

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 174 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.C.PATEL  
and  
Hon'ble MR.JUSTICE A.L.DAVE

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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 Civil Judge? :

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GARASIA NATHUBHA '

Versus

STATE OF GUJARAT

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Appearance:

1. Criminal Appeal No. 174 of 1994  
MR AD SHAH for the appellant.  
MR HL JANI, APP, for the respondent.
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CORAM : MR.JUSTICE M.C.PATEL  
and  
MR.JUSTICE A.L.DAVE

Date of decision: 30/04/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE A.L.DAVE)

1. The present appeal arises out of a judgment and order rendered by the learned Additional Sessions Judge, Bhavnagar, Camp at Mahuva, in Sessions Case No.15 of 1992

on 17.12.1993, convicting the appellant for offences punishable under Section 302 of the Indian Penal Code and Section 135 of the Bombay Police Act for having committed murder of one Valjibhai Gavarabhai of village Hamipara. The appellant was sentenced to undergo imprisonment for life and to pay fine of Rs.5000/-, in default, to undergo rigorous imprisonment for one year, for the offence of murder. The appellant was sentenced to undergo rigorous imprisonment for four months and to pay a fine of Rs.500/-, in default, to undergo rigorous imprisonment for one month for the offence under Section 135 of the Bombay Police Act.

2. The facts of the case, in brief, are that the appellant and the deceased both belong to village Hamipara, situate in Talaja taluka of Bhavnagar district. It is the case of the prosecution that on 19.10.1991, at about 7.00 P.M., while the deceased Valjibhai Gavarabhai, in company of Budhabhai Bachubhai and Budhabhai Oghabhai, going on his motorcycle on the road between village Hamipara and Dam Site and when they were passing by the field of Muljibhai, the appellant stopped them and started quarrelling. At that time, the appellant drew out a knife from his waist band and started inflicting blows indiscriminately on deceased Valjibhai. As a result of the injuries, the deceased-Valji and the other two pillion riders, namely, Budhabhai Bachubhai and Budhabhai Oghabhai fell down. It is the case of the prosecution that brother of the deceased-Vallabhbhai Gavarabhai was following on his bicycle and he witnessed the incident. He tried to intervene also. Budha Bachu and Budha Ogha were sent to the village for fetching a conveyance. Thereafter, they both and another brother of the deceased came to the place of incident in a tempo. They took the deceased Valjibhai for being treated. However, deceased-Valji succumbed to the injuries on the way to the hospital.

3. As per the prosecution case, the cause for the incident providing motive was that the appellant had demanded motorcycle from the deceased a few days prior to the incident, which request was turned down by the deceased and the appellant was, therefore, annoyed. He had even conveyed his annoyance to Vallabhbhai Gavarabhai in the recent past of the incident by saying that within few days either Valjibhai will not be there or he (i.e. the appellant) will not be there. Brother of the deceased-Vallabhai Gavarabhai lodged a First Information Report before the Police Sub-Inspector, "A" Division Police Station, Bhavnagar, at the time when the deceased was taken to the hospital. On basis of the said

information, police registered the offence and started investigation. Upon investigation, having found sufficient evidence against the appellant-accused, the Investigating Agency filed charge sheet in the Court of learned Judicial Magistrate, Talaja. The learned Magistrate, after following the procedure, committed the case to the Court of Sessions, as the case was triable exclusively by a Court of Sessions. Sessions Case No.15 of 1992 thus came to be registered.

3.1 Charge was framed against the accused-appellant at Ex.2. He pleaded not guilty to the charge and claimed to be tried.

3.2 The learned Additional Sessions Judge, considering the evidence led by the prosecution, came to a conclusion that the prosecution was successful in establishing the charges levelled against the appellant and, therefore, recorded a conviction and passed the sentence, as stated above. It is this judgment and order which is challenged by way of this appeal.

4. We have heard learned Advocate, Mr. A.D. Shah, for the appellant and the learned Additional Public Prosecutor, Mr. Jani, for the respondent-State. We have also examined the record and proceedings and have considered the evidence in light of the contentions that were raised before us.

5. The learned Advocate, Mr. Shah, appearing for the appellant submitted that the prosecution has examined three witnesses, who claimed to be eye-witnesses. There is one witness whose evidence is in the form of res gestae. Mr. Shah submitted that a mere reading of the depositions of the eye-witnesses clearly indicate that conviction cannot be recorded on the basis of their evidence. Their versions go contrary to each other and the version given by them in the Court is an improved edition of their original version tailored to suit the prosecution case. Mr. Shah, therefore, submitted that the Trial Court committed an error in accepting the evidence of the eye-witnesses.

