
(2011) 02 GUJ CK 0123
In the Gujarat High Court
Case No : Criminal Appeal No. 442 of 1995

Yogesh @ Anilbhai Zaverbhai

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 17-02-2011

Acts Referred:

Penal Code, 1860 (IPC) — Section 114, 201, 302

Citation : (2011) CriLJ 2582 : (2011) 2 GLH 53

Hon'ble Judges : R.M. Chhaya, J;A.L. Dave, J

Bench : Division Bench

Advocate : Pravin Gondaliya, for the Appellant; K.L. Pandya, APP, for the Respondent

Final Decision : Allowed

Judgement

R.M. Chhaya, J.—This appeal arises out of the judgment and order passed by the learned Additional Sessions Judge, Bharuch on

08.02.1995 in Sessions Case No. 170 of 1994, convicting the Appellant-accused for the offences punishable under Sections 302 and 201 of the

Indian Penal Code and sentencing him to imprisonment for life for the offence u/s 302 of the Indian Penal Code and imposing a fine of Rs. 250/-, in

default, to undergo simple imprisonment for one month and to suffer rigorous imprisonment for a period of two years and imposing fine of Rs.

250/-, in default, to undergo further simple imprisonment for one month for the offences punishable u/s 201 of the Indian Penal Code. The said

sentences were to run concurrently. The original accused No. 2-Jayaben @ Dakshaben was acquitted by learned Judge.

2. A short spectrum of the relevant and material facts leading to rise of this appeal needs narration at the first stage so as to examine the merits of

the appeal and challenge against it. Appellant-accused was resident of Village Samani, Tal. Amod, Dist. Bharuch. It was the case of the

prosecution that the Appellant had allegedly developed cordial relations with original accused No. 2-Jayaben @ Dakshaben, wife of deceased-

Kiranbhai Bhagwanbhai, and as the presence of deceased-Kiranbhai was a hurdle in relation between the present Appellant and the original

accused No. 2-Jayaben, pursuant to the alleged conspiracy hatched by both of them, the present Appellant, in the evening hours of 27.08.1993,

took deceased-Kiranbhai on his scooter at the outskirts of Village Pakhajan and allegedly killed him. It was further alleged that both the accused

persons have allegedly removed the clothes on the dead body of deceased-Kiranbhai and thrown it to a pit and allegedly tried to bury the dead

body of deceased-Kiranbhai in the said pit by filling up clay and also allegedly tried to burn the clothes of the deceased and thereby tried to

destroy the evidence.

3. As per the complaint filed by one Dharmraj Baliram, an unarmed head constable on 02.09.1993, it transpires that one Ahemadbhai Isam Musa,

resident of Village Pakhajan came to the outpost on 01.09.1993 and informed that an unclaimed dead body of an unknown person is lying in the

sim area of Village Pakhajan, besides the Narmada Canal.

4. Thereafter, investigation was carried out and charge-sheet came to be filed. Since the offence punishable u/s 302 of the Indian Penal Code

alleged to have been committed by the accused-Appellant was triable exclusively by a Court of Sessions, the case was committed by learned

Judicial Magistrate, First Class, Vagra to the Sessions Court, Bharuch and Sessions Case No. 170 of 1994 came to be registered.

5. Ultimately, the charges were framed against the present Appellant and original accused No. 2-Jayaben below Exh.2 for the offences punishable

under Sections 302 and 201 read with Section 114 of the Indian Penal Code. The accused persons had pleaded not guilty to the charges and had

claimed to be tried before the above said Court.

6. The trial court proceeded with the trial and after considering all evidence led by the prosecution, came to the conclusion that the prosecution has

successfully established the charges leveled against the present Appellant and specifically believed that the case of the prosecution, which is based

on chain of circumstances is complete and uninterrupted. Later on the prosecution evidence was recorded and on relying upon the same, the

learned trial Judge had reached to the conclusion that the offences punishable under Sections 302 and 201 of the Penal Code were duly

established against the Appellant (Original accused No. 1). The learned trial Judge, therefore, had recorded conviction of the Appellant, as

aforesaid, however, acquitted the original accused No. 2-Jayaben. Hence, the present appeal is filed by the Appellant against the aforesaid

impugned judgment and order recording conviction of the Appellant.

7. Heard Mr. Pravin Gondaliya, learned advocate appearing on behalf of the Appellant, while the Respondent-State has been represented by the

learned A.P.P. Mr. K.L. Pandya.

