ASHOKSINH JAYENDRASINH

v.

STATE OF GUJARAT

(Criminal Appeal No. 1123 of 2010)

MAY 7, 2019

[R. BANUMATHI AND S. ABDUL NAZEER, JJ.]

Penal Code, 1860 – s. 302 r/w. s. 34, s.307 r/w. s. 34 – Prosecution case was that accused persons including appellant-accused no. 1 ploughed the disputed road for which a civil suit was pending between complainant and the accused persons – When complainant and his family objected accused from carrying out ploughing activities, they were abused – Thereafter, complainant and his family went back to their houses – In the meantime, accused persons armed with guns and stick went to their houses and accused Nos. 1 & 2 fired three gun shots which hit victim-deceased (wife of PW-5), PW-6 and PW-7 – Wife of PW-5 died on spot – FIR was registered – Upon consideration of the evidence of injured eye-witnesses (PWs 6 and 7), recovery of weapons and other evidence on record, the trial court convicted appellant-accused No.1 and accused No. 2 u/s. 302 r/w. s. 34 IPC, u/s. 307 r/w. 34 IPC, u/s. 25(c) of the Arms Act and u/s. 3(1) (x) of SC and ST (Prevention of Atrocities) Act, 1989 – High Court acquitted accused No. 2, however, affirmed the conviction of the appellant-accused No.1 u/s. 302, 307 r/w. s. 34 IPC and u/s. 25 (c) of the Arms Act – On appeal, held: The occurrence was in the agricultural field of the complainant where it was dark – In absence of any evidence as to the light aspect, the possibility of identifying the accused in the darkness of the agricultural field becomes doubtful – There were contradictions in the case of prosecution as to who fired those gun shots – Further, PW-1 doctor did not state in his report that the injury was caused either by bullet or by pellets and also did not state whether wounds were caused by rifle or by gun – The witness to the panchnama (Ex. P-79) for recovery of weapons from accused Nos. 1 & 2 had turned hostile and there was no independent source to corroborate the recovery of the weapons – Therefore, the guilt of the accused was not proved beyond reasonable doubt – Impugned Judgment of the

A *High Court affirming the conviction of the appellant-accused No. 1 set aside.*

Allowing the appeal, the Court

HELD : 1. The occurrence was of 23.11.1997 at 09:00 PM in the agricultural field of complainant (PW-3), where it was dark. B **The panchnama of the scene of occurrence (Ex.P-73) shows no indication of the electric light either in the animal shed situated behind the house of complainant or that there is any electric pole anywhere in the vicinity or that there is a light on the well which is supplying water. Case of prosecution is that appellant and six** C **other co-accused surrounded the complainant party and there were three gunshots fired. The injured witness (PW-6) in his cross-examination has admitted that he had not stated anything about the burning light either in the animal shed or anywhere in the vicinity. In the absence of any evidence as to the light aspect, the possibility of identifying the accused in the darkness of the** D **agricultural field of the complainant, particularly at 09:00 PM becomes doubtful. It is also to be pointed out that there is no evidence as to whether there was moonlight on 23.11.1997 and complainant has also not stated that he has identified the appellant or other co-accused with the help of moonlight. In the absence of** E **evidence as to the availability of sufficient light, the identification of the accused and the overt act attributed to the appellant becomes doubtful. [Para 10] [315-E-H]**

2. PW-1-doctor opined that cause of death was due to rapturing of trachea, oesophagus and difficulty in breathing. In F **post-mortem certificate-Ex.P-52, PW-1 has not stated that the injury was caused either by bullet or by pellets. PW-1 has also admitted that he has not seen the recovered articles i.e. the recovered rifle and the double barrel gun. In the absence of definite evidence as to which of the fire arm caused the fatal injury, the same cannot be attributed to the appellant from whom rifle** G **was recovered. [Para 12] [316-F-G]**

