

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/CRIMINAL APPEAL NO. 1138 of 2000****FOR APPROVAL AND SIGNATURE:****HONOURABLE MS. JUSTICE GITA GOPI**

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Approved for Reporting	Yes	No
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BHAVSING CHHAGANBHAI BILVAL POLICE SUB INSPECTOR
SINCE DECEASED THROUGH HIS LEGAL HEIRS

Versus
STATE OF GUJARAT

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Appearance:

MR HORMAZ B SHETHNA (2436) for the Appellant(s)
MR ROHANKUMAR H RAVAL, APP for the Respondent(s) No. 1

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CORAM: HONOURABLE MS. JUSTICE GITA GOPI

Date : 14/08/2025

ORAL JUDGMENT

1. The trial of custodial death was against seven accused, in Sessions Case no.37 of 1990 before the learned Additional Sessions Judge, Bhavnagar Camp, Mahuva. The learned Additional Sessions Judge, Bhavnagar on 30.11.2000 convicted accused no.1-Bhavsingbhai Chhaganbhai Bilval, PSI, Savarkundla Town Police Station for the offence

under Section 304-II of IPC, sentencing him to seven years rigorous imprisonment and fine of Rs.15,000/- with the default clause on non-payment, to further suffer one year simple imprisonment.

1.1 For the offence under Section 330 IPC, accused no.1 was sentenced for three years rigorous imprisonment and Rs.10,000/- fine, in default of payment of fine, six months simple imprisonment.

1.2 Both the sentences to run concurrently. The benefit of set off under Section 428 of the Criminal Procedure Code (Cr.P.C.) was granted. The amount of compensation of Rs.25,000/- was ordered to be given to the legal heirs of the victim, deceased Kanudo @ Bhoplo Vallabhbhanna Waghri of Maninagar Vaghrivas, Savarkundla.

1.3 Aggrieved by the judgment and order of conviction, accused no.1 as appellant filed the present Criminal Appeal no.1138 of 2000 under Section 374(2) of Cr.P.C.

1.4 During pendency of the appeal, the appellant—Bhavsing Chhaganbhai Bilval died. Thus, in accordance to the proviso to sub-section (2) of Section 394 of Cr.P.C., the daughters and sons 1/1 to 1/6 as the heirs of the deceased were permitted to continue the appeal. Proviso under sub-section (2) has given a right to the near relatives of the accused who is convicted and sentenced to death or of imprisonment and who dies during the pendency of the appeal to continue the appeal by making an application to the Appellate Court within 30 days of the death of the appellant. This proviso is made to cover those exceptional cases, where the interest may, apart from being merely sentimental may be pecuniary also. The object in adding this proviso is to remove any stigma that may attach to the relatives of the accused by continuing the appeal. Where the legal heirs of the accused do not prosecute the appeal, otherwise as provided under sub-section (1) of Section 394,

every appeal under Section 377 or Section 378 of Cr.P.C. shall finally abate under death of the accused.

2. Learned advocate Mr. H.B. Shethna has raised a legal issue about the sustainability and legality of the conviction of the sole deceased appellant-accused under Section 34 IPC, where the other six co-accused as police personnel came to be acquitted.

- 2.1 Learned advocate Mr. Shethna referring to the judgment of **Javed Shaukatli Qureshi v. State of Gujarat, (2023) 9 SCC 164**, a case under Sections 396, 307, 445, 201 read with 149 IPC, submitted that when the similar identical evidence of eye-witnesses against the accused by ascribing them same or similar role is to be considered against all, the Court cannot convict one accused and acquit others. Learned advocate Mr. Shethna submitted that criminal court should decide like cases alike and in such cases, as observed in **Javed Shaukatali Qureshi (supra)** submitted that

the Court cannot make distinction between two accused which would amount to discrimination. Thus, stressing on the benefit of parity, learned advocate Mr. Shethna submitted that the deceased appellant is required to be declared as acquitted.

3. On 27.10.1989, accused no.1 was discharging his duty as PSI in Savarkundla Police Station, Bhavnagar between 6.00 p.m. and 0.15 a.m. on 28.10.1989, accused no.2 to 7 were discharging their duty in the same Police Station. Accused no.2 was unarmed Police Head Constable, while accused nos.3 and 7 were unarmed Police Constables, accused nos.4, 5 and 6 were armed Police Constables.

- 3.1 The charge framed below Exh.5 during the trial was to the effect that one Vinubhai Vaghaji Patel gave his complaint of theft in Savarkundla Police Station. In the matter of that complaint, deceased Kanudo was called for inquiry. In order to extort confession from Kanudo and to compel

him to return the stolen money, or to get such information by force or to extort the confession from him which would lead to disclosure of the offence, deceased Kanudo was beaten by all accused with the sticks and fisticuffs, which resulted into injuries on his person, and/or to see that the property or valuable security be returned or that their demand to that effect is satisfied or that from such information, the property or valuable security could be obtained, accused no.1 to 7 all shared the common intention while abetting each other, voluntarily caused injuries on the person of the deceased Kanudo by giving him fisticuffs and blows with the sticks. For that purpose, one and all accused were charged under Section 330 read with Section 34 of IPC.

3.2 On that day, time and place, all the accused in concert, abetting each other, in furtherance of the common intention for that act, gave unbearable beatings with sticks and kick and

fist blows, causing injuries, with the knowledge that such injuries would cause death, inspite of that, during the police custody, Kanudo @ Bhoplo Vallabh Waghri was beaten to death and thus, all the accused had committed the offence under Section 302 read with Section 34 IPC.

4. Learned advocate Mr. Shethna submitted that the conviction of the deceased appellant is not supported by any evidence on record. There is no injury attributed to the appellant as PSI Savarkundla Town Police Station who had the legal custody of the deceased in connection with the case of theft registered against Kanudo. Mr. Shethna stated that the deceased Kanudo was called for inquiry, which was a legal act of Shri Bilval. Beatings by any of the accused had not been proved during the trial. Inquest Panchnama suggests only three injuries and the defence could prove that deceased Kanudo had jumped from the jeep and thereafter, sustained the injuries. Mr. Shethna stated that PW11 - Dr.

Pardhi was medical person who had examined the deceased, who had not found any injury on the body of the deceased at the place alleged to be the place of offence. Mr. Shethna submitted that Dr. Pardhi was Government servant and had no reason to give any false evidence. Advocate Mr. Shethna referring to the evidence of PW12 – Dr. Mangal, stated that PW12 and Dr. Rajavat in panel had conducted postmortem of the dead body of deceased Kanudo and had marked about twenty three external injuries and five internal injuries. However, the injuries as ascribed cannot be attributed to the appellant – Bilval and further submitted that Dr. Mangal has specified injury nos.14, 16, 17 and 18 to have been caused by hard and blunt substance like stick which could be long and could be bent a little or can be cane sticks. The Muddamal article did not disclose any blood stain on it, while the Doctor opined that all the external and internal injuries taken together was sufficient to cause death of deceased and in

opinion of the Doctor, all the injuries might have been received by the deceased during 24 hrs. preceding the time of his death. Mr. Shethna submitted that the Doctor could not clarify that the injury nos.14, 16, 17 and 18 could have been possible because of fall from jeep and thus, there is no definite opinion of the Doctor with regard to those specified injuries. Mr. Shethna further submitted that the external injuries also did not cover any blood. Mr. Shethna submitted that since dead body was examined after two days, such blunt marks would develop in natural course. Mr. Shethna stated that the internal injuries suffered by the deceased were possible if the deceased had jumped from running jeep and fallen on road and if he had come in contact of the road by taking 2-3 turns.

4.1 Advocate Mr. Shethna submitted that the investigation was in connection with the complaint given by PW9 – Vinubhai Kanani and

Kanudo was brought in connection with the FIR lodged against him and therefore, the custody cannot be termed as illegal. PW9 – Vinubhai had stated in his evidence that on the second occasion, when they had gone to Waghrivas, along with PSI – Bilval, Kanudo had jumped out of running jeep and had run away, the police stopped the jeep and apprehended him. The fall from the jeep and deceased taking 2-3 flips and running away from the place has been corroborated by the witness PW9. If that evidence is to be considered, then the death could be because of such a fall of Kanudo from jeep.

4.2 Advocate Mr. Shethna referring to the evidence of PSO PW7 – Mansingbhai Kalibhai stated that PSO has not mentioned of any torture by beatings by any of the accused, when the boy was called for questioning. Mr. Shethna submitted that the complaint by PW2 – Dolatsinh Sahebji Khant, Dy.S.P. had invoked the provision of Section 114

IPC along with Section 302 IPC and thus, stated that invocation of Section 34 IPC by court would be prejudicial to the accused since the facts of the case do not invite the scope for the provision of Section 34, inspite of that, the Court decided to deal with the trial under Section 34 IPC. Mr. Shethna submitted that the prejudice caused to the deceased appellant Bilval would make him entitle for acquittal. Mr. Shethna submitted that the appellant was required to be acquitted by the Trial Court along with the co-accused no.2 to 7 as the Court could not convict only one accused on the basis of constructive liability.

4.3 Advocate Mr. Shethna contended that PW16 – Kantilal Vallabhbhai, brother of the deceased Kanudo and PW17 – Vallabhbhai Bhanabhai, father of deceased Kanudo had no opportunity to witness what had occurred in the chamber of Shri Bilval. The table of the PSO and the chamber of PSI were at a distance of 25-28 ft. The evidence of the

brother and father in that circumstances could not be believed as they are the interested persons and more so, the situation of the chamber of Shri Bilval would not have permitted them a direct access or a direct view to see what had transpired in the chamber of Shri Bilval. Advocate Mr. Shethna submitted that overt act of the accused no.1 was required to be proved for sustaining the conviction. There is no indication that it was only A-1 who gave all the blows and injuries which were sufficient in the ordinary course of nature to cause death. The cause of death is shock and hemorrhage because of multiple injuries, no blood stain has been found from the place of offence. Exh.34 is the map of the Police Station. The driver of jeep PW6 – Ghanshyam Gohil has corroborated the evidence that Kanudo had jumped from the jeep. PW7 – Mansing Kalibhai has given the evidence of roll call made by Shri Bilval and his evidence would bring on record the police who were on duty at that relevant time. Mr. Shethna

submitted that the police Pehredar named as Himmatbhai was present there but he was not examined. The investigating officer – Shri Satishchandra Sharma only recorded the statements while there was no further investigation on his part. PW10 – PSI Sangvan refers to the custodial death entry. However, Mr. Shethna submitted that it was only on the instructions of Mr. Sangvan that Shri Bilval had entertained PW9 – Vinubhai, regarding his complaint of theft and therefore, stated that PW10 was also required to be made an accused in the matter, if the concept of common intention under Section 34 IPC is to be entertained.

4.4 Mr. Shethna further stated that the inquest Panchnama was drawn by the Executive Magistrate in presence of Shri Sangvan, except three injuries, no injuries as recorded in the P.M. Note were found to be recorded in the inquest Panchnama. Mr. Shethna stated that Shri Bilval (A-1) had called Shri Sangvan PW10 at 11.15

p.m., and this act itself clarifies that it was under the instructions of Shri Sangvan that Shri Bilval had called deceased Kanudo.

4.5 Referring to the evidence of PW16 and PW17—brother and father of the deceased, Mr. Shethna submitted that presence of mother of the deceased as well as one Kadarbhai Kazi and Manjibhai and Khumanbhai as well as Advocate Balubhai Trivedi have been brought, by both the witnesses, and thus, relying upon the provision of Section 6 of the Indian Evidence Act, 1872 submitted that those witnesses could be considered as *res gestae* witnesses and in absence of their evidence, PW16 and PW17 should not be believed.

4.6 Advocate Mr. Shethna further submitted that in all ten police witnesses have been examined by the prosecution. PW2 — Shri Khant states that he has conducted preliminary inquiry and had joined the names of seven accused in the complaint. However, in the cross-examination, he admits

that it has not been disclosed of any accused beating the deceased. The name of the accused had been recorded on the basis of preliminary inquiry which would be baseless for the prosecution, as the complaint does not disclose that the accused had obtained the custody of deceased Kanudo. The FIR is based on no evidence, as nothing was available on record, neither in the form of documents, nor in the form of evidence of the witnesses and thus, stated that the complaint of Shri Khant bears no value.

4.7 Advocate Mr. Shethna further contended that PW6—driver of the jeep does not refer to any overt or covert act on the part of the accused policemen against deceased Kanudo. Advocate Mr. Shethna submitted that PW6—driver evidence proves that Kanudo had jumped from the jeep and he has clarified in his evidence that in his presence, none of the accused had beaten the deceased.

4.8 PW7 — PSO was in charge of the duty from 8.00 p.m. to next day 8.00 a.m. He has referred to police guard — Himmatbhai Bachubhai who has not been examined in the present matter. In the evidence of PW7, it has come that the investigation of theft was taken over by accused no.1. The boy was taken by accused no.3 and accused no.4 in the chamber of accused no.1. Except these three persons, nobody else was present. However, the fact could have been corroborated had police guard — Himmatbhai Bachubhai been examined. PW8 — Bhaisingh Vaghela had seen the boy sitting in the lobby of the Police Station and roll call was taken by accused no.1 — Bilval at 8.15 p.m. and in the evidence, he also states that he does not know when the boy was brought for the second time.

4.9 Referring to the evidence of PW10 — PSI — Sangvan, Advocate Mr. Shethna stated that Police Constable Himmatbhai, Police Constable Kishorbhai Bhikhalal who were reserve police

were not examined as the witness though were present in the Police Station. On 27.10.1989, between 4.00 p.m. and 8.00 p.m. in reserve police, constable-Ayubkhan Hasankhan (A7), Vajubhai (A3), Govindbhai (A5) were there. While in the cross-examination, PW10 stated that when he reached the Police Station, three persons, accused no.1, P.H.C. and P.S.O. were there and other policemen assisting him were present. Advocate Mr. Shethna submitted that the duty list refers to sixty three policemen on duty including those who were on leave.

4.10 Advocate Mr. Shethna further contended that the station diary Page-29 was totally blank and canceled so also the reverse portion. The reverse side of Page-27 shows the entry in the diary upto "23-19" on 29.10.1989. Thereafter, leaving the blank Page-29, on reverse side the entries upto 24-00 hrs. on 29.10.1989 came to be recorded. Though the witness was put to question, but could not clarify about the blank

pages in the cross-examination.

4.11 Advocate Mr. Shethna also submitted that PW18 – DSP Verma was in-charge of Palitana Sub-Division, which did not include the jurisdiction of Savarkundla Police Station, despite that fact, DIG, Junagadh Range handed over the investigation by sending a wireless message. PW18 learnt the facts from the complainant PW2 – Shri Khant, while the investigating officer – Shri Verma had failed to inquire the actual role of the accused as ascribed by the complainant, and when there was clear evidence on record that the investigation was in connection with CR no.173/89 Savarkundla Town Police Station under Section 379 read with Section 114 IPC, and it was legal judicial custody, the investigation was conducted by PW18 – Shri Verma under the pressure of the crowd of Waghri community and thus, stated that the registration of FIR as well as the investigation had succumbed to the crowd, which suggests that there was no

independent investigation.

4.12 Advocate Mr. Shethna raised a contention that the grounds appreciated by the Trial Court under which the conviction has followed, should only be examined by the Appellate Court and the explanation of the accused under Section 313 Cr.P.C. recorded has not been considered by the Trial Court for conviction, thus, the Appellate Court should not lay any reliance on the same.

4.13 Advocate Mr. Shethna concluding his arguments, submitted that the injuries on the body of the accused was because of his fall from the jeep and also because the dead body was carried at different places in the tank for the postmortem, which was delayed for about three days. Mr. Shethna submitted that the provision of Section 106 of the Indian Evidence Act, 1872 should not be drawn to put the accused for clarification for those circumstances which were not known to him and further stated that Section 106 of the Indian Evidence Act, 1872 becomes applicable

only when the foundational facts have been laid down by the prosecution. Stressing upon the need to bifurcate the provision of Section 34 IPC and its application viz-a-viz the acquitted accused, Advocate Mr. Shethna submitted that the deceased Shri Bilval has a right to be ordered as acquitted from the charges.

5. Relying on the judgments of **Govindbhai Adherabhai Katara v. State of Gujarat**, 2016 (2) GLR 1500, **Balaji Gunthu Dhule v. State of Maharashtra**, [(2012) 11 SCC 685] and **Ravi v. State of Punjab**, [(2025) 3 SCC 584], learned advocate Mr. Shethna in regard to Section 313 of Cr.P.C., submitted that where prosecution fails to prove its case beyond reasonable doubt by leading cogent reliable evidence, accused cannot be convicted on his further statement. Mr. Shethna stated that the statement of the accused under Section 313 Cr.P.C. is mainly corroborating in nature, the Court may rely, but Court is not mandated to exclusively rely on

such statement of the accused for conviction.

5.1 Learned advocate Mr. Shethna has also placed reliance on the judgment of **Killer Thiayagu v. State**, (2018) 16 SCC 207, to submit that the principle of vicarious liability enshrined by Section 34 of IPC would be attracted only if more than one accused person act conjointly in commission of the offence with others. Mr. Shethna submitted that the evidence has to be brought by the prosecution to disclose that more than one accused persons had acted in concert with other persons. **State of Gujarat v. Khatubhai Limbabbhai Pagi and Ors.**, [2014 (3) GLR 1919], was relied upon to bring distinction upon section 34 and 114 of IPC, and Mr. Shethna contended that under Section 34, a criminal act is done by several persons in furtherance of common intention of all, and each becomes liable, as if the offence was committed by himself alone. While under Section 114 IPC, a person prior to the commission of the act makes

himself liable as an abettor, and if he remains present at the time of commission of the offence without taking any active part in doing of the act, he renders himself liable under this Section. Thus, Mr. Shethna stated that the invocation of Section 34 IPC by the learned Trial Court Judge has seriously affected the appellant.

5.2 Mr. Shethna also relied on the case of **Krishna Govind Patil Vs. State of Maharashtra**, AIR 1963 SC 1413, to submit that common intention under Section 34 of IPC implies a pre-arrange plan and the criminal act executed in pursuance to a pre-arrange plan. Mr. Shethna thus submitted that such plan may be developed on the spot during the commission of the offence. Referring to the facts of the case submitted that all the accused had gone together as per the prosecution case, under the investigation of A-1, had brought deceased Kanudo at the police station and if such a plan could be assumed to have been

executed, then Mr. Shethna submitted that all the accused were required to be convicted or at the same time all were required to be acquitted.

5.3 The case of **State of Chhattisgarh v. Ashok Bhoi Etc.**, [2025 (0) AIJEL-SC 74852], was relied upon to submit that the theory of 'last seen together' cannot be said to be proved. Rather than placing reliance on section 106 of the Evidence Act, by leading reliable evidence, the prosecution was required to establish the case that the accused was last seen with the deceased and then only the burden could be said to be shifted to the accused to explain the incriminating circumstances in his statement under Section 313 of Cr.P.C. On the same line, Mr. Shethna relied on the case of **Jagdish Gond v. State of Chhattisgarh and Ors.**, [AIR 2025 SC 2423] and also placed reliance in the case of **Sadashiv Dhondiram Patil v. State of Maharashtra**, [(2025) 4 SCC 275], stating that the prosecution has first to lay down the

foundational facts before it seeks to invoke section 106 of the Evidence Act.

