

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPEAL NO. 75 OF 2009

STATE

through Police Inspector,
Margao Police Station,
Margao, Goa 403 601.

.... Appellant.

Versus

Tariq Ahmad Buttloo
s/o. Jalaluddin Buttloo,
aged 28 years, occupation unemployed,
resident of c/o. Jalaluddin Buttloo,
near Tindane High School, Basanbag,
Ganpatyar, Srinagar, Kashmir.

..... Respondent.

Mr. S. R. Rivankar, Public Prosecutor for the Appellant -State.

Mr. J.A. Lobo, Advocate appointed under the Legal Aid Scheme, for
the Respondent.

Coram : M.S. Sonak &
Smt. M.S. Jawalkar, JJ.

Reserved on : 21st January, 2020.
Pronounced on : 24th January, 2020.

JUDGMENT: (Per M.S. SONAK, J.)

Heard Mr. S.R. Rivankar, learned Public Prosecutor for
the State and Mr. J.A. Lobo, learned Counsel appointed under the
Legal Aid Scheme, who appears on behalf of the Respondent.

2. This Appeal, under Section 378 of the Code of Criminal Procedure, 1973 (Cr.P.C.), is directed against the Judgment and Order dated 10th July, 2008, passed by the learned Adhoc Assistant Sessions Judge, FTC-I, South Goa at Margao, (learned Sessions Judge) in Sessions Case No.15/2006, acquitting the Respondent of the charges under Sections 121, 419 and 420 of the Indian Penal Code (IPC), Sections 4 and 5 of the Explosive Substances Act, 1908, Section 7, read with Section 27 of the Arms Act, 1959 and Section 164, read with Section 179 of the Railways Act, 1989.

3. The Charge framed by the learned Sessions Judge on 17th October, 2006 in this matter, reads as follows :

“I, Shri N.S. Amonkar, Adhoc Asst. Sessions Judge, FTC-I, Margao, hereby charge you Tariq Ahmad Buttloo, s/o Jalaluddin Buttloo, r/o c/o Near Tindala High School, Basantbag, Ganpatyar Srinagar, Kashmir as follows:-

That you on the 10th day of March, 2006 at 20.30 hours was caught red handed when alighting from Mangala Express at Konkan Railway Station, Margao and during the search of the suitcase carried by you two spherical heavy objects wrapped in a muffler and cardboard backing, two silver coloured cylindrical objects partly packed in an envelope, a sealed plastic packet containing black coloured powder, a camera, two cell phones, identity cards in different names and a web camera were found in your possession and on interrogation, you informed that black coloured powder in the plastic packet to be RDX and spherical objects to be hand grenades and cylindrical objects to be detonators. You were carrying the said explosives without any permission or licence and you

disclosed yourself to be a member of Teheriq-Ul-Mujahiddin. You have thus committed an offence under Section 121 of I.P.C., Section 4 & 5 of Explosive Substances Act, 1908, Section 7 r/w Section 27 of Arms Act, 1959 and Section 164 r/w Section 179 of Railways Act.

Further, you have impersonated yourself as Irshad Ahamad Bhat to Smt. Clara Gonsalves and signed a leave and licence agreement with her for occupying her flat situated at building Rosa Mystica, Sirvodem, Margao. You have thus committed an offence under Section 419 and 420 of I.P.C.

And I hereby direct that you be tried by this court on the above charges

Sd/-

(N.S. Amonkar)

Margao

Adhoc Assistant Sessions Judge,

Dated : 17.10.2006.

*Fast Track Court-I, South Goa
Margao”*

4. The Respondent pleaded not guilty and claimed to be tried. In fact, the Respondent, in his arguments opposing framing of charge, took up a specific plea that he was never arrested at the Margao Konkan Railway Station as alleged by the Prosecution on 10th March, 2006, but was arrested on 3rd March, 2006 at about 3.30 p.m. to 4.00 p.m. by Police Inspector Krishna Shetgaocar of CID, Crime Branch, near Grace Church, at Margao and after being detained illegally, it was made to appear as if he was apprehended at the Railway Station whilst alighting from the train.

5. The Prosecution has examined, in all, 27 witnesses.

Thereafter, the Respondent was questioned in terms of Section 313 of Cr.P.C., in which, again, he has taken a specific plea about being in custody from 3rd March, 2006 and denying altogether the incident of arrest on the Railway Station on 10th March, 2006. The Respondent also produced on record some Judgment and Orders made by the Courts in Jammu and Kashmir, in which, the detention orders issued against him were set aside, or, in which, the Respondent was acquitted by the Sessions Court.

