

(2014) 03 GUJ CK 0014
In the Gujarat High Court
Case No : Criminal Appeal No. 1135 of 1994

State of Gujarat	Vs	APPELLANT
Suda Kara Rabari		RESPONDENT

Date of Decision : 11-03-2014

Acts Referred:

Bombay Police Act, 1951 — Section 135, 37(1)
Criminal Procedure Code, 1973 (CrPC) — Section 313, 378, 378(1)(3)
Evidence Act, 1872 — Section 6
Penal Code, 1860 (IPC) — Section 107, 114, 323, 325, 34

Citation : (2014) 3 GLH 217

Hon'ble Judges : Rajesh H. Shukla, J

Bench : Single Bench

Advocate : Monali Bhatt, APP, Advocate for the Appellant; Samir Khan, Advocate for the Respondent

Judgement

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Rajesh H Shukla, J.—The present Appeal under Section 378(1)(3) of the Criminal Procedure Code, 1973 is directed against the judgment and order delivered by the Additional Sessions Judge, Gondal in Sessions Case No. 110/1993 dated 06.09.1994 recording acquittal of the accused of the charges for the offences under Sections 355, 325, 323, 354, 504, 506(2), 509 read with Section 114 of the Indian Penal Code, under Section 37(1) read with Section 135 of the Bombay Police Act and under Sections 3(1)(10) and 3(1)(11) of the Atrocity Act. The facts of the case briefly summarized are as follows:-

1.1 It is the case of the prosecution that when the complainant, Ramji Samat was sitting at the house of his neighbour on 11.04.1992, the accused persons had abused the father of the complainant. He therefore came to his house from the said street and found that the accused persons were assaulting his father and when he tried to intervene, he also received injuries along with his wife. It is the case of the prosecution that they were threatened that if he lodges complaint

with the police, he will lose his life and the accused had thereafter left.

1.2 According to the case of the prosecution, the incident has occurred as narrated by Laxmiben (sister of the complainant) that when she had gone to buy sugar at village : Paneli and when she was returning, the accused persons had abused, misbehaved and also assaulted her. The accused No. 2 is said to have abused that they will abduct her and they made demand to accompany them, which declined and, therefore, the accused No. 2 caught hold of her hand trying to use the force and thereby outraged the modesty and committed offence. Therefore she tried to return to the house shouting for the help and though people were there, they had not intervened and when she entered into the house, the accused persons followed her, which led to the incident, in which, the father was assaulted as she and her sister had locked them inside the room.

1.3 Therefore, the complaint was lodged by the complainant, which came to be registered as C.R. No. 128/1992 with Bhayavadar Police Station for the alleged offences and it was tried by the Court of sessions after it was committed by the Court of Magistrate.

1.4 In order to bring home the charges leveled against the respondents-accused, the prosecution examined witnesses including the complainant, his sister, his brother and other witnesses including Laxmiben victim.

1.5 After recording the evidence of the prosecution witnesses was over, the statements of the accused under Section 313 of the Criminal Procedure Code were recorded.

1.6 After hearing the learned APP as well as learned Advocate for the accused, the learned Sessions Judge, as stated above, recorded acquittal on appreciation of material and evidence.

1. It is this judgment and order which has been assailed in the present appeal on the grounds mentioned in the memo of appeal.

2. Heard learned APP Ms. Monali Bhatt for the appellant State of Gujarat and learned Advocate, Shri Samir Khan for the respondent No. 3 accused.

2. Learned APP Ms. Bhatt has referred to the impugned judgment and order and also the testimonies of the witnesses including complainant, PW 1, Exh. 22, PW 5, Samatbhai Govabhai (father), Exh. 26, PW 11, Laxmiben Samatbhai, Exh. 38 and others including the medical evidence in the form of testimony of PW 6, Dr. Jamnadas Makwana, Exh. 27 and his medical certificate at Exh. 17 as well as testimony of PW 9, Dr. Khodaji Solanki, Exh. 34 and the medical certificate at Exh. 35 and also PW 10, Dr. Govindji Makwana, Exh. 36. She has referred to these testimonies and tried to submit that as stated by the witnesses including the complainant, who is an eyewitness, he had tried to intervene along with his wife and received injuries, for which, the medical certificate is also produced, which is corroborated by the testimony of other witnesses like PW 5 (father) at Exh. 26. She submitted that the testimonies of these witnesses are corroborated

