

(2008) 07 GUJ CK 0077
In the Gujarat High Court
Case No : Criminal Appeal No. 820 of 2000

Mansukh Karsan Vaghari

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 30-07-2008

Acts Referred:

Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 313, 374
Penal Code, 1860 (IPC) — Section 300, 302, 303, 304, 504

Citation : (2008) 07 GUJ CK 0077

Hon'ble Judges : Z.K. Saiyed, J;A.M. Kapadia, J

Bench : Division Bench

Advocate : Sadhana Sagar, for the Appellant; Mukesh Patel, Assistant Public Prosecutor for Opponent 1, for the Respondent

Judgement

Z.K. Saiyed, J.—Appellant ("The Accused" for short) was charged and tried by learned Additional Sessions Judge, Porbandar for commission of the offence punishable under Sections 302 of The Indian Penal Code ("IPC" for short) and u/s 135 of the Bombay Police Act ("B.P. Act" for short) on the accusation that the Appellant was abusing Madhubhai Sidibhai Vaghri and deceased Vasant Manu by giving bad words, in a drunkard position, and when Vasant Manu stopped him, the Appellant got excited and gave a blow near ribs below the part of the shoulder and caused injury with the knife in his hand and thereby caused the death of Vasant Manu, and also committed violation of notification of District Magistrate, Junagadh.

2. At the end of the trial, the Appellant/Accused was found guilty of the offence of murder of Vasant Manu, punishable u/s 302 IPC and u/s 135 of the B.P. Act. He was, therefore, convicted vide judgment and order dated 26.7.2000 and sentenced to imprisonment of life and fine of Rs. 1000/- i.d. SI for a further period of one year, 3 moths SI for the offence punishable u/s 504 IPC and 4 months SI for the offence punishable under Sction 135 of the B.P. Act and fine of Rs. 250.

3. The Appellant/Accused, aggrieved by the judgment and order of conviction and sentence, has filed the instant Appeal with the aid of Section 374 of the Code of Criminal Procedure ("the Code" for short).

4. The facts led to the trial are as follows:

4.1 As per the prosecution case Madubhai Sidibhai Vaghri, aged 30 years was doing T.V. Repairing work and residing in the Vaghari street near the Ashram of Pragabapa with his family. Then Madhubha Vaghari left the job of Krishna Electrics prior to the 3 months of the incident and started casual labour work/ temporary work.

4.2 On 21st August 1997, at about 4 O'Clock he was present in his house and his wife Daya had gone to village to sell the spices. His father, mother and daughters were present in the house and other children had gone to school. His brother-in-law-Vasant Manu and his wife and children were residing adjacent to his house. When Madhubhai and family members were present in their house in Vaghari Vas, at that time Mansukh Karshan Solanki who is also a resident of Vaghari Vas came there and started abusing Vasant-the elder brother-in-law of Madhubhai, in a drunken condition. Therefore, Madhubhai came out of his house. Mansukh Karshan Solanki started abusing him, instead of Vasant Manu. When Vasant Manu stopped Mansukh Karshan Solanki from doing so and scolded him for giving of bad words, at that time Mansukh Karshan Solanki, who was having open knife in his hand, gave a blow with the same to Vasant Manu near his rib below the shoulder due to which Vasant Manu fell down on the spot, and became unconscious. So, there was a big noise there, so Rama Bikha, Veja Puna rushed there and took Vasant Manu in unconscious condition to hospital in Riskshaw and Madhubhai had also arrived at the hospital. During the treatment Vasant Manu expired at 17.10 hours at Bhavsinghji Hospital of Porbandar City.

4.3 A complaint for the aforesaid incident was lodged before the Police Inspector, Kamla Baug Police Station by Madhubhai which was registered vide CR No. 157/1997 for commission of the offence punishable u/s 302 of IPC and Section 135 of the B.P. Act.

4.4 Pursuant to the registration of the complaint, investigation was put into motion and inquest of the dead body was held in the presence of panch witnesses and dead body was sent for autopsy. Panchnama of scene of offence was also drawn and statement of the witnesses were recorded. Discovery panchnama of weapon was also drawn and weapon was seized. Panchnama of physical condition of the Accused and clothes of the deceased were produced, so under the guise of panchnama, it was recovered that the blood of the deceased was also taken under panchnama. Certificate of treatment of disease and P.M. Note were attached with the investigation papers and mudamal was sent to FSL for scientific analysis and reports of the FSL was received by the I.O.

