

ARSHAD HUSSAIN

v.

STATE OF RAJASTHAN

(Criminal Appeal No. 889 of 2009)

JULY 17, 2013

[P. SATHASIVAM AND J. CHELAMESWAR, JJ.]

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Penal Code, 1860 – s.302 – Murder – Alleged against 3 accused – Conviction of all the 3 by trial court – High Court confirmed the conviction of only A-1 – Acquitted A2 and A3 on the ground of alibi – Appeal by A-1 – Held: In view of the evidence and the reasoning of High Court as regards alibi, prosecution seems to have suppressed the genesis and the manner in which the incident took place – Therefore, entire prosecution story liable to be rejected – There are also other infirmities in the prosecution case – Hence A-1 entitled to benefit of doubt and acquitted.

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Appellant-accused (A-1) was prosecuted u/s. 302 r/w. s.34 IPC alongwith A-2 and A-3. The prosecution case was that when the complainant party was coming on scooters, A-2 and A-3 came and stopped their scooters, and when they got down from their scooters, A-2 and A-3 called out A-1 to fire at them. A-1 fired 3 rounds, which resulted in death of the deceased. Trial court convicted all the three accused. High Court confirmed the conviction of A-1 but acquitted A-2 and A-3 believing their plea of alibi. Hence the present appeal.

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Allowing the appeal, the Court

HELD: 1. The contents of the FIR, the statements of the prosecution witnesses as well as the reasoning of the High Court clearly show that the incident had not taken place as alleged by the prosecution. The prosecution had suppressed genesis and the manner in which the

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A incident took place. Thus in the absence of specific
assertion by PWs 4, 5, 6 and 7, the role of the appellant
and also in the light of the conclusion by the High Court
accepting the alibi pleaded by A-2 and A-3, the entire
prosecution case could not be believed. [Paras 14 and
B 15] [963-B-D]

2. Each of the cartridges used in the 12 bore gun has
180 pellets. Thus after firing 540 pellets, i.e., 3 rounds, it
is not possible that none of the witnesses or the brothers
of the appellant did not receive a single pellet though they
C were within 7 feet radius. This aspect has not been
clarified by the prosecution. In addition to the above
infirmities, no scooter was recovered from the place of
incident. Likewise, the story relating to recovery of gun
from the custody of the appellant-accused is also
D doubtful. There is no evidence as to how and when the
gun was kept by the appellant under the bed and
thereafter got recovered from his own house. The story
of recovery of the gun at the information of the appellant
is ex facie concocted and unbelievable. [Paras 16 and 17]
E [963-E; 964-B-D]

3. When the genesis and the manner of the incident
is doubtful, the accused cannot be convicted for the
offence punishable under Section 302 IPC. Inasmuch as
the prosecution failed to establish the circumstances in
F which the appellant was alleged to have fired at the
deceased, the entire story has to be rejected. In such
circumstances, the appellant is entitled to the benefit of
doubt, and accordingly his conviction and sentence is
set aside. [Paras 18 and 19] [964-E, G]

G CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 889 of 2009.

From the Judgment & Order dated 30.04.2008 of the High
Court of Judicature for Rajasthan at Jodhpur in D.B. Criminal
H Appeal No. 586 of 2004.

Sushil Kumar Jain, Puneet Jain, Pratibha Jain for the Appellant. A

Dr. Manish Singhvi, AAG, Pragati Neekhra for the Respondent.

The Judgment of the Court was delivered by B

P. SATHASIVAM, J. 1. This appeal has been filed against the judgment and order dated 30.04.2008 passed by the High Court of Judicature for Rajasthan at Jodhpur in Criminal Appeal No. 586 of 2004 whereby the Division Bench of the High Court dismissed the appeal with regard to the appellant herein while setting aside the conviction and sentence imposed upon rest of the two appellants therein by the Court of Sessions, Udaipur, vide order dated 18.05.2004 in Session Case No. 96 of 2001 for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code, 1860 (in short 'the IPC'). C D

