SUPREME COURT OF INDIA

Soyebbhai Yusufbhai Bharania

Vs.

State of Gujarat

Crl.A.No.1418 of 2014

(Pinaki Chandra Ghose and Ashok Bhushan,JJ.,)

23.03.2017

JUDGMENT

Pinaki Chandra Ghose,J.,

1. This appeal is directed against the judgment and order dated 29.11.2013 passed by the High Court of Gujarat at Ahmedabad in Criminal Appeal No.1747 of 2010 with Criminal Appeal Nos.2223 & 2224 of 2010, whereby the High Court dismissed the appeal of the appellants herein and confirmed their conviction and sentence for various offences punishable under Sections 302, 147, 148 read with Section 149 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC").

2. The brief facts necessary to dispose of these appeals are that on 04.07.2009, at about 3:00 a.m., while one Rameshbhai Prajapati (since deceased), who was the Taluka President of Shivsena, his wife Bhavnaben and their children were sleeping, the accused persons assaulted the deceased in sleeping condition with a large knife because even after protest of the accused persons, younger brother of the deceased got married with a woman hailing from the community of the accused. Rameshbhai died on the spot and the whole incident was seen by his wife Bhavnaben (PW1) as she woke up. The accused after killing the deceased escaped from there.

3. The law was set into motion upon lodging of FIR by PW1 (complainant) on 04.07.2009 at 06:15 a.m., at Vagdod Police Station. The FIR was registered as C.R.No.69 of 2009. The post-mortem of the deceased was performed by Dr. Mayankbhai Vrajlal Sheth (PW2). As per the deposition of PW-2 with regard to post-mortem of the deceased, marked Exh. 25, there were injuries on artery, veins and windpipe due to injury caused on the throat by large knife.

4. Upon completion of investigation, charge-sheet under Sections 147, 148, 149, 302 and 120-B of the IPC was filed on 29.09.2009 in the Court of Judicial Magistrate, First Class, Patan, which was registered vide Criminal case No.4108 of 2009. However, the case being exclusively triable by the Court of Sessions, Surat, the same was committed to the Sessions

Court under Section 209 of the Cr.P.C. Accordingly, a Sessions Case No.72 of 2009 was registered against the accused. Thereafter, upon the case being transferred to the Court of Additional Sessions Judge, (FTC-2), Patan, charges were framed against the accused persons vide Exh.8, for the offences punishable under Sections 147, 148, 149, 302 and 120-B of IPC. After the accused persons denied the said charges in their statements vide Exhibit Nos.9 to 13, the evidence of prosecution witnesses was recorded.

5. Upon recording the evidence of the prosecution witnesses and after considering all the relevant facts, the Trial Court vide its judgment and order dated 16.08.2010 convicted accused Nos.1 to 4 for the offences punishable under Sections 302, 147 and 148 read with 149 of IPC and sentenced them to imprisonment for life and to pay a fine of Rs. 2,000/- and, in case of default to pay fine, to undergo further simple imprisonment for six months. However, the Trial Court acquitted accused No.5 - Umarbhai for the offences punishable under Sections 147, 148, 149, 302 and 120-B of the IPC, and acquitted rest of the accused for the offences punishable under Section 120-B of the IPC. It was further ordered that if the accused Nos.1 to 4 pay the amount of fine, then an amount of Rs.8,000/- be paid as compensation to the complainant on behalf of all the dependants. Being aggrieved by the aforesaid judgment and order of the Trial Court, the accused persons filed an appeal before the High Court. While accused preferred Criminal Appeal No.1747 of 2010 against order of their conviction and sentence, Criminal Appeal Nos.2223 & 2224 of 2010 were preferred by the State for enhancement of the sentence and against the acquittal of accused No.5, respectively.

