

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/CRIMINAL APPEAL NO. 1447 of 2006****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR. JUSTICE ANANT S. DAVE****and****HONOURABLE MR.JUSTICE A.G.URAIZEE**

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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**VIKRAMSINH MANUBHA PARMAR**

Versus

**THE STATE OF GUJARAT**

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Appearance:

MR ASHISH M DAGLI(2203) for the Appellant(s) No. 1

MS SHRUTI PATHAK APP for the Opponent(s)/Respondent(s) No. 1

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**CORAM: HONOURABLE MR. JUSTICE ANANT S. DAVE**

and

**HONOURABLE MR.JUSTICE A.G.URAIZEE**

**Date : 22/11/2017**

**ORAL JUDGMENT**

**(PER : HONOURABLE MR.JUSTICE A.G.URAIZEE)**

1. In this Appeal filed under Section 374 of the Code of Criminal Procedure, 1973, the appellant – original accused has challenged the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Fast Track

Court No.2, City Sessions Court, Ahmedabad, in Sessions Case No.51 of 2001 dated 15.05.2006, whereby while acquitting the co-accused persons the learned Sessions Judge convicted the appellant – accused for the offence punishable under Section 302 and 34 of the Indian Penal Code (for short “I.P. Code”) and directed the appellant to undergo the sentence as under:

Nature of offence	Sentence
302 & 34 of IPC	Imprisonment for life and fine of Rs.5,000/-
25(1)(B) of the Arms Act	Imprisonment four years R.I. with fine of Rs.3,000/-

2. The case of the prosecution as unfolded during the trial is that on 28.11.1998 at about 12:30 to 12:45 noon, the accused i.e. Pankaj and Raju along with present appellant resorted firing at Dipak Jasubhai Sheth at the basement of parking of Mahavir Complex, Ghatlodia nearby the lift and stairs. The injured sustained fire shot wounds over his right jaw and palm of right hand. He was removed to V.S. Hospital for treatment. Thereafter, Ashokbhai Shah (Son of maternal aunt of the injured) came there on receiving the telephonic message and asked Dipakbhai as to what had happened. Dipakbhai told him he received bullet injuries and thereafter Ashokbhai Shah lodged the complaint, which is registered as C.R. I 318 of 1998 with Ghatlodia Police Station. Said Dipakbhai died during the course of treatment.

On the basis of aforesaid complaint, the investigation was carried out and upon the conclusion of investigation as prima facie case was found, therefore, charge-sheet came to be filed against appellant along with other accused person in the Court

of learned Metropolitan Magistrate, Ahmedabad, for the offence punishable under Section 302 of Indian Penal Code and Section 25(1)(B) of the Arms Act. As the case was exclusively triable by the Court of Sessions Judge under Section 209 of Code of Criminal Procedure (for short "Code"). Upon committal, the case came to be registered as Sessions Case No.51 of 2001.

The learned Sessions Judge framed the charge at Exhibit 27 on 18.06.2002. The same was read over and explained to the appellant. The appellant pleaded not guilty and claimed to be tried.

In order to bring home the charge levelled against the appellant, the prosecution has examined the following witnesses and adduced the documentary evidence:

#### **ORAL EVIDENCE:**

PW No.	Name	Exhibit
1	Ghanshyambhai Motibhai Parmar	83
2	Ashokbhai Ratilal Shah	84
3	Saumil Premchandbhai Merchant	88
4	Jairambhai Vastabhai Rabari	90
5	Shambhubhai Maljibhai Desai	91
6	Akbarkhan Hussainkhan Pathan	94
7	Dr. Dinesh Savjibhai Chandana	97
8	Surendrabhai Pursottambhai Patriwala	100
9	Himanshu Pravinchandra Kothari	103
10	Suketu Jayantilal Mehta	109
11	Jaswantlal Manilal Sheth	110
12	Dilip Arnjubhai Rathod	111

