

(2013) 12 GUJ CK 0177

In the Gujarat High Court

Case No : Criminal Miscellaneous Application (for Leave to Appeal) No. 12930 of 2013 in Criminal Appeal No. 1144 of 2013

State of Gujarat

APPELLANT

Vs

Umesh Nathabhai Chovasiya

RESPONDENT

Date of Decision : 19-12-2013

Acts Referred:

Citation : (2013) 12 GUJ CK 0177

Hon'ble Judges : K.S. Jhaveri, J;K.J. Thaker, J

Bench : Division Bench

Advocate : C.M. Shah, APP No. 1, for the Appellant; K.S. Chandrani, Advocate for the Respondent No. 1, for the Respondent

Judgement

K.S. Jhaveri, J.—The present application for leave to Appeal is directed against the judgment and order dated 28.2.2013 passed by the learned 8th Addl. Sessions Judge, Rajkot, in Sessions Case No. 85/2009, whereby, the accused has been acquitted for the offence u/s 365, 366, 376 of IPC. The brief facts of the prosecution case are that on 16.1.2008, between 1.00 hours and 3.00 hours in the night, from village Kamlapur, the appellant had kidnapped or abducted the prosecutrix, aged about 17 years and 4 month, by coaxing and tempting with an intention to be secretly and wrongfully confined her and within an intention to commit illicit intercourse with her and took her at open place where he forcefully committed rape on her without her consent and wish, and therefore, the complaint was lodged against the accused persons before the Bhadala Police Station. On the basis of the complaint, investigation was carried out. After completion of investigation, charge-sheet was filed before the Court of learned Judicial Magistrate, Jasdan. Since the offence was triable by the Court of Sessions, it was committed to the Court of learned 8th Addl. Sessions Judge, Rajkot, which was numbered as Sessions Case No. 85/2009.

2. To prove the case against the accused, the prosecution has examined the following witnesses.

1. Bhagwanjibhai Bhimjibhai Bambhaniya Ex. 9
 2. Ghudabhai Valabhai Rathod Ex. 11
 3. Vinodbhai Bhagvanji Sarvaiya Ex. 13
 4. Maganbhai Sidebhai Metaria Ex. 15
 5. Bhanubhai Savashibhai Dudharejia Ex. 17
 6. Prosecutrix Ex.19
 7. Dr. Haridas Narbheram Desani Ex. 29
 8. Dr. Bipinchandra Mahashankar Nayak Ex. 32
 9. Rambhaben Bhanubhai Savashibhai Ex. 37
 10. Devrajbhai Rambhai Ex. 40
 11. Somakubhai Anakbhai Ex. 41
 12. Mukeshbhai Najabhai Rathod Ex. 42
 13. Harishkumar Rambhai Kidiya Ex. 56
 14. Purshottam Dalabhai Rathod Ex. 60
 15. Bhupatbhai Somabhai Sariya Ex. 74
3. The prosecution has also relied on the following documentary evidences.
1. Panchnama of scene of offence place Ex. 10
 2. Panchnama of person of accused Ex. 16
 3. Panchnama of clothes of prosecutrix Ex. 12
 4. Panchnama of clothes put on by the prosecutrix at the time of incident Ex. 14
 5. Statement of complainant Ex. 18
 6. Yadi Ex. 30
 7. Medical certificate of prosecutrix Ex.31
 8. Yadi Ex. 34
 9. Letter of opinion Ex. 35
 10. Birth certificate of prosecutrix Ex. 38
 11. Yadi Ex. 33
 12. Case papers of prosecutrix Ex. 36
 13. Form Ex. 61
 14. Copy of Missing Register No. 2/08 Ex.62

15. Order for investigation Ex. 63

16. FIR Ex. 64

17. Yadi Ex. 65

18. Copy of General Register of Kamlapur Kanya Shala Ex. 76

19. Birth certificate of prosecutrix Ex. 77

4. The trial Court, after taking into consideration the evidences produced by the prosecution, acquitted the accused of the charges levelled against him by the aforesaid judgment and order. Hence, the present application for leave to appeal.

