

(2013) 11 GUJ CK 0036

In the Gujarat High Court

Case No : Criminal Appeal No's. 2173 and 526 of 2010

Yunushsha Ibrahimsha @ Chhotusa Fakir

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 18-11-2013

Acts Referred:

Citation : (2013) 11 GUJ CK 0036

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

Bench : Division Bench

Advocate : M.J. Buddhbhatti, Ms. K.D. Parmar, No. 1 in Criminal Appeal No. 2173/2010 and Ms. C.M. Shah, APP in Criminal Appeal No. 526/2010, for the Appellant; C.M. Shah, APP for the Opponent/Respondent No. 1 in Criminal Appeal No. 2173/2010, for the Respondent

Judgement

K.J. Thaker, JJ.—Criminal Appeal No. 2173/2010 has been preferred by the appellant-original accused no. 1 under sec. 374(2) of the Code of Criminal Procedure, against the judgment and order of conviction and sentence dated 8.9.2009 passed by the learned Sessions Judge, Jamnagar in Sessions Case No. 36/2008, whereby, the learned trial Judge has convicted the appellant-ori. Accused no. 1 under sec. 376 of IPC and sentenced to undergo R/I for 10 years and to pay a fine of Rs. 2000/-, in default, to undergo further S/I for one month. Criminal Appeal No. 526/2010 has been preferred by the appellant-State under sec. 378 of Code of Criminal Procedure, 1973 against the judgment and order of acquittal dated 8.9.2009 passed by the learned Sessions Judge, Jamnagar in Sessions Case No. 36/2008, whereby, the learned trial Judge has acquitted the accused no. 1 for the offence under sec. 504 and 506(2) of IPC and accused no. 2 for the offence under sec. 324, 504 and 506(2) of IPC and under sec. 135(1) of the Bombay Police Act, which is impugned in these appeals.

Both these appeals arise from the judgment and order dated 8.9.2009 passed by the learned Sessions Judge, Jamnagar in Sessions Case No. 36/2008, they are heard together and disposed of by this judgment.

1.1 The brief facts of the prosecution case is that the complainant Bharatbhai Kashirambhai Ramanandi gave complaint on 2.12.2007 before Jamnagar Rural Police Station at about 23.30 hours to the effect that he is residing at Jamnagar and doing seva-puja work at Temple known as Hathila Hanumanji, situated at village Vaavdi. He is having five daughters and one son. On the date of filing of the complaint, at about 8.30 pm at night, when he returned after leaving his eldest daughter at her matrimonial house, he did not find prosecutrix, aged about 12 years, and therefore, asked his wife about prosecutrix. The wife of the complainant informed him that she went outside for having some food. As the daughter of the complainant was so minor, the complainant also went outside the house to search prosecutrix. However, he returned at his house with empty hands. At that time, his neighbour Umarbhai Jumabhai informed him that one girl is crying near Delo known as "Jentibhai Chakubhai No Delo", and therefore, the complainant went to the said place. At the same time, prosecutrix came out crying from dark side of the said premises. The complainant also found there one Yunus Fakir. The complainant asked his daughter about the reason why she was crying, to which, she informed the complainant that Yunush took her in dark side and firstly he gave her Rs. 50/- and then he started committing rape on her. Therefore, she tried to shout. However, on making hubbub, Aarif Fakir, real brother of Yunus had also came there and gave knife blow on his thigh. Therefore, the complainant made call to his brother Naval Kashiram instructing him to ask the police to go to the house of the complainant. On such instructions, Kalavad Police was informed and accordingly complaint was filed by the complainant against the present appellants.

1.4 The accused came to be arraigned for committing murder and after the investigation was complete, the charge-sheet was laid against the accused. Thereafter, as the case was exclusively triable by the Court of Sessions, the case was committed to the Court of Sessions, which was given number as Sessions Case No. 36/2008.

1.5 Thereafter, the Sessions Court framed the charge below Exh. 7 against the accused for commission of the offence u/s 376, 324, 504 & 506(2) of IPC and under sec. 135(1) of the Bombay Police Act. The accused have pleaded not guilty and claimed to be tried.

1.6 To prove the case against the Accused, the prosecution has examined the following witnesses:

1. PW-1 Dr. Khalid Amin Kureshi Ex. 18
2. PW-2 Dr. Diptiben Chatubhai Parmar Ex. 22
3. PW-3 Dr. Rohit Popat Nakum Ex. 24
4. PW-4 Bipin Maganlal Boda Ex. 31
5. PW-5 Ramesh Chandubhai Ex. 34

6. PW-6 Tulsibhai Mohanbhai Ex. 37
7. PW-7 Bharat Kashiram Ex. 43
8. PW-8 Vaishali Bharatbhai Ex. 46
9. PW-9 Arvindsinh Mangalsinh Gohil Ex. 47
10. PW-10 Maniben Jashabhai Sagathiya Ex. 53
11. PE-11 Khushalbhai Madhubhai Ex. 55
12. PW-12 Dr. Navin Badriprasad Dube Ex. 60
13. PW-13 Mahavirsinh Verubha Rana Ex. 71

1.7 The prosecution also relied upon the following documentary evidences so as to bring home the charges against the Accused.