6. The High Court vide its judgment and order dated 29.11.2013, dismissed the aforesaid appeals filed by the State. The High Court partly allowed Criminal Appeal No.1747 of 2010 filed by the accused persons and thereby quashed and set-aside the judgment and order of conviction and sentence passed by the Trial Court qua accused No.4 and he was acquitted. However, the judgment and order of conviction and sentence passed by the Trial Court qua accused Nos.1, 2 & 3 was confirmed. Aggrieved by the aforesaid judgment and order passed by the High Court, the accused persons have sought to challenge the same before us in this appeal.

7. We have heard the learned counsel appearing for the accused appellants as also the learned counsel appearing for the respondent and have perused the oral and documentary evidence on record.

8. A two-Judge Bench of this Court has formulated the principles for the exercise of jurisdiction in a petition under Article 136 of the Constitution of India in *Ganga Kumar Srivastava Vs. State of Bihar*[1], in the following terms:

> "i. "The powers of this Court under Article 136 of the Constitution are very wide but in criminal appeals this Court does not interfere with the concurrent findings of the fact save in exceptional circumstances.

ii. It is open to this Court to interfere with the findings of fact given by the High Court, if the High Court has acted perversely or otherwise improperly.

iii. It is open to this Court to invoke the power under Article 136 only in very exceptional circumstances as and when a question of law of general public importance arises or a decision shocks the conscience of the Court.

iv. When the evidence adduced by the prosecution fell short of the test of reliability and acceptability and as such it is highly unsafe to act upon it.

v. Where the appreciation of evidence and finding is vitiated by any error of law of procedure or found contrary to the principles of natural justice, errors of record and misreading of the evidence, or where the conclusions of the High Court are manifestly perverse and unsupportable from the evidence on record."

9. Keeping in mind the above position of law as enunciated and settled by a series of decisions of this Court, we shall now examine the evidence adduced by the parties and the materials on record and see that in view of the nature of offence alleged to have been committed by the appellants, whether the concurrent findings of fact call for interference in the facts and circumstances of the case.

10. In the present case, there have been concurrent findings as to the guilt of the accused persons by both the Courts below. In upholding the judgment and order of conviction of the Trial Court, the High Court had primarily relied upon the evidence of eye-witnesses, namely, PW1 who was found to be trustworthy. The weapon, being knife, was recovered and Panchnama was also proved. The High Court held that the accused were sharing the common object of causing injuries to the deceased.

11. Further, looking to the evidence given by PW5, one Dahyabhai Dalabhai Patel and PW6, Kurashibhai Jivabhai Desai, recovery of the weapon, being large knife with plastic handle, was corroborated. However it is also true that PW5 was declared hostile who had stated that appellant No.1 had taken out the large knife from the dump heap. It was further stated that no blood stains were found on the knife.

12. The High Court relied upon the judgment of this Court in *Mookkiah & Anr. Vs. State, represented by Inspector of Police, Tamil Nadu*[2], in support of the aforesaid conclusion, wherein this Court held:

"9. 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 levelled against them. On appeal by the State, the High Court, by the impugned order, reversed the said decision and convicted the accused under Section 302 read with Section 34 IPC and awarded RI for life. Since the 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 analyse the scope and power of the High Court in an appeal filed against the order of acquittal."

10. This Court in a series of decisions has repeatedly laid down that

'3...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 reappreciate 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 Vs. Sohan Lal & Ors*[3]*.*," .

Thus, looking to the deposition of the prosecution witnesses, the offence of murder of the Rameshbhai Prajapati has been proved beyond all reasonable doubt against the accused.

13. Mr. Huzefa Ahmadi, learned senior counsel appearing on behalf of the appellants contended that both the Courts below have committed an error in convicting the appellants for the offence punishable under Section 302 IPC along with two other accused. When the High Court had acquitted accused No.4 and confirmed the acquittal of accused No.5, no conviction could have been recorded of the remaining three accused for an offence punishable under Section 302 IPC.

