

(2012) 09 GUJ CK 0086
In the Gujarat High Court
Case No : Criminal Appeal No. 928 of 2007

Balubhai Parshurambhai Bhil	Vs	APPELLANT
State of Gujarat		RESPONDENT

Date of Decision : 26-09-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 209, 428
Penal Code, 1860 (IPC) — Section 300, 302, 304

Citation : (2013) 1 GLR 195

Hon'ble Judges : Bhaskar Bhattacharya, C.J.; J.B. Pardiwala, J

Bench : Division Bench

Advocate : Kruti M. Shah, for the Appellant; K.P. Raval, Addl. P.P., for the Respondent

Judgement

J.B. Pardiwala, J.—This appeal is at the instance of a convict-accused for the offence punishable under Sec. 302 of the Indian Penal Code

and is directed against the order of conviction and consequent sentence dated April 5, 2007 passed by the learned Additional Sessions Judge,

Fast Track Court No. 9, Vadodara, in Sessions Case No. 192 of 2006. By the said order, the learned Additional Sessions Judge convicted the

appellant-accused under Sec. 302 of the Indian Penal Code and sentenced him to undergo life imprisonment with fine of Rs. 1,000/-. It has also

been ordered that in default of payment of fine of Rs. 1,000/-, the appellant-convict shall undergo further simple imprisonment for one month.

Case of Prosecution:

On June 6, 2006 the deceased, at around 3-00 O'clock in the afternoon, was cultivating his field with a plough attached to the bullocks. At that

point of time, the P.W. 1 Mukeshbhai - son of the deceased was also in the field

and the wife of the deceased named Ramilaben was at her house.

It is the case of the prosecution that the accused who is the real brother of the deceased was present in his agricultural field and at that point of time

the accused is said to have told the deceased as to why the deceased had touched and shifted a stone which was lying on the boundary of the two

fields. The deceased is said to have replied to the accused that he had not touched or shifted the stone. On this reply, the accused had an

altercation with the deceased and entered into a physical scuffle. The deceased was knocked down by the accused and the accused started

inflicting kick blows on the leg of the deceased. Thereafter, the accused is alleged to have pounced on the chest of the deceased and forcefully

pressed the neck of the deceased, and thereby, throttling him to death.

This is the sum and substance of the case of the prosecution.

2. On June 24, 2006 at around 18-30 hours in the evening, the P.W. 1-Mukeshbhai, son of the deceased, lodged a First Information Report at

Nasvadi Police Station regarding the incident. On the strength of the First Information Report lodged by the P.W. 1-Mukeshbhai, the son of the

deceased, investigation commenced. It appears that as there was no sufficient light at the place of the incident, the dead-body of the deceased was

sent to Nasvadi Dispensary. On the next day at Nasvadi Dispensary, the inquest panchnama was drawn and the dead-body of the deceased was

sent for postmortem examination. The post-mortem examination revealed that there was a "U" shape condition mark below thyroid cartilage and

the internal examination revealed fracture of thyroid cartilage. As per the post-mortem report, the cause of death was cardiac arrest due to manual

strangulation. The scene of offence panchnama was drawn as pointed out by the first informant in presence of the panchas. On the accused being

arrested, the arrest panchnama was drawn of the person of the accused. The clothes of the deceased were collected and sent to the Forensic

Science Laboratory for chemical analysis. The statements of witnesses were recorded and finally the charge-sheet was filed against the accused for

the offence of murder punishable under Sec. 302 of the Indian Penal Code in the Court of the learned Judicial Magistrate, First Class, Sankheda.

3. As the case being exclusively triable by the Sessions Court, the learned Judicial Magistrate, First Class, Sankheda, committed the case to the

Court of Sessions under Sec. 209 of the Code of Criminal Procedure, 1973. The learned Sessions Judge framed the charge against the accused at

Exh. 6. The accused pleaded not guilty to the charge and claimed to be tried.

4. The prosecution examined the following witnesses during the course of trial:

5. The prosecution also adduced the following pieces of documentary evidence in support of its case:

6. On conclusion of the trial, the learned Additional Sessions Judge recorded finding of guilt against the accused for the offence of murder

punishable under Sec. 302 of the Indian Penal Code and passed the judgment and order of conviction and sentence as referred to above.

