

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 628 OF 2009**

Shri. Sunil @ Kishore Bastiya]
Aged 30 years, Occ: Service]
Resident of Near Inlacks Hospital]
Footpath, Chembur, Mumbai-400 071]
(At present in judicial custody and]
undergoing sentence imposed upon]
him at Nashik Road Central Prison,]
Nashik)].. Appellant
[Ori. Accused No.1]

Vs.

The State of Maharashtra]
At the instance of Senior Inspector]
of Police, Chembur Police Station]
Vide their FIR No. 154 of 2008].. Respondent

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Mr. Nitin Sejpal Advocate & Mrs. Pooja Sejpal Advocate for the Appellant

Ms. R.M. Gadhvi A.P.P. for the State

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**CORAM : SMT.V.K.TAHILRAMANI ACTING C.J. &
SHRI.A.S.GADKARI, J.**

DATED : OCTOBER 06, 2015

ORAL JUDGMENT: [PER ACTING CHIEF JUSTICE]

1 This appeal is preferred by the appellant-original accused no.1 against the judgment and order dated 19.5.2009

passed by the learned Additional Sessions Judge, Greater Bombay in Sessions Case No. 445 of 2008. By the said judgment and order, the learned Sessions Judge convicted the appellant under Section 302 of IPC and sentenced him to life imprisonment and fine of Rs.5000/- i/d simple imprisonment for six months.

2 The prosecution, case briefly stated, is as under:

Deceased Santosh Mane was the General Secretary of Marathi Yuvak Sangh Ghatalgaon. PW 1 Kamlesh was the Secretary of that Sangh. PW 9 Lavesb was worker of the said Sangh. On 5.4.2008 a drama was arranged by the said Sangh at Gaodevi Maidan, Ghatalgaon, Chembur in Mumbai. The drama started at about 7.45 p.m. At about 10.00 p.m. PW 1 Kamlesh, PW 9 Lavesb and deceased Santosh were standing near the entry of the stage and were having discussion. At that time, they heard noise like bursting of crackers. Thereafter, it was noticed that Santosh put his hand on the backside of his head and collapsed. As soon as Santosh collapsed, they saw one person having revolver in his hand. In the meanwhile, the person who was having revolver, fired two rounds. Before

firing two rounds, another person who was standing by the side of the first person who was holding revolver in his hand, asked him to fire towards PW 1 Kamlesh. Then Kamlesh went backside of the stage and saved himself. Then the crowd started running behind the assailants. PW 8 PSI Sasane was also in that crowd. They chased the assailants for about 1 km. Thereafter, PW 8 PSI Sasane managed to apprehend the appellant. He told the appellant to keep the revolver down. The appellant then kept the revolver down. PSI Sasane took charge of the revolver. Thereafter the firearm and the appellant were brought to the police station. PW 1 Kamlesh lodged F.I.R. Thereafter investigation commenced. Injured Santosh was taken to Shatabdi hospital where he was declared dead on admission. The seizure panchnama of firearm was prepared in the presence of panch witness PW 4 Kamlakar. The said panchnama was made on 6.4.2008 between 1.35 a.m. to 2.15 a.m. The dead body of Santosh was sent for post-mortem. Firearm injury was found on the occipital region of Santosh. Fracture of the skull was noted. After completion of investigation, the charge sheet came to be filed.

3 Charge came to be framed against the appellant and the co-accused under Sections 302, 307 and 120-B read with Section 34 of IPC and under Section 3 read with Section 25 of the Arms Act. The accused pleaded not guilty to the said charge and claimed to be tried. The defence of the appellant is that of total denial and false implication. After going through the evidence adduced in the present case, the learned Judge convicted and sentenced the appellant as stated in para 1 above, hence, this appeal. It may be stated here that the learned Judge acquitted the appellant of the offence under Sections 307 and 120-B of IPC and under Section 3 read with Section 25 of the Arms Act. The learned Judge also acquitted the original accused no.2 Hasmukh Shankar Solanki of the offences with which he was charged.

4 We have heard the learned counsel for the appellant and the learned A.P.P. for the State. After giving our anxious consideration to the facts and circumstances of the case, arguments advanced by the learned counsel for the parties, the judgment delivered by the learned Judge and the evidence on record, for the below mentioned reasons, we are of the

opinion that the prosecution has not proved its case beyond reasonable doubt that the appellant fired on Santosh and caused his death.

