

(2006) 02 AHC CK 0251

Allahabad High Court

Case No: Criminal Appeal No"s. 190, 191 and 338 of 1981

Dhyan Singh

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: Feb. 20, 2006**Acts Referred:**

- Arms Act, 1959 - Section 25
- Penal Code, 1860 (IPC) - Section 149, 307, 399, 402

Citation: (2006) 2 ACR 2120 : (2006) 100 RD 432**Hon'ble Judges:** M. Chaudhary, J**Bench:** Single Bench**Advocate:** N.K. Rastogi and J.S. Tomar, for the Appellant; R.S. Sengar, A.G.A., for the Respondent

Judgement

M. Chaudhary, J.

Since all the three criminal appeals have arisen out of one and the same judgment and order passed in Sessions Trial No. 84 of 1980, State of U.P. v. Dhyan Singh and Ors., and connected Sessions Trial Nos. 85, 86, 87 and 88 of 1980 all the three criminal appeals abovementioned have been heard together. Judgment shall be placed on the record of Criminal Appeal No. 190 of 1981, Nabi Ahmad alias Nabi Jan Khan v. State of U.P., which is leading one.

2. These three appeals have been filed on behalf of the accused Appellants from judgment and order dated 21st of January, 1981, passed by IIIrd Additional Sessions Judge Rampur in Sessions Trial No. 84 of 1980, State of U. P. v. Dhyan Singh and Ors., and connected Sessions Trial Nos. 85, 86, 87 and 88 of 1980 convicting the accused-Appellants under Sections 399 and 402, I.P.C. and Section 307 read with Section 149, I.P.C. and sentencing each of them to five years" rigorous imprisonment for each of the offences aforesaid and also convicting them u/s 25 of the Arms Act and sentencing each of them to one year"s rigorous imprisonment

thereunder directing all the sentences to run concurrently.

3. Brief facts giving rise to these appeals are that on receiving an information at police station Azeem Nagar at 9.30 p.m. on 28th of July, 1979, Station Officer Raghubar Dayal Sharma alongwith the police personnel and the informer proceeded from the police station at 9.55 p.m. towards village Kumhariya. On reaching near village Dilpura he directed constables Ram Prasad and Jhandu to go to the house of Chokhey Lal at village Kumhariya for safeguarding Chokhey Lal. On reaching at mursaina tiraha he collected constables Sahab Singh and Krishna Lal Sharma who were on patrol duty there. On the way they tried to pick up public witnesses but in vain. At about 11.00 p.m. the Station Officer alongwith the police personnel reached the grove of Ram Swarup. Then he inspected the grove and divided the police force in three parties. One was headed by Station Officer R. D. Sharma himself, the second one by S.I. Udan Prasad and the third one by H.C. Preetam Singh. All the three parties took position on northern, western and southern side of the hut situate in the grove itself. After waiting for about an hour some seven bandits came from the eastern side and assembled inside the hut and started smoking biris. About fifteen minutes thereafter one of the bandits spoke to his associates that Rafiq Ustad had not reached there till then and it was the right time for committing dacoity. He also stated that they had sufficient arms and ammunition and were acquainted with the location of the house of Chokhey Lal and they should proceed to commit the dacoity. Immediately thereafter as the bandits were about to proceed the Station Officer got convinced that it was a gang of dacoits which was about to proceed to commit dacoity and he challenged the bandits that they were already in police cordon and should not try to move from their respective places otherwise they would be shot dead. Immediately constable Chhotey Lal fired twice with V.L.P. in quick succession. Immediately one of the bandits fired towards the police personnel in the party of the Station Officer and the latter also fired two shots with his revolver. Then all the police personnel pounced upon the bandits and apprehended four of them in the grove itself and the remaining three succeeded in making their escape good. Then the Station Officer enquired the names and whereabouts of the four bandits apprehended and took their personal search. On personal search one countrymade revolver and two live cartridges were recovered from the possession of Dhyan Singh and one countrymade pistol with an empty cartridge in its barrel fired recently and four live cartridges from that of Chunna alias Chunnu. One country made pistol and three live cartridges were recovered from the possession of Nabi Ahmad alias Nabi Jan Khan and three live cartridges of rifle from that of Babban alias Babu Ram. Arms and ammunition recovered from the four bandits arrested on the spot were sealed in separate packets and the Station Officer got recovery memo of arms and ammunition recovered from the four bandits arrested prepared. Then the Station Officer alongwith the police personnel taking all the four bandits apprehended alongwith the sealed packets of arms and ammunition recovered from their

