

passed by the learned Sessions Judge, Gandhinagar in Criminal Appeal No.22 of 2006 confirming the judgment and order dated 29.8.2006 passed by the learned Third Additional Senior Civil Judge and Judicial Magistrate First Class, Gandhinagar in Criminal Case No.4377 of 2002 is quashed and set aside. Bail bond, if any, stands cancelled.

19. Record and Proceedings, if any, be sent back to the trial Court concerned, forthwith.

Result:- Revision Application allowed.

ABC 2017 (I) 168 GUJ
ACQUITTAL & BAIL CASES
HIGH COURT OF GUJARAT
(Akil Kureshi & Biren Vaishnav, JJ.)
Criminal Appeal No. 722 of 1994
Decided on 23 January, 2017

STATE OF GUJARAT

- Appellant(s).

Versus

SANDHI RASULBHAI ALARAKHA & ORS.

- Respondent(s).

Law Covered:- (A) Indian Penal Code, 1860 – Section 149 – Unlawful assembly – Common object – The incident happened at the instance of both the parties – Cross complaint – Held, merely because more than 5 persons had gathered at the spur of the moment to ward off each other – certainly cannot be said to a case where the persons had gathered with a common object as a part of an unlawful assembly – Section 149 cannot be attracted. (Para 18(e))

(B) Indian Penal Code, 1860 – Section 34 – Common object – No specific roles to the accused warranting their implication in the offences that they were charged with was evident – Acquittal upheld. (Para 18(f))

(C) Indian Penal Code, 1860 – Section 307 – Code of Criminal Procedure, 1973 – Section 378 – Appeal against acquittal – Injuries inflicted by accused were as a result of duly act of self defence and not with an intention or knowledge to cause death is a plausible theory – Evidence do not suggest an intention or knowledge – Held, merely on the basis of the nature of injuries sustained acquittal not disturbed – upheld. (Para 21)

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a (D) *Criminal Jurisprudence – Indian Penal Code, 1860 – Section 307 – Application of – Nature of injury – Held, merely because the nature of injuries sustained are perceived to be serious or grave would not automatically attract Section 307. (Para 21)*

b (E) *Indian Penal Code, 1860 – Section 307 – Application of – Essential requirement – Held, what needs to be seen is whether the act was done with an intention or knowledge to kill. (Para 21)*

c (F) *Criminal Jurisprudence – Code of Criminal Procedure, 1973 – Section 378 – Appeal against acquittal – Duty of the appellate Court – View taken by trial Court – when resulted in an acquittal – strengthens the presumption in favour of the accused – the same need not be upset. (Para 21)*

d **Facts:-** *The complainant alleged that when he and his cousin had gone to graze their cattle they met accused no.5 who questioned them as to why they entered his field with the cows. Thereafter, the accused persons assaulted the complainant them. Accused persons were tried for the offences punishable u/ss 143, 147, 148, 307, 325, 149, 34, 114, IPC. However, they came to be acquitted and the aggrieved State filed the present appeal.*

e *It was observed that the evidence on record do not suggest an intention or knowledge and therefore merely on the basis of the nature of injuries sustained, a view different from the one taken by the learned Judge was not taken. Acquittal was upheld.*

Law of relief:- *Merely because the nature of injuries sustained are perceived to be serious or grave would not automatically attract Section 307, IPC.*

f **Held:-** *The learned trial Judge on reading the further statements of accused nos. 5 and 6 has come to the conclusion that neither intention nor knowledge to cause death can be attributed to accused no. 6, Janmohammad. The dharia that he wielded was only with a view to defend himself from being attacked with sticks that the complainant and P.W. 9, Vanrajsinh were wielding. No specific roles have been attributed as far as accused no. 1 to 5 are concerned except that they were said to be present at the time when the incident occurred. The incident happened at the instance of both the parties as is evident from the complaint and the cross complaint. Looking to this fact, merely because more than 5 persons had gathered at the spur of the moment to ward off each other certainly cannot be said to a case where the persons had gathered with a*

common object as a part of an unlawful assembly and therefore ingredients of Section 149 of the Indian Penal Code could not be attracted. (Para 18(e))

Accused no. 6, Janmohammad's version that he wielded the dhariya in self-defence is an acceptable explanation when seen in light of the injuries sustained by the complainant, Jagdish. He suffered injuries even as per the version in the complaint when he was withdrawing himself from the scene in company of Vanraj who was running towards his village. Accused No.6 therefore cannot be said to have caused such injuries with an intention of and with the knowledge that such injuries will result in the death of the accused. No specific roles to the other accused warranting their implication in the offences that they were charged with was evident and therefore even their acquittal cannot be said to be vulnerable so as to merit any other view. (Para 18(f))

