

(2012) 02 GUJ CK 0075
In the Gujarat High Court

Case No : Criminal Appeal No. 1519 of 2009 and Criminal Appeal No. 2213 of 2009

Madhabhai Danabhai Nirashrit Thakor and 7

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 21-02-2012

Acts Referred:

Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 143, 147, 148, 149, 307

Citation : (2012) 02 GUJ CK 0075

Hon'ble Judges : Paresch Upadhyay, J; Jayant M. Patel, J

Bench : Division Bench

Advocate : Tejas P. Satta and Mr. Bhunesh C. Rupera, for the Appellant; C.M. Shah Ld. . App, for the Respondent

Judgement

Honourable Mr. Justice Jayant Patel

1. As both the appeals arise from common judgment and order passed by the learned Sessions Judge, they are being considered simultaneously. Criminal Appeal No. 1519 of 2009 is directed against the judgment and order passed by the learned Sessions Judge in Sessions Case No. 19/2008, whereby, the learned Sessions Judge has convicted the original accused No. A-1 to A-5 for the offence u/s 143, 147, 149, 326, 325, 323 of IPC read with section 135 of the Bombay Police Act, and has imposed sentence of 5 years R/I with the fine of Rs. 500/- and 10 days S/I for default in payment of fine and no separate sentence is imposed for the other offence. However, for the offence u/s 135 of the Bombay Police Act, one month's S/I with fine of Rs. 100/- has been imposed upon A-1 to A-5. The learned Sessions Judge has also convicted A-6 to A-8 for the offence u/s 326 read with section 149 of IPC and has imposed sentence of 2 years R/I with the fine of Rs. 200/- and 10 days S/I for default in payment of fine. No separate sentence has been imposed for other offences. However, for the offence under sec. 135 of the Bombay Police Act, same sentence has been imposed upon A-6 to

A-8 of one month's S/I with fine of Rs. 100/-.

2. Whereas, Criminal Appeal No. 2213/2009 has been preferred by the State for enhancement of the sentence upon all the accused contending that inadequate sentences have been imposed upon the accused.

3. As per the prosecution case, PW-1 complainant Exh. 29, when was going for buying kerosene at village Masali, at that time, Naran Dana A-4, Atmaram Dana A- 3, Madhabhai Dana A-1, Odhav Dana A-5, Naviben Dana A-6, Champaben Atmaram A-7, Madhuben Naranbhai A-8 and Narsinhbhai Haribhai A-2 who were hidden in the babool tree, came out and Naran Dana A-4, Atmaram Dana A-3 had dhariya in their hands, Madha Dana A-1 had Axe in his hand, Odhav Dana A-5 had sword in his hand, Naviben Dana A-6 had dhariya in her hand, Champaben Atmaram A-7 had stick in her hand, Madhuben Naran A-8 was having blow-dhoka and Narsinhbhai Hari A-2 had stick in his hand and all started giving blows to the complainant. As per the complainant PW- 1, A-3 gave a blow of dhariya on the head and therefore, complainant had fallen down and A-4 had also given blow of dhariya on the head of complainant. A-1 who was having Axe had also given blow on the head. A-5 had given blow of sword on the head and A-2 had given two to three blow of stick on his left hand. A-6 had given blow of dhariya on his right lag, A-7 with stick and A-8 with dhoka gave indiscriminate blows to the complainant. Therefore, the complainant started shouting. One Mohan Visa PW-2 Exh. 32, came running and all the accused told him as to why he had cultivated agricultural field known as "dharauvalu field" and they gave a threat that if the complainant enters the said field, they shall kill him, and thereafter, all the accused ran away from the place of offence. As per the complainant, at that time, Prabhu Shivaram PW-4 Exh. 35 had also came there and the complainant asked them to call his brothers, who then came there and the complainant was taken to the hospital. As per the complainant, because of the dispute of the agricultural field, he had cultivated the agricultural field as agreed with the accused and because of the same, the incident had happened. Thereafter, the complaint was filed with Radhanpur Police Station on 16.3.1999.

