IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL NO. 310 of 2004

With
R/CRIMINAL APPEAL NO. 471 of 2004

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE ILESH J. VORA

and
HONOURABLE MR. JUSTICE R. T. VACHHANI

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Approved for Reporting	Yes	No

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STATE OF GUJARAT
Versus
KIRANKUMAR @ FETIYO JASHWANTSINH BARIA & ORS.

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Appearance:
MS MEGHA CHITALIYA APP for the Appellant(s) No. 1
NOTICE SERVED for the Opponent(s)/Respondent(s) No. 1,2,3,4

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CORAM:**HONOURABLE MR. JUSTICE ILESH J. VORA**
and
HONOURABLE MR. JUSTICE R. T. VACHHANI

Date : 01/12/2025

ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE R. T. VACHHANI)

1. Feeling aggrieved and dissatisfied with the common judgment and order of acquittal dated 20.12.2002 passed by the learned Additional Sessions Judge, Fast Track Court, Godhra at Panchmahal in Sessions Case No.137 of 2002 and Sessions Case No.410 of 2002 for the offences punishable under Section 143, 302, 148, 436 and 427 of the of Indian

Penal Code and under Section 135 of the Bombay Police Act, the appellant – State has preferred the present appeal under Section 378 of the Code of Criminal Procedure, 1973 ("the Code" for short).

2. The brief facts leading to the filing of the present appeal are as under:

2.1. As per the prosecution case, after the publication of a news in the newspapers viz., Gujarat Samachar and Sandesh relating to the burning of Sabarmati Express on 27.2.2002 wherein about 70 Karsevaks were burnt alive, tense situation was prevailing in village Goghamba, District Panchmahals. It was in the wake of such incident that an incident in question took place on 28.2.2002 at around 9.30 p.m. in the said village wherein a mob of about 1400-1500 persons having armed with deadly weapons like swords, Dharia, pipes and rags fire, attacked the minority community of the said village by pelting stones and setting their houses ablaze. At that time, looking to the tense situation, the Executive Magistrate ordered firing whereupon the police personnel fired about 37 rounds at the mob and also released teargas shell. In the said incident, the mob set ablaze 10-12 houses of minority and caused heavy damages to various properties.

2.2. Accordingly, FIR being CR No 45/2002 came to be registered with Rajgadh Police Station at the behest of the complainant one Shri Kantibhai Shabhai, ASI of Rajgadh Police Station. The Police after investigation charge-sheeted the accused for the aforesaid offences before the learned JMFC, Court. However, as the said Court lacks jurisdiction to try offence under Section 302 IPC, the case was committed to the Sessions Court. On conclusion of evidence on the part of the prosecution, the trial Court put various incriminating circumstances appearing in the

evidence to the respondent-accused so as to obtain explanation/answer as provided under Section 313 of the Code. In the further statement, the respondent-accused denied all incriminating circumstances appearing against them as false and further stated that they are innocent and a false case has been filed against him. After examining the evidence, witness testimonies and submissions from both sides, the learned Court below recorded the finding in favour of the respondent-accused acquitting him of the charges levelled against them.

3. We have heard learned APP for the appellant – State and minutely examined oral and documentary evidence adduced and produced before the learned Sessions Court concerned.

4. Ms.Megha Chitaliya, learned APP appearing for the appellant – State submits that the impugned order of acquittal is required to be interfered with as the evidence produced on record proves the involvement of the accused in the commission of crime in question. She has further submitted that evidence of the witnesses examined before the Court has supported the case of prosecution and narrated the incident as it was happened. It was submitted that no such omission or contradiction in the evidence of the said witnesses have come on record to discard their evidence. She has further submitted that the prosecution witnesses have narrated the incident which corroborates with the other supporting material produced by the prosecution and therefore, the order of acquittal deserves to be quashed and set aside.

4.1 She has further submitted that the complainant is the Police Officials who has also deposed as to how and in which method the entire investigation is conducted and no such lacuna is found there-from to record the acquittal of the accused; however the learned trial Court has

recorded acquittal and committed serious error. Learned APP has further referred to the evidence of the other material witnesses and submitted that from the evidence of the said witnesses, the involvement of the accused in commission of the crime is proved and therefore, this Court may interfere with the said finding and record the conviction. She would therefore submit to allow this appeal.

