

(2008) 08 GUJ CK 0021
In the Gujarat High Court
Case No : Criminal Appeal No. 515 of 2001

Somabhai Hathibhai Damor

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 26-08-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 374
Penal Code, 1860 (IPC) — Section 114, 307, 324, 452, 504

Citation : (2008) 08 GUJ CK 0021

Hon'ble Judges : Z.K. Saiyed, J; A.M. Kapadia, J

Bench : Division Bench

Advocate : Sadhana Sagar, appointed by Legal Aid Committee, for the Appellant; K.C. Shah, APP, for the Respondent

Final Decision : Dismissed

Judgement

A.M. Kapadia, J.—Challenge in this appeal filed u/s 374 of the Code of Criminal Procedure ("the Code" for short) is to the correctness of the judgment and order dated 20.6.2001 rendered in Sessions Case No. 296 of 2000 by the learned Additional Sessions Judge, Panchmahals District at Godhra by which the sole appellant/accused ("the accused" for short) has been convicted for the offences under Sections 307 and 452 of the Indian Penal Code ("IPC" for short) and sentenced to suffer RI for three years and fine of Rs. 500/- i.d., SI for 15 days for the offence u/s 307 IPC and SI for six months and fine of Rs. 500/- i.d., SI for 15 days for the offence u/s 452 IPC.

2. The prosecution case has disclosed from the FIR and unfolded during trial is as under:

2.1. P.W.2, Nisharbhai Hakimabhai has lodged a complaint before Khanpur Police Station wherein inter alia he has alleged that he is running a grocery shop. Their old shop and house are at village Udava. His brother Mustak is doing business there.

The day before lodging of the complaint, he came to the house at Udava from the shop at Morkhakhara at about 6 O'clock. His mother Saberaben, brother Mustak, Mustak's wife Rizvana and their son Shahrukh were at home. They were sleeping after supper in night at home. At that time the front door of his house was knocked at about 01:30 at night. His mother got up and asked and it was said, "I am Soma Hathi and Beedis are to be taken". Due to fear the door was not opened at night. The knocking at the door was continued and then the door was opened. At that time all were got up. As soon as the door was open, Damor Soma Hathi, Raman Natha and Pratap Natha of Udava rushed in the house. There were scythes in the hands of Soma Hathi and Raman Natha and they were speaking abuses against mother-sister and saying "where is the old man? Bring him out and he is to be done away with". On hearing so, Mustak told "my father is at Shhera and not at home". They became excited and Some Hathi Damor gave a scythe blow from his hand on the head of Mustak's four years old son Shahrukh and the head was broken. The boy fell down. Raman Natha gave scythe blow on the hand of Mustak and there was a scar on the palm. The articles of the shop were got scattered. Thereafter they three came out of the house by shouting and went towards the road. As nothing was available in the night, they started in a bus at 6 O'clock in the morning for going to Lunavada and gave treatment to Mustak and his son who were referred to Godhra Civil Hospital wherein they are admitted. On hearing about the incident by his relatives, he went to the police station with Shaikh Wahidbhai and Imranbhai and lodged the complaint.

2.2. The aforesaid complaint is registered vide CR No. 61/2000 before Khanpur Police Station initially against three persons. Pursuant to the registration of the complaint, investigation was started and during the course of investigation, panchnama of scene of offence was drawn, muddamal dharia was recovered from accused Somabhai Hathibhai Damor and the injured were sent to hospital for treatment, statements of witnesses were recorded and at the end of investigation, as sufficient evidence was found against the accused Somabhai Hathibhai Damor charge sheet came to be filed against him for commission of the offence under Sections 307 452 324 504 506(2) and 114 IPC in the Court of learned JMFC Lunavada.

2.3. As the offence u/s 307 is exclusively triable by a Court of Sessions, the learned JMFC Lunavada committed the case to the Court of Sessions, Panchmahals District at Godhra.

2.4. The learned Additional Sessions Judge, Panchmahals District at Godhra ("the trial court" for short) to whom the case was made over for trial framed the charge against the accused for commission of the offences as alleged in the charge sheet.

2.5. To prove the culpability of the accused, prosecution has examined 14 witnesses, i.e., complainant, injured witness, other witnesses, etc., and relied upon their oral testimonies.

2.6. To bring home the charge against the accused, the prosecution has also produced a number of documents such as complaint, panchnama, medical certificates, recovery panchnama of dharia, etc., and relied upon the contents thereof.

