

(2017) 01 GUJ CK 0159
In the Gujarat High Court
Case No : 436 of 2005

MAJIDBHAI JAMALBHAI CHOKIA & ANR.

APPELLANT

Vs

STATE OF GUJARAT & ANR.

RESPONDENT

Date of Decision : 19-01-2017

Acts Referred:

[Indian Penal Code, 1860](#), [Section 114](#), [Section 302](#), [Section 304](#), [Section 34](#), [Section 147](#), [Section 324](#), [Section 323](#), [Section 326](#), [Section 148](#), [Section 149](#), [Section 143](#) - Abettor present when offence is committed - Punishment for murder - Punishment for culpable homicide not amounting to murder - Acts done by several persons in furtherance of common intention - Punishment for rioting - Voluntarily causing hurt by dangerous weapons or means - Punishment for voluntarily causing hurt - Voluntarily causing grievous hurt by dangerous weapons or means - Rioting, armed with deadly weapon - Every member of unlawful assembly guilty of offence committed in prosecution of common object - Punishment

Citation : (2017) 01 GUJ CK 0159

Hon'ble Judges : Akil Kureshi, Biren Vaishnav

Bench : Division Bench

Advocate : B M Mangukiya, Bela A Prajapati, C M Shah, ADV.

Judgement

1. These appeals arise out of a common judgment dated 29.01.2005 rendered by the learned Additional Sessions Judge, Bhavnagar, in Sessions Case No.207 of 2003. Briefly stated, the prosecution version was that the complainant Bhikhabhai Jusabbhai lived with his parents and other family members next to where the house of the accused was also situated. The father of the complainant had a grain grinding mill. The complainant's mother in the afternoon of 07.09.2003 had demanded recovery of Rs.80/from the accused. Angered by such demand, the accused nos.1 to 5 came to the house of the complainant armed with deadly weapons such as knife, gupti, iron pipes etc. and assaulted complainant's father Jusabbhai causing serious injuries. The complainant was

also present. He was also assaulted, injuring him. Jusabbhai died due to the injuries. Lady members of the family of the accused also joined them giving kick and fist blows to the family members of the complainant. All the eight accused were therefore charged under Exh.5 for having committed offences punishable under sections 143, 147, 148, 302, 323, 324 read with section 34 of IPC. At the end of the trial, learned Sessions Judge convicted the accused nos.1 to 5 for offence under sections 302, 147, 148, 149 and sentenced to life imprisonment. Accused no.2, 3, 4 and 5 were also convicted for offence under section 324 read with section 34 of IPC and sentenced to simple imprisonment of six months. Accused nos.6 to 8 were acquitted for offence under section 302 but, convicted for offence under section 323 read with section 114 of IPC and sentenced to simple imprisonment of two months. Criminal Appeal No.436 of 2005 has been filed by the original accused nos.2 to 5. Criminal Appeal No.585 of 2005 is filed by the original accused no.1. Criminal Appeal No.1784 of 2005 is filed by the State challenging the acquittal of accused nos.6 to 8 for offence under section 302 of IPC. We may also record that the accused nos.6 to 8 had filed Criminal Appeal No.308 of 2005 against their conviction and sentence under section 323 of IPC. However, this appeal came to be disposed of by an order dated 01.02.2016 as having become infructuous since the two appellants had already undergone the sentence and the third appellant i.e. original accused no.8 had died. We are therefore concerned with the conviction and sentence of original accused nos.1 to 5 and the State appeal against acquittal.

