
(2022) 07 GUJ CK 0082
In the Gujarat High Court
Case No : R/Criminal Appeal No. 728 Of 1995

State Of Gujarat	Vs	APPELLANT
Karimbhai Umarbhai Shaikh		RESPONDENT

Date of Decision : 21-07-2022

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 209, 378
Indian Penal Code, 1860 — Section 302, 447
Bombay Police Act, 1951 — Section 135

Citation : (2022) 07 GUJ CK 0082

Hon'ble Judges : S.H.Vora, J;Rajendra M. Sareen, J

Bench : Division Bench

Advocate : CM Shah, Mrudul M Barot

Final Decision : Dismissed

Judgement

Rajendra M. Sareen, J

1. This Appeal is filed by the appellant – State of Gujarat under Section 378 of the Criminal Procedure Code, 1973 against the judgment and order dated 28.04.1995 passed by the learned Additional Sessions Judge, Bhavnagar in Sessions Case No.129 of 1994 acquitting the respondent – original accused from the offence punishable under sections 302 and 447 of Indian Penal Code and 135 of Bombay Police Act.

2. The case of the prosecution in nutshell is as under:-

It is the case of the prosecution that the complainant was staying with her father and children in the area known as Mafatnagar. Her brother-in-law Ibrahim, younger brother-in-law Kadharbhai, Karimbhai and Salem were also staying with their children. It is the case of the prosecution that after the marriage of younger brother-in-law, Karimbhai, the present respondent accused, after one month of her marriage life, he was not staying with his wife and he gave divorce to his wife. According to the case of the prosecution, younger-brother-in-law was not

going to any job, and he was driven out of the house by her father-in-law. As respondent accused was not going to any service or business, once he was asked not to come to their house and he was not given meals. The respondent accused had beaten the complainant and her children. It is the case of the prosecution that the complainant's husband had driven out the respondent accused from house even then in absence of her husband, the respondent accused was threatening her. Before the day of incident, the respondent accused was asked by the husband of the complainant as to why he is not doing any job or business. It is further alleged in the complaint that on 10/05/1994 when the complainant and her husband after taking meals went for sleeping at about 12 midnight and while sleeping in the courtyard at about 1.30, the complainant's husband shouted for help and the accused had run away with razor after wounding the complainant's husband. The complainant's husband followed him to some distance but he could not catch him. The husband of complainant got injury on his neck. On hearing shout neighbours and other witness came there and thereafter complainant's husband was taken to hospital for treatment and during the treatment, he died. Hence, the complaint was lodged for the aforesaid offence.

On the basis of the said complaint, investigation was started and after through investigation, as there was sufficient evidence against the respondents – accused persons, chargesheet was filed before the learned Judicial Magistrate, First Class. As the offence committed by the accused persons was exclusively triable by the Court of Sessions as per the provisions of Section 209 of Criminal Procedure Code, the learned Judge was pleased to commit the case to the Court of Sessions and the case was transferred and placed for trial in the court of learned Additional Sessions Judge, which has been numbered as Sessions Case No.129 of 1994. Thereafter, Charge was framed against the accused for the offence punishable under sections 302 and 447 of Indian Penal Code and 135 of Bombay Police Act. The accused persons pleaded not guilty to the Charges and claimed to be tried. The prosecution, therefore, laid evidence, oral as well as documentary. At the conclusion of the trial, the learned Additional Sessions Judge was pleased to acquit the respondent accused for the charges levelled against him. Hence, the appellant – State of Gujarat has preferred the present Appeal challenging the judgement and order of acquittal.

3. Ms.C.M. Shah, learned APP for the appellant State has vehemently argued that the Sessions Judge has committed a grave error in not believing the deposition of the witnesses examined by the prosecution and evidence adduced by the prosecution. She has further submitted that the Sessions Judge has erred in acquitting the respondents – accused from the charges levelled against them. She has further argued that the prosecution has proved that the respondents have committed offence under sections 302 and 447 of Indian Penal Code and 135 of Bombay Police Act. She has further argued that Sessions Judge has acquitted the respondents accused merely on some minor contradictions and omissions in the evidence of the witnesses. She has further argued that the Sessions Judge has erred in not believing the evidence of the investigating officer

who had no reason to implicate the accused falsely in the case. She has further argued that the offence punishable under sections 302 and 447 of Indian Penal Code and 135 of Bombay Police Act is made out, however, the same is not believed by the Sessions Judge. She has further argued that though the prosecution witnesses have supported the case of the prosecution, the Sessions Judge erroneously not believed their evidence and acquitted the accused. She has further argued that the Sessions Court has erroneously held that the prosecution has failed to prove the case beyond reasonable doubt and so, she has requested to allow the present appeal.

