

(2016) 06 GUJ CK 0073

In the Gujarat High Court

Case No : Criminal Appeal No. 2170 of, Criminal Appeal No. 2150 of 2006 and Criminal Appeal No. 1417 of 2006

State of Gujarat

APPELLANT

Vs

Dhirajbhai Jinabhai Makwana

RESPONDENT

Date of Decision : 20-06-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 357
Penal Code, 1860 (IPC) — Section 302, Section 307, Section 323

Citation : (2017) 1 GLR 494

Hon'ble Judges : Mr. Anant S. Dave and Mr. B.N. Karia, JJ.

Bench : Division Bench

Advocate : Ms Moxa Thakker, APP, for the Appellant No. 1; Mr. Yogesh S. Lakhani, Sr Advocate and Mr. Maulin G. Pandya, Advocate, for the Opponent Nos. 1 and 2

Final Decision : Dismissed

Judgement

Mr. Anant S. Dave, J.—These three Criminal Appeals arising from judgment and order dated 12th July 2006 passed by learned Sessions Judge, Gandhinagar in Sessions Case No. 43 of 2006 are being heard and disposed of by this common judgment.

2. Criminal Appeal No. 2170 of 2006 is preferred by the State of Gujarat under Section 377 of the Code of Criminal Procedure, 1973 ["CrPC" for short] in respect of accused nos. 1 & 2 with a prayer to enhance the sentence awarded by the learned Sessions Judge, Gandhinagar for the offence punishable under Sections 307 & 323 of the Indian Penal Code ["IPC" for short]. Another Criminal Appeal, being Criminal Appeal No. 2150 of 2006 is preferred by the State under Section 378 (1) & (3) CrPC in respect of accused no. 3 with a prayer to quash and set-aside his acquittal. And, Criminal Appeal No. 1417 of 2006 is preferred by the original accused no. 1 & 2 under Section 374 (2) CrPC challenging the conviction of accused no. 1- Dhirajbhai Jinabhai Makwana for the offence punishable under

Section 307 IPC and thereby, sentencing him to suffer rigorous imprisonment for a period of three years with fine of Rs. 5,000/-; and in default thereof, to suffer simple imprisonment for a period of six months. The very accused has also challenged his conviction for the offence punishable under Section 323 IPC and thereby order of sentence to suffer rigorous imprisonment for a period of six months with fine of Rs. 1,000/-; and in default thereof, to suffer simple imprisonment for a term of fifteen days. Both the sentences qua the above accused were ordered to run concurrently. The very accused no. 1 was directed to pay a sum of Rs. 50,000/- to the widow of the deceased-Shaileshbhai Narsinhbhai Deepakar under Section 357 CrPC toward compensation. Accused no. 2- Ajitbhai Jinabhai Makwana is convicted and sentenced for the offence punishable under Section 323 IPC and ordered to suffer rigorous imprisonment for a period of one months with fine of Rs. 3,000/- and in default of payment of fine, to suffer simple imprisonment for a period of seven days.

3. Brief facts of the case are stated hereunder to appreciate the rival legal contentions urged before this Court for and on behalf of the respective parties.

4. It is the case of prosecution that the incident has taken place on 5th April 2006 at about 21:30 hours in front of the house of accused persons. It is the case of the prosecution that on the fateful day, the deceased- Shaileshkumar; PW-3 Pushpaben [Exh. 27]; his wife Alpaben [Exh. 25] were present at home and they were watching Television. The accused no. 2 Ajitbhai Jinabhai and accused no. 1-Dhiraj Jinabhai have called upon the deceased Shailesh, and accordingly, deceased Shaileshbhai left his home by saying that he would return within a short time. It is further the case of prosecution that PW-3 Alpaben Shaileshkumar heard the alarm of deceased Shaileshkumar. As she was pregnant then and was unable to walk, she persuaded PW-3 Pushpaben, her mother-in-law to look into the matter. Accordingly, PW-3 Pushpaben rushed towards the place of incident and she noticed that all the three accused persons named in the FIR were inflicting injuries to the deceased-Shailesh. It is the case of prosecution that accused Dhiraj was holding stick by which he caused an injury, whereas, accused Ajit and Jinabhai have caused fist to the deceased. The entire episode was concluded at the intervening of PW-3.

