

Gujarat High Court

Munnabhai Babubhai Makwana vs State Of Gujarat on 1 May, 2023

Bench: A.Y. Kogje

R/CR.A/400/2014

JUDGMENT DATED: 01/05/2023

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL NO. 400 of 2014

With

R/CRIMINAL APPEAL NO. 1481 of 2013

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE A.Y. KOGJE

and

HONOURABLE MR. JUSTICE M. R. MENGDEY

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

CRIMINAL APPEAL NO. 400 OF 2014
MUNNABHAI BABUBHAI MAKWANA & ANOTHER
Versus
STATE OF GUJARAT

WITH
CRIMINAL APPEAL NO. 1481 OF 2013
THE STATE OF GUJARAT
Versus
MAKWANA LALJIBHAI VELJIBHAI & ORS

Appearance - Criminal Appeal No. 400 of 2014:
HCLS COMMITTEE(4998) for the Appellant(s) No. 1,2
MR BOMI H SETHNA(5864) for the Appellant(s) No. 1,2
MS. KRINA CALLA, APP for the Opponent(s)/Respondent(s) No. 1

Appearance - Criminal Appeal No. 1481 of 2013:
MS. KRINA CALLA, APP for the Appellants
MR. YOGENDRA THAKORE for 1-3

R/CR.A/400/2014

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JUDGMENT DATED: 01/05/2023

CORAM:HONOURABLE MR. JUSTICE A.Y. KOGJE
and
HONOURABLE MR. JUSTICE M. R. MENGDEY

Date : 01/05/2023

COMMON ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE M. R. MENGDEY)

1. Criminal Appeal No. 400 of 2014 has been preferred by the Appellants namely Makwana Munnabhai Babubhai and Makwana Kalubhai Babubhai [Original Accused Nos. 1 and 2 respectively] under the provisions of Section 374 of the Code of Criminal Procedure ("Cr.P.C." for short) challenging the judgment and order dated 29.6.2013 passed by the learned Additional Sessions Judge, Dhangadra in Sessions Case No. 1 of 2009 whereby the Appellants have been convicted for offence punishable under Sections 302 read with Section 149 of the Indian Penal Code ("IPC" for short) and passed sentence for Rigorous Imprisonment, whereas, Criminal Appeal No. 1481 of 2013 has been preferred by the Appellant - State under Section 377 of the Cr. P.C. for enhancement of sentence imposed upon the Respondent Nos. 1, 2 and 3 [Original Accused Nos. 3, 4, 5 respectively] vide the aforesaid judgment.

2. It is pertinent to note at this stage that out of the three Respondents in Criminal Appeal No. 1481 of 2013, the Respondent No.1 - Makwana Laljibhai Veljibhai [Original Accused No.3] has expired and the said Appeal therefore abated qua him.

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3. The facts and circumstances giving rise to the filing of the present Appeals are as under.

3.1 On 15.6.2008, Jerambhai Sangrambhai Vaghela lodged an FIR with the Dhangadra Taluka Police Station to the effect that on 15.6.2008 he and his other family members along with several labourers were working in the field and his father namely Sangrambhai was moving around in the field. At around 11 O' Clock, Munnabhai Babubhai armed with Dharia, Kalubhai Babubhai armed with Axe, Laljibhai Veljibhai armed with Dharia, Jesinghbhai Valjibhai armed with Stick and Babubhai Valjibhai armed with Dharia, entered into the field from canal and started assaulting his

father Sangrambhai with the weapons they were carrying. He, his brother and his mother immediately ran to the spot. By the time they reached to the spot, the assailants fled away from the spot and his father was lying on the field profusely bleeding. He was immediately moved to the hospital at Dhangadra from where he was referred to C.U.Shah Hospital at Surendranagar and from Surendranagar he was referred to V.S.Hospital, Ahmedabad.

4. On the basis of the said FIR, initially an offence punishable under Sections 147, 148, 149, 447 and 307 of IPC was registered against the accused persons. Pending the investigation, the victim Sangrambhai succumbed to his injuries and died after eleven days of the incident, and therefore, Section 302 of IPC was added to the FIR. The Investigating Agency, after conclusion of R/CR.A/400/2014 JUDGMENT DATED: 01/05/2023 investigation, filed charge sheet against the accused persons for the aforesaid offences.

