

(2017) 01 GUJ CK 0019
In the Gujarat High Court
Case No : 740 of 1994

STATE OF GUJARAT

APPELLANT

Vs

AMRABHAI MADIYABHAI DAMOR & ORS

RESPONDENT

Date of Decision : 25-01-2017

Acts Referred:

[Indian Penal Code, 1860](#), [Section 302](#), [Section 397](#), [Section 34](#), [Section 147](#), [Section 323](#), [Section 148](#), [Section 149](#), [Section 395](#), [Section 143](#) - Punishment for murder - Robbery or dacoity, with attempt to cause death or grievous hurt - Acts done by several persons in furtherance of common intention - Punishment for rioting - Punishment for voluntarily causing hurt - Rioting, armed with deadly weapon - Every member of unlawful assembly guilty of offence committed in prosecution of common object - Punishment for dacoity - Punishment [Bombay Police Act, 1951](#), [Section 135](#) - Penalty for contravention of rule or directions under sections 37, 39 or 40

Citation : (2017) 01 GUJ CK 0019

Hon'ble Judges : Akil Kureshi, Biren Vaishnav

Bench : Division Bench

Advocate : Jirgha Jhaveri, P V Patadiya

Final Decision : Dismissed

Judgement

1. This acquittal appeal has been filed by the State challenging the judgment and order dated 28.1.1994 passed in Sessions Case No.68/1993. By the aforesaid judgment, original accused have been acquitted of the charge under sections 143, 147, 148, 302, 323, 149 of the IPC and under section 135 of the Bombay Police Act.

2. Navlabhai Tejiyabhai Sangadiya filed complaint before the police station alleging that on 23.2.1993, he along with his brother Bhudiya, Mangu and others had gone to village Gamla to attend the wedding. While returning when they went to accused no.1 Amra Madiya's place as his son's marriage was scheduled

on that day, his brother Mangu was detained and handed over to police by Amra Madiya and others. Since his brother was handed over to the police on the following day i.e. on 23.2.1993, he along with Pidiya and others went to question him as to why his brother was handed over to police. Both of them returned to the village and went back at Amra Madiya's place at around 4 in the evening with others. At this point of time Amra Madiya and Tejiya Madiya, accused no.1 and 2 were carrying a dhariya, Kanu Madiya and Manu Madiya were carrying bow and arrow. They started accusing Pidiya Ditiya and attacked him with the dhariya. When Pidiya ran towards the hillock, Amra Madiya and Tejiya Madiya accused no. 1 and accused no.2 hit him on his head with the dhariya, Suresh Rama was attacked by Mesu Bhavla and Ditiya Narsing accused no. 5 and 6 with bow and arrow. Suresh suffered injuries on the cheek as a result of hit by arrow. The others Mangaliya Nura, Bhudiya Tejiya, Raman Mathur in order to escape the attack ran towards the house of Sarpanch. In the meantime, the other villagers gathered at the scene. Pidiya Ditiya succumbed to his injuries. Suresh Rama who was injured also succumbed to the injuries.

3. Charge was therefore, framed at exh.3, whereby six accused were charged for offence under sections 147, 148, 149, 302 read with section 34 of the IPC for causing death of Pidiya Ditiya and Suresh Rama and injuries to others with deadly weapons on their hand.

4. In order to sustain the charge, essentially three witnesses out of 13 witnesses have been examined who were either injured eyewitnesses or have heard about the incident.

