

(2022) 04 GUJ CK 0104
In the Gujarat High Court
Case No : R/Criminal Appeal No. 1143 Of 1994

State Of Gujarat	Vs	APPELLANT
Bharatbhail Durlabbhai Parmar & 3 Other(S)		RESPONDENT

Date of Decision : 27-04-2022

Acts Referred:

Constitution Of India, 1950 — Article 21
Indian Penal Code, 1860 — Section 114, 302, 323
Code Of Criminal Procedure, 1973 — Section 209, 313, 378, 379, 384

Citation : (2022) 04 GUJ CK 0104

Hon'ble Judges : S.H.Vora, J;Sandeep N. Bhatt, J

Bench : Division Bench

Advocate : Chetna M. Shah, Umang H Oza

Final Decision : ?Dismissed

Judgement

Sandeep N. Bhatt, J

1. Feeling aggrieved and dissatisfied with the judgment and order of acquittal dated 30.06.1994 passed by the learned Sessions Judge, Navsari in Sessions Case No.26 of 1991 for the offences under Sections 302, 323 and 114 of the Indian Penal Code, 1860, the applicant – State of Gujarat has preferred this appeal as provided under section 378 of the Code of Criminal Procedure, 1973 ("the Code" for short) inter alia challenging the judgment and order of acquittal in favour of the respondents accused.

2. The case of the prosecution is that, Durlabbhai Bhagabhai and others - the accused had bitten one Naginbhai on 12.12.1990 as he has intervened in the dispute between Durlabbhai Bhagabhai and Chhaganbhai Bhagabhai. On 14.12.1990, the accused had gone to the house of said Naginbhai and used abusive language to his wife – Shardaben. The deceased – Gambhirbhai was a neighbour and therefore, he stopped the accused and told them not to use such language. The accused were provoked and as they were armed with sticks, gave stick blows to the deceased – Gambhirbhai. Due to that, Gambhirbhai received

serious injuries on head and other parts of the body and ultimately, he succumbed to the injuries. Thereafter, the complainant – Shantaben, wife of Gambhirbhai lodged the complaint with regard to the incident before the Chikhli Police Station, which was registered as I-C.R. No. 201 of 1990, for the offences under Sections 302, 323 and 114 of the Indian Penal Code, 1860.

3. In pursuance of the complaint lodged by the complainant, investigating agency recorded statements of the witnesses, collected relevant evidence in form of medical evidence and drawn various Panchnamas and other relevant evidence for the purpose of proving the offence. After having found material against the respondents accused, charge-sheet came to be filed in the Court of learned Judicial Magistrate, First Class, Chikhli. As said Court lacks jurisdiction to try the offence, it committed the case to the Sessions Judge, Navsari as provided under section 209 of the Code.

4. Upon committal of the case to the Sessions Court, Navsari, the learned Sessions Judge framed charge at Exh.1 against the respondents - accused for the aforesaid offence. The respondents - accused pleaded not guilty and claimed to be tried.

5. In order to bring home charge, the prosecution has examined

14 witnesses and also produced various documentary evidence before the learned trial Court, as described in the impugned judgment and order.

6. On conclusion of evidence on the part of the prosecution, the trial Court put various incriminating circumstances appearing in the evidence to the respondent accused so as to obtain his explanation/answer as provided u/s 313 of the Code. In the further statement, the respondents - accused denied all incriminating circumstances appearing against him as false and further stated that he is innocent and false case has been filed against him. After hearing both the sides and after analysis of evidence adduced by the prosecution, the learned trial Judge acquitted the respondent accused of the offences, for which he was tried, as the prosecution failed to prove the case beyond reasonable doubt.

7. We have heard learned APP Ms. Shah appearing for the applicant State and Mr. Umang Oza, learned advocate for the respondents. We have minutely examined the documentary evidence provided to us by learned APP during the course of hearing.

8. We have gone through the proceedings of the present appeal and record of the trial Court, where it is found that respondent No.3 – Balubhai Maganbhai Patel has expired on 12.04.2021 and therefore, the present appeal is abated qua respondent No.3. It is noted that the present appeal is admitted by this Court vide order dated 10.01.1995.

