

**(2016) 01 GUJ CK 0125**

**In the Gujarat High Court**

**Case No :** Criminal Appeal Nos. 2161, 2191 and 2249 of 2004 and 1755 of 2006 and Criminal Misc. Application No. 15833 of 2008 in Criminal Appeal No. 2191 of 2004

Dahyabhai Ajabhai Rabari

APPELLANT

Vs

State of Gujarat

RESPONDENT

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**Date of Decision :** 19-01-2016

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 313, Section 357

Penal Code, 1860 (IPC) — Section 149, Section 300, Section 302, Section 304

**Citation :** (2016) 01 GUJ CK 0125

**Hon'ble Judges :** K.S. Jhaveri and R.P. Dholaria, JJ.

**Bench :** Division Bench

**Advocate :** Yogesh S. Lakhani, Advocate, for the Appellant; D.A. Chaudhari, Advocate and L.R. Poojari, Addl Public Prosecutor, for the Respondent

**Final Decision :** Disposed Off

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**Judgement**

K.S. Jhaveri, J.—1. By way of these appeals, original accused No. 1 to 4 have challenged the judgement and order dated 28.10.2004 passed by the learned Additional Sessions Judge, Fast Track Court, Banaskantha at Deesa in Sessions Case No. 117 of 2003 whereby the trial court has convicted and sentenced the accused as under. Criminal Appeals No. 2161 and 2191 of 2004 have been preferred by original accused Nos. 4 & 3 respectively whereas Criminal Appeal No. 2249 of 2004 has been preferred by original accused Nos. 1 & 2 against the conviction. The State has filed Criminal Appeal No. 1755 of 2004 against the acquittal of original accused No. 5 in Sessions Case No. 42 of 2005.

2. It is the case of the prosecution that on 22.05.2003, while the complainant and his uncle - deceased along with other persons were sitting near the old building of milk society, the accused persons along with original accused No. 5 - now acquitted came there and asked them that inspite of their requests why the dairy building was not being constructed. It is the case of the prosecution that

original accused No. 1 to 3 were armed with sticks whereas accused No. 4 was armed with a dharia. Original accused No. 5 was armed with an axe. It is the case of the prosecution that an altercation took place between the parties and accused Nos. 1 to 3 gave stick blows to the complainant and the deceased whereas accused No. 4 gave a dharia blow on the leg of deceased whereas original accused No. 5 gave axe blow on the head of deceased. The deceased fell down and died on the spot. A complaint was therefore registered by the complainant who is the nephew of the deceased.

2.1 Pursuant to the complaint, investigation was initiated. During the course of investigation, the accused were apprehended and after investigation charge sheet was submitted. The case was committed to the Court of Sessions. The trial was initiated against the accused and during the course of trial the prosecution examined various witnesses whose evidences were read before us by learned advocates for both the sides. The prosecution also exhibited certain documents which have been perused by us during the course of hearing. At the end of the trial and after recording the statement of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Additional Sessions Judge convicted accused Nos. 1 to 4 and acquitted original accused No. 5 as mentioned aforesaid. Being aggrieved by and dissatisfied with the aforesaid judgement and order passed by the Sessions Court the accused and the State have preferred the present appeals.

3. Mr. Y.S. Lakhani, learned Senior Advocate appearing for the accused does not dispute the genesis of the incident. He has, however, drawn the attention of this Court to the medical evidence more particularly the number and nature of injuries sustained by the deceased and the cause of death certificate and submitted that considering the injuries and cause of death, the case of the accused may be considered under Section 304 (Part II) or at the most 304 (Part I). He submitted that considering the nature of injuries and the fact that considerable period of time has lapsed, this Court may take a considerate view in the matter. He submitted that the accused are remorseful and are ready and willing to pay appropriate amount as compensation to the victim's family members. Mr. Yatin Soni and Mr. B.S. Patel, learned advocates appearing for accused Nos. 3 & 4 respectively have also adopted the arguments advanced by Mr. Lakhani.

4. Mr. L.R. Poojari, learned APP appearing for the respondent State has supported the order of the trial court so far as the conviction and sentence of original accused No. 1 to 4 is concerned and has submitted that the trial court has gone into the evidence in detail and has come to the conclusion that the accused are guilty of the offence so convicted of. He also submitted that the sentence imposed upon the accused is just and proper and does not deserve to be reduced or quashed.

4.1 So far as the acquitted accused is concerned, Mr. Poojari submitted that the judgement and order of the Sessions Court is against the provisions of law and

that the Sessions Court has not properly considered the evidence led by the prosecution and looking to the provisions of law itself it is established that the prosecution has proved the whole ingredients of the evidence against the present respondents. Learned APP has also taken this court through the oral as well as the entire documentary evidence.

5. Mr. K.B. Anandjiwala, learned Senior Advocate appearing with Mr. Rushabh Shah, learned advocate for original accused No. 5 - respondent in Criminal Appeal No. 1755 of 2006 submitted that the trial court while passing the impugned judgement and order in Sessions Case No. 42 of 2005 has gone through the evidence in detail and has rightly acquitted original accused No. 5 after giving cogent and convincing reasons.

