

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

CRIMINAL APPEAL NO.893 OF 2018

Kamalkant Maheshchand Saini

.... Appellant

Versus

The State of Maharashtra

....Respondent

.....

Mr. Abbas Z. Mookhtiar, Advocate (appointed) for the Appellant.

Mr. S.R. Agarkar, APP for the Respondent-State.

.....

CORAM : SARANG V. KOTWAL, J.

DATE : 14th NOVEMBER, 2022

ORAL JUDGMENT :

1. The appellant has challenged the judgment and order dated 19.6.2018 passed by the Additional Sessions Judge, Thane in Sessions Case No.270/2016. The appellant was the sole accused before the trial Court though there was one more accused in the case. Since he was a juvenile he did not face the trial along with the appellant in this Sessions Case.

2. At the conclusion of the trial, the appellant was convicted as under :

i. for commission of offence punishable under Section 307 of

IPC, he was sentenced to suffer RI for ten years and to pay fine of Rs.10,000/- and in default of payment of fine to suffer SI for six months;

- ii. for commission of offence punishable under Section 3 read with 25 of the Indian Arms Act, he was sentenced to suffer RI for three years and to pay fine of Rs.5,000/- and in default of payment of fine to suffer SI for three months.
- iii. The substantive sentences were directed to run concurrently.
- iv. The appellant was granted set off under Section 428 of Cr.P.C.

3. Heard Mr. Abbas Mookhtiar, learned appointed counsel for the appellant and Mr.S.R. Agarkar, learned APP for the State.

4. The prosecution case is that the appellant was cousin of the mother of the victim Mamta. He resided in their house for a few days and developed love relation with Mamta. On 18.3.2016 he was going to his native place. He asked Mamta to accompany him. She refused. He took out a country made gun and fired at her chin. Mamta's sister Babita was present there. She shouted for help. The neighbours Avinash and Kamlesh rushed there. The injured Mamta

was taken to hospital. The appellant was caught at the spot. He was locked inside the house. The police came there. They broke-open the door and arrested the appellant. Babita gave her FIR. It was registered at Kalwa police station vide C.R. No.93/2016 on 18.3.2016. The investigation was carried out. The appellant was arrested from the room itself. The country-made gun was recovered from his person. Spot panchnama was conducted. The appellant's clothes were seized under panchnama. Statements of various witnesses were recorded and at the conclusion of the investigation, charge-sheet was filed and the case was committed to the Court of Sessions.

5. The charge was framed below Exhibit-12 during trial on 2.1.2017. Significantly the charge was framed firstly under Section 307 of IPC and secondly under Section 37(1) read with 135 of the Mumbai Police Act. No charge was framed for commission of offences under the Indian Arms Act.

6. During trial, the prosecution examined nine witnesses including the victim Mamta, her sister Babita, a neighbour Avinash,

Dr. Parmar who had treated Mamta, the panchas for various panchnamas and two police officers who had carried out the investigation. The defence of the appellant was of total denial. Learned Judge considered the evidence and the defence. He believed the prosecution evidence and convicted and sentenced the appellant, as mentioned earlier.

7. PW-1 Babita was an eye witness and the first informant. She has deposed that she was residing with her parents, two sisters and a brother at Kalwa. Their native place is Uttar Pradesh. At the time of incident she and the victim Mamta were studying in the 10th standard. The appellant was son of the paternal aunt of her mother. On 12.2.2016, when they had attended marriage of their maternal uncle, Mamta and Babita met the appellant. Mamta used to talk with the appellant on phone. The appellant had stayed with PW-1's family for about ten days as he was appearing for an examination for recruitment with the Railways. Then he went back to his native place. He again came their house for the purpose of appearing for that examination. He used to accompany PW-1's

