IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL NO. 3056 of 2008

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and
HONOURABLE MR. JUSTICE RAJENDRA M. SAREEN

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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NARUBHAI AMARSINH MAKWANA(KOLI PATEL)
Versus
STATE OF GUJARAT

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Appearance:
MR PATHIK M ACHARYA(3520) for the Appellant(s) No. 1
MR HK PATEL, ADDL PUBLIC PROSECUTOR for the Opponent(s)/Respondent(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI**
and
HONOURABLE MR. JUSTICE RAJENDRA M. SAREEN

Date : 15/06/2022

ORAL JUDGMENT
(PER : HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)

1. This appeal is directed against the judgment and order dated 09.09.2008 passed by the learned Sessions Judge, Ahmedabad (Rural) in Sessions Case No. 107 of 2007 whereby the present appellant – original accused came to be convicted for the offence punishable under Section 302 of the Indian Penal Code, 1860 (herein after referred to as 'the IPC') and sentenced to undergo life imprisonment and a fine of Rs.1000/- and in default of payment of fine, to undergo further simple imprisonment for 3 months.

2. The brief story of the prosecution is that on 19.08.2007 between 4:00 a.m. and 5:30 a.m. at village Bhetawada when deceased Savjibhai Amarshibhai was sleeping on the cot in a cattle-shed, the appellant – accused, allegedly keeping grudge of earlier dispute, possessed with arm i.e. Dharia came at the said place and thereafter gave blows on the head and left ear of the deceased. As a result of said injury sustained by the

deceased, he succumbed to the injuries. It is, therefore, alleged that the appellant-accused committed an offence alleged against him.

2.1 After the registration of FIR, the investigating agency carried out the investigation and thereafter submitted the charge-sheet before the concerned Magistrate Court. However, as the case was triable by the Court of Sessions, it was committed to the Sessions Court under Section 209 of the Code of Criminal Procedure.

2.2 The case was registered and numbered as Sessions Case No.107 of 2007 before the Sessions Court, Ahmedabad (Rural). The trial Court framed the charge against the accused. The accused pleaded not guilty and claimed to be tried. Thereafter the prosecution laid oral as well as documentary evidence with a view to prove the charge against the appellant – accused. The prosecution has examined the following witnesses and also produced several documentary evidence as under;

	ORAL EVIDENCE	
S/n.	**Name of Witness**	**Exh.**
1	Bharatbhai Savjibhai Patel, complainant	5
2	Gajaraben Bharatbhai	7
3	Nanjibhai Khodabhai	8
4	Pratapbhai Bhagjibhai	13
5	Kalubhai NarsibhaiMakwana	17
6	Manibhai Shankarbhai Kolipatel	19
7	Udesingbhai Velabha Makwana	20
8	Mahendrasinh Kalusinh Vaghela, PSO	21
9	Bhailalbhai Tulsibhai Karoliya, PI	22
10	Jaydevprasad Rambahor Mishra, PI	24
11	Kulsum Mohammedhusen Momin, MO	27

	DOCUMENTARY EVIDENCE	
S/n.	**Document**	**Exh.**
1	Original complaint	6
2	Inquest Panchnama	10
3	Panchnama of place of offence	18
4	Panchnama of physical condition of the deceased	11
5	Panchnama of physical condition of the accused	12
6	Seizure Panchnama of clothes of the accused	16
7	Seizure Panchnama of weapon	14
8	PM Note	28
9	Despatch Note	23
10	Receipt of FSL	25
11	FSL Report	26

2.3 At the end of the trial, further statement of the accused under Section 313 of the Code of Criminal Procedure was recorded. In which, he pleaded not guilty and also stated that he has been falsely implicated in the alleged incident. Thereafter, after considering the material placed before the Sessions Court, the concerned trial Court convicted the accused as observed herein above and passed the impugned order of conviction against appellant – accused. Against the said order, the appellant – accused has preferred this appeal.

3. Heard learned advocate Mr. Pathik Acharya for the appellant – accused and learned APP Mr. H. K. Patel for respondent – State.

