

(2008) 08 GUJ CK 0040
In the Gujarat High Court
Case No : Criminal Appeal No. 538 of 2001

Rambahadur Rikhiram Kshatriya

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 26-08-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 374
Penal Code, 1860 (IPC) — Section 201, 302, 377

Citation : (2008) 08 GUJ CK 0040

Hon'ble Judges : Z.K. Saiyed, J;A.M. Kapadia, J

Bench : Division Bench

Advocate : Sadhana Sagar, for the Appellant; K.C. Shah, APP for Opponent 1, for the Respondent

Final Decision : Dismissed

Judgement

Z.K. Saiyed, J.—Appellant - ori. Accused was charged and tried by the learned Addl. Sessions Judge, Bharuch for the commission of offences punishable under Sections 302 377 read with Section 201 of the Indian Penal Code (for short "IPC").

2. As per the prosecution case the appellant has committed carnal intercourse with male child against the order of nature and then due to the fear of penalty of said unnatural act, child Jabir Khan strangulated with bush-shirt and thereby the appellant - accused has committed murder of male child.

3. At the end of the trial, the appellant was found guilty of the offence of murder and carnal intercourse against the order of nature punishable u/s 302 377 and 201 of IPC. The appellant was, therefore, convicted vide impugned judgment and order dated 30.6.2001 and sentenced to imprisonment of life and a fine of Rs. 5000/- and in default, three years R/I and for the offence punishable u/s 377 of IPC, he was sentenced to imprisonment of life and a fine of Rs. 5000/-, in default, further R/I for three years and u/s 201 of IPC, he was sentenced to suffer 7 years imprisonment and a fine of Rs. 3000/-, in default, R/I for one year

vide impugned judgment and order dated 30.6.2001 rendered in Sessions Case No. 127/2000 by the learned Addl. Sessions Judge, Bharuch.

4. The appellant-accused being aggrieved by the said judgment and order of conviction and sentence passed by the learned trial Judge, has preferred this appeal u/s 374 of Code of Criminal Procedure.

5. As per the prosecution case, Jalil Khan Munsiraz Khan Pathan was residing at M.C. Bav Chemicals, Plot No. A/1 1101 Panoli G.I.D.C., Taluka Ankleshwar with his wife and son Jabir Khan, student of lower K.G. of National High School, G.I.D.C., Ankleshwar. Due to the holiday of Dhuleti on 20.3.2000 master Jabir Khan was at home and at about 11.00 am he went out for playing and at the time of lunch at about 11.30 am he was not found. On inquiry in the surroundings and also search was made at nearest villages, he was not found out and inquiry was continued.

6. On 21.3.2000 parents have inquired about whereabouts of their son at different villages. On 21.3.2000 Jalil Khan and Dalits Vir Singh and Gumansingh were also searching master Jabir Khan at 7.00 pm. When they were making search in the bathroom of Motilal Kimpers Company which was situated opposite their company, dead-body of Jabir Khan was found out there and it was also found out that he was strangled with his bush-shirt. So many persons had gathered there and Mohammad Sharif informed the police on telephone. So, police started inquiry and investigation of this offence and complaint was registered at Ankleshwar Rural Police Station vide CR No. I-37/2000 for the offence of murder of master Jabir Khan and investigation was carried on and panchnama of scene of offence was drawn and clothes of the deceased and muddamal was seized under panchnama. FSL experts were also called from Surat and under their instructions articles were seized from the scene of offence and inquest panchnama was prepared and dead-body of master Jabir Khan was sent for autopsy and sealed muddamal was sent for scientific analysis to FSL and then detailed investigation was carried out and appellant - accused was arrested and was also sent for medical check up and medical certificate was also obtained. Thereafter, the statements of the witnesses were recorded and Post Mortem note was also tagged along with the papers of investigation and Investigating Officer has filed the charge-sheet before the learned Judicial Magistrate First Class, Ankleshwar. Since the learned Magistrate has no jurisdiction to try the sessions case, he has committed the case to the Court of Sessions on 22.6.2000 and it was registered as Sessions Case No. 127/2000 and thereafter it was transferred to the learned Addl. Sessions Judge, Bharuch.

