

(2015) 10 GUJ CK 0011
In the Gujarat High Court
Case No : Criminal Appeal No. 1397 of 2011

Dipubhai Madhubhai Kamaliya

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 20-10-2015

Acts Referred:

Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 313, 374
Penal Code, 1860 (IPC) — Section 302, 304, 34

Citation : (2015) 10 GUJ CK 0011

Hon'ble Judges : Anant S. Dave and Z.K. Saiyed, JJ.

Bench : Division Bench

Advocate : Ashish M. Dagli, Advocate, for the Appellant; H.S. Soni, APP, for the Respondent

Final Decision : Partly Allowed

Judgement

Z.K. Saiyed, J.—By way of present appeal, filed under Section 374 of the Code of Criminal Procedure, 1973, the appellant has challenged the judgment and order of conviction dated 26.9.2011 passed by the learned Additional Sessions Judge, Bhavnagar, in Sessions Case No. 189 of 2010. The said case was registered against the appellant-original accused for the offences punishable under Sections 302 and 34 of the Indian Penal Code and under Section 135 of the Bombay Police Act. By the impugned judgment and order the appellant is convicted for the offence under Section 302 of the Indian Penal Code and sentenced to undergo Life Imprisonment and fine of Rs. 5,000/-, in default, R.I. for six months. The appellant is also convicted under Section 135 of the Bombay Police Act and sentenced to undergo R.I. for 06 months and fine of Rs. 500/-, in default further R.I. for 10 days for the said offence. All the sentences are ordered to run concurrently. Original accused No. 2 was acquitted by giving him benefit of doubt.

2. According to the prosecution case, the accused No. 1 Dipubhai used to quarrel frequently with any person, hence, the deceased Merambhai Lakhubhai had

taken him to task. Keeping animosity of the same, the accused persons and the child-accused harboured the intention of causing the death of the deceased in the ordinary course of nature, they united in furtherance of that intention, and on 1.9.2010 at 20-00 hours, at Kadamgiri village, the accused No. 1 armed himself with knife, a deadly weapon, and the accused No. 2 and the child-accused held the deceased, and the accused No. 1 gave blows of the said knife to the deceased in the left side and on the left hand, and by causing serious and fatal injuries to the deceased, he committed his murder. Further, it is the case of the prosecution that in spite of the fact that the notification of "Prohibition to Keep Arms" had been issued by the District Magistrate and it was in force at the aforesaid time and place and on the aforesaid date, the accused No. 1 violated this notification by arming himself with the deadly weapon of knife in public, and that by doing so, he has committed the offence punishable u/s. 135 of the Bombay Police Act. Hence the complaint was lodged. The offence was investigated by the police and subsequently charge-sheet was filed against the accused persons.

3. Thereafter, charge Ex. 4 came to be framed and explained to the accused persons, to which he pleaded not guilty and claimed to be tried.

4. In order to bring home the charges against the accused person, prosecution examined 13 witnesses and also produced 21 documentary evidences.

5. Thereafter, after filing closing pursis by the prosecution, further statements of accused persons under Section 313 of the Code of Criminal Procedure, 1973 were recorded, wherein the accused person denied the case of the prosecution and submitted that a false case is filed against him.

6. On conclusion of trial and after appreciating the oral as well as documentary evidence, the learned Judge vide impugned judgment and order convicted the appellant - accused as stated above and acquitted original accused No. 2 by giving benefit of doubt.

7. Being aggrieved by and dissatisfied with the said judgment and order of conviction dated 26.9.2011 passed by the learned Additional Sessions Judge, Bhavnagar, in Sessions Case No. 189 of 2010 the appellant has preferred the present appeal before this Court.

8. Heard Mr. Ashish Dagli, learned counsel for the appellant. He has read the charge, complaint and contents of oral evidence of the witnesses and contended that prosecution has not produced direct evidence in support of the prosecution case. He has contended that as per say of the complainant it is disclosed by him that when he was informed regarding the incident, the deceased has disclosed name of all the accused persons. It is further disclosed that present appellant assaulted him and gave knife blow to him. It is also disclosed that present appellant was always quarreling with all the persons and therefore in harsh words the deceased advised him and in result of that grievance the present appellant gave knife blow on abdomen part of the deceased body. He has

contended that in the present case the incident of offence was never disclosed by any other witnesses. As per say of the present complainant, he was informed by Odhabhai Bhabhabhai through phone, but Odhabhai who is examined as P.W. No. 3 at Ex. 19 has fairly admitted in cross-examination that pole of electric light was there but it was not working. He has further admitted that when he reached near the deceased, at that time, he was lying in the mud and accused Hasu and Madhu both were present and present appellant was not there. He has not seen present appellant. Now as per the evidence of P.W. No. 2 complainant, he has disclosed that oral statement in the form of dying declaration was made by the deceased before this witness. He has contended that oral statement of the deceased is not supported by any cogent, reliable and trustworthy evidence and prosecution has failed to establish that evidence of the complainant P.W. No. 2 is trustworthy, reliable and acceptable. He has drawn attention of the Court to the evidence of P.W. No. 1 Dr. Bharat Dabhi and has read the following injuries:-

