

(2016) 03 GUJ CK 0091

In the Gujarat High Court

Case No : Criminal Appeal Nos. 526 and 527 of 1994

The State of Gujarat

APPELLANT

Vs

Arifullakhan J. Pathan and Others

RESPONDENT

Date of Decision : 16-03-2016

Acts Referred:

Bombay Police Act, 1951 — Section 135, Section 37(1)

Criminal Procedure Code, 1973 (CrPC) — Section 313

Penal Code, 1860 (IPC) — Section 147, Section 148, Section 149, Section 302, Section 34

Citation : (2016) 03 GUJ CK 0091

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

Bench : Division Bench

Advocate : K.J. Shethna, Advocate, for the Appellant; C.M. Shah, Additional Public Prosecutor and E.E. Saiyed, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

K.S. Jhaveri, J.—1. It is reported that original accused No. 1 - Khamruddin Bavasab Shaikh has expired on 28.10.2014, original accused No. 2 - Shabbirmiya Aminmiya Malek has expired on 03.04.2005 and original accused No. 3 - Yasinmiya Khamruddin Shaikh has expired on 14.08.2015. Copies of their Death Certificates are produced, which are ordered to be taken on record. Therefore, Criminal Appeal No. 527/1994 stands abated qua original accused No. 1, 2 and 3.

2. All the above Appeals are directed against the judgment and order of acquittal dated 05.03.1994 in Sessions Case No. 50/1993 and Sessions Case No. 72/1992 of the learned Additional Sessions Judge, Kheda at Nadiad whereby the respondents herein were acquitted of the offences punishable under Sections 147, 148, 302 read with Sections 149 and 34 of the Indian Penal Code and under Sections 37(1) and 135 of the Bombay Police Act.

3. The case of the prosecution is as under:--

"3.1. On 15.06.1991, elections to the Lok Sabha were being held. Therefore, polling booths were set up in the premises of Agricultural Produce Market Committee of Shekhdi and Navapara villages of Petlad. Deceased - Hasmukhbhai Bhajibhai was the resident of Village Shekdi and used to work as a Electric Mechanical Engineer in Rajprakash Mills. At around 3.00 pm, the deceased had gone to cast his vote but after reaching there, he came to know that someone else had cast a vote in his place wrongly and murmuring such, he came outside. It is reported that he had inclination for one particular political party. It is alleged that when the deceased was coming out of the polling booth, near the house of one - Chanchalben Chotabhai Prajapati, the accused were standing with deadly weapons like dharia, gupti, sticks, pipe etc. They are alleged to have attacked deceased - Hasmukhbhai with dharia, gupti, knife, pipe and stick and inflicted several blows because of which he suffered serious injuries on the forehead, head, face, ears, on the shoulder portion near the neck, hand and the elbow, chest, lungs and because of such injuries received, Hasmukhbhai expired on the spot itself. Thus, it is alleged that the accused formed an unlawful assembly with a common intention of causing grievous injuries to the deceased and used various weapons to kill the deceased intentionally. The police patrolling party took the body of the deceased to the Civil Hospital at Petlad. Complainant - Hasmukhlal Ambalal went to the Nadiad Town Police Station and lodged a complaint in this regard. Pursuant to complaint, investigation was carried out and chargesheets were led against the accused in the Court of the learned Judicial Magistrate First Class, Petlad and as the cases were Sessions triable, the same were committed to the Sessions Court and numbered as Sessions Case No. 72/1992 and Sessions Case No. 50/1993. The charge was framed by the Sessions Court, which was read over to the accused, which the accused totally denied and therefore, the trial commenced.

3.2. At the time of the trial, the prosecution examined the following witnesses:--

The prosecution also relied upon various documentary evidence, some of them are:--

3.3. At the end of the trial, further statements of the accused under Section 313 of the Code of Criminal Procedure were recorded in which the accused pleaded not guilty and stated that they have been falsely implicated in the offence. Thus, after recording the further statements of the accused and hearing the arguments of both the sides, the learned Additional Sessions Judge passed the above judgment and order. Being aggrieved by the same, the present appeals have been filed, as aforesaid."

4. Learned Advocate for the complainant has submitted that the learned Judge has committed a grave error in not believing the version of the complainant and the other four witnesses who are referred in the complaint. It is further submitted that the benefit of doubt granted to the accused by the learned Judge could not have been granted in the facts and circumstances of the case.

