
(1996) 08 GUJ CK 0017
In the Gujarat High Court

Babu @ Salim @ Rakesh Narendrakumar Trivedi	APPELLANT
Vs	
State of Gujarat	RESPONDENT

Date of Decision : 20-08-1996

Acts Referred:

Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 302, 304, 308, 504

Citation : (1997) 1 GLR 519

Hon'ble Judges : M.R. Calla, J

Bench : Single Bench

Judgement

M.R. Calla, J.—This Criminal Appeal is directed against the order of conviction and sentence dated 19-9-1992 passed against the present appellant by the Addl. Sessions Judge, Nadiad in Sessions Case No. 233 of 1991. The appellant has been convicted u/s 304 Part I I.P.C. and sentenced to 7 years R.I. and a fine of Rs. 500/- and in default to undergo 1 month's further imprisonment. He has also been convicted u/s 308 I.P.C. and sentenced to 2 years R.I. with a fine of Rs. 200/- and in default to undergo 7 days R.I. The sentences have been ordered to run concurrently and he has been acquitted of the offence under Sections 302 and 504 of I.P.C. and Section 135 of Bombay Police Act.

2. The case of the prosecution is that with regard to an incident, which took place at village Bakrol on 14-4-1991 between 11-30 and 11-45 P.M., a F.I.R. was lodged on the same night, i.e., the night intervening 14th April 1991 and 15th April 1991 at 1-30 A.M. at Police Station, Vallabh Vidyanagar, by Bismillakhan Habibkhan Pathan, who himself had sustained injuries in this incident. In the evening of 14th April 1991 a party was arranged at the residence of one Abdulbhai Vohra living in Guru Krupa Society near Railway Station, Karamsad. Bismillakhan Habibkhan Pathan, i.e., the author of the F.I.R. alongwith one Nisharkhan Ajimkhan Pathan, a resident of Bismillakhan's village, went to Abdulbhai's place in a rickshaw at 9-00 P.M. Abdulbhai and one Vasudev M.

Sindhi were already present at Abdulbhai's residence at that time. Karamsad is said to be about 3 to 4 Kms. from Bakrol. Vasudev told Nishar that Salim, who is living in the Sahkar Colony at Bakrol, was not giving his photographs and, therefore, Nishar may get these photographs from Salim for him (Vasudev). Nishar told Vasudev that he would get him the photographs and Vasudev should not worry about it, but Vasudev insisted that he may get the photographs just now. Therefore, all the four persons left Karamsad in the same rickshaw at about 10-00 P.M. and went to Ambar Cinema and therefrom they went to Sahkar Colony at Bakrol in the same rickshaw. The rickshaw was made to stand at a place nearby Salim's house and having gone near Salim's house, Nishar called Salim. Salim came out of his house and Nishar told him that he may return the photographs of Vasudev. At this time there was exchange of some hot words between them and Salim's lady also came out of the house. Salim while saying that he had no photographs, started hurling abuses in anger and Nishar told him that he may not hurl abuses and thus there was a quarrel between them. Thereupon Salim suddenly brought out an edged weapon looking a knife and caused 2 injuries one on the chest and the other on the abdomen. When Nishar cried for help, Bismillakhan intervened and thereupon Salim also injured Bismillakhan by the same weapon, which was looking like a knife and Bismillakhan also sustained injuries on his left palm and neck. Bismillakhan and Nishar both ran to save their lives but after little distance Nishar fell down and Salim ran after Abdul and Vasudev, who were running away. At that time other persons from the Colony had also assembled but Salim left away. Thereafter, all the three persons, i.e., Bismillakhan, Abdul and Vasudev came back near Nishar and found that Nishar was lying and bleeding from chest and abdomen and that he was dead. Bismillakhan then went to village Bakrol in the same rickshaw and informed Shokat, i.e., brother of Nishar about the incident and the brother of Bismillakhan took him to the Police Station. Having taken the letter (Yadi) from the Police Station, Bismillakhan was taken to the Karamsad Hospital for treatment where he was admitted. The Police Inspector of Vidyanagar Police Station also came down to the Hospital and took the complaint from Bismillakhan. On the basis of this complaint, Vidyanagar Police Station registered the criminal case and the investigation was taken up by Police Sub-Inspector Shri Zala. Shri Zala went to the spot and found Nishar to be dead, posted police watch at the site and in the morning called the Panchas and prepared the inquest report and the Panchnama, took the blood stained soil from the site and took a pair of chappals and other Articles in his custody. The house of accused was near the place of incident and in presence of Panchas from a corner of the house of Salim a blood stained shirt was found, which was also having a cut on its left side and the lower boarder of which had a cut. The Police Sub-Inspector Zala recorded the statements of Ravindragiri Somgiri, Abdulbhai Ismail Vohra, Vasudev Mangaram, Kavitaaben, Shokatali, Hasinabanu, etc., and the dead body of Nishar was sent to the Hospital alongwith the inquest report for post- mortem and in the afternoon of 15th April, 1991 the investigation was handed over to Senior Police Inspector Shri Shah. Shri Shah recorded the statements of

