

(1998) 08 GUJ CK 0006
In the Gujarat High Court

Chikabhai Atmaram Thakore and Others

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 19-08-1998

Acts Referred:

Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 141, 146, 147, 148, 149

Citation : (1998) 3 GLR 2532

Hon'ble Judges : J.N. Bhatt, J;Arunkumar Kantilal Trivedi, J

Bench : Division Bench

Judgement

J.N. Bhatt, J.—By these appeals the appellant Nos. 1 to 5 - original accused Nos. 1 to 5 in Criminal Appeal No. 508 of 1991 have questioned the legality and validity of the impugned judgment and order of conviction and sentence recorded by the learned Sessions Judge, Ahmedabad (Rural), Mirzapur at Ahmedabad in Sessions Case No. 11 of 1991. It appears from the record that the Criminal Appeal No. 482 of 1991 came to be filed through jail by the appellant No. 2 and thereafter he came to be released on bail whereas Criminal Appeal No. 508 of 1991 is filed by the accused person including the original accused No. 2. That is how This Court while admitting Criminal Appeal No. 508 of 1991 directed that the Criminal Appeal No. 482 of 1991 to be heard along with Criminal Appeal No. 508 of 1991. Since both the appeals are in respect of same offence and same judgment and order, and in view of the order dated 18-1-1992 of This Court, both the appeals are being disposed of after hearing, simultaneously, by this common judgment.

2. The appellant Nos. 1 to 5 in Criminal Appeal No. 508 of 1991 are the original accused Nos. 1 to 5 in the Sessions Case No. 11 of 1991 who came to be convicted by the trial Court. The appellants are hereinafter referred to as accused persons in the same order, and the accused persons are held guilty u/s 302 read with Section 149 I.P.C, and they are sentenced to life imprisonment and to pay fine of Rs. 500/- each and in default to undergo four months rigorous

imprisonment. They are also held guilty for the offence punishable u/s 147 I.P.C, and each one is sentenced to undergo six months rigorous imprisonment. However, accused Nos. 1 & 3 who were found to have given knife blows to the deceased and are found also guilty for the offence punishable u/s 147 and to suffer rigorous imprisonment for six months on that count. The trial Court also has found accused Nos. 1 & 3 guilty u/s 135 of Bombay Police Act and sentenced to undergo four months rigorous imprisonment and to pay fine of Rs. 200/- and in default to undergo one month imprisonment. The impugned order of conviction and sentence in Sessions Case No. 11 of 1991 came to be recorded by the trial Court on 27-5-1991 which is directly under challenge before us in the main appeal.

3.1. With a view to appreciate the merits of the appeals and challenge against it, let us have a conspectus of relevant and material version of the prosecution which has given rise to these appeals.

3.2. On an auspicious day of Bhadarava Sudh Poonam, i.e., on 4-9-1990, the unfortunate killing of deceased Ranchhodbhai occurred between 4-30 and 4-45 p.m. in Tapalchok, Opp. Urban Bank, Sanand Town, which is part of Ahmedabad District (Rural) in pursuance of a common object of an unlawful assembly formed by the accused persons as per the prosecution case. The deceased Ranchhodbhai and the accused persons were on enimical terms. The accused No. 1 and the accused No. 3 were armed with knife each and they gave knife blows on the person of Ranchhodbhai whereas accused Nos. 2, 4 & 5 who were also members of unlawful assembly gave kicks and fist blows. According to the prosecution case the accused persons constituted unlawful assembly whose common object was to commit murder of deceased Ranchhodbhai, and in pursuance of said common object shared by accused persons the deceased was attacked in the evening near Tapalchock on 4-9-1990, which was also witnessed by the complainant-widow of deceased Ranchhodbhai, namely, Sharda @ Shantaben. The prosecution has also ascribed deep-seated motive. The appellant-original accused No. 1 Lala and also two others, i.e., (1) accused No. 3-Yasinbhai Motisha Fakir gave knife blows in the chest and abdomen portion of the deceased. Accused Nos. 2, 4 & 5 had given fist and kick blows. Thus, as a result of attack in pursuance of common object of unlawful assembly the injured person sustained serious injuries and fell down who was shifted in an autorickshaw to a Primary Health Centre at Sanand by his wife and other members of the family who had come there. The injured was found dead by the doctor and the post mortem was done on the next day.