1. Case papers of MLC No. 7662/07
2. Sample collection form Ex. 20
3. Yadi for medical check-up of victim Ex. 21
4. In-door case papers Ex. 23
5. Panchnama of clothes of accused Ex. 35
6. Panchnama of clothes of victim Ex. 40
7. Panchnama of person of accused Ex. 41
8. Yadi to register the offence Ex. 48
9. Complaint Ex. 50
10. Copy of station diary Ex. 51
11. Copy of school leaving certificate Ex. 56
12. Birth certificate of victim Ex. 57
13. Birth certificate Ex. 58
14. Copy of school register Ex. 59
15. Yadi for medical check-up Ex. 61 to 62
16. Report of Community Health Centre, Kalavad Ex. 63
17. Letter to Medical Officer by PI Ex. 64
18. Report about sample collection Ex. 65
19. Report of Community Health Centre Ex. 66
20. Panchnama of scene of offence place Ex. 72

21. Panchnama Ex. 73

22. Notification Ex. 78

23. FSL Report Ex. 79

24. Serological report Ex. 86

1.8 Thereafter, after examining the witnesses, further statement of the accused under sec. 313 of CrPC was recorded in which the accused have denied the case of the prosecution.

2.1 After considering the oral as well as documentary evidence and after hearing the parties, learned trial Judge vide impugned judgment and order dated 8.9.2009 has convicted the appellant - original accused no. 1 of Criminal Appeal No. 2173/2010 and acquitted the respondents of Criminal Appeal No. 526/2010, as stated above.

2.2 Being aggrieved by and dissatisfied with the aforesaid judgment and order passed by the Sessions Court, the appellant-original accused no. 1 of Criminal Appeal No. 2173/2010 has preferred the present appeal.

2.3 We have heard learned advocate Mr. M.J. Buddhbhatti learned advocate for appellant-ori. Accused no. 1 in Criminal Appeal NO. 2173/2010 and Ms. C.M. Shah learned APP for the State in both the appeals.

3. The learned advocate Mr. Buddhbhatti for the appellant-ori. Accused no. 1 of Criminal Appeal No. 2175/2010 has contended that the trial court has committed an error in passing the impugned judgment and order, inasmuch as it failed to appreciate the material on record in its proper perspective, and hence, the present appellant be given the benefit of doubt and be acquitted. It has been further submitted by the learned advocate Mr. Buddhbhatti the case is based on the medical evidence and the evidence of prosecutrix, and therefore, this case would fall within the purview of an attempt to commit the rape and not rape. He has heavily relied on the medical evidence. This was the only contention raised before us. As far as conviction u/s 376 of IPC is concerned, learned advocate has relied on the provisions of section 511 of IPC and submitted that at the most, it can be said that it was a case of an attempt to commit rape but it was not a rape, and therefore, the appeal deserves to be allowed.

4. On the other hand, learned APP Ms. Shah has strongly opposed the contentions raised by the learned advocate for the present appellant and has submitted that the trial court has passed the impugned judgment and order after taking into consideration the facts and circumstances of the case as well as the material, in the form of oral and documentary evidence, produced before it and hence, no interference is called for and the appeal deserves to be dismissed. Learned APP Ms. Shah has contended that looking to the medical evidence and the evidence of prosecutrix, school leaving certificate, and the age of the prosecutrix, this case would fall within the purview of section 376(2) of IPC, as

the age is now not disputed and the prosecutrix was below the age of 12 years at the time of incident. The incident is also not in dispute, and therefore, the learned trial Judge has rightly held the appellant guilty for the offence u/s 376 IPC. It is also contended by learned APP that the appellant could have been convicted u/s 504 and 506(2) also but he has been wrongly acquitted by giving benefit of doubt. Learned APP has further contended that this is a case of rape on minor, and therefore, no leniency should be shown to the accused and the appeal deserves to be dismissed.

5. We have gone through the entire evidence, oral as well as documentary, and considered the ocular version and the medical evidence on record. While giving our reasons, we are with the learned trial Judge as far as conviction is concerned and acquittal is concerned. However, on re-appreciation of the entire evidence which is led before the learned trial Judge, we are unable to persuade ourselves that to subscribe the total reasons given by the learned trial Judge and hence, we have re-appreciated, appreciated and re-evaluated the entire evidence on record. We are mainly discussing the evidence of doctor as to whether the submission made by the learned for the appellant -accused is sustainable or requires to be rejected. The evidence on record has been rightly appreciated by the learned trial Judge. The medical evidence clearly shows that; (1) there are signs of recent vaginal penetration. (2) there are signs of recent sexual intercourse; (3) there are signs of general physical injury; (4) there are signs of intoxication; (5) there are signs of pregnancy; and, (6) there are signs consistent with the history given. The medical certificate Ex. 28 shows that there was a rape. She was in fearful and anxious and there was no external injury marks. In the medical certificate Ex. 29 though there was no external injury, there was allegation of rape. Learned advocate for appellant- accused no. 1 has vehemently submitted that even in the medical papers, it shows that there were no injury marks and though the accused is abled bodied person, there are no injury marks. There is an old ruptured in hymen, and therefore, it cannot be said that there was any penetration that is what submitted by the learned advocate for the appellant. On going through the medical report, it appears that she was admittedly below the age group of 12 years. In her history also, it is a case of rape as mentioned by prosecutrix. The serological report also has been considered by the learned trial Judge extensively, and therefore, in light of these documentary evidences, we are unable to persuaded ourselves to the submission made by the learned advocate for the appellant that this is a case which would fall within the purview of an attempt to commit rape and not the rape and it cannot be said that just because there was no injury on her vital part, rape is not committed., and therefore, it cannot be said that it would not fall within the purview of section 375, 376 and 511 of IPC. Section: 375, 376 & 511 of IPC reads, as under:

Sec. 375. Rape.- A man is said to commit "rape" if he-

a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of

a woman or makes her to do so with him or any other persons; or

b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

d) applied his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions:-

First:- Against her will.

Secondly:- Without her consent.

Thirdly:- With her consent, when her consent has been obtained by putting her on any person in whom she is interested, in fear of death or of hurt.

Fourthly:- With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom is or believes herself to be lawfully married.

Fifthly:- With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly:- With or without her consent, when she is under eighteen years of age.

Seventhly:- When she is unable to communicate consent.

Explanation 1.- For the purpose of this section, "vagina" shall also include labia majora.

Explanation 2.- Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Section: 376. Punishment for rape.- (1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever-

(a) being a police officer, commits rape-

i) within the limits of the police station to which such police officer is appointed; or

ii) in the premises of any station house; or

iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c) being a member of the armed forces deployed in area by the Central or a State Government commits rape in such area; or

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant; or

(i) commits rape, on a woman incapable of giving consent; or

(k) being in a position of control or dominance over a woman, commits rape on such woman; or

(l) commits rape on a woman suffering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(n) commits rape repeatedly on the same woman, shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's life, and shall also be liable to fine.

Section: 511. Punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment.- Whoever attempts to commit an offence punishable by this Code with [imprisonment for life] or imprisonment, or to cause such an offence to be committed, and in such attempt does any act

towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with [imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence], or with such fine as is provided for the offence, or with both.

6. The Apex Court in the case of Prithi Chand Vs. State of Himachal Pradesh, , wherein, the Apex Court has held that mere absence of spermatozoa cannot cast a doubt on the correctness of the prosecution case, and therefore, we are not with the learned advocate for the appellant-accused that the ingredients of sec. 376 IPC are not proved. Therefore, we are convinced that the accused has committed the said offence and he has been rightly convicted for the said offence by the learned trial Judge. We find no reason to even reduce the sentence which has already been imposed by the learned trial Judge, and therefore, no interference is called for and the appeal being Criminal Appeal No. 2173/2010 requires to be dismissed.

7. So far as the acquittal appeal being Criminal Appeal No. 526/2010 is concerned, we have heard learned APP Ms. C.M. Shah appearing for the appellant-State. Though rule is served, even for convicted accused, learned advocate Mr. Buddhbhatti states that he has no instructions to appear. However, we are convinced that no case is made out for punishing the accused no. 1 for the offence punishable u/s 504 and 506(2) of IPC or accused no. 2 for the offence punishable u/s 324, 504 and 506(2) of IPC and u/s 135(1) of the Bombay Police Act. The evidence on record has been minutely discussed by the learned trial Judge and on the touch-stone of the decisions cited hereinbelow, we feel that no case is made out for convicting the accused under the said offence and the acquitted recorded by the learned trial Judge is just and proper.

8. It is a settled legal position that if the appellate Court agrees with the reasons and findings given by the trial Court, then the discussion of evidence is not necessary, however, we will have to consider the submissions made by all the learned counsel appearing for the parties.

9. The decisions which are referred to hereinafter, would apply to the facts of this case in its totality and on four counts, namely; that no different finding then that given by the learned trial Judge can be arrived at; that the circumstance did not permit us to take a different stand then that taken by the learned trial Judge on the basis of the evidence before it; that the State has not been able to succinctly make the case against the present respondents-original accused and that even if two views are possible, we do not think that it is such a case where we would like to interfere with the finding of the learned trial Judge.

10. Ms. C.M. Shah learned APP is not in a position to show any evidence to take a contrary view of 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.

11. 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 views are possible, the appellate court should not interfere with the finding of acquittal recorded by the court below.

12. 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, 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 emphasize 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.

13. 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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,]

19. 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.

20. 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 respondents. 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.

21. In the above view of the matter, we are of the considered opinion that the trial court was completely justified in acquitting the respondents 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, Criminal Appeal No. 526/2010 requires to be dismissed.

In the result, both these appeals are dismissed. The impugned judgment and order of conviction and sentence dated 8.9.2009 passed by the learned Sessions Judge, Jamnagar in Sessions Case No. 36/2008, convicting the accused no. 1-Appellant of Criminal Appeal No. 2173/2010 and acquitting the respondents no. 1 & 2 of Criminal Appeal No. 526/2010, is confirmed.

R & P to be sent back to the trial Court, forthwith.