

(2011) 04 GUJ CK 0159
In the Gujarat High Court
Case No : Criminal Appeal No. 2363 of 2005

Dinesh Jagjivan Vadgama

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 08-04-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 188, 300, 302, 304, 504

Citation : (2011) 3 GLR 2043

Hon'ble Judges : R.M. Chhaya, J;A.L. Dave, J

Bench : Division Bench

Advocate : J.M. Buddhbhatti, for the Appellant; K.L. Pandya, Addl. P.P., for the Respondent

Final Decision : Allowed

Judgement

R.M. Chhaya, J.—The present appeal arises out of the judgment and order dated 10-9-2004, rendered by the learned Additional Sessions Judge, F.T.C.-6, Rajkot, in Sessions Case No. 168 of 2003, convicting the Appellant-accused for the offences punishable under Sections 302 and 504 of the Indian Penal Code ("I.P.C." for short) and sentencing him to undergo imprisonment for life and to pay a fine of Rs. 2,000/- and in default of payment thereof to undergo further R.I for one month. For committing offence u/s 504, he was sentenced to undergo S.I. for two months. Both the sentences were ordered to run concurrently.

2. The prosecution case, briefly stated, is that the Appellant had given advance of money to deceased Sarabhai and in spite of repeated oral demands made by the Appellant-accused, the deceased did not repay the amount so advanced and therefore, on 31-7-2003 at about 12-30 hours, near Makwana Pan Centre, Ambedkarnagar Corner, on Gokuldharm Main Road, Rajkot, the Appellant met the deceased and got excited and gave filthy abuses to the deceased. It is the further case of the prosecution that the Appellant took out a rampuri knife from the waist-band of his pants and inflicted one fatal blow on right side below the

armpit and two fatal blows on the upper right arm of the deceased with rampuri knife, as a result of which the deceased fell down and the Appellant ran away with knife. The deceased was shifted to Madhuram Hospital by the witnesses on the Honda motorbike of Laxmanbhai, where the doctor declared him dead. Vajubhai Bhikhabhai Jogarana, therefore, lodged F.I.R. with Malviyanagar Police Station, Rajkot city.

3. The Investigating Officer registered the F.I.R and started investigation. The I.O. recorded the statements of the complainant, other eye-witnesses, doctor and other persons, who were found conversant with the facts of the case. The incriminating articles, which were seized during the course of investigation, were sent to F.S.L. for analysis. After obtaining Serological report as well as ascertaining the cause of the death and on completion of the investigation, the Appellants were charge-sheeted in the Court of learned J.M.F.C. Rajkot, for the offences punishable under Sections 302, 504 and 188 of I.P.C. As the offence punishable u/s 302 I.P.C. is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Rajkot, for trial, where it was registered as Sessions Case No. 168 of 2003.

4. The learned Judge of the trial Court framed charge at Exh. 10 against the Appellant-accused for the offences punishable under Sections 302, 504 and 188 I.P.C. The charge was read over and explained to the Appellant, who pleaded not guilty to the same and claimed to be tried.

5. After recording of evidence of the prosecution witnesses was over, the learned Judge explained to the Appellant the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement as required u/s 313 of the Code of Criminal Procedure. In his further statement given by way of additional statement, the case of the Appellant was that deceased Sarabhai had borrowed money from the Appellant and the deceased did not repay the same in spite of repeated demands. It is the further case of the Appellant that on the date of incident when he was passing through Gokuldharm Main Road, Ambedkarnagar for going to his residence situated at Punitnagar, deceased Sarabhai Gagjibhai Jogarana, Haribhai, Mithabhai and other persons of Khodiyarnagar, encircled him near Makwana Pan Centre and they made assault on him with chhari and stones with an intention to kill him and when deceased Sarabhai tried to inflict a blow with chhari, the Appellant snatched away the chhari from the deceased and in exercise of a right of private-defence, caused the above-referred to injuries to deceased Sarabhai. He has further stated he had no any intention to kill deceased Sarabhai.

