

(2016) 03 GUJ CK 0156
In the Gujarat High Court
Case No : Criminal Appeal No. 197 of 2007

Dilipsingh Chhatrasingh Parmar

APPELLANT

Vs

The State of Gujarat and Others

RESPONDENT

Date of Decision : 21-03-2016

Acts Referred:

Bombay Police Act, 1951 — Section 135

Criminal Procedure Code, 1973 (CrPC) — Section 313

Penal Code, 1860 (IPC) — Section 302, Section 304, Section 323, Section 34

Citation : (2016) 03 GUJ CK 0156

Hon'ble Judges : K.S. Jhaveri and G.B. Shah, JJ.

Bench : Division Bench

Advocate : Ramnandan Singh, Advocate, for the Appellant; Shruti Pathak, APP, for the Respondent

Final Decision : Partly Allowed

Judgement

K.S. Jhaveri, J.—1. The present appeal is filed by the appellants-original accused Nos. 1, 2, 3 and 4 being aggrieved and dissatisfied with the judgment and order dated 2-8-2006 passed by the learned Addl. Sessions Judge, Presiding Officer and Third Fast Track Court, Anand, in Sessions Case No. 56 of 2006 (Old Sessions Case No. 289 of 2000) whereby original accused were convicted and sentenced to undergo imprisonment for life and to pay a fine of Rs. 5,000/- each, in default, to suffer further rigorous imprisonment for six months for the offence punishable under section 302 read with section 34 of the Indian Penal Code ("IPC" for short) and simple imprisonment for six months and to pay a fine of Rs. 500/- each, in default, to suffer further simple imprisonment for fifteen days for the offence punishable under section 323 read with section 34 of IPC. They were, however, acquitted for the offence punishable under section 135 of B.P. Act. Both the sentences were ordered to concurrently. They were given set off for the period undergone in jail.

2. Short facts of the case of the prosecution are that on 19-9-2000 at about 7.30

p.m., in the field of Chhatrasinh Rupsinh Parmar situated in the border of Village Kalu Sidhapur, Taluka Borsad, District Anand, all the accused with a common intention to kill Hartansinh Himmatsinh Sindha, took him into the field and accused No. 2 caught hold of hands of the deceased, accused No. 1 gave kick blows on vital body of the deceased by catching hold of his neck and other accused also gave kick blows on the deceased and one of the accused gave stick blow on Gajraben. Thereafter, Hartansinh succumbed to the injuries sustained by him. A complaint was, therefore, filed against the accused. In pursuance of said complaint, investigation started and as there appeared prima facie case against the accused, a charge sheet was filed against the accused persons.

2.1 As the offence was triable exclusively by Court of Sessions, the learned Magistrate committed the case to the Court of Sessions. Thereafter charge was framed against the accused which was read over and explained to the accused. The accused pleaded not guilty to the charge and claimed to be tried. Hence, the prosecution was asked to prove the guilt against the accused.

2.2 To prove the guilt against the accused, prosecution examined following witnesses:

2.3 The prosecution also relied on following documentary evidence:

2.4 After filing of closing pursis by the prosecution, further statements of accused under Sec. 313 of Cr.P.C. were recorded. On conclusion of trial and upon hearing the learned advocates appearing for the respective parties, the impugned judgment and order was delivered by the trial court giving rise to the present appeal by the original accused.

3. Heard Mr. Ramnandan Singh, learned advocate for the appellants-original accused and Ms. Shruti Pathak, learned Additional Public Prosecutor, for the respondent-State.

4. Learned advocate for the appellants, Mr. Ramnandan Singh, mainly submitted that it is clear from injuries shown in column No. 17 of the post mortem note of the deceased that there were only three abrasions on the neck of the deceased and injury found on left testicle. According to him, there were no fracture injuries found on the body of the deceased as per the post mortem note and therefore, ingredients of the offence punishable under section 302 of IPC are not established by the prosecution beyond reasonable doubt. He further submitted that even if the role played by accused is taken into consideration, they did not cause injuries much less any fracture injuries on the deceased and therefore, their case may be considered to be falling in the category of exception either under section 304 Part-I or Section 304 Part-II of IPC and requested that some leniency be shown towards the appellants while awarding sentence. In this connection, he relied on the decisions of the Hon"ble Supreme Court in the cases of State of Karnataka v. Shivalingaiah alias Handigidda reported in , 1988(Supp) Supreme Court Cases page 533and Surinder Singh v. State of Punjab reported in , (2003)10 Supreme Court Cases page 66. He ultimately requested that

looking to the overall facts and circumstances, the conviction may be altered from the offence punishable under section 302 of IPC to either under section 304 Part-I or section 304 Part-II of IPC and sentence may be reduced by allowing the appeal.

