

(2016) 03 GUJ CK 0146

In the Gujarat High Court

Case No : Criminal Appeal Nos. 663 and 1055 of 2013

Rameshbhai Dhirubhai Shiyal

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 18-03-2016

Acts Referred:

Bombay Police Act, 1951 — Section 135, Section 135(1), Section 37(1)
Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 307, Section 326

Citation : (2016) 03 GUJ CK 0146

Hon'ble Judges : M.R. Shah and Mohinder Pal, JJ.

Bench : Division Bench

Advocate : P.P. Majmudar, Advocate, for the Appellant; Rakesh Patel, APP, for the Respondent

Final Decision : Disposed Off

Judgement

M.R. Shah, J.—1. As both these Appeals arise out of the impugned judgment and order passed by the learned Sessions Judge, Bhavnagar (hereinafter referred to as the "the learned trial Court") in Sessions Case No. 21/2012 one Appeal is preferred by the original accused challenging his conviction for the offence punishable under Section 326 of the Indian Penal Code, being Criminal Appeal No. 663/2013 and another Appeal is preferred by the State to enhance the sentence imposed by the learned trial Court, imposed while convicting the original accused for the offence punishable under Section 326 of the Indian Penal Code, both these Appeal are heard, decided and disposed of by this common judgment and order. At the outset, it is required to be noted that the original accused was charged for the offence punishable under Section 307 of the Indian Penal Code and for the offence punishable under Section 135 of the Bombay Police Act and at the conclusion of the trial by the impugned judgment and order the learned trial Court has held the original accused guilty for the offence punishable under Section 326 of the Indian Penal Code and has sentenced him to undergo three years Rigorous Imprisonment with fine of Rs. 1000/- and in

default to undergo further one month Rigorous Imprisonment and also imposed fine of Rs. 200/- and in default to undergo one day imprisonment for the offence punishable under Section 135 of the Bombay Police Act.

2.1 Feeling aggrieved and dissatisfied with the impugned judgment and order of conviction, original accused has preferred Criminal Appeal No. 663/2013 and being dissatisfied with the sentence imposed by the learned trial Court imposed while convicting the original accused for the offence punishable under Section 326 of the Indian Penal Code and Section 135 of the Bombay Police Act, State has preferred Criminal Appeal No. 1055/2013 for enhancement of the sentence.

3. At this stage it is required to be noted that the original accused was charged for the offence under Section 307 of the Indian Penal Code and by the impugned judgment and order the learned trial Court has held the original accused guilty for the offence punishable under Section 326 of the Indian Penal Code and thereby convicted the original accused for the offence punishable under Section 326 of the Indian Penal Code, and therefore, State preferred Criminal Miscellaneous Application No. 12016/2013 in Criminal Appeal No. 1057/2013 with Criminal Appeal No. 1057/2013 challenging the impugned judgment and order passed by the learned trial Court in so far as acquitting the original accused for the offence punishable under Section 307 of the Indian Penal Code and the Division Bench vide order dated 01/10/2013 has dismissed the said application for leave to Appeal and consequently the Appeal. It appears that at the time when the Division Bench considered the aforesaid application for leave to Appeal and the Appeal against acquittal the attention of the Division Bench with respect to pendency of the present Appeals was not drawn. Be that as it may. The order passed by the Division Bench dismissing the aforesaid application for Leave to Appeal and Criminal Appeal confirming the acquittal for the offence punishable under Section 307 of the Indian Penal Code has attained finality. Under the circumstances, now this Court is required to consider the present two Criminal Appeals, one preferred by the original accused challenging the conviction for the offence punishable under Section 326 of the Indian Penal Code and another preferred by the State for enhancement of the sentence imposed by the learned trial Court, imposed while convicting the original accused for the offence punishable under Section 326 of the Indian Penal Code.

4. The brief facts of the prosecution case in a nutshell is that one Meenaben Mukeshbhai Baraiya-original complainant lodged the complaint against the original accused with Bhavnagar City "B" Division Police Station for the offence punishable under Section 307 of the Indian Penal Code and Section 135 of the Bombay Police Act alleging inter alia that on 25/08/2011 at about 19:00 hours at Bhavnagar when the injured eye witness was sitting in the Market the original accused came and demanded money from the injured eye witness as loan and the injured witness stated that he is not having money, and therefore, the original accused became angry and inflicted two blows by knife on the injured eye witness. It was therefore alleged that the original accused has committed the

