

**(2013) 04 GUJ CK 0095**

**In the Gujarat High Court**

**Case No :** Criminal Miscellaneous Application (for Leave to Appeal) No. 7944 of 2012 In Criminal Appeal No. 748 of 2012 with Criminal Appeal No. 748 of 2012

State of Gujarat

APPELLANT

Vs

Rafik Ahemad Aziz Ahemad Sheikh

RESPONDENT

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**Date of Decision :** 03-04-2013

**Acts Referred:**

Bombay Police Act, 1951 — Section 135  
Bombay Prohibition Act, 1949 — Section 135(1)  
Criminal Procedure Code, 1973 (CrPC) — Section 209, 313, 378(1)(3)  
Evidence Act, 1872 — Section 27  
Penal Code, 1860 (IPC) — Section 302

**Citation :** (2013) 04 GUJ CK 0095

**Hon'ble Judges :** S.H. Vora, J;M. R. Shah, J

**Bench :** Division Bench

**Advocate :** L.B. Dabhi, app, for the Appellant;

**Final Decision :** Dismissed

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## **Judgement**

S.H. Vora, J.—Feeling aggrieved by and dissatisfied with the judgment and order dated 14th December 2011 passed by the learned Additional Sessions Judge, Court No. 14, Ahmedabad City in Sessions Case No. 72 of 2011 whereby the respondent-accused came to be acquitted for the offences punishable under Sections 302 of the Indian Penal Code (hereinafter referred to as "the IPC") read with Section 135(1) of the Bombay Police Act, the appellant-State of Gujarat has preferred this application to grant leave to appeal as provided u/s 378(1)(3) of the Code of Criminal Procedure, 1973 ("the Code", for short). The prosecution case as unfolded during the trial is such that the respondent-accused has love affairs with one prosecution witness-Jayashriben Patel. For such relationship, deceased rebuked the respondent-accused before about 10 days of the incident dated 19th May 2010. Keeping grudge of such rebuke, when deceased-Paresh was sleeping on the cot lying on the roadside nearby society on 19.5.2010 at

about 1.30 AM (at night) respondent-accused gave knife blow on the stomach and as the deceased shouted, one prosecution witness woke up and informed the complainant, i.e. mother of the deceased, that someone had beaten Paresh. Thereafter, deceased was taken to the hospital where he succumbed to the injuries.

2. The mother of deceased-Paresh lodged the complaint before Vatva Police Station on 19.5.2010 at about 4.40 AM for the incident alleged to have taken place on 19.5.2010 as aforesaid. In pursuance of the said complaint, the offence being I-C.R. No. 113 of 2010 came to be registered by the said police station. During the course of investigation, the investigating agency drawn the panchnama of the place of the offence, inquest panchnama, panchnama of recovery of the clothes worn by the deceased, panchnama of the discovery of the knife at the instance of the accused, recovery panchnama of bloodstained mat of Activa Scooter, arranged TI parade, collected FSL Report and also recorded the statements of various witnesses. After having found sufficient material against the respondent-accused, the respondent was arrested and charge-sheeted for committing the murder of deceased-Paresh and the investigating agency laid the charge-sheet before the learned Metropolitan Magistrate Court No. 1, Ahmedabad.

3. As the said Metropolitan Magistrate Court No. 1 lacked the jurisdiction to try the offence punishable u/s 302 of the IPC, it committed the case to the Sessions Court as provided u/s 209 of the Code. Upon committal of the case to the Sessions Court, the learned trial Judge framed charge against the respondent accused vide Exhibit 2 for the offence punishable under Sections 302 of the IPC and Section 135 of the Bombay Police Act. The respondent-accused pleaded not guilty and claimed to be tried.

4. In order to bring home the charge, the prosecution has examined 16 witnesses and also produced documentary evidence consisting of inquest panchnama, post mortem report, Serological Report, panchnama of identification parade, FSL report, panchnama of the scene of offence and other relevant panchnama and other evidence before the trial court.

5. On conclusion of the trial, the respondent-accused was generally examined under the provisions of Section 313 of the Code and in the further statement the respondent-accused denied his involvement in the crime and further stated that false case is lodged against him. After hearing both the sides and after analysis of the evidence adduced by the prosecution before the trial Court, the respondent-accused came to be acquitted from the charge of the offences framed against him.

