

HIGH COURT OF GUJARAT**RAMSINH BHAVANJI THAKOR***Versus***STATE OF GUJARAT****Date of Decision:** 04 December 2007**Citation:** 2007 LawSuit(Guj) 2988**Hon'ble Judges:** [Akil Kureshi](#)**Case Type:** Criminal Appeal**Case No:** 1045 of 1996**Subject:** Criminal**Acts Referred:**[Indian Penal Code, 1860 Sec 34, Sec 436](#)**Final Decision:** Appeal disposed**Advocates:** [R C Jani](#), [Hansa Punani](#)

[1] The appeal arises out of judgment and order dated 4th November 1996 rendered by learned Additional Sessions Judge, Ahmedabad (Rural) in Sessions Case No.181 of 1994. The appellants were original accused no.2 and 3 and were charged with offences punishable under Sections 436 read with Section 34 of Indian Penal Code. Learned trial Judge convicted the present appellants under Section 436 read with Section 34 of Indian Penal Code and sentenced them to rigorous imprisonment for a period of three years and fine of Rs.3,000/- each.

[2] From the material on record, the prosecution case appears to be that the complainant was running fun fare. On 18-3-1994, at about 9 O' Clock at night, when the programmes in the fun fare were going on, the present appellants and one Bhopabhai, original accused no.1, came there and to cause damage to the property and to disrupt the proceedings caused injury to the complainant, Babubhai, when accused no.1 gave a stick blow on his head. Other two accused damaged the tube lights and set the tents on fire. It was alleged that accused no.2, i.e. appellant no.1 herein with the help of his stick destroyed the tube lights and accused no.3, appellant no.2 herein set the tents on fire.

[3] Since original accused no.2 and 3 are before this Court in this appeal, I would confine the discussion of the material on record pertaining to these accused persons only.

[4] To bring home the charge prosecution examined several witnesses.

[5] One Gajendrasinh Waghela, P.W.3, Exh.24, though was stated to be an eye-witness had turned hostile. Similar is a case with one Ashwinbhai Natvarsinh Waghela, P.W.4, Exh.25.

[6] Complainant, Babubhai was examined as P.W.5, Exh.27. In his deposition, he stated inter alia, that accused Bhopabhai had come with a stick and smashed tube lights. There were three to four other persons with him, out of whom, two are present before the Court. On account of the stick blow given by Bhopabhai, he lost consciousness. Bhopabhai and others set the tents on fire. Upon being shown muddamal sticks, he stated that the sticks used by the accused were similar.

6.1 In his cross-examination, he stated that it is not true that on the date of incident since programme was delayed, people had got angry. He admitted that the accused at first damaged the tube lights and on account of which people started running. He admitted that in his complaint, he had stated that at about 9 O' Clock, seven persons aged about 20 to 22 years had come. He admitted that the stick with which he was given a blow had a iron ring at the base. He admitted that none of the muddamal article sticks had such a ring.

6.2 Most importantly, he stated that accused no.1 had given stick blow due to which he had immediately fainted and, therefore, could not state as to who set the tents on fire.

[7] Shobhraj Dungarmal, P.W.6, Exh.29 was the person, who was employed in the fun fare. As per his deposition, the incident took place about two and a half years before recording of evidence. He stated that the accused persons, who are present in the Court had come with sticks. They had damaged the tube lights. Babubhai got hurt on his head. He stated that the stick had an iron ring. He stated that the muddamal article stick was not the one used by accused no.1. He stated that the fire was started by Rajubhai, Accused no.3. He identified Rajubhai in the Court.

7.1 He stated that his work was to show magic and to manage the merry-go-round. When the incident took place, he was doing the said work. Suddenly, there was shouting. He, therefore, looked in that direction and saw that people were running around. When he went there, he saw that Babubhai got hurt on the head and the assailants had run away. Members of the public told him that name of the person,

who caused the injury is Bhopabhai. He stated that he ran away from the place towards the river. He stated that the next day, member of public gave the names of persons involved in the incident and that is how he came to know about it.

[8] P.W.7, Rajubhai Ganeshbhai was examined at Exh.30. He was also an employee working in the Anand Mela. He was working in the ticket office. At 9 O' Clock at night on the date of the incident when he was sitting in the ticket office, the accused persons had come with sticks and straightway gave a blow to Babubhai on the head. This blow was given by Bhopa. The stick had an iron ring. Accused no.3, Rajubhai set the tents on fire. Accused no.2, Ramsinh damaged the lights. He had seen the accused persons beating the complainant, damaging the lights and setting the tents on fire. He could not identify the muddamal sticks.

