

Anvaruddin and Others

Vs

Shakoor and Others

Criminal Appeals Nos. 119, 120, 121 and 122 of 1979

(A. M. Ahmadi, Smt. M. S. Fathima Beevi JJ)

30.03.1990

JUDGMENT

AHMADI, J. -

1. These four appeals, the first by relative Anvaruddin and the others by the State of U.P., arise out of a single incident which occurred on February 11, 1973 at about 11 a.m. wherein Siraju and his son Ali Mohammad were killed. Nine persons, namely, (i) Shakoor (ii) Fayaz Ahmad (iii) Ashan (iv) Allauddin (v) Shamshu (vi) Alam (vii) Wasla (viii) Gaju and (ix) Kallu were arraigned before the learned Sessions Judge, Meerut, principally on the charge of having formed an unlawful assembly for the murder of the aforesaid two persons. They were charged under Sections 147 and 302 read with Section 149, IPC. The learned Sessions Judge acquitted two of them, namely, Gaju and Kallu, of all the charges levelled against them and directed that they be set at liberty whereas the remaining seven persons were convicted under Section 302/149, IPC and were sentenced to suffer imprisonment for life. Accused Shakoor, Alam, Fayaz Ahmad, Ahsan, Allauddin and Wasla were also convicted under Section 148, IPC and were sentenced to suffer rigorous imprisonment for one year. Both the sentences were directed to run concurrently. Accused Shamshu was convicted under Section 147 and was directed to suffer rigorous imprisonment for six months. In his case also the substantive sentences were ordered to run concurrently. Against the said order of conviction and sentence recorded by the 2976 and 3303 of 1973, were preferred by the convicted accused persons. All these three appeals were disposed of by a common judgment rendered on October 5, 1978. The High Court came to the conclusion that the evidence tendered by the prosecution suffered from several infirmities and it was not safe to place implicit reliance on the three eyewitnesses who were close relatives of the deceased. In this view that the High Court took, it allowed the appeals and acquitted all the seven accused persons of the charges levelled against them. Feeling aggrieved by the order of acquittal Anvaruddin, a relative of the deceased, sought special leave of this Court, which was granted. The State also filed three separate appeals against the aforesaid seven accused persons. In all these four matters special leave having been granted, the appeals are before us for disposal.

2. The facts in brief are that the deceased and the accused persons were residents of the same village and neighbours. It appears that one Shabbir, brother of accused Shakoor, was murdered some time back. The deceased Siraju and his son Ali Mohammad were tried along with two others for the said murder. Siraju and Ali Mohammad were convicted by the trial court and were sentenced to suffer imprisonment for life. Their two companions were, however, acquitted. Siraju and Ali Mohammad preferred an appeal challenging the order of their conviction which was admitted to hearing by the High Court. The High Court also enlarged them on bail pending the disposal of the appeal. The case of the prosecution is that on their being enlarged on bail the accused Shakoor and his family

members were displeased and they took a vow to punish them even before the disposal of the appeal. When Ali Mohammad learnt about the same he preferred an application to the District Magistrate, Meerut on November 22, 1972 seeking protection on the ground that his life was in danger. It does not appear from the record that any protection was extended to him.

3. On February 11, 1973, at about 11 a.m. when Siraju, his son Ali Mohammad and PWs 1 to 2 were in the house, the nine accused persons suddenly entered the house armed with lethal weapons. Shakoor was armed with a gun, Fayaz Ahmad, Ahsan and Kallu were armed with tabals, Allauddin was armed with a pistol, Shamshu and Gaju were armed with lathis and Alam and Wasla wielded spears. After these nine persons entered the house of Siraju, Shakoor declared that they would take revenge for the murder of his brother Shabbir and so saying he fired a shot at Ali Mohammad. Almost simultaneously Allauddin also fired a shot at Ali Mohammad. As both the shots hit Ali Mohammad he collapsed. Thereupon, the rest of the accused persons attacked Siraju as well as Ali Mohammad and killed them on the spot. The entire incident, claims the prosecution, was witnessed by PW 1 Ismail, PW 2 Babu Khan, PW 3 Hajra, w/o Ali Mohammad and Anvaruddin, the appellant of Criminal Appeal No. 119 of 1979 who was not examined as a witness on the plea that he was won over. After the incident PW 1 Ismail called PW 6 Zafruddin from his village and dictated the first information report concerning the crime. This report was carried to Police Station, Partapur, eight miles from the place of occurrence, and was delivered to PW 5 Head Constable, Visheshwar Nath at about 1.06 p.m. The crime was registered and the Investigating Officer reached the scene of occurrence by about 2 p.m. An inquest was held on the dead bodies and thereafter the dead bodies were forwarded for post-mortem examination. The witnesses to the incident were interrogated and their statements were recorded in due course. The panchnama of the scene of occurrence was drawn up and after completion of the formalities the Investigating Officer undertook a search for the accused persons. It appears that all the accused except Gaju and Kallu surrendered to the court on February 13, 1973. Gaju and Kallu also similarly surrendered on February 15, 1973. The residences of the accused were searched but the weapons of attack were not found. On the completion of the investigation a charge-sheet was submitted against the aforesaid nine persons.

