
(2016) 01 GUJ CK 0067
In the Gujarat High Court
Case No : Criminal Appeal No. 330 of 2008

Lohana Rupesh

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 11-01-2016

Acts Referred:

Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 313, Section 357
Penal Code, 1860 (IPC) — Section 302, Section 304

Citation : (2016) 01 GUJ CK 0067

Hon'ble Judges : K.S. Jhaveri and R.P. Dholaria, JJ.

Bench : Division Bench

Advocate : Y.S. Lakhani, Sr. Advocate and Pravin Gondaliya, Advocate, for the Appellant; C.M. Shah, APP, for the Respondent

Final Decision : Partly Allowed

Judgement

K.S. Jhaveri, J.—1. Challenge is made to the judgment and order dated 29.11.2007 passed by learned Presiding Officer 6th Fast Track Court, Gondal camp at Jetpur in Sessions Case No. 123 of 2000 in this appeal whereby learned Presiding Officer has been pleased to convict the accused No. 3 and imposed the sentence upon him to undergo life imprisonment and fine of Rs. 25,000/- in default, further one year SI for the offences punishable under sections 302 of IPC, accused No. 3 is also ordered to undergo rigorous imprisonment for six months and fine of Rs. 1000/-, in default, two months simple imprisonment for offence punishable under section 135 of Bombay Police Act and ordered to run all the sentences concurrently.

2. The broad facts of the case are that on 28.9.2000 at about 22.05 hours Dr. Shri Gajera of Government Hospital, Jetpur has informed Jetpur City Police Station on telephone that Jeminpari Vilaspari Gosai, aged about 25 years, residing at Jetpur has approached for medical treatment as he sustained injuries in scuffle and he was referred to Government Hospital, Junagadh for further

treatment and thereafter he was shifted to Rajkot Government Hospital. It is the case of the prosecution that Shri V.S. Jhala, PSI has informed Pradhyumannagar Police Station on phone that Tino Madhusudanbhai Luvana has inflicted injuries upon Jeminpari Vilaspari Gosai for some reason and as he sustained serious injuries, medical treatment was given to him in Jetpur Government Hospital and during the course of further treatment, Dr. Kavtaben declared him to be dead on 28.9.2000.

3. Therefore, FIR bearing CR No. I - 262 of 2000 came to be registered before the Jetpur City Police Station. In pursuance of the complaint, the Investigating Officer carried out the investigation and filed the chargesheet against the accused on 16.11.2000 which was numbered as Criminal Case No. 1944 of 2000.

3.1 As the case was exclusively triable by the court of sessions, the same was committed to the Court of Sessions. The charge was framed against the accused. The accused pleaded not guilty to the charge and claimed to be tried. To prove the case against the accused, the prosecution has examined the following 23 witnesses.

3.2 The prosecution has also produced the as many as 28 documentary evidences viz., Medical Certificate Exh. 55, 56, P.M. Report Original Exh. 60, Police Yadi Exh. 61, Original Complaint Exh. 96, Inquest Panchnama Exh. 99 etc.

3.3 At the end of the trial, after recording the statement of the accused under section 313 of the Cr.P.C. and hearing the arguments on behalf of the prosecution and the defence, the trial Court delivered the judgment and order, as stated above.

3.4 Being aggrieved by the same, the appellant - original accused No. 3 has preferred the present appeal.

4. We have heard Mr. Y.S. Lakhani, learned senior counsel assisted by Mr. Pravin Gondaliya, learned counsel for the appellant and Ms. C.M. Shah, learned APP for the State.

5. Mr. Y.S. Lakhani, learned senior counsel for the appellant - original accused No. 3 has drawn our attention to the oral evidence of so called two eye witnesses, viz., (i) Atulpari Vilaspari Gosai at Exh. 95 and (ii) Satyen Jentigiri Gosai at Exh. 82 to contend that in view of the evidence which has come on record, more particularly, medical papers of Jetpur Government Hospital where accused No. 1 himself was working and he himself taken to the deceased to the hospital. He contended that there are serious contradictions in the evidence of both the witnesses and none of the witnesses were present at the scene of offence and accused No. 1 himself has taken to the deceased to the hospital. He further contended that Satyen Gosai is the real cousin of the deceased and looking to the evidence on record, the prosecution has miserably failed to prove the case against the accused - appellant herein. He further contended that if both the aforesaid witnesses are not believed, then there is nothing against the

