

(2007) 07 GUJ CK 0055
In the Gujarat High Court
Case No : Criminal Appeal No. 865 of 1995

Shyam Chhaganbhai Dhoria

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 23-07-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 374, 386
Penal Code, 1860 (IPC) — Section 302, 304, 323, 325

Citation : (2008) CriLJ 761 : (2007) 27 GLH 161

Hon'ble Judges : C.K. Buch, J

Bench : Single Bench

Advocate : B.P. Munshi, for the Appellant; P.D. Bhate, Id. APP, for the Respondent

Judgement

C.K. Buch, J.—The appellant-orig. accused (hereinafter referred to as "the appellant") has preferred present appeal u/s 374 of the Code of Criminal Procedure, 1973, challenging the judgment and order of conviction and sentence dated 15th July 1995 passed by the learned Additional Sessions Judge, Surat, in Sessions Case No. 103 of 1992. The appellant was initially charged for the offence punishable under Sections 302 and 323 of Indian Penal Code in the background of the facts mentioned in the complaint registered vide C.R. No. I-507 of 1991 with Chowk Bazar Police Station, Surat. After conclusion of the trial and appreciation of the evidence led during the course of trial, the learned trial Judge held the appellant herein guilty for the charge of offence punishable under Sections 304 Part I and 323 of the Indian Penal Code, and the appellant has been ordered to undergo rigorous imprisonment for 7 (seven) years and to pay a fine of Rs. 500/- and in default to undergo rigorous imprisonment for three months for the offence punishable u/s 304 Part I of the Indian Penal Code. No formal sentence has been passed by the learned trial Judge so far as the offence found proved against the appellant punishable u/s 323 of the Indian Penal Code is concerned.

2. According to Shri B.P. Munshi, learned Counsel appearing for the appellant,

the judgment and order of conviction and sentence passed by the learned trial Judge is erroneous and cannot be sustained in the eye of law, mainly on the grounds mentioned in paragraph No. 10 of the memo of the appeal. Shri Munshi has taken this Court through the initial case which was placed by the prosecution and the oral as well as documentary evidence led during the course of trial including the evidence of three doctors examined by prosecution. According to Shri Munshi, it is inferable from the evidence led by the prosecution itself that the victim-deceased must not have narrated anything as to the occurrence because he was not physically fit to state the details which are being found in the nature of dying declaration. The dying declaration was produced before the learned trial Judge with the list Ex.15 and the same has not been exhibited as it does not bear the signature of the victim-injured. It bears the endorsement of the doctor at the bottom where the doctor has said that the patient is conscious. This dying declaration was recorded by the Police Officer of Chowk Bazaar Police Station on 12th December 1991 and it is the say of the prosecution that the statement was read over to the victim at about 05-00 p.m. Shri Munshi has taken me through the evidence of two witnesses who have been examined as witnesses by prosecution and has submitted that the victim-deceased must not be conscious at about 05-00 p.m. The real brother who is the complainant in the present case was present throughout near the cot of the victim-injured when the victim-injured was being treated in the hospital by the doctor. When the complainant has stated that the victim was not able to speak, the dying declaration allegedly recorded by the Police Sub-Inspector ought not to have been given any weightage. Neither specific serious motive has been alleged against the appellant nor the victim and appellant were inimical to each other. On the contrary, they were co-workers when suddenly on a small issue, some quarrel had begun. It is the say of the defence that the learned trial Judge ought not to have presumed motive, intention or knowledge for linking the appellant with the crime in question. When the oral evidence of two witnesses examined is in direct conflict with the case of the prosecution, based on dying declaration, then the appellant could have been given benefit of doubt by the learned trial Judge, is the sum and substance of the arguments advanced by Shri B.P. Munshi.

