

**CRIMINAL APPEAL NO. 564/2004**

*Before Mr. Justice G.D. Saxena*

Decided on 10 May, 2013 (Gwalior)

BALLI @ DAULAT SINGH

... Appellant

Vs.

STATE OF M.P.

...Respondent

*Ravi Dwivedi with O.P. Meena, for the appellant.*

*R.K. Shrivastava, P.L. for the respondent/State.*

**J U D G M E N T**

**G.D. SAXENA, J. :-** This appeal under Section 374(2) of the Code of Criminal Procedure 1973 has been preferred by the accused against his conviction and sentence recorded vide judgment dated 16th August 2004 in Sessions Case No. 78/2003 by the Special Judge (Under M.P. Dakoity Avam Vyapharan Prabhavit Kshetra Adiniyam 1981, hereafter referred as the Adhinyam) Shivpuri, holding thereby him a guilty for commission of offence under Section 25(1-B) (a) of the Arms Act read with Section 11/13 of the said Adhinyam and sentencing to suffer three years' rigorous imprisonment with a fine of Rs. 200/- with further default punishment of one month's R.I.

(2) In brief, the prosecution version is that on 27th March 2003 P.N. Paul, Assistant Sub Inspector Police Outpost Sunari, got a secret information from informer that absconded dacoit Nanhe Singh, Makhan Singh and Balli @ Daulat Singh (present appellant) by hiding themselves near Papredu Math were making preparations to commit dacoity. He lodged the secret information in Entry no. 440 of Daily diary register (Roznamcha) of outpost and then informed through wireless message to his superior officer K.K. Dixit the then In-charge of Police Station Karera. On reaching of police force alongwith K.K. Dixit In-charge of the Police Station Karera, they arranged a raid on the spot and caught hold of the accused involved in illegal criminal activities. The accused were arrested on the spot by arrest memos (Ex.P/10, 12 and 14) with illegal firearms and ammunitions by seizure memos vide Ex.P/9, P/11 and P/13. One 12 bore county-made pistol with two live cartridges were seized from accused Balli @ Daulat Singh. After arrest of accused and seizure of firearms on the spot, the police force alongwith ASI P.N. Paul and K.K. Dixit In-charge of the Police Station Karera returned back to Police Station Karera. They registered their returning by Entry No. 1310 in the Daily dairy register (Roznamcha). Thereafter by FIR (Ex.P/15), the crime No. 111/2003 was registered. The investigation was set in motion. The seized firearms were examined by the head Constable Armorer posted in the Reserve Line Shivpuri. Thereafter permission to prosecute the accused under Section 29 of the Arms Act was obtained from the District Magistrate Shivpuri. Chargesheet was filed in the Criminal court having jurisdiction. The trial Judge after trial, the accused Nanhe Singh, Makhan Singh and Balli @ Daulat Singh (present appellant) guilty of the said offence and sentenced them as above. The accused Nanhe Singh and Makhan Singh filed another Criminal Appeal No. 526/2004 which was decided by this court vide judgment dated 22nd September 2010. So, this present appeal only remains to be considered by this court, which is preferred by one of the accused, i.e. Balli @ Daulat Singh.

(3) Learned counsel appearing on behalf of the accused submitted that the case of the present appellant is similar to other co-accused whose appeal (526/2004) stands decided by the judgment dated 22nd September 2010. He therefore prayed that the conviction of the present accused may be maintained for the alleged offence like other co-convicts and benefited by reducing sentence to the imprisonment already undergone like other accused namely, Nanhe Singh who had already undergone two years, one month and twenty three days. He therefore prayed that the present appeal may also be decided in terms of the same observations/directions.

(4) On perusal of the impugned judgment dated 22nd September 2010 recorded in Cri. Appeal No.526/04, it is noted that other co-accused Makhhan Singh has already served out the full sentence of imprisonment and so his appeal was dismissed as infructuous. The benefit was only extended to accused Nanhe Singh.

(5) The question for consideration before this court is whether present accused is entitled to the same benefit/relief on the ground of parity in a circumstance that a co-accused of the same criminal case with a similar role is granted benefit of undergoing jail sentence.

