

(2008) 10 GUJ CK 0060
In the Gujarat High Court

Case No : Criminal Appeal No's. 1141 and 1582 of 2006

Parshotambhai Amthabhai Nai

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 06-10-2008

Acts Referred:

Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 313, 377, 378
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 302, 326

Citation : (2008) 10 GUJ CK 0060

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

Bench : Division Bench

Advocate : Mehul Sharad Shah and Apurva R. Kapadia, for the Appellant; U.R. Bhatt, APP for Opponent 1, for the Respondent

Final Decision : Dismissed

Judgement

J.C. Upadhyaya, J.—Criminal Appeal No. 1141 of 2006 came to be preferred by the appellant, who was original accused in Sessions Case No. 156/1995, against judgment and order dated 18/4/2006 rendered by the Ld. Presiding Officer, 7th Fast Track Court, Palanpur, [for short "Ld. Trial Judge"] in the aforesaid Sessions Case convicting the appellant accused for the offences punishable u/s 326 of the Indian Penal Code [IPC] and u/s 135 of the Bombay Police Act [BP Act] and awarding sentence of rigorous imprisonment [RI] for 5 years and fine of Rs. 3,000/-, in default to further undergo simple imprisonment for 3 months for offence punishable u/s 326 of the IPC and fine of Rs. 500/- and in default of payment of fine, to undergo simple imprisonment for one month for the offence punishable u/s 135 of the BP Act. Feeling aggrieved and dissatisfied with the order of conviction recorded by the Ld. Trial Judge, the original accused preferred this appeal.

2. However, Criminal Appeal No. 1582 of 2006 came to be preferred by the State of Gujarat u/s 377 of the Code of Criminal Procedure [Cr.P.C] requesting that the

sentence awarded by the Ld. Trial Judge is very lenient and deserves to be enhanced.

3. The prosecution case, in nut shell, is as under:

3.1. On 7/9/1995 at about 9.00 p m in the City of Deesa, near the office of the Executive Magistrate, the accused inflicted knife blow on the left hand side stomach of deceased Somabhai Parshottambhai. Somabhai was immediately removed to Government Hospital at Deesa. Injured Somabhai Parshottambhai lodged FIR in connection with this offence. The FIR was registered and the police commenced investigation. However, on 16/9/1995 Somabhai Parshottambhai succumbed to the injury and, therefore, during the pendency of police investigation, the offence punishable u/s 302 of the IPC was added. After the completion of investigation, police filed charge-sheet in the Court of the Ld. Judicial Magistrate First Class, Deesa for the offences punishable u/s 302 of the IPC and Section 135 of the BP Act. Since the offence was exclusively triable by the Court of Sessions, the Ld. Magistrate committed the case to the Court of Sessions at Palanpur.

3.2. The Ld. Trial Judge framed charge against the accused for offences punishable u/s 302 of the IPC and u/s 135 of the BP Act. The accused did not plead guilty and claimed to be tried. Therefore, prosecution adduced its oral and documentary evidence. After the prosecution concluded its evidence, the Ld. Trial Judge recorded further statement of the accused u/s 313 of the Cr. P.C., wherein the accused generally denied all the allegations levelled against him and filed his written submissions in support of his further statement, wherein in sum and substance he submitted that he was wrongly implicated in this case and stated that the deceased was not in a position to give any dying declaration.

3.3. The Ld. Trial Judge, after appreciating the evidence on record and after hearing arguments advanced on behalf of both the parties, delivered the impugned judgment whereby the Ld. Trial Judge was pleased to acquit the accused for the offence punishable u/s 302 of the IPC, but convicted the accused for the offences punishable u/s 326 of the IPC and u/s 135 of the BP Act and awarded sentence as stated hereinabove.

4. Learned advocate Mr. Kapadia for the appellant "accused during the course of his arguments, submitted that the Ld. Trial Judge erred in convicting the accused for the offences punishable u/s 326 of the IPC and u/s 135 of the BP Act. It is submitted that the prosecution relied upon so called oral dying declaration made before the witnesses. However, the depositions of those witnesses before whom the deceased said to have given oral dying declaration, their testimonies are not consistent and create doubt about the genuineness of the case of the prosecution. That those witnesses though deposed before the Court that upon inquiry, deceased orally narrated the incident, but considering their evidence as a whole, if those witnesses were available just nearby the scene of offence, they should have seen the actual commission of the offence; but out of the 4

