
(2013) 08 GUJ CK 0011
In the Gujarat High Court
Case No : Criminal Appeal No. 349 of 2007

Dudabhai Dalabhai Gohil

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 13-08-2013

Acts Referred:

Citation : (2014) CriLJ 125

Hon'ble Judges : K.S. Jhaveri, J;K.J. Thaker, J

Bench : Division Bench

Advocate : Amirkhan Pathan and Ashish M. Dagli, for the Appellant; C.M. Shah, Assistant Public Prosecutor, for the Respondent

Final Decision : Partly Allowed

Judgement

K.S. Jhaveri, J.—The appellants have preferred the present appeal challenging the judgment and order dated 30.12.2006 passed in Sessions Case No. 41 of 1998. The appellants -- original accused were convicted for the offences punishable under sections 302, 324, 323 & 504 read with section 114 of Indian Penal Code as well as sections 37(1) & 135 of B.P. Act.

1.1 The appellants were ordered to undergo the following sentence:

- (i) Life imprisonment and fine of Rs. 10,000/- each, in default, simple imprisonment for one year for offence u/s 302 r/w 114 of Indian Penal Code;
- (ii) Rigorous imprisonment for three years and fine of Rs. 3,000/- each, in default, simple imprisonment for three months for offence u/s 324 r/w 114 of Indian Penal Code;
- (iii) Rigorous imprisonment for one year and fine of Rs. 1,000/- each, in default, simple imprisonment for one month for offence u/s 323 r/w 114 of Indian Penal Code;
- (iv) Rigorous imprisonment for two years and fine of Rs. 2,000/- each, in default, simple imprisonment for two months for offence u/s 504 r/w 114 of Indian Penal

Code;

(v) Rigorous imprisonment for three months and fine of Rs. 500/- each, in default, simple imprisonment for fifteen days for offence under sections 37(1), 135 of B.P. Act.

The accused were given benefit to set off. All the sentences were ordered to run concurrently.

It is the prosecution case that on 05.11.1997, at around 03.30 p.m., a verbal fight took place between the accused and one Kantaben Govindbhai (hereinafter referred to as "the deceased") near the house of Govind Vashram Harijan with regard to the issue of parking of autorickshaw. It is the prosecution case that accused No. 3 inflicted knife blows upon the deceased thereby causing her death and also inflicted knife blows on the stomach of P.W. 8- Nareshbhai thereby causing grievous injury. On the other hand, accused No. 1 inflicted injury on the right hand of P.W. 10 -- Gani Abdulbhai by way of iron pipe and accused No. 2 gave fist blows to the complainant -- Govindbhai Harijan.

1.1 The appellants-accused came to be arraigned for committing murder of Kantaben Govind. The investigation being complete, the charge-sheet was laid against the present appellants. The case being exclusively triable by the Court of Sessions was committed to the Court of Sessions, which was given number as Sessions Case No. 41/1998.

1.2 Thereafter, the Sessions Court framed the charge below Exh. 1 against the appellants for commission of the offence under sections 302, 323, 324 & 504 read with section 114 of IPC and under Secs. 37(1) & 135 of the Bombay Police Act. The appellants-accused have pleaded not guilty and claimed to be tried.

1.3 To prove the case against the present appellants, the prosecution has examined the following witnesses whose evidence is read before this Court by the learned advocates for the appellants:

