

Kanbi Nanji Virji and Others

Vs

The State of Gujarat

Criminal Appeal No. 20 of 1967

(V. Bhargava, K.S. Hegde JJ)

06.10.1969

JUDGMENT

HEGDE, J. -

1. This is an appeal by special leave. In the Trial Court as many as eight persons were charged under Section 147, 148, 201/149, 302/149 and 447/149, I.P.C. They were also charged alternatively under Section 323/34, 302/34, 307/34, 447/34 and 201/34, I.P.C. The learned trial Judge acquitted A-6 to A-8 of all the charges for which they were tried. He convicted accused 1 and 3 under the second part of Section 304, I.P.C. and sentenced each of them to suffer rigorous imprisonment for two years for the said offence. He convicted accused 2, 4 and 5 under 323, I.P.C. and sentenced each of them to suffer imprisonment for 6 months for the same. Both the State as well as the convicted persons went up in appeal against the judgment of the Trial Court to the High Court of Gujarat. The State was aggrieved by the acquittal of the accused under the murder charge. The High Court accepted the appeal of A-1 and A-3 and acquitted them. It also accepted the appeal of the State in part and convicted accused 2, 4 and 5 under the 1st Part of Section 304/34, I.P.C. For that offence each one of them was sentenced to suffer rigorous imprisonment for five years.

2. The incident giving rise to this case occurred at about noon on September 22, 1964 in Survey No. 265 on the outskirts of the village Ghanad of Lakhtar taluka in Surendranagar District. According to the prosecution case deceased Sabalsing and P.W. 5 were the owners of the said Survey No. 265. The field in question lies by the side of the road running North to South from Ghanad village to Nana Ankewalia. Survey No. 265 is about a mile from the village site of Ghanad. Across the road mentioned earlier, some of the villagers of Ghanad own lands. To reach those lands as well as to reach Nana Ankewalia, the villagers had to go by the road referred to earlier. But that road used to be submerged during rainy season and during that time, the villagers used to pass through the uncultivated portion of Survey No. 265 known as Mochan land.

3. The prosecution evidence discloses that on September 21, 1964 i.e. a day before the occurrence when accused 4 and 5 who have fields on the eastern side of the road were passing through the Mochan Land, they were obstructed by deceased Sabalsing. He warned them not to go by that way thereafter though as a matter of concession it is said he allowed them to go over the land on that day. On the day of the occurrence, it is said that A-4 and A-5 again tried to go by that way. At that stage Sabalsing and his brother P.W. 5 obstructed them. On being so obstructed A-4, returned to the village and thereafter A-1 to A-5 came there armed with spades and sticks. When they tried to pass through the Mochan land, they were obstructed by deceased Sabalsing, deceased Bhupatgar and P.Ws. 5 and 6. On being so obstructed, the deceased as well as P.Ws. 5 and 6 were attacked by A-1 to A-5 as a result of which Sabalsing and Bhupatgar died and P.Ws. 5 and 6 seriously injured.

4. The defence version as given by A-1 is that at about noon on the day of occurrence, A-4 came to him and told him that five to six Darbars and Bavas (evidently referring to the deceased persons and P.Ws. 5 and 6) had assaulted his brother on the previous day and had restrained him from passing through the Mochan and again on that day those Darbars and Bavas had assaulted him and obstructed him from going to his lands. He also told him that he had given that complaint to the Sarpanch and that he had come to tell him thereafter. He further says that after receiving that information he went to the Panchayat Office. At that time he saw village people running to Nana Ankewalia road. He thought that there may be a fight and so he went along the Ankewalia road. At the scene of the occurrence he found two groups of persons facing each other. Very soon thereafter Sabalsing inflicted knife blows on the chest and abdomen of A-2, his brother, who on receiving those blows fell down and thereafter Sabalsing inflicted knife blows on him (A-1); then he also fell down unconscious. He pleads that he does not know what happened subsequently.

5. The High Court has substantially accepted the plea of A-1. It has come to the conclusion that he is a responsible person. He had no motive to attack the deceased persons or P.Ws. 5 and 6. He had gone to the scene on a peaceful mission and that he is likely to have been attacked by the prosecution party during the course of the melee. The only witnesses who speak to the occurrence are P.Ws. 5 and 6. Both the Trial Court as well as the High Court wholly disbelieved P.W. 6. They have entirely rejected his testimony. So far as P.W. 5 is concerned, he has been disbelieved in material particulars by the High Court but yet relying on some portions of his evidence, accused 2, 4 and 5 have been convicted. The question for our consideration is whether there is reliable evidence to support their conviction.

6. The first question that arises for decision is whether the villagers of Ghanad or at any rate those villagers who had fields on the eastern side of Ankewalia road had a right of way over the Mochan land. Even according to the prosecution case, the villagers used to pass through the Mochan land whenever the road was submerged. Admittedly on the day of the occurrence, the road was submerged. Therefore prima facie Sabalsing and P.W. 5 were not justified in obstructing A-4 and A-5 when they tried to go over that land. The High Court was unable to come to any positive conclusion whether the villagers had acquired a prescriptive right of way over that land about it did come to the conclusion that the assertion of that right by the villagers was a bona fide one.

