**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**R/CRIMINAL APPEAL NO. 632 of 2022**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MR. JUSTICE S.H.VORA**

**and**
**HONOURABLE MR. JUSTICE RAJENDRA M. SAREEN**

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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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DAJABHAI S/O LUMBABHAI
Versus
MANCHARAM DWARKADAS SADHU

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Appearance:
CHETAN G BAIRWA(8175) for the Appellant(s) No. 1
for the Opponent(s)/Respondent(s) No. 1,2
MS CM SHAH APP for the Opponent(s)/Respondent(s) No. 3

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CORAM:**HONOURABLE MR. JUSTICE S.H.VORA**
and
**HONOURABLE MR. JUSTICE RAJENDRA M. SAREEN**

**Date : 18/08/2022**

**ORAL JUDGMENT**
**(PER : HONOURABLE MR. JUSTICE RAJENDRA M. SAREEN)**

1. Present Criminal Appeal has been preferred by the appellant – original complainant under Section 378 of the

Criminal Procedure Code, 1973 against the judgment and order dated 21/01/2019 passed by the learned 7th Additional Sessions Judge, Anjar, Kachchh in Special (Atrocity) Case No.28 of 2015 (Old Special (Atrocity) Case No.4 of 2012 acquitting the respondent Nos.1 and 2 – original accused Nos.1 and 2 from the offence punishable under sections 302 and 114 of Indian Penal Code and under section 3(2)(5) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocity) Act (hereinafter referred to as "the Atrocity" Act) and under section 135 of the Gujarat Police Act.

2. Facts of the case, in brief, are as under:-

The complainant lodged the complaint alleging that from 06/10/2011 to 07/10/2011 during the time between19.30 hours and 1.15 hours, the complainant had gone to the house of his mother situated at village Jatawada, Taluka Rapar, Kachchh after taking dinner and at her mother's house, his brother Karshanbhai, Nanjibhai and Rudo, his three sisters and his mother Laxmiben all were watching television and at about 9 O'clock at night, the complainant and his wife were going from the house of his mother to his house and they had slept at his house along with his children at night. Thereafter at about 1.15 at night, his neighbour Parbatbhai Devshibhai Dalit awaken him and told that there is call from Hakubha Sarpanch and somebody has beaten his brother Deshra and he is serious.

Therefore, he had contacted Hakubha Sarpanch from the mobile phone of Parbat and Hakubha Sarpanch informed him that on the road going towards Khodiyar Temple, near Rajput Vas, somebody has beaten on head of his brother Deshra and has caused serious injuries and he is serious and he is sent to Rapar Hospital in 108 Ambulance with Rudabhai Raghabhai and he asked the complainant to reach at the hospital immediately. At that time, police jeep had come and the complainant and his brothers Karshanbhai and Rudo, all three had gone to the hospital at Rapar and there Rudabhai Rajput of his village had met and treatment of his brother was going on and his brother could not speak anything and there was bleeding from the head of his brother and there was serious injuries on his head and after sometime, doctor declared him dead. Hence, the complaint is filed against unknown person with Rapar Police Station vide CR No.I-99/2011 for the offence under section 302 of Indian Penal Code and under section 135 of Gujarat Police Act.



3. On the basis of the said complaint, investigation was started and during the course of the investigation, offence under section 114 of Indian Penal Code and under section 3(2)(5) of the Atrocity Act came to be added and after through investigation, as there was sufficient evidence against the respondent Nos.1 and 2 – accused persons, chargesheet was filed before the learned Judicial Magistrate,

First Class, Rapar. As the offence committed by the accused persons was exclusively triable by the Court of Sessions as per the provisions of Section 209 of Criminal Procedure Code, the learned Judge was pleased to commit the case to the Court of Sessions and the case was transferred and placed for trial in the court of learned Additional Sessions Judge, which has been numbered as Special (Atrocity) Case No.4 of 2012 which was subsequently renumbered as Special (Atrocity) Case No.28 of 2015. Thereafter, Charge was framed against the accused for the offence punishable under sections 302 and 114 of Indian Penal Code and under section 3(2)(5) of the Atrocity Act and under section 135 of the Gujarat Police Act. The accused persons pleaded not guilty to the Charges and claimed to be tried. The prosecution, therefore, laid evidence, oral as well as documentary. At the conclusion of the trial, the learned Additional Sessions Judge was pleased to acquit the respondent Nos.1 and 2 - original accused Nos.1 and 2 for the charges levelled against them. Hence, the appellant - original complainant has preferred the present Criminal Appeal challenging the judgement and order of acquittal.