4. All the accused persons pleaded not guilty to the charges levelled against them and contended that they were falsely implicated due to the long-standing enmity with the family of deceased persons. Accused Gaju and Kallu pleaded alibi. Since they are acquitted we need not dwell on their plea of alibi. It may be mentioned that accused Ahmad and Ahsan examined two witnesses in their defence while the other accused persons did not examine any defence witness.

5. The accused persons belong to a single family, their common ancestor being one Faqira. This Faqira had four sons (i) Majid (ii) Sarju (iii) Gaju and (iv) Faizu. Shakoor is the son of Sarju. Aslam and Wasla are the sons of Majid. Fayaz and Ahsan are the grandsons of Majid. Kallu is the son of Gaju. Shamshu and Allauddin are the sons of Faizu. It will thus be seen that all the accused persons are family members. Similarly PW 1 Ismail, PW 23 Babu Khan and PW 3 Hajra are the family members of the two deceased persons. It is also common ground that there was enmity between the two families on account of the murder of Shabbir.

6. The incident occurred in the 'gher' (house) of deceased Siraju. It is necessary to bear in mind the physical condition of the place at the date of occurrence. This house was situate to the north of the house of Fayaz. There was a common compound wall between the two houses which was of the height of about 4 to 5 ft. The northern compound wall of the house was cemented and was of the height of 6 to 7 ft. The eastern and the western walls were also cemented and were of the height of 4 to 5 ft. The entrance to this house was from the east. In the north-east corner of the house was a

place known as 'kotha' which was used for resting during the day. The cattle were also tethered in the compound of the house. A fodder-cutting machine was installed and at the time of the incident both the deceased persons were working on this machine. On exit from the eastern gate of this house, towards the south were situated the houses of Mustafa Allauddin, Mulla and Habib. The prosecution case is that the accused persons scaled the compound wall of Fayaz's house and entered the compound of Siraju's house where Siraju and Ali Mohammad were working on the fodder machine. Accused Shakoor gave a call to finish them. According to PW 1 Ismail, Shakoor fired a shot from his gun from a distance of about 2 1/2 to 3 yards. Accused Allauddin also fired a shot from his pistol from almost the same distance. Both these shots hit Ali Mohammad. On Ali Mohammad falling to the ground the remaining accused persons who were armed with deadly weapons pounced on both of them and caused several fatal injuries. To the same effect is the evidence was PW 2 Babu Khan and PW 3 Hajra. The presence of these three witnesses at the place of occurrence is natural and cannot be doubted. The first information report was dictated by PW 1 Ismail to PW 6 Zafruddin. The evidence of PW 1 Ismail is consistent in material particulars with the facts stated in the FIR. However, since all the three witnesses are close relative of the deceased the question is whether it is safe to base a conviction on their testimony. The trial court came to the conclusion that their testimony was corroborated by medical evidence as well as the find of blood, etc., from the scene of occurrence. According to it merely because the three witnesses were partisan witnesses it was not proper to throw out their evidence merely on that ground. It also took the view that having regard to the fact that accused Shakoor was a Pradhan of the village for almost a decade and was a headstrong man neighbours did not dare to give evidence against him and his associates as they were terrorised by the manner in which they had done away with the two deceased in broad daylight in their own house. Having critically examined the evidence of the said three witnesses the learned trial Judge came to the conclusion that the evidence was sufficient against all the accused barring Gaju and Kallu. He, therefore, acquitted Gaju and Kallu and convicted the rest as stated earlier. The High Court, however, came to the conclusion that the evidence of the ballistic expert Shri Budul Rai went to show that injuries Nos. 12 and 13 found on the person of deceased Ali Mohammad were in all probability caused by a single shot thereby discrediting the prosecution evidence that both Shakoor and Allauddin had fired from their weapons. After so stating in the earlier part of the judgment the High Court concluded as under :

