

HIGH COURT OF MADHYA PRADESH**BENCH AT GWALIOR****SINGLE BENCH****PRESENT:****HON'BLE MR. JUSTICE G.S. AHLUWALIA****Criminal Appeal No. 278 OF 2009****Chandra Shekhar Jatav****-Vs-****State of M.P.**

Shri H.K. Shukla, counsel for the appellant.

Shri Girdhari Singh Chauhan, Public Prosecutor for the respondent/State.

And

Criminal Appeal No. 254 OF 2009**Harishchandra****-Vs-****State of M.P.**

Shri O.P.Mathur, counsel for the appellant.

Shri Girdhari Singh Chauhan, Public Prosecutor for the respondent/State.

J U D G E M E N T

(12/01/2017)

By the Single judgment, two criminal appeals, i.e. Criminal Appeal No.278/2009 and Criminal Appeal No. 254/2009 are being decided.

2. These criminal appeals have been filed against the judgment dated 2.4.2009 passed by Special Judge, MPDVPK Act, Gwalior in Special Sessions Trial No.62/2005 whereby the appellants have been convicted under Sections 399, 402

of IPC read with Section 13 of MPDVPK Act and under Section 25 (1B) (b) of Arms Act and the appellants have been acquitted of the charge punishable under Section 400 of IPC read with Section 13 of MPDVPK Act.

3. The prosecution story in short is that on 31.5.2005 Atmaram Sharma Incharge Inspector of Police Station Padav, District Gwalior received an information from an informer that five accused persons have gathered in the graveyard situated in front of Khwaja Kanoon with an intention to commit dacoity in the house of Subhash. The said information was entered in Rojnamchasanha and the entire staff of the police was called. They were informed about the information and the rifle and ammunitions were given to them. The entire police force was divided into two parts. Party No.1 was being led by Atmaram Sharma Incharge Inspector in which the ASI Devendra Singh, Head Constable Shivraj Singh, Gambhir Singh, Constable Suresh, Kamlesh, Prakash Chandra and Kishore were included whereas the second party was being led by Incharge Sub Inspector Gurbachan Singh in which ASI S.R. Barua and R.S. Chaudhary, Head Constable Ram Bahadur, Ram Prakash, Constable Vijay Pratap Singh, Rajesh Chaturvedi, Arun Mishra and Yashpal Singh were included. Two witnesses Sanjay Bhadoriya and Chhuttan Khan were also taken by the police parties along with them and both the parties were given two torches. The force went towards the spot on government vehicle and after reaching near Sai Baba Temple the force left the government vehicle and the party No.2 was directed to go to the graveyard from the side of Ravi Nagar and whereas the party No.1 went towards the graveyard from Phoolbagh Road. The party No.2 was directed that after reaching on the spot they

should give an indication by showing the light of the torch. The entire police force and the witnesses took their position by the side of the wall and at that time they heard the conversation between the accused persons. One person was saying that Amrit Bhaiya you are the leader of our gang and we have to commit dacoity in the house of Subhash which is rich party and in case if they succeed then they would get lot of material. That person also said that Chandra Shekhar, Surendra and Harishchandra would enter in the house of Subhash whereas the said person and Shekhar would remain outside. Thus, after hearing the conversation of the dacoits/accused and when it was found that the information which was received is true, the party No.2 gave an indication by the light of the torch. Atmaram Sharma challenged the accused persons to surrender themselves as they have been surrounded by the police party. They were also warned that in case any activity is done by them, then they will be killed. The accused persons after noticing the police tried to run away from the spot. Both the parties by surrounding the accused persons, caught hold of them. One person disclosed his name as Amrit Singh from whose possession one 12 bore loaded country made pistol and one cartridge was found, another disclosed his name as Harishchandra and from his possession, 12 bore country made pistol with two live cartridges were found, third disclosed his name as Chandra Shekhar from whom one knife was found, fourth disclosed his name as Surendra Singh from whom one knife was found and the 5th person disclosed his name as Shekhar Kumar from whom one lathi was found. When the accused persons could not produce any license for keeping the country made pistol and the knife, the said weapons were seized on the spot in the light

of the torch. Thereafter the accused persons were arrested and they were brought to the police station along with the seized weapons. FIR was recorded and the offences under Sections 399, 402 of IPC under Section 11/13 of MPDVPK Act, 1981 and under Section 25/27 of Arms Act was registered. After completing the investigation the police filed the charge sheet.

