HARISINGH M. VASAVA

v.

STATE OF GUJARAT

FEBRUARY 27, 2002

[R.P. SETHI AND K.G. BALAKRISHNAN, JJ.]

Indian Penal Code, 1860: Section 302.

Murder—Eye witnesses—Two witnesses turned hostile—Testimony of complainant-witness—Corroboration of—Evidence of complainant-witness held reliable—Conviction of accused held valid—Reversal of acquittal order by High Court held justified—Evidence Act, 1872.

Code of Criminal Procedure, 1973: Section 378.

Accused—Acquittal—State appeal against—Power of High Court in appeal—Extent of.

The appellant was prosecuted under Section 302 of the Indian Penal Code, 1860. The prosecution case was that he committed murder of a woman who was living with him as his wife. The murder was committed in the house of the complainant (PW2) who was tenant of the deceased. At the time of murder, deceased was in the company of the complainant. Besides complainant two girls of the locality were also present at that time. The appellant inflicted as many as 35 injuries on the deceased. Immediately after occurrence complainant lodged the complaint before the police. The accused himself appeared before the police. His blood stained clothes and dagger were seized. During trial only the complainant supported the case of prosecution while the other two girls were declared hostile.

The trial court acquitted the accused. It held that (i) the prosecution had failed to connect the accused with commission of the crime; (ii) the seizure of clothes and weapon of offence had not been proved (iii) complainant was an interested witness because he was having illicit relationship with the deceased; and (iv) many other persons had also collected at the scene of crime but name of even one such witness was not mentioned in the FIR.

On appeal preferred by State the High Court relied upon *the testimony*

A of the complainant and held that the prosecution had successfully established the culpability of the accused in committing the murder at the house of the complainant. Hence this appeal.

Dismissing the appeal preferred by accused, the Court

B HELD: 1.1. The High Court was justified in interfering in this case by setting aside the judgment of the trial court. It has assigned valid reasons for believing the testimony of complainant. [65-B]

2. There is sufficient corroboration of the testimony of complainant as is evident from the medical evidence showing the infliction of a number of C injuries with the weapon of offence stated to have been used by the appellant. His appearance before the police with the dagger and the blood stained clothes fully corroborates the prosecution evidence. No doubt is left when it is proved that blood stained clothes and the weapon of offence had the same group of blood which was that of the deceased. [63-G-H]

D 3. Merely because complainant did not intervene at the time when the appellant was inflicting knife blows on the person of the deceased cannot be a ground to discard his testimony. Only because the eye-witness fails to intervene to save the deceased, cannot be made a ground to reject his testimony particularly when he is not asked as to what restrained or refrained E him from intervening to save the deceased. [64-B]

4. FIR has been lodged promptly with sufficient details. The non-mentioning of the names of the people, stated to have gathered on the spot, in the FIR does not, in any way, help the defence in this case. [64-A-D]

5. The intimate relations between the deceased and the complainant on F account of their relationship of landlady and tenant cannot be stretched to the extent of holding that complainant was an interested witness in the case. The manner and the place where the occurrence had taken place unambiguously suggests that complainant is the natural witness of the occurrence. Merely because two other eye witnesses were declared hostile G would not render the evidence of complainant inadmissible in view of the fact that he stands corroborated in material particulars by other evidence. [64-E-F]

6. The settled position of law regarding the powers to be exercised by the High Court in an appeal against the order of acquittal is that though the H High Court has full powers to review the evidence upon which an order of

acquittal is based, it will not interfere with an order of acquittal because with the passing of an order of acquittal the presumption of innocence in favour of the accused is reinforced. The paramount consideration of the court should be to avoid miscarriage of justice. A miscarriage of justice which may arise from the acquittal of guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view based upon conjectures and hypothesis and not on the legal evidence, a duty is cast upon the High Court to re-appreciate the evidence in acquittal appeal for the purposes of ascertaining as to whether the accused has committed any offence or not. Probable view taken by the trial court which may not be disturbed in the appeal is such a view which is based upon legal and admissible evidence. Only because the accused has been acquitted by the trial court, cannot be made a basis to urge that the High Court under all circumstances should not disturb such a finding. Consequently, there is no illegality or error of jurisdiction requiring interference by this Court. [64-G-H; 65-A-B]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1076 of 1999.

