

(1998) 04 GUJ CK 0048
In the Gujarat High Court

Joriyabhai Thathiyabhai Nayak

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 03-04-1998

Acts Referred:

Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 302

Citation : (1998) 3 GLR 2169

Hon'ble Judges : R.M. Doshit, J;M.R. Calla, J

Bench : Division Bench

Judgement

M.R. Calla, J.—This Criminal Appeal is directed against the order dated 20th May, 1989, passed by the learned Additional Sessions Judge, Chhota Udepur, in Sessions Case No. 5 of 1989, whereby the appellant has been convicted for, the offence u/s 302 of I.P.C. and sentenced to life imprisonment and fine of Rs. 200/-, in default of which, further imprisonment for a period of three months.

2. The case arises out of the incident dated 1st October, 1989 between 7-00 p.m. and 9-00 p.m. at village Chikhli, Taluka-Chhota Udepur of District Baroda at the outskirts of village Panvad-Qwant. With regard to this incident, one Hegiben - wife of the deceased Manubhai Sendhabhai Rathva reported at outpost Panvad that on the previous evening at the time of sunset at about 6-00 p.m., she alongwith her husband Manu Sendha Rathva and her two sons and two daughters were sitting in their house in the village and at that time one Joriya Thathiya came to her house and asked her husband that "Kothivalu field" had been given to him for cultivation, but there was lot of surplus and waste growth of plants which should have been removed, and why he had not removed the same and therefore, let us go to the said field. Saying so, the accused Joriya Thathiya took Manu Sendha Rathva alongwith him. At about 9-00 p.m. while she was sitting in the house after closing the door, the accused Joriya Thathiya came with phaliu (a small piece of cloth which is wrapped on the head, like turban) and therefore, she asked Joriya Thathiya as to where was her husband and Joriya replied that he was lying in the field of Shaniya Ghughra and ran away. It was

further reported that her "devar" Monia Sendha Rathva who lived separately accompanied her to Shaniya Ghughra's field and there they found that her husband was lying dead. Her "devar" looked with the aid of the battery and found that her husband's body was injured on the back of the neck and there was a bleeding on the right hand and the blood was also lying on the ground and therefore, she alongwith her "devar" went to Police Patel Namla. The Police Patel told them to file a complaint at Panvad Police Station. According to her, since it was night time, she could not go to file a complaint and went in the morning of 2nd October 1988 and reported that her husband Manu Sendha Rathva has been killed by Joriya Thathiya Rathva with the use of "Palia" which he was having at the time when he came to call her husband. On the basis of this report (Ex-23), the case was registered against the accused u/s 302 of I.P.C. by the police and the investigation was started. PW-10 Somabhai who was in-charge of Police Station, Qwant on 2nd October 1988, has stated that in the morning of 2nd October 1988, the Police Constable-Bhupendrasinh Indrasinh of Panvad Outpost came with Occurrence Report No. 15 of 1988, on the basis of which the case was registered at No. 139 of 1988 at Qwant Police Station u/s 302 of I.P.C. He went to Chikhli and visited the site, prepared the inquest report and the dead body was sent for post-mortem to Medical Officer, Panvad. Panchnama of scene of offence was prepared, soil was also collected from the scene of the offence; Paghdi (Phalia) as shown by the wife of the deceased was taken into custody; blood-stained clothes on the dead body were also taken into custody. Inquiries were made from the accused who revealed that he was prepared to produce "Palia" which had been concealed and lying in his house and the said "palia" was recovered at the instance of the accused as it was concealed in the house of the accused. At the time of arrest of the accused, the arrest-memo was prepared and the blood-stained "Lungi" of the accused was also taken into custody. This witness PW-10 has also stated that there were injuries on the left leg, left hand and near left eye of the accused. Blood-stained clothes, blood soaked soil and the "Palia" were sent for examination. It was also stated that he had recorded the statements of Mania, Ramtiben, Hasan, Ranchhod, Manji Sendha, Buchia, Kalia, Namla Dalu, Sarapada etc. The accused was sent to judicial custody and the charge-sheet was filed.

