

(2016) 02 GUJ CK 0199

In the Gujarat High Court

Case No : Criminal Appeal Nos. 39, 62 and 95 of 2008 and Criminal Revision Application No. 68 of 2008

Jagdishbhai Batukbhai Parmar

APPELLANT

Vs

The State of Gujarat

RESPONDENT

Date of Decision : 29-02-2016

Acts Referred:

Bombay Police Act, 1951 — Section 135
Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 114, Section 302, Section 304, Section 304-II,
Section 323, Section 324, Section 325, Section 326, Section 327, S

Citation : (2016) 02 GUJ CK 0199

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

Bench : Division Bench

Advocate : Sunil C. Patel, Advocate, for the Appellant; C.M. Shah, APP, for the Respondent

Final Decision : Partly Allowed

Judgement

K.S. Jhaveri, J.—1. Criminal Appeal No. 39 of 2008 by the appellant-original accused No. 1 arises out of judgment and order dated 18-12-2007 passed by the learned Additional Sessions Judge, Bhavnagar, in Sessions Case No. 90 of 2007 whereby original accused No. 1 was convicted and sentenced to suffer RI for five years and to pay fine of Rs. 5,000/-, in default, to suffer further RI for one year for the offence punishable under section 325 of IPC, RI for three years and to pay fine of Rs. 3,000/-, in default, to suffer further RI for one year for the offence punishable under section 324 of IPC while no separate sentence was imposed for the offence punishable under section 323 of IPC. Criminal Appeal No. 62 of 2008 by original accused Nos. 2, 3 and 4, Criminal Appeal No. 95 of 2008 by original accused No. 1 and Criminal Revision Application No. 68 of 2008 by original complainant arise out of the judgment and order dated 18-12-2007 passed by the learned Additional Sessions Judge, Bhavnagar, in Sessions Case No. 89 of 2007 whereby original accused No. 1 was convicted and sentenced to

suffer RI for six months and to pay fine of Rs. 200/-, in default, to suffer further RI for one month for the offence punishable under section 447 of IPC and life imprisonment and to pay fine of Rs. 50,000/-, in default, to suffer further RI for one year for the offence punishable under section 302 of IPC; accused Nos. 2 and 3 were convicted and sentenced to suffer RI for six months and to pay fine of Rs. 200/-, in default, to suffer further RI for one month for the offence punishable under section 447 of IPC and RI for three months and to pay fine of Rs. 100/-, in default, to suffer further RI for 30 days for the offence punishable under section 323 of IPC and accused No. 4 was convicted and sentenced to suffer RI for six months and to pay fine of Rs. 200/-, in default, to suffer further RI for one month for the offence punishable under section 447 of IPC and RI for six months and to pay fine of Rs. 200/-, in default, to suffer further RI for one month for the offence punishable under section 327 of IPC.

2. As all these appeals and revision arise out of the same incident involving cross cases, with the consent of learned advocates appearing for the respective parties, they were heard together and are being decided by this common judgment.

3. Short facts of the case of the prosecution are that a complaint was filed by the complainant-Batukbhai Laljibhai-son of the deceased Laljibhai on 25-10-2006 with Vartej Police Station for the offence punishable under sections 302, 447, 337 and 114 of IPC and section 135 of Bombay Police Act registered as C.R. No. I-225 of 2006 stating inter alia that he owned agricultural land admeasuring about 7 bighas. Adjacent to his land, divided lands of brothers Nagjibhai Tapubhai admeasuring 6 bighas are situated. In respect of said lands, there was a scuffle between Laljibhai Tapubhai and Nagjibhai Tapubhai ten years prior to the date of incident in which father of the complainant received injuries on the neck and the matter was compromised between the brothers and no complaint was filed then. At about 6 a.m. on 25-10-2006, Laljibhai Tapubhai went to his field and at about 8.30 a.m., elder son of the complainant Jagdish also went to the field and at about 9.00 a.m., Jagdish came running and told that Nagjibhai and his sons, Balabhai, Dineshbhai and Panchabhai were assaulting Lalabhai Tapubhai. It was alleged that Nagjibhai hit Lalabhai on stomach with stone due to which, he fell down. As Jagdish intervened, he was also beaten and as he was afraid, he ran towards his house and informed his father. Thereafter, the complainant and one Rameshbhai Chhaganbhai Patel went to the place of incident and saw Lalabhai in unconscious state but he informed that Nagjibhai and his sons had beaten him. Lalabhai was thereafter taken to Sir T. Hospital at Bhavnagar where he died during treatment. A cross complaint was also filed on behalf of the otherside by Nagjibhai with "A" Division Police Station, Bhavnagar, at Sir T. Hospital, Bhavnagar, for the offence punishable under sections 323, 324, 504 of IPC and section 135 of B.P. Act being C.R. No. II-118 of 2006 with Vartej Police Station. In pursuance of aforesaid complaints, investigation started and as there appeared prima facie case against the accused, charge sheets were filed against the accused persons.

