
(2008) 08 GUJ CK 0075
In the Gujarat High Court
Case No : Criminal Appeal No. 535 of 2001

Dharshi Chakubhai Vaghari	Vs	APPELLANT
State of Gujarat		RESPONDENT

Date of Decision : 27-08-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 114
Penal Code, 1860 (IPC) — Section 302, 34, 411, 460

Citation : (2009) 1 GLR 614

Hon'ble Judges : Z.K. Saiyed, J;A.M. Kapadia, J

Bench : Division Bench

Advocate : Sadhana Sagar, for the Appellant; K.C. Shah, APP for Opponent 1, for the Respondent

Final Decision : Dismissed

Judgement

Z.K. Saiyed, J.—The present criminal Appeal has been preferred by the convict appellant- original accused of Sessions Case No. 130 of 1998 challenging the Judgment and order of conviction dated 30.5.2001 rendered by the learned Additional Sessions Judge, Junagadh. By the said Judgment the learned Additional Sessions Judge sentenced the appellant - accused for life for the offence u/s 460 of Indian Penal Code (for short "I.P. Code").

2. The facts of the prosecution case is that at village Makhiyada of Junagadh District there is one place named "Bhutiya Bapa Temple". In the said temple one Purshottam Bapu was residing with his family and doing the work as "devotee". Prior to the date of incident Triveniben, wife of Purshottam Bapu went to Rajkot to drop her daughter Nita and at that time Purshottam Bapu was alone at the said place. During the night of 29/30-4-1998, some unknown persons have entered into Bhutiya Bapa's place with an intention to commit theft and murder and at that time Purshottam Bapa was alone and just to justify the illegal act of offence Purshottam Bapa was threatened by them and he was murdered and

golden and silver ornaments and cash amount from the temple was taken away with the common intention of committing offence.

3. On 30.4.1998 the complainant went to the Bank at village Makhiyana at about 1.30 p.m. and at about 2.30 p.m. when he was doing his work at that time Patel Chandubhai Madhabhai of Makhiana village came and told him that Purshottam Bapu of Bhutiya Bapa's place is being murdered and articles are lying scattered there. On saying so Kalubhai told him to call Sarpanch. Patel Chandubhai called Kantilal Devjibhai and thereafter they all the three went to the place of Bhutiya Bapa. There they saw that the dead body of Purshottam Bapu was lying there on the cot in a room near the temple. The dead body was covered with mattress and shawl which were taken off by them and they noticed that from the nose, bleeding was there and swelling was on the neck of deceased. On seeing so they felt that somebody has murdered Bapu during night time. The lock of the room was broken down and the articles were lying scattered there. So, Kalubhai inquired from the wife of Purshottam Bapu and after knowing the facts he went to the Police station and filed complaint before Junagadh Taluka Police Station.

4. The Police has registered the complaint vide CR No. 0073 of 1998 for the offence punishable u/s 302 & 460 I.P. Code. The police has carried out the investigation, prepared Inquest panchnama and also the panchnama of scene of offence, muddamal articles were seized. The dead body of deceased was sent for autopsy and the statements of connecting witnesses were recorded. During the investigation Deputy Superintendent of Police, Head quarter, Junagadh, Mr. Jaisinh Jodhabhai has received one information on 22.7.1998 that the offenders are near Goladhan Dudukiya road. On receipt of such information he sent his subordinate staff members and made raid at the said place with two panchas and then at the said place in the light of torch they noticed that one person was trying to run away from the said place and, therefore, he was caught hold by the members of raiding party and he was identified by P.S.I. Jhala that he was Vaghri Dharshi Chapu (present appellant - accused). Then his physical condition was verified and during search Rs. 1900/- was recovered from his possession and from the bag 10 "Chhatra" and two "Panchiya" and one knife was recovered. He was interrogated and on interrogation, it was found that the said articles were looted by him from the place of "Bhutiya Bapa's Temple". He has also received information from the present appellant that other articles were looted by other person, who have absconded. So, the articles were seized under the panchnama and then in connection with the said recovery, the statements were recorded and other oral as well as documentary evidence was also collected by the Investigating Officer. Thereafter, after completion of investigation charge sheet was filed against the present appellant - accused in the court of learned Chief Judicial Magistrate, Junagadh. As the learned Chief Judicial Magistrate was having no jurisdiction to try the case, the learned Magistrate committed the case to the Sessions for trial.

