IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL NO. 6 of 2006

FOR APPROVAL AND SIGNATURE:

HONOURABLE DR. JUSTICE ASHOKKUMAR C. JOSHI

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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

ASIF ALIAS GANDHARO SULEMANBHAI SAMA & 3 other(s)

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Appearance:
MS. JIRGA ZAVERI, APP for the Appellant(s) No. 1
ADVOCATE NOTICE SERVED for the Opponent(s)/Respondent(s) No. 1
HCLS COMMITTEE(4998) for the Opponent(s)/Respondent(s) No. 2
MR. HARDIK K RAVAL(6366) for the Opponent(s)/Respondent(s) No. 2
MR.CHIRAG B UPADHYAY(6735) for the Opponent(s)/Respondent(s) No. 3,4

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CORAM:**HONOURABLE DR. JUSTICE ASHOKKUMAR C. JOSHI**

Date : 30/06/2022
ORAL JUDGMENT

1. Heard learned APP Ms. Jirga Jhaveri for the appellant – State and learned advocate Mr. Hardik Raval for the respondent No. 2 and learned advocate Mr. Chirag Upadhyay for the respondent Nos. 3 and 4 at length.

2. The State has filed this acquittal appeal challenging the

judgment and order dated 12.8.2005 passed by the learned Presiding Officer, 10th Fast Track Court, Rajkot in Sessions Case No. 32 of 2005 for the offences punishable under Sections 399, 402, 120(B) and 188 of the Indian Penal Code.

3. The brief facts of the case are that the respondents were gathered with common intention of committing an offence of dacoity with deadly weapons. That, the respondents have also committed a breach of a notification prohibiting carrying arms and weapons. That, the complaint was registered by the Police Inspector Mr. S.K. Janak Kanth. That, after completion of the investigation, charge sheet was submitted before the learned Judicial Magistrate First Class but the learned Judicial Magistrate First Class is not competent to try the offence, the case was committed to the learned Sessions Court under Section 209 of the Criminal Procedure Code. That, the charge sheet was filed and since the accused did not plead guilty, the trial was conducted. That, after the trial, the learned Fast Track Court was pleased to acquit the respondents – accused from the charges levelled against them and therefore, the State has preferred this appeal.

4. Learned APP Ms. Jirga Zaveri for the State has vehemently and fervently submitted that learned Fast Track Court has committed error in not appreciating the evidence and resultantly there is miscarriage of justice. She further submitted that the learned Fast Track Court has not re-appreciated and re-evaluated the evidence in its correct perspective and erroneously acquitted the respondents. She also contended that the as per the judgment of the Hon'ble Apex Court in the case of **State of U.P. Vs. M.K. Anthony,** reported in **AIR 1985 SC 48**, wherein it was held that while appreciating the evidence, ring of truth should be basis of forming

opinion about the witnesses and the prosecution case never becomes fatal due to minor contradictions. She contended that the different parameters of Section 399 coupled with Sections 391 and 402 of the IPC are duly proved by the prosecution and hence, acquittal of the accused may be converted into conviction and therefore, this appeal may be allowed.

5. Per contra, learned advocate Mr. Hardik Raval for the respondent No. 2 joined with the arguments advanced by the learned advocate Mr. Chirag Upadhyay for the respondent Nos. 3 and 4.

5.1 Learned advocate Mr. Chirag Upadhyay for the respondent Nos. 3 and 4 has vehemently and fervently argued that pursuant to the depositions of the prosecution witnesses as well as pursuant to the judgment and order of the learned Fast Track Court, the learned Fast Track Court has rightly opined that for commission of offence under Section 399 coupled with the Section 391 of the IPC, minimum 5 persons with common intention to commit an offence is to be proved but here it is undisputed fact that there are only 4 persons charged with the offence punishable under Section 399 read with Section 391 of the IPC. Learned advocate Mr. Upadhyay has also drawn attention of this Court that the prosecution has not proved its case beyond reasonable doubt, so longer as the charges framed against the accused persons. Ultimately, learned advocate Mr. Upadhyay has urged that there is no requirement to interfere by this Court and the judgment and order passed by the learned Fast Track Court is required to be confirmed and this appeal may be dismissed.

6. Having heard the arguments advanced by learned advocates for the respective parties and considering the materials available on

record, this Court would like to refer as under:

6.1 Before adverting to the facts of the case, it would be worthwhile to refer to the scope of interference in acquittal appeals. It is well settled by catena of decisions that an appellate Court has full power to review, re-appreciate and consider the evidence upon which the order of acquittal is founded. However, the Appellate Court must bear in mind that in case of acquittal, there is prejudice 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 reaffirmed and strengthened by the trial Court.

6.2 Further, 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. Further, 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 arrive at would not be arrived at by any reasonable person, and therefore, the decision is to be characterized as perverse.

