IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 148 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE M.C.PATEL
and
Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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STATE OF GUJARAT

Versus

JERAM THARIA BHANUSHALI

Appearance:

1. Criminal Appeal No. 148 of 1984

MR KG SHETH APP for appellant - State

MR TEJAS D KARIA for Respondent No. 1-3

..... for Respondent No. 4

CORAM : MR.JUSTICE M.C.PATEL
and
MR.JUSTICE A.M.KAPADIA

Date of decision: 29/08/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE A.M.KAPADIA)

1. This appeal under Section 378 of the Code of Criminal Procedure, 1973 ('the Code' for short) is directed against the judgment and order dated November 18, 1983 rendered by learned Additional Sessions Judge, Rajkot, Camp at Morvi, in Sessions Case No. 8 of 1983 by which respondents came to be acquitted of the offence under Section 302 read with Section 114 of the Indian Penal Code ('IPC' for short) for the commission of the alleged offence of murder of Khetshi Hemraj which had taken place on January 30, 1983 between 9.30 and 10 A.M. in the City of Morvi.

2. The facts of the case have been detailed in the judgment of the learned Additional Sessions Judge, therefore, it is not expedient to repeat the same all over again in verbatim and in detail in this judgment. However, basic facts which are necessary to be discussed in this appeal are that:

2.1. The incident in question had happened on January 30, 1983 between 9.30 and 10 A.M. near the Naka of Gebansha Pir Dargah at the cross roads of Vajepar main road and Kalika plot main road at Morvi. According to the prosecution, accused and deceased belong to the same caste. It appears from the prosecution case that there was some dispute between both of them in connection with kerosene hawker's licence which was given to respondent No.1/accused No.1 on condition that he should pay 25% of the profit which he may derive from the kerosene business to deceased Khetshi. As per the prosecution version, accused No.1 did not pay the agreed amount of profit to deceased Khetshi. Deceased Khetshi came from Jamnagar on the previous day of the incident and told his brother Karamshi with regard to the fact that accused No.1 had no intention to pay the commission and he was asked to come in the morning. On January 30, 1983 deceased Khetshi went to the shop. At that time Juma Sumar who was doing business as a camel cart rider came there with his camel cart. During that time there was a talk between deceased Khetshi and Juma Sumar with respect to non-settling of the account by accused No.1. Juma Sumar advised the deceased that same being a family affair it should be settled among themselves and they should not go to the court of law. However, Juma Sumar offered his assistance to settle the dispute between them and showed his willingness to accompany him to accused No.1 to settle the matter.

2.2. It is the case of the prosecution that thereafter

both of them went on their respective bicycle to the house of accused No.1. When they reached at Vajepar main road at the crossing of Vajepar and Kalika plot main road behind the Gabansha Pir Dargah, accused Nos.1, 2 and 3 met them and there was a talk between them with regard to the dealing of kerosene. At that time deceased Khetshi told accused No.1 that he was also threatening his man. Thereafter, according to the prosecution version, accused No.4 who is wife of accused No.1, came rushing and caught hold of the hair of deceased Khetshi. At that time accused No.2, Raghavji Lalji, took out a knife and accused Nos.1 and 3, Jeram Tharia and Shanker alias Parsottam respectively, caught hold of deceased Khetshi. Before Juma Sumar could intervene and rescue deceased Khetshi, accused No.2 gave knife blows on the back of Khetshi and on receiving the blows the deceased fell down. At that time many persons from the neighbourhood had gathered there and after assaulting the deceased Khetshi, all the four accused persons run away.

2.3. Thereafter Juma Sumar rushed to the shop of Karamshi, brother of the deceased, and informed him about the incident and both of them hired a taxi and came at the scene of the incident and shifted injured Khetshi to Government Hospital in the said taxi. However, during the course of treatment, injured Khetshi succumbed to the injuries.