2. Bhikhabhai Jusabbhai, PW1, Exh.32 was the eyewitness and also the first informant. He deposed that he lived with his parents and brothers. His father had a business of grain grinding mill. On the date of the incident, he was at home having returned after the labour work. His father was also at home. When he and his father were standing in front of their house, the accused i.e. Jamal Madamaccused no.1, Majid Jamalaccused no.2, Bhikha Jamalaccused no.3, Jusab Mamadaccused no.4 and Rafik Jusab came there. Accused no.1 had a knife, with which, he gave one blow to his father on his private part, upon which, his father had fallen down. When he tried to intervene, Majid Jamalaccused no.2 gave a gupti blow on his waist, Bhikha Jamalaccused no.3 gave a knife blow on his right arm. Jusab Mamadaccused no.4 gave a pipe blow on his head. At that time, his mother Zubedaben, his aunt Bibiben Kalubhai and uncle Kalubhai came there. His neighbor Allarakhabhai and Jetunbhai came. The lady members of the family gave kick and fist blows to his mother and his aunt. They then went to the hospital at Talaja in a truck of Gordhanbhai Savjibhai. He was treated there. His father had however, died by then. He pointed out that the reason for the attack was that his mother was demanding Rs.80/for the grinding of the grains. In the crossexamination, he agreed that the house of Jamal was right next to his house. The accused assaulted his father some five minutes after they had arrived, during which time, the accused were shouting. His father had fallen down where he was assaulted. He had also fallen down. After they fell down, none of the accused had given any blows to them.

3. Bibiben Kalubhai, PW2, Exh.34 was aunt of the complainant. She was also residing in the same locality. In the evening, she heard a commotion from the house of her brother in law. She and her husband both rushed there and found the accused nos.1 to 5 fighting. She also stated that accused no.1 had given a knife blow to her brotherinlaw i.e. Jusabbhai, which blow had landed near the navel. He had started bleeding. Accused no.2 had given a gupti blow to his son. In the crossexamination, she stated that she reached the place in a couple of minutes after hearing the shouting. When she reached, both sides were fighting. The fight lasted only for couple of moments.

4. PW3, Zubedaben Jusabbhai, Exh.35 was the wife of the deceased. She was also present at the house at the time of incident. She referred to the demand of Rs.80/from the accused in the afternoon. Later on at about 7"O clock in the evening, five accused had come to her house. Accused no.1 had given knife blow to her husband. Accused no.2 had a gupti. Accused no.4 had a pipe. When his son tried to intervene, accused no.2 had given a gupti blow to him. The lady members had given kick and fist blows to them. In the crossexamination, she denied that on the date of the incident, her husband had abused a lady member of the accused side, upon which, there was a quarrel and her husband had hit Bhikha Jamal with the pipe on head.

5. Gordhan Savjibhai, PW4, Exh.36 was the owner of the truck in whose vehicle the injured persons had reached the hospital at Talaja, also carrying Jusab in injured condition.

6. Jetunben Hakabhai, PW5, Exh.39 was living in the same locality. She deposed that on the date of the incident, upon hearing noises, she had rushed to the site and found that Jusabbhai had fallen down bleeding profusely. The accused were assaulting his son. Accused no.2 had given a gupti blow to him. Accused no.3 had given knife blow. She also referred to the presence of all of five accused at the scene of the incident. In the crossexamination certain improvements were brought on record, but nothing that would shake the very foundation of her version.

7. Labhshankar Gaurishankar, PW6, Exh.38 was the panch witness to the scene of incident, Panchnama Exh.39. He had supported the prosecution. Under this panchnama blood stained soil was collected from the scene of the incident alongwith two blood stained slippers. The defense however, heavily relies on the crossexamination of this witness to point out that as per the Panchnama Exh.39, the blood spots were spread over an area of nearly 60 feet. According to the defense, this would demonstrate that the incident actually did not happen outside the house of the deceased as alleged, but started near the house of the accused. The endeavor on the part of the defense is to show that the deceased and his son were the aggressors and if at all, in a sudden fight the accused had tried to defend themselves.

