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A.F.R.

Court No. - 4

Case :- CRIMINAL APPEAL No. - 1263 of 2015

Appellant :- Mohd. Azam

Respondent :- State Of U.P.

Counsel for Appellant :- Hemant Kumar,Anoop Trivedi,Dileep Kumar,Kamal Krishna,Rajrshi Gupta,Vivek Prakash Mishra

Counsel for Respondent :- Govt.Advocte,Vijay Kumar Pandey

Connected with

Case :- CRIMINAL APPEAL No. - 745 of 2015

Appellant :- Liaqat And Another

Respondent :- State Of U.P.

Counsel for Appellant :- Hemant Kumar,Ghan Shyam Das

Counsel for Respondent :- Govt.Advocate

Hon'ble Bala Krishna Narayana,J.

Hon'ble Irshad Ali,J.

(Delivered by Hon'ble Bala Krishna Narayana,J.)

1. These two connected appeals were heard by us on 29.3.2018 on which date we had passed the following order :

“Heard Sri Dileep Kumar, Advocate assisted by Sri Rajrshi Gupta, learned counsel appearing on behalf of the appellant, Sri Vijay Kumar Pandey, learned counsel for the complainant and Sri J.K. Upadhyay, learned AGA for the State.

We will give reasons later. But we are making the operative order here and now.

Since both the aforesaid appeals arise out of one and the same judgment and order dated 18.02.2005 passed by learned Additional Sessions Judge, Court No. 8, Azamgarh, therefore, both the appeals are being decided of by way of a common judgment.

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Both the criminal appeals are allowed. The impugned judgment and order dated 18.02.2015 passed by learned Additional Sessions Judge, Court No. 8, Azamgarh in S.T. No. 341 of 1996 (State Versus Mohd. Azam and others) by which the appellant-Mohd. Azam in Criminal Appeal No. 1263 of 2015 has been convicted and sentenced to imprisonment for life with fine of Rs. 30,000/- under Section 302 IPC and in default of payment of fine six months additional rigorous imprisonment while appellants-Liaqat and Alauddin in Criminal Appeal No. 745 of 2015 have been convicted and sentenced to imprisonment for life with fine of Rs. 30,000/- each and in default of payment of fine six months additional rigorous imprisonment each, are hereby set aside.

The appellants in both the aforesaid appeals are acquitted of all the charges framed against them. Appellant-Mohd. Azam in Criminal Appeal No. 1263 of 2015 is in jail. He shall be released forthwith unless he is wanted in any other criminal case while appellants-Liaqat and Alauddin in Criminal Appeal No. 745 of 2015 are on bail. They need not surrender. Their bail bonds are cancelled and the sureties are discharged. The appellants shall comply with Section 437A of Cr.P.C. within three weeks."

We are now giving reasons :

1. These two criminal appeals namely, criminal appeal nos. 1263 of 2015 and 745 of 2015 have been preferred by Mohd. Azam, appellant in criminal appeal no. 1263 of 2015 and Liaqat and Alauddin, appellants in criminal appeal no. 745 of 2015 against the judgment and order dated 18.2.2015 passed by Additional District and Sessions Judge, Court No. 8, Azamgarh in S.T. No. 341 of 1996 (State Versus

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Mohd. Azam and others) by which the appellant-Mohd. Azam in Criminal Appeal No. 1263 of 2015 has been convicted and sentenced to imprisonment for life with fine of Rs. 30,000/- under Section 302 IPC and in default of payment of fine six months additional rigorous imprisonment while appellants-Liaqat and Alauddin in Criminal Appeal No. 745 of 2015 have been convicted and sentenced to imprisonment for life with fine of Rs. 30,000/- each and in default of payment of fine six months additional rigorous imprisonment each u/s 302 IPC.

2. Briefly stated the facts of this case are that P. W. 2 Ashahad gave a written report Ext. Ka1 at Police Station Devgaon, District Azamgarh on 28.12.1995 stating therein that he is a resident of Katauli Khurd, Police Station Devgaon, District Azamgarh. On 28.12.1995 while Imamuddin @ Buggu was coming to him to bring the key of his vehicle he met accused, Azam son of Ali Hasan, Liaqat son of Haji Tauheed, Alauddin son of Rauf and Ajaz son of Mannan in the lane and on seeing them, they taunted him for filing a case against them and started chasing them on which they ran towards the east of the lane, Azam shot at Imamuddin @ Buggu with his firearm. Thereafter, Ajaz (non-appellant) also shot Imamuddin @ Buggu who died on the

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spot and on hearing the sounds of gun shots Javed Khan son of Aslam Khan and Abdul Kalam son of Ayyub also reached the place of occurrence and witnessed the incident which had taken place at about 10 A.M.

