

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 620 OF 1996

Shri Ayubkhan Khodadad Khan.

Age 62 years, Residing at

Dargah Road, Sonapur,

Bhandup, Mumbai.

..Appellant.

V/s.

The State of Maharashtra.

..Respondent.

Mr. Maitreya Girish Shukla, advocate for appellant.

Mr. S.S. Pednekar, APP for State.

CORAM : SMT. SADHANA S. JADHAV,J.

DATE : DECEMBER 6, 2018.

JUDGEMENT. :

1 The appellant herein is convicted for the offence punishable under section 308 of the Indian Penal Code and sentenced to suffer R.I. for 3 years and fine of Rs. 25,000/- I.d. to suffer R.I. for 6 months, by Additional Sessions Judge, Greater Mumbai, vide Judgment and Order dated 30/9/1996 in Sessions Case No. 1060 of 1995. Hence, this appeal.

2 Such of the facts necessary for the decision of this appeal are as follows :

(i) The appellant herein and the father of the complainant are the trustees of Mohmadi Urdu High School. Mohd. Anwar Mohd.Akbar

Talwalkar

Shamim was the principal of the school. There was an allegation regarding misappropriation of funds by the principal. Hence, the trustee i.e. Iqbal, father of P.W. 2 Bilal Ahmed had filed a complaint to the Education Department as well as at Bhandup Police Station. The appellant had not approved of the said filing of the complaint as the appellant was supporting the principal. Similarly, Bilal Ahmed P.W. 2 and his associates i.e. witnesses P.W. 5 and P.W. 7 were alleged to be teasing lady teacher of the said school and threatening hindu peons of the said school and hence, the report was lodged against them.

(ii) It is the case of the prosecution that on 9/2/1994 at about 6.45 p.m. when Bilal Ahmed was in front of Kamal sweet mart, the appellant had confronted him. There was a verbal altercation in which the appellant had slapped P.W. 2 on his face. The accused No. 2 Gaffar had caught hold of the complainant and at that juncture, the accused No. 3 i.e. principal instigated the appellant to kill Bilal Ahmed, as he happens to be the son of Iqbal Khan. The appellant had then drawn his revolver from the pocket and fired a round on the waist of the complainant. The other round was fired on his chest. P.W. 2 attempted to escape. The third round of firing had hit the wrist of Bilal. Bilal was taken to the hospital. The police had also rushed to the spot. The injured was taken to Mulund General Municipal Hospital and the injured Sarafat Mulla was

also taken to the hospital.

(iii) Thereafter, statement of Bilal was recorded. On the basis of which offence was registered. After completion of investigation, the charge-sheet was filed on 30th March, 1994 and the case was committed to the Court of Sessions and registered as Sessions Case No. 1060 of 1995. The prosecution examined 12 witnesses to bring home the guilt of the accused.

3 Prosecution mainly rests upon the evidence of P.W. 2 Bilal Ahmed. He has deposed before the Court in consonance with the FIR. According to the complainant, third round of firing had caused injury to his left wrist. While he was fleeing from the spot, he met Advocate Shri Tiwari to whom he disclosed that the appellant had fired on him. Mr. Tiwari with the help of the public had taken him to hospital in an auto rickshaw. The police had recorded his statement in the hospital and the same is marked as Exh. 29.

4 The complainant has given topography of the place where the incident had occurred. It is elicited in the cross-examination that Mr. Tiwari had represented P.W. 2 in few matters, as he was an advocate. That he alongwith his father and brothers were arrested in a case of house breaking. He has admitted that his father had lodged a report

against accused No. 3. He used to visit Kamal Sweet Mart regularly as his work shop was situated at a distance of hardly 500 to 600 ft. from sweet mart. His work shop and residential house are located in the same building. He has candidly admitted that he was not on enmity terms either with A-1 or A-2. It is admitted that in fact, A-1 fired one round in air. A-2 had caught hold of P.W.2 from behind so tightly that he could not run away. Thereafter, A-1 had fired bullet on his waist. He did not raise shout. He had no time to protect himself. He had not felt any pain after he had sustained 3 bullet injuries. All the 3 bullets were fired from close distance i.e. hardly 1 and 1 ½ feet. Thereafter, he started running away and then taken by Mr. Tiwari to the hospital. His statement under section 161 of the Code of Criminal Procedure, 1973 was recorded immediately in the hospital on the same day. He was discharged from the hospital and then he got himself admitted in private nursing home i.e. Aditi Nursing Home.

