.76	Geetaba Lakhubhai Bhambhala
PW 14 – Exh.79	Hansaba Babubhai Jivabhai
PW 15 – Exh.85	Anandba Babubhai Jivabhai
PW 16 – Exh.88	Naranbhai Kanjibhai Chouhan, Head constable
PW 17 – Exh.93	Ghanshyamsinh Mansinh Zala, Investigating officer

Documentary evidence

Exh.20	Babubhai Jivabhai Medical Certificate (CSC, Chuda)
Exh.22	Munnabhai Babubhai Medical Certificate (CSC, Chuda)
Exh.32	Babubhai Jivabhai Medical Certificate (Limbdi Hospital)

Exh.35	Munnabhai Babubhai Medical Certificate (Limbdi hospital)
Exh.40	Babubhai Jivabhai Medical Certificate (VS Hospital)
Exh.47	Panchnama of Place of Offence
Exh.52	Discovery Panchnama
Exh.57	Panchnama of clothes of Babubhai Jivabhai
Exh.58	Panchnama of accused
Exh.69	Original Complaint
Exh.83	Copy of Chuda Police station Diary Entry no. 3/07
Exh.84	Copy of Chuda Police station Diary Entry no. 1/07
Exh.94	Note of List of Articles sent to FSL Junagadh
Exh.95	Receipt of list of articles to FSL Junagadh
Exh.96	Letter of Report FSL Junagadh
Exh.97	Analysis report of FSL Junagadh
Exh.98	Serological Report
Exh.99	Proclamation of Arms ban

7. After closure of the prosecution evidence, the accused were questioned under Section 313 of Cr.P.C. to which they stated that the prosecution has suppressed the genesis of the case as the complainant party was the aggressor and made the assault on them.

8. The accused appellants have not adduced any evidence in their defence.

9. After hearing the respective parties and upon appreciation of evidence, the trial court came to a conclusion that, death of the deceased was homicidal in nature. The trial court while coming to the conclusion about the homicidal death, taken into account the nature of injuries sustained by the deceased, the medical evidence and opinion of the treating doctor. The trial court, on the charge of murder, came to a conclusion that,

the accused are liable to be punished for the offence of homicidal death not amounting to murder as defined under Section 304 Part I of the IPC and by invoking section 149 and having regard to the role attributed to the accused, they have been convicted under Section 304 of the IPC and sentenced to undergo 10 years rigorous imprisonment. The trial court has also convicted the accused under Sections 147, 148, 324 read with section 149 for causing injuries to the witnesses and sentenced as per the final order of the judgment and all the sentences were ordered to run concurrently.

10. Being aggrieved and dissatisfied with the judgment of conviction and order of sentence, the accused have preferred the conviction appeal (Criminal Appeal No.1034 of 2010), whereas the State has filed two appeals i.e. one for enhancement of sentence (Criminal Appeal No.1194 of 2010) and second one is acquittal appeal (Criminal Appeal No.1195 of 2010) for acquitting the accused under Section 302 of the IPC.

11. We have heard learned counsel Mr. B.M. Mangukiya appearing for and on behalf of the accused and Mr. L.B. Dabhi, learned APP for the State.

12. Mr. Mangukiya, learned counsel appearing for the appellants assailing the judgment of conviction, made the following submissions:

- (a) That, the judgment of conviction and order of sentence is passed without proper appreciation of oral as well as documentary evidence and the findings thereof are contrary to the evidence on record and having been passed in violation of settled principles of criminal jurisprudence and thus, the judgment of conviction is unjust and improper.
- (b) That, the prosecution miserably failed to prove that death of the deceased Babubhai was homicidal. The deceased died after 9 days of the incident and against the medical advice, the family got discharge from V.S. Hospital, Ahmedabad and he was cremated without informing the police and therefore, in the absence of post mortem, it cannot be safely concluded that, the death was homicidal or that it was caused due to the injuries inflicted as alleged and therefore, the findings of the trial court in determining the issue of homicidal death, is contrary to the settled principle of law and on this count, the judgment of conviction is not sustainable because the fundamental issue of homicidal death for convicting the person in the offence of murder, is not proved and established.
- (c) That, the accused A1 to A5 sustained grievous

injuries in the said incident and same are proved by the treating doctors examined by the prosecution and the said injuries were neither superficial, nor, minor and said injuries have not explained by the prosecution. The prosecution witnesses namely PW.8 and PW.9, were asked about the treatment taken by the accused and the injuries sustained, but, somehow, they denied to the facts that, they have not seen any injury on the body of the accused, nor, they have any knowledge about the treatment taken by them in the very same hospital where they had taken the treatment. In such circumstances, it was submitted that, non-explanation of the injuries by the prosecution creates serious doubt about the credibility of the prosecution version as the true facts of the incident being suppressed by the prosecution.

