

(2020) 01 GUJ CK 0173
In the Gujarat High Court
Case No : R/Criminal Appeal No. 46 Of 1997

State Of Gujarat	Vs	APPELLANT
Bhikhabhai Padmabhai Harijan		RESPONDENT

Date of Decision : 16-01-2020

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 209, 378
Indian Penal Code, 1860 — Section 302, 504

Citation : (2020) 01 GUJ CK 0173

Hon'ble Judges : R.M.Chhaya, J;Vireshkumar B. Mayani, J

Bench : Division Bench

Advocate : Manan Mehta, PV Patadiya

Final Decision : Dismissed

Judgement

Vireshkumar B. Mayani, J

1. The present appeal is directed under section 378 of the Code of Criminal Procedure, whereby the State has challenged the order of acquittal

rendered by the learned Sessions Judge, Palanpur in Sessions Case No. 18 of 1996 dated 31.08.1996 whereby the learned Sessions Court has

acquitted the respondent from the offence punishable under under section 302 read with section 504 of the IPC

2. The following noteworthy facts emerge from the record of the appeal Â?

2.1 As per the case of the prosecution, at about 17.30 hrs. on 27.12.1995, deceased Thakor Kantiji Vadanji while he was grazing the cattle at Sherganj

village situated on the bank of river Banas, he was assaulted by the respondent. It is the case of the prosecution that scuffle took place between

deceased and respondent with regard to not permitting to graze the cattle. It is alleged that the respondentÂoriginal accused was armed with stick and

he gave stick blow on the left hand side of the forehead and thereafter gave various blows, which according to the prosecution was scattered six blows.

2.2 As per the record, the deceased suffered fractures and other injuries which are more particularly described hereinafter and succumbed on the

succumbed on the scene of occurrence itself. As per the prosecution, Lavinji Heduji Thakor, uncle of the deceased, p.w.1 at exhibit 6 Lavingji,, lodged

an FIR wherein it is alleged as described hereinabove. Post Mortem was performed by Dr. Dhirajbhai Devabhai Jaganiya, p.w.2, exhibit 8 on

28.12.1995. Investigation was carried out and ultimately, the chargesheet came to be filed before the jurisdictional Magistrate against the accused

persons. As the case was exclusively triable by the Court of Sessions, learned Magistrate Court under Section 209 of the Cr.P.C. committed the said

case to the Court of learned Sessions Judge, Banaskantha Palanpur, which came to be numbered as Sessions Case No.18/96. Since, the accused did

not plead guilty and claimed to be tried, he was tried for the charges levelled against him.

2.3 The prosecution examined nine witnesses and relied upon documentary evidence and more particularly FSL report being exhibit 39. The

prosecution in order to prove the guilt of the accused, heavily relied upon the evidence of p.w.3 Ganpatbhai Lalubhai, p.w.4 Popatbhai Khemajibhai

Majirana and p.w.5 Pachanbhai Shankarbhai, who were examined as eye witnesses to the incident.

2.4 The learned Sessions Court after appreciation of the evidence on record, came to the conclusion that the version of third eye witness, Pachanbhai

Shankarbhai, p.w.5 at exhibit 14 was not trustworthy and there is self contradiction in his version and was declared hostile. It is recorded by the

learned Sessions Judge that the version given by the third eye witness does support each other and the learned Sessions Judge having found material

contradiction in the version of the third eye witness, has come to the conclusion that his version is doubtful and benefit of which is given to the

respondent's original accused. The learned Sessions Judge while giving benefit of doubt to the respondent's accused has observed that the prosecution

has failed to prove the guilt of the respondent to its hilt and has been pleased to acquit the respondent from all the charges levelled against him by the

impugned judgment and order. Being aggrieved by the same, the State has preferred this appeal under section 378 of the Code of Criminal Procedure.

3. Heard Mr. Manan Mehta, learned APP for the State and Mr. P.V. Patadia, learned advocate for the respondent.

4. Mr. Mehta, learned APP has taken this Court through the deposition of the p.w.3 Ganpatbhai Lalubhai, p.w.4 Popatbhai Khemajibhai Majirana and

p.w.5 Pachanbhai Shankarbhai as well as deposition of the Dr. Dhirajbhai Devabhai Jaganiya, p.w.2 at exhibit 8. Mr. Mehta, learned APP relied upon

the version of p.w.3 and p.w.4 in particular and contended that the prosecution has been able to bring home the point that the appellant assaulted the

deceased with stick and gave at least six blows, which corresponds with the injury that are mentioned in the P.M. Note at exhibit 10 and the same also

gets corroboration to deposition of Dr. Dhirajbhai Devabhai Jaganiya, p.w.2 at exhibit 8 who performed autopsy upon the deceased.

