IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL NO. 386 of 1995

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE S.H.VORA

and

HONOURABLE MR. JUSTICE RAJENDRA M. SAREEN

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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STATE OF GUJARAT
Versus
THAKORE CHAMANJI MOTIJI & 3 other(s)

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Appearance:
MS CM SHAH APP for the Appellant(s) No. 1
ABATED for the Opponent(s)/Respondent(s) No. 2,3
MR TEJAS BAROT for MR MC BAROT(144) for the Opponent(s)/Respondent(s) No. 1,4

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CORAM:**HONOURABLE MR. JUSTICE S.H.VORA**
and
HONOURABLE MR. JUSTICE RAJENDRA M. SAREEN

Date : 26/08/2022

CAV JUDGMENT
(PER : HONOURABLE MR. JUSTICE RAJENDRA M. SAREEN)

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1. Present Criminal Appeal has been preferred by the appellant – State of Gujarat under Section 378 of the Criminal Procedure Code, 1973 against the judgment and order dated 05/07/1994 passed by the learned Additional Sessions Judge, Banaskantha at Palanpur in Sessions Case No.119 of 1993 acquitting the respondent Nos.1 to 4 – original accused Nos.1 to 4 from the offence punishable under sections 302, 34, 326 and 324 of Indian Penal Code.

2. Facts of the case, in brief, are as under:-

The complainant – Sababhai Hahabhai Thakor is residing at Biyok, Taluka Vav. His elder brother is residing in the field and oil engine for pumping water is put in the partnership with one Thakor. One the day of incident when he returned from the field, the accused met on the road and due to personal enmity, accused No.1 Chamanji inflicted Dhariya blow on the head of the deceased, accused No.2 – Dehlaji inflicted Dhariya blow on the left hand fingers of the deceased and accused No.3 – Bhuptaji inflicted an axe blow on the right hand of the deceased and accused No.4 – Isaji inflicted injury with stick on left hand and left leg of the deceased. The informant alleged that he and his brother Thakra intervened to save the deceased. The complainant and his brother took the deceased in a tractor owned by Sarpanch to the hospital and gave F.I.R. at Vav Police Station, from where he was referred to Palanpur and while

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going to the hospital, the deceased expired. Hence the complainant filed the complaint for the aforesaid offence.

3. On the basis of the said complaint, investigation was started and after through investigation, as there was sufficient evidence against the respondents – accused persons, Chargesheet was filed before the learned Judicial Magistrate, First Class. As the offence committed by the accused persons was exclusively triable by the Court of Sessions as per the provisions of Section 209 of Criminal Procedure Code, the learned Judge was pleased to commit the case to the Court of Sessions and the case was transferred and placed for trial in the court of learned Additional Sessions Judge, which has been numbered as Sessions Case No.119 of 1993. Thereafter, Charge was framed against the accused for the offence punishable under sections 302, 34, 326 and 324 of Indian Penal Code. The accused persons pleaded not guilty to the Charges and claimed to be tried. The prosecution, therefore, laid evidence, oral as well as documentary. At the conclusion of the trial, the learned Additional Sessions Judge was pleased to acquit the accused Nos.1 to 4 for the charges levelled against them. Hence, the appellant has preferred the the present Criminal Appeal challenging the judgement and order of acquittal.

It is pertinent to note that the respondent Nos.2 and 3

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– original accused Nos.2 and 3 expired during the pendency of the present appeal and hence present appeal stood abated qua respondent Nos.2 and 3 and the present appeal is required to be considered qua respondent Nos.1 and 4 – original accused Nos.1 and 4 only.

4. Heard Ms.C.M. Shah, learned APP for the State and Mr.Tejas Barot, learned advocate for Mr.M.C. Barot, learned advocate on behalf of the respondent Nos.1 and 4.

