

(2016) 02 GUJ CK 0202
In the Gujarat High Court
Case No : Criminal Appeal No. 138 of 2009

Rameshbhai Gemarbhahi Koli and Others	APPELLANT
Vs	
State of Gujarat	RESPONDENT

Date of Decision : 29-02-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 302, Section 304, Section 34

Citation : (2016) 02 GUJ CK 0202

Hon'ble Judges : K.S. Jhaveri and G.B. Shah, JJ.

Bench : Division Bench

Advocate : Himansu M. Padhya, Advocate, for the Appellant; Hardik Soni, Additional Public Prosecutor, for the Respondent

Final Decision : Partly Allowed

Judgement

K.S. Jhaveri, J.—1. Heard learned Advocate for the appellants accused Mr. Himanshu M. Padhya and learned Additional Public Prosecutor Mr. Hardik Soni for the respondent - State.

2. The appellant accused No. 1 - Rameshbhai Gemarbhahi Koli has expired. Learned Advocate places before this Court a copy of the Death Certificate of Rameshbhai Gemarbhahi Koli which is ordered to be taken on record. Therefore, the appeal qua the appellant accused No. 1 is abated.

3. By way of this Appeal, the Appellant accused have felt aggrieved by the judgment and order of conviction and sentence dated 07.01.2009 passed by the learned Presiding Officer and Additional Sessions Judge, 2nd Fast Track Court, Deesa Camp at Deodar, in Sessions Case No. 46/2007 whereby both the appellants were convicted for the offence punishable under Sections 302 read with Section 34 of the Indian Penal Code and were sentenced to undergo imprisonment for life and fine of Rs. 10,000/- each and in default of payment of fine, rigorous imprisonment for one year.

4. The facts of the case in brief are as under:--

"4.1. It is the case of complainant - Isabhai Khagabhai Koli that he resides at Village Dudhva, Taluka Tharad. On 06.04.2007, the complainant was in the field of Patel Ganeshbhai looking after and taking care of the bajra crop that was sown in the field. In the night, the complainant was returning back to the village for having supper. While walking back to his village, the complainant saw that two men were trying to drag one person on the road. Since it was dark, the complainant, using the torch tried to see as to who these people were and identified them as Ramesh Gemar Koli and Hajura Masa Koli (the appellants herein). It is alleged that those two persons ran away towards the lake and the person who was tried to be dragged was the complainant's son - Vasabhai Isabhai. The complainant saw that there were injuries on the head and on the eyes on his son, because of which blood was oozing out. The complainant's son could not speak. Efforts were made to make the complainant's son stand on his legs but he fell down and it was noticed that he was dead. The above incident had occurred at around 11.00 pm. The complainant then left the body of his son on the road itself and called his nephew - Mevabhai Sattabhai Koli and his brother - Gopalbhai Khagabhai, who arrived at the scene of incident. Other members of the family as well as the residents of the village were also called for. On gathering information, it came to the knowledge of the complainant that both the accused had picked up a quarrel with the deceased, injured him to death and then dragged his body to the road and fled away from the scene of the incident. When the complainant was going to lodge the complaint, one - Jivabhai Nagjibhai came running and told the complainant that the accused No. 1 had an iron chain and the accused No. 2 had an axe and both of them, from the previous evening itself, had been looking for an opportunity to kill him and the son of the complainant. Both Jivabhai and the deceased were called to the area near the lake by the accused who later picked up a fight and both were beaten up.

4.2. Based on the above, a complaint was lodged with Tharad Police Station on 06.04.2007 at 7.30 am which was registered as I-C.R. No. 34/2007 under Sections 302 and 34 of the Indian Penal Code. The investigation commenced and the investigating officer prepared the inquest panchnama and sent the body of the deceased for post mortem. The statements of witnesses were recorded, the panchnama of the scene of offence was carried out and the accused were arrested. The weapons were recovered and the muddamal was sent for analysis to the FSL. Thereafter, the post mortem note and the FSL Report were made available. On completion of investigation, chargesheet was submitted in the Criminal Court at Tharad wherein it was registered as Criminal Case No. 256/2007. As the case was triable by the Sessions Court, the same was committed to the Sessions Court, Deesa, Camp at Deodar. The trial Court framed the charge and read it over to the accused. The accused pleaded not guilty and claimed to be tried.

