

(2014) 08 BOM CK 0198
In the Bombay High Court
Case No : Criminal Appeal No. 585 of 2010

Ganesh Vasudeo Bandekar

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 14-08-2014

Acts Referred:

Arms Act, 1959 — Section 25, 25(I-B)(a), 27, 3
Penal Code, 1860 (IPC) — Section 302, 307

Citation : (2014) 08 BOM CK 0198

Hon'ble Judges : Revati Mohite Dere, J

Bench : Single Bench

Advocate : Ameeta Kuttikrishnan, Advocates for the Appellant; P.P. Shinde, A.P.P, Advocates for the Respondent

Judgement

Revati Mohite Dere, J.

1. Heard learned Counsel for the appellant and the learned A.P.P.
2. The appellant has challenged the Judgment and Order dated 18th January, 2010 passed by the learned Additional Sessions Judge Court No.6, Sewree, Mumbai in Sessions Case No. 771/2008 by way of this present appeal. Vide the said Judgment and Order, the learned Sessions Judge has convicted the appellant for the offence punishable under Section 307 of the Indian Penal Code ("IPC") and has sentenced him to suffer RI for three years and to pay a fine amount of Rs. 500/-, in default, to suffer SI for six months. The appellant has also been convicted for the offence punishable under Section 3 r/w Section 25 of the Arms Act and is sentenced to suffer RI for three years and to pay a fine amount of Rs. 500/-, in default, to suffer SI for six months. Both the aforesaid sentences and the previous sentences passed in Sessions Case No. 716/2008 were directed to run concurrently.
3. At the outset, it may be noted that the present appellant has been convicted and sentenced for the offence punishable under Section 302 of the IPC with

imprisonment for life. Apart from Section 302 of the IPC, the appellant was also convicted for the offence punishable under Section 3 r/w 25(I-B)(a) and Section 27 of the Arms Act in Sessions Case No. 716/2008 by the same learned Sessions Judge. The conviction and sentence awarded in Sessions Case No. 716/2008 has been confirmed by this Court in Appeal vide Judgment and Order dated 19th July, 2013.

4. The prosecution case in short is as under :

The present appellant is the son of the complainant PW 1-Vasundhara Vasudeo Bandekar (the present appellant has disputed the same and has claimed to be the step-son of PW 1). PW 6-Dhiraj Vishwanath Koli received information on 11th September, 2007 at about 9.20 p.m. from Rajesh Vasudeo Bandekar-PW 2, that the present appellant had opened fire on his mother-Vasundhara Bandekar-PW 1. On receipt of the said information, PW 6-Dhiraj, who at that time, was attached to the Juhu Police Station, conveyed the said information to PI Balasaheb Dattatray Gade-PW 7, the night station duty officer. Thereafter, PW 6-Dhiraj, along with his staff visited the spot i.e. the residence of PW 1-Vasundhara at Aparna Apartment, S.V. Road, Andheri (West), Mumbai. PW 6-Dhiraj has stated that when he reached the spot of incident, persons had gathered there. PW 1 Vasundhara Bandekar is stated to have informed him, that the present appellant who was her elder son, had come to her house and had demanded his share in the property. She is stated to have narrated the entire incident which was recorded by PW-6. The said statement is at Exhibit 14.

After recording the statement of PW 1-Vasundhara, PW 6-Dhiraj informed the said incident to the Juhu Police Station and obtained a CR number on the said complaint. After registration of the offence, investigation commenced. Panchas were called for and spot panchnama came to be prepared in the presence of the said two panchas i.e. Jagdish Kothare and Suhas Jaywant.

During investigation, PW 6 -Dhiraj collected 1 cm length bullet, of which one side was damaged and the other side was encircled. He also collected broken pieces of glass. From outside the flat, where the alleged incident had taken place, he collected one empty cartridge. On the cap of the said empty cartridge, it was written as "KF 7.65" and in the middle portion, there was a mark of firing. The said articles were seized and sealed in the presence of the panchas. PW 6 -Dhiraj has identified the articles in Court i.e. two pieces of broken bullet-Article B (colly); broken pieces of glass Article A (colly). The spot of the incident was photographed. After taking charge of all the articles which were seized, he returned to the Juhu Police Station and filled up the printed proforma of FIR, which is identified and is at Exhibit 15. During the course of investigation, he recorded the statements of Rajesh-PW 2 and his wife Shami; he sent the recovered bullet and empty cartridge to the Chemical Analyser for his opinion along with a covering letter dated 19th September, 2007 (Exhibit 27). Thereafter, the investigation came to be handed over to PW 7 ? PI Balasaheb Gade.