6. The learned Sessions Judge, by the impugned Judgment and Order dated 10th July, 2008, has acquitted the Respondent of all the charges leveled against him. Hence, the present appeal by the Appellant-State.

7. Mr. Rivankar, learned Public Prosecutor, at the outset, criticized the impugned Judgment and Order as being cryptic and too short. He submits that the relevant evidence has been completely ignored and the acquittal is completely based upon misappreciation of the evidence on record and reference to trivial discrepancies and contradictions.

8. Mr. Rivankar submits that the learned Sessions Judge has grossly erred in holding that PW.5-Pancha witness, was an independent witness. He submits that merely because this witness may have acted as a Pancha witness in previous cases that, by itself,

does not denude this witness of his independence. He relies on *State of U.P. vs. Anil Singh*¹ in support of this proposition.

9. Mr. Rivankar submits that in the present case, there was ample evidence on record that the Respondent indeed alighted from Mangala Express at about 8.45 p.m. on 10th March, 2006, carrying the suitcase. Upon apprehending, a search of the suitcase revealed that the same contained two hand grenades, RDX powder and two detonators. He submits that all this was witnessed by the raiding party and attached under the Panchanama. The experts who have deposed in the matter, have confirmed that the powder, so attached, was indeed RDX and the cylindrical objects were detonators. Mr. Rivankar submits that the grenades could not be got examined on account of some miscommunication between the Ministry of Home Affairs and the State Police. He submits that Police witnesses who have deposed in the matter, had absolutely no animosity or hostility against the Respondent and, therefore, the learned Sessions Judge clearly erred in not even adverting to the evidence of the Police witnesses.

10. Mr. Rivankar submits that in this case there is evidence on record that the Investigating Officer did request the Railway Officials to cooperate, but no such co-operation was forthcoming. He points out that since no ticket was in fact found on the person of the

¹ 1988 (Supp) SCC 686

Respondent, the Prosecution could not have been required to prove negative. He submits that the learned Sessions Judge clearly erred in disbelieving the Prosecution case that the Respondent was a ticketless traveller in the Mangala Express, who was arrested upon alighting at the Margao Railway Station on 10th March, 2006 at about 8.45 p.m.

11. Mr. Rivankar submits that there is no discrepancy in the matter of the Respondent's signatures on the envelopes, in which the incriminating articles, like grenades, RDX and detonators were placed and sealed. He submits that such signature which, in fact, has not even been challenged by the Respondent, establishes that there was no infirmity in the attachment and sealing of such articles. He, therefore, joins the issue with the submission made by Mr. Lobo, learned Counsel for the Respondent on this aspect.

12. Finally, Mr. Rivankar submits that though it is possible to say that the Prosecution has not proved the ingredients of Section 121, 419 and 420 of the IPC, upon proper evaluation of the evidence on record, the Prosecution has proved, beyond reasonable doubt, the charges under Sections 3 and 4 of the Explosive Substances Act, 1908, Sections 7 and 27 of the Arms Act, 1959 and Section 164, read with Section 67 of the Railways Act, 1989.

13. Mr. Rivankar submits that the scope of an appeal against

acquittal is not unduly restricted and, if the evidence on record establishes the facts beyond reasonable doubt, the Appeal Court is duty bound to interfere with the acquittal recorded by the Trial Court.

14. Mr. Rivankar relies upon several decisions which will be considered in the course of this Judgment and Order.

15. Mr. J.A. Lobo, learned Counsel appointed under the Legal Aid Scheme, on behalf of the Respondent, submits that in the present case, no independent witnesses were ever examined by the Prosecution though, such independent witnesses must have been present as per the version of the Prosecution. He submits that the panchanama makes no reference to the Respondent signing the envelopes, in which the allegedly attached articles were placed and yet, such signatures appear on the envelopes. He submits that there is absolutely no evidence to suggest that the Respondent was travelling in Mangala Express or that he alighted from the same on 10th March, 2006. He submits that some of the witnesses deposed to the presence of H.C. Asolkar from the Bomb Defusal Squad and some witnesses denied the presence of any member from the Bomb Defusal Squad. He submits that H.C. Asolkar was not even examined as Prosecution witness. He submits that even the person who is alleged to have sealed the envelopes, in which the incriminating articles were placed, was never examined by the Prosecution. He submits that the

two Investigating Officers, initially claimed that they do not even know the Pancha witnesses. However, when confronted with the Panchanama in which these witnesses have acted as Panchas, when these very Investigating Officers had investigated into the matters, these witnesses relented and accepted the position. Mr. Lobo submits that all these circumstances are sufficient to uphold the acquittal recorded by the learned Sessions Judge.