5. Navlabhai Tejiyabhai, Prosecution Witness No.2, was examined at exh.35. He is the complainant. According to the testimony of this witness, he along with his brother Bhudiya, Mangu Dugdo Javlo had gone to village Gamla to attend their cousin Dinesh's wedding. Next morning, when they were on their way to Itava in order to attend the wedding, they had went at Amra Madiya's place since their was a marriage at his home. They had met Nandu a girl in that family from their village. At that point of time, Amra Madiya accused no.1 and Tejiya Madiya accused no.2 and others started attacking them with weapons. Mangu at this point started running in other direction. He was subsequently detained by the police. On the next day, he went to Amra Madiya's place to ask him as to why his brother Mangu was detained. Mangaliya Nura, Raman Mathur, Bhudiya Tejiya, Suresh Rama accompanied him to Amra Madiya's place. Amra Madiya, according to the testimony of this witness, informed him that his brother Mangaliya was handed over to the police. Thereafter, Amra Madiya and Tejiya Madiya started attacking the complainant and others. Amra Madiya accused no.1 and Tejiya Madiya accused no.2 had a dhariya whereas Ditiya Narsing, Mesu Bhavla, Kanu Madiya and Manu Madiya were carrying bow and arrow. According to this witness, all of them started attacking these persons. As a result of this, all of them ran towards the field. Some ran towards the hillock, rest of them ran towards the north direction. Tejiya Madiya had attacked Pidiya Ditiya with

dhariya. Amra Madiya had also attacked Pidiya Ditiya on his head with dhariya. Pidiya Ditiya died on the spot. When they started running away from the scene of the incident, Manu Madiya accused no.4 and Kanu Madiya accused no.3 followed them. Kanu Madiya attacked them with bow in his hand. Suresh Rama was also attacked by Dinu Narsing and Mesu Bhavla. According to this witness, Suresh Rama was attacked with arrow. He fell on the ground on a stone that was lying on the field. This witness thereafter, testifies that he along with Mangaliya Nura and Bhudiya Tejiya were taken to the house of Sarpanch. Thereafter, they were taken to Dahod in the police vehicle. Suresh was attacked with arrow by Mesu Bhavla. Mangaliya Nura was attacked by Kanu Madiya. Bhudiya Tejiya was attacked by the handle of dhariya by Tejiya Madiya. The police arrived after five and recorded their statements. This witness has been cross examined. In his cross examination, he denied the suggestion that they were to go to Amra Madiya's place for wedding. He denied the suggestion put by the defence that they were invited. This witness was examined on the issue of approach roads to Itava from Gamla. In his cross examination, he denied the suggestion that various options were available to reach Itava from Gamla. He admitted that in his police statement, he had stated that they had gone to Amra Madiya's place, as his brother Mangu had been detained by the police. He admitted that they did not approach the police to record the complain on the same night. He denied the suggestion that all of them had gone to Amra Madiya's place at 4 in the evening, he however, stated that they had gone around 1 in the afternoon. Thereafter, he stated that he along with Raman Masur, Ramchandra Lalu, Suresh Rama and others had gone thereafter to Amra Madiya's place. The suggestion was denied that since all of them were being attacked, with a view to save their skin, they ran towards the village. This witness further in his cross examination stated that after having gone to the dispensary, they were taken to the police station and they were detained for about 5 to 6 days and then they were produced in the Court. A suggestion was put to this witness which was denied that they had gone to Amra Madiya's place for the wedding armed with weapons. According to this witness, after the accused attacked Pidiya Ditiya, he saw Suresh lying on the hillock. Suresh was lying with his head on the stone of the hillock. He denied the suggestion that they were caught by the villagers and handed over to the police. This witness admitted that a case against them was pending in the Court which was filed by Amra Madiya, the accused no.1 herein, where they were accused of committing dacoity. In all, there were 12 accused including Pidiya Ditiya, Navla Pidu, Tejiya Mangaliya, Suresh Rama and others. The case was registered under sections 395 and 397 of the IPC.

6. Bhudiya Tejiya, brother of the complainant, Prosecution Witness No.3, was examined at exh.37. In his deposition, this witness stated that on 21.2.1993, they had gone to Gamla. On the next day in the evening, they went to Itava. On their way to Itava, they found that wedding was to take place at Amra Madiya's place. There they met their village girl Nandu. All of them therefore, stopped to speak to her. At that point of time, Amra Madiya, accused no.1 and remaining

