
(2015) 08 GUJ CK 0057
In the Gujarat High Court
Case No : Criminal Appeal No. 642 of 1993

State of Gujarat

APPELLANT

Vs

Mehmadjamil Valimahomad Shaikh and Others

RESPONDENT

Date of Decision : 28-08-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 378
Penal Code, 1860 (IPC) — Section 395, 397

Citation : (2015) 08 GUJ CK 0057

Hon'ble Judges : K.S. Jhaveri, J;G.B. Shah, J

Bench : Division Bench

Advocate : C.M. Shah, APP, for the Appellant

Final Decision : Partly Allowed

Judgement

K.S. Jhaveri, J—The present appeal, under section 378 of the Code of Criminal Procedure, 1973 (for brevity, "the Code") is directed against the judgment and order dated 18/02/1993 passed by the learned Additional Sessions Judge, Ahmedabad (Rural) at Mirzapur in Sessions Case No. 160 of 1991, whereby the respondents - original accused have been acquitted of the charges levelled against them for the offence punishable under Sections 395 and 397 of the Indian Penal Code, 1860 (for brevity, "the IPC").

2. Brief facts of the prosecution case are that on 17/04/1991 in the midnight at about 00:00 hours, the accused No. 1 made to sit the complainant as a passenger in his auto-rickshaw bearing registration No. GQG-1910 from Calico Mill bus-stand, Ahmedabad and thereafter, with the aid and abetment of the other accused, who were sitting in the said rickshaw, they drew the rickshaw in different areas and finally, took the complainant near Vishala Hotel, where, the complainant was threatened with knife and other deadly weapons like sickle/ scythe by the accused and robbed the complainant. The accused injured the complainant besides taking away cash and kind worth Rs. 5,550/-. Accordingly, the accused alleged to have committed the offence punishable under Sections

395 and 397 of the IPC for which, complaint had been lodged against them.

2.1 Pursuant to the complaint, investigation was carried out. After investigation, charge-sheet was filed and as the case was triable by the Court of Sessions, it was committed to the Sessions Court, Ahmedabad (Rural).

2.2 The trial Court framed charge against the accused. The accused pleaded not guilty to the charge and claimed to be tried. Therefore, the prosecution produced oral as well as documentary evidence.

2.3 In order to bring home the charge against the accused, the prosecution has examined as many as 21 witnesses and also produced several documentary evidence.

2.4 At the end of the trial and after recording Further Statements of the accused under Section 313 of the Code and hearing the arguments on behalf of prosecution and the defence, the learned Sessions Judge acquitted the accused of the charges levelled against them by impugned judgment and order.

2.5 Being aggrieved and dissatisfied with the aforesaid judgment and order passed by the Sessions Court, the appellant - State has preferred the present appeal against acquittal.

3. Referring the order dated 19/08/2015, it appears that the respondent No. 1 herein - original accused No. 1 -Mahamadjamil Valimahomad Shaikh has expired. Accordingly, present appeal, stands abated qua him. Further, by the said order, Mr. Manraj A. Barot, learned advocate, was instructed to appear on behalf of the respondent Nos. 2 to 5 herein - original accused Nos. 2 to 5.

4. We have heard Ms. Shah, learned Additional Public Prosecutor, for the appellant - State and Mr. Barot, learned advocate appearing for the respondent Nos. 2 - 5 herein - original accused Nos. 2 to 5.

4.1 Ms. Shah, learned Additional Public Prosecutor for the appellant - State, submitted the learned trial Judge has not properly appreciated the oral as well as the documentary evidence produced on record and has erred in holding that the prosecution has failed to prove the charge against the accused beyond reasonable doubt by leading legal, reliable and impeachable evidence, which is contrary to the evidence available on record. She submitted that though most of the prosecution witnesses have turned hostile however, as per the evidence of complainant - Chandubhai Virjibhai, recorded at exh. 22, he has narrated the complete story of the prosecution case. He has stated on oath that, "... the incident had occurred on 16/04/1991 when I was waiting for the bus at about 11:20 in the night. After having tea, again I was looking for the bus at that time, one rickshaw bearing registration No. GQG-1910 came and stopped near me and the rickshaw driver asked me as to where I wanted to go and accordingly, I replied to have gone to "L" colony and hence, the rickshaw driver assented and asked me to sit in the rickshaw. In the rickshaw, one person was sitting beside the driver, whereas, other three persons were sitting on the rear seat. I asked

