

(2015) 10 GUJ CK 0114
In the Gujarat High Court
Case No : Criminal Appeal No. 1362 of 1993

State of Gujarat

APPELLANT

Vs

Jeetendra Popatbhai and Others

RESPONDENT

Date of Decision : 06-10-2015

Acts Referred:

Bombay Police Act, 1951 — Section 135(1)
Criminal Procedure Code, 1973 (CrPC) — Section 313, 417
Penal Code, 1860 (IPC) — Section 114, 302, 34, 504

Citation : (2015) 10 GUJ CK 0114

Hon'ble Judges : M.R. Shah, J; Kaushal Jayendra Thaker, J

Bench : Division Bench

Advocate : Himanshu Patel, A.P.P., for the Appellant

Final Decision : Dismissed

Judgement

M.R. Shah, J—Feeling aggrieved and dissatisfied with the impugned judgment and order of acquittal passed by the learned Additional Sessions Judge, Jamnagar (hereinafter referred to as "the trial Court") dated 03/09/1993 in Sessions Case No. 36/1993 by which the learned trial Court has acquitted both the accused for the offences punishable under Sections 302 read with Section 34 of the Indian Penal Code ("IPC" for short) and Section 135(1) of the Bombay Police Act, State has preferred the present Criminal Appeal.

2. At the outset, it is required to be noted that during pendency of the present Criminal Appeal, respondent No. 1-original accused No. 1-Jeetendra Popatbhai expired and hence vide order dated 26/08/2015 the present Criminal Appeal qua respondent No. 1-original accused No. 1 was dismissed as having been abated.

Under the circumstances, the present Criminal Appeal is required to be considered qua respondent No. 2-original accused No. 2.

2.1 As per the case of the prosecution the incident took place on 28/10/1992 at about 5:00 a.m. in the morning. According to the prosecution there was some

dispute with respect to the property between the deceased and original accused No. 1 and, therefore, at about 5:00 a.m. in the early morning when the deceased left the house and was going to the vada land for feeding cattle and on reaching the skirt of the village near one school his brother-Jeetendra Popatbhai (original accused No. 1) gave pipe blow on his head and because of that he fell down and at that time other two unknown persons caught hold of him and his bhabhi (original accused No. 2)-wife of original accused No. 1 poured acid on him. According to the prosecution, immediately the deceased shouted for help and at that time his father-Popat Devraj, his wife-Jayaben and son-Jayesh rushed to the place of the incident and at that time his younger brother Jeetendra Popatbhai (original accused No. 1) ran away. The injured, (who subsequently died, while taking treatment in the hospital), was immediately taken to Kalavad Hospital where he was given primary treatment and thereafter he was taken to Ervin Hospital, Jamnagar. According to the prosecution, the deceased, who at the relevant time was conscious gave the complaint, which was recorded by P.S.I., Harishkumar Parmar of City "B" Division Police Station, Jamnagar, which was subsequently registered as Entry No. 0 as Kalavad Police Station was having the jurisdiction. The FIR was lodged against original accused Nos. 1 and 2 and two other unknown persons initially for the offences punishable under Sections 302, 114, 504 of the IPC and Section 135(1) of the Bombay Police Act, which was subsequently registered as C.R. No. I-167/1992 with Kalavad Police Station, Jamnagar having jurisdiction. The concerned Police Officer of Kalavad Police Station, Jamnagar started the investigation. He collected the documentary evidences, more particularly, the medical evidence and recorded the statement of the concerned witnesses, including Dr. Manaharkumar Mehta, Medical Officer, Ervin Hospital and Dr. Hiteshbhai Rabari, Resident Doctor In charge Surgeon of Ervin Hospital, Jamnagar. Yadi was sent by the P.S.I., Head Constable Shri Harishkumar Parmar to the Executive Magistrate at about 9:30 a.m. requesting to record the dying declaration of the deceased. The Executive Magistrate, Govindbhai Tapubhai Piparia (P.W. 18) immediately went to the hospital and recorded the dying declaration of the deceased at about 10:15 a.m. Thereafter, after a period of approximately 16 days and while taking the treatment in the hospital deceased died and, therefore, offence punishable under Section 302 of the IPC came to be added. On conclusion of the investigation, Officer filed the chargesheet against both the accused for the offences punishable under Section 302 read with Section 114 or Section of the IPC and also under Section 135(1) of the Bombay Police Act. As the case was exclusively triable by the Court of Sessions, the learned Magistrate committed the case to the Sessions Court, Jamnagar. The learned Additional Sessions Judge, Jamnagar framed the charge against the accused at Exh. 2 for the offences punishable under Section 302 and Section 114 or Section 34 of IPC and Section 135(1) of the Bombay Police Act for having killed the deceased-Premji. Both the accused pleaded not guilty and, therefore, the case came to be tried by the learned trial Court for the aforesaid offences.

