



Judgment

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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL APPEAL NO.584 OF 2004

Shri Solemn David Jacob,
aged about 38 years,
r/o 5/1 Lokmanya Colony,
Amravati.

..... **Appellant.**

:: V E R S U S ::

1. Shri Navin Singh s/o Shivmurat Singh,
aged about 35 years,
Allied Heights, Flat No.4,
Salunke Vihar Road, Pune - 48.

2. Shri Rajendra s/o Shankar Kadam,
aged about 30 years, Managing Director,
Maharashtra Forest Development Corporation,
Ballarsha.

..... **Respondents.**

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Dr. (Shri) Anjan De, Counsel for the Appellant.
Shri S.S.Sohoni, Advocate h/f Shri S.V.Sohoni, Counsel for
Respondent No.1.
Shri S.G.Loney, Counsel for Respondent No.2.
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CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 12/11/2024

PRONOUNCED ON : 26/11/2024

JUDGMENT

1. By this appeal, the appellant (original complainant) has challenged judgment and order dated 12.3.2004 passed by learned Chief Judicial Magistrate,

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Amravati (learned Judge of the Lower Court) in Regular Criminal (Complaint) Case No.118/1988.

2. By the said judgment, learned Judge of the Lower Court acquitted respondents (accused persons) for offences under Sections 379, 409, 424, and 427 of the Indian Penal Code.

3. Brief facts of the prosecution case are as under:

4. The complainant filed a complaint that he was having three Telescopes having description as Bushnell Banner Telescope 3x9 variable powers, new brand condition and other two Telescopes of Bushnell Range Finder 4x9 variable powers new brand conditions which were brought by him from USA by clearing it from the Custom Department. The said Telescopes were brought by him on 7.11.1985. The other two Telescopes were also brought by him from USA by clearing it from the Custom Department on 6.11.1987. Subsequently, the said Telescopes were kept by him in a shop i.e. "M/s.Nagpur Armory", Nagpur on 12.11.1987. In the

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year 1987, accused persons were serving as Assistant Conservators of Forest, East Melghat Division, Amravati. On 17.11.1987, accused persons had visited the shop “M/s.Nagpur Armory, Nagpur and seized three Telescopes of the complainant. According to the complainant, the said seizure was illegal as he had not committed any offence under provisions of Wild Life (Protection) Act, 1972 or Indian Forest Act, 1927. The complainant filed an application before learned Judge of the Lower Court at Amravati for return of the property i.e. three Telescopes. Learned Judge of the Lower Court directed Police Station Officer to hand over three Telescopes on Supurdnama on furnishing bond of Rs.10,000/-. On 23.2.1988, when the complainant had been to the Police Station Officer at Rajapeth, he found that the Bushnel Banner Telescope 3x9 was not in the custody of the police which he had kept in the shop “M/s.Nagpur Armory, Nagpur, but there was some another Telescope i.e. “22 Rifle Telescope Bushnel Sports View” and, therefore, he informed that the said Telescope does not belong to him and he did not

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take into the custody. He filed Misc. Criminal Application No.20/1988 under Section 91 of the Code of Criminal Procedure. He also obtained seizure memo prepared in Crime No.167/1987. He alleged that his Telescopes were handed over to the police station by accused No.1. Though accused persons seized three Telescopes, they did not hand over the same to the Police Station Officer intentionally and misappropriated one Telescope of Bushnel Banner Telescope 3x9 variable powers and thus, committed offence punishable under Sections 379, 403, 409, 424, and 427 read with 34 of the Indian Penal Code.

5. Learned Judge of the Lower Court took cognizance of the complaint and issued process against accused persons. The charge was framed to which accused persons pleaded not guilty and claimed to be tried.

6. In support of the prosecution case, the complainant examined himself vide Exh.95 (PW1); Chandrakant Deshmukh vide Exh.120 (PW2), Onkar

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Shivaji Nandane vide Exh.128 (PW3), and Purushottam Gawai vide Exh.198 (PW4).

7. Besides the oral evidence, the complainant placed reliance on copy of Arms' Licence Exh.97, extract of Arms' Register Exh.98, custom receipt Exh.99, copy of letter issued by Chandrakant Deshmukh Exh.100, certified copy of the complaint filed by accused Exh.102, certified copy of order passed by the District Magistrate Exh.104, certified copy of Judgment in Civil Suit no.325/1987 Exhs.105 and 106, certified copy of report Exh.107, and certified copy of panchanama Exh.112.

