

(1961) 06 GUJ CK 0006
In the Gujarat High Court

Case No : Criminal Appeal No's. 566 and 578 of 1960

Miyana Hasan Abdulla and Another

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 28-06-1961

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 154, 157
Evidence Act, 1872 — Section 157, 165, 35, 40, 44
Penal Code, 1860 (IPC) — Section 300, 34

Citation : AIR 1962 Guj 214 : (1962) GLR 107

Hon'ble Judges : V.B. Raju, J;A.R. Bakshi, J

Bench : Division Bench

Advocate : C.G. Shastri and A.V. Mody, for the Appellant; H.K. Thakore, Asst. Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Raju, J.—The learned Sessions Judge, Surendranagar, convicted two persons, namely, Lakhman Lakha and Hasam Abdulla, who were accused Nos. 1 and 2 in, Sessions Case No. 20/60 before him u/s 302 read with Section 34, Indian Penal Code for having committed the murder of one Chandubha Madarsing at about 9 P. M, on 5-5-1960 near the Maha Laxmi Talkies at Surendranagar. Lakhman Lakha has filed Cri. Appeal No. 578 of 1960 and Hasam Abdulla has filed Cri. Appeal No. 566 of 1960. For convenience, the two appeals filed by accused Nos. 1 and 2 have been heard together and this judgment will dispose of both the appeals.)

* * * * * 7. *****The evidence of this witness P. C. Jabubha is, however, attacked on, the ground that he had not given his complaint at about 9-45 P. M. as alleged by the prosecution. According to the learned Counsel for the appellants, the complaint must have been given after Natwarlal and Gajrajgar had gone to the hospital and after they had decided to involve the appellants. In his evidence, Jathuba had deposed that from the Irish Mission Hospital, he went

to the police station and gave his complaint (Ex.- 7). It was the same as shown and read over to him. It bore his signature. The witness was allowed to be examined again after his cross-examination was over. He deposed that the complaint (Ex. 51) on the printed form bore his signature. The learned Assistant Government Pleader contends that Ex- 51 should be treated as the first information report and not Ex. 7. According to him, when Jatubha went to make his complaint, his statement was taken by two different persons. In his cross-examination, Jatubha has stated that at the lime of recording his first information his signatures were taken on two different papers. His signature was taken first on the printed form He put his signature on Ex. 7 and also on Ex. 51. The P. S. I. Jadeja had taken his signature on bath. P. S. I. Jadeja and one another person were writing at the same time and he put his signatures after the writings were completed. Ex. 51 was written by P. S. I. Jadeja and Ex. 7 was written by another person. In view of the evidence of this witness, the contention of the learned Assistant Government Pleader is that Ex. 51 is the first information report and that Ex. 7 should not be treated as first information report. His contention is that although time is not noted in Ex. 7, it is noted in Ex. 51, and his contention is that Ex. 51 should be treated as first information report and not Ex. 7.

8. What is called a first information is that which is referred to in Section 154, Criminal Procedure Code. Section 154, Criminal Procedure Code reads as follows:-

"Every information relating to the commission of a cognizable offence if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf."

But a complaint given by a person or information given by a person does not itself become evidence automatically. It can go in as evidence only to corroborate the evidence of the complainant or the person who has given information In this case Jatubha has given his evidence, and his previous statement made at the police station immediately after the commission of the offence would certainly be admissible u/s 157, Evidence Act. Section 154, Criminal Procedure Code, provides that If the information is given orally it shall be reduced to writing by the officer in charge of the police station or under his direction and be read over to the informant and shall be signed by the persons giving it. The Section also provides that the substance of the information shall be entered in a book kept by such officer in the form prescribed. It is true that after the information Is reduced to writing, the officer has to enter the substance of this information in the book. But what Section 154 Criminal Procedure Code provides is that the information if given orally shall be reduced to writing. In view of this, the provisions of Section 91 of the Evidence Act are attracted. This section provides

the when any matter is, required by law to be reduced to the form of a document, no evidence shall be, given in proof of the terms of such matter, except the document itself, or secondary evidence of its content in cases in which secondary evidence is admissible under the provisions of the Evidence Act. The document has therefore to be proved and the provisions relating to the proofs of, documents are to be found in Sections 64, 65, 66 and 67 of the Evidence Act. Section 67 of the Evidence Act provides as under:-

"If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting"