by medical witnesses as stated above. Therefore, learned APP Ms. Bhatt submitted that the presence of the accused persons at the scene of offence at the house of the complainant and assault to the father is clearly established resulting into offence of trespass. She submitted that this incident has to be read in background of the earlier incident, where Laxmiben was abused and her modesty was sought to be outraged. Learned APP Ms. Bhatt submitted that as could be seen from the testimony of witnesses including the victim that the accused persons had audacity to not only abuse and assault her or make an attempt to outrage her modesty but when she proceeded towards her house, they followed her and even beaten the father at the house in their own house. Learned APP Ms. Bhatt therefore submitted that inspite of clear evidence both with regard to the offence of trespass and outraging the modesty under Section 354 of the IP Code with corroborating the medical evidence, the Court below has conveniently ignored the relevant material and has recorded acquittal without any justification. Learned APP Ms. Bhatt has also stated that the observations have been made without proper evidence and considering the relevant material. Learned APP Ms. Bhatt submitted that not only the Court below has committed an error in appreciation of evidence resulting into perversity but has conveniently and deliberately not considered the material and evidence on record. For that purpose, she pointedly referred to the notification issued by the Police Commissioner under the Bombay Police Act regarding the prohibition of weapons produced at Exh. 16 inspite of this notification in force though it was placed on record, the Court below has stated that the prosecution has failed to establish and prove any such prohibitory order. Similarly, learned APP Ms. Bhatt has also referred to the medical evidence with regard to the injuries caused to the victims and submitted that conveniently it has not been mentioned with regard to the injuries, which have been found merely because there is some mistake in describing the injuries, however, the fact remains that the injury has been caused due to assault, which is established by the medical evidence. Again learned APP Ms. Bhatt submitted that the observations are perverse and contrary to the material on record and evidence. Again learned APP Ms. Bhatt referred to Exh. 26 and submitted that though the entry or copy of the entry as regards Bhayavadar Police Station is placed on record, the observations have been made that no entry of this diary is produced on record by the prosecution. Learned APP Ms. Bhatt therefore submitted that this itself suggests casual approach resulted in perversity. She submitted that no person would come to a conclusion based on this material on record and, therefore, this is a fit case to entertain the present appeal.

3. Learned APP Ms. Bhatt has also submitted that though two accused have expired and the appeal qua them stands abated, the accused No. 3 cannot escape from the charges and the acquittal which has been recorded contrary to the evidence on record is required to be reversed. For that purpose, again she referred to the evidence and submitted that though particular injury may have been caused by other persons, fact remains that the presence of the accused is

established at the house of the victim and, therefore, the offence of trespass is made out. Similarly, she has stated that when the accused had abused and misbehaved outraging modesty of the woman, he would also be liable for the offence under Section 354 read with Section 114 of the IP Code. Learned APP Ms. Bhatt submitted that the Court below has failed to consider this aspect and there is no discussion on such vital aspects and has recorded acquittal in most casual manner. In support of her submissions, she has referred to and relied upon the judgments of the Hon''ble Apex Court in case of State of Andhra Pradesh Vs. M. Madhusudhan Rao, , State of Punjab Vs. Major Singh, , in case of Raju Pandurang Mahale Vs. State of Maharashtra and Another, and in case of Tarkeshwar Sahu Vs. State of Bihar (Now Jharkhand), .

