IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL (AGAINST CONVICTION) NO. 1230 of 2014
With
R/CRIMINAL APPEAL NO. 553 of 2014
With
R/CRIMINAL APPEAL NO. 1231 of 2014

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE ILESH J. VORA

and
HONOURABLE MR.JUSTICE P. M. RAVAL

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Approved for Reporting	Yes	No

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JAGDISHBHAI ARJANBHAI GONDALIA PATEL & ANR.
Versus
STATE OF GUJARAT & ANR.

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Appearance:
MR JM PANCHAL, SR.ADVOCATE WITH MR NR KODEKAR(5020) for the Appellant(s) No. 1,2
MR ROHAN RAVAL, APP for the Opponent(s)/Respondent(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE ILESH J. VORA**
and
HONOURABLE MR.JUSTICE P. M. RAVAL

Date : 14/11/2025

ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE P. M. RAVAL)

1. The present appeals are directed against the judgment and order of conviction dated 14.2.2014 in

Sessions Case No.26 of 2012 passed by learned Additional Sessions Judge, Gondal whereby the learned trial Court was pleased to convict the appellants – accused.

2. Since the judgment and order of conviction under challenge in all the captioned appeals is the same, the appeals were heard analogously and are being disposed of by this common order.

3. The case of prosecution is that PW 48 [Police Inspector, Gondal City Police Station] received an anonymous telephone call on 14.11.2011, at about 2050 hours, disclosing Mahant of a temple (hereinafter referred to as "the deceased"] was creating a nuisance on Gundala Road. The said anonymous telephone call was registered vide Station Diary Entry No. 29 of 2011 [Ex.151]. Therefore, PSI RL Dave [PW:46] and his subordinates proceeded towards the scene of incident, but did not find anyone at the temple or in the Aashram or nearby vicinity. However, soon thereafter, they found dead body of the Mahant lying on the

wasteland situated behind the Ashram, and therefore PSI, Shri RL Dave [PW:46] informed about the same to the concerned police station [Ex:154]. The PW:46 drew inquest panchnama at Ex:29 in presence of PW:3 and PW:4 on 15.11.2011 at about 0100 at midnight. The dead body was identified by PW:40 and thereafter it was sent for autopsy purpose at government hospital at Gondal, and thereafter it was sent to Rajkot. Upon the autopsy, the medical officer-PW:45 primarily came to conclusion that the Mahant died of injuries sustained all over the body and head with blunt substance. It is the case of prosecution that during the course of investigation, two witnesses namely Devang @ Pintoo Maheshbhai Bhojani and Bhavesh Madhubhai Bhojani [PW:33-34} appeared before the Investigating Officer and got their statements recorded. Allegedly both these witnesses declared before the Investigating Officer that they had video graphed and photographed the entire incident which led to death of the Mahant. They allegedly produced video cassette of the CD and three cameras in which the entire incident was allegedly recorded under panchnama-

Ex:35-97. When the investigating officer saw the CD, the appellants were allegedly identified. It is also alleged that statements of several witnesses were recorded at [Exh:158-161] under S.164 of CrPC by the learned Magistrate who was examined as one of the witnesses during trial as PW:47. It is also case of prosecution that during the course of investigation, they had drawn panchnama [Ex:44] of the ashram where the Mahant used to live, and found photo copies of application dated 14.11.2011 purported to have been prepared by the deceased Mahant, disclosing that several persons, excluding the accused appellants were likely to assault the deceased Mahant.

4. On the basis of the aforesaid, the appellants were arrested and at the end of the investigation, charge-sheet was submitted before the Court of competent jurisdiction. However, the case being exclusively triable by the Court of Sessions, was committed to the learned Additional Sessions Court where it came to be numbered as Sessions Case No. 26 of 2012. The learned trial Court framed charge against

the accused persons. On the accused pleading not guilty, the prosecution examined 50 witnesses and produced 45 documents to prove the case of prosecution. At the end of recording of oral evidence, the learned trial Court was pleased to record further statements as all accused persons by virtue of provisions of Section 313 of the Code of Criminal Procedure, 1973. The accused appellants again pleaded false implication. After hearing the parties through their advocates, the learned trial Court has been pleased to hold all accused guilty of offence punishable under sections 302 read with 34 Of the Indian Penal Code and also for the offence punishable under Section 143, 147, 148 and 149 of the Indian Penal Code, 1860.

