

(2009) 02 GUJ CK 0051
In the Gujarat High Court

Case No : Criminal Appeal No"s. 292 of 2005 and 1434 and 2234 of 2006

Hipabhai Sodabhai Rabari

APPELLANT

Vs

The State of Gujarat

RESPONDENT

Date of Decision : 27-02-2009

Acts Referred:

Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 313, 374, 377, 378
Penal Code, 1860 (IPC) — Section 114, 307, 324

Citation : (2009) 02 GUJ CK 0051

Hon'ble Judges : Sharad D. Dave, J;J.R. Vora, J

Bench : Division Bench

Advocate : B.M. Mangukiya, for the Appellant; L.R. Pujari, APP, for the Respondent

Judgement

J.R. Vora, J.—All the three appeals are preferred against the judgment and order delivered by learned Additional Sessions Judge, Fast Track Court No. 3, Bhavnagar, on 4th February, 2005, in Sessions Case No. 84 of 2004.

2. As per the brief facts, accused No. 1 - Hipabhai Sodabhai Rabari and accused No. 2 - Jabarabhai Sodabhai Rabari both came to be charged in the said Sessions Case for the offences punishable under Sections 307 and 114 of the Indian Penal Code and u/s 135 of the Bombay Police Act, by the Trial Court.

3. Vide judgment and order impugned in these appeals, accused No. 2 - Jabarabhai Sodabhai Rabari came to be acquitted by the Trial Court from all the charges levelled against him and hence, the State has preferred appeal being Criminal Appeal No. 2234 of 2006 against that acquittal u/s 378 of the Criminal Procedure Code.

4. Accused No. 1 - Hipabhai Sodabhai Rabari came to be convicted by the Trial Court for the offence punishable u/s 307 of the Indian Penal Code and has been sentenced to undergo imprisonment of 10 years and to pay fine of Rs. 500/-, in default to undergo rigorous imprisonment of 15 days and accused No. 1 -

Hipabhai Sodabhai Rabari has preferred Criminal Appeal No. 292 of 2005 u/s 374 of the Criminal Procedure Code against his conviction and sentence.

5. The State has also preferred Criminal Appeal No. 1434 of 2006 u/s 377 of the Criminal Procedure Code against the accused No. 1 - Hipabhai Sodabhai Rabari for enhancement of the sentence.

6. All the three appeals are arising from common judgment and order and hence, all the three appeals were heard together.

7. As per the brief facts of the prosecution case, complainant - Nanubhai Tapubhai, resident of Village : Thoradi, Taluka : Palitana, District : Bhavnagar and he happened to be the Surpanch of said village, on 23rd September, 2003 at about 11.30 a.m had been to Palitana on his hero-honda motor cycle. He being Surpanch, he stayed at the office of the Taluka Panchayat and after his work was over, he started to go to his village at about 1.00 p.m. When he reached near Harijan Vas on Palitana - Taraja road, one unidentified person and accused No. 1 came on bullet motor cycle and they accosted complainant - Nanubhai Tapubai. They asked the complainant that why complainant had preferred a complaint against them. The unidentified person caught hold of the complainant and accused No. 1 Hipabhai Sodabhai Rabari attacked on complainant Nanubhai with knife and inflicted various blows on different parts of body. Complainant had fallen down and, thereafter, accused No. 1 Hipabhai Sodabhai Rabari and that unidentified person who was accused No. 2, ultimately in the trial, ran away from the spot. One Yunusbhai, a passerby brought the complainant first to Government Hospital at Palitana and, thereafter, the complainant shifted to Sir T. Hospital at Bhavnagar. On 23rd September, 2003 at 21.10 hours, complainant gave his complaint before Police Sub Inspector, Palitana Police Station and stated that the husband of sister of the complainant whose name was Thakarsinhbhai Shambhubhai, had taken loan from accused No. 1 - Hipabhai on interest. Thakarsinhbhai Shambhubhai did not return the loan amount to accused No. 1 - Hipabhai. Accused No. 1 - Hipabhai had an impression that at the instance of the complainant, Thakarsinhbhai was not returning the loan amount to the accused No. 1 and, therefore, this incident had occurred. A crime came to be registered against the accused No. 1 and, thereafter, accused No. 2 also joined as an accused in the investigation. A charge-sheet came to be submitted by the police before the Magistrate and the case was committed to the Court of Sessions. Vide Ex.5, the charge was framed against both the accused for the offences punishable under Sections 307 and 114 of the Indian Penal Code and u/s 135 of the Bombay Police Act and was read over, to which both the accused did not plead guilty. Therefore, the prosecution examined, including injured, 25 witnesses and produced on record voluminous documentary evidence to prove its case. Thereafter, u/s 313 of the Criminal Procedure Code, incriminating circumstances were brought to the notice of the accused and their statements were recorded. Ultimately, after hearing both the sides, learned Trial Judge came to the above conclusion.