5. Ms.C.M. Shah, learned APP for the appellant State has vehemently argued that the Sessions Judge has committed a grave error in not believing the deposition of the witnesses examined by the prosecution and evidence adduced by the prosecution. It is further submitted that the Sessions Judge has erred in acquitting the respondents – accused from the charges levelled against them. It is further argued that the prosecution has proved that the respondent Nos.1 and 4 have committed offence under sections 302, 34, 326 and 324 of Indian Penal Code. It is further submitted that Sessions Judge has acquitted the respondent Nos.1 and 4 merely on some minor contradictions and omissions in the evidence of the prosecution witnesses. It is further argued that the Sessions Judge has erred in not believing the evidence of the investigating officer and complainant who had no reason to implicate the respondent Nos.1 and 4 falsely in the case. It is further argued that the offence

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punishable under sections 302, 34, 326 and 324 of Indian Penal Code, is made out, however, the same is not believed by the Sessions Judge. It is further argued that though the prosecution witnesses have supported the case of the prosecution, the Sessions Judge erroneously not believed their evidence and acquitted the respondent Nos.1 and 4 – original accused Nos.1 and 4. It is further argued that the Sessions Court has erroneously held that the prosecution has failed to prove the case beyond reasonable doubt and has requested to allow the present appeal.

6. Mr.Barot, learned advocate for the respondent Nos.1 and 4 has submitted that the accused Nos.2 and 3 have expired and present appeal survives qua respondent Nos.1 and 4 – original accused Nos.1 and 4. He has further submitted that there is hardly any substance in the submissions of learned APP. There is no admissible evidence on record connecting the respondent Nos.1 and 4 with the commission of the offence. There are material contradictions and omissions in the evidence of the prosecution witnesses. The prosecution has not proved the case beyond reasonable doubt. No error or illegality has been committed by the trial court in acquitting the original respondent Nos.1 and 4. They have requested to dismiss the present appeal.

7. Heard the leaned advocates for the respective parties at length and perused the impugned judgement and order of

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acquittal passed by the trial court as well as the entire record and proceedings.

8. It would be worthwhile to refer to the scope in Acquittal Appeals. It is well settled by is catena of decisions that an appellate Court has full Power to review, re-appreciate and consider the Evidence upon which the Order of Acquittal is founded. However, the Appellate Court must bear in mind that in case of Acquittal, there is prejudice in favour of the Accused, firstly, the presumption of innocence is available to him under the Fundamental Principle of Criminal Jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of Law. Secondly, the Accused having secured his Acquittal, the presumption of his innocence is further reaffirmed and strengthened by the trial Court.

9. We have gone through the entire record and proceedings. We have re-appreciated the evidence on record. On re-appreciation of the evidence, it appears that the complainant has lodged the complaint for the murder of his deceased brother Karsanbhai alleging that there was enmity between both the parties and hence to take revenge, the accused have committed murder of the deceased. However, considering the record it is clear that the complainant Sababhai was residing separately from his deceased brother Karsanbhai. The residence of the deceased

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Karsanbhai is situated 2 Kms. away from village Biyok in the western direction in his agricultural field and he was residing in the agricultural field and his two brothers Subobhai and Thakarabhai were residing with him. Though the said two brothers were residing nearby, they had not reached at the place of offence. Further, the complainant has stated in the complaint that Thakarabhai was with him, Thus, it appears that the complainant, who is residing with his mother at village Biyok in Thakor Vas, came to know about the incident subsequently after occurrence of the incident and thereafter, he reached at the place where the deceased was lying and he was first taken to the Vav Police Station and took Police Yadi and thereafter the deceased was taken to the CHC Tharad from where he was referred to Palanpur Civil Hospital and on the way of Palanpur, the deceased died, as per the case of the prosecution. However, the clothes of the complainant and Thakrabhai did not get the blood stains, even when the said two witnesses had allegedly placed the deceased first in tractor and thereafter in jeep or even thereafter. It appears that the complainant was not present at the time of incident. Had the complainant was present, he could have assaulted on the accused or in the scuffle, could have sustained injury, while trying to save his real brother – deceased. But none of the person from the complainant side has received any injury. It is not believable that the accused have beaten the deceased in presence of the complainant and his brother

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Thakra and they both did nothing to save the deceased. Had they tried to save the deceased, they must have sustained some injury. It is not believable that the complainant permitted the accused to go freely and did not attack or beaten the accused. The conduct of the complainant is unnatural.