2. Brief facts

(a) As per the prosecution case, on 18.12.2000, at around 10:30 p.m., Nizam (the complainant), Iqbal, Jamil and Moin were returning back to Khanji Peer, Udaipur on two scooters after having meals at Mulla Talai, Udaipur, in-laws' house of Iqbal. At that time, when all four of them reached near the house of Ashfaq, all of a sudden, Shahjad and Mujaffar, sons of Ashfaq, came in front of their scooters and stopped them. On seeing them, Iqbal got down from the scooter and asked as to what is the matter? Immediately, Shahjad and Mujaffar shouted 'Arshad fire'. On hearing the same, Arshad, who was standing in the verandah of his house with a gun, fired three shots which hit on the chest and shoulder of Iqbal, as a result of which, he fell down. Nizam, Jamil and Moin, who were also standing closer to Iqbal, ran away from the spot. E F G

(b) Thereafter, Nizam (the complainant), Jamil and Moin took Iqbal to the hospital in the car of Raja@Siraj (PW-7) and H

A submitted a written report (Exh. P-1) to Nazir Khan, Sub-Inspector of Police (PW-19), posted at P.S. Surajpol, Udaipur, on the basis of which, a First Information Report (FIR) being No. 523 of 2000 (Exh. P-52) was registered against Arshad Hussain (A-1), Mujaffar (A-2) and Shahjad (A-3) under Sections
B 341, 302 read with Section 34 of IPC and Section 30 of the Arms Act, 1959. It was also stated in the written complaint that there was old enmity between Ashfaq and Iqbal and the said incident was a pre-determined plan in order to kill him and also that he had seen the gun in the hands of Arshad while running
C away.

(c) After filing of the chargesheet, the case was committed to the Court of Sessions, Udaipur which was numbered as Session Case No. 96 of 2001.

D (d) The Sessions Judge, vide order dated 18.05.2004, convicted Arshad Hussain (A-1), Mujaffar (A-2) and Shahjad (A-3) under Section 302 read with Section 34 of IPC and sentenced them to undergo rigorous imprisonment (RI) for life along with a fine of Rs. 10,000/- each, in default, to further
E undergo RI for one year.

(e) Aggrieved by the said order of conviction and sentence, the appellant herein (A-1) and other convicted accused (A-2 and A-3) filed an appeal being Criminal Appeal No. 586 of 2004
F before the High Court. By judgment dated 30.04.2008, the High Court, while acquitting Mujaffar (A-2) and Shahjad (A-3) of all the charges, confirmed the conviction and sentence of Arshad Hussain (A-1).

(f) Against the said order, the appellant-accused has filed
G this appeal by way of special leave before this Court.

3. Heard Mr. Sushil Kumar Jain, learned counsel for the appellant-accused and Dr. Manish Singhvi, learned Additional Advocate General for the respondent-State.

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4. Mr. Sushil Kumar Jain, learned counsel for the appellant-accused mainly contended that the deceased was a history-sheeter, hard core criminal, was involved in more than 17 criminal cases in the States of Rajasthan and Gujarat and was detained under Section 3(2) of the National Security Act, 1980 (Act No. 65 of Central Act of 1980). He further submitted that the deceased and his gang wanted to extract money from the appellant by demanding Rs. 50 lakhs and when the appellant did not agree to the same, the deceased and his gang attacked his brother and 4-5 years' old daughter. He further pointed out that in view of the background of the said enmity between his gang and the appellant as well as his family members, even if the prosecution case is acceptable, the appellant is entitled to avail the right of private defence. He also submitted that inasmuch as the other co-accused, namely, Mujaffar (A-2) and Shahjad (A-3), have been acquitted by the High Court believing their alibi that they were not present at the place of incident, the entire prosecution story is to be disbelieved. According to him, in view of the acquittal of those persons, viz., Mujaffar (A-2) and Shahjad (A-3), the genesis of the prosecution case is completely falsified.

5. On the other hand, Dr. Manish Singhvi, learned Additional Advocate General for the respondent-State submitted that though the State has not preferred any appeal against the acquittal of A-2 and A-3, in the light of overwhelming evidence adduced by the prosecution with reference to the specific role of the appellant, the High Court is justified in confirming his conviction, hence, prayed for dismissal of the appeal.