5 In the cross-examination, P.W. 2 had specifically stated that he had no apprehension from A-1 that he would attack him only because the father of P.W.2 had lodged complaint against him. He had no fear in his mind against A-1 at the place of incident. It is admitted that there was no loss of blood due to bullet injuries. It is also admitted that there was enmity between the father of P.W. 2 and A-3.

6 P.W. 3 Adinath Tiwari happens to be a member of communist party for more than 22 years and he was also representing the father of P.W. 2 as an advocate. He had appeared for P.W. 2 Bilal Ahmed in a case which was filed by A-1. He had disclosed to the police that he had heard the sound of bursting of crackers. P.W.3 has disclosed before the Court that the victim was shouting that A-3 had exhorted the accused No. 1. It is further deposed that since Bilal was profusely bleeding, P.W. 3 on the ground of humanity had thought it fit to take him to the hospital. According to P.W. 3, this was the first occasion when he had heard the sounds of quarrel and had actually gone out to see what had happened.

7 P.W. 4 Tukaram Bansode is appointed as Tracer by Government of Maharashtra and since year 1992, he was working as a draftsman. P.W. 4 has stated that he could not find Kamal Sweet Mart on the spot. He is panch of scene of offence panchanama. He had stated in the examination in chief itself that after going to the spot, the constable had told him the said place where the Kamal Sweet Mart was existing and accordingly he mentioned the same. The reference to Kamal Sweet Mart finds place in the scene of offence panchanama on the say of the constable.

8 P.W.5 Sagir Ahmed Khan happens to be the relative of P.W. 2. He could not contact P.W. 2. He has claimed to be an eye witness. According to him, he had supported some of the persons while they were quarreling and that Ayub Seth i.e. the appellant was assaulting P.W. 2 Bilal. Upon query made by P.W. 5, Ayub had disclosed that P.W. 2 is indulging into gundagiri. According to P.W.5, A-1 had initially shot in the air. Since it had misdirected, he had once again shot and this time, it had hit P.W. 2. Throughout the episode A-2 had caught hold of the victim. It is stated that A-1 had fired a bullet at the back of P.W.2, after A-2 had pushed him down. Thereafter, P.W. 5 had learnt that one more unknown person had also sustained bullet injury and was lying opposite Mahavir General Store. One Mr. D.R. Sing had taken said unknown person at Mulund General Hospital. According to the witness, his place of business is situated towards western direction. P.W. 5 has admitted that P.W. 2 is his cousin. He has no knowledge about the school building case except that father of P.W. 2 is trustee of the said school. Ayub Khan was also a trustee. And that there was dispute regarding misappropriation of funds of the said school. He is well acquainted with all other trustees of Urdu school. He was acquainted with his previous statement and there are several omissions and contradictions. He has admitted that he is on enimical term with A-1 and A-3 but he has not disclosed the same to the police. He has also admitted that he was interested in the dispute of the

school and he had helped for the same. When he was in the shop of Azad Tailor, he did not hear any noise or commotion. The place of incident was not visible from the said Azad Tailor shop. When he saw people running helter-skelter, he had asked the people and then learnt about the quarrel. He had heard the commotion. He did not know the injured. He then learnt about quarrel between P.W. 2 and accused No. 1. He reached the spot and saw that accused No. 1 was assaulting P.W. 2. In short, the evidence of P.W. 5 does not inspire confidence of the Court, in as much as, according to him, after he had heard the sound of firing, he had withdrawn himself from the scene of offence. But he has further stated that he continued to stand on the same place till the last bullet was fired at P.W. 2 which hit on his left wrist. Upon perusing his evidence, it prima face appears that he is a got up witness.