6. We have minutely examined the oral and documentary evidence adduced by the prosecution before the trial court and we have heard the submissions of the learned APP, Mr. L.B. Dabhi appearing for the State. We have noticed that the entire case of the prosecution rests on circumstantial evidence. The death of the

deceased-Paresh was homicidal and the deceased died due to shock and haemorrhage due to stab injuries over the body. The evidence as appearing on record of the trial court is such that the prosecution witness-Rajubhai Patel, Exhibit 38 has seen the accused fleeing away on black colour Aactiva scooter after the incident. According to his evidence, he could identify the person who assaulted the deceased-Paresh. But, in the Test Identification parade, arranged by the Executive Magistrate, this witness could not identify the respondent-accused. Similarly, the bloodstained mat of Aactiva Scooter was not examined by the FSL. None of the witnesses of various panchnamas drawn by the prosecution supported the case of the prosecution and thus all the panchnamas drawn by the Investigating Agency during the course of the investigation at various stages remained unproved. Similarly, there is no iota of evidence as to occurrence of any of the so called incident 10 days prior to the incident wherein deceased-Paresh rebuked the respondent-accused for having affairs with one Jagrutiben Patel. It seems that the investigating agency drawn the discovery panchnama u/s 27 of the Evidence Act whereby weapon, namely, knife was recovered at the instance of the accused. Admittedly, both the panchas of the discovery panchnama did not support the prosecution case. Therefore, without there being any other sufficient evidence to involved the respondent-accused in the crime, no reliance can be placed on the discovery of knife at the instance of the accused so as to connect him with the crime of the murder. At this stage, it is fruitful to refer to the decision rendered in the case of Kana Mohan Sutar Vs. State, more particularly paragraph 4 thereof, which reads under:

4. Mr. H.L. Patel, the learned counsel for the appellant has relied upon the judgment of the Supreme Court in the case of Dudh Nath Pandey Vs. State of Uttar Pradesh, for the above proposition. The Supreme Court has very clearly stated that mere discovery of the weapon may at the best prove the accused knowledge as to where it is kept and hence it cannot be regarded as sufficient for the purpose of conviction. Mr. Patel has also referred to another decision of the Supreme Court in the case of Pohalya Motya Valvi Vs. State of Maharashtra, wherein also the Supreme Court has clearly stated that the recovery of the weapon is not sufficient to link the accused with the commission of offence. The authorship of the concealment would be the cogent evidence. The Supreme Court has further stated that it would be more so, when it is a confessional statement which becomes inadmissible under Sec. 27 of the Evidence Act. It goes on to say that the recovery of the weapon becomes incriminating not because of its recovery at the instance of the accused but the element of criminality tending to connect the accused with the crime lies in the authorship of consultant and not mere knowledge of where it is lying.

In the case on hand, panchnama at Exhibit 18 as to recovery of muddamal knife is effected in the open place and further both the witnesses to the panchnama at Exhibit 18 did not support the prosecution case as to recovery and further discovery panchnama at Exhibit 18 did not disclose that the respondent-accused stated that he had concealed muddamal knife and he was willing to discover the

same. No such statement is made by the accused in the presence of the panch witnesses and therefore only recovery of knife is not sufficient to link the respondent-accused with the offence as there is no reliable and trustworthy evidence that the respondent-accused had concealed the muddamal weapon.

7. When the case rests on the circumstantial evidence, the onus is on the prosecution to prove that the chain is complete and the circumstances from which the conclusion of the guilt is to be drawn should be fully established. The prosecution is required to prove such facts so established that the same should be consistent only with the hypothesis of the guilt of the accused and they should not be explainable on any other hypothesis except that the accused is guilty. It is further the requirement of law that the circumstances should be of conclusive nature and the chain of evidence should be so complete as not to leave any reasonable ground consistent with the innocence of the accused. In the case on hand, there is not a single circumstance appearing in the evidence except discovery of knife in pursuance of the panchnama drawn u/s 27 of the Evidence Act so as to connect the respondent-accused with the crime as alleged. Except the discovery panchnama, there is no iota of evidence/circumstances either directly or indirectly connecting the respondent accused with the crime. Therefore, in our considered opinion the learned trial Judge has rightly acquitted the respondent-accused from the alleged charge and we do not find any infirmities in the findings so recorded. In the case on hand, the only view which is possible is that the respondent-accused is not the author of the crime and there are no compelling reasons or grounds existing to interfere with the order of acquittal recorded by the learned trial Judge. The appellate Court should bear in mind the presumption of innocence of the accused and further that the trial Court's acquittal bolsters the presumption of his innocence. Keeping in mind the evidence adduced by the trial Court and also settled principle as to scope of appeal against the acquittal order there are no good reasons to interfere with the findings of the trial court.

In the result, Criminal Misc. Application No. 7944 of 2012 must fail and is dismissed. Consequently, Criminal Appeal No. 748 of 2012 must also fail and is dismissed.