

(2016) 03 GUJ CK 0190

In the Gujarat High Court

Case No : Criminal Appeal Nos. 1131, 1285, 1282 and 1283 of 2004 and
Criminal Revision Application No. 412 of 2004

Dharmendra Ramanlal Shah and Others

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 30-03-2016

Acts Referred:

Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 147, Section 148, Section 149, Section 302, Section 307, Section 324, Section 325, Section 326, Section 34

Citation : (2016) 03 GUJ CK 0190

Hon'ble Judges : K.S. Jhaveri and G.B. Shah, JJ.

Bench : Division Bench

Advocate : Umesh Trivedi and B.D. Karia, Advocate, for the Appellant; C.M. Shah, APP, for the Respondent

Final Decision : Dismissed

Judgement

K.S. Jhaveri, J.—1. As all these appeals as well as the Criminal Revision Application arise out of the common impugned judgment and order, the same are heard and being decided together.

2. Present appeals as well as the Criminal Revision Application assail the judgment and order dated 31/05/2004, passed by the learned Additional Sessions Judge, Fast Track Court, Surendranagar, in Sessions Case No. 13 of 2003, whereby, while acquitting the original accused Nos. 1, 3, 5 to 12 from all the charges levelled against them for the offences punishable under Sections 147, 148, 149, 302, 307, 326 and 325 of the Indian Penal Code, 1860 (for brevity, "the IPC"), the original accused Nos. 2 and 4 came to be convicted for the offences punishable under Sections 326 and 324 of the IPC and Section 135 of the Bombay Police Act, respectively. Accordingly, the original accused No. 2 was sentenced to undergo rigorous imprisonment for three years and compensation of Rs. 20,000/-, to be paid to injured - Sureshchandra and in

default of payment of compensation, to undergo further rigorous imprisonment for two years for the offence punishable under Section 326 of the IPC and for the offence punishable under Section 135 of the Bombay Police Act, he was sentenced to undergo simple imprisonment for one month. Whereas, the original accused No. 4 was sentenced to undergo rigorous imprisonment for two years for the offence punishable under Section 324 of the IPC and for the offence punishable under Section 135 of the Bombay Police Act, he was sentenced to undergo simple imprisonment for one month. The accused No. 4 also ordered to pay a compensation of Rs. 30,000/-, to be paid to the widow and the mother of the deceased in equal proportion, and in default of payment of compensation, to undergo further simple imprisonment for two years. However, the accused No. 4 was released on probation, under the provisions of the Probation of Offenders Act, 1958 on personal bond of Rs. 5,000/- with two solvent surety of the like amount, for three years. Accordingly, Criminal Appeal No. 1131 of 2004 has been filed by the appellants - original accused Nos. 2 and 4 against conviction, whereas, Criminal Appeal No. 1285 of 2004 has been filed by the State against original accused No. 2 for enhancement of sentence, Criminal Appeal No. 1282 of 2004 has been filed by the State against original accused No. 4 against his release on probation and Criminal Appeal No. 1283 of 2004 has been filed by the State against acquittal of all the accused. The original complainant has also filed the Criminal Revision Application No. 412 of 2004 against acquittal of all the accused.

3. It is reported that original accused No. 11 - Govindbhai Mohanbhai Khavas, Rajput (Chauhan) has died on 27/09/2006. Copy of his Death Certificate is produced, which is taken on record. Accordingly, the Criminal Appeal No. 1283 of 2004, filed by the State and the Criminal Revision Application, filed by the original complainant, against acquittal of all the accused, are abated qua original accused No. 11.

4. Filtering the unnecessary details, the facts of the prosecution case are that on 22/12/2002, at about 12:00 to 12:15 hours, on Padhiyar Road at Surendranagar, all the accused, by forming unlawful assembly in furtherance of their common object, keeping grudge of deceased Hitesh having molested the wife of accused No. 4 prior to about five days of the incident in question, assembled with deadly weapons like sword, iron pipe, sticks, hockey etc. and under the guise of settling the dispute they assaulted deceased Hitesh, his father Sureshchandra, his uncles - Kanaiyalal and Pramodbhai etc. with the aforesaid weapons and caused serious injuries to them, due to which, Hitesh had died and his father and uncles sustained serious injuries. Thus, the accused committed the offence, alleged against them, for which a complaint came to be lodged against them.