6. We have carefully considered the rival submissions and perused all the relevant materials.

Discussion:

7. In order to understand the rival submissions, it is useful

A to refer the First Information Report (FIR) made by PW-4 which reads as under:

“Sir,

B Submitted that today on 18.12.2000 at 10.30 p.m. night, I
 C Iqbal Bhai, Jameel Bhai and Moin Bhai were returning to
 D Khanji Peer on two scooters, after taking meals, from
 E SASURAL of Iqbal Bhai at the house of Babu Bhai which
 F is at Mulla Talai. That at about 10.45 p.m., all the four of
 G us reached near the house of Ashfaw in Kishanpol where
 there is a Ghati. My scooter was ahead which I was driving.
 Iqbal Bhai was sitting behind me and another scooter
 which Moin was driving and Jameel was sitting behind
 him. We were going side by side. Since there is ghati near
 the house of Ashfaw, scooters were at slow speed just then
 Shahjad and his brother Muzaffar came against my
 scooter all of a sudden and stopped us and just then Iqbal
 Bhai got down and asked what is the matter, by then
 Shahjad and Muzaffar both shouted Arshad fire, just then
 Arshad, who was already standing near the wall of the
 Verandah having a gun in hand fired three shots of gun. I
 feared and sat down and the bullet hit in the chest and side
 of Iqbal Bhai and he fell down there itself. At that time
 Jameel and Moin were also standing close by and all the
 three of them fled from the scene. At the time of this
 incident all the street lights of the road and the light in the
 verandah of the house of Ashfaq were also lit. There was
 old enmity between Ashfaq and Iqbal Bhai and they have
 committed this murder with pre-planning. While running, I
 saw gun in the hands of Arshad. Please take action.
 Thereafter I, Jameel, Moin put Iqbal in the car of my friend
 Raja alias Siraj and brought to the hospital where he died.”

H 8. If we carefully scrutinize the contents of the FIR given
 by Nizam (PW-4), it is clear that the occurrence took place at
 10:30 p.m. on 18.12.2000 when Iqbal (since deceased), Nizam
 (PW-4), Jamil (PW-6) and Moinuddin (PW-5) were returning to

Khanji Peer on two scooters. When all the four reached near the house of Ashfaq, Shahjad (A-3) and his brother Muzaffar (A-2) came towards their scooters and stopped them. On seeing this, Iqbal got down and asked about the matter, by then Shahjad and Mujaffar both shouted "Arshad fire". On hearing the same, Arshad (A-1), the appellant herein, who was standing in the verandah of his house with a gun opened fire upon them. It is further stated that the appellant, who was having gun in his hand, fired three shots and in order to escape, Nizam (PW-4) sat down and the bullet hit in the chest and the shoulder of Iqbal as a result of which he fell down immediately. Afterwards, PWs 5 and 6 ran away from the scene. It is also stated that at that time, the streetlights as well as the light of the verandah of the house of Ashfaq were on. It is also seen that there was old enmity between Ashfaq and Iqbal. It is further clear that on seeing the deceased and the prosecution party and also on the shoutings of A-3 and A-4, the appellant herein (A-1), who was standing in the verandah, fired three shots which hit the deceased due to which he sustained fatal injuries.

9. It is not in dispute that the High Court, after analyzing the evidence of prosecution witnesses, particularly PWs 4, 5, 6, 7 and 19 and the defence pleaded by A-2 and A-3, accepted the plea of alibi and categorically concluded that both of them were not present at the scene of occurrence. We have already stated that the State has not challenged the said order of acquittal by filing appeal before this Court and it has become final. It is clear that with the acquittal of said persons, viz., A-2 and A-3, the genesis of the prosecution case is completely falsified. Let us analyse this aspect in detail hereunder.

10. Though Mr. Sushil Kumar Jain has mainly submitted that the deceased was a history-sheeter and he threatened the family members of the appellant on several occasions and also in view of the criminal antecedents of the deceased, there is no acceptable evidence for availing the right of private defence as claimed by him. Likewise, though this Court on 29.09.2008 issued notice qua nature of offence only considering the

A materials placed by both the sides, we have gone into the matter in depth in order to do complete justice to the parties.

