
(1994) 02 SC CK 0052

In the Supreme Court Of India

Case No : Criminal Appeal No. 289 of 1979

Abdul Ise Suleman

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 14-02-1994

Acts Referred:

Penal Code, 1860 (IPC) — Section 147, 148, 149, 300, 301

Citation : AIR 1994 SC 1910 : (1994) 1 ALT(Cri) 659 : (1995) CriLJ 464 : (1994) 1 JT 602 : (1994) 1 SCALE 559 : (1994) 2 SCC 9 Supp

Hon'ble Judges : K. Jayachandra Reddy, J;G.N. Ray, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. This appeal is directed against the judgment and order of conviction and sentence passed by the High Court of Gujarat in Criminal Appeal No. 233 of 1976 on 4/25th April, 1979 reversing the order of acquittal dated December 23, 1975 passed by the learned Sessions Judge, Bharuch in Sessions Case No. 30 of 1975. Five accused persons including the appellant were prosecuted in the said Sessions Case No. 30 of 1975 for offences under Sections 147, 148, 307 and 302 read with 149 I.P.C. for murdering one young boy, Ayub Umarji, aged 10 years and injuring P.W. 9, Gulam Musa Mohmed Ismail with gun shot injuries. The learned Sessions Judge was of the view that the prosecution case could not be accepted because the incident was not likely to be witnessed by the prosecution witnesses which, according to the prosecution had happened at night and in all probability the incident had happened earlier and the boy had died because of a cross fire between two fighting groups.

2. Against the said judgment of acquittal the Suite of Gujarat preferred Criminal Appeal No. 233 of 1976 in the High Court of Gujarat against two accused, namely, Hasan Ise Suleman and the appellant Abdul Ise Suleman. The State of Gujarat, however, did not prefer any appeal against the other three accused. The complainant Umarji Vali Aslam filed a revisional criminal application No. 182 of

1976 against all the accused challenging the order of acquittal passed in their favour. Later on, the said complainant did not press the criminal revision application No. 182 of 1976 and the same was dismissed for non-prosecution and Criminal Appeal No. 233 of 1976 was disposed of by the High Court by reversing the order of acquittal and convicting the accused No. 1 Hasan Ise Suleman for offence punishable u/s 324 I.P.C. and sentencing him to suffer rigorous imprisonment for one year on that count. The High Court convicted the appellant accused No. 2 for an offence punishable u/s 302 read with Section 301 I.P.C. and sentenced him to suffer rigorous imprisonment for life. Against such order of conviction the accused No. 1 preferred Criminal Appeal No. 294 of 1979 but in view of the death of the said appellant Hasan Ise Suleman, during the pendency of this appeal before this Court, the said appeal was dismissed as abated. Criminal Appeal No. 289 of 1979 preferred by appellant. accused No. 2 was considered on merits and is being disposed of by this judgment.

3. The prosecution case in short is that on April 14, 1979 at about 5.00 p.m. accused No. 4 Ibrahim Ismail who was the servant of the other three accused had beaten the complainant Umaraji's uncle Ahmed Aslam with a shoe as the said Ahmed Aslam also known as Master had demanded one rupee from the said accused No. 4 as a contribution for giving water to the bullocks. The complainant after returning from his field at about 7.30 p.m. came to know about such assault on his uncle and thereafter he went to Pir Chakla which was adjoining to his house where he met P.W. 9 Gulam Musa Mohamed who was an injured witness and one Abdul Haq the son of said Ahmed Aslam. While they had been discussing about the incident of that assault of Ahmed Aslam, Kalidas Ibrahim, P.W. 10, also joined them. While they had been talking to Kalidas about the incident, the said persons were near the shop of P.W. 1S, Ibrahim and from the said place the house of P.W. 4 was visible. Kalidas then suggested that all of them should go to the house of accused No. 3 because they saw all the accused persons sitting on the benches of the Otila of the house of the accused No. 3. The intention of the complainant and his companions was to make a complaint about the incident of beating Ahmed Aslam with shoe by the accused No. 4 because accused No. 3, Haji Ise Suleman, was the head of the family and the master of the accused No. 4. The prosecution case is that the petromax light was burning at the Otila of accused No. 3's house. It is an admitted position that there was no electricity in the village. The further case of the prosecution is that on hearing the complainant the accused No. 3 lost his temper and the other accused person became very much excited. The said accused No. 3 then shouted at the accused No. 2 Abdul Ise Suleman, namely, the appellant and asked him to bring guns from the house. Accused No. 3 thereafter went to the house and brought three guns and gave one gun to each of the accused No. 1, and accused No. 2 and the accused No. 3 Haji Ise Suleman also kept one gun for himself. Accused No. 2 gave a leather wallet containing cartridges to accused No. 1 who distributed the said cartridges to accused Nos. 2 and 3 and asked them to load the guns. On seeing this all the said four witnesses including the complainant started running

