SUPREME COURT OF INDIA

Kathi Bharat Vajsur

Vs.

State of Gujarat

Crl.A.No.1042 of 2002

(H.L.Dattu and Anil R.Dave, JJ.)

08.05.2012

JUDGEMENT

H.L. Dattu, J.

I. This appeal is directed against the judgment and order passed by the Division Bench of the High Court of Gujarat in Criminal Appeal No. 744/1985 dated 15.07.2002. By the impugned judgment and order, the High Court has reversed the order of acquittal passed by the Additional Sessions Judge, Amreli in Sessions Case No. 22/84 and convicted the two appellants for the offence punishable under section 302 read with section 34 of the Indian Penal Code, 1860 [the IPC for short], sentencing them to imprisonment for life and a fine of ' 1000/- each, in default of which they are directed to further undergo rigorous imprisonment for six months.

2. At the outset, we note that initially there were three accused before the Trial Court, and they were all acquitted for the offences alleged against them. During the pendency of the appeal before the High Court, A1 (Kathi Fakira Vajsur) expired, and the appeal stood abated as against him. The other two accused, namely A2 (Kathi Bharat Vajsur) and A3 (Kathi Ramku Vajsur) are prosecuting this appeal. During the pendency of this appeal, this Court had enlarged the appellants on bail vide order dated 03.12.2002.

3. The factual scenario giving rise to the present appeal is as follows:

> "The case of the prosecution is that, a part of the adjoining land of the primary school in village Gigasan was leased out to A1, where he had constructed a storage tank for storage of kerosene. It was resolved by the Gigasan Panchayat to give the road between the school and the tank to the school for their use. Therefore, Panchayat had proposed to construct a wall on the land so granted. Prior to the date of the incident, when one Amra Pitha and other labourers had commenced the work on the said plot, A1 protested to it and did not permit them to carry out the proposed work, due to

which Amra Pitha had to complain to the Sarpanch Jagu Dada and the Secretary of the Panchayat Shri. Kanubhai about the interference caused by A1. On the morning of the incident, i.e. 30th March 1984, when Jagu Dada (PW6), Mulu Dada (deceased) and Dhoha Vasta (Informant) informed the President of the Taluka Development Officer about the attitude of A1 towards Amra Pitha and other labourers, he directed Mulu Dada to ignore the threat and complete the construction as resolved by the Panchayat.

4. On the same day, at about 3.30 pm, PW6, the deceased and two labourers, namely Jetha (PW8) and Natha (PW7) went to the plot and began the construction work as directed and they were assisted by Manjibhai and Patel who were teachers working in the Primary School. When they began digging for laying the foundation, A1 along with his brothers A2 and A3 came near the plot and asked them not to dig the pit. After verbal exchange, A1 took out a double bore tamancha from his pocket and pointed at PW6, and threatened him to leave. On his refusal to leave, A1 opened fire which caused injury on his right hand and thereafter, again fired on the chest of PW6. Meantime, A2 also fired from tamancha on the person of Mulu Dada due to which Mulu Dada fell down, after which A3 caused injury on the head with an axe which he was carrying with him. Thereafter they fled from the place of incident. Due to the injuries caused, Mulu Dada died on the spot. Immediately, PW5 reported the incident to the Police Station, Dhari and on the basis of the written report the Station Officer took-up the investigation and on completion thereof charge-sheet was filed against the accused persons for the offences punishable under Sections 302, 307 read with Section 34 of the Indian Penal Code (for short the IPC).

5. To substantiate its accusation, prosecution examined several witnesses to prove its case before the Trial Court. The Trial Court, after considering the entire evidence on record, acquitted the accused persons, on the ground that the prosecution failed to prove its case beyond reasonable doubt.

6. Aggrieved by the same, the State preferred an appeal before the Gujarat High Court. The Court, after examining the entire evidence on record, has set aside the judgment and order passed by the Trial Court, and convicted A2 and A3 under Section 302 read with Section 34 of the IPC, sentencing them to life imprisonment and a fine of ' 1000/- each. However, as far as A1 was concerned, the appeal had abated due to his death. Aggrieved by the conviction and sentence passed by the High Court, the accused -appellants are before us in this appeal.

