

DATE OF DECISION: 27.9.1995.

HIGH COURT OF GUJARAT AT AHMEDABAD.

CRIMINAL APPEAL NO. 193 OF 1995.

THE HONOURABLE Mr. JUSTICE K. J. VAIDYA,

AND

THE HONOURABLE Mr. JUSTICE M. H. KADRI.

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STATE OF GUJARAT Vs. NARESHBHAI HARIBHAI TANDEL & ORS
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1. Whether Reporters of Local Papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of judgment?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

Mr.S.R.Divetia, APP, for the State.

Mr.B.P.Dalal, Advocate, for the Respondents.

CORAM: K.J.VAIDYA & M.H.KADRI, JJ.

(27th September, 1995.

ORAL JUDGMENT. (per VAIDYA, J.)

1. The short, nonetheless the question of quite great importance that arises for our consideration in this acquittal appeal is - " Whether the learned trial Judge was justified in disposing of the Sessions Case acquitting the accused persons merely because one of the seriously injured prosecution witnesses could not be examined before the court, having gone to America and was not known whether and when he would return back, without there being any sincere and honest efforts put in, in the first instance by the learned Public Prosecutor in charge of the Sessions Case, and thereafter by the learned trial Judge, to substantiate the ground of the witness being not available for the purpose of examination ? "

2. To state few relevant facts as far as they are absolutely necessary to appreciate and resolve the point raised above, in substance, it is the prosecution case that the incident in question, wherein Babubhai Panchabhai came to be seriously injured by Nareshbhai Haribhai Tandel and three others, who were armed with weapons like knife, hockey stick, dharia, etc. took place on 1.3.1991 at 19.00 hours in the Machhiwad Navsarjan Falia (locality), at Village Onjal (Valsad District). On the basis of this allegation, the accused came to be tried for the alleged offences punishable under Ss. 307, 323, 114 of I.P.Code read with S. 135 of the Bombay Police Act, 1951, by the learned Sessions Judge, Valsad at Navsari, wherein he, at the end of the trial by a judgment and order dated 12.9.94 acquitted them on the short ground that Babubhai Panchabhai, the principal injured witness having gone to America could not be examined despite several opportunities given to the prosecution, giving rise to the present appeal.

3. When this appeal came up for admission before us on 1.9.1995, we issued Notice to the Respondents-accused, and in response to the same, Mr.B.P.Dalal, learned Advocate has filed his appearance. Mr.Dalal submitted that having regard to the facts and circumstances of the case, it cannot be said that the learned trial Judge has committed any substantial error in recording the order of acquittal, and in that view of the matter, no case is made out to interfere with the impugned order of acquittal at this stage.

4. Now for the reasons we are to set out in the course of this judgment, at the very outset it may be stated that the most casual and cavalier manner in which the Sessions Case has been disposed of, apart from being illegal, is unthinkable and has simply stunned us. The learned Judge ought not to have been oblivious to the fact that the accused were charged for quite serious offence punishable under Ss.307 and 114 of the I.P.Code read with S.135 of the Bombay Police Act, 1951. The learned trial Judge further ought not to have been oblivious to the fact that Babubhai Panchabhai had received serious injury as could be seen from the evidence of P.W. 1 Dr.Parimalaben J. Joshi, which is reproduced as under :

(i) 1 cm. X 1/4 cm. stab wound at third intercostal space right side, thoracic cavity deep.

(ii) There was diminished air entry on right side, for which X-ray was taken.

Further, according to the Doctor, this injury was possible by a sharp cutting instrument like knife.

According to the Doctor, the injury was fresh and the injured was in shock. According to the Doctor, this injury can be said to be fatal.

It appears that after P.W.1 examined Babubhai, he was sent to K.G.Hospital for further treatment. The certificate regarding the same is produced at Ex.14. At the time when the patient was examined by the Doctor, blood was oozing out from the injury, and according to the Doctor, the injury was possible to be caused by the muddamal knife shown to her.

Thereafter, this Doctor had telephoned the police

to arrange for recording the dying declaration of the injured. According to the doctor, injured Babubhai had given the history that at 7.00 P.M. he was stabbed. He had also given the name of the assailant to the doctor, but she had not noted down the same. According to the doctor, at the time of recording the deposition, she did not remember the name of the assailant.

