

MAHAMADKHAN NATHEKHAN  
v.  
STATE OF GUJARAT  
(Criminal Appeal No.162 OF 2007)

SEPTEMBER 10, 2014

[MADAN B. LOKUR AND C. NAGAPPAN, JJ.]

*Code of Criminal Procedure, 1973 - s. 378 - Appeal in case of acquittal - Interference by the High Court - Scope of - Held: High Court not expected to merely substitute its opinion for that of the trial court only because it is permitted to do so and because it has the power to do so.- High Court has to correct an error of law - It has to exercise its discretion very cautiously, keeping in mind the acquittal of the accused and the rights of the victim - On facts, the High Court convicted the appellants u/ss. 302/34, 302/114 and u/s. 25(1)(a) of the 1959 Act and sentenced them accordingly, setting aside the acquittal by the trial court - High Court misread the material evidence and reversed the decision of the trial court - Thus, order of conviction and sentence imposed by High Court set aside and the judgment of acquittal rendered by the trial court restored - Penal Code, 1860 - ss. 302/34, 302/114 - Arms Act, 1959 - s. 25(1)(a).*

**Allowing the appeals, the Court**

**HELD: 1.1 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 it is permitted 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**

A its discretion very cautiously, keeping in mind the acquittal of the accused and the rights of the victim. [Para 8] [783-G-H; 784-A]

B 1.2 On facts, homicidal death has not been established. There was no motive for the occurrence. The High Court misread the material evidence and reversed the decision of the trial court by convicting the accused. The conviction and sentence imposed by the High Court on the appellants is set aside and the judgment of acquittal rendered by the trial court is restored. [Para 12, 13, 14] [787-B, C, E, F]

C *Sujit Biswas vs. State of Assam* 2013 (3) SCR 830:(2013) 12 SCC 406 - referred to.

D \**Chandrappa vs. State of Karnataka* 2007 (2) SCR 630:(2007) 4 SCC 415 - relied on.

#### Case Law Reference:

E	2007 (2) SCR 630	Relied on	Para 8
	2013 (3) SCR 830	Referred to	Para 12

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 162 of 2007

F From the Judgment and Order dated 26.12.2006 and 22.01.2007 of the High Court of Gujarat at Ahmedabad in Criminal Appeal No. 865/1986.

WITH

G Crl.A. Nos. 406 and 695 of 2007.

H Suhil Kumar, D.G. Karia, Aditya Kumar, Sanjay Jain, Harpuneet Singh, Manisha T. Kariya, Sushil Kr. Gupta, J.M Pathan, L.R. Pathan, M. A. Sheikh, Kamal Mohan Gupta, for the Appellant.

MAHAMADKHAN NATHEKHAN v. STATE OF 779  
GUJARAT

Hemantika Wahi, Pinky Behra, Preeti Bhardwaj, Swati A  
Vaibhav for the Respondent.

The Judgment of the Court was delivered by

C. NAGAPPAN, J. 1. All three appeals are preferred B  
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 C  
Mahamadkhan Nathekhani and accused no.3 Vora Ismailbhai  
Daudbhai were tried for the charge under Sections 302, 120(B)  
and 201 of IPC and Section 25(A) of The Arms Act, 1959 for D  
committing the murder of Firoz bhai 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, E  
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 F  
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 G  
High Court found accused nos.1 and 3 guilty of the offence  
punishable under Section 302 read with Section 34 IPC and  
accused no.2 guilty for the offence punishable under Section  
302 read with Section 114 IPC 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 H

A 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 Firoz bhai and their relationship was cordial. Accused no.2 was also a common friend of them. Firoz bhai 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 Firoz bhai 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 Firoz bhai was interested in early recovery and at his instance accused nos.1 and 3 on 20.2.1984 agreed to accompany Firoz bhai to Savarkundla sometime during afternoon hours. Firoz bhai sold the tyres at Savarkundla on credit basis at the instance of accused no.3 by taking only token amount and hence Firoz bhai was keen that accused no.3 should accompany him. The brother of deceased Firoz bhai, Mohammed Usman was working in a cooperative bank in the same place and during the spare hours he was helping Firoz bhai in his business. On 20.2.1984 Firoz bhai 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 Firoz bhai 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 Firoz bhai 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 Firozbbhai received gunshot injury from the gun and the accused returned towards city to take injured Firozbbhai to the hospital. On the way accused no.2 got down with his gun. Accused nos.1 and 3 took injured Firozbbhai to V.S. Hospital and told the hospital authority that some unknown persons injured Firozbbhai when they were proceeding towards Savarkundla. Firozbbhai 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 clavical. 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 antemortem."

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.

A 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  
B case was transferred to Umrjala 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  
C 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.

D 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,  
E 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  
F 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  
G by this Court in the decision in *Chandrappa vs. State of  
Karnataka* (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. A

(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. B C

(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. D E

(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." F

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 H

A 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.

B 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 Firoz bhai 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. C Firoz bhai 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 Firoz bhai to sell tyres to the traders at Savarkundla. Accused no.1 also was a friend of Firoz bhai and accused no.2 was a common friend to all of them. At the instance of accused no.3, Firoz bhai sold tyres to customers at Savarkundla on credit basis and there were outstandings to be recovered and on 20.2.1984 Firoz bhai asked the accused no.3 to accompany him to collect the dues. D 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 Firoz bhai both accused nos.1 and 3 agreed to the trip. Firoz bhai 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 E 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 F that the relationship Firoz bhai had with accused nos.1 and 3 G H

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 1ft. 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

A 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.

B 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 :

C ..... "The presence of nitrate in the hand-wash of this accused establishes that at the time of sustaining gunshot injury by deceased Firoz bhai accused no.1 Ashrafkhan must be very close to him or he must be responsible for the injury.".....

D Accused no.1 was seated in the back seat along with Firoz bhai 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  
E 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.

F 12. The High Court treated the statement of accused no.3 given under Section 313 Cr.P.C. as evidence against him. This is clearly impermissible in law. This Court in the recent decision in *Sujit Biswas vs. State of Assam* (2013) 12 SCC 406 held thus :-

G "20.....The circumstances which are not put to the accused in his examination under Section 313 CrPC, 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

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Act, as the accused cannot be cross-examined with A  
reference to such statement."

Firozbbhai died of gunshot injury is established by the B  
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 C  
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 D  
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 E  
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 F  
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.