

(2008) 10 GUJ CK 0041
In the Gujarat High Court
Case No : Criminal Appeal No. 2158 of 2004

Kirpalsing Gurubachhansing Sikligar

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 20-10-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 395, 397

Citation : (2008) 10 GUJ CK 0041

Hon'ble Judges : J.R. Vora, J; J.C. Upadhyaya, J

Bench : Division Bench

Advocate : MM Tirmizi, No. 1, for the Appellant; M.R. Mengdey, APP for Opponents No. 1, for the Respondent

Final Decision : Allowed

Judgement

J.C. Upadhyaya, J.—The appellant who was original accused in the Sessions Case No.114 of 2004 came to be convicted for the offences punishable u/s 395 and Section 397 of the Indian Penal Code ("IPC", for short) and was sentenced to undergo rigorous imprisonment ("RI", for short) for 10 years and fine of Rs.500/-, in default of payment of fine to undergo simple imprisonment for one month for the offence punishable u/s 395 of the IPC and was sentenced to undergo RI for 7 years and fine of Rs.500/-, and in default of payment of fine to undergo simple imprisonment for one month for the offence punishable u/s 397 of the IPC by judgment and order dated 31.8.2004 rendered by learned Presiding Officer, 3rd Fast Track Court, Panchmahals at Godhra.

2. The prosecution case in nutshell is as under:

One Gopalsinh Jagatsinh Barad (PW-8) was serving as Circle Police Inspector (CPI), Lunawada, District Panchmahals from July 1988 to 13.3.2001 and he was transferred from Lunawada to Ahmedabad and on the date of incident i.e. on dated 21.3.2001, he was on joining leave and was at Lunawada. As per the

prosecution case, Gopalsinh Barad was residing with his wife Hansaben Gopalsinh (PW-5) at Lunawada in Anand Park Society. As Gopalsinh was on joining leave, he returned home from Ahmedabad at about 10.45 p.m. on 20.3.2001. After taking meals with his wife Hansaben, both retired to bed. Meanwhile, at about 10 p.m. two Gram Rakshak Dal (GRD) members named - Parvatsinh Kesrisinh (PW-10) and Takhatsinh Ramsinh (PW-9), who were posted as watchmen, came on their duty on night round in Anand Park Society. It is the prosecution case that at about 4.45 a.m. on 21.3.2001, some 8 to 10 unknown persons broke open the main door of the house and entered into the house. They were armed with sticks, swords, tamanchas etc. Due to this, both Gopalsinh and his wife Hansaben woke up. Persons, in all about 8 to 10 in number, entered into their bedroom and they were using abusive language and threatening words too. Gopalsinh was assaulted by one of those persons by pipe on head and 2 to 3 other persons also assaulted on him and he was not allowed to stand up. The key of the locker was demanded from his wife Hansaben. However, she did not give the same, and therefore, the locker was broken up. One of the persons snatched the mangalsutra, weighing about 3 tolas from Hansaben. Hansaben was also assaluted by sticks and pipes and by the blunt part of tamancha, on her forehead. During the course of this robbery, telephone wire was also cut off with the help of sword. As per the prosecution case, Rs.32000/- in cash were looted and the golden ornaments like mangalsutra and chain, as well as certain silver vessels worth Rs.33000/- were also looted. That, thus in all, together with cash amount, the property worth Rs.65000/- was looted. Thereafter, while leaving the house those robbers, who were 8 to 10 in number, dragged inside the house those two GRD watchmen and while leaving the house, the main door was locked from outside and those robbers who had entered into the house, made their escape good. Thereafter, Hansaben raised alarming shouts, called the neighbors, who came and opened the door. Both the injured Gopalsinh and Hansaben were taken to hospital for treatment. In connection with this offence, Hansaben lodged the First Information Report ("FIR", for short), which was registered by the police. The Investigating Police Officer conducted police investigation and recorded statements of witnesses. In presence of panchas, panchnama of the scene of offence was drawn, medical certificates of injured witnesses were obtained. One tempo bearing No.GJ-16U-6210 was recovered. After the completion of investigation, chargesheet was filed in the Court of learned Judicial Magistrate First Class, Lunawada. As the offence was exclusively triable by the Court of Sessions, the learned Magistrate committed the case to the Court of Sessions Judge, Panchmahals at Godhra, which was numbered as Sessions Case No.114 of 2004.