7. Being dissatisfied, the accused has come up with this appeal before this Court.

Oral evidence on record:

8. The P.W. 1, Mukesh Mukundbhai Bhil (Exh. 8), was examined by the prosecution as the original first informant. The P.W. 1 has deposed that

on the date of the incident, he himself and his father (deceased) were together in the field and at that point of time, the accused, who happens to be

the brother of the deceased, entered into an altercation with regard to a stone which was placed on the boundary of the two fields, and thereafter,

the accused and the deceased, both entered into a physical combat. The P.W. 1 has also deposed, that thereafter, the deceased fell down and the

accused pounced on the deceased and pressed his neck forcefully resulting into the death of the deceased. The P.W. 1 has also deposed that at

that relevant point of time, the P.W. 3, Ramanbhai Parsottambhai Bhil and the P.W. 2, Karshanbhai Vechanbhai Bhil, also came running at the

place of the incident and got the P.W. 1 released from the clutches of the accused. The P.W. 1 thereafter went to inform about this incident to his

mother. The P.W. 1 has proved the First Information Report, at Exh. 9. His evidence is quite consistent with what he had stated in the First

Information Report, Exh. 9.

9. The P.W. 2, Karshanbhai Vechanbhai Bhil, has been examined being Exh. 10 by the prosecution as one of the eye-witnesses to the incident.

The P.W. 2 has also deposed on the same line as deposed by the P.W. 1, Mukesh, the son of the deceased. The P.W. 2 has deposed that the

accused and the deceased quarrelled on the issue of stone, and thereafter, both of them had a physical scuffle. As a result of which the deceased

fell down and almost became unconscious. This witness has, however, not deposed that the accused forcefully pressed the neck of the deceased, and thereby, strangled the deceased to death. The P.W. 2 was accordingly declared hostile by the prosecution. However, one fact emerges from the evidence of the P.W. 2 that a quarrel ensued between the accused and the deceased and the deceased is said to have told the accused that he had removed the stone and on saying so the deceased came running at the place where the accused was standing and grabbed the accused with his hands.

10. The P.W. 3, Ramanbhai Parsottambhai Bhil, has also been examined by the prosecution at Exh. 11 as one of the eye-witnesses to the incident.

The P.W. 3 has also deposed that the accused and the deceased quarrelled on the date of the incident on the issue of a stone lying on the boundary of the two fields and the deceased started beating the accused and both entered into a physical scuffle.

The P.W. 3, Ramanbhai, was also declared as a hostile witness.

11. The prosecution also examined the P.W. 4, Parshurambhai Jivabhai Bhil, being Exh. 12, but he was also declared as a hostile witness. The

P.W. 4, however, deposed very clearly that the accused and the deceased both entered into a physical scuffle and the accused pounced upon the deceased, as a result of which the deceased died. This witness has deposed that the deceased was a patient of asthma and due to scuffle, the deceased felt breathless and passed away within minutes thereafter.

12. The P.W. 5, Dineshbhai Umedbhai Patel, has been examined (Exh. 13) in his capacity as a Circle Officer. The P.W. 5 prepared a map of the scene of the offence (Exh. 14).

13. The P.W. 6, Rupaben Mukundbhai Bhil, has been examined as Exh. 15, who is the wife of the deceased. The P.W. 6 has deposed that she was at her home and at that point of time her son, the P.W. 1, Mukesh came and informed her about the incident. The P.W. 6 thereafter rushed to the place of occurrence, where Karshanbhai Vechanbhai and Ramanbhai Parsottambhai were also present. Her father-in-law Parshurambhai was also present. She found her husband (deceased) lying dead in the field. The P.W. 6, Rupaben Bhil, is not an eye-witness.

14. The P.W. 7, Shankarbhai Jesingbhai Bhil, has been examined (Exh. 17) as

one of the panch-witnesses of panchnama of the dead-body of the deceased. The P.W. 7 has deposed that after drawing the panchnama, the dead-body was taken to Nasvadi Dispensary. No visible injuries were noticed on the body of the deceased.

15. The P.W. 8, Manharbhai Sukhrambhai Bhil, has been examined as Exh. 19 by the prosecution as one of the panch witnesses of the inquest panchnama. However, he was declared hostile by the prosecution.

16. The P.W. 9, Sugabhai Karabhai Dungra Bhil, has been examined (Exh. 20) as one of the panch witnesses of the scene of the offence panchnama and he has been declared hostile.