offence punishable under Section 307 of the Indian Penal Code and Section 135 of the Bombay Police Act. The aforesaid FIR was investigated by one Pratapsinh Dashratsinh Parmar of Bhavnagar "B" Division Police Station. He recorded the statement of the concerned witnesses, including the injured eye witness. He collected the evidence against the original accused and also collected the medical evidence. He also prepared the panchnama of the place of the incident. He arrested the original accused. The Investigating Officer also recovered the knife used by the original accused in commission of the offence at the instance of the original accused himself and the place, which was shown by the original accused. He also sent the yadi to the Executive Magistrate for recording the dying declaration of the injured. Having found prima facie case against the original accused the Investigating Officer filed the chargesheet against the original accused for the offence punishable under Section 307 of the Indian Penal Code and Section 135 of the Bombay Police Act in the Court of learned Chief Judicial Magistrate, Bhavnagar. As the case was exclusively triable by the learned Court of Sessions, the learned Chief Judicial Magistrate committed the case to the Sessions Court, Bhavnagar, which was numbered as Sessions Case No. 21/2012. The learned trial Court framed the charge against the original accused for the aforesaid offences. The original accused pleaded not guilty, and therefore, he came to be tried by the learned trial Court for the aforesaid offences.

To prove the case against the original accused the prosecution examined the following witnesses;

Through the aforesaid witnesses the prosecution also brought on record the following documentary evidences;

4.1 After closing purshis submitted by the prosecution further statement was recorded under Section 313 of the Code of Criminal Procedure. The original accused denied having committed any offence. At the conclusion of the trial the learned trial Court has held the original accused guilty for the offence under Section 326 of the Indian Penal Code and has imposed the sentence of three years Rigorous Imprisonment with a fine of Rs. 1,000/- and in default to undergo further one month Rigorous Imprisonment and has also imposed the fine of Rs. 200/- and in default to undergo further one day imprisonment while convicting the original accused for the offence under Section 135 of the Bombay Police Act, which has given rise to the present Criminal Appeals.

5. Shri P.P. Majmudar, learned advocate has appeared on behalf of the original accused in Criminal Appeal No. 663/2013, which has been preferred by the original accused challenging his conviction. Ms. Nisha Parikh, learned advocate has appeared on behalf of the original accused in Criminal Appeal No. 1055/2013, which has been preferred by the State for enhancement of the sentence. Shri Rakesh Patel, learned APP has appeared on behalf of the State in both the Appeals.

5.1 Shri P.P. Majmudar, learned advocate appearing on behalf of the original

accused has vehemently submitted that in the facts and circumstances of the case the learned trial Court has materially erred in convicting the original accused under Section 326 of the Indian Penal Code.

5.2 It is submitted that as such the motive for inflicting the knife blows on the injured eye witness is not believable. It is submitted that for non-fulfillment of the demand of Rs. 500/-it is not believable that the original accused could have committed the offence and inflicted the knife blows on the injured eye witness. It is submitted that therefore the motive alleged by the injured eye witness is not probable. It is submitted by the learned advocate appearing on behalf of the original accused that in the present case no T.I. Parade has been conducted. It is further submitted by Shri Majmudar, learned advocate appearing on behalf of the original accused that even the recovery of the knife, which was recovered at the instance of the original accused, is doubtful.

Making the above submissions, it is requested to allow the Criminal Appeal preferred by the original accused and quash and set aside the impugned judgment and order of conviction. No other submissions have been made.

6. The Appeal preferred by the original accused challenging his conviction is vehemently opposed by Shri Rakesh Patel, learned APP appearing on behalf of the State. It is vehemently submitted by Shri Rakesh Patel, learned APP appearing on behalf of the State that in the present case the injured eye witness, Parmar Vikrambhai Dhanjibhai Parmar (P.W. 6) who has been examined at Exh.25 has fully supported the case of the prosecution. It is submitted that he has been fully cross examined by the defense and even thereafter in the cross examination the defense has not been able to bring anything adverse to the case of the prosecution. It is submitted that even the injured eye witness from the very beginning disclosed the name of the original accused in the FIR as well as before the Doctor in the form of history. It is submitted that it was never the case on behalf of the original accused that the injured eye witness was not knowing the original accused. It is submitted that therefore when the name of the original accused was disclosed in the complaint as well as at the time of giving the history by the injured eye witness to the Doctor stating that the original accused has inflicted the blows by knife, not holding of the T.I. Parade cannot be said to be fatal to the case of the prosecution. It is further submitted by Shri Rakesh Patel, learned APP appearing on behalf of the State that there is discovery of knife at the instance of the original accused. It is submitted that even in absence of any discovery/recovery when the injured eye witness has fully supported the case of the prosecution and if the deposition of the injured eye witness is found to be reliable and trustworthy, there can be a conviction In the present case, the deposition of the injured eye witness is naturally found to be reliable and trustworthy. It is therefore submitted that no error has been committed by the learned trial Court convicting the original accused for the offence punishable under Section 326 of the Indian Penal Code.

