

Court No. - 18

Reserved
A.F.R.

Case :- CRIMINAL APPEAL No. - 616 of 1982

Appellant :- Jauhari and others

Respondent :- State Of U.P.

Counsel for Appellant :- G.S.Hajela,Ajay Kumar
Srivastava,S.A.N.Shah

Counsel for Respondent :- A.G.A.

Hon'ble J.J. Munir,J.

1. This appeal is directed against a judgment and order of Sri Vikramaditya Kulshreshth, the then Special Judge (Dacoity Affected Areas), Farrukhabad, dated 27.02.1982, passed in Special Sessions Trial no.3 of 1982, State vs. Jauhari and three others (arising out of Case Crime no.430/81 and Case Crime no.433/81), Police Station Kayamganj, District Farrukhabad, convicting the appellants of offences punishable under Sections 399, 402 IPC, Sections 25 and 27 of the Arms Act, and, sentencing them on each count, in the following manner:

| Sl. No. | Name of accused | Under Section | Imprisonment |
|-----------------------------------------------------|--------------------------------------------------|---------------|--------------|
| 1 | Bhagwan Sahai | 399 IPC | 3 years R.I. |
| | | 402 IPC | 3 years R.I. |
| 2 | Jauhari, Phool Singh & Ram Prakash | 399 IPC | 4 years R.I. |
| | | 402 IPC | 4 years R.I. |
| | | 27 Arms Act | 4 years R.I. |
| | | 25 Arms Act | 2 years R.I. |
| All the sentences were ordered to run concurrently. | | | |

2. Be it noted here that this appeal that was filed jointly by Jauhari, Phool Singh, Ram Prakash and Bhagwan Sahai, survives to be heard at the instance of appellant no.2, Phool Singh alone. Appellants Jauhari, Ram Prakash and Bhagwan Sahai, died pending appeal and at their instance this appeal was ordered to stand abated vide order dated 16.02.2016.

3. The prosecution commenced on a recovery-cum-arrest memo dated 19.12.1981, on the basis of which a single *chik* First Information Report giving rise to four Case Crimes, bearing nos.:430 of 1981,

under Sections 399, 402, 307 IPC, 431 of 1981, 432 of 1981, and, 433 of 1981, the last three all under Sections 25/27 of the Arms Act, were registered at Police Station Kayamganj, District Farrukhabad. Case Crime no.430 of 1981 was registered against all the appellants, Jauhari, Phool Singh, Ram Prakash and Bhagwan Sahai, together, whereas Case Crime nos.431 of 1981, 432 of 1981 and 433 of 1981, were registered separately against Jauhari, Ram Prakash and Phool Singh, in that order.

4. According to the prosecution case, that originates in a description of the occurrence carried in a memorandum dated 19.12.1981 about encounter with dacoits-cum-recovery of unlicensed fire arms & ammunitions goes somewhat like this. One Babu Lal Ojha, a Senior Sub-Inspector of Police posted at Police Station Kayamganj, District Farrukhabad at the relevant time, received information on 19.12.1981 at the Station through a professional police informer described in vernacular as *Mukhbir Khaas*, about an impending plan to commit dacoity. This information was received at the Station at 9 p.m. The informer is said to have conveyed to the Sub-Inspector last mentioned, that some miscreants were planning to congregate in the mango grove of one Phool Khan, located within the Village Niyamatpur with further detail that these miscreants would arrive at the venue last mentioned, approaching it from the west. They would then assemble in the south-east corner of the grove. The information further went that the miscreants had a plan to loot vehicles moving on the road. The Sub-Inspector reposing faith in the veracity of the information took as companions, Sub-Inspectors Amar Singh, Chhotey Singh and Jamuna Prasad, besides, Constables Shobha Ram, Reghunath Singh, Vinod Kumar, Rajendra Singh Damodar Singh, Daya Shankar, Netrapal Singh, Indrapal Singh, Vishwanath Singh. The police team proceeded to the place of apprehended occurrence, riding a Government Jeep driven by Driver Shiv Veer Singh, whereas some of the party proceeded on bicycles. Constable Vishwanath Singh had on him his private SBBL Gun with ammunition. The Sub-Inspectors and men were

variously armed with service rifles and revolvers, a detailed account of which is to be found in the memorandum under reference. The party reached Village Dhamdhera and parked their Jeep and bicycles away from the road. They secured the presence of certain public witnesses, to wit, Chhotey Lal Verma son of Ram Dayal, Mohan Singh son of Heera Lal, Babu Ram son of Jwala Prasad and Rajaram son of Raghuvar Dayal, all residents of Dhamdhera, Police Station Kayamganj, District Farrukhabad. These witnesses were acquainted with the secret information received by the police. The police party along with the public witnesses were divided into two groups. The first party was led by Babu Lal, whereas the second party was led by Sub-Inspector Amar Singh. The detailed composition of the parties also finds place in the memo under reference. The Senior Sub-Inspector appears to have instructed that his party would locate themselves at the eastern end of the grove, concealing themselves from sight, whereas the second party would station themselves at the southern end of the grove, also concealed from sight. All were instructed to observe silence and take positions, concealing themselves. They were further instructed that except in self-defence and on instructions from the Senior Sub-Inspector, none would open fire. It was also conveyed that on the Senior Sub-Inspector challenging the miscreants, both parties would move into overpower them. A password was coined at spot, that was 'Ganga', and conveyed to one and all in the party. Thereupon, all in the party proceeded to the grove. The Senior Sub-Inspector inspected the sight, and directed both parties to proceed to their pre-determined stations at about 8.00 in the evening. A little later, one by one, 7 – 8 miscreants trickled in, and assembled on the south-eastern corner of the grove, all standing under a mango tree. They opened conversation. One of them said that other companions have not arrived at, to which another responded by saying that they were in sufficient number and adequately armed. He suggested that as soon as a truck appears on the road, they would proceed to stop it, and one amongst them would overpower the driver, whereas the others would loot the vehicle. Upon hearing the aforesaid conversation, the police

party were assured that the congregated men were dacoits, who were preparing to commit dacoity by waylaying vehicles moving on the road. The Senior Sub-Inspector challenged the miscreants flashing his torch with words that all of them have been surrounded by the police; that they should lay down arms, and surrender; else they would be killed. Upon the aforesaid action by the police, the miscreants opened fire with an intention to kill members of the police party. It is recorded that driven by compulsion and in self-defence, the policemen opened fire, whereupon the miscreants ran pellmell. They were surrounded by both the police parties, who succeeded in capturing four of the miscreants. The rest of them escaped without being identified. The apprehended miscreants were asked to identify themselves. They disclosed their identities as follows:

- (1) Jauhari son of Banwari Bahelia, resident of Bhrahmpuri;
- (2) Phool Singh son of Murli Bahelia, resident of Bhrahmpuri;
- (3) Ram Prakash son of Nathu, resident of Bhrahmpuri; and,
- (4) Bhagwan Sahai son of Mathuri Bahelia, resident of Bhrahmpuri, all falling under the Police Station Kayamganj, District Farrukhabad.

The apprehended miscreants were searched before the witnesses at spot. The search led to recovery of a country-made 0.12 bore breach loading gun, the description of which is also given out in the memorandum under reference, and reported to be in working order. The gun had an empty in its barrel, whereas the apprehended man Jauhari, had on him a belt carrying five live 0.12 bore cartridges. The other apprehended, Ram Prakash also had on him a 0.12 bore country-made breach loading gun, the description of which is fully given out in the memorandum under reference, that was found to be firing fit. The said man on further search, was found in possession of four live cartridges, kept in his right coat pocket. The third miscreant apprehended, that is to say, Phool Singh had a country-made pistol of 0.12 bore caliber, held in his right hand, the description of which has been given in the memorandum. It was in working order. Upon further

search of his person from the right hand pocket of his *pyjama*, two live cartridges of 0.12 bore were recovered. The last of the four apprehended, Bhagwan Sahai was armed with a *lathi*, the description of which too finds place in the memorandum. The apprehended men were asked to show licenses to bear those fire arms, which they were unable to produce. As such, the empty found in the barrel of Jauhari's gun, was extracted, whereas all the other weapons recovered, as well as cartridges, were separately sealed into three bundles. Also, recovered from the place of arrest were seven empties of 0.12 bore calibre, besides, the empty, that was still in the chamber of Jauhari's gun. A total of eight empties, thus, recovered, were seized and sealed separately. The police party had fired differently from their weapons, about which there is a detailed description in the memorandum, which indicates that empties of the rounds fired, were also duly deposited at the station. These empties included mostly rounds fired from service rifles of the named Constables, that made for a total of eight empties of the fourteen rounds fired from those rifles. It is also recorded that Sub-Inspector Amarjeet Singh fired his stengun twice, leading to recovery of two empties. These 8 + 2 empties were also sealed with a specimen of the seal being retained separately. The entire memorandum of encounter-cum-recovery, dated 19.12.1981 is signed by various members of the police party and the four witnesses from the public. It must be remarked here that the aforesaid memorandum is not signed by the four apprehended accused, including the appellant, Phool Singh, at whose instance, this appeal is now proceeding.

5. On the basis of recovery-cum-arrest memo (Ex. Ka-1) scribed by Sub-Inspector Chhotey Singh at the dictation of Babu Lal Ojha, Senior Sub-Inspector, P.S. Kayamganj, a *chik* FIR (Ex. Ka-3) relating to the said occurrence was registered on 20.12.1981 in four case crimes, to wit, Case Crime no.430, under Sections 399, 402, 307 IPC against all the appellants; and, Case Crime nos.431, 432 & 433, under Section 25 of the Arms Act against the appellants, Jauhari, Ram Prakash, Phool Singh. The date and time of occurrence was shown in the *chik* as

20.12.1981 at 1.30 a.m. The place of occurrence was shown as the Grove of one Phool Khan near Village Nyamatpur. The distance from the police station was shown as 3 miles to the south. Investigation into the offence was handed over to S.I. Ram Lakhan Singh on 21.12.1981. He recorded the statements of the witnesses, inspected the place of incident and prepared a site plan, Ex. Ka-5 on the same day i.e. 21.12.1981. On 24.12.1981, he recorded the statements of PW-2, S.S.I. Babu Lal Ojha, PW-5, S.I. Chhotey Singh Bhadoria, PW-4, S.I. Amar Singh etc. On 01.01.1982, he obtained sanction with regard to cases under Section 25 of the Arms Act from the District Magistrate.

6. On 08.01.1982, after completion of investigating, PW-6, S.I. Ram Lakhan Singh submitted a charge sheet, Ex. Ka-9, against all the four appellants for the offences punishable under Sections 399, 402, 307 IPC. On the same day, separate charge sheets, Ex. Ka-10 to Ka-12 for the offence punishable under Section 25 of the Arms Act were submitted against the appellants, Jahuari, Ram Prakash and Phool Singh.

7. The Special Judge, Farrukhabad vide order dated 18.01.1982 framed charges for the offences punishable under Sections 399 and 402 IPC against all the four appellants and the appellants, Jauhari, Ram Prakash and Phool Singh were separately charged for the offence punishable under Section 25/27 of the Arms Act vide orders dated 18.01.1982. Each of the appellants, denied the charges, pleaded not guilty and claimed trial.

8. The prosecution examined the following witnesses:

- (1) PW-1, Chhotey Lal Verma, a native of Village Dhamdhera;
- (2) PW-2, S.S.I. Babu Lal Ojha, P.S. Kayamganj, who headed the police team;
- (3) PW-3, HC Babu Lal, posted as Head Moharrir at the Police Station Kayamganj;
- (4) PW-4, S.I. Amar Singh, a member of the Police Team;

- (5) PW-5, S.I. Chhotey Singh Bhadauriya, also a member of the Police Team; and,
- (6) PW-6, S.I. Ram Lakhan Singh, Investigating Officer of the case.