5. Since the offences in question were exclusively triable by the Court of Sessions, the Court of learned Magistrate, after complying with the provisions of Sections 207 and 208 of Cr.P.C., committed the case to the Court of Sessions for trial under Section 209 of Cr.P.C.

6. Upon commission of the case, the learned Sessions Judge framed charge against the accused persons for the aforesaid offences vide Exh.11. Since the accused persons pleaded not guilty, they were put to trial.

7. The prosecution has adduced oral as well as documentary evidence to bring home the charge leveled against the accused persons. The learned Sessions Judge, after considering the evidence on record, was pleased to convict the accused persons for offence punishable under Sections 302 read with Section 447 read with Section 149, 147 and 148 of IPC.

8. The Appellants of Criminal Appeal No. 400 of 2014 were imposed punishment of life imprisonment whereas the Respondents in Criminal Appeal No. 1481 of 2013 were sentenced to undergo Rigorous Imprisonment for six years with fine of Rs.10000/- vide impugned judgment and order dated 29.6.2013.

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9. Being aggrieved and dissatisfied with the same, the respective Appellants have preferred the present Criminal Appeals.

10. Heard learned Advocate Shri Bomi H. Sethna for the Appellants of Criminal Appeal No. 400 of 2014. Learned Advocate Mr. Sethna submitted that the evidence adduced on record by the prosecution is highly insufficient to bring home the charge levelled against the Appellants. Apart from that, it is emerging from the record that along with the first informant namely Jerambhai, his brother Dayarambhai and his mother, there were other persons / labourers working in the field at the time of incident and there is a reason to believe that considering their presence in the field at the time of incident, they also must have seen the incident. However, none of these labourers have been examined by prosecution as witnesses for the reasons best known to it. He further submitted that

the witnesses namely Jerambhai, Dayarambhai and their mother Savitaben, who have been projected to be the eyewitnesses, do not appear to be truthful, and therefore, their depositions are required to be discarded at the outset. He submitted that the first informant Jerambhai does not give the details as regards the blows inflicted by each of the accused persons upon the deceased either in the FIR or in the examination-in-chief. He submitted that there are several inconsistencies in the depositions of the eyewitnesses as regards the weapon attributed to each of the accused persons. He also submitted that the history before Dr. Arun R. Prasad, who had examined the R/CR.A/400/2014 JUDGMENT DATED: 01/05/2023 deceased at Dhangadra Government Hospital first in point of time, was given by one Lakhabhai Rupabhai. As per the history given before the said Doctor, there were six persons involved in the incident along with the accused persons. However, as per the charge sheet, there were only five persons involved in the incident, which creates doubt as regards the manner in which the investigation has proceeded. He further submitted that witness Dayarambhai, who also happens to be the son of the deceased, is not aware about the age of his deceased father, as, at one stage he states the age of his father to be 45 years, whereas, at another, he states the age of his deceased father to be 60 years, which creates doubt about the truthfulness of this witness. He further submitted that, as per the case of prosecution, the incident had occurred because the accused persons were required to pay Rs.25000/- to the deceased and his family for breaking the engagement of their son with the daughter of the brother of the deceased. Upon perusal of the entire evidence adduced on record by the prosecution, there is nothing as regards the motive sought to be attributed by prosecution to this incident. On the contrary, the father of the girl, whose engagement was broken, has been examined before the lower court. He, in his deposition has stated that there was no dispute between the parties as regards the sum of Rs.25000/- and no quarrel had ever taken place between the parties prior to the incident. Thus, the aspect of motive is not proved from the evidence of prosecution. He also submitted that there is no evidence whatsoever coming forth as regards the previous meeting of minds of the R/CR.A/400/2014 JUDGMENT DATED: 01/05/2023 accused persons to form an unlawful assembly. Therefore, the learned Sessions Judge ought not to have convicted the Appellants for the offence in question with the help of Section 149 of IPC. In view of these submissions, learned Advocate submitted that the prosecution had miserably failed to bring home the charge levelled against the Appellants and the learned Sessions Judge has committed grave error in convicting the Appellants for the offence in question despite the failure on part of the prosecution. He therefore submitted to allow the present Appeal and acquit the Appellants from the charges.

