

(2016) 07 GUJ CK 0071
In the Gujarat High Court
Case No : Criminal Appeal No. 498 of 2006

State of Gujarat

APPELLANT

Vs

Hanu Dharshi Vaghri

RESPONDENT

Date of Decision : 19-07-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 273

Evidence Act, 1872 — Section 33

Penal Code, 1860 (IPC) — Section 376, Section 395, Section 397, Section 398, Section 447

Citation : (2017) 2 GLR 1059

Hon'ble Judges : Mr. Anant S. Dave and Mr. B.N. Karia, JJ.

Bench : Division Bench

Advocate : Ms. Moxa K. Thakker, Additional Public Prosecutor, for the Appellant No. 1; Mr. Bhavesh, Hajare for Ms. S.J. Sheikh, Advocates, for the Opponent/respondent No. 1

Final Decision : Allowed

Judgement

Mr. B.N. Karia, J.(Oral) - This criminal appeal is preferred by the State of Gujarat against the respondent under Section 378(1)(3) of the Code of Criminal Procedure, 1973, against the order of acquittal passed by the learned Additional Sessions Judge, Second Fast Track Court No.2, Rajkot, in Sessions Case No. 219/98 dated 15.01.2005.

2. Brief facts of the prosecution case are that the complainant Alabhai Arjanbhai lodged a complaint before Rajkot Taluka Police Station inter alia stating that on the night of 27/7/1994 and 28/7/1994, when he and his son Ranchhodbhai were sleeping outside their house in their vadi field and his wife and daughter-in-law were sleeping inside the house, at about 1:30 hours complainant's son Ranchhodbhai raised shouts and complainant got awoken and he saw that there were about 8 persons near his house in his vadifield. He had seen them in the electricity light, which is outside his house. He had seen those 8 persons with sticks, pipes and one of them was having battery in his hand. He flashed light of

battery on complainant and another person gave pipe blow on head of the complainant and another blow on his left hand. The complainant and his son raised shouts and also ran towards west direction. One of them also gave stick blow on the leg and on the side on knee joints. Then the accused also went towards the vadifield of Laghrabhai Kanabhai. The complainant was taken to hospital by villagers of his village viz., Bharvad Lakhabhai and Chhaganbhai Devabhai and Dhirubhai Morarji in a matador. Nothing was missing from the house of the complainant Alabhai. His wife and daughter-in-law also received injuries on account of beating by the accused persons, who had come to the vadifield of complainant. The complainant lodged complaint and the offence was registered. The said persons had also gone to the vadifield of Laghrabhai Kanabhai and the accused persons were 8 to 10 in number and they threw stones on the house of complainant and complainant and his son were sleeping in front of their house in open field and his wife and daughter-in-law and two small children of his son were sleeping in a shade made in front of their house. On account of stone throwing, they were awakened and they were also beaten. The complainant and his sons ran away and some of the accused persons entered into the house of witness Lagharabhai Kanabhai and ransacked their house and damaged goods in their house. They have taken golden nose ring of 4 tola and silver Hirakedi of 10 tola, silver kadala of 600 gram and cash amount of Rs.1100/was also taken away from the house of complainant. The prosecution also alleged that the said 8 to 10 accused persons had also gone to the vadifield of witness Mavajibhai Damabhai. Said witness Mavajibhai Damabhai while sleeping in the courtyard of his house, in his vadi, at about 2:00 a.m at night, he got awakened and the dogs were barking. He came outside his vadifield on road and had seen six persons. Out of them, two were having sticks, two were having knives and two were having Dhariyas. They asked him whether the thieves had come and he denied. Those six persons were speaking mixed Hindi, Gujarati language and thereafter they had gone to the vadifield of complainant and the witnesses had also followed them. One of them pointed out knife at him and touched it to his body and asked him to give whatever he had with him. When he stated of having nothing, he was beaten with sticks. Out of them, three went into his house, ransacked his house and one of them told him that not to raise any shouts, otherwise, he would be beaten. He further stated that 1,000/rupees in cash and one umbrella and one battery were taken away from his house. His wife Vijuben was raped by three accused persons at the fear of knife and threat was given to kill her husband. The prosecution also alleged that the accused committed rape on Dhaniben wife of Kira Hamir in house of Vadifield of Vihabhai Bharvad at whose vadifield, she and her husband were staying to work as labourers. Thereafter a case was registered for the offence punishable under Sections 395,397,398,376,447 of Indian Penal Code and under Section 37(1), 135 of the Bombay Police Act. On completion of the investigation the police authority submitted the charge sheet before the learned J.M.F.C and he committed the Case to the Sessions Court, Rajkot, under the provisions of Section 209 of the Code of Criminal Procedure,1973.