(6) Before proceeding about the desirability of parity in the matter like present case, it would be better to refer the decision of Hon. Apex Court in the *State of M.P. Vs. Ayyub Khan* 2012 (8) SCC 676, wherein it has been observed as follows :-

"8. The legislature, in its wisdom, has fixed a mandatory minimum sentence for certain offences-keeping, possessing arms and ammunition is a serious offence for which sentence shall not be less than three years. The legislature, in its wisdom, felt that there should be a mandatory minimum sentence for such offences having felt the increased need to provide for more stringent punishment to curb unauthorised access to arms and ammunition, especially in a situation where we are facing with menace of terrorism and other anti-national activities. A person who is found to be in possession of country-made barrelled gun with two round bullets and 50 gm explosive without licence, must in the absence of proof to the contrary be presumed to be carrying it with the intention of using it when an opportunity arises which would be detrimental to the people at large. Possibly, taking into consideration all those aspects, including the national interest and safety of the fellow citizens, the legislature in its wisdom has prescribed a *minimum mandatory sentence*. Once the accused was found guilty for the offence committed under Section 25(1)(a) of the Arms Act, he has necessarily to undergo the minimum mandatory sentence, prescribed under the statute."

(7) On perusal of the law mentioned above, this court feels that the present appellant is not entitled for his early release, as the sentence which he has undergone is lesser to minimum sentence as prescribed by the Statute.

(8) So, on the request of the counsel appearing for appellant, the appeal is decided on merits.

(9) The contention put forth by the appellant is that that the judgment under appeal is against the law and procedure and therefore same is liable to be set aside. It is submitted that the trial Judge convicted the accused/appellant on evidence of police officers which is suffered by so many lacunas. The independent witnesses did not support the prosecution version hence they were declared hostile. The arrest memos and seizure memos of firearms from present appellant is not proved up to the hilt of conviction. The sanction to prosecute the accused by District Magistrate under Section 39 of the Arms Act is also not proved. The F.I.R. of the case in the form of entry lodged in Daily Dairy Register (Roznamcha) of Police Outpost which contains the secret information from informer regarding crime was not filed alongwith charge sheet and nor proved by the writer of the report. So called F.I.R. lodged in Police Station Karera is the report by returning officer who conducted the entire investigation proceedings on the spot, so the report is the report of crime registration at the police station. Apart from above, there are several other irregularities which *prima facie* show that the investigation is not properly done in this case. It is therefore prayed that by allowing the appeal, judgment under challenge may be set aside and the accused-appellant may be acquitted of the offence.

(10) *Per contra*, the learned Panel Lawyer appearing on behalf of the respondent/State contended that the prosecution succeeded to prove the guilt against accused/appellant by adducing evidence and there is no infirmity or illegality committed by the trial court in awarding conviction and sentence against the accused. Hence, it is prayed that by dismissing the appeal, the judgment of the trial court may be upheld.

(11) Heard the learned counsel appearing for the appellant and the learned Public Prosecutor for the respondent/State. Also perused the record of the trial court and the law applicable to the present case.

(12) The question for consideration in this appeal is whether the prosecution proved beyond doubts that the accused/appellant Balli @ Daulat Singh at the time of commission of offence was possessing illegally the firearm (one county made twelve bore pistol with two live cartridges without license) for which he has been rightly awarded impugned conviction as well as sentence.

(13) The prosecution to prove the charge against the accused has examined as many as ten witnesses.

(14) P.N.Pal (PW-2) Assistant Sub Inspector posted inout post Sunari of Police Station Karera deposed that on 27th March 2003 he received the secret information from informer that absconded dacoit Nanhe Singh, Makhan Singh and Balli were hiding themselves near Papredu Math with an intention to commit offence. He wrote the information on Entry No. 440 in Police Daily diary register (Roznamcha) and also informed on wireless set to In-charge of the Police Station Karera. On his information, the In-charge of the Police Station Karera with police force reached on police outpost and thereafter arranged the search raid operation on given spot. In-charge Inspector of the Police Station Karera arrested the accused including accused Balli @ Daulat Singh on the spot and seized the country-made 12 bore pistol which was illegally possessed from possession of the accused. The case diary for investigation was then handed over to him. He recorded the case diary statements and also made an enquiry with arrested accused Makhan, Balli @ Daulat Singh and Nanhe Singh which was recorded vide memorandums

Ex.P/2 to Ex.P/4. (He was not cross examined on behalf of accused Daulat Singh because the the Roznamcha of the concerned date was not available hence his court statement could not be completed).

