

(2008) 09 GUJ CK 0048
In the Gujarat High Court

Case No : Criminal Appeal No's. 634 and 774 of 1996 with Criminal Miscellaneous Application No. 120 of 1997 in Criminal Appeal No. 774 of 1996 with Criminal Miscellaneous Application No. 121 of 1997 in Criminal Appeal No. 634 of 1996

Guruprasad @ Munna Hariprasadkanojiya	APPELLANT
Vs	
State of Gujarat	RESPONDENT

Date of Decision : 17-09-2008

Acts Referred:

Penal Code, 1860 (IPC) — Section 114, 304II

Citation : (2008) 09 GUJ CK 0048

Hon'ble Judges : J.C. Upadhyaya, J;A.L. Dave, J

Bench : Division Bench

Advocate : Sadhana Sagar, for the Appellant; U.R. Bhatt, APP, for the Respondent

Final Decision : Dismissed

Judgement

A.L. Dave, J.—These two Criminal Appeals arise out of a judgment and order dated 31st July, 1996 rendered by the Sessions Court,

Vadodara, in Sessions Case No. 25 of 1996, convicting both the appellants for the offences punishable u/s 304-II read with Section 114 of the

Indian Penal Code, and sentencing them to undergo R.I. for a period of five years and to pay a fine of Rs. 2,000/- each, in default, to undergo R.I.

for six months.

The two Criminal Misc. Applications are on the basis of the notice for enhancement of sentence.

2. The brief facts of the case can be stated thus:

2.1 The incident occurred on 30th June, 1995 at about 5.30 p.m. at Panigate Bavchavad Slum Quarters. One Tina, son of Bhikhabhai Kishanbhai

Kahar, was sent to the shop of the appellants (hereinafter to be referred to as ""the accused"") for ironing the clothes. As per the prosecution case,

the accused threw away the clothes and slapped minor Tina. He, therefore, went home crying. Ashok @ Anna, the deceased, therefore, went to

the accused to inquire as to why did they do so, and in turn, as alleged, accused No. 2 - Raju Hariprasad Kanojiya caught hold of the deceased

and accused No. 1-Guruprasad @ Munna Hariprasad Kanojiya inflicted a knife blow on the neck of the deceased, which ultimately resulted into

death of the deceased.

2.2 Mother of Tina and the deceased, viz. Mangiben Bhikhabhai Kahar, therefore, lodged F.I.R., on the basis of which, investigation was started

and the investigating agency, having found sufficient evidence against the accused persons, filed charge sheet in the Court of Judicial Magistrate,

First Class, Vadodara. The learned J.M.F.C., in turn, committed the case to the Court of Sessions, as the offences, for which charge sheet was

filed, were triable exclusively by the Court of Sessions and Sessions Case No. 25/96 came to be registered.

3. Charge was framed against the accused persons at Exh.3 for the offence of murder read with Section 114 of the Indian Penal Code. Both the

accused pleaded not guilty to the charge and claimed to be tried.

3.1 Considering the evidence led by the prosecution, Sessions Court rendered the impugned judgment on 31st July, 1996 holding that the

prosecution has failed to prove the charge of murder. However, the case would fall in the category of culpable homicidal not amounting to murder

and recorded conviction for the offence punishable u/s 304-II of the Indian Penal Code and awarded sentence, as stated hereinabove.

3.2 It is against the said judgment and order that the two appeals are preferred by both the accused persons.

3.3 At the time of admission, notice for enhancement of sentence was ordered to be issued and that is how, Criminal Misc. Application Nos. 120

& 121 of 1997 came to be registered.

4. We have heard learned advocate Ms.Sadhana Sagar for the accused persons, and learned Additional Public Prosecutor Mr. U.R. Bhatt for the

State. We have also examined the record and proceedings.

5. Ms.Sadhana Sagar submitted that the Trial Court committed an error in

recording conviction. She submitted that the first informant herself has turned hostile to the prosecution and has not supported the prosecution case. Not only that, but, P.W.3 - Indiraben and P.W.5 - Sarojben have also not supported the prosecution case. The evidence of P.W.2 - Tino and eye witness Geetaben, PW.7, is shaky and scanty. They both are interested witnesses, which aspect has been overlooked by the trial Court. Their evidence suffers from the defect of improvement and contradictions. She, therefore, submitted that the appeals may be allowed.

