Jashubha Bharatsingh Gohil vs State Of Gujarat on 13 April, 1994

Equivalent citations: 1994 SCC (4) 353, JT 1994 (3) 250, 1994 AIR SCW 2360, 1994 (4) SCC 353, (1995) 1 GUJ LH 368, (1995) 1 MADLW(CRI) 10, (1994) 2 RECCRIR 511, (1994) 2 SCJ 469, 1994 CRILR(SC MAH GUJ) 313, (1994) 2 CRICJ 418, (1994) 3 SCR 471 (SC), (1995) 1 CHANDCRIC 7, 1994 CRILR(SC&MP) 313, (1994) 2 GUJ LR 1392, (1994) IJR 301 (SC), (1994) 3 CURCRIR 710, (1994) 2 ALLCRILR 283, (1994) 2 CRIMES 92, (1994) SC CR R 319, (1994) 3 JT 250 (SC), 1994 SCC (CRI) 1193

PETITIONER:
JASHUBHA BHARATSINGH GOHIL

Vs.

RESPONDENT:
STATE OF GUJARAT

DATE OF JUDGMENT13/04/1994

BENCH:
ANAND, A.S. (J)
BENCH:
ANAND, A.S. (J)
REDDY, K. JAYACHANDRA (J)

CITATION:
1994 SCC (4) 353 JT 1994 (3) 250
1994 SCALE (2)534

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by DR ANAND, J.-Twelve persons namely, Bharatsinh Patubha Gohil, Dhruvansinh Bharatsinh Gohil, Antruddhsinh Bharatsinh Gohil, Jodha Khoda Rabari, Bhikhubha Shivubha Gohil, Bhupatsinh Bahadursinh Gohil, Kuvarsinh Ajitsinh Gohil, Nirubha, Ajitsinh, Baldevsinh alias Bablubha Sajubha Gohil, Jashubha Bharatsinh Gohil and Mohansinh alias Nathabhai Ranchhodbhai Thaker alias Selanki alias Parma were tried for offences

punishable under Section 120-B read with Sections 302, 307, 148 IPC read with Section 149, Section 143 and in the alternative under Sections 302, 307/34 IPC and Section 25-A of the Arms Act by the learned Sessions Judge, Bhavnagar. (For the sake of convenience and brevity we shall refer to the number of the accused, A-1 to A-12, in the same order in which their names appear in the trial court.)

2. The trial court found that all the accused, as members of an unlawful assembly, under the leadership of accused 11 were responsible for the death of deceased Diwaliben. It also held all the accused as members of unlawful assembly were responsible for the death of Jaram Bhagvan and Odhavji Bhagvan. In the opinion of the trial court, accused 11 was also responsible for the death of deceased Purshottam Jaga and Popat Lakha. Further, accused 1, 5, 7, 8, 9, 10, II and 12 with active part played by accused 3, 10, 11 and 12 were held responsible for the death of Gordhan Lakha. Accused 1, 2, 5 7, 8, 9, 10, 11 and 12 with active part played by accused 5, 8, 11 and 12 were also held responsible for the death of deceased Babu Bacher. The learned Sessions Judge also held guilty all the members of unlawful assembly, with an active part played by accused II, for the death of Madhu Khoda and Nagji Khoda. With regard to injuries caused to Pragji Mavji, all the accused were held guilty for an offence under Section 324 IPC. The trial court observed that with regard to the injury caused to Madhu Naran all the accused were guilty of the offence under Sections 307/149 IPC and with regard to injury caused to Purshottam Mulji all the accused were held responsible for the offence under Sections 307/149 IPC. The learned Sessions Judge also found that Dhanji Bhagvan had been caused injuries by all the accused and therefore they were guilty of an offence under Sections 307/149 IPC. They were all sentenced to undergo life imprisonment for the offence under Section 302 IPC and Sections 302/149 IPC. No separate sentence was, however, imposed for the offence under Section 120-B IPC. A-1, A-2, A-5, A-8, A-9, A-11 and A-12 were also sentenced to suffer rigorous imprisonment of 3 years and to pay a fine of Rs 1000 each or in default to further undergo rigorous imprisonment for six months for the offence under Section 25-A of the Indian Arms Act. All the substantive sentences were directed to run concurrently. The accused filed an appeal in the High Court and the State also filed an appeal seeking enhancement of the sentence of life imprisonment to death sentence, since the accused had been found guilty of committing as many as 10 murders. The High Court acquitted A-4. Accepting the State appeal in part, it awarded the sentence of death to A-11, Jashubha only. The High Court confirmed the conviction and sentence of life imprisonment on rest of the accused. Conviction and sentence for other offences was also maintained. The accused have, by special leave, filed this appeal challenging their convictions and sentences. There is, however, no appeal filed on behalf of A-10, who has since been absconding.