16. Mr. Lobo relies upon several decisions which will be considered in the course of this Judgment and Order.

17. The rival contentions now fall for our determination.

18. At the outset, reference is necessary to the ruling of the Hon'ble Apex Court in *Hakeem Khan and ors. vs. State of Madhya Pradesh*² as to the scope of the appeal against acquittal. In this case, the Hon'ble Apex Court, quoted with approval, the following observations from *Murugesan v. State* ((2012) 10 SCC 383) :

“12. For all these reasons, we are of the considered opinion that the High Court clearly fell in grave error in setting aside the acquittal in the present case. We have to remind ourselves that the law on reversal of acquittals is well settled and is stated in many judgments, but one of them needs to be quoted here. In Murugesan v. State (2012) 10 SCC 383 this Court went into the meaning of different expressions—“erroneous”, “wrong” and “possible”, and has stated the law as follows: (SCC p. 398, paras 33-34)

² (2017) 5 SCC 719

“33. The expressions “erroneous”, “wrong” and “possible” are defined in Oxford English Dictionary in the following terms:

‘erroneous.—wrong; incorrect.

wrong.—(1) not correct or true, mistaken.

(2) unjust, dishonest, or immoral.

possible.—(1) capable of existing, happening, or being achieved.

(2) that may exist or happen, but that is not certain or probable.’

34. It will be necessary for us to emphasise that a possible view denotes an opinion which can exist or be formed irrespective of the correctness or otherwise of such an opinion. A view taken by a court lower in the hierarchical structure may be termed as erroneous or wrong by a superior court upon a mere disagreement. But such a conclusion of the higher court would not take the view rendered by the subordinate court outside the arena of a possible view. The correctness or otherwise of any conclusion reached by a court has to be tested on the basis of what the superior judicial authority perceives to be the correct conclusion. A possible view, on the other hand, denotes a conclusion which can reasonably be arrived at regardless of the fact whether it is agreed upon or not by the higher court. The fundamental distinction between the two situations has to be kept in mind. So long as the view taken by the trial court can be reasonably formed, regardless of whether the High Court agrees with the same or not, the view taken by the trial court cannot be interdicted and that of the High Court supplanted over and above the view of the trial court.”

19. Besides, in *Chandrappa and others vs. State of Karnataka*³

³ (2007) 4 SCC 415

Hon'ble Supreme Court has held that an Appellate Court 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. Therefore, if two reasonable views are possible on the basis of evidence on record and one favourable to the accused has been taken by the trial Court, it ought not to be disturbed by the Appellate Court. The Hon'ble Supreme Court, in this case, held that even though in an appeal against acquittal powers of the Appellate Court are as wide as that of the trial Court and it can review, reappreciate and reconsider the entire evidence brought on record by the parties and can come to its own conclusion on fact, as well as on law, if the view taken by the trial Court for acquitting the accused was a possible and plausible view, the Appellate Court ought not to interfere with the acquittal recorded by the trial Court. The Hon'ble Supreme Court, in fact, held that on the basis of evidence, it could be said that the other view was an equally possible view. However, in an appeal against acquittal, no interference is warranted.

20. In *Arulvelu and another vs. State*⁴, the Hon'ble Apex

⁴(2009) 10 SCC 206

Court has held that unless the Judgment of the Trial Court is perverse, the appeal Court would not be justified in substituting its own view and reverse the Judgment of acquittal.

21. Applying the aforesaid principles to the present case, it is difficult to hold that the view taken by the learned Sessions Judge is not even a plausible view, regardless of the fact as to whether entirely agree with the view taken or not. As long as the view taken by the learned Sessions Judge, is a view which could have been reasonably taken on the basis of evaluation of the evidence on record, the limited scope within which such appeals are to be decided, will not justify any interference with the acquittal recorded by the learned Sessions Judge in the impugned Judgment and Order.

22. The impugned Judgment and Order appears to be short. However, it is not as if the learned Sessions Judge has not indicated the reasons as to why, according to him, the Prosecution has failed to prove the charges against the Respondent. The learned Sessions Judge has pointed out that the Prosecution failed to examine any independent witnesses though, upon version of the Prosecution, several independent witnesses, including officials of the Railways, would certainly have been present at the Railway Station at the time of the alleged apprehension of the Respondent. The learned Sessions Judge has pointed out that there is absolutely no evidence on record to suggest that the Respondent was indeed travelling on Mangala

