

(2009) 03 GUJ CK 0047
In the Gujarat High Court

Case No : Criminal Appeal No's. 911, 946 and 975 of 2002

Nilesh Keshavlal Parmar and Others

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 05-03-2009

Acts Referred:

Bombay Police Act, 1951 — Section 135(1)

Penal Code, 1860 (IPC) — Section 114, 143, 147, 148, 149

Citation : (2009) 03 GUJ CK 0047

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

Bench : Division Bench

Advocate : Ashutosh R. Bhatt, in Criminal Appeal No. 911 of 2002, P.K. Pathak, in Criminal Appeal No. 946 of 2002 and M.M. Tirmizi, in Criminal Appeal No. 975 of 2002, for the Appellant; M.R. Mengdey, APP, for the Respondent

Judgement

A.L. Dave, J.—These three appeals arise out of a judgment and order rendered by City Sessions Court No. 13, Ahmedabad, in Sessions Case No. 249 of 2000 on 22nd October, 2002. The appellants in these appeals were the accused before the Trial Court, who have been convicted by the Trial Court for various offences and, therefore, they all challenge the said judgment and order. For the said of convenience, they have been referred to by their original accused numbers.

2. An incident occurred on 26th February, 2000, around 11.00 P.M., at Bungalow No. C-247, Aarti Society on Nikol Road, Odhav, Ahmedabad, where it is alleged that one Jagdishbhai Nandubhai was done to death and an attempt was made on life of his father, Nandubhai Ganpatbhai, by the appellants. The appellants in Criminal Appeal No. 911 of 2002 were accused Nos. 1 to 4, respectively, before the Trial Court. Appellant in Criminal Appeal No. 975 of 2002 was accused No. 5 before the Trial Court and the appellant in Criminal Appeal No. 946 of 2002 was accused No. 6 before the Trial Court.

2.1 In the evening of 26th February, 2000, the first informant, Kantaben Nandubhai Makwana (P.W.1-Exhibit 27) was cleaning her household utensils and,

at that time, accused No. 3 picked up a quarrel with her on some petty issue of spilling of dirty water and, then he threatened her that they would be taught a lesson in the evening. This occurred at about 6.00 P.M. Thereafter, late in the evening, at about 11.00 P.M., when Kantaben's husband, Nandubhai and their son, Jagdish, returned home on their scooter, it is alleged that all the appellants were waiting for them and assaulted first deceased-Jagdish. Appellant No. 1, Nilesh, inflicted Gupti blows on the deceased, appellant No. 2 inflicted knife blows on the deceased and when P.W.2-Nandubhai intervened, he was also assaulted upon by both accused Nos. 1 and 2. It is also the case of the prosecution that accused Nos. 3 and 4 also assaulted both the victims with stick and iron pipe. So far as accused Nos. 5 and 6 are concerned, they are alleged to have caught hold of deceased-Jagdish at the time of the assault. The deceased was badly injured and started profusely bleeding at the spot. He was taken into the house and then immediately taken to hospital. During the transaction, several neighbours also came to the spot. When the deceased was taken to hospital, he was declared dead. P.W.2-Nandubhai was also badly injured. He was hospitalized and was given treatment. Fortunately, he survived the injuries. Because of the incident, Kantaben, mother of Jagdish and wife of Nandubhai lodged an F. I. R. with Odhav Police Station, on the basis of which, an offence was registered and investigated. Upon investigation, the police having found sufficient material against the accused persons, filed charge sheet in the Court of Metropolitan Magistrate, Court No. 9, who, in turn, committed the case to the Court of Sessions as the offences were triable by the Court of Sessions and Sessions Case No. 249 of 2000 came to be registered.

2.2 Charge was framed against the accused persons at Exhibit 2 for the offences punishable under Sections 143, 147, 148, 149 read with Section 302 and 307 of the Indian Penal Code and Section 135(i) of the Bombay Police Act. The accused persons pleaded not guilty to the charge and claimed to be tried.

2.3 Upon considering the evidence led by the prosecution, the Trial Court found that the prosecution was successful in proving the charges against the accused persons and recorded their conviction as under:

1. u/s 302 read with Section 149 of the I.P.C.
2. u/s 307 read with Section 149 of the I.P.C.
3. u/s 147 of the I.P.C.
4. u/s 148 of the I.P.C.
5. u/s 143 of the I.P.C.

