

A.F.R.

Judgement Reserved

Court No. - 21

Case :- CRIMINAL APPEAL No. - 6167 of 2010

Appellant :- Mohd. Afzal @ Guddu And Another

Respondent :- State of U.P.

Counsel for Appellant :- S.M.G. Asghar, C.P.Mishra,D.K.Mishra,  
M.S.Akhtar,Mewa Lal Shukla,Mohd. Israr,O.P.Mishra,  
Prahlad Kumar Khare,V.M. Zaidi

Counsel for Respondent :- Govt. Advocate,I.M.Khan,S.A.Imam

Hon'ble Manoj Kumar Gupta,J.

Hon'ble Om Prakash Tripathi,J.

(Delivered by Hon'ble Om Prakash Tripathi, J.)

Heard Sri Mewa Lal Shukla, learned counsel for the appellants, Sri A.N. Mulla, Additional Government Advocate on behalf of the State and perused the material on record.

The appellants have preferred the present criminal appeal aggrieved by the judgment and order dated 04.09.2010 passed by the learned Special Judge (Gangster Act)/ Additional Sessions Judge, Court No.5, Bulandshahr in Special Trial No. 683/2007, under Section 302/34 IPC, State vs. Mohd. Afzal @ Guddu and others, Police Station Gulawadi, District Bulandshahr, convicting and sentencing the appellants to undergo life imprisonment under Section 302/34 of IPC with a fine of Rs.10,000/- each, in default thereof, to undergo three months additional rigorous imprisonment.

The prosecution case is as follows:

The deceased Shafaqat Ali was sleeping in his baithak situated in the Village Chandpur, P.S. Gulawadi, District Bulandshahr in the intervening night of 31-1/1-2-2007. At about 3:00 am, on the basis of hearing the gun shot fire and hue and cry the neighbours reached on the spot and found that the father of the first informant Shafaqat Ali received

a gun shot injury, complainant immediately rushed to him and proceeded to the District Hospital for treatment along with his brother Hasmat and his uncle Shahid and Rahat but he has succumbed to death in the way.

On the basis of the written report, the police registered a case as Crime No.30/2007, under Section 302 IPC and entry about registration of the case was made in the General Diary on 01.02.2007. Investigation of the case was taken over by the Sub-Inspector Samay Singh. He rushed to the spot and recorded the statement of the complainant Mukeet Ali and prepared the site plan.

During investigation, the Investigating Officer recorded the statements of the witnesses. After completing all formalities of investigation, he submitted the charge sheet (Exhibit Ka-16) against the appellants in the Court of Special Judge (Gangster Act), Bulandshahr, under Section 302 IPC and cognizance of offence was taken by the Court concerned.

Charge under Section 302/34 IPC and section 2/3 of Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 was framed by the Special Judge on 01.07.2008.

Charge sheet against Mohd. Afzal under Section 25/27 of Arms Act has been submitted before Chief Judicial Magistrate, Bulandshahr, cognizance taken by the Magistrate concerned, committed to the Court of Sessions Judge and thereafter transferred to the Court of Special Judge, (Gangster Act).

Charge under Section 25/27 of Arms Act has been framed against the accused Mohd. Afzal on 01.07.2008 by Special Judge, (Gangster Act), Bulandshahr. The accused-appellants pleaded not guilty and claimed to be tried. Special Trial No.639/2007 was consolidated and tried together with leading file Special Case No.683 of 2007.

In order to prove the charges framed against the appellants, the prosecution has examined the complainant Mukeet Ali, son of the

deceased (P.W.-1), Wahid Ali, the brother of the deceased (P.W.-2), Dr. B.P.S. Kalyani (P.W.-3), Munfat Ali (P.W.-4), Shyam Singh, Sub Inspector Reader (P.W.-5), Dariyab Singh (P.W.-6), Harish Chand Josi (P.W.-7), Sub Inspector Samay Singh (P.W.-8), Sub Inspector Ashok Kumar (P.W.-9) and Sub Inspector Kunwar Singh (P.W.-10).