Having appreciated the evidence on record and looking to the further statements of the accused at Exs. 72 and 73 and in light of the testimonies of the complainant Jagdish and P.W. 7, Vanrajsinh, in our view, merely because the nature of injuries sustained are perceived to be serious or grave would not automatically attract Section 307 of the Indian Penal Code. What needs to be seen is whether the act was done with an intention or knowledge to kill. Evidence on record as discussed in the preceding paragraphs do not suggest an intention or knowledge and therefore merely on the basis of the nature of injuries sustained, it would not make us take a view different from the one taken by the learned Judge. That the accused no. 6 inflicted injuries on Jagdish and Vanrajsinh as a result of duly act of self defence and not with an intention or knowledge to cause death is a plausible theory and in our opinion the learned trial Judge was right in his finding that the accused no. 6 could not have been held guilty of an offence under section 307 of the Indian Penal Code. Taking an overall view of the evidence that has emerged, a view that the learned judge has taken is a plausible and a possible view and therefore, when such a view has resulted in an acquittal of the accused which has strengthened the presumption in their favour, the same need not be upset. (Para 21)

Counsel:- For Appellant(s): Mr Himanshu K Patel, Addl. Public Prosecutor.

For Respondent(s): Mr. A.S. Asthavadi, Advocate.

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JUDGMENT

a **BIREN VAISHNAV, J.:** - 1. Aggrieved by the judgement and order dated 29.04.1994 passed by the Additional Sessions Judge, Bhavnagar acquitting the accused for offences under sections 143, 147, 148, 307, 325, 149, 34, 114 of the Indian Penal Code as well as section 135 of the B.P. Act, the State has filed this acquittal appeal.

b 2. The complainant, Jagdish Ajitsinh filed the First Information Report. It was his case that on 31.08.1986, at around 02.30 in the afternoon, when he and his cousin Vanrajsinh had gone to graze their cattle at Nana Surkana they met one Bhikhabhai Allarakha - accused no. 5. Bhikhabhai questioned them as to why they entered his field with the cows. On denying that they had done so, Bhikhabhai Allarakhabhai - accused no. 5, Janmohammad - accused no. 6, Rasoolbhai Allarakhabhai - accused no. 1, Yunusbhai Janmohammad - accused no. 2 advanced towards the complainant and Vanrajsinh. Janmohammad was armed with a dharia, Bhikhabhai had wielded an
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axe and the rest four had sticks in their hands. Janmohammad ran behind Vanrajsinh and hit him on the head and waist with the dhariya as a result of which Vanrajsinh collapsed. Having recovered after sometime, Vanrajsinh went to the village. According to the complainant's version, even he thereafter when was running towards the village with Vanrajsinh, Janmohammad threw a dhariya in his direction as a result of which he sustained injuries on the back. According to the complainant, both Vanrajsinh and he thereafter were admitted in the hospital due to the injuries sustained by them.

f 2.1 After due investigation, a charge at Ex. 4 was filed by which the accused were charged for offences under sections 143, 147, 148 and 149 of the Indian Penal Code. Janmohammad Allarakha - accused no. 6 in view of his role in attacking the complainant and Vanrajsinh with a dhariya was also implicated for the offence under section 307 of the Indian Penal Code and section 35 & 34 of the Indian Penal Code.
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h 3. The complainant, Jagdish Ajitsinh has been examined at Ex. 13 as P.W. 1. The complainant, in his testimony, stated that he is a resident of Darbargadh, near Songadh. On 31.08.1986, at 02.30 in the afternoon, when he along with his cousin Vanrajsinh had gone to graze their cattle at Nana Surkhana, they came across Bhikhabhai Allarakha - accused no. 5. Bhikhabhai called them into their field and asked them as to why they had let their cows loose in his field for