5. The trial Court framed charge (Exh.1) against the accused. The appellant -

accused has not pleaded guilty to the charge and the case was proceeded against the present appellant - accused. The accused has also asked for assistance of an Advocate to defend his case and, therefore, the Advocate was provided to defend his case, by the Legal Aid Committee.

6. In order to bring home the charge levelled against the accused, the prosecution has examined in all 9 witnesses and relied upon their oral testimonies. They are as under:

P.W.1 - Complainant - Kalubhai Raningbhai, Ex.24;

P.W.2 - Prabhakar Vaikunthray Vasavada, Medical Officer, Ex.26;

P.W.3 - Haridas Laxmidas, Circle Inspector, Ex.29

P.W.4 - Ishwarlal Parsottamdas , Exh.32

P.W.5 - Manjulaben Mangaldas, Ex.33;

P.W.6 - Triveniben Parsottamdas, wife of deceased Ex.34;

P.W.7 - Chimanbhai Madhbhai, Ex.35;

P.W.8 - Rameshbhai Kalabhai Ex.36;

P.W.9 - Prafulbhai Nathabhai, Ex.37;

P.W.10- Khimjibhai Jamnadas, Panch, Ex.38;

P.W.11- Vrajlal Purshottambhai, Executive Magistrate, Ex.39;

P.W.12- Bhanubhai Nathabhai, Panch, Ex.46;

P.W.13- Jagdishbhai Govindbhai, Panch, Ex.48;

P.W.14- Jaisinh Jodhabhai, Dy.S.P., Ex.49;

P.W.15- Amad Jusab, Panch, Ex.50;

P.W.16- Kishor Mohanbhai, Panch, Ex.52;

P.W.17- Harsukhbhai Amrutlal, Panch, Exh.54;

P.W.18- Harishchandrasinh Ravubha, I.O., Ex.57;

P.W.19- Nirmalsinh Kalyansinh, Ex.58;

7. To prove the culpability of the accused, the prosecution has also produced and relied upon the following documentary evidence. They are as under:

(1) Panchnama of Scene of Offence, Exh.8;

(2) Post Mortem Report, dtd. 30.4.98, Exh.9;

(3) Panchnama of possession of clothes and blood sample of deceased - dated 5.5.98, Ex.10;

- (4) Inquest Panchnama, dtd. 30.4.98, Ex.11
- (5) Police Report dt.30.4.98 sent with Dead Body Exh.12 & 28;
- (6) F.S.L. Report dtd.30.4.98, Ex.13
- (7) Certificate of Dy. S.P. giving powers to FSL , Ex.14
- (8) Muddamal Ravangi Nondh, Ex.15
- (9) Receipt regarding Muddamal received by FSL, Ex.16
- (10) Forwarding letter of F.S.L., Ex.17;
- (11) F.S.L. Report, Ex.18;
- (12) Serological Report of F.S.L., Ex.19;
- (13) Dispatch form of F.S.L. Ex.20
- (14) Opinion of F.S.L., Ex.21
- (15) F.I.R. dtd. 30.4.98, Ex.22;
- (16) Copy of Police Station Diary dtd.30.4.98, Ex.23
- (17) Original F.I.R. Ex.25;
- (18) Yadi written by PSI Junagadh Taluka Police Station to on duty M.O. For Post Mortem, dated 23.7.98, Ex.27;
- (19) Yadi to Circle Inspector for drawing the map of scene of offence, Ex.30;
- (20) Map of scene of offence Ex.31;
- (21) Yadi to Executive Magistrate written by P.S.I. Taluka Police Station, Junagadh for Identification Parade, dtd.23.7.98, Ex.40;
- (22) Yadi dated 23.7.98 written by Mamlatdar to P.S.I. For obtaining information, Ex.41;
- (23) Reply of P.S.I. to the Yadi written by Mamlatdar, Ex. 42;
- (24) Yadi dated 28.7.98 written by Mamlatdar to keep present the witnesses of Identification Parade, Exh.43;
- (25) Yadi written by P.S.I. to the Executive Magistrate to give copy of Identification Parade after keeping the witnesses and accused present, Exh.44;
- (26) Panchnama of Identification Parade, Ex.45;
- (27) Panchnama of arrest of accused and seizure of muddamal dtd.22.7.98, Ex.47;
- (28) Panchnama of taking possession of "Omkar" and "Dano" from the wife of accused, Ex.51;