Kanubhai Shah and his 2 sons, the rickshaw driver Kanubhai Raisingbhai and Natubhai Mohanbhai and accused was arrested on 21-4-1991. On 23-4-1991 the recovery of the weapon of offence was effected in presence of Panchas at the instance of accused Salim while he was in police custody. The weapon of offence was taken into possession by the police after preparing Panchnama. The clothes on the dead body had already been taken into possession in presence of the Panchas which were immediately sent to the Forensic Science Laboratory for analysis and report. The injury reports were obtained and the postmortem report of Nishar was also obtained and after completing the investigation, the charge-sheet was filed against the accused-appellant Salim. The Judicial Magistrate, First Class at Anand committed the accused to the Sessions Court at Nadiad wherefrom it was transferred to the Court of Addl. Sessions Judge, Nadiad camp at Anand for trial. The charges under Sections 302, 308, 504 I.P.C. and Section 135 of the Bombay Police Act were framed against the appellant-accused. The appellant-accused denied the charges and claimed trial and accordingly the trial was held. Since the appellant-accused had not engaged any lawyer, the services of one Shri C.K. Patel, Advocate, were made available for the defence of the appellant-accused as *amicus curiae*.

3. The prosecution examined 22 witnesses in all. No witness was examined in defence. The statement of the appellant-accused was recorded u/s 313 of the Cri. P.C. After considering the evidence, the learned Addl. Sessions Judge, Nadiad, i.e., trial Court found that the appellant-accused was not guilty of the offences under Sections 302 and 504 I.P.C. and Section 135 of the Bombay Police Act, but he was found to be guilty for committing the offence u/s 304 Part I of the I.P.C. and u/s 308 of the I.P.C. and after recording the conviction for the offences under Sections 304 Part I and 308 I.P.C., heard the accused on the question of sentence and sentenced him as above.

4. It may be mentioned that the State had preferred Criminal Appeal No. 174 of 1993 against the acquittal of the present appellant-accused under Sections 302 and 504 I.P.C. and Section 135 of the Bombay Police Act, but this Criminal Appeal filed by the State of Gujarat was dismissed by the Court on 27-7-1993.

5. This Appeal is preferred by the appellant challenging the order dated 19-9-1992 passed by the Addl. Sessions Judge, Nadiad whereby he was convicted and sentenced, as above, in Sessions Case No. 233 of 1991.

6. Mr. Bhatt, learned Counsel for the appellant, challenged the order of conviction and sentence on the ground that most of the witnesses were declared hostile. Vasudev, whose photographs were to be taken from the appellant, was not examined before the Court although his statements were recorded by the police. Nothing has come on record as to what was the nature of the photographs of Vasudev which he wanted to obtain from the accused-appellant, that there was no witness who could be said to be an eye-witness to the incident, no independent witness has supported the prosecution case, that recovery of the incriminating Article, i.e., knife, which is alleged to have been used for the

purpose of committing the offence, has not been proved. The prosecution has failed to explain the knife, which was produced by Kavitaaben, that there was no cross-matching of the blood group of the deceased and the blood which was found on the knife, the real F.I.R. was suppressed by the prosecution and that the prosecution evidence suffers from various contradictions, variations and exaggerations and that the weapon recovered has not been proved to be connected with the accused and the recovery of the same is not admissible u/s 27 of the Indian Evidence Act. He has cited (1) 1984(1) GLR 118 (Narsinhbhai D. Vaghela v. State) (2) 1975 GLR 782 (Hemant Ramji v. State) and (3) Kana Mohan Sutar Vs. State, .

