

(2015) 10 GUJ CK 0019
In the Gujarat High Court

Case No : Criminal Appeal Nos. 1037, 1032 and 836 of 2010

State of Gujarat

APPELLANT

Vs

Thakor Kadvaji Shankarji and Others

RESPONDENT

Date of Decision : 19-10-2015

Acts Referred:

Bombay Police Act, 1951 — Section 135, 34
Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 302, 304(II), 323, 324, 34

Citation : (2015) 10 GUJ CK 0019

Hon'ble Judges : K.S. Jhaveri and G.B. Shah, JJ.

Bench : Division Bench

Advocate : C.M. Shah, APP, for the Appellant; Yogendra Thakore, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

K.S. Jhaveri, J.—Present appeals assail the judgment and order dated 29/04/2010 passed by the learned Sessions Judge, Patan in Sessions Case No. 9 of 2009, whereby, the learned trial Judge was pleased to convict the original accused Nos. 1 and 2 for the offence punishable under Sections 304(II) and 324 of the Indian Penal Code, 1860 (for brevity, "the IPC") and Section 135 of the Bombay Police Act. The accused No. 1 was sentenced to undergo rigorous imprisonment for four years and a fine of Rs. 1,000/- and in default of payment of fine, to undergo further simple imprisonment for 15 days and the accused No. 2 was sentenced to undergo rigorous imprisonment for three years and a fine of Rs. 1,000/- and in default of payment of fine, to undergo, further simple imprisonment for 15 days. No separate punishment was inflicted upon the accused No. 2 for the offence punishable under Section 324 of the IPC. The accused Nos. 3 to 5 were acquitted of all the charges levelled against them. Accordingly, Criminal Appeal No. 1037 of 2010 has been filed by the State for enhancement of sentence of accused Nos. 1 and 2, whereas, Criminal Appeal No. 1032 of 2010 has been filed by the State against acquittal of all the accused and

Criminal Appeal No. 836 of 2010 has been filed by the accused No. 2 against conviction.

2. Brief facts of the prosecution case are that on 09/11/2008 complainant - Nanjiji Lavjiji Thakor, along with deceased Ramjiji and others had gone for fishing in the Rupen river and set the net for the same, at that time, the accused also came there for fishing and asked the deceased to set their net some far so that they could set their net to which, the deceased denied as they had already set the net. Hence, the accused, got excited and abused the deceased and assaulted him with knife and the stick due to which, the deceased sustained severe injuries and ultimately succumbed to the injuries. Thus, the accused committed the offence alleged against them for which, a complaint came to be lodged against them for the offence punishable under sections 302 , 323 , 324 , 504 r/w. 34 of the IPC and Section 34 of the Bombay Police Act.

2.1 Pursuant to the complaint, investigation was carried out. After investigation, charge-sheet was filed and as the case was triable by the Court of Sessions, it was committed to the Sessions Court, Patan.

2.2 The trial Court framed charge against the accused. The accused pleaded not guilty to the charge and claimed to be tried. Therefore, the prosecution produced oral as well as documentary evidence.