In documentary evidence, the prosecution has proved written report (Exhibit Ka-1), chik FIR (Exhibit Ka-2), gang chart (Exhibit Ka-9), spot map (Exhibit Ka-4), recovery memo (Exhibits Ka-5 and Ka-6), post mortem (Exhibit Ka-3), panchayatnama (Exhibit Ka-15), photo naash (Exhibit Ka-19), letter of R.I. (Exhibit Ka-15), letter of CMO (Exhibit Ka-17) sample seal (Exhibit Ka-18), charge sheet under section 302 IPC (Exhibits Ka-13 and Ka-14), recovery memo under Section 25 of Arms Act (Exhibit ka-7), chik FIR under Section 25 of Arms Act (Exhibit Ka-8), spot map under Section 25 of Arms Act (Exhibit Ka-2) general diary (Exhibit Ka-14), prosecution sanction (Exhibit Ka-22), charge sheet under section 25 of Arms Act (Exhibit Ka-21).

In the statement recorded under Section 313 Cr.P.C., the accused appellants have stated that they have been falsely implicated in the present case due to enmity of Pradhani and recovery was false and in defence no evidence has been adduced by the accused.

Eye witness P.W.-1, the complainant Mukeet Ali, son of the deceased, who is an Advocate has stated in his examination-in-chief that in the intervening night of 31.01./01.02 of 2007, I was sleeping at my home and my father Safaqt Ali was sleeping alone in his baithak. At about 3:00 am, sound of fire arm was heard. On this, neighbours and I alongwith others reached the baithak and saw that there was a big wound on the head of my father and blood was oozing out. I alongwith my brother Hasmat, uncle Shahid, Rahat took out father to the District Hospital for treatment but near Village Jainpur, my father died. We returned to our home with the dead body of my father and saw that near the cot of my

father, there was a piece of paper, in which something was written regarding murder of my father with intent to misguide us. This piece of paper is proved as material Exhibit-1. I have handed over this piece of paper to the Investigating Officer. I wrote a report myself. After panchayatnama and post mortem, the police handed over the dead body of my father to me for cremation. In the meantime, Parvez, Wahid and my brother Hasmat told me that Mohd. Afzaal, who is a jhola chaap doctor, used to practice near my baithak. Wife of Rahat Ali was ill and Afzal used to visit the house of my uncle for treatment. Afzal used to tease Sultana, the daughter of Rahat Ali. My father opposed this. Accused Iqbal, brother of Afzal is a criminal and both threatened my father prior to the incident and also threatened to kill him. We have not taken this threatening seriously. Pravez also told me that on 31.01/01.02 of 2007, in the intervening night, he was going to the house of Master Niaz Mohd. He saw that Afzal and Iqbal were coming from my baithak, Afzal had taken a country made pistol in his hand and both were full of fear. He asked them to stop but they had not given any reply. Munfat Ali also told me that in the night, he had gone for urinal, then he saw Iqbal and Afzal going towards the baithak of informant. Afzal took out country made pistol and both murdered Parvez. He had seen them at the place of occurrence in committing the murder of my father. Parvez has given statement before the police but Parvez was murdered on 06.02.2007.

P.W.-2 Wahid Ali, brother of the deceased had deposed on oath that his brother Safakat Ali was sleeping in his baithak. In front of his baithak, Afzal used to practice in his clinic. Rahat Ali is my younger brother and wife of Rahat Ali was ill and for treatment of wife of Rahat Ali, Afzal used to visit at his residence. Rahat Ali has a daughter, aged about 22 years. Afzal used to tease her. Shafaqat intervened in this matter. About 3 to 4 days prior to the incident, Shafaqat Ali threatened Afzal and there were hot talk between them. Afzal and his brother Iqbal threatened to kill Shafaqat Ali

but we have not taken this threatening seriously and for this reason, accused committed the murder of my brother Shafaqat Ali.

