
(2015) 02 GUJ CK 0033
In the Gujarat High Court
Case No : Criminal Appeal No. 1663 of 2010

Suresh	Vs	APPELLANT
State of Gujarat		RESPONDENT

Date of Decision : 06-02-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 299, 300, 302, 304

Citation : (2015) 02 GUJ CK 0033

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

Bench : Division Bench

Advocate : Manraj A. Barot, for the Appellant; J.K. Shah, APP, Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

G.B. Shah, J.—This appeal by appellant - original accused is directed against the judgment and order of conviction and sentence dated 10/08/2010 delivered by learned Additional Sessions Judge and Presiding Officer, Fast Track Court No. 2, Godhra in Sessions Case No. 180 of 2009 for the offence punishable under Section 302 of the Indian Penal Code (for brevity "IPC"), whereby the appellant - original accused was convicted and sentenced to undergo imprisonment for life with fine of Rs. 1,000/-, in default, to undergo further period of three months of simple imprisonment.

2. The case of the prosecution in brief is that on 14/05/2009 at about 7:30 p.m., deceased Rameshbhai Rathod, husband of complainant Sarojben Rathod, after completing his routine, was sitting on a raised platform (Otla) in the front portion of the house, whereas, the appellant - original accused, who is brother of the deceased and residing in joint family, was also sitting on a coat, in the front portion of the house. The complainant and her daughters were also present there. It is the case of the prosecution that since the appellant - accused did not work and used to drink liquor and altercate with the village people, the deceased

admonished him and told him not to drink liquor, do some work and stop harassing village people. At that time, the mother-in-law of the complainant and mother of the appellant and the deceased also tried to persuade the appellant - original accused and hence, the deceased got excited and started beating her to which, the deceased intervened and while the deceased trying to set her free, the accused got excited and knocked down the deceased cross on the floor and assaulted with a Chock (lakda nu fachru) on his face and neck by repeated blows and on hearing hue and cry of family members, absconded from there. In consequence to the assault, the deceased got severe injuries and eventually succumbed to the injuries and accordingly, a complaint for the aforesaid offence was lodged before the police. Upon conclusion of investigation, since a prima facie case was found against the appellant, a Charge-sheet was filed against the present appellant - original accused in the Court.

2.1 As the offence against the accused was sessions triable, learned Judicial Magistrate First Class, Kalol committed the case to the Court of Sessions at Godhra. The learned trial 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.

2.2 To prove the guilt against the accused, prosecution examined 14 witnesses and has produced and relied upon several documentary evidence.

2.3 On submission of Closing Purnis by the prosecution, learned trial Judge recorded Further Statement of the accused under Section 313 of Code of Criminal Procedure, 1973 (for brevity, "the Code") qua incriminating evidence. In the fag end of Further Statement, the appellant - original accused has replied that he is innocent and has been falsely implicated. Upon affording opportunity of hearing to the learned advocates appearing for the respective parties, the learned trial Judge delivered the impugned judgment convicting and sentencing the appellant as aforesaid in the earlier part of this judgment giving rise to present appeal.

3. Heard Mr. Manraj A. Barot, learned advocate for the appellant - original accused and Mr. J.K. Shah, learned Additional Public Prosecutor for the respondent - State.

4. The learned advocate appearing for the appellant - original accused submitted that the learned trial Judge has not properly appreciated oral as well as documentary evidence produced on record and has erred in holding that the prosecution has proved the charge against the accused beyond reasonable doubt. He submitted that the prosecution has examined in all 14 witnesses, however, the learned trial Judge has not properly appreciated the evidence of the said witnesses and thereby, the finding recorded by the learned trial Judge that the prosecution has proved the charge against the accused by leading legal, reliable and impeachable evidence, is contrary to the evidence available on