5. Mr. Mehta, learned APP contended that if the version of two eye witnesses who have supported the case of the prosecution is properly

appreciated, there is no contradiction whatsoever and the presence of the witnesses is also natural and both the witnesses have not only supported the

case of the prosecution but have brought on record the manner in which the assault was made by the respondent upon the deceased knowing fully

well that the same may result into death of the deceased.

6. Mr. Mehta, learned APP contended that all ingredients of section 302 of the IPC are proved beyond doubt by the prosecution and the Sessions

Judge has committed an obvious error in appreciating the evidence on record and has wrongly come to the conclusion that the version of the

eyewitness is not trustworthy. Mr. Mehta, learned APP contended that the learned Sessions Judge has committed an error in giving benefit of doubt to

the respondent. Mr. Mehta also contended that the prosecution has also been able to prove the motive behind the assault beyond doubt, which has not

been considered by the Sessions Court. Referring to the inquest panchnama at exhibit 15, it was contended by Mr. Mehta, learned APP that the

injuries no.3 and 4 which is reflected from column no.17 of the PM note at exhibit 10 were the real cause of death and the same is not only

corroborated by the deposition of p.w.2 the Doctor, but the same also is supported by two eyewitnesses, viz., Ganpatbhai Lalubhai and p.w.4

Popatbhai Khemajibhai Majirana. On the aforesaid grounds, Mr. Mehta contended that the order of acquittal deserves to be reversed and the

respondent deserves to be convicted under section 302 read with section 504 of the IPC and be sentenced for life.

7. Per contra, Mr. Patadia, learned advocate appearing for the respondent—original accused has supported the impugned judgment. Mr. Patadia also

heavily relied upon the deposition of the eyewitnesses p.w. 3 and p.w.4. Mr. Patadia submitted that the learned Sessions Court has rightly appreciated

the evidence on record and has correctly recorded the finding that there is self—contradiction in the version of two eye witnesses. Mr. Patadia

contended that even if the deposition of the two eyewitnesses is taken as it is, it clearly bornes out from the version of two eyewitnesses that they

have not seen the respondent inflicting any blows with stick upon the deceased. Mr. Patadia contended that p.w.3 and p.w.4 have categorically stated

and in fact have admitted the fact in their cross—examination that they both were at a distance which precludes them from seeing the occurrence as

projected by the prosecution. Mr. Patadia submitted that p.w.3 and 4 are so—called eyewitnesses and have been planted by the prosecution and in

fact they were not present which is evident from the deposition of the third eye witness, who was a child witness Pachanbhai Sankarbhai, p.w.5 at

exhibit 14 who has categorically stated that everyone ran away. Mr. Patadia contended that even as per the serological report at exhibit 39, no blood

stains have been found from the weapon stick and even the blood stains which were found on the cloths of the deceased bears the blood group AB,

which is the blood group of the deceased. According to Mr. Patadia, the respondent has been wrongly involved in the offence and the Sessions Court

has committed no error in appreciating the evidence and has correctly come to the conclusion that the statement of both the so called witnesses are

self—contradictory and has rightly given benefit of doubt in favour of the respondent. On the aforesaid grounds, Mr. Patadia contended that the appeal

is totally meritless and no interference is called for and the same deserves to be dismissed.

8. No other or further submissions, contentions or grounds have been raised by the learned advocates appearing for the parties.

9. Having considered the submissions made and the evidence on record, it would

be appropriate to note at this stage that as per the serological report at exhibit 39, no blood stains were found on the stick. Moreover, blood which is found on the cloths of the deceased bears his own blood group, i.e.,

AB. As per the evidence on record, the following injuries were found upon the person of the deceased Â?

(1) A Diffuse Swelling fore Head Haematoma present Reddish Contusion 11 cm x 4 cm long helly placed.

(2) A CLW on toe left eye brow size about 4.5 cm x 0.5 cm Deep Skin. Blood Clotted.

(3) A CLW on the Left temporalÂ?Parietal Region Size about 5 cm x 2 cm Deep bone Fracture Parietal bone.