10. PW No.6 Ambajibhai Hatajibhai Ex.25 – driver of the tractor wherein the deceased was taken to the police station and CHC Tharad has specifically stated and admitted in his evidence that he did not hear any commotion and when he asked Sababhai and Thakrabhai as to who injured him, they said that they did not know. From the evidence of the said witness Ambaji also, it is crystal clear that Sababhai and Thakrabhai rushed to the spot only after hearing commotion.

11. On perusal of the record, it appears that the complainant has not seen the incident and he is not the eye witness. Even as per the complainant the deceased did not give reply on asking as to why he was beaten by the accused.

12. PW No.8 Raisangji Veehaji Ex.27 has specifically stated in his evidence that it was open place where the incident took place. After inflicting injuries, the accused immediately fled. The brother of the deceased then came. This witness

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informed the brothers i.e. Sababhai and Thakrabhai about the incident. As such, the evidence of Raisangji Veehaji is contradictory to the evidence of the complainant and his brother. Thakrabhai.

13. The prosecution has examined PW No.10 Veerabhai Lagdhirbhai Ex.31 and PW No.9 Popatji Mavaji - Ex.30 on oath and they have stated that they were present at the time of commission of the offence, however, on perusal of the complaint Ex.24, it is clear that the complainant has not stated in the complaint that the aforesaid persons were present with him at the scene of offence. The evidence of PW No.9 – Popatji Mavaji Thakor Ex.30, PW No.10 – Veerabhai Lagdhirbhai Ex.31 falsifies the story of the complainant in the complaint. On the contrary, evidence of PW Nos. Popatji Mavaji Ex.30 and PW No.10 – Veerabhai Lagdhirbhai Ex.No.31 shows that the aforesaid two witnesses were not present at the scene of offence and their evidence is contrary to the complaint. Even As per the complainant, no one was present when the said complainant and Sababhai took the deceased with them.

14. Furthermore, so far as PW No.9 - Popatji Mavaji Thakor Ex.30 and PW No.10 – Veerabhai Lagdhir Ex.31 are concerned, various criminal cases are registered against them. Their evidence do not inspire confidence. They are not credible and trustworthy witnesses and relying on their

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evidence, the accused cannot be convicted. As per evidence of Popatji Mavaji PW No.9 Ex.30, he met the accused on his way to Dauva where the accused were allegedly armed and thereafter his brother Veera Lagdhir met him and they smoked and sat there for sometime thereafter the said witness informed his brother Veera Lagdhir that some guest had come at his place and therefore, he had come to call him. As per this witness hearing the commotion, he along with his brother Veerabhai Lagdhirbhai left to the spot and on their way, the accused went passed him towards Dauva. As per his evidence, when he reached the spot Sababhai and Thakrabhai were with the deceased Karsan. The evidence of said witness is completely belied by evidence of Sababhai Ex.23 and his FIR Ex.24 and also by the evidence of his brother Veerabhai Lagdhirbhai PW No.10 Ex.31.

15. As per the evidence of Veerabhai Lagdhirbhai PW No.10 Ex.31, while he was in his field, his brother came to call him and did not meet his brother on the way as suggested by his brother Popatbhai Mavabhai. Further, he denies the fact that he had seen the accused going away with the weapons.

16. Conjoint reading of the aforesaid witnesses clearly shows that none of the witnesses were present at the time of alleged incident. From the evidence of Sababhai Hahabhai Thakor PW No.5 Ex.23 and FIR Ex.24, besides him and his

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brother Thakra, there was no other witness.