14. Learned senior counsel further submitted that the proposition submitted by the State are incorrect in view of the fact that Section 149 is not attracted in the absence of the overt act being attributed to each accused, since there is no finding to the effect that five or more persons were involved in the act. In support of this submission, he relied on *Manmeet Singh alias Goldie Vs. State of Punjab*[4], wherein this Court observed as under:-

"With reference to the offence of dacoity under Section 391 IPC in particular and the import of Section 149 IPC, this Court in *Raj Kumar vs. State of Uttaranchal*[5] had propounded that in the absence of a finding about the involvement of five or more persons, an accused cannot be convicted for such an offence. Their Lordships, however, clarified that in a given case it could happen that there might be five or more persons and the factum of their presence either is not disputed or is clearly established, but the court may not be able to record a finding as to their identity resulting in their acquittal as a result thereof. It was held that in such a case, conviction of less than five persons or even one can stand, but in the absence of a finding about the presence or participation of five or more persons, less than five persons cannot be convicted for an offence of dacoity."

PW1 in her deposition vide Exhibit No.20 had identified the accused. However, she had not attributed any specific act to any of the accused.

15. It has been contented by the learned senior counsel for the appellants that the evidence of PW1 is vague and not reliable. About motive, she vaguely states that the deceased was Taluka President of the Shivsena and had a precarious relationship with all local Memons. Five accused had also been wrongly identified.

16. It is further submitted that there was no need to conduct test identification parade (TIP) considering the fact that conviction of all accused is based on the sole testimony of the widow (who at best had a fleeting glimpse of the accused under cover of darkness) since life of the appellants hang in a delicate balance. He thus relied upon *Dana Yadav alias Dahu & Ors. Vs. State of Bihar*[6]*,; Kanan & Ors. Vs. State of Kerala*[7]*, and Mulla & Anr. Vs. State of Uttar Pra.desh*[8]*,.*

17. On the other hand, Mr. D. N. Ray, learned counsel appearing on behalf of the respondent supported the order of conviction and sentence passed by both the Courts below. He submitted that it is true that accused No.5 and accused No.4 were acquitted by the Trial Court and High Court, respectively, from all the offences charged against them for want of evidence. It is equally true that out of five accused, two accused were acquitted by the Courts below by giving benefit of doubt and hence there were less than five accused before the High Court. He has specifically submitted that no point of perversity has been taken by the appellants or pleaded in their appeals and instead, asked for re-appreciation of the evidence. According to him, without showing any perversity committed by the Trial Court as well as by the High Court, there can be no ground to interfere with the findings of the High Court. He submitted that this appeal should be dismissed on this ground.

18. He further pointed out that the prosecution case is based on an unshakeable eye-witnesses' account. Therefore, motive becomes immaterial and question of proving the motive by the prosecution does not arise, since it is not a case based on circumstantial evidence. (See *Arjun Malik & Ors. Vs. State of Bihar*[9], Para 10). He also drew our attention to a decision of this Court in *Kuriya & Anr. Vs. State of Rajasthan*[10], wherein it was held that "Once the principal eye-witness(es) have proved their credentials on the whole, it can be said to be believable that the prosecution can rest even on the testimony of a single eyewitness."

19. Learned counsel appearing on behalf of the respondent further contended that many questions were tried to be raised in respect of the deposition/testimony of PW1, but from the evidence of PW1 - widow of the deceased, it would appear that there is no improvement regarding visibility of the crime as sought to be made out by the defence. So far the recovery of the knife is in question, although PW5 has turned hostile, even though on cross-examination, he has categorically stated that the recovery of a large sharp knife was made at the instance of accused No.1. He further pointed out that the deceased was running a Shivsena magazine in the heart of a Memon Village. Except a handful of Hindus, the entire

village comprised Muslims who were on inimical terms. It has come on record that the relationship of the deceased with the local Muslim villagers was so bad that in the past the police had to be called and the deceased had to be given police protection and the police had to resort to firing to save the deceased. He also took us through the evidence of PW3 and submitted that PW3 had married a Muslim lady from the same village, which aggravated the enmity between the deceased and the accused persons.