Express, whether ticketless or not and was apprehended upon his alighting therefrom at about 8.45 p.m. on 10th March, 2006. The learned Sessions Judge has pointed to the discrepancies in the matter of search. The learned Sessions Judge has commented upon the complete lack of investigation as to the source of incriminating material allegedly found in the suitcase which the Respondent was said to be carrying at the time of his apprehension. The learned Sessions Judge has commented upon the lack of expert evidence in relation to the hand grenades. The learned Sessions Judge has commented upon the failure of the Prosecution to examine the witness who is alleged to have sealed the envelopes in which the incriminating articles were placed. The learned Sessions Judge has commented upon the inherent inconsistencies in the witnesses who deposed to the search of the Respondent's apartment in which, in any case, nothing incriminating was really found. The learned Sessions Judge has commented upon the discrepancies as to the presence of the H.C. Asolkar of the Bomb Defusal Squad who, in any case, was never even examined by the Prosecution.

23. On the basis of the aforesaid reasons, the learned Sessions Judge, who had occasion of presiding over the trial of the Respondent right from its beginning and until its conclusion, observed that the witnesses for the Prosecution hardly inspire any confidence and, therefore, it was not safe to rely upon their testimony. According

to us, in the light of the material on record which we propose to discuss in some detail, it is difficult for us to say that the view taken by the learned Sessions Judge suffers from any perversity or is a view which was not a plausible view in this matter. On the basis of such reasoning, the learned Sessions Judge, by the impugned Judgment and Order, therefore, acquitted the Respondent of all the charges levelled against him.

24. The Prosecution claims that on 10th March, 2006, PW.7 Bossuet D'Silva, Dy. S.P., Crime Branch Dona Paula, received a phone call at about 6.30 p.m. from a caller, who identified himself only as a Patriotic Indian Citizen and informed him that a person of certain description was travelling in Mangala Express, which was to reach the Margao Railway Station at about 8.30 p.m. on the same day. PW.7 then sent the necessary intimation to the Police Inspector at Margao and based upon such intimation, a raiding party of almost 13 Police Officials rushed to the Margao Railway Station and lay in wait at the Platform No.1 in order to apprehend such person.

25. It is further the case of the Prosecution, including, in particular, the Investigating Officer Santosh Dessai (PW.26) that he, along with other Police Officials, waited on the platform where Bogie No.1 was expected to stop and the Respondent, in fact, alighted from Bogie No.1 of Mangala Express at about 8.45 p.m. PW.26 has deposed that almost, immediately, the Respondent was

apprehended. Search of his presence revealed nothing incriminating. However, search of the suitcase which he was carrying, revealed some black powder which was later on identified as RDX, two cylindrical objects which were later on identified as detonators and two grenades which, in the present case, were never analysed or examined in order to know whether they were really grenades, as urged by the Prosecution. It is the case of PW.26 that the panchanama with regard to arrest and seizure of these incriminating articles commenced within 5 minutes from the Respondent alighting from Bogie No.1 of Mangala Express. Even the Panchanama states that the same commenced at 8.50 p.m.

26. PW.26, in his cross examination, has clearly stated that he conducted the Panchanama on the arrival of the train. This means that PW.26 contacted the two Panchas, of whom only one *i.e.* Sandip Malkarnekar (PW.5) has been examined by the Prosecution, at or after 8.45 p.m. Now, PW.5 is a resident of Quepem, which is at a quite distance from Margao. In the cross examination, PW.26 has admitted that there were several people on the Railway Station. He has also accepted that he did request the Railway Authorities for co-operation, but has stated that such co-operation was not forthcoming. PW.26 has, however, not explained as to how he was able to secure presence of two Panchas within, almost, 5 minutes at the Margao Railway Station on 10th March, 2006 at about 8.45 p.m.

27. The aforesaid aspect is significant because in the course of cross examination undertaken by the Respondent in person, the Investigating Officer —PW.26 was specifically asked whether he knew the Panchas Vishwas Chari and Sandeep Malkarnekar prior to this case, the Investigating Officer - PW.26, however, answered that these two Panchas were not known to him prior to this case. Thereupon, the Respondent confronted PW.26 with a Panchanama in Criminal Case No.304/2005 in relation to an offence under Section 302 of IPC, in which, PW.26 was himself the Investigating Officer and the two Panchas *i.e.* Vishwas Chari and Sandeep Malkarnekar were the Panchas. Quite reluctantly, PW.26 had to admit that these persons might have acted as Panchas in other cases investigated by him. Mr. Lobo pointed out that the admission relates not merely to Criminal Case No.304/2005, but to “*other cases*” investigated by PW.26 aslo.

28. PW.5, the only Pancha witness examined by the Prosecution, in his cross examination, stated that he does not recollect whether he has acted as Pancha in any other case and denied the suggestion that he is a stock witness for the Police in many cases. However, upon PW.5 being confronted with the copy of a Panchanama recorded on 2/11/2005, PW.5 admitted the same.

