
(2009) 07 GUJ CK 0093

In the Gujarat High Court

Case No : Criminal Appeal No's. 1319 and 1333 of 2007

Hamirji Vardhaji Sodha and Others

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 20-07-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 120B, 143, 144, 147, 148

Citation : (2009) 07 GUJ CK 0093

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

Bench : Division Bench

Advocate : S.V. Raju and Ashish M. Dagli, s 1-4, for the Appellant; M.G. Nanavati, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

J.C. Upadhyaya, J.—Both these appeals arise out of a judgment and order rendered by learned Additional Sessions Judge, Gandhidham, Kutch on 28.09.2007 in Sessions Case Nos. 3, 40 and 58 of 2006. Criminal Appeal No. 1319 of 2007 is preferred by four appellants, who were original accused Nos. 2 to 5 in the aforesaid sessions case, whereas the Criminal Appeal No. 1333 of 2007 is filed by the appellant, who was original accused No. 1 in the aforesaid sessions case. The appellants in both the appeals, who were original accused Nos. 1 to 5 came to be convicted by the learned trial Judge by the impugned judgment and order for the offences punishable under Sections 143, 144, 147, 148, 149, 120B and 302 of the Indian Penal Code ("IPC", for short). Each of them was sentenced to undergo imprisonment for life and fine of Rs. 5000/- and in default of payment of fine, S.I for one year for the offence punishable u/s 302 of the IPC read with Section 149 of the IPC and R.I for two years and fine of Rs. 1000/- and in default of payment of fine, S.I for three months for the offence punishable u/s 148 of the IPC, and no separate sentence came to be passed, so far as the conviction recorded under Sections 143, 144, 147 and 120B of the IPC is concerned.

2. The case of the prosecution in nutshell is that the incident occurred on dated 1.10.2005, at about 8.30 a.m. in the area called Vathan Chowk, near Anganwadi in Dabhunda Village of District Kutch. Deceased Pravinsinh @ Raghubha Balvantsinh Zala was serving as field head-constable in Rapar police station. It is alleged that in connection with some another criminal case, arrest warrant was issued against the original accused Hamir Vardhaji, which came to be executed by the deceased, and accused No. 2 was confined to jail. It is further alleged that one Raghu Koli, who was allegedly close associate of original accused No. 2 Hamir Vardhaji, was murdered by some darbars, and the deceased allegedly played major role to see that those accused persons are released. It is alleged that keeping the grudge in mind, the appellants - accused persons along with original accused No. 6 Ramdevji @ Rambha Madarsinh Jadeja formed a unlawful assembly, and at the time and place of the incident, the appellants inflicted blows with dhariyas and stick on the deceased and the deceased succumbed to the injuries. Banesinh Govindsinh Jadeja lodged FIR regarding the incident in Rapar police station, which came to be registered. During the course of investigation, police recorded statements of material witnesses, weapons came to be seized. After collecting required material for the purpose of lodgment of chargesheet, chargesheet came to be filed in the Court of learned JMFC, Rapar. Since the offence was exclusively triable by the Court of sessions, the learned JMFC, Rapar committed the case to the Court of Sessions, Gandhidham, Kutch, which came to be registered as Sessions Case Nos. 3, 40 and 58 of 2006.

3. The learned trial Judge framed charge against all the five appellants as well as against co-accused No. 6 Ramdevji @ Rambha Madarsinh Jadeja at Exh.24 for the offences punishable under Sections 143, 144, 147, 148, 149, 120B and 302 of the IPC, to which they did not plead guilty and claimed to be tried. Thereupon the prosecution adduced its oral and documentary evidence. After the prosecution concluded its evidence, further statements u/s 313 of the Cr.P.C. came to be recorded and all the appellants - accused denied generally all the allegations levelled against them by the prosecution and stated that they were falsely implicated in this case.

4. Considering the evidence on record and the submissions made on behalf of both the sides, the trial Court arrived at the conclusion that the prosecution successfully proved its case beyond any reasonable doubt against the applicants (original accused Nos. 1 to 5) and recorded their conviction for the offences charged against them and awarded the sentence as hereinabove referred to in this judgment. However, the learned trial Judge recorded the acquittal of the original accused No. 6.

