**SUPREME COURT OF INDIA**

Mahamadkhan Nathekhan

Vs.

State of Gujarat

Crl.A.Nos.162, 406 and 695 of 2007

(Madan B. Lokur and C. Nagappan JJ.)

10.09.2014

**JUDGMENT**

**C. NAGAPPAN, J.**

1. All three appeals are preferred against the judgment dated 26.12.2006 in Criminal Appeal No. 865 of 1986 passed by the High Court of Gujarat at Ahmedabad.

2. Accused No. 1 Asaf Afkhan Kalandarkhan, accused No. 2 Mahamadkhan Nathekhan and accused No. 3 Vora Ismailbhai Daudbhai were tried for the charge Under Sections 302, 120(B) and 201 of Indian Penal Code and Section 25(A) of The Arms Act, 1959 for committing the murder of Firozbhai Abdul Latif by firing gun shot on the right side of his chest, when he was in the motor car of accused No. 3 in the early hours on 21.2.1984 in Sessions Case No. 44 of 1985 on the file of Additional Sessions Judge, Ahmedabad (Rural) at Narol. The Trial Court acquitted the accused from all the charges leveled against them. Challenging the same the State of Gujarat preferred appeal in Criminal Appeal No. 865 of 1986 on the file of the High Court of Gujarat at Ahmedabad and the High Court held that the charge of criminal conspiracy against accused Nos. 1 to 3 has not been proved by the prosecution and the offence Under Section 25(1)(a) of the Arms Act is not proved as against accused No. 3 and acquitted them of the said charges. At the same time, the High Court found accused Nos. 1 and 3 guilty of the offence punishable Under Section 302 read with Section 34 Indian Penal Code and accused No. 2 guilty for the offence punishable Under Section 302 read with

Section 114 Indian Penal Code and further held accused Nos. 1 and 2 guilty of the offence punishable Under Section 25(1)(a) of the Arms Act. Accordingly, the High Court sentenced all the three accused to undergo rigorous imprisonment for life for the charge of murder and sentenced accused Nos. 1 and 2 to undergo rigorous imprisonment for three years and to pay a fine of Rs. 5000/-, in default, to undergo rigorous imprisonment for six months for the offence under the Arms Act. Challenging their conviction and sentence all the three accused have preferred three independent appeals before this Court.

3. Briefly the prosecution case is as follows: Accused Nos. 1 and 3 were friends of deceased Firozbhai and their relationship was cordial. Accused No. 2 was also a common friend of them. Firozbhai was in the business of selling tyres of four wheelers and two wheelers and accused No. 3 was in the business of sale and purchase of motor trucks and was a broker in that field and he was helping Firozbhai to sell tyres to the traders at Savarkundla, a town under the district Bhavnagar. There were outstandings to be recovered from customers at Savarkundla and Firozbhai was interested in early recovery and at his instance accused Nos. 1 and 3 on 20.2.1984 agreed to accompany Firozbhai to Savarkundla sometime during afternoon hours. Firozbhai sold the tyres at Savarkundla on credit basis at the instance of accused No. 3 by taking only token amount and hence Firozbhai was keen that accused No. 3 should accompany him. The brother of deceased Firozbhai, Mohammed Usman was working in a cooperative bank in the same place and during the spare hours he was helping Firozbhai in his business. On 20.2.1984 Firozbhai told his brother Mohammed Usman of his plan to go to Savarkundla with accused Nos. 1 and 3 for collecting dues from his customers and requested him not to go to the bank on the next day so that he can attend to the business at the shop. Both the brothers took dinner in the night and at that time Firozbhai informed his wife Banu Bibi about his programme to go to Savarkundla and further told her that he was to go in the car with accused Nos. 1 and 3 and she need not worry because of severe cold. After dinner he left the home with a suitcase and went to the shop of accused No. 3.

4. Accused No. 3 at that time was reluctant to go with Firozbhai and finally accused Nos. 1 and 3 agreed and they started in the fiat car driven by accused No. 3. On their way, they put petrol from the petrol pump of Lalitkumar and proceeded

towards Bagodara. Suddenly, they decided to go to Nal Sarovar for hunting and they went to village Gangad and took accused No. 2 with his gun. It was decided that firstly they would go for hunting at Nal Sarovar and then they would proceed to Savarkundla. They took petrol from Bagodara petrol pump and started their journey towards Nal Sarovar. When they were nearing Nal Sarovar Firozbhai received gunshot injury from the gun and the accused returned towards city to take injured Firozbhai to the hospital. On the way accused No. 2 got down with his gun. Accused Nos. 1 and 3 took injured Firozbhai to V.S. Hospital and told the hospital authority that some unknown persons injured Firozbhai when they were proceeding towards Savarkundla. Firozbhai succumbed to the gunshot injury and the police from Ellisbridge Police Station recorded the complaint of accused No. 3 and the case was registered. Inquest was held and articles were recovered and the fiat car belonging to accused No. 3 was seized in the presence of panchas under a Mahazar. The body was sent to post-mortem.

