

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL NO. 164 of 2013

With

R/CRIMINAL APPEAL NO. 1080 of 2013

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS. JUSTICE GITA GOPI

Sd/-

and

HONOURABLE MR.JUSTICE L. S. PIRZADA

Sd/-

=====

Approved for Reporting	Yes	No
	-	✓

=====

PRAVINSINH VAJESING PARMAR

Versus

STATE OF GUJARAT

=====

IN CRIMINAL APPEAL NO.164 OF 2013

Appearance:

MR JV JAPPEE(358) for the Appellant(s) No. 1

MR MANAN MAHETA, ADDITIONAL PUBLIC PROSECUTOR for the
Opponent(s)/Respondent(s) No. 1

IN CRIMINAL APPEAL NO.1080 OF 2013

APPLICANT : TEJENDRASINH JAGATSINH PARMAR

Appearance :

MR ASHISH M DAGLI for the Appellant(s) No. 1

MR MANAN MAHETA, ADDITIONAL PUBLIC PROSECUTOR for the
Opponent(s)/Respondent(s) No. 1

=====

CORAM: HONOURABLE MS. JUSTICE GITA GOPI

and

HONOURABLE MR.JUSTICE L. S. PIRZADA

Date : 29/09/2026

COMMON JUDGMENT

(PER : HONOURABLE MS. JUSTICE GITA GOPI)

- Both the Appeals under Section 374 of the Code of Criminal Procedure, 1973 (for short as 'Cr.P.C.')

challenge the judgement of conviction and sentence passed by the learned 4th Additional Sessions Judge, Himmatnagar dated 09.11.2012 in Sessions Case No.79 of 2009. Both the appellants as original accused No.1 and 2 came to be convicted under Section 302 of the Indian Penal Code (for short 'IPC') and were sentenced to life imprisonment with a fine of Rs.10,000/- and in default of payment of fine to undergo three months rigorous imprisonment. For the offence under Section 135 of the Bombay Police Act (for short 'BP Act'), both the accused were ordered four months rigorous imprisonment. Both the sentences to run concurrently with the benefit of set off.

2. The trial of Sessions Case No.79 of 2009 was against nine accused under Sections 147, 148, 149, 323, 504, 506(2) and Section 302 of IPC and Section 135 of the BP Act. Accused no.3 to 9 were acquitted as found innocent under Section 302 IPC and other sections as charged. The Court had not believed the case under Sections 147, 148, 149, 323, 504, 506(2) against all accused.
3. Criminal Appeal No.164 of 2013 is by convicted accused No.1-Pravinsinh Vajesinh Parmar while Criminal Appeal No.1080 of 2013 is by convicted accused No.2-Tejendrasinh Jagatsinh Parmar.

4. The facts of the case refers to an incident dated 02.01.2009. On that day, the complainant-Kamalsinh Jasvantsinh Parmar had gone to Himmatnagar in the afternoon and had returned back at 5.30 pm at his residence at Salal. Returning home he came to know that about 4.00 pm, the wife of appellant accused-Pravinsinh Vajesinh Parmar – Shardaben and the wife of Jagatsinh Punjsinh, i.e. the mother of appellant accused-Tejendrasinh Jagatsinh Parmar-Alkhiben had quarelled with the complainant's wife-Geetaben raising dispute regarding the right of way. As per the complainant thereafter, Jagatsinh Punjsinh Parmar had come to the complainant's house and had resolved the issue.
5. According to the complainant, his younger brother Rajendrasinh Jasvantsinh was standing in front of his house, around 6.30 pm, Jaideepsinh Jagatsinh Parmar came there, keeping enmity with regard to the earlier verbal altercation, questioned Rajendrasinh addressing that he had become a Dada and told Rajendrasinh to stand there while he would call his other men.
6. According to the prosecution, Pravinsinh Wajesinh Parmar (A-1) had sickle in his hand, Tejendrasinh Jagatsinh (A-2) wield sword in his hand, Indrajitsinh Jagatsinh had an iron strip in his hand, Vikramsinh with a stick, with assistance of others, Jayendrasinh Ranjitsinh, Vijaysinh Ishwarsinh, Deepaksinh Bhanusinh,

Bhupendrasinh Pratapsinh Parmar, Jaydeepsinh Jagatsinh, abusing in vile language were shouting and all started beating his younger brother Rajendrasinh.

7. Pravinsinh (A-1) gave a blow with a sickle on the head and Tejendrasinh (A-2) gave a sword blow on the head, while Indrajitsinh, Bhupendrasinh beat the brother of the complainant with an iron strip on the body. So Rajendrasinh fell down and all the others started giving him kicks and fist blows. Therefore the complainant and his wife Geetaben and son Yuvrajsinh and Rajendrasinh's wife Jyotsanaben intervened and got him released from further beatings. It was alleged that all the accused by giving threats to do away with their lives went away from the place.
8. Since complainant's brother Rajendrasinh was injured, the complainant and his son Yuvrajsinh and his wife Geetaben and one Ishansinh Laxmansinh took Rajendrasinh at Civil Hospital Himmatnagar and for further treatment took injured to Dr. Tushar Shah in a Private Hospital, Opposite Ahmedabad Bus Stand and from there, for further treatment to Sterling Hospital, Near Gurukul, Ahmedabad where he was admitted as an indoor patient and as per the complainant, since the injuries were deep, and his brother was unconscious, and the brother was under treatment, therefore, the

complainant could give the complaint on 03.01.2009 before P.I., Prantij Police Station, Himmatnagar.

9. After the complaint came to be filed, the chargesheet was filed before Prantij Judicial Magistrate First Class, and under Section 207 of Cr.PC, the case came to be committed to Sessions Court.
10. It requires to be mentioned that for the same incident on 02.01.2009, a complaint was filed by Bhupendrasinh Pratapsinh Parmar at Prantij Police Station as C.R. No.4/09 under Sections 147, 148, 149, 324, 323, 504 and 506(2) of IPC and Section 135 of the B.P. Act. The trial as Sessions No.24 of 2010, in that connection, was tried against eight accused, whereby accused No.2-Yuvrajsinh Kamalsinh Parmar and accused No.7-Mahindrasinh Laxmansinh Parmar came to be convicted under Section 323 of IPC and were ordered to undergo sentence of one year simple imprisonment with a fine of Rs.1000/- with default stipulation in non-payment, to undergo one month simple imprisonment, while for offence under Section 135 of B.P. Act, both the accused were ordered to undergo four months simple imprisonment. Sessions Case No.79 of 2009 it was considered to be the cross case and therefore, the Sessions Case No.24 of 2010 under order came to be transferred and Judicial Magistrate by an order below Exhibit 24 committed the said case. The Appeals of both

the accused as CR.A No.1905 of 2012 and CR.A No.1907 of 2012 were listed together along with the present matter and therefore, all the Appeals were heard simultaneously.

11. The prosecution in Sessions Case No.79 of 2009 examined about 20 witnesses. PW1, 3, 4, 5, 6 were examined as panch witnesses, PW2, 7, 8, 9, were the Doctor witnesses, PW10-the complainant, PW11, 12, and 13 were the witnesses. PW14-Deputy Mamlatdar, PW15 as ASI, PW16 was the PSO, PW17 and PW18 were examined as Investigating Officer and PW19 and 20 were the Scientific Officer.
12. Learned advocate Mr. J.V. Japee for the appellant in Criminal Appeal No.164 of 2013, submitted that conviction has not followed under Sections 143, 147, 148, 149, 323, 504, 506(2) IPC as no case of vicarious liability of unlawful assembly was believed, and when the case in prosecution of common object of unlawful assembly was not believed then the only aspect which remains to be examined is whether the appellant accused in their individual capacity had committed the offence under Section 302 IPC.

12.1 Learned advocate Mr. Japee referring to the testimony of the witnesses submitted that the prosecution has failed to prove the case beyond

reasonable doubt. It has been alleged that the appellant Pravinsinh Vajesinh Parmar had inflicted dharia (sickle) blow on the head of the deceased, while Dr. Rajiv Doshi-PW9 has very specifically stated that if any injury is caused by any such weapon, the cuts would be bleeding and from the cut of the flesh, and if so, the traces of blood and flesh would be found on the weapon. Mr. Japee referring to the mudammal article sent for FSL Examination-Mark E for dharia, submitted that the serological report has not found any blood upon Mark E-Dharia while as per the evidence of Dr. Vipul Jani-PW7, no injury is caused by dharia.

12.2 Advocate Mr. Japee referring to the evidence of Dr. Rohit-PW2 who conducted the post mortem, submitted that injury No.1 was identified as surgical injury for the purpose of treatment, while according to Dr. Rohit, injury No.2 on the head was the fatal injury to cause death. Thus, according to learned advocate Mr. Japee, injury no.2 was the only cause for the death and as per prosecution case, accused No.2-Tejendrasinh had inflicted sword blow on the back of the head of the deceased. Thus, according to learned advocate Mr. Japee, since injury No.1 could be treated, thus could not be made the cause of death.

12.3 Adv. Mr. Japee referring to the evidence of Dr. Tushar Shah-PW8 stated that as per the Doctor, injury

No.2 could be caused by sword or dharia, while the same Doctor had given evidence that surgical process was done on the head of the deceased. Thus, as per Adv. Mr. Japee, injury No.1 was due to surgical process and according to Adv. Mr. Japee the appellant accused No.2 had not caused the injury No.2 on the head of the deceased. Therefore, when injury No.1 is attributed to the accused No.1 and injury No.2 to accused No.2 and when both the injuries are not proved to have been caused by both the appellants accused, the benefit of doubt ought to have been given to both the appellants.

12.4 Mr. Japee submitted that the prosecution had dropped eight independent witness by filing Pursis-Exhibit 133 and therefore, adverse inference was required to be drawn against the prosecution case.

