

HIGH COURT OF GUJARAT

RABARI VASHIBHAI BHAGWANBHAI

Versus

STATE OF GUJARAT

Date of Decision: 28 April 2009

Citation: 2009 LawSuit(Guj) 245

Hon'ble Judges: [J C Upadhyaya](#)

Case Type: Criminal Appeal

Case No: 301 of 2005

Subject: Criminal

Acts Referred:

[Indian Penal Code, 1860 Sec 201, Sec 504, Sec 302, Sec 304, Sec 323](#)

[Code Of Criminal Procedure, 1973 Sec 378, Sec 313](#)

[Bombay Police Act, 1951 Sec 135](#)

Final Decision: Appeal allowed

Advocates: [R C Jani](#), [K B Pancholi](#), [M G Nanavati](#)

J.C. Upadhyaya, J.

[1] The appellant, who was original accused No. 1 in Sessions Case No. 4/2005, came to be convicted by the Sessions Court, Mehsana, on 10/2/2005 for the commission of offence punishable under Section 304 Part-I of the Indian Penal Code [IPC] and was sentenced to undergo rigorous imprisonment [RI] for seven years and fine of Rs. 10,000/- and in default of payment of fine, simple imprisonment for one year. He came to be acquitted for the commission of offences punishable under Sections 302, 323, 504 and 201 of the IPC. Three co-accused, who were original accused Nos. 2, 3 and 4 came to be acquitted from all the charges levelled against them.

[2] The prosecution case, in nutshell, is that the incident occurred on 12/12/2004 at about 17.00 hours in the hotel of original accused No. 2 - Rabari Ajubhai Bhagwanbhai, which is situated in a village called Balasar, Taluka Kadi. It is alleged that at the time of the incident, deceased Bharatbhai Bhikhabhai and the first informant Mangaji Ranchhodji went to the hotel and they found original accused No. 2 - Ajubhai

Bhagwanbhai consuming liquor. It is alleged that the deceased Bharatbhai consumed liquor along with original accused No. 2 Ajubhai Bhagwanbhai. At that time, appellant original accused No. 1 - Vashibhai Bhagwanbhai came there and saw the deceased Bharatbhai consuming liquor. It is alleged that the appellant slapped the first informant Mangaji Ranchhodji and, therefore, he made his escape good. It is alleged that the appellant did not like deceased Bharatbhai taking liquor with original accused No. 2 - Ajubhai Bhagwanbhai and thereupon, inflicted a blow with wooden plank on the head of deceased Bharatbhai. It is further alleged that some-how deceased Bharatbhai went to the S.T. Bus Stand, which is about 7 to 8 ft., away from the hotel and fell down there. He was brought to Community Health Center, Kadi and there he succumbed to the injuries. The first informant Mangaji Ranchhodji lodged FIR in Kadi Police Station. The offence came to be registered and the investigation was started. Statements of material witnesses came to be recorded. Documentary evidence like P M Report, etc., were collected. Necessary panchnamas were prepared. Weapon wooden plank was discovered while drawing discovery panchnama. After collecting required material for the purpose of lodgement of charge-sheet, charge-sheet came to be filed in the Court of the Ld. Judicial Magistrate First Class, Kadi. Since the offence was exclusively triable by the Court of Sessions, the Ld. Magistrate committed the case to the Court of Sessions at Mehsana, which came to be registered as Sessions Case No. 4/2005.

[3] Ld. Trial Judge framed charge at exh. 2 against 4 accused persons including the appellant for the commission of offences punishable under Sections 302, 323, 201 and 504 of the IPC and Section 135 of the Bombay Police Act, to which, including the appellant, all the accused did not plead guilty and claimed to be tried. Thereupon, the prosecution adduced its oral and documentary evidence. After the prosecution concluded its oral evidence, the Ld. Trial judge recorded further statements under Section 313 of the Criminal Procedure Code [Cr. P.C] of all the accused persons including the appellant and they denied generally all the allegations levelled against them by the prosecution and filed their written reply, wherein in short, they denied their involvement. After appreciating the evidence on record and the submissions made on behalf of both the sides, the Ld. Sessions Judge came to the conclusion that the appellant original accused No. 1 was responsible for causing death of deceased Bharatbhai and the prosecution successfully established his involvement in the offence. However, the Ld. Sessions Judge came to the conclusion that the offence, which can be said to have been constituted, is not the murder but the culpable homicide not amounting to murder and recorded conviction of the appellant for the offence punishable under Section 304 Part-I of the IPC and recorded his acquittal for offences punishable under Sections 302, 323, 201 and 504 of the IPC and Section 135 of the Bombay police Act. On the basis of the same set of evidence, the Ld. Trial Judge

recorded acquittal of 3 co-accused persons who were original accused Nos. 2, 3 and 4. Hence, the original accused No. 1 challenged his conviction by preferring the appeal.

