

SHAHABUDDIN ABDUL KAHLIK SHAIKH

v.

STATE OF GUJARAT

APRIL 5, 1995

[DR. A.S. ANAND AND M.K. MUKHERJEE, JJ.]

Indian Penal Code 1860—Section 302 r/w Section 34—Terrorists and Disruptive Activities (Prevention) Act 1987—Appellant prosecuted for murder—Prosecution case based on the sole testimony of the brother of the deceased—contradictions in his statements—Convicted for both the charges by Trial Court—On appeal conviction set aside.

Evidence Act, 1872 :

Evidence—Appreciation of—Acceptance of contradictory evidence—To depend upon the consideration whether contradiction apparent or real, in consequential or material, explainable or irreconcilable—Inconsistency in the evidence of brother of the deceased—close scrutiny—Need for.

Appellant with 3 others, caused death of a person and was prosecuted u/s 302 r/w Section 34 IJPC and Section 3 of Terrorists and Disruptive Activities (Prevention) Act, 1987.

Prosecution relied solely on the testimony of the eye witness P.W. 2, brother of the deceased. In his statement, PW 2 stated that he saw the appellant and accused 'A' attacking him with 'Guptis' and the other 2 accused holding him from the first floor of the 'Chawl'. With regard to lights he stated that there was light at and around the place of occurrence.

There were material inconsistencies in the evidence of P.W. 2. Regarding the place from where he saw the incident, his evidence was controverted by his own statement. During investigation he said that he saw the incident from the upper floor of the 'Chawl' and in his cross examination said that he was at the corner of the 'Chawl'.

Statement regarding overt act played by the appellant was controverted by the charge wherein it was specifically stated that appellant and accused 'T' caught hold of deceased and the other two accused dealt 'Gupti' blows.

The claim of existence of light was controverted by P.W. 6 who stated that the area was under curfew that night. Further, he himself stated that the street lights were off.

The Trial Court, discarding the inconsistencies regarding the place, observed that from whatsoever place the incident was seen the crucial point was that the incident was seen by him. The inconsistency regarding the actual role played, was held as immaterial, once it was proved that appellant was one of the persons causing murder in pursuance to their common intention. As for the light, relying on the Panch witness, the court held that inspite of street lights not working, the place was illuminated by lights from surrounding places. Thus the Trial Court convicted him in respect of both the charges.

The appellant preferred appeal u/s 19 of Terrorists and Disruptive Activities (Prevention) Act, 1987.

Allowing the Appeal, this Court

HELD : 1.1 P.W. 2 materially contradicted himself as to the place wherefrom he saw the incident. Findings of Trial Court recorded on erroneous and perverse mode of appreciation of evidence & a patently wrong process of reasoning. [204-G]

1.2. The claim of PW 2 that he saw the incident could be accepted notwithstanding the contradiction brought in his evidence in this regard. The Trial Court was required to first consider whether contradictions are apparent or real, inconsequential or material, explainable or irreconcilable and acceptance of the claim of the witness was to depend on the answer thereon. Instead of approaching the matter from that angle & perspective—the court accepted the claim of PW 2 as gospel truth, contemptuously ignoring the material contradiction altogether. [205-B, C]

2. The overt act allegedly committed by the applicant did not fit in with the prosecution case as reflected in the charges. The observation of the Trial Court in this regard may be unexceptionable as a proposition of law, but the said inconsistency warranted a close scrutiny of the evidence of PW 2, as he happened to be brother of the deceased and the result of the trial solely rested upon his testimony. [206-E, 205-E]

3. There was no light around the place of incident. PW 2's claim to have seen the incident & identified the miscreants is wholly unacceptable

as credit worthy. The Panch witness who was relied on in this regard does not disclose the statement attributed to him by the Trial Judge. Even if he had made any statement, this court could not have relied, as he being only witness to seizure of blood and other articles on the following morning and not of the incident itself. He is not competent to testify as to whether the place of incident was illuminated on the previous night notwithstanding the curfew and the admitted fact that the street lights were not on that night. [206-E, B, C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 242 of 1994.

From the Judgment and Order dated 4.3.94 of the Additional Designated Court, Ahmedabad in T. CrI. Case No. 166 of 1993.

S.C. Patel for the Appellant.

