

(2009) 08 GUJ CK 0032

In the Gujarat High Court

Case No : Criminal Appeal No's. 817 and 914 of 2004

Nanabhai Shivabhai Pagi

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 21-08-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 114, 201, 302

Citation : (2009) 08 GUJ CK 0032

Hon'ble Judges : J.C. Upadhyaya, J; Bhagwati Prasad, J

Bench : Division Bench

Advocate : Rekha H. Kapadia, in Criminal Appeal No. 817 of 2004 and Yogesh Thakkar, in Criminal Appeal No. 914 of 2004, for the Appellant; L.B. Dabhi, Assistant Public Prosecutor for Opponent 1, for the Respondent

Final Decision : Allowed

Judgement

J.C. Upadhyaya, J.—Both these appeals arise out of a judgment and order rendered by learned Addl. Sessions Judge Fast Track Court No. 2 Panchmahals at Godhra on 26.04.2004 in Sessions Case No. 77 of 2003. In the aforesaid Sessions Case, six accused persons came to be tried for the offences punishable u/s 302 read with Section 114 of the Indian Penal Code ("IPC", for short) and Section 201 read with Section 114 of the IPC. At the end of the trial all the six accused persons came to be convicted for the aforesaid offences and each of them was sentenced to undergo R.I for life and fine of Rs. 100/- and in default of payment of fine, S.I for seven days for the offence punishable u/s 302 r/w. Section 114 of the IPC and R.I for three years and fine of Rs. 100/- and in default of payment of fine, S.I for seven days for the offence punishable u/s 201 r/w. Section 114 of the IPC. Original accused No. 2 Nanabhai Shivabhai challenged his conviction by preferring Criminal Appeal No. 817 of 2004, whereas original accused Nos. 1, 3 to 6 challenged their conviction by preferring Criminal Appeal No. 914 of 2004.

2. Prosecution case in nutshell is that the incident occurred on dated 13.12.2002 at about 7 p.m. in the evening in the village called Thesia, Taluka Lunawada, District Panchmahal. It is the case of the prosecution that at the time of the incident, deceased Kanubhai Dhulabhai along with six accused persons was consuming liquor in the house of accused No. 2 Nanabhai and during that time, some altercation took place and it is alleged that all the six accused persons assaulted upon deceased Kanubhai and his neck was pressed and deceased died by asphyxia due to throttling. It is alleged that thereafter, the dead-body of deceased Kanubhai was carried to the field of PW-11 Shankarbhai and was thrown in a well in said field. Initially, Somabhai the brother of deceased Kanubhai, reported to the concerned police station about the missing of his brother Kanubhai. It is the case of the prosecution that on dated 16.12.2002, the dead-body of deceased Kanubhai was found from the well. Immediately, Somabhai, the brother of the deceased again informed the concerned police about the finding of the dead-body of Kanubhai. Concerned Police Officer visited the field of PW-11 Shankarbhai and at that time, Bhikhabhai, the another brother of deceased Kanubhai lodged first information report against the six accused persons. The FIR was registered and investigation was commenced. During the course of investigation, statements of material witnesses were recorded, necessary panchnamas were drawn in presence of panchas, incriminating articles like bloodstained soil, clothes, etc were forwarded to FSL for examination. After collecting required material for the purpose of lodgment of chargesheet, chargesheet came to be filed in the Court of learned JMFC, Lunawada. Since the offence was exclusively triable by the Court of Sessions, learned JMFC committed the case to the Court of Sessions, Panchmahal at Godhra, which was numbered as Sessions Case 77 of 2003.

3. The learned trial Judge framed charge at Exh.4 against all the six accused to which they did not plead guilty and claimed to be tried. Thereupon, the prosecution adduced its oral and documentary evidence. The prosecution examined in all 15 witnesses and produced relevant documentary evidence. After the prosecution concluded its oral evidence, the trial Judge recorded further statements of all the six accused persons u/s 313 of the Cr.P.C. The accused denied generally all the incriminating circumstances put to them by the trial Court and stated that they were falsely implicated in this case.

4. Considering the evidence on record and the submissions made on behalf of both the sides, learned trial Judge recorded conviction of all the six accused persons, mainly on the evidence of the deceased having been last seen together when he was alive with the accused persons and that one of the accused persons, namely, accused No. 2 Nanabhai Shivabhai made confessional statement before PW-9 Sureshbhai and the same was considered as extra judicial confession and the third circumstance relied upon by the trial Court is that the soil recovered from the cattle-shed of the accused No. 2 Nanabhai contained blood and the same was found to be the blood of the deceased. Upon these three circumstances, the trial Court recorded the conviction of all the six

accused persons for the commission of murder of Kanubhai, and after committing the murder, for destroying the evidence of murder, punishable u/s 302 read with Section 114 of the IPC and Section 201 read with Section 114 of the IPC and awarded the sentence as hereinabove referred to in this judgment.

