
(2015) 03 GUJ CK 0066
In the Gujarat High Court
Case No : Criminal Appeal No. 924 of 2007

Pratapbhai Gandabhai	Vs	APPELLANT
State of Gujarat		RESPONDENT

Date of Decision : 30-03-2015

Acts Referred:

Penal Code, 1860 (IPC) — Section 135(1), 147, 148, 149, 299

Citation : (2015) 03 GUJ CK 0066

Hon'ble Judges : V.M. Pancholi, J.; Akil Abdul Hamid Kureshi, J.

Bench : Division Bench

Advocate : A.D. Shah, for the Appellant; Jirga Jhaveri, APP, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Akil Abdul Hamid Kureshi, J.—This appeal is filed by the original accused No. 2 in Sessions Case No. 114 of 1995. He alongwith eight other accused were charged with offences punishable under Sections 147, 148, 149, 324, 307 and 302 of IPC and Section 135(1) of the Bombay Police Act. Accused No. 1 expired during the trial. All, except accused No. 2, were acquitted by the learned Additional Sessions Judge, Ahmedabad (Rural) by judgment dated 27.04.2007. Charge of forming unlawful assembly was not believed. Accused No. 2 was, however, convicted for offences punishable under Sections 302 and 307 of IPC. For offence under Section 302, he was sentenced to life imprisonment and awarded fine of Rs. 1,000/-. For offence under Section 307, he was sentenced rigorous imprisonment of seven years and ordered to pay fine of Rs. 1,000/-. Both sentences were made concurrent.

2. Briefly stated the prosecution version was that, the original accused belonged to Koli Patel community. The complainant and the eyewitnesses as well as the deceased belonged to Bharwad community. Both were residents of village Bhamsara, Tal. Dholka Dist. Ahmedabad. At about 10.30 p.m. on 15.05.1995, there was quarrel going on near the house of one Karsanbhai, a koli patel. The

complainant and other bharwads who were either present or were in the nearby area rushed there. Soon, accused No. 2 Pratap Gandabhai fetched his licensed double barrel 12 bore gun and fired from close range of about 10 feet towards Arjan Kamabhai and other bharwads present there. The pellets hit Arjan Kamabhai and also caused injuries to Dahyabhai Ogadbhai P.W. 1 Exh. 72. He fired yet again but apparently, the second pellet did not cause any injuries. Arjan Kamabhai shortly died on the spot. There were cross cases since there was counter complaint of assault and injuries caused by the complainant side also. All the accused were, however, in such case, acquitted.

3. We may briefly summarize the evidence on record. Dr. Ramanbhai Raijibhai Bharwad, P.W. 11 Exh. 112 was the Medical Officer at Bavla Community Health Center. He had carried out the postmortem of deceased Arjan Kamabhai on 16.05.1991. In the postmortem note Exh. 114, he had recorded following external ante mortem injuries:

"1. Rounded hole about 1.5 cm radius is situated at splenic area penetrating 9th 10th rib just above mid axillary line.

2. Multiple pellets wounds are surrounding the above wound and causing impression of black tattoo marks."

4. The internal examination revealed that the stomach was penetrated by bullets just above mid axillary line. From the intestine, he recovered plastic cap ruptured by pellets. The liver and spleen were also ruptured by multiple pellets. According to him, the cause of death was due to severe hemorrhagic shock as a result of rupture of spleen, stomach and liver which led to sudden cardiac arrest as a result of bullet and multiple pellets injury. In his opinion, such injuries were caused by pellets of a bullet.

On the same day, he had also examined injured Dahyabhai Ogadbhai and gave his injury certificate Ex 116. In such certificate, he noted following injuries:

"1. Pellet injury on right lower chest. There is fracture of 9th rib clinically and swelling on medical side of ante axillary line.

2. Pellet injury on right hypochondrial region, small wound of tattoo mark about .5 cm x .5 cm x 1 cm in size."

The injured was treated as an indoor patient for 23 days. In his opinion, if the rib-bone had not come in the way, the pellets could have caused death. Such injuries could be caused by a bullet of the 12 bore gun which was shown to him.

