(2012) 12 GUJ CK 0076

Gujarat High Court

Case No: Criminal Appeal No. 2306 of 2008

Devayat Kanabhai Der Ahir	APPELLANT
Vs	
State of Gujarat	RESPONDENT

Date of Decision: Dec. 19, 2012

Acts Referred:

- Bombay Police Act, 1951 - Section 135
- Criminal Procedure Code, 1973 (CrPC) - Section 174, 313, 357, 70
- Penal Code, 1860 (IPC) - Section 302, 304, 323

Citation: (2013) CriLJ 1357 : (2013) 2 GLR 1271

Hon'ble Judges: J.B. Pardiwala, J; Bhaskar Bhattacharya, J

Bench: Division Bench

Advocate: D.P. Kinariwala, for the Appellant; K.P. Rawal, Assistant Public Prosecutor, for the Respondent

Final Decision: Allowed

Judgement

Honourable Chief Justice Mr. Bhaskar Bhattacharya

1. This appeal is at the instance of a convicted person and is directed against the order of conviction and sentence dated 29th July 2008 passed by the learned Additional Sessions Judge, 4th Fast Track Court, Gondal, Camp Jetpur, in Sessions Case No. 51 of 2008 by which the learned Sessions Judge convicted the appellant for the offence punishable u/s 302 of the Indian Penal Code and sentenced him to imprisonment for life and a fine of Rs. 15,000/-; in default of payment of such fine, a further imprisonment for one year was imposed. The learned Sessions Judge also convicted the appellant for the offence punishable u/s 135 of the Bombay Police Act and sentenced him to rigorous imprisonment for 4 months and a fine of Rs. 500/-; in default of payment of such fine, a further simple imprisonment for one month was ordered to be undergone. The learned Single Judge further directed that out of the amount of fine for the offence punishable u/s 302 of the Indian Penal Code, a sum

of Rs. 10,000/- should be payable to Puriben Shardulbhai, the wife of the deceased Shardulbhai, as compensation u/s 357 of the Criminal Procedure Code. The following charge was framed against the appellant:

On 8/4/2004 at 20.30 Hrs., you-the accused entered into scuffle with Shardul Khima Ayar, son of the complainant, aged 38 years, at Station Vavdi on trivial issue. While searching him, you went to house of the complainant and again entered into scuffle, pushed the complainant on the ground, caused grievous hurt by causing common injuries to him and you caused serious and fatal injuries to the son of complainant, i.e. Shardulbhai, on his left thigh and put him to death and by doing so, you-the accused murdered the son of the complainant-Shardulbhai. Though the Notification on Prohibition of Arms issued by the District Magistrate, Rajkot was in force at that time, you possessed lethal weapon like knife at the time of incident and in this way, you-the accused, have committed punishable offence u/s. 302 of IPC and u/s 135 of B.P. Act. Therefore, I pass order to proceed trial of case against you-the accused for the aforesaid offences.

2. The case made out by the prosecution may be summed up thus:

2.1 On 8th April 2004, Dr. Mansukhlal Chhaganbhai Gajera of Jetpur Government Hospital had informed the Jetpur Taluka Police Station on phone that the dead-body of one Shardulbhai Khimabhai Patel, aged about 38 years, resident of Station Vavdi, Taluka Jetpur, had arrived at the hospital. On receiving such information, a note was made at 22.15 hours on 8th April 2004 in the Station Diary of Jetpur Taluka Station Diary vide Station Diary entry No. 30/04 and the police also made a note No. 19 of 04 of the accidental death u/s 174 of the Criminal Procedure Code. Primary Investigation of this note was handed over to Head Constable R.M. Bhalgamadia of the Jetpur Taluka Police Station, Amarnagar Outpost. The P.S.O. of Jetpur Taluka Police Station had also sent a memorandum to the Executive Magistrate of Jetpur to prepare the inquest of the dead-body The Head Constable, R.M. Bhalgamadia, had drawn the inquest panchnama of the dead-body of Shardulbhai Khimabhai by going to the Government Hospital and also filled in the post mortem requisition form and gave the same to the Medical Officer of the Jetpur Government Hospital to conduct the post mortem of the dead-body of Shardulbhai to ascertain the cause of death.

