

(1971) 12 GUJ CK 0007
In the Gujarat High Court

Salim Mohmad and Another

APPELLANT

Vs

The State of Gujarat

RESPONDENT

Date of Decision : 18-12-1971

Acts Referred:

Penal Code, 1860 (IPC) — Section 147, 149, 225, 353, 426

Citation : (1971) 12 GUJ CK 0007

Hon'ble Judges : S.H. Sheth, J

Bench : Single Bench

Judgement

S.H. Sheth, J.—These two appeals arise out of Sessions Case No. 6 of 1970 decided by the learned Sessions Judge at Navsari. In that case seven accused were tried for having committed offences u/s 147. 353 read with Section 149. 225 read with Section 149. 426 read with Section 149 of the Indian Penal Code and under Sections 127 and 108 of the Indian Railways Act. The learned Sessions Judge has acquitted the accused of offences under Sections 127 and 108 of the Railways Act. He has convicted all the accused of offence u/s 147 of the Indian Penal Code and sentenced each one of them to undergo rigorous imprisonment for six months and to pay a fine of Rupees 200/- or in default to undergo rigorous imprisonment for one month. He has also convicted all of them u/s 353 read with Section 149 of the Indian Penal Code and sentenced each one of them to undergo rigorous imprisonment for one year and to pay a fine of Rupees 250/- or in default to undergo rigorous imprisonment for two months. The next offence of which he has convicted all the accused is u/s 225 read with Section 149 of the Indian Penal Code and he has sentenced each one of them to undergo rigorous imprisonment for one year and to pay a fine of Rupees 250/- or in default to undergo rigorous imprisonment for two months. Lastly he has convicted all of them u/s 426 read with Section 149 of the Indian Penal Code and sentenced each one of them to undergo rigorous imprisonment for one month and to pay a fine of Rupees 200/- or in default to undergo rigorous imprisonment for 15 days. He has directed all the substantive sentences to run concurrently. Criminal Appeal No. 475 of 1970 has been filed by the original accused Nos. 3

and 5 against this order of conviction. Criminal Appeal No. 476 of 1970 has been filed by the accused Nos. 1, 2, 4, 6 and 7 against the said order of conviction.

2. The prosecution case is disclosed in details by the evidence of Mansing Gagubha Gohil whose testimony appears at Ex. 5. The incident happened on 26th June, 1969 at about 4.10 a. m. At that time he was serving "as Police Sub-Inspector in charge of Anti-corruption Bureau. Vapi and was attached to the Anti-Smuggling Squad. With the members of his squad he had gone to Pardi in a jeep. He left Pardi for Bulsar at about 2-30 a. m. that day by Viram-gam Passenger train. He was accompanied by Head Constable Bhikhaji, Head Constable Vaman. Police Constable Madhukar Tapidas and Police Constable Lallubhai. All of them had been travelling by the same train. He checked the third class bogie by which he was travelling as he suspected that some of the passengers were carrying smuggled goods. He found in that compartment two persons Bihari and Rajnikant who according to him, were in possession of smuggled goods. He, therefore arrested them and took them to Bulsar where they reached at about 3 a. m. At Bulsar Railway Station they got down and boarded Dehradun Express bound for Bombay. The two arrested persons were with them. He had earlier received information that some smugglers had been pulling the chain of the railway train and stopping it at Udwada for transporting smuggled goods to Bombay and that some of them had also been travelling in second class compartments. Therefore, when he boarded Dehradun Express as Bulsar he with the members of his party and the two arrested persons thought of travelling by the second class compartment. In the second class compartment at that time there were members of the railway escort party. When the train neared Udwada railway station the train was stopped by pulling the chain. When the train made an unscheduled stop on account of the aforesaid reason, at Udwada Station he saw a crowd of about 25 persons entering the railway platform from the main gate and proceeding towards the second class compartment. They got into the second class compartment and placed their bundles there. In all there were about 12 such bundles which they placed in the second class compartment by which the witness was travelling. Those 25 persons included the accused Nos. 1, 2 and one Narayan Kher who is not before the Court. They thereafter closed the doors of the compartment. Those three persons were arrested by him. The train then started moving out of the station. The accused Nos. 1 and 2 and Narayan Kher at that time shouted that there was Police in the compartment and that they should be released from them. Therefore the train was again stopped by pulling the chain at some distance after it had started moving out of the railway station. As soon as the train stopped those who had been standing on the platform went near the compartment and told him that the three arrested persons should be released or otherwise they would not allow the train to proceed further. He told them that he had arrested them with smuggled goods and that, therefore they could not be released. The train again thereafter started moving. It was again stopped by pulling the chain. Those persons who had asked him to release the aforesaid three persons went near the compartment. He tried to pacify them. He