3.1 As the offences were triable exclusively by Court of Sessions, the learned Magistrate committed the cases to the Court of Sessions wherein complaint filed by son of the deceased Laljibhai was numbered as Sessions Case No. 89 of 2007 while complaint filed by Nagjibhai was registered as Sessions Case No. 90 of 2007. Thereafter charges were framed against the accused which were read over and explained to the accused. The accused pleaded not guilty to the charges and claimed to be tried. Hence, the prosecution was asked to prove the guilt against the accused.

3.2 To prove the guilt against the accused, prosecution examined following witnesses in Sessions Case No. 89 of 2007:

3.3 The prosecution also relied on following documentary evidence:

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3.6 After filing of closing pursis by the prosecution, further statements of accused under Sec. 313 of Cr.P.C. were recorded. On conclusion of trial and upon hearing the learned advocates appearing for the respective parties, the impugned judgments and orders were delivered by the trial court giving rise to the present appeals.

4. Heard learned advocates, Mr. Sunil C. Patel for the appellant-original accused No. 1 (Sessions Case No. 90 of 2007) in Criminal Appeal No. 39 of 2008 as well as for the applicant-original complainant (Sessions Case No. 89 of 2007) in Criminal Revision Application No. 68 of 2008, Mr. B.M. Mangukia, for the appellants-original accused Nos. 1, 2, 3 and 4 (Sessions Case No. 89 of 2007) in Criminal Appeal Nos. 62 of 2008 and 95 of 2008 and Ms. C.M. Shah, learned Additional Public Prosecutor, for the State in all the matters.

5. Learned advocate, Mr. Mangukia, contended that in view of appeal filed in cross case being Criminal Appeal No. 39 of 2008 arising out of the very same incident, it is a case where the accused No. 1 had tried to defend himself and therefore, it is a case where the offence will fall under section 326 of IPC inasmuch as while defending himself, he might have pushed the old man aged and sustained injuries. He took us through the evidence of P.W. No. 7-Dr. Ganesh Pyarelal Govekar and the injuries sustained by the deceased as per column No. 17 of the post mortem report and stated that cause of death was stated to be hemorrhage and shock consequent upon injury to vital organs and loss of blood.

5.1 Therefore, according to Mr. Mangukia, case of the accused No. 1-Nagjibhai will not fall under section 302 of IPC. He contended that though other dangerous weapon like handle to start the machine was available in the field, the accused did not use the same which goes to suggest that there was no intention on the part of the accused to attack the otherside. Moreover, if the evidences of the complainant and other witnesses are gone into, the allegation against accused

No. 1 was that he gave blow on the deceased on the stomach with stone. He also contended that there were contradictions and improvements in the evidence of prosecution witnesses and hence, considering the medical evidence and the fact that it is the first offence registered against the accused No. 1-Nagjibhai, his conviction may be altered from section 302 of IPC to one under section 304 Part-II of IPC.

6. Mr. Sunil C. Patel, learned advocate for the appellant-original accused No. 1-Jagdishbhai in Criminal Appeal No. 39 of 2008(Sessions Case No. 90 of 2007) restricted his arguments only on the point of quantum of sentence awarded. He contended that considering the facts that this is the first offence committed by accused No. 1-Jagdishbhai and that he did not have any intention to cause any injury to any person but the injury has been caused while defending himself, the sentence imposed on him be reduced.