2.2 To bring home the charge against accused, the prosecution examined as many 29 witnesses as under;

Through the aforesaid witnesses the prosecution brought on record the following documentary evidences;

2.3 After closing of the evidence by the prosecution, further statement of the accused came to be recorded under Section 313 of the Code of Criminal Procedure in which both the accused, as such, denied having committed any offences. Thereafter, on appreciation of the evidence and more particularly considering the material contradictions in the dying declarations recorded by the Executive Magistrate (Exh. 43) and the complaint recorded by P.S.I. Shri Harishkumar Parmar (P.W. 7), which was given by the deceased himself, by the impugned judgment and order the learned trial Court has acquitted both the accused by giving benefit of doubt, which has given rise to the present Criminal Appeal.

3. Shri Himanshu Patel, learned APP appearing on behalf of the appellant-State has vehemently submitted that the learned trial Court has materially erred in acquitting the accused. It is vehemently submitted that in the present case, as such, there are two dying declarations, one in the form of complaint given by the deceased himself, which was recorded by P.S.I. Shri Harishkumar Parmar, which was recorded immediately when the deceased was admitted at Ervin Hospital and the other is the dying declaration recorded by the Executive Magistrate. It is submitted that the complaint given by the deceased himself was registered as FIR. It is submitted that the complaint given by the deceased recorded by the Head Constable in presence of (P.W. 7) P.S.I. Shri Harishkumar Parmar has been proved by the prosecution beyond doubt and by leading cogent evidence. It is submitted that therefore the learned trial Court has materially erred in discarding and/or not relying upon the said dying declaration.

3.1 It is further submitted by Shri Patel, learned APP that the complaint given by the deceased himself, which was thereafter considered as FIR was prior in time in which the deceased specifically stated that original accused No. 1-Jeetendra Popatbhai gave pipe blow on the head and at that time he fell down and two other unknown persons caught hold of him and original accused No. 2 poured acid on him. It is further submitted by Shri Patel, learned APP that even the other prosecution witnesses in their depositions have fully supported the case of the prosecution. It is submitted that therefore the learned Judge has materially erred in acquitting the accused.

3.2 It is further submitted by Shri Patel, learned APP that in the present case even the muddamal articles like acid has been discovered at the instance of original accused No. 1 and handkerchief with holes dues to acid has been discovered at the instance of original accused No. 2 and that too from her house. It is submitted that therefore and in view of the dying declaration (Exh. 91) and other documentary as well as oral evidences on record, the learned trial Court

ought to have convicted the accused.

Making the above submissions it is requested to allow the present Criminal Appeal and quash and set aside the impugned judgment and order of acquittal passed by the learned trial Court.

4. The present Criminal Appeal is opposed by Shri Kanara, learned advocate appearing on behalf of the accused. In view of death of original accused No. 1 during pendency of the present Criminal Appeal, the present Appeal is required to be considered qua original accused No. 2 only.

4.1 It is submitted that on appreciation of evidence, the learned trial Court has rightly disbelieved both the dying declarations i.e. dying declarations at (Exh. 91) and (Exh. 43). It is submitted that there are material contradictions in both the dying declarations i.e. dying declarations at (Exh. 91) and (Exh. 43) and, therefore, by giving benefit of doubt the learned trial Court has not committed any error in acquitting original accused No. 2.

4.2 It is further submitted by Shri Kanara, learned advocate appearing on behalf of original accused that in the dying declaration recorded by the Executive Magistrate (Exh. 43), which is also relied upon by the prosecution, the deceased had not named original accused No. 2. It is submitted that in the entire dying declaration (Exh. 43) recorded by the Executive Magistrate the deceased had named original accused No. 1 and other two unknown persons. However, the deceased had not stated that original accused No. 2 poured acid on him. It is submitted that therefore when on appreciation of evidence the learned trial Court has acquitted the accused by giving benefit of doubt and the view taken by the learned trial Court is plausible, it is requested not to interfere with the impugned judgment and order of acquittal.