11. The Appeal is opposed by the learned APP Ms. Krina Calla. She submitted that the prosecution has examined Jerambhai Sangrambhai Vaghela, Dayarambhai Sangrambhai Vaghela and Savitaben Vaghela, who are the sons and the widow of the deceased. These persons, who were present in the field, where the incident had taken place and had witnessed the incident as it happened. These witnesses have given complete account as to how the incident took place except minor discrepancies inter se. There is no reason not to believe the depositions of these witnesses. She further submitted that the scientific evidence in the form of PM Note as well as FSL Report does not also support the case of prosecution, and therefore, the learned Sessions Judge does not appear to have committed any error in convicting the Appellants for the offence in question. She therefore submitted to dismiss the Criminal Appeal No. 400 of 2014.

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12. As regards Criminal Appeal No. 1481 of 2013, learned APP Ms. Krina Calla submitted that the learned Sessions Judge has convicted the Respondents in this Appeal for the offence punishable under Section 302 read with Sections 149, 447, 149, 147 and 148 of IPC. However they have been sentenced to undergo Rigorous Imprisonment for six years. The sentence imposed upon these Respondents is not in conformity with the provision of Section 302 of IPC under which the minimum sentence which can be imposed is of life imprisonment. The learned Sessions Judge has therefore committed error in sentencing the Respondents for six years only. She therefore submitted to allow Criminal Appeal No. 1481 of 2013 and impose appropriate punishment as provided under Section 302 of IPC.

13. Learned Advocate Mr. Yogendra Thakore appearing for the Respondent in Criminal Appeal No. 1481 of 2013 submitted that though these Respondents have not preferred any Appeal against the judgment so far as it convicts them, however, he still presses for acquittal of the Respondents and has adopted the arguments canvassed by learned Advocate Shri Bomi H. Sethna. He further submitted that in the absence of any cogent evidence it is not sufficient to convict the Respondents for the offence in question, they are required to be acquitted and therefore the Appeal filed by the State is devoid of any merit and therefore the same should be dismissed.

14. Heard learned Advocates for the parties and perused the record.

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15. The case of the prosecution rests mainly upon the deposition of three eyewitnesses namely Jerambhai, Dayarambhai and Savitaben. These witnesses happen to be the sons and the widow of the deceased. These witnesses, in their respective depositions before the learned Sessions Judge have stated that, at the time of incident, the deceased was moving around in the field and the convicts herein assaulted the deceased with weapons in their hands. All the three witnesses have attributed the convicts with the weapons they were carrying. The Convict Munabhai Babubhai with Dharia, convict Kalubhai Babubhai with Axe, Laljibhai Veljibhai with Dharia, Jesinghbhai Valjibhai with Stick and convict Babubhai Valjibhai with Dharia. It is pertinent to note that at the time of incident, these witnesses were working in their field nearby the place of incident. Being the family members of the deceased, the presence of these witnesses in the field is quite natural, and therefore, the fact that these witnesses had seen the incident, cannot be doubted. The witnesses depose in tandem before the learned Sessions Judge that the convicts assaulted the deceased with the weapons as attributed to them herein above. It is contended on behalf of the Appellants of Criminal Appeal No. 400 of 2014 that there are inconsistencies in the depositions of eyewitnesses as regards the weapons carried by each of the convicts. Upon examining the depositions and the record, it appears there are no inconsistencies in the depositions of witnesses as regards the weapons attributed to each of the convicts. Therefore, the argument that since there are R/CR.A/400/2014 JUDGMENT DATED: 01/05/2023 inconsistencies, the depositions of the eyewitnesses should be discarded must fall. These witnesses have been thoroughly cross-examined by defence before the learned Sessions Judge.