5. Learned senior advocate Mr.J.M.Panchal along with learned advocate Mr.N.R.Kodekar appearing for the appellants – accused would submit that despite all these witnesses having been turned hostile and having not supported the case of the prosecution, learned trial Judge has convicted the appellants – original accused persons

based on deposition of learned Judicial Magistrate, First Class who had recorded the statements under section 164 of CrPC. However, it is argued that statements recorded by learned Magistrate have been resiled by the witnesses before the learned trial Court coupled with the fact that statements are stereo-typed and not read over to the makers of the statements and also coupled with the fact that due care and caution which ought to have been taken while recording of statements of witnesses under section 164 of CrPC is not followed in its true spirit and creates serious doubt and the same can be discarded.

5.1 That none of the witnesses have supported the case of the prosecution and in such circumstances relied upon the photographs and CD without there being any substantive piece of evidence, more particularly, section 65-B of the Indian Evidence Act makes the judgment under challenge palpable wrong on the face of the record and there can be no justification whatsoever for convicting the present accused persons.

5.2 That even otherwise, the character and conduct of the deceased (Mahant) would show that the deceased was having enmity with many persons and many persons might have motive against the deceased which would be evident from the number of FIRs placed on record. In support of their submissions, learned advocates have relied upon the following decisions.

Sr.No.	Citation	Party name	Particulars
1	(2022) 7 SCC 581	Ravinder Singh Alias Kaku Vs State of Punjab	Failure to produce 65-B certificate.
2	(2014) 10 SCC 473	Anvar P.V. Vs P.K.Basheer & Ors.	Failure to produce 65-B certificate.
3	(2020) 7 SCC 722	Spmasundaram alias Somu Vs State	S.164 statement is not substantive evidence
4	(2010) 6 SCC 736	Baij Nath Sah Vs State of Bihar	S.164 statement is not substantive evidence
5	(1972) 3 SCC 280	Ram Kishan Singh Vs Harmit Kaur @ Another	S.164 statement is not substantive evidence

6. Per Contra, learned APP Mr.Rohan Raval would submit that when the prosecution has proved its case beyond reasonable doubt, more particularly, by examining learned Judicial Magistrate who has recorded the statements under section 164 of CrPC, the factum of

witnesses resiling from their statements before the learned Magistrate would be of no consequences coupled with the fact that there are recovery of photos, CD and video recording CD which are exhibited and proved in accordance with law and that during the test identification parade also, the accused were identified and thus test identification parade having been conducted in fair and transparent manner, learned trial Court was justified in convicting the present appellants, more particularly, when the deceased had also given the application naming two of the accused persons who were harassing him just prior to the death and under the circumstances, learned APP has argued to reject the present appeals.

7. Heard learned advocates for the respective parties and perused the impugned judgment and order. We have also gone through the depositions of all the witnesses.

8. At the outset, it is required to be noted that except PW 31 – Rameshbhai Mohanbhai Bhuva who knows

accused No.3 has been examined vide Exh.87. PW 39 – Kanaiyadas Guru Dayaramji has been examined vide Exh.108. PW 40 – Tulsidas Guru Nrutyagopaldas Bapu has been examined vide Exh.109. PW 42 – Ravjibhai Devabhai Davera has been examined vide Exh.112 and PW 44 – Sureshbhai Vishvanath Dave, Executive Magistrate who has conducted test identification parade has been examined vide Exh.127. PW 45 – Dr.Shailesh Dhanjibhai Bhuva has been examined vide Exh.140 who has conducted postmortem. PW 46 – Rameshchandra Laljibhai Dave has been examined vide Exh.149, PW 48 – Vishnudan Jasubhai Gadhvi has been examined vide Exh.197 and Arshad Aiyub Yakubkhan Sarvani has been examined vide Exh.197 who are Police Officers, none of the other witnesses have supported the case of the prosecution. It is required to be noted that vide Exh.155 – PW 47 Dipenbhai Dilipbhai Buddhdev, learned Magistrate who has recorded the statements of the witnesses under section 164 of CrPC has been examined.

9. From the reading of the entire record of the case

and also the impugned judgment, it transpires that learned trial Judge has heavily relied upon the statements recorded by PW 47 (learned Magistrate examined vide Exh.155) under section 164 of CrPC to bring home the charge coupled with the CD and photographs placed on record and then taking support from the test identification parade conducted by the Executive Magistrate – PW 44 – Sureshbhai Vishwanath Dave and also from the depositions of the Police Officers.

