

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.681 OF 2013

**SATISH RAMBACHAN @ BHOLU MURLI)
SHARMA)...APPELLANT**

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Prashant Gurav, Advocate for the Appellant.

Mr.S.V.Gavand, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 4th APRIL 2018

ORAL JUDGMENT :

1 The appellant/accused, by this appeal, is challenging the judgment and order dated 22nd February 2013 passed by the learned Ad-hoc Additional Sessions Judge-2, Thane, in Sessions Case No.263 of 2011 thereby convicting him of the offence punishable under Section 307 of the Indian Penal Code. The appellant/accused is sentenced to suffer rigorous imprisonment for 10 years apart from imposition of fine of Rs.3,000/- and

default sentence of 3 months vide the impugned judgment and order, by the learned trial court.

2 Facts in nutshell leading to the prosecution of the appellant/accused are thus :

- (a) Nagesh Gadhavi used to manufacture box files and other files at Sion, Mumbai. Injured informant PW2 Murardan Gadhavi is his nephew. PW2 Murardan Gadhavi used to transport the manufactured goods for delivering them to the customers by a three wheeler tempo bearing Registration No.MH-01-L-3285 owned by his uncle. Virappan @ Ganesh used to be the regular driver of that tempo. As he was on temporary leave, the present appellant/accused was engaged by Nagesh Gadhavi for driving the tempo for delivering the manufactured goods to the customers. Injured informant PW2 Murardan Gadhavi used to accompany the appellant/accused in the tempo for delivering the goods and receiving payment. PW3 Mahesh Gadhavi is cousin of injured PW2 Murardan Gadhavi.

- (b) On 21st May 2010, in the morning hours, loading the tempo with manufactured goods, PW2 Murardan Gadhavi left the unit for delivering the goods to Prakash Stationers at Bhiwandi in the tempo driven by the present appellant/accused. When the goods were being delivered, the appellant/accused refused to unload them and there was dispute between him and PW2 Murardan Gadhavi. PW3 Mahesh Gadhavi was informed by PW2 Murardan Gadhavi about reluctance on the part of the appellant/accused in unloading the goods. After delivering the goods to Prakash Stationers, PW2 Murardan Gadhavi received payment of Rs.18,436/-, and then, he along with the appellant/accused started returning to the manufacturing unit. During the course of return journey, the appellant/accused stopped the tempo on a flyover of Thane and asked PW2 Murardan Gadhavi to see whether somebody was approaching from the left side. When PW2 Murardan Gadhavi alighted from the tempo, the appellant/accused fired a bullet from country made handgun held by him causing injury to his abdomen.

The appellant/accused then drove the tempo at a high speed towards the direction of Mumbai. PW2 Murardan Gadhavi sought help from the motorcyclist, but the motorcyclist after chasing the tempo returned back and informed that the tempo met with an accident. Injured PW2 Murardan Gadhavi was then taken to the Civil Hospital, Thane. He, then, lodged report (Exhibit 10) to police while taking treatment at the Civil Hospital, Thane, which has resulted in registration of Crime No.I-206 of 2010 for the offence punishable under Section 307 of the Indian Penal Code with Navpada Police Station, Thane.

- (c) During the course of investigation, the spot came to be inspected and panchnama Exhibit 21 came to be prepared on 21st May 2010 itself. Handgun, full shirt, three live cartridges as well as the tempo found in damaged condition on the spot came to be seized from the spot vide Spot Panchnama Exhibit 21. Statement of witnesses came to be recorded. After recovery of injured PW2 Murardan Gadhavi,

again spot was inspected on 2nd June 2010 and panchnama Exhibit 8 came to be prepared. Seized articles were sent for forensic examination. Injury Certificate of PW2 Murardan Gadhavi was collected and the appellant/accused was charge-sheeted.