7. The learned trial judge has framed the charge against the appellant and as the appellant has not pleaded guilty, the trial proceeded in Sessions Case No. 127/2000.

8. During the course of the trial, the prosecution has examined, in all, 9 witnesses to prove the guilty of the accused-appellant, which are as under:

1. PW-1 Jalil Khan Munsiraz Khan Pathan Ex. 7
2. PW-2 Dharmeshbhai Mahendrabhai Ex. 9
3. PW-3 Firozbhai Daudbhai Ex. 14
4. PW-4 Aiyub Abdul Bhaiyat Ex. 21
5. PW-5 Mahemud Ishak Patel Ex. 24
6. PW-6 Balvantbhai Ratanjibhai Ex. 26
7. PW-7 Pravinbhai Devabhai Ex. 28
8. PW-8 Dr. Ajitbhai Pravinbhai Surati Ex. 30
9. PW-9 Mukeshkumar Laljibhai Parmar, I.O., Ex. 37.

The prosecution has also produced documentary evidence just to prove the allegations made against the accused-appellant, which are as under:

Complaint Ex. 8

Panchnama of scene of offence Ex. 13

Panchnama of clothes of deceased Ex. 27

Panchnama of articles seized from scene of offence Ex. 18

Panchnama of bush-shirt of deceased Ex. 20

Panchnama of person of accused Ex. 23

Inquest panchnama Ex. 25

P.M. Note Ex. 32

Note of muddamal despatched Ex. 39

Receipt of muddamal received Ex. 40

Yadi to FSL for scene of offence Ex. 38

Report of DNA Ex. 42

FSL report Ex. 41.

9. After recording of the evidence of the witnesses, the learned trial Judge has explained the circumstances which were appearing against him and the statement of the present appellant - accused was recorded u/s 313 of CrPC. In his statement, the appellant-accused has denied the case in toto and he made a statement before the Id. Judge that he has been wrongly booked in the said serious offence. The appellant has neither led any evidence nor examined any witnesses in support of his defence.

10. On appreciation and evaluation and scrutiny of the evidence on record, the

trial court held that there was sufficient evidence so as to say that the appellant has committed an offence punishable u/s 302 377 and 201 of IPC and he was sentenced to suffer R/I for life for the offence u/s 302 of IPC and a fine of Rs. 5000/-, in default, further R/I for three years and he was also sentenced to suffer R/I for life for the offence punishable u/s 377 of IPC and a fine of Rs. 5000/-, in default, R/I for three years and also for the offence punishable u/s 201 of IPC, he was sentenced to suffer R/I for 7 years and a fine of Rs. 3000/-, in default, further R/I for one year.

11. Heard Ms. Sadhana Sagar learned advocate appointed through Legal Aid Committee for the appellant and Mr K.C. Shah learned APP for the respondent-State.

12. Ms. Sagar has contended that from the evidence of the complainant, it appears that he has no knowledge of offence and the prosecution case only depends upon the circumstantial evidence and the panchnamas. She has read the P.M. Note and contended that in absence of any direct evidence when circumstantial evidence is weak in nature and without any corroboration by cogent evidence, a person cannot be booked and convicted for such serious type of offences. She has also contended that from the report of FSL, appellant cannot be punished only because the blood group is found same. She has contended that prosecution has failed to establish its case beyond reasonable doubt and judgment and order is erroneous and without application of mind and the same is required to be quashed and set aside.

13. Learned APP Mr K.C. Shah for the respondent-State has read the judgment and order and also read the oral as well as documentary evidence and contended that the trial court has considered all aspects of the evidence and the chain of circumstantial evidence is also proved before the trial court. So, the appellant has committed a heinous and cruel crime on a male child who was aged about 4 to 5 years only.

