
(2003) 03 GUJ CK 0029
In the Gujarat High Court
Case No : Criminal Appeal No. 622 of 1998

Gopalbhai Mahijibhai Thakore	Vs	APPELLANT
State of Gujarat		RESPONDENT

Date of Decision : 04-03-2003

Acts Referred:

Evidence Act, 1872 — Section 3, 8
Penal Code, 1860 (IPC) — Section 3, 4

Citation : (2003) 23 GLH 287 : (2003) 2 GLR 1550

Hon'ble Judges : M.S. Shah, J;B.J. Shethna, J

Bench : Division Bench

Advocate : J.B. Pardiwala, for the Appellant; A.Y. Kogje, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

B.J. Shethna, J.—This appeal is directed against impugned judgment and order of conviction and sentence dated 28-5-1998 passed by the learned 3rd Joint Addl. Sessions Judge, Kheda, Nadiad in Sessions Case No. 235 of 1997 whereby the learned Judge convicted the appellant-accused for the offence u/s 302 read with Section 34 I.P.C. and sentenced him to suffer life imprisonment and to pay fine of Rs. 500/- in default to further undergo S.I. for one month.

Case of the Prosecution in brief :-

On 9-6-1997 the First Informant lodged a First Information Report at Virsad Police Station inter alia stating that on 8-6-1997 at about 9-30 in the night the deceased who was serving as a driver at the place of the first informant and the brother of the first informant by name Pradeep had gone to village Virsad for the purpose of filling up diesel in the tractor at a Petrol Pump near Dharmaj Chokdi. The tractor was thereafter taken at the place of one Raman Panchal for the purpose of welding and was accordingly left at the place of Raman Panchal, Pradeep, the brother of the first informant talked to the first informant that when they were on their way of buying diesel, at that point of time the accused and

one Lalo both of them had met them and the accused inquired with the deceased as to where they were going. The deceased at that point of time had told the accused that he was going for getting diesel. Thereafter, the accused, one Lalo Mahiji and two others in company of each other was standing near Nilkanth Society close to the road heading towards Jantral. Thereafter, the deceased all alone came with the tractor and went to the field of Somabhai Shankerbhai Parmar for the purpose of cultivating the land. The said field is being known and identified in the name of Niyawala. At about a O'clock in the night one Ravjibhai Nanbhai Parmar a resident of the village of the first informant came at the house of the first informant and brought to the notice of the first informant that the tractor in the field of Somabhai Shankerbhai is not in motion and the driver i.e. the deceased is not on the driver's seat and this fact Ravjibhai learnt through his sister in law Savitaben Prabhatbhai. Thereafter, the first informant went to the field of Somabhai Shankerbhai and learnt that Savitaben had heard a scream. The first informant found that the tractor was at stand still, head lights were on and about 75 per cent of the field was cultivated. The head lights were off while the rear lights of the tractors were on. At about a distance of 25 to 30 feet the dead body of the deceased was lying on the ground and blood was coming out. The first informant in his first information report alleged that the motive behind the crime was that the sister of the accused by name Jashi was having some affair with the deceased which was not liked by the accused and on 7th the deceased and Jashi had come at the house of the first informant and had requested the first informant for Rs. 100/- and the first informant on inquiring with the deceased as to why he needed Rs. 100/- Jashi had told the first informant that they have been kicked out of the house by the accused. Accordingly, the first informant alleged that as a result of the relation of the deceased with Jashi, the accused and the other accused persons therefore committed murder of the deceased by inflicting a fatal blow with some sharp edged weapon, on the head of the deceased.

Against the appellant-accused and two other accused Dineshbhai Mahijibhai Thakore and Punjabhai Motibhai Thakore, the learned trial Judge framed following charge at Exh. 5 :-

"That on 9-6-1997 on or about 0-30 hrs. to 1-15 hrs. the appellant accused, co-accused No. 2 and co-accused No. 3 in company of one Laljibhai @ Lalo Mahiji assaulted deceased Galabhai Shanabhai driver of first informant Ashwinbhai Somabhai Patel in furtherance of the common intention wherein the appellant accused assaulted with a kosha, co-accused No. 2 with a stick and co-accused No. 3 with a Dafna on various parts of the body of the deceased, thereby committing murder of the deceased punishable u/s 302 read with Section 34 of I.P.C."

