
(2013) 09 GUJ CK 0025
In the Gujarat High Court
Case No : Criminal Appeal No. 401 of 2004

Sheshram Shivbhajan Varma	Vs	APPELLANT
State of Gujarat		RESPONDENT

Date of Decision : 06-09-2013

Acts Referred:

Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 313, 357, 374(2)
Penal Code, 1860 (IPC) — Section 299, 300, 302, 304, 304II

Citation : (2013) 09 GUJ CK 0025

Hon'ble Judges : K.S. Jhaveri, J;K.J. Thaker, J

Bench : Division Bench

Advocate : Ashish M. Dagli, No. 1, for the Appellant; K.P. Raval, APP for the Respondent No. 1, for the Respondent

Final Decision : Partly Allowed

Judgement

K.J. Thaker, J.—The appellant-ori. Accused has preferred this appeal under sec. 374(2) of the Code of Criminal Procedure, against the judgment and order of conviction and sentence dated 20.1.2004 passed by the learned Sessions Judge, Ahmedabad in Sessions Case No. 24/2002, whereby, the learned trial Judge has convicted the appellant- ori. Accused under sec. 302 of IPC and sentenced him to undergo life imprisonment and to pay a fine of Rs. 1000/-, in default, to undergo further R/I for one month, which is impugned in this appeal.

The brief facts of the prosecution case is that on 2.11.2000, at about 8.00 pm in the evening, the complainant had gone to meet his friend Kamlesh Rajput at Lambha, Indiranagar. At about 10.30 pm in the night, the appellant was also standing there and the appellant had informed the complainant that since he had altercation with Kamlesh Rajput and therefore he is not meeting him. Thereafter, the appellant had started giving abuses to Kamlesh Rajput and when Kamlesh Rajput told the appellant not to abuse him, appellant got excited and took out a stick from the house and gave stick blow on the backside of Kamlesh Rajput, due

to which, he fell down and thereafter again the appellant had given another stick blow on the head of Kamlesh Rajput due to which he became unconscious. The complainant had intervened and on hearing the shouts, other people came there and taken Kamlesh Rajput was taken to L.G. Hospital for treatment. Therefore, a complaint was lodged.

1.1 The appellant accused came to be arraigned for committing murder. The investigation being complete, the charge-sheet was laid against the present appellant. The case being exclusively triable by the Court of Sessions, the case was committed to the Court of Sessions, which was given number as Sessions Case No. 24/2002.

1.2 Thereafter, the Sessions Court framed the charge below Exh. 5 against the appellant for commission of the offence u/s 302 and 504 of IPC and under sec. 135 of the Bombay Police Act. The appellant-accused has pleaded not guilty and claimed to be tried.

1.3 To prove the case against the present appellant, the prosecution has examined the following witnesses whose evidence is read before this Court by the learned advocates for the appellants:

1. PW-1 Gopvindbhai Ishwarbhai Patel Ex. 9
2. PW-2 Jivrambhai Ramjibhai Patel Ex. 11
3. PW-3 Krishnakumar Bhagvatprasad Ex. 12
4. PW-4 Dharampalsing Vishvanathsing Ex. 14
5. PW-5 Dipendra Shivram Ex. 15
6. PW-6 Rohitbhai Dahyabhai Ex. 25
7. PW-7 Kanubhai Laxmanbhai Chauhan Ex. 27
8. PW-8 Jayendrasinh Bhanubha Ex. 29
9. PW-9 Dr. Jayantibhai Virjibhai Satapara Ex. 31
10. PW-10 Dr. Nirav Manibhai Ex. 36
11. PW-11 Senghaji Shakuji Ex. 40
12. PW-12 Rasikbhai Virjibhai Nandasana Ex. 41

1.5 The prosecution also relied upon the following documentary evidences so as to bring home the charges against the appellants-accused.

1. Telephone Vardhy Ex. 38
2. Complaint Ex. 13
3. Panchnama of scene of offence Ex. 10

4. Inquest panchnama Ex. 16
5. Panchnama of cloth of deceased Ex. 17
6. Discovery panchnama Ex. 26
7. Correspondence with FSL Ex. 18, 19,
8. FSL Report Ex. 20, 21
9. Medical Certificate Ex. 37
10. PM report Ex. 32

2. Thereafter, after examining the witnesses, further statement of the appellant-accused under sec. 313 of Cr. P.C. was recorded in which the appellant-accused has denied the case of the prosecution.

3. After considering the oral as well as documentary evidence and after hearing the parties, learned trial Judge vide impugned judgment and order dated 20.1.2004 held the present appellant- original accused guilty of the charge levelled against them under sec. 302 of IPC, convicted and sentenced the appellant-accused, as stated above.

