

(2024) 11 GUJ CK 0026

Gujarat High Court

Case No: Criminal Appeal (Against Conviction) No. 1106 of 2015

Kamalsinh @ Kamlesh Dhansinh
Naruka

APPELLANT

Vs

Vs State of Gujarat

RESPONDENT

Date of Decision: Nov. 28, 2024

Acts Referred:

- Code of Criminal Procedure, 1973 - Section 157, 300, 302, 304, 313, 374
- Indian Penal Code, 1860 - Section 34, 294(B), 302, 323
- Gujarat Police Act, 1951 - Section 135

Hon'ble Judges: Ilesh J. Vora, J; S.V. Pinto, J

Bench: Division Bench

Advocate: Pratik B Barot, L B Dabhi

Final Decision: Dismissed

Judgement

PW 1 â€" Exh. 9,"Jitendrasinh Vijaysinh Gohil, panch witness

PW 2 â€" Exh. 11,"Pravinbhai Dashrathbhai Vanikar, panch witness

PW 3 â€" Exh. 12,"Ajay Chhedilal Jaiswal, panch witness

PW 4 â€" Exh. 17,"Mukesh Ghanshyambhai Shahu, panch witness

PW 5 â€" Exh. 22,"Dharmendra Dashrathlal Raval, panch witness

PW 6 â€" Exh. 23,"Amol Laxmanbhai Sonwane, panch witness

PW 7 â€" Exh. 29,"Pravinbhai Madhubhai Patel, panch witness

PW 8 â€" Exh. 30,"Baldevbhai Karshanbhai Hadhiyal, panch witness

PW 9 â€" Exh. 31,"Dr. Manish Bachubhai Ghelani, medical officer

PW 10 â€" Exh. 33,"Sarlaben Meghjibhai Hala, complainant â€"eye witness

P W 11 " Exh.

38", Hemlataben Virendrabhai Verma

P W 12 " Exh.

39", Vivek Virendrabhai Verma

P W 13 " Exh.

40", Chetanbhai Naranbhai Koshti

Exh. 10, Inquest Panchanama

Exh. 13, Panchanama of recovery of clothes and taking blood sample from dead body

Exh. 18, Panchanama of crime scene

Exh. 24, Panchanama of examination of accused and seizure of clothes

Exh. 32, Post-mortem note

Exh. 34, Complaint

Exh. 45, Report under Section 157 of CrPC

Exh. 46, Report to FSL officer to arrive at crime scene and opinion

Exh. 47, FSL forwarding note

Exh. 48, FSL receipt

Exh. 49, FSL forwarding letter

Exh. 50, Geological report

Exh. 51, FSL receipt

Exh. 52, FSL report

Exh. 53, Serological report

found the following external injuries mentioned in column no. 17 in PM note (Exh. 32), "

(1) 4x1.5 cm x left thoracic cavity deep oblique (Downward laterally) stab wound at posterior of left lower chest which is 6 cm left to mid-line and 10,

cm interomedial to interior angle of left scapula. Superomedial angle is acute and interlateral angle broad. Margins of stab wound red, clean cut and "

inverted.,

- (2) Transverse 1.5x0.2x0.2 cm incised wound at right maxilla 1.5 cm below outer contusion of right eye.,
- (3) 1x0.3 cm transverse abrasion right forehead 0.5 cm above mid eyebrow.,
- (4) 1.5x0.5 cm transverse abrasion left forehead 6.5 cm above left end of left eyebrow.,
- (5) 1.5x0.5 cm transverse abrasion rt. Forehead 6 cm above rt mid eyebrow.,
- (6) 3x0.3 cm verticle abrasion mid forehead 3 cm above glabella.,
- (7) 1.5 x 0.5 cm transverse abrasion superior of left shoulder.,
- (8) 2.5 x 0.5 x 0.5 cm transverse inclosed wound on postero medical of it upper forearm 10 cm below elbow.,
- (9) Abrasion 2 x 0.5 cm, 0.5 x 0.5 cm & 0.5 x 0.3 cm post of Rt elbow.",
- (10) 2 x 0.5 cm verticle abrasion lateral of right upper arm.,
- (11) 3 x 0.2 cm & 3 x 0.5 cm transverse abrasions posterior of Rt. Midforearm.,
- (12) 0.5,0.5,0.2 cm Linear abrasions post medical of left wrist.",
- (13) 0.3 x 0.3 cm abrasion dorsal of right hand near thumb.,
- (14) 3 x 1.5 cm transverse abrasion ant.medical of Rt. Forearm near elbow.,
- (15) 3 x 2 cm abrasion post of right upper forearm.,
- (16) Multiple abrasion anterior varies from 0.5 x 0.2 cm to 3 x 1 cm 1/2 Rt forearm size varies from 0.5x0.2 cm to 3x1 cm.,
- (17) 1x0.5 cm transverse abrasion anterior of right knee,
- (18) 1 x 0.5 cm red contusion right midclavicular region.,
- (19) 1 cm verticle abrasion back of right lower abdomen.,

