Aher Maya Visa and Others

Vs

State of Gujarat

Criminal Appeal No. 663 of 1980

(K. Jayachandra Reddy, G. N. Ray JJ)

15.09.1992

JUDGEMENT

G.N. RAY, J.:-

1. This appeal is directed against the judgment of the High Court of Gujarat dated August 4, 1980 passed in Criminal Appeal No.1114 of 1979 by which the judgment of acquittal in favour of the accused/appellants passed by the learned Sessions Judge, Bhavnagar on July 25, 1978 in Sessions Case No. 100 of 1977 was set aside and the appellants were convicted under S. 302 read with S. 34, Indian Penal Code and each of the said accused was sentenced for imprisonment for life. The appellants were committed to Sessions Trial for an offence under S. 302 read with S. 34, IPC. for causing death of Samat Mansur and his brother, Vajsur Mansur on October 7, 1977. The prosecution case in short is that the said two deceased persons had gone to the house of one Nathiben at village Bodki to mourn the death of her husband. Both the said deceased persons stayed at the house of one Rajabhai, P.W. 1. The said Rajabhai was a relation of the deceased persons because the deceased, Vajsur was married to the sister of Rajabhai. On the morning of October 7, 1977, the said deceased persons again went to the house of Nathiben and after taking tea at her place, they had left for the bus stand. Nathiben, P.W.3, has a daughter named Raniben, P.W. 4 and she has also a son, Bhikha, P.W. 2. Nathiben, his son Bhikha and the daughter Raniben also accompanied the deceased persons to the bus stand because Nathiben and Bhikha also wanted to go with Raniben to the village Bhagura where Raniben was married. To reach Bhagura one has to get down at Borda bus stand for a change. The deceased persons and Nathiben, Raniben and Bhikha travelled in the same bus and all got down at Borda bus stand at about 7-30 in the morning. It is the case of the prosecution that as soon as the bus left the bus stand four accused persons came with axes and attacked the deceased persons by giving blows and first of all inflicted axe blows on Sarnat. Nathiben tried to intervene and in the process she received an injury and thereafter desisted from intervening. Seeing Mansur being attacked, Vajsur started running but he was chased by all the accused persons and was also given blows with axes and he also fell down about 14 feet away near a house which was under construction. Both the deceased persons expired on the spot. Nathiben, thereafter, requested her son, Bhikha, to go to the village Bodki and inform Rajabhai. Raja was informed by Bhikha and Raja and Bhikha both came to Borda bus stand and thereafter Raja went to Datha Police Station and lodged the first information report at about 10 a.m. on the same day. P.W. 13, Police Officer, in charge of the Police Station, registered the offence and sent two constables at the place of occurrence. The Officer also reached the place of offence at about 1-00 p.m. and prepared inquest panchnama. The dead bodies of the two persons were sent for post mortem examination. After recording the statement of Nathiben she was sent to Mahuva hospital for treatment. The Police Officer also

recorded statements of Bhlkha and some other persons. Later on, the statements of the Driver and the Conductor of the bus were also recorded. On October 9, 1977, the accused persons were arrested and on that day the statement of Raniben was also recorded. All the said four accused persons were committed for Sessions Trial in the Court of the learned Sessions Judge, Bhavnagar. The learned Sessions Judge, however, by his judgment dated July 25, 1978 acquitted all the four accused persons inter alia on the finding that the case against the accused persons could not' be established beyond reasonable doubt and the evidences of the eye witnesses, namely, P.W. 2, P.W. 3 and P.W. 4 could not be accepted. The learned Sessions Judge was of the view that in view of the custom prevalent in the Aher community to which the eyewitnesses belong, Nathiben who lost her husband only four days back was not to move out of the house for about 1 1/4 months. The learned Sessions Judge also noted that although, according to the prosecution case, Nathiben also suffered injury at the hands of the accused persons, Bhikha, another eyewitness being present at the place of occurrence must have seen such assault on his mother. Hence he could not have missed to report such incident to Raja, P.W. 1. As such incident was not reported to Raja, in the FIR lodged by him, such fact was not stated by Raja. The learned Sessions Judoe by indieating his reasonings had come to the finding that the case as sought to be made out by the prosecution suffered from various infirmities. As such it was not possible to come to a finding that the said eye-witnesses were actually present at the time of occurrence and as such they could give evidences about the, commission of offence by the,accused persons. In that view of the matter, thejudgment of acquittal was passed by the learned Sessions Judge.

