
(2016) 04 GUJ CK 0004
In the Gujarat High Court
Case No : Criminal Appeal No. 967 of 2009

Jigneshbhai

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 01-04-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 27, Section 302, Section 377

Citation : (2016) 04 GUJ CK 0004

Hon'ble Judges : K.S. Jhaveri and G.B. Shah, JJ.

Bench : Division Bench

Advocate : Harshit S. Tolia and Parth S. Tolia, Advocates, for the Appellant; C.M. Shah, APP, for the Respondent

Final Decision : Allowed

Judgement

K.S. Jhaveri, J.—1. This appeal has been filed by the appellant-original accused against the judgment and order dated 6-5-2009 passed by the learned 2nd Fast Track Judge, Amreli, in Sessions Case No. 66 of 2008 whereby the accused has been convicted and sentenced to undergo imprisonment for life and to pay fine of Rs. 11,000/- in default, to suffer further simple imprisonment for two years for the offence punishable under Sec.302 of the Indian Penal Code (hereinafter referred to as "the IPC" for short) and rigorous imprisonment for ten years and to pay fine of Rs. 7,000/- in default, to suffer further simple imprisonment for one year for the offence punishable under Sec.377 of the IPC. Both the sentences were ordered to run concurrently. The accused was given set off for the period undergone in jail.

2. Short facts leading to filing of the present appeal are a complaint was filed by Keshubhai Kanjibhai Jadav before Bagasara Police Station alleging inter alia that on 9-4-2008 at about 1.00 or 1.30 p.m., when his son Sanjay was taking bath in the river near Pankhi Ghar with his friends, the accused had abducted him and committed unnatural act on his son and thereafter killed him by throttling his

neck and hitting him with stone and hard substance. In pursuance of said complaint, investigation started and as there appeared prima facie case against the accused, a charge sheet was filed against him. Thereafter charge was framed against the accused which was read over and explained to the accused. The accused pleaded not guilty to the charge and claimed to be tried.

2.1 To prove the guilt against the accused, prosecution examined following witnesses:

2.2 The prosecution also relied on following documentary evidence:

2.3 After filing of closing pursis by the prosecution, further statement of accused under Sec.313 of Cr.P.C. was recorded. On conclusion of trial and upon hearing the learned advocates appearing for the respective parties, the impugned judgment and order was delivered, giving rise to this appeal.

3. Heard learned advocate, Mr. Tolia for the appellant-accused and Ms. C.M. Shah, learned Additional Public Prosecutor, Ms. C.M. Shah for the respondent-State of Gujarat. We have been taken through various oral as well as documentary evidences by the learned advocates for the respective parties.

4. Mr. Tolia, learned advocate for the appellant-accused, contended that the case is based on circumstantial circumstances. He drew our attention towards the depositions of all the witnesses including deposition of child witness, P.W. No. 9-Mohit Kadarbhai Shaheri at Exh.36 and contended that he has admitted in his cross-examination that he has not seen the accused murdering Sanjay. He also drew our attention towards the evidence of another child witness, P.W. No. 10-Naresh Hareshbhai Jadav at Exh.37 and contended that this witness has made the statement that he has seen the accused with the deceased in view of his confessional statement made before the police. In view of the evidence of these witnesses, the theory of last seen together has not been established by the prosecution beyond reasonable doubt inasmuch as these two child witnesses, who were examined as having seen the appellant along with the deceased, had admitted in their cross-examination that they have stated the same in pursuance of their confessional statements recorded by the police. He also took us through the evidence of P.W. No. 8-Jatashankar Ratilal Joshi, the so-called owner of PCO, and contended that he had admitted in his cross-examination that prior to panchnama of test identification parade, identification of the accused was made to this witness by the police. He drew our attention towards medical evidence of Dr. Shatish Kalele and submitted that all the injuries found on the body of the deceased were caused by mouth and nails of the animals. Thus, according to him, the prosecution could not prove the death of the deceased as homicidal. He, therefore, contended that only on the basis of confessional statements and section 27 panchnama, conviction cannot be based as the same is not admissible in law and therefore, the conviction of the appellant-accused was improper and illegal. Taking us through cross-examination of P.W. No. 2, he submitted that no alleged unnatural act for proving the ingredients of offence punishable under

section 377 has been committed by the accused more particularly in view of the fact that the dead body of the deceased could not have been identified as the body parts of the deceased were spoilt because of time gap. According to him, there is nothing on record to link the accused with the crime in question and since the entire link connecting the accused with the crime in question could not be established by the prosecution beyond reasonable doubt, his conviction cannot be sustained. He, therefore, requested that present appeal deserves to be allowed by quashing and setting aside his conviction and sentence. He relied on the following reported decisions:

- i. , (2016)1 Supreme Court Cases 550 in the case of Nizam and another vs. State of Rajasthan;
- ii. , JT 2002 (8) SC 305 in the case of Madho Singh Vs. State of Rajasthan;
- iii. , 1977(4) SCC 600 in the case of Narsinbhai Prajapati Vs. Chhatrasingh Kanji; and
- iv. , AIR 1966 SC 119 in the case of Aghnoo Nagesia Vs. State of Bihar.

