

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1333 OF 2008

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|--|---|--------------------|
| 1. Mangesh Sambhaji Pawar, |] | |
| Aged 28 Years, Occ.: Business, |] | |
| R/at 28/1, Parvati Darshan, Pune. |] | |
| |] | |
| 2. Ravindra Machhindra Choudhari, |] | |
| Aged 24 Years, Occ.: Education, |] | |
| R/at Flat No.26, Indra Shankar Nagari, |] | |
| Kothrud, Pune - 26. |] | |
| |] | |
| 3. Sachin Prakash Sonawane, |] | |
| Aged 29 Years, |] | Appellants / |
| Occ.: Autorickshaw Driver, |] | (Original Accused |
| R/at 100, Ghorpadi Peth, Pune. |] | Nos.1, 2 & 3) |

Versus

State of Maharashtra,	]	
Through Paud Police Station, Pune.	]	 Respondent

Mr. Priyal G. Sarda for Appellant No.1.

Mr. S.V. Kotwal, a/w. Mr. Avinash
Kamkhedkar, for Appellant No.2.

Mr. Prashant Patil for Appellant No.3.

Mrs. A.S. Pai, A.P.P., for the Respondent-
State.

CORAM : SMT. V.K. TAHILRAMANI &
DR. SHALINI PHANSALKAR-JOSHI, J.J.

DATE : 17TH JUNE, 2015.

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

1. This Appeal takes an exception to the Judgment and Order dated 29th November, 2008 in Sessions Case No.355 of 2006, passed by the Ad-Hoc Additional Sessions Judge, Pune, thereby convicting the Appellants for the offence punishable under Section 302 r/w. 34 of the IPC and sentencing them to suffer imprisonment for life and to pay fine of Rs.10,000/- each, in default to suffer R.I. for three months. By the said Judgment, Appellant No.1 is further convicted for the offence punishable under Section 25 of the Indian Arms Act and sentenced to suffer R.I. for two years and to pay a fine of Rs.2,000/-, in default to suffer further R.I. for ten days.

2. Facts, as are necessary, for deciding this Appeal may be stated as under :-

On 8th February, 2006, on the receipt of a phone call from deceased Mahesh, PW-7 Jitesh went to meet him at Paud at about 3 pm. There were two other persons with Mahesh and all the four of them went to the office of D.I.L.R. On completion of work in the said office, they started proceeding on road. PW-7

Jitesh went ahead to purchase bottle of drinking water. The Driver of deceased Mahesh started towards taking their car. At that time, PW-7 Jitesh heard sound of firing and Mahesh lying on the road in injured condition. As per Prosecution case, PW-7 Jitesh also saw that the bullets were fired from the pistol in the hands of Appellant No.1 Mangesh. There were four other persons with the assailant and all the five of them, after the firing, ran away on their motor cycles. PW-7 Jitesh then shifted the injured Mahesh to the hospital and then gave information of the incident to the Police.

3. Meanwhile, PW-3 PI Ravindra Rasal, who was on duty at Paud Police Station, received telephonic message, at about 4 pm, from Constable Bandal about this incident of firing. Hence, after taking necessary entry in the Station Diary, he rushed to the spot. There, PW-7 Jitesh approached him and gave information of the incident. He also gave the number of motor cycles, by which those five assailants had ran away from the spot. PW-3 PI Rasal then recorded the detailed complaint of PW-7 Jitesh vide Exhibit-72, which contained the description of the Accused and other details of the incident. Immediately he forwarded the information

received to the Police Station and the Control Room. Accordingly, blockade was done by the Police. He himself, along with the staff, left to take search of those persons.

4. On the complaint (Exhibit-72), C.R. No.13 of 2006, accordingly, came to be registered. The Spot Panchanama was made on the same day vide Exhibit-65 in the presence of PW-1 Panch Mahadeo Pingle. From the spot, the blood stained clothes, the blood mixed mud, two empty cartridges and one live cartridge were seized under the Panchanama.

5. Meanwhile, the injured was reported to have succumbed to the bullet injury sustained by him. Hence, his Inquest Panchanama (Exhibit-132) was carried out and the dead body was sent for postmortem examination. On the same day, PW-3 PI Rasal recorded the statements of few witnesses and received the information that the assailants have given away their motor cycles and left in Alto Car bearing No. MH-13-N-9062 towards Lonavala. Hence, PW-9 Police Naik Baban Kadam took entry of the said information and proceeded towards Lonavala. On the way, near the Vardhaman Society, they saw Alto Car parked there. They could catch hold of three assailants sitting in the Car,

whereas, two of them escaped. The assailants, who were arrested on the spot, are Appellant Nos.1, 2 and 3. Police took the personal search of the Appellants and the Car and in that search, one Pistol and some live cartridges with other weapons, like, knife came to be found and seized under the Panchanama, in the presence of PW-6 Panch Umesh Kamble. The Appellants were brought to the Police Station and arrested under Panchanama (Exhibit-89).

