

(2004) 01 AHC CK 0221**Allahabad High Court****Case No:** Criminal Appeal No. 2131 of 1981

Aijaz Ahmad

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: Jan. 27, 2004**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 302

Citation: (2004) 2 ACR 1596**Hon'ble Judges:** Onkareshwar Bhatt, J; M.C. Jain, J**Bench:** Division Bench**Advocate:** P.N. Misra, Mukhtar Alam, Apul Misra and V.M. Zaidi, for the Appellant; S.K. Pal and A.G.As., for the Respondent**Final Decision:** Dismissed**Judgement**

Onkareshwar Bhatt, J.

Aijaz Ahmad has preferred this appeal against his conviction u/s 302, I.P.C. He has been sentenced to imprisonment for life and to a fine of Rs. 500. In default whereof six months" further rigorous imprisonment has been ordered. The judgment and order was passed in Session Trial No. 392 of 1980 by the then I Vth Additional Session Judge, Bijnor on 18.9.1981.

2. One Sultan Ahmad, deceased of the case, lived with his brother Shamim Ahmad P.W. 3 who is the informant of the case, in Mohalla Sabniganj, police station Nazibabad district Bijnor. The Appellant also lived in the same Mohalla. The Appellant bore enmity with the informant and his family members. Sultan Ahmad had a flour mill in Mohalla Munirganj which was a little ahead of the utensil shop of Ashraf P.W. 4. The house of the informant and Sultan Ahmad opened on the northern side on a road. The road in front of their house communicated with a road running east-west. In the above road there is a house of one Jai Prakash whereafter there is a Gher of one Kapoor Chand and thereafter there is a house of the said

Kapoor Chand. In the middle of the house of Kapoor Chand there is an electric pole. From the said pole on the eastern as well as on the western side at a distance of about 100 feet each there are two other electric poles. In the Gher of Kapoor Chand also an electric bulb was fitted. All the electric poles and electric bulbs in the Gher of Kapoor Chand were emitting light. On 15.10.1979 at about 7.15 p.m. informant Shamim Ahmad while sitting in the Baithak of his house heard the shot of fire. He proceeded near the Gher of Kapoor Chand and saw that his brother Sultan Ahmad was lying on the road by the side of his stomach and blood was oozing out from his back. Sultan Ahmad told the informant that the Appellant had fired at him and had run away. Ashraf P.W. 4, Gaffar P.W. 5 and Abdul Sattar P.W. 6 also reached at that place. These witnesses told the informant that the Appellant had fired at Sultan and Sultan also told the same fact to his brother. Shamim carried Sultan Ahmad on a Rickshaw to P.H.C. Nazibabad. Dr. Harish Chandra Duwa, P.W. 1 attended the injured Sultan Ahmad when Shamim Ahmad proceeded to police station Nazibabad, after getting the written report prepared by Nizamuddin at the hospital itself. The report was lodged at 8.10 p.m. on 15.10.1979 S.I. N. P. Deshwal P.W. 10, Investigating Officer along with informant Shamim Ahmad went to the hospital and recorded the statement of Sultan Ahmad in the case diary, copy of which is Exhibit Ka-19. He also took into possession the bloodstained and plain earth from the place of occurrence. At 9.25 p.m. Tehsildar Nazibabad recorded the dying declaration of Sultan Ahmad in the hospital in presence of Dr. Harish Chandra Duwa. At 10 p.m. Sultan Ahmad died in the hospital. On 16.10.1979 the Investigating Officer prepared the inquest report and sent the dead body for post-mortem examination. P.W. 7 Dr. R. Prasad of the District Hospital performed the post-mortem examination on the dead body of deceased Sultan Ahmad on 16.10.1979 at 3 p.m. He found following anti-mortem injury:

Fire arm wound of entry 0.5 cm. ? 0.4 cm. ? abdominal cavity deep, edges inverted and lacerated. Blackening present around the wound over the middle of back vertebral region 24 cm. below the back of root of neck. On exposing the body right kidney was found badly lacerated, stomach was also found lacerated, 1-1/2 pound clotted blood was found in the abdomen cavity, 12th thoracic vertebra was found fractured. Peritoneum was found lacerated.