In the cross-examination, he agreed that on the same day, he had also examined accused Pratap Gandabhai. Left eye of Pratap Gandabhai was red. He complained of pain on the left shoulder. He had given injury certificate Exh. 118 in this regard in which, he had recorded red left eye and tenderness on the left shoulder joint. He, however, denied that the patient desired to go to Civil Hospital for further treatment or apprehended that, due to the injury, he would lose his eye

sight.

5. P.W. 1, Exh. 72, Dahyabhai Ogadbhai was the eyewitness. He deposed that the incident happened at about 11 O'clock at night near the house of Karsanbhai. He had gone for his cattle to drink water. He met Arjan Kamabhai and Bhopabhai at "Hawado" [a common place where village cattle are brought for drinking water]. From there, he, his father, Arjan Kamabhai and his son Bhopabhai returned and reached near the village gate. Arjan Kamabhai suggested that they should go through the village. When they came near the house of Karsanbhai, they heard shouts from there. To find out from where the noises are coming, they came near the house of Karsanbhai. He saw that complainant Kamabhai Sendhabhai and all the accused were present. Kamabhai was holding back these accused. At that time, Pratap Gandabhai was carrying a double barrel gun. Upon seeing them, he fired at them, from which shot, he and Arjan Kamabhai received injuries. Arjan Kamabhai had a pellet injury in the stomach. He received injury just below the ribcage. He was admitted as an indoor patient for 20 days. He identified the muddammal gun as the murder weapon.

In the cross examination, he agreed that at 11.30 at night when he went to the spot, Arjan Kamabhai was also with him. He also agreed that there was a quarrel between the members of Koli Patel community. He denied that he and Arjan Kamabhai received injuries from the firing by Jayanti. He agreed that besides agriculture work, he was also doing cattle breeding. Regarding the time when he would take his cattle out, he stated that there is no fix time but may go in the morning as late as 11 O'clock and return in the evening by 5 O'clock.

6. Bhopabhai Arjanbhai Bharwad, P.W. 2 Exh. 83 was also an eyewitness. He also stated that the incident took place in the night of 15.5.1991 at about 11.30 to 12.00 near the house of Karsanbhai. He and his father Arjan Kamabhai had taken land on crop share basis. They were returning on foot from the land. Dahyabhai Ogadbhai met them, who had gone to the village pond with his cows for drinking water. They all were returning home. When they heard shouts for help from the direction of house Karsanbhai, they rushed to the house of Karsanbhai. They saw Karsanbhai's family had locked the front door and they were inside. His grand father Kamabhai Sendhabhai was warding off the accused who were carrying weapons. As soon as they reached, Pratap Gandabhai fired causing injuries to Dahyabhai Ogadbhai and his father. His father Arjan Kamabhai fell down. He was lifted and put outside the house of Karsanbhai.

In the cross-examination, he agreed that the incident took place nearly 14 years back when he was 10 years old. He agreed that Karsanbhai's persons were involved in the quarrel who belonged to the Koli Patel community. He denied that the quarrel started since with the daughter of Aagarsangbhai, Shanti (son of Karsanbhai) and Jatu had misbehaved. He agreed that when they reached the spot, Kamabhai Sendhabhai was already present. The firing took place from a distance of about 10 feet. He denied that they had beaten up Jorubhai, Gandabhai and others and he also denied that, in fact, Jayantibhai Karsanbhai

had fired which was the cause of injury to his father and Dahyabhai Ogadbhai. He denied that the pellet from Jayantibhai's shot pierced eye of Pratap Gandabhai.