Dr. Ghelani found the following internal injuries, corresponding to the external injuries.",

â€œUnder skin contusion (red) 2x2 cm right mid clavicular area. Rest Colum. No.-17 injury No.-1 goes deeply in left thoracic cavity in,

anterior, upward and lateral direction in the way it cut skin, muscle, 10th inter-costal space (3.5x0.8 cm) pleura, lower part of lower lobe",

of left lung (posterior surface) (2.5x0.5x4 cm) red blood and blood clots in track of wound course of wound is 6.5 cm.100 cc red blood in,

left thoracic cavity All chambers of heart emptyâ€

So far as cause of death is concerned, the witness - Dr. Ghelani opined that the deceased died due to shock and hemorrhage on account of sustaining",
of the chest injuries. He further opined that, the injuries sustained were possible with the muddamal knife and injuries were sufficient to cause death in",
ordinary course of nature.,

8.6 The panch witnesses as referred in para-4 of this judgment have not supported to the case of the prosecution as they have been declared hostile.,

8.7 The material witness PW-16 " Mr. M.D. Upadhyay, Investigating Officer, in his deposition has stated that, after receiving the official worthy",

from the Amraiwadi Police Station, he immediate reached at the spot, where, he write down the complaint disclosed by the PW-10. He has further",

stated that, in the presence of officials of the Mobile FSL as well as independent panchas, he recovered and seized the weapon knife allegedly found",

at the place. In his deposition, he has stated that after arrest of the accused, he sent the blood stain cloths with blood samples to the FSL for further",

examination and after receiving the report and recording the statement of the witnesses, he filed chargesheet against the accused.",

9. In the aforesaid facts and circumstances of the case, while assailing the judgment of conviction and sentence, the learned counsel Mr. Pratik Barot",

appearing for the appellant " accused no. 2 Kamalsinh Naruka made the following submissions :,

(a) That the impugned judgment is against the law and evidence on record and is not maintainable in eye of law. That the entire prosecution case,

hinges upon the sole eye witness PW-10, who happened to be mother of the deceased. The independent witnesses have not supported the case of the",

prosecution. Thus, the PW-10, who is highly interested witness, as she being the mother, was having self interest to convict the appellant " accused.",

Thus, the sole testimony of PW-10 without independent corroboration to her evidence does not inspire confidence and cannot be relied upon.",

(b) The evidence of PW-10, on the aspect of weapon as well as story about the injuries caused to the accused is full of contradiction and she made",

major improvements, which create a doubt about the truthfulness of the witness and therefore, the material contradiction and improvement affect the",

core of the prosecution case.,

(c) It is the case of the prosecution that, the appellant accused took out his knife and gave it to the accused no. 1, who in turn stabbed the deceased",
and according to version of the witness PW-10, the appellant accused caught hold the deceased. On careful reading of the evidence of PW-10, it was",
submitted that, she nowhere clearly states that the appellant accused continued to hold the deceased till the assault was over and therefore, the",
ingredients of Section 34 qua the appellant accused, are not attracted, as prior to the commission of offence, there was no pre-arranged plan and",
actual participation of the appellant accused in the alleged act of murder and therefore, merely because the appellant accused had caught hold the",
deceased, he could not be held to have said the common intention to kill the deceased. Thus, the conviction recorded by the court below with the aid of",
Section 34 qua the appellant accused is not sustainable in law.,

(d) Lastly, alternatively, it was submitted that, the appellant accused did not have cause any injuries to the deceased and therefore, considering the",
peculiar facts and circumstances of the present case, there was only one stab injury on the deceased and that too was caused without pre-medication",
and the attack was in a sudden fight in a heat of passion and therefore, the appellant accused could not have been convicted under Section 302 of the",
Indian Penal Code.,

10. Mr. Pratik Barot, learned advocate, in support of the aforesaid submissions has relied on the following judgments :",

(i) Champaben w/o. Hareshbhai Chaturbhai Parmar Vs. State of Gujarat (2019 (0) AIJEL-HC 240190);,

(ii) Rajibhai Merubhai Parmar Vs. State of Gujarat (2014(3)GLR 2071);,

(iii) Mahendrabhai Babubhai Gadat Vs. State of Gujarat, (2013(0) AIJEL-HC-229809",