(29) Panchnama of identification of articles produced by the wife of accused, Ex.53;

(30) Panchnama of identification of "Chhatar" produced by the accused; Ex.55;

(31) Panchnama of place of offence shown by the accused, dtd.23.7.98, Ex.56;

8. Thereafter, after examining the witnesses, the statement of accused u/s 313 Cr.P.C. was recorded in which the appellant has contended that he is innocent and he has been falsely implicated in the said offence.

9. After considering the oral as well as documentary evidence the learned Additional Sessions Judge, Junagadh, vide impugned Judgment and Order dated 30.5.2001 in Sessions Case No. 130 of 1998 held the present appellant - accused guilty for the offence punishable u/s 460 I.P. Code and sentenced him to suffer Rigorous Imprisonment for life and to pay fine of Rs. 2000/- i/d to undergo further imprisonment for six months and also ordered to hand over Muddamal articles No. 9, 11 to the Mahant/Trustee of Bhutiya Bapa Temple after Appeal period is over and remaining muddamal articles were ordered to be disposed of.

10. Being aggrieved by and dissatisfied with the impugned Judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Junagadh, the present appellant - original accused has filed this Appeal, through Jail.

11. Heard learned Advocate Ms. Sadhna Sagar, appointed through Legal Aid Committee, for the appellant - accused and Mr. K.C. Shah, learned APP for the respondent - State, at length.

12. Ms. Sadhna Sagar, learned Advocate, has contended that the present case is only a case of circumstantial evidence and the prosecution has failed to prove the allegations levelled against the present appellant - accused. She has also contended that the panchnama of recovery of muddamal articles are not proved and the independent witnesses and the panch witnesses have not supported the case of the prosecution. It is also contended that identification of present appellant - accused is not established beyond reasonable doubt by the prosecution. It has also been contended that the oral evidence of panch witnesses of Identification Parade and the evidence of Executive Magistrate is doubtful and it is not a corroborative piece of evidence to connect the present appellant in the said offence. She has also contended that just from the recovery of stolen property, a person cannot be held guilty for the offence. She has also contended that the learned trial Judge has not applied his mind and the Judgment of the trial Court is biased and against the provision of law. She has also prayed that the sentence of imprisonment of life is also very harsh. Lastly, Ms. Sagar has contended that the Judgment and Order rendered by the trial Court is not proper, legal and against the provisions of law and, therefore, the same requires to be quashed.

13. On behalf of the State, Mr. K.C. Shah, learned A.P.P. has contended that

there is voluminous reliable, trustworthy and clinching evidence on record which unequivocally and unerringly proves that the appellant - accused has committed the offence charged against him. He has contended that in the facts of the case Section 114 of the Evidence Act is straightway applicable in the matter. Mr. Shah has read the oral as well as documentary evidence and contended that it was the duty of the appellant before the trial Court to explain the possession of stolen property. Even the motive, preparation and intention of the present appellant - accused is also proved. He has contended that from the evidence of identification parade and the panchnama of arrest of the appellant - accused and also the possession of muddamal stolen articles clearly established the guilt of the appellant - accused. He has also contended that the trial Court has dealt with each and every aspects of the matter and contented that the Judgment and order rendered by the trial Court is legal and proper and, therefore, the Appeal filed by the appellant - accused deserves to be dismissed.

