

Ahmed Suleman Bhorat and Others

Vs

The State of Gujarat

Criminal Appeal No. 198 of 1969

(J. M. Shelat, G. K. Mitter JJ)

02.03.1971

JUDGMENT

MITTER, J. -

1. In this appeal by special leave from a judgment of the Gujarat High Court the point canvassed before us was that inasmuch as the High Court found itself unable to rely fully on the evidence of six of the main prosecution witnesses with regard to at least two of the appellants before it in view of the evidence as to alibi, it had gone wrong in accepting the evidence with regard to the appellants before us and upholding their conviction.

2. The relevant facts for the disposal of the appeal may be stated as follows. The village of Nani Naroli in the District of Surat has a population of roughly 3,500. The Bhora community to which the appellants belong command a majority thereof. The other community which has any strength is that of the Maleka commanding a population of about 1,000. Both these communities are Muslim. Besides these two there is a small population of other people composed of Hindus and Vasavas. There was a good deal of hostility between Bhoras and the Maleks mainly engendered as a result of the Gram Panchayat elections in the middle of the year 1967 whereat the Bhoras carried the day, and the original accused No. 1 and one Lalji were elected as Sarpanch and Deputy Sarpanch defeating the two Malek candidates. A Vasava by name Punia Jafra was murdered a few weeks before November 9, 1967, when the incident out of which this appeal arises took place. Some of the Maleks, namely, Gulab Amir and his sons Vazir and Kalu, the last two losing their lives in the aforesaid incident, had helped the police in tracing out the dead body of Punia and had taken part in the investigations. This was followed by the arrest by the police of the original Accused 1 to 10 in this case. Although they were released by the Judicial Magistrate on bail on October 11, 1967, applications were made to him as well as to the Sessions Judge at Surat to cancel their bails. It was alleged in these applications that the said accused were threatening to kill the persons who had helped the police in the investigation of Punia's murder and had given evidence against them. The Judicial Magistrate at Kathor had fixed the hearing of the application to cancel the bail of Accused 1 to 10 on November 7, 1967, but the application was not heard on that day because the notices had not been served on the accused persons. Not unnaturally this action of Gulab and his son considerably angered the Bhora community and in particular the said ten accused. What exactly sparked off the trouble on the 9th November is not quite clear. The prosecution case and the defence version about its origin conflict with each other. However, there can be little doubt that some sort of affray did take place a short while before this incident and accused No. 7 (one of the appellants before this Court), accused Nos. 28 and 36 and one Ayeshabibi were injured. A complaint was lodged at the police station against four of the Maleks including the three persons who lost their lives later. According to the prosecution, about 4.30 p.m. on November 9, 1967 a large crowd of

Bhoras collected near a well about 140 feet from the house of Vazir armed with weapons like Dharias, spears, axes and sticks and proceeded towards the house of Vazir. Two of the accused, i.e., Nos. 12 and 13 (appellants before this Court) were also in the crowd with their guns. On seeing the crowd approaching Vazir's wife Subhanbibi (P.W. 36) closed the front as well as the back doors of their house but the crowd began to break them open. Vazir who was in the house went upstairs in order to avoid capture. Some members of the crowd rushed towards the back of Vazir's house while some of them managed to get on to the upper portion of Vazir's house and others scaled the roof of his house. Vazir managed to get into Mohmad's house and catching Vazir in the upper portion of Mohmad's house killed him and threw his body down on the ground below. At or about this time some 14 or 15 other members of the crowd rushed into the courtyard between the houses of Rehman which lay in between Vazir's, house and Hussain Gulab and Mohmad Mustafa's houses and brutally injured Rasul Amir who was there. Someone in the crowd shouted that Balu and Kalu, members of the Malek community, were running away. Kalu was given a chase up the road, captured and killed. Thereafter the dead bodies of Vazir and Rasul were taken away by some members of the crowd and left on the edge of the road about 125 feet away from Vazir's house. It appears that there were four armed police constables posted in the village for the purpose of maintaining law and order in view of the prevailing unsettled conditions. They came to the place where the quarrel was taking place and found the crowd attacking Vazir's house. One of them wanted permission to fire his rifle but this was rejected by the Head Constable. This constable went in a truck to the police station at Mangrol where he gave a report about the quarrel between the Maleks and Bhoras going in the village. The police Sub-Inspector who was away from the station at that time came to the village round about 10 a.m. in the night and recorded the complaint of Gulab Amir at about 11 p.m.