17. Further from the evidence of Sababhai, it is clear that the other witnesses Popatji Mavaji, Veera Lagdhir or Raisang Veeha were present with the deceased Karsan at the place of incident. Thus, it is clear that the evidence of PW No.9 Popatji Mavaji and PW No.10 Veerabhai Lagdhirbhai is unreliable. From the evidence of the complainant and comparising the evidence of the complainant with other witnesses Veera Lagdhir, Raisangji Veehaji and Popatji Mavaji, it is clear that all witnesses aare stating contradictory version to each other. As such, no reliance can be placed upon the evidence of the witnesses which is contradictory to each other and as such, the evidence of main witnesses are contradictory, which does not inspire confidence as to show who was really present when the alleged incident had taken place.

18. There are material contradictions and improvements in the evidence of the aforesaid witnesses. On perusal of the record, it is clear from the evidence of PW No.15 Baldevbharthi Surbharthi Ex.42 who admitted that Raisang Veeha in his police statement, has stated to have seen the incident behind the Babul bushes. However, Raisang Veehaji in his evidence denies that there are babul bushes, on the contrary says that the place of incident is open. The material contradictions are proved from the

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evidence of investigating officer, Arvindbhai Ranchhodbhai PW No.18 Ex.49.

19. From the evidence of Dr.Bharatkumar Babulal Thakkar, Medical Officer, CHC Tharad, it is clear that Sababhai first went to police station to obtain Police Yadi and thereafter he along with deceased Karsan reached CHC Tharad and not to the contrary claimed by him.

20. Recovery weapon is also not proved, in absence of any blood stains being found that the weapons were allegedly used for the commission of the offence.

21. It appears that there was enmity between the complainant and the accused and therefore, chances of implication of the accused falsely due to enmity cannot be ruled out and as all the witnesses are related to each other, they cannot be termed as independent witnesses and they are interested for getting the accused convicted. As such, the evidence of the interested witnesses cannot be relied upon in the facts of the case on hand.

22. Considering the entire evidence on record oral as well as documentary, we are of the opinion that the prosecution has failed to prove the case against the accused by leading cogent and convincing evidence. As discussed above, the evidence of the witnesses are contradictory to each other

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and if the evidence of the complainant and his brother is believed, the presence of other witnesses, Popatji, Raisangji and Veera becomes doubtful and if the evidence of Popatji, Raisangji and Veera is believed, the presence of complainant and his brother becomes doubtful. The evidence of all the main witnesses is contradictory to each other, which is rightly disbelieved by the learned Sessions Judge. As a result, the judgement delivered by the Sessions Judge is sound on the aspect of law and facts. The evidence brought on record by the prosecution before the trial court has been rightly appreciated by the trial court. No apparent error on the face of the record is found from the judgement. The judgement does not suffer any material defect or cannot be said to be contrary to the evidence recorded.

23. It may be noted that as per the settled legal position, when two views are possible, the judgment and order of acquittal passed by the trial Court should not be interfered with by the Appellate Court unless for the special reasons. A beneficial reference of the decision of the Supreme Court in the case of **State of Rajasthan versus Ram Niwas** reported in **(2010) 15 SCC 463** be made in this regard. In the said case, it has been observed as under:-

> *"6. This Court has held in Kalyan v. State of U.P., (2001) 9 SCC 632 :*

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“8. The settled position of law on the powers to be exercised by the High Court in an appeal against an order of acquittal is that though the High Court has full powers to review the evidence upon which an order of acquittal is passed, it is equally well settled that the presumption of innocence of the accused persons, as envisaged under the criminal jurisprudence prevalent in our country is further reinforced by his acquittal by the trial court. Normally the views of the trial court, as to the credibility of the witnesses, must be given proper weight and consideration because the trial court is supposed to have watched the demeanour and conduct of the witness and is in a better position to appreciate their testimony. The High Court should be slow in disturbing a finding of fact arrived at by the trial court. In Kali Ram V. State of Himachal Pradesh, (1973) 2 SCC 808, this Court observed that the golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The Court further observed:

"27. It is no doubt true that wrongful acquittals are

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undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilised society. Suppose an innocent person is convicted of the offence of murder and is hanged, nothing further can undo the mischief for the wrong resulting from the unmerited conviction is irretrievable. To take another instance, if an innocent person is sent to jail and undergoes the sentence, the scars left by the miscarriage of justice cannot be erased by any subsequent act of expiration. Not many persons undergoing the pangs of wrongful conviction are fortunate like Dreyfus to have an Emile Zola to champion their cause and succeed in getting the verdict of guilt annulled. All this highlights the importance of ensuring, as far as possible, that there should be no wrongful conviction of an innocent person. Some risk of the conviction of the innocent, of course, is always there in any system of the administration of criminal justice Such a risk can be minimised but not ruled out altogether It may in this connection be apposite to refer to the following observations of Sir Carleton Alien quoted on page

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157 of "The Proof of Guilt" by Glanville Williams, second edition:

"I dare say some sentimentalists would assent to the proposition that it is better that a thousand, or even a million, guilty persons should escape than that one innocent person should suffer; but no responsible and practical person would accept such a view. For it is obvious that if our ratio is extended indefinitely, there comes a point when the whole system of justice has broken down and society is in a state of chaos."

28. The fact that there has to be clear evidence of the guilt of the accused and that in the absence of that it is not possible to record a finding of his guilt was stressed by this Court in the case of Shivaji Sahebrao, (1973) 2 SCC 793, as is clear from the following observations:

"Certainly it is a primary principle that the accused must be and not merely, may be guilty before a court, can be convicted and the mental distinction between 'may be' and 'must be' is long and divides vague conjectures from sure considerations."

"9. The High Court while dealing with the appeals

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against the order of acquittal must keep in mind the following propositions laid down by this Court, namely, (i) the slowness of the appellate court to disturb a finding of fact; (ii) the noninterference with the order of acquittal where it is indeed only a case of taking a view different from the one taken by the High Court."

8. In Arulvelu and another versus State reported in (2009) 10 Supreme Court Cases 206, the Supreme Court after discussing the earlier judgments, observed in para No. 36 as under:

"36. Careful scrutiny of all these judgments lead to the definite conclusion that the appellate court should be very slow in setting aside a judgment of acquittal particularly in a case where two views are possible. The trial court judgment can not be set aside because the appellate court's view is more probable. The appellate court would not be justified in setting aside the trial court judgment unless it arrives at a clear finding on marshaling the entire evidence on record that the judgment of the trial court is either perverse or wholly unsustainable in law."

24. As observed by the Hon'ble Supreme Court in the case

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of ***Rajesh Singh & Others vs. State of Uttar Pradesh*** reported in ***(2011) 11 SCC 444*** and in the case of ***Bhaiyamiyan Alias Jardar Khan and Another vs. State of Madhya Pradesh*** reported in ***(2011) 6 SCC 394***, while dealing with the judgment of acquittal, unless reasoning by the learned trial Court is found to be perverse, the acquittal cannot be upset. It is further observed that High Court's interference in such appeal in somewhat circumscribed and if the view taken by the learned trial Court is possible on the evidence, the High Court should stay its hands and not interfere in the matter in the belief that if it had been the trial Court, it might have taken a different view.

25. Scope of appeal against acquittal is well laid down in case of ***Chandrappa and ors. vs. State of Karnataka*** reported in ***(2007) 4 SCC 415***, it was observed:

> *"42. From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge;*
>
> *(1) An appellate Court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded;*
>
> *(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such*

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power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, ’substantial and compelling reasons’, ’good and sufficient grounds’, ’very strong circumstances’, ’distorted conclusions’, ’glaring mistakes’, etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of ’flourishes of language’ to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.”

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28. Considering the aforesaid facts and circumstances of the case and law laid down by the Hon'ble Supreme Court while considering the scope of appeal under Section 378 of the Code of Criminal Procedure, no case is made out to interfere with the impugned judgment and order of acquittal.

29. In view of the above and for the reasons stated above, present Criminal Appeal deserve to be dismissed and is accordingly dismissed.

(S.H.VORA, J)

(RAJENDRA M. SAREEN,J)

R.H. PARMAR

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