grazing. Vanrajsinh denied this fact. At that moment, Bhikhabhai alongwith the five others started abusing them. Janmohammad - accused no. 6 attacked Vanrajsinh on his head with a dhariya. He also injured Vanrajsinh by a second blow which landed on the waist of Vanrajsinh. According to this witness, Vanrajsinh therefore fell down at the scene of offence. This witness further testified that Bhikhabhai Allarakha - accused no. 5 was carrying an axe whereas Kalubhai Allarakha - accused no. 4, Iqbalbhai Osaman - accused no. 3, Yunusbhai Janmohammad - accused no. 2 and Rasoolbhai Allarakha - accused no. 1 were carrying sticks. The complainant identified the accused who were present in the court. Vanrajsinh thereafter having recovered tried to run towards the village and when he tried to follow him, Janmohammad threw a dhariya as a result of which he sustained injuries on the back. According to the version of this witness also, he also briefly fell down, having recovered he together with Vanrajsinh went for treatment to a dispensary at Sihor. Since Vanrajsinh had suffered serious injuries, he was taken to Bhavnagar and was admitted at a hospital at Bhavnagar. The police recorded his further statement on the second day. He identified the muddamal dhariya and the axe which which were shown to him. This witness further stated that he was shifted from Sihor dispensary to Bhavnagar hospital. He was an indoor patient of Bhavnagar hospital for 22 days. A Mamlatdar had approached him at the hospital and when he came to the hospital Vanrajsinh's condition was critical. Both Vanrajsinh and he could not speak and could not remember the incident on a question being put by the Mamlatdar as to what had happened at the scene of the incident. They did not recall the incident and therefore could not give suitable answers to the questions put by the Mamlatdar.

3.1 This witness is cross examined at length. According to the cross examination of this witness, he has stated that they had gone to the field which was in the possession of Sanghis. When the incident occurred, Yunus Janmohammad - accused no. 2, Kalubhai Allarakha - accused no. 4, Rasoolbhai Allarakha - accused no. 1 and Iqbal Osaman - accused no. 3 were present. A suggestion to the contrary was denied by him. He stated that after the incident he became unconscious. He did not remember as to when he left the field after regaining consciousness. He further stated that he does not remember as to who approached him to Sihor hospital and subsequently shifted him to Bhavnagar hospital. Virbhadra Gohil had shifted him from Sihor to

Bhavnagar in an autorickshaw. He denied that Dashrathsinh and others had come at the scene when they were shouting. He further
a denied that even Batukbhai and Bharatbhai were present when the incident occurred.

23.01.2017 3.2 In his cross examination, the complainant denies the fact that Yunusbhai, Kalubhai and Rasoolbhai were not present at the scene of the incident. He further states that he does not know who
b carried him to Sihor dispensary and further from Sihor to Bhavnagar. He further adds that from Sihor to Bhavnagar, it was Virbhadrasingh who took him to hospital in an autorickshaw. He does not know as to who is the owner of the autorickshaw, however, he further adds that
c Vanrajsinh's elder brother does have an autorickshaw. He denied that at the time of the incident, Dashrathsinh and others had come to the scene of the incident. He also denied that Batukbhai was present.

3.3 When cross examined on behalf of accused nos. 5 and 6, he adds that there is only one entrance to the field of Bhikhabhai
d Allarakha and he only remembers to having come out of the Vadi and thereafter since he fell unconscious he does not remember anything. He further denies that he and Vanrajsinh had come home. A suggestion that he was brought from Songadh to Sihor is also denied. According to him, even Vanrajsinh was unconscious. He denies that
e on the date when he and Vanrajsinh were admitted in the hospital, even Bhikhabhai and Janmohammad were in the same ward. He denies that he had attacked Janmohammad with a stick and that as a result of this, Janmohammad had sustained injuries on his head and that his clothes were blood stained.

4. P.W. 2, Bhupat Bachubhai is the panch witness to the scene
f of offence and nothing substantial comes out from his deposition. The panchnama of the scene of offence is at Ex.23.

5. The next important witness is P.W. 7, Vanrajsinh Mavubha who is examined at Ex. 33 and according to the complainant's version
g he was accompanying him and had also sustained injuries. In his testimony, it comes out that on 31.08.1986, he alongwith Jagdish had gone to graze their cattle at Nana Surkana when Bhikhabhai had called them to his field and asked them that whether the cows grazing on his field were theirs. When this was denied, accused no. 6 started
h abusing him and attacked him with a dharia on his head and waist. He fell down unconscious. After recovering, he ran towards the village, reached the road leading to the village fell down again and

thereafter the only thing that he remembered was that he was at the Sihor dispensary. It was he who was attacked first and thereafter Jagdish was attacked with a dharia. He does not remember as to who brought him to Sihor and thereafter from Sihor to Bhavnagar. He was in the hospital for 22 days along with the complainant Jagdish who also had sustained injuries on the waist. He does not remember as to who had injured Jagdish during his treatment at Bhavnagar hospital. The Police Inspector had come to record his statement. Even the Mamlatdar had come to the hospital to record his statement and then when the statement was recorded he was in a position to speak. He identified both Janmohammad and Bhikhabhai and the remaining accused in the court. He reiterated the fact that Janmohammad had attacked him twice on his head and waist with a dharia.

