
(2013) 04 GUJ CK 0029
In the Gujarat High Court
Case No : Criminal Appeal No. 30 of 2007

Abdulbhai @ Abul Karimbhai	Vs	APPELLANT
The State of Gujarat		RESPONDENT

Date of Decision : 04-04-2013

Acts Referred:

Penal Code, 1860 (IPC) — Section 201, 302, 307, 377

Citation : (2013) 04 GUJ CK 0029

Hon'ble Judges : K. S. Jhaveri, J;G.R.Udhwani, J

Bench : Division Bench

Advocate : Ashish M. Dagli,s No. 1, for the Appellant; Jaswant Shah, Assistant Public Prosecutor for the Respondent(s) No. 1, for the Respondent

Judgement

G.R. Udhwani, J.—The appellant-original accused Abdulbhai @ Abul Karimbhai was convicted and sentenced to life imprisonment amongst other sentences for the offences punishable under Sections 302, 307 and 201 of Indian Penal Code (for short "IPC") by the impugned judgment and order dated 11.10.2006 passed in Sessions Case No. 52 of 2006 by the learned Additional Sessions Judge, Fast Track Court No. 2, Amreli. The appellant is therefore before this Court questioning the said impugned judgment and order. The prosecution case was totally based upon circumstantial evidence. We are therefore inclined to keep in view the principles laid down in the decision of Hon"ble Supreme Court in State of Goa Vs. Sanjay Thakran and Another, , particularly para 13 which reads as under:

13. The prosecution case is based on the circumstantial evidence and it is a well-settled proposition of law that when the case rests upon circumstantial evidence, such evidence must satisfy the following tests:

- (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- (2) those circumstances should be of a definite tendency unerringly pointing

towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

Therefore the case is required to be appreciated in light of the above principles. Additionally, it is also required to be appreciated in light of the observations made in *State of U.P. Vs. Shyam Behari and Another*, , relevant paras 4 and 5 which reads as under:

4. The trial court held that the circumstances 1, 3, 8 and 11 were proved and presented a complete chain of circumstances which established the guilt of the accused. The High Court found that circumstances 8 and 11 have not been established by cogent evidence. So far as the alleged last scene is concerned, the High Court found that the circumstances of last scene together do not by itself necessarily lead to the inference that it was the accused who committed the crime.

10... There must be something more establishing connectivity between the accused and the crime. There must be cases where on account of close proximity of place and time between the event of accused having been last seen with the accused and the factum of death a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide.

5. This Court in *Bodh Raj @ Bodha and Others Vs. State of Jammu and Kashmir*, held as follows:

31. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult to some cases, to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other person coming in between exists. in the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases.

2. Briefly stated, it was the prosecution case that, with an intention to commit an offence u/s 377 of IPC, the victim deceased aged 18 years was abducted and then, after commission of an offence under the above provision killed him on 19.2.2006 at any time between 7:00 p.m. in the evening and 2:50 p.m. on the

next day. As per the testimony of P.W. 11 which was heavily relied upon by the prosecution for establishing the appellant having been last seen together with the deceased at about 7:00 p.m. on 19.2.2006 at K.P. Asara High School on the road leading to Rajkot, he himself as well as one Bharat and deceased Sanjay were eating the grams at about 7:00 p.m. on the above date and Bharat parted and then accused Abdul offered them lift on the motor-cycle he was driving and asked them that he was prepared to drop them wherever they wanted, and therefore, P.W. 11 and the deceased boarded his motor-cycle and the motor-cycle was driven by appellant, took it to a school known as K.P. Asara school. When they reached there, P.W. 11 was asked by appellant to return and that they would be reaching back within short time. He also requested P.W. 11 to return the motor-cycle to Ramjan @ Raju P.W. 9 Exh. 32. The P.W. 11 carried out the instructions of the appellant and handed over motor-cycle to Raju with a statement that the appellant and the deceased were together at K.P. Asara school and they would return shortly. This testimony of P.W. 11 is heavily relied upon, on the ground that the appellant did not challenge any of the facts deposed by this witness. In fact, he was not cross-examined. It is also sought to be relied upon in the light of the corroboration it received on limited facts i.e. borrowing of a motor-cycle by appellant from Raju and returning of the same to Raju and P.W. 11 informing Raju that the appellant and the deceased were at K.P. Asara school and they would be returning soon.

3. Admittedly, after 7:00 p.m. on 19.2.2006 there was no evidence of accused having been seen with the deceased between the said time and 2:50 p.m. on the next day i.e. 20.2.2006 when the dead body of the deceased was located in a pond with half of lower part dipped into water.

