

(1992) 03 BOM CK 0049
In the Bombay High Court
Case No : Criminal Appeal No. 688 of 1986

State of Maharashtra

APPELLANT

Vs

Nanasaheb Bhikaji Tambe

RESPONDENT

Date of Decision : 02-03-1992

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 378, 390

Citation : (1992) 94 BOMLR 223

Hon'ble Judges : S.M. Daud, J; M.F. Saldanha, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

M.F. Saldanha, J.—In what situations would the State be justified in presenting an appeal against an order of acquittal? Section 378 of the Code of Criminal Procedure, 1973, undoubtedly, confers on the State the right to direct the Public Prosecutor to prefer an appeal against acquittal, but the section does not specify as to in what circumstances this should be done. It is not a matter of discretion, but a question of duty in those cases where a trial Court in the face of unimpeachable evidence records an acquittal, where a technicality is wrongly upheld, or where the law is misapplied. Conversely, it is equally necessary to lay down guidelines circumscribing the situations in which no such appeal should be filed as the legal system, which is already overstrained, cannot tolerate the burden of frivolous or unjustified appeals. Merely because the complainant or the relatives or, for that matter, the Police or the Prosecutor are unhappy over a verdict is no ground on which an order of acquittal can be assailed. The overloading of the system apart, it is essential to take cognizance of the paramount consideration, namely, the injustice caused to an accused person who may be continued in custody for several years if the charge is a serious one or, even if released on bail, has to undergo the trauma and uncertainty of the pending proceeding until its disposal. We are, therefore, constrained to lay down some broad guidelines in relation to these matters. The position has become all

the more necessary after hearing the present appeal.

2. The three respondents before us, original accused Nos. 1 to 3 before the trial Court, are the father, brother and mother respectively of the deceased Bhagwan Nanasaheb Tambe, another son of the family. It was alleged that on the night of August 21, 1985 at about 8 or 8:30 p.m., Bhagwan was assaulted by the accused and that he was strangled by means of a nylon rope, after which the dead body was flung into a canal. The record indicates that the deceased Bhagwan appears to have been a delinquent and that he was not only unemployed and a waster but that he was also given to various vices, which included excessive consumption of alcohol, addiction to charas, etc. The record also indicates that the deceased Bhagwan had lodged a complaint against his own father, accused No. 1, to the effect that the father was carrying charas; whereupon he came to be prosecuted, convicted and fined Rs. 250/-.

3. In this background, the Prosecution alleges that on the fateful night, the three respondents were responsible for the death of Bhagwan and in order to screen the evidence that they thereafter threw the dead body of Bhagwan in a canal. P.W. 5 Anil, who is a student, noticed the body floating in the canal some distance away on the next afternoon; whereupon he reported the matter to the Police. The Police took charge of the body, treated it as that of an unknown person and published a photograph in the local newspapers; whereupon persons from the village came forward and identified the body as being that of Bhagwan. The Police thereafter recorded their statements and on the basis of the investigation arrested the three accused, chargesheeted them and put them up for trial. The learned Additional Sessions Judge, Ahmednagar, on the basis of the material placed before him, came to the conclusion that neither of the two charges were established and acquitted the accused. Against this order of acquittal, the State of Maharashtra has filed the present appeal.

4. We must, at the outset, observe that even a plain reading of the judgment in this case will indicate that there was virtually no satisfactory evidence before the Court on the basis of which either of the two charges could have been sustained. Regardless of this fact, almost in a mechanical manner, the appeal has been filed and on the basis of an impression created that the accused have wrongly been acquitted, even though the evidence was sufficient to establish their guilt, the earlier Division Bench of this Court was persuaded to admit the appeal and direct action u/s 390 of the Code of Criminal procedure. It would be very much advisable, particularly in cases of the present type, if the office of the Public Prosecutor were to more carefully scrutinize the entire material that was placed before the trial Court before filing such appeals. The respondents accused are poor villagers and pursuant to their being taken into custody, they have been languishing in prison for over three years now, which is apart from the period of custody undergone by them prior to the trial. Such instances ought to be scrupulously avoided.

