

:: बन्दीगण की ओर से ::

माननीय उच्च न्यायालय मध्यप्रदेश, जुड़िकेवर बबलपुर, रुष्णपीठ

गवालियर

बापराधिक वपील न्यायालय १। १२००५



(१) बनिल उफ़ भूरा मुन परसाम शर्मा, आयु २२ वर्ष,
निवासी ग्राम विरसाडी, थाना गोद्वाल, जिला
भिठ्ठ (म०प्र०)

(२) जानेश उफ़ जानु मुन शिवशंकर शर्मा, आयु २४ वर्ष,
निवासी जेल वाले लुमान जी के पास, सखलगढ़
जिला मुरैना (म०प्र०)

-- वपील अधीर्णणा.

काम.

मध्यप्रदेश शासन द्वारा मुलिष थाना तुमासपुरा,
जिला शिवपुरी --- रिस्पोन्डेन्ट

बापराधिक वपील अन्तर्गत घारा ३७४ दण्ड प्रद्विधा संस्कार.
विरुद्ध निर्णय न्यायालय द्वितीय बपर सभा न्यायाधीश,
जिला शिवपुरी, प्रकरण न्यायालय द्वितीय बपर सभा न्यायाधीश,
जिला शिवपुरी, प्रकरण न्यायालय १११०४ सत्र बजनवान म०प्र०
शासन काम बनिल उफ़ भूरा बादि जिसके तहत वपील अधीर्णणा
को घारा ३०७।३४ माझ०विं में चार-चार वर्ष का सम्म
कारावास, एक सक हजार रुपया अर्धपट्ठ तक्या घारा २५,२७
वार्ष सक्ट के तहत तीन-तीन वर्ष का सक्रम कारावास, एक-
सक हजार रुपया अर्धपट्ठ से दण्डित किया। अर्धपट्ठ बड़ा न
करने को दशा में छूँहँ: माह के बत्तिरिक्त कारावास से दण्डित
किया गया।

वपील अधीर्णणा को ओर से बापराधिक वपील नियांकित
प्रस्तुत है:-

संक्षिप्त वथ्य :

(अ) यहकि, संक्षिप्त में बमियोजन की ओर से बत्ता इस प्रकार है





HIGH COURT OF MADHYA PRADESH

BENCH AT GWALIOR

SB : HON'BLE SHRI JUSTICE N.K. GUPTA

Criminal Appeal No. 11/2005

Anil @ Bhura & Anr.

Vs.

State of M.P.

JUDGMENT post for 03.02.2016

(N.K. GUPTA)
JUDGE
02/02/2016

HIGH COURT OF MADHYA PRADESH
BENCH AT GWALIOR

SB : HON'BLE MR. JUSTICE N.K. GUPTA

Cr.A. No. 11 of 2005

Anil @ Bhura & Anr.

Vs.

State of M.P.

Whether reportable :- Yes /No

For Appellants : Shri O.P. Mathur, Advocate.

For Respondent : Shri Mohd. Irshad, Panel Lawyer
 /State

JUDGMENT

(Delivered on this Day of 3rd February, 2016)

The appellants have preferred the present appeal aggrieved with the judgment dated 13/12/2004 passed by 2nd Additional Sessions Judge, Shivpuri in S.T. No. 111/2004, whereby, each of the appellant has been convicted of offence under section 307 r/w section 34 of IPC and section 25/27 of Arms Act and sentenced of four years rigorous imprisonment with fine of Rs. 1,000/- and three years rigorous imprisonment with fine of Rs. 1,000/-; respectively however, default sentence was also prescribed.



