

# SUPREME COURT OF INDIA

Abdulwahab Abdulmajid Baloch

Vs.

State of Gujarat

Crl.A.No.1507 of 2007

(S.B. Sinha, B. Sudershan Reddy and Dr. Mukundakam Sharma JJ.)

23.03.2009

## JUDGEMENT

### **S.B. SINHA, J.**

1. Appellant is before us aggrieved by and dissatisfied with a judgment and order dated 24.8.2007 passed by a Division Bench of the High Court of Gujarat at Ahmedabad in Criminal Appeal No. 1095 of 1999 whereby and whereunder a judgment of conviction and sentence passed by Additional City Sessions Judge, Ahmedabad in Sessions Case No. 13 of 1997 and 14 of 1997 for commission of offences punishable under Sections 302, 365, 387, 332 read with Section 34, 120B, 201 and 202 of the Indian Penal Code ("IPC" for short) and under Sections 21(1) (a) and 27 of the Arms Act was confirmed.

2. An identified dead body of a male was found to be lying near Sahakari Cold Storage, just opposite Munda Gate and Telephone Exchange. On or about 4.9.1993, H.P. Kohri, Police Sub-Inspector (PSI), Gaekwad Haveli Police Station received information thereabout. A firearm injury on the forehead above the left eye was found on the person of the deceased. During post-mortem examination, a bullet was taken out from the person of the deceased. A First Information Report ("FIR" for short) was lodged by the said Police Officer, which was registered as I.C.R. No. 161/93.

3. During investigation, the dead body was found to be of one Bhagvandas Dwarkadas Sindhi. It was reported that the deceased, who was dealing in illicit foreign liquor, had some dispute with one Abdulwahab Sheikh (Accused No. 24) (since deceased), who had also been carrying on identical business. A conspiracy was said to have been hatched by and between Accused No. 24, Abdulwahab (Accused No.1), Abdulsattar (Accused No.25) and Rasulkhan @ Rasulparti to abduct and to extort money from him.

4. Indisputably, Shakilahmed (Accused No.4) and Aslam (Accused No. 17) had also been dealing in liquor business near Madharam Theatre and the deceased used to visit them in relation thereto and in connection therewith. Allegedly, for keeping a watch over the deceased, Iqbalhussain (Accused No. 2) and Mohamadsalim (Accused No. 3) were employed. Abdulkadar (Accused No. 7) and Abdulsattar (Accused No. 8) are said to have provided the appellant (Accused No.1) and accused Sherzada (since deceased) a Maruti Van. Upon stopping the deceased, Accused No. 2 - Iqbalhussain and Accused No. 3 - Mohamadsalim informed the appellant and the deceased Sherzada who were in the Maruti Van. Appellant and other accused thereafter abducted the deceased and attempted to extort money from him. Resistance was offered thereto. A shot was fired at him by the appellant

from his revolver as a result of which he died. His dead body was thereafter thrown near the cold storage.

5. In connection with the aforementioned incident, Kamlesh Dayaram @ Kamli (P.W. 4) was arrested on or about 6.9.1994. The Investigating Officer, however, while filing charge-sheet in connection with the aforementioned case on 3.1.1995 filed an application in terms of Section 169 of the Code of Criminal Procedure, pursuant where to he was made a prosecution witness.

6. Indisputably, appellant was arrested on 31.5.1994 at Mumbai by the Investigating Officer in connection with another case being Case No.

60 of 1994. Appellant is said to have been in his custody a few days before he was formally arrested. He was arrested in connection with the case in question on 13.7.1994.

7. Indisputably, appellant while in custody in connection with the said Case No. 60 of 1994 made a confession leading to discovery of some weapons.

It is also not in dispute that pursuant thereto a few firearms and cartridges were recovered.

In connection with the aforementioned Case No. 60 of 1994, the following exhibits were sent for opinion of the Ballistic Expert.

"

Sr. Exhibit From where How seized Remarks No. the and from Muddamal whom has been seized

1. Exhibit-A P.S.I. Shri As the same Exhibit-282, D.C.B. M.P. U.T. has been Mark - 91/20 No.62/94, One Brahmhatt, produced by S.C.No.13/98 revolver made in has seized the accused Exh. 275 U.S.A. Smith and the same in Abdulvahab A.Date Vessal made, .38 presence of Abdulmajid 08.07.1999 bore and on the hand Panchas Shaikh from grip 630894 has been his house at written 67, Nandan Soc., Shahpur Ahmedabad.

