

(2010) 02 GUJ CK 0007
In the Gujarat High Court

Case No : Criminal Appeal No. 1 of 2007 and 2810 of 2008

Dahyabhai Ambaram Solanki (Chamar)	APPELLANT
Vs	
State of Gujarat	RESPONDENT

Date of Decision : 25-02-2010

Acts Referred:

Penal Code, 1860 (IPC) — Section 114, 302

Citation : (2010) 51 GLR 2617

Hon'ble Judges : H.N. Devani, J;A.L. Dave, J

Bench : Division Bench

Advocate : Mrudul Barot and B.H. Solanki, in Criminal Appeal No. 1 of 2007
Ashish M. Dagli, in Criminal Appeal No. 2810 of 2008, for the Appellant; K.L.
Pandya, Assistant Public Prosecutor in Both Appeals, for the Respondent

Final Decision : Dismissed

Judgement

A.L. Dave, J.—The Appellants, herein, came to be tried and convicted by Sessions Court, Mehsana, in connection with Sessions Case No. 125 of 2006. for the offence punishable u/s 302. read with Section 114 of the Indian Penal Code, for committing murder of Jagdishbhai Chhaganbhai Solanki (Chamar) on 10-6-2006, around 8-30 p.m., in the outskirts of Village Matasar, Taluka Bechraji, on the bank of river Rupen. The Appellants are sentenced to undergo imprisonment for life with fine of Rs. 1,000/-, and in default to undergo rigorous imprisonment for a period of three months, by judgment and order dated 8th December, 2006.

2. The prosecution case in brief is that, one Chhaji Khodaji Thakor, who was passing by the place of incident around 8-30 p.m., on the date of incident noticed the Appellants assaulting the deceased Jagdishbhai Chhaganbhai Solanki (Chamar) with stick. According to him, he saw the occurrence in the ravines of river Rupen. He, however, left the place of incident, without either intervening or raising any alarm. Upon reaching the village, it emerges from his evidence that he came across one Babuji on the outskirts of the village and told him about

having seen the incident. Then, he went to Pratapji Becharji Thakor, the Sarpanch of the village Matasar and told him about having seen the incident, who, in turn informed the Sarpanch of village Karansagar, Kalabhai Punjabhai Chamar. According to the witness, thereafter, they went to the place of incident, where the deceased was lying. The witness has stated that, at that time, the deceased orally indicated that two persons had assaulted him. On receiving the information, the Sarpanch of Karansagar village, also came to the place, where the deceased was lying. The deceased was then taken to the hospital in a tractor and then, an F.I.R. was lodged before the Bechraji Police Station, on basis of which, an offence was registered and investigated. Upon investigation, the police having found sufficient evidence against the Appellants, filed charge-sheet against them in the Court of Chief Judicial Magistrate, Mehsana, who in turn committed the case to the Court of Sessions, Mehsana and Sessions Case No. 125 of 2006 came to be registered.

2.1. The charges are framed against the Appellants at Exh. 3, to which both the accused pleaded not guilty and came to be tried by the trial Court.

2.2. Upon considering the evidence led by the prosecution, the trial Court found that the case against the accused/Appellants, was proved and recorded their conviction u/s 302, read with Section 114 of the Indian Penal Code and sentenced them, as stated in the earlier part of the judgment.

3. Mr. Mrudul Barot, learned Advocate appears for original accused No. 1-the Appellant in Criminal Appeal No. 1 of 2007, whereas Mr. Ashish M. Dagli, learned Advocate appears for original accused No. 2, the Appellant in Criminal Appeal No. 2810 of 2008 and Mr. K. L. Pandya, learned A.P.P., represents the Respondent-State, in both the appeals.

4. We have heard the learned Advocates for the Appellants and the learned A.P.P. and have examined the records and proceedings, in the context of the rival submissions.

