

2017 (0) AIJEL-HC 237973

GUJARAT HIGH COURT

Hon'ble Judges: Akil Kureshi and Biren Vaishnav JJ.

Samir Sirajbhai Pathan Versus State Of Gujarat

CRIMINAL APPEAL No. 2049 of 2010 ;
CRIMINAL APPEAL No. 331 of 2011 ;
CRIMINAL APPEAL No. 75 of 2011 ; *J.Date :- AUGUST 11, 2017

- CODE OF CRIMINAL PROCEDURE, 1973 Section - 378
- INDIAN PENAL CODE, 1860 Section - 302 , 307
- EVIDENCE ACT, 1872 Section - 3 , 27

Code of Criminal Procedure, 1973 - S. 378 - appeal against acquittal - scope of acquittal appeal - (1) Appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded - (2) Code of Criminal Procedure puts no limitation, restriction or condition on exercise of such power and an Appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law - (3) various expressions, substantial and compelling reasons, good and sufficient grounds, very strong circumstances, distorted conclusions, glaring mistakes, etc. are not intended to curtail extensive powers of an Appellate Court in an appeal against acquittal - such phraseologies are more in the nature of flourishes of language to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion - (4) however, Appellate Court must bear in mind that in case of acquittal, there is double presumption in favour of the accused - presumption of innocence available to him under fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law - accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the Trial Court - (5) if two reasonable conclusions are possible on the basis of the evidence on record, the Appellate Court should not disturb the finding of acquittal recorded by the Trial Court.

Indian Penal Code, 1860 - S. 302 - acquittal in murder case - evidence of witness - witness had criminal past - incident did take place in which the utility vehicle in which 'R' and others were travelling and after chasing down the vehicle it was fired upon, is simply not possible to deny - scene of the incident panchnama, damage to the vehicle showing multiple bullet marks on the window glass and doors and the broken windshield are testimonies of this incident - further, defence has been able to bring the

criminal past of this witness on record through his cross examination - that by itself would not mean that his entire testimony must be discarded about the manner in which very clearly the evidence suggests chasing down of the vehicle and being fired upon - insofar as the reference by this witness to the presence and involvement of three accused is accepted - further, name of this three persons were mentioned in the FIR - as per his version 'J' also got down from the car along with other three accused who arrived first - therefore, it is not possible to believe that witness would have forgotten to mention about such an important detail in the FIR.

Indian Penal Code, 1860 - S. 302 - Evidence Act, 1872 - S. 3 - testimony of witness - a person running away from scene under threat - held, insofar as reference to accused who arrived at the scene later on, version of witness cannot be accepted - in the cross examination, he agreed that he knew few of them but did not name them in the police statement - his identification of unknown accused would also be extremely unreliable since as noted earlier, when a person is under threat and is trying to run to save his life, it is unlikely that in a fraction of a moment, at the peak of excitement, he would have either time or even the presence of mind to register the faces of large number of assailants to recognize them later.

Indian Penal Code, 1860 - S. 302 - Evidence Act, 1872 - S. 27 - conviction of accused no. 7 - only piece of evidence to link this accused was discovery of firearm which according to the ballistic report could have been used for firing fatal bullets - discovery statement is admissible in evidence with the aid of S. 27 of Evidence Act - however, mere discovery cannot be a sufficient proof of the involvement of an accused - discovery can at best be a corroborative piece of evidence - therefore, conviction qua accused No. 7 set aside.

Indian Penal Code, 1860 - S. 302, 307 - murder due to political rivalry - use of firearms - not only three people involved in the incident - manner in which murderous attack was carried out is testimony of prior planning and therefore, proof of conspiracy - therefore accused No. 1 3 and 4 are to be convicted for offences punishable u/s 302, 307, 143, 147, 148 34, 120B and 201 of IPC and S. 25(1A), 25(1B) and 27 of the Arms Act and S. 135 of the Bombay Police Act - therefore, acquittal of accused No. 1, 3 & 4 reversed - acquittal of the rest of the accused confirmed - appeals disposed of.

Imp.Para: [29] [37] [40] [49] [51]

Cases Referred To :

1. Chandrappa And Ors. V. State Of Karnataka, 2007 0 AIR(SCW) 1850

Equivalent Citation(s):

2017 (3) RCR(Cri) 953 : 2017 JX(Guj) 668

JUDGMENT :-

AKIL KURESHI, J.

1 After completion of the arguments in these appeals, we had reserved the pronouncement of judgement. When the appeals were taken up for pronouncement of judgment, learned advocate Mr. Pawan Barot for Mr. P.B. Khanderia informed us that Digvijaysinh Balvantsinh Jadeja (original accused no.6) expired on 2.7.2017. He shall produce the death certificate on record by 31.8.2017. In view of this development, the State appeal as well as the appeal of the complainant qua original accused no.6 would abate.

2 These appeals arise out of a common judgment dated 1.11.2010 rendered by the learned Additional Sessions, Rajkot in Sessions Case no.88/2006. As many as 16 accused were tried for offences punishable under sections 302, 307, 143, 147, 148 34, 120B and 201 of the Indian Penal Code and sections 25(1A), 25(1B) and 27 of the Arms Act and section 135 of the Bombay Police Act. Learned Judge acquitted all the accused, except accused no.7 Samir Sirajbhai Pathan. He was convicted for offences punishable under sections 302 and 341 of the IPC, section 135 of the Bombay Police Act and sections 25(1A) and 25(1B) of the Arms Act and sentenced to life imprisonment. The convicted accused no.7 has filed Criminal Appeal No.2049/2010 challenging his conviction and sentence. Original complainant Jayesh @ Pancha Muljibhai Satodiya has filed Criminal Appeal No.331/2011 challenging the acquittal of the accused. The State has preferred Criminal Appeal No.75/2011 also challenging the acquittal of the accused.