4. Heard Mr.Chetan G. Bairwa, learned advocate for the appellant and Ms.C.M. Shah, learned APP for the respondent No.3 – State.

5. Mr.Bairwa, learned advocate for the appellant –

original complainant has vehemently submitted the sister of the accused namely Pushpaben, who is examined at Ex.74, has narrated the entire incident in her statement recorded by the police and from which the chain of circumstances is completed and from her statement before the police, the case of the prosecution against the accused is proved. He has further submitted that though the said Pushpaben is turned hostile, her statement recorded by the police is to be believed from which the involvement of the accused is clearly made out on record. Her statement laid down all the circumstances which form a chain which proves the guilt of the accused person.

The learned advocate for the appellant has further submitted that that the trial court has erred in acquitting the respondent Nos.1 and 2 and not considering the evidence on record. He has emphasized upon the point that the real sister of the respondent No.1 Pushpaben, who had love affair with the deceased and at the time of incident, she was with the deceased, has narrated the entire incident in her statement recorded by the investigating officer during the course of the investigation, however, the trial court has not considered the same. He has also submitted that in the entire case, there is no eye witnesses but the case rests upon circumstantial evidence and circumstances are of such nature which are pointing towards the guilt of the accused, which is not believed by the trial court. He has

also further submitted that it was a clear case of murder of the deceased and postmortem has been conducted and medical evidence has been brought on record suggesting that the entire case is of death on account of head injuries. He has further submitted that as per the statement of Pushpaben, those injuries have been inflicted by the accused by stick, which was recovered by the investigating officer at the instance of the respondent No.1. Though the circumstances were forming chain pointing towards the guilt of the accused, the trial court has not believed the same and has wrongly acquitted the respondent Nos.1 and 2. He has submitted that considering the evidence on record, more particularly statement of Pushpaben recorded under section 167 of the Code of Criminal Procedure recorded by the investigating officer, it is prayed to admit the present appeal.

6. Ms.C.M. Shah, learned APP for the respondent No.3 - State has fairly conceded that the State has not preferred any appeal against the judgement and order of acquittal. She has submitted that appropriate order may be passed looking to the evidence on record.

7. Heard the leaned advocates for the respective parties at length and perused the impugned judgement and order of acquittal passed by the trial court as well as the entire record and proceedings. Since the present Appeal is for

admission, we have called for the record and proceedings vide order dated 25/07/2022.

8. It would be worthwhile to refer to the scope in Acquittal Appeals. It is well settled by is 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.

9. We have gone through the entire record and proceedings. We have re-appreciated the evidence on record. On re-appreciation of the evidence, it appears that complainant Dajabhai Lumbhabhai Borika Ex.65, witness Ramilaben Mansangbhai Harijan Ex.68, witness Laxmiben Lumbhabhai Gharijan Ex.73, witness Ajiben Karshanbhai Ex.77, witness Meenaben Dajabhai Boricha Ex.78, witness Ratanben Dhanjibhai Ex.142, witness Hemiben Mansang Boricha – Ex.143, witness Karshanbhai Lumbhabhai Boricha – Ex.156, witness Nanjibhai Lumbhabhai Boricha

Ex.157, witness Ruda Lumbha Dalit – Ex.161, all are relatives and family members of the deceased and they were residing with the deceased. All had gone to the place of incident or at the hospital on coming to know about the occurrence of the incident and they had seen the dead-body of the deceased Desrabhai. All these witnesses are hearsay witnesses. They have not seen the incident and they are not the eye witnesses. The said witnesses have stated that they came to know about the incident from Harijan Parbatbhai Devjibhai. The prosecution has cited said Harijan Parbatbhai Devjibhai as witness in the chargesheet, but he is not examined. As per the case of the prosecution, Harijan Parbatbhai Devjibhai had informed the Sarpanch about the incident who is examined at Ex.59 Thus, even Harijan Parbatbhai Devjibhai has also not seen the incident. The witnesses have came to know about the incident from others and their evidence is hearsay evidence which is not permissible in the eye of law.

10. As per the case of the prosecution, witness Hakubha alias Ravindrasinh Rajubha Vaghela had informed Harijan Parbatbhai Devjibhai about the incident, who is examined at Ex.59, however, he has not supported the case of the prosecution.