14. We have considered the submissions made by learned Advocate Ms Sadhana Sagar for the appellant and Mr K.C. Shah learned APP for the respondent-State. We have also perused the impugned judgment and order as well as set of evidence supplied by the learned advocate during the course of submissions. We have also undertaken a complete and comprehensive appreciation of all vital evidence on record which is read and re-read by the learned advocates for the parties with reference to broad and reasonable probabilities of the case.

15. It is not in dispute and doubtful issue to the effect that deceased Jabir Khan died homicidal death due to strangulation. In this connection, the prosecution has produced the evidence of medical experts and experts of Forensic Science Laboratory and relied upon the oral evidence of PW-8 Dr. Ajitbhai Pravinbhai Surati Ex. 30 who has performed the post mortem of the deceased and produced the PM Note at Ex. 32. This witness has examined the injury which was found on the neck of the deceased and he has also examined the other injuries found on

the dead-body of the deceased, which are as under:

Contusion workish around the neck size - 24 cm x 2 cm

Contusion circular & blackish on the lateral Rt. Side of the neck seen on the upper border of injury No. 1 of side; size - 3 cm diameter;

Abrasion semicircular, raddish brown on the Rt. Lateral side of neck on the lower border of injury No. 1 - Rt. Side, size - 2 cms diameter;

Bruise reddish brown on the lateral side of neck 4-1/2 cms. Below Hurar lobe. Size 0.5 cm diameter;

Abrasion circular raddish brown on the tip of Lt. Size - 1 cm diameter;

Abrasion raddish brown circular, 2 cms. medial to the medial border of the (Lt.) scapula. Size 1/2 cms diameter;

Abrasion black on the (Lt.) elbow, verticle, posteriorly - size 1/2 cm x 1 cm

Abrasion black, on the Lt. Elbow joint, 6 cms below it. Size-1 cms x 1/2 cms.

Abrasion black, verticle, 4 cms below the (Lt.) - size 1-1/2 cm x 1cm

Abrasion 5 in No., circular & black, one below the other in oblique direction just above the (Lt.) popliteal fossa (Lt.) lower limb, Size 0.25 cm 1/2 cm diameter;

Abrasion, block obliave, on the (Rt) popliteal fossa (Rt.) lower limb - size 2-1/2 cm x 2 cm.

Multiple abrasion 8 in No. , black on the posterior side of (Rt) lower limb, entsrding down from popliteal fossa to middle part of the calf. Size - 0.25 cm to 1 cms. diameter.

On cleaning the forcal matter, pall discolouration, circular, around the amus enciading the area 2.5 cm on the outside of anus.

On Reyracting the Anus, Abrasion circular low around the Anal verge. (Rapture of lower anal canal spincheer)

Abrasion onmucore of the anotectal wall with reddish Patchy area.

16. From the evidence of PW-8, as an expert, he has specifically opined that by a bush-shirt, strangulation is possible and injury No. 1, 2 and 4 of Ex.32 are possible and he has also opined that injuries No. 10 to 15 mentioned in Post Mortem Note are possible during the carnal intercourse against the order of nature. We have perused the said injuries and from the perusal of contents of inquest panchnama at Ex. 25, it is corroborative piece of evidence of Ex. 32 and also oral evidence of a panch witness PW-5 Mahmud Ishak Patel Ex. 24. This witness has also made a statement regarding the recovery of dead-body. We have perused the oral evidence of PW-1 Jalilkhan Munsirazakhan Pathan Ex.7. We have found that complaint Ex. 8 is corroborative piece of evidence. We have

also found from the oral evidence of PW-2 Dharmeshbhai Mahendrabhai Ex. 9, panch witness, that important articles were seized in his presence and specific explanation of scene of offence given without any contradictory version of Ex. 13 panchnama of scene of offence. The prosecution was successful in proving the blood stains which were collected from the tiles of the floor of bath-room under panchnama at Ex. 20, through oral evidence of PW-3 Firozbhai Daudbhai Ex. 14. The presence of FSL officials was also proved by oral version of this witness and even muddamal Ex. 18 & 20 were also identified. Ex. 23 panchnama of recovery of muddamal clothes of the appellant is also proved by PW-4 Ayub Abdul Bhaiyat Ex. 21. PW-5 Mahmud Ishak Patel Ex. 24 has also identified the muddamal clothes of the deceased. No doubt, the panch witness of panchnama Ex. 27 was declared hostile, but that was proved through Investigating Officer. The contents of panchnama can be proved through its maker I.O. and therefore, the deposition of hostile panch witness would not be fatal to the prosecution case.

