IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1130 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE N.G.NANDI
and
Hon'ble MR.JUSTICE D.P.BUCH

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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

DIPSINI KESHRISINH BARIYA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1130 of 1995

MS SADHANA SAGAR for Petitioner Nos. 1-2

MR HH PATEL, APP for Respondent - State

CORAM : MR.JUSTICE N.G.NANDI
and
MR.JUSTICE D.P.BUCH

Date of decision: /10/2002

JUDGEMENT

(Per : MR.JUSTICE D.P.BUCH)

[1] This is an appeal under Sub-Section (2) of Section 374 of the Criminal Procedure Code, 1973 [for short "Code"] against the judgment and conviction order dated 21.11.1995 rendered by the learned Additional Sessions Judge, Camp at Chhota Udepur, District : Vadodara in Sessions Case No.9 of 1995 convicting the two appellants - original accused in the said Sessions Case, for the offence punishable under Section 302 read with Section 114 of the Indian Penal Code.

[2] The facts of the case leading to the aforesaid Sessions Case No.9 of 1995 may be briefly stated as follows :-

The incident in question had taken place at village Dolaria in Chhota Udepur of Vadodara District on 6.6.1993 at about 20.30 hours. The two appellants are brothers, to be more precise, they are step brothers. Deceased Rupendrasinh was real brother of appellant No.2 - Mahendrasinh Keshrisinh and was step brother of appellant No.1 - Dipsinh Keshrisinh. They are all staying in a locality known as "Ugamna Vas" [Eastern locality]. It seems that the appellants were not on good terms with deceased Rupendrasinh. The deceased had arranged a lunch on the aforesaid date. However, on account of the aforesaid position, the appellants were not invited at the lunch. After lunch was over, the deceased was proceeding towards his house. When he reached near the house of appellant No.2, appellant No.2 started quarrelling with him on the point as to why he was not invited at the lunch. In the meantime, appellant No.1 - Dipsinh Keshrisinh Bariya rushed to the spot and saw that deceased Rupendrasinh and appellant No.2 - Mahendrasinh were quarrelling. Appellant No.1, therefore, entered in the house of appellant No.2 - Mahendrasinh and took out a weapon known as "Palia" and rushed to the place at which deceased Rupendrasinh and appellant No.2 - Mahendrasinh were quarrelling. According to the case of the prosecution, appellant No.2 caught Rupendrasinh and appellant No.1 dealt blows with "Palia" on the person of Rupendrasinh. The widow of the deceased, Kamlaben, saw the incident and, therefore, she started shouting at that time. Thereafter, some neighbours also arrived at the spot. In the meantime, deceased Rupendrasinh fell on the ground and ultimately succumbed to the injuries on the spot. At this point of time, appellant No.1 ran away from the spot and appellant No.2 was still there. Thereafter, informant Kamlaben, who is the widow of the deceased lodged F.I.R., which was

filed by her in the early hours of the next morning. The police rushed to the spot and inquest panchnama of the dead-body of the deceased was prepared on the scene of offence. The statements of witnesses were recorded. Muddamal articles were recovered from the scene of offence and the same were sent to the Forensic Science Laboratory [for short "F.S.L."] for opinion with respect to blood on various articles seized by the Investigating Officer. In the meantime, both the appellants were arrested and produced before the learned Magistrate, who referred them to the Judicial custody. At the end of the investigation, the Investigating Officer submitted charge-sheet against both the appellants for the offences punishable under Section 302 read with Section 114 of the Indian Penal Code as well as for the offences punishable under Sections 504 and 201 of the Indian Penal Code together with Section 135 of the Bombay Police Act.

[3] It is, therefore, the case of the prosecution against the appellants that the appellants caused murder of the deceased. To be more particular, the prosecution has alleged that appellant No.1 committed murder of the deceased and appellant No.2 abetted, the commission of the said offence. The prosecution has also alleged that both the appellants had given abuses to the deceased and that they also destroyed the evidence. It is also the case of the prosecution that though there was a notification issued by the District Magistrate prohibiting carrying of weapons in public place, appellant No.1 carried a weapon known as Palia with him and used the same for committing the aforesaid offence.

