

Thakore Dolji Vanvirji and Others

Vs

State of Gujarat

Criminal Appeal No. 38 of 1980

(K. Jayachandra Reddy, G. N.Ray JJ)

15.09.1992

JUDGEMENT

K. JAYACHANDRA REDDY, J.:-

1. This is an appeal under Section 379, Cr. P.C. read with Section 2 of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act. There are four appellants. They are original accused Nos. 1, 2, 4 and 5. They along with. Tha Chandji Badarji (A-3) were tried for offences punishable under Sections 147, 148, 149, 302/ 34 and 323, I.P.C. The learned trial Judge acquitted all of them. The State preferred an appeal and a Division Bench of the Gujarat High Court reversed the order of acquittal and convicted A-1 under Section 302, I.P.C. and sentenced him to undergo imprisonment for life. He was also convicted under Section 148, I.P.C. and sentenced to undergo one year's R.I. A-2 to A-5 were convicted under Section 302/149, I.P.C. and sentenced to undergo imprisonment for life. A-2 was also convicted under Section 148 and sentenced to one year's R.I. A-3 to A-5 were also convicted under Section 147, I.P.C. and sentenced to six months R.I. The sentences were directed to run concurrently. Before filing this appeal, A-3 died. The remaining accused Nos. 1, 2, 4 and 5 have preferred this appeal. The prosecution case is as follows:

The complainant Bhupatsing Andaji was residing with his father and mother in Samdhi-Motawas and doing agricultural work. He had six brothers, he being the eldest. The other brothers were also residing with him. It appears that an election took place in the village two months before the occurrence in which accused No. 1 contested and when Dungarji Ghemarji voted against him, the accused who all belonged to one group wanted to kill him. On 18-3-76 at about noon when Dungarji Ghemarji was going to village Samdhi from his field and when he approached the office of Mota Vas, all the accused were sitting there, A-1 was armed with a sword, A-2 with a Barchhi and A-3 to A-5 with sticks. A-1 instigated A-4 to kill Dungarji as he did not give them vote. A-4 therefore dealt a blow with the stick on the hand of Dungarji who started running as he was afraid that he would be killed. He ran to the house of Andaji Motiji (the deceased). All the five accused followed him with the weapons in their hands. After Dungarji entered the house, Andaji was sitting near the door of his house. At that time one Kapurji Ratnaji was sitting on the Ota of the house of Andaji. Kapurji's mother Anduben was also sitting on the Ota. Complainant Bhupatsing was sitting on the Ota near the door of the house. When the accused followed Dungarji to kill him, the deceased intervened and accused No. 1 asked him to bring Dungarji out and Andaji refused saying that he has taken shelter under him

and that he would not bring him out. Thereupon A- 1 gave a blow with a sword on the head of Andaji who fell down. A-2 gave a blow with Barchhi on the face of the deceased and A-3 to A-5 gave him stick blows. Thereafter the accused ran away. The deceased died on the spot. Thereafter the two wives of Andaji, the deceased, who are mother and step-mother of complainant Bhupatsing, were called from the field. They came after one and half hours. Bhupatsing went to lodge a complaint in Gadh Police Station with one Agarsing, his cousin. They reached the Police Station at about 4 p.m. and Jamadar kept them waiting for some time till P.S.I. came at about 5.30 p.m. and recorded the complaint. After registering the crime, P.S. I. went to the scene of crime and arrested the accused. The inquest was held and the dead body was sent for post-mortem. Doctor Sasbihari Amratlal conducted the post-mortem and he found a transversely placed incised wound on the scalp; a Stab wound on the lower part of left cheek; a bruise on the axillary prominence of left cheek and 8 to 9 bruises on the left lateral half of the back. All the injuries were antemortem. On internal examination, he found linear fracture of the skull long placed transversely on the junction of two parietal bones and intracranial haemorrhage with a big clot of blood and the brain was injured due to rupture of small capillaries. He opined that injury No.1 was sufficient in the ordinary course of nature to cause death and the same could have been caused by a sword. The prosecution mainly relied on the evidence of the eye-witnesses Bhupatsing, Dungarji Ghemarji, Anduben and Lilaben. The accused pleaded not guilty. The learned trial Judge in the first instance considered the evidence regarding the motive. He commented upon the evidence of Anduben who stated that there was exchange of words between A-3 and Dungarji in respect of a money dealing and the other evidence namely that the motive was due to the election. In view of this inconsistency he held that the prosecution has failed to establish the motive for the commission of the offence. Then he proceeded to discuss the evidence of the other eye-witnesses. He pointed out certain discrepancies and in doing so he compared the evidence of each witness with that of the others. He also pointed out that there was delay in giving the report. He also took notice of the fact that there were some injuries on A-2 and A-3 and that the prosecution has not explained the same and therefore the witnesses are not giving the true version of the occurrence. He also commented that the witnesses are all interested and therefore it is not safe to place reliance on their evidence. In this context he referred to the medical evidence and pointed out that the deceased has not received as many injuries and it is highly doubtful whether A-3 to A-5 participated and inflicted stick injuries in the manner alleged by the prosecution witnesses. Having pointed out some of these infirmities he gave the benefit of doubt to the accused. He however rejected the evidence of the defence witnesses who were examined in support of alibi. The High Court in-the appeal against the said acquittal, referred to the decisions of this Court laying down the principles to be borne in mind in deciding an appeal against acquittal and thus proceeded to consider the various findings of the trial Court with reference to the relevant evidence. So far as the delay in giving the report is concerned, the High Court accepted the evidence of the complainant that he was made to wait at the Police Station till the P.S.I. came and held (hat the delay has been properly explained. Even otherwise in our view the delay was not inordinate. The occurrence took place around 12 Noon and the Police Station was at a distance of three miles and the report was recorded at about 5.30 p.m. The High Court therefore has rightly held that this delay, if any, remains explained. Even otherwise the same does not affect the

