

(2015) 06 GUJ CK 0028

In the Gujarat High Court

Case No : Criminal Appeal Nos. 1323 and 1603 of 2010

State of Gujarat

APPELLANT

Vs

Thakor Dashrathji Somaji and Others

RESPONDENT

Date of Decision : 11-06-2015

Acts Referred:

Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 313, 374, 378(1)(3)
Penal Code, 1860 (IPC) — Section 114, 147, 148, 149, 307

Citation : (2015) 06 GUJ CK 0028

Hon'ble Judges : Anant S. Dave, J;G.B. Shah, J

Bench : Division Bench

Advocate : J.K. Shah, APP, for the Appellant; Bhavin S. Raiyani, Advocates for the Respondent

Judgement

G.B. Shah, J.

1. As both these appeals arise from the same judgment and order, they have been heard together and are being decided by this common judgment.

2. Criminal Appeal No. 1603 of 2010 has been filed by the State under Section 378(1)(3) of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code" for Short) against the judgment and order of acquittal dated 9-7-2010 passed by the learned Addl. Sessions Judge and Presiding Officer, 3rd Fast Track Court, Mehsana, Camp Visnagar in Sessions Case No. 169 of 2008 whereby original accused Nos. 4, 5 and 6 respectively were acquitted of the charges levelled against them.

3. Whereas Criminal Appeal No. 1323 of 2010 has been filed by original accused Nos. 1, 2 and 3 under Section 374 of the Code against the same judgment and order of conviction dated 9-7-2010 whereby the original accused Nos. 1, 2 and 3 were convicted for the offence punishable under Sections 364 and 307 read with section 114 of the Indian Penal Code, 1908 ((hereinafter referred to as "the IPC" for Short) and sentenced to undergo rigorous imprisonment for ten years with

fine of Rs. 10,000/- each and, in default, to undergo further period of six months of imprisonment.

4. The case of the prosecution in brief is that on 22-7-2008 during night hours, Pinakin @ Paliyo Chandulal Acharya, son of the complainant, was abducted by the accused in a Scorpio Car bearing registration No. GJ-7-AG-3894 and took to an isolated place with an intention to kill him. The son of the complainant sustained kick, fist blows and knife blows causing fractures. Hence, a complaint was lodged before Visnagar Police Station for the offences punishable under Sections 147, 148, 149, 307 and 364 of the IPC and Section 135 of Bombay Police Act by the complainant against the accused persons and accordingly investigation started. Upon conclusion of investigation, since a prima facie case was found against the original accused, a charge sheet was filed against the original accused in the Court.

4.1 As the offence against the accused was triable by the Court of Sessions, the learned Magistrate, Visnagar, committed the case to the Court of Sessions. The learned Sessions Judge framed charge against the accused. The charge was read over and explained to the accused. The accused denied all the charges and pleaded to be tried. Hence, the prosecution was asked to prove the guilt against the accused.

4.2 To prove the guilt against the accused, prosecution examined 28 witnesses and has produced and relied upon several documentary evidence.

4.3 On submission of closing pursis by the prosecution, learned Addl. Sessions Judge recorded further statements of the accused under Sec.313 of the Code qua incriminating evidence. Upon affording opportunity of hearing to the learned advocates appearing for the respective parties, learned Addl. Sessions Judge and Presiding Officer, 3rd Fast Track Court, Mehsana, Camp Visnagar, delivered the impugned judgment convicting and sentencing original accused Nos. 1, 2 and 3 and acquitting original accused Nos. 4, 5 and 6 as aforesaid in the earlier part of this judgment giving rise to prefer Criminal Appeal No. 1603 of 2012 by the State against the acquittal of original accused Nos. 4, 5 and 6 and Criminal Appeal No. 1323 of 2010 by the original accused Nos. 1, 2 and 3 against their conviction and sentence.

