

(2013) 10 GUJ CK 0085
In the Gujarat High Court

Case No : Criminal Appeal No. 3049 of 2008 with Criminal Appeal No. 2866 of 2008

Aamad @ Bodu Jumma @ Kara (Lakha)

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 03-10-2013

Acts Referred:

Citation : (2013) 10 GUJ CK 0085

Hon'ble Judges : K.S. Jhaveri, J;K.J. Thaker, J

Bench : Division Bench

Advocate : Amir Khan for Mr. Ashish M. Dagli in Criminal Appeal No. 3049/2008 and Mr. K.P. Raval, APP in Criminal Appeal No. 2866/2008, for the Appellant; K.P. Raval, APP in Criminal Appeal No. 3049/2008 and Mr. Amir Khan for Mr. Ashish M. Dagli, Advocate in Criminal Appeal No. 2866/2008, for the Respondent

Judgement

K.J. Thaker, J.—Criminal Appeal No. 3049 of 2008 under sec. 374(2) of the Code of Criminal Procedure, has been preferred by the Appellant-Original Accused No. 1 against the judgment and order of conviction and sentence dated 15.9.2008 passed by the learned Sessions Judge, Junagadh in Sessions Case No. 82/2006, whereby, the learned trial Judge has convicted the present appellant ori. Accused No. 1 under sec. 302 of IPC and sentenced to undergo R/I for life. Criminal Appeal No. 2866/2008 has been preferred by the State under sec. 378 of the Code of Criminal Procedure, against the judgment and order dated 15.9.2008 passed by the learned Sessions Judge, Junagadh in Sessions Case No. 82/2006, whereby, the learned trial Judge has acquitted the respondents- ori. Accused No. 2 & 3 of the charges leveled against them. Since both the appeals arise from common judgment and order of the trial Court, they are heard and decided by this common judgment.

1.1 The brief facts of the prosecution case is that on the day of incident, i.e. on 3.8.2006, the complainant's nephew Aziz Taiyab came to his residence at about 9.30 am and said to have stated that there is dispute between themselves and

his uncle Jumma Kasam about the land located at Kharapa and a person from Court has come to prepare Rojkam, therefore, complainant should accompany them. The complainant, therefore, accompanied his nephew Aziz. The father of Aziz (Taiyabbhai), one Alarakha Osman, Post Master of village Sheriyakhan from the village chowk and Court Commissioner Mr. Vora had also joined them. As they were proceeding towards the suit site, accused No. 1 and 3 and one Alarkha Khamisa were following them on bullet. The condition of road due to heavy rain was such that it was not possible to go on motorbike upto the suit land. Therefore, parking the motorbikes at the corner of the road, they all were proceeding towards suit land by walking. As they came on the western side of the field of Musa Hasam, accused No. 1 had said to have asked Taiyabbhai something like this: ..."Taiyabkaka, come into the agriculture field." After saying so, accused No. 1 had taken knife from his waist and given blow into the belly of Taiyabbhai. Thereafter, he had given blows here and there on the body of Taiyabbhai. Meanwhile, nephew of the complainant rushed to save his father. Thereupon, accused No. 1 had given blows of knife to Aziz also. At this time, says the complainant, accused No. 3 had stick with him and he too was giving blows of stick to Taiyabbhai. Taiyabbhai fell to the ground. Accused No. 2 who was grazing the cattle rushed with axe and had given various blows of axe to Aziz. The complainant and others were frightened and rushed towards the village. While running away as they looked back, all the three accused had also fled away. Therefore, the complaint came to be filed.

1.2 The accused came to be arraigned for committing the murder. After the investigation, was complete, the charge-sheet was hold against the accused. Thereafter, as the case was exclusively triable by the Court of Sessions, the case was committed to the Court of Sessions, which was given number as Sessions Case No. 82/2006.

1.3 Thereafter, the Sessions Court framed the charge below Exh. 1 against the accused for commission of the offence u/s 302 read with sec. 114 of IPC. The accused have pleaded not guilty and claimed to be tried.