9. The following documents were exhibited on behalf of the prosecution:

| Sr. No. | Exhibit No. | Exhibited documents |
|---------|-------------|-------------------------------------------------------------------------------------------------------------------------------------|
| 1 | Ex. Ka-1 | Recovery-cum-arrest memo, proved by PW-1 |
| 2 | Ex. Ka-2 | Entry made by HM Sher Singh in GD no.13 at 19.15 hours dated 19.12.1981 with regard to Rawangi of SSI Babu Lal Ojha, proved by PW-3 |
| 3 | Ex. Ka-3 | Chik FIR written by PW-3, HM Babu Lal, proved by PW-3 |
| 4 | Ex. Ka-4 | Entry made by HM Babu Lal in GD no.3 at 1.30 a.m. dated 20.12.1981, proved by PW-3 |
| 5 | Ex. Ka-5 | Site Plan, Ex. Ka-5, proved by PW-6 |
| 6 | Ex. Ka-6 | Sanction by DM in Case Crime no.431/81 u/s 25 against the appellant, Jauhari, proved by PW-6 |
| 7 | Ex. Ka-7 | Sanction by DM in Case Crime no.432/81 u/s 25 against the appellant, Ram Prakash, proved by PW-6 |
| 8 | Ex. Ka-8 | Sanction by DM in Case Crime no.433/81 u/s 25 against the appellant, Phool Singh |
| 9 | Ex. Ka-6 | Charge sheet against appellants Jauhari, Phool Singh, Ram Prakash and Bhagwan Sahai in Case Crime no.430/1981, proved by PW-6 |
| 10 | Ex. Ka-10 | Charge sheet u/s 25 Arms Act against appellant, Jauhari, proved by PW-6 |
| 11 | Ex. Ka-11 | Charge sheet u/s 25 Arms Act against appellant, Ram Prakash, proved by PW-6 |
| 12 | Ex. Ka-12 | Charge sheet u/s 25 Arms Act against appellant, Phool Singh, proved by PW-6 |

10. At the conclusion of the prosecution evidence, the statement of the appellant, Phool Singh (along with the deceased appellants) was recorded u/s 313 Cr.P.C., putting to him the circumstances appearing against him in the prosecution case, which he generally denied, and in answer to question no.7, which is a open question asking, whether the appellant had anything else to say, the appellant answered thus (in Hindi vernacular):

“मुझे व अन्य मुलजिमान को दरोगा अमर सिंह 19 ता० को सुबह घर से पकड़ कर लाये और इसमें झूठा चालान कर दिये।”

11. It is also relevant to mention here, that the deceased appellant, Jauhari in his statement under Section 313 Cr.P.C., while generally denying the prosecution case, had answered question no.7, identically worded, as under:

“दरोगा अमर सिंह मुझे व अन्य मुलजिमान को घर से पकड़ कर लाये थे।”

12. Likewise, the deceased appellant, Ram Prakash in his statement under Section 313 Cr.P.C., while generally denying the prosecution case, had answered question no.7, identically worded, as under:

“मुझे व अन्य मुलजिमान को दरोगा अमर सिंह घर से पकड़ कर ले आये थे व झूठा फंसा दिया है।”

13. Likewise again, the deceased appellant, Bhagwan Sahai in his statement under Section 313 Cr.P.C., while generally denying the prosecution case, had also answered question no.7, identically worded, as under:

“मुझे 19 ता० के सुबह दरोगा अमर सिंह घर से पकड़ कर ले आये थे और इस मामले में झूठा चालान कर दिये।”

14. The appellant (including the deceased appellants), entered defence, and, examined DW-1, Shivpal Singh Yadav, Assistant Jailer, DW-2, Thakuri, DW-3, Jagdish Singh, and DW-4, Anil Kumar Tiwari, Assistant Jailer, in support.

15. Thereafter, on an application moved by Sri Subedar Singh, learned defence counsel appearing before the Court below, the learned Judge inspected the spot and drew up a site plan of the place of occurrence, on 21.02.1981.

16. The learned Special Judge after hearing both the parties, discussing the evidence and material on record found the appellants guilty for the offences punishable under Sections 399, 402 IPC and

Sections 25 and 27 of the Arms Act, sentencing them as above-detailed by the impugned judgment and order. Aggrieved by the impugned judgment and order, each of the four accused-appellant preferred this appeal, which now, as already said, proceeds at the instance of the appellant, Phool Singh alone.

17. Heard Sri S.A.N. Shah, learned counsel for the appellant and Ms. Meena, learned A.G.A. appearing on behalf of the State.

18. In order to determine the veracity of the prosecution case, evidence may be marshaled and considered on the basis of various facts in issue and relevant facts, detailed hereinafter.

