

(2015) 08 GUJ CK 0049

In the Gujarat High Court

Case No : Criminal Appeal (Against Conviction) No. 406 of 2010

Rabari Hargovanbhai Haribhai and Others

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 14-08-2015

Acts Referred:

Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 3
Penal Code, 1860 (IPC) — Section 302, 307, 308, 309

Citation : (2015) 08 GUJ CK 0049

Hon'ble Judges : S.G. Shah, J

Bench : Single Bench

Advocate : Sudhir Nanavati, Senior Counsel for V.D. Nanavati, for the Appellant; Siddharth H. Dave, Advocate and K.L. Pandya, APP, Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

S.G. Shah, J—Heard learned senior counsel Mr. Sudhir Nanavati for learned advocate Mrs. Vibhuti Nanavati for the appellants and learned APP Mr. K.L. Pandya for the respondent - State supported by learned advocate Mr. Sidharth H. Dave for the complainant.

2. All the appellants are convicted under Section 307 read with Section 34 and under Section 506(II) of the Indian Penal Code as under whereas they are acquitted under Sections 323, 324, 325 of the Indian Penal Code and Section 135 of the Bombay Police Act.

2.1 Out of total fine that may be deposited by the appellants, an amount of Rs. 40,000/- is ordered to be paid to the complainant for his treatment, if appeal is not filed. All the sentences are also ordered to be run concurrently and to extend the benefit of set off for the period of their custody during trial.

3. In support of prosecution case, 11 witnesses are examined and 28

documentary evidence are produced on record.

4. The sum and substance of the prosecution case as emerging from the charge at exhibit 15 is to the effect that on 07.09.2005 at about 4:00 a.m. all the accused have reached to the place of incident with dharia, axe, iron pipe and stick and started quarreling with the complainant stating that why he is filing complaint against them and during such quarrel, accused No. 1 has given a blow of dharia on the head of the complainant. However, complainant has tried to resist such blow by his hand and, therefore, he received serious injuries on fingers of right hand. It is further alleged that at that time, accused No. 2 has also beaten the complainant by his Axe, which resulted into fracture on both legs of the complainant, whereas accused No. 3 has given a blow by iron pipe on chest of the complainant, which resulted into fracture of ribs, whereas accused No. 4 has also beaten the complainant on his head and shoulder with the stick and thereby all the accused have jointly beaten the victim and thereby they have intended to kill the victim and, therefore, they have committed an offence under Section 307, 323, 324, 325 and 34 of the Indian Penal Code. It is also alleged that in addition to attack as disclosed herein above appellants have also threatened the complainant that they will kill him. Therefore, charge was also framed under Section 506(II) of the Indian Penal Code. Since, deadly weapons were used by the appellants they were also charged with the provisions of Section 135 of the Bombay Police Act. After trial, the learned additional Sessions Judge, Patan by impugned judgment and order dated 18.01.2010 in Sessions Case No. 12 of 2007 convicted the appellants as aforesaid.

5. Being aggrieved by such conviction appellants have filed this appeal. To ascertain the legality or otherwise of such impugned judgment, we have to appreciate the evidence on record which is discussed herein.

6. Before we discuss the evidence of witnesses, if we consider further statement under Section 313 of the Code of Criminal Procedure by the accused, it becomes clear that all the accused have in categorical terms disclosed before the Court that in fact the complainant and his supporters had beaten the wife of the appellant No. 1 and, therefore complaint was filed against them. Hence, to take revenge of such complaint, present complaint is filed and they are falsely implicated in such case.

7. So far as merits of the present issue is concerned, initially injuries of the complainant - victim is to be examined to ascertain that whether conviction under Section 307 can be sustained or whether it requires any interference.