4. The aforesaid complaint was investigated, and ultimately, the charge-sheet was filed against all the eight accused, and the case was thereafter, committed to the Court of Sessions being Sessions Case No. 19/2008.

5. The prosecution in order to prove the guilt of the accused, examined 16 witnesses and produced 16 documents, the details of oral as well as documentary evidence are mentioned by the learned Sessions Judge at para-6 of the judgment. The learned Sessions Judge, thereafter, recorded the further statement of the accused u/s 313 of Code of Criminal Procedure, wherein, the accused denied the evidence against them and in the further statement, they stated that absolutely a false case is filed against them. The learned Sessions Judge, thereafter, heard the prosecution and the defence and ultimately, found that the prosecution has not been able to prove the case for the offence u/s 307 read with section 506(2), and therefore, he acquitted the accused for the said

offence. However, the learned Sessions Judge found that the prosecution has not been able to prove the case against all the accused for the offence u/s 143, 147, 148, 323, 325, 326 and 149 of IPC read with section 135 of the Bombay Police Act, and therefore, the learned Sessions Judge convicted the accused and imposed the sentences as referred to hereinabove. Under the circumstances, all the accused have preferred appeal being Criminal Appeal No. 1519/2009 before this Court, whereas, as recorded earlier, the State has preferred the appeal for enhancement of the sentences. However, it deserve to be recorded that there is no appeal preferred by the State against the order of acquittal u/s 307 read with section 506(2) of IPC.

6. The learned counsel appearing for both the sides have taken us to the entire evidence on record. We have considered the judgment and the reasons recorded by the learned Sessions Judge. We have heard the learned counsel Mr. Rupera for the appellants as well as for the respondents-accused in the appeal preferred by the State for enhancement. We have also heard Ms. Shah learned APP for the State in both the appeals.

7. The testimony of PW-1 complainant Bhagavatsinh Danaram Ex. 29, who is eye witness, supports the case of the prosecution as stated in the complaint Exh. 62. The other witnesses PW-2 Mohanbhai Exh. 32 and PW-4 Prabhuram Exh. 35, whose presence was stated by the PW-1 - victim at the time of incident, have not supported the case of the prosecution, and they were declared hostile. But in their cross-examination, even after the permission was so granted by the court to the learned Public Prosecutor, no material has come out for supporting the case of the prosecution, except to the extent that as per PW-2, when he reached to the place of incident, he found the complainant lying in the field and was shouting. PW-3 Dr. Kishorkumar Karshanlal Panchal Exh. 33, is the doctor who examined at the first instance to the victim and PW-13 Dr. Vinodkumar Lajjaram Gupta Exh.51 is the doctor who treated the victim at the later stage when he was referred to Civil Hospital, Ahmedabad. The testimony of both the doctors on the aspect of injury caused to the victim fully supports the case of the prosecution. On the aspect of medical opinion, PW-3 Dr. Kishorkumar Exh. 33 has opined that the injuries no. 1 and 2 were such that if the treatment was not received well in time, one may lose the life, and he further opined that injuries nos. 3, 5 and 7 were serious injuries. As per the said doctor, injuries nos. 1 and 2 could be caused with sharp edged weapon and the remaining injuries could be caused with the hard and blunt substance. In all, there were eight injuries found on the body of the victim. Dr. Vinodkumar PW-13 Exh. 51 has opined that there were fractures found on the body of the victim and on the aspect of injuries, he has supported the injuries referred to by Dr. Kishorkumar PW-3 Exh. 33. The said Dr. Vinodkumar has also opined that the injury could be caused with dhariya, sword and sticks. Therefore, in this manner to the aforesaid extent, both the doctors have supported the case of the prosecution. There is also further corroboration of the discovery of the weapons at the instance of the concerned accused.