4.3 Shri Kanara, learned advocate has vehemently submitted that this is an Appeal against the order of acquittal passed by the learned trial Court. It is submitted that the Hon'ble Supreme Court in the case of Muralidhar @ Gidda and Another Vs. State of Karnataka, AIR 2014 SC 2200 : (2014) AIRSCW 2278 : (2014) CriLJ 2365 : (2014) 4 SCALE 693 : (2014) 5 SCC 730 has considered the scope and ambit and the powers of the appellate Court while considering the Appeal against the acquittal. It is submitted that in the aforesaid it is observed that merely because the appellate Court on re-appreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the learned trial Court is a possible view. It is submitted that it is further observed that evenly balanced views of the evidence must not result in the interference by the appellate Court in the judgment of the learned trial Court.

4.4 Shri Kanara, learned advocate appearing on behalf of the accused has also relied upon the decision of the Hon'ble Supreme Court in the case of Basappa Vs. State of Karnataka, (2014) 2 ACC 1 : (2014) ACJ 1016 : (2014) AIRSCW 1529 : (2014) 2 RCR(Criminal) 144 : (2014) 3 SCALE 87 : (2014) 5 SCC 154 as

well as another decision of the Hon"ble Supreme Court in the case of S. Govindaraju Vs. State of Karnataka reported in (2013) 15 SCC 315 in support of his request to dismiss the present Criminal Appeal.

Making the above submissions and relying upon the above decisions it is requested to dismiss the present Criminal Appeal.

5. Heard the learned advocates appearing on behalf of the respective parties at length. We have re appreciated the entire evidence on record, both oral as well as documentary.

5.1 At the outset, it is required to be noted that this is an Appeal against the impugned judgment and order of acquittal passed by the learned trial Court by which the learned trial Court has acquitted the accused for the offences punishable under Section 302, 114 or Section 34 of the IPC. As observed hereinabove, the present Appeal is required to be considered qua original accused No. 2 only as during pendency of the Appeal original accused No. 1 has died. As the present Appeal is against the order of acquittal the principles relating to the Appeal from the judgment of acquittal are required to be considered. The powers of the appellate Court while considering the Appeal against the acquittal has been elaborately considered by the Hon"ble Supreme Court in the case of Muralidhar alias Gidda (Supra). In paragraph Nos. 10 to 12 the Hon"ble Supreme Court has observed and held as under;

10. Lord Russell in Sheo Swarup, highlighted the approach of the High Court as an appellate court hearing the appeal against acquittal. Lord Russell said

"...the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses."

The opinion of Lord Russell has been followed over the years.

11. As early as in 1952, this Court in Surajpal Singh while dealing with the powers of the High Court in an appeal against acquittal under Section 417 of the Criminal Procedure Code observed;

"7. the High Court has full power to review the evidence upon which the order of acquittal was founded, but it is equally well settled that the presumption of innocence of the accused is further reinforced by his acquittal by the trial Court, and the findings of the trial Court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons."

