

RAMESH BABULAL DOSHI

v.

THE STATE OF GUJARAT

MAY 2, 1996

[M.K. MUKHERJEE, S.P. KURDUKAR, JJ.]

Code of Criminal Procedure 1973,—S.379—Appeal against reversal of acquittal—Trial Court acquitting appellant of charge of murder—High Court reappraising evidence and convicting the appellant without considering trial court's findings—Held, reasons given by trial court's were cogent and convincing and the High Court's approach in reappraising evidence was patently wrong.

Criminal trial—Circumstantial evidence—After initial search of premises of accused two days after event only a pair of blood stained trousers recovered—Keys of house left with brother-in-law of accused—Second search after five days leading to recovery of articles containing stains matching victim's blood group—Appellant not having access to flat—Held, the entire story of search and recovery of the articles was a myth.

Criminal trial—Circumstantial evidence—Theory of last seen—Held, on facts, even if proved did not by itself lead to the only conclusion that the appellant was guilty.

In seeking to prove the charge that it was the appellant who had murdered the deceased, who carried on business in diamonds, at his house in Surat on September 2, 1980, the prosecution relied upon, *inter alia*, the following circumstances : that the appellant, who also dealt in diamonds, and the deceased were seen moving on a scooter between 12 noon and 1.30 p.m. on the fateful day; that the following morning the appellant was seen going out with others with a trunk in which the dead body of the deceased was subsequently recovered and that some of the articles that were seized from the appellant's house on the morning of September 9 were found to contain human blood of Group A which also was the blood group of the deceased. The Trial court after discussing the evidence at great length held that the prosecution could not satisfactorily prove any one of the circumstances and accordingly acquitted the appellant and the three other co-accused.

A The High Court on a reappraisal of the evidence and without considering the findings of the trial court, reversed the acquittal of the appellant while confirming the acquittal of the co-accused. The High Court found each of the three circumstances mentioned above to be conclusively proved.

B Allowing the appeal, this court

C HELD : 1.1. The reasons given by the trial Court for recording the order of acquittal in favour of the appellant are cogent and convincing and the High Court was not at all justified in disturbing the same by reappraising the evidence. The entire approach of the High Court in dealing with the appeal was patently wrong for it did not at all address itself to the question as to whether the reasons which weighed with the Trial Court for recording the order of acquittal were proper or not. [276-G, 277-E]

D 1.2. The mere fact that a view other than the one taken by the trial Court can be legitimately arrived at by the appellate Court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial Court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. [271-F-G]

E 2. Each of the reasons given by the trial court for disbelieving the three witnesses said to have seen the appellant carrying the trunk are clear, cogent and convincing. [274-A]

F 3. The entire story of search and recovery of a lot of articles from inside the flat on September 9 was a myth as it was stated to have taken place despite the following tell-tale circumstances, viz., admittedly the flat of the appellant was searched in the night between September 4 and 5, 1980 by the police by breaking open the lock; at the time except a pair of trousers nothing incriminating was found; the flat was locked again and the for reasons unable to be fathomed, the keys were kept with the brother-in-law of the appellant; the appellant had no access to the flat till it was searched again on September 9. [275-G-H]

H 4. That the appellant was last seen with the deceased stood proved did not further the prosecution case for, by itself, it did not lead to the

only conclusion that the appellant was guilty of the offence alleged against him. [276-F] A

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 32 of 1988.

From the Judgment and Order dated 15/16.10.87 of the Gujarat High Court in Crl. A. No. 746 of 1981. B

Maganbhai Barot, Mahesh Agarwala, Atul Sharma, G.P. Srivastava and E.C. Agarwala for the Appellants.

