
(2012) 03 GUJ CK 0125
In the Gujarat High Court

Case No : Criminal Appeal No. 650 of 2006 with Criminal Appeal No. 8 of 2007

Raijibhai Devabhai Parmar and Another	APPELLANT
Vs	
State of Gujarat	RESPONDENT

Date of Decision : 20-03-2012

Acts Referred:

Penal Code, 1860 (IPC) — Section 114, 302, 326

Citation : (2012) 03 GUJ CK 0125

Hon'ble Judges : N.V. Anjaria, J; A.L. Dave, J

Bench : Division Bench

Advocate : Pratik B Barot, for the Appellant; RC Kodekar, Assistant Public Prosecutor for Opponent : 1, for the Respondent

Judgement

Honourable Mr. Justice A.L. Dave

1. These two appeals arise out of the judgment and order rendered by Sessions Court, Nadiad in Sessions Case No. 89 of 2005 on 17/02/2006. The appellants in these two appeals were accused No. 1 and 2 before the trial Court and, they came to be convicted for the offence of murder of Raysangbhai Budhabhai punishable u/s 302 read with Section 114 of the Indian Penal Code and came to be sentenced to undergo imprisonment for life with a fine of Rs. 100/- each in default to undergo simple imprisonment for seven days. The facts of the case in brief are that as per the prosecution case, the deceased - Raysangbhai Budhabhai was proceeding by the house of Shanabhai Shankerbhai at Village Morad of Tal. Petlad, on the bicycle alongwith his son - Hashmukhbhai, who on the carrier on 12/11/2004 at about 10:00 a.m. At that time, he was intercepted by accused No. 1 - Raijibhai Devabhai Parmar and immediately Raijibhai Devabhai Parmar inflicted a Dhariya blow on head of the deceased. Thereafter, came accused No. 1 - Arvindbhai Raijibhai, who was also armed with Dhariya and inflicted a Dhariya blow on the leg of the deceased. A third assailant - Jagdish Raiji juvenile offender was also present. He was allegedly armed with a hockey and he also inflicted blow on the deceased.

1.1. This attack on the deceased in an open street caused some hubbub and therefore Shanabhai Shankerbhai came out of his house, who saw the incident. After the incident was over, minor Hasmukh went to his home and informed his grandmother-Dhuliben. Dhuliben, in turn, came to the place of incident and on finding that the deceased had died, informed the Police. The Police initially recorded an occurrence report and then FIR and investigated the matter.

1.2. Soon after the incident, Shanabhai Shankerbhai also rushed to the place of incident and informed his parents and then Shanabhai Shankerbhai went to his field.

1.3. On basis of the FIR registered by the Police, the Police started investigation, visited the place of incident, got the Inquest Panchnama and Panchnama of place of incident prepared, recorded statements of relevant witnesses and ultimately having found sufficient material to connect the accused with the offence, filed charge-sheet in the Court of learned JMFC, Petlad, who committed the case to the Court of Sessions against accused Nos. 1 and 2 viz., Rajibhai Devabhai Parmar and Arvindbhai Rajibhai Parmar and since third assailant - Jagdish Raji was juvenile, transferred his case to the Juvenile Justice Board for proper inquiry.

2. The Sessions Court on the case being committed, registered the same as Sessions Case No. 89 of 2005 and framed charge against the two accused at Exh. 3 for offences punishable u/s 302 read with Section 114 of the Indian Penal Code. The accused persons pleaded not guilty to the charge and came to be tried. The trial Court after considering the evidence led by the prosecution came to the conclusion that prosecution was successful in proving the charge levelled against the accused and recorded conviction and sentence as stated herein above and hence this appeal.

3. Heard learned Advocate Mr. Barot for the appellants and learned Additional Public Prosecutor Mr. Kodekar for the respondent.