2.3 In order to bring home the charge against the original accused, the prosecution has examined as many as 12 witnesses viz. 1) Dr. Kalabhai Madhabhai Bajaniya, exh. 17, 2) Dr. Chandrakant Kailasपुरi Goswami, exh. 23, 3) Nanjiji Lavjiji Thakor, the complainant, exh. 26, 4) Jamaji Rayaji Thakor, exh. 27, 5) Chavda Vinubhai Mafabhai, exh. 29, 6) Jikarbhai Usmanbhai Saiyad, exh. 30, 7) Talaji Ramaji Thakor, exh. 31, 8) PSO - Manohar Sitaram Nigade, exh. 32, 9) IO - Narvarsinh Kodarsinh Kumpavat, exh. 35, 10) Circle Officer - Solanki Kantibhai Bhagabhai, exh. 49, 11) ASI - Ramanlal Chhaganlal, exh. 55 and 12) ASI - Valjibhai Lalbhai and also produced several documentary evidence viz. Complaint, exh. 36, Report as to registration of offence, exh. 38, Depute order, exh. 33, Inquest Panchnama, exh. 37, Form as to Death, exh. 19, Yadi for PM, exh. 18, PM Note, exh. 20, Panchnama of place of offence, exh. 39, Panchnama of seizure of clothes of the deceased, exh. 40, Panchnama as to physical condition of the deceased, exh. 41, Yadi as to issuance of certificate of treatment of the deceased, exh. 42, Certificate as to treatment of the complainant, exh. 24, Yadi as to preparing the map of the place of offence, exh. 43, Note as to sending the muddamal article to the FSL, exh. 44, Receipt issued by FSL, exh. 45, Report of FSL and the forwarding letter, exh. 46, Serological Report, exh. 47, Map of place of offence, exh. 50, Closing Pursis, exh. 51, copies of Inward Register of Bechraji Police Station, exh. 57 and 56.

2.4 At the end of the trial, Further Statements of the accused under Section 313 of Code was recorded in which they denied the evidence forthcoming on the record and stated that false case has been filed against them. Thus, after

recording above-referred Further Statements and hearing the arguments on behalf of prosecution and the defence, the learned Sessions Judge came to the aforesaid conclusion by the impugned judgment and order.

2.5 Being aggrieved and dissatisfied with the aforesaid judgment and order passed by the learned Sessions Court, present appeals have been filed.

3. We have heard Ms. C.M. Shah, learned Additional Public Prosecutor, for the State and Mr. Yogendra Thakore, learned advocate for the original accused No. 1.

3.1 Ms. Shah, learned Additional Public Prosecutor for the State, contended that the judgment and order of the Sessions Court is against the provisions of law; the Sessions Court has not properly considered the evidence led by the prosecution and looking to the provisions of law itself it is established that the prosecution has proved the whole ingredients of the offence against the accused. The learned Additional Public Prosecutor has also taken this Court through the oral as well as the entire documentary evidence and contended that the prosecution has examined Dr. Kalabhai Madhabhai Bajaniya at exh. 17 and Dr. Chandrakant Kailaspuri Goswami at exh. 23 and as per their evidence, the deceased had sustained several severe injuries as under:

"External Injuries:

- i) IW 3 c.m. X 1/2 c.m. X upto muscle on middle part of Lt. Thigh on inter median aspect;
- ii) IW 2 c.m. X 1/2 c.m. X upto muscle deep Lt. thigh upper & posterior part;
- iii) Diffuse swelling on middle & posterior part of Lt. thigh;
- iv) Legs are soiled & clotted blood;
- v) Diffuse soft swelling on Rt. parietal region.

Internal Injuries:

- i) 11 c.m. X 6 c.m. Bluish coloured haematoma on Rt. parietal temporal area of skull;
- ii) 4 c.m. X 3 c.m. size oval haematoma on middle of both parietal bone;
- iii) Brain: pale, 8 c.m. x 7 c.m. sized Brown Red coloured clotted haematoma Rt. parietal region."

3.2 She submitted that, out of above, five injuries were proved to be crucial for the death of the deceased. She made an endeavour to contend that the injuries were sufficient to cause the death of the deceased. She submitted that looking to the medical evidence, the trial Court has committed an error in acquitting the accused, more particularly, from the charge for the offence punishable under Section 302 of the IPC. She submitted that the prosecution has successfully proved the case against the accused beyond reasonable doubt, however, the

learned trial Court has committed an error in acquitting the original accused Nos. 3 to 5. Moreover, she contended that the learned trial Court has committed an error in considering the case for the offence punishable under Section 304(II) of the IPC instead of Section 302 of the IPC. She also contended that the learned trial Court has also committed an error in imposing the lesser punishment upon the accused Nos. 1 and 2, as considering the nature of offence and the injuries sustained by the deceased, the learned trial Judge ought to have imposed just and adequate punishment for commission of such an offence in which deceased had died, even for the offence punishable under Section 304(II) of the IPC. Making aforesaid submissions, she requested to allow the appeals filed by the State.