3. On the basis of the aforesaid written report Ext. Ka1, case crime no. 295 of 1995, under Section 302 IPC was registered against the appellants and one Ajza Ahmad, chek FIR Ext. Ka13 and corresponding G.D. entry Ext. Ka14 were prepared by P. W. 4 Asharafi Lal.

4. The investigation of the case was taken over by P. W. 4 Asharfi Lal who at the relevant point of time was posted at Police Station Devgaon, District Azamgarh. He after receiving the information tendered to him by P. W. 1 Abdul Kalam son of Ayyub who was accompanied with 4 to 5 persons, at Police Station Devgaon, District Azamgarh on 28.12.1995 at 10 A.M. that Imamuddin @ Buggu resident of village Katauli Khurd had been shot dead, reached the place of incident and after nominating the inquest witnesses, he conducted the inquest proceedings on the body of the deceased at 11:00 A.M. and after completing the inquest, prepared the inquest report of the deceased along with other related papers namely police form no. 13, photo nash,

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report addressed to R.I. Ext. Ka4 to Ext. Ka7 and report addressed to C.M.O. Ext. Ka8. Thereafter, he got the dead body of the deceased, Imamuddin @ Guggu sealed and dispatched to the District Hospital Azamgarh for conducting postmortem. The postmortem on the body of the deceased was conducted by late Dr. J.S. Govind on 29.12.1995 at about 12:15 P.M. which was proved by P. W. 3 Dr. Rajendra Prasad, Chief Pharmacist, Police Hospital, District Azamgarh. The postmortem report Ext. Ka3 indicated following ante mortem injuries on the deceased's body :

(i) Firearm wound of entry 1 cm x 1 cm bone deep on the left side face over left ear triangular margins lacerated invented under laying bone fracture.

(ii) Firearm wound of exit 2.50 cm x 2 cm x bone deep and communication to injury no. 1 margin lacerated invented under laying bone fracture.

(iii) Firearm wound of entry 2 cm x 2.50 cm x muscle deep on the outer aspect of right upper arm 16 cm below right shoulder joint margin invent.

(iv) Firearm wound of exit 3 cm x 2.50 cm x muscle deep on right upper arm inner aspect 18 cm below right shoulder and it is communicating with injury no. 3.

(v) Firearm wound of entry 3 cm x 2.50 cm x chest cavity deep on the right side of chest 6 cm from axilla margin invented and irregular.

(vi) Firearm wound exit 4 cm x 2.75 cm x abdomen and chest cavity deep on left side abdomen upper part near right side with axillary line margin invented lacerated injury is communicating to injury no. 5 recovered one plastic piece and corte.

According to the postmortem report of the deceased,

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cause of death was shock and hemorrhage due to ante mortem injuries.

5. P. W. 4 Asharfi Lal, the Investigating Officer of the case after completing the investigation filed charge-sheet against all the accused including the appellants under Section 302 IPC before C.J.M. Azamgarh who by his committal order order dated 24.7.1996 committed the accused for trial to the Court of Sessions Judge, Azamgarh where the case was registered as S.T. No. 341 of 1996 and made over from there for trial to the Court of Additional District and Sessions Judge, Court No. 8, Azamgarh who on the basis of the material collected during investigation and after hearing the prosecution as well as the accused on the point of charge, framed charge on 8.1.1999 under Section 302 IPC against accused-appellant, Mohd. Azam and under Section 302/34 IPC against the other accused-appellants Liaqat and Alauddin. The accused-appellants abjured the charge and claimed trial.