11. The prosecution has examined witness Ramilaben Mansangbhai. She was also present in the Garba when the

incident has taken place. As per her evidence, her Brother Dhanjibhai has given her information about the incident. As per cross examination, she is not eye witness to the incident and police has only asked her name and age. She knows the accused, as the accused are of her village. Nothing comes out on record regarding motive or her being eye witness to the incident. Her evidence is hearsay evidence.

12. Witness Laxmiben Lubabhai – mother of the deceased is also examined. She has stated that she came to know about the incident through Parbatbhai Devshibhai. In her cross examination she admits that she does not know with whom quarrel of her son had taken place and she has no doubt on anybody. As such her evidence is hearsay evidence.

13. Evidence of Ajiben Karshanbhai Boricha is also hearsay evidence. In the cross examination she has admitted that Parbatbhai had given her information regarding the incident and she is unknown to the fact that with whom quarrel of her Brother-in-law had taken place and she also admitted that she has not stated in her statement before the police that her Brother-in-law was having love affair with Pushpaben and due to that reason her Son-in-law was killed by the accused. As such, she has also not supported the case of the prosecution.

14. Witness Meenaben Dajabhai is also Sister-in-law of the deceased. Her evidence is also hear-say evidence, as she has received the information of incident through Parbatbhai. She has admitted in her cross-examination that whatever she has stated in her statement recorded by the police, is as per the information received by her. She does not have any doubt on any person. As per the statement given before the police, she is also unknown to the fact with whom her Brother-in-law had quarrel. She has also admitted that she has not mentioned in her statement before the police that her Brother-in-law was having love affair with Pushpa and due to that the accused has murdered her Brother-in-law.

15. Likewise, the evidence of Ratanben Dhanjibhai – Sister-in-law of the deceased is also hearsay evidence. She is not the eye witness.



16. Evidence of witness Hemi Mansing Boricha- aunty of the deceased is also hearsay evidence.

17. Witness Karmaben Arjanbhai Patel – wife of Arjanbhai Mavjibhai Patel has also not supported the case of the prosecution and she is declared hostile.

18. So far as the submission of the learned advocate for the appellant that though Pushpaben has not supported the case of the prosecution and is turned hostile, her statement

before the police is to be considered, is concerned, it is pertinent to note that statement of witness recorded by the investigating officer under section 161 of the Code of Criminal Procedure does not fall within the ambit of evidence as laid down in catena of decisions. Such evidence is only for confrontation in the cross examination. Statement of witnesses recorded under section 161 of the Code of Criminal Procedure being wholly inadmissible in evidence and cannot be taken into account. As per the settled proposition of law, statement recorded under section 161 of the Code of Criminal Procedure can be used only to prove the contradictions and/or omissions.

Here in this case, no doubt, statement of Pushpaben has been recorded under section 161 of the Code of Criminal Procedure by the investigating officer during the course of investigation, may be supporting the case of the prosecution in her statement but deposition given by her before the Court at Ex.74 is contrary to her statement and in her deposition before the court, she has not supported the case of the prosecution and she is declared hostile. The submission of the learned advocate for the appellant that statement of Pushpaben recorded by the investigating officer during the course of investigation should have been taken into account by the trial court, is not sustainable and cannot be believed, as the evidence through the trial which comes on record is to be appreciated in light of the provision of Evidence Act and not the statement recorded during the

course of investigation by the investigating officer are to be relied upon in the trial. The statements are recorded by the investigating officer during the procedure of investigation and thereafter whatever is stated by the witness before the Court that becomes the evidence and in light of that evidence, the entire case is to be evaluated. As such the statement recorded by the investigating officer cannot take place of evidence. Therefore, the submission of the learned advocate for the appellant that merely on the basis of the statement of Pushpaben recorded by the investigating officer, entire chain of circumstances is completed and case is proved, is not sustainable.

19. Considering the entire evidence on record, we are of the opinion that though the deceased has died an unnatural death, which may be termed as homicidal death but we are of the opinion that the prosecution has not been able to prove the case against the accused by leading cogent and convincing evidence on record in absence of any direct evidence. The circumstances brought on record to form a chain which points towards guilt of the accused only, the prosecution has failed to prove the circumstances against the accused.

