

GOLBAR HUSSAIN AND ORS.

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v.

STATE OF ASSAM AND ANR.

(Criminal Appeal No. 181 of 2013)

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APRIL 28, 2015

**[PINAKI CHANDRA GHOSE AND R.K. AGRAWAL, JJ.]**

*Penal Code, 1860 – ss. 302/149 – Prosecution under – Of five accused – Acquittal by trial court – Conviction by High Court – On appeal, held: The two prosecution witnesses were related, contradicted each other and were not supported by any independent witness – Hence conviction based on those witnesses is not sustainable.*

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*Appeal – Appeal against acquittal – Power of appellate court – Held: While deciding such appeal the appellate court has to bear in mind that presumption of innocence is available to the accused and such presumption is reinforced by his acquittal – If two views are possible, the view favourable to the accused, should be taken – Criminal Jurisprudence.*

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*Witness – Related witness – Evidentiary value – Held: There is no bar on admissibility of testimony of related witness, but it should stand the test of being credible, reliable, trustworthy, admissible in accordance with law and corroborated by other witnesses or documentary evidence.*

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**Allowing the appeal, the Court**

**HELD: 1.1 An appellate court, must bear in mind that in case of acquittal, there is double presumption in**

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- A 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. [Para 7] [531-D-F]

- C *Chandrappa and Ors. vs. State of Karnataka* (2007) 4 SCC 415:2007 (2) SCR 630 ; *Kallu alias Masih and Ors. vs. State of M.P.* (2006) 10 SCC 313: 2006 (1) SCR 201 – relied on.

- D 1.2 The Trial Court has given a reasoned decision after careful and thorough analysis of the evidence produced by the parties. The trial court also had the advantage of looking at the demeanor of the witnesses, and was correct in granting the benefit of doubt to the accused and acquitting them. The High Court erred in presuming a version against the accused as the view which is favourable to the accused should be taken in cases where two views are probable. The view taken by the trial court was reasonable and probable in view of the facts of the present case. [Paras 8 and 10] [532-E-G; 533-F]

- G 2.1 PW-4 and PW-5 are related witnesses. There is no bar on the admissibility of a statement by related witnesses supporting the prosecution case, but it should stand the test of being credible, reliable, trustworthy, admissible in accordance with law and corroborated by other witnesses or documentary evidence of the prosecution. It is the quality of the witness that matters and not the quantity, when the related witness was examined and found credible. In such a case, non-

examination of an independent witness would not be fatal to the prosecution case. [Para 9] [532-H; 533-A-B] A

*Manga alias Man Singh v. State of Uttarakhand (2013)*  
7 SCC 629: 2013 (3) SCR 175 – relied on.

2.2 In the present case, however, the prosecution witnesses PW-4 and PW-5, contradict each other, and their statements are not corroborated by any independent witness in spite of the incident happening in the market place, with shops on both sides of the road. Therefore, as the testimonies of PW-4 and PW-5 are not completely reliable, this is a fit case where corroboration by an independent witness was required. The case of the prosecution also weakens on the ground that the only independent witness PW-8 turned hostile. [Para 9] [533-C-D] B C D

*Shyamal Saha and Anr. v. State of West Bengal (2014)*  
12 SCC 321:2014 (3) SCR 90 – relied on. E

#### Case Law Reference

2007 (2) SCR 630	relied on.	Para 7	
2006 (1) SCR 201	relied on.	Para 8	F
2013 (3) SCR 175	relied on.	Para	
2014(3) SCR 90	relied on.	Para 9	

CRIMINALAPPELLATE JURISDICTION : Criminal Appeal No. 181 of 2013 G

From the Judgment and Order dated 31.08.2012 of the Gauhati High Court in CrI. Appeal No. 165 of 2004

Ranjan Mukherjee, Azim H. Laskar, Sachin Das, Abhijit H

A Sengupta, for the Appellants.

Kartika Sahay, Corporate Law Group, V. K. Jain, F. I. Choudhury, Rameshwar Prasad Goyal for the Respondents.

B The Judgment of the Court was delivered by

**PINAKI CHANDRA GHOSE, J.** 1. This appeal is preferred by the appellants against the judgment and order dated 31.08.2012 passed by the Gauhati High Court in Criminal Appeal No.165 of 2004 whereby the High Court has allowed the appeal filed by the State and convicted all the appellants under Section 302 read with Section 149 of the Indian Penal Code ("IPC") and sentenced them to undergo rigorous imprisonment for life and to pay a fine of Rs.10,000/- each.

2. The brief facts of the case, as per the prosecution story, are that on 5.1.2001 at about 6:10 p.m. at Chapra Beparipara which is under Chapar Police Station, the accused persons formed an unlawful assembly and in prosecution of the common object of such assembly, committed the murder of Hasen Ali. Amir Hussain, son of the deceased (PW-3) lodged an Ejahar about the incident at Chapar Police Station on 5.1.2001 at about 10:00 p.m. On receipt of the Ejahar, F.I.R. No.3/2001 was registered by Chapar Police Station and started investigation. The police arrived at the place of occurrence and called the Executive Magistrate who prepared the inquest on the dead body and the inquest was sent for post-mortem examination to Dhubri Civil Hospital. The police found one bag containing one dagger and two hand-made bombs lying near the dead body. After investigation, charge-sheet was submitted against the accused persons under Sections 147, 148, 149, 341 and 302 of the IPC. On 29.6.2001, the said charge-sheet was received by the Chief Judicial

Magistrate, Dhubri. Since the offence was triable exclusively by the Court of Sessions, the Chief Judicial Magistrate by his order dated 15.3.2002 committed the case to the Court of Sessions for trial. During the course of trial the prosecution examined 10 witnesses to bring home the charges levelled against the appellants. The defense adduced no evidence and took a plea of total denial.

