
(2009) 08 GUJ CK 0006
In the Gujarat High Court
Case No : Criminal Appeal No. 1356 of 2003

Vinubhai @ Daghiyo Himmatbhai Goswami

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 25-08-2009

Acts Referred:

Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 302

Citation : (2010) CriLJ 645 : (2009) 3 GLH 618

Hon'ble Judges : J.C. Upadhyaya, J; Bhagwati Prasad, J

Bench : Division Bench

Advocate : Mrharshitstolia, for the Appellant; L.B. Dabhi, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

J.C. Upadhyaya, J.—The challenge in this appeal is to the judgment and order rendered by the learned Additional Sessions Judge, Fast Track Court No. 1, Bhavnagar on 24.09.2003 in Sessions Case No. 37 of 2002, whereby the appellant, who was original accused in the said case came to be convicted for the offences punishable u/s 302 of the IPC and Section 135 of the Bombay Police Act and the appellant accused was sentenced to undergo life imprisonment and fine of Rs. 1000/- and in default of payment of fine, S.I for one year for the offence punishable u/s 302 of the IPC and S.I for four months and fine of Rs. 250/- and in default of payment of fine, imprisonment for two months for the offence punishable u/s 135 of the Bombay Police Act. He has challenged the impugned order recording his conviction and sentence by preferring this appeal.

2. The prosecution case in nutshell is that deceased Haribharthi Lalbharthi was serving as watchman at Crematorium, situated in Mahuva town of District Bhavnagar. On 5.11.2001, deceased Haribharthi and his son Nitinbharthi (PW-3) came to Mahuva from their Village Logia and at about 12 in the noon, when they

both were proceeding in the area called Vasitalav in Mahuva, at that time, the appellant met them and the appellant demanded some money from the deceased for consumption of liquor, to which deceased outright refused. The appellant thereupon abused the deceased. The deceased thereafter went towards the crematorium and his PW-3 Nitinbharthi departed from his deceased father, as the deceased had told his son Nitinbharthi to go to home. It is the case of the prosecution that Nitinbharthi while returning towards his home saw that the appellant was chasing his deceased father Haribharthi and he felt some doubt and, therefore, he also chased the appellant. When the deceased reached to the crematorium, the appellant initially inflicted blows with stone on the head of the deceased, and, thereafter, inflicted knife blows on the chest and other parts of body of the deceased. Nitinbharthi Haribharthi (PW-3) reported the incident to police and the FIR came to be registered. During the course of investigation, statements of material witnesses were recorded. Bloodstained clothes of the deceased and of the appellant were seized. At the instance of the appellant, weapon knife came to be recovered. After collecting required material for the purpose of lodgment of chargesheet, chargesheet came to be filed in the Court of learned JMFC, Mahuva. Since the offence was exclusively triable by the Court of Sessions, learned JMFC, Mahuva committed the case to the Court of Sessions at Bhavnagar, which was numbered as Sessions Case No. 37 of 2002.

3. The learned trial Judge framed charge at Exh. 4 against the accused for the offences punishable u/s 302 of the IPC and Section 135 of the Bombay Police Act, to which the appellant did not plead guilty and claimed to be tried. Thereupon the prosecution adduced its oral and documentary evidence. After the prosecution concluded its oral evidence, the learned trial Judge recorded the further statement of the appellant u/s 313 of the Cr.P.C. The appellant in his further statement denied generally all the incriminating circumstances put to him by the learned trial Judge and stated that he was falsely implicated in this case.

4. After considering the evidence on record and the submissions made on behalf of both the sides, the learned trial Judge came to the conclusion that though the prosecution case rests upon the testimony of sole eye-witness the first informant Nitinbharthi PW-3, examined at Exh. 15, his testimony is reliable, trustworthy and inspires confidence and is corroborated by other evidence adduced by the prosecution and ultimately recorded conviction of the appellant for the offences punishable u/s 302 of the IPC and Section 135 of the Bombay Police Act and awarded the sentence as herein above referred to in this judgment.

5. Learned advocate Mr. Tolia for the appellant accused submitted that the learned trial Judge committed serious illegality and irregularity in accepting the testimony of sole eye-witness examined by the prosecution. It is submitted that the evidence of sole eye-witness PW-3 Nitinbharthi is full of material contradictions and improvements. The testimony exposes his unnatural conduct in material particulars. He does not satisfactorily explain as to why on the date of the incident, he accompanied his deceased father to go to the crematorium,

where only his deceased father was serving as watchman. Even if it is believed that without any purpose he accompanied his deceased father to go to the crematorium, then there is no satisfactory explanation forthcoming from his evidence as to why after some altercation took place between appellant and his father in the area called Vasitalav, which comes on the way to the crematorium, his father instead of taking his son to the crematorium, told him to go back to his house. According to the FIR of PW-3 Nitinbharthi, he only saw the appellant inflicting blows with stones on the head of his deceased father and did not see the appellant inflicting knife blows on his father, yet, in the evidence material improvement is made to the effect that he saw the appellant inflicting blows on his father with stone as well as knife.

