

(2009) 03 GUJ CK 0038

In the Gujarat High Court

Case No : Criminal Appeal No's. 428 and 568 of 2003

Kamlesh @ Kamo Kunvarjibhai Patel

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 17-03-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 114, 201, 302, 363, 365

Citation : (2009) 2 GLR 1567

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

Bench : Division Bench

Advocate : Yogesh S. Lakhani, in Criminal Appeal No. 428 of 2003 and N.D. Nanavaty and N.D. Buck, Nos. 1, 2 and 3 in Criminal Appeal No. 568 of 2003, for the Appellant; M.R. Mengdey, Addl. P.P. in Criminal Appeal No. 428 of 2003 and M.R. Mengdey, Addl. P.P. in Criminal Appeal No. 568 of 2003, for the Respondent

Final Decision : Allowed

Judgement

A.L. Dave, J.—These two appeals arise out of a judgment and order rendered by Sessions Court, Morbi on 15-3-2003 in Sessions Case No. 22 of 2000 convicting all the appellants for the offences punishable under Sections 363 and 365 read with Section 114 of Indian Penal Code ("I.P.C.", for short) and Section 302 read with Section 114 of I.P.C. and Section 201 of I.P.C., sentencing them to undergo R.I for five years and fine of Rs. 1000/-, in default to undergo S.I for six months for the offences punishable under Sections 363 and 365 read with Section 114 of the I.P.C., imprisonment for life and fine of Rs. 1000/-, in default to undergo S.I for one year, for the offence punishable u/s 302 read with Section 114 of the I.P.C. and R.I for three years for the offence punishable u/s 201 of the I.P.C.

2. The prosecution case in nutshell is that the incident occurred on dated 16-10-1999 at about 8 p.m., when the appellant No. 1-Ashwin Karsanbhai came to the house of the first informant-Dinesh Maganbhai, who was residing in Bharatnagar, Morbi, Ashwinbhai inquired about Dhirajbhai Maganbhai. As

Dhirajbhai was already at home, he met appellant No. 1-Ashwinbhai. First informant-Dinesh Maganbhai asked appellant Ashwinbhai to pay Rs. 20,000/- to his brother Dhiraj Maganbhai, as appellant was indebted to Dhirajbhai to the tune of Rs. 20,000/-. Thereupon, appellant-Ashwinbhai said that he is prepared to pay the money to Dhirajbhai and asked Dhirajbhai to join him. Appellant-Ashwinbhai had come in Armada jeep and Dhirajbhai went with Ashwinbhai Karsanbhai in Armada jeep, and as per the case of the prosecution, at that time, the three appellants (original accused Nos. 2 to 4) were already there in Armada jeep. It is the case of the prosecution that thereafter, the appellants took Dhiraj Maganbhai to Rajkot and while going to Rajkot, one witness Girish Dayabhai had seen Dhiraj Maganbhai along with the appellant at Bajrang Parotha House, near Rajkot. Since Dhirajbhai did not return to his house till 20-10-1999, first informant-Dineshbhai, brother of Dhirajbhai, met the appellant No. 1-Ashwin Karsanbhai and inquired about his brother Dhirajbhai, but no satisfactory reply was given by the appellant. Thereafter, on 26-10-1999, first informant-Dinesh Maganbhai lodged F.I.R. in Morbi city Police Station. The F.I.R. was registered and investigation was commenced. During the course of investigation, dead-body of Dhiraj Maganbhai was found on the outskirts of village Veraval - Shapar. It was revealed that cause of death was "asphyxia because of strangulation". The dead-body of deceased Dhiraj was identified by first informant Dinesh only on the basis of a photograph shown to him by appellants. During the course of police investigation, according to the prosecution case, it was revealed that the appellants caused death of deceased Dhiraj Maganbhai. After collecting the required material for the purpose of lodgment of charge-sheet, charge-sheet came to be filed against the appellants in the Court of learned J.M.F.C., Morbi. As the offence was exclusively triable by the Court of Sessions, learned Magistrate committed the case to the Court of Sessions at Morbi, which came to be registered as Sessions Case No. 22 of 2000.

3. Charge came to be framed against appellants at Exh. 1, for the offences punishable under Sections 363, 365, 302, 201 read with Section 114 of the I.P.C. The appellants did not plead guilty and claimed to be tried. Thereafter, prosecution adduced its oral and documentary evidence. After the conclusion of the oral evidence adduced by the prosecution, the trial Court recorded further statements u/s 313 of the Cr.P.C, and the appellants denied generally all the allegations levelled against them by the prosecution. After considering the evidence on record and submissions of both the sides, the trial Court came to the conclusion that the prosecution successfully proved its case against all the appellants for commission of offences punishable under Sections 302, 363, 365, 201 read with Section 114 of the I.P.C. and convicted each of them for the offences charged against them and awarded the sentence as hereinabove described in this judgment.