16. Upon going through the cross-examination of these witnesses, it appears that there is nothing to dislodge what has been stated by these witnesses in their examination-in-chief. Therefore, the fact of the convicts having assaulted the deceased in the incident has been duly proved by the prosecution with the help of these eyewitnesses.

16.1 It is sought to be canvassed that at the time of incident the other labourers were also working in the farm and none of those labourers have been examined by the prosecution. It is true that it emerges from the record that at the time of incident the other persons were also working in the farm along with three eyewitnesses and these labourers also must have seen the incident as they were present in the farm at the time of incident.

16.2 As per the settled legal position, it is the quality and not the quantity of the evidence which is required to be seen. The three eye witnesses examined by prosecution give the complete account of the incident and there is no reason not to believe the version of these eyewitnesses. It is the prerogative of the prosecution as to whom should it examine as witness in the trial.

R/CR.A/400/2014 JUDGMENT DATED: 01/05/2023 Merely because these labourers have not been examined, it is no ground to throw the other evidence adduced on record overboard nor the same is the ground to disbelieve the eyewitnesses who have already been examined. It is also sought to be canvassed that after the incident the deceased was taken to the Government Hospital at Dhangadra where he was examined by Dr. Arun R. Prasad. Before the said Doctor, the history was given by one Lakhabhai Rupabhai to the effect that there were six persons involved in the incident. However, only five accused persons have been booked by the prosecution in the instant case. It is pertinent to note that the person i.e. Lakhabhai Rupabhai who had given the history before the said Doctor had not seen the incident. There is nothing on record to indicate as to on what basis the said information was given by him to the Doctor and therefore the information furnished by him to the Doctor does not appear to be reliable. Simply because some wrong information has been given by some person before the Doctor in the history, the entire case of prosecution should not be thrown out. Had the said history been given by some eyewitness, there would have been some ground to disbelieve the case of prosecution. However, since, person giving the said history was not an eyewitness to the incident, the history given by him does not have any bearing on the case of prosecution. The doubt is also sought to be created on the deposition of witness Dayarambhai by contending that the witness was not aware about the age of his father. Simply because the witness does not remember the correct age of his deceased father, whatever is deposed R/CR.A/400/2014 JUDGMENT DATED: 01/05/2023 by him as regards the incident need not be discarded. The witness has deposed before the Court being eyewitness to the incident and there is no other reason to disbelieve what has been stated by the witness in his deposition as regards the incident.

16.3 In view of these facts, what is required to be examined is the aspect as to whether this assault was carried out by the convicts with an intention to kill the deceased.

16.4 As per the case of prosecution, the incident had taken place as the engagement of the cousin sister of the first informant Laxmi with one of the convicts was broken up and the deceased was required to pay a sum of Rs.25000/- for the same to the convicts. The father of the said Laxmi

namely Kanjibhai @ Kanabhai Harjibhai Vaghela has been examined before the learned Sessions Judge vide Exh.68. He, in his deposition has stated that the engagement of his daughter Laxmi was done with convict Kalubhai. At the time of the engagement, it was agreed between the parties that, if the marriage was not performed within four months from the date of engagement, the sum of Rs.25000/- deposited by Jesdawada would be forfeited. However, subsequently, the engagement was broken by mutual consent. The witness in his cross-examination has stated that there was no quarrel between the parties as regards the sum of Rs.25000/- which was required to be paid to the convicts.

R/CR.A/400/2014 JUDGMENT DATED: 01/05/2023 There was no discussion as well in this regard between the witnesses and the convicts. Therefore, the motive, which is sought to be attributed by the prosecution to the incident, does not get any support from the evidence of this witness. Therefore, the breakup of engagement does not appear to be the reason for the convicts to assault the deceased.

16.5 Upon perusal of the entire evidence, there appears no other reason for the convicts to assault the deceased. The evidence of prosecution is also silent on the aspect of intention on part of the convicts in assaulting the deceased. There is nothing on record to indicate that the assault was carried out by the convicts with an intention to kill the deceased.