5.4 Mr. Shethna stressed upon the judgment in the case of **Maiku v. State of U.P.**, [1989 Supp. (1) SCC 25], to submit that here all the police officials were pursuing investigation which were their duty, and therefore, submitted that it could not be said that while pursuing the investigation it was the pursuance of unlawful object, and in pursuance of investigation it is alleged in the present case, that the deceased appellant resorted to violence. Mr. Shethna thus, stated that the object was the recovery of theft amount, which apparently could not be said to be unlawful object and therefore, conviction cannot lie. Mr. Shethna further stated that in the present case Kanudo lost his life and it is alleged that he had sustained injuries by hard and blunt weapon on his body, but it is not clear under what circumstance it had happened and how the deceased appellant could be

connected with those injuries.

6. Mr. Rohankumar Raval, learned APP raised his submission by stating that the accused deceased Bilval in his statement under Section 313 Cr.P.C. had admitted that it was he only, who was interrogating. When referred to the evidence of the presence of Mahivirsinh (A3) and Bhupatbhai (A4) in his chamber, Mr. Rohankumar Raval, learned APP submitted that, accused No.1 Shri Bilval has categorically admitted that both A3 and A4 were not with him while interrogating deceased Kanudo.

6.1 Learned APP Mr. Rohankumar Raval submitted that the accused himself admitted of the custody of deceased Kanudo with him. APP submitted that initial common intention of extorting confession could be gathered of all the accused. What had happened in the chamber of A-1 was within the knowledge of A-1 himself and in that circumstances law compelled him under Section 106 of Evidence Act to give a plausible

explanation regarding the death of Kanudo.

6.2 Mr. Rohankumar Raval, learned APP submitted that it is the case of custodial death and the accused was not an ordinary person, but a P.S.I. who was investigating a crime and was duty bound to remain within the boundaries of law and he was a person, who was well versed with the provisions of law and also knows the importance of his statement under Section 313 of Cr.P.C., where he has made himself solely liable for the incident.

6.3 Mr. Rohankumar Raval, learned APP submitted that the evidence has been rightly appreciated by the Trial Court Judge, however, if necessary the appellate Court can review all the evidence of acquitted accused and can express the view by determining the guilt, which Mr. APP stated that is permissible in context of provision of Section 34 of IPC.

6.4 Mr. Rohankumar Raval, learned APP submitted that

the evidence of the brother and the father of the deceased Kanudo would be an additional evidence to the conduct of accused No.1, who both have witnessed accused No.1 and other policemen taking Kanudo twice from their house and the evidence is also of the brother, who was running after the Jeep and police persons beating Kanudo in the Jeep. Father, Mother and brother of deceased had come to the police station, where they could see Kanudo beaten in the gallery mercilessly by all. The 'last seen theory' becomes well established from the evidence of the father and brother and there is denial of accused No.1, as the custody of Kanudo was with him in connection with the investigation of the theft.

6.5 Mr. Rohankumar Raval, learned APP submitted that 23 external injuries and five internal injuries could be proved by the Doctor who conducted forensic postmortem. The injuries were alleged to have been given by sticks which were used by

the police as well as by kick and fist blows. The possibility of blood oozing out from the injuries would be negligible, which had been proved by the medical evidence. The deceased was confined in the police station and was interrogated, requires no proof, as it is an admitted position on record. Deceased Kanudo was continuously in the custody of police was also proved on record. The rest of the accused Nos.2 to 7 could not be convicted, as they could not be named by the witness PW16 and 17, brother and father, while the other police witnesses had supported the prosecution case to prove the presence of accused No.2 to 7 by naming them. Mr. App submitted that in such a case of custodial death there would a tendency of the police to support their police brothers and therefore, no direct evidence of the presence of accused Nos.2 to 7 could be brought on record during the trial. However, the fact remains and could be proved that Kanudo was in custody of accused No.1 and accused No.1 too had

mercilessly beaten Kanudo in his custody and PW16 and PW17 could prove as eye-witness of having seen other policemen also beating Kanudo.

6.6 Mr. Rohankumar Raval, learned APP submitted that precious life of Kanudo was lost at the hands of police and the crime is dehumanising and against human dignity.

6.7 Mr. Rohankumar Raval, learned APP by placing reliance in the case of **Brathi @ Sukhdev Singh v. State of Punjab, (1991) 1 SCC 519**, submitted that after considering the series of decisions, the Hon'ble Supreme Court was of the view that when a definite number of known persons were alleged to have participated in the crime, and all except the appellant were acquitted, the appellant alone may not be convicted under Section 34 IPC, but he would be liable for his individual act of assault.

6.8 Learned APP Mr. Raval placed reliance on the case of **Haricharan v. State of M.P., (2011) 4**

SCC 159, for the observation, reproduced hereinbelow:-

"35. ...It was emphasised that custodial death is perhaps one of the worst crimes in a civilised society governed by the rule of law. It is aggravated by the fact that crimes in custody are committed by persons, who are charged with the solemn responsibility to protect the fundamental rights of all the citizens. These crimes are committed under the shield of uniform and authority within the four walls of the police station or lock-up, the victim being totally helpless."

6.9 The case of **State of M.P. v. Shyamsunder Trivedi**, (1995) 4 SCC 262 was relied upon by learned APP Mr. Raval to stress upon the 4th report of June, 1980, whereby the National Police Commission acknowledged the fact of custodial torture. The observation relied upon by learned APP is as under:-

"18. In its 4th Report of June 1980, The National Police Commission noticed the prevalence of custodial torture etc. and observed that nothing is so *dehumanising* as the conduct of police in practising torture of any kind on a person in their custody. The Commission

noticed with regret that the police image in the estimation of the public has badly suffered on account of the prevalence of this practice in varying degrees over the past several years and noted with concern the inclination of even some of the supervisory ranks in the police hierarchy to countenance this practice in a bid to achieve quick results by short-cut methods. Though Sections 330 and 331 of the Penal Code, 1860 make punishable those persons who cause hurt for the purpose of extorting the confession, by making the offence punishable with sentence up to 10 years of imprisonment, but the convictions, as experience shows us, have been very few *because the atrocities within the precincts of the police station are often left without any ocular or other direct evidence to prove who the offenders are.* Disturbed by this situation, the Law Commission in its 113th Report recommended amendments to the Indian Evidence Act so as to provide that in the prosecution of a police officer for an alleged offence of having caused bodily injuries to a person while in police custody, if there is evidence that the injury was caused during the period when the person was in the police custody, the court *may presume* that the injury was caused by the police officer having the custody of that person during that period unless, the police officer *proves to the contrary.* The onus to prove the contrary must be discharged by the police official concerned. The

recommendation, however, we notice with concern, appears to have gone unnoticed and the crime of custodial torture etc. flourishes unabated. Keeping in view the dehumanising aspect of the crime, the flagrant violation of the fundamental rights of the victim of the crime and the growing rise in the crimes of this type, where only a few come to light and others don't, we hope that the Government and Legislature would give serious thought to the recommendation of the Law Commission (*supra*) and bring about appropriate changes in the law not only to curb the custodial crime but also to see that the custodial crime does not go unpunished. The courts are also required to have a change in their outlook and attitude, particularly in cases involving custodial crimes and they should exhibit more sensitivity and adopt a realistic rather than a narrow technical approach, while dealing with the cases of custodial crime so that as far as possible within their powers, the guilty should not escape so that the victim of the crime has the satisfaction that ultimately the majesty of law has prevailed.

6.10 Reliance was placed by learned APP in the case of **State of U.P. v. Ram Sagar Yadav, (1985) 1 SCC 552** to submit that in the said case, the Hon'ble Supreme Court had chose to impress upon the Government the need to amend the law

appropriately so that the policeman who commits atrocious on person who are in their custody are not allowed to escape by a reason of paucity or absence of evidence. Learned APP submitted that it has been observed that the police officers alone and none else can give evidence as regards the circumstances in which a person in their custody comes to receive injuries while in their custody. Bound by the ties of kind of brotherhood, they often prefer to remain silence in such situation and when they choose to speak, they put their own gloss upon facts and distort the truth.

6.11 State of Rajasthan v. Thakur Singh, (2014) 12

SCC 211 was relied upon by learned APP to address the aspect of Section 106 of the Indian Evidence Act, 1872 to submit that Section 101 of the Evidence Act lays down a general rule of burden of proof on the prosecution. However, Section 106 is not intended to relieve the accused of his duty. Section 106 is designed to

meet certain exceptional cases, in which, it would be impossible or difficult for the prosecution to establish the facts which are especially within the knowledge of the accused. Learned APP has also relied upon the judgment of **D.K. Basu v. State of W.B., (1997) 1 SCC 416.**

7. Having heard the submissions of both the advocates, perused the record and depositions of the witnesses.
8. In the cases of **D.K. Basu v. State of W.B.** with **Ashok K. Johri v. State of U.P., (1997) 1 SCC 416,** the observation in Paragraph 28 would require a special mention, where the Hon'ble Supreme Court has made reference of custodial death and the rights inherited under Article 21 of the Constitution which requires zealous and scrupulous protection. The observations are as under:-

“Custodial death is perhaps one of the worst crimes in a civilised society governed by the rule of law. The rights inherent in Articles 21

and 22(1) of the Constitution require to be jealously and scrupulously protected. The expression "life or personal liberty" in Article 21 includes the right to live with human dignity and thus it would also include within itself a guarantee against torture and assault by the State or its functionaries. The precious right guaranteed by Article 21 cannot be denied to convicts, under trials, detenue and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law. It cannot be said that a citizen 'sheds off his fundamental right to life the moment a policeman arrests him. Nor can it be said that the right to life of a citizen can be put in 'abeyance' on his arrest. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law-breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchy. No civilised nation can permit that to happen. The Supreme Court as the custodian and protector of the fundamental and the basic human rights of the citizens cannot wish away the problem. The right to interrogate the detenus, culprits or arrestees in the interest of the

nation, must take precedence over an individual's right to personal liberty. The Latin maxim *salus populi suprema lex* (the safety of the people is the supreme law) and *salus reipublicae suprema lex* (safety of the State is the supreme law) coexist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. The action of the State, however, must be "right, just and fair". Using any form of torture for extracting any kind of information would neither be "right nor just nor fair" and, therefore, would be impermissible, being offensive to Article 21. Such a crime-suspect must be interrogated indeed subjected to sustained and scientific interrogation determined in accordance with the provisions of law. He cannot, however, be tortured or subjected to third-degree methods or eliminated with a view to elicit information, extract confession or derive knowledge about his accomplices, weapons etc. His constitutional right cannot be abridged in the manner permitted by law, though in the very nature of things there would be qualitative difference in the method of interrogation of such a person as compared to an ordinary criminal. Challenge of terrorism must be met with innovative ideas and approach. State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to "terrorism". That would be bad for the State, the community and above

all for the rule of law. The State must, therefore, ensure that various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto themselves. That the terrorist has violated human rights of innocent citizens may render him liable to punishment but it cannot justify the violation of his human rights except in the manner permitted by law. Need, therefore, is to develop scientific methods of investigation and train the investigators properly to interrogate to meet the challenge."

9. The complaint was filed, as cognizable offence on 29.10.1989 at 23.00 hrs. for the offence committed on 27.10.1989 between 18.00 hrs. to 23.15 hrs., by Shri Verma, ASP, Palitana. The person informing about the complaint was Shri D.S. Khant, Police Inspector, Mahuva Camp, Savarkundla.
10. The accused were Police Sub-Inspector – Bhavsing Chaganbhai Bilval, Head Constable, Vajubha Akhubha, buckle no.13 and Police Constables Mahavirsinh Bahadursinh, buckle no.1193, Bhupat Nanu, buckle no.259, Jagjivan Raghuram, buckle no.143, Govind Arjan, buckle no.225, Yusufkhan

Hasankhan, buckle no.1533, all residing at Savarkundla as noted in complaint Exh.28.

11. The prosecution examined about eighteen witnesses, out of them, ten were police witnesses. The complaint which originated for the present matter was I-CR no.173/1989 at Savarkundla Town Police Station under Section 379 and 114 of IPC filed by the complainant – Vinubhai Vaghjibhai Kanani (Patel) on 27.10.1989 against Kanudo @ Bhoplo–Vallabh Waghri and other unknown boys of Waghri community.

12. Section 302,330 read with Section 114 IPC were invoked against the police accused by way of charge-sheet.

12.1 Section 330 is reproduced hereunder for appreciating the evidence on record:-

“330. Voluntarily causing hurt to extort confession, or to compel restoration of property–

Whoever voluntarily causes hurt, for the purpose of extorting from the sufferer or from any person

interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

13. It is the case of the prosecution that in connection with CR no.173/89, the police officer and police constables brought accused Kanudo @ Bhoplo Vallabh, aged about 22 years, at the referred time of 18.00 hrs. to 23.15 hrs. at Savarkundla Town Police Station and during the interrogation, the police officer and the constables to extort confession had beaten deceased-Kanudo, who sustained innumerable injuries and thus, out of shock and hemorrhage on account of multiple injuries to the body, he died, which came to be known through the

postmortem report, the injuries noted as under:-

"Injuries -

1. Abrasion 1.5 x 1 cm Vertical on Rt maxillary prominence irregular
2. Abrasion 0.8 x 0.2 cm transverse on the front of neck Rt side situated 1 cm above the medial end of Rt clavicle
3. Abrasion 0.2 x 0.1 cm transverse 1.5 cm Rt to the injury no. 2
4. Abrasion 1 x 0.5 cm in sagittal plam situated on the tip of Rt shoulder
5. Abrasion 0.5 x 0.3 cm. transverse 0.5 cm below the injury No. 3
6. Abrasion transverse 3.5 x 0.5 cm transverse situated on the inner side of Rt arm 3 cms below the axillary pit
7. Abrasion 3 x 0.8 cm transverse situated 5 cms below the injury No. 6
8. Multiple small irregular abrasions on the back of Rt forearm, 9 cms below the tip of Olecranon (elbow) in an area of 5 x 5 cm. size varies from 0.2 cm. diameter to 0.5 x 0.2 cm
9. Abrasion 0.5 cm diameter on inner side of (Rt) elbow.

10. Reddish contusion on the (Rt) flank midaxillary line just above iliac crest extending on the back in transverse plam margin are diffused size 9 x 2 cms, skin abraded at places.

11. Reddish contusion with skin abraded at place on the (Rt) back 2.5 cm below the illiac crest & 1.5 cm (Rt) to midline oblious with lower end on medial side size 7 x 1.5 cms.

12. Multiple small abrasions 6 in number on (Rt) back, situated in one vertical row, 1.5 cm (Rt) to midline and from the level of T7 to L1 vertebrae, oval to round in shape size varies from 0.5 cm in diameter to 1 x 0.5 cm, the distance between two abrasions vary from 2 to 3.5 cms intervening area of skin is slightly contuised.

13. Same type of abrasions (as injury No.12) on Lt back two in number situated 1 cm left to midline and at the level of T12 to L1 vertebrae lower one in oval (vertically) 1.5 x 1 cm & upper one is 2 cms above and 0.5 cm diameter intervening area of skin is slightly contuised

14. Railroad pattern bruises (contusion) reddish in colour on back of chest extending from 7 cms Rt to midline at the level of T5 Vertebra going downwards to the Lt crossing the midline & terminating 7 cms Lt to midline at the level of T7 vertebra, margins are diffused size

15 x 2 cms with 0.6 cm non-contused area between two parallel lines

15. Reddish contusion with abraded skin at places on Lt side of back situated just above the iliac crest, extending from posterior axillary line level going downwards & medially on back for the length of 8 x 2.5 cm.

16. Multiple irregularly arranged contusions with abraded skin at places of Lt gluteal region in an area of 16 x 10 cm transverse. Contusions are in reddish in colour & intermingled with each other but rail road pattern of contusions can still be appreciated. The size of contusions varies from 5 x 2 cm. to 8 x 2 cms. with 0.6 cm. non-contused area in between two parallel lines. Most of them are in transverse plain.— This area is swollen.

17. Reddish colour rail road pattern contusion on the back of Rt thigh nearly transverse situated 6 cm below the gluteal fold size 5 x 2 cm with 0.5 to 0.6 cm non-contused area of skin in between two parallel lines. Margins are diffused.

18. Reddish colour rail road pattern contusion on the back of Lt thigh oblique situated 4 cm below the gluteal fold lower end to the inner side, size 6 x 2 cm with 0.5 to 0.6 cm non-contused area in between two parallel lines. Margins are diffused.

19. Abrasion 3 x 1.5 cm vertical on

back of Rt thigh 2 cm outer to the injury no.17.

20. Reddish contusion on outer side of Lt thigh just below iliac crest extending on front upto the outer half of inguinal region in an area of 16 cm vertical & 14 cm transverse, margins are diffused and appreciable swelling present on this region.

21. Reddish diffused contusion on back of Rt leg (calf region) in an area of about 8 x 3 cm in oblique plan.

22. Faint Reddish Contusion on proximal half of sole of Lt foot size 6 x 4 cms in sagittal plane. Margins are diffused.

23. Faint Reddish contusion on the sole of Rt foot inner side size 8 x 4 cms. in sagittal plane. Margins are diffused.

Varying degree of ecchymosis is present in the subcut-aneous tissue & muscles underneath the external injuries mentioned above.

The degree of ecchymosis is severe with more amount of blood extravasated in to the muscles & soft tissue on back of chest abdomen, Lt gluteal region posterolateral aspect of both thighs Rt calf & sole of both feet underneath the respective external injuries.

All injuries are antemortem in

nature.

Only one injury on the back & two on buttock as noticed further detail are mentioned in inquest Panchanama."

14. Exh.73 is addressed by Dr. H.M. Mangal, M.D. (Forensic Medicine), Professor In-charge Forensic Medicine, M.P. Shah Medical College, Jamnagar. The communication is addressed dated 20.11.1998 with a subject to answer queries in reference to A.D. no.16/89 of Savarkundla Town Police Station based on the PM report no.364/1989 dated 9.11.1989. The communication reads as under:-

"Sir,

With reference to the subject cited above, herewith I am giving the answer to your querries in the same sequence.

1. Injuries mentioned in the postmortem report of the deceased Kanudo alias Bhopala Vallabh Waghri are caused by hard & blunt object. Pattern by few of the injuries like injury No.14, 16, 17, & 18 are suggestive of use of hard blunt long & yielding object like a cane (lathi).

2. Death of the deceased was as a result of cumulative (collective) effect of all the injuries mentioned in the postmortem report.

3. Injuries were inflicted in with 24 hours before the death of the deceased.

4. The regurgitated food material mentioned in the postmortem report is the effect of decomposition, since it was not found during the conduction of inquest panchanama, when body was fresh.

5. The regurgitated food was no evidence of any type of disease found during the postmortem examination.

(6&7) The injuries mentioned in the postmortem report of deceased in are sufficient to cause death of a moderately nourished adult male in ordinary course of nature."

