A MOHAMMAD MIAN

v.

STATE OF U.P.

(Criminal Appeal No. 310 of 2006)

B DECEMBER 16, 2010

[HARJIT SINGH BEDI AND CHANDRAMAULI KR. PRASAD, JJ.]

Penal Code, 1860 – s.302 and s.307 r/w s.34 – Long C *standing enmity between the parties – Quarrel leading to firing of gunshots by accused which ultimately led to death of PW-1's father and grievous injury to his brother, PW-2 – Conviction of accused-appellants – Justification of – Held: On facts, justified – Though there was apparent confusion in the time* D *factor with regard to the special report, the Police official, who testified regarding the dispatch of special report to Magistrate, was not even remotely cross-examined in this regard and, therefore, no advantage can be taken by defence on account of this discordance, if any – It must be taken as proved that* E *the special report had been delivered to the Magistrate the same day the incident occurred – PW-2 was gravely injured in the incident and his presence, therefore, cannot be doubted – Presence of PW-1, the author of the FIR, also cannot be doubted – Statement of the investigating officer, when read* F *in the background of the site plan, made it clear that PW-1 was indeed present at the crucial time – The house of the complainants was only 100 feet from the house of accused and the incident happened about 10 feet away from the house of the accused – Presence of all the witnesses was, therefore,* G *natural at the time when the incident happened – Statements of PW 1 and 2 that the firing was from a distance of 10 to 12 steps (about 15 feet) clearly corresponded to the nature of the injuries found on the deceased – Trial court had acquitted the accused of the charge of murder primarily on the ground that*

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the medical evidence did not support the ocular version of the incident – The reasons given by the trial court were not well considered – Country made weapons had been used and the performance of these weapons being unpredictable and uncertain, the trajectory of the bullet alone would not be a safe basis for assessing the entire evidence more particularly as the projectiles could have been deflected from their true path by the bones or tissues that came along the way – Conviction, thus, upheld.

Appellant no.1 owned a fair price shop in the outer portion of his house and supplied/sold various items including sugar. The prosecution case was that pursuant to an argument over supply of sugar, appellant no.1 fired gunshots at PW-1's brother (PW-2), which rendered him grievously injured; that thereafter PW-1's father picked up a quarrel with appellant no.1, whereupon at the instance of appellant no.1, his sons picked up guns and rushed to their roof of their house and each of them fired a shot at PW-1's father in quick succession which led to his death.

The trial court held that the charge against the accused under s.302/34 could not be made out as the medical evidence did not correspond to the ocular version, thus, acquitted all the accused of such charge. The trial court, however, held appellant no.1 guilty under Section 307 IPC for having caused the gun shot injury on the person of PW-2 and sentenced him to 6 years R.I., but acquitted the other accused of that offence as well.

Aggrieved, the State preferred an appeal assailing the acquittal of the accused whereas appellant no.1 filed a separate appeal challenging his conviction and sentence under Section 307 IPC. The High Court set aside the acquittal orders of the trial Court, convicting all the accused under Section 302 IPC read with Section 34 IPC

A and sentenced each of them to life imprisonment. The criminal appeal filed by appellant no.1 challenging his conviction under Section 307 IPC was also dismissed by the High Court.

B In the instant appeals, the appellants contended that the High Court had ignored the basic fact that it was dealing with an appeal against acquittal in so far as the charge of murder was concerned and it could not be said that the judgment of the trial court was so perverse r against the evidence that interference was called for. C The appellants further pleaded that the FIR had not been lodged at its purported time but infact much later and then ante-timed in the light of the fact that the special report, as per the FIR itself, had been dispatched to the Magistrate a day after the incident. The appellants, D accordingly, pleaded that this delay had been utilized by the prosecution to involve the entire family of appellant no.1 in a false case. The appellants also emphasized that the medical evidence did not conform to the ocular testimony leading to the conclusion that the incident had E not happened in the manner suggested by the prosecution.