12.5 Mr. Japee further submitted that the genesis of the crime is suppressed. Three persons from the side of the accused, i.e. the appellant-Pravinsinh Vajesinh Parmar himself, Indrajitsinh Bhupendrasinh Parmar and Bhupendrasinh Pratapsinh Parmar sustained injuries and when complaint had been lodged against the complainant of the present matter and his witnesses, who have been charge-sheeted and when conviction has followed for Yuvrajsinh Kamalsinh Parmar and Mahendrasinh Laxmansinh Parmar, then it becomes incumbent upon the prosecution to explain the injuries sustained by the

accused which in the present matter, the prosecution has miserably failed to do so.

12.6 Advocate Mr. Japee contended that the place of incident is near the house of accused No.2-Tejendrasinh Jagatsinh Parmar, pool of blood was found near the house of Tejendrasinh, this could be proved by the evidence of PW3-Lalji Kodarji Parmar and PW11-witness Kishansinh Laxmansinh Parmar. Therefore, since the evidence becomes self evidentiary, the prosecution case fails on the falsehood of the complainant, where it had been proved on record that the complainant's side were the aggressors.

12.7 Advocate Mr. Japee submitted that the motive does not get proved as the quarrel between the ladies from both the sides was with regard to a way and it was resolved, even by the prosecution case, by Jagatsinh Punjsinh and therefore, there was no reason for the alleged incident when the dispute was amicably resolved. According to Advocate Mr. Japee, the real cause of the incident had not been brought on record when the quarrel of the ladies Geetaben, Shardaben and Alkiben was not at all related with the deceased Rajendrasinh. The wife of Rajendrasinh as per the record was Jyotasanaben-PW12 who was not involved in the verbal quarrel that had occurred as per the prosecution. Thus,

the accused had no cause to vent their anger on deceased-Rajendrasinh.

12.8 Advocate Mr. Japee submitted that when there has been a cross cases which were tried by the same Judge, i.e. Sessions Case No.79 of 2009 and Sessions Case No.24 of 2010, the case has to be considered as culpable homicide not amounting to murder within the meaning of exception 4 of Section 300 of IPC and when the evidence borne out from the record shows inter-se fight between two groups, nine persons from the appellant's side and eight persons from the complainant's side without any premeditation, considering the group clash and injuries sustained by both the sides, Adv. Mr. Japee submitted that the conviction under Section 302 IPC was not in accordance with the evidence on record, considering the fact that the death of the injured was after seven days of the incident and when no motive could be found, the conviction should be altered under 304 of IPC.

12.9 Mr. J.V. Japee has relied on the following decisions of the Hon'ble Apex Court:-

- a) **Resham Singh and Another v. State of Punjab** reported in (2002) 10 SCC 151;
- b) **Mohd. Khalil Chisti v. State of Rajasthan and Others** reported in (2013) 2 SCC 541;
- c) **Pratap Singh alias Pikki v. State of Uttarakhand** reported in (2019) 7 SCC 424;

- d) **Stalin v. State represented by the Inspector of Police** reported in (2020) 9 SCC 524;
- e) **Ananta Kamilya v. State of West Bengal** in Criminal Appeal of 1930 of 2019 dated 07.01.2020 and
- f) **Mariappan v. State represented by the Inspector of Police** reported in (2024) 2 SCC 598.

13. Advocate Mr. Ashish M. Dagli appearing for the appellant in Criminal Appeal No.1080 of 2013 submitted that before the Doctor who gave the initial treatment of the deceased, no names of the accused were declared nor the names of the accused were mentioned in the history before the neuro surgeon Dr. Tushar Shah of Sterling Hospital where the deceased was referred, nor any mention is made of the sword, before Dr. Rajiv Doshi at Sterling Hospital.

13.1 Advocate Mr. Dagli stated that the original complainant too had admitted that he had not given any names of the accused in the history before the Doctor. Mr. Dagli submitted that the incident occurred in a crowded place and there was a cross complaint, the incident occurred without any premeditation and it is a case of group clash. The incident which has been stated to occur prior to the alleged incident between the women was shown to have been settled, hence, Adv. Mr. Dagli submitted that there would not have been any reason left for both the groups to harbour motive. The wife of the

complainant had admitted of the compromise arrived at between the parties to the previous quarrel which as per advocate Mr. Dagli was not a major issue.

13.2 Advocate Mr. Dagli submitted that the place of incident has been totally changed. The Circle Officer had prepared the sketch on the basis of the panchnama. Admittedly, no blood was found outside the house of the complainant.

13.3 Adv. Mr. Dagli submitted that the panchas have not supported the panchnama of scene of offence nor the panchnama for the recovery of weapons and submitted that according to PW2-Dr. Rohit Jariwala who conducted the post mortem, only injury No.2 could be considered as serious and the rest of the injuries could be treated as simple.

13.4 Mr. Dagli submitted that panchnama of place of offence was drawn only after 36 hours and if the deceased was dragged for about 50 meters as alleged, then the said fact was required to be corroborated with the blood trails, which were absent in the present matter. Mr. Dagli submitted that the I.O. has affirmed that no statements of independent witnesses were recorded. Admittedly when the cross complaint was filed, Mr. Dagli submitted that every detail as per both the FIRs must be specifically proved. Advocate Mr. Dagli further submitted

that the injuries sustained by the accused had not been explained by the prosecution and the weapons which were seized from the hands of the prosecution witnesses were never sent for FSL Examination. The case was of open fight which got revealed during the course of investigation, still however, no investigation was made in fair manner.

13.5. Mr. Dagli submitted that it is a case of self defence as the prosecution witnesses were the aggressors and the accused had no option but to defend themselves and further stated that it would be a case of a single blow in accordance to the evidence of the witnesses and stated that when the genesis of the offence has been suppressed and when the injuries sustained by the accused are not proved, then according to Adv. Mr. Dagli as the prosecution failed, the learned trial Court Judge was required to acquit all the accused.

13.6. Learned advocate Mr. Dagli has relied upon the following decisions :-

- a) **Devendra Singh v. State of Uttar Pradesh** reported in **2024 0 INSC 576** and
- b) **Narayanbhai Babulal Bhosle v. State of Gujarat** reported in **2009 1 GLH 91**.

14. Learned Additional Public Prosecutor for the State Mr. Manan Maheta has submitted that the case is clear on

record, that it were the present appellants who had injured the deceased, the head injury had turned fatal. Another injury on the abdomen was also caused by the appellants since the facts of the case suggest that both the appellants had dangerous weapon as sickle and sword in their hands. The plea of self defence cannot be believed as there were nine accused against whom the deceased had to struggle. Learned APP Mr. Maheta submitted that the prosecution need not prove any other facts which are not connected and vital to the present case. The evidence recorded in the cross case cannot be read as evidence in the present matter and thus, it has been submitted by learned APP Mr. Maheta that the appellants have to prove their innocence on the basis of the evidence adduced by the prosecution. Learned APP Mr. Maheta stated that unnecessary plea of self defence has been raised which had never been made a ground before the trial Court. APP Mr. Maheta submitted that the facts of the case suggest that keeping grievance of the earlier quarrel occurred on that day, the accused had gone at the house of the complainant to assault the deceased and the prosecution could sufficiently prove by way of evidence the case of murder by the present appellants. Thus, learned APP Mr. Maheta contended that the Appeals may be dismissed.

15. Considered the submissions raised by learned advocate Mr. J.V. Japee, learned advocate Mr. Ashish M. Dagli and

learned APP Mr. Manan Maheta. The undisputable fact is that the complaint is made by both sides . The witnesses of the present matter are the accused in the cross complaint and the accused of the present matter have been the complainant and the witnesses in the cross complaint. The trial of both the complaints as Sessions Case No.79 of 2009 and Sessions Case No.24 of 2010 were conducted simultaneously and the trial Court had declared the judgment of conviction and sentence on the same day, 09.11.2012, but by different judgments.

16. In the present case, we are not concerned with the evidence that is recorded in the trial of the cross complaint, and as laid down in the case of **Mitthulal v. State of M.P. 1975 (3) SCC 529**, the appellate Court in deciding the appeal cannot refer to the evidence in the cross case and that appeal must be decided on the evidence admitted in that case itself. However since the plea of self defence has been taken by the learned advocates for the appellants, and when the facts of the complaint made in the cross case has been in the evidence of Investigating Officer-PW18-Attabhai Darjibhai Chowdhary, who affirmed that he had investigated both the offences and had filed the chargesheets, the case of the accused to that aspect becomes relevant to examine the plea raised. The I.O. was questioned about non-production of the documents in connection with the injury to the accused alongwith

the chargesheet, the I.O. replied that both the chargesheets arise from the cross complaints, therefore, according to him both are supplementary to each other and replied that it was not necessary to place all the documents. The I.O. also admitted that during his investigation, he could know that the grandfather of both the parties was the same but did not find the necessity to do DNA profiling, instead of blood grouping.

16.1. The accused have taken a defence that the injuries sustained by them had not been explained by the prosecution. In ***Babulal Bhagwan Khandare v. State of Maharashtra 2005 (10) SCC 404***, it had been held by the Apex Court :

“27.... Non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance.”

17. In the cross Sessions Case No.24 of 2010, the complaint was registered with the fact that on 02.01.2009, at about 18.30 hours, at Village Salal, there was a verbal quarrel with regard to throwing of water , hurling vile abuses, accused No.1-Kamalsinh Jasvantsinh Parmar raised dispute with witness-Pravinsinh Vajesinh Parmar and taking side, called the accused, who so by forming an unlawful assembly in prosecution of common object came with sickle, iron pipe and stick in their hands. Accused No.3-Prahladsinh Punjsinh Parmar gave a blow with iron

pipe on complainant Bhupendrasinh Parmar's head and accused No.4 Karansinh Prahladsinh Parmar gave a blow on the back of the head of Indrajitsinh Bhupendrasinh Parmar and accused No.5-Kiransinh Bhavaansinh Parmar gave a stick blow on the back of the head of witness-Pravinsinh Vajesinh Parmar and accused No.2-Yuvrajsinh Kamalsinh Parmar, accused No.6-Surajsinh Kiransinh Parmar and accused No.7-Mahendrasinh Laxmansinh Parmar beat the witnesses with a stick, while accused No.5-Kiransinh Bhavaansinh Parmar and accused No.8-Dharmendrasinh Bhavaansinh Parmar gave threat to their lives and by hurling filthy and nasty abuses had committed offences, which included breach of the notification of the District Magistrate.

