
(2009) 02 GUJ CK 0014
In the Gujarat High Court
Case No : Criminal Appeal No. 926 of 2001

Somabhai Jogibhai Rathod	Vs	APPELLANT
State of Gujarat		RESPONDENT

Date of Decision : 27-02-2009

Acts Referred:

Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 302, 304, 452

Citation : (2010) CriLJ 2363

Hon'ble Judges : Rajesh H. Shukla, J; Jayant Patel, J

Bench : Division Bench

Advocate : Farhanaymansuri, for the Appellant; Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Jayant Patel, J.—The present appeal is directed against the judgment and order passed by the learned Additional Sessions Judge (hereinafter referred to as the "Sessions Judge") in Sessions Case No. 132/2000, whereby the appellant-accused has been convicted for the offence u/s 302 of IPC as well as for the offence u/s 452 of IPC and for the offence u/s 135 of Bombay Police Act and the sentence has been imposed upon the accused for the life-imprisonment with the fine of Rs. 1,000/-, simple imprisonment for one year with fine of Rs. 500/- and a further simple imprisonment for one month with the fine of Rs. 100/- for the respective offences.

2. The short facts of the case appears to be that on 17.6.2000, when Janubhai Mohanbhai Rathod, complainant was at his residence at 8 o'clock in the morning, his wife had gone for doing labour work and he was preparing to go for labour work. At that time, his uncle-accused, who was residing at Village Donaja came on the bicycle and when the complainant enquired about well-being of his uncle-accused, he was informed that he had just come for loitering. Thereafter, as the

complainant had to go, when he went to shut the door of his house, his uncle accused also started walking along with the complainant with his bicycle and at that time, the accused-appellant informed the complainant that he had given blows with the axe to Bhukhubhai Bhagwanbhai Rathod (deceased). Thereafter, the accused went away. The complainant went to the house of Bhukhubhai Bhagwanbhai Rathod and saw that his uncle Bhukhubhai Bhagwanbhai Rathod was lying on the floor of the house in a pool of blood and the complainant felt that he had expired and, therefore, he being afraid of, informed another person, Dineshbhai Chhitubhai Patel, who was residing in the very area of the complainant. Thereafter, complainant and Dineshbhai Chhitubhai Patel, both once again came to the place of the deceased Bhukhubhai Bhagwanbhai Rathod and they saw that the blows given on the neck and the jaw of the deceased and the blood was coming out and the deceased had expired. The said Dineshbhai informed the complainant that Bhaldevbhai was also required to be informed about the same and both informed Bhaldevbhai. Thereafter complainant went to the police station and filed the complaint. As per the complainant, since there was dispute earlier between the accused and the deceased Bhukhubhai Bhagwanbhai Rathod, the accused-appellant had given blows with axe and had caused death of the deceased. The complaint was registered vide C.R. No. 104/2000 with Chikhli Police Station. The police investigated the complaint and as the sufficient material was found in the investigation, charge-sheet was filed against the appellant-accused for the offence u/s 302 of IPC and for other offences.

3. The prosecution, in support of the charge, examined the following witnesses:

- (a) Janubhai Mohanbhai Rathod Complainant Ex.8.
- (b) Dineshbhai Chhitubhai Patel witness Ex.9
- (c) Laxmiben Bhikhubhai wife of the deceased - witness Ex. 10
- (d) Natwarsinh Dayabhai Panch witness of the discovery panchnama of axe (muddamal) Ex.11
- (e) Saurabhsinh Dalsinh PSO, who took the complaint of the complainant Ex.13
- (f) Dr. Hinaben Mohanbhai Patel Medical Officer, who conducted the postmortem on the body of the deceased Bhukhubhai Bhagawanbhai Rathod Ex.19
- (g) Shrishbhai Gulabbhai Patel panch witness of the panchnama of the physical condition of the accused and seizure of bicycle Ex. 22
- (h) Trofi Saifuddin Kazi panch witness of the panchnama of seizure of axe Ex. 26
- (i) Sugdevbhai Shambhubhai Bharek Officer, who investigated the offence Ex. 28