6.1 As regards acquittal of the accused Nos. 2 to 4 of Sessions Case No. 89 of 2007 is concerned, Mr. Sunil Patel, learned advocate for the original complainant in Criminal Revision Application No. 68 of 2008, taking us through evidence of injured witnesses and medical evidence, contended that happening of the incident as well as presence of the accused at the place of incident cannot be disputed. He further contended that although almost all the prosecution witnesses have supported the case of the prosecution, the learned trial Judge has not properly appreciated their evidence in proper perspective and therefore, the finding recorded by the learned trial Judge that the prosecution has failed to prove the charges of Section 302 read with section 114 of IPC and section 135 of B.P. Act against the accused Nos. 2, 3 and 4 of Sessions Case No. 89 of 2007 is contrary to the evidence available on record. He also further contended that the learned trial Judge has not appreciated the seriousness of the offence wherein one person has lost his life. He also contended that since the prosecution has successfully proved the case against the said accused through oral as well as documentary evidence, the trial court has committed error in acquitting the accused under section 302 read with section 114 of IPC and section 135 of B.P. Act but convicting the accused Nos. 2 and 3 under sections 447 and 323 of IPC and accused No. 4 under sections 447 and 337 of IPC. He, therefore, requested that these accused may be punished appropriately by allowing Criminal Revision Application No. 68 of 2008.

7. Learned APP, Ms. C.M. Shah, did not enter into the facts narrated by the learned advocate for the accused. She, however, voluntarily told the Court that if legally entitled, the accused may be given the benefit.

8. This Court has gone through the record pertaining to the case as also the submissions made on behalf of the parties together with the impugned judgment and order of conviction and sentence passed by the trial court.

8.1 Regarding acquittal of the accused Nos. 2, 3 and 4 of Sessions Case No. 89 of 2007 for the offences punishable under section 302 read with section 114 of

IPC and section 135 of B.P. Act, principles governing and regulating the hearing of appeal by this Court against an order of acquittal passed by the trial Court have been very clearly explained by the Hon''ble Apex Court in number of decisions.

8.2 In the case of Dilawar Singh and Others v. State of Haryana reported in , (2015)1 SCC 737, it has been held by the Hon''ble Supreme Court in Paragraph 36 and 37 as under:

"36. The court of appeal would not ordinarily interfere with the order of acquittal unless the approach is vitiated by manifest illegality. In an appeal against acquittal, this Court will not interfere with an order of acquittal merely because on the evaluation of the evidence, a different plausible view may arise and views taken by the courts below is not correct. In other words, this Court must come to the conclusion that the views taken by the learned courts below, while acquitting, cannot be the views of a reasonable person on the material on record.

37. In Chandrappa and Ors. v. State of Karnataka , (2007) 4 SCC 415, the scope of power of appellate court dealing with an appeal against acquittal has been considered and this Court held as under:

"42.....(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."

Unless there are substantial and compelling reasons, the order of acquittal is not required to be reversed in appeal. It has been so stated in State of Rajasthan v. Shera Ram , (2012) 1 SCC 602."

8.3 In the case of State of Goa V. Sanjay Thakran & Anr. reported in , (2007)3 SCC 75, it has been held by the Hon''ble Apex Court In para 16 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."

8.4 In the case of *Luna Ram v. Bhupat Singh and Ors*, reported in , (2009) SCC 749, 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 postmortem 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."

8.5 Even in the case of *Mookiah and Anr. v. State*, rep. by the Inspector of Police, Tamil Nadu, reported in , AIR 2013 SC 321, 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 in 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 Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the appellant 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 reappreciate 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]"

8.6 It is also a settled legal position that in acquittal appeal, the appellate Court is not required to rewrite 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 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 Choudhary , (1967) 1 SCR 93 : (AIR 1967 SC 1124) that it is not the duty of the Appellate 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."

