

(2009) 08 GUJ CK 0007

In the Gujarat High Court

Case No : Criminal Appeal No's. 640 and 876 of 2002

Firoz Kalubhai @ Abdulbhai

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 21-08-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 313

Evidence Act, 1872 — Section 30

Penal Code, 1860 (IPC) — Section 120B, 201, 202, 302, 364A

Citation : (2009) 08 GUJ CK 0007

Hon'ble Judges : J.C. Upadhyaya, J; Bhagwati Prasad, J

Bench : Division Bench

Advocate : Shilpa R. Shah, No. 1, for the Appellant; Imran H. Pathan, for Appellant No. 2 and Nanavati, Assistant Public Prosecutor for Opponent No. 1, for the Appearing Parties

Final Decision : Dismissed

Judgement

J.C. Upadhyaya, J.—Both these appeals arise out of a judgment and order rendered by learned Sessions Judge, Rajkot on 16.07.2002 in Sessions Case No. 31 of 2000, whereby both the appellants, namely, appellant - Firoz Kalubhai, who was accused No. 2 in the aforesaid case and appellant Hitesh @ Bhavko Dave, who was original accused No. 1 in the aforesaid Sessions Case came to be convicted for the offences punishable under Sections 302 read with Section 120B of the Indian Penal Code ("IPC", for short) and Section 201 of the IPC and each of them was ordered to undergo R.I for life and fine of Rs. 25000/- each and in default of payment of fine, S.I for three years for the offences punishable u/s 302 r/w. Section 120B of the IPC and R.I for three years and fine of Rs. 10000/- each and in default of payment of fine, S.I for six months for the offence punishable u/s 201 of the IPC. Appellant Firoz Kalubhai original accused No. 2 challenged his conviction and sentence by preferring Criminal Appeal No. 640 of 2002 and the appellant Hitesh @ Bhavko Dave, who was original accused No. 1 challenged his conviction and sentence by preferring Criminal Appeal No. 876 of

2002.

2. Along with both the appellants, total four accused persons came to be tried by the learned Sessions Judge. Original accused Nos. 1 and 2, who are appellants came to be convicted for the offences as narrated above, whereas two co-accused persons, namely, original accused No. 3 Bhupat Raimal and original accused No. 4 Manjuben Bhupat came to be acquitted of the charges of the offences punishable under Sections 302 and 201 of the IPC, but were convicted for the offence punishable u/s 202 of the IPC, and as submitted the State did not challenge the acquittal of original accused Nos. 3 and 4 of the offence of murder punishable u/s 302 of the IPC or the offence punishable u/s 201 of the IPC nor the original accused Nos. 3 and 4 challenged their conviction for the offence punishable u/s 202 of the IPC.

3. The prosecution case in nutshell is that on dated 1.10.1999, when deceased Rahul Chandrakant Parekh was proceeding on his bicycle on Lakhajiraj Road, in the city of Rajkot, at that time, he was intercepted by both the appellants and the appellants promised him that they would help him to marry Kajal. Thereafter, deceased Rahul was taken by both the appellants on a motorcycle to a room, which they had hired from original accused Nos. 3 and 4. It is alleged that deceased Rahul was kept in the room and sedative drugs were administered to him by the appellants. However, the appellants had conspired with each other to kidnap deceased Rahul for the purpose of demanding ransom amount from his father. Telephone calls were made under the pseudo name of Iliyas to the father of the deceased, first informant, PW-19 Chandrakantbhai demanding ransom amount. Initially, first informant Chandrakantbhai informed police regarding the missing of his son Rahul. It is alleged that since the demand of ransom amount was not satisfied, both the appellants by causing bodily injuries to deceased Rahul murdered him. On 4.10.1999, father of deceased Rahul, PW-19 Chandrakantbhai Parekh informed Rajkot City police in writing, Exh.70 regarding the missing of his son. During the course of investigation, on the basis of the information, Exh.70 supplied by the father of the deceased, the investigation was commenced. Initially, the investigation was on the line of finding out missing Rahul. However, during the course of investigation, statement of witness, PW-9 Dharmeshbhai Solanki was recorded. It was revealed that both the appellants were involved in the incident, and it was further revealed that Rahul was done to death by the appellants and the appellants had hired a room of co-accused Nos. 3 and 4. Both the appellants along with co-accused Nos. 3 and 4 came to be arrested. During the course of further investigation, weapons, clothes and other articles connecting the appellants with the crime came to be seized. On behalf of the State first information report was filed by PI Mr. Baranda in Rajkot city police station regarding the offences. After collecting required material for the purpose of lodgment of chargesheet, chargesheet came to be filed in the Court of learned JMFC, Rajkot. Since the offence was exclusively triable by the Court of Sessions, learned JMFC, Rajkot committed the case to the Court of Sessions, Rajkot, which was numbered as Sessions Case No. 31 of 2000.

