
(2009) 05 GUJ CK 0038

In the Gujarat High Court

Case No : Criminal Appeal No's. 208 and 500 of 2003

Maheshbhai Ramabhai Baria

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 15-05-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Motor Vehicles Act, 1988 — Section 134, 177, 184

Penal Code, 1860 (IPC) — Section 120(B), 143, 147, 148, 149

Citation : (2009) 05 GUJ CK 0038

Hon'ble Judges : Rajesh H. Shukla, J; Jayant Patel, J

Bench : Division Bench

Advocate : B.S. Patel, Ranjan B. Patel and GC RAY, s 1-4, for the Appellant; K.P. Raval, APP for Opponent 1, for the Respondent

Judgement

Jayant Patel, J.—Both the appeals are directed against the Judgement and the order passed by the learned Sessions Judge in Sessions Case

No. 27/03, whereby the learned Sessions Judge has convicted the appellants-accused for the offences under Sections 120B & 143, 147, 148 &

365 read with Section 149 & 367 read with 342 read with 149 & 302 of IPC and has imposed the sentence of 1 month with the fine of Rs. 100/-

for the offence u/s 143 of IPC, sentence of 3 months imprisonment with the fine of Rs. 300/- for the offence u/s 147 of the IPC, sentence of 6

months imprisonment with the fine of Rs. 500/- for the offence u/s 148 of IPC, sentence of 1 year with the fine of Rs. 500/- for the offence u/s 365

read with Section 149 of the IPC, sentence of 2 years imprisonment with the fine of Rs. 500/- for the offence u/s 367 read with Section 149 of the

IPC, sentence of 3 months imprisonment with the fine of Rs. 300/- for the offence u/s 342 read with Section 149 of the IPC and life imprisonment

with the fine of Rs. 500/- for the offence u/s 302 read with Section 149 of IPC and the sentence of life imprisonment with the fine of Rs. 500/- for

the offence u/s 120B of IPC and all the sentence to be undergone simultaneously and the fine to be paid separately.

2. As per the prosecution case, on 24.10.2000, the Vardhi was received at Raopura Police Station from the SSG Hospital through Mr. Ramesh

Varjubhai, Buckle No. 1897 that one Raju Himmatbhai Chauhan (hereinafter referred to as "the deceased/victim") was hit by one matador bearing

No. GJ-7U-1902 and therefore, the victim received injuries on both the legs and therefore, he was brought for treatment to SSG Hospital by

Mahesh Ramabhai Baria (A-1) & Pravin@Ramesh Vitthalbhai Rathod (A-2) and he was serious. The Vardhi thereafter was forwarded to

Women Head Constable Madhuben Devjibhai of Halol Police Station. Based on the said report, C.R. No. 423/00 was registered with Halol

Police Station for the offences u/s 279 and 337 of IPC and for the offence u/s 177, 184 and 134 of the Motor Vehicles Act. Thereafter, since as

per the information of the Doctor, the patient-victim was in a conscious condition, and he was in a position to give statement, his dying declaration

was recorded wherein he stated that he was abducted by the accused from Omelet Lorry located at Bhutdi Japa bus stand in Matador No. 1902

and four persons viz. Ramesh, Mahesh, Lalo and Rango had abducted him and thereafter, at Halol, about 15-17 persons had beaten him for 2

days and thereafter, the persons of Bhailalbhai had left him to SSG Hospital by giving threat and therefore, he was admitted to the hospital and he

had sustained fractures on both the legs due to the injury caused to him with the sticks. Therefore, as the case was not of accident, but was of

abduction and for causing grievous hurt, the case was registered for offences under Sections 147 and 148, 149, 120B, 365 & 325 of IPC and

was transferred to City Police Station, Vadodara, who in turn registered the offence vide C.R. No. 341/00. The investigation pursuant to the said

complaint was made. The panchnama and the statements were recorded and thereafter, the charge-sheet was filed against 5 accused by the

prosecution viz. (1) Maheshbhai Ramabhai Baria (A-1), (2) Pravinbhai @ Rameshbhai Vitthalbhai (A-2), (3) Rangit @ Ranga Kanubhai Chauhan

(A-3), (4) Lalabhai Ambalal Panchal (A-4), and (5) Bhailalbhai Babubhai Chauhan.