[4] The learned Magistrate ascertained that the copies of the papers of the Investigation were supplied to the appellants. Since the offence punishable under Section 302 of Indian Penal Code was exclusively triable by the court of Sessions, the learned Magistrate committed the case to the Court of Sessions. There also, the Sessions Court ascertained from the appellants that the copies of papers of Investigation were supplied to the appellants. Charge was framed by the learned Additional Sessions Judge on 14.7.1995 for the aforesaid offences, which is placed at Ex.14. It was, thereafter, amended on 18.10.1995. The appellants pleaded not guilty to the charge framed against them. Therefore, the learned Additional Sessions Judge proceeded to record evidence produced before him by the prosecution.

[5] At the conclusion of the evidence, further statements were recorded under Section 131 of the Code, arguments were heard and the learned Additional Sessions

Judge found that appellant No.1 was guilty for the offence punishable under Section 302 of the Indian Penal Code. The learned Judge also found that appellant No.2 was guilty for the offence punishable under Section 302 read with Section 114 of the Indian Penal Code and convicted them accordingly. However, the learned Judge found that the appellants were not guilty for the offences punishable under Section 504 and 201 of Indian Penal Code and Section 135 of Bombay Police Act and, therefore, he acquitted them for these offences.

[6] After hearing the appellants on the quantum of punishment, the learned Additional Sessions Judge directed each appellant to undergo R.I. for life and each of them to pay fine of Rs.1,000-00. The learned Judge also directed that in case of default in making payment of fine, each appellant should undergo further S.I. for six months.

[7] Feeling aggrieved and dissatisfied by the aforesaid judgment of the Sessions Court, the appellants have preferred this common appeal before this Court through Legal Aid. It seems that the matter was entrusted to Ms.Sadhna Sagar, learned advocate, who argued the matter on behalf of the appellants. It also appears from the record that the appeal was admitted and Mr.H.H.Patel, learned APP has appeared for respondent - State in response to the service of notice of admission.

[8] We have, therefore, heard Ms.Sadhna Sagar and Mr.H.H.Patel, learned advocates for the parties and have perused the papers.

[9] The learned Advocate for the parties have taken us through the evidence on record including the oral as well as documentary evidence.

[10] Ms.Sadhna Sagar, learned advocate for the appellants has heavily assailed the judgment and conviction order of the Sessions Court and argued that the Sessions Court has not appreciated the evidence properly and, therefore, there are serious errors committed by the Sessions Court in convicting both the appellants.

[11] On going through the evidence, it appears that so far as appellant No.1 is concerned, P.W.1 Kamalaben Rupendrasinh has given evidence as an eye witness at Ex.9. Her evidence is at page-14 in the paper book. It is very clear that she was an eye witness from the beginning. She has deposed that the appellants were

quarrelling with her family and, therefore, they were not invited at the lunch organized by her family. She has further deposed that appellant No.2 started quarrelling with her husband on the point as to why they were not invited at the lunch. The said incident took place right in front of residence of appellant No.2. She has also deposed that when the quarrel was going on, appellant No.1 rushed there and he collected a weapon known as "Palia" from the house of appellant No.2 and dealt blows with the said weapon on the person of the deceased. She has also deposed that the incident took place at about 20.30 hours. She has also deposed that appellant No.2 Mahendrasinh caught hold of the person of the deceased and, thereafter, the blows were inflicted by appellant No.1 Dipisinh on the person of the deceased with "Palia" on right side of the neck and right shoulder etc. She has also deposed that on account of the aforesaid injuries, the deceased fell down on the ground and ultimately succumbed to the injuries. It is further deposed that she had raised shouts, at which the neighbours had rushed to the spot.