P.W.-3 Doctor V.P.S. Kalyani had conducted the post mortem of the deceased Shafaqat Ali on 01.02.2007 at 3:10 pm. As per the opinion of the Doctor, the possibility of death of the deceased was about half of a day prior to the date of postmortem. The deceased was of normal stature and his eyes and mouth was closed. After death of the deceased, stiffness was present on the body of the deceased. On internal examination of the deceased, the doctor opined that the deceased died due to shock and haemorrhage due to ante mortem injuries.

Following ante-mortem injuries were found on the body of the deceased:

*"1. Fire arm wound of entry 10 cm x 4 cm, brain cavity deep on right head 5 cm above from right ear. B/T not present margin inverted bones under found badly fractured.*

*2. Contused swelling 3 cm x 1.5 cm on right eye.*

*3. Multiple fire arm wounds in an area 8 cm x 4 cm on back of inner aspect of right fire arm middle part margins of all wounds are inverted.*

*Blackening and tattooing present in an area 10 cm x 5 cm around the wounds on exploration. 8 small pellets recovered from wounds. Sizes of wounds vary from 05 cm x 3 cm to 03 cm x 02 cm."*

P.W.-4 Munfat Ali had deposed on oath that I know accused Afzal and Iqbal. Afzal had relation with the daughter of Rahat Ali. Shafaqat Ali was elder brother of Rahat Ali. There was hot talk prior to four days from the date of incident among Afzal, Shafaqat Ali and Iqbal Ali. Both threatened to Safaqt Ali to kill. On 31.01/01.02 of 2007 at about 12:00 pm, I was doing urinal out of my house, I saw in the light of torch and bulb that Afzal and Iqbal were coming towards baithak of Safaqt Ali. I identified them. Afzal had taken a country made pistol in his hand. Thereafter I slept. In the morning it came to my notice that Safaqt Ali was murdered. I have full confidence that Afzal and Iqbal had committed the murder of Safaqt Ali.

P.W.-5 S.I. Shyam, a formal witness, has proved chik FIR (Exhibit Ka-2), he was the Investigating Officer of the case. He had prepared spot map and proved it as Exhibit Ka-4. He had also proved recovery memo of blood stained and simple earth as Exhibits Ka-5 and Ka-6. He had also proved the statement of Pravez as Exhibit Ka-6. This witness also proved recovery memo of ala-katal country made pistol, cartridges and recovery memo as Exhibit Ka-6.

P.W.-6, Constable Dariyab Singh had proved chik FIR as Exhibit Ka-2 and General Diary as Exhibit Ka-10 and on the basis of gang chart section 2/3 of Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986 has been added in the general diary, which is proved as Exhibit Ka-11.

P.W.-7 Harish Chandra Joshi, Investigating Officer of the case had filed the charge sheet, which is proved as Exhibit Ka-12.

P.W.-8 S.I. Samay Singh was also part of the investigation of the case and he had also filed charge sheet against Iqbal and proved it as Exhibit Ka-14.

P.W.-9 S.I. Ashok Kumar had prepared panchayatnama and proved it as Exhibit Ka-15. He also prepared recovery memo of spot stained and simple earth and proved them as Exhibits Ka-5 and Ka-6. This witness also proved letter of R.I. and letter of C.M.O., sample seal, challan laash and photo naash as Exhibit Ka-6. He also proved bundle (pulinda) as material Exhibit Ka-1, country made pistol as material Exhibit Ka-2, cartridges as material Exhibit Ka-3, empty cartridges as material Exhibit Ka-4 and polythin as material Exhibit Ka-5 and report of the FSL as material Exhibit Ka-6.

P.W.-10 S.I. Kunwar Singh, the Investigating Officer of the case filed charge sheet under Section 25/27 of Arms Act. He prepared spot map of the recovery and proved it as Exhibit Ka-20 and proved the charge sheet

as Exhibit Ka-21. He has also proved prosecution sanction as Exhibit Ka-22.