3. The learned Sessions Judge thereafter framed the charge. The prosecution examined various witnesses(to the extent found relevant shall be referred to hereinafter). The prosecution also produced various documentary evidence (to the extent found relevant shall be referred to hereinafter). The learned Sessions Judge, thereafter, recorded the statement of the appellant accused u/s 313 of CrPC and in the further statement, accused denied the evidence against him and stated that false case is filed against them. The learned Sessions Judge thereafter, heard the prosecution and the defence and ultimately, found that the prosecution has been able to prove the case against all the accused for the offences charged against them. The learned Sessions Judge thereafter, also heard the prosecution as well as the defence on the aspects of sentence and ultimately, has imposed the sentence as referred to hereinabove. Under these circumstances, the present appeal before this Court.

4. It may be recorded that the Criminal Appeal No. 208/03 was initially preferred by A-1, A-2, A-3 and A-4 and A-5. However, since A-3 had preferred separate appeal being Criminal Appeal No. 500/03, his name in the memo of the Cr. Appeal No. 208/03 was deleted and in his place, the name of Pravin @ Rameshbhai Vitthalbhai (A-2) was substituted. Cr. Appeal No. 500/03 has been preferred by the appellant Rangit @ Rango Kanubhai Chauhan (A-3) and both the appeals are heard together.

5. It may also be recorded that as per the jail report and the note made by the office, accused appellant of Cr. Appeal No. 500/03 Rangit @ Rango Kanubhai Chauhan is reported absconding since 09.02.2007, i.e. after he was released on furlough. Since Criminal Appeal No. 500/03 is arising from the very Judgement and Order of the learned Sessions Judge, which is also subject matter of Cr.Appeal No. 208/03, and the appellants-accused of Cr.Appeal No. 500/03 is also represented by the same lawyer, we find that the appeal deserves to be heard on merits simultaneously with Cr. Appeal No. 208/03 and it should not be dismissed for default giving liberty to the appellant-accused to move for restoration after he surrenders to the jail authority. Therefore, as the judgement and order of the learned Sessions Judge is in common in both the appeals, and as the facts are interwoven, we have found it proper to hear both the appeals on merits in accordance with law.

6. We have heard Mr. Buddhbhatti with Mr. Ray, learned Counsel appearing for the appellants in both the appeals. We have also heard Mr.

Raval, learned APP for the State.

7. We have gone through the entire evidence led by the prosecution viz. of the witnesses as well as the documentary evidence. We have also gone

through the Judgement and Order of the learned Sessions Judge.

8. It appears that there are two dying declaration, one is at Exh.53 recorded before the Executive Magistrate and the same has come on record as

per the deposition of Shri Vijaysinh Himmatsinh Parmar, P.W.19, (Exh.51). As per the said dying declaration of the deceased, it has been stated

by the deceased that one Bhailalbai of Halol is having Matador and he is running his Matador from Vadodara to Halol whose driver is Ramesh

and the vehicle number is 1902. He has stated that four persons of the said Sheth (Bhailalbai) prior to about 6 days, abducted him from Bhutdi

Japa and he was taken to the residence of the said Sheth at Halol, wherein about 15-17 persons had severely beaten him for two days. Thereafter,

the persons of Bhailalbai had left him outside SSG Hospital. He has been admitted to the hospital since last 4 days. He has sustained injuries and

fractures due to the stick and dang blows. It was stated by him that as there was jock between him, Bhailalbai and his relative Mahesh, due to

vengeance, he was abducted and was beaten. The aforesaid dying declaration is fully proved by the prosecution and in the cross-examination of

the said Executive Magistrate, defence has not been able to prove about to the contrary. Another evidence is of the statement recorded of the

deceased by the police officer on 26.10.2000, which has come on record by the deposition of Chandrasinh Somsinh Parmar, P.W.25, Exh.71. As

per the said statement, the deceased had stood by the same version as stated in the dying declaration before the Executive Magistrate. The only

additional aspect is that at it refers to the full name of the accused and there is also reference to the threat given for informing to the hospital

authority. It is also further stated that prior to the incident, there was altercation of hot words between the deceased and the relative of Bhailalbai.

The learned Sessions Judge, at the time when the deposition was recorded and the statement was produced, had reserved the decision to be final

Judgement since it was objected by the defence. However, the learned Sessions

Judge, ultimately in the impugned Judgement has found the statement to be treated as dying declaration together with the dying declaration recorded by the Executive Magistrate.

9. Under these circumstances, the dying declaration recorded before the Executive Magistrate of the deceased and the statement of the deceased recorded before the Police Officer and considered as dying declaration by the learned Sessions Judge clearly supports the case of the prosecution for involvement in abduction and for causing various injuries on the body of the deceased by beating with the sticks and dangs.