- (1) Place and manner of arrest;
- (2) Failure to obtain signatures of the accused on the arrest-cum-recovery memo, and furnishing its copy to the appellant;
- (3) Whether public witnesses including PW-1, Chhotey Lal Verma, are unreliable and pocket witnesses of the police;
- (4) Effect of failure to secure examination of the recovered weapons by a Ballistic Expert, and effect of non-production of Ballistic Report in evidence; and,
- (5) Standard of proof by the prosecution in a case involving charges of preparation to commit dacoity and being one of the five persons assembled for the purpose

(1) Place and manner of arrest

19. The genesis of the occurrence is said to be based on an information received by Babu Lal Ojha, Senior Sub-Inspector of Police, then posted at Police Station Kayamganj on 19.12.1981 from a police informer. The information according to this witness reached him at 7.12 in the evening hours to the effect that a gang of 7 – 8 armed dacoits were scheduled to assemble in the grove of a certain Phool Khan at Village Niyamatpur, located on the Kayamganj – Aliganj Road at 9 p.m. According to the dock evidence of this witness, the informer had further confided in him that this gang of dacoits would loot vehicles proceeding

on the Kayamganj – Aliganj Road. The testimony of this witness proceeds that at 7.12 p.m., he received this information, and within three minutes, he left the Station after making an entry in the General Diary with a police force of thirteen strong, besides himself. The police party included Babu Lal Ojha, PW-2, besides, three other Sub-Inspectors and ten men. This party, according to the evidence of PW-2, proceeded to the place of occurrence, as a divided group; some riding a Jeep and others on bicycles. They passed through Village Dhamdhera, where with the resource of a Constable in the party, Shobha Ram, four witnesses of the public with torches and licensed guns promptly became available. The Jeep and the bicycles, according to the version in the examination-in-chief, were left at Dhamdhera, where the witnesses joined.

20. Babu Lal Ojha, PW-2 divided the entire party into two; one under his charge and the other under the charge of Sub-Inspector, Amar Singh. Each of the two parties had its share of two public witnesses. The divided police team proceeded to the grove of Phool Khan on foot, necessary instructions being passed on to members of the party, as they proceeded to the grove. Once inside the grove, PW-2 has said that he inspected it and took position with his party on the south-eastern corner, whereas the other party were detailed to conceal themselves in a ditch on the southern end. This witness, who is the formal informant also, said in his testimony during the examination-in-chief that at about 8.30, 7 – 8 miscreants entered the grove from the western end, one by one, till they were in full strength. They sat down under a mango tree and struck conversation saying that as soon as a bus or truck would alight, they would loot it. He has further said that the miscreants were talking amongst themselves that one of them would overpower the driver, whereas the others would loot the vehicle. Hearing the aforesaid conversation, the police team were assured that they were miscreants who had assembled to pull a dacoity. The witness says that thereupon opening his torchlight, he challenged the miscreants conveying that they were surrounded by the police, and

better surrender. The time has been stated in the testimony with much precision to be 'twenty minutes past nine'. Upon being challenged, the miscreants opened fire. The witness has gone on to say in his examination-in-chief that the police party returned the fire. This led the miscreants to flee. The police upon seeing the miscreants take to their heels, both parties chased them and managed to overpower four, whereas another 2 – 4 escaped unidentified. The four appellants, including Phool Singh, were identified in Court and the recovery of different weapons and ammunition from each of the appellants was proved by PW-2. After the arrest, the witness says further in his testimony that the appellants were brought to the Station along with recovered weapons, ammunition and empties. The men were confined to the Lockup, and the recovered case property deposited with the Station Strong Room.

21. In his cross-examination at the instance of deceased appellant, Bhagwan Sahai and Ram Prakash, the schedule about receipt of information and leaving the police station is again mentioned with precision. The information was received at twelve minutes past seven, and it is said by PW-2 that within 2 – 3 minutes, the entire force assembled, armed and left Station within an exceptionally short time. The police party reached Village Dhamdhera on two modes of transport with quite a difference in the speed of the vehicles. The Constable detailed to secure witnesses, got four ready with licensed weapons. This is described by PW-2 in his cross-examination thus (in Hindi vernacular):

“सिपाही 5 – 7 मिनट में गवाहों के साथ लौट आया था। जिस सिपाही को गवाह लेने भेजा था वह जीप में हमारे साथ आया था। जब तक वह गवाह लेकर आया, तब तक साईकिलो वाला force भी आ गया। बाग, इस स्कूल से 3 – 4 फरलॉग होगा।”

22. This witness on being cross-examined on behalf of the deceased appellant, Jauhari, acknowledged the fact that he does not remember if a copy of the memorandum of recovery was given to the arrested

appellants, and further that he is not aware whether it is necessary to do so. He has further said in his cross-examination that fire was opened on both sides, but he did not see any pellet embedded in the trees or elsewhere in the drain or on the road. He has also said that two rounds were fired by S.I. Amar Singh from his stengun, acknowledging further, that a round fired from the stengun could bring down a tree branch.

23. PW-4, Amar Singh, a companion Sub-Inspector, who was with the team in his examination-in-chief, has generally corroborated the testimony of PW-2, Babu Lal Ojha. He has, however, said that on the miscreants opening fire, the police returned the fire and while doing so, shot some 16 – 17 – 15 rounds. This led to a commotion amongst the miscreants, who took to their heels. In his cross-examination, he has again categorically said that a copy of the recovery memo was not given to any of the appellants. This witness has further said in his cross-examination that the place where the police were stationed, was at a distance 10 – 12 paces from where the dacoits were located. He has also said that when the miscreants opened fire, they had shot at the police party too. The police party returned fire in self-defence, but not to kill.

24. PW-5, Chhotey Singh, another Sub-Inspector on the team, has also generally corroborated the prosecution case, and in his cross-examination, has not said anything of much significance to either party, different from the other witnesses.

25. The sole public witness, who is a native of Village Dhamdhera, one Chhotey Lal Verma son of Ram Dayal, has given a graphic account of the occurrence in his examination-in-chief, generally corroborating the other witnesses. He has narrated the precise words in the dock what the assembled miscreants uttered, the words in which they were challenged by the police, and has, most particularly, given a numerical account of the rounds fired on both sides: 8 – 7 by the miscreants, and 8 – 10 by the police. The witness identified the

appellant in Court, as also the other deceased appellants. This witness has also said that both, guns and rifles, opened fire on the side of the police. The witness has also acknowledged that the place of occurrence, that is to say, the grove of Phool Khan is located at a distance of one furlong from Village Niyamatpur. He has acknowledged the fact that when the aforesaid shootout took place between the police and the miscreants, nobody from the adjoining villages reached the place of occurrence.