3. The learned Additional Sessions Judge framed charge against the appellant-accused in connection with offence punishable u/s 395 and 397 of the IPC. Since the accused did not plead guilty and claimed to be tried, the prosecution adduced its oral and documentary evidence. After the conclusion of the evidence, the learned Judge recorded the further statements of the accused u/s 313 of the

Code and the accused generally denied all the allegations leveled against him. The learned Additional Sessions Judge, after considering the evidence on record and after considering the arguments advanced on behalf of both the parties, delivered the impugned judgment on dated 31.8.2004 and came to the conclusion that the prosecution successfully proved the offences charged against the accused, beyond any reasonable doubt and accused came to be convicted for the commission of offences punishable u/s 395 and Section 397 of the IPC and awarded sentence to the accused, as stated above.

4. On behalf of the appellant - accused, learned advocate Mr.Tirmizi submitted that the learned trial Judge committed serious illegality and irregularity in convicting the appellant - accused in connection with these offences. That the entire case rests upon the question of identification of this accused and considering the depositions of first informant - Hansaben and the witnesses Gopalsinh, Parvatsinh and Takhatsinh, it becomes quite clear that none of the witnesses had opportunity to see the face of the accused at the time of alleged incidence, so that subsequently they can identify the accused, either during the course of Test Identification Parade ("TIP", for short) or in the Court during their depositions. That it has come in evidence that the accused had masked his face and there was no possibility by any of the witnesses to see the face of the accused, so that subsequently he can be identified. That there is no cogent and convincing evidence as to whether there was availability of any electric light in the house of the first informant so that the miscreants can be subsequently identified. That no description of any accused is given in the FIR. That the present appellant - accused came to be arrested in connection with this offence on the basis of some statement given by one Mayasingh. However, neither the statement of said Mayasingh was recorded nor he was examined as a witness in this case. The accused came to be arrested on dated 29.1.2004 i.e. after about 3 years from the date of incident, as the incident had occurred on dated 21.3.2001. Even the witnesses have admitted in their depositions that during the course of incident, they had not marked any specific feature of the robbers. Despite this, as per the prosecution case, when the TIP was arranged in the office of Executive Magistrate, Mr.Chaturbhai Bariya (PW-11) on dated 4.2.2004, the first informant - Hansaben and her husband witness - Gopalsinh could identify the accused. That considering the deposition of Executive Magistrate Mr.Bariya (PW-11), he categorically admitted that when the accused was brought to his office by police, he did not ascertain as to whether prior to the TIP, the accused who was brought by police was seen by the witnesses or not. This witness further admitted that the accused was required to be brought to his chamber through open corridor of his office. Therefore, it is submitted that no proper precaution were taken by the Executive Magistrate Mr.Bariya to see that before the TIP, the accused is not exposed to the witnesses. That even there is a shaky evidence as to how the witnesses not only identified the accused, but, how those witnesses at the time of TIP remained present. That considering the deposition of one of the panch witnesses of the TIP panchnama, named

Ayubkhan Gafoorkhan. He categorically admitted that he was stamp vendor in the office of the Executive Magistrate itself. Under such circumstances, selected panchas were engaged to draw the panchnama of TIP. That except the evidence regarding the identification of the accused, which is not free from doubt, there is no evidence whatsoever against the accused to connect him with the crime or even to connect him with other co-accused persons. Therefore, it is submitted that the appeal preferred by the appellant - accused be allowed and the impugned judgment rendered by the learned trial Judge be set-aside and the appellant - accused be acquitted.

