

STATE OF MAHARASHTRA

v.

SYED UMAR SAYED ABBAS & ORS.

(Criminal Appeal Nos. 345-346 of 2012)

FEBRUARY 12, 2016

[PINAKI CHANDRA GHOSE AND R.K. AGRAWAL, JJ.]

*Penal Code, 1860: ss.302 and 307 r/w s.120-B – Murder – Victim-deceased sitting in pandal with PW-6 – Accused persons came there and opened fire on the victim hitting bullets in his head, chest and various parts of his body at point blank range – When PW-6 tried to run, he was also hit by one bullet – Victim was taken to hospital where he was declared dead – Conviction by trial court on the ground that it was conclusively established by TIP and eye witness testimonies that A1 and A12 had fired on the deceased and recovery of weapon along with the ballistic report further strengthened the prosecution case – High Court set aside the conviction granting benefit of doubt – On appeal, held: Evidence of eye witnesses was not reliable – The testimonies of the witnesses suffered various infirmities and contradictions and the TIP was not conducted properly and was delayed – High Court rightly granted benefit of doubt to the accused as their identity was not clearly established by prosecution.*

**Dismissing the appeals, the Court**

**HELD: 1. There were five eye-witnesses, including the injured eye-witness. PW1 allegedly recognized two persons, who shot at the deceased and the injured PW6, as A1 and A12, but his evidence suffered few infirmities. He stated that he first heard some shots and then some noise like bursting of firecrackers and saw the accused firing at PW6 when he was running towards the Police Chowky nearby. The major inconsistency was with respect to his deposition regarding the Test Identification Parade (TIP). He stated that in the TIP held on 30.8.1995, he had identified four persons out of 10-12 persons standing in the row. According to the prosecution, the TIP was conducted by PW21 (Special Executive Officer) on 30.9.1995. Even if it is presumed that the date was stated to be incorrect by mistake, the fact**

A remained that PW21 deposed that he conducted 2 TIPs on that day. In the first Parade, he placed A1 and one more accused who died later and in the second, he placed A3 and A4 for identification. At no point of time, 4 accused were put together for identification for PW1 to identify out of the whole group. This contradiction showed that it was not clear as to whether he rightly identified the accused. Also, he stated that in another parade held after almost a year, he identified A12. That parade was conducted by PW18 (another Special Executive Officer). A12 was arrested by the first week of September, 1996 and thus the TIP was conducted on 4.10.1996, but it was too large a gap for PW1 to have remembered his face. Also, PW1 had stated that he had seen the deceased receiving a bullet injury on his forehead but as per the post-mortem report, there was no injury on the forehead of the deceased as he had been attacked from behind. This makes the testimony of PW1 even more vulnerable. [Paras 9, 10] [588-D-H; 589-A]

D 3. The evidence of PW4 another eye-witness, who was the son of the deceased and was sitting in his grocery shop at the time of the incident. Even PW4 heard the noise of bursting of some crackers and then he could see what was happening in the Pandal and he recognized A1 in the parade conducted by PW21 on 30.9.1995 and A12 in the parade conducted by PW18 on 4.10.1996. PW5 is the first informant who stated that he witnessed the incident while he was standing in the first floor gallery of his building which was abutting the Pandal. He also deposed that he had identified A1 and A12 in the TIPs conducted by PW21 and F PW18, respectively. But it is not clear whether he could have witnessed the incident from the first floor as the setting up of the Pandal was completed and the work of putting tarpaulin over the Pandal was done and only the decoration of the frill was going on. PW5 deposed before the Court that he does not remember the physical appearance of both the suspects seen by him on the date of incident. It is doubtful whether PW5 could have witnessed the incident in the state of commotion when everyone was running for shelter due to firing. PW6, the injured eye-witness who sustained bullet injuries, deposed that he could not see any of the accused and while he was talking to the deceased, he received G a bullet injury and fell unconscious. He stated nothing about the H

fact that he was running to the Police Chowky when he got injured. To that extent his testimony did not support the case of the prosecution as the other prosecution witnesses stated that they saw the accused falling down due to the injury while he was running towards the Police Chowky. [Paras 11, 12 and 13] [589-B-F] A