2.7. After recording of the evidence of the prosecution witnesses was over, the trial court recorded the further statement of the accused u/s 313 of the Code. The accused denied the case of the prosecution case in its entirety and stated that he is innocent and false case has been filed against him. However, he has not led evidence nor did he examine any witness in support of his defence.

2.8. On appreciation, evaluation, analysis and scrutiny of the evidence on record, the trial court came to the conclusion that the prosecution has successfully established that the accused has inflicted injuries to witness Mustak and his son Shahrukh and thereby the complicity of accused for commission of the offence under Sections 307 IPC and 452 IPC is established. On the said finding the trial court recorded conviction of the accused for commission of the said offences and sentenced to which reference is made in earlier paragraphs of this judgment which has given rise to instant appeal at the instance of the accused.

3. Ms. Sadhna Sagar, learned advocate appointed by Legal Aid Committee for the accused, has submitted that there are many contradictions in the complaint Ex.8 and in the oral testimony of the complainant. There are also contradictions amongst the witnesses. Initially there were three persons whose names figured as accused but charge sheet is filed against one person only and the remaining two persons have been shown as witnesses which is an inherent defect and therefore the prosecution case suffers from lot of contradictions and therefore benefit of doubt must be given to the accused. Therefore, according to her, the impugned judgment and order deserves to be quashed and set aside by acquitting the accused by giving benefit. She therefore urged to allow the appeal.

4. Per contra, Mr. K.C. Shah, learned APP for the respondent - State of Gujarat has submitted that there is no infirmity or illegality committed by the trial Court in recording the conviction and sentence against the accused. Therefore, no interference is called for in the impugned judgment and order. He has submitted that the investigating Officer has in terms deposed that there was no evidence against remaining two persons i.e., Raman Natha Damor and Pratap Natha Damor and therefore no charge sheet is filed against them and they are shown as witnesses. Moreover, those two persons have also deposed against the accused and from their evidence also the presence of accused is established. From the evidence of the injured eye witness, complicity of the accused has been duly proved. There is no contradiction in this regard. Therefore he urged to dismissal the appeal by confirming the judgment and order passed by the trial court.

5. This Court has considered the submissions advanced by Ms. Sadhna Sagar, learned advocate for the accused and Mr. K.C. Shah, learned APP for the

respondent - State of Gujarat and perused the impugned judgment and order. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record, which is read and re-read by the learned advocates of the parties with reference to broad and reasonable probabilities of the case. This Court has examined the entire evidence on record for itself independently of the learned Judge of the trial Court and considered the arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether the trial Court has rightly recorded the order of conviction and sentence.

6. To prove the nature of injuries sustained by the injured witness Mustak and his son Shahrukh, the prosecution has examined and relied upon the oral testimony of P.W.8, Dr. Ashish Vinodchandra Jaiswal, Ex.17. He has, inter alia, testified that on 5.8.2000 he was on duty at Cottage Hospital, Lunavada and at that time one Mustak and his son Shahrukh came to him with police yadi. The history given before him was that Somabhai Hathibhai inflicted dharia blows to them on 5.8.2000 at night at about 8 P.M. He has examined both of them and also issued certificates at Exs.18 and 19. So far as certificate at Ex.18 is concerned, it is in respect of the injury sustained by Mustak. As per the certificate Mustak had received a cut injury of 7 cm x 1 cm on the right index and middle finger. So far as Ex.19 certificate is concerned, the said certificate is in respect of the injury sustained by Shahrukh and as per the certificate he has also received cut injury of 12 cm x 3 cm on the forehead and there was also fracture of skull bone.

7. In view of the aforesaid evidence and more particularly looking to the seriousness of the injury received by Shahrukh, according to this Court, if it would have been inflicted with a little more force, then possibility of death of the child cannot be ruled out. Therefore, injury caused to Shahrukh attracts the penal provision of Section 307 IPC and for causing injuries to Shahrukh and Mustak the accused has committed house trespass which attracts the penal provision of Section 452 and therefore the prosecution has been able to establish that the accused has committed the offence punishable under Sections 307 and 452 IPC.

8. Having held that the injury caused to Shahrukh attracts the penal provision u/s 307 IPC, next question is whether the accused alone is the author of the injuries to Shahrukh and injured Mustak.

8.1. In this connection, we shall first refer to the evidence of P.W.1, Ramabhai Hirabhai, Ex.5. He is a panch witness to the panchnama with respect to recovery of weapon dharia from the accused having found with blood stain. He has deposed as per the contents of the panchnama. Therefore, the prosecution has successfully established the recovery of weapon from the accused.

