

(2015) 08 GUJ CK 0062
In the Gujarat High Court

Case No : Criminal Appeal (Against Acquittal) No. 687 of 1992

State of Gujarat

APPELLANT

Vs

Maganbhai Nanubhai Patel and Others

RESPONDENT

Date of Decision : 17-08-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 209, 313
Penal Code, 1860 (IPC) — Section 302, 323, 34, 429

Citation : (2015) 08 GUJ CK 0062

Hon'ble Judges : K.S. Jhaveri, J;G.B. Shah, J

Bench : Division Bench

Advocate : Mitesh Amin, Public Prosecutor, for the Appellant; Adil R. Mirza, Advocates for the Respondent

Final Decision : Dismissed

Judgement

K.S. Jhaveri, J—By way of this appeal, the appellant-State has challenged the judgment and order dated 20.05.1992, passed by the learned Sessions Judge, Valsad at Navsari, in Sessions Case No. 77 of 1990, whereby the Trial Court has acquitted the original accused-respondents herein for the offence punishable under Sections 429, 302, 323 read with Section 34 of the Indian Penal Code (for short "the I.P. Code").

2. The case of the prosecution is that on 10.05.1990 at about 10:00 pm. the respondents herein came with weapons at the residence of the complainant and killed the dog of the complainant by inflicted pipe blows. When the wife of the complainant namely Bhaniben asked them why they had killed her dog, the accused persons got excited and inflicted pipe blows on the head, abdomen and hands of the wife of the complainant. It is further alleged that when the complainant and his son tried to rescue his wife, the accused persons also inflicted pipe blows on them and fled away from the scene of offence. Thereafter, the complainant and his wife taken to the hospital. During the treatment, the wife of the complainant namely Bhaniben expired. A complaint in respect of this

incident was lodged by the complainant.

3. The investigation was taken up and after usual investigation, charge-sheet came to be filed against the accused persons. The offence committed by the accused persons were exclusively triable by the Court of Sessions. Therefore, the learned Magistrate committed the case to the Sessions Court at Valsad under Section 209 of the Code, where it was registered as Sessions case No. 77 of 1990. Charge vide Exhibit-1 came to be framed against the accused persons. They pleaded not guilty and claimed to be tried.

3.1. In order to bring home the charge against the accused persons, the prosecution examined the following witnesses:--

3.2. The prosecution also produced and relied upon the following documentary evidence during the course of the trial.

4. After conclusion of the trial, further statement under Section 313 of the Code of the accused came to be recorded. The defence in the further statement is of total denial. The learned trial Judge heard the arguments of learned APP and learned advocate for the accused and after appreciating the evidence, recorded the judgment and order of acquittal against the accused, as aforesaid. Therefore, the present appeal.

5. The respondent No. 2-Jayantibhai Bhanabhai Patel-original accused No. 2 had died. Therefore, vide order dated 28.7.2015 the appeal qua him abated.

6. Mr. Amin, learned Public Prosecutor for the appellant submitted that the Trial Court has committed error in passing the impugned judgment and order. He has taken us to the evidence of the prosecution witnesses and contended that the Trial Court has committed an error in disbelieving the Dying Declaration of the deceased (Exhibit-20) on the ground that when the deceased was given Dying Declaration, she was not in a conscious state of mind. Alternatively, learned Public Prosecutor submitted that deceased expired between 3:45 to 4:00 pm. and her statement was recorded between 2:15 to 2:30, therefore, it can be treated as an extra Judicial Confession. It is further contended by the learned Public Prosecutor for the appellant that the Trial Court has committed an error in holding that the medical evidence is not supported the case of the prosecution and some of the eye witnesses turned hostile.

6.1. Learned Public Prosecutor for the appellant has also taken us to the evidence of the husband (complainant) and son of the deceased. It is further submitted by the learned Public Prosecutor that the Trial Court has committed an error in disbelieving the postmortem report and in giving the benefit of doubt to the original accused.