4. We have heard learned Sr. Advocate Mr. N. D. Nanavaty, learned Sr. Advocate Mr. Y. S. Lakhani, so also learned A.P.P. Mr. Mengdey.

5. The submissions made on behalf of the appellants can briefly be stated thus:

6. The case of the prosecution depended on circumstantial evidence and the prosecution has failed to establish a complete change of circumstance, connecting the accused with the crime. To show missing links, our attention is drawn to firstly the fact that there is no evidence worth name to fix the identity of original accused Nos. 2, 3 and 4. It is also indicated that no motive is attributed to anyone of them. When these two important aspects are missing, it was urged that original accused Nos. 2, 3 and 4 could not have been convicted by the trial Court.

7. So far as original accused No. 1 is concerned, it is indicated that though the incident occurred on 16-10-1999, the F.I.R. is lodged after ten days, i.e. on 26-10-1999. This delay is sought to be explained by the fact that, the first informant looked for his brother at the place of his relatives, but it emerges from evidence that search was completed by 20-10-1999, and therefore, even if that is accepted, the first informant has not taken any action from 20-10-1999 till 26-10-1999, either of lodging the F.I.R. or of lodging an occurrence report. It is thus contended that important witnesses, like mother of the deceased, is not examined. The father of the deceased Magan Mahadevbhai has not supported the prosecution case. Witness Sanjay is not examined, so far as the incident of 16-10-1999 is concerned. Thereafter, it is the case of the prosecution that the deceased was taken in the vehicle towards Jetpur. To establish this, reliance was placed on evidence of witnesses Manish Vasantbhai, Exh. 41 and Girish Dayabhai, Exh. 59. Manish Vasantbhai has not supported the prosecution case and has been declared hostile. So far as the evidence of Girish Dayabhai is concerned, it was contended that his evidence is vague. He does not give any specific date, on which he met the deceased and accused No. 1, near Bajrang Parotha House. It is clear from his deposition that he has made improvements in his original version, so as to cater the requirements of the prosecution, and no reliance, therefore, can be placed on such witness, particularly when his presence at Bajrang Parotha House was by a sheer chance. It was, therefore, urged that accused No. 1 may also be acquitted by according benefit of doubt.

8. Learned A.P.P. has opposed these appeals. According to him, though the F.I.R. is lodged late, fact remains that the deceased left in company of the accused person on 16-10-1999 and his dead-body was found on 17-10-1999 near Jetpur, which can be said to be in close proximity of time. It, therefore, cannot be said that the incident has not occurred. Learned A.P.P. submitted that accused No. 1 and deceased were known to each other and they were both engaged in similar activity, and first informant or his family members may not have suspected any foul play at the hands of accused No. 1. They, therefore, may not have acted promptly. Thus, delay in lodgment of F.I.R. may not be considered as fatal to the prosecution case. Girish Dayabhai gives details of his going to Rajkot and then his return by truck. The place, where he met the deceased and the accused persons, is on the highway, which is a natural place, where one would stop.

Therefore, his evidence cannot be thrown overboard, only on the count of him being a chance witness. He is otherwise not interested against any of the accused, and therefore, the trial Court was justified in convicting the accused persons. The appeals may, therefore, be dismissed.

9. We have examined record and proceedings in context of the submissions made by rival sides.

10. We shall deal with the case of original accused Nos. 2, 3 and 4 at the outset. We find that neither the first informant Dinesh nor Girish, who are the star witnesses of the prosecution, fix the identity of accused Nos. 2, 3 and 4, as the persons who had accompanied accused No. 1 and the deceased on the fateful day. They have been consistently described as unknown persons, except Girish identified Nilesh (accused No. 4). But, Girish was never called as a witnesses before Executive Magistrate for Test Identification Parade ("T.I.P.", for short). Similarly, first informant Dinesh also does not identify any of the accused in the Court and he has stated in his F.I.R. that he would not be in a position to identify the persons accompanying accused No. 1, even if they are shown. However, in the T.I.P., he has identified all the four accused persons. Therefore, the evidence of Dinesh as well as Girish on identity of accused Nos. 2, 3 and 4 becomes shaky and doubtful and no reliance can be placed on it. Added to this, is the fact that they had no motive against the deceased. When these two aspects are missing, they could not have been convicted for the offences with which they were charged. The trial Court erred in recording their conviction, and appeals, therefore, merit acceptance, so far as accused Nos. 2, 3 and 4 are concerned.

