

(2017) 02 GUJ CK 0126

In the Gujarat High Court

Case No : 1578 of 2011, 21 of 2012, 22 of 2012, 75 of 2012; 12782 of 2016

STATE OF GUJARAT

APPELLANT

Vs

ARVIND DEVsHI MAKVANA & ORS.

RESPONDENT

Date of Decision : 23-02-2017

Acts Referred:

[Indian Penal Code, 1860](#), [Section 120B](#), [Section 302](#), [Section 34](#), [Section 147](#), [Section 324](#), [Section 323](#), [Section 148](#), [Section 149](#), [Section 143](#), [Section 504](#), [Section 12B](#) - Punishment of criminal conspiracy - Punishment for murder - Acts done by several persons in furtherance of common intention - Punishment for rioting - Voluntarily causing hurt by dangerous weapons or means - 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 - Intentional insult with intent to provoke breach of the peace

Citation : (2017) 02 GUJ CK 0126

Hon'ble Judges : Akil Kureshi, Biren Vaishnav

Bench : Single Bench

Advocate : Jirga Jhaveri, J A Adeshra

Final Decision : Disposed

Judgement

1. These appeals arise out of a common judgment of the learned Additional Sessions Judge, Amreli, dated 07.12.2011 rendered in Sessions Case No.34 of 2006. Briefly stated, the prosecution version was that, on 18.03.2005, when deceased Ravi @ Babu Mohanbhai was sitting outside the locality where he was residing, alongwith his uncle and first informant Keshubhai Arjanbhai Chavada and other members of the family, Manga Devsinhaccused no.1, Jaga Devsinhaccused no.2 and Mukesh Khodabhaiaccused no.5 came there on a motorcycle and asked Ravi to take out his jeep for fetching liquor. Ravi refused stating that previously his jeep was detained and he cannot afford the jeep being detained again. These three people were angry and left abusing Ravi but,

returned about half an hour later with six more people. These people were carrying weapons such as knives, sword, pipe etc. They assaulted Ravi and gave knife blows. Complainant Keshubhai Arjanbhai Chavada who tried to save Ravi, was attacked with sword and pipe. Ravi died shortly due to the injuries. The complainant also had to receive treatment for his injuries. A charge to this effect was therefore framed at Exh.49 against all accused for having committed offences punishable under sections 147, 148, 149 and section 12B of the Indian Penal Code. They were also charged for the offence of conspiracy punishable under section 120B of the Indian Penal Code.

2. Upon completion of the trial, the learned Sessions Judge, by the impugned judgment, convicted original accused no.1 to accused no.5 and accused no.8. Accused no.6, accused no.7 and accused no.9 were acquitted. Accused nos.1, 2, 4 and 8 have filed Criminal Appeal No.75 of 2012. Accused no.3 has filed Criminal Appeal No.22 of 2012. Accused no.5 has filed Criminal Appeal No.21 of 2012. Criminal Appeal No.1578 of 2011 is filed by the State challenging the acquittal of accused nos.6, 7 and 9.

3. We may record the gist of the evidence. PW1, Keshubhai Arjanbhai Chavada, Exh.92 was an injured eyewitness and also the first informant. He deposed that he lived at village: Baharpara in Harijanvas. On 18.03.2005, at about 11"O clock at night, he, his nephew Ravi Mohan and Babu Bhimji were sitting outside their residential locality. At that time, on a bullet motorcycle, Manga Devsinh, Jaga Devsinh and Mukesh Khodabhai (accused no.1, no.2 and no.5 respectively) came there. They told his nephew to take out the jeep since they wanted to fetch liquor. His nephew told them that the jeep was caught once, if caught second time, it would not be possible to get it released. These people therefore got angry and started abusing. Babu Bhimji told them not to use bad words. These people therefore left, threatening. Listening to this commotion, other people such as Bhimji Amrabhai, Jayesh Mohanbhai and Popat Bhimjibhai had also come there. At about 11:30 at night later, these people returned on their bullet motorcycle with two more two-wheelers. On the bullet motorcycle, there were accused no.1, accused no.2 and accused no.5. On honda motorcycle, there were Mansukh Devshi i.e. accused no.4, Chiman Devshi accused no.8 and Sharad Giga accused no.3. On a moped were Giga Vira accused no.7 and Devsinh Vira accused no.9. Accused no.1 and accused no.2 took out knives. Chiman Devshi accused no.8 had a pipe. Mukesh Khodabhai accused no.5 had a sword. Devsinh and Giga Vira caught his nephew from the scuff. They all had tried to save him, upon which Jaga and Manga started giving knife blows to him. When he tried to intervene, he was also given a blow on finger of his left hand with the knife. Mukesh had given a blow on his left palm with his sword. Chiman gave indiscriminate blows to all of them. All the while, Mansukh Devshi was present and he had caught his nephew from behind. Arvind Devsinh also came there and started giving kick and fist blows. When more people came, these assailants ran away leaving the motorcycles and the sword. His nephew had fallen down bleeding profusely from the chest. He was taken to the hospital in an