15. Learned advocate Mr. Shethna had placed very strong reliance on the evidence of PW11 at Exh.61 Dr. Ramjibhai Pardhi who was a Medical Officer at K.K. Hospital on 27.10.1989 who had examined the deceased in the lock up and declared him dead. Dr. Pardhi did not make any note of examining the deceased. He did not see any injuries on the person. From his deposition,

it transpires that he had no idea who all were present at the Police Station at the relevant point of time. Dr. Pardhi was at his residence at about 11.30 p.m. on 27.10.1989 and one Bababhai of Aero Gas Agency of Savarkundla called him to inform that he was called by P.I. Sanghvam. From K.K. Hospital, he went to the Police Station which was at a distance of one kilometer.

16. Dr. Pardhi after reaching the Police Station went to the place, where the Police Inspector used to come. There the Police Inspector Shri Sangva told him that there was an accused in the adjacent room and therefore, Dr. Pardhi visited the room. He saw a dead body of a boy on the floor aged about 20-25 years and examining him, he said that he was dead. The witness stated that he saw the person in the dead condition, apart from that, he had not seen anything. The Doctor further clarified that he had not seen any injuries on the body of that person nor had

he made any notes of seeing the person. He does not even recollect as to who was present at that time at the Police Station.

17. The evidence of Dr. Pardhi was to the effect of seeing the person and his declaring him dead. It appears that he was not asked to examine the injuries on the body of the deceased Kanudo. Learned advocate Mr. Shethna for appellant stressed upon this evidence of Dr. Pardhi to submit that he was the first person and that too a Doctor who had not found any injury on the body of the deceased. Mr. Shethna thus has submitted that on this very evidence of Dr. Pardhi, all the accused and even the deceased appellant was required to be acquitted.

17.1 The cross-examination of Dr. Pardhi suggests that K.K. Hospital is a Government hospital of Savarkundla and he stated that he had checked the nerves of the deceased and the pupil of the eye and had checked his breath. He had not examined any other things. He in cross-

examination further affirmed that he had not seen any injuries on the body of the deceased. The evidence of the witness was not cross-examined from the side of the accused no.2 to 7.

18. PW12 — Dr. Harimohan Mangal was examined at Exh.70 who was serving as a Professor of forensic medicine in M.P. Shah Medical College, Jamnagar. On 29.10.1989, the dead body of the deceased Kanudo was received by him from PSI G.N. Katariya of Mahuva at 11.20 a.m. along with the police yadi Exh.50. Dr. Mangal stated that he along with Dr. Rajavat in the panel, examined the dead body for the postmortem and marked in all 23 external injuries on his body. The panel also marked about 5 internal injuries which were corresponding injuries in result of the external injuries. Dr. Mangal stated that if the external or internal injuries were taken together, they were sufficient to cause death of the deceased. All the injuries were caused by hard and blunt substance. Dr. Mangal stated that injury nos.

14,16, 17 and 18 were caused by hard and blunt substance like stick. The stick could be long and could bend a little or by cane sticks. Dr. Mangal was shown muddamal article 11 to 17 and he stated that all the external injuries referred by him could be caused by those muddamal sticks or by other substance like the muddamal sticks.

19. The deposition shows that some organs from the body were sent to Pathological Department of M.P. Shah Medical College for hystopathological examination with forwarding letter Exh.72. The reply Exh.73 as referred hereinabove was sent by Dr. Harimohan to the question in the nature of inquiry by the police about the injuries.

20. Exh.73 by the witness PW12 – Dr. Mangal is answering the queries raised. As noted in Exh.73 by Dr. Mangal, injuries were inflicted before 24 hours before the death of the deceased. Injury nos.14, 16, 17 and 18 are suggestive of use of hard, blunt and long object like cane (Lathi).

The injury nos.14, 16, 17 and 18 were found to be the cause of death. Dr. Mangal was referred to Article 11 to 17 – sticks and he affirmed that the external injuries could be caused by the Muddamal sticks or with other similar material as of the Muddamal stick.

21. In the cross-examination, the defence was raised of the possibility of injury to have been sustained by the deceased by jumping out of the jeep and falling down on the road, if the body takes two or three turns on the rough road and the clothes coming in contact of such road could be torned. This suggestion was put in context of the bushirt and pant of the deceased found to be torned and the manner in which they were torned, the defence suggested that it could not be possible because of the stick. The Doctor – PW12 affirmed the suggestion and stated of the probability of the clothes getting torned in such a manner, had the deceased jumped from the jeep and fallen on the road taking two to three

turns.

22. In the cross-examination, the Doctor - PW12, however, continued to stick to his deposition that the injury nos.14, 16, 17 and 18 could not be caused by jumping from the jeep and flitting on the road. The Doctor stated that there was no injury on the fingers of both the hands. He affirmed that all the external injuries were without any bleeding and were in the form of abrasions, and very negligible or no amount of blood could have occurred and he stated that in medical terms, it cannot be said that there was any bleeding from the injuries. He further affirmed that the clothes of the deceased were not blood stained. Doctor was confronted with the suggestion that after the injury, if death occurs, then on examination, such injuries could not be seen. The said suggestion was denied and the Doctor voluntarily stated that it could be possible only if inexperienced person examines, then such injuries could not be visible at the

first instance and may be unsuccessful to identify it, but an experienced Doctor or an experienced person would not commit any default in examining the injury.

23. Here it is necessary to refer to the provisions of Section 176 of Cr.P.C., where the inquiry is by the Magistrate into the cause of death including death in custody of the police. While introducing sub-section (1A) of Section 176 with effect from 23.6.2006, the power to inquire is held by the Judicial Magistrate or the Metropolitan Magistrate, as the case may be. In the Bharatiya Nagarik Suraksha Sanhita, 2023, such provision is made under Section 196. The purpose of Section 176 is for the inquiry by the Magistrate into cause of death. Provision of Section 176 Cr.P.C. would get attracted when the person dies in police custody and there is suspicion that the death has been caused by the police itself.

24. In the case of **Madhu v. State of Karnataka**, reported in (2014) 12 SCC 419, it has been observed in Paragraph 22 that the object of inquest proceedings is merely to ascertain whether a person has died under unnatural circumstances or an unnatural death and if so, what is the cause of death. Discrepancy occurring in inquest report cannot be termed as fatal or suspicious circumstances, which would warrant benefit of doubt to the accused. It has been noted that neither inquest report, nor postmortem report can be termed as basic or substantive evidence.

25. Much reliance has been placed on the evidence of Dr. Pardhi who in his testimony stated that he did not see any injuries on the body of the deceased Kanudo, but it is this Dr. Pardhi who had declared him dead in the police custody. The Police Inspector – Shri Sangvan had showed him the room, where the dead body of Kanudo was lying. Dr. Pardhi has categorically stated that

he had seen the person in dead condition and that he had seen no other thing, nor any injury on his body. Dr. Pardhi had come for the inquiry as was instructed by Police Inspector—Shri Sangvan to visit the Police Station and the purpose appears was to find out the actual death and not the cause of death. Dr. Pardhi had stated about his act, which he conducted to examine the deceased Kanudo. He was not asked to examine the injuries on the body of the deceased since Police Inspector — Shri Sangvan of Town Police Station only wanted to know whether Kanudo was alive or dead. Thus, the evidence of Dr. Pardhi should be viewed in that limited context. Under the circumstances, raising a reasonable suspicion that some person has committed an offence, the police has the authority to immediately intimate the nearest Executive Magistrate empowered to hold inquest.

26. It was also argued by learned advocate Mr. Shethna that in the inquest panchnama Exh.30,

only three injuries could be shown. Dr. Mangal – PW12 said that he did not ask the PSI who had brought the dead body to do the inquest again. According to the Doctor, from the eyes of an inexperienced person at first sight, injuries could not be seen and so could not be recorded. The Doctor was, thus, driving to the suggestion that since inquest panchnama was not prepared by the experts, therefore, having regard to the ordinary principle, he did not feel necessary to prepare the inquest again. However, Dr. Mangal could state that in the inquest report at Exh.32, as per his opinion, the injuries which were referred were tallying with injury nos.14, 15 and 16 and therefore, he stated that injury nos.14, 15 and 16 in the inquest report were practically the same, however, he affirmed that injury nos.14, 15 and 16 separately and interdependently were not sufficient to cause death. The opinion of the Doctor in the examination-in-chief was that the internal as well as external injuries were definitely prior

to the death and therefore, they were antimortem and the internal injuries referred by him were as a result of the external injuries and the internal injuries were corresponding to the external injuries.

27. There was also suggestion from the defence to the Doctor, that if the dead body was kept in an open tank to carry for postmortem and is taken from Savarkundla to Mahuva and thereafter, from Mahuva to Savarkundla and later on, the dead body if is taken to Jamnagar Medical College, during the period because of tossing of the body in the open tank, there were all possibilities of sustaining the external injuries as referred. The Doctor voluntarily thus answered that the external injuries as per the opinion were antimortem and if the dead body was brought in a tank or was carried in a tank, then also, for the sake of argument too, such kind of antimortem injuries cannot occur. In that case, the injury would be postmortem.

28. PW10 is Dharamsingh Chandansingh Sangvan was on his duty as PSI on 27.10.1989 at Savarkundla Town Police Station, on 28.10.1989 at about 0.15 hrs., he received a written report of PSI Shri B.C. Bilval, the present appellant - accused no.1. Thereafter, PW10 registered accidental death no.16/89 under Section 174 Cr.P.C. and since it was a custodial death, he had asked for report from Sub-Divisional Magistrate, Mahuva as well as he had informed the Divisional Police Officer and District Police Officer. Exh.57 was the letter written by the accused no.1 - Shri Bilval. The office copy of the requisition to the Sub-Divisional Magistrate was produced in evidence at Exh.58, and according to the letter, he had instructed to send a wireless message to the superior officers. PW10 produced Exh.59 the letter informing the Divisional Police Officer and the District police officer. PW10 had also written about the accidental note in his station diary register of Savarkundla Police Station for

the period between 17.10.1989 to 5.12.1989. He referred to Page-26 and the note at Page-2 which were in his handwriting and he produced the same at Exh.60. According to PW10, the inquest panchnama was executed under the instruction of Savarkundla Executive Magistrate. The requisition to the Executive Magistrate was placed at Exh.48. PW10 referred to Exh.32 as the inquest panchnama in his presence and thereafter, he stated that the panchnama of the place of offence was drawn, which was the place adjoining the chamber of Savarkundla Police Station Police Inspector. He stated that at the place of incident i.e. the chamber of PSI and the sitting area, he did not find any signs and therefore, he had drawn a NIL panchnama Exh.31.

28.1 PW10 recorded the statement of the complainant—Vinubhai Vaghjibhai, towards his complaint, the arrest of the deceased Kanudo was made. The further investigation was handed over to the Divisional Superintendent of Police, Mahuva —

Shri Khant.

28.2 The witness — Shri Sangvan — PW10 stated that the PSI — B.C. Bilval — deceased appellant was interrogating deceased Kanudo. Accused no.1— Bilval on 27.10.1989 from 8-00 to 11-00 in the evening was at Savarkundla Town Police on his duty with his staff members. Referring to the service register running from 7.10.1989 to 25.2.1990 and pointing to Page-27, PW10 stated that on 27.10.1989 between 8-00 to 11-00 at Savarkundla Town Police Station, the police officials were Head Constable — Mansinh Kaljibhai and Police Constable — Himmatbhai Bachubhai and in reserved force at the Police Station, Police Constable — Kishrobhai Bhikhabhai was present. Three persons present at the Police Station could be found from the register.

28.3 The witness — PW10 further referring to the register stated that on 27.10.1989 between 8-00 in the morning to 01-00 in the afternoon, the

police officials at the Police Station were Police Head Constable - Mansing Savjibhai, telephone duty Police Constable - Bhupendrasinh Kesarisingh and between afternoon 01-00 to evening 08-00, the officials were PSO Head Constable Raising Devabhai and on telephone duty - Police Constable - Ayubkhan Hasankhan were present.

28.4 For the time period between evening 04-00 to 08-00, PW10 stated that the Head Constable - Vajubhai Akhubha (A2), Police Constable-Jagjivan Raghuram (A6) and Police Constable-Govindbhai Arjanbhai (A5) were in reserve. The writing on 27.10.1989 were of Writer Head Constable.

28.5 The witness - PW10 was referred to Page-27 Exh.63 to state that on 27.10.1989 at about 08-00 at night at Savarkundla Town Police Station, roll call was recorded and those present during the roll call, were noted in Police Station Diary Register. On Page-24 on 27.10.1989, entry no.15 was about the roll call noted by the PSI -

Shri B.C. Bilval – accused no.1 in his handwriting, which the witness identified and placed it in evidence at Exh.64. The witness thus clarified that those who were not present on that night could be identified from the roll call recorded at 8 O’Clock night at the Police Station. He had given the yadi Mark-20/18 – Exh.65 to the investigating officer on 1.11.1989.

28.6 The case papers of theft registered against the deceased Kanudo was brought by this witness – PW10 before the Court and he stated that Vinubhai Vaghjibhai Patel had given the complaint to PSI – accused no.1 – Shri B.C. Bilval. Exh.66 – complaint was written by accused no.1 – Bilval, for that, an entry was made in Police Station Diary produced at Exh.41.

28.7 The witness PW10 also stated that on 29.10.1989, the Departmental Police Officer, Mahuva – Shri D.A. Khant was present and before him, the complaint was given and the further

investigation was entrusted to Shri Khant, which the witness – PW10 referred to from the Station Diary dated 29.10.1989, wherein the entry from 17.10.1989 to 5.12.1989 and entry no.7 was on Page-28 continued till Page-29. He identified his handwriting and placed it in evidence at Exh.67. On the basis of the complaint, he has registered the FIR in Police Station register of Savarkundla Police Station, PW10 produced xerox copy of the complaint at Exh.68.

28.8 The witness – PW10 was confronted by the defence advocate. As per the cross-examination, it comes on record that on 27.10.1989 at about 11:15 night, when PW10 was at his home, he received a call from accused no.1 and after the phone message, he went to Savarkundla Police Station and he saw that the deceased Kanudo was lying on the floor of the chamber of Sub-Inspector. The witness PW10 stated that when he saw body of Kanudo, he did not find any signs of beating on his body. He verified the said fact and

thereafter, he called Dr. Pardhi at the Police Station. Dr. Pardhi examined deceased Kanudo and declared him dead. PW10 further stated that when Dr. Pardhi was examining him, he stood near him and when Dr. Pardhi examined him, he too did not find any obvious marks of injury on the body of deceased Kanudo.

29. Advocate Mr. Shethna has taken a defence for the accused, that PW10 – Dharamsinh Chandansinh Sangvan and Dr. Ramjibhai Desabhai Pardhi – PW11, both the officers had not seen any injury marks on the body of the deceased Kanudo when he was examined at the place near the chamber of accused no.1. According to Advocate Mr. Shethna, this itself was a sufficient evidence on record to acquit accused no.1.

30. It is required to be clarified from the deposition of Shri Sangvan that he had called the Executive Magistrate in accordance to the provisions of Section 174 Cr.P.C. and had called Dr. Pardhi for that purpose. In the case of

Madhu (supra), the Hon'ble Supreme Court notes in Paragraph 22 that sub-section (1) of Section 174 Cr.P.C. only puts an obligation on the part of the investigating officer to intimate the Executive Magistrate empowered to hold inquest and that there is nothing in law which provides that the investigation cannot be carried out without his permission in writing or in his absence. The object of inquest proceedings under Section 174 Cr.P.C. is nearly to ascertain whether a person had died under an unnatural circumstances or unnatural death and if so, what is the cause of death. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit of scope of the proceedings under Section 174. The report of inquest is primarily intended of finding out the nature of injuries and the apparent cause of death. By the Doctor who holds postmortem examination, examines the body of the deceased from the medico legal stand point and

accordingly, it is the postmortem report that is supposed to contain the details of the injuries through scientific examination. In light of the observation of Hon'ble Supreme Court in **Madhu** (supra), non-observing of any injuries on the body of the deceased Kanudo by Dr. Pardhi – PW11 as well as PW10 – PSI Sangvan would have no importance since inquiry was conducted only to the extent of Section 174 Cr.P.C.

31. PW10, on the declaration of the Doctor of the death of Kanudo, had registered the accidental death report at 12-15 night at the Police Station and he himself took upon him the investigation and the accidental death complaint, thus, got registered on 28.10.1989. The investigation remained with him for 3-4 hrs. and thereafter, Deputy Superintendent of Police took upon the investigation of the A.D. and during the time when he had the investigation, he had drawn the Panchnama of the place of offence and had recorded the statement of

Vinubhai who had given the complaint of theft against deceased Kanudo. Over and above that, as per the departmental rules, he had informed the superior officers.

31.1 PW10 could not say when for the first time, parents of Kanudo had come to the Police Station. He does not remember whether Deputy Superintendent of Police — Khant and Sub Divisional Magistrate both had come together at the Police Station and he does not have the knowledge whether Deputy Superintendent of Police — Khant had examined deceased Kanudo after coming to the Police Station. The Panchnama of the place of offence was drawn on 28.10.1989 in the morning between 7.30 to 8.30. He stated that till that time, the investigation was with him.

31.2 PW10 denied the suggestion that prior to the inquest Panchnama, the near relative of the deceased Kanudo were called at the Police Station. His father — Vallabhbhai had identified

the dead body at the Police Station.

31.3 The witness – PW10 stated that when he had gone to the Police Station at that time, only three were present there. Accused – Bhavsingh (A-1), another, Head Constable who was in charge of the Police Station and the third was Constable who was PSO. Except that, no police staff was present at the Police Station. PSO and the Constable along with him were present there from 8-00 night of 27.10.1989 to 8-00 morning of 28.10.1989.

31.4 The witness – PW10 stated that accused no.1 – Bhavsingh left the Police Station after his reaching there. The witness PW10 further clarified that probably he must have sent him for some work or on his own may have left the Police Station. He stated that there was no such yadi for that purpose, but A-1 at regular intervals was visiting the Police Station. In the cross-examination, certain questions were also asked doubting the missing pages. At Sr.

No.1 to 3 on the right hand side, with Sr. No.33 to 36 in between with red ink below that name of Vajubha Appubha (A2), Jagjivan Raghuram (A6) and Govind Arjan (A5) were written in red ink. He denied the suggestion that these three names were not written in the duty register when the duties were allotted to them and later on were added to falsely implicate them in the case.

31.5 Witness – PW10 affirmed that the complaint about the death of Kanudo, almost at about 11-15 night hrs. on 27.10.1989 was registered against the accused on 29.10.1989 at 23-00 hrs. and the complaint of murder was registered. A copy was sent to the Court on 30.10.1989.

32. Exh.57 is dated 27.10.1989 by the deceased – appellant – accused no.1 to Police Inspector, Savarkundla Police Station. Accused no.1 reported that, as the investigating officer at Savarkundla Town Police Station, he had brought accused – Waghri Kanudo @ Bhoplo Vallabh, resident of Maninagar at Police Station in

connection with Savarkundla Town Police Station CR no.173/89 under Sections 379 and 114 IPC. Exh.57 further reports that while inquiring, in connection with the offence suddenly, Kanudo @ Bhoplo had fallen down on the floor of the office and had turned unconscious and had become feeble to give any answer and therefore, Dr. R.D. Pardhi was called from K.K. Hospital at the Police Station and on examination, he was declared dead. Accused no.1, by Exh.57, gave declaration of the incident.