4.1 Pursuant to the complaint, investigation was carried out. After investigation, charge-sheet was filed and as the case was triable by the Court of Sessions, it was committed to the Sessions Court at Surendranagar.

4.2 The trial Court framed charge against the accused. The accused pleaded not

guilty to the charge and claimed to be tried. Therefore, the prosecution produced oral as well as documentary evidence.

4.3 In order to bring home the charge against the accused, the prosecution has examined following witnesses and also produced several documentary evidence, as under:

4.4 At the end of the trial, Further Statements of the accused under Section 313 of Code of Criminal Procedure (for brevity, the Code") were recorded in which, they pleaded not guilty and stated that they have been falsely implicated in the crime. Thus, after recording above-referred Further Statements and hearing the arguments on behalf of prosecution and the defence, the learned Sessions Judge came to the aforesaid conclusion by impugned judgment and order.

4.5 Being aggrieved and dissatisfied with the aforesaid judgment and order passed by the Sessions Court, the State and the accused have preferred the present appeals as well as the original complainant has preferred the Criminal Revision Application, as aforesaid.

5. We have heard Mr. Umesh Trivedi, learned advocate with Mr. B.D. Karia, learned advocate for the appellant - original accused Nos. 2 and 4, Mr. Yogendra Thakore, learned advocate for the original accused Nos. 1, 3, 5, 11 and 12, Mr. EE Saiyed, learned advocate for the original accused Nos. 6 to 10 and Ms. C.M. Shah, learned Additional Public Prosecutor for the State.

5.1 Mr. Trivedi, learned advocate for the original accused Nos. 2 and 4 submitted that the trial Court has committed a grave error in convicting the original accused Nos. 2 and 4. It was contended by him that the judgment and order of the Sessions Court is against the provisions of law; the Sessions Court has not properly considered the evidence led before it and looking to the provisions of law itself, it is established that the prosecution has failed to prove the whole ingredients of the offence alleged against the accused Nos. 2 and 4. He also took this Court through the oral as well as the entire documentary evidence, more particularly, the evidence of the complainant - Pramodbhai Maneklal Shastri, exh. 62 and other two injured witnesses and also the medical evidence and the evidence of two independent witnesses namely Hirabhai Ramabhai Bharwad, exh. 64 and Bharatbhai Amarshibhai Koli, exh. 66, who stated to have reached to the scene of offence after the incident in question had occurred and contended that the trial Court has committed a grave error in convicting the accused Nos. 2 and 4 inasmuch as, there is serious improvement in the case of the prosecution and the witnesses on whose evidence the prosecution has placed much reliance, are not consistent regarding the weapons used in the alleged offence and as to which accused had given which blow and by which weapon. He submitted that none of the witnesses is categoric on this aspect and accordingly, the learned trial Judge has committed a grave error in convicting the accused No. 2 for the offence punishable under Section 326 of the IPC. He submitted that even if the case of the prosecution is believed, only one injury was there on the head of the injured,

otherwise, the prosecution has not proved the injuries also sustained by the injured. He also contended that even if the Post Mortem Note, exh. 71 is referred, out of several injuries, majority of them are abrasions and the injury No. 8, which is, "a stab wound 3.0x1 cm. oblique in direction, abdominal cavity deep on Lt. side of abdomen, lower part, 1 cm. above Lt. iliac crest on postero-lateral aspect", which is stated to be the cause of death, as explained by the Medical Officer, the prosecution has not established as to by whom, the same was caused. Taking into account all these aspects of the matter, the learned advocate for the accused Nos. 2 and 4 contended that, though, it is a case where death of a young man has been caused, however, looking to the evidence on record, the prosecution has miserably failed to prove the case against the accused beyond reasonable doubt. He submitted that none of the prosecution witnesses is a natural witness and they appear to be the chance witnesses and out of so-called injured eye-witnesses, two are the real brothers and though they were injured, they have not narrated the incident fully and the other two witnesses are the chance witnesses, who stated to have reached the spot after the incident in question had occurred. Moreover, taking into account that there are serious contradictions in the versions of the prosecution witnesses and the fact that there is nothing on record to establish the guilt of the accused Nos. 2 and 4 and the trial Court has misread and misinterpreted the evidence on record and has committed a serious error in convicting the accused Nos. 2 and 4, the learned advocate for the accused Nos. 2 and 4 requested that this is a fit case, which warrants interference of this Court and the accused Nos. 2 and 4 may be acquitted in view of lack of evidence and/or material contradictions and/or omissions in the same and to allow the appeal filed by the accused Nos. 2 and 4 and to dismiss the appeals filed by the State.

