
(2019) 02 GUJ CK 0067
In the Gujarat High Court
Case No : R/Criminal Appeal No. 611 Of 2015

Bharatbhai Rajabhai Ven (Dalit)	Vs	APPELLANT
State Of Gujarat		RESPONDENT

Date of Decision : 15-02-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 173, 208, 209, 374 Indian Penal Code, 1860 — Section 34, 120(B), 302

Citation : (2019) 02 GUJ CK 0067

Hon'ble Judges : J.B. Pardiwala, J;A.C. Rao, J

Bench : Division Bench

Advocate : Ad Shah, Pm Lakhani, R P Lakhani, Ronak Raval

Final Decision : Allowed

Judgement

1.00. The appellants - original accused Nos.1 and 2 have preferred the present Appeal under section 374 of the Code of Criminal Procedure challenging the judgement and order of conviction and sentence passed by the learned Additional Sessions Judge, Deesa camp at Deodar, District Banaskantha in Sessions Case No.35 of 2013 dated 22/4/2015, by which the learned Sessions Judge convicted both the appellants - original accused Nos.1 and 2 for the offence punishable under sections 302, 120(B) and 34 of Indian Penal Code and sentenced them to undergo life imprisonment with fine of Rs.10,000/-, and in default, sentenced to undergo further Simple Imprisonment for a period of three months.

2.00. The case of the prosecution, in nutshell is as under :-

The complainant Mashrubhai Mavjibhai hadiyal (Dalit) lodged FIR being CR No.I-142 of 2012 against in all three accused with the Tharad Police Station for the offence punishable under sections 302, 120(B) and 34 of Indian Penal Code on 2/10/2012, inter-alia alleging that on 6/9/2012 at about 11.00 A.M. his brother Bharat came with his Commander D.I. Bearing No.G.J.8.R.5713 to

Tharad and the complainant had also come to Tharad with his Tractor. It is stated that at about 4.00 O'clock in the evening, accused - Bharatbhai Rajabhai Ven and Shivabhai Nagabhai Ven, resident of village Mavsari had met the complainant near the Referral Hospital with their Car. They asked where the Bharat alias Bhati is. The complainant replied that the Bharat alias Bhati would be at the place where the vehicle for Deesa is being loaded. The complainant had seen, that the accused made the Bharat to sit in their White Colour Car and the Car had proceeded from Referral to the Deesa road. The complainant thought that they may have some business with Bharat. The complainant after completing his work at Tharad, returned to Khanpur. Thereafter, the father of the complainant informed the complainant that Bharat has not returned. Therefore, the complainant called Bharat on his mobile No.99255 05713, however, the phone was switched off. The complainant tried to call Bharat till late night and once the phone call was received, but there was no talk. Thereafter the complainant called Bharatbhai Vajabhai Ven on his Mobile Number 9687180543 at night. The phone was ringing but Bharat had not received the call. Thereafter, when he again called him, he had switched off the phone. On the next day morning, the complainant went to Tharad and inquired about the Bharat but no whereabouts of Bharat was found. Therefore, again the complainant called Bharatbhai Rajabhai Ven in the morning on 7/9/2012 and he informed the complainant that he will talk to him after coming to Tharad. However, he did not come to Tharad. Thereafter, in the evening at about 5.00 O'clock he got news from television that one dead-body is found near the village Siloi, Rajasthan which came from the Canal of Gujarat. Therefore, the complainant and his uncle Ramjibhai Hadiyal and Mevabhai Hadiyal, Dhudabhai Hadiyal and Bhim Hemjibhai Darghabhai, all went to Sanchor Police station and on inquiry, the police personnel of Sravana informed that the dead-body is found and same is kept in the Civil Hospital, Sanchor. On seeing the dead-body, the complainant found that it was the dead-body of his brother Bharat alias Bhati. There were injury marks on his body. He had seen that his brother had not put on Pant and he was in inner-wear. As per the complainant, his golden ear-rings were missing. There were injuries on his eyes and both the kidneys. Therefore, the complainant lodged the complaint alleging that the accused have killed his brother and taken away golden ear-ring and mobile and other items and thrown dead-body of his brother in the Canal.

2.01. Thereafter during the course of investigation the investigating officer arrested the appellants - accused Nos.1 and 2 and other accused No.3 on 14/11/2012. They were not released on bail and they were in jail all through out the trial.