Dismissing the appeals, the Court

F HELD: 1. The trial court had given findings in favour of the prosecution on virtually all aspects, but had ultimately acquitted the accused of the charge of murder almost exclusively on the ground that the medical evidence did not conform to or support the ocular version. The High Court has, merely, reversed this aspect G of the trial court judgment and held that a case of murder was also made out against three of the accused, that is the present appellants. [Para 8] [1300-F-G]

2. The prompt lodging of the FIR is a very significant H factor in any criminal prosecution. There are several

parameters by which the spontaneity of a F.I.R. and the prosecution's story as to the time at which it had been lodged has to be adjudged, and one of the primary factors is the time of the delivery of the special report to the Magistrate, as it is expected that he being unconnected in any manner with the investigation or the prosecution would be an independent person to endorse as to the time that a copy of the FIR had been received by him. It has come in the evidence that the incident had happened at 7 a.m. on the 24th April of 1980. The FIR (purportedly) had been lodged at Police Station, about 4 km. away at 9.10 a.m. and as per the column in the statutory form dealing with F.I.R's, the copy of the special report had been dispatched from the Police Station on the 25th April, 1980 to the Magistrate at Bareilly at a distance of 39 Kms. This date, if accurate, would arouse great suspicion about the time that the FIR had been lodged and *ipso facto* some suspicion about the prosecution story as well. However, PW-7-Head Constable, categorically stated that the copy of the special report had been dispatched from the Police Station on the 24th April, 1980 through a Constable and the said Constable had returned to the police station at 9:15 p.m. on the same day after delivering the special report and that both the departure and arrival reports had been recorded in the daily diary of the Police Station. Though the appellant's counsel emphasized that the statement of PW-7 was at variance with the entry made in the FIR and as such was an after thought, but PW-7 was not even remotely cross-examined on the apparent confusion in the time factor with regard to the special report. Therefore, no advantage can be taken by the defence on account of this discordance, if any. It must be taken as proved that the incident had indeed happened at 7 a.m., the FIR had been recorded at 9.10 a.m. and the special report had been delivered to the

A Magistrate the same day. [Para 9] [1300-H; 1301-A-H]

3. PW-2 was gravely injured in the incident. His presence, therefore, cannot be doubted. The medical evidence with respect to his injuries reveal five gun shot wounds of entry on the spine with a corresponding B wound of exit over the right buttock. The doctor had examined PW-2 at 12.25 p.m. on 24th April, 1980 and opined that the injuries could have been suffered within six hours. This corresponds fully with the prosecution story. It is this injury which has led to the conviction of C appellant no.1 under Section 307 IPC. The presence of PW-1, the author of the FIR, can also not be doubted. It is true that in the FIR recorded at his instance, he does not specifically allude to his presence at the spot. A perusal of the FIR, however, reveals that read as a whole, D it makes out that he was indeed an eye witness. PW-6, one of the investigating officers, who had prepared the site plan and had also carried out the preliminary investigations at the site, deposed in his examination-in-chief that he had also recorded the statement of PW-1 at E the spot and had prepared the site plan on his instructions and had also shown (in the site plan) the place from where he had seen the incident. When the statement of this witness is read in the background of the site plan, it is clear that PW-1 was indeed present at the F crucial time. [Para 10] [1302-A-F]

4. The evidence of PW-3, the third eye witness, is said to be a totally independent one. It is seen from the site plan that the presence of PW-3 also figures as having G seen the murder from outside the house of 'C', a very short distance away. Therefore, the presence of this witness can also not be doubted. Concededly, PW-6 did not record the statement of any of the persons of the immediate neighbourhood. He admitted to this fact in his cross-examination. One cannot, however, ignore the sad H

but basic truth that so-called independent witnesses tend to stay far away and are not willing to come forth as they often face grave consequences. The prosecution has therefore, perforce, to fall back on the testimonies of witnesses who are friends or family members of the victim. In the present case, the house of the complainants was only 100 feet from the house of accused and the incident happened about 10 feet away from the house of the accused. The presence of all the witnesses was, therefore, natural at the time when the incident happened and that in any case PW-2 was a stamped witness, against whom no suspicion could be raised. [Para 10] [1302-F-H; 1303-A-D]

