

**(2015) 09 GUJ CK 0050**  
**In the Gujarat High Court**

**Case No :** Criminal Appeal Nos. 1096, 1192 and 1196 of 2011

Dipakbhai Shankerji Thakore

APPELLANT

Vs

State of Gujarat

RESPONDENT

**Date of Decision :** 28-09-2015

**Acts Referred:**

Bombay Police Act, 1951 — Section 135(1)  
Constitution of India, 1950 — Article 161, 72  
Criminal Procedure Code, 1973 (CrPC) — Section 313  
Penal Code, 1860 (IPC) — Section 114, 120-B, 143, 147, 148

**Citation :** (2015) 09 GUJ CK 0050

**Hon'ble Judges :** K.S. Jhaveri, J;G.B. Shah, J

**Bench :** Division Bench

**Advocate :** Vijal P. Desai, for the Appellant; C.M. Shah, APP, Advocates for the Respondent

## **Judgement**

K.S. Jhaveri, J—Present appeals assail the judgment and order dated 04/07/2011 passed by the learned Additional Sessions Judge, City Civil and Sessions Court, Ahmedabad City in Sessions Case No. 384 of 2009, whereby, the learned Sessions Judge was pleased to convict original accused No. 2 - Dipakbhai Shankarji Thakor, the appellant of Criminal Appeal No. 1096 of 2011 for the offence punishable under Section 302 of the Indian Penal Code, 1860 (for brevity, "the IPC") and sentenced to undergo life imprisonment and a fine of Rs. 500/- and in default of payment of fine, to undergo, further simple imprisonment for 15 days. For the offence punishable under Section 449 of the IPC, he was sentenced to undergo rigorous imprisonment of one year and a fine of Rs. 500/- and in default of payment of fine, to undergo, further simple imprisonment for 15 days. Original accused No. 3 - Bhupat @ Bhopo Shankarji Thakor, the respondent No. 1 in Criminal Appeal No. 1196 of 2011, was convicted for the offence punishable under Section 326 of the IPC and sentenced to undergo rigorous imprisonment for three years and a fine of Rs. 500/- and in default of payment of fine, to undergo, further simple imprisonment for 15 days. He was also convicted

for the offence punishable under Section 450 of the IPC and sentenced to undergo rigorous imprisonment for one year and a fine of Rs. 500/- and in default of payment of fine, to undergo, further simple imprisonment for 15 days. Original accused No. 4 - Pravinaben @ Chaku Dipakbhai Shankarji Thakor, the respondent No. 2 in Criminal Appeal No. 1196 of 2011 and original accused No. 5 - Bhavnaben Bhupatbhai Thakor, were convicted for the offence punishable under Section 323 of the IPC and sentenced to undergo rigorous imprisonment for three months and a fine of Rs. 500/- each and in default of payment of fine, to undergo, further simple imprisonment for 15 days. They were also convicted for the offence punishable under Section 452 of the IPC and sentenced to undergo rigorous imprisonment for three months and a fine of Rs. 500/- each and in default of payment of fine, to undergo, further simple imprisonment for 15 days. The original accused Nos. 2, 3, 4 and 5 were also convicted for the offence punishable under Section 135(1) of the Bombay Police Act and sentenced to undergo, rigorous imprisonment for seven days and a fine of Rs. 100/- each and in default of payment of fine, to undergo further simple imprisonment of three days. Moreover, the learned trial Judge was pleased to enlarge the original accused Nos. 4 and 5 on probation of good conduct on their furnishing person bond of Rs. 5,000/- each and surety of the like amount for one year. Hence, the Criminal Appeal No. 1096 of 2011 has been filed by the original accused No. 2 - Dipakbhai Shankarji Thakor against conviction, whereas, the Criminal Appeal Nos. 1192 of 2011 and 1196 of 2011 have been filed by the State against acquittal of original accused No. 1 and for enhancement of sentence of original accused Nos. 3 and 4, respectively.

