

(2016) 01 GUJ CK 0083
In the Gujarat High Court

Case No : Criminal Appeal Nos. 1907 and 2146 of 2005

Rabari Rajabhai Ranabhai

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 12-01-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, Section 357
Penal Code, 1860 (IPC) — Section 114, Section 300, Section 302, Section 304, Section 325, Section 504, Section 506(2)

Citation : (2016) 01 GUJ CK 0083

Hon'ble Judges : K.S. Jhaveri and R.P. Dholaria, JJ.

Bench : Division Bench

Advocate : Yogesh Lakhani, Senior Advocate, Raxit Dholakia and Kedar G. Dave, Advocates, for the Appellant; L.R. Poojari, Addl. Public Prosecutor, for the Respondent

Final Decision : Partly Allowed

Judgement

K.S. Jhaveri, J.—1. By way of these appeals, original accused No. 1, 3 & 4 have challenged the judgement and order dated 18.08.2005 passed by the learned Additional Sessions Judge, Fast Track Court No. 1, Patan in Sessions Case No. 30 of 2004 whereby the trial court has convicted and sentenced the accused as under. The sentences were ordered to run concurrently and the accused were given benefit of set off.

1.1 Original accused No. 4 - Rabari Ranabhai Valabhai expired on 27.09.2008 and therefore Criminal Appeal No. 2146 of 2005 stands disposed of as having been abated qua original accused No. 4 - Rabari Ranabhai Valabhai. We have therefore heard Criminal Appeal No. 2146 of 2005 only qua original accused No. 1.

2. It is the case of the prosecution that on 13.10.2003, at around 05.00 pm when the husband of the complainant went to the place where the construction work of toilet in School was being done, the accused persons started threatening

him and told him that he was the person who was instigating the Sarpanch. Thereafter, on 14.10.2003, when the complainant, her husband, one Ramilaben and one Jamabhai Naranbhai were in their farm and at around 05.00 pm while they had completed milking buffaloes, the accused person came there. It is the case of the prosecution that accused persons came there and assaulted the complainant and her husband. Accused No. 1 was armed with stick and he gave a stick blow on the deceased, accused No. 2 armed with stick gave stick blow on the stomach of the deceased as well as Jamabhai, accused No. 3 gave being armed with a dhariya gave dhariya blow to Ramilaben and accused No. 4 was armed with axe and he gave axe blow to the complainant and deceased on his head. The complainant therefore started shouting and as people gathered there the accused persons ran away. A complaint was therefore registered by the complainant.

2.1 The accused were apprehended and after investigation charge sheet was submitted. The case was committed to the Court of Sessions. The trial was initiated against the accused and during the course of trial the prosecution examined around 23 witnesses whose evidences were read before us by learned advocates for both the sides. The prosecution also around 46 certain documents which have been perused by us during the course of hearing.

2.2 At the end of the trial and after recording the statement of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Additional Sessions Judge convicted the accused as mentioned aforesaid. Being aggrieved by and dissatisfied with the aforesaid judgement and order passed by the Sessions Court the accused have preferred the present appeals.

3. Mr. Yogesh Lakhani, learned Senior Advocate appearing for the accused in both the appeals is not in a position to dispute the genesis of the incident considering the fact that this is a case of cross complaint where both the sides were involved. Mr. Lakhani however submitted that the incident happened in 2003 and almost 12 years have passed and therefore considering the fact that considerable period of time has lapsed, this Court may take a considerate view in the matter. He submitted that the accused are remorseful and are ready and willing to pay appropriate amount as compensation to the victim and his family members. He has submitted that even if the prosecution case is accepted in toto, the blow inflicted upon by accused No. 1 on the deceased is single and therefore the trial court ought to have applied section 304 part II of the Indian Penal Code. He has submitted that even on that ground the judgement of the trial court requires to be altered.

4. Mr. LR Poojari, learned APP appearing for the respondent State has supported the order of the trial court and has submitted that the trial court has gone into the evidence in detail and has come to the conclusion that the accused are guilty of the offence so convicted of. He also submitted that the sentence imposed upon the accused is just and proper and does not deserve to be reduced or quashed.