5. Learned advocate Ms. Kapadia for the appellant - original accused No. 2 Nanabhai Shivabhai in Criminal Appeal No. 817 of 2004 and learned advocate Mr. Thakkar for the appellant - original accused Nos. 1, 3 to 6 in Criminal Appeal No. 914 of 2004 submitted that the entire case rests upon the circumstantial evidence. There is no eye-witness in this case. The trial Court relied upon the three circumstances, namely the deceased having been last seen together with the accused, extra judicial confession of accused No. 2 before the witness and finding of bloodstained soil from the cattle-shed of accused No. 2 Nanabhai, and recorded the conviction. It is submitted that the prosecution failed to prove each of the above circumstantial evidence. The prosecution mainly relied upon the evidence of PW-8 Kanubhai and PW-9 Sureshbhai. Their evidence is shaky and untrustworthy. Their conduct as emerges from their evidence is quite unnatural and renders their evidence doubtful one. Prosecution examined PW-8 Kanubhai about the circumstance of last seen together, but considering his evidence and the evidence of Investigating Officer, PSI Patel PW-15, it clearly appears that it was not possible for any passerby to look into the house of accused No. 2 Nanubhai and to see the persons sitting in the house. For three days, he did not tell anybody that the deceased was seen with the accused. Only during the course of police statement recorded on 17.12.2002 he told the police about the deceased having been last together with accused.

6. Likewise, about the circumstance of extra judicial confession, the prosecution examined PW-9 Sureshbhai and same infirmities are attached in his evidence in the sense that despite the fact that according to him the accused No. 2 Nanabhai confessed before him involving himself and other co-accused persons with the crime, yet, he did not disclose said fact before anybody and only on 17.12.2002 when his police statement was recorded for the first time he stated to the police about the alleged extra judicial confession.

7. The trial Court relied upon the third circumstance, which is recovery of bloodstained soil from the cattle-shed of the accused No. 2 Nanabhai. For that, the prosecution relied upon the panchnama, Exh.22, but considering the panchnama, Exh.22 the so-called bloodstained soil was found not only from the cattle-shed of the accused No. 2, but from the courtyard (vada) and the well from which the dead-body came to be found, but as per the FSL report, the soil found from the courtyard was not found bloodstained, whereas the soil extracted from the cattle-shed was found bloodstained. This is open cattle-shed. There is no medical evidence on record to come to the conclusion that the deceased had sustained any bleeding injury or open injury. Medical evidence reveals that the deceased had sustained some bodily injuries besides throttling by some hard and blunt substance. No such weapon is traced.

8. Thus, not only individually the circumstantial evidence is not proved, but, even collectively, the circumstantial evidence cannot be said to have been established in one chain. No motive is proved, therefore, it is submitted that the appeals may be allowed and all the six appellants be acquitted.

9. Per contra, learned Additional Public Prosecutor Mr. Dabhi for the State vehemently opposed both these appeals and stated that the prosecution successfully proved its case based on circumstantial evidence on the basis of the evidence of PW-8 Kanubhai and PW-9 Sureshbhai. Soil extracted from the cattle-shed of the accused No. 2 Nanabhai found to contain blood of the deceased. Evidence of last seen together and the extra judicial confession is duly proved. The medical evidence reveals that at the time when the PM was done, blood was found in the nose and ear of the deceased. Therefore, it is submitted that both appeals may be dismissed.

10. We have examined the record and proceedings in context with the submissions made by the rival sides.

11. Perusing the record of the case as well as the submissions made by both the sides, it transpires that the entire prosecution case centers around the evidence of PW-8 Kanubhai and PW-9 Sureshbhai. Admittedly, the prosecution case is based upon the circumstantial evidence. Considering the evidence of PW-8 Kanubhai, it transpires that the prosecution examined this witness to prove the circumstance that all the six accused persons were last seen together with deceased Kanubhai in the house of accused No. 2 Nanabhai, consuming liquor. According to the version of PW-8 Kanubhai, examined at Exh.40, on dated 13.12.2002, when he was returning from his labour work and he was passing on footpath near the house of accused No. 2 Nanabhai, he saw all the six accused persons and the deceased Kanubhai. Then he went to his house and slept. On 14.12.2002 and on 15.12.2002, he went for his labour work. On 16.12.2002, he went for his labour work, but he could not find the work and he came to know that dead-body of deceased Kanubhai was traced out. According to him after the cremation ceremony of deceased Kanubhai was over and while he was returning to his home, he met first informant Bhikhabhai Dhulabhai, the brother of the deceased and at that time, he had told him that he had seen the deceased with the accused. According to his evidence, on 13.12.2002, when he saw deceased with accused, at that time, his brother Ramanbhai was with him. The conduct of this witness is highly criticized by the appellants. Perusing his cross-examination, even it transpires that on 16.12.2002, when the dead-body of Kanubhai was found out from the well and the police was present, even at that time also, he admitted that he did not tell the police that the deceased was last seen together with the accused. He further admitted that even he did not go to the house of the brother of the deceased to inform him about what he had seen on 13.12.2002. He admitted that on dated 17.12.2002, when the police recorded his statement, for the first time he stated that he had seen the deceased with the accused. Moreover, considering his evidence it transpires that he was just