Y.P. Adhyaru, Ms. Hemantika Wahi and Avikar Raj for the Respondents. C

The Judgment of the Court was delivered by

M.K. MUKHERJEE, J. This Appeal under Section 379 Cr. P.C. is directed against the judgment dated October 15/16, 1987 rendered by the Gujarat High Court in Criminal Appeal No. 746 of 1981 whereby it reversed the acquittal of the appellant of the charges under Sections 302, 201, 212, 364, 365 and 397 IPC recorded in his favour by the Sessions Judge, Surat and convicted and sentenced him under Section 302 and 201 IPC, while upholding the acquittal of three others who were arraigned with him. D E

2. The prosecution case, so far as it is relevant for disposal of this appeal, is as under :

(a) Khodibhai Amarshi Patel (the deceased) used to reside in the city of Surat along with his wife Raiben (PW 2) and two children and carry on business in diamonds. On September 2, 1980 (which was the *Janmastami* day) he left his residence in the morning with a packet containing diamonds worth Rs. 60,000 after informing his wife that a person was waiting for him in the market. As he had not returned home till 3 P.M. his wife requested Shamjibhai Manjibhai (P.W. 8) to enquire of his whereabouts. Shamjibhai first went to the office of Gordhanbhai Patel (P.W.1), a cousin of the deceased, where he found Manjibhai Devjibhai (PW 10) sitting. He (PW 10) disclosed that at noon time he had seen the deceased near the market, sitting on the pillion of a scooter which was being driven by Ramesh (the appellant). They then went in search of the deceased in the market and other places but could not trace him out. Ultimately Gordhanbhai went to H

A the Chowk Bazar Police Station at or about 11.45 P.M. and lodged a missing information (Ext. 63).

B (b) In the meantime, some people of Patel community, to which the deceased belonged, having learnt that he was missing also started searching for him. In course of the search some of them when to the flat of the appellant, which was on the fourth floor of a building named "Yagnapurush", at Rampura. On their query the appellant informed them that along with the deceased he had gone to the office of Jayantibhai Master to show him some diamonds but as his office was closed they came back and on the way the deceased got down at Rampura.

C (c) On the following day, that is, on September 3, 1980 attempts were again made to trace out the deceased but without success. However, in course of the search Gordhanbhai learnt from Mukesh Chandra Maganlal Parekh (PW 9) that on the previous day at or about 1 P.M. he had also seen the deceased going towards Athwa with the appellant, on a scooter. D Gordhanbhai then went to the police station at or about 11.30 P.M. and lodged a formal complaint (Ext. 14) alleging that the appellant had kidnapped the deceased to grab the diamonds he was having with him. Police Inspector Chandravadan Himatlal Jaiswal (P.W. 31) recorded that information and registered a case thereupon. He then went to the flat of the E appellant but found it closed from outside.

(d) As the appellant was not traceable on the next day (September 4, 1980) also Sri Jaiswal started making enquiries about his relatives including his brother-in-Law R.R. Seth who was residing at Shrinath Apartment, Timelisiwad, Nanpura. In the meantime the investigation of the case F was handed over to Police Inspector Mr. A.N. Vaghela (P.W. 43).

(e) After taking over investigation Inspector Vaghela, alongwith R.R. Seth and panchas went to his (appellant's) flat in the early hours of September 5, 1981 only to find it still locked. After breaking open the lock G he searched the flat but found nothing incriminating except a pair of blood-stained trousers (Art. No. 1) hanging from a peg which he seized under a panchnama (Ex.53). After completion of search he locked the apartment and handed over the key to Sri Seth.

(f) On the same day, at or about 2.00 P.M. he (P.W. 33), received an H information that one trunk emitting foul smell was lying in the outskirts of

the city by the side of Udhna-Magdalla Road. He therefore left for that place and reaching there found a trunk (Art. 2) lying in a bush, at a distance of 10 feet from the road. He broke open the lock in presence of panchas and therein saw a decomposed body tied with string. He held inquest upon the dead body and got its photographs taken. He then sent the dead body to the Civil Hospital for post-mortem examination. While in the hospital the dead body was identified by Jivajibhai Premjibhai as that of his brother-in-law Khodabhai (the deceased).