5. The three eye-witnesses have categorically stated that there was enmity between the parties since long. It appears that the dispute with regard to the 1 Kg. sugar had merely precipitated the festering animosity. All the witnesses have stated as to the manner in which first appellant no.1 had shot PW-2 and when his father had come forward to see what had happened, he had been shot dead by the other two accused from the roof of their residential house. [Para 11] [1303-E-F]

6. The trial court had acquitted the accused of the charge of murder primarily on the ground that the medical evidence did not support the ocular version of the incident. The reasons given by the trial court were not well considered. These observations of the trial court are meaningless in the light of the ocular evidence when read in the context of incident as it happened. The post-mortem examination of the dead body was conducted by PW-5 who opined that the exit of injury No.1 was at a marginally higher level than the wound of entry, that the exit and entry wounds of injury No.2 were at the same level whereas the exit wound of Injury No.3 and 4 were at a slightly lower level than the wounds of entry. The

A doctor also opined that there were fractures of the left humerus bone, the 5th rib on the right side and the 7th costal cartilage. Country made weapons had been used and the performance of these weapons being unpredictable and uncertain, the trajectory of the bullet B alone would not be a safe basis for assessing the entire evidence more particularly as the projectiles could have been deflected from their true path by the bones or tissues that came along the way. [Paras 12, 13 and 14] [1303-G-H; 1304-A; 1305-D; 1306-E-H]

C *Modi's Medical Jurisprudence and Toxicology*, Twenty-third Edition at page 724 – referred to.

7. There is yet another circumstance which is extremely relevant. It is the case of the prosecution that D the gun shots had been fired from the roof of the house of appellant no.1 which was 10 or 12 feet high. It has come in the statements of PW nos.1 and 2 that the firing was from a distance of 10 to 12 steps which would mean 15 feet. This clearly corresponds to the nature of the E injuries found on the dead body. The trial court seems to have been greatly influenced by the fact that the prosecution story that the shots had been fired from the roof was deliberately created by the prosecution as otherwise appellant no.1's house would not have been F in their direct line of sight. PW-1 candidly admitted that the shop of appellant no.1 was not visible from their house as there was a mosque in between but after 10 feet or so beyond the grave located near the gate, the shop of the accused could be seen. In this situation, the normal G tendency of a witness who had heard the sound of repeated gun shots close to his house would be to move in that direction. This is what PW-1 apparently did as after hearing the sound of the first shot fired at PW-2, both the deceased and PW-1 had been attracted towards that way leading to the murder. It is also seen from the site plan H

which had been prepared contemporaneously that the gun shots had been fired on the deceased from the roof of the house. The finding of the trial court, therefore, that the prosecution had changed the location of the two accused to bring them on the roof, was speculative. Therefore, no fault can be found with the judgment of the High Court. [Para 14] [1307-D-H; 1308-A-B]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 310 of 2006.

From the Judgment & Order dated 7.10.2005 of the High Court of Judicature, Allahabad at Allahabad in Criminal Appeal No. 2731 of 1981 and in Government Appeal No. 907 of 1982.

WITH

Crl. Appeal No. 282 of 2006.

Ranjit Kumar, Abhay Kumar, Rajesh Anand, Tenzing Tsering, Madhusmita Singh for the Appellant.

Pramod Swarup, Ameet Singh, Alka Sinha, Anuvrat Sharma for the Respondent.

The Judgment of the Court was delivered by

HARJIT SINGH BEDI, J. 1. This judgment will dispose of Criminal Appeal Nos.310 of 2006 and 282 of 2006. They arise out of the following facts:

2. Mohammad Mian, one of the appellants herein, was running a fair price shop in the outer portion of his house situated in village Ferozpur, District Bareilly. At about 7 a.m. on the 20th of April 1980 Iqrar Mohammad son of Firasat Husain PW-2 went to the fair price shop to buy sugar but instead of supplying 2 kgs. of sugar as per the ration card, Mohammad Mian gave only 1 Kg. Firasat Husain then went to Mohammad Mian's shop and remonstrated with him and asked