2.02. The investigating officer recorded statement of the witnesses, prepared panchnama, performed inquest punchnama, got performed postmortem report of the deceased, prepared map of the scene of offence etc. After completion of investigation, the investigating officer filed chargesheet under section 173 of the Code of Criminal Procedure in the court of Judicial Magistrate, First Class, Tharad for the offence punishable under sections 302, 120(B) and 34 of IPC and the

case was registered as Criminal Case No.75 of 2013.

2.03. Since the case was triable by the Court of Sessions, the Judicial Magistrate after providing copies of the chargesheet papers to the accused under section 208 of the CrPC, committed the case to the Sessions Court under section 209 of the Cr.P.C. And the case was re-registered as Sessions Case No.53 of 2013 in the Sessions Court, Deesa camp at Diodar on 18/4/2013.

2.04. As the appellants were in jail, the Sessions Court issued Summons to the appellants - accused Nos.1 and 2 to remain present before the Court. The Sessions Court, after verifying that the accused, have received papers of the Chargesheet, frame Charge at Ex.9 for the offence punishable under sections 302, 120B and 34 of IPC on 5/9/2013. Plea of all the accused Nos.1 to 3 were recorded at Ex.Nos.10 to 12. The accused pleaded not guilty and therefore, the Sessions Court proceeded further with the trial in accordance with law.

2.05. The prosecution produced oral evidence and examined in all 29 witnesses and also produced 26 documentary evidence.

2.06. At the end of trial, the Sessions Court acquitted the original accused No.3 - Mavjibhai Kesharabhai Hadiyal (Dalit) for the offence punishable under sections for the offence punishable under sections 302, 120B and 34 of IPC, for want of sufficient evidence against him.

2.07. However, the Sessions Court convicted the appellants herein - original accused Nos.1 and 2 for the offence punishable under sections 302, 120B and 34 of IPC and sentenced to undergo life imprisonment with fine of Rs.10,000/-, and in default, sentenced to undergo further Simple Imprisonment for a period of three months.

Hence, the appellants in this Appeal have challenged the judgement and order of conviction.

3.00. Mr.A.D. Shah, learned counsel appearing for the appellants - original accused Nos.1 and 2 has vehemently submitted that the Sessions Court erred in convicting the appellants for the offence punishable under sections 302, 120B and 34 of IPC for the offence and sentencing them to undergo life imprisonment with fine. He has submitted that in fact the prosecution has failed to bring home the charge and as such the charge framed against the appellants is not proved beyond reasonable doubt.

3.01. Mr.A.D. Shah, learned counsel appearing for the appellant has submitted that there is not a single eye witness to the incident and this is a case of circumstantial evidence.

3.02. Mr.Shah, took us through the evidence of PW No.4 Nanjibhai Sendhabhai Ex.20, PW No.8 - Meetabhai Dharmabhai - Ex.26 as well as PW No.10 - Suresh Nanjibhai - Ex-28 and submitted that as per the said witnesses the accused have confessed before them that they were with the deceased Bharatbhai and also

consumed liquor together, therefore, the same can be said to be extra judicial confession of the accused to some extent. According to Mr.Shah, the same is not in accordance with law and not proved beyond reasonable doubt. He has submitted that even if such confession is believed, then also the same does not connect the accused with the commission of the alleged crime. Mr.Shah has further submitted that no alcohol is found in the body of the deceased in the postmortem report. Mr.Shah further submitted that even the conviction cannot be based on sole ex-extra judicial statement.

3.03. Mr.A.D. Shah, further submitted that as per the case of the prosecution, the complainant had seen the injuries on the dead-body of his deceased brother, however, no injury marks are found upon the whole body of the deceased during the postmortem.

3.04. Mr.A.D. Shah, has further submitted that even time of death of the deceased as per the opinion of the Doctor is quite contrary to the case of the prosecution.

3.05. Mr.A.D. Shah, further submitted that evidence of the mother of the deceased - Maniben PW No.14 Ex.35 and wife of the deceased - Varshaben PW No.9 Ex.27 is not considered by the Sessions Court in its true spirit.

3.06. Mr.Shah, took us through the evidence of PW No.5 Jagdishbhai Pravinbhai - Ex.21 and submitted that as the said witness has stated that he has seen the accused persons and the deceased going in a car and their evidence is considered by the Sessions Court and came together that the accused and the deceased were last seen together. He has submitted that, however, the chain of circumstances is not completed.

