

(2009) 10 GUJ CK 0054
In the Gujarat High Court
Case No : Criminal Appeal No. 519 of 1995

Dadubhai Dehabhai Kathi and Another	APPELLANT
Vs	
State of Guj.	RESPONDENT

Date of Decision : 01-10-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 357(1), 374(2)
Penal Code, 1860 (IPC) — Section 307, 326, 34

Citation : (2009) 10 GUJ CK 0054

Hon'ble Judges : H.B. Antani, J

Bench : Single Bench

Advocate : Nitin M. Amin, for the Appellant; Chetna Shah, APP, for the Respondent

Final Decision : Allowed

Judgement

H.B. Antani, J.—The appellants have preferred the present appeal u/s 374(2) of the Code of Criminal Procedure, 1973 (for short, "the Code") against judgment and order dated 18.04.1995 passed by the learned Additional Sessions Judge, Surendranagar in Sessions Case No. 104 of 1993 by which, the learned Judge convicted appellant Nos. 1 and 2 (original accused Nos. 1 and 2) for the offence punishable u/s 326 read with Section 34 of I.P.C. for R.I. of 3 years and fine of Rs. 3000/- each, in default, R.I. of one year. The complainant was awarded Rs. 4000/- towards compensation by the learned Judge u/s 357(1)(b) of the Code.

2. As per the prosecution case, the complainant, on 03.09.1993 at about 4:50 pm., had gone to his field and while he was coming back at about 7:30 pm., he was assaulted by the appellants. As per the prosecution case, appellant No. 1, who was armed with dharia, gave dharia blow on the head of the complainant while appellant No. 2, who was armed with farsi, gave farsi blow on the leg of the complainant. Original accused Nos. 3 and 4, who came to be acquitted by the learned Judge were present at the scene of offence and they instigated the appellants. When the incident took place, Teja Virambhai, nephew of the

complainant, was accompanying him and he had seen the incident. After sustaining the injuries, the complainant was taken to his residence and from there, he was shifted to Sayla hospital where, he lodged complaint against the appellants. The investigation was carried out by Arvindsinh S. Zala-P.S.I., Surendranagar in pursuance of the complaint given by Gabhrubhai to the police sub-inspector, Sayla police station. At the conclusion of the investigation, the investigating officer submitted chargesheet against the appellants and two other accused persons, who were acquitted by the learned Judge for the offence punishable u/s 307 read with Section 34 of I.P.C. The chargesheet was submitted before the learned Magistrate, Sayla, who in turn, committed the case to the Sessions Court as the case was exclusively triable by the Sessions Court. The charge against the appellants was framed vide Exh.3 and the appellants pleaded not guilty to the charge levelled against them. Therefore, the matter was set down for full-fledged trial before the learned Sessions Court.

3. The prosecution has examined following witnesses in order to prove guilt of the appellants in the commission of offence.

-----						P.W.
Name	of		witness			Exh.
-----						1.
Complainant	Gabhrubhai		Malabhai			14
-----						2.
Witness	Teja		Virambhai			17
-----						3.
Witness	Vibhabhai		Raghubhai			18
-----						4.
Witness	Parimaben		Boghabhai			19
-----						5.
Witness	Mashrubhai		Pitambarbhai			20
-----						6.
Panch	Pitambarbhai		Jivabhai			21
-----						7.
Panch	Sureshbhai		Jivabhai			22
-----						8.
Panch	Narayanbhai		Popatbhai			23
-----						9.
Panch	Hasmukh		Himmatlal			25
-----						10.
Ghanshyambhai		Chaturbhai				Dr. 26
-----						11.
Head	Constable		Dansang		Nathubhai	29
-----						12.
Executive	Magistrate		Bahadurali		Nazarali	31
-----						13.
Investigating	Officer	PSI	Arvindsinh	S.	Zala	35

4. The prosecution has also produced following documentary evidence in order to bring home the guilt against the appellants.

