Soma Bhai

Vs

State of Gujarat

Criminal Appeal No. 125 of 1973

(N. L. Untawalia, Syed Fazal Ali JJ)

30.04.1975

JUDGMENT

FAZAL ALI, J. –

1. The appellant Soma Bhai Lal Bhai - hereinafter referred to as Soma Lala was tried by the Sessions Judge, Surat for the charges under Sections 302, 307 and 201 I.P.C. as also under Sections 25(1) (a) and 27 of the Indian Arms Act, 1959, but was acquitted of all the charges by the Sessions Judge by his order dated November 30, 1971. The State of Gujarat filed an appeal before the High Court of Gujarat against the order of acquittal passed by the Sessions Judge and after hearing the aforesaid appeal the High Court of Gujarat reversed the order of acquittal and convicted the accused for offences under Section 302 I.P.C. and sentenced him to life imprisonment, under Section 307 to five years R.I. and a fine of Rs. 1000, under Section 25(1)(a) of the Arms Act to one year's R.I. and a fine of Rs. 200 and under Section 27 of the Arms Act to rigorous imprisonment for three years and a fine of Rs. 500. All the substantive sentences of imprisonment were ordered to run concurrently. The appellant has filed this appeal before us against the order of the High Court under the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970.

2. This case illustrates what disastrous consequences smuggling activities can sometimes lead to. In the instance case the precious life of a person has been lost and another person has been seriously injured because the accused is alleged to have entertained a serious apprehension that secrets of his smuggling activities would be revealed by one of the injured persons. The deceased Chhania Dhana however appears to have suffered merely because of his innocent intervention in the altercation between the appellant and Naran Kala the injured person.

3. Briefly put the prosecution case is as follows. The appellant Soma Lala and some of the eyewitnesses are residents of village Dandi, which is situated on the seashore of Olpad taluq of Surat district. It appears that all these persons were interested in smuggling silver worth Rs. 34,00,000 which they had hidden somewhere in the creek of the village seashore. Naran Kala one of the injured persons who had been shot by the appellant and was his main target used to be in the employ of the appellant for 2 or 3 years before the occurrence, but as the appellant was not paying his salary regularly he left his service and took up employment under Ratilal Deva. Five days prior to the incident, there was an altercation between Dita Lala and Makan Dita who were close relations of the accused and the deceased Chhania Dhana and Naran Kala near the seashore of the village. In the course of the altercation, Chhania Dhana is said to have assaulted Dita Lala and Makan Lala. This altercation resulted because Naran Kala appears to have been aware of the secrets of Soma Lala, Dita Lala and others regarding the place where they had hoarded the stocks of silver. This, according to the prosecution, provided the immediate provocation to the appellant to cause the death