requested them to allow the train to proceed further. Thereafter they started throwing stones at the compartment in which he and the members of his party had been travelling. At that time some more persons arrived there and they also started pelting stones. As a result, the glass panes of the windows of that compartment were broken. They therefore, closed the windows of the compartment by lowering the steel shutters. He opened the door of the compartment slightly and told the crowd to go away and allow the train to proceed. However the crowd was shouting that the train would not be allowed to proceed further unless the arrested persons were released. It was a crowd of about 300 to 400 persons at that time and all of them had started throwing stones at the witness and members of his party and other passengers in that compartment. The witness, therefore, apprehended that those persons might enter the other compartments of the train and might loot the passengers travelling by that train. He, therefore, fired in the air a shot from his revolver in order to prevent the crowd from doing any mischief having heard the report of the fire-arm the crowd started running away and after about five minutes they stopped throwing stones. The crowd again started throwing stones at the train because the train did not move and they also started approaching the compartment in which the witness and the members of his party were travelling. He, therefore, fired in the air a second shot from his revolver. Therefore the crowd ran away. Everything was quiet for about ten minutes. He then went to the Guard of the train and requested him to stop the train at Vapi Railway Station where it was not scheduled to stop because there were some arrested persons with smuggled goods with him. The Guard of the train did not grant his request. He therefore, returned to his compartment and the train started moving. The train then stopped at Palghar Railway Station at about 7 a. m. He and the members of his party and the arrested persons with smuggled goods got down there and at about 9-15 a. m. they went to Bulsar by another local train. In the compartment in which he and the members of his party were travelling there were other passengers. He had noted down their names before the train had reached Palghar Station. He had also collected the stones which had fallen in the compartment and the pieces of glass panes of the windows which were damaged by pelting of stones. From Palghar the party reached Vapi at about 10 a. m. where a Panch-nama of the smuggled goods was made. The arrested persons were with him. He thereafter informed the Police Inspector Anti-Corruption Branch on telephone about the incident. He was directed to file a complaint with the Railway Police Station, Bulsar. He therefore, went to Bulsar and lodged the complaint with the Police Sub-Inspector Bulsar. So far as the identity of the accused is concerned, he had stated in his examination-in-chief that he had identified five persons from the crowd who had accompanied the accused Nos. 1, 2 and Narayan Kher at the Udwada Railway Station. They are the accused Nos. 3 to 7. The accused Nos. 3 to 7 were instigating others and were also throwing stones at his party. Twelve bundles of smuggled goods were attached by him. After having inspected those smuggled goods by opening those twelve bundles they could not be repacked into 12 bundles and therefore they were repacked

into 14 bundles. He has proved the complaint which he lodged with the Police Sub-Inspector at Bulsar. It is Ex. 7.