18. In **Lakshmi Singh v. State of Bihar** reported in (1976) 4 SCC 394 : 1976 SCC (Cri) 671] , it was held that: (SCC p. 400, para 12)

"12. ... It is well settled that fouler the crime, higher the proof, and hence in a murder case where one of the accused is proved to have sustained injuries in the course of the same occurrence, the non-explanation of such injuries by the prosecution is a manifest defect in the prosecution case and shows that the origin and genesis of the occurrence had been deliberately suppressed which leads to the irresistible conclusion that the prosecution has not come out with a true version of the occurrence."

It is clear that:

"12. ... where the prosecution fails to explain the injuries on the accused, two results follow: (1) that the evidence of the prosecution witnesses is untrue; and (2) that the injuries probabilise the plea taken by the appellants. ... in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences:

'(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that 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 throw doubt on the prosecution case.'" (Lakshmi Singh case [(1976) 4 SCC 394 : 1976 SCC (Cri) 671] , SCC p. 401, para 12)

It is not always expected of prosecution to explain the injuries suffered by the accused. It is not that lack of explanation from the prosecution for the injuries sustained by the accused would bring a dent on the prosecution case; it is not always necessary to explain the injuries suffered by the accused. However, the non explanation would assume importance where the evidence is to be examined of interested or inimical witnesses and in case where defence gives a probable version. This aspect has been cleared in **Lakshmi Singh**

(*supra*) case [(1976) 4 SCC 394 : 1976 SCC (Cri) 671] ,
SCC pp. 401-02, para 12 as under :-

"12. ... The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one. ... [However,] there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, ... that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries."

19. PW7-Dr. Vipul Sanad Kumar Jani had given initial treatment to deceased Rajendrasinh at Civil Hospital, Himmatnagar on 02.01.2009 examining at about 7.40 hours in the evening. According to the Doctor, relatives had brought the injured- Rajendrasinh Jitendrasinh Parmar aged 40 years, resident of Salal for treatment. Rajendrasinh was not in a position to give any reply, therefore, his brother Kamalsinh Jasvantsinh Parmar (the complainant) informed the Doctor that there was an altercation and the opponents on that day had beaten with sickle. The Doctor examined the injured and found
i) incised wound muscle deep of 12x1 cm on the left side of the head. ii) CLW on the right side below the abdomen 1x0.5 cm deep.

19.1 Dr. Jani-PW7 thereafter took stitches on the wound and according to the doctor's evidence, at that time, bleeding continued. Thereafter, he administered Himacil Injection to reduce the flow of the blood and held the head in low position. The tetanus injection was given, antibiotics and injection to restrain any seizure was also administered, and at 8 o'clock at the end of his duty, the Doctor examined the blood pressure which was 74 and then the case was handed over to another Doctor.

19.2 Dr. Jani referring to the case papers of the Hospital deposed that the injured was given blood, and General Surgeon had examined the injured, who had advised to take photographs and X-Ray in the vertical position and had also advised for CT Scan and Sonography for lower part of the abdomen. At 9.10 hours at night, there was a Refer Yadi for Ahmedabad. Dr. Jani had informed Town Police Station PSO-Rajubhai, Buckle No.1103.

19.3 Dr. Jani as PW7, deposed that when injured-Rajendrasinh was brought to the hospital, he was not in a position to speak. The blood was oozing out from the injury of the head, which as per the Doctor could be sustained by weapons like sword, sickle, axe and similar type of weapons.

19.4 According to Dr. Jani since he had only examined injured Rajendrasinh, therefore, he could not give any

opinion in connection with the injury. Dr. Jani was shown muddamal article No.8 – sword, muddamal article No.5- iron sickle, who affirmed that the injuries to Rajendrasinh could be possible with such types of weapons. The Doctor on examination had given the Certificate-Exhibit 56.

19.5 In the cross examination, Dr. Jani-PW7 stated that Rajendrasinh was brought without any police yadi. The relatives of Rajendrasinh did not give the names, address, description of the accused before him. The Doctor also affirmed that he had not given the treatment papers to the police and also affirmed that he could not state as to what examination, the Doctor post his duty had undertaken and what decision was taken on the basis of such examination. X-Ray, Sonography, CT Scan etc. were not done at Himmatnagar.

19.6 Dr. Jani-PW7 was specifically asked about the history given by the Kamalsinh Jasvantsinh (complainant), the relative of the injured. The Doctor stated that in the certificate, the word "opponents" had been written as per the given history. Dr. Jani was shown muddamal article No.6 and to that he replied that he could not see any injury to Rajendrasinh with iron strip.

19.7. Doctor was also referred to the muddamal article No.7-stick, giving the answer, the Doctor stated that he had not seen any injury to Rajendrasinh with such a stick.

19.8. Dr. Jani-PW7 further denied the suggestion that in general, incised wound would tally with the weapon which had been used to cause the injury. Doctor was referred to muddamal article No.8-sword to which the Doctor affirmed that if the blow had been given by the said sword, then the injuries suffered by such sword would adopt the edge and the shape in its curved form. The Doctor denied the suggestion that if any injury is caused by weapon as muddamal article No.5-sickle on the head with the sharp edged side, then in the skull there would be round shaped injury and because of that, the injury on one side would be deep compared to the other side. The Doctor could opine that the injury was not caused with a sickle, but with the sword.

20. A total analysis of the evidence of Dr. Vipul Jani-PW7 would show that on 02.01.2009, at 7.40 hours complainant had taken the injured Rajendrasinh to the Civil Hospital, Himmatnagar. The history was given by the complainant. In the history, the complainant had not named the accused but had only used the word "*samawala ae*" (opponents). The Doctor had recorded the incised wound as muscle deep on the left side of the

head and another wound was a CLW, on the right side of abdomen. As per Dr. Jani, the injury on the head was not by the sickle but was caused with a sword.

20.1 Dr. Jani-PW7 in the cross examination affirmed that Rajendrasinh had come without any police yadi and according to the Doctor, the relatives of Rajendrasinh had not given any names, address and description of the accused. The Doctor also affirmed that he had not given the documents of treatment to the Police. The incident occurred on 02.01.2009 and the injured was brought to the Civil Hospital, Himmatnagar before Dr. Jani at 7.00 in the evening. The complaint was given on 03.01.2009 and according to the complainant, he had given the complaint-Exhibit 76 at Prantij Police Station. Perusal of Exhibit 76 shows that the complaint in writing was given to the Police Inspector, Prantij Police Station. The said complaint does not bear the time.

21. PSO-Gajanand Sampatrao Jaiswal was examined as PW16 and according to his testimony, he was incharge of Prantij Police Station on 03.01.2009 from 20.00 hours to morning 8.00 hours the next day and during that time, he received a complaint which was in presence of the Police Inspector. He had registered the offence in the Station Diary and since it was a visitation offence, he informed the Police Superintendent ACP. According to the PSO, the complaint sent to him was with a forwarding

letter (Suchipatra) with the signature of the P.I.-A.L. Chaudhary (PW18) placed in evidence at Exhibit 102. The PSO recorded I-C.R. No.3/2009 under Sections 147, 148, 149, 307, 323, 504, 506(2) of the IPC and Section 135 of the B.P. Act at Prantij Police Station. P.S.O had sent the public report-Exhibit 104 under his signature and F.T.P. No.14-Exhibit 103 on 03.01.2009 to Assistant Police Superintendent, Himmatnagar.

21.1 The PSO-Shri. Jaiswal identified Entry No.31 dated 03.01.2009 in Police Station Diary of Prantij in his handwriting; the photocopy of the entry after comparison with the original was placed in evidence at Exhibit 105. The PSO stated that the further investigation of the offence was handed over to Police Sub-Inspector Shri. K.D. Solanki-PW17.

21.2 As per the cross examination, the PSO had no personal information of the incident. He had undertaken the process after receiving the papers from PI-Shri. Chaudhary and under his instructions. The PSO appears to be facing a case under ACB trap, as per his testimony, he was acquitted by the Sessions Court and when facing the departmental enquiry, he was transferred to District Sabarkantha.

21.3 Further in cross examination, PSO-Shri. Jaiswal-PW16 stated that the complaint before the PI was

declared at 21:30 hours on 03.01.2009 and the offence was registered at that time and when the complainant was giving the complaint before PI, PSO was present at the Police Station, but not alongwith the PI. The PSO affirmed that in the Suchipatra-Exhibit 102 reference was already made with regard to the sections to be invoked and the C.R. No. to be given in the Prantij Police Station. He denied the suggestion that after registering the offence, Suchipatra was prepared. PSO also stated that when the offence was registered, P.I.-Shri. Chaudhary was present in the Police Station. When confronted as to why the investigation was not handed over to PI-Shri. Chaudhary, P.S.O replied that it was under the instructions of PI, the investigation was handed to PSI-K.D. Solanki.

21.4 PSO also affirmed that the complaint-Exhibit 76 does not bear the time, date and initial and denied the suggestion, that the time, date and initial were deliberately not written on the complaint, so as to write a convenient time in the FIR.