- (d) Charge for the offence punishable under Section 307 of the Indian Penal Code was framed and explained to the appellant/accused. He abjured guilt and claimed trial. In order to bring home the guilt to the appellant/accused, the prosecution has examined in all five witnesses. Panch witness Laxman Kanojiya is examined as PW1 and the Spot Panchnama dated 2nd June 2010 is at Exhibit 8. Injured Murardan Gadhavi is examined as PW2 and the report lodged by him on 21st May 2010 is at Exhibit 10. His cousin Mahesh Gadhavi is examined as PW3. The motorcyclist, who had seen the post event happenings, is examined as PW4. He is Vivek Bacchav. Investigating Officer Hemant Sawant, Police Inspector of Navpada Police Station, is

examined as PW5. The defence of the appellant/accused is that of total denial.

- (e) After hearing the parties, by the impugned judgment and order, the appellant/accused came to be convicted for the offence punishable under Section 307 of the Indian Penal Code and is sentenced as indicated in the opening paragraph of this judgment.

3 I have heard the learned advocate appearing for the appellant/accused at sufficient length of time. By drawing my attention to evidence of PW2 Murardan Gadhavi, the learned advocate argued that in his substantive evidence, this witness has stated that he was assaulted with a motive of robbing the cash carried by him, whereas in the First Information Report (FIR), the motive attributed is that of revenge. The motorcyclist, from whom help was sought, is stated to be the Police Officer in the substantive evidence by PW2 Murardan Gadhavi, whereas in the FIR, no such description of the motorcyclist is given. It is further

argued that the incident took place at a spur of the moment. The spot is not proved by the prosecution because the panchnama at Exhibit 8 shows that the spot of the incident was at flyover from Nashik to Mumbai and near pole of the streetlight. PW2 Murardan Gadhavi had not deposed about showing the spot to the police at the time of execution of the spot panchnama Exhibit 8. The Spot Panchnama at Exhibit 21 shows that the tempo was found dashed to the tanker. It is further argued that PW4 Vivek Bacchav is a suspicious witness and he has not deposed about showing of the spot of the incident. Medical evidence is discrepant as the Medical Certificate shows that the injured had suffered two wounds whereas the injured had deposed about firing of only one gunshot.

4 Against this, the learned APP supported the impugned judgment and order by contending that evidence of the injured witness is reliable and trustworthy. Intention to kill is reflected from the injury suffered and the weapon used.

5 I have carefully considered the rival submissions and also examined the Record and Proceedings including the oral as well as documentary evidence adduced by the prosecution.

6 This is a case of single accused and single victim. PW2 Murardan Gadhavi is the victim of the crime in question, who has suffered two gunshot injuries on his abdomen, as seen from the undisputed Medical Certificate, which is at Exhibit 23. In case of single accused and single victim, theory of false implication does not deserve a moment's consideration because the injured will not spare the real culprit and rope in an innocent person as perpetrator of the crime. Evidence of the injured eye witness carries great weight as his presence on the scene of occurrence admits no doubt, he himself having suffered injuries in the incident. Keeping in mind this aspect, let us examine what injured PW2 Murardan Gadhavi is stating about the incident. In his substantive evidence before the court, this witness has stated that the appellant/accused was driver of the three wheeler tempo owned by his uncle and used for supplying the manufactured

goods to the customers. He further deposed that he used to accompany the said tempo for delivering the manufactured goods. This evidence is not at all challenged in cross-examination of the injured.

7 As per version of PW2 Murardan Gadhavi, as usual on 21st May 2010, manufactured goods were loaded in the tempo and he along with the appellant/accused proceeded by the tempo to Bhiwandi for delivering those goods to Prakash Stationers at Bhiwandi. After delivering the goods, he and the appellant/accused were returning back to Sion. The appellant/accused stopped the tempo while crossing the flyover at Thane. When he alighted from the tempo, the appellant/accused caught hold of his shirt and all of a sudden took out a pistol and fired a shot at his stomach. Thereafter, the appellant/accused went away towards Sion. A Police Officer came on the motorbike and he requested that motorcyclist for help. They chased the tempo but saw that the tempo met with an accident having dashed against the tanker. The appellant/accused was not present there.

