

(2010) 01 GUJ CK 0002
In the Gujarat High Court
Case No : Criminal Appeal No. 1755 of 2004

Pana Hara Bhati and Others	Vs	APPELLANT
The State of Gujarat		RESPONDENT

Date of Decision : 11-01-2010

Acts Referred:

Bombay Police Act, 1951 — Section 135
Evidence Act, 1872 — Section 6
Penal Code, 1860 (IPC) — Section 114, 302, 34

Citation : (2010) 01 GUJ CK 0002

Hon'ble Judges : H.N. Devani, J;A.L. Dave, J

Bench : Division Bench

Advocate : Ashish M. Dagli, for the Appellant; K.L. Pandya, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

A.L. Dave, J.—The appellants were accused before the City Sessions Court No. 5, Ahmedabad, in Sessions Case No. 41/2003. They came to be tried for the offences punishable u/s 302 r.w. Section 34 or 114 of the Indian Penal Code ["IPC" for short] and Section 135 of the Bombay Police Act ["BP Act" for short]. The trial Court, after considering the evidence led by the prosecution, found that the charges were proved against the appellants-accused and recorded conviction by judgment and order dated 21st September, 2004.

2. The prosecution case, in brief, is that the incident took place during the night falling between 27.9.2002 and 28.9.2002 at Gulbai Tekra in Ahmedabad, where four accused persons collectively assaulted deceased Virabhai Savabhai Rathod with weapons like dharia, pipe, gupti and axe. The deceased was sitting with his sister Premiben near a small temple located in the area, which is near the house of Premiben. There was a dispute between the accused side and the victim side on account of teasing of Goviben, daughter of victim Virabhai Savabhai and, therefore, upon seeing the victim and Premiben, the four accused persons rushed

towards them with weapons in their hands. Premiben asked the victim to run away and she also tried to escape. The victim was chased by the accused persons and was attacked near the house of Amarabhai Ramabhai. Upon seeing the incident, Premiben raised shouts, but, in vain. She was scared and, therefore, she ran away from the place and reached Panjarapole area. Thereafter, she reached to the house of her sister Daluben in a rickshaw, who stays at a place nearby the place of the incident called Bhudarpura. There Premiben narrated the incident to her sister Daluben and thereafter they also told their sister Hariben about the incident and then all the three went to Navrangpura Police Chowky and informed the police. Therefore, the police accompanied them to the place of the incident, where from they took the deceased to V.S. Hospital and there FIR of Premiben was recorded. On the basis of that FIR, offence was registered and investigated. During the course of investigation, the appellants-accused came to be arrested on 1.10.2002. The charge sheet was filed against them in the Court of learned Metropolitan Magistrate, who in turn, committed the case to the City Sessions Court, Ahmedabad, where Sessions Case No. 41/2003 came to be registered.

3. Charge was framed against the accused persons at Exh.1. All the accused persons pleaded not guilty to the charge and claimed to be tried.

3.1 The trial Court, after considering the evidence led by the prosecution, came to the conclusion that the prosecution was successful in establishing the charges levelled against the accused persons and, therefore, convicted them for the offences punishable u/s 302 read with Section 34 IPC and Section 135 of the BP Act.

3.2 After hearing the accused persons on the question of quantum of punishment, the trial Court sentenced all the four accused persons-appellants to undergo imprisonment for life and to pay a fine of Rs. 500/- each, in default, to undergo one month's R.I, for the offence punishable u/s 302 read with Section 34 IPC; whereas for the offence punishable u/s 135 of the BP Act, they were sentenced to undergo imprisonment for seven days. Both the sentences were ordered to run concurrently and the benefit of set off was ordered to be given to the accused persons.

4. We have heard learned advocate Mr. Dagli for the appellants and, learned A.P.P. Mr. Pandya for the State.

5. Learned advocate Mr. Dagli submitted that the prosecution case depends mainly on the evidence of Premiben. If her evidence is seen, it is full of improvements. The story narrated by her in respect of the incident is improbable. He submitted that although independent witnesses were available, they have not been examined as witnesses. The investigation is not properly carried out. Although it has come in evidence that there were bloodstains on the otta of temple, no samples were drawn there-from. He submitted that the conduct of eye witness Premiben is not natural. In the first instance, Mr. Dagli submitted

that she could not have been sitting at the place in the wee hours of night with her brother all alone, as she has claimed. He submitted that at that point of time, there were many residents around and Premiben says that nobody came to their rescue. This is not a probable situation. Mr. Dagli submitted further that Premiben instead of going to police for help, goes to her sister's house. Mr. Dagli submitted that it has come in her evidence that the FIR was recorded at about 3.00 A.M, which is much prior to the FIR which is brought on record. As such, the FIR recorded at 6.00 A.M is subsequent and would cease to be an FIR and has, therefore, been erroneously exhibited on record. The FIR, allegedly recorded at 3.00 A.M, has not been brought on record.