6. The prosecution projected this witness PW-3 Nitinbharthi as sole eye-witness, but in his testimony it emerges that at the time of the incident, one dead-body of one lady was brought by her relatives for cremation in the crematorium. He further admits that when they reached the crematorium, the dead-body of that lady was on pyre in the crematorium. Thus, there was availability of other witnesses, yet, PW-3 Nitinbharthi who is son of the deceased is projected as sole eye-witness by the prosecution.

7. According to the evidence of PW-3 Nitinbharthi, seeing the incident happening, he immediately came to the house of his father's friend Ismailbhai (PW-4) and informed him about the incident and he himself and Ismail immediately came to the crematorium where they found the dead-body of deceased. The version of PW-3 Nitinbharthi does not get any corroboration, if the testimony of PW-4 Ismailbhai is considered together with the inconsistency regarding the time when they reached the crematorium.

8. It is further submitted on behalf of the appellant that the investigation is also tainted and unreliable. The panchnama of scene of offence and inquest panchnama came to be drawn prior to the registration of the FIR. The evidence of so-called eye-witness does not get corroboration from the medical evidence on record.

9. The trial Court placed much reliance upon the muddamal weapon knife having been recovered at the instance of the appellant vide discovery panchnama, Exh. 31. Both the panchas of said panchnama turned hostile. Considering the evidence of Investigating Police Officer PI Mer PW-14, examined at Exh. 36, the knife was recovered from the person of the accused at the time when the appellant accused came to be arrested and his arrest panchnama was drawn. Thus, the recovery of knife as alleged by the prosecution is very doubtful.

10. Therefore, it is submitted that the learned trial Judge erred in recording the conviction of the appellant. The appeal, therefore, may be allowed and the appellant accused may be acquitted of all the charges levelled against him.

11. Per contra, learned Additional Public Prosecutor Mr. Dabhi for the State vehemently opposed this appeal and submitted that the learned trial Judge

rightly relied upon the evidence of sole eye-witness PW-3 Nitinbharthi. There is no material contradiction between his testimony and the FIR, Exh. 16. There may be minor inconsistency, but, this witness hails from a small village and is an illiterate person, doing labour work. On material particulars, he fully supports the case of the prosecution. Therefore, the inconsistency about testimony etc. shall pale into insignificance. His evidence is corroborated by evidence of PW-4 Ismailbhai on material particulars. The evidence of sole eye-witnesses is supported by medical evidence on record. The knife used by him in the incident came to be recovered at his instance and the blood of the deceased is found on the knife as per FSL evidence. Therefore, it is submitted that the appeal may be dismissed.

12. We have examined the record and proceedings in context with the submissions made by the rival sides.

13. Considering the evidence on record, together with the submissions made on behalf of both the sides and the impugned judgment and order rendered by the learned trial Court, it transpires that the entire prosecution case rests upon the testimony of PW-3 Nitinbharthi Haribharthi examined at Exh. 15. In the impugned judgment, the learned trial Judge relied upon the case of Anil Phukan v. State of Assam reported in (1993) SCC (Criminal) 810 as to how and in what manner the testimony of sole eye-witness is to be appreciated. Honorable the Apex Court in paragraph 3 in the aforesaid judgment observed as under:

This case primarily hinges on testimony of a single eye-witness Ajoy PW 3. Indeed, conviction can be based on the testimony of a single eye-witness and there is no rule of law or evidence which says to the contrary provided the sole witness passes the test of reliability. So long as the single eyewitness is a wholly reliable witness the courts have no difficulty in basing conviction on his testimony alone. However, where the single eye-witness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the courts -generally insist upon some independent corroboration of his testimony, in material particulars, before recording conviction. It is only when the courts find that the single eye-witness is a wholly unreliable witness that his testimony is discarded in toto and no amount of corroboration can cure that defect. It is in the light of these settled principles that we shall examine the testimony of PW 3 Ajoy.

14. Thus, the conviction can be based upon the testimony of sole eye-witness if the same is found wholly reliable. If his testimony is not found to be wholly reliable, then the Court may insist upon some independent corroboration. If his testimony is found to be wholly unreliable, then the same is to be discarded in toto and no amount of corroboration can cure the defect.