3. Heard learned APP Ms. Moxa Thaker, for the State and Mr. Bhavesh Hajare, learned advocate for Ms. S.J. Shaikh, learned advocate for the respondent-accused. It is submitted by Ms. Moxa Thakker, learned APP for the State that the procedure adopted by the learned trial Court of relying upon the evidence recorded in earlier Sessions Case No. 170 of 1995 and without the same being brought on record of the present case, and even without exhibiting the same and/or producing the copies of the same on record and thereby acquitting the respondent-accused is not known to the Code of Criminal Procedure. She has relied upon Section 273 Cr.P.C and argued that all oral evidences were required to be taken during the course of the trial in presence of the accused. She also relied upon Section 33 of the Indian Evidence Act. She further relied on Section 299 Cr.P.C to contend that if it is proved that an accused person have absconded, and that there is no immediate prospect of arresting him, the Court is competent to try such person for the offence committed by him and in his absence, examine the witnesses (if any) produced on behalf of the prosecution and record their deposition. She has further argued that the judgment and order passed by the learned trial Judge acquitting the respondent herein, relying upon the evidences recorded in earlier Sessions Case No. 170 of 1995 and without producing copies of the said evidence on record of the present case, requires to be quashed and set aside. She has also requested to remand the matter to the learned trial Court to decide the matter afresh on merits. She has also relied upon two judgments of the Hon"ble Apex Court reported in (2014) 12 SCC 400 in the case of Vijay Ranglal Chorasaiy v. State of Gujarat and allied matters and also in the case of Nirmal Singh v. State of Haryana reported in (2000) 4 SCC 41.

4. On the other side, learned advocate Mr. Bhavesh Hajare for Ms. S.J. Shaikh, learned advocate appearing on behalf of the respondent has tried to support the judgment and order passed by the learned trial Court submitting that there is no case against the respondent and the learned trial Judge has rightly acquitted the respondent, more particularly, when an application was submitted on behalf of the respondent-accused at Exh.24, which he has declared that against the co-accused of the same offence Sessions Case No. 170 of 1995 was tried, deposition of the prosecution witnesses were recorded and documents were also produced by the prosecution, respondent has no objection to consider the same evidence and documents recorded earlier in Sessions Case No. 170 of 1995, and therefore, the trial Court has rightly considered the same and there is no illegality committed by the trial Court, and therefore, it is requested by the learned advocate to dismiss the present appeal.

5. Having considered the facts of the case, submissions made by the learned advocates for the respective parties and record of the trial Court, it emerges from the record that the criminal complaint came to be filed against the six accused persons including the present respondent herein and at the relevant point of time three accused persons were absconding, and therefore, charge sheet was filed only against three accused persons, who were tried by the learned Additional Sessions Judge, Rajkot in Sessions Case No. 169 of 1995.

During the trial of the above said Sessions Case i.e. 169 of 1995, which was against the three accused persons other than the respondent herein, the prosecution produced oral as well as documentary evidences and after considering the same, the learned Additional Sessions Judge, Rajkot, acquitted other three accused persons. Subsequently, another accused Hanu Dharshi Vaghri was arrested, and therefore, supplementary charge sheet came to be filed against him on 31.07.2002, and he was prosecuted. After considering the record of Sessions Case No. 170/95 he was acquitted by the learned Additional Sessions Judge, Second Fast Track Court, Rajkot, in Sessions Case No. 219 of 1998, on 15.01.2005.

