

**(2016) 01 GUJ CK 0115**  
**In the Gujarat High Court**

**Case No :** Criminal Appeal Nos. 648 of 2007 and 185 of 2008

|                                         |            |
|-----------------------------------------|------------|
| Faridkhan Dilavarkhan Pathan and Others | APPELLANT  |
| Vs                                      |            |
| State of Gujarat                        | RESPONDENT |

**Date of Decision :** 15-01-2016

**Acts Referred:**

Bombay Police Act, 1951 — Section 135(1)  
Criminal Procedure Code, 1973 (CrPC) — Section 313, Section 357  
Gujarat Police Act, 1951 — Section 135  
Penal Code, 1860 (IPC) — Section 302, Section 304, Section 324, Section 326, Section 329

**Citation :** (2016) 01 GUJ CK 0115

**Hon'ble Judges :** K.S. Jhaveri and R.P. Dholaria, JJ.

**Bench :** Division Bench

**Advocate :** Yogesh S. Lakhani, Senior Counsel and B.K. Oza, Advocate, for the Appellant; Hardik A. Dave, Advocate and C.M. Shah, Additional Public Prosecutor, for the Respondent

**Final Decision :** Dismissed

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## Judgement

K.S. Jhaveri, J.—1. Heard learned Advocates appearing for the respective parties.

2. By way of Criminal Appeal No. 648/2007, the appellants accused are aggrieved by the judgment and order of sentence and conviction dated 06.02.2007 of the learned Additional Sessions Judge, Ahmedabad (Rural), Ahmedabad in Sessions Case No. 6/2011 whereby the appellants were sentenced to undergo under Section 302 read with Section 34 of the Indian Penal Code rigorous imprisonment for life and fine of Rs. 1,000/- each, in default simple imprisonment for six months. There were no separate sentences awarded for the offences punishable under Section 135(1) of the Bombay Police Act. Criminal Appeal No. 185/2008 is an Appeal preferred by the State against the acquittal of the original accused No. 2 and 3 for the offences punishable under Section 324 read with Section 34 of the Indian Penal Code.

3. The case in brief and the incident which occurred on 12.01.2000 are as

under :-

"3.1. It is the case of the prosecution that on the said day the complainant had visited Taj Fry Center of one - Mustakbhai situated at Juhapura for having a cup of tea. At that time, the nephew of the complainant - Siddik Mohammed Safruddin Kansara was passing by and seeing the complainant seated at the tea stall, he came to meet the complainant. At that juncture, four persons armed with deadly weapons are alleged to have arrived and have assaulted the complainant and his nephew. Out of these four, one of them allegedly inflicted knife blow on the right side of the complainant's chest and caught hold of his hair. The complainant tried to release himself from the grips of this accused and in doing so, he realized that it was the original accused No. 3 - Afzalkhan. The other three accused started beating the nephew of the complainant and when the complainant tried to intervene, he realized that his clothes were blood stained. The accused then fled away from the place of incident. The appellant accused No. 1 allegedly had a knife whereas the others were armed with gupti. The nephew of the complainant was taken to Riaz Hospital and thereafter, was shifted to V.S. Hospital for treatment.

3.2. The genesis of the entire incident took place in a vehicle accident when the vehicle of the appellant No. 1 dashed with the vehicle of a girl named Asma. A quarrel took place between the two in which the nephew of the complainant Siddik intervened. Siddik allegedly slapped the appellant No. 1 and hence, his brother - Afzal and two others armed with deadly weapons came and assaulted the complainant and Siddik. The accused caused severe injuries to the complainant on the right side of his chest and also caused fatal injuries to Siddik, which resulted into his death. Hence, a complaint was filed before Vejalpur Police Station bearing I-C.R. No. 14/2000. The chargesheet was led before the learned Magistrate and the case was committed to the Sessions Court, being Sessions triable case. The accused pleaded not guilty to the charges levelled against them. On completion of the evidence of prosecution, further statement of the accused under Section 313 of the Code of Criminal Procedure were recorded.