7. Shri. Dholakia, learned senior counsel, submitted that the Trial Court was justified in acquitting the accused persons, as the Trial Court had recorded that there are material contradictions in the statements of PW5 and PW6 recorded by the police under section 161 of the Code of Criminal Procedure, 1973 [hereinafter referred to as the Code] and the evidence

that was tendered in the Court during the trial. He further submits that the tamancha allegedly used, was a single barrel gun, which needs to be reloaded after firing a single shot and that there was no evidence of such reloading. By referring to the testimony of the ballistic expert (PW 18), the learned senior counsel would state that the answer given by him was not conclusive whether such a fire arm could have been used. He would submit that since the conviction and sentence is imposed under Section 302 r/w Section 34, it was required for the prosecution to prove which injury was caused by which accused and which injury was fatal to the life of the accused. He would emphasize that there must be a live link between all the alleged events, in order to prove the guilt of the appellants beyond reasonable doubt, which he would submit, is missing in this case.

8. The four main contradictions/discrepancies that Shri. Dholakia points out in the prosecution story are:

> "(a) The eye witnesses (PW5 and PW6), when they were shown the arms recovered, emphatically denied that those were not the arms used on the date of the incident;
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> (b) The sequence of the shooting by A1 and A2, and who shot whom was not clear from the testimony of PW5 and PW6 when read along with their statements recorded under section 161 of the Code;
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> (c) That the clothes of PW5, which were seized and who is said to have carried the body of the deceased, had absolutely no blood stains on his clothes; and
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> (d)The conduct of the injured witness (PW6), in running away from the scene of the incident to a room and locking himself, and then running back to the scene of the incident, was suspicious and abnormal. Shri. Dholakia would then submit that if two views are possible, then the one that was in favors of the accused requires to be adopted. In conclusion, it is submitted that the Trial Court, which had observed the demeanour of the witnesses and considered all the facts and circumstances, had rightly acquitted the appellants of all charges. It is also contended that in the absence of any perversity or omission to consider material evidence or apparent error in law, the judgment of the Trial Court was not open to interference in an appeal against acquittal."

9. Smt. Madhavi Divan, learned counsel appearing for the respondent-State would fairly submit that some contradictions or discrepancies could be found in the evidence recorded, but would contend that if the evidence is read as a whole, there would not be even an iota of doubt left as to the guilt of the appellants. She would further submit that even if portions of the evidence of the hostile witnesses are eschewed from consideration, still it is possible to

arrive at the same conclusion as has been done by the High Court. The learned counsel would rely on the testimony of PW6, who is an injured witness to establish the presence of all the three accused at the time of the incident. PW6 has further described the kind of injuries that he had sustained, which, she would submit would corroborate with the medical evidence as well as the testimony of the doctor who had treated the injured witness. The learned counsel would submit that though, PW6 may be confused about the sequence of the gun shots, there is absolutely no dispute as to who fired the shots at the deceased person. Smt. Divan would further refer to the evidence of PW12 (Manjibhai), a teacher in the Primary School, who has also testified that the three accused were present at the scene of occurrence and they were carrying tamanchas and one of them an axe, and that there was an heated altercation between the accused persons and the deceased (PW5 and PW6), when he (PW12) left the scene. She would also state that he had heard the gun shots, and when he came out, saw the corpse of the deceased in pool of blood. The learned counsel would then refers to the evidence of PW7 and PW8, the labourers who were present at the place of the incident, who have also testified that the accused had come to the place with tamanchas and axe, and that there was altercation between the accused and the deceased, PW5 and PW6. They also testified that they had heard the gun shots. She would then refer to the evidence of PW16 (Lakha), who had also heard the gun shots fired, and was told about the incident by PW5.

10. Smt. Divan would fairly submit that though PW7, PW8 and PW12 are all declared hostile, yet, she would state that by reading their evidence with the evidence of PW5, PW6 and PW16, it is clear that the deceased, PW5 and PW6 were present at the place of the incident, and so were the accused appellants armed with tamanchas and axe. She would further submit that the factum of an altercation between the two parties was also established from the evidence on record, and that of the gun shots fired. With this evidence, Smt. Divan would submit, it is clear beyond any doubt that the death of the deceased was caused by the accused appellants, and strongly refuted the contention of Shri. Dholakia that two views were possible, stating that on this evidence no other view was possible, apart from the view taken by the High Court.

