

A KANUBHAI BHAGVANBHAI NAYAK

v.

STATE OF GUJARAT

(Criminal Appeal No. 1540 of 2018)

B DECEMBER 03, 2018

**[ABHAY MANOHAR SAPRE AND INDU MALHOTRA, JJ.]**

*Penal Code, 1860: s.302 – Conviction under s.302 by trial court – High Court confirmed conviction and sentence – Appeal against conviction on the ground that in the order of High Court, there was neither any reference of any evidence, nor its application and nor there was any discussion much less finding in the impugned order – Held: In view of the powers of the Appellate Court under s.386(b), Cr.P.C., the High Court ought to have examined the evidence of each prosecution witnesses on issues arising in the case and the same should have been examined in the light of the challenge made by the accused in appeal and then recorded a finding either of affirmation or modification or reversal, as the case may be – It was incumbent upon the High Court to deal with issues urged and then record its finding one way or the other keeping in view the law – Impugned order is set aside and matter remitted to High Court for fresh consideration – Code of Criminal Procedure, 1973 – s.386(b).*

**Allowing the appeal and remanding the matter to High Court, the Court**

**HELD: 1. The High Court neither discussed any issue arising in the case nor appreciated the evidence and nor recorded its findings on any of the issues arising in the case and urged by the appellant. Mere perusal of the impugned order indicated that the High Court first set out the post mortem report and on its perusal observed that the injuries on the body of the deceased revealed that the death was homicidal leading to murder. The Court then observed that the evidence led by “various witnesses” revealed that it was the accused who was present at the scene of the offence and carried the attack on deceased. The High Court then observed that since the Additional Sessions Judge had “minutely examined” all the evidence led by the prosecution and has given cogent and convincing reasons, the High Court is in**

**complete agreement with the view taken by the Additional Sessions Judge. It is only with this narration of facts, the High Court dismissed the appeal. [Para 9][454-F-H]** A

**2. In view of the powers of the Appellate Court under Section 386 (b) of the Code of Criminal Procedure, 1973, the High Court should have examined the evidence of each prosecution witnesses on issues arising in the case and the same should have been examined in the light of the challenge made by the accused in appeal and then a finding should have been recorded either of affirmation or modification or reversal, as the case may be. [Para 10][455-A-B]** B

**3. The High Court, is empowered in its appellate jurisdiction to examine the issues of facts and law while examining the legality and the correctness of the impugned order. It is equally incumbent upon the Division Bench to deal with issues urged and then record its findings one way or the other keeping in view the law laid down by this Court which governs the issues. [Para 12][455-C-D]** C

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1540 of 2018.

From the final Judgment and Order dated 25.04.2016 of the High Court of Gujarat at Ahmedabad in Criminal Appeal No.1512 of 2011. E

Ms. Vibha Datta Makhija, Sr. Adv., Aftab Ali Khan, M. Z. Chaudhary, Sajid Imam Naqvi, Ms. Disha Vaish, Ms. Heena Khan, Advs. for the Appellant.

Ms. Puja Singh, Ms. Hemantika Wahi, Ms. Jesal Wahi, Ms. Vishakha, Advs. for the Respondents. F

The Judgment of the Court was delivered by

**ABHAY MANOHAR SAPRE, J.**

1. Leave granted. G

2. This appeal is filed against the final judgment and order dated 25.04.2016 passed by the High Court of Gujarat at Ahmedabad in Criminal Appeal No.1512 of 2011 whereby the Division Bench of the High Court dismissed the appeal filed by the appellant herein and confirmed the order of conviction and sentence dated 30.09.2011 passed by the 9th Additional Sessions Judge, Vadodara in Sessions Case No.101 of 2010. H

A 3. Few facts need mention hereinbelow for the disposal of the appeal.

4. By impugned order, the Division Bench of the High Court dismissed the criminal appeal filed by the appellant (accused) and confirmed his conviction and sentence awarded by the 9th Additional Sessions Judge, Vadodara in Sessions Case No. 101/2010 under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as “IPC”) which gave rise to filing of the present appeal by way of special leave by the appellant (accused) in this Court.

5. The question, which arises for consideration in this appeal, is whether the High Court was justified in dismissing the appeal filed by the accused and thereby was justified in confirming the conviction and the sentence awarded by the Additional Sessions Judge.

6. Heard Ms. Vibha Datta Makhija, learned senior counsel for the appellant and Ms. Puja Singh, learned counsel for the respondent.

D 7. Having heard the learned counsel for the parties and on perusal of the record of the case, we are constrained to allow the appeal, set aside the impugned order and remand the case to the High Court for deciding the criminal appeal afresh on merits.

E 8. The need to remand the case has been occasioned because we find that the Division Bench has neither discussed any issue arising in the case nor appreciated the evidence and nor recorded its findings on any of the issues arising in the case and urged by the appellant.

F 9. Mere perusal of the impugned order would indicate that the Division Bench has first set out the post mortem report and on its perusal observed that the injuries on the body of the deceased reveal that the death was homicidal leading to murder. The Division Bench then observed that the evidence led by “various witnesses” reveal that it was the accused who was present at the scene of the offence and carried the attack on deceased. The Division Bench then observed that since the Additional Sessions Judge had “minutely examined” all the evidence led by the prosecution and has given cogent and convincing reasons, the High Court is in complete agreement with the view taken by the Additional Sessions Judge. It is only with this narration of facts, the Division Bench dismissed the appeal.

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10. In our opinion, keeping in view the powers of the Appellate Court under Section 386 (b) of the Code of Criminal Procedure, 1973, the Division Bench should have examined the evidence of each prosecution witnesses on issues arising in the case and the same should have been examined in the light of the challenge made by the accused in appeal and then a finding should have been recorded either of affirmation or modification or reversal, as the case may be. A  
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11. There is neither any reference to any evidence, nor its appreciation and nor there is any discussion much less finding in the impugned order.

12. The High Court, in our opinion, is empowered in its appellate jurisdiction to examine the issues of facts and law while examining the legality and the correctness of the impugned order. It is equally incumbent upon the Division Bench to deal with issues urged and then record its findings one way or the other keeping in view the law laid down by this Court which governs the issues. C  
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13. We, therefore, find ourselves unable to concur with such disposal of the appeal and feel inclined to set aside the impugned order and remand the case to the Division Bench of the High Court with a request to decide the appeal afresh on merits in accordance with law.

14. Having formed an opinion to remand the case, we do not consider it proper to go into the merits of the case. We, therefore, leave all the issues open to be decided by the Division Bench on merits, in accordance with law uninfluenced by our observations. E

15. In view of the foregoing discussion, the appeal succeeds and is accordingly allowed. Impugned order is set aside. We request the High Court to dispose of the appeal as expeditiously as possible preferably within six months. F

16. Pending application(s), if any, stand(s) disposed of.