4. Learned advocate for the appellant referred the deposition given by various prosecution witnesses. Learned advocate for the appellant referred the deposition given by PW 1 Bharatbhai Savjibhai, who is a son of the deceased. The deposition of said witness is recorded at Exh.5. It is submitted that the said witnesses is not eyewitness and he had not seen the incident

in question. Learned advocate thereafter referred deposition of PW 2 Gajraben Bharatbhai who is wife of the complainant. It is submitted that said witness has also not seen the incident in question and the said witness reached to the place of incident after the so called incident has taken place in the cattle-shed.

4.1 Learned advocate Mr. Acharya has also referred deposition given by PW 3 Nanjibhai Khodabhai, who is neighbor of the deceased. After referring to the deposition of the said witness, it is contended that as per the say of the said witness, he has seen the weapon Dharia in the hands of the accused – appellant. However, the deposition given by the said witness is not required to be believed as there are major contradiction in the deposition of the said witness.

4.2 Similarly learned advocate advocate has referred deposition given by the PW 4 Pratapbhai Bhayajibhai and PW 5 Kalubhai Narsinhbhai. Learned advocate submitted that PW 4 is the panch witness of panchnama of discovery of the weapon. It is submitted that said witness is not reliable witness

and because of incident of scuffle which took place in past between the said witness and the accused, it appears that the said witness has given false deposition against the accused. It is also contended that PW 5 Kalubhai Narsinhbhai is a panch witness of inquest panchnama of place of incident. In fact said witness knows Pw 3 Nanjibai Khodabhai, as he was Sarpanch and having residence near place of incident. Hence, the said witness is termed as an interested witness, this Court may not consider the deposition given by the said witness.

4.3 Learned advocate Mr. Acharya submitted that PW 6 Manibhai Shankarbhai and PW 7 Udesang Welabhai have turned hostile and not supported the case of the prosecution. At this Stage, it is submitted that from the deposition given by PW8 Mahendrasang Kalusing Waghela, PSO who has registered the FIR, it appears that the said witness informed PSI and as per the deposition of the said witness the complaint was taken at the place of incident. Learned advocate thereafter referred a deposition of PW 9 Bhailalbhai Tulasibhai Karolia, Investigation Officer who has carried out investigation,

recorded the statement, prepared the Panchnama and sent the mudamal weapon for necessary examination to FSL. It is submitted that thereafter PW 10 Jaydev Prasad Rambahor Mishra, another Investigating Officer has continued the investigation and filed charge-sheet against appellant – accused. However, in the meantime one police officer namely Mr. S. K. Solanki carried out the investigation but surprisingly the prosecution has not examined the said police officer.

4.4 Learned advocate thereafter referred the deposition of PW 11 Dr. Momin at Exh.27. It is submitted that from the deposition given by the Doctor as well as Post Mortem report, the deceased sustained one injury on head which was a fatal blow sustained by the deceased. Learned advocate therefore urged that in the present case there are no eyewitnesses to the incident in question and the case of the prosecution is based upon circumstantial evidence. It is submitted that in case of circumstantial evidence, the prosecution has to prove the motive with a view to prove the guilt of the accused. However, in the present case, from the evidence produced on

record the prosecution has failed to prove the motive on the part of the accused for commission of the alleged offence. It is submitted that even as per the case of prosecution on the previous day of the incident, the accused used abusive language and given threats but that does not mean that the accused was having any motive to kill the deceased. It is further submitted that prosecution is also failed to prove the intention on the part of the accused for committing the offence punishable under Section 302 of the IPC.

4.5 Learned advocate would further submit that the theory of last seen together is also not proved on the basis of deposition given by PW 3 Nanjibhai Khodabhai who is residing in the agricultural field of the family member of the accused and the deceased. Learned advocate would at this stage submit that the mudamal weapon was also found from the open place which is accessible to the public and the prosecution is also failed to prove the discovery of weapon at the instance of the appellant by leading cogent evidence.

