

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 553 OF 2008

Parshuram Alias Parshu Ganpat
Nalwade, Age-22 years
Resident of Room No.9,
Lokmanya chawl, Behind Satguru Nagar
Devipada, Borivli (East), Mumbai
(at present Accused in Nashik
Central Prison

..Appellant
(Org.Accused No.1)

Vs.

State of Maharashtra
Through Kasturba Marg Police
Station

..Respondent

Mr. Prakash H. Naik i/b Mr. Aniket Vagal, for the Appellant
Dr. F. R. Shaikh, A.P.P. for the State

....

CORAM :- **SMT. V. K. TAHILRAMANI AND
SHRI. B. P. COLABAWALLA, JJ**

DATE :- **APRIL 23, 2015.**

ORAL JUDGMENT: [PER SMT. V.K. TAHILRAMANI, J.]

1 This appeal is preferred by the appellant-original accused no.1 against the judgment and order dated 06.06.2008 passed by the learned Ad-hoc Additional Sessions Judge, Sewree in Sessions Case No. 861 of 2004. By the said judgment and order, the learned Sessions Judge convicted the appellant as under:-

Convicted u/s	Sentenced to
302 IPC	Life imprisonment and fine of Rs.3,000/- in default R. I. for three years.
25 (1-B) (a) Arms Act	Rigorous imprisonment for one year and fine of Rs.2,500/- in default R. I. for three months.
27(1) Arms Act	Rigorous imprisonment for three years and fine of Rs.2,750/- in default R. I. for six months.

The learned Sessions Judge directed that all the substantive sentences of imprisonment shall run concurrently.

2 The prosecution case briefly stated, is as under:

(a) Deceased - Akshay was the brother of PW-1 Sandip Bari. PW-1 Sandip Bari is first informant in the present case. The appellant was known to the complainant since December 2003. A quarrel had taken place between the appellant and

Rakesh who was the brother of PW-1 Sandip and deceased Akshay. The incident occurred on 30.06.2004. At about 6.55 p.m., Akshay went out of the house. PW-1 Sandip heard a cracker like noise. PW-8 Snehal Bhosale who was his neighbour came and told him that she saw Akshay lying on the ground by the side of the building hence PW-1 Sandip went down stairs. Sandip saw that his brother was bleeding. Sandip made enquiry with his brother. His brother told him that the appellant had shot him in the stomach with fire arm. PW-1 Sandip took his brother to the hospital. Within ten minutes, Doctor informed that Akshay had expired. PW-1 Sandip then lodged F. I. R.- Exhibit-28. Thereafter, investigation commenced.

(b) The dead body of Akshay was sent for postmortem. PW-9- Dr Rambhau Sanap conducted postmortem on the dead body of Akshay. He found fire arm injury present over abdomen and back. No bullet was found in the body of Akshay. In the opinion of Dr. Sanap, the cause of death was due to fire arm injury. During the course of investigation, fire arms were recovered at the instance of the appellant-original accused no.1 as well as original accused no.5-Janak Chaman Khavdiya

After completion of investigation, the charge sheet came to be filed.

3 Charge came to be framed against the appellant and five other accused under sections 120-B, 302 read with 34 of IPC and under section 3 read with sections 3,5, 25 and 27 of the Arms Act. All the accused pleaded not guilty to the said charge and claimed to be tried. The defence of the accused was that of total denial and false implication. After going through the evidence adduced in the present case, the learned Judge acquitted original accused nos.2 to 5, however, he convicted and sentenced the appellant as stated in para 1 above, hence, this appeal.

4 We have heard the learned counsel for the appellant and the learned APP for the State. After carefully considering their submissions, the judgment and order passed by the learned Sessions Judge and the evidence in this case, for the below mentioned reasons, we are of the opinion that the prosecution has not been able to prove its case against the Appellant beyond reasonable doubt.