22. The evidence of the PSO proves the fact that the complaint-Exhibit 76 does not specify the date and time and the PSO himself had not insisted for such endorsement on complaint-Exhibit 76. The Suchipatra records that the offence had occurred on 02.01.2009 at 18.30 hours at Village Salal and the offence was

registered on 03.01.2009 at 21:30 hours. The endorsement on the Suchipatra by Police Inspector-Shri. A.L. Chaudhary to the PSO, Prantij was that the complaint was recorded before him and was forwarded for its registration, with the specific instruction that the investigation had to be deputed to Police Sub-Inspector Shri. K.D. Solanki. The Public Report-Exhibit 104 notes that the intention behind the offence was avenging the quarrel which had occurred earlier with regard to a way. The quarrel as was referred in the Station Diary Entry No.31 was shown with the wife of the complainant-Geetaben, and keeping that grievance, accused No.8 raised dispute with deceased-Rajendrasinh Jasvantsinh who was standing at the front yard of the complainant's house. At that time, accused No.8-Jaydeepsinh Jagatsinh Parmar told the deceased "*tu Dada thay gayo che? Ubho rahe, mara manaso bolavi lavu chu.*", which translated would mean, that accused No.8 had addressed the deceased as being 'Dada' (head strong person) and had asked the deceased to wait there so that he could call his men.

22.1 Exhibit 105-the Station Diary records that accused No.8 called other accused, who all had formed unlawful assembly in prosecution of common object. By abusing and shouting accused No.1 gave a blow with a sickle, accused No.2 with a sword and accused No.3 with iron strip and other accused had given kick and fist blows.

The evidence of Dr. Vipul Jani as referred shows one incised wound muscle deep on the left side of the head, of 12x1 cm, while another blow as CLW 1x0.5 cm on the lower side of the abdomen. According to Dr. Jani, the injury on the head could occur only with the sword and not with the sickle. So the discrepancy is regarding another injury which was alleged to be on the head. That evidence does not corroborate the medical evidence. The weapon used for injury also goes under cloud of doubt.

23. The complainant-Kamalsinh Jasvantsinh Parmar examined as PW10 has referred to the earlier quarrel. He came to know about the quarrel at 5.30 p.m., when he had returned back to his Village Salal. Complainant on 02.01.2009 had gone to Himmatnagar to get the seat cover of his Santro car. His wife-Geeta informed him that at about 4.00 p.m., their family members Shardaben-wife of Pravinsinh Vajesinh (A-1), and Alakiben-wife of Jagatsinh Punjsinh had quarrelled with her, regarding the road and thereafter, Jagatsinh Punjsinh had come to their house and had settled the issue.

23.1 Thus as per the evidence, when the incident of quarrel regarding the way occurred at 4.00 pm, the complainant was not present there. The quarrel was with the wife of the complainant-Geetaben, by Shardaben and Alkiben and that verbal quarrel was settled by Jagatisnh

Punjsinh. Thus, according to the complainant, owing to the settlement, the cause did not remain.

23.2 However, his testimony further records that when he was at home and his younger brother-Rajendrasinh was standing at the front yard of their house, at that time, Jaydeepsinh Jagatsinh Parmar keeping the grievance with regard to the quarrel told complainant's younger brother-Rajendrasinh that he has become Dada and after saying so, he had brought Pravinsinh Vajesinh (A-1), who had dharia (sickle) in his hand, Tejsinh Jagatsinh (A-2) was with sword in his hand and Indrajitsinh Bhupendra had iron strip in his hand. Vikramsinh Bhalusinh (A-4) had a stick and the rest, Jayendrasinh Ranjitsinh (A-5), Deepaksinh Bhalusinh (A-7), Bhupendrasinh Pratapsinh (A-9), Vijaysinh Ishwarsinh (A-6), Jaydeep Jagatsinh (A-8), all together uttering abuses and shouting, assaulted his younger brother-Rajendrasinh.

23.3 As per the testimony of the complainant, Pravinsinh Vajesinh (A-1) gave a dharia blow on the head, Tejendrasinh Jagatsinh (A-2) had given a blow with the sword on the head, Indrajit Bhupensinh (A-3) had beaten on the back with the iron strip. Thereafter, his younger brother-Rajendra fell down and the rest of them gave kick and fist blows. Seeing so, he and his wife-Geeta and his son-Yuvrajsinh and deceased's wife-Jyotsana had

interevened to save the deceased from further beatings. According to the complainant, in spite of that, the accused, while going, gave threats to do away with their lives.

24. The evidence of Dr. Vipul Jani-PW7, where the deceased was taken at Civil Hospital, Himmatnagar as injured, referred to only one incised wound on the head and the other wound as CLW was on the right side, below the abdomen. While according to the complainant, the sword blow and dharia blow, both were on the head. This evidence becomes vital to examine the individual role of the present accused, when other accused came to be acquitted. In view of the medical evidence there is only one blow on the head. The contingency created would be, as to which of the appellants gave blow on the head, with the alleged weapon used.

24.1 The complainant as a witness has also referred to one Kishansinh Laxmansinh who had been examined as PW11, who according to the complainant had intervened to protect the deceased-Rajendrasinh. PW11 evidence records that after his uncle-Jagatsinh had settled the quarrel of the ladies, this witness thereafter had gone home. It appears that the witness had shown his presence even at the time when the quarrel was between the women, showing that he had seen Jagatsinh having settled the dispute. Again thereafter, in the evening,

around 6 to 6.30, witness brings his presence near the house of the complainant and gives the evidence of Jaydeepsinh Jagatsinh Parmar addressing Rajendrasinh as '*Dada*' while informing him that he would bring his men there. This witness-PW11 has named all the accused in the examination-in-chief, though he has stated A-1 was having dhariyu, A-2 was having sword and A-3 iron strip and A-4 a stick and others all together were beating the deceased, the witness has not specified that accused No.1, accused No.2 and accused No.3 had beaten the deceased with sickle and sword and iron strip. The witness has not specifically deposed before the Court of individual blow given by the accused on the head or on back of the deceased. According to him, when he reached the place, Rajendrasinh had already fallen down and was having injuries on his head. According to the witness, Rajendrasinh was lying near the house of Jagatsinh in a pool of blood. It is not the evidence of PW11 that he had seen the incident. It is also not the evidence of Kishansinh-PW11 that he had intervened in the quarrel to release the deceased.

25. From the evidence of the complainant and this witness-Kishansinh-PW11 it transpires that both of them had gone to Himmatnagar Civil Hospital. According to the witness Santro car was driven by this witness-Kishansinh. On the front seat beside the driver's seat, Yuvrajsinh son of Kamalsinh was sitting while

Rajendrasinh's head was on the lap of Kamalsinh at the rear seat and beside Kamalsinh was Geetaben. According to witness PW11, after treatment at Himmatnagar Civil Hospital, they had taken the injured to Dr. Tushar Shah at Ahmedabad and for further treatment, the injured was taken to Sterling Hospital and during the treatment, the injured in an unconscious state died on 09.01.2009. So after seven days of injury death occurred.

25.1. Witness-PW11-Kishansinh, though had identified the muddamal weapon in the hands of individual accused, but his evidence does not disclose that he had witnessed the incident, though he has stated the facts of the incident and also about the utterance, while his evidence does not suggest of injury on the head by A-1 with dharia and A-2 with the sword. In the cross examination, he had affirmed that there was a quarrel with regard to the road. He was at his house. In between his house and Jagatsinh's, there were about 10 houses.

25.2 The witness-PW11 also stated in the cross examination that he was an active member of Bhajpa-(BJP)-the political party and the accused and their father-V.P. Parmar, J.P. Parmar were Congress active members. In the cross examination, witness affirmed that the utterance by Jaydeep Jagatsinh before the house of his

uncle, addressing Rajendrasinh as '*Dada*' and informing of bringing his brothers had not occurred in his presence. The testimony of PW11 records that he could say so as Kamalsinh -the complainant, had informed him.

25.3.The police had recorded the statement of PW11 on 04.01.2009 and 10.01.2009. The witness-PW11 also affirmed that he had not got it recorded in the statement before the Police that when he had reached there, he had seen Rajendrasinh fallen near the house of Jagatsinh in the pool of blood and that he was injured at his head. He has affirmed that he had told the Police the facts regarding the blows with the weapons by the accused, as were informed to him by Kamalsinh-the complainant. Witness-PW11 also affirmed that he had stated about the incident as was told to him by Kamalsinh. Witness also stated that Rajendrasinh and Kamalsinh were his elder Uncle's sons.

25.4.The analysis of evidence of this witness-PW11 clarifies that he had not witnessed the earlier quarrel which had occurred between the parties, nor had he seen the present incident which has been the cause for trial. In the cross examination, PW11 also affirmed that on the date of incident, he had gone to Sterling Hospital, while complainant-Kamalsinh was not with him, who had come in his separate car. Rajendrasinh was taken in an ambulance to Dr. Tushar Shah in Sterling Hospital,

Ahmedabad. The witness-PW11 was in the ambulance while complainant-Kamalsinh had come in his Santro car at Ahmedabad. PW11's evidence suggests that a criminal case was also filed against his elder brother-Mahendrasinh. The cross examination would make it clear that the present witness-PW11 is an interested witness. He has not witnessed the incident, he joined the injured to the hospital. As per the evidence of PW11, the injured was taken in an Ambulance from Himmatnagar Civil Hospital to Ahmedabad before Dr. Tushar Shah and thereafter, to Civil Hospital. Now when the evidence suggests that PW 11 was not the eyewitness and whatever he deposed, was, what was informed to him by the complainant, so the evidence of PW 11 can be categorised as hearsay evidence. The relevancy of the evidence of this witness would be to the extent of taking the injured to the hospital for treatment. The hearsay evidence does not specify who assaulted with what weapon.