PW 7 -Gade was attached to Juhu Police Station, Mumbai, as PI at the relevant time. He received the papers of investigation of CR No. 214/2007 from PW 6 - Dhiraj. The said witness has deposed that he took steps to apprehend the appellant, however, he could not be found. He has deposed that as the present appellant was wanted in connection with a crime registered with the Dadar Police Station, Mumbai, and accordingly he contacted the Senior PI of the Dadar Police Station. However, the appellant could not be traced. Thereafter, the investigation was handed over to PW 8 -Sangita Patil.

PW 8 Sangita Patil, who was attached as PI to the Juhu Police, has deposed that she received the case papers of the present CR i.e. CR No. 214/2007 on 20th August, 2008 for further investigation. She has deposed that she learnt that the appellant was arrested in connection with a CR registered with the Dadar Police Station. Accordingly, she arrested the appellant under a Transfer Warrant on 22nd August, 2008 and prepared the arrest panchnama which is at Exhibit 23 in the presence of panchas. She has deposed that she referred the Muddemal recovered in this case to the Chemical Analyser. She has stated that the weapon involved in the said case, was recovered in the CR, registered with the Dadar Police Station. Accordingly, she obtained the custody of the weapon through the Court and thereafter, sent it to the Chemical Analyser with the covering letter (Exhibit 29). PW 8 -Sangita referred the bullet along with the empty cartridge to the Chemical Analyser. After completion of investigation, PW 8 -Sangita filed the charge-sheet in the Court of the learned Judicial Magistrate, First Class. As the offence was sessions triable, the same came to be committed to the Court of Sessions.

The appellant pleaded not guilty and claimed to be tried. The defence of the appellant was of total denial and false implication. He contended that PW 1 - Vasundhara was his step-mother and that as he had restrained her from selling the flat owned by his father, he was falsely implicated in the said case. According to the appellant, as the appellant and his wife did not leave the said flat, PW 1- his step-mother and her son Rajesh had falsely implicated him in the said case.

The prosecution in support of its case, examined as many as nine witnesses. PW 1-the complainant Vasundhara, the mother of the appellant; PW-2 Rajesh-the brother of the appellant; PW 3-Durgesh-the panch to the spot panchnama; PW 4-Santosh-panch to the arrest panchnama; PW 5 Shyamsunder-Assistant Chemical Analyser, who has given the Chemical Analyser's report; PW 6-Dhiraj Koli; PW 7-Balasaheb Gade and PW 8-Sangita Patil, the Investigating Officers in the said case.

5. In order to appreciate the contentions raised by the appellant and the learned Counsel for the appellant, it is necessary to consider the evidence that has come on record.

6. PW 1 Vasundhara-mother of the appellant has deposed that her husband Vasudeo had expired eight years ago. She has deposed that she married Vasudeo

in the year 1964 and had two sons from the said marriage, i.e. Ganesh-the present appellant and Rajesh-PW 2. She has deposed that her husband Vasudeo was previously married and after the death of his first wife, he got married to her. She has deposed that from the first wife, her husband had two daughters namely; Usha and Nisha; that Usha was married and residing in the house of her in-laws at Chembur, Mumbai and Nisha was residing at Worli. She has deposed that she was residing in the present premises where the incident took place i.e. A/1 Aparna Apartment at Andheri along with her son Rajesh-PW 2 and his wife Shami. She has stated that the present appellant was educated upto 12th standard and had got married about 13 to 14 years prior to the incident; that after leaving college, the appellant had learnt driving and was working as an Auto-rickshaw driver for his livelihood; and that for the last 12 to 13 years, the appellant was residing separately.

