HIGH COURT OF GUJARAT (*D.B.*)

VALLABHBHAI LALJIBHAI KOTHARI

Versus

STATE OF GUJARAT

Date of Decision: 15 December 2008

Citation: 2008 LawSuit(GUJ) 2337

Hon'ble Judges: Ravi R Tripathi, Rajesh H Shukla

Case Type: CRIMINAL APPEAL

Case No: 233, 411 OF 1989

Subject: Criminal

Acts Referred:
Indian Penal Code, 1860 Sec 114, Sec 302, Sec 397, Sec 452, Sec 411
Code of Criminal Procedure, 1973 Sec 313
Evidence Act, 1872 Sec 114, Sec 27

Final Decision: Appeal dismissed

Advocates: R C Jani, K T Dave

Cases Referred in (+): 4

RAJESH H.SHUKLA

[1] Criminal Appeal Nos.233 of 1989 and 411 of 1989 are notified with a Criminal Revision Application No.265 of 1994. When the matters are taken up for hearing, it is pointed out that learned Advocate Mr.Bhargav N.Bhatt has withdrawn his appearance. Looking to the age of the litigation, which is almost TWO DECADES, the Court deemed it fit to take assistance of an advocate by appointing learned Advocate Mr. R.C.Jani as amicus curiae. The Court requested the learned advocate to represent the Accused No.1 as the Accused No.2 has expired.

[2] The present Appeal is directed against the judgment and order dated 31.3.1989 passed by the learned Additional Sessions Judge, Gondal in Sessions Case No.36 of 1988, recording the acquittal of the Accused persons for the offence punishable under

Section 302 read with Section 452 of the Indian Penal Code (IPC) and also for the offence punishable under Section 397 as well as 114 of IPC.

[3] The short facts of the case briefly summarized are that, on a night between 21.7.1988 and 22.7.1988 the Accused persons are alleged to have entered the house of deceased Ramkunwarben Maganlal, residing at Jetpur Fulwadi in furtherance of their common intention of robbery and they are alleged to have cause death of deceased by strangulating her and thereby committing the alleged offence under Section 302 as well as 452 of IPC. It is averred that the complainant Madhusudan Durlabh Shukla, who is the son-in-law of the deceased, lodged a complaint at Jetpur Police Station, who is residing in Gondal near station plot. On 27.7.1988 at about 9:30 he received a call from the neighbour of deceased Kunwarben (mother-in-law) Shri Khatri, saying that the mother-in-law is serious and therefore he should rush to Jetpur immediately. Thereupon, the complainant's wife rushed to the house of the deceased mother-in-law at Jetpur and the police had arrived there and the dead-body of the deceased was lying near the kitchen. It is also stated that the death of the deceased was caused by strangulation and there were marks on the neck and the mattresses were lying scattered, which suggested that the deceased was strangulated with the rope and the cloth from sari, and there were also blood marks in the room of the house. It is stated that the deceased mother-in-law was residing all alone for last 15 years, and therefore, taking undue advantage of the fact that the deceased was living alone, somebody had entered the house with intention of robbery or theft and caused her death by strangulation, for which the complaint was lodged, which has been registered by the Jetpur Police Station being I-CR No.155/1988.

[4] It is also stated in the complaint that the complainant had visited 20 days back with his wife, as the sister-in-law had come from Bombay and he has also stated that according to his information, no cash or ornaments were lying in the house of the deceased.

[5] On the basis of the FIR the investigation was carried out. After the investigation was over, the charge-sheet was submitted and the learned Judicial Magistrate committed the case to the Court of Sessions, as the offence punishable under Section 302 of IPC, was triable by the Court of Sessions.

[6] After ascertaining as regards the papers made available to the Accused, the learned Additional Sessions Judge framed charge for the offence punishable under Section 302 read with Section 34 and also for the offence punishable under Sections 397, 452 as well as 114 of IPC against both the Accused persons and proceeded with the trial.