8. To prove such injuries prosecution has examined doctor as PW No. 1 at exhibit 24. The witness doctor has examined the complainant - victim Amrutlal at 4:15 a.m. on the date of incident i.e. 07.09.2005. It is his say that he has examined the victim who was brought before him by Rameshbhai, relative of the victim and he has given a history that on the same day at about 4:00 a.m. and the accused had assaulted the victim with dharia, axe, pipe and stick. On examination, he

found six injuries on the body of the victim, which includes (1) diffuse tenderness and swelling over upper 2/3 region of left leg with bone deep CLW of 2.5 c.m., (2) diffuse tenderness and swelling over upper 1/3 region of right leg, (3) diffuse tenderness on right hand between ring finger and middle finger, (4) diffuse tenderness and swelling on middle finger of left hand (5) over right forearm, (6) pain and tenderness on lower chest.

8.1 Since victim has been brought to CHC hospital, Sidhpur considering nature of injuries, the witness - Doctor has referred the victim to the Patan hospital for surgical opinion and investigation. He opined that all the injuries are possible by hard and blunt substance and thereby he proves certificate of injuries issued by him at exhibit 25. It is his opinion that condition of the victim was critical and he has examined him only for 5 minutes and noticed that injuries were serious and there was possibility of shock because of heavy internal bleeding. He also deposed that injury Nos. 1 and 2 are possible by Axe being mudamal article No. 5 whereas injury Nos. 3 and 4 are possible by back side of dharia i.e. mudamal article No. 4 whereas injury Nos. 5 and 6 are possible by stick. The witness is cross - examined at length wherein he admits that injuries were sustained within 24 hrs. before his examination, as there was bleeding from one of the legs where he has taken stitches, whereas no stitches were required for injury No. 2. He also admitted that he has not recorded the measurement of injury Nos. 3 to 6. He admits that he could not confirm that there was fracture or not but admits that he has not given any treatment for fracture and that he has done dressing of all injuries except injury No. 1. He admits that victim has not come before him with police yadi and since it was a medico - legal case, he has informed police but there is no such endorsement in his case papers. Whereas so far as nature of injuries are concerned, it is his admission that it is possible in vehicular accident also. He also admits that during the tenure of 13 years of medical practice he came across with case of internal bleedings which resulted into death. However, he did not come across a case like injury No. 4 of the victim, which resulted into death. So by and large though witness has supported his examination of the victim and proves his injuries, he has to admit that such injuries are possible in vehicular accident also and that history of assault by the accused was not disclosed by the accused but by his relative. Therefore, conclusive evidence is only to the limited extent that on the date of incident victim has received such injuries. However, it does not prove that such injuries were inflicted only and only by the appellants.

9. PW No. 2 at exhibit 27 is Medical Officer of Patan General Hospital - Dr. A.A. Mansuri. He has disclosed his activities when victim has reached his hospital at about 7:00 a.m. on date of incident i.e. 07.09.2005 with his relatives. He has also narrated the same injuries and same story though history of injuries were disclosed to him by the relative of the victim namely Rameshbhai. He has examined the victim radiologically and found that fractures of both right and left tibia and fibula with fracture of middle and ring finger of right hand and fracture of proximal phalanx of index finger of left hand. There was fracture of right

radious also. Whereas Xray of chest was normal. Thereby there was no fracture of ribs. He disclosed details of xray print at exhibit 28. He has also referred the victim to the Civil Hospital, Ahmedabad at about 12:50 p.m. and thereby he simply proves the injury certificate issued by him which is at exhibit 30 and police yadi received by him at exhibit 29. Though PW No. 1, previous doctor has opined that injuries are possible by vehicular accident, now this doctor has denied to accept such suggestion during his cross - examination. But he confirms that he has not seen the details of injuries on his own though he has taken U-turn in next breath by saying that he can confirm that whether injuries are possible in vehicular accident or not only after examining Xray report and that all wounds were stitched wound and, therefore, he has not opened any wound to examine it. Now he admits that he has seen the Xrays and that such injuries are possible in a vehicular accident. He further admits that if body of vehicle involved is of iron sheet then such injuries are possible. He admits that he has treated the victim by examining his Blood Pressure and carried out necessary tests. He further admits that Blood Pressure of the victim was low for which he has to prescribe tablet/medicine and that injury No. 1 may result into death whereas other injuries are not capable of resulting into death. However, thereafter he has to admit that he has treated other patients of tibia and fibula, but he has never come across death from any of such injury. In next breath however, he has changed his version that he has come across, such case of Shihori village wherein patient Nathaji Thakore had died. However, he further admits that if timely treatment is given to such patient then such injuries are curable and that orthopedic surgeon has given treatment to the victim but he cannot confirm that what treatment was given though he was present at the time of giving treatment as well as at the time of physical and medical examination of the victim. Therefore sum and substance of deposition of this doctor is also similar to the previous doctor which does not confirm the guilt of the appellants though it proved the injures received by the victim.