father for work. The incident occurred on 18.3.2016. At that time the appellant was to go to his native place. PW-1's parents had left to attend to their work. PW-1, Mamta and their brother were in the house. The appellant insisted that Mamta should accompany him to his native place. Mamta refused. The appellant removed a gun from his bag. He pointed it on the right side of Mamta's neck and fired the gun. Mamta sustained bleeding injury and fell down. PW-1 raised alarm. She came out of the house and sought help from her neighbours. Their neighbours Avinash, Kamlesh and others rushed there. Mamta was taken to hospital. The appellant was inside the house and was trying to remove the cartridge from his gun. PW-1 Babita locked the door from outside and thus the appellant remained inside the house. Somebody phoned the police. The police came there. She gave them keys. However, the door could not be opened. The police broke the door. They arrested the appellant. He was having the gun. He was taken to police station. PW-1 lodged her FIR, which is produced on record at Exhibit-15. The police took her to her house. She showed the spot of incident. The police seized bed-sheet, pillow cover, remote control of TV and

the plastic bag. All these articles were having blood stains. The police prepared the panchnama. They took photographs of the spot. She identified the gun and other articles in the Court. She identified the clothes of the victim and the appellant in the Court.

In the cross-examination, she admitted that Mamta was having affair with their neighbour Kamelsh. Mamta was 15 years of age at that time. She denied that there was any talk of marriage between the appellant and Mamta. Her house consisted of only one room. Eight members of the family, including the appellant, stayed there. Mamta had refused to marry the appellant. She denied the suggestion that her family was against the affair of Mamta and Kamlesh and, therefore, Mamta harmed herself by firing at herself. She denied the suggestion that the appellant tried to take away the gun from Mamta.

Her FIR, which is produced on record at Exhibit-15 corroborates her evidence substantially.

8. PW-2 Mamta was the victim herself. She has narrated the incident in exactly the same manner, as narrated by PW-1. She

has added that their brother Karan had left for school on that day when the incident took place. She has further deposed that the appellant was jealous of Kamlesh as Kamlesh was her friend. On the previous night of the incident, she had told her mother that the appellant was asking her to marry him. At 8.30 a.m. on 18.3.2016 he asked Mamta whether she had told her mother and then he fired at her. She sustained bullet injuries. She was taken to KEM Hospital. She identified the gun in the Court.

In the cross-examination, she denied the suggestion that her family opposed her affair with Kamlesh and, therefore, at the instance of Kamlesh she fired at herself. She also denied that the appellant had tried to save her in the incident.

9. PW-3 Avinash Prajapati was a neighbour, who rushed at the spot and took Mamta to the hospital. On the day of the incident, he heard sound like bursting of fire-crackers. Babita was shouting that the appellant had fired at Mamta. PW-3 himself and his brother Kamlesh rushed to their house. PW-3 asked Kamlesh to wait outside. PW-3 alone entered the house. At that time the

appellant was having a gun. Mamta was lying on the bed. She had sustained bullet injury. PW-3 and Kamlesh took Mamta to Hospital. She was taken to a hospital at Kalwa and then she was shifted to KEM Hospital. He identified the gun in the Court.

In the cross-examination, he deposed that he had seen the appellant on 2 – 3 occasions in Mamta's house. Kamlesh had told him that the appellant had threatened him. He accepted that he had not heard the gun shot. The police made enquiry with him in the police chowky in the hospital. After that the police never called him. His clothes and hands were stained with blood but the police did not seize his clothes.

10. PW-4 Dr. Yogesh Parmar was attached to KEM Hospital. On 18.3.2016 he had examined the victim and he found following injuries :

- (i) Entry wound of fire arm on right side of neck measuring 4 x 3 x 3 cm with the margin of blackish tattooing around the entry wound. Said injury was at the distance of 3 cm from right side mastoid process and 1 cm before inferior border of mandible of right

side.

[ii] Cut wound over left eyebrow measuring 1 x 0.5 cm.

