

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.252 OF 2015

Sachin s/o. Pandurang Ghortale,
Age 27 years, Occu. Labour,
r/o. Newasa Khurd, Tq. Newasa,
Dist. Ahmednagar ..Appellant

Versus

The State of Maharashtra ..Respondent

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Mr.P.S.Koshti, advocate for appellant

Mr.R.B.Bagul, APP for respondent - State

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CORAM : M.T. JOSHI, J.
RESERVED ON : JANUARY 28, 2016
PRONOUNCED ON : FEBRUARY 25, 2016

JUDGMENT :

Heard both sides.

2] The appellant/accused has been convicted by learned District Judge-2 and Addl. Sessions Judge, Shrirampur in Sessions Case No.49 of 2012 vide judgment and order dated 22nd January, 2014 for the offences punishable under Section 304 Part II

and 506 of Indian Penal Code; and Section 3(25) of the Arms Act.

. He was directed to suffer rigorous imprisonment for seven years for the offence punishable under Section 304 Part II of Indian Penal Code. No separate sentence was recorded for the other offences. Hence, the present appeal.

3] The appellant along with other four accused faced trial for the offences punishable under Section 120-B, 384, 302, 506 of Indian Penal Code; Section 3(25) of Arms Act; and Section 37(1)(3) read with 135 of the Bombay Police Act. The other accused, however, were acquitted and the appellant came to be convicted, as detailed supra.

4] The prosecution case, in short, is as under :-

. That on 15th October, 2011, the complainant PW 1 – Kamlesh Jagtap had received a phone call from

mobile number 9421401102 to his shop land-line number 241500 at Newasa Khurd. The unknown caller had made a demand of Rs.25,000/- and threatened that in case, the demand is not fulfilled, the complainant would be killed by bullets. He also told that his man would be coming to the shop of the complainant for collection of the money. The complainant gathered that from the similar mobile number, phone calls to various shop keepers in the area were made with similar demand and threats and in that connection, a complaint was filed at Newasa Police Station by the father of the complainant. The other merchants had also filed similar complaints.

5] In the situation, on 24th October, 2011 at about 7:00 p.m. while the complainant along with PW 4 – Shivaji More and one more servant were watching television with deceased Shahnawazkhan Pathan i.e. neighboring shop owner, one youth came

to the shop of the complainant. He had masked his face with a handkerchief. He was holding a metallic colour pistol. At that time, he made demand of Rs.25,000/- to the complainant. The complainant sought two minutes' time from the said youth. The pistol was pointed towards the complainant. In the circumstances, the complainant rushed into godown of the shop and put the shutter down. The youth fired three bullets in the complainant's direction, however, due to the shutter, he was not injured. After certain period, he came out and found that said Shahnawazkhan was injured in his stomach as the bullet caused grazing injury. Shahnawazkhan was taken to the hospital. Accordingly, the complaint came to be filed.

6] In the complaint, the assailant was described as a man of little height and of blackish complexion, around 23 to 24 years old, wearing

black and white strip shirt and tight black trouser.

. PW 12 – Police Inspector – Kailas Gawade of Newasa Police Station had registered the crime. He went to the spot of occurrence and in presence of the panch witness, *inter alia* seized the empty cartridges and two small boxes. He also seized a wooden bed which was damaged due to the bullet.

. PW 13 – SDPO Ganesh Rathod has carried further investigation. He recorded statements of various witnesses. The Local Crime Branch ultimately apprehended the appellant/accused. He, therefore, arrested him. He seized clothes of the injured. He also prepared seizure panchanama of bullet due to which, said Shahnawazkhan was injured.

7] While in custody, the present appellant made a statement leading to recovery of the pistol and

bullets from a gunny bag from the rented house of the appellant. Lateron, the appellant also made statement leading to the recovery of a SIM card and newspaper cutting from a pit nearby a railway bridge near Shrirampur.

. PW 14 – Mukund Aghav, Police Inspector of Newasa Police Station, carried further investigation. He has seized the clothes of the appellant and recorded statements of some of the witnesses. The ballistic report was called and ultimately, the charge sheet came to be filed.