4.5 On completing the investigation against the Accused, the I.O. has filed charge sheet against the Accused in the Court of learned JMFC, Porbandar, for

the offence punishable u/s 302 IPC and Section 135 of the B.P. Act.

4.6 As the offence punishable u/s 302 is exclusively triable by the learned Trial Judge (Sessions Judge), the learned JMFC committed the case to the Court of the Sessions, at Porbandar.

4.7 The learned trial Judge has framed charge against the Accused. The Accused has not pleaded guilty, so the trial proceeded in Session Case No. 16 of 1998.

4.8 Prosecution has examined 13 witnesses, to prove the culpability of the Accused, which have been given in paragraph 3 of the impugned judgment and order as under:

	Srl.	No.	Name	Exhibit
	1.		Manubhai Sidibhai	
Makwana 7				2. Sidi
Bhikhabhai 9				3. Dayaben
Madhubhai 10				4.
Minakshiben			Madhubhai	11
				5. Rita Madhubhai 12
				6. Chandaben Tapubhai 13
				7. Rama Bhikhabhai 18
				8. Ashok Bhanushankar
Thakkar 19				9. Virendra
Chandrakanta 21				10.
Mahendra Raghuram 20				
11.	Dr.	Parvej	Bahadurbhai	23
				12. Devabhai Punjabhai 28
				13. Devayat Khimabhai 31

4.9 Prosecution has also produced documents just to prove the charge leveled against the Accused are as under:

Particulars Exhibit	Srl.	No.
1. Letter received from the hospital.		32
the Executive Magistrate.	1A.	Note sent to 33
Panchnama. 14	2.	Inquest
3. Letter regarding PM of the dead body.		24
scene of offence.	4.	Panchnama of 15
the person of the Accused.	5.	Panchnama of 22
the cloth received from the hospital.	6.	Panchnama of 16

-----	7.	Receipt	
showing dead body is received.	27		
-----	8.	Receipt	
regarding handing over of dead body to relatives.	34		
-----	9.	Panchnama of	
blood sample of the deceased, received from the Bhav. Hospital.	17		
-----	10.	Discovery	
panchnama. 5/10 -----			
11.	Public	advertisement.	35
-----	12.	Medical	
certificate of Mansukh Karshan.	30		
-----	13.	P.M. Note of	
the deceased. 26 -----			
14. Report sent to FSL for analysis of Mudamal.	36		
-----	15.	Receipt sent	
to FSL for analysis of Mudamal.	37		
-----	16.	FSL Report.	
38 -----			
Serological Report.	39		

4.10 After recording of the evidence of the witnesses, trial Court explained to the Accused the circumstances appearing against him and u/s 313 of the Code, the statement was recorded. In his statement he denied the case in toto. He made a statement that he is wrongly booked in false case. He, neither led any evidence nor examined any witness in support of his defence.

4.11 On appreciation, evaluation and scrutiny of the evidence on record, the trial Court held that there was sufficient evidence as to say that the Appellant/Accused has committed an offence of murder and also committed breach of the notification of District Magistrate, and u/s 302 IPC he was sentenced to imprisonment of life for the offence of murder and also a fine of Rs. 1000/- and i.d. SI for a further period of one year, 3 moths SI for the offence punishable u/s 504 IPC and 4 months SI for the offence punishable u/s 135 of the B.P.Act and fine of Rs. 250.

5. Ms. Sadhana Sagar, learned advocate appointed by legal aid has contended that as per the say of the complainant Madhubhai Sidibhai in his complaint at Exh.8, Accused Mansukh Karsan has inflicted one blow just near rib below the part of the shoulder and caused injury with the knife and argued that only one single blow was inflicted by the Accused under impression of alcohol and it was not an intention of the Accused to kill Vasant Manu. He also argued that there was no intention to commit grievous hurt and pointed out that PW 11 Doctor Parvej Nathubhai Nathani has also in his oral evidence at Exh.23 said that he found 2x1" each side cut wound muscle which went deep near rib and also read PM note at Exh.26 and argued that there was only one single injury to the

deceased and in collaboration of evidence of complainant and PM, same collaborative piece of evidence is also given P.O. 2 to 6. It is also contended that panch witnesses of Exh.22 panchnama of discovery of weapon, both the panchas PW 8 and 9 turned hostile and did not say anything in support of the contention of panchnama of discovery. So it is also argued that in the absence of the evidence of independent witness panchas, trial Court cannot consider that contention of the discovery of panchnama is proved by I.O. It is also contended by the learned advocate Ms. Sadhana Sagar that from the injury itself, it appears that injury was not inflicted under intention to kill Vasant Manu. She has also contended that this witness has stated version of prosecutor in a contradictory manner and prosecution has failed to prove the charge leveled against the Accused. Form the oral evidence of the eye witness, material contradictions are on record and therefore the Accused is entitled for the benefit of doubt. Notwithstanding the aforesaid fact, the learned trial Court committed grave error in passing the impugned judgment and order, and the order of the conviction u/s 302 IPC and sentencing him to imprisonment for life, deserves to be quashed and set aside by allowing this Appeal. She, therefore, urged to allow this Appeal.