3. Case of prosecution is that as per disclosure statement of accused Nos.1 and 2, a rifle was recovered from the house of accused No.1 which has a single barrel. Similarly, as pointed out earlier in post-mortem certificate (Ex.P-52), a double barrel gun H **was also recovered from the house of accused No.2. It is merely**

stated that there were puncture wounds. The post mortem certificate does not state as to whether those gun wounds were caused by rifle or by gun. In the absence of any definite indication as to whether those fatal wounds were caused either by rifle or by double barrel gun, the courts ought not to have held appellant-accused No.1 responsible for the fatal fire arm wounds on the body of deceased. [Para 13] [316-G-H; 317-A-B]

4. The police officer-Investigating Officer has spoken about the recovery of the fire arms. There is no rule of law that the evidence of police officer has to be discarded or that it suffers from some inherent infirmity. But in the facts and circumstances of the present case where two fire arms viz. rifle and gun are said to have been used by accused Nos.1 and 2 respectively, prudence requires corroboration of recovery of the weapons from independent source. When panch witnesses in Ex.P-79 have turned hostile, the court has to seek corroboration from other sources regarding the recovery of weapons. [Para 14] [317-C-D]

5. There was darkness at the time and the place of occurrence making it difficult for the witnesses to identify the assailants. The evidence of eye-witnesses are contradictory to each other as to the firing of the fatal blow. The guilt of the accused has not been proved beyond reasonable doubt and the benefit has to be given to the accused. [Para 16] [317-H; 318-A]

Mahesh Dattatray Thirthkar v. State of Maharashtra **(2009) 11 SCC 141 : [2009] 3 SCR 1122 – referred to.**

Case Law Reference

[2009] 3 SCR 1122	**referred to**	**Para 17**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1123 of 2010.

From the Judgment and Order dated 05.03.2009 of the High Court of Gujarat at Ahmedabad in Criminal Appeal No. 10 of 2001.

Anuj Bhandari, Ms. Disha Bhandari, Abhinav Srivastava, Ms. Ruchi Kohli, Advs. for the Appellant.

Ms. Hemantika Wahi, Ms. Jesal Wahi, Ms. Vishakha, Advs. for the Respondent.

A The Judgment of the Court was delivered by

R. BANUMATHI, J.

1. This appeal arises out of the judgment dated 05.03.2009 passed by the High Court of Gujarat at Ahmedabad in Criminal Appeal No.10 of 2001 in and by which the High Court affirmed the conviction of
B appellant-accused No.1 under Section 302 IPC read with Section 34 IPC and the sentence of life imprisonment imposed upon him. The High Court also affirmed the conviction of the appellant under Section 307 IPC read with Section 34 IPC and under Section 25(c) of the Arms Act and the sentence of imprisonment imposed upon him. The High Court
C acquitted the appellant for the offence under Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

2. Brief facts which led to filing of this appeal are:-

On 23.11.1997 at about 09.00 PM, accused Nos.1 to 5 along with
D their servant (accused No.6) and another one accused gathered themselves and started ploughing the disputed road with a tractor for which a civil suit in Regular Suit No.131 of 1997 filed by complainant-Somabhai Rupabhai (PW-3) against appellant-accused No.1 and accused No.3 was already pending before the Court of Civil Judge, Modasa.
E According to the prosecution, the said road was used by the complainant and his family members for going to and fro. On the date of incident i.e. on 23.11.1997 at about 09:00 PM, when accused persons were ploughing the road, the complainant and his family members intervened and prevented them from carrying out the ploughing activities on which accused started abusing the complainant and his family members with caste remarks.
F Due to fear, complainant and his family members went back to their houses which were near to the place of incident. In the meantime, appellant/accused No.1-Ashoksinh Jayendrasinh and accused No.2-Kalusinh @ Harpalsinh armed with guns, accused No.4-Balbadhra Singh armed with stick and accused No.3-Gayendra Singh who was driving
G the tractor came there. Thereafter, accused Nos.1 and 2 fired three gun shots which hit deceased Somiben, wife of Hirabhai (PW-5), Ramanbhai (PW-6) and Nandaben (PW-7) due to which Somiben died on the spot and PWs 6 and 7 got injured. Thereafter, all the accused ran away from the place of incident. On 24.11.1997, on the basis of the complaint lodged by complainant (PW-3), FIR was registered against all the accused

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under Sections 302, 307, 120B IPC read with Section 34 IPC, 143, 147, 148, 149, 506(II), 323 and 504 IPC, under Section 25(c) of the Arms Act and under Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. A

