

**(2016) 02 GUJ CK 0044**  
**In the Gujarat High Court**  
**Case No : Criminal Appeal No. 2787 of 2008**

Anjumankhan Imtiyazkhan Pathan

APPELLANT

Vs

State of Gujarat

RESPONDENT

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**Date of Decision :** 04-02-2016

**Acts Referred:**

Bombay Police Act, 1951 — Section 135 (1)  
Criminal Procedure Code, 1973 (CrPC) — Section 154, Section 154, Section 155,  
Section 156, Section 156, Section 157, Section 157, Section 313, Section 397  
Penal Code, 1860 (IPC) — Section 302,

**Citation :** (2016) 02 GUJ CK 0044

**Hon'ble Judges :** K.S. Jhaveri and R.P. Dholaria, JJ.

**Bench :** Division Bench

**Advocate :** Y.S. Lakhani, Senior Advocate and Raxit J. Dholakia, Advocate, for the Appellant; C.M. Shah, A.P.P., for the Respondent

**Final Decision :** Allowed

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## Judgement

K.S. Jhaveri, J.—1. This appeal is filed against the judgment and order dated judgment and order dated 23.9.2008 passed by learned Additional City Sessions Judge, City Sessions Court No. 8, Ahmedabad City, in Sessions Case No. 114 of 2006. By the impugned judgment, learned trial Judge has convicted the accused for the offence punishable under Section 302 of the Indian Penal Code (for short, "IPC") and sentenced him to suffer life imprisonment and fine of Rs. 75,000/- and in default, simple imprisonment of six months was imposed. For offence under Section 135 (1) of the Bombay Police Act, the accused was awarded one month's imprisonment. The sentences were ordered to run concurrently. Being aggrieved by the impugned judgment, accused has preferred present appeal.

2. The facts in brief giving rise to the filing of present appeal are as under:

2.1 That on 18.8.2005, with an intention to commit robbery, both the accused entered the godown of the deceased Nooraalam Ansari. It is alleged that the accused had throttle the neck of the deceased with rope and he became

semiconscious. Thereafter, accused No. 2 covered the head of the deceased with a towel and accused No. 1 attacked him with a knife and caused injuries on his neck. The victim died due to these injuries. With these allegations, the complaint was given against the accused persons.

2.2 Upon filing of the complaint, investigation started. At the end of investigation, charge-sheet was filed against the accused before the Magistrate Court. Since the offence was exclusively triable by the Court of Sessions, the case was committed to Sessions Court and, ultimately, trial was initiated and charge came to be framed against the accused. The accused pleaded not guilty and claimed to be tried. It will not be out of place to mention here that accused No. 2 expired during the course of trial, therefore, it proceeded only against accused No. 1.

2.3 During the trial, the prosecution had examined following witnesses:-

2.4 The prosecution had also produced and relied upon following documentary evidence:-

Sr. No.

Description

Exh.

1

Complaint dtd. 18.8.2005

12

2

Panchnama of the scene of offence.

17

3

Panchnama of place of recovery of weapon.

19

4

Panchnama of recovery of clothes of the deceased.

22

5

Postmortem note.

34

6

Panchnama of identification parade.

39

7

Report of PSO.

42

8

Inquest panchnama.

43

9

Panchnama showing recovery of things during search of accused persons.

44

10

Yadi to FSL officer for scene of offence.

45

11

Visitation report of FSL officer.

46

12

Panchnama of recovery of blood of the accused.

47

13

Panchnama of recovery of weapon.

48

14

Yadi of the Executive Magistrate.

49

15

FSL dispatch note.

50

16

FSL receipt.

51

17

FSL report.

52

18

Report of FSL, Serological Department.

53

19

Notification of Police Commissioner.

54

20

Additional report under Section 397 of IPC.

55

21

Report of name change in postmortem report.

56

2.5 At the end of trial, the Court below recorded further statement of accused under Section 313 of Cr.P.C. and thereafter, passed the impugned judgment and order awarding the sentence to the accused, as aforesaid. Being aggrieved and dissatisfied with the impugned judgment of the trial Court, present appeal is preferred before this Court by the original accused.

3. Mr. Y.S. Lakhani, learned Senior Advocate appearing with Mr. Raxit Dholakia for the appellant-original accused has taken us through the evidence and submitted that the prosecution has miserably failed to prove its case against the appellant. Mr. Lakhani submitted that the arrest of the accused in the present case is doubtful as it is made without any clue and the officers, who arrested him are not examined in the present case. He also submitted that the accused have explained the situation in their statements before PSI Chaudhari, however, he is not examined in the present case. He also submitted that accused had got Rs. 1,50,000/- by selling gold chain and ring to the goldsmith and this fact was stated by Shri Barot, investigating officer. On the basis of the statement of IO, accused is acquitted of offence under Section 397, and since there was no motive for the accused to kill the deceased, accused is wrongly convicted by the trial