of Chhania Dhana and injuries to Naran Kala. The prosecution case was that on February 20, 1971 the complainant Ratilal Deva and Naran Kala - who will hereinafter be referred to as Naran - had gone to Surat on Fabruary 20, 1971, which is the date of occurrence. Both of them returned to the village Dandi in the jeep of Ratilal Deva along with the witnesses Soma Rama and Lalu Govind who also got a lift in the jeep of Ratilal Deva. After reaching Dandi the jeep car was left near the house of witness Lalu and other persons went to their respective houses. After a while all these persons collected at the house of Lalu Govind where Chhania Dhana was already there. They talked together on various matters for about an hour and thereafter Lalu Govind suggested that they should go to the house of Jiva Natha a neighbour living in the same village to enquire about his health because he was ailing for some time. In view of the proposal made by Lalu Govind, Ratilal Deva and Lalu Govind left the house and went to Jiva Natha's house where they found his wife Bai Bhani who told them that Jiva Natha had gone out and was likely to return soon. They were requested by Bai Bhani to wait for some time and accordingly Ratilal Deva and Lalu Govind waited for Jiva and occupied a wooden bench kept on the otta (raised platform) of Jiva Natha's house. As it was dark, a lantern was kept burning just near the otta where the two witnesses were sitting. As Ratilal Deva and Lalu Govind did not return to the house, the remaining members of the group, namely, Chhania Dhana and Soma Rama also proceeded to Jiva Natha's house. Ten minutes thereafter the appellant Soma Lala came through the opposite lane and finding his erstwhile servant Naran in the company of Ratilal Deva and his group he got enraged and asked Naran why he had left his service and taken employment under Ratilal Deva. Naran asserted that he was free to do anything he liked. This led to exchange of hot words between the appellant and Naran. It is said that the appellant had also made a grievance of the fact that Naran had beaten Dita Lala and Makan Dita who were keeping a watch over some goods of the accused. Naran, however, did not admit this allegation but warned the accused that he knew about all the activities of the appellant and would give out all the information to the police if he was further harassed. The deceased Chhania Dhana intervened and told the appellant that there was no reason to create all this fuss because Naran was a free man to accept the employment of anyone he liked. This, however, enraged the appellant who was armed with a revolver and he fired two shots which hit the deceased Chhania Dhana and fired one shot which hit Naran. Thereafter the accused bolted away and while returning he dashed against the projected corrugated iron sheets which were lying near the passage through which the accused fled away and sustained a small injury on the head. While the accused was running away, Sariat Soma lighted his torch and saw the accused with injuries on his head. According to the prosecution when the accused fired, the complainant Ratilal Deva and others went into the house of Jiva Natha and came out after the accused had left the place of occurrence but they saw the entire occurrence. When Ratilal Deva, Soma Rama and Lalu Govind came out in the angan they found Sariat Soma enquiring for the deceased Chhania Dhana as to what had happened and he told him that he was shot by the appellant who had injured both of them. This oral dying declaration is one of the most important pieces of evidence relied upon by the prosecution in support of its case. Thereafter the persons who had gathered in the house of Jiva Natha decided to carry the injured to the house of Lalu Govind. In accordance with this plan, Ratilal Deva and Mitha Bava carried Naran, while Lalu Govind, Soma Rama and Makan Rama carried Chhania Dhana to the house of Lalu Govind. When the two injured persons were brought near the house of Mitha Bava they stopped groaning and the prosecution party perhaps took them as dead. These two injured persons were therefore left in front of the house of Mitha Bava, while the complainant Ratilal Deva and Lalu Govind decided to proceed to Olpad police station to inform the police. On the way, however, they went to Gamelsinh at Kundiana and asked him to arrange for a doctor because Gamelsinh was working as a teacher and appeared to be a respectable person. The witnesses are alleged to have narrated the entire incident to Gamelsinh. No doctor could be sent to village Dandi because the doctor was not available. The complainant Ratilal

Deva and Lalu Govind ultimately reached the police station Olpad at about 9.30 p.m. and informed the P.S.I. Mahendra Kumar H. Patel -hereinafter referred to as Patel. The P.S.I. Patel after coming to know that the occurrence was a very serious one booked a call to Surat police station which materialised at about 9.47 p.m. and after getting instructions from the main police station at Surat he registered the case on the basis of the first information report lodged by Ratilal Deva at 10.15 p.m. While the complainant Ratilal Deva and Lalu Govind were at the police station Olpad, the witness Soma Rama took the injured persons from village Dandi to the Surat Civil Hospital in a jeep car and reached there at about 10 p.m., but unfortunately Chhania Dhana succumbed to the injuries before he could reach the hospital. It appears that the appellant also reached Surat police station, according to the evidence, near about 10 p.m. and was arrested by the Circle Inspector Rijhsinghani, because by the time the accused reached the police station, Rijhsinghani had already received information about the appellant having shot the deceased and injured Naran. A huge capital was made by the defence of the fact that in the report sent to the Surat police station it was said that the appellant had killed two persons, where the fact of the matter was that only one person was killed and one injured. This was, however, an error of misdescription by the person who heard the telephone and does not appear to be of much consequence. Thereafter the P.S.I. Patel reached the spot, examined the witnesses and after completing the usual investigations submitted a charge-sheet as a result of which the appellant was tried before the Sessions Judge, Surat and acquitted by him, but on appeal he was convicted and sentenced as indicated above.

4. The main plank of the defence of the appellant was that he was on inimical terms with the prosecution witnesses, particularly Ratilal Deva and felt extremely offended because they had alleged that the appellant had reported to the police that Ratilal Deva and party had concealed silver worth Rs. 34 lakhs in the creek of the seashore and on the basis of that report the said silver was recovered. It was thus alleged by the appellant that he was falsely implicated due to enmity. The accused further alleged that some sort of altercation had taken place between Chhania Dhana and other persons near the house of Mitha Bava as a result of their smuggling activities in the course of which Chhania Dhana was fatally assaulted and Naran was injured. With a view to wreak vengeance on the appellant for having reported to the police about the smuggling activities of the complainant Ratilal Deva the present false case was bolstered up by prosecution against the appellant. It was also suggested by the defence that F.I.R. was not written at the Olpad police station as alleged by the prosecution, but was prepared at the spot when the police came there and after due consultation and deliberation. It was also suggested that the statements of the witnesses recorded by the police under Section 161 of the Code of Criminal Procedure had been substituted by new statements in order to suit the needs of the prosecution case. We have been taken through the judgment of the learned Sessions Judge as also of the High Court. We have also gone through the evidence referred to us at the time of the arguments. On a consideration of the judgment of the learned Sessions Judge it seems to us that the learned Judge has rejected the evidence of the eyewitnesses without at all considering the evidence on its intrinsic merit but on the basis of the sweeping observations and inherent improbabilities, which according to the Sessions Judge were implicit in the said evidence. The last part of the judgment of the judgment of the learned Sessions Judge appears to be based on pure speculation, surmises and conjectures and most of the inferences that he had drawn from certain facts as will be shown hereafter are purely imaginary and illusory. The learned Sessions Judge accordingly disbelieved the prosecution case and acquitted the accused. The High Court, after reappraising the evidence, was of the view that the learned Sessions Judge had drawn wrong inferences from the facts and had taken the easy course of rejecting the evidence without sufficient reasons. The High Court has tried to repel almost every reason given by the Sessions Judge and has also been able to displace the circumstances relied upon by the learned Sessions Judge.

