

(2016) 01 GUJ CK 0174

In the Gujarat High Court

Case No : Criminal Revision Application No. 963 of 2005

Jesangbhai Bodabhai Deviputra

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 29-01-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, Section 313, Section 401, Section 482

Penal Code, 1860 (IPC) — Section 114, Section 302, Section 34, Section 363, Section 366, Section 376, Section 502

Citation : (2016) 01 GUJ CK 0174

Hon'ble Judges : Abdullah Gulamahmed Uraizee, J.

Bench : Single Bench

Advocate : B.K. Raj, Advocate, for the Appellant; N.J. Shah, Additional Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Abdullah Gulamahmed Uraizee, J.—1. The appellant-de facto complainant has preferred the present revision application under section 401 and 482 of the Criminal Procedure Code, 1973 (the Code, for short) to question the legality and validity of the judgement and order of acquittal dated 31st March, 2005 passed by the learned Additional Sessions Judge, Fast Track Court No. 14, Vadodara in Sessions Case No. 158 of 2004.

2. The facts giving rise to the present revision application are that respondent No. 2 to 4 on 26th April 2004 at about 1 AM in the night kidnapped Gitaben @ Raiben, daughter of the present applicant from his lawful custody by giving threat with an intention to marry her and had illegal intercourse with her against her will and consent and thereby committed rape on her at village Mavli. A complaint in respect of this incident was lodged by the applicant with Dabhoi Police Station vide C.R. No. I 44 of 2004 for the offences punishable under sections 363, 366, 376, 502 and 114 of the Indian Penal Code. After usual investigation, the charge sheet came to be filed against respondents Nos. 2 to 4.

The learned Magistrate committed the case to the court of Sessions, Vadodara as the offences are exclusively triable by the court of Sessions. The case was registered as Sessions Case No. 158 of 2004 in the Sessions Court, Vadodara.

3. Charge vide exhibit 4 came to be framed against respondent Nos. 2 to 4. They pleaded not guilty and claimed to be tried. In order to prove the case against the respondent No. 2 to 4, the prosecution has examined the following witnesses:

"1. Jesingbhai Bodhabhai, Complainant, PW No. 1 Exh. 10

2. Mangalbhai Bodhabhai, PW No. 2 Exh. 12

3. Hiraben Mangalbhai, PW No. 3 Exhi.13

4. Victim Gitaben @ Raiben Jeshang, PW No. 4 Exh. 15

5. Shardaben Kalusingh, PW No. 5 Exh. 16

6. Panch Juashbhai Ambalal, PW No. 6 Exh. 17

7. Panch Hanifbhai Hasanbhai, PW No. 7 Exh. 21

8. MO Atulbhai P Vaidya, PW No. 8 Exh. 22

9. M.O. Dr. Dharmesh R. Patel, PW No. 9 Exh. 24

10. P.I. Laman K. Katara, PW No. 10 Exh. 30

11. Principal, Bera Rinaben Rasiklal, PW No. 11 Exh. 40

12. Talati Bhumikaben Jivanbhai Vasava, Exh. 45"

4. The appellant has also produced and relied upon the following documentary evidence:

"1. Complaint of Shri Jesing Bodhabhai, Exh. 11

2. Panchnama of Victim, Exh. 18

3. Panchnama of body of the accused, Exh. 19

4. Certificate of MO of examining the person of the accused Exh. 23

5. Certificate of MO of examining the person of the victim Exh. 25

6. Report of sample of victim sent to FSL, Surat Exh. 27

7. Report of medical treatment given to accused, Exh. 31

8. Report of MO for examination of accused, Exh. 32

9. Register of sending muddamal to FSL, Vadodara, Exh. 33

10. Receipt of muddamal sent to FSL, Vadodara, Exh. 34

11. Permission letter to file charge sheet against accused Exh. 36

12. Report of FSL, Vadodara, Exh. 38"

5. Upon conclusion of the trial, the statement of the accused under section 313 of the Code was recorded, wherein he claimed to be innocent. Thereafter, the arguments on behalf of the prosecution and the defence were heard and by the impugned judgement and order, the learned Magistrate was pleased to acquit respondent Nos. 2 to 4. The appellant being aggrieved by and dissatisfied with the impugned judgement and order has preferred this appeal.

6. I have heard Mr. B.K. Raj, learned advocate for the applicant and Mr. N.J. Shah, learned APP for respondent No. 1 State and there is no appearance on behalf of respondents No. 2-4 - original accused.