4. The prosecution in support of the charge also produced the following documents:

- (a) Complaint Ex. 14

- (b) Panchnama of the place of offence Ex. 15
- (c) Inquest Panchnama Ex. 16
- (d) Panchnama of the body of the accused Ex.24
- (e) Discovery Panchnama Ex. 27
- (f) Recovery Panchnama of the clothes of the deceased Ex.17
- (g) Cause of death certificate Ex.20
- (h) Postmortem Report Ex. 21
- (i) Forwarding letter of the muddamal sent to FSL Ex.29
- (j) Expert's opinion and result about the muddamal along with the letter from FSL Ex.30
- (k) Xerox copy of the Notification under BP Act Ex.31
- (l) Map of the place of the offence Ex. 18
- (m) Signed copies of the panchas to bring the clothes of the accused under Muddamal Article No. 3.

5. The learned Sessions Judge thereafter recorded the statement of the accused u/s 313 of Cr.P.C. and in the further statement, the accused stated that he is innocent and he has been wrongly involved and he has been staying at his in-laws' place since last 12 years and he has nothing more to say. The learned Sessions Judge, after, hearing both the sides, found that the prosecution has been able to prove the case for the offence u/s 302 of IPC as well as for the offence u/s 452 of IPC and for the offence u/s 135 of Bombay Police Act and, therefore, the learned Sessions Judge has convicted the accused for all the three offences. The learned Sessions Judge also heard the accused on the aspect of punishment and ultimately has imposed the sentence of life-imprisonment with the fine of Rs. 1,000/- for the offence u/s 302 of IPC, simple imprisonment for one year with the fine of Rs. 500/- for the offence u/s 452 of IPC and simple imprisonment for one month with the fine of Rs. 100/- for the offence u/s 135 of Bombay Police Act. It is under these circumstances, the present appeal before this Court.

6. We have heard Ms. Farhana Y. Mansuri, learned Counsel for the appellant accused and Mr. Raval, learned APP for the State.

7. The evidence on record shows that Janubhai Mohanbhai Rathod complainant PW-1 has been examined at Ex.8 and he has supported the complaint fully and has also stated about the extra judicial confession made by the accused appellant before him for commission of offence and he has also admitted his signature on the complaint. In the cross-examination of the said witness, he has only stated that the accused appellant was staying at in-laws' place since last 12

years, but he has not contradicted the extra judicial confession made by the accused-appellant for commission of the offence. Dineshbhai Chhitubhai Patel PW-2 has supported the case of the prosecution inasmuch as he has confirmed that he was informed by the complainant and they had gone to the place of the deceased, where the deceased was found in a pool of blood and had expired. Nothing has come out in the cross-examination of the said witness to the contrary. Laxmiben Bhikhubhai, the wife of the deceased, has also supported the case of the prosecution. The only aspect, which may have some relevance is to the extent that as stated by the said witness, there was no dispute between the accused and the deceased and to that extent it could be said that the said part of the case of the prosecution is not fully supported by her deposition on the aspect of the dispute between the accused and the deceased.

8. Natwarsinh Dayabhai PW-4 is a panch witness to the discovery of axe, has supported the case of the prosecution for the discovery and also he has admitted his signature on the panchnama. He has also confirmed that the panchnama was prepared in his presence and in the presence of the other witnesses, Trofibhai, who is second panch. The defence has not been able to bring about any material in contradiction in the cross-examination. Trofibhai, who is another panch witness examined as PW-8, has fully supported the case of the prosecution for discovery of the axe and he has also stated that there were blood stains over the axe, he has identified the axe, which was shown to him and has confirmed the preparation of the panchnama and his signature. It appears that since Natwarbhai PW-4, though supported the case of the prosecution, was declared hostile, the prosecution with a view to strengthen the case and to bring on record the correct facts, has also examined the other panch witnesses namely; Trofibhai PW-8, who has fully supported the case of the prosecution.