3. It is submitted that when the prosecution was placing reliance on the dying declaration recorded by the Police Sub-Inspector, each statement allegedly made by the victim was required to be proved by the said Police Sub-Inspector and the said Police Sub-Inspector was also supposed to prove that recording of the statement was genuine and he has acted with utmost care and caution. The prosecution was under obligation to prove that the victim/ patient was in fit state of mind at about 05-00 p.m. on 12th December 1991. The victim-deceased was on the floor other than the doctor who has endorsed the statement allegedly made by the victim-deceased. The state of consciousness of a person is materially different than a condition which can be said to be a fit state of mind. The Court cannot ignore the nature of injuries found by the doctor who had examined the victim initially and the other one who had performed the autopsy.

There was a grave injury on the head and the person having such an injury affecting brain would not be in a position to speak or state anything with such minute details. According to Shri Munshi, meticulous narration which is found in the dying declaration itself is sufficient to raise doubt about its genuineness if the version of one of the two eye-witnesses is believed as to the physical condition of the witness at the relevant point of time and the injuries which were noticed by the doctor during the course of treatment of the victim.

4. While linking the appellant with the serious crime punishable u/s 302 or in the alternative 304 Part I of the Indian Penal Code, the learned trial Judge also ought to have considered the so-called weapon used in the incident in question. Even as per the say of the prosecution, the weapon used by the appellant was a stick having length and width as 29" X 1" (inches) and on one side of the said stick, there was a small hole and it was broken, and it was black in colour. So it appears that it must be lying some where near the place where the hot discussion must have taken place and on the spur of moment, the incident might have happened. In such a fact situation, the learned trial Judge ought not to have held that the prosecution has satisfactorily proved the charge beyond reasonable doubt.

5. The alternative argument advanced by Shri Munshi, learned Counsel appearing for the appellant, is that if the Court is of the view that even after ignoring the dying declaration allegedly recorded by the Police Sub-Inspector, there is sufficient evidence to link the appellant with the crime as there is reliable piece of evidence of two eye-witnesses, then this Court at least should not have held the appellant guilty for the charge of offence punishable u/s 304 Part I of the Indian Penal Code. The learned trial Judge has not applied mind whether the alleged wrong would fall in the category of wrong punishable u/s 304 Part II of the Indian Penal Code or a lesser offence or a wrong punishable u/s 325 of the Indian Penal Code. Merely because a young boy has died in the incident, the learned trial Judge has imposed a severe imprisonment of seven years. It is submitted that the Court also ought to have considered the age of the appellant as well as relation between them; their socio-economic background and the absence of motive or deliberation. So if this Court is of the view that the prosecution has satisfactorily proved that the appellant had given a blow on the head of the victim-deceased with the muddamal wooden stick (patti), then also the appellant ought to have been held responsible for the offence punishable either u/s 325 or Section 304 Part II of the Indian Penal Code.

6. Shri P.D. Bhate, learned Additional Public Prosecutor, has submitted that the finding of guilt has been legally arrived at by the learned trial Judge. It is true that the learned trial Judge ought not to have relied on the evidence which was led in the nature of dying declaration because there are a number of infirmities in the dying declaration; such as (i) the dying declaration is not found in the form of questions and answers; (ii) there is no certificate of the doctor in the beginning of the statement recorded; (iii) there is no signature or any other

mark below the said statement which can be said to have been made by the injured-victim; (iv) the conflict qua the time of the so-called consciousness of the victim-deceased and the endorsement of the doctor; and (v) the injured was not knowing the perfect Gujarati language because admittedly he was a native of Orissa State, and so he would not have narrated the details in a such a lucid Gujarati before the Police Sub-Inspector which is found in the so-called dying declaration.

7. It is argued that even if it is presumed that the victim might have reached to the hospital with some consciousness, it is in evidence that the real brother who is the complainant in the present case, and a person who had informed the police immediately in the hospital about the incident and the nature of occurrence, has stated that the victim was not in a position to speak anything, the dying declaration ought not to have been considered directly or indirectly in linking the appellant with the crime. However, according to Shri Bhate, learned Additional Public Prosecutor, this Court while exercising powers vested with the Court u/s 374 read with Section 386 of the Code of Criminal Procedure, 1973, can reappraise the evidence and reach to its own finding keeping the charge framed against the appellant in the background and decide as to which offence the prosecution has satisfactorily established against the appellant.