Court. He also submitted that complaint was recorded by Shri Barot and he sent it for registration with a direction to return the papers to him for further investigation and papers were returned to him accordingly, therefore, the investigation is bias and perfunctory. He also submitted that in a single day all the panchnamas were drawn, statements of 20 witnesses were recorded, accused was produced before learned Magistrate, an application for remand seeking custody of the accused was preferred, Yadis were sent to FSL, Finger print bureau, fire-brigade and dog squad, and an application to insert Section 397 of IPC was preferred before learned Magistrate. He submitted that it is impossible to carry out all these procedures in a single day and it clearly shows that with a view to implicate the accused is implicated in a false case. He also submitted that though the muddamal knife was found after three days from the canal where the water was flowing, surprisingly, as per FSL report it was found blood stained. He further submitted that PW-2 admitted that accused is identified at the behest of the police. He also submitted that Executive Magistrate could not be cross-examined in view of his death, therefore, the Test Identification Parade loses its significance. He submitted that considering all these aspects of the matter, this appeal may be allowed by setting aside the impugned judgment convicting the accused.

4. On the other hand, Ms. C.M. Shah, learned APP appearing for the State has submitted that the order of conviction recorded against the appellant-accused is just and proper and she has supported the conviction recorded by impugned judgment. She further contended that taking into consideration the evidence on record, the view taken by the trial Court is just and proper and no interference is called for. She further submitted that through the evidence of PW-1, PW-2, the prosecution has proved its case beyond reasonable doubt. It is submitted by Ms. Shah that the formality of preparing the FIR in which the police inspector records the factum of having received the information about the suspected commission of the offence and then taking up the investigation after registering the crime does not vitiate the investigation on the ground of bias or the like factor. In support of her submission, she has relied upon the decision of the Apex Court in *State v. V. Jayapaul*, reported in , (2004) 5 SCC 223, wherein it is observed as under:-

"4. We have no hesitation in holding that the approach of the High Court is erroneous and its conclusion legally unsustainable. There is nothing in the provisions of the Criminal Procedure Code which precluded the appellant (Inspector of Police, Vigilance) from taking up the investigation. The fact that the said police officer prepared the FIR on the basis of the information received by him and registered the suspected crime does not, in our view, disqualify him from taking up the investigation of the cognizable offence. A suo motu move on the part of the police officer to investigate a cognizable offence impelled by the information received from some sources is not outside the purview of the provisions contained in Sections 154 to 157 of the Code or any other provisions of the Code. The scheme of Sections 154, 156 and 157 was clarified thus by

Subba Rao, J. speaking for the Court in *State of U.P. v. Bhagwant Kishore* (, AIR 1964 SC 221).

"Section 154 of the Code prescribes the mode of recording the information received orally or in writing by an officer in charge of a police station in respect of the commission of a cognizable offence. Section 156 thereof authorizes such an officer to investigate any cognizable offence prescribed therein. Though ordinarily investigation is undertaken on information received by a police officer, the receipt of information is not a condition precedent for investigation. Section 157 prescribes the procedure in the matter of such an investigation which can be initiated either on information or otherwise. It is clear from the said provisions that an officer in charge of a police station can start investigation either on information or otherwise."

6. Though there is no such statutory bar the premise on which the High Court quashed the proceedings was that the investigation by the same officer who "lodged" the FIR would prejudice the accused inasmuch as the investigating officer cannot be expected to act fairly and objectively. We find no principle or binding authority to hold that the moment the competent police officer, on the basis of information received, makes out an FIR incorporating his name as the informant, he forfeits his right to investigate. If at all, such investigation could only be assailed on the ground of bias or real likelihood of bias on the part of the investigating officer. The question of bias would depend on the facts and circumstances of each case and it is not proper to lay down a broad and unqualified proposition, in the manner in which it has been done by the High Court that whenever a police officer proceeds to investigate after registering the FIR on his own, the investigation would necessarily be unfair or biased. In the present case, the police officer received certain discreet information, which, according to his assessment, warranted a probe and therefore made up his mind to investigate. The formality of preparing the FIR in which he records the factum of having received the information about the suspected commission of the offence and then taking up the investigation after registering the crime, does not by any semblance of reasoning, vitiate the investigation on the ground of bias or the like factor. If the reason which weighed with the High Court could be a ground to quash the prosecution, the powers of investigation conferred on the police officers would be unduly hampered for no good reason. What is expected to be done by the police officers in the normal course of discharge of their official duties will then the vulnerable to attack.

13. Viewed from any angle, we see no illegality in the process of investigation set in motion by the Inspector of Police (appellant) and his action in submitting the final report to the Court of Special Judge."

4.1 Ms. Shah also submitted that normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. She submitted that such minor contradictions,

inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case should not be made a ground on which the evidence can be rejected in its entirety. In support of her submission, she has relied upon the decision of the Apex Court in *State of UP v. Naresh and Others*, reported in , 2011 Cri.L.J. 2162, wherein it is observed as under:-

"25. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence. "Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility." Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/ materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited.

