

(2012) 09 GUJ CK 0110
In the Gujarat High Court
Case No : Criminal Appeal No. 2211 of 2004

State of Gujarat

APPELLANT

Vs

Suraj alias Shant Pannabhai Solanki and Another

RESPONDENT

Date of Decision : 21-09-2012

Acts Referred:

Citation : (2013) CriLJ 356 : (2013) 1 GLR 735

Hon'ble Judges : Paresh Upadhyay, J;A.L. Dave, J

Bench : Division Bench

Advocate : Neeraj Soni, app, for the Appellant; Nitin M. Amin, for the Respondent

Final Decision : Dismissed

Judgement

1. These two appeals arise out of a judgment and order rendered by City Sessions Court, Ahmedabad, in Sessions Case No. 266 of 2003, on August 20, 2004. The appellant Hashmukhbhai alias Shethi Shankarbhai Solanki, appellant in Criminal Appeal No. 250 of 2005, came to be arraigned as an accused No. 1 before the trial court and the respondent in Criminal Appeal No. 2211 of 2004 viz. Suraj alias Shant Pannabhai Solanki came to be arraigned as accused No. 2 before the trial court. They were alleged to have committed murder of Chimanbhai Narsinhbhai on November 25, 2001 at about 18:30 hours on G. D. Road, Saijpur, Vijay Kamdar Society, where it is alleged that Suraj alias Shant Pannabhai Solanki caught hold of the deceased and Hasmukh alias Shethi Solanki inflicted a knife blow on account of past animosity. An FIR was lodged by brother of the deceased Mahendrabhai with Naroda police station on the basis of which offence was registered and investigated and ultimately charge-sheet was filed in the court of Metropolitan Magistrate, Ahmedabad, who in turn, committed the case to the Court of Session and Sessions Case No. 266 of 2003 came to be registered. Charge was framed against both the accused at Exh. 3 for the said offences to which they pleaded not guilty and came to be tried. The trial court, after considering the evidence led by the prosecution, acquitted Suraj alias Shant

Pannabhai Solanki-original accused No. 2 and respondent in Criminal Appeal No. 2211 of 2004 whereas convicted original accused No. 1 Hashmukhbhai alias Shethi Shankarbhai Solanki, the appellant in Criminal Appeal No. 250 of 2005.

2. Since these two appeals arise out of same judgment and order, they are heard together and are disposed of by this common judgment. The appellant and the respondent being the accused in the Sessions Court, they are referred to by their original status and number of the accused for the sake of convenience.

3. Criminal Appeal No. 2211 of 2004 is preferred by the State of Gujarat against acquittal of accused No. 2 whereas Criminal Appeal No. 250 of 2005 is preferred by the original accused No. 1 against his conviction.

4. Learned advocate Mr. Dholakia, appearing for Mr. Amin, submitted that he appears for both the accused persons in these appeals. He submitted that the prosecution has projected five witnesses as eye-witnesses to the incident, however, out of five only one has supported the prosecution case. He is PW: 1 viz. Mahendrabhai Narsinhbhai who happens to be the brother of the victim. The remaining four witnesses have not supported the prosecution case. The whole case depends on testimony of this witness. Mr. Dholakia submitted that the entire case depends on sole testimony of a witness, the evidence of such witness must be of sterling quality and should be closely scrutinized. In the instant case according to Mr. Dholakia, the evidence of witness Mahendrabhai suffers from a number of defects which would raise doubt on his claim of being an eye-witness. Mr. Dholakia submitted that conduct of this witness is not natural. Though he claimed that he was at a distance of about 25 feet when his brother was attacked. He takes no step to rescue his brother. Even after the attack when the victim starts running towards home, this witness does not try to help him or to lend support to him. He reaches home much after the victim reaches home. Mr. Dholakia submitted that therefore the conduct of this witness is not natural.