A him as to why he had supplied only half the quantity of sugar that was due on his card. Mohammad Mian, however, abused him and told him that he would give only that quantity and he could take it or leave it as he wished. Mohammad Mian immediately thereafter fired a shot at Firasat Husain with his B gun hitting him on his thigh and as he turned backwards Mohammad Mian's son, Zamir Mian, fired at him with a country made pistol hitting him on the upper right gluteal region on which Firasat Husain fell down on the ground. On hearing the sound of the firing, Riyasat Husain, father of Firasat Hussain C went out of his house and moved in that direction and on seeing his son lying injured, he questioned Mohammad Mian which resulted in a quarrel between them. Mohammad Mian thereupon asked his sons Ahmad Mian and Shamim Mian to kill Riyasat Husain on which Ahmed Mian picked up a gun and Shamim D Mian a country made pistol and rushed to the roof of their house and as Riyasat Husain turned to move away, each of them fired a shot at him in quick succession on which he fell down. On hearing the sound of the firing, Sharafat Husain, PW-1 too left his house and proceeded towards the scene of occurrence. The E incident was also witnessed by Sabir Husain, Mohd. Aslam, Rahat Husain and Summeri PW-3, who too were going to the shop for purchasing sugar. Sharafat Husain immediately went to his father who was lying in a precarious condition and gasping for breath and removed him to his house but he succumbed to his injuries within a short time. Firasat Husain, F the injured was also brought from the place where he lay. Leaving his father's dead body and his injured brother in the family home, Sharafat Husain left for Police Station, Shahi at a distance of about 4 miles from village Ferozpur and lodged the FIR at 9.10 a.m. It is the case of the defence that the special G report was delivered to the Magistrate the next day i.e. the 25th April, 1980. After receiving the information of the murder, Sub-Inspector Sri Nivas Sharma immediately reached village Ferozpur and made the necessary inquiries and drew the

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inquest report. He also dispatched the dead body for the post-mortem examination. Firasat Husain was also sent to the District Hospital for treatment. The police officer also prepared the site plan and also collected blood stained earth from two places, one portion from the scene of occurrence and another from the house of the deceased where the dead body had been brought. Firasat Husain was medically examined by Dr. J.N. Bhargava at the District Hospital, Bareilly at 12.25 p.m. on the 24th April, 1980 with two injuries, one being a gun shot wound entry and the other its exit. Riyasat Husain's body was also subjected to a post-mortem examination at 2.30 p.m. on the 25th April, 1980, and nine injuries were found thereon, four gun shot wounds of entry and four of exit whereas the 9th was an abrasion. On an internal examination on the body, the humerus and a rib were found to be fractured on account of the gun shot injury. On the completion of the investigation, the accused i.e. Mohammad Mian and his sons Ahmad Mian, Shamim Mian and Zamir Mian were committed to the Court of Sessions for offences punishable under Section 302 and 307 of the IPC and as they pleaded not guilty, they were brought to trial.

3. The prosecution in support of its case, examined three eye witnesses, Sharafat Husain PW-1, Firasat Husain PW-2 and Summeri PW-3, Dr. J.N. Bhargava, PW-4 who had examined Firasat Husain for his injuries, Dr. K.S. Tiwari, PW-5 who had conducted the autopsy on the dead body, PW-6 Sub-Inspector Srinivas Sharma the main investigating officer and PW-7 Head Constable Raghvendra Pal Singh who had recorded the F.I.R. and dispatched the special report to the Magistrate. The accused denied the allegations leveled against them and pleaded that they had been implicated in a false case.

4. The trial court on a consideration of the evidence (and while believing most of the prosecution story) held that the charge against the accused under Section 302/34 could not be made out as the medical evidence did not correspond to the ocular version. All the accused were acquitted of this charge.

A The trial court, however, held Mohammad Mian guilty for the offence punishable under Section 307 of the IPC for having caused the gun shot injury on the person of Firasat Husain and sentenced him to 6 years R.I., but acquitted the other accused of that offence as well.