- (d) That, the A1 as per the prosecution case, went to the house of PW.8 on the aspect of fencing around the State land adjacent to the house of accused and both of them thereafter came at the place where heated exchange of words being taken place and at that time, the A1 was unarmed. Even, it is the admission of the PW.8 and PW.9 that, the accused armed with lethal weapon did not cause

injury till arrival of the deceased Babubhai and his son. The injuries sustained by the accused would itself shows that, the complainant party was also holding lethal weapons in their hands and it is not the case of the prosecution that the complainant party snatched away the weapons of the accused and beaten them. Thus, it could be presumed that, the aggression was the complainant party and the accused attacked first by the complainant and witnesses including the deceased and in that view of the matter, the accused can claim right of private defence and the said statutory right defined under Sections 96 and 97 of the IPC says that, nothing is an offence which is done in the exercise of right of private defence and every person has a right to defend his own body against any offence affecting the human body and as per Section 100 of the IPC, the right for private defence of the body extend to causing death if the assault causes reasonable apprehension of death or grievous hurt. That, it is not in dispute that, the incident occurred near the house of the accused, they assaulted the accused who sustained grievous head injuries and cross-cases were filed indicating mutual fight. That, the trial court despite of right of defence being pleaded by the defence, did not deal with the issue and the judgment is

silent on this issue which speaks voluminous and therefore, on this count, the conviction is not sustainable in law.

- (e) That, apart the claiming of right of private defence, the trial court failed to appreciate the facts that, both the sides have sustained grievous injuries and the parties were armed with lethal weapons and without any plan or premeditation on the issue of Government land, the quarrel took place. In that view of the matter, this is nothing but a free fight between the parties and if that is so, there can be no question of invoking section 149 for the purpose of imposing constructive criminal liability and those accused who are proved to have caused injuries can be held guilty for the injuries caused by them. In the facts of the present case, the A4 - Shivkubhai gave a fatal blow on the head of the deceased and having regard to the medical evidence, there was only one injury found on the body of the deceased and therefore, by invoking section 149, the trial court committed a serious error of law while convicting the accused and awarding the sentence.

13. In such circumstances as referred to above, Mr. Mangukiya, learned counsel submitted that, the court below has committed a serious error in appreciating the

evidence against the appellants and wrongly convicted them for homicidal death not amounting to murder under Section 304 Part I of the IPC and thus, the judgment of conviction and order of sentence are not sustainable in eye of law and same may be set aside and the appellants be acquitted from all the charges.

14. So far as State appeals are concerned, Mr. Mangukiya has submitted that, when the judgment of conviction and order of sentence are not maintainable, then question does not arise for converting the charge under Section 302 of the IPC, nor, circumstances exist to enhance the sentence awarded.

15. On the other hand, Mr. L.B. Dabhi, learned State counsel vehemently opposed the appeal. He would submits that, the court below has not committed any error while holding the appellants guilty of the offence punishable under Section 304 Part I of the IPC. The factum of cross case has rightly been not considered by the trial court as while conducting the trial, the court has determined the charge against the accused independently without taking into account the evidence led by the prosecution in the cross case. In such circumstances, the trial court has rightly disbelieved the right of private defence and the plea of free fight as advanced by the accused herein. The trial court while determining the issue of homicidal death, has rightly appreciated the medical

evidence and attending circumstances while arriving at the conclusion that, the death of the deceased was homicidal and therefore, the absence of post mortem and cause of death would not be fatal to the case of the prosecution. So far as non-explanation of the injuries on the person of the accused is concerned, it was submitted that, the injuries sustained by the accused brought to the notice of the trial court by producing medical certificate and when the prosecution evidence clear, cogent and creditworthy, mere a fact that injuries are not explained cannot by itself be a sole basis to reject the oral evidence. That, the accused so far as right of self defence is concerned, it is not proved that, the complainant party was the aggressor and the question in this regard were put to the notice of the I.O. and it was replied by the I.O. that during the investigation, he could not find that which party was aggressor and having regard to the fact of the cross case, the right of private defence never be available when there was a free fight.

16. Mr. Dabhi, learned APP in the circumstances as referred above, submitted that there being no merits in the conviction appeal and same may be dismissed.

