
(2011) 03 GUJ CK 0164
In the Gujarat High Court
Case No : Criminal Appeal No. 855 of 2003

Nathabhai Jaytabhai Dhakhda and Others	APPELLANT
Vs	
State of Gujarat	RESPONDENT

Date of Decision : 10-03-2011

Acts Referred:

Bombay Police Act, 1951 — Section 35
Penal Code, 1860 (IPC) — Section 302, 324, 34

Citation : (2011) 2 GLH 460

Hon'ble Judges : R.M. Chhaya, J;A.L. Dave, J

Bench : Division Bench

Advocate : Yogesh G. Kanade Abated, for the Appellant; K.L. Pandya, Assistant Public Prosecutor for Opponent: 1, for the Respondent

Final Decision : Dismissed

Judgement

Mr. R.M. Chhaya, J.—The present appeal arises out of judgment and order passed by learned Additional Sessions Judge, Amreli in Sessions Case No.3 of 2003 whereby the appellants were convicted u/s 302 read with Section 34 of Indian Penal Code and Section Section 324 read with Section 34 of Indian Penal Code and were sentenced for life imprisonment and R.1. for one year respectively, by judgment and order dated 18.6.2003.

2. The facts giving rise to this appeal are that the appellant No.1 and deceased Hirkuben were husband and wife and the first informant is father-in-law of appellant - accused No.1 Nathabhai Jaytabhai Dhakhda and original appellants No.2 and appellant No.3 are close relatives of appellant No.1 as well as the first informant.

2.1 It is the case of the prosecution that because of the fact that there was dispute between appellant - accused No.1 and deceased Hirkuben on account of being a childless couple, both the families had bitter relations with each other. It is the case of the prosecution that, on 5.11.2002, which was a New Year Day (according to Indian calendar) the deceased Hirkuben and the first informant

Mansurbhai Valerabhai (P.W.6) had been to Rajula, District Amreli to pay respects to one of his elder member of the family. It is the case of the prosecution that P.W.6 Mansurbhai Valerabhai had a house at Rajula, and after meeting relatives, P.W.6 Mansurbhai Valerabhai and deceased Hirkuben, his daughter boarded a rickshaw belonging to P.W.7 Yunusbhai Ishakbhai from Rajula and proceeded towards their Village Vad. It is the case of the prosecution that, at about 17:30 hours, when they reached at the cross-road of Vad - Bhachadar Village, all three appellants were waiting at the cross-road and forcibly stopped the rickshaw and started abusing. Because of this altercation, the deceased Hirkuben came out from rickshaw, and thereafter P.W.6 Mansurbhai also came out from rickshaw, and at that point of time, the appellants-accused, who were armed with deadly weapons like axe and iron pipe, with an intention to cause serious injuries upon the person of the deceased and P.W.6 Mansurbhai assaulted. It is the case of the prosecution that appellant - accused No.1 was armed with axe and he gave blow on the head of the deceased Hirkuben and appellant No.2 gave one blow on the right side of cheek of the deceased and appellant No.3 gave blows with iron pipe haphazardly upon the person of deceased Hirkuben. It is further case of the prosecution that, P.W.6 Mansurbhai tried to intervene, and therefore, P.W.6 Mansurbhai also received injury on his head. It is the case of the prosecution that, after this incident, P.W.6 Mansurbhai along with one Merambhai took deceased Hirkuben to hospital in a rickshaw at Rajula.

2.2 The case of the prosecution further is that, on examination of deceased Hirkuben, the doctor opined that she has already expired and separately treatment was given to P.W.6 Mansurbhai for the injuries sustained by him. The case of the prosecution is that thereafter FIR was lodged by P.W.6 Mansurbhai before Rajula Police Station. The Investigating Agency thereafter carried out the investigation, recorded statements of witnesses and also collected medical and other corroborative evidence. Thereafter the Investigating Agency filed chargesheet before the Court of learned JMFC, Rajula, and as the Offence were exclusively triable by the Court of Sessions, the learned Magistrate committed the same to the Court of Sessions at Amreli and the same was registered as Sessions Case No.3 of 2003.