6. After appreciating the evidence adduced by the prosecution and hearing the learned Counsel for the parties, the learned Judge held that the case of the prosecution against the Appellant-accused of the offences punishable under Sections 302, 504 and 188 I.P.C. was proved beyond reasonable doubt. In view of this conclusion, the learned Judge convicted the Appellant-accused as referred to above by judgment and order dated 10-9-2004, giving rise to the present

appeal.

7. Heard learned Advocate Mr. Buddhbhatti for the Appellant and learned A.P.P. Mr. Pandya for the State, at length and in great detail.

8. Learned Advocate Mr. Buddhbhatti for the Appellant has taken us through the oral testimonies of prosecution witnesses, who witnessed the incident, extensively. Mr. Buddhbhatti pointed out that in spite of the fact that the eye-witnesses support the case of the prosecution and even though it has come in the evidence of these witnesses that the Appellant inflicted blows with knife, there was no intention on the part of the Appellant to commit murder of deceased Sarabhai. Mr. Buddhbhatti vehemently submitted that in the further statement given by the Appellant, he has clearly narrated how the incident had occurred. The Appellant has stated in his further statement that he had advanced money to deceased Sarabhai and in spite of repeated demands being made, deceased Sarabhai did not repay the said advance and on the date of the incident, while the Appellant was passing by the place of the incident, he was encircled and assaulted with chhari and stones by deceased Sarabhai Gagjibhai Jogarana, Haribhai, Mithabhai and other persons. Learned Advocate Mr. Buddhbhatti has pleaded that the Appellant had no other alternative, but to save his life and therefore, the Appellant took out knife from the waist-band of the deceased and while doing so, he received injuries on his hand and under such circumstances, he inflicted blows to the deceased. Mr. Buddhbhatti submitted that such an act was committed by the Appellant in exercise of a right of self-defence and therefore, in the facts and circumstances of the case, even though, there is involvement of the Appellant in the present crime, the same would not amount to murder, as while exercising his right of self-defence, the deceased was injured and ultimately succumbed to the injuries. Mr. Buddhbhatti, therefore, submitted that the case of the Appellant would fall under Exception-II to Section 300 I.P.C. and this Hon"ble Court may be pleased to allow this appeal and set aside the conviction and sentence awarded by the trial Court, or in the alternative, to alter the offence punishable u/s 302 I.P.C. to mat of culpable homicide not amounting to murder punishable u/s 304, Part-II of I.P.C.

9. Learned Additional Public Prosecutor Mr. K.L. Pandya has opposed this appeal. Mr. Pandya has submitted that the eye-witnesses and the other prosecution witnesses have fully supported the case of the prosecution. Mr. Pandya has asserted that the prosecution has been able to establish the motive in the instant case. Mr. Pandya has submitted that the instant case is foolproof case and the direct evidence, which is available, is sufficient to connect the Appellant with the offence of murder. Mr. Pandya has further submitted that the medical evidence as well as the evidence in the form of Serological report supports the case of the prosecution. On the basis of the Serological report (Exh. 73), learned A.P.P Mr. Pandya pointed out that the weapon knife as well as the clothes of the deceased and the Appellant were bloodstained having human blood group of "A", which was also the blood group of the deceased. Mr. Pandya stressed that the Appellant

had caused serious injuries to the deceased with rampuri chhari, which was discovered at his instance and as the evidence of eye-witnesses gets ample corroboration from the medical evidence, the well founded conviction of the Appellant should not be interfered with by this Hon"ble Court in the present appeal. The learned Counsel for the State lastly pointed out that no error is committed by the learned Judge in appreciating the evidence on record and therefore, the appeal should be dismissed.

10. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

11. The fact that deceased Sarabhai died a homicidal death is not disputed at all. The evidence of Dr. Alpaben Jagdishbhai Jethva, P.W. 7 Exh. 36, establishes that on 31-7-2003, she had conducted post-mortem examination on the dead body of Sarabhai Gagjibhai Jogarana between 5-30 p.m. and 6-30 p.m. and she had noticed following four external injuries on the dead body of deceased Sarabhai:

(1) stab wound 8 cm. ? 3 cm. ? cavity deep vertically direction over 7th intercostal space cutting 7th and 8th ribs. Right side mid axillary line. Both end sharp.

(2) LCD. incision just below the wound with LCD. tube in situ.