4. Learned Advocate, Shri Khan for the defence has referred to the papers and submitted that the accused Nos. 1 and 2 have expired and, therefore, the present appeal would stand abated qua them and it would survive qua accused No. 3 only. Learned Advocate, Shri Khan has referred to the papers and tried to submit that the accused No. 3 is not attributed with any overt act, by which, it can be said to have abetted or caused any serious injuries. Learned Advocate, Shri Khan referred to the testimony of the prosecution witnesses and particularly, testimony of Laxmiben, PW 11, Exh. 38 and submitted that as stated by her, the accused No. 1 had caught hold of her hand and had abused her trying to outrage modesty. He submitted that the accused No. 1 had spoken word that she should be taken away and when the victim herself has not stated about the present accused No. 3, the charges for the same are not established. He further submitted that though as per the prosecution witnesses, the presence of the accused along with other two accused may have been established at both places, the accused No. 3 is said to have been armed with chain. Learned Advocate, Shri Khan therefore referred to the testimony of the complainant, PW 1, Exh. 22 along with other prosecution witnesses including the testimony of Shamji (father), PW 5, Exh. 26, who is an injured eyewitness. He submitted that the medical evidence in the form of the testimony of doctor and the medical certificate does not refer to any such injury attributed to the accused No. 3. He therefore submitted that the charges for the alleged offences under Section 323 of the Indian Penal Code are also not established. Learned Advocate, Shri Khan has referred to the aspect of abetment referring to provision of Section 107 of the Indian Penal Code and submitted that the charges for the abetment has to be established by evidence. He has also referred to and relied upon the judgment of the Hon''ble Apex Court in case of Joginder Singh and Another Vs. State of Haryana, . He has also referred to and relied upon the judgment of the Hon''ble Apex Court in case of S. Anil Kumar @ Anil Kumar Ganna Vs. State of Karnataka, and submitted that when the acquittal is recorded by the trial Court, it reinforces the innocence of the accused and, therefore, same may not be disturbed unless the judgment is perverse. Learned Advocate, Shri Khan submitted that merely because other view is possible may not be a ground to disturb the finding recording acquittal. He has also relied upon the judgment of the Hon''ble Apex

Court in case of Chandrappa and Others Vs. State of Karnataka, in support of his submissions.

5. Learned Advocate, Shri Khan has submitted that in any case, considering the passage of time and the fact that at the most, he has been guilty for abetment qua alleged offences, particularly, the outraging the modesty of a woman, the benefit under the provisions of the Probation of Offenders Act may be given subject to suitable conditions. In support of his submissions, he has referred to and relied upon the judgment of the Hon'ble Apex Court in case of Ram Chander and Others Vs. State of Haryana, and submitted that it may be considered in background of the fact that at the relevant point of time, he was aged about 21 years and, therefore, the benefit under the Probation of Offenders Act may be given to the present respondent No. 3 accused.

6. In view of these rival submissions, it is required to be considered whether the present appeal deserves to be allowed and the impugned judgment and order recording acquittal can be sustained.

7. As it transpires from the impugned judgment and the observations made therein, the Court below has failed to appreciate the material and evidence and rather drawn inference contrary to the facts and material on record. A few facts need mention before the scrutiny and discussion regarding the material and evidence on record, which have been appreciated by the Court below. Though the Court below has made observations that the notification regarding the prohibition of the Arms Act is not established, same is contrary to the material on record inasmuch as the notification is produced at Exh. 16 and the I.O., L.D. Barot, PW 19 in his testimony at Exh. 53 has clearly stated about this. Whereas in para No. 20 of the judgment, it has been observed that whether any such notification under the Arms Act was in force or not is not brought on record by the prosecution. The Court below has also conveniently referred to the publication thereof without any basis. Similarly, entry regarding the registration of FIR being C.R. No. 28/1992 at Bhayavadar Police Station is produced on record at Exh. 21, entry in the register is produced at Exh. 41 and entry in the station diary at Bhayavadar PS is produced at Exh. 44. The observations have been made without considering these aspects. PW 14, Hussain, P.S.O. of Bhayavadar Police Station in his testimony at Exh. 43 has clearly stated and produced on record that he has brought the original station diary and the entry which he had made himself. He has also stated that on the basis of Exh. 12 received from Moti Paneli Outpost, he has registered the offence. In spite of this clearly testimony, the observations have been made by the Court below that though Samat (father) had given complaint at Paneli Outpost, no such complaint was produced on record. On that basis, inference has been drawn that it is not clear as to whether the complaint was given at Paneli Outpost or not and the prosecution has not come out with actually as to whether the incident has been taken. These observations are totally contrary to the evidence on record. Similarly, the observations have been made referring to the inference which are

contrary to the medical evidence. It has been observed that the evidence of the complainant and the doctor is contradictory. It is observed that the complainant said about the injury on right palm and back, whereas the doctor has found the injury on left hand elbow. If the evidence of Dr. Jamnadas Makwana, PW 6, Exh. 27 is considered, he has given specific details about the injuries to the injured victims, which would not justify the observations.