4. The Trial Court framed the charges under Sections 399, 400, 402 of IPC r/w Section 13 of MPDVPK Act, 1981 and under Section 25 (1-b) (a) of the Arms Act.

5. The accused persons abjured their guilt and pleaded not guilty.

6. The prosecution in order to prove the guilt of the appellants examined Sanjay (PW-1), Chhuttan (PW-2), S.R. Barua (PW-3), Gambhir Singh (PW-4), Gurbachan Singh (PW-5), R.S. Chaudhary (PW-6), Shivraj Singh Bhadoriya (PW-7), Lal Singh (PW-8), R.K. Jain (PW-9), Atmaram Sharma (PW-10).

7. The accused persons examined Ravindra Singh @ Guddu (DW-1) in their defence.

8. Sanjay (PW-1) is an independent witness who is alleged to have accompanied the police party and in whose presence the weapons were seized from the accused persons. This witness has not supported the prosecution case. He has denied that any weapon was seized from any of the accused and stated that the police had obtained his signatures on the seizure memos which are Ex.P/1 to P/5. Similarly he denied the fact of arrest of the accused persons in his presence although he admitted his signatures on the arrest memo which are Ex.P/6 to P/10. This witness was declared hostile. In cross-examination by the Public Prosecutor he denied that any weapon was seized from the

possession of any of the accused. He further denied that any of the accused was arrested in his presence.

9. Chhuttan (PW-2) is the another independent witness who was alleged to have accompanied the police party at the time of raid. He too has not supported the prosecution case. He has denied the factum of seizure of any of the weapon from any of the accused and he has further denied the arrest of any of the accused persons. He was declared hostile and was cross-examined by the Public Prosecutor but nothing could be elicited from his cross-examination which may support the prosecution. This witness was cross-examined by some of the accused persons who admitted that he is running a small tea shop in front of Police Station Padav and whenever he is required, the police obtains his signatures on different papers. He further admitted that at least in 200-250 cases, Padav police has obtained his signatures and even today his evidence is to be recorded in several cases. Thus, it is clear that two independent witnesses who are alleged to be the member of the raiding party have not supported the prosecution case and have been declared hostile.

10. S.R. Barua (PW-3) has stated that Incharge T.I. Atmaram Sharma called them in the Police Station in the intervening night of 30/31.5.2005 and informed that he has received an information from an informer that some anti social elements have gathered in Khwaja Kanoon Dargah graveyard and they are planning for committing dacoity. The police force was provided with 303 bore rifles and 25 round of cartridges and the entire police force went to the spot on the police vehicle. When they reached near Sai Baba temple the entire police force left the vehicle. The police force was divided into two parties. Party No.1 was being led

by Atmaram Sharma in which about 8 to 10 police personnels were included and the party No.2 was being led by Gurbachan Singh, Sub Inspector and this witness was a member of party No.2. According to this witness, two independent witnesses were along with them. The party No.2 was asked to reach on the spot from Ravi Nagar side and the party No.1 was to reach from main road side. One torch was given to each of the parties and they were directed that after reaching on the spot they would give an indication by the light of the torch so that it can be ensured that both the parties have reached on the spot. Signal by the light of the torch was given. Thereafter, T.I. and these persons by hiding themselves found that some persons are sitting in the graveyard and were talking. At that time they heard the noise of a person who was saying that Amrit Bhaiya you are the owner of this party and they will get good material from the house of Subhash and please inform that what the accused persons to do and who would enter inside the house. Thereafter, the T.I. issued a warning to the accused persons as they have been surrounded by the police, therefore, they should surrender otherwise, they will be killed. After noticing the police party, the accused persons tried to run away. They were caught hold by the police and from the possession of Amrit one 12 bore country made pistol and one cartridge, from Harishchandra .22 country made pistol and one cartridge, knives from Chandra Shekhar and Surendra Singh and lathi from Shekhar was seized. After apprehending the accused persons, the weapons were seized on the spot in the light of the torch. The accused persons were arrested and thereafter the statements of this witness was recorded. In cross-examination this witness stated that he cannot say that how