autorickshaw where on the way he stopped talking and seemed to have died. The doctor at Civil Hospital, Amreli, declared him dead. He was treated for his injuries and released at about 2"O clock, from where, he immediately went to the police station for lodging the complaint. The witness identified the two knives, the sword and an iron pipe as weapons used by the accused at the time of the incident. He also identified all the accused before the Court since he knew them previously. In the crossexamination, he was questioned on the inaccurate description of accused Giga Vira given in the FIR where he had given the name Giga Devsinh. He explained that this had happened because of hurry with which the FIR was lodged. He agreed that a cross complaint was filed against him and others, in which, chargesheet was also filed. He stated that the description of some of the weapons in the FIR may be inaccurate because of the excitement. He knew about a prohibition case against Ravi and that Ravi's jeep was once detained for such reason. He also knew that the car of the accused was also likewise detained and was not released at the time of the incident.

4. Babu Bhimji Chavada, PW11, Exh.137 was yet another eyewitness. He also lived in the same locality. He deposed that on the night of the incident, accused nos.1, 2 and 5 had come to their locality at 11"O clock at night, when he alongwith others were sitting outside. They had asked for the key from Ravi who was the nephew of this witness also. Ravi refused since they wanted to bring liquor in the jeep apprehending that the jeep may be detained second time. These people thereupon left abusing and threatening Ravi. When they were still there, about half an hour later, these people came on a bullet motorcycle, three more people on a honda motorcycle who were Sharad Gigaaccused no.3, Chiman Giga (not joined as an accused), Chiman Devshiaccused no.8. On a moped there were Devsinh Viraaccused no.9 and Giga Viraaccused no.7. Immediately Devsinh Vira and Giga Vira caught Ravi, Jaga Devsinh and Manga Devsinh took out knives and started giving blows to him. Mukesh had a sword, with which, he gave a blow to his nephew and his brother Keshubhai. Everyone was shouting "kill" "kill". His nephew who had fallen down, was taken in an autorickshaw to a hospital. This witness also identified all accused before the Court. In the crossexamination, the defense brought out certain improvements in the evidence of this witness and omissions in his police statement.

5. Popat Bhimjibhai Chavada, PW12, Exh.146, was also an eyewitness. He also lived in the same locality. He also gave a similar version of the three accused accused no.1, accused no.2 and accused no.5 coming to their area at about 11"O clock at night, asking Ravi to take out his jeep to fetch liquor. When Ravi refused, they got angry, threatened Ravi and left. According to him, these people returned about half an hour later with six more persons on three different two wheelers. He also pointed out that accused no.1 gave knife blow to Ravi. Accused no.5 was also carrying a sword, with which he attacked Keshubhai. Jaga Devsinh had also assaulted Keshubhai with his knife. All these people had ran away leaving their motorcycles behind. In the crossexamination, he agreed that the three motorcycles were lying there till late at night in burning condition.

6. Dr.Arsibhai Vadher, PW15, Exh.156, was the medical officer at Civil Hospital, Amreli, at the relevant time. He deposed that on 19.03.2005, he was on night duty. At 6:40 in the morning, deadbody of Ravi Mohanbhai was handed over to him for postmortem. He had noticed and recorded in the postmortem note following two external injuries. I. A stab wound on Lt. 5th intercostal space, 1 cm away from Lt. Border of sterium obliquely placed size, 5 cm x 2.5 cm x cavity deep, directed downward midally spiddle shape, margins are sharp, bevelled pointed ends, clotted blood on and around wound. II. A stab wound on Lt. hypogastric area near Lt. Costal margin (7 cm down) and Lt. to the midline, obliquely placed, spiddle shape size 5cm x 2.5 cm x cavity deep. Margins are sharp, bevelled pointed end directed downwards medially, part of ovienturn (5 cm x 5 cm) protruded through wound, clotted blood, incise wound.

