

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 353 of 1998

For Approval and Signature:

HON'BLE MR.JUSTICE H.H.MEHTA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

PREMJI BHOJA HARIJAN

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 353 of 1998
MR DIPAK R DAVE for Petitioner No. 1
Mr.B.D.Desai, learned A.P.P. for Respondent No. 1
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CORAM : HON'BLE MR.JUSTICE H.H.MEHTA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 29/08/2003

C.A.V. JUDGEMENT

(Per : HON'BLE MR.JUSTICE SHARAD D.DAVE)

This appeal is directed against the judgment and order dated 5th December, 1997 passed by the learned Addl.Sessions Judge, Kutch at Bhuj in Sessions Case no. 3 of 1997 by which the appellant-accused Premji Bhoja Harijan was convicted for the offences under Sec.302 and Sec. 324 of Indian Penal Code and sentenced him to suffer rigorous imprisonment for life and fine of Rs.500/- i/d simple imprisonment for three months for the offence under Sec. 302 of I.P.C. and to suffer rigorous imprisonment for three months and fine of Rs.500/- i/d simple imprisonment for 15 days for the offence under Sec. 324 of I.P.C.

2. The brief facts of the present case are as under:

On 3.9.96 in between 10.00 a.m. to 2.00 p.m. in presence of complainant-injured Rajnikant Kantilal Solanki, the accused asked the deceased Mukeshkumar Chamanlal Dhobhi why he is seeing with broad eyes. Thereafter, at about 2.00 p.m. the accused by name Premji Bhoja Harijan with the help of knife gave blow on the left portion of the chest over left hand and near shoulder and due to these injuries, the deceased died and therefore the accused was held guilty of murder committed of the deceased. On the same day and in the same incident, the injured witness-complainant went to save the deceased and in turn the accused gave blow with knife on the chest portion of the injured witness and therefore the accused was held guilty of causing injuries to the complainant.

3. According to the injured witness Rajnikant Solanki, on 3.9.96 he and deceased Mukesh went to have tea in the hotel of Babubhai at about 10.30 a.m. and after taking tea went to pan galla for having Tulsi gutkha. At that time, the present appellant was doing cobbler work and said to deceased why is he seeing with broad eyes at him. To this, the deceased replied that he is not doing so and both the accused and injured witness went back to work. At about 2.00 p.m. both the persons were going to their house for lunch and on seeing that there is less air in the luna, stood near cycle shop for filling air in the luna. At that time, the accused came there, took out knife and gave blow to the deceased on the left side of chest, left hand and shoulder and when the injured witness-complainant went to save him, the accused gave blow to him on the lower portion of his chest. The deceased was laying in a pool of blood. The injured witness-complainant with the help of the cycle

wala went to his boss and informed him about the incident and after coming back took the deceased in a rickshaw to Government hospital. The doctor on duty at the hospital declared Mukesh as dead and admitted the injured witness for treatment.

4. After the complaint was recorded by the police, P.I.Shri K.R.Parmar prepared inquest panchanama of the dead body, panchanama of scene of offence, panchanama of clothes of deceased and seized the clothes, panchanama of clothes of injured witness and seized the clothes, thereafter recorded the statements of witnesses. On the same day, the accused went to the police station with the weapons on his own and panchanama was prepared of knife and his body. After that the muddammal articles i.e. clothes of deceased, clothes of injured witness, knife used in the incident, clothes of accused, soil of blood found at the place of incident were sent to F.S.L. Junagadh for analysis. On receipt of report from F.S.L. Junagadh, chargesheet was filed against the present appellant-accused under Sec. 302, 321, 504 of Indian Penal Code and Sec. 135(1) of the Bombay Police Act.

5. As the alleged offence was exclusively triable by the Court of Sessions, the Chief Judicial Magistrate, Bhuj by order dated 31.12.96 committed the criminal case no. 1589/96 to the Court of Sessions to the District Court, Bhuj-Kutch which was numbered as Sessions Case no. 3/97. The charge was framed against the accused vide exh. 1 for the offence under Sec. 302, 504, 326 of I.P.C. and Sec. 135(1) of the Bombay Police Act. The accused pleaded not guilty to the charge and claimed to be tried.