20. There is no eye witness and no one has seen the deceased with the accused and there is no evidence of last seen.

21. There is no direct evidence against the accused and the case rests on circumstantial evidence. The mobile investigation Van had Forensic Science Laboratory had had collected various samples. There was blood stains at the place of incident and the prosecution collected mud with blood, control mud, slipper with blood stain, stick with blood stain and four sticks. However, there is nothing to connect the accused with the commission of the offence.

22. The stick with which the injury is alleged to have been caused has been discovered at the instance of the accused which contains blood stains. However, the panch witness namely Devjibhai Jethabhai Patel Ex.42 and Mahesh Motibhai Vanand Ex.47 have been examined. The panch witnesses of the discovery of panchnama have not supported the panchnama and they have stated that the Muddamal has not been discovered in their presence. Even the panch witness of the recovery of clothes of the accused have also not supported the case of the prosecution.

23. If the deposition of the investigating officer Ex.104 is considered, it appears that Mohanlal Bhagvanram Khileri is examined who has stated that as per the suspected Velabhai has stated in his statement that accused has committed murder of the deceased, however, said Velabhai has not supported the case of the prosecution in his

deposition and he is declared hostile. Even it is not the case of the prosecution that his statement was recorded under section 164 of the Code of Criminal Procedure. Investigating Officer - witness Dhirendrasinh Lakhabhai Dodiya is examined at Ex.131, who has also not stated that by which weapon the accused caused injury, whether there was blood stain on the weapon and whether there was blood stain on the clothes of the accused. Thus, the panchas have not supported the case of the prosecution. Even in the panchnama of recovery of muddamal prepared by the investigating officer, there is no mention about the weapon and blood stain on the weapon and clothes of the accused.

24. As per the FSL Report, the blood group of the deceased was “O” and the blood group of the accused was”A” and “B”. As per the FSL Report, the blood group of the blood found on the slipper, pent, shirt and underwear is of “O” group, which is blood group of the deceased. The said articles have been recovered after the incident and not found from the accused. The blood group of the blood stain found on the stick is of “O” group, however, the panch witnesses of the discovery of the weapon stick have not supported the case of the prosecution and they are declared hostile. Even investigating officer has also not stated whether there was any blood stain on the stick or not and it is not proved from the evidence of the investigating officer

that there was blood stain on the stick. Under the circumstances the report of the FSL becomes insignificance. Even the discovery of the muddamal stick is also doubtful. Hence, on the basis of the blood stain on the stick, the accused cannot be connected with the commission of the alleged offence. Trilokbhai Mavjibhai Barot Ex.52 and Mehul Shankarbhai Raval Ex.54 are the Panch witnesses of the recovery of blood samples panchnama of accused Ishvardas Dwarkadas Sadhu (Ramnandi) – accused No.2 – respondent No.2, however, they have also not supported the case of the prosecution and they are declared hostile and even no useful information has come on record on their cross-examination.

Discovery Panchas have also not supported the case of the prosecution. As such, panch witness Devjibhai Jethabhai has also not supported the case of the prosecution. As such the discovery panchnama which is recovery of weapon stick at the instance of the accused Ex.44 is not proved. Moreover, the investigating officer has also not stated in his deposition regarding contents of section 27 – discovery panchnama in his deposition. As such, corroborative evidence of the discovery panchnama is also brought on record by the prosecution.

25. Considering the entire evidence on record, we are of the opinion that the prosecution has failed to prove the case

against the accused by leading cogent and convincing evidence. The judgement delivered by the Sessions Judge is sound on the aspect of law and facts. The evidence brought on record by the prosecution before the trial court has been rightly appreciated by the trial court. No apparent error on the face of the record is found from the judgement. The judgement does not suffer any material defect or cannot be said to be contrary to the evidence recorded.

26. It may be noted that as per the settled legal position, when two views are possible, the judgment and order of acquittal passed by the trial Court should not be interfered with by the Appellate Court unless for the special reasons. A beneficial reference of the decision of the Supreme Court in the case of **State of Rajasthan versus Ram Niwas** reported in **(2010) 15 SCC 463** be made in this regard. In the said case, it has been observed as under:-

> *"6. This Court has held in Kalyan v. State of U.P., (2001) 9 SCC 632 :*
>
> *"8. The settled position of law on the powers to be exercised by the High Court in an appeal against an order of acquittal is that though the High Court has full powers to review the evidence upon which an order of acquittal is passed, it is equally well settled that the presumption of innocence of the*