[4] Ld. Advocate Mr. Jani for the appellant submitted that the prosecution has miserably failed to prove its case beyond any reasonable doubt. The prosecution examined two witnesses, P.W. 3 - Abhuji Amjalji and P.W. 4 - Manubhai Kachrabhai in capacity as eye witnesses, but they did not support the case of the prosecution and they were declared hostile. It is submitted that the prosecution case is based upon the evidence of the first informant - Mangaji Ranchhodji P.W. 2. However, he does not claim to have seen the commission of the offence; but from his evidence the prosecution relies upon one circumstance about the deceased having last seen in company of the accused persons while he was alive. However, the prosecution miserably failed to establish the theory of deceased having been last seen together with the accused. The evidence of the first informant - Mangaji Ranchhodji, if closely seen, would reveal that it is unnatural and no reliance can be placed on his evidence.

4.1. It is submitted that the evidence of discovery of weapon wooden plank is equally weak in the sense that the panch turned hostile. The evidence of Investigating Officer [IO] is not cogent and convincing regarding the discovery part of the weapon.

4.2. It is submitted that as per the prosecution case, the genesis of the offence lies in the event when the first informant - Mangaji Ranchhodji was slapped by the appellant. For that act, the appellant came to be charged for the offence of simple hurt punishable under Section 323 of the IPC, but the Ld. Trial Judge recorded acquittal of the appellant for the offence punishable under Section 323 of the IPC. The evidence of the first informant - Mangaji Ranchhodji was found doubtful so far as his own injury was concerned, but the trial Court relied upon his evidence for recording conviction of the appellant. It is further submitted that on the same set of evidence, 3 co-accused persons came to be acquitted; whereas the appellant came to be convicted.

4.3. Ultimately it is submitted that the appeal may be allowed.

[5] Ld. APP Mr. Nanavati for the respondent - State opposed this appeal and submitted that the prosecution successfully proved its case regarding the circumstance that the deceased was found in company of the appellant when the deceased was alive. The evidence of the first informant - Mangaji Ranchhodji is cogent and convincing and the Sessions Court rightly relied upon the evidence of the first informant - Mangaji Ranchhodji.

5.1. It is further submitted that all the accused persons including the appellant filed a written reply at exh. 26 in support of their further statements under Section 313 of the Cr. P.C and they admitted that there was some scuffle with deceased Bharatbhai and thus admitted the presence of deceased inside the hotel along with them.

5.2. Therefore, it is submitted that the appeal may be dismissed.

[6] I have examined the record and proceedings in context with the submissions made by the rival side.

[7] All the accused persons including the appellant came to be convicted from the charge of offence of murder punishable under Section 302 of the IPC. The State did not challenge their acquittal by preferring acquittal appeal under Section 378 of the Cr. P.C.

[8] Considering the evidence on record, it transpires that the prosecution case is based upon the testimony of the first informant - Mangaji Ranchhodji - P.W. 2. It is pertinent to note that the prosecution examined witnesses Abhuji Amjalji - P.W.3 and Manubhai Kachraji - P.W. 4 in capacity as eye witnesses as their places of business are situated in the nearby vicinity of the hotel of original accused No. 2 Ajubhai Bhagwanbhai. However, they did not support the case of the prosecution and they were declared as hostile witnesses.

[9] Evidence of the first informant - Mangaji Ranchhodji - P.W. 2 exh. 11, if considered closely, he stated that he himself and deceased Bharatbhai had gone to the hotel of original accused No. 2 - Ajubhai Bhagwanbhai at village Balasar. At that time the accused No. 2 Ajubhai Bhagwanbhai was consuming liquor and the deceased Bharatbhai also started consuming liquor along with accused No. 2 Ajubhai. At that time, the appellant accused No. 1 - Vashibhai came and slapped him. Therefore, he left the place and ran away and went to his house. On the next day morning, he came to know that the deceased had died. He said that when he left the hotel, at that time the appellant, the original accused No. 2 Ajubhai and deceased Bharatbhai were there in the hotel. If his cross-examination is seen, he admits that after he reached to his home and on the next day, he lodged the FIR. In the meanwhile he did not tell anybody about the incident. He admitted that he has not seen the appellant inflicting any blow to the deceased.