5. Heard learned advocates, Mr. A.M. Dagli for the original accused Nos. 1, 2 and 3, Mr. Bhavin S. Raiyani for the original accused Nos. 4, 5 and 6 and learned APP, Mr. J.K. Shah for the State of Gujarat in both the appeals.

6. Mr. A.M. Dagli, learned advocate for the original accused Nos. 1, 2 and 3, submitted that the impugned judgment and order of conviction and sentence is contrary to law and evidence on record. He further submitted that the learned Judge committed a grave error in not holding that there were material contradictions in the evidence of injured witness Pinakinbhai Chandulal Acharya, P.W. No. 6, Exh.38 and hence, his evidence does not inspire confidence so far as accused Nos. 1, 2 and 3 are concerned. He further submitted that the learned

Judge further erred in not appreciating the evidence of Vishnubhai Somabhai Patel, P.W. No. 8, Exh.41, Vipulkumar Amrutlal Patel, P.W. No. 22, Exh.81, Ashokkumar Chandulal Acharya, P.W. No. 7, Exh.40 and Chandulal Dayashankar Acharya, P.W. No. 4, Exh.32. He also submitted that the learned Judge ought to have held that there were material contradictions in the evidence of Rameshkumar Fatandas Lavana, P.W. No. 10, Exh.43 and Bhaveshbhai Jayantibhai, P.W. No. 21, Exh.80. He further submitted that no independent witness has been examined by the prosecution to prove the case against the accused beyond reasonable doubt. He further submitted that the learned Judge has acquitted original accused Nos. 4, 5 and 6 by giving benefit of doubt but benefit of doubt was not given to accused Nos. 1, 2 and 3 though the prosecution could not prove the case against the original accused Nos. 1, 2 and 3 by examining any independent witness. It is, therefore, prayed that original accused Nos. 1, 2 and 3 may be acquitted by quashing and setting aside the impugned judgment and order.

7. Learned APP, Mr. J.K. Shah, however, submitted that the judgment and order of acquittal qua original accused Nos. 4, 5 and 6 is contrary to law and evidence on record. He drew attention of this Court on the impugned judgment and order dated 9-7-2010 and submitted that the learned trial Judge has not properly appreciated oral as well as documentary evidence while acquitting the original accused Nos. 4, 5 and 6. The learned trial Court ought to have relied on the evidence of the only injured witness, Pinakinbhai Chandulal Acharya, Exh.38, as his evidence attaches highest evidentiary value and it is through the evidence of this witness that the role and presence of the accused are established and hence, his evidence ought to have been corroborated with the evidence of complainant and other witnesses. The certificate issued by Medical Officer, who treated the victim, has not been taken into consideration by the learned trial Judge and hence, the gravity of injuries sustained by the injured was not considered by the learned Judge which has resulted into miscarriage of justice. Further, P.W. No. 4, Chandulal Dayashankar Acharya, Ex.32, has also supported the case of prosecution, however, his evidence has also not been properly appreciated by the learned Judge. He further submitted that the panch witness has also supported the prosecution case. However, the learned Judge has not considered the evidence of all these and other witnesses supporting the prosecution case and thereby accused Nos. 4, 5 and 6 were acquitted by the learned Judge. He, therefore, prayed that impugned judgment and order of acquittal of respondent Nos. 4, 5 and 6 require to be quashed and set aside and they shall be convicted and sentenced.

8. Mr. Bhavin S. Raiyani, learned advocate for original accused Nos. 4, 5 and 6, however, submitted that the trial Judge has rightly appreciated the evidence forthcoming on record and the reasons recorded for recording a finding of acquittal are reasonable and justifiable. He further submitted that there are glaring and major contradictions and material improvements without any explanation in the deposition of the prosecution witnesses and therefore, original

accused Nos. 4, 5 and 6 were rightly acquitted by the trial Judge. He further submitted that Criminal Appeal No. 1323 of 2010 being an appeal against the order of acquittal of original accused Nos. 4, 5 and 6, the judgment and order delivered by the trial Court deserves to be upheld as proper, as plausible reasons for acquittal have been recorded. Eventually, he submitted that Criminal Appeal No. 1323 of 2010 may be dismissed.