4.1 The aforesaid injury, according to P.W.1, Dr.Parimalaben J. Joshi was quite fatal so much so that she had to immediately request the police to arrange for recording the dying declaration and pursuant to that, the same was also recorded by the Executive Magistrate, which was not exhibited as the injured Babubhai Panchabhai ultimately survived. It appears that the incident in question took place on 1.3.1991 at 19.00 hours. The charge-sheet was submitted on 25.7.1991, and on the basis of the same, charge was framed by the learned Sessions Judge after about four years on 17.5.1994. Thereafter, it appears that the trial commenced on 6.6.1994, when the first witness P.W.1, Dr.Parimalaben Joshi came to be examined, and the prosecution evidence declared closed, concluded with the purshis Exh.34, dated 5.9.1994, given by the learned Public Prosecutor for closing the evidence. In between, it appears that on behalf of the prosecution, an application Exh.30 dated 2.7.1994 was submitted stating therein that the injured (Babubhai Panchabhai) had gone abroad, and in that view of the matter, since the summons could not be served, in the interest of justice, the trial be adjourned. This was granted. Thereafter yet another application Exh.31 dated 26.7.1994 was submitted before the learned trial Judge praying for one more adjournment, on the very same ground as stated in Exh.30. This too was also granted. Ultimately, by purshis dated 5.9.1994, the learned Public Prosecutor requested the learned trial Judge to discharge various witnesses, one of them being injured Babubhai Panchabhai, on the ground that he could not be examined as he had gone to America. This was also mechanically granted. Now, from the aforesaid purshis brought on the record, it is indeed very clear that neither the prosecuting agency nor the learned trial Judge has evinced the desired care and interest in dispensing justice. On the learned APP, Mr.Divetia being specifically asked to point out from the record as to what efforts were made by the Investigating Officer, and for that purpose even by the learned Public Prosecutor, to find out the particulars such as to (i) Whether Babubhai Panchabhai had in fact at all gone to America ? (ii) if yes, when he left India ? (this information the

Investigating Officer could have been able to collect from the friends and relatives of Babubhai and the passport office;) (iii) what was the residential address of Babubhai Panchabhai in America ? (iv) Whether he had gone on pleasure trip or for service or for business there ? (v) whether he was to stay there permanently ? (vi) which of his relatives have been contacted so far in order to know as to when Babubhai Panchabhai was likely to return to India? (vii) whether there were any good or bad occasion in his family on which Babubhai Panchabhai was likely to return home for few days at least ? (viii) whether any friends, relatives or family members were informed by the police that since the criminal case was pending against the accused before the Sessions Court, his examination as material witness was quite indispensable and for that purpose accordingly his arrival in India be immediately reported to the court or the concerned police station ? (ix) what watch was accordingly kept to collect the information regarding arrival of Babubhai in India ?

5. As a matter of fact, when the learned Public Prosecutor stated before the trial court that the injured witness had gone to America, the court should have activated itself in insisting upon the learned Public Prosecutor to file an affidavit of the concerned Investigating Officer or the successor-in-charge of his office on the aforesaid lines. But that was not done, and simply on some hearsay account without any tangible material brought on the record that Babubhai Panchabhai had gone to America, accepting the same as gospel truth, the learned trial Judge has disposed of the case with an unholy haste. It has got to be borne in mind that when a citizen knocks the door of the court, he knocks it for getting justice, and that part of justice is not a matter of mechanical process to be disposed of as one would like it as has been done in the instant case. When a citizen approaches the court, he approaches it holding the court in the highest esteem, with the hope and trust that justice would be done to him after hearing him. Here is a case wherein Babubhai Panchabhai, looking to the medical evidence, was fatally injured, and but for the providential escape, what ought we not know that he would have succumbed to the injury. To take such a case lightly is certainly not doing justice at all to a citizen. The court is not a disposal machine. nor a place to do mere paper justice. The respect and esteem that judiciary commands is for doing justice and not for disposing of the case. Further still, once the charge-sheet is filed and thereupon charge is also framed, the trial Judge is not empowered to take any decision on any question unless he is fully satisfied on oath before him or by affidavit of

the concerned person. These days it is simply hazardous to rely upon ipse dixit of concerned officer, unless he is pinned down by asking him to file an affidavit making him fully responsible for the information he passes on or the statement he makes before the court. To rely upon the bare statements of the learned Public Prosecutor or the process serving agency in a given case can be quite dangerous as the same ultimately amounts to abdicating court's duty and function in favour of the mischievous process servers to the benefit of some scheming accused and accordingly, bearing in mind this it is indeed the bounden duty of the trial Judge to see that to keep such an agency within the bounds, affidavit is insisted with.