2.4 The Trial Court awarded sentence as under:

Accused Nos. 1 to 3:

For the offence punishable u/s 302 read with Section 149 of the I.P.C., they are sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.

5000/-, in default, to undergo further simple imprisonment for one year. For the offence punishable u/s 307 read with Section 149 of the I.P.C., they are sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs. 2000/-, in default, to undergo further simple imprisonment for six months. For the offence punishable u/s 147, they are sentenced to undergo rigorous imprisonment for six months. For the offence punishable u/s 148, they are sentenced to undergo rigorous imprisonment for one year. No separate sentence is imposed for the offence punishable u/s 143.

Accused Nos. 4 to 6:

For the offence punishable u/s 302 read with Section 149 of the I.P.C., they are sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 2000/-, in default, to undergo further simple imprisonment for one year. For the offence punishable u/s 307 read with Section 149 of the I.P.C., they are sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs. 2000/-, in default, to undergo further simple imprisonment for six months. For the offence punishable u/s 147, they are sentenced to undergo rigorous imprisonment for six months. For the offence punishable u/s 148, they are sentenced to undergo rigorous imprisonment for one year. No separate sentence is imposed for the offence punishable u/s 143.

2.5 Aggrieved by the said judgment and order, present appeals are preferred.

2.6 Accused Nos. 1, 2 and 3 are in jail and accused Nos. 4, 5 and 6 are on bail.

3. Learned Advocate, Mr. A. R. Bhatt, for the appellants in Criminal Appeal No. 911 of 2002 contended that the conviction of appellants No. 3 and 4 in Criminal Appeal No. 911 of 2002 as well as that of the appellants in the other two appeals cannot be sustained. He, however, conceded that he was not in a position to assail the involvement, conviction and the sentence so far as they relate to appellants No. 1 and 2 (original accused Nos. 1 and 2) in Criminal Appeal No. 911 of 2002. He, therefore, under the instructions of the appellants, does not challenge the conviction and the sentence so far as they relate to original accused Nos. 1 and 2.

4. Mr. Bhatt submitted that the Trial Court has convicted the appellants with the aid of Section 149 for the offence of murder and attempted murder, but the evidence, if perused, would show that accused Nos. 5 and 6 (appellants in Criminal Appeals No. 975 and 946 of 2002) have been wrongly roped in and the evidence about their involvement in the instant case is scanty, shaky and doubtful. He submitted that the entire prosecution case depends on evidence of injured eye-witness, Nandubhai, and his wife, Kantaben (P.W.1). If their evidence is seen, it is clear that Kantaben does not name accused Nos. 5 and 6 in the F.I.R., but only refers to presence of two accomplices of the rest of the accused. According to him, even in her deposition, she does not name accused Nos. 5 and 6, but refers to them as accomplice and identifies accused Nos. 5 and 6 in the Court, for the first time. He submitted that the conviction of the accused except

accused Nos. 1 and 2, is based on shaky evidence. There are contradictions and inconsistencies in the evidence, which are overlooked by the Trial Court. There is no medical evidence to show any injury by stick or pipe caused to either the deceased or the injured witness, Nandubhai. Mr. Bhatt submitted that important witnesses, who came to the spot have not been examined. He, therefore, submitted that the appeals may be allowed.

5. Learned Advocates, Mr. Pathak and Mr. Tirmizi, have adopted the arguments of Mr. Bhatt.

6. Learned Additional Public Prosecutor, Mr. Mengdey, has opposed these appeals.

7. We have examined the record and proceedings in the context of the arguments made before us.

8. If the evidence to Kantaben is seen, it is clear that she does not name accused Nos. 5 and 6 in the F. I. R., but only refers to presence of two accomplices of the rest of the accused. Even in her deposition, she does not name accused Nos. 5 and 6, but refers to them as accomplice and identifies accused Nos. 5 and 6 in the Court, for the first time.

8.1 If the evidence of injured eye-witness, Nandubhai, is seen, he says that he knew accused Nos. 5 and 6 because they used to come to the house of accused Nos. 1, 2 and 3. He says in his examination-in-chief that when he and his son, Jagdish (the deceased), came, all the six accused persons were sitting in readiness for their arrival. He further goes to say that accused Nos. 5 and 6 caught hold of the deceased during the incident. If his cross-examination is seen, it is clear that he makes these two incriminating statements against accused Nos. 5 and 6, for the first time, in the Court. Differently put, his version before the police did not involve or attribute any overt act on the part of accused Nos. 5 and 6.

