

JAYANTIBHAI BHENKARBHAI

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v.

STATE OF GUJARAT

SEPTEMBER 11, 2002

[R.C. LAHOTI AND BRIJESH KUMAR, JJ.]

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Evidence Act, 1872:

s. 11, Illustration (a) and s. 103—Defence of alibi—Burden of proof—
Nine persons prosecuted for offences inter alia u/s. 302/149, IPC—Defence of
alibi raised by one of them namely A-9—His plea not accepted—He along
with eight others convicted and sentenced by trial court—High Court also not
accepting his defence of alibi, but acquitting four others giving them benefit
of doubt—Appeal before Supreme Court by A-9 only, reiterating his plea of
alibi—Held, an obligation is cast on the court to weigh in scales the evidence
adduced by the prosecution in proving the guilt of the accused and the evidence
adduced by the accused in proving his defence of alibi—If the evidence adduced
by the accused is of such a quality and of such a standard that the court may
entertain some reasonable doubt regarding his presence at the places and
time of occurrence, the court would evaluate the prosecution evidence to see
if the evidence adduced on behalf of the prosecution leaves any slot available
to fit therein the defence of alibi—The burden of the accused u/s. 103 is
undoubtedly heavy—However, while weighing the prosecution case and the
defence case, pitted against each other, if the balance tilts in favour of the
accused, the prosecution would fall and the accused would be entitled to
benefit of that reasonable doubt which would emerge in the mind of the
court—In the facts and circumstances of the case and keeping in view the
nature of the accusations made against the accused-appellant and weighing
the same against the overwhelming defence evidence adduced by the accused-
appellant in support of his plea of alibi, a reasonable doubt is created in the
prosecution case so far as the participation of A-9 in the incident is concerned—
The High Court itself has arrived at a finding in favour of A-9 that his
presence at the place stated by him upto 11.00 a.m. on the date of the incident
cannot be doubted. That being so, it is rendered highly improbable if A-9
could have reached back at the place of occurrence by the time the incident
happened -A-9 is entitled to benefit of doubt and his appeal is allowed—With
the acquittal of A-9, though the charge with the aid of s.149 IPC may fail, yet

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A *non-appealing accused could still have been held liable to conviction with the aid of s.34 IPC in which event the sentences would have remained the same. However, inasmuch as the other accused have chosen not to file any appeal of their own, the sustainability of their conviction is not examined—Penal Code, 1860—ss. 302/149, 147/148/452—Criminal Law—Defence of alibi.*

B CRIMINAL APPELLATE JURISDICTION :Criminal Appeal No.555 of 2001.

From the Judgment and Order dated 24.8.1998 of the Gujarat High Court in CrI. A. No.114/91.

C Tanuj Bagga Sharma, Advocate (A.C.) for the Appellant.

Divyang K. Chhaya, Hemantika Wahi and Aruna Gupta, for the Respondent.

The following Order of the Court was delivered :

D In an incident which took place in village Singpur of Taluk Songadh, Gujarat on 6.7.1989 at about 8.30 p.m. one Lallubhai Naranbhai died on account of injuries inflicted on him. Nine accused persons were charged with having committed offences punishable under Sections 302/149 and 147/148/452 IPC. Four accused persons, namely, accused Nos. 2,4,5, and 8 were directed to be acquitted by the trial Court as the charges against them were not proved and they were entitled to the benefit of doubt. Accused Nos. 1, 3, 6, 7 and 9 were held guilty of having committed the offence punishable under Section 302/149 IPC. These five accused persons were sentenced to undergo imprisonment for life and a fine of Rs. 250 each and in default to further undergo rigorous imprisonment for one month each. They were further sentenced to undergo rigorous imprisonment for one year each for having committed offences under Sections 147/148 and 452 IPC and also to pay a fine of Rs. 125 and in default of payment to undergo further imprisonment of one month each. The sentences were directed to run concurrently. All the five convicted accused persons preferred appeal before the High Court which has been dismissed. Accused Nos. 1, 3, 6 and 7,, namely, Singha Magan, Dina Afiniya, Digniya Rama and Rupa Singha have accepted the judgment of the High Court and have not pursued challenge to their conviction upto this Court. It is only the accused No. 9 Jayantibhai Bhenkarbhai who has filed this appeal by special leave.

