IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 899 of 1996

with

CRIMINAL MISC.APPLICATION No 5889 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH
and
Hon'ble MR.JUSTICE H.H.MEHTA

==========

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

RAJUBHAI KASTURAJI MARWADI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 899 of 1996
   MR LAXMANBHAI A AMAR for Petitioner No. 1-3
   MR BP MUNSHI for Petitioner No. 1-3
   PUBLIC PROSECUTOR for Respondent No. 1
   MR NB TIWARI for Respondent No. 1
2. Criminal Misc.Application No. 5889 of 1996
   PUBLIC PROSECUTOR for Petitioner No. 1
   MR BP MUNSHI for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH

and

MR.JUSTICE H.H.MEHTA

Date of decision: 30/04/2003

ORAL JUDGEMENT

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

1. The appellants above named have preferred Criminal Appeal No.899/96 under Section 376 of the Code of Criminal Procedure, 1973, challenging the judgment and conviction order dated 14th October, 1996, recorded by the learned Additional Sessions Judge, City Sessions Court at Ahmedabad, in Sessions Case No.369/92, under which the learned trial Judge convicted the present appellants original accused for offences punishable under Section 307 read with Section 120-B of the Indian Penal Code and sentenced them to suffer R.I. for 4 years and they are further directed to pay fine of Rs.500/- each and in default of payment of fine they are required to suffer further R.I. for two months.

2. The facts of the case of the prosecution before the trial court may be briefly stated as follows:

2.1 There was some quarrel between the son of respondent No.3 and the son of informant Fojaji Ravtaji. With a view to find out a solution, Dhelaben - sister of respondent No.3 had gone to the place of informant Fojaji Ravtaji at about 7.00 p.m. on 25.8.1991. Both of them carried out some talks and both of them had gone towards the house of respondent No.3. When they were at a distance of about 15 feet from the house of respondent no.3, near the house of one Mafatlal, injured Nagji Fojaji came to the shot and he was shouting that he was being beaten. When the informant he looked at his son Nagji, it was noticed that respondent No.1 Rajubhai Kasturji Marwadi was holding a Dharia, respondent No.2 was having a knife with him whereas respondent No.3 Kasturji Rupaji Marwardi was having a stick with him. At that point of time, Nagji sustained injuries at the hands of the three respondents. Out of them, the respondent No.1 Rajubhai Kasturaji dealt a Dharia blow on the head of Nagji whereas respondent No.2 Vikrambhai Kasturaji dealt a knife blow on the back of Nagji and respondent No.3 dealt a stick blow on the left hand of Nagji. At that point of time informant Fojaji Ravtaji tried to intervene, and in the process, appellant No.1 Rajubhai Kasturji dealt a dharia blow on the head of Fojaji also.

2.2 The injured were taken to the hospital, FIR was filed and offence punishable under Section 307 read with Sec.120-B of the IPC was registered against the three

appellants. The appellants were arrested and chargesheet was filed, and since the offence punishable under Section 307 of the IPC was exclusively triable by Court of Sessions, the Magisterial Court committed the case to the Court of Sessions. There the appellants were supplied with the police investigation papers, charge was prepared and framed against the appellants. It was read over and explained to them. They pleaded not guilty and, therefore, evidence was recorded. As soon as the recording of evidence was over, the learned trial Judge recorded further statements of the appellants under Section 313 of the said Code. After hearing the arguments, the learned trial Judge found the appellants guilty for the aforesaid offences. Therefore, they were heard on the point of quantum of punishment and thereafter the learned trial Judge inflicted the aforesaid punishment on the appellants.

2.3 Feeling aggrieved by the said judgment and conviction order of the trial court, the appellants have preferred this appeal before this Court.

