NARENDRASINH KESHUBHAI ZALA

v.

STATE OF GUJARAT

(Criminal Appeal No. 1179 of 2012)

MARCH 16, 2023

[B. R. GAVAI, VIKRAM NATH AND SANJAY KAROL*, JJ.]

Penal Code, 1860 – ss. 302/34 – Arms Act, 1959 – ss. 25(1) A, 27(2) – Acquittal of accused – Appellant was accused of having committed the murder of the victim-deceased by shooting at him while he was sitting on a Nala with PW-3 – FIR was lodged and the charge-sheet was filed and the appellant was put on trial – Trial Court convicted the appellant on the testimony of the sole eye-witness (PW-3) and such conviction was upheld by the High Court – On appeal, held: In the case of a sole eye witness, the witness has to be reliable, trustworthy, his testimony worthy of credence and the case proven beyond reasonable doubt and unnatural conduct and unexplained circumstances can be a ground for disbelieving the witness – It is not the quantity but the quality of witnesses and evidence that can either make or break the case of the prosecution – It is the duty of the prosecution to prove that the testimonies of the witnesses that it seeks to rely upon are of sterling quality, i.e. fully trustworthy and absolutely free from any kind of blemish – Further, it is true that concurrent findings of facts of the Courts below, are usually, not to be interfered with – However, in the instant case, testimony of PW-3 was full of blemishes, absolutely uninspiring in confidence – In absence of any other evidence linking the accused to the murder of the deceased, testimony of PW-3 discarded – Appellant acquitted.

Allowing the appeal, the Court

HELD:

1. **It is a settled principle of law that doubt cannot replace proof. Suspicion, howsoever great it may be, is no substitute of proof in criminal jurisprudence. Only such evidence is admissible and acceptable as is permissible in accordance with law. In the case of a sole eye witness, the witness has to be reliable, trustworthy, his testimony worthy of credence**

* Author

and the case proven beyond reasonable doubt. Unnatural conduct and unexplained circumstances can be a ground for disbelieving the witness. [Para 8]

2. What makes testimony of PW-3 shaky and the witness unbelievable is his admission of the Police Headquarters being in close proximity to the place of occurrence of the incident and despite knowing that police is always posted at the gate he did not approach the police. The explanation furnished is only that he was "much scared", which prudently is not acceptable, given that he was a close friend of the Deceased. Further, his credit stands impeached in the cross-examination part of his testimony. The witness is an adult, mature and worldly wise. He is aged 24 years and runs a grocery shop. He is not illiterate, yet he chose to not take any action, even to save the life of his friend. His explanation that he went home and slept is uninspiring in confidence for the incident took place in his presence and in close proximity of habitation, more specifically at a short distance i.e. just 3-4 minutes of walking distance from the Police Headquarters where constables are posted around the clock. He left his friend profusely bleeding on the spot but did not seek any help and immediately did not report the incident to the family members of the deceased. [Para 9]

3. This Court on multiple occasions has held that it is not the quantity but the quality of witnesses and evidence that can either make or break the case of the prosecution. It is the duty of the prosecution to prove that the testimonies of the witnesses that it seeks to rely upon are of sterling quality, i.e. fully trustworthy and absolutely free from any kind of blemish. [Para 10]

4. In the absence of any other evidence linking the accused to the murder of the deceased, the testimony of PW-3 discarded, there is no other direct or circumstantial evidence, ocular or otherwise, linking the accused be it on the point of motive or the incident. It is in this backdrop it is found that the Courts below to have seriously erred. The settled principles of convicting the accused on circumstantial evidence, enunciated by this Court in *Sharad Birdhichand Sarda v. State of Maharashtra* (1984) 4 SCC 116, have not been followed by the Courts below.