8. However, the pertinent aspect is that in the medical history given to the Dr. Kishorkumar PW-3 Exh. 33, by the complainant-victim, who was in full conscious condition, had stated that when victim was first examined by him and the victim had given the names of Atmaram Dana A-3, Naranbhai Dana A-4, Madha Dana A-1, Champaben Atmaram A-7 and Meghuben Naranbhai A-8 together with the name of Hari Khoda, against whom no charge-sheet is filed. It is true that in the said medical history, the word "others" was also mentioned. But, if the specific names were to be traced of the concerned accused, they were A-3, A-4, A-1, A-7 and A-8. The said medical history given before Dr. Kishorkumar PW-3 Exh. 33, if is further considered in light of the medical history given to Dr. Vinodkumar PW-13 Exh. 51, the names given for causing injuries were only of three persons, namely; Atmaram Dana A-3, Naran Dana A-4 and Madha Dana A-1. There is consistency in the medical history for the purpose of giving blows with stick, dhariya and sword. However, barchhi is only referred in the medical history given to Dr. Kishorkumar PW-3 Exh. 33. Further the names of two female accused, A-7 and A-8, were not stated in the medical history given to Dr. Vinodkumar PW-13 Exh.51.

9. It is in this light of the aforesaid fact situation, the matter is to be examined for the involvement of all the accused, namely A-1 to A-8 or A-1, A-3, A-4, A-7 and A-8 only or to consider the benefit of doubt for the presence of the remaining accused, namely A-2, A-5 and A-6 or not.

10. As per the prosecution case and even as per the complainant, A-1 was having Axe in his hand, A-4 and A-3 had sharp edged weapon like dhariya in their hands. If the said aspect is considered with the medical evidence of doctor on the aspect of the injuries caused with the sharp edged weapon, there is corroboration for injuries no. 1 and 2. So far as injury no. 3 is concerned, as per the doctor, it could be caused with the hard and blunt substance, which may include the Axe being used from reverse side. The injuries no. 5 and 7 are for causing fractures on the left hand and on the right lag and such injuries could be caused even as per the doctor, with hard and blunt substance, namely stick-dhoka, which were with A-7 and A-8 as per the complainant. We find that if the injuries received by the victim are considered, the prosecution case could be said as proved for A-1, A-3 and A-4 for giving blows with the sharp edged weapon and hard and blunt substance of Axe being used from the reverse side. However, there is no additional corroboration available by the medical history given to Dr. Kirshorkumar PW-3 Exh. 33 and Dr. Vinodkumar PW-13 Exh. 51 for the blows given by A-2 and A-5. So far as female accused are concerned, same situation would be there for A-6. The another female accused whose name is also not referred to in any of the medical history given before both the doctors. We may also state that the say of the complainant for giving blows with the stick by A-7 and for giving blows with dhoka by A-8, gets corroboration by the medical evidence and further gets corroboration in the medical history given before Dr. Kishorkumar PW-3 Exh. 33 about the names and involvement of A-7 and A-8, therefore, merely because the names of A-7 and A-8 are not given in the medical

history given before Dr. Vinodkumar PW-13 Exh. 51, it is not possible to believe that A-7 and A-8 have not played any role in causing injuries to the victim.

11. In view of the aforesaid observations and discussions, we find that the prosecution has not been able to prove beyond reasonable doubt the case for involvement of A-2, A-5 and A-6, and therefore, the benefit should be made available to them. Under the circumstances, the finding so recorded by the learned Sessions Judge for considering that the prosecution has been able to prove the case beyond reasonable doubt even against A-2, A-5 and A-6, in our view, cannot be sustained.

12. Under the circumstances, we find that A-1, A-3 and A-4 as well as A-7 and A-8 have been rightly held involved for causing injuries to the victim by the learned Sessions Judge.