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5. Aggrieved by the judgment aforesaid, the State preferred an appeal assailing the acquittal of the accused whereas the Mohammad Mian filed a separate appeal challenging his conviction and sentence under Section 307 of the IPC. The High Court acutely conscious of the fact that it was C largely dealing with an appeal against acquittal and the limitations that went with it, re-appraised the evidence and observed that the three eye witnesses, particularly the injured Firasat Husain, could not be disbelieved. The Court noted that though in the FIR Sharafat Husain had not stated that he had D witnessed the murder of his father, but the fact that the site plan had been prepared at his instance showing that he had witnessed the occurrence from near the 'baithak' of Chhotey Pradhan, he was indeed an eye witness to the murder. The Court observed that the distance between the house of the E complainant party and the accused was only 60 or 70 paces (which would make it about 100 feet) and this short distance and the sequence of events that preceded the firing made it clear that Sharafat Husain too had witnessed the incident. The Court also found that after receiving the firearm injury, Firasat F Husain had fallen at a distance of 10 feet from the fair price shop of Mohammad Mian and he was, therefore, in an apparent position to witness the fatal assault on his father. Likewise, the Court observed that PW-3 Summeri was a trust worthy witness as he too had seen the incident from the 'baithak' of Chhotey G Pradhan after being attracted by the altercation between Firasat Husain and Mohammad Mian. The Court finally concluded that the eye witness account could not be faulted in any manner. The High Court then dealt with the medical evidence vis-a-vis the ocular evidence and observed that as per the prosecution story

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the fatal shots had been fired at the deceased by Ahmad Mian and Shamim Mian from the roof of the house which was about 10 feet in height. The Court observed that merely because the wounds of entry and exit were either parallel to each other or in one case the exit wound was slightly higher than the wound of entry would not detract from the other evidence as it could not be said with certainty as to the posture which the deceased and the assailants were applying when the shots had been fired. The Court also observed that the FIR had been lodged promptly and the special report also delivered within a reasonable time which testified to the truthfulness of the prosecution story. The Court, accordingly, set aside the order of the trial court acquitting Mohammad Mian, Ahmad Mian and Shamim Mian for the offence punishable under Section 302 read with Sec tion 34 of the IPC and sentenced each of them to imprisonment for life. The Criminal Appeal filed by Mohammad Mian challenging his conviction under Section 307 was also dismissed. It was also directed that the sentence of the accused were to run concurrently. The two appeals mentioned above have been filed impugning the judgment of the High Court.

6. Mr. Ranjit Kumar, the learned senior counsel for the appellants, has raised several arguments during the course of hearing. He has pointed out that the High Court had ignored the basic fact that it was dealing with an appeal against acquittal in so far as the charge of murder was concerned and it could not be said that the judgment of the Trial Court was so perverse or against the evidence that interference was called for. He has further pleaded that the FIR had not been lodged at its purported time but infact much later and then ante-timed in the light of the fact that the special report, as per the FIR itself, had been dispatched to the Magistrate on the 25th of April, 1980 i.e. a day after the incident. He has, accordingly, pleaded that this delay had been utilized by the prosecution to involve the entire family of Mohammad Mian in a false case, though the circumstances showed that neither PW-1 nor PW-3 had

A been present at the spot. It has also been emphasized that the medical evidence did not conform to the ocular testimony leading to the conclusion that the incident had not happened in the manner suggested by the prosecution.

B 7. Mr. Pramod Swarup, the learned senior counsel representing the State of Uttar Pradesh, has, however, controverted these submissions and has pointed out that the distance between the house of the deceased and the shop and house of the accused was only 70 paces or 100 feet and on account of this very short distance and the time of the incident being 7 a.m., the presence of the eye witnesses at home was to be expected. It has also been pleaded that the presence of Firasat Hussain who had been grievously injured with a firearm could not, in any case, be disbelieved and in the light of this fact even assuming there was some discrepancy in the medical evidence vis-à-vis the ocular one, the same could be ignored. It has, further, been submitted that there was no delay in the lodging of the FIR or the delivery of the special report in the light of the statement of Head Constable Raghvendra Prasad Singh PW-7 who had deposed that the special report had been dispatched to the Magistrate within a very short time, with the result that there was no time to cook up a false story.