It is true that concurrent findings of facts of the Courts below, are usually, not to be interfered with. However, it is only in the presence of exceptional circumstances, this Court exercises its wide powers where there is travesty of justice and when absurd and erroneous conclusions are drawn by the Courts below. This is one such case fit for exercising the powers entrusted to us as a duty under Article 136 of the Constitution. [Paras 16, 17]

Jagga Singh v. State of Punjab **1994 Supp (3) SCC 463;** *Anil Phukan v. State of Assam* **(1993) 3 SCC 282 : [1993] 2 SCR 389;** *Amar Singh v. State (NCT of Delhi)* **(2020) 19 SCC 165;** *Amrik Singh v. State of Punjab* **(2022) 9 SCC 402;** *Pramila v. State of U.P.* **(2021) 12 SCC 550;** *Krishan Kumar Malik v. State of Haryana* **(2011) 7 SCC 130 : [2011] 8 SCR 774** *Kartarey v. State of U.P.* **(1976) 1 SCC 172 : [1976] 2 SCR 199;** *Ishwar Singh v. State of U.P.* **(1976) 4 SCC 355:** *Chaudhari Ramjibhai Narasangbhai v. State of Gujarat* **(2004) 1 SCC 184 : [2003] 5 Suppl. SCR 390;** *Sharad Birdhichand Sarda v. State of Maharashtra* **(1984) 4 SCC 116 : [1985] 1 SCR 88;** *Ramaphupala Reddy v. State of Andhra Pradesh* **(1970) 3 SCC 474;** *Balak Ram v. State of U.P.* **(1975) 3 SCC 219 : [1975] 1 1SCR 753;** *Bhoginbhai Hirjibhai v. State of Gujarat* **(1983) 3 SCC 217 : [1983] 3 SCR 280 – referred to.**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 1179 of 2012.

From the Judgment and Order dated 29.12.2011 of the High Court of Gujarat at Ahmedabad in CRLA No. 1037 of 2003.

A. Sirajudeen, Sr. Adv., Mrs. Revathy Raghavan, Ashok Kumar, Sanchit Vashisthe, Advs. for the Appellant.

Ms. Swati Ghildiyal, Ms. Devyani Bhatt, Advs. for the Respondent.

The Judgment of the Court was delivered by

SANJAY KAROL, J.

1. Vide a judgment dated 19.07.2003 passed by the Ld. Addl. Sessions Judge, Fast Track Court at Surendranagar, Gujarat in Sessions Case No. 27 of 2002, the appellant Narendrasinh Keshubha Zala stood convicted

for having committed offences under Section 302, Indian Penal Code read with Section 34, Indian Penal Code as also under Section 25 (1) A and Section 27 (2) of the Arms Act. In relation to the offence under Section 302, Indian Penal Code, he is sentenced to suffer imprisonment for life and pay fine of Rs. 500 and in default thereof, an additional sentence for one month. The same stands affirmed by the High Court vide impugned judgment.

2. In brief, the case set up by the prosecution reads as follows: on 14.1.2002 at around 2:30 AM police registered an FIR in relation to the murder of a person namely, Ram. The complaint was registered on the asking of Shri Mahipal K. Jadeja (PW-1), father of the deceased in the night intervening 13-14th of January, 2002. The Complaint records the complainant to have stated that at around 11:00 PM one person known as Munna Bhai alias Krupal Rajnikant (PW-6) had come on a motorcycle to his residence informing him of his son being critically injured and being taken to MG Hospital in an autorickshaw. The Complainant along with this person reached the hospital where he saw the dead body of his son lying on a stretcher. There was a cut on the left eyebrow and the right side of the neck bleeding profusely. On inquiry he was informed by the doctor that the victim had died as result of a fire shot injury. Significantly, in the complaint recorded the same day at around 02:15 AM he states that, his son had left the house for a walk after having dinner. Further, "… I have no information as to how and who killed my son…" and that "…his son had no animosity prompting anyone to kill…".