Apart from the genesis, the prosecution case is that when Laxmiben, who had gone to market for the sugar is abused, assaulted and when her modesty was sought to be outraged, she started returning to the house and she was followed by the accused persons. It is the specific case of Laxmiben, PW 11 at Exh. 38 that the accused No. 2 had asked that she would be carried in a rickshaw and, thereafter, she was abused and also caught her hand. She has specifically stated that therefore when she was returning back, she had shouted for help but as the people were scared of the accused persons, nobody would come to rescue and help her. She has specifically stated that there were many people on the road and she had requested for help, thereafter when she came in the house, her parents and sisterinlaw and younger sister were there and the accused persons are said to have entered into the house and assaulted the father. She has specifically stated that who assaulted the father how. Therefore, since the accused Nos. 1 and 2 have expired and the appeal has abated, the role of the present accused No. 3 is required to be considered. She has specifically stated that the accused No. 3 was armed with rickshaw chain and had given blows to the father, Samatbhai, hence, he had become unconscious and was taken to the hospital. Thus it reflects about the conduct of the accused persons that they had audacity not only to abuse, assault and outrage the modesty of the victim, Laxmiben but when she tried to return to her houses asking for help on the road but nobody intervened or helped her, the accused people followed her and trespassed her house and assaulted father and, thereafter, to the sisterinlaw and brother, who had tried to intervene. The testimony of PW 9, Dr. Solanki, Exh. 34 clearly suggests that he had referred to father, Samat at Junagadh and issued certificate, Exh. 35. Dr. Govindji Makwana, PW 10 in his testimony at Exh. 36 has also corroborated and had also issued certificate, Exh. 37. Therefore, though there may not be any specific mention about the injury caused by accused No. 3 with the chain, the fact remains that his presence all throughout i.e. in the market place when the coaccused, Bhupat had abused the victim and thereafter all the accused had followed her, abused her and had trespassed in her house and assaulted other victims i.e. father, sisterinlaw, victim, Laxmiben and the complainant (brother) would clearly suggest that the accused No. 3 was liable for the offence alleged regarding the assault under Section 323 of the IP Code, outraging modesty under Section 354 read with Section 114 or 34 of the Indian Penal Code. In other words, he has abetted the offence throughout and his presence as well as active role cannot be denied or disputed. The submissions which have been made by learned Advocate for the defence that as there is no overt act attributed to the accused No. 3 as there is no mention about any injury

caused with the chain, the offence under Section 323 of the IP Code is not established. As discussed above, the presence of the accused No. 3 along with other accused has been established throughout as participation or active role in the assault is also established. Merely because the injury, which could be caused with particular weapon like chain is not to be found in the medical certificate, would not be a ground to absolve the accused No. 3. In any case, he would be equally liable for the abetment of same offence. The provisions of Section 107 of the IP Code clearly provides that person/accused liable for the abetment would equally be responsible and liable for the offence and, therefore, such submission cannot be accepted.

