Nishar Ahmed Fajmohmed Kaji

Vs

State of Gujarat

(M. M. Punchhi, M. Srinivasan JJ)

07.11.1997

JUDGMENT

SRINIVASAN, J.

1.The appellant and another person by name Dilip Bhagwan Rai were prosecuted in the Court of Sessions, Valsad at Navsari, State of Gujarat for the offences punishable under Sections 302 and 34 of the I.P.C.on the charges that they committed murder of one Gajannand Patel on 4.8.1984 within the compound of Court of Judicial Magistrate (F.C.) Pardi.The deceased was an advocate by profession and the General Secretary of an employees' union.On 4.8.1984 at about 11.45 a.m.he reached the Court of the Judicial Magistrate by car alongwith four other persons, three of them being advocates.When the deceased was climbing the steps to go to the court room, he was shot by the appellant with a pistol.There were three firings.While two of them hit the deceased, one just caused abrasion on his body and fell outside.He was taken to the court room and soon thereafter he was removed to Dr.Nadkarni's hospital at Pardi where he was given preliminary treatment by Dr.Purnima Nadkarni.She advised to take him to Kasturba hospital at Valsad for further treatment.At about 12.30 p.m.he was taken to the said hospital.A message had meanwhile been given to the D.S.P., valsad by a lightning call.A Sub-Inspector rushed to the hospital at about 1.00 p.m.and recorded the complaint of the victim.Thereafter the Sub-Inspector conveyed the message to the Executive Magistrate who went to the hospital at about 2.00 p.m.and recorded the dying declaration of the injured.In the said dying declaration as well as in a statement made by the deceased in Dr.Nadkarni's hospital, the name of the appellant was mentioned as the person who shot the victim.The doctor started the operation at about 3.30 p.m.and completed the same at about 7.25 p.m.But soon thereafter the victim collapsed and died at about 7.30 p.m.

2.It was found that the appellant and the other accomplice were in the court room of the Judicial Magistrate (F.C.), Valsad for attending a case under police bandobast.The appellant and his accomplice were taken to custody and interrogated by the police.They were arrested at about 8.30 p.m.in the police station at Valsad.According to the prosecution on 4.8.84 a judgment was to be delivered by the J.M.F.C, Valsad in a case wherein the appellant and his accomplice were accused and they were present in the court for that purpose and that the police had given them bandobast as they apprehended breach of peace.Both had left the court premises around 11.00 a.m.and returned to the Court at 12.30 p.m.They were seen to be coming on a motor-cycle and parking the same in the compound.As it was raining on that day the clothes of the accused were also found wet.

3.The prosecution examined four eye witnesses three of whom were advocates who went to the Court at Pardi alongwith the deceased in the same car and the fourth being the driver of that car.Dr.Purnima Nadkarni who gave the preliminary treatment to the deceased soon after the incident and Dr.Harit Desai who operated on the deceased were also examined as PWs 13 and 12 respectively.The Secretary of the deceased who had taken him to the hospital in a tempo was

examined as PW7.The Head Constable who was posted alongwith other policemen for the bandobast in the Court at Valsad was examined as PW 16.The two statements given by the deceased in the Hospital were marked as Ex.44 and Ex.53.On a consideration of the entire evidence on record, the Sessions Judge held that the prosecution had established its case against the accused beyond any doubt and convicted then under Sections 302 and 34 I.P.C. The appellant was convicted also under Section 25-A of the Arms Act.The appellant was sentenced to life imprisonment and payment of fine of Rs.500/- for the offence under Section 302 read with Section 34 I.P.C.For the other offence he was sentenced to undergo RI for six months concurrently.The accused preferred an appeal before the High Court.During the pendency of the appeal and other accused Dilip Bhagwan Rai expired.On an analysis of the evidence, the High Court concurred with the view expressed by the Sessions Judge and confirmed the conviction and sentence.The appellant has preferred this appeal by Special Leave.

4.Learned counsel for the appellant has vehemently argued that the case of the prosecution is wholly improbable and that it has not been proved by satisfactory evidence.According to him, when the accused were admittedly present in the court of JMFC, Valsad under the bandobast of the police they could not have gone to the court at Pardi and committed the offence as alleged by the prosecution.It is argued that the version of the Head Constable PW 16 is totally unacceptable on the face of it, in the absence of any record to support the same and he should not have been believed by the courts below.

5.We do not find any merit in this contention.The evidence of PW 16 is quite natural and in the circumstances of the case there could not have been any record for the absence of the accused for about an hour and a half from the premises of the court at Valsad.The Trial Court as well as the High Court have discussed his evidence at length and considered the present contention in the proper perspective.We do not find any infirmity in the said discussion.We have no reason whatever to differ from the courts below and disbelieve PW 16.

