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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINL APPELLATE JURISDICTION
CRIMINAL REVISION APPLICATION NO.415 OF 2002.

Rajaram Gangaram Kathara	]... <u>Applicant.</u>
adult, residing at village Kopargaon	] Original
Tal. Panvel, Dist. Raigad	] Complainant

V/s.

- | | |
|--|-----------------------|
| 1. The State of Maharashtra |] |
| |] |
| 2. Raghunath Tukaram Thakur |] |
| Age: 35 years, r/o Kopargaon |] |
| Tal. Panvel. |] |
| |] |
| 3. Madhukar Hasha Thakur |] |
| age: 25 years, r/o Kopargaon |] |
| Tal. Panvel. |] |
| |] |
| 4. Harishchandra Ambaji Thakur |] |
| age: 26 r/o village Kopargaon |] |
| Tal. Panvel.(Dismissed) |] <u>Respondents.</u> |
| |] Original |
| 5. Subhash Jethu Patil |] Accused. |
| age: 31 , r/o village Motha Bhingar |] |
| tal. Panvel |] |
| |] |
| 6. Mahamad Jafar Mahamad Khaja Shaikh |] |
| age: 23 yrs, r/o Nalwadi Galli, |] |
| Room No. 138, Bahiram Pada, Bandra |] |
| Mumbai |] |
| |] |
| 7. Mahamad Rafiq Mahamad Issak Sayyad, |] |
| age; 28 years, r/o rajjak Wadi |] |
| room No.62, Bahirampada, Bandra |] |
| Mumbai (E).(Dismissed) |] |
| |] |
| 8. Vijay Janu Dare (abated) |] |
| |] |

9. Sunil @ Sujit Sudama Rajbhar (abated)]
age: 25 years, r/o Pali Naka]
Ambedkar Road, Besides Jairam Garage]
Room No.124, Bandra (E),]
Kudiyagon, Post. Kudiyava, post.Thane]
Bardahan, Tal. Dist. Ajamgarh UP]

Mr. G. S. Hiranandani i/by Mr. C.G. Gavnekar, for the applicant.
Mrs. A.S. Pai, APP for the Respondent No.1 State.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.
DATE : 4th DECEMBER, 2015.

ORAL JUDGMENT : [Per : Dr. Shalini Phansalkar-Joshi,J.]

1. The original complainant has preferred this revision, challenging the acquittal of the respondents, for the offences punishable under Sections 120(b) and 307 of the Indian Penal Code and section 27 read with section 25(a) of the Arms Act, as recorded by Ad-Hoc Additional Sessions Judge, Raigad -Alibag, vide his judgment and order dated 31st August, 2002, in Sessions Case No.121 of 2002.

2. Brief facts of the revision can be stated as follows :-

Applicant-complainant was doing transport business and running kerosene shop. Accused No.1 Raghunath was having strained

relations with the applicant. There used to be frequent quarrels between them. Some of such disputes were settled even by the police officers. As a result, the relations of applicant with other accused Nos. 3, 4 and 5 had also become strained.

3. The incident had taken place on 9th August, 1998. P.W.4 Naresh, the son of applicant, on that day had seen accused Nos 1, 2, 3 and 5 standing outside the office of accused No.1 Raghunath. After sometime when the applicant was returning from home, he saw the accused persons proceeding on the same road. He gave them some space for proceeding and went ahead. After some time, he heard shot of gun and noticed injury on the left side of his back near left scapula. He turned around and saw accused Nos 1, 2, 3 and 5 standing on the road. He also saw accused No.5 Mahamad Jafar trying to fire shot from the gun. He further saw accused No.5 Mahamad Jafar handing over the said gun to accused No.1 Raghunath. The applicant became frightened and entered into the corner of the hotel Manisha and raised alarm for help. Meanwhile accused Nos 1 to 3 and 5 left the spot in the car. The persons nearby rushed applicant to M.G.M. hospital. On the way he also told witness that one unknown person wearing black colour T-shirt and pant

had fired shot on him. In the hospital, he was treated by Dr. Narshetty and Dr. Pradip Dhar, who found injury over his left chest posterior aspect near the medial border of left scapula. According to injury certificate issued, it was opined that the injury might have been caused due to fast moving object (most likely a gun shot injury).

4. The investigation commenced on the complaint of applicant. The accused were arrested. The blood stained soil and simple soil came to be seized from the spot under panchnama. During the course of further investigation, at the instance of accused No.5, his pant and T shirt were recovered alongwith two revolvers. Statement of witnesses were recorded and further to completion of investigation, chargesheet was filed in the Court against in all 8 accused. Out of them, accused No.7 has expired during pendency of trial, hence the case was abated against him.

5. The trial Court framed charge against remaining accused. They pleaded not guilty and claimed trial.

6. In support of its case, prosecution examined in all 12

witnesses and on appreciation of their evidence, trial Court was pleased to hold that the prosecution has failed to prove two material aspects. Firstly, identification of the assailants and secondly that injury was caused on account of bullet fire.

7. This judgment of the trial Court acquitting accused of all the offences charged against them, is challenged in this Revision Application, by original complainant. The State has not preferred any appeal against the impugned judgment. In view of the death of respondent No.8, Revision is abated against him. It is dismissed for default against respondent Nos4 and 7 as per order dated 07.07.2006.