him about the fare but the rickshaw driver asked me to sit but since, I insisted to clarify the fare, it was decided to Rs. 3/- and then, I got in, in the rickshaw. When the rickshaw reached near Paldi, one person who was sitting on my left side, touched my back. I identify the accused Nos. 2 and 5, who are present in the Court. Again, somebody touched me and hence, I became conscious. The rickshaw then drove on the way approaching Vejalpur and reached near Shreyas Railway Crossing from where, the rickshaw ought to have taken right turn so as to reach my residence however, the rickshaw driver headed straight to which, I opposed. The accused No. 2 asked the rickshaw driver to drop him first for which, he would be paying Rs. 2/- more and hence, the rickshaw driver proceeded. I, then, afraid, as that road was being opened out of city. The rickshaw proceeded further crossing the octroinaka. Thereafter, since the accused No. 3 asked the rickshaw driver that he wanted to go to Vasna, the rickshaw again came near railway crossing and then, turned on the way to Anjanli cinema and did not drop me at my residence and headed towards Sarkhej octroinaka and hence, my doubt was confirmed. The rickshaw was slowed down and hence, I asked them where did they want to go which was replied to Guptanagar. I was unaware about Guptanagar. I, once, decided to shout but then, I didn't. When rickshaw crossed the octroinaka, I found some people, but I could not avail help. Then, one person asked the rickshaw driver to take the rickshaw on the left side and hence, the rickshaw driver took the rickshaw towards Vishala Hotel and hence, I inferred some conspiracy and waited for to reach near the gates of Vishala Hotel so as to take help of somebody but no body was found there and hence, I asked the rickshaw driver to stop the rickshaw and take his rent as he wanted to get off the rickshaw but the rickshaw driver did not stop the rickshaw. After the rickshaw proceeded 40-50" ahead, again, I asked him to stop the rickshaw, but he did not stop. Then, the accused Nos. 5 and 2 kept knives near my stomach and the accused No. 3 kept the weapon like sickle/ scythe on my neck. I am being shown muddamal article No. 11 - sickle. I could not say as to whether the accused No. 3 had used that type of weapon only. I am also being shown muddamal knives, article Nos. 12 and 13 however, I could not say that these are the same knives which were possessed by the accused. The accused No. 2 took away my wrist watch. I also gave the money to the accused No. 2 out of fear. I am being shown muddamal article No. 4 - watch, which I identify. I had also worn golden coloured diamond studded imitation ring of muddamal article No. 5, which I identify. I had given about Rs. 60 to 70/- to the accused No. 2 which I had kept in the pocket of my shirt. Then, on again demanding by the accused, I gave them an amount of approx Rs. 700/- in piecemeal so as to pass the time and thereby, get the help. Then, the accused No. 2 demanded the keys of the suitcase but since, it was not locked, I informed him accordingly. The suitcase was opened, however, since, there was nothing worth in it, it was closed. Again the accused No. 4, who was sitting beside the rickshaw driver, demanded the money giving fist blows and slaps. The accused No. 3 then, checked by hands near my undergarment, where he found something and on being asked, I replied to have money in the sum of Rs. 4,500/- and