2. However, fourth accused Lalo Mahiji @ Laljibhai, who was aged only 14 years was tried before Juvenile Court being Juvenile offender. We are told that the Juvenile Court by giving benefit of doubt acquitted the Juvenile accused-Lalo Mahiji @ Laljibhai for committing murder of deceased-Gababhai.

3. Prosecution has examined Pradeepbhai Somabhai Kachhia P.W. 4 Exh. 19, Ramsing Fulabhai P.W. 6 Exh. 21 and Lalo @ Gordhanbhai Thakore P.W. 7 Exh. 22 on the point of accused last seen with deceased sometime before the commission of offence. However, Jashiben Mahijibhai, sister of the accused, P.W. 8 Exh. 23 turned hostile. Dr. Shirazbhai Firozbhai Vohra, who performed post mortem was examined to prove post mortem notes at Exh. 13. Panchnama scene of offence at Exh. 25-Mohanbhai Vitthalbhai P.W. 9 Exh. 35 was examined as panch witness. Panchnama of slippers of the accused is at Exh. 26, Udesinh P.W. 10 Exh. 36 turned hostile. However, Shankerbhai Somabhai Solanki P.W. 11 Exh. 37 proved the Panchnama. Discovery panchnama of weapon "kosh" (iron bar, shaped at one end and used as an instrument for digging) discovered at the instance of the accused is at Exh. 39. Panch Witness, Bhupendrabhai Naranbhai P.W. 12 Exh. 38 turned hostile. However, another Panch Witness, Somabhai Mahijibhai P.W. 13 Exh. 43 has proved the Panchnama. F.S.L. report at Exh. 34 shows that human blood was found on "kosh". However, no opinion could be given regarding its blood group. Police Sub-Inspector, Shri Champaksingji Narsinh Parmar P.W. 14 Exh. 44 and Police Sub-Inspector Ranjitsingh Kishoresingh Chauhan P.W. 15 Exh. 47, I.Os. have investigated the case.

4. Ashwinbhai Somabhai P.W. 2 Exh. 14, Sarpanch with whom deceased-Gababhai, serving as a tractor driver on the day of incident, was examined to prove the motive. Jashiben, sister of the accused had relations with deceased-Gababhai and she was going to elope him, therefore, her brother committed murder of deceased-Gababhai, who was earlier working with him as tractor driver. Therefore, her accused father and others killed Gababhai.

5. Thus, in the instant case, there is no direct evidence of any eye-witness and the entire prosecution case rest on circumstantial evidence. After considering the evidence led by the prosecution and the defence of the accused, which is of total denial, the learned Judge by his impugned judgment came to the conclusion that the prosecution failed to prove its case against two other accused, Dineshbhai Mahijibhai Thakore and Punjabhai Motibhai Thakore beyond reasonable doubt, therefore, by giving benefit of doubt to them, he acquitted both the accused. However, he came to the conclusion that the prosecution witnesses has clearly proved its case against the accused beyond reasonable doubt as chain of circumstantial evidence was complete in this case. Therefore, the learned Judge convicted the accused for the offence u/s 302 read with Section 34 of I.P.C. and sentenced him to suffer life imprisonment. The learned Judge has relied upon following nine circumstances, which are as under :-

"(1) Accused was last seen near the temple of Zampni Mata at about 7 to 7-30 in the night.

(2) At about 10 O" clock in the night the accused was found standing with a weapon in his hand near Nilkanthnagar Road, which goes towards the field.

(3) Discovery of the weapon used in the commission of offence at the instance of

the accused.

(4) Prosecution has been able to prove through the medical officer that the injury which the deceased had sustained was through this weapon.

(5) On the blade of the weapon human blood-stains were found.

(6) Foot-print (impressions) of the slippers with words "Buniyad" written in English were found near the tractor.

(7) The slippers which were seized from the accused were also bearing the marks "Buniyad" written in English and the size of the slipper was No. 9.