witnesses, only one witness named Suresh Nai submits that he had seen the accused running away from the scene of offence. Thus, the presence of these witnesses in the near vicinity of the scene of offence cannot be believed. It is further submitted that as per the prosecution case, Executive Magistrate recorded dying declaration of the deceased; but considering the deposition of the Executive Magistrate Mr. Vankar, he categorically admitted that before recording dying declaration he did not inquire the Medical Officer on duty about the physical and mental state of the deceased. That thus no reliance can be placed upon the so called dying declaration recorded by the Executive Magistrate. It is further submitted that the prosecution relied upon the so called discovery of Muddamal weapon knife, but both the panchas to the discovery panchnama have turned hostile. Considering the deposition of the Investigating Officer [IO], in his cross examination he admitted that he had made independent search to find out the knife. That no reliance can be placed upon the evidence adduced by the prosecution in connection with discovery of the weapon knife. It is submitted that the prosecution miserably failed to prove the motive behind this crime. That as per the case of the prosecution, the accused suspected that the deceased had illicit relations with his wife Ramilaben, who was divorced by him. However, considering the deposition of Ramilaben, she turned hostile and did not support the prosecution case regarding the motive. That there are major contradictions in the depositions of the witnesses examined by the prosecution. That Medical Officer on duty, who administered initial treatment to the deceased, Dr. Bhati [PW1] stated that the deceased was brought to his hospital without any police Yadi and therefore, he informed the police station by telephone. However, considering the deposition of I O as well as the deposition of P.S.O. Chataraji [PW 16] he categorically stated that he had not received any telephone call from Dr. Bhati. That thus, the evidence adduced by the prosecution is very shaky and cannot be relied upon. Therefore, it is requested that the appeal be allowed and order of conviction recorded by the Ld. Trial Judge be set aside and the appellant" accused be acquitted.

4.1. In connection with the criminal appeal preferred by the State of Gujarat u/s 377 of the Cr. P.C bearing Criminal Appeal No. 1582 of 2006, learned advocate Mr. Kapadia for the respondent accused therein submitted that the prosecution miserably failed to prove its case beyond reasonable doubt and as a matter of fact, the respondent accused deserves acquittal and, therefore, the question of enhancement of sentence may not arise.

4.2. On behalf of the State of Gujarat, Ld. APP Mr. Bhatt, seriously opposing the Criminal Appeal No. 1141 of 2006 preferred by the appellant _ accused, submitted that the prosecution successfully proved beyond any reasonable doubt its case against the accused and the Ld. Trial Judge rightly came to be conclusion that the accused has committed offences punishable u/s 326 of the IPC and Section 135 of the BP Act. That the FIR itself was lodged by the deceased which becomes his dying declaration before the police. After the lodgement of the FIR the police recorded further statements of the deceased which also become dying

declaration before the police. That soon after the incident when the deceased was on the place of occurrence, the deceased narrated the incident and that he was assaulted by the accused, to 4 witnesses. That over and above this, Executive Magistrate recorded dying declaration of the deceased and in the dying declaration recorded by the Executive Magistrate, it bears the endorsement of the Medical Officer that the deceased was in a fit state of mind to give dying declaration. That it is true that both the panchas of the panchnama regarding the discovery of weapon knife, turned hostile, but considering the deposition of I O the discovery panchnama is duly proved. That considering the serological report, it clearly transpires that the knife which was recovered at the instance of the accused had blood marks of group "B", which was the blood group of the deceased. That thus the prosecution successfully proved its case and the Ld. Trial Judge rightly convicted the accused for the offences punishable u/s 326 of the IPC and Section 135 of the BP Act. Therefore, it is submitted that the appeal preferred by the appellant _ accused be dismissed.

4.3. Ld. APP Mr. Bhatt further submitted that in this case because of the injury sustained by the deceased ultimately he succumbed to the injury. There was no reason whatsoever for the Ld. Trial Judge to award extremely lenient sentence of imprisonment for the period of 5 years so far as the offence punishable u/s 326 of the IPC is concerned. That, therefore, the Criminal Appeal No. 1582 of 2006 preferred by the State for the enhancement of sentence be allowed and the accused be appropriately sentenced for the offence punishable u/s 326 of the IPC.

5. Considering the record of the case, it clearly transpires that in connection with this offence the FIR was lodged by the deceased before the police. Considering the FIR exh. 78, it is clearly mentioned that the accused inflicted knife blow on the left hand side stomach of the deceased. Considering the deposition of I O Mr. Pranami, exh. 77, he deposed that while the deceased was in hospital, his complaint was taken and in the complaint exh. 78 whatever was stated by the deceased was noted down. It further transpires that the FIR was registered on 7/9/1995 and on the next day dated 8/9/1995 the I O recorded further statement of the deceased wherein the deceased stated about the motive part of the incident that the accused was under impression that he [deceased] had illicit relations with wife of the accused named Ramila and that though the accused has given divorce to his wife Ramila, the accused suspected that the deceased was to marry his ex-wife Ramila. By keeping such suspicion in mind, the accused inflicted knife blow. Thus, the further statement exh. 80 can be said to be a dying declaration of the deceased before the police.