(15) K.K. Dixit (PW-5) In-charge/Inspector of P.S. Karera deposed that on 26th March 2003 he alongwith police force departed for searching area under anti dacoit operation. On 27th March 2003 during search of the area, he got wireless message from In-charge of police outpost Sunari and so he reached at police outpost. There Incharge of Police Outpost Sunari informed that absconded dacoits Nanhe Singh, Makhan Singh and Balli @ Daulat Singh were by hiding themselves near Papredu Math were making preparation to commit dacoity. He alongwith police force of police station and In-charge of police outpost Sunari surrounded the area and caught hold of accused Nanhe Singh, Makhan Singh and Balli @ Daulat Singh with unlicensed firearms and ammunitions. He arrested accused Nanhe Singh by arrest memo Ex.P/10 and seized the country made twelve bore pistol with five live cartridges by seizure memo Ex.P/9. He arrested accused Makhan Singh by arrest memo Ex.P/12 and seized the country made twelve bore pistol with three live cartridges without valid licence by seizure memo Ex.P/11. Thereafter he seized twelve bore country made pistol with two live cartridges from accused Balli @ Daulat Singh by seizure memo Ex.P/13 and arrested him by arrest memo Ex.P/14. After arrest and seizures made above on the spot he alongwith police force and arrested accused returned back to police station Karera and lodged his and police fore returning on Entry No. 1310 in Station daily diary register (Roznamcha). He also wrote the report as F.I.R. and registered the Crime No. 111/2003 in Police Station Karera and handed over the case diary for investigation to P.N. Pal In-charge of Police Outpost Sunari for further investigation.

(16) Janki Prasad Gaur (PW-1) posted as Constable No. 425 working as Arms Maharir in District Reserve Police Line Shivpuri deposed that on 22nd April 2003 under direction from Reserve Inspector (lines) he examined the firearms sent from Police outpost Sunari which was brought by Constable No. 331 Narayan Singh in open condition and not sealed and after examination he opined that examined firearms twelve bore country made pistols were in working condition and they can successfully be used in firing. His report is Ex.P/1. Thereafter he returned back the examined firearms and ammunitions in open state to concerned Constable.

(17) Lalaram Jatav (PW-3) an Arms clerk posted in the office of the District Magistrate Shivpuri deposed that on 2nd July 2003 he received a letter No. S.P./Shiv./Reader/DCD/63/2003 dated 26th June 2003 alongwith case diary of Crime No. 111/2003 registered in Police Station Karera with firearms three country made twelve bore pistols and live cartridges for grant of permission to prosecute the accused under Section 39 of the Arms Act. The then District Magistrate Shri V.L. Kantarao after perusal of the case diary papers produced and firearms and cartridges granted joint permission under Section 39 of the Act for prosecution of all accused under provisions of the said Act vide Ex.P/5 which bears his signatures.

(18) Kaptan Singh (PW-4) Head Constable posted in Police Station Karera deposed that the counter FIR lodged in Police Station Karera was delivered by Entry No. 661 to the concerning court of Judicial Magistrate at Karera.

(19) Dhruv (PW-6) and Makhan Singh (PW-7) who are witnesses of arrest memos of accused and seizure memos of illegal firearms seized from possession of arrested accused, though admitted their signatures on all arrest memos and seizure memos prepared on the spot, but denied the arrest of all accused and seizure of firearms from accused before them. Thus, they did not support the prosecution version. Other witnesses, namely, Prabhat Kumar Lithoria (PW-8) and Hari Singh Jatav (PW-9) who are the witnesses of memorandums (Ex.P/2 to Ex.P/4) recorded under Section 27 of the Evidence Act prepared by P.N. Pal (PW-2) did not support the prosecution version.

