

(1999) 10 GUJ CK 0035
In the Gujarat High Court
Case No : Criminal Appeal No. 452 of 1990

Rolia Jamal Ratwa

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 27-10-1999

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2000) 2 GLR 412

Hon'ble Judges : R.R. Tripathi, J;M.R. Calla, J

Bench : Division Bench

Advocate : Mathew Kalathil, for the Appellant; B.R. Gajjar and S.A. Pandya, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

M.R. Calla, J.—This appeal is directed against the order of conviction of the present appellant under Sec. 302 of I.P.C. and the sentence of life imprisonment and fine of Rs. 200/- and in case of default to pay the fine, further rigorous imprisonment for a period of three months, as was ordered on 20th April 1990 by the Addl. Sessions Judge, Baroda, in Sessions Case No. 31 of 1989. It may also be mentioned that by this very order, the accused no. 2, i.e. Nattarsinh Rolia was acquitted of the charge under Sec. 302 read with 34 of I.P.C. and in the alternative Sec. 114 of I.P.C. Against the acquittal of Nattarsinh, accused no. 2, Criminal Appeal No. 353 was filed by the State which was dismissed on 20th June 1990.

2. The incident is said to have taken place on 25th April 1989 at 7.00 p.m. On the following day, i.e. 26th April 1989, one Chandubhai Malubhai Ratwa lodged the complaint with the Police Station, Kawant to the effect that, in the village Chikhli (Raichha), Taluka Chhota Udepur, he was living with his mother and brothers, that he was an agriculturist, that they were two brothers, Mangla being the elder. He reported that on the previous day evening at about 7.00 p.m. he and his brother along with his wife Laxmi and Bhabhi Sakariben and his sister

Nargiben, his mother Tejliben were at home. At that time, his brother-in-law (sister's husband) Rolia Jamal with bow and arrow in his hand and his nephew (sister's son) Nattarsinh Rolia with Dingo in his hand came to his house. That his brother-in-law, Rolia Jamal was telling his brother Mangla that, about eight days back, Nattarsinh was on Tad and he had not supplied Tadi to him and at that time, he had quarrelled with him and said that why did he shoot an arrow. While saying so, he got enraged and shot an arrow at Mangla which pierced below his right arm as a result of which, Mangla fell down, his nephew Nattarsinh came running and gave a blow of Dingo on the neck (backside) and at that time, he himself, his Bhabhi Sakariben, i.e. wife of Mangla, Subhala Vichhia, Nargi and Tejli intervened and after a short time, his brother died and Rolia and Nattarsinh ran away. He has further reported that this incident had happened because about eight days back, his brother had demanded Tadi from Nattarsinh and when he did not supply Tadi, his brother had shot an arrow at Nattarsinh and for this reason his brother Mangla had been done to death in the previous evening at about 7.00 p.m. by both these persons by arrow and dingo, there is no other reason. Since it was night time, he had come to report the matter on the following day. A copy of the report as was drawn by the Police Sub Inspector of Kawant Police Station on which the left hand thumb impression of Chandu was obtained, is at Exh. 16 - page nos. 94-95 of the paper book. On the basis of this report, the police registered the case and started investigation. The statements of witnesses were recorded, the corpse of deceased Mangla was sent for post mortem and after the investigation was over, the chargesheet was filed against Rolia Jamal and Nattarsinh Rolia.

3. Both the accused were charged by the Addl. Sessions Judge, Baroda, camping at Chhota Udepur in Sessions Case No. 31 of 1989 for the offence punishable under Sec. 302 and 34 of I.P.C. and in the alternative, for Sec. 114 of I.P.C. Both the accused opted for trial. In the result of the sessions trial, the Sessions Court has convicted the present appellant, Rolia Jamal for the offence punishable under Sec. 302 of I.P.C. and the other accused Nattarsinh has been acquitted of the offence punishable under Sec. 302 read with Sec. 34 of I.P.C. and in the alternative, Sec. 114 of I.P.C. The present appellant has been sentenced to life imprisonment and fine of Rs. 200/- and in default, to undergo further rigorous imprisonment for three months. Aggrieved from the conviction and sentence as aforesaid, the appellant has preferred the present appeal before this Court.