17. The P.W. 12, Amarsinh Laxmansinh Rathod, has been examined (Exh. 22) by the prosecution as one of the police witnesses. On the date of the incident, the P.W. 10 was on duty at Nasvadi Police Station as a Police Station Officer and according to the P.W. 10, he had taken down the F.I.R. lodged by the first informant being Exh. 9.

18. The P.W. 11, Dr. Prashant Mohanlal Gupta, has been examined as Exh. 23. The P.W. 11 is a medical officer, who performed post-mortem of the dead-body of the deceased. The P.W. 11 in his evidence has deposed that the post-mortem examination reveals a fracture of thyroid cartilage inside the neck. The windpipe was found congested. The internal examination of the chest revealed that the wall of the chest and ribs were congested. Wall of the lungs as well as both the lungs were found congested. He further deposed that on the basis of viscera in the stomach, the death might have occurred before 20 to 22 hours from the time of post-mortem. The P.W. 11 further deposed that the death could have been caused by pressing the neck forcefully and the internal injuries sustained by the deceased were sufficient in the ordinary course of nature to cause death.

19. The P.W. 10, Sukhrambhai Haridas Bhil (Exh. 30), is also one of the panch witnesses, who was declared hostile.

20. The P.W. 13, Sunilkumar Dolabhai Damor (Exh. 32), is the Investigating Officer. The P.W. 13 has deposed that he had visited the place of incident at around 7-00 O'clock in the evening, where he found the dead-body of the deceased lying in the field of Parshurambhai. As there was

no sufficient light at the place of incident, the dead-body was shifted to Nasvadi Dispensary. The statements of the witnesses were recorded. The inquest panchnama, scene of offence panchnama and the arrest panchnama of the accused were drawn. The clothes of the deceased were collected and were sent to the Forensic Science Laboratory for chemical analysis. Finally, the charge-sheet was filed in the Court of the learned Judicial Magistrate, First Class, Sankheda.

Submissions on behalf of the accused:

21. Ms. Kruti M. Shah, the learned Advocate appearing on behalf of accused, vehemently submitted that the trial Court committed an error in holding the accused guilty of the offence of murder punishable under Sec. 302 of the Indian Penal Code, more particularly, considering the fact that the deceased got annoyed on a question being put by the accused regarding a stone and the deceased rushed into the agricultural field of the accused and entered into a physical scuffle. According to Ms. Shah, even as per the map prepared by the Circle Inspector, the place of the offence is the field of the accused, and therefore, it could be said that the deceased trespassed into the field of the accused and took up quarrel with the accused. According to Ms. Shah, even if the case of the prosecution is believed to have been proved beyond reasonable doubt, the conviction could not have been under Sec. 302 of the Indian Penal Code, but this being a case of culpable homicide not amounting to murder, the trial Court ought to have convicted the accused at best under Sec. 304 Part-II of the Indian Penal Code.

21.1. Ms. Shah further submitted that the trial Court also committed an error in placing implicit reliance on the oral evidence of a solitary eyewitness, namely, the P.W. 1, Mukesh Mukundbhai Bhil, the son of the deceased. According to Ms. Shah, the evidence of the P.W. 1, Mukesh Bhil, to the effect that the accused had pressed the neck of the deceased for about 10 minutes is unbelievable. Ms. Shah also submitted that the prosecution has not been able to prove the case of strangulation beyond reasonable doubt. According to Ms. Shah, the deceased was a patient of Bronchitis and in the case of strangulation, ordinarily, the blood would ooze from ears, nose and mouth, whereas in the present case no such symptoms were found in the post-mortem report. Ms. Shah, therefore, submitted

that the benefit of rule of reasonable doubt may be extended in favour of the accused. Submissions on behalf of the State:

22. Mr. K.P. Raval, the learned Additional Public Prosecutor appearing on behalf of State-respondent, submitted that the trial Court has rightly

believed the oral evidence on record in holding the accused guilty of the offence of murder punishable under Sec. 302 of the Indian Penal Code.

According to Mr. Raval, the ocular version of the P.W. 1, Mukesh Bhil, the son of the deceased, could not be said to be in any manner in conflict

with the medical evidence on record; on the contrary, according to Mr. Raval, the medical evidence suggests that the deceased was strangled to

death as the thyroid cartilage was also found to be fractured as noted in the post-mortem report. Mr. Raval, therefore, submitted that no

interference is warranted and the appeal deserves to be dismissed.