6. The prosecution in order to prove its case examined as many as five witnesses of whom P. W. 1 Abdul Kalam, P. W. 2, informant, Ashahad and P. W. 5 Javed Khan were produced as witnesses of fact while P. W. 3 Dr. Rajendra

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Prasad, Chief Pharmacist who proved the photo stat copy of the postmortem report of the deceased as Ext. Ka2. P. W. 4 S.I. Asharfi Lal, Investigating Officer of the case who had prepared and proved the inquest report Ext. Ka4, police form no. 13 Ext. Ka5, photo nash Ext. Ka6, R.I. report Ext. Ka7, C.M.O. report Ext. Ka8, site plan of the incident Ext. Ka9, recovery memo of bloodstained and simple earth from the place of occurrence Ext. Ka10, charge-sheet Ext. Ka11, report of the forensic expert of the bullet recovered from the dead body of the deceased Ext. Ka12, chek FIR Ext. Ka13 and carbon copy of the corresponding G.D. entry Ext. Ka14, were produced as formal witnesses.

7. The accused-appellants in their examinations under Section 313 Cr.P.C. denied the prosecution case as false and claimed themselves to be innocent and examined D.W. 1 Mohd. Ikhlaq as defence witness.

8. The learned Trial Judge after considering the submissions advanced before him by the learned counsel for the parties and scrutinizing the evidence on record, both oral as well as documentary, convicted the appellants under the aforesaid sections and sentenced them to life imprisonment together with fine.

9. Hence this appeal.

10. Sri Dileep Kumar, learned counsel appearing for the appellants has submitted that the FIR in this case is ante-timed. The written report of the incident which was signed and given by P. W. 2 Ashahad at Police Station Devgaon, District Azamgarh was suppressed and the same did not see the light of the day and the report which was signed and given by P. W. 1 Abdul Kalam at the police station as is evident from the perusal of the check FIR and the corresponding G.D. entry Ext. Ka13 and Ext. Ka14 was not the first information report of the incident but the same was prepared on the advice of the police personnel as is evident from the evidence of P. W. 4 Asharfi Lal, the Investigating Officer of the case itself. He next submitted that none of the so called eye witnesses had seen the occurrence. This fact is self evident in view of the irreconcilable conflicts vis-a-vis the ocular version and the medical evidence on record. The prosecution case as spelt out in the FIR which was lodged by P. W. 1 Abdul Kalam claiming himself to be an eye witness of the occurrence was that the deceased had received one gun shot each from the appellant, Mohd. Azam and non-appellant, Ajaz whereas the postmortem report of the

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deceased Ext. Ka3 indicated as many as three firearm wounds of entry with corresponding firearm wounds of exit. The eye witness account in this case does not inspire confidence and false implication of the appellants in the present case is writ large on the face of the record. Neither the recorded conviction of the appellants nor the sentence of life imprisonment awarded to them can be sustained and the same are liable to be set aside.

11. Per contra Sri J.K. Upadhyay, learned counsel appearing for the State submitted that the prosecution having succeeded in establishing the charge framed against the appellants by leading cogent and reliable evidence, the recorded conviction of the appellants by the trial court is not liable to be interfered with on account of there being some minor inconsistencies vis-a-vis the medical evidence and the ocular version. The FIR in this case is not ante-timed. The three witnesses of fact examined by the prosecution during the trial to prove the charge framed against the appellants have consistently supported the prosecution case on all material aspects of the incident and their evidence is not liable to be discarded merely on account of there being some minor contradictions in their evidence which are wholly

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immaterial and do not affect the core of the prosecution case. This appeal lacks merit and is liable to be dismissed.

12. The only question which arises for our consideration in this appeal is that whether the prosecution has been able to prove its case against the accused-appellants beyond all reasonable doubts or not.

13. Record shows that the incident had taken place at about 10 A.M. on 28.12.1995 within the limits of village Katauli Khurd, District Azamgarh. The written report of the incident Ext. Ka1 is said to have been given by P. W. 2 Ashahad, brother of the deceased at Police Station Devgaon, District Azamgarh on the same day at about 10 A.M. as deposed by P. W. 4 Asharfi Lal, the Investigating Officer of the case in his examination-in-chief on page 32 of the paper book. The distance between the police station and the place of occurrence as mentioned in the chek FIR Ext. Ka13 is about 3 km. P. W. 1 Abdul Kalam, the real brother of the deceased on page 17 and 18 of the paper book in his cross-examination twice deposed that the report of the incident was lodged by him, although on page 19 of the paper book he corrected himself by saying that the FIR was lodged by

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his brother Ashahad P. W. 2 and he and Javed had accompanied him to the police station and on the same page he stated that they had gone to the police station on their motorcycle and had reached the police station some time between 3 P.M. to 4 P.M. The FIR was scribed at the police station and given to Daroga Ji of Police Station Devgaon.

