

(2011) 08 GUJ CK 0033
In the Gujarat High Court

Case No : Criminal Appeal No. 1707 of 2004 with Cri. Appeal No. 1040 of 2005

State of Gujarat

APPELLANT

Vs

Bharatbhai Narubhai Macwana

RESPONDENT

Date of Decision : 10-08-2011

Acts Referred:

Penal Code, 1860 (IPC) — Section 114, 302

Citation : (2012) 1 GLR 534

Hon'ble Judges : Bankim N. Mehta, J;A.L. Dave, J

Bench : Division Bench

Advocate : K.L. Pandya, APP in Criminal Appeal No. 1707 of 2004 and H.V. Darji Criminal Appeal No. 1040 of 2005, for the Appellant; Amit N. Chaudhary in Criminal Appeal No. 1707 of 2004 and K.L. Pandya, Assistant Public Prosecutor Criminal Appeal No. 1040 of 2005, for the Respondent

Final Decision : Dismissed

Judgement

A.L. Dave, J.—These two criminal appeals arise out of judgment and order rendered by the Sessions Court, Sabarkantha at Himmatnagar in Sessions Case No. 72 of 2004 on 27-7-2004. The Sessions Court tried Lalabhai Gordhanbhai Vaghari and Bharatbhai Narubhai Macwana for the offence of murder of Kishan Ramji and Ramesh Ramji allegedly committed by them on 11-1-2004 at about 3-00 p.m. opposite shop of one Rasiklal at Talod, wherein it was alleged that accused Bharatbhai caught hold of the deceased persons and accused Lalabhai inflicted knife blows, which resulted into the death of both Kishan Ramji and Ramesh Ramji. The trial Court, at the end of the trial, found that the prosecution could prove the case against accused No. 1-Lalabhai and convicted him for the murders of Kishan Ramji and Ramesh Ramji punishable under Sec. 302 of the I.P.C. and sentenced him to under to life imprisonment and to pay fine of Rs. 5,000/-, in default, to undergo R.I. for six months. He, therefore, preferred Criminal Appeal No. 1040 of 2005. 1.1. The trial Court found that the prosecution was not able to prove the case against accused No. 2 Bharatbhai and acquitted him of the charges. The State, being aggrieved by the said acquittal,

has preferred Criminal Appeal No. 1707 of 2004.

The appellant in Criminal Appeal No. 1040 of 2005 - convict Lalabhai is represented by learned Advocate Mr. Darji appointed as pauper's Advocate. But when the matter was called out, he was not present. The Court, was therefore, required to request learned Advocate Mr. Tolia, who was present in the Court to act as amicus curiae, which he readily agreed to do. The State is represented by learned A.P.P. Mr. Pandya in both the appeals and the respondent in Criminal Appeal No. 1707 of 2004 - original accused No. 2-Bharatbhai is represented by learned Advocate Mr. Chaudhary.

2. The prosecution case in brief is that on 11-1-2004, deceased Kishan Ramji and Ramesh Ramji went to the place of incident i.e. opposite shop of Rasiklal at Talod, where there was open public place, for the purpose of conditioning the thread for kite-flying. At about 3-00 p.m., both the accused approached them stating that that is the place, where they have been working for same business, which has resulted into an altercation. Ultimately, it is the case of the prosecution that accused No. 2 caught hold of Kishan Ramji and accused No. 1 inflicted a knife blow in the chest of Kishan Ramji resulting into his death. It is also the case of the prosecution that Ramesh Ramji then went to his sister, who was doing vegetable business in a cart nearby, and then went to the Police Station and came back. When he came to the spot, he was again attacked by the accused, where again accused No. 2 caught hold of Ramesh Ramji and accused No. 1 inflicted a knife blow in the chest of Ramesh Ramji, which resulted into his death. It is the case of the prosecution that Popatbhai Ramabhai, son of the sister of the deceased persons, was present throughout and he witnessed the incident. Sister of the victims Laliben and her husband Ramabhai Kalabhai both were selling vegetables in the vicinity and on learning about the same, they came down and found both the persons dead. F.I.R. was given by Laliben to Talod Police, who registered the offence and investigated the same and after having found sufficient material against both the accused, filed charge sheet in the Court of J.M.F.C., Prantij, who, in turn, committed the case to the Court of Sessions and Sessions Case No. 72 of 2004 came to be registered. Charge was framed against the accused persons for offences punishable under Sec. 302 read with Sec. 114 of the Indian Penal Code at Exh. 2. Both the accused persons pleaded not guilty to the charge and claimed to be tried. The trial Court ultimately convicted accused No. 1-Lalabhai Vaghari and acquitted accused No. 2-Bharatbhai Macwana, and hence, these appeals.

3. For the sake of convenience, appellant in Criminal Case No. 1040 of 2005 is referred to as accused No. 1 and respondent in Criminal Case No. 1707 of 2004 is referred to as accused No. 2 in this judgment.

