Takhaji Hiraji vs Thakore Kubersing Chamansing & Ors on 2 May, 2001

Equivalent citations: AIR 2001 SUPREME COURT 2328, 2001 AIR SCW 2077, 2001 (1) JT (SUPP) 415, 2001 (2) UJ (SC) 865, 2001 (3) SCALE 589, 2001 (6) SCC 145, 2001 SCC(CRI) 1070, 2001 (6) SRJ 166, (2001) 2 ALLCRILR 702, (2001) 2 EASTCRIC 231, (2002) 1 GUJ LR 1, (2001) 3 PAT LJR 52, (2001) 2 RECCRIR 725, (2001) 2 CURCRIR 201, (2001) 3 SUPREME 690, (2002) 2 ALLCRIR 1659, (2001) 3 SCALE 589, (2002) 1 GCD 15 (SC), (2001) 2 CRIMES 288, (2001) 5 BOM CR 835

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Bench: Chief Justice, R.C. Lahoti, Doraiswamy Raju

CASE NO.:
Appeal (crl.) 635 of 1992

PETITIONER:
TAKHAJI HIRAJI

Vs.

RESPONDENT:
THAKORE KUBERSING CHAMANSING & ORS.

DATE OF JUDGMENT: 02/05/2001

BENCH:
CJI, R.C. Lahoti & Doraiswamy Raju

JUDGMENT:

WITH Crl.Appeal No. 636 of 1992 J U D G M E N T R.C. Lahoti, J.

L...I...T.....T.....T.....T.....T.....T.....T..J Eight accused persons were charged for having committed offences under Sections 147, 148, 302/34/149, 307/34/149, 302/307/109, 325, 325/34, 324 and 324/34 of the Indian Penal Code. The Trial Court acquitted accused nos.3, 4, 6, 7 and 8 of all the offences charged and set them at liberty. Accused nos. 1, 2 and 5 were held guilty on different counts as will be stated shortly hereinafterwards and convicted and sentenced. They preferred an

appeal before the High Court of Gujarat which was heard by a Division Bench. By the impugned judgment dated 14.12.1983 the appeal has been allowed and all the three accused-respondents have been acquitted. The complainant, Takhaji Hiraji who had lodged the first information report of the incident and was himself an injured person has preferred this appeal by special leave putting in issue the acquittal of accused nos. 1, 2 and 5. Later on the State has also filed an appeal by special leave. Both the appeals have been heard together.

A small village Dugrasan, Taluka Shihori in the State of Gujarat witnessed a joyful evening of 23rd March, 1980 being converted into a horrific tale of crime where violence was let loose between two communities, otherwise friendly and living together happily , resulting into death of 3 persons and simple and grievous injuries to several others. It appears that the village has population consisting mainly of Thakores and Kolis. Thakores treat themselves as upper caste and look down upon Kolis as their inferiors. On the date of incident, in the evening, the village people had collected in the chowk, an open space in the heart of the village to witness the performance of tight rope dancers. A rope is tied tightly on two poles installed at a reasonable distance from each other. On the tight rope moves a dancer. The performance includes tight rope walking with utensils on the head of the dancer. The performer is rewarded by making a bid amongst the viewers; one whos bid is the highest has the honour of lifting and putting down the utensils from over the head of the dancer. The highest bid is thus symbolic of honour to the bidder and a reward to the performer. Witnessing the performance were Thakores of the village and so also the Kolis. Two petromax were burning to provide illumination. As the show neared its end Thakore Magansing Dadusing, the accused no.2 made a bid for lifting the utensils. But the deceased, Amuji Narsangji Koli made a higher bid which was protested to by Gajrabai, the accused no.5 saying why the Kolis were bidding higher than the Thakores. There was a heated exchange of words followed by a quarrel and then knife and dagger being stretched out and wielded.