17. So far as State appeals are concerned, Mr. Dabhi would urge that, the injuries found on the vital part of the body, the manner in which the force was employed by the weapon scythe and other weapons would raise the

inference that there was an intention to kill the deceased and therefore, the findings recording the conviction under Section 304 Part I appears to be against the evidence on record and perverse and therefore, acquittal deserves to be allowed. In alternative, he submitted that, without any adequate and special reasons, the trial court awarded inadequate sentence instead of rigorous imprisonment because the court failed to appreciate the gravity of the offence and its impact on the society and therefore, so far as sentence is concerned, the case is made out for interference and by allowing the enhancement appeal, the appellants may be punished with the imprisonment for life or 10 years.

18. Before adverting to the submissions, it is necessary to examine the evidence adduced by the prosecution :

18.1 **Dr. Piyush Sheth (PW-1)**, when he was Medical Officer at Health Center, Chuda, examined and treated the deceased Babubhai, injured Raju @ Munno (PW-9).

Deceased Babubhai Jivabhai : Deceased was examined on 04.04.2007 at about 7-30 AM, and at relevant time, when he was brought before the doctor, his condition was not well and under semi conscious mind. The doctor, after examination, noted a single cut wound vertically situated in the middle of scalp (4 cm long and bone deep.) The doctor diagnosed that he was having a

Hematemesis. After giving primary treatment, the deceased was referred to higher centre at Surendranagar. The certificate and case papers produced at Exh. 19 and 20. According to opinion of doctor, the said injury could be possible by sharp instrument like scythe.

Raju @ Munnabhai (PW-9): The injured was brought before the Doctor Sheth and according to history given by him, he was assaulted with lathi near his house. On examination, the doctor noted the injury on the left wrist in the nature of CLW on anterior medial aspect and another injury of CLW in left parietal bone of scalp (3X0.5 cm). According to opinion of the doctor, the injuries could be possible by seized article stick. The doctor had produced the injury papers and certificate of the injured at Exh. 21 and 22.

Injuries found on the body of the accused by doctor Sheth PW-1.

During the cross-examination of the doctor, he had admitted that, on the same day and time, **A2 Kanubhai Manabhai** with the history of assault by Lakhubhai (PW-8) was brought before him for treatment. During the examination, the doctor noted two injuries - (i) A cut wound about the left ear in a semi circular shape (2 cm above left ear) bone deep (5-6 cm long) and blood vessels can be seen from the injury, (ii) A swelling on anterior

aspect of right forearm just below the right elbow joint. The patient was referred to higher centre at Limdi for further treatment and management. The injury certificate produced at Exh. 24.

On the same day in the morning, PW-1 had examined A3 **Bhabhlubhai Dhulabhai** with the history of assault by Lakhubhai with the weapon scythe outside the house in the morning. On examination of A3, the doctor noted (i) A cut wound in left parietal bone (6x1 cm vertically) situated upto bone deep; (ii) A cut wound in the occipital bone on left side of scalp (2x0.5 cm.), (iii) A CLW with palpable depressed fracture of occipital bone (1x0.5 cm). The patient was also referred to higher centre and according to opinion of the doctor, the injuries were life threatening. The injury certificate of the treatment produced at Exh. 25.

On the same day, at the same time, the doctor PW-1 examined **A4 Shivkubhai Kanubhai**, with the history of assault by PW-9 Raju @ Munnabhai. The doctor after examination noted, (i) A CLW on left parietal bone of scalp (6 cm) long and bone deep, (ii) A CLW on right side of parietal bone (2 cm) long x bone deep.

18.2 **Dr. Gitaben Kamleshbhai Shah (PW-2)**, who being a Medical Officer at Limdi General Hospital, had treated deceased Babubhai Jivabhai and witness Raju @

Munnabhai (PW-9). She had also examined the accused party namely Kanubhai Manbhai, Shivraj Shivkhubhai and Bhabhlubhai Dhulabhai.

Deceased Babubhai Jivabhai : On examination, the doctor found and noted the injuries, (i) there was profuse bleeding from the month, (ii) A CLW at the middle of scalp (4x0.5 cm x 0.5 cm), (iii) fracture of skull bone at the parietal bone. According to opinion of the doctor, the condition of the deceased was serious and for further examination and management, he was referred to Ahmedabad Government hospital. The case papers and certificates are produced at Exh. 32 to 34.

Raju @ Munnabhai Babubhai (PW-9) : (i) A CLW (2 cm x 0.5 cm x bone deep) on the left wrist, (ii) A CLW (3 x 0.5 cm) over the parietal and scull. According to opinion of the doctor, the injuries were of simple in nature and it could be possible by scythe and stick.