2.3 Charges were framed at Exh.1 for offence u/s 302 read with Section 34 of IPC as well as Section 324 read with Section 34 of IPC and Section 35 of Bombay Police Act. After hearing the parties, the charges were also read over to the accused, the accused pleaded not guilty to the charge and claimed to be tried.

2.4 After considering the evidence led by the prosecution, the Sessions Court came to the conclusion that the prosecution was successful in proving the charges against the appellants and recorded conviction by the judgment impugned in this appeal.

3. It may be noted that appellant No.2 was reported dead and therefore this Court vide order dated 18.10.2010 recording the said fact has passed an order that the appeal qua original appellant No.2 Madhubhai Nankabhai Kathi shall

stand abate and therefore the present appeal is continued qua appellant No.1 and appellant No.3.

4. Heard learned Advocate Mr.Yogesh Kanade for the appellants and learned Additional Public Prosecutor Mr.K.L. Pandya for the respondent-State.

5. Shri Kanade, learned Advocate has raised the following main contentions :-

(i) that there are contradictions in the evidence of P.W.6 Mansurbhai, eye-witness and another eye-witness P.W.7 Yunusbhai Ishakbhai.

(ii) that there are contradictions between medical evidence and ocular evidence.

(iii) that all witnesses which are examined by the prosecution are interested witnesses and are related to each other more particularly P.W.6 Mansurbhai, and therefore, the testimony of P.W.6 Mansurbhai is not trustworthy.

(iv) no test identification parade has been held and therefore the same is fatal.

(v) the statement of P.W.7 Yunusbhai Ishakbhai, eye-witness has been taken after three days and delay in recording such statement after three days is not explained and hence no reliance can be placed on such a belated statement.

5.1 Shri Kanade, learned Advocate has taken us through the oral testimony of P.W.6 Mansurbhai Valerabhai eyewitness, P.W.7 Yunusbhai Ishakbhai as well as oral testimony of P.W.10 Kishorbhai Bhikubhai. Shri Kanade has also taken us through the oral testimony of P.W.3. Dr. Babubhai Valabhai Kalsaria, who had performed postmortem of the dead body of deceased Hirkuben and who had treated P.W.6 Mansurbhai. Shri Kanade has also submitted that the oral evidence is not supported by the medical evidence as well as serological report and therefore the learned Sessions Judge has wrongly convicted both the appellants and therefore the judgment rendered by the learned Sessions Judge deserves to be set aside and the appeal deserves to be allowed.

5.2 Shri Kanade, learned Advocate in support of his submissions has relied upon following judgments :-

(i) Muluwa and Others Vs. The State of Madhya Pradesh,

(ii) Kapildeo Mandal and Others v. State of Bihar reported in 2008 (1) Crimes 111 (SC).

(iii) Tamilselvan v. State Rep. By Inspector of Police, Tamil Nadu reported in 2008 (3) Crimes 334 (SC).

(iv) State of Himachal Pradesh v. Lekh Raj and another reported in 2000 Cr.L.R. (SC) 7.

(v) Bhaval Shiva v. State of Gujarat reported in 32 GLR 1272.

5.3 Shri K.L.Pandya, learned Additional Public Prosecutor has opposed the appeal. Shri Pandya has contended that the evidence of two eyewitnesses P.W.6

Mansurbhai and P.W.7 Yunusbhai is supported by the medical evidence as well as serological report. Mr.Pandya further submitted that, P.W.6 Mansurbhai, the first informant, is not only an eye-witness but has also sustained injury, and from bare reading of deposition of P.W.6 Mansurbhai as well as P.W.7 Yunusbhai supported by medical evidence, the prosecution has been able to prove the guilt of appellants. Shri Pandya further submitted that the blood found on the weapon axe as well as iron pipe as per serological report Exh.25 bares human blood group "A". Similarly the blood found on clothes of deceased Hirkuben and blood found on clothes of accused also bares human blood group "A". Shri Pandya further submitted that no explanation is rendered by the accused in regard to the blood found on their clothes. Shri Pandya, therefore, submitted that the learned Single Judge has rightly passed an order of conviction, sentencing the appellants for offence u/s 302 of IPC. Shri Pandya, therefore, submitted that the appeal is devoid of any merits and the same deserves to be dismissed.