[Vide: *State Represented by Inspector of Police v. Saravanan and Anr.*, , AIR 2009 SC 152; *Arumugam v. State*, , AIR 2009 SC 331; *Mahendra Pratap Singh v. State of Uttar Pradesh*, , (2009) 11 SCC 334 : (2009 AIR SCW 2849); and *Dr. Sunil Kumar Sambhudayal Gupta and Ors. v. State of Maharashtra*, , JT 2010 (12) SC 287] : (2011 Cri LJ 705 (SC))."

4.2 Ms. Shah further submitted that even evidence of a hostile witness can also be taken into consideration and if any witness turns hostile, it is not necessary that it may prove fatal to the case of the prosecution. In this regard, she has relied upon the decision of the Apex Court in *M. Sarvana alia K.D. Sarvana v. State of Karnataka*, reported in , (2012) 7 SCC 636, wherein it is observed as under:-

"11. We may notice, at this stage that the court can even take into consideration the part of the statement of a hostile witness which supports the case of the prosecution. Therefore, it cannot be said that whenever prosecution witnesses are declared hostile, it must prove fatal to the case of the prosecution. Reference in this regard can be made to the judgments of this Court in *Bhajju v. State of M.P.* And *Govindaraju v. State*."

4.3 Ms. Shah submitted that there may be certain discrepancies in the investigation but every discrepancy in investigation does not necessarily results in acquittal of the accused. She further submitted that the discrepancies/lapses in the present case are of immaterial consequence. In support her submission, she has relied upon the decision in the case of Shyamal Ghosh v. State of West Bengal, reported in , (2012) 7 SCC 646, wherein it is observed as under:-

"58. Of course, there are certain discrepancies in the investigation inasmuch as the Investigating Officer failed to send the blood stained gunny bags and other recovered weapons to the FSL, to take photographs of the shops in question, prepare the site plan thereof, etc. Every discrepancy in investigation does not weigh with the Court to an extent that it necessarily results in acquittal of the accused. These are the discrepancies/lapses of immaterial consequence. In fact, there is no serious dispute in the present case to the fact that the deceased had constructed shops on his own land. These shops were not the site of occurrence, but merely constituted a relatable fact. Non-preparation of the site plan or not sending the gunny bags to the FSL cannot be said to be fatal to the case of prosecution in the circumstances of the present case. Of course, it would certainly have been better for the prosecution case if such steps were taken by the Investigating Officer."

4.4 She, therefore, submitted that the learned trial Judge has not committed any error while imposing the sentence on the accused and no interference is called for in the present appeal.

5. We have heard Mr. Yogesh Lakhani, learned Senior Advocate for the appellant-original accused and Ms. C.M. Shah, learned APP for the State. We have also gone through the impugned judgment as well as evidence on record. From the evidence of PW-1 it is clear that he has admitted in his cross-examination that he had not seen the accused coming out of the office of the deceased after commission of offence. It can also be seen that it is stated that a big knife (chhara) was recovered, however, in the panchnama it is stated that a Rampuri knife was recovered. Moreover, such knife was recovered after four days of the incident, therefore, it is not possible that the blood stains would have remained on it for such long period. Not only that crucial witnesses of panchnama have not been examined by the prosecution. The trial Court has acquitted the accused from the charge of offence punishable under Section 397, therefore, it can be said that the trial Court has believed the explanation of the accused regarding the amount of Rs. 1,50,000/- received by him from the sale of gold chain and gold ring. In addition to this, there was no motive for the accused to kill the accused and, therefore, the trial Court has committed an error in convicting the accused. Conviction of the accused is based solely on the evidence of PW-1 as other witnesses have turned hostile, and, as stated earlier, PW-1 has also admitted in his cross-examination that he had not seen the accused coming out of the office of the deceased, therefore, the conviction of the accused seems to be untenable. It is also a settle principle of law that howsoever strong the

suspicion may be, it cannot take place of evidence. From the evidence, it is clear that the accused were arrested in the mid night and all the panchnamas were drawn, statements of the witnesses were recorded, accused were produced before the Magistrate and all other procedures were completed in 24 hours, which creates a serious doubt about the case of the prosecution. Considering all these aspects of the matter, we find that the prosecution has failed to prove its case against the accused. In our view, this evidence could not have been relied to convict the appellant herein, therefore, benefit of doubt is required to be granted to the appellant. Though we do not exonerate the appellant-accused from the charges levelled against him, we grant him benefit of doubt. In view of this, present appeal is required to be allowed.

6. For the foregoing reasons, this appeal is allowed. The impugned judgment and order dated 23.9.2008 passed by learned Additional City Sessions Judge, City Sessions Court No. 8, Ahmedabad City, in Sessions Case No. 114 of 2006 is quashed and set aside. The appellant herein-original accused is acquitted of all the charges levelled against him by granting benefit of doubt. Bail bond, if any, stands cancelled. Record and Proceedings, if lying here, be sent back to the concerned trial Court forthwith.