
(2015) 08 GUJ CK 0036
In the Gujarat High Court
Case No : Criminal Appeal No. 1103 of 1993

State of Gujarat	Vs	APPELLANT
Thakorbbhai Vestabhai and Others		RESPONDENT

Date of Decision : 20-08-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 378
Penal Code, 1860 (IPC) — Section 144, 148, 149, 302, 34

Citation : (2015) 08 GUJ CK 0036

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

Bench : Division Bench

Advocate : C.M. Shah, A.P.P., for the Appellant; D.D. Vyas, Senior Advocate and Deep Vyas, Advocates for the Respondent

Final Decision : Dismissed

Judgement

K.S. Jhaveri, J—The present appeal, under section 378 of the Code of Criminal Procedure, 1973, is directed against the judgement and order dated 30.06.1993 passed by the Sessions Judge, Valsad at Navsari in Sessions Case No. 72 of 1992 whereby the trial court acquitted the respondents under Sections 144, 148, 302 r/w 149 of Indian Penal Code.

2. The brief facts of the prosecution case are that on 24.05.1992 at around 07.30 pm, the respondents formed an unlawful assembly armed with knife, dhariya (Chhatka) and wooden block of Babool tree assaulted the deceased. The respondent No. 2 assaulted Naveen Manilal on his head by way of chhatka and respondents No. 1, 3, 4 & 5 assaulted Ramesh Manilal by way of wooden block of babool tree and thereby caused their death.

2.1 Therefore the police was informed and complaint was lodged. Pursuant to the complaint, investigation was carried out. After investigation, the accused persons were apprehended and charge-sheet was filed and as the case was triable by the Court of Sessions, it was committed to the Court of Sessions, Valsad at Navasari (hereinafter referred to as "the trial court").

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 The trial was initiated against the accused and during the course of trial the prosecution examined following witnesses whose evidences have been read before us:

2.4 The prosecution also relied upon the following documents as documentary evidences which have been perused by us:

2.5 At the end of trial, after recording the further statement of the accused under section 313 of the Cr.P.C. and hearing arguments on behalf of prosecution and the defence, the learned Sessions Judge acquitted the respondents of the charges leveled against them by giving them benefit of doubt vide impugned judgement and order.

2.6 Being aggrieved by and dissatisfied with the aforesaid judgement and order passed by the Sessions Court, the appellant State has preferred the present appeal.

3. Ms. C.M. Shah, learned APP appearing for the appellant-State has submitted that the trial court committed an error in releasing the respondents-accused. It was contended by Ms. Shah that the judgement 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 evidence against the present respondents.

3.1 Ms. Shah has also taken this court through the oral as well as the entire documentary evidence. She has laid emphasis on the evidence of the P.W. 1 - Rameshbhai Lallubhai - complainant where he has narrated the entire incident. She has also drawn attention to the deposition of the widow of Rameshbhai wherein the previous enmity between the respondents and the deceased is borne out. She submitted that it is clear from the evidence of the witnesses that while they were returning from a marriage, the respondents assaulted the deceased with weapons.

3.2 Ms. Shah has also taken this Court to the evidence of P.W. 2 - Bhagubhai Gulabbhai Patel who is the Executive Magistrate and who has recorded the dying declaration of Ramesh Manilal Patel and P.W. 3 - Jyotiben Gandabhai who is the eye witness of the alleged incident. She submitted that the evidence of the deceased Rameshbhai and P.W. 3 eye witness corroborate each other.

3.3 Ms. Shah has further taken this Court to the evidence of P.W. 4 - Dr. Ramratan Ramavat who is the medical officer who had conducted the autopsy of the deceased Rameshbhai. She has drawn attention to the injuries mentioned in the post mortem report along with the cause of death of deceased as mentioned in the post mortem report. The injuries on the deceased as per the post mortem

report are as under:

- "(1) CLW over left parietal region size 6x2x1 cm
 - (2) CLW over occipital region size 4x2x1 cm
 - (3) CLW over parieto occipital region size 2x1x1 cm
 - (4) CLW over left frontal region size 2x1x1 cm
 - (5) CLW over left side of forehead above eyebrow size 2x1x1 cm.
 - (6) CLW over left cheek size 1x1x1/2 cm.
 - (7) CLW over right cheek size 1x1x1/2 cm
 - (8) CLW over right parietal region size 2x1x1 cm
 - (9) Multiple vertical parallel brivices over back of abdomen
 - (10) Swelling and tenderness over back of neck size 4x3 cm
 - (11) Tenderness over both side of front of chest over intra elvicvlar region.
- (sic)"

Ms. Shah has similarly taken this Court to the rest of the witnesses and submitted that the prosecution has proved the case against the respondents beyond reasonable doubt.