7. The learned Addl. P.P. Mr. Divetia has submitted that there is enough oral evidence in support of the case of the prosecution and the same is corroborated by medical evidence and the recovery of the weapon, i.e., knife used for committing the offence and the blood stained clothes of the accused. The investigation does not suffer from any infirmity and there is enough evidence in support of the prosecution case and that the prosecution has been able to prove the offences under Sections 304 Part I and 308 I.P.C. against the present appellant beyond any manner of doubt.

8. I have considered the submissions made on behalf of both the sides and have perused the entire record. I find from the evidence that it is proved by the statements of Bismillakhan-P.W. 1 and Kavitaaben-PW. 20 supported by other witnesses that there was a scuffle between the deceased and the accused near the house of the accused. It is also proved by the evidence of P.W. 1-Bismillakhan, P.W.-3 Abdulbhai, and P.W. 8-Kanubhai Raisingbhai, rickshaw driver that the deceased had gone to the house of the accused-appellant Salim in the late night hours so as to obtain the photographs as required by Vasudev after attending a party at Abdulbhai's place in the rickshaw, which was driven by Kanubhai Raisingbhai. On the demand of the photographs being made by the deceased-Nisharbhai from accused-appellant Salim, there was a quarrel between the deceased and the accused, which had started with the hurling of abuses and ultimately resulted into the death of Nishar and in this very incident Bismillakhan had also sustained injuries. P.W. 2-Ravindragiri, who is immediate neighbour of the accused, has clearly stated that on hearing alarm raised by Kavita, he had come out of his house and at that time the deceased and the accused were hurling abuses and there was a scuffle between them and at that time he had seen the deceased, the accused and other person who had sustained injuries in his left palm and since the deceased had told him that he should not interfere, he went back in his house. This witness P.W. 2-Ravindragiri has also stated that except him and his wife no other person living in the neighbourhood had come out at that time, but the persons had come out later on. The statement made by this witness in his examination-in-chief has remained untrammelled in the cross-examination. It cannot be said that there is no eye-witness. It is clear from the statements of P.W. 1-Bismillakhan, who himself is the injured in this very incident and who is also the author of the F.I.R., that he was very much present at the

time of the incident and the accused had caused 2 injuries in the chest of the deceased and one injury in the abdomen of the deceased and that he wanted to come to the rescue of the deceased and in this process he also sustained an injury in his left palm and another injury on his neck. It is only, thereafter, that he tried to run away. He has remained an indoor patient for 2 days in the Hospital for the treatment of the injuries sustained by him and he has also proved the F.I.R. Exh. 56A, which was recorded by the police, as stated by him, in the Hospital. The contradictions in his statements, which had been pointed out by the learned Counsel for the appellant, particularly with regard to the fact that he had kept standing nearby the temple and had not gone to the house of the accused are of no consequence for the simple reason that he had very clearly stated even in the cross-examination that having heard the call of Nishar he had rushed down from the temple near the house of the accused to the house of the accused and thus the presence of this witness P.W. 1-Bismillakhan, accused, deceased, Kavitaaben-P.W. 20 and Ravindragiri-P.W. 2 on the spot is proved. P.W. 20 Kavitaaben, who was a lady residing with the accused, is a very important witness in this case and there is no reason to doubt her testimony. She has categorically stated in her examination-in-chief that on 14-4-1991 in the night at about 11-30 or 11-45 p.m. Bismillakhan alongwith 2 others, whose names she does not remember, had come to the house in which she was residing and had asked for Salim. Salim, who was in the house at that time, came out and hurled abuses. She had also stated that the persons, who had come to her house, demanded photographs from Salim and when she wanted to know as to what photographs were being asked for, Salim told her that she will not be able to understand and she should go. At that time she raised an alarm and Salim took out a knife from his pocket and stabbed the same in the abdomen and the chest of the deceased and at that time, when the other person, who was accompanying with the deceased, tried to intervene, he also sustained injuries of the knife on his hands and, thereafter, Salim ran away. After some time, the police came on the spot and the person, who had sustained the knife injuries, was lying there as other persons, who were accompanying him had left the place immediately after the incident. She had also stated that thereafter her statements were recorded by the police. She is a witness, who was a lady living with the accused-appellant after deserting her husband and she has also admitted that in her police statement she had stated that she had affair with the accused and she left the house of her husband when she was beaten by her husband when her husband came to know about her love affair with Salim and only thereafter when Salim agreed to take her, she came with Salim and was living with him. There is no reason to disbelieve the testimony of this witness despite the fact that the Public Prosecutor during the course of her examination-in-chief had declared her to be hostile. During the course of hearing the arguments of both the sides, when the learned Counsel for the appellant invited my attention to the evidence of various witnesses and read out the evidence in extenso, I found that many witnesses have been declared hostile by the Public Prosecutor in this case when it could be very easily avoided. Although the practice of declaring the prosecution witnesses