Nature of document					Sr.No Exh.
Panchnama of place of incident					1. 10
Panchnama of seizure of clothes put on by complainant					2. 11
Panchnama of seizure of cloth [Pachhedi] put on by witness Rabari Meru					3. 12
Panchnama of fencing made in Kharaba and cultivable land on the north of check dam in village Nana Matra					4. 13
Original complaint and FIR					5. 15
Panchnama of seizure of blood-stained clothes put on by complainant.					6. 16
Panchnama of seizure of weapons used by accused persons in the incident.					7. 24
Injury Certificate issued by Medical Officer in respect of injuries sustained by Gabharubhai Alabhai					8. 27
Extract of Sayla Police Station Diary.					9. 30
Dying Declaration					10. 31/1
Letter written by PSI Sayla to Executive Magistrate, Sayla for recording dying declaration.					11. 32
Pursis dropping witnesses					12. 33
Injury Certificate issued by Medical Officer of C.U. Shah Medical Centre to Ghabharubhai Malabhai					13. 34
Panchnama of seizure of weapon from accused Kathi Dadubhai Dehabhai					14. 36
FSL Report					15. 37
Letter sent to FSL showing description of muddamal					16. 38
Pursis of Notification issued by District Magistrate					17. 39
					18.

Letter written by Nanamatra-Kaswali Joint Gram Panchayat to PSI, Sayla.	40
-----	19.
Extract of village form No. 8A of Kathi Najbhai Punjbhai	41
-----	20.
Extract of village form 7/12 in respect of Najbhai Punjbhai	42
-----	21.
Rojkam made by Circle Inspector, Vibhag-2, Sudamada.	43
-----	22.
Copy of extract of village form 7/12 in the name of the government.	44
-----	23.
Rojkam of Gauchar land.	47
-----	24.
Copy of extract of village form 7/12	48

5. The learned Judge, on the basis of the oral depositions adduced by the prosecution and the documentary evidence, held that as per the complaint given by Gabhrubhai, the appellants, armed with dharia and farsi, committed assault on the complainant when he was returning from his field. Appellant No. 1 gave dharia blow on the head of the complainant whereas appellant No. 2 gave farsi blow on the leg of the complainant. Two other accused persons, present at the scene of offence, instigated both the appellants to commit the crime. The learned Judge held that the complaint given by the complainant is supported by his own deposition vide Exh.14 wherein, he has narrated the incident in exhaustive detail. The complainant was accompanied by his nephew - Teja Virambhai, who has been examined vide Exh.17. The version given by the complainant is supported by Tejabhai and, therefore, the prosecution has established the involvement of the appellants in the commission of offence. However, considering the injuries sustained by the complainant, the learned Judge convicted the appellants for the offence punishable u/s 326 read with Section 34 of I.P.C. and considering the evidence against original accused Nos. 3 and 4, the learned Judge held that their involvement in the commission of offence is not established by the prosecution in a conclusive manner and, therefore, acquitted accused Nos. 3 and 4.

6. Learned advocate Mr.Nitin Amin, representing the appellants, submitted that the depositions adduced by the prosecution witnesses do not inspire necessary confidence to convict the appellants for the offence punishable u/s 326 read with Section 34 of I.P.C. The learned advocate submitted that the complainant has been examined vide Exh.14 and he has deposed in his testimony that on the date of incident, appellant No. 1 was armed with dharia and he gave dharia blow on his head while appellant No. 2 was armed with farsi and he gave farsi blow on his leg. He has further deposed that the other two accused persons were also present at the scene of offence. However, after sustaining dharia and farsi blows, he became unconscious. The learned advocate submitted that the version given by Gabhrubhai is not trustworthy and reliable and considering the deposition