3. In the trial, charge u/s 302 of I.P.C. was framed against the present appellant vide Ex. 3 page 8 on 18th February 1989 and on such charge being denied by him, the trial was conducted, and on the basis of the trial, the appellant has been convicted and sentenced as above by the learned Additional Sessions Judge, Baroda, camp-Chhota Udepur.

4. We have perused the record and have heard the Learned Counsel for the appellant Mr. B.N. Doctor and learned A.P.P. Mr. Bhatt. We find that there is no eye witnesses nor any direct evidence and the whole case hinges upon the circumstantial evidence in the form of last seen evidence coupled with an extra-judicial confession. The material witnesses, in this case are (1) Hegiben (PW-4), i.e., widow of the deceased who also lodged the F.I.R.; (2) Mania Senda Rathva

(PW-6), i.e., brother of the deceased; (3) Namla Dalu Rathva (PW-5) who is Police Patel; and (4) Bacha Kala (PW-7) before whom the accused is said to have made the extra-judicial confession. The Learned Counsel for the appellant has pointed out several contradictions in the versions between the statements made by Hegiben (PW-4) and Mania (PW-6) inasmuch as Hegiben says that she has been staying separately with her "devar", i.e., Mania, whereas Mania has stated that all of them were residing in the same house; Hegiben did not say anything about there being any clock/watch in the house, whereas Mania says that he had a watch; Hegiben says that they all had taken the food when the accused had come to her house, whereas Mania says that they did not have the food; Hegiben says that it was darkness at the time when the accused came to fetch the deceased, whereas according to Mania, it was 5-30 p.m. only; Hegiben says that when the accused came back, i.e., second time, they all had gone to sleep; according to Mania, the accused had come at 7-00 p.m. while in the F.I.R. Hegiben says that the accused came back at about 9-00 p.m.; Hegiben says that there was no electric light in the house, whereas Mania says that there was an electric bulb; according to Hegiben, the accused came thrice in all, whereas according to Mania, the accused came only twice; according to Hegiben, in the first instance she went to field alone and thereafter went with Mania and then with Police Patel, whereas according to Mania, they all went to the field together and thereafter with Police Patel. Neither Hegiben nor Mania says anything on the question as to whether the accused was carrying "Palia" when he came to fetch the deceased at his house. On reading the statements of PW-4 Hegiben and PW-6 Mania, we find that there are material contradictions between the versions of these two witnesses. Even with regard to the basic facts, apart from the question of point of time, whether they lived together or not is certainly a fact on which there should not have been any contradiction. How many times in fact the accused had come to the house, there also should not have been any contradiction. Whether there was electricity in the house or not, there should not have been any contradiction. Whether they all went together to the field in the night or Hegiben had gone all alone, there should not have been any contradiction - apart from the fact that it is not believable that in the night time Hegiben having come to know about the death of her husband would have gone all alone to the field to find that her husband was dead and then informed Mania and thereafter the Police Patel. Thus, we find that there are contradictions on material aspects with reference to the basic facts. Hegiben, who is author of the F.I.R. had categorically reported in Ex. 23 F.I.R. that the accused-appellant was carrying palia at the time when he came to fetch her husband, but in her statement while answering the Court question, she has answered that at the time when Joriya came second time whether he was empty handed or having a weapon, is not known to her by saying that he was having the weapon which was concealed and therefore, she could not see the same.

5. PW-6 Mania has stated that the accused-appellant had come back to give the "paghdi" and at that time he told that the deceased was lying in the field of

Shaniya and having given "paghdi" to his "Bhabhi", he ran away. He also stated that the "Paghdi" was blood-stained and was of red colour. He then says that he, Hasan and Hegiben went to Shaniya's field and brought his brother who was having two wounds on the back of the neck and one on the arm on the side of the chest and then they went to Police Patel. Thus, we find that these two witnesses PW-4 and PW-6 have given the version which mutually does not tally on material aspects. Rather, their version is contradictory on the basic facts and therefore, we find that their testimony does not inspire confidence to believe the prosecution case to be correct.

