
(2009) 03 GUJ CK 0004
In the Gujarat High Court
Case No : Criminal Appeal No. 1056 of 2000

Nathabhai Bachubhai and Others

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 23-03-2009

Acts Referred:

Bombay Police Act, 1951 — Section 135

Penal Code, 1860 (IPC) — Section 302, 324, 34, 504

Citation : (2009) 2 GLR 1126

Hon'ble Judges : J.C. Upadhyaya, J;A.L. Dave, J

Bench : Division Bench

Advocate : Yogesh S. Lakhani, Nos. 1 to 3, for the Appellant; Mengdey, Addl. P.P. for Opponent No. 1, for the Respondent

Final Decision : Allowed

Judgement

A.L. Dave, J.—This appeal arises out of a judgment and order rendered by Sessions Court, Jamnagar in Sessions Case No. 37 of 1996 rendered on 27-9-2000. The appellants came to be tried by the Sessions Court for murder of Bhupat Nanji and causing hurt to Bharat Nanji on 23-10-1995, at about 8-30 a.m., near Nageshwar Bhavani Mata Temple at Jamnagar. As per the prosecution case, appellant No. 2-Ramjibhai Bachubhai assaulted Bharat Nanji and caused hurt to him on his back with a knife. At that time, his brother Bhupat Nanji came to his rescue, who was assaulted upon by the appellants, where appellant Nos. 1 and 3 are alleged to have caught hold of deceased Bhupat and appellant No. 2 is alleged to have inflicted three knife blows, one on chest and two in abdomen to deceased Bhupat, as a result of which Bhupat ultimately died. It is further the case of the prosecution that the incident occurred because of some monitory transaction between the wife of accused No. 1 and first informant, and because of the appellants having some grievance against the victim and the first informant, regarding suicide of Gita, daughter of appellant No. 1, which she committed on the previous day of incident. The incident occurred while the dead-body of Gita was lying in the house. She was yet to be cremated, and relatives

and acquaintances had assembled outside the house of accused No. 1, about 150 to 200 in number. After the incident, as per the prosecution case, both the first informant and the deceased were taken to hospital by Chothiben and Radhaben in auto-rickshaw of Sajid. At the hospital, first informant Bharat was given treatment and the deceased was also admitted and then declared dead by the hospital authorities. The constable stationed at the hospital sent information to the B-Division police station, Jamnagar, on basis of which an entry was made in the police station register. Police came to the spot and F.I.R. of Bharat was recorded, on basis of which offence was registered and investigated. The police having found sufficient material to connect the appellants with the offence, filed charge-sheet in the Court of learned Chief Judicial Magistrate, Jamnagar. Learned C.J.M., in turn committed the case to the Court of Sessions, as the offence with which the appellants were charged, were triable by the Court of Sessions, Sessions Case No. 37 of 1996 came to be registered.

2. Charge was framed against the appellants at Exh. 3 for offences punishable under Sections 302, 324, 504 read with Section 34 of Indian Penal Code ("I.P.C.", for short) and Section 135 of Bombay Police Act. All the three accused pleaded not guilty to the charge and claimed to be tried.

3. The Sessions Court, after considering the evidence led by the prosecution, came to conclusion that the prosecution was successful in establishing charges against the accused persons-appellants and convicted them for offences punishable u/s 302 read with Section 34 of the I.P.C., Section 324 read with Section 34 of I.P.C. and Section 504 read with Section 34 of I.P.C. and sentenced them for the offences as under:

Sentences	Offences
Under Section 302 read with R.I for life and fine of Rs. 500/-, Section 34 of I.P.C. in default S.I for 15 days.	
Under Section 324 read with R.I for one year and fine of Rs. 100/- Section 34 of I.P.C. in default S.I for 7 days.	
Under Section 504 read with S.I for 6 months and fine of Rs. 100/-, Section 34 of I.P.C. in default S.I for 7 days.	

3.1. The Sessions Court recorded acquittal, so far as offence punishable u/s 135 of the Bombay Police Act was concerned. The sentences were ordered to run concurrently and benefit of set-off was made available to the accused.