5. Having considered the materials on record, we are of the view that there is no dispute that the accused were involved in the incident. It is required to be noted that Dr. Kanubhai Mohanlal Patni Ex. 39, who was the person who had treated the deceased at Patan General Hospital has stated that there was only one injury sustained by the deceased. He has stated that it was an injury on the outer side of the head and of a simple nature. He has further stated that the injury sustained by the deceased could also have been caused by a sharp edged stone.

5.1 In the instant case it is required to be noted that the complainant has not mentioned the previous day's incident in the FIR. The complainant herself has not made any whisper about the said aspect. She does not even state that she was aware of any such incident. Moreover, the prosecution has not brought any evidence about the incident which is alleged to have taken place the previous day. Moreover, the Sarpanch has not been examined. Therefore, it cannot be said that the incident was premeditated. In the present case also, it appears that this was a case of cross fight where there was an altercation followed by assaults on the deceased as well as other injured witnesses. When tempers ran high, in the heat of passion, original accused No. 1 assaulted the deceased, but without premeditation as a result of cross fights. Keeping the aforesaid angle in view we are of the opinion to the effect that the offence falls within Exception 4 of Section 300 and thus the trial court ought to have convicted original accused No. 1 under Section 304 part II of Indian Penal Code.

6. So far as original accused No. 3 is concerned, on the peculiar facts and circumstances of this case, we are of the considered opinion that the recent decision of the Apex Court in the case of Ankush Shivaji Gaikwad v. State of Maharashtra, reported in , 2013(6) Scale 778 will squarely apply to the facts of the present case, inasmuch as the incident appears to have happened in a spur of moment and considering the role of the accused No. 3 and the passage of 12 years, we have felt it appropriate that when the Apex Court has shown concern that section 357 of Cr.P.C. be implemented in its proper perspective this is a fit case where we feel that the same requires to be adopted.

7. Considering the facts and circumstances of the case coupled with the ocular as well as the documentary evidence and in light of the reasons stated hereinabove, we think it fit to pass the following order:

8. In the result, the impugned judgment and order of conviction and sentence dated 18.08.2005 passed by the learned Additional Sessions Judge, Fast Track Court No. 1, Patan in Sessions Case No. 30 of 2004 is modified as under:

"(i) The conviction imposed upon the accused No. 1 under Section 325 of Indian Penal Code is confirmed. The acquittal of original accused No. 1 under section 504, 506(2) r/w 114 of Indian Penal Code is also confirmed.

(ii) The conviction of original accused No. 1 under Section 302 of Indian Penal Code is altered to one under Section 304 (Part II) of Indian Penal Code. Original accused No. 1 is directed to undergo R.I. for five years under Section 304 (Part

II) of Indian Penal Code. The amount of fine is maintained.

(iii) So far as original accused No. 3 is concerned, the conviction and sentence under Section 325 of Indian Penal Code is confirmed. The acquittal of original accused No. 3 under Sections 504, 506(2) r/w 114 of Indian Penal Code.

(iv) However, in the event the accused No. 3 pays an amount of Rs. 1,00,000/- (1 Lakh) by way of compensation to the complainant under sec. 357 of Cr.P.C. over and above the amount of fine imposed by the trial court, he shall not be required to undergo the remaining part of sentence and the sentence he has already undergone shall be considered sufficient to meet the ends of justice.

(v) The amount of compensation/fine shall be paid by accused No. 3 within a period of three months from today. If the accused No. 3 does not pay the amount as ordered hereinabove in time, the sentence awarded hereinabove shall stand revived and it shall be open to the concerned authorities to take accused into custody and he shall be liable to serve the remaining part of the sentence.

(vi) Bail bond shall stand continued till the accused No. 3 pay the amount of fine and compensation or till the expiry of three months" period whichever is earlier and the same shall stand cancelled if the accused No. 3 has paid the amount of fine and compensation.

(vii) Both the appeals are allowed to the aforesaid extent.

(viii) Accused No. 1 shall surrender within a period of ten weeks from today to serve the remaining period of sentence. The accused shall be given benefit of set off and remission in accordance with law. The sentence awarded by the court below stands altered accordingly. R & P to be sent back to the trial court forthwith."