5. PW4 Dr. Pratima Mahendra Desai conducted autopsy under the supervision of PW1 Dr. Kothari and they found the following injuries:

> 1. Wound on right side of chest just lateral and slightly below right nipple. Its margin just touching the areola. It was 12 cms away from the midline of chest and 16 c.m. below right clavicle. It was 3 cms x 2 cms x chest cavity deep. Margin was abraded as shown in diagram the lower border showing beveling and it was red and upper border is overlapping. The 4th, 5th right ribs were fractured. The direction was from right to left anteroposteriorly and below upwards. Margins inverted. No visible marks of burning, tattooing and blackening. Blood was coming out from this wound these injuries were ante-mortem.
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> Exh. 15 is the post-mortem certificate issued by them and the cause of death was due to shock and haemorrhage resulting from fire-arm wound.

6. The Forensic Science Laboratory experts collected the chance-prints on the handle of the motor car and took specimen of blood from the blood stains found in the car. They took hand-wash of accused Nos. 1 and 3. On investigation the police found that accused No. 3 has given false information and the case was transferred to Umrala Police Station and thereafter the investigation was handed over to State

Crime Branch. The witnesses were examined and on completion of investigation final report came to be filed against the accused. During the trial the prosecution examined number of witnesses and marked documents. The Trial Court acquitted the accused of the charges. However, on appeal by the State the High Court set aside the judgment of the Trial Court and convicted and sentenced the accused as stated supra. The accused have challenged the same in the present appeals.

7. The primary submission made on behalf of the Appellants is that the High Court in the impugned judgment had merely substituted its view to the one taken by the Trial Court which is impermissible in law and it ought not to have interfered with the judgment of acquittal made by the Trial Court, particularly in a case of circumstantial evidence. Per contra, the learned Counsel appearing for the Respondent-State contended that the High Court has elaborately considered the evidence on record and came to the conclusion that the prosecution has proved the guilt of the accused persons and the conviction and sentence imposed on the Appellants are sustainable.

8. The crucial issue for consideration, therefore, relates to interference by the High Court in an acquittal rendered by the Trial Court. The entire case law on the subject was discussed by this Court in the decision in Chandrappa v. State of Karnataka MANU/SC/7108/2007 : (2007) 4 SCC 415 wherein it was held as follows:

> (1) An appellate court has full power to review, 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.

(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.

It is the obligation of the High Court to consider and identify the error in the decision of the Trial Court and then decide whether the error is gross enough to warrant interference. The High Court is not expected to merely substitute its opinion for that of the Trial Court only because of the first two principles in the decision referred above permit it to do so and because it has the power to do so - it has to correct an error of law or fact significant enough to necessitate overturning the verdict of the Trial Court. The High Court has to exercise its discretion very cautiously, keeping in mind the acquittal of the accused and the rights of the victim.

9. The case of the prosecution rests on circumstantial evidence. Though the Appellants herein were charged for the offence of criminal conspiracy to commit the murder of Firozbhai the Trial Court as well as the High Court held that the said charge has not been proved by the prosecution. In so far as the charge of murder is concerned, the High Court reversed the judgment of the acquittal of the Trial Court and found the Appellants guilty and that is under challenge in these appeals. For better appreciation, in this judgment, the accused are referred to by their original rankings before the Trial Court. Firozbhai was in the business of selling tyres of four wheelers and two wheelers and accused No. 3 was in the business of sale and purchase of motor trucks and he was helping Firozbhai to sell tyres to the

traders at Savarkundla. Accused No. 1 also was a friend of Firozbhai and accused No. 2 was a common friend to all of them. At the instance of accused No. 3, Firozbhai sold tyres to customers at Savarkundla on credit basis and there were outstandings to be recovered and on 20.2.1984 Firozbhai asked the accused No. 3 to accompany him to collect the dues. Accused No. 3 was reluctant to proceed to Savarkundla in the night on 20.2.1984 because of the cold climate but on the compulsion of Firozbhai both accused Nos. 1 and 3 agreed to the trip. Firozbhai directed his younger brother to look after the business in the shop the next day and convinced his wife that he is proceeding in the car driven by accused No. 3 and hence she need not worry about the cold climate. Accordingly, they left at about 10.00 p.m. on 20.2.1984 in the fiat car driven by accused No. 3 and on the way they put petrol from the petrol pump of Lalit Kumar. Out of 12 circumstances enumerated by the Trial Court in its judgment the above constitute first four of it and the Trial Court found that the prosecution has satisfactorily established the same. In this context it has to be borne in mind that the relationship Firozbhai had with accused Nos. 1 and 3 was very cordial. It is in evidence that accused No. 3 would frequently visit the shop of Firozbhai and was helping Firozbhai in improving his tyre business. In fact, accused No. 3 was reluctant to go to Savarkundla in the night on 20.2.1984 on account of cold climate and suggested to leave the next day morning. Firozbhai having come fully prepared for the trip with his suitcase, compelled accused Nos. 1 and 3 to leave the same night by car to Savarkundla.