8. The first submission of Shri P.D. Bhate, learned Additional Public Prosecutor, is that there is only one blow. The second injury is a superfluous injury, but the part of the body selected is the vital part. The blow must have been given with full force by the appellant which has caused skull fracture and internal injury in the brain. So the learned trial Judge cannot be said to have committed any error in linking the appellant with the charge of offence punishable u/s 304 Part I of the Indian Penal Code, but he has fairly acceded that in absence of any inimical terms and as the incident has occurred in a spur of moment and that too on a very trivial issue, the Court can hold the appellant guilty of the charge of offence punishable u/s 304 Part II or Section 304 Part I of the Indian Penal Code.

9. Considering the version of the complainant, who is the real brother of the deceased and examined by the prosecution, this Court is of the view that this witness has narrated the incident in a transparent manner. He has stated that the incident had occurred at about 02-00 p.m. The victim-deceased was given a blow by the appellant near a factory where he was working. The appellant was working in the factory upto 12-00 noon. Thereafter, he had returned again at about 02-00 p.m. and had started working in the factory. The appellant was to return on job at about 01-00 p.m., but instead of coming back to the factory at about 01-00 p.m., he reached at about 02-00 p.m. According to the complainant (real brother of the victim-deceased), he was to start and operate a machine, but he had not done it. So the appellant had come with a wooden log and had given a blow near the elbow joint of his left hand and also near left thigh. Thereafter, he had given blows to the victim-deceased with the said wooden stick. At that time, the other prosecution witness Niranjan was present there as he had been

there to have a cup of tea. This Niranjana has been examined by the prosecution and practically there is no change about the fact that Niranjana was working just adjacent to the factory where the incident had occurred. There is no material inconsistency or conflict in the versions of this witness qua the FIR given by him. After all, this witness was deposing before the Court after about four years but the sub-stratum of the story unfolded by him before the Court when is found corroborated by his earlier version i.e. FIR, obviously it shall have to be considered in its legal perspective. Of course, he is the real brother of the victim-deceased and in that way, he can be said to be a partisan witness but he does not appear to be a chance witness. Over and above, he is an injured witness. So this witness, who has been examined vide Ex.19, is required to be given due weightage. He has not attempted to justify the alleged recording of dying declaration by Police Sub-Inspector of Chowk Bazaar Police Station. He has not even exaggerated as to the number of blows given by the appellant. It is true that one blow appears to be a fatal blow inflicted by the appellant. The second injury which was found on the body of the victim was superfluous which might have been caused because of fall of victim after getting the head injury. In the cross-examination, the complainant has admitted that the basic quarrel was between the complainant and the appellant. The victim-deceased was compelled to intervene in the quarrel and if victim-deceased would not have intervened, perhaps the fatal blow would not have fallen on the head of the victim-deceased. So this witness has stood to the test of examination. Even in absence of this witness, this Court could have held the appellant guilty on the sole testimony of the other witness PW-4-Niranjana considering the corroboration made by him, who has been examined by the prosecution vide Ex.19. This witness corroborates the testimony of the complainant qua the main incident, the time of the incident and the place of the incident. He has stated that the victim-deceased was conscious. He has also stated that after incident in question, the appellant had run away from the scene of offence; meaning thereby, he has led some evidence which can be said to be the conduct of the accused and as such, there is no cross-examination on this point. If the appellant was not concerned with the injury which was found on the head of the victim-deceased, he would not have left the factory where he was working and he was also entitled to open and lock that factory also. Though PW-4 Niranjana has said that the victim was able to talk till 03-00 p.m. on 13th December 1991, but was able to speak out each detail meticulously which has been recorded by the Police Sub-Inspector or not, was a question because he had succumbed to the injuries at 05-50 p.m. on 13th December 1991 i.e. on the next day of the incident in question. Even if the victim as a patient was able to respond to some stray questions, would not be safe to say that he had capacity to give a detailed statement. The said witness Niranjana has identified the clothes of the appellant. So the evidence of these two witnesses satisfactorily establish that on the date of incident, the appellant had given some blows on the body of the present complainant and the fatal blow on the head of the victim-deceased, when the victim-deceased attempted to intervene in the quarrel between the complainant and the appellant. Shri Munshi

