

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1162 OF 2013

Mohsin Mohd. Yasin Behlim	]	
Age 34 years,	]	
R/o Room No.307, B-Wing,	]	
Green Garden C.H. S. Daulat Nagar,	]	
Santacruz West, Mumbai.	]	
(At present in judicial custody and lodged	]	
at Mumbai Central Prison)	]	... Appellant
		/Original Accused No.1

Versus

The State of Maharashtra	]	
(At the instance of Santacruz Police Station		
inconnection of C.R. No.75/2009	]...	Respondent

WITH
CRIMINAL APPEAL NO. 1172 OF 2013

Smt. Hikmatunnisa Siraj Khan	...	Appellant
vs.		
Zulfikar @ Zulfi Yasin Behlim and Ors.	...	Respondents.

WITH
CRIMINAL APPEAL NO. 56 OF 2014

The State of Maharashtra	...	Appellant
vs.		
Zulfikar @ Zulfi Yasin Behlim and Ors.	...	Respondents.

WITH
CRIMINAL APPEAL NO. 399 OF 2018

Zulfikar @ Zulfi Yasin Behlim and Ors.	...	Respondents.
vs.		
The State of Maharashtra	...	Appellant

Ms. Payoshi Roy i/b Dr. Yug M. Chaudhary for the appellant in Appeal No.1162/2013.

Mr.Sandeep K. Singh for the appellant in Appeal No.399/2018 and for Respondent Nos.1 and 2 in Appeal No.56/2014.

Mr.Ramesh S. Bhandary i/b Mr. Prakash L. Shetty for the Appellant in Appeal No.1172/2013.

Mr. H. J. Dedhia, APP for the Respondent.

**CORAM : B.P. DHARMADHIKARI &
SMT. SWAPNA S. JOSHI, JJ.
DATE : 12/06/2019.**

JUDGMENT (Per B. P. Dharmadhikari, J.)

Accused before this Court are convicted by Additional Sessions Judge, Greater Bombay on 30/3/2013 and accused No.1 Mohasin is sentenced to life imprisonment under section 302 of IPC and fine of Rs.10,000/- in default to suffer SI for 6 months. He is also convicted under section 307 of IPC and sentenced to 10 years imprisonment as also fine of Rs.10,000/-, in default thereof simple imprisonment for 6 months. He is punished under section 3, 5, 25, 27 of the Indian Arms Act and sentenced to suffer imprisonment for 7 years on each count and to pay fine of Rs.5,000/- on each count or in default to suffer simple imprisonment for 3 months on each count. Accused No.2-Zulfikar and accused No.3 Asif are found guilty of offence punishable

under section 323 read with 34 of IPC and sentenced to suffer imprisonment for one year and to pay fine of Rs.1,000/- or in default to suffer simple imprisonment for one month. They are acquitted of offence punishable under section 302 and 307 of IPC.

2. PW-1-Riyaj filed complaint that on 20/2/2009 accused persons committed murder of his brother Siraj. The family of PW-1, family of deceased and accused are all residents of Green Garden Co-Op Hsg. Soc.in the jurisdiction of Investigating Officer. Masjid is located just adjacent to the building of this co-operative Society.

3. As per PW-1 and prosecution on 20/2/2019 at about 20 hours in night Siraj was taking walk as usual on Relief Road in Daulatnagar locality. Accused No.3 Asif came there and started abusing him. He was abusing somebody on his cell phone but Siraj felt that he was being abused. Hence Siraj inquired and Asif rushed towards him. Complainant separated them. Siraj then went back to his home and Asif remained there.

4. At about 23.30 hours after attending Masjid, complainant was proceeding for namaz. He cleaned his hands by the side of gate of green garden society building. Siraj had changed clothes and come down from building with his wife-PW-2. They were