5. On behalf of the State of Gujarat, learned APP Mr.Mengdey supporting the impugned judgment and order rendered by the learned trial Judge submitted that the appellant accused is rightly convicted for the offence charged against him. That considering the depositions of first informant - Hansaben and her husband Gopalsinh and witnesses Parvatsinh and Takhatsinh, the prosecution successfully proved that at the time of commission of offence of robbery, they had seen this accused and soon after the arrest of this accused, first informant - Hansaben and witness Gopalsinh were called by Executive Magistrate Mr.Bariya to remain present in his office on dated 4.2.2004, and a regular TIP was arranged and this accused Kirpalsingh came to be identified by these witnesses. That therefore, by clear and cogent evidence adduced by the prosecution, the involvement of the accused in these offences is proved beyond reasonable doubt. That even the witnesses, during the course of their depositions, clearly identified the accused in open Court. There is no reason to doubt their testimonies. Therefore, the appeal preferred by the appellant - accused deserves to be dismissed.

6. Considering the record of the trial Court and the impugned judgment rendered by the learned trial Judge, there cannot be any dispute about the fact that a robbery had taken place in the house of the first informant - Hansaben and that during the course of the robbery, she, herself and her husband Gopalsinh were assaulted and they sustained bodily injuries. It has also come in evidence that cash of Rs.32000/- and certain golden ornaments and silver vessels worth Rs.33000/- were robbed by the robbers from the house of the first informant. However, the moot question to be replied by the prosecution is the involvement of the appellant - accused in this robbery.

7. Considering the overall evidence on record, it becomes clear that the entire case against the accused depends upon the identification of the accused.

8. First of all considering the deposition of first informant - Hansaben (PW-5), narrating the incidence, she stated that on dated 21.3.2001 at about 4.45 a.m. about 10 to 12 persons entered into her house by breaking open the door. That in the house she herself and her husband Gopalsinh were sleeping, but they were awakened by those persons, who entered her house. That those persons were demanding key of a locker, but, she refused and thereupon the locker was broke open. Then she described the golden and silver ornaments, which were robbed

by those persons including the cash amount, and she stated that those persons remained in her house for 5 to 10 minutes and thereafter they left. She further stated that those persons caused injuries to herself and her husband. She stated that she lodged the FIR before the police. She deposed that she was called to attend the identification parade and she had identified the accused. In her cross-examination on behalf of the accused, she admitted that she herself and her husband were sleeping and those unknown persons entered into her house. She categorically admitted that as the incidence occurred so abruptly that she could not see as to which person had turban on his head or which person had mustache or beard. She further admitted that in her FIR she has not given any description of any of the persons entered her house. She deposed that during the course of identification parade, she could identify the accused on the basis of his turban. She admitted that in her FIR, she has stated that the incidence of robbery continued only for 5 minutes. She denied the suggestion that at the time the robbery took place in her house, there was darkness. However, considering the entire deposition, she nowhere stated that either at the time when those unknown persons entered her house or during the course of robbery, electric light in her home was on.

9. Thus, considering the deposition of first informant Hansaben, it becomes clear that none of the persons who entered her house, including the appellant was known to her prior to the incidence. It further becomes clear that the incidence occurred during night hours. However, she denied the suggestion that at the time when the incidence took place there was darkness in her house, but, she nowhere stated whether the electric light was on, at the time when the incidence occurred. She stated that during the course of TIP, she could identify the accused because of his turban, but, she also admitted in her deposition that as the incidence occurred abruptly, and therefore, she could not say as to which person had turban on his head at the time of incidence.