5. It is also the case of prosecution that deceased Shailesh was brought to his residence. As he had sustained injuries, he was removed to Shraddha Hospital by PW-2 and 3. The Medical Officer serving with Shraddha Hospital was invited to examine Shailesh and upon medically examining Shailesh who was in a rickshaw, he was declared dead. It is also the case of prosecution that the relatives and friends were invited and after arrival of PW-4 Prashant Narsinhbhai Deepkar - brother of the deceased, the dead body of the deceased Shailesh was cremated according to their customs, rites and ceremonies in a private graveyard. It is the case of the prosecution that till the cremation of the dead body of the deceased, the FIR was not lodged because of the alleged threat given by the accused persons. After sometime, PW- 2 Alpaben decided to lodge complaint and

according FIR [Exh. 26] came to be lodged before the investigating officer [PW-5 : Exh. 29]. It is also the case of prosecution that the investigating officer after having received FIR, reduced it in writing and started the investigation. The dead body of the deceased was taken out from the graveyard and it was forwarded to Civil Hospital, Kalol for conducting the autopsy and to offer an opinion for cause of death. It further appears from the record that the dead body of the deceased Shailesh was further forwarded to Civil Hospital at Ahmedabad, where the team of medical experts constituted under the heads of Dr. V.R Patil, Dr. D.A Silajiya, Dr. J.C Jadav, Dr. H.T Khubchandani also associated with Dr. J.N Tank and Dr. A.B Nayak conducted the autopsy of the dead body. The cause of death was kept reserved till the availability of the report from Forensic Science Laboratory of Viscera and the Histopathology Report. The experts had noticed in all six injuries on the person of the deceased which were antemortem in nature and one injury was postmortem in nature. The tow internal injuries were further noticed by the experts. The report of the Forensic Science Laboratory was made available to the experts where no poisonous substance was found in the viscera. The pathologist also did not offer any concrete opinion. According to the opinion of the experts which was given on 29th April 2006, no injury to the vital organs was detected and they were not in a position to offer a definite opinion, however, a probable cause of death was concluded due to the head injury. The experts further offered that the injuries could have been caused by hard and blunt substance.

6. At the end of investigation, upon filing of the charge sheet, the case was committed to the Sessions Court at Gandhinagar and numbered as Sessions Case No. 43 of 2006 and tried accordingly by the learned Sessions Judge, Gandhinagar. The learned trial Judge, upon framing the charge at Exh. 4 on 19th June 2006, examined PW-1 : Dr. Dharmesh Amrutsinh Silajiya on 27th June 2006; PW-2 : Deepkar Alpaben Shaileshkumar [Widow of deceased]; PW-3 : Pushpaben Narsinhbhai Deepkar [Mother of the deceased]; PW-4 : Prashant Narsinhbhai Deepkar [Brother of the deceased] on 3rd July 2006 and rendered judgment on 12th July 2006. In all, five prosecution witnesses were examined and about more than twenty documentary evidences were weighed by the learned Sessions Judge, ultimately finding the accused no. 1 & 2 guilty of the offence and acquitted the accused no. 3, so recorded in the earlier paragraph.

7. Heard learned senior advocate Mr. Yogesh Lakhani appearing with Mr. Maulin Pandya, learned advocate for the appellants in Criminal Appeal No. 1417 of 2006 as well as Ms. Moxa Thakker, learned APP appearing for appellant- State in Criminal Appeals No. 2170 of 2006 and 2150 of 2006 for enhancement of the sentence and for setting aside the sentence for acquittal qua accused no. 3. They have taken us through the oral as well as documentary evidence in detail and having read over the testimonies of witnesses and contents of the documents, vehemently submitted that the appeals filed by them respectively be allowed.

8. Mr. Yogesh Lakhani, learned senior counsel for the convict would submit that

in the context of the case of prosecution, investigation was carried out and at the end when the charge sheet was filed, number of witnesses were cited and it was highlighted that in spite of availability of witnesses to strengthen the case of prosecution, three close relatives of the deceased viz., Wife [PW-2]; mother [PW-3] and brother [PW-4] came to be examined. So far as PW-1 is concerned, a Doctor who carried out postmortem along with other Doctors of the panel, described injuries on the body of deceased, which was exhumed after five days of the incident, that all the six injuries were ante mortem and no fracture of bone was noticed. Upon examination of internal parts of the body further, no fracture on skull was noticed and all three layers of the brain were intact. Even initially, the cause of death remained undecided and upon sending viscera, etc., for examination to Forensic Science Laboratory, the pathological report received shows absence of any poisonous substance. Further, it was opined that no definite conclusion could be drawn about the cause of death, but the probable cause of death could be head injury. Even the above witnesses, according to the learned advocate for the appellants, did not rule out possibility of injury due to accident. It is, therefore, submitted that the conviction based by taking into consideration such opinion by the learned Judge is contrary to law and deserves to be quashed and set aside.