4.1. The prosecution has examined eye-witness-Chehaji Khodaji Thakor at Exh. 25. According to this witness his field is situated on the "Kacha" road, between Matasar and Karansagar villages. He used to stay overnight in the field to protect the crop. On the date of incident, he was proceeding towards his field from his home at about 8-30 p.m. At that time, there was some light and he saw the Appellants beating the deceased. He noticed the occurrence because of the sounds of beating, coming from that direction. The Appellants were beating the deceased with stick. The witness states that he is not sure, as to who was holding the stick. He also states that, he did not notice anything further than this. Thereafter, he went towards the village and called the Sarpanch. He informed the Sarpanch about the aforesaid incident and told him to inform the Sarpanch of Karansagar. The witness further states that the deceased stated that two persons had assaulted him. This witness has been thoroughly cross-examined on the topography of the place of incident and the distance from the place from

where he saw the incident occurring. The witness states that he was on the top of the ravine and the incident occurred at the bottom. The distance was about 20 feet. This witness further states that, thereafter, he went to the village and informed Babuji about the same, without talking to anyone else. He states that, he, then gathered the people from the village. In reply to a suggestion that the F.I.R. was lodged after having consultation with other persons, the witness states that he had asked the Sarpanch to inform the police, and then left for his field. The persons who went to the place of incident, after it occurred, were, the eye-witness, Sarpanch of the village Karansagar-Kalabhai Punjabhai Chamar, Sarpanch of the village Matasar-Pratapji Becharji Thakor and brother of the deceased, along with several other persons.

4.2. It is stated by the witness-Kalabhai Punjabhai Chamar (Exh. 26) that he noticed the deceased lying on the slope of the river. Kalabhai also states that the deceased told him that the Appellants had beaten him. This witness was subjected to cross-examination as well. He states that he did not know that the complaint had to be lodged immediately, therefore, he did not lodge the complaint immediately.

4.3. Pratapji Becharji Thakor (Exh. 27) states that he was Sarpanch of Matasar village and was working as such, for about four years, prior to his deposition. He admitted that the victim was lying near the road. He also noticed the deceased making some utterances, which he could not hear, because of the distance between him and the deceased.

4.4. The first contention raised is that, at about 8-30 p.m. in the evening, in the outskirts of the village, there would not be sufficient light which could have made it possible for the eye-witness to notice the incident. The incident has occurred in the lower part of the ravine, at a distance of about 20 to 50 feet, and therefore, the witness could not have seen the incident. However, we have inquired from the Indian calendar, which shows that, that was a day prior to the full moon day of "Jeth" month as per the Indian calendar. Therefore, there would be sufficient moon light. Even otherwise, it would not have made much difference, for the reason that, the people staying in village, and particularly, who stay in agriculture fields during nights, are used and trained to work in darkness, and therefore, no inference can be drawn that the witness might not have seen the incident, as it was night time.

4.5. It is also worth noting that the panchnama of the place of incident and the map prepared, would go to show that there were electric light poles, at a distance of about 40 and 50 feet. Therefore, the argument that the witness could not have seen the incident, cannot be accepted.

4.6. The second fold of the argument is that, the Appellants have no motive to commit the murder of the deceased. The case of the prosecution is mainly based on the evidence of an eye-witness, and hence, the motive pales into insignificance.

4.7. The second contention is that, there is discrepancy in ocular evidence and medical evidence, so far as it relates to the injuries found on the person of the deceased. According to the eye-witness, he saw the Appellants giving blows to the deceased with stick. He has been thoroughly cross-examined on the topography and he clearly states that the ravine is about 20 feet deep and he was on the top of the ravine, and therefore, saw the occurrence. He admits that the incident lasted for about 10 minutes. However, he neither intervened nor did he raise any shouts for help. The explanation tendered by him for not doing so is that, he was all alone. and therefore, he went away. He, then, states that he went to the village and, on the way, he met Babuji. He thereafter, informed the Sarpanch of the village Pratapji Becharji Thakor, about the incident. Upon getting information, the other witnesses went to the place of incident and noticed the deceased, lying on the slope of the river. The deceased was offered water and he stated that two persons had assaulted him.

4.8. It is argued that, there is a slight discrepancy, as one of the witnesses stated that the deceased had given the names of the assailants, whereas the other says that the deceased only said that two persons had attacked him. In our view, nothing turns on this discrepancy, because besides this and dying declaration, there is evidence to connect the Appellants with the crime as would be seen from the discussion in the Paragraph to follow.

4.9. Another contention that is raised is that according to the eyewitness, the incident occurred at the bottom of the ravine and he saw it while standing on the top of it, whereas the other witnesses have stated that, they found the victim lying near the "kacha" road or on the slope of the river. The panchnama of the place of incident indicates that the place, where the puddle (pool) of blood was found, was at a considerable distance from the ravines. Therefore, it is vehemently contended that there is a discrepancy about the place of incident.

