

Allarakha Habib Memon Etc.

v.

State of Gujarat

(Criminal Appeal Nos. 2828-2829 of 2023)

08 August 2024

[B.R. Gavai and Sandeep Mehta,* JJ.]

Issue for Consideration

As per the FIR (Exhibit-79) there were two eyewitnesses to the incident, PW-12-Police Constable and PW-11-the first informant who was deceased's cousin brother. PW-12 claiming to be an eyewitness to the incident had reported at the police station with the crime weapons however, he did not lodge any complaint of the incident. FIR was registered on the basis of the oral statement of PW-11. Testimony of the aforesaid witnesses, if was trustworthy and reliable. In view of inconsistencies and contradictions in the evidences, whether the conviction of the accused-appellants under Section 302 read with Section 120B, Penal Code, 1860 and their sentence was justified.

Headnotes[†]

Penal Code, 1860 – ss.302 r/w s.120B – Concurrent conviction of the accused-appellants – Various inconsistencies and contradictions in evidences – Guilt of the accused appellants if proved beyond doubt:

Held: No – First informant-PW-11 was not present at the crime scene – Evidence of PW-12-an independent witness makes the very presence of PW-11 at the crime scene doubtful – Testimony of PW-11, the star witness of prosecution is thus, not trustworthy and reliable as the same was contradicted on material aspects by numerous material facts and circumstances – Testimony of the Police Constable-PW-12 also does not help the prosecution in linking the accused-appellant with the crime – It is improbable and totally unacceptable that a police constable had seen the incident and also brought the crime weapons to the police station and yet his statement would not be recorded and the factum of presentation of weapons would not be entered in the daily diary (roznamcha) of the police station – Non-production of the daily

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diary is a serious omission on part of the prosecution – Further, on facts, identification of the accused by PW-12 for the first time in the dock is unbelievable and unacceptable – Also, on a careful perusal of the complaint (Exhibit P-79) filed by PW-11 which was subsequently registered as the FIR, it is manifest that no time of recording was mentioned thereupon – There was no endorsement as to the date and time on which the said FIR reached the Court concerned – Going by the testimony of PW-11, the actual complaint filed by him at the police station seems to have been withheld and the FIR was a post investigation document and seems to have been created at a later point of time – Furthermore, neither the disclosure statements made by the accused were proved as per law nor the same resulted into any discovery which could be accepted as incriminating inasmuch as the requisite link evidence was never presented by the prosecution so as to establish that the recovered articles remained in the self-safe condition from the date of the seizure till the same reached the FSL – Prosecution failed to lead convincing evidence establishing the guilt of the accused appellants beyond doubt so as to hold the appellants responsible for the crime – Impugned judgments quashed and set aside – Appellants acquitted by giving them the benefit of doubt. [Paras 19, 20, 22, 23, 25, 28, 31, 36-38, 46, 48]

Code of Criminal Procedure, 1973 – ss.161, 162 – Police Constable-PW-12 claiming to be an eyewitness to the incident reported at the police station with the crime weapons however, he did not submit any report/complaint of the incident – Complaint lodged by PW-11-first informant who was deceased’s cousin brother came to be registered as FIR – Impermissibility:

Held: First version of the incident as narrated by the PW-12 would be required to be treated as the FIR and the complaint lodged by PW-11 would be relegated to the category of a statement u/s.161, CrPC and nothing beyond that – The same could not have been treated to be the FIR as it would be hit by s.162 CrPC – Prosecution is thus, guilty of concealing the initial version from the Court and hence, an adverse inference is drawn against the prosecution on this count. [Para 21]

Evidence Act, 1872 – ss.26, 21 – Confessions of the accused-appellants recorded by PW-2-Medical Officer while preparing their injury reports of the accused – Admissibility:

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Held: The so-called confessions are ex-facie inadmissible in evidence as the accused persons were presented at the hospital by the police officers after having been arrested in the present case – As such, the notings made by PW-2 in the injury reports of the accused would be clearly hit by s.26 – Therefore, the said admissions of the accused not accepted as incriminating pieces of evidence relevant u/s.21. [Para 41]

Evidence – Seizure panchnama, FSL Reports – Reliance upon – When not proper – Seizure panchnama recorded that the accused threw away their weapons and fled away from the crime scene and that all the weapons were brought to the police station by police personnel – Reliance placed by Courts below on FSL reports to hold that blood group found on the crime weapons incriminated the accused for the crime as the same matched with the blood group of the deceased – Correctness:

Held: Various infirmities create a doubt on the very process of seizure of the weapons – Seizure panchnama (Exhibit -38) does not bear the signatures of PW-12-police constable who admittedly collected the weapons from the crime scene and presented them to the police station – Thus, no credence can be given to seizure panchnama because it was not attested by the witness who had actually presented the weapons at the police station – Trial Court as well as the High Court heavily relied upon the FSL reports (Exhibits 111-115) for finding corroboration to the evidence of the eyewitnesses and in drawing a conclusion regarding culpability of the appellants for the crime however, the testimony of the so-called eyewitnesses is discarded being doubtful – Thus, even presuming that the FSL reports conclude that the blood group found on the weapons recovered at the instance of the accused matched with the blood group of the deceased, this circumstance in isolation, cannot be considered sufficient so as to link the accused with the crime – Further, the IO-PW18's evidence on the aspect of disclosure statements made by the accused-appellant leading to the recoveries is perfunctory and unacceptable – The witness did not elaborate upon the words spoken by the accused-appellant at the time of making the disclosure statements. [Paras 42-44]

Evidence Act, 1872 – s.27 – Disclosure as regards the place of incident irrelevant when crime scene was already known to police:

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Held: In the present case, the circumstance regarding identification of place of incident at the instance of the accused was inadmissible because the crime scene was already known to the police and no new fact was discovered in pursuance of the disclosure statements – Thus, since the place of incident was known to police, this disclosure was irrelevant. [Paras 41, 45]

Constitution of India – Article 136 – Concurrent findings by courts below – Exercise of jurisdiction u/Article 136:

Held: While exercising jurisdiction under Article 136 this Court will not interfere with the concurrent findings recorded by the courts below – However, where the evidence has not been properly appreciated, material aspects have been ignored and the findings are perverse, this Court would certainly interfere with the findings of the courts below though concurrent. [Para 47]

Case Law Cited

State of A.P. v. Punati Ramulu and Others (1994) Supp 1 SCC 590; *Babu Sahebagouda Rudragoudar and Others v. State of Karnataka* [2024] 5 SCR 174 : (2024) OnLine SC 561; *Mustkeem alias Sirajudeen v. State of Rajasthan* [2011] 9 SCR 101 : (2011) 11 SCC 724 – relied on.

Tomaso Bruno & Anr. v. State of Uttar Pradesh [2015] 1 SCR 721 : (2015) 7 SCC 178; *Amrik Singh v. State of Punjab* [2022] 7 SCR 451 : (2022) 9 SCC 402; *Animireddy Venkata Ramana & Ors. v. Public Prosecutor, High Court of Andhra Pradesh* [2008] 3 SCR 1078 : (2008) 5 SCC 368 – referred to.

List of Acts

Evidence Act, 1872; Penal Code, 1860; Code of Criminal Procedure, 1973; Constitution of India.