5. Appearing for the appellant Mr. Ashoke Sen submitted that this was a case in which the view taken by the Sessions Judge was reasonably possible, and, therefore, the High Court ought not to have reversed the order of acquittal passed by the learned Sessions Judge. In order to reinforce his argument he has drawn our attention to a number of inherent improbabilities appearing in the evidence to show that the prosecution case could not reasonably be accepted. Before, however, dealing with the contentions raised by the learned Counsel for the appellant, we might indicate the nature of the evidence produced by the prosecution in support of its case.

6. In the first place there is the evidence of the four eyewitnesses, namely, Ratilal Deva, Soma Rama, Lalu Govind and Naran. These witnesses have given a clear narrative of the manner in which and the background against which the occurrence took place. The evidence of these eyewitnesses is said to be corroborated by the dying declaration made by the deceased Chhania Dhana before Sariat Soma and Mitha Bava just before his death. Apart from that, witnesses Sariat Soma and Mitha Bava also proved that they reached the place of occurrence immediately after the incident had taken place and the deceased named the appellant as having shot the deceased and Naran. There is also the evidence of Sariat Soma that while he was going to the place of occurrence he found the accused running away with an injury on his head, and the witness identified him in the light of his torch. Finally there is the statement made by the complainant Ratilal Deva and Lalu Govind who had gone to Gamelsinh for enlisting the services of a doctor and told him that the appellant had fired shots killing the deceased Chhania Dhana and injuring Naran. Lastly there is the fact that the F.I.R. was lodged very soon after the occurrence in which substantial part of the prosecution case was mentioned and the appellant was named. Even before this a telephonic message was sent to the Surat police station mentioning that the appellant had killed two persons by firing at them. The medical evidence corroborates the evidence of the eyewitnesses. The accused himself was arrested near about 10 p.m. at Surat by Circle Inspector Rijhsinghani, because by that time he had come to know that the accused had killed two persons. Apart from the evidence of these witnesses, blood was found both at the place of occurrence as also at the place near the house of Mitha Bava where the body of injured person was kept.

7. Before adverting to the merits of the case, we might dispose of a serious comment made by the learned Counsel for the appellant against the conduct of the prosecution in this case. It was argued that although the genesis of the occurrence was the collection of the prosecution party at the house of Jiva Natha, neither Jiva Natha nor Bai Bhani wife of Jiva Natha was examined. This argument does not appeal to us, because Jiva Natha was not present at the time of the occurrence having left his house even before the prosecution party reached there. Bai Bhani was undoubtedly present at the time when the occurrence took place and was a material witness. But there is sufficient evidence to show that she was a close relation of the accused and the prosecution had given an application that they were giving her up because she had been gained over by the accused. In these circumstances the non-examination of these two persons does not at all destroy the fabric of the prosecution case.

8. We might further mention that if we believe the evidence of the four eyewitnesses which is corroborated by the evidence of Sariat Soma, Mitha Bava and Gamelsinh and the medical evidence, then we would require really very strong reasons to throw out the prosecution case merely on the basis of a few discrepancies here and there. With this background, we now proceed to deal with the various contentions that have been raised by the learned Counsel appearing for the appellant and most of whom appear to have found favour with the Sessions Judge as a result of which he rejected the prosecution case.