(4) A CLW on the Right Parietal Region Size about 6 cm x 2.5 cm Deep bone fracture Parietal bone Blood Clotted obliquely Placed.

(5) A CLW on the Occipital Region Just left size about 11 cm x 4 cm Deep bone Fracture Occipital bone Blood Clotted obliquely placed.

(6) A Diffuse Swelling on Rtght Shoulder.

10. Keeping in mind the aforesaid fact, it would be appropriate to refer to the evidence of P.W. 2 Dr. Dhirajbhai Devabhai Jaganiya at exhibit 8. In his

examinationÂinÂchief, he has narrated the injuries which were found on the body of the deceased as noted in the PM Note and he has also averred

that the cause of death is because of fracture as mentioned in the PM note. In his deposition, he has opined that the injuries received by the deceased

can be caused by a weapon like stick. In his crossÂexamination, he has admitted the fact that the injury as shown in the inquest panchnama does not

tally with the injuries found and noted in the PM Note at exhibit 10. He has also stated in his crossÂ examination that the injuries found upon the body

of the deceased cannot be caused by a single blow.

11. The prosecution has examined Ganpat Lalubhai, p.w.3 exhibit 12 who according to the prosecution was the eye witness. The said witness in his

examinationÂinÂchief has stated that around 5 to 6 PM, the incident has occurred. He has narrated that the accused, Popat Khemaji, p.w.4 and a boy

were grazing their cattle on the riverbank near the field. At that time deceased and Ramji Kupat were passing nearby. At that time deceased went to

attend natures call and Ramji had gone towards Sherganj. He has further stated in his examination in chief that at that time respondent accused

started abusing the deceased over grazing of cattle. After attending nature's call, while he was untying his shoes, at that time, the respondent accused gave stick blow on the left side of his ear and thereafter the accused started giving stick blows to the deceased on the head and other parts of the body. The said witness has further stated in his examination in chief that on hearing the shout of the deceased, he went there and he saw the dead body of the deceased bleeding from nose and ear. On seeing other persons at the place of the incident, the accused ran away. The said witness thereafter went to the village and informed p.w.1 Lavingji that the accused had beaten the deceased and deceased had died. It was stated in the examination in chief that he along with Lavingji, Balaji, Lekhji, Daduji, Vagharji came near the dead body and he and other three to four persons sat near the dead body and others had gone to the Police Station. The said witness has also stated in his examination in chief that he knows the accused who was present in the Court and he has identified the stick used by the accused and he has seen the accused beating the deceased. In his cross-examination the said witness has stated that at the time of the incidence, he was doing fencing work of his field. He has stated in his cross-examination that deceased is from his village and he knows him very well. He has stated in his cross-examination that the place of incidence is at distance of 10 ft to 15 ft from his farm. He has stated in his cross-examination that the deceased was sitting at a distance of fifteen feet from him for defecation. He has further stated in his cross-examination that p.w.4 Popat Khema was standing with accused Bhikha Padma. It was stated by the said witness in cross examination that he and p.w.4 Popat Khema are two eye-witnesses to the incident and no other person was present there. It was stated by the said witness in the cross-examination that the accused had not hit deceased Kantiji anywhere else but on his head and he had hit with a stick five times on the head of deceased indiscriminately. It was stated in the cross-examination that the said witness has not heard any conversation between the accused and the deceased if it has taken place before the accused hit him with the stick. It was stated by the said witness in the cross-examination that on hearing the shouting of the deceased, he went there and he saw the deceased was lying and was struggling for life. It was further stated in the cross-examination that the said witness does not know if any altercation had taken place between the accused and the

deceased before it and at the time when the incident took place, p.w.4 Popat Khema was nearby and after occurrence of the incident, Ramji had

come later. Further in the cross examination, this witness has denied that deceased had attempted to pick sheep and goats when the accused and p.w.

4 Popat Khema had brought cattle for grazing. It is also denied that altercation for the same had taken place between the deceased and the accused.