4.1 Apart from the unnatural conduct, the testimony of this witness suffers from the defect of being falsified by contemporaneous circumstances. One of the circumstances relating to this witness is the incident occurred near water tank which is at a distance of about 50 feet from the house of the victim and the witness. The panchnama of place of offence (Exh. 13) if perused, shows that there was no blood at the said place of incident. Mr. Dholakia submitted that this witness has asserted in his cross-examination that there was bleeding at the place of incident.

4.2 Commenting further, Mr. Dholakia submitted that this witness says that after reaching home, his brother was made to lie in the "Osri" where he bled profusely. Thereafter, he was taken to hospital in auto-rickshaw by this witness along with two of his friends and according to this witness the deceased was made to lie in their lap. If the deceased was bleeding profusely either his or his friends", who were travelling in the rickshaw, their clothes ought to have been stained with blood but no such evidence is coming forth. Even evidence of

Narsinhbhai (Exh. 24) would show that though he claims that the deceased came running and embraced him and that he was bleeding profusely, the clothes of Narsinhbhai are not stained with blood at all.

5. Mr. Dholakia submitted therefore that the contemporaneous material would show that there was no bleeding at the place where an incident is alleged to have occurred, the clothes of so-called eye-witnesses are not stained with the blood though they ought to have been stained with the blood of victim if what they say was truthful, therefore, the evidence of these witnesses is falsified by contemporaneous circumstances. If that is so, testimony of sole eye-witness becomes doubtful which aspect has not been given its due weightage by the trial court although the trial court has observed that evidence of these witnesses is not reliable. Mr. Dholakia submitted that the trial court's decision was influenced more by the fact that Vardhi given from the hospital supports the say of the eyewitness but that in itself cannot be a corroboration to the version of this witness because that is also given by this very witness. Mr. Dholakia therefore submitted that the judgment may be set aside and the accused No. 1 be given benefit of doubt.

6. So far as Criminal Appeal No. 2211 of 2004 against accused No. 2 is concerned, Mr. Dholakia submitted that involvement of accused No. 2 had never emerged either in the detailed First Information Report or in the Yadi or from other statements. It is a clear case of false implication. It is only Mahendrabhai, who, in his evidence, states about involvement of A2 and therefore the trial court was justified in giving benefit of doubt to the accused No. 2. In fact, the trial Court ought to have extended that benefit to A1 because the evidence is common. Mr. Dholakia therefore prayed that State appeal may be dismissed.

7. Learned APP submitted that PW: 1 Mahendrabhai Narsinhbhai is the brother of the victim. He was at the milk shop at a distance of about 25 feet. Only because he did not react in a particular manner, his deposition cannot be discarded. The observation of the trial court that the evidence of Mahendrabhai is not trustworthy or doubtful may be an error on the part of the trial court but the conclusion arrived at is correct. Blood is found at the Osri. The deceased started running towards home after the assault while keeping his hand on the wound and therefore there may not have been blood at the place of incident. That in itself need not render evidence of Mahendrabhai doubtful. The trial court therefore was justified in convicting A1. The trial court committed an error in acquitting A2 when it has convicted A1 on same set of evidence. According to learned APP, therefore, the appeal by the State may be allowed and the appeal against the conviction may be dismissed.

8. We have taken into consideration the rival submissions and have examined the Record and Proceedings in the context and in the context thereof.

9. Having examined the Record and Proceedings, we find that the trial court was justified in observing that evidence of PW: 1 does not inspire confidence. This

