Makan Jivan and Others

Vs

The State of Gujarat

Criminal Appeal No. 26 of 1969

(K. S. Hegde, A. N. Grover JJ)

30.04.1971

JUDGMENT

HEGDE, J. -

1. The appellants and one Dahya were tried before the Additional Sessions Judge, Surat in Sessions Case No. 13 of 1966, on his file. The second accused Ichhu and the afore-mentioned Dahya were tried for an offence under Section 302, read with Section 34, I.P.C. The first accused Makan Jivan and the 4th accused Jadav were tried for offences under Section 323, I.P.C. The Trial Court acquitted Dahya. It convicted accused No. 2, Ichhu under Section 302, I.P.C. and sentenced him to suffer imprisonment for life. Accused 1 and 4, viz. Makan Jivan and Jadav were found guilty of offences punishable under Section 323, I.P.C. For those offences each one of them was sentenced to undergo rigorous imprisonment for one month and also to pay fine of Rs. 50/-, in default to undergo further imprisonment for 15 days. The convicted accused went up in appeal to the High Court of Gujarat but their appeal was dismissed. Thereafter this appeal was brought by special leave.

2. The accused Ichhu, Dahya and Jadav are the sons of accused Makan Jivan. The accused own a field in Survey No. 9 in the village of Ckha. The adjoining field in Survey No. 6 was owned by P.W. 2 Lallubhai. The deceased Thakore and P.W. 3 Kantilal are the sons of P.W. 2 Lallubhai. P.W. 4 Divali is the wife of deceased Thakore. In between the field of P.W. 2 and that of the accused there is a stream.

3. According to the prosecution case the deceased Thakore and P.Ws. 2 to 4 worked in their fields on the day of the occurrence, viz. November 28, 1965. At about 4 p.m. on that day they began to water their brinjal plants by taking water from the stream that separates their field and the field of the accused. The accused were in their field at that time. The further case of the prosecution is that when Thakore and others were watering their field, all the accused came to the field of P.W. 2, in a body; at that time Accused 2 and 3 were armed with Bhallas and Accused 1 and 4 were armed with sticks; after coming there the accused with P.W. 2's party for taking water; then deceased Thakore told them that if they wanted they could also take water from the stream but there was no point in their abusing them and threatening them; but seeing the menacing attitude of the accused the deceased Thakore ran away from the place, then the accused pursued him, overlook him; Accused 2 Ichhu alias Chiman Makan gave a Dharia blow on his head; thereafter Accused 3 also gave him a blow; at the same time Accused 1 and 4 beat Kantilal and Divali; as a result of this assault Thakore sustained injuries. Thakore was immediately shifted to the hospital at Rander and admitted therein at about 6/15 p.m. The same day at about 8.10 p.m. Lallubhai as well as Kantilal were also admitted into the hospital for treatment. The first information report was laid before the police at about 7.15 p.m. on the same day. As the condition of Thakore was very critical, under medical advice he was

shifted to the Civil Hospital, Surat. He passed away on the night between the 29th and 30th.

4. The post-mortem examination of the deceased Thakore disclosed two external injuries. They are : (1) a difficult swellin on right side of the face, starting from of upper and of right ear to the angle of lower jaw 5" x 2" and (2) a punctured wound on left parietal region, posteriorly and towards mid-line 1/2" x 1/2" x 1/2" brain deep. On internal examination by P.W. 11, who conducted the post-mortem examination, the following injuries were noticed :

> "(i) The Rt. Parietal bone was broken into 6 pieces, varying in sizes from 1/4" to 1/2" to 1/2". The fracture extended up to the Rt. temporal bone and also to the left temporal bone in linear fashion in the size of 3" to 3 1/2".
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> (ii) The left parietal bone was fractured at the upper part in linear fashion from above downwards and foreward in the length of 4".
>
> (iii) A linear fracture extending from outer end of the fracture on left parietal bone, going backwards about 2 1/2" in length.
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> (iv) Rt. Parietal bone was fractured in the linear fashion at the back and middle part of the bone, about 3 1/4" long from above downwards.
>
> (v) A punctured wound on the left parietal region posteriorly and towards the mid line 1/2" x 1/4" x 1 1/2" brain deep.
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> (vi) Areas of covering corresponding to the fracture were torn. Brain substance was lacerated under fractured bone pieces. Blood clots were found on the substance of the brain under fractures.
>
> (vii) The second and third ribs were fractured.
>
> (viii) The right lobe of the liver was found to be ruptured posteriorly, 2" x 1/2" x 1/4".