6. Alternatively, it is also submitted by Ms. Sadhana Sagar, learned advocate of the Appellant, that if at all the evidence of the prosecution is a "culpable homicide not amounting to murder" punishable under Part I or Part II of Section 304 IPC, the Accused is in jail for more than 8 years and therefore the conviction may be altered from Section 302 to either Part-I or Part-II of Section 304 IPC and the sentence undergone by the Accused may be treated as substantive sentence and accordingly the Accused may be set at liberty forthwith.

7. Learned APP for the Respondent-State of Gujarat Mr. Mukesh Patel has supported the impugned judgment and order throughout. According to him, there is no infirmity in the prosecution. It is contended that it was the cruel attack of assault by the Accused to the deceased and by him reading the oral evidence of the complainant and the eye witnesses and contended that no question can arise of wrong identification and wrongly involvement of the Accused. It is contended that due to the fatal blow by the Accused as a result of which he died Therefore, it is a clear case of murder and no exception is attracted to murder punishable u/s 302 Part-I and Part-II. Therefore, according to him, the impugned judgment and order does not call for any interference by this Court. He, therefore, urged to dismiss the Appeal.

8. We have considered the submissions made by learned Advocate Ms. Sadhana Sagar and learned PP Mr. Mukesh Patel for the respondent State of Gujarat. We have perused the impugned judgment and order and the set of evidence supplied by him during the course of his submission. We have also undertaken a complete and comprehensive appreciation of all vital features of this case and the entire evidence on record, which is read and reread by the learned Advocates of the parties with reference to broad and reasonable probabilities of the case.

9. It is not a disputed issue to the effect that the deceased Vasant Manu had died

a homicidal death. In this connection, prosecution has produced evidence of eye witness and relied upon the oral evidence of PW-1 to 6 and also relied upon the evidence of PW-11 Doctor Parvej Bahadurbhai at Exh.23 by whom autopsy has been performed on the dead body of Vasant Manu and prepared autopsy report at Exh. 26. By a conjoint reading and oral testimony of PW-11 Doctor Parvej Bahadurbhai at Exh.23 and the P.M.Note at Exh.26, it appears that there was a deep wound in the body of the deceased near rib below the shoulder, and a muscle and vein deep in sized wound was seen and examined by maker of autopsy. The panchnama Exh.14 also supports the injury sustained by the deceased. So, it was observed by the trial Court that it is duly proved and established as a homicidal death and it was rightly recorded the said finding by trial Court that the deceased died a homicidal death. In this connection, we have scrutinized the evidence of PW-1 to 6 who are eye witnesses of the case. PW-3 is a witness whose evidence is hearsay. From the oral evidence of PW-1 and PW-2 and PW-4 to 7 it is specifically contended in oral evidence of above witnesses that the Appellant / Accused was abusing the complainant PW-1 - Madhubhai by giving bad words and the Appellant was in a drunken condition and giving bad words to deceased Vasant Manu and when he stopped him, the Appellant / Accused gave a blow near rib below part of the shoulder and caused injury with the knife and it was resulted into his death. So, witnesses and people from the nearby locality gathered there and injured Vasant Manu was shifted to hospital and due to the injury he died. We have perused the oral evidence of the eye witnesses. It is true that all the witnesses are relatives, but from the oral evidence it is established that their presence at the place of occurrence is quite natural. It cannot be said that they are interested witnesses. From the close examination of the eye witnesses we have not found any unnatural say of the witnesses. Even we have compared their evidence. We have not found any material contradiction from their oral testimony. We have testified the whole evidence of the eyewitnesses and we have compared oral evidence of the panch witnesses of discovery panchnama and perused the oral evidence of PW-8 Ashok Bhaunshankar and PW-9 Panch witness Mahandra Raghuram at Exh.20. It is proved that both the panchas turned hostile and did not turn up before the Court in support of the version of panchas. It appears from the oral evidence of the I.O. that he has proved the contention of discovery panchnama of weapon. We have perused the provision of ACC 27 of Evidence Act and we are of the opinion that even panchas turned hostile, yet maker of the discovery of panchnama can prove, and from his version it is required to be accepted that the evidence of the I.O. regarding the fact of discovery panchnama is required to be considered as a reliable and acceptable evidence. It is settled principle that if the evidence of the eyewitnesses is found trustworthy, reliable and acceptable without any doubt, then it cannot be thrown away simply due to the relationship with deceased. From the oral version of the eyewitnesses as well as evidence of Doctor, who has performed the autopsy, from his evidence there is evidence to the effect that assault made by the Appellant / Accused was in a drunken condition. It is established that under the impression of alcohol he was abusing deceased and