5. Learned senior advocate Mr. S.V. Raju for learned advocate Mr. Dagli for the appellants submitted that Honourable the Apex Court in Special Leave to Appeal (Criminal) Nos. 6631 and 6632 of 2008 vide order dated 11.09.2008, though the request of the appellants for bail came to be rejected, but it was ordered that the High Court shall consider the desirability of disposing of the appeal at an early

date.

6. It is submitted that virtually this is a case of no evidence, in the sense that the so-called eye-witnesses examined by the prosecution, turned hostile. The prosecution attempted to adduce the evidence to the effect that prior to the alleged occurrence and subsequent thereto, the accused persons were found loitering near the vicinity of the scene of the occurrence. It is submitted that about the actual occurrence, there is no direct evidence on record. Even the evidence adduced by the prosecution to the effect that all the accused persons, prior to the incident, and, thereafter, allegedly found loitering, is shaky and untrustworthy. The prosecution relies upon the evidence of PW-11 Bhurubha Dadubha Jadeja, Exh.56 and PW-14 Ramnikba Pravinsinh, Exh.61. But, considering the evidence of both these witnesses, nothing exact emerges on record, as to where the accused were found moving, either before or after the incident. According to the daughter of the deceased, witness Ramnikba, the accused were found moving near the house of the deceased, whereas the alleged incident took place, away from the house. Considering the evidence of PW-11 Bhurubha, he does not say as to at what time the incident occurred and when he saw the accused persons thereafter. The Investigating Police Officer drew panchnamas Exhs.46, 47 and 48, taking PW-11 Bhurubha, as one of the panchas on the day of the incident. However, his statements came to be recorded after about four days by the Investigating Police Officer, wherein this witness claimed that he had seen the accused persons moving in the village.

7. It is further submitted that the medical evidence suggests that the cause of death of the deceased is hemorrhagic shock due to excessive bleeding. As per the prosecution case, weapon - dhariya came to be discovered by the accused. The weapons, except the stick were not sent to FSL for analysis. Under such circumstances, the evidence of discovery does not serve any purpose.

8. It is submitted that in the impugned judgment, the learned trial Judge proceeded on the wrong assumption that why should the police authority involve innocent persons in connection with such heinous crime. That such assumption can never take place of evidence. The prosecution is supposed to prove its case beyond any reasonable doubt. When the prosecution failed to prove its case against the accused persons beyond any reasonable doubt, at that time, there was no need for the trial Court to raise such wrong assumption that Investigating police authority had no reason to falsely implicate the accused persons and, therefore, the prosecution proves its case.

9. Ultimately, it is submitted that both the appeals may be allowed.

10. Per contra, learned APP Mr. Nanavati for the State submitted that it is true that the prosecution examined some of the witnesses in capacity as eye-witnesses, who had actually seen the occurrence, but unfortunately, they turned hostile. However, the prosecution adduced cogent, clear and reliable evidence that soon before the incident and soon after the incident, all the accused persons

along with weapons were found moving near the place of incident. Such evidence is relevant evidence, connecting them with the crime. The complainant though lodged FIR and is one of the eye-witnesses, turned hostile, but in his FIR he narrated the entire incident witnessed by him. The accused in presence of panchas and Police Officer, discovered weapons. The prosecution proved the motive attributed to the accused for commission of the crime. Therefore, 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 adduced by the prosecution in this case, it clearly transpires that prosecution examined some of the witnesses in capacity as eye-witnesses to the incident, but all those witnesses did not support the case of the prosecution and they were treated as hostile witnesses. First informant PW-1 Banesinh Govindji, examined at Exh.36, who is first informant as well as an eye-witness, turned hostile and did not support the prosecution case and the contents of the FIR, Exh.37. The prosecution examined in capacity as eye-witnesses PW-2 Pathubha Jadeja, Exh.38 and PW-3 Nathu Bhura Vanand, Exh.39. They did not support the case of the prosecution and were declared as hostile witnesses.

13. The prosecution relied upon the evidence of PW-11 Bhurubha Jadeja, Exh.56. According to his evidence, on the day of the incident, he was going from his home to Dabhunda S.T. Bus-stand and at that time he had seen the appellants - five accused persons carrying weapons in their hand. He stated that the accused persons were found on a scooter. Considering his evidence, he nowhere stated about the exact place where he had seen the accused persons in Village Dabhunda. As per the prosecution case, the incident occurred in Vathan Chowk near Anganwadi. This witness does not say that in that vicinity, in the Village, he had seen the accused persons.