10. The material witness is PW No. 3 at exhibit 31, being complainant and victim. It is his say that on the date of incident at about 4:00; a.m. he was going to answer the call of nature to nearby ukarda of his house, after calling names of young boys of the family Dinesh Amrat, Viram Jugabhai, Ramesh Amrat. However, at that time four people namely, Hargovan Hari, Babu Vela, Prabhat Hari, Amrat Vela had come near him and started quarreling with him saying that why false complaints were filed against them and that victim would be killed on that day. It is his say that thereupon appellant No. 1 has given a blow by dharia. However he has raised his right hand and, therefore, he received injuries by dharia on his right hand. He further deposed that Babu Vela has fractured his both legs by Axe whereas Prabhat Hari has beaten him on his chest with iron pipe whereas accused Amrut Vela has beaten on backside of the victim. Thereupon his son Viram, Dinesh and Ramesh had come at the place of incident and thereupon accused have given threat to the victim that they will kill him. Thereupon he narrates the history of commuting from the place of incident to the

Sidhpur and Patan and then to Ahmedabad where he was treated as an indoor patient where he had to stay for 3 months during which, he underwent operative treatment for 5 times one on one leg itself. It is further stated that there are in all 11 fractures on his body. The witness also identifies the accused before the Court so also mudamal weapons being dharia, axe, pipe and stick and confirmed that which accused was carrying which weapons. He also identifies other mudamal articles and proves his complaint produced at mark 11/4. Since he is victim and eyewitness, he was cross - examined at length. However though witness had admitted several factual details which otherwise did not change the nature and manner of incident and its result as put forward by the prosecution, it simply proves that investigating agency has not recorded the statement of any independent witness and, therefore, even prosecution could not examine any such witness to prove the guilt of the accused beyond reasonable doubt. However, the fact remains that the lengthy cross - examination on the contrary confirms the incident as alleged in the FIR and charge sheet so also the presence of the accused at the relevant point of time else if there is a simple defence of non-involvement, accused would not have had any minute details about the incident. Thereby when accused have tried to prove, during cross-examination of the victim, the sequence of injury and result of different injuries as not trustworthy, they fail to realize that thereby practically they are hiding the fact about the nature and manner of the incident. Accused were able to create a doubt about attitude of the victim and his witnesses who are none but his family members only when none of the neighbours were examined. However it is equally true that when incident had taken place at about 4:00 a.m., there is less chance of presence and availability of any neighbour at early morning. Therefore only on such ground, it cannot be said that appellant-accused are innocent. Rest of the cross-examination regarding minute details of history after the incident regarding transfer to Ahmedabad and presence of other relatives are not material evidence and, therefore, its discussion is avoided.

11. PW No. 4 at exhibit 21 is a person who was working in nearby place with Dinesh, Ramesh and managing their buffaloes and in between complainant-victim has conveyed him that he is going to answer the call of nature but within two minutes he heard the shouts and thereupon he addressed to the victim with Dinesh and Ramesh and he saw appellants beating the victim and when they reached at the place, victim was requesting them not to beat him and appellant were asking him to withdraw the complaint and not to file false complaints else they will kill him. Thereafter witness has not only supported the story of the complainant but narrated the same story in detail and therefore defence lawyer has taken objections that he should not be allowed to ask suggestive question. However, such objection was over-ruled and ultimately witness has deposed every fact in detail that who has injured the victim with which weapon and what happened to all of them. Witness has also narrated the exact blow by each of the accused and confirmed that when they reached the place of incident, the accused had ran away after beating the victim and thereupon they took the victim initially

