

(2001) 03 GUJ CK 0080
In the Gujarat High Court

Case No : Criminal Revision Application No. 376 of 1993

Bharatbhai Patel

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 28-03-2001

Acts Referred:

Citation : (2001) 21 GLH 636

Hon'ble Judges : K.M. Mehta, J

Bench : Single Bench

Advocate : K.J. Shethna, for the Appellant; A.J. Desai, APP, for the Respondent

Final Decision : Allowed

Judgement

K.M. Mehta, J.—Bharatbhai Shankerbhai Patel and Sankabhai Madhabhai Patel, petitioners-original accused No.1 and 2 have filed this Criminal Revision Application under Sec. 397 read with Sec. 401 of the Code of Criminal Procedure, 1973 (hereinafter referred to as `the Code") challenging the judgment and order dated 27th September, 1993, passed by the learned Sessions Judge, Mehsana in Criminal Appeal No.34/93. The learned Sessions Judge by his judgment and order pleased to dismiss the appeal and confirmed the order of conviction dtd.5.8.93 passed by the learned Special Judge-Cum-Assistant Sessions Judge, Mehsana, in Special (Atrocity) Case No.35/93, whereby the learned Special Judge in the said case was pleased to convict the accused for six months and to pay a fine of Rs.250/- in default to undergo simple imprisonment for one month for the offence punishable u/s 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as `the Act") and also convicted the accused to undergo a sentence of payment of fine of Rs.500/- each for the offences punishable under Sec. 323 and Section 426 of the Indian Penal Code and in default to undergo simple imprisonment for two months. The learned Special Judge has acquitted the accused on the charge under Sec. 504 and 506(2) of the Indian Penal Code.

2. The prosecution case which has been unfolded in this case are as under:

2.1 The appellants-original accused were the guarantors of the complainant Prahladbhai Maganbhai of Langhnaj. He has purchased one Truck bearing No.GJ-2-T-6322 for Rs.4,20,000/- from Atmarambhai Bababhai and for that purpose he had obtained loan from the Gujarat State Financial Corporation. The owner Atmarambhai Bababhai had not paid the installments and so he had sold away the truck to the complainant. The Gujarat State Financial Corporation sold away the said truck in public auction as the complainant had defaulted for making the payment of installments.

2.2 It has been alleged by the prosecution that, on 21-8-92 at about 8.00 a.m., when the complainant was going towards the S.T. Stand, Near Godown both the accused met the complainant and told him as to why he was going on foot "Dheda" where the vehicle was. The complainant told him that the truck was taken away by the Corporation persons and it was already sold in public auction. At that time, accused gave certain abuses and also called him "Dheda". The accused got enraged and they had given vulgar abuses to the complainant and they had also told him "Sala Dheda" in order to teach him lesson they had done away all these things. Then both the accused gave fist blows to the complainant and his clothes were torn away, and as he had shouted for help, Chamar Nathabhai Magabhai and Revabhai Somabhai rushed there and he was saved and the accused went away. While going away the accused had given threats that in future he would be killed.

2.3 The complainant gave written complaint before the Langhnaj Police Station at about 4.00 p.m. The offence was registered. The complainant was sent to the hospital for treatment and head constable Kavaji Khatuji investigated the offence by recording the statements of witnesses and by making necessary panchnama and further investigation was made by PSI Mr. Rathod who has arrested the accused. On completion of investigation, charge-sheet was filed in the Court of the Judicial Magistrate, First Class and as the case was triable by the Special Court.

2.4 Shri K.B. Joshi, the learned Special Judge framed the charge Ex.8 against the accused. The accused have denied to have committed the offence and they have claimed to be tried. The learned trial Judge has recorded the oral evidence of seven prosecution witnesses:

- (1) P.W.No.1 Prahaladbhai Maganbhai Chamar at Exh.13 (Complainant).
- (2) P.W.No.2 Dr. Govindbhai Dahyabhai Patel at Exh.16 (Medical Officer).
- (3) P.W.No.3 Nathabhai Mangabhai Chamar at Exh.20 (person who has seen the offence.)
- (4) P.W. No.4 Kanubhai Sadabhai at Exh.21 (also alleged to have seen the offence).