7. As mentioned earlier both the Trial Court and the High Court have completely rejected the testimony of P.W. 6. Hence the prosecution case entirely rests on the testimony of P.W. 5. P.W. 5 was not believed by the High Court in several important respects. It came to the conclusion that he was not a truthful witness. It opined that his version as to the incident is a garbled one and that he has suppressed the part played by him and others on his side. But yet the High Court evidently influenced by the fact that two persons had been killed during the incident undertook a salvaging operation in an attempt to fish out truth out of the mass of false evidence given by him. In doing so it went in search of some corroborative evidence. According to P.W. 5, after the occurrence he ran to the house of Kasalsing, P.W. 10, and informed him about the occurrence. The High Court thought that to the extent the evidence of P.W. 5 tallies with the information given by him to Kasalsing the same may be accepted as true. But yet the High Court in many respects disbelieved the testimony of P.W. 5 even when it accorded with the version given by him to P.W. 10. It came to the conclusion that P.W. 5 did not give a full and correct version to P.W. 10. In particular it opined that while informing Kasalsing about the incident, P.W. 5 deliberately suppressed the part played by the persons on his side. Having come to the conclusion that right from the beginning P.W. 5 was giving a distorted version of the incident, the High Court was not right in holding that any portion of P.W. 5's evidence can be relied upon merely because that some portions of his testimony in court accords

with the version given by him to P.W. 10. It is true that often times the courts have to separate the truth from falsehood. But where the two are so intermingled as to make it impossible to separate them, the evidence has to be rejected in its entirety. The High Court overlooked this well-accepted principle. If we reject the evidence of P.W. 5, as we think we should, the prosecution case must be held to be unsubstantiated because there is no other evidence to support it. Whatever other evidence was there it has been rejected by the Trial Court as well as by the High Court as false. In this view it is not necessary to go into the question whether Kasalsing's evidence comes within the scope of Section 157 of the Evidence Act.

8. The High Court has found, in our opinion, rightly, that there was melee at the time of the incident and the two groups indulged in a free fight as a result of which four persons were injured on the side of the prosecution and two on the opposite side. A-1 and A-2 had sustained very serious injuries, several of which were incised injuries. At one stage it was thought that A-2 may not survive. His condition was so precarious that it became necessary to immediately operate upon him. The deceased Sabalsing had sustained two injuries only one out of them was a serious one. The other was a mere abrasion. The head injury proved fatal. Bhupatgar had received several injuries. Similarly P.Ws. 5 and 6 had also received several injuries. Once we come to the conclusion that the injuries sustained by the persons were in the course of a free fight, as the High Court has come to, then only those persons who are proved to have caused injuries can be held guilty for the injuries caused by them.

9. The High Court has come to the conclusion that it is not possible to come to any positive conclusion as to how the incident commenced as there is no reliable evidence about the same. We agree with that finding. In fact the first information sent to the police by Sajubha on the basis of the information given to him by Kunverji Khushal is that there was a 'Tofan' (fight or riot) at the scene of the occurrence. That was also the information given by P.W. 5 to P.W. 10. Therefore the evidence of P.W. 5 that it was an one sided attack appears to be baseless.

Dealing with the actual occurrence this is what the High Court observed :

"We are not prepared to accept Parbatsing's (P.W. 5) word regarding the participation of the different accused in the infliction of the injuries on Bhupatgar and Sabalsing and Parbatsing. The reason is that judging by the number of injuries on both the sides, something in the nature of a melee must have taken place and it would be difficult to judge who inflicted what blow on what part of the body in the course of such a melee."

Again in another portion of the judgment it observes :

"As to what exactly transpired at the time of the time of the incident and who acted as aggressors and who dealt with the first blow, there is no clear evidence available on the record of the case. According to the evidence of Parbatsing, to the extent that it is corroborated by Kasalsing the persons on the side of the accused acted as aggressors but we are not prepared to accept Parbatsing's version on that aspect of the matter, when he is silent about the injuries on accused Nos. 1 and 2."

10. After having observed as above, strangely enough, the High Court still came to the conclusion that accused 2, 4 and 5 went to the scene of occurrence with the common intention of forcing their way through the Mochan, by force, if necessary. The evidence on record discloses that as soon as A-

4 came back to the village and informed the villagers that Sabalsing and his brother are not allowing them to pass through the Mochan there was a drum beating at the instance of A-2. It is most likely that thereafter the villagers gathered there and all of them went to Mochan with a view to see that their right of way is not obstructed. In our opinion, the High Court was not right in relying on the testimony of P.W. 5 to come to the conclusion that only A-1 to A-5 went to the scene at that time. This finding of the High Court in a way conflicts with its findings as regards the role played by A-1 at the time of the incident. The probabilities are in favour of the version put forward by A-1. There was no basis for the High Court's finding that when A-2, 4 and 5 went to the scene they had the common intention of forcing their way, using violence, if necessary. At one stage the High Court arrived at a finding that the only common intention that the villagers had was to enforce their right of way. Such a common intention cannot be considered as a common intention to commit a criminal act within the meaning of Section 34, I.P.C. The inference drawn by the High Court that A-2, A-4 and A-5 had a common intention to force their way through the Mochan, using violence if necessary was evidently drawn solely on the basis of the fact that at the time of the occurrence A-2 had spade with him and A-4 and A-5 had sticks in their hands. From the fact that one villager had a spade in his hand and the other two had sticks in their hands, it is not safe to draw the inference that they intended to commit any offence. Again on the material on record, it is not possible to draw a firm inference that A-4, A-2 and A-5 had any common intention. It is not proved that they had met together earlier. From the proved facts, it is not possible to draw a conclusive inference that they acted in concert, which is the essential requirement of Section 34, I.P.C. Again for coming to the conclusion that A-2 had a spade and A-4 and A-5 had sticks in their hands, we have to largely rely on the testimony of P.W. 5, a wholly unreliable witness.

11. Even if the High Court is right in its conclusion that the common intention of A-2, A-4 and A-5 was to force their way through Mochan by using force, if necessary, it could not have convicted them under Section 304, I.P.C., because it is not the finding of the court they intended to cause any injury to any person. The High Court has failed to bear in mind the distinction between Section 34 and Section 149 of I.P.C.

12. In the result this appeal is allowed and the appellants are acquitted.

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