In support of her submissions, Ms. Shah has relied upon the following decisions:

(I) Krishan Vs. State of Haryana, (2013) 1 AD 388 : (2013) 2 RCR(Criminal) 88 : (2012) 12 SCALE 381 : (2013) 3 SCC 280 wherein it is held that the Apex Court has held that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused. Where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.

(II) Jose Thomas Vs. State of Kerala, (2013) 6 AD 543 : AIR 2013 SC 2284 : (2013) CriLJ 3232 : (2013) 9 JT 303 : (2013) 3 RCR(Criminal) 288 : (2013) 7 SCALE 523 : (2013) 14 SCC 172 wherein it is held that dying declaration cannot be rejected only for want of fitness certificate by doctor.

4. Mr. D.D Vyas, learned Senior Advocate appearing with Mr. Deep Vyas, learned advocate for the respondents supported the impugned judgement and order and

submitted that the same having been passed in accordance with law does not call for any interference. He submitted that the prosecution has failed to prove the case against the respondents beyond reasonable doubt. He submitted that there are many lacunae in the prosecution case and that the eye witnesses are got up witnesses.

4.1 Mr. Vyas has drawn our attention to the complaint and pointed out that when the complaint was lodged name of accused No. 5 who happens to be brother of accused No. 1 was not mentioned and the names of Madhuben and other four ladies, though known to the complainant, were not referred in the complaint with a view to create so-called eye witnesses. He submitted that there is a clear improvement in the prosecution case. Name of accused No. 3 is not mentioned in the dying declaration recorded on 25.05.1992 between 07.30 and 07.40 pm. He submitted that in fact it is also borne out that with a view to match the time of 07.30 pm, P.W. 3 has mentioned that the incident took place at around 06 to 06.30 pm but in her cross examination it is established that with a view to match the dying declaration time, the incidence is narrated to happened between 06.00 pm and 06.30 pm. He submitted that in fact the complaint is lodged very late.

4.2 Mr. Vyas has also taken us to the injuries mentioned in the post mortem report and submitted that there is no injury which could have been possible by way of dhariya (Chhatka) as referred in the dying declaration and the same has also been clearly admitted by the medical officer who conducted post mortem of the dead body.

4.3 In support of his submissions, Mr. Vyas has relied upon the following decisions:

(i) Amol Singh Vs. State of M.P., (2008) 3 CLT 92 : (2008) 8 SCALE 63 : (2008) 5 SCC 468 wherein it is held that inconsistencies and discrepancies in the last dying declaration make it doubtful.

(ii) Kanti Lal Vs. State of Rajasthan, AIR 2009 SC 2703 : (2009) 5 JT 635 : (2009) 6 SCALE 116 : (2009) 12 SCC 498 : (2009) 6 SCR 525 : (2009) AIRSCW 4147 : (2009) 3 Supreme 360 wherein it is held that when the dying declaration suffered from number of basic infirmities, the evidence of such dying declaration cannot be found admissible and accepted as genuine document.

(iii) Somabhai Ganeshbhai Parmar Vs. State of Gujarat, (2012) 3 GLH 169 : (2012) 3 GLR 2444 wherein also the aforesaid principle is reiterated.

5. While concluding his submissions, Mr. Vyas submitted that while exercising appellate power, even if two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court. He submitted that the respondents have been acquitted for the last 22 years and therefore this Court may take a considerate view of the matter.

6. At the outset it is required to be noted that the principles which would govern

and regulate the hearing of appeal by this Court against an order of acquittal passed by the trial Court have been very succinctly explained by the Apex Court in a catena of decisions. In the case of *M.S. Narayana Menon @ Mani Vs. State of Kerala and Another*, AIR 2006 SC 3366 : (2006) 3 BC 433 : (2006) 132 CompCas 450 : (2006) 6 CompLJ 39 : (2006) CriLJ 4607 : (2006) 3 CTC 730 : (2006) 6 JT 72 : (2006) 6 SCALE 393 : (2006) 6 SCC 39 : (2006) 3 SCR 124 Supp : (2006) AIRSCW 4652 : (2006) 5 Supreme 547 , the Apex Court has narrated about the powers of the High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under:

"54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a 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."

6.1 Further, in the case of *Chandrappa and Others Vs. State of Karnataka*, (2007) CriLJ 2136 : (2007) 3 JT 316 : (2007) 3 SCALE 90 : (2007) 4 SCC 415 : (2007) 2 SCR 630 the Apex Court laid down the following principles:

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

[1] An appellate court has full power to review, 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 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."

6.2 Thus, it is a settled principle that while exercising appellate power, even if two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.

