

The State Of Gujarat vs Adam Fateh Mohmed Umatiya And Ors. on 4 March, 1971

Equivalent citations: (1971)3SCC208, 1971(III)UJ466(SC), AIR ONLINE 1971 SC 19

Author: A.N. Ray

Bench: A.N. Ray, C.A. Vaidialingam

JUDGMENT

A.N. Ray, J.

1. This is an appeal by special leave from the judgment dated 8 and 9 February, 1968 of the High Court of Gujarat acquitting accused No. 1, 2, 3, 4 and 7 of the charge levied against them and setting aside the conviction Under Section 302 read with Section 149 and Section 34 and Sections 147 and 148 of the Indian Penal Code and the sentence of imprisonment passed by the Sessions Judge.

2. The appellants were accused No. 1, 2, 3, and 4 and 7. They were charged for having formed an unlawful assembly with the common object and intention of killing five persons, namely, Allauddin Allimohmed Marodia, Allauddin Nasir Kadiwalla, Suleman Janmohmed Sunsara, Suleman Vazir Mukhi and Noormohmed Ibrahim Badarpura and in the prosecution of that common object and intention accused No 1 had armed himself with a gun accused No. 2 with an axe & knife, accused No. 3 with an axe, accused No. 4 with a dharia and thus committed an offence punishable Under Section 302 read with Section 34, Section 302 read with Section 149 and Sections 147 and 148 of the Indian Penal Code. Accused No. 1 was also individually charged for committing the murders of the aforementioned five person. Accused No. 2, 3, 4 and 7 were charged for causing injuries to all the five persons with axe and dharia and thus each of them was charged for having committed an offence punishable Under Section 302 of the Indian Penal Code. Accused No. 1 was further charged for an offence punishable Under Section 25(1)(a) of the Indian Arms Act and accused No. 3 and 4 were charged for robbing the wrist-watches of the deceased and thus having committed an offence punishable Under Section 404 of the Indian Penal Code.

3. The accused belonged to a sect called "Barelvi". The five deceased belonged to sect called "Dev-Bandhi". There were religious differences between the two sects. The Dev-Bandhis believed that God is the only one omniscient while the other sect believed that the Prephet is also omniscient along with God. The Dev-Bandhis had followers of about 50 to 60 families. The Barelvis had many followers of about 300 to 400 families. The two sects belonged to village Basu in the Vadgam Taluka of the Banaskantha District in Gujarat There was a waqf in the village and trustees were appointed

regarding the management of the properties. One of the trustees was father of accused No. 1. There was another trustee of the Dev-Bandhis There was one Maulvi who belonged to the Barelvīs. The followers of the Dev-Bandhis wanted a separate teacher for their children. The two sects were at logger heads.

4. In the year 1966 a case under Chapter VIII of the CrPC in relation to security for the peace and for good behavior was filed against the Dev-Bhandhis and accused No. 1 and 2 figured as opponents along with others, The 5 deceased were also figuring as opponents in another case under the same Chapter which had been filed in the same Court of the instance of the followers of the Barelvīs. The hearing of the cases was fixed on 18 January, 1967. The 5 deceased came in a jeep. Their case was adjourned till 25 January, 1967. Those 5 persons after finishing their works in Court went to their village Bhagat about 8 miles away from Basu. About 10 p.m. they left for their village Basu. The accused lay in wait for those 5 persons. Altogether there were 8 accused. They shot the five dead with gun and inflicted injuries with sharp edged weapons and brutally murdered them The brother of the deceased Allauddin Alimohmed heard on 18 January, 1967 that there was some quarrel at village Basu. On his way from Changa to Basu he saw 5 dead bodies. Three were in a jeep and two were lying on the road near the jeep He thereafter informed his brother Valimohmed and another person called Kadivala what he had seen. Valimohmed then left village Basu to file a complaint. Accused No. 1 and 2 were arrested on 20 January, 1967 Accused No. 3 and 4 were arrested on 21 January, 1967. Accused No. 7 was arrested on 23 January 1967.

5. The Sessions Judge came to the conclusion that accused No. 1, 2, 3, 4 and 7 were guilty of offences punishable Under Section 302 read with Section 149 and Section 302 read with Section 34 and of offences punishable Under Sections 147 and 148 of the Indian Penal Code and sentenced each one of the accused to undergo rigorous imprisonment for one year for an offence Under Section 147 of the Indian Penal Code and to undergo rigorous imprisonment for two years for an offence punishable Under Section 148 of the Indian Penal Code and imprisonment for life for offences Under Section 302 read with Sections 149 and 34 of the Indian Penal Code. Accused No. 1 was also sentenced to undergo imprisonment for one year for an offence Under Section 25(1) of the Indian Arms Act. Accused No. 3 and 4 were convicted Under Section 404 of the Indian Penal Code and each one of them was sentenced to undergo imprisonment for one year.