6. PW-5 Namla, Police Patel is a witness who had gone along with the villagers at the scene of the offence where the body of Manu Sendha was lying and he has also narrated the wounds and injuries on the body of the deceased and he has accompanied them for filing a complaint before the police in the night itself at Panvad and has come back in the morning. While making reference to this witness, the Learned Counsel for the appellant has submitted that this witness has stated that he did not remember as to whether he had signed the complaint or had put his thumb impression and further that this witness has also stated that the police was inquiring from him as well as from Hegiben and was writing the report accordingly. He has then said that the police was asking to all of them, but when he was replying the police was writing and thereafter the police did not go to the village and did not make any inquiry from him. This witness has contradicted PW-6 Mania by saying that he had gone to the spot with the lamp as in the village no one has a battery. On the basis of this, the Learned Counsel for the appellant has submitted that in fact the author of the F.I.R. was this witness Mania and the F.I.R. was reported as per the version given by him and therefore, Hegiben cannot be said to be true author of the F.I.R. and he has also stated that Hegiben has also improved the version in her statement as compared to the contents of F.I.R. and none of the witnesses are believable. We have already discussed the testimony of PW-4 and PW-6 and have already opined as above.

7. PW-7 is a witness Bacha Kala before whom the extra-judicial confession is said to have been made. He has only given answers to the introductory questions in examination-in-chief and was immediately declared hostile. In the examination-in-chief he has stated that on the date of the incident at about 8-00 p.m. he was sitting in his compound alongwith his wife. The wife of Manu was telling that Manu had been killed and she had gone to the field of Shania. When he asked them as to who had killed him, Hegiben told that Joriya Thathia had killed him. This witness then stated that he had not talked about it to anybody. Wife of Manu had met him and Manu's brother Mania had come running and told that his brother had been killed and further that where was Joriya, and thereupon this witness told Mania that Joriya had run away. At this stage, this witness is declared hostile and thereafter he has stated that he had heard some noise from Shania's field and at that time Joriya Thathia came running and was nervous. He was having a "palia" in his hand and when he stopped him and asked him, Joriya told him that he had killed Manu Sendha and then ran away. This witness has

also stated that there was no relative of Joriya and in case there was nobody to take care of his land and in case Joriya is sentenced, he will have to look after his field. Whether the field is entered in his name or not, he is not concerned. He has said that the deceased has been cultivating the field of Joriya and after the death of Manu, it is Mania brother of the deceased who was cultivating the said field. In the cross-examination, after being declared hostile, he has said that Joriya came fast-breathing and was having "palia" in his hand and when he asked him as to what has happened, he said that he had killed Manu Sendha because he did not remove the surplus and waste growth of plants in the field; that Joriya had come to conceal "palia" in the house of this witness and having concealed the "palia" he had run away, and he himself had noticed Joriya while he was concealing the weapon. When the police came for recovery of "palia" it was he who had pointed out the "palia". He has denied the suggestion that he was making a wrong statement before the Court so as to grab Joriya's field. Thus, this witness has been relied upon by the prosecution for the purpose of showing that extra-judicial confession was made by the appellant-accused before this witness. Besides the fact that the witness is declared hostile, the fact remains that this witness himself has stated in the very beginning that when the wife of the deceased met him, he had asked her as to who had killed her husband. Thereafter, when Mania asked him where was Joriya, he said that Joriya is not there. Naturally, if at all the accused-appellant had made any extra-judicial confession as suggested by the prosecution before this witness, he must have made such extra-judicial confession before running away and therefore, it was already in the knowledge of this witness at the time when he met the wife of the deceased that it was Joriya who had killed Manu Sendha and even then he did not disclose this fact to anybody. On the contrary, he asked the wife of the deceased as to who had killed Manu Sendha. Besides this, the words in which the extra-judicial confession is said to have been made by the accused-appellant, has been narrated in different terms and words in the statement of this witness and thus we find no exactitude in terms in which this extra-judicial confession is said to have been made before this witness. In the first instance, he has said that. Then he has also added the reason given by the accused-appellant as to why he had killed the deceased and this time he has used the words. If at all the accused-appellant had made extra-judicial confession before this witness, one fails to understand as to why he did not disclose this fact when he had more than one opportunities for disclosing this extra-judicial confession. We further find that disclosure of this extra-judicial confession in the statement made by this witness also appears to be an after-thought because had such an extra-judicial statement been made before him and had this witness actually knew that it was Joriya who had killed Manu Sendha, he had no occasion to make inquiries from the wife of the deceased as to who had killed her husband. In the cross-examination, a suggestion has also been made to him that he was making his statement against Joriya with regard to the extra-judicial confession so that he may grab the land of Joriya. Of course, this suggestion has been denied, but he has admitted the fact that he would have cultivated the land in case Joriya is