2.4. The Medical Officer sent a yadi which is at Ex.13 to the police with regard to the said incident. Pursuant to the said yadi, PSI of Morvi Police station made an entry with regard to the said information vide entry No.18 in the police station diary and thereafter he went to the hospital. After reaching at the hospital, PSI Belim recorded statement of Juma Sumar which was the FIR according to the prosecution. On the basis of the said FIR, an offence under Section 302 read with Section 114 of the IPC was registered against the four accused. Thereafter inquest report on the dead body of deceased Khetshi was prepared and then the dead body was sent for autopsy. PSI Belim who was investigating officer started investigation and pursuant to the same recorded the statement of so-called eye witnesses and prepared Panchnama including panchnama under Section 27 of the Evidence Act as accused No.2 showed his willingness to find out the knife which he had thrown in a pond after the assault and the said muddamal was sent to FSL for report. After receipt of the autopsy report and FSL report, the investigting officer filed charge-sheet against all the four accused for commission of the offence of murder of Khetshi punishable under section 302

read with section 114 of IPC in the court of learned Judicial Magistrate, First Class, Morvi.

2.5. It appears from the record that accused No.4 Mayaben lodged a NC complaint - Mark B at about 16.20 hours when she came at the police station and her complaint was registered in the NC register at Sr.No.12/83. According to her she had some injury on her left wrist and therefore she was sent to Government Hospital for medical treatment with police yadi. The said NC complaint was also annexed with the copy of the charge-sheet to show her presence at the time of the alleged incident.

2.6. On committal the learned Additional Sessions Judge, Rajkot, Camp at Morvi, framed charge against all the accused for commission of the offence punishable under Section 302 read with section 114 of the IPC which was read over and explained to them. The accused pleaded not guilty and claimed to be tried and thereupon the accused were tried by the learned Additional Sessions Judge, Rajkot, Camp at Morvi in Sessions Case No. 8 of 1983.

2.7. In order to bring home the culpability of the respondents/accused, prosecution has examined a number of witnesses including two eye witnesses and placed reliance on several documents, panchnama of the scene of the offence, panchnama of the physical condition of the accused and panchnama prepared under section 27 of the Evidence Act at the instance of accused No.2 who had expressed his willingness to show the muddamal article - knife which he had thrown in a pond after the alleged incident.

2.8. The learned Additional Sessions Judge on analysis, appreciation, evaluation and scrutiny of the evidence on record came to the conclusion that homicidal death of Khetshi is proved. According to the learned Additional Sessions Judge there are material contradictions in the oral evidence of the so-called eye witnesses and the complaint. The learned Additional Sessions Judge held that the complaint which was given by Juma Sumar vide Ex.19/1 was not the FIR but entry made in the police station diary on the basis of the information conveyed by the Medical Officer of the Government Hospital at Ex.13 was the FIR wherein names of the assailants were not mentioned. According to the learned Additional Sessions Judge, on close scrutiny of the evidence of the eye witnesses, presence of Rabiya and Juma Sumar excluded each other from the scene of

incident. Therefore, the learned Additional Sessions Judge has recorded the finding that both of them were not present at the scene of occurrence and therefore they cannot be called eye witnesses.

2.9. So far as the recovery of the muddamal article knife which was used for the alleged crime recovered by preparing panchnama under section 27 of the Code is concerned, the learned trial Judge held that the knife was found from an open place and there was no blood stain on it and therefore no reliance can be placed upon it. So far as the so-called complaint Mark B given by accused No.4 in the Morvi Police station is concerned, the learned trial Judge held that the same was a got up one which was recorded after the investigation was started and therefore the same was hit by section 162 of the Code. On the basis of the aforesaid finding, the learned Additional Sessions Judge came to the conclusion that the charge levelled against the accused for commission of murder of Khetshi is not proved and therefore they are not guilty of offence under section 302 read with Section 114 of the IPC and resultantly they are acquitted of the said charge which has given rise to the present appeal at the instance of the appellant - State of Gujarat.

3. At the outset it may be stated that leave to appeal prayed for by the appellant - State of Gujarat was refused qua accused No.4 Mayaben Jeram whereas against accused Nos.1 to 3 leave was granted and the appeal against them came to be admitted.