9. It was argued by Mr. Sen in the first instance that the sudden collection of the prosecution

witnesses at the house of Jiva Natha, particularly when Jiva Natha was not there, and the dramatic appearance of the appellant while these persons were there, appears to be improbable, particularly when there is no evidence to show that the accused ever knew that these persons had collected at the house of Jiva Natha. In our opinion this argument is based on pure speculation. Either the witnesses has collected at Jiva Natha's house or they had not. When four eyewitnesses, namely, Ratilal Deva, Soma Rama, Lalu Govind and Naran categorically state on oath that they had gone to the house of Jiva Natha to enquire about his welfare there does not appear to be any improbability in their statement particularly when their presence at the house of Jiva Natha is corroborated by two independent witnesses, namely, Sariat Soma and Mitha Bava. An examination of the Sketch Map attached to the Paper Book would clearly indicate that all these eyewitnesses were close neighbours of Jiva Natha and if they found that Jiva Natha was reported to be ill, there was nothing wrong in paying a courtesy visit to Jiva Natha's house to enquire about his welfare who was also their co-villager. Secondly it is true that Jiva Natha was not present in the house but that may be explained due to several circumstances, which may have compelled him to go out for a short while. It is not the evidence of prosecution witnesses that Jiva Natha was suffering from any serious illness so as to make him confined to bed. Finally, the fact that blood was found near the house of Jiva Natha is an intrinsic circumstance which corroborates the presence of these witnesses and the fact that the occurrence took place there. Moreover the evidence of the eyewitnesses would show that most of them had gone to Surat during the day and had come back in the evening and had collected at the house of Lalu Govind where it was decided to go to Jiva Natha's house to enquire about his welfare. We do not see any inherent improbability in this conduct of the witnesses which on the other hand appears to us to be quite natural and probable.

10. The learned Counsel for the appellant, however, laid very great emphasis on the fact that how could the accused arrive at the spot when he did not know that Naran was at the house of Jiva Natha. This is, however, a fact which is clearly explained by the prosecution evidence. After all the appellant was also a resident of the village Dandi and did not live very far off from the house of Jiva Natha. The evidence of Ratilal Deva clearly shows that Bai Bhani the wife of Jiva Natha was a close relation of the appellant. P.W. 2 Ratilal Deva states in his evidence at p. 7 of the Paper book that the daughter of Bai Bhani is married to Dita Bhana, who is the son of Bai Ukardi. Bai Ukardi and the mother of the wife of the accused are cousins. He further states that a week before the occurrence Bai Bhani was residing with the son-in-law of the accused and even at the time when the witness was deposing she had been residing at the house of the son-in-law of the accused at Sangrampura in Surat. This shows the close relationship between the accused and Jiva Natha and his wife. The High Court has pointed out in its judgment that the prosecution had filed an application Ext. 55 stating that it was not in a position to produce Bai Bhani Because she was under the protection of the appellant. In these circumstances, therefore, if Jiva Natha was a close relation of the accused and was reported to be ill, there was nothing improbable in the accused also going to this house to enquire about his welfare. That may have been the original intention of the appellant in going to the place of occurrence but when he found Naran and was provoked by him, he flew into rage and started firing at the deceased with a revolver.

11. We might mention here another contention raised by Mr. Sen the learned Counsel for the appellant, which was that there was absolutely no reason for the appellant to have fired at Chhania Dhana because he had merely made an innocent protest and did not give any provocation to the appellant. We are, however, unable to agree with this contention. The appellant must have been extremely perplexed by the threat given by Naran when he said that he was going to disclose the secrets of the appellant and report about his clandestine activities. Since, Chhania Dhana, though in absolute good faith, tried to defend Naran, this may have given sufficient provocation to the

appellant to shoot at Chhania Dhana because Chhania was trying to defend his enemy. Various persons react to circumstances in different ways and cases are not few and far between where innocent spectators or innocuous interveners have been the victims of gruesome attack or wrath of aggressors. Human conduct being so diverse and unpredictable it is difficult to find explanation for everything in the world. In these circumstances we do not find any inherent improbability in the evidence of the eyewitnesses on this score. The learned Sessions Judge who appears to have accepted this argument based his judgment without considering the aspects pointed out by us and drew mostly on his imagination.