8 PW2 Murardan Gadhavi has stated that while delivering the goods, the appellant/accused refused to unload the goods. He further stated that he received cash amounting to Rs.20,000/- to Rs.25,000/- towards cost of that goods and the appellant/accused assaulted him for robbing the cash with him.

9 In cross-examination, the injured witness was unable to state the reason as to why the appellant/accused had fired a gunshot at him.

10 The substratum of the prosecution case is murderous assault on the victim PW2 Murardan Gadhavi by the appellant/accused. On this aspect, evidence of the injured witness is perfectly in tune with the prosecution case. When there are eye witnesses to the incident, then motive pales into insignificance. What propels a man to commit crime is difficult to fathom as it is the mental state of mind. Therefore, no overbearing importance can be given to the fact that in the FIR, the motive attributed was dispute over unloading of goods whereas in the substantive

evidence the injured is stating that for robbing the cash, a gunshot was fired at him. The incident in question took place on 21st May 2010 whereas the injured appeared before the court for adducing evidence after two years i.e. on 25th May 2012. Hence, minor discrepancies in his evidence are bound to be there, but as those are not shaking the substratum of the prosecution case, are not sufficient to dislodge the version of injured PW2 Murardan Gadhavi. His evidence is consistent with the FIR lodged by him on the very same day of the incident.

11 Evidence of the injured PW2 Murardan Gadhavi is gaining corroboration from the spot panchnama recorded on the very same day of the incident, which is at Exhibit 21. This is a document which is expressly admitted by the defence. Perusal of the spot panchnama reveals that the tempo was found in a damaged condition having dashed against the rear side of the tanker. Country made handgun, blackish full shirt and three live cartridges were also found lying in the said tempo which came to be seized vide Spot Panchnama Exhibit 21. This evidence is

certainly corroborating the version of injured PW2 Murardan Gadhavi.

12 Medico Legal Certificate Exhibit 23 is again a document which is expressly admitted by the defence. This Medico Legal Certificate issued by the Civil Hospital, Thane, shows that the injured PW2 Murardan Gadhavi was found to be having two oval shaped punctured wounds over left side of his abdomen in hypochondriac region parallel to each other. The Injury Certificate reflects the description of wounds suffered by injured PW2 Murardan Gadhavi in the incident in question. He suffered the following injuries, as seen from the Injury Certificate Exhibit 23, which is an undisputed document :

i) Two oval shaped punctured wound over left side abdomen in hypochondriac region parallel to each other.

(a) medial oval shaped punctured wound is about 0.9 cm x 0.8 cm x 0.4 cm. Edges of wound inverted and blackish in colour. It is about 10.5 cm below and left lateral to xipisternum and about 0.5 cm below the left hypochondriac edges. It is about 0.7

cm above and lateral to umbilicus.

(b) Lateral oval shaped punctured wound is about 0.1 cm x 0.9 cm x 0.5 cm. Edges of wound inverted and blackish in colour. It is about 2.7 cm apart and parallel to medial wound and 2.5 cm below the left hypochondriac region. On probing the medial wound is communicated with lateral wound.

ii) The multiple minute blackening of the skin over the abdomen – epigastric and right hypochondriac and umbilical region

iii) Multiple minute blackening of skin over the left elbow

(a) X-ray No.5604 (elbow) and X-ray No.5612 (chest/abdomen) reported by radiologist is within normal limit

(b) USG Abdomen No.7791/10 dated 21/05/10 reported by Sonologist dated 21/05/10

(c) Indoor Reg.No.7791/10 dt. 21/05/10 was discharged against medical advice on same day (time 9.20p.m.)

(d) On call general surgeon reference done on same day immediately

Injury Certificate at Exhibit 23, thus, makes it clear that PW2 Murardan Gadhavi had multiple minute blackening of the skin over the abdomen as well as left elbow. This depict firing of the

gunshot from a short distance. This evidence corroborates version of the injured witness who had stated that by stopping the tempo, the driver of the tempo i.e. the appellant/accused fired a gunshot at him during the course of their return journey to Sion. True it is that injured PW2 Murardan Gadhavi is stating about firing of only one gunshot but Injury Certificate shows two injuries on abdomen of PW2 Murardan Gadhavi. However, the firing was from the country made handgun and two injuries are possible because of pellets emitted from the handgun.