2. The prosecution case, in short, is that on 17/01/2004 an intimation was received to the Hemant Sharma (PW-8) who was Station House Officer, Police Station Subhashpura, Dist. Shivpuri; that two culprits having fire arms were hiding in the forest near village Patara. The Hemant Sharma (PW-8) along with police party went to the spot and surrounded the culprits. On giving challenge, the culprits started firing with gun and counter firing was also done by the police. Twenty nine rounds were fired by the police during combat. Ultimately, the appellant Anil @ Bhura was arrested on the spot and .315 bore gun with three live cartridges were recovered from him, whereas three empty cartridges of .315 bore gun were recovered from the spot. Similarly, five empty cartridges of 12 bore gun were also recovered from the spot. The appellant Anil @ Bhura on interrogation has told that he was accompanied with the appellant Gyanesh @ Gyanu. After some time, on 16/02/2004 appellant Gyanesh @ Gyanu was also arrested. After due investigation, charge sheet was filed before the Judicial Magistrate First Class, Shivpuri who committed the case to the Court of Sessions and ultimately, it was transferred to 2nd Additional Sessions Judge, Shivpuri.

3. The appellants have abjured their guilt. They have stated that they were falsely implicated in the matter. The

appellant Anil @ Bhura took the plea that on the date of incident he was present at the house of his brother Girish in the territory of police station Subhashpura, Dist. Shivpuri and he was arrested from that place and falsely implicated in the matter. In support, Girish Sharma (DW-1) was examined as defence witness. After considering the evidence adduced by the parties, the learned Additional Sessions Judge has convicted and sentenced the appellants as mentioned above.

4. I have heard learned counsel for the parties at length.
5. In the present case, looking to the facts and circumstances of the case, it would be apparent to consider the case of the appellant Gyanesh @ Gyanu separately and thereafter, the case of the appellant Anil may be considered.
6. It is surprising that after formal arrest of the appellant Gyanesh @ Gyanu on 16/02/2004, whereas, he was in custody and kept in Sub Jail Jaura due to another case and thereafter, nothing was recovered from him and prosecution sanction under section 39 of the Arms Act was not given by the District Magistrate against the appellant Gyanesh @ Gyanu, for his prosecution under section 25 of Arms Act. However, the trial court in absence of any evidence convicted the appellant Gyanesh @ Gyanu under section 25 of Arms Act. In absence of any sanction under section 39 of



Arms Act, the appellant Gyanesh @ Gyanu could not be tried of offence under section 25 of Arms Act and, therefore, his conviction of offence under section 25 of Arms Act appears to be bad in law.

7. Hemant Sharma (PW-8) who was Station House Officer at police station Subhashpura, Dist. Shivpuri led police force to surround the culprits, did not state that the appellant Gyanesh @ Gyanu could be identified at spot and, therefore, there is no ocular evidence against the appellant Gyanesh @ Gyanu that he was present at the spot or he fired with a 12 bore gun. On the other hand, Hemant Sharma has clearly stated that when the appellant Anil @ Bhura was arrested he told the name of appellant Gyanesh @ Gyanu. After arrest of appellant Gyanesh @ Gyanu no 'Test Identification Parade' was arranged before any witness or police constables and the information given by the accused Anil @ Bhura was not admissible against the appellant Gyanesh @ Gyanu.

8. The Hemant Sharma in para 4 of his statement has claimed that in crime No. 74/2004 one .315 bore gun and two live cartridges were recovered from the appellant Gyanesh @ Gyanu which indicates that for that recovery a separate case was lodged against the appellant Gyanesh @ Gyanu and, therefore, for that recovery the trial court could not frame the charge of offence under section 25 of Arms Act against the appellant Gyanesh @