4. Mr. Mathew Kalathil, learned Counsel for the appellant while assailing the order of conviction and sentence before this Court, has submitted that so far as the motive is concerned, PW3 Chandubhai Exh. 15 at page nos. 14-17, who is the brother of the deceased Mangla has not stated anything and on the contrary, he has stated that his brother has been killed without any reason and prior to the incident, nothing had happened. In para 4 of his cross-examination, he has stated on the question of motive that, he does not know anything as to whether deceased Mangla had demanded Tadi from Nattarsinh and as to whether Nattarsinh supplied Tadi or not. Then he has stated that Nattarsinh did not

supply Tadi and, therefore, Mangla had shot an arrow at him. However, he has stated that prior to the incident in question, there was a discussion between deceased Mangla and the appellant, Rolia Jamal. PW5 Sakariben (Exh. 19 at page nos. 21-21 of the paper book) i.e. widow of deceased has deposed that while her husband had been killed, she does not know the reason for which he had been killed.

5. Thus, on the question of motive, we find that while the witness PW3 Chandubhai who is the author of the complaint has given an inconsistent version, PW5, i.e. widow of deceased has not said anything. In any case, we find that if there is wholesome evidence which is otherwise trustworthy, the motive may not be of that importance.

6. Now, coming to the question of evidence with reference to the ocular evidence, Mr. Mathew Kalathil for the appellant has submitted that the prosecution has examined five witnesses in all as eye witnesses, but his submission is that they cannot be taken as eye witnesses as is clearly made out from the statements made by these five witnesses who have been claimed to be eye witnesses by the prosecution. These five witnesses are PW3, i.e. Chandubhai, who is brother of deceased, PW4 Subhala Vichhia who lives in neighbourhood of the complainant PW5 Sakariben - widow of the deceased, PW6 Nargiben who is the daughter of the deceased and PW7 Tejliben - mother of the deceased.

7. PW3 who is the author of the complaint and who had given the time of the incident as 7.00 p.m. in the complaint reported by him has in his statement Exh. 15 deposed that at about 5.00 p.m. while he was at home with Bhabhi (Sakariben, wife of the deceased), Laxmi (his wife), Nargi (daughter of the deceased) and Tejliben (mother of the deceased), at that time, Rolia Jamal, his brother-in-law along with Nattarsinh came there. Rolia Jamal was armed with arrow and bow and Nattarsinh with Dingo. Rolia Jamal shot an arrow which hurt his brother under the arm. At that time, his brother Mangla was near the gate of his house and he fell down near the gate. Nattarsinh gave a blow of Dingo on the neck (backside) of his brother and before he could make any effort, his brother had already been injured by the arrow shot and immediately thereafter died and both the accused fled away. At about 12 O'clock in the night, he went to the Police Station, but the complaint was recorded in the morning. He has stated that Mark 7/1, i.e. complaint is the complaint which bears his thumb impression and that the contents whereof are correct. This complaint is at Exh. 16. He has stated that the knob of the arrow remained in the body of the deceased. He has further deposed that he has bullocks, there is a cattle house at his house in which the bullocks are tied, beyond the cattle house, there is a vada with fencing, after this vada, there is house of meatyard after 150 steps; behind the house of meatyard, there is a vada of Vichhia and adjacent to Vichhia's house, there are houses of Rejan and Jangudia. In the house of Vichhia, Vichhia himself, his sons Fajal, Sumani and Dehli - four persons are living. He has denied the suggestion that