Anip Sachthey for the Respondent.

The Judgment of the Court was delivered by

M.K. MUKHERJEE, J. On February 1, 1995 we heard and disposed of this appeal with the following order :

"For the reasons to be stated later, the judgment of the Additional Designated Judge, Ahmedabad dated 4th March, 1994 in TCC No. 166/93 cannot be sustained. This appeal succeeds and is allowed. The conviction and sentences imposed upon the appellant are set aside and he is directed to be released from custody forthwith if not required in any other case".

We now state the reasons for the order.

The appellant was placed on trial before the Additional Designated Judge, Court No. 2. Ahmedabad to answer charges under Section 302 read with section 34 of the Indian Penal Code and Section 3 of the Terrorists and Disruptive Activities (Prevention) Act, 1987 ('Act' for short) which centred around the death of a person belonging to the Hindu Community on December 23, 1992. On conclusion of the trial the learned Judge recorded an order of conviction and sentence against the appellant in respect of both the charges. Hence this appeal under Section 19 of the Act.

Briefly stated the case of the prosecution is that on December 24, 1992 Rajubhai Govindbhai (P.W.1) a resident of Chatursing's Chawl, near Char Toda Kabrastan of Gomitpur in the city of Ahmedbad lodged a complaint with Gomitpur Police Station to the effect that on December 23, 1992 at or about 11 P.M. while he was sitting in front of his house along with his friends Hariphah Manoharbhai Solanki and Sanjay Kumar Kishorebhai he saw Manoharbhai Kaluram Koli, who was a resident of the same Chawl and working as a labourer at the Railway Station platform Canteen, coming towards them from the side of Patrawali Mosque. When he got as far as the road in front of the ESI Dispensary No. D-23 four persons named Kallar, Anif Hanif, Shahbuddin (the appellant) and Ishrar Kaliyo waylaid him. While the appellant and Ishrar Kaliyo caught hold of him the other two stabbed him, with *Guptis*. Resultingly, Manoharbhai received serious injuries and started bleeding profusely. When Rajubhai and his friends started shouting for help the miscreants fled away towards Patrawali's Chawl. They then rushed the injured to the hospital where the doctor declared him dead. In his complaint Rajubhai alleged that the murder was a sequel to the demolition of the structure of Babri Mosque at Ayodhya on December 6, 1992 and the communal riot that broke out in the city of Ahmedbad in its wake. On that complaint a case was registered and the appellant was arrested. On completion of investigation police submitted charge- sheet against the appellant, and the other three accused named in the complaint showing them as absconding. The appellant pleaded not guilty to the charges levelled against him and contended that he was falsely implicated.

That Manoharbhai met with his homicidal death on the fateful night stands conclusively proved by overwhelming evidence on record. In fact that part of the prosecution case was not challenged by the defence. The uncontroverted evidence of Head Constable Kantilal. (P.W.5), who held inquest, with the contemporaneous panchnama prepared by him (Ex.11) and that of Dr. P.R. Patel (P.W.3) who held post-mortem examination upon the deceased, when read together indicate that the deceased sustained and died of two stab injuries, one below the left middle and other on the upper lateral part of the right shoulder blade.

The next and the crucial question that falls for determination is whether the prosecution has succeeded in proving beyond all reasonable doubts, that the appellant was one of the persons who caused the death of

Manoharbai. To prove this part of the case, prosecution solely relied - and the trial Court passed its conviction - on the evidence of Jaydeep Maluram (P.W.2), the brother of the deceased, as P.W.1 turned hostile, before we refer to the evidence of P.W. 2 we may mention that in the charges framed against the appellant it was specifically stated that he and Ishrar had caught hold of the deceased and the other two accused had taken out *Guptis* and given blows on different parts of his body. In his sworn testimony P.W. 2 however categorically stated that the appellant and Arif attacked him with *Guptis* while the other two miscreants had caught him. Then again, P.W. 2 stated in his examination-in-chief that when he was on the first floor of the Chatursing's Chawl, where he was residing, he saw his brother being attacked by the miscreants in front of B-23 Dispensary. In cross-examination, however, he not only made an altogether different statement when he said that he was standing alone in the flour mill of Chelaji, which was in the corner of Chatursing's Chawl, when the incident took place, but also asserted that it was false to state that at the time of the incident he was on the upper storey of the Chawl. Against the above assertion when P.W.2's attention was drawn to the part of his statement made during investigation wherein it was recorded "I was on the upper storey of the landlord and when my brother came after escape. I came down", he denied to have said so. P.S.I. Nagesh Kumar (P.W.6), who investigated into the case, however admitted that P.W.2 did make such statement before him. From P.W.2's evidence we further find that when he was being cross examined regarding the source of light by which he could recognise the miscreants he stated that the lights in and around the place were on but then from P.W.6 it was elicited in cross- examination that the Gomtipur area was under curfew in that night. Indeed, in answer to a question put by the Court he admitted "The lights on ways/roads were off on the date of incident".