8.2 Evidence of these two eye-witnesses is to be appreciated in view of the fact that they give all minute details of the incident so far as they relate to accused Nos. 1 and 2. They give some details so far as they relate to accused Nos. 3 and 4, but there is some discrepancy therein and they fail to give any detail as to accused Nos. 5 and 6. The fact that P.W.1-Kantaben does not give any details of accused Nos. 5 and 6 and does not attribute any overt act to them, and the fact that P.W.2-Nandubhai gives details of accused Nos. 5 and 6 and attributes to them the overt act of having caught hold of the deceased, for the first time, in the Court would draw their depositions under the shadow of doubt. It has to be also kept in mind that accused Nos. 5 and 6 are not family members of accused Nos. 1, 2 and 3. They are not neighbours nor are they any relatives. They do not have any grievance or animosity against the victims. Their presence at the place becomes doubtful in light of the evidence, their involvement also becomes doubtful and, on this scanty and sketchy evidence, conviction could not have been recorded by the Trial Court.

9. The moment we come to a conclusion that involvement of accused Nos. 5 and 6 cannot be believed, the application of Sections 143, 147, 148 and 149 will be abrogated. That would leave behind accused Nos. 1, 2, 3 and 4 to be considered for their involvement. There is no allegation or charge of applicability of Section 114 or Section 34 of the I.P.C. As a consequence, their individual role and overt act would be the relevant factor to be considered by this Court.

10. So far as accused Nos. 3 and 4 are concerned, they are alleged to have caused hurt with iron pipe and stick. However, if the charge is seen, the charge against accused No. 4 is of having caused hurt with pipe. The evidence is that of having used a stick. So far as accused No. 3 is concerned, the evidence is that he gave a pipe blow. This discrepancy in a given set of facts may not be of any significance, but, in the instant case, it would assume significance for the reason that the prosecution has shown a tendency to implicate as many persons as possible. It would, therefore, be necessary for us to look for corroborative evidence. In this regard, if the medical evidence is seen, it is clear that neither the deceased nor the injured witness has any injury attributable to a stick or a pipe. In absence of such medical evidence, the discrepancy between the evidence of the witnesses and the charge would assume greater importance and, in our view, their involvement in the instant case altogether cannot be accepted. Their conviction for offences of attempted murder and murder with the aid of Section 149 of the I.P.C. has already been found to be not sustainable in the earlier part of the judgment.

11. We also notice that the prosecution has not examined important witnesses, who came to the spot immediately after the incident and who are named in the F.I.R., namely, Ramnikbhai Darbar and Dilubha Parmar. Though Dilubhai Parmar is named in the F.I.R., he has been examined as a Panch witness. But, in his deposition, he does not depose anything about the incident, but deposes only about the Panchnama. Therefore also, the prosecution case is doubtful.

12. In the light of the foregoing discussion, by necessary implication and process of deduction, conviction of accused Nos. 3, 4, 5 and 6 cannot be sustained and they deserve to be acquitted of the charges levelled against them. So far as conviction of accused Nos. 1 and 2 is concerned, they do not challenge their conviction and sentence. In the result, the following order is passed.

13. Criminal Appeals No. 946 of 2002 and 975 of 2002 stand allowed. Accused Nos. 5 and 6 are acquitted of the charges levelled against them. Since they are on bail, their bail bond shall stand cancelled. Fine, if paid by them, shall be refunded to them.

13.1 Criminal Appeal No. 911 of 2002 stands partly allowed. The appeal qua appellants No. 1 and 2 (original accused Nos. 1 and 2) stands dismissed. The appeal qua appellants No. 3 and 4 (original accused Nos. 3 and 4) stands allowed. The judgment and order of conviction and sentence recorded by the Trial Court against original accused Nos. 3 and 4 is set aside. Accused No. 3 shall

be released from the prison forthwith, if not required in any other case. Since accused No. 4 is on bail, his bail bond shall stand cancelled. Fine, if paid by them, shall be refunded to them.