From the Judgment and Order dated 22.7.99 of the Gujarat High Court in Crl. A. No. 560 of 1985.

Y.P. Adhyaru, Nandini Gore and Rajesh Kumar for the Appellant.

Mahendra Anand, Ms. Hemantika Wahi and Ms. Anu Sahni for the Respondent.

The Judgment of the Court was delivered by

SETHI, J. Actuated by jealousy, infuriated on account of self-conceived notions of her infidelity and demonstrating the possessive nature of his mistress-keep Ubadiben Bhurabhai, the appellant committed an unusually usual crime of her murder. To quench his thirst of anger, he sprinkled the blood of the deceased all around by piercing her body with the knife he possessed by inflicting as many as 35 injuries on her person. The trial court acquitted the appellant, apparently, on extraneous considerations and the appeal filed by the State was allowed vide the judgment impugned holding the appellant guilty for the offence of murder punishable under Section 302 of the Indian Penal Code and sentencing him to undergo life imprisonment. He was also found guilty for the commission of offence under Section 452 IPC but no separate sentence was awarded for that

A offence.

According to the prosecution, the deceased was a resident of Dadiapada, Navinagri where she had some houses. Complainant Saiyed Khan Majid Khan (PW2) had taken one of the houses on rent from her, as he wanted to start factory at Dadiapada. The deceased was residing in another house nearby
B the house leased out to the complainant (PW2). The appellant was stated to be the kept-husband of the deceased and both were living as husband and wife for the last 7-8 years. Two months prior to the date of occurrence, the appellant is alleged to have attempted to kill the deceased with an axe for which the deceased had filed a complaint before the police. On 7.8.1984
C when PW2 was present at his house, the deceased went to his house and was sitting on the chair in front of the room of that house. Besides the complainant, two girls, namely, Nayana (PW9) and Shuruti (PW10) of that locality were also there sitting on the cart. The deceased was informing the complainant not to allow the accused-appellant to take away anything from that house on any pretext. At about 11.30 a.m. on that day accused came in the house
D leased out to PW2 and stood on the Otala and demanded his clothes from the deceased. When she told him that she was not having his clothes, he got excited, pulled out a dagger from his waist and gave a blow with that dagger on the stomach of the deceased while she was sitting on the chair. After receiving the injury the deceased fell down and started crying. The persuations
E of PW2 to stop the accused from committing the crime had no effect and he gave repeated blows of his dagger on the body of Ubadiben, with the result she received 35 injuries on various parts of her body. Her clothes were stained with blood and she died on the spot. The accused ran away with his dagger. Yusufkhan Nurkhan and Abdul Razzak Akbar, are stated to have seen the accused running away from the house of the complainant with
F dagger. The complainant (PW2) thereafter lodged the complaint Exhibit 8 before the police. After registration of the case, the police came on spot and drew the inquest Panchanama of the dead body of the deceased. Panchanama of the scene of occurrence and dead body was also prepared. Post-mortem of the deceased was conducted on the following day. According to the prosecution
G the accused himself appeared before the police on 8.8.1984 along with the weapon of offence which was seized in presence of two Panch witnesses. The appellant was arrested and his blood stained clothes and dagger were seized vide Panchanam Exhibit 21.

After completion of the usual investigation, the charge-sheet was filed
H in the court. During the trial, out of three eye-witnesses only PW2 supported

the case of the prosecution. The two girls, namely, Nayana and Shuruti were declared hostile as they stated to have not seen the occurrence. In his statement, recorded under Section 313 Cr.P.C., the accused denied to have committed any offence. He submitted that he did not cause any injury to the deceased and was being falsely involved in the present case. No evidence was led in defence.