6. To prove the charge against the accused, the prosecution has examined 12 witnesses ; (1) P.w. 1 Dr.Vinodbhai Kavjibhai Varsant exh. 5, (2) p.w. 2 complainant/injured witness Rajnikant Kantilal Solanki exh. 8, (3) p.w. 3 Pratapbhai Gopalbhai Gohil exh. 9, (4) p.w. 4 Kanu Jivram Chauhan exh. 10, (5) p.w. 5 Ashish Laxmidas Purohit exh. 12, (6) p.w.6 Jayesh Kanakshi Thakkar exh. 13, (7) p.w. 7 Arun Kanakshi Thakkar exh. 14, (8) P.w. 8 Sandip Dinkarray Jethi exh. 15, (9) p.w. 9 Rajendra Himatlal Sheth exh. 16, (10) p.w. 10 Jigar Jagdish Pandya exh. 17, (11) p.w. 11 Gopalsinh Ganshilal Chauhan exh. 19, (12) p.w. 12 Kiritbhai Ramabhai Parmar exh. 21 and also relied on documentary evidence which consists of P.M.note exh. 7, medical certificate of injured exh. 6, panchanama of scene of offence exh. 18, inquest panchanama exh. 22, panchanama of scene of offence exh. 23, panchanama of

seizure of clothes of deceased exh. 24, panchanama of seizure of clothes of injured exh. 25, panchanama of seizure of knife exh. 26, F.S.L. report exh. 30, Seirologist report exh. 31 etc.

7. After the prosecution case was over, the appellant was questioned with regard to the evidence led by the prosecution against him and his statement was recorded under Sec. 313 of the Criminal Procedure Code. In his further statement the appellant denied the part played by him in the alleged offence.

8. The learned Addl. Sessions Judge, after appreciating the oral and documentary evidence and arguments advanced by the learned counsel of the prosecution as well as the defence, held the accused guilty of Sec. 302 and 324 of the Indian Penal Code and convicted and sentenced him as stated above which has given rise to this appeal.

9. Heard the learned counsel Mr.D.P.Joshi for the appellant and Mr. B.D.Desai learned A.P.P. for the State. They have taken us through the entire record and proceedings of the case.

10. According to the learned counsel Mr.Joshi for the appellant, deceased Mukesh, injured Rajnikant and other witness Ashish and Jayesh were are working in one lottery office and therefore there is a reason to believe that they were interested witness and therefore their evidence cannot be relied on. There was delay in filing complaint and the delay is not clearly explained by the prosecution. As per the panchanama of knife seized from the accused exh. 26, the knife was on one side uneven shape and other side edged. The injury as stated by the doctor does not tally with the weapon they have alleged to have been used in the said incident. The true story does not come forth. Genesis of crime is not unfolded by the prosecution. Exh. 20 is in real sense FIR and that it cannot be termed as cryptic message. There are two independent witnesses, one of them Babubhai Hotel wala is not examined and Pratapbhai Gohil has given half-hearted deposition. The place of offence is changed. The first incident took place at 10.00 a.m. and second incident took place at 2.00 p.m. and there is a gap of four hrs. The police has not done investigation properly and it has come on record that tainted investigation has been carried out by the police. Both the deceased and injures were involved in lottery and the Government has banned lottery as illegal and the question of lottery business does not arise at all. Against the present accused,

there were 7-8 persons. The real reason is not coming forth. Whether two incidents relate to each other and whether the fact of browbeating is relevant for murder. The P.S.I. has not explained the delay in recording the complaint. The commission of cognizable offence was disclosed at 3.15 p.m. but the P.M.note was held at 18.00 p.m. and completed at 19.00 hrs. The FIR as per Sec. 154 of Cr.P.C. was disclosed at 16.15 hrs. Why delay of one hour on the part of P.S.I. is not explained. In view of the aforesaid circumstances, there is a reasonable ground for developing their story and therefore the prosecution story is not believable. In support of his submissions, learned advocate Mr.Joshi for the appellant has relied on the following authorities :

1. State of Andhra Pradesh V/s Bogam Chandraiah and another reported in AIR 1986 S.C. 1899.
2. Lakshman Prasad V/s State of Bihar reported in AIR 1981 S.C. 1388.