8. Learned advocate Mr. B.M. Mangukia was heard in Criminal Appeal No. 292 of 2005 for the appellant and for the respondent in Criminal Appeal No. 1434 of 2006 and Criminal Appeal No. 2234 of 2006. Learned APP Mr. L. R. Pujari for the respondent - State in Criminal Appeal No. 292 of 2005 and for the appellant in remaining both the appeals was also heard.

9. So far as Criminal Appeal No. 292 of 2005 is concerned, learned advocate Mr. B. M. Mangukia for the appellant raised only contention that the incident in question is not disputed, but the act of the accused - appellant Hipabhai Sodabhai Rabari is not covered u/s 307 of the Indian Penal Code. It is submitted that at the most, it could be said that accused No. 1 - Hipabhai Sodabhai Rabari has committed the offence u/s 324 of the Indian Penal Code. Having regard to the facts and circumstances of the case. It is submitted that though there were in all 22 injuries as per medical evidence, but all were superfluous and according to the medical opinion also, there was no other serious injury, except one injury and nowhere it is established by the prosecution that any of the injury caused by the accused No. 1 - Hipabhai Sodabhai Rabari, was sufficient in ordinary course of nature to cause death or was such as might have caused death of the injured. It is, therefore, submitted that while appreciating the evidence of complainant - Nanubhai, who is P.W.1, Ex.12, no intention to kill is proved beyond doubt by the prosecution, so as to constitute the offence u/s 307 of the Indian Penal Code. Thus, in Criminal Appeal No. 292 of 2005, the appellant has contested the appeal to the extent of nature of offence committed by the appellant. It is submitted by the learned advocate Mr. B. M. Mangukia for the appellant that if the request or submission is granted in Criminal Appeal No. 292 of 2005 then Criminal Appeal No. 1434 of 2006 for enhancement of sentence becomes infructuous.

10. So far as Criminal Appeal No. 2234 of 2006 is concerned, learned advocate Mr. B.M.Mangukia for the respondent submitted that though this appeal is preferred by the State against the acquittal of accused No. 2, there is no evidence, at all, to connect the accused No. 2 with the crime.

11. Learned APP Mr. L. R. Pujari contesting all the three appeals submitted that injured Nanubhai had 22 injuries, the manner in which the incident occurred, reveals the intention of the accused to cause murder of the injured. The medical opinion has established beyond doubt that out of 22 injuries, one was serious and if the cumulative effect is taken into consideration, the intention of the accused would be clear and hence, it is submitted that the nature of the act which both the accused committed, fall u/s 307 of the Indian Penal Code. It is submitted that having regard to the injuries and having regard to the intention of the accused, the Trial Court rightly convicted the accused No. 1 - Hipabhai Sodabhai Rabari for the offence punishable u/s 307 of the Indian Penal Code and the sentence awarded is inadequate and for that, enhancement appeal is preferred. It is also submitted that true it is that in identification parade, accused No. 2 could not be identified by the injured, but thereafter, he preferred an affidavit and stated that accused No. 2 was not identified by him because he

thought that accused was muscle man and on account of threat and fear, he did not identify accused No. 2 in identification parade before Executive Magistrate. It is, therefore, submitted that accused No. 2 is equally liable for the offence punishable u/s 114 of the Indian Penal Code along with accused No. 1 for the offence punishable u/s 307 of the Indian Penal Code and his acquittal by the Trial Court is erroneous and is required to be set aside.

12. Criminal Appeal No. 292 of 2005 is restricted to the extent of nature of the offence committed by the appellant, accused No. 1 - Hipabhai Sodabhai Rabari. In this respect, it is pertinent to note that after the incident, the injured was shifted to Sir. T. Hospital at Bhavnagar on 23rd September, 2003. P.W.15 - Dr. Jitendra Dayalji Goswami at 16.00 hours examined injured Nanubhai and in history, the complainant stated that accused No. 1 had attacked him by knife. According to Doctor, the complainant had following injuries.

O/E. Multiple stab wound over chest and trunk.