26. The accused No.1-Pravin Vajesinh Parmar in his further statement under Section 313 of Cr.P.C., in his defence stated that on 02.01.2009 in the evening of winter, complainant's wife Geetaben Parmar and Alkiben Jagatsinh and Shardaben Pravinsinh inter-se had verbal quarrel with regard to way and at that time, Alkiben's husband-Jagatsinh personally went to the house of complainant-Kamalsinh and in the presence of the family

members, had made settlement and thereafter, there was no quarrel or grudge with regard to that dispute. Accused No.1 has further clarified that during that quarrel, none of the accused were present there, but in the evening at about 6.30 when Kamalsinh came to his house, his wife Geetaben and others narrated the incident of quarrel, thus Kamalsinh got excited and by taking side, Kamalsinh with a dharia having curved peak in his hand and his brother Rajendrasinh, both left their house and came at a distance after leaving four houses, on the western side, near the house of Jagatsinh where Pravinsinh was standing, both of them threatened Pravinsinh and abused him in an indecent language. Keeping the grudge of the earlier quarrel Kamalsinh while was about to give the blow with the sickle to Pravinsinh, Pravinsinh moved aside and the dharia blow landed on the head of Rajendrasinh, who was standing near them and since Rajendrasinh sustained the blow with the sickle, he collapsed owing to excessive bleeding. When Kamalsinh was abusing Pravinsinh, at that time, Upendrasinh Pratapsinh and others, one after another, from different places came there to release them. When complainant-Kamalsinh was abusing Pravinsinh, at that time, Prahladsinh, Karansinh, Kiransinh, Surajsinh and Dharmendrasinh came running there and during this quarrel, Pravinsinh, Bhupendrasinh and Indraajitsinh while releasing them sustained injuries on head, leg and other parts of the body. The accused No.1 Pravinsinh Parmar

has also stated in the further statement that at the time of the quarrel, Geetaben Kamalsinh, Jyotsanaben Rajendrasinh and Kishansinh Laxmansinh were not present at the place. Since Rajendrasinh was injured, he was taken to their house. In fact, none of the accused had injured Rajendrasinh but actually, with the sickle of Kamalsinh he got injured on his head and other parts of the body. Only after deliberation, under the advice of the lawyer, complainant file a false case. The same explanation has been recorded for appellant accused No.2-Tejendrasinh Jagatsinh Parmar.

27. The complainant-the brother of the deceased, examined as PW10 is a resident of Salal, Taluka Prantij, he is an agriculturist, they are two brothers and three sisters, the younger one was deceased-Rajendrasinh. His evidence to the incident is that, on 02.01.2009, after coming back from Himmatnagar at 5.30 in the evening, his wife had informed him about the earlier quarrel

27.1 The complainant as witness has not clarified whether Jagatsinh Punjsinh had come in his presence. The complainant's further evidence is that at 6.30 when he was in his house, his younger brother Rajendrasinh was in the front yard of his house, at that time, Jaydeepsinh Jagatsinh Parmar keeping the grudge of the earlier incident told his younger brother-Rajendrasinh that "tamo dada thai gaya cho" which as translated,

would mean, that they all have become head strong persons. According to the complainant, thereafter Jaydeepsinh had brought 1) Pravinsinh Vajesinh (A-1) who held a sickle in his hand, 2)Tejendrasinh Jagatsinh (A-2) who was having sword in his hand and 3) Indrajit Bhupendrasinh (A-3).

28. The complainant stated that after his complainant-Exhibit 76, on the next day, 04.01.2009, police had come to their house and had taken his further statement, thereafter he had given the clothes of his brother-Rajendrasinh, who was in hospital. The clothes were handed over to him from the hospital. The police seized those clothes, he had shown the police, the place of incident, the police had seized blood stained soil as well as bare soil. Both the types of soil were kept in a small box. Police thereafter, had again recorded his statement on 26.01.2009. He stated that apart from him, his wife, Prahladsinh Punjsinh, his son-Karansinh and Kiransinh Bhavansinh, Surajsinh Kiransinh, Mahendrasinh Laxmansinh and Dharmendrasinh Bhavansinh had all come there, so the accused escaped the place.

28.1 In the cross examination, the complainant affirmed about the complaint against him and another seven registered under Section 324 IPC at Prantij Police Station, and affirmed that the Criminal Case No.281 of 2009 was numbered as Sessions Case No.24/2010.

28.2 The witness was also asked about the case filed by the father of his wife-Geetaben against him and Jasvantsinh and Geetaben under Sections 363, 366, 376, 114 and 380 of IPC and affirmed that in connection to the complaint, Sessions Case is running against him. He over and above doing agriculture work was having a transport business and was in the business of driving.

28.3 In the cross examination, he affirmed that he was knowing all the accused by their names. Complainant also affirmed that when his brother was taken to Himmatnagar Civil Hospital and the private hospital of Dr. Tushar Shah and at Sterling Hospital, before none of the Doctors, he had given the names of the accused, their address or description. He also affirmed that nothing had stopped him from giving the names of the accused.

28.4 The evidence thus that comes on record, refers to the cross complaint against the complainant and seven others. The police after taking the complaint recorded the complainant's further statement on 04.01.2009, as well as on 26.02.2009. The complainant's brother died on 09.01.2009. Before all the Doctors, the complainant had not named any of the accused as being the assaulters.

28.5 The deceased brother was also in the profession of driving. He affirmed that all the accused were agriculturists. Complainant acknowledged that against his son Yuvrajsinh and his maternal aunt's son-Ashoksinh, who are witnesses in the matter, one Arvindbhai Manilal Patel of Village Poglu had filed a case in connection with Ketankumar Samlabhai, where the injury caused was with the stick and rectangular wooden strip, and because of the grievous injury, they were facing a case under Section 147, 148 and 326 of IPC, tried in the Court of Judicial Magistrate First Class, Prantij

28.6 The defence was raised of the deceased getting injured by the sickle, held by the complainant. The accused had put a version in defence that when complainant was about to give a blow to Pravinsinh, and as he dodged the blow, the sickle blow fell on the deceased's head, the complainant's brother. The complainant witness was confronted about the statement dated 26.01.2009, and he denied stating before the police of having dhariya (sickle) with him. The witness was shown the statement dated 26.01.2009 during the trial and thereafter, he affirmed that he had got it recorded that for his self-defence, he had kept dhariya with him, while he had not beaten anyone with dharia nor anyone had beaten him and further stated that he had produced the dhariya voluntarily. The witness stated that this fact was not given by him on his own volition

before the police and the police on his own had noted it. The witness affirmed that he had not made any complaints to any superior Police Officer about it. He affirmed that on 26.01.2009 at 18.30 hours, he and seven others were arrested in connection with I-C.R. No.4/09. The complainant denied the suggestion that during the course of panchnama, he as well as his son-Yuvrajsinh had produced dharia before the police.

28.7 The witness as a complainant was asked about the surrounding area near the place of incident. The complainant affirmed that after his house on the west is Parbatsinh Punjsinh's house, and after that are two houses of Pravinsinh Vajesinh and in that direction, is the house of Jagatsinh Punjsinh. Opposite Jagatsinh's house on the northern side are the houses of Pujaji Rachhodji, Mathurji Kalaji and others. The complainant affirmed that prior to the incident, the relation of all the accused with him and his family members were not smooth and because of that, there were often quarrels between the families of both the sides.

28.8 The complainant denied the suggestion that on the day of incident, he and his brother-Rajendrasinh had gone near the house of Jagatsinh with dharia in their hand to beat Pravinsinh Vajesinh and denied the suggestion that while hitting, Pravinsinh moved aside and Rajendrasinh suffered dharia blow on the head. The

witness thereafter, was questioned about the blood lying in front of the house of Jagatsinh. That evidence was recorded in question and answer form. The complainant was asked, whether Rajendrasinh got hurt with the dharia in front of Jagatsinh's house and so the blood was lying in front of the house of Jagatsinh, to that, the complainant replied that after beating Rajendrasinh, the accused dragged him before the house of Jagatsinh and therefore, there was a pool of blood in front of the house of Jagatsinh. The accused case was that the incident had taken place in front of the house of Jagatsinh and that the complainant had shown a false place of incident to the police.

28.9 The clarification which the complainant gives about the blood in front of the house of Jagatsinh was that the accused had dragged deceased-Rajendrasinh towards the house of Jagatsinh. The suggestion that he and his deceased brother and the rest of the accused as referred in I-C.R. No.4/09 had together gone in front of the house of Jagatsinh to assault Pravinsinh was denied and the complainant also denied the suggestion that since his brother-Rajendrasinh sustained injury by his dharia, and therefore, when he was taken to the hospital, the complainant had not given any names, the description of any person or their address before the Doctor. The complainant denied that after taking his brother to Ahmedabad, he came back to Salal and

thereafter, he and his family members, Prahladsinh and others, after setting together for false implication, had given the complaint at the Police Station. He affirmed that Prahladsinh, his paternal uncle is an Advocate and his sister Varshaben as well is an Advocate. He denied the suggestion that the complaint was given by Prahladsinh.

29. In the further cross examination, the complainant affirmed that police had seized dharia by way of panchnama from him, but the complainant denied the presence of blood stains on the seized dharia. He affirmed that the time he had given the complaint and thereafter, while recording of his statement by the police and during the panchnama, he was knowing about the presence of the accused at the time of the incident of quarrel regarding way. He denied the suggestion that in spite of knowing such facts he has not got it recorded in his complaint or in his further statement before the police.
30. The complainant witness was referred to complaint-Exhibit 76, his statement dated 04.01.2009 and statement dated 26.01.2009, before the Police and on reading, he stated that in his complaint as well as the statement, he has not got it recorded that all the accused were present at the time of the quarrel, with regard to the road.

31. The case that has come on record is of two incidents i) the quarrel between the women with regard to the way and the said issue settled by Jagatsinh. That incident had occurred at 4.00 p.m.; ii) the 2nd incident at about 6.30 p.m., where the allegation is of giving dharia and sword blow on the head of complainant's brother.

31.1 As per the complainant, both the blows were on the head of his brother, while the medical evidence records one incised wound on the head and CLW below the right side of the abdomen. The accused have placed two defence :- i) that the injury on the head was by the complainant himself while he was trying to beat Pravinsinh with a sickle (dharia) but since Pravinsinh moved aside, the sickle blow landed on the head of Rajendrasinh (complainant's brother) ii) another is the plea of self-defence with the allegation that the complainant and deceased brother had come with dharia in their hands to assault the accused.

31.2 The relevant aspect to bear in mind was the long drawn hostility of both the families which run from the same branch and the second incident is shown to be avenging the grudge which was owing to the first incident.