accused namely, Kanu Madiya and others attacked them. All of them therefore, ran away from the scene. Only Mangudia, his brother could not escape and was therefore, detained by the police. The following day at around 12, he along with Navla Tejiya went back to Amra Madiya's place to find as to why Mangu was being detained by the police. Along with them, Bhudiya Tejiya, Mathur Ramna, Mangaliya Nura, Rama Suresh, Ramsa Lalu and others had also accompanied to Amra Madiya's place. At that point of time, according to this witness, Amra Madiya, accused no.1, Tejiya Madiya accused no.2 had attacked them with dhariya. Kanu Madiya and Manu Madiya ran after them with bow and arrow. According to this witness, he was attacked on the head. Accused No.5 Mesu Bhavla attacked Suresh Rama with arrow. Suresh Rama as a result, collapsed and sustained injuries. In the cross examination, this witness suggested that they had gone to Tarvadiya in view of the fact that Nandu was related to them. She was a cousin staying at Patel Faliya where the accused were also staying. According to this witness, there was only one road to Itava from Gamla and the suggestion that there were several options to approach Itava from Gamla were denied. He also denied the suggestion that they had gone to attend the wedding at Amra Madiya's place. The witness further denied the suggestion that they had escaped in the same direction on being attacked by the assailants namely, accused no. 1 to 6. According to the version of this witness entire incident was narrated to police Patel and it was thereafter, decided that complaint would not be lodged on the same day. A decision was taken that on the subsequent morning, they would again visit Amra Madiya and find out the reason for Mangu being detained. The time according to this witness of the visit on the next day was 12 in the afternoon. This witness further stated that they had in fact, gone in between 1 and 2 in the afternoon. This witness again further suggested that the time of visit during the second part of the day was at 4 in the evening. He denied the suggestion that all of them had escaped and sought refuge at the Sarpanch's residence. A suggestion was put to him that 12 of them had gone in the afternoon on 22.2.1993 carrying dhariya and had indulged in stone pelting at Amra Madiya's place. He further denied the suggestion that Pidiya Ditiya was carrying dhariya and he attacked Tejiya Madiya with that on the right hand. He also denied the suggestion that when 12 of them had gathered at Amra Madiya's place, entire village folks arrived at the scene.

7. Ramnabhai Mathurbhai, Prosecution Witness No.11, was examined at exh.46, According to the version of this witness on 23.2.1993 at around 12 in the afternoon, complainant Navla Tejiya came to him and informed him that while they were returning from Gamla, they had met Nandu at Itava and when they started a conversation with her, his brother Mangu was detained by Amra Madiya and Tejiya Madiya. Except Mangu, rest of the brothers then escaped from Itava and it was at that point of time that the complainant had come to him to narrate the incident in question. Thereafter, he along with Pidiya Ditiya and Suresh Navlo, Ramsing Bhudiya, Mangaliya and others at around 12 in the afternoon went to Amra Madiya's place to inquire as to why his brother Mangu was

detained. At that point of time, accused six in number surrounded them and attacked them. Amra Madiya attacked Pidiya Ditiya with dhariya, Tejiya Madiya also attacked Pidiya Ditiya with dhariya. Pidiya Ditiya was injured due to dhariya blow in his head. Ditiya Narsing accused no.6 attacked Suresh. According to this witness, Ditiya Narsing attacked Suresh with arrow, as a result of which, Suresh sustained injuries on his cheeks. Suresh had fell down on an uneven part of the filed and was lying on the stone. This witness was also cross examined. According to this witness, he and four others went to the doctor as they had sustained injuries. A suggestion was denied that on the date of the incident at around 12 in the afternoon, all of them 12 in number had gone to Amra Madiya's place with dhariya and other weapons and attacked the accused.

8. Prosecution Witness no.12, Ishwarbhai Narvatbhai, Sarpanch of the village, was examined at exh.47. He stated that he was Sarpanch of village Tarvadiya Waja. According to the version of this witness, on 22.2.1993, Tejiya Madiya accused no.2 had approached Mangu at around 12 in the midnight. Except Tejiya Madiya, only other accused who accompanied him was accused no.4 Manu Madhiya. Mangu thereafter, was handed over to police. On the following day when he was returning in the evening, he was informed that the incident of dacoity was recorded at village Tarvadiya and police was present at the scene of the incident. The time was about 5:30 to 6:00 in the evening. At around this time, about four persons namely, Savla Tejiya, Bhudiya Tejiya and other two were sitting at his house. All the four of them were thereafter, sent in police vehicle. He did not inquire as to why the four people had come to his place. The only important part in the cross examination of this witness is that in the cross examination he has stated that there was a camp/police post at the village. This was as a result of firing that had taken place consequent to carrying out loot at the hands of Navla and others. The complaint was lodged against Navla and other villagers involved in the incident in question. Navla Tejiya and deceased Pidiya Ditiya and 10 others were accused in that incident wherein they had attacked Amra Madiya's place when the wedding was in progress.