[12] The learned advocate appearing for the appellants before the Sessions Court has cross-examined this witness at length. During the entire cross-examination, no fruitful materials were brought on record. Her evidence has not been shaken at all. This shows that her evidence is natural and genuine and she appears to be a genuine and natural eye witness to the incident in question.

[13] Then it comes on record that after the incident was over, P.W.1, Kamalaben, Ex.9 had gone to the Police Station, Zoz Out Post to file F.I.R. It was filed at 4.15 A.M. on 7.6.1993. Here it is argued that there was inordinate delay in filing the F.I.R. It is not possible to imagine a rustic woman seeing her husband being killed at 20.30 hours and then rushing to the Police Station without waiting for a movement. When the incident took place in her presence, she would naturally be shocked by the aforesaid event. She would require some time and advice to go to the Zoz Out Post to file F.I.R. Moreover, vehicles would not be easily and frequently available at such villages for going from one place to another. It is more so, when it was already 20.30 hours when the incident took place. There is some distance between village Zoz Out Post and village Dolaria. In the premises, the F.I.R. filed at the Zoz Out Post at 4.15 A.M. on 7.6.1993 in respect of the event which took place at 20.30 hours on 6.6.1993 at village Dolaria, cannot be said to be late. Therefore, it is not possible to agree with the aforesaid arguments of Ms.Sadhna Sagar

that inordinate delay was caused in filing the F.I.R.

[14] The aforesaid evidence of Kamalaben is amply supported by the evidence of Dr.P.K.Kharva, P.W.2, who has tendered evidence before the trial Court at Ex.11. The copy of his evidence is at page-23 in the paper book. His evidence corroborates the testimony of Kamalaben. He has also described the injuries found on the person of the deceased at the time when postmortem was carried out. He has noticed incised wound on right side of the face, on the right jaw, on right side of the chest, on left side of the face etc. Injuries, were also noticed on the back side of right shoulder, one more incised wound on right shoulder and one more incised wound on the right back of the deceased. The doctor has further certified that the injuries were antemortem and could be caused by a sharp cutting instrument. On seeing muddamal "Palia", he has opined that the injuries noticed on the person of the deceased could be caused by the said weapon. He has also stated that the death of the deceased has taken place on account of hemorrhage and shock due to cutting of major veins. He has also stated that the injuries Nos.1 to 9 were sufficient in ordinary course to cause the death of the deceased. The witness was cross-examined on behalf of the appellants, but nothing favourable could be gathered from the said cross-examination. This shows that the evidence of Doctor completely corroborates the testimony of Kamalaben, which also shows that Kamalaben was natural and genuine eye witness.

[16] Then there is an evidence of Popatsinh Keshrisinh, who is P.W.3 and who has given evidence at Ex.14, a copy of which is placed at page-27 in the paper book. He happens to be a brother of the deceased. Then Khamaliben wife of Popatsinh Keshrisinh, P.W.4 has been examined at Ex.15, Bhajiben Keshrisinh, P.W.5, mother of the deceased has been examined at Ex.16, Zinkiben P.W.6, who happens to be the wife of the elder brother of the deceased has also been examined at Ex.17. All these witnesses have supported the testimony of Kamalaben, widow of Rupendrasinh and all of them have been cross-examined at length on behalf of the appellants, however, nothing favourable could be brought out during this lengthy cross-examination. The learned advocate for the appellants has taken us through the evidence of these witnesses, but it was not possible for her to convince us on the point that the evidence tendered by these witnesses was not natural and genuine.