10. It is also required to be noted that the statements recorded under section 164 of CrPC by the learned Magistrate is not the substantive piece of evidence. In this regard, the decision in the case of ***Vijaya Singh and another Vs State of Uttarakhand***, reported in ***2024 INSC 905*** is required to be taken into consideration wherein in paragraphs 27, 28 and 31, the Honourable Apex Court has thus held as follows :

> "27. The jurisprudence concerning a statement under Section 164 CrPC is fairly clear. Such a statement is not considered as a substantive piece of evidence, as substantive oral evidence is one which is deposed before the Court and is

subjected to cross-examination. However, Section 157 of Indian Evidence Act, 1872 makes it clear that a statement under Section 164 CrPC could be used for both corroboration and contradiction. It could be used to corroborate the testimonies of other witnesses. In ***R.Shaji v. State of Kerala***, this Court discussed the two-fold objective of a statement under Section 164 CrPC as:

> "15. So far as the statement of witnesses recorded under Section 164 is concerned, the object is two fold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement, and secondly, to tide over immunity from prosecution by the witness under Section 164. A proposition to the effect that if a statement of a witness isrecorded under Section 164, his evidence in Court should be discarded, is not at all warranted ..."

The Court also recognized that the need for recording the statement of a witness under Section 164 CrPC arises when the witness appears to be connected to the accused and is prone to changing his version at a laterstage due to influence. The relevant para reads thus:

> "16. ... During the investigation, the Police Officer may sometimes feel that it is expedient to record the statement of a witness under Section 164 Code of Criminal Procedure. This usually happens when the witnesses to a crime are clearly connected to the accused, or where the accused is very influential, owing to which the witnesses

may be influenced ..."

28. Considering the conceptual requirement of recording a statement before a Judicial Magistrate during the course of investigation and the utility thereof, as prescribed in Section 157 of Evidence Act, it could be observed that a statement under Section 164, although not a substantive piece of evidence, not only meets the test of relevancy but could also be used for the purposes of contradiction and corroboration. A statement recorded under Section 164 CrPC serves a special purpose in a criminal investigation as a greater amount of credibility is attached to it for being recorded by a Judicial Magistrate and not by the Investigating Officer. A statement under Section 164 CrPC is not subjected to the constraints attached with a statement under Section 161 CrPC and the vigour of Section 162 CrPC does not apply to a statement under Section 164 CrPC. Therefore, it must be considered on a better footing. However, relevancy, admissibility and reliability are distinct concepts in the realm of the law of evidence. Thus, the weight to be attached to such a statement (reliability thereof) is to be determined by the Court on a case-to-case basis and the same would depend to some extent upon whether the witness has remained true to the statement or has resiled from it, but it would not be a conclusive factor. For, even if a witness has retracted from a statement, such retraction could be a result of manipulation and the Court has to examine the circumstances in which the statement was recorded, the reasons stated by the witness for retracting from the statement etc. Ultimately, what counts is whether the Court believes a statement to be true, and the ultimate test of reliability happens during the trial upon a

> calculated balancing of conflicting versions in light of the other evidence on record.
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> xxxx xxxx xxxx
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> 31. Having said so, we deem it fit to observe that a statement under Section 164 CrPC cannot be discarded at the drop of a hat and on a mere statement of the witness that it was not recorded correctly. For, a judicial satisfaction of the Magistrate, to the effect that the statement being recorded is the correct version of the facts stated by the witness, forms part of every such statement and a higher burden must be placed upon the witness to retract from the same. To permit retraction by a witness from a signed statement recorded before the Magistrate on flimsy grounds or on mere assertions would effectively negate the difference between a statement recorded by the police officer and that recorded by the Judicial Magistrate. In the present matter, there is no reasonable ground to reject the statements recorded under Section 164 CrPC and reliance has correctly been placed upon the said statements by the courts below."

Considering the aforesaid principle, though it is observed that the statement under section 164 of CrPC cannot be discarded at the drop of a hat and on a mere statement of the witness that it was not recorded correctly and much higher burden is placed on the witness who retracts from the same. After perusing the record of the case, we find

reasonable grounds to reject the statements recorded under section 164 of CrPC merely for the following reasons.