4. Learned Sessions Judge framed charge against four accused persons, including the two appellants at Exh.1, to which they did not plead guilty and claimed to be tried. Thereupon, the prosecution adduced its oral and documentary evidence. Prosecution examined 21 witnesses and produced required documentary evidence. After the prosecution concluded its oral evidence, learned Sessions Judge recorded further statements of all the four accused persons, including the appellants. The appellants in their further statements denied generally all the incriminating circumstances put to them by the learned Sessions Judge and stated that they were falsely implicated in this case. After appreciating the evidence on record and the submissions made on behalf of both the sides, the learned Sessions Judge recorded conviction of both the appellants for the offences punishable under Sections 302 read with Section 120B of the IPC and Section 201 of the IPC and awarded the sentence as herein above referred to in this judgment. So far as the original accused Nos. 3 and 4 are concerned, the learned Sessions Judge recorded their conviction for the offence punishable u/s 202 of the IPC.

5. Learned advocate Mr. Pathan for the appellant original accused No. 2 Firoz Kalubhai in Criminal Appeal No. 640 of 2002 and learned advocate Ms. Shah for the appellant original accused No. 1 Hitesh @ Bhavko Dave in Criminal Appeal No. 876 of 2002 submitted that the appellant Firoz Kalubhai is in jail, but, the appellant Hitesh @ Bhavko Dave has absconded. However, it is submitted that the evidence adduced by the prosecution against both the appellants is such which cannot be segregated. It is further submitted by learned advocate Ms. Shah that the absconding appellant is represented by her. Both the learned advocates submitted that the entire prosecution case rests upon circumstantial evidence. There is no direct evidence in form of the eye-witnesses, available in this case. The learned Sessions Judge mainly relied upon the confessional statement allegedly made by original accused No. 4 Manjuben Bhupatbhai before the learned JMFC, Rajkot and the confessional statement of original accused No. 3 Bhupat Raimal recorded by learned JMFC, Rajkot u/s 164 of the Cr.P.C. It is submitted that at the time their further statements u/s 313 of the Cr.P.C. came to be recorded, both the co-accused retracted the confessional statements, Exhs. 76 and 77 respectively. It is submitted that so-called confessional statements, Exhs. 76 and 77 of the co-accused persons cannot be pressed into service while recording the conviction of the appellants, who are original accused Nos. 1 and 2. That despite the so-called confessional statements, Exhs. 76 and 77 allegedly recorded by the learned JMFC, Rajkot u/s 164 of the Cr.P.C., yet, both the accused Nos. 3 and 4 who are makers of the confessional statements, came to be acquitted of the charge of offence of murder punishable u/s 302 of the IPC.

6. It is submitted that the prosecution relies upon the evidence of the deceased having been last seen together with the appellants. The evidence regarding the last seen together is shaky and weak, in the sense that the evidence adduced by the prosecution if considered as it is, the evidence is to the effect that the deceased was last seen with the appellants on 1/2.10.1999, whereas skull and

other bones allegedly of deceased came to be found on dated 19.11.1999, approximately after about 48 days from the date when deceased was last seen with the appellants as per evidence adduced by the prosecution. That, thus, there is no proximity of time between the deceased having been last seen with the appellants and of his death. Even the dead-body of the deceased Rahul is not found, but, skull and some bones etc. were found, and, therefore, the evidence regarding the death of Rahul itself is in doubt.

7. It is further submitted that the prosecution failed to prove the motive behind the crime. In a case solely based upon circumstantial evidence, motive plays very important role. The trial Court recorded acquittal of the appellants of the charge of the offence regarding kidnapping for ransom punishable u/s 364A of the IPC. Therefore, the trial Court did not accept the theory of kidnapping and demand of ransom amount from the father of the deceased.

8. The trial Court relied upon the evidence in form of so-called confessional statements, Exhs. 76 and 77 and the oral evidence of the witnesses, namely, PW-11 Hareshbhai, examined at Exh.46 and PW-14 Rameshbhai, examined at Exh.58. Their evidence is full of improvements and inconsistencies.

9. Ultimately it is submitted that both the appeals may be allowed and the appellants may be acquitted of the charges levelled against them.