23. The picture that emerges on cumulative reading of the entire evidence on record is as under:

23.1. The accused and the deceased both were full brothers. On the date of the incident, it appears that the deceased was in his field along with his

son, the P.W. 1-Mukesh. The accused inquired from the deceased as to whether the deceased had shifted or touched the stone which was lying

on the boundary of the two fields. It appears that on this trivial issue both the brothers i.e. the accused and the deceased, started quarrelling and

also entered into a physical combat with each other. It also appears that while fighting, the accused pounced on the deceased and pressed his neck

forcefully, and thereby, throttling the deceased to death. This part of the prosecution case stands fully corroborated by the medical evidence on

record. The P.W. 11, Doctor, has deposed that the post-mortem examination revealed fracture of thyroid cartilage inside the neck suggesting that

force might have been applied on the neck. There were no other injuries on the body of the deceased and the cause of death assigned was cardio-

respiratory failure due to manual strangulation. To the extent aforesaid, the prosecution has been able to prove its case beyond reasonable doubt.

23.2. However, the short question which falls for our consideration is whether, on re-appraisal of the peculiar facts and circumstances of the case,

the conviction of the appellant under Sec. 302 of the Indian Penal Code should be upheld or the conviction deserves to be converted under Sec.

304, Part-I or Part-II of the Indian Penal Code.

24. The sine qua non for the application of an Exception to Sec. 300, always is that it is a case of murder but the accused claims the benefit of the

Exception to bring it out of that Section and to make it a case of culpable homicide not amounting to murder. We must, therefore, assume that this

would be a case of murder and it is for the accused to show the applicability of the Exception. Exception 4 reads as under:

Exception 4:- Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden

quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

A perusal of the provision would reveal that four conditions must be satisfied to bring the matter within Exception 4:

(i) it was a sudden fight;

(ii) there was no premeditation;

(iii) the act was done in the heat of passion; and that

(iv) the assailant had not taken any undue advantage or acted in a cruel manner.

On a plain reading of Exception 4, it appears that the help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a

sudden fight, (c) without the offenders having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with

the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found.

25. There are following significant features of the case, which are required to be taken into consideration in answering the aforesaid question:

(1) Indisputably the incident happened at the spur of the moment.

(2) There was no pre-plan or any premeditation on the part of the accused.

(3) The incident happened on a very trivial issue.

(4) The accused and the deceased were full brothers.

(5) The accused had no weapon or any other object in his hand at the time of scuffle with the deceased.

(6) On the basis of the evidence on record, it could be said that there was a free-fight between the accused and the deceased and during such fight

the accused is alleged to have manually strangled the deceased to death by

applying pressure on the neck.

(7) The act was done in the heat of passion.

(8) The accused could not be said to have taken any undue advantage or acted in a cruel manner.

26. The Supreme Court had an occasion to deal with cases of similar nature. In *Jagrup Singh Vs. State of Haryana*, , the accused had inflicted a

single blow in the heat of moment in a sudden fight with blunt side of Gandhala on the head of the deceased causing his death. According to the

opinion of the doctor this particular injury was sufficient in the ordinary course of nature to cause death. But, according to the Supreme Court, the

intention to cause such an injury which was likely to cause death had not been made out. The Supreme Court altered the conviction of the accused

from Sec. 302 I.P.C. to Sec. 304 Part II I.P.C. and the accused was directed to suffer rigorous imprisonment for a period of seven years.

27. In another case *Pappu Vs. State of Madhya Pradesh*, , the Supreme Court observed as under:

.... The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having

taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within

Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Sec. 300 I.P.C. is not

defined in the I.P.C. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this

case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and

more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel.

It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of

Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender

has not taken undue advantage or acted in cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair

advantage".

28. On consideration of the entire evidence, including the medical evidence, we are clearly of the view that the conviction of the appellant cannot

be sustained under Sec. 302 of the Indian Penal Code, but the appropriate Section under which the appellant ought to be convicted is Sec. 304

Part-II of the Indian Penal Code.

29. We, accordingly, alter the conviction of the appellant from Sec. 302 of the Indian Penal Code to one under Sec. 304 Part-II of the Indian

Penal Code and sentence him to suffer rigorous imprisonment for 10 (ten) years. The fine as imposed by the trial Court is maintained. The

appellant would be entitled to get benefit of Sec. 428 of the Code of Criminal Procedure, 1973. The appeal is partly allowed in the

aforementioned terms and disposed of.