courtkutchehry.com

Company : CourtKutchehry
Website : www.courtkutchehry.com
Printed For :
Date : 18/09/2026

(2016) 08 GUJ CK 0067

In the Gujarat High Court

Case No : Criminal Appeal (Against Conviction) No. 964 of 2016 with Criminal Misc. Application No. 16536 of 2016 in Criminal Appeal No. 964 of 2016

Maheshbhai Ratilal Bhil — APPELLANT

Vs

State of Gujarat — RESPONDENT

Date of Decision : 11-08-2016

Acts Referred:
Penal Code, 1860 (IPC) — Section 304

Citation : (2017) CriLJ 459 : (2017) 2 GLR 1552

Hon'ble Judges : Mr. G.B. Shah, J.

Bench : Single Bench

Advocate : Mr. Vijay Patel for H.L. Patel, Advocates, for the Appellant No. 1; Mr. K.L. Pandya, Additional, Public Prosecutor, for the Opponent/Respondent No. 1

Final Decision : Allowed

Judgement

Mr. G.B. Shah, J. - Present appeal is directed against the judgment and order dated 28.04.2016, passed by the learned 3rd Additional Sessions Judge, Vadodara in Chhotaudaipur in Sessions Case No. 18 of 2015, whereby, the appellant herein original accused came to be convicted for the offence punishable under Sections 304 Part II of the Indian Penal Code, 1860 (for brevity, ''the IPC''), and sentenced to undergo rigorous imprisonment for seven years and to pay fine of Rs. 25,000 and in default of payment of fine, to undergo further simple imprisonment for one and half years. He was given set off for the period undergone in jail.

2. While preferring the present Criminal Appeal, the appellant herein has also preferred Criminal Misc. Application No. 16536 of 2016 under Section 389 of the Code of Criminal Procedure, 1973 (for brevity ''the Code'') for suspension of the sentence imposed by the trial Court.

3. On 14.07.2016, this Court has passed the following order in the said Criminal Misc. Application which reads as under:

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/maheshbhai-ratilal-bhil-appellant-…

"The present application has been filed by the applicant under section 389 of the Code of Criminal Procedure, 1973, for suspension of sentence imposed by the trial court. Learned advocate Mr. Vijay Patel for Mr. H.L Patel Advocates has furnished the relevant documents in form of paper book and has also supplied the same to learned Additional Public Prosecutor. He has also shown readiness and willingness to proceed with the final hearing of this Appeal and accordingly requested to call for the record and proceedings.

2. It is a fact that number of appeals are pending before this Court, however,simultaneously it is also a hard reality that in most of the old matters, the respective learned advocates appear to have no interest and/or they choose not to remain present and if after the conditional orders passed by the Court they remain present, they ask for adjourning the matters, either on the ground that since long the concerned appellant has not contacted in spite of repeated reminder or on the other ground.

3. Under the circumstances the Request made by learned advocate Mr. Patel is granted. Registry is directed to call for the record and proceedings of this appeal from the concerned trial court and the concerned trial court is directed to forward the same so as to reach this Court on or before 26.7.2016 and list the matter along with Criminal Appeal for final hearing on 27th July 2016."

4. Brief facts of the prosecution case are that the appellant picked up quarrel with one Kevjibhai alleging as to why his son Rataniya had kept the appellant''s sister Keshma with him and then in the said scuffle, the appellant inflicted blow on the head of Kevjibhai with stone and caused serious injuries. As a result of which, Kevjibhai died at the place of incident.

5. Pursuant to the complaint, investigation was carried out. After investigation, charge-sheet was filed and as the case was triable by the Court of Sessions, it was committed to the Sessions Court. The trial Court framed charge against the accused. The accused pleaded not guilty to the charge and claimed to be tried. In order to bring home the charge against the original accused, the prosecution has examined as many as 11 witnesses and also produced several documentary evidence. At the end of the trial, Further Statement of the accused under Section 313 of the Code was recorded in which he denied the evidence and stated that a false case has been filed against him. Thus, after recording above-referred Further Statement and hearing the arguments on behalf of prosecution and the defence, the learned Additional Sessions Judge convicted the accused, as aforesaid, by impugned judgment and order, giving rise to prefer the present appeal.