7. According to the PW 1-Vasundhara, on 11th September, 2007 at about 8.30 p.m., as the door bell rang, she opened the door and found the appellant at the door; the appellant asked if Rajesh-PW 2 was at home, however, despite the fact, that both Rajesh and his wife were at home, she is stated to have told the appellant that Rajesh was not at home; that the appellant threatened her and demanded a sum of Rupees One Crore from her. PW 1 -Vasundhara has deposed that the appellant had threatened to kill her and Rajesh. Pursuant to the threat, the appellant is stated to have pulled out a revolver from his pant pocket, shown it to PW 1 and demanded money by asking her to sell the house and pay him his share in the property. PW 1 -Vasundhara has deposed that on seeing the revolver, she immediately shut the door on the appellant, after which, the appellant came towards the window of the bedroom, broke the glass and inserted his hand from the broken glass. She has deposed that after closing the door, she rushed to Rajesh's bedroom and as she was talking to Rajesh, they heard the sound of shattering of the glass of another window. Accordingly, PW 1-Vasundhara, PW 2-Rajesh, his wife Shami and their son went to the spot, where they saw the appellant with a revolver in his hand. She has deposed that the appellant pointed out the revolver towards them from the broken window and opened fire towards them. She has deposed that one of the bullet hit the cupboard, then the wall and fell on the floor. She has deposed that Rajesh-PW 2 immediately called up the police from his mobile, pursuant to which, the police came to the spot and commenced with the investigation, after recording the complaint.

8. PW 1 -Vasundhara has deposed that prior to the incident, the appellant had come to her house in the month of March, 2007 and had demanded a sum of Rupees One Crore from her. The appellant at that time is also alleged to have broken the glasses of all the windows. Accordingly, PW 1 -Vasundhara had lodged a complaint with the police in connection with the said incident. She has further deposed that the appellant had also fired from his revolver on her son-in-law Prabhakar Sarang, who was residing at Worli, for which, a case was registered against him at the Dadar Police Station, Mumbai. The said witness has identified

the complaint lodged by her as well as the articles which were seized from the spot under a panchanama. Nothing substantial has been elicited in the cross-examination of the said witness. Although a few suggestions were made by the Counsel for the appellant, the same have been denied by the said witness. The suggestions made and which were denied were; that after the marriage of the appellant in the year 1996, and after the death of his father, she (PW 1) husband, she had driven the appellant out of her house; that she was harassing the appellant and his wife after the death of his father and that as the appellant was unemployed, she had driven him out of the house. The said witness has admitted that the house where she was residing, belonged to her husband, however, she deposed that it was not correct to say that she had not permitted the appellant to enter the house, whenever he visited the house. PW 1 has categorically denied the suggestion made by the Counsel for the appellant, that the appellant was her step-son and that she was not intending to give his share in the property and that she had filed a false complaint against him.

9. PW 2 Rajesh Bandekar-appellant's brother has deposed that the present appellant was his real brother and that till his marriage, he was residing with them. He has deposed that the appellant would frequently call the father, when he was alive and demand from him, his share in the property; that his father had refused to sell the house, despite the appellant's demand to sell the same; and that their father expired on 11th June, 2000. The said witness has further deposed that from January, 2007, the appellant had again started calling his mother, demanding his share in the property. He has deposed that on 18th March, 2007, the appellant came home and raised a quarrel with his mother (PW 1-Vasundhara), with regard to his share. Thereafter, the appellant broke the glass of the windowpane and left the premises.

10. With regard to the incident of 11th September, 2007, PW 2 Rajesh has deposed that at about 8.30 p.m., his mother (PW 1) opened the door on hearing the door bell, and found the appellant standing outside the door. The appellant is stated to have demanded his share in the property from his mother PW 1 by asking her to sell the house. According to PW 2, at that time, he along with his wife and son were in the bedroom. He has further deposed that his mother closed the main door on the appellant and came to his bedroom and disclosed to him that the appellant was demanding his share in the house and had shown his pistol to her and was asking about PW 2 Rajesh. He has deposed that thereafter, the appellant came towards the bedroom and broke the glass of the window. On hearing the sound of glass, he along with his wife rushed towards the bedroom and saw the appellant putting his hand inside the window from the broken glass. He has deposed that the appellant had a pistol and that he fired towards them with his pistol. He has further deposed that they were behind the wall, and therefore, the bullet hit the wall and then fell on the floor. Thereafter, the appellant fled from the spot. PW 2 Rajesh called the police, who reached the spot within five to seven minutes. Thereafter, the police collected the articles from the spot. A perusal of the cross-examination of the said witness would reveal that

nothing substantial was brought on record to disbelieve the testimony of the said witness with regard to the incident that had taken place. Several suggestions were put to the said witness which have been denied by the said witness.

11. The learned Counsel for the appellant contended that the prosecution had not proved the alleged incident of 11th September, 2007. She submitted that no independent witness was examined in the said case and that the only witnesses who were examined were PW 1-Vasundhara and PW 2-Rajesh, who were interested witnesses. She submitted that it appears that there was an exchange of words between PW 1 and the appellant, a result of which, the appellant was falsely implicated in the said case. She submitted that even otherwise, there was no intention to kill either PW 1 -Vasundhara or PW 2 Rajesh or any other person, as is evident from the fact that only one shot was fired, which hit on the wall and no person was injured in the said incident.