11. The statement recorded under section 164 of CrPC of witness – Pravinbhai Gordhanbhai Dholaria at Exh.158, witness – Mayursinh Jitendrasinh Raijada at Exh.159, witness – Virjibhai Somabhai Dangar at Exh.160 and witness – Girdharbhai Keshubhai Raiyani at Exh.161 if perused, all the statements of these witnesses are verbatim and stereotyped except barring few words. The entire statements of all the four witnesses are verbatim and on perusal of these statements at Exh.158 to 161, recording of satisfaction by learned Magistrate that witnesses have beenexplained, repercussions of recording of statements under section 164 of CrPC and after recording of such statements, whether such statements were read over to the witnesses is also not reorded under these exhibits. Thus, despite witnesses having stated that they have given the statements before the learned Magistrate, no specific dates have been admitted by them with regards making of such

statements and they have resiled from their statements recorded under section 164 of CrPC coupled with the fact that none of the independent witnesses except as stated hereinabove have supported the case of the prosecution. No reliance can be placed on the statements of the witnesses recorded under section 164 of CrPC which creates serious doubt in the manner in which they were recorded and under the circumstances as to how these statements were given is not proved beyond reasonable doubt nor the cooling off period or the factum of repercussions of the statements under section 164 of CrPC having been explained and recorded in such statements cannot be relied upon to convict the accused persons. Thus, the statements though relevant but their admissibility and reliability create serious doubt and does not pass the test of admissibility and reliability under the provisions of the Indian Evidence Act and no weightage can be attached to such statements and in light of all other evidence on record relied upon, section 164 of CrPC would be of no avail to the prosecution.

12. As far as witnesses supporting the case of the prosecution are concerned, the first such witness PW 31 – Rameshbhai Mohanbhai Bhuva at Exh.87 though has not been declared hostile, but does not support the case of the prosecution and does not take the case of the prosecution any further. As far as PW 39 – Kanaiyadas Guru Dayaramji who has been examined at Exh.108 is concerned, it is only proved to the effect that 10 to 12 days before the death of the deceased, the deceased had talked with this witness and stated that accused Nos.1 and 2 are harassing him and want to snatch away the possession of the land. Thus, only serious doubt can be said to have created and when no specific role is attributed to any of the accused nor as he eye witness to the incident, no reliance can be placed on such witness. The next witness who has supported the case of the prosecution is Tulsidas Guru Nrutyagopaldas Bapu who has been examined at Exh.109 also does not take the case of the prosecution any further since he only recognizes the dead body. PW 42 – Ravjibhai Devabhai Davera who has been examined at Exh.112 also does not take the case of the

prosecution any further and has clearly admitted in his cross examination that on the day of incident, he was not in Gondal City and that he has no personal knowledge about the incident and has no knowledge about how the deceased has expired.

13. As far as PW 25 Ratilal Naginbhai Patel is concerned who is examined vide Exh.69, he is Circle Officer working at the Mamlatdar office, Gondal had received request from Gondal City Police Station to prepare site map of the place of incident of 18.11.2011 and the same came to be prepared on 6.1.2012. However, merely preparing map of place of incident would not take case of the prosecution any further when none of the material witnesses have supported the case of the prosecution.

14. As far as PW 26 – Dr.Jitendrabhai Jivrambhai Joshi who has been examined at Exh.72 is concerned, he has treated accused No.1 and before the Doctor, he had given the history to the effect that Ramdas Bapu had

inflicted stick injury to him near Khimori lake on 14.11.2011 at 4.00 O'clock in the evening and also found injuries of reddish brown abrasion of 2 x 2 cm with scrap. It is required to be noted that such admission was recorded by the Doctor while he was in police custody and on the basis of such statement without there being any other substantial corroborative piece of evidence coupled with the fact that a bar under section 26 of the Indian Evidence Act which prevents confession by the accused while in custody of the police to be proved against him. Under such circumstances, no reliance can be placed on such history.

15. As far as PW 27 – Devendrabhai Tapubhai Babariya who has been examined at Exh.80 is concerned, the witness has deposed that it is accused No.1 i.e. Jagdishbhai who had telephoned and called ambulance and in the cross examination of the said witness, he has admitted that when he reached at the place of incident, one Sadhu was lying and was changing sides and was also speaking and had also heard from mouth to word that Bapu

who was expired was in drunk condition. In his examination-in-chief also, he has stated that he has received the call on 6.30 on 14.11.2011 from Jagabhai Gondaliya i.e. accused No.1 and in pursuance thereof, they had gone to Shriram Petrol Pump where one Sadhu was lying who was not well and on reaching, his health was improved and therefore, they came back. Thus, from the deposition of this witness also, nothing substantial supporting the case of the prosecution is coming on record.

16. As far as the deposition of the Executive Magistrate who has conducted test identification parade i.e. PW 44 – Sureshbhai Vishwanath Dave at Exh.127 is concerned, on perusal of the deposition of this witness and considering the same in its entirety, it transpires that the age, appearance, height etc. of the accused persons who were not stated and due to which dummy accused persons who were made to sit in the test identification parade were of neither relevant hight, colour, structure of the body and thus mandatory provisions of conducting test identification

parade having not followed. Also considering the fact that test identification parade is merely for the purpose of identification of the accused and is not substantial evidence but only corroborative evidence and hence mere identification in test identification parade cannot form the substantial evidence for conviction in absence of corroborative to the identification. Even otherwise, it was onus on the prosecution to establish that test identification was held in accordance with law.