(3) C.L.W. 9 cm. ? 3 cm. vertical direction ? muscle deep over right side arm lateral aspect. Both end sharp.

(4) C.L.W. 1 cm. ? ? cm. Bone deep over 7, 8 cervical vertebra. Back. Both end sharp.

The doctor has opined that the aforesaid injuries could be caused by muddamal weapon chhari. The cause of death of the deceased, according to the doctor, was cardiac respiratory failure due to haemorrhage shock due to assaulted injury to lungs, liver. The doctor has stated in her deposition before the Court that injury No. 1 sustained by the deceased was sufficient in the ordinary course of nature to cause death. The evidence of the medical officer gets ample corroboration from the post-mortem notes produced on the record of the case at Exh. 37. It is not the case of the Appellant that the injuries sustained by the deceased were either suicidal or accidental. Having regard to the facts and circumstances of the case, we are satisfied that the prosecution has proved beyond reasonable doubt that the deceased died a homicidal death. The finding recorded by the learned Judge of the trial Court regarding homicidal death of the deceased being eminently just is hereby upheld.

12. On close scrutiny of oral testimonies of the eye-witnesses, namely, Vajubhai Bhikhabhai Jogarana (P.W. 6 Exh. 27), Haribhai Gagajibhai Jogarana (P.W. 9 Exh. 41), Mithabhai Gagjibhai Jogarana (P.W. 10 Exh. 42) and Laxmanbhai Dhulabhai Maru (P.W. 11, Exh. 43), we find that these witnesses were present at the scene of offence. They all have stated that there was some altercation between the

deceased and the Appellant in regard to the money advanced by the Appellant. They have also stated that the Appellant-accused took out a knife and assaulted upon the deceased. In their respective cross-examinations, we also find that they have denied the suggestions of the defence and have supported the case of the prosecution.

13. Upon reading the evidence of Narendrabhai Khimjibhai Makwana (P.W. 12 Exh. 44), we find that he owns a Pan Centre in the name and style of "Makwana Pan Centre" on Gokuldham Main Road, where the incident in question had taken place. This witness has stated that there was some altercation between 5-6 persons and the deceased and the Appellant took out a knife and inflicted two blows to the deceased. In his cross-examination, this witness has stated that his attention was engrossed in preparing pans. He has also stated in his cross-examination that he could not say definitely as to who took out knife. In his cross-examination, this witness has stated that if he does not come out of the shop, nothing can be noticed. He has admitted in his cross-examination that he had not come out of the shop and had not seen the incident.

14. Sureshbhai Khodabhai Dangar, P.W. 13 Exh. 45, has stated in his testimony that he runs a pan-galla in the name and style of "Kishan Pan Cold-drinks" on Gokuldham Main Road, where the incident had taken place. He has stated that there was some altercation between the deceased and the Appellant and the Appellant took out a knife and inflicted blows to the deceased. In his cross-examination, he has stated that when the altercation was going on between the deceased and the Appellant, 5-6 persons were standing across the Appellant. This witness has also stated in his cross-examination that because of uproar, 15 to 20 persons had gathered and all participated in the altercation. He has further stated in his cross-examination that he heard the Appellant demanding money from the deceased and the deceased informing the Appellant that he had no money at that point of time. This witness has denied certain suggestions made by the defence.

15. Upon reading the deposition of witness Atmaram Panduram Pawar (P.W. 14, Exh. 72), who was stationed at Malviyanagar Police Station at the relevant point of time and who carried out the investigation, we find that he has stated the manner in which the investigation had been carried out by him, including recording of statements of the witnesses, preparation of panchnamas and sending of incriminating material so recovered during the course of investigation, to F.S.L. He was subjected to cross-examination, wherein he has stated that during the course of investigation, it has come on record that the Appellant-accused was beaten by the deceased and his relatives. This witness has denied the suggestion made by the defence that he had recorded the statements of the eye-witnesses of his own accord.

16. On perusal of the Serological report (Exh. 73), we find that the blood group of deceased Sarabhai was "A". The Serological report further indicates that the blood-stains found on the clothes of deceased Sarabhai and the Appellant as well

as weapon knife and shoe and cap of the deceased, were of human blood group "A", which was the blood group of deceased Sarabhai.