1.4 To prove the case against the accused, the prosecution has examined the following witnesses:

1. PW-1 Dr. Lineshkumar Savdasbhai Makwana Ex. 16
2. PW-2 Husenbhai Jusabbhai Ex. 32
3. PW-3 Alarkha Osman Lakha Ex. 38
4. PW-4 Bhupendra Hariprasad Vora Ex. 45
5. PW-5 Rasidbhai Taiyabbhai Ex.49
6. PW-6 Hasambhai Alarakhabhai Ex. 51
7. PW-7 Bharatbhai Mulabhai Dodiya Ex. 55

8. PW-8 Nagajan Kandhabhai Ex. 59
9. PW-9 Sukabhai Merkhibhai Keshwala Ex. 61
10. PW-10 Dayabhai Punjabhai Ex. 63
11. PW-11 Karshanbhai Naranbhai Parmar Ex. 76
12. PW-12 Devidasbhai Dudarbhai Virani Ex. 79
13. PW-13 Jagdishbhai Khetabhai Sondarava Ex. 86
14. PW-14 Maldebhai Bhimabhai Bagiya Ex. 89
15. PW-15 Bhupatbhai Rambhai Taraiya Ex. 94
16. PW-16 Piyushbhai Pragjibhai Firojiya Ex. 116

1.5 The prosecution also relied upon the following documentary evidences so as to bring home the charges against the accused.

1. Yadi for blood sample Ex. 17
2. PM Form Ex. 18 & 19
3. PM Note Ex. 20 & 21
4. Yadi to send blood sample Ex. 22
5. Yadi Ex. 23
6. Letter for opinion Ex. 24
7. Medical certificate of Adam Juma Ex.25
8. Medical certificate of Habib Juma Ex. 27
9. Complaint Ex. 33
10. Panchnama Ex. 52
11. Inquest panchnama Ex. 53
12. Arrest panchnama Ex. 56
13. Panchnama Ex. 57
14. Arrest panchnama Ex. 60
15. Copy of RCS No. 61/06 Ex. 64
16. Copy of application for rojkam Ex. 65
17. Copy of Summons Ex. 66 & 67
18. Letter of PSI Mangrol to Executive Magistrate asking for records of disputed land Ex. 69

19. Copy of 7/12 abstract Ex. 71
20. Copy of village form No. 8-A Ex. 72
21. Letter of Mamlatdar Ex. 8\\73
22. Copy of entry No. 10/2006 Ex. 77
23. Station diary Ex. 82
24. Fax message Ex. 84
25. Special report Ex. 85
26. Yadi for preparing map of scene of offence Ex. 90
27. Investigation Van report Ex. 95
28. Yadi for PM Ex. 96
29. Receipt of dead-body Ex. 97
30. Yadi for medical check-up Ex. 98 & 99
31. Receipt of FSL Ex. 102
32. FSL Report Ex. 104
33. Report of Physics Department Ex. 105
34. Serological report Ex. 107

2. Thereafter, after examining the witnesses, further statement of the accused under sec. 313 of Cr.P.C. was recorded in which the accused have denied the case of the prosecution.

3. After considering the oral as well as documentary evidence and after hearing the parties, learned trial Judge vide impugned judgment and order dated 15.9.2008 held the present appellant- original accused No. 1 guilty of the charge levelled against him] under sec. 302 of IPC and convicted and sentenced the appellant-accused No. 1, as stated above.

4. We have heard learned advocate Mr. Amirekhan for Mr. Ashish M. Dagali for the appellant and Mr. K.P. Raval learned APP for the respondent-State in Criminal Appeal No. 3049/2008 and Mr. K.P. Raval learned APP for the appellant-State and Mr. Amirkhan for Mr. Ashish M. Dagali for the respondents in Criminal Appeal No. 2866/2008.