8. Learned Judge of the Lower Court appreciated the evidence and held that there is a shadow of doubt as far as case of the complainant is concerned. There is no evidence as to the misappropriation of the said property by accused persons since there was no entrustment with accused persons and, therefore, learned Judge of the Lower Court acquitted accused persons.

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Being aggrieved and dissatisfied with the same, the present appeal is preferred by the complainant.

9. Learned counsel for the complainant filed his written submission wherein he submitted that the evidence adduced by the complainant and his witnesses shows that three Telescopes belonging to the complainant were seized by accused persons and out of which one was misappropriated. The said fact is supported by documents particularly in the light of the evidence of PW2 Chandrakant Deshmukh. The order of framing charge was challenged by accused persons before the court below in Criminal Application No.594/2000, which was dismissed. The civil suit of the complainant came to be decreed. Accused persons also filed an application for discharge which came to be rejected and revision petition challenging the order of rejection also came to be dismissed. Thus, there is an ample evidence on record to show that articles were entrusted to accused No.1 and he misappropriated the

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same. Learned Judge of the Lower Court ignored the said evidence and erroneously acquitted accused persons.

10. *Per contra*, learned counsel Shri S.V.Sohoni for accused No.1 submitted that the complainant has filed the complaint for offences under Sections 379, 409, 424, and 427 of the Indian Penal Code. The complainant conceded that only Section 409 of the Indian Penal Code is attracted. However, the evidence on record sufficiently shows that there was no entrustment to the accused. The judgment of the Civil Court has no binding effect on Criminal Court as standard of proof required in criminal cases is beyond reasonable doubt. In view of that, the judgment impugned is proper and legal one.

In support of his contentions, he placed reliance on following decisions:

(1) Mallappa and ors vs. State of Karnataka¹;

(2) Iqbal Singh Marwah and anr vs. Meenakshi Marwah and anr²;

¹ (2024)3 SCC 544

² (2005) 4 SCC 370

(3) Sudershan Kumar vs. State of Himachal Pradesh³;

(4) Vishnu Dutt Sharma vs. Daya Sapra (Smt)⁴;

(5) Kishan Singh (dead) thr. Lrs. vs. Gurpal Singh and ors⁵;

(6) Sukhjit Singh vs. State of Punjab vs. State of Punjab⁶, and

(7) Chandan Kumar Basu vs. State of Bihar⁷.

11. On appreciation of the evidence adduced, it reveals that learned Judge of the Lower Court framed charge under Sections 379, 409, 424, and 427 of the Indian Penal Code. To substantiate the charge, the complainant stepped into witness box by examining himself vide Exh.95. He testified that he was possessing three Telescopes brought by him from the USA. He filed on record original custom receipt dated 7.11.1985 Exh.96 as well as custom receipt dated 6.11.1987 Exh.99. As per his evidence, on 12.11.1987, he had kept three Telescopes in a shop i.e. "M/s.Nagpur Armory,

3 (2014)15 SCC 666

4 (2009)13 SCC 729

5 (2010)8 SCC 775

6 (2014)10 SCC 270

7 (2014)13 SCC 70

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Nagpur on 12.11.1987, which is the private Gun Shop. Accused persons were serving as Conservators of Forest. On 17.11.1987, accused persons seized all Telescopes. As per the evidence of the complainant, the said fact was informed to learned Magistrate by accused persons and no such seizure panchanama was drawn by them. Chandrakant Deshmukh, the owner of the shop "M/s.Nagpur Armory, issued him letter on 21.1.1987 informing him that Telescopes were seized by accused persons and, therefore, he filed an application for return of the property. It revealed to him that one of Telescopes is not of the description i.e. Bushnell Banner Telescope 3x9 variable powers and the same was misappropriated. As such, he filed the complaint against accused persons. During cross examination, it came on record that accused No.1 was serving as Assistant Conservator Officer of Forest. On 16.11.1987, he was called by accused No.1 in his office and made enquiry with him about weapons. He informed the accused that his rifle No.30.06 was given in Nagpur Armory for oiling, cleaning,

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and service purpose. The complainant has also made enquiry whether he had give his weapons to another person prior to the alleged incident. He further admitted that he came to know that on 17.11.1987 accused No.1 visited shop "M/s.Nagpur Armory. As to the description of the Telescopes, the complainant was unable to tell length of three Telescopes. He also admitted that Telescopes were delicate and study articles. The said Telescopes were seized by accused No.1 from "M/s.Nagpur Armory. He further admitted that there was no entry of his name that he had kept the Telescopes at shop "M/s.Nagpur Armory. He further admitted that Exh.99 discloses about only one Telescope and he has seen two Telescopes in the police station.