(g) In that night Bhupendrabhai Chunilal (since acquitted) was arrested but as the appellant could not be traced in Surat, Sub-Inspector Devkar (P.W. 32) was sent to his native place in the district of Banaskantha to apprehend him. Ultimately, he succeeded in arresting the appellant alongwith his father and one Bhartkumar (since acquitted) from village Rajpur on the following morning. On search a packet containing diamonds was found in the pocket of the trousers the appellant was wearing.

(h) On September 9, 1980 Mr. Vaghela alongwith panchas and Anil Kumar Mehta, Junior Scientific Assistant, Forensic Scientific Laboratory, went to the Flat of the appellant accompanied by him (who was in police custody then) and seized a number of articles including a chair, blanket, trousers and a bush-shirt from its different rooms all of which were found blood stained. Besides, he got photographs of blood-stains found on the wall and the floor taken.

(i) On completion of investigation chargesheet was submitted against the four persons arrested during investigation, including the appellant, and in due course the case was committed to the Court of Session.

3. The appellant pleaded not guilty to the charges levelled against him and contended that he had been implicated in the case on mere suspicion.

4. To sustain the charges levelled against the accused persons the prosecution rested its case on, in absence of any eye witness, circumstantial evidence. To prove that the dead body of Khodabhai was found in a trunk by the side of Udhana Magdalla Road, in the vicinity of the city of Surat on September 5, 1980 between 1.30 and 2 P.M. with multiple injuries on his person, which clearly indicated that he was murdered, the prosecution examined amongst others, Jivrajibhai (PW 22), brother-in-law of the

- A deceased who identified the dead body, Police Inspector Vaghela (PW 33), who held inquest, and Dr. Singal (PW-17) who held post mortem examination thereupon. We need not, however, detail or discuss their evidence as the concurrent findings of the learned Courts below in this regard is based on proper appreciation of the evidence. Indeed, this part of the prosecution case was not challenged by the defence.
- B

5. That brings us to the crucial question whether the prosecution has succeeded in conclusively proving that the appellant committed the murder and then removed the dead body at the place where it was found to screen himself from legal punishment. To bring home the above accusations the prosecution relied upon the following circumstances:

C

(i) The appellant, who also dealt in diamonds, and the deceased were seen moving on a scooter between 12 noon and 1.30 P.M. on September 2, 1980;

- D (ii) Thereafter, on the same day, between 1.30 P.M. to 1.45 P.M. the deceased was seen talking with the appellant in his (appellant's) flat, on the fourth floor of the building 'Yagnapurush';

- E (iii) On the following morning, (at or about 7.30 A.M. on September 3, 1980) the appellant was seen going out of 'Yagnapurush' along with others with a trunk (Article No. 2), in which the dead body of Khadabhai was subsequently recovered on September 5, 1980;

(iv) In the night between September 4/5, 1980 a pair of blood-stained trousers (Article No. 1) was seized from the flat of the appellant;

- F (v) Diamonds (Article No. 8) worth Rs. 63,000 were recovered from the pocket of the trousers the appellant was wearing at the time of his arrest on September 7, 1980;

- G (vi) Some of the articles that were seized from the Flat of the appellant in the morning of September 9, 1980 were found to contain human blood of Group A, which was the blood group of the deceased also; and

- H (vii) A piece of string which was also seized from the flat of the appellant on September 9, 1980 was similar to the string with which the deadbody of Khodabhai was found tied.