to be hostile on a minor variation here and there, as has been done in the instant case, cannot be approved, rather deserves to be deprecated, the version given by such witnesses cannot be discarded merely because the Public Prosecutor had chosen to declare them hostile. There is no reason for this witness-P.W. 20-Kavitaben to make wrong or false statement against the interest of the accused with whom she was living pursuant to her love affair with him and after deserting her husband.

9. True it is that the prosecution has not made any investigation about the nature of the photographs, which was sought to be obtained from the accused Salim by the deceased at the instance of Vasudev and it is also true that there are certain contradictions or variations in the statements of more than one witnesses as has been pointed out by the learned Counsel for the appellant, but these aspects are not so significant so as to create any doubt in the prosecution story to bring home the guilt to the hilt against the accused. I also do not find any substance in the argument of the learned Counsel for the appellant that the police has suppressed any F.I.R. The version, which has been given by P.W. 1-Bismillakhan, and his brother Salimkhan P.W. 6 that they first went to the Police Station to obtain Yadi for treatment of Bismillakhan and thereafter Brismillakhan was taken to the Hospital read with the statements of the Investigation Officer, namely, P.W. 21-P.R. Shah and P.W. 22 M.C. Zala makes it amply clear that there is no question of suppression of any F.I.R. in the facts of this case and even if the report was recorded by the police as given out by Bismillakhan in the Hospital, it would not impinge upon the fairness of the investigation nor any little finger can be raised against the validity of the F.I.R. on such basis.

10. Thus, so far as the oral evidence is concerned the case of the prosecution is fully established and the same is duly corroborated by the medical evidence on record.

11. The evidence of P.W. 18-Dr. Vijaybhai J. Mecwan, who had examined Bismillakhan and gave the report Exh. 44 proved the injuries, which were sustained by Bismillakhan and the evidence of P.W. 19-Dr. Mayur M. Trivedi, who conducted the autopsy and gave post-mortem report Exh. 48 proves the ante-mortem injuries, which have been sustained by the deceased. P.W. 18-Dr. Vijaybhai had clearly stated that Bismillakhan had been examined by him and he had found injuries on the left side of his neck and on his left palm and such injuries could be sustained by a weapon like knife and that injured Bismillakhan had remained indoor patient in the Hospital for 2 days. The injuries were fresh and the Injury Certificate had been issued on 22-4-1991, which was Exh. 44. He had also produced the case papers. Merely because the carbon copy of the letter sent with the police had been produced and on which the signatures of this Doctor were not there, it cannot be said that the same had not been received by him. P.W. 19-Dr. Mayur M. Trivedi has stated that in all there were 6 external injuries found on the body of the injured person and out of these injuries, injury No. 3 resulted into consequential internal injury as stated by him. He has clearly

opined that the injury Nos. 3 and 4 could be caused by any sharp edged weapon like knife, the injuries were ante-mortem. According to him the cause of death was excessive bleeding on account of the injuries sustained on the chest and the injury No. 3 was sufficient in the ordinary course to cause death. He has proved the post-mortem report Exh. 48 and it has been categorically stated at Item No. 23 in the postmortem report that the cause of death was shock and brain haemorrhage with stab wound on chest affecting left lung and pulmonary trunk.