5. Heard the learned APP for the appellant – State and perused the deposition of witnesses as also documentary evidence placed on record as well as the order passed by the learned Sessions Court.

6. At the outset, if the main allegation in the aforesaid FIR is to be examined, it is to the effect that at the time of the incident, a mob of about 1400-1500 people had caused damage to the properties of minority community and set ablaze 10-12 houses of minority and in order to disperse the said mob, the above named complainant and other police personnel fired about 37 rounds and also used teargas shells. Investigation initiated pursuant to the aforesaid FIR, the Investigating Officer recorded the statements of various persons including eyewitnesses. During the course of the investigation, it was revealed that the mob had set ablaze a motorcycle, two tractors, about 14 houses and a Masjid, as a result whereof a loss to property worth about Rs.48,02,000/- was caused and that in the said incident one Haji Ganibhai Hasanbhai Qureshi was killed. It was also revealed as alleged that during the course of the said investigation that the respondents-accused herein were also present in the mob. Thus, considering the above stated facts, now the case of the prosecution is required to be examined in consonance with the evidence recorded by the trial Court.

7. PW No.2-Kantibhai Shabhai, complainant who was serving as ASI

at Rajgadh Police Station at the relevant time and is examined at Exh.23. Witness has deposed in his testimony that due to Godhra train incident, the situation was tense and while they were on patrolling, they found mob of about 1400 to 1500 persons attacking and setting the houses of minority community on ablaze and as per the order of the Executive Magistrate, they made firing and disbursed the mob and teargas shell was also released and therefore mob was fled away. This Witness has deposed that he had given the complaint which was produced at Exh.24 and facts stated therein was true and correct. If the evidence of this witness examined, as per the complaint of the complainant, the complainant has not mentioned the names of any assailants anywhere. The complainant further states that the incident occurred at night, and at that time the power supply was shut off. He did not see any minority persons in the minority locality, as they had fled due to fear. During the incident, the police had not apprehended any individual. Considering the contents of the complaint, there is no evidence against any of the accused persons. After the offence was registered at the Radhanpur Police Station, the Investigating Officer recorded the statements of several witnesses and produced them before the Court.

8. PW No.3-Salimbhai Sattarbhai Shaikh is examined at Exh-25 and he has stated that on the day of the incident, he and his family were sitting at home and the electricity supply failed, and thereafter a mob approached and started stone-pelting. However, to save their lives, they fled and ran towards Rajgadh. They owned a tractor with a trolley, as well as a Bajaj Suzuki motorcycle. The mob set these on fire. His house was vandalised. Cash of Rs. 70,000/- and gold and silver ornaments were completely burnt. However, the witness did not identify any person in the mob. He further stated that his maternal uncle’s house was completely burnt and he was burnt to death and later on, he learnt at Sanand that the tractor

that was at Maheshbhai's place was also burnt. In cross-examination, the witness stated that due to the incident of 27th, the atmosphere in Popla village was tense. There were about 30 houses in the Masjid Faliya of Popla village. The people of the village had fled out of fear. However, the witness has not named or identified any accused persons who were found to have been present in the mob at the time of incident.

9. PW No.4 - Isubbhai Ismailbhai Shaikh is examined at Exh-26 who has stated that he suffered loss in the incident. The goods from his shop were burnt and he suffered a loss of about Rs. 1.25 lakhs. However, he has not identified any accused persons who were present in the mob.

10. PW No.5 -Razakbhai Abdulbhai Shaikh is examined at Exh.-27 who has stated that upon seeing the mob, he had run away from the spot. However, he has not identified any accused persons who were present in the mob.