14. P. W. 2 Ashahad on page 26 of the paper book in his examination-in-chief deposed that he and his maternal grandfather, Mohd. Zakariya had gone to the police station along with Atahar to lodge the FIR of the incident on one motorcycle along with Javed Khan P. W. 5 who was on another motorcycle and the FIR was scribed on the paper which was brought by P. W. 5 Javed Khan from the market, he had signed the report after the same had been read over to him. He proved the written report which was given by him at Police Station Devgaon. He further deposed on page 27 of the paper book that he along with his maternal grand-father (Nana) who accompanied with Atahar had gone to the police station and given Ext. Ka1 at the Police Station Devgaon. He was given a copy of the report and thereafter, they along with the Daroga Ji had returned to the place of occurrence where his statement was recorded after the completion of

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inquest proceedings. On page 29 of the paper book, he in his cross-examination denied the suggestions given to him that on the date and at the time of the incident he was not present in Azamgarh and he had reached the crime scene after the completion of inquest proceedings. On the same page where it was suggested to him by the defence counsel that his brother Abdul Kalam had given a written report against the Jaipuriya people on the basis of which inquest was conducted, he did not specifically deny the same and feigned ignorance.

15. P. W. 2 Ashahad has neither disclosed the time at which he had left the place of occurrence for the police station nor the time at which he reached thereon.

16. P. W. 5 Javed Khan also has not disclosed in his evidence the time at which he and the informant P. W. 2 Ashahad and the other persons accompanying them had reached the police station. He denied the suggestion given to him that the first information report of the incident was given at the police station against unknown persons and on the basis of which inquest proceedings were conducted.

17. We now proceed to evaluate the evidence of P. W. 4 Asharfi Lal on the aforesaid aspect of the matter. P. W. 4

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Asharfi Lal in his examination-in-chief on page 32 of the paper book has deposed that he was posted as Officer-In-Charge of Police Station Devgaon on 28.12.1995. On that day at about 10 A.M., P. W. 1 Abdul Kalam son of Mohd. Islam along with his 4 or 5 companions had come to the police station at about 10 A.M. On the information given to him by P. W. 1 Abdul Kalam that one Imamuddin @ Buggu resident of Village Katauli Khurd had been shot dead, he after issuing the necessary directions to register the case, reached the place of occurrence along with his force in a government jeep in village katauli Khurd and on reaching there he saw a dead body lying on cot. He after nominating the inquest witnesses commenced the inquest proceedings at 11 A.M. The inquest report which is on record as Ext. Ka4 also indicates that inquest proceedings had commenced pursuant to the information given at the police station by Abdul Kalam son of Mohd. Islam that Imamuddin @ Buggu had been shot dead. The inquest report Ext. Ka4 neither mentions the case crime number nor the names of the accused. P. W. 4 Asharfi Lal was re-examined and he in his re-examination on page 37 of the paper book deposed that the FIR of the incident which was on the record of the case

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was prepared on the basis of the written complaint given by Mohd. Ashahad son of Ayyub Ahmad on 28.12.1995 which is on record as Ext. Ka1. He further deposed before the Court that he was not aware about the fact whether there was any other person in village Katauli Khurd called Abdul Kalam son of Islam or not. He was also not aware whether the name of the father of Abdul Kalam is Ayyub or not. Chek FIR was not prepared on the basis of the written report given to him at the place of occurrence at the time when he had gone there to conduct inquest proceedings. He had received the written report of the occurrence when he had returned to the police station after completing the inquest proceedings which was signed by P. W. 2 Ashahad. The written report signed by Ashahad was received by him after 4 hours. He had scolded the Munshi for his having not prepared the chek FIR after receiving the written complaint of Abdul Kalam.