8.7 Similar principle has been laid down by the Apex Court in the case of Shivasharanappa and Ors v. State of Karnataka, reported in , JT 2013(7) SC 66.

8.8 Thus, in case the appellate Court agrees with the reasons and the opinion given by the lower Court, then elaborate discussion of evidence or assigning fresh reasons are not necessary.

9. We have considered the above referred rival submissions made by the learned advocates for the respective parties in light of the principles laid down in the aforesaid decisions.

10. As regards acquittal of the accused Nos. 2,3 and 4 for the offence punishable under section 302 read with section 114 of IPC and section 135 of B.P. Act is concerned, it is to be noted that nothing is forthcoming on record as to whether these accused have taken part in any manner in causing any injuries to the deceased. The allegations against them are that they have given blows on other injured persons and therefore, considering all the oral as well as documentary evidence on record and the medical evidence, the trial court has acquitted the accused under those sections. This Court is, therefore, of the opinion that the trial court was completely justified in acquitting the accused of those charges. Therefore, the findings recorded by the trial court in that regard are absolutely just and proper and no illegality or infirmity has been committed by it in the said findings.

11. Taking into account the fact that it is the first case registered against the accused No. 1-Nagjibhai Tapubhai Parmar of Sessions Case No. 89 of 2007, his old age and also the facts that cross complaints are filed by the parties together with the evidence on record more particularly the medical evidence, this Court is of the opinion that it would be appropriate and in the interest of justice to convert his conviction from the offence punishable under section 302 of IPC to section 304-II of IPC.

12. As far as accused No. 1-Jagdishbhai Batukbhai Parmar of Sessions Case No. 90 of 2007 is concerned, it is to be noted that the learned advocate for the said accused restricted his arguments only on the point of quantum of sentence awarded and hence, we would not like to reproduce or discuss the entire evidence which are on record as the same remained unchallenged. This Court is also in complete agreement with the reasons adopted and the conclusions

arrived at by the learned trial court in the impugned judgment so far as his conviction is concerned. However, the question to be considered is as to whether the said accused in the given facts and circumstances of the case is entitled to reduction of sentence which has been awarded by the trial court or not.

13. Considering the medical evidence and cross complaints filed, this Court is of the opinion that interest of justice will be met if the sentence imposed on accused No. 1-Jagdishbhai Batukbhai Parmar of Sessions Case No. 90 of 2007 for the offence punishable under section 325 of IPC is reduced from RI for five years to RI for two years.

14. Conviction imposed on the original accused No. 1 for the offence punishable under section 302 of IPC in Sessions Case No. 89 of 2007 is converted into conviction under section 304 Part-II of IPC and he is sentenced to suffer RI for five years. In view of the above, both the appeals are required to be allowed in part and the revision requires to be dismissed by passing the following order.

15. While confirming the conviction of the accused No. 1 in Sessions Case No. 90 of 2007, the sentence imposed on him for the offence punishable under section 325 of IPC is reduced from RI for five years to RI for two years.

16. Remaining part of the judgments and orders dated 18-12-2007 passed by the learned Additional Sessions Judge, Bhavnagar, in Sessions Case No. 89 of 2007 and Sessions Case No. 90 of 2007 including fine etc. would remain unaltered. The sentences are ordered to run concurrently. The accused shall be given set off for the period already undergone in jail. The accused are reported to be on bail and hence, their bail bonds shall stand cancelled. If the accused has not undergone the prescribed period of sentence, they are directed to surrender before the jail authorities within twelve weeks from today to undergo their remaining period of sentence. Accordingly, Criminal Appeal No. 95 of 2008 filed by accused No. 1 and Criminal Appeal No. 62 of 2008 filed by accused Nos. 2, 3 and 4 in Sessions Case No. 89 of 2007 and Criminal Appeal No. 39 of 2008 filed by accused No. 1 in Sessions Case No. 90 of 2007 shall stand partly allowed. Criminal Revision Application No. 68 of 2008 filed by the original complainant for enhancement of sentence imposed on accused Nos. 2 to 4 shall stand dismissed. Record and proceedings shall be sent back forthwith to the trial court.