

(2016) 01 GUJ CK 0086

In the Gujarat High Court

Case No : Criminal Appeal Nos. 564 and 998 of 2007

State of Gujarat

APPELLANT

Vs

Bahadurbhai Tilabhai Vala and Others

RESPONDENT

Date of Decision : 12-01-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 300, Section 302, Section 304, Section 304(II),
Section 326, Section 34

Citation : (2016) 01 GUJ CK 0086

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

Bench : Division Bench

Advocate : L.R. Poojari, Addl. Public Prosecutor, for the Appellant; S.P. Tolia, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

K.S. Jhaveri, J.—1. Having been sentenced to life imprisonment for the offence under section 302 of Indian Penal Code by impugned judgement and order dated 09.02.2007 passed by the learned Additional Sessions Judge, Bhavnagar, Camp at Mahuva in Spl. Atrocity Case No. 40 of 2005, original accused No. 1, is before this Court questioning the impugned judgment and order by way of Criminal Appeal No. 998 of 2007. Criminal Appeal No. 564 of 2007 has been preferred by the State against the acquittal of original accused Nos. 2 to 4 recorded under Section 302 r/w 34 of Indian Penal Code and u/s. 3(2)(5) of the Prevention of Atrocity Act vide judgement and order dated 09.02.2007 in Spl. Atrocity Case No. 40 of 2005.

2. It is the case of the prosecution that on 28.09.2005 at about 08.30 to 08.45 pm when the complainant was on his way to a pan shop in Hajipar village and when he reached the house of Dr. Balubhai, original accused No. 1 came there and sprinkled some liquid on the complainant. Thereafter accused No. 2 set him ablaze. The complainant started burning and he was immediately taken to hospital. He however succumbed to injuries on 03.10.2005.

2.1 Thereafter the offence was registered against the accused for the offences punishable u/s. 302 and 34 of Indian Penal Code and under Section 3(2)(5) of Prevention of Atrocity Act. Investigation was carried out and chargesheet was submitted against the accused Nos. 1 to 4. Thereafter, as the case was exclusively triable by the Sessions Court, the same was committed to the Sessions Court.

2.2 The trial was initiated against the appellant and during the course of trial the prosecution examined following witnesses:

2.3 The prosecution also relied upon various documents such as inquest panchnama at Ex. 16, arrest panchnama at Ex. 17, yadi for recording dd at Ex. 32, dying declaration at Ex. 47 p.m note at Ex. 57, FSL report at Ex. 67 and FIR.

2.4 At the end of trial, after recording the statement of the accused and hearing arguments on behalf of prosecution and the defence, the trial court convicted original accused No. 1 under Section 302 of Indian Penal Code by the impugned judgement and order. The trial court acquitted original accused No. 1 under Atrocity Act and also acquitted original accused Nos. 2 to 4 u/s. 302 r/w 34 of Indian Penal Code and u/s. 3(2)(5) of Atrocity Act.

2.5 Being aggrieved by and dissatisfied with the aforesaid judgement and order passed by the Sessions Court the accused as well as State have preferred the present appeals.

3. Mr. I.H. Syed, learned advocate appearing for the original accused No. 1 contended that the trial court ought not to have convicted the accused for the offence punishable under section 302 of Indian Penal Code. He submitted that the trial court has misread the evidence of P.W. 2 Bhikhabhai Gababhai (Ex. 34), P.W. 3 - Rajubhai Ramjibhai (Ex. 35) and P.W. 8 - Hussainbhai Sulemanbhai (Ex. 49). He submitted that there are material contradictions in the evidence of these witnesses and hence reliance ought not to have been placed on their evidence.

3.1 Mr. Saiyed submitted that the deceased died after a period of five days. He submitted that the cause of death as per the post mortem report is septicemia and therefore if the first part of the arguments is not accepted by this Court, in the alternative, without prejudice to the submissions made hereinabove, considering the medical evidence and the fact that the deceased had survived for around five days after the incident, the Court may consider the case of original accused No. 1 under section 304 (Part II) of Indian Penal Code.

3.2 In support of his submissions, Mr. Saiyed has relied upon the decisions of the Apex Court in the case of B.N. Kavatakar and Another v. State of Karnataka reported in 1994 Supp (1) SCC 304 and in the case of Maniben v. State of Gujarat reported in , (2009) 8 SCC 796.

4. Mr. L.R. Poojari, learned APP, however, submitted that the trial court has given cogent reasons for sustaining the conviction under section 302 of Indian Penal Code and this court may not interfere in the appeal filed by original accused No.

1. It is submitted that the trial court has based the conviction not only on the evidence of the complainant and the dying declaration but also considered entire circumstances of the case and the facts which are proved by cogent evidence.

5. So far as the acquittal appeals are concerned, Mr. Poojari submitted that the judgement and order of the Sessions Court is against the provisions of law and that 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 original accused Nos. 2 to 4. Learned APP has also taken this court through the oral as well as the entire documentary evidence and submitted that the trial court ought to have convicted original accused Nos. 2 to 4 as their roles have also been proved beyond reasonable doubt.

6. Mr. Tolia, learned advocate appearing for original accused Nos. 2 to 4 has supported the impugned judgement and order and submitted that the same having been passed in accordance with law so far as the acquittal of original accused Nos. 2 to 4 is concerned, the same may not be disturbed.

7. So far as acquittal appeal is concerned, it is required to be noted that 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 v. 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 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."