3.The prosecution case is as follows. Villages Mangadh and Chomaland are separated only by a boundary of earth embankment. In 1980 some Patels of Village Mangadh committed the murder of 3 Darbars namely, Bhimdevsinh Ajitsinh, son of A-9, Khengarbha Chandubha and Sajubha Patubha, brothers of A-1. Nine Patels of Village Mangadh were tried for the said offence but acquitted. Enmity and hostilities between the two factions continued.

4.On 20-9-1984 the appellants herein with a view to wreak the vengeance of the said incident hatched a conspiracy to assault the complainant party. It so happened that Gomtiben, the aunt of the complainant, died in Village Manvilas and the news of her death was received at Village

Mangadh also where the parents of the deceased Gomtiben resided. As is customary, the villagers of Mangadh decided that they would take bath at the well situated outside the village and thereafter go to Manvilas the next day to offer condolences. One tractor along with a trailer was arranged for transportation of the villagers on 20-9-1984. Twelve males along with some 12-13 females went in the tractor and trailer to Village Manvilas to offer condolences. Taking advantage of this situation, appellants herein, along with A-10 and the acquitted accused A-4, formed an unlawful assembly and lay in wait, armed with deadly weapons like gun, spear, axe and dharlya, for the tractor and the trailer to return from Manvilas. They concealed themselves behind the hedge separating the row near the Vadi of Koli Devji situated on the pathway between Manvilas and Mangadh. As soon as the tractor came on the road near the Vadi, A-11 came on the road and fired from his gun thereby deflating the tyre of the tractor and brought the same to a halt. In the meanwhile, the remaining accused persons also came out from behind the hedge and assaulted those who were sitting in the tractor. Gunshots were fired and some of the persons sitting in the tractor and trailer were injured. When some of the villagers tried to run away, after jumping from the tractor, they were chased and beaten up by members belonging to the accused party. As a result of the gunshots a number of persons received injuries and one of them, Diwaliben, died in the tractor. The accused then returned to the village and went towards southern outskirt of the village, where again shots were fired by them at the persons working in different fields as well as on those who were returning on their carts from the fields. A number of persons were killed. Pragji Mavji, Purshottam and Dhanji received gunshot injuries. Odhavji Bhagvan and Jaram Bhagvan were chased and killed by the accused party. Ganesh who was also injured by the gunshot lay there in an injured condition but died on the way to the hospital. The accused also fired at the residential place of Purshottam when he was unloading stones from the cart and he also died on the spot. Popat Lakha, Goverdhan Lakha and Babu Bacher were shot dead by the accused party while they were returning from their fields. Nagji Khoda and his associate Madhu Khoda were injured by gunshots and out of them Nagji died on the spot while Madhu Khoda succumbed to his injuries in the hospital. Madhu Naran succeeded in running away after receiving some injuries during the incident and got medical aid in the hospital at Gariadhar. While he was in the hospital, some of the injured persons were brought to the same hospital while some others had been sent to Bhavnagar Government Hospital and thereafter to Ahmedabad for treatment. Madhu Naran filed the complaint on the same day which forms the basis of the first information report and the investigation was taken in hand.

5.The prosecution led evidence in the case to show that a short time prior to the incident in question an assault had taken place on Purshottam Pragji in which A-8, A- 11 and A- 12 out of the present appellants along with the son of A-9 and the brother of A-7 were tried and convicted. Their appeal was pending against the conviction and sentence in the High Court, when the occurrence in this case look place on 20-9-1984.

6.That all the deceased in the case died as a result of the assault on them by firearms and other weapons has not been disputed before us and we are, therefore, not obliged to refer either to the postmortem reports, medical evidence or the other evidence including the evidence of the expert with regard to the use of firearms. Learned counsel for the appellant, Shri Mehta however submitted that the evidence on the record does not prove the case against A-2, A-3, A-6 and A-10 beyond a reasonable doubt and that the sentence of death awarded to A- 11 was also not justified since the