5.1 Similarly, Mr. Dagli submitted that the weapons were seized on 28.9.2002, but, they were sent to F.S.L on 18.10.2002. Mr. Dagli submitted that the prosecution has not led any evidence to show whether these weapons were lying there from 28.9.2002 to 18.10.2002 before being sent to FSI and whether they remained there untempered. The witness does not describe or attribute any specific injury to any of the assailants. If she had been really present, she could have done that also. Mr. Dagli, therefore, submitted that the trial Court solely relied on the evidence of Premiben and another witness Daluben, without looking for independent corroboration. In support of his submission, Mr. Dagli relied upon the decision of the Apex Court in the case of Joseph Vs. State of Kerala, particularly paragraphs 12 & 13.

5.2 Mr. Dagli submitted that arrest panchnama of the accused persons has not been brought on record by the prosecution, which shows lacuna in the evidence of prosecution. He submitted that the appeal may, therefore, be allowed.

6. Learned A.P.P. Mr. Pandya has opposed this appeal. According to him, evidence of Premiben is natural. Her conduct is natural and she was scared and, therefore, a natural conduct cannot be expected from her, but, her version gets corroboration from the medical evidence, so also the evidence of Daluben and, therefore, the trial Court was justified in recording conviction of the appellants. Mr. Pandya submitted that absence of certain evidence would be significant only if there is material to abrogate the evidence which is not on record. In the instant case, no such material is shown by the defence to abrogate the evidence of Premiben and the medical evidence. The trial Court was, therefore, justified in recording the conviction and this Court may not interfere with the judgment impugned in the appeal, in exercise of appellate jurisdiction. He, therefore, submitted that the appeal may be dismissed.

7. We have examined the record and proceedings of the case in the context of the rival side submissions.

8. Learned advocate Mr. Dagli is right on his say that the prosecution case depends mainly on the evidence of Premiben. Premiben is the sister of the victim, who has deposed at Exh.14. In her evidence, she states that there was an altercation between his brother deceased Virabhai and accused Ganesh and

Kishan when the deceased inquired of the two as to why had they teased the daughter of the deceased. The neighbours somehow intervened and they were separated and both the parties went home. On that very day, the witness says, she and her brother victim Virabhai were sitting on the otta of temple near her house. At that time, accused No. 1 Pana came with a dharia, accused No. 2 Ganesh had a gupti, accused No. 3 Kishan had an axe and accused No. 4 Deva had a pipe. They all came running towards them. She, therefore, asked her brother to run away or they may kill him. She also tried to escape along with her brother. By the time they reached near the house of Amarabhai Ramabhai, a dharia blow was given by accused No. 1 on the occipital region of the head of deceased Virabhai. Rest of the accused also joined accused No. 1 and collectively assaulted the deceased indiscriminately. She, therefore, raised cries. She then went to Panjarapole and from there she went to Bhudarpura at her sister's place. From there, she along with her two sisters went to Navrangpura Police Chowky and informed the police that her brother is killed. The police joined them and went to the place of incident, where they found the deceased lying dead. Thereafter the deceased was taken to V.S.Hospital. At the V.S.Hospital, her FIR was recorded. She identified the dharia, axe, gupti and pipe. She also identified the clothes of the deceased which he was wearing at the time of the incident. The witness also identified the accused persons by name before the Court. The witness was subjected to cross-examination where she admits that there were some police cases registered against the deceased.

8.1 During the cross-examination, it appears that, she has made certain statements as to the time of occurrence as well as other incidents. It emerges from her cross-examination that despite her raising cries for help, no one came and, therefore, she ran away. The questions are put as to when her brother victim came to her house and at what time they left. Whether she had any occasion in past to leave the house at such odd hours at night and, she has replied those questions appropriately. A question had also been put to her regarding the relationship between the victim and his wife, whether they were staying together or the victim had divorced her, because in her FIR she has stated that the deceased had divorced his wife. The questions are put to know if her clothes were stained with blood or not and she replied that in the Police Van her brother's head was not placed in her lap. She was sitting near to him. She says that there was blood spread in the Van where the dead body was kept. Then she says that as she was sitting beside her brother, her clothes were also stained with blood. She admits to have not stated certain aspects about the incident, in detail, in the FIR. She denies a suggestion that she gave a false complaint in consultation with her sister to settle the account with the accused persons on account of earlier quarrel.