8] Before the learned Additional Sessions Judge, in all 14 witnesses were examined out of which, PW 1 – Kamlesh, the complainant, PW 3 – Abhay, another shop owner and PW 4 – Shivaji, employee of the complainant, were examined as eye witnesses. PW 5 – Dr.Ajay Taware has conducted post mortem examination upon death of injured – Shahnawazkhan

on 6th November, 2011. Rest of the witnesses are either the panch witnesses or the Investigating Officer. PW 11 - Gorakshnath Gugarkar has recorded statements of some of the witnesses (not examined by the prosecution) under the provisions of Section 164 of the Code of Criminal Procedure.

9] The defence of the present appellant was of total denial. According to him, he was falsely implicated in the case. The learned Additional Sessions Judge, though found that the case of conspiracy was not proved, he came to the conclusion that the prosecution has proved beyond the reasonable doubt, that the present appellant intended to cause injuries of such a nature that those injuries were likely to cause death and therefore, the conviction and sentence, as detailed supra, came to be recorded against the appellant. Hence, the present appeal.

10] Mr.P.S.Koshti, learned counsel for the appellant submitted before me that the prosecution case itself is that the assailant was masked and as such, none of the eye witnesses, could have seen his face. Not only this, PW 4 - Shivaji has deposed that the father of the complainant had told him about a boy (the appellant). He further submitted that there was no test identification parade. Not only the panchnamas were concocted, but the crucial fact of seizure of pistol and cartridges were not proved, as none of the seizure panch witnesses was examined by the prosecution and only the Investigation Officer has deposed about the same. He therefore submitted that the learned Additional Sessions Judge has wrongly convicted the appellant.

11] On the other hand, learned A.P.P. for the respondent-State submitted that the appellant was identified by the eye witnesses from the features

which were already noted by those witnesses and recorded in the complaint. The seizure of SIM card at the behest of the appellant was clearly proved. The call details record of the said SIM produced by the prosecution would clearly prove that calls were made to the complainant and other merchants from the same SIM card. Further, the Investigating Officer has proved seizure of the pistol and the ballistic report would show that the bullets which hit the deceased were fired through the said pistol. In the circumstances, he submitted that no fault can be found in the reasons forwarded by the learned Additional Sessions Judge.

12] On the basis of this material, following points arise for my determination:-

(I) Whether the prosecution has proved that on 24th October, 2011 at village Newasa

Khurd, present appellant had intentionally caused injuries to the deceased of such a nature which are likely to cause death ?

(II) Whether the prosecution has further proved that on the given date, time and place, the present appellant had caused criminal intimidation to the complainant ?

(III) Whether the prosecution has further proved that on the given date, time and place, the appellant was possessing a dangerous arm without any pass or permit ?

. My findings to each of the point are in the affirmative. The appeal is, therefore, dismissed for the reasons to follow.

R E A S O N S

13] The deposition of PW 1 - Kamlesh, PW 3 - Abhay and PW 4 - Shivaji would show that a youth with a

masked face had barged into the shop of the complainant on 24th October, 2011. The evidence of the complainant would additionally show that on 15th October, 2011, he had received threats on the land-line phone from the mobile number referred above. The complainant has further identified the cloths placed before him which, according to him, were on the person of the appellant at the time of the occurrence. The complainant has particularly identified the trouser and shirt at Articles "A" and "B".

14] PW 7 - Yogesh Jadhav has deposed that the clothes of the appellant were seized in his presence and in presence of another panch witness by the Investigating Officer. Accordingly the panchanama was prepared and he has signed over the same. He proved the same at Exhibit-83. During the cross-examination, he admitted that during the period of incident, he was employee of the

complainant. He further deposed that he signed the panchanama as per the instructions of his employer i.e. the complainant, however, the articles, in fact, were shown to him. He further deposed that he had signed the panchnama which was already written by the police. The evidence of this witness, thus, would show that he is innocent and straight-forward.