4.6 Learned advocate Mr. Acharya submitted that without prejudice to the aforesaid contention and without admitting guilt of the appellant, even assuming that present appellant has given blow to the deceased, then it is a case of single blow and the incident has taken place in spur of moment. Therefore, the sessions Court has committed an error while punishing him and convicting the accused for the offence under Section 302 of the IPC and at the most appellant can be punishable under Section 304 (Part I) of the IPC.

5. Learned advocate Mr. Acharya has placed reliance upon following decisions;

(1) Binder Munda vs. The State of Orissa reported in 1992 Cr.L.J. 3508

(2) Digamber Vaishnav vs. State of Chhattisgarh reported in (2019) 4 SCC 522

(3) Nagendra Sah vs. State of Bihar reported in (2021) 10 SCC 725

(4) Shivaji Chintappa Patil vs. State of Maharashtra reported in (2021) 5 SCC 626

(5) Surendra Kumar vs. State of Uttar Pradesh reported in AIR 2021 SC 2342

5.1 After referring to the relevant paragraphs of the aforesaid decisions, it is contended that in the case of circumstantial evidence, there is always a danger that the conjecture or suspicion may take the place of legal proof and therefore, the Court has to be watchful and ensure that the conjecture and suspicion do not take the place of legal proof.

5.2 It is observed in Para 16 of the judgment in case of **Digamber Vaishnav (supra)** that;

> *"16. In order to sustain conviction on the basis of circumstantial evidence three conditions must be satisfied.*
> *(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;*
> *(ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and*
> *(iii) the circumstances, taken cumulatively, should form a chain so complete that there is not escape from the conclusion that within all human probability the crime was committed by the accused and none else, and it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused."*

5.3 It is also contended that in the said judgment it has been observed that there is long distance between "may be true and "must be true" and the prosecution has to travel all the way to prove its case beyond reasonable doubt. It is submitted that in the present case, prosecution has failed to prove the case against appellant beyond reasonable doubt.

5.4 Learned advocate would further submit on the basis of aforesaid decision rendered by the Honourable Supreme Court that in case of direct evidence motive would not be relevant. However, motive is the important link to complete the chain of circumstances. In the present case the prosecution has failed to prove the motive on the part of the appellant to commit the alleged offence to kill the deceased.

5.5 Learned advocate Mr. Acharya thereafter submitted that under Section 27 of the Evidence Act, it is not discovery of the fact that is admissible but relevant fact is alone admissible. Relevance is nothing but the link between the facts discovered

with the crime. It is submitted that in the present case the prosecution has failed to prove that the appellant was the owner of the weapon which was discovered at the instance of the appellant. It is submitted that from the evidence produced before the trial Court it revealed that one of the witnesses has specifically stated that the weapon i.e. Dharia which was discovered would be found with every person of the village and therefore in absence of ownership of weapon being established, the trial Court has committed an error while passing the order of conviction against the appellant – accused. Learned advocate therefore urged that the impugned order of conviction passed by the Sessions Court be set aside and thereby appellant be acquitted.

6. On the other hand, learned APP Mr. Patel has vehemently opposed this appeal and at the outset submitted that the prosecution has proved the case against the appellant beyond reasonable doubt and therefore, the trial Court has rightly passed an order of conviction against the appellant.

6.1 Learned APP has at this stage referred the FIR, copy of which is placed on record at page 57 of the paper-book. After referring to the FIR, it is submitted that FIR was filed on 19.08.2007 and on 18.08.2007, the appellant gave threats to the family members of the deceased, quarrel took place on 18.08.2007. The appellant used abusive language and given the threats that the family members of the deceased should not come at the bore-well of the appellant, otherwise he will kill one of the brothers. It is pertinent to note that appellant is the uncle of the complainant and the brother of the deceased. At this stage, learned APP has referred deposition of PW 3 Nanjibhai Khodabhai, who is neighbor of the deceased. After referring to the deposition it is contended that the said witness had seen appellant near the cot of the deceased with the weapon. The appellant was using abusive language also. At this stage learned APP referred the deposition given by PW 6 Manibhai Shankarbhai. The said witness though turned hostile, has specifically stated that he had overheard the voice of the appellant – accused. Thus learned APP submitted that presence of the appellant was established at the place of

incident at the time of incident in question.