the ladies of his house were out. He has then stated that in the house of Rejan, Rejan lives with his wife and nobody else lives therein. In the house of Jangudia, Jangudia, his wife and his mother are living. On the date of incident, Mangla had gone to tie the bullocks in the cattle house. One of the bullocks went to the vada of Vichhia and Mangla had gone to vada of Vichhia to bring back the bullock and it was in the vada of Vichhia that the deceased Mangla sustained the arrow injury. He has denied the suggestion that they all had gone to Mangla after hearing the call for help from him. He then states that after sustaining the arrow injury, Mangla himself came down walking to the open space of their house, his wife Sakariben brought water from the house, and thereafter, the Patel and the persons living nearby assembled. The Police Station Panwad is nearer to Chikhli and it takes about 1 to 1-1/2 hour to reach Panwad on foot. He has further stated that in the night, though they had gone to Panwad, the doors were closed and therefore, the report was made in the morning. At the time when the report was made, the Jamadar accompanied him to Chikhli and there the statements were recorded and the panchnama of the corpse was prepared. A Court question was put to him that whether the arrow was shot to his brother in the vada of Vichhia or near the gate of his house. To this specific question, he gives an evasive answer that vada of Vichhia is near to his house. He has stated that he had not seen that his brother Mangla had given Palia blow to Fajlu and has denied the suggestion that for this blow to Fajlu, no case was filed. He has also denied the suggestion about demand of Tadi by Mangla from Nattarsinh and that he does not know as to whether Nattarsinh supplied the Tadi or not. He then states that Nattarsinh did not supply Tadi and, therefore, Mangla had shot an arrow at Nattarsinh. He has stated that on the date of incident, there was a discussion between Mangla and Rolia Jamal and it is a fact that this discussion had taken place outside the gate of his house. He has also agreed to the suggestion that at the time of incident, Rolia Jamal had enraged and out of anger, he suddenly shot the arrow. He has also agreed to the suggestion that at that time Rolia had about 4 to 5 arrow and after injuring his brother with the arrow, Rolia had immediately ran away and thereafter they all lifted Mangla and brought him to their house. He has then denied the suggestion that at the time of incident, he was in the house. He has stated that he was standing in the open space. He has also agreed to the suggestion that there is a cactus fencing around the vada of Vichhia and after the fencing of Thor, there is a full passage of about 15 to 20" and upto that distance there is a cactus fencing of their own vada. He has also agreed to the suggestion that after the cactus fencing of vada, at a distance of about 15 to 20 steps, it is their cattle house and behind the cattle house, his house is there. He has also agreed to the suggestion that just adjacent to Vichhia's house, there are houses of Subhala and Rejan, but he has denied the suggestion that any person standing in the open space of his house cannot see the person standing in the vada of Vichhia. In answer to the question that he had reached the vada of Vichhia after hearing the call for help when his brother was injured by the arrow, he has answered that he had seen it.

8. We find from the statement of this witness as a whole that on the question of personally witnessing the incident, his version does not inspire the requisite confidence inasmuch as in the examination in chief, he has stated that at the time when the arrow shot was sustained by Mangla, he was standing near the gate of his house, but in the cross-examination, he has categorically stated that the arrow shot was sustained by his brother in vada of Vichhia. From the description of the situation of his house, his cattle house, the house of Vichhia, 10 to 15" passage, and thereafter the vada of Vichhia and the cactus fencing, we find that it may not be possible for any person standing in the open space of the house of the complainant to watch as to what is going on at the vada of Vichhia. Thus, there is discrepancy in the version of this witness with regard to the exact place where the arrow shot was sustained by the deceased and on the basis of his statement, it cannot be the exact place where the deceased sustained the arrow shot and it cannot be fixed as to whether it was near the gate of the house of the complainant or in the vada of Vichhia and it creates a lurking doubt about the case of prosecution in this regard, although it appears from the panchnama of scene of offence Exh. 22 at page no. 96 of the paper book that the place was vada of Vichhia. Even on the question as to whether this witness had himself seen the sustaining of the arrow shot by Mangla is doubtful.