6.3 Even in a recent decision of the Apex Court in the case of State of Goa Vs. Sanjay Thakran and Another, (2007) 5 JT 146 : (2007) 3 SCALE 740 : (2007) 3 SCC 755 : (2007) 3 SCR 507 , the 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."

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

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

6.6 Even in a recent decision of the Apex Court in the case of Mookkiah and Another Vs. State rep. by the Inspector of Police, Tamil Nadu, AIR 2013 SC 321 : (2013) 1 Crimes 8 : (2013) 1 JT 626 : (2013) 1 SCALE 95 : (2013) 2 SCC 89 : (2013) AIRSCW 339 : (2013) 1 Supreme 88 , the Apex Court in para 4 has held as under:

4. It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led in by the prosecution and defence, acquitted the accused in respect of the charges leveled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the 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, (2004) CriLJ 3842 : (2004) 5 JT 388 : (2004) 5 SCALE 86 : (2004) 5 SCC 573 : (2004) SCC(L&S) 1078 : (2004) 2 SCR 480 Supp : (2004) 2 UJ 1118 : (2004) AIRSCW 4321 : (2004) AIRSCW 5560 : (2004) 6 Supreme 669 : (2004) 3 Supreme 404]"

6.7 It is also a settled legal position that in acquittal appeal, the appellate court is not required to re-write the judgement or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of State of Karnataka Vs. Hemareddy Alias Vemareddy and Another, AIR 1981 SC 1417 : (1981) CriLJ 1019 : (1981) 1 SCALE 206 : (1981) 2 SCC 185 : (1981) SCC(Cri) 395 : (1981) 2 SCR 695 wherein it is held as under:

"...This court has observed in Girja Nandini Devi and Others Vs. Bijendra Narain Choudhury, AIR 1967 SC 1124 : (1967) 1 SCR 93 that it is not the duty of the appellate court 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."

6.8 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.

7. We have examined the matter carefully and gone through the evidence on record. We have appreciated, reappreciated and re-evaluated the evidence on the touchstone of the aforesaid decisions of the Hon''ble Apex Court.

7.1 We have heard learned advocates appearing for both the sides and have also gone through the materials placed on record. At the outset it shall be relevant to note that the present case rests on circumstantial evidence and it has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person.

7.2 We find that the trial Court while considering the evidence on record, has very elaborately discussed the evidence on record. The wife of deceased Ramesbhai is not examined. The evidence of so called eye witnesses are doubtful. There are four ladies claiming to be eye witnesses, however, none of their names are mentioned in the complaint. Thus, the veracity of the evidence of eye witnesses is doubtful. There is improvement in the evidence of P.W. 3 - Jyotiben Gandabhai and P.W. 5 - Chhibiben Gandabhai. In our view, this is a case where the prosecution has failed to complete the chain of evidence. Moreover, it is very pertinent to note that the injuries as mentioned in the post mortem report do not reveal any injury which could be attributed to the use of dhariya (chhatka) as alleged. Even P.W. 4 - Dr. Ramratan -the medical officer who conducted the post mortem has also stated that the injuries sustained by the deceased could not be possible by way of dharia.

8. So far as the dying declaration is concerned, it shall not be out of place to mention that the courts have to be on guard to see that the dying declaration is not the result of either tutoring or prompting or a product of imagination and that due care and caution must be exercised in considering weight to be given to the dying declaration. It is a settled position that once dying declaration has been made voluntarily, it is reliable and is not an attempt by deceased to cover up truth or falsely implicate a person, then courts can safely rely on such dying declaration and it can form the basis of conviction, more so where version given by other prosecution evidence, there is no reason for courts to doubt truthfulness of such dying declaration.

8.1 In the present case, we find doubt in the dying declaration given by the deceased as the same suffers from infirmities and is in fact contrary to the evidence of other prosecution witnesses. The main aspect is that the dying

declaration mentions that there was a dhariya blow inflicted upon the deceased which is contrary to the medical evidence. It is true that the deceased was conscious while giving the dying declaration and we are not discarding the dying declaration on the ground of fitness of the person giving the dying declaration. However, we find that the averments made in the dying declaration is an afterthought.

9. Further, learned APP 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 above view of the matter, we are of the considered opinion that the Court below was completely justified in passing impugned judgement and order.

10. We are, therefore, of the considered opinion that the findings recorded by the trial Court in acquitting the accused of the charge levelled against them by giving them benefit of doubt 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. No interference is warranted with the judgement and order of the trial Court.

11. Accordingly, appeal is hereby dismissed. The judgement and order dated 30.06.1993 passed by the Sessions Judge, Valsad at Navsari in Sessions Case No. 72 of 1992 is confirmed qua the acquittal of the respondents under sections 144, 148, 302 r/w 149 of Indian Penal Code. Bail bond, if any, shall stand cancelled.