

(2015) 10 GUJ CK 0002
In the Gujarat High Court

Case No : Criminal Appeal Nos. 179, 178 of 2011 and 2067 of 2010

State of Gujarat

APPELLANT

Vs

Jayantibhai Hemchandbhai

RESPONDENT

Date of Decision : 30-10-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 357
Penal Code, 1860 (IPC) — Section 114, 232, 302, 304, 307
Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 —
Section 3(1)(v), 3(1)(x)

Citation : (2015) 10 GUJ CK 0002

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

Bench : Division Bench

Advocate : Harsh K. Thakar, Advocate and C.M. Shah, A.P.P., for the Appellant;
Hriday Buch and Siddharth H. Dave, Advocates, for the Respondent

Judgement

K.S. Jhaveri, J.—All these appeals are preferred against judgment and order 18.11.2010 passed by learned Special Judge and Sessions Judge, Patan in Special Case (Atro) No. 11 of 2010. By the said judgment, accused Nos. 1 and 2 both have been acquitted from the charges of offences punishable under Sections 302 , 307 , 323 , 504 and 114 of the Indian Penal Code as well as for offence under Section 3(1)(x) and 3(1)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. While accused No. 1 was convicted for offence punishable under Section 304 , Part-II of IPC and ordered to undergo four years rigorous imprisonment with fine of Rs. 5,000/- and in default of payment of fine, further imprisonment of ten days was imposed. Being aggrieved by acquittal of the accused persons the State has preferred Criminal Appeal No. 178 of 2011, while Criminal Appeal No. 179 of 2011 is filed for enhancement of sentence imposed upon accused No. 1 and Criminal Appeal No. 2067 of 2010 is preferred by accused No. 1 against his conviction.

2. As all these appeals are arising out of the same judgment and since the evidence is common in all these appeals, the same are taken up for hearing

together.

3. The case of the prosecution is that on 3.12.2009 at about 19.30 hours, at Village-Sankhari, when the complainant Parmar Bharatbhai Kuberbhai was passing near the shop of grain, accused persons abused him by saying "Sala Dheda Amari Upar Te Agau Karel Case Nu Samadhan Kem Karto Nathi?". Thereafter, with an intention to kill him, accused No. 1 inflicted knife blow on his stomach and accused No. 2 inflicted stick blows on his legs and thereby caused grievous injuries to him and he died on 14.12.2009 during the course of treatment.

3.1 Investigation was carried out and the accused persons were arrested and charge-sheet was submitted in the Court of learned Magistrate. However, as the case was exclusively triable by the Court of Sessions, the same committed to Sessions Court. Thereafter, charges were framed against the accused persons. The accused pleaded not guilty and claimed to be tried.

3.2 During the trial, the prosecution had examined following witnesses;

3.3 The prosecution has also produced and relied upon following documentary evidence:-

3.4 At the end of trial, the Court below recorded further statements of accused persons under Section 313 of Cr.P.C. and thereafter, passed the impugned judgment and order awarding the sentence, as aforesaid, and also acquitting the accused persons of some of the charges levelled against them. Being aggrieved and dissatisfied with the impugned judgment of the trial Court, present appeals are preferred before this Court.

4. Mr. Hriday Buch, learned advocate for the accused has taken us through the evidence and submitted that the impugned judgment and order is against the evidence on record. He submitted that the prosecution has failed to prove its case against the accused. He also submitted that the weapon recovered from accused No. 1 is not used to cause death as no blood stains were found on the weapon. He submitted that there are contradictions in the evidence of the prosecution witnesses and relying upon them accused No. 1 could not have been convicted for the offence alleged against him. He also submitted that the incident in question occurred in dark night and there was no opportunity to identify the assailants. He also submitted that no motive is proved by the prosecution for the alleged offence. He also submitted that even the medical evidence is not supporting the case of the prosecution, therefore, he submitted that the accused is wrongly convicted by the learned trial Judge and he is required to be acquitted by reversing the impugned judgment.

