

(2018) 01 GUJ CK 0013
In the Gujarat High Court
Case No : 52 of 1995

STATE OF GUJARAT

APPELLANT

Vs

KANJI JETHA KHARVA & ORS

RESPONDENT

Date of Decision : 17-01-2018

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 313](#), [Section 378](#) - Power to examine the accused - Appeal in case of acquittal
[Indian Penal Code, 1860](#), [Section 176](#)

Citation : (2018) 01 GUJ CK 0013

Hon'ble Judges : Abhilasha Kumari, B.N. Karia

Bench : Division Bench

Advocate : JIRGA JHAVERI, HCLS COMMITTEE, HARDIK K RAVAL

Final Decision : Dismissed

Judgement

PW,Exh,Particulars of Witness,Remarks

1,18,Dr. Satish Dinkar Kavle,Medical Officer who performed post mortem on 23/3/1993

2,21,Vipul Vallabhdas Ruparel,Executive Magistrate who recorded Dying Declaration on 23/2/1993

3,24,Girdhar Lalji,Panch - Scene of Office - Hostile

4,26,Narshi Devji,Panch - Panchnama of Clothes -Hostile

5,28,Keshu Parshottam,Panch - Panchnama of Bed sheet-Hostile

6,30,Jadav Pamma,Complainant/Injured eye witness

7,31,Gangaben Pamabhai,Daughter of deceased/eye witness

8,32,Velji Pama,Son of deceased/Hearsay witness

9,33,Chhagan Pamabhai,Son of deceased/Hearsay witness
10,34,Dinesh Velji,Grandson of deceased/Hearsay wtn.
11,35,Kanji Pama,Son of deceased/Hearsay witness
12,51,Ashok Jiva Chavda,Panch-Scene of Offence- Hostile
13,52,Khima Lila,Panch - Panchnama of Clothes-Hostile
14,53,Prabhudas Karsanbhai,Panch-Panchnama of Bedsheet- Hostile
15,54,Viram Mulu,Pancha-Discovery Panchnama of Knife - Hostile
16,56,Udesinh Mathurbhai,Head Constable
17,59,Nazir Ahmedkhan Pathan,PI/Investigating Officer
18,60,Dr Bharatkumar Nathubhai Gorviyala,M.O who examined Pama Jiva and Jadhav Pama

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19,61,Dr Bipin Chaganlal Ambasana,Medical Officer who operated the deceased prosecution, and therefore, heavy burden lay upon prosecution to explain the injury on the person of injured witness, which unfortunately has not",,,
been satisfactorily explained. That, panchas to the discovery panchanama have not supported the prosecution case of discovering a knife at the",,,
instance of A1 from the heap of sand. That, the blood group of blood stain found on the knife was not determined by the prosecution. That, no",,,
specific role has been attributed qua the other accused persons who have been wrongly arraigned in such a serious offence of murder.,,,
18. Referring to the testimony of PW-7 Gangaben Pamabhai [Exh. 31], learned counsel for the respondents contended that it was the case of this",,,
witness that she took her father in a auto rickshaw for medical treatment to a Government Hospital, but surprisingly, auto rickshaw driver has not",,,
been examined by the prosecution to corroborate her version, and therefore, the learned trial Judge has rightly considered the evidence of these",,,
witnesses and evaluated their testimonies in a right manner.,,,
19. Referring to the complaint, counsel for the respondents argued that the prosecution has tried to arraign as many number of accused as they",,,
can; including two ladies in an offence, without assigning any role on their part. That, only one knife was allegedly recovered at the instance of A1.",,,

That, blood group of deceased and the injured was never determined by the prosecution during the investigation. That, the alleged dying",,,
declaration was never recorded in a fit state of mind of the deceased, which is required to be proved by the prosecution. That, mere matching of",,,
the blood group on articles seized by the Investigating Officer during the course of investigation would not involve the accused with the crime,,,
alleged.,,,

20. Placing reliance upon decisions of the Apex Court in the case of State of Uttar Pradesh v. Ram Veer Singh, 2007 [13] SCC 102 and",,,

Debarpriya Pal vs. State of West Bengal, AIR 2017 SC 1246, so also decision of this Court in the case of State of Gujarat v. Himatbhai Rambhai",,,