9. We have considered the above referred rival submissions made by the learned advocates for the parties and in light of the same, we have also perused the record and proceedings related to the case on hand including the impugned judgment and order passed by the learned trial Judge.

10. On going through the impugned judgment, it appears that the learned trial Judge in paragraph No. 13 of the impugned judgment and order has specifically observed that in the present case, there is no case against original accused Nos. 4 to 6 as it has been categorically stated by the complainant, P.W. No. 4, Chandulal Dayashankar Acharya in his deposition at Ex.32 that both the friends of Pinakin have informed him that it is the original accused Nos. 1 to 3 namely, Badaji Manaji, Vikramji Badaji and Ashokji Badaji respectively, who kidnapped Pinakin in Scorpio car. It was also stated by the complainant that initially names of accused Nos. 4 to 6 were not disclosed.

11. It appears from the deposition of complainant that the incident of kidnapping Pinakin in Scorpio car took place on 22-7-2008 at about 11.30 p.m. when three friends of injured Pinakin namely, Vishnubhai Somabhai Patel, Vipulbhai Amrutlal Patel and Bhaveshbhai Jayantibhai Patel were sitting on Shravan Sheri and on the next day morning at 6 "O clock, Pinakin was found on the road near Parul Gas Agency in seriously injured condition. The incident was reported by Pinakin to his friend Prakash Modi, three friends of Pinakin and his father-Chandulal Dayashankar Acharya, the complainant herein. It was also stated in the complaint that two friends of Pinakin namely, Vipulkumar and Vishnubhai came and informed him that accused No. 1-Badaji Manaji, his son-accused No. 2-Vikramji Badaji and Thakor Ashokji Badaji, accused No. 3 armed with sword, pipe and hokey stick got down from Silver Scorpio car and kidnapped Pinakin with an intention to kill him.

12. Now evidence of three witnesses, who are friends of injured witness is required to be seen. Mr. Vishnubhai, who has been examined at Exh.41 and Mr. Bhavesh Jayantilal, who has been examined at Exh.80 have deposed that six persons got out of the Scorpio. Mr. Vipulkumar, who has been examined at Exh.81 has deposed that although names of six persons were given to father of Pinakin, names of only three persons were mentioned in the complaint and rest of the persons were not included in the complaint by father of Pinakin.

13. Though the incident took place on 22-7-2008 during night hours, complaint was filed on 23-7-2008 at 12.00 noon. When Pinakin was left on the road by the assailants in injured condition, the first person to be informed by Pinakin from his

mobile phone was Prakash Modi and then to 108 Ambulance. Prakash Modi and one Jayantibhai Shyamalbhai Chaudhary of 108 Ambulance do not state that they were informed by Pinakin about six persons having assaulted on Pinakin. Pinakin is not giving names of six persons even to the Medical Officer of Mehsana Civil Hospital from where Pinakin was treated at 6.50 a.m. Further, as per the mobile phone record, the mobile phone from which calls were made to Prakash Modi and 108 Ambulance also does not indicate any such calls having made. In view of the above, the learned trial Judge came to the conclusion that original accused Nos. 1, 2 and 3 are the only assailants and not the original accused Nos. 4, 5 and 6 as no role was attributed to any of the original accused Nos. 4, 5 and 6 either of kidnapping or any other act in the evidence of any of the witnesses and held that since the case against the accused Nos. 4, 5 and 6 was not proved by the prosecution beyond reasonable doubt, they were acquitted by giving benefit of doubt. We are, therefore, of the opinion that as names of accused Nos. 4, 5 and 6 were not named initially by Vipul Exh.81 and Vishnu Exh.41 in the complaint and as no other evidence is forthcoming on the record about any role having played by these accused persons in the evidence of any of the witnesses, original accused Nos. 4, 5 and 6 were rightly acquitted by the learned trial Judge and we are not interfering with the said findings as no illegality, irregularity or perversity has been noticed by us in the same.