H The prosecution case briefly stated is that the accused No. 1 Singha

Magan came to visit the house of one Lalji Rajia at about 6.00 p.m. on 6.7.1989. Lalji Rajia was not at his house. Singha Magan demanded liquor from Ashwin, a minor son of Lalji Rajia, which was objected to by Ushniben, the wife of Lalji Rajia. There was some verbal altercation. Singha Magan (A-1) was speaking in foul language and was argumentative insisting on fulfilling his demand for liquor. At this point of time, Lalubhai and his brother Kantibhai, who were next door neighbours of Lalji Rajia came out, and intervened and chastised the accused Singha Magan by telling him that in the absence of Lalji Rajia, the accused should not have harassed the lady who was alone in the house. The accused was asked by Lalubhai to leave that locality and go away. This annoyed the accused and he left threatening that he would see him later.

At about 8.00 p.m. on the same day, accused No. 1 Singha Magan returned to the house of the deceased accompanied by accused Nos. 2 to 9. The accused persons were severally armed. Accused No. 1 Singha Magan was armed with a knife, accused No. 7 Rupa Singha had a pestle with him. Accused No 6 Digniya Rama and accused No. 9 Jayantibhai Bhenkarbhai were armed with sticks. The incident was witnessed by Kantibhai and Thakorebhai, brothers of the deceased. The accused persons fled away after assaulting the victim. Thakhorebhai went to Channabhai Dhirubhai and narrated to him the incident. He advised for a report being lodged with the police. Thakorebhai accompanied by Channabhai Dhirubhai went to Ukai police station situated at a distance of about 10-12 Kms. and lodged F.I.R. of the incident at 6.00 a.m. on 7.7.1989. A cognizable offence was registered and investigation commenced.

Shortly after the incident of assault Lalubhai succumbed to his injuries. Post-mortem on the dead body was performed by Dr. Surendra, Medical Officer, General Hospital, Songadh. The deceased was found to have sustained 22 injuries out of which 3 were incised wounds and remaining were contused lacerated wounds or abrasions, On internal examination, the deceased was found to have sustained fracture of right 5th and 6th ribs at the level of right midclavicular line and fracture of left 7 th, 8th and 9th ribs at the level of left midscapular line. The injuries were ante-mortem. The incised wounds could have been caused by sharp cutting weapon such as knife while other injuries could have been caused by blunt object such as stick, pestle or back portion of dharia.

The short question for decision in this appeal is whether Jayantibhai,

A the accused- appellant can be held to have participated in the incident of assault and as a member of unlawful assembly?

The accused denied his participation in the incident of assault on the deceased. His defence is that a day before the incident he had left village Singpur and gone to Ahmedabad in order to attend hearing in an election appeal filed by him before Additional Development Commissioner which was scheduled to be heard on 6.7.1989 at Gandhinagar. According to the accused-appellant there was yet another case - a criminal case under Section 409 IPC wherein he was accused and pending for trial in the Court of Judicial Magistrate at Vyara. Therein, also the date of hearing was appointed as 6.7.1989 and his personal appearance was required. In the election appeal Kantilal Shah, DW-3 was the advocate appointed by him. The election appeal had come up for hearing on 14.6.1989 and was adjourned for hearing on 6.7.1989. In the criminal case at Vyara Dhansukhbhai DW-4 was the counsel appointed by the accused-appellant. Kantilal Shah DW-3 had, on the hearing being adjourned on 14.6.1989, sent a postcard to the accused-appellant informing him that the hearing would positively take place on 6.7.1989 which he must attend. As the accused appellant could not have attended both the cases, i.e., the criminal case at Vyara and the election appeal at Gandhi Nagar, both fixed for 6.7.1989, he had through counsel Shri Dhansukhbhai DW-4 moved application in the Court of Judicial Magistrate, Vyara seeking exemption from personal appearance and an adjournment. This application was rejected on 6.7.1989 and the learned Judicial Magistrate at Vyara directed warrants to be issued against the accused. However, the accused-appellant did attend the hearing before the Addl. Development Commissioner on 6.7.1989. The hearing commenced after 11.00 a.m. and continued upto 2.30 p.m.

