
(2012) 04 GUJ CK 0019
In the Gujarat High Court

Case No : Criminal Appeal No. 176 of 2007 with 2322 of 2006, 1458 of 2007

Ramesh Bhai Atmaram Vaghela

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 03-04-2012

Acts Referred:

Evidence Act, 1872 — Section 27

Penal Code, 1860 (IPC) — Section 143, 148, 149, 302, 324

Citation : (2012) CriLJ 2386

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

Bench : Division Bench

Advocate : Pravin S. Goundlia, for the Appellant; R.C. Kodekar, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

A.L. Dave, J.—In Sessions Case No. 130 of 2000 before City Sessions Court, Ahmedabad. eight persons were arraigned as accused who have been charged with offence punishable under Sections 143, 148, 302 r/w 149, 326 r/w 149, 324 r/w 149 of the Indian Penal Code and u/s 135 of the Bombay Police Act. The trial Court after recording the evidence acquitted A-3-Amit Ramesh Vaghela, A-5-Charapaben w/o., Fatehsinh Solanki, A-7-Sumanben alias Sumitraben Jayantibhai Vaghela and A-8-Rekhaben Rameshbhai Vaghela. One of the suspects, Natvar Atmaram was absconding at the time of trial. The trial Court convicted A-1-Ramesh Atmaram Vaghela and A-2-Jayantibhai Atmaram Vaghela for offence of murder punishable u/s 302 r/w 34 of the IPC. Whereas, A-4 has been convicted for offence punishable u/s 326 of IPC and sentenced to undergo two years and six months SI and to pay a fine of Rs. 5,000/- in default to undergo one month SI. Therefore, A-1 and A-2 preferred Criminal Appeal No. 176 of 2007, where A-1 Ramesh Atmaram Vaghela has expired during pendency of appeal and his appeal stands abated. A-4-Popatbhai Ratilal preferred Criminal Appeal No. 2322 of 2006 against his conviction.

1.1 Now, therefore, this Court is required to examine cases against A-2-Jayantibhai Atmaram and A-4-Popatbhai Ratilal.

The State has preferred Criminal Appeal No. 1458 of 2007 against acquittal of A-3, A-5, A-7 and A-8 for offence punishable u/s 302 of the IPC and this Court, therefore, will have to examine whether their acquittal is justified or not.

2. We have heard learned Advocate, Mr. Gondalia for the convict - appellants in Criminal Appeal No. 176 of 2007 and Criminal Appeal No. 2322 of 2006, so also, learned, APP appearing for respondent in the said Appeals and for the appellant in Criminal Appeal No. 1458 of 2007.

3. Brief facts of the case are that the alleged incident occurred on 20/04/1999 at about 12:30 p.m. in the Vankarvas at Isanpur, Ahmedabad in the open courtyard behind the house of first informant - Bhanuben where it is alleged that the accused persons armed with deadly weapons attacked the said premises and assaulted - Shankersinh, who died because of the injuries suffered by him in the attack. It is also the case of the prosecution that the assailants also attacked witness - Harisinh as well as - Valiben with deadly weapons. This incident was seen by first informant PW No. 2-Bhanuben, P.W. No. 4-Sugnaben and P.W. No. 10-Madhuben. Besides the above witnesses, as per the prosecution case, there were several other persons, who had assembled there hearing the hubbub and they had also seen the incident. FIR was given by P.W. No. 2-Bhanuben with Vatva Police Station, who registered the offence and investigated the case and having found sufficient material to connect the accused persons with the offence, filed charge-sheet in the Court of learned Metropolitan Magistrate, who in turn, committed a case to the Sessions and Sessions Case No. 130 of 2000 came to be registered.

4. The learned trial Judge framed charge against the accused at Exh. 10. They pleaded not guilty to the charge and came to be tried. At the end of the trial, A-1, A-2 and A-4 came to be convicted, whereas rest of the accused persons were acquitted by the trial Court and hence these appeals.