(5) P.W. No.5 Khusalbhai Lavjibhai at Exh.22 (panch witness for the seen of offence.)

(6) P.W. No.6 Dilipsinh Magansih at Exh.26 (Police Head Constable at Langhnaj Police Station).

(7) P.W. No.7 Kavaji Khatuji at Exh.29 (Police Jamadar of Langhnaj Police Station).

2.5 Over and above, the chargesheet has been produced at Exh.1, Muddamal lists produced at Exh.11, FIR produced at Exh.14, Copy of Sale Deed is produced at Exh.15, Yadi by PSO to Medical Officer for treatment at Exh.18, Medical Case Papers of injured Prahaladbhai Maganbhai Chamar at Exh.19, Pachnama of scene of offence at Exh.23, Panchnama of person of injured Prahaladbhai Maganbhai Chamar at Exh.24, Signature of panch on the clothes of injured Prahaladbhai Maganbhai at Exh.25, the statement of accused No.1 was recorded at Exh.9 and statement of accused No.2 was recorded at Exh.10. In the statements which was recorded by the accused they have denied to have committed any offence. They have submitted written statement and they have not led any defence nor they have chosen to examine any witnesses.

2.6 After hearing the submissions of the learned advocate for the accused as well as the learned PP, the learned Special Judge by his judgment and order dated 5.8.93 was pleased to convict the accused for six months and to pay a fine of Rs.250/- in default to undergo simple imprisonment for one month for the offence punishable u/s 3(1)(x) of the Act and also convicted the accused to undergo a sentence of payment of fine of Rs.500/each for the offences punishable under Sec. 323 and Section 426 of the Indian Penal Code and in default to undergo simple imprisonment for two months. The learned Special Judge has acquitted the accused on the charge under Sec. 504 and 506(2) of the Indian Penal Code. The learned trial Judge has also heard the accused on the question of sentence.

2.7 Being aggrieved and dissatisfied with the aforesaid order of the learned trial Judge, the accused preferred appeal being Criminal Appeal No.34/93 before the Sessions Court, Mehsana.

2.8 The learned Sessions Judge, Mehsana, by his judgment and order dated 27th September, 1993, pleased to dismiss the Criminal Appeal No.34/93 filed by the accused. The learned Sessions Judge held that the judgment and order of conviction and sentence dated 5.8.93 passed by the learned trial Judge in Special Atrocity Case No.35/93 is legal and correct and it does not require any intervention by the appellate Court. The learned Sessions Judge also held that the appeal is maintainable in view of the provisions of the Scheduled Caste and Scheduled Tribes Act.

2.9 Being aggrieved and dissatisfied with the aforesaid judgment and order of the learned Sessions Judge, the accused have filed this application before this

Court somewhere in September, 1993. This Court by its order dated 29th September, 1993, pleased to issue rule and also granted bail to the accused in this behalf.