(i) P.W. 1-Mahesh Ratilal Pandya

Ex. 10

(ii) P.W. 2-Arjanbhai Ranchhodbhai

Ex. 12

(iii) P.W. 3-Ashok Ravjibhai

Ex. 14

(iv) P.W. 4-Dr. Khimjibhai Makwana

Ex. 16

(v) P.W. 5-Govindbhai Virabhai

Ex. 22

(vi) P.W. 6-Dr. Jayantilal Harilal

Ex. 37

(vii) P.W. 7-Sikandarbai Husenbai

Ex. 53

(viii) P.W. 8-Naresh Govindbai

Ex. 59

(ix) P.W. 9-Hansaben Rameshbhai

Ex. 61

(x) P.W. 10-Ganibhai Abdulbhai

Ex. 68

(xi) P.W. 11-Pankajbhai Sapaliya

Ex. 72

(xii) P.W. 12-Chandrabahadur Thapa

Ex. 74

(xiii) P.W. 13-Khimjibhai Bhikhabhai

Ex. 78

(xiv) P.W. 14-Harilal Popatbhai

Ex. 80

(xv) P.W. 15-Bhanubhai Parmar

Ex. 82

(xvi) P.W. 16-Sureshbhai Jivanbhai

Ex. 84

(xvii) PW. 17-Hasmukhbhai Gondaliya

Ex. 85

(xviii) P.W. 18-Dr. DahyalalTadhani

Ex. 113

(xix) P.W. 19-Dr. NavalbhaiShilu

Ex. 130

(xx) P.W. 20-Asarsilal Yadav

Ex. 140

1.4 The prosecution also exhibited the following documents as documentary evidences:

(i) Inquest panchnama

Ex. 11

(ii) Panchnama of local place

Ex. 13

(iii) Arrest panchnama

Ex. 15

(iv) Medical Certificate of Gani Abdul

Ex. 17

(v) Medical Certificate of NareshGovind

Ex. 18

(vi) Police Yadi

Ex. 38

(vii) P.M. Note

Ex. 39

(viii) Cause of death certificate

Ex. 40

(ix) Letter

Ex. 41, 42

(x) Panchnama of seizure of clothes of accused No. 1

Ex. 54

(xi) Panchnama of seizure of clothes of deceased

Ex. 55

(xii) Log book of cycle rent

Ex. 73

(xiii) Receipt of handling dead body

Ex. 75

(xiv) Discovery panchnama

Ex. 79

(xv) Discovery panchnama

Ex. 81

(xvi) Arrest panchnama

Ex. 83

(xvii) Police Yadi

Ex. 86

(xviii) Map of scene of offence

Ex. 87

(xix) Letter seeking details of AmarsinhPopat

Ex. 99

(xx) Letter seeking details of AmarsinhPopat

Ex. 100

(xxi) Yadi about absence from duty of Amarsinh

Ex. 101

(xxii) Letter seeking details of DudaDala

Ex. 103

(xxiii) Yadi about absence from duty of DudaDala

Ex. 104

(xxiv) S.T. Record Sheet dated 05.11.1996

Ex. 105

(xxv) Record sheet received from S.T.

Ex. 106

(xxvi) Yadi to C.I. for preparing map of local place

Ex. 107

(xxvii) P.M. Report

Ex. 108

(xxviii) Police Commissioner's notification

Ex. 109

(xxix) Letter

Ex. 110

(xxx) Letters for collecting blood samples

Ex. 114-116

(xxxi) Letters

Ex. 117, 118

(xxxii) Letter by P.I.

Ex. 119

(xxxiii) Police Yadi

Ex. 131

(xxxiv) Letter for collecting blood samples

Ex. 132

(xxxv) Letter for sending sample to FSL

Ex. 133

(xxxvi) OPD case papers of AmarsinhPopat

Ex. 134

(xxxvii) Forwarding letter

Ex. 141

(xxxviii) Depute Order

Ex. 142

(xxxix) FIR

Ex. 143

(xl) Report

Ex. 144, 145

(xli) Death Form

Ex. 146

(xlii) Letter seeking details of accused

Ex. 147

(xlili) Leave report of DamuDala

Ex. 148

(xliv) Yadi

Ex. 149

(xlv) Certificate

Ex. 150

(xlvi) Yadi

Ex. 151

(xlvii) Yadi for FSL

Ex. 152

(xlviii) Yadi to M.O. for treatment certificate

Ex. 153

(xlix) Application for protection by complainant

Ex. 154

(1) Yadi for treatment certificate

Ex. 155

(li) Receipt of handling dead body

Ex. 156

(lii) Yadi for blood samples

Ex. 157

(liii) Yadi for recording arrest in station diary

Ex. 158

(liv) Information of arrest of accused

Ex. 159

(lv) Yadi to M.O.

