IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL NO. 917 of 1998

FOR APPROVAL AND SIGNATURE:
HONOURABLE MR. JUSTICE NIRZAR S. DESAI Sd/-
and
HONOURABLE MR. JUSTICE HASMUKH D. SUTHAR Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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STATE OF GUJARAT
Versus
MITHU UMAR SINDHI & ORS.

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Appearance:
MR MANAN MEHTA, ADDL. PUBLIC PROSECUTOR for the Appellant(s) No. 1
HCLS COMMITTEE(4998) for the Opponent(s)/Respondent(s) No. 1,2,3
MR. YOGENDRA THAKORE(3975) for the Opponent(s)/Respondent(s) No. 1,2,3

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CORAM:**HONOURABLE MR. JUSTICE NIRZAR S. DESAI**
and
HONOURABLE MR. JUSTICE HASMUKH D. SUTHAR

Date : 22/05/2024

ORAL JUDGMENT
(PER : HONOURABLE MR. JUSTICE HASMUKH D. SUTHAR)

1. This appeal is directed under Section 378 of the Code of Criminal Procedure (hereinafter referred to as “the Code” for short) against the judgment and order of acquittal dated

13.08.1998 passed by the learned Additional Sessions Judge, Ahmedabad (Rural), Gandhinagar, in Sessions Case No.03/1997, whereby the learned Sessions Court acquitted the respondents for the offence punishable under Sections 395 and 397 of the Indian Penal Code, 1860 read with Section 135 of the Bombay Police Act.

2. The following noteworthy facts emerge from the record of the appeal:

2.1 In the present case, the Complainant Sureshbhai Rathod along with his family members went from his residence in Gandhinagar on the night of 06.11.1994 in his car to have dinner in a hotel. While, he was returning from the dinner, at 11.00 P.M. at the railway crossing of Radheja village, his car was stopped by some unknown persons and at that time, five people came with deadly weapons namely sticks, knife etc.. One of them hit the complainant with a stick and breaking the wind shield of the car and other people also used sticks and started hitting the complainant on the elbow with the right hand and on the face, whereas his son viz. Kirtan, his daughter and his wife were also assaulted by the accused persons and one accused was having

knife and he threatened and looted the ornaments of wife of the complainant, wrist watch and total goods worth Rs.36,000/-. After opening of the railway crossing, he went to hospital and after taking the primary treatment, he made a phone call to the PSI, Pethapur. Thereafter, the PSI visited the place of incident and filed the complaint against the unknown persons, which is produced at Exh.36. The panchnama of scene of offence and Ambassador Car was drawn, which are produced at Exhs.19 and 32. During the investigation, the accused Nos.1 and 2 both were arrested by way of transfer warrant from the Judicial Magistrate First Class, Prantij and then produced before the Executive Magistrate for the Test Identification Parade and *panchnama* was drawn.

2.2 Accordingly, FIR being C.R.No.155/1994 was lodged before Pethapur Police Station, Dist. Gandhinagar, investigation was carried out and ultimately, charge-sheet came to be filed against the accused persons for the offences punishable under Sections 395 and 397 of the IPC read with Section 135 of the Bombay Police Act before the jurisdictional Magistrate. As the case was exclusively triable by the Court of Sessions, learned Magistrate

Court under Section 209 of the Cr.P.C. committed the said case to the Court of learned Additional Sessions Judge, Ahmedabad Rural, which came to be numbered as Sessions Case No.03/1997. Since, the accused did not plead guilty and claimed to be tried, they were tried for the said offences;

2.3 At the trial, in order to bring home the charges levelled against the accused, the prosecution examined several witnesses and also relied upon the documentary evidence.

2.4 At the end of the trial and after recording the statement of the accused under Section 313 of the Code, and upon hearing the arguments on behalf of the prosecution and the defence, learned trial Court acquitted present respondents – accused from the offence under Sections 395 and 397 of the Indian Penal Code vide impugned judgment and order of acquittal dated 13.08.1998 in Sessions Case No.03/1997, as mentioned above;

2.5 Being aggrieved by the same, the appellant – State preferred present appeal under Section 378 of the Code of Criminal Procedure, 1973.