9.1. If the evidence of the first informant - Mangaji Ranchhodji is considered in light of the evidence of witness Mahendrasinh Solanki - P.W. 5, according to him, the first informant - Mangaji Ranchhodji told him about the incident. The first informant - Mangaji Ranchhodji neither in his evidence nor in his FIR exh. 12 stated that after reaching to his home, he narrated the incident to witness Mahendrasinh

Solanki. On the contrary, considering the FIR exh. 12, it transpires that on the next day at about 8.00 a.m., one driver Dinubhai told him that deceased Bharatbhai had sustained head injury and he had died.

[10] According to the prosecution case, the weapon wooden plank came to be discovered by the appellant in presence of panchas. But considering the evidence of panch Ashokbhai Baldevbhai - P.W. 7, he was declared hostile and he did not support the contents of discovery panchnama exh. 19. In this context, if the evidence of I.O. P.I. Solanki - P.W.9 is considered, he stated that the original accused No. 2 - Ajubhai expressed his willingness to point out as to where the weapon wooden plank is lying and it was the original accused No. 2 - Ajubhai, in presence of panchas, traced out the weapon wooden plank. It is pertinent to note that the I.O. P.I. Solanki did not refer in his evidence that the weapon wooden plank came to be discovered at the instance of the appellant. It is further pertinent to note that original accused No. 2 - Ajubhai Bhagwanbhai came to be acquitted by the trial Court.

[11] One more aspect is required to be considered. As per the prosecution case, the incident occurred in the hotel of original accused No. 2 - Ajubhai Bhagwanbhai. The scene of offence panchnama reveals blood marks in the hotel. The Ld. Trial Judge recorded acquittal of the original accused No. 2 - Ajubhai, who is the owner of the hotel and according to the prosecution case, he was present in the hotel at the time of the incident and accused No. 2 - Ajubhai and the deceased were consuming liquor in the hotel.

11.1. It is further pertinent to note that as per the prosecution case, the incident commenced when the appellant slapped the first informant - Mangaji Ranchhodji. The Sessions Court though disbelieved this aspect of the matter and disbelieved the evidence of the first informant - Mangaji Ranchhodji about his injury and recorded acquittal of the appellant for the offence punishable under Section 323 of the IPC. However, while recording conviction of the appellant, relied upon the evidence of the first informant - Mangaji Ranchhodji.

[12] It is true that during the course of their further statements recorded under Section 313 of the Cr. P.C, all the 4 accused persons including the appellant filed their written reply at exh. 26. It is stated that a quarrel took place between the accused and deceased in the hotel and during the course of quarrel, the head of the deceased dashed with a pillar and he sustained injury. However, considering this aspect of the matter, first of all there is nothing in their further statement to come to the conclusion that during the course of quarrel, any injury came to be sustained either by the appellant or any of the co-accused persons. In their further statements they denied their involvement in the incident. Moreover, it is the duty of the prosecution to prove its

case beyond any reasonable doubt. As stated above, if the evidence of the first informant - Mangaji Ranchhodji - P.W. 2 is considered, the evidence is not cogent, convincing and trustworthy so that a conviction can be recorded on the basis of his testimony.

[13] However, considering the medical evidence on record and especially considering the evidence of Dr. Sheth - P.W. 1 and the P M Report exh. 10, it is true that the cause of death of deceased is due to shock due to head injury and fatal injuries were found in his head. Thus, the prosecution successfully proved that the death of the deceased was homicidal death. However, in light of the entire above discussion, the prosecution failed to establish the involvement of the appellant in the incident beyond any reasonable doubt. Thus, the benefit of doubt is required to be given to the appellant.

[14] For the foregoing reasons, the appeal is allowed. The conviction of the appellant recorded by the Sessions Court, Mehsana on 10/2/2005 vide judgment and order rendered in Sessions Case No. 4 of 2005 for the commission of offence punishable under Section 304 Part-I of the IPC is set aside. The appellant is acquitted from the offence punishable under Section 304 Part-I of the IPC. The appellant be set at liberty forthwith from the jail, if his presence is not required in connection with any other case. Fine, if paid, be refunded.

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