5.1 In his cross examination, this witness states that on 31.08.1986, when they had gone to the field, a suggestion was denied that they had carried lathis in their hands. He states that as a result of the injuries he sustained, he fell unconscious and subsequently regained consciousness the same night. He does not remember as to at what time did the police come and record his statement. A suggestion is denied that after the incident the accused were given police protection. According to him, the time of the incident was 01.30 in the afternoon. He denies that they had trespassed into the fields of Janmohammad and Bhikhabhai Allarakha. He denied that a complaint was also made against Jagdishsinh, Mahendrasinh and Dineshkumar.

6. Sahdevsinh Juvansinh is P.W. 8 who is examined at Ex.34. He states that he is a resident of Songadh and Madhendrasinh and Jitubhai are his brothers. The incident occurred between 2.30 and 3 in the afternoon when he along with Jitu and Mahendra had gone to Surkana for grazing cattle. He heard shouts near the field. Therefore, along with Mahendra and Jitu he went in that direction where they saw a scuffle taking place. Vanrajsinh and Jagdish were found injured. He identified the accused in court who according to this witness was present when they went to the scene of the incident. Bhikhubhai was carrying an axe whereas Janmohammad was carrying dharia. Rest of the accused were wielding sticks. Janmohammad attacked Vanrajsinh with a dharia on head and on his waist. When Jagdish was running along with Vanrajsinh towards the village, Janmohammad threw the dharia as a result of which Jagdish sustained injuries on the back side of his waist. Batuksinh Sursinh and

others were present at the scene. All thereafter left for the village. They were subsequently informed that Vanrajsinh and Jagdish were taken to the hospital. He had not witnessed the incident. According to him, even he sustained injuries as a result of being hit by a stick which Bhikhubhai was carrying.

6.1 In his cross examination, according to this witness, if he had to go to the fields of Janmohammad he would have to cross the river. There were huts in the field and when he went there he saw the accused and Vanrajsinh arguing with each other. Vanrajsinh and Jagdish were leading. He did not accompany Vanrajsinh and Jagdish to the village, however, he accompanied them to a certain distance and thereafter went to the bus-stand. In his cross examination, this witness states that when he went to the field he saw Janmohammad standing there. Janmohammad was not bleeding nor his clothes were soiled with blood. The police recorded his statement on the next day.

7. Batukbhai Sursing is P.W. 9 and is examined at Ex. 35. According to this witness, he had gone to the field on a bicycle. While he was at the field he heard a commotion and saw Janmohammad being attacked by a dharia. Even Vanraj was bleeding. He therefore carried both Janmohammad and Vanraj on the bicycle and brought them on the road, put both of them in an autorickshaw that was passing by with instructions to the rickshaw driver that they may be dropped at Songadh. He followed them on the bicycle. At Songadh he was told that both of them needed to be shifted to Sihor dispensary. Jagdish informed him that he was attacked by Janmohammad with a dharia. Vanrajsinh was unconscious. He denied of having informed the fact that as to who had carried out the attack and as to who others were injured at the scene of incident. In his cross examination he denied that there were others who were present at the scene of offence and that the injured were already in autorickshaw.

8. Dr. Dineshkumar Makwana, P.W. 10 was examined at Ex. 39. He is the doctor of Sihor dispensary. According to him, on 31.08.1986, Vanrajsinh and Jagdishsinh had come to him for treatment. He confirms of having issued injury certificates at Ex. 40, 41 and 44. According to this doctor, Vanrajsinh had suffered incised wound of 7"x 2 1/2"x3" deep over nape of the neck in transverse direction extending to rt. Ear and another incised wound of 3"x2"x1" over left buttock in transverse direction corresponding to posterior

ilear crest. According to this witness, the injury could have been caused by a sharp cutting instrument. This doctor referred both Vanraj and Jagdish to the Bhavnagar hospital. Jagdish, according to the doctor, had also suffered injuries inasmuch as incised wound of 3" x 2" x 2" over back of the chest just medial to the lower border of scapulla in transverse direction. The injuries according to the doctor were sustained by a sharp cutting instrument.