about to come out of gate of society and at that time accused No.3 and accused No.1 barged from back side of Gypsy vehicle. They rushed towards Siraj. They were abusing him and threatening to kill him. Accused No.3 caught hold of right hand of Siraj while accused No.2 Zulfikar held his left hand. They forced him to bend forward and made him to face the earth. Accused No.1 took out revolver from his waist pointed it at the head of Siraj. Complainant attempted to rush to help but accused No.1-Mohasin fired bullet shot on head and then towards the ground. Siraj fell on ground. As complainant intended to save his brother Mohasin fired bullet towards him also. Bullet traveled close to the head and complainant bent down to avoid it. Mohasin inflicted two blows of butt of revolver, one on head while another on left side cheek thereby injuring complainant. Complainant Riyaj started shouting and running away towards their society building. Residents started gathering. Accused persons escaped towards Shastri Nagar by road. Siraj was then taken in Qualis motor vehicle to Nanawati hospital. Complainant Riyaj was taken to Nizamuddin Dispensary by one Zuber on his motor cycle. After treatment there, Riyaj came to Nanawati hospital to see Siraj.

5. In this backdrop learned counsel for accused persons have strongly criticized deposition of PW-1-Riyaz as it is inconsistent

with the fact that he had sustained injury. They state that PW-1 did not suffer any injury at all and perhaps was not present there. Only to involve accused persons in false case, he has fabricated a story. His version that single bullet was fired by accused No.1 on back portion of head of deceased is not supported by medical evidence. They submit that when it was crowded place, there could have been several other independent witnesses but nobody has come forward and deposed. Even person who admitted Siraj to hospital viz. Imran has not been examined by prosecution.

6. They state that Riyaj had hardly any injury and Doctor who examined him has deposed accordingly. This Doctor also states that Riyaj was insisting that he should be sent to some bigger hospital but it was not necessary. Learned counsel state that Riyaj should have been concerned about health of his brother Siraj but then, after taking treatment in Nizamuddin hospital, he did not go to even municipal hospital and came back to his residence. There he changed his clothes and then went to Nanawati hospital to inquire about health of Siraj. His excuse that because he had sustained bleeding injuries, he did not go to Nanawati hospital immediately, is not borne out from record.

7. Respective learned counsel state that informant also did not

go to police station immediately to lodge report. According to him police made inquiries with him in Nanawati hospital and he did not use his mobile phone also to inform police.

8. Evidence of PW-2-Hikmatmunisa the wife of Siraj is also assailed by pointing out that she is not an eye witness to the incident at all. Her statement under section 161 of Cr.P.C. is recorded on 21/2/2009 at 2.00 p.m. i.e. almost after 14 hours. There are material omissions in her statement. Though she narrates details of what she witnessed before attack, her conduct does not inspire requisite confidence. According to accused her belated statement is recorded to support story of false implication narrated by Riyaj. Identification of accused by her is therefore of no consequence. It is pointed out that she met police officer for the first time in police station when her statement was recorded and she accepted that she saw revolver Article 8 in Police Station before her statement was recorded. This when co-related with story of recovery of gun on 23/3/2009, it shows that when gun/revolver was shown to PW-2 it was not sealed. Though she falsely claims that she admitted her husband in hospital, she during cross examination, accepted her acquaintance with Imran. Admission papers show signature of Imran only as person admitting Siraj.

9. Learned counsel argues that evidence of PW-9-Daljeetsingh-owner of revolver or then evidence of his son PW-12 that revolver was taken by accused No.2 from him is also not relevant.

10. Evidence of PW-11-Moin Khan is read out to show that though prosecution examined him to prove recovery of weapon under section 27 of the Evidence Act, this person does not speak of any disclosure statement by accused and there is no mention of sealing of revolver at all. This witness is associate of deceased. His deposition and recovery panchanama are inconsistent with the claim that disclosure statement was recorded for about 30-45 minutes. His cross examination also shows that he was not knowing the location. Panchanama Exhibit 18 is very vague and hence entire evidence in this respect is liable to be discarded.

11. Learned APP relies upon evidence of PW-1-Riyaj and PW-2-Hikmatmunisa. He pointed out that this witness referred to enmity with accused group and also earlier incident in the evening when deceased was taking evening walk. Evidence of PW-12-Arjun is strongly relied upon to show that it is natural and brings on record a systematic design of accused persons to procure revolver. He has identified revolver on 25/2/2009 in police station. Contention is revolver which is connected with the crime, therefore is connected with accused persons by the

prosecution.