It is denied in the cross examination that the deceased had also attacked the accused for snatching the cattle. It is further denied in the cross

examination that he was at a far distance at the time of incident and has not witnessed it and that he has fabricated facts about the deceased being hit

indiscriminately by the accused with a stick. It is stated in cross examination that on the night of incident, he had gone to Deesa Police station to

inform about being an eye witness to the incident and he had gone there between eight and nine o' clock in the night and that police had recorded his

statement. It was stated in cross examination that the distance between the place where deceased Kantiji sat for defecating and the place where he

was struggling for life is 30 feet. It was stated in the cross examination that the place where Kanti was killed, was sandy river bed. Blood was found

at the place where deceased was killed and he saw blood at two places where the body was lying. Blood was found in the surrounding of five or ten

or fifteen feet from the place where deceased was lying. It was further stated in the cross examination that the said witness went to village half an

hour after the incident to inform the villagers and he and other six to seven persons from village returned to the dead body and that when they reached

there, two persons were standing near the dead body. The said witness went to Deesa Police Station and later, at about 12 o'clock at night, returned to

the dead body. It is stated in the cross examination that the dead body was not taken into possession by any police and the dead body remained lying

there until the police arrived in the morning and drew a panchnama and they all remained present there and the said witness p.w.3 was present there

when police drew a panchnama of the dead body and had shown the parts where the deceased was injured by stick especially left ear and on the

whole head and he did not show injury caused by stick on any other part of the body. It is denied in the cross examination that he has not dictated

such in my statement recorded by police that Hemujibhai came as deceased was shouting. It is denied that he has not witnessed the accused killing

the deceased. It is also denied that he is giving false statement because deceased was his friend friend and his farm is situated near the scene of incident.

12. The prosecution has examined Popatbhai Khemaji Majirana, p.w.4 at exhibit 13. He has stated in the examination in chief that the incident would

have occurred before 5Â6 months. It was stated in examination in chief by the said witness that at the time of incident his father was at home and he

had gone to river and was doing work of dying the clothes on the river and his father came and told the said witness that as his father was going to

market he was told to graze the goats of panjrapole. It is stated in the examination in chief that he therefore went to panjrapole where he met

Akhabha and Akhabha gave him goats of panrapole for grazing. It is stated in the cross examination that he along with other persons including

accused went to graze the goats towards river side. It is stated in examination in chief that they went for grazing the goats in the farm located on the

river bank. It was stated in examination chief by the said witness that the time of about FiveÂSix O'clock of evening. Ramji and the deceased both

were coming from Kupat. The deceased told Ramji that he will come after defecation and told Ramji to stand a little ahead. It is further stated in

examination in chief by the said witness that after defecation while the deceased was untying his shoe lace at that time the accused started abusing

the deceased Kantiji and told the deceased as to why his is not letting him to graze the goats here. Thereafter, the accused gave stick blows to the

deceased. The accused gave stick blow to deceased on head. The accused had given fiveÂsix stick blows. It is stated by the said witness in

examination in chief that as the deceased shouted, two persons, came and they way the deceased bleeding from nose and ears. It is stated by the said

witness in the examination in chief that thereafter, the accused had fled away and when Ramji had asked as to what happened, he didn't reply. The

deceased fell down there and died. Thereafter, p.w.5 Pachan and the said witness left the place taking their sheep and goats back to the panjarapole

and went home. It is stated in examination in chief that the police came on the next day morning and took his statement wherein the said witness has

stated that he knows the accused and the stick which was in the hand of the accused. Lastly the said witness has stated in the examination in chief

that he had witnessed that accused Bhikha Padma had beaten stick to deceased Kantiji.

In cross-examination of the said witness, it has been stated that that he had gone to graze the goats for the first time on the day of the incident and

that he had never gone to graze the goats before that but his father used to go. He has further stated in the cross-examination that the deceased sat

on the riverbank for defecation. The accused was grazing nearby at that time and I was at some distance, i.e about ten feet away. He has stated that

he had just talking terms with deceased but was not having any close relation with the deceased and he knew the deceased as the deceased used to

visit the place where the said witness was doing dyeing work on the river bank and that the deceased had no business near the riverbank. The said

witness has stated in cross-examination that he was standing far away when conversation took place between deceased and the accused. He has

denied that he went there after hearing the shout of the deceased. He has also denied that deceased Kanti had altercation with the accused and

verbally abused him. He has stated in the cross-examination that p.w.5 Pachan was present with him at the time of incident. The said witness has

denied that deceased had lifted the sheep to snatch it. It is not true that, the accused had told Kanti not to take the sheeps. The said witness has stated

in the cross-examination that he had neither went to the police station on the day of the incident nor had declared of seeing the incident and that he

had not told anybody about the incident at the panjrapole but told his father after reaching home. The said witness has denied that he was giving false

deposition because relatives of the deceased had told him to do so and lastly he has denied that he is not giving the correct fact about the event that

took place between the accused and the deceased.