[7] In order to bring home the charge leveled against the Accused persons, the prosecution has examined the following witnesses:

Srl. No. Name Prosecution Witness Exhibit 1. Madhusudan Durlabh Shukla PW-1 6 2. Kanubhai @Navinchandra Mohanlal Vyas PW-2 7 3. Parvatiben Hiralal PW-3 8 4. Narmadaben Devsibhai PW-4 9 5. Meghabhai Keshabhai (Panch) PW-5 10 6. Madhuben Magalnal (Daughter) PW-7 12 7. Dr. Prafulchandra Bhimjibhai (Medical Officer who performed PM) PW-8 14 8. Maheshkumar Babulal Gosai (Panch for discovery panchnama under Section 27) PW-9 16

[8] The prosecution has also produced the documentary evidence and also the Mudamal with the list (Exh.5) and also the complaint (Exh.15).

[9] After the recording of the evidence was over, the learned Additional Sessions Judge, Gondal recorded the further statement of the Accused persons under Section 313 of Criminal Procedure Code. In their further statement the Accused persons have denied the charges.

[10] After hearing the learned PP as well as learned advocate for the Appellant / Accused persons, the learned Additional Sessions Judge passed the impugned judgment and order recording the acquittal of the Accused persons.

[11] It is this judgment, which has been challenged before this Court, inter alia on the ground that the learned Additional Sessions Judge has erred in appreciation of the evidence, particularly when, it has been recorded that the FIR lodged by the son-in-law was valid, and also, when it has been recorded that the deposition of the panch witnesses for the discovery panchnama under Section 27 of the Evidence Act, is trustworthy and reliable, and when the same panch has been examined and on the basis of his evidence, when the panchnama with regard to recovery of the mudamal articles has been held to be proved, there is no justification for not accepting the evidence in toto. Learned APP submitted that when aforesaid evidence has been believed and accepted, the learned Judge ought not to have recorded acquittal for the alleged offence under Section 302 read with Section 34 as well as offence under Section 452, 397 as well as 114 of IPC. It was submitted that the learned Judge has erred in recording the conviction for the alleged offence under Section 411 of IPC only, i.e. recovery of the stolen mudamal ornaments but has not believed the case of the prosecution on circumstantial evidence with regard to other offences. Even though the discovery of the mudamal articles like ornaments as well as the rope and the other articles is made at the instance of the Accused persons. Moreover, medical evidence supports the prosecution case that the homicidal death of the deceased is by strangulation.

[12] Learned APP Mr.K.T.Dave submitted that the blood stains were found on the petticoat of the deceased, which has matched with the blood of Accused No.2 and, therefore, the judgment recording the acquittal is not just and proper. He has also submitted that on one hand it is accepted that the discovery panchnama under Section 27 of the Evidence Act has been proved and the mudamal articles are recovered from the possession of the Accused, on the other hand the involvement of the Accused or the presence on the same set of evidence is not believed or accepted. Learned APP, therefore, submitted that if the discovery panchnama under Section 27 of the Evidence Act is held proved on the basis of the deposition of the panch witness Maheshbhai, whose evidence is accepted, and infact the possession of the mudamal articles have also been recovered from the Accused persons, for which there is no explanation coming forth, the inference has to be drawn about the culpability or the involvement of the Accused persons. The learned Judge has failed to appreciate the evidence on record. Learned APP Mr. Dave submitted that the deposition of the other witnesses, i.e. Pushpaben Magan (daughter) at Exh.11 and deposition of another daughter Madhuben at Exh.12 supports the prosecution case. Learned APP Mr. Dave submitted that the medical evidence in the form of deposition of Dr. Prafulchandra Bhua at Exh.14 is also supporting the prosecution case that the death was caused by strangulation, for which the rope and cloth by which the strangulation could be made, has been recovered. Moreover, the PM Note, which is produced at Exh.15, the Doctor has clearly given the opinion that the death was due to the strangulation. Learned APP Mr. Dave also submitted that the deposition of Maheshbhai Gosai, panch-witness, for discovery panchnama, supports the prosecution case fully, and on the basis of his deposition, the discovery panchnama at Exh.17 has been exhibited. Therefore, considering the totality of the circumstances and failure of the accused to give any explanation with regard to the blood stains found as well as injury on person of the accused, which is not explained, and also recovery/discovery of mudamal (ornaments), would also be a circumstance leading to the inference about the culpability of the accused persons. He referred to and relied upon a judgment of the Apex Court in AIR 1978 SC 522 and AIR 1974 SC 1830. He also submitted that as regards the possession of the stolen articles - ornaments are recovered from the accused persons, which they have failed to explain, and when no explanation is given regarding such stolen ornaments and the possession, the presumption under Section 114 of the Evidence Act could be made.