17. As far as the death of the deceased being homicidal in nature is concerned, though defence lawyer has examined the Doctor at length, but we have no reason to discard the evidence that the death of the deceased was because of multiple injuries sustained by the deceased on his body and thus the death of the deceased was due to homicidal cannot be disputed.

18. As far as the deposition of PW 46 – Rameshchandra Laljibhai Dave who has been examined at

Exh.149, PW 48 – Vishnudan Jasubhai Gadhvi – Police Inspector and Investigating Officer who has been examined at Eh.166 and PW 49 – Arshad Aiyub Yakubkhan Sarvani – incharge Police Inspector when Vishnudan Jasubhai Gadhvi was on leave who has been examined at Exh.197 have been subjected to lengthy cross examination but the fact remains that they are formal witnesses and that none of them have deposed the contents of the panchnamas to prove various panchnamas recorded during the investigation and under the circumstances, it cannot be said that despite the panchas have turned hostile, panchnamas have been proved in accordance with law.

19. As far as recovery of camera and print out of photographs are concerned, the fact remains that none of the witnesses from whom such camera was recovered have supported the case of the prosecution nor they have been shown the camera which were used in taking photographs and/or CD and they have turned hostile coupled with the fact that no certificate under section 65-B of the Indian

Evidence Act is placed on record and hence no reliance can be placed, more particularly, in view of the decision in the case of ***Arjun Panditrao Khotkar Vs Kailash Kushanrao Gorantyal and others***, reported in ***(2020) 7 SCC 1*** wherein it is held that certificate required under section 65-B is a condition precedent to the admissibility of secondary evidence by way of electronic evidence. It was further held that oral evidence in place of such certificate cannot sufficient as section 65-B(4) is mandatory requirement of law and clearly states that secondary evidence is admissible only if laid in the manner stated and not otherwise.

20. The certificate under section 65-B(4) would be unnecessary if the original document itself is produced and this can be done by the owner of the laptop computer, computer tablet or even a mobile phone by stepping into the witness box and proving that the device concerned on which the original information is first stored is owned and/or operated by him. No such exercise has been undertaken while exhibiting the document, more particularly, CD or

photographs coupled with the fact that the person alleged to have taken photographs, recorded video and alleged interview after the death are not proved in accordance with settled principles in the aforesaid case.

21. In view of the same, reliance placed by learned trial Court on CD as well as photographs is based on without considering the settled principles of law. It is required to be noted that conduct of the deceased was also not clear of any doubt since there are various FIRs lodged against him also and that from the depositions of Girdharbhai and Jahidbhai Ismailbhai Bhatti, it has come on record that it is accused No.1 who had telephoned for calling abulance and was also found present at the scene of offence which would generally not be a conduct of an accused after committing a crime. Normally, a human behaviour is to the effect that a person who has committed a crime would try to concel himself from the offence and would not be present at the scene of offence nor would be telephoned to call ambulance after committing crime and

thus, defence is able to create serioud dent in the case of the prosecution theory.

22. Considering overall facts and circumstances of the case as well as documentary evidences on record, we are of the considered opinion that it cannot be said that the prosecution has been able to prove its case beyond reasonable doubt.

23. For the reasons stated hereinabove, the present criminal appeals succeed and the same are allowed. At this juncture, it would be relevant to note that appellant No.1 of Criminal Appeal No.1231 of 2014 i.e. Shambhubhai Gandubhai Kotadia Patel has expired pending the appeal on 8.2.2025 and photocopy of the death certificate is also placed on record. Considering the same, Criminal Appeal No.1231 of 2014 qua appellant No.1 - Shambhubhai Gandubhai Kotadia Patel stands abated. The impugned judgment and order dated 14.2.2014 in Sessions Case No.26 of 2012 passed by learned Additional Sessions Judge,

Gondal is quashed and set aside.

24. If the appellants – accused are in jail, they be set at liberty if not required in any other offence. R & P be sent back forthwith.

(ILESH J. VORA,J)

(P. M. RAVAL, J)

H.M. PATHAN

Original copy of this order has been signed by the Hon'ble Judges.
Digitally signed by: HABIBULLAKHAN MOHAMMADKHAN PATHAN(HC00167), GOV, at High Court of Gujarat on 14/11/2025 15:36:39