5. Learned APP, Ms. Shruti Pathak, submitted that in the present case, presence of the accused along with the role played by them has been clearly established by the prosecution. She, therefore, submitted that in view of the negligence of the accused, a person has lost his life and therefore, it is a fit case wherein the charge against the accused for the offence punishable under section 302 of IPC has been proved by the prosecution beyond reasonable doubt and hence, no interference is required to be made by this Court in the impugned judgment and order. She further submitted that neither it is a case falling under the category of either section 304 Part-I or 304 Part-II of IPC and thereby reduction of sentence. In this connection, she relied on a decision of the Hon''ble Supreme Court in the case of State of Karnataka v. Mohamed Nazeer @ Babu reported in , AIR 2003 Supreme Court page 999, more particularly towards observations made in paras 5, 8 and 11, which are as under:

"5. At this stage it is to be noted that the Trial Court has held that the prosecution has proved his case beyond a reasonable doubt. The Trial Court has also held, as set out above, that the accused has committed an act by which death was caused, with the intention of causing death or by causing bodily injury as is likely to cause death. We have not been able to fathom on what basis the trial Court then concluded that the offence was one under Section 304 (Part II). We can only surmise that the trial Court convicted the Respondent under Section 304 (Part II), IPC, out of misplaced sympathy, so that it could sentence the Respondent to undergo RI only for five years, and pay a fine of Rs. 3,000/-. Surprisingly the State never went in Appeal against this sentence.

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8. The High Court has fallen in error here also. As set out hereinabove the trial Court holds that the Respondent had intention to cause death. The High Court should have noticed that trial Court had unnecessarily, thereafter, changed the offences into one of a lessor nature. The High Court is also not disbelieving the evidence. It therefore should not have concluded that there was no intention to cause death. Even otherwise, the High Court should have noticed that the conviction was under Section 304 Part II IPC would be only if there was no intention to kill. The High Court erred in not noticing that the statement and the kick at the private part showed that the Respondent had knowledge that it was likely to cause death or to cause such bodily injury as is likely to cause death.

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11. As has been set out hereinabove, the evidence of eye-witnesses namely PWs. 1, 5, 6 and 7 establishes beyond a reasonable doubt that the Respondent came to the house of the deceased Amiruddin, caught hold of the deceased by his banian, lifted him up, hit him on the cheek and thereafter on the back of the neck. The evidence establishes that when he saw neighbours coming, he stated to Amiruddin that he would not leave him alive and then kicked Amiruddin with his right knee on the private part. This resulted in the death of Amiruddin. The evidence of the Doctor has also not been disbelieved. The evidence of the Doctor clearly shows that the death was caused due to neurogenic shock resulting from injury to the testicles and scrotum. Thus the death is directly due to the injury caused by the Respondent to the deceased. The injury was such that it was sufficient in the normal course to cause death. The injury resulted in death. The High Court was in error in stating that there was no injury. The High Court noted that death resulted from neurogenic shock but failed to note that the neurogenic shock was a result of the injury to the testicles and scrotum. The High Court omitted to note that such injury could be caused by a kick and was sufficient in normal course to cause immediate death. This was not a case where in a fit of anger or in a scufflesome act had taken place. We fail to understand how under such circumstances the High Court can conclude that the conviction can only be under Section 323 IPC. The injury caused was not even a simple injury. Section 323 would be wholly inapplicable. This was a case where the conviction should have been under Section 302 IPC. In any event, this was a case where the High Court would never have interfered with the conviction under Section 304 (Part II) IPC."

In view of the above, she urged that the present appeal may be dismissed by confirming the impugned judgment and order of conviction and sentence.

6. This Court has gone through the record pertaining to the case as also the submissions made on behalf of the parties together with the impugned judgment and order of conviction and sentence passed by the trial court as well as the decisions relied on by the learned advocates appearing for the respective parties.