In the cross-examination, the doctor PW-2 admitted that, on the same time, the accused Kanubhai Manbhai, Shivkubhai Kanubhai and Bhabhlubhai Dhulabhai were brought before her for treatment.

Kanubhai Manabhai (A2) : (i) A CLW in the left side of the scalp (15 cm x 2 cm x bone deep). The patient was advised for CT scan at higher center and according to

opinion of doctor, the injury could be possible by scythe. The certificate of treatment produced at Exh. 36.

Shivkubhai Kanubhai (A4) : (i) A CLW on the middle of scull (7 x 1 x 0.5), (ii) A CLW on the left parietal bone (3 x 1 x 0.5). The patient was also referred at higher center for CT scan. The injury certificate produced at Exh. 37.

Bhabhlubhai Dhulabhai (A3) : (i) A CLW on parietal and occipital region (7x1 cm x bone deep), (ii) A fracture seen in the frontal bone of the scull. According to opinion of the doctor, the injuries were serious in nature and therefore, the patient was referred to higher centre. A certificate thereof produced at Exh. 38.

18.3 **Dr. Snehalkumar Sherekar (PW-3)** : On 04.04.2007, the doctor was on duty as Medical Officer with V.S. Hospital, Ahmedabad. Deceased Babubhai with the transfer sheet without police reference was brought at the hospital for further treatment. He was admitted till 13.04.2007. On examination, the doctor noted the injuries over the scalp and hematoma found in the frontoparietal region for which, the operation for removal of the hematoma carried. According to opinion of the doctor, condition of the patient was serious and said injury could be possible by scythe and stick and same were likely to cause death. The doctor further testified that against the

medical advice, the patient got discharge. The case papers produced at Exh. 41 and 42.

In the cross-examination, doctor has opined that, in such kind of injury, patient may die or may not die. The doctor has further stated that had the patient could not be administered the proper treatment, then the injuries may likely to cause death. The doctor has admitted that, in the case of death, the real cause of death can be found by postmortem of the body of the deceased. The doctor has also admitted the fact that, after operation of hematoma, no any further complication arise. He also admitted that, at the time of discharge against the medical advice, he had cautioned to the brother of the deceased that, taking discharge without completion of the proper treatment, would may seriously affect the health condition of the deceased.

Injuries found by the treating doctor on the person namely, accused - Bhabhlubhai Dhulabhai (A3), Shivkubhai Kanubhai (A4) and Kanubhai Manbhai (A2).

Bhabhlubhai Dhulabhai (A3) : The A3 was also referred at the V.S. Hospital and after examination by the PW-3, he has noted the injury of fracture on the right frontoparietal region and right parietal occipital region and the said injuries were serious in nature and is likely to be caused death if proper treatment would not available. The

certificate thereof is produced at Exh. 43.

Shivkubhai Kanubhai (A4): On 04.04.2007, PW-3, the Medical Officer at V. S. Hospital, examined the accused and noted two injuries namely CLW on the right parietal region and left tempo parietal region. The injuries found to be a simple in nature and certificate thereof produced at Exh. 44.

Kanubhai Manabhai (A2): on 04.04.2007, at about 3-25 PM, the accused brought before the V. S. Hospital and after his CT Scan, the doctor found the injury over left tempo parietal region and the said injury according to opinion of the doctor was serious one and it might be fatal, if it is not treated early.

18.4 Eye Witness Lakhubhai Jlvabhai (PW-8): The witness is the brother of the deceased and uncle of PW-9 and entire family is resident of village: Bhanejada, Chuda. Both the parties claiming right over the panchayat Government land, as they intended to fence it for their personal use. In these background facts, the witness has stated on oath that on 04.07.2007, at about 07-00 AM, A1 Bhikhubhai came to his house and informed and directed him to remove the demarcation put on the government land adjacent to the house of the accused for fencing the land. The witness objected the purpose and on this issue, heated exchange of words took place, as a result, co-