record. He submitted that there are material contradictions in the deposition, exh. 8 of complainant and eye-witness - Sarojben, who is the wife of the deceased. As per the deposition of this witness the deceased was assaulted with a Knife, whereas, the Charge framed at exh. 3 speaks about the deceased was assaulted by a Chock (lakda nu fachru). He further submitted that there also appears discrepancies and vital contradictions in the depositions of the prosecution witnesses as regards the place of incident and manner in which the offence has been committed. He further submitted that as per the prosecution case itself, at the time of the incident, the appellant - original accused was in intoxicated condition and thus, it is the case of unconscious and unfit state of mind of the accused and the learned trial Judge has failed to take into consideration the said aspect. He further drew attention of the Court on Charge, exh. 3 dated 16/12/2009 framed by the learned trial Judge and submitted that in the Charge it has been specifically mentioned that, "since the deceased admonished, you have, out of aggression, with intention to cause death of the deceased, brought a Chock (lakda nu fachru) from the house, knocked down the deceased cross on the floor and assaulted the deceased with said Chock on face in which the Chock had broken and then, from the sharp edge of the said Chock gave repeated blows and thereby severely injured the deceased and committed his murder....". He then submitted that, if the facts narrated in Charge is believed that the deceased was fell down cross on the floor in that case, the appellant - accused could not cause any injury on the face of the accused and this aspect has not been properly appreciated by the learned trial Judge, which requires consideration. He also submitted that so far as time of incident is concerned, all the witnesses have given different times and hence, their versions being contrary, are not believable. He further submitted that, if the deposition of complainant Sarojben Rameshbhai Rathod, exh. 8, is referred, there appears material contradictions regarding the article alleged to have been used in the crime as well as presence of the complainant at the time of incident, which creates dark clouds of doubt and hence, benefit of doubt should have been given to the appellant - original accused. Likewise, considering the depositions of Sonalben Rameshbhai Rathod, exh. 10 and Vanrajsinh Mohansinh, exh. 17, presence of Sonalben Rathod, daughter of the deceased, is also doubtful in view of vital contradictions in the same. He further submitted that it has come on record that the appellant - original accused was working as a driver and hence, the case of the prosecution that while the deceased admonished the appellant - original accused on the count that he was not doing any work, is not believable at all and this important aspect has also not been considered by the learned trial Judge. He, therefore, prayed that the impugned judgment of conviction and sentence is required to be quashed and set aside and the appellant is required to be acquitted.

5. Per contra, Mr. J.K. Shah, learned Additional Public Prosecutor, drew attention of this Court on the impugned judgment and order and the documentary evidence forthcoming on record and submitted that while delivering the said

judgment and order, the trial Court has considered all the circumstances collectively and found that prosecution has proved the case against the appellant and came to irresistible conclusion that the appellant is the perpetrator of crime in question. He submitted that if the evidence of prosecution eye-witnesses i.e. complainant Sarojben Rameshbhai Rathod, exh. 8 and Sonalben Rameshbhai Rathod, exh. 10 as well as Shantaben Ranvirsinh Rathod, exh. 11 are referred, they have categorically supported the case of the prosecution that on being asked by the deceased to the accused to do some work and not to drink liquor and altercate with the village people, the accused became aggravated and assaulted the deceased and caused severe injuries, to which, he succumbed. Further, he submitted that only on the count of eye-witnesses being interested witness, their evidence cannot be discarded. They were eye-witnesses to the incident in question and it was necessary for the prosecution to examine the said witnesses and evidence of such witnesses is corroborated by other documentary evidence and hence, the same cannot be ignored and the learned trial Judge has rightly and properly appreciated the same. He then submitted that the trial Court sought explanation of the appellant as regards incriminating material that has surfaced against him to which, he denied as being untrue, false and created and submitted that the appellant - original accused had only tried to put his case that he has been wrongly implicated by the prosecution, which is not believable at all in view of the evidence on record. He further submitted that, thus, all the aspects of the matter have been dealt with by the learned trial Judge at threadbare and accordingly, the impugned judgment and order passed by the learned trial Judge is just, legal and proper as plausible reasons have been given which requires no interference at the hands of this Court and accordingly, present appeal deserves to be dismissed.

6. We have considered the above-referred rival submissions made by the learned advocates appearing for the parties and in light of the averments made in the Appeal Memo and in light of the evidence forthcoming on record, we have carefully perused the depositions of complainant Sarojben Rameshbhai Rathod, exh. 8, Sonalben D/o. Rameshbhai (deceased) Rathod, exh. 10, Shantaben Ranveersinh Rathod, neighbour of the deceased, exh. 11 as well as of Vanrajsinh Mohansinh, brother-in-law of the deceased, exh. 17. It appears that there is contradiction regarding time of incident narrated by them but considering the social strata of these witnesses and also considering the fact that they are village people, the exact details as to time of incident (i.e. 7:30 p.m.) might not have come on record but on careful perusal of the documents on record, it transpires that the incident had occurred in the evening after sunset and hence, this contradiction cannot be said to be a major contradiction. Moreover, it has come on record that the appellant - original accused was doing work of driving the tractor but on perusal of the allegations levelled in the Charge, it is clear that the deceased was not admonishing the appellant, his real brother, only on the point of sitting idle, doing nothing, but also on the point of drinking liquor and altercations with village people time and again, for which the village people used