2. The prosecution case in nutshell is that on 15/11/2008 at about 12:15 p.m., accused No. 1 - Shankarji Ramaji Thakor and others, with a view to take revenge of a decree which had been passed in favour of the deceased - Mukeshbhai and the same had been executed by him against the accused, they assaulted the deceased with deadly weapons like Gupti, sticks, bat and thereby, committed murder for which, a complaint came to be lodged with the Kagdapith Police Station, Ahmedabad for the offence punishable under Sections 143, 147, 148, 149, 452, 449, 452, 302 r/w. Section 120-B, 34 and 114 of the IPC and Section 135(1) of the Bombay Police Act.

2.1 Pursuant to the complaint, investigation was carried out. After investigation, charge-sheet was filed and as the case was triable by the Court of Sessions, it was committed to the City Sessions Court, Ahmedabad City.

2.2 The trial Court framed charge against the accused. The accused pleaded not guilty to the charge and claimed to be tried. Therefore, the prosecution produced oral as well as documentary evidence.

2.3 In order to bring home the charge against the respondents - original accused, the prosecution has examined as many as 21 witnesses and also produced several documentary evidence.

2.4 At the end of the trial and after recording the Further Statements of the accused under Section 313 of Criminal Procedure Code, 1973 (for brevity, "the Code") and hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge concluded as aforesaid by impugned judgment and order.

2.5 Being aggrieved and dissatisfied with the aforesaid judgment and order passed by the Sessions Court, present appeals have been filed.

3. We have heard Mr. Vijal P. Desai, learned advocate for the appellant in Criminal Appeal No. 1096 of 2011 and Mr. Yogendra Thakore, learned advocate for the respondents in Criminal Appeal Nos. 1192 of 2011 and 1196 of 2011 and Ms. C.M. Shah, learned Additional Public Prosecutor for the State.

3.1 Mr. Desai, and Mr. Thakore, the learned advocates appearing for the respective accused, took us to the evidence of the eyewitnesses and the other witnesses and contended that all the three witnesses are not natural witnesses and their presence is doubtful in view of the fact that PW-9 - Indravadan Dayalji bhai Vyas, who is examined at exh. 47, who has a office near the scene of offence, has not stated that other eye-witnesses were present at the time of commission of the offence. It is further contended that there are serious contradictions and improvements in the depositions of the prosecution witnesses, besides material lapses and omissions and lack of evidence even in the evidence of widow of the deceased - PW-10 - Ilaben Mukeshkumar Patel. It is further contended that the prosecution has not proved the complete chain of offence since there were no blood stains on the weapon which was alleged to have been used in commission of offence and the blood stains were found only from the place of incident. In that view of the matter, it is requested that benefit of doubt is required to be given in favour of the accused.

3.2 Whereas, Ms. Shah, learned Additional Public Prosecutor contended that on behalf of prosecution, Dr. Suresh Kantilal Jhaveri was examined at exh. 12, who was the Medical Officer and had performed the Post Mortem of the deceased on 16/11/2008 at Civil Hospital, Ahmedabad. He has stated that the dead-body of the deceased was brought with the police yadi and he and his colleague Dr. J.M. Solanki had completed the Post Mortem at about 9:00 a.m.; the deceased was aged about 58 years; he described the clothes which were worn by the deceased and the mobile pouch which was tied with the belt. The learned Additional Public Prosecutor submitted that this witness has stated that in the shirt of the deceased on right side, there were two cut marks, one admeasuring two cm. 14 cm. below the pocket; the other cut was also of 2 cm. which was found 2 cm. below the first cut; there was a 4 cm. oblique cut on the left side inside the pocket of. Thus, he has narrated all the injuries found on the body of the deceased. Moreover, in PM Note, in column No. 18 there was a reference of fracture found in the tibia and fibula. He also found contusion in the head on left side on high-parietal and occipital region of 10 x 6 cm. and on the right side on parietal region there was a contusion admeasuring 1 x.5 cm., no fracture was found on the head, however, both, the brain and the lungs were found congested

and swollen; the heart was found empty, however, the blood was found in the stomach. Eventually, he has stated that these injuries were sufficient enough to cause the death. The injury to the deceased was caused as cut on the vital part of the body and the deceased had succumbed to the injury on the same day. Thus, it is not in dispute that offence is committed punishable under Section 302 of the IPC. In that view of the matter, the death of the deceased was homicidal and was not a natural death and it was culpable homicide amounting to murder. Making above submissions, she requested to allow the appeals filed by the State.