According to him, the injury was possible by a gun fire shot. He had examined the victim at 11.55 a.m. and according to him the age of injury was within 3.25 hours. He has deposed that the nature of injury was homicidal and dangerous to life. As per medical investigation, foreign body of 1.5cm x 0.7 cm x 1.5 cm was lodged in the orbit of the left side abutting the optic nerve and injuring maxilla bone and mandibular bone causing fracture. Accordingly certificate was issued by him. It is produced on record at Exhibit-25. The victim was admitted in the hospital and she was sent to ENT department. She was immediately operated for extraction of bullet from left orbit as well as for repair of fractures and for closure of injury, under general anesthesia. She was admitted till 8.4.2016 and was then discharged. He produced the medical papers of her treatment at Exhibit-23.

In the cross-examination, he deposed that the victim's mother and other relatives had narrated the history of assault. The

patient was conscious but was not able to speak due to injury. On examination, according to him, the injury was caused by the bullet which was fired from the distance of less than one foot. He denied the suggestion that the injury was possible as self-inflicted wound with the shot of fire arm.

11. PW-5 Hemant Patil was a pancha for spot panchnama. The spot panchnama was produced on record at Exhibit-28. At the time of conducting the spot panchnama, the bed-sheets, pillow-cover, remote control and the plastic bag were seized which were covered with blood.

12. PW-6 Sandip Mandawale was another pancha for spot panchnama. He was also a pancha for seizure of clothes of the accused. PW-5 and PW-6 were common panchas for both these panchnamas. Seizure of the clothes of the accused was recorded under the panchanama which is produced at Exhibit-31.

13. PW-7 Muradbhai Solapurkar was another pancha. He had produced panchnama at Exhibit-35. Under that panchnama, the country made gun recovered from the person of the appellant

was seized. Along with the country-made gun, three live cartridges were also recovered. Nothing much is elicited in the cross-examination of these three pancha witnesses.

14. PW-8 API Bagul had gone to the spot of incident with detection squad. He was near the spot and, therefore, on receipt of information he went there. The accused was in room No.4 of chawl No.25 in Mahatma Phule Nagar at Kalwa. Complainant Babita was present there. She gave information about the incident. They took keys from Babita and tried to open the room but it was latched from inside. They entered the room by breaking open the door. The appellant was standing in the corner of the room. On his physical search, a country-made gun and live cartridges were recovered. The panchnama is produced on record at Exhibit-35.

15. PW-9 PSI Pote was also present when the appellant was arrested. He had carried out major part of the investigation. He had recorded complaint of Babita. He conducted the spot panchnama. The articles were seized by him from the spot. He recorded statements of witnesses. He went to Rajasthan in search of the

other accused who had provided country-made gun to the appellant. That accused was a minor. He obtained injury certificate of Mamta. Additional Commissioner of Police issued a letter on 2.6.2016 permitting him to file the charge-sheet against the appellant under other offences. Till then the ballistic expert's report was not submitted. This witness then filed the charge-sheet under IPC and under Maharashtra Police Act.

In the cross-examination, he admitted that till filing of the charge-sheet he had not received the ballistic report and the CA report. He denied the suggestion that he had gone to the spot of incident and to the hospital to take action against the victim Mamta for attempting to commit suicide. He denied the suggestion that after opening the door of room the appellant also entered the room along with police and that he had helped to remove Mamta to hospital.

16. Learned counsel for the appellant submitted that the conduct of the police does not inspire confidence. If according to the prosecution case the appellant was inside the room with live

cartridges and the gun the police would not have ventured to enter the room without any precautions. It was also not possible that the appellant would just stand there without making any attempt to run away from the spot. The recovery of the gun and live cartridges is doubtful. During trial, neither the ballistic expert's opinion nor any CA report is produced and, therefore, adverse inference needs to be drawn. The defence that Mamta was having an affair with her neighbour Kamlesh and because of opposition of her family she tried to commit suicide, is a probable defence and there was no reason to discard it.