4. We have heard learned Senior Advocate Mr. Y. S. Lakhani for the appellants and learned A.P.P. Mr. Mengdey for the State.

5. Learned Sr. Advocate Mr. Lakhani has broadly raised following contentions:

(1) The prosecution has suppressed the genesis of the incident.

- (2) The prosecution has not examined material eye-witnesses, though available.
- (3) The prosecution has failed to recover the important pieces of evidences like trouser of first informant as well as his shirt and clothes of Chothiben and has failed to send it to the F.S.L., for examination.
- (4) The prosecution examined only two witnesses who claim to be eyewitnesses, one the first informant Bharat Nanji and second is Chothiben Khimabhai. The evidence of both these two witnesses, if closely examined, would show that though they pose to be eye-witnesses to the incident, they cannot be accepted as eye-witnesses to the incident, conclusively. Their evidence is not beyond shadow of doubt and the prosecution having failed to examine other independent eye-witnesses to the incident, conviction could not have been recorded by the trial Court, only on the basis of evidence of these two witnesses.
- (5) The medical evidence does not support the prosecution theory wholly. The medical evidence taken at face value, would demolish the version of the other prosecution witnesses and render that evidence doubtful.
- (6) All these factors would lead to show that the investigation is not fair, transparent, impartial and not efficient.

5.1. Learned Sr. Advocate Mr. Lakhani, therefore, submitted that the trial Court has erred in convicting the appellants. The appeal may, therefore, be allowed, by setting aside the judgment and order recording conviction, and the appellants may be acquitted of the charges levelled against them.

6. Learned A.P.P. Mr. Mengdey has opposed this appeal. He submitted that the quality of evidence and not the quantity is important, and therefore, dropping of several eye-witnesses may not be treated as fatal to the prosecution case, simply because first informant is relative, his evidence cannot be brushed aside. He is an injured eye-witness. His injury is proved through medical evidence, and therefore, his evidence alone is sufficient to prove the guilt of the accused-appellants. The prosecution has examined Chothiben, who is an independent eyewitness and examining other eye-witnesses, would have only added burden to the Court record. Learned A.P.P. then contended that there may be inaccuracy or minor discrepancy in the prosecution evidence. Unless those discrepancies are indicated to be going to the root of the case, they may not be treated as fatal to the prosecution case. The trial Court has in its judgment considered all relevant aspects in its proper perspective and has recorded conviction. This Court, therefore, may not interfere with the judgment of the trial Court and may dismiss the appeal.

7. We have examined the record and proceedings in context of the submissions made by rival sides.

8. It is not a matter in dispute that there were several eye-witnesses to the incident and the prosecution has chosen to examine two of the witnesses, namely, first informant Bharat Nanji, Exh. 15 and Chothiben Khimjibhai, Exh. 20.

9. Evidence of Chothiben, if examined would go to show that she claims to have seen the incident. She describes the incident in a manner that appellant No. 2 inflicted knife blows to deceased Bhupat Nanji and appellant Nos. 1 and 3 caught hold of the deceased. She also describes accused No. 2 having inflicted the knife blow to the first informant. However, upon cross-examination, it transpires that she admits that she had not stated in her statement before police about appellant Nos. 1 and 3 catching hold of the deceased at the time of the incident, so also appellant No. 2 stabbing the deceased. It also emerges from her cross-examination that she refused to have noticed about 150 to 200 persons having gathered outside the house of appellant No. 1, on account of demise of Gita, daughter of appellant No. 1, who was yet to be cremated. If this is the evidence of Chothiben, it is difficult to accept her evidence as an evidence inspiring confidence, leading to an unerring conclusion of guilt of the accused-appellants.

10. The moment we discard the evidence of Chothiben, what is left out is the ocular evidence of the first informant Bharat Nanji. He is brother of the deceased and he has sustained a wound on his back. His having suffered that injury is not in dispute and is proved through the medical evidence, though there is discrepancy about the nature of injury, as can be seen from the ocular evidence of the doctor and the medical certificate.