9.1 There was a land dispute between two real brothers i.e. Durlabhbhai Bhagabhai and Chhaganbhai Bhagabhai, since long. One Naginbhai Ramabhai – a citizen of the village had intervened in the said dispute. Even though there was a

dispute between those two brothers regarding cutting of the trees in the field on 12.12.1990. Said Naginbhai therefore intervened in it. At that time, sons of Durlabhbai had given Axe blow to Naginbhai and he was hospitalised.

After two days of that incident i.e. on 14.12.1990, Durlabhbai and others went to the house of said Naginbhai and used filthy language to his wife – Shardaben. Gambhirbhai was a neighbour of Naginbhai. He had tried to stop the accused and told them not to use filthy language with a lady – Shardaben. At that time, the accused got provoked and since they were armed with sticks, had given stick blows to said Gambhirbhai. Gambhirbhai received injuries including head injuries and ultimately, succumbed to the injuries. The complainant is a wife of Gambhirbhai i.e. Shardaben.

9.2 It is a case of circumstantial evidence. Looking to the evidence of PW-1 – Shardaben Gambhirbhai at Exh.9, there are contradictions in her version. During the examination-in-chief, she has stated that she has given a complaint at the police station. Whereas, in her cross-examination, she has stated that firstly, she has given a complaint at the hospital and then at the police station. She has clearly stated that she has given a complaint at the hospital at about 10:00 a.m. and she has again given a complaint at the police station at about 6:00 p.m. Such fact cannot be believable. No one should give a complaint twice. Therefore, it smacks over-implication of the accused and/or the version may be changed by such time.

9.3 Further, PW-2 – Naginbhai Ramsinh Parmar – Exh.15 has stated that the incident has happened with him one day prior. The incident with him was happened on 12.12.1990, whereas the incident with Gambhirbhai was happened on 14.12.1990. This shows the bonafide of the said witness.

9.4 Further, PW-3 – Shardaben, w/o. Naginbhai at Exh.16 has stated that Durlabhbai has beaten her husband. At the same time, she has stated that the accused have beaten her husband. It is noted that the name of Durlabhbai was not there as accused at all. Therefore, the deposition of this witness cannot be believable.

9.5 There are contradictions regarding the blows given by the accused. PW-3 has stated in the deposition that the accused had not beaten Urmilaben. Whereas PW-4 has stated in his deposition that, Urmilaben was beaten by the accused. PW-4 has also stated in the deposition that, he doesn't know that who has given blows to whom. It shows that the version given by PW-4 gets changed and therefore, cannot be believable.

9.6 From the evidence of PW-4 – Prakashbai at Exh.17 vis-a-vis the evidence of PW-7 – Gotabhai at Exh.23, it reveals that after about 15-20 days from the commission of offence, the T.I. parade of the accused was done. It is noted that, the manner and method in which the T.I. parade was done smacks a lot. The trial Court has rightly observed in its judgment that before T.I. parade, the accused was presented before the complainant. They have clearly stated about the

procedure of the T.I. parade done by the police.

It is necessary to note that from Panchnama of T.I. parade, it is clearly found that all the dummy persons are from different age group and Panchnama does not speak about recording of the description of facts of these persons. This Hon'ble Court in the case of State of Gujarat versus Mahmad @ Munno Usmanbhai Chauhan reported in 1996 (2) GLR 821 has considered the aspect of Identification Parade and observed as under :

“(H.R. Shelat, J.)

8. Much has been emphasized upon the identification parade. Mahesh P. Pandya, the Deputy Mamlatdar and Executive Magistrate, held the identification parade. His evidence is recorded at Exh.