3. No less than 43 persons were charged with having formed an unlawful assembly and taking part in the incident. At the trial all the accused pleaded not guilty but four of them, accused 1, 3, 12 and 13 pleaded the defence of alibi. The appellants before us are original accused 2, 5, 7, 12 and 13.

4. The prosecution examined as many as 19 witnesses. The Sessions Judge rejected the evidence of a number of them as unreliable but applying the test of there being consistent evidence of at least four reliable witnesses as against thirteen of the accused persons as members of an unlawful assembly and responsible for the killings, he found them guilty of the offences punishable under Sections 147, 148 and 302 read with Section 149, I.P.C. He acquitted the others by the application of the test mentioned above.

5. All these thirteen accused went up in appeal to the High Court while the State preferred an appeal against the acquittal of thirty persons. The High Court rejected the State's appeal and allowed the appeal of eight out of the thirteen appellants before it. According to the High Court there was no dispute :

"that there was a crowd of Bhoras assembled near the well and that the persons forming this crowd did not go to the house of Vazir, Rasul and Kalu. The dispute that was pressed in the Trial Court and which is also pressed before us centres round the reliability of the witnesses examined and the identification of a particular accused by those witnesses."

6. There can be no doubt whatsoever that a large number of persons must have been taken part in killing the three Maleks. The evidence of Dr. Pandya shows that there were no less than 45 injuries on different parts of the body of Vazir. There consisted of wounds and contusions by means of

sharp-edged instruments and sticks. The wounds, according to the doctor, could have been caused by weapons like spears and Dharias. One injury, viz., injury No. 28, was individually sufficient to cause the death. On the body of Kalu 44 injuries were found caused by spears, Dharias and sticks. On the body of Rasul as many as 40 injuries were found 37 of which were wounds.

7. The High Court relied mainly upon the evidence of six witnesses and although some doubt was cast about the reliability of two out of the above number it upheld the conviction of the five appellants before us. It will suffice for our purpose to examine the evidence of the other four witnesses to see whether notwithstanding the acquittal by the High Court giving the benefit of doubt to some, the testimony of these persons can be accepted for maintaining the conviction of the appellants.

8. The first witness to be considered in this connection is of Subhan Bibi (P.W. 36), widow of Vazir. Before the Sessions Court she stated that when she saw the crowd at the well shouting to kill Vazir, Rehman and Kalu, she could identify at least 26 persons including one absconding accused Ayub Zheri. She named all the 25 persons and identified them before the Court. Her evidence was that a number of persons had entered the house from the back and she even gave their names and identified them. She said that she had seen accused 1, 2 and 16 actually killing Vazir on the upper portion of Mohmad's house. According to her, accused 7, 8 and Ayub Zheri carried the dead body on to the road and left it there. The High Court examined some alleged infirmities in her evidence. This mainly related to the number of persons she had mentioned to others as having taken part in the crime. Reliance was placed on the fact that she had mentioned to the police about having seen 39 persons whereas in the Sessions Court she identified only 26. She however denied that she had given more than 26 names to the police. According to her father-in-law she had given the names of only 8 or 10 persons and no more. It was also pointed out that she had not said to the police that she saw the dead body of her husband being thrown on the ground from the upper storey of Mohmad's house. The High Court examined her testimony in great detail and agreeing with the Sessions Judge on this point accepted her evidence that it was reliable to the extent that she had given the names of eight persons, seven of them being appellants to the High Court who had entered her house on that afternoon and pursued her husband with the object of killing him. The High Court found that she had improved upon her story to the police before the Sessions Court but even then her evidence to the extent that accused 1, 2, 12 and 13 were amongst the persons who had entered her house from the back was acceptable. The High Court also accepted her testimony that accused 7, 8 and Abub Zheri and lifted the dead body of Vazir and left it on the road. According to the High Court the testimony of this witness showed that accused 2, 5, 7, 12 and 13 were members of an unlawful assembly.

9. The High Court did not accept the evidence of the prosecution witness, Yakub and we are leaving him out of account. The third witness relied on by the High Court was Yusuf young boy of 12 years. His version was that he had gone to the locality of Vazir's house at about 4 p.m. on the fateful day to see about the cattle in the shed belonging to his father and finding no cattle there he had gone to Vazir's house when he saw the crowd coming from the well of which he named no less than 27 persons. He also said that Subhanbibi had closed the door when he was inside the house. Accordingly to him five persons had entered Vazir's house from the front. The High Court rejected the defence comment that he was a chance witness and held that it was not unnatural for him to have gone there and being present on the spot. The five persons named by him as having entered Vazir's house were accused 1, 5, 8, 12 and 13. According to the High Court no contradiction had been shown as regards this part of his evidence and it found no reason to disbelieve him on this point.

