

(2009) 05 GUJ CK 0005
In the Gujarat High Court
Case No : Criminal Appeal No. 960 of 2002

Vishrambhai Sakalaji Kharadi

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 06-05-2009

Acts Referred:

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

Citation : (2009) 05 GUJ CK 0005

Hon'ble Judges : Rajesh H. Shukla, J; Jayant Patel, J

Bench : Division Bench

Advocate : Sadhana Sagar, for the Appellant; C.M. Shah, APP for Opponent 1, for the Respondent

Judgement

Jayant Patel, J.—The present appeal is directed against the judgement and order passed by the learned Sessions Judge in Sessions Case No. 31/2002, whereby the learned Sessions Judge has convicted the appellant-accused for the offence u/s 302 of IPC and has imposed sentence of life-imprisonment with the fine of Rs. 1,000/-.

2. It appears that as per the prosecution case on 12.11.2001, the complainant was sleeping at his residence and at that time, Jakhirbhai Rasoolkhan Pathan, who was staying nearby the uncle of the complainant, with his wife, shouted and he was informed that there was fight going on between the uncle (of the complainant) and his son Vishrambhai Sakalaji Kharadi. Therefore, the complainant and his wife went to their place at about 2.30 and he found that Vishrambhai, the appellant - accused was giving blows to his father with a pot of metal (Ghada) and his uncle has fallen down. The complainant also saw that the accused was also giving blows on the chest and one iron rod was lying there and he also found that there was a spot of burning on the stomach of his uncle. When the complainant enquired, the complainant and one Jakhirbhai were informed by the accused that "salo mara baira ne chhano chhano rakhto hatu tethi me tene

dam dai ghado mari patavi didho chhe", meaning thereby "since he was keeping relation with my wife secretly today I have finished him by burning his skin and by giving blows with the pot." Thereafter, the complaint was filed by the complainant with Vijaynagar Police Station vide C.R. No. 139/01.

3. The complaint was investigated and thereafter the charge-sheet was filed against the appellant - accused. The learned Sessions Judge, after framing of the charge, tried the case. Prosecution, in order to prove the guilt of the accused, examined 10 witnesses and also produced 11 documentary evidences, which are referred to in para 2 of the judgement of the learned Sessions Judge. The learned Sessions Judge thereafter recorded the statement of the appellant-accused u/s 313 of Cr.P.C., in which the accused denied the evidences against him and in the further statement, the appellant-accused stated that the police case is filed against him because of the earlier dispute. The learned Sessions Judge heard the prosecution as well as the defence and ultimately found that the prosecution has been able to prove the case against the accused for the offence u/s 302 of IPC. The learned Sessions Judge also heard the matter on the aspects of imposition of sentence and ultimately imposed the sentence of life-imprisonment with the fine of Rs. 1,000/- upon the accused - appellant. It is under these circumstances, the present appeal before this Court.

4. We have heard Ms. Sadhana Sagar, learned Counsel for the appellant - accused and Ms. Chetnaben Shah, learned APP for the State.

5. We have gone through the entire evidences led by the prosecution, including the documentary evidences. We have also gone through the entire judgement and order of the learned Sessions Judge.

6. It appears that there are three eye-witnesses to the incident; one is Prakash Laxibhai - PW-1, another is Rekhaben Prakashbhai - PW-2 and third one is Jakhirbhai Rasoolkhan - PW-3. All the aforesaid three witnesses are consistent on the aspects of giving blows by the accused to the deceased, who was his father. The pertinent aspect is that the motive, even as per the case of the prosecution, is that the accused had a doubt that his father had illicit relation with his wife, but if the evidence of all the three eye-witnesses is considered together with the contents of the complaint, which is produced at Ex.10, it appears that there was not only the doubt, but, as stated by the appellant-accused before the said witnesses, the deceased had illicit relation with his wife. Further it also comes from record that on account of such illicit relation on the date of the incident there was quarrel and fighting between the deceased and the accused. Thereafter, the incident has happened of giving various blows by the accused to the deceased.

7. The injury upon the body of the deceased is proved by the medical evidence of Dr. Natwarlal Ditaji - PW-6, who has performed postmortem and he has opined that the cause of death is on account of the rupturing of left lung and as a result thereof, the blood circulation was discontinued and the death has resulted. He

has also found that the spot of burning of skin could be caused with the iron rod and he has also opined that the injury could also be caused with the hard and blunt substances. There is recovery as well as discovery of metal pot, iron rod and the knife. Under these circumstances, the evidence produced by the prosecution goes to show that the accused has given blows to his father with the metal pot and iron rod, who has ultimately succumbed to injuries.

8. The learned Counsel appearing for the appellant-accused has raised the only contention that the learned Sessions Judge could not have convicted the appellant - accused for the offence u/s 302 of IPC, when there was evidence on record that the deceased had illicit relation with the wife of the accused and there was also quarrel and fighting due to the said situation. She submitted that if under these circumstances the accused, who was husband, got provocation and has given blows to the father, not with any lethal weapon, it could not be said that there was any intention to cause death, nor could it be said that there was intention to kill the father. She submitted that it is on account of a sudden provocation due to the alleged illicit relation and the quarrel between the father and the son the incident had happened and, therefore, she submitted that the case would fall u/s 304 Part-I and in any case, it is error on the part of the learned Sessions Judge to convict the appellant - accused for the offence u/s 302 of IPC.