.....

23. Exhibit - W P.S.I. Shri Accused Mentioned in D.C.B. U.T. Mahmadrarik M.P. No.64/2000 one Brahmhatt Abdulrahim revolver foreign Shaikh (sic) made over which [he was SYSTEND ABADIE arrayed as BREVET has been Accused written No.9] has produced the same from his house at A-15, Saytam Society, Shahpur on 03.06.1994 "

One of the questions which was referred to the Ballistic Expert for his opinion was as under:

"Do the weapons mentioned in Exhibit - A to F and Exhibit - W are in working condition? They are country made or foreign made and whether they are dangerous or not?"

The report was submitted on 5.10.1994. It was in two parts. It appears that one of the revolver of .38 bore was marked as Exhibit-A.

The relevant portion of the report prepared by one Shri M. J. Rathod reads as under:

"Exhs.1 & 1A are two fired .38" copper jacketed bullets having five lands and five grooves with

right hand twist. Exhs-2A and Exh-3A are two grooves with left hand twist.

Exhs. 1, 1A, 2A & 3A and test fired six grooves with left hand twist Exhs.-1A, 2A & 3A and test fired bullets, test fired from Exhs-A, B & C of case No. FSL/EE/94/BL/277 this laboratory, were examined and compared under a comparison microscope.

The weapon characteristic marks (rifling marks) of Exhs-I & 1A and those on the test fired bullets test fired bullets, test fired from Exh-A of case No. FSL/EE/94/BL/277, were found similar.

The weapon characteristic marks (rifling marks) on Exhs.-2A & 3A and those on the test fired bullets, test fired from Exhs.-C of case No.FSL/EE/94/BL/277 were found similar, thereby showing that (1) Exhs-1 & 1A (bullets) have been fired from Exh-A of case No.

FSL/EE/94/BL/277, (2) Exhs - 2A & 3 (Bullets) have been fired from Exhs-G of Case No. FSL/EE/94/BL/277."

Appellant was acquitted in the said case. Recovery of weapons in the said case was not accepted by the Court.

8. Indisputably, there appears to have been some confusion with regard to the identity of the weapon vis-`-vis the number inscribed therein. By a letter dated 22.2.1996, a clarification was sought for from the Director of Forensic Science Laboratory, stating "I have received the investigation of the cases of the said offence from the Deputy Superintendent of Police, A.T.S., Gujarat State, Ahmedabad and I have received opinion in respect of the weapons and fired bullets from your side. It is, therefore, requested to give your opinion, that, do the legal actions may be taken against the person who has sold the said weapons.

Crime Branch has seized Revolver and Pistol from Abdulvhab Abdulmajid Shaikh in the case of Gaekwad Haveli Police Station I.C.R. No. 60/94, on 03.06.1994 and the same were sent towards you for the examination, which were lying in your office of Forensic Science Laboratory. If the detailed examination be over, you are requested to give your clear opinion regarding do you find any bullets while firing from the said weapons pertaining to the below mentioned offence.

A. The firing was caused in the case of Gaekwad Haveli Police Station I.C.R. No.

161/93 registered u/s 302, 120-B etc. of Indian Penal Code and the bullets found during the investigation was forwarded to you on 08.09.1993. The opinion thereof has been sent by you vide your No.

FSL/EE/93/BL/349, dated 19.10.1993."

9. On or about 18.4.1996, Shri A.S. Prajapati, Ballistic Expert, in reply to the said letter dated 22.2.1996 stated that the number seen on the Parce-A/Exhibit-A (0.38" S & W Revolver) was 768029.

A letter of Shri A.S. Prajapati, Scientific Officer, Forensic Science Laboratory addressed to the Deputy Superintendent of Police has been filed, wherein it was stated:

"The following weapons (firearms) received in the case No. FSL/EE/94/B1/277 were examined in the laboratory and here with an additional case report regarding the numbers and make of firearms

is submitted as per your requirement.