accused A2 to A5 armed with lethal weapons came in support of A1 and on hearing the conversation, the deceased Babubhai and his son PW-9 came in support of PW-8 at the place. The witness has further stated that, due to said dispute, A4 inflicted a blow of scythe on head of Babubhai, as a result, he fell on the ground and thereafter A3 and A2, caused injury on the body of the deceased with the respective weapons and in order to save him, his son PW-9 - Raju when intervened, he was also assaulted by the A4 and A5. The witness has further stated that, on seeing the said fight, the village people came to their rescue and they separated the parties. The witness has further stated that the condition of his brother was serious and therefore, after taking primary treatment, at CHC, Chuda and Government Hospital, Limdi, the deceased was taken to Ahmedabad and admitted in V. S. Hospital, where, the operation carried out by doctor. The witness has further stated that his brother was critical and against the medical advice, they got discharged from the hospital and came to his village on 13.04.2017 and on the next date, his brother Babubhai succumbed to injuries. The witness has stated that, on arrival at Ahmedabad hospital, the police came before him and upon inquiry, he disclosed the complaint, which he produced at Exh. 69. During the chief examination, the witness has identified the accused and the weapons used in the commission of offence.

In the cross-examination, the witness has stated that, without informing the police, the dead body of the deceased was cremated and before cremation, no post-mortem was done nor they insisted to do the post-mortem. In the cross-examination, the witness has admitted that the accused party lodged an FIR against him, deceased and PW-9 for causing the grievous injuries on them and said FIR was filed prior to the FIR lodged by them. The witness has admitted that, in his police statement, there was no reference of axe, allegedly used in the commission of crime. It is the admission of the witness that the accused did not have cause any injury till arrival of the deceased Babubhai and his son. The witness has denied that, they assaulted the accused by using lethal weapons and the persons, who rescued them, assaulted him and others. The witness has also admitted the fact that, there was fight between the parties and at relevant time, no one had participated in the fight. The witness has denied that, there was a allegation against him that, he had inflicted a blow on the accused Kanubhai and Bhabhlubhai with the scythe and deceased Babubhai assaulted accused Shivkubhai on his head by axe. It was asked to the witness whether, he has seen the blood on the body of the accused, which he has denied. The witness has denied that, in order to create a defence in the FIR filed by the accused party, the false FIR against the

accused has been filed and in order to pressurize the party, he is telling lie to involve the accused falsely.

18.5 Rajubhai @ Munno Bababhai (PW-9): The witness is son of deceased and nephew of PW-8. His presence at the place is not disputed. According to his version, A4 assaulted his father with the weapon scythe and A1 gave a lathi blow thereafter, and thereafter, he was given a dharia blow on his head by A4 and his uncle PW-8 also assaulted by A4. The witness has identified the accused and weapons seized and recovered by the IO. In the cross-examination, the witness has admitted that, in a cross case, he along with complainant PW-8, arrested by the police and during the investigation, they produced lathi. The witness on being asked about why he has produced the lathi, then, he said that, he does not about it. The witness has also admitted that, the incident can be termed to be a 'fight between the parties'. The witness has admitted that, in his police stamen, he has not disclosed the facts that the accused Shivkubhai caused injury to him with the scythe. The witness has denied the suggestion that, at the place, they went with the weapons and they were the first aggressor.

18.6 Jilubhai Unadbhai (PW-10), Bhikhubhai Jagabhai (PW-11) and Bhojbhai Bachubhai (12). All three witnessed were being present at the scene of offence and due to their efforts the parties had been separated. All three witnesses

have not supported the case of the prosecution and they have been declared hostile and after declaring hostile them, they denied the complete facts of the incident and other things.

18.7 Gitaba Lakhubhai (PW-13), Hansaba Babubhai (PW-14), Anandba Babubhai (PW-15). All three witnesses being family members of the complainant party, have deposed against the accused and in clear terms, they have stated that, the accused assaulted the deceased and witnesses. In the cross-examination, the factum of cross case and injury caused to the accused by the complainant party, the witnesses denied the occurrence of said incident.

18.8 Ghanshyamsinh Mansinh Jhala (PW-17). The witness had investigated the case, as at relevant time, he was on duty as PSI with Chuda Police Station. The IO investigated the cross case being CR No. 23 of 2007, allegedly, registered by the accused party against the complainant and other persons. It is the version of IO that, after registration of the affairs, he took the place of incident, drew the panchnama of scene of occurrence, recorded the statements of the witnesses, arrested the accused, seized and recovered the weapons used in the commission of offence at the behest of accused Bhabhlubhai and Shivkubhai, submitted a report to Magistrate for addition of Section 302 of the IPC as, on 17.04.2007, he came to know about death of deceased Babubhai, sent the seized

articles to the FSL, collected the medical case papers and filed the chargesheet against the accused for the offences as referred above.