3 Briefly stated, the prosecution version was that there was a long standing rivalry and bitter disputes between the two factions belonging to the same political party. There were previous violent incidences due to this. The incident took place in the city of Gondal. On 8.2.2004 at about 10 O' clock, witness Ramjibhai Pragjibhai Marakna was travelling in his utility jeep car along with complainant Jayesh @ Pancha Muljibhai Satodiya and deceased Nilesh Mohanbhai Rayani. Their car was chased by other vehicles and intercepted. Ramjibhai Pragjibhai who was till then driving the vehicle immediately realised the seriousness of the situation and told Nilesh Rayani, his younger companion, to take over the driving. Nilesh took the driver's seat and drove the vehicle ignoring the obstacles created by the intercepting vehicle. His car dashed against the vehicle and in the process, he lost control and his vehicle banged against the road side railing. Thereupon, all the assailants got down from different vehicles. They were armed with firearms and other deadly weapons such as sword, hockeysticks, etc. They fired on the vehicle. Complainant Jayeshbhai and witness Ramji Pragji escaped by jumping out of the vehicle through the broken windshield. The assailants indiscriminately fired at Nilesh Rayani causing his death. It appears that his dead body was thrown at an isolated place a little distance away.

4 We may record the gist of the evidence. Jayesh Muljibhai Satodiya, PW41, exh.465, was the first informant and also an eyewitness. He deposed that he is a resident of Gondal. On the night of the incident i.e on 8.2.2004 after dinner, he was at a Paan shop near his house talking to his friends. At that time, Ramjibai Pragjibhai Marakna (PW42), came there along with Nilesh Rayani, the deceased, in his white coloured utility car. With

them he went to Kanya Chatralaya on the highway. At the Chatralaya, Ramji called one Vitthalbhai Dhaduk outside by giving a phone call. He did not know what conversation took place between them since he was standing a little distance away. From there in the utility car, they started going towards Rajwadi area. Car was being driven by Ramjibhai. He was sitting next to Ramjibhai. Nilesh was occupying the back seat. At about 10 O' clock at night, near Devpara Central talkies, one Indica car overtook their vehicle and dashed against it and stopped in front of the vehicle. Ramjibhai got down and sat in the back seat telling Nilesh to drive saying that they had been attacked. Nilesh drove the car and banged against the vehicle in the front. When they reached Mandvi chowk, a Bolero car came and banged against their car, upon which, Nilesh lost control over the steering. Their car dashed against the railing near Moghiba school. The windshield broke. At that time, in a big car, Jayrajsinh Jadeja accused no.1, Jayanti Dhol accused no.2, Amarjitsinh Jadeja accused no.3 and Bhagat Rana accused No.4 came there and these four people got down. They had weapons and guns in their hands. Jayrajsinh fired on their utility vehicle. He and Ramjibhai got out from the windshield portion and jumped from the bonnet and ran towards the town hall. While they were running, they saw that a Bolero car had arrived there from which three to four people got down. From another car, four more people came. They were all carrying arms such as sword, baseball bat, etc. These people covered the utility vehicle. They (i.e himself and Ramjibhai) hid themselves in the town hall where they remained for about one hour. Ramjibhai's legs were broken and was unable to walk. When he was going to his house in an autorickshaw, on the way, he met Vinubhai to whom he narrated the incident. Vinubhai took him in the car to bring Ramjibhai. On the way, they met the policemen in a jeep. They all went to the town hall and rescued Ramjibhai. From there, Vinubhai took Ramjibhai to Rajkot hospital. He went with the police to the Gondal police station where he learned that Nilesh was shot and his dead body was thrown near the Mamlatdar's office. His FIR was registered which was produced at exh.430. At the time of recording of the FIR, he was extremely scared and had therefore, not given certain details which were recorded in his further statement. He was called for test identification parade thrice and had identified the accused.

In the cross examination, the credibility of the witness was sought to be impeached by pointing out that he was involved in cases of bootlegging. He and his brother both were involved in a murder case. He was also questioned on certain interim proceedings filed before the High Court when the trial was going on in which he himself was the petitioner. It was pointed out that he had filed a petition before the High Court for transfer of the Sessions trial before another Sessions Judge. He was also questioned on the precise nature of the firearms carried by accused Jayrajsinh and others. He was questioned whether such weapons were guns or double barrel guns or a smaller firearm.

He was questioned on the time of the incident of around 8 O' clock given in the FIR. He stated that this was not correctly recorded by the police. He denied that since the main accused Jayrajsinh at that time was present in a public function, he had attempted to change the time of the incident. To the question, whether he had seen anyone injuring Nilesh by firing, he stated that he had seen the accused firing but had not seen Nilesh getting injured. He was also confronted with certain improvements in his deposition as compared to the FIR. Significantly, in his FIR, he

had given the names of three accused who had got down from the car namely, Jayrajsinh Jadeja, Amarjitsinh Jadeja and Vikramsinh Rana's brother Bhagat. This was in contrast to his deposition before the Court where he had added the fourth name of Jayanti Dhol.

He agreed that these assailants had not run after him nor assaulted him and Ramjibhai when they were running towards the town hall.

He agreed that he had not seen Nilesh get down from the car trying to run. Though he knew Ratilal accused no.16 since long before the incident, he had not given his name in the FIR.

5 In the FIR exh.430, this witness had referred to three accused by name i.e. Jayrajsinh, Amarjitsinh and Bhagat who had first come out of the car with firearms. He had referred to some 10 to 12 other persons arriving in cars with deadly weapons. The time of the incident given was 8 O' clock.