adduced by PW-10-Dr. Ghanshyambhai vide Exh.26, the complainant was fully conscious when he was admitted in the hospital. The doctor has stated in the cross-examination that when the patient was brought to the hospital and thereafter when he was taken to Surendranagar, he was fully conscious. Therefore, the version of unconsciousness of injured - Gabhrubhai is falsified by the deposition given by Dr. Ghanshyambhai. The learned advocate submitted that even though Gabhrubhai had ample opportunity to disclose the names of the assailants after sustaining the injuries, he could disclose the names of the assailants only at the time when the complaint was given by him on 03.09.1993. The learned advocate placed reliance on the deposition given by Dr. Ghanshyambhai vide Exh.26 and submitted that after sustaining the injuries on 03.09.1993, the complainant was admitted in the hospital and, at that time, he narrated the place of incident and the manner in which he was given dharia and farsi blows by the assailants, but did not disclose the names of the assailants to the doctor, who recorded the history at the time of admission of the complainant in the hospital. Thereafter, the doctor gave wardhi to the Sayla police station as per the history given by Gabhrubhai. The learned advocate placing reliance on the wardhi at Exh.30, submitted that as per the wardhi, even the weapons used in the commission of offence were not disclosed and it has been only mentioned that complainant - Gabhrubhai sustained injuries in the scuffle. He submitted that thus, the names of the appellants were not disclosed by the complainant at the earliest opportunity even though ample opportunity was available to him. The learned advocate submitted that the version given by the complainant in his deposition that because he became unconscious, he could not disclose the names, makes it abundantly clear that with a view to save his own skin, the complainant gave false deposition. He submitted that, therefore, the deposition adduced by the complainant is not trustworthy and reliable and, on that ground alone, the appellants are required to be acquitted. The learned advocate submitted that it is the say of the prosecution that complainant-Gabhrubhai was accompanied by his nephew - Tejabhai Virambhai but that fact is also denied by the Executive Magistrate, who has given deposition vide Exh.31. In his cross-examination, he has deposed that the patient has not disclosed the name of any one, who was present at the time of incident. This also raises doubt about involvement of the appellants in the commission of offence. The learned advocate submitted that in view of the glaring lacuna in the deposition adduced by the complainant and the depositions of Dr. Ghanshyambhai vide Exh.26 as well as Executive Magistrate vide Exh.31, the prosecution has not established the involvement of the appellants in the commission of offence in a conclusive manner. Save and except the aforesaid evidence, the prosecution has not produced any other evidence to indicate the involvement of the appellants in the commission of offence. The learned advocate submitted that the prosecution has examined Teja Virambhai vide Exh.17 but, as per his say, he had not seen the incident and he could not say as to who were involved in the commission of offence. Likewise, PW.3-Vibhabhai Raghubhai vide Exh.18 has stated that he only took the complainant on the motorcycle to Sayla hospital. This witness has

turned hostile and not supported the prosecution case. P.W.4-Parimaben Boghabhai has been examined vide Exh.19. This witness has not seen the incident and she has only deposed in her testimony that the complainant was her son and after sustaining injuries in the incident, he was taken to the hospital. PW.5-Mashrubhai Pitambar, examined vide Exh.20, did not disclose the names of the appellants. Panch witness who are examined by the prosecution have turned hostile and not supported the prosecution case indicating the involvement of the appellants in the commission of offence. Thus, the case of the prosecution suffers from infirmity and, therefore, the benefit of the same deserves to be given to the appellants and the order passed by the learned Judge be quashed and set aside and the appellants be exonerated for the offence punishable u/s 326 read with Section 34 of I.P.C.

7. Learned A.P.P. Ms.Chetna Shah, representing the State, submitted that the prosecution has examined 13 witnesses with a view to prove the involvement of the appellants in the commission of offence. The deposition given by PW.1-Gabhrubhai at Exh.14 is supported by his own complaint vide Exh.15. The complainant was accompanied by Tejabhai, who has been examined by the prosecution to prove the incident as well as participation of the appellants in the commission of offence. The complainant has deposed in his testimony as to how appellant No. 1, armed with dharia gave dharia blow on his head and appellant No. 2, armed with farsi gave farsi blow on his leg. The other witnesses have supported the version given by the injured witness Gabhrubhai. Dr. Ghanshyambhai has been examined by the prosecution vide Exh.26. He has given injury certificate to the injured. It is true that the names of the assailants were not disclosed by the complainant while giving history to Dr. Ghanshyambhai, but that would not weaken the prosecution case in any manner whatsoever as the complainant has already disclosed the names of the assailants in his complaint as well as in his deposition at Exhs.15 and 14 respectively to the present case. The learned A.P.P. submitted that when the involvement of the appellants in the commission of offence is established by the prosecution then there is no reason to disturb the reasoning and finding given by the learned Judge in convicting the appellants for the offence punishable u/s 326 read with Section 34 of I.P.C. Learned A.P.P. submitted that the appeal preferred by the appellants is without any substance and the same deserves to be dismissed.

8. I have heard learned advocate Mr.Nitin Amin for the appellants and learned A.P.P. Ms.Chetna Shah for the respondent-State at length and in great detail. I have also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record of the case with reasonable and broad probabilities.

