
(2015) 07 GUJ CK 0019
In the Gujarat High Court
Case No : Criminal Appeal No. 1480 of 2008

Nahersinh Gulabsinh Parghi	Vs	APPELLANT
State of Gujarat		RESPONDENT

Date of Decision : 06-07-2015

Acts Referred:

Penal Code, 1860 (IPC) — Section 114, 395, 397, 457, 459

Citation : (2015) 07 GUJ CK 0019

Hon'ble Judges : S.G. Shah, J

Bench : Single Bench

Advocate : Bhunesh C. Rupera, for the Appellant; K.L. Pandya, APP, Advocates for the Respondent

Final Decision : Dismissed

Judgement

S.G. Shah, J.

1. Heard Ms. Sadhana Sagar, learned advocate for appellant Nos. 2 and 3 at length, whereas, Mr. K.L. Pandya, learned APP for the respondent-State.

2. This appeal is preferred by as many as five appellants, who were tried jointly but in separate Sessions Cases, since they could not be arrested at the relevant time so as to tried together for the offences committed by them jointly and in conspiracy with each other under Sections 395, 397, 457 and 114 of the IPC. The appellant Nos. 1 and 2 were tried in Sessions Case No. 89 of 2006, appellant No. 3 was tried in Sessions Case No. 32 of 2007 and appellant Nos. 4 and 5 were tried in Sessions Case No. 69 of 2007 by the learned Additional Sessions Judge and Presiding Officer of 5th FTC at Junagadh. The trial Court has by common impugned judgment and order dated 31.03.2008 for all three sessions cases, convicted all the accused for the above offences and awarded sentence of 10 years rigorous imprisonment with fine of Rs. 20,000/- and in default of payment of fine 1 year simple imprisonment under Section 395 of the Indian Penal Code, 5 years simple imprisonment with fine of Rs. 20,000/- and in default of payment

of fine 1 year simple imprisonment under Section 459 of the Indian Penal Code and 6 months rigorous imprisonment with fine of Rs. 250/- and in default of payment of fine 1 month simple imprisonment under Section 114 of the Indian Penal Code. However, such sentence was not to be undergo concurrently and, therefore, practically each accused was awarded with sentence of 15 years and 6 months and out of fine that may be deposited by the accused the trial Court has directed to pay Rs. 50,000/- to the complainant towards compensation.

3. It seems that none of the accused has deposited the fine as aforesaid and, therefore, practically their imprisonment would be now for additional two years and one month i.e. total imprisonment of 17 years and 7 months.

4. Out of five appellant - accused, at present only appellant Nos. 2 and 3 are present before the Court through learned advocate Ms. Sadhna Sagar, whereas, appellant Nos. 1, 4 and 5 absconded when they were released on temporary bail. However, when appellant Nos. 2 and 3 are in jail, they have right to press for hearing and decision in the appeal at least so far as their conviction is concerned and, therefore, their learned advocate has requested to separate the Appeal so far as appellant Nos. 2 and 3 are concerned and to decide it on merits since they are in custody for more than 7 years.

5. Therefore, so far as appellant Nos. 2 and 3 are concerned, we have to decide this Appeal on its own merits, whereas, so far as appellant Nos. 1, 4 and 5 are concerned, as they are absconding since long, let there be open non-bailable warrants for Rs. 25,000/- against them which is to be forwarded through the trial Court for execution by the Office of the concerned District Superintendent of Police. The concerned DSP Office shall forward quarterly report of such warrant to the concerned Sessions Court and in turn Sessions Court shall also forward it to this High Court, so as to take further steps in their Appeal.

6. Out of present two appellants under consideration, appellant No. 3 Dhanpal Raghuvir Solanki (Parghi) absconded when released on temporary bail in the year 2011, but, thereafter, he was arrested by Police of Madhya Pradesh on 4.9.2013 in case No. 3012 of 2011 and he is in custody of District Jail (Guna) in Madhya Pradesh. Such information was received by Registry on 26.4.2015 by a telegraphic message and same is confirmed by the learned APP. The same telegraphic message also confirms that appellant No. 1 is co-accused before Guna Court but he is not traceable. As recorded hereinabove, he is absconding since 2012 when released on temporary bail by this Court in this Appeal.