9. The prosecution has examined Dr. Hinaben Mohanbhai Patel, PW-6; who performed postmortem. The said doctor has admitted of having performed postmortem of the deceased. As per the postmortem, the injuries on the body of the deceased were as under:

1. chop wound on the left temporal region of head 5 cm. x 1 cm. x bone depth, oblique clean cut margins anterior end 7 cm from the left mastoid process posterior end 11 cm from the left mastoid process.

2. chop wound on the left side of mandibular region extending obliquely 6.5 cm x 2 cm x bone depth clean cut margins upper end = 5 cm from left ear lobule lower and 8 cm from the left ear lobule.

- corresponding to external injury No: (1) depressed fracture of the underlying temporal bone left side in an area of 5 x 2 cm.

- Diffuse subdural haemorrhage on the right hemisphere.

- Diffuse subarachnoid haemorrhage over the brain surface.

10. The cause of the death as per the doctor is "Cardio respiratory arrest due to

shock and haemorrhage as a result of multiple injuries". The said doctor has also opined that the external injuries at Item Nos. 1, 2, and 3 were on the vital part of the body and they were sufficient to cause death of a human being. She has also said that such injuries could be caused by the axe, which was shown to her being muddamal.

11. Mr. Shirishbhai Gulabhai Patel, PW-7 is a panch-witness for recovery of the clothes and the bicycle of the accused. He has fully supported the case of the prosecution and he has also confirmed his signature on the panchnama as well as the signatures of the other panch witnesses over such panchnama prepared by the police for recovery of the clothes and the bicycle. As per the said panchnama, the blood stains were found over the shirt and the pants of the accused and there were also blood stains on the floor, where the blows were given to the deceased.

12. The FSL report shows that the blood stains found from the clothes of the accused as well as the axe were of "B" Group, which were discovered from the accused and in this manner, the FSL report supports the case of the prosecution.

13. The learned Counsel for the appellant accused mainly contended that there is no eye-witness to the incident and the extra judicial confession, which is taken as the basis by the learned Sessions Judge for convicting the accused is a very weak piece of evidence and no reliance ought to have been placed by the learned Sessions Judge for finding the guilt of the accused. It was submitted that one of the panch witnesses of discovery of axe has not supported the case of the prosecution and, therefore, such being a vital aspect, the benefit should be made available to the accused. It was also submitted that the case is based on circumstantial evidence and if the extra judicial confession is excluded for the purpose of considering the case of the prosecution, the chain would not be complete and the motive, which is said to have been attributed to the accused is neither sufficient, nor strong enough to leave the conclusion that the accused has committed offence and, therefore, the impugned order of the learned Sessions Judge is erroneous and deserves to be set aside by this Court.

14. Whereas on behalf of the State, the learned APP while supporting the judgment and order of the learned Sessions Judge contended that it is not a case of only extrajudicial confession, but extrajudicial confession is fully corroborated by the other evidence on record namely; as that of discovery of the axe at the instance of the accused, the recovery of the clothes, the FSL report showing the blood stains of the deceased over the axe, which was used for commission of, offence and the blood, stain in the clothes, showing the blood of the deceased, which were put on by the accused at the time when ,the offence was committed. It was, therefore, submitted that keeping in view the aforesaid evidence on record, it cannot be said that the conviction is only based on extra judicial confession and, in any case, even if it is a case where extrajudicial confession exists the same is supported and corroborated by other unimpeachable evidence on record showing the involvement of the accused for commission of offence. It

was, therefore, submitted that the learned Sessions Judge has not committed of any error in finding that the prosecution has been able to prove the case against the accused and, therefore, the appeal may be dismissed.