3. Learned Counsel for the accused thereafter relied upon evidence of Prahladbhai Maganbhai Chamar (Complainant at Exh.13) in which he stated that he belongs to backward class (not stated that he belongs to Scheduled Caste or Scheduled Tribe). However, in the oral evidence it has been stated that both the accused Bharatbhai Shankerbhai Patel and Sankabhai Madhabhai Patel has called "Dheda Dheda" and also abuses the complainant and also humiliate the complainant in this behalf and there were also some beating and accused also gave fisticuffs to the complainant and they gave him abuses in the names of his mother and sister and tore his "Bandi". He has stated that at the time of incident one Nathabhai Chamar also came there. He further stated that after the incident he went home and took rest and thereafter lodged the complaint. In the cross-examination he admitted that he also initiated similar criminal proceedings as per the provisions of Atrocity Act for which offence took place on 27th August, 1992 and also another offence which took place after 5 days. It may be stated that in this case offence had taken place on 21.8.1992. He has stated that the accused had given abuses as "Sala Dedha" and also beating him and also tear his Bandi. He has referred to evidence of Dr. Govindbhai Dahyabhai Patel P.W.No.2 at Exh.16, Medical Officer to say that there was some injury to the complainant. He has also referred the evidence of Nathabhai Mangabhai Chamar P.W.No.3 at Exh.20 who has seen that both the accused beating the complainant and also giving abuses and also abuse "Dheda Dheda". He has also stated that during this scuffle, Bandi was torn off. He has also referred to another prosecution witness No.4 Kanubhai Sadabhai who has seen the incident in question. He has also referred to P.W.No.5 Khusalbhai Lavjibhai at Exh.22, who is a police officer of Langhnaj Police Station to prove the panchnama of scene of offence. He has also referred P.W.No.6 Dilipsinh Magansinh at Exh.26, head constable of Langhnej Police Station, who has stated that the complaint was registered at 4.00 p.m. and produced the complaint at Exh.18. He has also referred to P.W.No.7 Kavaji Khatuji at Exh.29 Police Jamadar of Langhnaj Police Station who produced panchnama regarding torn of Bandi.

3.1 Learned counsel for the accused thereafter relied upon the oral evidence of Nathabhai Mangabhai Chamar P.W.No.3 at Exh.20 wherein he stated that he belongs to backward class (not stated that he belongs to Scheduled Caste or Scheduled Tribe). However, in the oral evidence it has been stated that both the accused Bharatbhai and Sakabhai has called "Dheda Dheda" to the complainant and also abuses and insulted to the complainant in this behalf. He further stated there were also beating in this behalf and accused gave fisticuffs to the complainant.

3.2 As regards documentary evidence is concerned, learned Counsel for the accused has referred to charge Ex.8, Muddamal Lists Ex.11, List of Papers

produced by prosecution at Exh.12, complaint filed at Exh.14, Copy of Sale deed at Exh.15, Yadi by P.S.O. to Medical Officer for treatment at Exh.18, Medical Case papers of injured Prahladbhai Maganbhai Chamar at Exh.19, Scene of offence panchnama at Exh.23, panchnama of person of injured Prahladbhai at Exh.24, Signature of panch on the clothes of injured Prahladbhai at Exh.25.

3.3 In this case he has further submitted that from the complaint Exh.14 it appears that offence took place on 21.8.92 at 8.00 a.m. whereas complaint was registered on 21.8.92 at 4.00 p.m. afternoon. It was further submitted that offence took place at a Bus stand, half furlong only from the police station in which the written complaint was filed after 8 hours. He submitted that, in a case like this, it was quite easy for the complainant to create evidence and concoct the story. He submitted that the story itself is inherently improbable. He submitted that late filing of the complaint is also fatal to a prosecution case. He further submitted that in this case the truck was sold in public auction on June 1992 whereas incident took place on 21st August, 1992. So a truck was sold two months prior to the incident and therefore a story is not probable in the facts and circumstances of the case.

4. Learned advocate for the petitioners-accused have raised following contentions before me. Before I consider the said contention, I will quote Sec. 3(1)(x) of the Act which reads as under:

"Sec. 3(1)(x) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view."

Sec. 3(2)(v) of the Act reads as under:

"Sec. 3(2)(v) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, commits any offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine."