7. The Presiding Officer, 4th Fast Track Court, Junagadh has on 29.1.2007 framed a charge, which is at Exh. 1 of the record, disclosing that all the accused have committed illegal trespass in the house of the complainant with other unidentified and absconding persons with knife, iron rod and other weapons and they were speaking in Hindi and threatened the victim and her family not to make voice and to shouts and to keep quite with threat that if any one makes voice or shouts, they will cut their stomach and, thereafter, all the accused have

asked the victim and her family members to hand-over everything to them and given a blow on the left eye of the victim which resulted into simple injuries on her face and, thereafter, they have looted her golden ornaments which includes two rings, two bangles, mangalsutra, earrings and one nokia phone. They also broke open the cupboard of the complainant and stole and looted golden ornaments and Rs. 5,000/- cash and, thereby, total amount of loot was above Rs. 56,000/-. Therefore, they were called upon to face trial for committing offence under Sections 395, 397, 457 and 114 of Indian Penal Code read with Section 135 of B.P. Act.

8. As aforesaid, at present, we are concerned with the conviction of accused Nos. 2 and 3 only and, therefore, I would restrict the scrutiny of evidence so as to ascertain their conviction only.

9. So far as defence of the accused before the trial Court is concerned, obviously it was mainly based upon the non-involvement of all of them and absence of proper identification of all of them; both by the victim and other witnesses.

10. However, if we peruse the evidence which is summarized hereinafter, it becomes clear that there is ample evidence both direct and circumstantial as well as in the form of identification of the accused to conclude that there is nothing in favour of the appellants so as to acquit them. I have also perused the impugned judgment which makes it clear that even the trial Court has taken care of each and every issue raised before it so also the entire evidence on record as well as case-law applicable to facts and circumstances emerging from the record and, therefore, there is no reason to interfere with such reasoned judgment only because it is convicting all the accused.

11. As aforesaid, only material evidence confirming guilt of respondent Nos. 2 and 3 is to be discussed since at present we are dealing with the Appeal by them only, though it is filed by all the accused jointly.

12. PW-1 Lakhabhai Jasmatbhai Pansuriya at Exh. 9 and PW-2 Nanjibhai Mohanbhai Borad at Exh. 12 are panch witnesses of the Panchnama of the place of incident and they categorically support the case of the prosecution. Though they are cross examined by the defence lawyer, they could not rebut the evidence of the witness or prove their innocence.

13. PW-3 Laljibhai Virjibhai Daki is Panch witness of Recovery of some Mudamal. Though he is not supporting the case of the prosecution, since Mudamal articles are well before the Court, it does not make any difference even if such witness has become hostile.

14. Whereas, another panch witness of the Mudamal articles being PW-5 Mansukhbhai Devjibhai Chauhan at Exh. 16 has supported the case of prosecution and explained everything in detail. Though he was cross examined by the defence lawyer, he could not rebut the evidence of the witness or to prove his innocence.

15. PW-6 at Exh. 19 Induben Odhavjibhai Dave is victim, since she was looted, she has given all the details of incident and details of looted articles. The only arguments in favour of the appellant - accused relying upon her evidence may be to the effect that she has referred that there were only four persons, whereas, Police has filed chargesheet against five persons. However, if we read the evidence minutely, it becomes clear that in-fact it is a selective interpretation by the appellant - accused when she has categorically stated that four persons were in my house, whereas, others were standing outside my house. Therefore, it cannot be said that she is not telling the truth. Another similar issue raised by the accused is to the effect that there is specific averment in the evidence of eyewitness that all the persons were having "Bukani" on their face and, therefore, there was no proper identification of the accused and hence, conviction is unwarranted. Though witness has admitted that there was no enough light, she has re-confirmed that she can certainly identify the person who has closed the door of her bed-room from outside and, thereby, she specifically identified accused No. 1. She was examined and cross examined at length. Her deposition run into twenty-four pages but on scrutiny of her evidence, it becomes clear that accused could not rebut the evidence of the witness or prove their innocence.

