IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL NO. 1040 of 2010

With

CRIMINAL APPEAL NO. 1330 of 2010

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE KS JHAVERI

and

HONOURABLE MR.JUSTICE R.P.DHOLARIA

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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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BALVANTJI PRATAPJI THAKOR & 1....Appellant(s)

Versus

STATE OF GUJARAT....Opponent(s)/Respondent(s)

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Appearance:

MR. YOGENDRA THAKORE, ADVOCATE for the Appellant(s) No. 1 - 2

MR LR PUJARI, ADDL PUBLIC PROSECUTOR for the Opponent(s)/Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**
and
HONOURABLE MR.JUSTICE R.P.DHOLARIA

Date : 30/11/2015

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

1. Both these appeals arise out of a common judgement and order dated 05.05.2010 passed by the Additional Sessions Judge & Presiding Officer, Fast Track Court No. 3, Camp – Visnagar in Sessions Case No. 97 of 2008 whereby original accused nos. 5 & 6 were convicted for the offence punishable under section 302 r/w Section 34 of Indian Penal Code and sentenced to life imprisonment and fine of Rs. 1000/-, in default, to undergo further imprisonment for six months under section 302 of Indian Penal Code.

1.1 On the other hand, original accused nos. 1 to 4 & 7 to 9 were, however, acquitted of the offence under sections 302, 147, 148 & 149 of Indian Penal Code and under Section 135 of B.P. Act. Being aggrieved by the said conviction under section 302 of Indian Penal Code, original accused no. 5 & 6 have preferred Criminal Appeal No. 1040 of 2010 and challenging the acquittal of original accused nos. 1 to 4 & 7 to 9, the State has preferred Criminal Appeal No. 1330 of 2010.

2. The short facts of the prosecution case as narrated in the First Information Report is that on 15.04.2008 at about 01.00 pm at the instance of one Bharatbhai Rabari inter alia contending that while the father of Bharatbhai was returning from the residence of one Tejabhai, the accused persons reached there with weapons like spear, sword, dharia, knife etc. It is the case of the prosecution that as the father of the

complainant had not returned home, the complainant along with his cousin and elder borther went towards the residence of Tejabhai and when they reached Vastrapur School, they saw the accused persons at the scene of offence. It is further the case of the prosecution that absconding accused Vishnuji Thakor had inflicted a sword blow on the head of the father of the complainant whereas accused no. 5 was seen causing spear injury on the left side of abdomen followed by a spear blow on the back by accused no. 6. Rest of the accused persons were seen giving indiscriminate blows to the father of the complainant. It is the case of the prosecution that the father of the complainant started screaming and therefore Tejabhai rushed to the scene of incident. The accused persons ran away from the scene of offence.

2.1 Pursuant to the complaint, investigation was carried out. After investigation, on the basis of material collected against the accused, since the Investigating Officer found a prima facie case against the accused, chargesheet was filed and as the case was triable by the Court of Sessions, it was committed to the Court of Sessions. The trial Court framed charge against the accused. The accused pleaded not guilty to the charge and claimed to be tried.

2.2 Trial was initiated against the accused and during the course of trial the prosecution examined 22 witnesses whose evidences were read before us by learned advocates for both the sides and also relied upon around 25 documents which have been perused by us. At the end of the trial and after recording the statement of the accused under section 313 of Cr.P.C., and hearing arguments on behalf of prosecution and

the defence, the learned Additional Sessions Judge convicted original accused nos. 5 & 6 as mentioned aforesaid. The court below acquitted original accused nos. 1 to 4 & 7 to 9. Being aggrieved by and dissatisfied with the aforesaid judgement and order passed by the Sessions Court, the present appeals have been preferred by original accused nos. 5 & 6 as well as State.