Vaghsia & Anr., reported in 2013 [3] GLR 2528, counsel for the respondents urged this Court to dismiss the present Appeal.",,,

21. At the outset, it is required to be noted that, as such, the present Appeal has been filed under Section 378 of the Code of Criminal Prosecution",,,

and against an order of acquittal passed by the learned trial Court. Law on the appeal against acquittal and the scope and ambit of appeal against",,,

an order of acquittal has been elaborately dealt with and laid down by the Hon"ble Supreme Court in the case of Brahm Swaroop & Anr. v. State",,,

of Uttar Pradesh, reported in [2011] 6 SCC 288, followed by Division Bench of this Court in the case of State of Gujarat v. Rasid @ Papodo",,,

Abdul Kadar [Criminal Appeal No. 1223 of 1993 :: Decided on 6th December 2012.,,,

22. Having carefully considered the submissions advanced on behalf of the respective sides, first of all, this Court would like to examine scope of",,,

the appellate Court in a case of acquittal order passed by the trial Court.,,,

23. In a decision, rendered by the Apex Court, in the case of State of Uttar Pradesh v. Ram Veer [Supra], the Court observed and held that,",,

..there is no embargo on the appellate Court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal",,,

shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs",,,

through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to",,,

the guilt of the accused and the other to his innocence, the view which is

favourable to the accused should be adopted. The paramount",,,
consideration of the Court is to ensure that miscarriage of justice is prevented. A
miscarriage of justice which may arise from acquittal of the guilty,,,
is no less than from the conviction of an innocent."",,,
24. The Apex Court drawing observation from a decision in the case of Bhagwan
Singh & Ors. v. State of Madhya Pradesh reported in [2002] 2,,,
SC 567 observed that, "...In an given case where admissible evidence is
ignored, a duty is cast upon the appellate Court to re-appreciate the",,,
evidence where the accused has been acquitted, for the purpose of ascertaining
as to whether any of the accused really committed any offence or",,,
not." Highlighting the aspects already enunciated in catena of decisions, the
Apex Court in the very said authority, observed that, "...the principle to",,,
be followed by appellate Court considering an appeal against the judgment of
acquittal is to interfere only when there are compelling and,,,
substantial reasons for doing so. If the impugned judgment is clearly
unreasonable and relevant and convincing materials have been unjustifiably,,,
eliminated in the process, it is a compelling reason for interference."",,,
25. Reverting to the facts of the present case, it is true that the dying declaration
[Exh. 23] was recorded during the course of investigation and",,,
prosecution has tried to rely upon the same, and to prove the contents thereof,
had examined the Executive Magistrate Shri Vipul Vallabdas",,,
Ruparel as prosecution witness no. 2 at Exh. 21.,,,
26. As per the deposition of this witness, while recording the Declaration, he
sought certificate from attending Medical Officer as to the",,,
consciousness of the declarant, which was given, nevertheless, it appears from
the record that when the dying declaration was being recorded by",,,
this witness, Doctor was not present there. It also appears from the said dying
declaration that the deceased had put his thumb impression blow the",,,
declaration made, but the same has not been identified by any one. It transpires
that the version recorded therein is contrary to the complaint",,,
produced on record so also the testimonies of other prosecution witnesses.
Moreover, Medical Officer PW-1 Satish Dinkar Kavle has not opined",,,
that at the time of recordance of dying declaration, deceased was in a fit state of
mind to answer the queries likely to be put to him. Doctor has",,,
only opined that the patient was conscious. No certificate was issued by the

Medical Officer in respect of fit state of mind of the patient.,,,

27. Thus, from the testimony of PW-2 Executive Magistrate Shri Vipul V Ruparel who recorded the dying declaration of Jhadav Pama Jiva [Exh." ,,,

23], it is clear that he has not taken opinion of a Doctor to the effect that the patient was in a fit state of mind to understand the questions and give" ,,,

coherent reply before recording the dying declaration. Therefore, the learned trial Judge has rightly observed that consciousness of a person would" ,,,

not be sufficient to prove that the dying declaration was made in a fit state of mind, as both consciousness and fitness of mind are two distinct" ,,,

conditions which Doctor should first certify, since the patient may be conscious, but not necessarily in a fit state of mind." ,,,