Parcel-A (Ex.A): is a 0.38" Smith & Wesson revolver. Punched write up "Smith & Wesson Spring Field Mass, U.S.A., Patented Feb.6.06, Sept.14-09, Dec.29.14, 'The trade mark of company Smith &

Wesson, Reg. U.S. PAT OFF., 38 S&W CTG, made in U.S.A.' the number 768029 were found on it.

In the forwarding note of the Gaikwad Haveli Police Station C.R. No.

60/94, the number on the grip of Ex.A has been described as 630894 and this number was not present.

Parcel-B(Ex.B): is a 0.38" Smith & Wesson revolver. Punched write up "Smith & Wesson Spring Field Mass, U.S., Patented Feb.6.06, Sept.14-09, Dec.29.14, 'The trade mark of company Smith &

Wesson, U.S.A. Reg. U.S.

PAT OFF., 38 S&W CTG, made in U.S.A.' the number 781858 were found on Ex.B.

In the forwarding note, the number on the grip of Ex.B is described as 832184, and this number was not present."

10. On or about 23.7.1997, the learned Additional Sessions Judge, Ahmedabad framed the following charges against the appellant:

"10. Further, the accused, accused No.1 and 4 and No.17 and 24 have with the intentions of achieving their common motive to murder Bhagwandas Sindhi, murdered him and by such act committed criminal offence under Section 302 read with Section 34 of IPC, and alternatively under Section 302 read with Section 120B of IPC."

11. During trial of the case in question, an application was filed by the Special Public Prosecutor on or about 8.9.1998, which was in the following terms:

"I, the Special Public Prosecutor of this case, I am producing the list of documentary evidence Xerox copies under Section 294 of the Criminal Procedure Code.

Exh. 262 List

1. The Xerox copy of the 03.06.1994 panchnamas of the Seizure of the weapons dated 03.06.1994"

The said application was marked as an exhibit.

The firearms and cartridges recovered in connection with Case No.

60 of 1994 were also received. The recovery of the firearms as stated in the seizure memo are as under:

"1. One Revolver - Made in U.S.A., Smith and Vessal Company, .38 bore, below its handgrip 630894 read, which is in working condition. The cost of which shall considered to be 1 lac 50 thousand.

2. One Revolver - Made in U.S.A., Smith and Vessal company, .38 bore, below its handgrip 882184 read, which is in working condition. The cost of the same shall considered to be 1 lac 50 thousand."

12. Indisputably, in the case in question, Shri M.J. Rathod, Ballistic Expert submitted its report on or about 19.10.1993; relevant portion whereof reads as under:

"Exh-1: Is a copper jacketed bullet.

Results of Examination:

Exh-1: Is a fired .38" copper jacketed bullet having five lands and five grooves with right hand twist. It has been fired from standard weapon. Such bullet is used in .

.38" cartridge and fired from .38"

Revolver.

According to him, the bullet bound in the body of the deceased was fired from the revolver bearing No. 630894.

13. Inter alia, on the basis of recovery of the said weapon and the report of the Ballistic Expert, a judgment of conviction and sentence was recorded by the learned Sessions Judge, which by reason of the impugned judgment has been affirmed.

14. Before advertng to the merit of the matter, we may notice that there were 26 accused in the aforementioned case. Accused No. 14 and Accused 24 died during the trial. The prosecution although examined a large number of witnesses; PW-4, who, as noticed hereinbefore, arrayed as one of the accused, was later on extended the benefit of Section 169 of the Code of Criminal Procedure.

15. Indisputably, no charges under Sections 25 and 27 of the Arms Act were framed. The learned Sessions Judge examined only Accused No.1, Accused No.9 and Accused No. 23 under Section 313 of the Code of Criminal Procedure. All other accused, namely Accused Nos. 2 to 13 and 15 to 23 of Sessions Case No. 13 of 1997 and Accused Nos. 25 and 26 of Sessions Case No. 14 of 1997 were acquitted.