3. Mr. Yogendra Thakore, learned advocate appearing for accused has mainly contended that the trial court has committed a grave error by not properly appreciating the material available on record of the case. He has drawn the attention of this Court to the evidence of the complainant – P.W. 1 and his brother Jivanbhai – P.W. 16 and submitted that it is clear from the depositions of these witnesses that they are not telling the truth. He has submitted that the trial court has erred in not appreciating the evidence of Defence Witness – Babubhai Vankar Ex. 130 in its true perspective.

3.1 Mr. Thakore further submitted that no blood stains were found from the scene of offence which shows that the prosecution story is made up. He submitted that no incriminating evidence was found against the accused persons and therefore accused nos. 5 & 6 may be acquitted.

3.2 Mr. Thakore, in the alternative, without prejudice to his rights and contentions, submitted that considering the nature of offence and the fact that a single blow was inflicted upon the deceased, the case of accused nos. 5 & 6 may be considered under Section 304 (Part I) of Indian Penal Code.

4. On the other hand, Mr. L.R. Pujari, learned APP appearing for the State has submitted that the trial court committed an error in acquitting original accused no. 1 to 4 & 7 to 9. It was contended by Mr. Pujari that so far as the acquittal of original accused no. 1 to 4 & 7 to 9 is concerned, the judgement and order of the Sessions Court is against the provisions of law; the Sessions Court has not properly considered the evidence led by the prosecution and looking to the provisions of law itself it is established that the prosecution has proved the whole ingredients of the evidence against the accused.

4.1 Mr. Pujari submitted that admittedly, the fatal blows were on the vital organ with great force resulting in serious injury and that the injury is sufficient in the ordinary course of nature to cause death and, thus, both intention and knowledge are decipherable from the conduct of the accused and, hence, the conviction under Section 302 is to be upheld.

4.2 Mr. Pujari further submitted that the conviction and sentence imposed upon original accused no. 5 & 6 is just and proper and does not deserve to be interfered with. He has also taken this court through the oral as well as the entire documentary evidence.

5. Learned advocates appearing for both the sides have taken us through the evidence of the witnesses who have supported the prosecution case. Let us go through the evidence of material witnesses relied upon by the prosecution.

6. P.W. 1 – Rabari Bharatbhai is the complainant and has

been examined on behalf of the prosecution vide Ex. 22. He is an eye witness to the present incident. This witness has fully supported the case of the prosecution as narrated in the complaint which was produced at Ex. 23 and he has very clearly mentioned as to how the incident occurred and the role played by the accused persons. He gave the names of the accused persons.

6.1 P.W. 16 – Jivanbhai Rabari has been examined vide Ex. 86 by the prosecution. This witness has supported the case of the prosecution and deposed that while they went to search their father and while they reached Vastrapur School they found the accused person assaulting the deceased. This witness has also categorically named the accused persons and the weapons they carried and the injuries inflicted by them.

7. We have also perused the post mortem report which mentions the cause of death to be due to haemorrhagic shock due to vital organ's injury. Columns No. 17 of this very report mentions the nature of injuries sustained by the victim which were around 17 in number.

7.1 P.W. 17 – Dr. Pragneshkumar Patel is the medical officer who had treated the deceased. This witness has staed that on 14.04.2008 when he was performing his duty at C.H.C, Kheralu, at about 09.45 pm the deceased was admitted for treatment with police yadi. This witness has stated that his relatives gave history about the incident. This witness has further stated that the injuries on the person of the deceased were possible by way of sharp edged weapons which were

recovered as muddamal. Medical certificate in this regard was produced at Ex. 93.

7.2 P.W. 18 – Dr. Prakash Shah is the medical officer who performed the post mortem on the deceased. This witness has stated that the injuries were ante mortem. This witness has stated that the cause of death was shock due to grievous injury sustained on vital organs. He has further stated that the injuries mentioned in column no. 17 of the post mortem report were on the material part of the body and sufficient to cause death in ordinary course of nature and that the said injuries are possible by way of muddamal weapons.