F The version of the defence proceeds to say that the accused-appellant went to see and was going around the zoo at Ahmedabad for about half an hour commencing at 4.00 p.m. Thereafter, he went to Gandhi Nagar to meet one Rahulbhai who is employed as a clerk in the Secretariat at Gandhi Nagar. He secured pass for entry in the Secretariat and he signed the entry register wherein his name is mentioned along with his signatures. The accused then returned to Ahmedabad and went to stay with one Manekhbhai DW-2. It was at about midnight that Manekhbhai and Dineshbhai went to see off the accused-appellant at the bus station at Ahmedabad where the accused-appellant boarded a bus originating from a station in Rajasthan and proceeding to Songadh and reached Singpur in the morning of 7.7.1989. This register was summoned in

evidence and the accused-appellant appearing as DW-2 has deposed on oath to the entry made in his presence by the concerned clerk and the signatures put up by him on the register. A

The accused himself chose to appear in witness box and took oath to depose in support of his own version. He also examined Kantilal Shah, Advocate DW-3 and Ramanbhai DW-5 clerk in the office of the Additional Development Commissioner, According to Ramanbhai DW-5 the Additional Development Commissioner was regular in coming to the office at 10.30 a.m. and his routine was to attend to miscellaneous work, including disposal of the mail received, for about half an hour and commence hearing of cases at 11.00 a.m. The appellant's case was at item No. 4. The first three cases did not proceed and therefore the hearing of the appellant's case was taken up at about 11.30 a.m. and lasted upto 2.00 or 2.30 p.m. In the records maintained in the office of Addl. Development Commissioner, the presence of the accused-appellant alongwith his counsel Kantilal Shah DW-3 is recorded and both have signed in token of their having attended the office of Addl. Development Commissioner and participated in the hearing. Ramanbhai DW-5 has further deposed that he used to remain present during the course of hearings by the Additional Development Commissioner and take notes of the submissions made which he did on 6.7.1989 also. In view of the involvement of the accused-appellant having been alleged in the incident, he moved an application to the Addl. Development Commissioner to issue certificate showing his presence in the office of the Addl. Development Commissioner on 6.7.1989. Certificate in that regard was issued though the time at which the accused-appellant was present before the Addl. Development Commissioner was not mentioned in the certificate; obviously because record of such time is not maintained. The fact remains that the accused-appellant was in attendance in the office of Additional Development Commissioner at Gandhinagar some time after 11.00 a.m. on that day. The post-card dated 19.6.1989 written by Kantilal Shah, Advocate to the accused-appellant and sent through post bearing postal stamps and seals was produced in evidence wherein it has been communicated by the counsel to the appellant that his default in appearance on 14.6.1989 was viewed seriously and his appearance on 6.7.1989 was a must. On this very ground the appellant had moved an application before the judicial Magistrate Vyara seeking exemption from personal appearance on 6.7.1989. In support of the said application the post-card sent by advocate Kantilal Shah was filed. The record of this application accompanied by post-card was summoned in the Trial Court and proved by Dhansukhbhai, Advocate DW-4 appearing for the accused-appellant before the Magistrate's Court at B
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A Vyara.

The accused-appellant also produced in evidence two tickets of zoo purchased by him for himself and Dineshbhai on 6.7.1989. He also produced the bus tickets issued by the conductor of the bus by which he travelled from Ahmedabad to Singpur. The appellant had boarded the bus at about 1.00 a.m., that is, a little after the midnight of 6.7.1989 and reached Singpur in the morning of 7.7.1989.

