15. The present application is allowed accordingly. The proceedings of Criminal Case No. 1453 of 2008 are quashed and set aside qua the present applicant.

Result:- Application allowed.

ABC 2019 (I) 304 GUJ
ACQUITTAL & BAIL CASES

HIGH COURT OF GUJARAT

(A.G.Uraizee, J.)
Criminal Appeal No. 1156 of 2006
Decided on 3 December, 2018

SURSINH OGHADBHAI VALA KARADIA ***- Appellant(s).***

Versus

STATE OF GUJARAT ***- Respondent(s).***

Law Covered:- ***(A) Indian Penal Code, 1860 — Section 333 — Voluntarily causing grievous hurt to a public servant in the discharge of his duty — Conviction by trial Court — non-supporting the case by Panchas & neutral witnesses — Doubtful identification — Conviction set aside — Acquittal. (Para 12, 13 & 19)***

(B) Indian Evidence Act, 1872 — Section 3 — Relevant fact — Identification of the accused — Conduct of witness —after initial hesitation identified the appellant for the first time in the Court— gap of more than seven years — not the prosecution case the appellant has known to him before the incident—No Test Identification Parade conducted — Held, it would not be safe to rely upon the identification. (Para 15)

(C) Indian Evidence Act, 1872 — Section 3 — Relevant fact — History to Medical Officer — no name was given by complainant — indicates that obviously at that stage he had no previous acquaintance. (Para 17)

(D) Code of Criminal Procedure, 1973 — Section 313 —Statement of the accused under —basing conviction on — Consideration of further statement — Held, statement u/s 313 as a whole has to be considered— The Court cannot & should not in isolation pick up the answers to questions in the further statement to record the findings that the accused has committed an offence or not. (Para 18)

Facts:- *As per the prosecution case PW-9 was working as a driver with Gujarat ST. on the relevant day he was on duty as driver of the ST bus*

alongwith the conductor (PW-10). En route to the destination of the said bus the appellant came with his tractor from the opposite direction. It was alleged that there was an argument between both the drivers on the matter of taking side and the appellant inflicted a blow on the wrist of the driver resulting in to facture of the bone. PW-9 lodged the complaint with the Police for the offences punishable u/ss 333, 332, 504, 506(2), 114, IPC and Sec. 135, Bombay Police Act. The accused was convicted u/s 333 and acquitted of other offences. The appellant being aggrieved and dissatisfied with the judgment and order of conviction and sentence preferred the present appeal. After analyzing the evidence the honourable High Court ordered acquittal.

Law of relief:- ***Statement u/s 313 has to be considered as a whole, picking up the answers to questions in the further statement is not permissible.***

Held:- When he was asked to identify the driver of the tractor initially, his response was, he could not identify the driver of the tractor. But immediately thereafter by returning he identified the appellant as the driver of the tractor. At this stage, it needs to be noted that the incident had happened on 20.9.1999 and the testimony of the PW-9 was recorded on 26.04.2006 i.e. almost more than seven years after the incident. It is not the prosecution case nor the PW-9 has stated in his testimony that the appellant has known to him before the incident. It is therefore very curious that after initial hesitation identifies the appellant for the first time in the Court after the incident identified the appellant after around more than seven years of the incident. It is also an undisputed fact that no Test Identification Parade was conducted and therefore, in my view it would not be safe to rely upon the identification of the appellant by PW-9 in the Court to base the conviction. (Para-15)

So far as the history given to the medical officer is concerned, the appellant was initially examined by PW-1 doctor before whom the only history given by PW-9 was that of assault made by someone. In the said history he did not say that he was assaulted by driver of the tractor. It is only before PW-2 and PW-5, doctors he had given the history that he was assaulted by a driver of the tractor. It is thus, very clear from the testimonies of the doctors though before PW-2 and PW -5, the PW-9 had given the history that he was assaulted by the driver of a tractor, the name was not given and obviously at this stage he has no previous acquaintance. (Para-17)

