

CASE NO.:

Appeal (crl.) 868 of 2001

Appeal (crl.) 1207 of 2001

PETITIONER:

Ajitsinh Andubha Parmal & Anr., Chandrasinh @ Chandubha Lalubha

RESPONDENT:

State of Gujarat

DATE OF JUDGMENT: 26/09/2002

BENCH:

DORAISWAMY RAJU & SHIVARAJ V. PATIL.

JUDGMENT:

J U D G M E N T

Shivaraj V. Patil J.

These two appeals arise out of a common judgment, hence they are being disposed of together. Briefly stated, the facts leading to filing of these appeals are that on 14.5.1987 in the morning when Abhesinh, the younger brother of Gajubha (the deceased), was cleaning the 'Utara' (a place of tethering cattle), there was altercation between him and accused No. 4 and the accused No. 4 dealt a knife blow to him for which the F.I.R. (Exbt.55) was lodged by Abhesinh at Muli police Station. Mayaba and Manubha are the mother and father of the deceased Gajubha respectively. Sahdevsinh, Abhesinh and Ranubha are his brothers and Harshabha is his sister. Accused No. 1 is the brother of accused No. 3 and accused No. 2 is the brother of accused No. 4; and they are cousins among themselves.

The prosecution case as emerged during the trial is that at about 10.00 A.M. when Gajubha was rushing towards his mother Mayaba to rescue her, who was being assaulted with sticks by accused Nos. 1 and 3 and his sister Harshabha was pushed when she tried to intervene, the accused No. 2 emerged from the lane and inflicted knife blows on the chest and abdomen of the deceased. When he started running, accused No. 2 chased the deceased Gajubha and gave another knife blow. Even thereafter, the three accused the accused Nos. 1 and 3 chased and gave blows with sticks on his head. Deceased Gajubha succumbed to his injuries during treatment on 18.5.1987. All the four accused were tried for offences under Sections 452, 302 and 323 read with Section 34 IPC and also under Section 135 of the Bombay Police Act. The Additional Sessions Judge, after trial and on consideration of evidence, acquitted accused Nos. 1, 3 and 4 giving benefit of doubt and convicted the accused No. 2 alone for offence under Section 302 IPC holding him guilty for the said offence. The accused No. 2 preferred Criminal Appeal No. 652/90 to the High Court and the State challenged the order of acquittal in respect of accused Nos. 1 and 3 in Criminal Appeal No. 790/90. No appeal was preferred against the order of acquittal of accused No. 4. On appeal, the High Court by the impugned judgment

and order confirmed the conviction of the accused No. 2 dismissing the appeal filed by him and reversed the order of acquittal of accused Nos. 1 and 3 in the appeal filed by the State and convicted both of them for offence punishable under Section 302 read with Section 34 IPC. Hence, the Criminal Appeal No. 868/2001 by accused No. 1 and 3 and Criminal Appeal No. 1207/2001 by the accused No. 2.

According to the prosecution, on 14.5.1987 at 7.30 A.M. accused No. 4 quarreled with Abhesinh (younger brother of the deceased) when he was cleaning Utara near his house; father of the accused No. 2 caught Abhesinh's hands from the back and accused No. 2 dealt knife blow to him, on that account F.I.R. (Exbt. 55) was lodged; on the same day at about 10.00 A.M., accused Nos. 1, 3 and 4 barged into the house of Gajubha and started beating his mother Mayaba with sticks and dragged her outside the house towards back of Sulabha's house. At that time, Ranubha (PW-1), his sister Harshabha (PW-6) were present at the spot. Ronubha rushed to Utara to call Gajubha (the deceased). Gajubha rushed towards his house 200 ft. from Utara. When he came near the spot behind Surabha's house, he saw his mother being beaten; he shouted at the accused; at that time accused No. 2 emerged from lane adjoining Surabha's house; gave two knife blows, one on chest and another on abdomen of Gajubha; Gajubha started running back towards Utara; accused Nos. 1 and 3 left beating Mayaba (PW-5) and started chasing Gajubha with lathis; while Gajubha was running, accused No. 2 gave another knife blow; the accused still continued to chase Gajubha who fell near Utara where accused Nos. 1 and 3 gave him lathi blows on head; Ranubha went for the help of Tejubha who witnessed the incident from the distance of 50 ft. He got motor-cycle and they carried Gajubha to Civil Hospital, from there he was taken to hospital at Surendranagar. Gajubha was examined by Dr. Vadehra at 10.40 A.M.; Gajubha's statement was recorded by police at 1.30 P.M. which became dying declaration No. 1; statement of Gajubha to Executive Magistrate recorded between 3.10 P.M. and 3.35 P.M. on 14.5.1987 was dying declaration No. 2, Gajubha died on 18.5.1987. The trial court, looking to the evidence of Ranubha, Puriba, Harshabha and Mayaba held that the incident at home at 10.A.M. on 14.5.1987 was not proved because of material contradictions and omissions, which went to the root of the case. However, the trial court did not believe that someone else assaulted deceased Gajubha by knife and that accused No. 2 was falsely involved. The trial court noticed that in cross-examination PW-1 Ranubha stated that they had no ill-feelings with the accused party till the date he was examined in the court and he did not know why accused Nos. 1 and 3 beat his mother. He has also not stated that accused No. 1 and 3 came with sticks and assaulted his mother; the trial court observed that the conduct of this witness does not inspire confidence inasmuch as on the date of the incident, he was 16 years of age approximately and he did not intervene when they were beating his mother; if he was really present at the time of incident, he would have certainly intervened; PW-5 Mayaba, mother of the deceased stated that she was beaten by sticks on shoulder, back and waist; she also admitted that she