List of Keywords

Eyewitnesses; So-called eyewitnesses; Projected eyewitness; Concurrent findings by courts below; Concurrent conviction; Crime weapons; Weapons of offence; Identification of the accused; Test Identification Parade; FIR was a post investigation document; Disclosure statements made by the accused not proved; Admissions of the accused not incriminating pieces of evidence; Guilt of the accused not proved beyond doubt; Seizure panchnama, FSL Reports; Confessions of the accused; Confessions ex-facie

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inadmissible in evidence; No new fact discovered in pursuance of disclosure statements; Identification of place of incident at the instance of accused inadmissible; Crime scene already known to police.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 2828-2829 of 2023

From the Judgment and Order dated 18.02.2019 of the High Court of Gujarat at Ahmedabad in CRLAP Nos.450 and 563 of 2015

With

Criminal Appeal No. 112 of 2024

Appearances for Parties

Divyesh Pratap Singh, Ms. Shivangi Singh, Amit Sangwan, Rishi Malhotra, Utkarsh Singh, Praveen Chaturvedi, Advs. for the Appellants.

Ms. Deepanwita Priyanka, Ms. Swati Ghildiyal, Ms. Devyani Bhatt, Advs. for the Respondent.

Judgment / Order of the Supreme Court**Judgment**

Mehta, J.

1. Heard.
2. The instant criminal appeals have been filed by the appellants namely, Allarakha Habib Memon, Amin @ Lalo Aarifbhai Memon and Mohmedfaruk @ Palak Safibhai Memon, for assailing the common judgment dated 18th February, 2019, passed by the Division Bench of High Court of Gujarat at Ahmedabad dismissing the Criminal Appeal Nos. 94 of 2015, 450 of 2015 and 563 of 2015, preferred by the accused appellants and affirming the judgment and order dated 13th October, 2014 passed by the Court of Additional Sessions Judge, Anand, in Sessions Case No. 84 of 2011 (hereinafter being referred to as 'trial Court'). The trial Court had convicted the appellants for offence punishable under Section 302 read with Section 120B of the Indian Penal Code, 1860 (hereinafter, referred to as 'IPC') and sentenced them to imprisonment for life with fine of Rs. 1,000/- each,

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in default whereof, to undergo rigorous imprisonment for a period of three months. At the same time, the appellants were acquitted of the charge for the offence punishable under Section 323 IPC.

Brief facts: -

3. The accused appellants are the residents of New Memon Colony, Bhalej Road, Anand. There was some issue regarding the supply of water in the residential blocks where the accused Mohmedfaruk @ Palak was residing. On 3rd May 2011, a meeting was convened in this regard wherein, an altercation flared up between the accused Mohmedfaruk @ Palak and Mohammad Sohail. It is alleged that Mohmedfaruk @ Palak hurled abuses and used foul language against Mohammad Sohail, who in turn intimated the society members that he may be relieved from the duty of supplying water in the society. A meeting with respect to the intimation given by Mohammad Sohail was convened by the members of the society, wherein Mohammad Sohail insulted accused Mohmedfaruk @ Palak, who started carrying a grudge against Mohammad Sohail on this account. Resultantly, Mohmedfaruk @ Palak conspired with the accused Amin @ Lalo Aarifbhai Memon and Allarakha Habib Memon and hatched a plan to eliminate Mohammad Sohail. As per the prosecution, acting in furtherance of the above conspiracy, Mohmedfaruk @ Palak collected arms like *gupti*, daggers etc., and concealed the same in the dicky of his scooter. On 4th May, 2011 at around 8:00 pm, Mohammad Sohail, along with his first cousin namely, Mohammad Arif Memon (the first informant), had proceeded to Shah petrol pump on a two wheeler, where they got the vehicle refuelled, and then both proceeded towards their residence, by taking a turn towards Bhalej overbridge. On the way, the accused Mohmedfaruk @ Palak stopped them on the pretext of asking mobile number of one Mohammad Hussain. Taking advantage of the situation, the accused appellants launched an indiscriminate assault upon Mohammad Sohail with sharp edged weapons, causing injuries on his head and chest regions. Mohammad Arif Memon tried to intervene, upon which he was given a push by Mohmedfaruk @ Palak and fell down. Mohmedfaruk @ Palak took out a big knife and inflicted a blow with a sharp weapon on the back of Mohammad Sohail. Upon hearing the noise of the commotion, people from nearby gathered at the place of occurrence whereupon the accused appellants fled away, abandoning their weapons at

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the crime scene. Mohammad Sohail having been severely injured was shifted to a hospital, where he was declared dead.

4. Incorporating the above allegations, the first informant Mohammad Arif Memon (PW-11), first cousin of Mohammed Sohail (deceased) lodged a complaint (Exhibit P-79) being CR No. 141 of 2011 on 4th May, 2011 which came to be registered as FIR at Anand Town Police Station for the offences punishable under Sections 302 and 323 IPC read with Section 120B IPC. The investigation of the case was assigned to Dhananjaysinh Surendrasinh Waghela, Police Inspector (PW-18) (hereinafter being referred to as 'Investigating Officer').
5. Inquest *panchnama* (Exhibit P-25) was prepared and the dead body of Mohammad Sohail was sent for postmortem. Dr. Swapnil (PW-1) conducted autopsy taking note of 29 injuries all over the body of the deceased-Mohammad Sohail. He issued the post-mortem report (Exhibit P-12) opining that the cause of death of Mohammad Sohail was due to shock attributed to multiple injuries all over the body. The first informant-Mohammad Arif Memon (PW-11) was medically examined by the Medical Officer, Dr. Arvindbhai (PW-2) who after examining him, issued a medical certificate (Exhibit P-17).
6. The Investigating Officer (PW-18) carried out the usual investigation and prepared a site plan (Exhibit P-27) of the place of occurrence. The accused appellants were arrested after about five days from the date of incident. Clothes worn by the accused appellants were collected by drawing *panchnama* (Exhibit P-40). The Investigating Officer (PW-18) reconstructed the crime scene at the instance of all accused-appellants and drew demonstration *panchnama* (Exhibit P-50). The effected recovery of one big knife at the instance of accused Mohmedfaruk @ Palak; the blood-stained clothes of the deceased and the recovered weapons were forwarded to the Forensic Science Laboratory (in short 'FSL') for chemical analysis. The Investigating Officer (PW-18) also collected call detail records from service provider i.e. Vodafone. After conclusion of the investigation, a charge was filed against the accused appellants for the offences punishable under Sections 302, 323 and 120B IPC.
7. The offence under Section 302 IPC being exclusively triable by the Court of Sessions, the case was committed and made over for trial to the Court of Additional Sessions Judge, Anand, where it came

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to be registered as Sessions Case No. 84 of 2011. Charges were framed against the accused appellants for the offences punishable under Sections 302, 323 and 120B IPC. The accused-appellants pleaded not guilty and claimed trial. The prosecution examined 18 witnesses and exhibited 131 documents in order to bring home the charges. On being questioned under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter being referred to as 'CrPC') and upon being confronted with the allegations as appearing in the prosecution case, the accused appellants denied the same and took a categorical stance that they had been falsely implicated in the case. However, no evidence was led in defence.

8. After hearing the arguments put forth by the prosecution and the defence counsel and upon appreciating the evidence available on record, the trial Court, *vide* judgement and order dated 13th October, 2014 convicted and sentenced the accused appellants as mentioned above. The judgment of conviction and the order of sentence was challenged by the accused appellants before the Division Bench of Gujarat High Court by filing separate criminal appeals, which came to be rejected *vide* a common judgment dated 18th February, 2019, which has been subjected to challenge in the instant batch of appeals by special leave.
9. Since the appeals arise out of a common judgement, the same were heard and are being decided by this judgement.