3. The appellants have contended before this Court that the trial court did not have adequate material to convict them. That the trial court has not properly appreciated the evidence on record. That the trial court has omitted to consider material contradiction between evidence of different witnesses. That the witnesses were related to one another. That on the whole the judgment and conviction order of the trial court are illegal, errorneous and deserves to be set aside. The appellants have, therefore, prayed that the present appeal may be allowed, the judgment and conviction order may be set aside and the appellants be held not guilty and be acquitted for the aforesaid offences.

4. At the time when the appeal was filed it was heard on the point of admission, the learned Judge of this Court directed that the appeal be admitted and its hearing be expedited. The learned Judge also passed an order for issuing notice for enhancement of sentence to the appellants and bail was refused at that stage. On account of the above order, the office has registered a separate Criminal Misc. Application with a view to deal with the question of enhancement of punishment.

5. We would, therefore, require to consider as to whether the judgment and conviction order are illegal or not and whether the sentence imposed on the appellants is required to be enhanced or not.

6. During the course of arguments, Mr.B.P.Munshi has argued the matter on behalf of the appellants whereas Mr.B.D.Desai, learned APP has appeared on behalf of the respondent-State. We have been taken us through the evidence on record and also through the observations of the trial court during the course of the judgment.

7. If we go through the evidence on record, it is very clear that P.W.1 Fojaji Ravtaji Chauhan Exh.9 at page 83 has given detailed version as to how the event took place. He has stated that there was some quarrel between his son Nagji and the son of appellant No.3. That with a view to find out a solution, Dhelaben sister of appellant No.3 had met him and both of them were on way to appellant No.3. At that point of time, the aforesaid incident took place. The witness has further stated that, at that place, appellant No.1 had dealt with a dharia blow on the head of son Nagji. That appellant No.2 came to the spot and dealt with a knife blow on the back of Nagji. That thereafter appellant No.3 dealt with a stick blow on the left hand of Nagji. He has further stated that when he tried to intervene, appellant No.1 dealt with a dharia blow on his head.

7.1 The witness has been cross-examined at length. However, no fruitful material could be brought out during the lengthy cross-examination of the witness.

7.2 Then P.W.No.2 Nagji Fojaji Chauhan Exh.11 at page 97 is the son of informant Fojaji Ravtaji who has produced and proved the FIR at Exh.10. He has also deposed before the trial court that appellant No.1 had dealt with a dharia blow on his head and had also dealt a dharia blow on the forehead of his father Fojaji Ravtaji. The witness has further stated that appellant No.2 had rushed to the spot and had dealt a knife blow on his back whereas appellant No.3 had dealt a stick blow on his hand.

7.3 This witness was also cross-examined at length but nothing fruitful was brought out during the lengthy cross-examination of the witness. It is very clear that P.W.1 Fojaji Ravtaji and P.W.2 Nagji both have corroborated one another and their evidence is supported by FIR at Exh.10 which seems to have been filed without any loss of time.

7.4 Then Panch witnesses including P.W.3 Naresh Maknaji at Exh.15, Ramesh Atmaram Thakor at Exh.17, Ramit Rajendrasingh Bhatia at Exh.19, Jayesh Jayantilal Thakor at Exh.21, Ashokbhai Ghanabhai Parmar at Exh.23 and

Vitthalbhai Rajabhai Vaghela at Exh.25 were also examined. It seems that the prosecution has tried to prove the discovery of weapons and clothes after the arrest of the concerned appellants before the trial court by examining those panch witnesses. At the same time, if we go through the evidence of the said panch witnesses, it would clearly appear that the panch witnesses have not fully supported the case of the prosecution and yet they have not been treated hostile by the prosecution.

7.5 For instance Naresh Maknaji P.W.3 at Exh.15 on page 119 has stated before the trial court that in his presence blood stain clothes of Nagji were seized by the police under panchnama Exh.18. There could not be serious dispute about the recovery of this muddamal clothes. Same way, Ramesh Atmaram Thakor Exh.17 is also a panch witness. He has deposed before the trial court that certain blood stain clothes were seized in his presence and he has also produced and proved Panchnama Exh.20. This evidence is also not seriously disputable. The third panch witness Ramit Rajendrasingh Bhatia Exh.19 states that he was invited as panch. That he was taken to the scene of offence and a panchnama was drawn in respect of the said place. He has produced and proved panchnama at Exh.20.

