

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 36 OF 2017

MAYURESH AJIT GAMBHIR)
Aged about 28 years, Residing at Ram Ali,)
Poynad, Taluka Alibaug, District Raigad,)
At present undergoing the sentence imposed)
upon him at Nashik Central Prison)...APPELLANT

V/s.

1) THE STATE OF MAHARASHTRA)
)
2) SURESH YASHWAN TAVDE (Deceased))
)
3) BHARATI SURESH TAVDE)
Age 60, At Post Poynad, Taluka Alibag)
District Raigad, Pincode 402108)...RESPONDENTS

Ms.Payoshi Roy i/by. Dr.Yug Mohit Chaudhary, Advocate for the Appellant.

Smt. P. P. Shinde, APP for the Respondent - State.

**CORAM : REVATI MOHITE DERE &
V. G. BISHT, JJ.**

DATE : 5th JULY 2022

JUDGMENT : (PER : V. G. BISHT, J.)

1 This is an appeal by the convict from the judgment and order of conviction and sentence dated 25th February 2016 delivered in Sessions Case No.2 of 2008. By the said judgment, the appellant has been convicted under Section 302 of the Indian Penal Code (IPC for short) and sentenced to suffer imprisonment for life with fine of Rs.50,000/- (Rupees Fifty Thousand Only) with default stipulation. However, the present appellant-accused was acquitted of the offences punishable under Sections 3, 25(1) (A) and 27 of the Arms Act and so also other accused of the offences punishable under Section 302 read with Section 34 of the IPC and under Sections 3, 25(1(A) and 27 of the Arms Act.

2 Short fact of the case is that informant is father of Sachin Suresh Tavde (since deceased). On 13th August 2007, at about 8.00 p.m., the informant was sitting in the verandah along with his brother Nandkumar Yashwant Tavde and niece Kumari Puja Nandkumar Tavde (PW9). At about 9.00 p.m., a motorcycle of

red colour (Pulsar) came from the side of Marathi school and stopped on the road in front of the house of the informant. The rider of the motorcycle was wearing a helmet who enquired about the deceased. The informant, accordingly, called the deceased. The prosecution alleges that the moment the deceased came out of the house, the person riding the motorcycle fired a gun shot on the person of deceased, who fell down and started bleeding from the abdomen. The informant started shouting. A neighbour by name Ajay Giridhar Temkar tried to apprehend the rider of the motorcycle but the latter fled away. The deceased was immediately rushed to Civil hospital, Alibaug where he was declared dead.

3 In the above factual backdrop, the informant lodged the First Information Report (FIR) with Poynad Police Station, Alibaug, on the basis of which Crime No.60 of 2007 under Section 302 of the IPC read with 25(1)(A) of the Arms Act came to be registered.

4 The investigation was, firstly, taken up by PW17 Suresh Vartak who drew Inquest panchnama, seized clothes of deceased on being produced by sweeper from the Civil Hospital and also a bullet in the presence of Medical Officer. It further appears that the further investigation was carried out by PW19 Rajan Narayan Jagtap. He prepared Spot panchnama by visiting the spot, recorded statements of witnesses and also seized the clothes worn by the appellant.

5 During the course of investigation it revealed that accused Ranjit Kantilal Jain (acquitted) on account of earlier dispute with deceased and in order to take revenge and in lieu of handloan of Rs.30,000/- given by him to the present appellant-accused and in collusion with accused Ganesh Shiraji Devrukhkar (accused) committed murder of the deceased. On completion of investigation, PW19 filed a charge-sheet against all the accused.

6 To substantiate the charge against the appellant-accused, the prosecution has examined as many as 19 witnesses and exhibited

number of documents. The appellant-accused was questioned under Section 313 of the Cr.P.C. about the incriminating evidence and circumstances appearing against him and he expressed ignorance and denied all of them as false. According to him, a false case is lodged against him. Upon appreciation of oral evidence and circumstances, the learned trial Court convicted the appellant-accused for the offence punishable under Section 302 of the IPC and sentenced him in the manner stated hereinabove. Similarly, the learned Sessions Judge was pleased to acquit the other accused of the offences as noted hereinabove. Hence, this appeal.

7 Ms.Payoshi Roy, learned counsel for the appellant-accused, at the outset, vehemently submits that in view of the evidence on record, the learned Sessions Judge ought not to have convicted the appellant-accused as his involvement and complicity in the alleged offence is not proved beyond reasonable doubt. The learned Sessions Judge also erred in relying only upon the testimony of the informant and PW9 Puja Nandkumar Tavde,

inasmuch as their testimonies are not in consistent with the FIR. Admittedly, there was no Test Identification Parade and the learned Sessions Judge committed serious error in this regard while relying on the evidence of PW1 informant. The impugned judgment being erroneous and bad in law, the same deserves to be set aside, argued learned counsel

8 Smt. P. P. Shinde, learned APP, on the other hand, supported the impugned judgment and order of conviction and further submits that there being no illegality or perversity in the finding recorded by the learned Sessions Judge, the appeal deserves to be dismissed.