4. Mr.Mrudul Barot, learned advocate appearing for the respondent accused has submitted that there is hardly any substance in the submissions of learned APP. There is no admissible evidence on record connecting the accused with the commission of the offence. There are material contradictions and omissions in the evidence of the prosecution witnesses. The prosecution has not proved the case beyond reasonable doubt. No error or illegality has been committed by the trial court in acquitting the respondents accused and therefore, he has requested to dismiss the present appeal.

5. Heard the leaned advocates for the respective parties at length and perused the impugned judgement and order of acquittal passed by the trial court as well as the entire record and proceedings.

6. Before advertng to the facts of the case, it would be worthwhile to refer to the scope in Acquittal Appeals. It is well settled by is catena of decisions that an appellate Court has full Power to review, re-appreciate and consider the Evidence upon which the Order of Acquittal is founded. However, the Appellate Court must bear in mind that in case of Acquittal, there is prejudice 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 reaffirmed and strengthened by the trial Court.

7. On perusal of the record, it appears that the complainant in her cross examination has admitted that the police had first done panchnama of clothes of the deceased and thereafter her complaint was registered and she had put her thumb impressions and therefore, the FIR cannot be considered as complaint but can be considered as statement of the complainant.

8. From the panchnama of place of offence it is clear that the offence has taken place at 1.30 midnight and there is no evidence that there was any light. Even in the panchnama there is no mention that there was light. Identification of the accused at midnight in dark night without light is doubtful. In absence of light, merely because the accused was relative, it cannot be said that the complainant or relative can identify the accused.

9. From the evidence of the complainant, it is clear that there is one door in the

house and the complainant and his family used to sleep by closing the door. Had the door was closed, there is no question of coming the accused in the house. As per the evidence of the complainant, her husband was sleeping on the cot with bed-sheet, however, no blood stains are found on the bed-sheet which was on the cot, which is clear from the panchnama of place of offence. As per the complainant, her husband had put on clothes whereas as per the evidence of the Doctor and postmortem note, the deceased had put on mere underwear. Had the deceased put on mere underwear, there must be blood stains on the cot, but no blood stains are found on the bed. Even as per the complainant, the incident had happened in the courtyard, but from the panchnama of place of offence it is clear that no blood stains are found. Blood stains are found out side the courtyard. Therefore, it cannot be believed that the incident had happened in the courtyard.

10. As per the case of the complainant, hearing the shouts, neighbours namely Shabbirbhai, Dilavarkhan and Ravjibhai had come, but none of them has been examined, though their statements were recorded, as admitted by the investigating officer. From the cross examination of the investigating officer, it is clear that he has admitted that it has been come out from the investigation that three persons, who took the deceased to his house, had asked the deceased about the incident, but the deceased had not given any reply. Blood was found 30 to 40 meters away from the house of the deceased opposite the house of Dilavarkhan in the street. It is the case of the complainant that the incident had happened in the house, but there is no evidence that the incident had happened in the house. Therefore, it can be presumed that the incident might have occurred at other place. Even as per the case of the prosecution, the deceased had run after the accused, but no blood stains are found in the street.

11. As such it can be said that there might have been some incident in the street with some third person who could have inflicted injury to the deceased and the accused being falsely implicated in the offence.

12. Here in this case, the prosecution has relied upon the extra-judicial confession made by the accused which in the eye of the prosecution is very material. Here as per the evidence of the prosecution, extra-judicial confession is made by the accused before his niece i.e. daughter of the deceased but the daughter of the deceased has stated that her mother, while going to the hospital taking her father, had instructed her not to leave the house and to take care of her siblings till she comes. As such, as per the evidence of the daughter of the deceased, accused has confessed before her at her grand-mother's house when she was at her grand-mother's house. This aspect also cannot be believed, because when she has gone to grand-mother's house is not coming in the evidence, particularly when she was instructed to be at home and she has not left her house as per her say. The extra-judicial confession of the niece of the accused is a weak piece of evidence, which cannot be believed

13. Moreover, the confession upon which the prosecution has relied upon is the dying declaration of the deceased to the complainant stating the name of the

accused who has inflicted injury by razor and also the deceased running after the accused in the street. Considering this aspect, the evidence of the medical officer, who has performed the postmortem, is also material, wherein the Medical Officer has specifically stated that artery of the throat was cut and in that state, patient loses consciousness slowly and becomes unconscious after some moment. Here the deceased followed the accused, as per the case of the prosecution but the accused ran away and thereafter three neighbours namely Dilavarkhan, Ravjibhai and Shabbirbhai have taken the deceased to their house and when asked what has happened, the deceased was not able to speak anything before the aforesaid three neighbours – witnesses regarding the offence. As such, after running for some distance behind the accused and returning back, when he was not able to speak before the aforesaid three witnesses, it cannot be believed that the accused had narrated the history of injury before the complainant and therefore the contention of the prosecution regarding oral dying declaration of the deceased before the complainant also is not cogent and convincing aspect which can be relied upon and the oral dying declaration also becomes doubtful.