5. On the other hand, Ms. C.M. Shah, learned APP appearing for the State has submitted that the order of conviction recorded against the appellant is just and proper and she has supported the conviction recorded by impugned judgment. So far as Criminal Appeal No. 179 of 2011 is concerned, which is preferred for

enhancement of sentence imposed on accused No. 1, she has taken us through the evidence and contended that the trial Court has committed an error in imposing lesser sentence upon the accused inspite of voluminous evidence against him and contended that the trial Court ought not to have imposed such a lesser punishment. She also submitted that without appreciating the documentary as well as oral evidence available on the record of the case in its proper perspective, learned Judge has erred in imposing lesser punishment. She further submitted that the learned Judge has also erred in not properly appreciating the gravity of the offence committed by the accused while imposing the sentence and thereby committed grave error by imposing lesser punishment. She has taken us through the medical evidence and submitted that it is a grievous hurt, therefore, sentence imposed upon the accused is required to be enhanced. She has taken us through the judgment and contended that since it is proved beyond reasonable doubt that the appellant had caused injury, the sentence imposed upon the accused No. 1 is not adequate and it is required to be enhanced. She also submitted that the trial Court has committed an error in not believing the version of the complainant and other witnesses and considering the medical evidence, it can be said that the accused No. 1 is guilty of offence under Section 304 , part II and therefore, he should have been convicted for the same and accordingly, sentence imposed upon him is required to be enhanced. She also submitted that the learned trial Judge has committed an error in taking lenient view while imposing sentence on accused No. 1 and therefore, the sentence imposed is required to be enhanced. She also submitted that looking to the facts of the present case, when the prosecution has proved the case beyond reasonable doubt and when the learned Judge has also convicted the respondent-accused No. 1, the learned Judge ought to have imposed appropriate sentence provided under the provision of IPC. Therefore, she submitted that Criminal Appeal No. 179 of 2011 may be allowed and the sentence imposed by the trial Court may be enhanced.

6. So far as Criminal Appeal No. 178 of 2011 is concerned, which is preferred against acquittal of accused persons from the charges of offences punishable under Sections 302 , 307 , 232 , 504 and 114 of IPC and Sections 3(1)(x) and 3(1)(v) of the Atrocities Act, it is submitted by learned APP that acquittal is against law and evidence on record. She submitted that the learned Judge has erred in appreciating the evidence of the prosecution witnesses wherein the prosecution has established that the respondents-accused were guilty of the offence. She, therefore, submitted that by allowing Criminal Appeal No. 178 of 2011, impugned judgment acquitting the respondents-accused of the charges levelled alleged against them may be set aside.

7. We have heard Mr. Hriday Buch, learned advocate for the accused and Ms. C.M. Shah, learned APP for the State. We have also gone through the evidence on record. Considering the evidence on record and particularly the dying declaration, Exh. 35 and the complaint Exh. 29 filed by the deceased complainant, involvement of the accused in the offence is established. In view of

the medical evidence, it is rightly found by the learned trial Judge that the accused had attacked the victim and thereby caused the injuries and, therefore, accused No. 1 is rightly convicted for the offence under Section 304 , Part-II of IPC. As per the medical evidence, the cause of death is cardio-respiratory arrest due to abdominal injuries and their complications, therefore, accused No. 1 is rightly convicted for the offence under Section 304 , Part-II of IPC. We are in agreement with the view taken by the learned Sessions Judge while convicting the accused. However, considering the evidence on record, it can be said that the accused is guilty of causing injury and enhancement appeal being Criminal Appeal No. 179 of 2011 deserves to be allowed by enhancing the sentence to five years rigorous imprisonment instead of four years rigorous imprisonment imposed by the trial Court. In view of these findings Criminal Appeal No. 2067 of 2011 filed by the accused against his conviction deserves to be dismissed. However, it is submitted by learned advocate Mr.Buch appearing for the accused has pressed in service the decision of the Apex Court in Ankush Shivaji Gaikwad Vs. State of Maharashtra, and decision of this Court in Criminal Appeal No. 1552 of 2004, and submitted that as held therein the principle of sub-section (3) of section 357 of Cr.P.C. is empowering the Court to award compensation. He also submitted that even an affidavit of elder brother of the deceased is filed in this regard wherein it is stated that they have no objection if the sentence awarded to accused No. 1 is suspended in lieu of compensation. Therefore, looking to the special circumstances and the principles enunciated in the case of Ankush Shivaji Gaikwad Vs. State of Maharashtra, , since accused No. 1 has agreed to pay an additional amount of Rs. 1,00,000/- towards compensation to the family of the victim, if he pays such additional amount of compensation within a period of ten weeks from today he is not required to undergo the period of sentence imposed upon him.