9. PW5 Sakariben, i.e. widow of the deceased has stated that the house of Rolia was near to her house and her husband had been killed by Rolia Jamal. She has given the time of incident as 7.00 p.m. She has also stated that Rolia and Nattarsinh both had come to kill her husband, Rolia was armed with arrow and bow and Nattarsinh was armed with Dingo. Her husband had gone with the bullocks in the morning and came back with bullocks in the evening and while he was tying the bullocks, one of the bullocks escaped; she has stated that her husband had gone to take back the bullock to the gate of Subhala out of the cattle house and in the meantime, Rolia had come, Rolia shot the arrow on the right side below the arm in the ribs of Mangla, he had shot only one arrow and her husband had come to the gate of their house after sustaining the arrow injury, and what had been done by Nattarsinh is not known to her and after some time, her husband died. In the cross-examination, she has admitted that the bullock which escaped had gone to the vada of Vichhia and her husband had gone to the vada of Vichhia to take back the bullock and that thereafter, Rejan, Jangudia and others were called to her house and thereafter when they went to the vada of Vichhia, they found that Mangla had been injured with the arrow and was there in the vada of Vichhia wherefrom he was lifted and carried to her house. She has also stated that she along with Chandu, Tejli etc. had all assembled and all had gone together. Thereafter, Chandu and she went to Panvad Police Station for filing the complaint and since Chandu had been held up for one whole day in the farm, he was tired and therefore, he had gone for sleep. From Panvad in the morning, they went to Kawant in the morning at about 9.00 a.m. The Police then came to her village in the afternoon. Thus, we find that with regard to the actual place of offence, the deposition of this witness is also

inconsistent and it also appears from her statement that the actual place of offence committed was the vada of Vichhia. She has also categorically stated that after Mangla had gone to the vada of Vichhia, Jangudia had come to her house to call her and thereafter when they went to the vada of Vichhia, they found that Mangla had sustained the shot of arrow and was lying there and therefrom he was lifted and brought to the house and further that she along with Chandu had all gone together to the vada of Vichhia. Thus, it cannot be said on the basis of the deposition made by her that she herself had seen Rolia causing injury by arrow to Mangla and it appears from her statement that she reached the vada of Vichhia after Mangla had already sustained the arrow shot and when Rejan, Jangudia etc. came to her house to call her, she along with Chandu, Tejli etc. went to the vada of Vichhia. In her statement, she has also not said that her daughter Nargi was called when she went to the vada of Vichhia and even if it is an omission in her statement, it is a very important omission of an important witness. PW6 is Nargi, i.e. daughter of the deceased at Exh. 20, page nos. 22-23 of the paper book. While this witness has stated about the motive with reference to the demand and denial for supply of Tadi, on the question of the actual incident, she has firstly stated that she was at home when the arrow was shot and then she says that she was coming back from the farm and was quite close to her house, that she herself had seen the infliction of arrow shot and the Dingo blow inflicted by Nattarsinh on her father's neck (backside) by her Bhuva's husband from a distance of 15-20". That when her father fell down, first of all, her uncle Chandu came and thereafter her mother and grand-mother. The effort was made to give water to her father which he did not take and shortly thereafter, he died. She has also narrated the story with regard to the bullock and that Mangla had gone to the vada of Vichhia following the escape of the bullock. She has agreed to the suggestion that Subhala had come to her house and thereafter all of them had gone to the vada of Vichhia where Mangla was lying and was injured by the arrow shot under the arm and thereafter Rejan, Jangudia etc. lifted her father and brought him to her house. On being confronted with the statement by her before the police, she has denied the suggestion that she had not stated before the police that she had gone to the farm and while she was on her way back from the farm and was close to her house, at the time when the arrow was shot. Having denied this suggestion, she says that she herself had seen. In answer to a Court question, she has stated that at the time when the arrow shot was sustained by her father, she had not reached her home. She has denied the suggestion that in her statement before the police she had not stated that she was at a distance of 15-20 steps when the arrow was shot at her father. She then states that Nattarsinh had given the Dingo blow with force on the head of her father which resulted into a tear on his back and wherefrom he was bleeding. From the statement of this witness, we find that her version with regard to her presence at home and that she was coming back from the farm and that she had seen the incident from a distance of 15-20" and that she reached the vada of Vichhia on being called by Subhala are all at variance and do not make out the case as if she herself had seen the

incident. Even if it is taken that she was in close vicinity of her house or vada of Vichhia, it cannot be said that she herself had seen the actual shot of arrow by Rolia on her father because, she has categorically admitted that she had gone to the vada of Vichhia on being called by Subhala. Even otherwise, it appears that this witness is not reliable inasmuch as she has gone to the extent of telling that her father was bleeding from the backside of his neck as a result of the Dingo blow by Nattarsinh whereas the post mortem report and the statement of PW8 Dr.Rajeshkumar Exh. 23 shows that there was no such injury on the backside of the neck of the deceased and there was not even an abrasion. Therefore, this witness is not worth reliance more particularly when she has also not been named by her own mother as a person who accompanied the members of the house to the vada of Vichhia.