Submissions on behalf of the accused-appellants:-

10. Learned counsel appearing on behalf of the accused appellants advanced the following submissions beseeching the Court to accept the appeals, set aside the impugned judgments and acquit the accused appellants of the charges: -
 - 10.1 Demistalkumar, Police Constable (PW-12), projected to be an eyewitness of the incident, was admittedly the first to reach the police station with two weapons collected from the crime scene at 9:15 pm. However, surprisingly, his statement was either not recorded or if recorded, the same never saw the light of the day. The FIR (Exhibit P-79) which ought to have been registered on the earliest version of Demistalkumar (PW-12) was lodged at a much later point of time on the basis of a statement given by the first informant, Mohammad

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Arif Memon (PW-11) to S.N. Ghori, Police Sub-Inspector (PW-17) at 11:00 pm. The fact that Demistalkumar (PW-12) had reached the police station at the earliest point of time along with the weapons used in the crime is admitted by the prosecution and is fortified by the evidence of *panch* witness, Mohammad Hussain (PW-5), who stated that he was informed by the police that a person named Demistalkumar (PW-12) had produced the weapons at 9:15 pm.

10.2 Demistalkumar (PW-12) admitted in his cross-examination that after reaching the police station, an enquiry was made from him by the higher officials. As Demistalkumar (PW-12) is projected to be an eyewitness who had produced the weapons used in commission of the crime and had also been questioned about the incident at the police station at the earliest point of time, his statement which presumably was the first detailed disclosure about the incident, would have assumed the character of an FIR. However, his statement was never brought on record, which tantamounted to deliberate concealment by the prosecution. These proceedings which took place at the police station would definitely have been recorded in the daily diary (*roznamcha*) maintained at the police station. However, these vital aspects of the case have been intentionally withheld by the prosecution who failed to produce the corresponding daily diary entry before the Court, warranting an adverse inference to be drawn. In support of this contention, learned counsel placed reliance on a judgment rendered by this Court in the case of [*Tomaso Bruno & Anr. v. State of Uttar Pradesh*](#).¹ It was urged that the statement of Demistalkumar (PW-12) was legally required to be treated as the first and foremost information.

10.3 That the explanation offered by Demistalkumar (PW-12), for not lodging the FIR of the incident, stating that another person was already present there at the police station at 9:15 pm for giving the complaint, is falsified by the testimony of S.N. Ghori, Police Sub-Inspector (PW-17), who testified on oath that the statement of first informant, Mohammad Arif

1 [\[2015\] 1 SCR 721](#) : (2015) 7 SCC 178

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Memon (PW-11) was reduced into writing by him at Krishna Medical Hospital, Karamsad at 11:00 pm.

- 10.4** That the evidence of Demistalkumar (PW-12) also creates grave doubt about the very presence of the first informant, Mohammad Arif Memon (PW-11) at the place of incident, as the witness clearly stated in his evidence that he saw only the injured lying at the crime scene in a profusely bleeding condition.
- 10.5** That Demistalkumar (PW-12) made gross improvements in his evidence while identifying the three appellants in the dock for the first time after a span of more than two and a half years. The witness admitted in his cross-examination that he had not provided any details in his statement, recorded under Section 161 CrPC, about the identity of assailants. The identification in the dock without any Test Identification Parade (TIP) is a weak and unreliable piece of evidence. In support of this submission, learned counsel placed reliance on the judgment rendered by this Court in the case of [*Amrik Singh v. State of Punjab*](#).²
- 10.6** That K.N. Waghela, Head Constable (PW-16), posted at the Anand Town Police Station admitted in his cross-examination that a telephonic *wardhi* about the incident was noted down by him. However, the witness was not in a position to recollect the exact time of recording of the telephonic *wardhi*. The witness stated that it was mentioned in the telephonic *wardhi*, that an indiscriminate assault with sword and other sharp weapons had been made upon Mohammad Sohail (deceased). It was admitted by the witness in his cross-examination, that no reference of a sword was made in the FIR. It was also admitted that there was no reference of dagger and *gupti* in the telephonic *wardhi*. It was contended that the daily dairy entry pertaining to the recording of the telephonic *wardhi* was also not produced on record by the prosecution which tantamounts to concealment of vital facts requiring adverse inference to be drawn against the prosecution.

2 [\[2022\] 7 SCR 451](#) : (2022) 9 SCC 402

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- 10.7** That the information about the commission of crime had been received at the police station at 9:15 pm, is clear from the evidence of Demistalkumar (PW-12) and therefore, the statement of the first informant (PW-11) recorded by S.N. Ghorl, PSI (PW-17) at a later point of time, would tantamount to a statement under Section 161 CrPC and resultantly, it will be hit by Section 162 CrPC. In support of this contention, learned counsel placed reliance on a judgment rendered by this Court in the case of [*Animireddy Venkata Ramana & Ors. v. Public Prosecutor, High Court of Andhra Pradesh*](#).³
- 10.8** Mustaq (PW-13), another projected eyewitness to the incident, deposed that he was also present at the place of occurrence and had seen the accused appellants assaulting the deceased. The witness, while deposing on oath, made grave improvements in his testimony inasmuch as in his previous statement under Section 161 CrPC, he had clearly stated that he was at his house at the time of alleged incident and that he received a call from the father of the deceased, Mohammad Iqbal Memon (PW-14), about the attack made on the deceased. Thus, Mustaq (PW-13) spoke a blatant lie in his deposition while trying to assume the status of an eyewitness without actually being present at the crime scene. His claim in this regard is further belied by the testimony of Mohammad Iqbal Memon (PW-14), who stated on oath that it was he who had informed Mustaq (PW-13) about the incident. It was contended that if at all Mustaq (PW-13) was present at the place of incident, then he would have been the one to inform the father of the deceased, Mohammad Iqbal Memon (PW-14) about the incident and not the other way around.
- 10.9** That the evidence of Demistalkumar (PW-12) and K.N. Waghela, Head Constable (PW-16) completely contradicts the evidence of the so-called eyewitnesses Mustaq (PW-13) and first informant, Mohammad Arif Memon (PW-11) and brings their presence at the crime scene under a grave shadow of doubt.
- 10.10** That the first informant, Mohammad Arif Memon (PW-11), stated on oath that two other persons, namely, Mehboob Abdul

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Rehman Memon and Irfanbhai Memon, being the colleagues of the deceased were also present at the spot. However, these two persons were not examined in evidence for reasons best known to the prosecution.

- 10.11** That the first informant, Mohammad Arif Memon (PW-11) did not make any claim in the FIR that he too had sustained an injury in the alleged incident. However, he later claimed that he was also injured in the incident, upon which he was medically examined on the next day of the incident by Dr. Arvindbhai (PW-2). The doctor (PW-2) admitted in his cross-examination that the injury No.2 could be the result of itching and scratching.
- 10.12** That the first informant, Mohammad Arif Memon (PW-11) claimed in his evidence that he lifted the victim and placed him in a rickshaw, after he had been indiscriminately assaulted by the accused appellants using sharp weapons. However, he admitted not having received any blood stains either on his person or on his clothes, which was bound to happen if he had actually assisted in boarding the profusely bleeding victim on to the rickshaw.
- 10.13** That none of the so-called eyewitnesses were actually present at the crime scene; they never saw the incident and a case of blind murder had been foisted upon the accused appellants because of prior enmity.
- 10.14** That the trial Court and the High Court heavily relied on the circumstance that the accused appellants had collected weapons in the dicky of the scooter. However, neither any scooter was recovered by the police nor did any witness gave evidence in support of the above allegation. This circumstance which the prosecution banked upon heavily in order to bring home the charge of criminal conspiracy against the accused-appellant was not substantiated by any tangible evidence.
- 10.15** That as per the prosecution, the accused appellants were arrested by the police on 9th May, 2011 i.e. after 5 days from the date of alleged incident at a short distance from Memon Colony, where the accused-appellants reside, while they were trying to flee away on a motorcycle. It is highly improbable that the accused-appellants, after committing such a grave

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crime would continue to reside in close vicinity of the crime scene. Had there been any *iota* of truth in the prosecution case, the police would have arrested the accused immediately after the incident because they were all along available at their respective homes which are located just nearby to the place of incident.