8.2. The prosecution thereafter has examined and relied upon the oral testimony of P.W.2, Nisharbhai Hakimabhai, Ex.7. He is the complainant. He has inter alia deposed that at the time of incident he was at Morkhakhara and on the next day

when he came to know about the injuries sustained by his brother and nephew, he went to Cottage Hospital, Lunavada and met them. They informed that the accused Somabhai Hathibhai came yesterday night and knocked at the door demanding beedi and match stick but he did not give money and went away. He was having a dharia and a can of kerosene with him and thereafter he again came back. He set the room on fire and they raised shouts. As his brother opened the door, the accused inflicted a dharia blow on his hand and also on the head of his nephew. He has given complaint in this regard. He has identified the signature on the complaint.

8.3. In his cross-examination he has also admitted that at the time of lodging complaint, he was not in a fit and proper mental state and he has wrongly stated that he was present at the time of incident but in fact he was not present. He has also admitted that in the complaint he has stated that Raman Natha and Pratap Natha were present with dharia and they also inflicted injury on Mustak and Shahrukh and this was stated in the complaint as per the information received by him from his brother. He has admitted that Raman Natha is a head strong person and therefore he could not open his shop.

8.4. On reappraisal of his oral testimony, it is seen that though in the complaint Ex.8 the complainant had given names of Raman Natha and Pratap Natha, in his oral testimony he has not testified anything against them. He has admitted that at the time of lodging the complaint he was not in a fit and proper state of mind. He has also admitted that he was not at all present at the time of the incident.

8.5. The prosecution has thereafter examined and relied upon the evidence of P.W.3, Mustak Hakimbai, Ex.9. He has inter alia testified that the incident had taken place on 5.8.2000 at 1.30 at night. The accused came to his house in company of Raman Natha and Pratap Natha and they were having dharia with them. Soma Natha asked to open the shop as he wanted Beedi. At that time Raman Natha inflicted blows with dharia and thereafter Soma Natha inflicted dharia blow on the head of his son. He has not stated anything about Pratap Natha having inflicted any injury to him or his son.

8.6. The prosecution has thereafter examined and relied upon the oral testimony of P.W.4, Kankabhai Rupabhai, Ex.10. He has inter alia testified that at the time of incident he was at his residence. Mustak has shouted for him and therefore he went there. He saw the accused with dharia. He asked the accused why he was quarrelling. The accused told him that Mustak has not given Beedi to him and thereafter he told Mustak to give him beedi and Mustak gave him Beedi. Thereafter Mustak told him that the accused has given him dharia blow and he has given dharia blow to his son also.

8.7. The prosecution has thereafter examined and relied upon the evidence of P.W.5, Saberaben Salimbhai, Ex.11. She is the mother of injured Mustak and grand mother of injured Shahrukh. At the time of incident she was awoken and the accused came to her house for beedi. He was having dharia and a can of

kerosene. He ran away and again he came back. Thereafter he has set fire near the door with kerosene. Thereafter the accused inflicted blow to his son Mustak and her grand son Shahrukh.

8.8. The prosecution has thereafter examined and relied upon the evidence of P.W.6, Soniben Nathabhai, Ex.12. She is the mother of Raman Natha and Pratap Natha. She has stated that the police have come to arrest Raman Natha and Pratap Natha as their names were there in the complaint but as the villagers assembled there told that they were not there at that time of incident, they were not arrested and no charge sheet is filed against them. She has not seen the incident of inflicting injury by the accused to Mustak and his son Shahrukh.

8.9. The prosecution has thereafter examined and relied upon the evidence of P.W.7, Ramanbhai Nathabhai, Ex.13 and P.W. 10, Pratap Natha, Ex.23. Their evidence is identical. They have stated that they were informed by their mother Soniben that the accused is standing near the house of Mustak and therefore both of them should go there and save Mustak and therefore they went there. When they went there to save Mustak they saw that the accused had broken open the gate of house of Mustak and on the door he had set fire and the accused had inflicted dharia blow to Mustak and to his son Shahrukh.

8.10. All the above referred to witnesses were cross-examined at length by the learned advocate for the accused but nothing substantial could be brought out which would impeach the credibility of their evidence.