Ex. 160

(lvi) Yadi to court for custody of accused

Ex. 161

(lvii) Yadi for recording arrest of accused

Ex. 162

(lviii) Yadi

Ex. 163

(lix) Order for detaining AmarsinhPopat under PASA

Ex. 164

(Ix) FSL's opinion about muddamal

Ex. 165

(Ixi) Final report about serological analysis

Ex. 166

(Ixi) Report of physics department

Ex. 167

1.5 At the end of the trial and after recording the statement of the accused u/s 313 of Cr.P.C. and hearing arguments on behalf of prosecution and the defence, the learned Additional Sessions Judge convicted the appellants as mentioned aforesaid. Being aggrieved by and dissatisfied with the aforesaid judgment and order passed by the Sessions Court the appellants have preferred the present appeal.

2. Mr. Amirkhan Pathan and learned advocate appearing for Mr. A.M. Dagli for the appellants submitted that the trial court has committed an error in passing the impugned judgment and order inasmuch as it failed to appreciate the material on record in its proper perspective, and hence, the present appellants deserve to be given benefit of doubt and be acquitted.

2.1 Mr. Pathan submitted that the trial court ought to have considered the fact that there was a scuffle followed by free fight. He submitted that the death was caused because of a single blow of knife and that in the very same incident the present appellants also suffered grievous injuries. He submitted that one of the appellants got stitches on his head and that the other appellant was admitted in the hospital as an indoor patient.

2.2 Mr. Pathan further submitted that the eye-witnesses who were examined are near relatives of the deceased and are therefore interested witnesses. He also submitted that no blood stains were found from the place of offence or the autorickshaw in which the deceased was stated to have been taken to hospital.

2.3 Mr. Pathan also submitted that even if the case of the prosecution is accepted, the appellant Nos. 1 & 2 have not inflicted any knife blows on the deceased so as to cause her death. He submitted that even the injuries which are alleged to have been caused by them are only superficial in nature which could even have been self inflicted.

2.4 In the alternative, Mr. Pathan submitted that even if the case of the prosecution is accepted, considering the fact that the offence was committed in the spur of moment, this Court may consider the case of appellant No. 3 u/s 304(1) of the Indian Penal Code. He has relied upon a decision of the Apex Court in the case of Ankush Shivaji Gaikwad Vs. State of Maharashtra, and submitted that this Court may increase the amount of fine or compensation in lieu of the

sentence awarded considering the provisions of Section 37 of Cr.P.C.

3. On the other hand, Ms. C.M. Shah, learned APP has strongly opposed the contentions raised by the learned advocate for the present appellants and has submitted that the trial court has passed the impugned judgment and order after taking into consideration the facts and circumstances of the case as well as the material, in the form of oral and documentary evidence, produced before it and hence, no interference is called for and the appeals deserve to be dismissed.

4. Looking to the evidence on record of PW-5 Govindbhai Virabhai, PW-8 Naresh Govindbhai and PW-10 Ganibhai Abdulbhai, it appears that the appellants were involved in the alleged offence. It can be safely said that a fight had ensued after a verbal duel. It cannot be said that there was any motive on the part of any of the accused. However, the injuries will not permit us to give the benefit of doubt to the accused. The appellants also suffered injuries which is also clear from Ex. 134.

5. The injuries sustained by the deceased as per the post-mortem report are as under:

Incised wound (stab wound) 3 cm x 1 1/2 cm x cavity deep momentum protruding from wound. 10 cm below the xyphisternum & 2 cm lateral (4 side) from midline & 5 cm above the centriliculus. Transversely placed spindal shaped, evarted margin upper end sharpened, lower end plugged.