According to the prosecution Magansing, accused no.2 had taken out a knife from his waist by which he dealt blows on Sabuji Viraji and Amuji Narsangji. Kubersing, accused no.1 gave a dagger blow in the abdomen of Amuji Narsingji. Kubersing also caused a stab wound to Narsingji Hiraji. Magansing, accused no.2 also gave a knife blow on the back of Amuji Narsingji. Magansing also caused injury to Sabuji in his abdomen. Accused 1 and 2 caused injuries by sharp- edged weapons to other witnesses also belonging to Thakore community who tried to intervene. Gajrabai, accused no.5 gave a stick blow to Viraji Devaji causing a fracture of his hand. Other accused, excepting nos.1 and 2 were throwing katars, sticks, clubs etc. by which several other persons got injured. All other villagers and group of dance performers ran away from the chowk leaving the injured and the accused persons behind. After causing several injuries the accused persons left the chowk for their houses. The injured persons belonging to Thakore community were being taken to their houses but some of them found it difficult to walk. They sat down on the otta of Kalkamata Temple. A camel-cart was summoned. On it all the injured were seated and taken to Shirohi where they reached the dispensary at about 11.30 p.m. Narsingji Hiraji succumbed to his injuries on the way. Sabuji Viraji was taken to Mehsana where he too died on account of his injuries. Amuji Narsangji was taken to Deesa and he died thereat. Takhaji Hiraji one of the injured persons, leaving behind the seriously injured persons in the hospital at Shirohi went to the police station and lodged FIR of the incident. The police registered crime under Sections 302,307 and several other sections of the Indian Penal Code and

commenced investigation. Autopsies on the dead bodies of Narsangji Hiraji, Sabuji Viraji and Amuji Narsangji were conducted. All other injured persons were also medico-legally examined. It is not necessary for us at this stage to notice such details of the incident as have become insignificant consequent upon 5 of the 8 accused persons having been acquitted by the Trial Court and their acquittal having remained unchallenged. We will only notice such details of the prosecution case as are relevant and significant for the purpose of testing legality of the acquittal of the three accused-respondents as recorded by the High Court.

Sabuji Viraji was examined by Dr. Varvadia, PW2 on 24.3.1980 at about 12.15 a.m. He found one incised wound on the left side of upper part of abdomen, another incised wound on the left palm and the third incised wound on the scalp. Sabuji Viraji was referred to medical officer, Deesa for further treatment. He was transferred to Mehsana where he expired on 30.3.1980. The post-morten was conducted by Dr. Solanki, PW4. He found the same 3 injuries on the body of the victim which were ante-mortem. The cause of death was acute peritonitis caused by the injuries. Thus, the death of Sabuji Viraji was homicidal.

Amuji Narsangji was examined by Dr. Patel, PW5 of Deesa on 24.3.1980 at 1.45 a.m. The condition of the patient was precarious and he succumbed to his injuries on the table at about 2 a.m. The post-mortem was also conducted by Dr. Patel. Amuji Narsingji had sustained one stab wound 4 cm x 2 cm on the right side of epigastrium deep upto peritoneum cavity. Intestinal loops were cut and were coming out from the wound. There were 8 other incised wounds on his chest, left elbow, forehead and perietal region. Internally the superior mesenteric artery was cut off and peritoneum cavity was full of blood and upper part of intestines were completely out. It is this injury which had proved to be fatal. All the injuries were ante- mortem.

Post-mortem on the dead body of Narsingji Hiraji was conducted by Dr. Amin of Deesa, PW20. He found the patient having suffered one stab wound on anterior abdominal wall above umbilicus deep to peritoneum cavity. Peritoneum was full of blood. This stab wound was sufficient in the ordinary course of nature to cause death. The patient had suffered two other incised wounds in jejunum with perforations thereof. All the injuries were ante-mortem.

There are 5 stamped prosecution witnesses who had sustained injuries. Gajaji Viraji, PW10, Takhaji Hiraji, PW 8 and Amuji Khumaji, PW 20 were examined by Dr. Varvadia, PW2. Gajaji Viraji had sustained two incised wounds, one on the upper part of chest and the other on the left index finger. Takhaji Hiraji had suffered two incised wounds on forehead and abdomen and one stab wound on the left loin and one abrasion on left elbow. Amuji Khumaji was found to have sustained defused swelling over the left forearm with suspected fracture. However, x-ray examination conducted by Dr. Sutaria PW7 did not confirm any bony injury suffered by Amuji Khumaji.