29. In *Baldev Singh vs. State of Punjab*⁵ and *Babudas vs. State*

⁵ (2009) 6 SCC 564

of *M.P.*⁶ the Hon'ble Apex Court has held that cautious approach is required in accepting the testimony of stock witnesses. Besides, this is not a case where independent witnesses were really not available at the Railway Station. PW.26, apart from simply stating that he requested the Railway Authorities for co-operation, but such co-operation was not forthcoming, has, really not even deposed to the difficulties of securing any independent witnesses in the matter. Section 100(4) of the Cr.P.C. speaks about two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the locality. This sub-section provides that if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search, the Police Officer may issue an order, in writing, to them or any of them to do so. No such steps were taken by PW.26. Beside, Mr. Lobo, learned Counsel for the Respondent is right in submitting that it is really not conceivable that the Railway Officials, if requested to co-operate in a matter of this nature, would decline any co-operation, particularly since it is the case of the Prosecution that the Respondent was also a ticketless traveller and had committed offence under the Railways Act by carrying dangerous articles in the course of the travel.

30. In *Yakub Abdul Razak Memon vs. State of Maharashtra*,

⁶ (2003) 9 SCC 86

*through CBI, Bombay*⁷ the Hon'ble Apex Court has held that the primary intention behind the panchanama is to guard against possible tricks and unfair dealings on the part of the officers entrusted with the execution of the search, with or without warrant and also to ensure that anything incriminating which may be said to have been found in the premises searched was really found there and was not introduced or planted by the officers of the search party. The legislative intent was to control these malpractices of the officers by making the presence of independent and respectable persons compulsory for search of a place and seizure of article.

31. The Hon'ble Apex Court further held that Panchanama is a document having legal bearing which records evidence and findings that an officer makes at the scene of an offence/crime. However, it is not only the recordings of the scene of crime but also anywhere else which may be related to the crime/offence and from where incriminating evidence is likely to be collected. The document so prepared needs to be signed by investigating officer who prepares the same and at least by two independent and impartial witnesses called "*panchas*", as also by the party concerned. The witnesses are required to be not only impartial but also "*respectable*". "*Respectable*" here would mean a person who is not disreputed.

32. The Hon'ble Supreme Court has further held that :

⁷ (2013) 13 SCC 1

“356. Section 100 of the Code was incorporated in order to build confidence and a feeling of safety and security among the public. Section 100 sub-sections (4) to (8) stipulate the procedure with regard to search in the presence of two or more respectable and independent persons preferably from the same locality. The following mandatory conditions can be culled out from Section 100 of the Code for a valid panchnama:

356.1. All the necessary steps for personal search of officer (inspecting officer) and panch witnesses should be taken to create confidence in the mind of court that nothing is implanted and true search has been made and things seized were found real.

356.2. Search proceedings should be recorded by the IO or some other person under the supervision of the panch witnesses.

356.3. All the proceedings of the search should be recorded very clearly stating the identity of the place to be searched, all the spaces which are searched and descriptions of all the articles seized, and also, if any sample has been drawn for analysis purpose that should also be stated clearly in the panchnama.

356.4. The IO can take the assistance of his subordinates for search of places. If any superior officers are present, they should also sign the panchnama after the signature of the main IO.

356.5. Place, name of the police station, officer rank (IO), full particulars of panch witnesses and the time of commencing and ending must be mentioned in the panchnama.

356.6. The panchnama should be attested by the panch witnesses as well as by the IO concerned.

356.7. Any overwriting, corrections, and errors in the panchnama should be attested by the witnesses.

356.8. If a search is conducted without warrant of court

under Section 165 of the Code, the IO must record reasons and a search memo should be issued.”

33. The Hon'ble Supreme Court has also held that if any deviation from the procedure occurs due to a practical impossibility, then that should be recorded by the IO in his file so as to enable him to answer during the time of his examination as a witness in the court of law and where there is no availability of panch witnesses, the IO will conduct a search and seize the articles without panchas and draw a report of the entire such proceedings which is called as a “*Special Report*”.

34. In this case, as pointed out earlier, it was never the case of the Prosecution that independent witnesses were not available at the Railway Station. The evidence on record suggests that several persons were available at the Railway Station, including the Officials of the Railways. Yet, in the present case, not only stock panchas were called, but further the stock panchas were sought to be passed off as independent witnesses in the course of the trial. No doubt, in terms of some of the decisions relied upon by Mr. Rivankar, the evidence of Police witnesses cannot be discarded merely on the ground that they belong to the Police force, but even those decisions state that prudence dictates that their evidence needs to be subjected to strict scrutiny and as far as possible, a corroboration of their evidence in material particulars should be sought. Their desire is to see the

success of the case based on their investigation and requires greater care to appreciate their testimony. (See *Pradeep Narayan Madgaonkar vs. State of Maharashtra*, ((1995) 4 SCC 255).