10. The injury upon the body of the deceased is proved by the evidence of Doctor Ranjit Shantilal Chaudhary, P.W. 18 whose deposition is at

Exh.54. The said Doctor had examined the deceased when he was admitted to the hospital and had given treatment. As per the decision of the

said Doctor Ranjit Chaudhari, the deceased had fracture on Tibiya-Fibylna of left leg, was complaining for pain in the chest and on the stomach.

There was swelling on the hand and also one scar on the leg. Further, after the death of the deceased, the Postmortem was performed and the

same has come on record by the deposition of the Doctor Kishor P. Desai, P.W. 23, Exh.65. The P.M. has come on record at Exh.67. As per

the said Doctor, 17 injuries as described in column No. 17 of the Postmortem report were found on the body of the deceased and the internal

injuries were found of fractures on the ribs of both the sides. There was also fracture on the leg and as per the Doctor, the cause of death is

because of multiple injuries sustained by the deceased.

11. It is true that the panchas have turned hostile. However, the recovery and discovery which have come on record support the case of the

prosecution. The vehicle is also recovered and shows the blood stain, the weapon is also discovered with the blood stains. As per the FSL report,

the blood is found on the said weapon as well as in the matador. The evidence as produced by the prosecution clearly goes to show the

involvement of all the accused in the commission of offence.

12. The learned Counsel for the appellants-accused contended that two view are possible if the deposition of the Doctor is considered; one is of

the accidental injury and another is of injury caused by somebody. He submitted that as per the deposition of the Doctor, if such injuries could be

caused by accident, the benefit be given to the appellants-accused.

13. We cannot accept the contention of the learned Counsel for the appellants-accused for the simple reason that the injuries are caused by the

accused as stated by the deceased in the dying declaration recorded before the Executive Magistrate as well as in the statement recorded before

the police which is stated as dying declaration by the learned Judge. Therefore, when there is clear evidence available of causing injury, merely

because one probability is stated by the Doctor, it cannot be said that a serious doubt is created in the case of the prosecution. The aforesaid is

coupled with the other corroborative material and evidence which have come on record supporting the case of the prosecution that the injuries on

the body of the deceased are caused by the accused.

14. The learned Counsel for the appellants-accused next contended that the dying declaration is unbelievable and he submitted that there is no

truthfulness in the dying declaration and it has also not come on record as to whether the patient was in conscious condition or not and therefore,

the benefit may be given to the appellants.

15. The said contention also deserves to be rejected inasmuch as it is only after the opinion of conscious condition of the victim-deceased, the

Yadi was sent to the Executive Magistrate and the Executive Magistrate had recorded the dying declaration. At the time when the Executive

Magistrate had recorded the dying declaration, the deceased was under treatment and was fully conscious even as per the deposition of the

Executive Magistrate. Not only that, but the same is corroborated by the evidence of the police officer Chandrasinh Somsinh Parmar, P.W.25,

Exh.71, who has stood by the statement recorded before him. Further, there is no inconsistency in the statement recorded before the Executive

Magistrate and the statement recorded before the police so far as abduction of the deceased and giving blows by the person named.

16. Under these circumstances, when the dying declaration is found to be truthful and the deceased was in full conscious condition, and when the

incident narrated in the dying declaration is further corroborated by the other evidence as led by the prosecution, we cannot accept the contention

that the dying declaration is unbelievable and the accused would be entitled to any benefit.

17. The learned Counsel for the appellant-accused contended that the identity of the accused is not established and there is no independent witness

examined in support of the case of the prosecution. It was therefore submitted that the benefit should go to the appellants-accused and the case of

the prosecution would fail.

18. It is true that there is no other witness to the incident examined by the prosecution, but it is by now well settled that if the dying declaration is

found truthful, the conviction can be based on the same. In the present case, there is one dying declaration recorded before the Executive

Magistrate and another is the statement before the police which is rightly treated as dying declaration by the learned Sessions Judge. The statement

made in the dying declaration are further corroborated by material and evidence as led by the prosecution. Therefore, merely because other

witness is not examined would not result into making the case of the prosecution doubtful in the present case. Further, when the prosecution has

been able to corroborate the case and the identity stated by the deceased before the police officer with the other material and evidence on record

for corroborating the involvement of the accused, we cannot accept the contention that the identity of the accused is not established by the

prosecution. Therefore, the said contention is rejected.

