

(2022) 02 GUJ CK 0098
In the Gujarat High Court
Case No : R/Criminal Appeal No. 2511 Of 2009

State Of Gujarat	Vs	APPELLANT
Babusinh Somsinh Rathod & 1 Other(S)		RESPONDENT

Date of Decision : 28-02-2022

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 378(1)(3)
Indian Penal Code, 1860 — Section 114, 323, 504, 506(2)
Scheduled Caste And Scheduled Tribe (Prevention Of Atrocities) Act, 1989 — Section 3(1)(10)

Citation : (2022) 02 GUJ CK 0098

Hon'ble Judges : Rajendra M. Sareen, J

Bench : Single Bench

Advocate : P B Khambholja

Final Decision : ?Dismissed

Judgement

Rajendra M. Sareen, J

1. This Appeal is filed by the appellant – State of Gujarat under Section 378(1) (3) of the Criminal Procedure Code, 1973 against the judgment and order dated 05.09.2009 passed by the learned Sessions Judge, Sabarkantha at Himmatnagar in Special (Atrocity) Case No.3 of 2009 acquitting the respondent nos. 1 and 2 – original accused from the offence punishable under sections 323, 504, 506(2) and 114 of Indian Penal Code and under section 3(1)(10) of the Scheduled Tribes (Prevention of Atrocities Act), 1989.

2. The case of the prosecution is that the complainant is residing at village Moyad, taluka Prantij alongwith his family and serving with the Department of Agriculture, Sachivalaya, Gandhinagar. It is further the case of prosecution that an 22.11.2003 at about 6.30 hours in evening, while daughter of complainant namely Urvashi @ Pinki was bringing water from water-stand, at that time respondent accused - Babusinh Somsinh Rathod, Peon of Moyad Gram Panchayat came near water-stand and informed the daughter of complainant not to waste

water and to stop the water-tapit and thereby given filthy abuses. Thereafter, accused Babusinh had also given filthy abuses to complainant Jayantibhai and administered threat. Thereafter, again on 23.11.2806 while complainant was returning from village Galal and coming towards village Moyad on motorcycle, accused Mukhsinh and Babusinh called the complainant and the accused Mukhsinh pulled him away from motor cycle and gave fist blows on his face as well as given filthy abuses by saying "Sala Bhangiya, why are you raising dispute with Babusinh" and also administered threat to cause death. It is further the case of prosecution that at the time of incident, complainant shouted for help, the wife of complainant Savitaben came to the place of incident, and accused person ran away.

Thereafter, again on next day morning, accused persons came to the house of complainant and administered threat to cause death as well as to set the house of complainant on fire. Therefore, complainant has filed aforesaid complainant before Prantij Police Station, vide CR No. I-179/2083.

The police recorded statement of witnesses and after thorough investigation, as there was sufficient evidence connecting respondents with crime produced in this Case, charge-sheet was filed in the court of learned Judicial Magistrate, First Class, Prantij against respondents. The offence committed by respondents were absolutely triable by the court of learned Special Court, same was committed to the court of learned Sessions Judge, Sabarkantha at Himmatnagar and numbered as Special (Atrocity) Case No. 3/2009. During trial, prosecution has examined complainant, Medical Officer, Panch witnesses and police witnesses in support of the case of the prosecution. At the end of trial, the learned Judge, after appreciating necessary evidence laid down by prosecution, was pleased to acquit the respondents by his judgement and order of acquittal dtd. 05.09.2009 for the offences for which they were charged.

Being aggrieved by and dissatisfied with the aforesaid judgement and order of acquittal, present appeal has been filed by the appellant – State.

3. Learned APP Mr.R.C. Kodekar for the appellant State has vehemently argued that the Sessions Judge has committed a grave error in not believing the deposition of the witnesses examined by the prosecution and evidence adduced by the prosecution. He has further submitted that the Sessions Judge has erred in acquitting the respondents – accused from the charges levelled against them. He has further argued that the prosecution has proved that the respondents have committed offence under sections 323, 504, 506(2) and 114 of Indian Penal Code and under section 3(1)(10) of the Atrocities Act. He has further argued that Sessions Judge has acquitted the respondents accused merely on some minor contradictions and omissions in the evidence of the witnesses. He has further argued that the Sessions Judge has erred in not believing the evidence of the investigating officer who had no reason to implicate the accused falsely in the case. He has further argued that the offence punishable under sections 323, 504, 506(2) and 114 of Indian Penal Code and under section 3(1)(10) of the Atrocities

Act, is made out, however, the same is not believed by the Sessions Judge. He has further argued that though the prosecution witness has supported the case of the prosecution, the Sessions Judge erroneously not believed their evidence and acquitted the accused. He has further argued that the Sessions has erroneously held that the prosecution has failed to prove the case beyond reasonable doubt.