Dr. Sutaria, PW7, had examined Viraji Devaji PW 15. Viraji Devaji had diffused swelling over the left forearm with fracture of left radius and one abrasion on the left forearm. The former was a grievous injury while the latter was a simple one. Gambhirji Narsangji was found to have sustained an incised wound on the right side of the chest. The patient was admitted for treatment indoors and discharged in 11 days.

Thus, there were three persons who had met with homicidal death and five persons injured on the side of the prosecution party. The five injured were examined as prosecution witnesses. The medico-legal examination of the injured persons had taken place little after midnight on the day of the incident itself. The duration of the injuries sustained by all the injured persons as opined by the doctors conducting medico-legal examinations, coincided with the time of the incident.

Here itself it will be relevant to mention that some of the accused persons had also sustained injuries and they were medico- legally examined between midnight and 2.10 hours in the early morning of 24.3.1980. Kubersing Chamansing, accused No.1, Maganji Duduji, accused No.2 and Gajraben Maganji, accused No.5 were examined by Dr. Varavaida, PW2. Maganji Daduji was found to have sustained in all twenty injuries. There were two incised wound on the scalp, six contusions, five abrasions and two contused lacerated wounds on his person spread over the neck right arm and back. He also had a fracture of left index finger. All the injuries except the two on scalp were caused by hard and blunt weapon. Gajraben, accused No.5, had six contusions, four contused lacerated wounds and one abrasion on different parts of her body. Subaben alias Shivuba, accused No.7 and Mungiben, accused No.6 were examined by Dr. Keshavlal Patel, PW3. Subaben alias Shivuba had one abrasion and one contusion on left hand. Mungiben was found to have a weal mark on left shoulder joint and tenderness over right and left knee joints. Thus the injuries sustained by accused Nos. 1, 6 and 7 were simple, rather minor injuries.

When PW10 reached the police station for lodging first information report of the incident, Kubersing, accused No.1 was already present at the police station and he had also lodged a report of the incident, Ex.69.

At the trial, there were 21 witnesses examined on behalf of the prosecution. These include 5 eye witnesses of the@@ JJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJ incident namely, Gajaji Viraji PW 10, Takhaji Hiraji PW 8,@@ JJJJJJJJJJJJJJJJJ Amuji Khumaji PW 11, Viraji Devaji, PW15 and Gambhirji Narsangji PW9. . All these witnesses have themselves suffered injuries and therefore their presence at the place of the incident cannot be doubted. Apart from this there is dying declaration of Sabuji, deceased, Ex.28, recorded by Pravinchandra Gandhi, the Executive Magistrate at 10.20 p.m. on 25.3.80 and yet another dying declaration Ex.60 recorded by Constable Kesharam, PW16, a little before midnight. The trial court minutely examined the testimony of all the eye witnesses and found them worthy of reliance. The defence of the accused persons was one of denial so far as the injuries caused on the side of the prosecution are concerned. However, they pleaded that the prosecution party was the aggressor and had caused multiple injuries to five of the accused persons and that too near the house of the accused persons which is situated at a distance of about 200 feet from the chowk. The learned Sessions Judge, having minutely examined, marshalled and appreciated the entire evidence available on record, found the prosecution version to be truthful and negated the defence. It will be useful to sum up briefly the findings arrived at by the learned Sessions Judge :-

> (i) There were blood stains and blood stained earth in the chowk. The petromax at the scene of offence was lying broken. According to the FIR, Ex-69, lodged by accused No.1 and produced by PW21, head constable, some incident had taken place at the

chowk and when the accused had left the chowk and reached their home, then they were assaulted by the prosecution party. This happening of the incident in the chowk was substantiated by the circumstances and was partly admitted by the defence also in their earliest version of the incident i.e. the FIR lodged by one of the accused persons. However, no trace of blood and no visible signs of violence were found near the houses of the accused persons and, therefore, it could be safely inferred that the incident had taken place only in the chowk and not near the houses of the accused persons;

(ii) The prosecution witnesses and the three deceased on the one hand and the accused persons on the other hand did not have any previous enmity. They were residents of the same village. The incident had erupted at the spur of the moment. It was a case of sudden fight. It cannot be said that the accused persons had any common intention to beat anyone or that they had any common object for which they had formed an unlawful assembly. Their presence in the chowk to witness the show was quite natural and, therefore, the question of convicting anyone with the aid of Section 34 or Section 149 of the IPC does not arise;

(iii) Thakore Kubersing Chamansing, accused No.1, is proved to have caused a dagger blow in the abdomen of Amuji Narsingji which proved to be fatal. He is liable to be convicted under Section 302 IPC.