5. According to that witness the external injury No. 2 could have been caused by a sharp cutting instrument and that injury was sufficient in the ordinary course of nature to cause death. He further opined that the rupture of the lobe of the liver was due to beating. There were no external marks over the liver. He also opined that the eternal injury No. 1 on the deceased could have been caused with a blow by a hard and blunt substance. The evidence of the doctor (P.W. 10) who examined the deceased at the first instance at Rander hospital does not fully accord with the evidence of P.W. 11. He noticed only one external injury on Thakore. But we are of opinion that P.W. 10 had not carefully examined the injured. Hence we are not inclined to attach much value to his testimony. As between P.W. 10 and P.W. 11, P.W. 11 necessarily had better opportunity of observing the injuries on the deceased.

6. As mentioned earlier P.Ws. 2 and 3 were also examined on the same evening. They were examined by P.W. 10. P.W. 10 noticed three injuries each on P.Ws. 2 and 3. They were simple injuries. P.W. 4 was not produced before the doctor for examination. Her evidence is to the effect that as her husband's condition was critical, she chose to be by his side and therefore she did not appear before the doctor for examination. There is no reason to dis-believe her evidence on this point.

7. The prosecution case is fully supported by the testimony of P.Ws. 2, 3 and 4. Their presence at the scene at the time of the occurrence is probabilised by the injuries sustained by them. As mentioned earlier, the first information report in this case was laid within about an hour after the occurrence. Therein all the details of the occurrence had been given. Further the injured persons were produced for medical examination very soon after the occurrence.

8. The Trial Court as well as the High Court found that till the time of the occurrence, there was no enmity between the families of P.W. 2 and that of the accused. Therefore, there was no motive for P.Ws. 2 to 4 to falsely implicate the accused. The accused have no alternative case as to how the deceased as well as P.Ws. 2 to 4 came to be injured. Their plea is one of total denial of their participation in the attack on the injured persons. P.Ws. 2 to 4 are not shown to have had any motive to falsely implicate the accused in the case. There can be no denying of the fact that the deceased as well as P.Ws. 2 to 4 have been attacked by someone. We fail to see why P.Ws. 2 to 4 should give up the real assailants and falsely implicate the accused between whom and themselves there was no enmity.

9. It is true that accused No. 3 has been acquitted by the Trial Court by giving him the benefit of doubt. In view of the conflict in the evidence given by P.Ws. 10 and 11, the Trial Court came to entertain some doubt as to participation of accused No. 3 in the assault. According to P.W. 10, there was only one external injury on the person of the deceased. But according to P.W. 11, there were two external injuries. The Trial Court thought that the possibility of the deceased having sustained only one blow on the head cannot be completely ruled out and therefore it acquitted accused No. 3 by giving him the benefit of doubt. We are not satisfied with the reasoning of the Trial Court but suffice it to say that finding of the Trial Court does not in any manner throw doubt on the veracity of P.Ws. 2 to 4.

10. The evidence of P.Ws. 2 to 4 has been corroborated by P.W. 5, who claims to have come to the scene immediately after the occurrence and seen the accused going away from the scene. The High Court has not relied on his testimony. For the purpose of this case, it is not necessary to consider whether his testimony is acceptable or not.

11. Comment was made of the fact that some of the independent witnesses who were said to have been present at the time of the occurrence have not been examined by the prosecution. There is no basis for this comment. It is not the prosecution case that at the time of the occurrence any one other than those mentioned above were present. It was said that some people including a servant of P.W. 2 came to the scene very soon after the occurrence. It is those persons that have not been examined. Their examination was unnecessary for unfolding the prosecution case.

12. Some doubt was sought to be cast on the genuineness of the first information report produced in this case. It appears that some correction regarding the month in which the complaint was made is noticeable from that document. The month was either corrected from 10 to 11 or from 12 to 11. Neither the person who recorded that complaint nor the complainant was questioned about that correction. There can be hardly any doubt as to the month in which that complaint must have been made. We have earlier seen when the injured persons were medically examined. It appears that a copy of the first information was received by the Magistrate on the 29th itself.