7. Corresponding to such external injuries, he had recorded the following internal injuries: I. 5th and 6th rib (costal cartilage) cut sharply, obliquely size 5 cm in length, Rib injury coincide with injury No.1 on Col.17. Sharp cut on lower part of Rt.mediasternal plura of size 5 cm in length right diaphragmmtia plura size 5 x 2.0 cm cavity filled poles commotion front. Pale collopsed having sharp cut on media steral 5 cm and lower surface of size 2cm x 1cm x 1cm. II. Incise wound on interior peri cordium of size 5cm x 1.5 cm x pericardial cavity deep would concide with wound on ribs marced cut wound on art surface of Lt. Ventric near interior border size 1 x 0.5 x 0.5 cms margin sharp passing down above down medially injury mentioned in column no.17. Pale. Sharp cut wound peritoneum near greater curvature of stomach size 5 x 2.5 x cavity deep wound coincide injury no.2. (Col.17). Incised wound on diaphragm of size 5 cm x 2 cm x whole thickness wound coincide plural injury and liver injury margins sharp the spiddal shape peritoneum tongue in mouth cavity Laspa pale conthra front. III. Sharp cut wound of size 5 cm x 0.5 x 2.5 cm on superior surface of right liver obliquely placed directed downwards and internal thperiny power end. He opined that the cause of death was due to cardio vascular failure due to massive hemorrhage as a result of injury to heart, right lung and liver. He opined that the injuries could have been caused by the Muddamal articles knives. In his opinion, the first injury was sufficient in ordinary course of nature to cause death. Second injury, though seemed serious externally, by itself, was not sufficient to cause death and if the patient was treated promptly and properly, he could have survived had this been the sole injury. This doctor had also treated injured complainant Keshubhai Arjanbhai at the hospital at about 1"O clock at night of 19.03.2005. The patient had given the history of receiving injuries during the fight. He had recorded following injuries on him. I. Incised wound on Lt. Little finger distance/phalan x 1 cm x 0.5 cm x 0.5 cm clotted blood. II. Incised wound on Lt. palm on thinner eminence oblique 5 cm x 05. cm x 0.5 cm clotted blood. III. Linear abrasion on Lt. leg antero lutural near 3 cm internal, oblique unit part clotted blood. IV. Linear abration on Rt leg lower part on any surface 3 cm in length. In his opinion, injuries no.1 and 2 could be caused by the muddamal articles knife and sword. He was however of the opinion that injuries no.3 and 4 could not have been

caused with the pipe but could be caused if a person while trying to run, comes in contact with an object which would lead to friction causing such injuries.

8. The scene of incident Panchnama, Exh.95 and the sketch of the region Exh.155 would show that the incident seem to have taken place just outside the locality of the deceased and others where spots of bloods were found. Nearby to this place, a sword broken in two parts was recovered. The three motorcycles on which the accused had come to the scene of offence, were found at a distance of about 180 feet from the scene and they were burnt.

9. The knife allegedly used by the accused no.1 Manga Devsinh was discovered at his instance under discovery panchnama Exh.128 from a house belonging to his father.

10. Various articles recovered by the investigating agency during the course of investigation were sent for forensic analysis. The forensic science laboratory report read with the serological report, Exh.216 would establish presence of human blood on both the knives, however, only in one case the group of the blood could be ascertained which happened to be groupB, same as that of the deceased.

11. The defence had examined PW1, Dr.Prakash Jayantbhai Bhatt, Exh.222. This was to establish the case of alibi in case of Giga Viraaccused no.7 and Sharad Gigaaccused no.3. This witness produced a certificate at Exh.223 which according to him was issued by his father Dr.Jayant Bhatt on 02.04.2005 recording that these two accused were under his treatment on 18.03.2005.