5.1 P.W. 6, Dr. Jayantilal Harilal (Ex. 37) is the medical officer who performed the autopsy on the dead body of Smt. Kantaben Govindbhai. He has stated that there was one stab injury below the mid portion of chest and above the navel area. He stated that such injury was possible due to the muddamal knife. In the cross-examination he has denied that such type of injury is possible only if the weapon is sharp from one side and has zig zag edges on the other side. He has agreed to the suggestion that blood shall ooze out of the dead body on such wound being inflicted. The cause of death as mentioned by this witness is cardio-respiratory failure due to shock due to injury to vital organ liver.

5.2 The incident in question occurred in the year 1997. The accused No. 3 Amarshi Popatbhai Chauhan is in jail for the last six years, as per the jail record. The other accused are on bail.

6. On going through the judgment of the Hon''ble Apex Court in the case of Ankush Shivaji Gaikwad Vs. State of Maharashtra, wherein, it is held that the principle of sub-section (3) of section 357 of CrPC is empowering the Court to award compensation and Hon''ble Apex Court has referred to catena of decisions and on going through the entire record, it is found that the incident is of the year 1998 which was a free fight. The accused persons had a verbal argument on the point of the placing of autorickshaw and this enraged the accused persons who at the spur of moment reacted to the situation and the entire incident happened.

7. It shall be relevant to note that the one of the appellants got stitches on his

head and that the other appellant was admitted in the hospital as an indoor patient which means that the appellants were also assaulted by the complainant and/or the eye-witnesses involved in the fight.

8. P.W. 8-Naresh Govindbhai in his deposition vide Ex. 59 has narrated the entire turn of events which took place on the fateful day. He has deposed that on 05.11.1997, while he was working at a factory beside his house, he heard a commotion. He along with P.W. 10-Gani Abdul, Rasul Musa, Altaf Habib went to his house and saw that the accused persons were abusing the deceased. He has deposed that appellant No. 3 caught hold of the deceased and took out a knife and inflicted a blow on the deceased. By the time P.Ws. 6 & 10 went to intervene, appellant No. 3 inflicted knife blow on the neck of P.W. 10 and appellant No. 1 inflicted iron pipe blow on the right hand of P.W. 10. He has further deposed that appellant No. 2 inflicted fist blows on him and thereafter as people gathered there, the accused persons went away. He has deposed that the deceased was taken to hospital by the complainant along with P.W. 10 but she succumbed to the injuries during treatment.

8.1 Similarly, P.W. 10-Ganibhai Abdulbhai vide his deposition at Ex. 68 stated that he had received the said injuries during the assault by the accused persons. He has stated that on the date of incident, at around 03.30 p.m., the appellant No. 3 had picked up a quarrel with regard to the parking of autorickshaw and started abusing the complainant and deceased. This witness has stated that when the complainant and deceased retaliated, the appellant No. 3 took out a knife from his possession and inflicted a blow on the deceased. He has further deposed that the appellants No. 1 & 2 also inflicted iron pipe and fist blows on himself and P.W. 6.

9. Moreover, from the evidence on record it is clear that the accused No. 3 was the one who had inflicted knife blow upon the deceased which resulted into her death. The appellant No. 1 inflicted injury on the right hand of P.W. 10-Gani Abdulbhai by way of iron pipe and appellant No. 2 gave fist blows to the complainant-Govindbhai Harijan. There is nothing on record to show that the appellants No. 1 & 2 had inflicted any injury on the deceased so as to cause her death. The only injury which was found on the person of the deceased was a stab wound which had been apparently inflicted by appellant No. 3-accused No. 3 by way of the muddamal knife which was discovered and recovered at his instance. A proper panchnama was also drawn to this effect. Learned APP is not in a position to show any evidence so as to convict the appellants No. 1 & 2 u/s 302 of the Indian Penal Code. Therefore we are not inclined to convict the appellants No. 1 & 2 u/s 302 of the Indian Penal Code. However, they are rightly convicted under sections 324, 323, 504 of Indian Penal Code and sections 37(1) & 135 of B.P. Act.