5. The learned advocate for the present appellant- ori. Accused No. 1 has contended that the trial court has committed an error in passing the impugned judgment and order, inasmuch as it failed to appreciate the material on record in its proper perspective, and hence, the present appellant-accused No. 1 deserves to be given the benefit of doubt and be acquitted.

6. On the other hand, learned APP has strongly opposed the contentions raised by the learned advocate for the present appellant and has submitted that the trial court has passed the impugned judgment and order after taking into consideration the facts and circumstances of the case as well as the material, in the form of oral and documentary evidence, produced before it and hence, no interference is called for and the appeal deserves to be dismissed.

7. Having considered the minutely the evidence on record, oral as well as documentary evidence, which we have appreciated, re-appreciated and reconsidered in light of the latest decision of the Apex Court. The theory put forward by the learned advocate Mr. Amirkhan cannot be accepted as the injuries caused to deceased were very serious in nature. The presence of the accused at the time of offence is proved beyond reasonable doubt. He has motive to do away with both the deceased as there was a civil dispute going on between the parties. From the charge itself, it can be seen that the accused had premeditated to do away with the deceased. The injuries would not persuade us to hold that the incident happened on the spur of moment. The medical evidence of PW-1 Dr. Lineshkumar Savdabhai Makwana Ex. 16 will persuade us to hold that total number of witnesses who have testified has given the name of accused who has given blow with knife and he also gave blows with knife to the son of Taiyabhai who was closed relative.

8. The panchnamas are proved by all the panchas i.e. PW-6, 7, 8, 9 & 11 and recovery and discovery is also proved. PW-1 Dr. Lineshkumar Savdasbhai Makwana has testified to the effect that the death was possible by the weapon used i.e. knife, and therefore, we are unable to persuade ourselves that this was not a homicidal death which amounted to murder.

9. We are in complete agreement with the findings, ultimate conclusion and resultant order of conviction and sentence passed by the trial Court and we are of the view that no other conclusion except the one reached by the trial Court is possible in the instant case as the evidence on record stands. Therefore, there is no valid reason or justifiable ground to interfere with the impugned judgment and order of conviction and sentence and the appeal being Criminal Appeal No. 3049/2008 requires to be dismissed.

10. So far as the acquittal appeal being Criminal Appeal No. 2866/208 is concerned, at the outset, it is required to be noted that the principles which would govern and regulate the hearing of appeal by this Court against an order of acquittal passed by the trial Court have been very succinctly explained by the Apex Court in a catena of decisions. In the case of M.S. Narayana Menon @ Mani Vs. State of Kerala and Another, the Apex Court has narrated about the powers of the High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under:

54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while

exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well-settled principles of law that where two views are possible, the appellate court should not interfere with the finding of acquittal recorded by the court below.

11. Further, in the case of *Chandrappa and Others Vs. State of Karnataka*, the Apex Court laid down the following principles:

42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

[1] An appellate court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded.

[2] The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

[3] Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasize the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

[4] An appellate court, however, must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

[5] If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.

12. Thus, it is a settled principle that while exercising appellate power, even if two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.

13. Even in a recent decision of the Apex Court in the case of *State of Goa Vs. Sanjay Thakran and Another*, the Court has reiterated the powers of the High Court in such cases. In para 16 of the said decision the Court has observed as under:

16. From the aforesaid decisions, it is apparent that while exercising the powers

in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with.

14. Similar principle has been laid down by the Apex Court in the cases of State of Uttar Pradesh Vs. Ram Veer Singh and Others, and in Girja Prasad (Dead) by LRs. Vs. State of Madhya Pradesh, Thus, the powers which this Court may exercise against an order of acquittal are well settled.

15. It is also a settled legal position that in acquittal appeal, the appellate court is not required to re-write the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of State of Karnataka Vs. Hemareddy Alias Vemareddy and Another, , wherein, it is held as under:

...This court has observed in Girja Nandini Devi and Others Vs. Bijendra Narain Choudhury, that it is not the duty of the appellate court when it agrees with the view of the trial court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice.