6.2 Learned APP would further submit that the weapon by which the appellant has committed an offence punishable under Section 302 of the IPC was discovered at his instance. Learned APP has referred discovery Panchnama Exh.14. After referring to the same, it is submitted that the weapon was not found in the open place but it was only within the knowledge of the appellant–accused. It is submitted that discovery panchnama is duly proved by examining PW4 Pratapbhai Bhayajibhai at Exh.13.

6.3 Learned APP has submitted that blood stains were also found on the weapon. At this stage, learned APP referred the Serology Report of FSL i.e. Exh.26. After referring to the said report, learned APP submitted that blood group of the deceased i.e. "O" was found on the weapon and on the other articles which were sent to the FSL. Learned APP thereafter referred to the deposition given by PW 11 Dr.Kulsum Momin at Exh.27. It is submitted that from the deposition given by

the said witness and the postmortem report, it was revealed that the deceased sustained three injuries. One injury on the head and another on left ear of the deceased and the cause of death of deceased was shock due to severe injuries sustained by the deceased. Thus learned APP would submit that the deceased sustained more than one injuries. It is not the case of one blow as contended by learned advocate for the appellant.

6.4 Learned APP would further contend that the prosecution has proved the motive of the appellant for commission of the alleged offence and when the appellant was found near cot of the deceased with weapon - Dharia, during early morning hours, the prosecution has proved the case against the appellant beyond reasonable doubt. Learned APP therefore urged that the present appeal filed by the appellant – accused may not be entertained.

7. Having heard learned advocates appearing for the parties and having gone through the material placed on record, it would emerge that incident took place on 19.08.2007. It is

specifically stated in the FIR by the complainant that on the previous date of incident i.e. on 18.08.2007 quarrel took place between appellant and the family members of the deceased with regard to the bore-well and threats were administered by the appellant. It was specifically stated by him that one of the brothers will be killed. From the evidence of PW 3 Nanjibhai Khodabhai as well as PW 6 Manibhai Shankarbhai, it further reveals that PW 3 who is neighbor and who was sleeping near the cot of the deceased had found the appellant near the cot with weapon Dharia and he was also using abusive language. Similarly PW 6, though he was declared hostile, specifically stated that he had overheard the voice of the appellant, however, he did not see the appellant. Thus from the evidence of the aforesaid witnesses, the prosecution has able to prove the presence of the appellant at the time and place of incident. It is also relevant to note that the prosecution has examined PW 4 Pratapbhai Bhayajibhai at Exh.13 who is panch witness of discovery panchnama. We have gone through the deposition given by the said witness and the discovery panchnama. We are of the view that the

prosecution has proved the said discovery of the weapon. Blood stains were also found on the weapon. From the Serology Report produced at Exh.26 it is revealed that blood group of the deceased was found from the weapon which was discovered at the instance of the appellant. We have also gone through the deposition given by Dr. Kulsum Momin PW 11 at Exh.27. We have also perused the postmortem report of the deceased. From the deposition of the Doctor as well as PM report, it would reveal that the deceased sustained more than one injuries – one injury on the head and another near left ear and the cause of death is due to severe injuries sustained by the deceased. The Doctor has specifically stated in the deposition that injuries could be possible by the weapon – mudamal article 9 which was discovered at the instance of the appellant.