6. We have perused the Record & Proceedings in context of the rival submissions.

7. Upon reading evidence of P.W.6 Mansurbhai Valerabhai, father of deceased Hirkuben and father-in-law of appellant No.1 Exh.27, we find that he has categorically supported the case of the prosecution. We find that he has categorically stated that as the accused and the deceased Hirkuben did not have child, out of their wedlock, the appellant-accused used to beat deceased Hirkuben and therefore deceased Hirkuben was brought to the parental house. He has also categorically stated that while coming from Rajula in a rickshaw on the New Year Day, the appellant along with other two accused intercepted the rickshaw and caught hold off rickshaw driver, because of which the rickshaw had to be stopped, and when deceased Hirkuben got out from the rickshaw, the appellant-accused No.1 Nathabhai Jaytabhai gave blow with axe on the forehead of the deceased Hirkuben and appellant - accused No.2 also gave blow with axe. He has further submitted that when the witness came out from the rickshaw and tried to pacify the accused No.1, accused No.2 assaulted this witness with an axe on his forehead and accused No.3 Dhirubhai Nankabhai assaulted deceased Hirkuben with iron pipeT. He has also stated in his oral testimony that accused No.3 Dhirubhai Nankabhai also assaulted deceased Hirkuben with iron pipeT, and when the appellants felt that the deceased Hirkuben has expired, they run away. It has also come on record that the rickshaw driver, out of fear had left the place with his rickshaw. We find that he has stated the test of cross-examination. We do not find major contradiction the deposition as argued by Mr.Kanade, learned Advocate for the appellants.

The witness sticks to his version during cross-examination. Minor inconsistencies would not affect the veracity of such evidence if it does not affect the incident in the main. Witnesses at times may not be accurate in narrating the incident after a lapse of time. In this context, we may refer the judgment of the Hon''ble Apex Court in the case of State of U.P. Vs. Anil Singh, wherein in para 15 the Hon''ble Apex Court has observed as under :-

It is also our experience that invariably the witnesses add embroidery to prosecution story, perhaps for the fear of being disbelieved. But that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth, in the main, the case should not be rejected. It is the duty of the Court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies of falsehood are so glaring as utterly to destroy confidence in the witnesses. It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform."

8. It is an admitted position that accused No.1, is son-in-law of P.W.6 Mansurbhai, first informant, and husband of the deceased Hirkubcn. Only because of such close and personal relations, the version of P.W.6 cannot be disbelieved and he cannot be labelled as interested witnesses. His version of incident is supported by oral testimony of P.W.7 Yunusbhai, the other eye-witness as well as the medical evidence and the serological report.