5 To sustain the conviction, the prosecution is mainly relying on the evidence of PW 1 Kamlesh, PW 7 Sukhdeo, PW 8 PSI Sasane and P.W. 9 Laves. According to the prosecution, all these witnesses were present at the spot of the incident. PW 1 Kamlesh, PW 7 Sukhdeo and PW 9 Laves were the committee members or workers of the Marathi Yuvak Sangh. PW 1 Kamlesh has stated that deceased Santosh was the General Secretary of Marathi Yuvak Sangh Ghatalgaon. PW 1 Kamlesh was the Secretary of that Sangh. PW 9 Laves was worker of the said Sangh. On 5.4.2008 a drama was arranged by the said Sangh at Gaodevi Maidan, Ghatalgaon, Chembur in Mumbai. The drama started at about 7.45 p.m. PW 1 Kamlesh, PW 9 Laves and deceased Santosh were standing near the entry of the stage and were having discussion. At that time, they heard noise like bursting of crackers. Thereafter, it was noticed that Santosh put his hand on the backside of his head and collapsed. As soon as Santosh collapsed, they saw one

person having revolver in his hand. In the meanwhile, the person who was having revolver, fired two rounds. Before firing two rounds, another person who was standing by the side of the first person who was holding revolver in his hand, asked him to fire towards PW 1 Kamlesh. Then Kamlesh went backside of the stage and saved himself. Then the crowd started running behind the assailants. The evidence of PW 7 Sukhdeo and PW 9 Lavesh is on similar lines as that of PW 1 Kamlesh.

6 Mr. Sejpal, the learned counsel for the appellant submitted that the appellant was not known to PW 1 Kamlesh, PW 7 Sukhdeo and PW 9 Lavesh prior to the incident. He pointed out that PW 1 Kamlesh has categorically stated in para 3 of his evidence that both the assailants were unknown to him. PW 7 Sukhdeo in para 4 of his evidence has stated that both the accused persons were unknown to him. The evidence of PW 9 Lavesh in para no. 7 shows that the accused persons are unknown to him. Mr. Sejpal pointed out that PW 1 Kamlesh, PW 7 Sukhdeo and PW 9 Lavesh have all stated that they have not seen the actual incident of firing. Mr. Sejpal

drew our attention to the evidence of PW 1 Kamlesh, PW 7 Sukhdeo and PW 9 Lavesha wherein they have stated that they have not seen the actual incident of firing. Mr. Sejpal pointed out that the evidence of PW 1 Kamlesh, PW 7 Sukhdeo and PW 9 Lavesha shows that the appellant was shown to them in the police station. He submitted that in such case, identification of the appellant by PW 1 Kamlesh, PW 7 Sukhdeo and PW 9 Lavesha cannot be relied upon. He further pointed out that statement of PW 7 Sukhdeo was recorded four days after the incident and the statement of PW 9 Lavesha was recorded on 12.4.2008 i.e. almost six days after the incident. No plausible explanation has been furnished by the prosecution for the delay in recording the statements of these two witnesses. Mr. Sejpal submitted that in view of these facts and especially looking to the fact that the appellant was shown to these three witnesses in the police station, identification of the appellant by these three witnesses cannot be relied upon. We find much merit in this submission. It may be stated here that the trial Court has also not placed reliance on the evidence of PW 1 Kamlesh, PW 7 Sukhdeo and PW 9 Lavesha and in our opinion, rightly so.

7 The learned A.P.P. placed reliance on the evidence of PW 8 PSI Sasane to connect the appellant with the crime. The evidence of PW 8 PSI Sasane shows that on 15.4.2008 he was on Bandobast duty of drama which was arranged at Ghatalgaon Maidan. This drama was arranged by Marathi Yuvak Sangh Ghatalgaon. His evidence shows that at around 10 p.m. he heard noise like bursting of crackers. He along with other policemen rushed in that direction. They saw one person holding revolver in his right hand. Two other persons were accompanying that person. All the three persons were running away when they started going towards them. On the way, they saw one person lying about 20 feet away from the stage. He had sustained bullet injury on his head. PSI Sasane then came to know that there was firing. PSI Sasane then asked the persons who had assembled near the injured, to carry the injured to the hospital. Thereafter PSI Sasane started chasing the assailants who were running away towards Gaondevi road. After chasing for some distance, PSI Sasane told the appellant to surrender and asked him to keep the revolver down otherwise he would fire at him, Whereupon the appellant kept

the firearm down. Then PSI Sasane nabbed the appellant. PSI Sasane also picked up the revolver from the ground and took it in his custody.

8 Mr. Sejpal pointed out that the evidence of PW 8 PSI Sasane also shows that he did not witness the actual incident of firing and he only saw one accused person holding a firearm which according to PSI Sasane, was the appellant. The evidence of PW 1 Kamlesh and PW 9 Lavesb shows that two persons were holding firearm. None of the witnesses have stated as to which of the accused persons actually fired at Santosh. The evidence of PW 8 PSI Sasane shows that after the firing, three assailants ran away from the spot. When PSI Sasane chased them and apprehended the appellant, PSI Sasane was alone and none of the other staff members of police or public were with him. His evidence further shows that he chased the appellant for 1 km. and thereafter he managed to apprehend the appellant. This is seen from para 5 of his evidence. Mr. Sejpal submitted that it is difficult to believe that PSI Sasane could have chased the accused persons upto a distance of 1 km. and thereafter apprehended the appellant.