[13] Learned APP Mr. Dave also referred to paragraph 17 of the judgment. Further, learned APP referred to a judgment of the Hon'ble Apex Court, reported in 1980 Cr.LJ SC 1270 and submitted that it was also a case of circumstantial evidence. The learned APP submitted that in that it was held that only because the ornaments or the mudamal articles are discovered from the house of the accused persons, it would not be proper to rope him for the other alleged offences. But then in the present case, he

submitted that, the facts are different and the link is established as the mudamal stolen property-ornaments have been discovered at the instance of the Accused and also the blood stains are found on the petticoat of the deceased, which matched with the blood group of Accused No.2 and there is no explanation with regard to injury sustained by the Accused No.2. Learned APP Mr.Dave also referred to the discovery panchnama at Exh.17 and referring to paragraphs 13, 15 and 16, he submitted that the learned Judge has committed an error in appreciating the evidence and the panchnama. Learned APP Mr.Dave once again referred to the deposition of the panch-witness Maheshbhai Gosai at Exh.16, who is a panch-witness for the discovery panchnama (at Exh.17) and submitted that the discovery panchnama is accepted, and if the discovery of mudamal articles or the stolen articles like ornaments are made, the inference has to be drawn as regards the possession, and when the Accused persons have failed to explain, it is suggestive of the involvement of the Accused persons for the other offences. Learned APP Mr.Dave referred to and relied upon a judgment of the Hon'ble Apex Court reported in AIR 1979 SC 1042 and referring to paragraph 25, submitted that in that case also the discovery was made and the offence under Section 411 was confirmed.

[14] Learned advocate Mr.R.C.Jani for the Appellants referred to the FIR and also to the deposition of Kanubhai at Exh.7. Learned advocate Mr. Jani submitted that there are major contradictions and discrepancies in the evidence of the prosecution, and therefore, it has rightly not been accepted or believed by the Court below. He further submitted that even conviction for the offence under Section 411 of IPC is not justified. Learned Advocate Mr.Jani submitted that the Court may consider the major contradictions and the discrepancies in the evidence, which will go to the root of the matter. For that purpose he referred to the deposition of PW-2 - Kanubhai Vyas at Exh.7, who is related to the deceased, being son of the brother of the husband of the deceased. He pointedly referred that, on receiving the information about the incident, he and his wife rushed from Rajkot to Jetpur, and reached Jetpur between 10:00 to 11:00 AM, and found that the people had gathered there. Learned Advocate Mr. Jani states that the statement was recorded after four days of the incident and also states that his statement was recorded by the police on 22.7.1988 or 23.7.1988. Mr. Jani submitted that he has admitted that, in a statement before the police, he has stated that he knows how much ornaments the deceased was having, but he cannot say about the total gold ornaments. Mr. Jani referred to the discovery panchnama (Exh.17) and submitted that the discovery panchnama is made on 26.7.1981, whereas, admittedly, the police has shown these ornaments after few days after the incident. Further, learned advocate Mr.Jani referred to the deposition of Maheshbhai Gosai at Exh.16, panch witness of the discovery panchnama (Exh.17) and submitted that he has stated about the discovery and has specifically stated how the discovery was

made. He submitted that the fact of discovery is accepted by the Court, unmindful of the fact that the date of the panchnama is 26.7.1988. Learned Advocate Mr Jani, submitted that, either the panchnama was not made on 26.7.1988 or if the panchnama was made on 26.7.1988, then the deposition of PW-2 Kanubhai Vyas at Exh.7, cannot be accepted.