14. We have gone through the oral as well as documentary evidence led by the prosecution. We have also perused the submission made by both the parties. From perusal of oral evidence of Medical Officer, who has performed Post Mortem Note, it has been specifically explained that the cause of death of deceased is due to the fracture of bottle neck of the deceased. We have also perused the Post Mortem Report as well as Inquest Panchnama and oral evidence of Medical Officer. We have also gone through the cross examination of this witness and found that the defence has failed to establish that it was not a case of murder. We have also found that the cause of death of deceased was unnatural and homicidal. It is true that there was no eye witness, but when the muddamal stolen articles were found from the appellant - accused, it is established that the appellant - accused has committed the offence alleged against him. Especially when he failed to explain some satisfactory explanation regarding possession of muddamal articles. We have also gone through the evidence of P.W. 8 & 9. The said witnesses have identified the present appellant before the Executive Magistrate during identification parade.

15. From perusal of Panchnama Ex.56, it is established by the prosecution that the stolen articles were recovered from the possession of the present appellant and after the event of incident the present appellant had absconded and thereafter on 22.7.1998 the appellant - accused was found out and arrested and the stolen/looted muddamal articles were found from his possession. We have also perused the oral evidence of P.W.10, who was panch witness of identification parade and in his presence Prosecution Nos. 8 & 9 have identified the appellant - accused. We have also considered the panchnama of identification parade. We have not found any contradictory version from the oral evidence of said witnesses. We have considered the evidence of Panch witnesses of recovery panchnama, Ex.47, of stolen articles from the accused. Regarding the possession of stolen property the appellant - accused has not tendered any reasonable or trustworthy explanation.

16. We have also gone through the oral evidence of Medical Officer. The time and date of death of deceased is also established by the prosecution from this medical expert witness and according to the expert opinion the deceased must have died between 29/30.4.1998 and it was considered that at the midnight the deceased was assaulted and he was murdered. We have also perused the oral evidence of Investigating Officer and from the oral evidence of Investigating Officer we have not found any illegality committed by him. The Investigating Officer is a public servant and he has no personal interest or enmity with the appellant - accused.

17. We have also considered the Judgment of the trial Court. We have also gone through the reasons assigned by the trial Court. The trial Court has not considered the case against the appellant - accused for the offence u/s 302 34 I.P. Code and held the accused guilty for the offence u/s 460 I.P. Code.

18. The presumption permitted to be drawn u/s 114, Illustration (a) of Evidence Act has to be read along with the important time factor. If ornaments or things of deceased found murdered are found in possession of a person within a short period soon after the alleged incident, a presumption of guilt may be permitted. Presumption arises in favour of the validity of the Act. When explanation of the accused as to the possession of stolen property is not reasonably true, a presumption would immediately be drawn in accordance with the provisions of Section 114, Illustration (a) of the Evidence Act. The fact that within short period after the stolen muddamal articles recovered from the appellant coupled with other circumstances of case, warrant presumption that the appellant must have committed the offence. It is open to the Court to convict the accused by using the presumption where the circumstances indicate that no other reasonable hypothesis except the guilty knowledge of appellant is open to the prosecution.

19. We have found from the oral as well as documentary evidence that valuable muddamal articles ornaments were recovered very soon after the incident of murder which has taken place and muddamal articles have been proved to have been stolen in the course of the said offence and, therefore, the case of the appellant clearly falls within the ambit of Section 460 I.P. Code.

20. We have also found that the factum of recovery of articles at the instant of the accused person in presence of Police Officers and Panch witnesses who have deposed to be the same is itself sufficient to bring home the guilt of the accused under the provision of Section 460 I.P. Code with the aid of Section 114 of Evidence Act.

21. From the evidence itself on record that stolen articles were recovered from the possession of appellant - accused and due to recovery of ornaments and other muddamal articles by the police in presence of panch witness is some thing to say that the accused and other abettors were in company of each other at the place of deceased and in absence of any explanation then perhaps the presumption can be drawn upon the facts and circumstances of the case.