31.3 The complainant has admitted carrying dharia with him, his statement before the police was that he was carrying the dharia by way of self defence. The complainant has initially affirmed of such a statement being given before the police but then stated that it was not voluntarily narrated by him, but the police on its own had written the said fact. The cross case has been registered against the complainant and another seven accused and in that case, the police had seized dharia from the complainant. The complainant has affirmed that there was settlement of the first incident by Jagatsinh who had visited his house.

32. For the second incident, the complainant stated that he was at a distance of 10 feet from deceased-Rajendrasinh and that he had intervened to rescue Rajendrasinh which according to him, efforts were made by his hands. Apart from them, he had not done any other activity. The complainant-witness does not remember how he had tried to release his brother with his hands. According to the complainant, at that time, he as well as his brother were assaulted. He suffered simple injuries and therefore, he had not gone for immediate treatment. His wife and his son and Rajendrasinh's wife had not suffered any injuries. According to the complainant, he picked up Rajendrasinh from the place, and made him sit in his four wheeler and took him to the dispensary. The

complainant is not making mention of PW11 here, who could have accompanied by driving the car.

32.1 The evidence of the complainant brings the presence of his wife, his son and the wife of the deceased. However, they all had not sustained any injury.

32.2 The incident is alleged by the complainant to have taken place near his house and in the cross examination, he has affirmed of knowing the fact of pool of blood, in front of the house of Jagatsinh, even at the time of complaint and at the time of giving both the statements before the police and at the time of panchnama. The complainant affirmed that he had not got it recorded in the complaint as well as in his statements about the blood splattered in front of the house of Jagatsinh. So now, the evidence would prove the fact that the complainant had suppressed this evidence, his admission of a large collected puddle of blood in front of the house of Jagatsinh would bring the place of incident in front of the house of Jagatsinh.

32.3 In the cross examination it has been asked about the utterance of Jaydeepsinh Jagatsinh to the deceased-Rajendrasinh being in a singular form, where Jaydeepsinh told Rajendrasinh that he had become '*dada*', while the complainant in the examination-in-chief

has referred to the utterance in plural form as that '*they all had become dada.*' A contradiction has been brought on record that he had not got it recorded in the complaint that after Jaydeepsinh had asked Rajendrasinh to stand there, Jaydeepsinh had also told the deceased that he would bring Pravinsinh Vajesinh (A-1) there. The complaint was also challenged, whereby complainant affirmed that he had not narrated in the complaint about them being 'all together', and had also not narrated the fact that Indrajitsinh had given a blow with an iron strip on the back of the body.

33. Before the Doctor, at Himmatnagar Civil Hospital, when the complainant was asked about the incident, he informed the Doctor that it was a case of fight. The admitted position is that the complainant had not named the accused before any of the Doctors. The medical evidence is referred to for the purpose of corroboration. The fact of both the incidents are not denied by any of the side. The presence of the accused in the second incident also becomes an admitted position in view of the cross complaint filed from the accused's side.

33.1 In the case of **Solanki Chimanbhai Ukkabhai v. State of Gujarat** reported in (1983) 2 SCC 174, it has been laid down that in a criminal trial, testimonies of eye witness would be preferable to medical evidence unless

the medical evidence rules out the eye witness version.

It has been observed in Paragraph 13 as under :

"Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye witnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries: taking place in the manner alleged by eye witnesses, the testimony of the eye witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence."

33.2 Before the Doctor, the complainant has referred of his brother sustaining injuries from the opponent. The complainant had not given the names of the accused before the Doctor. It is not mandatory to give names of the accused to the doctor, however such facts can be used by the accused to support their defence. The earliest disclosure of the name of the accused can help the prosecution to bring authenticity to the trial.

34. The place of incident as per the accused was the area, in front of the house of Jagatsinh which the complainant himself has admitted in his cross examination by way of referring to the blood collected in front of the house of Jagatsinh and in spite of knowing the said fact, he had suppressed it while giving the complaint as well as during his two statements recorded by the police which gets corroborated by the complainant's own evidence while

denying that in front yard of his own house, there was a pool of blood. If the incident had occurred near his own house, then the definite case of the complainant would be of blood splattered or collected in front of his house. The complainant had shown the place of incident to the police on 04.01.2009 at about 9.00 in the morning and he affirmed that he was present there and during the panchnama, he had not shown the police the front yard of his house. The complainant has affirmed that during the incident persons from the accused side were injured and the said fact was not informed by him to the police. The complainant affirmed that at the incident, he, his wife, his son and wife of the deceased had sustained no injury.

35. In the incident, except the deceased, from the complainant's side, none suffered any injuries. While from the accused side, Bhupendrainsh, Indrajitsinh and Pravinsinh got injured. The complainant however, denied the suggestion that when his brother-Rajendrasinh was brought at Himmatnagar Civil Hospital for treatment, at that time, Bhupendrasinh and Indrajitsinh were also brought for treatment at Civil Hospital, Himmatnagar. The injuries suffered by the accused is the confirmation of their presence at the time of the incident. Both side suffered injuries.

36. The defence raised was that complainant was trying to assault Pravinsinh with the dharia, who moved aside, thus, the dharia blow landed on the head of complainant's brother-Rajendrasinh, such plea does not get proved where accused projected the case of single blow, ignoring another injury at the abdomen, and further, no witnesses have affirmed any such injury caused by such alleged accidental blow by the complainant on the deceased. The accused is also required to explain the injury sustained by the deceased as CLW below the right side of the abdomen 1x0.5 cm deep. The evidence of Dr. Vipul Sanatkumar Jani-PW7 is that the head injury was not because of dharia, but was an injury by a sword. Hence, the defence raised of the injury suffered by the deceased at the hands of the complainant gets ruled out. In view of the evidence of Medical Doctor as well as the evidence of the complainant, corroborated even by the wife of the deceased the injury to the deceased during the incident gets proved.

37. Wife of deceased was examined as PW12-Jyotsanaben Rajendrasinh Parmar has stated about the incident and according to her, Pravinsinh (A-1) had given a dharia blow on the head of her husband and Tejendrasinh (A-2) had given a blow by the sword on the head. Jyotsanaben Rajendrasinh Parmar, wife of the deceased as PW12 had not seen any of the accused sustaining any injury during

the incident. The defence has tried to impress during the cross examination that the wife of the deceased was mentally ill and that she was sustaining her life by the assistance of her father-in-law and the complainant. Though the fact would be relevant to consider, but in our Society parents-in-law supporting a daughter-in-law cannot be considered a very strong evidence to dilute the fact to conclude that the daughter-in-law was under such an influence to allow the real culprit to escape. Such a fact would not overthrow the evidence which has come on record more particularly, when the accused themselves had sustained injuries during the incident. The case becomes clear by way of evidence that accused No.1-Pravinsinh Vajesinh was having dhariyu in his hand, and accused No.2-Tejendrasinh Jagatsinh Parmar was having sword in his hand. The trial Court has not believed the case of injury with an iron strip by Indrajitsinh Bhupendrasinh, who as per the defence case was injured during the incident. Even his father-Bhupendrasinh Pratapsinh was injured and Pravinsinh Vajesinh (A-1) too sustained injury in the incident.

38. Section 149 of the IPC was invoked against nine accused. The trial Court had convicted the present two appellants as original accused No.1 and 2 and the conviction was only under Section 302 of the IPC and Section 135 of the BP Act. Both the appellants as accused No.1 and 2 had been given the benefit of doubt and were released as

innocent for the offences under Sections 147, 148, 149, 323, 504 and 506(2). So the trial Court had not believed any nexus between the common object and the offence committed. It was not believed that the offence was committed to accomplish the common object. Had it been so, every member of the assembly will become liable for the offence. Inference of common object has to be drawn from various factors such as the weapons with which the members were armed, their movements, the acts of violence committed by them and the result. It is well established that once a membership of an unlawful assembly is established, it is not incumbent on the prosecution to establish as to whether any specific overt act has been assigned to any accused. Mere membership of the unlawful assembly is sufficient. Even the presence in the unlawful assembly, but with an active mind to achieve the common object makes such a person vicariously liable for the acts of the unlawful assembly. Common object may form on the spur of the moment. Prior concert in the sense of meeting of unlawful assembly members is not necessary. To determine the existence of common object, the Court is required to see the circumstances in which the incident had taken place and the conduct of the members of unlawful assembly including the weapon of offence they carried or used on the spot.

39. Here in the present case, the complainant had tried to show the place of offence as a frontyard of his own house where his brother was allegedly standing and Jaydeep Jagatsinh Parmar came there keeping the grudge of the earlier incident which took place between the women where one of the ladies was Jaydeep's mother. While according to the complainant, Jaydeep's father-Jagatsinh thereafter had visited the house of the complainant to settle the dispute and according to the complainant as well as the witness-Geetaben, the wife of the complainant, no grudge remained since the dispute was resolved by Jagatsinh. If that circumstances is to be considered, then Jaydeep Jagatsinh Parmar had no reason to come in front of the house of the complainant. While the defence version was that the complainant after hearing about the earlier quarrel from his wife Geetaben, complainant-Kamalsinh got excited and carrying a curved peak sickle alongwith his brother-Rajendrasinh came near the house of Jagatsinh where Pravinsinh was standing there and the complainant and the deceased at that time, gave threats to Pravinsinh and abused him and keeping the grudge of the earlier quarrel, Kamalsinh raised the sickle to inflict blow on Pravinsinh, and since he dodged the blow and moved aside, the sickle blow landed on the head of Rajendrasinh.