2.2 In the meantime, one Khimabhai Karshanbhai Ahir, the father of the deceased Shardulbhai, filed a complaint before the Police Sub-Inspector, B.M. Ahir of Jetpur Taluka Police Station, thereby stating that on 8th April 2004 at about half past eight O''clock in the evening, after taking his meal, he was lying in a cot in the courtyard in front of his house, chatting with the deceased Shardulbhai''s son and at that time, the accused, who belonged to the same village, came suddenly with a knife in his hand and started speaking abusive words and inquired of the deceased who allegedly abused him at the shop of Vikrambhai. Hearing those words, the complainant got up, went near the accused and told the accused that he would take the accused to the place where the foul words were spoken. The accused told that

he had no business with him and wanted Shardul and pushed down the complainant as a result of which he fell down and suffered a head injury. Because of the commotion, Shardul and his wife came out of the house and asked the accused not to disturb his father. At this, the accused became enraged and inflicted one blow of knife in the left thigh of the deceased and also on the first finger of the left hand. Due to such injury, the deceased fell down. Due to this turmoil, one Hiralal Jayantibhai Rajgor came and the said Hiralal, Puriben [wife of the deceased] and the complainant helped the deceased to stand. At that time, one Bhagwanji Bhura Patel, a neighbour, also came there and Puriben went to call Raju Menshinbhai, the son of the complainant''s brother. One Rakesh @ Pravin @ Polo brought his motorcycle and made Shardul sit on the motorcycle and all the three pushed the motorcycle till the road, and from there, the deceased was taken to Jetpur Government Hospital in the rickshaw of Bhavesh Govindbhai Ayar. Subsequently, the elder son of the complainant came and informed that Shardul had died due to the serious injury.

2.3 The complaint was registered as C.R. No. 1-59 of 2004 on 9th April 2004 for the offences punishable u/s 323 and 302 of the Indian Penal Code and 135 of the Bombay Police Act and investigation of the case was assigned to PSI B.M. Ahir.

2.4 The Investigating Officer took the custody of the blood-smeared clothes of the deceased after drawing a panchnama and sent the same to the Forensic Science Laboratory for analysis. Search was made for the accused but he was not found and, therefore, steps were taken to secure warrant against the accused in accordance with section 70 of the Criminal Procedure Code. About four years thereafter, the accused, who was absconding, was caught in a case at Bhaktinagar Police Station, Rajkot City, and on getting such information, In-Charge PSI, M.A. Parmar, had taken legal custody of the accused and detained him on 13th January 2008. During interrogation, the accused had expressed his willingness to produce the weapon used by him for the commission of the crime from the place where he had hidden it. Two panch-witnesses were called, the panchnama was drawn and after that, by going to the place along with the two panchas, the accused searched out the knife from a hidden place which was in a rusting condition.

2.5 On investigation, as sufficient materials were found against the accused, the charge-sheet was filed before the court of JMFC, Jetpur who committed the case to the Sessions Court.

2.6 The accused pleaded "not guilty" and claimed to be tried.

2.7 The prosecution examined the following 9 witnesses.

2.8 The prosecution had also produced the following pieces of documentary evidence.

2.9 After the conclusion of the evidence, the accused was examined u/s 313 of the Criminal Procedure Code wherein he denied the allegations made by the various

witnesses against him and asserted that he was innocent.

2.10 As indicated earlier, the learned Sessions Judge, by the order impugned in this appeal, has found the accused guilty and imposed sentence as mentioned above.