away from the house of the accused No. 3. According to the complainant, the injured witness, Gulam Musa Mohmad, was running behind them while the complainant Kalidas and Adbul Haq were running ahead of Gulam. When the complainant reached the shop of Sadik Mohmad, they saw Khoda Gulam, P.W. 12, and Chandu Bechar, P.W. 13, standing there. According to the complainant, when they started running towards the west on a road leading towards a Khadki and while they were crossing the Pir Chakla, they heard a sound of gun shot and while they were standing in the Naveri, Gulam the injured witness who was following them told them that he was injured by the gun shot on his left hand. Immediately thereafter, they heard another sound of gun shot coming from the direction of the house of accused No. 3 and thereafter two more sounds were heard by them. A big crowd gathered in front of the house of one Abdul Mohmed Vilavati and the complainant went near the crowd and saw that his son Aiyub was lying there injured by a gun shot on his head and shoulder and on examining him he found that his son was dead. The police Head Constable from the village outpost arrived there and he took the complainant to the police station where he gave his complaint. The Head Constable thereafter sent the complaint and the injured person Gulam to Jambusar Police Station with the complaint Ext. 32 and according to the P.S.I., M.K. Chaudhari, P.W. 19, complainant, P.W. 8, and injured Gulam, P.W. 9 arrived at Jambusar police station at about 0.15 a.m. and the occurrence report and the offence was registered. The police recorded the statement of Gulam and sent him to the hospital for medical treatment. The P.S.I, thereafter left Jarftbusar for village Tankari where the incident had taken place and he reached the place at about 1.30 a.m. and the complainant, P.W. 8, showed to him the scene of occurrence. The P.S.I, made search of the accused persons but they could not be found in the village. The inquest over the dead body was held at about 2.IS a.m. and the statement of witnesses Kalidas, P.W. 10, Musa Mohmed, P.W. 14, Ibrahim, P.W. 15, and others were recorded at about 6.45 p.m. Panchnama of the scene of offence was prepared the next morning. During the search of the house of accused No. 3. a double barrel gun, Article No. 6, was seized under Panchnama Ext. 21, while nothing incriminating was found from the house of accused No. 4 and 5. The statement of two eye-witnesses Khoda, P.W. 12 and Chandu P.W. 13 were also recorded on the same day. Ultimately all the five accused persons presented themselves before the P.S.I. Jambusar Police Station and the accused No. 3 produced the gun licence, Article accused No. 1 produced gun licence, Article No. 12, and a combined double barrel bridge loading rifle, Article No. 13, and accused No. 2 produced a gun licence Article No. 14 and a double barrel rifle, Article No. 15. All the said articles were attached under Panchnama. After completion of the investigation, the accused persons were charge sheeted and they were ultimately committed to the court of Sessions.

4. The post mortem was held on the body of the deceased and the doctor noted the injuries caused by gun shot and the doctor gave his opinion that the death was caused due to the gun shot injuries and such injuries were sufficient to

cause death in the ordinary course. P.W. 9. Gulam, was also examined by the doctor at about 1.10 a.m. in the very night of occurrence and the doctor noticed two gun shot injuries and the said P.W. 9 was treated as indoor patient for five days.