10. From the above facts and circumstances of the case what is apparent is the lack of pre-meditation and intention to kill and a reason for the appellant No. 3 being provoked inasmuch there was a verbal argument and heated exchange of

words amongst the accused and complainant and his family members over a trivial issue of parking of autorickshaw. However, the fact remains that the offence is said to have been committed and the appellant No. 3 appears to have been driven by a grave and sudden provocation. Therefore, while we are inclined to hold that the offence had taken place as alleged by the prosecution we have a reason to say that the nature of offence would fall under exception to section 300. We are therefore inclined to alter the charge and the sentence from one u/s 302 to section 304 (Part I) and convict the appellant for the offence u/s 304 (Part 1) and sentence him to imprisonment for a period of ten years.

11. However, in view of the decision of the Apex Court in the case of Ankush Shivaji Gaikwad Vs. State of Maharashtra, we are of the opinion that considering the fact that the appellants were driven by a grave and sudden provocation and had no intention or motive to kill the deceased or injure the witnesses, it shall be in the interest of justice if the appellants are directed to pay compensation to the legal heirs of the deceased. In the result, appeal is partly allowed. The impugned judgment and order of conviction and sentence dated 30.12.2006 passed by the Presiding Officer, Second Fast Track Court, Rajkot in Sessions Case No. 41 of 1998 is modified as under:

(i) The appellants No. 1 & 2-original accused Nos. 1 & 2-Dudabhai Dalabhai Gohil & Amubhai Dalabhai Gohil are acquitted of the charges levelled against them u/s 302 of Indian Penal Code.

(ii) The conviction of appellant No. 3-original accused No. 3-Amarsinh Popatbhai Chauhan u/s 302 of the Indian Penal Code is converted to conviction u/s 304 (Pan I) of Indian Penal Code.

(iii) The conviction of the appellants under Sections 324, 323, 504 read with section 114 of the Indian Penal Code as well as under sections 37(1) & 135 of B.P. Act is upheld.

(iv) Accordingly, the appellant No. 3-original accused No. 3 is ordered to undergo rigorous imprisonment for ten years with fine of Rs. 10,000/- in default simple imprisonment for one year u/s 304 (Part I) of Indian Penal Code but the same is suspended on condition that the appellant No. 3-original accused No. 3 in all, pays an amount Rs. 15,000/- by way of compensation under Sec. 357 of CrPC. He is ordered to be set at liberty if not required in connection with any other case and the amount of compensation be paid within a period of three weeks from today.

(v) The appellants No. 1 & 2-original accused Nos. 1 & 2 also shall, in all, pay an amount Rs. 15,000/- each by way of compensation under Sec. 357 of Cr.P.C. The accused Nos. 1 & 2 are sentenced to undergo 3 years imprisonment u/s 324 but the same is suspended. The sentence awarded to the appellants under sections 323, 504 read with section 114 of Indian Penal Code and sections 37(1) and 135 of B.P. Act is also upheld but suspended on condition that the aforesaid amount of compensation is paid by them. The amount of Rs. 10000/- paid by the

accused as fine before the trial court u/s 302 of Indian Penal Code shall be given set-off for payment of compensation u/s 324, IPC.

(vi) The appellants No. 1 & 2-original accused Nos. 1 & 2 are already released on bail pursuant to the order of this Court. Accordingly their bail and bail bonds stand discharged.

(vii) Appellants-original accused shall pay the amount of compensation after deducting the amount, which they have already paid before the trial Court by way of fine, within a period of three weeks from today. If any of them does not pay the amount as ordered, the sentences awarded hereinabove shall stand revived. The amount of compensation shall be paid to the legal heirs of the deceased by way of compensation under sec. 357 of Code of Criminal Procedure.

(viii) R & P to be sent back to the trial Court forthwith.