

(2016) 02 GUJ CK 0062

In the Gujarat High Court

Case No : Criminal Appeal Nos. 2199 and 2241 of 2008

Thakor Balabhai Visabhai and Others

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 08-02-2016

Acts Referred:

Bombay Police Act, 1951 — Section 135

Criminal Procedure Code, 1973 (CrPC) — Section 313

Penal Code, 1860 (IPC) — Section 147, Section 148, Section 149, Section 300, Section 302, Section 304, Section 307, Section 323, Section 324, Sect

Citation : (2016) CriLJ 1771

Hon'ble Judges : K.S. Jhaveri and R.P. Dholaria, JJ.

Bench : Division Bench

Advocate : Mehulsharad Shah, Advocate, for the Appellant; C.M. Shah, APP, for the Respondent

Final Decision : Allowed

Judgement

K.S. Jhaveri, J.—1. Criminal Appeal No. 2199 of 2008 is preferred by org. accused Nos. 1 to 4 and 6; whereas Criminal Appeal No. 2241 of 2008 is preferred by original accused No. 5. Both these appeals are directed against the judgment and order rendered in Sessions Case No. 46 of 2007 on 11/07/2008 by the learned Additional Sessions Judge, Patan, convicting the appellants-org. accused Nos. 1 to 6 for the offence punishable under Sections for the offence punishable under Sections 302, 324, 323 read with Section 147, 148 and 149 of the Indian Penal Code. The appellants-org. accused Nos. 1 to 6 are sentenced as under:

"1. For the offence punishable under Sections 302 read with Sections 147, 148 and 149 of the Indian Penal Code, appellants are ordered to undergo rigorous imprisonment for life with fine of Rs. 500/-, in default, to undergo three months imprisonment.

2. For the offence punishable under Sections 324 read with Sections 147, 148

and 149 of the Indian Penal Code, appellants are ordered to undergo imprisonment for one year with fine of Rs. 500/-, in default, to undergo three months imprisonment.

3. For the offence punishable under Sections 323 read with Sections 147, 148 and 149 of the Indian Penal Code, appellants are ordered to undergo imprisonment for three months with fine of Rs. 100/-, in default, to undergo one month imprisonment.

4. No separate sentence qua offence punishable under Section 135 of the Bombay Police Act is awarded and all the sentences are ordered to run concurrently."

2. The prosecution case in nutshell are as under:

"2.1 That, on 16/03/2007 at about 22:00 hours at Village Vahedpura, where the complainant and his son had gone to their agricultural field in the night hours to keep watch of the crop, at that time, the accused persons by keeping grudge over the previous dispute between Bharvad and Thakor, having armed with deadly weapons, constituted an unlawful assembly and to achieve their common intention to kill the complainant and his son, had chased the complainant and his son by giving filthy abuses. It is the case of prosecution that org. accused No. 1 gave blow of iron pipe on the leg of Kachrabhai; whereas org. accused No. 5 gave dhariya blow on head of Kachrabhai, who had fallen down on the floor. However, upon intervention of the complainant, org. accused No. 2 and 3 gave blow of iron pipe on left hand elbow and accused No. 4 gave stick blow on left side shoulder and left leg of complainant and thereby caused grievous hurt to the complainant. It is the case of prosecution that since the witness-Kachrabhai had fallen down on the floor, all the accused persons had beaten him with the weapons they have armed with and thereby caused his death, as also caused injuries in the nature of fracture to the witness and by giving threat of killing them committed the offence punishable under Sections 302, 307, 147, 148, 148, 149, 323, 504 and 506(2) of the Indian Penal Code and under Section 135 of the Bombay Police Act.

2.2 FIR was lodged with Sami Police Station, on basis of which offence was registered and case was investigated. At the end of investigation, the Police found that there was sufficient material against the accused and, therefore, the charge-sheet was filed in the Court of learned JMFC, Samit, who in turn, committed the case to the Court of Sessions and Sessions Case No. 32 of 2006 came to be registered.

2.3 Charge was framed against accused at Exh. 27 for offence punishable under Sections 302, 307, 147, 148, 148, 149, 323, 504 and 506(2) of the Indian Penal Code and under Section 135 of the Bombay Police Act, to which he pleaded not guilty and claimed to be tried.

2.4 During the trial, the prosecution had examined following witnesses as oral

evidence:--

2.5 The prosecution had also produced and relied upon following documentary evidence:--

3. At the end of trial, the Court below recorded further statements of accused persons under Section 313 of Cr.P.C. and thereafter, passed the impugned judgment and order. Being aggrieved and dissatisfied with the impugned judgment of the trial Court, present appeals are preferred before this Court.