8. Learned advocate Mr. Gondaliya for the Appellant-accused has contended that the learned trial Judge has committed a grave error in recording

the judgment of conviction and sentence. It was urged that the evidence would go to show that the Appellant-accused could not have been

convicted for the offence punishable under Sections 302 and 201 of the Indian Penal Code. It was further submitted that the whole case is based

on circumstantial evidence. It was further submitted that the entire case hinges on the principles of ""last seen together"" and ""subsequent conduct of

the Appellant"".

9. Learned advocate Mr. Gondaliya further submitted that the Appellant has been falsely implicated. It was further submitted that the basic

requirement of motive is totally absent in the present case and that the prosecution has not been able to lead any evidence on the aspect of motive.

Mr. Gondaliya has also tried to point out that there was no motive for the Appellant-accused to commit the murder of the deceased-Kiranbhai.

10. Learned advocate Mr. Gondaliya has further submitted that the prosecution has also not been able to prove the exact time and place of

demise. Mr. Gondaliya further submitted that there is no corroborative evidence and even on appreciation of the medical evidence there is no

further evidence to connect the present Appellant with the alleged offence. It was further submitted that the reasons given for coming to the

conclusion that the present Appellant and the deceased were last seen together are self-contradictory.

11. Learned advocate Mr. Gondaliya further submitted that no identity has been made and the entire chain of circumstances is not proved by the prosecution. It is the specific case of the Appellant that the time and place is not specified by the prosecution. Learned advocate Shri Gondaliya has relied upon a decision of the Apex Court in case of Niranjana Panja Vs. State of West Bengal, in order to buttress his submission that the "motive" is an important circumstance wherein, the case of the prosecution is based on circumstantial evidence. The defence of the Appellant is that he has nothing to do with the death of deceased-Kiranbhai and that he has been falsely implicated. Mr. Gondaliya has also relied upon another judgment of the Apex Court in case of Rahman v. The State of U.P., reported in AIR 1972 SC 110 and argued that the circumstances forming evidence must be conclusively established and in such a case the prosecution has to prove beyond reasonable doubt the whole chain of circumstances so relied upon.

12. Learned advocate Mr. Gondaliya submitted that there is no eye-witness to the occurrence and the entire case totally rests upon the circumstantial evidence. He further submitted that the chain of circumstances in the present case is not complete, hence the accused cannot be convicted. Assailing the impugned conviction and sentence awarded by the learned Sessions Judge, the learned advocate Mr. Gondaliya has strongly contended that the conviction of the Appellant for commission of murder on the basis of "last seen together" theory under circumstantial evidence cannot be sustained in law for the simple and only reason that the prosecution miserably failed to prove the "last seen together" theory in its strict proof. It was vehemently argued that the entire concept of "last seen together" theory put forward by the prosecution without any evidence to establish and prove the time of death. According to learned Counsel Mr. Gondaliya, admittedly although there was no eye-witness to prove the prosecution case, the set of evidence so made available on record would not suggest for application of any "last seen together" theory so as to rope-in the Appellant for conviction u/s 302, IPC. Mr. Gondaliya, has, therefore, urged that the present appeal deserves to be allowed and the judgment of conviction and sentence as pronounced by the learned trial Judge requires to be set aside.

13. Learned A.P.P. Shri K.L. Pandya, on the other hand, opposed the present appeal and has contended that the learned trial Judge was perfectly justified in his judgment of conviction and sentence looking to the evidence on record of the case. According to him, as per the evidence led in the form of oral depositions by PW-14 Ramanbhai Bhagwanbhai (Exh.31) and PW-15 Prabhakar Ambalal (Exh.32), the whole chain of circumstances has been proved by the prosecution. It is further submitted that even photographs of the dead body have been identified by three persons and both, on theory of ""last seen together"" and ""subsequent behaviour of the Appellant-accused"", the Appellant has been rightly convicted. Learned A.P.P. submitted that the subsequent behaviour of the Appellant clearly establishes his guilty and the inquest panchnama as well as photographs having been identified by witnesses establishes the charges against the Appellant and, therefore, the conviction recorded against the Appellant is well-founded and appeal, therefore, be dismissed.

14. We have examined the record and proceedings in context of the rival submissions made by both the sides.

15. At the outset it requires to be appreciated that there is no eye-witness to the incident and therefore, the entire case of the prosecution purely rests upon certain circumstantial evidence.