- 10.16** That the recoveries/discoveries made at the instance of the accused-appellants are fabricated and were not proved by convincing/tangible evidence.

Submissions on behalf of the respondent-State: -

- 11.** *Per contra*, learned counsel appearing for the respondent-State, vehemently and fervently opposed the submissions advanced by the learned counsel for the accused-appellants. Learned counsel for the respondent-State advanced the following submissions craving dismissals of the appeals:-
- 11.1** That the prosecution case is based on clinching testimony of eyewitnesses which is corroborated in material particulars by the evidence of Dr. Swapnil (PW-1) and so also the incriminating recoveries effected by the Investigating Officer (PW-18).
- 11.2** That the FIR (Exhibit P-79) was lodged with utmost promptitude i.e. within two and a half hours of the incident. The accused appellants were named in the FIR. The first informant, Mohammad Arif Memon (PW-11) had no motive whatsoever to falsely implicate the accused appellants for the crime. The promptitude in lodging of the FIR lends succour to the prosecution case.
- 11.3** That it is an admitted case that a day before the incident, Mohmedfaruk @ Palak and Mohammad Sohail (deceased) had indulged in a quarrel during a meeting owing to the issue of shortage of water in the colony. Being enraged by this controversy, Mohmedfaruk @ Palak conspired with Amin @ Lalo Aarifbhai Memon and Allarakha Habib Memon and launched the pre-planned indiscriminate attack upon Mohammad Sohail, causing fatal injuries, leading to his death, and causing injuries to the first informant, Mohammad Arif Memon (PW-11).

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- 11.4** That the attack on the deceased was pre-mediated and gruesome, inasmuch as, 29 injuries were caused to the deceased by sharp and blunt weapons and no part of his body was spared. The injuries so inflicted upon Mohammed Sohail (deceased) proved instantaneously fatal which fact was duly proved by Dr. Swapnil (PW-1).
- 11.5** That Dr. Arvindbhai, Medical Officer (PW-2) proved the injuries of the first informant Mohammad Arif Memon (PW-11) which corroborates the presence of the witness (PW-11) with the deceased at the crime scene. In addition, thereto, Dr. Arvindbhai (PW-2) also examined and proved the injuries sustained by the accused appellants during the incident which again corroborates the prosecution case regarding active participation of the accused appellants in the incident.
- 11.6** That the prosecution led clinching evidence to establish the guilt of the accused and therefore, the trial Court was justified in convicting the accused-appellants as above. The High Court too did not commit any error while affirming the judgment of the trial Court and upholding the conviction of the appellants herein.
- 11.7** That two competent Courts sifted and made detailed analysis of the entire evidence and thereafter, have recorded concurrent findings of facts, holding the accused appellants guilty of the charges, and thus, this Court should not feel persuaded to exercise its jurisdiction under Article 136 of the Constitution of India, so as to interfere in the well-reasoned judgments rendered by the trial Court and the High Court.
- 12.** We have given our thoughtful consideration to the submissions advanced at bar and have perused the impugned judgments. We have minutely scanned the record with the assistance of the learned counsels representing the parties.

Discussion and Conclusions: -

- 13.** As per the prosecution case, the FIR (Exhibit-79) was registered on 4th May, 2011 at 11:00 pm on the basis of the oral statement given by the first informant Mohammad Arif Memon (PW-11) to S.N. Ghorl, PSI (PW-17) at Krishna Medical Hospital, Karamsad. The first informant, Mohammad Arif Memon (PW-11) deposed in

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his testimony that an incident had taken place on 3rd May, 2011 in their colony wherein, allegedly Mohammad Sohail (deceased) made some imputations against Mohmedfaruk, thereby annoying the accused Mohmedfaruk @ Palak. On the next day, i.e., on 4th May, 2011 at about 8:30 pm, the first informant (PW-11) along with his cousin Mohammad Sohail (deceased) had gone to Shah petrol pump, near Bhalej Road overbridge for filling petrol in their scooter. Having refuelled the scooter, they proceeded towards the Bhalej overbridge for going home. At that point of time, Mohmedfaruk @ Palak came around and asked for the mobile number of Mohammad Hussain, a friend of the first informant (PW-11) who used to reside at Bangalore. The first informant (PW-11) stopped the vehicle and was trying to look for the number of Mohammad Hussain saved in his mobile at which point of time, the accused Amin@ Lalo Aarifbhai Memon and Allarakha Habib Memom also reached there. Accused Mohmedfaruk @ Palak insinuated as to why Mohammad Sohail had insulted him in the meeting convened earlier in the Memon colony to discuss the issue of water. Amin@ Lalo Aarifbhai Memon suddenly took out a big knife concealed on his person and inflicted a blow thereof on the head of Mohammad Sohail (deceased). Allarakha Habib Memon took out a *gupti* and after removing the cover thereof, inflicted a blow on the head of Mohammad Sohail who started running towards the petrol pump in order to escape. Mohmedfaruk @ Palak also chased Mohammad Sohail, whereupon, the first informant (PW-11) tried to intervene, but he was given a push by Mohmedfaruk @ Palak and fell down as a result. Accused Mohmedfaruk @ Palak also took out a big knife being carried by him and inflicted a blow thereof on the back of Mohammad Sohail after chasing him down. Having received multiple injuries in the assault laid by the accused appellants, Mohammad Sohail fell down on the road just outside the petrol pump. A policeman was present near the petrol pump who came running towards Mohammad Sohail and on seeing him, the three assailants started running away with their weapons. In the intervening period, Mehboob Abdul Rehman Memon and Irfanbhai Memon, colleagues of Mohammad Sohail also arrived at the spot. Accused Allarakha Habib Memon and Amin @ Lalo Aarifbhai Memon threw down their weapons whereas, Mohmedfaruk @ Palak ran away carrying the knife held by him. The first informant (PW-11) noticed large number of injuries on the body of Mohammad Sohail. Someone stopped a rickshaw wherein; Mohammad Sohail was boarded, and

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he was taken to Anand Nagar Palika Hospital for treatment. On reaching the hospital, they came to know that the doctor was on leave on which, the first informant (PW-11) gave a call to his uncle Mohammed Iqbal Memon (father of the deceased) who came to the Anand Nagar Palika Hospital with a Maruti van. Mohammad Sohail was placed in the van and was taken to Krishna Medical Hospital, Karamsad for treatment where the duty Doctor examined him and declared that he had expired. The first informant (PW-11) stated that when Mohammad Sohail was being taken in the van, at that time, he, Mohammad Sohail's father Mohammed Iqbal Memon, Sikander Abdul Karim Chokshi, Munafbhai Farooqbhai Memon and Mustaq Mohammad Siddiqbhai Memon were also present in the vehicle. The aforesaid oral statement was treated to be the complaint (Exhibit P-79) and came to be registered as the formal FIR.

14. Apparently, going by the allegations made in the FIR (Exhibit P-79), there were two eyewitnesses to the incident, namely, the first informant, Mohammad Arif Memon (PW-11), and the Police Constable, Demistalkumar (PW-12) who were present at the petrol pump.
15. Before dealing with the evidence of the first informant, Mohammad Arif Memon (PW-11), we would like to allude to the testimony of the Police Constable, Demistalkumar (PW-12) who is indisputably an independent witness having no interest either in the complainant party or the accused party. The relevant extracts from the evidence of Demistalkumar (PW-12) are reproduced hereinbelow for the sake of ready reference: -

Examination-in-Chief:

“Since last 3 years I am discharging duty at Anand Town Police Station at L.R. Police constable.