35. In *Mohd. Hussain Babamiyan Ramzan v. State of Maharashtra*⁸ and *Panalal Damodar Rathi v. State of Maharashtra*⁹ it was held that normally, it is expected that the investigating officer will take independent panch witnesses and if knowingly he has taken pliable witnesses as panch witnesses, then the entire raid would become suspect and in such a case it would not be possible to hold that the evidence of police witnesses, by themselves, would be sufficient to base conviction.

36. In *G.V. Nanjundiah vs. State (Delhi Administration)*¹⁰, the Hon'ble Apex Court, noticed that one of the witnesses Shri R.N. Khanna had categorically admitted in his cross examination that he had earlier joined three or four such raids for traps organised by the CBI, the other witness Shri R.L. Verma worked in the same office as Khanna. The Deputy Superintendent of Police had, in fact called these witnesses from their office. In these circumstances, the Hon'ble Supreme Court held that neither of these witnesses can really be called as independent witnesses.

⁸ 1994 Cri. LJ 1020 (Bom)

⁹ (1979) 4 SCC 526

¹⁰ 1987 (Supp) SCC 266

37. In *State of U.P. vs. Anil Singh*¹¹, the Hon'ble Supreme Court has held that the prosecution case should not be rejected merely because of some minor inconsistencies or certain embellishments in the version of the witnesses. It is the duty of the Court to sift truth from falsehood. Further, where a witness had not been specifically cross examined on a particular question, the Court cannot presume something adverse to the witness in relation to that question unless, his attention is specifically drawn to it. In this case, the I.Os., as well as the Panchas, were specifically questioned in the cross examination as to whether they knew each other. These witnesses, initially, answered in the negative. However, upon being confronted with the previous Panchanama in other case, these witnesses were forced to relent and admit that they knew each other inasmuch as these Panchas had acted as Panchas in some other criminal cases where these very I.Os. were involved. Besides, this is not a case where acquittal is based upon some trivial inconsistencies or embellishments. The decision in *Anil Singh* (supra) is, therefore, clearly inapplicable to the facts of the present case.

38. In *State of U.P. vs. Zakaullah*¹² the Hon'ble Supreme Court has held that necessity of independent witnesses in cases involving police raid or police search, is not for the purpose of helping the accused person to bypass the evidence of those pancha witnesses

¹¹ 1988 (Supp) SCC 686.

¹² (1998) 1 SCC 557

who have had some acquaintance with the police or officers conducting the search at some time or the other. The acquaintance with the police, by itself, will not destroy a man's independent outlook. Every citizen of India must be presumed to be an independent person, until it is proved that he was dependent of the police or other officials for any purpose whatsoever. These observations were made in the context of the evidence of PW.6 in the said matter, who was alleged to be a pocket witness, since he was examined by the Police in one or two cases charge-sheeted by the Police. The Apex Court, upon evaluation of the evidence of PW.6 noted that PW.6 was examined as a witness in a case at Moradabad in which, he himself was the complainant against a doctor who demanded bribe from him. Similarly, in so far as PW.7 was concerned, he was a driver of the vehicle in which the officials went to the raid. In these circumstances, the Hon'ble Apex Court held that there was absolutely nothing to impeach the independence of PW.6 and PW.7 in the said matter. The position in the present case is quite different. As noted earlier, initially both the I.Os., as well as the Pancha witnesses claimed that they did not even know each other. It is only after they were confronted with the Panchanama in the previous matter that they relented. Besides, in this case there is no proper explanation as to how PW.5, who resides in Quepem, was contacted by PW.26 within 5 minutes from arrival of Mangala Express on Margao Railway Station. Accordingly, the ruling in

Zakaullah (supra) is distinguishable.

39. In *State of Maharashtra vs. Munner Ahamad Sheikh*¹³, a Division Bench of this Court has held that there is no rule of thumb having universal application that uncorroborated testimony of the Investigating Officer, cannot be believed in respect of recovery under Section 27 of the Evidence Act. Corroboration is only a rule of prudence and may be necessary on the facts of a case and not an inflexible requirement of law. In the present case, the testimony of PW.26-Investigating Officer cannot be said to be of such quality as to deserve acceptance without corroboration of any independent evidence. As noted earlier, PW.26 was not at all candid to the Court when he, on oath, stated that he does not even know the Pancha witnesses. However, later on when confronted with the Panchanama in the previous case, PW.26 proceeded to admit that these Pancha witnesses may have acted as Panchas in some other cases wherein PW.26 was the Investigating Officer. The ruling in *Munner Ahamad Sheikh* (supra) can, obviously, not assist the Prosecution in the facts of this particular case.

