
(2013) 11 GUJ CK 0062
In the Gujarat High Court
Case No : Criminal Appeal No. 962 of 2008

Mohanbhai Maganbhai Vasava

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 11-11-2013

Acts Referred:

Citation : (2013) 11 GUJ CK 0062

Hon'ble Judges : Z.K. Saiyed, J; Akil Kureshi, J

Bench : Division Bench

Advocate : Harnish V. Darji, No. 1, for the Appellant; H.L. Jani, APP for Opponent/Respondent No. 1, for the Respondent

Final Decision : Partly Allowed

Judgement

Akil Kureshi, J.—This appeal is filed by the original accused challenging the judgment dated 11.1.2008 rendered by the learned Principal Sessions Judge, Vadodara in Sessions Case No. 104 of 2006. The accused" was charged with the offence punishable u/s 302 of the Indian Penal Code. He was convicted for such offence and sentenced to life imprisonment. He has, therefore, challenged his conviction and sentence recorded by the learned trial Judge. Briefly stated the prosecution version was that, on 14.3.2006 the complainant Bhikhiben and her husband Ravjibhai had gone to offer prayers at the Holi fire at about 7 O'clock in the evening. They had pulled out a coconut from the fire and returned home where after dinner they were resting. At about 20.45 hours, the accused came there with an iron rod and picked up quarrel with Ravjibhai about taking out the coconut from the fire. He started abusing and used foul language. When Bhikhiben intervened and told him not to use bad words, he got excited and gave one blow with iron rod to Bhikhiben on her head. She started bleeding. She was taken to the hospital where she died on 16.3.2006 at 23:00 hours. Under charge Ex. 3, the accused was therefore charged with offence punishable u/s 302 of the Indian Penal Code and also u/s 135 of the Bombay Police Act.

2. The FIR was lodged by the deceased herself which was produced at Ex. 41 in

which similar version was disclosed. The dying declaration of Bhikhiben was recorded by Executive Magistrate - P.W. No. 1. He narrated the procedure undertaken by him for recording such dying declaration. He had visited the hospital upon being summoned by the police. After verifying that the patient was conscious and able to give a statement, he recorded the dying declaration which was produced at Ex. 15. In such dying declaration, Bhikhiben had stated that on the date of incident i.e. 14.3.2006, the accused had given a blow on the back of her head with an iron rod.

3. Ravjibhai, husband of the deceased, P.W. No. 2 was examined at Ex. 20. He deposed that on the date of the incident, he and his wife had gone for offering prayers at the Holi fire. They thereafter returned to their house and were sitting outside after dinner. At that point of time, the accused came to their house and started abusing for taking out the coconut from the fire. Bhikhiben told him not to use bad words. The accused, thereupon, went to his house and came back with an iron rod and gave a blow to his wife on the head. She started bleeding, after which, the accused run away. Bhikhiben was taken to a Government Hospital at Vadodara, where she died after three days of treatment. Nothing substantial has come out of the cross-examination of this witness. The defence suggested that on the date of the incident, the husband and wife had quarreled and it was during such quarrel that Bhikhiben received the injuries. The witness, however, denied any such suggestion.

4. Jagdishbhai Sanabhai P.W. No. 4 Ex. 22, was a neighbour of the deceased. He had also witnessed the incident. He deposed that on the date of Holi he had gone to the sim of the village for offering prayer at the Holi fire. When he had returned home and was having dinner, a quarrel had taken place between the accused and the deceased Bhikhiben. His house was situated right next to that of the Bhikhiben. When he came out, he found that Mohanbhai i.e. accused, had given a blow to Bhikhiben and run away.

5. The murder weapon - iron rod was discovered at the instance of the accused. A panchnama to this effect was drawn which was produced at Ex. 26. The panch witness Naginbhai - P.W. No. 6 at Ex. 25 supported the prosecution. As per the panchnama, the accused had volunteered to show the murder weapon from where it was hidden. It was an iron rod three and half feet long.

6. The murder weapon, the clothes of the deceased and other articles recovered during the course of the investigation were sent for forensic analysis. The FSL report and serological report at Ex. 35 confirmed presence of human blood of group "A" (that belonging to the deceased) from the murder weapon as well as the clothes of the deceased and the soil collected from the ground where the alleged incident had taken place.

7. Dr. Kishor Pramodrai Desai P.W. No. 7 at Ex. 38 had carried out the postmortem. He produced P.M. report at Ex. 39. In such P.M. report, he had indicated following external injuries:-

- (1) Surface wound Lt. Frontal lateral
- (2) 10 CM long curved
- (3) Central contusion. Bruises blackened 0.5 CM surface wound.
- (4) Surface wound 1 CM long Lt. Parietal. (Post)
- (5) 4 CM wound from scalp end of lower wound contusion lower elbow. 8th.. medial.. 8 x 6 long.

Corresponding to such external injuries, he had noticed following internal injuries:-

- (1) Scalp hemorrhage. Bruises black.
- (2) Lt. Temporal region.
- (3) Bump on Lt. Parietal bone. 2 CM diameter.
- (4) Linear Lt. Parietal bone 4 CM long.
- (5) Lt. Temporal.. 3 CM long from above & between to burrow hole
- (6) sub. brown black.
- (7) Rt. Parietal temporal occipital sub temporal and Lt. Sub temporal region.

According to him, cause of death was shock due to bleeding caused by the injury. In his deposition, he stated that the injury was sufficient in ordinary course of nature to cause death and that the injury in question could have been caused by the mudamal article No. 1, the murder weapon showed to him.