13	Ishwarbhai Nagjibhai Desai	120
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### **DOCUMENTARY EVIDENCE:**

Sr,No.	Particulars	Exhibit
1.	Map – place of offence	73
2.	Recovery Panchnama – Cloth of deceased	74 & 76
3.	Inquest Panchnama	75
4.	Ravangi Nondh – Muddamal to FSL	76, 78 & 79
5.	Receipt issued by FSL	80, 81 & 82
6.	Panchnama – Physical condition of appellant	85
7.	Complaint	89
8.	Panchnama – recovery of weapon	92
9.	Yadi issued by I.O. to Executive Magistrate for TI Parade	95
10.	Panchnama – TI Parade of accused No.1	96
11.	Medical papers	98
12.	FSL Report	101, 121 & 123
13.	Panchnama – scene of offence	104
14.	Report under Section 157 to the complaint given by complainant	112
15.	Sanction to file charge-sheet under the Arms Act	124

The defence side has produced following documentary evidence:

**DOCUMENTARY EVIDENCE (DEFENSE SIDE):**

Sr,No.	Particulars	Exhibit
1.	Vardhi issued by V.S. Hospital	113
2.	Wireless Message	114 & 115
3.	Vardhi about the death of deceased	116
4.	Message for arrest of appellant	117

Upon conclusion of the trial, the statement under Section 313 of the Code of the accused-appellants came to be recorded. The trial Court, after considering the evidence on record and arguments of learned APP and learned advocate for the accused, convicted the appellants accused of the charges by the impugned judgment and order.

3. I have heard Mr. Ashish Dagli, learned advocate for the appellant and Mr. Shruti Pathak, learned APP for the respondent – State.

4. Mr. Dagli, learned advcoate for the appellant vehemently submitted that learned trial Judge has recorded conviction on the basis of evidence of Ghanshyambhai Motibhai Parmar (P.W.1) and Jayrambhai Vastabhai Rabari (P.W. 4). It is his further submission that P.W.1 is not an eye-witness and he is a chance witness. He further submitted that he does not know anything about P.W.4. He would also submit that there is no evidence that in fact, P.W.1 had gone to delivery of the gas. There is no evidence that he was actually working with Gas Agency. He has relied upon the decision of the Hon'ble Supreme Court in the case of Sachhey Lal Tiwari Vs. State of

U.P. reported in 2004(11) SCC 410 (Para 77 on the issue of chance witness. He further submitted that P.W. 1 has identified the appellant in Test Identification Parade after 30 days of the incident on the basis of photographs recovered from him. It is his further submission that the Test Identification Parade conducted by Pathan Akbarkhan Husainkhan (P.W.6) can also not be relied upon because dummy person did not bear similarities with the appellant (Discovery). He also submitted that the panch witnesses of discovery panchnama are not local and they are from Ahmedabad and hence, discovery panchnama is not reliable. He also submitted that the motive for committing murder is also not forthcoming. Hence, he urged that the appeal may be allowed and the appellant may be acquitted of the charges levelled against him.

5. Ms. Shruti Pathak, learned APP has supported the impugned judgment. According to her submission, P.W. 1 is natural witness and his evidence does not suffer from any embellishment. It is his further submission that the conduct of the appellant in absconding for two years after the incident is also relevant factors which needs to be considered while evaluating the overall evidence adduced by the prosecution. She has further submitted that the creditability of P.W.1 is in no manner affect and dilute on account of showing the photographs of appellant to him. She further submitted that it is evident from the evidence of P.W.6 that the appellant was asked to stand in queue along with dummy person as per his choice. Despite incisive cross-examination, the evidence of P.W.6 is not diluted. Hence, the Identification of the appellant by P.W.1 is duly proved by the prosecution. She submitted that the revolver is discovered at the instance of the appellant

which is duly proved through the evidence of discovery panchnama.

6. She further submitted that P.W. 1 stood rigour of cross-examination and it is not revealed that he was tutored during 30 days, during identification of the appellant in the Test Identification Parade. P.W. 5 – Discovery Panchnama has stated in cross-examination that both parts of Panchnama were signed in field from where the revolver was discovered. Non-examination of Doctor is not of consequence as the medical evidence produced by the prosecution clearly reveals that the deceased was conscious when he was brought to the hospital. Hence, she submitted that the impugned judgment does not want any interference in this appeal.