8. So far as the evidence of defence witness is concerned, the case of the prosecution regarding an alleged altercation between the parties is borne out. The motive of the alleged offence is clear. The fact that the police officers were called so as to settle the matter between the parties.

8.1 Having considered minutely the evidence on record, oral as well as documentary, which we have appreciated, re-appreciated and reconsidered in light of the latest decision of the Apex Court we find that the finding of facts as far as the conviction of the original accused nos. 5 & 6 under section 302 r/w Section 34 of Indian Penal Code cannot be found any fault with. We are afraid that we are not persuaded to hold that the offence under section 304 IPC shall be attracted in the present case as submitted by learned advocate for accused. The injuries and the evidence of witnesses will not permit us to hold that the alleged incident was not motivated. There were total 17 injuries on the person of the deceased.

We are not in any way persuaded to hold that the attack was not motivated.

8.2 In a recent decision of the Apex Court in the case of **Bhaikon @ Bakul Borah vs. State of Assam reported in JT 2013 (10) SC 373** has held as under:

> "15. This Court, in a series of decisions has held that life imprisonment means imprisonment for whole of life subject to the remission power granted under Articles 72 and 161 of the Constitution of India. [Vide Life Convict @ Khoka Prasanta Sen vs. B.K. Srivastava & Ors. (2013) 3 SCC 425, Mohinder Singh vs. State of Punjab, (2013) 3 SCC 294, Sangeet and Anr. vs. State of Haryana (2013) 2 SCC 452, Rameshbhai Chandubhai Rathod (2) vs. State of Gujarat (2011) 2 SCC 764, Chhote Lal vs. State of Madhya Pradesh (2011) 8 SCR 239, Mulla and Another vs. State of Uttar Pradesh (2010) 3 SCC 508, Maru Ram vs. Union of India & Ors. (1981) 1 SCC 107, State of Madhya Pradesh vs. Ratan Singh & Others (1976) 3 SCC 470 and Gopal Vinayak Godse vs. State of Maharashtra AIR 1961 SC 600].
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> 16. In view of the clear decisions over decades, the argument of learned senior counsel for the appellant-accused is unsustainable, at the same time, we are not restricting the power of executive as provided in the Constitution of India. For adequate reasons, it is for the said authorities to exercise their power in an appropriate case."

9. As far as the acquittal of original accused nos. 1 to 4 & 7 to 9 is concerned, it is required to be noted that the principles which would govern and regulate the hearing of appeal by this Court against an order of acquittal passed by the trial Court have been very succinctly explained by the Apex Court in a catena of decisions. In the case **of M.S. Narayana Menon @**

Mani Vs. State of Kerala & Anr, reported in (2006)6 SCC, 39, the Apex Court has narrated about the powers of the High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under:

> "54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgement of acquittal, the High Court should have borne in mind the well-settled principles of law that where two view are possible, the appellate court should not interfere with the finding of acquittal recorded by the court below."

9.1 Further, in the case of **Chandrappa Vs. State of Karnataka, reported in (2007)4 SCC 415** the Apex Court laid down the following principles:

> "42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:
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> [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 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 curtain extensive powers of an

> appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis 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 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 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."

9.2 Thus, it is a settled principle that while exercising appellate power, even 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.

9.3 Even in a recent decision of the Apex Court in the case of **State of Goa V. Sanjay Thakran & Anr. Reported in (2007)3 SCC 75**, the Court has reiterated the powers of the High Court in such cases. In para 16 of the said decision the Court has observed as under:

> "16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal

> unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgement delivered by the Court below. However, the appellate court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with."

9.4 Similar principle has been laid down by the Apex Court in the cases of **State of Uttar Pradesh Vs. Ram Veer Singh & Ors, reported in 2007 AIR SCW 5553** and in **Girja Prasad (Dead) by LRs Vs. state of MP, reported in 2007 AIR SCW 5589**. Thus, the powers which this Court may exercise against an order of acquittal are well settled.