6. Heard learned advocate Mr. Vijay Patel for HL Patel advocates for the appellant-accused and Mr. K.L. Pandya, the learned Additional Public Prosecutor for the respondent State.

7. Learned advocate appearing for the appellant has drawn attention of this Court on the complaint dated 02.04.2015 filed by Gurjibhai Israbhai Nayak

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/maheshbhai-ratilal-bhil-appellant-…

which has been forthcoming on the record at Exh. 23 along with his deposition recorded as PW 8- Gurjibhai Israbhai Nayak at Exh. 25 and submitted that on a minute perusal of the documents, it is clear that the complainant has not supported the case of the prosecution as well as the complaint. Moreover, the learned trial Judge and the learned Additional Public Prosecutor who conducted the case before the trial Court have bypassed the provision of the Indian Evidence Act, 1872 and under the circumstances, as such, the conviction imposed by the trial Court cannot be said to be legal conviction but at the most it can be said to be moral conviction which has no place in the eye of law.

8. He has then drawn attention of this Court on the deposition of PW 9 Sumliben Kevjibhai Nayak Exh. 24 and submitted that if the said deposition of wife of the deceased is perused, it can be easily said that she has not seen the incident and she reached the scene of offence when the assailant had run away from the place. He has then drawn attention of this Court on the deposition of PW 1 Dr. Kishorbhai Jivrajbhai Bagda at Exh. 8 who has performed the post mortem of the deceased and submitted that though it is case of the prosecution that the appellant herein has first thrown the stone by which the deceased fell down and thereafter he had picked up the stone and hit the deceased on the back portion of the head then also if para 4 of his deposition Exh. 08 is referred, it is clear that no such injury had been noticed or recorded on the external part of the body though in paragraph 6 he has stated that internal injury was the multiple fracture on the left side on parital region from which brain has come out, but the fact remains that as such no visible injury was there on the outer side of head i.e external part of the head.

9. He has then referred the FSL report more particularly the serological report at page 49 and submitted that serial Nos. H/1, H/2 which are alleged to have been clothes of the appellant, the blood stain of the human blood of "B" group was found and it has also come on record that the blood group of the deceased was also of group "B". He further submitted that likewise the said human blood of "B" group was also found on the stone as well as on the stick, respectively serial Nos. E and F.

10. He has then submitted that even if the said evidence of FSL can be considered against the appellant herein then also at the most it can be said to be a corroborative piece of evidence as blood on the cloth was found but it cannot take place of substantive piece of evidence and this important aspect has not been properly considered by the learned trial Judge.

11. He has then submitted that so far as motive is concerned, the same is also not proved because before about seven years, love affair between the sister of the appellant and son of the deceased was there but since last seven years, the accused had not done anything and the normal tendency of a human being would be to react immediately on the said grievance but that has not happened as it has been specifically deposed by the complainant Exh. 22 in the cross examination that all the neighbourers of the Faliya celebrated the festivals

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/maheshbhai-ratilal-bhil-appellant-…

together in which the family members of both the parties celebrated the functions together and no any untoward incident took place during these celebrations. He has lastly submitted that the present appellant has been wrongly implicated.

12. Learned advocate for the appellant has relied upon the following decisions:

[1] Rajiv Singh v. State of Bihar & Anr reported in I (2016) CCR 70 (SC) more particularly paragraph Nos. 60 to 63.

[2] L.D. Satapara v. State of Gujarat reported in 2013 (5) GLR 3966.

[3] Ishwarbhai @ Lakhio Chimanbhai Parmar reported in 2011 (3) G.L.H. 296.

13. Mr. K.L. Pandya, learned Additional Public Prosecutor supported the impugned judgment and order and submitted that the Court below was completely justified in convicting the appellant for the offence under Section 304 Part II of the Indian Penal Code.