9. Panch witnesses with regard to the panchnama of the scene of the offence, discovery panchnama have turned hostile.

10. Dr. Babulal Badriprasad Mittal, Prosecution Witness No.1, was examined at exh.25. He carried out the postmortem of body of deceased Pidiya Ditiya. Pidiya Ditiya had according to this witness sustained injuries. All the injuries were antimortem. In the opinion of this doctor, the cause of death was as a result of excessive bleeding and hemorrhage due to head injuries sustained by the deceased. Such injuries could have been caused by article 14 which is dhariya which he identified. Sureshbhai Ramabhai was also treated by this doctor. Suresh however, succumbed to his injuries on 24.2.1993. On the next day, this very doctor had carried out the postmortem. According to the doctor, Suresh had suffered four incise wound over the cheek of size 1½x1¼. There was a swelling on the neck. He had sustained incise wound over the left thigh. A

lacerated wound was found over the occipital region. Cause of death was shock due to hemorrhage sustained due to head injury. According to the doctor, injury no.1 and 3 could also have been sustained due to fall on uneven surface and having impact on sharp stone. Injured witnesses namely, Prosecution Witness no.3 Bhudiya Tejiya and Prosecution Witness No.11 Ramnabhai Mathurbhai were also examined by this doctor and their injury certificates have been produced on record at exh. 32 and 33. According to the opinion of the doctor, these injured witnesses have suffered minor injuries.

11. This in short is the evidence on record.

12. The FIR lodged at the hands of Navla Tejiya, the complainant, who is examined as PW2 narrated that precursor to the incident in question was a visit to village Itava where Amra Madiya and other accused were at the wedding. According to the version in the complaint, they had gone there as a part of dancing party. It was at that point of time Mangu who had accompanied his brother, was detained by Amra Madiya. Next following day when he along with Pidiya Ditiya and others came at around 2 in the afternoon, after having come once for the first part of the day, they were attacked by Amra Madiya and others with dhariya and bow and arrow, as a result of which, Pidiya Didiya sustained injuries on his head and succumbed to his injuries. Suresh Rama was according to the version in the complaint attacked at the hands of accused no. 5 and 6 and due to the injuries sustained, succumbed to such injuries on the next day i.e. 24.2.1993.

13. On reading the testimony of the complainant who is examined as Prosecution Witness No. 2 at exh.35, it is apparent that he stuck to the version in the complaint that when he was on his way to Itava from Gamla, he was attacked by the accused no. 1 to 6 with various weapons in hand. It is further borne out from his testimony that when accused no1 and 2 attacked Pidiya Ditiya, accused no. 5 and 6 ran after Suresh, as a result of which, Suresh fell on the ground and he saw that body had impact on the stone lying on the field. Interestingly, this witness as is evident from the testimony of Prosecution Witness No.3 Bhudiya Tejiya, though do not vary in version of the injuries sustained by Suresh inasmuch as both of them had seen Suresh fall on the ground, none of them implicate the accused specially accused no. 5 and 6 of having attacked deceased Suresh with arrow.

14. Even if the version of Prosecution Witness No.3 is examined, the genesis of the incident varies inasmuch as in variance of the stand taken in the complaint that they had gone to Amra Madiya's place to attend wedding for and part of dancing party. Prosecution Witness no.3 Bhudiya Tejiya, states that while they were passing through Itava from Gamla, they met Nandu, a village girl. She was their relative and was married in Amra Madiya's family. It was at this point of time that their brother Mangu was detained by accused no. 1 to 6.

