

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 130 OF 2010

Jitendra Mevasingh Bangur,
Aged about 38-years,
Occupation Machinery Repairer.
Residing at Jagruty Society,
Parsi Panchayat, Ambawadi,
Old Nagardas Road, Boharawada (East),
Andheri (E), Mumbai-400069
At present in Judicial Custody and lodged
at Mumbai Central Prison, Mumbai. ...Appellant.

Vs.

The State of Maharashtra
(at the instance of
Senior Inspector of Police,
Bandra Police Station
vide CR No.515 of 1987). ...Respondent.

Ms. Rohini Dandekar Appointed Advocate by Legal Aid Committee
for the Appellant.
Smt. Geeta Mulekar, APP. for the State of Maharashtra.

CORAM : A.S.GADKARI, J.
DATE : 02nd August, 2016

ORAL JUDGMENT:

The appellant has questioned the correctness of the
Judgment and Order dated 22nd December, 2009 passed in Sessions
Case No.398 of 1989 by the Additional Sessions Judge, Greater

Bombay thereby convicting the appellant for the offence punishable under Section 452 read with 34, Section-393 read with 34 and under Section 307 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for 2 years under Section 452, 7-years under Section 393 and 5-years under Section 307 of the Indian Penal Code and to pay a total fine of Rs.1500/- on all counts and in default sentence is further prescribed for non payment of fine. The Trial Court has also directed that all the sentences shall run concurrently. The said Judgment and Order dated 22nd December 2009 is impugned herein.

2) The facts which are necessary to decide the present appeal and enumerated from the record can briefly be stated as under:-

(i) Liyakat Ali (P.W.1) is the son of Mohd. Yasin Habibulla Ansari (P.W.2). Mohd. Yasin (P.W.2) was conducting a business of bakery in the name and style as "Subhash Bakery" at Khar, Mumbai. Liyakat Ali (P.W.1) was working in the said establishment with his father. Rahid Ansari (P.W.7) is the cousin brother of Liyakat Ali (P.W.1) and was also working in the said bakery. The date of incident is 21.6.1987. At about 8.45 p.m. on 21.6.1987 Liyakat Ali was

sitting at the cash counter of the said bakery. Two Sardar persons came there. One of them was holding knife and other person was having pistol like weapon in his hand. The said two persons demanded money from Liyakat Ali (PW.1) and therefore, he raised shouts. The said two persons threatened the workers in the bakery by showing the weapon. At that time PW.2 was sitting on the cot (Charpai) near to the said shop.

(ii) On hearing the shouts of Liyakat Ali, Mohd. Yasin Ansari (PW.2) rushed to the spot with an iron rod in his hand. After seeing Mohd. Yasin the said two persons tried to run away but Liyakat Ali caught one person who was having fire arm in his hand. The said person managed to push Liyakat Ali and ran away. When Mohd. Yasin tried to assault the said person having firearm in his hand, the said person fired from the firearm towards Mohd. Yasin and he received injury on his right side of chest. Mohd. Yasin fell down. The said two persons ran away from the spot. Liyakat Ali tried to caught and also chased the said two persons. The people from the vicinity thereafter took help of Mohd. Aslam Shaikh (PW.8). Some of the persons in the vicinity also chased the accused persons from the taxi. The people who were chasing the accused persons were

successful in apprehending the person who was holding a firearm. The person who had holding knife was ran away from the spot. The people who had apprehended the person with firearm beat him and thereafter handed him to the police.

(iii) The said information was given to Bandra Police Station. Liyakat Ali (P.W.1) lodged first information report. On the basis of the said information, CR No.515/1987 under Section 452, 394,398, and Section 307 read with 34 of the Indian Penal Code and under Section 3 and 25 of the Arms Act was registered. Shri. Jayant Sarmokadam, Police Inspector was then attached to Bandra Police Station as PSI. He was entrusted with the investigation of the said Crime No.515/1987. He along with other police officers recorded the statement of witnesses, seized the country made firearm (Katta) from the spot, where the people from the vicinity apprehended the present appellant. Liyakat Ali (P.W.1), Mohd. Yasin (P.W.2), Rahid Ansari (P.W.7) identified the appellant as the same person who entered the shop with a country made firearm in his hand and fired at Mohd. Yasin (P.W.2).

(iv) Mohd. Yasin (P.W.2) was admitted to Nanavati Hospital on 21.6.1987 and Dr. Ashok Hatolkar treated him as indoor patient.

Dr. Ashok Hatolkar (PW.4) noticed the following injuries.

- I) The patient had contuse lacerated wound above right clavicle of the size 2 cm x 1.1/2.
- II) Multiple abrasions over face and hand
- III) Multiple punctured wounds over anterior chest wall
- IV) Wound of the size of 1 cm., 3cm. posterior to posterior axillary line.

Mohd. Yasin was discharged from the hospital on 1.7.1987. The injury certificate issued by Dr. Ashok Hatolkar is at Exh.25.