4. The prosecution adduced the testimony of PW7 as an eye-witness, but PW7 did not identify any of the accused/ respondents in the TIP which can be concluded from the substantive evidence. In the present case, the incident of firing occurred in the circumstances wherein much time was not available for the eye-witnesses to clearly see the accused. In such a situation, it was of much more importance that the Test Identification Parades were to be conducted without any delay. The first Test Identification Parade was held by PW21 after about 1½ months of the incident. The second Test Identification Parade was conducted by PW18 after more than a year of the incident. Even if it is taken into account that A12 was arrested after a year and within one month thereafter the test Identification Parade was conducted, still it is highly doubtful whether the eye-witnesses could have remembered the faces of the accused after such a long period. Though the incident took place in broad daylight, the time for which the eye-witnesses could see the accused was not sufficient for them to observe the distinguishing features of the accused, especially because there was a commotion created after the firing and everyone was running to shelter themselves from the firing. The High Court is, therefore, correct in giving the benefit of doubt to the accused as their identity had not been clearly established by the prosecution. [Paras 14, 17 and 18] [589-G; 590-C-G] B  
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*Siddanki Ram Reddy v. State of Andhra Pradesh (2010)*  
7 SCC 697: 2010 (8) SCR 1119 – referred to.

Case Law Reference

2010 (8) SCR 1119 referred to Para 16 G

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 345-346 of 2012.

From the Judgment and Order dated 15.09.2009 of the High Court of Judicature at Bombay in Criminal Appeal No. 1133 of 2003 and Criminal Appeal No. 1156 of 2003. H

A Kunal A. Cheema, Addl. Govt. Adv., Nishant Ramakantrao  
Katneshwarkar for the Appellant.

Mushtaq Ahmad for the Respondents.

The Judgment of the Court was delivered by

B **PINAKI CHANDRA GHOSE, J.** 1. These appeals, by special  
leave, have been directed against the judgment and order dated 15.9.2009  
passed by the High Court of Judicature at Bombay in Criminal Appeal  
No.1133 of 2003 and Criminal Appeal No.1156 of 2003, whereby the  
High Court allowed the criminal appeals filed by the respondents herein  
and acquitted them.

C 2. The brief facts necessary to dispose of these appeals are that  
on 12.8.1995, at about 3.00 P.M., Rajendra Rajaram Gupta (deceased),  
who was a social worker belonging to a particular political party and had  
a shop in Mahim area of Mumbai, was sitting in Ganesh festival Pandal  
and was busy talking with one Rajaram Sarfare (PW6-injured eye-  
D witness), who was the Contractor for decoration of the Ganesh festival  
Pandal. As per the prosecution story, when Rajendra Rajaram Gupta  
and PW-6 were talking to each other while sitting on chairs in the Pandal,  
two unknown persons entered the Pandal from Kapad Bazaar Road,  
opened fire on Rajendra Rajaram Gupta and pumped many bullets in his  
E head, chest and various parts of his body at point blank range. Allegedly,  
the said two assailants were escorted by three other persons. The firing  
noise created commotion in the Pandal and while PW6 tried to run, he  
was also hit by one bullet and he fell down. The assailants managed to  
escape. The deceased Rajendra Rajaram Gupta was taken to Hinduja  
Hospital immediately, where he was declared dead on arrival. The FIR  
F came to be immediately lodged at 4:15 P.M. by one eyewitness Rajesh  
Tanaji Akre (PW-5), who happened to have seen the incident from the  
first floor gallery of his residential building which was abutting to the  
said Pandal.

G 3. After investigation, charges were framed against 13 accused  
persons (Accused Nos.1 to 13) under Sections 302, 307, 120B read with  
Section 34 of the Indian Penal Code, 1860 (hereinafter referred to as  
"IPC") and Sections 25, 27, and 29 of the Arms Act, 1959. Accused  
Nos.2, 5, 6, 8, 10 and 13 had either died or were absconding during the  
trial. Hence, the trial proceeded against the remaining accused i.e.  
H. Accused Nos.1, 3, 4, 7, 9, 11 and 12.

