State of U.P. Vs. Dhanwan

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SooperKanoon Citation : sooperkanoon.com/455543

Court : Allahabad

Decided On : Jan-11-1963

Reported in : AIR1965All260; 1965CriLJ667

Judge : D.S. Mathur and ;Gyanendra Kumar, JJ.

Acts : Arms Act, 1878 - Sections 4 and 19; Evidence Act, 1872 - Sections 9

Appeal No. : Criminal Govt. Appeal No. 2041 of 1961

Appellant : State of U.P.

Respondent : Dhanwan

Advocate for Def. : J.N. Agarwala, Adv.

Advocate for Pet/Ap. : Government Adv.

Judgement :

Mathur, J.

1. This is a Government Appeal under Section 417, Crl. P. C. against the order of the Sessions Judge of Jhansi allowing the appeal of Dhanwan, respondent, and thereby acquitting Lim of the offence punishable under Section 19(f) of the Arms Act, on the ground that the D.B.M.L. gun said to have been recovered from his possession on 20-2-1901 was not sealed at the spot and the necessary link

evidence not adduced to prove that the gun was recovered in the same condition and was the same as was produced before the trial Court. The learned Ses-sions Judge took this view on consideration of certain decisions of this Court. In view of the fact that the appeal was being allowed on a legal ground, the Sessions Judge did not record a finding whether the prosecution had or had not succeeded in proving the recovery of the gun from the posses-sion of the respondent.

2. The learned counsel for the respondent made a request that in case the above question of law was decided against him, the appeal be remanded for a fresh hearing so that the respondent may also have the benem of a finding of fact of the lower appellate Court. The request is a reasonable one and in the circumstances, we are not expressing any opinion on the merits of the case.

3. The simple question for consideration is If the testimony or eye witnesses as to the identity of the recovered gun can be disregarded because the recovered article had not been scaled at the spot or tne prosecution did not care to produce during the trial formal evidence as to the sealing and safe transit or storage of the recovered article, to prove that the article produced before the Court was one which had been recovered from the possession of the accused.

4. At the very outset it may be observed tnat there is no provision in the Cr. P. C., nor in any other enactment including the Arms Act, under which it is necessary for the Investigating Officer to seal the recovered article at the spot, nor is there any provision that if necessary link evidence as to the safe transit and storage of the recovered article la not adduced, the evidence of recovery shall not be admissible or sufficient for conviction. Our attention was, however, drawn to Para 142(1) of the Police Regulations under which all sub-stances or articles connected with the commission of an offence which may be required as evidence at a trial should be sent with an invoice by the investigating Officer to the Prosecuting inspector in a sealed cover with the contents noted outside. This rule applies to all the material exhibits and isnot confined to those which will later be put for identification or the possession whereof is unlawful without licence or permission of a competent authority. Such a rule cannot be considered to be mandatory. Even if a contrary view is taken, non-compliance of the rule shall be a mere irregularity which will not

make the courts of law view the recovery with doubt in each and every case. It shall depend upon the facts of an individual case whether to accept or not to accept tne sworn testimony of witnesses.

5. It is a rule of caution and prudence notto accept the evidence of recovery if the Investigating Officer does not seal the recovered articleat the spot or the link evidence is not adducedduring the trial to prove that the article recoveredis the one produced before the Court. In the eyeof law, it is the statement on oath before theCourts of law which is substantive evidence andother evidence is merely to corroborate that testimony or to show that such testimony is authenticand should be accepted. Where substantive evidence is itself acceptable, the Courts snail not be justified in rejecting it for want of stereotyped evidenceor for want of corroboration. For example, if therecovered article is a suit, made to order, tailoredby one who invariably stitches and has stitchedhis name tag on the suit with the name of theperson for whom it was so tailored, it is not at allnecessary to seal the recovered article and to leadduring the trial the necessary link evidence. TheInvestigating Officer can easily, without being guiltyof any omission or negligence, not seal the recovered article and instead enter full particularsincluding those of the name tag in the recoverymemo. Such a recovery memo shall be good evidence to corroborate the testimony of the Investigation Officer and also of the witnesses to recovery.In other words, disregard of a rule based on caution and prudence is not fatal to the prosecutionprovided that the court is satisfied that tho evidenceadduced in the case is reliable and can be acceptedwithout any doubt.

