

otherwise, the nature of evidence of PW 2 is in the nature of corroborative only and that direct and preliminary evidence as regards to demand and acceptance used to come from the mouth of the complainant which is missing and even the evidence of PW 2 is also not sufficient to link the accused with the crime in question. Therefore, as stated above, in absence of specific and clinching evidence to prove all such acts by the accused, conviction recorded by learned trial Judge is not sustainable.

18. For the reasons recorded above, the appeal succeeds. The impugned judgment and order dated 28.7.2004 rendered by learned Additional Sessions Judge, 6th Fast Track Court, Banaskantha at Palanpur in Special Case No.72 of 1998 is quashed and set aside. The appellant is acquitted from the charges levelled against him. Bail bond, if any, stands cancelled. Fine, if any, paid by the appellant be refunded to him. R & P be sent back to the trial Court, forthwith.

Result:- Appeal allowed.

**ABC 2017 (I) 162 GUJ
ACQUITTAL & BAIL CASES
HIGH COURT OF GUJARAT**

(Z.K. Saiyed, J.)

Criminal Revision Application (Against Conviction) No. 820 of 2006

Decided on 24 January, 2017

DAXESHKUMAR DILIPBHAI BHATT - Applicant(s).

Versus

STATE OF GUJARAT - Respondent(s).

Law Covered:- (A) *Indian Evidence Act, 1872 – Section 3 – Relevant fact – Post-mortem report – Cause of death – Cardiac failure and not due to accident in question – fatal to prosecution. (Para 17)*

(B) *Indian Penal Code, 1860 – Section 304-A – Conviction under – Indian Evidence Act, 1872 – Section 3 – Relevant fact – Involvement of the accused – non production of any evidence – No reference of the name of the present applicant while giving the*

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complaint—Statement on oath by the complainant – he had no personal knowledge regarding the accident and name of the present applicant—Identification parade before the Court – not held –no eyewitness – Witnesses travelling in the vehicle – have not supported the case of the prosecution – CrPC – Section 313 statement under – name of the present applicant not stated— Acquittal – Code of Criminal Procedure, 1973 – Section 313. (Para 17)

b *Facts:- It was alleged that the complainant and other persons were going in a Matador, driven by the applicant rashly and negligently and therefore, the applicant lost the control over the said Matador and due to that the Matador turned turtle and the persons sitting in the Matador were seriously injured and out of them one passenger expired.*

c *Chargesheet came to be filed u/ss 279, 337 and 304(A), IPC and u/ss 183, 184, 187 and 177, MV Act against him and he was convicted the conviction was affirmed by the Sessions Court. Being aggrieved by and dissatisfied with the said judgment and order of conviction the applicant preferred the present Criminal Revision Application before the*

d *honourable Gujarat High Court. Finding flaws in the prosecution cases conviction was set aside.*

Law of relief:- Not supporting the alleged cause of death by post-mortem report is fatal to prosecution

e *Held:- Here in the present case in the postmortem note at Ex.20 doctor has declared the cause of death of deceased Madhuben Somdas Prajapati as cardiac failure and not due to accident in question. The prosecution has not produced any evidence regarding involvement of the present applicant for the offence in question. The complainant has not given the name of the present applicant while*

f *giving the complaint. On the contrary, he has stated before the trial Court on oath that he had no personal knowledge regarding the accident and name of the present applicant. Identification parade was not held before the learned Executive Magistrate and there was no eyewitness of the accident and other witnesses who were travelling in*

g *the vehicle have not supported the case of the prosecution and they have stated that they are not aware about the name of the person driving the said vehicle. Even in the 313 statement name of the present applicant is not stated. (Para 17)*

h *Cases Referred:-*

Mustufabhai Abdullhussain Vora vs. State of Gujarat, 2003(4) GLR 3714. (Para 15)

JUDGMENT

Z.K. SAIYED, J.: - 1. The applicant - original accused has filed a this application under Section 397 read with Section 401 of the Criminal Procedure Code praying to quash and set aside the judgment and order dated 15.12.2006 passed by the learned Sessions Judge, Gandhinagar in Criminal Appeal No.22 of 2006 wherein the judgment and order dated 29.8.2006 passed by the learned Third b Additional Senior Civil Judge and Judicial Magistrate First Class, Gandhinagar in Criminal Case No.4377 of 2002 came to be confirmed.

