

A MUSTAK @ KANIO AHMED SHAIKH

v.

STATE OF GUJARAT

(Criminal Appeal Nos. 488-489 of 2017)

B JUNE 18, 2020

[R. BANUMATHI AND INDIRA BANERJEE, JJ.]

Penal Code, 1860 – s.307 r/w. s.114 – Arms Act – s.25(1)(B)(a) – Bombay Police Act – s.135(1) – Attempt to murder – Prosecution case that victim, who was going to his laboratory was shot on face in his car from a motorbike driven by the appellant – The first accused was the pillion rider – The bullet was operated and removed – Thereafter, the statement of victim was recorded by the investigating officer – Both appellant and the first accused were arrested – The Trial court convicted the appellant and the first accused of the offence punishable u/s.307 r/w. s.114 IPC and s.25(1)(B)(a) of the Arms Act r/w. s.135(1) of the Bombay Police Act – Both the complainant -driver of victim and the victim had identified the appellant – The Trial court sentenced the appellant and the first accused to undergo rigorous imprisonment for six years – The High Court enhanced the sentence of imprisonment for offence u/s.307 r/w s.114 IPC to seven years instead of six – Before the Supreme Court, the appellant contended that identity of the appellant was not established – Held: The appellant was identified by both the victim and the complainant apart from pancha witness – Be that as it may, the testimony of an injured victim is sufficient for conviction – The complainant had identified the appellant as the driver of the motor cycle – The Judicial Magistrate had corroborated identification of the appellant by the complainant in the Test Identification Parade – It is also clear that the appellant as well as the dummies were brought before the Judicial Magistrate before the witness arrived – The defence was not able to show any infirmity in the identification parade of the appellant which vitiates the identification – Further, the pancha witness testified to the recovery of the weapon in his presence, at the instance of the appellant and identified appellant in Court – Also, the prosecution had established from the ballistic report and the evidence of FSL experts that the

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bullet that was extracted from the body of the victim, was fired from the weapon recovered on the confession of the appellant – The Trial court had successfully established the chain of events, linking the crime to inter alia the appellant – Thus, the conviction and enhancement of sentence imposed on appellant by the High Court affirmed.

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Dismissing the appeals, the Court

HELD: 1. The Trial Court, in effect, found:

(i) It had been established beyond any iota of doubt that the victim had sustained bullet injuries. It had also been proved that the incident had taken place and in the manner alleged.

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(ii) The contention of the defence that the injuries were not so life threatening or grave or serious as to attract Section 307 of the Indian Penal code was not acceptable, considering the testimony of three Medical experts who deposed with regard to the gravity and seriousness of the injury.

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(iii) The evidence of the FSL (Forensic Science Laboratory) Expert, coupled with Exhibit 92 established that an offence attracting the provisions of Section 307 of the Indian Penal Code had taken place.

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(iv) The recovery of the weapon in terms of Panchnama (Exhibit 88) was proved beyond reasonable doubt.

(v) Minor irregularities on the part of the investigation and, in particular, the casual manner in which the Investigating Officer (PW-14) testified would not vitiate the case of the Prosecution.

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(vi) The Appellant as also first accused were duly identified both by the complainant (PW-8) and the victim (PW-12) in course of identification parade held on 1st and 3rd January 2003 and they were also identified in Court. The mere fact that the Identification Parades were held on different dates would not render the identification unreliable.

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(vii) Both the eye-witnesses had identified the Appellant and the first accused as being the persons who were on the motorcycle. The motor cycle was driven by the Appellant and the first accused was the pillion rider. Both the eye-witnesses had

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- A seen the pillion rider, that is, the first accused handling the weapon. The victim clearly deposed that the first accused had fired at the victim at point blank range. The said witnesses remained unshaken despite extensive cross-examination.
 - (viii) The concerned Executive Magistrate who conducted
- B the identification parade (PW-11) corroborated the evidence of PW-12 and PW-8 with regard to the identification and he also could not be shaken despite extensive cross-examination.
- (ix) The Panchnama being Exhibit-88 relating to recovery of the weapon was duly proved by the oral testimony of Pancha witness (PW-10) who had also identified the Appellant.
- (x) The Prosecution had established from the ballistic report being Exhibit-92, and the evidence of FSL experts that the bullet that was extracted from the body of the victim, had been fired from the weapon recovered on the confession of the Appellant.
- D [Para 56][380-F-H; 381-A-H]
 - 2. The sessions Judge, correctly found that notwithstanding minor discrepancies, the Prosecution had successfully established the chain of events, linking the crime to inter alia the Appellant. [Para 57][382-A]
- E 3. In this appeal, this Court is not concerned with the conviction of the first accused. The involvement of the Appellant in the offences alleged has duly been established inter alia by the injury of the victim; extraction of bullet from the body of the victim; linking of the bullet to the weapon recovered on the confession of the Appellant upon Forensic examination; the evidence of two eye-witnesses to the crime, namely the complainant (PW-8) and victim (PW-12); Identification by the complainant and the victim of the Appellant in the Identification Parades as also in Court; Identification by the Pancha witness (PW-10) of the Appellant as the person at whose instance the weapon of offence was recovered. [Para 58][382-B-C]
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- H 4. The finding of the Sessions Court that the Prosecution had not been able to establish the involvement of the third accused, or to establish that the Appellant and the first accused were part of a conspiracy, which had targeted prominent leaders

of the Hindu community did not warrant interference. The High Court rightly dismissed the Criminal Appeal No.1145 of 2006, and allowed Criminal Appeal No.567 of 2006 filed by the Respondent State, only to the extent of enhancing the sentence of imprisonment *inter alia* of the Appellant to 7 years under Section 307 read with Section 114 of the Indian Penal Code, considering the gravity and seriousness of the offence. [Para 59][382-D-E]