4. Learned Advocate Mr. Barot submitted that the evidence of the two eye-witnesses does not inspire any confidence. The story is as if the accused persons were waiting for the deceased to be there, but there is no evidence that this was his usual time and place of being there. Mr. Barot submitted further that the conduct of the eye-witnesses is not natural. Witness-Shanabhai Shankerbhai, although notices murder, but after informing the parents of the deceased, goes to his field and his statement is recorded after six days. Similarly, statement of Hashmukhbhai - son of the deceased, who is an eye-witness, is recorded on the next day. Possibility of these two persons having been got up as eye-witness therefore cannot be ruled out. Mr. Barot submitted that accused No. 1 - Rajibhai has inflicted only one blow and, if the history of previous enmity, as projected by the prosecution, is accepted then intention to cause murder of the deceased cannot be attributed to A-1. So far as accused No. 2 is concerned, he has given only a single blow on the leg of the deceased and, therefore, neither of the appellants could have been convicted for the offence of murder. The trial Court

has committed an error in recording conviction.

4.1. Mr. Barot alternatively submitted that if the Court finds that conviction of A-1 is rightly recorded, conviction of A-2 needs to be altered, because, he is convicted only with the help of Section 114 of the Indian Penal Code, whereas, the role attributed to him is that of giving Dhariya blow on the leg of the deceased which is not a vital part of the body of deceased nor is there any evidence that the leg injury was responsible for death of the deceased. Mr. Barot submitted that the appeal may be allowed, conviction may be set aside and appellants be ordered to be set at liberty forthwith.

5. Learned Additional Public Prosecutor on the other hand has opposed these appeals.

5.1. He submitted that the presence of eye-witness - Shana Shanker is natural and he is an independent eye-witness. He also submitted that minor Hashmukhbhai is a natural witness, who was present at the place of incident as he was going with his father. The accused persons have attacked the deceased as if they were in consort and, therefore, the trial Court was justified in holding both the accused responsible for the murder of the deceased.

5.2. As regards the alternative submission made by learned Advocate for the appellant, learned APP submitted that act of the two accused cannot be treated as independent act. The attack is almost simultaneous and both the accused were armed with Dhariya and, therefore, the act on the part of accused No. 2 who had attacked only on the leg of the deceased, has to be considered as an act of deterring the deceased from escaping and thereby aiding and abetting accused No. 1. He submitted that judgment and order of the trial Court is well considered and may not be interfered.

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

7. What is found from the record is that the incident occurred in broad daylight on the populated public road. It also transpires from the evidence that people had gathered after the incident, but none, except the son of the deceased and Shanabhai Shankerbhai is examined. In our view, this should not weaken the prosecution case in any manner for the reason that presence of Hashmukhbhai, son of the victim is natural. Similarly, presence of Shanabhai is also natural because the incident had occurred in front of his house. Evidence of both these eye-witnesses flows naturally and if perused closely, evidence of Shanabhai Shankerbhai would indicate that he reached the spot after a few moments and therefore his evidence lacks in certain material information which is emerging from evidence of Hashmukh. This only adds to the veracity of their evidence.

8. Hashmukh is examined at Exh. 28. He says that he was going towards town with his father at about 10:00 a.m. and while they were passing by house of Shanabhai Shankerbhai, the incident occurred. When they reached near the

house of Shanabhai Shankerbhai, A-1 intercepted the deceased, at that time, A-1 was armed with a Dhariya and he gave a Dhariya blow above right eye. Thereafter, came Arvind. He had also Dhariya and inflicted Dhariya blows on hip and both the legs as well as wrist of the deceased. Then, he goes on to describe attack by juvenile offender - Jagdish. This witness has been put to the test of cross-examination. He denies the suggestion that he was taught by a lawyer what to depose and volunteered that he is stating whatever he has seen. As such, there is no cross-examination on the incident.

9. The picture that would emerge from the evidence of this witness is that only A-2 inflicted multiple blows. However, keeping this aspect in mind, if evidence of Shanabhai Shankerbhai is seen, who is examined at Exh. 30, he says that he was in his home and when he heard commotion, he rushed out of the house where he saw accused Nos. 1, 2 and the juvenile offender. He saw that they were attacking the victim. Raijibhai had a Dhariya in his hand, so also, Arvind, whereas, Jagdish had a hockey. According to this witness, Raijibhai inflicted Dhariya blow on forehead of Raisingbhai and then two blows on the legs as well as wrists were given by A-1. The Dhariya blow that was given by A-2 landed on the leg. The witness in cross-examination then states that he has not stated that A-1 inflicted blows on Raising on the wrist and on the other parts of the body.

10. The only consistent feature emerges therefore, from evidence of these two witnesses is that A-1 inflicted a blow on the head of the deceased, whereas, A-2 inflicted a blow on the leg of the deceased. There were multiple injuries found on hips and legs of the deceased. But, only one blow is attributed to A-2 by this witness.