4. We have heard learned Advocate Mr. Darji for accused No. 1, Mr. Chaudhary for accused No. 2, learned A.P.P. Mr. Pandya for the State and learned Advocate Mr. Tolia as amicus curiae.

5. It is canvassed on behalf of the accused persons that the prosecution case, though initially projected as having been witnessed by Laliben-first informant, it turns down that it was not witnessed by her. Similarly, witness Ramabhai Exh. 16 also has not witnessed the occurrence, although both Laliben and Ramabhai were selling vegetables in the vicinity of the area. The incident is claimed to have been seen by child witness Popat Rama Exh. 44. He is the solitary eye-witness to the incident. It is submitted that the solitary eye-witness, being a child witness and that being the only evidence against the accused, the Court may give a close scrutiny to the evidence of Popat Rama before confirming the conviction or upsetting the acquittal. It was submitted that the version, that is given by Popat Rama (Exh. 44) before the Court, is not the whole truth. His evidence is inconsistent with the evidence of other witnesses. He is suppressing the genesis of the incident and has tried to mould his evidence to suit the requirement of the prosecution. It would therefore, be risky to act upon such evidence when there is no corroboration to his version about the occurrence. There is absence of any other direct evidence and corroborative or circumstantial evidence is not sufficient to uphold the conviction of accused No. 1. The benefit of doubt therefore, may be extended to accused No. 1 and the appeal against conviction may be allowed.

5.1. It is further contended that the acquittal recorded by the trial Court in respect of the accused No. 2 does not call for any interference. In fact, the reasoning adopted for the purpose of recording acquittal of accused No. 2 and the evidence relied upon therefor would apply with same vigor and force in favour of accused No. 1 and accused No. 2 therefore, must get benefit as accused No. 2 has got. It is therefore, submitted that the State appeal against acquittal may be dismissed and the appeal against conviction may be allowed by setting aside conviction of the accused No. 1.

6. Learned A.P.P. submitted that Popat Rama is a child witness and standard of understanding of a child witness may not be expected at par with a grown-up prudent man. It was submitted that there may be a minor lapse in stating the sequence of the incident. Otherwise, the evidence is truthful and is accepted to be truthful by the trial Court in respect of accused No. 1 and if it is accepted as truthful against accused No. 1, the same has to be accepted as truthful against accused No. 2. Acquittal of accused No. 2 is therefore, erroneously recorded, and therefore, the State appeal may be allowed and the appeal by accused No. 1 against conviction may be dismissed. Mr. Pandya further submitted that the clothes of both the accused were seized and were found to have been stained with blood of group. The panchnama of place of incident would also show that the blood found at the place of offence was of the same group. Accused No. 2 did not have any injury on his person. The blood on his clothes therefore, was necessarily that of the deceased unless he tenders a reasonable explanation to other effect. Same would be the situation so far as accused No. 1 is concerned, and therefore, also, the appeal may be dismissed.

7. We have examined record and proceedings in the context of rival submissions.

8. Laliben is the sister of the victims, who is the first informant as well. She is examined at Exh. 15. Exh. 49 is the F.I.R. If Exh. 49 is perused, it is found that Laliben claims to be the eye-witness to the incident and states details of the incident as if she has seen the occurrence and has even participated in the incident. She, in her evidence Exh. 15, has made certain admissions, which would go to show that when she reached the place of incident, both the deceased persons were lying on the ground in injured condition. Ultimately, the tenor of her evidence is that she is not an eyewitness. Differently put, she is a witness who has tried to improve upon the case right from the very beginning i.e. at the time of filing of the F.I.R., and has tried to pose as an eye-witness and when she was faced with cross-examination, she succumbed to the same and was exposed by the truth of being not an eye-witness. Next witness is Ramabhai Kalabhai, who is husband of Laliben and is examined at Exh. 16. He is also found to have not seen the occurrence.

8.1. The important witness is Popat Rama Exh. 44. He is a minor aged about 11 and son of first informant Laliben and witness Ramabhai. He claims that he was at the place of occurrence with his maternal uncles - deceased Kishan Ramji and Ramesh Ramji and has seen the occurrence.

8.2. Since Popatbhai is the only eye-witness and the prosecution case mainly depends upon his evidence coupled with the fact that he is a child witness, his evidence would call for a close scrutiny.

8.3. According to Popat Rama, two accused persons came to the spot and insisted that is the place where they have been running their business of conditioning the thread for kite-flying, which has resulted into an altercation and a scuffle between accused Nos. 1 and 2 on one side and deceased Kishan Ramji on the other. From an overall view of his evidence, considering what he has stated in examination-in-chief and cross-examination, his case is that accused No. 2 caught hold of Kishan Ramji and accused No. 1 inflicted knife blow. Upon this, Ramesh Ramji went to the first informant and informed her about the incident; then went to the Police Station, but Police paid no heed, and he therefore, came back. And when he came back, again accused No. 2 caught hold of Ramesh Ramji and accused No. 1 inflicted knife blow and caused his death. According to Popat Rama, he had accompanied Ramesh Ramji at that point of time. The statement of this witness was recorded by Police 3 or 4 days after the occurrence as per his version. However, as observed by the trial Court, the fact is otherwise.