[17] It is not in dispute that the houses of the

witnesses are around the place of the offence. In fact, the place of offence is just at a distance of 10 feet from the house of appellant No.2. The house of Popatsinh Keshrisinh, P.W.3, Ex.14 is also at a distance of about 10 feet from the place of the offence. Looking to the nature of the offence, their relation and situation of their residences, it is quite natural that the witnesses would be present at 20.30 hours and, therefore, they would be natural eye witnesses to the incident in question. An attempt was made by Ms.Sadhna Sagar, learned advocate to show that there is some contradiction with respect to the scene of the offence. Now when there was a scuffle resulting in death, then the incident may not be said to have happened at a particular place. There would be some marginal error in describing the place of offence also. Moreover, in such type of cases, the victim and the accused may not continue to stand at one place. There would be some movement here and there. Therefore, if there is a difference of a few feet here or there in the description of the scene of the offence given by different witnesses, it would not be sufficient to discard the evidence of the eye witnesses solely on the ground about this type of discrepancy in their evidence.

[18] Then we can also turn to the evidence of Ramsinh Vajesinh, P.W.7, Ex.18, who is a panch witness, in whose presence, the panchnama of the scene of offence was prepared and he is also a witness to the discovery panchnama under which appellant No.1 discovered the weapon known as "Palia" from the place, where it was hidden by him. The witness has supported the prosecution case on all the three aspects and even, the event of discovery of "Palia" has also been amply proved by this witness. This shows that appellant No.1 - Dipsinh is proved to have discovered the weapon known as "Palia" voluntarily and, therefore, that part of evidence would be admissible under Section 27 of the Evidence Act. This fact further supports the evidence tendered by the aforesaid witnesses.

[19] Once the fact of discovery is proved, there would be three different probabilities -

[A] that this appellant had seen someone placing muddamal "Palia" at the said particular place ; or

[B] that someone had told appellant No.1 that muddamal "Palia" was hidden at that place; or

[C] that appellant No.1 himself had hidden there.

[20] This appellant nowhere states anything touching points [A] or [B] and hence, it will be reasonable to accept the third probability.

[21] Then H.C. Balvanrao, P.W.10, Ex.29 has also corroborated the testimony of Kamalaben. This witness was working as Head Constable at Zoz Out Post. He has clearly deposed that Kamalaben came at Zoz Out Post on 7.6.1993 in early hours and she had filed F.I.R. and, thereafter, the said F.I.R. was sent to Chhota Udepur Police Station for registration of the offence, and, therefore, his evidence also supports the testimony of Kamalaben. Then there is evidence of Serologist, which shows that the clothes of the deceased were found stained with blood and the said blood belonged to Group-A and the deceased had also the same blood group. This evidence does connect appellant No.1 with the offence in question.

[22] In above view of the matter, the evidence of Kamalaben is sufficiently corroborated by other eye witnesses. It is further corroborated by Dr.Kharva, who had undertaken the post-mortem of the dead-body of the deceased. It is further supported by the aforesaid panch witnesses and evidence of discovery panchnama. Even the blood stained clothes of these appellants further support the aforesaid prosecution case and evidence of Kamalaben and other witnesses. The map produced on record showing the place, where the offence was committed, also supports the case of Kamalaben.

[23] In above view of the matter, when these witnesses have completely testified against appellant No.1, there is no reason to discard their evidence. Once the evidence of Kamalaben is found to be reliable, there is no reason to disbelieve the same and once her evidence is accepted, the only conclusion, which can be drawn would be that appellant No.1 is proved to have committed the murder of the deceased. It is more so when her evidence gets full corroboration from other evidence including the evidence of eye witnesses and other pieces of evidence discussed hereinabove.

[24] Appellant No.1 had intervened at the quarrel between the deceased and appellant No.2. He had collected a weapon known as Palia from the House of appellant No.2, which was at about 10 feet from the place of the offence. He dealt blows of Palia on the person of the deceased. The blow was inflicted on vital parts of the body of the deceased. It is proved on record that

the injuries inflicted by him on the person of the deceased were intended to be inflicted by him and the injuries, which were intended to be inflicted by him on the person of the deceased were actually inflicted by him on the person of the deceased. The injuries caused by appellant No.1 were sufficient in the ordinary course of nature to cause death of the deceased.