2. The brief facts of the case are that on 23.2.2002 at 9:30 in the morning, the complainant, namely, Shri Vitthalbhai Nathabhai Prajapati and other persons were going to Dehgam in Matador c bearing Registration No.GJ9T8201 which was driven by the applicant rashly and negligently and, therefore, the applicant lost the control over the said Matador and due to that the Matador turned turtle and the persons sitting in the Matador were seriously injured and out of d them one passenger, namely, Madhuben Somdas Prajapati expired. The aforesaid complaint came to be lodged before Dholka Police Station as CR No.126 of 2002.

3. Thereafter, investigation was carried out and statements of several witnesses were recorded. During the course of investigation, accused person was arrested and, ultimately, chargesheet came to be e filed under Sections 279, 337, and 304(A) of the Indian Penal Code and under Sections 183, 184, 187 and 177 of the Motor Vehicles Act against him in the Court of learned Magistrate.

4. Thereafter, charge came to be framed and explained to the accused person, to which the accused person not pleaded guilty and f claimed to be tried.

5. In order to bring home the charges against the accused person, prosecution has examined several witnesses and also produced documentary evidence.

6. Thereafter, after filing closing pursis by the prosecution, further g statements of accused person under Section 313 of the Code of Criminal Procedure, 1973 were recorded. The accused person has denied the case of the prosecution and submitted that a false case is filed against him.

7. After hearing both the sides, learned Sessions Judge, h Gandhinagar vide judgment and order dated 15.12.2006 passed in Criminal Appeal No.22 of 2006 confirmed the judgment and order

a dated 29.8.2006 passed by the learned Third Additional Senior Civil Judge and Judicial Magistrate First Class, Gandhinagar in Criminal Case No.4377 of 2002.

b 8. Being aggrieved by and dissatisfied with the said judgment and order of conviction dated 15.12.2006 passed by the learned Sessions Judge, Gandhinagar, the applicant has preferred the present Criminal Revision Application before this Court.

c 9. Heard Mr. H.N. Joshi, learned advocate appearing for M/s.Thakkar and Pahwa Advocates, learned advocate for the applicant. He has contended that the P.M.Note was produced before the trial Court at Ex.20, wherein the concerned doctor has declared the cause of death of deceased Madhuben Somdas Prajapati as cardiac failure and not due to accident occurred and the said doctor has not been examined by the complainant.

d 10. He has contended that the evidence regarding the physical presence of the accused and both the Courts below have not properly appreciated the evidences which were available on record substantiating the say of the present applicant to the effect that he was not driving the particular vehicle which is involved in the accident.

e 11. He has contended that the prosecution could not prove and could not produce any evidence regarding the involvement of the applicant as well as the presence of the present applicant in the alleged incident. It is pertinent to note that the complainant had also not given the name of the present applicant while giving the complaint. On the contrary, the complainant himself had admitted before the trial Court on oath that he had no personal knowledge regarding the accident and the name of the present applicant came to the knowledge of the complainant for the first time, when the present applicant was present in the Court. He has contended that the applicant was not known to the complainant and the complainant had also admitted the said fact before the trial Court and the trial Court has materially erred in not properly considering the important issue whether the applicant was driving the said vehicle or not at the time of incidence.

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h 12. He has contended that evidence of the postmortem report at Ex.20 clearly reveals that the cause of the death of the deceased Madhuben Somdas Prajapati is due to cardio respiratory failure and cardinal spinal injustice. He has contended that as per the postmortem report at Ex.20 the cause of death was due to cardiac

failure and not due to the alleged accident occurred and, therefore, the applicant cannot be held liable for the offence punishable under Section 304(A) of the Indian Penal Code. a

13. He has contended that looking to the panchnama it reveals that the Matador was damaged from the side of driver. However, there was no evidence to the effect that the driver of the said Motor vehicle sustained any injury and/or took treatment. He has contended that no issue were framed to decide the question as to whether the present applicant was the driver of the said motor vehicle at the time of accident or not. He has contended that telephone vardhy at Ex.15 contains no mention about the place and time of incidence as well as the other required details. b c

14. He has contended that identification parade was not held before the learned Executive Magistrate and also there was no eyewitness of the accident, except the passengers of the vehicle. It is contended that other passenger travelling in the said vehicle have not supported the case of the prosecution and they have simply stated that they are not aware about the name of the person driving the said vehicle at the time of accident. One witness, namely, Nandubhai below Ex.6 have stated that he is not in a position to identify the present applicant as the driver of the vehicle driving the vehicle at the time of accident and, therefore, he could not submit the same on oath in that regard. He has contended that even the complainant himself has stated on oath that he was not aware about the accident and name of the accused came to the knowledge of the complainant for the first time when he saw the present applicant in the Court. d e