6. Having considered the materials on record, we are of the view that there is no dispute that the accused were involved in the incident. It is required to be noted that Dr. Rakeshbhai Patel Ex. 16, who was the Medical Officer who had performed post mortem of the deceased at Dhanera Referral Hospital has stated that there were six contusions sustained by the deceased. He has further stated that the deceased had sustained one incised wound on middle of head up to bone and there was one rib fracture with contusion on back of chest.

6.1 The cause of death as mentioned in the post mortem report is shock due to lt. side lung rupture, brain haemorrhage and multiple fracture. It is required to be noted that when there erupted an altercation about the construction of dairy building, tempers ran high and in the heat of passion, the accused assaulted the deceased, but without premeditation as a result of verbal arguments. Going by the medical records wherein the nature of injuries have been described, we are of the opinion that the offence falls within Exception 4 of Section 300 and thus the trial court ought to have convicted original accused under Section 304 part I of Indian Penal Code.

6.2 On the peculiar facts and circumstances of this case, more particularly, considering the fact that the incident is 12 years old and the fact that the accused are remorseful and that the incident happened in a fit of rage, we are of the considered opinion that the recent decision of the Apex Court in the case of Ankush Shivaji Gaikwad vs. State of Maharashtra, reported in , 2013(6) Scale 778 will squarely apply to the facts of the present case, inasmuch as the incident appears to have happened in a spur of moment, we have felt it appropriate that when the Apex Court has shown concern that section 357 of Cr.P.C. be implemented in its proper perspective this is a fit case where we feel that the same requires to be adopted.

7. So far as acquittal appeal is concerned, 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 & Anr., reported in , (2006)6 SCC,

39, 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 judgement of acquittal, the High Court should have borne in mind the well-settled principles of law that where two view are possible, the appellate court should not interfere with the finding of acquittal recorded by the court below."

7.1 Further, in the case of *Chandrappa Vs. State of Karnataka*, reported in , (2007)4 SCC 415 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 emphasis 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."

7.2 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.

7.3 Even in a recent decision of the Apex Court in the case of State of Goa V. Sanjay Thakran & Anr. Reported in , (2007)3 SCC 75, 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 judgement 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."

7.4 Similar principle has been laid down by the Apex Court in the cases of State of Uttar Pradesh Vs. Ram Veer Singh & Ors, reported in , 2007 AIR SCW 5553 and in Girja Prasad (Dead) by LRs Vs. State of M.P., reported in , 2007 AIR SCW 5589. Thus, the powers which this Court may exercise against an order of acquittal are well settled.

7.5 It is also a settled legal position that in acquittal appeal, the appellate court is not required to re-write the judgement 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, reported in , AIR 1981 SC 1417 wherein it is held as under:

"...This court has observed in Girija Nandini Devi V. Bigendra Nandini Chaudhary , (1967)1 SCR 93 : (AIR 1967 SC 1124) 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."

7.6 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. from the evidence itself it is established that the prosecution has not proved its case beyond reasonable doubt so far as original accused No. 5 is concerned. Mr. Poojari, 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.

8. Considering the facts and circumstances of the case coupled with the ocular as well as the documentary evidence, and considering the fact that a considerable period of time has lapsed, we think it fit to pass the following order:

9. In the result, the impugned judgment and order of conviction and sentence dated 28.10.2004 passed by the Additional Sessions Judge, Fast Track Court, Banaskantha at Deesa in Sessions Case No. 117 of 2003 is modified as under:

(i) The conviction and sentence imposed upon the accused under section 302 r/w 149 of Indian Penal Code is altered to one under Section 304 (Part I) of Indian Penal Code. The accused are ordered to undergo rigorous imprisonment for a period of ten years under section 304 (Part I) of Indian Penal Code.

(ii) However, in the event the accused deposit an amount of Rs. 62,500/- each by way of compensation before the trial court under sec. 357 of Cr.P.C. over and above the amount of fine imposed by the trial court, they shall not be required to undergo the remaining part of sentence and the sentence they have already undergone shall be considered sufficient to meet the ends of justice.

(iii) The amount of compensation/fine shall be deposited by accused individually within a period of three months from today before the trial court. If the accused or any of the accused do/does not pay the amount as ordered hereinabove in time, the sentence awarded hereinabove shall stand revived and it shall be open to the concerned authorities to take the concerned accused into custody and they/he shall be liable to serve the remaining part of the sentence.

(iv) Bail bond shall stand continued till the accused pay the amount of fine and compensation or till the expiry of three months" period whichever is earlier and the same shall stand cancelled if the accused have paid the amount of fine and compensation.

(v) If children of the deceased file an application before the trial court within a period of one year from today for disbursement of the amount of compensation deposited by the accused, the trial court after verifying the identity of the concerned family member, shall disburse the amount.

(vi) However, in the event the family members of the deceased do not file any application for disbursement, the said amount after expiry of period of one year from today shall be used for the construction of sanitation facilities in the village panchayat.

(vii) Criminal Appeal Nos. 2161, 2191 & 2249 of 2004 are allowed to the aforesaid extent.

(viii) The judgement and order passed by the trial court in Sessions Case No. 41 of 2005 is confirmed. Criminal Appeal No. 1755 of 2006 stands dismissed accordingly. Cr. Misc. Application No. 15833 of 2008 stands disposed of accordingly.

(ix) R & P to be returned to the trial court forthwith.