

(2017) 02 GUJ CK 0141
In the Gujarat High Court
Case No : 642 of 1993

THE STATE OF GUJARAT

APPELLANT

Vs

MAHOMADJAMIL VALIMAHOMAD SHAIKH & ORS.

RESPONDENT

Date of Decision : 22-02-2017

Acts Referred:

Indian Penal Code, 1860, Section 397,
Section 395 - Robbery or dacoity, with attempt to cause
death or grievous hurt - Punishment for dacoity

Citation : (2017) 02 GUJ CK 0141

Hon'ble Judges : Akil Kureshi, Biren Vaishnav

Bench : Division Bench

Advocate : Himanshu K Patel, Darshan M Varandani, Mousami K Vala, advt.

Judgement

1. Being aggrieved by the judgement and order dated 18.02.1993, passed by the learned Additional Sessions Judge, Ahmedabad, in Sessions Case No. 160 of 1991, by which the accused have been acquitted of the charge of offence under Section 397, the State has come in appeal.

2. Chandubhai Virjibhai Patel is the complainant. According to the version in the complaint, which is at Exh.23, on 16.04.1991 at 23:10 hours at night, while he was waiting at the Jamalpur busstand, an autorickshaw with registration No. GQ G 1910 approached him. Three passengers were sitting in the back of the rickshaw and two passengers were sitting in the front. On being asked by the rickshaw driver, the complainant informed that he wanted to go to old sachivalay. The complainant boarded the rickshaw. The rickshaw proceeded towards Sardar bridge, crossed Sharda Mandir railway crossing and went towards Vastrapur railway station. A copassenger at that point stated that he wanted to be dropped at Guptanagar. The rickshaw then went towards Vishala hotel. Suspecting something fishy, the complainant requested the autorickshaw driver to stop the rickshaw. However, of the three passengers sitting in the autorickshaw, one of them, according to the complainant took out sickle / scythe and two others took

out knives and attacked the complainant on the stomach. They took Rs.50/ from the shirt pocket and the wallet from his trouser. It is the case of the complainant that, he was also robbed of cash worth Rs.4,500/ which he had put in his under garments. A watch valued at Rs.350/ was also taken away by the copassenger in the autorickshaw. According to the version in the complaint, the complainant further stated that the passengers in the autorickshaw threw him out of the autorickshaw along with his suitcase and the autorickshaw proceeded towards VatvaNarol cross roads. The complainant further in his complaint stated that the complainant came in the middle of the road, stopped an approaching truck, boarded the truck and followed the autorickshaw. The truck over took the autorickshaw at the Sarkhej Octroi Post and was stopped. The autorickshaw driver, who at that time was in the autorickshaw, on being questioned, identified himself as Mohammadjamil Valimohammad Shaikh, a resident of Danilimda. A complaint was accordingly lodged at the Vejalpur Police Station, as according to the complainant the the autorickshaw driver Mohammadjamil Valimohammad Shaikh had revealed names of other copassengers being Akbar Valimohammad Belim, Mohammad Yunus, Mohammad Hussain and Anwar alias Anni Chhotubhai. Based on this complaint, an investigation was carried out and the charge was framed by the trial Court at Exh.2 and the five accused namely, Mohammadjamil Valimohammad Shaikh, Mohammad Yunus, Akbar Valimohammad Belim, Mohammad Hussain and Anwar respectively were charged for committing offence under Section 395 and 397 of the IPC.