to Sidhpur dispensary and from there to Patan hospital. Witness also confirms that police has inquired and interrogated him and recorded his statement. He also identifies the mudamal weapons and reconfirms the possession of each weapon by particular accused. However, the fact remains that though this witness is eyewitness, he is relative of the victim and residing in his house but in any case he has admitted that previously a complaint was lodged and before that, son of the victim was also beaten by the accused, for which complaint was filed. During cross-examination he admits that victim is his maternal uncle and he is residing with him since there is no-one to carry out certain work. He also explained the details about properties of the victim. However he also confirms that for doing work of the victim, his salary was not fixed explaining that since there is nobody at the place of victim to take care of his cattle, he was residing there and since victim is his maternal uncle, there is no question of demanding salary from him. He further stated that he is not aware about dispute between appellants and victim but he came to know about quarrel between accused and Ramesh and thereupon he came to know that accused has a dispute with the victim. He was also further cross-examined so far as his daily routine work is concerned. However, there is nothing in benefit of the accused in his cross-examination. He was also cross-examined to verify that why they have not opposed the accused and why they have also not carried weapons to safe guard the victim. However, the witness confirms that they did not think about carrying weapons with them and they have requested the accused not to beat his uncle and that when they are holding deadly weapons, they remained away from them and they have not even shouted and they have not even interfered so as to save his uncle. It is argued with such cross examination that this attitude shows that witness is a chance witness and there was no person at the relevant time. However, it is difficult to hold so for several reasons. Basic reason is quite obvious that when there is such disturbance and attack with deadly weapon, at given point of time some people may get afraid and may not be able to resist and, therefore, it cannot be said that he has never witnessed such incident. So also the fact that accused has not beaten any of the witness, is not a reason to believe that eyewitnesses are chance witnesses or that they have not witnessed the incident at all. He was further cross-examined about story from the time point of incident till hospitalization of the victim but it is not material at present. In any case, there is no evidence in rebuttal.

12. PW No. 5 at exhibit 34 is panch witness of panchnama of place of incident. He supports the prosecution case and proves the panchnama at exhibit 35 that he was accused and could not get any evidence for his acquittal.

13. PW No. 6 at exhibit 36 is panch witness of recovery panchnama of the clothes of the victim, PW No. 7 at exhibit 47 is panch witness to recovery panchnama of weapons where it was kept or hidden by the accused. PW No. 8 at exhibit 47 is panch witness regarding physical condition of the victim. All these panch witnesses are not only supporting the prosecution story but they practically deposed as per panchnama which was drawn in their presence and

thereby they prove such panchnama at exhibits 38, 42 to 46, 48 and 49 which includes identification and other relevant documents also. Though all these panch witnesses are cross -examined at length, they could not rebut his evidence and could not prove that these witnesses are not knowing anything or they have never executed any such panchnama which are prove by them. Therefore, all such activities during investigation is properly proved on record by cogent, reliable and independent witness and evidence.

14. PW No. 9 at exhibit 50 is ASI of Kakoshi Police Station who has registered the FIR as Kakoshi Police Station I - C.R. - 44/2205 and proves the report of PSO and identifies the panchnama of exhibit 35 and ultimately he has handed over further investigation to PSI Mr. Sindhi. During cross-examination there is delay in disclosing the incident so also an attempt was made to show that there are contradictions in topography of the place of incident. However, appellant could not prove anything in his favour or rebut the evidence of such witness being police official.

15. Similar is the situation with PW No. 11 at exhibit 59 PSI and Investigating Mr. N.M. Sindhi who has completed further investigation and filed charge-sheet. Therefore, he has knowledge and history of investigation and proves relevant documents including FSL report and other communication at exhibit 60 to 67. During his short cross-examination only fact confirmed on record is regarding previous cases between two groups. Otherwise being police officer he has completely narrated the story of prosecution and therefore accused could not rebut any evidence in any manner whatsoever.