sentenced. In such facts and circumstances of the case, apart from the fact that this extra-judicial confession is not in accordance with the settled norms so as to rely the same, we find that it would be wholly unsafe to base the conviction on this extra-judicial confession made by this witness who has been declared hostile and as a whole does not inspire any confidence.

8. So far as the recovery of the weapon, i.e., "palia" is concerned, the recovery cannot be said to be admissible u/s 27 of the Evidence Act inasmuch as there is contradiction about the factum of recovery and the witness Bacha PW-7 has stated that "palia" had been concealed in his house by the accused and he had pointed out the hidden "palia" to the police when the police came to recover. This part of the statement of this witness makes recovery suspicious and inadmissible u/s 27 of the Evidence Act and therefore, the fact that "palia" was having human blood group "B" loses significance and the same cannot be used for the purpose of sustaining conviction of the appellant. The medical evidence of the concerned Doctor Rajesh K. Shah PW-8; post mortem report and the reports of chemical examination of the articles do show that the deceased was done to death on the basis of the injuries which had been so found and which can be caused by the weapon like the one which was used in this case and there was human blood of the same group on the clothes etc., but that evidence does not establish the commission of offence alleged against the appellant-accused and when we find that on the basis of other circumstantial evidence which has been brought on the record by the prosecution, guilt is not brought home against the appellant, conviction cannot be sustained on the basis of the post mortem report and the report of the examination of the Forensic Science Laboratory. Even otherwise, the circumstantial evidence and the extra-judicial confession, which is made available in this case is so feeble in nature that no conviction can be sustained on the basis of such feeble circumstantial evidence which suffers from many infirmities, material contradictions on the basic facts and extra-judicial confession does not inspire confidence and it may also be pointed out that the conduct of the appellant-accused as has been stated by the witnesses Hegiben and Mania, also does not appear to be natural inasmuch as accused person having fetched a person from his house and having killed him in the field knowing it fully well that he is the person in whose company the deceased has been seen last and after doing the person to death, he would come back to his house with the bloodstained "paghdi" of the deceased so as to hand it over or put it inside the house of the deceased and also informing the wife and/or brother of the deceased that the deceased was lying in the field of Shania.

9. For the reasons aforesaid we find that conviction and sentence of the appellant u/s 302 of I.P.C. cannot be sustained and the same is set aside.

Accordingly, this criminal appeal succeeds. The conviction and sentence of the appellant u/s 302 of I.P.C. is set aside. He is acquitted of the charge u/s 302 I.P.C. The present appellant-Joriya Thathiyabhai Nayak who is in jail since 3rd October 1988 shall be released forthwith, if not required in other cases.