

(2016) 03 GUJ CK 0214

In the Gujarat High Court

Case No : Criminal Appeal Nos. 449 and 580 of 1996

Pravin Mithabhai Dabhi

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 28-03-2016

Acts Referred:

Bombay Police Act, 1951 — Section 135(1)

Criminal Procedure Code, 1973 (CrPC) — Section 313

Penal Code, 1860 (IPC) — Section 143, Section 148, Section 149, Section 300, Section 302, Section 304, Section 323, Section 34

Citation : (2016) 03 GUJ CK 0214

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

Bench : Division Bench

Advocate : Nitin M. Amin, Advocate, for the Appellant; C.M. Shah, Addl. Public Prosecutor, for the Respondent

Final Decision : Disposed Off

Judgement

K.S. Jhaveri, J.—1. The State of Gujarat by way of filing Criminal Appeal No. 850 of 1996 and original accused No. 1 by way of filing Criminal Appeal No. 449 of 1996, before this Court have questioned the impugned judgment and order dated 15.05.1996 passed by the learned Additional City Sessions Judge, Court No. 10, Ahmedabad in Sessions Case No. 252 of 1992 whereby original accused No. 1 has been sentenced to seven years" rigorous imprisonment and fine of Rs. 2000/-, in default, rigorous imprisonment for three months for the offence under section 304 (Part I) of Indian Penal Code. The accused has, however, been acquitted under sections 143, 148, 323, 302 r/w 149 of Indian Penal Code and Section 135(1) of B.P. Act. Original accused Nos. 2 to 6 were also acquitted under sections 143, 148, 323, 302 r/w 149 of Indian Penal Code and Section 135(1) of B.P. Act. Criminal Appeal No. 850 of 1996 is filed against the said acquittal awarded by the trial court whereas Criminal Appeal No. 449 of 1996 is filed against the conviction.

2. The facts as per the prosecution case are that on 15.03.1991, the complainant

and his brother had gone for their business of selling newspapers and periodicals. It is the case of the prosecution that at around 08.15 pm, accused No. 1 who owns a pan stall near the place of business of the complainant, came there and picked up a Chitralkha. When the complainant demanded money for the same, accused No. 1 threw the magazine and started abusing him. Thereafter, there ensued a verbal exchange between them and in the meantime other accused reached there. It is the case of the prosecution that accused No. 1 went to Lucky Restaurant, picked up a glass and broke it and dashed towards the complainant to cause injury. The complainant with a view to save himself tried to escape from there and ran away. On the way, he met Javed and one Munavar on scooter who were coming from their house. The complainant informed them about the incident. Therefore, they told him to sit on the scooter and all the three went to Lucky Restaurant. At that time all six accused were present there. The accused encircled deceased and gave him fist blows. Thereafter, accused No. 1 who was having a sharp edged weapon with him, gave a blow with it on left flank below abdomen to deceased - Javed. Accused No. 1 also received injuries on his face and hand. The deceased fell down and the accused fled away from the scene of offence. The deceased was taken to hospital where he succumbed to injuries.

2.1 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 the following witnesses as oral evidence whose evidence have been read out before us:

2.2 The prosecution also relied upon various documents as documentary evidences such as post mortem report at Ex. 29, panchnama of scene of offence at Ex. 31, inquest panchnama at Ex. 32, panchnama of clothes on dead body at Ex. 33, body condition panchnama at Ex. 34, treatment certificate of accused at Ex. 36, FSL report at Ex. 39, notification at Ex. 40 etc which have been perused by us:

2.3 At the end of the trial and after recording the further statement of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and the defence, the learned Additional Sessions Judge convicted/acquitted original accused as mentioned aforesaid. Being aggrieved by and dissatisfied with the aforesaid judgment and order passed by the Sessions Court, the present appeals have been preferred by the State and original accused No. 1.

3. Mr. Nitin Amin, learned advocate appearing for the appellant submitted that the trial court ought not to have convicted the appellant merely on the basis of the deposition of P.W. 3-Sirajuddin Shaikh, P.W. 4 - Mahebullah and P.W. 5 Munavar - so called eye witnesses. He submitted that the evidence of these witnesses is exaggerated and suffers from infirmities. He submitted that these witnesses are highly interested and untrustworthy.

3.1 Mr. Amin further submitted that neither P.W. 3, P.W. 4 nor P.W. 5 had

witnessed the real incident and hence no FIR like Ex. 57 disclosing names of accused No. 1 and other accused was lodged at V.S. Hospital. He submitted that the alleged FIR seems to have been lodged on the next day and hence the timing of entry at Ex. 60 was subsequently written down in ink pen to anti time the FIR. He submitted that in fact the trial court has virtually held that Ex. 60 of station diary was forged.

3.2 Mr. Amin further submitted that even if the case of the prosecution is accepted, it may be taken into consideration that the deceased attacked accused No. 1 who was standing on the footpath of K.C. Medical Stores which is opposite to Dinbhai Tower and injured him. He submitted that in such a situation, accused No. 1 raised shouts to save him and the deceased received one stab injury. He submitted that even if the prosecution case is accepted, the deceased fell down on receiving a stab injury and therefore there was no question of accused receiving bleeding injuries after the deceased sustained stab injury. He submitted that therefore it is clear that the deceased had injured accused No. 1 initially and thereafter the act in self defence would have happened. He submitted that the trial court ought to have given benefit of self defence as the deceased was the initial aggressor. He submitted that the entire incident happened in a spur of moment without any intention or motive.