5.2 Alternatively, the learned advocate for the accused Nos. 2 and 4 submitted that if this Court does not find favour with the aforesaid submissions, in that case, the accused No. 4 is already released on probation by the trial Court giving cogent and sufficient reasons and so far as accused No. 2 is concerned, by relying upon a decision of the Hon'ble Apex Court in the case of Ankush Shivaji Gaikwad v. State of Maharashtra, reported in , (2013) 6 SCC 770, he submitted that the accused No. 2 is ready to pay the compensation, as may be directed by this Court, to the deceased as well as the injured in lieu of sentence of imprisonment to be undergone by him and accordingly, he requested this Court to pass appropriate order to pay the compensation by the accused No. 2 and he may be released accordingly as in any case, it is not a case for enhancement of sentence of accused No. 2 and interference in the release of accused No. 4 on probation by the trial Court.

5.3 We have also heard Mr. Saiyed and Mr. Thakore, learned advocates representing the other accused, as aforesaid. They have supported the impugned judgment and order passed by the learned trial Judge and submitted that the same having been passed after due appreciating and evaluating the evidence on record, taking into consideration all the aspects of the matter, it is requested that

this Court may not interfere in the appeal filed by the State against acquittal of the other accused.

6. Whereas, Ms. Shah, learned Additional Public Prosecutor, for the State and Mr. Yogesh Lakhani, learned senior advocate, assisted by Mr. J.M. Thakkar, learned advocate for the revisionist, while assailing the impugned judgment and order, submitted that the trial Court has committed a grave error in acquitting the accused from the charges levelled against them, more particularly, the charge for the offence punishable under Section 302 of the IPC. They also took us through the oral as well as the documentary evidence on record and contended that taking into consideration the same, more particularly, the evidence of the injured eyewitnesses, who have supported the case of the prosecution in clear terms and from the evidence of other prosecution witnesses, it is clear that the prosecution has successfully proved the case against the accused beyond reasonable doubt and eventually, they requested to allow the appeals filed by the State as well as the revision application, filed by the revisionist and to dismiss the appeal of the original accused Nos. 2 and 4.

7. We have heard the learned advocates for the parties, examined the matter carefully and gone through the evidence on record. We have re-appreciated and re-evaluated the evidence on the touchstone of the latest decisions of the Hon'ble Apex Court. We have also gone through the discussion made by the learned trial Judge in the impugned judgment and order.

7.1 Taking into consideration the evidence on record and the injuries which are caused to the deceased as well as the injured persons and the facts narrated by the prosecution witnesses and the discussion made by the learned trial Judge in the impugned judgment and order, we are of the opinion that the trial Court, while appreciating the evidence adduced before it, has discussed the same in detail and observed that there are serious omissions, improvements and contradictions in the case of the prosecution and the prosecution could not successfully prove its case against all the accused for the charges levelled against them. On further perusal of the impugned judgment and order in line with the evidence on record, we also find it proper and in agreement with the conclusion arrived at by the trial Court in convicting the original accused Nos. 2 and 4 for the offences punishable under Sections 326 and 324 of the IPC r/w. Section 135 of the Bombay Police Act, respectively, and accordingly, in our opinion, no interference is called for in the present litigations.