*accused persons, as envisaged under the criminal jurisprudence prevalent in our country is further reinforced by his acquittal by the trial court. Normally the views of the trial court, as to the credibility of the witnesses, must be given proper weight and consideration because the trial court is supposed to have watched the demeanour and conduct of the witness and is in a better position to appreciate their testimony. The High Court should be slow in disturbing a finding of fact arrived at by the trial court. In Kali Ram V. State of Himachal Pradesh, (1973) 2 SCC 808, this Court observed that the golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The Court further observed:*



*"27. It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilised*

*society. Suppose an innocent person is convicted of the offence of murder and is hanged, nothing further can undo the mischief for the wrong resulting from the unmerited conviction is irretrievable. To take another instance, if an innocent person is sent to jail and undergoes the sentence, the scars left by the miscarriage of justice cannot be erased by any subsequent act of expiration. Not many persons undergoing the pangs of wrongful conviction are fortunate like Dreyfus to have an Emile Zola to champion their cause and succeed in getting the verdict of guilt annulled. All this highlights the importance of ensuring, as far as possible, that there should be no wrongful conviction of an innocent person. Some risk of the conviction of the innocent, of course, is always there in any system of the administration of criminal justice Such a risk can be minimised but not ruled out altogether It may in this connection be apposite to refer to the following observations of Sir Carleton Alien quoted on page 157 of "The Proof of Guilt" by Glanville Williams, second edition:*

*"I dare say some sentimentalists would assent to the proposition that it is better that a thousand, or even a million, guilty persons should escape than*

*that one innocent person should suffer; but no responsible and practical person would accept such a view. For it is obvious that if our ratio is extended indefinitely, there comes a point when the whole system of justice has broken down and society is in a state of chaos."*

*28. The fact that there has to be clear evidence of the guilt of the accused and that in the absence of that it is not possible to record a finding of his guilt was stressed by this Court in the case of Shivaji Sahebrao, (1973) 2 SCC 793, as is clear from the following observations:*

*"Certainly it is a primary principle that the accused must be and not merely, may be guilty before a court, can be convicted and the mental distinction between 'may be' and 'must be' is long and divides vague conjectures from sure considerations."*



*"9. The High Court while dealing with the appeals against the order of acquittal must keep in mind the following propositions laid down by this Court, namely, (i) the slowness of the appellate court to disturb a finding of fact; (ii) the noninterference with the order of acquittal where it is indeed only a case of taking a view different from the one taken*

*by the High Court."*

*8. In Arulvelu and another versus State reported in (2009) 10 Supreme Court Cases 206, the Supreme Court after discussing the earlier judgments, observed in para No. 36 as under:*

*"36. Careful scrutiny of all these judgments lead to the definite conclusion that the appellate court should be very slow in setting aside a judgment of acquittal particularly in a case where two views are possible. The trial court judgment can not be set aside because the appellate court's view is more probable. The appellate court would not be justified in setting aside the trial court judgment unless it arrives at a clear finding on marshaling the entire evidence on record that the judgment of the trial court is either perverse or wholly unsustainable in law."*



27. As observed by the Hon'ble Supreme Court in the case of ***Rajesh Singh & Others vs. State of Uttar Pradesh*** reported in ***(2011) 11 SCC 444*** and in the case of ***Bhaiyamiyan Alias Jardar Khan and Another vs. State of Madhya Pradesh*** reported in ***(2011) 6 SCC 394***, while dealing with the judgment of acquittal, unless reasoning by the learned trial Court is found to be perverse, the acquittal

cannot be upset. It is further observed that High Court's interference in such appeal in somewhat circumscribed and if the view taken by the learned trial Court is possible on the evidence, the High Court should stay its hands and not interfere in the matter in the belief that if it had been the trial Court, it might have taken a different view.

28. Scope of appeal against acquittal is well laid down in case of ***Chandrappa and ors. vs. State of Karnataka*** reported in ***(2007) 4 SCC 415***, it was observed:

> *"42. From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge;*
>
> *(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 emphasize 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 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."*

29. Considering the aforesaid facts and circumstances of the case and law laid down by the Hon'ble Supreme Court while considering the scope of appeal under Section 378 of the Code of Criminal Procedure, no case is made out to interfere with the impugned judgment and order of acquittal.

30. In view of the above and for the reasons stated above, present Criminal Appeal being devoid of merits, cannot be admitted and the same deserves to be dismissed and is accordingly dismissed in limine.



**(S.H.VORA, J)**

**(RAJENDRA M. SAREEN,J)**

R.H. PARMAR