13.1. He has vehemently submitted that over and above the deposition of wife of deceased i.e. P.W. 9 Sumliben Kevjibhai Nayak Exh. 24 the blood stains have been found on the clothes of the accused, stone and also on stick. This is the most important and cogent evidence against the accused and thus it is very much clear and proved that the appellant has brutally killed the deceased and as there was sudden provocation, the court has also believed the same and convicted the appellant herein for the offence punishable under section 304 Part II and imposed the sentence of seven years, which is just and proper and does not require any interference.

14. I have considered the rival submissions made by the learned advocates for the parties.

15. Before considering the submissions made by learned advocates for the parties, citations on which the learned advocate for the appellant has relied have to be reproduced which are as under:

[1] In case of Rajiv Singh v. State of Bihar & Anr- I (2016) CCR 70 (SC), it has been held in paragraph Nos. 60 to 63 as under:

"60. It is well entrenched principle of criminal jurisprudence that a charge can be said to be proved only when there is certain and explicit evidence to warrant legal conviction and that no person can be held guilty on pure moral conviction. Howsoever grave the alleged offence may be, otherwise stirring the conscience of any court, suspicion alone cannot take the place of legal proof. The well established cannon of criminal justice is "fouler the crime higher the proof". In unmistakable terms, it is the mandate of law that the prosecution in order to succeed in a criminal trial, has to prove the charge(s) beyond all reasonable doubt.

61. The above enunciations resonated umpteen times to be reiterated in Raj

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/maheshbhai-ratilal-bhil-appellant-…

Kumar Singh @ Raju @ Batya v. State of Rajasthan (2013) 5 SCC 722 as succinctly summarized in paragraph 21 as hereunder:

"21. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that "may be" proved and "will be proved". In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between "may be" and "must be" is quite large and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between "may be" true and "must be" true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between "may be" true and "must be" true, the court must maintain the vital distance between conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure that miscarriage of justice is avoided and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense."

[Emphasis laid by the Court]

62. In supplementation, it was held in affirmation of the view taken in Kali Ram v. State of H.P., (1973) 2 SCC 808, that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted.

63. In terms of this judgement, suspicion, howsoever grave cannot take the place of proof and the prosecution case to succeed has to be in the category of "must be" and not "may be" a distance to be covered by way of clear, cogent and unimpeachable evidence to rule out any possibility of wrongful conviction of the accused and resultant miscarriage of justice. For this, the Court has to essentially undertaken and exhaustive and analytical appraisal of the evidence on record and register findings as warranted by the same. The above proposition is so well-established that it does not call for multiple citations to further consolidate the same."

[Emphasis supplied]

[2] In case of L.D. Satapara v. State of Gujarat reported in 2013 (5) GLR 3966, in paragraph no. 10, it has been observed as under:

"10. What is proof? In a sense, proof is antonyms to the presumption. Commission of crime cannot be presumed. The prosecution is required to bring

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/maheshbhai-ratilal-bhil-appellant-…

on record commission of crime by the accused. It is to be established. In order to prove the crime, the prosecution may take aid of substantive evidence and corroborative evidence. Say of witness before the Court is considered as substantive evidence. It is the say of material witness in oral evidence who either may be the victim or the eye witness or both that would transform the incident into the crime. Version and impression of the victim or the eye witness about the occurrence would form the basis of the case. They would give shape to the case of prosecution. The other material on record other than evidence of victim or the eye witness would serve as a corroborative piece of evidence. It is the say of the witness that sieved through the cross-examination that would form the material for the Court to appreciate. In cross-examination, attempt would be to puncture the story of the prosecution by creating doubt. The defence would also advance their own version of incident in cross-examination. The Court would appreciate the material and decide whether the say of prosecution as to commission of crime should be believed or not."

[3] In case of Ishwarbhai @ Lakhio Chimanbhai Parmar reported in 2011 (3) G.L.H. 296, Head note reads as under:

"CRIMINAL LAWS- Indian Penal Code, 1860-S.302- Indian Evidence Act, 1972-S.60- Evidence of eye witnesses- Admissibility- On facts, major contradictions and omissions in their evidence found- Serious doubts arised about their having witness of the incident in question Animosity with the appellant accused- Held, Credibility of a witness should be judged not only from his/her evidence but also with reference to surrounding circumstances and probabilities- Conviction cannot be sustained on glaring contradictions- Conviction set aside."