4. Mr. K.G. Sheth, learned APP for the appellant State of Gujarat vehemently criticized the impugned judgment and order of acquittal. He has taken us through the prosecution evidence more particularly through the evidence of two so-called eye witnesses whose evidence, according to him, is cogent, consistent and sufficient enough to connect the accused with the crime alleged against them. According to him, there is no contradiction in their evidence and their evidence is consistent and in consonance with their previous statement recorded during the course of investigation. According to the learned A.P.P., the learned trial Judge has misread the evidence and complaint mark 19/A is wrongly disbelieved. In fact, according to the learned APP, mark 19/A is the FIR because prior to that one entry was recorded at Ex.13 in the police station diary on the basis of the information conveyed by the Medical officer and it is not necessary for the Medical Officer to record the name of the assailants as the primary duty of the Medical Officer is to give treatment to the injured and

not to perform the role of investigating officer. What is asserted by the learned A.P.P. is that even if we exclude the evidence of Rabiya in that case also evidence of Juma Sumar is sufficient enough to connect the accused with the crime as Juma Sumar had accompanied the deceased from the very beginning and he was present throughout the incident and in his presence accused No.2 gave the fatal blows on the back of the deceased. It is stressed by the learned APP that the complaint Mark B which was given by accused No.4 Mayaben wherein it is stated that she has received injuries during the course of the said incident unequivocally suggests her presence at the time of the alleged incident and therefore the learned trial Judge has committed grave error in discarding that piece of evidence. In fact she was not in the police custody when her statement was recorded and therefore there is no question of her statement being hit by section 162 of the Code. It is further contended by the learned APP that witness Nanalal is also a natural and independent witness who saw one woman and three men talking with two men who were on bicycles. According to the learned APP, witness Annapurnaben is also a natural witness. On the aforesaid premises, Mr. Sheth, learned A.P.P., urged that the judgment and order recorded by the learned trial Judge acquitting respondents is bad in law as it is recorded by discarding the natural and independent eye witnesses and hence the impugned judgment and order requires to be interferred with at the hands of this Court in exercise of powers under section 378 of the Code. He therefore urged to allow this appeal by quashing and setting aside the judgment and order of acquittal and by recording conviction and respondents may be dealt with in accordance with law by sentencing them.

5. In counter submission, Mr. Tejas D. Karia, learned advocate for respondent Nos.1 to 3/ original accused Nos.1 to 3 supported the judgment and order of the learned Additional Sessions Judge throughout. According to him, there is no evidence worth the name to consider as the evidence of so-called two eye witnesses suffers from serious infirmities and there are material contradictions in their evidence. According to him, the learned trial Judge has rightly disbelieved Mark 19/A which was recorded after the inquest panchnama of the dead body was over and therefore according to him the learned trial Judge has very rightly considered Ex.13 as FIR which was recorded on the basis of the information conveyed by the Medical Officer to the police station wherein names of the assailants were not mentioned. According to the learned advocate, if names were known to the so-called eye witness Juma Sumar he would have

immediately stated it either before the Medical officer or before the PSI Belim who rushed to the hospital on getting the information in the police station. But that is not so in the present case. Even in the complaint at Ex.19/A name of Rabiya is not mentioned. In the statement of Rabiya who claims to be an eye witness, there is no mention about the name of Juma Sumar. Therefore, according to the learned advocate for the respondents, both the so-called eye witnesses are not at all eye witnesses to the alleged incident. It is also asserted by him that so far as the so-called discovery panchnama of the weapon is concerned, the said weapon/knife was found from an open place and it did not bear any blood stain and hence it cannot be called a discovery panchnama. According to the learned advocate, the learned trial Judge has very rightly come to the conclusion that evidence of both the eye witnesses excluded each other and their presence at the scene of incident is not established and therefore the learned trial judge has rightly recorded the finding of acquittal which does not warrant any interference at the hands of this Court in view of the principal enunciated in respect of acquittal appeal. Therefore he urged that the appeal being devoid of any merit, deserves to be dismissed and it may accordingly be dismissed.