9. In juxtaposition to the above, Mr. Lakhani, learned counsel has taken up through the evidence of PW-2; PW-3 and PW-4 about the cause of incident, manner in which the incident had taken place, description of the place of offence, injured who was taken to the private hospital and opinion given by Dr. Rajat of Shraddha Hospital that the injured was brought dead at the hospital, falsify her version about failure on her part to approach the police authority disclosing death of the injured. When the injured was taken to the hospital, persons from neighbourhood were available and presence of Chaitnya, Manubhai Waghela, Mukesh, Hasmukh and Dr. Rajat who could have thrown light on the case of prosecution were not examined as witnesses, and therefore, according to the learned counsel, PW-2 and PW-3 as well as PW-4 were prevented from lodging complaint before the police authority due to threat to their life, administered by the accused nos. 1 & 2 is utterly a falsehood.

10. Mr. Lakhani, learned counsel for the appellants/convicts has taken us through the testimony of PW-3 particularly about the threat administered to her by one Dhiraj Jinabhai Makwana who was identified in the Court and according to PW-3, such threat was administered to her when dead body of the deceased Shaileshbhai was brought in a maruti van from the private hospital in which Bharat Waghela and Chikkabhai were present. As against the above, testimony of Investigating Officer viz., PW-5 in his cross examination admits that such threat was given to PW-3 ie., the mother of the deceased by one Ajit, while she was taking her injured son at her house. Thus, striking contradiction appears about the person administering threat to her life. It is further submitted that different versions appear in the testimonies of PW-2 ie., wife of the deceased and PW-3 : mother of the deceased and certainly there are improvements in their

testimonies, if it is seen along with the complaint dated 5th April 2006 at Exh. 26. It is submitted that even the motive attributed to the accused and charges framed for which no material is available and foundation of the charge in this case itself is weak. In absence of any relevant material evidence, no further edifice could have been constructed leading to collapse of the case of the prosecution.

11. Learned counsel Mr. Y.S Lakhani has further contended that the very genesis of the crime is absent in the facts of this case. It is submitted that even the learned trial Judge having noticed certain glaring lacunae in the case of prosecution, proceeded to convict the accused on the basis of surmises and conjectures, particularly when on the record; including that of the PW-5 Investigating Officer, it appears that initially death of the deceased was either accidental or natural and witness had deposed so in no uncertain terms. That, the complaint was lodged after four days upon taking legal advice of a lawyer who drafted the contents and the only explanation which comes forth is threat administered by the accused to PW-2 & 3 of dire consequences; including to kill their another son.

12. Therefore, in a hurriedly conducted trial, which was concluded within fifteen days from its commencement on recording testimonies of witnesses, by applying irrational and illogical possibilities and probabilities much less any reasonings or findings given by the learned trial Judge which are not absurd but perverse to the core and when there is a possibility of two views, even after close scrutiny of evidence a view supporting innocence of the accused is to be taken, discarding another view to conclude about the guilt of the accused.

13. In support of his submissions, three decisions were relied upon viz., in case of Kali Ram v. State of Himachal Pradesh, AIR 1973 SC 2773 which deals with rule of presumption of innocence of the accused and his entitlement to the benefit of reasonable doubt in criminal cases. The Apex Court in para-22 has held and observed that, "...One of the cardinal principles which has always to be kept in view in our system of administration of justice for criminal cases is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him guilty of the offence with which he is charged." Learned counsel further relied on para 24 to 27 of the above judgment which discusses about certain established principles of criminal jurisdiction.