10. Considering the deposition of witness Gopalsinh Barad (PW-8), he also narrated the incidence in the same manner the first informant Hansaben narrated in her deposition. He also stated that 8 to 10 unknown persons, who had entered his house caused injuries to him and his wife - first informant Hansaben and that those persons robbed golden, silver ornaments, cash etc. from his house. He deposed that as the present accused was arrested on 29.1.2004, and therefore, PSI Mr.Damor of Lunawada police station telephoned him on dated 3.2.2004 to remain present for the purpose of identification parade of the accused. That therefore, on dated 4.2.2004, he himself and his wife Hansaben went to the office of Executive Magistrate, Lunawada and the present appellant - accused could be identified. In his cross-examination, he clearly admitted that in his statement before police, he has not given any description of any of the persons, who had entered his house for the purpose of robbery. He admitted that some of the persons who entered his house had muffled their faces.

11. As per the prosecution case, at the time of incidence, witnesses Takhatsinh

Solanki and Parvatsinh Jadav were on their night round and they have seen the robbers, who committed robbery in the house of the first informant. In this connection, considering the deposition of witness Takhatsinh (PW-9), he stated that at the time when the incidence occurred in the house of the first informant, he was on night round and some unknown persons with weapons entered into the house of the first informant. He denied the suggestion that identification parade of the accused was arranged and he had identified the accused. This witness was declared hostile by the prosecution and he did not support the case of the prosecution that during the course of identification parade of the accused, he had identified the accused. In his cross-examination on behalf of the defence, he admitted that those persons had muffled their faces, and therefore, could not identify them.

12. The prosecution examined witness Parvatsinh (PW-10) and about the incidence almost identical facts have been deposed by him, which were deposed by witness Takhatsinh. He also admitted that at the time of incidence, he was on night round. He stated that some 7 to 8 unknown persons entered the house of the first informant. He stated that he was called at the office of the Executive Magistrate and he had identified the accused. In his cross-examination, he admitted that he has stated before police in his police statement that those persons had muffled their faces, and therefore, they could not be identified.

13. As stated above, the entire case against the accused rests upon the identification of the accused. In this respect, the prosecution examined Executive Magistrate Mr. Bariya (PW-11) at Exh.11. According to him the TIP was arranged in his chamber on dated 4.2.2004 at 1 p.m. That the accused was brought by police to his office. Eight persons for the purpose of dummies were called. Two out of eight persons were sikhs. That first, witness Hansaben was called, and thereafter witness Gopalsinh was called and witnesses Takhatsinh and Parvatsinh were called. That all the 4 witnesses identified the accused. That the TIP proceeding was witnessed by two panchas, which came to be concluded at 2.30 p.m. The TIP panchnama, Exh.11 was drawn. In his cross-examination, he admitted that in the TIP panchnama, Exh.11, nowhere the description of the persons who were called as dummies, is mentioned. He further stated that in the panchnama, Exh.11, it is nowhere mentioned as to which of the dummies had turban on his head. He admitted that the accused was brought to his office by police. He does not know as to when those witnesses had come to his office. That he did not ascertain as to whether the accused was seen by the witnesses in his office before the TIP. He further admitted that to bring the accused in his chamber, where the TIP was arranged, the police was required to take the accused through open corridor in his office.

14. Thus, first of all considering the deposition of the Executive Magistrate Mr. Bariya, it becomes clear that no precaution was taken by him to see that the accused is not exposed to the witnesses before the TIP. As stated earlier, first informant Hansaben in her deposition stated that on the basis of turban, she

could identify the accused. In this connection, considering the deposition of Executive Magistrate Mr. Bariya, nowhere he stated that either all or any of the dummies had turbans on their head.

15. Moreover, on behalf of the appellant, as stated hereinabove, a contention was raised that on dated 4.2.2004, how the witnesses remained present in the office of the Executive Magistrate, is still in doubt, in the sense that according to the deposition of witness Gopalsinh on dated 3.2.2004, he was serving as PI in Ahmedabad and he was telephonically informed by PSI, Lunawada to come to Lunawada on dated 4.2.2004 for the purpose of TIP of the accused. That accordingly, he and his wife Hansaben had attended the TIP on dated 4.2.2004. Admittedly, no written notice or any writing was forwarded to the witnesses, asking them to remain present on 4.2.2004 to attend the TIP.