"(1) A stab wound, in left side of body in iliac region, oblique in shape, 24 c.m. from the mid line, 4 inch from Anterior superior iliac 8 c.m. long x 3 c.m. width x deep upto 10 c.m. protrusion at some internal organ probable cause bleeding from inside to exterior clear margin and edge some foreign body like sand mud present in tissue. Yellowish pinkish discharge of protruding mass.

(2) A incised wound over the left forearm, on exterior surface 15 c.m. from elbow joint parallel in direction 5 c.m. long x 2 c.m. width x deep upto bone skin subal tissue, muscle excess bone visible with some sand mud present inside wound with clear margin edge and bleeding from wound without fracture of bone.

(3) Cut laceration on the right little finger oblique in shape with cutting of nail from middle underlining tissue visible red coloured."

He has contended that even from the evidence of the medical expert also it is established by defence that there was no intention of present appellant to kill the deceased, even no pre-meditated mind is established and no undue advantage was taken by the present appellant accused in cruel manner. He has prayed that he is not arguing the case on merit but he is praying that from the prima facie case of the prosecution it is established that this is not a case of Section 302 of the Indian Penal Code but as per the injury disclosed by the doctor and witnesses it is prima facie established that this is a case of Section 304 Part-II of the Indian Penal Code. He has contended that the appellant is in jail for considerably long time and therefore, the conviction and sentence may be modified from one under Section 302 of the Indian Penal Code to one under Section 304 part II of the Code. He has prayed to reduce the sentence from life to 07 years. Lastly, he has read observations of the learned Judge and contended that the observations made by the learned Judge are not proper in the eye of law and therefore, judgment and order of the learned Judge deserves to be set aside.

9. Heard Mr. H.S. Soni, learned APP for the respondent - State. He has read evidence of medical expert, P.W. No. 1, 2 and 3 and contended that as per say of

the P.W. No. 3 it is disclosed by him that two lady witnesses of family of deceased were present and in presence of all the witnesses it is disclosed by the deceased that present appellant has inflicted knife blow on the vital part of his body and cause of incident is also disclosed by all the witnesses. The present appellant used always used to quarrel with all the persons and therefore, deceased advised him not to do so, in result of that, keeping grievance the appellant inflicted knife blow on the vital part of body of deceased. He has contended that with intention, preparation and motive knife blow was given to the deceased and in result of that the prosecution has proved that present appellant has committed grave offence of Section 302 of the Indian Penal Code. He has contended that the learned Judge has considered each and every aspect of the matter and has passed absolutely just and proper judgment. Therefore, the impugned judgment and order of conviction and sentence passed by the learned Judge requires to be confirmed.

10. He has further contended that sufficient corroborative pieces of evidences are produced on record. He has contended that the prosecution, by leading sufficient evidence has proved the offence beyond reasonable doubt and learned Judge has rightly considered the case of the prosecution against the present appellant. He has, therefore, prayed to confirm the judgment and order of the learned Judge.

11. We have heard learned counsel for the respective parties. We have gone through the papers produced in the case. We have minutely perused evidence of the witnesses examined by the prosecution. The prosecution has examined witnesses in support of its case.

12. Mr. Dagli has fairly admitted that from the evidence of the P.W. No. 1 Dr. Bharatbhai Dabhi, he has disclosed the injuries in P.M. Note at Column No. 17 and contended that single blow was given by the present appellant to the deceased. We have minutely perused injuries of the deceased as well as FSL report. In the present case it is the case of the prosecution that before complainant and other two witnesses oral dying declaration was made by the deceased and name of the present appellant is disclosed and cause of the incident is also established through oral version of the deceased. But in the present case, we have minutely perused the evidence of the prosecution and it appears that sufficient defence is made by the appellant that due to the sudden quarrel that took place, the incident in question happened and it was not pre-meditated. Even looking to the evidence of the witnesses and case of the prosecution it is established that present appellant has not taken undue advantage or acted in a cruel or unusual manner. It is also established that when deceased has objected to the conduct of the present appellant who was always quarreling with the people and in exchange of hot words and due to the grievance in the mind of the present appellant knife blow was inflicted to the deceased. From the evidence of the prosecution it is established beyond reasonable doubt that due to heated exchange of arguments between the deceased and present appellant, the incident in question happened and there