6. Accused No. 1, 2, 3, 4 and 7 filed an appeal to the High Court of Gujarat. The State of Gujarat filed a revision application for enhancement of sentence passed against accused No. 1, 2, 3, 4 and 7 on the ground that normally the sentence for causing pre-meditated murder could only be the sentence of death.

7. The High Court held that the prosecution failed to prove that accused No. 1, 2, 3, 4 and 7 were guilty of the charge levied against them. The appeal of accused No. 1, 2, 3, 4 and 7 was allowed. The order of conviction and sentences was set aside. The accused were set at liberty. The application of the State for enhancement of sentence was dismissed.

8. Counsel for the State contended that direct evidence of eye-witness Soma Bhema connected accused No 1, 2, 3 and 7 with crime and the discovery of various incriminating articles by accused

No. 1, 2, 3. and 4 afforded direct circumstantial evidence connecting the accused with the offence. Counsel for the State did not reply on the extra judicial confession of accused No. 7 to incriminate him.

9. Soma Bhema was a rustic agriculturist. The High Court said that the conduct of Soma Bhema is not giving information to the police rendered his evidence unreliable. Soma Bhema said that on the date of the occurrence he was working with Nura Miyanji whose field was near the scene of occurrence. Nura Miyanji belonged to the Dev-Bandhi sect. Soma Bhema was sleeping and he heard a gun shot. He got up. He went to the hedge called "Chhinda". He heard another shot He said that one light of the jeep was on and he saw some persons near the jeep He also said that 6 or 8 persons were beating these sitting in the jeep. He recognised accused No. 1, 2, 3 and 7. He said that accused No. 1 had a gun and he saw accused No. 1 firing. Accused No 2 had an axe. Accused No. 3 had an axe and accused No. 7 had a dharia. The Sessions Judge did not rely on the version of Soma Bhema.

10. The High Court found the discrepancies in the evidence of Bhema Soma to be first regarding the time at which he heard the gun shot; secondly whether he had seen the incident in the moon-light or in the light of the motor car or both; and, thirdly, the distance between the place where the offence was committed and the opening of the hedge from where Soma Bhema was alleged to have seen the assailants.

11. In the High Court it was said that Soma Bhema did not depose exactly about the time because he was a rustic agriculturist. It was also said that there was no enmity between Soma Bhema & the accused. Both the Sessions Judge and the High Court on appreciation of evidence did not rely on his evidence, The various inconsistencies in the evidence of Soma Bhema in the light of his subsequent conduct particularly when he did not give any information to the police about the incident indicate not only the infirmities but also the unreliability of Soma Bhema as an eye-witness. The finding by the Sessions Court as well as the High Court on the credibility of Soma Bhema does not call for any interference on any question of law.

12. In the circumstantial evidence the gun figures prominently. The gun was discovered by accused No. 1 who showed his willingness to find out the gun which he had hidden in the 'Guvar' crop of Nura Pira Choudhary. Accused No. 1 led the police and the Panch witness to the place who found out a gun from the heap of crop. The gun was article No. 31. The prosecution also relied upon the find of empty cartridge, misfired cartridges and a broken sheet of the jacket of the bullet. On behalf of the accused it was challenged that the empty cartridges Article 29 and 86 were discovered in consequence of any statement given by accused No. 2. The High Court found that the empty cartridges were merely reocurred by the police and the prosecution did not prove that the empty cartridges were recovered at the instance of the accused No. 2.

13. The prosecution relied on the evidence of Vishnu Dhekane. He worked as a foreman in the Chief Inspector of Armaments at Kirkee. The Crime Branch, Ahmedabad sent him the rifle, one damaged metal piece being the jacket cap of the bullet, one misfired cartridge, 4 empty fired cartridges and a piece of lead. The police sent him 5 test cartridges out of which two were misfired and there were fired cartridges. His evidence was that the rifle had a magazine which contained 5 cartridges. He

took photographs of the empty test cartridges fired in his office as also of two empty cartridges sent by the police. One of the bullets could not be produced by him because he could not get it. Two cartridges which were fired had two bullets. The jacket of one of the bullets was in tact. By bullet the witness meant the jacket and the lead piece was inside the jacket.

