

(2009) 05 GUJ CK 0057

In the Gujarat High Court

Case No : Criminal Appeal No"s. 799, 803 of 2002 and 491 of 2005

Rameshbhai Amrutlal Patel

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 15-05-2009

Acts Referred:

Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2009) 05 GUJ CK 0057

Hon'ble Judges : Bhagwati Prasad, J; Bankim N. Mehta, J

Bench : Division Bench

Advocate : Yogesh S. Lakhani, HD Chudasama and Rekha Kapadia, for the Appellant; A.J. Desai, Additional Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Bhagwati Prasad, J.—The present group of appeals arise out of the judgment and order dated 30th July 2002 passed by the learned Additional Sessions Judge, Court No. X, Ahmedabad, in Sessions Case No. 163 of 2001 whereby the learned Sessions Judge convicted the accused Nos. 1, 2, and 3 for the offence u/s 302 read with Section 34 of IPC and sentenced them to undergo life imprisonment with a fine of Rs. 5,000/-

2. The present group of appeals arise from the same judgment and order passed by the learned Sessions Judge and therefore are being heard and decided by this common judgment and order.

3. The prosecution story as contained in the first information report was that Ranjitsinh s/o Pratapsinh resides at Parmeshwar Park along with his another brother Jitendrasinh and father Pratapsinh. Those were the days when the incident occurred preparations for marriage of Jitendrasinh were going on. In connection with the marriage of Jitendrasinh they had gone to Jamfarwadi and while they were there talking to Dipak, who is another son, about marriage preparations of Jitendrasinh, the accused persons had said to have come. They

are also said to be friend of the deceased. They called Dipak with them and took him away. The deceased did not turn up until 11.30 PM at Jamfarwadi and three persons, namely, Ranjitsinh, Pratapsinh and Jitendrasinh continued to be there waiting for him. Then, while they were thinking of going in search, Gafoor @ Amarsinh Dabhi arrived there and on his arrival he informed them that while he was driving his rickshaw, he had two passengers whom he had taken to Sattadhar Society near Baroda Express Highway. He heard certain skirmishes. Having identified that the noise could be that of Dipak, he went there and saw that the accused persons were assailing Dipak. Accused No. 1 was armed with sword, accused No. 2 - Pappu Pager had knife and accused No. 3 had no weapon and he was hitting the deceased with kicks and fists. Seeing the accused performing the aforesaid acts, this witness turned around and went to Parmeshwar Park where he did not find these three persons and therefore he came to Jamfarwadi and informed them.

4. The learned Counsel for the accused submits that out of the prosecution witnesses, Ranjitsinh, Jitendrasinh and Pratapsinh, Pratapsinh and Jitendrasinh have not been examined. Ranjitsinh in his statement has stated that he has not gone to Jamfarwadi on the date of the incident and if anything to that effect is stated in the complaint, that is false. According to the statement of Ranjitsinh, he never went to Jamfarwadi. Thus, if the statement of this witness is taken into consideration, then, he along with two others was at Parmeshwar Park and has not gone to Jamfarwad and the circumstance which the prosecution has tried to press against the accused in the nature of last seen with the deceased vanishes and there is no evidence to suggest that accused had took Dipak with them.

5. This takes the prosecution case to the ocular evidence of of Gafoor @ Amarsinh Dabhi. This witness is a chance witness and this witness stated that he owns auto-rickshaw bearing registration No. GJ-7-4948 and on the date of the incident he was standing near Rajinder Park along with his auto-rickshaw at 9 PM. At that time two passengers approached him for going to Sattadhar Society. He dropped them at Sattadhar Society and while he was returning he heard shouting and he realised that it was sound of his maternal cousin - Deepak. He, therefore, took the rickshaw towards Dodsai company and saw accused No. 1, Pappu Pager giving sword blows to Dipak, accused No. 2-Nirmalsin @ Fatio Rajendrasinh giving knife blows to Dipak and accused No. 3 - Rameshbhai Amrutlal Patel giving fist and kick blows to deceased Dipak. He got scared and rushed to the home of his maternal uncle - Ranjitsinh and told him about the incident. They went to the scene of offence and found Dipak to be dead. They therefore went to CTM police chowky for lodging the complaint. In the cross-examination, this witness stated that he purchased the auto-rickshaw for Rs. 28,000/- on loan. The rickshaw was registered with RTO, Nadiad and he got it transferred in his own name. He showed ignorance that for plying auto-rickshaw one needs to obtain permit from the authorities. However, Defence Witness, Vijaybhai Mohanlal Bijlani, a Clerk in RTO, Nadiad stated that auto-rickshaw bearing registration No. GJ-7W-4948 was registered in the name of Manibhai

Revabhai Rathod. It was transferred to Ahmedabad in the name of one Dastagir Rasulbhai Masuri, resident of Amraiwadi, Ahmedabad. The said transfer was effected on 3.8.2001.