7.6 Jayesh Jayantilal Thakor P.W.6 at Exh.21 is also a panch witness. He has deposed before the trial court that appellant Rajubhai Kasturaji was present in Police Station where he was invited to act as a panch. He has deposed that the appellant had told him that he wanted to produce the muddamal weapon before the police and therefore all of them were taken to the place from where muddamal dharia was discovered by him from a place where it was hidden. He has denied that the entire panchnama was signed by him in the Police Station. He has produced the panchnama at Exh.22.

7.7 Ashokbhai Ghanabhai Parmar P.W.7 at Exh.23 is also a panch witness who has deposed before the trial court that he was invited to act as a co-panch. He has also stated that appellant No.3 Kasturaji Rupaji Marwadi was present there who wanted to produce the weapons before the police and therefore preliminary panchnama was drawn. Thereafter he was taken to the place where the stick was hidden. That the appellants had brought out the stick from the place at which it was hidden. That the said stick was seized by the police under panchnama which he produced at Exh.24.

7.8 Vitthalbhai Rajabhai Vaghela P.W.8 at Exh.25 is also a witness to the incident and according to his evidence he was on the way of shop for purchasing milk and that when he was passing by the house of appellant No.3 he could notice that injured Nagji and appellant No.1 were quarreling in a street. That appellant No.1 had dealt a dharia blow on the head of Nagji. That informant Fojaji also rushed there and appellant No.1 dealt a dharia blow on the forehead of Fojaji. That he had no idea about the other injuries sustained by other person. That at that time appellant no.2 Vikrambhai also rushed to the spot and dealt a knife blow on the back of Nagji and appellant No.3 came with a stick and dealt a stick blow on the head of Nagji. This witness was also cross-examined at length by the prosecution. However, he appears to be a disinterested witness. He has lent corroboration to the evidence tendered by informant and his son referred to hereinabove.

7.9 Bharatbhai Chimanlal Shah P.W.9 at Exh.26 is again a panch witness who has stated that the police had invited him to act as a panch and appellant Vikrambhai wanted to show a place and therefore they all went to the said place. That appellant Vikrambhai took out a knife from a ganibag which was seized by police. On going through the evidence of this witness, it appears that the witness does not say that before they started, appellant Vikrambhai had made a statement that he was ready and willing to discover the said weapon. In view of the evidence given by this witness, it is difficult to accept panchnama Exh.27 to be a discovery panchnama within the meaning of Section 27 of the Evidence Act.

7.10 Then we find the evidence of Dr.Harshid Devasbhai Dalal P.W.10 Exh.33. He has proved the injuries sustained by the said two injured witnesses. Considering the evidence given by the witness and considering the injury certificate issued and produced by him at Exh.34 it is clear that the said evidence both oral and documentary evidence fully corroborates the testimonies of the three eye witnesses including informant Fojaji, injured Nagji and Vitthal Raja.

7.11 Then there is an evidence of P.W.13 Dr.Surendra Mahendrakumar Sharma at Exh.53. He has deposed that he had examined informant Fojaji Ravtaji and had noticed injuries as disclosed by him in his evidence. This evidence is supported by medical certificate issued and produced by him at Exh.54. Then there is an evidence of P.I. Mr.Patel who has investigated the case.

7.12 Considering the evidence produced before the trial court, it is amply clear that there are atleast three eye witnesses to the incident in question and all of them have supported the case of the prosecution. All the three eye witnesses were cross-examined at length and nothing fruitful was brought out during the lengthy cross-examination. The evidence of the eye witnesses get corroboration from the medical evidence referred to hereinabove. The FIR was filed without any loss of time and the entire detail has been conveyed to the police soon after the event took place. This shows that the case of the prosecution has not been subsequently improved after the incident took place. In other words, the FIR also fully supports the oral testimonies of the eye witnesses. It is true that the two eye witnesses Fojaji and Nagji are father and son but their case is supported by the injuries sustained by them. They are both injured eye witness and, therefore, it is difficult to reject their testimonies.