20. He further pointed out that although it is not seriously urged that since five persons could not be identified and/or only three has been convicted, therefore, Section 149 IPC cannot be attributed to convict anybody other than the accused No.1. Such submission cannot be accepted by the Court since PW1 clearly deposed in her testimony that she had seen five persons fatally assaulting her husband. She has categorically named five persons assaulting her husband with big knives. Therefore, the fact of the five persons, who were present cannot be doubted. Doubt is with regard to the exact identification of one or two accused.

21. We have meticulously perused the oral evidence of PW1 who is the only eye witness in the present case and that of PW3 who was the fort to know about the incident, as PW1 had called her. It was admitted that day before the incident of murder one Nageshbhai had a private conversation with the deceased outside their house and thereafter deceased was feeling very much grief and his face was looking pale and during evening hours many phone calls were received on telephone. No independent act or overt act was attributed to each accused, albeit it was stated that she had seen the clothes of the assaulter stained with her husband's blood during occurrence.

22. In our view, albeit the murder is proved but the ingredients of the unlawful assembly remained elusive, as pre-requisite condition for an unlawful assembly i.e., minimum five persons, has not been met. Nevertheless, the common object has been proved by the prosecution.

23. Moreover, when the appeal was preferred before the High Court, acquittal of the accused No.5 was not rebutted and further finding of the High Court whereby accused No.4 has also been acquitted for reasonable doubts, leaves a well-set doubt that prosecution has not proved its case beyond reasonable doubt. We are constrained to have this opinion that trial court was vitiated by some manifest illegality or that the decision is perverse. PW9/Circle Officer has also stated that PW2, brother of deceased, influenced him into adding of cots, whereas they were not actually there. No zero watt bulb is shown in the Panchnama (site plan) as well, which efficaciously gives rise to doubt of the role attributed to the appellants.

24. Finally, it has been argued by the learned senior counsel for the appellants that a reference was also made to a previous incident of 2001, where deceased had to be given police protection during some altercation with people of the other community. However, the accused in that case were admittedly different and there is nothing to connect the appellants in the present case, except the fact that they belong to the same community.

25. On the other hand, it has been submitted by the learned counsel for the State that the incident actually did happen due to the fact that the brother of the deceased had got married with a girl of the community of the appellants. Had this marriage was not solemnized or as per present situation not registered in Court, then the deceased might not have been murdered.

26. After considering the present facts and circumstances, we are of the considered opinion that for furtherance of the common intention namely to do away the deceased, appellants had entered into the house of the deceased and were seen by PW1. They then started beating the deceased and after causing injuries on his neck with a sharp knife, they ran away. The homicidal death was proved beyond all reasonable doubts. The High court has thus rightly relied on the judgment of this Court in the case of *Pulukuru Kottaya & Ors. Vs. Emperor, reported in*[11], wherein it was held that "The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision".

27. Above all, the fact that accused had been identified and recovery made from accused No.1 has left no room for doubt that all the appellants were involved in the commission of the murder with common object to do away the deceased with sharp knife.

28. Thus, in the light of the above discussion, we are of the view that the present appeal is devoid of merits and we, therefore, do not find any reason to interfere with the order of the High Court. Hence, the appeal is dismissed.

Judgment Referred.

[1]*(2005) 6 SCC 0211*
[2]*(2013) 2 SCC 0089*
[3]*(2004) 5 SCC 0573*
[4]*(2015) 7 SCC 0167*
[5]*(2008) 11 SCC 0709*
[6]*(2002) 7 SCC 0295*
[7]*(1979) 3 SCC 0319*
[8]*(2010) 3 SCC 0508*
[9]*(1994) Supp.2 SCC 0372*
[10]*(2012) 10 SCC 0433*
[11]*AIR (34) 1947 PC 0067*