6. The trial Court discussed the evidence adduced by the prosecution in support of each of the above circumstances at great length (the judgment runs through 178 Pages) and held that the prosecution could not satisfactorily prove any one of them. In setting aside the above judgment and convicting the appellant the High Court recorded the following findings:

"In our view therefore, the prosecution has proved beyond reasonable doubt that the accused and deceased were seen together on a scooter on 2.9.80. Thereafter they were seen in the block of accused No. 1 at 1.30 p.m. Accused No. 1 was seen panicky at about 4.00 to 4.30 p.m. On the next day i.e. on 3rd September, 1980 the accused along with other persons was seen going with metallic box similar to article No. 2 in which the dead body of Khodabhai was found. The box was lifted by two persons i.e. one handle was held by accused No. 1 and other was held by an other person. From the apartment of accused No. 1 number of articles as stated above containing human blood group A were found. The blood of the deceased Khodabhai is also A. These circumstances, in our view, prove beyond reasonable doubt that the accused No. 1 (the appellant) is guilty for the offence punishable under Sections 302 and 201 of the Indian Penal Code."

7. Before proceeding further it will be pertinent to mention that the entire approach of the High Court in dealing with the appeal was patently wrong for it did not at all address itself to the question as to whether the reasons which weighed with the trial Court for recording the order of acquittal were proper or not. Instead thereof the High Court made an independent reappraisal of the entire evidence to arrive at the above quoted conclusions. This Court has repeatedly laid down that the mere fact that a view other than the one taken by the trial Court can be legitimately arrived at by the appellate Court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere an order of acquittal unless it comes to the conclusion that the entire approach of the trial Court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While setting in judgment over an acquittal the appellate Court is first required to seek an answer to the question whether the findings of the trial Court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate Court answers the above question in the negative the order of acquittal is not to be

A disturbed. Conversely, if the appellate Court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then-and then only-reappraise the evidence to arrive at its own conclusions. In keeping with the above principles we have therefore to first ascertain whether the findings of the trial Court are sustainable or not.

B

8. Of the various incriminating circumstances alleged against the appellant (detailed earlier) the two which in our opinion, are clinching are circumstances No. (iii) and (vi). To prove the former the prosecution relied upon the evidence of Dahyabhai Ratanji (P.W. 3), the watchman of 'Yagnapurush', and Dhirubhai Babulal Shah (P.W. 4) and Smitaben (P.W. 6), residents of that building. P.W. 3 deposed that on September 3, 1980 at or about 7.30 A.M. he had seen the appellant going upstairs alongwith another man and a little later saw them coming down the staircase with a big trunk wherefrom blood coloured drops were trickling and the younger brother of the appellant (since acquitted) wiping out the steps of the staircase to remove those drops. After going out of the building they talked to a person standing by the side of rickshaw stationed nearby. One or two minutes thereafter that person left the place with the rickshaw and then the appellant and others proceeded ahead. PW 3 next stated that a little later he had asked Dhirubhai Babulal Shah (P.W. 4), as to why those persons had come at that time to which Dhirubhai's answer was that as he was sleeping he did not know anything. In cross-examination he admitted that till his statement was recorded by the police on September 7, 1980 he had not disclosed to anybody what he had seen in the morning of September 3, 1980. He further admitted that though in the evening of 'third' (obviously referring to September 3, 1980) and also in the night of September 5, 1980 police officers and other persons had come in search of the appellant and had remained in his flat for some time and that though at that time he knew that the appellant was involved in the offence he did not speak to them about the appellant's movement that morning. According to PW 3 he went to the police station on September 6, 1980 on being summoned by them and was detained there from 12 noon of that day till 1.00 A.M. on the following day, when he was released after his statement was recorded. He also admitted that even though Nathubhai had earlier asked him of the whereabouts of the appellant he did not tell him anything. In view of the answers so given by him in cross-examination the trial Court observed that it was difficult to believe that if really he had seen Ramesh

C
D
E
F
G
H

going down the building with the trunk on September 3, 1980 he would not disclose the same to the police and other people who had been coming to the flat of the appellant since the night of September 2, 1980 in search of the appellant, more so when he was the watchman of that building. It further observed that the fact that he made his disclosure as late as on September 7, 1980, after he was detained for 13 hours by the police, made his testimony suspect. For the above reasons the trial Court expressed its inability to rely upon his testimony.

