
(2022) 10 GUJ CK 0026
In the Gujarat High Court
Case No : R/Criminal Appeal No. 942 Of 1995

?State Of Gujarat

APPELLANT

Vs

Narshi Shivji Bhanushali & 2 Other(S)

RESPONDENT

Date of Decision : 07-10-2022

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 209, 313, 378
Indian Penal Code, 1860 — Section 114, 201, 302, 498A

Citation : (2022) 10 GUJ CK 0026

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

Bench : Division Bench

Advocate : CM Shah, Jaimin D Pandya, Premal S Rachh

Final Decision : Dismissed

Judgement

Rajendra M. Sareen, J

1. Present Criminal Appeal has been preferred by the appellant – State of Gujarat under Section 378 of the Criminal Procedure Code, 1973 against the judgment and order dated 30/06/1995 passed by the learned Sessions Judge, Kachchh at Bhuj in Sessions Case No.44 of 1994 acquitting the respondent Nos.1 to 3 – original accused Nos.1 to 3 from the offence punishable under sections 498-A, 302, 114 and 201 of Indian Penal Code.

It is pertinent to note that the respondent No.1 – original accused No.1 has expired during the pendency of the proceedings and hence the present appeal stood abated qua respondent No.1 vide order dated 20/06/2022.

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

The F.I.R. is lodged by one Lalji Gopal Bhanushali of Nalia on 26/12/1993 at 5.30 but the hours are not written so it is assumed that it is 5.30 in the morning. In the F.I.R. the names of all the three accused are mentioned. According to the F.I.R. the incident is alleged to have taken place on 25/12/1993 at 12.00 hours.

The complainant and Lalji Gopal is resident of Nalia. He has two sons and two daughters. The eldest daughter Jashoda was married to Naran Narabi, accused No.2. Jashoda had two years old son Deepak. Jashoda Used to reside with her husband Naran who resides at Bombay for his business. After marriage, Jashoda used to often visit to the house of her parents at Modkuba. The complainant alleges that mother-in-law Savitri of Jashoda, her father-in-law Narshi Shivaji and her husband Naran Narshi on account of dowry used to taunt her and she was not allowed to go out of house. Even she was beaten and thus, she was mentally and physically harassed by them. This was conveyed by deceased Jashoda to the complainant and her mother and both the complainant and his wife appraised her as and when need arose and she was sent to her inlaw about two years back when he received Modkuba the willing of inlaws of Jashoda, he found that he was beaten and was harassed. He, therefore, took per to his own house at Nalia and this was conveyed to one Mithubhai and Virjibhai of village Nalia who gave an undertaking that this will not happen again and, therefore, the complainant again sent his daughter Jashoda to her husband and inlaws at village Modkuba. Lastly, the complainant visited Jashoda's inlaws village Modkuba and her husband when her grand-father-in-law died before three months back. At that time also Jashoda complained to them that she was harassed on account of dowry and petty domestic work. At that time, she was taken by the complainant to his house and again after two days she was appraised and sent back to his inlaws. On 25/12/1993 at about 5.00 p.m. one Damji Bhanushali of Modkuba came to the complainant at his village and told him that his daughter is burnt in the bathroom. The complainant, therefore, alongwith his wife went in a taxi to Modkuba and on enquiry and on seeing on the top of the bathroom he found that his daughter Jashoda sprinkled kerosene on her body and died. At about 12 noon when there was none in the house, she closed the bathroom from inside and set fire to herself. According to him, his daughter Jashoda after her marriage was harassed by her inlaws on petty matters and dowry and she was physically and mentally harassed. Tiring thereof, he alleges that Jashoda sprinkled kerosene on her body and committed suicide.

3. On the basis of the said complaint, investigation was started, statement of witnesses were recorded, inquest panchnama was carried out, panchnama of scene of offence was carried out, postmortem report was obtained 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 Sessions Judge, which has been numbered as Sessions Case No.44 of 1994. Thereafter, Charge was framed against the accused for the offence punishable under sections 498-A, 302, 114 and 201 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. After the evidence was over, Further Statement of the respondents – accused were recorded under section 313 of the Code of Criminal Procedure and arguments were heard. At the conclusion of the trial, the learned Sessions Judge was pleased to acquit the accused for the charges levelled against them. Hence, the appellant - State of Gujarat has preferred the present Criminal Appeal challenging the judgement and order of acquittal.

It is pertinent to note that the respondent No.1 - original accused No.1 has expired during the pendency of the present appeal and hence present appeal stood abated qua respondent No.1 and the present appeal is required to be considered qua respondent Nos.2 and 3 – original accused Nos.2 and 3.

