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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL NO. 2502 of 2005

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE RAJENDRA M. SAREEN

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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H.K.THAKUR
Versus
NAZIR NOORMOHMED KARA & 2 other(s)

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Appearance:
MR NIKUNT RAVAL for the Appellant(s) No. 1
MR P B KHAMBHOLJA(5730) for the Opponent(s)/Respondent(s) No. 1,2
MR RC KODEKAR APP for the Opponent(s)/Respondent(s) No. 3

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CORAM:**HONOURABLE MR. JUSTICE RAJENDRA M. SAREEN**

Date : 09/02/2022

CAV JUDGMENT

1. This Appeal is filed by the appellant – State of Gujarat under Section 378 of the Criminal Procedure Code, 1973 against the judgment and order dated 21.01.2004 passed by the Additional Chief Metropolitan Magistrate, Ahmedabad in Criminal Case No.399 of 1988 acquitting the respondent

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Nos. 1 and 2 – original accused from the offence punishable under section 135 of Customs Act and under section 120B of Indian Penal Code.

2. The case of the prosecution is that an information was received by the customs officers on 11th April 1986 that one Amratlal Chandmal Jain of Ahmedabad was actively dealing in foreign mark gold on large scale and one Kishanla Meghraj Soni of Ahmedabad was his associate who used to smuggle in foreign mark gold through the Coast of Saurashtra. On 28.4.1986 the police officers of Ahmedabad intercepted one Daud Jusab Manek of Salaya who was carrying with him 136 pieces of foreign mark gold and while he was proceeding towards Uttam Niwas Guest House at Ahmedabad. The police officers apprehended opponent no.1 herein in this connection at Kalupur Police Station and informed the custom officers about the recovery of foreign marked gold as well as apprehension of those two persons. Since both the aforesaid persons could not produce any documentary evidence as regards legal import of such gold nor could produce any purchase vouchers showing the legal acquisition of the same, the said gold worth Re.32,64,000 at that point of time was seized under panchnama dated 28.4.1986 drawn in presence of two panchas and the aforesaid two accused persons. Since the accused persons did not possess license to deal with primary gold under the Gold (Control) Act, 1968 the customs officers confiscated the gold under the provisions of the said Act.

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2.1 That upon further interrogation of two accused they informed the investigating agency that the said gold was to be delivered to one Rameshbhai @ Kishanlal Meghraj Soni at Manek Chowk, Ahmedabad. It was also revealed during interrogation that the gold was brought to India in a vessel Rasul Madat MNV 575 owned by accused Adam Suleman Gandhar. The said gold was given to Adam Suleman Gandhar at Dubai by Noormohmed Abdul Kara and accused Amratial Chandmal Jain and he was told by Normohmed Abdulla Kara to deliver the said gold to his son Nazir Noormohmed Kara, accused no.4 - Opponent no.1 herein. It is also revealed that said Adam Suleman Gandhar upon reaching Salaya met Nazir Noormohmed Kara and informed him that his father Noormohmed Abdulla Kara had given him gold to deliver it to Nazir Noormohmed Kara. Thereupon Noormohmed Kara told Adam Sulemen Gandhar to deliver the said gold to Daud Jusab Manek, accused no.6. At that time, accused no.7, opponent no.2 herein, had accompanied Adam Suleman Gandhar. Thereafter, they handed over the gold to Daud Jusabh Manek who brought it to Ahmedabad but was apprehended by the police while he was proceeding towards Uttam Guest House. Therefore since the offence was completed, the complainant filed a complaint for the offences punishable under Section 135 of the Customs Act read with Section 120B of the Indian Penal Code in the competent court.

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2.2. The trial court issued the summons by taking cognizance and recorded the plea of the accused. The accused did not plead guilty and denied their statements recorded under Section 108 of the Customs Act. The trial Court after holding the trial and after hearing the submissions of both the sides had come to the conclusion that the accused person are not guilty of the offence under Section 135 of the Customs Act and therefore acquitted the accused of the said offence by his judgement and order dated 21.1.2004.

3. Being aggrieved by and dissatisfied with the aforesaid judgement and order of acquittal, present appeal has been filed by the appellant – State.

4. Learned advocate Mr.Nikunt Raval for the appellant – original complainant has vehemently argued that the Magistrate has committed a grave error in not believing the deposition of the witnesses and documentary evidence on record. He has further submitted that the learned Magistrate has erred in acquitting the respondents – accused from the charges levelled against them. He has further submitted that the prosecution has proved that the respondents have committed offence under section 135 of Customs Act and under section 120B of the Indian Penal Code. He has further submitted that the learned Magistrate has acquitted the respondents accused merely on some minor contradictions and omissions in the evidence of the

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witnesses. He has further submitted that the learned Magistrate has erred in not believing the evidence of the investigating officer who had no reason to implicate the accused falsely in the case.He has further submitted that the offence punishable under section 135 of Customs Act and under section 120B of the Indian Penal Code, is made out, however, the same is not believed by the Sessions Court. He has further submitted that though the prosecution witness has supported the case of the prosecution, the trial court erroneously not believed their evidence and acquitted the accused.

Making above submissions, he has requested to allow the present appeal.

4. Mr.P.B. Khambholja, learned advocate for the respondent Nos.1 and 2 original accused submitted that there is hardly any substance in the submissions of learned APP. There is no admissible evidence on record connecting the accused with the commission of the offence. There are material contradictions and omissions in the evidence of the prosecution witnesses. The accused from whom the gold was found, has died and against the other respondents accused, the offence is of abetment, which is also not proved beyond reasonable doubt. There is no evidence that the accused Daud Jusub, from whom the gold was recovered was going to handover the gold to Nazir Noormohmed who stayed at Uttam Guest house. No original report of the Mint House regarding purity of the

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gold has been placed on record and the copy produced on record cannot be relied as admissible evidence. Witness has admitted that the foreign mark which was on the gold can be put by anybody, therefore, it cannot be believed that the gold was smuggled gold.

