

(2022) 07 GUJ CK 0083

In the Gujarat High Court

Case No : R/Criminal Appeal No. 701 Of 1995, R/Criminal Revision Application
No. 493 Of 1994

State Of Gujarat

APPELLANT

Vs

Thakor Lalji Gambharji & 3 Other(S)

RESPONDENT

Date of Decision : 21-07-2022

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 209, 378, 397, 401
Indian Penal Code, 1860 — Section 114, 302, 324, 325, 326, 504
Bombay Police Act, 1951 — Section 135A

Citation : (2022) 07 GUJ CK 0083

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

Bench : Division Bench

Advocate : CM Shah, Tejas Barot, Dhruvin P. Bhupati

Final Decision : Dismissed

Judgement

Rajendra M. Sareen, J

1. Criminal Appeal No.701 of 1995 has been preferred by the appellant – State of Gujarat under Section 378 of the Criminal Procedure Code, 1973 against the judgment and order dated 30/11/1994 passed by the learned Additional Sessions Judge, Banaskantha at Palanpur in Sessions Case No.92 of 1993 acquitting the respondents – original accused Nos.1 to 4 – original accused Nos.1 to 4 from the offence punishable under sections 302, 324, 325, 326, and 114 of Indian Penal Code and 135-A of Bombay Police Act.

2. Criminal Revision Application No.493 of 1994 has been filed by the original complainant under section 397 read with section 401 of the Code of Criminal Procedure challenging the aforesaid judgement and order of acquittal.

3. Facts of the case, in brief, are as under:-

The complainant lodged the complaint alleging that the respondents - original accused committed offence on 03/11/1992 at village Varnoda, Taluka Deesa

when Tejaji Suraji, Vardhaji Suraji and Parkhaji Suraji were installing electric fuse in the line when the respondent No.4 – original accused No.4 Ishwarji Paruji came on the spot and raised quarrel as to why the above three persons closed the main switch and thereupon, original accused Nos.1 to 3 – respondent Nos.1 to 3 herein with a common intention to cause serious injuries to aforesaid three persons joined respondent No.4 when respondent nos.1 to 3 – original accused Nos.1 and 3 were armed with Dhariya and No.2 with stick and caused injuries on the aforesaid three persons. That Talaji Suraji on 4/11/1992 succumbed to the injuries and he died at 2.30 in the night whereupon section 302 was added to CR.No.I-142 of 1992.

4. On the basis of the said complaint, investigation was started and after through investigation, as there was sufficient evidence against the respondents – accused persons, chargesheet was filed before the learned Judicial Magistrate, First Class. As the offence committed by the accused persons was exclusively triable by the Court of Sessions as per the provisions of Section 209 of Criminal Procedure Code, the learned Judge was pleased to commit the case to the Court of Sessions and the case was transferred and placed for trial in the court of learned Additional Sessions Judge, which has been numbered as Sessions Case No.92 of 1993. Thereafter, Charge was framed against the accused for the offence punishable under sections 302, 324, 325, 326, and 114 of Indian Penal Code and 135-A of Bombay Police Act. The accused persons pleaded not guilty to the Charges and claimed to be tried. The prosecution, therefore, laid evidence, oral as well as documentary. At the conclusion of the trial, the learned Additional Sessions Judge was pleased to acquit the accused Nos.1 to 4 for the charges levelled against them. Hence, the appellant and the original complainant have preferred the captioned Criminal Appeal and Criminal Revision challenging the judgement and order of acquittal, respectively.

5. Heard Ms.C.M. Shah, learned APP for the State and Mr.Tejas Barot, learned advocate for the respondent Nos.2 and 4 – accused nos.2 and 4, in Criminal Appeal and Mr.Dhruvin Bhuptani, learned advocate appearing on behalf of Mr.Y.S. Lakhani learned advocate for the revisionist– original complainant and Mr.Tejas Barot, learned advocate for the respondent No.2 and 4 in Criminal Revision Application and Ms.C.M. Shah, learned APP for the respondent No.5 - State.