3. This is the prosecution case. There is no dispute about the occurrence of the incident and about the train having stopped at Udwada Railway Station at the material time. Apart from the evidence of Police Sub-Inspector Gohil and his companions there is sufficient independent evidence which proves these two facts. The evidence of Prabhakar Gopal who was Signal Inspector, Bulsar at the relevant time. Mahakal Manibhai Desai who was the Assistant Station Master at Udwada, Pritam Nanumal who was another Station Master Udwada, Kekobad Cawasji who was the Guard of the train and Nanu Khalpa who was a cabinman at Udwada Railway Station proves to the hilt that the incident of throwing stones at the material time at this railway train had occurred. Their evidence also proves that the train by which Police Sub-Inspector Gohil and his party were travelling was not scheduled to stop at Udwada but had made an unscheduled stop there on account of the failure of the block. They do not say that the train had made an unscheduled stop at Udwada Railway Station on account of someone having pulled the chain from inside the train to stop it. That is the story to which Police Sub-Inspector Gohil and members of his party have deposed to. Whether the train had stopped on account of the pulling of the chain or on account of the failure of the block is in my opinion not a very material fact. The material fact is whether the train had made an unscheduled stop at Udwada Railway Station in the early hours of the morning that day. The question must be answered in the affirmative in view of the overwhelming evidence of independent railway officers. In these circumstances the material question which survives for my consideration is one relating to identity of the accused Nos. 3 to 7. Is there satisfactory evidence on record to show that the accused Nps. 3 to 7 were amongst the crowd which threw stones at the railway train in the early hours of the morning on the day of the incident? Could they have been identified by prosecution witnesses? The next question which has been raised for my consideration is that even if the entire prosecution case is taken to be true, the accused nos 1 and 2 could not be convicted of the offences with which they are charged. I shall deal with the prosecution case against the accused Nos. 1 and 2 later.

4. So far as the identity of the accused Nos. 3 to 7 is concerned the evidence of five railway officers to whom I have referred earlier does not disclose that anyone of them had identified any of the accused nos. 3 to 7. If anyone of them had identified any one or more accused the position would have been entirely different. They are independent persons having no axe to grind so far as the prosecution is concerned. It would have been difficult for me to disbelieve their testimonies if they had disclosed any such thing. Their testimonies do not disclose the identity of the accused nos. 3 to 7 or any of them. Bearing this broad and indisputable aspect of the case in mind, I now turn to what the witnesses have to say about the identity of the accused Nos. 3 to 7.

5. The evidence of Police Sub-Inspector Gohil discloses the following facts. He

had known the accused Nos. 3 to 7 about ten or 15 days prior to the occurrence of the incident. He had learnt about them from Head Constable Bhi-khaji who in the instant case has been examined as a prosecution witness. He had also made inquiries about some of them. He had also visited Udwada. When the incident happened it was night time. The incident happened near cabin "A" of Udwada Railway Station. There was no light there except in the compartments of the train. Police Sub-Inspector Gohil did not get down from the train compartment at the time when stones were pelted at the train. None else from his party had also got down. Under these circumstances it would have been difficult for him to know whether the accused nos. 3 to 7 were in the crowd which was pelting stones at the railway train. Merely because P. S. I. Gohil knew the accused nos. 3 to 7 earlier and merely because they were at the railway platform where the train had made an unscheduled stop and merely because they had demanded the release of their men, it cannot be said that they were the members of the crowd which pelted stones at cabin "A" of the Udwada Railway Station. In order to establish the identity of the accused nos. 3 to 7 he must have seen them before he knew who they were. In his cross-examination Police Sub-Inspector Gohil has stated that his Police statement was recorded. This is how that part of his deposition has been recorded by the learned Sessions Judge.

It is not true that the Police has not recorded my statement.

Obviously therefore, though the Police had recorded his statement it was not made available to the defence. The learned Sessions Judge has made a note in the deposition of P. S. I. Gohil that the learned Assistant Public Prosecutor told him that he was not in a position to produce the said Police statement of P. S. I. Gohil. Obviously, therefore, the defence was deprived of a very valuable opportunity of contradicting the material prosecution witness. Police Sub-Inspector Gohil with reference to his Police statement.