- [1] 3 x 1 cm in size over chest Rt. Side of
- [2] 1 x 1 cm in size over chest & trunk
- [3] 3 x 1 cm in size
- [4] 1 x 1 cm in size [1] CLW over size over
- [5] 3 x 1 cm in size 5 x 2 x 2 cm Rt. Palm
- [6] 1 x 1 cm in size
- [7] 2 x 1 cm in size [2] CLW over Rt. finger
- [8] 3 x 1 cm in size 2 x 1 cm in size
- [9] 1 x 1 cm in size
- [10] 1 x 1 cm in size [3] CLW over Rt. Leg 3 x 2 cm in
- [11] 1 x 2 cm in size size 3 x 2 x 1
- [12] 2 x 1 cm in size
- [13] 4 x 1 cm in size USG abdomen - NAD
- [14] 2 x 1 cm in size X - ray Not visible
- [15] 7 x 1 cm in size
- [16] 1 x 1 cm in size DOA 23/9/03
- [17] 2 x 1 cm in size DAMA 24/09/03
- [18] 2 x 1 cm in size
- [19] 2 x 1 cm in size

[20] 2 x 1 cm in size

According to Doctor in cross-examination, all the stab wounds were simple in nature and one injury at Sr. No. 15 above was serious and, therefore, the injuries were considered serious. Thereafter, injured was examined by private practitioner Dr. Amulakh Laxmanbhai Savani, who was examined at Ex.20. According to him, when patient came to him on 24th September, 2003, he was treated by him and was discharged on 16th October, 2003. He had stitched injuries. He had given a certificate dated 10th November, 2003 which is produced on record at Ex.21, as under.

This is to certified that Mr. Nanjibhai Tapubhai Khasiya, Aged 50 yrs., Resi. At Thorali, Taluka : Palitana had allegedly assaulted by somebody with knife on 23-9-03 and, for the same Pt. admitted in Sir T. Hospital, Bhavnagar.

On 24-9-03 Pt. admitted in this Hospital and discharged on 16-10-03.

He had multiple injuries over anterior abdomen, Rt low Rt Pelvis Lt. Thumb, upper abdomen, all stitch wounds taken in government Hospital.

Rt. side pelvis wounds reopened and bleeding controlled and resutised nerve.

Other wound were clear.

Otherwise patient treated conservatively here. Pt. had diabetes mellutes also skin treatment for the same.

In his cross-examination, he stated that the injury which was on abdomen was serious. Thereafter, he was again shifted to third Doctor and P.W.24 Dr. Hasanbhai Padmakant Chauhan examined at Ex.54. As injuries were healed at that time and he also produced on record a certificate dated 6th October, 2003 at Ex.55. Accordingly, he had following injuries.

Incised healed wound on Rt. Parm 1/2 cm x 1/2 cm x skin deep

13. Thus, considering the medical opinion, it is found that there was only one injury which was serious, that was injury No. 15 of Ex.36. This serious injury also was not opined to be such, as could have caused death of the injured Nanubhai. Though, injury No. 15 of Ex.36 is 7 cm x 1 cm incised, but it appears that 7 cm is horizontal measurement and not depth of the wound. Except this, all injuries, though they are 20 in numbers, are simple in nature. Thus, it is difficult to come to the conclusion from the medical evidence that injured had such injury as was likely to cause death of the injured. Now, when the intention is assessed of the accused, the only available witness is injured himself examined at Ex.12. It must be noted that cause of incident which the complainant - injured stated, was that Thakarsinhbhai Shambhubhai was not refunding the loan amount. This is not sufficient motive to harbour any intention to kill the injured. Along with this, if the nature and manner of the incident is seen, as revealed through the deposition of P.W.1, it appears that no intention of the accused to kill the injured is established. The injured was going on motor cycle, according to him, accused

came and inflicted blows. Had the intention of the accused was to kill the injured, then we would have found more serious injuries on the body of the injured. It might be that on account of impression that injured was the cause that Thakarsinhbhai Shambhubhai was not refunding the amount, to teach a lesson to the accused No. 1, might have accosted the injured. According to injured, the incident continued for couple of minutes only. It is not the case of the complainant that somebody intervened and he was freed from both the accused. In couple of minutes, according to the prosecution case, accused No. 2 caught hold of the injured and accused No. 1 inflicted about 22 injuries, but all were simple. Therefore, from this established fact, even having regard to the medical evidence as has been adduced during the Trial and during the evidence of injured, it appears that neither there was intention on the part of the accused to kill the injured nor there was any such serious injury which would have caused death of the injured and, therefore, the learned Trial Court came to the erroneous conclusion that there was intention on the part of accused No. 1 to cause murder of the injured and that there was one serious injury on abdomen of the injured. From medical evidence, it is clear that when the injured went to third Doctor, all the injuries were healed, except the injury on pelvis. From these facts and circumstances of the case, we are unable to accept the conclusion of the Trial Court that the accused No. 1 was guilty for the offence punishable u/s 307 of the Indian Penal Code. Having regard to the nature of the injury which is not even a grievous hurt as defined in Indian Penal Code, we, at the most can hold the accused guilty for the offence punishable u/s 324 of the Indian Penal Code and not for the offence punishable u/s 307 of the Indian Penal Code. Therefore, so far as Criminal Appeal No. 292 of 2005 is concerned, interference is required to this extent only and that we convert the conviction of the accused from the offence u/s 307 of the Indian Penal Code to the offence punishable u/s 324 of the Indian Penal Code. Consequently, interference is required in sentence imposed as well. The learned Trial Judge imposed sentence of ten years and to pay fine of Rs. 500/-, in default to undergo 15 days imprisonment. According to the jail remark which is produced on record dated 24th February, 2009, accused No. 1 - Hipabhai Sodabhai Rabari has already undergone imprisonment of three years and eleven months. u/s 324 of the Indian Penal Code punishment provided is a sentence of imprisonment of either description for a term which may extend to three years or with fine or both. Meaning thereby that accused No. 1 - Hipabhai Sodabhai Rabari has already undergone imprisonment more than provided by Section 324 of the Indian Penal Code and, therefore, the sentence is required to be altered already undergone by the accused No. 1.