Where a document is written by one person and signed by another, the handwriting of the former and the signature of the latter have both to be proved in view of Section 67 of the Evidence Act. Signature and handwriting may be proved in various ways. The signatures of Jatubha on both Ex. 7 and Ex. 51 have been proved, but the handwritings on neither Ex. 7 nor Ex. 51 have been proved. According to the complainant, P. S. I. Jadeja had written Ex. 51, and P. S. I. Jadeja has not been examined by the prosecution. It is however, contended that Jadeja was not available as he had gone to Calcutta, But even If P. S. I. Jadeja had gone to Calcutta, the handwriting of P. S. I. Jadeja would have been proved by the prosecution in many ways; one of the ways was to examine any person who knew the handwriting of P. S. I. Jadeja. The handwriting on Ex. 7 has not been proved. This is conceded by the learned Assistant Government Pleader. It is, however, contended by the learned Asst. Government Pleader that the signature of P. S. I. Jadeja on Ex. 51 has been proved. It is not the case of the prosecution (hat Jadeja has signed the document as the signatory of the document. What Section 67 of the Evidence Act refers to is the signature of a person who has signed a document as a "person making the document. Section 67 of the Evidence Act does not refer to signature of a witness who countersigns a document as a person who was present at the time the document was signed by another person. What Section 67 of "the Evidence Act requires is that the signature of the person who is alleged to have signed or made the document must be proved. This is not a case where Jadeja and another person are joint signatories of the document. Jadeja countersigned in his capacity as a police officer. The signature of Jadeja is more or less a signature of a person whosigned as "before me". It is contended that Dy. S. P. Jethva has proved the signature of Jadeja. It is conceded that Dy. S. P. Jethwa has not proved the handwriting on Ex. 7 or Ex. 51. In this view, the two documents Exs. 7 and I 51 have not been proved in the manner provided by Section 67 of the Evidence Act. There can be only one complaint of a complainant and Only one complaint can be used to corroborate the evidence of the complainant. It is only that complaint which is reduced to writing u/s 154 Criminal Procedure Code, that can be used for she purpose of corroboration. If the police officer in charge of the police station records the whole complaint and subsequently enters the whole statement in the

prescribed book, the entry would not be a complaint, because what is to be entered in the prescribed book is to be done after the complaint has been reduced to writing. The first stage is to reduce the complaint to writing and the second stage is to enter the substance of the complaint in the prescribed book. Even if the whole complaint is entered in the prescribed book, that would not become a complaint Ex. 51 cannot be regarded as a complaint reduced to writing u/s 154, Criminal Procedure Code, even though in one of the columns the whole statement of the complainant has been entered. It is only Ex. 7 which can be regarded as the complaint. But, unfortunately, Ex. 7 has not been proved in the manner required by Section 67 of the Evidence Act." Section 2 of the Evidence Act repealed the whole of the English Common Law on evidence so far as it was in force in British India. Section 5 of the Evidence Act provides as under :-

"Evidence may be given in any suit or proceedings of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others."

Evidence cannot therefore be given of facts which are not declared to be relevant somewhere in the Evidence Act. Section 165 of the Evidence Act provides that the Judgment must be based upon facts declared by the Act to be relevant and duly proved. In view of this provision, as observed by the Privy Council in AIR 1941 16 (Privy Council) , the Evidence Act has prohibited the employment of any kind of evidence not specifically authorised by the Act itself and it is not open to any Judge to exercise a dispensing power and admit evidence not, admissible by the statute because it appears to him that the irregular evidence will, throw light upon the issue it is the purpose of the law of evidence to define what matters should be given in evidence as essential for the ascertainment of truth.

9. As observed by the Privy Council the Evidence Act prohibits the employment of any kind of evidence not specifically authorised by the Evidence Act itself and therefore there must be a specific provision in the Evidence Act before facts can be treated as relevant and facts must also be proved as laid down in the Evidence Act. Facts which are not properly proved cannot be considered by the Judge and cannot form the basis of a judgment It is only those facts which are declared to be relevant and duly proved, which can be the basis of a judgment as provided by Section 165 of the Evidence Act.