16. In light of the above referred legal position, when we consider the deposition of complainant Gurjibhai Israbhai Nayak PW 8 recorded vide Exh. 22, it is clear that the said witness, who is complainant, has not supported the complaint. It is important to note that after recording of paragraphs Nos. 1 and 2 of the examination-in-chief, the learned Additional Public Prosecutor had neither requested the Court to declare the said witness as hostile one nor seek permission to cross-examine the said witness. Instead of doing that, it appears from the evidence which has been recorded vide paragraphs 3 and 4 of the examination-in-chief that a leading question had been asked to refresh the memory of the said complainant PW 8 and thereby a novel procedure has been adopted by the learned Additional Public Prosecutor which was permitted by the learned trial Judge which is against the provisions of Indian Evidence Act, 1872. It is important to note that before recording paragraph Nos. 3 and 4 of the examination-in-chief of P.W. No.8- Gurjibhai Israbhai Nayak at Exh. 25, the learned trial Judge has not put any note or remark to show as to for what reason learned Additional Public Prosecutor was permitted to adopt said novel procedure.

17. It is pertinent to note at this juncture that thereafter in paragraph No. 17 of the impugned judgment and order, the learned trial Judge has observed that said P.W. No.8 was the eye witness to the incident, who filed the complaint being

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/maheshbhai-ratilal-bhil-appellant-…

nephew of deceased Kevjibhai and as he was an Adivasi, illiterate and uneducated and as the deposition was being recorded after eight months of the incident, learned APP had asked the questions to said witness after for refreshing his/her memory and thereby the said witness had deposed against the appellant-accused herein as recorded in para 3 of the examination-in-chief. Thus, it appears that while dictating the judgment, the learned trial Judge has for the first time disclosed the reason for permitting the learned APP to ask the questions to the said witness after his memory. Said explanation, in my view, is nothing but an after-though and against the provisions of Indian Evidence Act, 1872. As such, the learned APP has put the answers in the mouth of the said witness which was impermissible and which prejudiced the appellant-accused herein. Under the circumstances, if at all no question had been asked to the said witness in the cross-examination by the defence related to paragraphs 3 and 4, then also, it makes no difference because the entire evidence of paragraphs 3 and 4 had come on the record bypassing the provisions of Indian Evidence Act. It is clear from the cross-examination of said complainant made by the defence that he had not supported the case of the prosecution and on the contrary, has admitted that on the date of incident at night, his aunt Sumliben Kevjibhai Nayak PW 9 at Exh. 30 had come to his house and declared that his uncle has passed away and they have to visit the place during night in darkness where the dead body of the uncle was lying at about two kilometers away from their house. The complainant has deposed that at the time of incident, he was at his home and no one has informed about the incident and he has also not gone to the place of incident. He has deposed that he had not seen any quarrel having taken place on the road. He has further deposed that he did not see as to who has inflicted the stone blow to whom and killed the deceased. He has further deposed that he had doubt that the appellant had killed the deceased because of the quarrel relating to the sister of the appellant and the son of the deceased. Now if we peruse the paragraph nos. 3 and 4 of the P.W. No. 8 complainant at Exh. 22 as referred above by refreshing the memory the questions which had been put in his mouth by learned APP he has deposed that at the time of incident, he was at home and at the that time, his aunt Sumliben called him and told that deceased had gone to take tobacco and the appellant had chased him accordingly. Therefore, they rushed to the place of incident where there was scuffle between the appellant and the deceased and because of which the appellant inflicted blow of the stone on the head of the deceased as a result of which the deceased fell down and at that time the appellant picked up another big stone and hit the deceased and run away from the place of incident cannot be considered for the reasons referred here in above and otherwise also apparently two contradictory versions have forthcoming on the record which creates doubts. Thus, it is clear that the evidence of the complainant as referred herein above, is full of suspicion and it creates doubt about the veracity of the testimony of the said witness.