Making above submissions, he has requested to allow the present appeal.

4. Mr.Khambholja, learned advocate for the respondents - original accused has submitted that there is hardly any substance in the submissions of learned APP. There is no admissible evidence on record connecting the accused with the commission of the offence. There are material contradictions and omissions in the evidence of the prosecution witnesses. The prosecution has not proved the case beyond reasonable doubt. No error or illegality has been committed by the trial court in acquitting the respondents accused by giving benefit of doubt.

Making above submissions, he has requested to dismiss the present appeal.

5. Heard the learned advocates for the respective parties and perused the impugned judgement and order of acquittal and re-appreciated the entire evidence on record.

6. Before advertng to the facts of the case, it would be worthwhile to refer to the scope in Acquittal Appeals. It is well settled by is catena of decisions that an appellate Court has full Power to review, re-appreciate and consider the Evidence upon which the Order of Acquittal is founded. However, the Appellate Court must bear in mind that in case of Acquittal, there is prejudice 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 reaffirmed and strengthened by the trial Court.

7. On perusal of the record, following three issues, as framed by the Sessions Court arise in this case

[1] whether on 22.11.2003 at Moyad Village Nathaji Vas, the accused gave filthy abuses to the daughter of the complainant Pinkey on the aspect of switching off the water-tap and uttered words against her caste namely "Sala Bhangiya Nokri Kare Chhe"?

[2] Whether on 23.11.2003 in the morning at 10.30 hours, when the complainant was coming on motorcycle from Salal to Moyad, at that time the accused pull him down and uttered words against his casts namely "Sala Bhangiya Nokrik Kare Chhe ane Dado Thai Gayel Chhe? And

[3] Whether the accused gave filthy abuses and inflicted injury on the right side of face and threatened to kill?

8. So far as the first issue is concerned, the complainant Jayantibhai has admitted in his deposition that at the time when the first incident of 22.11.2003 had occurred, he was not present and he has not seen the incident. The witness Urvashi in her deposition has stated that when she was fetching water near her house, at that time both the accused asked her to switched off the water-tap and abused and threatened that "sala bhangiya Gandhinagarma nokari kare chhe, atiketi ma rahechhe and fatigayo chhe. Whereas, the eye witness Savitaben has stated in her deposition that both the accused told her husband that "sala bhangiya Gandhinagar ma Nokri Karechhe tethi dado thai gayo chhe. Thus, there is major contradictions in the deposition of the complainant and his wife. Further, complainant came to know about the first incident after reaching at home. Thus, the deposition of the complainant is contrary to the deposition of the witness Savitaben and witness Urvashiben. As per the complainant, at the time of commission of offence, Urvashiben and Savitaben were present. As sated hereinabove, witness Urvashiben is examined at Ex.29 who has further stated in her deposition that the accused uttered the words ""sala bhangiya Gandhinagar ma Nokri Karechhe ane aticte ma rahe chhe ane fati gayo chhe". She has further stated that the accused threatened to kill her and set her house at fire. As per the case of the prosecution, at the time of commission of the offence, witness Savitaben was present, who is examined at Ex.28 and she has stated in her deposition that both the accused on the aspect of switched off the water-tap abused the Urvashi and told her husband that "bhangiya Gandhinagar nokari kare chhe ane dado thai gayelo chhe. If the evidence of botch the witnesses are examined, accused has not uttered words against the caste to the witness Urvashi or witness Savitaben. As per both the witnesses, accused uttered the words against the husband of the Savitaben and father of Urvashiben that "sala bhangiya Gandhinagar nikari karechhe ane tethi dado thai gayo chhe". When the said words were uttered by the accused, complainant Jayantibhai was not present.

9. If the complaint is seen, there is no mention in the complaint of the words against his caste sala bhangiya Gandhinagar nokari kare chhe eticates ma rahe chhe fatigayo chhe, alleged to have been uttered on 22/11/2003 to the Urvashi/ Pinki on the aspect of switching off the water-tap.

10. The deposition of Savitaben and Urvashiben are contrary so far as the words uttered against their caste is concerned. The words alleged by Urvashiben against the accused have not been mentioned in the complaint. Both the witnesses Savitaben and Urvashiben have not stated in their deposition the words alleged to have uttered by the accused against their caste. Witness Urvashi has admitted in her deposition that there is garden near her house and she pours water to the ponds by fetching water from the water-tap of the Panchayat. She admitted that there was shortage of water and hence accused No.1, who was serving as peon in the Panchayat, used to ask her not to waste water. She admitted that both the accused asked her to switched off the water-tap. Thus, the first incident was merely regarding switching off the water-tap.