(8) The deceased and sister of the accused as a result of the love -affair between the two had gone to the house of the first informant as the sister of the accused was driven out of her house by her accused brothers.

(9) The motive behind committing the offence is that the deceased was having an affair with the sister of the accused."

6. Learned Counsel, Shri Pardiwala for the appellant-accused firstly submitted that when the learned trial Judge acquitted two other co-accused for the offence u/s 302 I.P.C. for committing murder of deceased-Gababhai, then he could not have convicted the present appellant-accused for the offence u/s 302 read with Section 34 I.P.C. He, therefore, submitted that the impugned judgment and order of conviction and sentence passed by the learned trial Judge convicting the accused u/s 302 read with Section 34 I.P.C. and sentencing him to suffer life imprisonment be quashed and set aside.

In support of his submission, Shri Pardiwala placed reliance on the following judgments of the Hon"ble Supreme Court :-

(i) Prabhu Babaji Navle Vs. State of Bombay, .

(ii) Krishna Govind Patil Vs. State of Maharashtra, .

7. However, learned A.P.P. Shri Kogje has relied upon the judgment of the Hon"ble Supreme Court in case of Sukh Ram Vs. State of U.P., and submitted that acquittal of two out of three named accused does not bar conviction of third u/s 302 read with Section 34 if he is shown to have committed the offence with two unknown companions. We have carefully gone through the aforesaid judgments of the Hon"ble Supreme Court cited by both the learned Advocate, Shri Pardiwala for the appellant-accused, learned A.P.P., Shri Kogje for the respondent-State. However, we have refrained ourselves from dealing with the same in detail as on merits we are inclined to accept the second submission made by Shri Pardiwala that the prosecution has failed to prove its case against accused beyond reasonable doubt by establishing the chain of circumstances.

8. In a case of circumstantial evidence most important circumstance is motive. In the instant case, Ashwinbhai Somabhai P.W. 2 Exh. 14 lodged F.I.R. Exh. 15 on 9-6-1997 at about 5-00 a.m. before the police for the incident in question, which

took place at night hours during 0-30 to 1-15 hrs. on the same night. It is stated in the F.I.R. by Sarpanch Shri Ashwinbhai Somabhai Exh. 14 that on 7-6-1997 just a day before the incident at about 8-00 p.m. deceased-Gababhai (his driver) and Jashiben, daughter of Mahijibhai Mohanbhai came to him and his driver demanded Rs. 100/- from him. Thereupon, he asked that why he wanted that money? Jashiben told him that she was driven out from her house. Thereupon, Ashwinbhai told her to call her brother, therefore, both of them left without money by saying that he was scolding them. He came to know that when his driver-deceased-Gababhai was serving as a tractor Driver with Mahijibhai, deceased had relation with his daughter Jashiben and because of the illicit relation, Jashiben, her brother Gopalbhai and his associates must have committed murder of his driver-deceased-Gababhai at mid night hours between 0-32 to 1-15 a.m. hrs, by assaulting with sharp edged weapons and sticks. However, he has not disclosed that from whom he came to know about their relations. Suggestion was made in his cross-examination that he wanted to grab the land of the accused, therefore, he had filed false complaint against them, which he has denied. Jashiben Mahijibhai Exh. 23 has not supported the prosecution, therefore, she has been declared as hostile. She denied to go to Sarpanch on 7-6-1997 with deceased-Gababhai and demanded money from him as stated by Sarpanch-Ashwinbhai in his evidence. She clearly stated in her evidence that Sarpanch-Ashwinbhai wanted to grab, their land, therefore, he has falsely involved his brothers as accused in this case. If the accused side is not on good terms with Sarpanch-Ashwinbhai, then it would be difficult for us to believe that Jashiben along with Gababhai gone to Ashwinbhai on 7th for money, when up to 7th deceased-Gababhai was in service of Mahijibhai, father of Jashi and the accused persons. Sarpanch-Ashwinbhai claimed to have employed deceased-Gababhai on 8-6-1997 itself. This raises serious doubt in our mind about Jashiben going to his place along with deceased-Gababhai on 7th for money. If Jashiben was driven out from her house, then there was no need for the accused, who are her brothers, to commit murder of Gababhai. Thus, in our considered opinion, first and foremost circumstance i.e. "motive" is not proved in this case by the prosecution. Therefore, in our considered opinion, the learned Judge was wrong in coming to the conclusion that the prosecution proved the motive in this case.