5. Learned APP Ms. Shah for the State has submitted that the trial Court has committed error in not appreciating the evidence produced on record. She further submitted that the trial Court erred in holding that though independent witnesses were available, none of them were examined by the prosecution. The trial Court wrongly observed that there are contradictions in the evidences of the witnesses. In that view of the matter, the judgment and order of acquittal is required to be quashed and set aside.

6. We have considered the judgment and the reasons recorded by the learned trial Judge. We have considered the record and proceedings. We have heard learned APP for the State.

7. 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, 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 judgment 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.

8. Further, in the case of Chandrappa and Others Vs. State of Karnataka, 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, re-appreciate 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.

9. 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.

10. Even in a recent decision of the 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 judgment 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.

11. Similar principle has been laid down by the 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.

12. 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 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.

13. In the case of Lunaram Vs. Bhupat Singh and Others, the Apex Court in para 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 strangled. 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 running condition.

11. Considering the parameters of appeal against the judgment 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.

14. 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, 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 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 Sec. 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 the acquittal. [Vide State of Rajasthan Vs. Sohan Lal and Others,

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

16. We have gone through the judgment and order of acquittal passed by the trial court. We have also perused the oral as well as documentary evidence led by the trial court and also considered the submissions made by learned APP for the appellant-State. The trial court while considering the oral as well as documentary evidence has clearly observed that there is no any evidence to convict the respondent. The prosecution has miserably failed to prove the case against the accused beyond any reasonable doubt. Even in the present appeal, nothing is produced or pointed out to rebut the conclusion of the trial Court. Thus, from the evidence itself it is established that the prosecution has not proved its case beyond reasonable doubt.

17. We have perused the evidence of prosecutrix on record and the medical evidence. It emerges from the record that the victim was in love with the respondent-accused and it seems that she had fallen in love with the respondent-accused. Apart from that, the period for which she had voluntarily gone with the respondent-accused mainly establishes that she had gone voluntarily with the respondent-accused. Even the medical evidence has not supported the case of the prosecution. Even otherwise, the victim had tried to improve her version which has come out in the cross-examination. The date of birth as per school general register is 1.6.1991, whereas, as per Birth & Death register, the date of birth of the prosecutrix is 31.12.1989, and, therefore, on 16.10.2008, the age of the prosecutrix was 18 years and 11 months, therefore, the age of the victim is proved to be above 17 years. This shows that there was no compulsion on her part and she voluntarily remained with the accused. Under the circumstances, it is not possible to believe that there was any sexual intercourse under compulsion, more particularly, when there is no medical evidence supporting the case for the offence u/s 376 of IPC. The panchas have turned hostile and they have not supported the case of the prosecution.

18. We are supported in our view by the decision of the Apex Court to hold that no offence can be said to have been committed as sex with woman above 16 years of age with her consent is not a rape. If the court is of the opinion that on the evidence two views are reasonably possible, one that the respondent is guilty and the other he is innocent then the benefit of doubt goes in favour of the accused. For the reasons given above, we do not think that this appeal requires

to be kept on the file of this High Court, and we likewise refuse to grant leave to appeal. We are supported by the decision of the Apex Court in the case of K.P. Thimmappa Gowda Vs. State of Karnataka, . It cannot be said that she was abducted. Further, the prosecution has failed to establish that there was no consent. In this case, therefore, it cannot be said that there was any rape committed by the accused or he had forcibly kidnapped her in violation of section 366 of IPC.

19. Under the circumstances, if the learned trial Judge has found that the prosecution has not proved the case beyond reasonable doubt, the same cannot be said to be erroneous.

20. In the above view of the matter, we are of the considered opinion that the trial court was completely justified in acquitting the respondent of the charges leveled against them. We find 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, therefore, in complete agreement with the findings, ultimate conclusion and the resultant order of acquittal recorded by the court below and hence find no reasons to interfere with the same. Hence, there is no merits in the appeal. In that view of the matter, the application for grant of leave to appeal deserves to be rejected. In the result, the application for grant of leave to appeal is rejected. In view of dismissal of the application for leave to appeal, the appeal is dismissed. Bail and bail bonds stand discharged.