IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL NO. 982 of 1999

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE NIRZAR S. DESAI

and

HONOURABLE MR. JUSTICE HASMUKH D. SUTHAR

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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
KANTIBHAI GANDALAL PRAJAPATI & ORS.

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Appearance:
MR MANAN MEHTA, APP for the Appellant(s) No. 1
HCLS COMMITTEE(4998) for the Opponent(s)/Respondent(s) No. 1,4
MR JV JAPEE(358) for the Opponent(s)/Respondent(s) No. 2,3
MR NR KODEKAR(5020) for the Opponent(s)/Respondent(s) No. 1,4

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

Date : 20/05/2024

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 31.07.1999 passed by learned Additional Sessions Judge, Ahmedabad (Rural) at Gandhinagar, in Sessions Case No.14/1999, whereby the learned Sessions Court acquitted the respondents for the offence punishable under Sections 394, 395 and 397 of the Indian Penal Code, 1860.

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

2.1 The complainant Gulanhusain Sheikh was serving as a driver and on 25.02.1998 at about 09:30 hours in the night, when he was returning from Kadi to Ahmedabad with his tempo bearing registration No.GJ-01-V-6519, at that time, near FCI godown, one Maruti car overtake and stopped the tempo of the complainant, from which, the accused - respondents along with one absconding accused came down from the car and dragged the complainant from the tempo. It further reveals that, the accused beaten the complainant by showing knife and revolver and asked to give money whatever he had.

Therefore, the complainant had given Rs.1,800/- and then, the accused fled away with the tempo of the complainant. Thereby, the accused had committed an offence of robbery of money and vehicle of the complainant. In this regard, complaint came to be registered with Adalaj Police Station.

2.2 Accordingly, FIR being C.R.No.45/1998 was lodged before Adalaj Police Station, Dist. Gandhinagar, investigation was carried out and ultimately, chargesheet came to be filed before the jurisdictional Magistrate against the accused persons. 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.14/1999. 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 394, 395 and 397 of the Indian Penal Code vide impugned judgment and order of acquittal dated 31.07.1999 in Sessions Case No.14/1999, 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 Mr. Manan Mehta, learned Additional Public Prosecutor for the appellant-State, Mr. J.V.Japee, learned counsel for Respondent Nos.2 and 3 and Mr. N.R.Kodekar, learnel counsel for respondent Nos.1 and 4.

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 has supported the

case of the prosecution. He further contended that the complainant has identified the respondents and vehicle was also recovered. Investigating officer has also supported the case of the prosecution and test identification parade was also conducted before the Executive Magistrate, who is an independent witness. The said witness in his deposition at Exh:25 has clearly deposed that, the test identification parade conducted in the presence of complainant and complainant had identified accused Nos.1, 3 and 4. Mr. Mehta has submitted that the learned trial Court has committed an error in holding that belatedly test identification parade was conducted and merely on the basis of delay in conducting test identification parade, the accused were exonerated. Even learned trial Court has given weightage to the minor omission and contradiction in the witnesses though there was no any material omission and contradiction in the evidence or the witnesses. The learned trial Court has relied on the minor contradictions and discarded the evidence of 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, which deserves to be quashed 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.

5. 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. Panchwitnesses have declared turned hostile and not supported the case of the prosecution. Test identification parade itself is doubtful, which came to be conducted after a delay of seven months. 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. Even the amount of Rs.1,800/- was also not recovered. Further, the knife and revolver used in the

offence was also not recovered from the respondents and there was material contradiction and improvement in the evidence of the complainant. Learned counsel for the respondents has submitted that as the panchwitnesses 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.

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

7. 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."*

7.1 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. Having heard learned counsel for both the sides and going through the evidence produced on record, it appears that, at the instance of PW:10 Gulamhusain Shaukathusain Sheikh, who was examined at Exh:29, complaint came to be filed at Exh:30, wherein, he has stated that he was doing job as a driver and driving a tempo of one Abdul Kadar Shaikh, (PW:3), who was examined at Exh:18 and on 25.02.1998 at

about 09:30 p.m, while he was returning from Kadi to Ahmedabad with his tempo bearing registration No.GJ-01-V-6519, at that time, near FCI godown, Adalaj, one Maruti car overtake and stopped his tempo and the accused respondents along with one absconding accused came down from the car and dragged him from the tempo. The accused made an assault on his chick by butt of revolver and asked him to give money whatever he had. Therefore, the complainant had given Rs.1,800/- and then, the accused fled away with his tempo. In this regard, offence was registered. Even, in September 1998, during the investigation of another offence, Police Inspector, LCB, Mr. Rohitbhai Baranda had arrested the present accused and recovered revolver etc. and custody of the accused received by way of transfer warrant and after conducting test identification parade, vehicle tempo was found in unattended condition near Wankaner, which came to be seized.