(iv) Thakore Kubersing Chamansing, accused No.1 is guilty of causing a dagger blow in the abdomen of Narsingji Hiraji which blow proved to be fatal and therefore accused No.1 is responsible for causing death of Narsingji Hiraji and hence liable to be convicted under section 302 IPC on this head of charge too.

(v) Thakore Magansing Dadusing, accused No.2 is responsible for causing the incised wound to Sabuji Viraji in his abdomen resulting in his death. He is liable to be convicted under Section 302, IPC.

(vi) Thakore Magansing Dadusing Accused No.2 had caused an incised wound 2x¼x¼ on right side of chest of Gambhirji Narsangji, the only injury suffered by him. The injury caused was by a dagger blow. However, the nature of the injury was simple. Accused No.1 was, therefore, liable to be convicted under Section 324 of IPC for causing simple hurt by sharp weapon to Gambhirji.

(vii) Gajaji Viraji had sustained two injuries by sharp cutting weapon at the hands of Kubersing, accused No.1. The@@ JJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJ injuries were simple in nature. The accused No.1 was,@@ JJJJJJJJJJJJJ therefore, responsible for causing simple injuries to Gajaji Viraji by means of sharp cutting weapon, an offence punishable under Section 324 of the IPC.

(viii) Maganji, accused No.2 had given a knife blow to Takhaji Hiraji, PW8. The injuries were simple in nature.@@ JJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJ Maganji, accused No.2, was, therefore, liable to be@@ JJJJJJJJJJJJJJJJJ convicted under Section 324 of the IPC for causing simple injuries by sharp weapon to Takhaji Hiraji (para 27).

(ix) The authorship of injuries caused to Amuji Khumaji was not established and, therefore, none of the accused was liable to be convicted for causing simple injuries by sharp weapon to Amuji Khumaji. (para 28)

(x) Abrasion on the left forearm with diffused swelling and fracture of the left radius on the person of Viraji@@ JJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJ Devaji were caused by blunt weapon like a stick by Thakore@@ JJJJJJJJJJJJJJJJJJJJJ Gajrabai, accused No.5. She was, therefore, liable to be convicted under Section 325 of the IPC.

(xi) As to accused Nos. 3, 4 and 6 to 8, the prosecution case was that they had indulged into throwing katars and sticks etc. However, the prosecution witnesses were not consistent about the part played in the incident by these accused persons. Their presence at the place of the incident, in the facts and circumstances of the case, was innocuous and, therefore, by their mere presence at the place of the incident, they could not be held liable to conviction alongwith other accused persons with the aid of Section 34 or 149 of IPC.

The most important plea raised on behalf of the accused persons before the trial court was that the prosecution witnesses did not offer any explanation for the injuries sustained by the accused persons. This showed, according to the defence, that the genesis of the incident was being concealed by the prosecution witnesses and the whole truth was not placed before the court which lent support to the defence version that the incident, in all probabilities, took place in the manner and at the place suggested by the defence, that is to say, the incident had taken place near the houses of the accused persons where the persons belonging to prosecution party were aggressor. The trial court opined that in so far as the injuries sustained by accused No.1 and 5 to 7 are concerned, they were all injuries of very minor nature and their non-explanation did not cause any infirmity in the prosecution case. Magansing Dadusing, the accused No.2, had sustained several injuries of which two were incised wound and one was a fracture on the finger. The trial court held that several persons were participating in the incident and several persons were injured. In such a melee it was difficult to exactly locate how the injuries on the person of the accused No.2 were sustained. The accused No.2 himself does not suggest how and in what manner, he sustained injuries. Katars and sticks were thrown during the incident. In the peculiar facts and circumstances of the case, mere non-explanation of the injuries on the person of accused No.2 was not fatal to the prosecution case. On the abovesaid findings, the trial court convicted the three accused respondents as under:- (1) The accused No.1 was convicted under Section 302 IPC for committing murder of Amuji Narsangji and sentenced to imprisonment for life;

(2) The accused No.1 was also convicted for committing murder of Narsangji Hiraji and sentenced to imprisonment for life.