3.3. At the time of the trial, the prosecution examined the following witnesses :-

The prosecution also relied upon various documentary evidence, some of them are :-

3.4. At the end of the trial, the learned Additional Sessions Judge, Ahmedabad (Rural), Ahmedabad passed the above judgment and order of sentence and conviction."

4. Learned Senior Counsel Mr. Yogesh S. Lakhani alongwith learned Advocate Mr. B.K. Oza appearing for the appellants has submitted that there is a scope for acquittal of the appellants on account of the first information received by the police authorities wherein three persons are named, however, none of them were examined. It is further submitted that the Asma who was examined at Exhibit 19 and who was involved in the vehicular accident has not supported the case of the

prosecution and turned hostile. It is also submitted that the prosecution has failed to prove and establish the discovery and/or recovery of the weapons and from the manner of the said discovery and/or recovery as well as from the find of the blood stain on the weapons, the prosecution has failed to prove the case beyond the case beyond reasonable doubt against the present appellant accused. Considering the above, it is submitted that this is a fit case which requires the interference of this Court and the judgment and order of conviction and sentence be upturned.

5. Learned Advocate for the original complainant Mr. Hardik A. Dave has submitted that the widow of the deceased has expired. It is also stated that the parties have settled the dispute amongst themselves and hence, this Court may grant the benefit to the appellants considering the principle rendered by the Apex Court in Ankush Shivaji Gaikwad v. State of Maharashtra reported in , 2013 (6) SCALE 778. Learned Advocate for the complainant also places before this Court an Affidavit filed by the complainant which reads as under :-

"I, the undersigned, MOHAMMED YUSUF MOHAMMED RAMZAN KANSARA, aged : 47 years, Occupation : Artist, Sex : Male, Residing at 3, Al Kamar Society, Behind Royal Akbar Tower, Juhapura, Ahmedabad and Prosecution Witness No. 7 in Sessions Case No. 6 of 2001 tried by Ld. Additional Sessions Judge, Ahmedabad (Rural) and Original Complainant in Complaint which is at Exhibit 51 in Sessions Case No. 6 of 2001, state on oath and solemnly affirm that;

I say and submit that I am aware that Appellants herein namely FARIDKHAN DILAARKHAN PATHAN and AFZALKHAN DILAVARKHAN PATHAN are Original Accused in the FIR filed by me for the alleged offences punishable under sections 302, 326, 34 of Indian Penal Code, sections 135 of Gujarat Police Act. I further say and submit that I am also aware that Appellants herein are convicted by Ld. Additional Sessions Judge, Ahmedabad (Rural) for the different offences and sentenced them to different punishments. I further say and submit that I am also aware that out of four accused persons who were tried together, two accused persons are acquitted against which State of Gujarat has preferred Appeal which is numbered as Criminal Appeal No. 185 of 2008, which is pending before this Hon"ble Court.

I say and submit that subsequent to the alleged incident, wherein my real Nephew died leaving behind his Wife Rehanabanu w/o Mohammed Siddiq Sarfuddin Kansara and two minor Sons namely Mohammed Zed (aged 16 years at present) and Mohammed Jeshan (aged 15 years at present), were being looked after by me. I also say and submit that wife of the deceased i.e. Rehanabanu died due to illness after some period of alleged incident. I say and submit that till the death of the Rehanabanu I took all care of them. I say and submit that since minor Sons of the deceased were of merely Nineteen Months and Three Months respectively when Rehanabanu died, they were being taken by younger sister of Rehanabanu.

I further say and submit that Appellants herein are our family friends and said relation was continue since our forefathers. I further say and submit that immediately after incident, due to intervention of the family members who are closely netted with each other since decades, decided to arrive at mutual agreement with a condition that future of the survivals behind the Deceased i.e. Wife Rehanabanu and Two Minor Children, were being secured in absence of deceased and therefore at the relevant point of time amount of compensation was fixed which was paid by the family of the Appellants to me which was only and only utilised by me for the purpose of taking care of Rehanabanu and two minor children of the Deceased.

