

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 889 OF 2009

Arshad Hussain

.... Appellant(s)

Versus

State of Rajasthan
Respondent(s)

...

J U D G M E N T

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').

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.

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

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 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 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) 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 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 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 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.

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

“Sir,

Submitted that today on 18.12.2000 at 10.30 p.m. night, I Iqbal Bhai, Jameel Bhai and Moin Bhai were returning to Khanji Peer on two scooters, after taking meals, from SASURAL of Iqbal Bhai at the house of Babu Bhai which is at Mulla Talai. That at about 10.45 p.m., all the four of 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.”

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

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:

“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.”

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

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.

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 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.

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.

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.

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:

"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."

Again it is stated that: -

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

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

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

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.

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* concocted and unbelievable.

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.

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 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.

.....J.
(P. SATHASIVAM)

.....J.
(J. CHELAMESWAR)

NEW DELHI;
JULY 17, 2013.