28. Thus, viewed in the background of the facts emerging from the evidence available on record, admittedly in the instant case, while recording" ,,,

dying declaration of injured-Jhadav Pama Jiva, Doctor was not present, nor certificate issued as to his fitness of mind to give declaration as it was" ,,,

at the instance of Executive Magistrate, a certificate as to the consciousness of the patient was issued. Moreover, referring to the testimony of PW-" ,,,

1 Dr. Satish Dinikar Kavle [at Exh. 18], he is not aware of the contents of the dying declaration which was recorded by PW-2 Executive" ,,,

Magistrate, and hence, in absence of other material evidence available as its creditworthiness, the dying declaration produced at Exh. 23 cannot be" ,,,

sole evidence which can be relied upon and accepted by the Court.,,,

29. Apt it would be, to refer to a decision of this Court, which was relied upon by learned counsel for the respondents in the case of State of" ,,,

Gujarat v. Himatbhai Rambhai Vaghasia [Supra] wherein, the learned Single Judge [Smt. Abhilasha Kumari, J.], taking note of a decision of the" ,,,

Supreme Court in the case of Paparambaka Rosamma v. State of Andhra Pradesh, reported in 1999 [7] SCC 695, observed in para 27, as under" ,,,

:- ,,,

As per the dicta of the Supreme Court in the above-quoted judgment, consciousness and fitness of mind are distinct conditions which the Doctor" ,,,

should certify. If the certification of the Doctor is only about consciousness and not about the patient being in a fit state of mind before the Dying" ,,,

Declaration is recorded, it would not comply with the requirement of certification, as one may be conscious but not necessarily in a fit state of" ,,,

mind. In the present case, though there is an endorsement of the Doctor on the complaint that the patient is conscious and well-oriented, there is no",,,

certification that she is in a fit state of mind to record the complaint. Insofar as the Dying Declaration is concerned, there is no certification by a",,,

Doctor at all, even regarding consciousness, as the deceased has not been examined by a doctor before it was recorded. Only the Executive",,,

Magistrate has endorsed that before recording the Dying Declaration, he has ascertained that the deceased was conscious. As stated by the",,,

Supreme Court in the above judgment, consciousness is not synonymous with fitness of mind. In view of this serious lacuna in the Dying",,,

Declaration, its reliability and creditworthiness is considerably eroded and this piece of evidence as well as the complaint, have rightly not been",,,

taken into consideration by the trial Court."",,,

30. Apex Court in the case of *Mukesh & Anr. v. State of NCT of Delhi & Ors.*, reported in 2016 Cri.L.J 4365, while laying down tests for",,,

ascertaining credibility of dying declaration, has observed and held that, "...Dying declaration is substantial piece of evidence provided it is not",,,

tainted with malice and is not made in unfit mental state. However, there are some well-known tests to ascertain as to whether statement was made",,,

in reference to cause of death of its maker and whether same could be relied upon or not. Court also has to satisfy as to whether deceased was in",,,

a fit mental state to make statement. Court must scrutinize dying declaration carefully and ensure that declaration is not result of tutoring, prompting",,,

or imagination. Once court is satisfied that declaration is true and voluntary, it can base its conviction without any further corroboration. It cannot",,,

be laid down as absolute rule of law that dying declaration cannot form sole basis of conviction unless it is corroborated. Rule requiring",,,

corroboration is merely rule of prudence, that deceased had opportunity to observe and identify assailants and was in a fit state to make",,,

declaration."",,,

31. Now, if we analyze testimonies of prosecution witnesses one by one, it appears that deceased in his dying declaration [Exh. 23] has stated that",,,

at about 8:00 pm when he was in his house at Subhash Nagar, A1 Kanji Jetha and his two brothers, two sisters and cousin son Parshottam Budha",,,