18. Sumliben Kevjibhai Nayak, P.W. 2, at Exh. 30, has deposed that when her deceased husband was going to take tobacco by passing through the house of

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/maheshbhai-ratilal-bhil-appellant-…

the appellant, the appellant chased him. At that time she was at home and she rushed to the place of incident after hearing the shouts, "maro maro" but the appellant had run away from the place of incident after beating her husband. She has further stated that she had not heard the conversation between the appellant and the deceased. The deceased died because of pelting of stone on his head by the appellant as a result of severe injuries. She has further stated that she could identify the stone used in giving blow on the head of the deceased. In the Court, she had identified the muddamal stone.

19. In light of the same, it appears from paragraph no. 5 of his evidence that the contradictions which have been emerged in the said deposition has been proved in the cross-examination by the defence side showing the statement of the said Sumliben Kevjibhai Nayak recorded by the police. On going through the deposition of investigating officer Ashok Kumar Umedsingh Tapariya which has been recorded as PW 12 at Exh. 29, it appears that he has admitted in the cross examination that in the statement of wife of the deceased it was not stated by her that her husband had gone to village to bring tobacco. It was further not stated by her that to purchase tobacco from the shop situated in the village one has to pass through the house of the Appellant. She had not stated when she was at her home after hearing the shouts "maro maro" they had gone. She had not stated that when they reached there accused had run away after beating deceased. The above contradictions are in my view are the vital contradictions forthcoming on the record which have been duly proved but the learned trial judge had neither touched nor discussed. The above deposition of the wife of deceased does not inspire any confidence. Thus, there appears major and vital contradictions in the evidence of the complainant which is fatal to the case of the prosecution.

20. On going through the deposition of PW 15 Kavliben Gurjibhai Nayak, who is wife of the complainant, recorded vide Exh. 25, it appears that without declaring the said witness as hostile, the questions appear to have been put in the mouth of the said witness for recollecting her memory and same procedure has been adopted while examining the complainant, PW 8 at Exh. 22 referred as herein above and from the said deposition also, nothing substantial has come out against the appellant.

21. Thus, in my view, simply because blood stains of the blood group of the appellant have been found on the clothes of the deceased as well as on the stone, it cannot be said that the charge framed against the appellant has been proved beyond reasonable doubt. More particularly when it has come in cross examination of complainant that police had been called by Ranjitbhai and police has come in the night. Ramjibhai and Jayantibhai both are working together and who had written the complaint, which had not read over to the complainant. The prosecution has not examined either Ramjibhai or Jayantibhai. Thus it appears that the learned trial judge, in my view held guilty to the appellant-accused on pure moral conviction and the same cannot take place of legal conviction in

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/maheshbhai-ratilal-bhil-appellant-…

absence of legal proof and as referred herein the Hon''ble Supreme Court has specifically held that howsoever grave the alleged offence may be, otherwise stirring the conscience of any court, suspicion cannot take the place of legal proof. The learned Additional Public Prosecutor is unable to show how the stick has come as Muddamal because none has deposed anything nor any document is there on record to show that the stick was recovered as muddamal.

22. In view of the above this Court is of the opinion that the case against the appellant-accused could not be proved by the prosecution beyond reasonable doubt and hence, the appellant deserves to be given benefit of doubt. Thus, the present appeal requires to be allowed and appellant requires to be acquitted of the charges levelled against him by quashing and setting aside impugned judgement and order.

23. In view of the above, Criminal Appeal is allowed. Conviction and sentence imposed on the appellant-accused vide judgement and order dated 28.04.2016 passed by the learned 3rd Additional Sessions Judge, Chhota Udepur, in Sessions Case No. 18 of 2015 is hereby quashed and set aside and the accused is acquitted of the charges levelled against him by giving benefit of doubt. The accused is in jail and hence, he is ordered to be set at liberty forthwith, if not required in any other case.

24. In view of the above judgement and order, Criminal Misc. Application No. 16536 of 2016 for suspension of bail does not survive and is disposed of accordingly.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/maheshbhai-ratilal-bhil-appellant-…