15. Keeping in mind the ratio laid down by Honourable Apex Court in the aforesaid case, if the evidence of PW-3 Nitinbharthi is considered, it transpires that at the relevant time his father was serving as watchman in the Mahuva

Crematorium. According to him, 2 to 3 days prior to the date of the incident, his father was on leave and was not in a position to attend his duty as watchman in the crematorium, and, therefore, in place of his father, as a reliever, he attended the duty as watchman in the crematorium. According to him, his occupation was labour work. He was not an employee engaged in the crematorium. On the day of the incident, his father had arrived and his father was to attend the duty as watchman in the crematorium. However, in his evidence, he stated that on the day of the incident, he left his home along with his father to go to crematorium at Mahuva. No satisfactory explanation is forthcoming as to why on the date of the incident, he accompanied his father to go to the crematorium.

16. Be that as it may be, the significant aspect of his evidence is that while on way to the crematorium, the appellant met them and demanded some money from his father for purchase of liquor and his father outright refused the request and thereafter according to him, the appellant abused his father. Thereafter, his father told him to go to home and his father proceeded towards crematorium and he proceeded towards his home. However, according to him, the appellant started chasing his father to the crematorium, and, therefore, he became suspicious. No plausible explanation is forthcoming as to why after some altercation took place between his father and the appellant, his father abruptly told him to go back to home and his father alone proceeded towards crematorium. According to PW-3 Nitinbharthi, as the appellant abused his father, he suspected for the malafide intention of the appellant and in fact he chased the appellant. According to him when his father departed from him and was proceeding towards crematorium, the appellant chased his father and suspected some foul play on the part of the appellant. This witness instead of going back to his home, chased the appellant. He admitted that despite the fact that he suspected for the bad intention of appellant, he did not warn his father, but, he chased the appellant in such a manner that his father could not know who was proceeding ahead towards the crematorium. According to this witness as soon as his father reached to the crematorium, the appellant took the stone in his hand and proceeded to inflict blow with stone on his father. He neither shouted for help nor warned his father about the attack. According to his testimony, thereafter the appellant inflicted two blows with knife on the body of his father. He admitted that he did not intervene to save his father nor he shouted for help. Even at that point of time, he did not go near his father to help him despite the fact that his father had sustained serious injuries, but, immediately went to the house of his father's friend Ismailbhai and informed Ismailbhai about the incident, and Ismailbhai and he himself again came to the crematorium and at that time the appellant was found escaping from the place of the incident.

17. Moreover, PW-3 Nitinbharthi denies the suggestion that in his FIR, he has not stated that the appellant inflicted blows with knife on the body of his father, but in this respect considering the FIR, Exh. 16 along with the evidence of Investigating Police Officer, PI Mer PW-14, he admitted that the first informant PW-3 Nitinbharthi did not state in his FIR recorded before him that he had seen

the appellant inflicting blows with knife on the body of his father. According to our considered opinion, when the prosecution case is based upon the sole evidence of a solitary witness, this is material improvement in the evidence of this witness that he saw that appellant inflicting knife blows on the body of the deceased.

18. Considering the evidence of PW-3 Nitinbharthi, it further transpires that at the time of the incident, dead-body of one lady was brought by the relatives for cremation. He admits that he has stated in his FIR that the dead-body of the lady was brought to the crematorium for cremation and the dead-body was placed on pyre for cremation. On behalf of the appellant, therefore, it is submitted that there was availability of independent witnesses at the time of so-called incident, but the prosecution only projected PW-3 Nitinbharthi as solitary eye-witness. We find considerable force in the submission as it is revealed from the evidence of this witness that at the time of incident, there was availability of other witnesses in the crematorium itself.