In the opinion of the doctor cause of death was shock and haemorrhage as a result of fire arm injury.

3. The Appellant has stated that the informant Shamim Ahmad bore enmity with him. He stated that the police also bore enmity with him since he used to send reports against the police. He also stated that the dying-declaration was false. Maqsood Ahmad D.W. 1 has been produced in defence who has stated that on 15.10.1979 the bulb of one of the electric pole near the house of Kapoor Chand was fused. The Appellant pleaded his false implication in the case.

4. Sri P. N. Misra, learned senior Advocate, assisted by Sri Mukhtar Alam for the Appellant and Sri S. K. Pal, learned A.G.A. for the State have been heard and the evidence on record has been carefully perused by us.

5. Admittedly, the informant Shamim Ahmad P.W. 3 is not an eye-witness of the occurrence. He reached the place of occurrence after he heard the shot. He saw his brother Sultan Ahmad lying in injured condition on the road in front of Gher of Kapoor Chand. P.W. 4 Ashraf stated that he was passing through Mohalla Sabnigaran and was proceeding to his house in Mohalla Kalluganj after closing his shop. He stated that deceased Sultan Ahmad was going ahead of him at a sufficient distance. The witness stated that he saw the deceased lying near the Gher of Kapoor Chand having sustained injury in his back from which blood was oozing. He stated that Gaffar P.W. 5 and Abdul Sattar P.W. 6 also reached there. The witness stated that the deceased was telling that the Appellant had fired at him and had run away, P.W. 5 Gaffar and Abdul Sattar P.W. 6 did not support the prosecution case and have been declared hostile. Gaffar stated that he did not see any occurrence while Abdul Sattar stated that he reached his house at about 11 p.m. in the night and he heard that deceased had been fired at and it was rumoured that the Appellant had fired at him.

6. None of the above three witnesses has supported the prosecution case regarding the actual firing having been seen by any of them. The prosecution relied upon the dying declaration made by deceased Sultan Ahmad and res gestae evidence of informant Shamim Ahmad P.W. 3 and Ashraf P.W. 4.

7. The Appellant resided in Mohalla Sabnigaran where the deceased as well as his brother Shamim Ahmad, informant P.W. 3 lived. The Appellant was well known to the deceased as well as to the informant. The Appellant as well as his four brothers Jameer Ahmad, Irshad Ahmad, Tashliq Ahmad and Izhar Ahmad bore enmity with the informant and his family members. About two years prior to the occurrence Jameer Ahmad dug a pit in the road for preparing septic tank. The residents of the mohalla had given an application in that regard to Nagar Palika in which informant was also a signatory. The Nagar Palika gave notice to Jameer Ahmad and thereupon a case was started in the Court of the District Magistrate. On 31.1.1979 Jameer Ahmad, Tesleem and Aizaz came and threatened the informant when the informant had filed Vakalatnama in that case. The informant reported the matter at the police station Nazibabad in above regard, as per Ex. Ka-4. Due to the lodging of the report the enmity further intensified. It has come in evidence that the Appellant and his brothers were influential persons of the locality and they caused harassment to the persons of the locality. In another incident the Appellant along with his brothers, Hashmat and Yamin came to the house of the informant and threatened him. A report in this regard was also lodged by the informant which is Ex. Ka-5. On 10.10.1979 the informant had gone to Lucknow for his personal work. At Lucknow he met the manager of Punjab National Bank and delivered him a copy of the

application which he had given to the manager of the Bank at Nazibabad. In the application it had been alleged that loan which was being demanded by the Appellant be not granted to him because he had formed a forged Samiti. At that occasion the Appellant's elder brother Irshad Ahmad had met him at Lucknow and threatened the informant that by moving the application he had not done good and that he would ruin the informant. Copy of the application is Ex. Ka-6 on record. The occurrence took place on 15.10.1979, i.e., after five days of the threatening given by the elder brother of the Appellant Irshad Ahmad to the informant at Lucknow. The above facts go to show that the Appellant and his family members were well known to each other and there was deep rooted enmity in between them and it has also come in evidence that elder brother of the Appellant was an influential person of Nazibabad.