6 Ramjibhai Pragjibhai Marakna, PW42, exh.493, was also an eyewitness. He deposed that Vinubhai Shingala was his cousin brother. He was looking after the agricultural field of Vinubhai Shingala at Rajwadi, Gondal, after Vinubhai purchased it from Gunadityasinh, exruler of Gondal. The incident took place at about 10 O' clock at night on 8.2.2004, at the Central chowk, Gondal. There was a programme in Patel Girls' hostel. Though he was a Patel, he was not invited. Instead Jayrajsinh Jadeja was invited. He therefore, had given a call to Vitthal Dhaduk at 8:30 at night and insisted that he would attend the function. Vitthalbhai told him not to come. After that, he and Nilesh Rayani started in his utility car to go to Chatralaya. On the way, they picked up Jayesh Satodiya from a Paan stall. After reaching the place, he called Vitthal Dhaduk outside who refused to let him in the programme. The three of them therefore, from there, started to go towards Rajwadi in their utility car. At that time, he was driving the vehicle. At about 10 O' clock, they saw three cars following them. One of them a Indica car overtook his vehicle and banged against it in the front. He stopped his car and gave the steering to Nilesh Rayani telling him to drive quickly because they had been attacked. Nilesh drove the car. A Honda city car, went past their vehicle. At the Central chowk, one Bolero car came and dashed against their vehicle, upon which, Nilesh lost the control. From the Honda city car, four people Jayrajsinh Jadeja, Amarjitsinh Jadeja, Vikramsinh Rana's brother Bhagat Rana and Jayanti Dhol got out with weapons. Jayrajsinh, Jayanti and Amarjitsinh had pistols or revolvers. Bhagat had a gun. All four started firing on their vehicle. The car had stopped after dashing against a wall near Moghiba school. He and Jayesh Satodiya jumped out of the car through the front windshield and stopped near a crowd of people which had gathered near a teastall and saw that all these four people were firing on the vehicle. Soon from Bolero and Indica car, 10 or 12 people came with weapons. He saw that Nilesh was injured in the head from the bullet fired by Jayrajsinh. Jayanti Dhol's bullet hit him on the side. He then hid himself in the town hall.

He had injury on the legs and could not walk. He told Jayesh to reach home and inform someone. When he was sitting there, Jayesh Satodiya and Vinubhai Shingala came there. He was taken to a hospital at Rajkot in Vinubhai's car. He identified

before the Court the four accused Jayrajsinh Jadeja, Jayanti Dhol, Amarjitsinh Jadeja, and Bhagat Rana who had come with firearms and had fired. According to him, the assault took place because of the incident of Kanya Chatralaya where he had objected to Jayrajsinh being invited. He was called for test identification parade before the Mamlatdar on three occasions. He identified before the Court eight accused whom he had identified during such test identification parade also.

In the cross examination, he agreed that till he reached the town hall, he had not seen Nilesh get out from the car. When Nilesh was hit by the bullet, he was in the car but had not seen Nilesh being assaulted with any other weapons such as sword, baseball bat etc. When he was running away, no one had chased him with the firearms.

After this incident, the incident of murder of Vinubhai Shingala took place in which he was an eyewitness. One of the assailants in the said case is Gopalsinh who is also an accused in this case. He had not given the name of Gopalsinh to the police in the present case. Likewise, though he knew accused Jaypalsinh, Viramdevsinh and Ratilal, he had not named them in his police statement.

He was the owner of the utility car. Though he denied that he was not keeping any weapons in the car, could not explain how live cartridges and the weapons such as swords, sticks, etc. were found from his car. He agreed that Jayanti Dhol and other accused were supporters of Jayrajsinh and some of them were his relatives.

7 Dr. Kamleshbhai Popatbhai Talaviya, PW2, exh.193, was the orthopedic surgeon and had his private practise at Rajkot. He deposed that at about 3:40 in the morning of 9.2.2004, Ramjibhai Pragjibhai was brought to his hospital for treatment. He was carrying the following injuries :

"Injuries : bilateral fracture culcarium Abrasions upper half of skin of tibia...surface of tibia left side. Abrasion dorsum of MP joint right thumb and abrasion of PIP joint left middle finger. He was admitted on 9204 and discharged on 9204... below knee cut was given. Injuries as above are such could be caused by blunt substance and would normally take 12 to 16 week to heal if no complications arise."

He had plastered both his legs and discharged the patient on the same day. The fracture would take about three months to heal. He had issued injury certificate exh.194. He agreed that the injuries on the legs could be as a result of a person jumping from a height of about 4 feet. 2nd and 3rd injury could be caused by friction with a rough surface. Chances of such injuries resulting in an accident are less but the possibility cannot be ruled out.

In the cross examination, he agreed that from the history given by the patient, since it appeared to be a medico legal case, he had informed the Pragatinagar police station at about 3:50 in the morning by giving telephonic message. He had informed the police that Ramjibhai had received injuries while trying to run away from the utility car, upon which, firing had taken place. The police had arrived on the same day. He had brought the case papers which he produced at exh.197. He agreed that

the history was recorded by him as given by the patient. In the history, he had recorded as under :

"While travelling in the utility car, upon being fired, while trying to run away, near Central Cinema, Gondal."

He agreed that in such history, the names of the assailants were not recorded but pointed out that in the same document at a later place, the names have been mentioned. He denied that this portion was extrapolated.

8 Chandreshkumar Rughnathbhai Gadhiya, PW38, exh.335, claimed to be an eyewitness. He deposed that on the night of the incident at about quarter to 10 at night, he had gone to Eden Video to see a film with his friend Dileep Hansraj. Since the film was not good, they stopped at Khodiyar hotel for tea. Between 10 to 10:15 at night, he saw a utility car coming and seemed to have met with an accident. A Bolero car came and dashed against this vehicle, upon which, utility car's driver lost his control and dashed against the railing near Moghiba school. Then a long car arrived from which Jayrajsinh Jadeja, Jayanti Dhol, Amarjitsinh Jadeja, Vikramsinh Rana's brother Bhagat Rana got down. Three of them had revolvers and pistols, the fourth one Bhagat had a double barrel gun. They started firing on the utility car. One of the persons in the car was hit by bullet. Two people ran away towards the town hall lane. People started running. He and his friend also ran away. He identified the said four accused before the Court.