trial court had sentenced him to suffer imprisonment for life, keeping in view all the facts and circumstances of the case. Learned counsel, however, was unable to point out any material on the record from which the substratum of the prosecution case could be doubted insofar as the complicity of the remaining accused persons are concerned. He drew our attention to some parts of the evidence led by the prosecution to draw a distinction between the cases of A-2, A-3, A-8 and A-10 on the one hand and the remaining accused on the other. The prosecution evidence, in our opinion, is clear, cogent and specific insofar as the involvement of accused other than A-2, A-3, A-6 and A- IO are concerned, whose cases we shall deal with a little later. Learned counsel for the appellants has been unable to point out any cogent reasons for not agreeing with the trial court and the High Court as regards the guilt of the remaining accused. It has, however, been argued that the enhancement of sentence to death in the case of A- 11 was not justified. The appreciation of evidence by the courts below has impressed us and we agree with the reasoning and the conclusions arrived at by both the courts below as regards the guilt of the appellants other than A-2, A-3, A-6 and A- 10 and find that the same has been successfully brought home. However, before considering whether the High Court- was justified in enhancing the sentence of life imprisonment to death in the case of A- 11, Jashubha, we propose to deal with the case of A-2, A-3, A-6 and A-10.

7.The learned Sessions Judge as well as the High Court rightly treated the complaint made by Pragji at the police chowky, as the first information report in the case, on the basis of which investigation commenced and a copy of which had also been forwarded to the Court. A perusal of the said report shows that accused A- 1, A-5, A-7, A-8, A-9, A- 11 and A- 12 have been specifically named as the assailants. It is also specifically stated in the said report that out of them four of the accused were armed with firearms and that the incident took place between 9.30 a.m. and 10.00 a.m. It is nobody's case and indeed in fairness to learned counsel for the State, it must be recorded that he also did not dispute that the complainant knew A-2, A-3, A-6 and A- 10, as well as he knew the other accused persons. The complainant, Pragji PW 16 being an injured witness himself is a stamped witness and it is significant that he did not name A-2, A-3, A-6 and A-10 as members of the accused party in the first information report, lodged soon after the occurrence. It is also relevant in this connection to bear in mind that in his statement recorded by PW 1 1, Shri Mehta, Executive Magistrate, Pragji PW 16 again did not name A-2, A-3, A-6 and A-10 as having taken any part in the assault. Of course, in the statement the complainant had stated that there were four other persons also but since, the names of all the other accused were mentioned in the report, one fails to understand as to what prevented the names of A-2, A-3, A-6 and A-10 to be also given by the complainant in his report. At the trial, of course, an effort was made to implicate these four accused also but then we cannot lose sight of the fact that the tendency to rope in some innocent persons along with the guilty ones is not new. It appears that due to the enmity, which is admitted between the parties and the past hostilities, the names of A-2, A-3, A-6 and A-10 were sought to be introduced in the prosecution case at a later stage, after thoughtful deliberations, and the case was then developed so as to implicate them also. None of the witnesses produced by the prosecution has been able to ascribe any particular role to A-2, A-3, A-6 and A-10. The mention of the expression "4 others" by the complainant shows that he had designedly left a margin to add to the number of the accused later on after deliberations and consultations. The evidence of Pragji as well as the other prosecution witnesses, particularly Madhu Naran PW 17, shows that the prosecution has made a concerted effort to improve upon its case and implicate A-2, A-3, A-6 and A-10 along with the other

accused persons later on. In this connection, it requires to be noticed that a careful analysis of the testimony of the 3rd eyewitness, Purshottam Mulji PW 18, also creates an impression on our minds that while dealing with the two parts of the incident, one at the tractor-trolley and the other in the village, the role played by A-2, A-3, A-6 and A-10 has not been clearly brought out by him either. Our careful appraisal and independent analysis of the evidence on the record, coupled with the glaring omission in the first information report and the statement of Pragji recorded by the Executive Magistrate PW 11, for which omission the prosecution explanation deserves a mention only to be rejected, has created an impression on our minds that the prosecution has failed to prove the case against A-2, A-3, A-6 and A-10 beyond a reasonable doubt and that the possibility that they have been implicated along with other accused persons on account of their relationship and association with the other accused persons cannot be ruled out. The trial court as well as the High Court, in our view, fell in error in not distinguishing their cases and in convicting and sentencing them also along with the other accused persons. These four appellants namely, A-2, A-3, A-6 and A-10, therefore, deserve to be given the benefit of the doubt and acquitted. We may hasten to add that A- IO has not filed any appeal in this Court but since the infirmities which attach to the cases of A-2, A-3 and A- 6 are the same which attach to his case also, we cannot deny the benefit of our judgment to him also only because he has not filed any appeal against his conviction and sentence before us. We give him the benefit of the doubt also and set aside his conviction and sentence in the same manner as we set aside the conviction and sentence of A-2, A-3 and A-6 by giving them the benefit of the doubt.