40. The place of offence as per the complainant is the frontyard of his house where Jaydeepsinh Jagatsinh

brought all the accused. The prosecution case is that appellant-Pravinsinh Vajesinh had sickle and Tejendrasinh Jagatsinh had a sword, while Indraajitsinh Bhupendrasinh was carrying a iron strip. The trial Court has not believed any case against Indraajitsinh Bhupendrasinh and others against whom the allegation is that they too had beaten his brother. The injury to the deceased brother is shown in the front yard of the complainant's house. PW14-Samalbhai Maganbhai Patel had drawn the map of the place of incident placed at Exhibit 97. Referring to the map, the witness deposed that the place of incident was the place adjacent to the frontyard of Jagatsinh Punjsinh's house, the person who as per the complainant had come to his house to settle the dispute of the women. The complainant had not shown his presence in the front yard of his house where he states that the incident had taken place. The complainant, his wife-Geeta, his son-Yuvrajsinh, the deceased Rajendrasinh's wife-Jyotsana had come only after Rajendrasinh had fallen down on the ground. The defence had brought through the evidence of the complainant that he was holding a sickle in his hand which the complainant states that he was holding it for self defence. The case as projected by the complainant as per his testimony does not show his presence at the time of the incident with a sickle in his hand.

41. The case of the accused that the incident had taken place in front of Jagatsinh Punjsinh's house gets corroborated from the sketch drawn by PW14 with his own testimony in the cross examination. The sketch-Exhibit 97 shows two spots where the witness has recorded the presence of blood. Between the two places, are the houses of Vajesinh Punjsinh and Parbatsinh Punjsinh, while the house which has been shown of Jagatsinh Punjsinh in the sketch shows the blood stains on the road quite adjacent to the frontyard of Jagatsinh Punjsinh's house. The witness-PW14-Samalbhai Patel had affirmed that he had not verified the ownership of the house shown to be in the name of Kamalsinh Jasvantsinh. The evidence by way of the sketch contradicts the deposition of complainant where according to the evidence of PW14, the place of incident is the place adjacent to the frontyard of Jagatsinh Punjsinh's house. The blood stained soil as per the panch witness-PW3-Lalji Parmar was collected from the place in front of house of Jagatsinh as recorded in panchnama-Exhibit 74. Thus, from the record it gets proved that the place of incident was the road adjacent to the frontyard of Jagatsinh's house. Thus, the case of accused coming at the complainant's house is not believable.
42. Here in this case, Jagatsinh had not been examined as a witness who as per the complainant was the person who had come to his house to settle the dispute of the

women. The case of the prosecution also does not become believable that Jaydeep Jagatsinh Parmar had come near the complainant's house and had called the deceased a head strong person and asked the deceased to stand there, when he would go and call the other associates and thereafter, all the accused had come with the alleged weapons to hit deceased-Rajendrasinh. It would be unbelievable that after Jaydeep Jagatsinh Parmar left the place, deceased-Rajendrasinh would have stood there idle and had waited for the assailants to come there. In non-examination of Jagatsinh Parmar, it could be believed that after hearing about the first incident of quarrel from his wife-Geetaben, complainant would have gone near the house of Jagatsinh Parmar and as has come on record, complainant was carrying a sickle in his hand. In the cross complaint, eight accused faced the trial in Sessions Case No.24 of 2010. The same Investigating Officer had investigated both the complaints. The presence of eight persons from the complainant's side and nine from the accused's side at the place of incident has been brought by the Investigating Officer. There is no denial of sickle in the hands of complainant since the weapons in the hands of the other co-accused of Sessions Case No.24 of 2010 are not the part of the evidence of the present trial, the case of sudden fight in the heat of passion upon a sudden quarrel becomes proved as the case of premeditation between the accused of the present matter does not get

proved. It appears that the complainant and the deceased brother with others and the present appellants as accused alongwith other acquitted accused must have met in front of Jagatsinh's house and the quarrel got converted into sudden fight where the complainant is shown to be armed with sickle and appellant accused No.1 Pravinsinh Vajesinh was with a sickle and appellant accused No.2 Tejendrasinh Jagatsinh was armed with sword. The Investigating Officer-PW18-Attabhai Chaudhary evidence proves that it was a case of open fight between two groups and the evidence of the IO-Shri. Chaudhary also proves the place of offence where he could also record the complaint of Bhupendrasinh in Civil Hospital, Himmatnagar where Bhupendrasinh and his son were under treatment. The Investigating Officer had affirmed that there was no blood or any noticeable sign on the road upto the house of complainant-Kamalsinh where Kamalsinh had alleged that his brother was dragged till the distance of 52 feet. The panchnama of place of offence in the present case as well as the cross case were common. The Investigating Officer had affirmed that the accused of the present matter Pravinsinh, Bhupendrasinh and Indraajitsinh were injured while on the opposite side only Rajendrasinh sustained injury.

43. Exception (4) to Section 300 of IPC considers culpable homicide as not murder if it is committed without

premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taking undue advantage or acted in a cruel or unusual manner.

44. Here the case of sudden fight upon a sudden quarrel becomes proved. There appears to be no premeditation from accused. The case of the complainant of inflicting injury on the head with sickle as well as sword does not get proved. There is only one head injury. The medical evidence records another one injury at the abdomen. The prosecution case is of weapon in the hands of A-1 and A-2 and that the weapon as iron strip in the hands of A-3 had not been believed. Therefore, in that circumstances, the trial Court had believed the case against A-1 and A-2.

45. The accused have claimed self defence on the ground that the complainant and others had come at the place near Jagatsinh's house with weapons and therefore, in self defence they had raised their weapon to resist. Such a defence has not been raised in 313 Cr.P.C. statement of the accused. Appellant accused No.1-Pravinsinh Vajesinh Parmar stated in his statement that on 02.01.2009, at 6.30 when complainant-Kamalsinh came to his house, his wife Geetaben informed him about the earlier quarrel between the ladies and complainant-Kamalsinh got excited with dharia in his hand, alongwith

his brother deceased-Rajendrasinh came near the house of Jagatsinh where Pravinsinh was standing and they gave nasty abuses and threatened him and with a dharia complainant moved to hit Pravinsinh but accidentally as Pravinsinh dodged the blow, it fell on the head of Rajendrasinh and during that period, in that quarrel Prahladsinh, Karansinh, Kiransinh, Surajsinh and Dharmendrasinh came running there and while they interferred in the quarrel to release them, Pravinsinh, Bhupendrasinh and Indrajitsinh sustained injury on head, leg and on different parts of the body and such injury was also suffered by Rajendrasinh. Even appellant accused No.2-Tejendrasinh Jagatsinh Parmar in his further statement under Section 313 Cr.P.C. has reiterated the same version.

45.1 The statement given under Section 313 Cr.P.C. shows the presence of complainant and deceased-Rajendrasinh. This statement of both the appellants do not bring the presence of any other person accused in the cross-case. The defence is for the present case where both the appellants as an accused has defended the blow on the head of the deceased, where the defence is that the sickle blow by the complainant accidentally landed on the head of his own brother-the deceased. This version raised is probably to put a defence in the present matter so as to project the injury to the deceased on the head suffered not at the hands of the

accused but at the instance of complainant himself. As noted earlier, the accused could not explain the injury on the abdomen of the deceased, further the present appellant as accused had not made any clarification about the injuries suffered by the co-accused Bhupendrasinh, his son-Indrajitsinh and injuries sustained by the appellant-Pravinsinh. In absence of explanation from the present appellants as accused, the case of giving the blow to the deceased in self defence cannot be believed as onus on accused has not been discharged. The principle of law with regard to self defence has been referred by making reference to various judgments in the judgement of **Mohd. Khalil Chisti v. State of Rajasthan**, (2013) 2 SCC 541 : (2013) 2 SCC (Cri) 634 : 2012 SCC OnLine SC 1036 at page 556, referred by learned advocate Mr. Japee. The relevant observations of the judgments are reproduced hereinbelow :-

"35. In Krishnan v. State of T.N. [(2006) 11 SCC 304 : (2007) 1 SCC (Cri) 437] , the following principles have been relied on: (SCC pp. 311-13, paras 15-17)

"15. It is now well settled that the onus is on the accused to establish that his action was in exercise of the right of private defence. The plea can be established either by letting in defence evidence or from the prosecution evidence itself, but cannot be based on speculation or mere surmises. The accused need not take the plea explicitly. He can succeed in his plea if he is able to bring out from the evidence of the prosecution witnesses or other evidence that the apparent

criminal act was committed by him in exercise of his right of private defence. He should make out circumstances that would have reasonably caused an apprehension in his mind that he would suffer death or grievous hurt if he does not exercise his right of private defence. There is a clear distinction between the nature of burden that is cast on an accused under Section 105 of the Evidence Act (read with Sections 96 to 106 of the Penal Code) to establish a plea of private defence and the burden that is cast on the prosecution under Section 101 of the Evidence Act to prove its case. The burden on the accused is not as onerous as that which lies on the prosecution. While the prosecution is required to prove its case beyond a reasonable doubt, the accused can discharge his onus by establishing a preponderance of probability (vide Partap v. State of U.P. [(1976) 2 SCC 798 : 1976 SCC (Cri) 303] , Salim Zia v. State of U.P. [(1979) 2 SCC 648 : 1979 SCC (Cri) 568] and Mohinder Pal Jolly v. State of Punjab [(1979) 3 SCC 30 : 1979 SCC (Cri) 635]).

16. In *Sekar v. State* [(2002) 8 SCC 354 : 2003 SCC (Cri) 16] this Court observed: (SCC p. 355B-d)

'A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find out whether right of private defence is available or not, the injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities

are all relevant factors to be considered. Whether in a particular set of circumstances, a person acted in the exercise of the right of private defence, is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the court to consider such a plea. In a given case, the court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record.'

17. The above legal position was reiterated in Rizan v. State of Chhattisgarh [(2003) 2 SCC 661 : 2003 SCC (Cri) 664] . After an exhaustive reference to several decisions of this Court, this Court summarised the nature of plea of private defence required to be put forth and the degree of proof in support of it, thus: (SCC pp. 670-71, para 13)

'13. ... Under Section 105 of the Evidence Act, 1872, the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the court to presume the truth of the plea of self-defence. The court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses

examined for the prosecution. An accused taking the plea of the right of private defence is not required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. When the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. ... The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea."