33. The evidence on record, thus, by Exh.57 suggests that deceased Kanudo @ Bhoplo was called for inquiry in connection with CR no.173/89, which was in connection with theft. Accused no.1, in the further statement under Section 313 of Cr.P.C. in connection to report Exh.57, affirmed that such written report was asked to be given by the Shri Sangvan – PW10 – Police Inspector, Savarkundla Police Station. The circumstances that was placed before accused no.1 under

Section 313 of Cr.P.C. by the Court questioning, that witness—Dharamsinh Chandansinh Sangvan in his oral evidence stated that on 28.10.1989, he was Police Inspector on duty, at that time, at about 0.15 hrs., his subordinate Police Inspector - accused no.1 - Shri Bilval, PSI had given a written report and therefore, accidental death entry no.16/89 was registered on 28.10.1989 under Section 174 of Cr.P.C. Accused no.1 was, therefore, asked about Exh.57, on the basis of which, the accidental death entry no.16/89 - Exh.60 was drawn. It was to that question accused no.1 stated that Exh.57 report was given by him on the instruction of Shri Sangvan.

34. Learned advocate Mr. Shethna had referred to the evidence of PW9 - Vinubhai Vaghjibhai Kanani who was the complainant to CR no.173/89 under Sections 379 and 114 IPC that Vinubhai - PW9 had initially visited Police Inspector - Shri Sangvan at his home complaining about the theft

of Rs.20,000/-. Learned advocate Mr. Shethna, thus, submitted that the Police Inspector – Sangvan was required to be made an accused as it was under his instructions, accused no.1 – Bilval had interrogated accused – Kanudo @ Bhoplo. Advocate Mr. Shethna submitted that it has not come on record as to what instruction has been given by PW10–Sangvan to accused no.1 in connection with the complaint of PW9. Advocate Shethna thus pointed the probability that Shri Sangvan may have asked accused no.1 – Shri Bilval to get confession from Kanudo in connection with the complaint of PW9.

35. PW9 – Vinubhai Vaghjibhai Kanani at Exh.52 deposed that on 27.10.1989, Rs.25,000/- had come through Angadiya from Mumbai. That money he carried on the petrol tank of Hero Honda motorcycle from his Angadiya office at his home, he parked his motorcycle along with the money outside his house. After half an hour, when he came out of his house, he found Rs.20,000/-

less. PW9 further stated that at that place, there was Lohar's son, known as Munno who met him and informed him that one boy had come and had given Rs.100/- for the snacks. PW9, thus, stated that he came to know that there were two boys of Waghri community involved in the theft. Therefore, along with Munna, he went at Vaghrivas, where he identified the person. PW9 stated that he does not recollect the name. However, when he inquired from the boy, the boy stated that he had not taken the money and therefore, he had gone to Police Inspector – Sangvan's house and had informed about the theft. Mr. Sangvan asked him to go to the Police Station.

35.1 PW9 further stated that Shri Sangvan Saheb had asked PSI Bilval – A-1 to immediately arrest the accused and to receive the Muddamal. Therefore, PW9, Munno, PSI Bilval – A-1 and police persons had gone to Vaghrivas, where earlier he had gone for inquiry, where at the house, the boy was

called and on inquiring his name, he stated that he was Kanudo @ Bhoplo.

36. The argument of learned advocate Mr. Shethna finds the weight from this evidence that it was Shri Sangvan who had instructed accused no.1 to immediately arrest the accused and to recover the Muddamal. As per the further statement of accused no.1 under Section 313 of Cr.P.C., as referred hereinabove, it was Shri Sangvan who had asked accused no.1 to give report Exh.57 for the death of Kanudo @ Bhoplo who during inquiry had fallen down on the office floor and had become unconscious, while Dr. Pardhi had declared him dead and it was Mr. Sangvan who on the basis of Exh.57 had recorded the accidental death entry no.16/89 – Exh.60. Mr. Sangvan has not been made an accused in the matter. From the evidence of PW9 – Vinubhai Kanani, it becomes clear that Shri Sangvan had instructed accused no.1 to arrest the accused immediately and to recover the Muddamal. However, such instruction

of Shri Sangvan cannot be assumed and inferred that the superior officer had instructed the subordinate to compel the accused for extorting the confession, nor would it be inferred that Shri Sangvan had instructed the police officer (A-1) to torture accused – Kanudo @ Bhoplo.

37. The further evidence of PW9 would note that after inquiring the name, Kanudo @ Bhoplo was asked to sit in the jeep by A-1 and Kanudo was brought to Savarkundla Town Police Station. PW9 – Vinubhai further states that A-1 had started inquiring and Kanudo stated that he would remove and give the money and therefore, again, Kanudo was taken to Maninagar at his house. At that time with PW9, the person was Munno. The police persons did not find any money from the house of Kanudo and therefore, the boy was brought back at the Police Station. Thereafter, A-1 took PW9 complaint Mark 20/2, PW9 identified his signature. He further stated that after the complaint, the inquiry of the boy was held. PW9

identified PSI – Bilval – A-1, while for the rest of the police persons, he stated that he does not know. In the cross-examination, it has come on record that second time, when they had gone to Vaghrivas with PSI – Bilval and were returning back, at that time, Bhoplo had run away from the place. He affirmed that the police halted the jeep and the policeman ran after him to catch him. According to PW9, on the front part of the jeep, driver and PSI – Bilval were sitting, while the door of the rear side of the jeep was half open. PW9 also stated that at the rear side of the jeep, he, Bhoplo and Munna were sitting. After leaving the house, within short time, Bhoplo ran away. He also affirmed that Bhoplo somersaulted and he fell on the ground and flipped twice or thrice and thereafter, he started running. The witness also affirmed that Kanudo had made attempts to run away from the hands of police and affirmed that till the police brought the jeep, he was attempting to run away, and he was brought to the Police

Station in the jeep.

37.1 PW9 further stated that prior to the registration of the complaint, he, Munno and Bhoplo were made to sit in a room and after inquiry, his complaint was taken. PW9 does not recollect whether they were sitting in Osari or in the room. He stated that Munna had informed him that there were two persons and Munna had also told him that he would identify both of them. PW9 was at the Police Station till 10-30 night. PW9 further stated that from the time, Kanudo was arrested till 10-00 or 10-30, he, Munno and Bilval Saheb were together. PW9 very categorically stated that in his presence, it has not happened that Bilval Saheb or any other police had beaten Kanudo.

38. For this witness – PW9, complaint, Kanudo was interrogated. He states that till 10-30, Kanudo @ Bhoplo was not beaten by any of the policemen, nor by accused no.1.

38.1 Next day, at his home, the police had come to call PW9 and he was taken to Rest House. There a person in a ordinary dress had started his inquiry and he in his statement had informed that Kanudo had escaped from the jeep. Thereafter again, he was inquired by another police, at that time too, he had informed that Kanudo had ran away from the jeep.

39. PW9 – Vinubhai's deposition has excluded the beatings by the police in the Jeep. According to Vinubhai, on the front side of the Jeep, P.S.I. Bilval (A-1) and the driver were sitting, while on the rear side of the Jeep PW9 himself, Bhoplo and Munna were sitting. Vinubhai does not bring the presence of other police in the Jeep. However, his evidence in the examination-in-chief do state that when they had gone again at Maninagar he and Munno and police persons had gone there.

40. PW9 interest appears to favour the accused. His testimony cannot be considered as fabricated,

but surely biased. He was interested in recovering his money alleged to be stolen. His interest was the financial benefit from the outcome of his complaint, however, that could not happen, but led to the result that the alleged person lost his life in the process.

41. PW9 was favouring the police persons involved, who helped in his complaint. He can be termed as a biased witness. His testimony cannot be outright rejected, but no reliance can be placed to examine the credibility, which becomes doubtful.

42. PW16 – Shantilal Vallabhbhai is the brother of the deceased Kanudo examined at Exh.104. His deposition notes that Kanudo was his younger brother. He does not remember the day but recalls that it was the day of Dhanteras. He and his brother Kanudo and others were staying together. The residential house was at Savarkundla Village behind Maninagar area.

42.1 PW16, brother states that on the day of Dhanteras, in the afternoon between 3 to 4 O' clock, he, his parents and his brother Kanudo and uncle and others were sitting in their house. PW16 evidence recorded that two persons looking like an agriculturists had come and called him and Kanudo out of the house and a boy along with them, pointed towards his brother— Kanudo and stated that the boy was just like his brother — Kanudo and therefore, the people who were like agriculturists had asked his brother Kanudo to sit on Hero Honda vehicle and to go along with him. PW16, brother stated that the farmers had alleged his brother and were stating that now that money is gone and after sometime, stating that diamonds are gone and again and again, they were doubting his brother. When the farmers asked to sit on Hero Honda, his brother Kanudo stated that he has not committed any offence and therefore, denied to sit on Hero Honda. At that time, the farmers threatened him to wait for some time and to see how he was not

coming with them.

42.2 PW16 stated that thereafter, the farmers went away and while they were sitting in the house, after some time, Bilval saheb and six police persons had come to their house in police jeep. The witness stated that he could identify Bilval saheb and six police persons. On the day of the deposition, A-1 was not present before the Court, while six were there, whom he identified but stated that he does not know their names.

42.3 The brother - witness further stated that Bilval Saheb told them that the farmers have filed the case and they have come to take Kanudo for inquiry. Thereafter, Kanudo was caught and put in police jeep by those people. PW16 stated that the police, which was sitting in the jeep started beating his brother - Kanudo. He started running after the jeep, he saw them beating his brother - Kanudo. He even asked the police not to beat his brother.

43. The evidence of PW16 - brother suggests that in all, seven police had come to his house in a police jeep. As per the witness, the police which was sitting in the jeep was beating his brother.

44. After the police Jeep left the place, PW16, the brother ran after the jeep and he stated that he had seen police beating his brother Kanudo and he had asked the police person not to beat his brother. Thereafter, he, his parents and his uncle - Maganbhai went after the jeep to the police station. When they reached the police station, at the lobby, he saw Bilvalsaheb (A-1) and police and others beating his brother Kanudo and therefore he asked them not to beat his brother.

44.1 PW16 stated that both the hands of his brother at the police station were put through the iron framed grill in such way that both his hands remain outside the grill parallelly. PW16 stated that police persons were beating his brother and

other police men were holding both his hands. When asked not to beat his brother, the police started abusing and hurled stick against them and asked them to leave the police station, therefore, they came out, where they met person named Bablabhai Khuman.

44.2 PW16 stated the Bablabhai Kuhman had telephoned at the police station and he was told that he had no right to call them and that he should not make such phone. The police even told Bablabhai that they had right to beat and that he should not involve himself in it.

45. Learned advocate Mr. Shethna has made contention that Bablabhai had not been examined by the prosecution, who could have verified the fact of deceased brother present at the Police Station and further stated that Advocate Balubhai Trivedi, who too was stated to have made a phone call at the police station was not examined.

46. The deposition of PW16 suggests that Bablabhai Khumanbhai and advocate Balubhbhai had made phone call, while Bablabhai was instructed by the police not to interfere, however, Advocate Balubhai Trivedi was told that they were not beating and Kanubhai was sitting at the police station. The police had told Advocate Balubhai to get Kanudo release on bail the next morning, therefore, Advocate Balubhai told them that they would initiate procedure to get Kanudo released from police station.

47. According to PW16, police when had come again on that day in the evening at about 5.00 to 5.30 at their house and was making search, PW16 stated that his brother Kanudo, was also along with the police. The police did not find any illegal material from their house. He further stated that when he had taken the lota (small rounded water container) of water from his house for Kanudo, police threw the water mug down with the stick and did not allow Kanudo to drink water.

After the search, again police took back Kanudo along with them.

48. PW16 further stated that after police had left they waited at their home and about 3.00 to 4 0' clock night Kadarbhai Kazi and his maternal uncle Sartanbhai Manjibhai had come to their house and woke them up, therefore, his father and uncle both went out of the house, who were informed that they had talked with Savarkundla police station and Kanudo would be released under compromise and therefore asked to join them at the police station. Therefore, his father, uncle and the two persons, who had come to call them, all the four sat in a rickshaw and went to the police station, while PW16 rided his cycle to the police station. On reaching there, he saw that no such procedure was to be done for releasing his brother, but he saw his brother's dead body covered with cloth in a room at the lobby of the police station. Police persons asked them to put a signature on the fact of his

brother's death, however, they declined and returned back home.

49. As per PW16 after three days and three nights police called them at Savarkundla Government Hospital and gave the dead body, which they received for the last rites. The evidence of PW16 clearly states about the police persons taking his brother, beating him in the jeep and even beating his brother at the police station. He saw A-1 – Bilval and other police were beating his brother in the lobby of the police station. He had given the description of the act of A-1 and other police persons. He had seen the dead body of his brother in the room of the police station, which was in the lobby. The witness specifically named A-1.

50. PW17 is the father of the deceased – Vallabhbhai Bhanabhai, who was aged about 80 years on the date of his deposition dated 25.10.1999. As per his deposition at Exh.113, he has four sons and five daughters, Kanudo was the third son who was

fondly called Bhoplo. On the day of the incident, PW17 was at home. He stated that Fojdar Saheb and two to five persons had come to their house in a motor and inquired about Kanudo and as there was no other person except Kanudo, the witness showed him to the police, who took him in a motor. The witness went behind them. He stated that in police line, there was room of Fojdar Saheb, where they were beating. Along with him, his son Shanti, his wife Dhaiben, had gone together. He stated that no other person were with them. Kanudo was beaten at the police station. They were waiting in the street of the police station. Witness stated that Kanudo was given, hand and kick blows by the Fojdar Saheb and the police. He knows the Fojdar Saheb. The witness identified accused no.1 in Court by going near the accused seat, and when he was asked whether he could identify the other police persons, the witness said that he does not remember. PW17, the father further stated that when police took Kanudo at that time, two three

Kanbis had also come there. When his son was taken by the Fojdar Saheb, he asked him the cause, who replied that they were taking for investigation of theft, at that time, he told that his son's name was not there in the theft.

50.1 As noted in the deposition of PW17, when police took his son first time, there was no incident. He stated that police had come again at their house to make search, and they had found nothing, at that time, his son was with the police. The witness stated that for the first time police had come at 4 O' clock and again at 5.00 in the evening. According to the PW17, when first time police had come police persons had come to his house, while second time police had come, there was no one along with them. The same police had come second time in jeep, who took Kanudo along with them. Thereafter, they later on followed the police, along with him, was his son Shanti and his wife Dahiben. They had gone to Darbanga Police Station, where he saw police

persons beating Kanudo. The witness father had asked Fojdar Saheb not to beat, but he did not listen to him and had asked him to run away from there and therefore they had come back home and after coming home they went to visit Bablabhai Darbar at his house to inform him that police was beating his son, therefore, Bablabhai phoned police in his presence, who told Bablabhai that they would beat, therefore, Bablabhai asked Fojdar Saheb not to beat. The witness stated that the phone call was made at 8 or 9 O' clock at night. Thereafter, they returned back home and went to sleep. In the morning at the wee hours, Waghri Motiya and Kadarbhai had come to their house, and with them he, his son and his wife, three of them had gone along with Kadarbhai and Moriya in a rickshaw to the police station, where inside the police station in a room they saw Kanudo lying on the ground who was covered with cloth. He raised the cloth and saw Kanudo and identified him. The witness stated that his son's dead body was lying in the office

of Fojdar Saheb.

51. In the case of *Jasdeep Singh v. State of Punjab* reported in (2022) 2 SCC 545 Hon'ble Supreme Court has referred to various judgments in relation to the scope of Section 34 IPC. The reference herein is made as thus:-

28.1. *Suresh v. State of U.P.* [*Suresh v. State of U.P.*, (2001) 3 SCC 673 : 2001 SCC (Cri) 601] : (SCC pp. 682-83 & 686-87, paras 24 & 40)

"24. Looking at the first postulate pointed out above, the accused who is to be fastened with liability on the strength of Section 34 IPC should have done some act which has nexus with the offence. Such an act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only a covert act it is enough, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. Even an omission can, in certain circumstances, amount to an act. This is the purport of Section 32 IPC. So the act mentioned in Section 34 IPC need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act e.g. a co-accused, standing near the victim face to face saw an armed assailant nearing the victim from behind with a weapon to inflict a blow. The co-accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with

the idea that the blow should fall on the victim. Such omission can also be termed as an act in a given situation. Hence an act, whether overt or covert, is indispensable to be done by a co-accused to be fastened with the liability under the section. But if no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, Section 34 IPC cannot be invoked for convicting that person. In other words, the accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of Section 34 IPC.

40. Participation in the crime in furtherance of the common intention cannot conceive of some independent criminal act by all accused persons, besides the ultimate criminal act because for that individual act law takes care of making such accused responsible under the other provisions of the Code. The word "act" used in Section 34 denotes a series of acts as a single act. What is required under law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown not to have dissuaded themselves from the intended criminal act for which they shared the common intention. Culpability under Section 34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the court can, with judicial servitude, hold that the accused must have preconceived the result that ensued in furtherance of the common intention. A Division Bench of the Patna High Court in *Satrughan Patar v. Emperor* [*Satrughan Patar v. Emperor*, 1919 SCC OnLine Pat 4 : AIR 1919 Pat 111] held that

it is only when a court with some certainty holds that a particular accused must have preconceived or premeditated the result which ensued or acted in concert with others in order to bring about that result, that Section 34 may be applied."

28.2. *Lallan Rai v. State of Bihar* [*Lallan Rai v. State of Bihar*, (2003) 1 SCC 268 : 2003 SCC (Cri) 301] : (SCC p. 277, para 22)

"22. The above discussion in fine thus culminates to the effect that the requirement of statute is sharing the common intention upon being present at the place of occurrence. Mere distancing himself from the scene cannot absolve the accused – though the same however depends upon the fact situation of the matter under consideration and no rule steadfast can be laid down therefor."

28.3. *Chhota Ahirwar v. State of M.P.* [*Chhota Ahirwar v. State of M.P.*, (2020) 4 SCC 126] : (SCC p. 133, para 24)

"24. Section 34 is only attracted when a specific criminal act is done by several persons in furtherance of the common intention of all, in which case all the offenders are liable for that criminal act in the same manner as the principal offender as if the act were done by all the offenders. This section does not whittle down the liability of the principal offender committing the principal act but additionally makes all other offenders liable. The essence of liability under Section 34 is simultaneous consensus of the minds of persons participating in the criminal act to bring about a particular result, which consensus can even be developed at the spot as held in *Lallan Rai*

v. State of Bihar [Lallan Rai v. State of Bihar, (2003) 1 SCC 268 : 2003 SCC (Cri) 301] . There must be a common intention to commit the particular offence. To constitute common intention, it is absolutely necessary that the intention of each one of the accused should be known to the rest of the accused."

