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

**R/CRIMINAL APPEAL NO. 518 of 1996**

**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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STATE OF GUJARAT
Versus
KISHORBHAI DEVJIBHAI PARMAR & 4 other(s)

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Appearance:
MS CM SHAH, APP for the Appellant(s) No. 1
ABATED for the Opponent(s)/Respondent(s) No. 4
MR UI VYAS(1000) for the Opponent(s)/Respondent(s) No. 1,2,3,5
MR. KARAN U VYAS(6992) for the Opponent(s)/Respondent(s) No. 1,2,3,5

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

**Date : 11/07/2022**

**ORAL JUDGMENT**

**(PER : HONOURABLE MR. JUSTICE S.H.VORA)**

1. Feeling aggrieved and dissatisfied with the judgment and order of acquittal dated 09.04.1996 passed by the learned Additional City Sessions Judge, Ahmedabad in Sessions Case No.145 of 1995, whereby the respondents accused came to be acquitted for the offences under sections 143, 147, 148 and 302 of Indian Penal Code and under section 135(1) of the Bombay Police Act, the appellant – State has preferred present appeal under section 378 of the Code of Criminal Procedure, 1973 ("the Code" for short).

2. Brief facts leading to prosecution case can be stated thus deceased – Babubhai was having one sister named Laxmiben and there as an incident of eve-teasing made of her, five years prior to the incident relating to the offence which had taken place on 17.03.1995 at about 8.30 pm opposite Mohanlal Shop, situated near Khadawali-ni-Chali in Gomtipur area of Ahmedabad City and thereafter, said Laxmiben had died and as there was hot exchange of words before about five years, out of grudge, incident in question had taken place.

2.1. According to prosecution, all the five accused persons came there by forming unlawful assembly with common intention to commit murder of deceased - Babubhai Makwana. When Babubhai was passing through the road, as per prosecution case, accused no.1 to 4 were armed with lathis and pipes and 5th accused gave fist blows and because of attack by the accused, said Babubhai sustained severe 19 injuries. As there was holi festival, police were on patrolling duty in the said area and 2nd Police Inspector of Gomtipur Police Station happened to pass by during the course of his patrolling in the said area and on seeing Babubhai injured and helpless

condition, he shifted him to the hospital, where, Babubhai was declared dead.

3. In pursuance of the FIR lodged by the complainant – which came to be registered as C.R.No.I-48 of 1995 with Gomtipur Police Station for the offence under sections 143, 147, 148 and 302 of Indian Penal Code and under section 135(1) of the Bombay Police Act, the investigating agency recorded statements of the witnesses, drawn panchnama of scene of offence, discovery and recovery of weapons and obtained FSL report for the purpose of proving the offence. After having found sufficient material against the respondents accused, charge-sheet came to be filed in the Court of learned Metropolitan Magistrate, Ahmedabad. As said Court lacks jurisdiction to try the offence, it committed the case to the Sessions Court, Ahmedabad as provided under section 209 of the Code.

4. Upon committal of the case to the Sessions Court, Ahmedabad, learned Sessions Judge framed charge at Exh.1 against the respondents accused for the aforesaid offences. The respondents accused pleaded not guilty and claimed to be tried.

5. In order to bring home charge, the prosecution has examined following 14 prosecution witnesses and also produced various documentary evidence before the learned trial Court, more particularly described in para 5 and 6 of the impugned judgment and order.

<u>Prosecution witnesses</u>

| Sr.No. | Name | Exh. |
|---|---|---|
| 1 | Shantaben | Exh.13 |

| | | |
|---|---|---|
| 2 | Rajuben | Exh.15 |
| 3 | Navtarbhai | Exh.17 |
| 4 | Manubhai | Exh.19 |
| 5 | Ramesh Laxman | Exh.20 |
| 6 | Mahesh Babulal | Exh.23 |
| 7 | Hansaben | Exh.24 |
| 8 | Ratnaben | Exh.25 |
| 9 | Hargovindbhai | Exh.26 |
| 10 | Arvindbhai | Exh.29 |
| 11 | Navnitlal Bhailal | Exh.31 |
| 12 | Dr. Gaurang Govind | Exh.33 |
| 13 | Shreemali | Exh.35 |
| 14 | Chandansinh Chauhan | Exh.36 |

6. On conclusion of evidence on the part of the prosecution, the trial Court put various incriminating circumstances appearing in the evidence to the respondents accused so as to obtain explanation/answer as provided u/s 313 of the Code. In the further statement, the respondents accused denied all incriminating circumstances appearing against them as false and further stated that they are innocent and false case has been filed against them.

7. We have heard learned APP Ms. Shah for the appellant – State and learned advocate Mr.K.U.Vyas for respondent nos.1 to 3 and 5.