7. Kalubhai Ramabhai P.W. 10 Exh. 105 was also an eyewitness. He also deposed that the incident took place on 15.05.1991 at about 11.30 p.m. He was at the pan shop of Jatubhai. When he heard shouts from house of Karsanbhai, he reached there. All the family members of Karsanbhai closed the front iron gate. They were inside the house. Kamabhai was present there. He was reasoning with the accused. Shortly, Arjanbhai Kamabhai, Dahyabhai Ogadbhai and Bhopabhai Arjanbhai also arrived there. As soon as they came, Pratap Gandabhai fired from his double barrel gun. Arjan Kamabhai and Dahyabhai Ogadbhai received injuries from such gun shot.

In the cross examination, the defense asked multiple questions to this witness regarding the location of two settlements namely that of the Koli Patel community and Bharwad community. It has come on record that the Koli Patel community was residing in the center of the village and the Bharwad community were residing in a settlement called nace slightly away from the center of the village.

8. P.W. 3 Kantibhai Radhabhai was the panch-witness of the panchnama of scene of offence. The panchnama was produced at Exh 89. From the site in a circumference of about 10 feet, 16 small pellets were recovered. Little away from there, five vads of cardboard and one damaged vad were recovered. Blood spots were noticed on the ground and on the otla of the house of Karsanbhai. Samples were taken from there.

9. Janaksinh Jaywantsinh Sarvaiya P.W. 13 Exh 160 had carried out the investigation. He had recovered the double barrel gun from the house of one of the accused Gandabhai Rudabhai alongwith one empty case of cartridge and three live cartridges. He had sent various articles such as pellets received from the spot, from the body of the deceased, the double barrel gun etc. for forensic analysis. He stated that cross cases were registered out of the same incident.

10. The forensic laboratory was asked for definite opinion whether firing had taken place from the recovered gun and whether the pellets from the body of the deceased matched with those recovered from the spot. In the report Exh 165 it was opined that, the two sets of cartridges were similar and could be shots from Shaktiman cartridges which was used in 12 bore shot gun. The wadas also could have been fired from same gun. The double barrel gun was found in perfectly working condition. Several bullets were exclusively test fired from both the barrels. Analysis further showed that firing had taken place from the both barrels prior to receipt in the laboratory.

11. The defense version largely was that there was a quarrel between two groups of Koli Patel community. Kasanbhai's son was involved in the eve teasing of a girl. He was also carrying a fire arm. The Bharvads had arrived at the site to help

Karsanbhai. Several people from the side of accused had also received injuries. In addition to taking a total denial so far as the appellant convict is concerned, it was also alternatively sought to be suggested that the convict also received a bullet injury in the left eye when Jayantibhai's son fired from his gun. The entire depositions of the cross case were brought on record in the present sessions trial. Heavy reliance was placed on the deposition of Dr. Saroj Shah P.W. 7 in the said case. She had treated Pratap Gandabhai in the Civil Hospital. The record showed that he was admitted on 25.05.1991 when he come with the certificate from the hospital at Bavla of the bullet injury in the left eye. He was, later on, admitted in November 1991 and surgery was carried out on 26.11.1991. The pellet could not be removed because it was deposited behind the eye.

12. This, in the nutshell, is the evidence on record. On the basis of such evidence, learned advocate Mr. A.D. Shah for the appellant-convict submitted that the case against the appellant was not proved beyond reasonable doubt. His involvement was not established. The presence of witnesses was hugely doubtful. Their depositions were full of contradictions and improvements. Alternatively, it was contended that in any case, the accused himself had received injury from a gun shot. Even if it is believed that he fired from his licensed gun; in facts of the case, he would be entitled to benefit of Exception 4 to Section 300 of IPC which would take his case out of the definition of murder and fall within the purview of culpable homicide not amounting to murder.

13. Learned counsel relied on the judgment in case of Prakash Chand v. State of Himachal Pradesh reported in AIR 2004 Supreme Court 4496(1).

14. On the other hand, learned APP Ms. Jirga Jhaveri opposed the appeal contending that there were, as many as, three eyewitnesses who consistently stated that the accused fired from the close range causing fatal injuries to one person and serious injuries to another. Such ocular evidence was duly supported by the medical as well as the forensic evidence. This was not a case of sudden fight. Exception 4 to Section 300 of IPC would have no application.