8.1 In his cross examination, this witness states that he does not remember that the patients were shifted from Sihor to Bhavnagar in a government vehicle. He further states that he did not ask the two patients as to how they had sustained the injuries. The medical papers have been produced on record and the reference note of Bhavnagar hospital states that the injured were assaulted by a dharia, this was the history recorded in the reference sheet sent to the Bhavnagar hospital.

9. P.W. 11, Dr. Hasmukhlal Parekh is the medical officer of Sir T Hospital, Bhavnagar. According to this witness, Jagdish and Vanrajsinh wre brought to the hospital on a reference note from Sihor. Vanrajsinh had a stitched wound on the nape of the neck in transverse direction 18 cm in length and another stitched wound on left iliac crest. He stated that re- suturing was found to have done. In the opinion of this doctor, primary treatment was given at the Community Health Center. The medical certificate is produced at Ex. 47. Jagdish was also treated by this doctor and his medical certificate was at Ex. 48. In the cross examination, this witness has stated that when they were brought to the Bhavnagar hospital, they were fully conscious.

10. Dineshchandra Vyas is the Mamlatdar who recorded the dying declaration of Jagdish and Vanrajsinh and is examined as P.W. 12 at Ex 51. This witness states that he received a yadi pursuant to which he went to Sir T Hospital to record the statements of Jagdish and Vanrajsinh. Both Jagdish and Vanrajsinh were questioned and when asked they had specifically stated that when they had gone to the field to graze their cattle, Janmohammad - accused no. 6 had attacked them with a dharia. According to Vanrajsinh he was attacked on his head and waist and according to the version given by Jagdish he was attacked on his waist.

11. P.W. 13, Shantilal Patel is the police officer who recorded the complaint for the complainant Jagdish at Bhavnagar hospital. In

a the cross examination, this witness has stated it was stated by the complainant that after Vanrajsinh ran towards the village on being attacked the complainant also followed Vanraj and went to their house in the village from where they were brought to Sihor dispensary.

b 12. The Investigating Officer, Amratlal Gangaram Joshi has been examined as P.W. 14. He has narrated in detail the method and the manner in which the investigation was carried out.

c 13. Further statements of Bhikhabhai Allarakha - accused no. 5 and Janmohammad Allarakha - accused no. 6 have been recorded at Exs. 72 and 73 respectively. On reading Bhikhabhai Allarakha's further statement at Ex. 72, it is borne out that according to him Jagdish had abused both Janmohammad and him and then attacked him with a stick. It was at that stage that Janmohammad picked up a dharia which was lying on the ground and in self defence carried out the act. There was no intention or knowledge on the part of d Janmohammad to inflict such injuries on both Jagdish and Vanraj so as to kill them.

e 14. Janmohammad - accused no. 6 also in his further statement at Ex. 73 has narrated the same sequence of the incident. His statement further indicates that both Bhikhabhai and he were treated as injured patients at Sir T Hospital, Bhavnagar for 8 days. According to him, he had wielded a dharia only to see that Jagdish and Vanrajsinh do not attack him with sticks and it was only in view of defending himself that he had wielded such dharia.

f 15. The defence has examined two witnesses being D.W. 1 - Jivrajbhai Bhalani and D.W. 2 - Muljibhai Shamjibhai. Nothing turns out on the testimony of D.W. 1 and therefore his testimony need not be reproduced. So far as D.W. 2 is concerned, at the relevant time he was the Medical Officer of Sir T Hospital, Bhavnagar. According to him at 09.00 in the night of 31.08.1986, Janmohammad had come for treatment as a result of injuries sustained by him. He had come g without a police yadi. In his history, he had stated that he had sustained injuries as a result of a scuffle that had ensued at his field. Janmohammad was discharged from the hospital on 08.09.1986. The injury certificate has been produced at Ex. 49/1. According to this h witness, even Bhikhabhai Allarakha - accused no. 5 was treated by him as he had sustained injuries on the right elbow. He also was discharged after treatment on 08.09.1986.