In the cross-examination, the IO has admitted that, the cross FIR came to be registered first at the instance of accused party and offence against the complainant party including deceased was registered under Section 326 of the IPC and on the basis of said complaint, he arrested the complainant PW-8 and witness PW-9. He also admitted that, the family members of the deceased without informing the police, cremated the deceased on 13.04.2007. The IO in his cross-examination further admitted that, the reason behind the incident is the dispute with regard to panchayat land and the said land is situated adjacent to the house of the accused and house of the complainant is situated at the distance of 250-500 feet from the place of incident. He has also admitted that, during his investigation, he did not find that who was aggressor and assaulted the first point in time to the other side.

19. We have heard at length learned counsels appearing for the respective parties and carefully examined the case records and perused the judgment.

20. Before adverting to the submissions, the following admitted facts to be noted:

(i) Both the parties are related and belonged to one and same village and by profession, they are farmers;

(ii) The government land has not been allotted to any of the parties;

(iii) The accused party intend to fence the government vacant land adjacent to their house for miscellaneous purpose for which, the complainant party had reservation;

(iv) On 04.04.2007, raising the dispute of vacant government land, the scuffle between two group arose at the village, as a result, the complainant party and accused party sustained a grievous injuries for which, extensive treatment being administered at the Government hospitals upto Ahmedabad;

(v) The deceased Babubhai being brother of complainant PW-8 sustained serious head injury and the operation for removal of hematoma being undertaken by the doctor of V.S. Hospital, Ahmedabad and he was admitted as in-patient from 04.04.2007 to 12.07.2004 and despite of the serious condition, he got discharge against the medical advice and on the next date i.e. 13.04.2007, according to version of the complainant party, Babubhai succumbed to the

injuries and after his death, the complainant party without informing the police, cremated him;

(vi) In the cross case being CR No. 24 of 2007, three persons shown as accused namely, deceased Babubhai, Lakhubhai (PW-8), and Raju @ Munnabhai Babubhai (PW-9). They had been charged for the offence of grievous hurt and admittedly, as per the medical evidence, as discussed in this judgment, the accused Nos. 1 to 4 have sustained serious head injuries.

21. It is the contention of the defence that, in absence of cause of death, the prosecution failed to establish the nexus between the injuries and death and therefore, the issue of homicidal death is not proved and conviction for the act of homicidal death amounting to murder is not sustainable in law. We have carefully examined the medical evidence and nature of injuries sustained by deceased Babubhai. The autopsy report is not strictly mandatory when the other evidence would prove the cause of death. In the present case, the treating doctor PW-3 has categorically stated that, the deceased was not conscious when brought before him and his condition was critical because of serious head injury and the injury inflicted was grievous and sufficient in ordinary course to cause death and it could be possible by the weapons seized in the case. In such circumstances, we are of the

considered view that, having regard to the nature of scuffle, injuries certified by three doctors and testimonies of the injured witnesses, would establish the link between the injuries and the death. Thus, the death of the deceased can be said to be homicidal death. In the case of ***Udho Mahton Vs. State of Bihar (1991) 0 AIJEL - Patna High Court***, after referring Section 174 of the Cr.P.C., the Division Bench of the High Court, relying on the observations made by the Supreme Court in the case of ***Keharsingh & Ors. vs. State (Delhi Administration) (AIR 1988 SC 1883)***, held that, when there is a clear evidence about the cause of death, the post mortem examination loses all its significance. In another case, the Supreme Court, ***State of Maharashtra vs. Damu S/o. Gopinath Shinde & Ors. (2000) 6 SCC 269*** in para-33, held that, “the court should be circumspect over the broader features in deciding whether death was homicidal or not as presence of the other injuries on the dead body would lead any sensible person to conclusion that the child was done to death and it is no matter that the post mortem examination was not conducted on the dead body. Thus, in absence of post mortem or clear opinion on the issue of cause of death is not fatal to the prosecution case as having regard to the testimony of the witnesses, medical evidence and opinion of the treating doctor, nature of injury and the manner in which the incident occur would establish the nexus

between the injuries and death and it was homicidal.