28.4.*Barendra Kumar Ghosh v. Emperor [Barendra Kumar Ghosh v. Emperor, 1924 SCC OnLine PC 49 : (1924-25) 52 IA 40 : AIR 1925 PC 1] : (SCC OnLine PC)*

"... the words of Section 34 are not to be eviscerated by reading them in this exceedingly limited sense. By Section 33 a criminal act in Section 34 includes a series of acts and, further, "act" includes omissions to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. By Section 37, when any offence is committed by means of several acts whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence. Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things "they also serve who only stand and wait". By Section 38, when several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act. Read together, these sections are reasonably plain. Section 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for

"that act" and "the act" in the latter part of the section must include the whole action covered by "a criminal act" in the first part, because they refer to it. Section 37 provides that, when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common to all), makes the actor liable to be punished for the commission of the offence. Section 38 provides for different punishments for different offences as an alternative to one punishment for one offence, whether the persons engaged or concerned in the commission of a criminal act are set in motion by the one intention or by the other."

28.5. *Mahbub Shah v. Emperor* [*Mahbub Shah v. Emperor*, 1945 SCC OnLine PC 5 : (1944-45) 72 IA 148 : AIR 1945 PC 118] : (SCC OnLine PC)

"... Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say "the common intentions of all", nor does it say "an intention common to all." Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of Section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships

that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan."

28.6.*Rambilas Singh v. State of Bihar* [*Rambilas Singh v. State of Bihar*, (1989) 3 SCC 605 : 1989 SCC (Cri) 659] : (SCC pp. 609-10, para 7)

"7. ... It is true that in order to convict persons vicariously under Section 34 or Section 149 IPC, it is not necessary to prove that each and every one of them had indulged in overt acts. Even so, there must be material to show that the overt act or acts of one or more of the accused was or were done in furtherance of the common intention of all the accused or in prosecution of the common object of the members of the unlawful assembly."

28.7.*Krishnan v. State of Kerala* [*Krishnan v. State of Kerala*, (1996) 10 SCC 508 : 1996 SCC (Cri) 1375] : (SCC p. 515, para 15)

"15. Question is whether it is obligatory on the part of the prosecution to establish commission of an overt act to press into service Section 34 of the Penal Code. It is no doubt true that court likes to know about an overt act to decide whether the person concerned had shared the common intention in question. Question is whether an overt act has *always* to be established? I am of the view that establishment of an overt act is not a requirement of law to allow Section 34 to operate inasmuch as this section gets attracted when "a criminal act is done by several persons in furtherance of the common intention of

all". What has to be, therefore, established by the prosecution is that all the persons concerned had shared the common intention. Court's mind regarding the sharing of common intention gets satisfied when an overt act is established qua each of the accused. But then, there may be a case where the proved facts would themselves speak of sharing of common intention : *res ipsa loquitur*." (emphasis in original)

28.8. *Surendra Chauhan v. State of M.P.* [*Surendra Chauhan v. State of M.P.*, (2000) 4 SCC 110 : 2000 SCC (Cri) 772] : (SCC p. 117, para 11)

"11. Under Section 34 a person must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture."

28.9. *Gopi Nath v. State of U.P.* [*Gopi Nath v. State of U.P.*, (2001) 6 SCC 620] : (SCC p. 625, para 8)

"8. ... As for the challenge made to the conviction under Section 302 read with Section 34 IPC, it is necessary to advert to the salient principles to be kept into consideration and often reiterated by this Court, in the matter of invoking the aid of Section 34 IPC, before dealing with the factual aspect of the claim made on behalf of the appellant. Section 34 IPC has been held to lay down the rule of joint responsibility for criminal acts performed by plurality of persons who joined together in doing the criminal act, provided that such commission is in furtherance of the common intention of all of them. Even the doing of separate, similar or diverse acts

by several persons, so long as they are done in furtherance of a common intention, render each of such persons liable for the result of them all, as if he had done them himself, for the whole of the criminal action – be it that it was not overt or was only a covert act or merely an omission constituting an illegal omission. The section, therefore, has been held to be attracted even where the acts committed by the different confederates are different when it is established in one way or the other that all of them participated and engaged themselves in furtherance of the common intention which might be of a pre-concerted or pre-arranged plan or one manifested or developed at the spur of the moment in the course of the commission of the offence. The common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. The ultimate decision, at any rate, would invariably depend upon the inferences deducible from the circumstances of each case."

28.10. *Ramesh Singh v. State of A.P.* [*Ramesh Singh v. State of A.P.*, (2004) 11 SCC 305 : 2004 SCC (Cri) Supp 70] : (SCC p. 314, para 12)

"12. ... As a general principle in a case of criminal liability it is the primary responsibility of the person who actually commits the offence and only that person who has committed the crime can be held guilty. By introducing Section 34 in the Penal Code the legislature laid down the principle of joint liability in doing a criminal act. The essence of that liability is to be found in the existence of a common

intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. Thus, if the act is the result of a common intention, then every person who did the criminal act with that common intention would be responsible for the offence committed irrespective of the share which he had in its perpetration."

28.11. *Nand Kishore v. State of M.P.* [*Nand Kishore v. State of M.P.*, (2011) 12 SCC 120 : (2012) 1 SCC (Cri) 378] : (SCC pp. 126-27, paras 20-23)

"20. A bare reading of this section shows that the section could be dissected as follows:

(a) Criminal act is done by several persons;

(b) Such act is done in furtherance of the common intention of all; and

(c) Each of such persons is liable for that act in the same manner as if it were done by him alone.

In other words, these three ingredients would guide the court in determining whether an accused is liable to be convicted with the aid of Section 34. While first two are the acts which are attributable and have to be proved as actions of the accused, the third is the consequence. Once the criminal act and common intention are proved, then by fiction of law, criminal liability of having done that act by each person individually would arise. The criminal act, according to Section 34 IPC must be done by several persons. The emphasis in this part of the section is on the word "done". It only flows from this that before a person can be convicted by following the provisions of Section 34, that person must

have done something along with other persons. Some individual participation in the commission of the criminal act would be the requirement. Every individual member of the entire group charged with the aid of Section 34 must, therefore, be a participant in the joint act which is the result of their combined activity.

21. Under Section 34, every individual offender is associated with the criminal act which constitutes the offence both physically as well as mentally i.e. he is a participant not only in what has been described as a common act but also what is termed as the common intention and, therefore, in both these respects his individual role is put into serious jeopardy although this individual role might be a part of a common scheme in which others have also joined him and played a role that is similar or different. But referring to the common intention, it needs to be clarified that the courts must keep in mind the fine distinction between "common intention" on the one hand and "mens rea" as understood in criminal jurisprudence on the other. Common intention is not alike or identical to mens rea. The latter may be coincidental with or collateral to the former but they are distinct and different.

22. Section 34 also deals with constructive criminal liability. It provides that where a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it was done by him alone. If the common intention leads to the commission of the criminal offence charged, each one of the persons sharing the common intention is constructively liable for the criminal act done by one of them. (Refer to *Brathi v.*

State of Punjab [Brathi v. State of Punjab, (1991) 1 SCC 519 : 1991 SCC (Cri) 203] .)

23. Another aspect which the court has to keep in mind while dealing with such cases is that the common intention or state of mind and the physical act, both may be arrived at the spot and essentially may not be the result of any predetermined plan to commit such an offence. This will always depend on the facts and circumstances of the case,..."

28.12.*Shyamal Ghosh v. State of W.B. [Shyamal Ghosh v. State of W.B., (2012) 7 SCC 646 : (2012) 3 SCC (Cri) 685] : (SCC p. 682, para 87)*

"87. Upon analysis of the above judgments and in particular the judgment of this Court in *Dharnidhar v. State of U.P. [Dharnidhar v. State of U.P., (2010) 7 SCC 759 : (2010) 3 SCC (Cri) 491]* , it is clear that Section 34 IPC applies where two or more accused are present and two factors must be established i.e. common intention and participation of the accused in the crime. Section 34 IPC, moreover, involves vicarious liability and therefore, if the intention is proved but no overt act was committed, the section can still be invoked. This provision carves out an exception from general law that a person is responsible for his own act, as it provides that a person can also be held vicariously responsible for the act of others, if he had the common intention to commit the act. The phrase "common intention" means a pre-oriented plan and acting in pursuance to the plan, thus, common intention must exist prior to the commission of the act in a point of time. The common intention to give effect to a particular act may even develop on the spur of the moment between a number of persons with reference to the facts of a

given case."

52. The reference of the case by learned advocate Mr. Shethna of the case of **Maiku and Ors.** (supra) would not be applicable in the present case, since the judgment of **Maiku** (supra) is in context with the Section 149 IPC. There is distinction between Sections 34 and Section 149 IPC. Section 34 does not by itself creates any specific offence whereas, Section 149 IPC does. Common intention must be proved under Section 34 IPC, while Section 149 speaks of common object. The distinction between Section 34 and Section 149 IPC has been dealt with in case of **Virendra Singh v. State of M.P.**, (2010) 8 SCC 407, it was held as under:

"Distinction between Section 34 and Section 149 of the Penal Code

46. (i) Section 34 does not by itself create any specific offence, whereas Section 149 does so;

(ii) Some active participation, especially in crime involving physical violence, is necessary under Section 34, but Section 149 does not require it and the

liability arises by reason of mere membership of the unlawful assembly with a common object and there may be no active participation at all in preparation and commission of the crime;

(iii) Section 34 speaks of common intention, but Section 149 contemplates common object which is undoubtedly wider in its scope and amplitude than intention; and

(iv) Section 34 does not fix a minimum number of persons who must share the common intention, whereas Section 149 requires that there must be at least five persons who must have the same common object.

53. Section 149 IPC is of wider scope than Section 34 IPC and in a case where Section 149 applies, a constructive liability arises even in respect of those persons, who may not be actually in the commission of the offence. Though, in both the sections the persons are vicariously responsible for the acts of others. In order that Section 34 IPC may apply, it is not necessary that the prosecution must prove that the act must done by a specified person.

54. In the case of **Ramesh Singh v. State of A.P.**,
(2004) 11 SCC 305 it was held as under:

"12. ... As a general principle in a case of criminal liability it is the primary responsibility of the person who actually commits the offence and only that person who has committed the crime can be held guilty. By introducing Section 34 in the Penal Code the legislature laid down the principle of joint liability in doing a criminal act. The essence of that liability is to be found in the existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. Thus, if the act is the result of a common intention then every person who did the criminal act with that common intention would be responsible for the offence committed irrespective of the share which he had in its perpetration..."

54.1 Thus, according to the observation, the liability would arise by existence of common intention connecting the accused and when the criminal act is done by several persons in furtherance of common intention of all. In **Virendra Singh** (supra), it has been observed about the vicarious liability under Section 34 IPC, which is as under:

"38. The vicarious or constructive liability under Section 34 IPC can arise only when two conditions stand fulfilled i.e. the mental element or the intention to commit the criminal act conjointly with another or others; and the other is the actual participation in one form or the other in the commission of the crime."

55. Certain circumstances were referred to A-1, which had come in evidence during trial to be explained under Section 313 Cr.P.C. A-1 had taken all the onus on himself excluding A-2 to A-7 from the crime. The evidentiary value of such explanation has to be examined. In regard to Section 313 Cr.P.C., the Hon'ble Supreme Court in the case of ***Premchand v. State of Maharashtra, (2023) 5 SCC 522***, held as under:

"14. A Bench of three Hon'ble Judges of this Court in *State of U.P. v. Lakhmi* [State of U.P. v. Lakhmi, (1998) 4 SCC 336 : 1998 SCC (Cri) 929] has extensively dealt with the aspect of value or utility of a statement under Section 313 CrPC. The object of Section 313CrPC was explained by this Court in *Sanatan Naskar v. State of W.B.* [Sanatan Naskar v. State of W.B., (2010) 8 SCC 249 : (2010) 3 SCC (Cri) 814]

The rationale behind the requirement to comply with Section 313CrPC was adverted to by this Court in Reena Hazarika v. State of Assam [Reena Hazarika v. State of Assam, (2019) 13 SCC 289 : (2019) 4 SCC (Cri) 546] . Close on the heels thereof, in Parminder Kaur v. State of Punjab [Parminder Kaur v. State of Punjab, (2020) 8 SCC 811 : (2020) 3 SCC (Cri) 914] , this Court restated the importance of Section 313CrPC upon noticing the view taken in Reena Hazarika [Reena Hazarika v. State of Assam, (2019) 13 SCC 289 : (2019) 4 SCC (Cri) 546] and M. Abbas v. State of Kerala [M. Abbas v. State of Kerala, (2001) 10 SCC 103 : 2002 SCC (Cri) 1270] .

15. What follows from these authorities may briefly be summarised thus:

15.1. Section 313CrPC [clause (b) of sub-section (1)] is a valuable safeguard in the trial process for the accused to establish his innocence.

15.2. Section 313, which is intended to ensure a direct dialogue between the court and the accused, casts a mandatory duty on the court to question the accused generally on the case for the purpose of enabling him to personally explain any circumstances appearing in the evidence against him.

15.3. When questioned, the accused may not admit his involvement at all and choose to flatly deny or outrightly repudiate whatever is put to him by the court.

15.4. The accused may even admit or own incriminating circumstances adduced against him to adopt legally recognised defences.

15.5. An accused can make a statement without fear of being cross-examined by the prosecution or the latter having any right to cross-examine him.

15.6. The explanations that an accused may furnish cannot be considered in isolation but have to be considered in conjunction with the evidence adduced by the prosecution and, therefore, no conviction can be premised solely on the basis of the Section 313 statement(s).

15.7. Statements of the accused in course of examination under Section 313, since not on oath, do not constitute evidence under Section 3 of the Evidence Act, yet, the answers given are relevant for finding the truth and examining the veracity of the prosecution case.

15.8. Statement(s) of the accused cannot be dissected to rely on the inculpatory part and ignore the exculpatory part and has/have to be read in the whole, inter alia, to test the authenticity of the exculpatory nature of admission.

15.9. If the accused takes a defence and proffers any alternate version of events or interpretation, the court has to carefully analyse and consider his statements.

15.10. Any failure to consider the accused's explanation of incriminating circumstances, in a

given case, may vitiate the trial and/or endanger the conviction.

16. Bearing the above well-settled principles in mind, every criminal court proceeding under clause (b) of sub-section (1) of Section 313 has to shoulder the onerous responsibility of scanning the evidence after the prosecution closes its case, to trace the incriminating circumstances in the evidence against the accused and to prepare relevant questions to extend opportunity to the accused to explain any such circumstance in the evidence that could be used against him...."

56. The law laid down in the referred judgments under Section 34 IPC has to be appreciated with the material facts and evidence on record. Whether only A-1 was responsible or all had participated for their common intention needs evaluation keeping in context the further statement of A-1, excluding A-2 to A-7 from the offence. In the cross-examination of brother PW16, it has come that initially, he ran after the Jeep alone to certain extent, he saw police beating his brother in jeep. He stopped running after some distance, which covered a distance of 10 minutes. When the remaining persons came,

they all went to the police station. The evidence of father PW 17 is that he and his son PW16 and wife had gone to the Police Station. According to PW16, after his brother was taken to police station approximately about one to one and half hour, they reached the police station. Evidence of father PW17 brings details in affirmative that when a boy told the police that it was a boy like Kanudo, police took kanudo with them. The evidence of PW16 and PW17 is consistent of their following the police Jeep, and when they reached Police Station, they saw police continuously beating Kanudo. Police was beating Kanudo in the room of Faujdar Sahab. PW17 denied the suggestion that he had not seen Faujdar Sahab beating kanudo. He came to know from the police that the name of Faujdar Sahab was Bilval Sahab. He had seen Bilval Sahab at his home twice.

57. The evidence of both eye-witnesses, PW16 and PW17, brother and father of Kanudo are

consistent, they had seen the police taking Kanudo in jeep to police station. Police had come twice at their house. PW17 father could very clearly identify A-1 Shri Bilval and PW16 stated that Bilval Sahab and another police were beating. PW16 could identify all the accused in the Court, but could not name A-2 to A-7.

58. Learned advocate Mr. Shethna contended that the prosecution failed to examine the mother of Kanudo, Bablabhai Khuman and Advocate Balubhai Trivedi. The mother had seen the same thing, as what PW16, PW17 saw. Rather their evidence gives further account of the act of mother, who when could not pacify herself, had again gone to police station, when they all after returning back from police station, were sitting along with their community people, who were in the business of selling chewing-stick (Miswak used for brushing teeth for oral hygiene). Bablabhai Khuman was the representative of the community and Advocate Balubhai Trivedi, their legal

adviser. Meeting these people would be natural conduct of PW16 and PW17 to seek help. Non-examination of these witnesses would not be fatal to prosecution case.

59. PW16 and PW17, father and brother of deceased, could not name all the police, who had taken Kanudo with them. They could specifically name only A-1 Shri Bilval. The presence of other accused can be verified from the evidence of other police witnesses.

60. PW6 is the driver of the jeep, Ghanshyamsing Danubha Gohil. In his deposition, it was noted that on 27.10.1989, he was on duty as driver to the Jeep of Police Inspector, who was Sangwan Saheb. Police Sub-inspector were Bilval Saheb and Mishra Saheb. On that day at about 5:15 p.m. P.S.I. Bilval had called him at the Police Station with Jeep. He took the Jeep to the Police Station, where Bilval Saheb asked to take him to Maninagar. Along with them, there were other police persons.

60.1 Then they had gone to Maninagar at Vagrivas.

This witness stated that the other police were one Bhupatbhai (A4), Vajubhai (A2), Yusufbhai (A7), Jagjivanram (A6), Hargovindbhai (A5) and Saheb (A-1). The police persons, when they came back had one boy with them of Waghri Community. With all these police persons and the boy they had come back in the Jeep at the police station. He clarified that when they had gone from Town Police Station to Maninagar along with them, apart from the police, there were two other persons, one named Munno and another Vinubhai. Both were taken along to identify the person, who had committed theft.

60.2 This evidence of PW6, as driver of the Jeep would corroborate the version of PW16 and PW17, father and brother of deceased Kanudo as well as PW9 Vinubhai, the complainant of the alleged theft.

60.3 PW6 again corroborates the evidence, that after coming back to the Police Station, they had again gone back to Maninagar. At that time, along with PW6 were Bilvalsaheb (A1) Vajubha (A2), Mahavirsinh (A3), Bhupatbhai (A4), Jagjivanbhai (A6) and Waghri's son Kano. PW6 was waiting at the road, having parked the vehicle. After half an hour, they had come back and sitting in the vehicle, they had come at the Town Police Station. At about 9 o' Clock after taking the permission of Bilvalsaheb, he went away with the vehicle. PW6 stated that Bilvalsaheb was in the Police Station in his chamber.

61. The evidence of PW6 driver had brought the presence of all the other accused police persons. His evidence also clarifies of going to the house of deceased Kanudo twice. And further (A-1) Shri Belwal was at the Police Station even after 9 o' Clock. Accused No.1 could not deny his presence, as he was the police in-charge and

was having the custody of Kanudo. Exh.60, on 28.10.1989 at 0.15 hours, is the Accident Death Report No.16/89 under Section 174 of Cr.P.C., where by information of the death of Kanudo @ Bhoplo of Maninagar was given by Shri B.C. Bilval (A-1), Police sub-Inspector of Savarkundla Police Station. The death had occurred during the police custody while the accused was interrogated in connection to C.R.No.173/89 for Section 379 IPC.