5. The presumption of innocence embodied in our criminal jurisprudence is

reinforced by an order of acquittal. Such an order should not be appealed against in the following cases:

(i) where the view taken by the trial Court is reasonable and proper as laid down in *Hukam Singh Vs. State of Rajasthan*, and *Ram Das Vs. State of Maharashtra*, .

(ii) Where there are valid reasons and inconsistencies on which the trial Court has based an acquittal as laid down in *Ediga Sanjanna v. State of U.P.* (1976) 2 S.C.C. 218.

(iii) Where the view taken by the trial Court is both reasonable and possible, even though a different view of facts is permissible. (See *Bahal Singh Vs. The State of Haryana*, and *Akoijam Ranbir Singh Vs. The Government of Manipur*, .

(iv) Where it is not possible to offset all the reasons given by the trial Court for recording a verdict of acquittal and it is merely argued that one or some of them are debatable as laid down in *Bhagirath Singh Vs. State of Bihar*, .

(v) When after holding one or more accused individually responsible for their acts, there being no justification for assailing the acquittal of the co-accused.

(vi) Where there is no evidence connecting the accused with the offence and the reasons given by the lower Court in support of an acquittal are sufficiently compelling, and an appeal proceeds on the ground that a serious incident has taken place and an impression should not be created in the public mind that nobody has been punished; as laid down in *Raj Bhongshi Prasad v. State of Assam*, (1970) 3 SCC 678 .

(vii) Where, undoubtedly, another view is possible, but where it is impossible to indicate" any serious infirmity in the trial Court's appreciation of evidence as was held in *Akoijam Ranbir Singh Vs. The Government of Manipur*,

(viii) Where a judgment of the trial Court is a generally well-considered one and at least two views were possible, an appeal would be unjustified as indicated in *Anne Nageswara Rao Vs. Public Prosecutor, Andhra Pradesh*, .

(ix) Where the important or integral fact, such as identity of the accused, was not fully established as was the case in *Phoolchand Vs. State of Rajasthan*, .

6. The Supreme Court has laid down in the case of *Shivaji Sahab Rao v. State of Maharashtra* (1973) S.C.C. (cri.) 1033 that an acquitted accused should not be put in peril of conviction save where substantial and compelling ground exists for such a course. It is, therefore, essential that certain principals be followed in the matter of preferring appeals against orders of acquittal, such as the correctness of the view of the trial Judge, as to the credibility of the witnesses, the presumption of innocence in favour of the accused, the right of the accused to the benefit of doubt and the fact that the trial Judge arrived at a conclusion after having the advantage of seeing the witnesses. Barring situations where the verdict is downright perverse, or a patent miscarriage of justice, a mechanical appeal against an order of acquittal would not be permissible. It would follow as

a corollary that if the view taken by the trial Court in acquitting the accused is not unreasonable, occasion for the rehearsal of that view would not arise, (see Sethu Madhavan Nair and Others Vs. The State of Kerala, .

7. Conversely, while assessing this ticklish issue with regard to the situational justification for the filing of an appeal against acquittal, it is necessary to consider the occasions when such an appeal would be permissible, such as:

(i) where the view of the trial Court was palpably wrong and all the reasons for acquittal given by it could be dispelled as held in AIR 1976 400 (SC)

(ii) where the trial Court's verdict is both factually and legally erroneous (See Baljit Singh and Another Vs. State of Uttar Pradesh, .

(iii) where the trial Court had simulated "mere frivolities" as reasons for rejecting the Prosecution case as in the case of Abdul Majid Abdul Rahman Vs. State of Gujarat, .

(iv) where the trial Court had rejected the evidence on flimsy grounds and on the ground of trifling contradictions as had happened in the case of Surat Singh v. State of Punjab (1975) 4 S.C.C. 311.

(v) in case of patent infirmities in the trial Court's approach of the case and its appreciation of evidence (See Ravinder Singh Vs. State of Haryana, .

(vi) where the trial Court rejected the testimony of the eye-witnesses without at all considering the evidence in its intrinsic merit, but on the basis of sweeping observations and inherent improbabilities as had happened in the case of Soma Bhai Vs. State of Gujarat, .

