

(2017) 03 GUJ CK 0015
In the Gujarat High Court
Case No : 102 of 2012

SELABHAI BHARABHAI BHARVAD

APPELLANT

Vs

STATE OF GUJARAT

RESPONDENT

Date of Decision : 01-03-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 433](#), [Section 432](#) - Power to commute sentence - Power to suspend or remit sentences
[Indian Penal Code, 1860](#), [Section 302](#) - Punishment for murder
[Bombay Police Act, 1951](#), [Section 135](#) - Penalty for contravention of rule or directions under sections 37, 39 or 40

Citation : (2017) 03 GUJ CK 0015

Hon'ble Judges : Akil Kureshi, Biren Vaishnav

Bench : Division Bench

Advocate : YOGENDRA THAKORE, H K PATEL

Judgement

1. The sole accused has filed this appeal challenging the judgement and order dated 30.12.2011 passed by the Additional Sessions Judge, Ahmedabad, by which, though acquitted of the offence charged under the Atrocities Act, the accused has been convicted and sentenced to life imprisonment for the offence under section 302 of IPC. As is evident from the charge, Exh 1, the case of the prosecution is that on 31.10.2009, at about 11:30 at night, when the complainant Kalpeshkumar Surabhai Garasiya was sleeping on an iron cot alongwith Poonambhai Veerabhai Bharwad, the accused Selabhai Bharabhai Bharwad, who was the nephew of Raghubhai, attacked Poonambhai with a stick. According to the charge, he inflicted two blows on Poonambhai's face and head and then escaped in the darkness towards Vandarwad lake. The apparent motive according to the charge was the fact that it was not as per Selabhai's liking that Raghubhai had employed Poonambhai, the deceased. The accused was charged for having committed offence under section 302 of IPC read with section 135 of the Bombay Police Act. He was further charged for having committed offence

under section 3(2) (5) of the Atrocities Act.

2. Essentially the case rests on the testimony of the complainant, PW 1, who is examined at Exh 13. According to this witness, at the time of the incident, he was staying at an open plot owned by Raghubhai Bharwad. On 31.10.2009, on the date of the incident he alongwith his maternal uncle Poonambhai had returned after their work and were resting on the iron cot in the open plot. Selabhai, who was Raghubhai's nephew suddenly approached with a stick and attacked Poonambhai. According to this witness, Selabhai attacked Poonambhai on his head and his chest. Having seen being attacked, he shouted, as a result of which, Selabhai escaped in the cover of darkness. An ambulance was summoned and when the doctor arrived at the scene, Poonambhai was declared dead. The complaint was produced at Exh 14. This witness identified Selabhai, who was present in the Court. The muddamal article, stick was also identified by this witness. In the cross examination, he agreed that while they were sleeping on the cot, Poonambhai was sleeping on his right and he saw Selabhai standing in front of the cot near his legs at a distance of approximately 2 ft. According to this witness, Ramsing and Chimanbhai were also staying in the said plot. However, Ramsing was not present at that moment at the scene of offence. This witness admitted that they were not having electric connection in the plot and therefore at the time when the incident occurred, it was dark. Raghubhai was using lantern but at that point of time, they also had no lantern. He admitted that at a distance of about 10 ft, one could not identify an individual standing in front of him. This witness denied a suggestion that on the date of the incident, Selabhai was not present at the scene of the offence and that he attacked Poonambhai with the stick.

3. PW 2, Ramsing Huklabhai Paraghi, was examined at Exh 15. He was the neighbour of Raghubhai Bharwad and his nephew Selabhai. According to this witness, on 31.08.2009, at about 11 in the evening when he was sleeping, he heard a commotion and therefore went to the scene of the offence. On hearing the shouts of Kalpeshbhai, he went and asked Kalpeshbhai, told that Poonambhai had been attacked with a stick by Selabhai. He identified Selabhai who was present in the Court. In the cross examination, this witness stated that when the incident occurred, he was sleeping at a distance and when he heard the commotion, he came to the scene of the offence and called for an ambulance.