15. Even if the testimony of Prosecution Witness No.11 Ramnabhai Mathurbhai is

seen in light of what is narrated by these two witnesses, he also does not support the story as stated by Prosecution Witness No.2 Navla Tejiya. He stated that all of them had gone to Itava and on way they were attacked by the accused when Nandu had come out and started talking to them. In contrast, the testimonies narrated by Prosecution Witness No.3 Bhudiya Tejiya, the version in the complaint and the testimony of the complainant are at variance and therefore, the prosecution story itself creates a lingering doubt.

16. Evidently as accepted by the learned Judge, though the death of both Pidiya Ditiya and Suresh were homicidal, medical evidence on record visavis the nature of injuries sustained by Suresh with ocular evidence on record did not clearly indicate whether injuries sustained by Suresh were at the hands of accused no. 5 and 6 who were implicated for attacking the deceased with arrow. Looking to the nature of injuries in the testimony of doctor is seen, he has not ruled out the possibility of fact that Suresh could have sustained injuries as a result of fall and having impact with the stone. This doctor has been extensively cross examined on the question of whether the deceased had sustained a puncture wound or an incise wound. He categorically agreed that he has not stated whether deceased had sustained puncture or incise wound. According to the doctor, if the deceased had sustained wound as a result of attack by arrow, there would certainly have been a puncture wound. If the testimony of this doctor is read in light of testimony of Prosecution Witness No.3. Bhudiya Tejiya, it comes out from record that he had seen Suresh at a distance collapse as a result of being followed by accused no. 5 and 6 after he ran on seeing accused no.1 and 2 attacking Pidiya. According to the testimony of this witness, Suresh fell on uneven surface of the land and had an impact on the stone lying on the ground. The doctor in his opinion does not rule out the possibility that deceased could have sustained such fatal injury due to having impact on sharp edged stone. Bearing in mind these evidences, therefore, the prosecution theory that deceased Suresh sustained injuries as a result of role attributed to accused no. 5 and 6 is seriously in doubt.

17. A conjoint reading of the testimonies, particularly those of Prosecution Witnesses No.2 and 3 together with that of Prosecution Witness no.12, the incident in question appears to be one being direct outcome of the fact that the complainant and others appear to have gone to village Tarvadiya with the intention of carrying out loot at the marriage party. When the suggestions put to the complainant are examined, from the cross examination of these witnesses it has come out that all of them were carrying weapons and at some stage there was stone pelting at the scene of the incident and the village people had gathered at the scene. Even otherwise the incident in question, as narrated by the prosecution and tried to be supported by testimony of the complainant and Prosecution Witness No.3, do not lend credence to the theory of accused no. 1 to 6 carrying out the attack on the complainant and the deceased Pidiya Ditiya and Suresh Rama with a common object of causing injuries which would result in death of the victims.

18. The learned Judge has on recording of evidence extensively in the judgment under challenge found that the time of the incident itself as narrated by the complainant and the Prosecution Witness No.3, brother of the complainant is at variance. Though the incident is stated to have occurred as a result of visit following date i.e. 23.2.1993 in two parts i.e. in the morning and in the afternoon, testimony of these witnesses insofar as time of the incident is concerned, same is in contrast to each other. At one stage, the complainant states time of the incident is at around 12 in the afternoon. Bhudiya, complainant's brother, Prosecution Witness No.3 at various stages in his cross examination stated that the incident occurred at 12, then says that the incident occurred at around 1 and 2 in the afternoon. The Sarpanch in his cross examination stated that it was in the evening he saw the complainant and four others having come to his residence being taken by the police. Based on this set of evidence on record, learned Judge thought it fit to acquit the accused of the offence they were charged with by his impugned judgment.

19. Having independently assessed the evidence on record at our hands, we do not find any reason to upset the acquittal of the accused as the view that the learned Judge has taken is a possible view and therefore, the acquittal handed out by the learned Judge by judgment and order dated 28.1.1994 is confirmed.

20. Criminal Appeal is dismissed. R&P may be transmitted back to the concerned trial Court.