has rightly argued that as such there is no case qua motive as placed by the prosecution, it would not be safe to record a finding on imaging grounds and conjecture. This is not the case of a motive hidden in the mind of the accused. There was no animosity between them and the real brother of the deceased was the co-worker of the appellant. The other workers were there. It is in evidence that none of them attempted to intervene in the incident but when there is neither any suggestion nor evidence to show that the evidence of this witness Niranjana, who was either close to the victim-deceased or inimical to the appellant, should be given proper weightage being an independent person and the learned trial Judge has rightly given due weightage to the version of this witness.

10. It is true that before the learned trial Judge one proposition was also placed that the injury found on the head of the injured may be accidental because of a sudden fall on a strip of power-loom where the victim-deceased was working or he may have fallen down on any hard and blunt substance as he was working in a power-loom factory. But this hypothesis has not been accepted by the Court. If this case was really a case of accident, then there was no reason for these two prosecution witnesses to implicate the appellant as a culprit because otherwise they were having good relations. Why the complainant being a co-worker would implicate the appellant falsely in the incident ? Of course, this would not be so relevant but the Court is inclined to say that a worker if loses his life accidentally at his working place, his family would get various compensatory benefits. So the injury appears to be a result of the blow given on the head of the victim-deceased and not accidental. The evidence of the complainant, as observed earlier, is found natural being an injured eye-witness and for causing injury to complainant, the appellant has also been held guilty for the offence punishable u/s 323 of the Indian Penal Code.

11. I do not find any error in the finding recorded by the learned trial Judge that the appellant is the author of the blows given to the victim-deceased as well as the complainant, including the fatal blow which was found on the head of the deceased. The doctors examined i.e. the doctor who treated the injured initially and who performed the autopsy, have proved that there is nexus between the injury and the death of the victim. In this background, I am inclined to observe that there is neither illegality nor perversity in the finding of guilt recorded by the learned trial Judge.

12. The crucial question before this Court is that ultimately for which offence punishable under the Indian Penal Code the learned trial Judge could have linked the appellant ? The above discussion is sufficient to record a finding that the learned trial Judge has erred in holding that the appellant had committed offence punishable u/s 304 Part I of the Indian Penal Code. It is not necessary to reproduce the relevant part of Section 304 wherein the offence is described. The Courts are supposed to evaluate the evidence in the background of totality of the evidence led and record a finding whether the case falls in Part (I) or Part (II) of

Section 304 of the Indian Penal Code - which is a lesser offence. The acquittal of the appellant for the offence punishable u/s 302 of the Indian Penal Code has not been challenged by the State. Even otherwise as discussed earlier, when this is a case of one blow and that too by a small wooden log and without any intention which can be attributed to the appellant, the learned trial Judge has rightly acquitted the appellant from the charge of offence punishable u/s 302 of the Indian Penal Code. But with this set of facts, the learned trial Judge ought to have held the appellant guilty for the charge of offence punishable u/s 304 Part II of the Indian Penal Code because Part II of Section 304 of the Indian Penal Code deals with the offence which is lesser offence than the offence described in Part I of the said Section. The force of blow given and the part on which the blow was given, are sufficient to infer that it was possible for the appellant to assess and apprehend that the blow which he has given was likely to cause death or may cause death. There may not be any intention to cause death or to cause such a bodily injury which may result into death. So the element of part of body on which the fatal blow is found and the resultant effects i.e. internal injury found at the time of autopsy, at the most, were of the nature under which the learned trial Judge could have said that the appellant has committed an offence punishable u/s 304 Part II of the Indian Penal Code.