B 11. We have already noted the contents of the FIR and the conclusion of the High Court ordering the acquittal of A-2 and A-3. The first witness relied on by the prosecution is Nizam (PW-4) – the complainant. A perusal of the evidence of PW-4 shows that the same is in conformity with the contents of the FIR. In other words, he reiterated what he has stated in the FIR. The important statement made by him as stated in the FIR is as under:

C “Iqbal Bhai asked the accused as to what is the matter, by then Arshad fired. Arshad, who was already standing with gun inside the boundary wall of his house shot three fires on Iqbal. One shot hit on the right shoulder and right arm pit.”

D It is clear from the above that only on the direction of Shahjad and Mujaffar, Arshad (the appellant herein) fired at Iqbal.

E 12. The other witnesses examined on the side of the prosecution were PWs 5, 6 & 7. All of them made similar statements as that of PW-4. In other words, all the three witnesses once again reiterated similar assertion made in the FIR including the presence of Shahjad and Mujaffar, stopping of scooters and shouting Arshad to fire on Iqbal.

G 13. The High Court has found that Mujaffar and Shahjad were not present at the place of incident. The basis for such conclusion was that at the relevant time Mujaffar (A-2) was admitted in a Hospital at Bombay and Shahjad, his brother, was attending him at the said place. In the absence of challenge as to the same by the State, it is clear that both the co-accused were not present at the place of incident and, therefore, three important aspects of the prosecution case have not been established, namely, (a) the party of the deceased was stopped

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by Shahjad and Muzaffar; (b) the deceased and his associates were stopped by Shahjad and Muzaffar near the gate of their house; and (c) Shahjad and Muzaffar had asked Arshad to open fire upon the deceased. A

14. A perusal of the contents of the FIR, the statements of the above mentioned prosecution witnesses as well as the reasoning of the High Court clearly show that the incident had not taken place as alleged by the prosecution. We are satisfied that the prosecution had suppressed genesis and the manner in which the incident took place. B

15. In other words, in such circumstances, in the absence of specific assertion by PWs 4, 5, 6 & 7, the role of the appellant and also in the light of the conclusion by the High Court accepting the alibi pleaded by A-2 and A-3, the entire prosecution case could not be believed. C D

16. Another aspect to be noticed is the use of automatic 12 bore gun in the manner alleged by the prosecution. According to the prosecution, each of the cartridges used in the 12 bore gun has 180 pellets. With regard to the above, Nizam (PW-4), who is alleged to have driven the scooter on which Iqbal was sitting, has stated as under: E

"The scooter which was being driven by Moin stopped on the right side just ahead to my scooter. Muzaffar and Shahjad only stopped our scooter nobody stopped the other scooter. Iqbal got down from left side of the scooter. We, the six persons, who were standing on the spot were within the radius of about seven feet." F

Again it is stated that: – G

"This is true that except Iqbal none of us were hit by the pellet."

Moinuddin (PW-5), in his evidence has stated as under: H

A "This is true that the pellets of cartridge did not hit any one of us except Iqbal Bhai and not hit on our scooter."

B In view of the above, it is seen that after firing 540 pellets, i.e., 3 rounds, how it is possible that none of the witnesses or the brothers of the appellant did not receive a single pellet though they were within 7 feet radius. This aspect has not been clarified by the prosecution.

C 17. In addition to the above infirmities, no scooter was recovered from the place of incident. Likewise, the story relating to recovery of gun from the custody of the appellant-accused is also doubtful. There is no evidence as to how and when the gun was kept by the appellant under the bed and thereafter got recovered from his own house. The story of recovery of the gun at the information of the appellant is ex facie D concocted and unbelievable.

E 18. It is a well settled principle of law that when the genesis and the manner of the incident is doubtful, the accused cannot be convicted for the offence punishable under Section 302 IPC. Inasmuch as the prosecution failed to establish the circumstances in which the appellant was alleged to have fired at the deceased, the entire story has to be rejected.

F 19. In the light of the above discussion, though we are unable to accept the contention relating to the right of private defence as pleaded by learned counsel for the appellant, on going through the entire prosecution case, coupled with the reasoning of the High Court accepting the claim of the other accused, i.e., A-2 and A-3, the entire prosecution case is to be rejected as unbelievable. In such circumstances, the G appellant is entitled to the benefit of doubt, accordingly, we set aside his conviction and sentence.

20. The appeal is allowed. The appellant is directed to be released forthwith, if he is not required in any other case.