10. The High Court rejected the evidence of Nathu Kala but accepted the evidence of Deva Namla (P.W. 10). This witness was not a member of either community. His house was immediately adjacent to Vazir's. According to this witness, at the time when the mob came to the house of Vazir he was in his own house and had seen the crowd approaching Vazir's house and breaking open the doors. He also said that certain persons had climbed on to the roof of Vazir's house and shouted that Vazir should be killed. He had heard two gun shots and taking fright had gone inside the house and closed the doors. He did not come out even when the police came there at about 10 p.m. The next morning he went to his fields and stayed away from his house for 3 or 4 days. His statement was recorded by the police on November 13, 1967. He named certain persons as having been in the crowd and identified among these accused 1, 2, 5, 7, 12 and 13. The High Court held that he was a natural witness and the mere statement to the police before November 13, was not enough to reject his evidence. Although he named one Ibrahim Suleman as a person seen among the crowd near Vazir's house, he could not properly identify that person among the accused before the Sessions Court. The High Court accepted his evidence as to the identification to eight accused including accused 1, 2, 5, 7, 12 and 13.

11. Leaving out of account the other witnesses whose testimony was accepted in part and rejected as to the rest by the High Court, we come to the prosecution witness, Halimabibi. Her version was as follows. She was working in the field of Vazir in the village Togapur. At about 4.30 p.m. on the 9th November she was going home following a foot track near the cart track along which Kalu was running when he was killed. According to this witness she was from a distance of about 50 or 100 feet that Kalu was running along Togapur road was chased by about 10 to 20 Bhoras. She identified 15 persons out of them including Ayub Zheri. According to her a gun was fired at Kalu's direction whereupon Kalu stopped and he was immediately pounced upon by the crowd and put to death. She went to the spot where Kalu was lying and after waiting for some time she went home. It was urged that she was a chance witness and that she had met Subhanbibi, widow of Vazir the same evening. The High Court took the view that these points did not detract from her credibility and there was no reason for her to concoct the whole untrue story if she had not seen the incident of Kalu being murdered. Excepting that she had gone in the identification of accused No. 33 there was nothing to reject her evidence as to the substantive identification of accused 1, 2, 3, 4, 5, 7, 8, 12 among others.

12. The High Court found the evidence of six of the prosecution witnesses acceptable, namely, Subhanbibi, widow of Vazir, Yusuf Gulab Malek, Deva Namla, Saberabibi, wife of Hussain Gulab and Halimabibi. The cumulative effect of the testimony of these witnesses was that accused 1 and 8 were two of the assailants of the Maleks on November 9. The High Court however took the view that there was reasonable doubt about the presence of accused 1 and 8 at Naroli at the time when the incident took place. For this the High Court relied mainly on the evidence of a Magistrate of Kathor to the effect that these two persons were present in his court at least till 2.30 or 3 p.m. on the day of the incident and Kathor being at a distance of 17 or 18 miles from the village where the occurrence had taken place they could not have been present at Nani Naroli between 4 and 4.30 p.m. We have looked into the evidence of the Magistrate and speaking for ourselves we are not disposed to place much reliance thereon but inasmuch as the High Court has acted on that in giving the benefit of doubt to accused 1 and 8 we propose to say nothing more on the subject.

13. We find that the evidence of at least four witnesses, Subhanbibi, Deva Namla, Yusuf Gulab Malek and Halimabibi discussed above are acceptable. Subhanbibi is the widow of one of the deceased. She was present in the house; she tried to save her husband; she saw a number of accused trying to break the doors open and she saw her husband being injured and his dead body being thrown on the ground and being carried away from there. Deva Namla was not an interested witness

at all. Yusuf Gulab Malek was a boy of 12 who could not have withstood cross-examination effectively unless he was speaking the truth. As regards Halimabibi the only interest if at all which she had in the deceased was that she had been working in the field of Vazir. But she gave a very consistent story of the chasing and killing of Kalu by some of the accused and she named and identified a number of them and was not shaken in cross-examination.

14. If the evidence of these four persons was accepted by the High Court - and we see no reason to the contrary - it must be held that the appellants were members of an unlawful assembly who were directly responsible for committing the crime of murder of three persons. We see no reason to take a view different from that of the High Court as regards their guilt and we accordingly dismiss the appeal.

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