9. The next important witness is Daluben Virabhai Marvadi examined at Exh.24. She is the sister of first informant staying at Bhudarpura. About the incident, she says that Premiben came to her house at Bhudarpura at about 2.00 to 2.30 in the night and told her that their brother Virabhai has been done to death with

dharia and gupti. The witness says that she also got scared and informed her sister Hariben and all of them went to Navrangpura Police Chowky and informed the police that their brother has been done to death and the three sisters may also be murdered and may be protected. Thereafter, Premiben sat in police-van and witness Daluben and her sister Hariben went by rickshaw to the place of the incident and found the deceased lying dead near the osari of house of Amarabhai Ramabhai. The deceased was lying with his face down and was bleeding profusely. The witness then says that while the daughter of the deceased was going to purchase milk, Ganesh had caught her hand, which had resulted into an altercation/quarrel. In her cross-examination, the witness denies that she has stated in her police statement that her brother had divorced his wife Nathiben. She admits during her cross-examination that none-else than Premiben told them as to who had murdered the victim. She admits not to have stated in her police statement that Premiben told her that Virabhai has been done to death with dharia and gupti and they got frightened therefore and told Hariben about the same. She denies that her case is concocted after deliberation.

10. As regards the medical evidence, we may note that Dr. Rohit Chimanlal Zaverivala, who had performed the post-mortem and is examined at Exh.16, says that the deceased had as may as 18 external injuries and 8 internal injuries. According to the Doctor, injuries found on the person of the deceased were sufficient in the ordinary course of nature to cause death. The Doctor has been cross-examined, but nothing special emerges from his cross-examination except that injury No. 1 was possible with any hard and blunt substance. He denies the suggestion that injury No. 1 mentioned in column No. 17 in the post-mortem note was possible by fall.

10.1 The injuries are mainly chop wounds, contused lacerated wounds, multiple abrasions and stab wounds.

11. From these important pieces of evidence, what emerges is that, according to the eye witness, assailants-appellants came to the victim and, therefore, he started running from the place and was hit for the first time near the house of Amarabhai by dharia and then he was assaulted upon indiscriminately by the accused persons with their respective weapons. The incident occurred at odd late night hours when there would be no person around. Even cry for help by first informant Premiben did not yield any result. It is true that in the FIR, details of assault by different accused persons are not given, but, it would not be proper to expect a solitary lady eye witness to closely watch and remember the sequence of events, time, place and manner in which the incident had occurred. It has come in the evidence of the first informant in terms that she cried for help and when no one turned up, she got scared and ran away towards Panjarapole and from there, she caught a rickshaw and went to Bhudarpura to her sister's place. It is equally true that she has not given full details in the FIR about the sequence of events, but, that by itself would not discredit her version because the FIR is meant mainly to initiate investigation and all details are not required to be stated

in the FIR. Having examined the FIR, it cannot be said that it is a cryptic FIR. There is no conflicting version emerging from the FIR as well as deposition which would render both or either of them unreasonable. The injuries found on the person of the deceased were multiple in nature which would speak volumes about the manner in which the incident must have occurred and it is natural that a lady would get scared when no one responds to her cry for help, more so when she belongs to that strata of society where there is less education and more poverty. What the eye witness has stated gets corroborated by the medical evidence. The injuries on the person of the deceased are certified to be ante-mortem and attributable to the weapons allegedly used in the commission of crime by the accused persons. Therefore, in our view, the version of the eye witness gets corroborative support from the medical evidence.