passerby on the footpath near the house of accused No. 2 Nanabhai, and he does not tell the exact time. He saw the accused along with the deceased in the house of accused No. 2 Nanabhai. However, he denied the suggestion that a passerby on footpath cannot see inside the house of accused No. 2 Nanabhai, but considering the evidence of Investigating Police Officer PSI Patel PW-15, Exh.51, in his evidence he outright admitted that any passerby on the footpath situated near the house of accused No. 2 Nanabhai, cannot see as to what is going on in the house of accused No. 2 Nanabhai.

12. Under such circumstances, considering the unnatural conduct of this witness PW-8, Kanubhai about not informing promptly, not only the police, but even to the family members of deceased Kanubhai that he had seen the deceased Kanubhai with the accused persons and the doubt as to whether this witness PW-8 Kanubhai could have seen the accused along with the deceased inside the house of the accused No. 2 Nanabhai from the footpath, we are of the opinion that the evidence in form of the deceased having been last seen together with the accused sought to be proved through this witness PW-8 Kanubhai, cannot be said to have been proved beyond any reasonable doubt. Even applying the proximity test, according to this witness the deceased was last seen together with the accused on 13.12.2002 and the dead-body of the deceased came to be found from a well, which is 2 kms. away from the house of accused No. 2 Nanabhai on dated 16.12.2002, so there was a gap of about three days in between the two events and the two events cannot be said to be within the close proximity of time in the facts and circumstances of this case. It appears that in the impugned judgment, the learned trial Judge erred in not properly appreciating and scrutinizing the evidence of PW-8 Kanubhai in its perspective.

13. Furthermore, according to the evidence of PW-8 Kanubhai, at the time when he saw the deceased along with the accused persons, at that time, his brother Ramanbhai was with him. We find the evidence of PW-8 Kanubhai unnatural one, shaky and not inspiring confidence of this Court. Ramanbhai, who allegedly saw the deceased with the accused persons, as per the evidence of PW-8 Kanubhai has not been examined as witness by the prosecution in this case.

14. The prosecution examined PW-9 Sureshbhai at Exh.41, to establish a circumstance that accused No. 2 Nanabhai made confessional statement before this witness involving himself and the remaining five accused persons in the crime. According to the evidence of PW-9 Sureshbhai right from the late evening of 13.12.2002 till the dead-body of the deceased came to be found out from one abandoned well in the morning of dated 16.12.2002, he was all the while with the complainant party to find out allegedly missing deceased Kanubhai. About extra judicial confession, he stated that in the morning of dated 16.12.2002, when he was passing near the house of accused No. 2 Nanabhai to find out the whereabouts of deceased Kanubhai, and at that time, accused No. 2 Nanabhai requested him to save him and stated that in the evening of dated 13.12.2002 in the courtyard of his house situated towards the backside of his house, he himself

and five accused persons along with deceased Kanubhai were chitchatting and some altercation took place and thereupon, Kanubhai was throttled by pressing his neck and was killed and to destroy the evidence, the dead-body of Kanubhai was thrown by them in the abandoned well of one Shankarbhai Chandubhai. This witness in his cross-examination admits that whatever the accused No. 2 Nanabhai had confessed before him, he did not pass on said information to anybody including the brothers of deceased Kanubhai named Somabhai or the Bhikhabhai, the first informant. He further admitted that even he did not pass on said information to members of the public, who had gathered near the well from where the dead-body of the deceased was found. He admitted that on dated 16.12.2002, he was called by the police as one of the panchas in connection with panchnama of the well from where the dead-body of the deceased was found produced at Exh.21. He admitted that even at that time he did not tell police that the accused No. 2 Nanabhai had confessed his guilt before him. He admitted that only on 17.12.2002, when police recorded his statement, he told the police about the extra judicial confession made before him by the appellant No. 2 Nanabhai. This witness admitted in his evidence that right from the evening of 13.12.2002, he was searching for deceased Kanubhai along with the brothers and family members of Kanubhai. He further admitted that he was sharing with the brothers of the deceased all the secret informations. Despite this as admitted by him, he did not share the very important information about the confession made by accused No. 2 to him with the brothers and family members of the deceased. He had opportunity to even share the information with the police, when on 16.12.2002, he was called by police to witness the panchnama of the well produced at Exh.21. It seems that in the impugned judgment the learned trial Judge did not properly appreciate the evidence of this witness PW-9 Sureshbhai and did not properly mark his unnatural conduct emerging from his own evidence. Moreover, there is nothing to show that PW-9 Sureshbhai was relative or close friend of the accused No. 2 Nanabhai that he would confide in him and confess the guilt before him.