9. Whereas the learned APP Ms. Shah, while supporting the judgement and order of the learned Sessions Judge, has contended that there are three eye-witnesses to the incident and the manner in which the blows have been given by the accused to the deceased shows that there was intention was to kill him and, therefore, she submitted that the conviction recorded by the learned Sessions Judge u/s 302 of IPC is legal and valid.

10. It does appear from the perusal of the judgement and order of the learned Sessions Judge that he has not considered the case on the aspects as to whether it would fall u/s 304 Part-I of IPC or not and the learned Sessions Judge has proceeded on the basis, in the judgement, that the case is proved u/s 302 of IPC against the accused possibly because no such contention appears to have been raised seriously by the defence before the learned Sessions Judge. However, the appeal is a continuous proceedings and even if such contention is not raised, it is open to the appellant - accused to raise such contention, if on the basis of the evidence available on record, the same can be supported and substantiated.

11. The examination of the evidence on record shows that the case of the prosecution is that since the appellant - accused had the doubt of illicit relation of the deceased with his wife, the appellant - accused has caused death of the deceased. It further appears from the complaint that there is reference to the existence of the illicit relation as stated by the accused of his wife with the deceased. The depositions of all the three eye-witnesses; (1) Prakash Laxibhai - PW-1, (2) Rekhaben Prakashbhai - PW-2 and (3) Jakhirbhai Rasoolkhan - PW-3 shows that prior to the incident, there was quarrel between the accused and the

deceased. In the examination-in-chief the witness Prakash Laxibhai - PW-1 has specifically referred to the said aspects and it is on account of such quarrel between accused and his father, Jakhir and his wife had called Prakashbhai and his wife Rekhaben. In the complaint also at Ex.10 it has been specifically stated by the complainant that the accused and the father of the complainant were fighting and, therefore, the complainant had gone to the place of the accused. In the cross-examination of Prakash Laxibhai - PW-1, it has come on record that the deceased Sakalaji Zalamaji Kharadi had illicit relation with other females also. Under these circumstances, it appears that if on account of the illicit relation of the deceased with the wife of the accused, there was inter se quarrel between the accused and the deceased and the said quarrel further resulted into inter se fighting and thereafter if the blows have been given by the accused to the deceased, it could be said as under sudden provocation and the case would attract the provisions of Section 304 Part-I of IPC for the purpose of considering the aspects of conviction of the accused-appellant.

12. In addition to the above, it also deserves to be recorded that the accused has not used any lethal weapon, which, in normal circumstances, could be used to cause death of a human being. As per the prosecution case the blows have been given with metal pot. The existence of metal pot could be, in the house in normal circumstances, in any case, in the village area. Such shows that at the time when there was quarrel and fight between the accused - appellant and the deceased, metal pot might have picked up and the blows have been given by the accused to the deceased. This aspect shows that there could not be any premeditation on the part of the appellant - accused to kill the deceased.

13. At this stage, we may refer to the decision of the Apex Court in the case of Pulicherla Nagaraju @ Nagaraja Reddy Vs. State of Andhra Pradesh, and more particularly the observations made by the Apex Court at para 18 in the said decision, which would be relevant to trace as to whether the case would fall u/s 302 or Section 304 Part-I of IPC. At paragraph 18 in the said decision, the Apex Court has observed as under:

18. Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls u/s 302 or 304 Part I or 304 Part II. Many petty or insignificant matters plucking of a fruit, straying of a cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no pre-meditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable u/s 302, are not converted into offences punishable u/s 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder

punishable u/s 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances : (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any pre-meditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention. Be that as it may.

14. If the aforesaid factual circumstances are considered in light of the aforesaid observations made, by the Apex Court in the aforesaid decision, we are of the view that the case would fall u/s 304 Part-I of IPC and it would not be a case falling u/s 302 of IPC. Hence, we find that the learned Sessions Judge has committed error in convicting the appellant - accused for offence u/s 302 of IPC and it was a case for conviction of the accused for the offence u/s 304 Part-I of IPC. Hence, the judgement and order of the learned Sessions Judge deserves to be modified to that extent. In the result, the conviction recorded by the learned Sessions Judge of the appellant-accused for the offence u/s 302 of IPC is modified to the effect that the conviction shall be u/s 304 Part-I of IPC.

15. On the aspects of sentence, we have also considered the matter. The jail report, which is produced by the learned APP shows that the accused has already remained in jail for a period of more than seven years. Considering the peculiar facts and circumstances in the present case, we find that the sentence already undergone by the appellant - accused without fine shall meet with the ends of justice. Hence, the appellant - accused shall be released forthwith, unless he is required for any purpose known to law.

16. The appeal is partly allowed to the aforesaid extent.