On 4/5/11, I was having my duty at Shah Petrol Pump which is situated towards Anand at Bhalej bridge between morning hours 10 to 2400 (sic). At 8:30 o' clock in the night, I came to know that some scuffle has taken place opposite Radhaswami Chamber. Hence I came on road from Shah Petrol Pump. Once person was found lying there in bleeding condition. He had fallen down at small garden near Mahendra Shah Petrol Pump and 3 persons were running towards him to beat him. They were having weapons like knife and Gupti. Upon seeing me, 2 persons

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out of the 3 had thrown away their weapons and 3rd person ran away towards the bridge. Thereafter the person who was having bleeding was made to sit in the rickshaw and was sent for treatment. His relative came and the weapons were deposited at police station. I came to know that the person who was having bleeding had passed away at Shri Krusna hospital. Police had taken my statement once only. I had presented one big knife and Gupti at police station and I can recognise those weapons if I am shown those weapons.”

...

“I can identify 3 persons which I have mentioned. Upon being asked to 1st identified 2 accused out of the persons present in the court today, he identifies 2 accused. One of them is Amin Arif Memon and another one is Farooq Safi Memon.”

Cross-examination:

“One person told me that something wrong is going on and hence I came to know about the things because of which I went to the road and thereafter people got together. Within 3-4 minutes people got together.”

...

“There was one person in the rickshaw along with the injured person.”

...

“It was approximately 6 minutes between my having seen the injured person and the injured person having gone in the rickshaw. I had tried to help in keeping the injured person in the rickshaw. That person was having severe bleeding. During placing the injured person in the rickshaw, my clothes got blood stains. Those clothes I had not handed over to the police. Police had not asked those clothes. After that injured person was taken to hospital, at about 9:15 o’ clock I had gone to the police station. I had gone to Anand Town Police Station. I had gone with the weapons. I had not gone with the weapons not covered.

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Those weapons were given to Saheb. I was enquired by the Saheb. I had not lodged any complaint. Reason for not giving complaint was that, there was one person sitting over there for giving the complaint. He was sitting there at 9:15 o' clock. I do not know what proceeding was carried out after I had deposited those weapons. I stayed at police station for nearly 20 minutes. It is true that, in this regard I had not made any report to the police. On the day I had gone to the police station my statement was not taken. It is true that, my statement was taken the next day and in that statement there is no description about the persons whom I have seen or about their clothes."

16. Demistalkumar (PW-12) was portrayed by the prosecution to be an eyewitness of the incident. He categorically stated that on 4th May, 2011 at 8:30 pm, he came to know that a scuffle had taken place opposite the Radha Swamy chamber and hence, he went to the said location. There, he found one person lying down in a bleeding condition near a garden adjacent to the Mahendar Shah petrol pump. Three assailants brandishing weapons like knife and *gupti* were approaching to beat the person. On seeing Demistalkumar (PW-12), two of the three assailants threw away their weapons and ran away towards the bridge. Thereafter, the injured was boarded on to a rickshaw and was sent for treatment. His relatives came and the weapons were deposited at the police station.
17. In cross-examination, Demistalkumar (PW-12) admitted that someone told him about the untoward incident whereupon he proceeded towards the road and within three to four minutes, people gathered at the crime scene. He stayed with the injured for about three to four minutes. One man accompanied the injured in the rickshaw. The witness also helped in placing the injured in the rickshaw and his clothes got stained with blood in this process. After the injured person had been taken to the hospital, he proceeded to the Anand Town Police Station carrying the two weapons abandoned by the offenders with him and reached there at 9:15 pm. However, he did not lodge any complaint of the incident. The witness explained the reason for not giving the complaint stating that a person was already sitting at the police station at 9:15 pm for giving the report.
18. Having carefully sifted through and analysed the evidence of Demistalkumar (PW-12), we find that he did not utter a single word

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about the presence of the first informant, Mohammad Arif Memon (PW-11) at the scene of occurrence. He claimed to have picked up two weapons used by the accused, i.e., one big knife and a *gupti* and had presented them at the police station around 9:15 pm on the very day of the incident. He also stated that he did not submit any report/complaint of the incident because he saw that someone was already sitting at the police station at 9:15 pm for giving the report/complaint.

19. We find it improbable and totally unacceptable that a police constable had seen the incident and had also brought the crime weapons to the police station and yet his statement would not be recorded and the factum of presentation of weapons would not be entered in the daily diary (*roznamcha*) of the police station. Demistalkumar (PW-12) explained in his cross-examination that he did not give a report about the incident because he noticed the presence of someone at the police station who was sitting there from 9:15 pm to give the report. However, as per the record, no report was admittedly presented at the police station by any person from the complainant side. No police personnel deployed at the Anand Town Police Station corroborated the version of Demistalkumar (PW-12) that someone had come to the police station at 9:15 pm for giving a report of the incident.
20. Since the Police Constable, Demistalkumar (PW-12) claiming to be an eyewitness to the heinous assault had reported at the police station with the crime weapons, there was no reason whatsoever as to why his statement would not have been recorded immediately on his arrival at the police station. From the circumstances discussed above, a reasonable doubt is created in the mind of the Court that the statement of Demistalkumar (PW-12) would definitely have been recorded in the daily diary (*roznamcha*) but his version may not have suited the prosecution case and that is why, the daily diary entry was never brought on record. Non-production of the daily diary is a serious omission on part of the prosecution.
21. There cannot be any doubt that the first version of the incident as narrated by the Police Constable, Demistalkumar (PW-12) would be required to be treated as the FIR and the complaint lodged by Mohammad Arif Memon (PW-11) would be relegated to the category of a statement under Section 161 CrPC and nothing beyond that. The same could not have been treated to be the FIR as it would be hit by Section 162 CrPC. Evidently thus, the prosecution is guilty of

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concealing the initial version from the Court and hence, an adverse inference deserves to be drawn against the prosecution on this count.

22. The FIR (Exhibit-79) was registered on the basis of the oral statement of the first informant (PW-11) recorded at Krishna Medical Hospital, Karamsad by S.N. Ghori, PSI (PW-17). The witness (PW-17) stated in cross-examination that Demistalkumar (PW-12) met him at the police station at around 2:30 am on 5th May, 2011. No information about the incident was received at the police *chowki*. He came to know at about 10:00 pm that some cognizable offence had been committed. The said information was based on a *wardhi* received from the hospital which was issued by Dr. Varun Patel. On receiving this *wardhi*, he proceeded to the Krishna Medical Hospital, Karamsad at about 10:00 pm where he met the first informant. He stayed at the hospital for about one and a half hours. The witness, S.N. Ghori, PSI (PW-17) also admitted that the complainant did not mention in the complaint that he had received any injuries in the incident. Thus, there is a huge cloud of suspicion on the very threshold of the prosecution case i.e. the time and manner of lodging of the FIR (Exhibit-79).
23. Demistalkumar (PW-12) was also made to identify the accused persons in the dock, but that is another story which we shall consider at a later stage. The witness identified the accused appellants as the offenders. However, we find that the lame attempt by PW-12 to make dock identification of the accused in his deposition recorded after nearly two and a half years of the incident is absolutely flimsy and unacceptable. The witness had not given out either the names or the description of the features of the accused in his police statement and thus, if at all, the prosecution was desirous of getting the accused identified at the hands of this witness, then he should have been made to identify the accused persons in a Test Identification Parade during the investigation. Thus, the identification of the accused by Demistalkumar (PW-12) for the first time in the dock is totally unbelievable and unacceptable.
24. Now, we shall proceed to discuss the evidence of the star prosecution eyewitness, namely, Mohammad Arif Memon (PW-11), the first informant. The witness (PW-11) narrated the details of the incident as were stated by him in an oral statement given to S.N. Ghori, PSI (PW-17) on 4th May, 2011 at the Krishna Medical Hospital, Karamsad

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which was treated to be the FIR (Exhibit P-79). In addition to the facts as set out in the FIR, the witness also alleged that he also received an injury on his head when he fell down as a result of the push given by Mohmedfaruk @ Palak. A very important fact which emerges from the evidence of the first informant (PW-11) is that he categorically stated that he gave a complaint of the incident by personally appearing at the Anand Town Police Station. He further stated that after he had given the complaint, the police called him next morning after the incident and that he had pointed out the crime scene to the police. Only thereafter, he signed the complaint. Apparently thus, from the version set out in the examination-in-chief of the first informant (PW-11), there is a grave discrepancy regarding the time and place of lodging the complaint.