4. The investigation was carried out upon the complaint lodged by Shantaben, Wd/o. deceased and the charge-sheet followed which culminated into Sessions Case No. 11 of 1991 before the learned Sessions Judge, Ahmedabad (Rural), Mirzapur, at Ahmedabad, in which upon trial the impugned order of conviction and sentence came to be recorded on 27-5-1991.

5. In order to appreciate the charges against the accused persons the prosecution relied on the oral evidence of following 20 witnesses:

Name PW No. Exh. No. 1. Dr. Chandrakant Punjabhai 1 20 2. Shantaben Ranchhodbhai 2 22 3. Vaghri Asit Ganpatlal 3 24 4. Rameshbhai Bachubhai 4 25 5. Vaghela Bachubhai Dolatsinh 5 27 6. Dilipkumar Babulal 6 29 7. Dasrathbhai Bababhai 7 31 8. Jayantibhai Bababhai 8 32 9. Akbarbhai Sulemanbhai Mansuri 9 33 10. Kanayalal Manilal Barot 10 34 11. Dasrathbhai Ranchhodbhai Rana 11 36 12. Rajnibhai Babubhai 12 37 13. Rajnikant Parshottamdas 13 38 14. Prakash Babubhai Shah 14 39 15. Rasiklal Mangaldas 15 40 16. Saraswatiben Ranchhodbhai Rana 16 42 17. Ibrahim Sahib/a Malek 17 44 18. Bhikhaji Juhap 18 46 19. Trikambhai Shankerdas Patel 19 47 20. Jitendra Nanalal Joshi 20 48

These witnesses supported the prosecution case. The trial Court after evaluating the documentary and viva-vote evidence and the submissions raised before it found the accused persons guilty and awarded sentence as stated, hereinbefore, holding that all the accused persons were the members of unlawful assembly on 4-9-1990 at the lime of incident in the evening and the common object of the unlawful assembly was to commit murder of the deceased Ranchhodbhai-husband of the complainant on account of deep-seated motive.

6. Learned Advocates appearing for the accused persons have forcefully submitted before us that the prosecution has failed to prove the alleged complicity, of the accused persons. In that it was, repeatedly, contended that the impugned judgment and order is recorded without sufficient evidence to prove that there was an unlawful assembly common object of which was to commit murder of deceased Ranchhodbhai and reliance on the witness of the evidence of the complainant-widow of the deceased, i.e., Shantaben is neither legal nor reasonable. She is the interested witness and again she could not have witnessed the incident. It was also submitted that the prosecution witness Akbarbhai Sulemanbhai Mansuri has, totally, given a different version excluding the original accused No. 3. The evidence of Dasrathbhai Bababhai and Saraswatiben Ranchhodbhai Rana, who is the daughter of the deceased could not have been relied on. In short, it was jointly contended that the prosecution has not been able to establish the guilt of accused persons. The learned Addl. P.P. Mr. Desai has supported the impugned judgment and order holding all the accused persons guilty for the offences. That the Prosecution Witness No. 1-Dr. Chandrakant Punjabhai who was examined at Exh. 20 clearly goes to show that the injuries sustained by the deceased were sufficient to cause the death and as such death was caused due to number of injuries which are elaborately highlighted by him in his evidence. We do not propose to discuss the evidence of Medical Officer-Dr. Chandrakant "in extenso" for the only reason that the cause of death and the nature and number of injuries sustained by the deceased were not at all disputed. Dr. Chandrakant has also conducted the post-mortem and the post-mortem report is produced at Exh. 21.

7. In view of the medical evidence of Dr. Chandrakant and the post-mortem report following external injuries were found on the person of the deceased:

- (i) Index finger of right hand first phalanx was ventrally cut incised transverse,
- (ii) Middle finger first phalanx transverse incised wound,
- (iii) Ring finger second phalanx ventrally transverse incised wound,
- (iv) Right thumb base upto palm incised wound.
- (v) Left thumb third phalanx medial side incised wound 1 cm. transverse.

Following were the main injuries on the body:

Left side 8 cm. below the nipple incised wound 3 cm. x 1/2 cm. x deep inside cavity.

4 cm. below the wrist wound and medially to umbilicus 2 x 1/2 cm. x superficial fascia.

Above the umbilicus cut portion of intestine (small) out of body.

Medial to third not cut part of intestine out of body.

Medial to inferior angle and parallel to inferior angle and just right to midline 2 x 1/2 cm. upto rib.