14. Now it has to be seen from the oral as well as from the documentary evidence and the impugned judgment whether the conclusions arrived at and findings recorded by the trial Court as far as the conviction and sentence of original accused No. 1-Thakor Badaji Manaji, No. 2-Thakor Vikramji Badaji and No. 3-Thakor Ashokji Badaji are just, legal and proper or not.

15. It is established from the evidence of injured witness-Pinakin and his three friends that on the date of incident, Pinakin was kidnapped on 22-7-2008 at 11.30 p.m. from Shravan Sheri in Scorpio car. However, from the evidence of these witnesses, it cannot be established that Pinakin was kidnapped with an intention to kill him. In this regard, gravity of injuries sustained by the injured witness is required to be considered.

16. It appears from the evidence of Medical Officer, Mahendrabhai Limbachia at Exh.23 that there were four injuries found on the injured Pinakin out of which, injury Nos. 1 and 2 were possible by hockey stick while injury Nos. 3 and 4 were possible if a person is forcefully dragged on the ground. Dr. Bhairaviben Pandey in her evidence at Exh.26 has deposed that there were stab injuries on left side chest and injuries on two legs with hockey stick. As per the evidence of Dr. Bhaktibhai Prajapati at Exh.29, injured Pinakin was brought to Mehsana General Hospital from Vadnagar Hospital and she noticed six injuries on the injured and an injury certificate Exh.30 was issued from the said hospital.

17. It appears from the medical evidence of Dr. Mahendrabhai Limbachiya, Dr. Bhairaviben Pandey and Dr. Bhaktibhai Prajapati and the injury certificates that the injuries sustained by the injured Pinakin were serious in nature to cause

death in the ordinary course and considering the evidence of three doctors and the medical certificates, it was held by the learned trial Judge that the intention on the part of original accused Nos. 1, 2 and 3 can be implied from the injuries received by the injured.

18. In this case, the only eye witness is victim himself, who was injured i.e. P.W. No. 6, Pinakinbhai Chandulal Acharya, Exh.38. Complainant, P.W. No. 4, Chandulal Dayashankar Acharya, Exh.32, is the father of the victim-eye witness and who has not seen the incident and hence, his evidence does not carry much weight when comparing with the evidence of injured eye witness, Mr. Pinakinbhai Chandulal Acharya. We, therefore, put much force on the evidence of injured witness-Pinakinbhai Chandulal Acharya.

19. It appears from the evidence, more particularly of injured witness Pinakin, that the serious injuries on the chest i.e. on the vital part of his body were inflicted by Vikramji Badaji Thakor-original accused No. 2. Said injuries were possible by knife and were sufficient to cause death of the person in the ordinary course. His evidence is found to be natural, trustworthy, credible and inspiring confidence. He narrated the incident in the manner in which it happened and nothing is coming out from his cross examination so as to create any doubt about his testimony. It also appears from the evidence that accused No. 3-Thakor Ashokji Badaji was the driver riding Scorpio car. Accused No. 1-Thakor Badaji Manaji also does not appear to have played any role in inflicting injuries on the injured Pinakinbhai.

20. It is pertinent to note that motive in the commission of offence is previous enmity immediately before the incident. It appears that a day prior to happening of the incident, an FIR was lodged by a friend of Pinakin namely, Rameshkumar Fatandas Lavana against original accused Nos. 1, 2 and 3 on 21-7-2014 which is at Exh.95. The motive behind the incident in question has also been established by the prosecution beyond reasonable doubt.