many rifles were issued while leaving Padav Police Station. This witness could not say that who had gone to summon the witnesses. This witness denied the suggestion that there are three graveyards around Khwaja Kanoon. He further denied that there is a graveyard behind the Khwaja Kanoon. He further denied that there is a big graveyard by the side of main door of Khwaja Kanoon. He had gone to the graveyard which is situated in front of the Khwaja Kanoon. He also admitted that there are rooms inside the mosque in which the persons reside. He further denied that the gate of graveyard is about 200 steps away from the mosque. Ravi Nagar is situated in the eastern side of Sai Baba temple. He denied that no road from Ravi Nagar goes towards the Khwaja Kanoon Dargah. He further admitted that no private person was included in the party No.2. He could not say that at how much of distance from the wall the accused persons were sitting. He on his own stated that his party was near the mosque and there was a distance of about 150-175 steps between the mosque and the accused persons. He also could not say that at which place the first party was standing. He also could not say that which person had said to Amrit that he is their leader. This witness further admitted in his cross-examination in paragraph 9 that there is a small nala in between the mosque and the graveyard and contaminated water flows from that nala. This witness also could not say that which accused was arrested by which police personnel. This witness denied the suggestion that the entire proceedings were completed at the police station and no one was arrested from the spot. In further cross-examination this witness admitted that he had not made any entry in the rojnamchasana with regard to leaving from the Police Station. He further stated that such an entry was

made by the SHO. The informant did not go with him. The place of incident is 1 Km. away from the police station and when they were going to the spot there was a traffic on the road. The weapons which were seized have not been produced in the Court. Even he could not tell the rifle of which number was given to him. He also denied that the witnesses of PW-1 to PW-10 are the pocket witnesses of the police and in most of the cases they have been made witnesses.

11. The witness Gambhir Singh (PW-4) has stated that he was posted as Head Constable. When they reached on the spot and were standing by the side of wall of Khwaja Kanoon, the voice of some accused persons was coming out. He heard that one person was saying that Amrit Bhaiya you are our leader and we have to commit dacoity in the house of Subhash. He is having lot of money. Another accused said that in case if they succeed then they would get lot of material. When the accused persons were challenged by Atmaram Sharma T.I. then they started running. They were surrounded and they were caught on the spot. They disclosed their names as Amrit Singh, Harish Chandra, Chandra Shekhar, Surendra and Shekhar Kumar. Weapons were seized and the seizure memos were prepared on the spot. This witness identified Harishchandra, Surendra, Shekhar and Chandra Shekhar in the Court. In the cross-examination this witness admitted that he was not knowing these persons prior to the date of incident. No test identification parade was conducted. The name of informant was disclosed by the T.I. to them. He admitted that when they reached on the spot it was a total dark and only with the help of light of the torch the police party was called. There was no source of light on the spot. He further

admitted that he had not apprehended any of the accused. He further admitted that the police persons get price for apprehending the anti social elements. It is further admitted that the proceedings pertaining to the seizure were completed in his presence.

12. Gurbachan Singh (PW-5) has stated in the same line. He had stated that when the accused persons were challenged by the T.I. they were arrested by the police party. Weapons were seized from their possession and the accused persons were not having any license to possess the weapons. In cross-examination this witness admitted that the informant had not given any information to this witness but Atmaram Sharma had informed about the information at about 11:30 in the night. The police party had left the police station at 11:50. This witness had not made any entry in the rojnamcha and in fact Atmaram Sharma had made an entry in the rojnamcha with regard to the departure of the entire police force. This witness also could not say that which weapon was given to which police personnel from the police station. He admitted that the weapons are always kept in the Malkhana and whenever a weapon is issued, then the name of the said person is recorded. As he was holding a pistol and cartridges, therefore, he was carrying the same. He could not say that from where the independent witnesses Chhuttan and Sanjay were called by the T.I. The vehicle was left around about 1/2 and 1 Km. from the spot. The police force was divided by the T.I. in the police station itself. The police parties were separated when they reached near Sai Baba temple. However, this witness could not say that from which direction the location was given to him but he has stated that he had gone from Ravi Nagar side. This witness also could not say that how many

persons by name of Subhash are residing in Ravi Nagar. He also could not say in whose house the accused persons were planning to commit dacoity. He has further stated that he does not know any Subhash residing in Ravi Nagar. He could not say about the length of the boundary. However he said that the height was about 3 to 4 feet. He had heard the conversation of the accused persons from the distance of 20 to 30 feet. Signal by the light of the torch was given by Atmaram Sharma which was replied by him. This witness also could not say that which of the accused had said that they would get good material although he denied that the said fact is mentioned by this witness on his own. However, this witness also could not say that why the accused persons would make a plan in front of the police. He also could not say that why the T.I. had taken the police party by vehicle even for the distance of 1 Km. This witness could not say that who was driving the vehicle of police force. He also could not say that whether the informant had gone with the police party or not. This witness has stated that except two independent witnesses no other person of public was the member of the police party. The entire written work was done by the T.I. but he cannot say that what was written by him as none of the document bears his signatures. This witness also could not say that who was showing the light of the torch, when seizure proceedings were going on.