4. Heard Ms.C.M. Shah, learned APP for the State and Mr.Jaimin Pandya, learned advocate for the respondent Nos.1 and 3.

5. Ms.C.M. Shah, learned APP for the appellant State has vehemently argued that the Sessions Judge has wrongly acquitted the accused of the offences for which they were charged and the acquittal order is against the law and evidence on record. There is no proper appreciation of evidence done by the trial court. She has further 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. It is further submitted that the Sessions Judge has erred in acquitting the accused from the charges levelled against them. It is further argued that the prosecution has proved that the respondent the accused have committed offence under sections 498-A, 302, 114 and 201 of Indian Penal Code. It is further submitted that Sessions Judge has acquitted the respondents accused merely on some minor contradictions and omissions in the evidence of the prosecution witnesses. It is further argued that the Sessions Judge has erred in not believing the evidence of the investigating officer and complainant who had no reason to implicate the accused falsely in the case. It is further argued that the offence punishable under sections 498-A, 302, 114 and 201 of Indian Penal Code, is made out, however, the same is not believed by the Sessions Judge. It is 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. It is further argued that the Sessions Court has erroneously held that the prosecution has failed to prove the case beyond reasonable doubt. She has submitted that as such, the trial court has erred in not appreciating the evidence on record in its true spirit and has given wrongly acquittal to the respondents accused which cannot sustain at the scrutiny of this Court and has requested to allow the present appeal.

6. Mr.Jaimin Pandya, learned advocate has submitted that the respondent No.1 – original accused has expired and present appeal survives qua respondent Nos.2 and 3 – original accused Nos.2 and 3. 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 respondent Nos.2 and 3 with the commission

of the offence. There are material contradictions and omissions in the evidence of the prosecution witnesses. It is also submitted that the medical evidence produced by the prosecution is rightly appreciated by the trial court and has not relied upon. The evidence of the medical officer regarding external injury No.3 of the deceased which alleged by the prosecution to be caused by the muddamal knife by the accused is rightly appreciated and not believed by the trial court. The prosecution has not proved the case beyond reasonable doubt. No error or illegality has been committed by the trial court in acquitting the respondent Nos.2 and 3. He has requested to dismiss the present appeal.

7. Heard the learned 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.

8. 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.

9. We have gone through the entire record and proceedings. We have re-appreciated the evidence on record. On re-appreciation of the evidence, it appears that the entire case of the prosecution has been rested upon two aspects. One is regarding harassment and ill-treatment by the accused to the deceased on the petty issue and also taunting the deceased by the in-laws and her husband on account of give and take of the dowry and the second aspect upon which the case of the prosecution rests is that due to the ill-treatment to the deceased, the deceased has committed suicide in the bathroom by sprinkling kerosene on herself. Thereafter it was investigating agency which concluded that it is a case of homicidal death whereas the accused No.2 inflicted blow of knife in the abdominal of the deceased and thereafter all the three accused burnt the deceased in the bathroom and tried to make an attempt to show the case as of suicide.

10. Now, so far as aspect of ill-treatment to the deceased is concerned, the witnesses who have been examined are the parents of the deceased - Laljibhai Gopalbhai Ex.25 and his wife Changbahi Laljibhai Ex.26. Considering their evidence, it appears that mere words in the mouth alleging ill-treatment to the deceased, there is absolutely nothing on record by way of cogent and convincing evidence that the deceased was ill-treated by the accused on petty issue and was taunted on the point of dowry.

11. As per the say of the complainant, in the past the deceased was sent to her parental home and she was at her parental home, and thereafter, she was sent to the house of her in-laws and husband after intervention of the villagers and persons of their community Vithhubhai Khimjibhai and Virjibhai Khimjibhai. Vithhubhai Khimjibhai and Virjibhai Khimjibhai have been cited as witness in this case by the prosecution to prove the allegation of ill-treatment to the deceased and that there was dispute between the deceased and her husband and in-laws, for which, she was sent to her parental house and due to their intervention she was returned back to her in-laws house. Here, in this case, Vithhubhai Khimjibhai and Virjibhai Khimjibhai are examined at Ex.20 and 21. They have not supported the say of the complainant regarding ill-treatment and are declared hostile. As such, the deceased being harassed and ill-treated by the accused has not been supported by the independent witnesses on whom reliance has been placed by the complainant himself. It is a common trend and practice that when a married woman is subjected to ill-treatment by her in-laws and husband, the first person to know about the ill-treatment is next door neighbour. A lady who is subjected to ill-treatment will also try to console herself by taking help of the neighbour. Here in this case, the next door neighbour is Fakubai Musabhai who is examined at PW No.5 Ex.23. The said witness has also not supported the case of the prosecution on the point of ill-treatment to the deceased. On the contrary, this witness has stated that the married life of the deceased was going on smoothly and she has never heard any quarrel. Considering the evidence of Vithhubhai Khimjibhai and Virjibhai Khimjibhai and neighbour - Fakubai Musabhai the allegation of ill-treatment and physical and mental harassment has not been proved.