"It is true in his testimony Shri Badul Rai, the ballistic expert does not totally exclude the possibility of injuries Nos. 12 and 13 having been caused by two different shots, but the overall effect of his evidence is that 'the greater probability is that both these injuries had been caused by the same shot'."

Thus, the High Court did not reach a firm conclusion that injuries Nos. 12 and 13 were caused by a single shot. From the passage extracted above it becomes clear that the ballistic expert also did not rule out the possibility of the said two injuries being caused by separate shots. Since no punctured wounds were found on the person of both the deceased the High Court doubted the prosecution story regarding Alam and Wasla being armed with spears. In the inquest report injury No. 14 comprising eight incised wounds 1 1/4 cm x 1/2 cm muscle deep was stated to be a gunshot injury. However, the medical evidence did not support this statement as the margins of the incised wounds were sharply cut. The medical evidence, however, is not that these either incised wounds were caused by a spear. The High Court, therefore, doubted the version of the prosecution witnesses that the accused Alam and Wasla had wielded spears. The High Court summed up its conclusion in the following words :

"The position that emerges from the aforesaid discussion is that the testimony of the

prosecution witnesses that the deceased Ali Mohammad was first shot at by Shakoor appellant, this shot was followed up by a shot from a countrymade pistol by Allauddin, and he was thereafter assaulted, is in conflict with the evidence of the ballistic expert, who is of the opinion that only one shot caused the two firearm injuries on the person of the deceased. Further, there are no typical spear injuries found on the person of the deceased, though according to the prosecution case some of the appellants were armed with spears. This renders the presence of the eye-witnesses at the scene of occurrence at the time of the attack to be doubtful."

In the absence of any independent evidence the High Court gave benefit of doubt and acquitted all the accused. It is against this order of acquittal that the present appeals by special leave are filed.

7. It will thus be seen that the High Court rejected the direct testimony of the aforesaid three witnesses principally for three reasons, namely, (1) all of them are highly interested and partisan witnesses, (2) their evidence is not consistent with medical opinion and the opinion of the ballistic expert, and (3) independent witnesses, though available, were not examined to corroborate their testimony. The trial court found the three witnesses to be natural witnesses and on a close scrutiny of their evidence, applying the normal rule of prudence, it concluded that it was safe to act on their testimony. It preferred the direct testimony of the three eye-witnesses vis-a-vis the opinion of the ballistic expert and came to the conclusion that injuries Nos. 12 and 13 to Ali Mohammad were caused by separate gunshots fired by Shakoor and Allauddin. On the third contention the trial court observed that since the incident occurred in the house of the deceased Siraju which was bounded on all the four sides by a compound wall of the height of 4 to 5 feet, it was not possible to expect independent witnesses to the actual occurrence. As regards the statement made in the FIR that many persons had witnessed the incident the trial court held that PW 1 was merely referring to the presence of neighbours after the event and not at the time of the actual assault. In this view that the trial court took it convicted 7 out of the 9 accused persons, giving the benefit of doubt to Gaju and Kallu. The High Court reversed the decision of the trial court on the aforesaid grounds. The question before us is whether the High Court was justified in so doing. We are of the view that the High Court wholly misdirected itself in the view that it took.