15. In order to consider the submission, we may examine the relevant case law on the aspects. In the case of State of Andhra Pradesh Vs. Kanda Gopaludu, the Apex Court has observed that the extra judicial confession is admissible if it inspire confidence and is made voluntarily. Therefore, the test for admissibility of the extrajudicial confession would be as to whether such is inspiring confidence and whether the same is made voluntarily or not. In the case of Sivakumar Vs. State by Inspector of Police, , the Apex Court did observe that the extra judicial confession may or may not be a weak piece of evidence, but each case is required to be examined on its own facts. In the very decision, the Apex Court, extracted its earlier view as so observed in the case of State of Rajasthan Vs. Raja Ram, as under:

46. Yet again in State of Rajasthan Vs. Raja Ram, it was stated:

19. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, -like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. It is not open to any court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility.

For the reasons aforementioned, the courts below must be held to have correctly come to the conclusion that the prosecution case has been proved as against the accused in view of the extra-judicial confession of the Appellant before the Village Administrative Officer, recovery of the air gun from Pappannan Thottam canal, the conduct of the Appellant and that he was last seen with the deceased.

Each one of the aforementioned circumstances although may not by itself be sufficient to prove the guilt of the Appellant, we are satisfied that the cumulative effect thereof satisfies the test of proof of the guilt of the Appellant on the basis

of circumstantial evidence for the commission of the offence u/s 304, Part II of the Indian Penal Code. The appeal being devoid of any merit is, thus, dismissed.

16. The aforesaid shows that the value of evidence as to the confession would depend upon the reliability of the witness, who gives the evidence. The approach of the Court shall be not to proceed on the basis that the extra judicial confession is a very weak piece of evidence, but the Court will have to undertake the scrutiny as to whether the same is inspiring confidence and as to whether the same is voluntarily made or not. If in the facts of the case the Court finds that the extrajudicial confession is not inspiring any confidence though made voluntarily, the Court may discard the same. But if the Court finds that such extra judicial confession is inspiring confidence and is also made voluntarily, the Court may be required to consider the same in the evidence. Of course, the further scrutiny may be required on the part of the Court to consider the other circumstances as may be available on record to find out not only the reliability of such extrajudicial confession, but also to find out as to whether the same appears to be genuine or not after having taken into consideration the other corroboration to such confession by other evidence led by the prosecution for supporting the guilt of the accused.

17. In the case of Ajay Singh Vs. State of Maharashtra, , the Apex Court did observe, inter alia, at para 8 as under:

8. ...While dealing with a stand of extra judicial confession, Court has to satisfy that the same was voluntary and without any coercion and undue influence. Extra judicial confession can form the basis of conviction if persons before whom it is stated to be made appear to be unbiased and not even remotely inimical to the accused. Where there is material to show animosity, Court has to proceed cautiously and find out whether confession just like any other evidence depends on veracity of witness to whom it is made. It is not invariable that the Court should not accept such evidence if actual words as claimed to have been spoken are not reproduced and the substance is given. It will depend on circumstance of the case. If substance itself is sufficient to prove culpability and there is no ambiguity about import of the statement made by accused, evidence can be acted upon even though substance and not actual words have been stated. Human mind is not a tape recorder which records what has been spoken word by word. The witness should be able to say as nearly as possible actual words spoken by the accused. That would rule out possibility of erroneous interpretation of any ambiguous statement. If word by word repetition of statement of the case is insisted upon, more often than not evidentiary value of extra judicial confession has to be thrown out as unreliable and not useful. That cannot be a requirement in law. There can be some persons who have a good memory and may be able to repost exact words and there may be many who are possessed of normal memory and do so. It is for the Court to judge credibility of the witness's capacity and thereafter to decide whether his or her evidence has to be accepted or not. If Court believes witnesses before whom confession is

made and is satisfied confession was voluntary basing on such evidence, conviction can be founded. Such confession should be clear, specific and unambiguous.