Thus, the accused have not uttered the words to the witness Savitaben and witness Urvashiben against their caste, the complainant was not present and according to him, Savitaben and urvashiben informed him about the words uttered by the accused against his caste, which cannot be believed.

11. Further, no evidence to prove that the incident occurred on 22.11.2003 at 6.00 p.m. has been produced. It appears that the accused Babusinh was working as peon and witness Urvashi was pouring water to the ponds and wasting the water, the accused asked her not to waste water and the allegation that the accused uttered the word against the caste is not proved. Thus, for the reasons, issue No.1 is answered in negative.

12. So far as issue Nos.2 and 3 are concerned, the complainant has stated in his deposition that on 23.11.2003 at 10.30 a.m., when he reached near Mahakali's Temple, both the accused met him and they pull down the motor cycle, whereas in the complaint Ex.25, the complainant has stated that both the accused had met, stopped the motorcycle and thereafter Makhusinh pull down the motorcycle and gave fist blow on the face and uttered words against his caste. Thus, there is major contradictions between the complaint Ex.25 and the deposition of the complainant Ex.24.

13. The deposition of the witness Savitaben and witness Urvashiben are contradictory and considering the deposition of both the witnesses, the complaint cannot be believed.

14. In the complaint, it is alleged that the accused Mukhsinh pull down the complainant from the motorcycle and inflicted fist blow on the face and gave abused and uttered the word that Sala Bhangiya kem tu babusinh sathe Mathakut kare chhe, aaje to java daiye chhiye parantu have pachhi janthi mari nakhishu, and such threat was administered. Whereas the complainant in his deposition Ex.24 has stated that both the accused pull him down from the motor cycle. As per the deposition of the complainant Ex.24, both the accused pull him down from the motorcycle, whereas as per the complaint accused Mukhsinh pull him down from the motorcycle, inflicted fist blow and threatened to kill him. If the examination in chief of the complainant with respect to incident dated 23.11.2003 is seen, wherein he has not stated that any of the accused out of the two accused, has uttered the word "sala bhangiya". Thus, from the deposition of the complainant on 23.11.2003 near the Mahakali temple's bus-stand, the accused uttered words "sala bhangiya" and insulted his caste is not proved.

15. The complainant has stated in his deposition that when he was admitted in Civil Hospital, Prantij, accused Makhusinh had come to beat Savitaben and told that "if he files complaint in the police station, he will set his house at fire. However, this fact is not in his complaint. On the contrary in the complaint it is mentioned that the accused asked the wife of the complainant at 9.00 a.m. that "kya chhe taro pati tene amo jivto chhodvana nathi ane taru ghar bali nakhvana chhiye. There is no evidence on this aspect in the deposition of the complainant

and Savitaben.

16. Further, the complainant has stated in his deposition that hearing the shouting, his wife Savita, daughter Urvashi and Neeta had come and the accused had run away. Whereas, in the complaint it is stated that hearing the shouts only his wife Savitaben had come and the accused had run away. Whereas Savitaben in her deposition Ex.26 has stated that hearing shouts she and her daughter had come and asked the accused why they are beating her husband, accused were abusing, Mukhsinh also beaten her by throwing bricks. There is no evidence that the Savitaben was present at the time of incident or same is not proved from the deposition of the complainant. As per the complaint of the complainant, his wife Savitaben had come after commission of the incident. Thus, it is proved that Savitaben had seen the incident.

17. The medical officer has admitted that the injury is possible by nail if any persons washes his mouth. There is no specific opinion that the injury is possible by fits blow only. Even in the history before the Doctor the complainant has not disclosed the name of any of the accused.

18. The evidence of the complainant is not trustworthy and does not inspire any confidence. Even Savitaben had come to the place after completion of the incident and she has not seen the incident. There is no mention that daughter Urvashi had seen the incident of 23.11.2003. Considering the overall evidence on record, the prosecution has failed to prove that the accused threatened the complainant to kill or uttered the words "sala dhedha".

19. Though the place of offence is surrounded by various residential houses, no statement of independent witnesses have been recorded nor they have been examined. The only witnesses are complainant, his wife and daughter, who can be said to be independent witnesses and even their evidence is also not trustworthy.