19. The learned Counsel for the appellants-accused lastly contended that the conviction by the learned Sessions Judge u/s 302 of the IPC is

erroneous. He submitted that all the injuries were such which could be described as grievous hurt. It was submitted that even as per the

prosecution case, the injuries were caused with the stick and dangs and the were not on the vital parts of the body. Further, after the injuries, as

per the prosecution case, the accused themselves have brought the victim to the hospital and the victim has survived for about 3 days. Therefore, in

any case, there could not be any intention on the part of the appellants-accused to cause death of the deceased and had it been so, they would not

have brought the victim to the hospital. He therefore, submitted that when the injuries are not on the vital parts of the body of the victim, it would

be a case falling u/s 304 Part-I of the IPC and not u/s 302 of the IPC as held by the learned Sessions Judge.

20. Whereas, the learned APP while supporting the Judgement and Order of the

learned Session Judge, contended that there are multiple injuries found on the body of the deceased and the victim was seriously beaten and thereafter, he has succumbed to the injuries. It was therefore submitted that considering the various grievous hurts i.e. fractures on ribs of both the sides and legs, have resulted into blood loss and the death of the deceased and therefore, the learned Sessions Judge has rightly convicted the appellants-accused for the offence u/s 302 of the IPC.

21. Whether the case would fall u/s 302 of IPC or u/s 304 Part I or II of IPC would require the Court to examine various circumstances and the same are well observed by the Apex Court in its decision in the case of Pulicherla Nagaraju @ Nagaraja Reddy Vs. State of Andhra Pradesh, and more particularly the observations made at para 18 would be useful in the present case, which reads as under:

18. Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls u/s 302 or 304 Part I or 304 Part II. Many petty or insignificant matters plucking of a fruit, straying of a cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no pre-meditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable u/s 302, are not converted into offences punishable u/s 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable u/s 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances : (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any pre-meditation; (vii) whether there

was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention. Be that as it may.

22. If the facts of the present case are examined in light of the aforesaid legal position as observed by the Apex Court, it appears that the weapon used is stick and dang which in normal circumstances could not be termed as lethal weapon. Further, the blows have not been given on the vital parts of the body, but have been given on the chest, hand and legs of the victim. The peculiar circumstances in the present case is that after the injuries were caused even as per the prosecution case, it has come on record that the accused themselves have carried him to the hospital and have left him at the hospital which goes to show the intention on the part of the appellants-accused to see that the treatment may be available to the victim at the hospital for the injury caused. Such would in any case, show the intention on the part of the appellants-accused that the victim may survive. Under these circumstances, it is difficult to accept the existence of any premeditation on the part of the appellants-accused to cause death of the victim/deceased.

23. We may also usefully refer to the decision of the Apex Court in the case of Chuttan and others Vs. State of Madhya Pradesh, , wherein the Apex Court found that if almost all the injuries were on non-vital parts namely on the legs or on the arms, it is difficult to conclude that the intention of the appellants was to cause death or to cause such injuries which were sufficient in the ordinary course of nature to cause death and therefore, the conviction u/s 302 of IPC was modified by conviction u/s 304 Part-II of IPC.

24. Even in the present case, if the injuries caused on the legs and the ribs are considered, they are such which could be sufficient to cause grievous hurt to the victim. Further, after the injury, the victim has been left by the accused themselves to the hospital, and the victim has survived for about

3 days. This shows the absence of premeditation to cause death of the victim/deceased by the appellants-accused. Even on the aspects of conspiracy, the allegation of conspiracy even if believed as per the prosecution case, cannot be concluded for causing death of the deceased, but can be concluded for causing various grievous hurts to the deceased.

25. Hence, keeping in view the facts and circumstances of the present case, we find that the learned Sessions Judge has committed error in

convicting the appellants-accused for the offences u/s 302 of the IPC, whereas, it was a case of conviction u/s 304 Part-I of the IPC read with the

other charges u/s 149 of IPC read with Section 120B of the IPC. So far as other sentences imposed upon the appellants-accused are concerned,

the period is over by efflux of time. Further, it appears that as there were multiple grievous hurts caused to the deceased, the sentence deserves to

be imposed accordingly.

26. Under these circumstances, we find that the judgement and order of the learned Sessions Judge, so far as it relates to conviction of the

appellants-accused u/s 302 read with Section 149 and for the offence u/s 120B of IPC deserves to be modified to the effect that the conviction

shall be u/s 304 Part-I read with Section 149 of IPC read with Section 120B of IPC. Consequently, the sentence imposed of life imprisonment

with the fine of Rs. 500/- shall stand modified with the 10 years imprisonment with the fine of Rs. 500 on each of the accused.

27. Appeals are partly allowed accordingly.