12. The next important contention raised before us was that the prosecution had changed the place of occurrence by shifting the situs of the occurrence from the house of Mitha Bava to the house of Jiva Natha in order to enable the eyewitnesses to depose to the occurrence. Intrinsic support is sought to be lent to this argument by the fact that the blood which is alleged to have been found and seized by the police from the place of occurrence was wrapped in newspapers dated February 24 and 25, 1971. It was argued that if it was true that according to the prosecution blood was seized on February 21, 1971, then how could it be possible that the papers in which it was wrapped would be of a date three or four days later. From this an irresistible inference, according to the Counsel for the appellant, is that the blood-stained earth must have been taken either on February 24 or 25, 1971, from some other spot and falsely connected with the place of occurrence. The learned Sessions Judge appears to have accepted this argument and this is one of the important reasons given by him for rejecting the prosecution case and acquitting the accused. The High Court has pointed out in its judgment that the finding of the learned Sessions Judge was factually wrong and he had overlooked a number of circumstances which went to demolish the contention raised. To begin with, there is the evidence of two witnesses, namely Lalbhai Patel PW 12 and Prabhubhai Patel PW 35, to show that the earth was collected in their presence on February 21, 1971, by P.S.I. Patel from the place of occurrence. Both these witnesses have categorically great length no animus against the accused has been proved. It is true that PW 12 Lalbhai Patel is a relation of the complainant Ratilal Deva but that by itself is no ground to distrust his testimony. In fact the learned Sessions Judge has been led away by certain general comments against the witness without at all making any real effort to appreciate the intrinsic merit of the evidence of the witness which has led him to take the easy course of rejecting the prosecution case on circumstances which are based on speculation. If the evidence of PW 12 Lalbhai Patel and PW 35 Prabhubhai Patel is believed that the blood-stained earth was collected from the place of occurrence on February 21, 1971, then there is absolutely no question of the police having manipulated the earth which was taken from some other place. We have gone through the evidence of these two witnesses and feel that their evidence is both consistent and straightforward and contains a ring of truth and we see no reason whatsoever to distrust their evidence. The sheet-anchor of the argument of the learned Counsel for the appellant is the statement made by PW 12 Lalbhai Patel in cross-examination where he said that the blood-stained earth was collected in a paper and that paper was placed in the tin. This paper was a newspaper and he is unable to give any explanation as to how the newspapers dated February 24 and 25, 1971 were found in the tins. It seems to us that the witness has made this statement under the stress of cross-examination while labouring under a serious misapprehension. The witness found that in the Court three tins of earth were wrapped in newspapers which were dated February 24 and 25 and he at once jumped to the conclusion that this position must have existed even on February 21 when the earth was taken from the place of occurrence. It is pertinent to note that this witness has categorically stated that the blood-stained earth was taken on February 21, 1971, in his presence from the place of occurrence and on this point nothing has been elicited in cross-examination to show that this statement was false. On the other hand the evidence of the other panch witness Prabhubhai Patel

shows that earth was not at all wrapped in any newspaper at all. This witness says that a policeman took out that blood-stained earth from both these places and placed it in a tin box. A slip with the signatures of the panches was fixed on that tin was then tied with string. The witness categorically states that the papers which were found in the boxes were not there. This, therefore, clearly explains that the earth appears to have been wrapped in the papers long after it was collected from the spot and furnishes a complete answer to the argument put forward by the learned Counsel for the appellant. The evidence of these witnesses is supported by the panchnama which is Ext. 35 where also there is no mention at all that the earth after being collected was wrapped in any paper. Apart from this, the High Court has rightly pointed out that if the panchnama Ext. 35 and the evidence of PW 35 Prabhubhai Patel establish the fact that the earth was not wrapped in any paper on February 21, 1971 and yet it is found wrapped in the paper in the Court, then it must have been done at a subsequent time. The High Court points out that the report of the Chemical Analyser shows that when he opened these boxes no paper cuttings were found. It is, therefore, clear that the paper cuttings in which the blood-stained earth was found wrapped at the time of the trial, must have been put either by the Chemical Analyser at Junagadh or by the Serologist at Calcutta. Moreover even PW 12 Lalbhai Patel in him re-examination has clearly admitted that the blood-stained earth was placed in a paper but he was not sure whether it was placed in the tin with the paper. This makes it clear that the witness has stated that the earth was placed in the newspaper of February 25 at the time when it was collected purely from memory and he does not remember this fact at all. Finally, it is not in dispute even by the accused that the blood was recovered from the place near the house of Mitha Bava on February 21, where, according to the defence, some occurrence had taken place. But it would appear that articles Nos. 14, 15 and 16 contained blood-stained earth found from that place also. Surely then it is nobody's case that the blood-stained earth found near the house of Mitha Bava was collected on February 24 and 25, 1971. No other explanation for this could be given excepting the one that we have indicated above. Lastly it was argued by Counsel for the appellant that according to the prosecution bodies of the deceased Chhania Dhana and Naran were carried to the house of Mitha Bava and yet there does not appear to be any trail of blood from the house of Jiva Natha to the spot where the bodies were placed near the house of Mitha Bava. This does not appear to be a circumstance of any consequence. Admittedly the passage through which the bodies were carried was a village pathway through which all the villagers used to pass. Furthermore, the bodies were carried by four or five persons and even if some drops of blood may have fallen on the ground they may have been wiped out by the footprints of the carriers. The medical evidence shows that there was a good deal of blood inside the iota of the deceased. Therefore there was hardly any chance of the blood trickling down on the ground after the body had been placed near the house of Jiva Natha for quite some time. Finally, the clothes of the deceased were also blood-stained and they must have been soaked in blood. In these circumstances, therefore, the absence of a trail of blood from the house of Jiva Natha to the house of Mitha Bava is clearly explained and is not enough to discard the prosecution case. The learned Sessions Judge was not justified in giving any credence to this so-called infirmity.