4.1 Learned advocate for the petitioners submitted that under Sec. 3(1)(x) of the Act is concerned, the ingredients of the said section are that one who is not a member of the Scheduled Caste or Scheduled Tribe intentionally insults or intimidates, knowing to humiliate member of the Scheduled Caste or Scheduled Tribe in any place within public. He submitted that in the present case the accused are acquitted of the charge of insulting the complainant. He submitted that if they are acquitted for the offence under Secs. 504 and 506 of IPC then they cannot be convicted under Sec. 3(1)(x) of the Act. He submitted that the findings are contrary to and inconsistent with record of the case in this behalf. He further submitted that in this case the complainant in his deposition has stated that he belongs to backward class. He submitted that to belong to "backward class" is one thing and to belong to a scheduled caste and scheduled tribe is

another. He, therefore, submitted that until and unless in his evidence the complainant says in no uncertain terms that he belongs to scheduled caste and/or until and unless there is positive evidence, in no uncertain terms that the complainant belongs to a scheduled caste and scheduled tribe, it cannot be presumed that the complainant belongs to scheduled caste and if it is not proved beyond reasonable doubt, the accused cannot be convicted for the offence under the Act. He further submitted that Sec. 3(1)(x) of the Act provides that whoever not being the member of scheduled caste or scheduled tribe intentionally insults or intimidates knowing to humiliate member of the scheduled caste or scheduled tribe in any place within public view an offence under IPC punishable with imprisonment of term which shall not be less than six months but which may extend to five years and fine. He submitted that in the present case there is no evidence at all to the effect that petitioners-accused have committed any offence alleged against him on the ground that complainant injured is a member of scheduled caste/scheduled tribe. To attract the provisions of Sec. 3(1)(x) of the Act, he submitted that the victim should be a person who belongs to Scheduled Caste or a Scheduled Tribe and that the offence under the IPC is committed against him on the basis that such a person belongs to a Scheduled Caste or a Scheduled Tribe. In support of the same, he relied upon the judgment of the Hon"ble Apex Court in the case of MASUMSHA HASAN ASHA MUSALMAN VS. STATE OF HARASHTRA reported in 2000 Supreme Court Cases (Cri.) 722, particularly para 9 of the said judgment on page 725 reads as under:

"Section 3(2)(v) of the Act provides that whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, commits any offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine. In the present case, there is no evidence at all to the effect that the appellant committed the offence alleged against him on the ground that the deceased is a member of a Scheduled Caste or a Scheduled Tribe. To attract the provisions of Section 3(2)(v) of the Act, the sine qua non is that the victim should be a person who belongs to a Scheduled Caste or a Scheduled Tribe and that the offence under the Indian Penal Code is committed against him on the basis that such a person belongs to a Scheduled Caste or a Scheduled Tribe. In the absence of such ingredients, no offence u/s 3(2)(v) of the Act arises."

4.2 The learned counsel for the accused has also relied upon the Division Bench judgment of this Court in the case of Lalubha Keshrisinh Garasia Vs. State of Gujarat reported in 1997(38) 3 GLR 2568. In Para 12 on page 2570 the Hon"ble Court observed as under:

"Provisions of section quoted above clearly indicate that the offence under I.P.C. should be established by the prosecution to have been committed on the ground that the injured person or persons against whom the offence is committed is/are

a member of Scheduled Caste or Scheduled Tribe. It is not sufficient that the injured person should be a member of either but further it is required to be proved that the offence has been committed on the ground of victim being a member of Scheduled Caste or Scheduled Tribe. In absence of this material, merely because the injured happens to be Scheduled Caste or Scheduled Tribe automatically the offence under Sec. 3(2)(v) of the Atrocities Act is not made out. There is no material on record indicating that the deed was done on the ground that the injured was a member of Scheduled Caste. The fact that they are members of Scheduled Caste is not in dispute. However, in absence of the material that the offence has been committed on the ground of the victim being a member of Scheduled Caste, the conviction under the said provisions of the Act cannot be sustained. The appeal is, therefore, partly allowed to that extent."