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Iqbal and Another v. State of Uttar Pradesh (2015) 6 SCC 623 : [2015] 6 SCR 239; Salim Akhtar @ Mota v. State of U.P (2003) 5 SCC 499 : [2003] 3 SCR 470; Bodhraj @ Bodha and Others v. State of Jammu & Kashmir (2002) 8 SCC 45 : [2002] 2 Suppl. SCR 67 – referred to.

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Case Law Reference

[2015] 6 SCR 239	referred to	Para 41	D
[2003] 3 SCR 470	referred to	Para 49	
[2002] 2 Suppl. SCR 67	referred to	Para 49	

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 488-489 of 2017.

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From the Judgment and Order dated 29.09.2015 of the High Court of Gujarat at Ahmedabad in Criminal Appeal No. 1145 of 2006.

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Ms. Meenakshi Arora, Sr.Adv., M.M. Saikh, Ms. Monisha Handa, Mohit D. Ram, Ms. Jesal Wahi, Ms. Vishakha, Ms. Mamta Singh, Ms. Hemantika Wahi, Advs. for the appearing parties.

The Judgment of the Court was delivered by

INDIRA BANERJEE, J.

1. This appeal is against a common judgment and order dated 29th September 2015 passed by a Division Bench of the High Court of Gujarat at Ahmedabad, dismissing Criminal Appeal No.1145 of 2006, filed by the Appellant, partly allowing Criminal Appeal No.567 of 2006, filed by Respondent State, affirming the judgment and order of conviction dated 18th January 2006, passed by Additional City Sessions Judge (Court No.6)

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- A at Ahmedabad City in Sessions Case No.245 of 2004, but enhancing the sentence of rigorous imprisonment from six to seven years, for offence under Section 307 of the Indian Penal Code.
 - 2. The learned Sessions Judge had, by his aforesaid judgment and order convicted the Appellant and one Salim alias Salim Chaurala Yakubhai
- B Patel, hereinafter referred to as the first accused, of offence punishable under Section 307 read with Section 114 of the Indian Penal Code and Section 25(1)(B)(a) of the Arms Act read with Section 135 (1) of the Bombay Police Act for targeting and attempting to murder one Dr. Jaydeep Patel, hereinafter referred to as the victim, by aiding and abetting each other. The third accused, Abhasbeg Habibbeg Mirza, was acquitted of all the charges levelled against him.
- C 3. The learned Sessions Judge sentenced the Appellant and the first accused to undergo rigorous imprisonment for six years for offence under Section 307 read with Section 114 of the Indian penal Code, rigorous imprisonment for three years for offence under Section 25(1)(B)(a) of the Arms Act and rigorous imprisonment of six months for violation of Section 135(1) of the Bombay Police Act, to run concurrently. By the judgment and order under appeal, the High Court has *inter alia* confirmed the judgment and order of conviction of the appellant and the first accused, passed by the Session Judge, but enhanced the sentence of imprisonment
- D for offence under Sections 307/114 of the IPC to seven years instead of six.
- E 4. It is the case of the Prosecution that the victim, who was going to his laboratory from his residence at around 4.45 p.m. on 3.12.2002, in his Indica Car bearing the Registration No. GJI HE 1575, driven by his driver Jignesh G. Vyas, being the complainant, was shot near the Galaxy Cinema, from a pistol fired by the first accused, from a motorbike, driven by the Appellant, on which the first accused was the pillion rider.
- F 5. When the car had to slow down to negotiate a speed breaker, as it was approaching the Galaxy Cinema, the Appellant suddenly stopped the motorbike beside the victim's car, on the side the victim was sitting, and the first accused took out a pistol and fired at the victim, after which the Appellant and the first accused fled the scene of occurrence. The bullet pierced the glass window and hit the victim on his face.
- G 6. It appears that, after the victim was shot, he instructed the complainant to take him to the Hospital of Dr. Pareshbhai, which was
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nearby. However as Dr. Pareshbhai was not available, the victim was taken to Anand Surgical Hospital of one Dr. Narender Sanghvi, at Siazpur, where the victim was given preliminary treatment. On the advice of Dr. Singhvi, that the victim should be taken to a better equipped hospital, the victim was rushed to Sterling Hospital. In the meanwhile, the complainant filed a complaint under Section 157 of the Criminal Procedure Code with the police who had rushed to the Anand Surgical Hospital on getting information of the incident. The complaint was forwarded to Naroda Police Station and registered as ICR 530/02.

7. Thereafter, the police took up investigation, examined the complainant, went to the place of occurrence, seized articles such as pieces of broken glass etc. Later, the clothes worn by the victim when he was shot, the mats of the car and a cover kept on the rear seat of the car, described as carpet which contained human blood etc., and other articles found inside the car were also seized. After the bullet was operated and removed and the victim was in a position to be examined the Investigating Officer recorded his statement. The first accused and the Appellant were arrested on 30.12.2002 and 31.12.2002 respectively. Identification Parade of the first accused was held on 2.1.2003 and that of the Appellant, arrayed the second accused on 4.1.2003. While the accused were in custody, the weapon used for the offence was recovered by the police on the confession of the Appellant, from the place shown by the Appellant.