5.1 In order to substantiate his contentions, Mr. Shah submitted that the evidence of the complainant-Vallabhbbhai Gavarabhai is highly unnatural. In the complaint, he does not speak of presence of either Budha Bachu or Budha Ogha about whose presence he speaks in his deposition. Mr. Shah submitted that the F.I.R., if perused, rules out the possibility of deceased Valji going on motorcycle in company of Budha Bachu and Budha

Ogha. Mr. Shah submitted that, as per the F.I.R., the accused ran away from the place on being accosted by the complainant. The F.I.R. also indicates that Madhabhai Damabhai and Budha Ogha arrived at the place of incident subsequently. The F.I.R. further indicates that Budha Ogha was sent to inform Bhupat and Bhupat came to the place with a tempo. Thus, the F.I.R. rules out the presence of Budha Bachu and Budha Ogha with the deceased on motorcycle. It was contended that the evidence of Muljibhai, near whose field the incident is alleged to have occurred, comes out with an altogether new version, which is not emerging from the case of the eye-witness. Muljibhai puts certain words in the mouth of the deceased which no other witness speaks of and he does not speak anything about the shouts raised by the complainant while rescuing the deceased and the deceased being assaulted by the appellant. It was submitted that Muljibhai claims to have rushed to the spot from his field nearby and seen the appellant running from the place. During cross-examination, he admits that Budha Ogha was not present at that time. It was argued that Budha Ogha had gone to the village to inform others and he came along with Bhupat. As per the other witnesses, on being accosted by the complainant, the appellant had run away from the place. Therefore, Muljibhai could not have seen the incident because when he reached, Budha Ogha was present and much prior thereto, the appellant must have escaped. Mr. Shah, therefore, urged that the evidence led by the prosecution and accepted by the Trial Court is not sufficient to record conviction.

5.2 Mr. Shah submitted that there is inconsistency between the ocular version and the medical evidence. It was submitted that the complainant in his F.I.R. speaks of infliction of three blows whereas the medical evidence speaks of more number of injuries and the complainant, in order to secure support from the medical evidence, has improved his evidence by increasing the number of blows even at the risk of going contrary to his F.I.R.

5.3 Mr. Shah submitted that there is a vital omission about the complainant-Vallabhbai leaving the Wadi on cycle and coming to the scene of offence on cycle. There are conflicting versions emerging on record as to whether the complainant was following the deceased or whether he was coming from the opposite direction.

5.4 It was contended that the prosecution has failed to examine Budha Ogha, who is alleged to have gone to the house of Bhupatbai Gavarabhai. This renders the evidence of Bhupatbai Gavarabhai as totally irrelevant

and hit by the rule of hearsay evidence.

5.5 It was contended that the evidence regarding recovery of knife is not reliable as both the Panchas have not supported the prosecution case. The contents of Panchnama are not proved by the evidence of the Panch witnesses and the Investigating Officer merely stated that the accused produced the knife. He speaks nothing about the condition of the knife, whether it was blood stained or otherwise. It was contended that there may not be sufficient light as the light of the motorcycle was on at the time of the incident and, therefore, identification of the assailant may not have been possible. Mr. Shah, therefore, urged that the judgment and order impugned herein may be set aside and the appellant be acquitted of the charges.

6. Learned Additional Public Prosecutor, Mr. Jani, submitted that the incident occurred at about 7.00 P.M. when it may not be very dark. He also submitted that the parties are known to each other and there is no scope for any mistake in identifying the assailant. Mr. Jani submitted that the inconsistencies highlighted by the learned advocate for the appellant are not vital in nature. They do not affect the prosecution case, in substance. Mr. Jani submitted that the witnesses are laymen and certain discrepancies in form of contradiction or omission are bound to creep in. There may be some exaggerations here and there, but none of the contradiction or omission goes to the root of the prosecution case and render the prosecution case vulnerable to doubt. Mr. Jani, therefore, urged that the appeal may be dismissed.

7. Having regard to the contentions, the Court has before it depositions of complainant-Vallabhbhai Gavarabhai (Ex.11), Budhabhai Bachubhai (Ex.16) and Muljibhai Haribhai (Ex.17). They all claim to have seen the incident. Vallabhbhai Gavarabhai, in clear terms, states that when the incident occurred, deceased-Valji was going on a motorcycle along with Budha Bachu and Budha Ogha. He says that he was going on his bicycle. They all were going to have their dinner. When they reached near the field of Muljibhai, the appellant started quarrelling with deceased-Valji. In the meantime, the witness reached near them and, at that time, the appellant drew out a knife from his waist band and started inflicting blows indiscriminately on Valji. The complainant, therefore, accosted the appellant by saying "leave him". The appellant, therefore, ran away towards the dam. He says that because of the injuries