6.The second contention of learned counsel for the appellant is that all the four eye-witnesses are interested persons and they are not worthy of any credence.There is nothing on record to show how the said witnesses were interested to speak against the accused.Nothing has been placed on record to indicate any enmity or motive on their part to speak against the accused.The mere fact that three of them were advocates and the fourth was the driver of the deceased is not sufficient to dub them as interested persons.There is no doubt whatever that the said witnesses were in the same car by which the deceased went to the court at Pardi and they were all present at the scene of occurrence.We do not find any merit in this contention

7.The next contention is that the High court was in error in refusing permission to the appellants to examine an independent eye witnesses by name Kirti Ratilal Rajput and an adverse inference should have been drawn against the prosecution for not examining the said person in court as a witness.During the pendency of the appeal in the High Court, the appellant filed an application for examining Kirti Ratilal Rajput as a court witness alleging that he was an independent eye witness and his statement was recorded in the course of investigation under Section 162 of the Cr.P.C., but the prosecution had deliberately omitted to examine him on the ground that the witness would be against the prosecution.We are unable to accept this contention.The High Court has found that the statement made before the police by the said Kirti Ratilal Rajput was not against the prosecution and in no sense or manner in favour of the appellant.The application for examining him was made after a lapse of seven years from the date of occurrence, some time before the hearing of the appeal though the appeal was itself pending from 1985.The High Court has rightly rejected the application

filed by the appellants.

8.The fourth contention of learned counsel is that the eye witnesses did not identify the accused and could not have identified him.He place reliance on the judgment of this court in State of Orissa Vs.Brahamanada, AIR 1976 sc 2488 wherein it was held that if in a murder case the entire prosecution depended on the evidence of a person claiming to be an eye witness and the said witness did not disclose the name of the assailant for a day and a half after the incident and the explanation offered for such non-disclosure was unbelievable, such non-disclosure was a serious infirmity which destroyed and credibility of the evidence of the witness and that the High Court was correct in rejecting it as untrustworthy.There is no merit whatever in the contention.All the eye witnesses had known the appellant for more than three years prior to the occurrence.Their presence at the scene of occurrence was quite natural and established.They had seen the appellant running away from the steps of the court room.The courts below were not in error in accepting their testimony.The above ruling cited by the learned counsel has no application in the facts of this case and his contention is rejected.

9.The fifth contention is that there is discrepancy between the medical evidence and the ocular evidence.It is contended by the learned counsel that the medical report shows that firing could not have taken place from a short distance and the person, who fired the pistol should have been far away and therefore the witnesses could not have identified the said person.It is pointed out by the High Court there cannot be a definite opinion regarding the distance from which shot was fired.As per the evidence of PW 22, a Senior Scientific Officer in Forensic Science Laboratory, Ahmedabad, on examination of the skin samples, it could not be said with certainty whether the firing was from a particular distance.According to him, the blackening of the skin would be there in a case of pistol or revolver fired from the distance of about 2 feet to 3 feet while powder marks could be detected even from & distance of 20 feet in cases of those two weapons.He has also stated:

> "I do not agree that as the range increases tatooing from the powder more spare until no trace of powder marks are found which normally beyond a yard".Thus there is no discrepancy between the medical evidence and ocular evidence.This contention is also rejected 10.The last argument is that the dying declaration given by the deceased should not have been accepted as the name of the accused was introduced therein at the instance of his relatives and it was not mentioned by the deceased on his own.Learned counsel for the appellant refers to a statement of Dr.Hirabhai PW 12 to the affect that the name of the accused was given by a relative and not by the deceased.It is, therefore, contended that the deceased did not mention the name of the appellant on his own in Ext.44.There is no substance in this contention.Even before the deceased was taken to Kasturba hospital at Valsad, he was given preliminary treatment by Dr.Purnima Nadkarni.In her presence, the deceased had mentioned the name of the appellant as the person who had fired the bullets at him.Her deposition in this regard is very clear and has not been shaken in any manner in the cross examination.We have no hesitation to affirm the view expressed by the courts below accepting the reliability of the dying declaration of the deceased.

11.Learned counsel for the appellant has placed reliance on the judgment in Milkiyat Singh Vs.State of Rajasthan AIR 1981 SC 1578.In that case, the dying declaration was not attested by the wife of the deceased or the doctor present in the hospital.The court found that it was matter of concotion.Besides, there was inconsistency between the medical and ocular evidence.The court held that the conviction of the accused was unsustainable and reversed the judgment of the High

Court.The facts in that case are entirely different and the ruling has no bearing in the present case.

12.On a consideration of all the materials on record we have no hesitation to affirm the concurrent judgment of the courts below and dismiss this appeal.