was no pre-meditation on the part of the accused and prima facie appellant has established from the evidence of the prosecution that prosecution could not convince through oral and documentary evidence that accused has taken undue advantage or acted in cruel or unusual manner. In view of above and the expression "undue advantage" as used in the provisions means "unfair advantage" and from perusal of the prosecution case and for application of Exception 4, it is shown that accused has not taken undue advantage and not acted in cruel and unusual manner.

13. We are of the opinion that from the above observations it is prima facie established that present appellant has committed offence of murder but looking to the injuries shown on the body of the deceased in the P.M. Note at Column No. 17 as well as in the evidence disclosed by the witnesses the offence in question is covered within the meaning of Section 304 Part-II of the Indian Penal Code.

14. Considering the nature of the injuries caused to the deceased and the weapons used by the accused, it cannot be ruled out that the accused assaulted the deceased with the knowledge that the injury may cause death of the person. Moreover, there is no evidence from the side of the prosecution that the accused person pre-planned to cause death of deceased. After analyzing the entire evidence, it is evidently clear that the occurrence took place suddenly and there was no premeditation on the part of the appellants. There is no evidence that the appellant made special preparation for assaulting the deceased with the intent to kill him. There is no dispute that the appellant assaulted deceased in such a manner that the deceased suffered grievous injury which was sufficient to cause death, but we are convinced that the injury was not intended by the appellant to kill the deceased.

15. The question is whether the case will come under the 302 or the second part of Section 304 , IPC. In our opinion it will come under the second part in view of the decisions of this Court in Ramesh Vithalrao Thakre and another Vs. State of Maharashtra, , Sarup Singh Vs. State of Haryana represented by the Home Secretary, , Mavila Thamban Nambiar Vs. State of Kerala, , Sudhir Samanta Vs. State of W.B. and Another, , K. Ramakrishnan Unnithan Vs. State of Kerala, , Tholan Vs. State of Tamil Nadu, , Jagpati Vs. State of Madhya Pradesh, , Tarsem Singh and Others Vs. State of Punjab, , Hari Ram Vs. State of Haryana, , Randhir Singh alias Dhire Vs. State of Punjab, , Kulwant Rai Vs. State of Punjab, and Shankar alias Kallu Vs. State of Madhya Pradesh, .

16. In the facts and circumstances of the case, in our considered opinion, the present case cannot be said to be a case falling under the provisions of Section 302 IPC. The instant case falls under Section 304 Part II IPC. Although the appellant had no intention to cause death but it can safely be inferred that the appellant knew that such bodily injury was likely to cause death, hence the appellant is guilty of culpable homicide not amounting to murder and is liable to be punished under Section 304 , Part II IPC.

17. It is well settled proposition of law that the intention to cause death with the knowledge that the death will probably be caused, is very important consideration for coming to the conclusion that death is indeed a murder with intention to cause death or the knowledge that death will probably be caused. From the testimonies of the witnesses, it does not reveal that the accused person intended to cause death and with that intention he inflicted knife blow on the body of the deceased.

18. While coming to the aforesaid conclusion, we are fortified by a decision of this Court in *Dharam and Others Vs. State of Haryana*, wherein also under similar circumstances, this Court held that the offence committed by the accused persons would fall within the ambit of Section 304 Part II. In that case the deceased and the accused happened to be blood relations and having regard to the peculiar circumstances of the case in which the incident took place, fatal injury inflicted on the head of the deceased, which was found to be sufficient in the ordinary course of nature to cause death could not be held as an injury intended by the accused persons to cause death or an injury likely to cause death of deceased. The facts, therefore, are almost similar to case in hand and the ratio is fully applicable to the facts of this case.

19. Thus, we partly allow the appeal and modify the conviction from one under Section 302 IPC to one under Section 304 Part II of the IPC by reducing the sentence from life imprisonment to 07 years. The impugned judgment and order dated 26.9.2011 passed by the learned Additional Sessions Judge, Bhavnagar, in Sessions Case No. 189 of 2010 is thus modified as above. No other part of the impugned judgment except the above modification is disturbed.

20. Record and proceedings, if any, be sent back to the trial Court concerned, forthwith.