8. The place of occurrence where the deceased was shot at and was lying with his face downward is on the road in front of the Gher of Kapoor Chandra. It has come in evidence that the said place of occurrence is at a distance of 45 steps from the house of the informant Shamim Ahmad. On the Gher of Kapoor Chandra there was private bulb which was emitting light. Adjoining to the Gher of Kapoor Chandra is his house where there is a Government electric pole. From the said pole there are two other Government electric poles on eastern as well as on the western side at a distance of about 100 feet. In all the three electric poles electric rod was fitted and the same was emitting light. Ashraf P.W. 4 has stated that at that time there was electric light which was glowing at the house of Kapoor Chandra as well as on the Government electric poles. The Investigating Officer Sri N. P. Deshwal P.W. 10 visited the place of occurrence on the same night and had found that electric bulb which was at a distance of five steps from the place of occurrence and one bulb which was at the wall of Kapoor Chandra were glowing and emitting light. The place of occurrence is just in front of the Gher of Kapoor Chandra on the road, from which place bloodstained earth was taken and the same was found to contain human blood. The fact that the deceased Sultan Ahmad was lying in injured condition on the road in front of the Gher of Kapoor Chandra is amply corroborated from the statement of the informant Shamim Ahmad, Ashraf P.W. 4 as well as from the statement of the Investigating Officer Sri N. P. Deshwal. The time of occurrence was 7.15 p.m. on 15.10.1979. According to the evidence adduced in the case there was sufficient light at the place of occurrence. The trial court has rightly disbelieved the evidence of D.W. 1 Maqsood Ahmad that a bulb on the Government electric pole near the house of Kapoor Chandra was fused. The trial court has given cogent and convincing reasons for disbelieving the testimony of Maqsood Ahmad with which we agree.

9. Ashraf P.W. 4 and Shamim Ahmad informant had not seen the actual assault caused on the deceased. Ashraf has stated that at about 7.15 p.m. he saw the deceased lying in an injured condition having sustained fire arm injury. The deceased had injury on his back and blood was oozing from it. The deceased told

Ashraf as well as his brother Shamim Ahmad that the Appellant had caused injuries to him and had run away. After the incident the informant took the deceased in injured condition to the Primary Health Centre, Nazibabad where he was admitted at 7.35 p.m., i.e., within twenty minutes of the occurrence. The first informant report was lodged at 8.10 p.m. at police station Nazibabad. In the first information report, the name of the Appellant was given as the assailant of the deceased who had caused fire arm injury to him. The statement of Ashraf and Shamim Ahmad that the deceased told him that the Appellant was his assailant who had fired at him is res gestae and is admissible in the law of evidence. It is not in dispute that the injury on the back was sustained by the deceased by fire arm. The seat of injury is suggestive that no organ of body affecting speech was affected. Ex. Ka-2 is dying declaration of the deceased which has been recorded by the Tehsildar at 9.25 p.m. At the time, the deceased was fully conscious and was giving answer to the questions. Shamim Ahmad informant has stated that when he went to the hospital along with the Investigating Officer the deceased was fully conscious. He has also stated that the deceased was conveniently answering the questions to Tahsildar. His dying declaration is Ex. Ka-2 which bears signature of Tahsildar and it has been proved by Dr. H. C. Duwa P.W. 1. The doctor has also proved his certificate given on the dying-declaration. At 10 p.m. the deceased breathed his last. It has been contended that prior to the recording of the dying declaration persons of locality, mother and son of the informant were present in the room wherein the deceased was admitted. It has also come in the evidence that other persons of the locality also came and went away and in the room talks were going on that the Appellant had caused injury to the deceased. The mere fact that relatives and persons of the locality visited the room where the deceased was lying in the hospital cannot be taken to mean that the deceased was tutored. The family members and persons of the locality who visited the deceased in the hospital were more concerned with his condition and treatment for saving his life. It has been denied by Shamim Ahmad that the deceased was tutored by any one of them. The Appellant is the sole accused in this case. After being hit on his back the deceased would have turned to see the assailant as a natural impulse and since the Appellant was the person of his own Mohalla with inimical background and there being sufficient light at the place of occurrence, he could have unmistakably recognised the Appellant who was his assailant. In fact, after being hit on the back in his reflex action he would have turned his neck and saw the Appellant and even after falling down in the condition with his back upward and head towards west and his hand folded under his face he would have recognised the Appellant. According to P.W. 4 Ashraf the assailant ran towards west after causing injury. In the above situation when the deceased sustained injuries and even when he was lying on the ground with his face towards west ward he could see the Appellant very well when the Appellant was known to him from before the occurrence.