3. With the registration of the FIR, investigation was conducted by I.O. Manbha Bepasaheb Parmar, (PW - 20) which revealed that on 13.1.2002 at around 9:30 PM, while the deceased and Nirav Bipinbhai Patel (PW-3) were sitting on the Nala near the Circuit House, accused Narendra and Shailendra – pillion rider came on a motorcycle and after a brief talk, accused Narendra Zala (Appellant herein) shot dead the deceased with a gun, which was discovered pursuant to his disclosure statement. With the completion of investigation, challan was presented in the court for trial only against accused Narendra Zala.

4. The Ld. Trial Court convicted the accused on the ground that the incident was witnessed by Nirav Bipinbhai Patel (PW-3), whose testimony, being the sole eye-witness was trustworthy and reliable to the extent that there was motive, being money dispute which the deceased had to return to

the Accused. The Police pursuant to Appellants disclosure statement recovered the weapon of crime.

5. The High Court upheld the judgement of the Ld. Trial Court on the ground that the prosecution story was reliable and worthy of credence. Even on the absence of motive being established, i.e. whether or not the deceased owed money to the Appellant, the testimony of the sole eyewitness (PW-3), worthy of credence, fully matched with the case of Murder as set out by the prosecution.

6. We have heard learned counsels for both the parties at length. Certain facts are not in dispute:

(A) The identity of the deceased and the death as result of a gun shot injury; **(B)** The Post Mortem conducted by Dr. Ravjibhai Makwana (PW - 5) who prepared the Post Mortem Report (Ex. P.36) evidencing the fact that 60 metal pellets were recovered from the muscular tissues of the neck of the deceased; **(C)** The cause of death being haemorrhage on account of injury on the right side of the neck pursuant to the use of firearm; **(D)** The prosecution case rests on the testimony of material witnesses, i.e. PW-3 sole eyewitness, who was the deceased's friend and PW-1 who is father of the deceased.

7. In the considered view of this Court this case primarily rests solely upon the testimony of PW-3, which is full of blemishes, absolutely uninspiring in confidence and the witness not having deposed the truth.

8. It is a settled principle of law that doubt cannot replace proof. Suspicion, howsoever great it may be, is no substitute of proof in criminal jurisprudence **[Jagga Singh v. State of Punjab, 1994 Supp (3) SCC 463].** Only such evidence is admissible and acceptable as is permissible in accordance with law. In the case of a sole eye witness, the witness has to be reliable, trustworthy, his testimony worthy of credence and the case proven beyond reasonable doubt. Unnatural conduct and unexplained circumstances can be a ground for disbelieving the witness. This Court in the case of **Anil Phukan v. State of Assam, (1993) 3 SCC 282** has held that:

" **3.** … So long as the single eyewitness is a wholly reliable witness the courts have no difficulty in basing conviction on his testimony alone. However, where the single eyewitness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may

show that he could have an interest in the prosecution, then the courts generally insist upon some independent corroboration of his testimony, in material particulars, before recording conviction. It is only when the courts find that the single eyewitness is a wholly unreliable witness that his testimony is discarded in toto and no amount of corroboration can cure that defect…"

The same principle has been enunciated in: **Amar Singh v. State (NCT of Delhi), (2020) 19 SCC 165.**

9. In the instant case when we examine the testimony of PW-3, we notice him to have deposed that on the fateful night ie. 13.1.2002, around 11 PM both he and the deceased were sitting on a Nala near the Circuit House in Surendranagar. At that time, accused came on a motorcycle with Shailendra as a pillion rider and after abusing, wanted Ram (deceased) to state as to when he would return the money borrowed by him. When the deceased stood up to answer, Narendra pulled out a pistol and after placing it on the neck, said, "… this would not take much time to finish you." Thereafter, accused fired the pistol. Resultantly, the deceased collapsed on the ground and started bleeding profusely from the neck. Immediately, Narendra Zala and Shailendra drove away towards the Sardar Society. PW-3 states that the incident left him shocked and stunned. He was so scared that he ran towards the society where he met his uncle Harshad Veljibhai (PW-9) and his friend Manish Natvarlal Trivedi (PW-8) whom he informed of the incident. Seeing his condition, he was asked by his uncle to go home and sleep. Next morning, he went to the house of Ram and narrated the incident to his mother and sister Heenaba Pradipsinh Zala (PW-2). Thereafter he went to the hospital and informed Ram's father (PW-1)of the incident. Police interrogated him at different places and recorded his statement on the 14th of January at around 4:30PM at the Police Headquarters. Cross examination part of his testimony reveals this witness to have repeatedly improvised his initial statement, disclosed to the Police. Illustratively he had not informed the Police of having disclosed the incident to the sister of the deceased. He had also not disclosed to the Police that there was exchange of words between Ram and Narendra (Appellant herein) in relation to some money owed by the deceased to the accused. This may not have any effect on the veracity of his statement. But what makes his testimony shaky and