6. Mr.Tejas Barot, learned advocate has submitted that respondent Nos.1 and 3 – original accused Nos.1 and 3 have expired. The present proceedings survives qua accused Nos.2 and 4.

7. Ms.C.M. Shah, learned APP for the appellant State in Criminal Appeal and Mr.Dhruvin Bhuptani, learned advocate for the petitioner – original complainant in Criminal Revision Application have vehemently argued that the learned 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 learned Sessions Judge has erred in acquitting the respondents – accused from the charges levelled against them. It

is further argued that the prosecution has proved that the respondents have committed offence under sections 302, 324, 325, 326, and 114 of Indian Penal Code and 135-A of Bombay Police Act. It is further submitted that the learned Sessions Judge has acquitted the respondents accused merely on some minor contradictions and omissions in the evidence of the witnesses. It is further argued that the learned Sessions Judge has erred in not believing the evidence of the investigating officer who had no reason to implicate the accused falsely in the case. It is further argued that the offence punishable under sections 302, 324, 325, 326, and 114 of Indian Penal Code and 135-A of Bombay Police Act, is made out, however, the same is not believed by the learned Sessions Judge. It is further argued that though the prosecution witnesses have supported the case of the prosecution, the learned Sessions Judge erroneously not believed their evidence and acquitted the accused. It is further argued that the learned Sessions Court has erroneously held that the prosecution has failed to prove the case beyond reasonable doubt and have requested to allow the present appeal as well as revision.

8. Mr. Tejas Barot, learned advocate appearing for the respondent Nos. 2 and 4 - accused Nos. 2 and 4 has submitted that the accused Nos. 1 and 3 have expired. He has further submitted that there is hardly any substance in the submissions of learned APP. There is no admissible evidence on record connecting the accused nos. 2 and 4 with the commission of the offence. There are material contradictions and omissions in the evidence of the prosecution witnesses. The prosecution has not proved the case beyond reasonable doubt. No error or illegality has been committed by the trial court in acquitting the accused Nos. 2 and 4. He has requested to dismiss the present appeal.

9. 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.

10. It is pertinent to note that the respondent Nos. 1 and 3 - original accused Nos. 1 and 3 have expired and hence present appeal stood abated qua respondent Nos. 1 and 3 - original accused Nos. 1 and 3 vide order dated 05/05/2022. Under the circumstances, present appeal is required to be considered qua accused Nos. 2 and 4 respondent Nos. 2 and 4 herein.

11. It would be worthwhile to refer to the scope in Acquittal Appeals. It is well settled by catena of decisions that an appellate Court has full Power to review, re-appreciate and consider the Evidence upon which the Order of Acquittal is founded. However, the Appellate Court must bear in mind that in case of Acquittal, there is prejudice in favour of the Accused, firstly, the presumption of innocence is available to him under the Fundamental Principle of Criminal Jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of Law. Secondly, the Accused having secured his Acquittal, the presumption of his innocence is further reaffirmed and strengthened by the trial Court.

12. We have gone through the entire record and proceedings. We have re-appreciated the evidence on record. On re-appreciation of the evidence of PW No.4 injured victim Parkhaji Suraji Ex.20, it appears that though the deceased was conscious and able to speak, he did not inform the Doctor on duty as to who caused injury to him, which is clear from the deposition of injured victim. Even the Doctor did not ask as to how he received injury. Neither he nor the Doctor inform the police about the incident. The conduct of Parkhaji in not telling to anyone about the incident is unnatural. From the evidence of Balaji Mulaji PW No.1 Ex.16 it appears that while he was present, Doctor had not asked Parkhaji as to how the incident occurred and how he received injury. From the evidence of Dr.rameshkumar Varda, Deesa Civil Hospital,PW 7 Ex.26 it is clear that the said Doctor has admitted that Dr.Bhati was his senior in the hospital. He deposed that he did not remember the telephonic conversation with Dr.Bhati. Even Dr.Varde confirms that the alleged victim came without Police Yadi. Dr.Varde gave information to PSO Deesa Rural Police Station on 3/11/1992 at 9. pm. Dr.Varda was informed by PSO that Aagthala Police Station was connected with phone. However, Dr.Varda, Deesa Civil Hospital, did not receive any phone call from Aagthala Police Station. Dr.Varde did not receive any information about victims approaching Aagthala Police Station or Deesa Rural Police Station. He mentioned only two injuries, injury No.1 on Right elbow - # radius Ulna and injury No.2 on the left shoulder.