8. Three weapons- a country made pistol, a pistol apparently made in England and another pistol apparently made in China, were recovered from underneath the earth in an open ground near the Shahalam Dargah, described in the Panchnama under which they were seized. The weapons were sent to the Forensic Science Laboratory for analysis and test as also the bullet recovered from the body of the injured.

9. The prosecution has alleged that the victim was targeted as a sequel to the communal riots in Ahmedabad after the Godhra incident, which had taken place in February 2002. The accused had entered into a conspiracy to target and finish off prominent members of the religious community, to which the victim belonged. The accused persons accordingly started monitoring the movements of the victim, a prominent member of a religious organization and its Secretary at the time of the riots, who ran a pathological laboratory.

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- A 10. After the investigation was completed, charges were framed against the first accused, the appellant, arrayed as the second accused, and one Abhasbeg Habibeg Mirza arrayed as the third accused and the case was committed to the Sessions Court and registered as Sessions Case No.245 of 2004.
- B 11. To substantiate its case, the prosecution examined following 14 witness including the complainant and the victim, who were eye witnesses:-
1. Haribhai Jethabhai
 2. Jaimini P Patel
 - C 3. Mahesh Ravjibhai Patel
 4. Punambhai Ranchodbhai Patel
 5. Dr. Narendra P Sanghvi
 - D 6. Devang M Parikh
 7. Pareshkumar P Jethwal
 8. Jignesh G. Vyas
 9. Dr. Anil Bansal
 - E 10. Pradip Mohanbhai Patel
 11. Mohmedyunus A Mansuri
 12. Dr. Jaydeep A Patel
 13. Dr. Shreekant Prabhakar
 - F 14. Gagabhai L khunti
12. The Prosecution also relied upon the documentary evidence such as, the complaint filed by the complainant, medical reports/ certificates of the victim, Panchnama prepared at the scene of occurrence, Panchnamas relating to recovery of articles, clothing etc.
- G Panchnamas relating to identification of the first accused and the Appellant (second accused), Panchnamas relating to recovery of weapons on the basis of the statement of the Appellant and the bullet extracted from the body of the victim, Forensic Science Laboratory Reports, the Lie Detection Analysis Report etc.
- H 13. The victim who had himself deposed as the 12th Witness (PW-12) said that the incident had occurred around 4.45 p.m. on 3rd December

2002, when the victim was on his way to his pathological laboratory from his home, in his car being a Tata Indica car, with Registration Number GJI HE 1575, which was being driven by the complainant being his driver. The victim deposed that he was seated at the back, on the left side of the car. When the car was passing by the Galaxy Cinema, it slowed down at a speed breaker. As the car negotiated the speed breaker, there was a noise from the left which the victim, later in cross examination, explained as the sound of an approaching motorbike. On hearing the noise, the victim turned in the direction of the motorbike, which was by the side of the car, and saw that there were two persons on the motor cycle. The pillion rider had a weapon, which looked like a pistol, in his hand. The pillion rider opened fire. The victim was hit by the bullet and he slumped to the right. He said he was taken to the hospital of Dr. Pareshbhai which was near his laboratory but the Doctor was not there. He then asked his driver to take him to Anand Surgical Hospital. He was in severe pain. They reached Anand Surgical Hospital and narrated the incident to Dr. Narendra Sangvi. Dr. Sanghvi started treatment, took an X-ray and gave primary treatment but recommended that the victim should be taken to a bigger hospital. Thereafter, the victim was shifted to Sterling Hospital. The victim further deposed that after examining diagnostic reports, the doctors of Sterling Hospital decided to operate on the victim. The operation was performed on 4th December 2002 at the Sterling Hospital and the bullet was removed. The victim remained admitted in Sterling Hospital for about 8 days as an indoor patient, after which he was discharged on 11th December 2002. He said that due to the injury, the bone below his left eye was broken for which he had to undergo treatment for about six months after his discharge from the hospital. He said that the vision of his left eye had deteriorated because of the injury.

14. In course of his examination, the victim asserted that he had seen and could recognize both the Motorcyclists - the driver and the pillion rider, whom he had identified at the Test Identification parade, and also in Court.

15. The complainant deposed as the eighth witness (PW-8). This witness (PW-8) deposed that he had to slow down the car near Galaxy Cinema as there was a speed breaker. At that time there was a bike behind the car with two persons. The person in front had dark glasses and a black cap. PW-3 said that just as he negotiated the speed breaker, he heard the sound of firing and on turning to his left he found that the

- A persons on the bike were driving away towards Chandresh Nagar Society. The person sitting on the pillion had a weapon that looked like pistol or a revolver, which he put into the pocket of his jacket. When PW-8 looked behind he found that the left eye of the victim was bleeding.

16. This witness confirmed that he first took the victim to the hospital of Dr. Pareshbhai but the Doctor was not there. The victim was therefore taken to Anand Surgical Hospital of Dr. Narender Sanghvi, where the victim was given primary treatment. While the treatment was going on, the police arrived and took his complaint. This witness identified the complaint made by him and stated that the police officer had also signed the complaint in his presence. He confirmed that the facts stated in the complaint were true.