10. The dying declaration is being criticized on the ground that in the bed head ticket there is an entry that some unknown person had caused fire arm injury to him. The statement of Dr. H. C. Duwa P.W. 1 shows that in the bed head ticket which was not even prepared by him but by a Pharmacist, there is a mention of the condition of injured deceased after about 15 to 20 minutes. The doctor could not make medico legal examination of the deceased in the hope that his general condition will improve. The details in the bed head ticket appear to have been written afterwards. Shamim Ahmad has stated that after lodging the report at the police station when he came back to hospital the doctor was examining the patient. He has categorically stated that prior to his going to the hospital or on his return from the police station the Doctor had not written anything on any paper and was only attending the patient. The above fact is suggestive that the entry made in the bed head ticket was made afterwards and not in sequence of time after about 15 or 20 minutes, as is mentioned in it. Even if the statement made by the deceased to the Investigating Officer is kept aside, the evidence of res gestae and the dying declaration made by the deceased to Tahsildar is consistent, convincing and reliable. The Tahsildar had no affinity with the prosecution which could prompt him to record false dying declaration. The evidence on record shows that the dying declaration was made by the deceased Sultan Ahmad when he was fully conscious and was in a fit mental condition to make the dying declaration. The certificate of Dr. H. C. Duwa is to the effect that the declarant was in a fit mental and physical condition for giving statement. It is perfectly appealing in view of the fact that the injury had not caused any damage to the organ of the body affecting the speech of the deceased. After making the dying declaration at 9.25 p.m. the deceased breathed his last at 10 p.m. No one at the point of death is presumed to tell a lie. The maxim "memo moriturus praesumitur mentire" which means that a man will not meet his Maker with a lie in his mouth is attracted and applies fully to the facts and circumstances of the case. The dying declaration in the present case is true and free from embellishment and it alone is sufficient for conviction without corroboration as has been held in the case of Kundula Bala Subrahmanyam and Another Vs. State of Andhra Pradesh . The present case being true and free from embellishment is corroborated from the evidence of res gestae, as has been discussed above. The dying declaration bears thumb impression of the deceased. Therefore, the ratio of the case of State of Uttar Pradesh v. Shishupal Singh 1992 SCC 957, is not applicable. The fact of the case of Ramilaben Hasmukhbhai Khristi and Anr. v. State of Gujarat 2002 (3) ACR 2614 (SC) : 2002 SCC 1575, was different and is not applicable to the facts of the present case because in this case certificate of the doctor shows that declarant was in a fit mental and physical condition to give dying declaration.

11. In view of the above discussion, the finding of the trial court that dying declaration is reliable cannot be faulted with. The finding that the Appellant is guilty of the charge of murder of the deceased also calls for no interference. The appeal has, therefore, got no force and is liable to be dismissed.

12. The appeal is dismissed.

13. The Appellant Aizaz Ahmad is on bail. He shall be taken into custody forthwith to serve out the sentence. The Chief Judicial Magistrate, Bijnor is directed to cause the arrest of the Appellant and lodge him in jail for serving out the sentence awarded to him and report compliance within two months.