8. Dr.Pawankumar Chaudhary, PW11, Exh.52 was the medical officer at Talaja

government hospital. He had carried out the postmortem on the body of the deceased. He had recorded a single injury between the stomach and thigh portion of the deceased of the measurement of 2.5 x 0.5 x 6 cms. The injury had severed the left femoral artery and vein. In the opinion of the doctor, the death occurred due to shock on account of excessive bleeding because of damaged vein. This doctor had also on the same date treated the injured Bhikhabhai Jusabbhai. He had recorded following three injuries: i. A sharp cutting injury on right buttock of 1.5 x 1.5 x 1 cms.

ii. One sharp cutting injury on the right arm of 1.5 x 0.5 x 1 cms.

iii. A contused wound on the tampered portion of 4 x 0.5 x 0.5 cms.

In his opinion, all the injuries were simple and if no complications arose, would heal within seven days. This doctor had given the postmortem report which was produced at Exh.53.

In the cross-examination, he agreed that the deceased carried only one injury. Had the artery and the vein not been severed, the injury would have proved to be simple. The vein is located one inch inside the body. If the vein was not damaged, the injury by itself would not be sufficient to cause death. A similar injury on any other part of the body would be of a simple nature.

9. This in the nutshell, is the evidence on record. From such evidence, the involvement of accused nos.1 to 4 stands clearly established. The complainant and the accused were neighbors. The time of incident was about 7"O clock in the evening. There are several eyewitnesses who have given fairly consistent account of the background and the nature of the incident. Bhikhabhai Jusabbhai, PW1, Exh.32 was himself an injured eyewitness. He pointed out that previously on the date of the incident his mother had demanded recovery of Rs.80/ from the accused. Being annoyed by that, the accused nos.1 to 5 came to their house at about 7"O clock in the evening and after a brief heated argument, accused no.1 assaulted his father with knife. When he tried to intervene, accused no.2 gave him knife blow on the waist. Accused no.3 gave a gupti blow on his arm and accused no.4 hit him with an iron pipe. His version is substantially corroborative that of his mother Zubedaben Jusabbhai, PW3, Exh.35. She was also at home when the incident took place. She also referred to her demand of Rs.80 in the afternoon. She was inside the house but rushed out upon hearing the shouts and saw her husband being assaulted by accused no.1 and thereafter her son.

10. Bibiben Kalubhai, PW2, Exh.34 was the aunt of the complainant and lived in the same locality. She also claimed to have rushed to the spot upon hearing the shouts. She had seen accused no.1 giving knife blow to her brother-in-law and the complainant being assaulted. Jetunben Hakabhai, PW5, Exh.39 was a neighbor. She reached the site soon after deceased Jusabbhai was assaulted. She was in time to see the complainant being assaulted.

11. The version of these witnesses is further corroborated by evidence of

Dr.Pawankumar Chaudhary, PW11. He had carried out the postmortem on the body of the deceased Jusabbhai and recorded a singular injury between the stomach and thigh. He had also treated the complainant and recorded three injuries; one on his waist, another on his arm and third on right side of his forehead. All these injuries were consistent with the version given by the witnesses.

12. Identification of the accused would pose no problem since the complainant and the other witnesses lived in the same locality since long. The accused persons who belonged to the same family also lived there. There was no reason for several witnesses to falsely implicate the accused. It may be that the scene of the incident showed the marks of blood at more places than one and this would dent the version of the complainant PW1 that his father had collapsed where he was assaulted, however, this by itself would not destroy the version of multiple eyewitness which consistently pointed out to the involvement of accused nos.1 to 4 and the presence of accused no.5.

13. The crucial question is, was the learned Trial Judge correct in convicting the accused nos.1 to 5 for offence punishable under section 302 with the aid of section 149 of IPC? In this context, we may appreciate two aspects. First is, whether the accused nos.1 to 5 and the remaining accused whose appeal no longer survives, formed an unlawful assembly. Further, whether the common object of this unlawful assembly was to commit murder. Second aspect of the matter would be focused on the nature of the injuries caused by the different accused. This would enable us to ascertain the precise nature of offence that have been stated to have been committed by the accused.