2 x 1/2 cm. upto coracoid process. Incised wound left side 7 cm. from lower line of neck.

These all injuries were possible by sharp cutting instrument.

Following were the internal injuries:

- (1) Left side between 9th and 10th deep incised wound.
- (2) Above the 9th and medial to first incised wound upto rib.
- (3) Incised wound 2 cm. deep inferior lobe lower part and 2 cm. length, 1/2 cm. breadth.
- (4) paritoneum cut according to two wounds.
- (5) 2 cm. puncture cut of ilium.

Mesentery 4 punctures cut each having 2 cm. length.

It is, therefore, not in controversy that the cause of death was due to cardiorespiratory failure due to excessive bleeding of incised wounds in lungs and intestine.

8. We have gone through the discussions and the entire evidence of complainant - P.W. 2 Shardaben @ Shantaben, widow of the deceased. Despite several attempts to create a cloud by pointing out discrepancies and contradictions in her evidence, her testimony has remained unimpeached. Her presence was found quite natural. It was very clear from the evidence that she had gone near the venue of offence on the day of incident as she wanted to buy tea-powder and

sugar for making tea. She has, in clear terms, narrated in her testimony at Exh. 22 that the original accused No. 1 - Lala and accused No. 3 - Yasin inflicted knife blows as they were indignant and accused No. 2 - Chikabhai, accused No. 4 - Jitubhai and accused No. 5 - Shantibhai gave fist and kick blows. Adjoining owners of the shop and some neighbours had gathered there. Prosecution witness-one Jayantibhai and Dasrathbhai who were present when she witnessed the incident. Since people intervened who had collected, the accused persons, immediately, fled away from the venue of offence. It is also very clear from the evidence of Shardaben @ Shantaben that the accused persons were out to kill her husband as he had lodged a complaint of attacking him by the accused persons sometime before. It is also very clear from her evidence that her son Chandu was killed by the accused persons ten months before.

9. The incident was preceded by an assault on the deceased-Ranchhodbhai by the Accused persons with sword and iron pipes for which the complaint was filed by deceased before the police and the matter was pending in the Court at the time of main judgment. Therefore, the prosecution case that the deceased was done away to withhold further prosecution and in pursuance of common object of unlawful assembly formed by the accused persons is reinforced.

10. Her evidence was seriously criticised before us. It is true that the prosecution witness No. 8 - Jayantibhai Bababhai examined, at Exh. 32, who was present at the time of incident occurred, evidence of Shantibhai (sic.) has not supported the prosecution case as he has turned hostile. It is also true that one P.W. 9 - Akbarbhai Suleman Mansuri examined at Exh. 33 has supported the prosecution case and the evidence of Shantaben in respect of accused Nos. 1, 2 & 5. It may also be mentioned that there are some discrepancies and contradictions in the evidence of P.W. 7 -Dasrathbhai Bababhai at Exh. 31 and the panchas have not supported the prosecution case.

11. After having examined the entire evidence we are quite satisfied that the trial Court was justified in placing reliance on the evidence of P.W. 2 - Shardaben at Exh. 22 who is the widow of deceased whose presence at the venue of offence was natural and her evidence remained impeachable. On the main story of the prosecution version, it is needless to mention that minor contradictions or some discrepancies at the micro-level would not be sufficient to dynamite the whole prosecution case. The main anxiety of This Court is to see as to whether the prosecution case and the main points against the accused persons are established beyond reasonable doubt or not. Some minor contradictions in respect of time, or narration of incident, or number of blows between some witnesses would not constitute a sufficient basis for discarding the evidence of the widow of the deceased.

12. No doubt, in one sense, it could be said that the widow of the deceased to be an interested person. It was, therefore, contended that she is a partisan witness and she should not be believed. It is true that the evidence of interested or partisan witness should be evaluated with extra care and caution. It is not the

interestedness which would affect the authenticity of the testimony of a witness who is closely related to the deceased. On the contrary, a close relation, may it be the better half, ordinarily would not be interested to let-off the real assailants and to involve the innocent. Therefore, serious criticism about the evidence of prosecution witness No. 2 - Shantaben, at Exh. 22, in our opinion, is meritless. Her evidence inspire our confidence. Her testimony has remained unshaken on the main story of prosecution.