7. Now so far as the Appeal preferred by the State for enhancement of the

sentence is concerned, Shri Rakesh Patel, learned APP appearing on behalf of the State has submitted that in the facts and circumstances of the case and the manner in which the original accused has committed the offence and caused the injury on the injured eye witness by deadly weapon i.e. knife and that too for a small reason and the injured sustained serious injuries and he was required to be hospitalized for ten days as an indoor patient, imposing three years Rigorous Imprisonment for the offence punishable under Section 326 of the Indian Penal Code cannot be said to be just, adequate commensurate with the gravity of the offence. Making the above submissions and relying upon the decisions of the Hon"ble Supreme Court in the case of Raj Bala Vs. State of Haryana and Ors. reported in , (2016) 1 SCC 463 and in the case of Abdul Waheed Vs. State of Uttar Pradesh reported in , (2016) 1 SCC 583, it is requested to impose maximum punishment provided under Section 326 of the Indian Penal Code.

7.1 Shri Rakesh Patel, learned APP has submitted that even the learned trial Court has materially erred in imposing the fine of Rs. 200/- only while convicting the original accused for the offence punishable under Section 135 of the Bombay Police Act. It is submitted that considering Section 135 of the Bombay Police Act and considering the fact that in the present case the original accused had used the knife as weapon, maximum sentence provided is four months sentence. It is therefore submitted that the learned trial Court has committed a grave error in imposing the fine of Rs. 200/- only for the offence punishable under Section 135 of the Bombay Police Act.

8. Criminal Appeal preferred by the State for enhancement of the sentence is vehemently opposed by Ms. Nisha Parikh, learned advocate appearing on behalf of the original accused. It is submitted that when in exercise of the discretionary jurisdiction and by giving cogent reasons the learned trial Court has exercised the discretion and has exercised the sentence of three years Rigorous Imprisonment, in the facts and circumstances of the case the same is not required to be interfered with by this Court. It is submitted that in fact there was no intention of the original accused to cause any injury to the injured eye witness. It is submitted that as rightly observed by the learned trial Court on grave provocation the original accused caused injury to the injured eye witness and without intention to kill and/or cause death. Hence, the learned trial Court has rightly imposed the sentence of three years Rigorous Imprisonment.

Making the above submissions, it is requested to dismiss the Criminal Appeal preferred by the State.

9. Heard the learned advocates appearing on behalf of the respective parties at length. We have considered the impugned judgment and order passed by the learned trial Court and re-appreciated the entire evidence on record.

9.1 At the outset it is required to be noted that the original accused was charged for the offence punishable under Section 326 of the Indian Penal Code and Section 135 of the Bombay Police Act for having caused the injury by knife on

the injured eye witness, Vikrambhai Dhanjibhai Parmar, who has been examined as (P.W. 6). However, on appreciation of evidence the learned trial Court has convicted the original accused for the offence under Section 326 of the Indian Penal Code and Section 135 of the Bombay Police Act and has imposed the sentence as stated hereinabove.

9.2 To prove the case against the original accused the prosecution examined the injured eye witness, Vikrambhai Dhanjibhai Parmar at P.W. 6. He has narrated the entire incident and the manner in which the original accused inflicted the knife blows on him. He has been fully cross examined by the defence. However, he has fully supported the case of the prosecution. He has stated that the original accused inflicted two blows by knife on him and the same has been corroborated by medical evidence and medical certificate as well as the Doctor who treated the injured eye witness, Vikrambhai Dhanjibhai Parmar. After thorough cross examination by the defence the injured eye witness has stood by what he has stated and he has fully supported the case of the prosecution. There is no reason to doubt the trustworthiness of the said witness. The said witness is reliable and trustworthy and relying upon the deposition of (P.W. 6) injured eye witness it will be safe to convict the original accused.