22. The other submission advanced on behalf of learned counsel of the appellants is that in this case, the injuries found on the person of the accused, has not been explained by the prosecution. It is settled legal position that, non-explanation of serious injuries on the person of accused may be fatal to the prosecution case, but, where the injuries sustained are minor in nature, even in absence of proper explanation, story of prosecution cannot be disbelieved. In case of ***Mano Dutt vs. State of U.P. (2012) 4 SCC 79***, the Supreme Court in para-38 of the judgment, observed that, the normal rule is that whenever the accused sustain injuries in the same occurrence, in which the complainant suffered the injury, the prosecution should explain the injury upon the accused, but it is not a rule without exception that if the prosecution fails to explanation, the case must fail. In another case, the Supreme Court (***Rajendra Singh Vs. State of Bihar 2000(4) SCC 298***), on the issue of non-explanation of the injuries on the person of the accused, held that, where the evidence is clear, cogent and credit worthy; and where the court can distinguish the truth from falsehood, the mere fact that the injuries on the person of the accused are not explained by the prosecution, cannot by itself be the sole basis to reject the testimony of the witnesses and consequently the whole case of the prosecution. In light of

the settled law on the issue and having regard to the facts of the present case, it is proved and established that, from the complainant side, three persons including the deceased Babubhai sustained injuries and on the other side, out of five accused, four persons sustained grievous injuries and both the parties received the said injuries in the course of same occurrence would indicate that there was a fight between both the parties. In such circumstances, it cannot be presumed that the prosecution has suppressed the genesis of the crime and in view of the oral evidence, the injuries sustained by the accused in the said occurrence would raise the inference that in a free fight between the parties, the witnesses and accused have sustained injuries and in that view of the matter, non-explanation of the injuries on the body of the deceased in specific terms would not be fatal to the prosecution case.

23. The next issue raised is that, the trial court neither considered the right of private defence, nor, the elements of free fight which has caused miscarriage of justice because it was the complainant party who attacked first on the accused and therefore, the accused are entitled to protect themselves and whatever act done in the exercise of right of private defence, is no offence. We have carefully examined the evidence on record and statutory provision of the right of private defence provided under

Section 96 to 106 of the IPC. The statutory provision of the right of private defence allows the individual to protect themselves from the others and their property when there is an imminent threat and no immediate recourse to the public authorities. In the facts of the present case, the I.O. (PW.17), in his deposition, stated that during the investigation of both the cross-cases, he could not find the facts about who had attacked first or aggressor in causing the injuries. We have examined the testimony of the witnesses which shows that, altercations took place between the parties on the issue of Government land and they armed with deadly weapons and despite the opportunity either to escape from the place, or seek help and participated in the fight. Thus, therefore, in the absence of clear evidence about who was the aggressor, in our considered opinion, it is a case of free fight and in absence of any evidence with regard to who was the aggressor, the right of private defence as claimed is not legally available to the accused-appellants. It is settled position of law that, the right of private defence is purely defensive and it cannot be used as a pretext for aggression or retaliation and said right is available only against an aggressor and the accused cannot take a private defence when it is unclear who was the aggressor. Thus, when it becomes difficult to ascertain who the aggressor was or who initiate the violence, no right of private defence to the either party can claim and

reasoning behind that if both the parties intended to fight, neither can be considered a victim acting purely in self defence and therefore, the appellant herein in our considered opinion failed to prove that their case falls under the exception of private defence.

24. It is the submission that, the learned trial court by invoking Section 149, held vicariously liable the accused for the act of homicidal death not amounting to murder which findings are contrary to the settled position of law because when both the sides have sustained injuries and it is a free fight as per the case of prosecution, then, question does not arise for invocation of Section 149. We find merits in the submission advanced by learned counsel Mr. Mangukiya. It is settled position of law that, once the conclusion is drawn that the injuries sustained by the persons were in course of free fight, the only those persons who are proved to have caused injuries can be held guilty for the injuries caused by them. In the facts of the present case, as per the charge, A4 caused injuries on the head of the deceased Babubhai by weapon scythe, whereas, A2 and A3 assaulted the deceased with their respective weapons like Lathi and Barchhi and thereafter, A3 assaulted the complainant (PW.8) with the blunt side of Barchhi and A5 also assaulted the PW.8 with wooden log. This was the initial version disclosed in the FIR (Exh.69). It is relevant to note that, in the deposition, instead of

