

(2022) 07 GUJ CK 0081
In the Gujarat High Court
Case No : R/Criminal Appeal No. 841 Of 1995

State Of Gujarat	Vs	APPELLANT
Lakhaji Dharmaji Thakor & 3 Other(S)		RESPONDENT

Date of Decision : 21-07-2022

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 209, 378
Indian Penal Code, 1860 — Section 34, 114, 302, 304II, 323, 326
Bombay Police Act, 1951 — Section 135

Citation : (2022) 07 GUJ CK 0081

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

Bench : Division Bench

Advocate : CM Shah, Ekant G Ahuja

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 10.05.1994 passed by the learned Additional Sessions Judge, Banaskantha at Palanpur in Sessions Case No.76 of 1993 acquitting the respondents – original accused Nos.1 to 4 from the offence punishable under sections 302, 323, 326, 34 and 114 of Indian Penal Code and 135 of Bombay Police Act.

2. The factual matrix as narrated by the prosecution case stands as under:

2.1. The complainant lodged the complaint that on 19/2/1993 stating that on 19/2/1993 at around 8 O'clock in the morning in the sim of Balochpura falling under the jurisdiction of Shihori Police Station, all the four accused, with a view to fulfill their common intention to kill the deceased – Amthaji came to the place of incident and accused No.1 Lakhaji was having Vasi (Dhariya) in his hands and accused Nos.2, 3 and 4 were having stick in their hands and accused No.1 inflicted Vasi (Dhariya) blow on the head of deceased Amthaji and hence Amthaji

had fallen down and at that time accused Nos.2, 3 and 4 had beaten the Amthaji with kick and fist blows and also beaten Amthaji on the stomach of Amthaji and thereby caused fatal injuries to the Amthaji.

It is also alleged that on the aforesaid date, place and time, accused No.1 inflicted Vasi blow on the Meruji Navaji Thakor on his left eye and in the said act accused Nos.2 to 4 helped the accused No.1. It is also alleged that the accused No.2 had inflicted stick blow to the Naviben on the left side of her body and in the said act accused Nos.2 to 4 helped the accused No.1.

2.2. 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.76 of 1993. Thereafter, Charge was framed against the accused for the offence punishable under sections 302, 323, 326, 34 and 114 of Indian Penal Code. 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 accused Nos.2 to 4 for the charges levelled against them and convicted the accused No.1 for the offence under section 304 Part-II of Indian Penal Code and sentenced to undergo rigorous imprisonment for a period of five years with fine of Rs.500/-and in default, to undergo further simple imprisonment for three months and acquitted the accused No.1 from the other offences 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, 323, 326, 34 and 114 of Indian Penal Code and under section 135 of the 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, 323, 326, 34 and 114 of Indian Penal Code and under section 135

of the 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.Ekant Ahuja, learned advocate appearing for the respondents accused has submitted that the accused Nos.1,2 and 4 have expired. He has further 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. It is pertinent to note that the respondent Nos.1, 2 and 4 – original accused Nos.1, 2 and 4 have expired and hence present appeal stood abated qua respondent Nos.1, 2 and 4 – original accused Nos.1, 2 and 4 vide order dated 07/07/2022. Under the circumstances, present appeal is required to be considered qua accused No.3 – respondent No.3 herein. The allegation against the accused No.3 is that he has inflicted stick blow on the stomach of the deceased along with the accused Nos.2 and 4.

7. We have gone through the entire record and proceedings and on perusal of the same, it appears that as per the postmortem report, there was fracture on the head of the deceased and there was injury on the stomach, however, it cannot be said that out of accused nos.2 to 4 who caused the injury by stick to the deceased, as it is alleged that accused Nos.2, 3 and 4 have inflicted stick injuries on the stomach of the deceased. Even it is also not proved that all the accused had common intention to kill the deceased. Even abetment with each other is also not proved. It is also not proved that how and when all the four accused had gathered. It is also not proved that all the accused were knowing that the deceased was passing through the bank of river. General allegation is made against the accused No. 3 that he has inflicted stick blows, however, no such injury is found on the person of the deceased. The evidence against the accused No.3 herein is doubtful. Even medical evidence also does not support the case of the prosecution. It is not proved beyond reasonable doubt that the accused No.3 took part in commission of the offence. Even nobody has seen all the accused together. Even no blood stains are found on the sticks recovered from the accused. Even no blood is found from the clothes of the accused.

Therefore, it is not proved beyond reasonable doubt that the accused Nos.3 took part in commission of the alleged offence. One Manguben has received injury and her injury certificate has been produced on record at Ex.17 but she is not examined at all.

8. The only evidence against the accused is of interested witnesses and no independent witness has been examined. Even no statement of independent witness has been recorded.

9. There are material contradictions, addition, alterations and modifications in the evidence of the complainant, such as, the complainant in the FIR has stated that the accused No.1 was having stick, but in his deposition he has stated that the accused No.1 was having (Vasi) Dhariya. The same shows the credibility of the complainant and the same is also fatal to the case of the prosecution.

10. On appreciation of evidence, the trial court has rightly held that no offence is proved against the accused No.3 and rightly acquitted accused No.3, as no offence is proved against him beyond reasonable doubt.

11. It would be worthwhile to refer to the scope in Acquittal Appeals. It is well settled by a 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.

12. On perusal of the record, it appears that the case of the prosecution hinges on the evidence of three witnesses namely complainant – Meruji Navaji Ex.19, injured witness Naviben Sonaji widow of Swarupji Navaji Ex.21 and Raymaluji Amthaji son of deceased Amthaji Ex.22. Out of the three witnesses as per the case of the prosecution two witnesses namely Meruji Navaji and Naviben have received injuries and Amthaji has received Vasi (Dhariya) blow on his head inflicted by the accused No.1 and after he fell down, accused No.3 inflicted stick blow on stomach of the deceased but no injury was found on stomach of the deceased.

13. 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."

14. 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.

15. 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.

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