9. I have reappreciated the evidence on record of the case. Considering the deposition adduced by complainant - Gabhrubhai vide Exh.14, it becomes clear that Gabhrubhai was assaulted by appellant No. 1 with dharia on 03.09.1993 while appellant No. 2, armed with farsi gave farsi blow to the complainant on his

leg. The complainant, as a result of the injuries sustained in the scuffle, was admitted in the hospital where he was issued injury certificate by Dr. Ghanshyam. On perusal of the deposition given by the complainant, it becomes clear that the complainant disclosed the names of the appellants in the deposition and prior to giving his deposition in the Court, he had also mentioned the names of the assailants in his complaint at Exh.15. The incident in question took place on 03.09.1993. Thereafter, he had ample opportunity to disclose the names of the assailants but the same was not availed by the complainant. With a view to save his own skin, the complainant has deposed in his testimony that after sustaining the injuries in the scuffle, he became unconscious and at the time of recording the complaint, he regained consciousness. But that version of the complainant is falsified by the deposition given by Dr. Ghanshyam at Exh.26. Dr. Ghanshyam has deposed in his cross-examination that when the patient was brought to the hospital and thereafter, when he was taken to Surendranagar, he was fully conscious. Likewise, Bahudarali, Executive Magistrate, who has given deposition at Exh.31, has deposed in his cross-examination that the patient has not given the history that he was not conscious after the injuries sustained by him in the scuffle.

10. It has been deposed by the complainant that appellant No. 1 was armed with dharia and gave dharia blow on his head while appellant No. 2 was armed with farsi and gave farsi blow on his leg. While considering the deposition of Dr. Ghanshyambhai at Exh.26, it becomes clear that while giving history to the doctor, the complainant did not disclose the names of the assailants. He only mentioned about the place of incident and weapons used in the commission of offence. On perusal of the deposition of PW.11-Dansung Nathubhai, examined at Exh.29, he has also mentioned that the names of the assailants were not given by the complainant and on perusal of the wardhi at Exh.30, the names of the assailants are not mentioned in the wardhi and even the weapons used in the commission of offence have not been mentioned in the wardhi. As per the complainant's version, his nephew - Tajabhai accompanied him on the date of incident while, on perusal of the deposition given by Bahadurali, Tejabhai never accompanied the complainant. These contradictions, in my considered view, are glaring and when the case of the prosecution bristles with contradictions then the benefit of the same deserves to be given to the appellants. It is the cardinal principle of the criminal law that when the injured, who sustained injuries, gives the testimony that he sustained injuries then his version is required to be believed but at the same time, the version given by the injured must be trustworthy and reliable. Considering the entire gamut of evidence on record of the case, the prosecution version about the involvement of the appellants in the commission of offence and their participation in the assault committed on the complainant has not been conclusively established by the prosecution in any manner whatsoever and, therefore, the order passed by the learned Judge cannot be sustained. I have also considered the deposition adduced by the other witnesses as well as panch witnesses and the deposition adduced by the

investigating officer in the present case. The documentary evidence, such as panchnama of the place of incident, panchnama of recovery of weapons used in the commission of offence, etc. and F.S.L. report is perused by me. In view of the above discussion, the prosecution has miserably failed to prove involvement of the appellants in the commission of offence in conclusive manner. I have considered the judgments rendered by the Apex Court in case of Joseph alias Jose Vs. State of Kerala, and in case of Rajeevan and Another Vs. State of Kerala, as well as the judgment cited by the learned A.P.P. in case of Umar Mohammad and Ors. v. State of Rajasthan reported in (2009)3 SCC (Cri) 244 and there is no dispute about the ratio or proposition laid down in those judgments. However, considering the entire evidence on record of the case, it becomes clear that the prosecution has not established the involvement of the appellants in the commission of offence by adducing cogent, convincing and conclusive evidence.

11. In view of the foregoing discussion, the appeal is allowed. Judgment and order dated 18.04.1995 passed by the learned Additional Sessions Judge, Surendranagar in Sessions Case No. 104 of 1993 convicting the appellants for the offence punishable u/s 326 read with Section 34 of I.P.C. for R.I. of 3 years and fine of Rs. 3000/-each, in default, R.I. of one year is hereby quashed and set aside. The appellants are set at liberty forthwith. Amount of Rs. 4000/-, if any, paid to complainant - Gabhrubhai by way of compensation be recovered and amount of fine paid by appellant No. 2 (Original accused No. 2) be refunded to him on proper verification and identification. As the appellants are on bail, their bail bond shall stand cancelled. Muddamal articles to be disposed of in terms of the order passed by the learned Judge.