Barchhi, the weapons axe was assigned to A3. The medical evidence shows that there was a single injury on the head of the deceased Babubhai. Thus, the allegations made against A2 and A3 with regard to causing injury to the deceased is not believable because medical evidence does not support the version of witnesses as if it is so, then, the doctor would have noticed the another injuries. Thus, the role assigned to A2 and A3 seems that, it was over implication on the part of the complainant party. The injuries sustained by PW.8 was not visible injury as in the MLC Certificate (Exh.68), no any injury being mentioned by the Medical Officer of Limbdi Hospital and in that view of the matter, the prosecution failed to prove the factum of injury received by the PW.8. So far as injury sustained by PW.9 – Raju @ Munna is concerned, he sustained a simple injury on his left wrist as well as on the head. In the FIR, there is no specific name of the accused being disclosed about who had caused injuries to the PW.9, nor PW.8 – the complainant has specified in his deposition. The injured Raju – PW.9 in his chief examination, stated that, the A4 had caused head injury to him by weapon scythe, however, in the police statement, he did not have uttered a word about his injuries caused by A4 and on the contrary, allegations in the police statement being alleged that A2 and A3 assaulted him with lathi. In such circumstances, if we examine the individual role of the accused, the prosecution failed to prove that, the accused

had caused the grievous injuries as defined under Section 324 of the IPC either to the deceased or the witnesses. However, the fact remains that, the version of the witnesses with regard to causing injuries to the deceased Babubhai by the A4 – Shivkubhai Kanubhai is consistent and reliable and has been corroborated by the medical evidence. Thus, it is proved beyond reasonable doubt that A4 had caused fatal single injury to the deceased over his head, as a result, he succumbed to his injury after 9 days of the incident and that is why, in view of the exception 4 of Section 300, the trial court convicted the A4 for the act of homicidal death not amounting to murder. However, the invocation of Section 149 by the trial court fixing the vicarious liability is against the law as in case of sudden fight between the parties, there cannot be question of invoking Section 149 for the purpose of imposing constructive criminal liability, more particularly when the evidence does not prove their involvement (A1, A2, A3 and A5) in causing the fatal injuries to the deceased and therefore, examining the individual role of the accused, we have no hesitation to hold that, the prosecution miserably failed to prove the charges beyond reasonable doubt against the A1, A2, A3 and A5, whereas, the offence against the A4 has been proved beyond reasonable doubt for causing homicidal death not amounting to murder of deceased Babubhai, however, so far sentence is concerned, it is reported that, more than 3 years has been

undergone by the accused and presently he is on bail. In our opinion, the sentence of 10 years awarded is require to be reduced and/or altered because of the following reasons:

- (i) there was a single head injury found on the body of the deceased.
- (ii) As per the doctor opinion, the operation was successful in removal of hematoma and despite of this, after 9 days of the admission in the hospital, the discharge was sought against medical advice and the doctor (PW.3) had caution that in absence of proper treatment, the deceased might be die. According to version of PW.9 – brother of the deceased, on the very next day after removal of oxygen bottle, the deceased succumbed to his injuries. The victim family did not inform the police. In such circumstances, it is the prosecution to explain why there was a need to take discharge against the medical advice and it is not the say of the doctor that when the deceased was discharged, he was on oxygen.
- (iii) If proper treatment would have administered to the deceased as an indoor patient at the hospital, then, there might be a chances of

survival.

- (iv) In the cross-case the charge against the deceased and other was under Section 326 of the IPC as the accused party sustained grievous injuries in the nature of fracture over their heads, but in the present case, due to death of the deceased, Section 302 was invoked by the police authority and accordingly, charge came to be framed.

25. For the reasons recorded, having regard to the peculiar facts of the present case so far as sentence of 10 years awarded to the A4 - Shivkubhai Kanubhai Kathi is concerned, it is altered and/or reduced to the sentence already undergone. We do not alter the fine amount whatever awarded by the trial court. As observed, the charge against the rest of the accused are not proved and they are acquitted of all charges.

26. So far as enhancement appeal filed by the State being Criminal Appeal No.1194 of 2010 is concerned, in view of the reasons assigned in the case of appellants-accused, the enhancement appeal would not require to decide on merits and accordingly, stands disposed of.

27. In the acquittal appeal being Criminal Appeal No.1195 of 2010, having regard to the nature of offence, injuries sustained by both the parties and findings with

regard to free fight, the question does not arise for invocation of Section 300 for the act of murder. Thus, we do not find any merits in the acquittal appeal and same stands disposed of accordingly.

28. The conviction appeal being Criminal Appeal No.1034 of 2010 filed by the accused allowed in part. The appellants-original accused no.1, 2, 3 and 5 have been acquitted of all charges, whereas, the conviction of A4 - Shivkubhai Kanubhai Kathi is upheld, but the sentence is modified and/or altered to the sentence already undergone.

The appellants are on bail and there is no need to surrender to the jail authority. The bail bonds stand cancelled and surety discharged. The Registry shall send the R& P to the court concerned.

Sd/-

(ILESH J. VORA,J)

Sd/-

(P. M. RAVAL, J)

TAUSIF SAIYED