appellant except Exh. 113 - discovery panchnama of muddamal knife wherein it is alleged that knife used in the crime in question has been recovered at the instance of accused No. 1. He further contended that the prosecution has miserably failed to prove the fact as to where blood sample which is taken and referred in the PM Note has gone. He, therefore, submitted that benefit of doubt is required to be granted in favour of the appellant - accused No. 3. Mr. Lakahni brought our attention to the medical advise which has come on record to take the deceased to the nearby hospital and against the medical advise, they have taken the deceased to Rajkot hospital though real brother has not accompanied to ambulance and the presence of the father of deceased is not proved by the prosecution. He has also taken us through the evidence of PW 9 - Vinod Babubhai Vanzar who turned hostile who is crucial witness at whose shop, at the instance of the deceased, accused Nos. 1, 2 and 3 were directed by the deceased to throw out of the shop and in his cross examination which has come on record has stated that there was some scuffle between the deceased and Madhusudan. However, the prosecution while cross examining this witness has not brought anything against the appellant except that the accused has come to the scene of offence and there was exchange of words between Madhusudan and the deceased. He also submitted that looking to the facts of the present case and in view of the decision of the Hon"ble Apex Court in "Ankush Shivaji Gaikwad v. State of Maharashtra", , 2013 (6) SCALE 778, which is followed by this Court in a number of decisions, this Court may invoke the provisions of Section 357 of the Criminal Procedure Code in this case.

6. On the other hand, Ms. C.M. Shah, learned APP appearing for the State has submitted that the order of conviction recorded against the appellant-accused person is just and proper and she has supported the conviction recorded by impugned judgment. Learned APP has contended that taking into consideration the medical evidence, evidence of the complainant, and other witnesses, the view taken by the trial Court is just and proper and no interference is called for. She also submitted that the learned trial Judge has not committed any error while imposing the sentence on the accused person and, therefore, no interference is called for in the present appeal.

7. We have also perused the medical evidence. PW 8 - Dr. Jagdishbhai Devrajbhai Tank has performed the postmortem who has described two injuries. The cause of death shown in column No. 17 of the report is cardio-respiratory failure due to hemorrhage shock. Therefore, it is clear that this injury is the reason for death of the deceased. Even otherwise, both the accused Nos. 1 and 2 were in the shop and in view of the evidence of PW 9 - Vinod Babubhai Vanzar who has stated that there was scuffle at the instance of the deceased.

8. Taking into consideration the crucial document at page 244, we are of the opinion that the name of the appellant has disclosed in the first entry at 11.15 hours Exh. 92 and recovery panchnama. Now coming to the point whether it falls within 302, or 304, part-II. Taking into consideration the injury, leaves a room

for the prosecution that this is not a case for 302. Therefore, we are of the opinion that the trial Court has not committed any error in convicting the accused, however, looking to the nature of the injury, it can be said that the accused No. 3 is guilty of offence under Section 304, Part II of IPC and not for the offence under Section 302 of IPC. Therefore, the Criminal Appeal is required to be allowed by holding the accused No. 3 guilty for offence under Section 304, Part II of IPC and not for offence under Section 302 of IPC and sentence imposed upon him is required to be reduced to five years imprisonment.

9. During the course of hearing, Mr. Lakhani, learned senior counsel has urged that family circumstances of the accused are very poor and the father of accused No. 3 has met with paralytic attack and he is only bread earner of the family. He, therefore, requested to invoke the provisions of section 357 of the Cr.P.C. as has been held by the Honourable Apex Court in the case of Ankush Gaikwad (supra).

10. In view of the above discussion, the appeal is partly allowed. The impugned judgment and order dated 29.11.2007 passed by learned Presiding Officer 6th Fast Track Court, Gondal camp at Jetpur in Sessions Case No. 123 of 2000 is modified to the extent that conviction u/s. 302 IPC of accused No. 3 is altered to one u/s. 304 Part-II IPC and the accused is ordered to undergo rigorous imprisonment for five years. It is stated that accused No. 3 has already undergone 1 year, 10 months and 3 days of sentence. Looking to the special circumstances and the principles enunciated in the case of Ankush Shivaji Gaikwad (Supra), accused No. 3 is directed to deposit a sum of Rs. 50,000/- towards compensation before the concerned trial Court, which will be paid to the mother of the victim. If accused No. 3 deposits such amount, he is not required to undergo remaining period of sentence and if accused No. 3 fails to deposit the amount of compensation within two months from today, he shall surrender before the jail authorities to undergo the remaining period of sentence if not completed five years of sentence. Remaining part of the impugned judgment shall remain unaltered. Bail bond, if any, of the accused stands cancelled. Record and Proceedings, if lying here, be sent back to the concerned trial Court forthwith.