9. Upon reading the evidence of P.W.7 Yunusbhai Ishakbhai (Exh.38), we find that he is an auto-rickshaw driver, aged about 18 years. He has clearly stated that on the date of incident, P.W.6 Mansurbhai and deceased Hirkuben boarded his rickshaw at about 4:00 p.m. for going to Bhachadar. We also find that he has categorically stated that, when his rickshaw reached the cross-road of Bhachadar, the appellants were standing near the cross-road. We also find in his deposition that he had seen appellant No.1 and appellant No.2 armed with an axe and appellant No.3 armed with an iron pipe. We find that he has narrated the incident and has also rendered his explanation that, as the accused threatened him after committing the crime, he had no option but to run from the scene of offence. P.W.7 Yunusbhai Ishakbhai is not related to either parties and therefore he cannot be labelled as interested witness and/or chance witness. The version given by P.W.7 Yunusbhai is supported by oral testimony of P.W.6 Mansurbhai, the first informant, and the same gets supports from the medical evidence as well as serological report. It is also noteworthy that P.W.7 Yunusbhai has categorically stated in his deposition that appellant - accused No.1 inflicted an axe blow on the head of deceased Hirkuben. P.W.7 Yunusbhai has also stated that appellant - accused No.2 gave blow with an axe on the cheek of deceased Hirkuben. He has also further narrated that P.W.6 Mansurbhai was also assaulted by appellant - accused No.1. P.W.7 Yunusbhai in his deposition has also clearly denied of having any relation with Babubhai relative of P.W.6 Mansurbhai. We, therefore, find ring of truth in the oral testimony of P.W.7 Yunusbhai. These pieces of evidence clearly implicate the appellants with the offences charged.

10. The Doctor Babubhai Valabhai Kalsaria (P.W.3) who performed autopsy upon the dead body of deceased is examined at Exh.16. The said witness has narrated the internal as well as external injuries upon the body of deceased Hirkuben. As per the opinion of Dr. Babubhai, the cause of death is due to "cardio-respiratory

failure due to haemorrhage and shock due to injury on head and face". The doctor has categorically stated that the injuries upon the person of deceased Hirkuben and more particularly external injuries No.1 and 2 which can be caused by axe were sufficient to cause death.

Even the serological report at Exh.25 indicates that the clothes of P.W.6, clothes of appellant No.1-accused and the soil taken from the scene of offence as well as the weapons i.e. two axe and Iron pipe bares human blood group "A" which is of the deceased Hirkuben.

11. We have considered the judgments cited by Shri Kanade, learned Advocate for the appellants-accused. Learned Advocate Shri Kanade relied upon judgment of Hon''ble Apex Court in the case of Muluwa s/o. Binda and others (supra) and pointed out that the oral testimony of P.W.7 Yunusbhai cannot be relied upon but he is an informed witness. However, as stated above, in view of the fact that P.W.6 Mansurbhai is also an eye-witness and injured witness, and even from the oral testimony of P.W.6 Mansurbhai or P.W.7 Yunusbhai, it cannot be inferred that P.W.7 Yunusbhai is an informed witness and the ratio laid down by the Hon''ble Apex Court in Muluwa case (supra) would not be applicable to the facts of the present case.

11.1 Learned Advocate Shri Kanade has relied upon another judgment in the case of Kapildeo Mandal and others (supra) and has pointed out that P.W.6 Mansurbhai being related witness, his testimony should be discarded. In the present case, it is a case of false implication. However, as stated aforesaid, the testimony of P.W.6 Mansurbhai inspires confidence and the same is corroborated by other evidence on record and therefore the ratio laid down by the Hon''ble Supreme Court in Kapildeo Mandal case (supra) would also not be applicable to the facts of the present case.

11.2 The other three judgments relied upon by learned Advocate Shri Kanade in the case of Tamilselvan (supra). State of Himachal Pradesh (supra) and Bhaval Shiva (supra) also would not apply to the facts of this case inasmuch as that, as in the instant case, P.W.6 Mansurbhai, first informant is father-in-law of accused No.1 and therefore the appellant -accused No.1 is known and the evidence on record leaves no doubt regarding involvement of the accused. Similarly, we do not find any glaring contradiction between - medical evidence and ocular evidence. The prosecution has been able to prove all the charges against the appellants -accused and the oral testimony of P.W.6 Mansurbhai and P.W.7. Yunusbhai is amply corroborated by medical evidence as well as serological report.

12. Cumulatively, therefore, the prosecution has been able to prove the guilt of appellants-accused and the appeal is devoid of any merits. No interference is called for in exercise of our appellate powers. The appeal must fail and stands dismissed.