7. In the present case, presence of the appellants-accused at the scene of offence has been clearly established. However, it appears from the evidence on record more particularly from column No. 17 of the post mortem note and other medical evidence that there are no grievous injuries or fracture injuries found on the body of the deceased and the injuries noticed were abrasions and injuries on left testicle. The cause of death as shown in column No. 23 of the post mortem reads as under:

"Cause of death is testicular injury to It. testis resulting in vaso-vagal shock causing cardiac respiratory arrest."

Thus, the deceased died due to cardiac respiratory arrest as a result of crushing injury on left testis. However, there are no fracture injuries caused by the appellants as per column No. 17 of the post mortem note. Now the question to

be decided by this Court is whether, in view of the aforesaid medical evidence and the fact that presence of the accused at the scene of offence has been established by the prosecution, the case of the accused can be treated to be falling under either section 304 Part I or section 304 Part-II of IPC or not.

8. In this connection, we may refer to the decision of the Hon^{ble} Supreme Court in the case of Ankush Shivaji Gaikwad v. State of Maharashtra reported in , AIR 2013 Supreme Court page 2454 wherein it has been observed by the Hon^{ble} Supreme Court as under:

"15. The next question then is whether the case falls under Section 304, Part I or Part II of the IPC. The distinction between the two parts of that provision was drawn by this Court in Alister Anthony Pareira v. State of Maharashtra , (2012) 2 SCC 648-: (AIR 2012 SC 3802 : 2012 AIR SCW 930), in the following words :

"..... For punishment under Section 304, Part I, the prosecution must prove: the death of the person in question; that such death was caused by the act of the accused and that the accused intended by such act to cause death or cause such bodily injury as was likely to cause death. As regards punishment for Section 304, Part II, the prosecution has to prove the death of the person in question; that such death was caused by the act of the accused and that he knew that such act of his was likely to cause death...."

16. Reference may also be made to the decision of this Court in Singapagu Anjaiah v. State of Andhra Pradesh , (2010) 9 SCC 799, where this Court observed :

"16. In our opinion, as nobody can enter into the mind of the accused, its intention has to be gathered from the weapon used, the part of the body chosen for the assault and the nature of the injuries caused..."

(Emphasis supplied)

17. The decision of this Court in Basdev v. The State of PEPSU , AIR 1956 SC 488, drew a distinction between motive, intention and knowledge in the following words-:

"....Of course, we have to distinguish between motive, intention and knowledge. Motive is something which prompts a man to form an intention and knowledge is an awareness of the consequences of the act. In many cases intention and knowledge merge into each other and mean the same thing more or less and intention can be presumed from knowledge. The demarcating line between knowledge and intention is no doubt thin but it is not difficult to perceive that they connote different things..."

18. This Court in the above decisions quoted the following passage from Reg. v. Monkhouse (1849) 4 Cox C C 55, where Coleridge J. speaking for the Court observed :

"The inquiry as to intent is far less simple than that as to whether an act has

been committed, because you cannot look into a man's mind to see what was passing there at any given time. What he intends can only be judged of by what he does or says, and if he says nothing, then his act alone must guide you to your decision. It is a general rule in criminal law, and one founded on common sense, that juries are to presume a man to do what is the natural consequence of his act. The consequence is sometimes so apparent as to leave no doubt of the intention. A man could not put a pistol which he knew to be loaded to another's head, and fire it off, without intending to kill him; but even there the state of mind of the party is most material to be considered..."

(Emphasis supplied)

19. In *Camilo Vaz v. State of Goa*, (2000) 9 SCC 1 : (AIR 2005 SC 1374 : 2000 AIR SCW 1173), the accused had hit the deceased with a danda during a premeditated gang-fight, resulting in the death of the victim. Both the Trial Court and the Bombay High Court convicted the appellant under Section 302, I.P.C. This Court, however, converted the conviction to one under Section 304, Part II, I.P.C. and observed :

"....When a person hits another with a danda on a vital part of the body with such a force that the person hit meets his death, knowledge has to be imputed to the accused. In that situation case will fall in Part II of Section 304, IPC as in the present case..."