16. It clearly transpires from the evidence on record that there is no direct evidence on the question as to how killed deceased-Kiranbhai. Looking to the case of the prosecution it appears that the prosecution wants to establish the following circumstances against the Appellant-accused:

(a) on 27.08.1993 in the evening hours the present Appellant and the deceased-Kiranbhai were found riding on a scooter driven by the present

Appellant and on being asked the present Appellant did not stop the vehicle but inform that both were proceeding towards village Pakhajan;

(b) thereafter, the present Appellant came back on the same night i.e. on 27.08.1993, however, deceased-Kiranbhai did not return home;

(c) on 01.09.1993 one Ahemadbhai Isam Musabhai informed the outpost at Pakhajan Village that one unclaimed dead body is lying besides the

Narmada Canal at the outskirts of Village Pakhajan;

(d) that the deceased died because of strangulation;

(e) that the Appellant and the deceased were last seen together on 27.08.1993;

(f) the photographs of the dead body of deceased-Kiranbhai have been identified by the brother of the deceased, namely, Ramanbhai and other

two witnesses;

(g) the subsequent behaviour of the present Appellant and destruction of the evidence;

(h) the Appellant and the original accused No. 2-Jayaben had love affairs and that they disappeared until they were arrested.

17. In the backdrop of the facts and evidence on record, the so-called motive, as deposed by PW-14 Ramanbhai (Exh.31), was that the present

Appellant was in love affair with original accused No. 2, wife of deceased-Kiranbhai. Except the said statement of PW-14 Ramanbhai there is no

further corroboration by the prosecution.

18. The Apex Court in the case of Niranjan Panja v. State of West Bengal (supra) observed that:

15. ...Motive is an important circumstance in the prosecution which is based on circumstantial evidence. However, we do not see any such strong

motive on the part of the Appellant. We, therefore, reject the theory that there was any motive much less any strong motive on the part of the

accused so as to commit the murder of the deceased.

Similarly the Apex Court in the case of Rahman v. The State of U.P. (supra) observed that:

21. It is true that the Appellant was concealing himself for nearly a month though he must have known that he was wanted by the Police and that he

left his wife to face the situation alone. But absconding by itself is not conclusive either of guilt or of a guilty conscience. For, a person may abscond

on account of fear of being involved in the offence or for any other allied reason.

22. In our view, the case against the Appellant cannot be said to have proved beyond reasonable doubt, and the Appellant must obtain the benefit

of that doubt. This means, in view of Zaibun's acquittal by the High Court and the absence of any appeal by the State against her acquittal, that a

heinous crime of a dastardy character has to go unpunished. That is obviously regrettable but a conviction of the Appellant on the evidence as it

stands on the record would not be, in our view, in conformity with the well-settled principle regarding circumstantial evidence, that the

circumstances forming that evidence must be conclusively established and even

when so established, they must form such a complete chain that it is not only consistent with his guilt but is inconsistent with any reasonable hypothesis of his innocence.

19. ...In view of the above principles enunciated by the Apex Court, motive is an important circumstance in a prosecution case, which is based on circumstantial evidence and in absence of any motive merely having love affairs with the wife of deceased-Kiranbhai without there being any prior incident or complaint in relation to such an illicit relation, no motive can be attributed on the part of the Appellant so as to commit murder of deceased-Kiranbhai.

20. The prosecution has thus, not been able to prove the relativity between the alleged crime against the present Appellant and hence, the conviction cannot be based only on such hypothesis, in absence of vital evidence of motive.

21. Similarly, the prosecution has also not been able to prove the exact time and place of demise and merely relying upon the statements of PW-14

Ramanbhai Bhagwanbhai (Exh.31) and PW-15 Prabhakar Ambalal (Exh.32) the chain of circumstances sought to be relied by the prosecution in order to bring home of the conviction under the theory of "last seen together" has also not established by the prosecution.

22. It is also required to be noted that wife of deceased i.e. accused No. 2-Jayaben under the same set of evidence has been acquitted by the

learned Judge by specifically coming to the conclusion that the circumstantial evidence relied upon by the prosecution is not sufficient to convict

original accused No. 2-Jayaben and only because original accused No. 2-Jayaben and the present Appellant had illicit relations, learned Judge has

come to the conclusion that the prosecution has not been able to prove any case against original accused No. 2-Jayaben and has therefore, been

acquitted her by giving her benefit of doubt.

23. The prosecution has thus, not been able to prove full chain of circumstances relied upon by it and the prosecution is expected to prove the case

through circumstantial evidence beyond the reasonable doubt, by establishing circumstances to its hilt so as to link the offence and in the present

case, the prosecution has failed to do so. The trial court has thus, erred in convicting the present Appellant. The appeal, therefore, deserves to be

allowed.

24. For the foregoing reasons, the appeal is allowed. The judgment and order of conviction and sentence dated 08/02/1995 passed by learned

Additional Sessions Judge, Bharuch in Sessions Case No. 170 of 1994 is hereby set aside. The Appellant is acquitted from the charges levelled

against him. The accused-Appellant YOGESH @ ANILBHAI ZAVERBHAI PATEL be set at liberty forthwith, if not required in any other case.

Fine, if paid, be refunded to him.