8. We have considered the arguments advanced by the learned counsel for the parties. It will be noticed that the trial court had given findings in favour of the prosecution on virtually all aspects, but had ultimately acquitted the accused of the charge of murder almost exclusively on the ground that the medical evidence did not conform to or support the ocular version. The High Court has, merely, reversed this aspect of the trial court judgment and held that a case of murder was also made out against three of the accused, that is the present appellants. It is in this background that the entire matter would have to be examined by us.

9. Undoubtedly, the prompt lodging of the FIR is a very

significant factor in any criminal prosecution. There are several parameters by which the spontaneity of a F.I.R. and the prosecution's story as to the time at which it had been lodged has to be adjudged, and one of the primary factors is the time of the delivery of the special report to the Magistrate, as it is expected that he being unconnected in any manner with the investigation or the prosecution would be an independent person to endorse as to the time that a copy of the FIR had been received by him. It has come in the evidence that the incident had happened in village Ferozpur at 7 a.m. on the 24th April of 1980. The FIR (purportedly) had been lodged at Police Station, Shahi, about 4 km. away at 9.10 a.m. and as per the column in the statutory form dealing with F.I.R's, the copy of the special report had been dispatched from the Police Station on the 25th April, 1980 to the Magistrate at Bareilly at a distance of 39 Kms.. Undoubtedly, this date, if accurate, would arouse great suspicion about the time that the FIR had been lodged and ipso facto some suspicion about the prosecution story as well. We have, however, gone through the evidence of PW-7 Head Constable Raghvendra Prasad Singh. This police official categorically stated that the copy of the special report had been dispatched from the Police Station on the 24th April, 1980 through Constable Mahesh and the said Constable had returned to the police station at 9:15 p.m. on the same day after delivering the special report and that both the departure and arrival reports had been recorded in the daily diary of the Police Station. Mr. Ranjit Kumar has, however, emphasized that the statement of PW-7 was at variance with the entry made in the FIR, (as noted above) and as such was an after thought. It is extremely significant, however, that PW-7 was not even remotely cross-examined on the apparent confusion in the time factor with regard to the special report. We are, therefore, of the opinion that no advantage can be taken by the defence on account of this discordance, if any. We must therefore take it as proved that the incident had indeed happened at 7 a.m., the FIR had been recorded at 9.10 a.m. and the special report had been delivered to the Magistrate the same day.

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A 10. We now examine the other evidence in the above background. It bears notice that PW-2 Firasat Husain was gravely injured in the incident. His presence, therefore, cannot be doubted. We have gone through the medical evidence with respect to his injuries and find five gun shot wounds of entry
B on the spine with a corresponding wound of exit over the right buttock. The doctor had examined Firasat at 12.25 p.m. on the 24th April, 1980 and opined that the injuries could have been suffered within six hours. This corresponds fully with the prosecution story. It is this injury which has led to the conviction
C of Mohammad Mian under Section 307 of the IPC. We also see that the presence of PW-1 Sharafat Husain, the author of the FIR, can also not be doubted. It is true that in the FIR recorded at his instance, he does not specifically allude to his presence at the spot. A perusal of the FIR, however, reveals
D that read as a whole, it makes out that he was indeed an eye witness. We have examined the evidence of PW-6 Shri Nivas Sharma, one of the investigating officers, who had prepared the site plan and had also carried out the preliminary investigations at the site. He deposed in his examination-in-chief that he had also recorded the statement of Sharafat
E Husain at the spot and had prepared the site plan on his instructions and had also shown (in the site plan) the place from where he had seen the incident. When the statement of this witness is read in the background of the site plan, it is clear that Sharafat Husain was indeed present at the crucial time.
F Mr. Ranjit Kumar has also drawn our attention to the evidence of Summeri PW-3, the third eye witness, who is said to be a totally independent one. He has referred us to his cross-examination where he says that he had not made any statement to the Darogaji under Section 161 of the Cr.P.C. To our mind,
G this appears to be an attempt to help the defence as the Darogaji referred to i.e. PW-6 categorically stated that he had recorded his statement on the date of the murder. We also see from the site plan that the presence of PW-3 also figures as having seen the murder from outside the house of Chhotey