9. The trial Court next discussed the evidence of Dhirubhai Babulal Shah (P.W. 4), resident of flat No. 28, which is on the same floor as that of the appellant. He stated that when he was brushing his teeth while standing in the gallery he saw the appellant talking with a riskshawpullar on the road in front of the building and a galvanised steel trunk lying nearby. Besides the appellant he saw his younger brother and some other persons standing there. He next stated that a few minutes later he saw the appellant and one person holding the trunk and going away. The trial Court discussed his evidence at length keeping in view the various material contradictions brought on record with reference to his statement recorded under Section 161 Cr. P. C. and concluded that though right from September 3, 1980 till the morning of September 5, 1980 he had several opportunities to divulge what he had seen he did not disclose the same either to the police or the members of the Patel Community who had come to meet the appellant suspecting his involvement in the disappearance of Khodabhai. The trial Court further noticed that PW 4 admitted that the police had called him and several other persons at the police station on 6th September and detained them in one room till the afternoon of 7th September, 1980 when they were allowed to go after interrogation. The trial Court next observed that PW 4 had also tried to improve upon his police version, in view of the various contradictions appearing in the evidence of this witness which had been brought on record. For all these reasons the trial Court did not feel inclined to rely upon the same. Similar was the comment by the trial Court regarding the other witness, namely, Smitaben (P.W. 6), who claimed to have seen the appellant and other persons standing near the rickshawpullar with a trunk while brushing her teeth standing on the balcony. This witness also stated that the police had taken her for recording her statement between 3.00 P.M. to 4.00 P.M. on September 6, 1980 and before that day she did not disclose those facts to the Patels who had come in search of the appellant. The trial Court also referred to the various

A material contradictions brought on record with reference to her statement recorded under Section 161 Cr. P.C. Having carefully gone through the evidence of these three witnesses we find that each of the reasons given by the trial Court for disbelieving them are clear, cogent and convincing.

B 10. While on this point we may refer to another decisive finding recorded by the trial Court which takes the wind out of the sail of the prosecution case. As already noticed, prosecution sought to establish that as the deceased was seen alive and talking to the appellant in his flat at or about 1.30 P.M. on September 2, 1980 and the trunk carrying his deadbody was seen being taken out of the building on the following morning the C appellant must have committed the murder in his flat in between this period. In laying bare the utter absurdity of this claim of the prosecution the trial Court first referred to the evidence of Manjibhai Devjibhai (P.W. 10), Savjibhai (P.W. 20) and Dahyabhai Ratanji (PW 3), the watchman, wherein they had claimed to have gone to the flat of the appellant to D inquire about the deceased and met him (the appellant) at different hours of the night between September 2 and 3, 1980 and drew the following conclusions :

E "Now when the prosecution witnesses Manjibhai Devjibhai and Savjibhai Naranbhai were searching for Khodabhai and were knowing that accused No. 1 knew about Khodabhai and they had gone thrice to the flat of accused No. 1 and stood outside as they knew that if they were to admit that they had entered the flat then they would have to further admit that they did not find Art. No. 2- the trunk containing the dead body of Khodabhai in the flat at that time. But I do not think that when they have gone thrice to the flat of accused No. 1 Ramesh then they would not have entered the flat and that they would not have noticed Art. No. 2, the trunk if it were in the flat. Now the medical evidence shows that the head injury found on the dead body of deceased Khodabhai could be caused by hard and blunt substance and the incised wounds found on the dead body of Khodabhai could be caused by sharp-cutting instrument, and therefore in order to cause head injuries and incised wounds, hard blunt substance and sharp-cutting instruments were used. Now flat No. 29 is situated by the side of flat No. 28, and flat No. 30 is also situated by the side of flat No. 29 and that flats Nos. 31 and 32 are situated opposite to flats No. 28,