9.5 In the case of **Luna Ram Vs. Bhupat Singh and Ors. reported in (2009) SCC 749**, the Apex Court in paras 10 and 11 has held as under:

> "10. The High Court has noted that the prosecution version was not clearly believable. Some of the so-called eye witnesses stated that the deceased died because his ankle was twisted by an accused. Others said that he was strangulated. It was the case of the prosecution that the injured witnesses were thrown out of the bus. The doctor who conducted the post-mortem and examined the witnesses had categorically stated that it was not possible that somebody would throw a person out

of the bus when it was in a running condition.

11. Considering the parameters of appeal against the judgement of acquittal, we are not inclined to interfere in this appeal. The view of the High Court cannot be termed to be perverse and is a possible view on the evidence."

9.6 Even in a recent decision of the Apex Court in the case of **Mookiah and Anr. Vs. State rep. By the Inspector of Police, Tamil Nadu reported in AIR 2013 SC 321**, the Apex Court in para 4 has held as under:

4.It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led in by the prosecution anddefence, acquitted the accused in respect of th e charges leveled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Section 302 read with Section 34of IPC and awarded RI for life. Since counsel for the appellants very much emphasized that the High Co urt has exceeded its jurisdiction in upsetting the order ofacquittal into conviction, let us analyze the scope and power of theHigh Court in an appeal file d against the order of acquittal.ThisCourt in a serie s of decisions has repeatedly laid down that as the first appellate court the High Court even while dealing with an appeal against acquittal,wasalso entitled,andobliged as well, to sc an through and if need be reappreciatethe entire evidence, though while choosing to interfere onlyth e court should find an absolute assurance of the gui lt on the basis of the evidence on record and not merely becausethe High Court could take one mo re possible or a differentview only. Except the abo ve, where the matter of the extentand depth of con sideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction

> or the other against an acquittal. [Vide State of Rajasthan vs. Sohan Lal and Others, (2004) 5 SCC 573]"

9.7 It is also a settled legal position that in acquittal appeal, the appellate court is not required to re-write the judgement or to give fresh reasonigns, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of **State of Karnataka Vs. Hemareddy, reported in AIR 1981 SC 1417** wherein it is held as under:

> "… This court has observed in Girija Nandini Devi V. Bigendra Nandini Chaudhary (1967)1 SCR 93: (AIR 1967 SC 1124) that it is not the duty of the appellate court when it agrees with the view of the trial court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

9.8 Thus, in case the appellate court agrees with the reasons and the opinion given by the lower court, then the discussion of evidence at length is not necessary.

10. We have examined the matter carefully and gone through the evidence on record. We have appreciated, re-appreciated and re-evaluated the evidence on the touchstone of latest decision of the Hon'ble Apex Court. We find that the reasonings adopted and findings arrived at by the trial court with regard to the role of original accused nos. 1 to 4 & 7 to 9 are not required to be interfered with. The appeal filed by respondent – State does not have any merits and is required to be dismissed.

11. For the foregoing reasons, both the appeals are hereby dismissed. The judgement and order dated 05.05.2010 passed by the Additional Sessions Judge and Presiding Officer, Third Fast Track Court, Camp – Visnagar in Sessions Case No. 97 of 2008 is confirmed. However, it is clarified that after original accused nos. 5 & 6 serve sentence for 14 years their case may be considered for remission as it is not that life imprisonment should be treated till last breath and the case of the original accused nos. 5 & 6 may be reviewed by the appropriate authority considering the decision of Apex Court in the case of Bhaikon @ Bakul Borah (supra). The period of sentence already undergone shall be considered for remission and set off in accordance with law. Bail bond shall stand cancelled in case of original accused nos. 1 to 4 & 7 to 9. So far as the case of the absconding accused is concerned, appropriate action to be undertaken as soon as he is arrested. R & P to be sent back forthwith.

(K.S.JHAVERI, J.)

(R.P.DHOLARIA,J.)

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