11. Against the aforesaid submissions, Mr.B.D.Desai learned A.P.P. for the State submitted that the cyclewala was examined as independent witness. The rickshawwala is also independent witness who is also examined and he has also given truthful version to the effect that witness Arunbhai Thakkar took the deceased and injured in the hospital. There is no enmity with the injured and deceased and accordingly there is no reason to involve the accused in this case falsely. It is true that the witnesses are from one office but in the present case, we are concerned with the quality of evidence and not quantity of evidence. So far as FIR is concerned, in the submissions of learned A.P.P., on getting information through witness Jayesh and injured, the boss Arunbhai Thakkar took the deceased and injured to the hospital where the doctor declared Mukesh dead and the injured witness was admitted to give treatment for his injuries. Thereafter the police in hospital informed the concerned P.I. who came to the hospital and recorded the complaint given by the injured witness-complainant. In no case, it can be said as late FIR. The alleged incident took place in two parts (1) at about 9.30 a.m. to 10.00 a.m. and another at 2.00 to 2.30 p.m. The presence of witness Jayesh at 9.30 a.m. can be termed as usual presence as he also came there at about 9.30 a.m. Jayesh, injured witness Rajnikant Solanki and deceased Mukesh after taking tea from Babubhai hotelwala went to the nearby cabin to purchase tulsi gutkha. They all were serving at the lottery centre of Arunbhai Thakkar. The injuries were caused to deceased Mukesh and injured witness with a knife which is produced by the accused having uneven edge on one side. The deposition of Dr.Vinod p.w. 1 has

given fullest support. In short, the learned A.P.P. for the State has supported the judgment rendered by the trial court. Lastly, he submitted that in the facts and circumstances of the case, the appeal deserves to be dismissed. The learned A.P.P. relied on the following authorities :

1. Majju and another V/s State of M.P. reported in 2002 S.C.C. (Cri) 597.
2. Gajula Venkateswara Rao and others V/s State of A.P. reported in 2002 S.C.C. (Cri) 1432.

12. We have gone through the papers, depositions, panchanamas etc. produced on the record of this case. The prosecution has fully relied on the deposition of p.w. 2 Rajnikant Kantilal Solanki exh. 8 who happens to be eye witness and injured witness too. The injured witness Rajnikant Solanki and deceased Mukesh were serving in the lottery office. On 3.10.96, both of them were standing opposite their office at about 10.00 a.m. At that time, another friend by name Jayesh was passing by and he also came there to share cup of tea. After taking tea, witness Rajnikant and Mukesh went to nearby shop for tulsi gutkha and at that time, the present accused-appellant spoke filthy language and also told him why he was looking with broad eyes. Thereupon, the injured witness Rajnikant and Jayesh came there and after that both of them went to their respective offices. At about 2.00 p.m. they were going to their houses for lunch, on account of less air in luna both of them went to cycle shop and instructed the person to fill the air. At that time, the accused came there from the opposite direction and gave knife blow on the chest portion, shoulder and on the hand of deceased Mukesh. Thereupon, injured witness went to save Mukesh whereupon he was also given one blow on the lower chest portion by the appellant. Thereafter, the injured witness went to convey the message to his boss and in between Ashishbhai p.w. 5 met him and in turn Ashishbhai informed Arunbhai Thakkar. Arunbhai took the injured and deceased in the rickshaw of Kanu Chauhan p.w. 4 to the Government hospital wherein the doctor declared Mukesh as dead and he admitted injured Rajnikant as indoor patient. Therefore, the presence of witness Jayesh, Ashish, Arunbhai Thakkar appears to be normal. The alleged incident took place at about 2.15 p.m. and after injured was brought to the hospital, the doctor declared Mukesh as dead and given treatment to witness injured Rajnikant before whom also Rajnikant gave the name of the present appellant as the person who caused injuries to both of them. The complaint was given at 4.15 p.m. In our view, there cannot be said to be delay in giving detailed FIR

by the injured witness Rajnikant.

13. The appellant-accused was known to the deceased and injured as he was doing cobbler work in front of shop of Babubhai where the deceased and injured used to go for tea. Therefore, the identity of the present appellant was not in dispute. The defence has also failed to bring on record anything regarding enmity between the deceased and present accused and presence of witnesses on the spot appears to be very usual and normal. The deposition of Dr.Vinod also can be termed as a deposition of independent witness as he is not interested in either conviction or acquittal of the appellant-accused. While giving discussion of the injuries of the deceased as well as injured witness, Dr.Vinod has identified the weapon used in the alleged crime and stated that injury caused to the witness as well as the deceased can be possible by such weapon.

