

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL NO. 267 of 2022

ODHABHAI S/O. DAHYABHAI MAKWANA

Versus

STATE OF GUJARAT

Appearance:

HCLS COMMITTEE(4998) for the Appellant(s) No. 1

MR.KISHORE PRAJAPATI(6305) for the Appellant(s) No. 1

for the Opponent(s)/Respondent(s) No. 2,3

MS CM SHAH, APP for the Opponent(s)/Respondent(s) No. 1

CORAM:HONOURABLE MR. JUSTICE S.H.VORA

and

HONOURABLE MR. JUSTICE SANDEEP N. BHATT

Date : 02/02/2022

ORAL ORDER

(PER : HONOURABLE MR. JUSTICE S.H.VORA)

1. Feeling aggrieved by and dissatisfied with the judgment and order of acquittal dated 10.01.2020 passed by the learned Principal Judge, Bhavnagar in Sessions Case No.107 of 2016, whereby the accused – private opponents herein viz. Shri Bhikhabhai Savjibhai Makwana and Shri Hirabhai Savjibhai Makwana came to be acquitted from the charge of the offences punishable u/s 302, 323, 504 of the IPC and under section 135 of B.P.Act, the appellant – original complainant has preferred present criminal appeal u/s 372 of the Code of Criminal Procedure, 1973 (for short “the Code”).

2. Briefly stated, the complainant – Shri Odhabhai Dahyabhai Makwana registered complaint with Shihor Police Station on 25.04.2016 being C.R.No.I-39 of 2016 inter-alia stating that dinner was arranged on 24.04.2016 at about 8.30 night on account of religious function and after completion of dinner, all went to sleep. At mid night at about 1.30 am on 25.04.2016, the

private opponents and other co-accused came to the house of the appellant – complainant and started quarrel with regard to power being on from temple connection near the residence of the appellant and beaten the appellant – complainant and his cousin Shri Ghanshyam. It is alleged that during this fight, accused persons gave Dhariya blow to the cousin of the appellant and during treatment he died.

3. Pursuant to the FIR lodged by the complainant, investigating agency recorded statements of the prosecution witnesses, drawn panchanama and collected relevant expert evidence for the purpose of proving the offence. After having found sufficient material against the private opponents herein and other co-accused for the aforesaid offence, charge-sheet came to be filed in the Court of learned JMFC, Sihor. Since the case was exclusively triable by Sessions Court, learned JMFC, Sihor committed the case to the Sessions Court as provided under section 209 of the Code.

4. Upon committal of the case to the Sessions Court learned Sessions Judge framed charge at Exh.21 against the accused including private opponents herein for the aforesaid offence. The accused pleaded not guilty and claimed to be tried.

5. In order to bring home charge, the prosecution has examined 18 prosecution witnesses and also produced documentary evidence before the learned trial Court, which is as under :-

Oral evidence

Sr.No.	Name of the witness	Exh.
1	Complainant – Odhabhai	29

	Dahyabhai Makwana.	
2	Panch Jitubhai Devshibhai Kodhi	33
3	Panch Kishorbhai Bhijalbai.	35
4	Panch Mathurbhai Bachubhai.	39
5.	Panch Bhupatbhai Merabhai Baraiya.	43
6	Panch Rajubhai Bhijalbai Gohil.	45
7	Panch Mehulbhai Dhirubhai Parmar.	47
8	Panch Pravinbhai Prabhatsinh Parmar.	50
9	Panch Pravinbhai Waghjibhai Chauhan.	60
10	Witness – Kishan @ Kishor Odhabhai Makwana.	65
11	Witness – Hansaben Ghanshyambhai @ Ghanabhai Makwana.	66
12	Witness – Dhamabhai @ Dharmasinhbhai Kanabhai Makwana.	67
13	ASI Gopalbhai Mafatlal Limbachia.	69
14	Dr. Vikram Becharbhai Gohil.	77
15	Dr. Manishbhai Bachubhai Ghelani.	81
16	PSO Jinabhai Bhalabhai Makwana.	84
17	IO Hareshbhai Rambhai Herbha.	88
18	IO Shaktisinh Yashwantsinh Zala	96

Documentary evidence.

Sr.No.	Documents	Exh.
1	Complaint.	30
2	Panchanama of deceased.	34
3	Panchanama of place of incident.	36

4	Panchship.	37, 38
5.	Panchnama of physical condition of deceased.	40
6	Panchnama of sample collected from injured.	44
7	Arrest panchnama.	46
8	Panchanam of recovery of clothes of accused.	48
9	Panchslip.	49
10	Panchslip.	51 to 59.
11	Discovery panchnama.	61
12	Panchnama of sample collected from accused.	62
13	Panchnama of Medical officer who collected sample of deceased.	63
14	Yadi for Inquest.	70
15	Form of deceased.	71
16	Yaid of Police Choki of Civil Hospital to Surgeon of Civil Hospital.	72
17	Receipt of giving dead body.	73
18	Yadi of Police Choki Civil Hospital to Shahibaugh Police Station.	74
19	Medical certificate of Dhanabhai Dayabhai.	78
20	Case papers of Ghanshayambhai Dahyabhai.	79
21	Medical certificate of injured.	80
22	PM Report.	82
23	Certificate issued by Medical Officer, Ahmeabad.	83
24	Xerox of Station diary.	85
25	Yadi to take charge of investigation.	86
26	Yadi to register offence.	89
27	Yadi of injured to take sample.	90