11. Smt. Madhavi Divan, learned counsel, would submit that this Court must not give undue importance to the non-recognition of the weapons by PW5 and PW6 during the trial. According to the learned counsel, the panch witnesses have identified the weapons recovered at the instance of the accused during the trial. She would, for this purpose, refers to the evidence of PW10 (Vallabhbhai), who not only narrated the place and manner in which the axe and the other weapons were recovered at the instance of A2, but also identified the same when shown the same in Court. She would further state that it is reasonable for the eyewitnesses, one of whom was injured in the incident, not to have seen the weapons in the commotion of the incident properly. To sum up, the learned counsel submits that the High

Court, after re-appreciating the entire evidence on record, has come to the conclusion that the Trial Court has fallen in error in magnifying the minor contradictions to arrive at a conclusion that the prosecution has failed to prove the guilt of the accused beyond all reasonable doubt.

12. The circumstances in which an appellate court will interfere with the finding of the Trial Court are now well settled by catena of decisions of this Court. In *Dwarka Dass v. State of Haryana*[1]the dicta of all these decisions has been crystallized thus:

> "While there cannot be any denial of the factum that the power and authority to apprise the evidence in an appeal, either against acquittal or conviction stands out to be very comprehensive and wide, but if two views are reasonably possible, on the state of evidence:
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> one supporting the acquittal and the other indicating conviction, then and in that event the High Court would not be justified in interfering with an order of acquittal, merely because it feels that it, sitting as a trial court, would have taken the other view. While re- appreciating the evidence, the rules of prudence requires that the High Court should give proper weight and consideration to the views of the trial Judge...

13. In the case of *Narinder Singh v. State of Punjab*[2]this Court has held that the High Court is entitled to re- appreciate the evidence if it is found that the view taken by the acquitting Court was not a possible view or that it was a perverse or infirm or palpably erroneous view or the Trial Court taken into consideration inconsequential circumstances or has acted with material irregularity or has rejected the evidence of eye-witnesses on wrong assumptions.

14. It is also now well settled that in a criminal trial the guilt of the accused must be proved beyond reasonable doubt, in order to convict him. This court in the case of *State of U.P. v. Krishna Gopal*[3]held:

> "A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to proof is an exercise particular to each case.Referring to the interdependence of evidence and the confirmation of one piece of evidence by another a learned Author says:
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> The simple multiplication rule does not apply if the separate pieces of evidence ardependent. Two events are dependent when they tend to occur together, and the evidence of such events may also be said to be dependent. In a criminal case, different pieces of evidence directed to establishing that the defendant did the prohibited act

with the specified state of mind are generally dependent. A juror may feel doubt whether to credit an alleged confession, and doubt whether to infer guilt from the fact that the defendant fled from justice. But since it is generally guilty rather than innocent people who make confessions, and guilty rather than innocent people who run away, the two doubts are not to be multiplied together. The one piece of evidence may confirm the other. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over- emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately, on the trained intuitions of the Judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimization of trivialities would make a mockery of administration of criminal justice.

15. In the case of *Gurbachan Singh v. Satpal Singh*[4] it is observed:

> "The standard adopted must be the standard adopted by a prudent man which, of course, may vary from case to case, circumstances to circumstances. Exaggeration devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice, according to law. The conscience of the court can never be bound by any rule but that is coming itself dictates the consciousness and prudent exercise of the judgment. Reasonable doubt is simply that degree of doubt which would permit a reasonable and just man to come to a conclusion. Reasonableness of the doubt must be commensurate with the nature of the offence to be investigated."

16. Now coming back to the facts of the case, it is not in dispute that in the incident, said to have taken place on 30th March, one person is killed and the other person is seriously injured. In the trial, the injured has fully supported the case of

the prosecution. His evidence finds support from the evidence of PW6 and the evidence of Doctor, PW 16.While hearing the learned counsel appearing for the parties, we have also perused the entire evidence on record, we are of the view that Trial Court had erred in holding that the prosecution had not been able to prove the case beyond reasonable doubt. We are inclined to agree with the submission of Smt. Madhavi Divan, learned counsel appearing for the respondent, that by relying on the evidence of PW5, PW6, PW7, PW8, PW12 and PW 16, there can be no doubt that the A1, A2 and A3 were present at the place of the incident and were carrying tamanchas and axe, and that, there was an altercation between the accused persons and PW5, PW6 and the deceased, and that gun shots were fired and the deceased died because of the gun shot injuries and the blow on the head with the axe by A3.Perhaps the Trial Court took a hyper-technical view by primarily concentrating on minor contradictions to hold that the prosecution has failed to prove the guilt of the accused beyond reasonable doubt. We are not in agreement with the findings and conclusions reached by the Trial Court.