3. Heard learned advocates for the respective parties.

4. Learned APP for the appellant – State has contended that, the learned trial Court has committed an error in acquitting the respondents and not properly appreciated the evidence produced on record though the prosecution has proved case against the accused and the complainant along with his family members have supported the case of the prosecution. Investigating officer has also supported the case of the prosecution and test identification parade was also conducted test identification parade was also conducted in the presence of learned Executive Magistrate, who has also examined and supported the case of the prosecution and complainant has identified the accused persons.

5. Learned APP Mr. Mehta has submitted that the learned Sessions Judge has committed an error in holding that the accused had sold the stolen gold ornaments to one Mr. Soni Sunilkumar Ghanshyambhai and Harshadbhai Soni, which was recovered after drawing the panchnama. Though stolen ornaments were also recovered at the instance of the accused persons and complainant was examined below Exh.35 and his wife viz. Rekhaben and son’s evidence also get corroboration and

due to such incident, the witnesses and complainant have sustained injury and the said injury certificate are also proved by the prosecution, which are produced on record and they have been examined by Dr. Mukulbhai Pandit. It is submitted that even the learned trial Court has given weightage to minor omission and contradiction in the deposition ignoring the fact that the alleged offence took place in the year 1994 while evidence was recorded in the year 1998 though case of the prosecution is fully supported by the witnesses. Thus, the reasons assigned by the learned trial Court while acquitting the accused are unjust, improper, perverse and unwarranted to the facts of the prosecution case and thereby, has committed an error in acquitting the accused. Mr. Mehta has further submitted that, the prosecution has been able to establish the guilt of all the accused to its hilt and learned trial Court has committed an error both on law and facts. Thus, the learned trial Court has wrongly recorded the order of acquittal. Considering the irrelevant facts, the learned Trial Court exonerated the accused persons and he has requested to consider his case and to quash and set aside the judgment of acquittal recorded by the learned Session Judge and to convict the accused persons and appropriate sentence for the

offence be passed against all the accused.

On the aforesaid contentions, learned APP submitted that, present appeal may kindly be allowed, as prayed for.

6. Per contra, learned counsel for the respondents – accused have supported the impugned judgment and order and contended that the learned trial Court has properly appreciated the evidence and prosecution has failed to prove the case against the accused. Prosecution is duty bound to prove the case against the accused persons beyond all reasonable doubt. Panch-witnesses have turned hostile and not supported the case of the prosecution. Even stolen articles are not found in its original form. Even,Test identification parade itself is doubtful, prior to test identification parade accused were seen and identified by the complainant. Therefore, the test identification parade does not inspire any confidence. Even no any incriminating material or articles were recovered at the instance of the accused. There was no any material recovered or found which suggests the involvement of the respondents- accused in the said offence. Learned counsel for the respondents has submitted that as the panch-witnesses have turned hostile and offence against the

accused was not proved beyond reasonable doubt, impugned judgment and order of acquittal does not warrant any interference of this Court.

On the aforesaid contentions, learned counsel for the respondents have submitted that, present appeal being meritless, deserves to be dismissed.

7. Except above, no other or further submissions, contentions and grounds have been made/raised by both the sides.

8. Scope and interference by the appellate Court in acquittal appeal is very limited. The Hon'ble Supreme Court has discussed the scope and interference in acquittal appeal in the case of **Sheo Swarup v. King Emperor, AIR 1934 PC 227** and held as under:-

> *"While dealing with an appeal against acquittal, the High Court should and will always give proper weight and consideration to such matters as-*
> *(1) the views of the trial Judge as to the credibility of the witnesses;*
> *(2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial;*
> *(3) the right of the accused to the benefit of any doubt; and*
> *the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses."*

8.1 Further, considering the law laid down in the case of **Babu Sahebagouda Rudragoudar v. State of Karnataka, 2024 SCC OnLine SC 561**, every criminal trial starts with general presumption and one of the cardinal principle of criminal jurisprudence is that, there is a presumption of innocence in favour of the accused, unless proven guilty. Burden of proving the case of the prosecution always rests on the shoulder of the prosecution. As a consequence, the onus on the prosecution becomes more burdensome as there is a double presumption of innocence, which gathers stregnth before the appellate Court.