8.4. If evidence of Laliben Exh. 15 is seen, she says that after the deceased got settled at the place of occurrence, she and her husband went to a nearby place for selling vegetables. It emerges from her evidence that, two places, though in the vicinity, were so located that they would not be within the eye-sight of each other. Person standing at one place would not be able to see what is happening

at the other. She says that Ramesh Ramji came to her and told her about quarrel being taken up by the accused persons. She therefore, advised him not to go there, but to inform the Police. Ramesh Ramji therefore, went to Police Station and came back. By that time, Kishan Ramji was done to death and when Ramesh Ramji went to the place of incident, he was also done to death in the manner stated in the earlier part of this judgment i.e. accused No. 2 catching hold and accused No. 1 inflicting knife blow.

8.5. If evidence of the Investigating Officer is seen, he has stated that during the course of investigation, he found that, in the incident, accused No. 1 was attacked with an iron angle by deceased Ramesh Ramji and that he had suffered injury and for that, F.I.R. was also taken from him upon his arrest. He also stated that during the course of examination, it was found that deceased Kishan Ramji had given kick and fist blows to accused No. 1 at the time of occurrence.

9. If the above pieces of evidence are considered collectively and if the prosecution case is seen as a whole, following aspects emerge :

(1) First informant Laliben has been a story-teller from the very beginning. In the F.I.R., she narrates the incident as if she has herself witnessed the occurrence. Not only that, she participated in the occurrence also, but she was not able to withstand the cross-examination, and ultimately, it emerges from her cross-examination that she is not an eye-witness to the occurrence. The prosecution case from the very initiation of the investigation, is therefore, founded on a false story.

(2) Witness Popat Rama is the child witness, who claims to be an eye-witness to the occurrence and he is the sole eye-witness as per the prosecution case. According to us, his evidence is not coming in a natural way and does not inspire confidence. Possibility of his being a tutored witness is greater than his being a natural and truthful witness. He halfheartedly states about scuffle between accused Nos. 1 and 2 and Kishan Ramji, but does not speak anything about Ramesh Ramji, whereas, as per admission made by the Investigating Officer in his evidence Exh. 52, it was revealed during investigation that Kishan Ramji had given kick and fist blows and Ramesh Ramji had assaulted with an iron angle upon the accused persons. Witness Popat Rama remains totally silent about the same except that there was a scuffle between the two accused and Kishan Ramji. It also emerges from the evidence of the Investigating Officer that accused No. 1 had suffered injuries, about which also, Popat Rama is silent. As a matter of fact, the prosecution has not even attempted to explain the injury on person of the accused. On the contrary, the prosecution evidence does not reveal that accused No. 1 had lodged an F.I.R.; that accused No. 1 had suffered injury and that the deceased had assaulted the accused persons with iron angle and gave kick and fist blows. It is only during the cross-examination of the Investigating Officer that these facts are coming on record. Therefore, the prosecution has suppressed these material facts from the Court.

(3) Much emphasis was put on blood-stained clothes of the accused. It would be appropriate to note that Panch witnesses to the recovery have not supported the prosecution case and the recovery, is therefore, not properly proved. It would also be appropriate to note that blood group of accused No. 1 is not brought on record. It has come on record that he has suffered injury with the iron angle, for which he was treated by doctor. It is contended by learned A.P.P. that it was only an abrasion, but what was the extent of abrasion, what was the extent of bleeding, is not emerging on record, and therefore, not much reliance can be placed on this circumstance.

(4) When the prosecution is not coming out with the whole truth; when it is found that certain material facts have been suppressed by the prosecution; when it is found that the solitary eye-witness is not an eye-witness of truth; and when it is found that recovery of clothes is not properly proved, merely presence of blood on clothes will not prove the guilt of the accused.

10. The foregoing factors will show that the trial Court has overlooked relevant aspects while recording conviction of accused No. 1 and this error has to be rectified by allowing Criminal Appeal No. 1040 of 2005. Though, not supported by proper reasons, acquittal of accused No. 2 is a correct conclusion and calls for no interference.

11. Resultantly, Criminal Appeal No. 1040 of 2005 is allowed and the judgment and order of conviction and sentence dated 27-7-2004 passed by the learned Addl. Sessions Judge, Fast Track Court, Himmatnagar in Sessions Case No. 72 of 2004 is set aside qua appellant accused No. 1-Lalabhai Gordhanbhai Vaghari and he is acquitted of the charges levelled against him. The appellant accused is ordered to be set free forthwith, if he is not required in any other offence. Fine, if paid, be refunded to him. Acquittal of accused No. 2 is upheld and Criminal Appeal No. 1707 of 2004 stands dismissed. The judgment and order of conviction and sentence dated 27-7-2004 passed by the learned Addl. Sessions Judge, Fast Track Court, Himmatnagar in Sessions Case No. 72 of 2004 is confirmed qua appellant accused No. 2-Bharatbhai Narubhai Macwana.