14. We are of the opinion that there is also circumstantial evidence on record which proves the guilt of the present accused. The name of witness Jayesh is not mentioned in the complaint. It is the principle of criminal jurisprudence that FIR cannot be used as substantial evidence, however it can be used for corroboration and for contradictions only. The deposition of the eye witness stated they were taking tea and Jayesh came. However all the three persons were serving at the office of Arunbhai Thakkar. While witness Ashish was not there at 10.00 a.m. incident, however, he was there at 2.00 or 2.15 p.m. and injured witness came there to convey the message to their boss Arunbhai. The witness Ashish was told by the injured witness that he and Mukesh were injured and Ashish told Arunbhai by shouting and thereupon Arunbhai came from his office and took the injured and deceased in rickshaw of p.w. 4 Kanu Chauhan exh. 10 who stated that while he was standing near the Mamlatdar office, witness Arunbhai came there and both of them went to Vandi Faliya where one person was lying in a pool of blood. The people put him in the rickshaw. While he was on way to hospital, he saw one person in blood marks clothes and he was also taken to hospital. Therefore the presence of p.w. 4 Kanu Chauhan appears to be very normal. In the presence of p.w. 8 panch witness Sandip Jethi and another panch Dharmendra Bhatt, the present accused/appellant produced knife which was seized under panchanama. In presence of another panch p.w. 9 Rajendra Sheth exh. 16 the panchanama of scene of offence was recorded. In presence of Jigar Pandya p.w. 10 exh. 17 the panchanama of clothes of deceased i.e. blood stained jeans pant and blood stained

blue colour shirt were seized. In the same way clothes of injured were seized under panchanama exh. 25. Then all the articles were sent to F.S.L. for analysis. The blood group of deceased was AB and the pant of the deceased was also showing blood group of AB, blood stained knife was also showing the same blood group and the blood stained soil was also showing the same blood group. Accordingly, there is a reason to believe that the circumstantial evidence proves the guilt of the accused and therefore we are of the opinion that the learned trial Judge has rightly convicted the accused-appellant for the offence under Sec. 302 of the I.P.C. for the murder of deceased Mukesh and convicted him under Sec. 324 of the I.P.C. for injuring Rajnikant Solanki.

15. In case of Lakshman Prasad (supra), in the facts and circumstances of the case, the evidence showing possibility of false implication of accused and raising suspicion regarding complicity of accused in dacoity and in view of this the conviction was set aside.

16. In case of Bogam Chandraiah (supra), the facts before the Apex court were such that Apex Court held :

"the High Court has evolved theory of its own, without there being any material to support it, and premised that the occurrence must have taken place during darkness and subsequently the respondents must have been implicated on account of suspicion. It further held that the appeal of State of A.P. was allowed and the Apex Court set aside the acquittal and restored their conviction under Sec. 302 read with Sec. 34 of the Penal Code and the sentence of life imprisonment and ordered the respondents to surrender themselves to custody for undergoing the sentence awarded to them."

17. The facts of the aforesaid cases are not related to the present case before us and therefore the authorities do not help the present accused.

18. In case of Gajula Venkateswara Rao and others (supra), in para 11 the Apex Court has held as under:

"The witnesses found present at the spot were natural witnesses. They are competent to depose about the incident more so when they themselves are injured witnesses, unless there is any cogent reason or apparent material on the record, otherwise their evidence cannot be discarded merely because they belong to the same party or they are connected with the victims." The Apex

court has further held that "minor contradictions here and there can always be found in the statements of the witnesses due to lapse of time or other such reasons. There can always be some difference in description of the minute details amongst the witnesses as to who assaulted where and how many times or by which side of the weapon etc."

19. In case of Majju and another (supra), the Apex Court held that:

"even though the witnesses were related to the deceased and thus interested witnesses but they having sustained injuries in the incident, which was proved by the medical certificates issued by doctor who examined them, their presence at the place of occurrence cannot be doubted and their evidence being consistent, it was held there was no infirmity therein."

20. In case of Sheelam Ramesh and another V/s State of A.P. reported in 2000 Cr.L.R.(SC)30, in the facts and circumstances of the case, the Apex court has held that his first duty, in addition to his safety, was to bring police to the place of occurrence and to ensure that medical help be given to the deceased. It was held that there was no delay in filing the FIR. The Apex Court has further held that the courts are concerned with quality and not the quantity of evidence and in a criminal trial, conviction can be based on the sole evidence of a witness if it inspires confidence.

21. In the above view of the matter, we fully agree with the reasoning and findings of the trial court and hold that the accused has been rightly held guilty of the offences under Sec. 302 and 324 of I.P.C. The appeal is, therefore, dismissed.

(H.H.MEHTA, J)

(SHARAD D DAVE, J)

srilatha