13. Learned Counsel for the State rightly urged that there was absolutely no motive for the prosecution to have changed the place of occurrence and shifting the situs of the assault from the house of Mitha Bava to the house of Jiva Natha. In fact the prosecution would have gained nothing from this. The house of Mitha Bava is also at a very short distance from the house of Jiva Natha and, therefore, all the eyewitnesses who were available at the house of Mitha Bava and Mitha Bava could have been an additional witness to see the occurrence if it took place near his house. What benefit, therefore, would the prosecution derive in changing the place of occurrence, had it not been a fact that the occurrence actually took place in the angan of the house of Jiva Natha. Having regard

to these circumstances, therefore, the contention raised by the learned Counsel for the appellant must be overruled as also the reasons given by the learned Sessions Judge for accepting this plea taken by the accused.

14. It was then urged by Mr. Sen that the mystery surrounding the trunk call booked by the complainant at this residence after he reached the police station Olpad for lodging the F.I.R. throws a good deal of suspicion on the manner of the lodging of the F.I.R. and also illustrates a close collusion between the P.S.I. Patel and the complainant Ratilal Deva. The argument is that the telephone was installed in the office of Mamlatdar and was an official telephone and it could not have been allowed to be used by any private person unless the P.S.I. was prepared to oblige such a person. This argument overlooks certain basic facts proved in this case. The evidence shows that the keys of the Mamlatdar's office used to remain with the Havaldar in charge of the office and any telephone which could be booked from that office could be done after taking the keys from the Havaldar and with his permission. There is absolutely no evidence on the record to show that the complainant Ratilal Deva had approached the Havaldar or even the P.S.I. Patel for giving him the keys. Nor is there any evident to show that it was the complainant himself who had booked the call at his residence at Surat. The mere fact that a call was booked at the residence of the complainant from Mamlatdar's office does not necessarily lead to the inference that it was booked by the complainant. In fact it is extremely dangerous to draw such an inference because so many persons receive calls from various places and in such cases it cannot be inferred that such calls must be by the owner. P.S.I. Patel does not say that he had allowed the complainant to book any call for Surat. The learned Sessions Judge who readily accepted this argument of the accused without there being any legal evidence on the record appears to have again fallen into error basing his conclusion on pure surmises.

15. We might also mention here an argument which is closely connected with this matter and which was pressed before the Sessions Judge and accepted by him. It was urge before the Sessions judge that in view of the fact that P.S.I. Patel was favourably inclined towards the complainant, the F.I.R. was not written at Olpad police station but was written out in the village Dandi after due deliberations and consultations. The learned Sessions Judge appears to have accepted this contention also without trying to examine it carefully. The High Court has rightly pointed out that this was a most fantastic suggestion which was not supported by an iota of evidence on the record. On the other hand there were intrinsic circumstances to show that the F.I.R. could not have been recorded in village Dandi. In the first place the information was undoubtedly given at police station Olpad which led the P.S.I. Patel to book a call for Surat police station for getting instructions. The call was booked at 9-47 p.m. This being the position there was no reason for the P.S.I. Patel to have waited for four or five hours in order to record the F.I.R. on the spot. Furthermore, the D.S.P. was informed about the occurrence and another police office was deputed to investigate the case. The P.S.I. Patel therefore could not have taken such a great risk in the presence of his superior officers. Although the fact that the deceased Chhania Dhana had made a dying declaration before Sariat Soma which had been deposed to by the eyewitnesses as also by Sariat Soma, yet this fact is not mentioned in the F.I.R. Indeed if the F.I.R. was lodged in the village Dandi after due deliberations and consultation, the complainant would have seen to it that this fact was also clearly incorporated in the F.I.R. The omission of this material fact in the F.I.R. shows the bona fides of the complainant who appears to be so mentally agitated that he did not even remember to mention this fact in the F.I.R. which was lodged immediately after the occurrence without the least possible delay. There is, however, no reliable evidence from which an inference can be drawn that the F.I.R. was not lodged at the police station Olpad but in the village Dandi. The finding of the learned Sessions Judge on this point is, therefore, completely erroneous both in law and on fact and was rightly by the High Court.