2.11 Being dissatisfied, the appellant has preferred this appeal.

3. Mr. Kinariwala, the learned advocate appearing on behalf of the appellant, vehemently criticized the order of the learned Sessions Judge by pointing out that the panch witnesses for recovery of the weapon having been declared hostile, the learned Sessions Judge should not have relied upon the evidence of recovery of the weapon given by the investigating officer. According to Mr. Kinariwala, if the discovery of the weapon is disbelieved, there was no justification of involving the appellant in the offence by relying upon the deposition of the father and the wife of the deceased. According to Mr. Kinariwala, the evidence given by those two witnesses were inconsistent, and at the same time, they were interested witnesses. Mr. Kinariwala, therefore, prayed for setting aside the order of conviction imposed by the learned Sessions Judge.

3.1 Mr. Kinariwala also made an alternative submission that even if it is assumed for the sake of argument that his client was involved in the incident, it was not a case of murder as there was only one major injury, and that too, on the left thigh of the victim, and such fact reflects that there was no intention on the part of the accused to murder the victim. Mr. Kinariwala further submits that the widow of the victim had admitted that there was no dispute between the accused and the victim and thus, at the most, an offence punishable u/s 304 Part-I has been made out. Mr. Kinariwala further contends that merely because his client was absconding for about 4 years, such fact does not justify the inference of guilt.

4. Mr. Rawal, the learned Additional Public Prosecutor appearing on behalf of the prosecution, has, on the other hand, supported the reasoning assigned by the learned Sessions Judge and has contended that even though the two panch witnesses of recovery of the weapon were declared hostile, the recovery of the weapon has been proved even by the evidence of the Investigating Officer and there was no justification of disbelieving such a piece of evidence. Mr. Rawal further contends that the involvement of the appellant at the time of the incident is virtually admitted, inasmuch as, to the widow of the victim, a specific suggestion was given on behalf of the accused that at the relevant time, the accused was in a drunken stage. By referring to such suggestion in the cross-examination, Mr. Rawal submits that the accused having admitted his presence but having taken the plea of drunkenness, he cannot get the benefit of such drunkenness as he himself took the liquor and it is not his case that he was made to drink the liquor by the deceased or the complainant or any other person against his wish. Mr. Rawal, therefore, submits that the learned Sessions Judge, on consideration of the evidence adduced by two eyewitnesses, being satisfied with the involvement of the appellant, we should not

interfere with such finding.

4.1 As regards the alternative submission of Mr. Kinariwala that it is case punishable u/s 304 Part-I of the IPC, according to Mr. Rawal, the injury being at the vital part of the body, viz. thigh and there being an incised wound of 11 cms X 3 cms X 4 cms on a vital place of the body, as a result of which the femoral artery and femoral vein have been cut down, the case cannot come within the purview of Section 304 of the Indian Penal Code. Mr. Rawal, therefore, prays for dismissal of the appeal.

5. The question that falls for determination in this appeal is whether on the basis of materials on record, the learned Sessions Judge was justified in convicting the appellant u/s 302 of the Indian Penal Code and Section 135 of the Bombay Police Act.

6. In order to appreciate the submissions made on behalf of the learned counsel for the parties, we first propose to consider the oral evidence adduced by the prosecution.

6.1 Chunilal Muljibhai Bhuva, the PW No. 1, is a panch witness who turned hostile. According to this witness, he had gone out of home for attending a funeral ceremony, and at that time, the police stopped him on the way and obtained his signature in a readymade panchnama. According to him, he did not know about the implication of the said panchnama and also what was contained therein. According to him, he neither read the panchnama nor was it read over to him by the police and that the police had taken no action in his presence. He denied the suggestion that the police had seized the bloodstained soil or control soil from the scene of offence in his presence. Such being the stance taken by this witness, he was cross-examined by the prosecution.

6.2 PW No. 2 is one Kanubhai Meghjibhai Kumbhar, who has also turned hostile. According to him, when he was going to his house, the police had obtained his signatures in a readymade panchnama. He did not know what was written in the said panchnama nor was the said panchnama read over to him by the police, and no action has been taken by the police in his presence. In view of such stance taken by him, he was declared hostile and was cross-examined by the prosecution.

