

(2016) 01 GUJ CK 0197
In the Gujarat High Court

Case No : Criminal Appeal Nos. 908 of 2003 and 227 of 2004

Dinesh

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 27-01-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 120(B), Section 201, Section 300, Section 302, Section 304, Section 392, Section 397, Section 398

Citation : (2016) 01 GUJ CK 0197

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

Bench : Division Bench

Advocate : B.M. Mangukiya and Bela A. Prajapati, Advocates, for the Appellant;
L.R. Poojari, Addl Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

K.S. Jhaveri, J.—1. Having been sentenced to life imprisonment and having been imposed fine of Rs. 500/- for the offence under section 302 of Indian Penal Code and having been sentenced to rigorous imprisonment for seven years each under Sections 392, 397 & 398 of Indian Penal Code by impugned judgement and order dated 01.04.2003 passed by the learned Additional Sessions Judge, Court No. 1, Ahmedabad in Sessions Case No. 103 of 2001, original accused No. 1, is before this Court questioning the impugned judgment and order by way of Criminal Appeal No. 227 of 2004. Criminal Appeal No. 908 of 2003 has been preferred by the State against the acquittal of original accused Nos. 2 to 4 recorded under Sections 302, 392, 397, 398, 201 and 120(B) of Indian Penal Code vide judgement and order dated 01.04.2003 in Sessions Case No. 103 of 2001.

2. It is the case of the prosecution that on 23.12.2000, at about 07.30 pm the complainant alongwith his brother - deceased were going on separate bicycles on 132 ft. ring road and were carrying collection amount of Rs. 1,12,750/- of H.S. Gas Agency. When they reached between Jaymala Bus stand and Govindvadi, the accused persons encircled the complainant and his brother and looted cash

amount of Rs. 1,12,750/-. It is the case of the prosecution that original accused No. 1 inflicted injuries on the complainant and deceased and the deceased died on the spot.

2.1 Thereafter the offence was registered against the accused. Investigation was carried out and chargesheet was submitted against the accused Nos. 1 to 4. Thereafter, as the case was exclusively triable by the Sessions Court, the same was committed to the Sessions Court.

2.2 The trial was initiated against the accused and during the course of trial the prosecution examined following witnesses:

2.3 The prosecution also relied upon various documents such as inquest panchnama at Ex. 69, arrest panchnama at Ex. 72, P.M Note at Ex. 51, Medical case papers of complainant at Ex. 99, panchnama of recovery of muddamal at Ex. 78, panchnama regarding recovery of sale proceeds of scooter at Ex. 76 etc.

2.4 At the end of trial, after recording the statement of the accused and hearing arguments on behalf of prosecution and the defence, the trial court convicted original accused No. 1 under Sections 302, 392, 397 & 398 of Indian Penal Code by the impugned judgement and order. The trial court acquitted original accused No. 1 under Sections 201 and 120(B) of Indian Penal Code and also acquitted original accused Nos. 2 to 4 u/s 302, 392, 397, 398, 201 & 120(B) of Indian Penal Code.

2.5 Being aggrieved by and dissatisfied with the aforesaid judgement and order passed by the Sessions Court the accused as well as State have preferred the present appeals.

3. Mr. B.M. Mangukiya, learned advocate appearing for the accused submitted that the trial court failed to appreciate and evaluate the deposition of the complainant in its proper perspective. He submitted that the prosecution has failed to prove the case against the accused beyond reasonable doubt. He submitted that the evidence rendered by the prosecution witnesses is doubtful as the same is full of contradictions.

3.1 Mr. Mangukiya further submitted that, without prejudice to his submissions made hereinabove, even if the case of the prosecution is accepted, it is required to be noted that there was no intention on the part of original accused No. 1 to kill the deceased. He submitted that at the most it could be said that during the process of robbery, the deceased sustained injuries which proved to be fatal. He has drawn the attention of this Court to the fact that the main motive and intention of the accused was not to kill the deceased and submitted that this Court may alter the conviction of accused No. 1 from Section 302 of Indian Penal Code to one under Section 304(Part I) of Indian Penal Code.

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 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 is 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 are 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 acquitted accused. Learned APP has also taken this court through the oral as well as the entire documentary evidence.

5. We have gone through the oral as well as documentary evidences relied upon by the prosecution. So far as original accused No. 1 is concerned, it is borne out that the charges against him under Sections 392, 397 & 398 are proved. P.W. 1 is the eye witness in the incident. He has stated that he had seen accused No. 1 giving sword blow to the deceased. P.W. 1 is an injured witness. His presence at the scene of offence is proved beyond reasonable doubt. From the evidence on record, it is clear that original accused No. 1 was armed with a deadly weapon being knife. Moreover considering the testimony of P.W. 1, it is clear that accused No. 1 had tried to commit robbery and in the course of robbery, he attacked the deceased with a knife. The FSL report suggests that the knife discovered through accused No. 1 contained blood group "B" and the sample of deceased's blood is also of "B" group. It thus is clear that accused No. 1 was involved in the alleged offence of robbery and the assault by him lead to the death of deceased. The trial court in para 59 of the impugned judgement and order has observed that the testimony of P.W. 1 is credible, trustworthy and reliable on material aspects including on the fact that he and his brother were carrying money and that the same was looted. The offenders used deadly weapon knife and cause grievous hurt to the deceased and P.W. 1. Therefore, the trial court has rightly convicted original accused No. 1 under Sections 392, 397 & 398 of Indian Penal Code.

6. However, it is trite that the death of the deceased was not intentional and it happened during the course of robbery. It appears that the deceased though was injured at about 07.30 pm he reached the hospital after few hours. From the above facts and circumstances of the case what is apparent is the lack of pre-meditation and intention to kill. Due to the conflict which took place between the accused and the deceased with an intention to rob the deceased of the cash available with him, it can be said that in a spur of moment accused stabbed the victim in order to accomplish the robbery. However, the fact remains that the offence is said to have been committed. Therefore, while we are inclined to hold that the offence had taken place as alleged by the prosecution we have a reason to say that the nature of offence would fall under exception to section 300. We are therefore inclined to alter the charge and the sentence from one under section 302 to section 304 (Part I) and convict original accused No. 1 for the

offence under section 304 (Part I) and sentence him to imprisonment for a period of ten years.

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. Accordingly, the conviction of original accused No. 1 under Section 302 of the Indian Penal Code vide judgment and order dated 01.04.2003 passed by the Additional Sessions Judge, Court No. 11, Ahmedabad in Sessions Case No. 103 of 2001 is converted to conviction under Section 304 (Part I) of Indian Penal Code. Accordingly, original accused No. 1 is ordered to undergo rigorous imprisonment for ten years under Section 304(Part I) of Indian Penal Code. The amount of fine is maintained. The conviction and sentence under Sections 392, 397 & 398 of Indian Penal Code is also maintained. The acquittal of original accused Nos. 2 to 4 is also maintained. The acquittal of original accused No. 1 under section 201 and 120(B) of Indian Penal Code is also maintained. The judgement and order dated 01.04.2003 is modified accordingly. All the sentences shall run concurrently. Original accused No. 1 shall surrender within a period of ten weeks from today to serve out the remaining period of sentence. The period of sentence already undergone shall be considered for remission and set off in accordance with law. Criminal Appeal No. 227 of 2004 is allowed to the aforesaid extent. Criminal Appeal No. 908 of 2003 is dismissed accordingly. R & P to be sent back forthwith.