7.13 It is more so when their evidence was supported by medical evidence and the evidence in the shape of FIR Exh.10, to some extent by the discovery of weapons by one of the three appellants also supports the case of the prosecution and the prosecution witnesses. It is true that the evidence of Bharatbhai Chimanlal Shah Exh.26 with respect to discovery has not been satisfactorily established and it is not accepted that appellant No.2 had discovered knife from his ganibag. However, so far other two appellants are concerned, the discovery of weapons used by them has been established and though the evidence of discovery of a weapon said to have been used for an offence cannot be treated to be a substantive evidence and though the accused person may not be convicted on the sole evidence of discovery, it remains a fact that in the present case, fact of discovery was used as a corroborative piece of evidence in order to corroborate the testimonies of three eye witnesses. Therefore, when the evidence of three eye witnesses is supported by discovery of weapon by the two appellants, then in that case, it is not possible to reject the oral testimonies of the three eye witnesses. At least the third eye witness had no reason to come out with a false version in order to support the case of the prosecution.

8. In that view of the matter, we feel that the learned advocate for the appellants is unable to challenge the conviction recorded against the third appellant by the trial court. We feel that the trial court has not committed any error in appreciation of evidence on record. The findings are based on reasons

for such finding and the findings have been recorded on the evidence on record. These are not the findings without any evidence on record or against the evidence on record. When the appreciation is proper and when no infirmity has been noticed, it is not possible for us to take a view different from the view recorded by the trial court. Therefore, we find that there is no substance in the present appeal and consequently the appeal deserves to be dismissed.

9. At this stage, we would require to consider the notice issued by the Court for enhancing the punishment. In the present case, we find that though deadly weapons has been used for committing the offence, fact remains that there was some quarrel between the two groups and in fact Dhelaben, sister of appellant No.3, had approached injured Fojaji, father of injured Nagji for settlement. This shows that along with the quarrel a process of solution was also going on and, therefore, if the sentence is enhanced at this stage then probably peace may not be restored and there is likelihood for further quarrel between the two groups and therefore this is not a fit case for enhancing the punishment.

10. It is required to be considered that all the three appellants come from one family. Appellant No.3 is the father of appellants No.1 and 2 and appellants No.1 and 2 are the real brothers. It is true that the offence punishable under Section 307 of the IPC has been proved against them, at the same time, looking to the nature of injuries sustained by the two injured persons and considering the total period of hospitalization also, it has to be accepted that the punishment awarded cannot be said to too lenient.

11. We are also of the view that, even if there is some sort of leniency shown by the trial court, at the same time, it is felt that the quantum of punishment is not found to be less or inadequate then also it would not be appropriate to enhance the punishment on that consideration.

12. It is also a fact that the appellants were convicted and sentenced to suffer R.I. 4 years by judgment and conviction order of the trial court dated 14.10.96. The said period is also over and it appears that even if the appellants have not paid the amount of fine then also they have undergone period of imprisonment to be suffered by them in default of payment of fine.

13. Learned advocate for the appellants states that

the appellants have already paid fine. Any way the entire period is over before about 3 years. This may not to be a sole ground for not enhancing the punishment but it would be one of the considerations in this behalf. In that view of the matter this is not a fit case to enhance the quantum of punishment.

14. For the foregoing reasons, we dismiss the appeal of the appellants and confirm the judgment and conviction order of the trial court. Since the appellants have already undergone the punishment imposed on them, no further order is required to be made in this behalf.

15. In view of the order passed in Criminal Appeal No.899/96, no further order is required to be passed in Criminal Misc.Application No.5889/96. Notice is discharged.

(D.P. Buch, J.)

(H.H. Mehta, J.)

syed/