17. This witness also stated that in deference to the advice of Dr. Narender Sanghvi that the victim should be taken to a better equipped hospital, the victim was shifted to Sterling Hospital on the same day. On the next day, the complainant showed the police the place of occurrence. The police made investigations.

18. This witness (PW-8) stated that on 4th January 2003, the police summoned him to Gheekanta Court. The Court peon made this witness sit outside the Court for about 15 to 20 minutes after which he was taken to the Court room before the Judge, and the Judge asked him to identify the accused from out of six persons. This witness identified the person driving the motorcycle. The person identified by PW-3 stated that his name was Mustak @ Kanio. After the identification, the Judge asked the complainant to go out.

19. In Court this witness again identified the said person whom he had earlier identified during the identification parade and who had stated that his name was Mustak @ Kanio. This witness also identified the person driving the motor cycle, being the first accused, in Court.

20. This witness said that on the left back door of the vehicle there was a small glass with a steel strip fitted to it. The bullet came from the said strip and the glass cracked. Pieces of glass fell on the back seat. The board at the back where speakers had been kept, the back seat belt as also the carpet on the seat were stained with blood. This witness also identified the clothes worn by the victim at the time of the incident.

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21. This witness was cross-examined at length. He, however, remained unshaken in cross-examination. He confidently deposed that the motorcycle was a Yamaha motor cycle. Though he did not know its number. He confirmed that he had identified the second accused at the identification parade and he had identified both the Appellant (second accused) and first accused (Salim) in Court, as the Driver of the motorcycle and the pillion rider, who had opened fire.

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22. The recovery of the weapon with which the offence was committed, on the confession of the appellant, from underneath the ground from the place shown by the Appellant has been proved by the oral evidence of the Pancha Witness, Pradip Mohanbhai Patel who deposed as the tenth witness (PW-10). This witness also identified the Appellant in Court, as the person at whose instance three weapons were recovered by the police, in his presence.

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23. The Judicial Magistrate who conducted the Test Identification Parade namely Mohmedyunus A. Mansuri, deposed as the eleventh witness (PW-11). He corroborated identification of the Appellant by the complainant and the victim at the Test Identification Parades conducted by him.

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24. Three doctors have deposed in this case. Dr. Narendra P. Sanghvi who deposed as PW-5 stated that he gave primary treatment to the victim, conducted tests and recommended that the victim be taken to a bigger, better equipped hospital, considering the gravity of his injury. 9th Prosecution Witness (PW-9), Dr. Anil Bansal, Chief Medical Officer, Sterling Hospital deposed that the victim had been brought to Sterling Hospital at around 6:30 p.m. on 3rd December, 2002. He appeared to have been injured by a bullet. This witness along with other Doctors had physically examined the victim. It appeared that he had a wound of one centimeter below the left eye but he was fully conscious and his pulse, blood pressure etc. were normal. This witness deposed that the victim was immediately shifted to the operation theatre where he was operated upon and the bullet was taken out. The victim was discharged from the hospital on 11th December 2002.

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25. This witness also identified the certificate issued by the hospital to the victim regarding his injuries and treatment. He said that the certificate was issued in printed form but he identified his hand writing and signature on the certificate. This witness observed that the injuries

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- A sustained to the patient could be said to be serious because bullet had entered the neck of the patient from lower part of left eye.

- 26. The 13th Prosecution Witness (PW-13), Dr. Srikant, a Surgeon said that on 4th December 2002 he along with his team of Doctors had performed surgery of the victim who had a bullet injury. The bullet was
- B lodged on the left side of the neck. This Doctor described how the bullet had been taken out. This Doctor also opined that the bullet was lodged in a vital part of the body.

- 27. From the depositions of the witnesses named above and the documents relied upon, there can be no iota of doubt that the victim was
- C shot on 3rd December 2002 at around 4:45 p.m. near the Galaxy Cinema while he was on his way from his home to his pathological laboratory in his Indica Car driven by his driver, the complainant. Both the complainant (PW-8) and the victim (PW-12) have deposed that while the said car slowed down near Galaxy Cinema to negotiate speed breaker a motor cycle which was following the car pulled up to the left, the pillion rider pulled out pistol and fired at the victim (PW-12) at point blank range and fled away. Both the complainant and the victim have as eye witnesses, identified the Appellant.

- 28. The Appellant did not examine any witness. After the 14 prosecution witnesses named above were examined the Appellant was
- E examined under Section 313 of the Criminal Procedure Code. His defence was of total denial.

- 29. Ms. Meenakshi Arora, learned senior counsel appearing on behalf of the Appellant submitted that the Test Identification Parade of the Appellant had been conducted contrary to the rules of evidence and
- F failed to establish the identity of the Appellant. She argued that as per the case of the Prosecution, the only two eye witnesses were the complainant (PW-8) and the victim (PW-12). However, the Appellant who had been arrayed as the second accused had only been identified by PW-8.

- G 30. From the judgment and order of the Sessions Court, duly affirmed by the High Court, it appears that the Appellant has been identified by both the victim (PW-12) and the complainant (PW-8) apart from the Pancha witness (PW-10). Be that as it may, the testimony of an injured victim is sufficient for conviction.