The learned Sessions Judge in his judgment inter alia took notice of the fact that whereas the deceased was murdered on 3.9.1993 the incriminating articles in Case No.60 of 1994 were seized on 3.4.1994, i.e., after an interval of nine months. It was placed on record that except disclosure statements no other evidence has been brought on record. The learned Special Judge, however, applied the provisions of Section 114(a) of the Indian Evidence Act to hold that the illustrations given in Section 114 of the Evidence Act being not exhaustive; a presumption may also be drawn in respect of charges of aggravated offences such as murder, robbery, etc. So far as recent unexplained possession of the offending weapon in the hands of the accused is concerned such presumption may be permitted to raise upon considering evidence and circumstances of each case.

It was furthermore held:

"73. Now turning to the offence committed by accused No.1, there is no direct evidence to prove his participation in murder of Bhagwandas Dwarkadas Sindhi. However, there are cogent, credible and clinching circumstantial evidence against him to establish that he had committed said murder. The

bullet taken out by doctor from the dead body of the deceased was fired from the revolver recovered from the house at the instance of accused no.1.

Revolver was kept and concealed in such place that knowledge of same could not be attributed to any other person than accused No.1. The important circumstance that as opined by expert to the effect that the said bullet could only be fired from that particular revolver. Another important circumstance, on the basis of presumption, which connect the accused No.1 to the murder that he could not offer any satisfactory account/explanation as how he came to be in possession of said revolver (weapons). These circumstances sufficient to bring home the guilt of accused No.1 beyond reasonable doubt. Witnesses may lie, but circumstances cannot.

In the light of above, it can be held that accused No.1 fired a shot from his revolver on the deceased. The shot was hit on the vital part i.e. head. Under the circumstances, it can safely be held that the accused no.1 intended to cause a fatal injury to the vital part of the deceased, which was later on found sufficient in ordinary course of nature to cause his death. Thus, act of accused No.1 is clearly covered under Clause (3) of Section 300 of I.P. Code.

74. Having due regard to the evidence adduced and circumstances available on record, the prosecution has failed to prove that accused and others entered into a criminal conspiracy prosecution has also failed to establish that accused No. 1 had shared common intention with other accused as there was prior concert in furtherance of which deceased Bhagwandas was done away. Therefore, no such inference can be drawn. In the circumstances, accused No.1 is liable for his own act/acts.

There was constructive charge against all the accused persons u/s 302, r.w. 34, but, the finding arrived at on the strength of evidence that it was only the accused no.1 who inflicted injury which proved fatal. It has been established by prosecution that crime of murder is committed by accused no.1 individually, in that case he can be convicted u/s. 302, (simplicitor) of T.P.C.

75. The evidence of prosecution does suggest that along with the offence punishable u/s 302 of I.P. Code the accused no. 1 has also committed offence punishable u/s 25 & 27 of the Arms Act. However, I am helpless to convict him on the said counts as there is no specific charge against him. It is true that such charge is available against other accused persons, but, there is no evidence against them."

Thus, as no charge under Sections 25 and 27 of the Arms Act was framed, he was convicted only under Section 302 of the Indian Penal Code.

16. Mr. Sushil Kumar, learned Senior Counsel appearing on behalf of the appellant would contend:

i) that the learned Special Judge as also the High Court committed a serious error in passing the impugned judgment insofar as they failed to take into consideration that not only the recovery of weapons but also the commission of offence has not been proved in the case in which the seizure was effected, namely, Case No.60/1994.

ii) It is apparent from the materials brought on record that the prosecution having found that Shri Prajapati had not submitted a favourable report, procured a report from Shri M.J. Rathod upon changing one weapon by another.

iii) The High Court failed to perform its duty as a first appellate court insofar as the evidence was

neither re-appreciated nor reevaluated despite the fact that the learned Sessions Judge proceeded on the basis that only circumstantial evidences were available against the appellants.

iv) Xerox copy of the seizure memo which did not contain the signature of the Investigating Officer, which was sought to be brought on record, was inadmissible in evidence particularly in view of the fact that the seizure memo witnesses did not support the prosecution case.

17. Mr. Sidharth Luthra, learned Senior Counsel appearing on behalf of the State, however, would contend that the Investigating Officer has proved the seizure memo.