12. Evidence of PW-16 who is Assistant Director of Forensic Science Laboratory is relied upon to show that he has proved use of revolver and gun and injury on deceased. It is submitted that this bullet was fired through gun seized by police under section 27 of the Evidence Act. Evidence of Dr. Rathod who has conducted post mortem is also pressed into service for this purpose.

13. Learned APP submits that thus material on record convincingly connects accused persons with the crime. Accused nos. 2 and 3 therefore, must be punished under section 302 IPC and appeal of State Government should be allowed.

14. Respective learned counsel for accused in brief reply rebutted arguments of learned APP. They submit that as no perversity is demonstrated, appeal filed by the State Government for enhancement of punishment for accused Nos.2 and 3 assailing their acquittal under section 302 of IPC is liable to be dismissed.

15. To explain the scope of section 27 of the Evidence Act accused relied upon judgments reported in the case of ***Mangu Singh vs. Dharmendra and Another, (2015) 17 Supreme Court Cases 488 and State of Karnataka vs. David***

Razario, 2002 Cri. L.J. 4127 .

16. It will be appropriate to first look into the deposition of PW 15 Dr. Ganesh Rathod who has performed post mortem. His evidence shows that the course of the bullet was from left to right of lateral side of body. Though in paragraph 5 it is recorded during his deposition that brain was lacerated due to “multiple bullets and multiple Pilates”, but the post mortem report Exh. 130 in column no. 17 does not show any other bullet injury. Entry wound is 3 cm above left ear and exit wound is 9 cm above the right ear. The ballistic expert PW 16 Sudhakar Ramteke in his examination in chief states that the pieces Exh. 1/A to 1/E were highly deformed lead pieces of fired 0.32 inches revolver lead bullets. He has connected the revolver with the crime.

17. Reporter PW 1 Riyaz Khan Abdul Rajak Khan claims to be the eye witness. Deceased Siraj is his real brother. He speaks of earlier quarrel between Siraj and accused on 20/2/2009 and then points out the actual incident. He has deposed that as soon as his brother Siraj and wife of Siraj named Hikamatunisha PW 2 came near the gate of the building, all accused went towards him. The accused persons were abusing Siraj and saying that there was much drama and it would be finished. Accused No. 3 Asif caught right hand of Siraj and accused no. 2 Zulfikar caught

his left hand. They forced Siraj to bend down. Accused No. 1 Asif took out a revolver and from close range, fired shot on the head of the deceased. Accused no.1 then fired two rounds towards the ground. PW 1 rushed towards Siraj and Mohsin then fired at PW 1. The bullet passed by the side of his ear. Mohsin gave blows on his head and below left eye with the butt of the revolver. He got frightened and ran towards the compound of the building. One Zuber who resides in the same building, carried PW 1 to hospital on motor cycle. At that time people had already gathered on spot and in the presence of PW 1 only, Siraj was taken in four wheeler to hospital.

18. PW 1 was taken to Nizamuddin dispensary where he was treated and doctor advised him to go to Municipal Hospital. Siraj was taken to Nanavati Hospital. From dispensary PW 1 came to his home, changed his clothes and then went to Nanavati Hospital. After some time, police arrived and recorded his statement. Police then took him to spot. This witness therefore, points out firing of the bullets on the backside of head of Siraj by forcing him to bend down. His cross examination shows that one Imran, resident of their building was also present at the time of incident. Though PW 1 had mobile, he did not report the incident to the police by using it. Because PW 1 had bleeding injuries, he

did not go with Siraj to Nanavati Hospital. Doctor of Nizamuddin dispensary asked him to go to Cooper Hospital but he never went there. He was not knowing who brought Siraj to Nanavati Hospital. He stated that the police had enquired with PW 2 who is wife of Siraj and recorded her statement. He accepted that at the spot police found one live cartridge and one empty cartridge case. He did not see any lead piece (projectile) lying there.

19. His evidence also shows that there was some quarrel between Siraj and accused no. 3 Asif in July, 2008 and he denied that at that time parties had lodged police reports against each other. He denied that he had informed police accordingly. He stated that portion marked "A" in his report was not stated by him.

20. PW 10 Dr. Nizamuddin deposed that PW 1 Riyaz came to his dispensary on 20/02/2009 and though enquired, did not give history. He had minor abrasion over left side of the face. He was treated accordingly. He was referred to Cooper Hospital as per his request. He has also stated that the said injury was possible by fall.