31. To impress upon this Court that the complainant being the driver of the car could not have recognized the Appellant, Ms. Arora pointed out that the complainant had, in his complaint stated “I saw then two persons were on the back behind my car, out of them the person plying had put on black goggles and black cap”. In his testimony in Court he said:-

“.....I saw back side from centre mirror. At that time two persons were coming on bike after me, wherein the person in front had put on black glasses and back cap” (examination in chief)

.....Thereafter on 4/1/2003 the police summoned me at Gheekanta Court. I reached over there between 3.45 to 4.00 O’ clock evening. The peon made me seated outside of court at the sitting place and I was again called after about fifteen to twenty minutes. I was taken in the Court room before the Judge and the Judge over there asked me my name, address etc. Thereafter asked me to identify the person I could identify from six persons. That I had identified a person standing third and fourth in the middle and caught and dragged his hand. The Judge asked name to this person and the person stated his name to be Mustak alias Kanio. On completion of the procedure the (Judge) asked me to go. (examination in chief)

“..... It is true that, I have never seen any of the person seated on the motor cycle prior the incident. It is true that I saw only back of person seated in back of the motor cycle. Said motor cycle went away from the place of incident at a speed of about forty to fifty kilometer. It is true that, after the incident the motor cycle went away on rough road turning by left back side door of our car. Said motor cycle did not go from front of our car but turned on left side back door of our car and went away” (Cross-examination)

It is true that I saw the motor cyclist, heard the blast, and the motor cyclists were turned towards Chandresh Nagar, all this was happened just within blink of eye

It is true that at the very same time I saw the motor cyclists turning towards Chandreshnagar. It is true that the road on which our vehicle was, is very busy road. It is not true that it

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- A *was not the Yamaha Motor cycle but was the motor cycle like Yamaha. The witness empathetically states that, it was the Yamaha motor cycle only. It is true that, on occurrence of incident I did not come out from the car. For the first time I came out from the car after reaching to hospital of Dr. Paresh Shah, at that time Jaydipbhai was also taken out of car....*
- B *It is true that especially about physical description of the persons ride on motor cycle I only knew that they could be twenty to twenty five years of age.*
- C *It is true that, none of the person in identification parade were wore gape or glasses. It is true that, none of the person from identification parade had subtle eye.*

(cross-examination)

- D 32. Referring to the evidence of the complainant, as extracted above, as also the part of the complaint extracted above, Ms. Arora emphatically argued that the complainant could not possibly have identified the Appellant with certainty as the Appellant had been wearing dark glasses and a cap, the motor cycle was behind and not in front of the car, the complainant had seen the Appellant from the rear mirror when the motor cycle was at a speed of 40-50 kilometers per hour and the motor cycle had turned away within the blink of an eye, after the complainant turned around on hearing the pistol shot.

- F 33. With the greatest of respect, the evidence of the witnesses have to be read as a whole. Words and sentences cannot be truncated and read in isolation. The witness has categorically stated that he would be able to identify and actually identified the driver of the motor cycle as the Appellant. The PW-11 being the Judicial Magistrate has corroborated identification of the Appellant by the complainant in the Test Identification Parade.

- G 34. Ms. Arora thereafter referred to Testimony of PW-11, Mohmedyunus A Mansuri, the Judicial Magistrate who conducted the Test Identification Parade and in particular the following portions:-

“The accused of this case was brought before me in the court room at 16.30 hours on 2/1/2003, the name, address was asked to the accused and same was verified, they were made to sit in the court....

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.....*Thereafter, called five dummy persons from outside through my peon. In the meantime the witnesses of the case had not come and my another peon had informed about they came at 16.35 o'clock.*(examination in chief) A

..... *It is true that the accused was not produced covered in the veil.....* B

.....*It is true that, physical description of none of the dummy are given in the panchnama. It is true that, in the yadi exhibit-64 it has been mentioned that the accused is aged about twenty to twenty five years. It is true that none among the dummy is aged 27 years.....* C

.....*I did not ask the witness as to have you seen the accused before the identification parade or not.*

It is true that it was appeared from the yadi that two persons were the motor cyclist and had put on black goggles and black cap and were aged about twenty to twenty five years of age. It was also appeared from the yadi that the pillion rider had put on black jacket and black jeans. It is true that it was also mentioned in the yadi that the complainant can identify the motorcyclists and the witness can identify the person who executed fire. From yadi exhibit-64 I did not feel that the accused Salim was the driver of the motorcycle..... D E

It is true that, in spite of my instructions both the accused were not brought to me covered under veil at the time of identification parade. I have not done any proceedings for the police did not follow such clear instruction from me. It is true that from both the yadis I had realized that which witness could identify to which accused. F

It is true that, there is a corridor outside of my court room and thereafter the compound wall is situated. It is true that, too many members of the police and public are in both places the corridor as well as compound. It is true that, I cannot say anything that if the witness and accused were introduced to me when the witness and the accused were brought to me..... G

....At both times I did not feel that none of the dummy is fit and he should be sent back. I did not take into consideration H

A *the age, height, look and cloths of dummy. It is true that now even I am unable to give description of one dummy even.....*

.....It is true that, after arranging the accused with the dummy in line, my peon had gone to call the witness, this was happened at both the times. It is true that, I cannot say that

B *during both this time if any conversation could have taken between my peon and the witness.....*

.....It is true that, during both the panchnama I did not enquire to accused. It is true that, after completion of the panchnama, none of the witness from both did not inform that for which reason he has identified the accused...."