10. For the reasons already given above, was hold that the complaint Ex. 7 has not been properly proved Ex. 51 has also not been properly proved, Entries in the book prescribed u/s 154, Criminal Procedure Code may be relevant u/s 35 of the Evidence Act. But Ex. 51 is not such an entry. Ex. 51 is a report made to a Magistrate made as provided in Section 157, Criminal Procedure Code. Such a report may be a public document but being a report is not relevant u/s 35 of the Evidence Act Entries in the book prescribed u/s 154, Criminal procedure Code have however not been proved. Therefore the complaint Or the first- information given by Jatubha has not been properly proved, and Exs. 7 and 51 were therefore wrongly admitted as evidence and both must be rejected from

consideration.

11. Even if we do so, we must observe that the contradiction relied on by the learned counsel for the appellants, which are found in the complaint or the first information are minor and insignificant, The contradictions relied on relate to the description of the weapons with the various assailants, the nature of blows inflicted by the various assailants, the parts of the bodies of the injured persons where blows are alleged to have been inflicted by the various assailants, the order of blows and the persons who were round the lorry etc. In our opinion," the discrepancies on these points are bound to exist in a case like this when an incident happened in a crowded locality. These discrepancies may be due to imperfect observation, weak memory and also inability to give precise evidence. We are therefore, not prepared to attach any importance to these discrepancies and contradictions. Some of these contradictions are really omissions, which do not amount to contradictions.

* * * * * 19. The judgment in Small Cause Suit No. 133 of 1960 filed by Gajrajgar was produced by the defence. It is suggested that the suit was dismissed, as Gajrajgar had made a false claim. It is important, however, to note that under Sections 40 to 44 of the Evidence Act a Judgment is not admissible to prove that the plaintiff had filed a false case. Section 43 of the Evidence Act reads as follows:-

"Judgments, orders or decrees, other than those mentioned in Sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provision of this Act."

The judgment produced in the instant case does not come within the scope of Sections 40, 41 or 42 of the Evidence Act. It is therefore clearly irrelevant.

* * * * * 21. The next question is whether the learned Sessions Judge was right in holding that the appellants had caused the death of Chandubha in furtherance of their common intention to cause death or had caused bodily injuries sufficient in the ordinary course of nature to cause death. The learned counsel for the appellants relied on the case of AIR 1945 118 (Privy Council) It is necessary to distinguish similar Intention of persons from common intention, which is requisite u/s 34, Indian Penal Code. There must be a previous concert among the accused to make the intention common. But it is not necessary that there should be such a previous concert by the offenders a long time before the commission of the offence; they may concert immediately before the commission of the offence or even at the time of the commission of the offence. Such a previous concert can be inferred from the circumstances in which the offence was committed and from the various acts of the accused. In this case, there is the evidence of P. C. Jatubha, who has deposed that he saw Chandubha running and he was chased by four persons, Those persons were at a distance of 6 to 7 feet from Chandubha. The first blow was given by accused No. 1. Even after Chandubha had fallen, he was given blows by three persons. Hasam gave

one blow with an axe. Witness Natwarlal has deposed that when he heard the hubbub from a nearby lorry of Zachhi, he saw the four accused giving blows to Chandubha. He knew the four accused. Witness Gajrajgar has deposed that Hasam and another assailant were standing opposite Chandubha. Accused No. 1 and the other assailant were to the east of Chandubha; When Chandubha looked at Ismail (accused) No. 4), accused No. 1 gave an axe blow to Chandubha, who caught hold of the axe, Chandubha then ran towards the Adarsha Lodge. While running from the Adarsha Lodge, he came to the public urinal, and there Lakhman (accused No. 1) ran after him and gave a blow. It is therefore clear from the evidence of Jatubhai and also from the evidence of the other two witnesses that this was a common attack by accused Nos. 1 and 2 and others. In these circumstances, the learned Sessions Judge was quite right in inferring common intention on the part of accused Nos. 1 and 2, and the common intention must necessarily be to cause bodily injuries sufficient in the ordinary course of nature to cause death, because admittedly one of the assailants was armed with an axe. When an attack is made by a number of persons, one of them being armed with an axe, the attack must invariably be of a serious type and very often end in the death of the victim. In these circumstances, the learned Sessions Judge was right in inferring that there was a common intention. On the part of accused Nos. 1 and 2 and that the common intention was to cause Chandubha bodily injuries sufficient in the ordinary course of nature to cause death.

22. In the result, the conviction of the appellants u/s 302 read with Section 34, Indian Penal Code, and the sentence of imprisonment for life imposed on them are confirmed, and the appeals are dismissed.