16. Whereas PW No. 10 at exhibit 54 is Orthopedic Surgeon of V.S. Hospital who has treated the victim. He also therefore narrated the details of injuries and proves treatment papers at exhibit 55 to 58. However, the most important evidence is admission by such witness that none of the injuries was capable of resulting into death and there were multiple fractures on both hands and legs. He was cross-examined, wherein he also admits that injuries recorded by him are possible in a vehicular accident also. He also admits that some of the injuries except fracture are simple in nature.

17. If we summarise the submissions by learned senior counsel Mr. Nanvati, it becomes clear and obvious that though there is no iota of evidence of entire prosecution, it is certain that there are contradictions between story of complainant and witnesses, it is also clear that injuries are not serious to cause death, the evidence also confirms that when incident has taken place at 4:00 a.m. and when there is not light, identification of accused by eyewitness who are only relatives and when there is no independent witness from houses of Suthar and Raval, there is reason to extend benefit of doubt.

18. As against that learned APP is relying upon deposition of complainant and eyewitnesses supporting panch witness for recovery panchnama, FSL report and evidence of medical officers submitting that there is corroboration of each

evidence and that thereby it is well prepared and planned attack to kill the victim.

19. Learned advocate Mr. Dave appearing for the complainant has also supported and added the submissions by learned APP and further submitted that injury was on hand but actual assault was on head. However, medical evidence confirms that there is no imputation. Therefore though there is corroboration of entire evidence, there is substance in the submissions by learned senior counsel Mr. Nanavati and overall evidence certainly confirms that it is a pre-planned attack to kill the victim for which mens rea and motive are must though it can be said that previous complaints are motive, in absence of any detail of those complaints some admission here and there may not prove motive to kill.

20. Learned advocate for the appellants are relying upon following decisions;

(1) Lallan Rai and Others Vs. State of Bihar, AIR 2003 SC 333 : (2003) 95 CLT 553 : (2003) CriLJ 465 : (2002) 9 JT 334 : (2003) 1 SCC 268 , wherein the Honourable Supreme Court has while dealing with the evidence of eyewitnesses with reference to provisions of Section 302, 307 and 326 of the Indian Penal Code held that even in case of murder causing of grievous hurt which is established by injury report will attract the conviction under Section 307 and 326 read with Section 34 instead of Section 307, when infliction of injury by accused persons proves that victim was died because of injuries caused by some other persons. In such reported case though Honourable Supreme Court has convicted the accused under Section 302, conviction of another accused is converted from Section 307 to 326 considering the actual role and nature of injuries resulted by his act. And thereby even imprisonment was reduced to only two years from 5 years without fine. Situation before us is almost similar. Therefore, I rely upon the judgment to modify the sentence.

(2) State of Karnataka Vs. Yeda and Others, (2008) CriLJ 4726 , wherein division bench of Karnataka High Court has converted the conviction from Section 307 to Section 326 though accused were armed with deadly weapons but their assault has resulted into injuries on non vital part of the body in this case injuries by accused before it, considering the nature of injuries inflicted by them.

21. As against that, learned APP is relying upon following citations;

(1) R. Prakash Vs. State of Karnataka, AIR 2004 SC 1812 : (2004) CriLJ 1391 : (2004) 2 JT 348 : (2004) 2 SCALE 405 : (2004) 9 SCC 27 : (2004) 2 SCR 281 : (2004) AIRSCW 4173 : (2004) AIRSCW 815 : (2004) 2 Supreme 78 : (2004) 4 Supreme 503 , wherein the Honourable Supreme Court has while dealing with Section 3 of the Evidence Act and Section 307 of the Indian Penal Code held that if infliction of bodily injury is capable of causing death, intention and knowledge is not always necessary and therefore even if one injury is on vital part, then irrespective of other injuries on non vital part, conviction under Section 307 is proper. However, in our case as already discussed herein above there is no injury on vital part and there is specific opinion by doctors that none of the injuries are serious, there is certainly difference between grievous hurt and serious injury

capable of causing death. Therefore, all grievous hurts may not be serious so as to result into death and therefore only because injury is grievous it cannot be said that it would cause death and thereby conviction must be under Section 307. If we peruse the provision of Indian Penal Code, Section 320 defines grievous hurt while giving eighth definition; it starts with the sentence; kind of hurt is only designated as "grievous" wherein example No. 8 confirms that; "Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits".

