

Harishchandrasing Sajjansinh Rathod and Another

Vs

State of Gujarat

Criminal Appeal No. 16 of 1973

(Jaswant Singh, P. S. Kailasam JJ)

18.01.1979

JUDGMENT

JASWANT SINGH, J. –

1. This criminal appeal by certificate is directed against the Judgment and Order dated December 6/7, 1972 of the High Court of Gujarat at Ahmedabad convicting the appellants under Section 202 of the Indian Penal Code and sentencing them to rigorous imprisonment for six months and a fine of Rs. 1000.

2. Shorn of details, the case as put forth by the prosecution : One Rayab Nathu Sumera was murdered at Jamnagar on the evening of October 20, 1970. The incident resulting in the death of the said Rayab Nathu Sumera was alleged to have been witnessed by Bhagwanji son of Jesangji, a resident of Knodiyar Colony, Jamnagar. The first information report with regard to the commission of murder of Rayab Nathu Sumera was laid at the B Division Police Station, Jamnagar, by one Abu Hussein. On the basis of this information, a case under Section 302 of the Indian Penal Code was registered at the said police station and investigation of the crime was entrusted to Shermohmad Makrani, Sub-Inspector of Police, who deputed Harishchandrasing Sajjansinh Rathod, Probationary S.I. attached to the police station and Chanduji Jethiji, Head Constable attached to the police station but on the day of the incident on duty in Irvin Hospital, Jamnagar, appellants herein, as also Gambhirsinh Jivansinh, an unarmed police constable attached to "A" Division Police Station, Jamnagar city to go to the house of the said Bhagwanji and bring him over to the police station for interrogation. Pursuant to the instructions given to them by Shermohmad Makrani, the appellants along with Gambhirsinh Jivansinh, Hanubha Kanaji and Lalji Hiraji, constables went in a police jeep to the house of Bhagwanji and after making him sit in the jeep started off for the police station. On the way, the jeep carrying Harishchandrasing Sajjansinh Rathod, his posse, and Bhagwanji met the jeep carrying Joel Florian Gilbert who was returning from the scene of the offence of murder of Rayab Nathu Sumera. At the point of the meeting of the two jeeps, a talk took place between Harishchandrasing Sajjansinh Rathod and Joel Florian Gilbert whereafter with a view to extort information from Bhagwanji in relation to the aforesaid murder of Rayab Nathu Sumera, the six persons viz. Harishchandrasing Sajjansinh Rathod, Chanduji Jethiji, Gambhirsinh Jivansinh, Hanubha Kanaji, Lalji Hiraji and Joel Florian Gilbert formed an unlawful assembly and inflicted a number of injuries on the person of Bhagwanji by means of fists, Kicks and sticks knowing that the bodily injuries inflicted by them were likely to cause the death of Bhagwanji. On arrival of the jeeps at the police station, Bhagwanji was taken before Shermohmad Makrani who interrogated him for about ten minutes. During the course of investigation, Bhagwanji complained about pain in his chest whereupon Shermohmad Makrani directed Harishchandrasing Sajjansinh Rathod to take Bhagwanji to the Irvin Hospital. In compliance with instructions of Shermohmad Makrani, Bhagwanji was

taken to the Irvin Hospital where he was admitted in the casualty ward at about 11 o'clock at night. After a few hours, Dr. Upadhyaya, Medical Officer Incharge of the casualty ward noticed that the condition of Bhagwanji was deteriorating. Thereupon he apprised Motising, constable on duty at the hospital who jotted down the information given to him by the doctor in the register called the Hospital Duty Register maintained by the Police Department and recorded the dying declaration of Bhagwanji in the course of which he disclosed that he had been beaten by some policemen with fists, kicks and sticks. Bhagwanji ultimately died in the hospital at 2.15 a.m. On the information regarding the death of Bhagwanji being conveyed to Shermohmad Makrani, the latter repaired to the hospital. Subsequently Shermohmad Makrani reported the matter to the Deputy Superintendent of Police who instructed him to send for Hematsinh, the brother of Bhagwanji, deceased. Accordingly Hematsinh was sent for on the following morning and on his arrival, his report was recorded and crime case registered. After completion of the investigation, the appellants and four other persons viz. Gambhirsinh Jivansinh, Hanubha Kanaji, Lalji Hiraji and Joel Florian Gilbert were prosecuted and tried by the Sessions Judge, Rajkot for offences punishable under Section 331, 304 (Part II) read with Section 149 of the Indian Penal Code or in the alternative with offences punishable 331 and 304 read with Section 34 of the Penal Code as also for offences punishable under Section 202 of the Penal Code read with Section 145(2) of the Bombay Police Act. Harishchandrasing Sajjansinh Rathod was also charged with the commission of the offence under Section 193 of the Indian Penal Code. On consideration of the evidence produced in the case, the Sessions Judge, Rajkot acquitted all the accused of the aforesaid charges. On appeal by the State, the High Court while maintaining the rest of the order of acquittal passed by the Sessions Judge, Rajkot convicted and sentenced the appellants, as stated above. It is against this judgment and order that the present appeal is directed.

3. Appearing in support of the appeal, Mr. Patel has vehemently urged that on the proved facts and circumstances of the case, the aforesaid offence under Section 202 of the Indian Penal code is not made out against the appellants. It would be convenient at this stage to refer to Section 202 of the Penal Code which runs as under :

202. Intentional omission to give information of offence by person bound to inform.
- Whoever, knowing or having reason to believe that an offence has been committed, intentionally omits to give any information respecting that offence which he is legally bound to give, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

4. To sustain a conviction under the above quoted Section 202 of the Penal Code, it is necessary for the prosecution to prove (1) that the accused had knowledge or reason to believe that some offence had been committed, (2) that the accused had intentionally omitted to give information respecting that offence, and (3) that the accused was legally bound to give that information. We have gone through the entire evidence bearing on the aforesaid offence under Section 202 of the Penal Code but have not been able to discern anything therein which may go to establish the aforesaid ingredients of the offence under Section 202 of the Penal Code. The offence in respect of which the appellants were indicted viz. having intentionally omitted to give information respecting an offence which he is legally bound to give not having been established, the appellants could not have been convicted under Section 202 of the Penal Code. It is well settled that in a prosecution under Section 202 of the Penal Code, it is necessary for the prosecution to establish the main offence before making a person liable under this section. The offence under Section 304 (Part II) and the one under Section 331 of the Penal Code not having been established on account of several infirmities, it is difficult to sustain the conviction of the appellants under Section 202 of the Penal Code. The High

Court has also missed to notice that the word 'whoever' occurring at the opening part of Section 202 of the Penal Code refers to a person other than the offender and has no application to the person who is alleged to have committed the principal offence. This is so because there is no law which casts a duty on a criminal to give information which would incriminate himself. That apart the aforementioned ingredients of the offence under Section 202 of the Penal Code do not appear to have been made out against the prosecution. There is not an iota of evidence to show that the appellants knew or had reason to believe that the aforesaid main offences had been committed.

5. For the foregoing reasons, we are unable to uphold the conviction and sentence passed against the appellants. Accordingly we allow the appeal, set aside the aforesaid convictions and sentences of the appellants and acquit them of the charge under Section 202 of the Penal Code. The appellants shall be set at liberty forthwith unless wanted in connection with some other charges.

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