15. Having heard learned counsel for the parties and having perused the documents on record, few things emerged clearly from the evidence. The incident happened late at night at about 11.00 on 15.01.1991 near the house of Karsanbhai. House of the convict Pratap Gandabhai is right opposite to that of Karsanbhai. They both belonged to Koli Patel community. The complainant and other prime eyewitnesses all belonged to Bharwad community. Their houses were at a fair distance away from this locality since they lived in their nace in a settlement away from the village center.

16. The fact, that Pratap Gandabhai fired from his gun causing fatal injuries to Arjan Kamabhai and serious injuries to eyewitness Dahyabhai Ogadbhai is clearly established on the record. This version has come consistently in three eyewitnesses' account viz. Dahyabhai Ogadbhai, P.W. 1, Bhopabhai Arjanbhai Bharwad, P.W. 2 and Kalubhai Ramabhai, P.W. 10. All these persons, upon

hearing the shouts from the direction of the house of Karsanbhai rushed there to see some kind of quarrel going on. According to them, one of the members of the Bharwad community viz. Kamabhai was already present and he was trying to ward off all the accused from attacking Karsanbhai's family. Karsanbhai and his family had locked themselves inside their house closing the front iron gate. Accused Pratap Gandabhai was carrying a double barrel gun. As soon as these people reached the spot, he fired from his gun once from a close range of about 10 feet. Since the cartridge carried several pellets, few of them hit deceased Arjanbhai Kamabhai in his stomach region. Few pellets hit P.W. 1 Dahyabhai Ogadbhai. Apparently, he fired again. This time around, causing no further injuries.

17. The eyewitnesses' accounts have been duly corroborated by the medical and forensic evidence. We may recall Dr. Ramanbhai Raijibhai Bharwad P.W. 11 had carried out the postmortem of deceased Arjanbhai Kamabhai on 16.05.1991 and also had treated injured Dahyabhai Ogadbhai on the same day at the Community Health Center, Bavla where he was the Medical Officer. The PM note recorded various injuries on the stomach region of the deceased showing spleen and liver rupture. Several pellets were recovered from the body. According to him, the cause of death was due to severe hemorrhage and shock resulting into the injuries such as rupture of spleen, stomach and liver which lead to sudden cardiac respiratory arrest. In his opinion, the injuries were consistent with double barrel gun shot. Similarly injuries to injured eye-witness Dahyabhai Ogadbhai were caused by double barrel gun shot.

18. The forensic analysis also supported the prosecution case. As noted, the recovered gun was in perfectly working condition. From both barrels several shots were successfully fired. The opinion was that both barrels were fired from the gun before the gun was brought to the laboratory. The pellets recovered from the place of the incident were similar to these recovered from the body of the Arjanbhai Kamabhai.

19. Thus, there was perfect match not only with the injuries, but also with the fire arm allegedly used in the commission of offence. The fact, that the entry wound carried scorching marks would demonstrate that the firing could have taken place from a fairly close range. The accused was known to all the witnesses. Both sides were residing in village since long. Even late at night, therefore, the identification of the accused by the witnesses should present no problem.

20. We may now examine the alternative suggestion of the defense. Admittedly, Dr. Raamanbhai Raijibhai Bharwad P.W. 11 had also treated accused Pratap Gandabhai on the same day. His left eye was red and had pain and tenderness on his left shoulder. Even the prosecution witness agreed that some quarrel had taken place between two groups of Koli Patel community. Though they denied that the cause of the quarrel was the eve teasing of a girl by son of Karsanbhai, they did admit that it was a quarrel between the two groups of Koli Patel