21. Thus the informant who claims that he was injured by bullet, did not go to police station at all and though his injured brother was placed in Qualis and was being moved to hospital in

his presence, he did not follow him and preferred to go to other doctor. There he did not give history of being fired at. After getting the treatment, he could have rushed to the police station in his blood stained cloths. He did not do so. He also did not go to hospital immediately and comes back to his house. There he changes his cloths and then goes to Nanavati Hospital. This conduct on the part of the victim who is fired at and injured, cannot be countenanced. He was aware that his brother Siraj was fired at in head and hence, police complaint and witnesses would be required. He did not take any step in that direction. On the contrary, he does not narrate this story to Doctor Nizamuddin (PW 10). The injury suffered by him is only an abrasion.

22. The other eye witness is wife of deceased Siraj namely Hikmatunnisa. She is examined as PW 2. She claims that she saw the incident from the distance of about 5 to 6 ft. She initially points out that her husband was prevented by the accused Asif when he was taking walk. Then she pointed out that when she and her husband were going for '*namaj*' and reached near the small gate of their society, one Gypsy vehicle was parked on the road at the distance of about 30 ft. Accused No. 2 Zulfikar and accused no. 3 Asif were standing on the backside of that vehicle. Accused No.1 Mohsin was sitting on motor cycle on the foot

path near Gypsy. PW 1 Riyaz was washing hands at '*Vazukhana*' (place of washing). She deposed that all of a sudden, accused Asif and Zulphikar came to Siraj. Asif held the right hand while Zulfikar held the right hand of Siraj. They twisted the respective arms forcing Siraj to bend down. Mohsin arrived there with revolver. He put the said revolver on the backside of head of Siraj and fired. Riyaz also came there and shouted as to what was happening. Accused No. 1 Mohsin fired at Riyaz but Riyaz avoided the bullet. Mohsin then gave blow of butt of revolver on the head of Riyaz. Hence, Riyaz ran and entered from the small gate and went towards the Green Garden building shouting that Siraj was assaulted and he himself was also assaulted. Her husband was lying on the foot path near bike. Zulfikar kicked her husband to find out whether he was alive and uttered the words whether Siraj has died or is alive. All accused then left that place.

23. Her cross examination shows that she identified the cloths of the deceased. She stated that she reached Nanavati Hospital within 20 minutes and till 1 pm on the next day, she was in the hospital. Police tried to enquire with her but she did not give any statement. She learnt that complaint was lodged by PW 1 Riyaz. On 21/2/2009 at about 2.00 pm she went to police station. Police

made enquiries with her only once and she met the concerned police officer for the first time at the police station. She accepted that she knows the person by name Imran and Imran was present in the hospital though he does not happen to be relative. She stated that the papers were not signed by Imran at Hospital but she signed those papers in Hindi. It may be noted that there are no such papers signed in Hindi on record and the papers pertaining to admission of Siraj show that he was admitted by Imran who has signed those papers. Presence of Imran in the hospital is accepted even by PW 1.

24. Her further cross examination shows that she could not explain why the incident in the evening when Siraj was taking walk did not appear in her police statement. She could not explain why the fact that Gypsy vehicle was standing, other details of accused persons, the fact that Riyaz was then washing hands at "Vazukhana" did not appear in her police statement. She accepted that she did not tell the police that the accused persons came near Siraj when she was standing at the distance of 6 ft from her husband. She further stated that she could not explain why the fact of accused no.2 and 3 holding the arms of the deceased and twisting it did not appear in her police statement. She could not also explain why the fact that the

bullet was fired on the back side of the head of Siraj did not appear in her police statement.

25. Similarly she could not explain why the fact of Riyaz coming there shouting what was happening, PW 1 Riyaz avoiding the bullet, Riyaz running away shouting about the assault or accused Zulfikar giving kick blows, Zulfikar uttering the words are not appearing in the police statement. She also could not explain as to why the fact that the cloths on the person of her husband were blood stained and other details did not appear in her police statement. She denied that she was not present in the hospital or then she did not go to the hospital. She accepted that she did not give description of the revolver to the police and there was no special identification mark on it. She stated that the said revolver was seen by her in the police station. But then her statement was not recorded by police. Thus her deposition does not inspire confidence and it appears that she did not witness the incident.