5. The learned counsel for the petitioners further submitted that the prosecution has not produced any other documentary evidence particularly certificate issued by Panchayat or any authority to show that the complainant belongs to scheduled caste or scheduled tribe. He has further submitted that the statement which has been recorded under Sec. 313 of the Code, the prosecution has not pointed out that complainant belongs to scheduled caste or scheduled tribe and, therefore, the accused have not committed the aforesaid offence under the provisions of the Scheduled Caste & Scheduled Tribe Act.

5.1 Learned counsel for the accused has submitted that by the consideration of the basic principle of jurisprudence and decision rendered by the Hon''ble Apex Court on appreciation of evidence, the benefit of doubt apparently should be given in favour of the accused which has been denied in this case and, therefore, this Court should exercise its revisional jurisdiction under Sec. 397 read with Sec. 401 of the Code. For that purpose, learned counsel for the accused has relied upon an Unreported Judgment of this Court in a case of Criminal Revision Application No.328 of 1982 decided by this Court (Coram: M.S. Parikh, J.) on 11/12-1-94. For similar purpose he has also relied upon judgment of this Court in a case of Criminal Revision Application No.313 of 1990 decided by this Court (Coram: D.H. Waghela, J.) on 4th August, 2000. In that case after referring to Sec. 397 read with Sec. 401 of the Code, this Court on page 12 of the said judgment has held as under:

"Under Section 401 of the Cr.P.C., this Court is clothed with the powers conferred on a court of appeal by Sections 386, 389, 390 and 391 which include the power in reverse the findings and sentence and acquit or discharge the accused. A conjoint reading of the legal provisions as above and the facts and circumstances of this case clearly suggest that this is a fit case where the extraordinary powers of an appellate Court are exercised."

6. As against this, Shri A.J. Desai, learned APP appearing on behalf of respondent-State submitted that in this case there are concurrent and consisting findings of facts of both the Courts below in which the courts below have rightly convicted the accused after appreciating oral and documentary evidence in this

behalf. He, therefore, submitted that this Court should not interfere with the findings of fact arrived at by Courts below in revisional jurisdiction in this behalf.

7. I have gone through the record of the case particularly evidence of Prahladbhai Maganbhai Chamar P.W.No.1 in which he has stated that he belongs to backward class and that he has not stated that he belongs to scheduled caste or scheduled tribe. Even prosecution has not produced documents to show that complainant belongs to scheduled caste or scheduled tribe. No oral evidence throw any light on the question as to whether complainant belongs to scheduled caste or scheduled tribe. I have also gone through the judgment of the Hon''ble Apex Court in the case of Masumsha Hasan Asha Musalman (supra) and also judgment of this Court in the case of Lalubha Keshrisinh Garasia (supra). In my view, there is no evidence at all to the effect that the accused have committed offence alleged against them on the ground that complainant is a member of a scheduled caste or a scheduled tribe. In view of the judgment of the Hon''ble Apex Court to attract the provisions of Sec. 3(2)(v) of the Act sine qua non that complainant is a person who belongs to a scheduled caste or a scheduled tribe and that the offence on the basis that complainant belongs to a scheduled caste or a scheduled tribe. In my view, this ingredients are absent in this case from the evidence on record and, therefore, no offence under Sec. 3(2)(v) of the Act arises. Similar principle has also been considered in the Division Bench judgment of this Court in Lalubha''s case which is binding on me.

8. In view of the discussions made hereinabove, this Revision Application is allowed. The judgment and order dated 27th September, 1993, passed by the learned Sessions Judge, Mehsana, in Criminal Appeal No.34/93 is hereby quashed and set aside. I further quash and set aside the order of conviction dated 5.8.93 passed by the learned Special Judge-cum-Assistant Sessions Judge, Mehsana in Special (Atrocity) Case No.35/93 whereby the learned Special Judge was pleased to convict the accused for six months and to pay a fine of Rs.250/- in default to undergo simple imprisonment for one month for the offence punishable under Sec. 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. Rule is made absolute.