4. We have gone through the evidence on record, more particularly, the evidence of the person who was residing nearby the place of incident viz. PW-6 - Pravinbhai Chandubhai Patel, who had informed the police by making a call from his mobile phone and accordingly, the police had reached the spot. However, he has categorically stated in his deposition that he was not knowing the deceased and on the day of incident in the evening he came to know that the deceased was a builder and afterwards, on next day, he came to know about the name of the deceased from the newspaper and except that, he was not knowing anything and since, he was not knowing anything, he was examined to the extent of his informing the police.

4.1 The crucial witness is PW-9 - Indravadan Dayaljibhai Vyas, who is examined at exh. 47, who has his office near the place of incident. He has stated in his deposition that on the day of incident in question had occurred, he had gone out for some work and while he returned to his office at about 12:30 p.m., at that time, near Urmikunj, he saw crowd gathered and hence, he went there and found the deceased lying on the road and blood was oozing out from his stomach from right side and immediately, thereafter, 108 ambulance reached the spot and took the deceased for treatment and thereafter, he went to his office and informed the wife - widow of the deceased about somebody had beaten Mukeshbhai and he was taken to the hospital in 108 ambulance. He has stated that since he was to purchase the adjoining office, he had a talk with deceased - Mukeshbhai and at that time, the deceased had informed him about the Civil Suit regarding the property in question and as to the possession of the property in question where accused Shankarji etc. were residing. Except that, he did not know anything. He has stated that he was knowing the deceased as he was maintaining his accounts.

4.2 The other witness - PW-10 - Ilaben Mukeshkumar Patel, the wife of the deceased is also examined at exh. 48. She is not the eyewitness to the incident. She has stated in his deposition that Mr. Vyas (PW-9) had informed her on phone about the incident and hence, she called one Sunilbhai Patel, who was the friend of her husband and in turn, he informed her that her husband was taken to Siddhivinayak Hospital where, he succumbed to the injuries and hence, she rushed to the hospital together with her relative where her husband was lying dead. She has stated in her deposition that on the previous day only, her deceased husband had informed her about their being succeeded in the civil suit

and the accused had been threatening him. Before the trial Court, she identified accused No. 1 - Shankarji and other accused whose names were not known to her. It will not be out of place to mention here that she was not doing the business but was the only proprietor of the firm and the said fact is not in dispute.

4.3 The other witness is PW-11 - Satyambhai Mukeshbhai Patel, the son of the deceased, who is examined at exh. 52. He has also supported the version of the widow of the deceased and said that they were being threatened by the family of the accused.

4.4 The prosecution has also examined one Jitendrakumar Dashrathlal Patel - PW-12 at exh. 53, who happened to be the brother of the deceased. He has stated in his deposition that he was residing in USA and returned from USA on 20/11/2008. He was informed about the incident by his brother-in-law - Jatinbhai on phone that Shankarji Ramaji and his family members attacked Mukeshbhai and murdered him; he knew the accused from his father's time; he was residing in an open land on Plot No. 163 as Chowkidar; in 1994 it was decided to develop the said land and construct Urmikunj Flats and Urmikunj Residency which was not liked by the accused. His deceased brother, in partnership of other two, had constructed 16 flats and 32 shops and since, they were sold, they had decided and proceeded to develop the land situated on the rear side and for that they had a talk with Shankarji but since, no solution was arrived at, the deceased had moved the Court of law at Ahmedabad. On perusal of the evidence of this witness, he has also supported the case of the prosecution inasmuch as the accused threatened the deceased and his family. The suit was decided almost after eight years in favour of the deceased and the possessions order was issued on 29/07/2008.

4.5 The another crucial witness is PW-14 - Kantibhai Chhotabhai, whose deposition is at exh. 55. He does centering work. He has stated in his deposition that, on the day of incident, when he reached at Urmikunj, the place of offence, at that time accused No. 1 - Shankarbhai and the deceased were talking about the house and then altercation started between the two and hence, Bhupat, the son of the accused No. 1 and the wife of his son came there armed with Bat and quarrel started; Dipak came there with Gupti, a deadly weapon and gave 2-3 blows on the stomach of the deceased; then the deceased was dragged to outside and accused No. 3 - Bhupat @ Bhopo gave a blow with Kos, a deadly weapon, on the left leg due of the deceased to which, he fell down; thereafter, an ambulance was called by one Paragbhai; police recorded his statement in the evening; he identified the accused sitting in the Court. This witness appears to be trustworthy for the reasons that he was working with the deceased since long. He was also cross-examined by the defence but nothing contrary was found from his deposition and thus, he has also fully supported the case of the prosecution.