9 Before looking into the evidence of material witnesses viz. PW1 Suresh Tavde – informant, PW2 Ramesh Yeshwant Tavde - brother of the informant and PW9 Puja Nandkumar Tavde, we propose to refer the postmortem report conducted by PW15 Dr. Deepak Nanagir Gosavi (Exh. 116).

10 PW15 testified in his evidence that on 13th August 2007, at about 11.00 p.m., he and Dr. Vinayak Sutar started postmortem on the dead body of the deceased. On external examination he found following injuries :

“Deep penetrating wound having inverted (inner side) edges and abrasion. Collar of approximately 1 cm. in diameter having depth of 3 cm.

Location : 4 cm laterally from anterior midline and 9 cms downwards. Obliquely and medially from right side of nipple. Single (Irregular, Burning, blackening and tattooing.)

This injury was antimortem in nature.”

On internal examination, he made following observations :

“Thoracic cavity examination shows entry wound track showing lacerations of thoracic wall. Deep penetrating causing haemothorax (blood) around 300 grams.

Right lung examination : collapsed, firearm bullet in the apical portion of upper lobe. Fire arm bullet measuring about 3 cm. in length was found.

Right lung shows irregular lacerations and blood clots.

Left lung congested.

Pericardium (it is a wall around heart) shows blood around 350 grams alongwith the tear to pericardium. No injury to heart.

Abdominal cavity examination shows irregular lacerations on anterior surface of right lobe of liver.”

11 According to this witness, the cause of death was due to shock due to haemorrhage and injury to vital organs due to firearm injury. He then proved his signature and that of Dr. Vinayak Sutar on the postmortem report at Exh. 119. It is his further evidence that injury mentioned at Column No.17 of the postmortem report was sufficient in ordinary course to cause death. He further opined that the injury noted by him was possible, if a bullet is fired with the help of katta / gun.

12 Pertinently, evidence of this material witness is not seriously assailed in the cross-examination. Not only the nature of injuries but the means by which those injuries were possibly caused were also not challenged in the cross-examination. In the circumstances, we have no hesitation in our mind that the deceased met a homicidal death.

13 We have examined the record and more particularly the evidence adduced by the prosecution. We are not satisfied with the nature of evidence led by the prosecution. We will now take up the evidence of material witnesses which weighed in the mind of the learned Sessions Judge and enabled him to record the finding of guilt. As noted above, the material witnesses are PW1, PW2 and PW9.

14 PW1 Suresh Tavde – father of the deceased, states in his evidence (Exh. 87) that on 13th August 2007 he was sitting in the *padvi / oati*. His brother Nandkumar and niece Puja (PW9) were also sitting there. The deceased was also present in the house. At about 9.00 p.m., one person came on motorcycle from Poynad school and stopped near his house. He had worn black coat and red helmet and colour of motorcycle was black. The said person asked the informant whether the deceased was in the house to which the informant replied in the affirmative and called the deceased. The deceased came out and then the said person fired from the gun and ran away. The informant also identified the said

person as the appellant-accused in the Court and also proved his FIR at Exh. 88.

15 If the substantive piece of evidence of informant is read alongwith the FIR, we get sheer disappointment and dissatisfaction for number of reasons. We notice from the FIR that according to the informant the said person had come on a red colour pulsar bike and was wearing helmet whereas the version of informant shows that the said person was wearing black coat and colour of motorcycle was black. For a moment we keep this discrepancy aside and further go through his evidence. Before that, we may note here that, admittedly, no Test Identification Parade in the present case was carried out by the Investigating Officer for the reasons best know to him.

16 In the examination-in-chief this witness was asked a question to the effect that can he identify the assailant who fired shot on his son. Despite the objection of the defence, which was overruled by the learned Sessions Judge, the informant pointed out towards the appellant-accused as the assailant. Interestingly,

we find that the alleged incident in question took place on 13th August 2007 whereas the examination-in-chief of informant was recorded on 5th February 2014. This means, this witness was able to identify the appellant-accused, although according to his own version he was wearing the helmet, after a period of about 6 years 6 months. This is quite intriguing and puzzling and does not stand to the test of reason. Be that as it may, there is something more in the cross-examination.

17 In the cross-examination, the following question was put to the informant :-

Question : You have lodged a complaint against a person who came on a motorcycle without naming him ?

Answer : I recognized the assailant from his voice as Mayuresh Gambhir (i.e. the present appellant-accused) and lodged complaint against him.

From the above question and answer, there is no difficulty at all for us in concluding that on the date of lodging of FIR, as to the incident in question, the informant had recognized appellant-accused as an assailant, but much to our chagrin, did not name

the appellant-accused in the FIR as the person who had fired a gunshot on the person of the deceased and had caused his death. We simply cannot accept this evidence.

18 Further, he states in the cross-examination that, at the time of lodging of FIR (Exh. 88) he could not understand it properly as he could not see contents, and therefore, is not aware about its contents. This kind of admission takes away the significance of his examination-in-chief. Even PW19 Investigating Officer states in his cross-examination at paragraph 29 that the informant had informed that there was firing by unknown person and had not mentioned that he had identified the assailant even on the basis of voice. This clearly goes to show that the assailant was unknown to the informant and had he not been so, the informant at once could have given the name of the assailant as the person behind the death of the deceased.