6.3 One Hitendrasinh Juvansinh Zala is PW. No. 3. According to him, on 14th January 2008, he was not called anywhere by the police and his signature was obtained by the police in the panchnama, and he did not know what was written therein. He has further stated that he did not remember whether he was taken anywhere and except that he made signatures in the panchnama, he did not know anything. He denied that in his presence, the accused had found out the knife. In view of such stance, this witness was also declared as hostile.

6.4 Dipalbhai Vasantbhai Naliyapara, the PW. 5, has stated that on 14th January 2008, he was not called by the police as a panch but his signature was obtained by

the police in a readymade panchnama. He did not know what was written therein. He has also stated that he was not taken anywhere by the police and except signing the panchnama, he did not know anything. In view such attitude of the witness, he was also declared hostile.

6.5 Dr. Mansukhlal Chhaganlal Gajera, the PW No. 5, was serving as Medical Officer in the Government Hospital, Jetpur. According to him, on 8th April 2004 at 9.50 PM, the dead-body of Shardulbhai was brought by Bahadurbhai Govabhai and Vajubhai Mensibhai Fakir at the hospital and they told that Shardulbhai was injured and they had brought him to the Hospital. He informed the Jetpur Taluka Police Station in this regard and after the inquest panchnama of the dead-body was carried out by the police, and the postmortem was performed by him along with another panel Doctor, Dr. Sarvaiya.

6.5.1 In his evidence, he has stated that the following injuries were found on the dead-body:

(1). An incised wound at left mid-thigh, anterior-medial surface slight oblique, direction is above-downwards and from anterior medial surface to medial surface of left thigh. Upper end of incised wound is 23 cm below from left anterior-superior iliac spine, elliptical in shape, size of incised wound is 11 cm X 3 cm X 4 cm.

Muscle fibres and soft tissues cut down behind the wound in relation to length and depth of wound.

Common femoral artery and femoral vein were cut down and wound was full of blood. Both ends of the wound were sharp cutting edge.

(2). Cut at dorsal surface of left hand. The wound was lacerated. Its size was 1.5 X 0.3 X 0.3 cm. The wound was bleeding.

6.6 According to the said witness, the cause of death was cardio respiratory failure in view of hemorrhagic shock due to the injury No. 1 mentioned in column No. 17. He has proved the postmortem report. He has further stated that looking to the form and nature of injury No. 1, due to depth of the said injury and the fact that the femoral artery and femoral vein were cut, it can be said that this injury was serious and fatal in nature and due to this injury, there is possibility of causing death of a person, whether he is given medical treatment or not. He has further opined that injury No. 2 may occur in a scuffle or due to dashing with hard blunt substance.

6.6.1 In the cross-examination, this witness has stated that it was true that he could not give a decisive opinion that the injury No. 1 could be caused with the knife only, and if any sharp edged instrument is forcefully dashed on the injured part, such kind of injury can be caused.

6.7 The complainant, Khimabhai Karshanbhai Ahir, is PW No. 6. In his examination-in-chief, he has given a detailed description of the incident. In

cross-examination, he stated that the deceased and the accused had no dispute. He denied the suggestion that the accused had not come to his house in search of the deceased. He admitted that for the death of the deceased, the wife of the deceased got money from the Insurance Company. He further denied the suggestion in cross-examination that the insurance money was received by mentioning that Shardul had died due to accident during agricultural work. He also denied the suggestion that Shardul got injury in any other way.

6.8 Puriben, the widow of the deceased, is PW. No. 7. She has also narrated the incident in detail since she was an eyewitness of the incident along with her father-in-law. In her cross-examination, it was suggested on behalf of the accused that the accused was, at the relevant time, in a drunken condition and this witness has accepted such suggestion. She also admitted that she got insurance amount for the death of her husband, and she denied the suggestion that by mentioning accidental death of her husband, she got the amount.