8.1 In his cross-examination, he stated that at the time of the incident about 100 to 150 people had come to see the show. He stated that he had seen Babubhai being beaten up. Immediately on seeing Babubhai being attacked, he ran away. At that time, he was at the ticket window. He had jumped from there and ran away. Significantly, he stated that at first he heard the sound of tube lights being smashed. He agreed that since 5 to 6 tube lights were destroyed, there was partial darkness. He agreed that on hearing the tube lights being smashed, he jumped and ran away. He stated that even before the date of the incident since the accused were visiting the fun fare, he knew them. He stated that on the next day, he came to know about names of the accused from the members of public.

[9] Ghanshyamsinh Kanubha Zala, P.W.8, Exh.31 was investigating officer, who had carried out the investigation.

[10] It is on the basis of this evidence that the prosecution sought to prove the charge against the accused persons. It may be recalled that this appeal is filed by accused no.2 and 3 and we are, therefore, concerned with the evidence on record against these accused persons and not against original accused no.1.

[11] From the evidence on record, it can be seen that the complainant, Babubhai, P.W.5, had clearly admitted in his cross-examination that due to stick blow he lost his consciousness and, therefore, did not know who set the tents on fire. Therefore, so far as this witness is concerned, he does not further the prosecution case regarding the present appellants or any of them having set the tent on fire. Regarding appellant no.1, original accused no.2 having damaged tube lights, Babubhai has nowhere in his deposition stated that he saw this accused damaging the tube lights. In fact, in his examination-in-chief, Babubhai stated that he saw Bhopo, accused no.1, damaging the tube lights.

[12] Shobhraj, P.W.6, though stated that accused no.3, Rajubhai set the tents on fire, did not attribute any specific role to accused no.2 regarding damaging the tube lights. In his cross-examination, he stated that he came to know about the names of the accused from the members of public on the next day. He stated that the incident had taken place about two and a half years before the date of deposition. With respect to the value of his deposition, I would revert back at a slightly later stage.

[13] Witness, Rajubhai, P.W.7, also does not help the prosecution cause. He stated that upon Babubhai being assaulted, he immediately ran away. In his cross-examination, he further stated that first he heard the tube lights being damaged and upon hearing the noise of tube lights being broken he jumped and ran away. He agreed that since 5 to 6 tube lights were destroyed, there was partial darkness. He also did not know the names of the accused persons before hand.

[14] It can thus be seen that all the accused persons were unknown to the witnesses. The incident had taken place about two and a half years before the date of deposition. The incident took place at night at about 9 O' Clock. According to the witness, Rajubhai, P.W.7, he could first hear the tube lights being broken. 5 to 6 tube lights were damaged and that resulted into the condition of semi darkness prevailing. Admittedly, no test identification parade was carried out by the investigating agency. Witnesses identified the accused for the first time before the Court.

[15] Under the circumstances, it would be extremely unsafe to rely on such identification. As per witness, Rajubhai, P.W.7, on the date of incident, there were more than 100 to 150 people at the fun fare. According to all witnesses, upon the tube lights being damaged the members of the public started running for safety. This would have obviously led to great deal of commotion, particularly when the incident took place in semi dark condition. The assailants were unknown to the witnesses. They were not made to identify the accused at the first available opportunity and for the first time they saw the accused again before the Court after two and a half years. Their identification would remain highly unsafe.

[16] Additionally, I also find that there are some material contradictions so far as role of the present appellants, namely, accused no.2 and 3 is concerned. As noted, complainant, P.W.5, Babubhai stated that Bhopabhai, accused no.1 had damaged the tube lights. Every witness attribute this act to accused no.3. Secondly Babubhai, P.W.5 states that first the tube lights were damaged and thereafter the blow was given to him by Bhopabhai. Whereas Rajubhai, P.W.7, stated that he could first hear the sound of tube lights being broken.

[17] Under the circumstances, I find that learned Additional Sessions Judge erred in convicting the present appellants. Their presence and involvement in the alleged incident remains unproved beyond reasonable doubt. They must, therefore, be given benefit of doubt.

[18] Resultantly, the judgment and order under challenge dated 4-11-1996 insofar as present appellants are concerned is quashed. Their conviction is set aside. Appeal is disposed of accordingly. Bail bonds cancelled. Fine, if paid, to be refunded.