2. As aforesaid, on the appeal against the acquittal being preferred by the State of Gujarat, Criminal Appeal No. 1114 of 1979 came up for consideration before the Division Bench of the High Court of Gujarat. The High Court has noted that the place of occurrenceisundisputed because admittedly the dead bodies were found at the spot mentioned in FIR. The nature of the injuries, as noted at the time of post mortem examination, also tallied with the prosecution case, namely, infliction of injury by axe. The High Court has indicated that in the light of such admitted position, the evidences of all the eye-witnesses are to be appreciated. The High Court has indicated that the evidences of the said eye-witnesses were not accepted by the learned Sessions Judge because, according to the learned Sessions Judge, Nathiben had lost her husband only four or five days back an the entire family was in mournlng mourners had been calling on the fiamily-Precisely for the said reason, the deceased had been to the house of Nathiben one day earlier. In such circumstances, the learned Sessions Judge was of the view that it was not expected that Nathiben would come out of the house and accompany the daughter, Raniben (P.W. 3), to the house of her husband in a distant village. For the same reason, the learned Sessions Judge was also of the view that shortly after the death of the father it was not expected that Raniben should leave her widowed mother and would intend to go back to her husband's house. It was for this reason, the learned Sessions Judge had doubted the correctness of the prosecution case that Nathiben and her son, Bhikha, had accompanied Raniben and they had travelled in the same bus by which the accused persons also travelled and by that process got down at the bus stand at the village Borda where the murder had taken place. The learned Sessions Judge, considering the evidences adduced on behalf of the eye-witnesses that there is a custom in the Aher Community that the widow does not leave the house at least for aperiod of 45 days after the death of the husband, held that it was all the more improbable that Nathiben had in fact left her house and accompanied her daughter. The High Court has, however, held inter alia that in the written Code of Conduct of the Aher Community, there is no mention that widow should not leave the house for a period of little over one month from the date of the death of the husband. The High Court was of the view that Nathiben had no enmity' so far as the ccused persons are concerned and it is not expected that the said eye-witnesses should falsely implicate innocent persons on a

charge of murder. The High Court has noted that if it is assumed that there is a custom in even the other Community that, a widow does not leave her house for some period after the death of the husband, simply because Nathiben had left the house by ignoring the custom, the veracity of the statement of Nathiben should not be doubted. The High Court has noted that essentially all the said eye-witnesses have stated how the murder had taken place and there is consistency in their depositions. According to the High Court, failure on the part of the Bhikha to inform Raja that her mother also suffered injury when she tried to prevent the murderous assault is not at all improbable and for such lapse his evidence is not to be discarded. The High Court has also held that an injury on the forehead of Nathiben which was likely to be caused by a sharp cutting instrument, was noted by the Medical Officer on the date of murder when she was sent by the Police for medical examination. Such injury also conforms with the case of the prosecution that she had also suffered injury at the hands of the assailants when she tried to prevent. The High Court has referred to the deposition given by the Conductor of the bus, Musabhai (PW.5). He has stated that at village Borda 7 persons got down and 4 passengers boarded the bus and in the cross-examination, he had admited that the bus had reached Borda at about 7- 10 to 7-15 a.m. According to the prosecution case seven persons travelled including the deceased persons because from the village Borda two of the deceased persons and Nathiben, Bhlkha and Raniben and her two children boarded the bus and all of them had got down at the bus stop of Borda. The prosecution case, therefore, stands corroborated by the evidence of the conductor. A strong adverse inference was drawn by the learned Sessions Judge against the prosecution case because the incident of death was not reported to a relation of one of the deceased who had been married in the village Borda. The High Court has held that Raja was also a very close relative of the deceased and he was living in the village Bodki which was also quite close to village Borda and if Nathiben had decided that Raja should be informed first of all, there was nothing improbable or peculiar. It may be noted here that as a matter of fact on being asked by the Court Nathiben has stated in her deposition that she could not remember at that time that there was also a relation of one of the deceased in the village Borda. The High Court has also noted that the village Bodki is at a distance of only three kilometers. If after being informed by Bhikha about the said incident Raja had again travelled three kilometers distance to reach the place of occurrence and thereafter had been to the Police Station and lodged the FIR by, 10-00 a.m., it must be held that no delay was caused in lodging the FIR. The High Court has also held that the learned Sessions Judge drew an adverse inference against the prosecution case because Nathiben could not state as to by whom she sustained the injury. According to the High Court when four persons were attacking the deceased persons and in the process of her attempt to intervene she has received an injury, it is quite likely that she may not be able to know as to by whom she received the injury. On the contrary, her evidence appears to be truthful. The High Court is of the view that the prosecution has been able to establish that the said eye-witnesses had travelled with the deceased persons in the bus and they had to get down at the Borda bus stop. The evidences adduced by the eye-witnesses are natural and trustworthy and they have not been shaken in cross-examination. The High Court has held that from the nature of the injuries inflicted on the deceased persons and from the fact that Vajsur was chased and was also done to death by inflicting axe blows at a distance of 14 feet from the bus stop, the case of common intention of the accused persons to murder both the brothers was established. The High Court has referred to a decision of this Court in the case of Pala Singh v.. State of Punjab, reported in AIR 1972 SC 2679 and also another decision of this Court made in the case of K. Gopal Reddy v. State of Andhra Pradesh, AIR 1979 SC 387 where occasion for interference by the High Court in an appeal against the order of acquittal was taken into consideration and the principles laid down by the Privy Council in the decisionreported in AIR 1934 Privy Council 227 (2) were discussed. In Pala Singh's case (supra) the Supreme Court has observed that "substantial and compelling reasons" good and 'sufficiently cogent reasons' tended to curtail the

undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion but in doing so the appellate court should consider every matter on record having a bearing on the questions of fact and the reasons given by the Court below in support of its own judgment which led it to hold that the acquittal was not justified.

3. In Gopal Reddy's case (AIR 1979 SC387)this Court has noticed that if two reasonable and probable views, on the appreciation of evidence, are possible, then one must necessarily concede the existence of a reasonable doubt. But fanciful and remote possibility must be left out of account. Referring to the said decisions, the High Court is of the view that the view taken by the learned Sessions Judge is not at all a reasonable and probable view so that there is compelling reason not to disturb the finding made by the learned Sessions Judge by reappreciating the evidence. Accordingly, the order of acquittal passed by the learned Sessions Judge was set aside by the High Court and all the accused persons were convicted under S. 302 read with S. 34 of the Indian Penal Code and they were sentenced to imprisonment for life.

4. Mr. Mehta, learned counsel appearing for the appellant, has very strenuously contended before us that the High Court was not justified in interfering with the finding made by the learned Sessions Judge. On appreciating the evidences adduced in the case, the learned Sessions Judge has given cogent reasons for coming to the finding that it was improbable rather doubtful that the said eyewitnesses had at all travelled by the same bus and they had any occasion to see the murderous assault committed by the accused persons. It cannot be contended that such view of the learned Sessions Judge is a perverse view or no reasonable man can take such view. If on appreciation of the evidences, the view which has been taken by the learned Sessions Judge, is also possible, the law is well established that in an appeal against acquittal interference by the High Court is not called for. The learned counsel has contended that truth may be stranger than fiction at times but there is no manner of doubt that under normal circumstances, it is not expected that the widow within 4 to 5 days of the death of her husband should leave her house against the prevalent custom of Aher Community and would accompany the daughter to leave her in her husband's place at a distant village. Even if there was any necessity that an adult should accompany the daughter because of her two young children, Nathiben's son Bhikha, could have been sent and there was no necessity for the widowed mother to go. That apart, various discrepancies to which reference has been made by the learned Sessions Judge were also highlighted by the learned counsel for the appellants and he had submitted that such discrepancies, lapses and some basic infirmities in the evidences adduced by the alleged eye-witnesses, leave considerable doubt about the veracity of their statements. If for such facts, the learned Sessions Judge has not believed the case of the prosecution and has given a verdict of acquittal, there was no occasion for the High Court to reappraise the evidences and to substitute its own finding. The learned counsel has contended that such finding could have been made by the High Court had there been no verdict of acquittal but in an appeal against acquittal the position was different. Mr. Mehta has also contended that each infirmity may be explained by considering the case from a different angle but it is the totality and the cumulative effect of all such infirmities which are required to be taken into consideration for accepting the case of the prosecution. The learned Sessions Judge, on consideration of the totality of the effect of the improbabilities, infirmities and discrepancies in the evidences, has come to the finding that evidences of the alleged eye-witnesses are doubtful and on such doubtful evidences, conviction on a charge of murder is not justified. He has submitted that in the aforesaid facts this Court should accept the finding made by the learned Sessions Judge by holding that the total effect of the inconsistencies, improbabilities and discrepancies in the evidences clearly put the prosecution case in the realm of doubt and no conviction for murder can be made when such doubt exists. He has submitted that admittedly the village Borda has substantial population and admittedly the murder had taken place near the bus

stop itself and such murder had taken place at about 7-30 in the morning when villagers were expected to be out of their houses for their daily cores. In such circumstances, it is reasonably expected that the act of gruesome murder of two persons must have been noted by the villagers and in all probability the accused persons would have been apprehended. It, therefore, appears that the murder had not taken place in the manner alleged by the prosecution and the case of the prosecution, therefore, should not have been accepted by the High Court by interfering with the order of acquittal passed by the learned Sessions Judge. He has submitted that in the facts and circumstances of the case it is pre-eminently a fit case for interference by this Court by setting aside the judgment of the High Court and confirming the order of the learned Sessions Judge.