7.1 Further, in the case of *Chandrappa v. 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 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."

7.2 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.

7.3 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 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."

7.4 Similar principle has been laid down by the Apex Court in the cases of State of Uttar Pradesh v. Ram Veer Singh & Ors, reported in , 2007 AIR SCW 5553 and in Girja Prasad (Dead) by LRs v. state of MP, reported in , 2007 AIR SCW 5589.

Thus, the powers which this Court may exercise against an order of acquittal are well settled.

7.5 It is also a settled legal position that in acquittal appeal, the appellate court is not required to re-write the judgement 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 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."

7.6 Thus, in case the appellate court agrees with the reasons and the opinion given by the lower court, then the discussion of evidence is not necessary. from the evidence itself it is established that the prosecution has not proved its case beyond reasonable doubt. Mr. Poojari, learned APP is not in a position to show any evidence to take a contrary view of the matter or that the approach of the trial court is vitiated by some manifest illegality or that the decision is perverse or that the trial court has ignored the material evidence on record so far as the acquittal of original accused Nos. 2 to 4 is concerned.

8. With regard to the conviction appeal filed by original accused No. 1, looking to the evidence on record, it appears that the death of the deceased happened as a result of the liquid sprinkled by original accused No. 1. The deceased in his dying declaration has narrated the turn of events and stated that original accused No. 1 had sprinkled some liquid from behind and had set him ablaze. The said dying declaration has been supported by P.W. 7 - Khimjibhai Kantaria (Ex. 47). The medical evidence supports the case of the prosecution. The FSL report also supports the case of the prosecution.

9. P.W. 12 - Kashyapbhai Dave is the Medical Officer who conducted the autopsy of the dead body of deceased. This witness has opined that the cause of death of the deceased was Septicemia due to injury on vital organ lung and multiple fractures on account of injury. He has opined that the deceased had sustained 60% burns on his back, right shoulder, palms and elbow. The cause of death as per the post mortem notes is Septicemia due to burns.

10. We do not find any reason persuading enough to not hold original accused No. 1 guilty of death of the deceased considering the dying declaration given by the deceased. The medical evidence also supports the case of the prosecution. Nevertheless, we do not find any strong motive or premeditation on the part of original accused to hold him guilty of the offence under section 302 of Indian Penal Code. Moreover the deceased had survive for around five days after the incident and thereafter expired due to Septicemia.

11. In the case of the B.N. Kavatakar and another (supra), the Apex Court in a similar case of septicemia where the deceased therein had died in the hospital after five days of the occurrence of the incident in question, converted the conviction under section 302 to under section 326 and modified the sentence accordingly.

11.1 Similarly, in the case of Maniben (supra), the Apex Court has observed as under:

"18. The deceased was admitted in the hospital with about 60% burn injuries and during the course of treatment developed septicemia, which was the main cause of death of the deceased. It is, therefore, established that during the aforesaid period of 8 days the injuries aggravated and worsened to the extent that it led to ripening of the injuries and the deceased died due to poisonous effect of the injuries.

19. It is established from the dying declaration of the deceased that she was living separately from her mother-in-law, the appellant herein, for many years and that on the day in question she had a quarrel with the appellant at her house. It is also clear from the evidence on record that immediately after the quarrel she along with her daughter came to fetch water and when she was returning, the appellant came and threw a burning tinsil on the clothes of the deceased. Since the deceased was wearing a terylene cloth at that relevant point of time, it aggravated the fire which caused the burn injuries.

20. There is also evidence on record to prove and establish that the action of the appellant to throw the burning tinsil was preceded by a quarrel between the deceased and the appellant. From the aforesaid evidence on record it cannot be said that the appellant had the intention that such action on her part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased. Therefore, in our considered opinion, the case cannot be said to be covered under clause (4) of Section 300 of IPC. We are, however, of the considered opinion that the case of the appellant is covered under Section 304 Part II of IPC."

11.2 In the present case, we have come to the irresistible conclusion that the accused is infact the perpetrator of the offence in question. However, the points which have also weighed with this court are that the deceased had survived for five days in the hospital. The medical opinion points that the deceased could have recovered from the injuries had septicemia not occurred. Therefore, the entire burden of guilt cannot be saddled upon original accused No. 1 as far as the death of the deceased is concerned. In that view of the matter, we are of the opinion that the conviction of the original accused No. 1 under section 302 of Indian Penal Code is required to be converted to that under section 304(II) of Indian Penal Code.

12. In the premises aforesaid, Criminal Appeal No. 564 of 2007 is dismissed. Criminal Appeal No. 998 of 2007 is partly allowed. The conviction of original

accused No. 1 under Section 302 of Indian Penal Code vide judgment and order dated 09.02.2007 arising from Spl. Atrocity Case No. 40 of 2005 passed by the Additional Sessions Judge, Bhavnagar, Camp at Mahuva is altered to conviction under Section 304 (Part II) of Indian Penal Code. The 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 instead of life imprisonment as awarded by the trial court under section 302 IPC. The amount of fine and sentence in default of fine is maintained. The acquittal of original accused Nos. 2 to 4 is confirmed. The judgement and order dated 09.02.2007 is modified accordingly. The period of sentence already undergone shall be considered for remission of sentence qua original accused No. 1 and he is granted time of ten weeks from today to surrender before the jail authorities. Bail bond shall stand cancelled. R & P to be sent back to the trial court forthwith.