13. Not only that her evidence is also supported by the evidence of prosecution witness No. 8 - Dasrath Bababhai who is examined at Exh. 31 and also by the evidence of prosecution witness No. 9 - Akbarbhai Sulemanbhai Mansuri. It, therefore, cannot be contended that the conviction has been founded upon the only testimony of close relative. Her evidence is also corroborated in material particulars by other witnesses and the circumstances.

14. Prosecution Witness No. 2 - Shardaben had lodged a complaint before Sanand Police at the earliest point of time. Incident occurred between 4-30 and 4-35 p.m. and the F.I.R. lodged by her before Sanand P.S. came to be recorded at 5-15 p.m. on the same day within a spell of 40 minutes. The motive created for the commission of the offence is successfully established beyond doubt. It is, therefore, rightly observed by the trial Court that there was deep-seated motive. It is true that the deceased-Ranchhodbhai lost one son on account of murder which according to the prosecution case was committed by accused. There is no dispute about the following aspects in view of statement before us and also further statements of accused persons u/s 313:

(i) The deceased Ranchhodbhai had lodged a complaint against the accused persons for being assaulted. The copy of F.I.R. came to be produced at Hxh. 19.

(ii) The deceased had lost son - Chandu on account of murder and according to prosecution case the authors of the said murder were also the present accused persons.

(iii) The complaint of assault pending against the accused persons at the time of incident was sought to be settled by the accused to which the deceased refused.

15. Under the circumstances, all the aforesaid facts which are not in controversy, the conclusions of the trial Court that there was deep-seated motive for the commission of crime in question is quite justified, and in our opinion, the assessment of evidence of the trial Court is supportable and acceptable. Merely because some of the witnesses turned hostile and thereby obliged the accused persons whose history is known in the light of record cannot be sufficient to discard the evidence of eye -witness-widow-Shantaben the prosecution witness No. 1 and Dasrathbhai prosecution witness No. 7 and Akbarbhai Sulemanbhai Mansuri prosecution witness No. 9. As stated hereinbefore the trial Court has already enumerated the corroborative circumstances confirming the authenticity of the prosecution case. Therefore, in our opinion, the ultimate conclusion recorded by the trial Court in passing the impugned judgment of conviction and

sentence cannot be said to be in anyway vulnerable or impeachable. We are satisfied that the prosecution case has rightly weighed and proved beyond reasonable doubt by the trial Court.

16. Obviously, that would lead to the appreciation and examination of legal position and the provisions under which the accused persons came to be convicted. The trial Court has convicted all the accused persons for committing murder of deceased Ranchhodbhai u/s 302 read with Section 149. The trial Court has also found that there was offence under Sections 147 and 148 of I.P.C. It was contended before us that no important role or no weapon employed even as per the prosecution case by the accused Nos. 2, 4 & 5. That according to prosecution only the accused Nos. 1 & 3 dealt with by knife blows and accused Nos. 2, 4 & 5 with kicks and fist blows. Merely because some of the members of unlawful assembly are not armed with deadly weapons or they have not actively participated in giving blows would not absolve them from vicarious liability for commission of crime in pursuit of common object of unlawful assembly in which they were members. It is not the imperative of law that all the members of unlawful assembly should actively participate completely in commission of the offence. It is not saying by hands but saying by mind which matters for holding each member of the unlawful assembly vicariously accountable for the offence committed in pursuance of common object.

17. It is succinctly established without any shadow of doubt that all the accused persons were present at the relevant time at the venue of offence. All of them had culminated with the deceased and vice-versa. They were the persons against whom the deceased had filed complaint for being assaulted. The accused pressurised the deceased, if not tortured, to settle or withdraw the complaint filed by him and for which trial against them was pending. The offence contemplated u/s 149 is, therefore, vicarious one if the offence is committed or crime is committed in pursuance of common object of unlawful assembly. That what was the common object and whether there was unlawful assembly are not the aspects which need not be and could not be directly established by any independent witness. It is, therefore, rightly expounded in a catena of decisions that common object of constitution of unlawful assembly are some of the aspects which could be relied upon from the set of proved facts. The trial Court has placed reliance on the aforesaid circumstances in holding that there was unlawful assembly formed by the accused persons with a common object to kill the deceased. It is also clearly found from the record that accused Nos. 1 & 3 were armed with knives and gave several blows in the abdomen and around the area of the abdomen of the deceased.