3. Upon completion of investigation, charge sheet was filed against the appellant and other co-accused under Sections 302, 307, 120B IPC read with Section 34 IPC, 143, 147, 148, 149, 506(II), 323 and 504 IPC, under Section 25(c) of the Arms Act and under Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. B

4. To bring home the guilt of the accused, the trial court examined four eye-witnesses viz. complainant-Somabhai Rupabhai (PW-3), Hirabhai Somabhai (PW-5) and injured eye-witnesses-Ramanbhai Mulabhai Rangjibhai (PW-6) and Nandaben Hirabhai (PW-7), Dr. Rohit Kumar (PW-1) who conducted the post-mortem on the dead body of deceased Somiben, Dr. Deshmukh Hiralal (PW-4) who examined the injured eye-witnesses and other witnesses. Upon consideration of the evidence of injured eye-witnesses (PWs 6 and 7), recovery of weapons and other evidence on record, the trial court *vide* its judgment dated 15.11.2000 convicted the appellant-accused No.1 and accused No.2 under Section 302 IPC read with Section 34 IPC and sentenced them to undergo life imprisonment along with fine of Rs.5,000/- each. They were also convicted under Section 307 IPC read with Section 34 IPC and were sentenced to undergo rigorous imprisonment for seven years along with fine of Rs.5,000/- each. They were also convicted under Section 25(c) of the Arms Act and sentenced to undergo rigorous imprisonment for three years along with fine of Rs.500/- each and under Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and sentenced to undergo rigorous imprisonment for six months along with fine of Rs.500/- each. The trial court acquitted accused No.1 and 2 under Sections 147, 148, 149, 323, 504 and 506(II) IPC. The trial court also acquitted accused No.3 to 7 from all the charges. Being aggrieved, appellant-accused No.1 and accused No.2-Kalusinh filed Criminal Appeal No.10 of 2001 before the High Court. Challenging the acquittal of co-accused-No.3 to 7, respondent-State has also filed Criminal Appeal No.127 of 2001 before the High Court. By the common judgment dated 05.03.2009, the High Court affirmed the conviction of appellant-accused No.1 under Section 302 and Section 307 IPC read with Section C D E F G H

34 IPC and under Section 25(c) of the Arms Act. The High Court acquitted the appellant under Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and also acquitted accused No.2-Kalusinh from all the charges by giving him the benefit of doubt. By the same judgment, the appeal preferred by the respondent-State was dismissed by the High Court.

5. Being aggrieved by the dismissal of his appeal, appellant-accused No.1 has preferred this appeal. Challenging the acquittal of accused No.2-Kalusinh, respondent-State has filed Criminal Appeal No.1125 of 2010 which we have dismissed *vide* order dated 02.05.2019.

6. Mr. Anuj Bhandari, learned counsel appearing on behalf of the appellant has submitted that the occurrence was of 23.11.1997 at 09:00 PM in the agricultural field of complainant-Somabhai Rupabhai (PW-3) and there is no evidence as to the electric light burning at the time of occurrence so as to enable the complainant and the witnesses to identify the assailants and in the absence of any vital evidence regarding the light, identity of the assailants by the witnesses ought not to have been relied upon. It was further submitted that two panch witnesses viz. Mukeshkumar Pranlal Sheth (PW-12) and Ramanbhai Hirabhai Panchal (PW-17) have not supported the panchnama (Ex.P-89) and in the absence of proof of recovery of weapons from the appellant, the fatal injuries sustained by deceased Somiben cannot be attributed to the appellant. It was submitted that in the post-mortem certificate (Ex.P-52), Dr. Rohit Kumar (PW-1) has stated that there were puncture wounds but it is not clear as to whether those wounds were caused by rifle or by gun. It was urged that in the absence of any definite evidence as to which weapon-whether rifle or gun had caused the injuries, the court ought not to have convicted the appellant-accused No.1 under Sections 302 IPC read with Section 34 IPC and Section 307 IPC read with Section 34 IPC and under Section 25(c) of the Arms Act and prayed for giving benefit of doubt to the appellant-accused No.1.