17. The argument canvassed by Shri. S.K. Dholakia, learned senior counsel, appearing for the appellants, that there was material discrepancies in the evidence adduced by the eyewitnesses PW5 and PW6, with regard to the sequence of shots fired and who shot whom. This, the learned senior counsel would submit, is enough to punch a hole in the prosecution story.He would further state that the High Court has brushed aside these contradictions merely terming them as minor contradictions. Per contra, Smt. Divan, learned counsel appearing for the respondent, while not denying that there were some discrepancies in the evidence given by PW5 and PW6, would state that on a complete reading of the evidence, there is no doubt about the guilt of the accused. We are inclined to agree with the learned counsel for the respondent.

18. In the case of *Leela Ram v. State of Haryana*[5]this Court held:

> "It is indeed necessary to note that one hardly comes across a witness whose evidence does not contain some exaggeration or embellishment sometimes there could even be a deliberate attempt to offer embellishmentand sometimes in their overanxiety they may give a slightly exaggerated account. The court can sift the chaff from the grain and find out the truth from the testimony of the witnesses.Total repulsion of the evidence is unnecessary. The evidence is to be considered from the point of view of trustworthiness. If this element is satisfied, it ought to inspire confidence in the mind

of the court to accept the stated evidence though not however in the absence of the same."

19. This Court, in the case of *Sunil Kumar Sambhudayal Gupta (Dr.) v. State of Maharashtra*[6]summarized the law on material contradictions in evidence thus: Material contradictionsWhile appreciating the evidence, the court has to take into consideration whether the contradictions/omissions had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The trial court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and the appellate court in normal course would not be justified in reviewing the same again without justifiable reasons. (Vide State v. Saravanan.)Where the omission(s) amount to a contradiction, creating a serious doubt about the truthfulness of a witness and the other witness also makes material improvements before the court in order to make the evidence acceptable, it cannot be safe to rely upon such evidence. (Vide State of Rajasthan v. Rajendra Singh.)The discrepancies in the evidence of eyewitnesses, if found to be not minor in nature, may be a ground for disbelieving and discrediting their evidence. In such circumstances, witnesses may not inspire confidence and if their evidence is found to be in conflict and contradiction with other evidence or with the statement already recorded, in such a case it cannot be held that the prosecution proved its case beyond reasonable doubt. (Vide *Mahendra Pratap Singh v. State of U.P.*)

20. In case, the complainant in the FIR or the witness in his statement under Section 161 CrPC, has not disclosed certain facts but meets the prosecution case first time before the court, such version lacks credence and is liable to be discarded. (Vide State v. Sait.)In State of Rajasthan v. Kalki, while dealing with this issue, this Court observed as under: (SCC p. 754, para 8) 8. In the depositions of witnesses there are always normal discrepancies however honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence, and the like. Material discrepancies are those which are not normal, and not expected of a normal person. The courts have to label the category to which a discrepancy belongs. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. (See *Syed Ibrahim v. State of A.P.6 and Arumugam v. State.)In Bihari Nath Goswami v. Shiv Kumar Singh* this Court examined the issue and held: (SCC p. 192, para 9) 9. Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test the credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.While deciding such a case, the court has to apply the aforesaid tests. Mere marginal variations in the

statements cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution case, render the testimony of the witness liable to be discredited. Moreover, by reading the evidence of the PW1 (Kamlesh), PW2 (Dr. Savjibhai) and PW3 (Dr. Shobhanaben), the injuries on PW6 and the deceased have come to light. These injuries are consistent with the testimony of the evidence tendered by the eyewitnesses, namely PW5 and PW6. This Court, in the case *of Rakesh v. State of M.P*[7]held:

> "It is a settled legal proposition that the ocular evidence would have primacy unless it is established that oral evidence is totally irreconcilable with the medical evidence. More so, the ocular testimony of a witness has a greater evidentiary value vis-a-vis medical evidence; when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence if proved, the ocular evidence may be disbelieved. (Vide State of U.P. v. Hari Chand, Abdul Sayeed v. State of M.P. and Bhajan Singh v. State of Haryana.)When the medical evidence is in consonance with the principal part of the oral/ocular evidence thereby supporting the prosecution story, there is no question of ruling out the ocular evidence merely on the ground that there are some inconsistencies or contradictions in the oral evidence. We are not inclined to agree with Shri. Dholakia on this count. Shri. Dholakia would lay emphasis on the unusual conduct of PW6 after the occurrence of the incident and therefore submits that the learned trial judge was justified in disbelieving the evidence of PW6. We cannot agree. This Court, in the case of *Appabhai v. State of Gujarat*[8]held:
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> Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties.