10. PW7 Tejliben has contradicted PW3 Chandu on the question that there was some discussion between Rolia and deceased Mangla before the incident. She has supported the story with regard to the bullock. She has not fixed the actual place where the offence is committed and has deposed in her examination in chief that at the time when the deceased Mangla fell down, she was cooking the food in her house and when all the persons assembled, she came to know about it and at that time she came to know that her husband had fallen down and she came out and she along with her daughter-in-law and the girl and her son Chandu was also there. In an answer to the Court's question, she has said that Nargi told her that her father had been injured by an arrow shot at the hands of Rolia and Dingo blow had been given by Nattarsinh. Thus, this witness cannot be taken to be an eye witness for the simple reason that she has categorically stated that it was Nargi who told her that Rolia had given the arrow shot to her father and Nattarsing had given a Dingo blow.

11. The last and the next eye witness is PW4 who is a neighbour namely Subhala. Apart from the fact that the above discussed witnesses are of the members of the house, being brother, wife, daughter and mother of the deceased, this witness is a neighbour who could be an independent witness. This witness has categorically said that he was at his house at the time of the incident, opposite to his house there is house of Vichhia. He has stated that Mangla's house is on the side. The house of Mangla can be seen from ahead of his house. He supported the story of the bullock, he has stated that he had not seen the actual quarrel, he was under fever and was lying on his bed, he said that he had seen deceased Mangla as injured by an arrow, but he had not seen as to who had shot the arrow. He has also agreed to the suggestion that Mangla's house cannot be seen from the vada of Vichhia and that at the time when he went to the vada of Vichhia, Rejan, Jangudia etc. all had come there and Mangla was lying there. He has stated that from his house also Mangla's house can be seen. He has further agreed to the suggestion that when he went to the place of occurrence, Chandu, Sakari, Tejli etc. all had come there and at that time, there was nobody who had shot the arrow. However, this witness has been declared to be hostile during the course of his examination before the Court.

12. From the analysis of the ocular evidence as above read with the medical evidence as deposed by PW8, we find that Mangla had of course sustained an injury below his arm by an arrow shot which proved to be fatal and it is also a fact that he has died as a result of this injury, but it cannot be concluded on the basis of the witnesses as aforesaid that it was Rolia and Rolia alone who had caused this arrow shot. In view of the diversions and inconsistencies in the statements of the witnesses as aforesaid, none of the witnesses PW3, PW4, PW5, PW6 and PW7 can be said to be eye witnesses nor we find it safe to base the conviction on the depositions made by these witnesses read with the medical evidence more particularly when it appears that the vada of Vichhia cannot be even seen from the house of the complainant party.

13. Learned Counsel for the appellant has cited the decision in the case of B.N. Singh Etc. Vs. State Of Gujarat Etc., and has submitted that in this case the Supreme Court has held that, if the implication of one of the two accused is found to be false by the Court on the basis of the statements of those very witnesses, the other accused cannot be convicted on the maxim that if the evidence is not trustworthy, the accused is entitled to be acquitted.

14. Learned Addl. Public Prosecutor has cited the decision in the case of Ishwarbhai Fuljibhai Patni, reported in 1995(2) GLH 1 and has read out certain portions from the statements of the witnesses. We do not find that this decision has any relevance or that it is of any avail to the case of the prosecution.

15. Learned Counsel for the appellant has also pointed out that since 1989 the present appellant is in jail and by now, he has remained in jail for a period of more than ten years.

16. In the result, we do not find it safe to sustain the conviction on the basis of the analysis of the evidence as aforesaid and we find that the present appellant is entitled to the benefit of doubt in view of the evidence which has been discussed hereinabove. Accordingly, this appeal succeeds and the same is hereby allowed. The impugned order of conviction for the offence punishable under Sec. 302 of I.P.C. and sentence dated 20th April 1990 passed by the Addl. Sessions Judge, Baroda, in Sessions Case No. 31 of 1989 is hereby set aside. The appellant stands acquitted. The appellant shall be released forthwith if he is not required in any other case.