9. Second important circumstance, which is relied upon by the learned Judge for committing the accused is that the accused was last seen near the temple of Zampni Mata at about 7-00 to 7-30 p.m. on 8-6-1997 and the accused was seen standing with weapons in his hand near Nilkhant Nagar road, which is going to field where the incident in question took place at about 10 O' clock in the night of 8-6-1997.

Lalo @ Gordhanbhai Thakore P.W. 7 Exh. 22 stated in his evidence that on 8-6-1997 at about 7-30 p.m. when he and others were going towards temple of Zampni Mata accused Gopal met them near Nilkanth Nagar on the way. He refused to accept "prasad". Thereafter they had gone towards their house.

Surprisingly, we find that Lalo was asked in his chief examination by the learned P.P. after seeking permission from the Court to refresh the memory of the witness. The question was put with a view to involve juvenile accused "Lalo", who was only 14 years old at the time of commission of offence and acquitted by Juvenile Court. Simple presence of accused-Gopal near Nilkanth Society at 7-30 p.m. on 8-6-1997 would not take the prosecution case further. It is absolutely innocuous circumstance which can never be used by the accused.

Pradeepbhai Somabhai Kachhia, P.W. 4 Exh. 19 stated in his evidence that on 8-6-1997 at about 6-00 p.m. his brother Bipinbhai employed deceased-Gababhai as driver of the tractor for Rs. 500/-. Prior to that deceased-Gababhai was serving at the place of Mahijibhai i.e. at accused place. In the night at 9-45 p.m. Gababhai came to his house and he along with Gopalbhai went for filling diesel in his tractor. On the way Lalo, son of Mahijibhai, juvenile accused and Gopalbhai (present appellant-accused) met them. They stopped the tractor and asked Gababhai, where he was going? Gababhai told them that they were going for filling diesel. Thereafter, when they returned after filling diesel, on Jantral road, Near Nilkanth Nagar, Lalo, juvenile accused, Gopalbhai, present appellant-accused and others were standing. Thereafter, they gone to their house and joined "thresher" and from there they had gone to the house of Ramanbhai Panchal. Therefore, Gababhai removed the "thresher" and gone to the field of Somabhai with tractor for ploughing it at about 11-00 p.m. He had not gone long with Gababhai. Thus, from the evidence of this witness Pradeepbhai nothing comes out except that when they were going for getting diesel on the way accused "Lalo" and "Copal" met them. They stopped the tractor and inquired from Gababhai, where was he going? While returning they had seen both the accused Lalo and Gopal standing at Jantral Road, Near Nilkanth Nagar. This is also an innocuous circumstance and it will not take the case of the prosecution any further.

Ramsing Fulabhai P.W. 6 Exh. 21 stated in his evidence that he is running camel cart. On the day of incident at about 10-00 p.m. he was coming in his camel cart with "Bajra" from Jantral. He had seen 4-5 persons gathered under big banyan tree near Jantral road. Accused-Gopalbhai and Dineshbhai were there with something like weapons in their hands. In his cross-examination, he stated that he had not gone on his own to the police and his statement was recorded after day of incident. He denied the suggestion that at he instance of Ashwinbhai he was giving false statement against the accused.

10. Having carefully gone through the evidence of this witness Ramsing, we are not prepared to place any reliance on his evidence. He is a chance-witness. He could not have seen accused persons standing under big banyan tree with the weapons in their hands at a distance in a dark night hours at 10 O'clock when he was going in his camel-cart. During dark night at 10 O'clock he was not seen by anyone, then the question is that how police came to know that witness Ramsinh had seen the accused at 10-00 p.m. under the banyan tree with something like

weapons in their hands.