16. In connection with the above discussion, it would be necessary to consider the deposition of panch witness Kalpesh Suthar (PW-7). He is examined in connection with the arrest panchnama of the accused, produced at Exh.19. According to his deposition, he was called at Lunawada police station on dated 29.1.2004. That at that time, 2nd panch Dilipsinh Vakhatsinh and the accused were present. He further stated that at that time, Mr. Barad was also present and Mr.Barad and other Police Officers were making inquiries to the accused. In his cross-examination on behalf of the accused, he admitted that Mr. Barad, he referred in his examination-in-chief is Gopalsinh Barad. When such is the situation, according to this panch witness, on dated 29.1.2004, the arrest panchnama was required to be drawn, at that time, in the police station itself, witness Mr.Gopalsinh Barad was present and he was inquiring to the accused along with other police officials. Thus, the fact becomes clear that before the TIP was arranged on dated 4.2.2004, witness Gopalsinh had seen the accused on dated 29.1.2004 in police station itself. Witness Gopalsinh is husband of first informant Hansaben, and when he was Circle Police Inspector at Lunawada, the witnesses Parvatsinh and Takhatsinh were serving under him at Lunawada. Under such circumstances, when the accused was already shown to witness Gopalsinh on dated 29.1.2004, the subsequent TIP of the accused dated 4.2.2004 and the fact that in said TIP, witnesses could identify the accused, cannot be said to be such trustworthy evidence, regarding the identification of the accused, which can be relied upon.

17. It is further pertinent to note that the offence took place on 21.3.2001. The present accused came to be arrested on 29.1.2004. Thus, after about 3 years, the accused came to be arrested. We need not repeat her the above discussions regarding any description of any accused mentioned either in the FIR or in the depositions of the witnesses, but, suffice it to say that neither in the FIR nor in the depositions of the witnesses - first informant Hansaben, her husband Gopalsinh, Parvatsinh and Takhatsinh. the fact regarding description of any accused comes on record. On the contrary, considering the depositions of the witnesses, it becomes clear that on account of darkness, and the fact that the

incident occurred abruptly and continued only for about 5 to 10 minutes, no person, who entered the house of the first informant could be identified. Considering the depositions of witnesses Parvatsinh and Takhatsinh, it further transpires that those persons had muffled their face. Despite all such adversities, it becomes doubtful as to how these witnesses could identify the accused on dated 4.2.2004, when the TIP was arranged.

18. Under such circumstances, we are of the considered opinion that in the impugned judgment, the learned trial Judge erred in relying upon the TIP proceeding and erred in coming to the conclusion that the accused was duly identified by the witnesses.

19. In the case of Matru alias Girish Chandra Vs. The State of Uttar Pradesh, it was observed that - "identification test do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right line. The identification can only be used as corroborative of the statement in court." Almost similar observation was made in the case of Suresh Chandra Bahri Vs. State of Bihar with Gurbachan Singh, that substantive evidence of the witness is his evidence in the Court but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after his arrest is of great importance because it furnishes an assurance that the investigation is proceeding on right lines". Under such circumstances, it is true that though the substantive evidence of the witness is his evidence in the Court and it is equally true that the identification tests do not constitute substantive evidence, but, it can only be used as corroborative evidence. But, the important aspect, which is required to be taken into consideration in this case, is the possibility or ability of the witnesses to identify the appellant - accused after about 3 years from the date of occurrence. We need not repeat here the entire discussion made above in this judgment, but suffice it to say that during the course of the robbery, there is nothing on record to say that the witnesses had an opportunity to identify the appellant - accused so that in future, during the course of TIP or during the evidence in open Court, the accused can be identified by them. The appellant - accused was totally unknown to the witnesses.