3. The Trial Court on a careful scrutiny of the evidence found that the statements of PW-4 & PW-5 were contradictory which created doubt as to the presence of these two witnesses at the place of occurrence. Jamaluddin (PW-1) deposed that about 6 months ago, when he was returning from the Pharmacy, he met Shah Alam who said that his brother had been killed in the market, but he did not mention the name of any person. The incident took place in the market place where there were about 50 shops on both sides of the road. The Trial Court observed that if accused Golbar and Abu Sama appeared from the left and right, they must have come out of one of the shops on both sides of the road since PW-4 categorically stated that he had not seen the accused persons on the road while they were going towards the house of the deceased. But none of the shopkeepers, adjacent to the place of occurrence, came forward to depose that any occurrence as stated by PW-4 & PW-5 had taken place in front of their shops. PW-5 during cross-examination stated that he knew the names of two shopkeepers and they are Sattar and Hazrat Ali. Hazrat Ali (PW-2) did not state that the occurrence took place in front of his shop. PW-5 further stated during cross examination that the deceased was an accused in a murder case and had no explanation as to whether the deceased would move around having bombs and other weapons with him. The Trial Court drew the conclusion that the seized articles were belonging to the deceased persons. On analysis of the evidence the Trial

- A Court decided that the evidence of PW-4 and PW-5 was full of contradictions on material particulars and as such the testimony of these witnesses did not inspire any confidence. Under the circumstances, the uncorroborated testimony of PW-4 and PW-5 by some independent eye witness could not be  
B accepted to warrant the conviction of the accused persons.

4. The High Court on the other hand overruled the decision of the Trial Court and convicted all the five accused under Section 302 read with Section 149 of IPC and  
C sentenced them to undergo rigorous imprisonment for life and to pay a fine of Rs. 10,000/- each.

5. We have heard the learned counsel appearing for the appellants as also the learned counsel appearing for the  
D State of Assam.

6. The present case involves consideration on two issues. **First** being the powers of appellate Court while dealing with an appeal against an order of acquittal. **Second**, being  
E the sufficiency of the testimonies of PW-4 and PW-5 to convict the accused persons without any corroboration from an independent witness and the relevancy of the statement of a hostile witness involving appreciation of the statement of PW-8 who turned hostile.  
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7. On the **first** issue, the legal principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal, have been reiterated by this Court in a catena of cases. This Court culled down five general  
G principles in **Chandrappa and Ors. vs. State of Karnataka**, (2007) 4 SCC 415, as follows:

- “(1) An appellate court has full power to review,  
H reappreciate and reconsider the evidence upon which

the order of acquittal is founded.

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(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.

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(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.

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(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.**

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(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."

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(Emphasis supplied)

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A        8. The Court referred to ***Kallu alias Masih and Ors. vs. State of M.P.***, (2006) 10 SCC 313, in the above-mentioned judgment, where it held that;

B        “While deciding an appeal against acquittal, the power of the Appellate Court is no less than the power exercised while hearing appeals against conviction. In both types of appeals the power exists to review the entire evidence. However, one significant difference is that an order of acquittal will not be interfered with, by an appellate court, where the judgment of the trial court is based on evidence and the view taken is reasonable and plausible. It will not reverse the decision of the trial court merely because a different view is possible. The appellate Court will also bear in mind that there is a presumption of innocence in favour of the accused and the accused is entitled to get the benefit of any doubt. Further if it decides to interfere, it should assign reasons for differing with the decision of the trial Court”.

E        In our view, the above mentioned are certain cardinal rules to be kept in mind in appeals against acquittal. In our view the Trial Court has given a reasoned decision after careful and thorough analysis of the evidence produced by the parties.

F        The Trial Court also had the advantage of looking at the demeanor of the witnesses, and was correct in granting the benefit of doubt to the accused and acquitting them. The High Court erred in presuming a version against the accused as the view which is favourable to the accused should be taken in

G        cases where two views are probable.

H        9. The **Second** issue for consideration is the testimonies of PW-4 and PW-5 in absence of any corroboration from any independent witness. PW-4 and PW-5 are related witnesses as they are the brothers of the deceased Hasen Ali. There is no bar on the admissibility of a statement by related



witnesses supporting the prosecution case, but it should stand the test of being credible, reliable, trustworthy, admissible in accordance with law and corroborated by other witnesses or documentary evidence of the prosecution. This Court has held in ***Manga alias Man Singh v. State of Uttarakhand***, (2013) 7 SCC 629, that it is the quality of the witness that matters and not the quantity, when the related witness was examined and found credible. In such a case non-examination of an independent witness would not be fatal to the prosecution case. In the present case, however, the prosecution witnesses PW-4 and PW-5, contradict each other, and their statements are not corroborated by any independent witness in spite of the incident happening in the market place, with shops on both sides of the road. Therefore, in our view, as the testimonies of PW-4 and PW-5 are not completely reliable, this is a fit case where corroboration by an independent witness was required. The case of the prosecution also weakens on the ground that the only independent witness PW-8 turned hostile. A similar situation arose in ***Shyamal Saha and Anr. v. State of West Bengal***, (2014) 12 SCC 321, where the only independent witness turned hostile. This Court decided to affirm the acquittal and granted benefit of doubt to the accused considering the factual background and circumstances involved in the case.

10. Therefore, in the light of the above conclusions on the issues for consideration, the view taken by the Trial Court was reasonable and probable on the facts of the present case. We are, therefore, of the opinion that the High Court should not have set aside the acquittal of the appellants. Accordingly, this appeal is allowed and the impugned judgment and order passed by the High Court is set aside. The appellants are accordingly directed to be set free from incarceration, if not required in any other case.