5. The High Court referred to a number of decisions of this Court and noted the guiding principles governing the exercise of appellate jurisdiction of the High Court and the duty of the appellate court while dealing with an order of acquittal. The High Court has indicated that keeping in mind all the well settled principles for deciding an appeal against an order of acquittal, the facts and circumstances of the case were taken into consideration by the High Court and the impugned judgment was delivered. A site of the place of occurrence being Ext." 10 was prepared by Musabhai Valibhai, P.W.I, and he proved the said site plan. The High Court indicated in the judgment that all the important spots in the map had been carefully noticed by the High Court in order to correctly appreciate the evidences adduced in the case. It has been noted by the High Court that the distance where the said young boy had died and the house of accused No. 3 was 131 ft. or roughly about 43 to 44 yards only and the High Court also noticed that all the prosecution witnesses and the accused persons were present within the circumference of about 100 yards. It also transpired from the map that there were shops in the locality and the evidences also disclosed 30 that shopkeepers also used to keep petromax lanterns in the shop and there was hotel in the locality and it also transpired from the evidences that there was petromax light even in the house of accused No. 3. Panchnama of the scene of offence being Ext. 16 clearly indicates that near Pir Chakla the house of Abdul Mohmed Vilayati was situated and there was mud otla of the length of 2 1/2 feet from the door of his house. Near that place, there was a pool of blood within an area of half foot. It was also indicated in the Panchnama of the scene of offence that certain cartridges and pellets were seized by the police. It also transpires from the Panchnama that the house of other witnesses were also situated near the scene of offence. The High Court has noted that the complaint, P.W. 8, stated in his deposition that one petromax light was burning on the otla. He also stated that there was no electric light in the village and all the shopkeepers used to keep petromax lantern. He also stated that on hearing the complaint of these four persons, accused No. 3 lost his temper and all the accused persons were excited. It has also been noted by the High Court that although an effort was made in the cross-examination of the said complainant to suggest that there was enmity between the said complaint and the accused but such suggestion in the cross-examination was denied by the said witness. The said witness in his cross-examination stated that although the injured witness Gulam had told him that it was the gun of the accused No. 1 which caused injuries to the said Gulam but such fact was not stated by the complainant when he lodged the complainant before the Police Constable. The said complainant also stated in his cross-examination that Khoda P.W. 12 and Chandu P.W. 13 has told him that they had seen shot from the gun of accused No. injuring Gulam P.W. 9 and other gun shot

from accused No. 2 hitting his son. The said witness further stilted that he could not give the details in the complaint because he was too excited and frightened. The complainant, P.W. 8, denied the suggestion that Khoda P.W. 12 and Chandu P.W. 3 were got up witnesses. The High Court has noted that the complainant, shortly after the incident, lodged the complaint before the police and the names of all the witnesses were mentioned in the complaint. The High Court has also noted that the deposition of the complainant tallies with the complaint made by him. The High Court has further founded that P.W. 9 Gulam who was an injured witness also supported the prosecution case. The High Court has further noted that reading the entire cross-examination of the said injured witness, it can be noticed that there was no contradiction in his deposition. The High Court, after indicating the reasons in detail, has come to the finding that the entire evidence of the injured witness P.W. 9 is trustworthy and the witness has suited truth. The High Court has also taken into consideration the evidence of two eye witnesses Khoda P.W. 12 and Chandu P.W. 13 and according to the High Court the said eye witnesses were natural witnesses and their names were mentioned in the complaint Ext. 32. which was lodged shortly after the incident. After referring to the site map, the High Court has come to the finding that both the said witnesses were very much present at the shop of Sadik Mohamed and the place where the boy had been shot dead was close from the place where the said witnesses were present. The High Court has noted that from the evidence of P.W. 12, it transpires that at the relevant time accused Nos. 1, 2 and 3 were holding guns and he heard a gun shot being fired from the gun of accused No. 1 and he noticed that Gulam was injured by that gun shot. He also deposed that after some time accused No. 2 fired his gun and that shot hit Aiyub who was standing on the ota of accused No. 3 and being hit by the gun shot Aiyub had fallen down. The High Court has held that the evidence of P.W. 12 inspires confidence and his presence at the said spot, for the reasons disclosed by the said witnesses, was acceptable. The High Court has also noted that the evidence of P.W. 12 stands corroborated by the Panchnama of scene of offence inasmuch as the deceased had fallen down just near the house of Mohamed Vilayati. The High Court has also noted that P.W. 12 had no oblique motive against the accused persons. The High Court has also noted that no contradiction worth the name could be brought by the defence to destroy the credibility of the said witness. The High Court has also referred to the evidence of Chandu P.W. 13 and has come to the finding that he was a natural witness and his evidence also stands corroborated by the evidence of the injured Gulam and also the evidence of witness No. P.W. 12. The High Court has noted that although P.W. 13 did not suite before the police that there was petromax light but non-mention of such petromax light was insignificant omission and the substantive evidence should not be discarded for such omission. The High Court has also referred to the deposition of P.W. 15 Ibrahim Ismail. The shop of the said witness is situated just near Pir Chakla and opposite to spot 'B' in the map where the young boy had died. It has been noted by the High Court that the evidence of P.W. 15 has clearly established that at 5.00 p.m. accused No. 4 had given a shoe beating on