7.1 In case of **Binder Munda (supra)**, the Orissa High Court has considered the case of **Sharad Birdhichand Sarda vs. State of Maharashtra reported in (1984) 4 SCC 116** and thereafter observed that in case of circumstantial evidence following

aspects are required to be considered by the Court;

> *"(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.*
>
> *(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say. they should not be explainable on any other hypothesis except that the accused is guilty,*
>
> *(3) the circumstances should be of a conclusive nature and tendency.*
>
> *(4) they should exclude every possible hypothesis except the one to be proved, and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."*

7.2 In case of **Nagendra Sah (supra)**, the Honourable Supreme Court has once again considered the aforesaid guidelines in case of **Sharad Birdhichand Sarda (supra).**

7.3 In case of **Digamber Vaishnav (supra)**, the Honourable Supreme Court has held that one of the principle of criminal jurisprudence is that burden of proof squarely rests on the prosecution and that the general burden never shifts. It is also observed that there is a long distance between "may be

true" and "must be true" and the prosecution has to travel all the way to prove its case beyond reasonable doubt. It is also held that in criminal cases if two view are possible one binding to the guilt of the accused and the other is to his innocence, the view which is favourable to the accused should be adopted.

7.4 Thereafter, in the very same decision the Honourable Supreme Court has made observations with regard to provisions contained under Section 27 of the Evidence Act that it is not the discovery of every fact that is admissible but the discovery of relevant fact is alone admissible. In the said case the recovery of the motorcycle is sought to be releid upon as a circumstances against the concerned appellants - accused and ownership of the said motorcycle was not proved by the prosecution and in the said case, the prosecution has not proved that the appellant – accused was the owner of the motorcycle and therefore, the Honourable Supreme Curt has made certain observations. However, in the present case the aforesaid observations would not be applicable as the present

case is not the case of vehicle which was discovered at the instance of the appellant – accused.

7.5 In case of **Shivaji Chintappa Patil (supra)**, the Honourable Supreme Court has observed in para 27 that in a case of direct evidence, motive would not be relevant, in a case of circumstantial evidence, motive plays an important link to complete the chain of circumstances.

7.6 Similar type of observations are also made in the case **Surendra Kumar (supra)** in para 25 and 26;

> *"25. Similarly for the husband Ramveer, there is no direct evidence to establish his role in the incident. As his conviction is entirely based on a conspiracy theory, it is essential to determine whether there was an agreement between the parties for doing an unlawful act and it must emerge clearly from evidence that there Page 20 of 23 was meeting of mind towards a common goal between Ramveer and his brother and also between Ramveer and the two armed robbers. The case evidence on record does not however establish any such agreement between Ramveer and the other accused. Conspiracy is a matter of inference and inference must be based on solid evidence. In case of any doubt the benefit must inevitably go to the accused. The 2nd appellant's conviction simply because of his dislike for the deceased, even if accepted to be correct, would not in*

our opinion be justified in the absence of any evidence either direct or of conspiracy, to link him with the crime.

26. The conspiracy theory to kill Kamla Rani, only because she was not liked by her husband is far too improbable to accept since the prosecution failed to present any evidence to show meeting of minds and common intention of all accused. Ramveer may not have been happy with his wife but this by itself does not establish that he hatched a conspiracy with his brother Surendra and his father Om Prakash (who died during trial), to kill Kamla Rani. The simple fact of being unhappy with a person even if accepted, do not provide a strong enough motive to hatch a conspiracy to eliminate the person. But this aspect was ignored by the Court below to attribute motive for the murder. In our assessment the motive element in the chain of circumstances is not acceptable and the benefit of the broken link must be made available to the appellants."

7.7 Keeping in view the aforesaid decisions rendered by the Honourable Supreme Court as well as Odisha High Court, facts and evidence produced by the prosecution before the trial Court are carefully examined, this Court is of the view the prosecution has proved the case against appellant beyond reasonable doubt. Motive of the appellant accused is also established by leading cogent evidence and the chain of circumstantial evidence is also complete.

8. We have also gone through the reasoning recorded by the concerned trial Court. We have also re-appreciated the entire evidence produced before the trial Court and we are of the view that the trial Court has not committed any error while passing the impugned order of conviction against appellant – accused. This appeal is therefore deserves to be dismissed. Accordingly the same is dismissed.

(VIPUL M. PANCHOLI, J)

(RAJENDRA M. SAREEN,J)

DRASHTI K. SHUKLA