F

G

H

29, and 30 and that there is a common wall between flats Nos. 29 and 30 and the entrance door of flats No. 29 and 30 is falling on 1-1/2 feet balcony where there is staircase and that opposite to Yagnapurush apartment and leaving the road, there is industrial apartment. Now deceased Khodabhai would have raised shouts and offered resistance in order to save himself from receiving the injuries and that could have been heard by the prosecution witnesses, Dhirubhai Babulal Shah, Pravinchandra Babaldas Parikh and Smitaben Pravinchandra as their flats are situated by the side of flat No. 29 of accused No. 1. Now P.W. 4-Dhirubhai Babulal Shah in cross-examination has stated that on the Janmashatami day, between 12.00 noon to 4.30 P.M. he had not heard any sound coming from the flat of accused No. 1 Ramesh, P.Ws. Pravinchandra Babaldas Parikh and Smitaben Pravinchandra Parikh have stated that at about 4.00 P.M. on the Janamashtami day, accused No. 1 Ramesh had come to their flat. Now this cannot be the conduct of a murderer and therefore the prosecution story that Khodabhai was murdered in flat No. 29 between 1.30 to 4.00 or 4.30 P.M. is most unnatural and improbable."

11. The above conclusions of the trial Court and the reasons for arriving at the same in our view are unexceptionable; and , at the cost of repetition, we would like to mention that the High Court did not even consider these findings of the trial Court, much less, demonstrate that they were not sustainable at all.

12. Coming now to the circumstance No. vi, namely, recovery of blood-stained clothes and other articles from the flat of the appellant in the morning of September 9, (1980) some of which were found to contain group 'A' blood-which was also the group of the blood of the deceased - we are constrained to say that the evidence adduced by the prosecution in this regard was contrived to sustain the charges levelled against the appellant. Admittedly the flat of the appellant was searched in the night between September 4 and 5, 1980 by the police after breaking open its lock. At that time except a pair of trousers, nothing incriminating was found by the police, much less seized. It is also the admitted case of the prosecution that after the flat was searched it was locked again and the keys were kept with none other than the brother-in-law of the appellant the reasons for which we are unable to fathom. Be that as it may, it is also an admitted fact that

A since then the appellant had no access to his flat till it was searched on September 9, 1980. In spite of these tell tale circumstances a lot of articles - containing 'Group A' blood - was found inside that flat on September 9, 1980 - it only shows that the entire story of search and recovery of the articles is a myth.

B
13. The matter can be viewed from another angle also. If really the appellant had committed the murder inside his flat, as is the prosecution case, he would see that evidence which may implicate him was not available to the prosecution. In this case it was not at all difficult for him to remove the articles allegedly found for he had about 6 days time at his disposal to get the same done with the keys which were with his brother-in-law. However, the reasons given by the trial Court to disbelieve this part of the prosecution case are altogether different. Though the reasons of the trial Court in this regard cannot be said to be improper we need not pursue the matter further, having regard to the conclusions we have drawn from the admitted facts of the case.

D
14. Apart from the above two circumstances, namely, circumstances No. iii and vi, the only other circumstance which the High Court found on discussion of the evidence to have been conclusively proved was that the appellant was last seen with the deceased at 1.30 P.M. in his (appellant's) flat (circumstance No. ii). Even if we proceed on the basis, notwithstanding the finding of the trial Court in this regard, that the above circumstance stands proved it does not further the prosecution case for by itself it does not lead to the only conclusion that the appellant was guilty of the offences alleged against him.

E
F
15. For the foregoing discussion we unhesitatingly hold that the reasons given by the trial Court for recording the order of acquittal in favour of the appellant are cogent and convincing and the High Court was not at all justified in disturbing the same by reappraising the evidence. The appeal is, therefore, allowed. The appellant, who is on bail, is discharged from his bail bonds.

S.M.

Appeal allowed.