40. In the absence of any independent witnesses to the incident of apprehension of the Respondent and recovery of incriminating articles from him on the Margao Railway Station is, but one aspect. PW.26, as also 2 or 3 other Police witnesses, speak of the presence of

¹³ 1999 All M.R. (Cri) 571

H.C. Asolkar, Bomb Defusal Squad who was called on the Railway Platform soon after apprehension of the Respondent. However, several of the other police witnesses who were parties to the same raid, state that no such bomb defusal expert was ever called or was present at the Railway Platform. The Prosecution failed to examine H.C. Asolkar, bomb defusal expert, who was allegedly present on the platform soon after apprehension of the Respondent along with the incriminating articles like RDX, detonators and grenades. Grenades, admittedly, were never sent for forensic examination and consequently, there is no evidence on record as to the nature of the objects, allegedly recovered from the suitcase of the Respondent. There is expert evidence that the substance examined by the experts was RDX or the cylindrical objects were detonators. However, on the basis of such evidence alone, it is not possible to conclude that these substances or articles were, in fact recovered from the suitcase which the Respondent was carrying at the time of his alleged apprehension on the Margao Railway Station on 10th March, 2006.

41. Pancha witness PW.5, very categorically deposes that the brown envelopes in which RDX powder, detonators and the hand grenades were placed and sealed, were signed upon by the two Panchas and the I.O. However, the Pancha witness says nothing about signatures of the Respondent on such envelopes. In the course of cross examination, questions were posed to PW.5 in relation to the

signatures of the Respondent on the envelopes. However, PW.5 gave no satisfactory answers. It was the duty of the Prosecution to explain as to when and why signatures of the Respondent were taken on such envelopes.

42. Mr. Lobo pointed out that the Respondent, who conducted the cross examination by himself, did confront the witnesses with the newspaper reports which indicate that the Respondent was arrested much prior to 10th March, 2006 or which indicate the photographs of the Respondent along with various incriminating articles spread out on the platform. Mr. Lobo submits that there is no explanation forthcoming from the Prosecution regards these newspaper reports. He submits that there is absolutely no evidence of about any photographs being taken of the articles attached from either the person or the suitcase of the Respondent. He, therefore, submits that in fact, it is the case of the Prosecution that all such articles were sealed no sooner the same were attached from the suitcase of the Respondent. Mr. Lobo submits that in these circumstances, the Prosecution was required to explain these photographs. Mr. Lobo submits that with the appearance of these photographs, even the Test Identification Parade, conducted by the Prosecution, was rendered a total farce.

43. Mr. Rivankar submits that the newspaper reports do not constitute any evidence and, therefore, no cognizance whatsoever

can be taken about the same. It is true that the contention of Mr. Rivankar that the newspaper reports, *per se*, do not constitute any evidence as such. However, at least in the context of the Test Identification Parade, such photographs assume importance and, therefore, quite correctly Mr. Rivankar did not seek to place any reliance whatsoever upon the Test Identification Parade in the present case.

44. In *Rammi alias Rameshwar vs. State of M.P.*¹⁴, the Hon'ble Apex Court has reiterated that minor variations or discrepancies, is not a good ground to reject the testimony. The Apex Court has held that the Courts should bear in mind that it is only when the discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence. This was a case where the Court had ignored the provisions of Section 155 of the Evidence Act and no opportunity was given to the witness to explain the so called contradictions in the previous statement.

45. In the *State of M.P. vs. Dharkole alias Govind Singh and ors.*¹⁵, the Hon'ble Supreme Court has held that minor points or discrepancies should not be taken into account, so as to doubt the Prosecution case. Further, not all doubts are sufficient to acquit the accused person. Only reasonable doubts which grow out of the

¹⁴ (1999) 8 SCC 649

¹⁵ (2004) 13 SCC 308

evidence in the case, can be taken into consideration. In the present case, we do not feel that the learned Sessions Judge has gone by some fanciful or unreasonable doubts in order to acquit the Respondent.