6. The next prosecution witness is Bhikhaii. Ramaji whose testimony appears at Ex, 20. He was Police Head Constable attached to the Anti-Smuggling Squad. He supports P. S, I. Gohilin material particulars of the prosecution case. As to the identity of the accused Nos. 3 to 7 he has stated that he had not identified the accused at the time of the investigation and that no identification parade was held by the Investigating Officer for the purpose. He does not state in his evidence that at the time of the incident he had seen the accused nos. 3 to 7 or any of them in the crowd pelting stones at the train. He has tried to introduce some improvement in his deposition before the learned trial Judge, In his deposition before the learned Committing Magistrate he has stated that no passenger travelling on the train had been injured, while before the trial court he has stated that some passengers travelling on the train were injured on account of stone throwing.

7. The next prosecution witness is Vaman Dula whose testimony appears at Ex. 21. He was a Police Head Constable attached to Anti-Smuggling Squad at that time. He tries to support the prosecution case in all material particulars. As to

the identity of the accused Nos 3 to 7 or any of them he has stated that during the progress of the incident he had been trying to see the accused by slightly opening the door of the compartment. Similarly P. S. I. Gohil had also been trying to see them in the same manner. Police Head Constable Bhikhaji had been sitting at that time near the Muddamal articles and P. S. I. Ranjit had been standing near the arrested persons. When the crowd did not stop pelting stones for sometime, P. S. I. Gohil fired two shots from his revolver to scare them away. The revolver shots fired by P.S.I. Gohil achieved the purpose. It has been brought out in his cross-examination that he was telling for the first time in the Trial Court in his deposition that the accused nos. 1,2 and Narayan Kher had shouted that there was Police in their compartment and that they were arrested after they had entered the compartment. It has also been brought out in his cross-examination that he had told the trial court for the first time that the accused No. 5 had been instigating the crowd to throw stones at the train. While in his cross-examination this witness states that P, S. I. Gohil had got down from the compartment on the off side of the train after the stone throwing had started and staved for a minute or two. P. S. I. Gohil himself in his evidence does not say that he had got down from the train. According to this witness, when P. S. I. Gohil was standing outside the train after having got down from the train for a few minutes he was trying to save himself from the stones which were hurled at the train and also at him.

8. Two passengers travelling on the train have also been examined by the prosecution. One is Virendra Ramprasad Desai whose testimony appears at Ex. 7. He deposes to the occurrence of the incident. Though he had been travelling by a second class compartment he was in the same bogie. He was not in the same compartment. His evidence does not help the prosecution in identifying the miscreants.

9. Another passenger who was travelling by the same train and whose testimony appears at Ex. 8 is Manilal Shankerlal Kadia. When the incident happened he woke up all of a sudden on account of the noise of the stone throwing. He had seen P. S. I. Gohil and members of his party on the train at that time. His evidence goes to show that the incident had happened but does not help the prosecution in any manner whatsoever in identifying the miscreants.

10. Amongst the railway officials who have been examined by the prosecution Mahakal Manibhai Desai is one. His testimony appears at Ex." 9. He was the Assistant Station Master Udwada Railway Station. At the relevant time he was not on duty. On account of the incident of stone throwing which produced a good deal of noise he was awakened by his wife. He went out and saw what was happening. He was one of those persons who checked up the train after the incident in order that the train might have smooth and undisturbed running. In his cross-examination he has stated that on the side from where stones were pelted by the crowd it was so dark that nothing could be seen.

11. The next railway official who has been examined by the prosecution is Pritam

Nanumal whose deposition appears at Ex. 14. He was at the material time the Assistant Station Master. Udwada Railway Station and was on duty. In his cross-examination he has stated that at the time when the incident happened there was no light at the scene of offence and that it was dark.

12. Kekobad Cawasji was the Guard in charge of that train at that time. He has stated that there was no electric light at Udwada Railway Station beyond its "A" cabin. It was all dark at that time.

13. On this point the evidence of Nanu Khalpa whose testimony appears at Ex. 12 does not disclose anything. He was the cabinman at the material time at Cabin "A" of Udwada Railway Station.