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For acquitting the accused, the trial court found that the prosecution had failed to connect the accused with the commission of crime as, according to it, the evidence of complainant (PW2) did not inspire the confidence on account of Nayana (PW9) and Shuruti (PW10) having not supported the prosecution case. The evidence of Abdul Razzak Akbar (PW11) was not accepted as he was held to be a chance witness. On account of Panch witnesses Thakarbhai at Ex. 20 and Bharatsingh at Ex. 22 turning hostile, the seizure of the clothes and weapon of offence was held not proved. The prosecution was stated to have not successfully established the nexus with the injuries and the authorship thereof. The illicit relationship between the deceased and PW2 was termed to be as an indication of partisanship. PW2 was also not relied upon on the ground that he did not intervene when the deceased was given one after the other successive knife blows by the appellant in his own house in front of him and, therefore, it was a doubtful circumstance, the benefit of which was given to the accused. The conduct of the complainant was stated to be not free from suspicion. It was further held that as many other persons had collected at the venue of the offence but the complainant did not mention the name of any other witness or the neighbour collected on the spot in his complaint, he could not be relied upon.

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In appeal, the High Court evaluated the whole of the prosecution evidence and found that prosecution had successfully established the culpability of the accused for committing the murder after trespassing into the house of the complainant without any shadow of doubt. It was held that the view adopted by the trial court and the ultimate conclusion arrived at was not sustainable. The High Court found that the trial court had adopted not only unreasonable but perverse approach in discarding the reliable evidence of eye-witnesses which undoubtedly, has intrinsic quality and forensic worth. The view which the trial court reached in discarding the testimony of the witnesses was totally unjustified. For relying upon the testimony of the complainant (PW2), the High Court was impressed by the following circumstances:

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"(i) It was he who immediately rushes to Deidapada police station

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A and lodges a complaint without any loss of time within half an hour. It is an important event succeeded the incident which has been lost sight of by the learned trial court judge. In case of delay, which has not been accounted for, it could be argued that the complainant had sufficient time to manipulate. This is the case where such a hypothesis has no role. A complainant, who immediately, after having seen that B accused giving successive knife blows on the person of deceased Ubadi, and after accused fled away from the deceased was no more, obviously, a reasonable and prudent ordinary person, would react in a way as the complainant did. He immediately went to the police station and gave the account of the incident which was recorded by C police Head-constable, Narpatsingh, PW 12, Ex. 27. So, the complaint, which is an important piece of corroborative evidence, came to be lodged without any loss of time and which was recorded as narrated by complainant which is produced at Ex. 8 fully reinforces the testimony of the complainant. This factum of lodging FIR, without loss of time, before the competent police officer, and narrating the D same incident and deposing the same incident before the court, lends very significant support to the evidence of the complainant.

(ii) There was motive on the part of the accused to resolve to the ghastly killing but deceased Bai Ubadi, as it is noticed from the evidence and which is not questioned before us, was living with the E accused as his wife. Both of them lived as husband made wife in the eyes of the society for almost a spell of 8 years and obviously when he sees his beloved and a person near to her as only him in the company of the complainant on the day of the incident, obviously would not like. However, instead of taking recourse to the law, accused F who had come with a knife started giving blows after blows. There was exchange of words as noticed from the record between the deceased and the complainant. It is also noticed by us from the evidence that the deceased and the complainant Saiyedkhan had also intimate relationship which obviously would not be liking of accused.

G (iii) Complainant is the tenant of deceased Bai Ubadi who had rented a part of the house at a monthly rent of Rs. 80, and the deceased Bai Ubadi was landlady. It is also noticed by us that deceased Ubadi landlady of the house of the complainant had gone to Dediapada where her house is situated to attend a meeting of Panchayat and she had also gone to the place of complainant for the obvious reasons and H in between them unfortunately for the deceased, accused reached to

the venue and found his dear ones in the company of complainant. A

(iv) The deceased was, though stayed with accused for almost a period of 8 years probably, may be enjoying the company not of marital bliss, as earlier also accused had inflicted axe blow on her person for which the deceased had lodged complaint. The documentary evidence produced at Ex. 17 is the complaint of the deceased against the accused, B Ex. 18 is the certified copy of the order recorded in a category of Criminal case known as "Chapter Case", which is also reinforced by the evidence of the son of the deceased Virji Bangra, PW at Ex. 12. It is clearly testified by him that his deceased mother was attacked by the accused with axe blows and the complaint was lodged against C him by the mother. This is also a motive. Of course, once the complicity of the accused is established without any reasonable doubt, the motive falls into insignificance. However, we have highlighted it for the reason that it is a factor which materially and substantially lends support to the testimony of the complainant Saidyedkhan."