Our attention in this behalf has also been drawn to the fact that Shri Prajapati was asked to submit his report as to whether the weapons recovered were in working condition or not whereas Shri Rathod was asked to report as to whether the bullet recovered from the body of the deceased could be fired from one of the weapons seized in connection with the aforementioned case.

18. We have noticed as to how, perfunctorily, the investigation had been carried on. Even in a case of this nature proper charges had also not been framed. The documents had also not been properly brought on record.

Indisputably, only Xerox of the seizure memo was sought to be brought on record invoking Section 294 of the Code of Criminal Procedure, which had no application. It, however, appears that during trial the original seizure memo as also the material objects were called for. The prosecution for reasons best known to it did not examine Shri Prajapati, one of the Ballistic Experts. Shri Rathod, however, was examined who proved his report.

19. A dispatch note was sent on 6.7.1994 in respect of revolver Nos.

630894 and 882184. Shri Prajapati in his report in response to questionnaire No.1 opined that the firearms were in working condition.

It, however, does not appear that he was asked to submit his report on the question as to whether the bullet recovered from the body of the deceased was fired from one of the aforementioned weapons.

Part II of the report which appears to have been enclosed with the original report dated 19.10.1993 was prepared by Shri M.J. Rathod.

A confusion, however, appears to have arisen from letter dated 18.4.1996 wherein in respect of Parcel-A/Exhibit-A, the number inscribed on the Exhibit was stated to be 768029.

It was in view of the discrepancy in the aforementioned number and the weapon, a contention was raised by Mr. Sushil Kumar that one weapon was substituted by another.

20. However, in the aforementioned situation, evidence of Shri Rathod assumes some importance.

In his evidence, he stated:

"7. On examining the Mark A revolver I had found that the said revolver was earlier used. The said revolver right hand twist 5 lands and 5 grooves were found. The said revolver is in working condition, for checking this there was test fired in the Laboratory.

Mark B revolver was also test fired and it was also found to be in working condition. It also had 5 land and 5 grooves. It was also right hand twist.

Mark C revolver also was test fired, from this it was found that it was also in working condition. It was left hand twist, and in it there were 6 grooves and 6 lands.

8. The mark I bullet comparison with Mark A and Mark B and with Mark C revolver test fire bullets comparison was done.

Such comparison we had done using microscope. In this manner after making comparison I have arrived on the following opinion. Mark I bullet was fired from the Mark A revolver.

For arriving to the above conclusions I had made the land to land match where the hy-filing marks were matching, number of lands and number of grooves whose breadth, and rifling were compared. From the rifling marks I state that, Mark I bullet was fired from the Mark A revolver and it was not fired from any other weapon.

He furthermore stated:

"9. In this matter the list Mark 91/18 I have perused and state that it is the original opinion which is shown in part-2. Which is proper. It is the Xerox copy of the same. In the Xerox copy also I have identified my signature. Now list Mark 91/18 Part 2 is given Exh. 281. The said report is given on 5/10/94. The above three revolvers were in the matter of Gaekwad Haveli Police Station I.C.R. No.

60/94 muddamal, and the dispatch note by the police officer was also received.

In the matter of Crime Reg. No. 60/94, 3 weapons which were received by us with the dispatch note the original of the said dispatch note is in our office. In this statement in the end as per the orders List Mark 91/20 is Exh. 282. I am shown List Mark 91/19, it is the Xerox copy of the dispatch note. Which is proper it is given Exh. 282. (It is exhibited by the consent of the Advocate for accused)"

No question was put to him as regards the discrepancy of the number in the revolver.

Indisputably, the court granted permission to bring on record the original FSL Report to be brought on record and proved in Crime No. 60 of 1994.

21. The Investigating Officer when examined was shown the material articles being Article No. 33. He stated that the said article made in USA Smith & Wesson Company .38 bore wherein nos. 630894 was shown below the butt was the same revolver which was found from the suitcase during Panchanama.

The revolver in question being article No. 34 was also shown to the said witness, in reply whereto he stated:

"The said article No. 34 is a revolver it is the same on perusing the same it is made in U.S.A.

Smith & Wesson Company .38 bore and below its butt reading from the nozzle size No. 882184 is read. And on reading from the other side the number 781858 is read."

The learned judge noted:

"At this stage the Special P.P. Mr. K.B.