8.2. It would be further apposite to refer the decision of the Hon'ble Apex Court in case of **Jafarudheen v. State of Kerala, (2022) 8 SCC 440:**

> *"While dealing with an appeal against acquittal by invoking Section 378 CrPC, the appellate court has to consider whether the trial court's view can be termed as a possible one, particularly when evidence on record has been analysed. The reason is that an order of acquittal adds up to the presumption of innocence in favour of the accused. Thus, the appellate court has to be relatively slow in reversing the order of the trial court rendering acquittal. Therefore, the presumption in favour of the accused does not get weakened but only strengthened. Such a double presumption that ensures in favour of the*

accused has to be disturbed only by thorough scrutiny on the accepted legal parameters."

9. Having heard learned counsel for both the sides and going through the evidence produced on record, it appears that, the complainant Sureshbhai Rathod is examined below Exh.35 and complaint is produced below Exh.36 against the unknown accused persons. In order to prove the said fact of the complaint, prosecution has also examined the wife of the complainant viz. Rekhaben below Exh.34, Son of complainant viz. Kirtanbhai Rathod below Exh. 33. Perusing the evidence of 3 witnesses, it appears that prosecution was able to prove that on the fateful day the complainant along with his family members went to hotel to have dinner and at that time, incident took place. Further, in the said incident, the ornaments were looted and complainant and witnesses have sustained injury and for that, they have taken treatment from Dr. Mukulbhai Pandit, who is also examined below Exh.11 and he has produced injury certificate below Exhs.12, 13 and 14. Considering the aforesaid fact, it appears that the moot question deserves to be considered as to whether prosecution has adduced or produced any evidence to connect

the accused persons or involvement of the accused persons in the alleged offence. To connect the accused persons with the aforesaid offecnce, prosecution has mainly relied on the T.I. Parade of accused persons and further relied on the recovery of ornaments, which was recovered by Sunilbhai and Harshad bhai to whom the accused persons sold the said ornaments. Except this no any other evidence is produced by the prosecution to prove guilt against the accused persons.

9.1. Scanning the aforesaid evidence, it appears that complainant and his wife along with his son have supported the case of the prosecution and identified the accused persons before the Court in the door. It appears that the said incident took place in the midnight and complaint was filed against the unknown persons and after getting the custody of the accused persons by way of transfer warrant from the Court of Judicial Magistrate First Class, Prantij, the T.I. Parade was conducted by the complainant. No any other witnesses have been identified during the said T.I. parade. Perusing the evidence of complainant and Executive Magistrate, it appears that the T.I. parade was conducted in the presence of Panch-witnesses and they have

turned hostile and have not supported the case of the prosecution. The Executive Magistrate viz. Kanahiyalal Atmaram Patel (PW-9) was examined below Exh.31. Going through the said evidence, it appears that the alleged incident took place on 06.11.1994 and after a period of 8 months on 25.07.1995, T.I. parade was conducted and the accused were produced before him without covering their face with handcuffs produced upto his chamber. He has admitted that the said witnesses as well as Investigating Officer has admitted that neither complainant nor any witnesses have given the description of the appearance of the accused persons, whereas only six dummy persons were standing in the queue. In the cross-examination, it is admitted that prior to arrest of the accused-persons, their photographs came to be published in the newspapers. Considering the aforesaid fact, the learned Sessions Judge came to the conclusion that prior to T.I. parade, their photographs were published in the newspapers and considering the fact that the said incident took place in the midnight. It appears that first T.I. Parade was conducted on 25.07.1995 after a delay of more than 8 months and panchnama was drawn on 07.08.1995. Wife of the Complainant - Rekhaben failed to identify any accused and in