13. R.S. Chaudhary (PW-6) has stated that after both the parties reached on the spot they gave a signal by show of light of the torch. Thereafter while they were standing by the side of the wall, they heard the conversation of the accused persons. Accused persons were talking to each other that Amrit Bhaiya you are our leader and they would get good material from the house of Subhash. When a

warning was issued by T.I. that all of them have been surrounded and, therefore, they should surrender, at that time the accused persons tried to run away but as they were surrounded by the police party, therefore, they were arrested. They disclosed their names and weapons were seized. The entire proceedings were done by the T.I. on the spot itself in the light of the torch and thereafter the accused persons were brought to the police station. In cross-examination this witness has stated that the place of incident is situated around 2-2.5 Kms. from police station Padav. Rifles were given to the constables but which rifle was given to which constable and which number of rifle was given to which constable is not also known to him. Since pistol was allotted to him, therefore, he was having the same. This witness also could not show that who was driving the vehicle. He also could not say with surety that what was the time when the police party left the police station although he said that it might be 11:45 in the night. Entry was made by the T.I. in the rojnamcha with regard to the departure of entire police force. He also could not say that who had called the witnesses and from where they were called. This witness has stated that police party was not divided in the police station itself. He further specifically denied that the police parties were divided in the police station itself. Gurbachan Singh was the incharge of the party in which the present witness was the member. This witness has stated that he was standing at the distance of 10 feet from the accused persons but admitted that the accused persons were not visible from the place where they were standing. He also could not say that which accused had stated that Amrit you are leader. It is further stated by him that when they reached on the spot, it was around 1:00

AM in the night. He further admitted that the graveyard is adjoining to the main road and the traffic was going on. He also admitted that he did not suggest that the traffic may be stopped as the gunshots may be fired. He further admitted that he did not apprehend any accused. He also could not say that which police personnel had apprehended the accused. The paper work was done by Atmaram Sharma himself in the light of the torch and thereafter the accused persons were brought to the police station. Around two hours were taken for completing the paper formality in the light of the torch. This witness has stated that he was showing the light of the torch to the T.I. when paper work was going on and the said torch was his personal. Although he admitted that for the first time he is saying in the court that he was having a personal torch. He further admitted that the weapons which were allegedly seized from the possession of the accused persons have not been produced in the Court. The police party reached back to the police station at around 3:00 AM.

14. Shivraj Singh Bhadoriya (PW-7) had also stated in the same line. He had stated that he had heard the conversation of the accused persons from the side of the wall. The accused persons were saying that Amrit you are the leader and in what manner the dacoity is to be conducted. Another person said that it is a rich party and in case they succeed they would get good material. At that time the party No.1 gave indication to the party No.2 by the light of the torch. The accused persons were challenged by T.I. Atmaram Sharma. After noticing the police party, the accused persons started running. They were arrested by the police and weapons were seized. In cross-examination this witness has stated that he was in Gandhinagar Beet from

where he and other police force was called. He further stated that when they reached to Phoolbagh they were informed by the T.I. about the information given by informant. Therefore, did not go to police station and from Phoolbagh they directly went to the spot. This witness has taken a rifle from one constable. However, he could not disclose the name of said constable. He also could not disclose the number of the rifle. He further admitted that no entry with regard to the issuance of rifle was made in the register of Malkhana. His departure was mentioned in the rojnamcha on the next morning at Phoolbagh. The police force available at police station and other police personnels had gathered. He also could not say that who was driving the vehicle. He even could not disclose the number of the vehicle but said that it is a mobile vehicle. He admitted that he had not stated the number of the vehicle in his 161 statement but could not say that how the number was mentioned. This witness had admitted that the police party was divided at Phoolbagh. It was specifically denied that the police party was divided at Police Station Padav. He further stated that two independent witnesses met with them at Phoolbagh. This witness has stated that the police vehicle was left about 100 meters earlier to the spot. There was no traffic on the road. He had heard the conversation from a distance of 5 to 6 feet. The accused persons were challenged by the T.I. This witness had not apprehended any accused. Gurbachan Singh had prepared the papers on the dictation of T.I. About 30 to 40 minutes were consumed for completing the paper work. This witness has stated that after 12 they came back to the police station thereafter he said that they came back in between 12:00 to 1:00 AM.