13. If the involvement of A-1, A-3 and A-4 with A-7 and A-8 for commission of crime are found proved, at the first brush, one might get the impression that since number of accused would be five for the commission of the crime, the requirement of section 149 of IPC could be said as satisfied and the charge u/s 149 of IPC could be said as proved. However, the pertinent aspect is that if the charge framed is considered qua A-7 and A-8, there was no charge u/s 149 of IPC against A-7 and A-8. 22.02.2012

14. Under the circumstances, in absence of any specific charge of section 149 of IPC qua A-6 to A-8, the learned Sessions Judge has committed an error in holding that the charge u/s 149 read with section 323 and 326 of IPC was also proved against A- 6, A-7 and A-8. Therefore, so far as holding A-7 and A-8 guilty for the offence u/s 326, 325 and 323 of IPC with the aid of section 149 of IPC, in our view, cannot be sustained. The net result of the aforesaid observations and discussions would be that A-1, A-3 and A-4 can be held guilty for the offence u/s 326, 325 and 323 of IPC, and further A- 7 and A-8 can be held guilty for the offence u/s 326, 325 and 323 of IPC and the remaining accused, namely A-2, A-5 and A-6 would be entitled to the benefit of doubt since the prosecution has not been able to prove the case beyond reasonable doubt for their involvement in the incident.

15. But, it further appears that the matter does not end there for the purpose of convicting all the aforesaid accused, namely A-1, A-3, A-4, A-7 and A-8 with the aid of section 149 of IPC since A-7 and A-8 have not been charged for the offence u/s 149 of IPC independently or with section 326, 325 and 323 of IPC. If A-7 and A-8 cannot be held guilty for the offence u/s 149 of IPC or with the aid of sec. 149 of IPC in absence of any charge against them, the remaining accused namely A-1, A-3 and A-4 who could be found as guilty for the involvement in the crime, if separated, the number of persons, would be less than five and they would be only three. The requirement for holding any person guilty for the offence u/s 149 of IPC either independently or together with other offences under IPC, is five or more which consequently would in the present case come

down to three. Under the circumstances, A-1, A-3 and A-4 cannot be convicted for the offence u/s 149 of IPC either independently or with the aid or by taking aid of section 149 of IPC. But, at the same time, they can be considered for the lesser charge. As in the present case, A-1, A-3 and A-4 were charged for the offence u/s 149 of IPC independently and for taking aid of section 149 of IPC with the other offences, in our view, even if the number is reduced to three, aid can be taken u/s 34 of IPC while convicting A-1, A-3 and A-4 for the offence u/s 326, 325 and 323 of IPC, but such will not be the situation for A-7 and A-8 for taking aid of section 34 of IPC because in their case, there was no any higher charge u/s 149 of IPC or otherwise, hence A-7 and A-8 cannot be considered even for convicting them with the aid of section 34 of IPC.

16. In view of the aforesaid observations and discussions, we find that A-1, A-3 and A-4 can be held guilty and consequently can be convicted for the offence u/s 326, 325 and 323 read with section 34 of IPC read with section 135 of the Bombay Police Act, whereas, A-7 and A-8 can be held guilty for the offence u/s 326, 325 and 323 of IPC. We, therefore, accordingly, hold so and hold A- 1, A-3 and A-4 guilty for the offence u/s 326, 325 and 323 of IPC read with section 34 of IPC and we also hold A-7 and A-8 guilty for the offence u/s 326, 325 and 323 of IPC. However, so far as A-2, A-5 and A-6 are concerned, we find it proper to give the benefit of doubt to them and hold them not guilty for the charged offences. Therefore, conviction recorded by the learned Sessions Judge deserves to be modified to the aforesaid extent.