12. Here in this case, as per the case of the prosecution, the deceased has been stabbed with knife and after she was unconscious, she was burnt in the bathroom. Under the circumstances, in this case only main evidence which can be reconsidered is medical evidence. Dr.Parmar, who has performed the postmortem has been examined at Ex.10. In his examination-in-chief he has stated the entire facts of the postmortem note, external injury and internal injuries found on the dead-body and position of the dead-body at the time of performing the postmortem. He has opined that the internal and external injuries were ante-mortem. Injury No.3 was spindle shaped wound 9.5 cm x 3.2 cm. He has stated that the wound was burnt irregularly and was black in colour. He has stated that the injury is possible by muddamal article knife. The medical officer is extensively cross-examined by the defence. From the evidence of the medical officer, it is finding of the trial court that the external injury No.3 and internal injury No.1 were having shape of incised injury i.e. it is incised but the margin of the wound were burnt when examined. It is on record and admitted by the medical officer that the word "incised" is not in the postmortem note. External and internal injury is examined extensively. The cross examination of the Doctor, relying upon various authors of medical jurisprudence, has been extensively appreciated by the learned Sessions Judge. It is found from the postmortem note

and the muddamal article No.2 which was shown to the witness, the muddamal article knife having blade of 12.1/4 c.ms. whereas the injury was 9.5 c.ms. x 3.2 c.ms. which was burnt irregularly with black colour. It has also been appreciated by the learned Sessions Judge that diagram was made by the medical showing the shape of whole of the injury on the anterior surface of stomach. The diagram shows that the injury is triangular injury and using the muddamal knife the accused by muddamal has caused the injury is not convincingly believed by the learned Sessions Judge. Considering the evidence of the medical officer as admitted in the cross examination that the injury was incised but characteristics showing external injuries whereas the margins were blacken irregular and internally the medical officer does not know that the injury on the stomach was incised or otherwise. As stated above, diagram which has been brought on record by the prosecution shows the injury as arrow head injury which cannot be caused by any knife, as believed by the learned Sessions Judge. The learned Sessions Judge, appreciating the evidence of the medical officer based upon medical jurisprudence by Cocks, Modi and Parikh has given cogent and convincing finding. Based on medical jurisprudence, the learned Judge has come to the conclusion that if the injury is caused by the knife, internal and external it would be incised but here in this case internal and external injuries are corresponding to each other, which is not disputed but the shape cannot be externally or internally, which is found in this case.

13. From the Inquest Report which has been brought on record at Ex.32 it is found that the dead-body was found in the bathroom and it was in pugilistic position. As per inquest report, the stomach was burnt with skin. The skin below umbilicus was torn on account of burning and some internal part of the stomach had become out and is seen but the inquest panchnama has not found any injury on the stomach of the deceased. However, as per the Doctor who performed the postmortem report, there are external and internal injury both, but as appreciated by the learned Sessions Judge in the findings, two different shape of injuries internal and internal cannot be caused. Internal injury is shown to be spindle and not of incised whereas internal injury is shown to be arched injury. As such when the internal and external injury are corresponding to each other, shape cannot differ which is finding given by the Sessions Court. As such, as per the evidence of Mr.Parmar, Medical Officer, which is rightly appreciated by the learned Sessions Judge that there must have been burns of the incised wound at least internally but factually it cannot be so.

14. So far as the medical evidence is concerned, which is the main evidence, in this entire case, there is no eye witness to the incident, and Dr.Parmar has deposed contradictory. There is nothing regarding incised injury in the entire postmortem report. As such, the learned Sessions Judge has rightly appreciated the medical evidence and has given finding that the death of the deceased cannot be said to be proved beyond reasonable doubt to be a homicidal death.

15. As discussed hereinabove, the evidence regarding harassment and ill-

treatment to the deceased by the respondents has not been proved by cogent and convincing evidence on record by any of the panch witnesses examined at Ex.27 and 28. As such, the panchas have not supported the case of the prosecution. The panchas of discovery panchnama of muddamal article No.2 and clothes of the accused Ex.29 and 30 is also not proved.

16. It is cardinal principle of law that when there is no direct evidence in the case and case rests on circumstantial evidence, the chain of circumstances is required to be proved and the ultimate result of which should be that only the accused and none else should be the author of the crime. In other words, chain of circumstances pointing towards the guilt of the accused should be linked with each other in such a way which points out to the accused and none else depending upon all circumstances.

17. Here in this case, the chain of circumstances if taken together medical evidence is not supporting beyond reasonable doubt because the discovery of knife at the instance of the accused No.2 is also not proved. Considering the medical evidence and evidence of Mr.Parmar couple with other evidence on record, the learned Sessions Judge has rightly appreciated the evidence on record.

18. Considering the entire evidence on record oral as well as documentary, we are of the opinion that the prosecution has failed to prove the case against the accused by leading cogent and convincing evidence. The judgement delivered by the Sessions Judge is sound on the aspect of law and facts. The evidence brought on record by the prosecution before the trial court has been rightly appreciated by the trial court. No apparent error on the face of the record is found from the judgement. The judgement does not suffer any material defect or cannot be said to be contrary to the evidence recorded.

19. 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."

20. 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.

21. Scope of appeal against acquittal is well laid down in case of *Chandrappa and ors. vs. State of Karnataka* reported in (2007) 4 SCC 415, it was observed:

"42. From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge;

(1) An appellate Court has full power to review, reappraise 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 emphasize 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 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.”

22. 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.

23. In view of the above and for the reasons stated above, present Criminal Appeal deserve to be dismissed and is accordingly dismissed qua respondent Nos.2 and 3.