5. Learned Advocate Mr. Gondalia submitted that even if the prosecution case is accepted as it is, without even glancing at the cross-examination, what emerges is that there is discrepancy about the place of incident. Though the police papers and the witnesses indicate that the incident occurred in the open courtyard behind the house of the first informant, Panchnama would reveal that there were no marks of any violence or injury at that place and there were marks of violence and damage to a vehicle near the house of A-1. These two places are located at a distance of about 100" to 150". Learned Advocate therefore, submitted that the prosecution cannot be said to have established the place of incident beyond reasonable doubt.

5.1 Mr. Gondalia submitted further that Wardhi to Police does not contain name of A-2-Jayantibhai Atmaram. He also submitted that the genesis of the incident is not properly established by the prosecution because what is stated by the

prosecution witnesses and the evidence led in this regard by the prosecution is inconsistent.

5.2 Mr. Gondalia submitted further that though the incident is claimed to have been seen by several persons including the injured persons, no one gives the names of the assailants in the history to the Doctor. It was then contended by Mr. Gondalia that though independent witnesses were available, they have not been examined by the prosecution and thereby prosecution has built up its case only on the evidence of interested witnesses. It was then contended that no blood marks were seen on the weapons alleged to have been used in the commission of offence. There is discrepancy in evidence about the weapons. Mr. Gondalia, therefore, submitted that conviction could not have been found on the basis of such scanty evidence.

5.3 Mr. Gondalia submitted that for this very incident, the accused side had lodged an FIR. In that cross-case, the trial Court has acquitted the accused, but fact remains that there is a possibility of there being a different place of incident as is emerging from the material collected during investigation of that offence.

5.4 Mr. Gondalia also submitted that as per the medical evidence, the blood that was collected was quantity-wise 25 MI. This sample was sent to FSL for chemical analysis and the FSL report would show that the sample which was received by FSL, contained only 10 MI. of blood.

5.5 Mr. Gondalia, therefore, submitted that the quality of investigation is not upto the mark. The discrepancy in quantity of blood sample would lead to a possibility of lethargy or even a mistake. In any of this eventuality, the investigation cannot be said to have been properly carried out to show only the guilt of the accused. The discrepancy in prosecution witnesses would render the prosecution case doubtful and, therefore, benefit of doubt ought to have been given by the trial Court to the appellants, more so, when the trial Court itself has not believed the prosecution story against several accused persons.

5.6 So far as State appeal is concerned, Mr. Gondalia submitted that with the above type of evidence led by the prosecution, the trial Court had no option but to acquit accused Nos. 3, 5, 6, 7 and 8. According to him, there is no need for any interference with the said judgement on this count.

6. On the other hand, learned APP has opposed these appeals. According to him, evidence of PW No. 2-Bhanuben, PW No. 4-Sugnaben and PW No. 10-Madhuben would clearly reveal involvement of these persons in the episode and, therefore, the trial Court has wrongly acquitted A-3, A-5, A-6, A-7 and A-8. They ought to have been convicted, at least, with help of Section 149 of the IPC and therefore the State appeal may be allowed.

6.1 So far as the other appeals are concerned, Mr. Kodekar submitted that an attempt is made to create a ghost out of the evidence led by the prosecution by making suggestions about change of place of incident, which however, should not

have any bearing on the decision of the Court, for the reason that absence of any marks at the place of incident is explained in the Panchnama itself where it is stated that because of movement of people there are no marks of any blood it being loose soil. It was also submitted that the presence of eye-witnesses is natural. They have supported the prosecution case and it is not required that the prosecution must always examine all available witnesses. It is the qualitative test which is to be applied in respect of ocular evidence of witnesses and not quantitative. He, therefore, submitted that State's appeal may be allowed and other two appeals of conviction may be dismissed.