4. Bhailalbai Raghubhai Bharwad has been examined as PW 3 at Exh 16. According to this witness, when the incident occurred on 31.10.2009, he alongwith his father had gone to graze the cattle. On his return, he heard some shouts and therefore, he came to the scene of the offence. He saw Poonambhai lying unconscious and therefore the police was informed and so was the ambulance called for. On being asked, he was informed that Poonambhai had been hit by his brother Selabhai with a stick and that he had escaped thereafter. This witness, however, admitted that in his police statement he did state that he had seen Poonambhai being attacked by Selabhai. Nothing substantial comes out

in the cross examination of this witness.

5. Corroborative evidence in terms of panchamas, recoveries of clothes of the accused and deceased have been produced on record. However, the witnesses have turned hostile.

6. Dr. Manish Bachubhai Ghelani, Medical Officer at the Civil Hospital was examined as PW 10 at Exh 40. He carried out the postmortem of deceased Poonambhai. The postmortem report is produced at Exh 41. The external injuries that the deceased sustained are as under: "17. Vertical CLW 0.5x0.2x0.5 cm on lower border of Lt side mandible at left mandible angle C diffuse swelling (approx 7x 6 cm area) on Left side fact anterior and inferior to left ear (mandible area) Blood clots at margin and back of wound."

7. The internal injuries that the deceased sustained are as under: "Sub dural hemorrhage (SDH) all over brain extending up to back of brain C thickness of 5 to 7 mm more on anterior pole of both frontal lobes and both temporal lobes.

Thin layer suharch hold hemorrhage (SDH) over brain"

8. According to this doctor, the cause of death was due to shock and hemorrhage due to head injury. The injuries reflected in column No. 17 could not have been sustained as a result of being hit by hard and blunt substance. He admitted that such injuries could have been caused by muddamal article stick which was shown to him.

9. The discovery panchnama is produced at Exh 15. Though the panchwitnesses have turned, they have admitted their signatures. From the testimony of the investigating officer, it is evident that the stick used in committing offence was discovered as is also evident from the panchnama at Exh 50.

10. Based on this evidence on record, the learned Sessions judge convicted the accused and sentenced him to undergo life imprisonment for offence under section 302.

11. As recorded earlier, the complainant is the sole eyewitness. Reading his testimony which is at Exh 13 it is apparent that his version is beyond doubt that the accused Selabhai had attacked the deceased with a stick. Though this witness states that the deceased was attacked and was inflicted two blows, one on head and another on the chest, the medical evidence on record shows that the deceased was inflicted a blow as a result of which, he sustained the external injuries as is evident from Column No. 17 of the postmortem report. Though the defence has tried to bring out the case of dubious identity in view of the fact that the scene of the offence was not well lit, the prosecution theory that Selabhai could escape in the cover of darkness would not be significant in view of the fact that the complainant knows Selabhai is evident from his testimony.

12. The medical evidence on record also indicates that the death was caused as a result of a single stick blow inflicted by the accused on the deceased. The

discovery panchnama at Exh 15 corroborates the fact that the stick which was used at the hands of the accused which resulted in the injuries that the deceased sustained.

13. Apparently except the incident in question which apparently was without a real motive was the sole incident and nothing as come on record that the accused had any criminal antecedents.

14. Taking into consideration the fact that the weapon used was a stick and that the deceased was inflicted a single blow which resulted in his death, it is evident from the evidence which has come on record that though the act is done with the knowledge that it was likely to cause death, intention to cause death was missing.

15. Looking to the weapon and the injuries sustained therefore it will be in the fitness of things that the conviction and sentence handed out by the learned Sessions Judge under section 302 of IPC is altered to that of sentence under section 304 Part II of IPC. The accused is sentenced to undergo seven years of rigorous imprisonment and a fine of Rs. 500/- as imposed by the learned Sessions Judge.

16. The appeal is allowed accordingly. The conviction of the appellant for offence under section 302 of IPC is altered to one under section 304 Part II of IPC. He is sentenced to rigorous imprisonment for a period of seven years under section 304 Part II and fine of Rs. 500/-, as already provided, remains unaltered. The rest of the judgement and order shall remain the same.

17. Nothing stated in this order shall affect the order that may be passed or may have been passed by the State in exercise of powers under section 432 or section 433 of Cr.P.C. R & P may be transmitted back to the concerned Trial Court.