12. So far as the question of the recovery of the weapon, which was used for committing the offence, is concerned, the learned Counsel for the appellant submitted that Kavitaaben-PW 20 had clearly stated in her statement that the police had recovered the knife from her house and had not recovered anything else; whereas the recovery of the knife has been shown by the police in the course of the investigation from some place near Nadiad and, therefore, there is a material contradiction so far as the recovery is concerned. It may straightaway be observed that not a single question was put to the concerned Investigating Officer by the defence as to which was that knife which was recovered from the house wherein accused and Kavita were living. In absence of such a suggestion being made to the concerned Investigating Officer by defence, there is no reason to have any confusion about the recovery of the weapon from a place near Nadiad. The recovery at the instance of the accused in presence of Pancha-P.W. 14-Allauddinmiya is also supported by statements of Investigating Officers and the F.S.L. report shows the presence of human blood on the weapon. Merely because the cross-matching of the blood group found on the knife and that of the deceased has not been done, it cannot be said that the weapon recovered is not connected with the offence because the weapon has been recovered from a distant place at the instance of the accused, who shown the way to the place where knife had been hidden. Such recovery cannot be said to be inadmissible in evidence u/s 27 of the Indian Evidence Act nor it can be said that the prosecution has failed to connect the weapon of offence with the accused.

13. The trial Court has considered the entire evidence and has found that of course Nishar had died as a result of the injuries caused by the accused, nevertheless it was not a case for conviction u/s 302 I.P.C. because the accused had acted in his own defence, but at the same time it also came to the conclusion that the accused had exceeded his right of private defence while causing the fatal injuries to the deceased and, therefore, it has found it to be a case of culpable homicide not amounting to murder and accordingly the trial Court convicted the present appellant u/s 304 Part I of the I.P.C. and for the injury sustained by Bismillakhan, taking it to be a case of attempt to commit culpable homicide, it has convicted the appellant u/s 308 of the I.P.C. After considering the evidence in its entirety and after hearing the learned Counsel and after the analysis of the evidence read with the reasons given in the Judgment of the trial Court, I do not find any basis to take a different view and hence no interference is warranted with the conviction recorded by the trial Court against the present appellant under Sections 304 Part I and 308 of I.P.C.

14. So far as the question of sentence is concerned, it has been submitted by the learned Counsel for the appellant that the appellant had been arrested way back on 21-4-1991 and since then he is in jail and thus he has already suffered the jail for a period of nearly 5 years and 4 months by now. It has also been submitted that the entire case of the prosecution, even if taken to be correct, makes it clear that the deceased and the injured Bismillakhan had gone to the house of the accused and there in the course of scuffle between the deceased and the accused, the deceased as well as Bismillakhan sustained injuries and after all the trial Court has also found that he had acted in his defence, may be that the right of private defence has been exceeded. It has also been submitted by the learned Counsel for the appellant that at the time of incident, the appellant was only 22 years old and further that he has liability of an old widowed mother, younger brother and sisters and wife also and that he is a petty cloth merchant. It has also been submitted that it is his first offence and he has never been involved in any criminal case prior to this incident; whereas according to the learned Counsel for the appellant, it has come on record in the statement of PW-1-Bismillakhan himself that deceased Nisharbhai was known as a Dada in Vidyanagar and Bakrol and there had been many cases against the deceased Nisharbhai pertaining to physical assault and under the Prohibition Act and it has also come on record in the evidence of more than one witnesses that even on the date of the incident, the deceased as well as the injured Bismillakhan had consumed liquor at Abdulbhai's place just before 1 or 2 hours of the incident.

15. I have considered the submissions made by the learned Counsel for the appellant on the question of sentence and looking to the entirety of facts and circumstances of this case, I find that the request of Mr. Bhatt to reduce the sentence so as to leave the appellant under the sentence undergone is reasonable and deserves to be accepted. For Section 304 Part I IPC, the appellant was sentenced to 7 years R.I. and for the offence u/s 308 I.P.C. he was sentenced to 2 years R.I. The sentences were ordered to run concurrently. Thus, out of the maximum sentence of 7 years, the appellant has already remained in jail for a period of 5 years and 4 months. While the sentence of 2 years R.I. u/s 308 I.P.C. is kept intact, the sentence of 7 years R.I. for the offence u/s 304 Part I, I.P.C. is hereby reduced to the period of sentence already undergone by him up till now. Whereas the sentences for both the offences are to run concurrently, the maximum sentence which the appellant has to undergo is reduced to the sentence already undergone. So far as the sentence of fine is concerned, it is sustained for both the offences and the appellant has to deposit the fine failing which the consequences, as ordered by the trial Court, shall follow.

16. This Criminal Appeal is dismissed so far as conviction is concerned, but is partly allowed on the question of sentence and the same is reduced to the sentence already undergone by the appellant. In case the amount of fine, as ordered by the trial Court, has not been deposited so far and the same is deposited now, the appellant shall be released forthwith, if not required in any other case.