6.3 Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment 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. That the duty is cast upon the appellate Court, in such circumstances, to re-appreciate the evidence to arrive to just decision on the basis of material placed on record to find out whether the accused is connected with the commission of the crime with which he is charged.

6.4 In ***Mallikarjun Kodagali (Dead) represented through Legal Representatives v. State of Karnataka and Others, (2019) 2 SCC 752***, the Apex Court has observed that, *"The presumption of innocence which is attached to every accused gets fortified and strengthened when the said accused is acquitted by the trial Court. Probably, for this reason, the law makers felt that when the appeal is to be filed in the High Court it should not be filed as a matter of course or as matter of right but leave of the High Court must be obtained before the appeal is entertained. This would not only prevent the High Court from being flooded with appeals but more importantly would ensure that innocent persons who have already faced the tribulation of a long drawn out criminal trial are not again unnecessarily dragged to the High Court*".

6.5 Yet in another decision in ***Chaman Lal v. The State of Himachal Pradesh, rendered in Criminal Appeal No. 1229 of 2017 on 03.12.2020***, ***2020 SCC OnLine SC 988*** the Apex Court has observed as under:

> *"9.1 In the case of Babu v. State of Kerala, (2010) 9 SCC 189), this Court had reiterated the principles to be followed in an appeal against acquittal under Section 378 Cr.P.C. In paragraphs 12 to 19, it is observed and held as under:*
>
> *12. This Court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the trial court. The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though*

the view of the appellate court may be the more probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject-matter of scrutiny by the appellate court. (Vide Balak Ram v. State of U.P (1975) 3 SCC 219, Shambhoo Missir v. State of Bihar (1990) 4 SCC 17, Shailendra Pratap v. State of U.P (2003) 1 SCC 761, Narendra Singh v. State of M.P (2004) 10 SCC 699, Budh Singh v. State of U.P (2006) 9 SCC 731, State of U.P. v. Ram Veer Singh (2007) 13 SCC 102, S. Rama Krishna v. S. Rami Reddy (2008) 5 SCC 535, Arulvelu v. State (2009) 10 SCC 206, Perla Somasekhara Reddy v. State of A.P (2009) 16 SCC 98 and Ram Singh v. State of H.P (2010) 2 SCC 445)

13. In Sheo Swarup v. King Emperor AIR 1934 PC 227, the Privy Council observed as under: (IA p. 404) "... 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 (4) 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."

14. The aforesaid principle of law has consistently been followed by this Court. (See Tulsiram Kanu v. State AIR 1954 SC 1, Balbir Singh v. State of Punjab AIR 1957 SC 216, M.G. Agarwal v. State of Maharashtra AIR 1963 SC 200, Khedu Mohton v. State of Bihar (1970) 2 SCC 450, Sambasivan v. State of Kerala (1998) 5 SCC 412, Bhagwan Singh v. State of M.P(2002) 4 SCC 85 and State of Goa v. Sanjay Thakran (2007) 3 SCC 755)

15. In Chandrappa v. State of Karnataka (2007) 4 SCC 415, this Court reiterated the legal position as under: (SCC p. 432, para 42)

"(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 curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise 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."

16. In Ghurey Lal v. State of U.P (2008) 10 SCC 450, this Court reiterated the said view, observing that the appellate court in dealing with the cases in which the trial courts have acquitted the accused, should bear in mind that the trial court's acquittal bolsters the presumption that he is innocent. The appellate court must give due weight and consideration to the decision of the trial court as the trial court had the distinct advantage of watching the

demeanour of the witnesses, and was in a better position to evaluate the credibility of the witnesses.

17. In State of Rajasthan v. Naresh (2009) 9 SCC 368, the Court again examined the earlier judgments of this Court and laid down that: (SCC p. 374, para 20) "20. … an order of acquittal should not be lightly interfered with even if the court believes that there is some evidence pointing out the finger towards the accused."

18. In State of U.P. v. Banne (2009) 4 SCC 271, this Court gave certain illustrative circumstances in which the Court would be justified in interfering with a judgment of acquittal by the High Court. The circumstances include: (SCC p. 286, para 28) "(i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position;

> *(ii) The High Court's conclusions are contrary to evidence and documents on record;*
>
> *(iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;*
>
> *(iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;*
>
> *(v) This Court must always give proper weight and consideration to the findings of the High Court;*
>
> *(vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal." A similar view has been reiterated by this Court in Dhanapal v. State (2009) 10 SCC 401.*

19. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference."