Kharva came to his house. They had a talk with his son Jadav Pama in respect of

some money transaction, and in altercation, his son Jadav Pama",,,
 was given a blow of knife by A1 Kanji Jetha. As per version of this witness, when he completed his dinner and was consuming water, at that time,",,
 A1 Kanji Jetha inflicted a blow of knife in his abdomen and therefore, he fell down. This witness has no idea as to what happened later on. Thus,",,
 as per dying declaration, the incident of assault on the person of deceased as well as his son Jadav Pama [complainant] took place in their house.",,
 32. Now, if we examine deposition of PW-6 Jadav Pama [complainant], as per his version in the complaint, the incident to assault to his father",,,
 occurred in his house and whereas, he was assaulted by a knife blow outside the house, while he returned after having a pan. While as per the",,,
 version dictated in the dying declaration by the deceased, the entire incident occurred in the house at the hands of A1. Thus, there are material",,,
 contradictions in the version of the deceased and injured witness [complainant] in respect of place of incident. Though, PW-7 Gangaben in her",,,
 version at Exh. 31 supports testimony of PW-6 Jadav Pama-injured witness, however, as per version of said Jadav Pama at Exh. 30 given before",,,
 the Court, he states that while he was returning to his house and was nearby, suddenly he was assaulted by someone from behind his back and due",,,
 to which, he immediately become unconscious and fell down on the path. This witness further states of his regaining consciousness after about one-",,,
 and-half hour of his becoming unconscious. This witness has stated in his police statement that he was taken to a Hospital by his sister Gangaben,,,
 Pamabhai. However, in his testimony before the Court, this witness speaks of having seen his father lying on the ground in heavily bleeding",,,
 condition and states about assault by A1 with a knife blow on his abdomen.,,,
 33. From the deposition of this witness and the complaint lodged by him, it appears that the complainant has never seen A1 inflicting blow of knife",,,
 to his father, as the incident of assault by a knife blow on his person occurred outside the house, where he fainted unconscious. Complainant has",,,
 not stated even clearly as to who assaulted him. Thus, there is material contradiction in the deposition of PW-7 Gangaben Pamabhai, who in her",,,
 statement before the Police speaks that her father down on the ground due to pressure on his abdomen, and therefore, he was covered with a bed",,,
 sheet and at that time, accused- Mansukh Jetha Kharva and Kaviben Jetha

Kharva came at the scene of offence. However, she testifies before the",,,
Court that soon after her father sustained injury on his abdomen, she rushed
outside the house raising hue and cry. Deceased himself has not stated",,,
anything in his dying declaration in respect of her presence or shouting, or even
her rushing outside from the house. Thus, there is inconsistencies in",,,
the version of the prosecution witnesses.,,,

34. Admittedly, other prosecution witnesses viz., PW- 8 Velji Pama and PW-9
Chhagan Pamabhai [Exhs. 32 & 33] were not present at the scene",,,
of offence or they having eye witnesses the incident, however, they have stated
in their examination-in-chief that they were informed by the",,,
deceased Jhadav Pama Jiva that A1 Kharva Kanji Jetha had assaulted him by a
knife, while other accused persons caught hold of him. Having",,,
read their version in juxtaposition to each other, it transpires from their cross
examination that they had not stated anything in their statements which",,,
came to be recorded by the police during the course of investigation. Moreover,
there is material omission on the part of these witnesses, and",,,
therefore, their testimonies have rightly been discarded by the trial Court and
therefore, it cannot be relied upon.",,,

35. Similarly, PW 10 Dinesh Velji and PW 11 Kanji Pama, who came to be
examined vide Exh. 34 & 35 respectively are not the eye witnesses to",,,
the incident alleged, since as per their version they came to know about the
incident at a later point of time. Further, it transpires from the record",,,
that panchas have turned hostile and they have not supported the prosecution
case, and therefore, they cannot be relied upon.",,,

36. Discovery panchnama drawn at the instance of A1, discovering a knife from
the heap of sand, in absence of any other reliable evidence",,,
cannot be proved through deposition of Investigating Officer alone, since none of
the panchas have supported the prosecution. And therefore",,,
merely relying upon testimony of Investigating Officer, conviction of the accused
cannot be determined.",,,

37. True, that on some articles viz., shirt, pant, ganji [vest], blood stains were
found, showing blood group ""O"", which as per FSL report at Exh.",,,
48 and Serological Report Exh. 50 would not be sufficient to connect the accused
persons with the crime alleged, when the blood group of",,,
deceased and injured witness was not drawn for analysis.,,,