6. However, considering the oral evidence on record, it transpires that witnesses Natvarlal Hiralal [PW 2], Ranabhai Kalidas [PW 3], Sureshkumar Mangaji Thakore [PW4] and Sureshkumar Babulal Nai [PW13] in their depositions stated that upon hearing noise, they immediately rushed where the deceased was lying and when they asked as to what had happened, deceased Somabhai stated to these witnesses that he [the deceased] was assaulted by the accused. Considering the

cross-examination of these witnesses made on behalf of the defence, nothing emerges on record which would make their depositions doubtful. Under such circumstances, what the deceased stated before those 4 witnesses, becomes oral dying declaration of the deceased and considering the oral dying declaration, it clearly transpires that the deceased categorically stated that he was assaulted by the accused.

7. The prosecution examined Executive Magistrate Mr. Vankar [PW6] at exh. 45 and according to his deposition, on 7/9/1995 at about 10.00 p m he received Yadi from P.S.O. Deesa to the effect that the dying declaration of deceased Somabhai was required to be recorded. That, therefore, at about 10-13 p m he reached the Civil Hospital, Deesa. He further stated that soon after arriving at the hospital, he met Medical Officer Dr. Bhati and inquired about the physical and mental condition of the deceased and thereupon Dr. Bhati stated that the deceased was fully conscious. Executive Magistrate Mr. Vankar thereafter recorded the dying declaration of the deceased which is produced at exh. 47. Considering the dying declaration exh. 47, the deceased stated that on 7/9/1995 at about 9.30 p m, after closing his shop when the deceased was going towards his home, at that time near his shop, he was assaulted by the accused and that the accused inflicted one knife blow on the left hand side of his stomach. Upon inquiry made by the Executive Magistrate as to why the accused inflicted knife blow on his body, the deceased stated that the accused suspected that he [deceased] had illicit relations with the wife of the accused and, therefore, because of such suspicion, he was assaulted by the accused. Considering the dying declaration exh. 47, below it there is a clear endorsement made by the Medical Officer that during the time when the dying declaration was recorded, the patient was fully conscious. However, it is true that in para. 13 of his cross-examination Executive Magistrate Mr. Vankar stated that he did not obtain any endorsement of any doctor regarding mental condition of the deceased. Therefore, learned advocate Mr. Kapadia for the appellant accused submitted that the dying declaration exh. 47 cannot be relied upon as there is no evidence whatsoever to come to the conclusion that the deceased was in a fit state of mind to give dying declaration. However, in this respect, what Executive Magistrate Mr. Vankar stated in his cross-examination is that he did not inquire about the mental condition of the deceased. However, considering his examination-in-chief, he stated that he inquired to the Medical Officer as to whether the deceased was conscious or not and thereupon Medical Officer stated that the deceased was fully conscious. In his cross-examination Executive Magistrate Mr. Vankar nowhere admitted that he even did not inquire to the Medical Officer as to whether the deceased was conscious or unconscious, before meeting the deceased. Mr. Vankar categorically stated that he made inquiry about this aspect of the matter and the Medical Officer replies that the deceased was fully conscious. In this respect, considering the deposition of Dr. Bhati [PW10], he stated that the deceased was brought to his hospital at about 9.30 p m on 7/9/1995 and that the deceased had sustained one injury on the left hand

side of his stomach. He administered initial treatment. He stated that when the deceased was under treatment, at about 10-00 p m he received police Yadi. He further stated that the injury could be caused by knife. Considering his entire deposition, it nowhere transpires that when the deceased was brought to his hospital and even during the period he was under his treatment, the deceased was unconscious.

8. Under such circumstances, the genuineness of the dying declaration recorded by the Executive Magistrate Mr. Vankar cannot be doubted. It may be noted that the deceased succumbed to the injury on 16/9/1995. The Executive Magistrate Mr. Vankar recorded the dying declaration of the deceased on 7/9/1995. Thus, here is not a case wherein the deceased succumbed to the injury soon after sustaining the injury, but he survived practically for the period of 9 days after sustaining the injury and as stated above, there is nothing on record to come to the conclusion that immediately after sustaining the injury or during the time he was under treatment, he was unconscious. On the contrary, considering the deposition of witness Sureshkumar Nai [PW13], he stated that the deceased was his uncle and as soon as he came to know that the deceased had sustained injury and was under treatment in the hospital, he went to the hospital and met the deceased. As stated earlier in this judgment, upon inquiry, the deceased told him that he was assaulted by the accused. Considering the cross-examination made on behalf of the defence of this witness Sureshkumar Nai, he categorically stated that when he went to the hospital, at that time near the deceased there were Executive Magistrate, Medical Officer and other persons. Under such circumstances, there is nothing on record that the deceased was not in fit state of mind to give dying declaration. On the contrary, the prosecution proved by adducing positive evidence that at the time when the Executive Magistrate recorded the dying declaration of the deceased, the deceased was conscious and was in fit state of mind to give dying declaration.