4. The Trial Court by its judgment and order dated 23.07.2003 convicted Accused Nos.1, 3, 4, 9 and 12 for offences punishable under Sections 302 and 307 read with Section 120-B of the IPC. Accused Nos.1, 3, 4 and 12 were also convicted for the offence punishable under Section 27 of the Arms Act, whereas Accused No.9 was also convicted for the offence punishable under Section 25 of the Arms Act. Original Accused Nos.7 and 11 were acquitted of all the charges. The High Court vide the impugned judgment acquitted all the accused of all the charges by overturning the judgment of the Trial Court.

5. The State of Maharashtra has filed these appeals against the acquittal of Accused Nos.1, 3, 4, 9 and 12. Learned Additional Government Advocate appearing for the State of Maharashtra has inter alia reiterated that the judgment of the Trial Court is well reasoned and well considered. The learned counsel for the respondents have rebutted the submissions of the appellant by relying upon the judgment of the High Court pressing that it had gone deeper into the case that the prosecution could not bring home the charges levelled against the accused.

6. The Trial Court convicted the accused respondents on the basis of the testimonies of five eye-witnesses - Hemant Parshuram Akre (PW1), Ganesh (PW4), Rajesh Tanaji Akre (PW5), Rajaram Sarfare (PW6) and Kishor Maniklal Damaniya (PW7), out of which PW6 was the injured eye-witness. The Trial Court found their depositions to be corroborative of each other and also in tandem with the testimonies of PW18 and PW21, the Special Executive Magistrates, who conducted the Test Identification Parade of the accused. The Trial Court held that it was conclusively established by the Test Identification Parade and eye-witness testimonies that A1 and A12 had fired on the deceased. The recovery of the weapon along with the ballistic report further strengthens the conclusion. The Trial Court found that the prosecution has proved its case beyond reasonable doubt and hence the accused were convicted of the offences charged after being found guilty.

7. However, the High Court pointed out serious lacunae in the above said evidences and hence the conviction order was set aside and the benefit of doubt was given to the accused. The High Court is of the view that the Trial Court had placed unwarranted reliance on the Test Identification Parades in arriving at the guilt of the accused when the same suffered major discrepancies along with the inconsistencies of the

A depositions of the eyewitnesses to that of the injured eyewitness' testimony.

8. We have perused the documentary and oral evidences on record and gone through the submissions of both - the appellant State as well as the respondents. We shall now examine each and every contention in light of the arguments adduced before us in the Court. In our considered view, the main issue in the case is whether the identity of the accused was properly established with the aid of the testimonies of the eyewitnesses and whether the Test Identification Parades were conducted properly. All the other evidences are secondary and need to be examined only if the accused can be linked to the crime. To decide the same we shall analyse the depositions of the eye-witnesses.

9. There are five eye-witnesses, including the injured eye-witness. We shall peruse their statements one by one. PW1 allegedly recognized two persons, who shot at the deceased and the injured PW6, as A1 and A12, but his evidence suffers few infirmities. He stated that he first heard some shots and then some noise like bursting of firecrackers and saw the accused firing at PW6 when he was running towards the Police Chowky nearby. The major inconsistency is with respect to his deposition regarding the Test Identification Parade. He stated that in the Test Identification Parade held on 30.8.1995, at Arthur Road Prison, he had identified four persons out of 10-12 persons standing in the row. According to the prosecution, the Test Identification Parade was conducted by PW21 (Special Executive Officer) on 30.9.1995. Even if it is presumed that the date was stated to be incorrect by mistake, the fact remains that PW21 deposed that he conducted 2 Test Identification Parades on that day. In the first Parade, he placed A1 and one more accused who died later and in the second, he placed A3 and A4 for identification. At no point of time, 4 accused were put together for identification for PW1 to identify out of the whole group. This contradiction shows that it is not clear as to whether he rightly identified the accused. Also, he stated that in another parade held after almost a year, he identified A12. That parade was conducted by PW18 (another Special Executive Officer). We are aware that A12 was arrested by the first week of September, 1996 and thus the Test Identification Parade was conducted on 4.10.1996, but it is too large a gap for PW1 to have remembered his face.