complainant, therefore, in view of the aforesaid fact situation, the question that arises for consideration is, as to whether the offence alleged to have been committed by the Accused, is an offence of murder, punishable u/s 302 of IPC or the offence of "culpable homicide not amounting to murder" falling either under Part-I or Part-II of Section 304 IPC.

10. In the case of Lachman Singh Vs. State of Haryana, , Supreme Court has held in this case that if occurrence takes place in course of sudden quarrel, conviction of the Appellant is required to be altered from Section 302 to Section 304 Part-I.

11. In the case of Harendra Nath Vorah v. State of Assam 2007 AIR SCW 4631 their Lordships have set out the distinction between "Murder" and "Culpable homicide not amounting to murder". In this case Supreme Court has altered conviction recorded u/s 302 to 304 Part-I.

12. In present case we have discussed oral evidence of eye witnesses as well as maker of autopsy. It is true that solitary blow given by the Appellant / Accused to the deceased was near rib below the part of the shoulder with the knife, not a vital part and it would be much to say that the Appellant / Accused knew that Suber Lavian of left side shoulders vein would cut as a result of that wound and due to the continuous bleeding. Even a medical man perhaps may not have been able to judge the location of the vein with any precision of that type. The fact that vein suber lavian was cut, therefore, be ascribed to a known intention or accidental circumstance.

13. The injury which was found to be sufficient in the ordinary course of nature to cause death has resulted from a blow with a sharp edged weapon, the same could be said to have been intended that the only injury which could be regarded as intentional was the superficial wound resulting directly from the blow, that the assailant could not be held guilty of an offence punishable u/s 302 IPC and that he was, on the other hand guilty of a lesser offence falling under Part-II of Section 304 thereof. Looking to the cause of death, facts and circumstances, however, do not bring the case close. Thirdly of Section ACC 300, I.P. Code the circumstances tend to show that the Appellant/Accused had no intention to kill the deceased. He could not only be attributed with requisite knowledge that injury resulting from the knife blow was likely to cause his death and it cannot be considered that it is a murder and cannot fall under Part-II of Section 304. We are of the opinion that the nature of injury and the fact that the appellant did not inflict any more injuries, it is difficult to hold that he intended to inflict that particular injury which the doctor opined to be fatal. But, from the whole evidence of the prosecution, it came to the record that there was no knowledge that the Appellant by inflicting that injury he was likely to cause death and when the knowledge and intention was not present, then ingredience of murder cannot be established.

14. Applying the principles laid down by the Supreme Court in various

judgments, to the facts of the instant case that the Appellant / Accused was under drunkard position and there was heated exchange of words between the parties and therefore, case clearly falls within the meaning of Section 304 Part-II IPC.

15. Seen in the above context, the impugned judgment and order convicting and sentencing the Accused for commission of the offence punishable u/s 302 IPC deserves to be altered into the offence punishable u/s 304 Part-II IPC, and accordingly the Appeal deserves to be allowed to the said extent.

16. For the foregoing reasons, the Appeal succeeds in part and accordingly it is partly allowed. We uphold the conviction of the Accused for commission of the offence of murder of Chanaksinh Laxmansingh. However, we alter the conviction recorded u/s 302 IPC to Section 304 Part-II IPC.

17. It is stated by Mr. Mukesh Patel, learned APP for the respondent-State of Gujarat on the basis of the jail remark sheet that the Accused is in jail for more than 8 years. Therefore, according to us custodial sentence of more than 8 years would meet the ends of justice. The Jail authority is therefore, directed to set at liberty the Accused forthwith, if his presence is not required in connection with any other offence.

Appeal is accordingly disposed of.