7. We have examined the record and proceeding in context of rival submissions.

8. Evidence of Harisinh (Exh. 26) would, reveal that he is an injured eye-witness. According to him, he suffered injury in the incident caused by Dhariya. In support of his version, there is medical evidence, but from his evidence, it is revealed that when he reached the place of incident, he saw the assailants coming out of the gate of the backyard of first informant - Bhanuben (PW No. 2). As per the prosecution case, the incident occurred inside the courtyard at a distance of about 20" from the rear door of the house of the accused. Therefore, witness -Harisinh could not have seen the actual assault on deceased - Shankersinh.

9. In this very context if evidence of Bhanuben (PW No. 2) is seen, she states that after the assault on deceased - Shankersinh, the neighbours had assembled and on seeing them the assailants ran away and at that point of time Harisinh arrived. Therefore, attack by the assailants with the accused persons on Harisinh becomes doubtful as asserted by Harisinh and other witnesses. Similarly, it is required to be noted that there is no mark of any violence or assault or blood marks in the rear courtyard of first informant - Bhanuben who happens to be daughter-in-law of Shankersinh. Now, if the case of the prosecution is that the accused persons armed with deadly weapons indiscriminately attacked deceased - Shankersinh and if the injuries which are found on person of Shankersinh in the post-mortem notes are seen, there are bound to be some marks of violence. Deceased - Shankersinh would have either resisted or would have tried to scape and save himself from the attack and the assailants would have either gheraoed him or chased him and then assaulted him. This would certainly leave behind some imprint on the place of incident which are easily tried to be wiped out by stating in the Panchnama that because of movement of people, there are no marks found. It would be appropriate to state that the place of incident is not a public place. It is rear courtyard of the house of the first informant, which is covered by compound and there is an iron gate for entry and exit. Not much time had elapsed in between the incident and the drawl of Panchnama and, therefore, defence version that the incident did not take place in the courtyard of the house of Bhanuben or Shankersinh needs to be given its due weightage, particularly, when in the Panchnama of place of incident itself, there is a reference to something having happened near the house of A-1 where it is found that Maruti

Van was lying in a recently damaged condition to the windshield and other window-pane. Whereas, none of the witnesses speak anything about anything having happened near the house of Ramesh. This discrepancy in place of incident therefore, makes the prosecution case more vulnerable.

10. It is also required to be noted that weapons have been discovered by the accused persons by drawl of discovery Panchnama u/s 27 of the Evidence Act. The said Panchnama is at Exhs. 78 and 79. A plain reading of this Panchnama would make it clear that it is a joint Panchnama drawn and the discovery is at the instance of absconding accused - Natvarsinh from his house which was locked. Be that as it may, fact remains that weapons which had been discovered, did not carry any blood marks on them. If these weapons were used in commission of the crime, as is alleged, in indiscriminate manner, there ought to have been some marks of blood on the weapons.

11. It would also be appropriate to note that blood mark was found on an iron pipe which was recovered near the place of incident and that pipe was stained with blood. That blood was of the group of the deceased -human blood "B". In this very context we deem it proper to record that the blood sample which was collected from the dead body of the deceased - Shankersinh was 25 MI. in volume as can be seen from Panchnama Exh. 64. If the FSL Report in juxtaposition is read, it would reveal that the sample was received by the FSL in a sealed bottle which contained only 10 MI. of blood. How this discrepancy in quantity of blood sample has taken place is not even attempted to be explained by the prosecution. This would reflect very seriously on quality of investigation.

12. We may also record at this stage that second injured witness - Valiben has not been examined by the prosecution.

13. So far as PW No. 10-Madhuben is concerned, in her deposition during cross-examination, she has stated that in the said incident, Rameshbhai did not receive any injury. She also states that she had not stated before Police that Ramesh Atmaram had suffered injury on his head and right hand. In this context, if the evidence of P.W. No. 15-Naransinh Bhavansinh Parmar, I.O. (Exh. 75) is seen, he states that statement of Madhuben was recorded by PSI, Gosai. PSI, Gosai has expired, but record reveals the statement recorded by PSI, Gosai. Witness - Madhuben has stated that in this quarrel - Ramesh Atmaram had also received injuries on head and right hand. It is also revealed during cross-examination of this witness that Madhuben did not state in her statement before Police that Popatbhai was beating Shankersinh with pipe. This would mean that Madhuben is moulding her deposition to suit to the requirement of prosecution.