6. Be that as it may, according to the learned Counsel for the appellants the fact of auto-rickshaw was being owned by Gafoor is a false fact. Then, this witness Gafoor says that he first went to the Parmeshwar Park and having found witnesses not there he came to Jamfarwadi. This story is given up by Gafoor in court version. Thus, there is a major contradiction in his police statement and the statement recorded before the Court. Therefore, his testimony should be scrutinised with care and caution. He being the solitary eye witness cannot be believed and if there is only one eye witness then he is a witness of sterling worth.

7. Accused - Vinaysinh @ Pappu Pager Jat is is stated to have been arrested on 15th May 2001 and he got the knife recovered from the bank of a canal after removing rubbish over it. The sword was recovered at the instance of another accused, namely, Nirmalsinh @ Fatio Rajendrasinh from a gutter line after removing some covering on it. The learned Counsel for the appellants therefore submits that these are the recoveries which cannot be said to be recoveries from the exclusive possession of the accused. They are recovered from the open place which is accessible to all and sundry. These are not places which are in the exclusive knowledge of the accused alone and therefore recovery cannot be pressed into service. According to the learned Counsel for the appellants, there remains no evidence which can be used against the accused for bringing home the guilt against the accused.

8. Per contra, the learned Additional Public Prosecutor submitted that it is a case where from the house the deceased was taken by the three accused persons and for recovery of money deadly weapons were used to kill him and there is an eye witness and weapons of assault have been recovered. Thus, the prosecution has succeeded in bringing home the case against the accused persons.

9. We have given our thoughtful consideration to the arguments of the learned Counsel for the parties and perused the record.

10. The entire case rests on the testimony of sole eyewitness, Gafoor @ Amarsinh Dabhi. On two material counts Gafoor @ Amarsinh had been established by the defence to have prevaricated from his previous statement. He has given go-bye to the story, which was adopted by the complainant in his complaint. Thus, he not only discredits himself but also discredits the story put up by Ranjitsinh that Ranjitsinh, Pratapsinh and Jitendrasinh had gone to Jamfarwadi at Dipak's house. If the testimony of Gafoor is considered, then this shifting of the witness Ranjitsinh from Parmeshwar Park to Jamfarwadi never occurred. The prosecution had a dubious intention in creating a case, which had fallen.

11. Gafoor becomes an witness who is prone to bring in falsehood in his version.

Another false version, which he gave is regarding auto-rickshaw, which brings him on the scene of occurrence. According to him, the rickshaw is registered in his name, which story is falsified by the record of RTO. The rickshaw stood in the name of Manibhai Revabhai Rathod. If the rickshaw was not in the name of Gafoor, then, there is no reason of Gafoor possessing it. He does not say that Manibhai Rathod gave it to him for plying. Then, he falsifies himself and goes to the extent of saying that he does not know whether a permit is necessary to ply the auto-rickshaw or not. Thus, naturally, there is no question of not possessing permit in the name of Gafoor. The reason of Gafoor being on the spot of the incident falls to the ground. He is a chance witness. The chance witnesses have a tendency of suddenly appearing and disappearing. The auto-rickshaw therefore does not belong to him. Therefore, the basic reason for he being there on the place of incident falls to the ground and his presence at the scene of offence becomes doubtful. If his presence becomes doubtful, then narration of incident also becomes doubtful. This Court will be slow in accepting the testimony of a solitary eye witness if he resiles and brings in an entirely new story in his court statement, he becomes to be labelled as a witness who is prone to falsehood. The resiling character of his evidence forces us to hold that this witness is not reliable.

12. There is no corroborative piece of evidence available on record. Two recoveries of weapons recovered from open place, which is accessible to all and sundry, cannot be said to be a recovery in terms of Section 27 of the Evidence Act, 1872. If there is no corroboration, then the evidence of solitary eye witness, who is held by us as untruthful cannot be relied upon. There is no other evidence which is available on record, which can be pressed into service. In that view of the matter, the prosecution has miserably failed to bring home the case against the accused-appellants.

13. In the result, the appeals are allowed. The conviction and sentence recorded by the learned Additional Sessions Judge, Court No. 10, Ahmedabad by the judgment and order dated 30th July 2002 rendered in Sessions Case No. 163 of 2001 is set aside. Accused - (1) Vinaysinh @ Pappu Pager Jat, (2) Nirmalsinh @ Fatio Rajendrasinh Jadeja and (3) Rameshbhai Amrutlal Patel are in jail. They are ordered to be released forthwith if not required in any other case. Fine paid, if any, by the accused is ordered to be refunded back to them. Direct Service is permitted.