21. The court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability if any, suggested by the accused. The court, however, must bear in mind that witnesses to a serious crime may not react in a normal

manner. Nor do they react uniformly. The horror stricken witnesses at a dastardly crime or an act of egregious nature may react differently. Their course of conduct may not be of ordinary type in the normal circumstances. The court, therefore, cannot reject their evidence merely because they have behaved or reacted in an unusual manner. In Rana Pratap v. State of Haryana Chinnappa Reddy[9]speaking for this Court succinctly set out what might be the behaviour of different persons witnessing the same incident. The learned Judge observed: Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible.

22. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way.

23. We are in agreement with the above observations. When an eyewitness behaves in a manner that perhaps would be unusual, it is not for the prosecution or the Court to go into the question as to why he reacted in such a manner. As has been rightly observed by his lordship O.Chinnappa Reddy, J., in Rana Prataps case (supra.) there is no fixed pattern of reaction of an eyewitness to a crime. When faced with what is termed as an unusual reaction of an eyewitness, the Court must only examine whether the prosecution story is in anyway affected by such reaction. If the answer is in the negative, then such reaction is irrelevant. We are afraid that the unusual behavior of the injured eyewitness, PW6, will not, in anyway, aid the appellants to punch a hole on to the prosecution story.

24. Shri. Dholakia, learned senior counsel, would emphasis on the fact that when the eyewitnesses PW5 and PW6 were shown the weapons recovered, they explicitly stated that these were not the weapons used for by the accused. He would state that this was a major discrepancy in the case of the prosecution. In support of this, he would rely on the case of *Mahendra Pratap Singh v. State of UP*[10]In reply, Smt.Divan, learned counsel, would submit that it would be more reliable to rely on the evidence of the Panch witness (PW10) and the PSI (PW20) than on the eyewitnesses for the purpose of identifying the weapons, especially when the weapons were recovered at the instance of the accused persons. She would further state that in the commotion of the incident, it is possible that the eyewitnesses might not have clearly seen the weapons. We find that the argument of the learned counsel for the respondent is reasonable and therefore, we accept the same.

25. When the entire evidence on record is considered, the fact that the eyewitnesses did not recognize the weapons used, makes no difference to the prosecution story.

26. We are afraid the decision of this Court in the case of Mahendra Pratap Singh (supra.) cited by Shri. Dholakia would not help the appellants, as in the case not only were the weapons used identified, but also the evidence on record did not inspire confidence in the story of the prosecution. In that case, this Court came to conclude that two views were possible, and therefore gave the benefit of the same to the accused.

In the instant case, cumulative reading of the entire evidence makes the prosecution story believable, thereby proving the guilt of the accused appellants beyond any doubt. The High Court in the impugned judgment has correctly appreciated the evidence on record, and we do not find any infirmity in the same, therefore we uphold the conviction of guilt and sentence imposed by the High Court.

27. In the light of the above discussion, we see no merit in the appeal and accordingly, the same is dismissed. The appellants have been enlarged on bail during the pendency of this appeal before this Court. Therefore, the Jurisdictional Jail Superintendent is directed that the appellants herein be taken into custody forthwith to serve out the sentence of life imprisonment.

Judgment Referred

[1]*(2003) 1 SCC 204*
[2]*2000 Crl. LJ 3462 (SC)*
[3]*1988] INSC 222; (1988) 4 SCC 302*
[4]*1990] INSC 294; (1990) 1 SCC 445*
[5]*(1999) 9 SCC 525*
[6]*(2010) 13 SCC 657*
[7]*(2011) 9 SCC 698*
[8]*1988 Supp SCC 241*
[9]SCC p. 330, SCC (Cri) p. 604, para 6
[10]*(2009) 11 SCC 334*