13. The Court is not in agreement with the submissions made by Shri Munshi, learned Counsel appearing for the appellant, that the appellant ought to have been held guilty for the charge of offence punishable u/s 325 of the Indian Penal Code. On re-appreciation of the entire set of evidence, it is clear that the prosecution has satisfactorily established the charge against the appellant of the offence punishable u/s 304 Part II and 323 of the Indian Penal Code for the injuries caused to the victim-deceased and the complainant respectively. The version of the complainant qua the injuries which were found on his body, is corroborated by the medical evidence and the medical certificate produced and proved by PW-6-Dr.Divya Ravindrasinh Ravindrasinh vide Ex.23.

14. Shri B.P. Munshi, learned Counsel appearing for the appellant, has placed reliance on one decision of the Apex Court in the case of *Vadla Chandraiah v. State of Andhra Pradesh* reported in 2007(14) GHJ 332. The facts of the cited decision are little bit different. But when the sudden provocation was not doubtful in the case, the case would fall in the category of Section 304 Part II of the Indian Penal Code. This observation would help the appellant in the present case because the fact situation reveals that there must be some hot exchange of words between the complainant and the appellant prior to the movement (assault by stick) which compelled the victim-deceased to intervene in the matter.

15. When the Court finds that the appellant is responsible for less graver offence, the impact would be on the punishment of imprisonment. It is true that the Court can inflict imprisonment upto a period of 10 years even for the offence punishable u/s 304 Part II of the Indian Penal Code, but considering the element of sudden quarrel and other aspects including the age of the appellant and other

socio-economic background of the appellant, the imprisonment for seven years would be harsh. In a number of cases, this Court and the Apex Court have sentenced the accused persons for a period varying between two to five years for such an offence. In a given case, the Court even can give advantage of the provisions of the Probation of offenders" Act. The detailed submissions were made in this regard before the learned trial Judge also and they are reflected in the operative part of the judgment and order under challenge. I have considered all these submissions made before the learned trial Judge on this point but the imprisonment of punishment for a year or two would not meet the ends of justice. The imprisonment in a case where a young person has lost his life, and that too a young boy of about 18 to 19 years of age, the Court should impose an adequate punishment so that the same may carry some message to the society. There is no need to add the element of deterrence in each punishment imposed but simultaneously the Court also should not be too liberal when the question is of reduction of sentence so imposed. So the substantive sentence if is reduced to three years, would be proper and would meet the ends of justice. It is not necessary to increase the amount of fine imposed because increase of amount of fine may result into increase of in default punishment and the whole purpose of reducing the punishment may frustrate. So the present appeal is required to be allowed partly holding that the conviction recorded by the learned trial Judge for the offence punishable u/s 304 Part I is required to be altered to Part II of the said Section and the substantive sentence is required to be reduced to three years.

16. There is enough force in the submission of Shri B.P. Munshi, learned Counsel appearing for the appellant, that as the appellant is on bail since years, he should be given some reasonable time to surrender to serve the sentence. Obviously, the appellant would be entitled to the benefit of set off.

17. In view of above observations and discussion, the present appeal is hereby partly allowed. The judgment and order of conviction and sentence dated 15th July 1995 passed by the learned Additional Sessions Judge, Surat, in Sessions Case No. 103 of 1992, is hereby reduced and modified to the effect that the appellant is hereby convicted for the offence punishable u/s 304 Part II of the Indian Penal Code, instead of offence punishable u/s 304 Part I of the Indian Penal Code; and instead of rigorous imprisonment for seven years for the offence punishable under 304 Part I, the appellant shall now undergo rigorous imprisonment for three years for the offence punishable u/s 304 Part II of the Indian Penal Code. As the appellant has already paid the amount of fine, the order of sentence qua fine remains unaltered so far as the aforesaid offence is concerned. The finding qua the offence punishable u/s 323 is also upheld as this Court concurs with the expression of the learned trial Judge that no separate sentence is required to be imposed for the offence punishable u/s 323 of the Indian Penal Code.

18. As the appellant is enjoying bail since years, he should be given some

reasonable time to surrender and, therefore, the appellant is directed to surrender himself within a period of 6 (six) weeks from today to serve the sentence, failing which the learned trial Court shall issue a non-bailable warrant against the appellant to secure the custody of the appellant and he shall be sent to jail to serve the sentence. The bail bond of the appellant shall stand cancelled.