8. In view of the above evidence on record, we have not the slightest hesitation in confirming the involvement of the accused in causing the injury to the deceased Bhikhiben which resulted in her death. To summarize, the overwhelming evidence on record suggested that on the date of the incident i.e. 14.3.2006, Bhikhiben and her husband had gone to the sim of village for offering the prayer on the occasion of Holi. The husband of the deceased had pulled out a coconut from the fire. They thereafter, reached home. After dinner, they were resting at which point, the accused came there and picked up a quarrel with the husband of the deceased about his pulling out the coconut from the fire. He started using foul language. Deceased Bhikhiben told him not to do so. He got excited and gave one blow with the iron rod on her head.

9. So much is sufficiently established by cogent evidence on record. The FIR lodged by the deceased herself gives similar version. Dying declaration of Bhikhiben was recorded by the Executive Magistrate - P.W. No. 1. In the dying declaration Ex. 15, the deceased had clearly stated that the accused Mohanbhai had given her a blow on the head with an iron rod. This was supported by eyewitness account of Ravjibhai, husband of the deceased P.W. No. 2. He was also present when the incident took place. He had also given similar version of

the incident. Jagdishbhai Sanabhai - P.W. No. 4 was the next door neighbour of the deceased. He was also at home after returning from Holi prayers. He heard the quarrel and when he came out, he found that the accused had given blow to the deceased and run away.

10. Such eyewitness account duly corroborated by the dying declaration gets further support from other evidence, namely, the discovery of the murder weapon at the instance of the accused, the presence of human blood of group "A", namely, that belonging to the deceased on the murder weapon, the clothes of the deceased and the soil picked up from the ground where the incident took place. The medical evidence in the form of the doctor's deposition P.W. No. 7 and the P.M. Report at Ex. 39 further corroborate the prosecution case. The doctor had noticed one head injury on the deceased. According to him, such injury could have been caused with the murder weapon the iron rod.

11. In our opinion, in view of such clear evidence, the learned Judge committed absolutely no error in holding the accused guilty for causing death of Bhikhiben. The deceased herself had given two dying declarations, one in the form of FIR at Ex. 41 and another in the form of the dying declaration at Ex. 50 recorded by the Executive Magistrate. Such versions were in conformity with the eyewitness accounts of her husband P.W. No. 2 and her neighbour -P.W. No. 4.

12. The sole question, therefore, remains is of the nature of offence committed by the accused. The learned counsel for the appellant would contend that looking to the evidence on record, his conviction u/s 302 of the Indian Penal Code was not justified and he should have been, instead, convicted for offence u/s 304 Part-II of the Indian Penal Code at the very best. He, therefore, submitted that the sentence of life imprisonment is required to be substituted by lesser punishment.

13. On the other hand, learned APP Mr. Jani supported the judgment of conviction and sentence and submitted that looking to the nature of the murder weapon and the injury caused, the conviction u/s 302 is justified.

14. From the record, it clearly emerges that on the date of the incident, the accused visited the house of the deceased Bhikhiben and after brief quarrel with her husband, when Bhikhiben intervened and instructed not to use foul language, gave one blow on her head with an iron rod. It is true that the blow was given on vital part of the body and eventually it resulted into death. Nevertheless, there are several factors which would persuade us to hold that the accused did not cause injury with the intention of causing death. Firstly, the murder weapon was an iron rod which may be normally carried by an agriculturist or agricultural labours, even during daily routine activities. Though P.W. 2, husband of the deceased suggested that, after the quarrel the accused went back and returned with an iron rod, we are not convinced about this. Two dying declarations given by the deceased suggest otherwise. According to these statements the accused was carrying the rod when he came there. Perhaps the husband in order to add seriousness to the deeds of the accused suggested that he went home and

returned with the rod. We must discard such minor exaggeration. It is thus established that the accused was carrying the rod when he came to the house of the deceased and gave one blow with the rod and did not repeat the assault though there is nothing on the record to suggest that he was prevented by anybody from doing so. Thus, though the accused had all the opportunities to give successive blows and cause more serious injuries, he did not do so. The injury did not result into instantaneous death. Bhikhiben was taken to hospital where, she survived for about three days before succumbing to the injury. Section 302 of the Indian Penal Code prescribes punishment for the offence of murder. Section 304, on the other hand, prescribes punishment for the offence of culpable homicide not amounting to murder. Part-II of Section 304 provides I for the punishment of imprisonment of either description for a term which may extend to ten years if the act is done with the knowledge that the accused is likely to cause death, but without any intention to cause death or to such bodily injury as is likely to cause death. In the present case, in our opinion, the act of the accused would clearly come within such description. He can be stated to have committed an act about which he must have the knowledge that the same is likely to cause death. He cannot be attributed any intention either to cause death or to cause such bodily injury as was likely to cause death. His conviction is, therefore, required to be converted into one punishable u/s 304 Part-II of the Indian Penal Code. His jail record suggests that he has already served out sentence of over seven years and five months including the period of set off. This does not account for the remission available to him according to rules. In our opinion, the sentence already undergone by the accused would be more than sufficient punishment for the offence committed by him. Under the circumstances, the appeal is disposed of with following directions:-

- (1) Conviction of the appellant - original accused is converted from that u/s 302 of the Indian Penal Code into u/s 304 Part-II thereof.
- (2) He is awarded sentence of the period already undergone by him.
- (3) He shall be released forthwith, if not required in any other criminal case.
- (4) Learned counsel Mr. Darji for the appellant pointed out that the appellant has not paid fine of Rs. 1,000/- due to abject poverty in default of which he has to serve out further sentence of six months. In our view, having served out a sentence of nearly seven and half years should also cover this further default sentence of further period of six months.
- (5) We are informed by learned APP that he is on temporary bail which period expires on 13.11.2013, in which case he shall not have to surrender, after the said period is over.
- (6) The appeal is partly allowed and disposed of in above terms. R & P be transmitted to the trial Court.