62. The death under the custody of Shri Bilval (A-1) is proved on record by documentary evidence as well by the oral evidence.

63. The defense had been raised that the injuries had not occurred in the police custody, but while Kanudo jumped from the Jeep, while was brought to the Police Station. In the cross-examination PW6 driver of the jeep, affirmed the suggestion that when they came second time to the Police Station, accused Kanuda jumped from the running jeep. Therefore, on instruction of

police he halted the vehicle, and thereafter Bilvalsaheb and other police ran after him, and Kanudo was caught and brought near the Jeep. PW6 affirmed that at that time Kanudo tried to release himself from the hands of police. He does not remember that to control accused, Bilvalsaheb slapped him two-three times. It was about five minutes, when they caught and brought Kanudo. They had taken Vinubhai and Munno from outside the Town Police Station in the Jeep.

64. The statement of the witness PW6 was first recorded by Jamadar-Ganpatbhai Bhatt after two days of bringing Kanudo. Second statement was recorded by P.I. Sangvan (PW10) on the same day evening. Dy.S.P. Khant (PW2) had recorded his statement and A.S.P. Satish Verma (PW18) too had recorded his statement.

64.1 Before Vermasaheb, PW6 had stated that when they were on the way to Police Station with P.S.I. Bilvalsaheb, they saw Mahivirsinh Bahudarsinh (A3) near old bus-stop. He stopped the Jeep and

Bilvalsaheb asked A3 to sit in the Jeep and thereafter they went to Town Police Station. He affirmed that in his police statement before Shri Khant, he had not stated that when they for the first time left for Maninagar at that time, Bhupatbhai (A4), Jagivanram (A6) and Hargovindram (A5) were with them.

64.2 The witness PW6 in his deposition affirmed that in his presence none of the accused had beaten the child of Waghri and he does not know that when he had gone to take the permission of Bilvalsaheb for leave, at that time rest of the accused were present there or not. PW6 affirmed that he had not seen them. He stated that in the Police Station, there, in front is Osri and one could see people in the Osri.

64.3 After leaving the Police Station at 9 O' Clock again PW6 was called at night at 12 O' Clock by Shri Sangvan (PW10) and he took Shri Sangvan from Rural Police Station to Town Police Station, there he met Pehrewala Himatbhai Valji.

He affirmed that thereafter, he had gone to call persons from police line. He affirmed that Mahavirsinh (A3) and Bhupatsinh (A4), both were at their home in the police line, whom he had called. He also affirmed that in his statement before Dy. S.P. Khant, he had stated that there on inquiry a boy named Munno had identified a son of Waghri for the theft of Patel.

65. In background of these evidence on record, the legal question raised by learned advocate Mr. Shethna becomes relevant to be examined, where the challenge is to the sole conviction of deceased appellant, while acquittal of rest of the co-accused.

66. It becomes amply clear that deceased Kanudo was picked from home, by Bilval (A-1) and other police persons. From the evidence of PW16 and 17 and more specifically evidence of PW6 – the driver of Jeep almost from 5:30 in the evening Kanudo was in the custody of police. In the examination-in-chief PW6 does not state of

Kanudo jumping from the Jeep or running away from the clutches of police. Even if, that evidence of PW6 is read, which has come in cross-examination, it took about five minutes to again apprehend Kanudo. PW6 does not state that deceased had sustained injuries on his body by jumping from the Jeep.

66.1 From the time, he was picked from home, at 5:30 in the evening of 27.10.1989 till mid-night, Kanudo was in police custody. Exh.60 Accident Death Report No.16/89 was given by Bilval (A-1) at 28.10.1989 at 0.15 hours, where it notes very explicitly that death had been in police custody while accused was interrogated in connection to C.R. No.173/89 under Section 379 IPC.

67. There is no controversy of death in police custody. Accused themselves were in no position to deny the same. Custodial death was proved even by the police official documents.

68. Learned advocate Mr. Shethna's argument was that PW16 and PW17 could not have seen the accused beating Kanudo while in their custody, as it has become clear and evident from the testimony of police witnesses, that unless and until any person would come to the lobby of the Police Station, one will not be able to see inside the chamber of PSI.

68.1 Exh.34 is the sketch of the Police Station, where it could be seen that the main door is falling at the main road and there appears to be grill on the wall of chamber of Police Sub-Inspector. The chamber has attached lock-up. The chamber is falling on the road. Exh.34, in the chamber, shows the dead body of Kanudo lying down there. The evidence of PW16 and 17, brother and father was, having seen Kanudo being beaten by the police. PW16 could state that it was in a way that his hands were lying out of the grill in a parallel position. From the main road, the grill is easily visible. The evidence, thus, of

PW16 and PW17 gets corroborated by the document Exh.34.

69. In the considered opinion of this Court, even if no one comes forward and depose of the custodial torture by the police, in the present case, the fact itself becomes self-explanatory that Kanudo died in police custody. There is no escape from that conclusion and it is an admitted fact on record. The case is registered on the ground of custodial death. Moreover, there is no denial to that proposition of law that even in custodial death, it is for the prosecution to establish beyond reasonable doubt a proper link between the accused and commission of crime.

70. Accused Kanudo was interrogated in police custody. The evidence is now to be examined, to view as to who were involved in the beatings.

71. It would be relevant to refer to the observations in **State of M.P. v. Shyamsundar Trivedi & Ors.**, 1996 (1) GLH 9 : 1995 (4) SCC

262, where in Paragraphs 16 and 17, it has been noticed as under:-

"16.The High Court erroneously overlooked the ground reality that rarely in cases of police torture or custodial death, direct ocular evidence of the complicity of the police personnel would be available, when it observed that 'direct' evidence about the complicity of these respondents was not available. Generally speaking, it would be police officials alone who can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that the police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues, and the present case is an apt illustration, as to how one after the other police witnesses feigned ignorance about the whole matter.

17. From our independent analysis of the materials on the record, we are satisfied that Respondents 1 and 3 to 5 were definitely present at the police station and were directly or indirectly involved in the torture of Nathu Banjara and his subsequent death while in the police custody as also in making attempts to screen the offence to enable the guilty to escape punishment. The trial court and the High Court, if we may say so with respect, exhibited a total lack of sensitivity and a "could not care

less" attitude in appreciating the evidence on the record and thereby condoning the barbarous third degree methods which are still being used at some police stations, despite being illegal. The *exaggerated* adherence to and insistence upon the establishment of *proof beyond every reasonable doubt*, by the prosecution, ignoring the ground realities, the fact-situations and the peculiar circumstances of a given case, as in the present case, often results in miscarriage of justice and makes the justice delivery system a suspect. In the ultimate analysis the society suffers and a criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach of the courts because it reinforces the belief in the mind of the police that no harm would come to them, if an odd prisoner dies in the lock-up, *because there would hardly be any evidence available to the prosecution to directly implicate them with the torture*. The courts must not lose sight of the fact that death in police custody is perhaps one of the worst kind of crimes in a civilised society, governed by the rule of law and poses a serious threat to an orderly civilised society. Torture in custody flouts the basic rights of the citizens recognised by the Indian Constitution and is an affront to human dignity. Police excesses and the maltreatment of detainees/undertrial prisoners or

suspects tarnishes the image of any civilised nation and encourages the men in 'Khaki' to consider themselves to be above the law and sometimes even to become law unto themselves. Unless stern measures are taken to check the malady, the foundations of the criminal justice delivery system would be shaken and the civilization itself would risk the consequence of heading towards perishing. The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may lose faith in the judiciary itself, which will be a sad day."

72. PW7 — Mansing Kaljibhai Charel, Head Constable was on his duty on 27.10.1989 at Savarkundla Town Police Station. His duty was from 8.00 hrs to 13.00 hrs. On that day from night 8.00 to next day 8.00, PW7 was in-charge of PSO . On 27.10.1989, he came on duty at night at 8.00. At that time, roll call was in progress by Shri Bilval Saheb. He was given the charge of PSO at 8.15 p.m. PW7 stated that in the police station lobby, there was one boy sitting who had worn dress alike white colour. After the roll call, people dispersed and went away. The original

roll call with the signature of A-1 – Bilval was examined during trial in the Court and the photocopy was put in evidence at Exh.40 which was entry no.15.

73. Perusal of Exh.40 under the signature A-1 of entry no.15, the copy has also come on record at Exh.64 shows the roll call of Bakkal nos.1231, 1425, 1530, 1151, 1161, 877, 814, 1657, 1060, 1542, 791, 1279, 1193, 1203, 13, 701, 259, 713, 269, 143, 225, 230, 1689, 625. These are the police officers who were present during the roll call at 20-00 hrs. Exh.65 is the statement of those police persons not present during the roll call at 8.00 p.m., but were on duty. Exh.128 has been produced by PW18, the investigating officer showing the police officers with Bakkal numbers sent on night duty with entry no.23, they are Bakkal nos.1530, 1161, 13, 1060, 1425, 225, 1203, 235, 701, 143, 269 and 1180.

73.1 The accused are Bakkal nos.13, 1193, 259, 225, 143 and 1533. Except Bakkal no.1533 A-7,

presence of others were there in the roll call.

74. PW7 stated that at the Police Station a duty register is maintained. At 20.20 hrs., PSI Shri Bilval asked PW7 to give him station diary for institution of offence of theft. Entry no.20 the witness produced at Exh.41. After the offence was registered by Shri Bilval, PW7 came to know that the boy sitting in the lobby was the accused named Kanudo @ Bhoplo. When PW7 took the charge at 8.15 p.m. along with him, Paheredar was Himmatbhai Bachubhai.

74.1 PW7 stated that Bilval Saheb took on his own the investigation of the offence which he registered thereafter. The accused was brought for investigation by Police Constable – Bhupatsinh (A4) and police constable Mahavirsinh (A3) who took him to the chamber of Bilval Saheb. PW7 stated except A1, A3 and A4, there were no other present there. Thereafter, reserve police Kishorbhai Bhikhabhai was called. Pehrewala was sitting near him on a bench and reserve police

was sleeping on the cot near Registrar's office. According to PW7, Registrar's office is opposite to PSO table.

74.2 PW7 further stated that persons for night duty had come at 11 O'Clock. He had made the entry accordingly, entry no.23 was put in evidence at Exh.42.

74.3 According to PW7 at 11.30 p.m., the voice of Bilval Saheb was calling PSO and Pehrewala. So this witness and Himmatbhai had gone to the chamber. There they saw that the boy who was brought had fallen on the floor. It is the evidence of PW7 that Bilval Saheb had informed him that while he was interrogating the boy, he had fallen down. PW7 stated that the Doctor had come, however, he does not remember the time. The Doctor had declared him dead.

75. The evidence of PW7 PSO and PW6 – Driver now would require a comparison to verify the presence of other co-accused at the place of

offence.

75.1 PW6 named the accused who had accompanied A-1 – Bilval. PW7 could give documentary evidence of who all were on duty that day. PW7 said as evidence that when he was called by Bilval Saheb at that time, apart from him was watchman Himmatsinh and reserve man Kishor who was sleeping on the cot near Sub-Registrar's office. The fact has come on record by way of evidence of PW16 and PW17, the father and brother of deceased, that over and above A-1, other police persons were also beating deceased Kanudo. PW16 and PW17 could name A-1 – Bilval as the person beating. A-1 is the person who had taken the investigation in his hand and he had the legal custody of deceased Kanudo. PW7 evidence gives the evidence with Bakkal number and PW6 could name them.

75.2 Exh.34 the sketch of the Police Station was admitted by PW7 stating that if one has to reach to PSI chamber, one has to pass through osri.

The witness affirms that unless people come in the lobby, nothing can be seen of PSI chamber. PW7 had not gone along with Dr. Pardhi in the chamber to see the dead body.

75.3 According to PW7, when Mr. Khant (PW2) had come, at that in the Police Station, there was Mr. Sangvan and Bilval and Mamlatdar. PW7 affirmed that when Mr. Sangvan had come, thereafter jeep driver and watchman Himmatsinh were sent to call other police person, the said evidence gets corroboration from PW6 jeep driver.

76. PW1 — Gordhanbhai Narenbhai Katariya was examined about the postmortem of deceased on 28.10.1989. The body of deceased Kanudo @ Bhoplo from K.K. Hospital, Savarkundla had come to Mahuva Hospital, but Mahuva unit Doctor declined to do the postmortem in such type of cases and asked them to go to Jamnagar.

76.1 On order of Deputy Superintendent of Police — Shri Khant (PW2) along with four police persons

dead body was taken to Jamnagar in Government vehicle. They started at 2.30 from Mahuva and reached at 23.30 hrs. at Jamnagar. The body was kept in the postmortem room with necessary arrangement. Next day the postmortem was conducted. The Doctor gave him a report in a closed cover with the dead body and with the report witness PW1 came to Savarkundla and handed over the dead body and the sealed cover to Executive Magistrate Shri Mehta. In cross-examination, he stated that he did not see any injuries on the face of the deceased with his bare eyes.

77. PW2 is the complainant Deputy Superintendent of Police — Dolatsingh Sahebji Khant. He received the phone call regarding death of one Kanudo in police custody on 28.10.1989 at 1.00 Monday. Immediately, he phoned Sub Divisional Magistrate, Mahuva and both of them went to Savarkundla Police Station. Sub Divisional Magistrate gave the inquiry to Executive

Magistrate, Savarkundla and PW2 took the investigation of the accidental death registered by Police Inspector. He recorded the statement of witnesses.

77.1 PW2 deposed that as there was unwillingness of the relatives of the deceased, so postmortem could not be done on 28th at Savarkundla Hospital, so sent to Mahuva, but as there was no facility of forensic expert, so for postmortem, the body was sent to Jamnagar Kirvin Hospital.

77.2 The opinion of cause of death was sent to Executive Magistrate, Savarkundla from the hospital at Jamnagar. The cause of death was shock and hemorrhage due to multiple injuries to the body.

77.3 On receiving the opinion, he filed complaint on behalf of State. PW2 stated that accused were named as per the preliminary investigation he had done of the offence. He had sent the complaint to Savarkundla inspector by a

communication for its registration. The complaint was put at Exh.26 and Exh.27. Complaint Exh.27 is signed office copy. He produced in evidence Exh.28 report to the superior officer. Exh.29, the wireless message to Deputy Superintendent of Police, Bhavnagar.

77.4 In the cross-examination, PW2 complainant affirms that in his preliminary investigation, it did not get disclose of any of the accused having beaten Kanudo. Prior to giving complaint, he had not seen the inquest Panchnama and the dead body. After the information of custodial death, he reached Police Station, Savarkundla at three at night and at that time had seen the dead body in the chamber of Police Sub-Inspector.

78. The complainant was only on the basis of preliminary investigation. PW2 could not say how and under what circumstances the names of co-accused got disclosed, for him to name them in the complaint.

78.1 The complainant Exh.26 shows the time of offence on 27.10.1989 between 18.00 hrs to 23.15 hrs. place of offence as Savarkundla Town Police Station. The offence got decalred on 29.10.1989 23 hrs. The offence was registered at Savarkundla Town Police Station as CR no. 175/89 under Sections 302, 330, 114 IPC.

79. PW3 — Amirkhan Abdulkhan, Panch has not supported the panchnama Exh.31 of place of offence. PW4 — Ashokbhai Natubhai sheth is the Panch at Exh.36 regarding the arrest of all the seven accused on 10.11.1989 at Savarkundla Police Station, panch denied the arrest . He has given evidence of bringing Dr. Pardhi from K.K. Hospital on the instruction of Police Inspector — Sangvan. PW4 has denied of all accused producing Muddamal sticks. PW5 is also the panch of Exh.36 panchnama. He too had denied of any arrest and production of weapons.

80. PW18 on 30.10.1989 was serving as an Assistant Superintendent of Police. As Palitana Assistant Superintendent of Police, he was not having the jurisdiction of Savarkundla Police Station. In spite of that, he stated that considering the gravity of the case, DIG, Junagadh Range entrusted the investigation to him. PW18 stated that DIG, Junagadh Range received a wireless message and on that basis, he had taken up the investigation. PW18 stated that the complainant and the investigating officer was Shri B.S. Khant — PW2, Dy.S.P., Mahuva, from whom, he took over the investigation with the documents, and appraised himself of the case. He stated that the accident death entry no.16/89 under Section 174 Cr.P.C. with regard to the death of Kanudo @ Bhoplo Vallabh Waghri on 27.10.1989 was done by Shri B.S. Khant, DY.s.p. At that time, statement of jeep driver of Savarkundla Police Station Shri Ghanshyamsinh Gohil was recorded, and from that statement, it was found that, approximately six police persons were on duty at

Savarkundla Police Station and according to Police Sub Inspector – Shri Bilval (A-1), they had gone to bring accused from Maninagar area of Savarkundla.

80.1 According to PW18, the investigation for accidental death entry was as per rules and the statements of the concerned witnesses were recorded and inquest Panchnama was drawn and report for the postmortem of the deceased were dispatched. On 29.10.1989, postmortem report of medical college, Jamnagar for deceased Kanudo @ Bhoplo was received and it was found that the death was in Savarkundla police Station.

80.2 As per PW18, deceased Kanudo @ Bhoplo in connection to Savarkundla Police Station CR no.I-179/89 was not produced before the Court of Savarkundla for the punishable offence of Sections 379 and 114 IPC, nor he was as accused in police custody or judicial custody, but was brought to Savarkundla Police Station as

suspicious accused.

80.3 The evidence of PW18 does not state of custody of deceased Kanudo @ Bhoplo in the hands of A-1 as legal. According to PW18, Kanudo was not actually made the accused in CR no.I-173/89. PW18 stated that the death of Kanudo @ Bhoplo was in Savarkundla Police Station.

80.4 PW18 also referred to law and order situation in Savarkundla Town, because of distress and agitation in Waghri community. The group had gathered near Savarkundla Town Police Station. The dead body of the deceased was taken to Savarkundla Government Hospital and Mahuva Government Hospital, but was not accepted since the Doctors were of the opinion that the death had occurred in the custody of Savarkundla Town Police Station and the Waghri brothers staying in surrounding area, apprehended undue pressure from the police officers of Savarkundla on the Doctors, and therefore, for opinion of Forensic

Science Experts, the body was sent for postmortem to Jamnagar Medical College. From 27.10.1989 to 29.10.1989, necessary process was done for the postmortem from Jamnagar and on 29.10.1989, postmortem report was received, and on that basis, Shri Khant, DSP, Mahuva filed a complaint on behalf of the Government at Savarkundla Town Police Station as CR no.I-175/89 under Sections 302, 330 and 114 of IPC.

80.5 PW18 has further referred to the complaint of PW2 — Shri Khant at Exh.125 and had also made a reference of the wireless message on 28.10.1989 and referring to the office copy, he stated that it was in connection with CR no.I-173 (sic)/89 under Section 375, 114 IPC of Savarkundla Police Station the accused was arrested and Waghri Kanudo @ Bhoplo was called by PSI, Savarkundla Town Police Station Shri Bilval for the Muddamal involved in the offence and during the interrogation, he suddenly got unconscious and therefore, Dr. Pardhi was called from K.K.

