
(1991) 10 GUJ CK 0006
In the Gujarat High Court
Case No : Criminal Appeal No. 91 of 84

Thakarda Hamirji Gajuji

APPELLANT

Vs

The State of Gujarat

RESPONDENT

Date of Decision : 29-10-1991

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 113
Penal Code, 1860 (IPC) — Section 300, 302, 304

Citation : (1992) CriLJ 3966

Hon'ble Judges : V.H. Bhairavia, J; J.M. Panchal, J

Bench : Division Bench

Advocate : K.G. Sheth, for the Appellant; M.A. Bukhari, Addl. P.P., for the Respondent

Final Decision : Allowed

Judgement

1. This appeal has been preferred by the appellant-accused against the judgment and order dated 31-12-1983 passed by the learned Sessions Judge, Mehsana in Sessions Case No. 108/83 whereby the learned Sessions Judge convicted the appellant-accused for the offence punishable u/s 304, Part II of the I.P. Code and convicting him to suffer rigorous imprisonment for 4 years. However, by the impugned judgment and order, the learned Sessions Judge had acquitted appellant accused for the offence punishable u/s 302 of the I.P. Code.

2. The prosecution case in brief is that complainant Kanaji Chelaji is younger brother of deceased Pupaji Chelaji. Both brothers are staying separately. A day before the day of incident, Pupaji had gone to Patan and returned back at about 5.00 p.m. with accused Thakarda Ramirji Gajuji. Deceased introduced accused to the complainant. Accused slept in the house of Rupaji on that night. On the day of incident, i.e. 11-8-83 accused and Rupaji had gone to Patan in the S.T. bus at 1.00 p.m. They reached Patan at 2.00 p.m. and had gone in the Bazar. It is the case of the prosecution that near Hingalaj Chachar. Rupaji demanded money from accused. Thereafter, they moved in Bazar. When they reached near

Bank of Baroda building, Rupaji again demanded money from the accused. There was some altercation between the two. Rupaji gave a fist blow on the nose of accused and thereupon, accused brought out knife from the pocket of his pant and holding the knife with both the hands, he gave knife blow on the chest of Rupaji. Rupaji brought that knife out from the chest and tried to inflict blow on the accused and accused suffered injury on the back. Thereafter, both of them fell down. Rupaji died on the spot. At that time Bargovan Keshavlal and Vaktuji Pradhanji came there. After some time, police came at the place of incident. Complaint was lodged against the accused for the offence punishable u/s 302 of the I.P. Code. As accused was also injured, he was sent for medical treatment in the hospital and thereafter, accused came to be arrested on 13-8-1983. After completion of investigation, a charge-sheet was submitted in the Court of the learned Judicial Magistrate (F. C.) Patan for the offence punishable u/s 302 of the I.P. Code. As the offence is triable by the Court of Session, the learned J.M.F.C. committed the case to the Court of Session at Patan. Accused came to be tried by the learned Sessions Judge. Accused pleaded not guilty to the charge and claimed to be tried. After considering prosecution evidence, the learned Sessions Judge held the accused guilty for the offence punishable u/s 304, Part II of I.P. Code since, according to the learned Sessions Judge, there was no intention on the part of the accused to commit murder of the deceased Rupaji. The learned Sessions Judge, therefore, acquitted the accused of the offence punishable u/s 302 of the I.P. Code and convicted him for the offence punishable u/s 304, Part II of the I.P. Code and sentenced him to suffer rigorous imprisonment for four years. Hence, present appeal.

Mr. K. G. Sheth, learned counsel (appointed) for the appellant-accused vehemently submitted that view of the medical evidence coupled with the evidence of prosecution witnesses, this is a case of private defence and the appellant accused is entitled to the benefit of Exception-2 to Section 300 of the I.P. Code. Hence, his conviction u/s 304, Part II of the I.P. Code is bad in law and requires to be quashed and set aside and appellant accused requires to be acquitted. Mr. M. A. Bukhari, learned Addl. P.P. supported the judgment of the learned Sessions Judge and submitted that the findings and reasoning given by the learned Sessions Judge for convicting the appellant accused for the offences u/s 304, Part II of the I.P. Code and sentencing him as aforesaid, are just, legal and supported by the evidence on record. He, therefore, submitted that the judgment and order of the learned Sessions Judge requires to be upheld.