6.2. Learned Public Prosecutor for the appellant relied upon the decision of the Apex Court in the case of Rajendra and Others Vs. State of Maharashtra, (2006) 2 DMC 456 : (2006) 7 SCALE 662 : (2006) 10 SCC 759 , more particularly paragraph No. 5, which reads as under:--

"6. We find that the two written dying declarations and the one oral dying declaration are consistent. It may be that the second written dying declaration is not as detailed as the first one as in that specific role has not been assigned to the appellants. We do not find any reason to discard the dying declarations which have been relied upon by the Trial Court as well as the High Court. It was sought to be argued before us that so far as the second dying declaration is concerned, it was recorded by PW 1 who was merely a senior clerk in the government department who was authorised to record dying declarations as an Executive Magistrate authorised by the Tahsildar. It was submitted that law does not permit the Tahsildar to nominate a clerk in the Government department to perform the duties of an Executive Magistrate. It may be that the dying declaration recorded by PW 1 cannot be given the same sanctity as a dying declaration recorded by a Magistrate, but at the same time there is no law which mandates that a dying declaration should be recorded only by a Magistrate. No doubt more sanctity is attached to a dying declaration recorded by a Magistrate since the recording of dying declaration by a Magistrate assures the Court that the statement has been correctly understood and truthfully recorded by an impartial person. Even so, since there are three dying declarations and all of them are consistent, we do not attach much weight to the fact that the second dying declaration is not recorded by a Magistrate, and that it has been recorded by a person nominated by the Tahsildar to record dying declarations which in normal course is the duty of an Executive Magistrate."

6.3. By making the above submissions and by relying upon the above decision, the learned Public Prosecutor for the appellant urged that this Court may allow this appeal and quash and set aside the impugned judgment and order of the Trial Court.

7. On the other hand, Mr. Mirza, learned advocate for the respondent No. 1 supported the impugned judgment and order of the Trial Court. He submitted that even if the Dying Declaration of the deceased is believed, from the evidence of Dr. Kiran Udesing Patel (P.W. 43) and the observations made by the Trial Court, it cannot be said that when the deceased was given Dying Declaration, she was in a conscious state of mind.

7.1. By making the above submissions, the learned advocate for the respondent No. 1 urged that this Court may not allow this appeal and confirm the impugned judgment and order passed by the Trial Court.

8. We have heard learned Public Prosecutor for the appellant-State and learned advocate for the respondent No. 1-original accused No. 1. Learned advocates on either side have taken us through the documentary and oral evidence on record. We have independently and dispassionately applied our mind to this evidence. At the outset, 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.

9. In the case of M.S. Narayana Menon @ Mani Vs. State of Kerala and Another, AIR 2006 SC 3366 : (2006) 3 BC 433 : (2006) 132 CompCas 450 : (2006) 6 CompLJ 39 : (2006) CriLJ 4607 : (2006) 3 CTC 730 : (2006) 6 JT 72 : (2006) 6 SCALE 393 : (2006) 6 SCC 39 : (2006) 3 SCR 124 Supp : (2006) AIRSCW 4652 : (2006) 5 Supreme 547 , the Apex Court has narrated about the powers of the 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."

10. Further, in the case of 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 , 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."

11. 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.

12. Even in the case of *State of Goa Vs. Sanjay Thakran and Another*, (2007) 5 JT 146 : (2007) 3 SCALE 740 : (2007) 3 SCC 755 : (2007) 3 SCR 507 , 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."

12.1. Similar principle has been laid down by the Apex Court in the cases of *State of Uttar Pradesh Vs. Ram Veer Singh and Others*, AIR 2007 SC 3075 : (2007) 10 SCALE 545 : (2007) 13 SCC 102 : (2007) 10 SCR 689 : (2007) AIRSCW 5553 : (2007) 6 Supreme 164 and in *Girja Prasad (Dead) by LRs. Vs. State of Madhya Pradesh*, AIR 2007 SC 3106 : (2007) 10 JT 421 : (2007) 10 SCALE 358 : (2007) 7 SCC 625 : (2007) AIRSCW 5589 : (2007) 6 Supreme 49 . Thus, the powers, which this Court may exercise against an order of acquittal, are well settled.