Hospital, Savarkundla for physical examination and the Police Inspector on duty Shri Sangvan was informed as noted in the wireless message, which he put in evidence at Exh.176.

80.6 The schedule of roll call on 27.10.1989 at 20-00 hrs. to record the presence of the police officers on duty, the signature of Shri Sangvan-PW10 with the verification of this witness PW18, produced in evidence at Exh.128. The certified copy of the station diary dated 27.10.1989 of 23-00 hrs. of Savarkundla Town Police Station in context with entry no.23, which was for the police officer sent for night round, signed by Shri Sangvan-PW10 and verified by this witness was produced in evidence at Exh.128. At Exh.129, he produced the cause of death, received from Shri M.P. Shah Medical College, Jamnagar Dr. Shri H.M. Mangal of Department of Forensic Medicine. At Exh.130, produced the FSL opinion dated 11.11.1989 for the Muddamal Articles A to F in connection with the present offence of CR

no.175/89 registered at Savarkundla Town Police Station for Sections 302, 330 and 114 IPC. The original yadi of the Muddamal was put in evidence at Exh.135.

80.7 The witness PW18 stated that the accused were arrested on the basis of the prima facie, oral as well as documentary evidence and the Muddamal Articles 11 to 17, sticks were seized from the accused, which were produced by them voluntarily and the arrest was made of the accused on 10.11.1989 vide Exh.36 Panchnama between 19-00 to 20-00 hrs. The witness stated that since he was to go on leave and therefore, the investigation was handed over to Shri G.S. Jodhpura – PW15. In the cross-examination of PW18, the witness PW18 affirmed that in the case of death of Kanudo in CR no.I-173/89, the investigation was carried on by Police Sub-Inspector Shri Bilval Savarkundla and accused nos.2 to 7 had joined him. However, he stated that he had not received any document to that

effect. He also affirmed that Armed Police Constable has not to assist their superior officer or equal police officers. He voluntarily clarified that so far as Armed Police Constables are concerned, they are to only oversee and keep the arrested accused in control. He affirmed that accused no.2 – Vajubha, accused no.4 – Bhupatbhai, accused no.5 – Govind and accused no.6 – Jagjivan were Armed Police Constable of Savarkundla Police Station.

81. By way of evidence at Exhs.127 and 128, PW18 has tried to project that accused nos.2, 4, 5 and 6 could only be involved in the Japta of the accused. Accused nos.2, 3 and 7 are shown as Unarmed Police Constables in the cause title. Exh.128 read with Exh.17 shows that accused no.2 – Head Constable Vajubha Akhubha, Bakkal no.13 was shown to have been sent in night round. PW18 denied the suggestion that almost about 5 pages were kept blank in the station diary for the date 27.10.1989 to 31.10.1989 of Savarkundla

Town Police Station, and he had come to know about such facts during his investigation. He denied the suggestion that such papers were kept blank to decide the shape to be given to the incident of death of Kanudo @ Bhoplo. The witness stated that Exh.63 dated 27.10.1989 showed the duties of total 63 + 3 police officers, in all 66 police officers present and has affirmed that in the duty list, no serial numbers have been noted preceding the names of Vajubha, Jagjivan Raghu and Govind Arjan. He denied the suggestion that those names were written later on and also denied the suggestion that the names of all the accused were added later on to falsely implicate them.

82. PW13 and 14 are the Head Constable and Police Constable respectively who both on 27.10.1989 were at Savarkundla Town Police Station and were present during the roll call at 8-00 p.m. PW13 – Pujabhai Virjibhai had seen a boy, aged about 15 years in the lobby near the grill. He had seen

him at a distance of 15 ft. when he was standing in the line for roll call of police staff. He was allotted night duty of 11 O'Clock, and therefore, had come at 11-00 at the Police Station, at that time, PSO was Mansingbhai-PW7 and in Pahera was constable Himmatbhai. The witness stated that when he was in the lobby of the Police Station near the PSO seat, at that time, Police Sub-Inspector – Shri Bilval gave a call to come in his room. Hearing the voice, this witness-PW13, PSO-Mansing, PW7 and Constable Himmatbhai, all the three had gone in the office of Shri Bilval, where Shri Bilval informed them, that he was interrogating the boy, who had fallen down. This witness stated that the boy was near the office table. He also stated that at that time, Kishorbhai Bhikhabhai, Constable was sleeping on the otta of the Sub-Registrar office adjacent to the Police Station building.

82.1 PW13 in his evidence stated that after the roll call, when he was going towards his house, he

came out of the Town Police Station, at that time, he met near the Police Station at the Main Bazar, constable Yusufkhan (A7). He had general talk with A7. This witness has brought the presence of Yusufkhan, who according to PW6, the driver of the jeep, was along with them while going to Maninagar.

82.2 While PW14 – Kishor Bhikhalal was also present at the roll call at 8 O’Clock evening and the attendance master Shankarbhai had informed him to serve as leave reserve constable from 8-00 night to 8-00 morning at Town Police Station and therefore, he appeared accordingly for his duty. During that period, he saw a 15 year boy sitting near the table of PSO. PW14 inquired about the boy from PSO – Mansing (PW7) who told him that the boy was in the chamber of Bilval Saheb and Bilval Saheb was interrogating him. At that time, PW14 stated that Mahavirsing (A3) and Bhupatbhai (A4) were as Constable near Bilval Saheb. Witness had not gone into the chamber of

Bilval Saheb during his leave reserve duty. PW14 affirmed that at 09-30, he went to sleep and till that time, he had not seen Constable Mahavirsing or Constable Bhupatbhai or Bilval Saheb. He stated that he would not know if they were in the chamber of Bilval Saheb.

83. PW8 – Raising Devabhai Vaghela on 27.10.1989 was a PSO at Savarkundla Town Police Station between 1-00 in the afternoon to 8-00 at night. He stated that on that day at about 05-30 to 05-45, Police Constable – Mahavirsing (A3) had come to the Police Station and informed him that Shri Bilval is standing out with his jeep and A3 asked for reserved police, so PW8 sent Head Constable – Vajubha (A2) to Shri Bilval. He stated that on that day, Yusufkhan was also on duty and PW8 informed Yusufkhan that two persons have gone out and instructed Yusufkhan (A7) to call them and send to Shri Bilval. The witness stated that at about 6-30 to 6-45, Shri Bilval Saheb and other police persons brought a boy at

the Police Station and along with them, were 2-3 public persons. The boy was made to sit in the lobby of the Police Station and 2-3 public persons along with Shri Bilval Saheb entered his chamber and after sometime, the boy was taken again out of the Police Station. At that time, PW8 stated that it was the boy, Bilval Saheb and 2-3 persons of the public and police staff persons who had gone out. He does not remember who were there as police staff persons. Those who had gone out, all had come back between 7-30 to 7-45 at the Police Station and as it was a roll call time, Shri Bilval Saheb (A-1) took the roll call and thereafter, at 8-15, Mansingbhai, PSO – PW7 took the charge, and PW8 went home. PW8 in the cross-examination stated that reserve police would have to remain with the PSO and if they have to go out, then necessary permission is to be taken. The duties entrusted were noted at the station diary and on 27th, Head Constable – Vajubha (A2), Constable Govindbhai (A5) and police Jagjivan (A6) were in reserve.

84. The evidence of PW6 – Ghanshyamsing D. Gohil, PW7 – Mansing Kalibhai, PW8 – Raising Devabhai Vaghela, PW13 – Pujabhai Virjibhai, PW14 – Kishorlal Bhikhalal, all police witnesses refers to the presence of co-accused. PW6 – jeep driver had given the testimony of A4 – Bhupatbhai, A2 – Vajubha, A7 – Yusufbhai, A6 – Jagjivanram, A5 – Hargovindbhai present along with A-1. He has also further categorically stated that in his statement before the investigating officer – Verma, he had informed that while he was going to the Police Station with Police Sub-Inspector– Shri Bilval (A-1), on the road, near the old bus station, they saw Mahavirsing Bahadursing (A3), and Bilval Saheb (A-1) asked him to sit in the jeep and they all came to Town Police Station. The witness also stated that at night 12 O’Clock he was called by Sangvan Saheb – PW10 and thereafter, he had gone to call Mahavirsingh (A3) and Bhupatsinh (A4) from their house at police line. PW7 stated that Bilval Saheb took

the investigation of the matter on his own and he had taken Police Constable – Bhupatsing (A4) and Police Constable – Mahavirsing (A3) in his chamber. PW8 refers to Vajubha (A2), Jagjivan Raghuram (A6) and Govind Arjan (A5), PW13 refers to Constable Yusufkhan (A7) near the Police Station at the main bazar. He had a general talk with Yusufkhan. PW14 refers to Mahavirsing (A3) and Bhupatbhai (A4) present in the chamber of Shri Bilval (A-1). The identification of the co-accused nos.2 to 7, thus, becomes proved by the evidence of the referred witnesses – PW6, PW7, PW13 and PW14. PW16 and PW17 had seen the police person beating Kanudo in the jeep as well as at the Police Station.

85. The defence has been raised of Kanudo jumping from the jeep and sustaining injuries. The learned Sessions Judge has not believed the defence and observed that he was trying to run away, but the police persons who were in the jeep had held him. Even if the explanation given

by the accused no.1 in his further statement under Section 313 Cr.P.C. is taken into consideration that Kanudo @ Bhoplo had attempted to jump from the jeep and therefore, he fell down on the road and flipped, but when he examined him, he did not find any signs of injury and therefore, they had gone to Savarkundla Police Station. In view of this explanation, the defence raised of injuries sustained by the deceased at the time when he was in the jeep would become invaluable. The postmortem report forensically examined refers to the injuries, which the deceased received in the Police Station in the custody of A-1.

86. In the case of ***Haricharan v. State of M.P.*** reported in (2011) 4 SCC 159 it was held as under:

"38. Mr Nagendra Rai had submitted that there is no direct evidence of the involvement of Anil Kumar Singh Kushwaha in the legal custody and alleged torture of Mathura. He also submitted that no specific role had been attributed to him. In our

opinion, both the submissions are without any merit. This submission of Mr Nagendra Rai is completely answered by the observations made by this Court in *State of M.P. v. Shyamsunder Trivedi* [(1995) 4 SCC 262 : 1995 SCC (Cri) 715] .

39. We may notice here the observations made in SCC paras 16 and 17 of the aforesaid judgment in *Shyamsunder Trivedi* [(1995) 4 SCC 262 : 1995 SCC (Cri) 715] : (SCC pp. 272-73)

"16. ... The High Court erroneously overlooked the ground reality that rarely in cases of police torture or custodial death, direct ocular evidence of the complicity of the police personnel would be available, when it observed that 'direct' evidence about the complicity of these respondents was not available. Generally speaking, it would be the police officials alone who can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that the police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues, and the present case is an apt illustration, as to how one after the other police witnesses feigned ignorance about the whole matter.

17. From our independent analysis of the materials on the record, we are satisfied that Respondents 1 and 3 to 5 were definitely present at the police station and were directly or indirectly involved in the torture

of Nathu Banjara and his subsequent death while in the police custody as also in making attempts to screen the offence to enable the guilty to escape punishment. The trial court and the High Court, if we may say so with respect, exhibited a total lack of sensitivity and a 'could not care less' attitude in appreciating the evidence on the record and thereby condoning the barbarous third degree methods which are still being used at some police stations, despite being illegal. The *exaggerated* adherence to and insistence upon the establishment of *proof beyond every reasonable doubt*, by the prosecution, ignoring the ground realities, the fact-situations and the peculiar circumstances of a given case, as in the present case, often results in miscarriage of justice and makes the justice delivery system a suspect. In the ultimate analysis the society suffers and a criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach of the courts because it reinforces the belief in the mind of the police that no harm would come to them, if an odd prisoner dies in the lock-up, *because there would hardly be any evidence available to the prosecution to directly implicate them with the torture*. The courts must not lose sight of the fact that death in police custody is perhaps one of the worst kind of crimes in a civilised society, governed by the rule of law and poses a serious

threat to an orderly civilised society. Torture in custody flouts the basic rights of the citizens recognised by the Indian Constitution and is an affront to human dignity. Police excesses and the maltreatment of detainees/undertrial prisoners or suspects tarnishes the image of any civilised nation and encourages the men in 'khaki' to consider themselves to be above the law and sometimes even to become law unto themselves. Unless stern measures are taken to check the malady, the foundations of the criminal justice delivery system would be shaken and the civilisation itself would risk the consequence of heading towards perishing. The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may lose faith in the judiciary itself, which will be a sad day."

(emphasis in original)

87. In the case of ***State of Rajasthan v. Thakur Singh***, reported in (2014) 12 SCC 211, it was held as under:

"16. Way back in *Shambhu Nath Mehra v. State of Ajmer* [*Shambhu Nath Mehra v. State of Ajmer*, AIR 1956 SC 404 : 1956 Cri LJ 794 : 1956 SCR 199] this Court dealt with the interpretation of Section 106 of the Evidence Act and held that the section is not intended to shift the

burden of proof (in respect of a crime) on the accused but to take care of a situation where a fact is known only to the accused and it is well-nigh impossible or extremely difficult for the prosecution to prove that fact. It was said: (AIR p. 406, para 11)

"11. This [Section 101] lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are 'especially' within the knowledge of the accused and which he could prove without difficulty or inconvenience.

The word 'especially' stresses that. It means facts that are *pre-eminently* or *exceptionally* within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not."

(emphasis supplied)

18. Reliance was placed by this Court on *Ganeshlal v. State of Maharashtra* [(1992) 3 SCC 106 : 1993 SCC (Cri) 435] in which case the appellant was prosecuted for the

murder of his wife inside his house. Since the death had occurred in his custody, it was held that the appellant was under an obligation to give an explanation for the cause of death in his statement under Section 313 of the Code of Criminal Procedure. A denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant was a prime accused in the commission of murder of his wife.

22. The law, therefore, is quite well settled that the burden of proving the guilt of an accused is on the prosecution, but there may be certain facts pertaining to a crime that can be known only to the accused, or are virtually impossible for the prosecution to prove. These facts need to be explained by the accused and if he does not do so, then it is a strong circumstance pointing to his guilt based on those facts."

88. PW15 – Gulamrasum Hasambhai Jodhpura was handed over the investigation by PW18 – Satish Verma. He was in charge of A.D.P.O. on 5.12.1989 at Botad Division. He received an order from DSP, Bhavnagar to carry on the investigation as ASP, Palitana was proceeding on leave. The letter

handing over the investigation to him was produced at Exh.79. During his investigation, he received FSL report from Junagadh and biological report and connecting photographs which were sent to ASP, Palitana with the forwarding letter, he accepted the same. The biological report and serological report with the concerned forwarding letter he placed in evidence at Exhs.81 to 103. He had recorded the additional statements of the witnesses and after the investigation, he filed a charge-sheet on 23.1.1990 at Savarkundla JMFC Court. He identified A2 to A7 in the Court, while A-1 – Shri Bilval was not present on that day during the trial. Exh.82 is the FSL report with regard to stomach and its contents, one foot of small intestine, piece of liver and half of each kidney, sample of blood, blood of deceased dried on cloth piece. The result of chemical analysis did not detect poison, while the blood of deceased dried on cloth piece was forwarded for necessary analysis to biology and physics

division. The biological department's opinion on examining the bushirt, buttons of the shirt, pant, 10 paise coin, a metal ring, wrist watch of the deceased, and for the same sample, F1 to F5, it was opined by the biological department that external force was used, however, has noted that it was not possible to express what type of force was executed. The report of the biological department for the blood of the deceased dried on cloth piece and F1, F2, bushirt and pant found the presence of blood group 'A'.

89. The charge against accused nos.1 to 7 was of bringing Kanudo for inquiry to extort confession and to compel him to return stolen money or to get information by force or to extort the confession which could lead to disclosure of the offence. Thus, with that common intention in furtherance thereof, the accused had beaten deceased Kanudo with sticks and kick and fist blows, so for voluntarily causing hurt were charged with Section 330 with Section 34 IPC.

Further, the multiple injuries caused by accused nos.1 to 7 was the cause of shock and hemorrhage leading to death and thus, were charged with Section 302 read with Section 34 IPC.

90. In custodial deaths, Magistrate is empowered to hold inquiry under Section 196 of Bharatiya Nagarik Suraksha Sanhita, 2023. At present, Magistrate includes both Judicial Magistrate and Executive Magistrate. In **People's Union for Civil Liberties v. State of Maharashtra, (2014) 10 SCC 635**, the Supreme Court held that the inquiry in the cases of death by police torture must be invariably conducted by Judicial Magistrate who is empowered to take cognizance of the offence under Section 176 Cr.P.C. (now Section 196 of the Bharatiya Nagarik Suraksha Sanhita, 2023). It was opined that the inquiry of custodial deaths may be conducted by Judicial Magistrate rather than Executive Magistrate for a fair trial.

91. This Court at present does not find it necessary to express any opinion on the inquiry of the Executive Magistrate in the present case. But can certainly say that judicial mind of a Judicial Magistrate would have the ability to judge and decide by analyzing information applying legal principles and reach to a reasoned and impartial judgment. It involves a process of careful consideration weighing of evidence finding the admissibility, and by application of relevant legal standard can arrive at just and fair conclusion.

92. Here the raised issue is the application of Section 34 IPC to put the accused on trial. The police while filing the complaint and charge-sheet, found the case of abetment. So the charge-sheet filed was with Section 114 IPC, while the learned Judge while drawing the charge against the accused found it fit to invoke Section 34 IPC. The accused took no offence, denied the charge and prayed for trial.

93. All the accused faced the trial aware of the charges, so now would have no scope to claim prejudice. The difference between the charge under Section 34 and 114 has been noted in the case of State of Gujarat v. Khatubhai Limbabbhai Pagi & Ors. (supra) referred by learned advocate Mr. Shethna. The learned Trial Court was framing charges under Sections 330 and 302 IPC. The charge under Section 114 IPC would not be feasible, having noted the presence of all the accused police at the place of offence. Further, the superior relation of A-1 with A-2 to A-7 was also required to be noted and when all were police, the question of abetment would have to be examined with the meaning of Section 107 IPC and the definition of abettor under Section 108 IPC. Section 34 IPC as noted in the judgment of **Krishnamurthy @ Gunodu and Ors. v. State of Karnataka, (2022) 7 SCC 521** deals with the role of co-perpetrator. It has been observed that a co-perpetrator who shares a common intention,

will be liable only to the extent that he intends or could or should have visualized the possibility or probability of the final act. If the final outcome of offence committed is distinctly remote or unconnected with the common intention, he would not be liable. Merely accompanying the principal accused may not establish common intention. In the instant case at hand, A2 to A7 had accompanied A-1 under his instructions of police officer who took upon himself the investigation of CR no.173/89, the offence of theft of Rs.20,000/-. A2 to A7 were the police on duty at that time, they on the oral order of A-1 as armed and unarmed police had gone with A-1 to bring him to the police station for interrogation. Whether the custody of deceased Kanudo with A-1 was legal or not would not have been matter of concern for A-2 to A-7, however, they had the knowledge that they had no authority to beat Kanudo who was in custody of A-1. Evidence of PW18 was in light of the fact that unarmed police would have to

ensure the safe custody of accused, who is in Japta. The common intention initially of all the police accused was to bring the accused Kanudo to the police custody for interrogation. The police had gone to Waghri Vas, thus, to avoid any untoward incident, the police force would have been taken, which could be a normal conduct of A-1. A-2 to A-7 were responsible to bring deceased Kanudo safely to the police station. The circumstances and conduct of each police accused as per the evidence of witnesses were pointing to their harbouring the intention of aiding extortion of confession, considering directly/indirectly compelling Kanudo to return the money with custodial torture, which ended into custodial death. For the application of Section 34, it is not necessary that the plan should be pre-arranged, common intention can be formed just a minute before the actual act happens. The essence and proof that there was simultaneous consensus of mind of co-participants in the criminal action is mandatory

and necessary.