This is because, PSI Sasane has stated that after he heard the noise like bursting of crackers, he rushed towards that direction. They saw one person holding revolver in his right hand. Two other persons were accompanying that person. All the three persons were running away when they started going towards them. On the way, they saw one person lying. He had sustained bullet injury on his head. PSI Sasane then came to know that there was firing. PSI Sasane then asked the persons who had assembled near the injured, to carry the injured to the hospital. Thereafter PSI Sasane and other police personnel started chasing the assailants. According to PSI Sasane, he chased the appellant for about 1 km. and then nabbed the appellant. Mr. Sejpal submitted that accused persons started running away immediately after firing took place whereas PSI Sasane on hearing the firing, went in that direction. He stopped to see the injured person and noticed that he had bullet injury on the head. He gave direction to the persons gathered there to take the injured person to the hospital and all these events would have taken some time and in the meanwhile, the assailants would have managed to cover quite some distance and it is difficult to believe that PSI Sasane could

still manage to catch up with the accused persons and manage to nab one of them i.e. the appellant after 1 km. As stated earlier, none of these witnesses i.e. PW 1 Kamlesh, PW 7 Sukhdeo, PW 8 Sasane and PW 9 Lavesha have stated that they had seen the appellant actually firing at Santosh. All these facts raise doubt in the mind whether it was the appellant who actually fired at Santosh.

9 The prosecution has then placed reliance on the evidence of panch witness PW 4 Kamalakar to show that firearm was seized from the appellant. However, on going through the evidence of this witness, it shows that the firearm was produced by PW 8 PSI Sasane. Moreover, according to the prosecution, the panchnama relating to seizure of the firearm Article-A took place on 6.4.2008 between 1.35 a.m. to 2.15 a.m. i.e. within about three and half hours of the incident however, the evidence of panch witness Kamalakar in cross-examination shows that police came to his shop at 10.00 a.m. in the morning to call him to the police station for panchnama. The panchanma started at 1.30 p.m. and it was completed in the afternoon at about 2.15 p.m. Kamalakar has stated that it

did happen that PSI Sasane showed him revolver in the police station at 1.30 p.m. Revolver was in the hands of PSI Sasane when it was shown to him. Moreover, the evidence of PW 4 Kamlakar shows that he is an interested witness. He has stated that deceased Santosh was known to him. Kamlakar has further stated that he had gone to the police station that night when Kamlesh (PW 1), Sukhdeo (PW 7) and other 4 to 5 people had arranged the drama. PW 4 Kamlakar has admitted that it is true that he had gone to the police station that night with PW 1 Kamlesh Lad, PW 7 Sukhdeo and 4 to 5 persons who had arranged the drama. That night he was in the police station till 1.30 a.m. PW 4 Kamlakar has categorically denied that panchnama was prepared in the night and they signed the panchnama in the night at 2.15 a.m. All these facts raise doubt in the mind about the seizure of the firearm from the appellant.

10 Thereafter the prosecution has placed reliance on the ballistic report which shows that the bullet fired at Santosh, was fired from the firearm found with the appellant. However, as far as this aspect is concerned, as stated earlier, we do not find the evidence of panch witness PW 4 Kamlakar to be

reliable. Based on the evidence of this witness, it cannot be reliably said that the firearm was seized from the appellant. Moreover, the evidence of the panch witness PW 4 Kamlakar categorically shows that the panchnama of seizure of firearm did not take place in the night between 5.4.2008 and 6.4.2008 but it took place in the afternoon of 6.4.2008. We have already discussed in the above para why we are not inclined to place any reliance on the circumstance of seizure of firearm. In view of these facts, main connecting link which connects the firearm to the appellant, is found to be missing.

11 On going through the evidence on record, we are of the opinion that the prosecution has not proved its case beyond reasonable doubt against the appellant. Hence, the following order is passed.

ORDER

(1) The judgment and order dated 19.5.2009 in Sessions Case No. 445 of 2008 passed by the learned Additional Sessions Judge, Greater Bombay thereby convicting and sentencing the appellant - Sunil @ Kishore Bastiya under Section 302 of IPC for life imprisonment, is set aside. The

appellant is acquitted of the offence under Section 302 of IPC.

(2) The appellant be set at liberty forthwith, if not required in any other case.

(3) Appeal is allowed and is disposed of accordingly.

A.S.GADKARI, J.

ACTING CHIEF JUSTICE

Kandarkar

CERTIFICATE

Certified to be true and correct copy of the original signed Judgment.