6. During the course of further investigation, other co-accused came to be arrested. The Test Identification Parade of the Appellants and other co-accused was conducted by PW-15 Tahasildar Pandurang Muqadum on 17th March, 2006, in which the Appellants and other co-accused came to be identified by PW-7 Jitesh, the eye witness. Memorandum Panchanama of the Test Identification Parade was made vide Exhibit-78. In further course of investigation, one more Pistol came to be seized at the instance of the co-accused Yogesh Sonawane from the house of his sister. All the seized muddemal articles were sent to Chemical Analyzer on 3rd March, 2006 and 13th March, 2006 by PW-20 PI Jaywant Deshmukh, who has taken over further

investigation of the case. On the receipt of Ballistic Report, confirming that the bullet found in the body of the deceased Mahesh, at the time of postmortem, was matching with the test fired bullet from the Pistol recovered, further to completion of investigation, Charge-Sheet came to be filed in the Court against totally ten Accused including the present Appellants, who are Original Accused Nos.1, 2 and 3. Out of them, Original Accused No.10-Sunil Sakharam Dagade expired during the course of trial.

7. On the committal of the case to the Sessions Court, the Trial Court framed charge vide Exhibit-37 for the various offences punishable under Sections 302, 307 and 120-B of the IPC. Accused Nos.1 and 4 were also charged for the offence punishable under Section 3 r/w. 25 of the Indian Arms Act and Accused Nos.2, 3, 6 and 8 were charged for the offence punishable under Section 4 r/w. 25 of the Said Act. The Appellants and co-accused pleaded not guilty and claimed trial.

8. In support of its case, Prosecution examined in all 20 witnesses and on appreciation of their evidence, the Trial Court held the guilt of the present Appellants / Original Accused Nos.1, 2 and 3 to be proved, only for the offence punishable under

Section 302 r/w. 34 of the IPC. The charge of the offence punishable under Section 25 of the Arms Act held to be proved against Appellant No.1 only. Accordingly, they were convicted and sentenced, as aforesaid. All the Accused were acquitted of the offence punishable under Section 120-B of the IPC and Section 307 r/w. 34 of the IPC.

9. The convicted Accused Nos.1 to 3 have preferred this Appeal, whereas, the Respondent-State has not preferred any Appeal challenging the acquittal of co-accused.

10. In this Appeal, we have heard learned Counsels for the Appellants and learned A.P.P. for the Respondent-State. In our considered opinion, in order to effectively deal with the rival submissions advanced by them, it would be useful to refer to the evidence on record.

11. To prove the homicidal death of Mahesh, Prosecution has examined PW-8 Dr. Milind Wable, who, at the relevant time was attached to Forensic Medicines, Sassoon Hospital, Pune and has conducted postmortem examination on the dead body of Mahesh. On examination, he found following external injuries :-

- (i) *Wound of entry in the middle of forehead, 3 cms above medial angle of left eyebrow, cruciate in shape, measuring 2 x 1 cms, abrasion collar present surrounding area of 2.5 cm shows tattooing. Margins inverted.*
- (ii) *Right black eye.*
- (iii) *Circular wound of entry, 3 cms. Behind right ear, measuring 1 cm in diameter. Abrasion collar present. Surrounding area of 2 cms diameter shows tattooing. Margins inverted.*
- (iv) *Vertical wound of exit. Left side of forehead, 2 cms away and 1.5 cms above lateral angle of left eyebrow, measuring 1.2 x 1 cms. Surrounding area of 2 cms. Contused. Margins inverted and irregular.*
- (v) *Abrasion on posterior aspect of right forearm, measuring 3 x 1.5 cms.*
- (vi) *Abrasion left elbow, 1 cm in diameter.*
- (vii) *Circular wound of entry left side of back, 1 cm left lateral to midline, 4 cms above the level of buttock, measuring 1 cm in diameter. Abrasion collar present. Margins inverted.*

12. On internal examination, he found following injuries :-

- (i) *Hematoma over frontal region, measuring 5 x 4 cms.*
- (ii) *Circular clean cut fracture of frontal bone, measuring 1.7 x 1 cms, involving both tables.*
- (iii) *Extradural haemorrhage, mid frontal area, measuring 5 cms in diameter.*
- (iv) *Lacerations of meninges, 3 cm in diameter.*
- (v) *Lacerations of both frontal lobes, in the middle, measuring 2 x 1 cms. Of left and 2 x 2 cms of right frontal lobe, involving whole thickness.*
- (vi) *Lacerations of right parietal lobe, measuring 2.5 x 2 cms, involving whole thickness.*
- (vii) *Lacerations of right occipital lobe, measuring 2 x 1 cm. Bullet found lodged in right occipital lobe.*

13. PW-8 Dr. Milind Wabale has opined the cause of the death as *“traumatic and haemorrhagic shock as a result of firearm injuries”*.