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Assailing the judgment of the High Court Shri Y.P. Adhyaru, Senior Advocate contended that as there is no corroborative evidence to the testimony of PW2, his lone statement cannot be made a ground for convicting and sentencing the appellant. He further submitted that he also being a paramour of the deceased was an interested witness. As he failed to intervene and did not take any step to save the deceased when she was being attacked by the E appellant, his presence on the spot becomes very doubtful. Non mentioning of the names of the people in the FIR who allegedly gathered on the spot is a further circumstance which weakens the testimony of PW2. It is further submitted that the trial court was justified in discarding the testimony of PW2 for the reasons detailed in its judgment.

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We are not impressed with any of the submissions made on behalf of the appellant as we feel that none of the circumstances pointed out have any substance. Otherwise also the grounds urged to disbelieve PW2 are based on misconception of facts and law. It cannot be said that there is no corroboration of the testimony of PW2. There is sufficient corroboration in this case as is G evident from the medical evidence showing the infliction of a number of injuries with the weapon of offence stated to have been used by the appellant. His appearance before the police with the dagger and the blood stained clothes fully corroborates the prosecution evidence. No doubt is left in our mind when it is proved that blood stained clothes and the weapon of offence had the same group of blood which was that of the deceased. The FIR has been H

A lodged promptly with sufficient details. On appreciation of evidence, the High Court has assigned valid reasons for believing the testimony of PW2 and rightly held that the trial court had arrived at erroneous conclusions of fact and law.

Merely because PW2 did not intervene at the time when the appellant B was inflicting knife blows on the person of the deceased cannot be a ground to discard his testimony. Only because the eye-witness fails to intervene to save the deceased, cannot be made a ground to reject his testimony particularly when he is not asked as to what restrained or refrained him from intervening to save the deceased. In the instant case the nature of injuries inflicted on the C person of the deceased and the weapon of offence he was having in his hand is indicative of the state of mind of PW2 which obviously prevented him from intervening.

The non mentioning of the names of the people, stated to have gathered on the spot, in the FIR does not, in any way, help the defence in this case. D No effort was made or suggestion given to any of the witness that besides PW2, Nayana (PW9), Shuruti (PW10) any other person had seen the occurrence or that the prosecution was unnecessarily suppressing the alleged independent evidence.

The intimate relations between the deceased and the complainant on E account of their relationship of landlady and tenant cannot be stretched to the extent of holding that PW2 was an interested witness in the case. The manner and the place where the occurrence had taken place unambiguously suggests that PW2 is the natural witness of the occurrence. Merely because Nayana (PW9) and Shuruti (PW10) were declared hostile would not render the F evidence of PW2 inadmissible in view of the fact that he stands corroborated in material particulars by other evidence including the statement of PW7.

The settled position of law regarding the powers to be exercised by the High Court in an appeal against the order of acquittal is that though the High Court has full powers to review the evidence upon which an order of acquittal G is based, it will not interfere with an order of acquittal because with the passing of an order of acquittal the presumption of innocence in favour of the accused is reinforced. The paramount consideration of the court should be to avoid miscarriage of justice. A miscarriage of justice which may arise from the acquittal of guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view based upon conjectures and H hypothesis and not on the legal evidence, a duty is cast upon the High Court

to re-appreciate the evidence in acquittal appeal for the purposes of ascertaining as to whether the accused has committed any offence or not. Probable view taken by the trial court which may not be disturbed in the appeal is such a view which is based upon legal and admissible evidence. Only because the accused has been acquitted by the trial court, cannot be made a basis to urge that the High Court under all circumstances should not disturb such a finding. A B

In view of the above, the High Court was justified in interfering in this case by setting aside the judgment of the trial court. We do not find any illegality or error of jurisdiction requiring our interference.

There is no merit in the appeal which is accordingly dismissed. C

T.N.A. Appeal dismissed.