5. Learned Additional Public Prosecutor Ms. C.M. Shah has submitted that the learned Judge has erred in discarding the evidence of complainant - Hasmukhbhai, who is an eye-witness to the entire incident and whose evidence gets corroboration from the First Information Report which was lodged immediately after the incident. Considering the above, it is submitted that this is a fit case which requires interference of this Court and the judgment and order of the learned Judge be upturned.

6. Learned Advocate for the respondent Nos. 1-2 Mr. E.E. Saiyed has submitted that the original accused No. 1, 2 and 3 of Sessions Case No. 72/1992 have expired and the presence of the witnesses at the place of incident is doubtful inasmuch as their names were not referred by the complainant. It is further submitted that the statements were recorded at the residence and not at the place of incident and further, the learned Judge has given cogent and convincing reasons to arrive at the acquittal of the respondents and therefore, no interference is required at the hands of this Court. Learned Advocate has also relied on the various judgments of the Hon"ble Supreme Court which are detailed hereinbelow:--

"In the case of M.S. Narayana Menon @ Mani v. State of Kerala & Anr, reported in , (2006) 6 S.C.C. 39, 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."

Further, in the case of Chandrappa v. State of Karnataka reported in , (2007) 4 S.C.C. 415, 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."

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.

Even in the case of *State of Goa V. Sanjay Thakran & Anr.* reported in , (2007) 3 S.C.C. 75, the Apex 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."

Similar principle has been laid down by the Apex Court in the cases of *State of Uttar Pradesh v. Ram Veer Singh & Ors* reported in , 2007 A.I.R. S.C.W. 5553 and in *Girja Prasad (Dead) by LRs v. State of MP* reported in , 2007 A.I.R. S.C.W. 5589. Thus, the powers, which this Court may exercise against an order of acquittal, are well settled.

In the case of *Luna Ram v. Bhupat Singh and Ors*, reported in , (2009) SCC 749, 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.

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."

Even in a recent decision of the Apex Court in the case of Mookkiah and Anr. v. State, rep. by the Inspector of Police, Tamil Nadu, reported in , AIR 2013 SCC 321, 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 appellant 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 v. Sohan Lal and Others, , (2004) 5 SCC 573]."

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 v. Hemareddy, reported in , AIR 1981, SC 1417, wherein it is held as under:--

"This Court has observed in Girija Nandini Devi V. Bigendra Nandini Choudhary , (1967) 1 SCR 93:(AIR 1967 SC 1124) that it is not the duty of the Appellate 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."

Similar principle has been laid down by the Apex Court in the case of Shivasharanappa and Ors v. State of Karnataka, reported in , JT 2013(7) SC 66."

7. We have heard learned Advocates for the parties and gone through the evidence on record, more particularly the medical evidence, especially Column No. 17 of the Post Mortem Note and the cause of death, and on going through the same, it appears that the incident would lead to culpable homicide amounting to murder. However, it transpires from the evidence of the complainant who is the brother-in-law of the deceased that there are serious omissions in his statement. We have perused the well reasoned judgment and order of the learned Sessions Judge wherein, the learned trial Judge has discussed all the evidence very elaborately dealing with each and every aspect of the matter. However, in view of the observations made by the Hon''ble Apex Court in above judgments, when the second view is possible, the benefit of doubt is required to be given to the accused and taking into consideration the overall aspects of the matter, we are of the view that the second view is possible, in the facts and circumstances of the case, and accordingly, we concur with the view taken by the learned Judge. Apart from that, the learned Additional Public Prosecutor Ms. C.M. Shah for the appellant - State is not in a position to show any evidence to take a contrary view in the matter or that the approach of the trial court is vitiated by some manifest illegality or that the decision is perverse or that the trial court has ignored the material evidence on record. In that view of the matter, we are in complete agreement with the reasons recorded by the learned trial court and in our view, the impugned Judgment is just, legal and proper and requires no interference by this Court.

8. Both the Appeals are devoid of merits and stand dismissed. The judgment and order of acquittal dated 05.03.1994 in Sessions Case No. 50/1993 and Sessions Case No. 72/1992 of the learned Additional Sessions Judge, Kheda at Nadiad stands confirmed. Record and proceedings be sent to the concerned Trial Court forthwith.