21. Thus, from the evidence of complainant, injured witness and other evidence, it appears that there is no case against original accused Nos. 1 and 3 of causing any injuries on the injured witness Pinakin. We are, therefore, of the opinion that case against the accused Nos. 1 and 3 could not be established by the prosecution beyond reasonable doubt and hence, they cannot be held liable for causing injuries on the injured Pinakin. The accused Nos. 1 and 3 are, therefore, entitled to the benefit of doubt and they are entitled to be acquitted.

22. As far as accused No. 2-Thakor Vikram Badaji is concerned, the injured Pinakin received injuries on his chest and on legs and those injuries are corroborated by medical evidence. When evidence of injured witness is found to be trustworthy, credible and inspiring confidence and is corroborated with the medical evidence and also when other witnesses are not throwing light on true version of the incident, then there is no necessity to discuss the evidence of other witnesses in detail except to rely on reliable and trustworthy evidence of

injured witness. In view of the above, we are in complete agreement with the reasons recorded and the conclusions arrived at by the learned trial Judge in the impugned judgment so far as the conviction of the original accused No. 2-Thakor Vikramji Badaji is concerned. However, considering the nature of injuries sustained by the injured on the chest and other injuries which are on the legs with sticks, we are of the opinion that case of the accused No. 2 would not fall under Section 307 of IPC but would fall under Section 326 of IPC.

23. We have given thoughtful consideration to the submissions made on behalf of learned advocate for the original accused No. 2. It is to be noted that the accused No. 2 is aged about 27 years having wife and two minor children aged 9 and 7 years to look after. He is a poor person and is the only earning member in his family. This is the first offence committed by him in his entire life. He is in jail for considerable period i.e. more than 5 years and 5 months and his jail conduct also appears to be good. Considering all these aspects, this Court is of the opinion that interest of justice will be met if the sentence imposed on the appellant is reduced to the sentence which has already been undergone by accused No. 2 i.e. Vikramji Badaji Thakor.

24. Thus, Criminal Appeal No. 1603 of 2010 is hereby dismissed. Impugned judgment and order dated 9-7-2010 rendered by the learned Addl. Sessions Judge and Presiding Officer, 3rd Fast Track Court, Mehsana, Camp Visnagar, in Sessions Case No. 169 of 2008 is confirmed qua original accused Nos. 4, 5 and 6.

25. Criminal Appeal No. 1323 of 2010 is partly allowed.

26. Impugned judgment and order dated 9-7-2010 rendered by the learned Addl. Sessions Judge and Presiding Officer, 3rd Fast Track Court, Mehsana, Camp Visnagar in Sessions Case No. 169 of 2008 is quashed and set aside qua original accused Nos. 1 and 3. Original accused Nos. 1 and 3 are acquitted for the charged levelled against them giving benefit of doubt. They are on bail and hence, their bail bond shall stand cancelled.

27. Impugned judgment and order dated 9-7-2010 rendered by the learned Addl. Sessions Judge and Presiding Officer, 3rd Fast Track Court, Mehsana, Camp Visnagar in Sessions Case No. 169 of 2008 is modified and conviction and sentence of the original accused No. 2 for the offence punishable under Sec.307 of IPC is converted into offence punishable under Sec.326 of IPC and he is sentenced to suffer RI for ten years with fine of Rs. 10,000/-, in default to suffer further imprisonment for six months. Original accused No. 2 has already undergone approximate sentence of more than 5 years and 5 months and the said sentence would, in our view, be sufficient and hence, the sentence imposed on him is reduced to the period he has already undergone. He is ordered to be set at liberty forthwith, if not required in any other case.

28. Rest of the impugned judgment and order dated 9-7-2010 rendered by the learned Addl. Sessions Judge and Presiding Officer, 3rd Fast Track Court, Mehsana, Camp Visnagar, in Sessions Case No. 169 of 2008 would remain

unaltered.

29. Since this common judgment has been delivered looking to the peculiar facts of this case, this should not be treated as a precedent and would not have any binding effect on any other matter.