17. The next aspect deserves to be considered is for imposition of appropriate sentences for the offences for which the concerned accused have found to be guilty. It appears that the principles of sentencing the convict are by now well settled. The Court, at the time when punishment or the sentence is to be imposed would be guided by the gravity of the offence, deterrent effect to be created to the society and also personal or individual mitigating circumstances of the accused concerned or the convict. The first and second consideration, as referred to hereinabove, would in normal circumstances, over-weigh the third circumstances namely the personal circumstances of the convict or the accused and if such is not considered the aspect of creating deterrent effect in the society or convicting the persons according to law would stand diluted. It is only in rare case of personal circumstances, the court may make the departure to a great extent for the purpose of reducing the quantum of the sentences imposed upon the convict or accused who is found guilty for the charged offences.

18. Having considered the aforesaid broad principles of sentences, if the facts of the present case are examined, it appears that the sentence provided for the offence u/s 326 of IPC may extend to the imprisonment for life or for a term which may extend to 10 years with the fine. As against the same, the learned Sessions Judge has imposed the sentence of five years with fine of Rs. 500/- upon each of the accused. It is on account of the same, the State has preferred the appeal for enhancement of the sentence. Considering the facts and

circumstances, we find that the way in which the victim was attacked by the accused with deadly weapons by surrounding him and giving indiscriminate blows, the gravity of the offence could be said as more keeping in view the number of injuries and the fractures sustained more than three by the victim. Therefore, we find that it would be proper to enhance the sentence in the present case by seven years R/I in place of five years R/I, as imposed by the learned Sessions Judge upon A-1, A-3 and A-4 with the same amount of fine, as imposed by the learned Sessions Judge with the default sentence as imposed by the learned Sessions Judge.

19. However, so far as the A-7 and A-8 are concerned, as observed earlier, the conviction is not with the aid of section 34 of IPC and they could independently be considered for imposition of sentences. Further, keeping in view the fact that A-7 and A-8 are female, the learned Sessions Judge has already exercised the discretion and has imposed lesser punishment by sentencing them for 2 years R/i with the fine of Rs. 200/-. We find that taking into consideration the personal individual circumstances and the A-7 and A-8 being female, the sentence imposed by the learned Sessions Judge upon A-7 and A-8 may not be enhanced and no interference is called for to the sentence imposed upon A-7 and A-8 by the learned Sessions Judge.

20. In view of the aforesaid observations and discussions, the following order is passed:

1.A-2, A-5 and A-6 are acquitted for the offences charged against them and they shall be set at liberty forthwith, unless their presence is required for any other lawful purpose.

2.A-1, A-3 and A-4 are held to be guilty and convicted for the offence u/s 326, 325 and 323 of IPC with the aid of section 34 of IPC and sentence of 7 years R/I with fine of Rs. 500/- and 10 days S/I for default in payment of fine, are imposed upon all the said accused i.e.

A-1, A-3 and A-4. 3.A-7 and A-8 are held to be guilty and convicted for the offence u/s 326, 325 and 323 of IPC and the sentence imposed upon them shall be 2 years R/I with the fine of Rs. 200/- and 10 days S/I for default in payment of fine.

4.The conviction recorded and the sentence and fine imposed by the learned Sessions Judge upon A-1, A-3, A-4, A-7 and A-8 for the offence u/s 135 of the Bombay Police Act, are not interfered with and the same is confirmed.

5.All the sentences shall run concurrently.

21. The judgment and order dated 28.7.2009 passed by the learned Sessions Judge, Paten in Sessions Case No. 19/2008, shall stand modified to the aforesaid extent only. Both the appeals shall stand partly allowed accordingly to the aforesaid extent only.

22. It has been stated by the learned counsel Mr. Rupera for the appellants-accused that A-6, A-7 and A-8 are on bail, but as A-6 is already acquitted, her bail bonds would no more survives. However, for A-7 and A-8, learned counsel Mr. Rupera prays that four weeks time may be granted to surrender. Considering the facts and circumstances, A-7 and A-8 shall surrender themselves within 4 weeks from today, unless any order is passed by the higher forum, failing which, the concerned Sessions Court shall issue non-boilable warrant to effect the arrest of A-7 and A-8, and their bail bonds shall also stand cancelled accordingly upon the expiry of period of 4 weeks.