(vii) where the trial Court has overlooked several important aspects of the case Jai Ram and Others Vs. State of U.P. and Another, or in a situation where the law has been misapplied.

8. Undoubtedly, these are some of the broad situations in which an appeal against an order of acquittal may or may not be justified. What requires to be emphasised, however, is the fact that criminal cases can hardly ever be compared with each other on facts, and secondly, while it is as much important to prevent the subversion of the rule of law by assailing unsustainable acquittals because it is essentially in the public interest that the guilty be punished, that it is a matter of even greater responsibility that there be complete and adequate justification for an appeal against acquittal. The Law Department of the State Government is invested with the duty of appraising the correctness of the trial Court's orders and of directing the office of the Public Prosecutor to file an appeal. It is unfortunately common place for the officers of that Department to mechanically act on the basis of a recommendation from the Public Prosecutor who has conducted the trial, or because the Police are aggrieved and, more often, because the complainant or the relatives are insistent. None of these are reasons enough unless the judgment itself is assailable to the extent that there is

a reasonable certainty on the material adduced that the Appeal Court will reverse the verdict It is at this stage that the record of the case must be sent for and examined, which unfortunately is seldom done. The office of the Public prosecutor would do well in following and carefully assessing the justifiability of an appeal and in all those cases such as the present one, where such an appeal is inadvisable, to suggest to the State government that the decision be reconsidered.

9. At the admission of such an appeal, the reviewing Court is, undoubtedly, under a considerable handicap, in that it proceeds on the basis that the scrutiny procedures has been observed, that the appeal has been filed within a full sense of responsibility and that the grounds presented are, in fact, valid ones. The situation in which an order of acquittal may be set aside having now been well-defined and completely crystallised, the results do indicate that in a majority of cases, such appeals ought not to have been filed at all. The weeding out process at the State Government level and the office of the Public Prosecutor is of utmost necessity, if the Courts are to be spared of this large means of unnecessary litigations which are partially responsible for choking up the Courts.

10. The evidence in this case consists essentially of three of the witnesses from the village, two of them P.Ws. 3 and 6 are father and son, and a neighbour P.W.10 Janardhan. The version set out by P.Ws. 3 and 6 is almost identical. According to them, the deceased Bhagwan was a no good unemployed person and on that night he had come to the Chawadi and had asked them to prepare a chillum. On their informing him that they did not possess tobacco, he provided tobacco, at which time his father accused No. 1 arrived on the scene. The deceased Bhagwan is alleged to have immediately slunk away from that place and these witnesses state that sometime thereafter they heard cries to the effect that the deceased is being strangled/hanged the two versions differ. According to them, sometime later, the 1st accused is supposed to have once again approached them and asked them whether they had seen Bhagwan and that he appeared to be in a frightened condition at that time. This shaky evidence is supported by the even weaker evidence of P.W.10 Janardhan, who is a neighbour. This witness states that he heard a commotion coming from the house of accused No. 1, that he went there and that accused No. 1 and accused No. 3 were assaulting the deceased Bhagwan with an axe and a stick respectively and accused No. 2 was holding his legs. He states that he intervened, snatched the axe and went away, that thereafter the incident continued and that he heard the deceased Bhagwan shouting out that he was being hanged. The psychology of a villager would always impel him to rush to the scene of a commotion. The non-action on the part of these three witnesses is eloquent proof of their not having heard or seen anything on that night.

11. Mr. Suryavanshi, the learned A.P.P., has also sought to rely on certain other stray piece of evidence, such as the attachment by the Police of a bicycle on the wheel of which blood is alleged to have been noticed, a rope, a stick and an axe.

Unfortunately, these items, which were sent to the Chemical Analyser on the ground that there were blood-stains on them were examined by him and the report indicates that there was no blood on any of these. The learned A.P.P. has valiantly tried to submit as an alternative that the circumstantial evidence in this case is sufficient to bring home the charge. Unfortunately, we are not in agreement with what he has submitted before us.