12.2. In the case of *Lunaram Vs. Bhupat Singh and Others*, (2009) CriLJ 1899 : (2009) 3 JT 155 : (2009) 3 SCALE 363 : (2009) 3 SCC 749 : (2009) 3 SCR 706 : (2010) AIRSCW 298 : (2009) 7 Supreme 103 , the Apex Court in para 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 anke 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 post-mortem 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.

12.3. 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, AIR 2013 SC 321 : (2013) 1 Crimes 8 : (2013) 1 JT 626 : (2013) 1 SCALE 95 : (2013) 2 SCC 89 : (2013) AIRSCW 339 : (2013) 1 Supreme 88 , 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 appellant 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, (2004) CriLJ 3842 : (2004) 5 JT 388 : (2004) 5 SCALE 86 : (2004) 5 SCC 573 : (2004) SCC(L&S) 1078 : (2004) 2 SCR 480 Supp : (2004) 2 UJ 1118 : (2004) AIRSCW 4321 : (2004) AIRSCW 5560 : (2004) 6 Supreme 669 : (2004) 3 Supreme 404 .

12.4. It is also a settled legal position that in acquittal appeal, the appellate Court is not required to re-write 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, AIR 1981 SC 1417 : (1981) CriLJ 1019 : (1981) 1 SCALE 206 : (1981) 2 SCC 185 : (1981) SCC(Cri) 395 : (1981) 2 SCR 695 , wherein it is held as under:--

"...This Court has observed in Girja Nandini Devi and Others Vs. Bijendra Narain Choudhury, AIR 1967 SC 1124 : (1967) 1 SCR 93 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."

12.5. Similar principle has been laid down by the Apex Court in the case of Shivasharanappa and Others Vs. State of Karnataka, AIR 2013 SC 2144 : (2014) 1 CCR 485 : (2013) CriLJ 2658 : (2013) 7 JT 66 : (2013) 3 RCR(Criminal) 86 : (2013) 6 SCALE 757 : (2013) 5 SCC 705 : (2013) AIRSCW 2719 : (2013) 4 Supreme 38 .

13. 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.

14. We have perused the impugned judgment and order of the learned Trial Court. We have also perused the oral as well as documentary evidence led before the trial Court and also considered the submissions made by learned advocates for both the parties and found that the prosecution has not been able to prove the case against the present respondent-original accused and therefore, we are of the considered opinion that the Trial Court has rightly acquitted the original accused-respondent herein for the offences punishable under sections 429, 302, 323 read with Section 34 I.P. Code by giving benefit of doubt. Further, in our opinion the contention raised by Mr. Amin, learned Public Prosecutor that the Executive Magistrate is competent to record the Dying Declaration is just and proper but the same would not help the prosecution case in view of deposition of Dr. Kiran Udesing Patel (P.W. 43), wherein he categorically stated that the patient was not in a position to answer the queries put to her. Considering the aforesaid fact, it can be said that the mental and physical condition of the deceased was doubtful when the deceased gave her Dying Declaration. Further, the medical evidence also does not support the case of the prosecution and some of the material witnesses turned hostile. Apart from that, the learned Public Prosecutor for the appellant-State is not in a position to show any evidence to take a contrary view in the matter or that the approach of the Trial Court is vitiated by some manifest illegality or that the decision is perverse or that the Trial Court has ignored the material evidence on record.

15. In that view of the matter, we are in complete agreement with the reasons recorded by the learned Trial Court in respect of acquitting the original accused-respondent herein for the offence under Sections 429, 302, 323 read with Section 34 I.P. Code. Hence, this appeal lacks of merits.

16. For the foregoing reasons, the present appeal is dismissed. The impugned judgment and order dated 20.05.1992, passed by the learned Sessions Judge, Valsad at Navsari, in Sessions Case No. 77 of 1990 is hereby confirmed. Bail bond, if any, stands discharged. Record & Proceedings, be sent back to the trial court concerned forthwith.