26. The evidence of PW 15 Dr. Rathod who has conducted post mortem and who speaks about trajectory of bullet does not show any bullet wound on the backside of head of the deceased. On the contrary the entry and exit wounds are both situated above the left ear and right ear respectively and hence, negate

the version of this witness.

27. PW 9 is claimed to be owner of revolver and PW 12 is his son who claims to have given that revolver to the accused. We need not examine this evidence in detail because revolver is discovered under section 27 of the Evidence Act vide disclosure made by accused no. 1 Mohsin. This disclosure panchanama is at Exh. 18 and it is recorded at about 11.05 hrs on that date. Then there is recovery panchanama which is recorded till 12.40 hrs in the afternoon. This panchanama and recovery is on 23/2/2009 after 10.50 am. PW 11 Moinkhan has been examined to prove this recovery. These documents show that the police came in custody of recover for the first time on 23/2/2009. We have already noted supra that PW 2 Hikmatunnisa saw the revolver in police station on 21/2/2009. This in-congruence in the case of prosecution is a serious fault in the entire investigation.

28. Reading of disclosure panchanama Exh. 18 shows that accused no.1 has not spoken about any particular place. He only mentions the place at which he has put the revolver would be shown by him.

29. This brings us to evidence of PW-11 Shri Moin Khan whose anxiety is to prove recovery under Section 27 of the Evidence Act, 1872. The Judgment of the Hon'ble Apex Court in **State of**

Karnataka v/s. David Razario and another reported in 2002 Cri. L. J. 4127, in paragraph 5, shows that necessary statement or information given by accused must be adduced through evidence. The mere statement that accused led the Police and the witnesses to the place where he had concealed the articles is not indicative of the information given. The other Judgment of Hon'ble Apex Court in **Mangu Singh v/s. Dharmendra And Another reported in (2015) 17 Supreme Court Cases 488**, particularly paragraph 14 shows that it is not the material recovery which has to be proved, but the disclosure based upon which the recovery has been made needs to be proved. The pivotal fact is making of the statement to the police which leads to recovery and the High Court rightly pointed out that during the investigation, no statement disclosing the fact/material to be discovered was proved before the Trial Court.

30. This exposition of law squarely applies to the deposition of PW-11. He does not know who was the co-witness and also during cross-examination, could not explain the exact location. He stated that the accused made statement for about 30-40 minutes. His examination-in-chief does not show exact statement and even contents of disclosure Panchnama are not read out to him. He then states that the accused led them to a Hindu

Crematorium and then produced three bullet caps as well as one revolver. The same were seized under the Panchnama. Again he does not speak of sealing of seized articles.

31. The disclosure Panchnama states that the accused told the witnesses that he would show the place where the revolver was hidden and asked them to come with him. Thus, he does not indicate or describe any specific place at all to the police.

32. When this recovery on 23rd February, 2009 under Section 27 is read with the disclosure made by PW-2, deposition of PW-2 that she saw the revolver in Police Station on 21.2.2009, the result is inevitable. It does not rule out fabrication of a false case against accused.

33. In the light of this discussion, we proceed to pass following order:

- a) Criminal Appeal Nos. 1162/2013 and 399/2018 are allowed.
- b) Conviction of these appellants by Judgment and Order dated 30.8.2013 delivered by Additional Sessions Judge, Greater Mumbai in Sessions Case No.354 of 2009 is hereby quashed and set aside.
- c) Appellants in Criminal Appeal No. 399/2018 namely Zulfikar @ Zulfi Yasin Behlim and Asif Mohd. Yasin Behlim have already undergone their punishment. However, their conviction and

sentence is also set aside.

d) Appellant Mohsin (accused No.1) be set forth at liberty forthwith if his custody is not required by prosecution in any other matter.

e) Appeal Nos. 1172/2013 and 56/2014 are dismissed.

f) Muddemal property be dealt with as directed by trial court after appeal period is over.

(SMT.SWAPNA JOSHI, J.)

(B.P. DHARMADHIKARI, J.)