19. If the evidence of PW-4 Ismail, examined at Exh.17 is considered, he stated that at about 2 p.m. to 2.30 p.m. PW-3 Nitinbharthi came to his house and told him that somebody has killed his father. Nitinbharthi told him that his father was assaulted upon by stone and knife by somebody. He went to crematorium along with Nitinbharthi and found dead-body of father of Nitinbharthi. In his cross-examination he stated that Nitinbharthi met him for the first time at about 6.30 p.m. to 7 p.m. He further admitted that Nitinbharthi did not tell him the name of the assailant, who caused injury to his father. We are therefore of the considered opinion that the evidence of PW-4 Ismailbhai does not corroborate the evidence of PW-3 Nitinbharthi, but on the contrary makes the testimony of PW-3 Nitinbharthi, a doubtful one. PW-4 Ismailbhai does not say that Nitinbharthi informed him that his father was assaulted upon by the appellant. According to Nitinbharthi, immediately he himself and Ismailbhai came to the crematorium. However, according to the evidence of Ismail, Nitinbharthi came to his house at about 6.30 p.m. to 7 p.m. and, thereafter, he went to crematorium with Nitinbharthi. According to the evidence of PW-3 Nitinbharthi, when he himself and Ismailbhai came to the crematorium, at that time, appellant was seen fleeing from the crematorium with knife. No such facts are stated by PW-4 Ismailbhai in his evidence. Considering the impugned judgment rendered by the trial Court, the trial Court did not rely upon the evidence of PW-4 Ismailbhai and branded him as liar and even the show-cause notice of perjury came to be issued by the trial Court against the PW-4 Ismailbhai. However, when the evidence of PW-4 Ismailbhai is viewed by the trial Court as false and unreliable, then, the trial Court failed to consider the material aspect of the matter, as to what would be effect of such unreliable evidence of PW-4 Ismailbhai upon the testimony of sole eye-witness PW-3 Nitinbharthi. As stated above, the evidence of PW-3 Nitinbharthi does not get any corroboration from the evidence of PW-4 Ismail, but on the contrary makes the evidence of PW-3 Nitinbharthi a doubtful one. PW-4 Ismail is examined as witness of the prosecution and has not been

declared as hostile witness.

20. The prosecution examined Ramaben Haribharthi PW-5, at Exh. 20, who is widow of deceased, but her evidence is of no significance and her evidence remains mere hearsay evidence. Prosecution examined mother of the appellant PW-5 Rudiben as prosecution witness to prove that she delivered bloodstained clothes of her son - the appellant to the police, but, she did not support the case of the prosecution. The prosecution examined PW-7 Abdul Razak to prove that a day prior to the date of the incident, the appellant purchased muddamal weapon knife from him, but he turned hostile and did not support the said version of the prosecution. Prosecution examined PW-9 Jayesh Parshottambhai at Exh. 24, surprisingly, to establish that after the incident the appellant took PW-9 Jayesh to the crematorium, and showed the dead-body of deceased, stating that he had killed the deceased, and if this witness Jayesh would tell anybody about the incident, then he would be killed like the man whom he had killed as well as to prove the fact that after showing the dead-body of the deceased the appellant took Jayesh to the place where he had concealed the knife, and showed him said place. However, this witness PW-9 Jayesh Parshottambhai turned hostile and did not support the above version of the prosecution case. However, the significant aspect is that this creates serious doubt about the honesty and integrity and the manner and method of investigation undertaken by the Investigating Police Officer. PW-9 Jayesh admitted that he is not the eye-witness, there was no reason whatsoever for accused to take Jayesh to the scene of occurrence and to show the dead-body of the deceased and then to threaten Jayesh that if he would tell anybody that the deceased was murdered by him, then he would be murdered like the deceased. There was no reason whatsoever for the appellant to take Jayesh to the place where allegedly the appellant had concealed the weapon knife. We agree with the submission made on behalf of the appellant, whereby police investigation is criticized as tainted investigation.

21. Considering the evidence of PW-13 PSO Mr. Parmar, the FIR lodged by the first informant PW-3 Nitinbharthi, Exh. 16 came to be registered in the police station at 20.30 hours on 5.11.2001 and Crime Register No. 160/2001 was allocated to the FIR. It is pertinent to note that the inquest panchnama, Exh. 48 came to be drawn between 19 hours to 20 hours and the panchnama of the scene of occurrence, Exh. 28 came to be drawn between 20 hours to 21 hours and in both the panchnamas, Exhs .28 and 48, the Crime Register No. 160/2001 is referred. However, as a matter of fact, the FIR was registered as C.R. No. 160 of 2001 after both these panchnamas were drawn. Despite this, in both these panchnamas which came to be drawn admittedly before the FIR came to be registered as C.R. No. 160/01, the C.R. No. 160/01 is referred in these panchnamas. How this defect occurred is still doubtful. The Investigating Police Officer Mr. Mer in his evidence tried to justify this defect by explaining that the person who was sent to police station for registration of the FIR returned back with the crime register number of the FIR. However, no such policeman, who went for registration of FIR to police station is examined a witness and even

Investigating Officer Mr. Mer does not say as to when he sent the policeman for the purpose of registration of FIR to the police station and when said policeman returned. In nutshell, this fact explicitly reveals the manner and method in which the investigation was carried over.