18. If the facts of the present case are examined in light of the aforesaid legal position, it does appear that it is not a case of mere extrajudicial confession to be considered for finding the guilt of the accused as such by the prosecution, but is a case where such extra judicial confession is fully corroborated by the other unimpeachable and trustworthy evidence on record as led by the prosecution. Had it been a case where the Court had to only rely upon the extra judicial confession and there being no evidence available on record having trustworthiness for its corroboration or other evidence in support thereof, it might attract a further detailed scrutiny and may create doubt about the confidence to be attached to such extra judicial confession. But in a case where the extrajudicial confession, which has come on record is fully supported by the discovery of the weapon, which was used for commission of offence, the clothes, which were recovered by the prosecution from the accused and the FSL report, it would be reasonable on the part of the Court to rely upon such extra judicial confession while considering the case of the prosecution. In the present case, it appears that the accused did voluntarily confess before the complainant Janubhai Mohanbhai Rathod PW-1 that he had given axe blows to the deceased Bhikhabhai. The said statement being voluntary has not been contradicted by the defence in the cross-examination of the very witness Janubhai or any other witness. Such statements made before the complainant Janubhai by the accused is fully supported by the discovery of the axe, which is made at the instance of the accused. As stated in the panchnama Ex. 27, the accused, of his own, has said to the panchas to show the axe, which was kept by him in hidden condition and ultimately, the discovery of such axe is made. The said axe did contain the blood stains, which as per the FSL report were found of the deceased. In the same manner, it has come on record that the clothes of the accused was recovered as per panchnama Ex 24 and such clothes were found containing blood stains and the said blood as per the FSL report was found as that of the deceased. The aforesaid shows the genuineness of the contents of the extra judicial confession namely; for commission of offence by the accused for causing death of deceased by the accused. In any case, the medical evidence fully supports the case of the prosecution for the injuries being found on the body of the deceased and such injuries could be caused with axe, which was shown to the doctor. Under these circumstances, as the extra judicial confession is fully supported by other evidence on record, considering the facts of the present case, we cannot accept the contention raised on behalf of the accused-appellant that such extra judicial confession is not inspiring any confidence and was wrongly relied upon by the learned Sessions Judge.

19. It is true that as per the complaint the motive attributed to the accused is on account of the dispute of land between the deceased and the accused. It is also true that the wife of the deceased has not stated about any such dispute. But

thereby, in the facts of the present case, it cannot be said that since the motive is not proved to the fullest extent, the accused is not involved in commission of offence. Had it been a case of only circumstantial evidence, it may stand on a different footing, but if the case is as that of not only extrajudicial confession, being made voluntarily and inspiring confidence, but is fully supported by the other evidence on record, the importance of the aspect of the motive would stand diluted. Further as per the evidence of the doctor, who has performed postmortem, PW-6, the injuries Nos. 1, 2 and 3 were on the vital part of the body of the deceased and all were independent enough to cause death of a human being. Therefore, if three blows are given and each one is sufficient to cause death of a human being, being on the vital part of the body, intention on the part of the accused also can be gathered to do away the deceased. Therefore, keeping in view the gravity of the injuries caused coupled with the medical evidence on record, it cannot be said that there was no intention on the part of the accused appellant to cause death of the deceased. Such being apparent, the past animosity or dispute, may be of the land or otherwise, would lose its importance. Therefore, keeping in view all the facts and circumstances of the present case, we cannot accept the submission made by the learned Counsel for the accused that as strong motive was not coming on record, the same would be fatal to the case of the prosecution.

20. In view of the above, we find that no error is committed by the learned Sessions Judge while holding that the prosecution has been able to prove the case against the accused for commission of offence u/s 302 of IPC. Similar would be the situation in case of the commission of offence by the accused u/s 452 of IPC as well as Section 135 of Bombay Police Act since the same are consequential thereof and inter-woven with the principal charge for the commission of offence u/s 302 of IPC.

21. In the result, the judgment and order of the learned Sessions Judge is hereby confirmed. The appeal is dismissed.