

(2015) 12 GUJ CK 0014
In the Gujarat High Court

Case No : Criminal Appeal Nos. 1501 and 1768 of 2010

Patel Bharatbhai Mafatlal and Others

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 08-12-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 201, 302, 304, 304(I), 34

Citation : (2015) 12 GUJ CK 0014

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

Bench : Division Bench

Advocate : N.D. Nanavaty, Sr. Advocate for Nanavaty Advocates, for the Appellant; C.M. Shah, APP, for the Respondent

Judgement

K.S. Jhaveri, J.—Present appeals are directed against the judgment and order dated 29/07/2010 passed by the learned Additional Sessions Judge and Presiding Officer, 3rd Fast Track Court, Mahesana, Camp: Visnagar in Sessions Case No. 82 of 2009, whereby, the original accused Nos. 1 and 2 came to be convicted for the offence punishable under Section 302 r/w. 34 of the Indian Penal Code, 1860 (for brevity, "the IPC") and sentenced to undergo life imprisonment and a fine of Rs. 3,000/- each and in default of payment of fine, to undergo further imprisonment for three months, whereas, the original accused Nos. 3 and 4 came to be acquitted of the charges levelled against them. Accordingly, Criminal Appeal No. 1501 of 2010 has been filed by the accused Nos. 1 and 2 against conviction whereas, Criminal Appeal No. 1768 of 2010 has been filed by the State against acquittal of the original accused Nos. 3 and 4.

2. Brief facts of the prosecution case are that on 14/05/2009 at about 21:00 hours at the residence of complainant - Urmilaben w/o. Ajitkumar Jayantilal situated near Fateho Darwaja in Visnagar town, the accused persons, belonging to the same family and having grievance as to the family property, for getting the said property partitioned, accused No. 1 - Bharatbhai Mafatlal Patel called the

deceased at home and quarrelled and thereafter, assaulted Jayantibhai Patel, the father-in-law of the complainant, with iron road (kaus) so also Ajitkumar, the husband of the complainant. Moreover, Jaiminkumar @ Pintu Jayantilal Patel, the accused No. 2 also assaulted them with knife and thereby, they caused their death. Moreover, the accused Nos. 3 and 4, the wives of the accused Nos. 1 and 2 respectively, tried to destroy the evidence by removing the blood stains and thereby, they aided and abetted the offence. Thus, the accused committed the alleged offence punishable under Sections 302 , 201 r/w. 34 of the IPC, for which, a complaint came to be lodged against them.

2.1 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, Mahesana, camp at Visnagar.

2.2 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.

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

2.4 At the end of the trial, Further Statements of the accused under Section 313 of Criminal Procedure Code, 1973 (for brevity, "the Code") was recorded in which they pleaded not guilty and false implication. Thus, after recording above-referred Further Statements and hearing the arguments on behalf of prosecution and the defence, the learned trial Judge convicted the accused Nos. 1 and 2, whereas, acquitted the accused Nos. 3 and 4, as aforesaid, by the impugned judgment and order.

2.5 Being aggrieved and dissatisfied with the aforesaid judgment and order passed by the Sessions Court, the State as well as the accused Nos. 1 and 2 have preferred the present appeals.

3. We have heard Mr. N.D. Nanavaty, learned senior advocate, for the original accused Nos. 1 and 2 and Ms. C.M. Shah, learned Additional Public Prosecutor, for the State.

3.1 Mr. Nanavaty, learned senior advocate for the accused, has mainly contended that this is a family dispute and the accused and the deceased are the close relatives. The accused No. 1 is the brother of deceased Jayantilal whereas, accused No. 2 is the son of deceased Jayantilal and the brother of deceased Ajitkumar. He submitted that the unfortunate incident had occurred in a spur of the moment due to certain ongoing dispute as division of the family property, in which, the accused lost control over their minds and the incident had taken place. He further submitted that the death of the deceased was homicidal but not the culpable homicide amounting to murder. In support of his submission, he took us to the evidence of Urmilaben, the complainant, exh. 14, Jayaben, exh.

17 and Vishnubhai, exh. 16 and contended that presence of Urmilaben while incident, is doubtful as she is a chance witness and no corroboration to that effect is there on record. He, to contradict the evidence of Urmilaben, submitted that after the incident she put the head of her husband - Ajitkumar in her lap and accordingly, her clothes were also stained with blood, however, she did not submit her clothes to the police, which was her bounden duty and accordingly, it is doubtful, and therefore, she being chance witness, her evidence is to be viewed very closely. Her presence is not natural. He submitted that there appears remarkable improvement in the versions of Urmilaben before the police and before the Court. Mr. Nanavaty, learned senior advocate for the accused Nos. 1 and 2, further submitted that the statement of Vishnubhai, is given after legal advice and recorded after one month of the incident. He submitted that the same is case with witness Jayaben and her statement was also recorded after one month. He invited attention of the Court to the pursis tendered by the learned Public Prosecutor below exh. 62 and submitted that the same requires to be viewed very seriously inasmuch as merely because the prosecution witnesses did not support the case they are not required to be crept into. Making above submissions, in aforesaid view of the matter, benefit of doubt is required to be given to the appellants - accused Nos. 1 and 2.