8. Further, when the presence of the accused No. 3, the trespassing the house of the victim, assault to the injured victims i.e. family members of the victim and the charges for the outraging modesty, are not at all considered by the Court below. Assuming that the accused No. 2, Bhupat had caught hold of her and abused her, the presence of the accused No. 3 is also established and, therefore, looking to this conduct, he cannot escape from the rigorous of the offence when intentionally and with the knowledge, he has participated throughout in the offence committed by them. When the accused No. 2, Bhupat had assaulted, abused and outraged modesty by holding victim, the accused No. 3 was also with him and it is not the case of the defence that it was done suddenly by Bhupat and, thereafter, the accused No. 3 had not taken any steps or had distanced himself. In fact, after that first incident, when the victim returned towards the house, all the accused including the present accused No. 3 followed her, trespassed into her house and assaulted the family members, which itself reflect about the intention and involvement of the accused No. 3 also regarding the commission of the offence. Therefore, the submission made by learned Advocate for the defence has no merit inasmuch as the accused No. 3 was present at market place when the first incident about the abuse to the victim and outraging the modesty had taken place. Thereafter considering the subsequent conduct that the present accused No. 3 along with other accused followed the victim right upto her house, trespass the house and assaulted the family members in the house of the victim reflecting about their intention, it is this conduct which is required to be considered with reference to the provision of Section 6 of the Evidence Act, which referred to the relevancy of the facts forming a part of same transaction. Therefore in view of the clear evidence corroborated by the testimony of other injured witnesses corroborated by medical evidence in the form of testimony of doctor, who examined either injured witnesses or issued certificates, charges for the offences about assault, injury, trespass and outraging modesty of the victim in the market place are clearly established. Same transaction has a two part, one is at the market place followed by subsequent transaction or trespass in the house when she returned back followed by the accused persons. It is in this background, the finding and conclusion recorded on the basis of the reasons recorded by the Court below cannot be sustained. It must be stated that the approach of the Court below is

rather perfunctory, casual and contrary to the material and evidence on record. If such conclusion are sustained, it would rather be a miscarriage of justice. The submission which has been made referring to the scope of the interference in the acquittal appeal under Section 378 of the Cr.P Code is required to be considered in background of the broad guidelines laid down by the Hon''ble Apex Court in catena of judicial pronouncement. The Hon''ble Apex Court in case of Chandrappa and Others Vs. State of Karnataka, has very succinctly discussed the scope of Section 378 of the Cr.P. Code and laid down the guidelines, which has been summarized. However at the same time, it has also been observed that, "Bare reading of Section 378 of the present Code (Appeal in case of acquittal) quoted above, makes it clear that no restrictions have been imposed by the Legislature on the powers of the appellate Court in dealing with appeals against acquittal. When such an appeal is filed, the High Court has full power to reappreciate, review and reconsider the evidence at large, the material on which the order of acquittal is founded and to reach its own conclusions on such evidence. Both questions of fact and of law are open to determination by the High Court in an appeal against an order of acquittal."

9. However, word of caution has been expressed that normally the High Court would be guided by the broad principles including the fact that the accused having secured an acquittal, the presumption of innocence is reinforced and strengthened. At the same time, it has also been observed and quoted referring to the aspects, which need to be considered while exercising such power. The observations made by Lord Russel, which has been referred to and quoted as under:--

"There is in their opinion no foundation for the view, apparently supported by the judgments of some Courts in India, that the High Court has no power or jurisdiction to reverse an order of acquittal on a matter of fact, except in cases in which the lower Court has "obstinately blundered", or has "through incompetence, stupidity or perversity" reached such "distorted conclusions as to produce a positive miscarriage of justice", or has in some other way so conducted itself as to produce a glaring miscarriage of justice, or has been tricked by the defence so as to produce a similar result".

10. Reference is made to other judgments including the observations made in another judgments referring to compelling reasons. A useful reference can also be made to the observations made by the Hon''ble Apex Court in case of Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra, where suggesting to strike a balance between importance of individual liberty and evil of acquitting guilty persons, the observations have been made by Krishna Iyer, J., which reads as under:--

"Even at this stage we may remind ourselves of a necessary social perspective in criminal cases which suffers from insufficient forensic appreciation. The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good

regardless of justice to the victim and the community, demand especial emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs thro" the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community. The evil of acquitting a guilty person light heartedly as a learned author (Glanville Williams : "Proof of Guilt") has saliently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicted "persons" and more severe punishment of those who are found guilty. Thus, too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. For all these reasons it is true to say, with Viscount Simon, that "a miscarriage of justice may arise from the acquittal of the guilty no less than from, the conviction of innocent.." In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents".