7. In rejoinder, relying upon the decision of the Hon'ble Supreme Court in the case of ***Rahman Vs. the State of U.P.*** reported in ***AIR 1972 SC 110*** (Paras 21 & 22), Mr. Dagli, learned advocate submitted that abscondence is not proof of guilty. He also relied upon the decision of Hon'ble Supreme Court in the case of ***Jagdishsinh @ Munno Ranjitsinh @ Ranubhai Jadeja Vs. State of Gujarat*** reported in ***2016(4) GLR 3122*** (para 34), wherein it is held that exact information attributable to the accused must be brought on record.

8. It is imminently clear that essentially, the prosecution case rests on the evidence of P.W.1, P.W.4, P.W.6, discovery panch and discovery panchnama of weapons on crime.

9. P.W.1 Ghanshyambhai Motibhai Parmar is star witness of the prosecution. It emerges from his evidence that at the time

of incident, he was working as delivery boy in Kiran Park Gas Company. He used to deliver gas cylinders covering area from Bhuyangdev to Ghatlodia villages. Mahavir Tower where the incident had happened falls under Ghatlodiya area. According to him, the incident had happened between 12 to 1:00 p.m. while he was going to deliver gas cylinders in Sejal Hospital. At that time, Dipakbhai and two others were talking on staircase near the lift on the ground floor. When he came back after delivering gas cylinder, he had heard two blasts and showed two men running from Mahavir Tower. He caught hold of one of them by his collar. The person, who was caught by him, had threatened him by brandishing revolver on him. However, a Pangallawala man asked him to leave that person and therefore, he left him. It emerges from his evidence that around one month after the incident, the police had shown him photographs and asked him to identify as the person, who had shown him revolver. Thereafter, around one and half or two years, he was again called at Mamlatdar office and was asked to identify the person, who had shown revolver from amongst 8 to 10 persons standing in queue. He identified the appellant as person, who had brandished revolver at him from those 8 to 10 persons. From his cross-examination, it emerges that he had caught one from two unknown persons while other person had threatened him by showing revolver. Moreover, he has stated in his cross-examination that the appellant had shown him three photographs and in one, wherein one person was common. It also emerges that he had stated in his statement before the Police that on seeing the photograph, he had told the police that the person appearing in photographs had 75% similarities with the person whom he had caught.



10. The another important witness is Jayrambhai Vastabhai Rabari (P.W.4). He was workign as driver of the deceased Dipakbahi at the time of incident. It emerges from his evidence that after Dipakbhai got injured, he and Ramaben put the deceased in motorcar and took him to Vadilal Hospital for treatment. He stated that on the way, the deceased told him that the appellant had fired gunshot at him and Anand was with the appellant. However, from his cross-examination, it appears that in his statement before the police, he had not stated that the deceased had disclosed to him that the appellant had caused gunshot injury.

11. P.W. 6 Akbarkhan Pathan, who was working as Mamlatdar at the relevant time in Ahmedabad city. Test Identification Parade was conducted in his presence and P.W.1 had identified the appellant from amongst the dummy persons as the person , who had brandished the revolver at him.

12. It is thus, imminently clear that the evidence of P.W.1 and P.W.4 suffer from embellishment and material contradictions. The prosecution has set up P.W.1 as the delivery boy of Gas Agency but there is no iota of evidence to even remotely indicate that he had in fact worked as delivery boy for Gas Agency. Not only that but the prosecution has not produced any evidence to show that in fact, P.W.1 had gone to Mahavir Tower to deliver the gas cylinders at Sejal Hospital. It was very easy for the Investigating Officer to collect such evidence but same is not collected. Moreover, the identification of the appellant by P.W.1 in Identification Parade also stands vitiated because P.W.1 himself has stated in his examination-in-chief that after one month of the incident, the

