

(2013) 11 GUJ CK 0004
In the Gujarat High Court

Case No : Criminal Appeal No. 339 of 2002 and Criminal Miscellaneous
Application No. 7172 of 2003 in Criminal Appeal No. 339 of 2002

Sharifkhan @ Rajubrusli Subhankhan Pathan APPELLANT
Vs

State of Gujarat and 1 Another RESPONDENT

Date of Decision : 13-11-2013

Acts Referred:

Citation : (2013) 11 GUJ CK 0004

Hon'ble Judges : Z.K. Saiyed, J; Akil Kureshi, J

Bench : Division Bench

Advocate : M.M. Tirmizi, No. 1, for the Appellant; Maithily Mehta, APP for the
Opponent/Respondent No. 1, for the Respondent

Final Decision : Allowed

Judgement

Akil Kureshi, J.—Appellant was original accused No. 1. He was, along with two other accused, charged with offence punishable u/s 302 read with section 34/114 of the Indian Penal Code. By the impugned judgment dated 11th January 2002, rendered by the learned Additional City Sessions Judge, Ahmedabad in Sessions Case No. 71/01, he was convicted for offence u/s 302 of the Indian Penal Code and sentenced to imprisonment for life. Other two accused were acquitted. He has preferred the appeal challenging such judgment. There is no appeal by the State questioning the acquittal of other accused. Briefly stated, the prosecution version was that sister of the present accused Sharifkhan and other two acquitted accused had an affair with one Salimuddin. Despite strong persuasion from the family members, the girl refused to sever her relations. On 4.12.2000, when Salimuddin was sitting with his brother Karimuddin, near the meat market, accused came there and picked up quarrel. Accused Nos. 2 and 3 gave kick and fist blows to Salimuddin and held him while accused No. 1 gave knife blows to him. Charge was accordingly framed at Ex. 1 alleging that all accused had committed offence punishable u/s 302 read with section 34/114 of the Indian Penal Code.

2. Only two eye witnesses were examined, namely, Karimuddin, the complainant, brother of the deceased and one Ishaq Ahmed. Both the witnesses turned hostile. The prosecution, however, relied on the discovery of murder weapon, knife and the clothes of accused No. 1 and the medical evidence for cause of death in support of its case. We may refer to the evidence in brief.

3. Knife and clothes were discovered at the instance of accused No. 1 under discovery panchnama Ex. 33. Panch witness Abdul Wahid Shaikh, PW-1, Ex. 16, and Zubair Ahmed Farooqui, PW-2, Ex. 18, supported the prosecution. As per the witnesses and as recorded in the discovery panchnama, accused No. 1 led the police party and the panch witnesses to a closed factory in an industrial area and accused No. 1 entered the premise and from a closed bag lying on the wall, took out a T-shirt and a knife wrapped in the shirt.

4. Dr. Vikram Pargi, PW-3, Ex. 19, had carried out the postmortem. He had recorded the following injuries in the postmortem report, Ex. 20.

Penetrated deep muscle wound to suprasternal illegible about 3 x 1.5 cm.

Muscle cut wound to rt. side of neck which penetrated to rt. carotid artery

Interior to rt. nipple therein penetrated wound about 2.5 x 1.5 cm deep to upper rt. lobe of liver.

Pooling of blood about 700 ml in thorax cavity.

In his opinion, the cause of death was due to tempovaleric shock after sustaining injuries to vital organs of the body. In his deposition, he stated the injuries were sufficient in ordinary course of nature to cause death.

In the cross-examination, he agreed that he could not state with confidence whether such injuries were caused by the muddamal article knife.

5. Karimuddin, the first informant and the elder brother of deceased, PW-5 was examined at Ex. 24. Though he was supposed to be an eyewitness, he did not support the prosecution and turned hostile.

6. Likewise, Ishaq Ahmed, PW-6, Ex. 25 another eyewitness also turned hostile.

7. Dhanjibhai Damor, Investigating Officer, PW-7, was examined at Ex. 28. He gave the steps taken by him during the course of the investigation.

8. Serological report, part of Ex. 14, indicated presence of human blood on the T-shirt of accused No. 1. No blood was found from the knife.

9. On the basis of such evidence, the learned Judge proceeded to convict accused No. 1 primarily on the basis of discovery of the murder weapon and shirt of the accused. In our opinion, there was insufficient evidence to convict the accused. As already noted, there were no eyewitness account of the incident in question. Though two witnesses supposed to have witnessed the incident, i.e. PW-5, Kamruddin Shaikh and PW-6 Ishaq Ahmed, they did not support the

prosecution. Barring such evidence, all that we have on record is the discovery of the knife allegedly used for the commission of the offence and the bloodstained T-shirt of accused No. 1. Besides this, the prosecution relied on the testimony of the doctor who had carried out the postmortem.

10. In our opinion, such an evidence was insufficient to convict the accused. To begin with, the doctor was unsure whether the injury could have been caused by the muddamal article knife. The knife allegedly discovered at the instance of the accused did not show presence of blood. Merely because the knife was discovered and with that T-shirt of the accused was also discovered, it would not be safe to convict the accused on such limited evidence. The learned Judge has heavily relied on such discovery and held that in view of section 27 of the Evidence Act, the inculpatory statement made by the accused is admissible in evidence. The learned Trial Judge has observed that discovery was duly corroborated by the evidence of the Investigating Officer. We may have no quarrel with the conclusion of the learned Judge that certain articles were discovered as alleged by the prosecution. Nevertheless, what is admissible in evidence is the statement which leads to the fact of discovery. That is the essence of section 27 of the Evidence Act. In the present case mere discovery of the knife and T-shirt in absence of any other evidence on record, the accused could not have been convicted for the offence u/s 302 of the Indian Penal Code. In the result, judgment and order of the Trial Court is reversed and the appellant-accused No. 1 is acquitted of the charges. Appeal is allowed accordingly. R & P be transmitted to the Trial Court. Resultantly, Misc. Criminal Application No. 7172 of 2003 is disposed as infructuous.