4.10. Having read the panchnama of place of incident (Exh. 18), and having read the evidence of eye-witness Chehaji Khodaji Thakor (Exh. 25) and witnesses Kalabhai Punjabhai Chamar (Exh. 26) and Pratapji Becharji Thakor (Exh. 27), we find that, although, at first glance, there appears to be inconsistency in the evidence about the place of incident, on close scrutiny we find that it is only a difference in language used for describing the same place and it is clear when the witness-Kalabhai Punjabhai Chamar (Exh. 26) says, that he saw the deceased lying in the slope of the river. This witness, in his cross-examination, admits that by "slope of river", he meant "the bank of river". As can be seen from the map (Exh. 31), which is prepared on the basis of panchnama of the place of incident, it is clear that the place of incident is in proximity of the river on the one side, and the "kacha" road on the other. Obviously, therefore, when a witness describes the place of incident as "slope of the river" or "the bank of river" or the "ravine", it means the same place and in our opinion, there is no discrepancy or any inconsistency in the evidence relating to the place of incident.

4.11. Now, insofar as the question as to whether there is any discrepancy

between the ocular evidence and the medical evidence is concerned, it is contended that as per the ocular evidence of the eye-witness, he saw the Appellants assaulting the deceased with stick and after seeing that for some time, he left the place of incident. The sum and substance of the evidence of the eye-witness is that he noticed both the Appellants assaulting the deceased with the stick, against this the medical evidence is that only one injury on the head, which is proved to be fatal and attributable to any hard and blunt substance, was found on the person of the deceased. If what was noticed by the eye-witness was correct, there ought to have been multiple injuries, attributable to a hard and blunt weapon, would have been found on the person of the deceased, and therefore, there is inconsistency between medical evidence and ocular evidence.

4.12. It is not possible to accept this contention for the reason that, the medical evidence speaks of one head injury which is proved to be fatal. It is attributable to hard and blunt weapon like stick. The medical evidence also speaks of several other injuries, in the form of abrasions and bruises with contusions. Such abrasions with contusions cannot be result of any dragging or simple fall, and would therefore, be attributable to a hard and blunt weapon. Thus, we, upon giving the evidence a harmonious and legal interpretation, find no discrepancy about the place of incident or between medical evidence and ocular evidence on the injuries caused to the victim. The version of the eye-witness that the incident lasted for about 10 minutes has to be treated as a mistake in assessment of time or at the worst an exaggeration with no significance as the witness has soon after seeing the incident reported the same to Babuji and the Sarpanch, involving the Appellants. Principle of *res gestae* would thus be attracted.

4.13. It was also contended that there was no blood on the stick, which was allegedly discovered at the behest of one of the Appellants. It is true that there was no blood found on the stick, but, that by itself will not abrogate the ocular evidence of the eye-witness, supported by other contemporaneous material. The fact that, the eye-witness, while coming towards village, immediately informed Babuji and then Sarpanch of the village, Pratapji Becharji Thakor, about the fact that the Appellants were assaulting the deceased, would be, therefore, significant and relevant. The eye-witness had no time to think over and concoct a story, and even otherwise, there is no material on record to show that he had any motive to do so, either. This witness, being a third party, has neither any grievance against the accused nor any favour towards the victim, his evidence cannot be brushed aside lightly, only on the ground of so-called inconsistency in the medical evidence.

4.14. It is true that the F.I.R. has been lodged late i.e. on the next day, but, the late filing of F.I.R. pales into insignificance, since soon after witnessing the incident, the eye-witness has given a clear version of the incident to one Babuji and the Sarpanch of Matasar-Pratapji Becharji Thakor, implicating both the Appellants and that fact stands duly proved.

4.15. The next important factor, which requires consideration is that clothes of

original accused No. 1-Jagdishbhai Khusalbhai Solanki (Chamar). have been found to be stained with blood, when they were recovered by drawing panchnama (Exh. 20), and the said blood-stains, after chemical analysis by F.S.L., were found to be of blood group "B", which is found to be the blood group of the deceased. Even the shirt of original accused No. 2-Dahyabhai Ambaram Solanki (Chamar) was also found to be stained with blood. However, upon chemical analysis by F.S.L., the blood group of those blood-stains could not be ascertained.