6. At the outset it may be mentioned that there is no dispute with respect to the homicidal death of Khetshi. The learned trial Judge has after close scrutiny of the evidence and considering the autopsy report came to the conclusion that deceased succumbed to the injuries and cause of death was internal haemorrhage as a result of injuries to spleen, left pulmonary vessels and lung and all the injuries were anti-mortem. Therefore, it is duly proved that deceased died a homicidal death.

7. To prove the culpability of the accused, the prosecution case mainly hinges on the evidence of the two eye witnesses Juma Sumar P.W.3 Ex.19 and Rabiya P.W.5 Ex.31. We have minutely scrutinised the evidence of both the eye witnesses as well as other witnesses. On having look at the oral evidence of Juma Sumar P.W.3 at Ex.19, we find major discrepancy in the incident narrated by him before the police and the narration before the court. He has admitted in his cross-examination that the inquest on the dead body was lasted upto 12.45 hours and till then no complaint was recorded and thereafter the investigating officer started inquiry. On minute examination of the oral evidence of Juma Sumar, nowhere he says about the presence of Rabiya at the scene of the

alleged offence. He has unequivocally admitted that in his complaint he has not stated anything about the presence of two female at the time of the incident. If we examine the oral testimony of Rabiya, P.W.5 - Ex.31, according to her, accused were known to her. She firstly tried to show that the accused were not known to her but later on she stated that she knows the accused very well. She did not say anything about the presence of Juma Sumar. Her statement was recorded by the investigating officer at 6 PM. There is material contradictions in her statement and the oral deposition before the court. If we examine the oral evidence of Annapurnaben, P.W.6, Ex.34, presence of Rabiya at the scene of offence is doubtful. From the evidence of Annapurnaben, it is clear that she did not see the assailants. From her evidence, presence of Juma Sumar is also not established.

8. The prosecution tried to establish the involvement of accused No.4 Mayaben in the crime on the basis of the complaint Mark B (Ex.74) but the learned trial Judge has given cogent reason for not believing mark B (Ex.74). According to the learned trial Judge, Mark B (Ex.74) was recorded after commencement of the investigation into the complaint lodged against the accused. Therefore, the learned trial Judge has recorded the finding that the said statement is hit by the provisions of section 162 of the Code and is inadmissible in evidence.

9. We are conscious of the fact that we are dealing with an acquittal appeal and we have, therefore, to bear in mind the guiding principles governing exercise of this court's appellate jurisdiction which principles are well settled. The appellate court, while dealing with an appeal against the order of acquittal, though it has full power to review at large the evidence on which the order of acquittal is founded, yet in exercising its powers, should give proper weight and consideration to such matters as (i) the views of the trial Judge as to the credibility of the witnesses; (ii) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (iii) the right of the accused to the benefit of doubt and (iv) the slowness of an appellate court in disturbing a finding of fact arrived at by the Judge who had the advantage of seeing and marking the demeanour of the witnesses, which finding certainly cannot be disturbed if two reasonable conclusions can be reached on the basis of the evidence on record.

10. Keeping this principle in the forefront and considering the evidence which is adduced before the learned trial Judge which we have adverted hereinabove, at the cost of repetition be it stated that all the prosecution witnesses have given their version altogether different from their earlier version and there are contradictions on every part of the statement of the witnesses as to the manner in which the incident has occurred. There is no reliable and satisfactory evidence to connect the accused with the crime. In the absence of satisfactory evidence the accused cannot be convicted for the offence with which they have been charged. The learned trial Judge was therefore perfectly justified in disbelieving the so-called two eye witnesses as their evidence suffers from serious infirmities. This being an acquittal appeal we cannot upturn the finding of the learned Sessions Judge unless we are satisfied that the reasoning adopted by him is unsustainable or that the view taken by him is unreasonable. In fact, in the present case, the view taken by him is very plausible, therefore, we cannot interfere with the finding recorded by the learned trial Judge in the course of the present appeal which is directed against the order of acquittal. Hence this appeal is devoid of merit and deserves to be dismissed.

11. For the foregoing reasons, the appeal fails and accordingly it is dismissed. The respondents/accused are on bail. Therefore their bail bonds shall stand cancelled and sureties are discharged.

(M.C. Patel, J.)

(A.M. Kapadia, J.)

(karan)