7. Ms. Jesal Wahi, learned counsel appearing on behalf of the respondent-State has taken us through the judgment of the trial court and the impugned judgment and submitted that the evidence of injured eye-witnesses (PWs 6 and 7) and the evidence of complainant-Somabhai Rupabhai (PW-3) and other eye-witness Hirabhai (PW-5) are cogent and consistent and the courts below rightly convicted the appellant-accused No.1 and the concurrent findings warrant no interference.

8. We have carefully considered the rival contentions and perused the impugned judgment and the judgment of the trial court and other materials placed on record. A

9. As per the prosecution case, the motive for the occurrence is regarding the dispute over the enjoinment of the road in Survey No.95 of Dhemda Village belonging to accused No.1. Complainant-Somabhai Rupabhai (PW-3) filed a civil suit in Regular Suit No.131 of 1997 for the land measuring four acres and twenty-two *guntas* in the Court of Civil Judge, Modasa against accused Nos.1 and 3. In the said suit, by the order dated 16.10.1998 (Ex.P5), the court has ordered "status quo". Against the said order of status quo, accused has filed appeal in CFO No.67 of 1998 and the copy of said appeal has been marked as Ex.P-126. Regarding the enjoyment of the land bearing Survey No.95, there was enmity between the parties and thus the prosecution has proved the motive. Proof of motive was taken as one of the important aspects by the trial court as well as by the High Court. Though motive is a relevant aspect, it is to be kept in view that motive is a double edged weapon. Proof of motive merely adds to the value of evidence of the eye-witnesses. B C D

10. The occurrence was of 23.11.1997 at 09:00 PM in the agricultural field of complainant-Somabhai Rupabhai (PW-3), where it was dark. The panchnama of the scene of occurrence (Ex.P-73) shows no indication of the electric light either in the animal shed situated behind the house of complainant or that there is any electric pole anywhere in the vicinity or that there is a light on the well which is supplying water. Case of prosecution is that appellant and six other co-accused surrounded the complainant party and there were three gunshots fired. The injured witness (PW-6) in his cross-examination has admitted that he had not stated anything about the burning light either in the animal shed or anywhere in the vicinity. In the absence of any evidence as to the light aspect, the possibility of identifying the accused in the darkness of the agricultural field of the complainant, particularly at 09:00 PM becomes doubtful. It is also to be pointed out that there is no evidence as to whether there was moonlight on 23.11.1997 and complainant has also not stated that he has identified the appellant or other co-accused with the help of moonlight. In the absence of evidence as to the availability of sufficient light, the identification of the accused and the overt act attributed to the appellant becomes doubtful. E F G H

A 11. In the complaint filed by complainant-Somabhai Rupabhai (PW-3), it has been stated that appellant/accused No.1-Ashoksinh Jayendrasinh and accused No.2-Kalusinh fired three gun shots from their guns. Whereas, in the statement before the court, PW-3 has stated that "*Kalu Sinh fired three shots which injured Nandaben and Ramanbhai"*. As per the case of complainant as stated in the court, B total three gun shots were fired and all three were fired by accused No.2-Kalusinh. As rightly submitted by the learned counsel for the appellant, there are contradictions in the case of the prosecution as to who fired those gun shots and the benefit of doubt is to be given to the appellant.

C 12. Dr. Rohit Kumar (PW-1) has conducted the post-mortem on the dead body of deceased Somiben and as per post-mortem certificate (Ex.P-52), PW-1 noted the following injuries:-

(i) One entry wound on left side of chest above the nipple of 0.5 cm diameter.

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(ii) Puncture wound, round, on left side of neck measuring 0.5 cm.

(iii) Injury No. (i) passed into the back forming Exit wound at the side of middle of spine of right scapula measuring 1 cm in diameter. At the back at the level of 1st Exit wound 5th rib E was broken. At the level of 2nd Exit wound 7th rib was broken at the back side of left chest.

PW-1 opined that cause of death was due to rapturing of trachea, oesophagus and difficulty in breathing. In post-mortem certificate-Ex.P-52, PW-1 has not stated that the injury was caused either by bullet F or by pellets. PW-1 has also admitted that he has not seen the recovered articles i.e. the recovered rifle and the double barrel gun. In the absence of definite evidence as to which of the fire arm caused the fatal injury, the same cannot be attributed to the appellant from whom rifle was recovered.