to complain to the deceased. Under the circumstances, since from the depositions of some of the witnesses it has come on record that the appellant - original accused was doing the work of driving the tractor, the entire prosecution theory relating to admonishing part has vanished, in our view, cannot be affirmed as it cannot be said to be the vital contradiction so far as the charge levelled against the present appellant - original accused is concerned. If the depositions of all the witnesses are perused carefully, the presence of the appellant - original accused at residence is clearly established and proved and it is also a fact that, after the occurrence of incident, the appellant - original accused was absconded and arrested subsequently after 22 days and this conduct also goes against the appellant - original accused. It has come on record that during the said period of 22 days, the appellant - original accused had stayed at his sister Sarojben's house at Village: Zalawad, Taluka: Dakor. It has been submitted by the learned advocate appearing for the appellant - original accused that statement of said Sarojben had not been recorded nor she had been examined by the prosecution. We have considered the same and in our view, there appears no substance in the said submission for the reason that Sarojben, sister of the appellant - original accused, was not the eye-witness to the incident in question and thus, it cannot be said to be material lapse on the part of the investigation /prosecution. Moreover, if the medical evidence is perused carefully, it cannot be said to be contrary to the ocular evidence. As per the deposition of Dr. Shakuntala Kiransinh Parmar, exh. 6, the cause of death of the deceased is "Neuro Haemorrhage Shock and Injuries on Head", however, if the cause of death mentioned in Post Mortem Note is taken into consideration, the same is "Neuro Haemorrhage Shock due to injuries on head (facial injury)" and the case of the prosecution that the appellant - original accused gave repeated Chock blows on the face of the deceased has been supported by the evidence of the prosecution witnesses. Moreover, as per the deposition of this doctor, the deceased had also sustained fracture of Maxilla Bone on face, which substantiates the case of the prosecution. Moreover, as per medical evidence, the deceased sustained in all 09 injuries on his face out of which, two specified to be the fracture injuries and thus, the theory of defence that the deceased had died due to felling down from the raised platform (Otlā) in front of his house, cannot be believed as these injuries can only be sustained by a pointed weapon. Thus, considering the overall aspects of the matter viz. evidence of the eye-witnesses and other corroborative oral as well as the documentary evidence available on record, we are of the opinion that the case of the prosecution appears to be proved. The learned trial Judge has, in the impugned judgment and order, considered all the aspects of the matter minutely and come to the irresistible conclusion that the prosecution has proved the case against the appellant - original accused beyond reasonable doubt and accordingly, passed the impugned judgment and order to which, in view of the above discussion and taking into consideration facts and circumstances of the case coupled with other evidence discussed herein above, it can be said that prosecution succeeded in proving the guilt against the accused beyond reasonable doubt and therefore, the trial Court

has rightly convicted and sentenced the appellant - original accused for the alleged offence and we are in agreement with the same.

7. Last submission made by the learned advocate for the appellant - original accused that requires to be dealt with at this stage is to the effect that, without prejudice to the rights and contentions, even if the case of the prosecution is accepted, in the alternative, considering the fact that the incident in question has occurred out of sudden provocation and in a spur of the moment and there was no mens rea and/or intention on the part of the appellant - original accused to commit such an offence, the case against the appellant may be considered under Exception 4 to Section 300 of the IPC and convert the case against the appellant from murder to the culpable homicide not amounting to murder and the same may be converted into Section 304 Part (I) or Part (II) of the IPC and accordingly, this Court should reduce the quantum of sentence.

7.1 The learned Additional Public Prosecutor has vehemently opposed the said submission made by the learned advocate appearing for the appellant and submitted that the trial Court has gone into the evidence in detail and has come to the irresistible conclusion that the appellant is guilty of the offence so convicted of. He submitted that considering the barbaric act committed by the appellant, the trial Court has rightly convicted the appellant. He also submitted that the sentence imposed upon the appellant is just and proper and does not deserve to be reduced.

8. In the case on hand, undoubtedly the prosecution has succeeded in proving the guilt against the appellant - accused, however, in the context of above submission of the learned advocate appearing for the appellant, relevant statutory provisions viz. Section 299 (Culpable Homicide) and Exception 4 to Section 300 (Murder) of the IPC should be looked into, which read as under:

"299. Culpable Homicide: Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

300. Murder: Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or--

Secondly--If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or--

Thirdly--If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or--

Fourthly--If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is

likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Exception 1--When culpable homicide is not murder--Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:--

First--That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly--That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly--That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation--Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Exception 2--Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Exception 3--Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4--Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation--It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5--Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent."