14. Furthermore, the Investigating Police Officer had taken his services as one of the panchas in connection with panchnamas Exhs.46, 47 and 48, drawn on the day of the incident i.e. on dated 1.10.2005. This witness admits in his evidence that at the time when the panchnamas came to be drawn, he had told the Police Officer that he had seen the accused persons running away. However, he admits that the police recorded his statement, after about four days and in his police statement, which came to be recorded after about four days, he has stated to the police that he has seen the accused persons running away. Under such circumstances, the evidence adduced by this witness regarding the fact that he had seen the accused persons running away with weapons, appears to be doubtful.

15. The prosecution examined PW-14 Ramnikba Pravinsinh, daughter of the deceased, at Exh.61. According to this witness, she was residing with her parents and on dated 1.10.2005, during morning hours, when her father (deceased) was

in the home, and when she went outside her home for throwing garbage, at that time, she had seen the accused persons moving near her house. She further stated that she had seen sticks on the scooter of accused No. 2 Hamirji and she had seen dhariya on the bike of accused No. 3 Chanubha Vardhaji. She stated that she told her deceased father about her seeing the accused persons near their house, to which her father said that he is going out, but he will take care. She stated that, thereafter, after about half an hour, one Nathu Vanand came to her house and stated that her father was assaulted upon by the accused and her father had died.

16. Considering the evidence of this witness Ramnikba, it transpires that she has not actually seen the incident. She only stated that during morning hours, she has seen the accused persons near her house. All the accused persons are resident of the same village i.e. Village Dabhunda. Moreover, she does not say the exact time when she saw the accused persons, nor she deposes as to when her father left the house. There is no evidence on record to show that when the deceased left the house, all the accused persons chased him, since the incident did not take place near the house of the deceased. According to her evidence, Nathu Vanand informed her about the incident. The prosecution examined this witness - Nathu Vanand PW-3 at Exh.39 and as stated above, though the prosecution examined this witness in capacity as eye-witness, this witness did not support the case of the prosecution and was declared hostile. Thus, considering the overall evidence on record, we are of the considered opinion that the evidence adduced by this witness Ramnikba Pravinsinh, daughter of the deceased is not cogent, convincing and trustworthy, so that the conviction of all the appellants - accused persons can be recorded solely relying upon her evidence.

17. The prosecution relies upon one more evidence regarding alleged discovery of weapon - dhariya, at the instance of the accused persons. The panchas did not support the discovery evidence. Considering the evidence of Medical Officer Dr. Bimalkumar Das PW-16, Exh.67 and the P.M. Report, Exh.68, it clearly transpires that the deceased had sustained multiple incised wounds and the cause of death is opined to be hemorrhage on account of incised wound on neck, face and had resulted into damaging jugular vein and carotid artery. The medical evidence thus reveals that the deceased must have profusely bled. Despite this, the Investigating Police Officer did not forward weapon - dhariya to the FSL for appropriate analysis. Even no satisfactory explanation is forthcoming for not sending the weapons to FSL. Under such circumstances, the weapon allegedly discovered cannot be duly connected with the crime. This is more important, considering the peculiar facts of this case because the witnesses examined by the prosecution in capacity as eye-witnesses turned hostile and did not support the case of the prosecution. Therefore, to establish the nexus between the weapon and the crime, the weapons were required to be forwarded to the FSL for appropriate opinion. Nothing whatsoever was done.

18. In light of the entire above discussions, we are of the considered opinion that the prosecution failed to prove its case beyond any reasonable doubt against the appellants - accused persons. Both these appeals, therefore, deserve acceptance.

19. For the foregoing reasons, both these appeals are allowed. The conviction recorded by the trial Court for the offences punishable under Sections 143, 144, 147, 149, 120B and 302 of the IPC and sentence passed thereunder are set-aside. All the appellants - accused are acquitted from the charge of the offences for which they came to be convicted. The appellants - accused be forthwith released from jail, if no longer required in connection with any other matter. Fine if paid, be refunded to them.