9. Considering the medical case papers of the deceased, it clearly transpires that on 7/9/1995 general condition of the deceased was fair. As per the prosecution case, the FIR which was lodged by the deceased was lodged on 7/9/1995 and on the same day, the deceased narrated the incident before 4 witnesses as well as Executive Magistrate recorded his dying declaration. Thus, the medical case papers support the case of the prosecution that the deceased was conscious and his physical condition was fair. It is true that both the panchas of discovery panchnama exh. 82 turned hostile. However, in this connection, considering the deposition of I O PI Mr. Pranami [PW17], he stated that the accused was arrested on 26/9/1995 and in his presence and in presence of panchas, the accused showed his willingness to discover the weapon knife. I O Mr. Pranami stated that thereupon preliminary panchnama was drawn and thereafter, the accused took them to the compound of the office of Executive Magistrate and discovered the knife and the same was recovered by the panchnama exh. 82. It is true that I O Mr. Pranami in his cross-examination stated that before the accused came to be arrested, he had made attempts to find out the weapon wife, but he did not

succeed in his attempt. Merely because I O Mr. Pranami before arrest of the accused made attempt to find out the weapon knife, thereby it cannot be said that the discovery panchnama exh. 82 which was drawn on 26/9/1995 becomes doubtful. The important aspect is what the accused stated before police and panch about the place of concealment of the knife. Considering the deposition of I O PI Mr. Pranami and the panchnama exh. 82, we are of the considered opinion that the discovery of the knife at the instance of the accused in accordance with Section 27 of the Evidence Act is proved.

10. In this connection, considering the serological report of the FSL exh. 84, it transpires that the blood group of deceased was "B". During the course of analysis, blood stains were found on the knife by the FSL and as per the serological report, the blood stains found on the knife were of group "B". Thus, the serological report further supports the case of the prosecution that the knife which was discovered by the accused vide panchnama exh. 82 was used by him while causing injury to the deceased.

11. In the impugned judgment the Ld. Trial Judge elaborately discussed the evidence adduced by the prosecution and ultimately came to the conclusion that though the prosecution failed to establish its charge against the accused for the commission of offence of murder punishable u/s 302 of the IPC, the prosecution successfully proved that the accused has committed the offence of grievous hurt punishable u/s 326 of the IPC.

12. It is important to note that the prosecution did not challenge the acquittal of the appellant _ accused for the offence of murder punishable u/s 302 of the IPC. The State did not prefer any appeal u/s 378 of the Cr. P.C challenging the acquittal of the accused for the offence of murder. The State preferred appeal u/s 377 of the Cr. P.C for enhancement of sentence awarded by the Ld. Trial Judge for the offence punishable u/s 326 of the IPC. Therefore, the fact remains that the State did not challenge the acquittal of the accused for the offence of murder punishable u/s 302 of the IPC.

13. So far as the Criminal Appeal No. 1582 of 2006 preferred by the State u/s 377 of the Cr. P.C for the enhancement of sentence is concerned, considering the impugned judgment delivered by the Ld. Trial Judge, it transpires that the Ld. Trial Judge awarded the sentence of RI of 5 years and fine of Rs. 3,000/- to the accused for the offence punishable u/s 326 of the IPC. While fixing the quantum of the sentence, the Ld. Trial Judge observed that the impugned judgment was delivered on 18/4/2006, whereas the offence had taken place much earlier in the year 1995. He also observed that the accused was very young. In that background Ld. Trial Judge exercised his discretion in fixing the quantum of punishment. Considering the facts and circumstances of the case, we do not find that the discretion exercised by the Ld. Trial Judge can be said to be arbitrary exercise of his power. Further it cannot be said that the quantum of punishment fixed by the Ld. Trial Judge can be said to be unduly lenient causing miscarriage of justice. Under such circumstances, we are of the considered opinion that while

fixing the quantum of punishment the Ld. Trial Judge did not commit any illegality or irregularity.

14. For the foregoing reasons, the Criminal Appeal No. 1141 of 2006 preferred by the appellant "accused deserves to be dismissed. The order of conviction and sentence recorded by the Ld. Trial Judge deserves to be confirmed. In the result, Criminal Appeal No. 1582 of 2006 preferred by the State of Gujarat u/s 377 of the Cr.P.C for the enhancement of the sentence also deserves to be dismissed.

Both these appeals stand dismissed.