17. As per the above discussion, we found that scene of offence is proved by independent panch witness and during the consideration of the evidence of doctor ligature marks were found which can be caused by bush-shirt and blood stains & semen were found on bush-shirt and on clothes of the accused. We have perused the medical certificate regarding examination of accused - appellant, and it is found from Ex. 34 the injuries, viz. (1) tear wound on the tip of claus penis verticle on the (lt) side. Size : 2mm x 1/2mm, and (2) Abrasion, Horizeantal, reddish coloured around the junction of glans penis and inner side of the fort skin except the posterior phrehulumb size: 6cms x 1/2cm. We have also perused serological report at Ex. 41 and Ex. 42 and from the serological report blood of the accused and semen were found from the muddamal articles seized at the scene of offence. From the above circumstantial evidence, we have found that prosecution has established its case beyond any reasonable doubt.

18. Applying the principle as laid down by the Apex Court in various judgments to the facts of the instant case, the chain of circumstances is required to be completed. In the above context, from the oral evidence and documentary evidence and circumstances, it is established that deceased male child Jabirkhan, when he was playing, he was taken away by the appellant with an intention and motive to have carnal intercourse against the order of nature and after the completion of said carnal intercourse due to the fear of arrest created in the mind of appellant, just to protect himself from the penalty of said offence, child was strangulated and killed by him.

19. It is true that just to prove the offence u/s 377 of IPC, ingredients are required to be established are - (1) carnal intercourse, (2) carnal intercourse with any man, woman or animal, (3) against the order of nature (4)there was penetration. We have perused oral as well as documentary evidence and from the evidence of medical expert and expert opinion of FSL, all above four ingredients were found present and proved before the trial Court.

20. As discussed above, it is true that when only circumstantial evidence is

available at the outset, one normally starts looking for motive and opportunity to commit the crime. If the evidence shows that the accused was having a strong enough motive and had the opportunity to committing the crime and therein when the established circumstances on the record considered along with explanation of the doctor and scientific expert witnesses it is established that the chain of the evidence is considered to be completed so as to show that within all human probabilities, the crime has been committed by accused, then he shall safely be held guilty on the basis of such circumstantial evidence.

21. The Court have emphasized that judicial response to human rights cannot be bounded by legal jugglery. In this case, circumstantial evidence is so strong and convincing enough to leave no scope for any reasonable doubt about the guilt of the appellant-accused.

22. In the present case, from the evidence it is established that the appellant had committed carnal intercourse against the order of nature on deceased who was five years old boy. We have found from the medical certificate of doctor that on the private part of the body of the accused-appellant injuries were found and for said injuries of accused-appellant, he has made false explanation with regard to those injuries, is also considered as his conduct and it can be proved from the injuries of accused with a corroboration of presence of semen and blood found from the scene of offence as well as from the clothes of deceased and appellant, is sufficient evidence to say that the appellant has committed the said heinous crime.

23. Seen in the above context, the impugned judgment and order convicting and sentencing the appellant-accused for the commission of the offence punishable u/s 302 377 and 201 of IPC deserves to be confirmed.

24. For the foregoing reasons, the appeal fails and accordingly it is dismissed. The judgment and order of conviction and sentence dated 30.6.2001 recorded by the trial Court against the appellant - accused in Sessions Case No. 127/2000 is hereby confirmed and maintained. Muddamal be disposed of in terms of directions contained in the impugned judgment and order passed by the trial Court. Accordingly, this Appeal is dismissed.