Thus, from the cross examination, it reveals that extract of Arms' Register Exh.98 and custom receipt Exh.99 show the description of one Telescope.

As far as the third Telescope is concerned, no document was produced on record by the complainant

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and in the cross examination, it is specifically stated that Exh.99 shows the receipt regarding only one Telescope.

12. To substantiate the contentions of the complainant, he placed on record various documents including Exhs.98 and 99. Exh.99 is the receipt issued by the Custom Department which shows entry as to the one Telescope brought by the complainant of the year 1985 i.e. on 7.11.1985 and another Telescope on 6.11.1987. It further reveals from documents that the District Magistrate has also taken action on the complainant on the report filed by accused No.1 The seizure memo as to the seizure of Bushnell Banner Telescope is drawn by Rajapeth Police Station, which shows seizure of three Telescopes in presence of panchas.

13. The complainant also examined Chandrakant Deshmukh vide Exh.120, who was owner of shop i.e. "M/s.Nagpur Armory. His evidence shows that he told accused No.2 that the complainant has not kept any arm, but he kept three Telescopes and accused No.1 gave

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those Telescopes on executing indemnity bond to him. Accused No.1 prepared description of three Telescopes. The original indemnity bond and seizure were filed by him before the Court. His cross shows that Telescopes are not covered within the definition of the Arms. He also admitted that he is not having any documentary evidence to show particulars of those three Telescopes. He has also not filed any document about transfer of weapons. He further admitted that in the letter Exh.171 no description of Telescopes is mentioned. He also admitted that he has not lodged any report about taking of Telescopes from his shop. He further admitted that he was not having any documentary evidence to show that on which particular date the complainant had kept three Telescopes with him in his shop.

Thus, the evidence of this witness shows that there is no document to show that the complainant had kept the said three Telescopes with him. It further shows that accused No.1 handed over the Telescopes to him on furnishing the indemnity bond.

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14. PW3 Onkar Nandane, serving as "Awwal Karkoon" in the Collector Office, deposed that the Arm Register is maintained in his office about the arms kept in the Armory. At serial No.156, there is an entry in the name of the complainant about purchase of the rifle No.30.06 dated 26.11.1985. He further admitted that Additional District Magistrate Amravati had issued permission to the complainant to sale above said licence. He also admitted that the entry of Bushnel Range Finder 4x12x variable power Telescope is neither in the licence nor in the the register of Arms. He further admitted that if the arm is stolen, the information is given to the police station or the District Magistrate.

15. Investigating Officer PW4 Purushottam Gawai, who prepared the seizure memo, narrated that the seized memo is prepared by him. Accused No.1 had been to the Rajapeth Police Station and from articles under seizure memo were seized by him by preparing seizure memo. He testified that entry of seized articles were taken in property register.

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On the basis of this evidence, the complainant claimed that it was the accused who deposited the same in the police station and he removed the property dishonestly which was in the possession of the complainant. Admittedly, the said Telescopes were not removed or obtained from the possession of the complainant. The seizure memo shows that the accused has handed over it to the Rajapeth Police Station and the seizure memo was prepared by Investigating Officer PW4 Purushottam Gawai.

As far as ownership of the said Telescopes is concerned, two receipts Exhs.98 and 99 show the ownership of two Telescopes.

As far as third Telescope is concerned, there is no document to show ownership of the complainant over the same. The complainant handed over the same to PW2 Chandrakant Deshmukh who was partner of "M/s.Nagpur Armory". However, there is no entry when

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the said Telescopes were kept by the complainant in "M/s.Nagpur Armory".

The evidence of PW3 Onkar Nandane, shows that accused No.1 seized Telescopes and again handed over the same to him on furnishing indemnity bond. Again, it was seized and produced before the Rajapeth Police Station, Amravati.

Thus, as far as custody of three Telescopes are concerned, there is no documentary evidence to show that three Telescopes were handed over the the Rajapeth Police Station, Amravati.