possession went back to police station Azeem Nagar. Station Officer R. D. Sharma lodged an F.I.R. of the said occurrence there at 4.30 a.m. the same night, i.e., on 28.7.1979. The police registered a crime against the accused under Sections 399, 402 and 307, I.P.C. and Section 25 of the Arms Act accordingly. Station Officer Maganvir Singh Chikara police station Tanda district Rampur to whom investigation of the crime was entrusted investigated the crime and after completing the investigation and obtaining necessary sanction of District Magistrate, Rampur, to prosecute the accused u/s 25 of the Arms Act submitted charge-sheets against the accused accordingly.

4. After framing of charge against the accused the prosecution examined S.I. Udan Prasad (P.W. 2), constable Sahab Singh (P.W. 3), constable Ashok Kumar (P.W. 4), constable Chhotey Lal (P.W. 5) and Station Officer R. D. Sharma (P.W. 6) as eye-witnesses of the occurrence. P.W. 1 constable Rajveer Prasad Mishra who prepared check report on the basis of the recovery memo at the instance of the Station Officer R. D. Sharma and made entry regarding registration of the crime in the G.D. proved these papers. Station Officer Maganvir Singh Chikara, police station Tanda who investigated the crime and submitted charge-sheets against the accused proved the police papers.

5. The accused pleaded not guilty denying the alleged occurrence altogether and also denying their arrest at the place, time and in the manner alleged by the prosecution. They also denied the alleged recovery of arms and ammunition from their possession.

6. On an appraisal of evidence and other material on the record the trial court believed the testimony of the police witnesses examined by the prosecution and convicted the accused under Sections 399 and 402, I.P.C. and Section 307 read with Section 149, I.P.C. and Section 25 of the Arms Act sentencing each of them as stated above.

7. Feeling aggrieved by the impugned judgment and order the accused-Appellants preferred these appeals for redress.

8. Heard the Appellants' learned Counsel and learned A.G.A. for the State as well and gone through the record.

9. P.W. 6 Station Officer R. D. Sharma narrated all the facts of the occurrence from the beginning to the end as stated above. P.W. 2 S.I. Udan Prasad, P.W. 3 constable Sahab Singh, P.W. 4 constable Ashok Kumar and P.W. 5 constable Chhotey Lal tried to corroborate him stating likewise. However, in view of the following facts and circumstances attending the case the testimony of the police witnesses abovenamed does not inspire confidence in the truthfulness of the prosecution version.