the witness unbelievable is his admission of the Police Headquarters being in close proximity to the place of occurrence of the incident and despite knowing that police is always posted at the gate he did not approach the police. The explanation furnished is only that he was "much scared", which prudently is not acceptable, given that he was a close friend of the Deceased.

Further, his credit stands impeached in the cross-examination part of his testimony. The witness is an adult, mature and worldly wise. He is aged 24 years and runs a grocery shop. He is not illiterate, yet he chose to not take any action, even to save the life of his friend. His explanation that he went home and slept is uninspiring in confidence for the incident took place in his presence and in close proximity of habitation, more specifically at a short distance i.e. just 3-4 minutes of walking distance from the Police Headquarters where constables are posted around the clock. He left his friend profusely bleeding on the spot but did not seek any help and immediately did not report the incident to the family members of the deceased whose house he visited only the following day at around 8:00 – 9:00 AM. His conduct of going off to sleep, having seen his friend being murdered right before his eyes and then not visiting the hospital forthwith is quite unnatural. Also he did not inform the incident to his parents. It was only when the police interrogated him that he named the accused. His testimony is not free from embellishments, nor is not corroborated by any other evidence. Also, he admits not to have any information of any monetary transactions between the accused and the deceased.

10. This Court on multiple occasions has held that it is not the quantity but the quality of witnesses and evidence that can either make or break the case of the prosecution. It is the duty of the prosecution to prove that the testimonies of the witnesses that it seeks to rely upon are of sterling quality, i.e. fully trustworthy and absolutely free from any kind of blemish. **[Prahlad v. State of M.P.*(supra)*; Amrik Singh v. State of Punjab, (2022) 9 SCC 402; Pramila v. State of U.P., (2021) 12 SCC 550; Krishan Kumar Malik v. State of Haryana, (2011) 7 SCC 130]**

11. Examining the testimony of an independent witness, Munna bhai alias Krupal Rajnikant (PW-6), we find him to be the one to have firstly informed the father of the deceased (PW-1) of his son having sustained injuries and taken to MG Hospital, in such a condition. As per his

version, hearing cries of some fight, he rushed to the spot and noticed the deceased lying on the road bleeding profusely. On his asking, one autorickshaw driver took him to the hospital on the promise of paying the fare. Who is this person? Why he himself did not take the deceased to the hospital? All this remains unexplained. For after all, he knew him and had informed the father of the deceased. Is it that he himself was a suspect? Significantly, the witness admits not to have heard the sound of the gun shot. He contradicts himself by stating that he had informed the police of the incident only on 15.05.2002. He does not identify the autorickshaw driver and was not familiar with him. Significantly, the autorickshaw driver has not been examined in the Court.

12. When we examine the testimony of the Complainant (PW-1) we notice him to have deposed that around 11 PM, one person namely Munna Bhai alias Krupal Rajnikant (PW-6) came on a motorcycle and informed that in a critically injured condition, Ram, had been taken to MG Hospital in an autorickshaw. Immediately, he reached the hospital and got recorded his complaint with the police. It is the case of this witness that Nirav (PW-3) met him in the hospital at around 9:30AM and at that time informed him of the incident. This witness does not corroborate the testimony of Nirav (PW-3) of the disclosure of the incident either to his wife or daughter (PW-2). Further, if the identity of the accused was known both to the father (PW–1) and Nirav (PW-3) then why is that the statement implicating the accused was recorded only at 4:30PM in the evening? The timing is significant, more so when Nirav (PW-3)himself was interrogated by the Police at two different places, which exercise continued till 6:30PM of the evening of 14.01.2002.