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Having learnt of the accusation against him the accused-appellant had moved an application on 10.7.1989 seeking anticipatory bail from the Sessions Courts. The application was rejected. He pursued his prayer for anticipatory bail by moving the High Court but thereat also he failed. However, what is significant to note is that even in the application for anticipatory bail moved on 10.7.1989 the accused-appellant pleaded alibi in support of his prayer for anticipatory bail.

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Babulal PW-9, the investigating officer has admitted during his cross-examination that if the road is clear and there are no obstructions then ST bus can reach Ahmedabad from Songadh village in 8 hours. However, he further admitted that if one has to travel by ST bus from Songadh to Ahmedabad then all ST buses go to Ahmedabad from Songadh invariably via Surat which would take a little longer time.

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The High Court took into consideration the plea of alibi taken by the accused-appellant and formed an opinion that the plea was not strictly proved as required so as to completely exclude the possibility of the accused having been present at the place and time of the incident. The reasons assigned by the High Court are that through the prosecution evidence the involvement of the accused in the incident is proved beyond reasonable doubt. As against this, the conduct of the accused-appellant appears to be unnatural inasmuch as he did not promptly (that is, on 7.7.1989 itself) approach the investigating officer to tell him that he was being falsely implicated as he was in fact in Ahmedabad on the date and at the time of the incident. In the opinion of the High Court the plea of alibi was not also fully substantiated in view of non-examination of Dineshbhai, who had accompanied the accused in Ahmedabad while he boarded the bus for Songarh and Rahulbhai, the clerk in the Secretariat to whom the accused claims to have gone to meet at about 5.15 p.m. on 6.7.1989.

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These very reasons were assigned by the Trial Court for disbelieving

the plea of alibi taken by the accused-appellant. However, an additional reason assigned by the Trial Court is that in the application for anticipatory bail the accused has stated his presence in the office of Addl. Development Commissioner upto 1.00 p.m. only while later on he tried to improve upon his version by pleading that he had remained present there upto 2.30 p.m. Vide para 27.1 of the judgment, the High Court while appreciating the defence evidence, has arrived at a positive finding that the accused-appellant has been able to prove by his evidence his presence at about 11.00 a.m. at Gandhi Nagar in the office of Addl. Development Commissioner. Thus, even in the opinion of the High Court, the plea of the accused that he had on the date of the incident gone to Ahmedabad to take part in the hearing of his appeal fixed before Addl. Development Commissioner is not false and at least at 11.00 a.m. He was present thereat.

In the facts and circumstances of this case we propose to begin by dealing with the evidence of alibi adduced by the accused-appellant. We have no reason to disbelieve the statement of Kantilal Shah, advocate DW-3 and Ramanbhai DW-5, clerk who have deposed that the hearing before the Addl. Development Commissioner had taken place on that date and that the accused was present at the time of hearing. The hearing must have lasted for a reasonable length of time assuming without holding that it had not continued upto 2 or 2.30 p.m. We have also no reason to doubt the entry in the Secretariat register wherein the name and particulars of the accused-appellant are mentioned as one of the visitors to the Secretariat on that date alongwith the signatures of the accused-appellant against the entry. This shows that on 6.7.1989 the accused did visit Gandhi Nagar. Assuming that the accused-appellant had departed from the office of Add. Development Commissioner at the conclusion of hearing of his case, he must have spent a reasonable time in visiting the Secretariat which would obviously be during the working hours of the day. Thereafter, he may have left Gandhi Nagar for Songadh. According to the available modes of transport he would have taken a bus from Gandhi Nagar for Ahmedabad and from Ahmedabad he would have boarded a bus for Songadh which would proceed via Surat Only. A public transport required to cover a distance of about 300 Kms., allowing a reasonable margin for time lost in stoppages on way, would take about 8 to 10 hours to reach Songadh. It does not appear probable that the accused-appellant could have reached Singpur and participated in the incident which is said to have taken place at about 8.00 p.m.