8. It is well settled law that evidence of witnesses to the occurrence cannot be thrown overboard merely because they are interested and partisan witnesses. All that the law demands is that their evidence should be scrutinised with great care and caution to safeguard against the normal temptation to falsely implicate others. The trial court had adopted that approach in evaluating the evidence of the eye-witnesses. On a critical examination of their evidence it concluded that their evidence stood corroborated by medical evidence, in that, it disclosed that Ali Mohammad had received as many as 18 injuries (13 incised wounds, 2 gunshot wounds, 2 abrasions and one contusion) whereas the deceased Siraju had sustained five injuries (four incised wounds and a swelling). The evidence of PW 1 also stood corroborated by the evidence of PW 6 Zafaruddin who wrote the FIR EX. Ka 3 at the behest of PW 1. The contents of the FIR also corroborate the testimony of PW 1. The find of blood, etc. from the scene of occurrence noted in the Panchnama proved through PW 7 Om Prakash also lends corroboration to their testimony. It was, therefore, contended that the High Court failed to come to grips with the evidence and approached the matter in a perfunctory manner.

9. The deceased Ali Mohammad had, as stated earlier, suffered as many as 18 injuries. Injuries Nos. 12 and 13 are described as gunshot injuries. They read as under :

"Injury No. 12 : 4 circular gunshot wounds of entry 3/4 cm x 3/4 cm with abraded margins on top of nose and right side of cheek near nose in an area of 5 cm x 5 cm. No tattooing or blackening.

Injury No. 13 : One circular gunshot through and through wound of entry x exit wound 3/4 cm. x 3/4 cm on right side upper lip. No tattooing or blackening."

10. These two injuries are undoubtedly gunshot injuries. Dr. Mathur, who performed the post-mortem, states that these injuries could be caused if fired at from a distance of over 4 feet. There were corresponding holes in the shirt worn by the victim. This medical officer does not say that the aforesaid two injuries were possible by single shot. However, Shri Badul Rai, the ballistic expert, opined that the said two injuries could have been caused by a single shot fired from a country made pistol. He deposed that if the shots were fired from a short distance of 8 to 10 feet all the pellets would have entered the body en masse and would have caused an exist wound thereby discrediting the evidence of the three witnesses that the shots were fired from 2 1/2 to 3 yards. The witnesses, however, admitted that his estimate regarding the distance from which the shot was fired was based on standard ammunition and not countrymade weapons. But when cross-examined he stated that the single shot must have been fired from a countrymade weapon from a distance of 8 ft. The fact that there was no tattooing or blackening is indicative of the fact that the shots were fired from not too short a distance. The High Court took no notice of Dr. Mathur's opinion in this behalf. The evidence of the three eye-witnesses as to the distance from which the shots were fired is a mere estimate. Even though the ballistic expert initially opined that injuries Nos. 12 and 13 could be the result of a single shot he vacillated and stated that the possibility of the said two injuries having been caused by two different shots could not be ruled out altogether. He merely stated that the greater probability was that they were the result of a single shot. In other words the ballistic expert was not positive in his view. In this nebulous state of the evidence of the ballistic expert we are of the view that the High Court was wholly wrong in doubting the direct evidence of the three eye-witnesses on this ground. Where the expert evidence is obscure and oscillating, it is not proper to discredit the direct testimony of the eye-witnesses of such uncertain evidence. In such a situation unless the evidence of the eye-witnesses is shaken by some glaring infirmities, it would not be proper to doubt the correctness of their statements. We are, therefore, of the opinion that the High Court was wrong in its conclusion based on the vacillating evidence of the ballistic expert.

11. True it is that the three eye-witnesses to the occurrence are not only close relatives of the deceased but are also inimical to the accused persons. Shakoor's son Shabbir was murdered some time back and both the deceased were convicted by the trial court but were enlarged on bail by the High Court. In such circumstances there can be no doubt that Shakoor and his family members would have a grudge against the deceased persons. They had, therefore, the motive to kill them. It has come in evidence that Ali Mohammad had sought protection by a written application 'Ex. Ka 7 dated November 22, 1972 as he apprehended danger to his life from Shakoor and others. That lends corroboration to the prosecution case that Shakoor and his family members had vowed to punish the deceased before the appeal in the High Court was disposed of. In this backdrop we have to appreciate the evidence of the three eye-witnesses. The High Court has found that independent witnesses, though present, were deliberately not examined by the prosecution. This inference is drawn from the fact that PW 1 stated in his FIR as under :

"This incident was witnessed by Ali Mohammad, Hajra w/o Ali, Babu Kahn and my younger brother, Ghossi, son of Anvaruddin, son of Hafizuddin and by so many people besides me."