(iv) Shambhu Kuer Vs. State of Bihar (1982(1) SCC 486),

11. On the other hand, opposing the contentions, learned Additional Public Prosecutor Mr. L.B. Dabhi, has supported the findings recorded by the",

court below and submitted that, the learned trial Court, closely examined the evidence of PW-10, who is mother of the deceased; she was only sole",

witness, who was present at the house and therefore, she being the natural independent witness, has gave the true account of the incident and her",

evidence does not suffer from any infirmities and her evidence as a ring of truth, credible cogent and reliable and there is no reason to falsely implicate",

the accused and let it go the original culprits. The prosecution has examined the independent witnesses, who were neighbours, but somehow, they win",

over by the other side and did not support the case of the prosecution. Thus, the evidence of PW-10 corroborated by the medical evidence, as the",

injuries found by the PM doctor PW-9, were sufficient in ordinary course of nature to cause the death. It was further submitted that, the minor",

contradictions or inconsistency with regard to armed knife found at the place and other aspects cannot be termed as material contradictions, which do",

not affect the root of the prosecution case and it should not be made a ground on which the evidence which is otherwise reliable and cogent can be,

rejected in its entirety. So far role attributed to present appellant " accused is concerned, it was submitted that the appellant was armed with knife",

and at relevant time, if it would not have handed over to the accused no. 1, then, the incident of murder could not have happened. Thus, there was a",

pre-planned and the accused shared the common intention to kill the deceased and same facts being proved and established by the oral testimony of,

PW-10. So far as contention relates to alternative plea about the offence not amounting to murder, cannot be accepted as the injuries were on vital",

part of the body and the manner in which stab wound caused on the body of the deceased, the benefit of exception to Section 300 would not be",

available to the appellant accused.,

12. In view of the aforesaid contentions, learned Additional Public Prosecutor Mr. Dabhi prays that there is no any perversity in the judgment and the",

court below has recorded sound and cogent reasons for arriving the conclusion of the guilt of the accused, which do not warrant interference.",

13. We have heard at length the learned counsel for the respective parties and with their assistance, examined the material evidence.",

14. In the facts of the case, it is not in dispute that, the accused no. 1 and 2 are related to each other and residing in the same vicinity where the",

deceased was lived. At the time of incident, the deceased was sleeping on the terrace and his mother was at the ground floor (varanda). So far as role",

attributed the present appellant "accused is concerned, he carried the dangerous weapon knife with him and during the scuffle, he gave it the said",

knife to accused no. 1, which resulted into death of the deceased.",

15. The case of the prosecution hinges upon the evidence of PW-10, as other eye-witnesses, as referred above, have not supported the case of the",

prosecution. PW-10 is the mother of deceased. The first contention relates to the non-reliability to PW-10 as she is interested witness. It is settled,

position of law that, there is no proposition in law that relatives are to be treated as "untruthful witnesses". A close relatives of the deceased",

would normally be most reluctant to spare the real assailants and to falsely mention the name of another person. In the facts of present case, at the",

time of incident, except mother " PW-10, nobody was there in the house. Thus, in our opinion, after close scrutiny of the evidence of PW-10, she",

was the natural and independent witness of the incident. She stood firm in her version despite the searching cross examination of the defense and on,

material particulars we do not find any major contradictions, inconsistencies or any improvement, as argued by the defense. The evidence of PW-10,",

having a ring of truth, and minor variations in the account of said witness, further strengthen the truthfulness and reliability of her statement. Thus, the",

evidence of PW-10, does not in any manner termed to be untruthful witness and her testimony on the complicity of the accused as well as the act of",

murder, allegedly done by the accused, inspires confidence and found cogent, credible and trust worthy and therefore, the contention that the evidence",

of PW-10 on account of contradictions and inconsistencies in her evidence and she being the mother, should be rejected, is not acceptable and having",

no substance.,

16. The next is the contention that, the appellant accused could not have been convicted with the aid of Section 34. Section 34 says that when a",

criminal act is done by several persons, in furtherance of the common intention of all, each of such person is liable for that act in the same manner, as",

it were done by him alone. Thus, before invoking Section 34 of the Indian Penal Code, it is imperative on the part of the prosecution to prove and",

establish that, there was existence of common intention amongst the participants and the common intention between the assailants. In other words, it",

requires a pre-arranged plan, because a man can be vicariously convicted for the act of another, the act must have been done in furtherance of the",

common intention of the other accused. The question whether in the facts of the present case, there was any common intention shared by the present",