16. It was then urged by the learned Counsel for the appellant that there was documentary evidence to show that the complainant after reaching Surat had made three lightning calls to Dandi which must have been necessitated by the report which the accused made before the police regarding the hoarding of silver by the complainant party. This circumstance, in our opinion, is not all germane to the murderous assault by the accused on the deceased Chhania Dhana. The lightning calls were made long after the occurrence had taken place. It is no doubt clearly proved in this case that the appellant had made some sort of a report at Surat police station which led to the recovery of silver worth Rs. 34 lakhs from the creek of the seashore from the complainant and other persons. In these circumstances, even if the complainant long after the incident made these lighting calls from Surat that will neither falsely the taking place of the occurrence nor the evidence of Ratilal Deva and in fact is not at all relevant for decision of this case.

17. It was then submitted that the alleged dying declaration by the deceased Chhania Dhana to Sariat Soma is a false piece of evidence as it was not at all mentioned in the F.I.R. It was also argued that according to the medical evidence the deceased would have died instantaeously and well before Sariat Soma could have reached the spot and, therefore, the question of making any dying declaration to Sariat Soma does not arise. This argument was also accepted by the learned Sessions Judge. It may be observed here that the learned Sessions Judge appears to have disbelieved the entire evidence of the eyewitnesses merely on the ground that they deposed as to the alleged dying declaration. This was doubtless an absolutely wrong approach because it is well settled that the courts should make an effort in disengaging the truth from falsehood. In these circumstances, therefore, even if the dying declaration on the part of the prosecution case be treated as unnecessary embellishment or orientation in this case that will not detract from the testimony of the eyewitnesses with respect to the other portion of their evidence to which they have deposed and regarding which they have not been shaken in cross-examination. It is true that Sariat Soma categorically states that the deceased Chhania Dhana had made a dying declaration before him to the effect that the appellant had fired the shots from his revolver and injuring the deceased and Naran and, therefore, this fact was a very material one and in all probability should have been mentioned in the F.I.R. particularly when some minor details regarding how the bodies of the deceased and Naran were carried from the place of occurrence to Mitha Bava's house by the carriers were mentioned. Secondly the evidence of PW 6 the doctor clearly show that having regard to the injuries received by the deceased Chhania Dhana the deceased would have died instantaneously within 3 or 4 minutes and at any rate he would not be in a position to make any statement to Sariat Soma. In view of these two circumstances we are not inclined to accept the testimony of the witness with respect to the dying declaration made by the deceased to Sariat Soma. We, however, do not mean to suggest that the evidence of Sariat Soma is false, but in view of the infirmities pointed out above, we feel that it is extremely unsafe to rely upon that part of the testimony. It is, however, well settled that merely because a portion of the testimony of a witness is not reliable, this is no ground to brush aside his entire evidence. The evidence of Sariat Soma on the point that he had seen the appellant running away with injuries on his head is undoubtedly believable and is corroborated by the facts and circumstances of the case as pointed out by the High Court.

18. It was lastly contended by the learned Counsel for the appellant that as the accused was found at Surat at 9 p.m. when he lodged the report against Ratilal Deva and others regarding the concealment of smuggled silver, hence the accused could not have been present at the time of occurrence. In other words, this as a sort of plea of alibi which was sought to be taken by the appellant. There is, however, no evidence on the record to prove that the accused was seen at Surat by the police officer at 9 p.m. The evidence of Circle Inspector Rijhsinghani clearly shows that he saw the accused at about 10 p.m. The occurrence took place at Dandi a little before 9 p.m. There was ample time for

the accused to have gone to Surat by a jeep. It may be mentioned that it is admitted case of the appellant that he went to Surat in a jeep and in fact he explained that he got the injuries on his head because his jeep suddenly came to a stop in view of the crowded streets of Surat and his head dashed against the window-screen of the jeep. It is well settled that a plea of alibi has go to be proved to the satisfaction of the Court. In the instance case there is absolutely no evidence to show that the accused could ever have reached Surat at 9 p.m. Even in his statement made under Section 342 of the Codeof Criminal Procedure while he says that he went to Nausari Bazarpolice chowky at Surat he does not say that he had reached Surat at 9 p.m. According to his statement on February 20, 1971, at about 8 p.m. He was in his shop at Dandi when he came to know from certain persons that there was an altercation between Makan Dita, Dita Lala and others on the one side and Chhania Dhana, Naran Kala and others on the other near the house of Mitha Bava. Thereafter he started in jeep car with his driver. He does not state in his statement as to when and at what time he left Dandi for Surat. In these circumstances, therefore, there is absolutely no legal evidence to prove that he ever reached Surat at about 9 p.m. or before that. On the other hand there is categorical evidence of witness Rijhsinghani that he had met him at 10 p.m. If this was so, then there was ample time for the accused to have fired at the deceased and Naran and then proceeded to Surat.