14. Similar is the situation so far as evidence of PW No. 4-Sugnaben (Exh. 36) is concerned. This witness in her deposition states that incident occurred in the courtyard of the house of Bhanuben-daughter-in-law of deceased-Shankersinh. She states that the assailants broke open the iron gate and came. During cross-examination, she admits that this is an imprint and she has not so stated in her

police statement. This witness does not reveal anything about any occurrence that has taken place near the house of Ramesh. Similarly, she does not say anything about what is stated by Madhuben about pelting of stone and what is stated by Madhuben about pelting of stone does not find support from the Panchnama of place of incident. If both the groups were pelting stones against each other, there would have been stones found lying at the place of incident. The evidence of these three witnesses therefore, if taken collectively viz., Bhanuben and Madhuben would not explore any confidence. Same is the situation so far as evidence of Harisinh is concerned. It is also required to be noted that the accused persons have had themselves lodged FIR. But, FIR states of the incident took place near the house of Ramesh. That version is finding support from the Panchnama of place of incident drawn in this case itself where it is recorded that a Maruti Van was found lying in a damaged condition and that the damage was recent.

15. The foregoing discussion would reveal that the evidence led by prosecution is inconsistent so far as place of incident is concerned. The place which is shown to be a place of incident, does not bear out any imprint of such occurrence having occurred and the place where the accused side claims the incident to have occurred has some imprints of some incident having occurred. Possibility of the prosecution having changed the place of incident cannot be ruled out. That would mean that the prosecution is not placing the truth before the Court. Investigation is not upto the mark. There is discrepancy in quantum of blood sample collected and received by the FSL. Harisinh though claiming to be an eye-witness cannot be believed to be an eye-witness because his approval is indicated to be after the escape of the assailants. Consequently, assault on him also cannot be believed.

16. The whole picture gets smudged with doubt as to who is telling the truth and who is not, which is the place of incident, why the incident occurred and who were the assailants. None of the witnesses speak anything about the injury having been caused by A-1. whereas the I.O. says that in his investigation it had come that Ramesh did receive injury. If that be so, the prosecution case becomes doubtful and benefit ought to tilt in favour of accused persons.

17. In our opinion, therefore, the judgment impugned cannot be sustained.

18. In the result. Criminal Appeal No. 176 of 2007 and Criminal appeal No. 2322 of 2006 are allowed. The judgment and order impugned in these appeals rendered by the learned Additional Sessions Judge, FTC No. 1, Ahmedabad City in Sessions Case No. 130 of 2000 dated 28/11/2006 convicting the appellant - Accused No. 2 -Jayantibhai Atmaram Vaghelaand appellant - Accused No. 4 - Popatbhai Ratilal is hereby set aside and they are acquitted of charges levelled against them. Convict - Accused No. 2 - Jayantibhai Atmaram Vaghela beset at liberty forthwith, if not required in any other case. Since appellant - Accused No. 4-Popatbhai Ratilal is on bail, his bail bond shall stand cancelled. Fine, if paid by the appellants, is ordered to be refunded to them. 19.1 So far as Criminal Appeal No. 1458 of 2007 preferred by the State against acquittal of rest of the accused

persons is concerned, as we have found in the foregoing discussions that the prosecution case in its entirety does not inspire confidence, the story becomes doubtful, the said appeal cannot be allowed particularly when this Court has given benefit of doubt to the convict - appellants. The appeal therefore must fail and stands dismissed.