11.1 Apart from the above aspects, it is also worth a note that eye witness Premiben had soon after the incident, run to her sister and told her as to what had happened. That version is on the same line with her deposition which inculcates the four accused persons. The version which is given by eye witness Premiben to her sister Daluben is soon after the incident and while she was under shock or mental agony of the incident, she has given this version within a few minutes of the incident and had no time to fabricate and concoct the story against the accused persons. The principles of *res gestae* can be applied, which is incorporated in Section 6 of the Indian Evidence Act, which runs as under:

6. Relevancy of facts forming part of same transaction.- Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Illustration (a) to that Section is very apt, which also runs as under:

(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

12. The version of the eye witness, therefore, gets support from the evidence of Daluben as well.

13. A strong contention was raised about the fact that the real FIR is not coming on record because as per the first informant it was recorded at 3.00 A.M, whereas the FIR on record indicates that it was recorded at 6.00 A.M. This, in our view, cannot be considered as a case where earlier FIR is suppressed by the prosecution. Consistently it has come on record that only one FIR is recorded. The confusion is because of time aspect. In this context, if the evidence of eye witness is seen as a whole, an impression is created that she has no sense of proportion as to time. At one stage she says that the incident occurred at about 2.00 A.M. and at the another stage she says that the incident occurred at 10.30 to 11.00 P.M. Similarly, the eye witness has stated that the temple is located at a distance of about half-an-hour walk from her house. We can take judicial notice

of the fact that that cannot be true, as the area itself is not that big. Half-an-hour journey is sufficient to cover several kilometers, which is not the case here.

13.1 It is also contended that the weapons were seized on 28.9.2002 and were sent to FSL on 18.10.2002 and no evidence is led to indicate that where the weapons were lying and whether they were safe and untampered. In this context, it may be recorded that the weapons were seized under a panchnama and a seal was put. The weapons have been sent to FSL for investigation and FSL has not found that slips were broken or tampered. Therefore, there is no likelihood of any prejudice being caused to the accused because of the lack of evidence on custody of weapons between the date of seizure and sending them to the FSL.

14. It was also contended that as per the prosecution case, bloodstains were found on the otta of the temple, but, sample of that blood had not been drawn by the investigating agency. It is also contended that as per the evidence of eye witness, the deceased was assaulted for the first time near the house of Amarabhai and no attack was made near the temple. Therefore, it was contended by the defence that the evidence of eye witness will be of no benefit to the prosecution. The evidence, if considered as a whole, would go to show that the possibility of there being no blood at the temple cannot be ruled out. Even a suggestion is put by the defence, though denied by the witness, that red marks on the otta of the temple were because of kumkum offered to the Deity. Apart from that, this slip or mistake on the part of the Investigating Officer would not, in any manner, abrogate the effect of reliable evidence in the form of evidence of eye witness Premiben, her sister Daluben or Doctor. Similar would be the situation when it is contended that the bloodstained bedsheets and the bloodstained clothes of Premiben were not seized by the police. It would have been better if the I.O had remained vigilant and collected these pieces of evidence, which would have lend more credence to the prosecution case.

15. It was contended that Premiben does not disclose anything to any one while going from the house of her sister at Bhudarpura to Navrangpura Police Chowky, which is not a natural conduct. This argument can be made only for recording that, as per the prosecution case, the first informant had already informed her sister Daluben immediately about the incident in detail, which implicates all the four accused persons. Then there was no need for her to go on repeating as to how this incident had occurred.

16. Keeping all these aspects in the mind, if the evidence as a whole is seen, though it is in the form of evidence of a solitary eye witness supported by her sister and other evidence, the Court is of the view that the trial Court was justified in relying upon and accepting the evidence of Premiben as truthful and in recording conviction.

16.1 Mr. Dagli has relied upon the decision of the Apex Court in the case of Joseph Vs. State of Kerala, particularly paragraphs 12 & 13. That was the case

where acquittal appeal was allowed by the High Court and conviction was recorded and while appreciating that aspect, it was observed that in the facts of that case, it was found that there ought to have been blood at the place of the incident if version of the witness was accepted. But, there was none and in such eventuality, non-seizure of bloodstained clothes was considered as a factor in favour of the accused, who came to be acquitted by the trial Court and convicted by the first appellate Court. The decision, therefore, cannot help the appellants, as no prejudice is shown to have been caused because of non-seizure of bloodstained bedsheets or bloodstained clothes of Premiben. If they were seized, it would have lent greater credence to the evidence of Premiben. But, non-seizure of it would not reduce the credibility of the witness once it is found that she is a truthful witness and her version is supported by other evidence.

17. For the foregoing reasons, we are of the view that no interference is called for in the view taken by the trial Court. The appeal must fail and stands dismissed. The judgment and order of conviction and sentence rendered by the City Sessions Court No. 5, Ahmedabad, on 21.09.2004, in Sessions Case No. 41/2003, is hereby confirmed.