community. The presence of the deceased and other members of Bharwad community at the said place raises several questions. Their theory that one of them had gone for the cows to drink water at the tank and was returning and the other two were returning from the land they had taken for cultivation on crop share, seems highly doubtful. There was no apparent reason why the cows should have been taken for water so late at night. Normally, the village life comes to a halt once the sun sets and darkness spreads. Since unlike urban areas, there is no electrification or street lights at least in the outskirts of the village and in small settlements. There was no explanation why the other witnesses had gone to their field and were returning at 11.00 p.m. Unless there was specific purpose, no normal work takes place in agriculture field so late at night. One of the witnesses also suggested that they decided to go through the village clearly indicating that another may be shorter route, without entering the main village residences, was available. This is not to suggest that their presence is doubted. This is to suggest that the reason for the presence may not be a mere coincidence or innocuous as the witnesses suggested before the Court.

21. In this background, we may further notice that there were cross cases filed by both sides complaining of injuries of various seriousness. Dr. Saroj Shah, who was the P.W. 7 in the cross case, had treated accused Pratap Gandabhai for eye injury. He was admitted as indoor patient between 25.05.1991 and 05.06.1991 in Civil Hospital, Ahmedabad where he had come with the certificate from Bavla hospital of having received bullet injury. He was further treated in November 1991 when on 26.11.1991 a surgery was done in his left eye but the bullet could not be removed. The record suggests that he was in the police custody as an under trial prisoner between 16.05.1991 to 02.12.1991.

22. From the above evidence, the defense version that the accused himself also received a bullet injury cannot be ruled out. Dr. Saroj Shah's evidence would show that there was a pellet in his left eye which could not be removed because of complications. He was treated for such purpose first time on 25.05.1991. We have referred to his tenure as an under trial prisoner to demonstrate that such injury could not have been suffered by him after 16.05.1991 when he was in custody, police or judicial. We must recall that as an accused, the burden on him is to probabalize his defense and not establish beyond reasonable doubt, a burden which is cast on the prosecution.

23. With this background, we may refer to Exception 4 to Section 300 of IPC. As is well known, Section 299 of IPC defines what is culpable homicide. Section 300 provides the definition of murder and provides that, except in cases excepted culpable homicide would be murder if the act by which, death is caused is done as described in 4 Clauses of the said section. Exception 4 provides that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a certain quarrel and without the offenders having taken undue advantage or acted in a cruel or unusual manner.

24. In case of Prakash Chand v. State of Himachal Pradesh (supra) in context of

Exception 4 to Section 300, the supreme court observed as under:

"7..... There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300, IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage". These aspects have been highlighted in *Dhirajbhai Gorakhbhai Nayak Vs. State of Gujarat*, . When the factual scenario is considered in the legal principles indicated above, the inevitable conclusion is that Exception 4 to Section 300 IPC is clearly applicable." 25. The facts of the case thus present an immensely plausible scenario where there was a fight between the two sides of Koli Patel community. One led by Karsanbhai. The accused belonged to the other side. The deceased and the witnesses who rushed there belonged to Bharwad community. They would have sided with Koli Patel and others. Their presence at the scene of the incident was not as innocuous as was sought to be presented, merely passing by from nearby area at past 11 O'clock in the night. Accused Pratap Gandabhai also received injuries. One of them is bullet injury in the left eye.

26. This was thus a case of sudden fight and the act having been committed in the heat of passion upon a short sudden quarrel. There is nothing to suggest that the accused took any undue advantage or acted in a cruel or unusual manner. He would, therefore, be entitled to benefit of Exception 4 to Section 300 of IPC. His case, therefore, would fall within culpable homicide not amounting to murder punishable under Part I of Section 304 of IPC. His conviction under Section 302 is set aside and is substituted by conviction under Section 304 Part I. He is sentenced to rigorous imprisonment for Ten years. Consequently, conviction under Section 307 is converted to Section 308 of IPC. For offence under Section

308, he shall undergo rigorous imprisonment for Five years. Both sentences shall run concurrently. Directions for payment of fine are maintained. He shall have time to surrender up to 15.05.2015. Appeal is disposed of.