10. First, according to the prosecution case information was received at the police station at 9.30 p.m. that at about 12.00 mid night the dacoits would assemble in the grove of Ram Swarup situate at the outskirts of village Kumhariya and would commit dacoity at the house of Chokhey. It has come in evidence that village Kumhariya is situate at a distance of about 4 kilometres from the police station and that the abadi of village Kumhariya at a distance of some 3-4 furlongs from the grove of Ram Swarup. Thus, on reaching at the grove of Ram Swarup there was sufficient time to send two constables to the village abadi in order to collect 2-3 public witnesses in order to witness the alleged occurrence and anticipated recovery of arms and ammunition from the bandits apprehended but nothing of the sort was done by Station Officer R. D. Sharma. Secondly, P.W. 6 Station Officer R. D. Sharma stated in his cross-examination that roof of the hut inside the grove was made of straw and it was open from all the four sides whereas rest of the witnesses namely P.W. 2 S.I. Udan Prasad, P.W. 3 constable Sahab Singh, P.W. 4 constable Ashok Kumar and P.W. 5 constable Chhotey Lal stated that the hut was east faced and from the remaining three sides it was covered with tatiya. P.W. 2 S.I. Udan Prasad stated that first party headed by Station Officer R. D. Sharma was sitting at a distance of about 25 paces from the hut taking the side of trees and sugar cane crop. It has come in evidence that it was a grove in which there were about 100-150 guava and mango trees and there were shrubs also and this grove was in an area of about one acre. If the said grove was in an area of about one acre and there were about 100-150 mango and guava trees there could be no space for any sugarcane crop. The Investigating Officer has shown in the site plan map only trees and shrubs in the grove (Ext. Ka 6). In view of these inconsistent statement too it appears to be doubtful that the alleged incident occurred at the place, time and in the manner alleged by the prosecution. Thirdly, according to the prosecution case two constables Jhandu and Ram Prasad were sent to guard the house of Chokhey for his safety as dacoity was to be committed at his house the alleged night, but for the reasons best known to the prosecution neither Chokhey nor any of the two constables was examined by the prosecution in support of its case. Fourthly, according to P.W. 6 Station Officer R. D. Sharma the four bandits were apprehended by them on the spot at 1.00 a.m. He further stated that they proceeded from the grove of Ram Swarup taking all the four bandits apprehended and with the sealed packets of arms and ammunition recovered from them at about 3:45 a.m. It is incomprehensible as to what did they do for nearabout three hours in the grove. It also creates some suspicion about truthfulness of the prosecution case. There is also discrepancy in the statements of the five police witnesses regarding arrival of two constables who were sent to the house of Chokhey for his safety. P.W. 6 Station Officer R. D. Sharma stated that when they were about to proceed from the grove both the constables returned back to the grove. However, P.W. 5 constable Chhotey Lal stated that the two constables returned back after half an hour of the arrest of the four bandits. P.W. 3 constable Sahab Singh stated that when they were returning back from the grove to the police station both the constables who were returning

from the house of Chokhey met them on the way at about 4.00 a.m. P.W. 4 constable Ashok Kumar stated that when they reached back the police station he saw both the constables at the police station. Fifthly, there is nothing on the record to show that copies of the recovery memo of arms and ammunition from their possession were prepared and supplied to the four persons allegedly arrested on the spot. But there is mandatory provision that if a person is arrested and some incriminating article is recovered from his possession, the recovery memo should be prepared on the spot then and there and its copy has to be furnished immediately to the person arrested. But nothing of the sort was done in the instant case. The recovery memo does not bear the signatures or thumb impressions of the accused-Appellants in token of having received copies of the recovery memo (Ext. Ka-3). Thus, obviously copies of the recovery memo were neither prepared nor supplied to the accused. This omission is fatal to the prosecution case. Further, recovery of arms and ammunition from the possession of the four persons allegedly arrested on the spot is not witnessed by any public witness. Lastly, in a case of the present nature the evidence of five police witnesses has to be construed as evidence of one person. From this aspect also the accused-Appellants could not be convicted on the bare testimony of a police officer who is concerned with the success of the case. The evidence of the police officer gets no corroboration by any independent piece of evidence. It is not a case where any injury was caused to any of the police personnel though according to the prosecution evidence one shot was fired by one of the bandits but none of the police personnel received a scratch even. The evidence of the five police witnesses furnished by the prosecution is of hackneyed nature and is common to such cases.

11. In view of the above facts and circumstances attending the case the Court is of the view that the prosecution has not been able to establish its case beyond reasonable doubt and arrest of the four accused-Appellants at the time and place and alleged recovery of arms and ammunition from their possession is not free from doubt. Since the judgment of the trial court is based on misappreciation of evidence and is somewhat perfunctory it cannot be sustained in law and is liable to be set aside.

12. The appeal is allowed. The impugned judgment convicting the accused-Appellants under Sections 399 and 402, I.P.C. and Section 307 read with Section 149, I.P.C. and Section 25 of the Arms Act and sentences passed thereunder is hereby set aside. The accused-Appellants are held not guilty of the charge levelled against them. They are hereby acquitted. They are on bail. Their bail bonds are hereby discharged.

13. Copy of the judgment be certified to the Court below.