26. The Investigating Officer of the case, one Ram Lakhan Singh, Sub-Inspector posted at Police Station Kayamganj, has, in his examination-in-chief, formally proved the various documents that have been exhibited, including the sanction orders under the Arms Act and the charge sheets. He has said in his cross-examination about the telltales signs of a shootout, thus (in Hindi vernacular):

“मुझे पूरे बाग में कोई निशानात ऐसे नहीं मिले थे जिससे जाहिर होता कि फायरिंग हुई थी।”

27. It must be remarked here that mere consistency of witnesses would not turn falsehood to truth. The evidence even of eye witnesses, depending on the nature of the offence, ought to be corroborated by objective circumstances. This case appears to be one where the manner and place of occurrence are telltale of utter falsehood of the prosecution story. The falsehood of it, is somewhere to be found in the inception of the prosecution, where it is said by PW-2 that on receipt of information about the assemblage of some miscreants planning to pull a dacoity at twelve minutes past seven, he could collect a force of fourteen strong, arm them, make an entry in the General Diary, and leave the Station, all within the fantastically short time of three minutes. The said fact has been acknowledged in his evidence by PW-2 that all this was done in that unbelievably short duration of just three minutes; but that is only one unbelievable feature. The main event which is the shootout between police and the miscreants is said to have taken place in a mango grove at a distance of 10 – 12 paces, as appears in the

evidence of PW-4, S.I. Amar Singh. Even if the said estimation of distance is considered to be an overenthusiastic statement, or an arithmetical miscalculation, the evidence of all witnesses is consistent that the distance between the encountering parties was not, indeed, beyond the safe distance of gun fire. It has also figured in the statement that 16 – 17 rounds from rifles, shot guns and two from a stengun, were fired by the police party, whereas the miscreants are said to have fired 7 – 8 rounds. Indeed, it is very unlikely that a divided party of 16 men on one side and 7 – 8 on the other, firing so many rounds, at close quarters, would leave everyone uninjured – even without the graze of a pellet. If that possibility is also accepted, it certainly defies all logic that in the consistent statement of PW-4 and the Investigating Officer, no pellet or bullet was found anywhere embedded in anything, such as a tree or elsewhere. The Investigating Officer who inspected the spot, has conceded in his cross-examination that in the entire grove, he did not find any telltale marks that would show that any shootout took place there.

28. There is another feature about the prosecution case and their evidence, which makes it sound, rather incredible. Assuming that the miscreants had assembled in the mango grove to pull a dacoity, there is no good reason why they would talk aloud amongst themselves, about their plan to pull a dacoity, and the precise manner of executing it. If one were to assume that they were blissfully assured that there was no one about the place where they had assembled, it is against behaviour native to man that in a place that was certainly not a home to any of the miscreants gathered, they would go about loudly discussing, as if announcing their plans to commit dacoity. It seems to be a baseless allegation introduced by the police in order to bring home the charge under Section 399 IPC. In similar circumstances, this Court in **Shokat Abdul Aziz vs. State, 2018 (5) ALJ 261**, held:

“26. A perusal of the recovery memo shows that there is no signature or thumb mark of the appellants on it. The copy of the recovery memo was not given to any of the appellants which is a

mandatory provision. The information has been given by a police informer. Several Police Officials have raided at the spot and it appears unnatural that the appellants without showing any apprehension or indication, all of a sudden, started speaking so loudly about their plan for committing dacoity in the house of Dhanumal Sarraf, that it was easily overheard by the police party. Two miscreants are said to have escaped from the spot, but the police has not made any effort to arrest them despite the fact that their faces were seen by the police party in the torch light."

(Emphasis by Court)

29. The submission of Ms. Meena, learned A.G.A. on behalf of the State that since the entire episode has been consistently recounted by all the eye witnesses, one of whom is a public witness, the same is a dependable guarantee of its truthfulness. This Court is afraid that this submission does not accord with law about evaluation of a consistent eye-witness account. In this connection, the decision of the Supreme Court in **Badam Singh vs. State of U.P., (2003) 12 SCC 792**, may be gainfully referred to. Their Lordships in **Badam Singh** (*supra*), criticizing the approach of the High Court in accepting the ocular testimony of three eye-witnesses in a murder case, merely because it was consistent, held:

"16. The learned Sessions Judge after considering the evidence on record and accepting the evidence of the eyewitnesses found the appellant guilty of the offence under Section 302 IPC and sentenced him to imprisonment for life. The High Court by its impugned judgment dismissed the appeal preferred by the appellant. We have perused the impugned judgment of the High Court. The High Court which was the first court of appeal did not even carefully appreciate the facts of the case. It mentions that the FIR was lodged by PWs 5 and 6 whereas the fact is that the FIR was lodged by PW 4, the Forest Officer. Without subjecting the evidence on record to a critical scrutiny, the High Court was content with saying that the three eyewitnesses having deposed against the appellant, the prosecution had proved its case beyond reasonable doubt. In our view, the High Court has not approached the evidence in the manner it should have done being the first court of appeal. The mere fact that the witnesses are consistent in what they

say is not a sure guarantee of their truthfulness. The witnesses are subjected to cross-examination to bring out facts which may persuade a court to hold, that though consistent, their evidence is not acceptable for any other reason. If the court comes to the conclusion that the conduct of the witnesses is such that it renders the case of the prosecution doubtful or incredible or that their presence at the place of occurrence as eyewitnesses is suspect, the court may reject their evidence. That is why it is necessary for the High Court to critically scrutinise the evidence in some detail, it being the final court of fact. We have, therefore, gone through the entire evidence on record with the assistance of the counsel for the parties."