22. Prosecution relies upon the evidence of discovery of weapon knife at the instance of the appellant and the blood of the deceased, found on the knife. To prove the discovery panchnama, Exh. 31, the prosecution examined panchas PW-8 Lalitbhai and PW-12 Murad, but they both have turned hostile. According to the panchnama, Exh. 31, the accused took the Investigating Police Officer and the panchas to a road leading towards a port and from a roadside bush the knife was recovered. Panchas did not support the contents of the panchnama, Exh. 31. Usually when such situation arises, Court always looks at the evidence of Investigating Police Officer who drew the discovery panchnama, but in the instant case, on this count, considering the evidence of PI Mer PW-14, Exh. 36, he stated that at the time of the arrest of the appellant, arrest panchnama was drawn and at that time the weapon knife was seized from the appellant. He does not state that the weapon knife was recovered at the instance of the appellant vide discovery panchnama. Exh. 31. Such evidence of Investigating Police Officer is contrary to the contents of the discovery panchnama, Exh. 31. At any rate this makes the recovery of muddamal weapon knife doubtful piece of evidence and does not connect the appellant with the knife which is allegedly a weapon of the crime. When such is the situation, the FSL evidence reveals that the blood of the deceased of group "A" came to be found on the knife, cannot be considered as an incriminating evidence involving the appellant with the crime. Again it creates serious doubt about the way in which a serious offence like murder is investigated.

23. We are aware of the fact that a true and genuine criminal case of a victim does not stand frustrated on account of mere defect in investigation of the crime or negligence or inefficiency on the part of a police office in carrying out investigation. However, in the present judgment, the manner and method of investigation by the investigating police officer is discussed only for the limited purpose of arriving at just and reasonable conclusion as to how to evaluate and assess the evidence of the sole eyewitness examined by the prosecution. As held in the case of *Anil Phukan v. State of Assam* (supra), Hon'ble the Apex Court broadly divided the evidence of sole eyewitness in three categories, namely, (i) wholly reliable, (ii) not found to be wholly reliable and (iii) wholly unreliable. If the evidence of solitary eyewitness is found to be wholly reliable, the conviction can be based on it, but if it is not found to be wholly reliable, the Court may insist for some corroboration before acting upon the evidence. However, when such evidence is found wholly unreliable and defective, then the same is required to be discarded in toto and no amount of corroboration can cure that defect. In the instant case, we have found the evidence of PW-3 Nitinbharthi, projected as solitary eyewitness, full of material improvements, inconsistent and doubtful. We need not reiterate here the discussions made above in this judgment regarding

the evidence of the PW-3 Nitinbharthi but suffice it to say that his evidence rather reveals his unnatural conduct and behaviour causing serious doubt about the veracity and reliability of his evidence. His evidence is not found to be trustworthy and does not inspire confidence in the mind of the Court, and, therefore, it is not safe to record conviction solely relying upon his evidence. According to us his evidence is "wholly unreliable", but even if it is believed that his evidence is not found to be wholly reliable, then in that case, as discussed earlier, the evidence of PW-3 Nitinbharthi does not get any corroboration in material particulars by evidence of PW-4 Ismailbhai and considering the manner and method in which the investigation is made by the investigating officer, the evidence collected through such investigation does not satisfactorily corroborate the evidence of PW-3 Nitinbharthi. As a matter of fact, the evidence regarding nature and quality of the investigation rather causes adverse effect upon the evidence of PW-3 Nitinbharthi. One weak evidence does not provide corroboration to another weak evidence. So, in every respect, the evidence of PW-3 Nitinbharthi is shaky and untrustworthy and it is not safe to record conviction solely relying upon his evidence. Even the trial Court, in paragraph 11 in the impugned judgment, criticized the conduct of this witness and opined his conduct to be unnatural. Consequently, once the testimony of the PW-3 Nitinbharthi is excluded from the evidence, there remains nothing on record which would hold the appellant responsible for the offence charged against him.

24. We are, therefore, of the considered view that the learned trial Judge erred in recording the conviction of the appellant for the offences punishable u/s 302 of the IPC and Section 135 of the Bombay Police Act. The prosecution has failed to prove its case beyond reasonable doubt against the appellant and the appellant deserves the benefit of doubt. The appeal merits acceptance and the impugned judgment and order recording the conviction of the appellant, deserves to be set-aside.

25. For the foregoing reasons, the appeal is allowed. The conviction of the appellant recorded by the learned Additional Sessions Judge, Fast Track Court No. 1, Bhavnagar on 24.09.2003 for the commission of the offences punishable u/s 302 of the Indian Penal Code and Section 135 of the Bombay Police Act in Sessions Case No. 37 of 2002 and the sentence awarded thereunder are set-aside. The appellant is acquitted of the charges levelled against him. The appellant be released forthwith from the jail, if no longer required in connection with any other case. Fine, if paid, be refunded to him.