3. At the outset, we are informed that the respondent No.1 i.e. Mohammadjamil Valimohammad Shaikh has expired. The appeal, therefore, qua respondent No.1 abates. The complainant Chandubhai has been examined at Exh. 22 as prosecution witness No.5. According to the testimony of this witness, he is a resident of Navsari. On 16.04.1991, on the date of the incident, he was waiting for a bus at the busstop, at which point of time an autorickshaw approached him. The registration number of the autorickshaw was GQG 1910. On being asked the complainant responded by telling the autorickshaw driver that he wanted to go to "L" Colony, Ambawadi. Three passengers were sitting in the autorickshaw. The complainant refused to sit, unless, the autorickshaw driver told him the fixed amount of fare, which ultimately was settled at Rs.3/ He, thereafter, boarded the autorickshaw. According to this witness, when the rickshaw reached near Paldi, he felt one of the copassenger touching his back. He identified the accused Nos. 2 to 5, who were present in the Court. This witness further testifies that again somebody touched his back, therefore, he became alert. The rickshaw proceeded towards Vejalpur. The rickshaw turned right after crossing Shreyas Railway Crossing. The rickshaw did not stop and proceeded further, therefore, according to this witness, he objected to the route that the autorickshaw was taking. This witness further stated that at this point of time, the accused No.2 asked the rickshaw driver to drop him first, and hence the rickshaw driver proceeded. The accused No.3, according to this witness's version, informed the driver that he wanted to go to Vasna, and therefore, the rickshaw turned again and came near

to the railway crossing. On finding the route of the autorickshaw suspicious, he felt like shouting, but he resisted from doing so. This witness further testifies that he was waiting for the road to the Vishala Hotel expecting to get some help, but could not find any person who could help him. The autorickshaw driver refused to stop the autorickshaw. Thereafter, the accused Nos. 5 and 2, kept knives near the complainant's stomach and the accused No.3 kept a weapon like sickle / scythe on his neck. Article No.11 i.e. the Sickle was identified by the complainant. However, he could not identify articles Nos. 12 and 13 the knives, as to whether they were used by the accused Nos. 2 and 3. According to the further testimony of this witness, a copassenger in autorickshaw tried to open his suitcase and the passenger sitting next to the autorickshaw driver tried to attack him with fist blows. According to the version of the complainant, he was pushed out of the autorickshaw. He ran behind the autorickshaw and tried to note the number. Since he did not carry any writing instrument, he could not note down the number, but he tried to memorize the number. He came back, picked up his suit case lying on the road and stood in the middle of the road to stop the truck that was approaching. The approaching truck driver stopped the truck finding the complainant standing in the middle of the road, initially the truck driver abused him, but on being explained about the incident, he was allowed to board the truck. According to this witness, he along with the truck driver followed the autorickshaw, found him and over took the autorickshaw at the Narol Octroi post. He got down from the running truck at the Octroi post, got the help of a person wearing a "Khakhee" uniform on being under the impression that they were the police personnel. However, this Security Guard was subsequently found to be a Municipal Security Guard. He along with the security guard found the autorickshaw in the line. The autorickshaw driver was challenged. He stopped the autorickshaw. The autorickshaw driver was identified. At this point of time, according to this witness, he asked the name of the driver, whom he then identified as Mohammadjamil Valimohammad Shaikh. On the Narol Police arriving, the incident was narrated to the police. The police questioned the security staff of the Octroi post and then a complaint was lodged at the Vejalpur Police Station. This witness further testifies that, thereafter, his brothers and father were summoned to the police station. According to this witness, he has suffered minor injuries on the hand and that he returned after taking some primary treatment. This witness was crossexamined. In his crossexamination, he stated that he had stopped at the Calico Busstand for around 20 minutes. He denied of admitting that he had not stated that the passengers travelling with him did not try to attack him and that he had tried to stop the autorickshaw when it moved away from the route that was suggested. This witness further in his crossexamination stated that when the truck driver over took the autorickshaw driver, it was only for the first time that he informed the security people when he got down from the truck and it was subsequently that he informed the Narol Police. In the crossexamination, this witness further admitted that when he went to the police station on the third day, the accused were in the lockup and that the Test Identification Parade was carried out on the fifth day.

Thereafter, he further admitted in his cross-examination that he had seen the accused at the Police lockup, before the Test Identification Parade. But he had even otherwise identified them. In his cross-examination, he further admitted that he did not note down the details of the truck number or the truck driver.