16. PW-7 Premsuman Rajeshbhai Pathak at Exh. 21 is minor son of the victim. He has narrated the story as per his knowledge and understanding. Though, he was cross examined by the defence lawyer, he could not rebut the evidence of the witness or prove his innocence.

17. PW-8 Dr. Janakkumar Odhavjibhai Pathak at Exh. 22 who has examined the victim. Therefore, he also explained his investigation and confirmed the injuries and proved certificate at Exhs.24 and 25. Though he was cross examined by the defence lawyer, he could not rebut the evidence of the witness or prove his innocence.

18. PW-9 Chandrakant Dayaram Bapodara at Exh. 27 is a Scientific Officer who has visited the place of incident for verification of thumb impression etc. He has narrated his part of investigation in detail that how he has taken thumb impression from the house of the victim. Though he was cross examined by the defence lawyer, he could not rebut the evidence of the witness or to prove his innocence.

19. PW-10 Bharatbhai Bhikhabhai Parmar at Exh. 31 is neighbour of the victim. He has supported the case of prosecution as per his knowledge. Though he was cross examined by the defence lawyer, he could not rebut the evidence of the witness or to prove his innocence.

20. PW-11 Rajeshbhai Damjibhai Makadia at Exh. 32 is brother of the victim who managed to purchase the mobile from PW-12 and PW-12 Ashish Narangiri Aparnathi at Exh. 33 is a shop keeper from whom the victim purchased mobile phone which was looted. They were examined to confirm that there was

existence of mobile phone with the victim at the relevant time and to identify the same they have disclosed all relevant facts and material with a statement that they can identify the mobile even it is shown to them. Thereby, they support the case of prosecution. In their cross examination, though one or two sentences were shown to have some contradiction with their statements already recorded by the police at the relevant point of time, the fact remains that they were cross examined by the defence lawyer, they could not rebut the evidence of the witness or prove their innocence.

21. Whereas, PW-13 Nirav Kantilal Makhecha at Exh. 34 is a person from whom victim has purchased sim card for the mobile. He also narrated his story and supported the case of prosecution. Though he was cross examined by the defence lawyer, he could not rebut the evidence of the witness or prove his innocence.

22. PW-14 at Exh. 37 is Kalabhai Kamalbhai Halepotra who has noticed some people at late night going with iron road etc. disclosing that it seems that they were from other State and may commit loot by house breaking and, therefore, they have intimated to the Police but after Police has reached at his place, they could not find out the suspected persons. However, on next day morning, he came to know about the incident for which accused were tried. Though he was cross examined by the defence lawyer, he could not rebut the evidence of the witness or prove his innocence.

23. PW-15 is Shailesh Simabhai Dabhi at Exh. 38 and PW-16 is Mukesh Simabhai Dabhi at Exh. 47 who are sons of owner of guest house near Chotila Highway, who confirm that three people have stayed in their guest house on the date of incident and that in all there were four people. They confirm the name of the person as per his register is Neharsinh, probably appellant No. 1 with Anubhav, Rajnath and Raju.

After narrating their story, as per investigation and proving his register at Exh. 39, they identified accused Nos. 1 and 2 before the Court as accused persons. Though they were cross examined to prove that nobody has stayed at their place or that they were not knowing the accused, unfortunately, now during cross examination, the witness has also identified appellant No. 3 herein and so far as register is concerned, he has explained that register would disclose only one name who has registered his name as occupant when others are accompanied by him and, therefore, name of all may not be recorded in the register. There is no reason to doubt such position which is otherwise not illegal or uncommon but when witness identified three accused amongst appellants, there is no reason to doubt their evidence. Thus, though they were cross examined by the defence lawyer, they could not rebut the evidence of the witness or to prove their innocence.

