

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

(1) CRA-S-304-SB-2004
Date of decision:-2.2.2018

Masibul and others
...Appellants

Versus

State of Haryana
...Respondent

(2) CRA-S-363-SB of 2004

Devender Kumar @ Devna and another
...Appellants

Versus

State of Haryana
...Respondent

CORAM : HON' BLE MR. JUSTICE H.S. MADAAN

Present: None for the appellant No.1 – Masibul in
CRA-S-304-SB-2004.

Mr.P.R. Yadav, Advocate
for the appellants No.2 and 3 in
CRA-S-304-SB-2004.

Mr.A.D.S. Sukhija, Advocate
for the appellants in
CRA-S-363-SB-2004.

Mr.Gaurav Bansal, AAG, Haryana.

H.S. MADAAN, J.

Vide this judgment, I propose to dispose of two appeals i.e.

CRA-S-304-SB-2004 filed by appellants – Masibul, Gianesh alias

Ganesh and Shashi Bhushan and **CRA-S-363-SB of 2004** filed by appellants – Devender Kumar alias Devna and Mohd. Idrish, all of them being accused in FIR No.74 dated 23.2.2003 for the offences under Sections 399/402 IPC and Section 25 of the Arms Act registered with Police Station Udyog Vihar, Gurgaon, who were tried by learned Additional Sessions Judge, Gurgaon and acquitted for the offences under Sections 399 and 402 IPC, whereas they were convicted for an offence punishable under Section 25 of the Arms Act vide judgment/order dated 27.1.2004 and convicts Devender alias Devna, Masibul and Mohd. Idrish were sentenced to undergo rigorous imprisonment for a period of 2 years and to pay a fine of Rs.500/- each and in default thereof, to further undergo rigorous imprisonment for a period of one month each. Whereas convicts Mohd. Harun, Gianesh and Shashi Bhushan were sentenced to undergo rigorous imprisonment for a period of 1 year and to pay a fine of Rs.500/- each and in default thereof, to further undergo rigorous imprisonment for a period of one month each.

The accused-convicts, who are appellants before this Court prayed that the appeals be accepted, the impugned judgment of their conviction and order of sentence be set aside and they be acquitted of the charge framed against them.

Briefly stated, facts of the case as per prosecution story are that on 23.2.2003, a police party from Police Station Udyog Vihar, Gurgaon headed by SI/SHO Babu Lal was travelling in an official vehicle bearing No.HRU-895 in connection with patrol duty; that when the vehicle carrying the police party was present at Shankar Chowk,

Gurgaon, there SI Babu Lal received a secret information that six young boys, namely, Devender Kumar alias Devna son of Umesh Sharma, Masibul son of Jamal, Mohd. Idrish son of Mohd. Hakim, Mohd. Harun son of Mohd. Gadoli, Gianesh son of Kumar Pal and Shashi Bhushan son of Om Parkash were sitting near Sirhaul Border towards western side of the road in the bushes and they were planning and making preparation to commit dacoity at a liquor shop situated at Sirhaul Border and if a raid was conducted, they could be apprehended along with weapons; that on receipt of such information, SI Babu Lal divided the police force in three raiding parties, first headed by himself, other by ASI Budhi Parkash and third by HC Har Parshad; that thereafter all the three raiding parties proceeded towards the spot from three directions; that the first raiding party headed by SI Babu Lal went near the bushes, whereas the remaining two parties stayed behind at some distance waiting for signal from the first party; that SI Babu Lal overheard the conversation saying that Devender Kumar @ Devna, Masibul and Idrish were having country-made pistols and Mohd. Harun, Gianesh @ Ganesh and Shashi Bhushan were having daggers and knives and all would use their respective weapons in case the need arose while looting the liquor shop; that SI Babu Lal gave a signal at which remaining two raiding parties rushed nearby; that on seeing the police personnels, all the accused persons started running; that SI Babu Lal overpowered Devender alias Devna and Mohd. Harun; that the second party apprehended Masibul and Gianesh alias Ganesh, whereas third party caught hold of Mohd. Idrish and Shashi Bhushan; that on being searched, a country-made pistol and live cartridge of .12 bore each were

recovered from accused Devender alias Devna and Masibul, whereas a country-made pistol and a live cartridge .32 bore were recovered from accused Mohd. Idrish, while from the remaining accused, namely Mohd. Harun and Gianesh alias Ganesh, a dagger of steel and from Shashi Bhushan a knife were recovered; that after preparing sketches of country-made pistols and daggers/knife, those were taken into possession by the police; that a ruqa was sent to the police station, which formed the basis for registration of the FIR. The case was investigated. Statements of witnesses were recorded. On return to the police station, accused were put up in the lock up. Recovered weapons were deposited with MHC. During the course of investigation, arms and ammunition were got tested from Armourer and sanction order from the District Magistrate, Gurgaon for prosecution of accused Mohd. Idrish, Devender alias Devna and Masibul under Section 25 of the Arms Act was obtained.

After completion of investigation and other formalities, challan against accused was filed in the Court.

On presentation of challan in the Court of Judicial Magistrate Ist Class, Gurgaon, copies of documents relied upon in the challan were supplied to all the accused free of costs as provided under Section 207 Cr.P.C. Then finding that offences under Sections 399 and 402 IPC are exclusively triable by the Court of Sessions, learned Judicial Magistrate Ist Class, Gurgaon committed the case to the Court of learned Sessions Judge, Gurgaon from where it was entrusted to the Court of learned Additional Sessions Judge, Gurgaon.

On receipt of case in the Court of learned Additional

Sessions Judge, Gurgaon, observing that charge for offences under Sections 399 and 402 IPC and Section 25 of Arms Act was disclosed against the accused charge-sheeted them accordingly, to which, they pleaded not guilty and claimed trial. The case was then fixed for evidence of the prosecution.