4. We have heard at length learned advocate Mr. A.M. Dagali for the appellant and Mr. K.P. Raval learned APP for the respondent-State.

5. The learned advocate for the present appellant has contended that the trial court has committed an error in passing the impugned judgment and order, inasmuch as it failed to appreciate the material on record in its proper perspective, and hence, the present appellant deserves to be given the benefit of doubt and be acquitted.

6. On the other hand, learned APP has strongly opposed the contentions raised by the learned advocate for the present appellant and has submitted that the trial court has passed the impugned judgment and order after taking into consideration the facts and circumstances of the case as well as the material, in the form of oral and documentary evidence, produced before it and hence, no interference is called for and the appeal deserves to be dismissed.

7. The injury certificate issued by PW-10 Dr. Nirav Manibhai Ex. 36, who was on duty at LG Hospital, Ahmedabad. The evidence of said doctor when corroborated with the evidence on record, would permit us to hold that the death was neither accidental nor suicidal. The injury was grave. Now the question is whether the injury and the incident which occurred was such which would persuade us to hold that the view taken by the learned trial Judge holding that the accused was guilty of commission of murder. In this light, while answering this question, the factual scenario will have to be borne in mind. The charge and complaint categorically shows that during the altercation, the accused got so agitated that he gave one single stick blow on the back side of the deceased and thereafter gave another stick blow on the head of the deceased. This is the evidence of PW-1, PW-2 and

PW-4. ON this touch-stone, the submission made by the learned advocate for the appellant Mr. Dagali will have to be examined as recently the Apex Court has held that the appellate Court should weigh each and every evidence on its own. The first submission is that the history given before the doctor does named the accused and the wordy with the name of the accused. There were other three persons who were armed with weapons but they have not been arraigned as an accused. On what source of information is not made available. The maker of the said document or wordy is not examined before the learned trial Judge. The Police Officer who had taken over the investigation from PW-11 is also not examined before the learned trial Judge. According to the learned advocate, there are two sets of evidence, time of incident, manner of incident and place of incident also defer. From the totality of the evidence, even if the discrepancies as negated by the learned trial Judge are taken into account, there is no motive nor is there any intention to cause death. It is an admitted position according to the learned advocate for appellant that the deceased died after about 9 days of the incident. The incident is reported late and it is cooked up story because the weapon shown to be belonging to the appellant is nowhere stated in the yadi or no piece of evidence is available to say that the stick was used and it had blood stains of deceased. He has relied on the decision of the Apex Court in the case of State of Goa Vs. Sanjay Thakran and Another, and has submitted that the Apex Court in paras- 20 and 22 has observed as under:

20. After the arrest of A-1, this flat was once again searched on 11.2.2000 in the presence of another court bailiff Peter Fernandez and other panch witnesses as A1 allegedly confessed about the crime on 08.02.2000. According to the prosecution version, he agreed to handover the incriminating articles to the police. P.W. 8- Sanjay Naik, a witness to the confession of A-1, was also present as panch witness when A-1 had allegedly handed over jewellery items, I.e., eight yellow metal bangles, one pair of ear-rings and one finger ring and clothes such as a white full-sleeves shirt, a saffron-coloured women's kameez with cream-coloured salwar, a green-coloured saree with blouses, a light cream-coloured silken kurta pyjama and a designer black full-sleeves shirt, on the search of the flat of the accused persons in Goa on 11.02.2000. This witness further said that the flat was locked and when the bailiff of the court tried to open the lock after breaking the seal it did not open and the key got damaged in the process of opening of the lock and the lock was opened by using a wire. P.W.-38 mentioned that on 11.02.2000 the flat was found sealed and was opened in the presence of the bailiff and panch witnesses. The panchnama of recovery made on 11.02.2000 (Exhibit No. 34) mentioned that the bailiff of the court removed the seals and tried to open the locks with keys. According to this panchnama, one iron rod was used to open up the locks but instead of the locks, the latch of the door got broken. When the chain of latch was removed, it was found that the door was locked due to body lock. Since the door was locked, the grills of the window were removed and after removing the broken glasses, one person was lowered and finally entry was made in the flat. The courts below have rejected the evidence of