G 13. Case of prosecution is that as per disclosure statement of accused Nos.1 and 2, a rifle was recovered from the house of accused No.1 which has a single barrel. Similarly, as pointed out earlier in post-mortem certificate (Ex.P-52), a double barrel gun was also recovered from the house of accused No.2. It is merely stated that there were H puncture wounds. The post mortem certificate does not state as to

whether those gun wounds were caused by rifle or by gun. In the absence of any definite indication as to whether those fatal wounds were caused either by rifle or by double barrel gun, the courts ought not to have held appellant-accused No.1 responsible for the fatal fire arm wounds on the body of deceased Somiben. A

14. Yet another circumstance raising doubts about the prosecution case is to be pointed out. Mukeshkumar Pranlal Sheth (PW-12) and Madhusudanbhai Arvindbhai Pandya (PW-13) are the witnesses to the panchnama (Ex.P-79) for recovery of weapons from accused Nos.1 and 2 and both of them have not supported the prosecution case. The police officer-Investigating Officer has spoken about the recovery of the fire arms. There is no rule of law that the evidence of police officer has to be discarded or that it suffers from some inherent infirmity. But in the facts and circumstances of the present case where two fire arms viz. rifle and gun are said to have been used by accused Nos.1 and 2 respectively, prudence requires corroboration of recovery of the weapons from independent source. When panch witnesses in Ex.P-79 have turned hostile, the court has to seek corroboration from other sources regarding the recovery of weapons. B C D

15. Learned counsel appearing for the appellant mainly contended that fired bullet was not recovered and only empty cartridges made of bronze were recovered near the mango tree. Contention of the appellant is that since the fired bullet which caused fatal injuries to the deceased was not recovered, the ballistic expert cannot give definite opinion as to which weapon was used to cause the fatal gun wounds to the deceased. Learned counsel further contended that ballistic expert has stated that he only tested the fired bullet C2 from rifle C1 and examined only empty bullet recovered and therefore, from the evidence of ballistic expert, it cannot be said that gun shot injury was caused to the deceased only from the rifle recovered from the appellant. Non-recovery of bullet cannot be said to be fatal to the prosecution case. Since benefit of doubt is given to the accused on other aspects like darkness in the place of occurrence and doubts as to who caused fatal injuries, we are not inclined to consider the merits of the contention assailing the opinion of the ballistic expert. E F G

16. There was darkness at the time and the place of occurrence making it difficult for the witnesses to identify the assailants. The evidence of eye-witnesses are contradictory to each other as to the firing of the H

A fatal blow. The guilt of the accused has not been proved beyond reasonable doubt and the benefit has to be given to the accused.

17. We are conscious that the Supreme Court would be slow to interfere with the concurrent findings of the courts below. In an appeal under Article 136 of the Constitution of India, concurrent findings of fact B cannot be interfered with unless shown to be perverse (vide *Mahesh Dattatray Thirthkar v. State of Maharashtra* **(2009) 11 SCC 141**). Where the appreciation of evidence is erroneous, the Supreme Court would certainly appreciate the evidence. In our considered view, the High Court ought to have weighed and considered the materials. When the findings of the trial court and the High Court are shown to be perverse C and there is no proper appreciation of evidence qua the appellant, the Supreme Court would certainly interfere with the findings of fact recorded by the High Court and the trial court. It is to be pointed out that the High Court has not appreciated the oral evidence, other evidence and the points raised by the appellant-accused No.1. In our considered view, the D impugned judgment affirming the conviction of the appellant-accused No.1 cannot be sustained and the impugned judgment is liable to be set aside.

18. The conviction of appellant-accused No.1 under Section 302 IPC read with Section 34 IPC and Section 307 IPC read with Section 34 E IPC and under Section 25(c) of the Arms Act is set aside and this appeal is allowed. The appellant/accused No.1-Ashoksinh Jayendrasinh is ordered to be released forthwith unless his presence is required in any other case.

Ankit Gyan Appeal allowed.