17. Before we discuss about his evidence, we may refer to the decision of this Court rendered in the case of Motilal Gajarbhai Chasisiya v. State of Gujarat, 1988(1) GLH 264, wherein it is laid down that, while holding the identification parade, care should be taken to procure the dummies of nearly the same age and physique of the accused, so that the accused may not be wrongly identified, and involved with the crime. In this case, we find the identification parade held was perfunctory and an empty formality also. Nothing has been mentioned in the I. P. panchnama (Exh. 15) of what height the dummies were. The Deputy Mamlatdar selected the dummies of the age of 20, 32, 43, 36 and 27 years. He did not take care to select the dummies falling within the same age group. The persons having similar physique were also not selected. It seems the Executive Magistrate did not ascertain the description of the respondent so as to select almost similar dummies. Description of the persons selected as the dummies is also not mentioned in the panchnama, but with a view to fill up the gaps that remained in the panchnama, the Deputy Mamlatdar has made rectifying statement at the time of his evidence. The panchas selected were the managers of the mid-day meal scheme. The panch witness (Exh. 14) has made it clear that they had to obtain the permit from the Mamlatdar's office for the mid-day meal scheme. Both the panchas were, therefore, not above the dominating effect of the Executive Magistrate. The panchas will, therefore, like to be attuned to the requirements of the prosecution and will never be impartial and bold. The dummies from the village of the respondent were not selected. In view of such circumstances, it was easy for Bhikhiben to single out the respondent. The identification parade held, therefore, cannot be termed veracious and credible, and consistent with the law made clear in the above referred decision. The learned Judge has elaborately dealt with the point of the identification parade assigning adequate reasons. We do not find any reason to disagree with him. We, therefore, cannot agree with the submission made on behalf of the appellant in this regard.

(A.N. Divecha, J. - concurring)

6. In order to establish the identity of the respondent connecting him with the

offences with which he stood charge at trial, the prosecution undertook the holding of the identification parade. It was done by the Executive Magistrate at the relevant time. His testimony has been recorded at Exh. 17 on the record of the case. The outcome of the identification parade has been reduced to writing and it is at Exh. 15 on the record of the case. The learned trial Judge has minutely scrutinised the evidence in that regard and highlighted quite a few infirmities found therein. The infirmities galore in the identification parade would leave no room for doubt that what was done was a mere empty formality. The Executive Magistrate had done his job very casually and in a cavalier and perfunctory manner."

9.7 It is also required to note that the police has not covered the face of the accused persons when they had taken to the Court and even they have brought for T.I. parade from the police station and for that also, benefit should be given to the accused. This aspect has been considered by this Court in the case of Motilal Gajarbhai Chasisiya versus State of Gujarat reported in 1988 (1) GLH 264.

9.8 The Test Identification Parade is a weak piece of evidence and the Hon'ble Apex Court in the case of Md. Sajjad alias Raju alias Salim versus State of West Bengal reported in AIR 2017 SC 642 has observed as under :

"15. In the case in hand, apart from the fact that there was delay in holding the Test Identification Parade, one striking feature is that none of the concerned prosecution witnesses had given any identification marks or disclosed special features or attributes of any of those four persons in general and the accused in particular. Further, no incident or crime had actually taken place in the presence of those prosecution witnesses nor any special circumstances had occurred which would invite their attention so as to register the features or special attributes of the concerned accused. Their chance meeting, as alleged, was in the night and was only for some fleeting moments.

16. In Subash v. State of U.P. 2, the aspects of delay as well as absence of any special features for identification and the effect thereof were considered by this court in paragraphs 8 and 9 as under:-

"8. Apart from this infirmity we further find that Shiv Shankar was not put up for test identification parade promptly. The identification parade has been held three weeks after his arrest and no explanation has been offered for the delay in holding the test identification parade. There is, therefore, room for doubt as to whether the delay in holding the identification parade was in order to enable the identifying witnesses to see him in the police lock-up or in the jail premises and make a note of his features.

9. Over and above all these things there remains the fact that a sufficiently long interval of time had elapsed between the date of occurrence when the witnesses had seen Shiv Shankar for a few minutes and the date of the test identification parade. It is, no doubt, true that all the three witnesses had correctly identified Shiv Shankar at the identification parade but it has to be borne in mind that

nearly 4 months had elapsed during the interval. It is relevant to mention here that neither in Exhibit Kha-1 nor in their statements during investigation, the eye-witnesses have given any descriptive particulars of Shiv Shankar. While deposing before the Sessions Judge they have stated that Shiv Shankar was a tall person and had "sallow" complexion. If it is on account of these features the witnesses were able to identify Shiv Shankar at the identification parade, they would have certainly mentioned about them at the earliest point of time because their memory would have been fresh then. Thus in the absence of any descriptive particulars of Shiv Shankar in Ex. Kha-1 or in the statements of witnesses during investigation, it will not be safe and proper to act upon the identification of Shiv Shankar by the three witnesses at the identification parade and hold that he was one of the assailants of Ram Babu. As pointed out in *Muthuswami v. State of Madras* 3 where an identification parade was held about 2½ months after the occurrence it would not be safe to place reliance on the identification of the accused by the eye-witnesses. In another case *Mohd. Abdul Hafeez v. State of A.P.* 4 It was held that where the witnesses had not given any description of the accused in the first information report, their identification of the accused at the sessions trial cannot be safely accepted by the court for awarding conviction to the accused. In the present case there was a long interval of nearly 4 months before the test identification parade was held and it is difficult to accept that in spite of this interval of time the witnesses were able to have a clear image of the accused in their minds and identify him correctly at the identification parade."