Ramsing Fulabhai P.W. 6 Exh. 21 was not in a position to state in his evidence that he had actually seen weapons in the hands of the accused. What he stated before the Court was that he had seen something like weapons in the hands of the accused persons. At the cost of repetition, we may state that in the dark night hours of 10 O'clock in the night it would be impossible for anyone to identify the persons or to see something in their hands of the persons standing under the big banyan tree at a long distance when there was no light in the village at that place. This witness, Ramsing Fulabhai was introduced by the police only with a view to show that the accused were seen with the weapons in their hands near the place of incident, which took place between 0-30 hrs. to 1-15 hrs. on 9-6-1997.

11. In any case, the prosecution has not led any evidence to show that deceased and accused were seen last together. On the contrary, as per the evidence of witness-Pradeep Somabhai Exh. 19, he was with the deceased-Gababhai up to 11 O'clock in the night, and thereafter, within one and half hour the incident took place and Gopalbhai was found dead. Thus, second important circumstance viz., deceased and accused were seen last together is not proved. Therefore, in our considered opinion, the learned Judge was wrong in convicting the accused by holding that the accused was seen last near the temple of Zampni Mata at 7-00 to 7-30 p.m. and at about 10 O'clock in the night the accused was seen with the weapon in his hand.

12. The third circumstance, which was used against the accused by the learned Judge was that foot impressions of the slippers with word "Buniyad" written in English and No. "9" were found near place of incident and the slippers which were seized from the accused were also bearing the marks "Buniyad" written in English and the size of the slippers was No. 9.

Panchnama of scene of offence Exh. 25 was drawn on 9-6-1997 between 8-00 to 9-15 a.m. wherein it is stated that at one or two places these foot impressions of the slippers with words "Buniyad" and No. "9" were found, Mohanbhai Vitthalbhai P.W.-9 Exh. 35 was examined as panch witness to prove panchnama of scene of offence. Panchnama of slippers Exh. 26 shows that slippers put on by the accused-Gopalbhai was tallied at the place of incident. The said panchnama was recorded at the place of incident itself on 9-6-1997 between 9-25 to 10-30 a.m. Shankerbhai Somabhai P.W. 11 Exh. 37 examined as panch witness admitted that muddamal Article No. 4, Slippers were easily available in the market and that prior to him many persons had gone to the place of incident. When the accused was very much there in the field when the panchnama of scene of offence and panchnama of slippers was drawn, then mere finding of foot impression of the word "Buniyad" and No. "9" that too at only one or two places would be of no help to the prosecution. Under the circumstances, this circumstance also cannot be used against the accused.

13. Discovery of the weapon "kosh" at the instance of accused is also highly doubtful. Though, the accused was very much there in the village, we fail to understand why he was arrested in the night at about 10-00 p.m. on 9-6-1997. Such weapon like "kosh" would be easily available in the houses of village people. It is true that human blood was found on it as per F.S.L. report, but its blood group was not available.

14. Thus, in our considered opinion, in the instant case, most important circumstances like (1) motive; (2) deceased and accused seen last together before the incident; and (3) finding of foot impression of the slippers with words "Buniyad" and No. "9" at one or two places near the place of incident are not proved and the chain of circumstantial evidence is not complete in this case. Therefore, the present appellant-accused is entitled for benefit of doubt. More particularly, when his two other co-accused have been acquitted by the learned Judge himself by his impugned judgment by giving benefit of doubt and that another juvenile accused has been acquitted by the Juvenile Court. Therefore, the appeal of the present appellant required to be allowed.

15. In view of the above, this Appeal is allowed and the impugned judgment and order of conviction and sentence dated 28-5-1998 passed by learned 3rd Joint Additional Sessions Judge, Kheda, Nadiad in Sessions Case No. 235 of 1997 convicting the appellant accused-Gopalbhai Mahijibhai Thakore for the offence u/s 302 read with Section 34 I.P.C. and sentencing him to suffer life imprisonment and to pay fine of Rs. 500/- in default to further undergo one month S.I. is hereby quashed and set aside. The appellant-accused is ordered to be acquitted, forthwith, if he is not required in any other case. Fine, if paid, be refunded to the appellant-accused.