18. Thus, upon perusing the evidence of P. W. 1 Abdul Kalam, P. W. 2 Ashahad, P. W. 5. Javed Khan, the eye-witnesses of the occurrence and P. W. 4 Asharfi Lal, investigating officer of the case, we have no hesitation in holding that the FIR in this case is ante-timed. It is proved from the evidence of P. W. 1, P. W. 2 and P. W. 4 that two

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written reports of the incident were given at the police station one by Abdul Kalam P. W. 1 and the other by P. W. 2 Ashahad, which was given at the police station after the inquest proceedings had concluded. The report given by P. W. 1 Abdul Kalam was anterior in point of time is proved from the evidence of P. W. 4 Asharfi Lal and also recitals contained in the inquest report which described the informant as Abdul Kalam P. W. 1 but strangely instead of registering the case on the basis of the written report given by P. W. 1 Abdul Kalam at the police station, the case was registered on the written report of the occurrence allegedly given by P. W. 2 Ashahad at Police Station Devgaon 4 to 5 hours after the occurrence which was apparently prepared after due deliberations and consultations falsely implicating the appellants due to admitted previous enmity between the parties. The Head Constable / Head Moharrir who had prepared the chek FIR was deliberately not examined by the prosecution with oblique motive. He having not been produced as a witness, the defence was deprived of the opportunity to cross-examine him. Moreover, the fact that the FIR of the incident which had taken place on 28.12.1995 at 10:00 A.M. was registered on the same day at the same

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time is in itself an impossible feat notwithstanding the fact that the distance between the police station and the place of occurrence is only 3 km and the informant's claim is that he had gone to the police station to lodge the FIR on a motorcycle, because as a normal human reaction after the incident, sometime must have been lost in grieving over the death of Imamuddin @ Buggu and procuring the piece of paper from the market on which written report was scribed by P. W. 5 Javed Khan on the dictation of P. W. 2 Ashahad. Moreover, there are other attendant circumstances which indicate that the FIR in this case is ante-timed and the information of the incident was not given by P. W. 2 Ashahad but P. W. 1 Abdul Kalam and the FIR of the incident which was lodged by P. W. 2 Ashahad was not in existence at the time of holding of the inquest, inter alia that the inquest report Ext. Ka4 does not mention the number of the case crime ; and that the name of the person on whose information the inquest proceedings had commenced has been shown as P. W. 1 Abdul Kalam and not P. W. 2 Ashahad.

19. Thus, the credibility of the FIR in this case stands totally shattered in view of the evidence on record. Since the

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FIR in this case itself appears to be a devious, bogus and fictitious document, hence no reliance on the prosecution story as spelt out therein can be placed.

20. The veracity of the evidence of the three eye-witnesses produced by the prosecution during the trial has been castigated by the learned counsel for the appellants on the ground that ocular testimony in this case is contrary to the medical evidence. It has been held by the Apex Court in a catena of decisions that where there is direct evidence on record minor variance between the direct evidence and the medical evidence or inconsistency in the direct evidence vis-a-vis medical evidence, it is the duty of the Court to remove the chaff from grain and ascertain the truth. In the instant case, the prosecution has come up with a categorical case that appellant, Mohd. Azam and non-appellant, Ajaz had each fired a single shot at the deceased, Imamuddin @ Buggu. All the three witnesses of fact, P. W. 1 Abdul Kalam, P. W. 2 Ashahad as well as P. W. 5 Javed Khan have consistently deposed before the trial Court in the same voice. However, the postmortem report of the deceased which was prepared by Dr. J.S. Govind on 29.12.1995 at about 12:15 P.M. and proved by P. W. 3 Dr. Rajendra Prasad,

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Chief Pharmacist, Police Hospital, District Azamgarh as Dr. J.S. Govind had unfortunately expired clearly indicates that the deceased had received three firearm wounds of entry namely (i) firearm wound of entry 1cm x 1cm bone deep on the left side face over left ear triangular margins lacerated invented under laying bone fracture, (ii) firearm wound of exit 2.50 cm x 2 cm x bone deep and communication to injury no. 1 margin lacerated invented under laying bone fracture, (iii) Firearm wound of entry 2 cm x 2.50 cm x muscle deep on the outer aspect of right upper arm 16 cm below right shoulder joint margin invent.