24. PW-17 Umeshbhai Nathabhai Makadia at Exh. 67 is a panch witness of identification parade. He supported the case of prosecution and confirmed the

identification carried out by the Executive Magistrate wherein victim identified the appellant - accused. He also identified the accused No. 3 before the Court. Though, he was cross examined by the defence lawyer, he could not rebut the evidence of the witness or prove his innocence.

25. PW-18 Karsanbhai Jethsurbhai Khataria and PW-19 Vinodkumar Harjivandas Purohit are panch witnesses of identification parade wherein appellant Nos. 4 and 5 were identified and, therefore, not material witness at present when we are not dealing with the Appeal by such accused.

26. PW-20 Parsotambhai Haribhai Panna at Exh. 74 is P.S.O. of Keshod police station, Keshod, who has registered the complaint and initiated the investigation. Therefore, he proved certain documentary evidence regarding investigation. Though he was cross examined by the defence lawyer, he could not rebut the evidence of the witness or prove his innocence.

27. PW-21 is Himmatlal Hamirbhai Vala at Exh. 80 who was serving as Chitnish to Collector at Keshod at the relevant time. He explained his activity in conducting identification parade. Being an Executive Magistrate, he has narrated all the information in nut shell regarding his activity and confirmed that complainant had identified accused No. 3 from the group of persons standing in such parade. During cross examination, identification regarding appellant Nos. 1 and 3 was also confirmed. Though he was cross examined by the defence lawyer, he could not rebut the evidence of the witness or prove his innocence.

28. PW-22 at Exh. 87 is Investigating Officer Hardevsinh Bhagvatsinh Vaghela. He has also explained details of his investigation and evidence collected by him. Though, he was cross examined by the defence lawyer, he could not rebut the evidence of the witness or prove his innocence.

29. PW-23 at Exh. 92 is P.I. Subhashchandra Gunvantray Raval who has arrested the accused during his investigation and found out the looted Mudamal. He has also explained his investigation and evidence collected by him in detail. Though he was cross examined by the defence lawyer, he could not rebut the evidence of the witness or prove his innocence.

30. PW-24 at Exh. 108 is P.S.I. Rajeshbhai Jethabhai Bathvar who has ultimately filed chargesheet after collecting all the material from investigation. He also explained his part of inquiry and investigation and though he was cross examined by the defence lawyer, he could not rebut the evidence of the witness or prove his innocence.

31. As against that, the defence is regarding total absence and innocence of all the accused in committing such offence, whereas, the evidence hereinabove makes it clear that there is positive evidence regarding identification of them, both by the victim and by independent witness so also by the guest house people and, therefore, when accused were found with Mudamal articles, there is no substance in the Appeal so as to acquit the appellants as prayed for.

32. However, I have perused the impugned judgment and written submissions by both the complainant as well as accused before the trial Court, but when trial Court has taken care of all rival submissions and explained all relevant and material facts and evidence on record for concluding that accused are guilty of the offences as alleged, I do not see any reason to interfere in such reasoned judgment so as to acquit the appellants, as prayed for.

33. Though confirmation of conviction may not be based upon such fact; it cannot be ignored that three accused are absconding, whereas, appellant Nos. 1 and 2 are involved in some cases in Madhya Pradesh also and appellant No. 3 is in Guna Jail facing similar trial.

34. Therefore, in view of above facts and circumstances, there is no substance in the Appeal by appellant Nos. 2 and 3 and, therefore, their Appeal is dismissed, whereas, Appeal against appellant Nos. 1, 4 and 5 is to be separated from this Appeal and it should be taken care of only after they are arrested pursuant to open warrants to be issued as aforesaid.

35. So far as appellant No. 3 is concerned, the Registry has to forward a Yadi of this judgment to the Guna Court, Madhya Pradesh conveying that as and when and if aforesaid accused is required to be released from that jail, instead of releasing him free, he should be transferred initially to Ahmedabad Central Jail, Ahmedabad, (Gujarat). For accused Nos. 1, 4 and 5, Registry shall comply with the direction as per Paragraph 5 of this judgment.