So far as the FIR is concerned, as per the prosecution case, the incident took place in the intervening night of 31.1/01.02 of 2007. FIR was lodged on 01.02.2007 at 10:00 am. Police Station is about 10 km far from the place of the occurrence. Complainant is an Advocate, he tried his best for the treatment of his father but on the way, he died. He alongwith other returned back to the home and FIR was lodged after seven hours from the time of the incident against unknown accused. It means that at the time of lodging of the FIR, entire facts were not in the knowledge of the complainant. The complainant has no suspicion against the accused at the time of lodging of the FIR. Thus from the facts and circumstances, it is clear that FIR has been lodged promptly without consultation and the complainant had full opportunity to name the accused at the time of the lodging of the FIR but has not done so, which shows his bona fide.

There is no direct ocular evidence regarding the involvement of the accused appellants in the crime. The case of the prosecution is on the basis of circumstantial evidence. Factors has to be taken into account in adjudication of cases on circumstantial evidence as laid down by the Apex Court in **Anjan Kumar Sharma vs. State of Assam (2017 14 SCC 359)** and in **Sharad Birdhi Chand Sarda vs. State of Maharashtra, 1984 (4) SCC 116**.

Five golden principles as laid down in the case of **Sharad Birdhi Chand Sarda (Supra)**, are as follows:

*“(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established:*

*It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established. There is not only a grammatical but a legal distinction between “may be proved” and “must” be or should be proved” as was held by this Court in Shivaji Sahabrao Bobade and another vs. State of Maharashtra 1973 2 SCC 793 where the observations were made :*

*(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,*

*(3) the circumstances should be of a conclusive nature and tendency,*

*(4) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."*

The first circumstance relied by the trial Court is that accused Afzal is a jhola chaap doctor. His shop is in front of baithak of Shafaqat Ali. Rahat Ali is the brother of the deceased. His wife was ill and accused Afzal used to tease Sultana, daughter of Rahat Ali. Shafaqat Ali opposed this. There was altercation between Afzal and deceased Shafaqat Ali, prior four days of the incident. Afzal threatened Shafaqat Ali to kill him. It relates to motive.

It is a case of a circumstantial evidence. There is no eye witness of the alleged incident. Later on, prosecution had developed a motive for the incident that Afzal was a jhola chhap doctor and was treating the wife of Rahat Ali. Rahat Ali has a daughter, named Sultana aged about 22 years old and with her he developed a relationship or he began to tease Sultana as stated by P.W.-2 and P.W.-4 but no report regarding teasing Sultana has been filed by her father, Rahat Ali, his wife and his daughter against the appellant accused Afzal. Rahat Ali, his wife and his daughter Sultana are the best witnesses for proving the motive but the prosecution had not examined any of them to prove the motive. Thus, in the absence of best witnesses, it will be deemed that prosecution had failed to prove the motive of the incident. It is also alleged that there was hot talk between Safaqt Ali and Afzal prior to 4 days from the incident in which Afzal Ali had threatened Safaqt Ali to kill but no FIR has been lodged on this aspect and even this fact has not come in the knowledge of the complainant at the time of the lodging of the FIR. Although, he was advocate. It is very common that in the night when Advocate was present in the home, such sort of threatening incident, would normally be communicated to him but



the threatening by the accused to father of the complainant is not in the knowledge of the complainant, which also shows that there was no threatening and no teasing by the accused appellants. In case of circumstantial evidence, the motive plays a very important role.

It is also pertinent to mention here that in the statement recorded under Section 161 Cr.P.C., the complainant had also not given such statement that accused Afzal has an illicit relationship with Sultana and also not stated that Munfat Ali and Parvez had told about this. This fact has not been told by him that accused has given threatening to kill Safaqt Ali prior four days from the date of incident. This fact was stated in the statement of Investigating Officer P.W.-5 at page-8 in his cross-examination. The factum of the motive has not been stated in the written report.