11. The medical evidence, if seen, would reveal that the cause of death was haemorrhage due to head injury. The said injury, therefore, can be attributed to only A-1 who gave blow on the forehead of the deceased with Dhariya which is proved to be fatal. So far as other injuries are concerned, they are on non-vital part of the body and have been proved to be non-fatal. Only one of such injuries is proved beyond reasonable doubt against A-2. There is inconsistency so far as other injuries are concerned as to who caused the multiple injuries on leg of the deceased.

12. Now, if the overall picture that emerges from the evidence is seen, it transpires that A-1 attacked the deceased first and then A-2 and then A-3. It is nobody's case that they had either conspired to commit such an act or that there was a common intention to commit this crime. As such, there is no material to infer the meeting of mind of the two accused.

13. Now, if the conduct of A-1 is seen, he intercepts the deceased and inflicts Dhariya blow on his head which has proved to be fatal. There are other incised injuries found on person of the deceased out of which only one is attributed to A-2. Out of three assailants, only two were armed with a sharp cutting weapon. Necessarily, therefore, that if A-2 is proved to have been given only one blow on

leg, the rest of the incised wounds found on person of the deceased were caused by A-1. This would reflect his intention to cause death of the deceased and on this there is no much cross-examination and nothing much left for the appellant to argue. The trial Court was therefore justified in convicting A-1 for murder of Raisingbhai Budhabhai.

13.1. However, so far as A-2 - Arvind Rajji is concerned, we find that he was attributed only one blow which fell on leg of the deceased. There is no evidence to infer that he was either acting pursuant to a common intention or with a common object of causing death of the deceased. He has given a blow on non-vital part of the body and that is not the cause of death. He could not have been therefore convicted for the offence of murder.

14. The case of accused No. 2 therefore deserves to be accepted by acquitting him of the offence of murder, but at the same time, his involvement in the offence was proved but for lesser offence which would be punishable u/s 326 of the Indian Penal Code viz., causing grievous hurt with a deadly weapon.

15. Resultant effect is that conviction of both the accused for offence of murder with aid of Section 114 of IPC is not sustainable. Conviction of A-1 seems to us to be well founded. There is evidence to show that A-1 caused injury on head of the deceased which was proved to be fatal and he also caused injury on other parts of the body with the same Dhariya viz., hips, legs, etc. A-1 did not stop at giving only blow and his intention is reflected by his conduct and as such there is no merit in the appeal of A-1. The appeal must fail and stands dismissed, so far as A-1 is concerned.

16. So far as appeal of A-2 is concerned, he is also convicted for offence of murder read with Section 114 of the IPC. In the instant case, what is found is that accused No. 2 has given only one blow on leg which has resulted in fracture of tibia fibula. The death is not attributable to this injury. There is no evidence to know or infer that both the accused had pursued their common intention or object. There is no commonality of intention.

17. In the result, the only act that A-2 can be said to have been committed is of having caused grievous hurt to the deceased with a deadly weapon like Dhariya. He could have been held guilty of that offence only. The appeal so far as A-2 is concerned therefore deserves to be allowed to that extent. So far as sentence part is concerned, we have heard both the sides.

18. Accused No. 2 - Arvindbhai Rajibhai Parmar is in jail for a period of 06 years, 10 months and 29 days as on 20/03/2012. The offence is punishable with imprisonment which may extend to imprisonment for life. In our considered view, if accused No. 2 is ordered to undergo the sentence that he has undergone already, would meet the ends of justice.

19. In the result, Criminal Appeal No. 650 of 2006 preferred by org. accused No. 1 - Rajibhai Devabhai Parmar stands dismissed. The judgment and order of

conviction and sentence recorded by the trial Court is confirmed. So far as Criminal Appeal No. 8 of 2007 preferred by org. accused No. 2 - Arvindhbhai Rajibhai Parmar is concerned, the same is partly allowed. The conviction of the org. accused No. 2 - Arvindhbhai is altered from one u/s 302 read with Section 114 of the Indian Penal code, to u/s 326 of the Indian Penal Code and he is ordered to undergo rigorous imprisonment for the period already undergone by him with no change in punishment of fine.