3. Learned counsel for the appellant-accused took us through the entire evidence on record. We have also perused the judgment of the learned Sessions Judge. The learned counsel took us through the evidence of P.W. 2 complainant Kanjaji Chelaji (exh. 10) and submitted that accused had sustained injury on the left side of the chest by knife at the hands of the deceased and he further pointed out that according to this witness, after receiving injury on the chest, deceased himself had taken out knife from the chest and tried to give blows to the accused which has caused injuries to the accused. This version is not probable. Learned

counsel also took us through the medical evidence of P.W. 1 Dr. Suryaprasad Shivprasad Raval (exh. 6) and pointed out from the cross-examination that the injured who receives injuries on the chest like the injuries received by the deceased would become unconscious immediately and would not be in a position to give counter blow to his assailant. The learned counsel has also relied on the statement given by the accused u/s 113 of the Cr.P.Code and the explanation to question No. 21. We find much force in the submissions of the learned counsel for the appellant. Evidence of P.W. 2 Kanaji is supported by the medical evidence also. However, evidence of P.W. 3 Vaktuji Keshavji Thakarda (exh. 12) and P.W. 4 Hargovanbhai Keshavbhai Raval (exh. 13) does not support evidence of P.W. 2 Kanaji as they do not admit presence of Kanaji on the spot. P.W. 4 Hargovanbhai (exh. 13) has deposed that P.W. 2 Kanaji had come at the scene of offence simultaneously with him and P.W. 3 Vaktuji. But we do not give much importance to this infirmity in the evidence. So far as genesis of the incident is concerned, there is clear evidence of P.W. 2 Kanaji-brother of the deceased that deceased Rupaji Chelaji demanded money from the accused and as accused had no sufficient money, he refused to oblige deceased by giving money. Thereupon, unfortunate incident took place as first deceased had given fist, blow on the neck of the accused. This is an admitted fact. It is quite natural that the P. W. 2 Kanaji would support the prosecution case since his own brother has been killed, but if we read medical evidence read with evidence of the witnesses referred above as well as the statement of the accused regarding unfortunate incident, opinion given by P.W 1 Dr. Suryaprasad is more probable than the injured having received injuries on the chest, would not be in a position to give counter blow to his assailant immediately. From the medical evidence, we are convinced that the deceased Rupaji must have given knife blows first in point of time to the accused and accused must have tried to save his life from the serious injuries which deceased intended to inflict on the accused. We have been left to draw inference whether the accused inflicted knife blows on the chest of the deceased with the same knife which deceased had in his hand or with other knife. From, the medical evidence and the explanation given by the accused, we find the explanation given by the accused more probable. In our view, the accused has acted without premeditation and without any intention of doing more harm than is necessary for the purpose of his self defence and thereby, exercised his right of private defence since the deceased had assaulted him first in point of time. In our view, therefore, the appellant-accused is entitled to the benefit of Exception-2 to Section 300 of the I.P. Code. Exception-2 to Section 300 of the Indian Penal Code, reads as under:

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 than is necessary for the purpose of such defence.

4. Considering the medical evidence on record and evidence of the prosecution

witnesses, in our view, the appellant accused had exercised in good faith the right of private defence without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence, but exceeded the same. He is, therefore, entitled to the benefit of Exception-2 to Section 300 of I.P. Code. In our view, therefore, the conviction and sentence u/s 304, Part II of the I.P. Code deserve to be quashed and set aside and appellant is entitled to the benefit of Exception-2 to Section 300 of the I.P. Code and is entitled to be acquitted. Hence, present appeal requires to be allowed.

5. Appeal is allowed. Judgment and order dated 31-12-1983 passed by the learned Sessions Judge, Mehsana, in Sessions Case No. 108/83 convicting the appellant-accused for the offence punishable u/s 304, Part II of the I.P. Code and sentencing him to suffer rigorous imprisonment for 4 years, is hereby quashed and set aside. The appellant-accused is given benefit of Exception II to Section 300 of the I.P. Code and is hereby acquitted of the offence for which he is convicted. Appellant-accused be set at liberty forthwith if not required to be detained in any other matter. He is on bail, his bail bonds stand cancelled.