13 The country made handgun seized from the spot of the incident, as it was found lying in the tempo driven by the appellant/accused, was subjected to forensic examination and the report of Ballistic Expert is at Exhibit 27. The relevant portion thereof reads thus :

“The deformed soft nose copper jacketed bullet in Exhibit 5 is a fired 8 mm rifle bullet having brushing marks. The bullet in Exhibit 5 tally with the bullet test fired from the countrymade handgun Exhibit 1 in respect of their characteristics superficial

lengthwise brushing marks, examined under comparison microscope showing that the bullet in Exhibit 5 has been fired from the countrymade handgun Exhibit 1.

The presence of blackening burning powder residues and detection of metallic copper and lead around the periphery of encircled shot holes on front side of half bush shirt Exhibit 6 and corresponding shot hole on the sandow banian Exhibit 7 is consistent with the passage and wipe of cuprojacketed bullet having been fired from within close range of the weapon.

14 This evidence makes it clear that the handgun seized from the tempo driven by the appellant/accused was used for firing the bullet at PW2 Murardan Gadhavi who had suffered abdominal injuries because of the gunshot. The said handgun was found to be used for firing the bullet and blackening burning powder residue is detected as well as fired bullet seized from the spot was found to be fired from the seized country made handgun as per the report of the Ballastic Expert.

15 Vide Seizure Panchnama Exhibit 22, which is also a document admitted by the defence, shirt and sandow banian of injured PW2 Murardan Gadhavi was seized by the Investigating Officer and it was also subjected to the forensic examination. The report of the Ballastic Expert at Exhibit 27 shows that the blackening burning powder found on the shirt and sandow banian was matching with the wipe of the passage of the handgun as well as wipe of the copper jacketed bullet.

16 PW3 Mahesh Gadhavi has stated that on 21st May 2010 after PW2 Murardan Gadhavi and the appellant/accused left the manufacturing unit for delivering the goods, he received a telephonic call from PW2 Murardan Gadhavi at about 12.30 p.m. complaining that the appellant/accused is not helping in unloading of the goods. Then, again at 3.30 p.m., he received a telephonic call from PW2 Murardan Gadhavi, who informed this witness that the appellant/accused fired a gunshot at him. PW3 Mahesh Gadhavi, then, went to Civil Hospital, Thane and found his cousin PW2 Murardan Gadhavi having suffered a gunshot

injury. Evidence of this witness has virtually remained unchallenged. Evidence of this witness proves former statement of injured witness PW2 Murardan Gadhavi to the effect that the appellant/accused had fired a gunshot at him and the same is admissible under Section 157 of the Evidence Act.

17 The Spot Panchnama at Exhibit 21 was made soon after the incident i.e. on 21st May 2010 and it is recording the spot where the tempo dashed the tanker whereas the Spot Panchnama Exhibit 8 was prepared on 2nd June 2010, when after his recovery, injured PW2 Murardan Gadhavi had shown the spot to police, which was the spot where he had suffered the gunshot injury. Hence, the spots involved in the case in hand are two different spots. Therefore, it cannot be said that the prosecution has failed to prove the spot of the incident.

18 In order to make out the offence punishable under Section 307 of the Indian Penal Code, intention coupled with overt act is sufficient. In the case in hand, weapon used by the

appellant/accused was country made handgun. The gunshot was fired at the abdomen of the injured witness causing two injuries to him. Thus, the intention as well as knowledge of the appellant/accused is established by the act committed by him making the offence as one punishable under Section 307 of the Indian Penal Code, for which proper punishment is imposed on him by the learned trial court.

19 In the result, the appeal is devoid of substance and hence the order :

ORDER

The appeal is dismissed.

(A. M. BADAR, J.)