

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

CRIMINAL APPEAL NO.191 OF 2011

Lalusingh @ Lalu Bihari @ Chhota
Bihari Singh (Suresh Chandru Singh)
Aged 32 years,
Occupation Rickshaw Driver
Residing at Room No.506,
Building No.8, Diamond Co-operative
Housing Society, Natwar Parikh
Compound, Govandi, Mumbai ...Appellant

V/s.

The State of Maharashtra
(at the instance of Social Service Branch,
Sion Police Station vide C. R. No.135 of 2009) ...Respondent

Mr. Nitin Sejpai a/w. Ms. Akshata B. Desai & Mr.
Hiren Mehta for the Appellant.
Mrs. P. P. Shinde, APP for the Respondent-State.

**CORAM : NITIN JAMDAR AND
C. V. BHADANG, JJ.**

DATE : 27 July 2021

JUDGMENT: (Per Nitin Jamdar, J.)

The Appellant has challenged the judgment and order of the learned Sessions Judge, Greater Bombay Sewree dated 23 April 2010, by which the Appellant is convicted under

section 302 of the Indian Penal Code and is sentenced to undergo life imprisonment.

2. The prosecution's case, in brief, is as follows: Sandeepkumar Singh, Suresh Shinde, Mohd. Nasir Mohd. Shafi Khan are auto-rickshaw drivers. They used to park their rickshaws at a rickshaw stand at Sion, Mumbai. There is also a taxi stand beyond the rickshaw stand. The Accused, a taxi driver, used to park his taxi at this taxi stand. Sandeepkumar Singh and Suresh Shinde, and other rickshaw drivers knew the accused by the name Lalu Bihari @ Chota Bihari as he was generally known. On 21 May 2009, at 00.10 hours, Sandeepkumar came to the rickshaw stand at Sion and parked the rickshaw under the flyover near Sion Junction. Gorakh Nangare, the victim, had parked his rickshaw at that place, and they were chatting sitting in his rickshaw. Then at about 1.35 a.m. the accused came from behind and shot Gorakh Nangare in head by a revolver. Gorakh collapsed out of the rickshaw. When Sandeepkumar Singh went to lift Gorakh, the accused pointed the revolver at his chest, threatened him and pulled the trigger; however, there was no bullet. Sandeepkumar ran away and stood on the side of the entrance of the Sion subway watching. Accused pointed the revolver in the direction of Suresh Shinde, and Suresh ran away. Accused raised his hands in the air with the revolver and issued general challenge and threat to everyone. The other rickshaw

drivers present there started running with fear. Then the accused went towards Sion Railway Station. Assured that accused had left Sandeepkumar Singh, Suresh Shinde, Zia-ul-Haq lifted Gorakh and put him in the rickshaw of Gorakh. Police Inspector-Shantanu Pawar received a message from the Control Room and he was instructed to go to the Sion rickshaw stand. PI-Pawar went to the Sion rickshaw stand. Sandeepkumar Singh told him that Gorakh Nangare was shot in the head by the accused and Nangare was taken to Sion hospital and admitted as an indoor patient.

3. PI-Pawar went to Sion hospital along with PSI Shinde and other staff. Gorakh was admitted to the Emergency Ward and was not in a position to speak. PI-Pawar obtained the opinion of a medical officer that Gorakh was unfit to give a statement. Then PI-Pawar and PSI Shinde came back to the rickshaw stand. Sandeepkumar Singh reported a complaint about the accused. Offence was registered against the accused vide Crime No.135 of 2009 in Sion Police Station.

4. Spot panchanama was prepared. The Investigating Officer-Pawar collected blood samples and empty cartridge of the bullet from the scene of the incident under the same panchanama. Photographs of the place of the incident were taken. Clothes of the deceased were attached under panchanama.

Panchanama of the rickshaw of the deceased was done. There were bloodstains in the rickshaw. The bloodstained clothes of Sandeepkumar were attached under the same panchanama. Articles were forwarded to the chemical analyzer. The Investigating Officer recorded statements of witnesses. On 21 May 2009, Gorakh succumbed to injuries. Inquest panchanama was prepared. The accused was arrested on 10 September 2009. Accused made a voluntary statement regarding the discovery of clothes and weapons. The police went to Gowandi in Mumbai, and they found nothing in the room and accordingly 'Nil' panchanama-Exhibit 40 and 41 were prepared. Again, the accused made a disclosure, pursuance to which the police went to Mujafar Nagar, Bihar but they found nothing again, and Exhibit 42 and 43 Nil panchanama was prepared. Pursuant to the statement of the accused, police went to Chembur, Mumbai, from where the clothes were recovered under a panchanama.