In the cross examination, he stated that he and his friend were taken to police by one Dileepbhai and moved around Ujjain for about 6 to 7 days. Jagdishbhai Muljibhai Satodiya was also with them. He agreed that one Ramjibhai was also there but said that he did not know that Ramjibhai's surname was Marakna though he had spent about seven days with him. They were arrested by the police when they were going from Ujjain to Gondal. Though Ramjibhai was with him during such trip, he did not realise that Ramjibhai was the same person who had escaped from the utility vehicle. He was confronted in his police statement in which apparently he had referred to Ramjibhai Marakna as the person who had escaped.

He agreed that he along with Jagdishbhai Muljibhai Satodiya, Ramjibhai Pragjibhai Marakna and Dileep Hansraj are accused in prohibition and bootlegging cases and that all four of them are the witnesses in the present sessions trial.

He was also confronted with yet another criminal case for offence under section 307 of the IPC, where he and Jayesh @ Pancha Muljibhai Satodiya were co-accused.

He agreed that they were in judicial custody after their remands were over and till they were released on bail, they were kept together in the jail.

He was also grilled on his statement that he had gone to see a film in the Eden Video cinema house. He stated that the show for which he had gone was an English film which started at 10 O' clock. He however, did not remember the name of the film or the actors, but did say that it was an English film which was dubbed. He

denied that on that day Eden Video cinema was exhibiting only Hindi film. In an answer to the question as to how much amount he had paid for the ticket, he said that since he did not find the film interesting, he had not entered the theater at all. Only from the poster and from what the people around were talking, he could make out that the film was not good. He however, agreed that in his police statement, he had said that upon seeing the film he did not like it.

9 Kanaksinh Harisinh Chudasma, PW3, exh.200, had a Paan shop near Central talkies at Jesing Kala chowk by the name Somnath Paan. He deposed that when he was at the Paan shop at about 8:30 to 9 at night, cars had come. One of them was white coloured jeep which had dashed against the wall near the Ladies school. People had gathered. He shut down the shop and ran away. He was declared hostile. In the cross examination by the Special Public Prosecutor, he agreed that his statement was recorded by the police on 10.2.2004, he could give some details since the incident was fresh. He had stated that his attention was drawn with the noise of the car banging against the wall. Since the people started running, he had shut down the shop. He did not support the police statement that while shutting down the shop he could hear about eight or nine firing sounds or that the incident had actually taken place at 10 O' clock at night.

10 Sanjaybhai Khodubha Chudasma, PW4, exh.201, had a STD PCO store at Jesing Kala chowk. According to him, he had heard a noise and then seen a vehicle banging at about 8:30 to 9 at night. He had shut down the store and left. He was also declared hostile. In the cross examination, by the Special Public Prosecutor, he agreed that the car had banged against the railing near Moghiba school which was at a distance of about 15 to 20 feet from his store. He had come out to see what had happened upon hearing the noise of the car banging. He however, did not agree to his police statement that the incident had taken place at about 10 or 10:30 at night.

11 Rameshbhai Haribhai Sarvaiya, PW37, exh.325 was an employee at Somnath Paan shop. He had also heard the sound of utility car dashing against the wall near Moghiba school. He also turned hostile and did not support his police statement in which he had stated that after this, he heard the firing.

12 Geetaben Bhikubhai Solanki, PW35, exh.321, was doing labour work and residing in the hutments opposite Mamlatdar's office at Gondal. She deposed that on the night of the incident, she returned home in the evening after labour work. She was cooking in her house when she heard three or four loud noises, upon which, she came out and saw that one person was lying in front of the house. He was covered with blood. She then went to her father's house. She had seen two cars leaving from there. She had not seen the people inside the car. She was declared hostile and she was confronted with the police statement in which she had stated that these people in the car had threatened her not to open her mouth or that the incident had taken place at about 10:30 at night. She however, agreed that she and her father had gone near the dead body and her father had called the police.

13 Dhudabhai Chanabhai Solanki, PW7, exh.208, father of Geetaben, deposed that he lived at Balashram, near Mamlatdar's office. At about 8:30 at night, his daughter

Geetaben had come to his house and told him that one person was lying near the gate of Mamlatdar's office. She had heard some sounds and seen the two cars leaving. He tried to find some person with a mobile which took some time. Finally, he found a person with a mobile at about 10 to 10:30 at night. He did not know the number of the police but gave the number of a person in the police staff whose name was Vijaybhai. He spoke to Vijaybhai and told him about the incident. He was allowed to be questioned by the Special Public Prosecutor on the timing of the incident. It was suggested that the incident had taken place at about 10 O' clock and he was only changing the time to help the accused.

14 Dileepbhai Premjibhai Parmar, PW8, exh.210, was the person whose mobile phone, Dhudabhai PW7, had borrowed to make a call, He gave the time of this incident between 10 to 10:30.

15 Farukbhai Haji Hasanbhai Qureshi, PW5, exh.202, was the peon at the Government Rest house at Gondal. He deposed that he was on duty at the rest house from 8 O' clock at night. He was reading the newspaper in the lobby at about 10 O' clock. At 11 O' clock, Jayrajsinh and Amarjitsinh came there in a black car. He knew Jayrajsinh because he was the MLA of Gondal. About five minutes after these people arrived, Jayantibhai Dhol also came there. They were talking that some fight has taken place in the town and they should therefore, go away. Then all of them left. In the cross examination, he agreed that in the police statement, he had not given the time that Jayrajsinh or Amarjitsinh arrived at 11 O' clock but did not remember if he had given time of quarter to 10.

16 Dr. Rashmibhai Durlabjibhai Shukla, PW1, exh.188, had carried out the postmortem. In the postmortem note, exh.189, he had recorded the following injuries :

"(1) Wound of Entry :

A fire arm wound on (R) temporal region 3 cm above (R) Ear oval in shape with charring of wound margin and Hair. Margin inverted wound diameter 1/2 cm with burnt hairs swirling margin

(2) A clw over occipital region detressed area of 1 1/2 cm middle of occipital region CLW size 2.5 cm x 1 x bonedeeep detressed # of occipital bone would surrounded by dark blacklist red blood clott.