14. Even otherwise, there are material contradictions, addition, alterations and modifications in the evidence of the prosecution witnesses. Considering the overall facts and circumstances of the case, we are of the opinion that the prosecution has failed to prove the case beyond reasonable doubt.

15. It may be noted that as per the settled legal position, when two views are possible, the judgment and order of acquittal passed by the trial Court should not be interfered with by the Appellate Court unless for the special reasons. A beneficial reference of the decision of the Supreme Court in the case of State of Rajasthan versus Ram Niwas reported in (2010) 15 SCC 463 be made in this regard. In the said case, it has been observed as under:-

“6. This Court has held in Kalyan v. State of U.P., (2001) 9 SCC 632 :

“8. The settled position of law on the powers to be exercised by the High Court in an appeal against an order of acquittal is that though the High Court has full powers to review the evidence upon which an order of acquittal is passed, it is equally well settled that the presumption of innocence of the accused persons, as envisaged under the criminal jurisprudence prevalent in our country is further reinforced by his acquittal by the trial court. Normally the views of the trial court, as to the credibility of the witnesses, must be given proper weight and consideration because the trial court is supposed to have watched the demeanour and conduct of the witness and is in a better position to appreciate their testimony. The High Court should be slow in disturbing a finding of fact arrived at by the trial court. In Kali Ram V. State of Himachal Pradesh, (1973) 2 SCC 808, this Court observed that the golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be

adopted. The Court further observed:

"27. It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilised society. Suppose an innocent person is convicted of the offence of murder and is hanged, nothing further can undo the mischief for the wrong resulting from the unmerited conviction is irretrievable. To take another instance, if an innocent person is sent to jail and undergoes the sentence, the scars left by the miscarriage of justice cannot be erased by any subsequent act of expiration. Not many persons undergoing the pangs of wrongful conviction are fortunate like Dreyfus to have an Emile Zola to champion their cause and succeed in getting the verdict of guilt annulled. All this highlights the importance of ensuring, as far as possible, that there should be no wrongful conviction of an innocent person. Some risk of the conviction of the innocent, of course, is always there in any system of the administration of criminal justice. Such a risk can be minimised but not ruled out altogether. It may in this connection be apposite to refer to the following observations of Sir Carleton Allen quoted on page 157 of "The Proof of Guilt" by Glanville Williams, second edition:

"I dare say some sentimentalists would assent to the proposition that it is better that a thousand, or even a million, guilty persons should escape than that one innocent person should suffer; but no responsible and practical person would accept such a view. For it is obvious that if our ratio is extended indefinitely, there comes a point when the whole system of justice has broken down and society is in a state of chaos."

28. The fact that there has to be clear evidence of the guilt of the accused and that in the absence of that it is not possible to record a finding of his guilt was stressed by this Court in the case of Shivaji Sahebrao, (1973) 2 SCC 793, as is clear from the following observations:

"Certainly it is a primary principle that the accused must be and not merely, may be guilty before a court, can be convicted and the mental distinction between 'may be' and 'must be' is long and divides vague conjectures from sure considerations."

"9. The High Court while dealing with the appeals against the order of acquittal must keep in mind the following propositions laid down by this Court, namely, (i) the slowness of the appellate court to disturb a finding of fact; (ii) the noninterference with the order of acquittal where it is indeed only a case of taking a view different from the one taken by the High Court."

8. In *Arulvelu and another versus State* reported in (2009) 10 Supreme Court Cases 206, the Supreme Court after discussing the earlier judgments, observed in para No. 36 as under:

"36. Careful scrutiny of all these judgments lead to the definite conclusion that the appellate court should be very slow in setting aside a judgment of acquittal particularly in a case where two views are possible. The trial court judgment can not be set aside because the appellate court's view is more probable. The appellate court would not be justified in setting aside the trial court judgment unless it arrives at a clear finding on marshaling the entire evidence on record that the judgment of the trial court is either perverse or wholly unsustainable in law."

16. 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.

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, present Criminal Appeal deserves to be dismissed and is accordingly dismissed.