12. The approach of the appellate court in the appeal against acquittal has been

dealt with by this Court in *Tulsiram Kanu Vs. The State*, AIR 1954 SC 1 , *Atley Vs. State of Uttar Pradesh*, AIR 1955 SC 807 : (1955) CriLJ 1653 , *Aher Raja Khima* (AIR 1956 SC 217), *Balbir Singh Vs. State of Punjab*, AIR 1957 SC 216 : (1957) CriLJ 481 , *M.G. Agarwal Vs. State of Maharashtra*, AIR 1963 SC 200 : (1963) 2 SCR 405 , *Noor Khan Vs. State of Rajasthan*, AIR 1964 SC 286 : (1964) CriLJ 167 : (1964) 4 SCR 521 , *Khedu Mohton and Others Vs. State of Bihar*, AIR 1971 SC 66 : (1971) CriLJ 20 : (1970) 2 SCC 450 : (1970) 1 SCC(Cri) 479 : (1971) 1 SCR 839 , *Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra*, AIR 1973 SC 2622 : (1973) CriLJ 1783 : (1973) 2 SCC 793 : (1973) SCC(Cri) 1033 : (1974) 1 SCR 489 , *Lekha Yadav Vs. State of Bihar*, AIR 1973 SC 2241 : (1973) 2 SCC 424 : (1973) SCC(Cri) 820 , *Khem Karan and Others Vs. The State of U.P. and Another*, AIR 1974 SC 1567 : (1974) CriLJ 1033 : (1974) 76 PLR 677 : (1974) 4 SCC 603 : (1974) SCC(Cri) 639 : (1974) 3 SCR 863 : (1974) 6 UJ 389 , *Bishan Singh, Gurdial Singh, Hardial Singh, Surjit Singh, Harbans Singh and Hazur Singh Vs. The State of Punjab*, AIR 1973 SC 2443 : (1973) CriLJ 1596 : (1974) 3 SCC 288 : (1973) SCC(Cri) 914 : (1973) 5 UJ 755 , *Umedbhai Jadavbhai Vs. The State of Gujarat*, AIR 1978 SC 424 : (1978) CriLJ 489 : (1978) 1 SCC 228 : (1978) SCC(Cri) 108 : (1978) 2 SCR 471 , *K. Gopal Reddy Vs. State of Andhra Pradesh*, AIR 1979 SC 387 : (1980) CriLJ 812 : (1979) 1 SCC 355 : (1979) SCC(Cri) 305 : (1979) 2 SCR 363 : (1979) 11 UJ 52 , *Tota Singh and Another Vs. State of Punjab*, AIR 1987 SC 1083 : (1987) CriLJ 974 : (1987) 2 Crimes 54 : (1987) 2 JT 20 : (1987) 1 SCALE 657 : (1987) 2 SCC 529 : (1987) 2 SCR 747 , *Ram Kumar Vs. State of Haryana*, AIR 1995 SC 280 : (1994) CriLJ 3836 : (1994) 3 Crimes 633 : (1994) 6 JT 502 : (1994) 4 SCALE 484 : (1995) 1 SCC 248 : (1994) 4 SCR 335 Supp , *Madan Lal Vs. State of Jammu & Kashmir*, AIR 1998 SC 386 : (1998) CriLJ 667 : (1997) 7 JT 357 : (1997) 5 SCALE 461 : (1997) 7 SCC 677 : (1997) 3 SCR 337 Supp , *Sambasivan and Others Vs. State of Kerala*, (1998) 1 AD 505 : AIR 1998 SC 2107 : (1998) CriLJ 2924 : (1998) 3 JT 742 : (1998) 3 SCALE 462 : (1998) 5 SCC 412 : (1998) 3 SCR 280 : (1998) AIRSCW 1986 : (1998) 4 Supreme 562 , *Bhagwan Singh and Others Vs. State of Madhya Pradesh*, AIR 2002 SC 1621 : (2002) CriLJ 2024 : (2002) 2 Crimes 42 : (2002) 3 JT 387 : (2002) 3 SCALE 169 : (2002) 4 SCC 85 : (2002) AIRSCW 1532 : (2002) 2 Supreme 567 , *Harijana Thirupala and Others Vs. Public Prosecutor, High Court of A.P., Hyderabad*, AIR 2002 SC 2821 : (2002) CriLJ 3751 : (2002) 3 Crimes 87 : (2002) 5 JT 551 : (2002) 5 SCALE 434 : (2002) 6 SCC 470 : (2002) 1 SCR 379 Supp : (2002) AIRSCW 3199 : (2002) 5 Supreme 229 , *C. Antony Vs. K.G. Raghavan Nair*, AIR 2003 SC 182 : (2006) 4 BC 295 : (2002) 112 CompCas 611 : (2003) CriLJ 411 : (2003) 1 SCC 1 : (2003) 1 UJ 36 , *State of Karnataka Vs. K. Gopalakrishna*, AIR 2005 SC 1014 : (2005) CriLJ 1436 : (2005) 1 DMC 245 : (2005) 2 JT 389 : (2005) 9 SCC 291 : (2005) AIRSCW 949 : (2005) 1 Supreme 735 , *State of Goa Vs. Sanjay Thakran and Another*, (2007) 5 JT 146 : (2007) 3 SCALE 740 : (2007) 3 SCC 755 : (2007) 3 SCR 507 and *Chandrappa and Others Vs. State of Karnataka*, (2007) CriLJ 2136 : (2007) 3 JT 316 : (2007) 3 SCALE 90 : (2007) 4 SCC 415 : (2007) 2 SCR 630 . It is not necessary to deal with

these cases individually. Suffice it to say that this Court has consistently held that in dealing with appeals against acquittal, the appellate court must bear in mind the following;

(i) There is presumption of innocence in favour of an accused person and such presumption is strengthened by the order of acquittal passed in his favour by the trial court;

(ii) The accused person is entitled to the benefit of reasonable doubt when it deals with the merit of the appeal against acquittal;

(iii) Though, the powers of the appellate court in considering the appeals against acquittal are as extensive as its powers in appeals against convictions but the appellate court is generally loath in disturbing the finding of fact recorded by the trial court. It is so because the trial court had an advantage of seeing the demeanour of the witnesses. If the trial court takes a reasonable view of the facts of the case, interference by the appellate court with the judgment of acquittal is not justified. Unless, the conclusions reached by the trial Court are palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the appellate court in interfering with such conclusions is fully justified; and

(iv) Merely because the appellate court on re-appreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial court is a possible view. The evenly balanced views of the evidence must not result in the interference by the appellate court in the judgment of the trial Court.