5 In order to sustain conviction, the prosecution is relying on the evidence of PW-1 Sandip and PW-4 Pramod Waygankar. PW-1 Sandip is the first informant in the present case. He is the brother of deceased Akshay. According to the prosecution, Akshay made an oral dying declaration to PW-1 Sandip implicating the appellant. The evidence of PW-4 Pramod is relied upon to prove the circumstance of recovery of fire arm at the instance of the appellant. PW-1 Sandip has stated that Akshay was his brother. On 30.06.2004 at about 6.55 p.m., his brother Akshay went out of the house. At that time Sandip heard noise like bursting of cracker. Sandip has further stated that PW-8 Snehal Bhosale is his neighbour, she came and told him that she saw Akshay lying on the ground by the side of the building hence PW-1 Sandip went down stairs. Sandip saw that his brother was bleeding. Sandip made enquiry with his brother. His brother told him that the appellant had shot him in the stomach with fire arm. PW-1 Sandip took his brother to the hospital. Within ten minutes, Doctor informed that Akshay had expired. PW-1 Sandip then lodged F. I. R.- Exhibit-28.

6 No doubt, the evidence of PW-1 Sandip shows that an oral dying declaration was made by his brother Akshay to him wherein Akshay told him that the appellant had fired bullet on his stomach, however, we do not find it safe to rely on the evidence of PW-1 Sandip that an oral dying declaration was made to him wherein Akshay stated that the appellant had fired bullet at him. We say so, in view of the evidence of PW-6-Devidas. Devidas has stated that when he came outside his factory, he saw that PW-1 Sandip had lifted his brother Akshay. He made enquiry with PW-1 Sandip about what had happened to Akshay. Thereupon PW-1 Sandip told him that “somebody” had fired at Akshay. If indeed Akshay had told PW-1 Sandip that the appellant-Parshuram had fired at him, PW-1 Sandip would have told PW-6 Devidas that appellant-Parshuram had fired at his brother. The fact that PW-1 Sandip did not tell PW-6 Devidas that the appellant fired at his brother, raises grave doubt about oral dying declaration being made by Akshay to PW-1 Sandip wherein he took the name of the appellant.

7 The next circumstance which is relied upon by the prosecution is recovery of fire arm at the instance of the

appellant. Panch witness PW-4-Pramod has deposed about recovery of fire arm at the instance of the appellant. PW-4 Pramod has stated that on 02.07.2004, he was called by Police to act as a panch. In his presence, the appellant made a statement that he would show the place where a revolver was kept. PW-4 Pramod has stated that thereafter the appellant took the Police and panchas near Vivekanand Centre, Borivali (E). The appellant took them near a ground. The appellant then took out one plastic bag containing one revolver and two cartridges and same were seized by the Police.

8 We are not inclined to place reliance on the recovery of revolver for three reasons; first, recovery was from open place, second; none of the witnesses have stated that the weapon was sealed after the accused produced it and third reason is that, panch witness was a stock panch. As far as first aspect is concerned, we have already stated above that the evidence of panch witness shows that recovery was from open ground. As far as recovery from an open place is concerned, the Supreme Court in the case of **Kora Ghasi V/s State of Orissa**¹ has observed thus:-

1 AIR 1983 SC 360

“So far as the recovery is concerned we cannot attach much importance to this fact as it was from an open place accessible to all.”

The Supreme Court in the case of **Trimbak V/s The State of M. P.**² observed thus:-

“ When the field from which the ornaments were recovered was an open one, and accessible to all and sundry, it is difficult to hold positively that the accused was in possession of these articles. The fact of recovery by the accused is compatible with the circumstance of somebody else having placed the articles there and of the accused somehow acquiring knowledge about their whereabouts and that being so, the fact of discovery cannot be regarded as conclusive proof that the accused was in possession of these articles.”

This Court in the case of **Ravindra Kondiba Pol and Another V/s The State of Maharashtra**³ has also held that recovery effected from an open place cannot be relied upon.

² AIR 1954 SC 39

³ 1998 ALL MR (Cri) 20

9 The second reason due to which we are not inclined to place reliance on recovery of firearm is that, none of the prosecution witnesses have stated that weapon was sealed when it was produced by the accused. The Supreme Court in the case of **Amarjit Singh Alias Babbu V/s State of Punjab**⁴ has observed that the non-sealing of the revolver at the spot is a serious infirmity because the possibility of tampering with the weapon cannot be ruled out.

 This Court in the case of **the State of Maharashtra V/s Shripati Pandurang Patil and Ors**⁵ has observed thus:-

“ There is absolutely no evidence to show that the articles and the clothes recovered were sealed on the spot. In the absence of sealing, evidence on recovery becomes suspicious and cannot be relied upon.”