the head of Master and at about 8.00 p.m. on the same day he heard two or three gun shots.

6. The High Court, has also analysed the reasons indicated by the trial court for giving an order of acquittal and after indicating its own reasonings the High Court came to the finding that such reasonings of the learned Sessions Judge were against the weight of the evidences and could not be accepted. The High Court has also held that the incident had happened at about 6.30 p.m. when the son of the complainant had died. The complaint was lodged at about 10.30 p.m. It has been held by the High Court that if the grief stricken father had lodged the complaint within two hours from the time of the incident. It can not be contended that there was unreasonable delay thereby raising suspicion about cooking up of a false case. The High Court has also come to the finding that non-mention of petromax light in the complaint lodged by the poor father can be easily explained because the father was under a great shock and it was quite likely that he had omitted to mention about the petromax light in that state of mind. The High Court has also come to the finding that although the accused No. 2 might have not intended to kill the young boy aged 10 years but the provisions u/s 301 I.P.C. is clearly attracted in the facts and circumstances of the case.

7. In view of the aforesaid findings, the High Court set aside the order of acquittal passed by the learned Sessions Judge and held that accused No. 1 was guilty for the offence punishable u/s 324 I.P.C. for causing injury to P.W. 9 Gulam with a gun and appellant No. 2 was held guilty for an offence punishable u/s 302 read with Section 301 I.P.C. for causing the death of the son of the complainant P.W. 8. In that view of the matter, the High Court passed the sentence of life imprisonment against the appellant.

8. The learned Counsel for the appellant has submitted that the prosecution story does not inspire confidence on the face of it. It has been contended by the learned Counsel that it is unusual and not expected normally that the complainant and his companions would wait even when the accused No. 3, a rich and influential man in the locality, became highly agitated along with other accused persons and ordered for bringing guns from the house to teach a lesson to the complainant and his associates. In any event, it is absolutely improbable that when actually three guns were brought to the place of accused No. 3 and wallet containing cartridges were also brought, the complainant and his associates would still wait there and see the distribution of cartridges and only thereafter they would leave the place. The learned Counsel has also contended that it is an admitted position that there was no electric light in the locality and in the First Information Report the complainant did not mention about any petromax light burning in the place of accused No. 3. He has also not mentioned about petromax light being used by the hotel or other shopkeepers. The mention of petromax light at a later stage was a clear embellishment and the learned Sessions Judge was justified in disbelieving the existence of sufficient light in view of petromax lantern burning there. It has been contended by the learned

Counsel for the appellant that if strong light was not there in the opla of the accused No. 1 or near about the place where the boy was shot dead and P.W. 9 Gulam had sustained injuries, it was not possible for any of the witnesses to see who had actually fired the gun. Admittedly, there were three guns brought from the house and admittedly all the said guns were loaded. In the aforesaid circumstances, unless it can be clearly pinpointed as to which of the accused had actually fired the gun causing the death of the said boy, it was not possible to convict the appellant on a charge of murder.