13. The third eyewitness examined by the prosecution is p.w.5 Pachanbhai Sankarbhai at exhibit 14 is a child witness. He has not supported the case

of the prosecution and was declared hostile. In his examination in chief, he has even denied the fact that the deceased abused the respondent. On the

contrary, in his cross-examination by the prosecution, he has totally denied the incident. He has also in his deposition stated that all the three, i.e.,

p.w.3, p.w.4 and p.w.5 ran away. The prosecution has also examined brother of the deceased Lavinji Heduji Thakor, p.w.1 at exhibit 6.

14. The prosecution has also examined Investigating Officer Chandansinh Lakhsinh Rathod, p.w.9 at exhibit 31. He has narrated the manner in which the investigation was carried out and has made an attempt to support the case of the prosecution.

15. In the above factual background and the evidence on record, the case of the prosecution is heavily based upon the deposition of p.w. 3 Ganpatbhai

Lalubhai and p.w.4 Popatbhai Khjemaji Majirana, who are posed as eye witness. In his examination in chief, he has clearly mentioned that he has not

heard any conversation between the deceased and the respondent. He has categorically admitted that he was far away and was engaged in building

the embankment of the field and as the deceased shouted, he looked towards the side of the deceased and he has stated that after that he went near

the deceased where he was lying. In his examination in chief, he has stated that he immediately went to the village to inform the uncle of the deceased

whereas in his cross-examination, he has narrated that he went after about half an hour. P.W.4 Popatbhai Khemaji Majirana who is also posed as

eyewitness at exhibit 13 has also admitted in his cross-examination that he was standing at a far distance. On re-appreciation of the evidence of this

witness as a whole, we find that there are heavy contradictions in his examination in chief and his cross-examination. The third witness Pachanbhai

Shankarbhai, p.w. 5 at exhibit 14 examined as eye witness has not supported the case of the prosecution. However, considering his examination in

chief, he has stated that he does not know what has happened to the deceased and all three immediately left the scene of occurrence.

16. As noted hereinabove, the serological report also does not support the version of the prosecution. Even if the evidence of Investigating Officer

Chandansinh Lakhsinh Rathod, p.w.9 is re-appreciated, the same does not lead to any further corroboration to the case of the prosecution. The

learned Sessions Judge in his observation in para 19 in particular, has correctly appreciated the evidence on record and has correctly observed that the

deposition of two eyewitnesses, p.w.3 Ganpatbhai Lalubhai and p.w.4 Popatbhai Khemajibhai Majirana is not trustworthy. The learned Sessions Judge

has rightly noted that the evidence of these two eyewitnesses are self contradictory and the same does not support each other. The contradiction

between the evidence of third eyewitness Pachanbhai Sankarbhai, p.w.5 is of such a nature that their presence at the scene of occurrence and that

they have witnessed the alleged assault made by the respondent is very doubtful. Upon reÂappreciation of the evidence as a whole, this Court finds that the prosecution has not been able to prove the guilt to its hilt and the version of the eyewitnesses creates doubt about its veracity, benefit of which has been rightly given by the learned Sessions Judge to the respondentÂoriginal accused. The medical evidence as well as the deposition of Dhirajbhai Devabhai Jaganiya, p.w.2, at exhibit 8 also does not prove the guilt of the respondent even if it is reÂ? appreciated independently and it is found that the same is not in corroboration even with the serological report as observed hereinabove. The prosecution has not been even able to recover or discover the cloths of the respondent accused. The evidence of other panch witnesses, p.w.1, Lavinji Heduji at exhibit 6 being original complainant, p.w.6 Ramjibhai Khemabhai at exhibit 21, p.w.7 Shokatali Alamkhan, witness for discovery panchnama at exhibit 25 and p.w.8 Mohanbhai Gamanbhai, panch witness for cloths of the deceased at exhibit 26 does not require any elaborate discussion in facts of this case.

17. In totality of the facts and evidence on record, this Court finds that the learned Sessions Judge has correctly passed the order of acquittal and the same does not suffer from any infirmity or error which requires interference by this Court in exercise of its power under section 378 of the Cr. P.C.

The appeal therefore fails and is hereby dismissed. Bail bond stands cancelled.