9.2 When the findings of fact recorded by a court can be held to be perverse has been dealt with and considered in paragraph 20 of the aforesaid decision, which reads as under:

> *"20. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. (Vide Rajinder Kumar Kindra v. Delhi Admn (1984) 4 SCC 635, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons 1992 Supp (2) SCC 312, Triveni Rubber & Plastics v. CCE 1994 Supp. (3) SCC 665, Gaya Din v. Hanuman Prasad (2001) 1 SCC 501, Aruvelu v. State (2009) 10 SCC 206 and Gamini Bala Koteswara Rao v. State of A.P (2009) 10 SCC 636)." (emphasis supplied)*

9.3 It is further observed, after following the decision of this Court in the case of Kuldeep Singh v. Commissioner of Police (1999) 2 SCC 10, that if a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with.

9.4 In the recent decision of Vijay Mohan Singh v. State of Karnataka, (2019) 5 SCC 436, this Court again had an occasion to consider the scope of Section 378 Cr.P.C. and the interference by the High Court in an appeal against acquittal. This Court considered catena of decisions of this Court right from 1952 onwards. In paragraph 31, it is observed and held as under:

> *"31. An identical question came to be considered before this Court in Umedbhai Jadavbhai (1978) 1 SCC 228. In the case before this Court, the High Court interfered with the order of acquittal passed by the learned trial court on re-appreciation of the entire evidence on record. However, the High Court, while reversing the acquittal, did not consider the reasons given by the learned trial court while acquitting the accused. Confirming the judgment of the High Court, this Court observed and held in para 10 as under: (SCC p. 233)*

> *"10. Once the appeal was rightly entertained against the order of acquittal, the High Court was entitled to reappreciate the entire evidence independently and come to its own conclusion. Ordinarily, the High Court would give due importance to the opinion of the Sessions Judge if the same were arrived at after proper appreciation of the evidence. This rule will not be applicable in the present case where the Sessions Judge has made an absolutely wrong assumption of a very material and clinching aspect in the peculiar circumstances of the case."*

31.1. In ***Sambasivan v. State of Kerala (1998) 5 SCC 412,*** *the High Court reversed the order of acquittal passed by the learned trial court and held the accused guilty on re-appreciation of the entire evidence on record, however, the High Court did not record its conclusion on the question whether the approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. Confirming the order passed by the High Court convicting the accused on reversal of the acquittal passed by the learned trial court, after being satisfied that the order of acquittal passed by the learned trial court was perverse and suffered from infirmities, this Court declined to interfere with the order of conviction passed by the High Court.*

While confirming the order of conviction passed by the High Court, this Court observed in para 8 as under: (SCC p. 416)

> *"8. We have perused the judgment under appeal to ascertain whether the High Court has conformed to the aforementioned principles. We find that the High Court has not strictly proceeded in the manner laid down by this Court in Ramesh Babulal Doshi v. State of Gujarat (1996) 9 SCC 225 viz. first recording its conclusion on the question whether the approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable, which alone will justify interference in an order of acquittal though the High Court has rendered a well-considered judgment duly meeting all the contentions raised before it. But then will this non-compliance per se justify setting aside the judgment under appeal? We think, not. In our view, in such a case, the approach of the court which is considering the validity of the judgment of an*

appellate court which has reversed the order of acquittal passed by the trial court, should be to satisfy itself if the approach of the trial court in dealing with the evidence was patently illegal or conclusions arrived at by it are demonstrably unsustainable and whether the judgment of the appellate court is free from those infirmities; if so to hold that the trial court judgment warranted interference. In such a case, there is obviously no reason why the appellate court's judgment should be disturbed. But if on the other hand the court comes to the conclusion that the judgment of the trial court does not suffer from any infirmity, it cannot but be held that the interference by the appellate court in the order of acquittal was not justified; then in such a case the judgment of the appellate court has to be set aside as of the two reasonable views, the one in support of the acquittal alone has to stand. Having regard to the above discussion, we shall proceed to examine the judgment of the trial court in this case."

31.2. In K. Ramakrishnan Unnithan v. State of Kerala (1999) 3 SCC 309, after observing that though there is some substance in the grievance of the learned counsel appearing on behalf of the accused that the High Court has not adverted to all the reasons given by the trial Judge for according an order of acquittal, this Court refused to set aside the order of conviction passed by the High Court after having found that the approach of the Sessions Judge in recording the order of acquittal was not proper and the conclusion arrived at by the learned Sessions Judge on several aspects was unsustainable. This Court further observed that as the Sessions Judge was not justified in discarding the relevant/material evidence while acquitting the accused, the High Court, therefore, was fully entitled to reappreciate the evidence and record its own conclusion. This Court scrutinised the evidence of the eyewitnesses and opined that reasons adduced by the trial court for discarding the testimony of the eyewitnesses were not at all sound. This Court also observed that as the evaluation of the evidence made by the trial court was manifestly erroneous and therefore it was the duty of the High Court to interfere with an order of acquittal passed by the learned Sessions Judge.