. Therefore, merely because this witness is an employee of the complainant and that the police has obtained his signature on the prepared panchanama, there is nothing to disbelieve. In fact, the appellant was not known to the complainant previous to the incident. He had no motive to implicate the appellant falsely either by himself or through his employee i.e. PW 7 - Yogesh Jadhav.

. On the basis of the identification of the clothes, the complainant had identified the appellant.

15] PW 6 - Chandragupta Patil deposed that on 29th October, 2011, at about 2.00 p.m. the present appellant while in custody of the police, made a statement that he was ready to discover the SIM card, a mobile phone and some newspaper cuttings. His statement was recorded in his presence and in presence of other witnesses (Panchnama-Exhibit-81). Thereafter, the appellant led all of them to Shrirampur. Near a railway bridge, he went under a Neem tree and by digging earth, pointed a SIM card and paper cuttings. He identified the SIM card and the newspaper cuttings.

. The call details record placed below Exhibit-118 would show that from the same SIM Card, the phone calls, as detailed in the complaint, were made.

16] The learned counsel for the appellant submitted that the SIM Card was allegedly seized from an open place and the same was not admittedly in the name of the appellant, but in the name of one Vishwanath.

. It is to be noted that the SIM card was seized by digging a pit on the statement of the appellant and it has been proved that the present appellant had led the police and the panch witnesses to that place. In the circumstances, it cannot be said that the SIM card was seized from an open place and that the appellant was not concerned with the said SIM card.

17] It is true that the prosecution has failed to examine any of the witnesses regarding seizure of the pistol or cartridges at the best of the appellant. It was a crucial evidence. The

Investigating Officer has deposed about the same. It appears that the Assistant Public Prosecutor in the trial Court Shri. Walte was negligent in this regard.

. The facts on record, however, would show that the complainant has identified the clothes seized from the person of the appellant as those of the assailant.

. Further, there is a reliable proof that the present appellant has made statement leading to recovery of the SIM card, which ultimately proved to have been used in issuing threat calls to the complainant and other merchants. In that view of the matter, it has been proved beyond the reasonable doubt, that the present appellant is the author of the injuries received by deceased Shahnawazkhan.

18] PW 5 — Dr.Ajay Taware has conducted post mortem examination on the dead body of the deceased on 6th November, 2011. The deceased was injured on 24th October, 2011. The prosecution did not place or prove the examination papers, which would throw light, as to what injuries were received by the deceased as post mortem examination note is natural regarding therapeutic injuries seen by the Medical Officer. The Medical Officer has noted following injuries :-

1. Incised stitched wound on Center of abdomen 19 cms vertical 16 stitches seen (therapeutic)
2. A whole 2 x 1 cm seen at right iliac region (therapeutic) region.
3. A Hole 3 x 1 cm seen at left iliac region therapeutic.
4. A stitched wound 1 x 1 cm incised over anterior axillary line 10 cm above right anterior superior iliac spine. (?fireram) injury (near right side of stomach).
5. Abrasion 0.5 x 0.5 cm at right forearm ventrally blackish.

6. Abrasion 3 x 2 cms blackish over left elbow posterior.

He, however, was sure that the death was caused due to a fire-arm injury mentioned at Sr. No.4.

19] The statements of the eye witnesses coupled with the statement of PW 5 – Dr.Ajay Taware leave no room for doubt that the deceased had suffered firearm injuries, which has ultimately caused the death. Thus, the prosecution has proved beyond reasonable doubt that the appellant committed the offences.

20] Mr.Koshti, learned counsel for the appellant has relied upon the ratio laid down in the case of **Kanan Vs. State of Kerala, 1979 CJ(SC)210** wherein, *inter alia*, finding that there was no test identification parade, benefit of doubt was extended to the accused. In the present case, however, we have different set of facts.

21] In the circumstances, present appeal deserves to be dismissed.

22] Hence, the following order.

. The Criminal Appeal is hereby dismissed.

Sd/-
[M.T. JOSHI, J.]

kbp