19 Thus, the above shape of evidence does not instill confidence in our mind. We are constrained to observe that the learned Sessions Judge utterly failed to appreciate and marshal

the evidence of this crucial witness in a fashion which was expected of him and erroneously observed that the informant had duly identified the appellant-accused by his voice. The learned Sessions Judge also miserably failed to bear in mind that after 6 ½ years it was not humanly possible, particularly when the assailant was wearing helmet, to identify the accused conveniently before the Court. For all these reasons, we do not wish to place any reliance on the testimony of PW1 informant -father.

20 We would now take up the testimony of PW2 Ramesh Yashwant Tavde (Exh. 89) – uncle of the deceased. He testified that on 13th August 2007, at about 9.00 p.m., he alongwith his wife and children was taking dinner. His brother Nandkumar came shouting and therefore, he came out of the house. He was told that a bullet was fired on Sachin (deceased) and there was black colour without number plate, black colour jacket and red colour helmet and that the person had run away after firing. He, therefore, went to the house of Sachin, who was lying on the ground and bullet had hit his chest and blood was oozing.

21 The examination-in-chief gives a clear semblance that this witness had not witnessed the incident personally. All that he was told was firing of a bullet on the person of the deceased by one person who was wearing black colour jacket and red colour helmet and had come on black colour pulsar (motorcycle).

22 If we see the cross-examination of this witness, we find that his statement recorded under Section 161 of the Cr.P.C. was neither read over to him nor he himself read it, and therefore, was not aware as to what the police had written in his statement. This being so, his entire evidence is of no use to the prosecution. We are unable to draw any strength from his testimony and do not attach any evidentiary value to his evidence.

23 PW9 Kumari Puja Nandkumar Tavde (Exh. 102) states in her evidence that she knows accused Ranjit (A-1), Mayuresh (A-2) and the present appellant and also identified the appellant who was sitting in the dock.

24 Her evidence then shows that deceased was her cousin. On 13th August 2007, at about 9.00 p.m., she was sitting in the common oati. Her father Nandkumar and uncle Suresh Yashwant Tavde (informant) were also sitting with her. At that time, one person on a motorcycle came from Marathi school side and stopped near their oati. The person was wearing helmet who asked the informant whether deceased was there in the house. The informant then called the deceased. The deceased came in the padvi. The motorcycle driver then fired one bullet towards the deceased by his left hand. The deceased fell down on the ground. Thereafter, this witness identified the appellant as the assailant.

25 From the examination-in-chief of this material witness, it is quite clear that she was knowing all the accused and more particularly the appellant-accused. However, this piece of evidence has come on record by way of omission. As the said omission was noticed by the learned counsel for the appellant-accused, he confronted the witness in the cross-examination by asking whether she had stated before the Investigating Officer that

she knew all the accused to which she answered in the affirmative. However, the said omission is duly proved by PW19 Investigating Officer (Exh. 130) in his cross-examination at paragraph 33 by stating that this witness had not stated in her statement that she knew A-1, appellant-accused and A-3. Therefore, we distance ourselves from reading anything positive from her examination-in-chief when she says that she knew the appellant-accused.

26 Her examination-in-chief again shows that the person who had come on a motorcycle had fired a bullet at the deceased by his left hand. This is also a material omission because the said fact does not find place in her statement recorded under Section 161 of the Cr.P.C. by the Investigating Officer. The said omission is again proved by PW19 Investigating Officer in his cross-examination at paragraph 33 by stating that this witness had not stated before him that the appellant had fired by his left hand. Therefore, we are unable to attach any significance to the testimony of this witness.

27 No other positive evidence is forthcoming to prove that it was the appellant-accused only who authored the death of the deceased.

28 The cumulative effect of the appreciation and marshaling of evidence of PW1 informant, PW2 uncle and PW9 niece is that the prosecution, at the very first instance, has not been able to establish the identity of the appellant-accused as the assailant. This is further aggravated by non-conduction of the Test Identification Parade. Besides, the testimonies are marred and plagued by fatal omissions and contradictions. All in all, there is nothing but an abysmal failure on the part of the prosecution to bring home the guilt.

29 In the light of above discussion, we are of the firm opinion that the learned Sessions Judge committed fundamental error while appreciating the evidence available on record, holding that the guilt of the accused is proved. Needless to say, there is total failure on the part of the prosecution to prove that it was the appellant-accused alone, who caused the death of the deceased.

The finding of guilt cannot be sustained and necessarily needs to be quashed and set aside.

30 In view of above, we pass the following order :

ORDER

- i) The appeal is allowed.
- ii) The impugned judgment and order dated 25th February 2016 passed by the learned Sessions Judge, Raigad, Alibaug, in Sessions Case No.2 of 2008 is quashed and set aside.
- iii) The appellant is acquitted of the offence, with which he is charged. The appellant is set at liberty forthwith, if not required in any other case.

(V. G. BISHT, J.)

(REVATI MOHITE DERE, J.)