On the next day the accused-appellant learnt of the Judicial Magistrate

A Vyara having turned down his prayer for exemption from personal appearance before the Court at Vyara on 6.7.1989 and consequently having issued a warrant of arrest for securing the presence of accused before him. The accused-appellant rushed to Vyara, appeared in the Court and moved an application for recalling warrant of arrest stating the factum of his presence before the Additional Development Commissioner at Gandinagar on 6.7.1989. This application was allowed and the warrant of arrest was recalled. These relevant facts have been deposed to by reference to the documents from the record of the Judicial Magistrate, Vyara by Dhansukh Bai, Advocate, DW-4.

C We have carefully gone through the prosecution evidence. Although the Trial Court as well as the High Court have recorded a finding of the accused-appellant having participated in the incident but a few prominent features of the prosecution case and of the findings arrived at by the two Courts need to be noticed. All the four eye witnesses are not specific about the overt act attributed to this accused-appellant. While some witnesses attribute two specific injuries on the person of the deceased having been caused by this accused appellant, others only make a generalised statement of this accused appellant also having participated in the assault. There is another accused also, namely, Digniya Rama (A-6) who was armed with a stick. A stick stated to have been used in the incident has been recovered from the accused Digniya Rama (A-6). No recovery has been made from the accused-appellant. Secondly, the incident took place at about 8 p.m. while the first information report of the incident was lodged at 6 a.m. at a police station situated at a distance of about 10 to 12 Kms. from the village where the incident took place. The F.I.R. cannot be said to be belated. But, the fact remains that the first informant was in the company of Chhanabhai Dhirupbhai, a political rival of the accused-appellant, soon after the incident and before and at the time of lodging of F.I.R. A possibility of some embellishment having crept into the F.I.R. in view of the political influence wielded by such opponent of the accused-appellant cannot be completely ruled out. Thirdly, this accused-appellant, from the very beginning, no sooner he learnt of accusation against him, took the defence of alibi by informing the necessary facts to the investigating officer on 8.7.1989 itself. Thereafter, this plea of alibi has been consistent and reflected in several documents of undoubted veracity as also substantiated by the testimony of such witnesses who do not have any animus to falsely depose in favour of the accused. There is also supporting documentary evidence of unimpeachable veracity adduced in support of the defence plea.

H In view of the overwhelming evidence adduced by the accused-appellant,

the factum of non-examination of Dinesh Bhai and Rahulbhai pales into insignificance. Rahulbhai could have only supplied some more details of the visit of accused-appellant to him in the secretariat which visit cannot be doubted on account of entries made in the visitors register. Dinesh Bhai could have spoken of the accused-appellant's stay at Ahmedabad upto the mid-night of 6th and 7th July, 1989. His evidence would have been oral and subjected to usual criticism. But his non-examination does not water down the impact of finding that during the delay at least upto after the mid-day the accused was undoubtedly present in Ahmedabad and Gandhinagar leaving aside the exact time whether upto 1.00 p.m. or 2.00 p.m. or 2.30 p.m. His such presence at Gandhinagar and Ahmedabad renders it highly improbable that he could have been in or reached at, Singpur by 8.00 p.m. the same day.

Section 11 of the Evidence Act, 1872 provides that facts not otherwise relevant are relevant if they are inconsistent with any fact in issue or relevant fact or if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or a relevant fact highly probable or improbable. Illustration (a) of Section 11 reads as under :

Illustrations

- (a) The question is, whether A committed a crime at [Calcutta], on certain day. The fact that, on that day A was at [Lahore] is relevant.