(Emphasis supplied)

20. In *Jagrup Singh v. State of Haryana*, (1981) 3 SCC 616 : (AIR 1981 SC 1552) the accused had given a blow on the head of the deceased with the blunt side of a gandhala during a sudden fight causing a fracture to the skull and consequent death. This Court altered the conviction from Section 302 to Section 304, Part II, IPC placing reliance upon the decision in *Chamru Budhwa v. State of Madhya Pradesh*, , AIR 1954 SC 652, in which case also the exchange of abuses had led both the parties to use lathis in a fight that ensued in which the deceased was hit on the head by one of the lathi blows causing a fracture of the skull and his ultimate death. The accused was convicted for the offence of culpable homicide not amounting to murder under Section 304, Part II of the IPC.

21. Reference may also be made to the decisions of this Court in *Sarabjeet Singh and Ors. v. State of Uttar Pradesh*, (1984) 1 SCC 673 : (AIR 1983 SC 529); *Mer Dhana Sida v. State of Gujarat*, (1985) 1 SCC 200 : (AIR 1985 SC 386) and *Sukhmandar Singh v. State of Punjab*, , AIR 1995 SC 583 : (1994 AIR SCW 4864) in which cases also the cause of death was a fracture to the skull in a sudden fight without premeditation. The Court altered the conviction from Section 302, IPC to Section 304, Part II of IPC.

22. Though the accused had inflicted only one injury upon the deceased, the fact that he had attempted to stab him a second time was taken as an indication of the accused having any intention to kill for the purpose of Section 304, Part I,

IPC in *Kasam Abdulla Hafiz v. State of Maharashtra*, (1998) 1 SCC 526 : (AIR 1998 SC 1451 : 1998 AIR SCW 831), where this Court observed :

"....Looking at the nature of injuries sustained by the deceased and the circumstances as enumerated above the conclusion is irresistible that the death was caused by the acts of the accused done with the intention of causing such bodily injury as is likely to cause death and therefore the offence would squarely come within the 1st part of Section 304, I.P.C. The guilty intention of the accused to cause such bodily injury as is likely to cause death is apparent from the fact that he did attempt a second blow though did not succeed in the same and it somehow missed..."

(Emphasis supplied)"

9. In view of the aforesaid principle laid down by the Hon"ble Supreme Court, it appears that in the present case, the intention of the accused to cause more injuries can be gathered from the fact that the accused have allegedly given several blows on the body of the deceased but as per medical evidence, vital injury is found on the left side testicle of the deceased. Such injuries might have caused death of the deceased in the ordinary course of nature. Therefore, applying the principles laid down in *Ankush Gaikwad* (supra), although the unfortunate death of the deceased had taken place due to the incident in question, taking into account the injuries found on the body of the deceased as per column No. 17 of the post mortem note and the cause of death of the deceased as per column No. 23 of the post mortem note, this Court is of the opinion that interest of justice will be served if the conviction imposed on the appellants-original accused for the offence punishable under section 302 of IPC is converted into conviction under section 304 Part-I of IPC. Accordingly, sentence imposed on original accused is required to be reduced from life imprisonment to RI for ten years. Thus, appeal requires to be allowed in part.

10. As regards the decision relied on by learned APP on *State of Karnataka v. Mohamed Nazeer @ Babu* (supra) is concerned, there cannot be any dispute regarding the principles laid down therein. In the said decision, a very specific statement was made by the accused that "he would not leave the deceased alive". However, no such definite intention either by way of statement or in any other manner as having made by any of the accused during the course of incident or prior to that could be noticed from the record of the present case by this Court and therefore, when such an act with definite intention is lacking in the present case, no reliance can be placed on the principle laid down therein.

11. The appeal is partly allowed. Conviction imposed on the appellants-original accused Nos. 1, 2, 3 and 4 for the offence punishable under section 302 of IPC is converted into conviction under section 304 Part-I of IPC and they are sentenced to suffer RI for ten years. Rest of the judgment and order dated 2-8-2006 passed by the learned Addl. Sessions Judge, Third Fast Track Court, Anand, in Sessions Case No. 56 of 2006 including fine etc. would remain unaltered. The sentences

are ordered to run concurrently. The appellants shall be given set off for the period already undergone in jail and/or remission, as the case may be. The appellants are reported to be on bail and hence, their bail bonds shall stand cancelled. They are directed to surrender before the jail authorities within twelve weeks from today to undergo their remaining period of sentence failing which, concerned authorities shall take action in accordance with law. Registry to send the record and proceedings forthwith.