witness claims to be eye-witness, he is brother of the victim, apart from his unnatural conduct what emerges is that he is not telling the whole truth before the Court. He states that incident occurred near water tank which is about 50 feet from his house and he was standing at distance of about 25 feet from that tank near a milk-shop. When attack takes place, he does not attempt to rescue his brother nor does he try to render support to his brother. When his brother, after that act, escapes towards home, he reaches home leisurely after his brother reaches home in an injured condition. Apart from this conduct, what makes his claim about being eye-witness doubtful is the fact that there was no blood found at the place of incident i.e. near the water tank. A lame excuse was given by learned APP by stating that panchnama was drawn after about 6 to 7 hours from the incident and the area being populated, the stains of blood may not have remained there due to pedestrian movement. This argument does not hold good ground because there is no evidence to the effect that there was lot of pedestrian movement at the place after the incident one, and secondly when the place was examined by FSL expert in a scientific way (FSL report at Exh. 21) they could not find any trace of blood at the place of incident. We can take notice of the fact that a road is normally porous and with scientific method certainly the traces of blood would have been found. Against this, blood is collected from Osri where the deceased was made to sleep and samples of blood were collected from the tiles where there was blood.

10. The second aspect which requires serious consideration is that according to this witness the deceased was bleeding profusely and that aspect is established by panchnama where blood is found on the Osri. Thereafter, the deceased was taken to hospital in an auto rickshaw by PW: 1 along with two of his friends and it is not the case of the prosecution that clothes of anyone of them was stained with blood of deceased, no evidence is coming to that effect. The evidence of this witness would also show that the three friends including the witness sat in autorickshaw and the deceased was made to sleep in their lap, therefore, clothes of any one of them ought to have been stained with blood looking to the volume of blood that the deceased was bleeding with. This also throws doubt about presence of this witness at the time of occurrence or soon thereafter.

11. Evidence of Narsinhbhai Kalabhai Rathod (PW:7, Exh. 24) also does not inspire confidence. He claims that deceased came rushing in a bleeding condition and embraced him, however, his clothes were not stained with blood. This is again doubtful.

12. There are several other aspects which render the prosecution case doubtful. The first is that, admittedly the area where the incident is occurred is thickly populated but no independent witness has supported the prosecution case. The incident has occurred at about 6-30 in the evening and the prosecution could have easily examined some independent witnesses.

12.1 The case of the prosecution is that A2 caught hold of the deceased and A1 inflicted knife blow. The injuries, as emerging from post-mortem notes (Exh. 19),

are four in numbers as (i) stab wound on middle and left chest between third and fourth inter-costal space margins are sharply cut and curved, (ii) vertical contusion abrasion on back of trunk on left side just later to L2 vertebra, (iii) abrasion on lateral of left knee, and (iv) abrasion on dorsum of right hand on medial aspect just above little finger. The internal examination, as emerged from PM notes (Exh. 19), would show that just beneath injury No. 1, pericardium, Right atrium and upper border of Right Vertical and Right lower lobe of Right lung had suffered injuries. The cause of death was shock and haemorrhage due to injury to Heart and lung. With these injuries, if the injured person embraces someone or if he is taken in lap, the clothes of such persons can be expected to be stained with blood, unlike the prosecution case. Similarly it can reasonably be expected that clothes of assailants would also be stained with blood, but we find from FSL report (Exh. 37A) that neither trouser nor T-shirt worn by A1 was stained with blood.

13. As recorded earlier, the entire prosecution case hangs on sole testimony of PW: 1 and other circumstances. As discussed earlier, other circumstances do not support the version of PW: 1. The moment evidence of PW: 1 falls, there is hardly anything left to connect the accused with the offence. It has come in evidence that there was animosity between the accused side and the victim side and, therefore, possibility of false implication cannot be ruled out. In our view, the prosecution cannot be said to have proved the case against A1 beyond reasonable doubt. The trial court erred, when it doubted the evidence of witnesses and also recorded the conviction. Such conviction cannot be sustained. Criminal Appeal No. 250 of 2005 by accused No. 1 therefore merits acceptance. Same is allowed. Conviction of accused No. 1 recorded by the learned Additional Sessions Judge, Court No. 10, Ahmedabad is set aside. He is acquitted of all the charges levelled against him. He be set at liberty if not required in any other case. Fine if paid by him, be refunded to him. For the foregoing reasons, the case against A2 would be still weaker and trial court was justified in recording his acquittal. The appeal filed by the State against the acquittal of A2 therefore must fail and stands dismissed.