14. To prove the involvement of the Appellants in the homicidal death of Mahesh, Prosecution has mainly placed reliance upon

the evidence of the only eye witness PW-7 Jitesh Balkawade. This witness has, however, not completely supported the Prosecution case. Though he has admitted that, at the relevant time, he was along with deceased Mahesh and some bullets were fired on the deceased, he has denied having witnessed the actual incident of firing. According to him, he has gone to purchase the bottle of drinking water and when he returned, he saw that deceased Mahesh was lying in injured condition. He has denied that he had seen five persons armed with sword and pistols, rushing towards him and Mahesh and out of those five persons, one person has fired bullet towards Mahesh, as a result of which Mahesh has sustained the injury. He has also not stated anything about he himself sustaining the injuries in the said incident, for which the Prosecution has charged Appellants and other co-accused for the offence punishable under Section 307 of the IPC. He has also denied that in the Test Identification Parade, he has identified any of the said assailants. In evidence before the Court also, therefore, there was no question of his identifying any of the assailants.

15. Thus, the only eye witness examined by the Prosecution, on

whose testimony the Prosecution was banking and relying a lot, having not supported the Prosecution case, the Prosecution case has crumbled to the ground. Though this witness is cross-examined by learned A.P.P., absolutely nothing worthwhile is elicited in his cross-examination to support the Prosecution case. He has even denied lodging of the complaint or the contents of the said complaint being true and correct.

16. Though as per evidence of the Investigating Officer, there were two more eye witnesses to the incident, they were not found and hence there is no substantive evidence of eye witnesses on record to prove the involvement of the Accused in the said offence.

17. The Prosecution and the Trial Court has, therefore, relied upon the recovery evidence of the two empty cartridges and one live cartridge from the spot of incident. The Prosecution has further placed reliance on the recovery evidence of two Pistols at the time of arrest of the Accused and the evidence of Ballistic Expert PW-19 Nandkumar Rokde. However, the Prosecution has failed to establish these circumstances also, beyond reasonable doubt. PW-6 Umesh Kamble, Panch Witness to the recovery of

the Pistol from the possession of the Accused, has not supported the Prosecution case. Hence, he was also declared hostile. As per further Prosecution case, at the instance of Original Accused No.4- Sachin Dhumal also, one Pistol was recovered. However, PW-5 Jagdish Lande, Panch Witness to the said Panchanama, has also turned hostile and has not supported the Prosecution case.

18. Though Prosecution has also relied on the recovery of weapons, like, knife, scyth from the Alto Car and the evidence of Finger Print Expert PW-11 Vivek Urade in respect thereof, the use of these weapons in the commission of offence is not at all proved, either through the evidence of eye witness or even through the evidence of PW-8 Dr. Milind Wable, who has conducted the postmortem examination. The Postmortem Report (Exhibit-84) does not reflect any injury caused by the sharp edged weapons like knife and scyth.

19. So far as report of the Ballistic Expert PW-19 Nandkumar Rokde is concerned, admittedly, two Pistols were sent to him for examination; one recovered at the time of arrest of the present Appellant No.1 Mangesh Pawar and another recovered at the instance of Original Accused No.4 Sachin Dhumal. Admittedly, as

per evidence of PW-7 Jitesh, only one Pistol was used in the commission of the offence and two bullets were fired therefrom. Therefore, it was necessary for the Prosecution to bring connecting evidence to establish that the Pistol, from which the two bullets were fired, was the one recovered from possession of Appellant No.1 and the bullet recovered from the dead body was found to be tallying with the bullet test fired from the said Pistol. The report of Ballistic Expert and the evidence of Investigating Officer PW-20 PI Deshmukh is, however, not establishing this connecting link between the two.

20. Even otherwise also, in the absence of the substantive evidence of eye witness on record, the corroborating evidence alone cannot establish the guilt of the Accused beyond reasonable doubt. As a result thereof, conviction of the Appellants for the offence charged and held proved against them by the Trial Court for the offence punishable under Section 302 r/w. 34 of the IPC cannot be sustained. The Appeal needs to be allowed.

21. Consequently, the Criminal Appeal is allowed and the conviction and sentence of Appellant No.1 Mangesh Sambhaji

Pawar, Appellant No.2 Ravindra Machhindra Choudhari and Appellant No.3 Sachin Prakash Sonawane, for the offence punishable under Section 302 r/w. 34 of the IPC and further conviction and sentence of Appellant No.1 Mangesh Sambhaji Pawar for offence punishable under Section 25 of the Indian Arms Act, are quashed and set aside and the Appellants are acquitted of the offences with which they were charged. Fine, if paid by the Appellants be refunded to them. Since Appellants are in Jail, they be released forthwith, if not required in any other case.

[DR. SHALINI PHANSALKAR-JOSHI, J.] [SMT. V.K. TAHILRAMANI, J.]