During the course of its evidence, the prosecution has examined as many as five witnesses, namely, ASI Hawa Singh as PW1, ASI Budhi Parkash as PW2, SI Babu Lal as PW3 and Gurdial Singh, HC-Armourer as PW4 and Inspector M.S. Sethi as PW5. The sanction order produced in evidence as Ex.PX.

With that the prosecution evidence stood closed.

Statements of the accused were recorded under Section 313 Cr.P.C., in which all the incriminating circumstances appearing against such accused were put to them but they denied the allegations contending that they are innocent and have been falsely involved in this case.

Accused did not lead any evidence in their defence.

After hearing arguments, learned trial Court convicted and sentenced the accused as mentioned supra, which left them aggrieved and they have filed the present appeals.

I have heard learned counsel for the appellants-accused-convicts and learned Assistant Advocate General for the State of Haryana besides going through the record.

It is pertinent to mention here that in order dated 12.5.2017 passed by this Court, it is found mention that from the certified copy of the judgment dated 26.10.2009 passed by learned JMIC, Gurgaon in

Criminal Case No.792-AD of 2003, which had been brought on record by learned counsel for the appellants Gianesh and Shashi Bhushan, appellant/accused/convict Masibul stood declared as a proclaimed offender vide order dated 12.3.2008. Further, at present he is not represented by any counsel.

Learned counsel for the appellants have argued that the trial Court has disbelieved the prosecution story as regards offences under Sections 399 and 402 IPC, however, believed it with regard to offence under Section 25 of the Arms Act, which shows the erroneous approach of the Court and non-application of mind. Though learned State counsel has defended such action of the Court below but I find merit in the contention so raised by learned counsel for the appellants. A perusal of the impugned order goes to show that in para No.11, the trial Court has observed that prosecution has miserably failed to bring guilt to any of the accused under Sections 399 and 402 IPC. The main reason given therein being that the star witnesses for the prosecution i.e. ASI Budhi Parkash (PW2) and SI Babu Lal (PW3) happened to be official witnesses and without any independent corroboration being there and further no independent witness was joined either at the time of receiving secret information or at the time of alleged raiding having ample opportunity to do so especially when the purpose of the police party was to do patrolling. In paras No.12 and 13, the trial Court has highlighted absence of independent corroboration to the statements of official witnesses. It would be relevant to reproduce para Nos.14 to 17 of the judgment, which are as under:

The accused were armed with pistols and

knives, as stated by the witnesses but none of the accused attacked any member of the police party and tried to run to save themselves and their surrender before the police meekly by itself makes the prosecution story as doubtful so far as the preparation by the accused to commit dacoity is concerned. In Nasru Vs. State of U.P. 1994 Supreme Court Cases (Cri.) 51, relied upon by learned counsel for the accused, the Hon'ble Supreme Court observing that the accused, though were armed with a stick and an unlicensed firearm, did not attack on the police party, acquitted them of the charges under Sections 388, 402 and 307 IPC but confirmed the conviction under Section 25 of the Arms Act of the accused who was having unlicensed firearm.

Further, as per statement of SI Babu Lal, PW3 they received secret information at about 7 p.m. and they took 15 minutes in reaching the spot after receipt of the secret information. The fact that the accused continued harping on the same string and repeating their planning to commit dacoity amongst themselves till the police party reached the spot, also makes the conduct of the police witnesses highly doubtful in so far as continuance of the conversation amongst the accused is concerned.

It was dark at the time of the alleged raid and

no source of light was there at the spot as admitted by SI Babu Lal, PW3. The accused are stated to be concealing themselves in the bushes at that time. Therefore, the factum of nabbing the accused in such circumstances from the spot also make the conduct of the police witnesses as unreliable.

The prosecution has, therefore, miserably failed in proving its case against the accused for offence under Sections 399 and 402 IPC. All the accused for the above offences are, therefore, acquitted of the charges.

However, all of sudden in para No.18, the trial Court made a somersault while disbelieving the prosecution story with regard to police having apprehended the accused making preparations to commit dacoity but at the same time believing it with regard to recovery of pistols, arms, ammunition and weapons from the accused. Same yardstick should have been applied with regard to offence under Section 25 of the Arms Act. If depositions of official witnesses were not found believable and creditworthy with regard to offences under Sections 399 and 402 IPC, then how could their depositions be accepted as such with regard to recovery of weapons from them, more particularly when admittedly the recovered weapons had not been converted into sealed parcels ruling out possibility of any tampering and several vital links in the chain of prosecution evidence being missing. The trial Court by faulty reasoning and misappraisal of evidence has convicted the accused for offence under Section 25 of the Arms Act when they deserved to be

acquitted for that offence also. Therefore, while dismissing the appeal filed on behalf of appellant/accused/convict Masibul as he is not being represented by any counsel having been declared a proclaimed offender, the appeals so filed on behalf of remaining appellants/accused/convicts Gianesh alias Ganesh, Shashi Bhushan, Devender Kumar alias Devna and Mohd. Idrish are accepted. The impugned judgment of conviction and order of sentence under appeals qua them as a result thereof are set aside. The appellants – accused Gianesh alias Ganesh, Shashi Bhushan, Devender Kumar alias Devna and Mohd. Idrish are acquitted of the charge for which they have been held guilty and convicted vide the impugned judgment. The appellants are on bail and as such they and their sureties also stand discharged from their liability of bail bonds and surety bonds.

Necessary intimation be sent to the quarter concerned.

2.2.2018
Brij

(H.S.MADAAN)
JUDGE

Whether reasoned/speaking : Yes/No

Whether reportable : Yes/No