9 P.W.6 is the injured witness Sharafatkhan Munirkhan. According to him, he had initially seen some persons assaulting another person with fists and kick blows. He heard the sound of cracker firing and then realised that he had sustained injury on his stomach and that the blood was oozing. He fell unconscious. After about an hour, he was taken to Aditya Hospital. He has not named the appellant nor he has identified the assailants and the victim in the Court.

10 According to P.W. 7 Ali Ahmed Garibullah Khan initially there was verbal altercation. Thereafter, one Sagir Ahmed Khan had pacified them and then the appellant had fired at the victim by his revolver. He withdrew himself from the scene of offence but he heard the sound of second fire. And then he had seen A-1 firing at the victim as well as P.W. 2. He knew about the disputes in the management of Mohomadi Urdu School. He had also advised Iqbal to lodge a complaint against accused No. 3. He has further stated that he was silent spectator to the incident of firing and has admitted that he did not leave the place of incident. According to him, arms of Accused No. 1 were openly stretched when he fired from a distance of 8 to 9 ft. thereby causing hurt to P.W. 2 on his hand. That the police had come to the place of incident on 12/2/1994 and that time witness had disclosed to the police that he happens to be an eye witness. He has further admitted that he is an accused in two cases. That he has also filed 2 cases against A-1 and in one of the cross case Dr. Khan is also an accused. But Iqbal and Bilal are not co-accused in the said case. It is further admitted that he has registered two cases after 9/2/1994. He has admitted that certain pamphlets were distributed indicating that P.W. 7 was indulging in touching the lady teachers of the said school. The said pamphlets were published by Shamim and they were distributed by A-3. The enquiry in respect of misappropriation of school funds was still pending. In fact, P.W. 7 happens to be an

interested witness.

12 P.W. 8 is the carrier of the revolver to Forensic Laboratory at Kalina.

13 P.W.9 Mrs. Geeta Kumar is the doctor who had examined Bilal Iqbal Khan. She has categorically stated that the injuries sustained by Bilal were not bullet injuries but they were pellet injuries. She had examined Sharafat Mulla at the same time and he had given history of bullet shot injury on the abdomen. The patient was conscious. She has further admitted that according to her, pellet means small ball bearing type objects. According to her, it could be any other article similar to ball bearing.

14 P.W. 10 Dr. Rajendra Sheth had performed operations on both the patients with the assistance of Dr. Chitale. It is pertinent to note that according to P.W. 10 direction of projectile could not be given since there was hardly any distance from the point of entry to the place where they got the bullet. There was no exit or entry wound of the bullet on the posterior of the body. The doctor has shown two metal pieces to which he referred as bullets which he had removed from the person of Bilal Ahmed. At the time of operation, he was not sure as to whether these

injuries could be caused by the revolver which was seized.

15 On placing implicit reliance upon the evidence of P.W. 9 and P.W.10, it appears that the injuries caused to the victim was not by the revolver, which was seized from the accused and sent to the ballistic expert. There appears to be a grey area as to whether the incident had occurred as narrated by the witnesses. All the witnesses are interested witnesses so much that they are all concerned with the management of the committee of the school. It is doubtful as to whether the appellant had shot the victims with an intention to eliminate them or whether it would fall in the category of section 307 of the Indian Penal Code, which may extend to 3 years. In any case, the appellant has expired on 4/5/2013. The death certificate is on record. However, the stigma would remain and therefore, learned Counsel for the appellant requested this Court to hear the matter on merits.

16 In view of the above observations, the appeal deserves to be allowed. Hence, following order is passed :

ORDER

- 1) The appeal is allowed.
- 2) The conviction imposed upon the appellant vide Judgment and Order dated 30/9/1996 passed by Addl. Sessions Judge for Gr.

Talwalkar

Mumbai in Sessions Case No. 1060 of 1995 is hereby quashed and set aside. The appellant is acquitted of all the charges.

- 3) Fine amount, if paid, be refunded.
- 4) Property involved in this case be disposed of as per Clause Nos. 4 and 5 of the operative part of the Judgment and Order dated 30/9/1996 in Sessions Case No. 1060 of 1995.
- 5) The Writ be issued expeditiously.

17 The appeal is disposed of accordingly.

[SMT. SADHANA S. JADHAV, J.]