sustained by Valji, Valji as well as Budha Ogha and Budha Bachu fell down from the motorcycle. He firstly rescued Valji. He noticed that Valji was bleeding from his abdomen and that his intestines were protruding. He also noticed that the deceased was bleeding from the left side of the chest just below ribs. Likewise, from the right side of the chest also, he was bleeding. He says that he noticed about seven to eight wounds. He says that he sent Budha Bachu and Budha Ogha to the village. He recalls to the best of his impression that his uncle Madhabhai also came there. Those two who were sent to the village went to Bhupat and Bhupat came to the place with a Tempo of Lakhubhai of Trapaj. The deceased was taken in the Tempo to Bhavnagar, where he was declared dead. He speaks of the appellant having conveyed to him that within 5/7 days, either Valji will not be there or the appellant will not be there. According to this witness, the appellant was annoyed because Valji had refused to give his motorcycle to the appellant 2/3 days prior thereto. The witness has been subjected to cross-examination mainly on question as to whether he could have seen and identified the knife. He has also been put questions as to what he did on seeing the incident. An attempt is made to indicate that his conduct is not natural. Questions are put to contradict him from his police statement where he has stated that Valji met him while he was returning from the field and not while he was following Valji, as stated by him. In our opinion, such contradictions are minor in nature. The fact remains that, soon after the incident, this witness took the deceased to hospital and lodged the complaint immediately and, in that complaint, the entire version about having seen the incident emerges. Likewise, about the number of injuries also, questions are put. In the complaint, he has stated about three blows, but in the deposition, he says that he noticed about 7/8 wounds. It may be that while giving deposition, he is influenced by postmortem notes, but that by itself will not falsify his deposition when he says that the appellant started giving blows indiscriminately. His having stated as three blows in the complaint may be only an estimate, but he categorically states that injuries were caused with knife indiscriminately.

8. Witness Budhabhai Bachubhai (Ex.16) says that he was going on a motorcycle with Valjibhai and Budha Ogha. He says that the appellant met them and came in front of the motorcycle and started quarrelling with deceased-Valjibhai. The appellant then took out a knife from his waist band and started giving blows to Valjibhai

indiscriminately. He says that all the three fell down and he sustained injuries on his right knee and his trouser was torn. He describes as to how the incident occurred. He speaks of Vallabhbhai reaching there on his bicycle and shouted "leave him, leave him". He has been cross-examined at length, but he sticks to his version. He has been asked about his having not stated in his police statement about Vallabhbhai coming on bicycle. During cross-examination, he says that the entire incident was over within two minutes.

9. Witness-Muljibhai Haribhai (Ex.17) is the owner of the field situate near the place of the incident. He says that he was working in his field when he heard a shout saying "Hey Nathubha, I am your cow". He, therefore, rushed to the place and noticed that Nathubha, i.e. the appellant herein, running towards the dam. He says that Vallabhbhai, both the Budhas and Madhabhai were present. Valabhai was bleeding from his chest and abdomen and was gasping. Other 7/8 persons also gathered. He fetched a mattress, placed it into the tempo brought by Bhupatbhai and deceased-Valabhai was taken to the hospital in the tempo. The witness has been subjected to cross-examination. He denies that it was dark at the time of the incident. He admits that the headlight of the motorcycle was on. He says that he had noticed the appellant running away from a distance of about 10 feet.

10. A reading of the depositions of these three witnesses collectively indicates that they all have seen the incident. It is true that there are some discrepancies in the depositions of these witnesses, but it cannot be overlooked that these witnesses are villagers and not highly educated or qualified people. Certain admissions may have been given without realising the effect and intricacies of the answer. The witnesses attempt to give answer to the questions put to them in cross-examination, some times out of imagination, only out of fear of being disbelieved and in doing so, some times, they add some embroidery to their genuine and original version. That by itself will not affect the veracity of their deposition. We find that they have deposed in a natural manner.

11. The version that is given by these witnesses is supported by medical evidence in form of deposition of Dr. Saiyed (Ex.8) and Postmortem Note (Ex.9). Deposition of Budha Bachu assumes greater importance for the reason that he sustained injury which would vouch for his presence and the fact of his having sustained injury

is proved from the deposition of Dr. Patel (Ex.53) and the Medial Certificate (Ex.54). It was, of course, argued that he has taken treatment on the next day. It is nowhere suggested that the injury was self-inflicted and created one.

12. Despite a close scrutiny from the angle suggested by the learned Advocate for the appellant, we are not able to find any circumstance to raise a reasonable doubt about the involvement of the appellant in the offence. Even if the recovery of knife is not considered, there is sufficient evidence in form of direct evidence of eye-witnesses to implicate the appellant. In our opinion, the learned Trial Judge has rightly appreciated the evidence and recorded conviction.

13. Learned Advocate Mr. Shah placed reliance on the decision in the case of Kalyan & Ors. v. State of U.P., J.T. 2001 (8) SC 200 and the decision in the case of Ramkumar Pande v. State of M.P., AIR 1975 SC 1026. We have gone through these judgments and find that they were given in facts of those cases which are totally different from the facts of the present case. These decisions, therefore, cannot help the appellant in any manner.

14. For the foregoing reasons, we do not find any merit in the appeal. The appeal, therefore, must fail and is, therefore, dismissed. The judgment and order of conviction and sentence dated the 17th December, 1993, passed by the learned Additional Sessions Judge, Bhavnagar, in Sessions Case No.15 of 1992 is hereby confirmed.

[ M.C. PATEL, J. ]

[ A. L. DAVE, J. ]

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