12. Mr. Khokhawala, learned Counsel appointed to defend the respondents - accused,, has initially submitted before us that, as rightly held by the learned trial Judge, the circumstances on the basis of which the charge is said to be established have not been made out individually, nor do they collectively point to one and only one inference, namely, the guilt of the accused. He has submitted, and with some justification to our mind, that the oral evidence of the three witnesses referred to by us above, if carefully scrutinized, will indicate that they could not be speaking the truth and it is quite obvious that the Police have put in their mouths the so-called events of the night of August 21, 1985 when they are supposed to have heard a voice crying out in the distance. He is equally correct when he attacks the evidence of the neighbour, Janardhan (P.W.10), who claims to be the only eye-witness, in this case because the evidence very clearly indicates that the minor injuries found on the dead body were neither of the type which can be caused by an axe nor could they have been inflicted on the deceased by a stick. It is quite certain, therefore, that Janardhan, even though he may be residing close-by, could not have been an eye-witness to the incident. If the evidence of these three witnesses comes to be discarded, all that remains is the extremely flimsy evidence with regard to the so-called motive.

13. As indicated by us, there appears little dispute about the fact that the deceased Bhagwan was a delinquent, obviously a wayward son and his lifestyle was such that the family was most certainly not well-disposed towards him. This, however, would still be a rather weak circumstance because one needs to take into account the fact that the three accused happen to be his father, mother and brother. The lifestyle of the deceased Bhagwan was such that he had done no work for several years and having tolerated this situation for so long, there was no special reason why on the night of August 21, 1985 his family should have suddenly decided to brutally finish him off. It is equally plausible, as pointed out by learned Counsel, that having regard to the habits to which the deceased Bhagwan was apparently addicted, namely, excessive consumption of alcohol and addiction to charas, etc., that he could have easily got into a brawl with anybody. It is, therefore, extremely difficult on the basis of the present record to fathom as to how and under what circumstances he met with his end. The attempt of the Prosecution, however, to fasten the guilt on the present three accused, who are before us, miserably fails in so far as the circumstances adduced do not, in the least, establish their guilt.

14. Having regard to these circumstances, we do not see any reason to interfere with the finding of the learned trial Judge, nor does the judgment under appeal

deserve to be interfered with. We, accordingly, dismiss the appeal and confirm the acquittal.

15. Pursuant to the admission of this appeal, the three respondents-accused have been taken into custody and the record indicates that they are at present in jail. We direct that respondents Nos. 1 to 3 original accused Nos. 1 to 3 be released forthwith, unless required in connection with any other case.

16. The respondents original accused, as indicated by us earlier, are poor agriculturists and they belong to the strata of society where they cannot even afford the services of a lawyer, necessitating thereby the provision of legal assistance by the State. We have appointed Mr. Khokhawala to argue the appeal on behalf of the original accused and he has done a good job of the task assigned to him. It was brought to our notice by him that had the respondents accused been economically better off, they would most certainly have had the benefit of legal advice at the stage when this appeal was admitted in January 1988; that they would have been in a position to approach this Court and demonstrate that there was valid ground for not retaining them in custody. Obviously, their poverty has resulted in their languishing in custody for four years. Having recorded conclusively that the trial Court was perfectly correct in acquitting the respondents - accused, we are constrained, in the special circumstances of this case, to follow the unusual procedure of recording that normally we would have been inclined to award heavy compensatory costs to the respondents, who are the original accused. We are not doing so for the limited reason that the aspect of law involved in this judgment and the guidelines laid down by us had not specifically been brought to the notice of the concerned Department. We direct that a copy of this judgment be forwarded to the Secretary to Government, Law & Judiciary Department, Mantralaya, who, in his turn, shall confirm to the Registrar of this Court within a period of 4 (four) weeks from the receipt thereof that the issues relating to the filing of appeals by the State in relation to criminal matters, both in case of situations where even one or more accused has been wrongly acquitted, where the trial Courts have shown undue leniency as also instances where the acquittal orders are unjustified, be brought to the notice through a circular to that effect, of the Public Prosecutors attached to all the Courts in the State of Maharashtra. On receipt of the confirmation from the Secretary, along with the circular, the Registrar shall inform us of such compliance on the part of the State Government. We hope and trust that a greater sense of responsibility will be displayed and that due care and caution will be observed before filing appeals of the present type.