IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL REVISION APPLICATION NO. 309 of 2005

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J. C. DOSHI

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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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HIMMATKHAN TAJKHAN MALEK
Versus
THE STATE OF GUJARAT & ORS.

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Appearance:
MR MM TIRMIZI(1117) for the Applicant(s) No. 1
ABATED for the Respondent(s) No. 10,15
HL PATEL ADVOCATES(2034) for the Respondent(s) No. 11,12,13,14,16,17,18,19,2,20,21,22,23,24,3,4,5,6,7,8,9
MR CHINTAN DAVE APP for the Respondent(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE J. C. DOSHI**

Date : 08/05/2024

ORAL JUDGMENT

Order dated 30/03/2005 passed in Sessions Case No.217 of 2002 by the learned Additional Sessions Judge, Mehsana, 2nd Fast Track Court acquitting the private respondents from the

charge of offences punishable under Sections 147, 148, 149, 436, 395, 295 of the Indian Penal Code under Section 135 of the Bombay Police Act is sought to be challenged by the De-facto complainant in this revision under Section397 read with Section 401 of the Code of Criminal Procedure (for short "Cr.PC).

2. The short facts of the case are that while the complainant was at his home at that time present respondents-accused came and threatened to leave the village otherwise asked to face the consequences. It is further alleged in the FIR that on 01/03/2002 while the complainant was at his home at that time again the accused persons came and administered threat to leave the village or else they will be set on fire. Thus, the complainant and other persons being scared got out of the house and prepared to leave the place; however the accused persons came and set ablaze their houses by pouring petrol and kerosene from the carbo, as also committed loot of the articles and utensils and thus committed the offence.

3. In pursuance of the complaint lodged by the complainant with the Vijapur Police Station for the aforesaid offences, the investigating agency started usual investigation and recorded statements of the witnesses, drawn various Panchnamas. After having found sufficient material against the respondents accused, charge-sheet came to be filed in the Court of learned JMFC, Vijapur. Since trial of offence alleged against accused is triable exclusively, before Court of Sessions, learned JMFC had committed offence to Sessions Court, Mehsana as provided in section 209 of the Code.

4. Upon committal of the case to the Sessions Court, Mehsana, learned Sessions Judge framed charge at Exh.23 against the respondents accused for the aforesaid offences. The respondents accused pleaded not guilty and claimed to be tried.

5. In order to bring home charge, the prosecution has examined as many as 08 witnesses and also produced 15 documentary evidence before the learned Sessions Court.

6. On conclusion of evidence on the part of the prosecution, the Sessions Court put various incriminating circumstances appearing in the evidence to the respondents accused so as to obtain explanation/answer as provided u/s 313 of the Code. In the further statement, the respondents accused denied all incriminating circumstances appearing against them as false and further stated that they are innocent and false case has been filed against them.

7. After hearing both the sides and after analysis of the evidence adduced by the prosecution before the learned Trial Court, the respondents accused were acquitted from the charge of offence as aforesaid. Hence, present Revision Application is filed by the complainant.

8. Heard learned advocate Mr.Tirmizi for the complainant and learned APP Mr.Dave for respondent - State. None remained present for the private respondents.

9. In a limited argument, learned advocate Mr.Tirmizi for complainant submitted that there were direct evidence against

the accused. The witnesses examined by prosecution have identified the accused setting ablaze the houses of complainant and properties belonging to them as well as holy shrine (Masjid) and also looted the movable properties; yet the learned Sessions Court overlooked the said evidence and thereby committed serious error of law and facts. He would further submit that offence took place after the Godhra Train Carnage and thus it could be presumed that particular community was under threat and target and therefore delay in lodging the FIR took place which is usual. He would further submit that houses were set on fire and articles lying in the house were looted and to that effect the evidence was produced; however the learned Sessions Court did not believe these evidence. The evidence has been specifically points out the incident of setting on fire and looting of muddamal articles lying in the house; but the same has been left unnatural to acquit the accused and therefore impugned order requires to be quashed and set aside.

9.1 Upon above submissions, it is submitted to allow present Revision Application.

10. Learned APP would submit that State has accepted the impugned order and no challenge has been made and therefore no interference would be required. He would submit to pass necessary order in the facts and circumstances of the case.

11. Respondents no.10 and 15 are reported to have expired and therefore revision against them stands abated. None remained present for rest of the accused – respondents.

12. Having heard learned advocates for the parties, let refer section 397 and section 401 of Cr.PC so as to understand ambit and scope of interference.

> "397. Calling for records to exercise powers of revision.
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> (1)The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.
> Explanation. - All Magistrates, whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of Section 398.
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> (2)The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.
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> (3)If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them.

401. High Court's powers of revision.

(1)In the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by Sections 386, 389, 390 and 391 or on a Court of Session by Section 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by Section 392.

(2)No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3)Nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction.