5.2 In the case of Basappa (Supra) the Hon"ble Supreme Court has observed that while considering the scope of interference by the appellate Court, in an Appeal against acquittal, Hon"ble Supreme Court has observed and held that possibility of different view is not enough to interfere with acquittal and if the view taken by the learned trial Court is a plausible view then High Court will not be justified in reversing it merely because different view is possible. Similar view has been taken by Hon"ble Supreme Court in the case of S. Govindraju (Supra).

Applying the aforesaid ratio and the law laid down by the Hon"ble Supreme Court to the facts of the case on hand, the present Appeal against the order of acquittal is required to be considered.

5.3 In the present case there are two dying declarations at (Exh. 91) and (Exh. 43). Exh. 91 is the complaint given by the deceased himself, which was recorded before the P.S.I. Shri Harikumar Parmar and written by the Head Constable in which the deceased has named accused No. 2 also, however, in the dying declaration recorded by the Executive Magistrate, who can be said to be an independent witness (Exh. 43) the deceased has not named original accused No. 2. There is no whisper about any role played by original accused No. 2, more

particularly, any allegation that original accused No. 2 poured acid on the deceased. From the evidence on record, it appears that the complaint recorded before the P.S.I. Shri Harikumar Parmar and the dying declaration by the Executive Magistrate are in the proximity of time. It has come on record that the yadi was sent to the Executive Magistrate at about 9:30 a.m. and the Executive Magistrate recorded the dying declaration of the deceased at about 10:15 a.m.. It also appears that the complaint was recorded before P.S.I. Shri Harishkumar Parmar at about 9:30 a.m. or so. Under the circumstances, there are material contradictions in both the dying declarations at (Exh. 91) and (Exh. 43). As such, there is no reason not to believe the dying declaration recorded by the Executive Magistrate (Exh. 43) in which the original accused No. 2 is not named at all. At this stage it is required to be noted that at the time when the deceased was taken to Ervin Hospital, Jamnagar he gave the history before Dr. Manahar Mehta and Dr. Hitesh Rabari. As per the deposition of the aforesaid two Doctors, Dr. Manahar Mehta (P.W. 20) and Dr. Hitesh Rabari (P.W. 29), who have been examined at Exh. 46 and 89, the deceased named only his younger brother-Jeetendra Popatbhai-original accused No. 1 and, therefore, the history given by the deceased before the aforesaid two Doctors were first in time in which the deceased named only Jeetendra Popatbhai and two unknown persons. He did not name original accused No. 2.

5.4 Considering the aforesaid facts and the material contradictions in the dying declarations at (Exh. 91) and (Exh. 43) when the learned trial Court has disbelieved both the dying declarations and other evidences on record, more particularly, the deposition of the family members of the deceased and has acquitted the accused i.e. original accused No. 2 by giving benefit of doubt, the impugned judgment and order of acquittal passed by the learned trial Court is not required to be interfered with by this Court in exercise of appellate jurisdiction against the order of acquittal. On re appreciation of the entire evidence on record and for the reasons stated hereinabove, we are of the opinion that the view taken by the learned trial Court is a plausible view. As observed by the Hon'ble Supreme Court in the case of Muralidhar alias Gidda (Supra) and in the case of Basappa (Supra) when the view taken by the learned trial Court is plausible and even on re appreciation of the entire evidence on record two views are possible, in that case, the appellate Court would not be justified in interfering with the order of acquittal.

6. Under the circumstances, when the view taken by the learned trial Court is plausible and the finding recorded by the learned trial Court cannot be said to be perverse and/or contrary to the evidence on record, considering the principles governing the scope and ambit of the Appeal against the order of acquittal narrated hereinabove, we are of the opinion that the impugned judgment and order passed by the learned trial Court giving benefit of doubt to original accused No. 2 and consequently acquitting her is not required to be interfered with.

7. In view of the above and for the reasons stated hereinabove, the present

Criminal Appeal fails and the same deserves to be dismissed and is accordingly dismissed. Consequently, the bail bond stands cancelled.