appellant accused with the another accused or not? In the case on hand, PW-10 has categorically stated that her son was stabbed by accused no.1",

with weapon knife, allegedly took out and given by the present appellant accused. She has also stated that, with intent to kill her son, the appellant",

accused before the attack, caused physical harm and by holding his neck, caught hold the deceased. Thus, in our opinion, it is proved and established",

that the appellant accused was armed with the dangerous weapon knife and same was not a kitchen knife but the knife which generally used by,

professional killer; the accused proceeded from their house with the said knife, which shows that, there was intention on their part to stab the",

deceased. The medical evidence shows that, the external injury no. 1, mentioned in the column no. 17 of the PM report, was found at the vital part",

chest. The nature of injury found at the posterior of left lower chest (4X1.5 cm x left thoracic cavity deep oblique downward laterally), which is",

corresponding to the internal injury mentioned in the PM note and as per the opinion of the doctor, the injuries were sufficient in ordinary course to",

cause the death and it would be possible with the armed weapon, seized at the place. In the totality of the circumstances, the presence of the appellant",

accused is proved and established and despite of a dangerous weapon knife carried by him, he did not stop there but gave it to accused no.1 and",

caught hold the deceased, which shows his active participation in the offence and therefore, the ingredients of Section 34 qua the appellant accused",

are attracted because, his presence was established at the scene of offence and he was having knife with him, which he gave it to the accused no.1",

and while holding the deceased, A1 stabbed the deceased on his vital part. In these circumstances, in our opinion, the learned trial Court while invoking",

Section 34 qua the appellant accused, did not have committed any error of law and has properly read the oral evidence and therefore, the contention",

relates to non-applicability of Section 34 qua the appellant accused cannot be accepted.,

17. On the applicability of Section 34, the defense has heavily relied on the judgment of the Supreme Court delivered in the case of Shambhu Kuer Vs.",

State of Bihar (1982 (1) SCC 486). In the facts of the cited case, the accused Shambhu Kuer was held guilty with the aid of Section 34, as he hold the",

deceased till the assault was completed by the co-accused. The Supreme Court after careful examination of the evidence of the eye-witnesses, held",

and observed that, the witnesses did not clearly state that the appellant accused continued to hold the deceased till the assault was over. In the facts of",

the present case, PW-10 has clearly stated that the appellant accused hold the deceased and during the scuffle, the knife which was carried by him",

given to the accused no. 1, who stabbed the deceased. Thus, on factual aspect, it can be said that, till the end of assault, the deceased was caught hold",

by the appellant and therefore, the citation would not rescue to the case of appellant.",

18. The third contention relates to the conviction rendered by the Court-below under Section 302 of the Indian Penal Code. In the facts of present,

case, the question whether the offence is murdered punishable under Section 302 or culpable homicide not amounting to murder under Section 304",

Part-I or Part-II of the Indian Penal Code.,

19. We have noted the facts that the accused no.1, who stabbed the deceased, has been absconding and till date, he has not surrendered in the jail",

authority. Whether he has challenged the conviction or not, that has not come on record. The A1 is the brother-in-law of present accused. In these",

background facts, it was submitted that, there was only one stabbed injury on the deceased and without any premeditation, in a sudden fight in the heat",

of passion, the attack was done by accused no.1 and therefore, offence did not fall under Section 302 of the Indian Penal Code. As discussed above",

the prosecution has successfully proved and established that, the blow was given at the vital part of the body and the amount of force employed in",

causing injury was such that the lungs were cut. The weapon knife is not ordinary knife. Nothing comes on record that, before the attack, the",

deceased in a heated exchange of words, tried to caused injury to the accused. In such circumstances, considering the nature of injury, the manner in",

which, the weapon was used and in absence of any facts about sudden fight, the vary act of the accused inflicting knife blow itself indicates that they",
intended to cause that particular injury which were sufficient in the ordinary course to cause death. As discussed above, the facts does not disclose",
that the accused has been proved or by loss of temper or self-controlled, the act was committed. These facts clearly constitute the offence of murder",
as defined under Section 300 of the Indian Penal Code. The defense submission about applicability of exception (iv) to Section 300 do not exist and,
same cannot be accepted in the present case.,

20. In the backdrop findings recorded above, we are of the considered view that the prosecution has duly proved that both the accused in furtherance",
of their common intention have committed the offence of murder of the deceased under Section 302 read with Section 34 of the Indian Penal Code.,
We find no case of interference. Hence, present conviction appeal being devoid of merits, stands dismissed. Accordingly, present Criminal Appeal is",
dismissed. R&P, if any, be sent forthwith to the concerned Court.",