8.So far as the remaining accused are concerned, the prosecution evidence is clear and cogent. The eyewitness account is specific. Despite lengthy cross-examination of the eyewitnesses nothing has been brought out on the record to create any doubt about the creditworthiness of the testimony of any of the prosecution witnesses. The recoveries made from them, pursuant to the disclosure statements, which have not been doubted before us coupled with the medical evidence shows that the prosecution has established its case against them beyond every reasonable doubt. We agree with the reasoning and findings of the trial court as well as the High Court and upheld the conviction of A- 1, A-5, A-7, A-8, A-9, A- 11 and A- 1 2 insofar as the offences under Sections 302/149 IPC and other offences are concerned. Since, the High Court itself did not grant the appeal of the State for enhancing the sentence of life imprisonment in the case of A-8 and A- 12, we need not detain ourselves to deal with their case and it would suffice to record that we agree with the High Court that the sentence of life imprisonment on A-8 and A-12, did not call for any enhancement.

9.We shall now come to the case of A- 11, who has been sentenced to death by the High Court by partially accepting the State's appeal.

10.Indeed 10 murders had taken place in broad daylight. The conscience of the State appears to have been shaken when it found that the trial court had sentenced all the accused only to life imprisonment. The State considering the gravity of the crime in which 10 innocent persons had lost their lives approached the High Court for enhancing the sentence of A-8, A- 11 and A- 1 2 and the High Court enhanced it in the case of A- 11 only. As already noticed, it was A- 11, Jashubha, who first emerged on the scene and fired from his gun and deflated the tyre of the tractor. After the tractor came to a halt, it was he again who fired the second shot on the passengers which caused injuries to

some others including Diwaliben who died. Jashubha A-11, according to the prosecution, fired yet another shot from his gun which hit Dhanji Bhagvan. The other shots fired by him could not be linked specifically to the injuries to any of the deceased or injured. The manner in which the murders were committed indeed exposes its gravity. Undoubtedly, the assault was made by the accused party led by A- 11 on unarmed and innocent persons, who were returning after offering condolences on the death of Gomtiben. That there was previous enmity between the parties certainly did not justify the manner in which A- 11 and his companions acted and went on a killing spree. The trial court which had the benefit of examining the demeanour of the witnesses chose not to inflict the extreme penalty of death on any of the accused persons and instead sentenced all the accused to life imprisonment by its judgment dated 14-12-1987. The High Court enhanced the sentence of A- 11, vide its judgment dated 6-3-1992.

11. Learned counsel for the State has pleaded for upholding the sentence of death on A- 11 while Mr Mehta, learned Senior Advocate appearing for the appellant Jashubha A- 11 has pleaded that the sentence of death be not confirmed on him.

12.It is needless for us to go into the principles laid down by this Court regarding the enhancement of sentence as also about the award of sentence of death, as the law on both these subjects is now well settled. There is undoubtedly power of enhancement available with the High Court which, however, has to be sparingly exercised. No hard and fast rule can be laid down as to in which case the High Court may enhance the sentence from life imprisonment to death. Each case depends on its own facts and on a variety of factors. The courts are constantly faced with the situation where they are required to answer to new challenges and would the sentencing system to meet those challenges. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing appropriate sentence. The change in the legislative intendment relating to award of capital punishment notwithstanding, the opposition by the protagonist of abolition of capital sentence, shows that it is expected of the courts to so operate the sentencing system as to impose such sentence which reflects the social conscience of the society. The sentencing process has to be stern where it should be.

13.There are however certain basic principles which this Court has laid down in Bachan Singh case' for imposition of death sentence in "rarest of rare" cases and we need not repeat those principles.

14.Section 354(3) of the Code of Criminal Procedure, 1973, as amended, makes it obligatory in cases of conviction for offences punishable with death or with imprisonment for life to assign reasons In support of the sentence awarded to the convict and further ordains that in case the Judge awards death penalty, "special reasons" for such sentence shall be stated in the judgment. Thus, the Judge is under a legal obligation to explain his choice of the sentence. The legislature in its supreme wisdom thought that in some "rare cases" for "special reasons" to be recorded it will be necessary to impose the extreme penalty of death to deter others and to protect the society and in a given case even the sovereignty and security of the State or country. 1 Bachan Singh v. State of Punjab, (1980) 2 SCC 684: 1980 SCC (Cri) 580: AIR 1980 SC 898 it, however, left the choice of sentence to the judiciary with the rider that the court may impose the extreme punishment of death for "special reasons". The sentencing court has, therefore, to approach the question seriously and make an endeavour to see

that all the relevant facts and circumstances bearing on the question of sentence are brought on record. It is only after giving due weight to the mitigating as well as the aggravating circumstances, that it must proceed to impose the appropriate sentence.