18. In Chapter VIII of the I.P.C. the offences against public tranquillity are "provided and Section 141 in the Chapter deals with unlawful assembly which reads as under:

141. Unlawful assembly: An assembly of five or more members is designated as an "unlawful assembly". if the common object of the persons composing the

assembly is:

First - To overawe by criminal force, or show of criminal force, the Central or any State Government or Parliament or the Legislature of any State, or any public servant in the exercise of lawful power of such public servant, or

Second - To resist the execution of any law, or any legal process, or

Third - To commit any mischief or any criminal trespass, or other offence, or

Fourth - By means of criminal force, or show of criminal force, to any person to take or obtain possession of any property or to deprive any person of the enjoyment of right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment or to enforce any right or supposed right, or

Fifth - By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation: An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

19. It could very well be seen from the aforesaid provision that in order to constitute an unlawful assembly there should be five or more persons and it must have one of the five specified objects as their common object. That the evidence led by the prosecution itself permit to infer without any shadow of doubt that there was an unlawful assembly formed by five accused persons the common object of which was to commit murder of deceased Ranchhodbhai. The accused persons are rightly held to be the members of unlawful assembly. It is also rightly held by the trial Court that the common object of the unlawful assembly constituted was to commit murder of deceased Ranchhodbhai in view of deep-seated motive.

20. Section 146 of I.P.C. deals with rioting. Whenever force or violence is used by an unlawful assembly or by any member thereof, in prosecution of the common object of such assembly, and every member of such assembly is guilty of the offence of rioting. Section 147 deals with punishment for rioting. Whoever is guilty of rioting, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. As per provisions of Sections 147 & 148 whoever is guilty of rioting armed with deadly weapon or with anything which could be used as a weapon of offence, is likely to cause death, is liable for a punishment of imprisonment of either description for a term which may extend to three years, or with fine, or with both. Section 149 provides that every member of unlawful assembly guilty of offence committed in prosecution of common object is vicariously liable. So, there is a contributory criminality in view of the provisions of Section 149 The prosecution has succinctly established without any shadow of doubt that there was rioting and accused Nos. 1 & 3 were armed with deadly weapons like knives and as such they had used

knife to give blows which has culminated into unfortunate death of deceased Ranchhodbhai. Therefore, accused Nos. 1 & 3 are also vicariously liable for offence of rioting punishable u/s 149.

21. The trial Court has rightly found all the accused persons guilty and sentenced mem to undergo imprisonment for life u/s 302 I.P.C., read with Section 149. The first essential element of the provisions of Section 149 is the commission of offence by anyone of the members of the assembly. The second essential feature is that the offence must be committed in prosecution of common object of unlawful assembly. Even prosecution can succeed by showing that as the members of that unlawful assembly knew that offence is to be likely to be committed in prosecution of common object formed by them. There is no doubt about the constitution of unlawful assembly with unlawful common object acted and even on the subject it need not be a precondition in what Section 149 of I.P.C., provides whoever functions on the basis of contributory criminality. If it is done by even one of the members of the unlawful assembly and crime is committed in prosecution of common object it is sufficient as we have discussed hereinabove that all these aspects are in different forms have been examined by the trial Court and we find no infirmity whatsoever to make a departure thereof.

22. Upon the true and correct appraisal of testimonial and documentary evidences, extensively made dispassionately, and after having heard the submissions of the learned Advocate appearing for original accused and learned A.P.P., we are fully satisfied that the impugned judgment of conviction and sentence order as alleged by the prosecution have been succinctly established without any shadow of doubt. Therefore, in our opinion, these appeals merit dismissal and accordingly both the appeals are dismissed. Appellant Nos. 2, 4 & 5 original accused Nos. 2, 4 & 5 are reported to be enlarged on bail in course of appeal. Therefore, they are directed to surrender to serve out the sentence immediately.

23. Learned Advocate Mr. Nanavati for the accused persons at this stage requests for six weeks time to surrender. Since accused Nos. 2, 4 & 5 are on bail since long, they are directed to surrender within six weeks and their bail-bonds stand cancelled after six weeks from today.

24. Before parting with, it may be taken on record that original accused No. 2 while being in jail filed Criminal Appeal No. 482 of 1991 and again all the accused persons filed Criminal Appeal No. 508 of 1991 and vide order dated 18-1-1992 both are ordered to be heard together. Therefore, both the appeals stand dismissed.