4. Dilavarsinh Mangalsinh Zala, prosecution witness No 9, was at the relevant time working at the NarolSarkhej Octroi post. According to the testimony of this witness, on 16.04.1991, he saw one individual getting down from the truck and informing the staff present at the Octroi naka that he had been robbed and the autorickshaw was followed, which needs to be stopped. Accordingly, the autorickshaw was stopped. He did not remember the autorickshaw number, but when asked the complainant identified the autorickshaw and the driver therein. The rickshaw driver was then handed over to the police. This witness stated that, since it was late in the night, he could not identify the autorickshaw driver. Prosecution witness No.10 is the relative Virjibhai Kalabhai, who has been examined at Exh. 34. In his testimony, this witness states that on 17.04.1991 on being called he went to the police station, where Chandubhai the complainant was recording his version before the Police Officer. According to this witness, Chandubhai the complainant narrated the version as recorded in the complaint to this witness.

5. Prosecution witness No.17 Kiritbhai Virjibhai Patel is younger brother of the complainant, who is examined at Exh. 48. In his testimony, this witness states that on being informed by his elder brother Vasant, he went to the Police Station. When he went to the Police Station, the rickshaw driver was being questioned and the police was recording the complaint of his brother Chandubhai. The Executive Magistrate, who carried out the Test Identification Parade is examined as PW11. Pravinkumar Parshottamdas Mevada, who is examined at Exh. 36, in his examination in chief, explains the procedure that was carried out in identifying the accused.

6. The prosecution by way of corroborative evidence has pressed into service the discovery panchnama at Exh.31, by which the weapons used i.e. the sickle and two knives have been discovered at the instance of the accused.

7. To bring home the charge under Section 397, the essential ingredient is that of the version as narrated in the complaint, which is supported by the testimony of the complainant Chandubhai Patel at Exh.22. As per the version in the complaint, the complainant extensively narrates the version as to how the autorickshaw driver travelled from the Calico bridge to various routes and how the complainant was robbed of his belongings, namely, the cash and the wrist watch. As far as the version of this witness is concerned, it is to be noted that there is a remarkable improvement in his testimony, inasmuch as, he does not narrate in his complaint as to how he was pushed down from the auto, how he collected the suit case and tried to memorize the registration number of the autorickshaw. When his testimony is read, the version so narrated does not find place in the complaint. Moreover, the theory put forward by the complainant that after having

been pushed down from the autorickshaw, he could catch up the autorickshaw with the help of a truck driver, and remember the registration number of an autorickshaw at the dark hour of night, seems highly improbable.

8. This testimony has to be tested in light of the testimony of the security guard i.e. PW9 Dilavarsinh Mangalsinh Zala, who is examined at Exh.33. According to the version of this witness, he saw the complainant getting down from the truck and at his behest the autorickshaw driver was stopped and the autorickshaw driver took the autorickshaw to a side. Had it been so, the autorickshaw driver, who was otherwise implicated for an offence, the conduct of the autorickshaw driver would naturally have been to flee the scene and not stop once as asked to stop by the security guard.

9. The exercise of Test Identification Parade carried out at the instance of the prosecution by which the accused have been said to be identified also is explainable in view of the fact that it has come out in cross-examination of the complainant that he had seen the accused in the police lockup three days before and the Test Identification Parade was carried out five days thereafter. Corroborative evidence, therefore, of identifying these accused would be highly suspicious in view of the fact that it has come on record that the complainant had seen them five days before the incident in the lockup.

10. The testimony of the other witnesses, who are otherwise relatives and can only be said to be witnesses who have heard the version of the complainant, do not support the evidence on record.

11. Further, it is the case of the complainant that while he was travelling in the autorickshaw, he was attacked by Sickles / scythes and two knives and therefore sustained injuries, cannot be said to be a credible version in view of the absence of any medical evidence on record which substantiates the stand of the prosecution.

12. For the foregoing reasons, the judgment of the learned Additional Sessions Judge, Ahmedabad, in Sessions Case No. 160 of 1991, by which the accused have been acquitted of the charge of offence under Section 397, cannot be said to be perverse, and therefore, we see no reason to interfere with the order of acquittal. The appeal, therefore, stands dismissed. R & P be sent back to the Court below forthwith.