28	Yadi to take blood sample of accused.	91
29	Yadi to add section 302.	92
30	Yadi to take DD.	93
31	Yadi to take DD.	94
32	Description of place done by FSL officer.	95
33	Yadi to get PM note.	97
34	Yadi to draw map of place of incident.	98
35	Yadi to draw map of place of incident.	99
36	Note of sending Muddamal.	100
37	Notification of weapon.	101.
38	Receipt of FSL with regard to receiving Muddamal.	102
39	Forwarding letter of FSL	103
40	Report of Biological analysis.	104
41	Report of serological analysis.	105

6. On conclusion of evidence on the part of the prosecution, the trial Court recorded further statements of private opponents as provided u/s 313 of the Code, wherein, the private opponents herein denied their involvement in the offence and stated that false case has been filed against them. After hearing both the sides and after appreciating evidence adduced by the prosecution, the learned trial Judge acquitted the private opponents herein from the charge of offence under sections, 302, 323 and 504 of IPC but convicted private opponents for the offence under sections 447 and 114 of IPC.

7. We have heard learned advocate Mr. Kishore Prajapati for the appellant – complainant and minutely examined the oral as well as documentary evidence adduced before the learned Trial Court discussed at great length in the impugned judgment itself.

8. Learned advocate for the appellant – complainant submits that learned Trial Judge has not properly appreciated the role of private opponents inasmuch as they were present at the time of occurrence of incident as per oral deposition of prosecution witness – Shri Kishanbhai Makwana examined at Exh.65. He has invited our attention to the deposition of said witness, who according to the complainant is eye witness. According to learned advocate for the appellant – complainant, it is case of pre planned fight with the appellant – complainant and private opponents had come to the house of the appellant and beaten them and gave Dhariya blow to the deceased Ghanshyam for settling the score. He has further submitted that entire plan was designed and hatched by private opponents.

9. While appreciating the submissions made at bar, we have carefully examined deposition of witness – Shri Kishanbhai. No-doubt he has deposed before the Court that private opponents were armed with wooden stick and while deposing so, he has not attributed any role to the private opponents. Apart from it, it is relevant to note here that wife of deceased – Ms.Hansaben is also examined at Exh.66. According to her version, other co-accused had quarrel with the deceased and complainant and she has not uttered a word with regard to the presence of private opponents at the scene of offence and no role is attributed to them. Thus, though, prosecution witnesses viz. Shri Kishanbhai and Ms. Hansaben were present at the scene of offence at the time of

occurrence of incident, but wife of deceased Ms. Hansaben did not attribute any role to the private opponents. In view of such inconsistency in the version of both the eye witnesses, learned Trial Judge thought it fit to give benefit of doubt to the private opponents. Further the deceased while giving medical history to the Doctor did not utter a word of the private opponents though they are residing nearby and also relative. In view of such major discrepancy in the evidence of eye witnesses, learned Trial Judge after appreciating evidence found it appropriate to extend benefit of doubt to the private opponents. On our re-assessment and re-appreciation of entire evidence, we do not find that there is any infirmity or irregularity in the findings of fact recorded by the learned trial judge. Under the circumstances, the learned trial Judge has rightly acquitted the private opponents for the elaborate reasons stated in the impugned judgment and we also endorse the view/finding of the learned trial Judge leading to the acquittal.

10. It is a cardinal principle of criminal jurisprudence that in an acquittal appeal if other view is possible, then also, the appellate Court cannot substitute its own view by reversing the acquittal into conviction, unless the findings of the trial Court are perverse, contrary to the material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable. (Ramesh Babulal Doshi V. State of Gujarat (1996) 9 SCC 225). In the instant case, the learned APP has not been able to point out to us as to how the findings recorded by the learned trial Court are perverse, contrary to material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable.

11. In the case of Ram Kumar v. State of Haryana, reported in AIR 1995 SC 280, Supreme Court has held as under:

"The powers of the High Court in an appeal from order of acquittal to reassess the evidence and reach its own conclusions under Sections 378 and 379, Cr.P.C. are as extensive as in any appeal against the order of conviction. But as a rule of prudence, it is desirable that the High Court should give proper weight and consideration to the view of the Trial Court with regard to the credibility of the witness, the presumption of innocence in favour of the accused, the right of the accused to the benefit of any doubt and the slowness of appellate Court in justifying a finding of fact arrived at by a Judge who had the advantage of seeing the witness. It is settled law that if the main grounds on which the lower Court has based its order acquitting the accused are reasonable and plausible, and the same cannot entirely and effectively be dislodged or demolished, the High Court should not disturb the order of acquittal."

12. As observed by the Hon'ble Supreme Court in the case of Rajesh Singh & Others vs. State of Uttar Pradesh reported in (2011) 11 SCC 444 and in the case of Bhaiyamiyan Alias Jardar Khan and Another vs. State of Madhya Pradesh reported in (2011) 6 SCC 394, while dealing with the judgment of acquittal, unless reasoning by the learned trial Court is found to be perverse, the acquittal cannot be upset. It is further observed that High Court's interference in such appeal in somewhat circumscribed and if the view taken by the learned trial Court is possible on the evidence, the High Court should stay its hands and not interfere in the matter in the belief that if it had been the trial Court, it might have taken a different view.

13. Considering the aforesaid facts and circumstances of the case and law laid down by the Hon'ble Supreme Court while considering the scope of appeal under Section 372 of the Code of Criminal Procedure, no case is made out to interfere with the impugned judgment and order of acquittal.

14. In view of the above and for the reasons stated above, present criminal appeal fails and same deserves to be dismissed and is accordingly dismissed.

(S.H.VORA, J)

SATISH

(SANDEEP N. BHATT, J)