Both the substantive sentences were directed to run concurrently.

(3) Accused No.1 also convicted under Section 324 IPC for voluntarily causing hurts to Gajaji Viraji and Gambhirji Narsangji but no separate sentence was passed.

(4) Accused No.2 was convicted under Section 302 of the IPC for committing murder of Sabuji Viraji and was sentenced to imprisonment for life.

(5) The accused No.2 was also convicted under Section 324 of the IPC for causing hurt to Takhaji Hiraji but no separate sentence was passed.

(6) The accused No.5 was convicted under Section 325 of the IPC for voluntarily causing grievous hurt to Viraji Devaji. However, she was ordered to be released on probation of good conduct on executing a bond of Rs.1,000/- with one surety for a period of one year for keeping peace. She was also ordered to pay compensation of Rs.500/- to Viraji Devaji.

(7) The accused Nos. 1, 2 and 5 were acquitted of rest of the charges.

(8) The accused Nos. 3, 4, 6, 7 and 8 were acquitted of all the charges.

The three convicted accused persons preferred an appeal, as already stated. The Division Bench of High Court, has in its brief judgment, acquitted the accused persons mainly influenced by two considerations. Firstly, the High Court has felt that as there was only one incident which had taken place in the chowk, the injured accused persons must have sustained injuries during the course of the same incident and as the prosecution witnesses did not explain how the accused persons sustained injuries, it could be safely inferred that the prosecution witnesses were suppressing the genesis of the incident. The High Court has also observed that looking to the numerous injuries sustained by the accused persons it can reasonably be inferred that the accused persons were in grave apprehension of death or grievous injury being caused to the accused persons or to anyone or more of them and hence they were entitled to use weapons for their own protection. They cannot be said to have exceeded their right of self-defence. Another reason which has prevailed with the High Court is that though several persons were present at the place of the incident but the prosecution has not examined any independent witness. The eye witnesses examined on behalf of the prosecution are related with the deceased and the injured. The combined effect of these two factors was that the testimony of the witnesses could not be believed. As to the dying declaration, the High Court has observed that the dying declaration also does not explain the injuries on the persons of the accused persons and coupled with the fact that the version of the prosecution as given in the court was being disbelieved, the dying declaration could not alone form the basis of conviction. On these findings, the appeal has been allowed and the respondents acquitted. The High Court has not entered into appreciation of evidence. No effort has been made by the High Court at marshalling the evidence and assessing the intrinsic worth of the testimony of the prosecution witnesses which, as

we have already noted, were the persons undoubtedly present at the place of the incident having themselves suffered injuries.

The first question which arises for consideration is what is the effect of non-explanation of injuries sustained by the accused persons. In Rajendra Singh & Ors. Vs. State of Bihar, (2000) 4 SCC 298, Ram Sunder Yadav & Ors. Vs. State of Bihar, (1998) 7 SCC 365 and Vijayee Singh & Ors. Vs. State of U.P., (1990) 3 SCC 190, all 3-Judges Bench decisions, the view taken consistently is that it cannot be held as a matter of law or invariably a rule that whenever accused sustained an injury in the same occurrence, the prosecution is obliged to explain the injury and on the failure of the prosecution to do so the prosecution case should be disbelieved. Before non-explanation of the injuries on the person of the accused persons by the prosecution witnesses may affect the prosecution case, the court has to be satisfied of the existence of two conditions : (i) that the injury on the person of the accused was of a serious nature; and (ii) that such injuries must have been caused at the time of the occurrence in question. Non-explanation of injuries assumes greater significance when the evidence consists of interested or partisan witnesses or where the defence gives a version which competes in probability with that of the prosecution. Where the evidence is clear cogent and credit worthy and where the Court can distinguish the truth from falsehood the mere fact that the injuries on the side of the accused persons are not explained by the prosecution cannot by itself be a sole basis to reject the testimony of the prosecution witnesses and consequently the whole of the prosecution case.