15.1 In his cross examination, he denies that both these injured had come to the hospital for treatment pursuant to police yadi. He denied that the injuries sustained by them were ordinary and a suggestion that such injuries could be caused due to a fall were denied. a

16. A cross complaint registered at the hands of accused no.5 has also been brought on record at Ex. 86 which is also dated 31.08.1986. On a brief reference of the contents of the First Information, it is revealed that Jagdish and Vanrajsinh had entered the fields of the complainant therein - Bhikhabhai Allarakha with their cattle and when they were asked to leave by Bhikhabhai, both Bhikhabhai and Janmohammad were attacked with sticks. b

17. This in short is the evidence on record. On the basis of the evidence on record, the learned trial Judge found that the accused were not guilty and therefore awarded an acquittal to all the accused. Some of the points on which the acquittal was recorded by the learned Judge are as under: c

(i) The testimonies of the complainant Jagdish, PW 1 did not reveal the whole truth. Similarly, Vanrajsinh, P.W. 7 also was not a witness who could be stated to be a credible witness. According to the learned Judge, when the testimonies of these witnesses are appreciated in light of the testimonies of witnesses Batukbhai, P.W. 9 and Sahadev, P.W. 8, it appears that the version of the complainant that they suffered serious injuries at the scene of the incident and that they suffered bouts of unconsciousness is highly exaggerated. Their story that they could not remember as to who brought them from the field to Songadh and from there to Shihor and then to Bhavnagar cannot be believed. d e

(ii) P.W. 9, Batukbai has in his testimony stated that both, Jagdish and Vanraj were brought by him to Songadh in an autorickshaw. He had accompanied them up to the road where when an autorickshaw was passing by, both were put into the autorickshaw and the driver was instructed to carry them to Songadh. Though, according to the learned Judge both these witnesses are projected to be eye witnesses/ independent witnesses to the incident, on a closer reading of their testimonies, it is clear that they were not in fact eye witnesses to the scene of the incident and even they had reached the scene of the incident later in point of time. Therefore their versions were not fully acceptable so as to support the testimonies of the complainant Jagdish and Vanrajsinh. f g h

(iii) Further statements of accused Nos. 5 and 6 at Exs. 72 and 73 and the cross complaint filed by Bhikhabhai Allarakha- accused no. 5 indicate that the exact nature of the incident is not as the one that is narrated by the complainant Jagdish. When the incident is seen in the context of the further statements and the cross complaint and not in isolation only from the way it is perceived by Jagdish, that the accused nos. 5 and 6 acted in self-defence is a plausible theory. D.W. No. 2, Dr. Mulji Shamji, who was the medical officer at Sir T Hospital at the relevant time substantiates that both the accused nos. 5 and 6 had also sustained injuries and the history as narrated showed that Jagdish also had attacked them with a stick. The suggestions put to the PW1 and PW 7 in cross when seen in light of these facts indicate that the incident did not entirely occur at the hands of the accused only.

(iv) The theory of self defence was therefore an acceptable view and therefore the learned Judge found that the accused could not be convicted for the offences charged for. It was certainly not a case where where the accused had formed an unlawful assembly with a common object of attacking the complainant Jagdish and Vanraj and certainly not with an intention or knowledge that such injuries would cause death. Hence, the learned judge acquitted the accused of the offences they were charged for.

18. The question that needs to be addressed is whether the view that the Learned Judge took was a view that was possible and acceptable. In any case, even if we were persuaded to take another view it is a settled position of law that when deciding an acquittal appeal, the Court should not disturb the findings of acquittal merely as another view is possible particularly when the view that favours the accused has weighed and the accused have an acquittal in their favour which strengthens the presumption of innocence. Keeping this in mind, the evidence on record when assessed independent of the judgement indicates the following features:

(a) The complaint at Ex. 14 when read in light of the testimonies of the complainant Jagdish and P.W. 7, Vanrajsinh indicate that the version of these witnesses is highly exaggerated. It is apparent that both these witnesses have stated that the accused no. 6, Janmohammad first attacked Vanra with a dhariya on his head and then on his waist. Vanrajsinh sustained injuries and collapsed, subsequently recovered and then ran towards his village. According

to Jagdish, he followed Vanrajsinh but Janmohammad on seeing this, threw the dharia at Jagdish who sustained injuries on his waist. The testimonies further indicate that both of them ran towards their home. However, a closer reading of the testimonies of both Jagdish and Vanrajsinh reveal that they have at various places stated that they did not remember as to how they were taken from the field to Songadh, then to Sihor and then to Bhavnagar. They feigned ignorance of the identity of persons who brought them first to Songadh, then Sihor and then Bhavnagar. Jagdish denies remembering whether Vanraj's brother had an autorickshaw but remembers having been brought to Bhavnagar hospital by an autorickshaw. Lapse of memory is attributed to the fact that he passed out repeatedly as a result of injuries sustained. He further denies that P.W. 9, Batukbhai was present when the incident happened. Vanraj also says that he fell unconscious as soon as he was attacked. Cross examination of this witness further reveals that he fell unconscious when he came on to the road.