25. In cross-examination, the first informant (PW-11) stated that he reached the Krishna Medical Hospital, Karamsad at around 9:00 pm. He did not take any treatment for the injuries sustained by him in the incident. By the time he reached Krishna Medical Hospital, his uncle Mohammed Iqbal Memon, father of the deceased, was already present there and he told the doctors that the attack was made by sharp weapons. They proceeded from the hospital to the Anand Town Police Station which is at a distance of about 10 kms from the hospital and he gave the complaint at the Police Station. No police personnel accompanied him when he proceeded from Krishna Hospital. When he reached the hospital, he noticed the injuries suffered by the deceased. They went to the police after meeting the doctor. The witnesses referred to in the complaint were present with him when he drafted the complaint which was submitted at the Police Station about an hour, after his companions had reached there. He admitted that before giving the complaint, a discussion was held amongst the relatives as to the manner in which the complaint was to be drafted and lodged. However, the witness explained that he drafted the complaint describing the incident as he had seen it. A pertinent suggestion was given to the witness (PW-11) in cross-examination that he could not describe the number and location of the injuries caused to the deceased because he was not present on the spot and did not see the incident. He denied the said suggestion. He admitted that the factum of his going to the petrol pump along with the deceased was known only to him, Mohammad Sohail (deceased) and Mehboobbbhai. Approximately, five minutes after the assault, the

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injured was taken to the hospital. He was bleeding from his head. He was lifted and made to sit in the rickshaw. However, from the persons who lifted the injured, only Irfanbhai Memon received blood stains on his clothes. The witness (PW-11) admitted that neither he nor any other person received blood stains on their clothes or elsewhere. He was confronted with his previous version and admitted that he did not mention in the complaint (Exhibit P-79) that he had received an injury on his head in the incident. Going by the above version of the witness (PW-11), manifestly, the complaint which he gave at the police station never saw the light of the day and seems to have been intentionally withheld. Furthermore, PW-11 categorically stated that he signed the complaint on the morning after the incident and pursuant to the site inspection by the police, which creates a genuine doubt in the mind of the Court that the FIR (Exhibit-79) seems to have been created at a later point of time.

26. As per the deposition of S.N. Ghorl, PSI (PW-17), the oral statement of Mohammad Arif Memon (PW-11) was taken down in writing at the Krishna Medical Hospital, Karamsad and the same was treated to be the complaint (Exhibit-79) which came to be registered as CR No. 141 of 2011 for offences punishable under Sections 302, 120B and 323 IPC. The formal FIR was exhibited during the deposition of S.N. Ghorl, PSI (PW-17) who stated that on 4th May, 2011, while performing duty as Police Sub-Inspector (PSI) in the Sardar Bagh Police Station of Anand Town, he got information that three persons had caused injuries to Mohammad Sohail (deceased) near Shah petrol pump on Bhalej Road at about 8:00 pm. He was apprised that the injured was first taken to Nagar Palika Hospital, Anand in an autorickshaw and from there, the father of the injured took him to Krishna Medical Hospital, Karamsad in his van for further treatment. Upon this, the PSI (PW-17) proceeded to Shri Krishna Medical Hospital, Karamsad where he met the first informant Mohammad Arif Memon (PW-11) who narrated the details of the incident which was drawn up as the complaint. The witness marked Exhibit P-79 on the complaint and proved his signature thereupon.
27. The complaint (Exhibit P-79) was registered as a formal FIR by witness K.N. Waghela, Head Constable (PW-16) who testified that he had been performing duties as a Head Constable in Anand Town Police Station for last four years. He was present on duty on 4th May, 2011. The complainant Mohammad Arif Memon (PW-11)

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filed a complaint against Mohmedfaruk @ Palak and others to S.N. Ghorī, PSI (PW-17) at 11:30 pm. The said complaint was forwarded to the police station Anand Town and accordingly, CR No. 141/2011 was registered, and investigation was assigned to DhananjaySinh Waghela, Police Inspector (PW-18). The station diary of the Anand Town Police Station was proved as Exhibit P-97 wherein, the factum of registration of the FIR is recorded. The witness also stated that a telephonic *wardhi* forwarded by Dr. Varun Patel, Shri Krishna Medical Hospital, Karamsad was also entered in the station diary on which the witness (PW-16) as well as S.N. Ghorī, PSI (PW-17) had signed. The said *wardhi* was prepared at 10:00 pm whereas, the complaint was received at the police station at 11:30 pm.

28. Certain very significant incongruencies come to the fore on a minute evaluation of the evidence of Mohammad Arif Memon, the first informant (PW-11), K.N. Waghela, Head Constable (PW-16) and S.N. Ghorī, PSI (PW-17). Whilst Mohammad Arif Memon (PW-11), the first informant categorically stated that he drafted the complaint and submitted it at the Anand Town Police Station, but in total contradiction thereto, S.N. Ghorī, PSI (PW-17) stated that the complaint was registered on the basis of the oral statement of the first informant, Mohammad Arif Memon (PW-11) which he took down in writing at the Krishna Medical Hospital, Karamsad. On a careful perusal of the complaint (Exhibit P-79) which subsequently came to be registered as the FIR, it is manifest that no time of recording is mentioned thereupon. Another very relevant fact which manifests from the complaint/FIR is that there is no endorsement as to the date and time on which the said FIR reached the Court concerned. Going by the highlighted excerpts (*supra*) from the testimony of Mohammad Arif Memon (PW-11), the actual complaint filed by him at the police station seems to have been withheld and there are genuine reasons to hold that the FIR is a post investigation document.
29. This Court in the case of ***State of A.P. v. Punati Ramulu and Others***⁴ held that when the police officer does not deliberately record the FIR on receipt of information about cognizable offence and the FIR is prepared after reaching the spot after due deliberations, consultations and discussion, such a complaint cannot be treated as FIR and it

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would be a statement made during the investigation of a case and is hit by Section 162 CrPC. The relevant paras of the judgment in this regard are reproduced hereinbelow: -

“5. According to the evidence of PW 22, Circle Inspector, he had received information of the incident from police constable No. 1278, who was on ‘bandobast’ duty. On receiving the information of the occurrence, PW 22 left for the village of occurrence and started the investigation in the case. Before proceeding to the village to take up the investigation, it is conceded by PW 2 in his evidence, that he made no entry in the daily diary or record in the general diary about the information that had been given to him by constable 1278, who was the first person to give information to him on the basis of which he had proceeded to the spot and taken up the investigation in hand. It was only when PW 1 returned from the police station along with the written complaint to the village that the same was registered by the Circle Inspector, PW 22, during the investigation of the case at about 12.30 noon, as the FIR, Ex. P-1. In our opinion, the complaint, Ex. P-1, could not be treated as the FIR in the case as it certainly would be a statement made during the investigation of a case and hit by Section 162 CrPC. As a matter of fact the High Court recorded a categorical finding to the effect that Ex. P-1 had not been prepared at Narasaraopet and that it had “been brought into existence at Pamaidipadu itself, after due deliberation”. **Once we find that the investigating officer has deliberately failed to record the first information report on receipt of the information of a cognizable offence of the nature, as in this case, and had prepared the first information report after reaching the spot after due deliberations, consultations and discussion, the conclusion becomes inescapable that the investigation is tainted and it would, therefore, be unsafe to rely upon such a tainted investigation, as one would not know where the police officer would have stopped to fabricate evidence and create false clues.** Though we agree that mere relationship of the witnesses PW 3 and PW 4, the children of the deceased or of PW 1 and PW 2

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who are also related to the deceased, by itself is not enough to discard their testimony and that the relationship or the partisan nature of the evidence only puts the Court on its guard to scrutinise the evidence more carefully, we find that in this case when the bona fides of the investigation has been successfully assailed, it would not be safe to rely upon the testimony of these witnesses either in the absence of strong corroborative evidence of a clinching nature, which is found wanting in this case.”