46. Though it is not necessary for the accused to prove the existence of right of self defence beyond reasonable doubt, the plea is required to be established either by letting defence evidence or from the prosecution evidence itself. The plea of right of private self defence should be made out from the circumstances that would have reasonably caused an apprehension in the mind of the accused that he would suffer death or grievous hurt if

he does not exercise his right of private defence. The accused can discharge his onus by establishing his right by way of preponderance of probability. A plea of private defence cannot be based on surmises and speculation. It is not the case of the present both the appellants that they had any threat to their safety and it is also not the case that they had given the blow to deceased-Rajendrasinh since he had come forward to hit the present appellant with deadly or dangerous weapon. Under Section 105 of the Evidence Act, the burden of proof is on the accused who sets up the plea of self defence. The Court shall presume the absence of such circumstances and it is for the accused to bring necessary material on record by adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. No such defence has been raised to the complainant witness or any other witnesses examined, where the prosecution apart from the complainant, had examined wife of the complainant-Geetaben Parmar as PW13, the wife of the deceased-Jyotsanaben as PW12 or Kishansinh Parmar-PW11 who had been examined as eye witness to the incident. Thus the plea of self defence would not be believable.

47. In context of the evidence recorded hereinabove, the only conclusion that could be drawn is of sudden fight

upon a sudden quarrel, where both the sides had come in front of the house of Jagatsinh and had raised weapons and in that quarrel, the acquitted accused No.3-Indrajitsinh Bhupendrasinh Parmar, accused No.9-Bhupendrasinh Pratapsinh Parmar, both son and father and the appellant-Pravinsinh Vajesinh Parmar suffered injuries and on the complainant's side, deceased-Rajendrasinh had suffered one injury on the head and one at the abdomen. In this background, it would be relevant to refer to the judgment in the case of **Raghubir Singh v. State of Rajasthan** [(2011) 12 SCC 235], where the observation in para 16 would become relevant which reads thus :

"16. In the light of the facts that have been enumerated above, it would be seen that the observations of the High Court that both sides had come to do battle appears to be justified as this is an assessment on an appreciation of the evidence which cannot be said to be palpably wrong so as to invite the intervention of this Court. The observation in Gajanand case [Gajanand v. State of U.P., AIR 1954 SC 695 : 1954 Cri LJ 1746] that in order to bring the matter within a free fight both sides have to come armed and prepared to do battle must be applied in the present case with the result that each accused would be liable for his individual act."

48. In the case of **Mohd. Khalil Chisti** (supra), on total observation of the evidence coupled with the proposition of law by citing various judgments summarizing the case, it was noted that analysis of the prosecution case had led

to two sets of evidence and finally, it was observed in Paragraph 42 as under :-

"42. The analysis of the materials clearly shows that two versions of the incident adduced by the prosecution are discrepant with each other. In such a situation where the prosecution leads two sets of evidence each one which contradicts and strikes at the other and shows it to be unreliable, the result would necessarily be that the court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Though the accused would have the benefit of such situation and the counsel appearing for the appellants prayed for acquittal of the appellants of all the charges, in view of the principles which we have already discussed, we are of the view that each accused can be fastened with individual liability taking into consideration the specific role or part attributed to each of the accused. In other words, both sides can be convicted for their individual acts and normally no right of private defence is available to either party and they will be guilty of their respective acts....."

49. It was also argued that it could be a case of single blow and thus, Section 302 of IPC would not be applicable. The judgment in the case of **Stalin** (supra), as referred by learned advocate Mr. J.V. Japee, was a case of single blow. The Hon'ble Apex Court was of the view from its various decisions, that there is no hard and fast rule, that in a case of single injury, Section 302 IPC would not be attracted and depends upon the facts and circumstances of each case. The nature of injury, the part of the body where it is caused, the weapon used in causing such injury, are the indicators of the fact, whether the accused caused the death of the deceased with an intention of

causing death or not. It cannot be laid down as a rule of universal application, that whenever the death occurs on account of a single blow, Section 302 IPC is ruled out. The fact situation has to be considered in each case, and the events which precede, will also have a bearing on the issue, whether the act by which the death was caused was done with an intention of causing death or knowledge that it is likely to cause death, but without intention to cause death. It is the totality of the circumstances, which will decide the nature of offence. As noticed earlier, the case would fall under Exception (4) of Section 300 of IPC.

50. In the judgment of **Sridhar Bhuyan v. State of Orissa, (2004) 11 SCC 395 : 2004 SCC OnLine SC 830 at page 396**, the Supreme Court observed as under :-

"7. For bringing in operation of Exception 4 to Section 300 IPC, it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

8. The fourth exception of Section 300 IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges

them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused : (a) without premeditation; (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or

not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

51. If prosecution case with witness version is believed, then the complainant and his wife (PW-13), son and wife of the deceased (PW12) were not the eye witnesses to the blow sustained by the deceased. The course of treatment to the deceased shows that the doctor was trying to control the flow of blood from the head injury. As noticed through medical evidence, there was only one injury on the head, while all the witnesses deposed of head injuries, one given by appellant A-1 with a sickle and another by appellant A-2 with a sword. The complainant and his wife and wife of the deceased all had given evidence that A-1 had given blow on the head with sickle and A-2 had given a sword blow on the head. Considering the case of free fight by two groups and under group clash, the deceased suffered injury on head and when Section 149 IPC does not become applicable, considering the injury suffered, the offence would be under Section 325 IPC. In view of the evidence, the discrepancy is about which accused gave the head blow. If the blow is by A-1, then it would be by sickle and if the blow is to be considered by sword as per the Doctor's

testimony, then it would be by A-2. In absence of Section 149 IPC, individual act of the accused are to be delineated. The complainant in context of the prosecution case cannot be considered eyewitness of the incident to the extent of accused having assaulted the deceased, complainant's presence becomes proved only after injured fell down. However, as analysed, the evidence suggest free fight between two groups, and in that case, the complainant becomes witness to the incident. The complainant had not disclosed the true facts and failed to explain the injuries suffered by the accused, there is suppression of the real genesis of the occurrence. Since the complainant failed to explain the injuries suffered by co-accused Bhupendrasinh, his son-Indrajitsinh and the appellant accused-Pravinsinh, the complainant cannot be believed that the accused were the aggressors. The evidence read in totality proves the group clash, it appears that in that group clash the complainant could not actually identify the inflictor of the injury suffered by his brother. The single injury on the head of the deceased, whether was by A-1 or A-2 had not been proved by the complainant or the witnesses. The injury whether was by sickle or sword that does not get clarified. As noticed that there was no premeditation on both the sides nor it is a case of a grave and sudden provocation to cause grievous hurt to the deceased. Conclusively, it was a sudden fight in the heat of passion upon a sudden quarrel. The weapons involved are sickle

and sword and considering them as dangerous weapons, it would become a case of voluntarily causing grievous hurt, hence, the conviction would fall under Section 325 of IPC with the exception under Section 335 of IPC. Though the conviction should be for the offence under Section 325 of IPC, but the individual act of accused A-1 and A-2 does not get proved, where the prosecution failed to prove through the witnesses the weapon with which the single grievous hurt on the head was sustained by the deceased. Appellant accused No.1 was armed with sickle, while appellant accused No.2 was holding a sword as weapon, and when the prosecution has failed to prove whether the single blow on the head was by appellant accused No.1 or appellant accused No.2, benefit of doubt is required to be given to the appellants.

52. The jail remarks suggest that accused-Pravinsinh Vajesinh Parmar was released on bail on 21.02.2023 on the sentence being suspended by Criminal Miscellaneous Application (For Suspension of Sentence) No.01 of 2023 in Criminal Appeal No.1604 of 2013. The sentence undergone is 13 years and 26 days alongwith the set off.
53. While the jail remarks of Tejendrasinh Jagatsinh Parmar shows that he had undergone 13 years, 6 months and 14 days imprisonment who was released on bail by an order dated 17.02.2023 in Criminal Miscellaneous Application

(Regular Bail) No.4 of 2022 in Criminal Appeal No.1080 of 2013.

54. In the conspectus of the analysis of evidence, it could be recorded that the conviction of both the appellants under Section 302 of IPC becomes faulty, contrary to the evidence on record. The learned trial Court Judge had acquitted the present accused and the co-accused under Section 149 of IPC not believing the case of unlawful assembly, committing offence in prosecution of the common object, then in that background, the learned trial Court Judge was required to examine the individual act of the accused prior to concluding order of conviction against the present appellants. The learned trial Court Judge failed to take this fact and provision of law into consideration to decide the guilt of the accused so as to attract Section 149 of IPC, it must be shown that the incriminating act was done to accomplish common object of unlawful assembly and when the learned trial Court Judge had concluded by acquitting the accused under Section 149 of IPC of non-existence of common object then the trial Court was required to see the circumstances alleging the individual act of the convicted accused in the incident by examining the weapon used to the injury suffered by the deceased. The prosecution failed to prove the specific act of the accused, corresponding them to the injury and the weapon used. When the injury on the head was with a single blow, then

the accused who gave that single blow was required to be identified to draw the conclusion towards the offence committed. The learned trial Court Judge has committed an error by convicting the accused. When the prosecution could not prove the sole blow on the head by a definite accused, then the present appellants-accused would be entitled for benefit of doubt. In failure of satisfactorily establishing the offensive act of the accused, the conviction is required to be set aside.

55. In the result, both the Appeals are allowed. The judgment and order of conviction and sentence dated 09.11.2012 of the learned 4th Additional Sessions Judge, Himmatnagar in Sessions Case No.79 of 2009 is set aside. The appellants are acquitted of all the charges levelled against them. Bail/bail bond, stands discharged. The amount of fine paid, if any, be refunded to the appellants herein. Record and proceedings, be sent to the concerned Trial Court forthwith.

Sd/-
(GITA GOPI, J)

Sd/-
(L. S. PIRZADA, J)

CAROLINE / DB # 1