3.07. Mr.A.D. Shah, learned counsel appearing for the appellants has further submitted that the motive is not proved. He has submitted that it is alleged that the deceased demanding Rs.65,000 from the accused persons and therefore, the accused have killed the deceased. However, the same is not proved beyond reasonable doubt. According to Mr.Shah, as per the evidence of PW No.7 Rupa Savjibhai, he had seen three persons throwing something like dead-body in the canal and he has also identified two accused in the Court. He has further submitted that as per the evidence of PW No.2 Masharubhai, the accused committed murder of the deceased to avoid outstanding amount of Rs.65,000/-. Mr.Shah submitted that it is the case of the prosecution that the complainant had hired the accused Nos.1 and 2 to kill his own son and he agreed to pay Rs.65,000 to the accused nos.1 and

2. This is quite contrary to the charge framed against the accused. Mr.A.D. Shah, further submitted that the prosecution has subsequently changed its case at later stage during the course of trial, which is not permissible.

3.08. Mr.A.D. Shah, further submitted that the intention is not proved.

3.09. Mr.A.D. Shah, learned counsel appearing for the appellants has drawn our

attention to the evidence of PW No.7 - Rupabhai Savjibhai Ex.23 who has stated that he has seen three persons throwing something in canal like a man and he has identified two accused persons in the Court. He has submitted that the said witness is a got-up witness and his evidence is not trustworthy.

3.10. Mr.A.D. Shah, learned counsel appearing for the appellants has submitted that considering the evidence on record, the appellant is entitled to be acquitted by giving benefit of doubt.

4.00. Present appeal is opposed by Mr.Ronak Raval, learned APP appearing for the State. He has made the following submissions

[1] The prosecution has proved the case beyond reasonable doubt.

[2] The judgement and order of conviction and sentence passed by the Sessions Court is on appreciation of evidence and same is neither arbitrary nor contrary to the record and therefore, the same is not required to be interfered with by this Court.

[3] That there are evidence of PW No.4 Nanjibhai Sendhabhai Ex.20, PW No.8 - Meetabhai Dharmabhai - Ex.26 as well as PW No.10 - Suresh Nanjibhai - Ex-28, before whom the accused have confessed that they were with the deceased Bharatbhai and also consumed liquor together, therefore, the same can be said to be extra judicial confession of the accused.

[4] That as per the evidence of PW No.5 Jagdishbhai Pravinbhai Ex.21, he had seen the accused persons and deceased going in a car and thus, the appellants and accused were seen last together.

[5] That as per the evidence of PW No.7 Rupabhai Savjibhai Magirana Ex.23, he had seen three persons throwing something in canal like a man and the said witness has also identified the two accused persons in the Court.

He prayed that the appeal be dismissed.

5.00. Heard Mr.A.D. Shah, learned counsel for the appellants and Mr.Ronak Raval, learned APP appearing for the State at length. Perused the impugned judgement and order of conviction. Re-appreciated the evidence on record.

5.01. In the present case, there is not a single eye witness to the incident and the entire case hinges on circumstantial evidence.

5.02. According to the case of the prosecution, as per the evidence of PW No.4 Nanjibhai Sendhabhai Ex.20, PW No.8 - Meetabhai Dharmabhai - Ex.26 as well as PW No.10 - Suresh Nanjibhai - Ex-28, the accused confessed before them that they were with the deceased Bharatbhai and also consumed liquor together. While convicting the appellants, the Sessions Court relied on the said evidence of the said witnesses treating the same as extra judicial confession of the accused. However, no alcohol is found in the body of the deceased in the postmortem report. Even otherwise, accused cannot be convicted merely on the basis of the

ex-extra judicial confession. There is no other corroborative evidence to corroborate the version of the extra judicial confession.

5.03. As per the case of the prosecution, the complainant had seen the injuries on the dead-body of his deceased brother, however, no injuries were found on the body of the deceased during the postmortem.

5.04. Even the time of death of the deceased as per the opinion of the doctor is in conflict with the case of the prosecution.

5.05. The trial court failed to appreciate that the prosecution has not been able to prove and establish the motive behind the commission of the murder of the deceased.

5.06. As per the evidence of PW No.2 Masharubhai, the accused committed murder of the deceased to avoid payment of the outstanding amount of Rs.65,000/-. It has come on record that the complainant had hired the accused Nos.1 and 2 to kill his own son and he agreed to pay Rs.65,000 to the accused Nos.1 and 2. Thus, the prosecution changed its entire story during the course of trial, which is not permissible.