10. Per contra, learned Additional Public Prosecutor Mr. Nanavati for the State vehemently opposed these appeals and submitted that the prosecution successfully proved its case beyond any reasonable doubt against both the appellants by adducing cogent, convincing, reliable and trustworthy circumstantial evidence. The evidence in form of confession recorded by learned JMFC and the evidence of witnesses, namely, PW-11 Hareshbhai and PW-14 Rameshbhai is cogent enough to bring home the charges levelled against both the appellants. It is further submitted that the dead-body in form of skull and skeleton etc. came to be identified by the father of the deceased Chandrakantbhai on the basis of garments of his deceased son Rahul and the cementing of teeth. Ultimately, it is submitted that both the appeals may be dismissed.

11. We have examined the record and proceedings in context with the submissions made by the rival sides.

12. Re-examining the evidence on record in the context with the submissions made on behalf of both the sides, it is clear that the prosecution case solely rests upon the circumstantial evidence. There is no direct evidence in form of deposition of any eye-witnesses. Considering the evidence on record and perusing the impugned judgment rendered by the trial Court, it clearly transpires that the prosecution successfully proved the confessional statements, Exhs. 76 and 77 recorded by learned JMFC, Rajkot. Perusing both these statements, it becomes clear that the original accused No. 4 Manjuben and original accused No. 3 Bhupat Raimal gave their confessional statements to the learned JMFC, Rajkot.

The statements reveal that they owned a room, which came to be hired by both the appellants. They stated that on dated 1.10.1999, both the appellants came to the room along with one another person. That man was kept in the room and whenever the appellants used to go out, that man was confined in the room and the room was locked from outside. They also stated that tea and food was supplied by the appellants to said person, who was confined in the room. Some sedative drugs came to be added by the appellants. They further stated that the appellants had kept sickles in the room. On dated 02.10.1999, during early morning hours, the appellants left the room, and when they were inquired about the person who was confined in the room, they stated that said person has gone to Morbi. After the appellants left the room, blood was found outside the room. Thereafter, the brother of accused No. 4 Manjuben was called and by removing Mangalore tiles laid down on the roof of the room, he went inside the room and found that the person who was confined in the room was buried in a pit in the room and he had died. They further stated that thereafter, appellants were called and both the appellants confessed before them that the man who was kept in the room has been murdered by them.

13. The confessional statements, Exhs. 76 and 77 were assailed by the appellants on various grounds, namely, the confession of co-accused cannot be used against them, the makers of the confession have retracted said confession during the course of their further statements u/s 313 of the Cr.P.C. and that the so-called confessional statements are outcome of threat and coercive tactics adopted by the police. Considering the impugned judgment rendered by the learned trial Court, the confessional statements were challenged before the trial Court almost on the same grounds. We have taken into consideration the evidence of the concerned learned JMFC Mr. Pandya PW-20, recorded at Exh.74. We are satisfied that due care was taken by the learned JMFC while recording the confessional statements, Exhs. 76 and 77. Nothing emerges that the accused Nos. 3 and 4 gave their confessional statements under coercion or threat either by the police or by anybody. Before the confessional statements came to be recorded, learned JMFC informed both the accused that they are not bound to make confessional statements and further ascertained from them that there was no coercion or threat administered to them by anybody. The subsequent retractions of confessional statements during the course when the further statements came to be recorded by the learned Sessions Judge u/s 313 of the Cr.P.C. loses its importance for the simple reason that during the course of cross-examination of the concerned learned JMFC PW-20 Mr. Pandya, nothing emerges, which would render the confessional statements, Exhs. 76 and 77 a doubtful piece of evidence. Moreover, the present appellants as well as the makers of the confessional statements, namely, co-accused No. 3 and co-accused No. 4 were jointly tried in the aforesaid Sessions Case regarding the same offences. Section 30 of the Evidence Act runs as under:

30. Consideration of proved confession affecting person making it and others jointly under trial for same offence:

When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

[Explanation - "Offence", as used in this section, includes the abetment of, or attempt to commit the offence.

14. Considering the provisions contained u/s 30 of the Evidence Act, as referred above, and considering the facts and circumstances of the case and in light of the above discussions, we are of the considered opinion that the trial Court did not err in taking into consideration such confessional statements against the present appellants. Perusing the confessional statements, Exhs. 76 and 77, nothing transpires that the offence of murder of deceased Rahul was committed by the makers of the confessional statements, namely, the accused Nos. 3 and 4 or that in commission of the offence of murder, they helped or provided any aid or abatement to the appellants. It is true that the original accused Nos. 3 and 4 came to be acquitted of the charge of murder, but, at the same time, they are convicted by the trial Court for the offence punishable u/s 202 of the IPC regarding the intentional omission to give information of offence, though they were legally bound to inform the police and appropriate sentence for the commission of offence punishable u/s 202 of the IPC came to be awarded to them by the trial Court. In sum and substance, we are of the opinion that the trial Court rightly used the confessional statements, Exhs. 76 and 77 against the appellants.