[25] In above view of the matter, there is no alternative, but to accept the findings and reasoning of the trial Court that appellant No.1 is proved to have committed the murder of the deceased by intentionally inflicting serious injuries on the vital parts of the body of the deceased by means of palia - a deadly weapon. There is no merit in the appeal of appellant No.1. Hence the same deserves to the dismissed.

[26] So far as appellant No.2 - Mahendrasinh is concerned, it is also true that according to Kamalaben, appellant No.2 had caught hold of the deceased at the time of commission of the offence. However, so far as the other witnesses are concerned, they do not depose about the participation of appellant No.2 at the time of commission of the offence. Same set of witnesses would again be required to be considered for the purpose of the participation by appellant No.2. Popatsinh, P.W.3, Ex.14, Khamaliben, P.W.4, Ex.15, Bhajiben, P.W.5, Ex.16 and Zinkiben, P.W.6, Ex.17 all of them have very clearly deposed that appellant No.2 was present at the time when appellant No.1 had dealt palia blows on the person of the deceased but none of them has said anything about the participation of appellant No.2 at the time, when the said offence was committed by appellant No.1. None of them said before the Sessions Court that appellant No.2 had caught hold of the deceased, when appellant No.1 dealt blow with weapon known as Palia on the person of the deceased. Therefore, the aforesaid witnesses, who were closely related to the deceased and to the appellants, have not corroborated the oral testimony of Kamalaben. Therefore, this is a case of a solitary eye witness namely, Kamalaben widow of the deceased who has not been supported by other witnesses with respect to the participation of appellant No.2. It would, therefore, be difficult to place reliance on the sole testimony of Kamalaben, Ex.9.

[27] It is also required to be noted that if appellant No.2 had really caught hold of the hands of the deceased at the time of the aforesaid event, then the hands of the deceased would have been saved and no injury could have been found on the hands of the deceased. However, the

evidence of Dr.Kharva at Ex.11 shows that the deceased had injuries on his right hand and right thumb, more incised injuries were found on right hand thumb. In fact, there were about four injuries on the right thumb and right hand of the deceased sustained by him in the said event. Even the middle finger of the deceased had wound. Therefore, it would be difficult to accept that the present appellant had caught the hands of the deceased.

[28] So far as the other parts of the body are concerned, there are injuries on the face and neck of the deceased. It seems that even the neck of the deceased would not have been caught by appellant No.2 Mahendrasinh. The injuries were found on the face of the deceased, which would indicate that the face of the deceased would not have been caught by appellant No.2 Mahendrasinh. Even the shoulders of the deceased also sustained wound. By the side of the chest, injuries have been noticed on the person of the deceased. This shows that even the chest would not have been caught by appellant No.2 Mahendrasinh. This would show that he had not caught the deceased at the time of commission of the said offence. If the deceased was caught by appellant No.2 then appellant No.1 Dipsinh could not have inflicted those injuries on several parts of the person of the deceased.

[29] In above view of the matter, when the evidence of Kamalaben is not supported by other eye witnesses on the aforesaid point and when the said evidence runs contrary to the medical evidence on record, the evidence of Kamalaben with respect to the participation of appellant No.2 Mahendrasinh, in commission of the offence, becomes doubtful and, therefore, appellant No.2 should be entitled to the benefit of the said reasonable doubt.

[30] Mr.H.H.Patel, learned APP for the respondent - State has argued on the point that muddamal has been recovered from the house of this appellant. The blood there on found to be of Group-A, is the blood group of the deceased. This fact shows that Mahendrasinh was present at the occurrence and place of the offence. When the deceased sustained several injuries at the hands of appellant No.1 Dipsinh, it can be said that some part of the blood from the Palia may have sprinkled on the towel and handkerchief of appellant No.2 and the same blood might have been found present there on the towel and handkerchief of appellant No.2. This probability cannot be ruled out.