Gyanu because for that offence a separate case was registered. When the appellant Gyanesh @ Gyanu was neither identified at the spot nor any 'Test Identification Parade' was arranged then there was no evidence on record to say that the appellant Gyanesh @ Gyanu was present with the appellant Anil @ Bhura who was captured at the spot. It is also pertinent to note that Hemant Sharma did not claim that any 12 bore gun was recovered from the appellant Gyanesh @ Gyanu. It was for the Investigating Officer that, after getting formal arrest of the appellant Gyanesh @ Gyanu, he would have been taken on police remand and 12 bore gun should have been recovered. Hence, in absence of any evidence it could not be concluded that the appellant Gyanesh @ Gyanu was the person who accompanied the appellant Anil @ Bhura or had fired with 12 bore gun upon the police party. Hence, the appellant Gyanesh @ Gyanu could not be convicted either of offence under section 307 of IPC or under section 27 of Arms Act. The trial court has committed an error in convicting the appellant Gyanesh @ Gyanu for the aforesaid offences without any lawful evidence advanced by the prosecution.

9. Now the case of the appellant Anil @ Bhura is to be considered. In this connection the independent witness Dhiraj Singh (PW-1) and Jawahar Singh (PW-2) who were examined and



have turned hostile. Both of them have accepted that police force took them in the vehicle of the police and thereafter got their signature on various papers. They have stated that no one was arrested before them and no exchange of fire took place before them. However, constable Narayan Singh (PW-5), Head Constable Moolchand (PW-6) and SHO Hemant Sharma (PW-8) have stated that on information Hemant Sharma (PW-8) along with police force went in the forest near the village Patara and surrounded the culprits. The culprits who were present in a culvert started firing upon the police force and, therefore, firing was done by the police force in return. According to Hemant Sharma (PW-8) 29 rounds were fired by police party, whereas, three cartridges from .315 bore gun were fired by one culprit and five cartridges were fired by another culprit with a 12 bore gun. However, Hemant Sharma (PW-8) out of 29 rounds could not recover 20 empty cartridges fired by the police force, only 9 empty cartridges could be recovered. If firing has been done with a gun then empty cartridges get dropped near the person who fires the gun. Hence, it is surprising, that police party could not recover the 20 cartridges which were fired by the police officials. Possibility indicates that no fire was done by the police force but it is shown on the papers that 29 rounds were fired and 9 empty cartridges could be recovered.

10. When independent witnesses have turned hostile, the testimony of the police officials is to be considered with great caution because the police officials are required to be involved in investigation of crime every day and it is not expected from them to remember each and every incident which has taken place between them. Thus the officials of police have stated before the Court on the instruction given by the SHO concerned. In the present case, the SHO Hemant Sharma (PW-8) has committed so many mistakes in his initial investigation.

11. There is lot of material contradictions in the statements of various witnesses including Moolchand and Hemant Sharma. The constable Narayan Singh and SHO Hemant Sharma have stated that only the appellant Anil @ Bhura could be arrested from the spot whereas, head constable Moolchand (PW-06) has stated in his examination-in-chief that two culprits were arrested, out of them one was Anil @ Bhura and 2nd was Gyanesh @ Gyanu. He has also stated that .315 bore gun and three live cartridges were recovered from the appellant Gyanesh @ Gyanu. When he was suggested in para 7 of his cross examination that only Anil @ Bhura could be caught then he did not accept the suggestion given by the defence. If Head Constable Moolchand accompanied the police force who went to challenge the culprits and arrested Anil @



Bhura then Moolchand should have remembered that only one culprit could be arrested. The statement given by the Head Constable Moolchand clearly indicates that either he did not accompany the police force or no such encounter took place as claimed by the SHO Hemant Sharma.

12. When some one claimed that crime was committed and arrest as well as recovery is done before registration of crime then on such document crime number cannot be mentioned from the very beginning before registration of crime on such papers. Police writes crime number as 0/year in which crime was registered and after registration of case crime number is to be additionally mentioned on the document. In the present case Hemant Sharma and his staff have claimed that appellant Anil @ Bhura was arrested at the spot and arrest memo was prepared. One .515 bore gun and 3 live cartridges were recovered from the appellant Anil @ Bhura. Thereafter, empty cartridges fired by the culprits were recovered from the spot and memo Ex. P-6 was prepared. Again the empty cartridges fired by the police party a memo Ex. P-7 was prepared. If the entire documents and time mentioned on the documents are considered then important document *Dehati Naliyi* Ex. P-12 on which it is mentioned that crime was registered at crime No. 0/04 and it was registered at 20:30 hours, whereas,