In his substantive evidence before the court PW 1 explained that others had collected at the scene of occurrence shortly after the incident and that is why he inferred that they had witnessed the incident. It must be remembered that the incident occurred in the house of Siraju which was bounded on all sides by a compound wall of the height of 4 to 5 feet. The prosecution case is that the assailants scaled the wall from the side of Fayaz's house and entered the open space where the deceased were working on the machine. Therefore, it is not possible that the neighbours would have collected immediately the assault was launched. It may be possible that the neighbours may have collected some time after hearing the gunshots. The incident could not have lasted for long and therefore, the explanation given by PW 1 in this behalf cannot be said to be false. Non-examination of Anvaruddin, also a family member, cannot make any difference. In these circumstances we think that the High Court was not right in concluding from this solitary statement in the FIR that the prosecution was guilty of keeping back independent witnesses. It must also be remembered that accused Shakoor was a village headman since almost a decade and wielded considerable influence. Having regard to the manner in which he and his companions had come to death both the deceased, it is difficult to expect residents of that village to come forward to depose against him.

12. Lastly, the High Court thinks that the evidence of the three eye-witnesses is doubtful because there is not a single spear injury on either of the two deceased persons. That indeed is true. It must, however, be realised that the three eye-witnesses have not deposed to have seen Alam or Wasla actually inflicting the spear injuries. All that they have said is that they were armed with spears. Further, according to them, after the shots were fired at Ali Mohammad, the rest of the accused persons attacked both the deceased persons and killed on the spot. The witnesses do not state to have seen Alam or Wasla actually causing spear injuries. There were as many as 13 incised wounds on the person of Ali Mohammed and four incised wounds on the body of his father Siraju. The nature of the injuries found on the person of both the deceased show that they must have been caused by talbars wielded by Fayaz and Ahsan. One of the injuries caused to Ali Mohammad was an incised wound 24cm x 3cm brain deep which had cut the lower part of occipital bone, the upper part of the right ear and temple exposing the brain matter. There were several other incised wounds found on the persons of Ali Mohammad besides 8 small sized incised shown at injury No. 14, initially thought to be caused by a gunshot. Four incised wounds were caused to Siraju on vital parts such as the neck, jaws parietal region, etc. The medical evidence says that the injuries were so serious that the victims must have died on spot. Therefore the mere absence of spear injuries on the persons of the two deceased cannot render the evidence of the eye-witnesses as to the actual commission of the crime doubtful. All that one can say is that as the eye-witnesses are highly interested witnesses and since their evidence regarding the part played by Alam and Wasla is not corroborated for want of spear injuries, they should be given the benefit of doubt. We are, therefore, of the opinion that Alam and Wasla are entitled to the benefit of doubt. We, therefore, confirm their acquittal.

13. We are conscious of the fact that these appeals are directed against the order of acquittal. Ordinarily, we would not have interfered with the order of acquittal under Article 136 of the Constitution. We, however, find that the entire approach of the High Court is far from satisfactory. The manner in which the High Court brushed aside the direct testimony of three eye-witnesses without marshalling the evidence, leaves much to be desired. This Court, has times out of number, reminded that the direct testimony of witnesses, whose evidence is otherwise consistent, should not ordinarily be rejected on the ground that they are partisan witnesses, unless the surrounding circumstances discredit their version. Ordinarily, close relatives of the deceased would not allow the real culprits to escape. The possibility of their implicating others with the real offenders must however, be kept in mind. Keeping that in mind we have given the benefit of doubt to Alam and Wasla. We cannot, however, persuade ourselves to the view that the High Court had not committed a

serious error. We are, therefore, constrained to interfere. It is our duty to correct a manifest error by interfering under Article 136 of the Constitution for otherwise a serious crime of double murder will go wholly unpunished.

14. For the above reasons we allow the appeals against. (1) Shakoor (2) Fayaz Ahmad (3) Ahsan (4) Allauddin and (5) Shamshu, set aside the order of their acquittal passed by the High Court and restore the conviction recorded by the trial court. Since they are on bail we direct that they should surrender forthwith and serve their sentence. We confirm the acquittal of Alam and Wasla.

</html