9.3 It is the case on behalf of the original accused that as no T.I. Parade has been conducted, and therefore, benefit of doubt should be given to the original accused. However, it is required to be noted that from the very beginning the name of the original accused was disclosed in the complaint as well as when the injured eye witness gave the history before the Doctor in the injury certificate issued by the Doctor also the injured eye witness has disclosed the name of the original accused and has stated that the original accused had inflicted the blows by knife on him. It was never the case on behalf of the original accused that he was not known to the injured eye witness. Under the circumstances, not conducting the T.I. Parade cannot be said to be fatal to the case of the prosecution. Even the submissions on behalf of the original accused that no other independent witnesses have been examined is concerned on the aforesaid ground and more particularly when the injured eye witness has fully supported the case of the prosecution and as observed hereinabove he is trustworthy and reliable, non examination of other witnesses cannot be said to be fatal to the case of the prosecution. As observed hereinabove and relying upon and considering the deposition of the reliable eye witness the original accused can be held and is rightly held guilty for the offence punishable under Section 326 of the Indian Penal Code having caused the injury by knife on the injured eye witness, Vikrambhai Dhanjibhai Parmar, and therefore, the findings recorded by the learned trial Court while holding the original accused guilty for the offence punishable under Section 326 of the Indian Penal Code are on appreciation of evidence and they are neither perverse nor contrary to the evidence on record. In view of the above, we confirm the impugned judgment and order of conviction passed by the learned trial Court convicting the original accused for the offence punishable under Section 326 of the Indian Penal Code.

9.4 Now that takes us to the Appeal preferred by the State for enhancement of the sentence imposed by the learned trial Court while convicting the original accused for the offence punishable under Section 326 of the Indian Penal Code. It is required to be noted and it cannot be disputed that the punishment must commensurate with the gravity of the offence and the same cannot be at the whims of the Court.

9.5 In the case of *Raj Bala Vs. State of Haryana and Ors.* reported in , (2016) 1 SCC 463 the Hon'ble Supreme Court has observed that A Court, while imposing sentence, has a duty to respond to the collective cry of the society. In paragraph 1 to 4 the Hon'ble Supreme Court has observed and held as under;

"In *Gopal Singh Vs. State of Uttarakhand*, while focusing on the gravity of the crime and the concept of proportionality as regards the punishment, the Court has observed: (SCC pp. 551-52, para 18)

"18. Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of proportionately allows a significant discretion to the Judge but the same has to be guided by certain principles. In certain cases, the nature of culpability, the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal in future, capability of his reformation and to lead an acceptable life in the prevalent milieu, the effect-propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crime and his conduct in the interregnum bearing in mind the nature of the offence, the relationship between the parties and attractability of the doctrine of bringing the convict to the value-based social mainstream may be the guiding factors. Needless to emphasize, these are certain illustrative aspects put forth in a condensed manner. We may hasten to add that there can neither be a straightjacket formula nor a solvable theory in mathematical exactitude. It would be dependent on the facts of the case and rationalised judicial discretion. Neither the personal perception of a Judge nor self-adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors which we have indicated hereinbefore and also have been stated in a number of pronouncements by this Court. On such touchstone, the sentences are to be imposed. The discretion should not be in the realm of fancy. It should be embedded in the conceptual essence of just punishment."

2. Seven years prior to that, in *Shailesh Jasvantbhai Vs State of Gujarat* it has been held that;

"7. The law, regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross-cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of "order" should meet the challenges confronting the society. Friedman in his Law in Changing Society stated that; "State of criminal law continues to be - as it should be - a decisive reflection of social consciousness of society". Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix be by deft modulation, sentencing process be stern where it should be and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.

8. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law, and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed, etc. This position was illuminatingly stated by this Court in *Sevaka Perumal Vs. State of T.N.*

And again (SCC p.362, para 13)

"13. ...The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and the victim belong. The punishment to be awarded for a crime must not be irrelevant but it should confirm to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society"s cry for justice against the criminal."

3. It needs no special emphasis to state that prior to the said decision, there are series of judgments of this Court emphasising on appropriate sentencing. Despite authorities existing and governing the field, it has come to the notice of this Court that sometimes the court of first instance as well as the appellate court which includes the High Court, either on individual notion or misplaced sympathy or personal perception seems to have been carried away by passion of mercy, being totally oblivious of lawful obligation to the collective as mandated by law and forgetting the oft quoted saying of Justice Benjamin N. Cardoz, "Justice, though due to the accused, is due to the accuser too" and follow an extremely

liberal sentencing policy which has neither legal permissibility nor social acceptability.