14. Fire arms are broadly divided into two main classes. Smooth base arms and rifle arms are the two types. Shot gun belong to the first type. Rifles, revolvers, automatic and self-loading pistols belong to the second type. The barrel of the second type has spiral grooves for accuracy and penetrating power. The thumb point of the gun and the grooves are taken into consideration for establishing the identity of the rifle in question. The expert witness said that the rifle in the present case had 6 grooves with right hand twist. There is a bolt face to the rifle. The bolt meant portion at the top of the bolt. The bold, extractor and ejector formed the magazine which contained the cartridges. The witness said that the bold face of the rifle in the present case had a peculiar defect and because of that defect the base of the cartridge loaded in the rifle would have peculiar marks of identification. It was also his evidence that tiger of the rifle in the present case was defective. These defects in the rifle, according to the witness, produce peculiar marks on the empties. His evidence was that when he loaded the rifle with test cartridges and when it was fired he found a circular cut on the base of the cartridge & the striker hit made a peculiar mark on the center of the cartridge. Each rifle, according to the expert, has its own peculiar defect and the marks which are found on the cartridges will not be found if similar cartridges are fired from any other rifle. His evidence was that he compared the marks on the test cartridges with those of the empty cartridges and in his opinion the empty cartridges were fired from the rifle. His reasoning was that the test fired cartridges and the empty cartridge showed matching in the bold face impression and striker scrape.

15. The evidence of the expert that empty cartridges were fired from the rifle was based on three principal reasons. First that there was a circular or arch-like mark at the base of the cartridges and the corresponding part of the rifle had a peculiar defect and it was because of this defect that there was semicircular mark. He said that he saw with naked eyes the arch like scrapping on the base of the cartridges on account of defect of the bolt face and he compared those marks with the test cartridges and found them similar. The second reason was that there were bulge marks on test cartridges and the bulge marks on the empty cartridges were similar. The third reason was that dents were noticed on the bulge of the test fired cartridges. According to the expert, there were two small roundish striker's indentations or dents on the bulge in the test cartridges. Those dents were caused by some protruding portion of the striker. According to the expert, that distinct indentation mark was a peculiarity of each rifle. The expert did not take any photograph of the misfired cartridge or of misfired test cartridges for comparison. Yet he gave an opinion that bold face impressions and striker scrape of misfired cartridge were smaller to those of test fired cartridges.

16. The first reason that the empty cartridges had a arch-like mark at base of the cartridges was not accepted by the High Court because the mark on the rifle which was called "family thumb mark" could be found on cartridges fired from the guns which were manufactured in the same batch. Barrnd in his book. "The Identification of Firearms and Forensic Ballistics, 3rd Edition, 1956 at pages 133 and 134" said that "the chief risk connected with the family likeness lies in the original tool makings only being partially obliterated by subsequent work, and when this occurs it is possible

to mistake some very pronounced mark or marks for the one and only "thumb mark" of some particular weapon. Such pronounced marks are easily photographed and tend to attract attention away from the more insignificant, finer, and less visible tool marks left by the work subsequent to the original cuts. It is these finer markings which are of primary and vital, importance, and any identification based solely on one or two major markings without any finer striations as well should be regarded with suspicion. So the possibility of the existence of a family likeness or thumb-mark must be kept in mind, and when some very pronounced and obvious tool cuts have been found to leave their imprint on the base of a fired cartridges the investigator should not jump at conclusions too rapidly, but should search carefully for some finer imprints which will possibly be of more value in determining the true thumb-mark of the weapon which fired the cartridge". The expert witness said that he did not carry out any experiment with the gun of the same make or batch with similar cartridges. It could not be proved beyond doubt that the empty cartridges were fired from the rifle.

17. The expert gave the opinion that the empty cartridges were fired from the rifle because of the arch-like projection on the base of the cartridges produced by the defect in the rifle. The expert took photographs of two out of the four empty cartridges. He also took photographs of the test cartridges. He compared the photographs of the empty and the test cartridges and came to the conclusion that marks seen on the photographs were similar. He however did not take photographs of the misfired cartridge. It was also his evidence that the marks on the test bullet were indistinct and therefore it was not possible to compare satisfactorily the marks on the bullets which had been sent by the police to him. He could not say that the jacket cap of the bullet sent by the police was a bullet which had been fired from the rifle.

18. The witness further said that he did not compare the marks of misfired cartridge with those of the empty cartridges. The witness said that the striker scrapes on the test cartridges and on the empty cartridges were not identical but similar. The witness also said that when a striker strikes the cap normally the mark would be circular. In the empty cartridges the mark would be circular. In the empty cartridges the mark was of an eye-like shape and the witness said that it was because of a defect in the gun. In the photographs of the empty cartridges there was on the cap a mark which was roughly roundish. The witness said that the entire bulge was called the scrape. The differences between the test cartridges and empty cartridges were vital and varied. The photographs of the test cartridges and of the empty cartridges revealed that there were black spots on the test cartridges which did not tally with the black spots on the empty cartridges. The witness admitted that photographs were necessary for comparison. He took no photographs of the misfired test cartridge. Burrard in his book at page 175 states that evidence of identification unsupported by photographs is nothing more than an expression of opinion. The evidence does not establish that test cartridges and empty cartridges were fired from the same weapon or that the misfired cartridge was fired from the same weapon.