12. Per contra, learned A.P.P. supported the impugned Judgment and Order of conviction and sentence and contended that no interference whatsoever was warranted in the same. According to the learned A.P.P., the evidence of PW 1 Vasundhara and PW 2 Rajesh cannot be disbelieved, inasmuch as, they were the intended victims. She submitted that the FIR was promptly lodged and that it was clearly evident from the evidence on record that the appellant had fired a shot with the intention of causing their death for property. She submitted that the Ballistic report corroborates the incident of firing that had taken place.

13. Heard learned Counsel for the parties at length. Perused the evidence on record. A perusal of the evidence of PW 1-Vasundhara and PW 2 Rajesh shows, that PW 1 is the real mother and PW 2, the real brother of the appellant, although the appellant has denied the same. The evidence of both PW 1 Vasundhara and PW 2 Rajesh inspires confidence and cannot be brushed aside merely because the prosecution has not examined any independent witness. It has come in the evidence of PW 1 Vasundhara and PW 2 Rajesh, that the appellant had come home on 11th September, 2007 at about 8.30 p.m.; demanded Rupees One Crore from PW 1, as his share in the property; that the appellant broke open the glass window of the bedroom; and that the appellant fired in the direction of PW 1 and PW 2. Both, PW 1 and PW 2 were indeed fortunate not to have received any injury in the said firing. Evidence of both the witnesses is consistent and there is nothing brought on record in their cross-examination to disbelieve or discredit their testimony. The police were promptly called and on their arrival at the spot, the statement of PW 1 Vasundhara came to be recorded and thereafter, CR No. 214/2007 came to be registered with the Juhu Police Station, Mumbai. The bullet found at the spot came to be seized. The result of the analysis shows that it is the same bullet which was fired from the pistol which was subsequently seized. The same has been elicited in the evidence of PW 5-Shyamsunder, Assistant Chemical Analyser. The results of the analysis of the Forensic Science Laboratory, reads as under :

"---The cuprojacketed bullet in Exhibit 1 is a fired 7.65 mm pistol bullet having

superficial brushing marks showing that the Exhibit 1 has been fired from weapon having a smooth bore barrel. -----The empty in Exhibit 2 are the cartridge case of fired 7.65 mm pistol cartridge.-----"

14. PW 5 Shyamsunder, Assistant Chemical Analyser, has categorically deposed that the copper jacked bullet was a fired 7.65 mm pistol bullet having superficial brushing marks showing that the bullet (Exhibit 1) has been fired from a weapon having a smooth bore barrel. The empty in Exhibit 2 were the cartridge case of fired 7.65 mm pistol cartridge.

15. It is pertinent to note, that PW 3-Durgesh Kothare, the panch to the spot panchnama has deposed that when the spot panchnama was prepared, the police found the empty bullet (back portion of the bullet) from a place near the spot. The said witness has stated that when he entered the house, he had seen a hole on the wall, at a distance of 1 1/2 feet from the floor; that the police had found and seized the front side of the bullet inside the house; and that the glass of the windowpane were broken. He has deposed that the police collected the fired bullet and the empty bullet and pieces of glasses found on the spot, wrapped them in a on plastic bag and then sealed the same.

16. PW 5-Shyamsunder, Assistant Chemical Analyser, who was attached to the Kalina Lab, has categorically stated that he had received two sealed parcels from the Juhu Police Station. He has deposed that he mentioned the description of the parcel in the Register as Exhibit 1 one deformed copper jacked bullet having brushing marks and Exhibit 2-one KF 7.65 mm pistol empty having indentation on the cap. He has stated that after carrying out the physical and chemical examination of the copper jacked bullet and pistol having cap, he has submitted the examination report. He has deposed in para 3 and 8 as under :

"3. The copper jacked bullet in Exhibit 1 is a fired 7.65 mm pistol bullet having superficial brushing marks showing that the Exh. 1 has been fired from weapon having a smooth bore barrel. The empty in Exh. 2 are the cartridge case of fired 7.65 mm pistol cartridge."

"8. I made the entry and mentioned description of the articles in the Register at the office. The Exh.1 One deformed copper jacked bullet having brushing marks and Exh. 2 One KF 7.65 mm pistol empty having indentation on the cap."