The fact that near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

- (b) xxx xxx xxx

The plea of alibi flows from Section 11 and is demonstrated by illustration (a). Sarkar on Evidence (Fifteenth Edition, p. 258) states the word 'alibi' is of Latin origin and means "elsewhere". It is a convenient term used for the defence taken by an accused that when the occurrence took place he was so far away from the place of occurrence that it is highly improbable that he would have participated in the crime. Alibi is not an exception (a special or general) envisaged in the Indian Penal Code or any other law. It is only a rule of evidence recognized in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. The burden of proving commission of offence by the accused so as to fasten the liability of

A guilty on him remains on the prosecution and would not be lessened by the mere fact that the accused had adopted the defence of alibi. The plea of alibi taken by the accused needs to be considered only when the burden which lies on the prosecution has been discharged satisfactorily. If the prosecution has failed in discharging its burden of proving the commission of crime by the accused beyond any reasonable doubt, it may not be necessary to go into the question whether the accused has succeeded in proving the defence of alibi. But once the prosecution succeeds in discharging its burden then it is incumbent on the accused taking the plea of alibi to prove it with certainty so as to exclude the possibility of his presence at the place and time of occurrence. An obligation is cast on the Court to weigh in scales the evidence adduced by the prosecution in proving of the guilt of the accused and the evidence adduced by the accused in proving his defence of alibi. If the evidence adduced by the accused is of such a quality and of such a standard that the Court may entertain some reasonable doubt regarding his presence at the place and time of occurrence, the Court would evaluate the prosecution evidence to see if the evidence adduced on behalf of the prosecution leaves any slot available to fit therein the defence of alibi. The burden of the accused is undoubtedly heavy. This flows from Section 103 of the Evidence Act which provides that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence. However, while weighing the prosecution case and the defence case, pitted against each other, if the balance tilts in favour of the accused, the prosecution would fail and the accused would be entitled to benefit of that reasonable doubt which would emerge in the mind of the Court.

Reverting back to the facts and circumstances of the case and keeping in view the nature of the accusations made against the accused-appellant and weighing the same against the overwhelming defence evidence adduced by the accused-appellant in support of his plea of alibi, in our opinion, a reasonable doubt is created in the prosecution case so far as the participation of this accused-appellant in the incident is concerned. We have already noted, the High Court itself, having arrived at a finding in favour of the accused-appellant that his presence at Gandhi Nagar upto 11.00 a.m. on the date of the incident cannot be doubted. That being so, it is rendered highly improbable if the accused-appellant could have reached back village Singpur by the time the incident happened.

For the foregoing reasons, we are of the opinion that the accused-appellant is entitled to benefit of doubt and his appeal therefore deserves to

be allowed.

Though we are holding Jayantibhai Bhenkarbhai, the accused-appellant before us entitled to acquittal, we are conscious of the fact that the High Court has held five accused persons guilty and convicted them with the aid of Section 149 IPC. With the acquittal of Jayantibhai Bhenkarbhai (A-9), the accused-appellant before us, the number of culprits who participated in the incident is reduced to less than five and the charge with the aid of Section 149 IPC falls the ground. We could have, in exercise of our jurisdiction under Article 136 of the Constitution, entered into the legality and propriety of the conviction of the non-appealing accused persons also. However, in the facts and circumstances of the present case, we are not inclined to do so. Though the charge with the aid of Section 149 IPC may fail, yet non-appealing accused-persons could still have been held liable to conviction with the aid of Section 34 IPC in which event the sentences would have remained the same. Be that as it may, in as much as the other accused-appellants have chosen not to file any appeal of their own, we are not inclined to enter into examining the sustainability of the conviction of the non-appealing accused persons.

The appeal filed by Jayantibhai Bhenkarbhai, the appellant before us, is allowed. His conviction under Section 302/149 IPC and Section 147/148/452 IPC is set aside. He is directed to be acquitted. He shall be released forthwith if not required to be detained in any other offence.

We place on record our appreciation of the valuable assistance rendered by Ms. Tanuj Bagga Sharma, the learned amicus as also of the fairness with which Mr. Divyang K. Chhaya, the learned counsel for the State argued the case.

R.P.

Appeal allowed.