This bring me to the further statement of the appellant. I have very carefully examined the further statement of the appellant,

wherein essentially the appellant has denied whole incident, though in answer to one of the questions, he had stated that he was returning from Sutrapada Factory after lodging dust in the tractor. In my view statement under Section 313 as a whole has to be considered, while making it as a base for the recording of conviction. The Court cannot and should not in isolation pick up the answers to questions in the further statement to record the findings that the accused has committed an offence or not. (Para-18)

Counsel:- ***For Appellant(s):*** *Ms. Shachi G Mathur, Mr Vikram J Thakor, Advs.*

For Respondent(s): *Mr K P Raval, Adv.*

JUDGMENT

A.G.URAIZEE, J.: - 1. The present appeal under Section 374 of the Code of Criminal Procedure 1973 (Code for short) arising out of judgment and order of conviction dated 31.5.2006 passed by the learned Presiding Officer, Fast Track Court, Veraval in Sessions Case No.33 of 2002, whereby and where-under the appellant came to be convicted for the offences punishable under Section 333 of the Indian Penal code ("I.P. Code" for short). Learned trial judge has acquitted the appellant for the offences punishable under Sections 332, 504, 506(2) of the Indian Penal Code and under Section 135 of the Bombay Police Act.

2. The prosecution case against the appellant from the impugned judgment is that Laljibhai Haribhai-PW-9 was working as a driver with the Veraval ST Depot. On 20.9.1999, he was on duty as driver of the ST bus of Veraval to Morasa route. He started from Veraval for going to Morasa at about 13:30 hours. Nebhabhai Virambhai Kuchadiya-PW-10 was the conductor of the said bus. While, the bus was returning from Veraval to Morasa, at that time at about 15:30 hours near village Prashavada, the appellant came with his tractor from the opposite direction. The PW-9, therefore took the bus on the side to make way for the tractor to pass. At the same-time, the PW-9 asked the appellant to take his tractor on his side which enraged the appellant and he started hurling invectives to the PW-9, who asked him not to do so. The appellant therefore, alighted from his tractor with tomy and inflicted a blow on the left hand wrist of PW-9 after opening the door of the driver cabin. PW-10 and other passengers intervened and saved PW-9. The appellant while leaving, threaten the PW-9 with his life, if he passed from the same route. PW-9 lodged the complaint with Sutrapada Police Station in respect of

this incident, which was registered vide I-C.R.No.0092 of 99, for the offences punishable under Sections 333, 332, 504, 506(2), 114 of the Indian Penal Code and Section 135 of the Bombay Police Act.

3. Investigation ensued pursuant to the First Information Report and upon conclusion of the investigation, charge-sheet came to be laid against the appellant in the Court of learned Judicial Magistrate First Class, Veraval. The learned Magistrate committed the case to the Session Case under Section 209 of the Code as the offences committed by the appellant were exhaustively triable by the Court of Sessions. Upon committal, the case came to be registered as Sessions Case No.33 of 2002 in the Court of learned Additional Sessions Judge, Veraval.

4. Charge vide Exh.6 came to be framed against the appellant who pleaded not guilty and came to be tried.

5. In order to bring home, the case against the appellant, the prosecution examined following witnesses :

Oral Evidences

Sr. No.	Name of Witness	Exhibit No.
1	Witness no. 1 - Dr. Dipakbhai Jugalkishor Shah	**9**
2	Witness no. 2- Dr. Amrut bhai Gorabhai Rathod	**11**
3	Witness no. 3 - Hamirbhai Varjangbhai Panch of the local place of incident	**15**
4	Witness no. 4 - Jesingbhai Ramsingbhai Panch of the local place of incident	**17**
5	Witness no. 5 - Dr. Kishorkumar R. Hariyani	**19**
6	Witness no. 6 - Masribhai Jagmalbhai Shah	**22**
7	Witness no. 7 - Naranbhai Jesingbhai	**23**
8	Witness no. 8 - Punjabhai Hamirbhai	**24**
9	Witness no. 9 - Laljibhai Haribhai Complainant	**27**
10	Witness no. 10 - Nebhabhai Virambhai Kuchhadiya – Conductor	**29**
11	Witness no. 11 - Jayantibhai Labhshankar Bhatt - A.S.I. / I.O.	**30**