14. Biharibhai Gokalbhai who was one of the persons arrested by P. S. I. Gohil was in the compartment. His evidence does not help the prosecution because he was declared hostile by the learned Sessions Judge. No reliance, therefore, can be placed upon his testimony.

15. The prosecution evidence to which I have made a very brief reference shows that at the scene of offence it was pitch dark and that nothing could be seen. Under these circumstances it is difficult to accept the testimony of the Police Officers when they say that they had seen the accused Nos. 3 to 7 or any of them at the scene of offence pelting stones along with others at the railway train in order to rescue the persons whom the Police had arrested. In my opinion therefore, the prosecution has failed to establish the identity of the accused Nos. 3 to 7 as some of the miscreants constituting the crowd at the material time. They are, therefore entitled to benefit of doubt and to be acquitted.

16. So far as the accused Nos. 1 and 2 are concerned, it is the consistent prosecution case that they were arrested by P. S. I. Gohil along with one Narayan Kher and were in the compartment of the train when the crowd pelted stones at the train at "A" cabin, of Udwada Railway Station. The only evidence against them in regard to the offences with which they have, been charged is that they in concert with Narayan Kher had shouted that there was Police in the compartment and that they should be released from them. This has not been stated in the first information report. Ex. 6. It is difficult therefore, to accept such a statement made for the first time before the Trial Court in the deposition of P. S. I. Gohil.

17. Now the offences with which they have been charged are such of which they cannot be convicted. Section 225 inter alia provides that whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of any other person for an offence, or rescues or attempts to rescue any other person from any custody in which that person is lawfully detained for an offence shall be punished with imprisonment which the said section prescribes. It is difficult to place reliance upon Section 225 upon which the learned Assistant Government Pleader has placed reliance. The accused Nos. 1 and 2 were already arrested and had been in the custody of P. S. I. Gohil in the compartment itself. This offence

can be committed by a person who tries to rescue such arrested persons. It has no application to the person who is in lawful custody and who was offered no resistance or obstruction. The accused Nos. 1 and 2 therefore cannot be convicted of that offence.

18. Section 353 provides that whoever assaults or uses criminal force to any persons being a public servant in the execution of his duty as such public servant or with intent to prevent or deter that person from discharging his duty as such public servant or in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant shall be punished with imprisonment which that section lays down. In the instant case there is no evidence whatsoever to prove that the accused Nos. 1 and 2 had assaulted P. S. I. Gohil or any members of his party or used criminal force. The charge u/s 353 must, therefore fail so far as the accused Nos. 1 and 2 are concerned.

19. The third charge is u/s 426 of the Indian Penal Code. It provides punishment for mischief. There is no evidence whatsoever to show that the accused Nos. 1 and 2 who were in the compartment with the Police Officers had committed any act of mischief within the meaning of Section 426. Therefore. Section 426 has no application to them.

20. Two more sections which have been pressed by the prosecution, into service are Sections 147 and 149 of the Indian Penal Code. Section 147 prescribes punishment for rioting and Section 149 renders every member of an unlawful assembly guilty of the offence committed by other members of his party. The accused Nos. 1 and 2 were in the compartment. There is no evidence to show that they had committed an act of rioting. Similarly the unlawful assembly which the crowd had converted itself into, was outside the train standing in dark and pelting stones at the train. The accused Nos. 1 and 2 were not members of that assembly because they were in the compartment. In my opinion, therefore Sections 147 and 149 cannot be applied to the accused Nos. 1 and 2 in any manner whatsoever.

21. In the result, therefore so far as the accused Nos. 1 and 2 are concerned the prosecution has completely failed to prove against them any of the offences with which they have been charged, So far as the accused Nos. 3 to 7 are concerned, on account of want of evidence as to their identity they are entitled to benefit of doubt and to be acquitted.

22. In the result, I allow the appeals set aside the order of conviction and sentence recorded by the learned Sessions Judge against the accused and order the accused to be acquitted. So far as this case is concerned the accused shall be set at liberty forthwith. Their bail-bonds are cancelled. Fine if paid shall be refunded to them.