[31] An attempt was also made to show that appellant No.2 had started quarrelling with the deceased and, therefore, it would be reasonable to infer that he had committed the offence in question. At the same time, it is also required to be considered that appellant No.2 had only a quarrel, he had no weapon with him. On the contrary, the weapon in question was brought by appellant No.1 - Dipsinh. If the appellant No.2 desired to commit the murder of the deceased, he could have rushed to his house and brought the same from his house. This has not happened. Any way, the fact remains that there is the sole evidence of Kamalaben in respect of the participation of appellant NO.1 in the commission of the offence in question. Her evidence does not get support from other eye witnesses, as regards the appellant No.2. The other circumstances discussed hereinabove also do not support the said oral words of Kamalaben. In the premises, it is not acceptable that appellant No.2 did catch hold of the deceased at the relevant time. The prosecution has thus not been able to prove the case against appellant No.2. The trial Court has, therefore, not properly appreciated the evidence on record. The findings and reasonings of trial Court cannot be upheld and confirmed.

[32] Then with respect to appellant No.1, the oral testimony of eye witnesses is supported by the event of discovery of blood stained muddamal. The medical evidence completely corroborates the oral testimony of Kamalaben and other eye witnesses. Even the circumstance on record about the situation of the houses of witnesses and the appellants also supports the evidence of Kamalaben. Therefore, the evidence of Kamalaben is found to be reliable and trustworthy with respect to appellant No.1. Therefore, the evidence of the prosecution with respect to the commission of the offence by the appellant No.1 is acceptable. So far as appellant No.2 is concerned, even the circumstances as aforesaid are against the evidence of Kamalaben, which do not support her evidence as discussed. Mr.H.H.Patel, learned APP for the respondent - State was unable to dislodge the aforesaid arguments advanced by Ms.Sadhna Sagar for the purpose of arguing that the case against appellant No.2 is not proved beyond any reasonable doubt and, therefore, the benefit of reasonable doubt is required to be given to appellant No.2.

[33] For the foregoing reasons, we find that the trial Court has not committed any error in convicting appellant No.1 for the offence punishable under Section 302 of the Indian Penal Code and sentencing him to suffer

imprisonment for life etc. This appeal deserves to be dismissed qua him.

[34] As regards appellant No.2, we find that the trial Court has not properly appreciated the evidence and has erred in relying upon the sole witness Kamalaben with respect to the participation of appellant No.2 Mahendrasinh in commission of the offence. Appellant No.2 - Mahendrasinh cannot be held guilty for the offence of commission of murder of his deceased brother. Therefore, we find that the trial Court has committed an error in appreciating the evidence with respect to appellant No.2, we are unable to agree with the reasonings and findings of the trial Court with respect to the finding of guilt recorded in respect of appellant No.2. We find that the prosecution has not satisfactorily proved the participation and abetment of appellant No.2 in the commission of offence in question and, therefore, appellant No.2 is entitled to a benefit of reasonable doubt as the case against him is not found to be proved beyond the reasonable doubt. The net result of these observations is that the appeal in respect of appellant No.2 is required to be allowed. The judgment and conviction in respect of this appellant are required to be set aside and he is required to be acquitted.

[35] For the foregoing reasons, the present appeal is ordered to be dismissed of appellant No.1 - Dipsinh Keshrisinh Bariya and the judgment and conviction order recorded against him by the learned Additional Sessions Judge, Vadodara, Camping at Chhota Udepur in Sessions Case No.9 of 1995 is ordered to be confirmed.

[36] We hereby allow the appeal of appellant No.2 Mahendrasinh Keshrisinh Bariya and set aside the judgment and order of conviction recorded by the learned Sessions Judge, Vadodara, Camping at Chhota Udepur in Sessions Case No.9 of 1995 and we acquit the said appellant for the offence punishable under Section 302 read with Section 114 of the Indian Penal Code. Since appellant No.2 is in jail, he is ordered to be set at liberty forthwith if he is not required in any other offence.

[N. G. NANDI,J.]

[D. P. BUCH, J.]

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