4.3. At the time of the trial, the prosecution examined the following witnesses:--

The prosecution also relied upon various documentary evidence, some of them are:--

4.4. At the end of the trial, further statements of the accused under Section 313 of the Code of Criminal Procedure were recorded in which, the accused pleaded not guilty and stated that they have been falsely implicated in the offence. Thus, after recording the further statement of the accused and hearing the arguments of both the sides, the learned Sessions Judge passed the above judgment and order. Being aggrieved by the same, the present appeal has been filed, as aforesaid."

5. Learned Advocate for the appellants accused Mr. Himanshu M. Padhya has submitted that presence of Jivabhai at the place of incident is doubtful. It is further submitted that the complainant had seen two persons who were dragging the body of the deceased. On the torch light being beamed on the accused, the complainant had stated that it was the accused herein but there were no lacerated injuries found on the back side of the body of the deceased nor were there any marks of dragging on the deceased. It is also submitted that in the night hours, it would have been improbable to state that it was the accused herein who had caused the death of the deceased. It is further submitted that even if the case of the prosecution is believed, this Court would have to refer to the injuries suffered by the deceased which are detailed at Column No. 17 of the Post Mortem Report given by Dr. Pankaj L. Gupta, the Medical Officer who conducted the post mortem on the dead body of the deceased and who opined that "the probable cause of death is due to shock and heart failure due to extensive internal loss of blood due to laceration of viscera (liver) and perforation of heart." In the circumstances, in the submission of the learned Advocate for the appellants accused, the learned trial Judge ought to have given the benefit of doubt to the accused and acquitted them. However, without prejudice to the rights and contentions of the accused, he submitted that considering the above factual aspects and looking to the number of years that have elapsed, this Court may convert the conviction of the accused No. 2 from Section 302 of the Indian Penal Code to Section 304 Part I of the Indian Penal Code.

6. On the other hand, learned Additional Public Prosecutor Mr. Hardik Soni has taken us to the medical evidence and has submitted that the presence of the accused has been proved at the place of incident beyond reasonable doubt. It is further submitted that the learned Sessions Judge has given cogent and convincing reasons to arrive at the conviction and sentence of the accused. Considering the above, it is submitted that this is a fit case which requires no interference of this Court and instead, the conviction and sentence of the accused should be confirmed.

7. We have heard learned Advocates appearing for the respective parties and perused the records of the case. From the statement of various witnesses, the presence of the accused has been proved beyond reasonable doubt. Regarding doubt of veracity of the statement of the witness - Jivabhai, we are of the view

that there is no need whatsoever for this witness to give evidence with an ulterior motive, because it was this witness who had escaped from the clutches of the accused. Looking to the nature of injuries that have been caused which ultimately resulted into the death of the deceased and considering the submissions advanced by learned Advocate for the appellants herein, we are of the opinion that this Criminal Appeal is required to be allowed by holding the accused No. 2 guilty for the offence under Section 304, Part I of the Indian Penal Code and not for offence punishable under Section 302 of the Indian Penal Code and sentence imposed upon the accused No. 2 is required to be reduced to ten years imprisonment.

8. In the result, the Appeal is partly allowed. The judgment and order of conviction and sentence dated 07.01.2009 passed by the learned Presiding Officer and Additional Sessions Judge, 2nd Fast Track Court, Deesa Camp at Deodar in Sessions Case No. 46/2007 for the offence punishable under Section 302 of the Indian Penal Code is altered to one under Section 304 Part I of the Indian Penal Code and the original accused No. 2 - Hajuraji Masaji Koli is sentenced to undergo rigorous imprisonment for ten years instead of life imprisonment. The rest of the part of the judgment and order of conviction and sentence including fine etc. remains unaltered.

The period of sentence already undergone shall be considered for remission and set off in accordance with law. The accused No. 2 shall surrender before the jail authorities within a period of twelve (12) weeks from today to serve the remaining period of sentence failing which, the jail authorities shall take appropriate steps to see that the accused No. 2 is arrested and he undergoes the sentence as awarded by this Court. Bail bond, if any, of the accused No. 2 stands cancelled. Record and proceeding be sent to the concerned Trial Court forthwith.