11. PW No.6-Isubbhai Ummarbhai Shaikh, who has been examined at Exh.28 and he has stated in his testimony about the occurrence of the incident. He has stated before the Court by raising his finger against the org. accused No.1-Ketiyo and identified him as he present in the Court; however he has not identified any other persons found present in the mob. During the cross-examination of this witness, the fact revealed that when the mob came, the electricity lights were not working and he had left the house between 10:00 to 11:00 in the night hours. This Witness has admitted that due to pelting of the stones, the doors and windows of the home were closed and electricity light was not working. This Witness has not identified any of the person found present in the mob. Thus, from the evidence of this witness though name of accused No.1 was revealed; but since the electricity light was not working and it was dark and doors and

windows were also closed due to pelting of the stones, indicating the name of original accused No.1 who is alleged to have present at the time of commission of offence, the credibility of this witness smacks doubt and therefore, the same has rightly been discarded by the learned Sessions Court.

12. If the evidence of the aforesaid witness viz., PW No.6-Isubbhai (Exhibit-28) is further evaluated, he has named only accused No.1 and stated that he had identified him. However, in a mob of a thousand to fifteen hundred persons, it is not plausible that this witness could have identified only accused No. 1. The circumstances stated by the witness during cross-examination show that identification under such condition would be extremely difficult. According to the witness, the windows and doors were closed, and the electricity supply was off and therefore, under these circumstances, it is not believable that he could have identified any particular individual. Furthermore, at the time of the incident, about one hundred to one hundred and fifty people were on the upper floor along with the witness, however none of them had identified any accused. It is improbable that in the same situation only one person could identify an assailant while none of the others were identified. Considering the version of this witness, while he was on the upper floor, he could not have seen what exactly was happened on the ground floor, nor as to who had set on fire the property. The tempo was parked at the back. Whether members of the mob set fire to the rear portion of the house or whether accused-Ketan threw a burning object at the back of the house causing the tempo to catch fire, the said witness has not stated anything clearly in this regard. Moreover, the mob consisted of about one thousand to fifteen hundred people; whereas the witness's assertion that he could specifically identify accused - Ketan among such a large mob is not acceptable in such circumstances.

13. All the Panch witnesses to the Panchnama drawn by the IO have turned hostile and has not supported the case of prosecution.

14. Thus, considering the evidence of the prosecution witnesses adduced before the learned Sessions Court and considering the case of the prosecution followed by the evaluation of the evidence by learned Sessions Judge, it appears that, having regard to the overall facts, a mob of 1500–2000 persons committed rioting in the Village on 27/02/2002 in connection with the Godhra Sabarmati Express incident and caused damage the houses of minority community by setting them on fire. The incident occurred around 9:30 p.m. when there was a power cut. If at 9:30 p.m. the electricity was off, then under such circumstances, it cannot be believed that anyone could have been clearly identified anybody. It is an admitted fact that deceased Haji Ganibhai had passed away; his death appears to be unnatural; but no such evidence appears to attribute the cause on account of the accused. It is true that the incident is of a serious nature; however, it is not proved that the accused had any active role in the commission of the said act. It is true that, in an offence of this nature, when a charge under Section 149 of the IPC is levelled against the accused, then mere presence of the accused with the unlawful assembly may be sufficient to hold him guilty. But, in the present case, except for accused Kiran, none of the other four accused have been identified by any witness as being present at the time of the incident. There is no evidence explaining as to what role the other accused played or what weapons they were equipped with. As discussed earlier, although two witnesses have deposed against accused Kiran, their testimony cannot be wholly relied upon, particularly, in view of the fact that in a mob comprising of 100 to 150 persons, the accused alleged to have been identified, is not possible to accept that only one person—accused Kiran—was recognized among them. Moreover, all the accused reside in the same neighbourhood

(faliya), and therefore, the witnesses residing in that locality should have been able to identify all of them. Even according to the police statements, no other witness has given the name of accused Kiran or stated that they identified him. The two persons who have named accused Kiran cannot be relied upon as there appears to be a vast contradictions in their evidence. One witness claims that accused Kiran set his hut on fire, while another witness claims that the accused burned his tempo. The accused is presently in jail. Taking into consideration the testimonies of witnesses Rasulbhai and Yusufbhai, and after evaluating the evidence in light of the cross-examination, the evidence is not sufficient to convict accused Kiran. The entire case based on circumstantial evidence. Upon evaluating the evidence, where multiple witnesses were present at the time of the incident; but only two of them claim to have identified the accused each alleging different acts at different places, and therefore their testimony, even if considered to be independent testimony, lacks corroboration in such circumstances, in absence of any supporting evidence. There must be corroborative evidence. In the present case, there is no supporting evidence for the testimonies of both Isukbhai and Rasulbhai. Although several other witnesses were present at the time of the incident, none of them have stated that they saw accused Kiran setting fire to the tempo or the hut. There is no documentary evidence proving the ownership of the tempo, nor has the R.C. Book of the tempo been produced. It is also not proved that any weapon was recovered from any of the accused. It has not been established as to what kind of weapons, if any, were possessed by the accused at the time of the incident. Even during the police investigation, no muddamal appears to have been recovered. There is also no evidence showing that a curfew order was in force at the time of the incident.