hence, the accused No. 4 who was sitting in the front portion, gave me fist blows. At that time, the rickshaw was being driven slowly. My mouth was closed with hands and there was a little commutation. The trio who sat beside me, tried to get out the money from the undergarment but since they could not, they, cut my undergarment and snatched away the money. I am being shown the muddamal article No. 2 - undergarment, which I identify. I, out of fear, caught hold the knife with my hands and accordingly, sustained injuries and was paining. The rickshaw was being driven slowly, my suitcase was thrown out; its handle was detached due to scuffle and then, I was also thrown out of the rickshaw and then, the rickshaw was driven away. I ran after the rickshaw and noted the number of the same, which was GQG-1910. I tried to get the fountain pen, however, as the same was dropped in the scuffle, I remember the same by reiteration. I, then, went to the place where the suitcase was lying and found that one lock of the suitcase was locked whereas, the other lock was open. Then, I inferred from the lights that some vehicle was approaching and hence, I stayed in the middle of the road so as to compel the truck driver to stop the truck; the truck driver stopped the truck and firstly, he abused me, however, after hearing my story, he gave me lift in his truck and drove away the truck and within awhile, we found the rickshaw and when we reached nearer, I read the number and confirmed the rickshaw and informed the truck driver accordingly and sat and said them, we would find some people ahead and would catch the accused there. On proceeding further, we found a big octroinaka and before the accused could reach the octroinaka, we overtook the rickshaw and I get out of the running truck where, one person in khakhi coloured dress to whom I believed to be the policeman, informed the fact of robbery committed to me and the said rickshaw is approaching the octroinaka and hence, two persons in khakhi dress, who were the security persons from the municipality, came out on the road and after the long queue of the trucks, they found the rickshaw, which was stopped, in which, there was only one person - driver of the rickshaw, who was the accused No. 1, who is present in the Court. The accused No. 1 was frightened and started shouting of having been robbed. The rickshaw made to stop however, the driver did not get off. Then he turned off the rickshaw and take it to the wayside. I again noted the number of the rickshaw by getting the paper from the suitcase. Name of accused No. 1 was asked and he replied Mahamadjamil and resident of Baherampura, Danilimda. He made to sit on the bench. He was complaining about having been beaten hence, we checked as to whether he had sustained any injuries, but no injury marks were found on his body. I found ring and the chain worn by him, which were of imitation. On rolling up the sleeve of the shirt, wrist watch also found to be worn by him. On checking the pocket of the shirt, one purse was found in which there found about Rs. 25/- to 30/- and some papers. He was not freed and we waited for the police to come and after passage of about 30 minutes, a police van had come and passed away from there speedily but we could not see it. Thereafter, two persons sat flanked by the accused No. 1 and I went to telephone the police and thereafter, after passage of much time, the police reached and we got the help and informed about the

incident to the Narol Police and by jeep, we headed towards Vishala Hotel and I showed the police the place of incident. Thereafter, the jeep reached the main place i.e. the octroinaka, where, the police interrogated the employees of the octroinaka and thereafter, went to the Vejalpur Police Station, where, before the officer concerned, I narrated the incident. I was also inquired and the accused No. 1 came to be arrested. Thereafter, Shri Desai, Superintendent of Police, talked on telephone and then he came to the Police Station within 10 minutes and interrogated the accused No. 1. Again, I made to talk primarily with Sing Saheb on telephone and he inquired accordingly and after about 25 minutes he also reached. Before that, I had informed on telephone my elder brother about the incident and asked him to come to the Police Station with my father. Thereafter, my younger brother, elder brother and my father came to Vejalpur Police Station by scooter and thereafter, Sing Saheb had come. After much interrogation, the accused No. 1 gave the names and addresses of the other accused. Since, I had sustained injuries on my fingers of the hand and on stomach and the neck, I was sent for treatment and Sing Saheb had gone to arrest the other accused. I returned after about one and half hour after taking treatment. At that time, it was 5:15 a.m. Thereafter, police van had come within awhile in which, I saw the accused No. 2. It was informed to have found the ring and the watch but not the money. I was taken to the place of incident for preparing the panchnama and I went accordingly. I do not remember the names and addresses of the other accused as had been furnished by the accused No. 1. My wrist watch was worth about Rs. 400/-. I am being shown the complaint at mark 13/1 in which, my signature is there, which is exhibited as exh. 23...". Thus, the complainant has narrated the complete story as per the complaint and thereby, has completely supported the case of the prosecution. Ms. Shah, learned Additional Public Prosecutor, also took us to the panchnama and other documentary evidence. She further took us to the evidence of independent witness Dilavarsinh Mangalsinh Zala, recorded at exh. 33, who was a Security Guard, who has supported the version of the complaint and though, he was declared hostile, he has supported the factum of complaint that the complainant was dropped at the octroinaka by a truck and informed him that he had been looted and requested to stop the following rickshaw. Father of the complainant - Virjibhai Kalabhai, was also examined at exh. 34, who has also supported the case of the prosecution. Since, he was not the eye-witness, we are not discussing his evidence in detail. Executive Magistrate - Pravinkumar Parsottamdas Mevada, who had conducted the Test Identification Parade, who is examined at exh. 36, has also supported the case of the prosecution. The complainant has identified all the accused and thereby, it is submitted that the prosecution has successfully proved the involvement of all the accused in the commission of the alleged offence. The prosecution has also examined one of the independent and crucial witnesses namely Nandlal Kanaiyalal Ramchandani at exh. 44 who was serving as peon at the said octroinaka, who was present at the octroinaka when the complainant reached the octroinaka, and has completely supported the case of the prosecution. The brother of the complainant -