6. As stated above, the present respondent submitted an application before the learned trial judge stating that against the co-accused Sessions Case No.170 of 1995 was tried, in which testimony of the prosecution witnesses were recorded as well as documentary evidence was produced and he has no objection, if they are considered in the present case. The learned trial judge noted that in a pursis submitted by the respondent-accused total 1 to 52 witnesses were examined by the prosecution and documentary evidence was produced. But none of the certified copies of the documents were produced in the present Sessions Case, which was exhibited vide 25 to 93. However, if the record of Sessions Case No. 170 of 1995 is considered, it was found that the testimony of the prosecution witnesses and documentary evidence produced were exhibited afresh. It appears from the judgment and order passed by the learned trial judge that only one witness i.e. the Investigating Officer was examined vide exh. 97 and closing pursis was filed by the prosecution. Only two documents were produced i.e. arrest panchnama of the accused Exh. 98 and panchnama of the place of offence Exh.99. No other documentary evidences were produced, nor any witnesses from the prosecution were examined in the trial Court. Of course, the learned trial judge has considered oral testimony of the prosecution witnesses recorded in Sessions Case No. 170 of 1995, but the copies of their evidence in the form of oral testimonies were never produced on the record. Then, the prosecution has filed its pursis vide Exh. 101 to close its evidence. It also appears that the prosecution has not objected to the pursis Exh.24 being submitted by the respondent, declaring the facts to consider oral evidence of the prosecution witnesses produced in Sessions Case No. 170/95 and documentary evidence in the same case. This Court has called for record and proceedings of the trial Court of Sessions Case No. 219/98. It is found that not a single evidence, either documentary or oral, is produced on record of the present case, and instead of that, the learned trial Judge has considered the entire oral as well as documentary evidence recorded in Sessions Case No. 170/95, acquitting the respondent herein. Such a procedure and method adopted by the learned Additional Sessions Judge, Fast Track Court No.2, Rajkot, is never found in the Code of Criminal Procedure, and this Court cannot approve the same. If we look at the provisions of Section 273 of the Code of Criminal Procedure and the evidences taken in the course of the trial, every proceeding shall have to be

taken in presence of the accused, or when his personal attendance is dispensed with, in presence of his pleader. It is pertinent to note that in earlier trial, being Sessions Case No. 170/95, which was not against the respondent herein, the evidences were recorded in respect of the accused persons who were tried in the said Sessions Case. If we assume that depositions recorded and the evidence recorded in Sessions Case No. 170/95 can also be relied upon, the accused in a subsequent trial, at least those evidences, depositions are to be exhibited and brought on the record in subsequent trial. Same thing had happened in a cognate matter in Sessions Case No. 169/95, therefore, this Court was also pleased to pass an order in Criminal Appeal No. 2236/2005 partly allowing the appeal and thereby quashing the order passed by the learned trial judge in Sessions Case No. 218/98. It appears that after filing pursis by the respondent Exh.24, before the trial Court, no witnesses were examined by the prosecution except Investigating Officer, nor any documents were produced on the record afresh, or of the Sessions Case No. 170/95 tried earlier by the learned Additional Sessions Judge. Not a single evidence of the prosecution witnesses as stated above or any other documents were produced on the record of present case. Copy of none of the evidences of the depositions recorded in Sessions Case No. 170/95 are not on record of the present case and instead of that, considering the evidence/deposition recorded in Sessions Case No. 170/95 without placing them on record, learned judge has acquitted the respondent by merely considering the record of Sessions Case No. 170/95. It is also noted by the learned trial judge that not a certified copy of a single document was produced on record of the present case. However, he has proceeded to rely upon the record of the previous Sessions Case. As referred above, this cannot be approved and the same is dehors the procedure prescribed in the Code of Criminal Procedure. Under the circumstances, we are of the view that the judgment and order of acquittal passed by the learned trial judge is required to be quashed and set aside. The matter should be remanded to the learned trial judge for deciding the same afresh in accordance with law and on merits, after following due procedure of recording evidence, deposition etc, and thereby following the correct procedure. It is clarified that this Court has not expressed any opinion on merit of the case and trial Court would not be influenced or impressed upon, while conducting the trial of the order passed by this Court.

7. For the reasons stated herein above, this appeal is hereby partly allowed. The judgment and order passed by the learned trial judge in Sessions Case No. 219/98 dated 15.1.2005, is hereby quashed and set aside and the matter is remanded back to the trial Court for deciding the same afresh and in accordance with law and on merits, after following the procedure of recording evidence/deposition and in consonance with the provisions of section 273 of the Code of Criminal Procedure, and Section 33 of the Indian Evidence Act.

8. The offence is alleged to have been committed in the year 1998. The trial court is directed to conclude the trial on remand, within a period of six months from the date of receipt of writ of this judgment and order.