photographs were shown to him by the police and he was asked to identify the appellant as person, who had brandished the revolver him. Strangely, thereafter, after around 1/2 years the Test Identification Parade was conducted in which P.W.1 identified the appellant as person, who had brandished revolver at him. It is not the case of the prosecution that the P.W.1 had previous acquaintance with the appellant and that it is to say that the appellant was known to P.W.1. Therefore, the identification of the appellant by P.W.1 is doubtful on two counts; firstly after one month of the incident, the photographs of the appellants were shown to P.W.1 and secondly, Test Identification Parade was held 1/2 years thereafter. Therefore, in our considered view, the identification of the appellant by P.W.1 in test identification in Test Identification Parade and thereafter, in the Court is highly doubtful and no conviction can be recorded on that base. The evidence of P.W.1 is not reliable for the purpose of recording conviction.

13. The evidence of P.W. 4, driver of the deceased also suffers from improvement and embellishment. It is very clear from the evidence particularly, his cross-examination and evidence of Investigating Officer, P.W. 12 that he had not stated in his statement before the Police and in-root to V.S. Hospital and deceased had disclosed him that the appellant had caused injury to him by gunshot and therefore, the evidence of P.W.4 is not reliable for the purpose of conviction.

14. So far as discovery of revolver at the instance of appellant is concerned, it is trite law that the discovery of weapon on crime even after it is believed to have been proved is corroborative piece of evidence. Such discovery alone would

not automatically lead to conclusion that offence was also committed by the accused. In fact, thereafter, the prosecution has to establish a close link between discovery of the material object and its use in the commission of an offence by the accused persons. Moreover, such an information, even if admitted in the evidence, does not constitute substantive evidence but is only a corroborative piece of evidence to show that the accused had knowledge of the whereabouts of the weapon. It is only after it is proved that the weapon has discovered at the instance of the accused person was in fact used in the commission of the offence by him through substantive evidence does the fact of discovery of weapon becomes relevant as a piece of corroborative evidence.

15. Hence, when it is doubtful from the evidence of P.W.1 and P.W.4 that it was the appellant, who had killed the deceased Dipak by firing gunshot, the appellant cannot be convicted solely on the basis of discovery of revolver at the instance of appellant.

16. It is imminent from the record that after the incident, the appellant was not available for more than 2 years and therefore, Ms. Shruti Pathak, learned APP has vehemently urged that this conduct of abscondence on account of the involvement of the appellant in crime. This contention cannot be accepted and only because the appellant was available for a long time after the incident, that itself would not permit presumption or conclusion that the appellant concealed himself because he was guilty. The Hon'ble Supreme Court in the case of ***Rahman (Supra)***, has held in para 21 as under:

*"It is true that the appellant was concealing himself for nearly a month though he must have known that he was wanted by the Police and that he left his wife to face the situation alone. But absconding by itself is not conclusive either of guilt or of a guilty conscience. For, a person may abscond on account of fear of being involved in the offence or for any other allied reason."*

17. We are therefore, unable to convince ourselves to record our concurrent findings recorded by the learned trial Judge to convict the appellant and therefore, the impugned judgment and order of sentence convicting the appellant for the offence punishable under Section 302 read with Section 34 of Indian Penal Code and Section 25(1)(b) of the Arms Act does not warrant any interference in this appeal.

18. For the foregoing reasons, the Criminal Appeal is allowed. The conviction and sentence recorded by the learned Additional Sessions Judge, Fast Track Court No.2, City Sessions Court, Ahmedabad, by the judgment and order dated 15.05.2006 rendered in Sessions Case No.51 of 2001 convicting and sentencing the appellant is set aside. The appellant is acquitted for the charges levelled against him.

The appellant is on bail and hence, his bail bonds stand cancelled and surety, if any, stands discharged. Fine paid by the appellant is ordered to be refunded forthwith.

R & P is ordered to be transmitted to the concerned trial Court forthwith.

**(ANANT S. DAVE, J)**

**(A.G.URAIZEE, J)**

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