15.In the instant case, the trial court dealt with the question of sentence elaborately from paragraphs 83 to 92 of the judgment and after referring to statutory provisions and taking note of the legislative change which has since been brought about by Section 354(3) CrPC and some judicial pronouncements, came to the conclusion that the sentence of imprisonment for life would meet the ends of justice. Therefore, the trial court did not merely, by a cursory order, impose the sentence of life imprisonment and used its discretion not to award the capital sentence of death for detailed reasons recorded by it. The reasons given by the trial court cannot be said to be wholly unsatisfactory or irrelevant much less perverse. The High Court differed with the reasoning of the trial court and almost 5 years after the judgment had been pronounced by the trial court proceeded to enhance the sentence of A- 11 from life imprisonment to that of death sentence. The High Court also gave its own reasons in support of its view on the question of sentence. The High Court, however, did not opine that the reasons given by the Sessions Judge were perverse or so unreasonable as no court could have advanced the same. It took a different view of the legislative policy as also of the law laid down by this Court and referred to some other judgments of this Court also in support of its "reasons" to impose the sentence of death. The view taken by the High Court, it can legitimately be said is also a possible view.

16.We have given our anxious consideration to the reasons advanced by the trial court for not choosing to impose the death sentence as also those given by the High Court for enhancing the sentence of life imprisonment to that of death on A- 11, Jashubha.

17.Prior to the incorporation of Section 354(3) CrPC in 1973 when the imposition of death sentence was almost the rule and imposition of life imprisonment required the trying judge to give reasons, this Court was faced with almost a similar situation as in the present case. In Dalip Singh v. State of Punjab2, this Court dealt with the subject, thus:

> (AIR pp. 367- 68, para 39) "On the question of sentence, it would have been necessary for us to interfere in any event because a question of principle is involved. In a case of murder the death sentence should ordinarily be imposed unless the trying judge for reasons which should normally be recorded considers it proper to award the lesser penalty. But the discretion is his and if he gives reasons on which a judicial mind could properly found an appellate court should not interfere. The power to enhance a sentence 2 1954 SCR 145: AIR 1953 SC 364: 1953 Cri LJ from transportation to death should very rarely be exercised and only for the strongest possible reasons. It is not enough for an appellate court to say, or think, that if left to itself it would have awarded the greater penalty because the discretion does not belong to the appellate court but to the trial Judge and the only ground on which an appellate court can interfere is that the discretion has been improperly exercised, as for example where no reasons are given and none can be inferred from the circumstances of the case, or where the facts are so gross that no normal judicial

mind would have awarded the lesser penalty."

(emphasis ours)

18.In view of the legislative amendment noticed above, the present case stands on a better footing than Dalip Singh case2. Keeping in view the guideline in Dalip Singh case2 we are of the opinion that in the peculiar facts and circumstances of this case, when the occurrence took place almost 10 years ago and for the last more than 6 years the spectre of death has been hanging over the head of A- 11, Jashubha, the High Court should not have enhanced the sentence from life imprisonment to death because for exercising its discretion in choosing the sentence the trial court had given elaborate reasons which it cannot be said no judicial mind could advance. Only because the High Court looked at those reasons differently, in our opinion, it did not justify the enhancement of sentence to death sentence. We, therefore, commute the sentence of death imposed upon A- 11 by the High Court to that of imprisonment for life and restore the sentence as was imposed by the Sessions Judge.

19.Thus, in view of the above discussion, the appeals of A-2, A-3 and A-6 areallowed and their conviction and sentence are set aside. A-10 shall also beentitled to the benefit given to A-2, A-3 and A-6 and his conviction and sentence are also set aside. The appeal of A- 11 is allowed to the extent that while maintaining his conviction the sentence of death imposed upon him is commuted to the sentence of life imprisonment. In all other respects, his appeal fails and is dismissed and his conviction and sentence for other offences maintained. Appeals of the remaining accused A-1, A-5, A-7, A-8, A-9 and A-12 are dismissed and their conviction and sentences are maintained.

20.A-2, A-3, A-6 shall be set at liberty forthwith if not required in any other case.