5. Charge was framed by the learned Sessions Judge under section 302 of I.P.C. and section 3 read with 25 (1-B)(a) of the Arms Act. The Accused-Appellant pleaded not guilty, taking the defence of total denial and false implication. The Learned Sessions Judge by judgment and order dated 23 April 2010 convicted the Appellant for the offence punishable under section 302 of Indian Penal Code and is sentenced to undergo

Life Imprisonment and acquitted the Appellant for the offence punishable under section 3 read with 25 (1-B) (a) of Arms Act.

6. We have heard Mr. Nitin Sejpal, the learned Counsel for the Appellant and Mrs. P. P. Shinde, the learned Additional Public Prosecutor for the Respondent-State.

7. Regarding the death of Gorakh Nangare, being homicidal, the medical officer, Dr. Rajesh Dere PW-6 was examined by the prosecution. Post mortem report Exhibit 25, Inquest panchanama and the deposition of the Medical Officer showed that Gorakh died due to a bullet shot in his head. We have gone through Spot panchanama at Exhibit 14. IO had collected blood samples, and an empty cartridge of the bullet from the place of incident. Clothes of the deceased was attached under panchanama Exhibit 17. The panchanama of rickshaw belonging to Exhibit 20 showed there were bloodstains. The bloodstained clothes of complainant- Sandeepkumar who lifted the deceased had bloodstains. Therefore, the prosecution has proved that Gorakh was shot in the head by a revolver and died from the gunshot and was taken to the hospital by Complainant.

8. The primary defence before us of the identity of the assailant. Regarding the role and identity of the accused, the prosecution led evidence of three witnesses. All three, i.e. PW-1-

Sandeepkumar Singh, PW-2-Suresh Shinde and PW-3-Mohd. Nazir Mohd. Shafi Khan are rickshaw drivers. They were on the relevant date at the midnight of 21 May 2009 and 22 May 2009 were at Sion rickshaw stand. PW-1-Sandeepkumar Singh deposed that it was on 21 May 2009 at 12.00 in the night, he had come to a rickshaw stand with his rickshaw for business. Gorakh Nangare was there with his rickshaw. They were waiting for customers. He was chatting with Gorakh in Gorakh's rickshaw. Gorakh was sitting in front, and he was sitting on the rear side. The Appellant came from and shot Gorakh in the head with a revolver. Gorakh fell down. When he was trying to lift Gorakh, the accused fired at him, but there was no bullet in the revolver. The Accused said, "*aao sab ek ek karke dikata hoon*". Sandeepkumar ran away in fear and stood watching from a distance. PW-2-Suresh Shinde attempted to lift the Gorakh, and the accused again pointed revolver to his chest pressed the trigger, but there was no bullet. Suresh also ran away. When Sandeepkumar saw that accused leaving and going towards Sion Station, he came towards Gorakh, other rickshaw drivers assembled. He lifted Gorakh, and put him in the rickshaw of Gorakh and took him to the hospital.

9. PW-2-Suresh Shinde corroborated the deposition of Sandeepkumar. He deposed that he knew the Appellant. He deposed that on 21 May 2009 at 1.30 a.m., he had parked his vehicle on the curve going to Sion Railway Station. Behind him,

Gorakh Nangare had parked his rickshaw. Gorakh and Sandeepkumar were in the rickshaw of Gorakh. At about 1.35 a.m., he heard a noise, and he turned back and saw Gorakh lying on the ground. When he went to lift Gorakh, the accused came near him, pointed the revolver towards his chest, and pressed the trigger, but only a sound came and no bullet. Suresh ran away and waited at a distance. He waited for some time, and after the accused left he Sandeepkumar and Zia Ul Haq took Gorakh to hospital. Suresh further deposed that Sandeep Kaur told him that accused has shot and killed Gorakh Nangare.