(3) wound of entry : A firearm wound over abdomen 1 cm below XY phisterning on epigastric region. wound margin blackishmargin is inverted, wound oval in shape size 3/4 cm x cavity deep covered - blood dark clotts.

(4) wound of exit : a firearm wound seen on back of chest at lower thoresic region at level of T 12 1 cm cm to spinalcord (R) side margin of wound are averted collect dark blood clotts size 1 cm x 1 cm.

(5) Two A dark blackish brown area 3/4 cm size over left side and chest over 8th inter costel space in line of mid clavicle."

He had found the following internal injuries corresponding to the above-noted external injuries.

"Clotted blood seen on (R) temporal parietal and occipital region of scalp size 3x2 cm & 3 x 3 cm size. A firearm wound entry seen on (R) temporal region just below injury No.(1) same size with meaty hairline # of temporal bone all over size, dented. # of occipital bone in brain. Firearm particle entered from (R) temporal region and pierced through temporal & part of mid brain seen embedded between two hemispheres at middle part of mid brain. Extra dural blood clots at the scalp of entry 2 cm area sub dural hemorrhage and blood clots seen at mid brain ventricles are broken & CSF mixed with blood. Laceration of brain material from part of firearm injury. Pyloric end of stomach seen injuries due to firearm injuries wound through and seen injuries surrounded. Blood vessels (Epigastric) & clonal branches ofand seen injuries to lumbar muscles at level of T12 (R) side piece out seen peritoneum empty contain blood some digested food No smell c poison...."

He recovered two metal parts from the stomach. In his opinion, the death was due to firearm injuries. Injuries no. 1 and 3 were caused by firearms. Injury no.4 was an exit wound of injury no.3. Injury no.2 could be caused by hard and blunt substance such as hockey stick or baseball bat. Injury no.1 was caused by use of firearm at a close range. In his opinion, the firearm injuries as well as injury no.2 caused with blunt substance were each individually sufficient in ordinary course of nature to cause death. He had also treated the complainant Jayeshbhai Muljibhai Satodiya at about 5 O' clock in the morning of 5.2.2004. He had given the history of receiving injuries in a fight. There were three abrasions on the temple region. His left knee was scratched. He agreed that such injuries could be as a result of vehicle getting involved in an accident.

In the cross examination, he agreed that person receiving injury no.1 would die instantaneously. Injury no.1 was caused by bullet fired from a distance less than five feet.

17 Ramanbhai Kachrabhai Parmar, PW15, exh. 225 was the Scientific Officer. He had carried out the examination of the utility car on which the firing had taken place. He had produced the FSL reports at exh.228 and 235. In the report exh.228, he had noted bullet marks on the utility car and the glasses of the car. A minute perusal of this report would show indiscriminate firing on the car and corresponding damage to the body and the glasses including windshield of the car in the process. Report exh.235 includes the scientific testing of different weapons including the firearms recovered during the course of investigation. The report also contained analysis of bullets found from or near the car. The firearms were in operating condition and some of them, according to the report, were recently fired from. The bullets found from the scene of the incident matched with some of the firearms such as 9 mm pistol. This witness was subjected to lengthy cross examination. The very thrust of the defence theory was that the ballistic analysis was not consistent with the version of the so called eyewitnesses and going by the report of the expert, the bullets were not fired in the manner in which the witnesses were referring.

18 Bhupatsinh Mansinh Solanki, PW43, exh.501, was the PSI of Gondal Police station at the relevant time. He had recorded the FIR given by Jayesh @ Pancha Muljibhai, copy of which is produced at exh.502.

19 Navalsinh Bhikubhai Jadeja, PW44, exh. 504, had carried out partial investigation. Upon being informed, he rushed to the scene of the incident at Moghiba school and found the damaged utility car but there was no passenger inside. Since it was not possible to verify who had got injuries and other details related to the incident, he had inquired in the hospital and also instructed the police station to convey the message to the police control room. In the meantime, he received a message from the police station that dead body of a person is lying near Mamlatdar's office. He therefore, went to the Mamlatdar's office and found the dead body of a man lying there carrying firearm injuries. When he was inquiring into the incident, he received a phone call from Vinubhai Shingala calling him near the busstand so that they can reach where Ramjibhai Pragjibhai was hiding. At the busstand, Vinubhai Shingala changed his vehicle and sat in his car. Jayesh @ Pancha also who was with Vinubhai sat in the police car and took them to the town hall. At the town hall, they found Ramjibhai hiding inside in a dark corner. He then went to busstand in Vinubhai's car to lodge the FIR. Ramjibhai went to Rajkot for his treatment.

20 Further investigation was carried out by Bachubhai Jivaji Ninama, PW45, exh.511. He gave the detailed account of the steps taken during such investigation.

21 Serological report exh.513, would show that the deceased had blood group 'B'. It was blood of this group which was found from the clothes of the deceased, from the utility car and from the pieces of used bullets found from the scene of the incident.

22 Asheshbhai Tejendrabhai Thakker, PW46, exh.718, was an officer from Vodafone company.

23 Exh.270 was the panchnama of the scene of the incident which showed a damaged utility car lying after hitting the wall of Moghiba school. The front windshield of the car was completely broken and the pieces were lying on the bonnet. Bullet marks were also visible on the glasses and the car body. This panchnama also referred to the place where the dead body was found i.e. near the Mamlatdar's office, where spots of blood were also found and recorded.

24 Exh.272 was the panchnama of the Bolero car allegedly used by the accused for intercepting the vehicle of the deceased. The front bumper of the car had dents.