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Pradhan, a very short distance away. To our mind, therefore, the presence of this witness can also not be doubted. Concededly, PW-6 did not record the statement of any of the persons of the immediate neighbourhood. He admitted to this fact in his cross-examination. We cannot, however, ignore the sad but basic truth that so-called independent witnesses tend to stay far away and are not willing to come forth as they often face grave consequences. The prosecution has therefore, perforce, to fall back on the testimonies of witnesses who are friends or family members of the victim. In the present case, we find that the house of the complainants was only 100 feet from the house of accused and the incident happened about 10 feet away from the house of the accused. As already mentioned above, the presence of all the witnesses was, therefore, natural at the time when the incident happened and that in any case Firasat Husain was a stamped witness, against whom no suspicion could be raised.

11. We have also gone through the depositions of the three eye-witnesses. They have categorically stated that there was enmity between the parties since long. It appears that the dispute with regard to the 1 Kg. sugar had merely precipitated the festering animosity. All the witnesses have stated as to the manner in which first Mohammad Mian had shot Firasat Husain and when his father had come forward to see what had happened, he had been shot dead by the other two accused from the roof of their residential house. The learned counsel for the appellants has, however, referred us to some inconsistencies inter se the statements of these three witnesses. To our mind, they are so insignificant that they call for no serious discussion as they are bound to appear in the statement of any witness.

12. The trial court had acquitted the accused of the charge of murder primarily on the ground that the medical evidence did not support the ocular version of the incident. To our mind, the

A reasons given by the trial court were not well considered. It has been observed by the Trial Court thus:

"Moreover, the medical evidence also does not fit in the prosecution story in this case even if it is presumed although reluctantly that the fatal shots were fired from the roof top by the accused Ahmad Mian and Shamin Mian. According to Dr. K.S.Tiwari who conducted the post mortem examination of the deady body of Riasat Husain there were four gun shot wounds of entry on the back of chest of the deceased which are injuries no.1 to 4 in the post mortem examination report Ex. Ka-3. Their corresponding wounds of exit are injuries no.5,6,7 and 8 respectively. According to PW5 Dr. K.S. Tiwari the exit wounds of injury No.1 is slightly higher than the wound of entry. This particular injury cannot be caused from roof top. The witness PW.1 Sharafat Husain stated that the height of the roof from where the fatal shots were fired is about 10' and there is also a Mundair thereon about 1 ½' or 2' high. This witness also stated that the deceased Riasat Husain was at a distance of 6 or 7 stops from the door of the shop from the roof of which the accused Shamim Mian and Ahmad Mian fired the shots. This topography makes it certain that injury No.1 corresponding to its wound of exit injury no.5 cannot be caused from the roof top. The witness PW5 Dr. K.S.Tiwari further stated that injury No.2 and injury No.4 have their exit wound at the same level. This witness further says that the exit wound of injury No.3 is slightly on a lower plan. Thus the position of the wounds of entry and exit is such that it is difficult to believe that the firing in which Riasat Husain (illegible)was caused from the roof top as alleged by the prosecution. It appears that the firing actually took place from the shop itself and the two accused Ahmad Mian and Shamim Mian were elevated to the roof top simply to be seen by the witnesses from point 'F' and in this process the prosecution evidence lost its credibility

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and led the court only to a confusion which was aggravated all the more by the contents of the FIR Ex.Ka01. It became and doubtful under these circumstances to ascertain which of the two sets of accused fired the fatal shot. The court cannot presume that it were the accused Mohammad Mian and Zamir Mian standing at the shop fired the fatal shots because they are not stated by the witnesses to have fired any shot at Riasat Husain deceased. The other set of the two accused Ahmad Mian and Shamim Mian are unautmously alleged to be at the roof top and first alleged to have fired at Riasat Husain at his chest and then at his back but by medical evidence it is not probable that the fatal shots were at all fired from the roof top."

13. To our mind, these observations are meaningless in the light of the ocular evidence when read in the context of incident as it happened. The post-mortem examination of the dead body was conducted by PW-5 Dr. K.S.Tiwari on the 25th April, 1980 at 2.30 p.m. He had found the following injuries thereon :

"(1) Gun Shot wound of entry 1 cm x 1 cm x chest cavity deep on back of scapula lateral end, margins inverted and ragged. No blackening or tattooing present. Under the injury humerus bone was fractured on upper part.