94. Section 35 of IPC explains about the criminal act done with criminal knowledge or intention.

Section 35 IPC is reproduced hereunder:-

"35. When such an act is criminal by reason of its being done with a criminal knowledge or intention.- Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention."

95. In **Krishnamurty @ Gunodu and Ors.** (supra), the case of **Afrahim Sheikh & Ors. v. State of West Bengal, AIR 1964 SC 1263** has been referred with relevant observation of Barendra Kumar Ghosh judgment. The case referred is relevant to be mentioned to bring out the corollary for the provision of Section 34 and 304 Part-II IPC, which is relevant to be referred at this stage.

"14. Appropriate at this stage would be reference to an earlier decision of this Court in *Afrahim Sheikh v. State of W.B.* [*Afrahim Sheikh v. State of W.B.*, AIR 1964 SC 1263] , which referred to with approval the following quote on the expression "act" explained by the Judicial Commissioner in *Barendra Kumar Ghosh v. King Emperor* [*Barendra Kumar Ghosh v. King Emperor*, 1924 SCC OnLine PC 49 : ILR (1925) 52 Cal 197] : (*Barendra Kumar Ghosh case* [*Barendra Kumar Ghosh v. King Emperor*, 1924 SCC OnLine PC 49 : ILR (1925) 52 Cal 197] , SCC OnLine PC)

"... criminal act means that unity of criminal behaviour, which results in something, for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence."

This "criminal act" under Section 34IPC, it was held, applies where a criminal act is done by several persons in furtherance of common intention of all. The criminal offence is the final result or outcome but it may be through achievement of individual or several criminal acts. Each individual act may not constitute or result in the final offence. When a person is assaulted by a number of accused, the "ultimate criminal act" normally will constitute the offence which finally results or which may result in death, simple hurt, grievous hurt, etc. This is the final result, outcome or consequence of the criminal act, that is, action or act of several persons. Each person will be responsible for his own act as

stipulated in Section 38IPC. However, Sections 34 and 35 expand the scope and stipulate that if the criminal act is a result of common intention, every person, who has committed a part of the criminal act with the common intention, will be responsible for the offence.

15. It was accordingly held in *Afrahim Sheikh* [*Afrahim Sheikh v. State of W.B.*, AIR 1964 SC 1263] as under : (AIR pp. 1267-268, paras 9-10)

"9. Provided there is common intention, the whole of the result perpetrated by several offenders, is attributable to each offender, notwithstanding that individually they may have done separate acts, diverse or similar. Applying this test to the present case, if all the appellants shared the common intention of severely beating Abdul Sheikh and some held him down and others beat him with their weapons, provided the common intention is accepted, they would all of them be responsible for the whole of the criminal act, that is to say, the criminal offence of culpable homicide not amounting to murder which was committed, irrespective of the part played by them. The common intention which is required by the section is not the intention which Section 299 mentions in its first part. That intention is individual to the offender unless it is shared with others by a prior concert in which case Sections 34 or 35 again come into play. Here, the common intention was to beat Abdul Sheikh,

and that common intention was, as we have held above, shared by all of them. That they did diverse acts would ordinarily make their responsibility individual for their own acts, but because of the common intention, they would be responsible for the total effect that they produced if any of the three conditions in Section 299IPC applied to their case. If it were a case of the first two conditions, the matter is simple. They speak of intention and Section 34 also speaks of intention.

10. The question is whether the second part of Section 304 can be made applicable. The second part no doubt speaks of knowledge and does not refer to intention which has been segregated in the first part. But knowledge is the knowledge of the likelihood of death. Can it be said that when three or four persons start beating a man with heavy lathis, each hitting his blow with the common intention of severely beating him and each possessing the knowledge that death was the likely result of the beating, the requirements of Section 304, Part II are not satisfied in the case of each of them? If it could be said that knowledge of this type was possible in the case of each one of the appellants, there is no reason why Section 304, Part II cannot be read with Section 34. The common intention is with regard to the criminal act i.e. the act of beating. If the result of the beating is the death of the victim, and if each of the assailants

possesses the knowledge that death is the likely consequence of the criminal act i.e. beating, there is no reason why Section 34 or Section 35 should not be read with the second part of Section 304 to make each liable individually."

95.1 In the case of **Krishnamurthy @ Gunodu and Ors.**

(supra), the essence of Section 34 and proof required to prove common intention for the criminal action has been explained in following way.

"16. Accordingly, to attract applicability of Section 34IPC, the prosecution is under an obligation to establish that there existed a common intention before a person can be vicariously convicted for the criminal act of another. The ultimate act should be done in furtherance of common intention. Common intention requires a prearranged plan, which can be even formed at the spur of the moment or simultaneously just before or even during the attack. For proving common intention, the prosecution can rely upon direct proof of prior concert or circumstances which necessarily lead to that inference. However, incriminating facts must be incompatible with the innocence of the accused and incapable of explanation by any other reasonable hypothesis.

17. By Section 33IPC, a criminal act in Section 34IPC includes omission to act. Thus, a co-perpetrator who has done nothing but has stood outside the door, while the offence was committed, may be liable for the offence since in crimes as in other things "they also serve who only stand and wait". Thus, common intention or crime sharing may be by an overt or covert act, by active presence or at distant location but there should be a measure of jointness in the commission of the act. Even a person not doing a particular act but only standing as a guard to prevent any prospective aid to the victim may be guilty of common intention. [See *Tukaram Ganpat Pandare v. State of Maharashtra*, (1974) 4 SCC 544 : 1974 SCC (Cri) 580]

18. Normally, however, in a case of offence involving physical violence, physical presence at the place of actual commission is considered to be safe for conviction but it may not be mandatory when prearranged plan is proved and established beyond doubt. Facilitation in execution of the common design may be possible from a distance and can tantamount to actual participation in the criminal act. The essence and proof that there was simultaneous consensus of mind of co-participants in the criminal action is however, mandatory and essential. [See *Ramaswami Ayyangar v. State of T.N.*, (1976) 3 SCC 779 : 1976 SCC (Cri) 518] In *Krishnan v. State of Kerala* [*Krishnan v. State of Kerala*, (1996)

10 SCC 508 : 1996 SCC (Cri) 1375] it has been observed that an overt act is not a requirement of law for Section 34IPC to operate but prosecution must establish that the persons concerned shared the common intention, which can be also gathered from the proved facts."

96. To apply Section 34 IPC, the requirement is there should be two or more accused, they had common intention and they had participated by doing criminal act in furtherance of common intention of all, then each of such persons is liable for that act in the same manner as if it were done by him alone. Common intention or crime sharing may be by an overt or covert act, jointness in the commission of crime is to be proved.

97. In **Rajeshkumar v. State of Himachal Pradesh**, (2008) 15 SCC 705, it has been held as under:-

"24. In Rajesh Kumar v. State of H.P. [Rajesh Kumar v. State of H.P., (2008) 15 SCC 705 : (2009) 3 SCC (Cri) 1158] this Court had elucidated and laid down the following principles as applicable

to Section 34IPC : (SCC p. 709, para 13)

"13. '17. Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the Section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it prearranged or on the spur of moment; but it must necessarily be before the commission of the crime. The true contents of the section are that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in *Ashok Kumar v. State of Punjab* [*Ashok Kumar v. State of Punjab*,

(1977) 1 SCC 746 : 1977 SCC (Cri) 177] , the existence of a common intention amongst the participants in a crime is the essential element for application of this section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision.' "

After referring to the facts in *Rajesh Kumar [Rajesh Kumar v. State of H.P., (2008) 15 SCC 705 : (2009) 3 SCC (Cri) 1158]* , the conviction was converted from Section 302IPC to one under Section 326IPC highlighting the factual position that the accused in question had assaulted the victim by a danda on a non-vital part."

98. The presence of accused nos.2 to 7 with the accused no.1 had been proved by oral evidence as eye-witness 16 and 17 brother and father of deceased Kanudo could depose about the atrocious act of all police. PW6 G.D. Gohil, the driver of jeep could bring the presence of all accused. Documentary evidence brings their presence on duty on that day, with A-1 accordingly PW2 Dy.S.P. Dolatsinh Khant could file the complaint

who says he relied on the statement of PW6 the driver of the jeep. PW16 and 17 had seen A-1 and other police persons beating deceased Kanudo. Multiple injuries on the body of deceased would draw the inference that it was not the act of beating of one person. The forensic postmortem has brought the injuries suffered by the deceased. The presence and participation of other accused persons cannot be denied since PW16 and PW17 could state it and injuries gets corroborated by the evidence of PW12 – Dr. Harimohan Mangal the P.M. Doctor Forensic Expert.

99. In the case on hand, the accused were charged with Section 302 read with Section 34 IPC, while deceased appellant as accused no.1 was convicted for offence under Section 304-II and 330 IPC. The offence against A-2 to A-7 was concluded by the Trial Court as not proved. The analysis of evidence by this Court as referred hereinabove with the law as pronounced under Section 34 in

the judgments referred, makes all the accused liable for the acts of all and hence, all are liable for the death of Kanudo.

100. In **Brathi @ Sukhdev Singh v. State of Punjab, (1991) 1 SCC 519** the case of **Sunder Singh v. State of Punjab, 1962 Supp. 2 SCR 654, AIR 1962 SC 1211, (1962) 2 Cri LJ 290** was referred to examine the case, when no appeal is filed for the acquitted accused and in that circumstances, the power and jurisdiction of the Appellate Court.

"9. ...In *Sunder Singh case* [1962 Supp 2 SCR 654 : AIR 1962 SC 1211 : (1962) 2 Cri LJ 290] four persons were tried for offence under Sections 302/304, IPC. The Sessions Judge gave the benefit of doubt to Rachpal Singh and acquitted him but convicted the other three of the offences charged. No appeal was preferred against the acquittal of Rachpal Singh. But the three convicted persons appealed to the High Court. The High Court was of the view that the Sessions Judge was wrong in giving the benefit of doubt to Rachpal Singh that Rachpal Singh was present at the scene of occurrence and all the four accused had the common intention alleged by

the prosecution. The appellants in that case contended before the Supreme Court that the High Court had no jurisdiction or authority to embark upon an enquiry into the propriety or validity of the acquittal of Rachpal Singh and that its finding that Rachpal Singh had taken part in the offence as alleged by the prosecution had introduced serious infirmity in the judgment of the High Court.

Gajendragadkar, J., as he then was, speaking for the bench of three Judges observed at page 664 as under:

"When the High Court in appeal considered the case against the three appellants, it had inevitably to examine the comment made by Mr Sethi against the reliability of the witnesses on the ground that their evidence against Rachpal Singh had not been accepted by the trial Court and that necessarily meant that the High Court had to apply its mind to that problem as well. If in dealing with the case presented before it on behalf of the appellants it became necessary for the High Court to deal indirectly or incidentally with the case against Rachpal Singh, there is no legal bar at all. It may be that in considering the evidence as a whole, the High Court may have come to the conclusion that the evidence against Rachpal Singh was unsatisfactory and if it had come to such a conclusion, it would have examined the said evidence in the light of this infirmity. On the other hand, after considering the evidence, the High Court may well

have come to the conclusion, as it has, in fact, done in the present case, that the evidence against Rachpal Singh is also good and need not have been discarded. In our opinion, there is no doubt that if in appreciating the points made by the appellants before it the High Court had to consider the whole of the evidence, in respect of the accused persons, it was free to come to one conclusion or the other in respect of the said evidence, so far as it related to Rachpal Singh. That is why we think that the point made by Mr Sethi that Section 423(1)(a) precluded the High Court from considering the merits of the order of acquittal even incidentally or indirectly cannot be upheld."

It was pointed out that when the High Court considered the criticism against the prosecution evidence based on the assumption that the said evidence was found to be unreliable insofar as Rachpal Singh is concerned, it was not appreciating that evidence with a view to reverse the order of acquittal passed in favour of Rachpal Singh; it was appreciating only with a view to decide whether the said evidence should be believed against the appellants before it and observed thus at page 666:

"Indeed, as an appellate Court, the High Court has to consider indirectly and incidentally the evidence adduced against an accused person who had been acquitted by a trial Court in several cases where it is dealing with the appeals before it by the co-accused persons

who had been convicted at the same trial and in doing so, the High Court — and even this Court sometimes records its indirect conclusion that the evidence against the acquitted persons was not weak or unsatisfactory and that the acquittal may in that sense be regarded as unjustified.

10. These observations indicate that the High Court is entitled to evaluate the prosecution evidence and arrive at its own conclusion. Such assessment is for the limited purpose of determining whether the infirmity which led to the acquittal of one of the accused persons could be availed of by the other accused who had been convicted. On re-examination of the evidence the appellate court is free to reach its own conclusion which may be contrary to the one reached by the trial court while acquitting the co-accused. It can certainly come to an independent finding that evidence against the acquitted accused was satisfactory and would not have been discarded. On the basis of such a finding, the appellate court does not proceed to disturb the order of acquittal which has become final. It can certainly consider the impact of its conclusion on the case of the appellant before it. If on the evidence, the High Court can unmistakably arrive at the conclusion that the appellant and acquitted person had acted in furtherance of their common intention, the conviction of the appellant with the aid of Section 34

is legal. It would be a travesty of justice if no conviction can be founded with the aid of Section 34 notwithstanding the finding that the acquitted person was in fact one of the participants in the offence..."

100.1 Para 18 thus concluded on the observations of various judgment as follows:-

"18. The authorities thus show that it is not essential that more than one person should be convicted of the offence and that Section 34, Penal Code, 1860, can be invoked if the court is in a position to find that two or more persons were actually concerned in the criminal offence sharing a common object. Where the evidence examined by the appellate court unmistakably proves that the appellant was guilty under Section 34 having shared a common intention with the other accused who were acquitted and that the acquittal was bad, there is nothing to prevent the appellate court from expressing that view and giving the finding and determining the guilt of the appellant before it on the basis of that finding.

21. We are of the opinion that the High Court was fully justified in re-assessing the evidence with a view to determining if the infirmities pointed out by the trial court while acquitting the co-accused existed on record. In doing so, the High Court was not fettered

by the conclusions of the trial court. The entire evidence was before it and it was free to reach its own conclusions. It was free to examine the infirmities for the limited purpose of assessing the impact thereof on the case of the appellant. While doing so, it came to the conclusion that Teja Singh was not only present but had given the fatal blow in furtherance of the common intention shared with the appellant. It could not reverse the acquittal of the co-accused in the absence of a State appeal. But the High Court could not refuse to visit the appellant with the consequences notwithstanding the conclusions reached. It could not render the entire exercise nugatory and perpetuate the error committed by the trial court, and resultant miscarriage of justice. We, therefore, hold that the High Court had rightly convicted the appellant with the aid of Section 34, Penal Code. The judgment does not suffer from any infirmity."

101. In the case of **State of M.P. v. Shyamsunder Trivedi** reported in (1995) 4 SCC 262, it was held as under:-

"19. From the evidence available on the record both documentary and oral, we are satisfied that Respondents 1 and 3 to 5 had participated in causing injuries to Nathu Banjara while in police custody, directly or indirectly, and

even if it is not possible to say that they intended to cause the death of Nathu, and they can certainly be clothed with the knowledge that the injuries which were being caused to the deceased at the police station were likely to cause his death though probably without any intention to cause his death or even to cause such bodily injuries to him as were likely to cause death. Their offence would, thus, squarely fall under Sections 304 Part II/34 IPC. Respondents 3 to 5 are also guilty of the offences under Sections 201 and 342 IPC and holding them so guilty, we convict them for the said offences."

102. Thus, as observed in the case of **Brathi Alias Sukhdev Singh** (supra), re-assessment of evidence is justifiable, to examine whether actually infirmities observed by the trial Court existed acquitting the accused. The High Court has to reach to its own conclusion, on assessment of entire evidence which was recorded before the trial Court. The analysis of the evidence and re-assessment in the present matter proves the involvement of all the accused, acquitted as well as convicted. Common intention for the commission of the crime had been proved. Hence,

each accused sharing the common intention is constructively liable for the criminal aid of each and all. The appellate Court can observe the guilt of the involved accused person, if the evidence warrants, to find that the person found convicted was guilty of the offence under Section 34 IPC by virtue of having committed the offence along with the acquitted person.

103. In the result, there is no escape for the deceased appellant, for the vicarious criminal liability of the criminal act done by him and co-accused, for the custodial death of Kanudo. It was not a crime buried with the grave, but was in police custody, where every police becomes answerable to the public for his custodial torture. The crime does not fade even after death. Let all the police be reminded of the fundamental right enshrined in our Indian Constitution under Article 21 that "No person shall be deprived of his life or personal liberty except according to procedure

established by law." The heirs of deceased appellant have not succeeded in proving the case for any benefit of doubt, to declare deceased – original appellant innocent posthumously.

104. Consequently, the appeal fails merits and thus, stands dismissed. The judgment and order passed by the learned Additional Sessions Judge, Bhavnagar in Sessions Case no.37 of 1990 dated 30.11.2000 is upheld.

104.1 The learned Trial Court Judge had ordered deceased appellant as accused no.1 to pay the fine of Rs.25,000/- as compensation to the heirs of deceased Kanudo @ Bhoplo Vallabhbhanna Waghri, Maninagar Waghriwas, Savarkundla.

104.2 The said compensation amount was computed, as was fine of Rs.15,000/- for the offence punishable under Section 304 part-II IPC along with the sentence and Rs.10,000/- fine was for the offence punishable under Section 330 IPC along with the sentence.

104.3 Fine, as per the provision of the Cr.P.C. are recoverable from the movable and immovable property of the accused. Section 70 of IPC provides that the death of the offender does not discharge the property from liability and the fine would be payable even after the death of the offender and such fine is recoverable from the property of the deceased. Section 70 of the IPC is as follows:-

"70. Fine leviable within six years, or during imprisonment-Death not to discharge property from liability. - The fine, or any part thereof which remains unpaid, may be levied at any time within six years after the passing of the sentence, and if, under the sentence, the offender be liable to imprisonment for a longer period than six years, then at any time previous to the expiration of that period; and the death of the offender does not discharge from the liability any property which would, after his death, be legally liable for his debts."

104.4 Thus, the Trial Court is directed to issue a warrant to the Collector of the District, for realization of the amount of Rs.25,000/- as

arrears of land revenue from the movable or immovable property, or both, of deceased – Bhavsinh Chhaganbhai Bilval.

104.5 Record and Proceedings be sent back to the concerned Trial Court forthwith.

Maulik/Pankaj

(GITA GOPI,J)