I further say and submit that due to immediate mutual understanding and agreement and humanitarian gesture on the part of the Appellants herein and their family members, I as a Complainant and my family members decided to forgive the Appellants herein. I say and submit that Law had taken its own course.

I say and submit that now due to long lasting relations, due to humanitarian gesture on the part of the Appellants and considering future of the two minor children of the deceased and due to mutual understanding and agreement which was and is arrived between me and Appellants herein, I state to this Hon"ble Court that now I don't have any grievance with the Appellants herein or Acquitted Accused persons.

I say and submit that as such now I intend that this Hon"ble Court may not sentence the Appellants herein for any further period and I humbly request this Hon"ble Court to accept mutual understanding and agreement arrived between myself and Appellants herein and grant appropriate relief as deemed just and proper to this Hon"ble Court in the interest of justice.

I state that what is stated herein above is true and correct to the best of my knowledge, information and belief and I believe the same to be true. I further state that filing of false Affidavit is an Offence."

The same is ordered to be taken on record.

6. Learned Additional Public Prosecutor Ms. C.M. Shah has submitted that the there are direct and indirect evidence which connect the accused with the crime and at the relevant point of time, all the accused persons had come to the place with a clear intention to fulfill their motives and were armed with deadly weapons. It is further stated that all the accused were identified by the eye witnesses who were present at the time of the incident. Considering the above, it is submitted that this is a fit case which requires interference of this Court and the judgment and order of the learned Judge be upturned qua acquittal of the accused under Section 324 read with Section 34 of the Indian Penal Code.

7. We have heard learned Advocates appearing for the respective parties and perused the records of the case including the medical evidence of Dr. Tapan

Jitendra Mehta. We have perused the affidavit filed by the original complainant which states that the dispute has been resolved between the two families. It is also pertinent that the witness - Asma who was involved in the vehicular accident has also turned hostile. Hence, in the facts and circumstances of the case, the Criminal Appeal preferred by the appellants accused is allowed. The judgment and order of conviction of the appellants under challenge is modified and altered from Section 302 of the Indian Penal Code to one under Section 304 Part-I of the Indian Penal Code and the appellants are sentenced to undergo rigorous imprisonment for ten (10) years instead of life imprisonment. The rest of the part of the judgment and order of conviction and sentence remains unaltered. The fine and in default punishment as imposed by the trial court is maintained. If the appellants have already served the aforesaid period of sentence, they shall be set at liberty forthwith, provided they are not required by the jail authority for any other purpose. Record and proceedings be sent back forthwith.

However, considering the facts and circumstances of the case and the submissions advanced, we are of the view that the interest of justice would be met by considering the principle rendered by the Apex Court in *Ankush Shivaji Gaikwad v. State of Maharashtra* reported in , 2013 (6) SCALE 778. Hence, we are inclined to grant the benefit of the provision of Section 357 of Cr.P.C. to the appellants. Accordingly, while granting benefit of judgment rendered in *Ankush Shivaji Gaikwad*'s case to the appellants, it is directed that if each of the appellants deposit a sum of Rs. 2,50,000/- (Rupees Two Lacs Fifty Thousand Only) totalling Rs. 5,00,000/- (Rupees Five Lacs Only) with the Registry of the concerned Trial Court, within a period of four months from today, the appellants are not required to undergo the remainder part of their sentence, as stated above. However, if the appellants fail to deposit the amount of Rs. 5,00,000/- as aforesaid within the stipulated period, the appellants shall surrender to custody on expiry of the aforesaid period, failing which the investigating agency shall take necessary steps against the appellants for sending them to jail custody.

It is made clear that if the amount as aforesaid is deposited with the Registry, the same shall be invested in Fixed Deposit Receipt for a long tenure and the amount shall be disbursed to the legal heirs of the deceased, i.e. Mohammed Zed and Mohammed Jeshan only after they attain the age of 21 years.

8. In view of the above, Criminal Appeal No. 185/2008 preferred by the State stands dismissed.