13. From the evidence of Dr.Rekha Maheshwari, General Hospital, Palanpur PW No.8 Ex.35 mentions only one injury i.e. on the elbow and no mention of injury on the left shoulder.

14. From the evidence of Ganpatlal Khemshankar, PSO Aagthala Police Station PW No.12 Ex.61, it is clear that no information was given in respect of the alleged incident to Aagthala Police Station on 3/11/1992 or 4/11/1992.

15. From the document Ex.53 it is clear that extract from station Diary does not narrate any specific injury inflicted by accused No.2.

16. From the evidence of Kalubhai Keda, PSI Aagthala Police Station PW No.19 Ex.59 it is clear that no statement of the concerned officer from Deesa Police Station was recorded. He states that he was unaware of Janvajog Entry Ex.53. Therefore, nothing is on record to suggest that information was received by Aagthala Police Station from Deesa Police Station.

17. Panch witnesses namely Nagji Mohanji PW No.2 Ex.17 and Bhikhabhai Savdas PW No.3 Ex.19 of Recovery panchnama of the weapon stick have not supported the case of the prosecution and hence the panchnama of recovery of weapon stick is not proved.

18. It is pertinent to note that in this case, FIR against the present accused has been filed for the inciedent dated 3/11/2022 on 5/11/2022, whereas, it has come on record in the evidence that on 3/11/2022 in the night itself, the present accused No.4 Ishvarji Thakor had filed the complaint against Bhataji Surji,

Varghaji Suraji and Parkhaji Suraji, who is shown to be the injured by the present accused No.2, as such it could be made out that as a counter-blast to the complaint filed by the accused No.4, the present case is filed. It has also come on record in the evidence that when the incident took place, nobody was having any stick. As such the allegation that the accused No.2 was having stick and gave stick blow cannot be believed.

19. Even otherwise, alleged incident occurred at night and due to darkness it was not possible for any prosecution witness to identify the accused or the alleged injuries inflicted on particular victims.

20. From the entire evidence, it emerges that the Charge for the offence under section 504 of the Indian Penal Code is against the accused No.4 only, which is admitted by other witnesses but those witnesses can be termed to be interested witnesses in this case and it also reveals from the evidence that the allegation against the accused No.4 for the offence under section 504 of the Indian Penal Code is nothing but false implication of the accused No.4 in this Case, as the accused No.4 had filed complaint against the complainant and his two witnesses, which is produced on record at Ex.54. As such, it also can be said to be counter-blast against the accused No.4 by the interested witnesses in this case.. As such, the charge for the offence under section 504 of Indian Penal Code against the accused No.4 is also not proved and is rightly been held so by the trial court.

21. There are material contradictions, addition, alterations and modifications in the evidence of the complainant.

22. On appreciation of evidence, the trial court has rightly held that no offence is proved against the accused nos.2 and 4 and rightly acquitted accused Nos.2 and 4, as no offence is proved against them beyond reasonable doubt.

23. 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."

24. 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.

25. 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.

26. In view of the above and for the reasons stated above, present Criminal Appeal as well as Criminal Revision deserve to be dismissed and are accordingly dismissed.