4. The doctor P.W. 5 Exh. 21 deposed of having performed autopsy on the dead body between 5:00 p.m. and 6:55 p.m. on 20.2.2006, and as per his opinion, the dead body had complete rigor mortis, and from this fact, the doctor further opined that death could have occurred at least within 8:00 to 10:00 hrs before he started performing autopsy. Thus, as per his testimony, the earlier possible time of the death of the deceased could be somewhere around 9:00 a.m. of 20.2.2006. The doctor also testified of having found half digested food in the deceased stomach which is also a pointer to the fact that if the death occurred at 9:00 a.m., the deceased might have consumed the food between 5:00 a.m. and 9:00 a.m. However, the evidence that was tendered before the trial court was that after 6:00 a.m. on 20.2.2006 the deceased was at the place of his maternal uncle about 120 kms away from the site of the offence. It was established that, in fact, the appellant had left his parental house in early morning about 6:00 a.m., and as per deposition of P.W. 10, the appellant was with him for the whole day and also until he was apprehended by police after midnight of 20.2.2006 and 21.2.2006 early morning at about 3:00 a.m. Despite the above clear evidence as to alibi of appellant, it is surprising to note that the prosecution did not question the testimony of P.W. 10. Thus, the prosecution itself has come out with two stories, one of which is a indicator of absence of appellant at the possible time of

commission of murder of the deceased.

5. It is also an admitted position that, if we peruse the evidence of Investigating Officer P.W. 14 Exh. 42 that he apprehended the appellant in the early morning at 3:00 a.m. on 21.2.2006 and the appellant remained in his custody, though unauthorised, until 22.2.2006 when he was officially arrested.

6. Coupled with the above facts, it is also apparent that, in the complaint Exh. 13, the complainant P.W. 1 Exh. 12, father of the deceased clearly came out with a case that he had no suspicion against any person about killing of his son. However, admittedly, immediately thereafter within 24 hrs he completely altered his story, now coming out with a case that the deceased was being harassed by appellant and was being asked for sodomy and was also being threatened of killing the deceased by knife.

7. It is pertinent to note that, though, generally the motive may not be relevant, but, in the peculiar facts of this case, the very genesis attributed to the appellant was kidnapping with a view to commit sodomy, and thus, the motive becomes very basis of the offence and is most relevant aspect to be considered. After lodgment of the FIR, it appears that the things started moving against the appellant and the prosecution was lodged against him.

8. It is true that P.W. 11 was not cross-examined by appellant. Therefore, taking his deposition at the face value, what could be establish was the presence of appellant and the deceased together lastly at about 7:00 p.m. on 19.2.2006 not at the site of the offence but at K.P. Asara school which is admittedly about 2 kms away from the site of the offence. Other fact which is established from the testimony of P.W. 11 is that appellant had borrowed motor-cycle from P.W. 9 and he returned to him on the instructions of the appellant with a statement that the appellant and the deceased were at K.P. Asara school and would be returning soon. This may be one of the strong circumstances, but, without corroboration as to what happened thereafter between the huge gaps i.e. 7:00 p.m. on 19.2.2006 and 2:50 p.m. on the next day i.e. 20.2.2006 it cannot be relied upon. It is also not explained by the prosecution as to how the dead body reached into the pond at a distance of 2 k.m. from K.P. Asara school. Further the appellant was attributed to have discovered knife from the canal nearby the site of offence and it is reported to have contained blood stains of the deceased. However, it was not brought on record as to whether there was any water flowing in the canal, and if it was, then what was its velocity. This fact is relevant to find out whether after throwing the knife into canal, it could be found at the same place. It is also doubtful as to whether the footwear that the appellant was wearing all throughout for two days while he was in unauthorised custody would continue to contain the blood stains of the deceased or soil. Thus, the discovery on this count is as feeble as can be and cannot take a place of proof beyond reasonable doubt. It is also not established that the quantity of soil on the foot wear was adequate enough to be analysed for the purpose of determining the blood and its group. Further the medical certificate of the examination of the appellant by doctor at

Exh. 26 is an indicator that the appellant was not used to sodomy inasmuch as the doctor has given such unimpeached opinion after examining the appellant. Thus, the very genesis of the prosecution case evaporates. Furthermore, we find a vast improvement in the complaint and the testimony of P.W. 1 as discussed above which is also incapable of inspiring the confidence of the Court. It has not been explained by P.W. 11 as to how, after lodgment of the complaint, he suspected the appellant as assailant of his son when he had no suspicion against him immediately within 24 hours prior thereto.

9. In the light of above discussed facts, the required chain of circumstances as indicated by the Hon"ble Supreme Court in State of Goa Vs. Sanjay Thakran (supra) cannot be said to have been established, and therefore, we are inclined to extend the benefit of doubt to the appellant. In the premise, the appeal is allowed. The impugned judgment and order dated 11.10.2006 passed by the learned Additional Sessions Judge, Fast Track Court No. 2, Amreli in Sessions Case No. 52 of 2006 is set aside and the appellant-accused is ordered to be acquitted of the offences punishable under Sections 302, 377 and 201 of the Indian Penal Code. The appellant is ordered to be set at liberty forthwith if not required in any other case. Farad of this judgment shall be served upon the concerned Jail authority forthwith. Direct service is permitted.