25 Under the discovery panchnama exh. 277, a pistol was recovered at the instance of the accused no.7 Samir Sirajbhai Pathan from the house where he led the panch witnesses and the police party. Under panchnama exh.281, a countrymade gun was recovered at the instance of accused Mahendrasinh @ Bhagat Pravinsinh Rana. The remaining firearms were recovered under panchnama exh. 284 and 286.

26 The defence examined several witnesses. Brief reference to their testimonies would be sufficient. Hitendrasinh Vakhatsinh Jhala, DW2, exh.784, was the manager of Eden

Video talkies. He was examined to point out that on the night of the incident, a Hindi cinema was being exhibited. Bharatbhai Ravatbhai Vala, PW5, exh.791, was the owner of a ginning factory who was examined to establish that Jayrajsinh Jadeja accused no.1, Jayanti Dhol accused no.2, Amarjitsinh Jadeja accused no.3 and Bhagat Rana accused No.4 were with him on the night of the incident.

27 This in the nutshell is the evidence on record. On the basis of such evidence, learned Additional Sessions Judge found certain inconsistencies in the prosecution version and was therefore, persuaded to acquit all the accused except accused no.7. He concluded that the incident took place at about 8:30 at night and the prosecution incorrectly wanted to shift it to the later part of the night. He did not accept the version of the three eyewitnesses. Jayesh Muljibhai Satodiya, PW41, Ramjibhai Pragjibhai Marakna, PW42 and Chandreshkumar Rughnathbhai Gadhiya, PW38.

28 Having come to such conclusions, strangely, the learned Judge convicted accused no.7 Samir Sirajbhai Pathan on the basis of the revolver discovered at his instance and which according to the ballistic report was used for the purpose of firing the bullet which hit the deceased Nilesh Rayani. This was the only piece of evidence against accused no.7 which in the opinion of the learned Sessions Judge was sufficient to establish his guilt.

29 We have heard the learned advocates for the parties at considerable length. We are conscious that we are dealing with the appeal against acquittal so far as all accused except Samir Sirajbhai Pathan accused no.7 are concerned. The Supreme Court in case of Chandrappa and ors. v. State of Karnataka reported in 2007 AIR SCW 1850, after referring to large number of judgments on the point on the issue of scope of acquittal appeal, culled out the following principles :

"(1). An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, substantial and compelling reasons, good and sufficient grounds, very strong circumstances, distorted conclusions, glaring mistakes, etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of flourishes of language to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the

presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

30 Bearing in mind these principles, we may assess the evidence on record.

31 Insofar as the eyewitnesses are concerned, we may divide them in three parts. First part would comprise of the witnesses who were or claimed to be eyewitnesses and comprise of Jayesh Muljibhai Satodiya, PW41, Ramjibhai Pragjibhai Marakna, PW42 and Chandreshkumar Rughnathbhai Gadhiya, PW38. The second part would comprise of the witnesses who owned shops and other establishments near Moghiba High school area and were therefore, present at the time of the incident. This part would comprise of Kanaksinh Harisinh Chudasma, PW3, Sanjaybhai Khodubha Chudasma, PW4 and Rameshbhai Haribhai Sarvaiya, PW37. Third part would comprise of the witnesses near Mamlatdar's office. This would comprise of Geetaben Bhikubhai Solanki, PW35, Dhudabhai Chanabhai Solanki, PW7, exh.208, father of Geetaben and Dileepbhai Premjibhai Parmar, PW8.

32 We may first refer to the deposition of Chandreshkumar Rughnathbhai Gadhiya, PW38. We may recall he claimed that on the night of the incident, he along with his friend Dileep Hansraj had gone to see a film at Eden Video theater. They did not like the film therefore, they stopped for a cup of tea at the tea stall when they saw the utility car banging against the railing and then Jayrajsinh Jadeja, Jayanti Dhol, Amarjitsinh Jadeja and Vikramsinh Rana's brother Bhagat getting down from another car and firing on the utility car. He also said that two people got away from the car and one was still inside.

33 For multiple reasons, the testimony of this witness does not inspire confidence and he appears to have been a planted witness. Our reasons for the same are as follows. His presence at the scene of the incident was a mere chance. To cover for the same, he claimed that he along with his friend Dileep Hansraj had gone to see a film at Eden Video cinema. They did not like the film and, therefore, had stopped by to have a cup of tea at a tea shop. However, he faltered in the cross examination. To the question about the name of the film or the ticket price, he could give no details. He only stated that it was an English film which was dubbed. He could not give the price of the ticket since he had not entered the cinema at all. He explained that only from the poster of the film and other people talking he had decided that the film was not good. The defence had examined Hitendrasinh Vakhatsinh Jhala, DW2, the manager of the Cinema, to show that it was actually a Hindi film which was being exhibited at that time.

34 Presence of this witness seems further doubtful as unlike the other two eyewitnesses Jayesh Muljibhai Satodiya, PW41 and Ramjibhai Pragjibhai Marakna, PW42, he does not refer to more people arriving in other cars armed with weapons such as hockey sticks and baseball bats. Though he said that as soon as the firing took place, he like others ran away from the place, claims to have seen the bullets fired by four accused but did not refer to any more accused arriving there.

35 Even otherwise, he does not come across as a truthful witness. Firstly, he made no mention about familiarity with Ramjibhai or Jayeshbhai in his police statement or in his examination-in-chief before the Court. In the cross examination, also he tried to completely disguise his close connection with these two people. However he agreed that he had gone to Ujjain with these two people and from there he and others were arrested by the police. He was also co-accused along with these people in a case of prohibition and bootlegging. He was a co-accused along with Jayesh Satodiya for offence under section 307 of the IPC where they were both kept in the same jail. His friend Dileep Hansraj also knew these persons very well. By all accounts, the testimony of this witness Chandreshkumar Rughnathbhai Gadhiya, PW38 cannot be accepted. As noted, his presence at the scene of incident, was hugely doubtful. His explanation for being present there is falsified. His close connection with the first informant and the injured eyewitness have been duly brought on record by the defence much to his reluctance. All in all, the testimony of this witness cannot be relied upon.