7.2 Further, so far as the appeal against the acquittal 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 Hon'ble Apex Court in catena of decisions. In the case of *M.S. Narayana Menon @ Mani v. State of Kerala & Anr.*, reported in , (2006)6 SCC, 39, the Hon'ble 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 Hon'ble 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 views are possible, the appellate court should not interfere with the finding of acquittal recorded by the court below."

7.3 Further, in the case of *Chandrappa v. State of Karnataka*, reported in , (2007) 4 SCC 415 the Hon"ble 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 emphasise 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."

7.4 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.

7.5 Even in a recent decision of the Hon"ble 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."

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

7.7 In the case of Luna Ram v. Bhupat Singh and Ors., reported in , (2009) SCC 749, the Hon"ble Apex Court in paras 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 ankle 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 a running condition.

11. Considering the parameters of appeal against the judgement 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."

7.8 Even in a recent decision of the Hon"ble Apex Court in the case of Mookiah and Anr. v. State rep. by the Inspector of Police, Tamil Nadu reported in , AIR 2013 SC 321, the Hon"ble 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 in by the prosecution and defence, acquitted the accused in respect of the charges levelled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Section 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 an acquittal.[Vide *State of Rajasthan v. Sohan Lal and others*, , (2004) 5 SCC 573 : (AIR 2004 SC 4520 : 2004 AIR SCW 4321)]"

7.9 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 Hon"ble Apex Court in the case of *State of Karnataka v. 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."

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

7.11 Thus, taking into consideration the overall facts and circumstances of the case, we are of the considered opinion that the impugned judgment and order so far as acquittal of the other accused from the offences alleged against them and convicting the original accused Nos. 2 and 4, as aforesaid, is concerned, deserves to be confirmed and accordingly, the aforesaid appeals of the State as well as the Criminal Revision Application filed by the original complainant, require to be dismissed.

7.12 Now, in view of the above discussion, though we confirm the conviction and sentence, more particularly, of accused No. 2, taking into consideration the decision of the Hon"ble Apex Court in *Ankush Shivaji Gaikwad* (supra) and in the facts and circumstances of the case, we are of the opinion that ends of justice would meet if the sentence of imprisonment qua accused No. 2 is converted into

compensation to the tune of Rs. 2,50,000/-, to be paid by the accused No. 2 to the father of the deceased and the injured with the default clause to undergo the sentence of imprisonment as has been awarded by the trial Court, if the aforesaid amount of compensation is not paid.

8. In view of the aforesaid discussion, the Criminal Appeal No. 1283 of 2004, filed by the State and the Criminal Revision Application, filed by the original complainant, against acquittal of all the accused, are already abated qua original accused No. 11 - Govindbhai Mohanbhai Khavas, Rajput (Chauhan). The Criminal Appeal No. 1131 of 2004, filed by the appellants - original accused Nos. 2 and 4 against conviction, succeeds in part and while confirming the impugned judgment and order dated 31/05/2004, passed by the learned Additional Sessions Judge, Fast Track Court, Surendranagar, in Sessions Case No. 13 of 2003, it is observed that if the original accused No. 2 - Dharmendra Ramanlal Shah pays an amount of Rs. 2,50,000/- towards compensation, to be deposited before the concerned trial Court on or before 08/07/2016, out of which, Rs. 1,50,000/- is to be paid to Sureshbhai, the father of the deceased and Rs. 1,00,000/- to injured Kanaiyalal Maneklal Shastri on proper verification, by A/c. Payee Cheques, following due procedure, the original accused No. 2 needs not to undergo the sentence of imprisonment awarded by the trial Court and if he fails to pay such compensation, he shall have to surrender to custody by the aforesaid date (08/07/2016) to undergo the remaining sentence, failing which, the concerned investigating agency shall be at liberty to take appropriate actions, in accordance with law. He may be given set off of the period he has already undergone. The rest of the judgment and order shall remain unaltered. Accordingly, the Criminal Appeal Nos. 1285, 1282 and 1283 of 2004, filed by the State and Criminal Revision Application No. 412 of 2004, filed by the original complainant, as aforesaid, fail and are dismissed accordingly. Registry to return the R&P to the trial Court forthwith.