5. The learned counsel for the State has, however, submitted that the High Court has given good reasons as to why the interference against the order of acquittal in the facts of this case was warranted. He has submitted that admittedly the deceased persons travelled by the bus and they were murdered near the bus stop. For the purpose of going to the village of Raniben, one is required to get down at the Borda bus stop for a change and hence travelling by the said bus by Raniben, her mother and brother and getting down at the said bus stop at Borda was not at all unnatural or improbable. He has submitted that the alleged custom of the Aher Community has not been noted in the written Code of Conduct and the alleged custom was also not accepted by the High Court for good reasons. Even assuming that there was such a custom and if a widow has not conformed to the custom and has decided to accompany the daughter, the case cannot be disbelieved merely because the conduct is contrary to the custom. He has submitted that there may be an omission by Bhikha to state the detailed facts to Raja but in the state of mind after seeing the gruesome murder of two persons, it is quite probable that Bhikha failed to narrate to Raja various details of incident that happened at the time of murder. The evidences of eye-witnesses got ample corroboration by other facts as noted by the High Court and as such the same were not liable to be rejected on an assumption of improbabilities without any real basis. He has, therefore, submitted that no interference is called for in this appeal and the same should be dismissed.

6. After giving our anxious consideration to the facts and circumstances of the case and the submissions made by the learned counsel for the parties, it appears to us that the High Court was not oblivious of the implication of an order of acquittal and the duties cast on the Court of appeal while dealing with an order of acquittal. It also appears that the High Court referred to the decisions of this Court an d also a decision of the Privy Council and keeping in mind the principles to be followed by the Court of appeal in an order of acquittal, the prosecution case was considered by the High Court

7. In our view, the evidences adduced b the eye-witnesses do not suffer from any material discrepancy, inconsistency or improbability for which there was any occasion to hold that the case sought to be made out by the prosecution was doubtful or the veracity of the eye-witnesses was to be doubted. In our view, the reasonings given by the High Court in accepting the evidences are sound. It appears to us that the learned Sessions Judge proceeded on surmises and conjectures and had drawn adverse inference against the prosecution case by analysing the evidences from an erroneous point of view. There is no material warranting a finding that the eyewitnesses had any motive to falsely implicate the accused persons on a charge of murder. The FIR has been lodged within a short period after the murder because the FIR had been lodged within less than three hours, although Rajagot the information from Bhikha at his own village which was three kilometers away from the place of occurrence and thereafter he came to the place of occurrence on foot and then went to the Police Station at some distance. The injury on Nathiben conforms to the case of the prosecution that she also sustained injury while she had been trying to prevent the murderous

assault. Any case of cooking up a story by introducing alleged eye-witnesses does not stand scrutiny. It may be noted that hardly there was any occasion for two ladies and Bhikha to falsely implicate four innocent persons with a charge of murder. Admittedly the murder had taken place near the bus stop of a populous village in the morning at about 7-15 a.m. It was quite likely that such incident might have been noticed by some other villagers. In such circumstances, it will be a wild imagination to suggest that in order to cook up a story by lodging a FIR within three hours, fabrication was meticulously made by introducing two ladies and another person from a different village as eye-witnesses even at the risk of exposing unusual behaviour of a widow to leave her residence on the fateful day. If the story was to be cooked up, Nathiben could have seen easily excluded so that the case would have been made more convincing. In our view, the evidences of the eye-witnesses appear to be quite natural straightforward and trustworthy and we do not think that there is any occasion to hold that such evidences are cooked up. Moreover, the evidences of the eye-witnesses got ample corroboration from other facts established in the trial by the prosecution. The view taken by the learned Sessions Judge does not appear to be acceptance of one of the probable views. The view taken by the learned Sessions Judge has its foundation more in the realm of surmise and conjecture than on reasonable inferences drawn on facts established. In an appeal from the order of acquittal, the court of appeal should be careful enough in weighing the reasonings of the learned Sessions Judge and it need not reappreciate the evidences to substitute its own finding when the other finding is also a possible one and not contrary to the evidences. But if it transpires that the finding made by the learned Sessions Judge is contrary to the weight of the evidence adduced and facts established in the trial and such finding is inherently based on surmise and conjecture and improper and irrational inferences have been drawn from the facts established, in our view, it will not only be just and proper to discard the judgment of acquittal but it will be duty of the appeal court in exercise of its appellate power to consider the evidences and materials on record to come to its own finding. In the aforesaid circumstances, we do not find any reason to interfere with the decision passed by the High Court in convicting and sentencing the accused persons. The appeal, therefore, fails and is dismissed. The bail bonds stand cancelled and the accused persons are directed to serve out the sentence.

Appeal dismissed.

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