4.16. The ultimate outcome is that the incident is seen by the eye-witness-Chehaji Khodaji Thakor, the clothes of original accused No. 1 are found to be stained with the blood of that of the deceased, and there is no discrepancy about the nature of injuries, as described by the eye-witness and the doctor. The suspicion that, the night being dark on the day of incident, restricting the vision, also gets ruled out, because by way of contemporaneous material, we have, upon referring to the calendar found that it was the day prior to the full moon day. The fact that, eye-witness informed Babuji and the Sarpanch of the village Matasar-Pratapji Becharji Thakor, immediately, about having seen the incident would wipe out the effect of minor discrepancies indicated. Even, when the deceased was taken to Dr. Jignesh Rameshchandra Modi (Exh. 12), the history was given that the Appellants have assaulted the deceased, which was recorded by him in Medical Certificate (Exh. 13). The evidence proves active participation by both the Appellants, in the incident, as can be seen from the evidence of Chehaji Khodaji Thakor (Exh. 25), and therefore, the trial Court was justified in invoking Section 114 of the Indian Penal Code, while recording conviction. The medical evidence clearly indicates that the injuries were sufficient enough in the ordinary course of nature, to cause death and are possible with the muddamal "stick". This aspect has gone unchallenged. The resultant effect is that both the appeals have to fail.

4.17. At this stage, Mr. Ashish M. Dagli, learned Advocate for original accused No. 1, has invited attention of this Court to a decision of the Supreme Court in Shrishti Narain Jha Vs. Bindeshwar Jha and Others, to support the argument that the discrepancy in the version of eye-witness and the medical evidence, would result in acquittal.

4.18. The principle of law enunciated by the Supreme Court in the above-mentioned judgment, is not disputed. However, on a perusal thereof, we find that, while recording acquittal, apart from the discrepancy in the version of eye-witness and medical evidence, several other factors i.e. long-standing enmity between the parties, the nature of injuries being not attributable to the weapons alleged to be used etc., were also taken into consideration by the Apex Court, which facts are absent in the case on hand, and therefore, the said judgment would not help the Appellants.

4.19. Mr. Dagli has further relied on another decision of the Apex Court in Prabir Mondal and Another Vs. State of West Bengal, In that case, the prosecution led a

specific theory that the complainant suffered injuries, while he tried to prevent the accused, by holding the blade of a knife. However, no injury was found on the palm of the complainant by the doctor, who examined him. Moreover, the bloodstained knife and mat, recovered from the place of incident, were not sent to F.S.L. The Apex Court, therefore, held that the possibility of fabrication cannot be ruled out, and set aside the conviction.

4.20. In the instant case, in our opinion, the situation is quite different from the one emerging in the case mentioned above. In the case on hand, the injuries found on the body of the deceased, tally with the weapon alleged to be used by the Appellants. Besides that, the version given by the eye-witness, implicating both the Appellants, is consistent and is also supported by contemporaneous material and, therefore, this judgment will also not come to the help of the accused persons.

4.21. Mr. Mrudul Barot, learned Advocate for original accused No. 2, has also invited our attention to a decision of Division Bench of this Court in *Rolia Jamal Ratwa v. State of Gujarat*, reported in 2000 (2) GLR 1364, wherein the Division Bench found that there were discrepancies in the version given by the witness, claiming to be an eye-witness, regarding exact place of occurrence. In that case, the Court held that, in view of the diversions and inconsistencies in the statements of the witnesses, none of the witnesses can be said to be an eye-witness, and the Appellant was given the benefit of doubt.

4.22. In the present case, as discussed hereinabove, there is no inconsistency regarding the place of incident, but, it is only the difference in language, which is used by different witnesses to describe the place of incident, which gives an impression that, there is inconsistency about the place of incident, and hence, this judgment will also not come to the rescue of the accused persons.

5. For the reasons stated hereinabove, both the appeals fail, and are dismissed. The judgment and order of the Sessions Court, Mehsana, dated 8th December, 2006, passed in Sessions Case No. 125 of 2006, stands confirmed. The original accused No. 2-Dahyabhai Ambaram Solanki (Chamar) is on bail, his bail-bonds stand cancelled. The original accused No. 2 shall surrender before the Jail/Competent Authority, within a period of four weeks, from today.