17. He further submitted that though learned Judge has recorded conviction under the Indian Arms Act, no charges were framed under the Indian Arms Act and, therefore, the conviction and sentence under that Act are unsustainable.

18. Learned APP, on the other hand submitted that this is a open and shut case. The appellant was caught at the spot with the weapon. The victim suffered serious life threatening injuries. There was no reason for the victim or her sister to implicate the appellant

falsely who was also their relative. The defence is neither probable nor believable. However, Shri Agarkar could not justify the conviction under Sections 4 & 25 of the Indian Arms Act in the absence of specific charge against the appellant under those sections.

19. I have considered these submissions. As rightly submitted by learned APP, this is a clear case where the appellant was found on the spot with the weapon used for the offence. The evidence of PWs-1, 2 and 3 is quite consistent. PWs-1 & 2 have described the incident in detail right from the inception. Both of them were in the house when the incident took place. PW-1 is a natural witness. PW-2 is the victim herself. There is no justifiable explanation as to why all of them would implicate the appellant falsely. Both of them have consistently deposed that the appellant wanted PW-2 Mamta to accompany him to his native place and on her refusal he fired at her from very close range. The neighbours rushed for their help. The appellant was locked inside the room when he was trying to remove the cartridges from his gun. This

sequence of events does not appear to be unnatural. It corroborated the fact that Mamta has suffered serious injuries. She was taken to hospital. Babita had narrated the incident. Though learned counsel for the appellant tried to contend that it was not possible for the appellant to have remained at the spot, PW-1 has explained under what circumstances he could be locked inside the room. The appellant was trying to remove the cartridges from the gun and in the meantime the neighbours came at the spot and PW-1 herself had locked the room from outside. When the police came there, the appellant was inside the room and the room was locked from inside. He could be apprehended once the police broke open the door and entered that room. The gun was seized under a panchnama. He was immediately arrested. The weapon was seized under that panchnama between 9.05 a.m. to 9.48 a.m.. He was arrested between 11.20 a.m. to 11.45 a.m. on 18.3.2016. The spot panchnama was conducted also on the same day immediately at around 10.50 a.m. All this was done within a short time from the incident. All these panchnamas are conducted promptly within a short span time. There was no scope to concoct a false story and to

implicate the appellant falsely. The FIR itself was lodged by Babita immediately after she had gone to the hospital. Therefore, though there is no CA report or ballistic report, in the facts of this case, this will not make any difference.

20. Considering the immediate steps taken by the police, as discussed earlier and based on the arrest of the appellant at the spot, the prosecution has proved its case against the appellant beyond reasonable doubt. However, there is one important lacuna in this case. The charge under Section 3 read with Section 25 of the Indian Arms Act was not framed and, therefore, the conviction and sentence under that particular offence is not sustainable. To that extent, the conviction and sentence under those particular sections under the Indian Arms Act is required to be set aside. I am also giving serious consideration for quantum of the sentence. Considering the nature of the incident, I am not inclined to reduce the sentence. The victim was barely 15 years of age. The appellant had procured a fire-arm from Rajasthan. He has used it from close-range and had shot at the victim. It was only because of her good

fortune that she survived. The act of the appellant was cruel and dangerous. He does not deserve any further leniency and the sentence cannot be reduced as far as conviction under Section 307 of IPC is concerned. With the result, the following order is passed :

:: O R D E R ::

- i. The appeal is partly allowed.
- ii. The conviction and sentence of the appellant under Section 3 read with 25 of the Indian Arms Act are set aside.
- iii. Rest of the order including the conviction under Section 307 of IPC and sentence of RI for ten years and to pay fine of Rs.10,000/- and in default of payment of fine to suffer SI for six months, are maintained.
- iv. With these directions, the appeal is disposed of.

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by
PRADIPKUMAR
PRAKASHRAO
DESHMANE
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Deshmane (PS)

(SARANG V. KOTWAL, J.)