Illustration (A) to Section 114 of the Evidence Act is to effect the man who is in the possession of stolen goods ornaments within a short period of said offence is the real culprit of the offence and no doubt in above case presumption is further extended to the extent by holding such person has committed the offence of murder also. So, in this case there are sufficient circumstances to connect the accused with the guilt of murder and also the guilt u/s 411 I.P. Code, and that is to say, that he has not explained the possession of stolen property and, therefore, the only presumption is required to be drawn by the application of Section 114(a) of the Evidence Act.

22. In the present case murder and robbery were part of the same transaction and the accused from whom the recoveries were made, consequent upon his statement of disclosure he did not offer any explanation regarding the possession of stolen property. By drawing presumption u/s 114 of Evidence Act, it can safely be held that the aforesaid act was committed by the appellant. When the appellant - accused has not explained the possession of stolen articles, currency notes, it can be presumed that he is the real offender and the trial Court has rightly held guilty for the offence punishable u/s 460 I.P. Code.

23. We have also found that in the present case the appellant could not give the explanation as to how he came into possession of valuable ornaments and currency notes belonging to Bhutiya Bapa's place. In the facts and circumstances of the case we are of the opinion that this is a fit case to connect the guilt of the appellant - accused with the guilt.

24. The principles of proof beyond reasonable doubt is applicable in the matter of testing the guilt of the accused. It has no operation in the area of proof of primary facts, particularly in cases where the guilt of the accused is sought to be established by circumstantial evidence. Proof of primary facts is one thing and inference of facts to be drawn from primary facts is another thing. In regard to proof of basic or primary facts the Court has to judge the evidence in the ordinary way and in the appreciation of evidence in respect of proof of these basic or primary facts, there is no scope for the application of the principles of benefit of doubt. The Court considers evidence and decides whether that evidence proves particular fact or not. We have considered the oral as well as documentary evidence. We have not found any lacuna regarding the observation made by the trial Court in its Judgment and order.

25. In the case of Earabhadrapa v. State of Karnataka reported in , the Hon''ble Supreme Court has held that "where the accused was charged for murder and robbery, mere fact that a period of one year had lapsed between the commission of offence and discovery of stolen articles would not lead to the presumption that the accused was only a receiver of stolen property and had not committed murder, particularly when the accused was absconding during that period."

26. From the perusal of the Judgment and order of the trial Court we have not found any breach of the provisions of law. We have also found that it was the

duty of the appellant - accused to explain the possession of stolen property. We are, therefore, of the opinion that the we have no reasons to interfere with the Judgment and order of the trial Court. We are in complete agreement with the reasoning assigned by the trial Court.

27. As observed and discussed at length, in our opinion, the prosecution has proved its case beyond reasonable doubt. There is no reason for the complainant and the witnesses to falsely involve the appellant - accused. The appellant - accused has not explained anything during recording his further Statement u/s 313 Cr.P.C. From the oral as well as documentary evidence adduced by the prosecution, in our opinion, the learned trial Judge has rightly convicted and sentenced the appellant - accused. Therefore, the conviction and sentence awarded by the trial Court against the appellant - accused does not call for any interference of this Court in exercise of appellate powers.

28. We find ourselves in complete agreement with the said finding, ultimate conclusion and resultant order of conviction passed by the trial Court and we are of the view that no other conclusion except the one reached by the trial Court is possible in the instant case as the evidence on record stands. Therefore, there is no valid reason or justifiable ground to interfere with the impugned Judgment and order of conviction and sentence.

29. For the forgoing reasons the Appeal fails and is hereby dismissed. The Judgment and order of conviction and sentence dated 30.5.2001 recorded by the trial Court against the appellant - accused in Sessions Case No. 130 of 1998 is confirmed and maintained. The order regarding the Muddamal is also maintained.

30. This Appeal is accordingly dismissed.