

STATE OF GUJARAT

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v.

KALUSINH @ HARPALSINH

(Criminal Appeal No. 1125 of 2010)

MAY 02, 2019

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[R. BANUMATHI AND S. ABDUL NAZEER, JJ.]

Appeal: Appeal against acquittal – Prosecution case was that on the fateful day when the accused persons were ploughing the disputed land, complainant party objected to their act of ploughing whereafter accused no.1 and 2 fired three gun shots which hit wife of PW-5, PW-6 and PW-7 – Wife of PW-5 died on the spot and PW-6 and PW-7 got injured – Trial court convicted accused no.1 and 2 under s.302 r/w s.34 – High Court confirmed conviction of accused no.1, however, acquitted accused no.2 by holding that the identification of accused no.2 was doubtful and therefore he was entitled to benefit of doubt – State’s appeal against acquittal – Held: There was contradiction in prosecution’s case and statement made in the court as to who fired the gun shots – Likewise, the recovery of the weapons from the accused was also not proved by convincing evidence – The post-mortem certificate did not indicate as to whether the gun shots wounds on the body of deceased were caused by rifle or by gun – In absence of definite evidence as to whether the fatal gunshot wounds were caused either by the rifle or by double barrel gun, it cannot be said that the impugned judgment of the High Court acquitting the accused suffered from perversity warranting interference – Penal Code, 1860 – s.302.

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Dismissing the appeal, the Court

HELD : The High Court observed that there was dispute as to the identity of accused No.2 and acquitted accused No.2 by holding that the identity of accused No.2 became suspicious. The findings recorded by the High Court is a plausible view which cannot be patently erroneous warranting interference with the judgment of acquittal. Therefore, there was no good ground warranting interference with the order of acquittal insofar as accused No.2 was concerned. [Paras 9, 10] [476-B; E-F]

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- A CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1125 of 2010.

From the Judgment and Order dated 05.03.2009 of the High Court of Gujarat at Ahmedabad in Criminal Appeal No. 10 of 2001.

- B Ms. Jesal Wahi, Ms. Hemantika Wahi, Kabir Hathi, Advs. for the Appellant.

Anuj Bhandari, Abhinav Srivastava, Ms. Ruchi Kohli, Advs. for the Respondent.

The Judgment of the Court was delivered by

- C **R. BANUMATHI, J.**

1. This appeal is preferred by the State of Gujarat arising from the judgment and order dated 05.03.2009 in Criminal Appeal No.127 of 2001, in and by which the High Court of Gujarat acquitted the accused No.2-Kalusinh @ Harpalsinh Bhamarsinh from the offence under Section

- D 302 and other offences.

2. Case of prosecution is that on 23.11.1997 at about 9.00 p.m. accused No.1-Ashok Singh Jayendra Singh, accused No.2-Kalusinh, accused No.3-Gayendra Singh, accused No.4-Balbadhra Singh, accused No.5-Dhermandra Singh along with their servant accused No.6-

- E Mohanbhai Ramjibhai and others were ploughing the disputed land regarding which there was a civil suit pending in the civil court. According to the prosecution the said land used as road was used by the complainant and his family members for having ingress and egress. On the date of the incident i.e., on 23.11.1997 at about 9.00 p.m. when accused persons

- F were ploughing the land, the complainant party intervened and objected to their act in carrying out the ploughing.

3. Thereafter, accused Nos.1 and 2 fired three gun shots which hit deceased Somiben, wife of Hirabhai (PW-5), Ramanbhai (PW-6) and Nandaben (PW-7) due to which Somiben died on the spot and PWs

- G 6 and 7 got injured. Thereafter, all the accused ran away from the place of occurrence. On the basis of the complaint lodged by complainant (PW-3), on 24.11.1997, FIR was registered against all the accused under Sections 302, 307, 120B IPC read with Section 34 IPC and other offences.

4. Upon completion of investigation, charge sheet was filed against the appellant and other co-accused under Sections 302, 307, 120B IPC

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read with Section 34 IPC, 143, 147, 148, 149, Section 506 (II), 323 and 504 IPC, under Section 25(c) of the Arms Act and under Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. A

5. Relying upon the evidence of injured witnesses Ramanbhai (PW-6) and Nandaben (PW-7) and recovery of weapons from the accused, the trial court vide its judgment dated 15.11.2000 convicted accused No.1-Ashok Singh and accused No.2-Kalu Singh under Section 302 read with Section 34 IPC and sentenced them to undergo life imprisonment. They were further convicted under Section 307 read with Section 34 IPC and were sentenced to undergo rigorous imprisonment for seven years each and under Section 25(c) of the Arms Act they were sentenced to undergo three years of rigorous imprisonment, for the conviction under Section 3(1)(x) of the Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989, they were sentenced to undergo rigorous imprisonment for six months along with fine of Rs.500/. The trial court acquitted all the other accused of all the charges. B

6. In appeal, the High Court has affirmed the conviction of the accused No.1-Ashok Singh but acquitted the accused No.2-Kalusinh by holding that the identification of Kalusinh is doubtful and the benefit of doubt has to be given to the accused No.2. C

7. We have heard Mr. Anuj Bhandari, learned counsel appearing for the appellant and Ms. Jesal Wahi, learned counsel appearing for the respondent. We have perused the impugned judgment and other materials placed on record. D

8. In the complaint filed by complainant-Somabhai Rupabhai (PW-3), it has been stated that accused No.1-Ashoksingh Jayendrasinh and accused No.2-Kalusinh @ Harpalsinh Bhamarsinh fired gun shots from their guns, whereas in the statement before the court, PW-3 has stated that Kalusinh fired three shots which injured Ramanbhai(PW-6) and Nandaben (PW-7). There is thus contradiction in the case of the prosecution and sentence adduced in the court as to who fired the gun shots. Likewise, the recovery of the weapons from the accused is also not proved by convincing evidence. The post-mortem certificate (Ex.P-52) does not indicate as to whether the gun shots wounds on the body of deceased Somiben were caused by rifle or by gun. In the absence of definite evidence as to whether the fatal gunshot wounds were adduced E

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- A either by the rifle or by double barrel gun, it cannot be said that the impugned judgment of the High Court acquitting the accused suffers from perversity substantial error warranting interference in the order of acquittal

9. In the impugned judgment, the High Court observed that there is dispute as to the identity of accused No.2-Kalusinh and acquitted accused No.2 by holding that the identity of accused No.2 becomes suspicious. The relevant portion of the judgment reads as under:-

- “It was pitch dark night at 9.00 p.m. when in the village the incident occurred it is alleged that there was a lamp in the lane and tractor was lighted but when this incident occurred and was first reported, it has not been reported in the police statement. Therefore, if the omission is taken as is occurred in the police statement, it should be seen that there was no light at the time when the incident occurred. In this background, we would see that when the dispute about identity of Kalusinh @ Harpalsinh is there and it is stated that Kalusing is not as Kalusinh and in fact Harpalsinh, a server of Army. His identity as accused becomes suspicious in the mind of the Court. Therefore, it cannot be said that it was Kalusing @ Harpalsinh Bhamarsinh who was the person who caused gunshot and who made gunshots at the incident. Therefore, he deserves benefit of doubt”.

10. Upon consideration of evidence adduced by the prosecution, in our view, the above findings recorded by the High Court is a plausible view which cannot be patently erroneous warranting interference with the judgment of acquittal. Hence, we do not find any good ground warranting interference with the order of acquittal insofar as accused No.2-Kalusinh @ Harpalsinh Bhamarsinh is concerned. This appeal is, accordingly, dismissed.

Devika Gujral

Appeal dismissed.