[15] Learned Advocate Mr. Jani submitted that, even if it is accepted that as per the discovery panchnama, the stolen mudamal article of gold ornaments etc. were recovered or discovered, that itself does not establish the presence of the Accused at the scene of offence beyond reasonable doubt. Therefore, merely because the stolen articles are recovered or discovered from the Accused persons, would not be sufficient to rope them for the other offences, when there is no evidence. Moreover, learned advocate Mr. Jani submitted that the prosecution evidence of Mr. Joshi, I.O. at Exh.36, is shaky and vague. For that purpose, learned Advocate Mr. Jani referred to the deposition of I.O. Mr. B.P.Joshi at Exh.36 and pointedly referred to the manner in which the investigation has been made. He pointedly drawn the attention of the Court to paragraphs 16, 17, 18 and 19 to bring his point home. For that purpose, referring to paragraph 16, he submitted that it has been admitted by the I.O. that during the course of investigation, it was revealed that the mudamal articles were with 'Bhailu' and 'Jaggu', which was lateron found to be incorrect during the course investigation. He has also stated that he has recorded their statements but he has not shown them as witnesses. Similarly, in the cross-examination of the I.O. it is brought out that one Mr. Rana had admitted or confessed that Bhailu and Jaggu had committed the murder. Further, it is also recorded that they had taken away the mudamal article ornaments. The I.O. has further stated that, therefore, he had called and kept Rana in the police station for two days. Learned Advocate Mr. Jani also submitted that the I.O. in cross-examination has admitted that he had carried out search of the house of the said 'Bhailu' and 'Jaggu' but has not produced any evidence as to what was found or recovered. Learned Advocate Mr. Jani submitted that atleast panchnama should have been drawn when he carried out the search. The learned advocate submitted that it was necessary for him to draw a panchnama even if nothing was recovered. A 'Nil' panchnama ought to have been prepared and produced on record. On the contrary he has stated that he did not think it fit to do so, and therefore, he has not produced any evidence. Similarly, learned advocate Mr. Jani submitted that in paragraph 19 in the cross-examination, it has been admitted by the I.O. that the report of the foot print has not been produced on record as evidence. In this regard also the I.O. has stated that as the report was Nil, he did not think it fit to place on record. Learned Advocate Mr. Jani submitted that if a scientific evidence of this nature or the report of the expert was obtained, then it was obligatory on the part of the I.O. to keep on record for appreciation of evidence by the Court. Instead, he himself decided about the same. He

further submitted that again the I.O. stated that he has not recorded the statement of Sindhwa Rabari as he did not consider it essential or important evidence. Therefore, learned advocate Mr. Jani submitted that the prosecution has failed to establish the presence of the Accused or the involvement of the Accused in the offence. Even if the discovery panchnama is accepted, even then it could be an evidence for the offence under Section 411, and in light of the evidence, particularly the deposition of I.O. at Exh.36 raises the doubt. Learned Advocate Mr. Jani strenuously submitted that as it is revealed from the deposition of the I.O. that Bhailu and Jaggu are the two persons who are said to have been involved, but for whatever reasons they have not been examined as witnesses, and though it has been admitted by the I.O. that one Mr. Rana had confessed before him that Bhailu and Jaggu has committed the offence of murder and yet he did not think it fit to carry out further investigation as regards the involvement of Bhailu and Jaggu. Learned Advocate Mr. Jani also submitted that instead those two persons, the present Accused are roped in by falsely implicating them. He submitted that if the report of the foot prints were produced, it would have thrown some light and that is why it has been withheld.