prosecution case.

2. Now coming to the evidence of the eye-witnesses regarding the actual occurrence, the High Court looked into various circumstances including the fact that the incident happened all of a sudden and there was no scope for any fabrication of a coloured or false version. Now coming to the non-explanation of the injuries on A-2 and A-3, the High Court pointed out that A-2 and A-3 were in fact examined by the Medical Officer but these two accused in the statement under Section 313, Cr. P.C. have denied of having received such injuries. They even went to the extent of stating that the version that they received injuries during the occurrence is false. When the accused themselves do not want to rely on the injuries found on them and do not in any manner connect the receipt of the injuries to the present occurrence, the question of explaining the same by the prosecution does not arise. The High Court has rightly held that the trial Court has erred in doubting the prosecution case and the evidence of the eye-witnesses on the ground that injuries on A-2 and A-3 were not explained. The evidence of the number of eyewitnesses appears to be natural. They were all living in the vicinity. The occurrence has taken place in broad day light. According to these witnesses, the accused chased Dungarji and he took shelter in the house of the deceased. The accused shouted at the deceased to bring out Dungarji. All this must have certainly attracted the attention of the eye-witnesses. The comment of the trial Court that these witnesses are all interested cannot lead to the result of discarding their evidence in toto. One of the reasons given by the trial Judge for rejecting their evidence is that they did not tell about the incident to anybody. In a case of this nature where the occurrence has taken place in the village itself in a public place, everybody must have come to know and the witnesses cannot be expected to go on telling each and everybody as to what has happened unless somebody asks them. The High Court in a detailed judgment has examined every finding of the trial Court and has rightly, in our view, held that the reasons given by the trial Court for acquitting the accused are highly unreasonable and unsound. Now the question is whether all the accused would constructively be liable for an offence of murder by virtue of Sec. 149, I. P.C. So far A-1 is concerned, it is the consistent version of all the eye-witnesses that he dealt a fatal blow on the head with a sword and the medical evidence shows that there was a fracture of skull and the blow must have been very forceful because even the brain was injured. Therefore, he was directly responsible for the death of the deceased and the High Court has rightly convicted him under Sec. 302, I.P.C. Now coming to the rest of the accused, all the eye-witnesses have made an omnibus allegation against them. Even A-2, according to the eye-witnesses, gave only one blow and that the remaining accused gave stick blows. All these injuries were not serious and were simple. The injury attributed to A-2 was on the cheek and the Doctor did not say that it caused any damage. So it must also be held to be a simple injury. Then we find only a bruise and an abrasion on the right arm and some bruises on the back. These injuries did not result in any internal injuries. There was not even a fracture of rib. Therefore they must also be simple injuries. It is only the injury No. I which was serious and proved fatal. Therefore the question is whether under these circumstances common object of the unlawful assembly was to cause the death of the deceased and whether every member of the unlawful assembly shared the same? No doubt Section 149, I.P.C. is wide in its sweep but in fixing the membership of the unlawful assembly and in inferring the common object, various circumstances also have to be taken into consideration. Having regard to the omnibus allegation, we think it is not safe to convict every one of them for the offence of murder by applying Sec. 149, I.P.C. On a careful examination of the entire prosecution case and the surrounding circumstances, we think the common object of the unlawful assembly was only to cause grievous hurt. But A-1 acted in his own individual manner and caused one injury with the sword which proved fatal. No doubt he inflicted only one blow but having regard to the nature of the weapon and the vital organ on which the blow was inflicted and the medical evidence regarding the result of injury proving

fatal, he must be held responsible for offence of murder. In differentiating the case of A-2 to A-5 to that of A-1 we do not mean to say that for the purpose of Section 149, I.P.C. every one of them should participate and inflict serious injuries but having regard to the special circumstances of this case particularly in sudden manner in which the occurrence took place in the village itself, we think it would be unsafe to make every one of the accused liable for offence of murder by application of Section 149, I.P.C. Accordingly, we confirm the conviction of A-1 under Section 302, I.P.C. and sentence of imprisonment for life thereunder. Regarding the rest of the accused, we set aside their conviction under S. 302/ 149 and sentence of imprisonment for life. Instead, we convict them under Section 326/ 149 and sentence each of them to undergo seven years' R.I. Accordingly, the appeal is dismissed as against A-1 and partly allowed as against A-2, A-4 and A-5. Order accordingly.

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