(v) During the course of investigation Shri. Jayant Sarmokadam (PW.9) collected the report from the Chemical Analyzer and Forensic Laboratory pertaining to the weapon i.e. the firearm and the blood stains of the clothes of the witnesses and submitted charge sheet in the Court of Additional Chief Metropolitan Magistrate, 9th Court, Bandra, Mumbai, for the offence punishable under Sections-452, 394, 398 and 304 read with 34 of the Indian penal Code. The other accused person could not be arrested, however during the course of investigation his name was revealed as Harisingh and while submitting the charge sheet he was shown as absconding accused.

vi) As the offence punishable under Section 307 is exclusively triable by the Court of Session the learned Metropolitan Magistrate committed the said case to the Court of Session as contemplated under Section 209 of the Cr.P.C. After committal of the said case, the learned Trial Court framed the Charge below Exh.3. The said charge was read over and explained to the appellant in vernacular language to which he denied and claimed to be tried. The defence of the appellant was of total denial and false implication. The prosecution in support of its case examined in all 9-witnesses. The learned Trial Court after recording the evidence and after hearing the accused convicted and sentenced the appellant by the impugned Judgment and Order dated 22.12.2009.

3) Heard the learned counsel Ms. Rohini Dandekar appointed for the appellant by the Legal Aid Committee and the learned APP and also perused the record pertaining to the present case.

4) The learned counsel appearing for the appellant submitted that on the date of incident no amount was robbed. She submitted that except administering threats to Liyakat Ali (P.W.1) the appellant even did not made any attempt to rob any amount

from him. She further submitted that the appellant was caught by the people in the vicinity and according to her the identity of the appellant is not proved beyond reasonable doubt. That is a case of 'mistaken identity' and the benefit of doubt for the same may be given to the appellant. She therefore prayed that, the appeal may be allowed.

5) The learned APP vehemently opposed the appeal and submitted that Section 393 of the Indian Penal Code deals with an attempt to commit robbery and the Trial Court has convicted the appellant under the said section. She further submitted that the identify of the appellant is proved by Liyakat Ali (P.W.1), Mohd. Yasin (P.W.2) and Rahid Ansari (P.W.7). She further submitted that the weapon which was used in the present crime has been properly identified by P.W. Nos. 1 and 2. She submitted that as a matter of fact the appellant was immediately apprehended by the people after a chase when he tried to flee from the scene of offence and the witnesses were having sufficient opportunity to identify him. She therefore, prayed that the present appeal my be dismissed and the conviction and sentence imposed upon the appellant may be confirmed.

6) As stated earlier, the prosecution has examined in all nine witnesses in support of its case. P.W.1 Liyakat Ali was present in the shop when appellant along with co-accused entered it. The appellant was holding a country made firearm (katta) in his hand. P.W.7 Rahid Ansari cousin brother of Liyakat Ali (P.W.1) was present in the shop at that time. Mohd. Yasin (P.W.2) is the father of Liyakat Ali (P.W.1) and uncle of Rahid Ansari (P.W.7) who was also present near the shop at the time of incident. Mohd. Yasin (P.W.2) is the injured witness in the present case. All the three witnesses have in unequivocal terms narrated the actual incident and have identified the appellant in their substantive evidence. The testimonies of P.W.1 Liyakat Ali, P.W.2 Mohd. Yasin and P.W.7 clearly indicate that they had witnessed the incident of attempt to commit robbery and subsequent firing from the country made firearm (katta) by the appellant on Mohd. Yasin (P.W.2). As stated earlier, the appellant was apprehended after Liyakat Ali (P.W.1) raised shouts and the people from the vicinity chased the appellant. The weapon which was in possession of the appellant was seized from the spot where he was apprehended as the said weapon had fallen down from his hand. It is also to be noted here that Abdul Salam

Ansari (P.W.3) was a salesman in the said bakery and after hearing sound of firing had rushed towards Mohd. Yasin (P.W.2) and had seen the Appellant with a weapon. He has identified the appellant in the Court while leading the substantive evidence. It is to be noted here that the appellant in his defence has failed to elicit any admissions and/or omissions through the cross examination of these witnesses and in my view, the evidence of these witnesses is wholly reliable and trust worthy.

7) P.W.4 Dr. Ashok Hatolkar has deposed about the injuries received by the appellant as reproduced in the foregoing paragraph. Mohd. Yasin (P.W.2) has received injuries on his right side of the chest. The record reveals that a bullet was extracted from the body of Mohd. Yasin (P.W.2) and the same was sent for forensic examination. The forensic report pertaining to the said firearm and the bullet extracted from the body of Mohd. Yasin (P.W.2) is at Exh.41. It is established by the prosecution that the bullet extracted from the body of Mohd. Yasin was fired from the firearm seized from the appellant. As stated earlier P.W.2 Mohd. Yasin has identified the appellant and has deposed that the appellant fired from the firearm on his chest. Thus, according to me, the prosecution has

proved beyond reasonable doubt the offence as contemplated under Section 307 of the Indian Penal Code.

8) After taking into consideration the entire evidence available on record I am of the considered view that the prosecution is successful in proving the offence under Section 452, 393 read with 34 and 307 of the Indian Penal Code against the appellant. In the result, I find no merits in the appeal and the appeal is accordingly dismissed.

9) The fees to be paid to the learned Advocate appointed by the Legal Aid Committee is quantified at Rs.5000/-.

(A.S. GADKARI, J.)