16. In the case of Lunaram Vs. Bhupat Singh and Others, the Apex Court in para 10 and 11 has held as under:

10. The High Court has noted that the prosecution version was not clearly believable. Some of the so-called eye witnesses stated that the deceased died because his anke was twisted by an accused. Others said that he was strangulated. It was the case of the prosecution that the injured witnesses were thrown out of the bus. The doctor who conducted the post-mortem and examined the witnesses had categorically stated that it was not possible that somebody would throw a person out of the bus when it was in running condition.

11. Considering the parameters of appeal against the judgment of acquittal, we are not inclined to interfere in this appeal. The view of the High Court cannot be termed to be perverse and is a possible view on the evidence.

17. Even in a recent decision of the Apex Court in the case of Mookkiah and

Another Vs. State rep. by the Inspector of Police, Tamil Nadu, the Apex Court in para-4 has held as under:

4. It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led by the prosecution and defence, acquitted the accused in respect of the charges leveled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Sec. 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the appellants very much emphasized that the High Court has exceeded its jurisdiction in upsetting the order of acquittal into conviction, let us analyze the scope and power of the High Court in an appeal filed against the order of acquittal. This Court in a series of decisions has repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be re-appreciate the entire evidence, though while choosing to interfere only the Court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against the acquittal. [Vide State of Rajasthan Vs. Sohan Lal and Others,

18. Thus, in case the appellate court agrees with the reasons and the opinion given by the lower court, then the discussion of evidence is not necessary.

19. It is contended by the learned APP Mr. K.P. Raval that the trial Court has committed an error in acquitting the present respondents as their presence in the was found and they should have been convicted u/s 302 of IPC.

20. We have gone through the judgment and order of acquittal passed by the trial court. We have also perused the oral as well as documentary evidence led by the trial court and also considered the submissions made by learned APP for the appellant-State. Learned APP has not been able to satisfy us that the injuries were caused by accused No. 2 and 3. It cannot be said that there was any common intention. There was no overt act on the part of the respondents and therefore, it cannot be said that there was any common object to do away with the deceased and, therefore, the acquittal recorded by the learned trial Judge cannot be interfered with. The trial court while considering the oral as well as documentary evidence has clearly observed that there is no any evidence to convict the respondents. The prosecution has miserably failed to prove the case against the accused beyond any reasonable doubt. Even in the present appeal, nothing is produced or pointed out to rebut the conclusion of the trial Court. Thus, from the evidence itself it is established that the prosecution has not proved its case beyond reasonable doubt.

21. Mr. K.P. Raval learned APP is not in a position to show any evidence to take a

contrary view of the matter or that the approach of the trial court is vitiated by some manifest illegality or that the decision is perverse or that the trial court has ignored the material evidence on record.

22. In the above view of the matter, we are of the considered opinion that the trial court was completely justified in acquitting the respondents of the charges leveled against them. We find that the findings recorded by the trial court are absolutely just and proper and in recording the said findings, no illegality or infirmity has been committed by it. We are, therefore, in complete agreement with the findings, ultimate conclusion and the resultant order of acquittal recorded by the court below and hence find no reasons to interfere with the same. Hence, the appeal requires to be dismissed.

23. In the result, Criminal Appeal No. 3049/2008 is dismissed. The impugned judgment and order of conviction and sentence dated 15.9.2008 passed by the learned Sessions Judge, Junagadh in Sessions Case No. 82/2006 convicting and sentencing the appellant - ori. Accused No. 1 is confirmed.

24. However, it is clarified that life would not mean till the last breath and his case may be considered by the State Government after 14 years and he shall be entitled to remission and set-of as admissible. Criminal Appeal No. 2866/2008 is dismissed. The impugned judgment and order of acquittal dated 15.9.2008 passed by the learned Sessions Judge, Junagadh in Sessions Case No. 82/2006 acquitting the respondents- ori. Accused No. 2 and 3 is confirmed.

R & P to be sent back to the trial Court.