(20) Now, it is no doubt true that the evidence of P.N.Pal (PW-2) Assistant Sub Inspector posted in outpost Sunari of Police Station Karera and K.K. Dixit (PW-5) Incharge/ Inspector of P.S. Karera supports the prosecution case in toto as stated hereinabove. The point is whether the learned trial Judge was right in accepting their evidence who were police witnesses as credible and trustworthy so as to hold that the prosecution proved its case beyond shadow of reasonable doubt against the present appellant.

(21) In *Govindaraju Vs. State*, (2012) 4 SCC 722, at page 743 : the Hon. Apex Court observed as follows :-

“30. It cannot be stated as a rule that a police officer can or cannot be a sole eyewitness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidence, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people; in that event, no credibility can be attached to the statement of such witness.

31. This Court in *Girja Prasad* while particularly referring to the evidence of a police officer said that it is not the law that police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption applies as much in favour of a police officer as any other person. There is also no rule of law which lays down that no conviction can be recorded on the testimony of a police officer even if such evidence is otherwise reliable and trustworthy. The rule of prudence may require more careful scrutiny of their evidence. If such a presumption is raised against the police officers without exception, it will be an attitude which could neither do credit to the magistracy nor good to the public, it can only bring down the prestige of the police administration.

32. Wherever, the evidence of the police officer, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form the basis of conviction and the absence of some independent witness of the locality does not in any way affect the creditworthiness of the prosecution case. The courts have also expressed the view that no infirmity attaches to the testimony of the police officers merely because they belong to the

police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. Such reliable and trustworthy statement can form the basis of conviction.

(22) On perusal of the statement of witness P.N.Pal (PW-2) Assistant Sub Inspector and In-charge of Police Outpost Sunaria, it is found that his statement did not inspire confidence because the copy of Entry No. 440 dated 27th March 2003 written by him regarding the information from informer in relation with presence and involvement in crime of accused as first information of non cognizable offence was neither produced with charge-sheet nor that information written in Roznamcha was proved. But that is not enough. There are some more disquieting and disturbing features of this case which also persuade this court to think and believe that everything was not fair and proper with the investigation in this case on account of which the irresistible and inevitable conclusion is to hold that the appellant is entitled to the benefit of reasonable doubt. For an example, by evidence of this prosecution witness and KK Dixit (PW-5) of Police Station Karera who participated in investigation after proceeding with P.N. Pal for preparation of seizure memos of weapons from accused, it is not proved that after seizure of weapons like twelve bore pistols and cartridges whether they were properly sealed on the spot and were put in proper and safe custody of the Police Station Karera. These two Police witnesses above also could not establish by their testimony that the seized weapons after receiving from Armorer were sent in sealed alongwith Case Diary to the District Magistrate for seeking permission. From the evidence of these witnesses it could not be proved that the seized weapons alongwith cartridges after sealing properly were sent to the Criminal Magistrate with charge sheet papers. Moreover, at the time of recording of the evidence of prosecution evidence, these weapons were not produced before the trial Judge for exhibition and proving the recovery of a particular weapon and cartridges from a particular accused. Therefore by statements of these police officers, namely, P.N. Pal (PW-2) and K.K. Dixit (PW-5) recovery of the weapons is not proved beyond any reasonable doubt. The glaring defects in the investigation on the part of these police officer in this case thus certainly can be said to have caused prejudice to the defence and that being so, the appellant is entitled to the benefit for doubt.

(23) From the above facts and circumstances, it is crystal clear that the investigation in this case was neither fair nor proper. It was far from the principles of fair-play, enquiry and good conscience. That being so, the legitimate conclusion is that during course of the investigation a fair amount of prejudice was caused to the defence and not following the proper procedural law, in the facts and circumstances of this case, would be fatal to the prosecution. Hence, the prosecution has not established and proved its case beyond shadow of reasonable doubt against the appellant in this particular case. The appellant is entitled to benefit of such a reasonable doubt and sunscreen acquittal.

(24) In this view of the matter, the appeal succeeds and the same is allowed. The impugned judgment and order passed by the learned trial Judge convicting and sentencing the appellant as above are quashed and set aside. The appellant is acquitted of the offences under Section 25(1-B) of the Arms Act read with Section 11/13 of the said Adhinyam. He shall be set at liberty forthwith unless required in some other case. Fine, if paid by him, shall be refunded.

*Appeal allowed.*