3.3 Mr. Amin has drawn the attention of this Court to the evidence of P.W. 1 - Dr. Ravindra Bhise (Ex. 28) and submitted that from the evidence of this witness it is clear that there was only a single blow inflicted upon the deceased and rest are abrasions. He submitted that going by the cause of death recorded in the post mortem report and the fact that a single blow was inflicted, this Court may in the alternative, consider the case of accused No. 1 under Section 304(Part II) of Indian Penal Code.

4. Ms. C.M. Shah, learned APP appearing for the respondent State has supported the order of the trial court so far as conviction of 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 accused No. 1 is guilty of the offence so convicted of. She also submitted that an act of culpable homicide even if in self defence cannot be justified and that the sentence imposed upon the accused is just and proper and does not deserve to be reduced or quashed.

4.1 Ms. Shah, learned APP has submitted that the trial court committed an error in acquitting accused under Section 302 of IPC. It was contended by Ms. Shah, 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 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 present respondent. Learned APP has also taken this court through the oral as well as the entire documentary evidence.

5. We have considered the evidence at length. It is not in dispute that the

accused were involved in the scuffle. From the evidence, the presence of accused at the scene of offence is proved beyond reasonable doubt. Accused No. 1 also sustained injuries on cheek and fingers. The medical evidence corroborates the fact that the blood of accused No. 1 was found from the scene of offence. Going by the evidence of witnesses, the fact which is borne out is that accused No. 1 is the perpetrator of the alleged offence.

6. The injuries sustained by the deceased remain to be seen. The cause of death as per the post mortem report is shock and haemorrhage as a result of stab injury sustained. It is required to be noted that Dr. Ravindra Bhise Ex. 28, who performed the post mortem of deceased that the deceased had sustained a stab wound on the left abdomen 7 c.ms. above and medial to the left anterior superior iliac, spine verticle 1.5 c.m. x 1 c.m. x cavity deep; upper angle acute; lower angle semilunar blood stains were seen around the edges. He has stated that there were abrasions on the left side of face above the lateral end of left eye brow 1 c.m. x 1 c.m. in size. He has stated that the two injuries were ante mortem. He also stated that the injury was caused by sharp edged pointed weapon and the same is sufficient in ordinary course of nature to cause death of a person. He has also stated that the said injury was possible by way of muddamal article No. 5.

7. The case of the defence is that the accused had exercised the right of private defence. It is trite that right of private defence need not necessarily be exercised for the defence of one's own person; it can be exercised for the defence of the person of another one. However, the fact remains that the incident in question happened as a result of which the deceased passed away. We have also not lost sight of the fact that there was an altercation during which the deceased was assaulted. There was no premeditation in the alleged incident and the same happened in a fit of rage. Exception II to Section 300 IPC provides that culpable homicide is not murder if the offence, in the exercise in good faith of the right private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he has exercised such right of defence without pre-meditation, and without any intention of doing more harm than is necessary for the purpose of such defence. Keeping the aforesaid angle in view we are of the opinion to the effect that the offence falls within Exception 4 of Section 300 and thus the trial court ought to have convicted appellant under Section 304 part II of Indian Penal Code.

8. So far as the acquittal appeal is concerned, 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 judgment 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."

8.1 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 emphasize 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."

8.2 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.

8.3 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 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 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 L.Rs. 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.

8.5 In the case of Luna Ram Vs. Bhupat Singh and Ors. reported in , (2009) SCC 749, the 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 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."

8.6 Even in a recent decision of the Apex Court in the case of Mookiah and Anr. Vs. 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 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, , (2004) 5 SCC 573]"

8.7 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 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."

8.8 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.

9. We find that the trial Court while considering the evidence on record, has very elaborately discussed the evidence on record so far as role of accused Nos. 2 to 6 is concerned. The role of these accused has not been enunciated by the prosecution except for the allegation that they were present alongwith accused No. 1 and that they encircled the deceased during the alleged offence. The guilt against the accused has not been established beyond reasonable doubt.

10. Further, learned APP is not in a position to show any evidence to take a contrary view in the matter or that the approach of the Court below is vitiated by some manifest illegality or that the decision is perverse or that the Court below has ignored the material evidence on record. In above view of the matter, we are of the considered opinion that the Court below was completely justified in passing impugned judgment and order. Even otherwise, the incident is of the year 1991 and we are not inclined to disturb the position which has been prevailing for these many years. The trial court has granted benefit of doubt to the accused Nos. 2 to 6 which is not being interfered with by us in absence of substantial proof.

11. Accordingly, the conviction of original accused No. 1 under Section 304 (Part I) of the Indian Penal Code vide judgment and order dated 15.05.1996 passed by the learned Additional City Sessions Judge, Court No. 10, Ahmedabad in Sessions Case No. 252 of 1992 is converted to conviction under Section 304 (Part II) of Indian Penal Code. Original accused No. 1 is ordered to undergo rigorous imprisonment for a period of five years under section 304 (Part II) of Indian Penal Code. The sentence awarded by the court below stands altered accordingly. The fine imposed is maintained. The appellant shall surrender before the concerned authorities within a period of twelve weeks from today to serve out the remaining period of sentence. Acquittal of original accused Nos. 2 to 6 is confirmed. Acquittal of original accused No. 1 under Sections 143, 148, 323, 302 r/w 149 of Indian Penal Code and Section 135(1) of B.P. Act is confirmed. The judgment and order dated 15.05.1996 is modified accordingly. Criminal Appeal No. 449 of 1996 is allowed to the aforesaid extent. Criminal Appeal No. 850 of 1996 is dismissed accordingly. R & P to be sent back forthwith.