Making above submissions, he has requested to dismiss the present appeal.

5. Heard the learned advocates for the respective parties and perused the impugned judgement and order of acquittal. Re-appreciated the entire evidence on record.

6. Before adverting to the facts of the case, it would be worthwhile to refer to the scope in Acquittal Appeals. It is well settled by is catena of decisions that an appellate Court has full Power to review, re-appreciate and consider the Evidence upon which the Order of Acquittal is founded. However, the Appellate Court must bear in mind that in case of Acquittal, there is prejudice 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 reaffirmed and strengthened by the trial Court.

7. On perusal of the evidence on record, it appears that

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the accused Daud Jusab died during the pendency of the trial and hence the case qua him came to be abated. It is pertinent to note Daud Jusab from whom the gold was found, has died and the charge against the other respondents accused is of abetment.

7.1. Even there is no evidence that the accused Daud Jusub, from whom the gold was recovered was going to handover the gold to Nazir Noormohmed who stayed at Uttam Guest house.

7.2. Even no original report of the Mint House regarding purity of the gold has been placed on record and the copy produced on record cannot be relied as admissible evidence. The prosecution witness has admitted that the foreign mark which was on the gold can be put by anybody, therefore, it cannot be believed that the gold was smuggled gold.

7.03. On perusal of overall evidence on record, it can be safely said that there is no admissible evidence against the respondents accused and the prosecution has failed to prove the case against the respondents accused beyond reasonable doubt.

8. It may be noted that as per the settled legal position, when two views are possible, the judgment and order of acquittal passed by the trial Court should not be interfered

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with by the Appellate Court unless for the special reasons. A beneficial reference of the decision of the Supreme Court in the case of **State of Rajasthan versus Ram Niwas** reported in **(2010) 15 SCC 463** be made in this regard. In the said case, it has been observed as under:-

> *"6. This Court has held in Kalyan v. State of U.P., (2001) 9 SCC 632 :*
>
> > *"8. The settled position of law on the powers to be exercised by the High Court in an appeal against an order of acquittal is that though the High Court has full powers to review the evidence upon which an order of acquittal is passed, it is equally well settled that the presumption of innocence of the accused persons, as envisaged under the criminal jurisprudence prevalent in our country is further reinforced by his acquittal by the trial court. Normally the views of the trial court, as to the credibility of the witnesses, must be given proper weight and consideration because the trial court is supposed to have watched the demeanour and conduct of the witness and is in a better position to appreciate their testimony. The High Court should be slow in disturbing a finding of fact arrived at by the trial court. In*

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Kali Ram V. State of Himachal Pradesh, (1973) 2 SCC 808, this Court observed that the golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The Court further observed:

> *"27. It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilised society. Suppose an innocent person is convicted of the offence of murder and is hanged, nothing further can undo the mischief for the wrong resulting from the unmerited conviction is irretrievable. To take another instance, if an innocent person is sent to jail and undergoes the sentence, the scars left by the miscarriage of justice cannot be erased by any subsequent act of*

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expiration. Not many persons undergoing the pangs of wrongful conviction are fortunate like Dreyfus to have an Emile Zola to champion their cause and succeed in getting the verdict of guilt annulled. All this highlights the importance of ensuring, as far as possible, that there should be no wrongful conviction of an innocent person. Some risk of the conviction of the innocent, of course, is always there in any system of the administration of criminal justice Such a risk can be minimised but not ruled out altogether It may in this connection be apposite to refer to the following observations of Sir Carleton Alien quoted on page 157 of "The Proof of Guilt" by Glanville Williams, second edition:

"I dare say some sentimentalists would assent to the proposition that it is better that a thousand, or even a million, guilty persons should escape than that one innocent person should suffer; but no responsible and practical person would accept such a view. For it is obvious that if our ratio is extended indefinitely, there comes a point when the whole system of justice has broken down and society is in a state of chaos."

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28. The fact that there has to be clear evidence of the guilt of the accused and that in the absence of that it is not possible to record a finding of his guilt was stressed by this Court in the case of Shivaji Sahebrao, (1973) 2 SCC 793, as is clear from the following observations:

"Certainly it is a primary principle that the accused must be and not merely, may be guilty before a court, can be convicted and the mental distinction between 'may be' and 'must be' is long and divides vague conjectures from sure considerations."

“9. The High Court while dealing with the appeals against the order of acquittal must keep in mind the following propositions laid down by this Court, namely, (i) the slowness of the appellate court to disturb a finding of fact; (ii) the noninterference with the order of acquittal where it is indeed only a case of taking a view different from the one taken by the High Court."

8. In Arulvelu and another versus State reported in (2009) 10 Supreme Court Cases

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206, the Supreme Court after discussing the earlier judgments, observed in para No. 36 as under:

"36. Careful scrutiny of all these judgments lead to the definite conclusion that the appellate court should be very slow in setting aside a judgment of acquittal particularly in a case where two views are possible. The trial court judgment can not be set aside because the appellate court's view is more probable. The appellate court would not be justified in setting aside the trial court judgment unless it arrives at a clear finding on marshaling the entire evidence on record that the judgment of the trial court is either perverse or wholly unsustainable in law."

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9. In that view of the matter, the Criminal Appeal being devoid of merits is dismissed.

(RAJENDRA M. SAREEN,J)

R.H. PARMAR

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