[16] It is, in these circumstances, learned advocate Mr. Jani strenuously submitted that the judgment and order recording acquittal of the Accused persons cannot be said to be perverse or erroneous and the Court may not interfere. Further, learned advocate Mr.Jani submitted that even the conviction for the offence under Section 411 of IPC is also not proper and the Court may examine the same.

[17] In view of the rival submissions made by both the parties and the scrutiny of the evidence and the material on record, it is required to be considered whether the impugned judgment and order passed by the Court below calls for any interference.

[18] In this regard the submissions made with much emphasis by the learned advocate Mr. Jani for the Accused, are required to be appreciated. It is not in dispute that, the presence of the Accused persons at the scene of offence is not established. That being so, it is a case of circumstantial evidence only. There being no direct evidence as regards the presence of the Accused at the scene of offence and in absence of any evidence to the effect that the Accused persons were present at the house of deceased at any time the case of the prosecution warrants closer scrutiny. The emphasis is on the 'circumstances'. 'The discovery panchnama', which shows the discovery of stolen mudamal (ornaments) for which there is no explanation by the Accused persons. The other circumstance is, 'the blood stains' found on petticoat of the deceased, which matched with the blood group of the Accused No.2. Further, there is no explanation about the injury sustained by the Accused No.2. These are the circumstances, which are relied upon by the prosecution to establish the involvement

of the Accused persons and to prove the charges leveled against them by the prosecution.

[19] It is well settled that in a case of 'circumstantial evidence', the prosecution must establish that the chain is complete and it leads to an unimpeachable inference about the involvement of the Accused persons. The Hon'ble the Apex Court in a judgment reported in AIR 2007 SC 2080, referring to the appreciation of the evidence in case of 'circumstantial evidence' and discussing about the inference of the guilt has discussed the principle enunciated by the Apex Court that, 'the inference of guilt can be justified only when all the incriminating evidence and circumstances are found to be incompatible with the innocence of the accused or the guilt of any person.' The Apex Court has observed:

> "It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused of the guilt of any other person.
>
> The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances."

[20] The Hon'ble the Apex Court referred to the judgment in the case of Padala Veera Reddy v. State of A.P. reported in AIR 1990 SC 79 and observed as under:

> "(1) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
>
> (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
>
> (3) the circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
>
> (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

[21] In the present case, it cannot be said that the chain of circumstances is complete and thereby an unimpeachable inference about the involvement and guilt of the accused can be drawn. On the basis of the discovery panchnama at Exh.17 and

deposition of the panch witness for the same at Exh.16 is complete and accepted, at the most it would establish the discovery of such stolen mudamal article (ornaments) from the accused persons. However, the accused persons are convicted for the alleged offence under Section 411 of IPC on the basis of the said evidence. However, on the basis of this, neither an inference can be drawn nor it can be said that the offence under Section 302 of IPC is established. Only on the basis of such discovery of mudamal article (ornaments) coupled with the fact that the blood stains found and some injury found on the Accused No.2, would not be sufficient to draw an unimpeachable inference and there has to be a strong evidence or the circumstance which lay the basis for the inference to be drawn has not been established. The presence of the Accused at the house of the deceased or at the scene of offence has to be established by a complete chain of circumstances as it is a case of circumstantial evidence. Further, there is some discrepancy with regard to the panchnama and the deposition to which our attention has been drawn. Even if such discrepancy is ignored and discovery panchnama (Exh.17) is relied upon and is accepted and also the deposition of the panch witness Mahesh Joshi at Exh.16 is accepted at the face value, it would be relevant only for the purpose of discovery of the mudamal articles- stolen ornaments from the Accused persons. However, to link the accused persons with the other alleged offence, particularly when, there is no evidence with regard to their presence at the scene of offence coupled with the shaky evidence of the I.O. at Exh.36, requires a closer scrutiny. It is pointedly referred by the learned advocate Mr. Jani that the I.O., when he has admitted in the cross-examination about two other persons 'Bhailu' and 'Jaggu', whom he had interrogated and recorded the statement but has not shown as witness. Though he has stated that he had carried out the search of the house of 'Bhailu' and 'Jaggu', he has not prepared the panchnama and has not produced. Even if nothing was recovered, 'Nil' panchnama ought to have been drawn and produced. However, this has not been done and also the report of the foot print, though obtained, has not been placed on record and has stated that as the report was Nil, he did not think it fit to produce on record. This aspect attains special significance in light of the other evidence and the circumstances. Thus, on scrutinizing the evidence, the judgment and order, the acquittal of the Accused persons, recorded by the learned Judge, cannot be said to be perverse or erroneous.