(b) Let us test this version in context of the testimony of Batuk, PW 9. According to him, on hearing a commotion he went to Allarakha's field where he saw Janmohammad attacking Jagdish with a dhariya. On reading the cross examination of this witness, it becomes clear that he came after the incident happened and therefore was not an eyewitness. He testifies that he brought both Jagdish and Vanraj from the field to the road and then stopped an autorickshaw and instructed the driver of the rickshaw to drop them at Songadh. Evidently, therefore this piece of information discredits the versions of both Jagdish and Vanraj that they ran towards the village or that they came on their own. The theory of their falling unconscious on the ground and recovering is also an attempt to magnify the nature of injuries so as to attempt justifying the attack at the hands of the accused. At various stages both the complainant and P.W. 7, Vanrajsinh have tried to exaggerate their versions. At one stage, they state to have fallen unconscious and they did not remember as to how they were brought to the hospital and at another stage they have stated that they ran towards the village and then went home. The versions of these witnesses therefore as rightly concluded by the learned trial Judge do not reveal the whole truth.

(c) If the entire episode is seen in light of the complaint and the cross complaint at Ex. 86, cross-examination of the witnesses especially P.W. 2 and P.W. 7, further statements of the accused Nos. 5

a and 6, version of D.W. 2, the doctor who treated accused nos. 5 and 6, the real plausible incident that unfolds is that even the complainant and Vanrajsinh carrying sticks attacked accused nos. 5 and 6. As a result, accused no.6 used a dhariya in self-defence. As a result of a free- fight, which was without any pre-meditation or with any underlying common object, in presence of the other 4 accused, resulted in injuries to the complainant and Vanraj which are explained by way of evidence of P.W.10 Dr. Dineshkumar and P.W.11, Dr.Hasmukhlal, the Medical Officer at Bhavnagar Hospital. That even the accused were injured in the episode is also evident from the testimony of D.W.2, Dr. Muljibhai Shamji. When the suggestions put to the complainant and Vanrajsinh in their cross-examination are seen in light of these evidences, the version of the witnesses for the prosecution, especially those of P.W.2 and P.W.9 belie their versions and denials that Janmohammad and Bhikhabhai were not at the same hospital or had sustained injuries.

d (d) Dying Declarations lost their value as a result of the fact that the complainant and Vanraj survived the incident. They were therefore not admissible in evidence as they were only previous statements used to contradict the versions or in other words the only value of these dying declarations, in accordance with Sections 155 and 157 of the Indian Evidence Act, 1872, is for the purpose of contradicting the statements made by them. Even if these are read together with the First Information Report, they are at variance inasmuch as the dying declarations do not implicate anyone except accused no.6. The first information report clearly indicates that according to the version of the complainant all the six accused were involved in the offence, however, none of the accused, as named in the FIR, other than accused no. 6, find reference in such dying declarations(now previous statements).

g (e) The learned trial Judge on reading the further statements of accused nos. 5 and 6 has come to the conclusion that neither intention nor knowledge to cause death can be attributed to accused no. 6, Janmohammad. The dharia that he wielded was only with a view to defend himself from being attacked with sticks that the complainant and P.W. 9, Vanrajsinh were wielding. No specific roles have been attributed as far as accused no. 1 to 5 are concerned except that they were said to be present at the time when the incident occurred. The incident happened at the instance of both the parties as is evident from the complaint and the cross complaint. Looking to this fact,

merely because more than 5 persons had gathered at the spur of the moment to ward off each other certainly cannot be said to a case where the persons had gathered with a common object as a part of an unlawful assembly and therefore ingredients of Section 149 of the Indian Penal Code could not be attracted. a

(f) Accused no. 6, Janmohammad's version that he wielded the dhariya in self-defence is an acceptable explanation when seen in light of the injuries sustained by the complainant, Jagdish. He suffered injuries even as per the version in the complaint when he was withdrawing himself from the scene in company of Vanraj who was running towards his village. Accused No.6 therefore cannot be said to have caused such injuries with an intention of and with the knowledge that such injuries will result in the death of the accused. No specific roles to the other accused warranting their implication in the offences that they were charged with was evident and therefore even their acquittal cannot be said to be vulnerable so as to merit any other view. b c d