10. Also, PW1 had stated that he had seen the deceased receiving a bullet injury on his forehead but as per the post-mortem report, there

was no injury on the forehead of the deceased as he had been attacked from behind. This makes the testimony of PW1 even more vulnerable. A

11. We now proceed to peruse the evidence of PW4 another eye-witness, who was the son of the deceased and was sitting in his grocery shop at the time of the incident and was making payment to one Bhatia who was not examined by the prosecution. Even PW4 heard the noise of bursting of some crackers and then he could see what was happening in the Pandal and he recognized A1 in the parade conducted by PW21 on 30.9.1995 and A12 in the parade conducted by PW18 on 4.10.1996. B

12. PW5 is the first informant who stated that he witnessed the incident while he was standing in the first floor gallery of his building which was abutting the Pandal. He also deposed that he had identified A1 and A12 in the Test Identification Parades conducted by PW21 and PW18, respectively. But it is not clear whether he could have witnessed the incident from the first floor as the setting up of the Pandal was completed and the work of putting tarpaulin over the Pandal was done and only the decoration of the frill was going on. It is also pertinent to note that PW5 deposed before the Court that he does not remember the physical appearance of both the suspects seen by him on the date of incident. It is doubtful whether PW5 could have witnessed the incident in the state of commotion when everyone was running for shelter due to firing. C  
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13. PW6 is the injured eye-witness who sustained bullet injuries. He deposed that he could not see any of the accused and while he was talking to the deceased, he received a bullet injury and fell unconscious. He stated nothing about the fact that he was running to the Police Chowky when he got injured. To that extent his testimony does not support the case of the prosecution as the other prosecution witnesses stated that they saw the accused falling down due to the injury while he was running towards the Police Chowky. F

14. The prosecution adduced the testimony of PW7 as an eye-witness, but PW7 did not identify any of the accused/ respondents in the Test Identification Parade which can be concluded from the substantive evidence. G

15. The recovery of arms need not be discussed by us in detail as the same has already been discussed by the High Court to arrive at the conclusion that it is not trustworthy and incriminating against the H

A respondents.

16. Learned counsel for the accused/respondents has cited the decision of this Court in *Siddanki Ram Reddy v. State of Andhra Pradesh*, [(2010) 7 SCC 697] wherein it was held:

B *“When an attack is made on the injured/deceased by a mob in a crowded place and the eyewitnesses had little time to see the accused, the substantive evidence should be sufficiently corroborated by a test identification parade held soon after the occurrence and any delay in holding the test identification parade may be held to be fatal to the prosecution case.”*

C 17. It is very clear that in the present case the incident of firing occurred in the circumstances wherein much time was not available for the eye-witnesses to clearly see the accused. In such a situation, it was of much more importance that the Test Identification Parades were to be conducted without any delay. The first Test Identification Parade was held by PW21 after about 1½ months of the incident. The second D Test Identification Parade was conducted by PW18 after more than a year of the incident. Even if it is taken into account that A12 was arrested after a year and within one month thereafter the test Identification Parade was conducted, still it is highly doubtful whether the eye-witnesses could have remembered the faces of the accused after such a long period. E Though the incident took place in broad daylight, the time for which the eye-witnesses could see the accused was not sufficient for them to observe the distinguishing features of the accused, especially because there was a commotion created after the firing and everyone was running to shelter themselves from the firing.

F 18. In view of the discussion in the foregoing paragraphs, we are of the considered view that the testimonies of the witnesses suffer various infirmities and contradictions and the Test Identification Parade was not conducted properly and was delayed. The High Court is, therefore, correct in giving the benefit of doubt to the accused as their identity had not G been clearly established by the prosecution.

19. Thus, in the light of the above discussion, we find no grounds to interfere with the judgment passed by the High Court. The appeals are, accordingly, dismissed.

Devika Gujral

Appeals dismissed.

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