The High Court was therefore not right in overthrowing the entire prosecution case for non-explanation of the injuries sustained by the accused persons. The High Court ought to have made an effort at searching out the truth on the material available on record as also to find out how much of the prosecution case was proved beyond reasonable doubt and was worthy of being accepted as truthful.

So is the case with the criticism levelled by the High Court on the prosecution case finding fault therewith for@@ JJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJ non-examination of independent witnesses. It is true that@@ JJJJJJJJJJJJJJJJJ if a material witness, which would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness which though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the Court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the Court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself __ whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the Court can safely act upon it uninfluenced by the factum of non-examination of other witnesses. In the present case we find that there are at

least 5 witnesses whose presence at the place of the incident and whose having seen the incident cannot be doubted at all. It is not even suggested by the defence that they were not present at the place of the incident and did not participate therein. The injuries sustained by these witnesses are not just minor and certainly not self-inflicted. None of the witnesses had a previous enmity with any of the accused persons and there is apparently no reason why they would tell a lie. The genesis of the incident is brought out by these witnesses. In fact, the presence of the prosecution party and the accused persons in the chowk of the village is not disputed. How the vanity of Thakores was hurt leading into a heated verbal exchange is also not in dispute. Then followed the assault. If the place of the incident was the chowk then it was a sudden and not pre-meditated fight between the two parties. If the accused persons had reached their houses and the members of the prosecution party had followed them and opened the assault near the house of the accused persons then it could probably be held to be a case of self-defence of the accused persons in which case non- explanation of the injuries sustained by the accused persons would have assumed significance. The learned Sessions Judge has on appreciation of oral and circumstantial evidence inferred that the place of the incident was the chowk and not a place near the houses of the accused persons. Nothing more could have been revealed by other village people or the party of tight rope dance performers. The evidence available on record shows and that appears to be very natural, that as soon as the melee ensued all the village people and tight rope dance performers took to their heels. They could not have seen the entire incident. The learned Sessions Judge has minutely scrutinised the statements of all the eye-witnesses and found them consistent and reliable. The High Court made no effort at scrutinising and analysing the ocular testimony so as to doubt, if at all, the correctness of the several findings arrived at by the Sessions Court. With the assistance of the learned counsel for the parties we have gone through the evidence adduced and on our independent appreciation we find the eye-witnesses consistent and reliable in their narration of the incident. In our opinion non-examination of other witnesses does not cast any infirmity in the prosecution case.

Thus, we are of the opinion that the two grounds on which the High Court has reversed the judgment of the Sessions Court were irrelevant and could not have been relevant for such reversal. Justice has been made sterile by exaggerated adherence to rule of proof. Benefit of doubt must always be reasonable and not fenciful.

As we have already stated, we have ourselves minutely scrutinised the evidence available on record. We do not find any infirmity in the findings arrived at by the learned Sessions Judge fixing the liability on the accused persons by pointing out the specific overt act attributed to each of the accused persons. However, on the determination of the nature of offence committed by one of the accused persons, we are at variance with the finding of the learned Sessions Judge which we will state a little later. We do not deem it necessary to re-state in very many details our own findings as to the exact role played by the three accused respondents inasmuch as they are the same as have been recorded by the learned Sessions Judge. However, briefly we would indicate what we have found from the appreciation of evidence.

Kubersing, accused no.1 dealt a blow by dagger on the abdomen of Amuji Narsingji. This injury proved fatal. It was sufficient in the ordinary course of nature to cause. All the witnesses have attributed this fatal injury on the person of Amuji Narsingji to Kubersing accused no.1. Thus he has

been rightly convicted of an offence punishable under Section 302 IPC for causing death of Narsingji Hiraji.

Narsingji Hiraji had sustained only one stab wound in the abdomen. The weapon had penetrated deep cutting the intestines which shows the force by which the blow was dealt. The author of this injury is Kubersing accused no.1 as deposed to by all the witnesses. This injury was also sufficient in the ordinary course of nature to cause death. Kubersing accused no.1 is therefore guilty of offence punishable under Section 302 IPC also for causing the death of Narsingji Hiraji.