17. Similarly the issue of delay weighed with this court in *Musheer Khan v. State of M.P.* 5 in discarding the evidence regarding test identification as under:

"8. Insofar as the identification of A-5 is concerned that has taken place at a very delayed stage, namely, his identification took place on 24-1-2001 and the incident is of 29-11-2000, even though A-5 was arrested on 22-12- 2000. There is no explanation why his identification parade was held on 24- 1-2001 which is after a gap of over a month from the date of arrest and after about 3 months from the date of the incident. No reliance ought to have been placed by the courts below or the High Court on such delayed TI parade for which there is no explanation by the prosecution.""

9.9 Looking to the deposition of PW-5 – Manjuben at Exh.18, the role played by the investigating agency is doubtful. It clearly reveals that the police has not taken a complaint immediately. They have taken a complaint very late, for the reasons best known to them.

9.10 Further, looking to the entire evidence on record vis-a-vis medical evidence, the trial Court has recorded that all the so-called injuries of the injured are very minor and imaginary. If we consider the deposition of medical officer, it does not support the case of the prosecution.

9.11 Further, considering the aspect of recovery and discovery of muddamal – sticks, it transpires that all the witnesses sing a different song regarding it.

Therefore, it tilts the balance in favour of the respondents.

9.12 Looking to the entire evidence on record, medical evidence, panchnama and contradictory statements in the examination-in-chief as well as in cross-examination, it transpires that there are major contradictions in all the statements/depositions. This is a case of murder. No one can play with life imprisonment by over-implicating the innocent persons and/or falsely implicating the innocent persons. Considering the overall facts and circumstances of the case and the evidence on record, the trial Court has not committed any error in acquitting the respondents.

9.13 Under the circumstances, the learned trial Judge has rightly acquitted the respondents - accused for the elaborate reasons stated in the impugned judgment and we also endorse the view/finding of the learned trial Judge leading to the acquittal.

10. It is pertinent to note that the prosecution is required to prove the intention or knowledge of the accused persons, however, it is necessary that the prosecution is required to prove the intention or knowledge of the accused persons and it is not necessary that injury capable of causing death should have been inflicted by the accused persons. What is material to attract offense under section 302 of the IPC is the intention / motive or knowledge with which all the acts are done irrespective of its results. In order to attract the offence under section 302 of IPC, we have minutely examined the oral evidence and all the prosecution witnesses, we found that nothing is disclosed with regard to intention / motive or knowledge so as to constitute that there is anything on the part of the respondents – accused persons to commit act or to commit murder. In the present case, the prosecution has failed to discharge its duty to prove its case beyond reasonable doubt and the trial Court has rightly acquitted the accused persons.

11. We have minutely scrutinised the entire evidence available on record. Except relying upon aforesaid evidence, no any other direct evidence either oral or documentary is pressed into service to interfere with the findings of the learned trial Court leading to acquittal of the respondents accused. When substantial evidence is lacking to connect the accused with the crime or not brought on record sufficient evidence to establish the guilt, other corroborative evidence loses its significance or needs any consideration to upset the findings and therefore, there is no need to overburden the judgment anymore or needs any discussion of such evidence.

12. In view of above and on our own analysis and re-appreciation of the evidence, we do not find any infirmity or compelling reasons to interfere with the order of acquittal recorded by the trial Court. We have also perused the judgment and findings given by the trial Court and find that the same are in accordance with law.

13. It is a cardinal principle of criminal jurisprudence that in an acquittal appeal if

other view is possible, then also, the appellate Court cannot substitute its own view by reversing the acquittal into conviction, unless the findings of the trial Court are perverse, contrary to the material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable (Ramesh Babulal Doshi V. State of Gujarat - (1996) 9 SCC 225). In the instant case, the learned APP has not been able to point out to us as to how the findings recorded by the learned trial Court are perverse, contrary to material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable.