10.1. Apart from the above aspect, if the evidence of Bharat Nanji is seen, he states that he was going out of his house to attend nature's call at about 8-30 a.m., when the appellants started giving him abuses and when he asked as to why they were giving abuses, appellant No. 2 inflicted a knife blow on him. There was a commotion on that account, and therefore, his brother Bhupat rushed there to his rescue. Appellant Nos. 1 and 3 caught hold of him and appellant No. 2 inflicted three consecutive knife blows, one in chest and two in abdomen. This incident was seen by several persons from neighbourhood and the persons who had assembled outside his house. Thereafter, the first informant and the deceased were taken to hospital in auto-rickshaw of Sajid, and Chothiben and Radhaben accompanied them. At the hospital, he was given treatment and his brother Bhupat was declared dead. The police came and he lodged his F.I.R.

10.2. If his cross-examination is seen, it emerges therefrom that at the time of incident, Bhupat Nanji neither tried to run away or escape nor did he make any assault or attack on any of the appellants. Obviously, then there was no reason for appellant Nos. 1 and 3 to catch hold of the deceased. His version, therefore, so far as it relates to appellant Nos. 1 and 3 gets no support from the circumstance prevalent at the relevant time, even if they are considered as projected by him.

10.3. There is another aspect about presence of Bhupat at the place of incident. In his F.I.R., he says that Bhupat followed, on his raising shout upon attack by the appellants. Whereas in his deposition, he says that he and deceased Bhupat started altogether for going to attend nature's call and that they had decided to go to the police station for lodging the F.I.R., after attending nature's call. What

was that F.I.R. for, against whom it was to be lodged, for what offence, are all questions, which are not answered by the prosecution evidence. 10.4. The first informant has attributed two motives for the incident, the first being that there was a monitory transaction between him and wife of appellant No. 1-Valiben, to whom he had lent Rs. 2000/-. In this regard, it emerges from his cross-examination that the accused persons are financially better placed than the first informant. That apart, he admits that upon his demand, Valiben had returned that amount of Rs. 2000/-, the previous day. Then that would not leave any motive for the quarrel. Similarly, so far as second motive is concerned, it is alleged that the accused persons had some grievance against the first informant for the suicide committed by Gita, daughter of appellant No. 1. But, what was the nature of grievance and why was such grievance nurtured by them, is a question neither answered by the prosecution nor by the witness. The evidence of Bharat Nanji, therefore, cannot be considered as an evidence of sterling quality, on sole basis of which conviction can be recorded or sustained.

11. Considering the evidence of two eye-witnesses as discussed above, there are certain other factors of the prosecution case, which tend to weaken the strength of evidence of the witnesses of the prosecution case.

12. Witness Bharat Nanji claims that he along with deceased went in the auto-rickshaw of Sajid to the hospital. In this regard, if we see the medical evidence, it is found that the deceased was brought before the Medical Officer at 8-40 a.m., whereas Bharat Nanji appeared before the Medical Officer at 9-20 a.m., meaning thereby that they did not go together as is claimed by Bharat Nanji or for that matter the prosecution.

12.1. It also emerges from medical evidence that between preparation of case-papers of Bharat Nanji and Bhupat Nanji, about 60 to 65 case-papers of different patients were prepared. If, Bharat Nanji had accompanied Bhupat Nanji to the hospital together, this would not have happened. This, therefore, throws doubt in the evidence of Bharat.

12.2. It transpires from the medical evidence further that Bharat Nanji had an injury on back. The doctor in his deposition describes the injury as abrasion, whereas in the case-paper and the medical certificate, it is referred to as a flap injury with linear abrasion. It also transpires that in the medical case-paper, the injury was described differently, which has been then scrolled out and then it is written as a flap injury. It also transpires from medical evidence (deposition of Dr. Shaparia, Exh. 30) that the first informant left the hospital along with case-papers against medical advice and it was only after a period of about 3 months that doctor was asked to issue a certificate, which he issued on basis of that medical case-paper and he does not know where that medical case-paper was during these period of three months. Resultantly, there is a discrepancy about nature of injury, whether it was simple abrasion or whether it was a flap injury.