(2) Gun shot wound of entry 1 cm x 1 cm x cavity deep on left side back of chest 5 cm below injury No.1. Margins inverted and ragged. No blackening or tattooing present.

(3) Gun shot wound of entry 1 cm x 1 cm x cavity deep on left side back of chest 8 cm away from middle and 19 cm below root neck. Margins inverted and ragged. No blackening or tattooing present.

A (4) Gun shot wound of entry 1 cm x 1 cm x caity deep on left side back 10 cm below injury No.3.

(5) Gun shot wound of exit 1.2 cm x 1 cm on the front of left shoulder 2 cm below top of shoulder corresponding to injury No.1, margins everted.

B

(6) Gun shot wound of exit 1.2 cm x 1.1. cm on front of chest left side upper part 4 cm above left nipple corresponding to injury No.2 margins everted.

C (7) Gun shot wound of exit on left side chest 6.5 cm below left nipple corresponding to injury No.3, margins everted.

(8) Gun shot wound of exit 1.2 cm x 1 cm on front of chest left side 2.1 cm from midline and 19 cm from umbilicus corresponding to injury No.4, margins everted.

D

(9) Abrasion 2 cm x 2 cm on outer aspect of left buttock 10 cm below anterior superior iliac spine."

E 14. The doctor opined that the exit of injury No.1 was at a marginally higher level than the wound of entry, that the exit and entry wounds of injury No.2 were at the same level whereas the exit wound of Injury No.3 and 4 were at a slightly lower level than the wounds of entry. The doctor also opined that there were fractures of the left humerus bone, the 5th rib on the right side F and the 7th costal cartilage. We must observe that country made weapons had been used and the performance of these weapons being unpredictable and uncertain, the trajectory of the bullet alone would not be a safe basis for assessing the entire evidence more particularly as the projectiles could have G been deflected from their true path by the bones or tissues that came along the way. This is what Dr. Modi has to say in Modi's Medical Jurisprudence and Toxicology, Twenty-third Edition at page 724:

H

Direction from which the Weapon was fired. A

"The question regarding the direction of fire, whether from right to left or from front to back is of medico-legal importance. To ascertain this, it is necessary to know the position of the victim at the time of the discharge of the bullet, when a straight line drawn between the entrance and exit wounds and prolonged in front generally indicates the line of direction. In some cases, it is difficult to determine the direction as the bullet is so often deflected by the tissues that its course is very irregular, also when the bullet wobbles." B C

There is yet another circumstance which is extremely relevant. It is the case of the prosecution that the gun shots had been fired from the roof of the house of Mohammad Mian which was 10 or 12 feet high. It has come in the statements of Sharafat Husain and Firasat Husain that the firing was from a distance of 10 to 12 steps which would mean 15 feet. This clearly corresponds to the nature of the injuries found on the dead body. The trial court seems to have been greatly influenced by the fact that the prosecution story that the shots had been fired from the roof was deliberately created by the prosecution as otherwise Mohammad Mian's house would not have been in their direct line of sight. We have, however, considered this aspect in the light of the statement of PW-1. He candidly admitted that the shop of Mohammad Mian was not visible from their house as there was a mosque in between but after 10 feet or so beyond the grave located near the gate, the shop of the accused could be seen. In this situation, we find that the normal tendency of a witness who had heard the sound of repeated gun shots close to his house would be to move in that direction. This is what Sharafat Husain apparently did as after hearing the sound of the first shot fired at Firasat Husain, both the deceased and Sharafat had been attracted towards that way leading to the murder. We also see from the site plan which had been prepared contemporaneously that the gun shots had D E F G H

A been fired on the deceased from the roof of the house. The finding of the trial court, therefore, that the prosecution had changed the location of the two accused to bring them on the roof, was speculative. We are, therefore, of the opinion that no fault can be found with the judgment of the High Court. The B appeals are, accordingly, dismissed.

B.B.B. Appeals dismissed.

End of 2010