C 35. From the evidence of the PW-11, being the Judicial Magistrate, it appears that the Appellant as well as the dummies were brought before the Judicial Magistrate before the witnesses arrived. It is clear that the Appellant was duly identified by the eye-witnesses. The defence has D not been able to show any such infirmity in the Identification Parade of the Appellant which vitiates the Identification.

E 36. The suggestion of there being many police men in the corridor as also members of the public insinuates that the witnesses may have been tipped off by the police. Apart from the fact that there is absolutely no evidence of any interaction between the witnesses and the policemen, the Judicial Magistrate has deposed that the Appellant was brought in before him, before the witnesses arrived. From the tenor of the oral evidence of the Judicial Magistrate, it is patently clear that he deposed truthfully and did not try to cover up any loopholes or lacunae.

F 37. Ms. Arora's submission that the Sessions Court accepted that the identity of the Appellant had not been established, but at the same time convicted the Appellant on the basis of the testimony of the same witnesses, is difficult to accept. The portion of the judgment of the Trial Court relied upon by Ms. Arora is extracted hereinbelow:-

G 30. It has been vehemently argued and, in my opinion, I may even venture to say that, the arguments are not entirely devoid of merit, that there are some doubts with regard to the identity of accused No.1 & 2 as being the perpetrators of the offence herein. There is some merit in the submission made on behalf of the defence that, though the accused Nos.1 & 2 were already in the custody H of the Naroda police on accused of their being arrested in

connection with some other offence, there is no worthwhile reason as to why their arrest was affected in the present offence nearly a week thereafter. There is further merit as to why since both the accused were already in police custody i.e. to say custody of the Naroda Police on the relevant dates, the identification parades were separately held on 01.01.2003 and 03.01.2003 respectively. It is also necessary to note that, no satisfactory explanation has been forthcoming from the Investigating Officer PW-14, who has in my opinion, has testified in a rather casual manner and not too serious fashion.....”

38. The judgment of the Sessions Court has to be read in entirety. Even though the Trial Court made certain observations with regard to the casual manner in which the Investigating Officer had testified, the Trial Court found that the first accused and second accused had positively been identified by both the concerned eye witnesses i.e., PW-12 and PW-8.

39. The relevant part of the judgment is extracted hereinbelow :-

“31. It is required to be noted that, both the accused nos. 1 & 2 have been positively identified in the course of valid identification parades by both the concerned eye witnesses i.e. to say PW-12 & PW-8 respectively as being the persons, who has come on the motor cycle driven by accused no.2 of which, the accused no.1 was a pillion rider and what further emerges is the undisputed and uncontroverted fact of the accused no.1 pulling out a pistol like weapon and firing it at Dr. Jaydeep Patel at a point blank range. The identification parades exhs. 65 and 67 respectively are corroborated by PW-11 being the executive magistrate and Mohmedyunus A. Mansuri and are further corroborated and supported by the testimonies of PW-12 & PW-8 respectively and despite extensive cross-examination by the Learned Advocate for the defence, the testimony of all the three witnesses has withstood the test of cross examination and the cumulative effect of such testimonies make me unhesitatingly come to a conclusion that, both the accused Nos. 1 & 2 were positively identified in the course of the identification parades by PW-12 & PW-8 respectively.....”

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- A 40. We are unable to accept Ms. Arora's submission that the High Court erred in dismissing the appeal and upholding the conviction, with the observation that the witnesses had extensively been cross-examined by the defence, but nothing incriminating had emerged in the cross-examination to disbelieve there evidence. It is a matter of record that both the witnesses had in the course of separate Test Identification Parades, positively identified the first accused as well as the Appellant herein.
- B 41. Ms. Arora's submision that the Courts below had erred in holding that the Appellant had positively been identified by Prosecution Witnesses is also not sustainable. The identity of the Appellant has been proved beyond reasonable doubt, by the eye-witnesses to the crime as well as the Pancha witness. It may be true that conviction based on erroneous identification and a faulty Test Identification Parade cannot be sustained. The proposition of law in *Iqbal and Another vs. State of Uttar Pradesh*¹ cited by Ms. Arora is unexceptionable. However, in this case, the Appellant had actually been identified by both the victim and the complainant and also in Court by the Pancha witness (PW-10), as observed above. The identification cannot be said to be erroneous. Nor did the Test Identification Parade suffer from such infirmity as to vitiate the identification itself.
- C 42. Ms. Arora next submitted that the prosecution has not been able to establish the chain of custody of the bullet which was removed by Dr. Shrikant (PW-13) from the body of the victim. She referred to Dr. Shrikant's deposition that:-
- D "After the surgery we gave the bullet to sister we took out from body of the patient, Sister means Standing Nurse, I do not have person knowledge that she gave it to whom, we gave her loose bullet. It is true that in medico-legal case when any bullet is taken out from body of anyone, then the care should be taken that no scratches whatsoever appeared on such bullet or it does not get damaged in other way. I do not know anything as to such bullet should be kept in free box and to be sent to the F.S.L. It is true that nowhere I have mentioned any description of said bullet." (Cross-examination @ Pg. 118-119)"
- E 43. Ms. Arora further pointed out that the Investigating Officer being the 14th Prosecution Witness (PW-14) had in his evidence stated
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“Today I did not recall that whether the bullet which was produced before me by Sterling Hospital was in sealed condition or not.....”
(Cross examination).