15. Upon perusing the panchnama of the scene of offence, it is evident

that the houses of minority residents were damaged, and an assessment has been carried out showing a loss of approximately Rs. 48,02,000/-. In connection with the massacre that occurred on 27/02/2002 at the Godhra Railway Station, widespread riots had taken place across Gujarat. In that context, the particular community, agitated and overwhelmed by sentiments of anger, committed the present offences, all of which appear to have been done in a state of emotional frenzy. It is true that Hajabhai Ganibhai passed away; however, there is no evidence regarding who is responsible for causing his death. There is no evidence as to who set on fire his hut or who inflicted injuries upon him. The prosecution has completely failed to establish the charges against accused and the learned Sessions Judge has rightly discarded the evidence in absence of any corroboration.

16. It is also pertinent to note that no direct evidence or witness in support of the case of prosecution has come on record and thus the entire case of the prosecution case comes under the shadow of doubt. Therefore, the conclusion arrived at by the learned competent court of acquitting the respondents – accused does not warrant any interference in absence of reliable evidence proved beyond reasonable doubt and therefore, the order passed by the competent court is just and proper and in our opinion, the same does not require any interference.

17. At this stage, this Court may refer to the decision of the Hon'ble Apex Court in the case of ***Rajesh Prasad v. State of Bihar and Another [(2022) 3 SCC 471]*** encapsulated the legal position covering the field after considering various earlier judgments and held as below: -

> *"29. After referring to a catena of judgments, this Court culled out the following general principles regarding the*

powers of the appellate court while dealing with an appeal against an order acquittal in the following words: (Chandrappa case [Chandrappa v. State of Karnataka, (2007) 4 SCC 415]

"42. From the above decisions, in our considered view, the following general principles regarding powers of the 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 Criminal Procedure Code, 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."

18. In the case of ***H.D. Sundara & Ors. v. State of Karnataka [(2023) 9 SCC 581]*** the Hon'ble Apex Court has summarized the principles governing the exercise of appellate jurisdiction while dealing with an appeal against acquittal under Section 378 of CrPC as follows: -

"*8.1. The acquittal of the accused further strengthens the presumption of innocence;*

8.2. The appellate court, while hearing an appeal against acquittal, is entitled to reappreciate the oral and documentary evidence;

8.3. The appellate court, while deciding an appeal against acquittal, after reappreciating the evidence, is required to consider

whether the view taken by the trial court is a possible view which could have been taken on the basis of the evidence on record;

8.4. If the view taken is a possible view, the appellate court cannot overturn the order of acquittal on the ground that another view was also possible; and

8.5. The appellate court can interfere with the order of acquittal only if it comes to a finding that the only conclusion which can be recorded on the basis of the evidence on record was that the guilt of the accused was proved beyond a reasonable doubt and no other conclusion was possible."

19. In light of the above legal position and for the reasons recorded in the foregoing paragraphs, coupled with the fact that the case of the prosecution does not get support from the evidence recorded by the learned trial Court, the present appeals fail and are accordingly dismissed. Records and Proceedings, if any, be remitted to the Court concerned forthwith.

(ILESH J. VORA,J)

(R. T. VACHHANI, J)

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Original copy of this order has been signed by the Hon'ble Judges.
Digitally signed by: MANISHKUMAR JYOTINDRA SOMPURA(HC00189), Principal Pvt. Secretary, at High Court of Gujarat on 01/12/2025 14:53:01