

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE JURISDICTION
CRIMINAL APPEAL NO. 435 OF 2003**

The State of Maharashtra]
(Juhu Police Station, Mumbai)].. Appellant
[Ori. Complainant]

Vs.

Mohd. Hussein Abdul Aziz Shaikh]
Residing at 31, Track Street,]
Surati Mohalla, Behind Dhudhwale]
Bldg, Zopade, Nagpada, Mumbai]
and (2) Amrut Nagar on the S.T.]
Alwa High School, 1st floor, Mumbra]
Thane.].. Respondent-
[Ori. Accused no.1]

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Mr. H.J. Dedhia APP for the Appellant-State
Mr. Amin Solkar a/w Misbaah Solkar Advocate for Respondent

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**CORAM : PRADEEP NANDRAJOG, C.J. &
SMT. BHARATI DANGRE, J.**

DATED : AUGUST 14, 2019

JUDGMENT [PER PRADEEP NANDRAJOG C.J.]:

1. Sessions Case Nos. 23/1999, 807/1999 and

313/2000 arose out of the same incident but separate charge-sheets were filed. They were directed to be tried together. A-2 and A-3 have been acquitted. Leave to appeal sought by the State against their acquittal was declined vide order dated 18th November 2009.

2. Hence, the instant appeal is being decided by us today.

3. The grievance of the State is to the sentence to undergo R.I. for five years imposed upon A-1 who has been convicted for the offence of murder.

4. As per Sub-Section (3) of Section 377 of the Code of Criminal Procedure 1973 if the appeal is for the sentence to be enhanced the accused may plead for acquittal. Notwithstanding A-1 not having filed an appeal challenging his conviction, we have heard learned Counsel for the Respondent-accused after the conviction is sustained the sentence follows. It has to be either to undergo imprisonment for life or a death sentence.

5. A-1 has been convicted as per the impugned judgment dated 29th December 2000 believing the testimony

of PW-3 as per whom he saw A-1 running away with pistol in hand after the crime was committed and was accosted by his friend Ganesh. Corroboration has been reinforced to the case of the prosecution from the testimony of PW-5 which brings out that there was a telephone installed in her house and one Salebhai who was occupying Flat No.201 would use her telephone at the time when the crime was committed. Further corroboration has been found in the testimony of PW-4 as per which, after he was apprehended A-1 pointed out the place where the crime was committed. The impugned judgment also holds that a pistol recovered from A-1 when he was apprehended was linked to the crime through the opinion of the Ballistic expert. The opinion being that fired cartridges which were recovered from the scene of crime had pin marks identical to the test fired cartridge from the firearm in question.

6. There was commotion behind Godrej Bungalow on Juhu Chowpaty at 19.58 hours on 31st July 1998. There was firing. Two persons were shot dead. P.S.I. Chagan PW-1, attached to Police Station Juhu was on duty. He was informed by Senior Police Inspector Sarnaik that message had been received from the control room that firearm being used at Godrej Bungalow. He accompanied Shri. Sarnaik in the Police

Jeep and met P.S.I. Surve of the Police Staff, who informed that he was patrolling the area since 7.00 p.m. and did not notice any illegal activity but as they proceeded towards Godrej building, they saw two dead bodies with bullet injuries on the head, chest and stomach. Four empty cartridges were recovered and on his statement F.I.R. (Ex.12) was registered. Ashok PW-2 also a P.S.I. had also reached the scene of crime and before him Senior Police Inspector Sarnaik had reached.

7. With reference to the testimony of the two police officers, we find that neither has proved any seizure memo of four fire cartridges picked up from the scene of crime. There is no evidence of four cartridges being put inside a parcel with a seal affixed. There is no evidence of the four cartridges being deposited in the Malkhana. The testimony of Rajendra Sopanrao Ghule PW-11 is to the effect that he was attached to DCB CID and he received information on 26th August 1998 that on 27th August 1998 a gangster of Chota Rajan gang would be produced in the Sessions Court and a gangster of Chota Shakil gang would kill him. Accordingly, on 27th August 1998 they rushed to the Sessions Court at 11.45 a.m. they saw a person walking suspiciously. He and Ganesh Yeshwant Chavan PW-10 caught him and seized a pistol with seven live rounds.

The person apprehended was A-1. During interrogation of A-1, he revealed that he had used the pistol for committing a crime in respect whereof F.I.R. was registered at Police Station Juhu.

8. The Ballistic Report links the said pistol recovered on 27th July 1998 to the four cartridges seized at Juhu on 31st July 1998 and we feel like laughing.

9. There is no seizure memo prepared. There is no evidence that the pistol and seven live cartridges were deposited in the Malkhana. There is no evidence of safe custody thereof. Evidence shows that the pistol was sent for Ballistic opinion on 5th September 1998.

10. Thus, the incriminating evidence relied upon by the learned Court of Sessions in the form of firearm linked to A-1 and being the firearm which was used at the scene of the crime fails.

11. The testimony of PW-5 simply shows that a person named Salebhai used to come to her room and used her telephone. Who is the Salebhai ?

12. The testimony of PW-4 would at best be relevant evident under Section 8 of the Indian Evidence Act and would be the proof of the conduct of the accused to point out the scene of the crime. The weight of this evidence is obviously very very weak.

13. We are then left with the testimony of PW-3 who as per the prosecution, used to sell sandwiches at Juhu Beach but on the date of the crime he was not selling sandwiches because his father had expired. The sound of fire attracted him towards Chowpaty. He saw persons running helter-skelter. He caught one person who said 'I am not the culprit' and therefore he allowed him to go. His friend Ganesh has caught hold of another person who fired in the air and ran away. Said person was A-1.

14. PW-3 has deposed the said fact in Court but there is no clue from the evidence as to how the Investigating Officer detected PW-3 as a witness. It is not the claim of PW-3 that he reported to the Police Station and informed of what he had deposed to.

15. We find that the statement of PW-3 under Section 161 of Code of Criminal Procedure is purportedly recorded a day after the incident, but we find no effort made by the prosecution to revisit the place when PW-3 claims that his friend Ganesh had caught A-1 and A-1 secured his freedom by firing a shot in the air and ran away. No attempt has been made to see whether any fired cartridge was lying at the said place.

16. As per the prosecution, A-1 was put up for a test identification parade before Deva PW-6 working as an S.E.O. and the memorandum of identification Ex.33 shows that PW-3 successfully identified A-1 as the person his friend Ganesh had caught.

17. Learned counsel for the State urges that the testimony of PW-3 finds credence from the fact that during the test identification parade he successfully identified A-1 as the person running away from the scene of the crime with the pistol in hand.

18. While dealing with the forensic evidence we have already held that in the absence of any seizure memos proved and in the absence of any proof of the fired cartridges and the

pistol being deposited in the Malkhana said evidence has no incriminating value. In respect of PW-3, as we have noted above, there is no evidence as to how the Investigating Officer reached him. There is no evidence that PW-3 himself reported to the police. Another serious lacuna is that no fired cartridge was recovered from the place where PW-3 claims A-1 to have freed himself when caught by his friend Ganesh by firing in the air. We find the testimony of PW-3 very shaky.

19. We dispose of the Appeal setting aside the conviction of A-1 as also the sentence imposed.

20. The Appeal is dismissed.

SMT. BHARATI DANGRE, J.

CHIEF JUSTICE