6. The prosecution also produced and relied upon the following documentary evidence.

Documentary Evidences

Sr. No.	Details of Documents	Exhibit No.
1	Certificate of Injuries received by the Complainant issued by the Doctor of Sutrapada Hospital.	**10**
2	Injury Certificate of the Complainant issued by the Doctor of the Hospital at Junagadh after carrying out the examination.	**12**
3	X-ray of the Complainant taken in the Hospital at Junagadh	**13**
4	Refer Note issued by the Doctor of the Hospital of Veraval addressing the Doctor of the Junagadh Hospital.	**14**
5	Panchnama of the Arrest of the accused and scene of offence.	**16**
6	Yadi of the Police addressed to Dr. Hariyani	**20**
7	Injury Certificate of the Complainant issued by Dr. Hariyani of Veraval Government Hospital.	**21**
8	Original Complaint	**28**
9	Report made by the Investigating Officer regarding Section 333 of I.P.C.	**31**
10	Notification about Prohibition to keep arms.	**32**

7. Upon conclusion of the evidence of the prosecution, statements of the appellant under Section 313 of the Code came to be recorded, wherein he had denied all the incriminating evidence. He did not examine any witnesses in defence.

8. The learned Presiding Officer of the Fast Track Court, Veraval by his impugned judgment and order was pleased to acquit the appellant for the offences punishable under Sections 332, 504, 506

(2) of I.P. Code and Section 135 of the Bombay Police Act under Section 235(1) of the Code but convicted him under Section 235(2) of the Code for offences punishable under Section 333 of the IP Code and sentenced him to suffer Rigorous Imprisonment of Two Years and Six Months (30 Months) and to pay fine of Rs.8000/-, in default of payment of fine, further Rigorous Imprisonment for Three months. The appellant being aggrieved and dissatisfied with the judgment and order of conviction and sentence has preferred this appeal.

9. I have heard Ms. Shachi G. Mathur, learned advocate for Mr. Vikram Thakor, learned advocate for the appellant and Mr. K.P. Raval, learned Additional Public Prosecutor for the respondent-State. I have also perused the record and proceedings of the Sessions Case No.33 of 2002.

10. Ms. Shachi Mathur, learned advocate for the appellant has vehemently submitted that material witnesses and panch witneses, except PW-9-original complainant have not supported the prosecution case. She submitted that the learned trial Judge has convicted the appellant solely on the basis of identification on the part of PW-9 for the first time after around seven years of the incident in the Court. It is her submission that for the first time, in the Court and on the basis that the appellant has not disputed his presence in statement (Further Statement) under Section 313 of the Code. She stoutly submitted that the learned trial Judge has committed an error in convicting the appellant in absence of any cogent evidence and therefore, she urged that the appeal may be allowed and the appellant may be acquitted.

11. Mr. K.P. Raval, learned Additional Public Prosecutor has supported the impugned judgment and order of conviction. He submitted that though material witnesses and panch witnesses have not supported the prosecution case, PW-9- original complainant has deposed in line with his complaint Exh.28. He submitted that the PW-9 has identified the appellant in the Court and therefore, the learned Trial Judge has not committed any error in convicting the appellant. He also submitted that the learned Trial Judge has assigned cogent reasons in the impugned judgment and order which does not suffer from any infirmity or illegality warranting interference in this appeal. He therefore urged that the appeal may be dismissed.

12. Perusal of the record reveals that Hamirbhai Varjangbhai-PW-3 and Jesingbhai Ramsingbhai-PW-4, who are the panchas of

recovery panchnama-Exh.16 recovery of tomy from the appellant, have not supported the prosecution case.