Anandjiwalal has given the application Exh.

219 and requests that in the matter of the Gaekwad Haveli Police Station Crime Reg. No.

60/94 the discovery panchanama was prepared and the pancha in the same be recalled and the slips on the muddamal taken into custody in the matter of said 60/94 bears his signature. The said signature should be shown to the said witness and it is in the interest of justice to prove the same. In these circumstances after such pancha witness was recalled and after the statement was completed the further examination in chief of the witness Police Office Mr. Brahmbhatt is required to be recorded. The defence has not taken any objections in this regard. In these circumstances the application by the prosecution to recall the pancha witness is allowed and it is ordered to adjourn the examination-in-chief of the witness Mr. Rathod in the interest of justice."

On recalling the witness, the Panchanama was proved.

22. It furthermore appears that a confusion arose as despite the original Panchanama having been proved which contained the signature of the Investigating Officer, the Xerox copy thereof was marked as an Exhibit.

The original was returned. Signature of the Investigating Officer in the Xerox copy is admittedly missing.

The Investigating Officer in his evidence stated in cross- examination:

"In this matter that is in the Gaekwad Haveli Police Station I.Crime Reg. No. 161/93 the supplementary chargesheet against the accused the said Exh. 262 panchanama copy is shown.

The said copy in this chargesheet is on page No.

178 to 184. On perusal of the said copy I state that in which there is the signature of the panchas, but as the police officer my signature is not seen. The said chargesheet Page Nos. 178 to 184 is given Exh. 263. [On request made by Advocate Mr. Jhala] It is not true that in this matter the original panchanama was written [Exh. 262] at that time I was not present."

The learned Sessions Judge, however, opined:

"70. Lastly, Ex. 263 (page 178 to 184 in copy of charge-sheet produced in the present case) the Xerox copy of Discovery Panchanama Ex.

262, wherein signature of Panch witnesses are visible, but the signature of P.I. Shri Bharmbhatt is missing. The defence has argued that it strengthens the allegations that said Ex. 262 is a table work and the investigation is tainted. It is merely a Xerox copy, perhaps some mischief might have committed. However, on that count only the available reliable evidence cannot be ignored."

23. The prosecution should have got the original record marked which is stated to be containing the signature of the Investigating Officer.

Original Panchanama also upon being marked as an exhibit could have been replaced by a certified

copy.

The accused, in a situation of this nature, is entitled to take the benefit of the weakness of the prosecution case, which led to the aforementioned finding of the learned trial judge which was not correct.

24. Be that as it may, we feel that only because the recovery of a weapon was made and the Expert opined that the bullet found in the body of the deceased was fired from one of the weapons seized, by itself cannot be the sole premise on which a judgment of conviction under Section 302 could be recorded. There was no direct evidence. Accused, as noticed hereinbefore, was charged not only under Section 302 read with Section 34 of the Indian Penal Code but also under Section 302 read with Section 120B thereof. The murder of the deceased was said to have been committed by all the accused persons upon hatching a conspiracy. This charge has not been proved. The learned trial judge itself opined that the recovery having been made after nine months, the weapon might have changed in many hands. In absence of any other evidence connecting the accused with commission of crime of murder of the deceased, in our opinion, it is not possible to hold that the appellant on the basis of such slender evidence could have been found guilty for commission of offence punishable under Section 302 of the Indian Penal Code.

It is a matter of serious concern that despite recovery of weapon appellant had not been charged for commission of offence punishable under Sections 25 and 27 of the Arms Act. We have noticed hereinbefore the helplessness expressed by the learned trial judge in this behalf. The learned judge who had framed charges should have been more careful.

The learned judge also, in our opinion, was incorrect in drawing a presumption of commission of offence punishable under Section 302 of the Indian Penal Code by applying the provisions of Section 114 of the Indian Evidence Act keeping in view the principle that the prosecution must prove its case beyond all reasonable doubt.

25. Having regard to the facts and circumstances of this case, we have no other option but to hold that the appellant is entitled to benefit of doubt. The impugned judgment, therefore, is set aside. The appeal is allowed. The appellant who is said to be in custody is set at liberty unless wanted in connection with any other case.