20. Moreover, considering the deposition of Investigating Police Officer Mr.Rana (PW-16), who conducted initial investigation in connection with the crime, he stated that on dated 5.9.2001, he was investigating an offence bearing Kothamba police station Crime Register No.16 of 2001 and he was interrogating one Mayasingh, who was accused in said case and during the course of his interrogation Mayasingh stated that this accused along with others committed robbery at Lunawada in the house of the first informant Hansaben. It is pertinent to note that on the basis of information received from Mayasingh, the present accused came to be implicated in connection with this offence and subsequently, came to be arrested. Said Mayasingh is not one of the accused in this case.

Under such circumstances, the Investigating Police Officer should have recorded the statement of Mayasingh and the prosecution should have examined Mayasingh in this case. Nothing whatsoever was done.

21. Considering the impugned judgment, it further transpires that the learned trial Judge placed reliance upon the panchnama, Exh.29 while coming to the conclusion that the prosecution successfully proved its case against the accused. Considering the panchnama, Exh.29, it seems to have been drawn on dated 29.1.2004 and bare perusal of the panchnama would reveal that virtually it is a "demonstration panchnama". According to this panchnama, the present accused had taken the Investigating Police Officer and the panchas to the house of the first informant Hansaben and he demonstrated as to how the robbery was committed. Of course, one of the panchas Dilipsinh Gohil (PW-13) examined by the prosecution turned hostile and did not support the contents of panchnama, Exh.29, however, considering the deposition of the Investigating Police Officer, it comes on record that prior to dated 29.1.2004, the panchnama of the scene of offence had already been drawn. Now, as per the scheme of Section 27 of the Evidence Act, it is clear that the fact may be said to be discovered when the knowledge of the existence of the fact was for the first time derived from the information furnished by the accused. When the fact has already been known to the police, there cannot be a discovery again of that fact, as a result of a statement made by the accused, subsequent to the original discovery. It is a basic principle underlying Section 27 of the Evidence Act that "what is not covered, cannot be discovered". Under such circumstances, the learned trial Judge erred in relying upon the "demonstration panchnama", Exh.29 in coming to the conclusion that the accused is involved in this offence.

22. Considering the entire evidence on record, there is nothing that any ornament looted during the course of robbery or any weapon was recovered either from this accused or came to be discovered at the instance of this accused. It has come on record that from the shop of goldsmith - Harishbhai, two small ingots, one golden and another silver were recovered, but, again there is nothing that those ingots were recovered at the instance of the appellant - accused. Again there is nothing on record to come to the conclusion that how the present appellant - accused was in any respect connected with the other co-accused persons implicated in this offence. In the impugned judgment, the learned trial Judge observed that the offence of robbery did take place in the house of the first informant Hansaben, and during the course of robbery, Hansaben and her husband witness Gopalsinh were assaulted and they sustained bodily injuries. There cannot be any dispute regarding the incident having taken place, the golden and silver ornaments and cash amount being looted during the course of the robbery and that first informant Hansaben and Gopalsinh sustained bodily injuries, but, so far as the present case is concerned, the prosecution was required to establish the fact that the appellant - accused was involved in this crime. From the entire above discussions, we are of the considered opinion that the prosecution failed to adduce cogent, convincing and reliable evidence to

prove the case against the appellant - accused.

23. For the foregoing reasons, the impugned judgment and order rendered by the learned trial Judge, recording conviction of the appellant - accused and awarding sentence for the offence charged against him, deserve to be quashed and set-aside by allowing this appeal.

24. The appeal is therefore allowed and the impugned judgment and order rendered by 3rd Fast Track Court, Panchmahals at Godhra in Sessions Case No. 114 of 2004 convicting the present appellant - accused for the offences punishable u/s 395 and 397 of IPC and awarding the sentence thereunder are hereby set-aside and the appellant - accused is hereby acquitted. The appellant - accused be immediately set at liberty from jail if no longer required in connection with any other case.