[22] Therefore, taking an over all view of the matter, we do not find that any infirmity or illegality has been committed by the Court below in passing the impugned judgment and order recording the acquittal for the offence under Sections 302 read with Section 452 of IPC and also for offence punishable under Section 397 and 114 of IPC. Therefore, on appreciation and scrutiny of the evidence, as it would make it evident that the judgment and order recording acquittal is not perverse but possible and this Court is in agreement with the ultimate conclusion arrived at by the Court below. As

observed by the Hon'ble the Apex Court in its judgment in the case of State of Karnataka v/s. Hemareddy & Anr., AIR 1981 SC 1417 - no further elaboration of this aspect or threadbare analysis of the evidence is required.

[23] Moreover, it is well settled that even when two views are possible or a different view than the one which is taken by the learned Judge is possible, that by itself is not sufficient to interfere with the order of acquittal. The Hon'ble the Apex Court in the case of State of Goa v/s Sanjay Thakran & Anr. Reported in (2007) 3 SCC 755, has observed discussing 'the scope of interference by the appellate Court' that, 'the appellate Court can review the evidence and interfere with the order of acquittal only if the approach of the lower court is vitiated by some manifest illegality or the decision is perverse and the Court has committed a manifest error of law and ignored the material evidence on record.'

[24] The Hon'ble the Apex Court in subsequent judgment in case of K. Prakashan v/s. P.K.Surenderan, reported in (2008) 1 SCC 258, has again referred to this aspect and has observed that, 'when two views are possible, the appellate Court should not reverse the judgment of acquittal merely because the other view is possible unless when the judgment of the trial Court was either perverse or suffered from any legal infirmity or non-consideration of the evidence on record.'

[25] Therefore, in view of the discussion made hereinabove, the impugned judgment and order dated 31.3.1989 passed by the learned Additional Sessions Judge, Gondal in Sessions Case No. 36 of 1988, does not call for any interference. On appreciation of evidence, the conclusion arrived at, is just and proper, and therefore, this Court is not inclined to interfere with the acquittal recorded by the Court below. At the same time, the conviction recorded for the offence under Section 411 of IPC is maintained and the fact that the discovery panchnama is established and the evidence of the panch witness is found to be reliable, the conviction recorded under Section 411 is held just and proper. The submissions made by learned advocate Mr.Jani for total acquittal cannot be accepted. However, in the alternative, Mr. Jani submitted that in the event the Court is going to uphold the conviction under Section 411 of IPC, the quantum of sentence be considered favourably in light of the fact that it is after such a long time that the accused will have to surrender again to the jail and will have to undergo the remaining part of his sentence. Mr. Jani has submitted that there are sufficient mitigating circumstances, which warrant that the sentence undergone be awarded for the offence under Section 411, which will serve the ends of justice. Therefore, considering the submission of Mr.Jani and considering the time length, which has lapsed, it would be in fitness of things, if the sentence for the alleged offence under Section 411 is reduced from 3 years-imposed by the Court below, to the sentence already undergone, as in the opinion of this Court, that would meet the ends of justice.

Therefore, the impugned judgment is confirmed and the present Appeals are dismissed.

[26] We appreciate the assistance rendered by learned Advocate Mr.R.C.Jani as a amicus curiae to the Court.