6.9 P.W. 8, Mahendrasinh Ajitsinh Parmar, has stated in his deposition that he was performing his duty as PSI in Jetpur City Police Station and on 13th January 2008, he was performing additional duty as PSO as the regular PSO was on leave. He has proved the arrest of the accused and also the recovery of the weapon at the instance of the accused. He has also denied the suggestion of the accused in the cross-examination that the recovery of the weapon lodged by him was not correct.

6.10 Bhimabhai Maldevbhai Aahir, PW. No. 9, is also a police officer who had taken the complaint by the original complainant and investigated the offence. In his cross-examination, nothing has come out to disbelieve any part of his investigation.

7. On consideration of the aforesaid oral evidence on record, we find that there are two eyewitnesses of the actual stabbing, viz., the complainant and the widow of the victim. In their evidence, they gave details of the incident and denied the suggestions that their statements were wrong. Nothing inconsistent came out in their cross-examination. We have also pointed out that by giving a suggestion in the cross-examination that the accused was in a drunken state, the accused has virtually admitted his presence at the scene of occurrence, and we do not find any reason to disbelieve the version of those two persons when no suggestion has been given of any prior enmity between the accused and the deceased. The widow of the victim has also admitted that there was no prior dispute between the parties.

8. Regarding receipt of insurance-money, there is nothing unusual in getting the said money even if the person insured has died due to murder. No evidence has been adduced on behalf of the appellant to indicate what the nature of the insurance was and whether it prohibited the heirs of the insured from claiming money for this type of death.

9. Regarding recovery of weapon, it appears that the same was recovered about 4 years after the incident and there was no blood stains on the said knife. Therefore,

in this case, apart from recovery of the article, there is no other importance of the said knife. Of course, no evidence has been elicited from the cross-examination of the Doctor that by the said knife, the injury found was not possible. What was stated by the Doctor was that by any sharp instrument, the injury could be caused.

10. We are quite conscious that mere abscondance is not a ground for concluding the guilt of the absconded person; but after taking into consideration the other evidence, i.e. the version of two eyewitnesses and the recovery of weapon, if we take into consideration the fact that the accused-a person belonging to the same village-remained absconding for 4 years, such fact can definitely be taken into consideration as a corroborative piece of evidence.

11. We, therefore, find that in this case, it has been well established that it was the appellant who inflicted the injury upon the deceased, as a result of which death had taken place.

12. The next question is, whether this is a case where the accused should be convicted u/s 302 of the Indian Penal Code.

13. There is no dispute that virtually, there was only one major blow and the same was on the thigh, but having regard to the fact that the appellant had inflicted the blow not on any vital part of the body, such as chest, stomach, head, throat etc., but only on the leg, we find substance in the contention of Mr. Kinariwala that the appellant should get benefit of the 1st part of Section 304, IPC.

14. The Supreme Court, in the case of Gokul Parashram Patil Vs. State of Maharashtra, has held that when the solitary blow given by the accused to the deceased was on the left clavicle, a non-vital part, it would be too much to say that the appellant knew that the superior venacava would be cut as a result of that wound. By relying upon the said principle, we are also of the view that the injury having been made on the thigh, we should not presume that the appellant, in a drunken stage, knew that there lies femoral artery and femoral vein and if those are cut down, the victim would die. We are of the opinion that the appellant definitely had intention to cause injury with the knife but the injury having been inflicted on thigh, it is not possible to presume that he knew the position of main artery and vein at that place. It appears that a similar view has been taken by the Supreme Court in the case of Harjinder Singh alias Jinda Vs. Delhi Administration, and also in the case of AIR 2002 SC 2339 .

15. We, therefore, find that it is a fit case where the conviction u/s 302 of the IPC should be converted to one under the 1st Part of Section 304, IPC and accordingly, we reduce the sentence to rigorous imprisonment for 10 years. We do not touch the remaining part of the conviction and sentence awarded by the learned Sessions Judge. The appeal is, thus, allowed only to the extent indicated above.