11. Coming to the case against original accused No. 1, it must be recorded that Dinesh is brother of the deceased. He knew accused No. 1 and he has deposed that accused No. 1 came with three persons and took away the deceased with them on 16-10-1999 evening, under the pretext of repaying the dues to the deceased. However, he does not take any action till 26-10-1999. It can be appreciated that he would wait for his brother for a couple of days as he had gone with his friend, namely accused No. 1, who were both engaged in similar activity, but from his evidence only it appears that on 20-10-1999, he went to the house of the accused No. 1 and accused No. 1 did not give a satisfactory reply on the question as to where has the deceased gone. It would be reasonable then to expect some action on part of the first informant, but, he sits tight over it and does nothing till 20-10-1999, when he lodges the F.I.R. for the first time. It transpires from his evidence that between 20-10-1999 and 26-10-1999, he went to Junagadh at the instance of police, to find out, if a dead-body, which was found by the police, was that of his brother-deceased Dhirubhai, and he says that he went to Junagadh and found that the photograph was not of the dead-body of his brother. If he suspected a foul play from 20-10-1999, and even when the police asked him to go there, there would have been some record with the police, on basis of which the police advised him to go to Junagadh. No such fact is coming forward on record from the prosecution side.

12. From the forgoing discussion, it is clear that implication of accused Nos. 2, 3 and 4 is not established. However, the first informant has implicated them in the F.I.R. itself, so also in his ocular evidence. The first informant has changed his stand as per the requirements. Initially, in the F.I.R., he says that he would not be able to identify accused Nos. 2, 3 and 4, the persons who accompanied accused No. 1 on 16-10-1999, even if they are shown to him, but, at the T.I.P., he identifies all four of them, which is strange enough. Still more strange is his behaviour in Court, when he is not able to identify accused Nos. 2 to 4, as the persons in company of accused No. 1. Thus, the version of witness Dinesh has to be properly scanned before accepting the same. In this context, if deposition of his father Magan Mahadevbhai is seen, he does not support the prosecution case at all. Mother Laxmiben is not examined as witness, so also witness Sanjay, who is an independent witness, is also not examined, who could have thrown light on the incident that could have happened on 16-10-1999. Govind Sardulbhai is examined as a witness, but, he does not support the prosecution case. Then, there is evidence of Girish, which as discussed earlier, suffers from the defect of vagueness. He remembers the number of the car in which accused No. 1 is alleged to have taken away the deceased, but, he does not remember the number of any other vehicle. He is not able to give any details, as to in whose vehicle he went to Rajkot. Witness Girish has acted as panch witness. He is panch to recovery of clothes, which are allegedly discovered by accused No. 3-Kamlesh. But, if the evidence as a whole is seen, the discovery panchnama is not proved by the prosecution and is not forming part of the record. If that discovery is not proved, subsequent recovery would stand adversely affected. It is also relevant to record that in his evidence Girish Dayabhai states that he met the first informant Dinesh and told him about his having met the deceased and the accused persons at Bajrang Parotha House, but the first informant in his F.I.R. remains silent about it, so also in his deposition before the Court. All these factors taken collectively, gives us the feeling that the prosecution evidence as it stands, is shaky and suffers from element of doubtful circumstances. The change of circumstances to link accused No. 1 with the crime is also not satisfactorily established. Departure of the deceased with accused No. 1 on 16-10-1999, is brought on record only on basis of evidence of the first informant, whose evidence does not inspire confidence. The subsequent link in form of evidence of Girish Dayabhai, to show that the deceased was in company of the accused persons right upto Bajrang Parotha House, is also not properly established and does not inspire confidence.

13. We may refer to the decision in case of State of Goa Vs. Sanjay Thakran and Another, where it has been held thus:

When the case rests upon circumstantial evidence, such evidence must satisfy the following tests:

(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the condition that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

14. Now, if the evidence is seen, in light of the principles enunciated in the said judgment, it is clear that the evidence is not complete and incapable of any explanation of any other hypothesis than that of the guilt of the accused. A possibility of some other person involved in the crime, cannot be ruled out. We are, therefore, of the view that accused No. 1 also could not have been convicted by the trial Court, as the evidence against him is doubtful.

15. For the foregoing reasons, both the appeals merit acceptance. The appeals are, therefore, allowed. The conviction of the appellants Ashwin Karsanbhai Patel, Rajesh @ Raju Karsanbhai Patel, Kamlesh @ Kamo Kunverjibhai Patel, Nilesh Prabhubhai Patel, recorded by the Additional Sessions Judge, Fast Track Court, Morbi in Sessions Case No. 22 of 2000 for the offences punishable under Sections 363, 365 read with Section 114 of the Indian Penal Code and Section 302 read with Section 114 of the Indian Penal Code and Section 201 of the Indian Penal Code, is hereby set aside. The appellants are acquitted of charges levelled against them, and they be set at liberty forthwith, if not required in any other case. Fine, if paid, be refunded.