8. So far as Criminal Appeal No. 178 of 2011 is concerned, which is preferred against acquittal of the accused persons of some of the charges levelled against them, we have heard learned APP for the State and learned advocate for the respondent-accused. We have also gone through the evidence on record and the impugned judgment. 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 Vs. State of Kerala and Another, , the Apex Court has narrated the powers of 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 view 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 and Others Vs. State of Karnataka, , 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, re-appreciate 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."

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 the case of State of Goa Vs. Sanjay Thakran and Another, , the Apex 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 and Others, and in Girja Prasad (Dead) by LRs. Vs. State of Madhya Pradesh, . Thus, the powers, which this Court may exercise against an order of acquittal are well settled.

8.5 In the case of Lunaram Vs. Bhupat Singh and Others, , 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 postmortem 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 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 Mookkiah and Another Vs. State rep. by the Inspector of Police, Tamil Nadu, , 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,]"

8.7 It is also a settled legal position that in acquittal appeal, the appellate Court is not required to rewrite 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 Alias Vemareddy and Another, , wherein it is held as under:

"...This Court has observed in Girja Nandini Devi and Others Vs. Bijendra Narain Choudhury, that it is not the duty of the Appellate 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 is not necessary.

9. We have gone through the oral as well as documentary evidence on record. While passing the impugned judgment, the learned trial Judge has rightly observed that it is not proved that the accused have not committed any offence under the Atrocity Act and they have not used any word which would insult the caste of the deceased in public. From the evidence on record, the prosecution has also failed to prove offence under Sections 302 , 307 , 323 , 504 and 114 of IPC against the accused persons. It is also rightly found from the evidence on record that accused cannot be said to be guilty of abetment in causing death of the deceased. Therefore, they are rightly acquitted by the learned trial Judge. From the above, it is clear that the learned Judge has not committed any error while acquitting the accused persons of some of the charges levelled against them. Moreover, learned APP is not in a position to show any evidence on record so as to take a contrary view in the matter or to conclude 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 material evidence while acquitting the accused persons. Hence, we are of the considered opinion that the Court below has not committed any error in acquitting the respondents-accused of some of the charge levelled against them. We are in complete agreement with the reasonings given by and the findings arrived at by the Court below in the impugned judgment and, therefore, find no reasons to entertain this appeal and this appeal is also required to be dismissed.

10. For the foregoing reasons, the following final order is passed.

11. In view of above discussion, Criminal Appeal No. 178 of 2011 preferred by the State against acquittal of the accused persons is dismissed.

12. So far as Criminal Appeal No. 179 of 2011 is concerned, the same is partly

allowed. The impugned judgment and order dated 18.11.2010 passed by learned Special Judge and Sessions Judge, Patan in Special Case (Atro) No. 11 of 2010 is modified to the extent that the sentence imposed on accused No. 1 for offence punishable under Section 304 , Part-II is enhanced from two years rigorous imprisonment to five years rigorous imprisonment. The period of imprisonment, the accused No. 1 has already undergone, shall be given set off. Looking to the special circumstances and the principles enunciated in the case of Ankush Shivaji Gaikwad Vs. State of Maharashtra, , since accused No. 1 has agreed to pay an additional amount of Rs. 1,00,000/- towards compensation to the family of the victim, if he pays such additional amount of compensation within a period of ten weeks from today he is not required to undergo the period of sentence imposed upon him. Upon deposit of Rs. 1,00,000/- towards compensation by accused No. 1, as aforesaid, the same shall be paid to Shri Vipulbhai Bharatbhai Parmar by an account payee cheque, which shall be used for the marriage of his younger sister. If accused No. 1 fails to pay the amount of compensation within ten weeks from today, he shall surrender before the jail authorities to undergo the sentence as awarded. Bail bond, if any, stands cancelled. Record and Proceedings be sent back to the trial Court concerned forthwith.

13. In view of above order passed in Criminal Appeal No. 179 of 2011, Criminal Appeal No. 2067 of 2010 preferred by accused No. 1 against his conviction recorded by impugned judgment and order dated 18.11.2010 passed by learned Special Judge and Sessions Judge, Patan in Special Case (Atro) No. 11 of 2010 is dismissed.