felt giddiness and had fallen on the wall of Surabha's khadki; lost consciousness and gained consciousness thereafter at Surendranagar hospital; she was silent about the motive of the accused to beat her; she further admitted that her son Ranubha (PW-1) and her daughter Harshabha (PW-6) did not resist the attack by accused 1 and 3; PW-2, Puriba does not speak about stick blows; she did not state before the police that accused Nos. 1 and 3 assaulted the deceased with sticks; Parsanabha (PW-7) deposed only against accused No. 2 (Chandrasinh) and did not say anything against accused Nos. 1 and 3; when questioned under Section 162 Cr.P.C. she deposed that she has not stated that accused Nos. 1 and 3 were beating Mayaba and Gajubha came to save her; even in the dying declaration of Gajubha he is silent about the incident at home and his brother Ranubha coming to call him and his rushing towards his mother; Mayaba's version about stick blows on chest, waist and back is not corroborated by the medical evidence; because Mayaba's medical certificate (Exbt.32) does not show any injuries on waist, chest and back and there was a contusion on either side of scalp; the defence version that on seeing her son being beaten, she herself dashed her head on the wall, could not be ruled out; thus looking to the evidence of these witnesses and having regard to the material contradictions and admissions which went to the root of the case, the trial court held that incident as alleged by the prosecution at home at 10.00 A.M. on 14.5.1987 was not proved.

The trial court also observed that the deceased Gajubha in his dying declaration did not say anything about the incident at home and that his brother Ranubha went to call him. Investigating Officer, Mavalsinh Shivubha in his evidence admitted that Mayaba did not state that the accused 1 and 3 gave stick blows to deceased Gajubha; Harshabha has not stated before him that Bharatsinh went home and brought sticks; he also stated that accused Nos. 1 and 3 appeared before police on their own account; he admitted that before the arrest of the accused, their houses were searched but nothing was found; the trial court also observed if the incident as claimed had taken place at 10.00 A.M. at the house of Mayaba and beating her and dragging her, that could have certainly found place in the dying declaration but it is silent on the point; PW-11, Dr. Devjibhai who examined Gajubha at 10.00 A.M. on 14.5.1987 noticed four incised wounds; he opined that chest injury (injury no. 1) was serious; injury nos. 1 to 4 could be caused by knife; in the cross-examination, he stated that he examined the whole body of Gajubha and gave treatment to him for two hours and he did not find any injury caused with blunt object; the learned Sessions Judge rejected the case of the prosecution as to participation of all the accused and to apply Section 34 IPC having regard to the evidence placed on record while holding the accused No. 2 guilty of offence under Section 302 IPC.