It is also stated that the complainant generally lives in the city and occasionally lives in the village so he was not aware of the motive. This submission is not tenable because the appellant Afzal is an Advocate and he is much aware about his family and village. Thus, the evidence on the point of motive by P.W.-1 is an improvement on the basis of evidence of P.W.-2 and P.W.-4, whereas the best witness of motive has not been produced. Although, they were present and also closely related to the complainant. This fact will be against the prosecution. Thus, the prosecution has failed to prove motive beyond all reasonable doubt against the accused appellants. Thus, the first circumstance relied upon by the trial Court is not proved.

The second circumstance is that Mohd. Pravez at about 3:00 to 4:00 am in the night was going at the house of Master Niaz and he saw that Afzal and his brother Iqbal was coming with fast paces with fear in mind. Afzal was carrying a country made pistol in his hand. It is submitted that statement of Pravez has been recorded by the Investigating Officer on 03.02.2007. Thereafter the accused persons killed Parvez. Parvez also

told the complainant about this fact that he saw accused persons going in fast paces after the incident and Afzal was carrying a country made pistol in his hand. The Investigating Officer also proved the statement of Parvez recorded under section 161 Cr.P.C. as Exhibit Ka-6 but Parvez has not told this fact to the complainant before lodging of the FIR. The name of Parvez has not been shown as a witness in the FIR. The trial Court had relied on the statement of Parvez, which is in Exhibit Ka-06 with the help of Section 33 of Indian Evidence Act.

Section 33 of Indian Evidence Act, reads as under:

*“Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which is stated, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:*

***Provided** - that the proceeding was between the same parties or their representatives in interest;*

*that the adverse party in the first proceeding had the right and opportunity to cross-examine;*

*that the questions in issue were substantially the same in the first as in the second proceeding.*

***Explanation** – A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.”*

It is crystal clear in the catena of judgement that statement of the witness recorded under Section 161 Cr.P.C. does not fall within the ambit of evidence. Such evidence is only for confrontation in cross-examination. The statement of witness recorded under Section 161 Cr.P.C., being wholly, inadmissible in evidence, cannot be taken into consideration. An investigation is not a judicial proceeding. Opportunity to cross-examine the chance witness Parvez has not been given to the accused. There are not two proceedings between same the parties in this case and no question that issues were substantially the same in the first as in the second

proceeding. Witness Parvez is not an injured persons or a complainant, so his statement has no relevance in the present facts and circumstances of the case. The incident took place in the season of winter at about 3:00 to 4:00 am and for what purpose, chance witness Parvez was going at the house of Master Niaz Mohd, is not disclosed by this witness in the statement recorded under Section 161 Cr.P.C.. To prove this fact, Master Niaz Mohd. should have been examined but he has not been examined. Thus, the statement of Parvez recorded under Section 161 Cr.P.C. is not relevant or admissible under Section 33 of Indian Evidence Act. Thus, the second circumstance relied by prosecution, is also not proved.

The third circumstance is that P.W.-4 Munfat Ali, awoke for urinal and went out of his house at about 12:00 to 1:00 pm and saw that Afzal and Iqbal were going towards baithak of Safaqt Ali. Afzal was carrying a country made pistol in his hand. He saw them in the light of torch and bulb. But in the cross-examination, this witness has stated that I had not told about bulb light to the Investigating Officer and also not produced the torch to the Investigating Officer and also told that my house is 100 meters far from the baithak of Safaqt Ali. House of Abrar Khan and Abid Khan is between my house and baithak of Safaqt Ali. This witness has deposed that there was a country made pistol in the hand of Afzal. This statement is not reliable because generally while committing the crime, the accused does not show the incriminating weapons to persons 100 meters away from the place of offence. He will naturally hide the weapon in his clothes. It is also not probable that after committing the crime, the accused left the place of occurrence at 3:00 am, brandishing country made pistol in his hands, as stated by Parvez. Thus, the statement of this witness has no relevance who is simply a chance witness. Thus, the third circumstance is not also tenable.

The last circumstance is that incriminating weapon country made pistol 12 bore, empty cartridges and one live cartridge have been recovered on the pointing out of the accused Afzal. The trial Court has not

relied on this point and disbelieved the recovery from the accused Afzal under Section 27 of the Indian Evidence Act.