14. Another decision which was pressed into service by the learned counsel is in case of State of Kerala v. Anilachandran alias Madhu & Ors., AIR 2009 SC 1866 to contend that even in a given case version of the prosecution witnesses about role of the accused is accepted to be true, but genesis of the incident is not established, and therefore, it will be unsafe to record conviction. If it is brought to the notice of the trial Court that crime was not committed in a manner as suggested by the prosecution and the genesis of the incident is not established, the duty of the prosecution is to prove its case beyond reasonable doubt that the

accused person is guilty, is in no manner diluted or taken away. Merely because the accused was not able to prove his defence, it cannot be presumed that the prosecution case is proved against him.

15. Lastly, learned counsel relied on a decision of Apex Court in case of Rai Sandeep alias Deepu v. State [NCT of Delhi], reported in (2012) 8 SCC 21, wherein the Apex Court opined about qualities of "sterling witness" which should remain unassailable, irrespective of status of such witness and relevant aspect is truthfulness of the statement made by such witness which has to be consistent and inspiring confidence. Counsel emphasized on para 22 of the above decision.

16. Conjointly as above, it is submitted that this is a case where the prosecution has failed to bring enough material to establish motive of the crime, genesis of the incident. There is also lack of trust-worthiness and truthfulness of the prosecution witnesses containing full of discrepancies, improvements, material contradictions, absence of any medical evidence, no definite cause of death and even at the end of Viscera and histopathology report, only opinion given by the experts is probable cause of death of the deceased due to head injury, but no nexus appears proving guilt of the accused. At the end, according to the learned counsel appearing for the appellant, the conclusion drawn by the learned trial Judge by usage of certain words "fortunately or unfortunately" and "may be or might be" is unknown in trial of accused charged with serious offences. Even if it is believed that whatever is recorded in para-34 about prosecution succeeding in bringing certain facts on record, though remain unproved viz., about death of the deceased and PW-2 & PW-3 stating about deceased leaving with the accused, injury sustained and noted down by PW-1 Exh. 14 and post mortem report Exh. 15 and probable cause of death being head injury, indisputably, no cogent evidence has come on the record connecting the accused with the crime, and therefore, the conviction and sentence qua original accused Nos. 1 & 2 deserves to be quashed.

17. While, arguing the Appeal filed by the State of Gujarat for enhancement and setting aside the acquittal and opposing the appeal filed by the accused against their conviction, Ms. Moxa Thakker, learned APP contended that the learned trial Judge has carefully gone through the testimonies of PW-1 to PW-5 and found corroboration in the medical evidence which conclude the nature of injuries and possibility of one of the injuries ie., injury No. 3 which was found on the forehead being caused by hard and blunt substance used by the assailant-accused which turned out to be probable cause of death, so opined by the experts. The above evidence, according to the learned APP, is sufficient enough and no other or further evidence is necessary to be looked into. That, the quality of the evidence and not quantity is important in establishing and proving the guilt of the accused. According to the learned APP, delay in lodging FIR is well explained by PW-2 and PW-3, and particularly when PW-2 was at an advance stage of pregnancy and threatened by the accused of dire consequences; including threat to their life, sometime was taken initially and after mustering courage and taking opinion of a

lawyer, a complaint was filed which cannot be said to be an unusual conduct of the complainant. Under the circumstances, it is further submitted that non examination of certain witnesses so referred by the learned counsel for the accused were not in fact present at the scene of offence and they had no first hand information of the incident, and therefore, PWs 2 & 3 viz., wife and mother of the deceased, who were eye-witness, were examined and they stood by their version during cross examination, etc., and are rightly believed by the learned trial Judge. It is further contended that punishment of conviction and sentence recorded under Section 307 IPC by the learned trial Judge is not adequate when the accused were charged of offence punishable under Section 302 IPC, etc. and the medical evidence revealed homicidal death which clearly rules out other possibilities namely accident or natural death.

18. Learned APP has also drawn our attention to the answer given by accused in the statement recorded under Section 313 of the Code of Criminal Procedure pointing out to their guilt and submitted that in a given case, even if the prosecution fails to bring real motive behind the crime, that by itself will not affect the core of the prosecution case, when the material evidence surfaces on the record of the case. According to her, testimony of PW-2 and PW-3 get duly corroborated so far as initial version in the complaint by PW-5-Investigating Officer about injured shouting of deadly assault, heard by PW-2 and PW-3, rushing to the scene of incident and actual happenings ie., of inflicting of blows by accused nos. 1, 2 & 3 respectively by Dhoka, Stick and also kick and fist blows. It is, therefore, submitted that a case was made out by the prosecution to bring home the guilt of the accused on the record for conviction under Section 302 IPC, and therefore the acquittal order qua original accused no. 3 be quashed and set aside and he be convicted under Section 302 IPC, and the conviction and sentence order qua original accused no.1 under Section 307 and 323 IPC, and qua accused no. 2 under Section 323 IPC deserves to be modified and conviction be recorded and sentence be imposed under section 302 IPC against both A1 & A2, and the appeal be allowed accordingly.