14. With respect to the first part of the matter, there is no evidence to suggest that all five accused, later on joined by the three lady members of the family, had a common object to use criminal force. It may be recalled that there was dispute about the accused not paying outstanding amount of Rs.80/to the mother of the complainant. The witnesses including the complainant himself has stated that when the accused arrived in the evening, they shouted for about couple of minutes. PW2, Bibiben Kalubhai had also referred to shouting which was taking place when she reached the place of incident. From such accounts, it can be gathered that the accused may have arrived with an intention of heated argument or at best a quarrel, but not for assault or with premeditation for causing grave injuries. The fact that the cross case was filed by the accused side would further suggest that there had been a fight between the two sides. The accused therefore cannot be stated to have formed an unlawful assembly. At any rate, the nature of injuries caused by all the accused to which we would make a detailed reference a while later, would show that the common object of this assembly was under no circumstances to cause death or to commit murder.

15. We may now refer to the role played by each accused. Accused no.1 had given a knife blow to the deceased near his thigh. The witnesses were clear that this person received only one injury. This was also the finding of Dr.Pawankumar

Chaudhary, PW11. He had given the dimensions of injury as 2.5 x 0.5 x 6 cms. In other words, the knife blow was barely half a centimeter deep. Unfortunately, this blow severed the femoral artery and a vein. The doctor was specific that but for this internal injury, the blow by itself would have caused a simple injury. He also agreed that had the vein not been severed, the death would not have occurred. Insofar as the accused no.1 is concerned, he had given a knife blow on a somewhat vulnerable part of the body and caused an injury which severed an important vein. This in turn, caused excessive blood loss, resulting into the death. The accused therefore, had neither intention or knowledge to cause death nor intention to cause such bodily injury as was likely to cause death. He can neither be convicted for offence under section 302 nor under section 304. The conviction would be under section 326 of IPC.

16. Insofar as accused no.2, accused no.3 and accused no.4 are concerned, each had caused simple injury as agreed by Dr.Pawankumar Chaudhary, PW11. His opinion was that under normal circumstances, patient could have been fully recovered in seven days. The accused no.2 and accused no.3 had used knife and gupti respectively. They would therefore, be convicted for offence punishable under section 324, of IPC. Accused no.4 had used a pipe. He would be convicted under section 323. Insofar as accused no.5 is concerned, except for his presence, no role is attributed to him. He was not carrying any weapon. He had not given any blow either to the deceased or to the injured. He was wrongly convicted under section 302 with the aid of section 149.

17. We are informed that Accused no.1 has already undergone imprisonment of 5 years, 6 months and 10 days. Accused no.2 has already undergone imprisonment of 4 years, 2 months and 10 days. Accused no.3 has already undergone imprisonment of 4 years and 8 days. Accused no.4 has already undergone imprisonment of 4 years, 2 months and 10 days and accused no.5 has already undergone imprisonment of 4 years, 1 month and 6 days.

18. In the result, Criminal Appeals No.436/2005 and 585/2005 are allowed in part. Conviction of accused no.1 is converted into one under section 326 of IPC and is sentenced to undergo rigorous imprisonment for three years. Accused nos.2 and 3 are convicted for offence under section 324 of IPC and sentenced to undergo rigorous imprisonment of one year. Accused no.4 is convicted for offence under section 323 of the IPC and sentenced to six months rigorous imprisonment. Conviction of these accused for offence under section 302 is set aside. Accused No.5 is acquitted. In view of the sentence already undergone by accused nos.1 to 4, they would not have to serve any further sentence. These Criminal appeals are accordingly disposed of. State appeal being Criminal Appeal No.1784/2005 is required to be dismissed summarily. The lady members had even as per the witnesses, played no role beyond kick and fist blows to the family members of the complainant. Even if their conviction is not disturbed, since their appeals have been dismissed as infructuous, surely, there is no case for roping these lady members in any serious offences. Accordingly Criminal

Appeal filed by the State is dismissed.

R & P to be transmitted back to the concerned trial Court. Bail bonds, if any, stand cancelled.