In cross-examination, the complainant P.W.-1 has stated that Parvez and Munfat Ali told everything in the evening of the date of the incident. What Munfat and Pravez told me, I narrated all the facts to the Investigating Officer but if all the facts has not been mentioned in my statement, I could not tell the reason.

Contrary to this, P.W.-4 Munfat Ali had deposed in his cross-examination that I told about the incident to Mukeet Ali after third day of the incident, after azal-mazal (a muslim ritual). He had not shown the torch to the Investigating Officer. There was no report with regard to the hot talk between Shafaqat Ali and accused. Thus, there is contradictions in the evidence of above two witnesses. Evidence of P.W.-1 is not corroborated by the evidence of P.W.-4. A parcha has also been annexed with the FIR in which it has been stated that "Shafaqat Ali used to complain about me with my uncle at his baithak, so I planned the murder by giving Rs. 2 lakhs to the out sider criminals. Wakeel and Niaz Mohd. would be murdered by out sider criminals for which, I shall pay Rs. 4 lakhs but the date of death is not soon. I have relation with criminals who belongs to Lucknow." This piece of paper was found under the quilt of deceased. For this piece of paper, P.W.-1 has stated that this paper has been given with intent to misguide the investigation. This paper is proved by P.W.-1 but it has no relevance with the present murder. P.W.-1 has not shown the names of Babbar, Anwar, Abid and Liyaqat in the FIR, who reached on the spot.

The accused had stated in their statements recorded under section 313 Cr.P.C. that they have been falsely implicated in the present case due to election of Pradhani. Shanawaz won the election. Hasmat, complainant had threatened for dire consequence. Due to that enmity, accused has been falsely roped. No witness has been examined to prove the said defence of the accused.

No doubt the death of the deceased Shafaqat Ali took place in a most unfortunate manner by fire arm head injury, but that itself is not sufficient. The prosecution has to establish beyond reasonable doubt person being prosecuted is guilty of the crime. From the evidence on record, it is apparent that appellants are not named in the FIR but the name of the appellants came in light through the evidence of chance witnesses. The evidence of P.W.-1, P.W.-2 and P.W.-4 is not fully reliable on the aforesaid reasons. Their evidence would not lead us to believe that appellants could be only perpetrators of crime. The chain of circumstantial evidence is not complete and do not lead to the conclusion that in all human probability, the murder must have been committed by the appellants only. Thus, prosecution has failed to prove its case beyond all reasonable doubts that accused Afzal @ Guddu and Iqbal had committed the murder of Shafaqat Ali at the time, place and in the manner as alleged by the prosecution. It would indeed be unsafe to convict the appellants based on the testimony of circumstantial evidence. They would certainly be entitled to be benefit of doubt which is created by the very circumstances which we have referred.

Appellants Afzal @ Guddu and Iqbal are acquitted by the trial Court for the charge under Section 3 (1) of Uttar Pradesh Gangsters and Anti Social Activities (Prevention), Act. Accused Afzal @ Guddu is also acquitted under Section 25/27 of Arms Act by the trial Court.

For the aforementioned reasons, the appeal is **allowed** and the judgment and order dated 04.09.2010 passed by the learned Special Judge (Gangster Act)/ Additional Sessions Judge, Court No.5, Bulandshahr in Special Trial No. 683/2007, under Section 302/34 IPC, State vs. Mohd. Afzal @ Guddu and others, Police Station Gulawadi, District Bulandshahr for convicting and sentencing the appellants to undergo life imprisonment under Section 302/34 of IPC, is hereby set-aside.

The appellants Afzal @ Guddu and Iqbal are acquitted for the charges under Section 302/34 IPC. They shall be set at liberty forthwith, if not required in any other case.

Office is directed to send copy of this judgment alongwith original record to the Court concerned for necessary action and compliance in accordance with law.

(Om Prakash Tripathi, J.) (Manoj Kumar Gupta, J.)

Order Date : 21.02.2022

Monika