19. Having heard learned advocates for the parties and on perusal of the record of the case, judgment and order under challenge in respect of appeals filed by the accused as well as State under Section 374 [2] and under Sections 377 and 378 (1) & (3) CrPC, we are of the considered opinion that the impugned judgment and order under challenge by the accused in appeal filed under Section 374 (2) CrPC cannot be sustained and allow to remain on file recording guilt of the accused and holding them guilty of the offence under Section 307, 323 IPC qua Accused no.1 and under Section 323 IPC of conviction and sentence qua Accused No. 2, particularly when this Court finds that the trial Court had drawn conclusion by usage of words "fortunately or unfortunately" and "may be or might be" which are unknown terms used in criminal trial. Apart from this, there are several other aspects which render the prosecution case doubtful. The first is that, except three close relatives of the deceased viz., Wife [PW-2]; Mother [PW-3] and brother [PW-4], no independent witness from the neighbourhood

was examined by the prosecution and this conduct by itself falsifies version of PW-2 & PW-3 that they were prevented from lodging a complaint before the Police. Moreover, there are striking contradictions in respect of person administering threats to PW-3, as according to her, she was threatened by one Dhiraj Jinabhai Makwana, when the dead body of the deceased- Shailesh was brought in a maruti van from a private hospital in which Bharatbhai Waghela and Chikkabhai were present. As against this version, in the testimony of I.O viz., PW-5 in his cross examination admits that such threat was given to PW-3 by one Ajit, while she was taking her injured son at her house. These contradictions shake the foundation of the charges framed and weakens the case against the accused persons. Further, there is no plausible explanation for delayed lodgement of the complaint; except bare assertion by PW-3 that she was threatened of dire consequences. Thus, the prosecution has failed to bring home enough material to establish motive of the crime as well as genesis of the incident. Further, a Doctor who carried out post mortem along with other doctors of the panel described injuries on the body of the deceased, which was exhumed after five days of the incident, that all the six injuries were ante mortem and no fracture of bone was noticed, nor any fatal injury detected on the vital organs deceased, and the probable cause of death was concluded due to injuries caused by hard and blunt substance, without there being any nexus proving the guilt of the accused. We are in agreement with the law laid down by the Apex Court in case of Kali Ram v. State of Himachal Pradesh [Supra] and Rai Sandeep alia Deepu v. State [NCT of Delhi] (Supra) and find that there is also lack of trustworthiness and truthfulness of the prosecution witnesses containing discrepancies and improvement. Therefore, the trial Court erred in recording conviction of A1 & A3 for the offence punishable under Section 307 & 323 IPC. Accordingly, Criminal Appeal No. 1417 of 2006 filed by original accused Dhirajbhai Jinabhai Makwana and Ajitbhai Jinabhai Makwana is allowed. The impugned judgment and order dated 12th July 2006 passed in Sessions Case No. 43 of 2006 convicting and sentencing accused no.1-Dhirajbhai Jinabhai Makwana for the offence punishable under Section 307 and 323 IPC, and accused no.2-Ajitbhai Jinabhai Makwana for the offence punishable under Section 323 IPC is hereby quashed and set-aside. The order qua payment of compensation in the sum of Rs. 50,000/= to the widow of the deceased Shaileshbhai passed under Section 365 IPC is not disturbed. Fine amount, if paid, is hereby ordered to be refunded to the appellants of Criminal Appeal No. 1417 of 2006. Rule nisi made absolute to the aforesaid extent with no order as to costs. Appellants being on bail, their bail bonds stand cancelled.

20. Criminal Appeals No. 2170 of 2006 and 2150 of 2006 preferred by the State of Gujarat for enhancement and against acquittal of the accused persons fail, for the reasons stated herein above, and accordingly, stand dismissed. Rule discharged with no separate order as to costs.