4. Learned Advocate Mr. Mehul S. Shah, appearing for the appellants has submitted that case of the prosecution mainly depends upon evidence of PW 4, 5, 7 and 11. He has submitted that if the evidence of the witnesses are taken at face value, the prosecution has not proved its case beyond reasonable doubt. He has further contended that even if the medical evidence is taken into consideration, the injuries caused to the deceased as well as the injured are not attributed to the accused with the weapons they were alleged to have been caused. He has further contended that there are serious discrepancy in the FIR as well as DD recorded with regard to presence of the accused persons and therefore, the learned trial Judge ought to have considered before convicting the accused persons. He submitted that considering the fact that the appellant did not intend to kill the victim or to cause such grievous injury which shall lead to his death, may consider the case of the appellant under section 304 (Part I) of Indian Penal Code.

5. Learned Senior Advocate Mr. Yogesh Lakhani appearing for the appellant-original accused No. 6 has contended that there is serious discrepancy in mentioning the name of the accused person in the FIR as well as DD and therefore the involvement of the appellant itself is doubtful from the inception and accused is required to be acquitted by giving the benefit of doubt.

6. On the other hand, Ms. Shah, learned APP has contended that taking into consideration the evidence of the prosecution witnesses, it clearly transpires that all the material witnesses have supported the case of prosecution and have deposed the method and manner in which the entire incident took place, as also the role played by each of the accused and injuries caused by each of the accused with the weapon armed by them at the time of incident. She has further submitted that PM report shows the cause of death was due to cardio respiratory failure due to head injury no interference is required to be made in the impugned judgment and order. She has further submitted that looking to the evidence of the complainant and other witnesses, the view taken by the trial Court is just and proper.

6.1 Lastly, she has submitted that the learned trial Judge has not committed any error while imposing the sentence on accused and, therefore, no interference is called for in the present appeal.

7. We have heard the learned Counsel for the respective parties. We have also

perused the records and proceeding in the context of arguments advanced before us. We have also gone through the impugned judgment as well as evidence on record.

8. If the evidence of the prosecution witnesses is taken into consideration, the most vital piece of evidence is of PW 4-Ghelabhai Kachrabhai (Exh. 49), who is son of the complainant and injured witness in the said incident. Witness has deposed in his testimony that deceased-Kachrabhai was his father and incident took place in the night hours of 16th March last year. Witness alongwith his father was at agricultural field for protection of the crop, at that time, from the village side accused persons had come with hubbub and on throwing light of torch, witness found that these six persons which include Vela Lakhman armed with Dhariya, Bala Visha armed with pipe, Kalu Visa armed with pipe, Rasik Ganda armed with pipe, Lala Visa armed with stick and Bhikha Visha armed with dart (Barchhi). Witness has further deposed that Vela Lakhman gave Dhariya blow on head of father of the witness, Bala Visa gave pipe blow on left leg of his father and upon his intervention, Vela Lakhman gave dhariya blow on head of witness, Kalu Visha gave pipe blow on head of the witness, Rashik Ganda gave pipe blow on left hand elbow of witness, Lala Visha gave stick blow on right hand side shoulder and Bhikha Visha having armed with dart was saying to kill him and he therefore rushed to save his life. Witness has further deposed that while he was running, at that time, Bala Visha gave pipe blow on left leg of witness and he therefore rushed to save his life towards his home. However, his father was fallen down and on seeing back, he found that all these six persons were beating his father. Witness has also deposed that in the complaint given by him names of Visha, Kalu Visha, Rasik Ganda and Lala Visha were given and since the treatment was going on and due to injuries he could not mention the names of other two persons. Witness has further deposed that before the Mamlatdar he had mentioned the names of Vela Lakhman and Bhkha Vashu.

9. Now, if the medical evidence is seen, the doctor who conducted the postmortem on the dead body of the deceased is examined as PW 11 at Exh. 71 who has deposed that injury Nos. 1 and 2 mentioned at Column No. 17 are sufficient to cause death in the natural course, therefore, it is clear that this is a case of murder. Witness has also deposed that 47 stitches were taken on head of the deceased. The cause of death was due to cardio respiratory failure due to head injury. Thus, it is clear that this injury is the reason for death of the deceased. Therefore, we are now required to consider as to which accused had caused injuries to the deceased which had resulted into cause of death. From the evidence, it appears that injury caused by org. accused No. 1 with the pipe on leg of deceased proves to be fatal, because having received the said injury, deceased was fallen. However, the deceased was died after two days of the causation of the injuries. Furthermore, the dhariya injury caused by org. accused No. 5 is not proved beyond reasonable doubt since the name of org. accused No. 5 was not stated in the FIR by the said witness and therefore this can be said to be serious discrepancy. Taking into consideration medical evidence, it is clear

that only one injury is the reason for death of the deceased, more particularly, head injury, but that was not caused by org. accused No. 1 as per evidence on record, therefore, it leaves a room for the org. accused No. 1 to argue that since it this is not a case for Section 302. Only one injury on the head of the deceased is the reason for death. Therefore, the trial Court has not committed any error in convicting the accused, however, looking to the nature of the injury, it can be said that org. accused No. 1 is guilty of offence under Section 304, Part I of IPC and not for the offence under Section 302 of IPC.