31.3. In Atley v. State of U.P. AIR 1955 SC 807, in para 5, this Court observed and held as under: (AIR pp. 80910) "5.

It has been argued by the learned counsel for the appellant that the judgment of the trial court being one of acquittal, the High Court should not have set it aside on mere appreciation of the evidence led on behalf of the prosecution unless it came to the conclusion that the judgment of the trial Judge was perverse. In our opinion, it is not correct to say that unless the appellate court in an appeal under Section 417 Cr.P.C came to the conclusion that the judgment of acquittal under appeal was perverse it could not set aside that order.

It has been laid down by this Court that it is open to the High Court on an appeal against an order of acquittal to review the entire evidence and to come to its own conclusion, of course, keeping in view the well-established rule that the presumption of innocence of the accused is not weakened but strengthened by the judgment of acquittal passed by the trial court which had the advantage of observing the demeanour of witnesses whose evidence have been recorded in its presence.

It is also well settled that the court of appeal has as wide powers of appreciation of evidence in an appeal against an order of acquittal as in the case of an appeal against an order of conviction, subject to the riders that the presumption of innocence with which the accused person starts in the trial court continues even up to the appellate stage and that the appellate court should attach due weight to the opinion of the trial court which recorded the order of acquittal.

If the appellate court reviews the evidence, keeping those principles in mind, and comes to a contrary conclusion, the judgment cannot be said to have been vitiated. (See in this connection the very cases cited at the Bar, namely, Surajpal Singh v. State AIR 1952 SC 52; Wilayat Khan v. State of U.P AIR 1953 SC 122) In our opinion, there is no substance in the contention raised on behalf of the appellant that the High Court was not justified in reviewing the entire evidence and coming to its own conclusions.

31.4. In K. Gopal Reddy v. State of A.P. (1979) 1 SCC 355, this Court has observed that where the trial court allows itself to be beset with fanciful doubts, rejects creditworthy

evidence for slender reasons and takes a view of the evidence which is but barely possible, it is the obvious duty of the High Court to interfere in the interest of justice, lest the administration of justice be brought to ridicule."

(emphasis supplied)."

7. This Court has gone through the deposition of the PW – 1 – Bharat Keshavlal at Exh. 16, who was Panch witness. In his cross examination, he has stated that he does not know as to how many Police personal had accompanied. Further, he also does not know about the details of the jeans pant worn by the accused and that how many pockets were there in the jeans pant. He has also admitted that Police Inspector Jankant was not there during the raid.

7.1 The prosecution has also testified, PW – 2, Kabir Raviram at Exh. 18, who also supposed to be a Panch witness, and he has admitted in his cross examination that he has not made any search of the accused persons, simultaneously, he confessed that as such there was no search by Bharatbhai and the same fact not recollected.

7.2 The prosecution has examined PW – 3 Mahavirsinh Rana at Exh 21, who is PSI, at the respective time, he has fairly deposed in his cross examination that the items in questions and in the custody of the accused were easily available in the market. Further prosecution has also testified that the Police Inspector PW 4 Mr. Harisinh Jethabhai Jankant Exh. 27, deposed that in this offence he has arrested four persons as accused for the offences punishable under Section 399 of the IPC.

8. On the basis of the re-appreciation and re-evaluation of the evidence, it appears that, in all there are four accused persons, who have been implicated in this so called offece. Therefore, it would be

worth while to refer Sections 399 and 391 of the IPC, which read as under:

> *"Sec. 399 - Making preparation to commit dacoity.— Whoever makes any preparation for committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.*
>
> *Sec. 391. Dacoity.—When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity".*

9. As per the plain reading of the Section 399 read with Section 391 of the IPC for the commissions of offence under Section 399, there must be minimum five persons, whereas, in the present case, it is undisputed fact that there were only four accused persons involved in the offence and accordingly therefore, pursuant to the order and judgment passed by the learned Fast Track Court has meticulously discussed all the aspects in the depositions of the witnesses and also pre- requirement of Section 399 read with Section 391 of the IPC and rightly acquitted the accused persons, for which there is no requirement to interfere by this Court.

10. Hence, *in-fleri,* prosecution failed to prove case upon the accused.

11. In view of the aforesaid discussion and observations, this Court is of the opinion that the judgment and order dated 12.8.2005 passed by the learned Presiding Officer, 10th Fast Track Court, Rajkot in Sessions Case No. 32 of 2005 is just and proper and there is no need of interference by this Court. Accordingly, this

appeal is devoid of merits and stands dismissed accordingly and the judgment and order dated 12.8.2005 passed by the learned Presiding Officer, 10th Fast Track Court, Rajkot in Sessions Case No. 32 of 2005 is confirmed.

12. Bail Bond, if any, shall stand cancelled. Record and Proceedings be sent back to the trial Court concerned.

(A. C. JOSHI,J)

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