30. A perusal of the finding of the Trial Court, who has rather unconventionally written his judgment by framing issues held on this aspect of the matter that evidence of prosecution witnesses who are policemen, cannot be discarded on the basis alone that they are policemen. The learned Trial Judge has then forayed into considering the effect of police record about arrest, such as, entries in the General Diary, to raise a presumption against the accused about the manner and place of arrest, contrary to that alleged by the accused, who said that they were arrested from home. While it may be true that policemen cannot be disbelieved for the reason alone that they are members of the police force, their word can equally not be accepted on a presumption of regularity, otherwise available to official actions done in the ordinary course of discharge of duties by a Government servant. The entries in the General Diary regarding manner and place of arrest, also cannot be held to prove what is recorded there on a presumption under Section 114 of the Evidence Act, which the Trial Court has raised against the accused, and then held it to be unrebutted. Proceeding further about this particular fact of the manner and place of occurrence, the Trial Court has ventured into considering arguments based on the history of Senior Sub-Inspector, Babu Lal Ojha, who was found in the past to have falsely implicated a blind man in some crime involving a gang. It is pointed out that he was suspended in connection with the said implication in a false case. The Trial Court has remarked that since he was reinstated in service and exonerated, the said charge is of no

consequence. Similarly, the history of Sub-Inspector, Amar Singh regarding the issue of false implication urged on behalf of the accused, has occupied a good length of the judgment by the learned Trial Judge to draw an inference about the place and manner of occurrence. This Court thinks that those facts on the basis of which the Trial Court has drawn an inference against the accused, are not of much relevance. The approach of the Trial Court in evaluating evidence about this very relevant fact, does not commend itself to this Court. It is for the reason that evaluation of evidence on the issue is not based on a clear approach, that may test the veracity of the prosecution account about the occurrence. The Trial Judge has proceeded more on irrelevant considerations, and touching hardly any good and relevant evidence, that would prove or dispel the prosecution case about the manner and place of occurrence.

31. In the totality of circumstances, this Court is of clear opinion that the manner and place of occurrence, as put forward by the prosecution, is not established by cogent and convincing evidence.

(2) Failure to obtain signatures of the accused on the arrest-cum-recovery memo, and furnishing its copy to the appellant

32. It is submitted by Sri S.A.N. Shah, learned counsel for the appellant that the most vital and earliest record about the occurrence is the memorandum of encounter and recovery of illegal weapons drawn up at site by the police. He submits that the said recovery memo does not bear the signatures of any of the appellants, including the appellant, Phool Singh. It is signed by the police officials and the four public witnesses, who were claimed to be with the police party. He urges that it was imperative for the police to have furnished a copy of the said recovery memo to each of the then arrested accused, including the appellant, Phool Singh. It is pointed out that a copy of this recovery memo was not handed over to the appellant, including the three deceased appellants. Learned counsel further submits that there is no mention of the fact that the appellant, Phool Singh or any of the

other three deceased appellants refused to sign the recovery memo. It also does not carry any remark or explanation to show why a copy of the said recovery memo was not furnished to the appellant, Phool Singh and the deceased appellants. In the submission of the learned counsel for the appellant, the failure to secure the signatures of the appellant, Phool Singh, or the other deceased appellants on the memo of recovery, falsifies the entire prosecution story, and lends credence to the version of the appellants that they were arrested from home and framed in the case.

33. Ms. Meena, learned A.G.A. on the other hand has refuted the aforesaid submission, not in point of fact, but for a legal proposition. She does not deny the fact that signatures of the appellant, Phool Singh and the deceased co-appellants, were not secured on the recovery memo, a fact which she can possibly not deny. She also does not deny the fact that a copy of the recovery memo was not handed over to the appellant, Phool Singh, or the three others arrested along with him. She submits that it is not necessary under the law that a copy of recovery memo must be got signed by the arrested accused, from whom recovery is made, or that its copy be supplied to such accused.

34. She has placed reliance on a decision of this Court in **Mahadeo vs. The State, 1990 CriLJ 858**, where with reference to the provisions of Sections 51 and 100 Cr.P.C., it has been held that there is no requirement under the law about accused being asked to sign a recovery memo. However, the failure of the police to give a receipt of the articles recovered was held to be requirement of the law, but non-adherence, a mere procedural irregularity that would not vitiate the trial. Moreover, **Mahadeo** (*supra*) was a case where no public witness was available, whereas in the present case, there are four public witnesses of the recovery who have signed the recovery memo.

35. Learned counsel for the appellant on the other hand has depended again on the decision of this Court in **Shokat Abdul Aziz** (*supra*), where in paragraph 26 of the report it has been held that

failure of the prosecution to give a copy of the recovery memo to the appellant amounts to violation of mandatory provisions. A perusal of the provisions relating to search and seizure, in particular, the provisions of Sections 51 and 100 Cr.P.C. would indicate that there is no mandatory requirement of providing a copy of the seizure memo to the accused. So far as giving of a receipt of articles seized under Section 51 of the Cr.P.C. is concerned, it would appear that the provision is attracted to cases where arrest is made under a non-bailable warrant or under a bailable warrant, where the person arrested is unable to furnish bail. Section 100 Cr.P.C. pertains to the class of provisions relating to execution of search warrants. The provision in sub-Section (7) of Section 100 Cr.P.C. requiring a list of all things taken possession of to be prepared and a copy of the same to be delivered to the person in occupation of the place searched, does not appear to bear much relevance in the facts of the present case. It may not be strict requirement of the law to provide a copy of the recovery memo to the accused much less requiring him to sign it, but the failure of even a slight mention of the fact that the accused were asked to sign and refused, or a copy of the memo was delivered to them, which they declined to accept, in the togetherness of other circumstances makes the entire prosecution story suspect. It is a circumstance that lends credence to the appellant's defence that after all nothing of the kind ever happened. They were simply implicated in the present crime, after being picked up by the police from home.

