

(2013) 11 GUJ CK 0038
In the Gujarat High Court

Case No : Criminal Appeal No's. 1327 and 1671 of 2010

State of Gujarat

APPELLANT

Vs

Thakor Kanuji @ Jahaji Kuberji

RESPONDENT

Date of Decision : 19-11-2013

Acts Referred:

Citation : (2013) 11 GUJ CK 0038

Hon'ble Judges : K.S. Jhaveri, J;K.J. Thaker, J

Bench : Division Bench

Advocate : H.S. Soni, APP No. 1, for the Appellant; Tanuja N. Kachchhi,
Advocate for Opponent/Respondent No. 1, for the Respondent

Judgement

K.S. Jhaveri, J.—Both these appeals arise out of a common judgment and order dated 3.6.2010 passed by learned Additional Sessions Judge & Presiding Officer, camp at Visnagar, in Sessions Case No. 100 of 2009. Therefore, they are heard together and disposed of by this common oral judgment. Criminal Appeal No. 1327 of 2010 is filed by the State u/s 377 of the Code of Criminal Procedure, 1973 for enhancement of sentence awarded by the Trial Court whereas Criminal Appeal No. 1671 of 2010 is filed by the appellant-original accused u/s 374 of the Code of Criminal Procedure against his conviction u/s 394 read with Section 397 of the Indian Penal Code.

2. Brief facts of the prosecution case are that in village Sipor, near Motavas, at the outskirts of Sipor outpost, on 31.5.2009 when the wife of the complainant was sleeping on cot at about 12.30 in midnight, the accused Kanuji @ Jahaji Kuberji snatched her golden chain valued at Rs. 15,000/-. When the accused tried to run away, the complainant caught him. At that time, the accused inflicted sword blows on head and hand of the complainant and ran away with the golden chain. Therefore, a complaint was lodged by the complainant in that regard at Vadnagar Police Station. On the basis of the complaint, investigation was carried out. After completion of investigation, charge sheet was filed against the accused for the offence punishable under Sections 394 read with Section 397 of the Indian Penal

Code.

2.1 Charge was framed against the accused. It was read over and explained to him. He pleaded not guilty to the charge and claimed to be tried. The prosecution, therefore, led evidence against the accused. Statement of the accused u/s 313 of the Criminal Procedure Code was recorded. The trial Court, after taking into account the evidence on record, convicted the accused u/s 394 read with Section 397 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for three years. Hence the State has preferred this appeal for enhancement of the sentence.

3. Learned APP Mr. Soni for the appellant State has contended that in view of the evidences PW-1 Dr. Rameshbhai Maganbhai Shah, PW-2 Rameshji Prahladji Thakor, PW-3 Bhavanaben Rameshbhai Thakor, PW-4 Bharatji Suraji Thakor, PW-5 Chehaji Babaji Thakor, PW-6 Vinuji Somaji Thakor, PW-9 Dr. Pravinbhai Gandabhai Rabari, PW-10 Dalaji Chanduji Thakor, PW-11 Dr. Nishitbhai Baldevbhai, PW-14 Sendaji V. Thakor, PW-15 Kantibhai Nathubhai, PW-16 Chanduji Gulabsinh Solanki, PW-17 Udaykumar Bhanushankar Raval, the trial Court, though accepted the case of the prosecution, sentenced the accused to suffer rigorous imprisonment for three years in spite of the fact that the language used in Section 397 of the Indian Penal Code that punishment for committing the offence shall not be less than seven years. He further contended that the trial Court has not imposed any fine on the accused though u/s 395 of the IPC both fine and sentence are required to be imposed. In that view of the matter, the sentence imposed by the trial Court is required to be enhanced.

4. Learned counsel for the respondent-accused Ms. Tanuja Kachchhi has contended that the trial Court has committed error in relying on the evidences of the witnesses whose presence is doubtful. She has further contended considering the evidences on record, benefit of doubt is required to be given in favour of the accused. She further contended that the identity of the accused is not established and there is contradiction in the evidences of the witnesses. In that view of the matter, the judgment and order of the trial Court is required to be set aside.

5. We have heard learned counsel for the parties. To prove the case against the accused the prosecution has examined the following witnesses:

1. PW-1 Dr. Rameshbhai Maganbhai Shah at Exh. 10
2. PW-2 Rameshji Prahladji Thakor, at Exh. 12
3. PW-3 Bhavanaben Rameshbhai Thakor at 15
4. PW-4 Bharatji Suraji Thakor at Exh. 20
5. PW-5 Chehaji Babaji Thakor at Exh. 21
6. PW-6 Vinuji Somaji Thakor at Exh. 22

7. PW-7 Velaji Amaji at Exh. 23
8. PW-8 Kanuji Amuji at Exh. 24
9. PW-9 Dr. Pravinbhai Gandabhai Rabari at Exh. 26
10. PW-10 Dalaji Chanduji Thakor at Exh. 28
11. PW-11 Dr. Nishitbhai Baldevbhai at Exh. 31
12. PW-12 Vajuben Jenaji Thakor at Exh. 33
13. PW-13 Motiben Kodarji Thakor at Exh. 34
14. PW-14 Sendaji V. Thakor at Exh. 35
15. PW-15 Kantibhai Nathubhai at Exh. 36
16. PW-16 Chanduji Gulabsinh Solanki at Exh. 38
17. PW-17 Udaykumar Bhanushankar Raval at Exh. 43