6. The same principle can be applied to the recovery of unlicensed arms. Fire arms, ammuni-tions etc. manufactured by reliable concerns bear many particulars including the name of the company. Number of the fire-arm is also embossed thereon. If such particulars are noted in the recovery memo, it is not necessary to seal the recovered article as the testimony of witnesses can be tested with reference to the recovery memo, Even if the fire-arm does not bear any number, nor the name of the company, it can easily be ascertained whether the fire-arm is complete and is serviceable. If full description of the fire-arm is contained in the recovery memo, sealing of the recovered article and the adducing of the link

evidence is not necessary, as the fire-arm produced before the court can be compared with the description contained in the recovery memo to find out if tnat nre-arm had been recovered from the possession of the accused, in certain circumstances, however, the sealing of the recovered article and the giving of the necessary link evidence during the trial may be absolutely necessary.

7. The term 'Arms' has been defined in Section 4 of the Arms Act to include firearms, bayonets, swords, daggers, spears, spearheads and bows and arrows, and also cannons, parts of arms and machinery for manufacturing arms. The definition is not exhaustive but is illustrative and consequently the term can be given a wider meaning to include all kinds of weapons which can be used for the purpose of offence or defence. it is the purpose for which the firearm is primarily meant or can be used which determines whether it does or does not fall within the definition of 'arms'. It is a settled law that a fire-arm even though unserviceable but can be used after repairs is still a firearm. Further, parts of a fire-arm are by themselves 'arms' as defined in Section 4. The barrel of & gun or pistol, or a trigger thereof, 3s also an 'arm' which cannot be possessed by anyone without a licence.

8. Even though the definition of 'arms' is wide it cannot cover those parts which are unserviceable and beyond repairs. For example, barrel of a gun eaten up by rust cannot be used as barrel of a fire-arm. It shall have to be molten before making another barrel. For all practical purposes, such a rusted barrel is unserviceable and cannnot be deemed to be a part of a firearm. Other barrels though unserviceable at the time of recovery may become serviceable after cleaning or minor repairs. A barrel which can be used as such continue to be a part of firearm. The same can be said of a trigger. A broken or damaged trigger of a firearm cannot ordinarily be used as such and it ceases to be a part of the firearm. But if the trigger is serviceable or can be made serviceable after minor repairs, it continues to be a part of the fire arm.

9. Similarly, a gun or pistol can be serviceable or unserviceable and an unserviceable firearm can be made fit for use after changing a few parts or making repairs, such an unserviceable gun or pistol is, in the eye of law, on 'arm' as

defined in Section 4 of the Arms Act. A contrary view may be taken if the weapon cannot be made serviceable without changing too many parts or incurring heavy expenditure considered unreasonable keeping in mind the price of a new weapon. A firearm not serviceable at the time of recovery can thus continue to be an 'arm' within the meaning of the Act.

10. Where the inspection of the firearm, or part thereof, is necessary before courts can lay down whether it falls within the defintion of 'arms' as envisaged by Section 4, it shall be necessary for the Investigating Officer to seal the recovered article at the spot and for the prosecution to adduce the requisite link evidence during the trial. But where the recovered article is such which, on the face of it, is an 'arm' within the meaning of Section 4, no such precaution need be taken nor it shall be necessary to adduce the during the trial link evidence, as the nature of tlie article recovered can be determined from the recovery memo and the testimony of witnesses tested with reference thereto.

11. We are thus of the opinion that no hard and fast rule can be laid down and it shall depend upon the circumstances of each case whether the non-sealing of the recovered 'Arm' or the failure toadduce link evidence during tne trial is fatal to the prosecution and, in the absence of such evidence, the accused shall deserve acquittal of the offence, where the court is satisfied that the article produced before the court is the one which was recovered from the possession of the accused, it can easily convict him (accused) even though the re-covered article was not sealed at the spot and If sealed, the necessary link evidence was not adduced during the trial. But where the court is not so satisfied, the accused can be given the benefit of doubt and acquitted of the charge unless tne trial court considers it desirable to record the evidence of formal witnesses under Section 540 Cr. P. C. or the appellate court records such evidence by way of additional evidence under Section 428 Cr. P. C.