12. This, in the nutshell, is the evidence on record. On the basis of such evidence, learned advocate Shri Aadeshara for the appellantconvicts submitted that there was no involvement of accused no.3 to accused no.9 since no overt act was attributed to any of them in causing death of Ravi. The presence of accused no.3 and accused no.7 itself was doubtful. Even accused no.5 who was attributed with carrying a sword, had not given any blow to the deceased. The prosecution version that accused no.5 had given a blow to the complainant, was not probable. Firstly, because none of the injuries suffered by the complainant could have been caused by a sword and secondly, since the accused no.5Mukesh Khodabhai himself was carrying an old injury making him incapable of participating in the commission of the offence. Counsel further submitted that the conviction of accused no.1 and accused no.2 was also wrongly recorded. The evidence of the witnesses was inconsistent and full of contradictions. All the three eyewitnesses were close relatives of the deceased and therefore interested witnesses. Brother of the complainant was employed in the police department. The complainant himself had criminal antecedents. He lastly pointed out that accused nos.1, 2, 5 and 8 have served out sentence of more than 11 years by now.

13. On the other hand, learned APP Ms.Jirga Jhaveri opposed the appeals of the convicts and submitted that there was voluminous evidence against the accused.

With premeditation, they had come to the house of the complainant, armed with deadly weapons. They immediately assaulted the deceased, causing serious injuries. All the accused thus, formed an unlawful assembly and each member of such unlawful assembly would be responsible for the act of the others committed for carrying out the object of the unlawful assembly.

14. We may assess the evidence on record. We may recall, there were as many as three eyewitnesses to the incident. PW1, Keshubhai Arjanbhai Chavada who was the first informant, pointed out that he, his nephew Ravi and others were sitting outside their houses at about 11"O clock at night when the three accused, accused no.1, accused no.2 and accused no.5 came there on their bullet motorcycle and asked Ravi to take out his jeep to fetch liquor. Ravi refused since his jeep was detained once and if caught second time, it would be difficult to get it released. These accused got angry, abused Ravi, threatened him and left. They however, returned after about half and hour alongwith six more people. This time, they were carrying weapons such as knives, sword and iron pope. Accused no.1 and accused no.2 gave knife blows to Ravi on chest and stomach. When the witness tried to intervene and save Ravi, one of these accused gave knife blow to him on the hand. Accused no.5Mukesh also hit him with a sword.

15. The testimony of other two eyewitnesses to the above noted extent is quite consistent. Babu Bhimji Chavada, PW11, Exh.137 who also lived in the same locality, gave a very similar account of the events of 18th March. Yet another eyewitness Popat Bhimjibhai Chavada, also a resident of the same locality, gave a similar version.

16. PW1, Keshubhai Arjanbhai Chavada himself was an injured witness. He was treated for such injuries by Dr.Arsibhai Vadher, PW15, Exh.156, the Medical Officer at Amreli Civil Hospital. The time of the treatment is recorded as 1:10. Keshubhai pointed out that after the treatment was over, at about 2"O clock, he went straight to the police station to lodge the FIR.

17. We have no reason to discard the testimony of these three eyewitnesses insofar as role of accused no.1, accused no.2 and accused no.5 is concerned. Their versions are substantially consistent and duly corroborated by other evidence on record. Firstly, as noted, Keshubhai Arjanbhai ChavadaPW1, was himself an injured eyewitness. The other two witnesses PW11 and PW12 also lived in the same locality. Presence of all these three witnesses was thus, perfectly natural. The investigating agency had collected blood stained soil from the scene of incident alongwith a sword broken in two parts. The witnesses also referred to three motorcycles lying nearby which were burnt.

18. By all accounts thus, it was duly established that the three accused, accused no.1, accused no.2 and accused no.5 had first came to the area where deceased Ravi lived. When their request for taking out the jeep for fetching the liquor was refused, they left in a huff and came back with reinforcement. Accused no.1 and accused no.2 immediately attacked Ravi giving one blow on chest with knife and

another in the stomach. Accused no.1 also tried to hit PW1 Keshubhai Arjanbhai Chavada to prevent him from interfering. Likewise, accused no.5 Mukesh Khodabhai also gave a blow to Keshubhai with a sword. It is a different matter that these blows caused merely minor injuries to Keshubhai. However, injuries to the deceased were far more serious. The blow on the chest punctured the lung and the heart. One on the stomach ruptured the liver. The death was because of heart failure because of excessive bleeding.