15. Both the sides referred the evidence of PW-11 Hareshbhai examined at Exh.46. The prosecution examined this witness Hareshbhai to prove the circumstantial evidence regarding deceased having been last seen together with the appellants. He stated that both the appellants had hired the room of accused Nos. 3 and 4. He further stated that at the instance of accused No. 4 Manjuben, he had gone to the room carrying cups containing coffee to serve to the appellants and when he entered the room, he found both the appellants with deceased Rahul. He explained that name of the third person present along with the appellants was Rahul, because both the appellants used to call the person by his name Rahul. He further stated that after about two days, he was called by accused No. 4 Manjuben and when he reached near the room, the room was locked from outside and some blood stains were found outside the room and thereupon he climbed on the roof on the room and removed some Mangalore tiles and went inside the room and found blood in the room. He further deposed that during the evening hours, both the appellants had come to the room and the appellant Bavka opened the lock of the room and took out one bag from the room and thereupon, accused No. 4 Manjuben inquired about the contents of the bag and it was revealed that the bag contained dead-body of Rahul. PW-11 is cross-examined at length on behalf of the appellants, but nothing emerges from

his evidence, which would render the deposition of PW-11 Hareshbhai untrustworthy. We are of the considered opinion that while recording the conviction of the appellants the trial Court rightly placed reliance upon the evidence of PW-11 Hareshbhai.

16. Both the sides referred evidence of PW-14 Rameshbhai recorded at Exh.58. Perusing the evidence of witness Rameshbhai, it transpires that the evidence carries importance regarding circumstantial evidence, namely, extra judicial confession before this witness by the appellant. According to his evidence, the accused No. 4 Manjuben is his relative and he met her near the bridge and Manjuben told him that she suspects that both the appellants murdered Rahul, the son of one advocate. Then this witness called both the appellants and they came near the bridge where accused No. 4 Manjuben was waiting. This witness inquired to the appellants as to whether they have murdered Rahul. Initially, they denied but, subsequently, appellant Bavka admitted it and stated that they have murdered Rahul and the dead-body is buried by them in one room in bedi. We have examined the evidence of this witness Rameshbhai and we are satisfied that the trial Court rightly relied upon his evidence. It is true that according to the evidence of witness Rameshbhai the extra judicial confession was made by appellant Bavku, but considering the evidence as a whole, it clearly transpires that at the time when appellant Bavku made the extra judicial confession, the appellant Firoz was also present and thereafter, this witness Rameshbhai along with appellants and accused No. 4 Manjuben went to the room of the accused Nos. 3 and 4 in bedi and the dead-body was removed. It is pertinent to note that the room was hired by both the appellants. It is further pertinent to note that the trial Court accepted the case of conspiracy punishable u/s 120B of the IPC and concluded that the murder was committed in furtherance of the conspiracy hatched by both the appellants.

17. Considering the other circumstantial evidence adduced by the prosecution in this case and as elaborately discussed by the learned Sessions Judge in the impugned judgment, the dead-body was recovered at the instance of the appellants. It is true that a body in form of some skeletons was found, but considering the evidence of Dr. Govekar PW-13 and the PM report, Exh.54, it has come in evidence that the skeleton was of a male aged between 20 to 30 years. The PM was done on dated 19.11.1999. Considering the evidence of father of deceased Rahul named Chandrakant Parekh PW-19, Exh.69, it transpires that he identified the clothes of his son Rahul, he further stated that cementing was done in the teeth of the Rahul and identified the teeth of Rahul on the basis of the cementing.

18. The learned Sessions Judge in the impugned judgment at length discussed the circumstantial evidence adduced by the prosecution. We are of the considered opinion that no illegality or error has been committed by the trial Court in recording the conviction of both the appellants for the offences punishable u/s 302 read with Section 120B and Section 201 of the IPC.

19. We are therefore, of the considered opinion that both the appeals are devoid of any merits and deserves dismissal.

20. For the foregoing reasons, both these criminal appeals stand dismissed. The judgment and order rendered by learned Sessions Judge, Rajkot on dated 16.7.2002 recording the conviction of both the appellants for the offences punishable u/s 302 read with Section 120B of the IPC and Section 201 of the IPC and the sentence there under imposed by the learned Sessions Judge to both the appellants are confirmed.