On a careful perusal of the impugned judgment in the light of the evidence of P.W.2 as detailed discussed above we are constrained to say that the trial Judge recorded its findings on an erroneous and perverse mode of appreciation of evidence and a patently wrong process of reasoning. In dealing with the glaring and material contradiction in the evidence of P.W. 2 as regards the place wherefrom he saw the incident, the learned Judge observed :

"..... I am of the opinion that be it from hear the flour mill or from

the first floor of the building he did see the incident as deposed by him and that is the crucial point".

(emphasis supplied)

In making the above observation the learned Judge has, in our view, put the part before the horse. In fact, the crucial point before the Court was whether the claim of P.W. 2 that he saw the incident could be accepted notwithstanding the contradiction brought in his evidence in this regard. In this context the learned Judge was required to first consider whether the contradiction was apparent or real, inconsequential, or material, explainable or irreconcilable and acceptance of the claim of the witness was to depend on the answer thereon. Instead of approaching the matter from that angle and perspective the learned Judge accepted P.W.2's claim as gospel truth, contemptuously ignoring the material contradiction altogether.

We next find that when the learned Judge's attention was drawn to the inconsistency in the evidence of P.W.2 regarding the actual role played by the appellant in the murder, the Judge observed that once the prosecution succeeded in proving that the appellant was one of the four miscreants who committed the murder pursuant to their common intention, the question as to whether he had only caught hold of the deceased or had actually stabbed him was redundant. As a proposition of law the above observation made by the trial judge may be unexceptionable but then it cannot be gainsaid that the inconsistency pointed out by the appellant warranted a close scrutiny of the evidence of P.W.2, as he happened to be the brother of the deceased, and the result of the trial solely rested upon his testimony.

Lastly, in rejecting the contention of the appellant that there being no light in and around the area where the incident took place P.W.2 could not have seen it much less identified the miscreants, the learned Judge observed that even though the Investigating Officer said that the electric poles were not working at the time of the incident, the panch witness had stated in an answer to Court's query that the buildings surrounding the area were having lights whereby the roads were illuminated and the persons on the road could be identified. The learned Judge then recorded the following finding :

"So, even if it may be that the street lights may not be working, yet

there was sufficient light thrown from the nearby buildings with the aid of which the buildings with the aid of which the persons walking on the road can be easily seen, and this also renders a ring of truth to the straight forwardness and the credibility of the witness (P.W.2) when he says that he had witnessed the incident".

On going through the record placed before us we however find that the only Panch witness who was examined during the trial was one Ishwar Singh (P.W.4) and his evidence does not disclose the statement attributed to him by the trial Judge. We hasten to add that even if he had made any such statement we would not have placed any reliance thereupon as, being a witness only to the seizure of blood and other articles on the following morning, that is on 24.12.1992 - and not of the incident itself - he was not competent to testify as to whether the place of incident was illuminated on the previous night notwithstanding the curfew and the admitted fact that the street lights were not on in that night.

For the foregoing discussion we unhesitatingly hold that the reasons given by the trial Court for accepting the evidence of P.W.2 are wholly unsustainable. We further hold that having regard to the facts that P.W.2 materially contradicted himself as to the place wherefrom he saw the incident, that the overt act allegedly committed by the appellant did not fit in with the case of the prosecution as reflected in the charges and that there was no light in and around the place of incident, P.W.2's claim that he had seen the incident and identified the miscreants is wholly unacceptable as creditworthy. The appeal must therefore be allowed and we order accordingly.

Appeal allowed.