44. Ms. Arora argued that when conviction is based on firing of a bullet, the Prosecution has to establish that the same bullet has been sent for forensic examination. The Prosecution failed to do so. Ms. Arora questioned the correctness of the following findings of the Trial Court:-

“The panchnama Exh.82 again finds corroboration and therefore, though much has been made out with regard to the mode of handing over the bullet to the Investigating Officer not being in accordance with the provisions of law, I am of the opinion that, even if some irregularities are found to have taken place, the same cannot undermine and negate the prosecution version to the extent of giving a clean chit or thereby resulting in the acquittal of the accused Nos. 1 & 2 as sought for by the defence”

45. We do not find any such error in the findings of the Session Court to warrant interference. When there is a time gap between an occurrence and the trial it is impossible for police/Investigating Officer to recall minute details. Nor is it possible for a surgeon performing an operation to remove a bullet from the body of a patient to throw light on the chain of custody of the bullet, after it was made over to the attending Nurse. There was sufficient incriminating evidence for conviction of the Appellant.

46. Ms. Arora also argued that conviction of the Appellant placing reliance on alleged recovery of a weapon from an open ground cannot be sustained. In support of her submission she referred to the testimony of the Investigating Officer (PW-14) extracted hereinbelow:-

“....On 5/1/2003 the accused Mustak Ahmedbhai Shaikh expressed his willingness to show the weapon used in this offence as well as two other weapons which were hide buried in the ground opposite of Shahalam.....

we came to Shahalam Darwaja, where the accused told that the Jeep would no go further, therefore we get down, the accused walked ahead and from shahalam Dargah came into an open ground from a street on opposite side and he removed the sand from the ground and took out and showed a weapon in a cloth bag which were two Pistols and Tamanca for which a detailed

A panchnama was drawn and seized and packed all the three separately and sealed them, a chit duly signed by the panchas was placed in it and were sealed.”

47. Ms. Arora argued that the Prosecution could not have relied on recovery of a weapon from an open field after one month from the B date of the alleged incident. PW-14, Investigating Officer, could not stand the test of cross-examination with regard the description of the place of alleged recovery and the direction thereto. To buttress her arguments, Ms. Arora referred to the cross-examination of the PW-14 where he stated:-

C “it is not true that the place from where the accused found the weapon is situated too far and deep from the main road. I do not recall now that after getting down from the Jeep and to reach to the place, it comes after three curves, or not, I do not recall now. It is true that too many residential houses comes on the way, I D cannot say that what is situated in front of row of those residential houses. It is true that the place from where the weapon was found out was open space, there was no traffic. I have not recorded statement of anyone from the residential houses situated nearby the said place.”

48. In my considered opinion, minor discrepancies in evidence E and inability to recall details of the description of houses, roads and streets after several years, do not vitiate the evidence of recovery itself. The Appellant showed the police the spot where the weapons had been hidden under the sand. The Trial Court upon appreciation of evidence on record very rightly held:-

F “Again providing positive corroboration to the entire version is the fact of the discovery of the muddamal weapon in terms of the panchnama exh.88 at the behest of accused no.2 which panchnama, positively establishes the recovery of the muddamal. The said panchnama derives independent corroboration and support in the testimony of PW-10 Pradeep Mohanbai Patel, who has not only positively identified accused No.2 but has also given a complete corroboration to the process reflected in the panchnama exh.88. The Panch witness has also, in my opinion, clearly withstood the test of extensive cross-examination and in my opinion, there is no reason to discard or disbelieve such witness.

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..... The prosecution in my opinion, has successfully established the chain of events linking the tanking place of the incident, establishing the positive identity of accused Nos.1 & 2, recovery of the muddamal weapon at the behest of accused No.2.

49. In support of her submission that recovery from an open place accessible to all was vitiated and could not have been relied upon for conviction of the Appellant, Ms. Arora cited the following judgments:-

1. *Salim Akhtar @ Mota v. State of U.P*²
2. *Bodhraj @ Bodha and Others v. State of Jammu & kashmir*³

50. From the evidence and materials on record it cannot be said that recovery of the weapon of offence was from an open place accessible to all. The weapons were dug out from underneath the sand in an open ground behind the Shah Alam Dargah.

51. Ms. Arora finally argued that the Prosecution had failed to prove motive and conspiracy which was essential to convict the Appellant. However, where the firing had taken place and there were eye witnesses to the firing, it was not necessary to establish a motive. At the cost of repetition it is reiterated that both the Appellant and the first accused were identified by the eye witnesses to the firing, being the complainant (PW-8) and the Appellant.

52. The prosecution may not have been able to prove the greater conspiracy of targeting the prominent leaders of the Hindu community. The inability of the Prosecution to establish greater conspiracy led to the acquittal of the third accused. It is well settled the minor discrepancies in the evidence does not vitiate a conviction. The discrepancy if any in the timing is insignificant. PW-8 in his cross-examination stated that the incident took place between 4.45 to 5.00. p.m. on 3.12.2002. The victim has said the incident occurred at around 4.45. p.m. They both stated that the incident took place near Galaxy Cinema.