10. PW-3- Mohd. Nasir Mohd. Shafi Khan deposed that he and one Shah Alam were sitting near Sion flyover on a platform. His rickshaw was parked in front of Gorakh's rickshaw. Sandeepkumar was on the floor of the rickshaw at the back and Gorakh was seated in the driver's seat and facing towards the right. He was sitting 35 to 40 feet away from the place. He saw the accused firing the revolver at the back of the head of Gorakh. He then deposed the same as the other two witnesses that Sandeepkumar attempted to lift the deceased Gorakh, then Appellant tried to shoot Sandeepkumar and Sandeepkumar ran away. Then accused tried to fire at Suresh. The accused raised his hands in the air with a revolver and threatened all saying "*jisme dum hai ek ek ko tapkata hoon*". The other rickshaw

drivers started running to save themselves. After the accused left, all rickshaw drivers assembled around Gorakh.

11. The learned Counsel for the Appellant submitted that the version of these witnesses is not believable as that the incident took place at around 1.00 in the night and there would be darkness, and no test identification parade was held, and therefore the identity of the assailant is doubtful. There is no merit in this contention. The spot panchanama is on record at Exhibit 47. It shows that the rickshaw stand was on the busy intersection of one of main roads of Mumbai. As the learned APP rightly points out, there is sufficient light on such a busy intersection in a metropolis city like Mumbai. Further, all the three witnesses, i.e. PW-1-Sandeepkumar Singh, PW-2-Suresh Shinde and PW-3-Mohd. Nasir Mohd. Shafi Khan- rickshaw drivers knew the Appellant, a taxi driver, and these witnesses and appellant used to park their rickshaw and taxi at nearby stand.

12. The learned Counsel for the Appellant then submitted that PW-2-Suresh Shinde did not depose that PW-1-Sandeepkumar Singh was present at the spot. On this count alone, the presence of PW-1-Sandeepkumar Singh on the busy public street cannot be doubted. All three eyewitnesses being rickshaw drivers their presence at the stand at that hour of the night is natural.

13. The learned Counsel for the Appellant then submitted that the evidence of PW-2-Suresh Shinde could not be relied upon as he has admitted in his cross-examination that he has only given the description of the accused, there was no test identification parade and that he has admitted that on 21 September 2009, the police called him in the police station and pointed out the accused to whom he identified as the Appellant. As regards this submission it has to be noted that PW-2-Suresh Shinde has deposed that he was acquainted with the Appellant who runs a taxi and was parking his taxi at Sion taxi stand, which was in front of rickshaw stand at a distance of 50 ft. where PW-2-Suresh Shinde used to park his rickshaw. In the cross-examination, reference to description and body status is not in respect of the identity of the accused but was in respect of the age of the accused. In that context, he did not tell the age of the accused to police but only stated the description and body status of the Appellant. Since PW-2-Suresh Shinde was acquainted with the Appellant, there was no question of any identification parade.

14. As regards the recovery, the Appellant had taken the police to two places that is at Gowandi, Mumbai and Mujafar Nagar, Bihar. However, there was no recovery. The learned Counsel for the Appellant sought to stress on this position that vital piece of evidence such as the recovery of a revolver is missing, and the benefit should go to the Appellant. There is no

merit in this submission. Recovery is an corroborative piece of evidence and it's absence does not mean the evidence of eyewitnesses if found trustworthy needs to be discarded. The Appellant shot Gorakh in the head in a busy city area, and three witnesses whose presence on the spot is natural witnessed this. These three witnesses knew the Appellant and have identified the Appellant. The Appellant not only shot Gorakh but also brandish his revolver and threatened others; as such, the witnesses had sufficient time to identify the Appellant. The version of these three witnesses is consistent. Nothing has been elicited in the cross-examination to discredit their version. In the light of this clear and cogent evidence of the eyewitnesses, the aspect of recovery is not relevant in this case.

15. The incident took place on 21 May 2009. The accused was absconding and was arrested on 10 September 2009. This is one more factor against the accused. Considering the evidence as above in totality, the conviction and sentence recorded against the Appellant by the learned Sessions Judge will have to be sustained. The appeal is dismissed.

(C. V. BHADANG, J.)

(NITIN JAMDAR, J.)