4. We have commenced the judgment with the aforesaid pronouncements, and our anguished observations, for the present case, in essentiality, depicts an exercise of judicial discretion to be completely moving away from the objective parameters of law which clearly postulate that the prime objective of criminal law is the imposition of adequate, just and proportionate punishment which is commensurate with the gravity, nature of the crime and manner in which the offence is committed keeping in mind the social interest and the conscience of the society, as has been laid down in *State of M.P. Vs. Bablu*, *State of M.P. Vs. Surendra Singh* and *State of Punjab Vs. Bawa Singh*."

9.6 In another decision in the case of *Abdul Waheed Vs. State of Uttar Pradesh* reported in , (2016) 1 SCC 583 while considering the principles for sentencing the Hon''ble Supreme Court has observed and held that it is the duty of Court to award proper sentence having regard to the manner in which the offence was committed. It is further observed that undue sympathy would do more harm to criminal justice system undermining the public confidence in the efficacy of the system.

9.7 Applying law laid down by the Hon''ble Supreme Court in the aforesaid decisions to the facts of the case on hand, it is required to be noted that the injured eye witness sustained the following two injuries, which were inflicted by the original accused;

"(i) 3 x 2 x 5 cm incised wound over left chest. 3 cm lateral and 10 cm below xifi sternum.

(ii) 7 x 1 x 0.5 cm linear contused lacerated wound over left forearm middle side."

As per the deposition of the Doctor both the injuries were possible by knife. It is required to be noted that the injured was required to remain in the hospital as indoor patient for ten days. He has also been operated once. Considering the aforesaid facts and circumstances of the case and considering the fact that on a small issue of not fulfilling the demand of the original accused of giving Rs. 500/- by way of loan as the injured witness was not having it and immediately he took out the knife and caused/inflicted the injuries by knife in the abdomen and hand, and therefore, imposing the sentence of three years Rigorous Imprisonment only cannot be said to be imposing adequate punishment commensurate with the gravity of the offence. Even the reasoning given by the learned trial Court to impose lesser punishment cannot be sustained. The learned trial Court has imposed lesser punishment by observing that on the spot and all of a sudden as he became angry he inflicted the blows by knife and at the time of commission of the offence he was of young age, and therefore, it cannot be said to be ground germane to impose lesser punishment. In the aforesaid facts and circumstances of the case, we are of the opinion that if the original accused is sentenced to

undergo five years Rigorous Imprisonment with fine imposed by the learned trial Court for the offence punishable under Section 326 of the Indian Penal Code the same can be said to be just, adequate punishment commensurate with the gravity of the offence.

9.8 Even the learned trial Court has materially erred in imposing the fine of Rs. 200/- only while convicting the original accused for the offence punishable under Section 135 of the Bombay Police Act. As the original accused has used the knife as a weapon considering Section 37(1) read with Section 135 of the Bombay Police Act the minimum sentence provided is four months Rigorous Imprisonment and the maximum punishment is one year. However, despite the fact that the case would fall under Section 37(1) of the Bombay Police Act the learned trial Court has imposed the fine of Rs. 200/- only, which cannot be sustained and considering Section 135(1) of the Bombay Police Act read with Section 37(1) of the Act sentence of four months is liable to be imposed for the offence punishable under Section 135 of the Bombay Police Act.

10. In view of the above and for the reasons stated hereinabove, Criminal Appeal No. 663/2013 preferred by the original accused is hereby dismissed. The impugned judgment and order passed by the learned Sessions Judge, Bhavnagar in Sessions Case No. 21/2012, convicting the original accused for the offence punishable under Section 326 of the Indian Penal Code and Section 135 of the Bombay Police Act is hereby confirmed.

10.1 In view of the above and for the reasons stated hereinabove, Criminal Appeal No. 1055/2013 preferred by the State is hereby partly allowed and while confirming the conviction of the original accused for the offence punishable under Section 326 of the Indian Penal Code and Section 135 of the Bombay Police Act the original accused is hereby sentenced to undergo five years" Rigorous Imprisonment with fine of Rs. 1000/- and in default to undergo further one month Rigorous Imprisonment for the offence punishable under Section 326 of the Indian Penal Code and is sentenced to undergo four months" Rigorous Imprisonment and in default to undergo further three months Rigorous Imprisonment for the offence punishable under Section 135 of the Bombay Police Act. Both the sentences to run concurrently. It goes without saying that whatever the sentence the original accused had already undergone the same shall be given set off in accordance with law. It is reported that during pendency of Appeal the original accused is on bail and on the conviction being confirmed by the judgment and order and the sentence being enhanced, his bail bond stands cancelled and the original accused be taken into custody forthwith.

Registry is directed to send the Record and Proceedings of the case to the learned trial Court forthwith.