13. One other contention taken on behalf of the appellants was that they have not been given copies of some of the statements of the prosecution witnesses taken during the investigation. During the cross-examination of P.W. 3, it appears, he was asked whether he had signed the statement given by

him before the police and further whether P.W. 4 had put her thumb mark on her statement. He answered those questions in the affirmative. From that statement an argument was sought to be advanced that some of the statements recorded from the witnesses were not made available to the accused. This contention proceeds on the basis that P.Ws. 3 and 4, must have given more statements than one before the police. It may be noted that neither P.W. 4 was asked as to whether she had put any thumb mark on the statement given by her to the police nor was the investigating officer asked whether any witness had signed or put his thumb mark on his statement. Further, the statements made by witnesses during investigations should not be got signed by them if they are reduced into writing and in this case the investigating officer could not have thought that the witnesses so closely related to one another could ever have been gained over. Evidently the accused were trying to exploit the statement made by P.W. 3 under some misapprehension. But the learned Trial Judge would have done well to clear this point by questioning the investigating officer and by looking into the relevant records.

14. It was next urged that there was conflict between the medical evidence and the evidence of P.Ws. 2 to 4. This argument was based on the evidence give by P.W. 10. We have already mentioned that we would prefer to act on the testimony of P.W. 11 rather than on the testimony of P.W. 10. P.W. 11's evidence accords with the prosecution version.

15. The only other contention taken was that as the accused were not properly questioned under Section 342, Cr. P.C., the prosecution should fail. Section 342, Cr. P.C., provides that for the purposes of enabling the accused to explain any circumstances appearing in the evidence against him, the court may, at any stage of any inquire or trial without previously warning the accused, put such questions to him as the Court considers necessary, and shall for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. In the instant case what the Trial Court has done is that after reading out the statements made by the accused in the Committal Court, it merely asked them as to what they had to say about the prosecution evidence recorded in their presence. This is a wholly unsatisfactory way of questioning the accused. The Trial Court had a duly to put to each of the accused the various circumstances appearing against them and further put the prosecution case generally for the purpose of affording the accused an opportunity to explain the circumstances appearing against them. There is no doubt that the examination of the accused under Section 342, Cr. P.C. in this case is highly defective. But that does not by itself vitiate the trial. It is for the defence to satisfy the court that because of the defect in the procedure adopted accused have been prejudiced.

16. In Ajmer Singh v. The State of Punjab, (1953 SCR 418 : AIR 1953 SCJ 76 : 1953 SCJ 85.) this Court ruled that the duty of the Sessions Judge under Section 342, Cr. P.C. to examine the accused is not discharged by merely reading over the questions put to the accused in the Magistrate's Court and his answers, and by asking him whether he has to say anything about them. It is also not a sufficient compliance with the section to generally ask the accused that, having heard the prosecution evidence what he has to say about it. He must be questioned separately about each material circumstance which is intended to be used against him. The whole object of the section is to afford the accused a fair and proper opportunity of explaining the circumstances which appear against him and the questions must be fair and must be couched in a form which an ignorant or illiterate person may be able to appreciate and understand. It is, however, well settled that every error or omission in complying with Section 342 does not necessarily vitiate the trail. Errors of that type fall within the category of curable irregularities and the question whether the trial has been vitiated depends in each case upon the degree of error and upon whether prejudice has been or is likely to have been caused to the accused. Despite the defective questioning of the accused in that case the court came

to the conclusion that on the facts of that case, the accused were not prejudiced as the material evidence in that case was direct evidence and that evidence was taken in the presence of the accused who was represented by a counsel.

17. The facts before this Court in Bimbadhar Pradhan v. State of Orissa, (1956 SCR 206 : AIR 1956 SC 469 : 1956 SCJ 441.) are somewhat similar to those before us in case. Therein also the prosecution case rested on the testimony of the eye-witnesses. The only relevant question put to the accused in that case was "Have you got anything to say on the evidence of the witnesses". Therein it was contended that in view of the defective questioning of the accused under Section 342, Cr. P.C. the conviction of the accused must be set aside but this Court overruling that contention observed :

> "That (questioning of the accused) in our opinion, is sufficient in the circumstances of this case to show that the attention of the accused was called to the prosecution evidence. As to what is or is not a full compliance with the provisions of that section of the Code must depend upon the facts and circumstances of each case. In our opinion, cannot be said that the accused has been in any way prejudiced by the way he has been questioned under that section."

18. In this context it may be remembered that the plea of the accused persons in this case was that they were not present at the scene at the time of the occurrence. In view of that plea any further question to them would have been purposeless.

19. For the reasons mentioned above this appeal fails and the same is dismissed.

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