13. The medical evidence, if examined further, would go to show that the

deceased was brought by Vinu Dhanji. Who is that Vinu Dhanji, nobody knows, although he is examined as a panch witness, P.W 5, but, he does not depose about he having taken the deceased to the hospital. Against that Radhaben, who took the deceased to the hospital and Sajid, in whose auto-rickshaw the deceased was taken to the hospital, are witnesses, who are not examined by the prosecution for the reasons best known.

14. Now, if we examine the manner in which the investigation is carried out, we find several loose ends, which have not been explained by the prosecution.

14.1. As per the medical evidence, it appears that, dead body was taken to the hospital by Vinu Dhanji. Vinu Dhanji, does not depose about it. In medical case-papers, it appears that case history is given by Bharat Nanji. This discrepancy remains unexplained. Apart from this, the history which is given by Bharat Nanji, only says that some persons assaulted the deceased. He does not speak about his own injury there. He does not disclose the name of the assailant either, although the assailants are known to him from the beginning. He does not refer not only to name any of the assailants, more particularly appellant No. 2. Despite this, it transpires that Habib, who was Constable posted at the hospital, in his report to the police station, states the name of appellant No. 2 as assailant. Surprisingly, though the yadi, Exh. 37 refers to name of accused No. 2 as assailant, the entry No. 8 in the police station register, Exh. 38 is silent about name of appellant No. 2. Habib has not been examined by the prosecution, and therefore, it is difficult to know wherefrom he learnt about involvement of appellant No. 2 in the incident, which is reflected in his yadi, Exh. 37.

15. Exh. 37, apart from referring to name of appellant No. 2, the source of knowledge of which is not known, refers to two other aspects, one that there was a fight and that fight involved knife and a dhoka. Now, in the entire prosecution case, there is no reference whatsoever to dhoka, no investigation is made in that direction, and no investigation is made to verify, if there was any fight, which is referred to in Exh. 37. Where does this dhoka and fight, so also name of appellant No. 2 come from, a question, which could have been answered only by Habib Mahmad, who has not been examined by the prosecution. This would throw a shadow of doubt on the genesis of the incident. Whether the incident occurred in the manner, which is alleged by the eye-witnesses, who are even otherwise found to be doubtful, is factor which has not been proved by the prosecution, leave aside proving it beyond reasonable doubt.

15.1. It also transpires from evidence of eye-witness Bharat Nanji that his shirt was cut (torn) and also blood-stained because of the injury inflicted on him. It also transpires that his trouser was stained with blood of the deceased. It also transpires from evidence that clothes of Chothiben were also blood-stained. He also says that when he gave the complaint, his trouser was stained with blood, so also his shirt, but the investigating agency has not bothered to collect this important pieces of evidence and send them for chemical analysis.

16. Last but not the least, it appears from evidence that the blood samples, which were sent to F.S.L., though described as samples of appellant Nos. 1 and 2 in the forwarding letter, the sample which accompanied that forwarding letter were that of Ibrahim Dawood and Razak Bachubhai. This may not have any direct impact on the prosecution case, but, it would certainly reflect the quality of investigation. The investigating agency appears to have acted in a very casual manner.

17. In light of the foregoing discussion, we find that evidence of the first informant Bharat Nanji and Chothiben does not inspire confidence. The investigation is not upto the mark and above all the prosecution has failed to examine independent witnesses, though they were available. The quality of evidence of two eye-witnesses is not sufficient to sustain conviction. The appeal, therefore, merits acceptance.

18. For the foregoing reasons, the appeal is allowed. The conviction recorded by the Additional Sessions Judge, Jamnagar in Sessions Case No. 37 of 1996 dated 27-9-2000 for the offences punishable u/s 302 read with Section 34 of the I.P.C., Section 324 read with Section 34 of the I.P.C. and Section 504 read with Section 34 of the I.P.C. is set aside. The appellants-accused persons are acquitted of the charges levelled against them. The appellant No. 2 be set at liberty forthwith, if not required in any other case. Bail-bonds of appellant Nos. 1 and 3 shall stand cancelled. Fine, if paid, be refunded to them.