(2) M/s. Bharat Coking Coal Ltd. vs. New Govindpur Coal Co. Pvt. Ltd. reported AIR 2008 SC 2967, wherein Honourable Supreme Court has held that when injuries are serious even if it is with lathi, acquittal on the ground that injuries of such nature leads to death is improper. Therefore, conviction is otherwise confirmed but for awarding sentence, nature of injuries are required to be considered when it is not on a vital part.

(3) State of Madhya Pradesh Vs. Saleem @ Chamaru and Another, AIR 2005 SC 3996 : (2005) CriLJ 3435 : (2005) 6 JT 293 : (2005) 5 SCC 554 : (2005) 2 SCR 562 Supp : (2005) AIRSCW 3511 : (2005) 4 Supreme 733 wherein the Honourable Supreme Court has held that when offences are of serious nature, reduction of sentence to that already undergone on ground that accused persons are belonging to lower income group and therefore matter was remanded back. However, in present case, there is no evidence regarding intention and when injuries are not on vital part, only because Honourable Supreme Court has confirmed the sentence in given case, in every case same principle cannot be applied without appreciating evidence on record and without considering overall facts and circumstances and evidence on record for confirming imprisonment of a particular accused.

(4) Criminal Appeal No. 1381 of 2008 decided on 25.11.2014, wherein conviction under Section 307 was confirmed. However, it is mainly because of the fact that accused in that case has given knife blow on stomach of both the victim and if they were not given proper treatment at the relevant time, probably they would have died due to such injuries. When such judgment is referred by learned APP, in this judgment conviction of two accused was confirmed whereas other two accused were released because they have not played vital role.

(5) Criminal Appeal No. 216 of 2003 decided on 26.03.2015, wherein also the victim has received serious injuries which was capable of resulting into death of the victim and, therefore, only because this Court has confirmed conviction under Section 307 in some other case, based upon facts, circumstance and evidence and more particularly injuries in that case, it cannot be said that in all such cases, conviction under Section 307 is must.

22. Therefore, overall evidence confirms that though there is corroborating evidence regarding commission of offence as alleged in the charge sheet and that there are fractures so far as nature of injuries are concerned, that it is by

deadly weapons, and that victim was hospitalized and as many as 11 operations are carry out, none of the injuries are on vital part of the body so as to cause death of a person. It is found from the record that all other injuries are though grievous; they are not serious in nature so as to result into death of a person. It is also found from record that except family members, there are no independent witnesses, though it can be argued that since incident has taken place in early morning at 4:00 a.m. and since it is village place and if four persons including complainant and three witnesses are working for their cattle in early morning, there may be some other such families who must have noticed or at least heard the shouts of the victim. Moreover, the injuries are as stated above though grievous but not serious and therefore though appellants are not entitled to benefit of doubt for total acquittal it seems that, considering the nature of injuries and medical evidence on record, this is a fit case where benefit of doubt is to be extended while confirming conviction and awarding sentence which should be rational related to the nature of injuries and not related to the allegation alone. For the purpose if we peruse the provisions of different sections under which appellants are charged, it becomes clear that when injury is grievous only in nature and not serious so as to cause death but only because it is by dangerous weapon, the maximum sentence under such sections are unwarranted. It cannot be ignored that all the doctors have categorically stated that such injuries are also possible in vehicular accident.

22.1 Thereby though impugned order of conviction is confirmed the appeal needs to be partly allowed by modifying the conviction considering the overall evidence on record one from 10 years simple imprisonment to the period already undergone. However the order of fine shall remain as it is. Thereby appellants have to deposit fine as per impugned judgment and it is to be paid to the victim for his treatment. Thereby appeal is allowed in aforesaid terms. R & P be sent back to the concerned trial Court forthwith.