4.6 Another witness examined by the prosecution is PW-15 - Parag Mohanbhai Patel, who is examined at exh. 56, who was accompanying the deceased on the

day of incident. He has stated that when the deceased was sitting at his bungalow, he along with Amratbhai and Kantibhai were sitting outside on a coat and at that time, accused No. 1 - Shankarbhai had come and gone to the room of deceased - Mukeshbhai and they had some discussion; the deceased offered him some compensation for purchasing other residence and at that time, Dipak and Bhupat came. Dipak had Gupti in his hand and Bhavnaben and Chakuben had bat with them; Dipak gave Gupti blows and Chakuben and Bhavnaben gave bat blows to the deceased; Dipak and Shankarbhai were also giving kick and fist blows to the deceased and thereafter, all the five accused dragged the deceased to the out side in the compound where, Bhopo had given Kos, a deadly weapon, blow to the deceased on his left leg; thereafter, 108 ambulance was called for and the deceased was taken to the Siddhivinayak Hospital. Thus, this witness has also supported the case of the prosecution in toto.

4.7 One another witness namely PW-16 - Mohanbhai Nathubhai Rot, who is examined at exh. 58, has also supported the story of the prosecution. In that view of the matter, the contention of learned advocate Mr. Desai for the accused that the prosecution case suffers from material contradictions and lapses, cannot be accepted, more particularly, when the eye-witnesses and the medical evidence support the case of the prosecution.

4.8 We have examined the matter carefully and gone through the evidence on record. We have re-appreciated and re-evaluated the evidence on the touchstone of the latest decisions of the Hon"ble Apex Court. We find that the trial Court while considering the evidence on record, has very elaborately discussed the evidence adduced before it and has come to such a conclusion. Further, the learned advocate for the accused is not in a position to show any evidence to take a contrary view in the matter or that the approach of the Court below is vitiated by some manifest illegality or that the decision is perverse or that the Court below has ignored the material evidence on record. In that view of the matter, we are of the considered opinion that the Court below was completely justified in passing impugned judgment and order.

5. We are, therefore, of the considered opinion that the findings recorded by the trial Court are absolutely just and proper and in recording the said findings, no illegality or infirmity has been committed by it. We are in complete agreement with the reasonings given and the findings arrived at by the trial Court. However, so far as sentence of rigorous imprisonment of three years only imposed by the trial Court upon accused No. 3 - Bhupat @ Bhopa for the offence punishable under Section 326 of the IPC is concerned, the same is, in our considered opinion, inadequate and on lower side and hence, the same is required to be enhanced and accordingly, the appeal of the State qua this accused, is required to be allowed and the order of the trial Court is required to be modified accordingly.

5.1 Moreover, so far as sentence of life imprisonment, as has been awarded to the accused No. 2 - Dipak Shankarji Thakor is concerned, in a recent decision of

the Apex Court in the case of Bhaikon @ Bakul Borah Vs. State of Assam, (2013) 6 AD 166 : (2013) 10 JT 373 : (2013) 2 RCR(Criminal) 952 : (2013) 6 SCALE 496 : (2013) 9 SCC 769 has held that life imprisonment means imprisonment of life subject to the powers of remissions vested under Articles 72 and 161 of the Constitution of India. It would be fruitful to reproduce the relevant portion of the aforesaid decision as under:

"15. This Court, in a series of decisions has held that life imprisonment means imprisonment for whole of life subject to the remission power granted under Articles 72 and 161 of the Constitution of India. [Vide Life Convict Bengal @ Khoka @ Prasanta Sen Vs. B.K. Srivastava and Others, (2013) 2 AD 509 : AIR 2013 SC 1163 : (2013) CriLJ 1446 : (2013) 3 JT 20 : (2013) 1 RCR(Criminal) 999 : (2013) 2 SCALE 467 : (2013) 3 SCC 425 : (2013) 1 SCC(L&S) 625 : (2013) AIRSCW 2161 : (2013) AIRSCW 1006 : (2013) 3 Supreme 47 , Mohinder Singh Vs. State of Punjab, (2013) 2 AD 636 : AIR 2013 SC 3622 : (2013) CriLJ 1559 : (2013) 1 Crimes 184 : (2013) 2 JT 182 : (2013) 1 RCR(Criminal) 878 : (2013) 2 SCALE 24 : (2013) 3 SCC 294 : (2013) AIRSCW 1120 : (2013) 1 Supreme 452 , Sangeet and Another Vs. State of Haryana, AIR 2013 SC 447 : (2013) CriLJ 425 : (2013) 1 Crimes 25 : (2013) 1 RCR(Criminal) 114 : (2012) 11 SCALE 140 : (2013) 2 SCC 452 , Rameshbhai Chandubhai Rathod Vs. The State of Gujarat, AIR 2011 SC 803 : (2011) CriLJ 1458 : (2011) 2 JT 33 : (2011) 1 RCR(Criminal) 728 : (2011) 1 SCALE 757 : (2011) 2 SCC 764 : (2011) 1 SCC(Cri) 883 : (2011) 1 SCR 829 : (2011) AIRSCW 1026 , Chhote Lal Vs. State of M.P., (2011) 8 SCALE 257 , Mulla and Another Vs. State of Uttar Pradesh, AIR 2010 SC 942 : (2010) CriLJ 1440 : (2010) 1 Crimes 157 : (2010) 2 JT 35 : (2010) 2 SCALE 179 : (2010) 3 SCC 508 : (2010) 2 SCR 633 : (2010) 2 UJ 802 , Maru Ram and Others Vs. Union of India (UOI) and Others, AIR 1980 SC 2147 : (1980) CriLJ 1440 : (1981) 1 SCC 107 : (1981) SCC(Cri) 112 : (1981) 1 SCR 1196 , State of Madhya Pradesh Vs. Ratan Singh and Others, AIR 1976 SC 1552 : (1976) CriLJ 1192 : (1976) 3 SCC 470 : (1976) SCC(Cri) 256 : (1976) SCR 552 Supp and Gopal Vinayak Godse Vs. The State of Maharashtra and Others, AIR 1961 SC 600 : (1961) CriLJ 736(1) : (1961) 3 SCR 440 ].

16. In view of the clear decisions over decades, the argument of learned senior counsel for the appellant-accused is unsustainable, at the same time, we are not restricting the power of executive as provided in the Constitution of India. For adequate reasons, it is for the said authorities to exercise their power in an appropriate case."

6. In view of the aforesaid discussion, Criminal Appeal No. 1096 of 2011, filed by the original accused No. 2 against conviction and Criminal Appeal No. 1192 of 2011, filed by the State against acquittal of original accused No. 1, fail and are dismissed accordingly. However, life imprisonment as awarded under Section 302 of the IPC, would not be till last breathe and the case of original accused No. 2 may be considered by the appropriate authority in accordance with law. All the sentence shall run concurrently. So far as Criminal Appeal No. 1196 of 2011, filed

by the State for enhancement of sentence of original accused Nos. 3 and 4 is concerned, the same succeeds in part, qua respondent No. 1 - original accused No. 3 - Bhupatbhai @ Bhopo Shankarji Thakor only and his sentence for the offence punishable under Section 326 of the IPC is enhanced to rigorous imprisonment of 05 (five) years, instead of 03 (three) years, as has been awarded by the trial Court and to that extent, the impugned judgment and order dated 04/07/2011 passed by the learned Additional Sessions Judge, City Civil and Sessions Court, Ahmedabad City in Sessions Case No. 384 of 2009 is modified. Accordingly, if he is on bail, his bail bond, if any, shall stand cancelled and he is directed to surrender before the concerned jail authority within 10 (ten) weeks from today to undergo the remaining sentence. The rest of the order shall remain intact. The period of sentence already undergone by the accused shall be considered for remission of sentence. Bail bond, if any, qua other accused, shall also stand cancelled. Registry to return the R&P to the trial Court forthwith.