36 We next turn to the deposition of Jayesh Muljibhai Satodiya, PW41. His testimony requires a closer scrutiny. His presence at the scene of the incident and that he would have been able to witness at least part of the incident, is not possible to doubt. As per his deposition, he, Ramjibhai Pragjibhai and Nilesh Rayani had gone to Chatralaya where Ramjibhai had spoken with Vitthal Dhaduk. They returned without attending the function. On the way back, their vehicle was chased by other cars. Ramjibhai Pragjibhai handed over the driving to Nilesh Rayani. The car was dashed by another one. Nilesh lost control and the car dashed against the railing near Moghiba High school. Soon a car arrived from which Jayrajsinh, Jayanti, Amarjitsinh and Bhagat, got down all four carrying firearms and started firing at their car. He and Ramjibhai could get away from the broken windshield and hid themselves in the town hall. Ramjibhai had got injuries on the legs. He could not move. He came back with the police and Vinubhai Shingala and Ramjibhai was rescued.

37 The fact that the incident did take place in which the utility vehicle in which Ramjibhai and others were travelling and after chasing down the vehicle it was fired upon, is simply not possible to deny. The scene of the incident panchnama, damage to the vehicle showing multiple bullet marks on the window glass and doors and the broken windshield are testimonies of this incident. It is true that the defence has been able to bring the criminal past of this witness on record through his cross examination. That by itself would not mean that his entire testimony must be discarded about the manner in which very clearly the evidence suggests chasing down of the vehicle and being fired upon. Insofar as the reference by this witness to the presence and involvement of Jayrajsinh Jadeja, Amarjitsinh and Vikramsinh Rana's brother Bhagat is concerned, we have no hesitation in accepting the same. The names of these three persons were mentioned in the FIR which was lodged at the first available opportunity. He and Ramji Pragji did run away from the car while trying to save themselves. He had just enough time to see these three people get down from the car and start firing on the vehicle. His reference to the fourth accused namely Jayanti Dhol however, must be seen in light of omission of his name in the FIR. It is not even the case of the prosecution that this witness did not know Jayanti Dhol before hand and therefore, could not name him immediately in the FIR. As per his version Jayanti Dhol also got down from the car along with the other three

accused who arrived first. It is not possible to believe that the witness would have forgotten to mention about such an important detail in the FIR.

38 Identification of this witness of other accused is highly unsafe to rely upon. Firstly, according to his version after four people got down from a big car, the others followed later. He also did not name any of these persons in the FIR. Obviously because he did not claim to know any of them before hand. When he was trying to save his life, it is unlikely that he would have stopped to observe and retain the memory of facial features, structure, height, body or skin colour of assailants. His claim to have identified these accused later therefore, simply does not inspire confidence.

39 Testimony of Ramjibhai Pragjibhai, PW42, is of extreme importance. It was his car which was involved in the incident. He had gone to attend a function of Patel community at Kanya Chatralaya. He was uninvited and an unwelcome guest. He was unhappy that he was not invited whereas Jayrajsinh was invited. He tried to force his entry but was either prevented or persuaded by Vitthal Dhaduk not to create a scene then. He left the place with his other two friends. On the way, his car was chased by other vehicles. He handed over driving to Nilesh Rayani. He also pointed out that after Nilesh took over the driving, the car was dashed by another vehicle upon which Nilesh lost control and the car banged against a railing. He referred to four people getting down from the car i.e. Jayrajsinh, Jayanti, Amarjitsinh and Bhagat carrying firearms who immediately started firing indiscriminately. He also referred to some 10 or more people coming out with weapons. He and Jayeshbhai could escape through the broken windshield and hid themselves in the town hall. This witness himself had got injuries on his legs and received hairline fracture for which he was treated by a private doctor at Rajkot. He was taken there by Vinu Shingala.

40 To the limited extent of involvement of the three accused Jayrajsinh, Amarjitsinh and Bhagat, the testimony of this witness must be accepted. Insofar as reference to the accused who arrived at the scene later on, the version of this witness cannot be accepted. In the cross examination, he agreed that he knew few of them but did not name them in the police statement. His identification of unknown accused would also be extremely unreliable since as noted earlier, when a person is under threat and is trying to run to save his life, it is unlikely that in a fraction of a moment, at the peak of excitement, he would have either time or even the presence of mind to register the faces of large number of assailants to recognize them later.

41 Involvement of Jayanti Dhol by this witness is also not reliable. Firstly, Jayeshbhai had not named Jayanti in the FIR though he knew him very well. This witness had given the history to Dr. Rashmibhai Durlabjibhai Shukla, PW1 at Rajkot where he was treated in which he has also referred to three persons using firearm i.e. Jayrajsinh, Amarjitsinh and Bhagat. Involvement of Jayanti Dhol by this witness later on therefore, would not be sufficient to overturn the acquittal in his favour. However, insofar as reference to the three accused Jayrajsinh, Amarjitsinh and Bhagat is concerned, his testimony needs to be accepted. As noted, the incident took place in his own car. His presence in the car therefore, cannot be doubted. Vehicle was found at the place referred by him ridden with bullets. He himself received injuries on his legs trying to get away from the car and the

Dr. Kamleshbhai Popatbhai Talaviya, PW2 who treated him agreed that such injuries could be caused by jumping from the height of about 4 feet.

42 We have given reasons for not relying on the identification of this accused by Ramji Pragji and Jayesh Satodiya. They did not know the accused before hand. Though Ramji Pragji stated that he knew him by face, gave no reason for such familiarity. Neither of these two witnesses have referred to this accused getting down from the car along with Jayrajsinh Jadeja, Amarjitsinh Jadeja, Bhagat Rana and Jayanti Dhol.