53. In course of the trial, the Trial Court has considered the evidence on record at length. It is reiterated that the eye witnesses to the crime being the victim and the driver of his car, the complainant confidently identified the Appellant and first accused and they could not be shaken in cross-examination. PW-10 testified to the recovery of

² (2003) 5 SCC 499 Para 9-12

³ (2002) 8 SCC 45 para 18

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- A offence in his presence, at the instance of the Appellant and also identified the Appellant in Court. Considering the gravity of offence and the seriousness of the injury and the manner in which the victim was shot, there can hardly be any doubt that the attempt was to murder the victim. The High Court confirmed the judgment and order of conviction but enhanced sentence under Section 307 read with 114 of the Indian Penal Code to seven years instead of six.
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54. The Trial Court after considering the evidence on record and after hearing the Prosecution, the Appellant and the other accused found that the third accused was not present at the place of occurrence and there was no evidence to establish that he was part of any conspiracy.

- C The third accused was accordingly acquitted. The Sessions Court, however, found the Appellant and first accused guilty and convicted them of offences punishable under Section 307 read with Section 114 of the Indian Penal Code read with Section 25(1)(B)(a) of the Arms Act read with Section 135(1) of the Bombay Police Act for having committed
- D the offence of aiding and abetting each other in targeting and attempting to murder the victim.

55. The Sessions Court sentenced the Appellant to undergo rigorous imprisonment for 6 years for offence under Section 307 read with Section 114 of the Indian Penal Code, rigorous imprisonment for 3

- E years for offence punishable under Section 25(1)(B)(a) of the Arms Act and rigorous imprisonment for 6 months for violation of Section 135(1) of the Bombay Police Act. The sentences were to run concurrently and the time spent by the Appellant in judicial custody was ordered to be set aside while computing the total period of sentence.

- F 56. The Trial Court, in effect, found:

- (i) It had been established beyond any iota of doubt that the victim had sustained bullet injuries. It had also been proved that the incident had taken place and in the manner alleged.
- (ii) The contention of the defence that the injuries were not so life threatening or grave or serious as to attract Section 307 of the Indian Penal code was not acceptable, considering the testimony of three Medical experts who deposed with regard to the gravity and seriousness of the injury.
- (iii) The evidence of the FSL (Forensic Science Laboratory) Expert, Mukesh N. Joshi coupled with Exhibit 92 established

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that an offence attracting the provisions of Section 307 of A
the Indian Penal Code had taken place.

- (iv) The recovery of the weapon in terms of Panchnama (Exhibit 88) was proved beyond reasonable doubt. A
- (v) Minor irregularities on the part of the investigation and, in particular, the casual manner in which the Investigating Officer (PW-14) testified would not vitiate the case of the Prosecution. B
- (vi) The Appellant as also first accused were duly identified both by the complainant (PW-8) and the victim (PW-12) in course of identification parade held on 1st and 3rd January 2003 and they were also identified in Court. The mere fact that the Identification Parades were held on different dates would not render the identification unreliable. C
- (vii) Both the eye-witnesses had identified the Appellant and the first accused as being the persons who were on the motorcycle. The motor cycle was driven by the Appellant and the first accused was the pillion rider. Both the eye-witnesses had seen the pillion rider, that is, the first accused handling the weapon. The victim clearly deposed that the first accused had fired at the victim at point blank range. The said witnesses remained unshaken despite extensive cross-examination. D
- (viii) The concerned Executive Magistrate who conducted the identification parade (PW-11) corroborated the evidence of PW-12 and PW-8 with regard to the identification and he also could not be shaken despite extensive cross-examination. E
- (ix) The Panchnama being Exhibit-88 relating to recovery of the weapon was duly proved by the oral testimony of Pradeep Mohanbhai Patel (PW-10) who had also identified the Appellant. F
- (x) The Prosecution had established from the ballistic report being Exhibit-92, and the evidence of FSL experts that the bullet that was extracted from the body of the victim, had been fired from the weapon recovered on the confession of the Appellant. G

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A 57. The sessions Judge, in our considered opinion, correctly found that notwithstanding minor discrepancies, the Prosecution had successfully established the chain of events, linking the crime to *inter alia* the Appellant.

B 58. In this appeal, we are not concerned with the conviction of the first accused. The involvement of the Appellant in the offences alleged has, in our opinion, duly been established *inter alia* by the injury of the victim; extraction of bullet from the body of the victim; linking of the bullet to the weapon recovered on the confession of the Appellant upon Forensic examination; the evidence of two eye-witnesses to the crime, namely the complainant (PW-8) and victim (PW-12); Identification by the complainant and the victim of the Appellant in the Identification Parades as also in Court; Identification by the Pancha witness (PW-10) of the Appellant as the person at whose instance the weapon of offence was recovered.

C 59. The finding of the Sessions Court that the Prosecution had not been able to establish the involvement of the third accused, or to establish that the Appellant and the first accused were part of a conspiracy, which had targeted prominent leaders of the Hindu community did not, in our view, warrant interference. In our view, the High Court rightly dismissed the Criminal Appeal No.1145 of 2006, and allowed Criminal Appeal No.567 of 2006 filed by the Respondent State, only to the extent of enhancing the sentence of imprisonment *inter alia* of the Appellant to 7 years under Section 307 read with Section 114 of the Indian Penal Code, considering the gravity and seriousness of the offence.

D 60. For the reasons discussed above, we dismiss this Appeal and affirm the conviction of the Appellant and the sentence imposed upon the Appellant as enhanced by the High Court.

Ankit Gyan

Appeals dismissed.

