Supreme Court of India
Appabhai And Anr. vs State Of Gujarat on 5 February, 1988
Equivalent citations: AIR 1988 SC 696, 1988 CriLJ 848, 1988 (1) Crimes 606 SC, (1988) 2 GLR 823, JT 1988 (1) SC 249, 1988 (1) SCALE 228, 1988 Supp (1) SCC 241, 1988 (2) UJ 27 SC
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Bench: K J Shetty, M.
JUDGMENT Jagannatha Shetty, J.

1. These two appeals relate to the same occurrence and arise out of a common judgment dated April, 1982 delivered by the Gujarat High Court. Both appeals are before us by special leave granted by this Court on different occasions. The Gujarat High Court confirmed the conviction and sentence against the appellants awarded by the Sessions Judge, Ahmedabad (Rural) at Narol in Sessions Case No. 49 of 1979.

2. Accused 1, 2, 5, 6 and 7 have preferred these appeals. They along with three others were prosecuted for the murder of one Trikam and attempt to murder his brother Devji Bhai.

3. The incident in which the murder has taken place appears to be an offshoot of the Panchyat election. The Panchayats at the village level are the nurseries of our democracy. But unfortunately, the election to the Panchayat is more often fought on personal level rather than on principle. When the election is fought on personal level, inevitably it leads to bitterness and factions in the village. The village in taluq Dhandhuka appears to be no exception to this rule. It was alleged by the prosecution that there were two groups in that village-one led by accused No. 1 and the other by Devji. These two groups hd cases and counter cases against each other. In the election held accused No. 1 was elected as Sarpanch. He defeated Devji who was previously the Sarpanch of the village. Jadav who was of the followers of Devji, had filed a chapter case against the accused. That was in the court of Dhandhuka. On January 6, 1979, Jadav and accused No. 1 after attending the Court proceedings were returning to the village Jalila by bus. The bus arrived at the bus stand at Jalila at about 5.15 or 5.30 P.M. It was further alleged by the prosecution that at the relevant time accused Nos. 2, 3, and 7 were present at the bus stop. They were in an extremely bellicose mood. They were duly armed. Accused No. 1 got down from the bus, but accused No. 3 poked his spear in the bus, where Jadav was sitting near the window. They were also alleged to have uttered some threatening words. Jadav on seeing that tense atmosphere, thought that the discretion was better part of valour and he did not get down at the bus stop. Instead, he proceeded by the same bus to Barwala, where he lodged a complaint, in the police station. That complaint has been produced as Exh. 70. It is said that Devji and Trikam had proceeded to Jalila bus stand to catch the said bus as they wanted to go to some place. By the time, they reached the bus stand, the bus had already left and hence they were returning home. There then the incident occurred. The appellant-accused attacked Devji and Trikam and inflicted numerous injuries on them. In all about 18 injuries on the person of Trikam and 9 on Devji. The news of the attack was carried by Rambha to Jivaraj the father of the victims. Jivaraj came to the spot and saw the accused running away after the attack. Immediately, a tractor was brought and the injured were taken to the hospital. Trikam was pronounced dead before any medical assistance could be rendered to him. Devji however, survived. He had to be treated for a long time as an indoor patient at Ahmedabad Civil Hospital.

4. Immediately after Devji was admitted to the hospital on the date of incident, his statement was recorded as a dying declaration by the Executive Magistrate, Dhandhuka. The statement has been produced as Exh. 66.

5. Upon considering the evidence produced by the prosecution, the trial court convicted all but one accused (A8) under Section 302, 148, and under Section 307, 149 I.P.C. and sentenced them to various terms of imprisonment.

6. In the appeal preferred by the accused, the High Court examined the evidence in detail. The High Court was of the opinion that A-3 was proved to have not participated in the perpetration of the crime. The High Court also held that the evidence against A-4 was not sufficient since at material time, the prosecution witnesses did not mention his name as one of the accused present at the scene of the occurrence. With these reasons, the High Court acquitted A3 and A4. The conviction and sentence of the remaining five accused were maintained. They have preferred these two appeals. During the pendency of the appeals, A1 is reported to be dead. We are now concerned with the four convicted accused.

7. Before us, the first contention urged by Mr. Lalit, learned Counsel for the appellants, relates to the failure of the prosecution to examine independent witnesses who were present at the place of the incident. The counsel said that it was a busy bus stand where number of people were present at the time of the incident, but the prosecution has failed to examine anyone of such witnesses. The prosecution only examined witnesses having pronounced animus against the accused and therefore, the prosecution version does not inspire confidence in the absence of evidence from independent witnesses. His second contention relates to the numerous contradictions in the evidence of Devji, particularly as against his first statement recorded by the Executive Magistrate and a subsequent statement recorded by the police. According to the counsel, those contradictions lead to the inference that there was suppression of truth in regard to the actual incident as well as the accused who perpetrated the crime.

8. Before we consider the contentions urged for the appellants, we may recall that these are appeals by special leave under Article 136 of the Constitution. Jf conclusions of the courts below are supported by acceptable evidence, this Court will not exercise its overriding powers to interfere with the decision appealed against. This court also will not consider the contentions relating to re-appreciation of the evidence which has been believed by the courts below. The tact that the special leave has been granted should not make any difference to this practice. The grant of special leave does not entitle the parties to open out and argue the whole case. The parties are not entitled to contest all findings recorded by the Courts below unless it is shown by error apparent on the record that substantial and grave injustice has been done to them. This position of law has been made clear in Hemraj v. State of Ajmer 1954 SCR 1133 at 1134 1135, where this Court speaking through Mahajan, C.J. said :

Unless it is shown that exceptional and special circumstances exist that substantial and grave injustice has been done and the case in question presents features of sufficient gravity to warrant a review of the decision appealed against, this Court does not exercise its overriding powers under

article 136(1) of the Constitution and the circumstance that because the appeal has been admitted by special leave does not entitle the appellant to open out the whole case and contest all the findings of fact and raise every point which could be raised in the High Court. Even at the final hearing only those points can be urged which are fit to be urged at the preliminary stage when the leave to appeal is asked for.