(3) Whether public witnesses including PW-1, Chhotey Lal Verma, are unreliable and pocket witnesses of the police

36. The question whether public witnesses who accompanied the police party, and one of whom Chhotey Lal Verma testified in support of prosecution, are pocket witnesses of the police, is a fact, the proof of which would depend much on circumstances, including evidence of these witnesses. PW-2, Babu Lal Ojha, who headed the police party, that claims to have busted a dacoity in preparation, has said in his

examination-in-chief, that on way from the Police Station to the place of occurrence, the police party passed through Village Dhamdhera. There, on his instructions, Constable Shobha Ram went to fetch the witnesses. The witnesses arrived armed with torches (electric), and each had his licensed gun on him. This evidence of PW-1 is expressed in the words of the witness as follows (in Hindi vernacular):

“हम लोग जीप व साईकिलो से खाना हुये। रास्ते में ग्राम डमढेरा पड़ा जहाँ रुक कर सिपाही शोभाराम को गवाहों को लेने के लिये भेजा। गवाहान आ गये जो टार्च व अपनी लाईसैन्सी बन्दूखे लेकर आये थे।”

During his cross-examination, this witness said that the Constable took 5 – 7 minutes to come back with the witnesses (public witnesses). It is also mentioned that the said Constable, who was detailed to secure the attendance of witnesses, had accompanied the police team in the Jeep, whereas a backup force had cycled its way. This part of the cross-examination has already been detailed hereinabove verbatim.

37. Now, a reading of this evidence indicates that these public witnesses came forth as if they were standing ready for the job, which was certainly not a pleasant one. In fact, witnessing apprehension of a suspected gang of dacoits for a common man, like these witnesses including Chhotey Lal Verma, could only be ascribed to two different motives. The first could be that these witnesses were truly spirited citizens and gallant man, ever ready to stand by the law, risking even their life for it, if the need arose. The other motivation could be that they were, indeed, pocket witnesses of the police, who neither saw or did anything, except that they owed some loyalty to the police for whatever consideration it be. It is not said anywhere in the evidence of these witnesses that they had some kind of a background of military, police, or other martial training, or antecedents of a kind that would make their rather unusual behaviour in joining the police on a escapade with dacoits in preparation at the short notice of 5 – 7 minutes, ready with their torches and guns, something of a conduct expected of these men.

It is true that no particular question was put to them during cross-examination about their background, but it is equally true that the prosecution could have removed a hovering cloud about the behaviour of these witnesses consistent with their conduct as upright citizens, in going about the task they did. If even slight evidence had come forthwith about the background of these witnesses, it would have sufficed. But, with not a word in evidence about the background of these public witnesses, that would legitimately account for their very public spirited conduct, the inference from the conduct of these witnesses tends to sway heavily in support of what learned counsel for the appellant says, that all of them are pocket witnesses of the police. To this conclusion, if one were to look to the cross-examination of Chhotey Lal Verma, one of these four public witnesses, who testified in the witness-box as PW-1, he has responded about his past association with being a police witness in the following words (in Hindi vernacular):

“मेरे गाँव में मेरी वल्लियत का और कोई नहीं है नाम के कई हैं। आज से पहिले मैंने एक case में गवाही दी है। यह याद नहीं है कि वह शराब का मुकदमा था या बन्दूख का। यह गलत है कि मैं 4 – 5 मुकदमों में गवाही दे चुका हूँ।”

This witness has acknowledged the fact that he has been a witness for the police in a case under the Excise Act or the Arms Act in the past, though he has denied the suggestion that he has stood for the police in 4 – 5 other criminal cases. Though standing witness in one case by itself may not lead to any inference, but in the totality of circumstances where the conduct of PW-1, together with the other public witnesses has been rather unusual, the fact that he has in the past stood for the police in a case, that was also one entirely at the instance of the police (as distinguished from a case initiated at the instance of a member of a public), the inference that PW-1 and his associated public witnesses are, indeed, pocket witnesses of the police, is clearly established.

(4) Effect of failure to secure examination of the recovered weapons by a Ballistic Expert, and effect of non-

production of Ballistic Report in evidence

38. PW-6, Ram Lakhan Singh, a Sub-Inspector of Police, who was the Investigating officer, said, thus, in his cross-examination when asked if he had sent the weapons and cartridges to the Ballistic Experts (in Hindi vernacular):

“मैंने चले हुए कारतूस व weapons को बैलेस्टिक Expert के पास नहीं भेजा। काम की ज्यादाती के कारण मैं बैलेस्टिक Expert के पास नहीं भेज सका।”

39. The law relating to the prosecution's burden to be discharged, that fire arms recovered from the appellant and his associates were in working order, or that live cartridges recovered from their possession were indeed live can only be discharged by sending those weapons, the ammunition recovered and the empties to the Forensic Science Laboratory, and by proving the report received from the Lab to show that the recovered weapons were in working order. The law in this regard has been laid down by the Supreme Court in **State of Punjab vs. Jagga Singh, (1998) 7 SCC 214**, where it is held:

"..... Though the evidence of PW.1 H.C. Baldev Singh and PW.3 Basant Singh establishes that the respondent was found in possession of one. 12 bore DBBL Gun and four live cartridges, there is no satisfactory evidence to show that the said Gun and the cartridges were sent for examination by the Central Forensic scientific Laboratory. There is no report from the forensic Scientific Laboratory nor any other evidence to prove that the said gun was in a working condition or that the said cartridges were live cartridges. An entry made in the Malkhana register was relied upon by the prosecution. It does not mention that Gun bearing No. 14119-88 was sent to the Central Forensic Laboratory nor does it contain any description of the cartridges."

40. Still earlier, in **Jaspal Singh vs. State of Punjab, 1998 (7) SCC 289**, it was held by their Lordships of the Supreme Court thus:

"2. Admittedly, no evidence was led by the prosecution to prove that the gun was in working condition and that the cartridges which were found from the person of the appellant were live cartridges. Neither ASI - Balbir Singh had stated

so nor any report from an expert was obtained to establish that the gun was in working condition and that five cartridge were live. What was found in the gun were two empties and not live cartridges and, therefore, it was not proper to presume that it was in working condition. In absence of any evidence to that effect, the conviction of the appellant under both these aforesaid Section cannot be upheld."