recovery made on 11.02.2000 and they have found that the first list of the articles found in the flat as prepared on 17.12.1999 did not mention any box or gold-like materials/artificial jewellery or any other gold article or any clothes in the list of movable articles of the flat (Exhibit No. 112). How is it that the articles were found in the subsequent search from the same flat which was locked and sealed? The panchnama of the flat searched on 17.12.1999 though mentioned about three big suitcases full of clothes and artificial jewellery, no [details, whatsoever, regarding those I articles were made and without any reference as to the quality of golden colour ornaments, P.W.-38 considered them as artificial jewellery. On both occasions when the search was made in the flat, it was not sealed properly with the court seal and, instead thereof, one rupee and five-rupee coins were used. The entry in the flat on both occasions, i.e. on 17.12.1999 and 11.02.2000, was made through the window which shows that this flat was easily accessible although the seal of the court was put on it, without interfering with the seal after removing the grill of the window. There was material contradiction in the panchnama of flat search made on 11.02.2000 and evidence of P.W.-8 and P.W.-38 with respect to the way in which the entry was made to the flat of the accused persons on 11.02.2000. When at the first instance no jewellery was found inside the flat, how it was recovered on the subsequent search? The search and recovery of articles by the police on 11.02.2000 does not inspire confidence as the flat was easily accessible, without disturbing the lock and planting of the articles by the police cannot totally be ruled out. We have carefully gone through the evidence of the witnesses and the panchnamas and list of seized articles and have found that reasoning adopted by the courts below in discarding the evidence of seizure of articles from the flat of the accused persons cannot be said to be without any basis.

22. The learned senior counsel for the appellant(s) Mr. Mahendra Anand has placed reliance on the recovery of two bangles which had the identification mark "RK 22 KL", weighing approximately 23.5. grams, from the shop of P.W. 12-Ulhas Lotlikar at the instance of A-2. On 13.02.2000, during interrogation she disclosed that she would point out the goldsmith to whom the gold ornaments were sold. Accordingly, as per her directions, police party and panch witnesses approached the jewellery shop of P.W.-12 at Khareband, Margao. In presence of panchas, P.W.-12 produced the two bangles bearing identification mark "RK 22 KL", weighing 23.5. grams, before the police party. As per this witness, the accused came to his shop and sold two bangles, a necklace and a gold finger ring. When he asked for the reason as to why she was selling these ornaments, A-2 told him that their restaurant was not running well and hence, they were in urgent need of money. He paid Rs. 12,400/-, Rs. 3,200/- and Rs. 1,200/- respectively, for two bangles, a necklace and a gold finger ring. He did not melt the bangles since they were in good condition. As per the prosecution, these gold ornaments belonged to deceased Priya Nanda. During cross-examination, P.W.-12 volunteered to produce the book where he maintained the record of sale of these ornaments. However, inspite of ample opportunity given to him to produce the

book, he did not do so. In his cross-examination, he admitted that a day before recovery, A-2 was shown to him in the office of Dy. Superintendent of Police, Mapusa. That apart, the police had not recovered the other ornaments alleged to have been sold by the accused to P.W.-12 as it is said that he had melted those ornaments. It is highly improbable that P.W.-12 would have retained the bangles, which have the distinctive mark over them and would have melted other ornaments with no distinctive marks on them. The whole purpose and authenticity of the recovery of these ornaments have been lost when the witness has admitted that a day ahead of the recovery the accused was shown to him in the police station.

He has further contended that except the incriminating object being found from the accused, nothing is there to connect the appellant with the scene of offence and the offence having taken place in presence of accused. He has further relied on the decision of the Apex Court in the case of *Vikramjit Singh @ Vicky Vs. State of Punjab*, and has submitted that just because accused was not found for 14 days guilt cannot be said to have been established. Motive, preparation, prior and subsequent conduct must be seen and has submitted that as held by the Apex Court the conduct of the accused must have a nexus with the crime committed and must form part of the evidence as regards his conduct either preceding, during or after commission of the offence. He has further submitted that burden of proving of fact within the knowledge will not relieve the prosecution to prove its case and has, therefore, submitted that accused be granted benefit of doubt as according to learned advocate, the versions of the witnesses have been changing from time to time. The complainant and deceased were friends and therefore also, only with a view to rope the accused, this evidence is given by shielding the other accused whose identity remained unknown but three persons were involved.

As against this, learned APP has submitted that answer to both the decisions of the Apex Court are answered in the latest decision of *Rumi Bora Dutta Vs. State of Assam*, on the totality of the aspect of evidence on the basis of injuries which are found on the deceased, the judgment cannot be found fault with and no second opinion is possible.

8. On going through the entire evidence, the finding on point no. 1 by learned trial Judge cannot be found fault with as the medical evidence and the ocular version goes to show and prove that it was a homicidal death, we come to the same decision.

9. The homicidal death was committed by whom is now the next question and whether it was homicidal death amounting to murder or not requires to be decided.

10. Having gone through the entire record, it would be relevant to refer to section - 299, section - 300 and 304 of IPC, which reads as under:

299. Culpable homicide.- Whoever causes death by doing an act with the

intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

300. Murder.- Except in the cases hereinafter expected, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or

2ndly.- If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or

3rdly.- If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or

4thly.- If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

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304. Punishment for culpable homicide not amounting to murder: - Whoever commits culpable homicide not amounting to murder shall be punished with [imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death,

Or

With imprisonment of either description for a term which may [extent to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as "is" likely to cause death.