9. The learned Counsel has also contended that when the complainant and his associates were running away from the opla being frightened by the fact that the three guns were loaded by the accused persons, it was not expected that they should try to look back as to what the accused had been doing. In the aforesaid circumstances, it would be a natural tendency of the complainant and his associates to run as fast as possible in order to save their lives. The learned Counsel has submitted that although the High Court, in its judgment has noticed the guiding principle in dealing with the order of acquittal by the appellate court, but such principles have not been followed by the High Court. The learned Counsel has submitted that the learned Sessions Judge has given very cogent reasons for basing his finding that the prosecution case could not be established beyond reasonable doubt. According to the learned Counsel for the appellant such finding is consistent with the evidence and the learned Sessions Judge having taken a reasonable view, the High Court was not justified to make a reappraisal of the evidence adduced in the case for making independent finding of its own and to set aside proper and reasoned order of acquittal. The learned counsel for the appellant has further submitted that in any event, the facts and circumstances of the case and the depositions lead by the prosecutions do not establish that the appellant had any intention to commit murder of an innocent boy aged ten years with whom there was no question of having any enmity or any occasion to take a revenge. Even if from the evidence, it is possible to hold that the gun shot taken by the appellant ultimately caused the death of a boy, the court must hold that such death was absolutely unintentional and at best it can be held that such firing was a rash and negligent action on the part of the appellant. In that event, the offence committed by the appellant cannot be held to be a murder u/s 302 read with Section 301 I.P.C. as held by the High Court but an offence u/s 304A I.P.C. The learned Counsel has further submitted that if an old man aged about 80 years had been given a shoe beating on the head by accused No. 4 who was the servant of accused No. 3, there was no occasion for the accused No. 3 to lose temper if his attention was drawn to such improper behavior of accused No. 4. The learned Counsel has submitted that the prosecution case was false and the truth was not told by the prosecution witnesses. He has submitted that the learned Sessions Judge has rightly held that it is likely that there was some incident in the afternoon for which two groups had fought and it was only the cross fire a young boy was shot dead and one of the witnesses had sustained injuries. The learned Counsel has, therefore,

submitted that the improper order of conviction and sentence passed against the appellant should be set aside by this Court and the appellant should be acquitted.

10. Such contention is, however, disputed by the learned Counsel for the State and it has been submitted that the prosecution case was fully established by reliable and clinching evidences and the offence of murder by the appellant has been proved by a murder of eye-witnesses. It has been submitted that the High Court has analysed the depositions of eye-witnesses and has clearly held that the deposition of each of the eye witnesses stands corroborated by the site plan and medical evidence and such depositions are absolutely reliable. The High Court has also held that P.W. Nos. 12 and 13 were natural witnesses and they had no animus against any of the accused persons and their evidences were absolutely trustworthy. He has submitted that the reasonings of the learned Sessions Judge have been taken into consideration by the High Court and by indicating very cogent reasons, the same has been discarded. Hence, there is no occasion to interfere with the order of conviction and sentence passed against the appellant and the appeal should be dismissed.

11. After giving our careful consideration to the respective submissions made by the learned Counsel for the parties and considering the facts and circumstances of the case and evidences on record, we have no hesitation in holding that the order of acquittal passed by the learned Session Judge against the appellant was wholly unjustified and against the weight of the evidence adduced in the case. In the instant case, apart from the depositions of complainant and his companions who had been to the house of the accused No. 3 to lodge protest against the assault made on the said old man, there are convincing evidences of two independent eye witnesses, namely, P.W. 12 and 13. In our view, the High Court is justified in holding that P.Ws. 12 and 13 are natural witnesses and their evidences are absolutely reliable and the same get corroboration by the evidences given by other eye witnesses and also from the injuries suffered by the deceased and the injured person and the site plan prepared for the case. The reason given by the complainant for not mentioning the existence of petromax lantern in the complaint before the police is quite convincing and natural. The complainant has stated in his deposition that he was greatly shocked by the wanton act of killing of his son and he was also nervous when he lodged the complaint to the police and therefore, he did not mention the of presence of petromax light. There is positive evidence that the shopkeepers used to keep petromax lantern and in the otla of the accused No. 1 a petromax light was burning. In our view, the High Court has given very cogent reasons for holding that the appellant was guilty of the offence u/s 302 read with Section 301 I.P.C. The gun was not fired in the air just to frighten the complainant and his companions but the gun was fired by the appellant towards fleeing persons even when by the first shot one of such persons was injured. Such firing was resorted in a locality where there were number of shops. Accordingly, the provision of Section 301 I.P.C. is clearly attracted in the facts and circumstances of the case. We, therefore, find no reason to take a contrary view in the case and to upset

the well reasoned judgment of the High Court convicting the appellant. The appeal, therefore, fails and is dismissed. The appellant was released on bail during the pendency of the appeal. He should, therefore, be taken into custody to serve out the sentence.