Dhirajbhai Gorakhbhai Nayak vs State Of Gujarat on 25 July, 2003

Equivalent citations: AIR 2003 SUPREME COURT 2855, 2003 (9) SCC 322, 2003 AIR SCW 3596, 2003 CRILR(SC&MP) 740, (2003) 3 KHCACJ 473 (SC), (2003) 9 ALLINDCAS 915 (SC), 2003 (4) SLT 653, (2003) 6 JT 189 (SC), 2003 (8) SRJ 264, 2003 ALL MR(CRI) 1780, 2003 SCC(CRI) 1809, 2003 (3) KHCACJ 473, 2003 (5) SCALE 469, 2003 (6) ACE 325, 2003 CRIAPPR(SC) 370, 2003 (2) JKJ 656, 2003 (2) UJ (SC) 1346, 2003 UJ(SC) 2 1346, (2003) 3 JLJR 176, (2003) 2 CHANDCRIC 138, (2004) SC CR R 717, (2003) 25 OCR 147, (2003) 3 CRIMES 219, (2003) 10 INDLD 98, (2003) 3 CURCRIR 63, (2003) 3 ALLCRILR 710, (2004) 1 CURCC 312, (2003) 3 JCR 228 (JHA), (2004) 1 GUJ LR 456, (2003) 3 GUJ LH 477, (2003) 3 RAJ CRI C 728, (2003) 3 RECCRIR 891, (2003) 5 SUPREME 223, (2003) 5 SCALE 469, (2003) 47 ALLCRIC 487, 2003 (2) ANDHLT(CRI) 251 SC, (2004) 1 CPJ 241

Author: Arijit Pasayat

Bench: Doraiswamy Raju, Arijit Pasayat

CASE NO.:
Appeal (crl.) 870 of 2002

PETITIONER:
Dhirajbhai Gorakhbhai Nayak

RESPONDENT:
Vs.

State of Gujarat

DATE OF JUDGMENT: 25/07/2003

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT.

JUDGMENT:

J U D G M E N T ARIJIT PASAYAT,J.

One Hasmukhbhai Patel (hereinafter referred to as 'the deceased') was the victim of homicidal death on 12.8.1993. The appellant Dhirajbhai was alleged to be the assailant. The learned Additional Sessions Judge, Surat, held him guilty of offence punishable under Section 302 of Indian Penal Code, 1860 (for short 'IPC') and sentenced to suffer imprisonment for life and to pay fine of Rs.2000/- with default stipulation. It was further directed that in case fine is paid, the same is to be paid to the deceased's widow Dahiben as compensation. Appeal before the High Court of Gujarat did not bring any relief to the accused-appellant and by the impugned judgment conviction and sentence were upheld.

Accusations which led to trial of the accused-appellant are as follows:

> Dahiben (PW1) and the deceased were staying in house No. 7/1427 situated in Dhastripuara in the city of Surat with her two sons Dhanesh (PW 3) and Narendra. About 10 days prior to the date of occurrence accused-appellant had taken his small daughter to the in-law's house and have kept her there. On his return, the deceased scolded him for leaving a small child at a distant place and the accused was very angry for this interference in his personal matters and that led to quarrels - first verbal and then physical. Subsequently on the date of occurrence at about 1.30 p.m. when the deceased was sitting at a temple accused-appellant warned him and challenged him saying that if he wanted to fight he was ready for the same. This resulted in exchange of words and a fight. Resident of the locality and PW1 separated them. In the evening Naranbhai (PW8), a friend of deceased came to the house of deceased and told Dahiben that since the quarrel was going on in the house, he would take the deceased for seeing a movie. PW1 agreed and both PW8 and deceased went to see a movie late in the night. As it was mid night when they got back, PW8 and deceased slept on the verandah of the house while PW1 and 3 slept inside the house. At about 4.00 p.m. in the morning on hearing shouts for help PW1 opened the door and went outside. In the meantime PW3 also woke up and he joined his mother outside the house. They saw the deceased in bleeding condition. They also found the accused-appellant delivering blows on the deceased. PW1 called out his name and asked him as to why he was doing this and if there was any problem, that could be sorted out in the morning. The appellant on hearing this immediately ran away. PW-1 went out and asked for help from the neighbours. Many of them came to her house. The deceased was taken to hospital where he breathed his last at about 4.45 a.m. First information report was lodged at the police station at 5.15 a.m. Investigation was undertaken and charge sheet was placed on completion of investigation. Ultimately, the matter came to trial by learned Additional Sessions Judge, Surat. Ten witnesses were examined to further the prosecution version. Testimony of PWs 1 and 3 was accepted to be credible and as noted above, learned Trial Judge convicted and sentenced the accused. The High Court in appeal, did not interfere. Learned counsel for the appellant submitted that the Trial Court as well as the High Court lost sight of certain salient features of the case. The accused has taken a definite plea that PW1 and PW8 were the authors of the crime as they had an illicit relationship which was not liked by the deceased. On the night of occurrence they attacked the deceased and