13. Likewise, Masribhai Jagmalbhai Shah-PW-6, Naranbhai Jesingbhai -PW-7 and Punjabhai Hamirbhai-PW-8, who were passengers in the ST bus have also not supported the prosecution case.

14. The prosecution case therefore, now rest on the evidence of Laljibhai Hirabhai - original complainant-PW-9 and Nebhabhai Virambhai Kuchhadiya -a conductor- PW-10 aside from the evidence of three Doctors viz. PW-1-Dr. Dipakbhai Jugalkishor Shah, PW-2-Dr. Amrutbhai Gorabhai Rathod and PW-5-Dr. Kishorkumar R. Hariyani.

15. Laljibhai Hirabhai-PW-9 has deposed in line with Exh.28 First Information Report. It emerges from its testimony that on the day of incident, he was returning from Veraval to Morasa, when the incident had happened. He states in his testimony that he was attacked by a driver of tractor and hence, suffered fracture injury on his wrist, while warding off a blow of tomy by the driver of the tractor. When he was asked to identify the driver of the tractor initially, his response was, he could not identify the driver of the tractor. But immediately thereafter by returning he identified the appellant as the driver of the tractor. At this stage, it needs to be noted that the incident had happened on 20.9.1999 and the testimony of the PW-9 was recorded on 26.04.2006 i.e. almost more than seven years after the incident. It is not the prosecution case nor the PW-9 has stated in his testimony that the appellant has known to him before the incident. It is therefore very curious that after initial hesitation identifies the appellant for the first time in the Court after the incident identified the appellant after around more than seven years of the incident. It is also an undisputed fact that no Test Identification Parade was conducted and therefore, in my view it would not be safe to rely upon the identification of the appellant by PW-9 in the Court to base the conviction.

16. The learned trial Judge has solely relied upon the evidence of Doctors PW-1, PW-2, PW-5 before whom history was given by PW-9 and also further statement under Section 313 of the Code given by the appellant.

17. So far as the history given to the medical officer is concerned, the appellant was initially examined by PW-1 doctor before whom the only history given by PW-9 was that of assault made

by someone. In the said history he did not say that he was assaulted by driver of the tractor. It is only before PW-2 and PW-5, doctors he had given the history that he was assaulted by a driver of the tractor. It is thus, very clear from the testimonies of the doctors though before PW-2 and PW-5, the PW-9 had given the history that he was assaulted by the driver of a tractor, the name was not given and obviously at this stage he has no previous acquaintance.

18. This bring me to the further statement of the appellant. I have very carefully examined the further statement of the appellant, wherein essentially the appellant has denied whole incident, though in answer to one of the questions, he had stated that he was returning from Sutrapada Factory after lodging dust in the tractor. In my view statement under Section 313 as a whole has to be considered, while making it as a base for the recording of conviction. The Court cannot and should not in isolation pick up the answers to questions in the further statement to record the findings that the accused has committed an offence or not.

19. Upon overall appreciation of the evidence more particularly of PW-9, in my view, the identification of the appellant by PW-9 is strictly doubtful and therefore, the learned Trial Judge has fallen in error in convicting the appellant under Section 333 of the Code on the basis of the identification coupled with an isolation answer the question in further statement that it was the appellant who had assaulted the PW-9. I am therefore of the view that the conviction recorded by the learned Trial Judge can not be sustained and the impugned judgment and order warrants interference in this appeal.

20. For the foregoing reasons, the appeal is succeed and is hereby allowed the judgment and order of conviction dated 31.5.2006 passed by the learned Presiding Officer, Fast Track Court, Veraval in Sessions Case No.33 of 2002, is hereby quashed and set-aside and the appellant is acquitted from the offence punishable under section 333 of the code.

Record and proceedings is ordered to be transmitted to the trial Court forthwith.

Result:- Appeal allowed.

March 2019