16. As far as allegations of criminal breach of trust by accused No.1 is concerned, definition of criminal breach of trust given under Section 405 reads as under:

"Section 405. Criminal breach of trust. - Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be

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discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

¹[²*Explanation 1*].A person, being an employer
³[of an establishment whether exempted under section 17 of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952) or not] who deducts the employees contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.]

¹[*Explanation 2*.A person, being an employer, who deducts the employees contribution from the wages payable to the employee for credit to the Employees State Insurance Fund held and administered by the Employees State Insurance Corporation established under the Employees State Insurance Act, 1948 (34 of 1948), shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount

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of the said contribution in violation of a direction of law as aforesaid.”

17. In order of to prove the offence of breach of trust, the prosecution must prove that accused was in any manner entrusted with property. In order to sustain the conviction under Section 409 of the Indian Penal Code, two ingredients are to be proved namely:

(i) the accused, a public servant or a banker or agent was entrusted with the property of which he is duty-bound to account for; and

(ii) the accused has committed criminal breach of trust. What amounts to criminal breach of trust is provided under Section 405 of the Indian Penal Code.

The basic requirement to bring home the accusations under Section 405 are the requirements to prove conjointly (i) entrustment, and (ii) whether the accused was actuated by dishonest intention or not, misappropriated it or

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converted it to his own use to the detriment of the persons who entrusted it.

18. As far as the present case is concerned, admittedly, there is no evidence to show that the accused who is public servant was entrusted with the property and he has with dishonest intention or not, misappropriated it or converted it to his own use to the detriment of the person who entrusted it.

19. Admittedly, while prosecuting accused persons, no sanction was obtained. It is submitted that the sanction was not required as the act was not committed while discharging official duty.

20. While examining aspect whether the sanction was required to prosecute the accused or not, it is necessary to see Section 197(1) and (2) of the Code of Criminal Procedure, which reads thus:

197. Prosecution of Judges and public servants.
(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his officer save by or with the sanction of the

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Government, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction-

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State of the State Government:

[Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression "State Government" occurring therein, the expression "Central Government" were substituted.] [Added by Act 43 of 1991, Section 2 (w.e.f. 2-5-1991).]

[Explanation. - For the removal of doubts it is hereby declared that no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under section 166A, section 166B, section 354, section 354A, section 354B, section 354C, section 354D, section 370, section 375, section 376, [section 376A,

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section 376AB, section 376C, section 376D, section 376DA, section 376DB,] [Inserted by Criminal Law (Amendment) Act, 2013] or section 509 of the Indian Penal Code.] [Inserted by Act 63 of 1980, Section 3 (w.e.f. 23.9.1980).]

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

21. Section 197 of the Code affords the protection to public servants from the acts which are committed while discharging their duties. The section falls in the chapter dealing with conditions requisite for initiation of proceedings. For instance, no prosecution can be initiated in a Court of Sessions under Section 193, as it cannot take cognizance, as a court of original jurisdiction, of any offence unless the case has been committed to it by a Magistrate or the Code expressly provides for it. Section 197 of the Code not only specifies the persons to whom the protection is afforded but it also specifies conditions and circumstances in

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which it shall be available and the effect in law if the conditions are satisfied. The mandatory character of the protection afforded to a public servant is brought out by the expression, 'no court shall take cognizance of such offence except with the previous sanction'. Use of the words, 'no' and 'shall' make it abundantly clear that the bar on the exercise of power by the court to take cognizance of any offence is absolute and complete. Very cognizance is barred.

By the said Section, the protection is extended to even those acts or omissions which are done in purported exercise of official duty. Official duty therefore implies that the act or omission must have been done by the public servant in course of his service and such act or omission must have been performed as part of duty which further must have been official in nature. The section has, thus, to be construed strictly, while determining its applicability to any act or omission in course of service. For instance a public servant is not entitled to indulge in criminal activities. But once it is

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established that act or omission was done by the public servant while discharging his duty then the scope of its being official should be construed so as to advance the objective of the section in favour of the public servant. Otherwise the entire purpose of affording protection to a public servant without sanction shall stand frustrated.

22. In the present case, admitted act or omission done by accused No.1 was while discharging his official duty and therefore, the sanction was required which was not obtained by the complainant prior to prosecuting the accused and the court has taken cognizance in absence of the sanction.

23. It is submitted that the civil court passed the decree in favour of the complainant. As already observed that the standard of proof, as far as criminal case is concerned, is required beyond reasonable doubt. As far as civil suits are concerned, burden on plaintiff is to establish the case on the basis of preponderance of probability.