10 Similar view was taken by this Court in the case of **Tulshiram Bhanudas Kambale and Ors V/s The State of**

⁴ 1995 Supp (3) SCC 217

⁵ 2015 ALL MR (Cri) 895

Maharashtra ⁶. In the said judgment, it was observed as under:-

“ A Division Bench of this Court of which one of us was a member (Vishnu Sahai, J.) in the case of (State of Maharashtra Vs. Prabhu Barku Gade) reported in 1995 Cri L. J. Page 1432 in paragraph 12, relying upon the decision of the Apex Court reported in (1993) 4 CUR. Cri. R.486 Amarjit Singh Vs State of Punjab laid down the ratio that “where the recovered articles were not immediately sealed, no value can be attached to the said recovery”

11 The third reason we are not inclined to place any reliance on the recovery of revolver is that the panch who was examined in support of the recovery was a stock panch. The Supreme Court in the case of **State of Gujarat V/s Kumudchandra Pranjivan Shah** ⁷, observed that when it is established that the panch witness has acted as a panch in number of cases, there are reasons to believe that he was a pliable witness and it was not safe to rely on his evidence.

⁶ 1999 ALL MR (Cri) 1593

⁷ 1995 CRLJ 3623 equivalent to 1997 SCC (Cri) 750

12 This Court in the case of **Shri Bhagwatsingh Gaud V/s State of Goa**⁸ has observed that when the evidence shows that panch witness has acted as a panch in many cases it leaves no manner of doubt that the panch witness is a stock witness and he can be termed as pliable witness and evidence of such witness cannot be relied upon as it casts a serious doubt and creates serious suspicion about recovery.

13 In the present case relating to the recovery of revolver, the panch witness (PW-4 Pramod) has admitted that he has acted as a panch on two to three times on the say of Kasturba Marg Police Station i.e. the very Police Station which has investigated the present case. In addition, the panch witness has stated that he had acted as a panch in three murder cases in the year 2006.

14 Looking to the fact that the same panch has been taken as panch witness by Kasturba Marg Police Station in three cases and admission of the panch that he has acted as panch in three more murder cases, it become crystal clear that

⁸ 1998 ALL MR (Cri) 1421

this witness is a habitual panch and he is very much under the thumb of Police. In such case, this panch, cannot be considered as an independent witness and must be considered as pliable witness in the hands of the Police. In view of the evidence on record, the evidence of PW-4 Pramod, panch witness has to be discarded on the ground that he was under the thumb of Police and is a pliable witness. It does not mean that now the prosecution can contend that as evidence of panch witness, is not trustworthy, the evidence of police witness should be accepted, if on scrutiny the same is found to be trustworthy. Normally, it is expected that the Investigating Officer will take independent panch witness and if he has taken pliable witness as a panch witness, the entire recovery would become suspect and in such case it would not be possible to hold that the evidence of police witness would be sufficient to base a conviction. A similar view was taken by this Court in the case of **Rudhirkumar K Panda V/s The State of Maharashtra** ⁹.

15 In view of the above, the conviction of the appellant cannot be sustained based on the circumstance of recovery of

⁹ 2013 ALL MR (Cri) 2128

fire arm at his instance.

16 In addition, we would like to state that a revolver was also recovered at the instance of original accused no.5 Janak Khavdiya who was acquitted in this case. In addition cartridges were recovered at the instance of original accused no.6 P. K. Sudhir @ Keshav Narkar who has also been acquitted. No bullet was found in the body of deceased nor was any empty cartridge seized from the spot. Thus, there is no evidence to show that the very same revolver which was recovered at the instance of the appellant was used to fire at deceased Akshay.

17 Besides the two circumstance enumerated above, there is no other evidence which connects the appellant with the crime.

18 In view of the above, it cannot be said that the prosecution has proved its case against the appellant beyond reasonable doubt. Hence, the following order.

ORDER

(I) The Appeal is allowed.

(II) The judgment and order dated 06.06.2008 passed by the learned Ad-hoc Additional Sessions Judge in Sessions Case No.861 of 2004 is set aside. The appellant is acquitted of all the offences. He be set at liberty, if not required in any other case.

[SHRI. B. P. COLABAWALLA, J.] [SMT. V. K. TAHILRAMANI, J.]