The learned senior counsel for the appellants in Criminal Appeal No. 868/2001 urged that the High Court committed grave jurisdictional error in reversing the order of acquittal as regards the appellants; the learned Sessions Judge on a careful and objective

consideration of the entire evidence found that the prosecution failed to prove the incident alleged to have taken place at the house of Mahubha at 10.00 A.M. on 14.5.1987 and that incident of beating Mayaba by the appellants was not established; the High Court has devoted substantial portion of the judgment to consider whether the court can look into the police statement of witnesses to ascertain whether the contradiction or omission brought on record was really there or not; in the light of evidence recorded during trial and in view of the contradictions and omissions brought about, as is evident from the statement of Investigating Officer, the High Court was not at all right and justified in looking to the statements of witnesses made to police; as to the use of sticks by the appellants and their assaulting the deceased by sticks, there were serious omissions as pointed by the trial court which the High Court did not properly appreciate; the High Court seriously erred in convicting the appellants applying Section 34 IPC; even if High Court could take a different view that itself was not sufficient to reverse the order of acquittal unless the finding recorded by the trial court was untenable or unjust; it could not be said that the reasons recorded by the trial court were either perverse or not based on proper appreciation of evidence. The learned senior counsel for the appellant in Criminal Appeal No. 1207/2001 fairly submitted that in view of the concurrent findings of conviction recorded against the appellant (accused No. 2), he was not in a position to challenge the same. However, he argued that the accused No. 2 could be held guilty only for an offence under Section 304 Part II IPC.

Per contra, the learned counsel for the State made submissions supporting the impugned judgment and order of the High Court.

Having carefully considered the submissions made by the learned counsel for the parties, in the light of the evidence placed on record, we have no hesitation in confirming the order of conviction and sentence passed against appellant (accused No.2) in Criminal Appeal No. 1207/2001. The case of the prosecution as far as the accused No. 2 is concerned, has been consistent and fully supported by the prosecution witnesses. The trial court and the High Court have concurrently found him guilty for an offence under Section 302 IPC. The learned counsel for the accused No. 2, in our opinion, was right in not challenging the order of conviction. We are finding it difficult to accept his submission that the accused No. 2 could not be held guilty for offence under Section 302 IPC in the light of specific and clear evidence that he gave first two knife blows on the vital parts of the body causing serious injuries and thereafter gave knife blow again after chasing him. We are unable to accept that the offence committed by him could be one under Section 304 Part II. The High court was right and justified in confirming his conviction under Section 302 IPC and we do not have any good reason to differ with the same.

As regards the appellants in Criminal Appeal No. 868/2001 (accused Nos. 1 and 3), the trial court on a detailed analysis and objective assessment of evidence

of eye-witnesses concluded that prosecution failed to establish the incident as alleged to have taken place at 10.00 A.M. on 14.5.1987 at the house of the deceased of beating Mayaba and dragging her and Ranubha and rushing to call the deceased. There were material omissions and contradictions in the statements of these eye-witnesses who are related to the deceased as to the assaulting of the deceased by accused Nos. 1 and 3 with sticks and further medical evidence belied the version of Mayaba of the accused Nos. 1 and 3 beating her with sticks as noticed by the trial court. In our opinion, the trial court was also right in not applying Section 34 IPC to convict the accused Nos. 1 and 3. Firstly, it was not proved beyond reasonable doubt that the accused Nos. 1 and 3 assaulted the deceased with sticks; even otherwise there is no evidence to show any pre-plan or common intention on the part of the accused Nos. 1 and 3 to commit the murder of the deceased. It is not the case that all the accused went together or waiting together in a common place for the arrival of the deceased, further it is also in the evidence that accused No. 2 emerged suddenly from a lane and assaulted the deceased with knife. Under the circumstances, we find it difficult to accept that the accused Nos. 1 and 3 could be held guilty for offence under Section 302 read with Section 34 IPC. In our view, the High Court committed serious error in reversing the order of acquittal merely because it could take a different view. It is not possible to say having regard to the evidence on record that the reasons recorded and findings arrived at by the trial court to acquit the accused Nos. 1 and 3 were unjustified or untenable. The High Court also failed to dislodge all the reasons given by the trial court for acquitting them.

Under these circumstances, the impugned judgment and order of the High Court convicting and sentencing the accused Nos. 1 and 3 reversing the order of acquittal cannot be sustained. Hence, for the reasons stated hereinabove, the Criminal Appeal No. 868/2001 is allowed. The impugned judgment and order of the High Court convicting the appellants (accused No.1 and 3) in Criminal Appeal No. 868/2001 is set aside and the order of acquittal recorded by the trial court in their favour is restored. Their bail bonds shall stand discharged. The Criminal Appeal No. 1207/2001 is dismissed confirming the impugned judgment and order so far it relates to accused No. 2 (Chandrasinh).