19. Before closing the case, we might advert to two important circumstances noticed by the High Court. In the first place the High Court was of the opinion that the F.I.R. lodged by Ratilal Deva was inadmissible in evidence because the telephonic call booked by the P.S.I. Patel to Surat by which he conveyed the information that the appellant had killed two persons by firing at them would constitute the first information within the meaning of Section 154 of the Code of Criminal Procedure and the statement made by the complainant before the police subsequent to that would be hit by Section 162 of the Code of Criminal Procedure. We are, however unable to agree with the view taken by the High Court on this point. It is true that under Section 154 of the Code the first information is the earliest report made to the police officer with a view to his taking action in the matter. In the instance case, the complainant had made the report regarding the occurrence having taken place to the P.S.I. Patel, who, however, before reducing it into writing, by way of abundant caution, tried to seek further instructions from the main police station at Surat, and that is why he had booked a call to Surat. The message given to the Surat police station was too cryptic to constitute first information report within the meaning of Section 154 of the Code and was meant to be only for the purpose of getting further instructions. Furthermore, the facts narrated to the P.S.I. Patel which were reduced into writing a few minutes later undoubtedly constituted the first information report in point of time made to the police in which necessary facts were given. In these circumstances, therefore we are clearly of the opinion that the telephonic message to the police station at Surat cannot constitute the F.I.R. and the High Court was in error in treating the F.I.R. lodged in the present case as inadmissible in evidence.

20. Secondly that High Court relied on a complaint made by the accused before the police during the course of investigation which constituted his defence before the police. This is Ext. 102. The Sessions Judge held that this report was admissible in evidence as it was not hit by Section 162 of the Code of Criminal Procedure, but held it to have been given under duress. The High Court has, however, held that as the complaint was regarding a different matter it was not hit by Section 162 of the Code and was clearly admissible in evidence and accordingly the statements made in this document has been used by the High Court in its judgment. Here also we feel that the High Court has committed an error of law. Having read the contents of Ext. 102 we are satisfied that they are closely connected with the facts of the present case which form the subject-matter of the F.I.R. in this case. It is admitted on all hands that the accused had given this statement to the police after the investigation into the F.I.R. lodged by Ratilal Deva had already started and this was, therefore,

clearly a statement made by the accused in the course of investigation and therefore hit by Section 162 of the Code. The High Court was, therefore, not right in holding that Ext. 102 was admissible in evidence. We have, therefore, completely excluded this document form consideration.

21. Finally on a consideration of the evidence we find ourselves in complete agreement with the reasons given by the High Court which has pointed out that the name of the accused appears to have been revealed at all important stages. The eyewitnesses narrated the incident to Mitha Bava and Sariat Soma who arrived at the spot to whom the name of the accused as the assailant was revealed even before going to Olpad police station. The occurrence was narrated to Gamelsinh who is an independent witness who in his statement fully supported the version of the eyewitnesses. The accused himself when arrested was bare-headed and bare-footed and the explanation given for the injury he received on his head has rightly been found by the High Court as unconvincing. On the other hand the explanation given by the prosecution witness that the accused may have dashed against the projected corrugated iron sheets which were lying near the passage through which the accused fled away appears to be more probable and supported by the evidence of some witnesses examined by the prosecution. A perusal of the judgment of the High Court clearly reveals that it has fully considered all the reasons given by the learned Sessions Judge as also the circumstances relied upon by him and after displacing the circumstances it has overruled the reasons on cogent grounds.

22. It was argued by Mr. Sen that this was clearly a case where another view on the evidence was possible and, therefore, the order of acquittal passed by the learned Sessions Judge ought not to have been disturbed. On going through the evidence and considering the circumstances in the present case and in the light of the argument advanced before us, we are fully satisfied that this is not a case in which another reasonable view could be possible. On the other hand we feel that the judgment of the learned Sessions Judge was manifestly perverse and wholly unreasonable and was largely based on pure speculation, surmises and conjectures. Most of the reasons which the learned Sessions Judge gave for rejecting the prosecution case were not only against the weight of the evidence, but also illusory and artificial as pointed out by the High Court. We feel that on a proper appreciation of the evidence led by the prosecution case in this case, the only view which is possible is the one which has been taken by the High Court. We, therefore, find ourselves in complete agreement with the judgment of the High Court and hold that the High Court was fully justified in reversing the order of acquittal passed by the learned Sessions Judge.

23. For the reasons given above, the conviction and sentences passed on the appellant are affirmed and the appeal is dismissed.

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