19. Additionally, the presence and involvement of remaining convicted accused nos.3, 4 and 8 was also duly established through the oral evidence of these witnesses. Their precise role differed from the accounts of witness to witness. According to PW1, some of them had caught hold of deceased Ravi so that accused no.1 accused no.2 could stab him with their knives. Even in absence of complete accuracy about precise role played by the remaining convicted accused, we are not prepared to believe that they were either not present or did not form a part of an unlawful assembly. This is so for the following reasons. Their presence was pointed out by as many as three eyewitnesses. They were named in the FIR lodged by the PW1 without any wastage of time. The witnesses and the accused resided in the same village and were therefore familiar with each other. Question of identification or confusion in identity would therefore not be an issue. Further, the manner in which, the incident took place, precursor to the actual assault, would establish that the accused had arrived at the scene of incident for committing offence. We may recall, accused no.1, accused no.2 and accused no.5 first came to the scene of incident and when rebuked by the deceased regarding their demand for providing the jeep car for fetching liquor, they left abusing and threatening him. Half an hour later, these three accused came along with other accomplices on three separate two-wheelers. This time, they were carrying deadly weapons such as knives, swords etc. The fact that these people had come to take revenge and to create trouble therefore is writ large on the face of the record. Formation of unlawful assembly thus stood established. The convicted accused would therefore be answerable for offences punishable under sections 143, 147, 148, 149, 323, 324 and 504 of Indian Penal Code. The question however, that still comes to our minds again and again is, did this assembly carry the common object of committing murder. In our opinion, minute scrutiny of evidence would lead to an answer which would be in negative.

20. It is undoubtedly true that angered by the refusal to lend the jeep by the deceased, accused no.1, accused no.2 and accused no.5 arrived at the scene of offence with other supporters with full intention of causing mischief. The fact that they had every intention of picking up a fight and to teach a lesson to Ravi is also clear. However, the manner in which the attack was carried out and the role of the different accused which emerges from the evidence on record would convince us that as a group of nine accused persons, this unlawful assembly did not share the common object of committing murder. Such intention may have been either individually or collectively carried out by accused no.1 and accused no.2, but was certainly not a common object shared by this unlawful assembly. Our conclusions

would be reinforced when we take note of the fact that accused no.5 was carrying a sword, caused no injuries at all to deceased Ravi and very superficial injury to PW1. Remaining accused who were either not carrying any weapons at all or attributed with a pipe, there is inconsistent evidence of use of these weapons. Had the common object of the assembly been to cause death of Ravi or others, far more damage could have been caused with the active role of the remaining accused also.

21. Insofar as accused no.1 and accused no.2 are concerned, however, they were the principal aggressors. They were carrying knives. As soon as they arrived at the scene, they took out the knives and assaulted Ravi, one blow was given on chest and the other was on stomach, both being vulnerable and on the vital parts of the body. It may be that the injury in the stomach according to the medical opinion was not sufficient by itself to cause death. Nevertheless, we cannot lose sight of the fact that both the accused were acting in tumtum and had used deadly weapons to give blows to the deceased on vital parts of the body. Their conviction for offence under section 302 with the aid of section 34 Indian Penal Code would therefore have to be upheld.

22. Insofar as acquitted accused are concerned, we find no reason to upset the findings of the trial Court. In addition to evidence of involvement of these accused being extremely hazy and at times, inconsistent. Being an appeal against acquittal, even otherwise, we would not disturb the judgment of the Trial Court unless it was pointed out that the conclusions were based on perverse appreciation of evidence, which in the present case, we simply do not find.

23. In the result, insofar as accused no.3, 4, 5 and 8 are concerned, their conviction and sentence for offences punishable under sections 143, 147, 148, 323, 324, 504 read with section 149 IPC is confirmed. They are however acquitted for offence under section 302 read with section 149 of IPC. Insofar as accused no.3 and 4 are concerned, who are stated to be on bail, their bail bonds stand canceled. Insofar as accused no.5 and 8 are concerned, they shall be released if they have served out their sentences and if not required in any other criminal case. Insofar as accused no.1 and 2 are concerned, their conviction and sentence for offences under sections 143, 147, 148, 323, 324, 504 read with section 149 of IPC is confirmed. They are convicted for offence under Section 302 read with section 34 of IPC. The appeals against convictions are disposed of in above terms. State appeal against acquittal is dismissed.

24. In view of disposal of Criminal Appeal No.75 of 2012, Criminal Misc. Application No.12782 of 2016 will not survive and hence, the same is also disposed of.