Dr. Vervadia PW2, who examined Sabuji Viraji on 24.3.1980 at 12.15 a.m. found him to have sustained 3 injuries of which the incised wound on left side of upper part of abdomen was 1x¼x¼. This injury is attributed to Magansing, accused No.2 by all the prosecution witnesses. They are consistent on this point and not shaken in cross- examination. The dying declaration, Ex.28, made by the deceased Sabuji and recorded by Magistrate also attributes authorship of this injury to Magansing, accused No.2. However, what has to be really determined is the nature of this injury. In his statement Dr. Vervadia has not stated the nature of the injury caused. Sabuji Viraji died on 30.3.1980. Post-mortem on his dead body was conducted on 31.3.1980 by Dr. Solanki PW4. Dr. Solanki, PW4, conducted post mortem on the dead body of Sabuji on 31.3.80 at 10.20 AM. He found the wound stitched. On opening he found internally ___ Large intestine sutured wound 2.5 cm on splenic flexure gappling containing faecal matter; surrounding area of wound was red in colour; opening was found absent. The cause of death in the opinion of Dr. Solanki was shock due to acute peritonitis. None of the two doctors has deposed if the injury was grievous or sufficient in the ordinary course of nature to cause death or that the injury was so imminently dangerous that it must have in all probability resulted in death or was likely to cause death. The exact cause of peritonitis is not known. That negligence to treat the wound could be a contributing factor cannot be ruled out. In such state of medical evidence it will not be proper to draw an inference against Magansing accused no.2 of his having committed murder of Sabusing Viraji punishable under Section 302 of the IPC. The injury dealt by him by a sharp weapon had cut into the intestine. Though, an intention to cause death or such bodily injury as is likely to cause death cannot be attributed to him, knowledge is attributable to accused No.2 that an injury by knife into the abdomen was likely to cause death. As it was a case of sudden fight, the act of this accused would amount to culpable homicide not amounting to murder punishable under part II of Section 304 of IPC. The other injuries on the person of Sabuji are not attributed to accused No.2, Magansing.

Insofar as Gajrabai Magansing the accused no.5 is concerned her causing a grievous hurt to Viraji Devaji by a stick is proved beyond reasonable doubt. Viraji Devajis own statement to this effect is fully corroborated by other eye witnesses and medical evidence. In our opinion, she was rightly convicted by the learned Sessions Judge under Section 325 of the IPC.

We do not deem it necessary to further discuss the evidence and record our findings as to offences punishable under Section 324 of the IPC committed by accused no.1 and accused no.2 for causing injuries by sharp weapon to other prosecution witnesses inasmuch as the learned Sessions Judge having recorded a finding of guilt on those counts has chosen not to pass any sentence of imprisonment and therefore such exercise would be futile at this stage, also in view of the nature of

sentences which is being passed on the accused respondents.

For the foregoing reasons the appeals are partly allowed. The judgment of the High Court, under appeal, is set aside. The finding of guilty as recorded by the trial court along with the sentence passed thereon on the respondent, Kubersing Chamansing (accused no.1) are restored, that is, he is held guilty of offences punishable under Section 302 IPC on two heads respectively for causing the death of Narsingji Hiraji and Amuji Narsingji. He is sentenced to imprisonment for life on both the counts. Both the sentences shall run concurrenly. The acquittal of Magansing Dadusing, accused no.2 under Section 302 IPC is maintained. However, he is held guilty of an offence punishable under Section 304 Part II IPC for causing culpable homicide not amounting to murder of Sabusing Viraji and he is sentenced to undergo rigorous imprisonment for a period of five years with a fine of Rs.2,000/- in default of payment whereof he shall undergo further imprisonment for a period of six months. The amount of fine, if realised, shall be paid as compensation to the heirs of Late Sabuji. The acquittal of Gajrabai Magansing accused no.5 under Section 325 is set aside and instead her conviction along with sentence as passed by the trial court is restored. The bail bonds of Kubersing Chamansing and Magansing Dadusing are hereby cancelled. They shall surrender and be taken into custody for serving out the sentences as passed hereinabove. Gajrabai the respondent-accused no.5 shall be called upon to execute the bond and furnish one surety as ordered by the trial court. The amount of Rs.500/- shall be recovered from her as fine and paid by way of compensation to Viraji Devaji as ordered by the trial court. The appeals stand disposed of accordingly.