38. It is pertinent to note that blood group of deceased or injured witness was not ascertained by the prosecution during the course of,,,

investigation, and therefore, it can be said that there is no evidence in respect of blood group found on the articles recovered during the course of",,,

investigation; as referred to above.,,,

39. In the case of Debapriya Pal v. State of West Bengal [Supra], the Apex Court, in para-8 of its decision, has held that, ""..mere matching of the",,,

blood stains on the clothes seized would not lead to a conclusion that it is the appellant [accused] who had committed crime"".",,,

40. It is further held that, ""Even if we presume that the blood on the bed sheet was that of the deceased, the possibility cannot be ruled out that the",,,

same blood group as to the accused appellant thereof. Therefore, mere matching of the blood group on the blood stained clothes, which was even",,,

on the bed sheet, would not lead to the conclusion that it is the appellant who had committed the crime..."".",,,

41. The Apex Court, in the said decision, went on to further observe that, ""...Under Section 27 of the Evidence Act only so much of recovery, as a",,,

result of the disclosure statement, which directly pertains to the commission of crime is relevant. Otherwise, such an evidence is barred under",,,

Section 24 of the Evidence Act.""",,,

42. It has come on record that at the place of incident, number of people had gathered, since in the vicinity, there are other residential units located",,,

nearby, but none of the independent witnesses have come fore, or were examined by the prosecution. Moreover, the prosecution witnesses who",,,

were examined are related or inimical witnesses. Even their testimonies before the trial Court were contrary to each other. When the prosecution,,,

witnesses are related with the deceased, it is difficult for us to believe that all these witnesses have actually seen the occurrence. Further, none of",,,

the prosecution witnesses have stated anything specific about the role played by other accused persons; except A1.,,,

43. Referring again to the testimony of PW-1 Dr. Satish Dinkar Kavle [Exh. 18] who performed post mortem of the deceased Jhadav Pama Jiva,,,

on 23rd March 1993 [ie., one month after the alleged incident], this witness in his Report at Exh. 20 has described the injuries sustained by the",,,

injured in column no. 17 of post mortem Note, which reads thus - ""Cardio

respiratory failure on account of septic peritonitis as a result of the said",,,
stab injury of the abdomen and its complications."""",,,

44. As per opinion of this witness, considering the nature of injury sustained by the deceased, death could be possible due to increase of",,,

septicemia. This witness in his cross examination has admitted that penetrative injury would not be sufficient alone to cause death of an injured. He,,,

also admits that before performing post mortem of the deceased, he had no opportunity to medically examine the injury of this person so as to",,,

opine whether it was simple in nature or otherwise. Further, this witness has opined that by a sharp cutting article or sharp glass, such injury in the",,,

abdomen could occur even by accident. So far as development of septicemia is concerned, this witness has deposed that there are various reasons",,,

of development of septicemia; which includes condition of deceased himself and care taken of. Here, if we peruse the panchnama of the scene of",,,

offence, which is available on record at Exh. 25, it appears that in the house of complainant, there is some luggage found lying on the ground",,,

alongwith pieces of glass scattered around in the area. Now, if we consider the opinion of Dr. Satish Dinakar Kavle [PW-1 : Exh. 18], injury on",,,

the person of deceased was possible by a sharp piece of glass or sharp article and from the panch nama of the scene of offence, we could evince",,,

some pieces of glass found lying on the floor together with other articles, and therefore, accidental injury on the person of injureddeceased cannot",,,

be ruled out.,,,

45. No other contention has been raised by the learned APP appearing on behalf of the appellant-State to dislodge the conclusion arrived at by the,,,

trial Court. For the reasons recorded hereinabove, this Court finds no reason to interfere with an order of acquittal passed by the learned trial",,,

Court acquitting the accused for an offence punishable under Sections 302, 324, 452, 504, 114, 147, 148, 149 of the Indian Penal Code &",,,

Section 135 of the Bombay Police Act and thereby confirms the impugned judgment and order of acquittal.,,,

46. In light of foregoing discussion, we find no substantial reason to interfere with the judgment dated 21st October 1994 passed by the learned",,,

Additional Sessions Judge, Porbandar in Sessions Case No. 37 of 1993. Resultantly, the present Criminal Appeal fails and is, accordingly",,,

dismissed. Bail bonds stand cancelled.,,,