6. In the facts of the present case, with utmost respect to the learned trial Judge, we are constrained to observe that the case has been disposed of in the most casual manner. If the purshis of the learned Public Prosecutor, based on some hearsay has to be accepted on mere bidding, then we are sorry to say as to how cleverly in a given case, the whole criminal trial could be sabotaged. It is here that the learned trial Judge is expected to be on alert and watchful, as the Custodian of the interest of justice, to see that he is not misled and trapped by some sham purshis. As a matter of fact, assuming that injured Babubhai Panchabhai had gone to America, even then, having regard to the gravity and seriousness of the offence, it was indeed the bounden duty of the learned trial Judge to have seen adjourned the case till the time he returns to India keeping the case on dormant file asking the Investigating Officer to be on constant watch to serve witness summons and report to the court the arrival of the injured at his residential place. It is a matter of common experience that all Indians who have gone to foreign countries go there, ultimately maintaining their roots in this soil, and they do return on some good or bad, happy or sad occasions like marriage, death, etc. in family and friend circle. Not only that, but the fact whether Babubhai Panchabhai was likely to return to India or not, could have been easily ascertained by the learned trial Judge by obtaining his residential address of America by asking the learned P.P. in-charge of the case and by sending a registered post letter to him inquiring from him as to when was he likely to return to India as the trial was suspended for quite some time for want of recording his evidence. Unless and until this was done, to dispose of the case in hot haste does neither enhance the image, or esteem of concerned Public Prosecutor and for that purpose even of the court conducting the case. In fact the record and proceedings must demonstrate on face of it that before the purshis for

closing the evidence is filed and accepted, all the three, that is to say, the investigating agency, the learned Public Prosecutor in charge of the case and the learned trial Judge had put in their respective hard, honest, and sincere efforts, in short done their best to examine material witnesses before the court. If this is not done, the whole system would be reduced to "justice show", without doing any substantial justice, and which in turn could be nothing less than a mere farce and rank judicial hypocrisy. Such lapses and remissness on the part of either the Investigating Agency, the learned Public Prosecutor or the learned trial Judge cannot be countenanced lightly and they are liable to explanation. This is to be noted for the future only. We hope this case and this judgment will serve as an example to all Investigating Officers, Public Prosecutors and the learned Judges dealing with the cases where some material witnesses are not examined on some flimsy hearsay ground of he/she having gone abroad, and was not likely to return or not available at given address, etc.

7. Mr. Divetia has, of course, invited our attention to the certificate issued by the Sarpanch of Onjal Gram Panchayat, dated 29.5.1994, to the effect that Babubhai Panchabhai (ex-Sarpanch) had gone abroad for business. Now assuming for the time being that this certificate is true, then even the person who had gone abroad for business purpose is ordinarily bound to return to India. Further, before accepting and relying upon such sort of certificates from the Gram Panchayat, the Sarpanch should have been insisted upon to file an affidavit as no ipse dixit of any Tom, Dick and Harry can be accepted, and relied upon unless it lends full satisfaction to the judicial conscience to accept the same. When the court takes any decision, it takes so on the basis of the honest, real satisfaction of its conscience, and not on the surfaces of what is merely hearsay. Thus, without any in-depth inquiry, to dispose of the case, to say the least, does not befit either the trial Judge and/or the learned Public Prosecutor in charge of the case.

8. Courts are supposed to decide cases on evidence as far as possible and not to dispose of the same just to get rid of. If criminal cases are to be disposed of in the manner in which it has been done in the instant case, people are bound to gradually lose their faith in the administration of justice, and as a result may, ultimately take law in their hands and by extra-judicial methods satisfy their urges for justice in the streets, on the strength of their respective mights. Let's not

accordingly belie the hopes of the people in the administration of justice by disposing of the cases in the manner like the one in the instant case, and drive them to the point of frustration and no return making them taking law in their hand and knock out rough and ready justice for them as they want.

9. In view of the aforesaid discussion, we have indeed no alternative left with us, but to allow this appeal and remand the case to the trial court by quashing and setting aside the impugned judgment and order. Accordingly, the appeal is allowed. The impugned judgment and order is quashed and set aside, and the matter is remanded to the trial court for examining Babubhai Panchabhai and dispose of the same in accordance with the observations made in this judgment. The Public Prosecutor in-charge of the case in the trial court shall make fresh inquiry through the Investigating Officer by collecting the address of Babubhai Panchabhai and enquiring from him as to when he is likely to return to India so that he can be examined as a witness and his evidence recorded before the Court. Till then, this case shall remain on the dormant file of the trial court, with a direction to the Investigating Officer to report every month, (i) whether the witness Babubhai Panchabhai has returned from abroad ? (ii) If yes, for how many days he was to stay in his village/town (as the case may be) and (iii) exactly on what date he is to return.

10. The Registry is directed to forward the copy of this judgment to the Secretary, Legal Department, Govt. of Gujarat, Gandhinagar, to circulate direction to all the Public Prosecutors and process-serving agencies as to how they are required to conduct themselves when material prosecution witnesses are not available to serve out witness summons.