absence of other evidence, the learned Judge came to the conclusion that evidence of T.I. parade does not inspire any confidence. It appears that no proof of recovery or the discovery of the stolen articles are produced on record. Panchas have not supported the case of the prosecution and they have turned hostile. It appears that the stolen articles which were sold to Mr. Soni Sunilkumar Ghanshayambhai and Harshadbhai Soni by the accused persons were not examined as witnesses and they have not identified the accused persons and they were also not examined by the accused persons. Nonetheless the said stolen articles are not recovered in its original form but in a melted form. Thus, it appears that the identification of stolen ornaments is itself in dispute. Nonetheless, the said panchnama of allegedly stolen ornaments is also not proved by the prosecution. While recording the evidence the learned Judge came to the conclusion that the said evidence is not admissible as evidence and even no procedure is followed under Section 27 of the Evidence Act. Thus recovery of stolen articles is not proved by the prosecution and in this regard no evidence is produced. It appears that corroborative piece of evidence, which pointed out the accused persons was not produced except the T.I. parade. Even,Test

identification parade itself is doubtful as photographs were also published in the newspapers prior to T.I. parade. The T.I. parade evidence which is based on supporting evidence only corroborates the substantive evidence given by the witnesses in the Court. The T.I. parade by itself is not an independent value. In view of above, in absence of any substantive evidence on record as two views emerge from the record, then the learned trial Court has rightly adopted the views, which favoured the accused.

9.2 Considering the cardinal principles of Criminal Jurisprudence until and unless offence is proved by the prosecution against the accused persons beyond all reasonable doubt accused is innocent. It appears that, prosecution is failed to produced or adduced any clinching and material evidence which is of sterling quality, which connect the accused persons with the alleged offence.

9.3. In view of above, learned Sessions Judge has not committed any error in recording the acquittal and prosecution and appellant failed to prove the case against the accused persons beyond all reasonable doubt under Sections 395 and 397

of the IPC.

9.4. It appears that the muddamal which is in melted form is also not recovered from all the accused persons and as panch-witnesses have not supported the case, in absence of any incriminating material or muddamal articles and there being no sufficient evidence produced on record, no offence is made out against the accused persons under sections 395 and 397 of the IPC and prosecution has failed to prove that the accused persons have breached Notification under Section 37 (1) of the Bombay Police Act and they have committed an offence under Section 135 of the Bombay Police Act as prosecution failed to prove that the accused persons have breached the said Circular and they had such deadly weapons, considering the fact that Notification is also not produced on record and proved by the prosecution.

10. As discussed above, in order to prove the offence under Sections 395 and 397 of the Indian Penal Code, 1860, prosecution ought to have proved that the accused have used deadly weapons and made an assault to commit robbery and voluntarily caused hurt to the complainant or witness. Here in the present

case, prosecution has failed to prove that the accused have used deadly weapons and have committed the offence of robbery or made an assault and there is no iota of evidence to connect the accused with the alleged offence.

11. Considering the aforesaid facts and reasons, learned trial Court has found that the evidence of IT parade does not inspire any confidence. Even going through the findings of learned trial Court, it appears that the same are just, legal and proper. Further, learned APP has failed to point out any palpable error in the reasons assigned by the learned trial Court, which are manifestly erroneous or unsustainable.

12. In view of the above and in backdrop of the evidence adduced/produced by the prosecution, material contradictions which goes to the root of the case of the prosecution are noticed by the learned trial Court and as the prosecution failed to prove the case against the accused beyond all reasonable doubts, learned trial Court has not committed any error in acquitting the accused.

13. Accordingly, present appeal fails and is hereby dismissed.

The judgment and order of acquittal passed by learned Additional Sessions Judge, Ahmedabad (Rural) at Gandhinagar, stands confirmed. Bail bond, if any, given by respondents-accused stands discharged. Record and proceedings be sent back to the concerned trial Court forthwith.

Sd/-
(NIRZAR S. DESAI,J)

Sd/-
(HASMUKH D. SUTHAR,J)

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