17. It also transpires from the record of the case that the Appellant-accused was treated by Dr. Mukeshbhai Jethalal Upadhyay and he found the following three injuries on the person of the Appellant:

- (1) C.L.W. on parietal occipital region 5 cm. ? ? cm. (left side)
- (2) Abrasion on hand (left) 1 cm. ? 1/2 cm.
- (3) complaint about pain on left shoulder.

18. Cumulatively, therefore, we find that the Appellant had advanced money to deceased Sarabhai and on persistent demand made by the Appellant and more particularly because of the altercation that took place on 31-7-2003 in presence of other six persons, who were relatives of deceased Sarabhai, the Appellant in order to save his life assaulted, upon the deceased, which resulted into death of deceased Sarabhai. By way of additional statement, the Appellant has taken a plea of self-defence. From the facts emerging from the evidence on record, it cannot be ruled out that the prosecution party could have been aggressors. From the evidence on record, it transpires that the altercation took place between the deceased and the Appellant as aforesaid. It is also revealed from the evidence of Narendrabhai Khimjibhai Makwana (P.W. 12 Exh. 44), who owns a Pan Centre in the name and style of "Makwana Pan Centre" on Gokuldham Main Road and the evidence of Sureshbhai Khodabhai Dangar, (P.W. 13 Exh. 45), owner of Kishan Pan Cold-drinks, that there was an uproar before the occurrence and the prosecution has not been able to prove beyond reasonable doubt that the Appellant was the aggressor. There is no such evidence on record on the basis of which it can safely be inferred that the Appellant and not the deceased Sarabhai was the aggressor. As already mentioned the Appellant undoubtedly received injuries during the same occurrence and when he has taken the plea that he acted in self-defence, that cannot be lightly ignored particularly in the absence of any explanation of his injuries by the prosecution. It is not necessary to refer to various decisions where it has been held that the accused, if acted on self-defence, need not prove beyond all reasonable doubt and if two views are possible, the accused should be given the benefit of doubt. Having regard to the injuries received by the accused, we find it difficult to hold that his plea altogether is unfounded. It is also to be noted that the plea of self-defence cannot be weighed in a golden scale. From the Serological report, the prosecution has not been able to prove the guilt of the Appellant, as the human blood group of the Appellant is "A" and the human blood group of the deceased is also "A". It has come in evidence that the Appellant had received injuries, as aforesaid, which have not been explained by the prosecution. Therefore, the Serological report does not take the case of the prosecution any further. In the facts and circumstances of the case, the plea of right of private defence has to be accepted.

19. Even though, it could be said that the Appellant-accused had knowledge that the blows inflicted by him would cause death of the deceased, it cannot be inferred that the Appellant had intention to commit murder of the deceased. As the Appellant was surrounded by six persons, in order to save his life, he exercised his right of private defence and inflicted blows to the deceased. Under the circumstances, having regard to the injuries inflicted by the Appellant on deceased Sarabhai, the Appellant is entitled to the benefit of Exception-II of Section 300 I.P.C.

20. The foregoing discussion would go to show that the trial Court erred in appreciating the defence of exercise of a right of private defence advanced by the Appellant. The defence is not impossible one. The material on record, as discussed above, would go to show that the possibility of the incident having been occurred in the manner stated by the Appellant in his further statement u/s 313 of the Code of Criminal Procedure cannot be ruled out. The benefit, therefore, has to go to the Appellant and his theory of exercise of a right of private defence has to be accepted. He, therefore, cannot be said to have committed an offence of murder of Sarabhai Gagjibhai Bharvad.

21. Resultantly, the appeal is partly allowed. The conviction of the Appellant is altered from the offence of murder of Sarabhai Gagjibhai Bharvad punishable u/s 302 I.P.C. to the offence of culpable homicide not amounting to murder punishable u/s 304 Part-II of the Indian Penal Code.

We have heard learned A.P.P and learned Advocate Mr. Buddhbhatti for the Appellant on sentence. The Appellant is ordered to undergo R.I for the period already undergone by him, with no change in sentence of fine. His conviction u/s 504 I.P.C. remains unaltered.