21. We have very carefully scanned the evidence of P. W. 3 Rajendra Prasad, Chief Pharmacist, Police Hospital, District Azamgarh who was examined by the prosecution during the trial to prove the postmortem report of the deceased but we have not found anything in his evidence which may indicate that the three ante mortem firearm wounds of entry found on the dead body of Imamuddin @ Buggu could be result of two shots. Infact the testimony of P. W. 3 Dr. Rajendra Prasad is wholly silent on the aforesaid aspect of the matter.

22. Admittedly the firearm weapons which were allegedly used by the accused-appellants for committing the murder

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of the deceased were never recovered during investigation. We are absolutely in the dark about the kind of weapons which were used by the culprits. The report of forensic expert vis-a-vis the bullet and the pellet which were recovered from the body of the deceased, Imamuddin @ Buggu, plain and bloodstained earth recovered from the place of occurrence and the clothes of the deceased Ext. Ka12 merely states that the blood was found on the bloodstained earth and other articles sent for forensic examination but the same were either totally disintegrated or not capable of classification. We are afraid that the forensic evidence on record is not at all sufficient to link the appellants with the offence for which they have been convicted. Moreover, neither there is any evidence nor any suggestion which may indicate as to which out of two accused, Mohd. Azam and non-appellant, Ajaz had shot at the deceased with the double barrel gun. The three ante mortem injuries noted by P. W. 3 Dr. Rajendra Prasad, Chief Pharmacist, Police Hospital, District Azamgarh on the body of the deceased, Imamuddin @ Buggu are on different parts of his dead body, although, the three witnesses of the occurrence have stated in unison that the

two shots were fired by the appellants at the deceased.

23. In the instant case, the accused-appellants were neither apprehended on the spot nor any firearm was recovered from them or on their pointing out at any stage of the investigation.

24. Thus, in the present case, we find that the manner of assault as described in the FIR and later testified by the three witnesses of fact produced during the trial by the prosecution does not find corroboration from the medical evidence on record which puts a big question mark against their claim of being eye-witnesses of the occurrence. Moreover, all the three witnesses of fact, two of them namely P. W. 1 Abdul Kalam and P. W. 2 Ashahad being the real brothers of the deceased while P. W. 5 Javed Khan his cousin brother, are highly interested witnesses. It is true that the evidence of a witness cannot be discarded merely on account of his being a relative of the deceased if upon a cautious appraisal of his evidence, the Court comes to the conclusion that he has given correct and cogent description of the incident but considering the material contradictions in their testimonies inter alia on the point of time and the identity of the person who had lodged the FIR of the

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occurrence and the irreconcilable conflict between the ocular version and the medical evidence with regard to the number of shots fired at the deceased by the accused-appellants, it cannot be said that the three witnesses of fact have given cogent and correct description of the occurrence and that their evidence is wholly reliable and trustworthy. The previous enmity between the parties could be a very strong reason for them to falsely implicate the appellants after the dead body of the deceased was found.

25. The motive for the accused-appellants to commit the murder of the deceased as spelt out in the FIR and as deposed by P. W. 1 Abdul Kalam and P. W. 2 Ashahad in their evidence tendered before the trial court is that on the date of occurrence while Zakariya, the maternal grand-father of the deceased was going to lodge the FIR with regard to an occurrence which had taken place one day before the date of occurrence in which two persons Naushad and Seraj had dealt a lathi blow to Zakariya, the accused had shot the deceased in reaction. There is no evidence on record showing that the appellants had also participated in the earlier incident or they were either relatives of Naushad and Seraj or they had committed the offence at their behest. No

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reason is forthcoming as to why the appellants would have shot the deceased Imamuddin @ Buggu instead of shooting Zakariya, the maternal grand-father of P. W. 1 Abdul Kalam and P. W. 2 Ashahd who according to the prosecution was going to lodge the FIR of the incident which had taken place on the date of occurrence at about 7 A.M. if they had acted at the behest of Naushad and Seraj.

26. The prosecution, in our opinion has totally failed to prove the motive for the appellants to commit the murder of the deceased.

27. Thus, upon a holistic view of the facts of the case and a careful appraisal and evaluation of the evidence on record, both oral as well as documentary, we find that the prosecution has miserably failed to prove its case against the appellants beyond all reasonable doubts. Hence neither the recorded conviction of the appellants nor the sentences awarded to them can be sustained and are liable to be set aside.

28. These are the reasons for which we had allowed this criminal appeal.

Order Date:- 29.3.2018.
SA