16.5.1 It is pertinent to note at this stage, that, if the deceased was assaulted by the convicts with the deadly weapons as attributed to them with an intention to kill him, there would have been many more injuries on the body of the deceased. As per the case of prosecution, after the incident, immediately the deceased was taken to the Government Hospital at Dhangadra, where he was examined by Dr. Arun R. Prasad. This Doctor has been examined vide Exh.38 before the learned Sessions Judge. He, in his deposition has stated that he had found only three injuries on the body of the deceased, out of which, two injuries were on the head of the deceased and another was on the back of the deceased. It is also required to be noted that the alleged incident had taken place on 15.6.2008, and after the incident, the deceased was alive for ten days and he expired after ten days on 25.6.2008. Therefore, the injuries caused to the deceased were not of such a nature that they would result in an instant death looking to the fact that this aspect also indicates that the convicts had not assaulted the deceased with an intent to kill him.

17. The learned Sessions Judge has convicted the convicts for the offences in question with the help of Section 149 of IPC. Upon perusal of the entire record, the record is silent as regards any previous meeting of minds of the convicts as well as their common intention. The prosecution has failed to bring any cogent evidence on record to prove the previous meeting of minds of the convicts and that they had a common intention to kill the deceased. The learned Sessions Judge while sentencing the Respondents of Criminal Appeal No. 1481 of 2013 has taken the individual roles attributed to them. Therefore, the aspect of any unlawful assembly is also not proved.

18. Having regard to the manner in which the incident took place, it appears that it was not premeditated. It is no doubt true that the deceased had sustained injuries in the said fight at the

hands of the convicts. However, that by itself would not make them liable for conviction for offence punishable under Section 302 of IPC in view the circumstances discussed herein above.

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19. Section 326 of IPC provides for punishment for voluntarily causing grievous hurt,. The term 'grievous hurt' has been defined under Section 320 of IPC as under:

"Any hurt which endangers life ..."

19.1 From the evidence adduced on record by prosecution, it is clear that the present convicts had caused such hurt to the deceased which would endanger his life, and therefore, in the opinion of this Court, the convicts herein had committed an offence punishable under Section 326 of IPC and not an offence under Section 302 of IPC. Therefore, the conviction of the convicts is altered from the one under Section 302 of IPC to Section 326 of IPC. The convicts have already undergone sentence sufficient for punishing them for the offence under Section 326 of IPC in the opinion of this Court, and therefore, the sentence imposed upon the Appellants of Criminal Appeal No. 400 of 2014 is reduced from life imprisonment to the Rigorous Imprisonment to the tune which they have already undergone. The Appellants [Original Accused Nos. 1 and 2] are ordered to be set free forthwith, if not required in any other case. Their Bail Bonds, if any, shall stand cancelled. From the record, it appears that Appellant No.1 - Munnabhai Babubhai Makwana [Original Accused No.1 is already on Permanent Bail vide the order dated 20.2.2023, passed by the Coordinate Bench in Criminal Misc. Application No. 1/2023 (For Suspension of Sentence) in Criminal Appeal No. 400 of 2014.

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20. As per the settled legal position, though the Respondents of Criminal Appeal No. 1481 of 2013 have not preferred any Appeal against the judgment of conviction, they would be entitled to the benefit which has been granted by this Court to the Appellants in Criminal Appeal No. 400 of 2014. The Respondent Nos. 2 and 3 in another Criminal being Criminal Appeal No. 1481 of 2013 are also convicted for the offence punishable under Section 326 of IPC and they have already undergone the sentence which was imposed upon them by the learned Sessions Judge and since the said sentence in the opinion of this was sufficient for punishing them for the said offence, no further order is required to be passed qua them in the said Criminal Appeal No. 1481 of 2013. From the record, here also, it appears that Respondent Nos. 2 and 3 [Original Accused Nos. 4 and 5 respectively] have already been released in the year 2013 vide the order passed by the State Government. 20.1 In view of the aforesaid, the judgment and order in Criminal Appeal No. 1481 of 2013 having become infructuous is hereby disposed of accordingly.

(A.Y. KOGJE, J) (M. R. MENGDEY,J) J.N.W