46. In *State of U.P. vs. Nahar Singh (Dead) and others*¹⁶, the Hon'ble Supreme Court has dealt with the scope of interference in an appeal against acquittal. The Hon'ble Supreme Court has held that the powers of the Appellate Court are quite wide, but in exercising such powers, the High Court should and will always give proper weight and consideration to such matters as the views of the trial Judge as to the credibility of the witnesses; the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; the right of the accused to the benefit of any doubt; and the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. In fact, the Hon'ble Supreme Court has held that these principles have been approved and followed in numerous decisions referred to in paragraphs 21 and 22 of the Judgment. The law laid down in *Nahar Singh* (supra) is in no manner different from the law laid down by the Hon'ble Apex Court in *Hakeem Khan and others* (supra) and *Chandrappa & others* (supra), which decisions have been considered by us at the very outset.

¹⁶ (1998) 3 SCC 561

47. The ingredients of the offences under Sections 121 of the IPC have certainly not been made out in the present case and Mr. Rivankar, learned Public Prosecutor also did not, in the course of his rejoinder, press for any conviction under Section 121 of the IPC. There is absolutely no evidence in relation to the offences under Sections 419 and 420 of the IPC and, rightly, therefore, not even any submissions were made in the context of these offences.

48. Mr. Rivankar, learned Public Prosecutor submits that the Respondent in the present case, cannot be regarded as some innocent person, who was unnecessarily roped in by the police in the matter. He points out that three different identity cards were recovered from the Respondent. He points out that the Respondent himself, at the stage of recording of his 313 Criminal Procedure Code statement produced on record two orders made by the Jammu and Kashmir High Court quashing his detention and one order made by the Sessions Judge at Kashmir acquitting him of serious offence.

49. Mr. Rivankar also referred to the dossier issued by Jammu and Kashmir police, in which it is stated that the Respondent is a member of "*Teheriq-Ul-Mujahiddin*", which is in all probabilities some terrorist organization.

50. Mr. Rivankar submits that the detention orders were quashed on the basis of technicalities and the Sessions Judge recorded

the acquittal against the Respondent on the basis that no witnesses were coming to depose against the Respondent. Mr. Rivankar submits that these factors, coupled with other evidence on record establish that the Respondent is not some innocent person who, without any reasonable cause has been roped into this matter as suggested by Mr. Lobo, learned counsel for the Respondent under Legal Aid Scheme.

51. According to us, the aforesaid is simply, is not sufficient to record the conviction against the Respondent or to reverse the acquittal recorded by the learned Sessions Judge in the present matter. It is true that the detention orders issued to detain the Respondent were struck down by the High Court on technical grounds. But, in preventive detention matters normally the detention orders are struck down for procedural violation and it cannot be said that such procedure is merely a part of some technicality. The procedure prescribed in matters of preventive detention has, on most occasions underpinning in the constitutional provisions relating to preventive detention. The Sessions Judge of Jammu and Kashmir has also ultimately recorded the acquittal of the Respondent. The dossier, by itself constitutes no evidence. The prosecution, in any case, has also failed to produce any material on record as to either membership or status of the Respondent qua the organization “*Teheriq-Ul-Mujahiddin*”. At the highest, the submission of Mr. Rivankar may

amount to suggesting that it is probable that the Respondent may be involved in the crimes, alleged against him or that there is some suspicion about involvement of Respondent in the crimes alleged against him. However, it is quite well settled that suspicion however grave, can never be a substitute for legal proof in such matters.

52. In *Mohd. Faizan Ahmad Vs State of Bihar*¹⁷ the Hon'ble Supreme Court held that the High Court erred above being carried away by the heinous nature of the crime and losing sight of the basic principle underlying criminal jurisprudence that suspicion, however grave cannot take the place of proof and that Courts recognize only legally admissible evidence and not some conjectures and surmises.

53. In *Narendra Singh Vs State of M. P.*¹⁸, the Hon'ble Apex Court held that it is trite that suspicion, however grave may be, cannot take place of a proof. It is equally well settled that there is a long distance between '*may be*' and '*must be*'. In this case, the Hon'ble Supreme Court has held that presumption of innocence is a human right. Such presumption gets stronger when a judgment of acquittal is passed.

54. In *Babu Singh Vs State of Punjab*,¹⁹ the Hon'ble Apex Court held that probabilities however strong and suspicion however

¹⁷ 2013(2) SCC 131

¹⁸ 2004(10) SCC 699

¹⁹1963 (3) SCR 749

grave can never take the place of proof.

55. For all the aforesaid reasons, we dismiss this Criminal Appeal. There shall, however, be no order as to costs.

56. We record our appreciation for the assistance rendered by Mr. J.A. Lobo, whom we requested to appear on behalf of the Respondent and to Mr. Rivankar, learned Public Prosecutor for his fair approach in the matter.

Smt. M.S. Jawalkar, J.

M.S. Sonak, J.