(4)Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

(5)Where under this Code an appeal lies but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same

accordingly."

13. What could be noticed from the language of statue is that revisional power is limited only to examine record of Trial Court for the purpose of satisfying as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed. Section 401(3) of Cr.P.C. specifically bars Court to convert a finding of acquittal into one of conviction.

14. The very object of conferring revisional jurisdiction upon the superior criminal courts is to correct miscarriage of justice arising from misconception of laws or irregularity of procedure. Apt to note that discretion in exercise of revisional jurisdiction should be exercised within four corners of section 397 read with section 401 of Cr.P.C., as to prevent miscarriage of justice. The revisional jurisdiction should not be lightly exercised as it cannot be invoked as of right. "For the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceeding of such inferior court", for this purpose, if High Court or the Sessions Court find necessary and expedient; it can exercise power. Normally, Revisional Court does not dwell at length upon the facts and evidence of the case. The Court, chair in revisional jurisdiction can consider material only to satisfy itself about the correctness, legality and propriety of the findings, sentence or order and refrain from substituting its own conclusion on an elaborate consideration of evidence.

15. In the **State of Maharashtra v/s. Jagmohan Singh [(2004) 7**

SCC 659], the Hon'ble Apex Court has held that High Court in exercise of its revisional jurisdiction cannot embark upon in-depth re-examination of the oral and medical evidence and come to the conclusion contrary to the consistent one reached by the two courts below.

16. In **Bharwada Bhoginbhai v/s. State of Gujarat [AIR 1983 SC 753],** the Hon'ble Apex Court has observed that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses, cannot be annexed with undue importance. More so, when all important "probabilities-factors" echoes in favour of the version narrated by the witnesses.

17. It is to be noted that in the present case, the State has not filed any acquittal appeal challenging the impugned order. The complainant has filed present Revision application upon police report. In exceptional cases revisional jurisdiction may be exercised by the High Court on revision application filed by private party in a case instituted on police report. **[see : K. Chinnaswamy Reddy v/s. State (AIR 1962 SC 1788)]**.

18. In **Khetra Basi v/s. State of Orissa [AIR 1970 SC 272]**, Hon'ble Apex Court while placing reliance on earlier decision in the case of **D.Stephens v/s. Nosibolla [AIR 1951 SC 196]** observed as under :-

> *"the revisional jurisdiction conferred on the High Court under the Code is not to be lightly exercised, when it is invoked by a private complainant against an order of acquittal, against which the government has right of appeal. It could be exercised only in exceptional cases*

where the interest of public justice require interference for the correction of a manifest illegality or the prevention of gross miscarriage of justice. This jurisdiction is not ordinarily invoked or used merely because the lower court has taken a wrong view of the law or mis-appreciated the evidence on record. The High Court in its revisional power does not ordinarily interfere with judgments of acquittal unless there has been manifest error of law or procedure."

19. I may also refer to judgment of Hon'ble Apex Court in the case of **Sheetala Prasad v/s. Sri Kant [(2010) 2 SCC 190]**, wherein, Hon'ble Apex Court held that private complainant can file a revision application in certain circumstances, including when trial court wrongly shuts out evidence which the prosecution wishes to produce. Noting principles of revisional jurisdiction at the instance of private complainant, it is observed by Hon'ble Apex Court as under :-

"12. The High Court was exercising the revisional jurisdiction at the instance of a private complainant and, therefore, it is necessary to notice the principles on which such revisional jurisdiction can be exercised. Sub-Section (3) of Section 401 of Code of Criminal Procedure prohibits conversion of a finding of acquittal into one of conviction. Without making the categories exhaustive, revisional jurisdiction can be exercised by the High Court at the instance of private complainant

(1) where the trial court has wrongly shut out evidence which the prosecution wished to produce,

(2) where the admissible evidence is wrongly brushed aside as inadmissible,

(3) where the trial court has no jurisdiction to try the case and has still acquitted the accused,

(4) where the material evidence has been overlooked either by the trial court or the appellate court or the order is passed by considering irrelevant evidence and (5) where the acquittal is based on the compounding of the offence

which is invalid under the law."

20. Thus, order of acquittal when invoked in revision by a private complainant, the jurisdiction cannot be exercised lightly and that it can be exercised only in exceptional cases where the interest of public justice require interference for correction of manifest illegality or for prevention of gross miscarriage of justice.

21. In background of above principle, we will now examine present case as to find out any irregularity or illegality has been recorded by the learned Sessions Judge which turn into gross miscarriage of justice while acquitting the accused.

22. Though re-analysis of the evidence is not permissible, in exercise of revisional jurisdiction, for the limited purpose to find out where there exists any patent illegality in appreciating evidence or application of procedure of law, let creep through to impugned judgment.