(emphasis supplied)

30. In this regard, we are also benefitted by a recent judgment of this Court in the case of [*Babu Sahebagouda Rudragoudar and Others v. State of Karnataka*](#),⁵ the relevant portion of which reads as under: -

“47. Apparently, thus, the close relatives of the deceased had gone to the police station in the late hours of 19th September itself. If this version was true then, in natural course, these persons were bound to divulge about the incident to the police and their statement/s which would presumably be about an incident of the homicidal death would have mandatorily been entered in the Daily Dairy of the police station if not treated to be the FIR. However, the Daily Diary or the *Roznamcha* entry of the police station corresponding to the so called visit by the relatives of the deceased to the police station was not brought on record which creates a grave doubt on the genuineness of the FIR (Exhibit P-10). The complainant (PW-1) admitted in cross examination that the Poujadar came to his house and he narrated the incident to the officer who scribed the same and thereafter, the complainant appended his signatures on the writing made by the Poujadar. However, ASI Tikota Police Station (PW-18) testified on oath that complainant (PW-1) came to the police station and submitted a written report which was taken as the complaint of the incident. **He did not state anything about any complaint being recorded at the house of the complainant prior to lodging of the report. Thus, there is a grave**

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contradiction on this important aspect as to whether the report was submitted by the complainant (PW-1) in the form of a written complaint or whether the oral statement of complainant (PW-1) was recorded by the police officials at his home leading to the registration of FIR (Exhibit P-10). The non-production of the Daily Dairy maintained at the police station assumes great significance in the backdrop of these facts. Apparently thus, the FIR (Exhibit P-10) is a post investigation document and does not inspire confidence.”

(emphasis supplied)

31. In addition to all the above noted inconsistencies and contradictions in the evidence of the prosecution witnesses, this Court has to be conscious about the deposition of Demistalkumar (PW-12) who has categorically stated that when he reached the crime scene, he saw only the injured lying on the road with the three assailants brandishing sharp weapons towards Mohammed Sohail, and about four minutes later, some other people came there. Thus, the evidence of Demistalkumar (PW-12) makes the very presence of the first informant, Mohammad Arif Memon (PW-11) at the crime scene doubtful.
32. Had there been an *iota* of truth in the claim of the first informant, Mohammad Arif Memon (PW-11) that he was an eyewitness to the occurrence then, there was no reason as to why he did not divulge the details thereof to Police Constable, Demistalkumar (PW-12) present at the spot. The natural reaction of any prudent man would be to make a complaint of the incident to the policeman present at the spot.
33. Furthermore, the Police Constable, Demistalkumar (PW-12), stated that he got blood stains while placing the injured in the rickshaw. On the other hand, the first informant, Mohammad Arif Memon (PW-11), however, admitted that he did not receive any blood stains either on his hands or on his clothes at the time when the injured was placed inside the rickshaw. Rather, he did not acknowledge that Demistalkumar (PW-12) also helped in placing the victim on to the rickshaw. Had there been any *iota* of truth in the version of the first informant, Mohammad Arif Memon (PW-11) that he had seen the assault being made on his cousin brother, Mohammad

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Sohail (deceased) and that he had helped in lifting the injured and placing him in the rickshaw then, it is impossible that he would not have received the blood stains from the blood oozing out from the multiple sharp weapon injuries suffered by Mohammad Sohail. As per Demistalkumar (PW-12), when he reached the crime scene, the victim was lying on the ground and no one else was to be seen near him other than the assailants. Thus, the first informant, Mohammad Arif aMemon (PW-11) seems to have abandoned his own cousin brother who was lying on the road in gravely injured condition creating a further doubt on his very presence at the spot when the incident occurred.

34. The first informant, Mohammad Arif Memon (PW-11) also stated that after Mohammad Sohail had been assaulted by the accused-appellant with sharp weapons and had fallen on the ground, two persons namely Mehboob Abdul Rehman Memon and Irfanbhai Memon also came at the spot. The complainant and Irfanbhai Memon took Mohammad Sohail to the Nagar Palika Hospital for treatment. The said Mehboob Memon and Irfanbhai Memon were not examined by the prosecution even though they were most material witness for unfurling a true picture of the story which creates further doubt on the truthfulness of the prosecution case.
35. In total contradiction to the above version of the first informant (PW-11), Demistalkumar (PW-12) stated that he saw only one person taking the injured in the rickshaw. Thus, the claim made by Mohammad Arif Memon (PW-11) that he and Irfanbhai Memon both took Mohammad Sohail to the hospital is contradicted by Demistalkumar (PW-12) who is an independent witness. The first informant, Mohammad Arif Memon (PW-11) also stated that he lodged the complaint at the Anand Town Police Station which fact is also contradicted by the evidence of K.N. Waghela, Head Constable (PW-16) and S.N. Ghorl, PSI (PW-17) as noted above.
36. The first informant, Mohammad Arif Memon (PW-11) admitted in his cross-examination that after Mohammad Sohail's father Iqbalbhai, Sikander Abdul Karim Chokshi, Munafbhai Farooqbhai Memon and Mustaq Mohammad Siddiq Memon arrived at the Krishna Medical Hospital, Karamsad, the incident was discussed in presence of all who had gathered there. He had noticed the injuries caused to the deceased when he reached Krishna Medical Hospital, Karamsad. In

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the background of the discussion made above, these incongruencies, even though minor, reinforce the doubt created in the mind of the Court regarding the presence of the first informant, Mohammad Arif Memon (PW-11) at the crime scene. Thus, the argument advanced by learned counsel for the accused appellants that the star prosecution eyewitness Mohammad Arif Memon (PW-11) was not present at the crime scene deserves acceptance.

37. Another important aspect which was elicited in the cross-examination of (PW-11) is that the fact regarding the deceased having gone to the petrol pump for taking fuel was known only to two of them and one Mehboob Abdul Rehman Memon. In this background, it is highly improbable that the accused persons would have known in advance that Mohammad Sohail would be available at the petrol pump at that particular moment and that they got time and opportunity to conspire together and made extensive preparations for launching an assault on the victim by taking advantage of his presence at the petrol pump. Thus, we are of the view that the testimony of the first informant, Mohammad Arif Memon (PW-11), the star witness of prosecution, is not trustworthy and reliable as the same is contradicted on material aspects by numerous material facts and circumstances which we have discussed above. There is no option but to discard the testimony of the first informant, Mohammad Arif Memon (PW-11).
38. The other eyewitness to the incident who was examined on behalf of the prosecution was the Police Constable, Demistalkumar (PW-12). We have already discussed his evidence and have doubted the attempt made by the witness to identify the accused-appellant for the first time in the dock. Hence, the testimony of the Police Constable, Demistalkumar (PW-12) also does not help the prosecution in linking the accused-appellant with the crime.
39. So far as Mustaq (PW-13) is concerned, who was treated to be an eyewitness of the incident and whose testimony was relied upon by the trial Court as well as the High Court, suffice it to say that there are ample circumstances on record which deny the claim of the eyewitness that he had seen the alleged assault been made on the deceased. Firstly, the name of Mustaq (PW-13) does not figure in the FIR (Exhibit P-79) as an eyewitness to the incident. Furthermore, when he was examined under Section 161 CrPC, he categorically stated that he was at his house and that the information of the

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incident was given to him by the father of the deceased, Mohammad Iqbal Memon (PW-14). In this background, when the witness was confronted during cross-examination, he could not explain the grave improvement. Thus, we have no hesitation in holding that, Mustaq (PW-13) was falsely portrayed to be an eyewitness of the incident, and his testimony cannot be relied upon.