5.1 So far as enhancement of sentence is concerned, she submitted that if the Court finds no merits in the appeals and examines the question of quantum of sentence, this is not a case where sentence awarded is unduly lenient. The Court has considered various aspects and has awarded five years" R.I. and has also imposed fine; whereas Section 304-II also contemplates award of only fine. The incident has occurred, as held by the trial Court, abruptly and without premeditation. She also submitted that the incident has occurred about 13 years back and thereafter there has been no any untoward incident. She, therefore, submitted that the notice for enhancement of sentence should be discharged.

6. Learned A.P.P. Mr. Bhatt has opposed the appeals. According to him, the accused persons made a concerted attack on the deceased, wherein accused No. 2 caught hold of the deceased and accused No. 1 inflicted a knife blow on his neck, which is a vital part of the body. He, therefore, submitted that the conviction is appropriately recorded and may not be interfered with. He submitted that the sentence imposed on the accused is inadequate and may be appropriately enhanced.

7. Having examined the record and proceedings, we find that Mangiben, the first informant, who is also the mother of the deceased, has not supported the prosecution case and has been declared hostile. Similarly, P.W.3 Indiraben and P.W.5 Sarojben have also not supported the prosecution case.

7.1 The three witnesses, who support the prosecution case, are Tino Bhikhabhai Kahar, P.W.2 Exh.9, Miraben Laxmanbhai Kahar, P.W.6, Exh.13 and Geetaben Kahar, PW.7 Exh.20. On going through their depositions, we find that Tino has seen the incident. He says that he had gone to the shop of the accused persons with clothes to be ironed, which were thrown

away by them and he was slapped. He, therefore, went back to his home and complained about it. Therefore, the deceased went to the accused persons. There, they had a quarrel and accused No. 2 caught hold of the deceased and accused No. 1 inflicted a knife blow on the left side lower part of the neck. When the deceased was taken to the Doctor, he was found dead as can be seen from the deposition of Dr. Naranbhai P.Parmar, PW.4 Exh.11.

7.2 P.W.6 Miraben Laxmanbhai Kahar says in her deposition recorded at Exh.13 that on hearing shouts she rushed to the place of incident and noticed that both the accused persons, after throwing away the knife in the gutter, ran away. P.W.7 Geetaben also supports the prosecution case and narrates the incident on the lines of what Tino P.W.2 has deposed.

8. The witnesses have been tested on touchstone of cross-examination. But, we do not find any material emerging out of the cross-examination to benefit the accused persons or to render the prosecution case doubtful. Under the circumstances, we are of the view that the trial Court was justified in holding that the prosecution successfully proved the involvement of both the accused persons in the incident.

9. The trial Court, after holding that the involvement of both the accused persons is duly proved by the prosecution, has come to a conclusion that the case would not fall in the category of murder, but, would fall in the category of culpable homicidal not amounting to murder, in view of the fact that the incident occurred suddenly, without premeditation and in the heat of moment. There is no appeal by the State against acquittal for the offence of murder. In this set of circumstances, we hold that the conviction recorded by the trial Court has to be upheld by dismissing the appeals.

10. So far as the quantum of sentence is concerned, we find that the incident occurred about 13 years back. The sentence awarded is five years"

R.I. with fine of Rs. 2,000/- to each of the accused, in default, to undergo R.I. for six months. Looking to the circumstances, in which the incident has occurred, and the age of the accused, we are of the view that the judicial discretion, used by the trial Court, cannot be said to have been used arbitrarily. It cannot be said that the sentence awarded is grossly inadequate. The conviction is of the year 1996 and since we are in the year 2008, much time has lapsed in between. We also notice that the offence, for which the

accused persons were convicted, is punishable with imprisonment or fine. Differently put, only fine can also be imposed on an offender under this provision. In the instant case, the trial Court has imposed not only fine, but, rigorous imprisonment for a period of five years as against the maximum imprisonment for ten years as provided by the Code. We, therefore, discharge the notice for enhancement of sentence and dispose of both the Criminal Misc. Applications accordingly.

11. For the foregoing reasons, both the appeals would stand dismissed, and both the Criminal Misc. Applications also would stand disposed of.