15. Thus, taking into consideration the evidence of PW-9 Sureshbhai as a whole, we are of the considered opinion that the trial Court erred in relying upon the evidence of this witness while coming to the conclusion that the prosecution successfully proved the circumstantial evidence regarding the extra judicial confession.

16. The third circumstance appears to have been weighed much to the learned Sessions Judge is find of bloodstained soil in the cattle-shed of the accused No. 2 Nanabhai. We have taken into consideration the panchnama, Exh.22 regarding the house, courtyard and cattle-shed of the accused No. 2 Nanabhai. Considering the panchnama, Exh.22, it seems that bloodstained soil were found at two places, namely, the courtyard and the cattle-shed. FSL evidence reveals that the blood group of the deceased is "AB". It seems that the blood group of the blood found from the soil of courtyard could not be ascertained, but, according to the prosecution case, the blood found from the soil of cattle-shed was detected to be

of "AB" group of deceased. Considering the evidence, it further transpires that the police seized one shawl allegedly used by the accused to wrap the dead-body of Kanubhai and to carry the same from the house of accused No. 2 Nanabhai and to throw the body of the deceased in a well, which is 2 kms. away from said house. Considering the medical evidence on record, it becomes clear that no bleeding injury or open injury came to be sustained by the deceased. However, at the time of postmortem, it is reported that bloody fluid was oozing from the nose of the deceased. When the shawl was forwarded to FSL for examination, it transpires that no bloodstains were detected from the shawl. Clothes of the deceased were also found bloodstained by the police. When such is the situation, the shawl allegedly used as per the prosecution case by the accused to wrap the body of the deceased in it for the purpose of carrying the same up to 2 Kms., the absence of any blood mark in the shawl creates doubt about the circumstantial evidence regarding find of the blood of the deceased in the cattle-shed. Moreover, the evidence reveals that the cattle-shed does not form part of the built-up house of the accused No. 2 Nanabhai, but the cattle-shed was away from the main building. There is nothing on record that the house of the accused No. 2 along with the cattle-shed was surrounded by any pucca wall. Perusing the impugned judgment delivered by the trial Court it further transpires that the accused took the defence that during the course of investigation, their blood was not examined about the grouping. The learned trial Judge discarded such defence holding that the defence is insignificant, but we are of the considered opinion that in the above background, the absence of any evidence regarding the blood group of the accused and especially of the accused No. 2 Nanabhai, it is unsafe to base the conviction for the offence of murder, solely on one circumstance that from the soil of the cattle-shed blood group "AB" was found. Moreover, the third circumstance regarding the find of blood from the soil of the cattle-shed is not further corroborated by other piece of circumstantial evidence, namely, the deceased having been last seen together with the accused and the extra judicial confession. Therefore, the chain of circumstantial evidence pointing the guilt to the six accused persons for the offence of murder cannot be said to have been satisfactorily established and linked up.

17. In the result, in light of the entire above discussions, we are of the considered opinion that the learned trial Judge erred in coming to the conclusion that the prosecution successfully proved the circumstantial evidence pointing guilt to the accused persons for the offence of murder. Learned trial Judge further erred in coming to the conclusion that the chain of circumstantial evidence is well established and linked up. The prosecution therefore failed to prove its case beyond any reasonable doubt against the six accused persons. All the six accused persons therefore, deserve the benefit of doubt. Therefore, the impugned judgment and order recording the conviction of all the six accused persons deserves to be set-aside by allowing both these appeals.

18. For the foregoing reasons, both these appeals are allowed. The impugned judgment and order rendered by learned Additional Sessions Judge, Fast Track

Court No. 2 Panchmahals at Godhra on 26.04.2004 in Sessions Case No. 77 of 2003 recording conviction of the appellants for the offences punishable u/s 302 read with Section 114 of the IPC and Section 201 read with Section 114 of the IPC and the sentence passed thereunder are set-aside. All the appellants are acquitted of the charges levelled against them. All the appellants be released from the jail forthwith, if not required in connection with any other case. Fine, if paid, be refunded to them.