5. Learned APP, Ms. C.M. Shah, drawing our attention towards oral as well as the documentary evidence, contended that the prosecution has proved the case against the accused beyond reasonable doubt in view of the evidence of the complainant and two child witnesses. She further contended that the deceased and the accused are real cousins. She also contended that looking to the evidence on record including the evidence of two child witnesses, the evidence of owner of PCO and cross-examination of I.O., the entire involvement of the accused with the crime in question has been clearly established. She further contended that the panchnama and FSL report also supported the case of the prosecution. She also contended that on an appreciation of the entire oral as well as documentary evidence on record, as the case against the accused has been proved by the prosecution beyond reasonable doubt, the appellant-accused has been rightly convicted and sentenced. According to her, no irregularity or illegality has been committed by the trial court in passing impugned judgment and order warranting interference by this Court in the present appeal. She, therefore, requested to dismiss the present appeal.

6. We have considered the above referred contentions raised by the learned advocates appearing for the parties in light of the oral as well as the documentary evidences produced on record and have carefully gone through the impugned judgment and order as well as the decisions relied on by the learned advocate for the appellant-accused.

7. To know the aspect whether death of the deceased was homicidal or not, we have gone through the medical evidence of Dr. Shatish Dinkarbhai Kalele, P.W. No. 2 wherein he has deposed that injuries found on the body of the deceased were post mortem injuries. He has also deposed that other injuries noticed on the body of the deceased were due to eating away of body parts by animals. It is

to be noted that body of the deceased was traced after a considerable period and hence, it would be impossible to correctly identify the dead body. In view of the above, it cannot be believed that the death of the deceased could have been homicidal.

8. Regarding the theory of last seen together, we have gone through the evidence of P.W. No. 8-Jatashankar Ratilal Joshi. It is to be noted that in para 7 of his cross-examination, he has clearly admitted that he was called at the circuit house by the police on 13-4-2008 and accused was shown to him and thereafter on 14-4-2008, panchnama of test identification parade was held. Thus, it appears that this witness has not last seen the accused with the deceased.

9. We have also gone through the evidence of two child witnesses namely, P.W. No. 9-Mohit Kadarbhai Shaheri at Exh.36 and P.W. No. 10-Naresh Hareeshbhai Jadav at Exh.37. P.W. No. 9-Mohit Kadarbhai Shaheri has admitted in para 9 of his cross-examination that he has not seen the accused murdering Sanjay but it has been stated by the police. However, certain improvements have been made by this witness in para 8 of his cross-examination. It appears from the cross-examination of P.W. No. 10-Naresh Jadav that he has admitted that he has last seen the accused with the deceased in view of his confessional statement recorded before the police. In para 3 of his deposition, he has clearly admitted that Sanjay had gone home and thereafter he and other persons left the place and subsequently they came to know that the deceased was murdered. He also admitted that T-shirt was not shown to him by the police.

10. From the aforesaid evidence, it is clear that nobody appears to have last seen the accused with the deceased and therefore, the theory of last seen together is missing in the present case.

11. It is thus clear that the links in the chain of circumstances could not be proved by the prosecution against the accused beyond reasonable doubt and hence, a doubt is created in the mind of this Court regarding involvement of the accused in the crime in question.

12. It is a well settled principle of law that even if there is a slightest doubt regarding the involvement of the accused, benefit of doubt is required to be given in favour of the accused. Looking to the entire evidence on record, there is nothing on record to come to a conclusion that it is the accused and the accused alone who had committed the crime in question. We have appreciated the evidence on record keeping in mind the basic principles of criminal jurisprudence.

13. In the entirety of the facts and circumstances narrated hereinabove, we are of the opinion that the prosecution has failed to establish that the accused was last seen together with the deceased and said material link in the chain of circumstances is missing. Further, the intention or motive in the commission of alleged offence also could not be proved by the prosecution. Therefore, the Court should not be carried away by the emotional considerations to take the place of proof. Therefore, though the unfortunate incident of death of the deceased has

taken place, the accused cannot be fastened with such serious offences and hence, benefit of doubt is required to be given to the appellant accused. Thus, we hold that the offence as well as the charge in question has not been proved by the prosecution beyond reasonable doubt against the accused and hence, this appeal is required to be allowed and the impugned judgment and order of conviction and sentence passed against the appellant-accused is required to be quashed and set aside.

14. In view of the above, appeal is allowed. The impugned judgment and order dated 6-5-2009 passed by the learned 2nd Fast Track Judge, Amreli, in Sessions Case No. 66 of 2008 convicting and sentencing the appellant-accused for the offences punishable under Sections 302 and 377 of the IPC is quashed and set aside and he is acquitted of the charges levelled against him. He is ordered to be set at liberty forthwith, if not required in any other case. He is on bail and hence, his bail bond shall stand cancelled. Fine paid by the appellant-accused shall not be refunded. Record and proceedings shall be sent back forthwith to the trial court.