9. Further, in order to prove the case against the accused, prosecution has mainly relied on the evidence of PW:10 - complainant Gulamhusain Sheikh at Exh:29, PW:7 – Mr. Harbal Mackwan, Executive Magistrate at Exh:25, PW:11 Mr. Ambalal Devjibhai Chaudhary at Exh:33 and PW:13 – Investigating

Officer Mr. Rohitbhai Baranda at Exh:35. Except the said witnesses, other witnesses have declared turned hostile. Even the prosecution has not been able to prove recovery or discovery of weapons. Perusing the evidence of the material witness i.e. complainant – Gulamhusain Shaikh, who was star witness of the prosecution and going through the evidence of the said witness, it appears that he has made material improvement in the evidence and though he has identified the accused, learned trial Court came to the conclusion that test identification parade itself is very doubtful on two counts i.e. incident took place at the night hours and witness himself has stated that five people were set in the carrier, while in the complaint, it is stated that accused persons came in a car and overtake and then stopped the car of the complainant. Said version of the complainant is very contradictory. Nonetheless, even it is accepted as it is, the accused persons were traveling in a tempo, though one accused set in a carrier and while moving vehicle, one accused had made an assault and took out Rs.1,800/- from his pocket and from running vehicle, the complainant was fell down from the vehicle and accused fled away with the tempo. In the evidence of the complainant, he had not uttered a whisper about the use of Maruti car and even

use of revolver or knife and thereby, there is material improvement and contradiction in the story of the complainant as well as in version of the case of the prosecution. Even the incident took place in night hours and after a delay of seven months, the accused persons were identified by the complainant. Learned trial Court came to the conclusion that, after delay of seven months, test identification parade was conducted. Nonetheless, panchwitnesses have not supported the procedure of test identification parade. Panchnama was not performed while conducting TI parade, but subsequently, it was performed based on the memory. Even the alleged incident took place at 10:40 p.m and while accused were traveling in the tempo and set as passengers in the carrier, one by one came into cabin in moving vehicle. Keeping in mind the aforesaid facts, learned trial Court came to the conclusion that TI parade itself is doubtful. PW:7 Executive Magistrate, who was examined at Exh:25 has also stated in his evidence that the complainant was already set in his chamber and at that time, police came with the accused persons and he did not call other dummy persons to conduct TI parade. Hence, learned trial Court had rightly not relied on TI parade. Nonetheless, recovery of muddamal cash of Rs.1,800/- and

weapon is not proved on the record. Considering the aforesaid facts, as muddamal was not recovered and there was material improvement and contradiction in the evidence of the complainant, prosecution failed to prove the case against the accused beyond all reasonable doubt. Vehicle was also found in abandoned condition after 7 days of the commission of offence and that too, not in conscious possession of the accused and there is no any iota of evidence, which connects the accused with the offence. One more aspect is required to be considered that, there is no any direct evidence, which points the guilt of the accused or no any circumstances, which suggests the involvement of the accused persons. Perusing the evidence of PW:13 Mr. Rohit Baranda (Investigating Officer), who was examined at Exh:35, it appears that on the basis of intelligence that one accused - Vishwanath Parasnath Dube, resident of Kalol, was going to attend the Court at Patan and as he was engaged in illegal trade of weapons, said investigating officer along with police personnel made a watch and arrested the accused Vishwanath Dube and at that time, one country made revolver along with bullets were found. In this regard, complaint came to be filed at Patan City Police Station and while recording the statement of said accused Mr.Dube, it

came to know that other co-accused are also coming at Chanasma and accused persons were intercepted at Chanasma and recovered the revolver from the said accused and in this regard, another complaint came to be filed at Chanasma Police Station. During the investigation of the said two offences registered at Patan and Chanasma Police Stations, he came to know about the commission of impugned offence registered at Adalaj Police Station. Said witness does not know about the commission of said offence took place on 25.02.1998 and merely based on the statements of co-accused persons, accused were arrested in connection with the impugned offence and except this, there is no iota of evidence which connects or shows involvement of the accused persons in an offence. It is needless to say that statement before the police authority is not admissible in the evidence and in absence of any corroborative evidence or independent witness to prove the said facts, admission or version on the part of the accused person, no iota of evidence collected during the investigation by the investigating officer. Appreciation of evidence in criminal trial depending upon the facts and circumstances of each case and prosecution has to prove the case against the accused beyond all reasonable doubt. It is

true that minor inconsistency, exaggeration, embellishment and contradiction are required to be ignored. But here in the present case, no any material evidence which connects the accused with the offence was led by the prosecution witnesses.

10. As discussed above, in order to prove the offence under Sections 394, 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.

(NIRZAR S. DESAI,J)

(HASMUKH D. SUTHAR,J)

SUCHIT