15. He has contended that all the passengers have not said in their deposition before the trial Court that the accused was the driver at the time of accident, but they have categorically stated on oath that the speed of the motor vehicle was very excessive and the driver drove the said motor vehicle rashly and negligently. He has contended that owner of the vehicle Shri Gordhanbhai Thakore has deposed that he was not aware about the person driving the vehicle at the time of accident and he came to know about the accident only after two to three days. In support of his submissions he has relied on the decision in the case of *Mustufabhai Abdulhussain Vora vs. State of Gujarat, 2003(4) GLR 3714*. Lastly, he has read observations of the learned Judge and contended that f g h

a observations made by the learned Judge are not proper in the eye of law and therefore, judgment and order of the learned Judge is required to be set aside.

b 16. Heard Mr.N.J.Shah, learned APP for the respondent. He has contended that prosecution witness at Ex.12 has identified the accused before the Court. He has contended that other side has clearly denied that he saw the accused for the first time before the Court. He has contended that accident is clearly proved by the prosecution through the deposition of the witnesses. He has contended that injured witness Vithalbhai Nathabhai and Nandubhai have supported the case of the prosecution. He has contended that due to rash and excessive speed of the matador this accident occurred. He has contended that Ramabhai Motibhai was also injured and he has supported the case of the prosecution. He has contended that one witness has identified the driver. He has prayed that no interference is required in the judgment and order passed by the learned Judge.

d 17. I have heard the learned advocates for the respective parties and perused the papers produced before me. I have also considered the submissions advanced by the learned advocates for the rival parties. I have gone through the impugned judgment and order passed by the learned Judge and oral as well as documentary evidence produced on the record. Here in the present case in the postmortem note at Ex.20 doctor has declared the cause of death of deceased Madhuben Somdas Prajapati as cardiac failure and not due to accident in question. The prosecution has not produced any evidence regarding involvement of the present applicant for the offence in question. The complainant has not given the name of the present applicant while giving the complaint. On the contrary, he has stated before the trial Court on oath that he had no personal knowledge regarding the accident and name of the present applicant. Identification parade was not held before the learned Executive Magistrate and there was no eyewitness of the accident and other witnesses who were travelling in the vehicle have not supported the case of the prosecution and they have stated that they are not aware about the name of the person driving the said vehicle. Even in the 313 statement name of the present applicant is not stated.

h 18. In view of the foregoing reasons, present Revision Application is allowed. The judgment and order dated 15.12.2006

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passed by the learned Sessions Judge, Gandhinagar in Criminal Appeal No.22 of 2006 confirming the judgment and order dated 29.8.2006 passed by the learned Third Additional Senior Civil Judge and Judicial Magistrate First Class, Gandhinagar in Criminal Case No.4377 of 2002 is quashed and set aside. Bail bond, if any, stands cancelled.

19. Record and Proceedings, if any, be sent back to the trial Court concerned, forthwith.

Result:- Revision Application allowed.

ABC 2017 (I) 168 GUJ
ACQUITTAL & BAIL CASES
HIGH COURT OF GUJARAT
(Akil Kureshi & Biren Vaishnav, JJ.)
Criminal Appeal No. 722 of 1994
Decided on 23 January, 2017

STATE OF GUJARAT

- Appellant(s).

Versus

SANDHI RASULBHAI ALARAKHA & ORS.

- Respondent(s).

Law Covered:- (A) Indian Penal Code, 1860 – Section 149 – Unlawful assembly – Common object – The incident happened at the instance of both the parties – Cross complaint – Held, merely because more than 5 persons had gathered at the spur of the moment to ward off each other – certainly cannot be said to a case where the persons had gathered with a common object as a part of an unlawful assembly – Section 149 cannot be attracted. (Para 18(e))

(B) Indian Penal Code, 1860 – Section 34 – Common object – No specific roles to the accused warranting their implication in the offences that they were charged with was evident – Acquittal upheld. (Para 18(f))

(C) Indian Penal Code, 1860 – Section 307 – Code of Criminal Procedure, 1973 – Section 378 – Appeal against acquittal – Injuries inflicted by accused were as a result of duly act of self defence and not with an intention or knowledge to cause death is a plausible theory – Evidence do not suggest an intention or knowledge – Held, merely on the basis of the nature of injuries sustained acquittal not disturbed – upheld. (Para 21)

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