7. Mr. Raj, learned advocate for the applicant has vehemently submitted that the victim-girl was minor at the time of the incident and the learned trial judge has committed an error in recording the conclusion that the victim was above 17 years of age. It is his further contention that the learned trial judge has ignored the evidence of other material witnesses and therefore, the impugned judgment of acquittal needs to be quashed and set aside by allowing this revision application.

8. Mr. N.J. Shah, learned Additional Public Prosecutor submits that the State has not challenged the impugned judgment of acquittal. It is his further contention that the learned trial judge has evaluated the oral and documentary evidence in detail and on facts has found that the relationship between respondent No. 2 and the victim was consensual and that respondents No. 3 and 4 were falsely involved in the case and therefore, in his submission, the judgment and order of the learned trial judge does not warrant any interference.

9. I have perused the record and proceedings of the case and I have give my thoughtful consideration to the arguments canvassed by them.

10. Before delving upon the merits of the case, it is necessary to take note of certain decisions of the Supreme Court, wherein the powers of this Court while dealing this acquittal appeal are explained:

10.1 In the case of Chandrappa v. State of Karnataka , (2007) 4 SCC 415, the Supreme Court has laid down following principles concerning acquittal appeals as under:

"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.

10.2 Again in case of *State of Goa v. Sanjay Thakran & Anr.* , (2007) 3 SCC 75, the Supreme Court has propounded the following proposition:

"[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.

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[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."

10.3 In case of Mookiah and Anr. v. State rep. by the Inspector of Police, Tamil Nadu , AIR 2013 SC 321] the Supreme Court has held thus:

"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 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 : (AIR 2004 SC 4520 : 2004 AIR SCW 4321)]"

10.4 In the case of State of Karnataka v. Hemareddy , AIR 1981 SC 1417, the Supreme Court has 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."

11. In the present case, the case of the prosecution greatly depends upon the age of the prosecutrix. The prosecution has come with a case that at the time of the incident the prosecutrix was below the age of 14 years and therefore, according to the prosecution, even if it is concluded that the relationship was consensual, the respondents cannot be allowed to go off the hook. With a view to find out whether the conclusion recorded by the learned trial judge that the prosecutrix was above the age of 17 years, this court will have to examine the evidence of the prosecutrix, her father and the medical evidence.

12. The prosecutrix who was examined as PW No. 1 states in her oral evidence before the court that on the date of the incident she was aged around 15 years while there is a variation in the evidence of her father, PW No. 2, uncle PW No. 3. The Principal of the School in which the prosecutrix studied was also examined.

It is revealed from the evidence of the Principal that at the time of admission of the prosecutrix in the school her birth date was recorded as 1.6.1990. The Principal states that the date of birth was recorded in the school record on the basis of the birth certificate. It is worthwhile to note at this stage that the defence examined Talati of the village who stated in his testimony that the date of the birth was recorded in the register on the basis of the date given by the father of the child. According to her, the date of the birth of the prosecutrix was 14.6.1987 which was registered on 17.6.1987. The medical report of the Medical Officer estimates the age of the prosecutrix at 20 years or more. Thus, looking to such contradictory evidence, the learned judge of the trial court has reached a conclusion that at the time of the incident the prosecutrix was more than 17 years old.

13. I have also scanned through the evidence as to the age of the prosecutrix minutely. Once the age of the prosecutrix is found to be more than 17 years, the next aspect that requires examination is whether the relationship between the prosecutrix and respondent No. 2 was consensual or not. Again, the learned trial judge, upon close examination of the oral and documentary evidence reached a conclusion that the relationship was consensual one. Many material contradictions are found during the trial between the oral evidence of the prosecutrix and the witnesses on one hand and their statements under section 161 of the Code recorded during the course of the investigation and therefore the learned trial judge has rightly reached a conclusion that the relationship was consensual one.

14. Moreover, the evidence which is brought on record shows that respondents Nos. 3 and 4 were roped in the case because of political rivalry and therefore, they came to be acquitted. The findings recorded by the learned trial judge are on the basis of the material which has come on record, which cannot be lightly interfered with in this revision application.

15. For the foregoing reasons, I do not find any perversity or procedural irregularity in the impugned judgment of acquittal. The revision application lacks merits and it does not require any interference. Under the circumstances, I am of the opinion that the judgement and order of acquittal recorded by learned Magistrate is supported by just and cogent reasons, which does not require any interference in this appeal.

Hence, the revision application fails and is hereby dismissed. Registry is directed to remit back the record and proceedings to the trial court forthwith.