his life was snuffed out. Strong reliance was placed on the evidence of PW2 who resiled from his statement made during investigation. It was submitted that evidence of such witness is not necessarily to be wiped out and that portion of evidence which helps either the prosecution or the defence can be taken note of. Presence of Dhanesh (PW3) at the spot is clearly ruled out the evidence of PW1. Additionally the medical evidence more particularly testimony of Dr. Rajivbhai (PW7) clearly establishes that the injury which is stated to have been caused by the accused could not have been caused by the weapon claimed to be the weapon of assault. The name of PW3 being absent in the FIR, his presence is doubtful. Though PW1 claimed that her clothes and those of PW8 were blood stained, when they tried to carry the deceased in injured condition to the hospital, the said apparels were not seized by the police and this has been accepted by the Investigating Officer. It was pointed out that the evidence of witnesses clearly shows that it was a dark night and it was impossible to see anything. So the claim of PW1 and PW3 that they saw the accused-appellant assaulting the deceased is clearly unacceptable.

It was also submitted that if the prosecution case is accepted in its totality, Exception 4 to Section 300 is clearly applicable as alleged assaults were made in course of a quarrel. Motive for the crime as claimed by the prosecution is too fragile to warrant acceptance. Per contra, learned counsel for the State of Gujarat submitted that both the Trial Court as well as the High Court have found version about alleged illicit relationship between PW1 and PW8 to be a myth and figment of imagination. Evidence of PW1 and PW3 has not been shaken in spite of the incisive cross-examination. The courts below have rightly placed reliance on their evidence. Medical evidence is in no way at variance with ocular evidence and in any event the ocular evidence being cogent has been rightly accepted. The case is clearly covered by Section 302 IPC and Exception 4 to Section 300 has no application. Motive is not a determinative factor to decide whether a crime has been committed or not.

The rival contentions need careful consideration. Coming to the plea that name of PW3 does not appear in the First Information Report, it has to be noted that death took place, according to medical records, at about 4.45 a.m. and the First Information Report was lodged at about 5.15 a.m. In other words the First Information Report was lodged almost immediately after the occurrence. As observed by this Court in Sri Bhagwan v. State of Rajasthan (2001 (6) SCC 296) the mental condition of the person who has just seen a close relative, the bread-earner loose his life cannot be lost sight of. The psychic trauma cannot be ignored. Merely because PW3's name did not figure in the First Information Report, that is not a suspicious circumstance. Evidence of PWs 1 and 3 has been analysed by both trial Court and High Court minutely and found to be credible and cogent. Nothing infirm therein could be shown to weaken their acceptability and reliability. The Trial Court and the High Court were justified in placing reliance thereon.

> Coming to the evidence of PW2 on which reliance has been placed by the learned counsel for the accused- appellant, he has been rightly described as untruthful by the Trial court and the High Court. He accepted to have come near the house of the deceased on hearing shouts of Dahiben. But he stated that he did not enquire how he died and who was the assailant. This conduct was to say the least most unusual and abnormal. It was not because he was shocked and, therefore, did not ask. He does not say so. On the contrary, he describes in graphic detail about alleged illicit relationship between PW1 and PW8. The Trial Court has rightly observed that he has tried to create a smoke screen. As regards the alleged discrepancy between medical evidence and ocular evidence it is to be noted that a combined reading of the evidence of PW9 who examined the deceased after he was brought to the hospital and PW7 who conducted the post-mortem, it is clear that there is no discrepancy in the medical evidence vis-à-vis ocular evidence. Only in respect of injury no.1, there appears to be some confusion but that does not dilute the prosecution evidence. It would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye witnesses account which has to be tested independently and not treated as "variable" keeping in view the medical evidence as "constant". (See State of U.P. v. Krishna Gopal and Anr. (AIR 1988 SC 2154) The residuary plea is about applicability of Exception 4 to Section 300.

For bringing in its operation it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

The Fourth Exception of Section 300, IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception

1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without

premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300, IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'.

The provision has no application to the facts of present case.

When the factual background established by the materials on record is tested with the legal principles indicated, the inevitable conclusion is that the appeal is without merit and deserves dismissal. We direct so.