13. Coming to the testimony of Harshadbhai Veljibhai Patel (PW-9), we notice him to have not supported the prosecution at all and in the cross examination part of his testimony, we do not find anything eliciting of the accused in the crime.

14. We may observe that save and except for the confessional statement of the accused, the Prosecution is not able to link the weapon with the accused. There was no scientific evidence, or the marks of his fingerprints, other identification marks or any tell-tale signs of the blood found on body of the deceased, linking it to the metal pellets of the bullet fired from the weapon recovered during investigation.

15. This Court has consistently held in a catena of judgements that it is

the duty of the prosecution to establish use of the weapon discovered in the commission of the crime. Failure to do so may cause aberration in the course of justice. [**Kartarey v. State of U.P., (1976) 1 SCC 172; Ishwar Singh v. State of U.P., (1976) 4 SCC 355; Chaudhari Ramjibhai Narasangbhai v. State of Gujarat, (2004) 1 SCC 184; Amar Singh's case *(Supra)***]

16. In the absence of any other evidence linking the accused to the murder of the deceased, the testimony of PW-3 discarded, there is no other direct or circumstantial evidence, ocular or otherwise, linking the accused be it on the point of motive or the incident. It is in this backdrop we find the Courts below to have seriously erred. The settled principles of convicting the accused on circumstantial evidence, enunciated by this Court in **Sharad Birdhichand Sarda v. State of Maharashtra (1984) 4 SCC 116**, have not been followed by the Courts below.

17. It is true that concurrent findings of facts of the Courts below, are usually, not to be interfered with. However, it is only in the presence of exceptional circumstances, this Court exercises its wide powers where there is travesty of justice and when absurd and erroneous conclusions are drawn by the Courts below. We are of the opinion that this is one such case fit for exercising the powers entrusted to us as a duty under Article 136 of the Constitution in lite of principles enunciated in: **Ramaphupala Reddy v. State of Andhra Pradesh, (1970) 3 SCC 474; Balak Ram v. State of U.P., (1975) 3 SCC 219; Bhoginbhai Hirjibhai V. State of Gujarat, (1983) 3 SCC 217.**

18. We may record that the High Court seriously erred in finding the accused guilty of having committed the offence of murder under Section 302, Indian Penal Code. In its judgment running into 21 pages, the Court has simply reproduced the decisions rendered by this Court and presumptively, without actually appreciating or discussing the testimony of PW-3, held him to have deposed truthfully, fully establishing the prosecution case, against the accused, beyond reasonable doubt.

19. Unfortunately, none of the courts below have referred to the basic principles of criminal jurisprudence. We may also state that the Courts must refrain from committing such grave errors in the future, whereby innocent people are made to suffer incarceration for over a period of nearly two decades, without proper appreciation of evidence.

20. Hence, we set aside the judgments passed by the Ld. Addl. Sessions Judge, Fast Track Court at Surendranagar, Gujarat in Sessions Case No. 27 of 2002, dated 19.07.2003, titled State Government of Gujarat v. Narendrasinh Keshubhai Zala, as affirmed by the High Court of Gujarat at Ahmedabad vide judgment in Criminal Appeal No, 1037 of 2003, dated 29.12.2011, titled Narendrasinh Keshubha Zala v. State of Gujarat and acquit the accused (Appellant herein) of all the charges framed against him.

The present appeal is allowed.

We direct the Appellant to be released forthwith unless required in any other case.

Headnotes prepared by: Ankit Gyan (*Assisted by:* Mahendra Yadav, LCRA).

Result of the case: Appeal allowed.