14. In this view of the matter, Criminal Appeal No. 1434 of 2006 which is filed by the State u/s 377 of the Criminal Procedure Code for enhancement of the sentence becomes infructuous and is required to be disposed of and dismissed.

15. So far as Criminal Appeal No. 2234 of 2006 is concerned, the appeal is preferred by the State against the acquittal of accused No. 2 - Jabarabhai Sodabhai Rabari. While going through the evidence, it is found that there is no

evidence against the accused that he caught hold of the injured and accused No. 2 inflicted injuries. In complaint, his name is not given and that he is labelled as unidentified person. It is found from the evidence that thereafter, upon the request of Police, Executive Magistrate held test identification parade of accused No. 2, but injured could not identify accused No. 2 in the said identification parade. Thereafter, afterwards on 20th October, 2003, injured filed an affidavit before the Executive Magistrate that though he did not identify accused No. 2 on account of fear of accused No. 1 and 2, he did not dare to say that he had identified accused No. 2 in test identification parade. The test identification parade was held on 8th October, 2003. Thus, it clearly appears that accused No. 2 is falsely implicated in this case as had it been so that injured was apprehending threats, he could have requested the police and Mamlatar both, on 8th October, 2003, when the test identification parade was initiated. He filed his affidavit twelve days thereafter on 20th October, 2003. Except this, there is no evidence, at all, as against accused No. 2 and respondent in Criminal Appeal No. 2234 of 2006. We have gone through the reasons assigned by the Trial Court for acquitting accused No. 2 and they are the same reasons that accused No. 2 was not identified by the injured in identification parade. In view of unsatisfactory evidence as against the accused No. 2, we are of the considered opinion that no illegality is committed by the Trial Court in acquitting the accused No. 2 for the offence with which he was charged. We are in complete agreement with the findings, ultimate conclusion and resultant order of acquittal as recorded by the Trial Court, as in our view, no other conclusion is possible except one reached by the learned Trial Judge and hence, in this view of the matter, Criminal Appeal No. 2234 of 2006 is also required to be dismissed.

16. For the reasons discussed above, the following final order is passed.

Criminal Appeal No. 1434/2006 filed by the State for enhancement of the sentence stands dismissed.

Criminal Appeal No. 2234/2006 filed by the State against the acquittal of accused No. 2 also stands dismissed.

Criminal Appeal No. 292/2005 filed by the accused No. 1 Hipabhai Sodabhai Rabari is partly allowed. The judgment and order of the Trial Court convicting the appellant - Hipabhai Sodabhai Rabari for the offence punishable u/s 307 of the Indian Penal Code and sentencing him, the imprisonment of ten years and to pay fine of Rs. 500/-, in default to undergo simple imprisonment of 15 days is set aside and instead we find the appellant - Hipabhai Sodabhai Rabari guilty for the offence punishable u/s 324 of the Indian Penal Code and we sentence him to imprisonment which he has already undergone which is more than provided by Section 324 of the Indian Penal Code. Thus, we convert conviction of the appellant - Hipabhai Sodabhai Rabari from Section 307 of the Indian Penal Code to Section 324 of the Indian Penal Code and we sentence him as aforesaid to the imprisonment which he has already undergone. It is directed, therefore, that the appellant - Hipabhai Sodabhai Rabari, if he is not required to detain for any other

purpose, he be set to liberty forthwith. Remaining order of the Trial Court in respect of muddamal etc. is not interfered with. Direct service is permitted.