19. The second reason given by the expert witness that bulge marks on test cartridges and bulge marks on the empty cartridges were similar but not the same cannot establish that the empty cartridges were fired from the rifle. The bulge marks on the empty cartridges were of the shape of an eye. The expert witness did not take composite photographs of the empty cartridges superimposed by the test cartridges. The photographs which were taken were not taken in the same condition of

light. The High Court looked at the enlarged photographs but found it difficult to say that the bulge marks on the test cartridges and the empty cartridges were the same.

20. The third reason given by the expert witness was that there were two small roundish striker's indentations or dents on the bulge of the test cartridges which were caused by some protruding portion of the striker. The expert did not find any dents on the empty cartridges. His evidence was that the indentation mark was the peculiarity of the rifle. The expert could not give any reason for the presence of dents on the test cartridges and the absence of dents on the empty cartridges. If indentation marks were different at the base of the cartridges that would show that they were not fired from the same weapon. The evidence of the expert cannot, therefore, be relied upon to hold that the empty cartridges were fired from the rifle in question.

21. The High Court rightly held that the prosecution evidence failed to prove that the empty cartridges or misfired cartridge or the jacket of the cap of the bullet sent by the police were fired from the rifle. It is true that accused No. 1 made a statement relating to the discovery of the rifle but that would not be sufficient to connect accused No. 1 with the crime.

22. With regard to accused No. 2 it was said that he discovered the empty cartridges and discovered the knife stained with human blood. The High Court found that the seizure of empty cartridges was not a discovery which could connect accused No. 2 with the crime. Similarly, the knife was found out but it could not be said to be discovered, The knife was found on the shelf. Any one could have found out the knife. It would not be a discovery until it was found on making search for a thing which was secretly concealed. The High Court rightly said that accused No. 2 did not discover the knife.

23. The prosecution case against accused No. 3 was that he led the Panch witness and found out the axe which was stained with human blood. The other piece of evidence relied on by the prosecution was that accused No. 3 discovered a watch belonging to Allauddin Alimohmed. The High Court found that accused No. 3 had discovered the axe, but held that it was not an incriminating circumstances against the accused. The High Court came to the conclusion that the prosecution failed to prove that the watch discovered by accused No. 3 belonged to the deceased Allauddin Alimohmed. In order to prove that the watch belonged to Allauddin the prosecution relied on the evidence of Kun-varbai wife of the deceased, Rasirahmad son of the deceased, Adam Haji brother-in-law of the deceased, Daud Alimohmed, brother of the deceased and Daud Jiva and Suleman Valimohmed, the watch repairer as also Ismail Abdul-gani; the original owner of the watch. The High Court said that the witnesses were shown the watch and were then asked questions as to whether they could identify the watch and such identification was found by the High Court not to be reliable.

24. Most of the witnesses were interested. None of the witnesses could give any reason for identifying the watch. The repairer said that the mark "ARS" was put by him on each watch, and the mark was found on that watch. If he put the mark on all watches repaired by him he could give no reason to say that the watch belonged to Allauddin. Ismail who purchased the watch said that the number of the watch was 4411 but he could give the number only after the watch was shown to him in the witness box. The watch was therefore not proved to belong to Allauddin.

25. The prosecution was against accused No. 4 is that he discovered watches belonging to Noormohmad Ibrahim and Alladdin Nasir Kadivala from inside the Kuran at his house, Ibrahim's watch was identified by his wife and a few other witnesses including Residmiyan, the watch repairer. The High Court did not rely on their evidence because most of the witnesses were interested and they could give no reasons for identifying the watch. The watch repairer said on seeing the watch and the mark "H-4718" that the mark was the same which he had mentioned in his bill. He cancelled the bill and did not keep a duplicate of it. Evidence of this type is utterly unconvincing. Yusuf Nazir brother of Kadivala said that his watch and Kadivala's watch were of the same make and bore consecutive marks. It might be a strange coincidence about the consecutiveness of the numbers of the two watches but that would not prove that it belonged to Kadivala. The watch repairer identified the watch because of the initials "ARS", appearing on the watch. These initials were of the watch repairer Suleman. He might have repaired the watch but it would not prove the watch to be of Kadivala.

26. The High Court rightly acquitted the accused. The appeal is therefore dismissed. The accused are set at liberty.