crime was committed at 21:45 hours. According to the various documents one gun and three live cartridges were recovered from the appellant Anil @ Bhura with a document Ex. P-5 and that document was prepared at 22:00 hours. Thereafter the document Ex. P-6 related to recovery of empty cartridges fired by the culprits was prepared at 22:40 hours. Again document Ex. P-7 a recovery memo of empty cartridges fired by the police was prepared at 22:50 hours, whereas, the appellant Anil @ Bhura was arrested with a document Ex. P-8 at about 22:10 hours. However, in these documents crime number 08/2004 is mentioned. When case was registered with FIR Ex. P-13 at about 23:40 hours then SHO Hemant Sharma could not know that crime number 08/2004 would be registered at police station Subhashpura and, therefore, he should have mentioned on the document Ex. P-5 & P-8 that initially crime number 0/2004 was registered as per Dehati Nalisi and after registration of case an additional crime No. 08/2004 should have been mentioned on those documents. Similarly, recovery memo relating to empty cartridges i.e. Ex. P-6 & P-7 crime No. 08/2004 is mentioned though these documents are prepared after writing of Dehati Nalisi but before registration of actual crime at police station Subhashpura. Such mistake committed by the SHO Hemant Sharma clearly indicates that a story was cooked and the FIR Ex.



P-13 was registered and thereafter various documents were prepared to make the case.

13. If an intimation was received by SHO Hemant Sharma that two culprits were hiding in the forest near village Patara then he should have made an entry of this information in his Rojnamcha. Similarly, when he left the police station then he should have made an entry in Rojnamcha that how many police constables or Head constable accompanied him and how much ammunition or fire arms had been taken by the police and thereafter when the police force came back to the police station then return entry should have been noted in the Rojnamcha and it was the duty of the SHO Hemant Sharma to file the copy of aforesaid Rojnamcha and those should have been proved by production of original Rojnamcha before the trial court, but no such Rojnamcha has been filed or proved by the Investigating Officer. No reason has been shown as to why such Rojnamcha has not been proved before the Court. Under these circumstances, adverse inference is to be drawn that neither any police force went to the forest near village Patara nor any encounter took place nor the police force came back with arms and ammunition. In absence of this Rojnamcha, possibility cannot be ruled out that the appellant Anil @ Bhura was arrested from the house of his brother

Girish (DW-1) and false case was prepared to show the bravery of the police force in arresting the appellant Anil @ Bhura. Under these circumstances, when the independent witnesses have turned hostile, the evidence given by Shri Hemant Sharma, SHO and his officials cannot be believed. In this context, the evidence given by the Head Constable Moolchand is much relevant that he told about arrest of two persons, whereas, second person was not arrested at the spot. No arrest was shown of Gyanesh @ Gyanu at the spot either by witnesses or FIR Ex. P-13. The statement of Head constable Moolchand clearly indicates that story was prepared by SHO Hemant Sharma and told to his staff and the same was repeated by police officials before the trial court. However, in absence of Rojnamcha, it was not proved beyond doubt as to whether Head constable Moolchand or constable Narayan Singh accompanied SHO Hemant Sharma, who allegedly went to the forest near village Patara. Also it is doubtful that any police party went to the forest near village Patara. Under these circumstances, where entire story appears to be cooked by SHO Hemant Sharma, it cannot be said that the appellant Anil @ Bhura fired with a .315 bore gun upon the police party or tried to kill any of the police officials.