8.11. On reappraisal of their evidence, it is clear that through inadvertent mistake, the complainant had given names of Raman Natha and Pratap Natha in the complaint as assailants along with Somabhai Hathibhai Damor but in fact they were not the assailants and they came at the scene of incident to rescue Mustak upon the persuasion of P.W.6, Soniben, their mother. In fact they were not present there. The Investigation Officer during the course of investigation found that the complainant has falsely named Raman Natha and Pratap Natha as assailants along with the accused Soma Hathi and therefore not only charge sheet was not filed against them but they were shown as witnesses and they in terms deposed as to what had happened at the time of incident and deposed that Soma Hathi was the assailant. In the medical certificate issued by P.W.8, Dr. Ashish Vinodchandra Jaiswal, has recorded that Mustakbhai, the injured witness, who is also the father of injured Shahrukh, has stated that Soma Hathi is the assailant. P.W.4, Kankabhai, Ex.10, who came to the house of injured Mustak on hearing shouts has in terms stated that at that time Soma Hathi was present at the house of Mustak and when he inquired Mustak as to why he is making quarrel, he told that Mustak was not giving beedi to him. Thereafter when he asked Mustak about the incident, Mustak informed him that Soma Hathi inflicted dharia blows and caused injuries to him and his son Shahrukh. P.W.5, Saberaben, Ex.11, who is mother of Mustak and grandmother of Shahrukh, has also deposed that Soma Hathi inflicted injuries to her son and grandson with dharia. The complainant has also in his deposition stated that he has given names of Raman

Natha and Pratap Natha as assailants as told by his brother but in his deposition, he has not stated anything against Raman Natha and Pratap Natha. Therefore, from the over all evidence on record, it is clear that the real assailant of Mustak and Shahrukh is Soma Hathi and none else and therefore, we find that the trial court has reached to the right conclusion that Soma Natha is the person who has inflicted injuries to Mustak and Shahrukh.

8.12. In view of the aforesaid state of affairs, the contention of Ms. Sadhna Sagar, learned advocate for the accused that in the complaint along with the accused, names of two other persons, Raman Natha and Pratap Natha were given but no charge sheet came to be filed against them and therefore benefit of doubt must be given to the accused and he may be acquitted, has no substance. So far as the witnesses are concerned, they are consistent so far as the injury caused by the accused to both the victims. Injured Mustak tried to implicate Raman Natha as the assailant who has inflicted injury on his hand. But looking to the medical certificates issued by P.W.8, Dr. Ashish Vinodchandra Jaiswal, before whom Mustak had the opportunity to first disclose the names of assailants, it is seen that Mustak has named only Soma Hathi as the assailant. In addition to this, as per the evidence of P.W.4, Kankabhai also Mustak told him that Soma Hathi had inflicted injuries to him and his son. Moreover, when Kankabhai came running to the house of Mustak, he saw only Soma Hathi at his house and neither Raman Natha nor Pratap Natha was present there. As per the complaint, Soma Hathi, Raman Natha and Pratap Natha were assailants but investigating officer has recovered dharia from Soma Natha only. If as per the complaint all the three assailants had inflicted injuries, there could have been more than one injury each on both the injured victims. But the record shows that only one injury each was sustained by both the injured persons. Therefore, this Court finds that the statement made by Mustak in his deposition about the involvement of Raman Natha in the assault is nothing but a figment of his imagination and the trial court has rightly not believed the said part of his deposition. Therefore, the submission made by Ms. Sadhna Sagar for giving benefit of doubt to the accused and acquitting him of the offences with which he was charged, contains no merits and hence it is rejected.

9. In view of the clinching and satisfactory evidence of the prosecution witnesses, complicity of the accused in commission of the offence of inflicting injuries to injured Mustak and his son Shahrukh has been duly established. Suffice it to say that the trial Court has given cogent and convincing reason for convicting the accused for commission of offences under Sections 307 and 452 IPC and Ms. Sadhna Sagar, learned advocate for the accused could not dislodge the said reasons given by the trial Court.

10. We find ourselves in complete agreement with the finding, ultimate conclusion and the resultant order of conviction and sentence recorded by the trial Court, as according to us, no other finding, conclusion and order, is possible except the one reached by the trial Court, which is required to be affirmed by us.

11. Seen in the above context, there is no reason or justifiable ground to interfere with the impugned judgment and order of conviction and sentence passed by the trial Court, and as the appeal lacks merit, it deserves to be dismissed by confirming the judgment and order passed by the trial Court.

12. For the foregoing reasons, the appeal fails and accordingly it is dismissed. Resultantly, the judgment and order of conviction and sentence dated 20.6.2001 rendered in Sessions Case No. 296 of 2000 by the learned Additional Sessions Judge, Panchmahals District at Godhra, is hereby confirmed and maintained.