Vasantkumar Virjibhai, who is examined at exh. 45, has also supported the case of the prosecution and stated that on receiving the call from the complainant from the Police Station, they rushed to the Police Station. Another brother of the complainant namely Kiritbhai Virjibhai Patel was also examined at exh. 48, who has also supported the case of the prosecution. The other crucial witness is PW-21 - Edvin Anetsing, examined at exh. 56, who had prepared the panchnama at exh. 27 on 17/04/1991 and has supported the case of the prosecution. Making above submissions, she requested to allow the present appeals.

5. Whereas, Mr. Barot, learned advocate for the accused Nos. 2 to 5, supported the impugned judgment and order whereby, the accused were acquitted of the charges levelled against them and thereby, opposed the present appeal. He submitted that the learned trial Judge has discussed each and every aspect of the matter minutely and has left no stone unturned and since plausible reasons have been given for the acquittal, no interference is called for by this Court. Moreover, he submitted that most of the witnesses have turned hostile and in the Further Statements, recorded under Section 313 of the Code, the accused have specifically denied the offence alleged to have committed by them and the same requires to be accepted. Moreover, there is no eye-witnesses to the incident in question save and except the complainant. Further, he submitted that the doctor has not been examined so as to prove the injuries sustained by the complainant and in that circumstance, it is not a case for reversal of the acquittal into conviction. Making above submissions, he requested to dismiss the present appeal.

6. We have heard the learned advocates for the respective parties. We have also examined the matter carefully and gone through the evidence on record. We have appreciated, re-appreciated and re-evaluated the evidence on the touchstone of the latest decisions of the Hon'ble Apex Court. Before proceeding further, it is relevant to reproduce Section 397 of the IPC hence, the same is extracted as under:

"397. Robbery or dacoity, with attempt to cause death or grievous hurt:

If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, so attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years."

6.1 We have taken into consideration the evidence of the complainant which was supported by his father and his brothers and the independent witness i.e. employee of octroinaka, as aforesaid. Looking to the topology of Ahmedabad City, in our opinion, the incident which has been narrated by the complainant, is absolutely probable whereas, the version in the Further Statement by the accused No. 1, recorded under Section 313 of the Code, is highly improbable. In that view of the matter, looking to the evidence of the complainant, the Investigating Officer and the father and the brothers of the complainant as well

as the employee of the octroinaka, we believe that the prosecution has successfully proved the case beyond reasonable doubt against the present accused for the offence punishable under Section 397 of the IPC. Moreover, looking to the panchnama and the articles which have been recovered pursuant to the discovery and recovery panchnama at the instance of the accused, it clearly proves the case against the present accused. In that view of the matter, when the prosecution has successfully proved the case against the present respondents - original accused for the offence punishable under Section 397 of the IPC, we are of the considered opinion that this is a fit case where the acquittal is required to be converted into conviction for the said offence.

7. In view of the aforesaid discussion, the present appeal succeeds in part. The impugned judgment and order dated 18/02/1993 passed by the learned Additional Sessions Judge, Ahmedabad (Rural) in Sessions Case No. 160 of 1991, is hereby quashed and set aside and the respondents - original accused are held guilty for the offence punishable under Section 397 of the IPC. The appeal is abated qua respondent No. 1 - original accused No. 1 since he has expired. Accordingly, the respondent Nos. 2 to 5 -original accused Nos. 2 to 5 are directed to undergo rigorous imprisonment for a period of 07 (seven) years and further directed to surrender themselves before the concerned jail authority within a period of 08 (eight) weeks from today. The accused may be given set off for the period they have already undergone. Their bail bonds shall stand cancelled. Registry to return the record and proceedings to the trial Court forthwith.