3.2 Whereas, Ms. Shah, learned Additional Public Prosecutor, for the State contended that presence of complainant - Urmilaben, while the alleged offence had occurred, is natural inasmuch as immediately after receiving the information as to phone call made by Shilpaben from Jayaben, who was residing next to her, she rushed to the spot and accordingly, in her submission, there is no reason to disbelieve her evidence. Moreover, she submitted that all the accused have, in aid and abetment of each other, committed the offence which was proved by the prosecution beyond reasonable doubt, the learned trial Judge has committed error in acquitting the accused Nos. 3 and 4. In support of her submissions, Ms. Shah, learned Additional Public Prosecutor, for the State relied upon following decisions:

- i) Kartik Malhar Vs. State of Bihar, - para 4, on the aspect of conviction based on testimony of a single witness;
- ii) State of U.P. Vs. Naresh and Others, - para 23, on the aspect of no recovery of weapon no ground to disbelieve;
- iii) Shyamal Ghosh Vs. State of West Bengal, , para 58, on the aspect of common defective investigation;
- iv) Goudappa and Others Vs. State of Karnataka, , para 20, on the aspect of single blow.

3.3 Last but not least, Ms. Shah, learned Additional Public Prosecutor, submitted that the State has filed the appeal against acquittal of accused Nos. 3 and 4 is required to be allowed since the offence is already proved against accused beyond reasonable doubt and the appeal filed by the accused Nos. 1 and 2

against their conviction requires to be dismissed.

4. Before proceeding with the matter, it will not be out of place to mention that it is a family dispute and the accused and the deceased were close relatives and family members. The story put forward by the prosecution is regarding dispute as to division of the family property. We have 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 and accordingly, we cannot disbelieve the presence of complainant - Urmilaben for the reason that when she and her deceased husband, her husband received a call on his mobile phone from Bharatbhai, the accused No. 1, calling his deceased father and accordingly, her husband went to their place after some time, Shilpaben called Jayaben and thereby, informing the complainant about the quarrel between the accused and the deceased. Even story put forward by the prosecution as to both the deceased accompanied each other, is also proved. Moreover, taking into consideration the evidence of three witnesses viz. Urmilaben, the complainant, exh.14, Jayaben, exh. 17 and Vishnubhai, exh. 16, it appears that the incident in question had occurred. Moreover, from the medical evidence it is clear that the cause of death of deceased Jayantibhai was "spleen injury". Accordingly, we believe that the death of the deceased was homicidal. However, the submission of Mr. Nanavaty, learned senior advocate for the accused Nos. 1 and 2, is also required to be appreciated that the incident had occurred in a spur of the moment and it does not amount to culpable homicide which amounts to murder and considering dropping of witness and in view of the compromise, the offence would fall under Section 304 , Part-I of the IPC and accordingly, sentence is required to be reduced by converting the offence from 302 of the IPC to Section 304(I) , to which, in view of aforesaid discussion, we are in complete agreement with the same.

4.1 So far as appeal against acquittal of accused Nos. 3 and 4, preferred by the State is concerned, on careful examination of the matter and the evidence on record, in our considered opinion the learned trial Judge has rightly concluded in favour of the accused Nos. 3 and 4 and in view of several decision of the Hon''ble Apex Court, as follow, we do not discuss the same in length:

4.1.1 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 Vs. State of Kerala and Another, , 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 view

are possible, the appellate court should not interfere with the finding of acquittal recorded by the court below."

4.1.2 Further, in the case of Chandrappa and Others Vs. State of Karnataka, the Hon"ble Apex Court has 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."

4.1.3 Thus, it is a settled principle that while exercising appellate powers, 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.

4.1.4 Even in a recent decision of the Hon"ble Apex Court in the case of State of Goa Vs. Sanjay Thakran and Another, , 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."

4.1.5 Similar principle has been laid down by the Hon"ble Apex Court in the cases of State of Uttar Pradesh Vs. Ram Veer Singh and Others, and in Girja Prasad (Dead) by LRs. Vs. State of Madhya Pradesh, . Thus, the powers which this Court may exercise against an order of acquittal are well settled.

4.1.6 In the case of Lunaram Vs. Bhupat Singh and Others, , 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 strangled. 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."

4.1.7 Even in a recent decision of the Hon"ble Apex Court in the case of Mookkiah and Another Vs. State rep. by the Inspector of Police, Tamil Nadu, , 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 Vs. Sohan Lal and Others,]"

4.1.8 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 Vs. Hemareddy Alias Vemareddy and Another, wherein it is held as under:

"...This court has observed in Girja Nandini Devi and Others Vs. Bijendra Narain Choudhury, 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."

4.1.9 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.

5. In view of the aforesaid discussion, Criminal Appeal No. 1501 of 2010, filed by the appellants - original accused Nos. 1 and 2, succeeds and the impugned judgment and order dated 29/07/2010 passed by the learned Additional Sessions Judge and Presiding Officer, 3rd Fast Track Court, Mahesana, Camp: Visnagar in Sessions Case No. 82 of 2009 is modified to the aforesaid extent and it is held that offence punishable under Section 302 r/w. 34 of the IPC for which the appellants - original accused Nos. 1 and 2 are awarded sentence of life imprisonment by the trial Court, is converted into the offence punishable under Section 304(I) of the IPC and accordingly, they are sentenced to undergo ten years" rigorous imprisonment. The rest of the impugned judgment and order shall remain unaltered. They may be given benefit of set off for the period they have undergone. Whereas, Criminal Appeal No. 1768 of 2010 filed by the State against acquittal of original accused Nos. 3 and 4, fails and is dismissed. Bail bonds, if any, shall stand cancelled. Registry to return the R&P, if any, to the trial Court forthwith.