14. According to the witnesses, incident took place in the



night, whereas, there was no source of light and with the help of torch the police party could not know the place where the culprits were hidden then by haphazard firing it cannot be said that the person who fired with a gun had any intention to kill any police official or SHO Hemant Sharma. If any fire took place then it was simply done, so that police force should not come near to the culprits and the culprits may have opportunity to escape. Under these circumstances, where the entire prosecution story is highly doubtful, it is not proved beyond doubt the the appellant Anil @ Bhura had fired with gun upon the police party and if it is presumed that he fired with a gun then without aiming any police official his crime does not fall within the purview of section 307 of IPC. When a doubt is created then the benefit of doubt is to be given to the accused. The trial court has committed an error in convicting the appellant Anil @ Bhura for offence under section 307 of IPC, when it is not established beyond doubt that the appellant Anil @ Bhura was the person who fired with a gun then he could not be convicted of offence under section 27 of Arms Act. Similarly, when independent witnesses relating to seizure have turned hostile and it is highly doubtful that the police party went to the forest near village Parara or not, then it cannot be said beyond doubt that any fire arm was recovered from the appellant Anil @

Bhura. Possibility cannot be ruled out that the same was plotted by SHO Hemant Sharma because he had claimed to arrest a person on whose head some price was declared. When seizure of fire arm is doubtful then benefit of doubt is to be given to the appellant Anil @ Bhura and he could not be convicted even of offence under section 25 of Arms Act.

15. On the basis of aforesaid discussions, it would be apparent that the appellant Gyanesh @ Gyanu was convicted of offence under section 25/27 of Arms Act, whereas, no gun was recovered from him in the present case. There was no eye witness and chain of circumstantial evidence did not exist to show his presence therefore the appeal of the appellant Gyanesh @ Gyanu appears to be acceptable.

16. Similarly, it was not proved beyond doubt that such encounter was arranged by the police while arresting the appellant Anil @ Bhura or the appellant Anil @ Bhura had fired upon the police party. It is not proved beyond doubt that any fire arm was recovered from the appellant Anil @ Bhura. Hence, the appellant Anil @ Bhura could not be convicted either of offence under section 307 of IPC or section 25/27 of Arms Act and his appeal also appears to be acceptable.

17. Consequently, the appeal filed by the appellants is

hereby allowed. Their conviction as well as sentence of offence under section 307 of IPC and section 25/27 of Arms Act is hereby set aside. They are acquitted from the aforesaid charges.

18. It is not clear from the record as to whether the appellants are in custody or on bail because during pendency of the case arrest warrants were issued and the appellants were brought before the Court with the help of production warrant because they were detained in other cases. If the appellants are not in custody in the present appeal then their bail bond shall stand discharged, however, release warrant should be issued against both of the appellants to inform the jail authorities that they are not required in the present case if there is no other matter pending against them, then they may be released.

19. Copy of this judgment be sent to the trial court along with its record for information and compliance.

- (1) Application received on..... 6/2/16
 (2) Applicant told to appear on..... 19/2/16
 (3) Applicant appeared on..... 6/2/16
 (4) Application (With or w/o further /
 particulars) to the Record
 keeper / Dealing Assistant on..... 6/2/16
 (5) Application (with or w/o record,
 and for further or correct particulars,
 if any required) received from the
 Dealing Assistant / Record keeper on..... 19/2/16
 (6) Applicant given notice for further or
 correct particulars on.....
 (7) Applicant given notice for further
 fund on.....
 (8) Was in S.R. No. (5) or (7) complied
 with on..... 19/2/16
 (9) Copy ready on..... 19/2/16
 (10) Copy delivered on..... 19/2/16
 (11) Court fee realized..... 6/2/16

1/2/16
 3.2.16
(N.K. GUPTA)
JUDGE
(03/02/2016)

CERTIFIED TO BE A TRUE COPY

Section Officer
 Madhya Pradesh High Court
 Gwalior Bench, Gwalior
 Certified u/s 76 of the Evidence Act

Checked & Found Correct
 1/2/16
 A.H.C.