4. On the other hand, Mr. Thakore, the learned advocate appearing for the accused No. 1 submitted that though the prosecution failed to prove the case against the accused Nos. 1 and 2 beyond reasonable doubt, the learned trial Court imposed conviction upon them for the offence punishable under Section 304(II) and thereby, has committed an error. It is also submitted that there are material contradictions and improvements in the evidence led by the prosecution, however, the learned trial Judge, without taking into consideration said aspect, has convicted the accused Nos. 1 and 2, which is contrary to the evidence on record. However, without prejudice to the rights and contentions to be made on behalf of the accused Nos. 1 and 2, the sentence imposed by the learned trial Judge for the offence punishable under Section 304(II) of the IPC, being just and proper and since, the incident had occurred in a spur of the moment, this Court may not interfere in the appeal.

5. So far as appeal against acquittal is concerned, 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 Hon''ble Apex Court in catena of decisions. In the case of M.S. Narayana Menon @ Mani Vs. State of Kerala and Another, , the Hon''ble 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 Hon''ble 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 judgement 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."

5.1 Further, in the case of Chandrappa and Others Vs. State of Karnataka, the Hon''ble Apex Court has 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, reappreciate 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."

5.2 Thus, it is a settled principle that while exercising appellate powers, 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.

5.3 Even in a recent decision of the Hon'ble Apex Court in the case of State of Goa Vs. Sanjay Thakran and Another, , the 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 judgement 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."

5.4 Similar principle has been laid down by the Hon''ble Apex Court in the cases of State of Uttar Pradesh Vs. Ram Veer Singh and Others, and in Girja Prasad (Dead) by LRs. Vs. State of Madhya Pradesh, . Thus, the powers which this Court may exercise against an order of acquittal are well settled.

5.5 In the case of Lunaram Vs. Bhupat Singh and Others, , the Hon''ble Apex Court in paras 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 ankle 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 a running condition.

11. Considering the parameters of appeal against the judgement 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."

5.6 Even in a recent decision of the Hon''ble Apex Court in the case of Mookkiah and Another Vs. State rep. by the Inspector of Police, Tamil Nadu, , the Hon''ble 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 levelled 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 appellants 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,]"

5.7 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 Hon"ble Apex Court in the case of State of Karnataka Vs. Hemareddy Alias Vemareddy and Another, wherein it is held as under:

"...This court has observed in Girja Nandini Devi and Others Vs. Bijendra Narain Choudhury, that it is not the duty of the appellate court when it agrees with the view of the trial 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."

5.8 Thus, in case the appellate Court agrees with the reasons and the opinion given by the lower court, then the discussion of evidence at length is not necessary.

6. We have examined the matter carefully and gone through the evidence on record. We have re-appreciated and re-evaluated the evidence on the touchstone of the latest decisions of the Hon"ble Apex Court. We find that the trial Court while considering the evidence on record, has very elaborately discussed the evidence adduced before it. Considering the evidence on record, it appears that the element of motive behind commission of crime by the accused, is not proved by the prosecution beyond reasonable doubt and it appears that the incident had occurred in a spur of the moment. However, from the evidence of PW-3 - Nanjiji Lavjiji Thakor, the complainant, exh. 26 and the evidence of PW-4 - Jamaji Rayaji Thakor, exh. 27 who were the eyewitness to the incident in question and their presence appears to be natural at the place of offence and in view of the fact that they have supported the case of the prosecution and taking into consideration the role of both the accused, we are of the opinion that the learned trial Judge has rightly come to such conclusion and convicted the accused Nos. 1 and 2 for the offence punishable under Section 304(II) of the IPC and acquitted the accused Nos. 3 to 5. Further, the learned Additional Public Prosecutor is not in a position to show any evidence to take a contrary view in the matter or that the approach of the Court below is vitiated by some manifest illegality or that the decision is perverse or that the Court below has ignored the material evidence on record. In that view of the matter, we are of the considered opinion that the Court below was completely justified in passing impugned judgment and order. We are, therefore, of the considered opinion that the findings recorded by the trial Court are absolutely just and proper and in recording the said findings, no illegality or infirmity has been committed by it. We are in complete agreement with the reasonings given and the findings arrived at by the trial Court.