8. In this revision, I have heard learned counsel for the applicant. According to him, there is more than sufficient evidence on record to prove identification of the assailant. P.W.1 Rajaram-the complainant himself has deposed that he has seen gun in the hands of accused No.5. he has also given the description of the clothes worn by accused No.5 at the time of incident. Those clothes were also recovered and seized during the course of investigation. Moreover, two guns were recovered at the instance of accused No.5. Hence according to him, there

was sufficient material to connect the accused No.5 in the assault. As regards injury, he has submitted that the evidence of P. W. 11 Dr. Anil is sufficient to prove that injury caused to the applicant was on account of gun shot and hence mere non recovery of live or empty cartridge, the benefit of doubt cannot be extended to the accused. The learned counsel, has thus, tried to persuade this Court to hold that the view adopted by the trial Court and the reasons recorded by the trial Court for acquittal of accused, for offences charged against them is not correct and valid. Hence according to him, it requires to be quashed and set aside.

9. In this case, though the prosecution has examined in all 12 witnesses, material witness for prosecution is naturally the complainant i.e. P.W.1 Rajaram, who was injured in the said incident. His evidence reveals that he saw the accused Nos 1, 2, 3 and 5, coming out of the office of accused No.1. As they were trying to go ahead of him, he moved himself away from the road and gave them space to pass. Thereafter he heard a shot of gun and also noticed bullet injury on his back side. Hence he turned around and saw all the accused persons standing in one row. Accused No.5 was again trying to fire at him. As the bullet could not be fired, accused No.5 handed over the gun to

accused No.1. Thereafter he entered into the corner of Hotel Manish. At that time he saw the accused escaping from the place in a car.

10. In his cross-examination, P.W.1 Rajaram has admitted the fact that he was not knowing the accused No.5 since prior to the incident and therefore, he has given only description of the clothes which the assailant was wearing at the time of incident. According to him, the colour of T shirt which assailant was wearing was black. As per prosecution case, P.W.1 Rajaram has identified accused No.5 in test identification parade. Hence the evidence of test identification parade was very material in the present case. The prosecution, however, has not adduced evidence of Special Executive Magistrate, who has conducted the test identification parade of the accused. In such situation, when the assailant is unknown to the victim, the identification of the assailant for the first time in the Court at the time of substantive evidence, without it being supported or backed by the evidence of test identification parade, constitutes a major lacuna and it becomes difficult to place implicit reliance thereon, unless and until the evidence on record proves that the victim had sufficient opportunity to observe the assailant and to remember his features.

11. In the present case P.W. 1 Rajaram has admitted that he had no such opportunity because gun shot was fired from his backside. Only when he heard the shot and noticed injury to his back, he turn around and saw gun in the hands of assailant. According to his further admission, immediately after the incident, he ran away to escape and he had no further opportunity to see the assailants. The accused persons, according to his further evidence, also ran away from the spot in a car. Therefore, it cannot be said that he had sufficient opportunity to observe the assailant, who actually fired shot on him, either before firing of shot or after firing of shot. He has not observed specific features of the assailant It is also pertinent to note that he has only seen that gun was in the hands of accused No.5 and he was handing it over to accused No.1. Therefore, it cannot be said unequivocally that the shot was fired by accused No.5 and none else.

12. In this respect it is pertinent to note that the alleged guns recovered at the instance of accused No.5 are not sent to ballistic expert to prove that shot was fired from the said gun. Moreover, if only one shot was fired, then there was no explanation about recovery of two

guns. There is also no evidence to prove out of two guns from which gun shot was fired. Neither live cartridge nor empty cartridge was found at the spot or inside the body of the victim i.e. applicant. Thus, there is no connecting link also to establish that shot was fired from the gun recovered at the instance of accused No.5.

13. As a matter of fact, even injury found on the back of P.W. 1 Rajaram was also not categorically stated to be caused by bullet. P.W.11 Dr. Anil, who has not personally treated the injured has admitted in his cross-examination that the injury might have been possibly caused by gun shot. Therefore, that fact is also not unequivocally established by the prosecution. The Doctor who has treated the applicant viz. Dr. Dhar, is not examined by the prosecution.

14. As regards the corroborating evidence instead of proving prosecution case, to some extent it damages the prosecution case. P.W.2 Dharma, who had immediately rushed to the spot on hearing cries of P. W. 1 Rajaram, has admitted that the P.W. 1 Rajaram had told before him that he was assaulted by a person who had put on black clothes which clearly establishes that at the time of incident, P. W. 1 Rajaram was not

knowing accused No.5.

15. The evidence of P.W.4 Naresh, the son of the P. W. Rajaram further proves that both of them had seen accused No.5 in the office of A.C.P. and his name was told to them by A.C.P. In such situation, if the accused was shown to the witness even before test identification parade, the evidence relating to test identification parade also loses its significance. Hence from the mere fact that the accused persons were found standing in front of the office of accused No.1 before the incident, it would be far fetched to infer that they hatched a conspiracy to kill P.W. 1 Rajaram and in pursuance of that conspiracy, gun shot was fired by accused No.5.

16. In the light of these infirmities and lacunas in the prosecution case, which go to the root of the matter, the view adopted by the trial Court of acquitting the accused for want of sufficient evidence on record against them, needs to be upheld and confirmed. The revision, therefore, holds no merit and stands dismissed.

[DR. SHALINI PHANSALKAR-JOSHI, J.]

CERTIFICATE

Certified to be true and correct copy of the
original signed judgment