12. We shall now make our brief comments on the earlier decisions of this Court as have been brought to our notice. In Crl. Appeal No. 443 of 1956 (All) Hon'ble Beg, J. observed as below:

'If this sort of evidence can be considered to be enough to prove the identity, then it would be possible for the police officers to bring any article with them in court and it would be sufficient for some of the witnesses to say that the said articled were the articles recovered. In order to ensure the identity of the articles, the court should insist on something more than the bare oral statement of witnesses.'

The above observations, if read in isolation, can give an Impression that uncorroborated oral testimony of a police officer and of witnesses to the recovery cannot be considered reliable and cannot establish the identity of the recovered article. Such a view shall be in conflict with the established principles, and we do not think that Hon'ble Beg, J. was laying down a rule that oral evidence is insufficient for establishing the Identity of the article or the ownership thereof. Witnesses can be divided in three categories: wholly reliable, wholly unreliable, and partly reliable and partly unreliable. It is a settled law that the oral testimony of a 'wholly reliable' witness or witnesses can be accepted and made the basis of conviction even thougn uncorroborated by other evidence, oral or documentary. Corroboration is necessary for the acceptance of oral statement of witnesses partly reliable and partly unreliable; while the oral statement of 'wholly unrealia-ble' witness does not carry any weight. Further, conviction can be based on the testimony of a 'wholly reliable' solitary witness or wholly reliable' interested witnesses. Probably, what Hon'ble Beg, J. meant was that to exclude the possibility of a mistake in good faith or as a result of mistaken identity the courts should insist for some evidence in addition to the sworn testimony of witnesses. Such additional evidence can be of different forms, not necessarily by sealing the recovered article at the time of recovery and leading link evidence during the trial. Where the accused holds a licence for possession of a fire-arm, the question for consideration shall be whether the fire-arm recovered was or was not covered by the licence. If the fire-arm covered by the licence bears particulars, non-existence of such particulars in the recovered fire-arm shall be conclusive evi-dence of the identity thereof, and this can be established by oral evidence coupled with the recovery memo. But where the licenced fire-arm bears no particulars it snail be necessary for the investigating officer to seal the recovered fire arm and to adduce during the trial the necessary link evidence.

13. Tne Identity of the recovered article can be established by other modes also, one of them toeing, as already mentioned above, by giving full particulars of and the nature of the article so recovered in the recovery memo. The identity can also be established by the witnesses signing or putting a special mark on the recovered article. It is thus the satisfaction of the court as to the Identity of the article recovered which is the determining factor, and not what other evidence the prosecution could adduce.

14. Hon'ble Beg, J. made a reference to two earlier decisions of this Court--one by Hon'ble Chaudhari, J. in Criminal Appeal No. 61 of 1950 decided on 17-2-1958 (All) and the other by Hon'ble Bishambar Dayal,, J. in Criminal Appeal No. 1081 of 1856 decided on 30-4-1958 (All). Criminal Appeal No. 1081 was not decided on 30-4-1958 and we are not able to lay our hands on the case decided by Hon'ble Bishambhar Dayal, J., Hon'ble Chaudhari, J. did not, while deciding criminal Appeal No. 61 of 1956 (All), give reasons for ex-pressing the following opinion :-

'It would thug appear that the prosecution evidence is silent on the movement of the fire-arms from the movement of their alleged recovery on the night between the first and second of August, 1954 until tne time when suddenly they purport to have reached the Head Armourer, P. W. 1, at policelines Etawah on 25-8-1954. It cannot be presumed that the firearms purporting to have been received by the Head Armourer were the firearms which are said to have been recovered from three of the appellants.'

If Hon'ble Chaudhari, J. meant to lay down an inflexible rule to be applicable to each case of re-covery, we are, for reasons, already indicated above, in respectful disagreement. The link evidence is meant for tne satisfaction of the court and if without such evidence the court is satisfied as to the correctness of the evidence of recovery it can accept the evidence and use it for convicting the accused.

15. To sum up, we are of opinion that the evidence of recovery can be accepted even though the recovered article had not been sealed soon after the recovery and or no link evidence was adduced during the trial, provided that the court is satisfied on consideration of the material on record and the circumstances of the case that the article produced before the court is the same which had

beenrecovered from the possession of the accused. As the lower appellate court had taken a wrong viewof the law and it did not express any opinion on the merits of the case, it is necessary to remand the appeal for a fresh hearing.

16. The Government Appeal is hereby allowed in the sense that the order of acquittal is setaside and the appeal is remanded to the Sessions Judge for a hearing in accordance with the law.