40. The trial Court as well as the High Court, placed extensive reliance on the confessions of the accused appellants Mohmedfaruk @ Palak Safibhai Memon and Amin @ Lalo recorded by the Medical Officer, Dr. Arvindbhai (PW-2) while preparing the injury reports of the accused.
41. We find that these so-called confessions are *ex-facie* inadmissible in evidence for the simple reason that the accused persons were presented at the hospital by the police officers after having been arrested in the present case. As such, the notings made by the Medical Officer, Dr. Arvindbhai (PW-2) in the injury reports of Mohmedfaruk @ Palak and Amin @ Lalo would be clearly hit by Section 26 of the Indian Evidence Act, 1872 (hereinafter being referred to as 'Evidence Act'). As a consequence, we are not inclined to accept the said admissions of the accused as incriminating pieces of evidence relevant under Section 21 of the Evidence Act. The circumstance regarding identification of place of incident at the instance of the accused is also inadmissible because the crime scene was already known to the police and no new fact was discovered in pursuance of the disclosure statements.
42. The trial Court as well as the High Court heavily relied upon the FSL reports (Exhibits 111-115) to hold that blood group found on the weapons of offence incriminated the accused for the crime as the same matched with the blood group of the deceased. In this regard, it is suffice to say that the two weapons which were picked up by Demistalkumar (PW-12) from the place of occurrence were formally seized at the Anand Town Police Station around 2:30 am on 5th May, 2011. Only one of the *panchas* Mohammad Hussain (PW-5) was examined at the trial. The seizure *panchnama* (Exhibit -38) records that the three accused who had inflicted deadly blows to the deceased with dagger, *gupti* and knife, threw away their weapons near the garden and fled away from the crime scene and that police personnel brought all the weapons to the police station. However, the *panchnama* (Exhibit P-38) does not bear the signatures of the

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police constable, Demistalkumar (PW-12) who admittedly collected the weapons from the crime scene and presented them to the police station. Thus, no credence can be given to seizure *panchnama* (Exhibit P-38) because it suffers from the lacuna of not being attested by the witness who had actually presented the weapons at the police station. In addition, thereto, we may further note that Demistalkumar (PW-12), the police constable who deposited the weapons at the police station, did not state in his evidence as to whom he had given the knife and the *gupti* which he picked up from the crime scene. These weapons were seized *vide* seizure *panchnama* (Exhibit-38) which was admittedly prepared at 2:30 am. However, the Police Constable, Demistalkumar (PW-12) stated that he reached the police station at about 9:15 pm and stayed there for only 20 minutes. These infirmities create a doubt on the very process of seizure of the weapons.

43. The trial Court as well as the High Court heavily relied upon the FSL reports (Exhibits 111-115) for finding corroboration to the evidence of the eyewitnesses and in drawing a conclusion regarding culpability of the appellants for the crime. We may reiterate that the testimony of the so-called eyewitnesses has already been discarded above by holding the same to be doubtful. Thus, even presuming that the FSL reports (Exhibits 111-115) conclude that the blood group found on the weapons recovered at the instance of the accused matched with the blood group of the deceased, this circumstance in isolation, cannot be considered sufficient so as to link the accused with the crime. In this regard, reliance can be placed on the judgment of [*Mustkeem alias Sirajudeen v. State of Rajasthan*](#),⁶ wherein this Court held that sole circumstance of recovery of bloodstained weapon cannot form the basis of conviction unless the same was connected with the murder of the deceased by the accused. The relevant portion is extracted hereinbelow:-

“19. The AB blood group which was found on the clothes of the deceased does not by itself establish the guilt of the appellant unless the same was connected with the murder of the deceased by the appellants. None of the witnesses examined by the prosecution could establish that fact. The blood found on the sword recovered at the instance

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of [Mustkeem](#) was not sufficient for test as the same had already disintegrated. **At any rate, due to the reasons elaborated in the following paragraphs, the fact that the traces of blood found on the deceased matched those found on the recovered weapons cannot ipso facto enable us to arrive at the conclusion that the latter were used for the murder.”**

(emphasis supplied)

44. On a perusal of the deposition of the Investigating Officer (PW-18), we find his evidence on the aspect of disclosure statements made by the accused-appellant leading to the recoveries to be totally perfunctory and unacceptable. The witness did not elaborate upon the words spoken by the accused-appellant at the time of making the disclosure statements.
45. On a threadbare analysis of the entire record, we do not find that the prosecution examined any witness who had deposed about the link evidence/safe custody of the *mudammal* articles right from the time they were received at the police station and seized till the time the same reached the FSL. Hence, otherwise also, the FSL report (Exhibits 111-115) pales into insignificance. Investigating Officer (PW-18) deposed that he arrested the accused persons. A detailed enquiry was made from all three accused-appellants, and they were examined for the injuries found on their bodies. Thereafter, all the accused-appellants conveyed their willingness to show the place of the offence and thereafter, *panchnama* as per Section 27 of the Evidence Act was prepared. Since the place of incident was also known to police, this disclosure is irrelevant. Search of the houses of the accused-appellant was undertaken in presence of the *panch* witnesses and a big knife was seized from the house of the accused Mohmedfaruk @ Palak, *vide panchnama* (Exhibit-52).
46. Hence, we are of the firm view that neither the disclosure statements made by the accused were proved as per law nor the same resulted into any discovery which could be accepted as incriminating inasmuch as the requisite link evidence was never presented by the prosecution so as to establish that the recovered articles remained in the self-safe condition from the date of the seizure till the same reached the FSL.
47. By and large, this Court while exercising jurisdiction under Article 136 of the Constitution of India will not interfere with the concurrent

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findings recorded by the courts below. But where the evidence has not been properly appreciated, material aspects have been ignored and the findings are perverse, this Court would certainly interfere with the findings of the courts below though concurrent.

48. Upon an overall appreciation of the evidence available on record, we are of the considered opinion that the prosecution has failed to lead convincing evidence establishing the guilt of the accused appellants beyond all manner of doubt so as to hold the accused appellants responsible for the crime. Hence, the conviction of the accused appellants as recorded by the trial Court and the sentences awarded to them *vide* judgment and order dated 13th October, 2014 and so also the judgment dated 18th February, 2019 rendered by learned Division Bench of the High Court of Gujarat rejecting the appeals preferred by the accused appellants do not stand to scrutiny. The appellants deserve to be acquitted by giving them the benefit of doubt.
49. Resultantly, the appeals are allowed, and the impugned judgments dated 13th October, 2014 and 18th February, 2019 passed by the trial Court and the High Court, respectively are hereby quashed and set aside.
50. The accused appellants are acquitted of the charges. Accused appellants Allarakha Habib Memon and Amin @ Lalo Aarifbhai Memon are on bail and need not surrender. Their bail bonds are discharged.
51. Accused-appellant Mohmedfaruk @ Palak Safibhai Memon, shall be released forthwith, if not required in any other case.
52. Pending application(s), if any, shall stands disposed of.

Result of the case: Appeals allowed.