10. While proceeding to Bagodara they decided to go Nal Sarovar for hunting and they took accused No. 2 with his gun and when they were nearing Nal Sarovar Firozbhai received the gunshot injury from the gun. Both the wife and younger brother of Firozbhai have testified that Firozbhai was fond of hunting and on earlier occasion he had gone for hunting along with his friends. Hence, there is no surprise that they took a decision while midway to go for hunting at Nal Sarovar and then proceed to Savarkundla. Only for that purpose they picked up accused No. 2, a common acquaintance, from his village. As per the prosecution case, accused No. 3 was driving the fiat car and accused No. 2 was seated at his left side in the front seat and Firozbhai and accused No. 1 were seated on the back seat and the gun resting between them vertically. Exh.48 is the panchnama dated 19.5.1984

prepared during test and it states that the gun was placed on rear seat of the fiat car and the butt of gun moved towards the down side of the seat of the driver at 14 inches below the seat and the person was made to sit on the left side of the rear seat looking at the pipe of the gun and the pipe remain at 5 inches from the chest. PW1 Dr. Kothari under whose supervision the autopsy was conducted has testified that he saw wound on the right side of chest slightly below right nipple and the direction was from right to left anteroposteriorly and below upwards. It is his further testimony that if deceased is sitting in motor car and if nosal of gun is within distance of 1 ft. and it is in direction of injury and there is accidental firing the said injury is possible. The Ballistic expert PW7, in his testimony given on 10.12.1985 in the trial has stated that it is possible that if there are jerks and the road is bumpy there is a possibility that the trigger could be pressed and the gun be fired accidentally. He further categorically opined that the direction of the injury is from down to up and hence there is every possibility that the gun injury is due to an accident.

11. Much reliance was placed by the High Court on the information of the FSL expert about the presence of nitrate in the hand-wash of accused No. 1. In fact, the High Court in paragraph 24 of the judgment has observed thus:

> ..."The presence of nitrate in the hand-wash of this accused establishes that at the time of sustaining gunshot injury by deceased Firozbhai accused No. 1 Ashrafkhan must be very close to him or he must be responsible for the injury."....
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> Accused No. 1 was seated in the back seat along with Firozbhai when the gun fired. Prosecution witness No. 7 Jayprakash, Ballistic expert has testified that on the back seat of the car and on the doors of the left side glass pane nitrite was found. Having seated in the back seat it is but natural that nitrate was found in the hands of accused No. 1 but from that no inference can be drawn that he used the gun and was responsible for injury.

12. The High Court treated the statement of accused No. 3 given Under Section 313 Code of Criminal Procedure as evidence against him. This is clearly

impermissible in law. This Court in the recent decision in Sujit Biswas v. State of Assam (2013) 12 SCC 406 held thus:

> 20...The circumstances which are not put to the accused in his examination Under Section 313 Code of Criminal Procedure, cannot be used against him and must be excluded from consideration. The said statement cannot be treated as evidence within the meaning of Section 3 of the Evidence Act, as the accused cannot be cross-examined with reference to such statement.
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> Firozbhai died of gunshot injury is established by the medical evidence. The Trial Court elaborately considered the evidence and held that there was possibility of accidental death rather than homicidal death. In our view the homicidal death has not been established in the facts of the case.

13. There was no motive for the occurrence. Though large amounts are said to be due from the customers at Savarkundla, there is no evidence of record in the form of books of accounts. Practically, there is no evidence on this aspect. In fact, according to PW3 Mohammed Usman as per Exh.19 a sum of Rs. 35,640/- was due from accused No. 3 and a sum of Rs. 18,240/- was due from accused No. 1. In the cross examination he has stated that the said amount is due from the clients of Savarkundla and not from accused No. 3 Ismailbhai and there are no dues from him. The law is well settled that when the prosecution case rests purely on circumstantial evidence, motive plays an important part in order to tilt the scale against the accused. In our view the High Court misread the material evidence and reversed the decision of the Trial Court by convicting the accused. The conviction and sentence are liable to be set aside.

14. In the result all the appeals are allowed and the conviction and sentence imposed by the High Court on the Appellants in the impugned judgment are set aside and the judgment of acquittal rendered by the Trial Court is restored.