6.1 However, so far as sentence awarded for the offence punishable under

Section 304(II) of the IPC upon the accused No. 1 and 2 by the learned trial Judge is concerned, it appears to be inadequate and against the provision of law, more particularly, when no cogent reasons have been assigned for imposing the lesser punishment.

6.2 Moreover, recently, it has been held by the Hon"ble Apex Court in the decision in the case of Raj Bala v. State of Haryana and Others etc. etc. in Criminal Appeal Nos. 1049 to 1050 of 2015, decided on 18/08/2015, in para 1 and 2 as under:

"1. In Gopal Singh v. State of Uttarakhand, while focusing on the gravity of the crime and the concept of proportionality as regards the punishment, the Court had observed:--

"Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of proportionality allows a significant discretion to the Judge but the same has to be guided by certain principles. In certain cases, the nature of culpability, the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal in future, capability of his reformation and to lead an acceptable life in the prevalent milieu, the effect - propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crime and his conduct in the interregnum bearing in mind the nature of the offence, the relationship between the parties and attractability of the doctrine of bringing the convict to the value-based social mainstream may be the guiding factors. Needless to emphasise, these are certain illustrative aspects put forth in a condensed manner. We may hasten to add that there can neither be a straitjacket formula nor a solvable theory in mathematical exactitude. It would be dependent on the facts of the case and rationalised judicial discretion. Neither the personal perception of a Judge nor self-adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors which we have indicated hereinbefore and also have been stated in a number of pronouncements by this Court. On such touchstone, the sentences are to be imposed. The discretion should not be in the realm of fancy. It should be embedded in the conceptual essence of just punishment."

[Emphasis added]

2. Seven years prior to that, in Shailesh Jasvantbhai v. State of Gujarat, it has been held that:--

"7. The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross-cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of "order" should meet the challenges confronting the society. Friedman in his Law in Changing Society stated that: "State of criminal law continues to be-as it should be-a decisive reflection of social consciousness of society." Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.

8. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law, and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed, etc. This position was illuminatingly stated by this Court in *Sevaka Perumal v. State of T.N.*"

[Emphasis supplied]

And again:--

"The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and the victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society"s cry for justice against the criminal".

6.3 Accordingly, we are of the considered opinion that the interest of justice would meet if the sentence for the offence punishable under Section 304(II) of the IPC is enhanced to five years" imprisonment and accordingly, the appeal filed by the State for enhancement of sentence is allowed.

7. In view of the aforesaid discussion, Criminal Appeal No. 1037 of 2010 filed by the State for enhancement of sentence of original accused Nos. 1 and 2 succeeds and the impugned judgment and order dated 29/04/2010 passed by the learned

Sessions Judge, Patan in Sessions Case No. 9 of 2009 is modified to the aforesaid extent and it is held that the original accused Nos. 1 and 2 shall have to undergo five years" rigorous imprisonment. Accordingly, if they are on bail, they are directed to surrender before the concerned jail authority within 10 weeks from today to undergo the remaining sentence and their bail bonds, if any, shall stand cancelled. Accordingly, Criminal Appeal No. 1032 of 2010 filed by the State against acquittal and Criminal Appeal No. 836 of 2010 filed by the original accused No. 2 against conviction, are dismissed. Registry to return the R&P, if any, to the trial Court forthwith.