20. Mr.Chhaganbhai Bharwad is examined at Ex.35, he has stated that he was working as Police Inspector and complainant had personally lodged the complaint and since the offence was under Atrocity, Dy.S.P. ST/SC Cell was informed. According to him, he prepared panchname of the place shown by the complainant. He recorded statement of witnesses. Thus, though Mr.Bharwad was P.I. and was aware that the offence is under Atrocity, he continued the investigation and recorded statement of witnesses and thereafter the further investigation was handed over to Dy.S.P. SC/ST Cell. Thus, the statements are not recorded by the competent officer namely Dy.S.P. SC/ST Cell and as per settled legal procedure when investigation was done and statements are recorded by the office below the rank of Dy.S.P., entire trial is illegal and vitiated. In the present case investigation has been done by Mr.Bharwad, Police Inspector. The prosecution has failed to prove that the investigation has been done by the Dy.S.P. Considering the overall evidence on record, this Court is of the opinion that the prosecution has failed to prove the case against the accused beyond

reasonable doubt.

21. It may be noted that as per the settled legal position, when two views are possible, the judgment and order of acquittal passed by the trial Court should not be interfered with by the Appellate Court unless for the special reasons. A beneficial reference of the decision of the Supreme Court in the case of State of Rajasthan versus Ram Niwas reported in (2010) 15 SCC 463 be made in this regard. In the said case, it has been observed as under:-

"6. This Court has held in Kalyan v. State of U.P., (2001) 9 SCC 632 :

"8. The settled position of law on the powers to be exercised by the High Court in an appeal against an order of acquittal is that though the High Court has full powers to review the evidence upon which an order of acquittal is passed, it is equally well settled that the presumption of innocence of the accused persons, as envisaged under the criminal jurisprudence prevalent in our country is further reinforced by his acquittal by the trial court. Normally the views of the trial court, as to the credibility of the witnesses, must be given proper weight and consideration because the trial court is supposed to have watched the demeanour and conduct of the witness and is in a better position to appreciate their testimony. The High Court should be slow in disturbing a finding of fact arrived at by the trial court. In Kali Ram V. State of Himachal Pradesh, (1973) 2 SCC 808, this Court observed that the golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The Court further observed:

"27. It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilised society. Suppose an innocent person is convicted of the offence of murder and is hanged, nothing further can undo the mischief for the wrong resulting from the unmerited conviction is irretrievable. To take another instance, if an innocent person is sent to jail and undergoes the sentence, the scars left by the miscarriage of justice cannot be erased by any subsequent act of expiration. Not many persons undergoing the pangs of wrongful conviction are fortunate like Dreyfus to have an Emile Zola to champion their cause and succeed in getting the verdict of guilt annulled. All this highlights the importance of ensuring, as far as possible, that there should be no wrongful conviction of an innocent person. Some risk of the conviction of the innocent, of course, is always there in any system of the administration of criminal justice. Such a risk can be minimised but not ruled out altogether. It may in this connection be apposite to refer to the following observations of Sir Carleton Allen quoted on page 157 of "The Proof of Guilt" by Glanville Williams, second edition:

"I dare say some sentimentalists would assent to the proposition that it is better that a thousand, or even a million, guilty persons should escape than that one innocent person should suffer; but no responsible and practical person would accept such a view. For it is obvious that if our ratio is extended indefinitely, there comes a point when the whole system of justice has broken down and society is in a state of chaos."

28. The fact that there has to be clear evidence of the guilt of the accused and that in the absence of that it is not possible to record a finding of his guilt was stressed by this Court in the case of Shivaji Sahebrao, (1973) 2 SCC 793, as is clear from the following observations:

"Certainly it is a primary principle that the accused must be and not merely, may be guilty before a court, can be convicted and the mental distinction between 'may be' and 'must be' is long and divides vague conjectures from sure considerations."

"9. The High Court while dealing with the appeals against the order of acquittal must keep in mind the following propositions laid down by this Court, namely, (i) the slowness of the appellate court to disturb a finding of fact; (ii) the noninterference with the order of acquittal where it is indeed only a case of taking a view different from the one taken by the High Court."

8. In Arulvelu and another versus State reported in (2009) 10 Supreme Court Cases 206, the Supreme Court after discussing the earlier judgments, observed in para No. 36 as under:

"36. Careful scrutiny of all these judgments lead to the definite conclusion that the appellate court should be very slow in setting aside a judgment of acquittal particularly in a case where two views are possible. The trial court judgment can not be set aside because the appellate court's view is more probable. The appellate court would not be justified in setting aside the trial court judgment unless it arrives at a clear finding on marshaling the entire evidence on record that the judgment of the trial court is either perverse or wholly unsustainable in law."

22. In that view of the matter, the Criminal Appeal being devoid of merits is dismissed.