S.R. Das, J. in Gurbakhsh Singh v. State of Punjab made similar observations:

Many of these criticisms do not appear to have been advanced before the High Court and further these criticisms only have a bearing on the question of appreciation of evidence and in the present appeal, which is by special leave, this Court cannot consistently with its practice, convert itself into a third Court of facts.

9. In Bharwada v. Gujarat M.P. Thakkar, J. speaking for this Court observed (at 285):

A pure finding of fact recorded by the Sessions Court and affirmed by the High Court. Such the concurrent finding of fact cannot be reopened in an appeal by special leave unless it is established : (1) that the finding is based on no evidence or (2) that the finding is perverse, it being such as no reasonable person could have arrived at even if the evidence was taken at its face value or (3) the finding is based and built on inadmissible evidence, which evidence, if excluded from vision, would negate the prosecution case or substantially discredit or impair it or (4) some vital piece of evidence which would tilt the balance in favour of the convict has been overlooked, disregarded, or wrongly discarded.

10. In the light of these principles, we may now consider the first contention urged by the learned Counsel for the appellants. The contention relates to the failure of the prosecution to examine independent witnesses. The High Court has examined this contention but did not find any infirmity in the investigation. It is no doubt true that the prosecution has not been able to produce any independent witness to the incident that took place at the bus stand. There must have been several of such witnesses. But the prosecution case cannot be thrown out or doubted on that ground alone. Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability if any, suggested by the accused. The Court, however, must bear in mind that witnesses to a serious crime may not react in a normal manner. Nor do they react uniformly. The horror stricken witnesses at a dastardly crime or an act of egregious nature may react differently. Their, course of conduct may not be of ordinary type in the normal circumstances. The Court, therefore, cannot reject their evidence merely because they have behaved or reacted in an unusual manner. In Rana Pratap and Ors. v. State of Haryana 1988 (3) S.C.C. 327 O. Chinnappa

Reddy J. speaking for this Court succinctly set out what might be the behaviour of different persons witnessing the same incident. The learned Judge observed; (at p. 330).

Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way.

11. These may be some of the reactions. There may be still more. Even a man of prowess may become pusillanimous by witnessing a serious crime. In this case, the courts below, in our opinion, have taken into consideration of all those respects and rightly did not insist upon the evidence from other independent witnesses. The prosecution case cannot be doubted or discarded for not examining strangers at the bus stand who might have also witnessed the crime. We, therefore, reject the first contention urged for the appellants.

12. On the second contention, the learned Counsel highlighted many of the contradictions in the evidence of Devji (PW-4) as against his previous statement ; one recorded by the Executive Magistrate (Exh. 66) and another by the police during the investigation. We have, however, also examined the relevant evidence. It is true that there are many contradictions in the evidence of Devji. He has not attributed overt acts to individual accused in his statement before the police whereas he has attributed such overt acts in his evidence before the court. But that is no ground to reject his entire testimony. It must not be forgotten that he was a victim of the assault. Fortunately he has survived. He must, therefore, be considered as the best eye witness. The Court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The Court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the court. The courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy. Jagamohan Reddy, J., speaking for this Court in Sohrab and Anr. v. the State of Madhya Pradesh 1972 Crl. L.J. 1302 at 1396 observed :

This Court has held that falsus in no falsus in omnibus is not a found rule for the reason that hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishments. In most cases, the witnesses when asked about details venture to give some answer, not necessarily true or relevant for fear that their evidence may not be accepted in respect of the main incident which they have witnessed but that is not to say that

their evidence as to the salient features of the case after cautious scrutiny cannot be considered.

13. In Bharwada Bhoginbhai Hirjibhai v. State of Gujarat , M.P. Thakkar, J. observed :

A witness though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him -perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all important "probabilities-factor" echoes in favour of the version narrated by the witnesses.

14. In the light of these principles, we may examine the evidence. The critical evidence in the case is that of Jadav (PW-9) and Devji (PW-4). Jadav was travelling in the bus on the fateful day. He was frightened after seeing the accused at the bus stand at Jalila. He did not get down from the bus. He proceeded further to Barwala Police Station and gave the complaint at 5.50 P.M. on the same day. His complaint Exh. 17 was against A-2, A-3 and A-7 in respect of what they did with their weapons at the said bus stand. According to him, he saw A-2, A-3 and A-7 armed with Dhariya, pears and battle axe. Therein he has stated that one of them attacked him with the handle of the pear and another asked him to get down from the bus so that they could kill him. He has asserted the same in his evidence before the Court. The presence of these three accused at the bus stand armed with deadly weapons could not therefore be doubted. The next earlier statement was that of Devji, (PW-4) which was recorded as dying declaration Exh. 66. He has specifically named accused 1, 2, 3, 5, 6 and 7 as those attacked him. He has not mentioned the names of the accused who attacked his brother, Trikam. The accused No. 5 and 6 do not figure in the complaint Exh. 17 made by Jada v. We can, therefore, conclude that accused No. 5 and 6 must have come later and attacked only Devji. The benefit of doubt may therefore, go in their favour for the offence under Section 302 for the murder of Trikam. Their conviction and sentence under Section 307 read with Section 149 IPC however, cannot be unjustified.

15. In the result, we allow the appeals in part, acquit the accused No. 5 and 6 for an offence under Section 302 and their conviction and sentence under Section 307 read with Section 149 are however kept undisturbed. The appeals of other accused are dismissed.