10. Now so far as original accused Nos. 2 to 4 are concerned, there are no evidence as to the injuries caused by them are proved to be fatal and therefore the conviction awarded on the org. accused Nos. 2 to 4 for the offence punishable under Section 302 r/w Section 147, 148 and 149 of the IPC are required to be quashed and set aside. However, the org. accused Nos. 2 to 4 had caused injuries to the deceased as well as injured witness (PW 4) not on the vital parts of the body, their conviction under Sections 323 and 324 r/w Sections 147, 148 and 149 of the IPC is required to be maintained.

11. Now, so far as org. accused Nos. 5 and 6 are concerned, the most important witness, who also got injured in the incident in question has deposed before the Court that their names were not stated in the FIR but later on their names were mentioned in the DD recorded by the Mamlatdar. Furthermore, the dhariya injury caused by org. accused No. 5 is not proved beyond reasonable doubt since the name of org. accused No. 5 was not stated in the FIR by the said witness and therefore this can be said to be serious discrepancy so far as org. accused No. 5 is concerned and therefore also the benefit of doubt is required to be given to the said accused. It is also required to be noted that though the PW 4 had stated that org. accused No. 6 had armed with dart, but did not state as to which kind of injury was caused by him. Thus, the prosecution case is doubtful so far as the org. accused Nos. 5 and 6 are concerned and they are required to be given the benefit of doubt.

12. From the above facts and circumstances of the case what is apparent is the lack of pre-meditation and intention to kill and a reason for the appellant being provoked. However, the fact remains that the offence is said to have been committed. Therefore, while we are inclined to hold that the offence had taken place as alleged by the prosecution we have a reason to say that the nature of offence would fall under exception to section 300. We are therefore inclined to alter the conviction and the sentence recorded qua org. accused No. 1 from one under section 302 to section 304 (Part I) and convict the appellant for the offence under section 304 (Part I) and sentence him to imprisonment for a period of ten years.

13. In the result, Criminal Appeal No. 2199 of 2008 preferred by the original accused Nos. 1 to 4 is partly allowed; while allowing the said appeal in respect of original accused No. 6.

13.1 The judgment and order rendered in Sessions Case No. 46 of 2007 on 11/07/2008 by the learned Additional Sessions Judge, Patan, convicting the original accused No. 1-appellant No. 1 of CR.A No. 2199 of 2008 for the offence punishable under Sections 302, 324, 323 read with Section 147, 148 and 149 of the Indian Penal Code, is altered to one punishable under Section 304 Part-I of the Indian Penal Code and, accordingly he is directed to undergo rigorous imprisonment of ten years for the said offence and the period of sentence already undergone shall be considered for remission of sentence. The bail bond and surety shall stand cancelled and he is directed to surrender before the Jail Authorities concerned, within a period of twelve weeks from today to serve the remaining sentence; failing which, the concerned Jail Authority shall take appropriate action, in accordance with law.

13.2 Insofar as original accused Nos. 2 to 4 -appellant Nos. 2 to 4 of CR.A No. 2199 of 2008 are concerned, the judgment and order of conviction and sentence for the offence punishable under Section 302 read with Sections 147, 148 and 149 of the IPC, is quashed and set aside; however the judgment and order of conviction under Sections 323 and 324 r/w Sections 147, 148 and 149 of the IPC is confirmed and their order of sentence is reduced to the sentence already undergone by them, on the condition that they will deposit a sum of Rs. 10,000/- (Rupees Ten Thousand Only) each as compensation to the son of deceased-Ghelabhai Kachrabhai within a period of 12 weeks from today and the said amount of compensation will be deposited before the Sessions Court concerned, which in turn shall be paid to the son of the deceased as compensation after due and proper verification. If the org. accused Nos. 2 to 4 will not deposit the amount of compensation as directed herein above, then they are required to undergo the remaining sentence awarded under Sections 323 and 324 r/w Sections 147, 148 and 149 of the Indian Penal Code by the trial Court.

13.3 Insofar as org. accused No. 6-appellant No. 5 of CR.A No. 2199 of 2008 is concerned, the judgment and order of conviction and sentence rendered qua him is quashed and set aside. He is ordered to be acquitted of all the charges levelled against him. Bail bond and surety shall stand discharged.

14. Criminal Appeal No. 2241 of 2008 preferred by org. accused No. 5 is allowed. The judgment and order of conviction and sentence rendered qua him is quashed and set aside. He is ordered to be acquitted of all the charges levelled against him. Bail bond and surety shall stand discharged. R & P to be sent back to the trial Court forthwith. Yadi of this Farad shall be forwarded to the Jail Authorities immediately.