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24. Learned counsel for accused persons rightly placed reliance on the decision of the Hon'ble Apex Court in the case of **Vishnu Dutt Sharma vs. Daya Sapra (Smt) supra** wherein it is held that judgment/finding given in a criminal proceeding will not be binding in a civil proceeding and Judgment of a criminal court in a civil proceeding will only have limited application viz. *Inter alia*, for ascertaining who was the accused and what was the result of the criminal proceedings.

25. In the case of **Vishnu Dutt Sharma vs. Daya Sapra (Smt) supra**, the Hon'ble Apex Court specifically held that findings of fact recorded by the Civil Court do not have any bearing so far as the criminal case is concerned and vice-versa. Standard of proof is different in civil and criminal cases. In civil cases it is preponderance of probabilities while in criminal cases it is proof beyond reasonable doubt. There is neither any statutory nor any legal principle that findings recorded by the court either in civil or criminal proceedings shall be binding between the same parties while dealing with

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the same subject matter and both the cases have to be decided on the basis of the evidence adduced therein.

26. Thus, the prosecution or the complainant has to adduce evidence beyond reasonable doubt, which appears to be absent in the present case.

27. As far as appeals against acquittal are concerned, it is well settled that the Appellate Court should be relatively slow in reversing the order of the Trial Court rendering the acquittal. It is also well settled that while exercising the appellate powers, especially while dealing with appeals against acquittal, cardinal principle to be kept in mind is that there is a presumption of innocence in favour of accused unless the accused is proved guilty. The presumption continues and finally culminates into a fact when the case ends in acquittal. The possibility of two views in criminal cases is not an extraordinary phenomenon while considering appeals against acquittal. A fact cannot lose sight of the same. The trial court has appreciated the entire evidence and reversal of an order

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of acquittal is not to be based on mere existence of different views or mere difference of opinion. Normally, while exercising the appellate jurisdiction, it is the duty of the appellate court to see, whether decision is correct or incorrect on law and facts. While dealing with appeals against acquittal, the court cannot examine the impugned judgment only to find out whether the view taken was correct or incorrect. After re-appreciating oral and documentary evidence, the Appellate Court must first decide whether the Trial Court's view was a possible view. The Appellate Court cannot overturn acquittal only on the ground that after re-appreciating evidence, it is of the view that the guilt of the accused was established beyond a reasonable doubt.

28. It has been observed by the Privy Council in the case of **Sheo Swarup vs King-Emperor**⁸ considered provisions relating to the power of an Appellate Court in dealing with appeals against acquittal and observed as under:

8 1934 PC 227(2)

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“16. It cannot, however, be forgotten that in case of acquittal, there is a double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of 35 of 50 criminal jurisprudence that every person should be presumed to be innocent unless he is proved to be guilty by a competent court of law. Secondly, the accused having secured an acquittal, the presumption of his innocence is certainly not weakened but reinforced, reaffirmed and strengthened by the trial court.

In exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted

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at his trial; (3) the right of the accused to the benefit of any doubt; and (4) 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. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognised in the administration of justice.”

29. Recently, the Hon’ble Apex Court in the case of **Rajesh Prasad vs. The State of Bihar and anr**⁹ considered its various decisions and summarized the legal position that It is trite law that acquittal of a co-accused cannot simpliciter be a ground for acquittal of other accused. There may be factors distinguishing the two cases. the approach of the appellate court while considering a judgment of acquittal was discussed and it was observed that unless the appellate court comes to the conclusion that the judgment of the acquittal was

9 [2022] 3 S.C.R.

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perverse, it could not set aside the same. Merely because the High Court is of different view that by itself is not sufficient to set aside the order of acquittal. While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed.

30. After appreciating the evidence on record, I do not find that the judgment and order of acquittal either is perverse or erroneous. The view taken by learned Judge of the Lower Court is a plausible view and, therefore, no interference is called for. The judgment impugned in the appeal appears to be legal and correct and nothing is on record to arrive at a finding that the judgment impugned is perverse or illegal and, therefore, no interference in the judgment impugned is called for.

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31. In the light of the above, as the appeal is devoid of merits and liable to be dismissed, the same is **dismissed**.

Appeal stands **disposed of** accordingly.

(URMILA JOSHI-PHALKE, J.)

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