23. Having heard the learned advocate for the petitioner and examined the record of the case, the fact emerging from the impugned order is that FIR was filed five days after the so-called incident. The alleged incident took place on 01/03/2002 and victim was under police protection; yet the FIR was filed only on 06/03/2002. Thus, the first aspect which runs in the mind of the trial Court to disbelieve the case of prosecution is delay in filing of FIR; without any satisfactory reasons. According to this Court, in absence of any explanation qua delay of five days in

lodging the FIR at the instance of complainant and victim would prove fatal to the case of prosecution.

24. In all four witnesses including the complainant has been examined by the prosecution to establish the charge against the accused beyond reasonable doubt. All the four witnesses are resident of small Village Sundarpur. It is worth to note that even the accused are resident of the same village. Now, in background of this aspect, if we examine the evidence of the prosecution witnesses what culled out is that houses and the mosque were torched by the mob and this act took place subsequent to the Godhra Train Carnage under provocation. Whether the accused are part of the mob or not? It is the main crux of the entire allegations.

25. On going through the deposition of the IO – Shri B D Gohil (Exh.63), he has specifically deposed that during the investigation, he has not found any role of the accused in torching the houses and mosque. He has further deposed that accused were not specifically identified by the complainant. It also appears from the FIR that even the independent witnesses viz., the complainant–Himmatkhan Tajkha Malek (Exh.52), Witness-Iqbalhussain Fakirmohmmed Mansuri (Exh.53), witness – Kusenminya Dosuminya Kureshi (Exh.56) and Nabibhai Dawodbhai (Exh.61) did not depose that accused have torched the house and looted the articles. This issue assumes significance on the aspect that even prior to the incident, though the complainant were knowing the accused; they were not specifically named. Thus, during the court proceedings, the accused were not properly identified by the complainant. On

going through the impugned judgment, it also appears that learned Sessions Court has noted strak differences in the depositions of the four witnesses. According to the prosecution case, Mr.Mahebubkhan Fatehkhan and Mr.Hasanbhai Dosuminya were present on the spot of the incident; but they were not examined as witness and no reason has been assigned. This aspect has been weighed against the case of prosecution. Learned advocate Mr.Tirmizi did not put any explanation qua said aspect.

26. What further appears that from total 23 persons arraigned as accused, six wooden stick and two spades were recovered from the eight accused; Panch Witness to the recovery Panchnama was turned hostile. FSL Report has not been obtained and thus all this discrepancy proved fatal to the prosecution case. On one hand, the complainant deposed that Dhavalpeti Dargah was ransacked; whereas witness Iqbalhussain deposed that Madresha was ransacked. Thus, the discrepancy about the place is also relevance which would go against the case of prosecution.

27. What further appears that before lodging this FIR which came to be registered on 06/03/2003, according to deposition of the witnesses, they have discussed and deliberated as to how and in what manner the FIR to be registered. Thus, it appear that a pre-planned FIR to name and arraign the accused was lodged; no such explanation has been offered by the prosecution' nor by the witnesses that why and how it took long time to file FIR for the alleged incident which took place on 01/03/2003. It could be noticed that complainant and witnesses at the relevant

time were totally under the safeguard of the Police and they were living in the camp at the relevant time under the protective power. Thus, there was no reason to delay in lodging the FIR. All this aspect would lead trial Court to believe that no case is made out against the accused. The learned Sessions Court has given cogent and compulsive reasons for not believing the case of prosecution.

28. Although in a revisional jurisdiction, it is open to set aside the order of acquittal even at the instance of the private party where the State has accepted the verdict and do not prefer any appeal, it is well settled that jurisdiction should be exercised only in exceptional cases where some glaring defect in the procedure or manifest error on the point of law and consequent flagrant miscarriage of justice is visualized. Learned Advocate Mr.Tirmizi failed to point out any patent illegality. Even otherwise, in a case where private complainant or De-facto complainant is in a mood of settling personal vendetta cannot permit this Court to exercise the revisional jurisdiction. In the present case, no patent illegality is found. The trial Court has passed a very reasoned order to acquit the accused.

29. It is to be noticed that even if two views are possible even for the appellate Court in appeal against acquittal, it is less than chance to interfere with the view which has favoured the accused much less in a revision the powers are much narrowed.

30. In nutshell, going through impugned judgment along with Record and Proceedings of Sessions Case, it does not indicate that learned Sessions Judge has committed any illegality in

reaching to conclusion of acquitting the accused. De-facto complainant, has failed to establish exceptional case to believe that there is miscarriage of justice as well as public interest. Complainant has failed to prove his case within four corners by which revisional jurisdiction can be exercised by High Court.

31. For the foregoing reasons, since learned Sessions Judge has not committed any error much less error of understanding law, present Revision Application deserves no consideration and accordingly, it is dismissed. As noted earlier, since respondents no.10 and 15 are reported to have expired, revision against them stands abated.

Record and Proceedings be send back to learned Trial Court.

(J. C. DOSHI,J)

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