14. In the case of Ram Kumar v. State of Haryana, reported in AIR 1995 SC 280, Supreme Court has held as under:

"The powers of the High Court in an appeal from order of acquittal to reassess the evidence and reach its own conclusions under Sections 378 and 379, Cr.P.C. are as extensive as in any appeal against the order of conviction. But as a rule of prudence, it is desirable that the High Court should give proper weight and consideration to the view of the Trial Court with regard to the credibility of the witness, the presumption of innocence in favour of the accused, the right of the accused to the benefit of any doubt and the slowness of appellate Court in justifying a finding of fact arrived at by a Judge who had the advantage of seeing the witness. It is settled law that if the main grounds on which the lower Court has based its order acquitting the accused are reasonable and plausible, and the same cannot entirely and effectively be dislodged or demolished, the High Court should not disturb the order of acquittal."

15. As observed by the Hon'ble Supreme Court in the case of Rajesh Singh & Others vs. State of Uttar Pradesh reported in (2011) 11 SCC 444 and in the case of Bhaiyamiyan Alias Jardar Khan and Another vs. State of Madhya Pradesh reported in (2011) 6 SCC 394, while dealing with the judgment of acquittal, unless reasoning by the learned trial Court is found to be perverse, the acquittal cannot be upset. It is further observed that High Court's interference in such appeal is somewhat circumscribed and if the view taken by the learned trial Court is possible on the evidence, the High Court should stay its hands and not interfere in the matter in the belief that if it had been the trial Court, it might have taken a different view.

16. In the very recent judgment reported in 2021 (15) SCALE 184 in the case of Mohan @ Srinivas @ Seena @ Tailor Seena V/s. State of Karnataka, the hon'ble Apex Court has observed the scope of section 378 of the Code in Para : 20 to 22 as under :-

"20. Section 378 CrPC enables the State to prefer an appeal against an order of acquittal. Section 384 CrPC speaks of the powers that can be exercised by the Appellate Court. When the trial Court renders its decision by acquitting the accused, presumption of innocence gathers strength before the Appellate Court. As a consequence, the onus on the prosecution becomes more burdensome as there is a double presumption of innocence. Certainly, the court of first instance

has its own advantages in delivering its verdict, which is to see the witnesses in person while they depose. The Appellate Court is expected to involve itself in a deeper, studied scrutiny of not only the evidence before it, but is duty bound to satisfy itself whether the decision of the trial Court is both possible and plausible view. When two views are possible, the one taken by the trial court in a case of acquittal is to be followed on the touchstone of liberty along with the advantage of having seen the witnesses. Article 21 of the Constitution of India also aids the accused after acquittal in a certain way, though not absolute. Suffice it is to state that the Appellate Court shall remind itself of the role required to play, while dealing with a case of an acquittal.

21. Every case has its own journey towards the truth and it is the Court's role undertake. Truth has to be found on the basis of evidence available before it. There is no room for subjectivity nor the nature of offence affects its performance. We have a hierarchy of courts in dealing with cases. An Appellate Court shall not expect the trial Court to act in a particular way depending upon the sensitivity of the case. Rather it should be appreciated if a trial Court decides a case on its own merits despite its sensitivity.

22. At times, courts do have their constraints. We find, different decisions being made by different courts, namely, trial court on the one hand and the Appellate Courts on the other. If such decisions are made due to institutional constraints, they do not augur well. The district judiciary is expected to be the foundational court, and therefore, should have the freedom of mind to decide a case on its own merit or else it might become a stereotyped one rendering conviction on a moral platform. Indictment and condemnation over a decision rendered, on considering all the materials placed before it, should be avoided. The Appellate Court is expected to maintain a degree of caution before making any remark."

17. Considering the aforesaid facts and circumstances of the case and law laid down by the Hon'ble Supreme Court while considering the scope of appeal under Section 378 of the Code of Criminal Procedure, no case is made out to interfere with the impugned judgment and order of acquittal.

18. In view of the above and for the reasons stated above, the present Criminal Appeal deserves to be dismissed and is accordingly dismissed.