(emphasis supplied)"

11. A useful reference can also be made to the observations of the Hon"ble Apex Court in case of Ramesh Babulal Doshi Vs. State of Gujarat, , where it has been considered when the order of acquittal cannot be sustained. Rather it is necessary that the miscarriage of justice should be avoided and it cannot be lost sight of the fact that a miscarriage of justice may arise from the acquittal of guilty, which is not less than the conviction of an innocent. Therefore, it is the duty of the appellate Court (High Court) that the reasons recorded for arriving at the conclusion are scrutinized and where view taken is plausible and probable, it cannot be suggested that the view taken by the trial Court may not be disturbed in appeal because the accused has been acquitted, which could lead to miscarriage of justice. At the same time, the Hon"ble Apex Court in a judgment in case of Chandrappa (supra) has also made observations that while dealing with such acquittal appeals, the appellate Court or the High Court will not reverse the decision mere because different view is possible and when it has full power to review or reappraise or reconsider the evidence, it must scan or scrutinize the evidence and material and also consider the reasons recorded by the Court below and also recording reasons for reversing such findings. Therefore, the appellate Court has to closely scrutinize the appreciation of evidence with the reasons recorded for disturbing the finding and conclusion arrived at offering the justification as per the broad guidelines. In other words, in ultimate analysis, it is

only when the Court though having a power may exercise with caution to prevent the miscarriage of justice resulting from slip shod and casual manner resulting into acquittal, such finding cannot be sustained, for which, the reasons are recorded for arriving at independent conclusion on the basis of the overall view of the material and evidence.

12. Therefore, as discussed above, the finding and conclusion arrived at on the basis of the reasons recorded by the Court below cannot be sustained and the impugned judgment recording acquittal of the accused persons deserves to be quashed and set aside. However, as the accused Nos. 1 and 2 have expired, it would survive qua accused No. 3 only. Therefore, the charges for the offence under Sections 323 and 455 read with Section 114 of the IP Code are held to be established. Similarly, the charges for the offence under Section 354 read with Section 114 of the IP Code are also held to be established. Therefore, the accused No. 3 is held guilty for the offence under Sections 323, 354, 455 read with Section 114 of the IP Code. The impugned judgment is not disturbed qua other charges.

13. In the fact of the case, the present appeal therefore deserves to be allowed and accordingly stands allowed. The impugned judgment and order passed in Sessions Case No. 110/1993 by the Additional Sessions Judge, Gondal dated 06.09.1994 recording acquittal is hereby quashed and set aside to the aforesaid extent.

FURTHER ORDER

14. After the judgment was pronounced, I have heard learned Advocate, Shri Samir Khan for the respondent No. 3 accused and learned APP Ms. Monali Bhatt for the appellant-State.

15. Learned Advocate, Shri Khan has stated that considering the facts of the case and also the young age of the respondent No. 3 and also the time which has passed, minimum sentence may be awarded and leniency may be shown. He has also requested for extending the benefit under the provisions of the Probation of Offenders Act.

16. Learned APP Ms. Bhatt on the other hand has referred to the judgment in case of Narendra Champaklal Trivedi Vs. State of Gujarat, and submitted that the passage of time will not be aground for any leniency.

17. Therefore having regard to the facts and circumstances, the interest of justice would be served if the respondent No. 3 accused is ordered to serve the sentence of 18 months and fine of Rs. 1,000/- for the offence under Sections 323, 455 read with Section 114 of the IP Code and to serve the sentence of 18 months and fine of Rs. 1,000/- for the offence under Section 354 read with Section 114 of the IP Code and fine of Rs. 1,000/-. Both sentences are ordered to be run concurrently. Learned Advocate, Shri Khan has requested for time of eight weeks to surrender to enable the respondent No. 3 accused to take appropriate

steps to approach the Hon"ble Apex Court. Time of eight weeks as prayed for is granted. The respondent No. 3 accused shall therefore surrender on or before 6th May, 2014, failing which, bailable warrant be issued.