41. In **Dev Dutta and another vs. State, 2017 (1) ACR 604**, this Court following the aforesaid decisions of their Lordships in a case relating to preparation to commit dacoity, held:

"34. In view of what has been indicated herein above, I am of the opinion that the prosecution has miserably failed to prove the case against the appellants beyond reasonable doubt. Recovery of pistols and cartridges from the appellants are also doubtful in the absence of any C.F.S.L. report and benefit of doubt is to be given to the appellants."

42. This Court finds, from the evidence of the Investigating Officer, that he never sent any of the weapons for analysis to the Ballistic Expert. He has said that he did not do so because he was overburdened with work. Whatever be the reason, in the absence of a report from a Ballistic Expert, that the weapons were in working order, the ammunition was live, or the empties were fired from the guns said to have been recovered from the appellant's possession and that of his associates, makes the entire recovery of fire arms very doubtful. That apart, it has not figured in the evidence of any of the witnesses before the Court that the fire arms were in working order, or that the cartridges were live.

43. In the circumstances, it is held that the prosecution have failed to prove that the weapons shown to be recovered from the appellants were, indeed, recovered from their possession or that the said weapons were employed in exchange of fire with the police party.

(5) Standard of proof by the prosecution in a case involving charges of preparation to commit dacoity and being one of the five persons assembled for the purpose

44. It must again be remarked that the offence under Section 399

IPC is one of the few offence that is punishable at the stage of preparation. Once the offence is punishable at the stage of preparation and there is evidence about it, it cannot go unpunished. But, it would be prudent to remember that an offence punishable at the stage of preparation is founded on an act or omission that is so inchoate, that it is still not an attempt. Therefore, evidence about the offence must be scrutinized with circumspection to find out whether, in fact, the fact in issue is clearly established by good evidence.

45. In **Chaturi Yadav and others vs. State of Bihar, AIR 1976 SC 1412**, conviction for offences under Sections 399, 402 IPC, was overturned by their Lordships of the Supreme Court on facts that the appellants in that case were found to have assembled in the odd hours by night at 1 a.m. in the premises of a school. On seeing a police party, they tried to run, but some of them were apprehended. One of the appellants, was found to be in possession of a gun and live cartridges, whereas the others had merely one live cartridge each, in their pockets. In those circumstances, their Lordships held thus:

"4. The Courts below have drawn the inference that the appellants were guilty under both the offences merely from the fact that they had assembled at a lonely place at 1 A.M. and could give no explanation for their presence at that odd hour of the night. Mr. Misra appearing for the appellant submitted that taking the prosecution case at its face value, there is no evidence to show that the appellants had assembled for the purpose of committing a dacoity or they had made any preparation for committing the same. We are of the opinion that the contention raised by the learned counsel for the appellants is well founded and must prevail. The evidence led by the prosecution merely shows that eight persons were found in the school premises. Some of them were armed with guns, some had cartridges and others ran away. The mere fact that these persons were found at 1 A.M. does not, by itself, prove that the appellants had assembled for the purpose of committing dacoity or for making preparations to accomplish that object. The High Court itself has, in its judgment, observed that the school was quite close to the market, hence it is difficult to believe that the appellants would assemble at such a conspicuous place with the intention of committing a dacoity and would take

such a grave risk. It is true that some of the appellants who were caught hold of, by the Head Constable are alleged to have made the statement before him that they were going to commit a dacoity but this statement being clearly inadmissible has to be excluded from consideration. In this view of the matter, there is no legal evidence to support the charge under Sections 399 and 402 against the appellants. The possibility that the appellants may have collected for the purpose of murdering somebody or committing some other offence cannot be safely eliminated. In these circumstances, therefore, we are unable to sustain the judgment of the High Court."

46. A wholesome look at the evidence in this case would show that the prosecution had nothing in hand in the sense of tangible evidence, that may lend some credit to the ocular testimony to prove their case, except that they might have found the appellants for the worst, assembled at the place of occurrence. The prosecution account has been held to be unbelievable about the nature and place of occurrence, earlier in this judgment. The recovery of fire arms from the appellant and his companions is not established, or the credit of the independent public witnesses. The entire story appears to be one where the appellant has been framed. The Trial Court appears to have believed the story because it was a dacoity affected area. This Court thinks that in the circumstances of an area, that is afflicted by dacoity, the probability of a false implication by the police in a case of preparation to commit dacoity is far stronger, where there is no convincing and tangible evidence *aliunde* to establish facts that are necessary to prove a case of preparation. Those facts, in the clear opinion of this Court, have far from been proved.

47. This Court finds and holds that the prosecution has not been able to establish the appellant's guilt beyond reasonable doubt.

48. In the result, the appeal succeeds and is **allowed**. The impugned judgment and order dated 27.02.1982 passed by the Special Judge (Dacoity Affected Areas), Farrukhabad in Special Sessions Trial no.3 of 1982, State vs. Jauhari and three others, under Sections 399 & 402 IPC (arising out of Case Crime no.430/81) and under Sections 25/27 of

the Arms Act (arising out of Case Crime no.433/81), Police Station Kayamganj, District Farrukhabad, is hereby **set aside** and the appellant, Phool Singh is acquitted.

49. The appellant, Phool Singh is on bail. He need not surrender. The bail bonds are cancelled and sureties stand discharged. However, the appellant, Phool Singh, is ordered to comply with the provisions of Section 437-A Cr.P.C. before the Trial Court.

50. A copy of this judgment along with Trial Court record be sent to the learned Sessions Judge, Farrukhabad for information and necessary compliance. Judgment be certified and placed on record.

Order Date :- 30.8.2018

Anoop