11. On going through the judgment of the Hon"ble Apex Court in the case of Ankush Shivaji Gaikwad Vs. State of Maharashtra, , wherein, it is held that the principle of sub-section (3) of section 357 of Cr. P.C. is empowering the Court to award compensation and Hon"ble Apex Court has referred to catena of decisions, and on going through the entire record, it is found that the incident is of the year 2000 and the quarrel had taken place in a spur of moment. However, looking to the evidence, more particularly, in light of the decision in the case of Ankush Shivaji Gaekwad (supra) would apply in full force in the facts of this case as the incident has occurred in the year 2000. It would be relevant for us to refer to the guidelines issued by the Hon"ble Apex Court in the case of Ankush Shivaji Gaekwad (supra).

12. The residual question which arise before us whether section 302 of IPC has

its application or it would be falling within section 304 of IPC even if sec. 357 is invoked or not invoked.

13. This brings us to the crucial question as to which was the appropriate provision to be applied. In the scheme of the IPC culpable homicide is genus and "murder" its specie. All "murder" is "culpable homicide" but not vice-versa. Speaking generally, "culpable homicide" sans "special characteristics of murder" is culpable homicide not amounting to murder. For the purpose of fixing punishment, proportionate to the gravity of the generic offence, the IPC practically recognizes three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the gravest form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as "culpable homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

14. The academic distinction between "murder" and "culpable homicide not amounting to murder" has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

INTENTION

15. Clause (b) of section 299 corresponds with clauses (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the "intention to cause death" is not an essential requirement of clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by illustration (b) appended to section 300.

16. Clause (b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under clause (2) of Section 300 can be where the assailant causes death by a fist blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased

heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given. In clause (3) of Section 300, instead of the words "likely to cause death" occurring in the corresponding clause (b) of Section 299, the words "sufficient in the ordinary course of nature" have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real and if overlooked, may result in miscarriage of justice. The difference between clause(b) of Section 299 and clause(3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word "likely" in clause (b) of Section 299 conveys the sense of probable as distinguished from a mere possibility. The words "bodily injury..." sufficient in the ordinary course of nature to cause death" mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature.

17. For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the internal bodily injury or injuries sufficient to cause death in the ordinary course of nature.

18. The ingredients which are required are that there should be no motive. On the touch-stone of the latest decision of the Apex Court, this case, in our opinion, will not fall within the purview of section 302 or section 304 Part-I but looking to the injuries on the deceased, it will fall within the purview of section 304-II of IPC the reason being there were injuries on the vital part of the head which had culminated into the death of the deceased. Recently, the Apex Court has held that the sentence should be commensurate with the offence. In this case, incident has occurred on the spur of moment in the hit of passion due to earlier altercation between he accused and the deceased, the accused inflicted the injuries and certain injuries are not even explained by the investigating authority, however, we feel that the sentence of life requires to be altered. The incident occurred in the year 2000. The accused has undergone sentence from 16.11.2000 to 7.4.2001 and from 20.1.2004 to 23.9.2004. He has undergone sentence for about 1 year and 26 days. Though the time has elapsed, we hold that the sentence of five years would be just and proper. However, as per the decision of the Apex Court in the case of Ankush Shivaji Gaekwad (supra), it would be just and proper that the said sentence is suspended and the appellant is directed to pay an amount of Rs. 25000/- to the legal heirs of the deceased within a period of 12 weeks from today and to that extent the appeal requires to be partly allowed.

19. In the result, this appeal is partly allowed. The impugned judgment and order of conviction and sentence dated 20.1.2004 passed by the learned Sessions Judge, Ahmedabad, in Sessions Case No. 24/2002, is modified as under:

20. The conviction and sentence imposed upon the appellant- original Accused u/s 302 of IPC to undergo life imprisonment, is altered and he is convicted u/s 304 Part-II of IPC and sentenced to undergo 5 years imprisonment but the same is suspended and he is ordered to pay the amount of Rs. 25000/- to the legal heirs of deceased within a period of 12 weeks from today by way of compensation under sec. 357 of Cr. P.C.

It is clarified that the aforesaid amount shall be deposited within a period of 12 weeks from today. However, if appellant-original accused fails pay the said amount, as aforesaid, he shall serve the remaining sentence. If the amount of fine, as ordered in the impugned judgment and order, is paid and deposited with the State, the same shall remain with the State.

21. The appellant - original accused is on bail. On his depositing the aforesaid amount of compensation, his bail and bail bonds stand discharged. R & P to be sent back to the trial Court, forthwith.