43 The witnesses in the second compartment had establishments at the scene of the incident. They all turned hostile, however, agreed that the accident sort of incident had taken place where a utility car had banged against the railing of the wall. They did not support the police statement in which they had referred to hearing the firing shots. The learned Sessions Judge has referred to the testimonies of these witnesses to hold that this incident actually took place at about 8 or 8:30 at night, which in our opinion, was a serious error. It ought to have been seen that these witnesses had turned hostile and possibility of them succumbing to pressure by the accused cannot be ruled out. In the police statement they had consistently referred to the incident taking place between 10 to 10:30 at night. A clear attempt was made on part of the defence to shift the time of shooting between 8 to 8:30.

44 The third set of witnesses referred to the dead body being thrown near the Mamlatdar's office which it appears is at a distance of half a kilometer from Moghiba High school location. Though these witnesses did not support entirely the prosecution, their testimonies to the limited extent in support of the prosecution, would show that a dead body was thrown there at night. These witnesses also changed the time of the incident to 8:30 instead of 10 or 10:30 at night. Significantly, Dhudabhai Chanabhai Solanki, PW7, father of Geetaben had made a phone call to the police staff member explained that he took about one and half hours to find a person with mobile phone. Dileepbhai Premjibhai Parmar, PW8, whose mobile phone he had used gave time of about 10 O' clock. This is yet another indication of the defence trying to shift the time of the incident.

45 Much was sought to be made of the actual place of the incident by the defence. According to the counsel, if the incident took place near Moghiba school, how was it that the dead body of Nilesh Rayani was found near the Mamlatdar's office, a far distance away. There was no investigation or proof of shifting Nilesh Rayani either seriously injured or already dead from the driver's seat of the car to nearby slums situated besides Mamlatdar's office. If he was shifted in a vehicle there had to be evidence of witnesses and seizure of the vehicle used in the incident. This however, in our opinion, would not shake our belief that the murderous attack on the inmates of the car did take place near Moghiba school. There is voluminous evidence establishing this fact to which we have already referred to at a length in the earlier portion of the judgment. The fact that Nilesh Rayani was travelling in the said car and actually driving the car at the time of the incident, has already come on record through evidence of eyewitnesses. His dead body was found near Mamlatdar's office which is at a distance of about half a kilometer, has also come on record. Merely because the investigating agency did not make further

investigation and bring on record the manner in which the body was carried, would not be fatal to the prosecution.

46 The defence questioned Ramjibhai being taken to Rajkot for treatment. We however, cannot lose sight of the fact that there was a clear and imminent danger to his life. He was probably the centre of this murderous attack. There were past violent instances between the two groups. It has come on record that even when the trial was going on of Ramjibhai Pragjibhai, Vinu Shingala who had rescued him and taken to Rajkot for treatment was murdered. If Vinubhai at that time worrying about safety of Ramjibhai Pragjibhai took him to Rajkot for treatment instead of having him treated at Gondal, same was not unusual.

47 Much was sought to be made out of the ballistic expert's opinion. It was argued that such evidence would run counter to the evidence of the eyewitnesses principally, Jayesh Muljibhai Satodiya, PW41 and Ramjibhai Pragjibhai Marakna PW42. The manner in which, the distance from which and the angle from which the bullets were fired, according to these witnesses, does not match the expert's evidence in this regard specially the nature of damage to the car. We do not find any major conflict between the two sets of evidence. However, as is well established, even if there is minor discrepancy, the eyewitnesses' account would prevail.

48 In our opinion, therefore, learned Judge committed a serious error in acquitting Jayrajsinh, Amarjitsinh and Bhagat. Their involvement was clearly established through reliable evidence.

49 Coming to the conviction of accused no.7 Samir Sirajbhai Pathan, we find that the learned Judge has committed a serious error. As noted earlier, only piece of evidence to link this accused was the discovery of firearm which according to the ballistic report could have been used for firing fatal bullets. Discovery statement is admissible in the evidence with the aid of section 27 of the Evidence Act. However, mere discovery cannot be a sufficient proof of the involvement of an accused. Discovery can at best be a corroborative piece of evidence. Conviction and sentence of Samir Sirajbhai Pathan (original accused no.7) is required to be set aside.

50 We have thus no hesitation in believing the role of Jayrajsinh Temubha Jadeja (original accused no.1), Amarjitsinh Aniruddhsinh Jadeja (original accused no.3) and Mahendrasinh alias Bhagat Pravinsinh Rana (original accused No.4) in causing the death of Nilesh Rayani with the use of firearms. Though we have not believed the identification of the additional assailants, it does not mean that these were the only three people involved in the incident. The manner in which the murderous attack was carried out is testimony of prior planning and therefore, proof of conspiracy. These accused are to be convicted for offences punishable under sections 302, 307, 143, 147, 148 34, 120B and 201 of the Indian Penal Code and sections 25(1A), 25(1B) and 27 of the Arms Act and section 135 of the Bombay Police Act.

51 In the result, the Criminal Appeals are disposed of in the following manner :

i) Conviction and sentence of Samir Sirajbhai Pathan (original accused no.7) is set aside. Criminal Appeal No.2049/2010 is allowed and disposed of.

ii) Acquittal of Jayrajsinh Temubha Jadeja (original accused no.1), Amarjitsinh Aniruddhsinh Jadeja (original accused no.3) and Mahendrasinh alias Bhagat Pravinsinh Rana (original accused No.4) is reversed. They are convicted for offences punishable under sections 302, 307, 143, 147, 148 34, 120B and 201 of the Indian Penal Code and sections 25(1A), 25(1B) and 27 of the Arms Act and section 135 of the Bombay Police Act.

For offence punishable under section 302, they would serve life imprisonment. They would have time upto 30.09.2017 to surrender. They would also deposit fine of Rs. 1 lakh each. In default of payment of fine, they shall serve sentence of simple imprisonment of one year. For the remaining lesser offences, no separate sentence is imposed. Acquittals of the rest of the accused are confirmed. Criminal Appeal No.75/2011 filed by the State and Criminal Appeal No.331/2011 filed by the complainant stand disposed of in above terms.