5.1 The prosecution has relied on the following documents:

1. Complaint at Exh. 13
2. Panchnama of the place of offence at Exh. 39
3. Panchnama of seizure of blood stained clothes of the complainant at Exh. 40
4. Panchnama of seizure of clothes of the accused and the muddamal weapons used by the accused at Exh. 44
5. Medical Certificate at Exh. 27
6. Medical Certificate of General Hospital, Mehsana at Exh. 11
7. Medical Certificate of Dr. Anil Patel at Exh. 32
8. Letter of PSO Vadnagar at Exh. 45
9. Letter to register crime at Exh. 41
10. Note regarding forwarding of muddamal to FSL at Exh. 46
11. Receipt regarding receiving of muddamal at Exh. 47
12. Note of FSL at Exh. 49
13. Serological report at Exh. 50

5.2 We have seen the injury certificate issued by Dr. Rabari wherein it is stated that assaulted injury by sharp weapon. It is further stated in the certificate that large grievous contused lacerated wound (12 cm x 2 cm) anteroposteriorly present over left temporo frontal region of scalp extending upto medial end of (lt.) eye-brow with massive bleeding present. CLW 5 cm long transversally (cutting wound) present over posterior parietal region. Small cuts (1 cm) two in

numbers present over right hand dorsal surface. Cutting injuries (1 cm) with cutting of thumbnail of (lt) hand. Injuries to head are very grievous. Medical Certificate issued by Dr. N.B. Patel also deposes injury over forehead and scalp. It is also stated in the Certificate that Rameshji Thakor was having infected wound over left forehead about 15 cm size and wound over high parietal region.

5.3 Considering the medical evidence on record and the evidence of the complainant Rameshji Thakore, PW-2, it is clear that the role played by the accused using deadly weapon in committing robbery and snatching away gold ornament is clearly established. Therefore, the prosecution has been successful in proving the case against the accused. PW-2 Rameshji Thakore has produced purchase bill dated 29.4.2009 whereby the ornament in question was purchased by the complainant is proved.

5.4 From the evidence on record, it is clear that the injury which was caused to the complainant was established. Considering the evidence produced on record, we are of the opinion, the presence of the accused is proved. Initially, the purpose was to commit robbery but as seen the accused was armed with a weapon which he had used effectively and therefore it can be inferred that he was trying to kill as well and therefore, provisions of Section 397 of the Indian Penal Code are also attracted in the facts of this case. We are supported in our view by the latest decision of the Hon"ble Apex Court in the case of State of A.P. Vs. M. Sohan Babu and Another, The prosecution has successfully proved the case against the accused u/s 394 read with section 397 of the Indian Penal Code. Sections 394 and 397 of the Indian Penal Code are reproduced hereunder:

Sec. 394 - Voluntarily causing hurt in committing robbery - If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person or any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with [imprisonment for life] or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Sec. 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, or 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.

In view of the language used in Section 397 of the Indian Penal Code, the punishment should not be less than seven years. In that view of the matter, the judgment and order trial Court is required to be interfered with and the appeal filed by the State for enhancement of the sentence deserves to be allowed.

5.5 Learned counsel for the appellant in conviction appeal has requested the Court that leniency has been rightly shown by the trial Court. No identification parade has been carried out. We are unable to persuade ourselves with the contention of the learned counsel for the appellant-accused. First identification

parade has been conducted and the accused has been identified in the Court as per the latest decision of this Court and the Hon''ble Apex Court. Muddamal has been found from the accused. Muddamal knife was also found from him. Therefore, we are unable to persuade ourselves to the fact that the accused is entitled to benefit of doubt. This takes us to the question of sentence. Looking to the provision of Section 397 of the Indian Penal Code, learned trial Judge could not and ought not to have imposed sentence less than which has been statutorily imposed, on the accused. The judgment cited by learned trial Judge of this Court in the case of State of Gujarat Vs. Natwar Harchandji Thakor, will not apply to the facts of this case as it was rendered under a Prohibition Act where powers were given to the Presiding Officer, after assigning reasons. Learned trial Judge once having believed the offence to have been committed u/s 397 of the Indian Penal Code, ought not to have imposed lesser punishment than seven years. In that view of the matter, the appeal filed by the accused against his conviction is required to be dismissed.

In the result, Criminal Appeal No. 1327 of 2010 filed by the State is allowed. The conviction u/s 394 read with Section 397 of the Indian Penal Code awarded by the trial Court is upheld. On the question of sentence, in view of language used in Section 397 of the Indian Penal Code, the accused is sentenced to suffer rigorous imprisonment for seven years. Fine of Rs. 250/- is imposed on the accused. In default of payment of fine, he has to undergo simple imprisonment for 15 days. The judgment and order of the trial Court dated 3.6.2010 passed by learned Additional Sessions Judge & Presiding Officer camp at Visnagar, in Sessions Case No. 100 of 2009 is modified to the aforesaid extent. The accused Thakor Kanuji @ Jahaji Kuberji will surrender to the jail authority within a period of 12 weeks from today failing which the authority will take appropriate steps against the accused.

Criminal Appeal No. 1671 of 2010 filed by the accused is dismissed.