8. It needs to be noted that respondent no.4 – accused no.4 – Dinesh Alias diniyo Ramjibhai Parmar expired on 24.11.2001, pending hearing of the present Criminal Appeal and therefore, the present Criminal Appeal qua respondent no.4 came to be abated.

9. The prosecution has examined in all 14 witnesses. It is a matter of fact that large number of prosecution witnesses have been declared hostile, as they did not support the prosecution case. Learned APP took us through the deposition of complainant – Shantaben recorded at Exh.13 and child witness – Mahesh examined at Exh.23. According to the complainant – Shantaben, child witness – Mahesh who is her grandson informed about the incident and thus, she lodged the complaint and gave names of the assailants, whereas, during her deposition she has candidly deposed that she has not given names but subsequently, names were given by her in the complaint. It has come in her deposition that she has not seen accused committing the act and as she was informed about the incident by her grandson – Mahesh, she immediately rushed to the spot and had seen later part of the offence. Apart from the complainant, two other eye witnesses did not support the prosecution case. Much reliance has been placed on the child witness – Mahesh examined at Exh.23. Learned Trial Judge thought it fit not to administer oath as he was not able to give proper reply to the Court's question and therefore, his statement was recorded without giving him any oath. He has deposed that all the five accused persons were present when offence took place and he has identified all the accused persons in the open Court. The child witness in para – 3 of his cross examination admits that when first pipe blow was inflicted on head of his father, he fell down and thereafter, he ran away crying at his home. He has also deposed that it took 10 minutes to reach his home and when returned back at the scene of offence, about 1000 to 1500 people were gathered and police also came at the spot. He has also deposed that there was dark night at the time of incident. Learned Trial Judge considering deposition of child

witness did not believe prosecution case, more particularly, believing child witness as eye witness to the incident. No-doubt, sole eye witness being child can be believed and conviction can be based on his evidence also. But before, evidence of child witness is relied, it needs corroboration with other independent witnesses. In the case on hand, learned APP could not point out any other independent corroborative evidence and thus, the prosecution has not proved beyond reasonable doubt any guilt of the accused persons on any count. Even learned Trial Judge has also found and observed that motive has been shown that there was some incident about five years ago and Laxmiben was teased by one of the accused or some of the accused and therefore, motive of prosecution case for the accused persons was found illogical by the learned Trial Judge and even on such count, prosecution case is rightly disbelieved by the learned Trial Judge. Learned APP could not point out any other evidence of independent nature.

10. We have independently re-examined and re-assessed evidence and also findings recorded by the learned Trial Judge in the impugned judgment. Under the circumstances, the learned trial Judge has rightly acquitted the respondents - accused for the elaborate reasons stated in the impugned judgment and we also endorse the view/finding of the learned trial Judge leading to the acquittal, more so, the child is not an eye witness to the occurrence of entire incident.

11. Except relying upon aforesaid evidence, no any other direct evidence either oral or documentary is pressed into service to interfere with the findings of the learned trial Court leading to acquittal of the respondents accused. When substantial

evidence is lacking to connect the respondents accused with the crime or not brought on record sufficient evidence to establish the guilt, other corroborative evidence loses its significance or needs any consideration to upset the findings and therefore, there is no need to overburden the judgment anymore or needs any discussion of such evidence.

12. It is a cardinal principle of criminal jurisprudence that in an acquittal appeal if other view is possible, then also, the appellate Court cannot substitute its own view by reversing the acquittal into conviction, unless the findings of the trial Court are perverse, contrary to the material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable. (Ramesh Babulal Doshi V. State of Gujarat (1996) 9 SCC 225). In the instant case, the learned APP has not been able to point out to us as to how the findings recorded by the learned trial Court are perverse, contrary to material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable.

13. In the case of Ram Kumar v. State of Haryana, reported in AIR 1995 SC 280, Supreme Court has held as under:

> *"The powers of the High Court in an appeal from order of acquittal to reassess the evidence and reach its own conclusions under Sections 378 and 379, Cr.P.C. are as extensive as in any appeal against the order of conviction. But as a rule of prudence, it is desirable that the High Court should give proper weight and consideration to the view of the Trial Court with regard to the credibility of the witness, the presumption of innocence in favour of the accused, the right of the accused to the benefit of any doubt and the slowness of appellate Court in justifying a finding of fact arrived at by a Judge who had the advantage of seeing the witness. It is settled law that if the main grounds on which the lower Court has based its order acquitting the accused are reasonable and plausible, and*

*the same cannot entirely and effectively be dislodged or demolished, the High Court should not disturb the order of acquittal."*

14. 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.

15. 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.

16. In view of the above and for the reasons stated above, present Criminal Appeal deserves to be dismissed and is accordingly dismissed.

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

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

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