8.1 Moreover, in the peculiar facts and circumstances of this case, as discussed herein above in detail, recent decision of the Hon"ble the Apex Court in the case of Ankush Shivaji Gaikwad Vs. State of Maharashtra, will squarely apply, Head

Note "A" of which is relevant, which is extracted hereunder:

"(A) Penal Code (45 of 1860), S.300, S.304, Part 2 - MURDER - CULPABLE HOMICIDE - Murder -Sudden fight - Accused beating dog of deceased -Leading to verbal altercation between them -Culminating into scuffle in which appellant hit deceased with iron rod which he was carrying - No previous enmity between accused and deceased -Appellant not giving any further blow after deceased was fell down - Even during verbal altercation deceased was asked to shut his mouth lest he would be beaten like dog - Words used also show that intention of appellant was only to belabour deceased and not to kill him - Appellant entitled to benefit of Exception 4 to S. 300 - Accused having no intention but only having knowledge that injury may cause death - Liable to be convicted under S. 304, Part-II." 8.2 With this prelude, the genesis of the incident is a small dispute which arose when the deceased admonished his brother, the appellant - original accused on the count of the accused sitting idle and doing nothing and used to altercate with village people drinking liquor every now and then, and on their mother's intervening, the accused started beating her. It is nobody's case that the incident occurred with a premeditation of mind. It cannot be said that there was any motive to do away with the deceased and/or prior enmity. The entire episode seems to have happened in a spur of moment.

8.3 However, looking to the facts and circumstances of the case it cannot be said that the death was not homicidal. The Post Mortem Report gives details of the injuries on the body of the deceased and the same go to show that it was a homicidal death, which occurred due to injuries by Chock blows. The eyewitnesses have supported the prosecution case, which is corroborated by other documentary evidence. In the present case, we have come to the irresistible conclusion that the role of the appellant is clear from the complaint lodged by the complainant and other records. However, the points which have also weighed with this Court are that the deceased had ultimately died of Neuro Haemorrhage Shock due to injury (facial injury). Moreover, we have also considered the fact that the incident occurred in a spur of moment without any premeditation of mind or intention on the part of the appellant. We have carefully perused the deposition of Dr. Shakuntala Kiransinh Parmar, recorded vide exh. 6 and Post Mortem Report of deceased Rameshbhai Adesinh Rathod at exh. 7. Dr. Shakuntala, in her cross-examination, has initially admitted that injuries Nos. 1 to 7 shown in column No. 17 are possible on dashing with a hard and blunt substance. She has volunteered that injury No. 3 could not be possible by a hard and blunt substance but by a pointed weapon. It appears from column No. 17 of Post Mortem Note at exh. 7 that except injury No. 3, rest of the injuries are CLWs in nature. So far as injury No. 8 is concerned, it is a bruise mark and injury No. 9 is a contusion present over right temporal region. In short, though the learned trial Judge has observed that there appears nine grave injuries on the face of the deceased, on a careful perusal of column No. 17, it is clear that except injuries Nos. 3 and 7, other injuries are minor in nature and could not be said to be grave in nature. While considering the provision of Exception 4 to

Section 300 of IPC, it must be shown that the offender has not taken undue advantage. It is not under dispute that the deceased and the appellant - original accused are real brother and nothing has come on record to show that they have enmity between them but as such, they were residing together. There also appears absence of any pre-plan or motive or intention of murder of his own brother. Under the circumstances, according to learned advocate appearing for the original accused, culpable homicide of above-referred degree is punishable under the second part of Section 304 of IPC. Nothing material has been pointed out on this aspect by the learned Additional Public Prosecutor. We are, therefore, of the opinion that there appears substance and merit in the above-referred submission made by the learned advocate appearing for the appellant - original accused. As far as quantum of punishment is concerned, it is to be noted that accused is aged about 36 years. It is the first offence committed by him. He has no criminal antecedent. He is in jail since 07/06/2009. Considering the facts and circumstances and jail conduct of the accused, we are of the view that interest of justice would be met if the sentence imposed on the accused is reduced to the period he has already undergone in jail.

9. In the above backdrop, the appeal is partly allowed. The impugned judgment and order of conviction and sentence dated 10/08/2010 passed by the learned Additional Sessions Judge and Presiding Officer, Fast Track Court No. 2, Godhra in Sessions Case No. 180 of 2009 is modified to the extent that the conviction of appellant - original accused under Section 302 of the IPC is converted into conviction under Section 304 (Part II) of the IPC and accordingly, the appellant - original accused is sentenced to undergo imprisonment which he has already undergone in jail. The impugned judgment and order qua fine and all other aspects would remain unaltered. The appellant is ordered to be set at liberty forthwith, if not required in any other offence. Bail bond shall stand cancelled in case the accused has paid the amount of fine.

9.1 R and P to be sent back to the trial Court forthwith.