5.07. PW No.7 - Rupabhai Savjibhai - Ex.23, has stated that he had seen three persons throwing something in canal like a man also does not inspire any confidence and his evidence is not trustworthy. The said witness in his evidence has stated that at 5.00 O'clock in the evening he had seen three persons with the help of torch. According to him, he was searching of his lost buffalo and he while walking along the Canal, he had witnessed something being thrown in the Canal. He had walked about 10 Kilometers. The said witness has admitted that there is no order of the Court to mark his presence in the police station. There is no explanation as to why in the month of September at 5.00 p.m. the torch was required and though there was no order of the Court, why he had to go to the police station for marking his presence. Thus, the evidence of the said witness is not trustworthy and does not inspire any confidence.

5.08. The PW No.4 and PW No.8 have stated in their deposition that they had asked the Bharat - appellant No.1 and they had inquired about the deceased Bharatbhai to the appellant no.1 and stated that when they were proceeding in the Jeep from. Thereafter on the way to Mavsari near Canal, they met to four accused persons who stooped the Car and forced Bharat to get down from the Car and they started beating Bharat, so they ran away from the place leaving Bharat at the canal. According to the said witnesses, the appellant No.1 had told that as the battery of his phone had discharged, he could not inform the Sarpanch immediately, while the appellant No.2 had told him that as he had consumed more alcohol, he had slept. Thus, as such, there is no confession about the alleged incident, according to the said witnesses.

5.09. Further, the cause of death as per the postmortem report is asphyxia due to drowning . However, as per the case of the prosecution, the deceased was

killed before he was thrown in the canal, which is contrary to the medical evidence.

5.10. Considering the overall evidence on record, we are of the opinion that the prosecution has failed to prove the case against the accused beyond reasonable doubt and the accused are entitled to acquittal by giving benefit of doubt. This is a case of circumstantial evidence and law in this regard is required to be referred to.

5.11. This unfortunate fact cannot be lost sight of that in our courts there is a general tendency on the part of the witnesses not to tell the whole truth. They often resort to exaggeration and embellishment when narrating an incident. In this way the entire fabric becomes so polluted that the courts have to disengage the truth from falsehood. While performing such a function the entire evidence, coupled with the attending circumstances, has to be sifted. In that process it has to be found whether truth and falsehood are so inextricably mingled that it is not possible to sever one from the other. After an elaborate and comprehensive treatment, the intrinsic credibility of the witnesses, who testify, has to be determined and conclusion arrived at. For weighing such evidence there can be no specific canon as each case depends upon its own facts and peculiarities. Infirmities, which creep in the statements, have to be sufficient in nature to reach the core of the prosecution case.

5.12. It has been consistently laid down by the Apex Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See *Hukam Singh v. State of Rajasthan* AIR (1977 SC 1063); *Eradu and Ors. v. State of Hyderabad* (AIR 1956 SC 316); *Earabhadrapa v. State of Karnataka* (AIR 1983 SC 446); *State of U.P. v. Sukbasi and Ors.* (AIR 1985 SC 1224); *Balwinder Singh v. State of Punjab* (AIR 1987 SC 350); *Ashok Kumar Chatterjee v. State of M.P.* (AIR 1989 SC 1890). The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In the case of *Bhagat Ram v. State of Punjab*, reported in AIR 1954 SC 621, it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt.

5.13. We may also make a reference to a decision of this Court in the case of *C. Chenga Reddy and Ors. v. State of A.P.*, reported in (1996) 10 SCC 193, wherein it has been observed thus:

"In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the

circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence....".

5.14. In the case of Padala Veera Reddy v. State of A.P. and Ors., reported in AIR 1990 SC 79, it was laid down that when a 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.

5.15. In State of U.P. v. Ashok Kumar Srivastava, (1992 Cri.LJ 1104), it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

5.16. Applying the above aforesaid principles to the facts of the case on hand, we find substance in the submissions of the learned counsel of the appellants and we are agree with the same. Considering the overall facts and evidence on record, we are of the view that the impugned judgement and order of conviction and sentence is not sustainable in law.

6.00. In the result, the present Appeal is allowed. The impugned judgement and order of conviction and sentence passed by the learned Additional Sessions Judge, Deesa camp at Deodar, District Banaskantha in the Sessions Case No.35 of 2013 dated 22/4/2015 is hereby quashed and set aside. The appellants herein - original accused Nos.1 and 2 are acquitted of the offences punishable under Sections 302, 120(B) and 34 of the IPC, by giving benefit of doubt. The appellants herein - original accused Nos.1 and 2 be set at liberty forthwith if not required in any other case.