17. He has further deposed that a query was made, as to whether the referred bullet was fired from the weapon which was seized in CR No. 295/2007 registered with the Dadar Police Station. PW 5 Shyamsunder has deposed that when the pistol was sent in a sealed envelop along with a covering letter for physical as well as chemical examination, the said witness carried out a test firing from a 7.65 mm cartridge from the laboratory stock and compared it with the bullet and empty referred and accordingly, he gave two separate detailed examination reports. The said reports are Exhibits 32 and 33.

18. It is thus evident that the prosecution has proved beyond reasonable doubt;

that the appellant was present at the spot; that he fired in the direction of PW 1 and PW 2; and that a bullet was found on the spot, which matched the pistol from which it was fired. It is also pertinent to note, that the appellant has not denied his presence on the spot on the date of the incident, nor any explanation has been offered by the appellant as to how the incident had occurred. Merely because PW 1 Vasundhara and PW 2 Rajesh are interested witnesses, their evidence cannot be doubted. The evidence of PW 1 Vasundhara and PW 2 Rajesh inspires confidence and is consistent with each other. There is nothing brought on record to disbelieve their testimony. The said testimony of the eye- witnesses i.e. intended victims is corroborated by PW 3 Durgesh, a panch to the spot panchnama with regard to finding of a bullet as well as the shell on the spot and the evidence of PW 5 Shyamsunder, who analysed the weapon and the bullet which was seized from the spot. Thus, the ocular evidence corroborates the circumstantial evidence which has been brought on record by the prosecution.

19. In the present case, although the appellant has denied the fact that PW 1 Vasundhara is his real mother and has stated that PW 1 was his step-mother, there is nothing to disbelieve the testimony of the PW 1 Vasundhara and PW 2 Rajesh to show that the appellant was the real son of PW 1 and real brother of PW 2. It is evident from the evidence of PW 1 and PW 2 that the appellant was demanding a share in the property i.e. Rupees One Crore and as the complainant PW 1 was not giving him his share by selling the premises, the appellant had come to the spot along with his pistol with the intention of firing at them. It also appears from the record, that the appellant had prior to the said incident, caused the death of his brother-in-law i.e. his step sister's husband on 22nd July, 2007 by firing from the very same pistol for which he was convicted by the learned Sessions Judge and which Judgment and Order was confirmed in appeal by a Division Bench of this Court.

20. The learned Counsel for the appellant relied on the Judgment of the Apex Court in the case of Sagayam Vs. State of Karnataka, and Prakash Chandra Yadav Vs. State of Bihar and Others, .

21. Per contra, learned A.P.P. relied on the Judgments in the case of State of M.P. Vs. Kashiram and Others, ; State of Maharashtra Vs. Balram Bama Patil and Others, and Girija Shankar Vs. State of U.P., .

22. Perused the said Judgments. What is contemplated under Section 307 is the intent coupled with some overt act in execution thereof. It is not essential that there has to be some bodily injury which is capable of causing death which ought to have been inflicted. There can be no doubt that although the nature of injury which is actually caused may often get considerable assistance in arriving at a finding with regard to the intention of the accused, nevertheless, the intention can also be gathered or proved from the intervening circumstances and even in some cases, be ascertained without any reference to the actual injuries inflicted. The Court has to see whether the act, irrespective of its result, was done with the intention or knowledge and in the circumstances mentioned in the Section.

This position was highlighted in State of Maharashtra Vs. Balram Bama Patil and Others, , Girija Shankar Vs. State of U.P., , R. Prakash Vs. State of Karnataka, and State of Madhya Pradesh Vs. Saleem @ Chamaru and Another, . Therefore, in the present case, what is to be seen is whether the act, irrespective of its result was done with the intent, knowledge and in the circumstances mentioned in Section 307 of the IPC. The evidence on record clearly shows that the appellant had come to the house with a revolver and in order to give effect to the intent, had fired at the PW 1 and PW 2. Fortunately, neither PW 1 nor PW 2 or any other family member sustained any injury, but the act of the appellant clearly shows his intent coupled with an overt act which was done in execution of the intent.

23. Considering the material on record, the Trial Court has rightly convicted the appellant. There is no infirmity in the impugned Judgment and Order. Accordingly, the Judgment and Order of conviction and sentence is upheld and Criminal Appeal is dismissed.

24. The Court expresses gratitude for the assistance rendered by the learned amicus curiae.

25. A copy of this judgment be forwarded to the appellant, who is lodged in jail.