19. Much emphasis was laid by learned Additional Public Prosecutor, Mr. Himanshu Patel on the nature and gravity of injuries sustained by the complainant Jagdish and Vanrajsinh. According to Mr. Patel, the medical evidence together with the evidence of these two witnesses clearly made out a case for holding accused No.6 guilty of an offence under Section 307 of the Indian Penal Code. Both the injured witnesses had suffered serious injuries with a dhariya and were in hospital for a period of 22 days. Looking to the serious injuries that they had suffered even dying declarations were recorded. Therefore, at least the accused no.6 could not have been let- off. e

20. Section 307 of the Indian Penal Code has been interpreted on various occasions by the Hon'ble Supreme Court. According to the Hon'ble Supreme Court, in order to justify a conviction under Section 307 of Indian Penal Code it is not essential that the bodily injury capable of causing death should have been inflicted. Though the nature of injury i.e. cause may often give considerable assistance but that merely need not lead one to hold an accused guilty of offence under section 307 of the Indian Penal Code. What needs to be found out is whether the accused had an intention or knowledge to cause death. For our benefit it will be appropriate to quote paragraph nos. 10 to 13 from the case of *State Of M.P. Vs Saleem alias Chamaru and Another reported in (2005)5 SCC 554.* f g h

a "10. The Court will be failing in its duty if appropriate
punishment is not awarded for a crime which has been
committed not only against the individual victim but also
against the society to which the criminal and victim belong.
The punishment to be awarded for a crime must not be
irrelevant but it should conform to and be consistent with the
b atrocity and brutality with which the crime has been
perpetrated, the enormity of the crime warranting public
abhorrence and it should "respond to the society's cry for
justice against the criminal".

c 11. It is to be noted that the alleged offences are of very
serious nature. Section 307 relates to attempt to murder. It
reads as follows:

d "Whoever does any act with such intention or
knowledge, and under such circumstances that, if he by that
act caused death, he would be guilty of murder, shall be
punished with imprisonment of either description for a term
which may extend to ten years, and shall also be liable to fine;
and, if hurt is caused to any person by such act, the offender
shall be liable either to (imprisonment for life), or to such
punishment as is hereinbefore mentioned."

e 12. To justify a conviction under this Section, it is not
essential that bodily injury capable of causing death should
have been inflicted. Although the nature of injury actually
caused may often give considerable assistance in coming to a
finding as to the intention of the accused, such intention may
also be deduced from other circumstances, and may even, in
f some cases, be ascertained without any reference at all to
actual wounds. The Section makes a distinction between an act
of the accused and its result, if any. Such an act may not be
attended by any result so far as the person assaulted is
concerned, but still there may be cases in which the culprit
g would be liable under this Section. It is not necessary that the
injury actually caused to the victim of the assault should be
sufficient under ordinary circumstances to cause the death of
the person assaulted. What the Court has to see is whether the
act, irrespective of its result, was done with the intention or
h knowledge and under circumstances mentioned in the Section.
An attempt in order to be criminal need not be the

penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.

13. It is sufficient to justify a conviction under Section 307 if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. The Section makes a distinction between the act of the accused and its result, if any. The Court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section. Therefore, an accused charged under Section 307 IPC cannot be acquitted merely because the injuries inflicted on the victim were in the nature of a simple hurt. "

21. Having appreciated the evidence on record and looking to the further statements of the accused at Exs. 72 and 73 and in light of the testimonies of the complainant Jagdish and P.W. 7, Vanrajsinh, in our view, merely because the nature of injuries sustained are perceived to be serious or grave would not automatically attract Section 307 of the Indian Penal Code. What needs to be seen is whether the act was done with an intention or knowledge to kill. Evidence on record as discussed in the preceding paragraphs do not suggest an intention or knowledge and therefore merely on the basis of the nature of injuries sustained, it would not make us take a view different from the one taken by the learned Judge. That the accused no. 6 inflicted injuries on Jagdish and Vanrajsinh as a result of duly act of self defence and not with an intention or knowledge to cause death is a plausible theory and in our opinion the learned trial Judge was right in his finding that the accused no. 6 could not have been held guilty of an offence under section 307 of the Indian Penal Code. Taking an overall view of the evidence that has emerged, a view that the learned judge has taken is a plausible and a possible view and therefore, when such a view has resulted in an acquittal of the accused which has strengthened the presumption in their favour, the same need not be upset.

22. Accordingly, appeal is hereby dismissed. The judgement and order dated 29.04.1994 passed by the Additional Sessions Judge, Bhavnagar in Sessions Case No. 19 of 1987 is confirmed qua the acquittal of the respondents. Bail bond shall stand cancelled. R & P to be transferred to the trial court forthwith.

Result:- Appeal dismissed.