15. Lal Singh (PW-8) is the armorer who had stated that

the country made pistol seized from the possession of Harishchandra was not in working condition. Similarly, the country made pistol and two cartridges which were seized from the possession of Anvar Singh was found to be in working condition.

16. R.K. Jain (PW-9) has stated that he is posted on the post of ADM, Gwalior. After going through the police case diary he had granted sanction for prosecution. In cross-examination he admitted that the weapons and the cartridges were brought in open condition and he had merely relied upon the report of the armorer.

17. Atmaram Sharma (PW-10) has stated that at about 23:30 he received an information from an informant that 4 to 5 unknown anti social elements are sitting inside the graveyard and they are making preparation for committing dacoity in the house of Subhash resident of Sai Baba Temple road. The CSP was informed and the police force which was available in the police station was divided in two parts and after taking arms and ammunition and after summoning two witnesses who were found in front of police station itself reached on the spot and they over heard a conversation from a place which was disclosed by the informer and with the help of party No.2 the accused persons were arrested and the weapons were seized. The seizure memos and the arrest memos Ex.P1 to Ex.P/10 were prepared. In cross-examination, this witness has stated that the information was given by the informer while he was all alone. The police parties were constituted from the force which was available at the police station itself. The police force was divided in two parties one being led by him and another was under the leadership of Gurbachan Singh. He also could not said that how many police personnels were included in his police

party and in the party which was led by Gurbachan Singh. He further stated that before leaving the police station he had made the necessary entry in the rojnamcha. He could not say the number of the vehicle by which they had gone to the spot. He further stated that the spot is situated at a distance of only 1 Km. from the police station. He also could not say that at what time he reached on the spot. He also could not say that which party had gone to the spot from which direction. He had stated that he had seen the accused persons from the distance of 10 meters in the light of the torch. He denied that the accused persons were not arrested from the spot. He also denied that nothing was seized from the possession of accused persons. He further admitted that sample of the seal was not affixed on the seizure memos as it was not available with them. He further admitted that knives which are alleged to have been seized are easily available in the market. He further admitted that the seized weapons have not been produced in the Court. He further stated that for completing the entire proceedings about 3.25 hours were taken as there is no source of light therefore the entire proceedings were done in the light of the torch.

18. If the evidence of the witnesses are considered then it would be clear that the independent witnesses have not supported the prosecution case. Although it is a well settled principle of law that a person can be convicted on the basis of the evidence of the police personnels but when the police party itself is a complainant and they have a vested interest in ensuring that the accused persons are convicted under that circumstance, it is essential to scrutinize the evidence of the police personnels meticulously.

19. S.R. Barua (PW-3) has stated that he had heard the conversation from a distance of 150-175 steps which means

around 15 feet. This witness was a member of party No.2 which was led by Gurbachan Singh (PW-5). Gurbachan Singh (PW-5) has stated that they have heard the conversation from a distance of 25 to 30 feet. Thus, it is clear that there is a material discrepancy in the evidence of S.R. Barua (PW-3) and Gurbachan Singh (PW-5) with regard to the distance from which they had heard the conversation. Similarly R.S. Chaudhary (PW-6) was the member of party No.2. According to him he had heard the conversation from a distance of 10 feet. Thus, there is a material contradiction between the evidence of S.R. Barua (PW-3), Gurbachan Singh (PW-5) and R.S. Chaudhary (PW-6) with regard to the distance from where they had heard the conversation. S.R. Barua (PW-3) who was the member of the party No.2 has stated in paragraph 8 of his cross-examination that all the members of his party were the police personnels whereas Gurbachan Singh (PW-5) has stated in paragraph 3 of his cross-examination that independent witnesses were the members of his party. There is a material contradictions in the evidence of the police witnesses as to where the police force was divided into two parties. According to S.R. Barua (PW-3) when the entire police force reached near Sai Baba temple at that time the police force was divided into two parties. Similarly, Gambhir Singh (PW-4) has stated that the police force was divided in two parties near the Sai Baba temple. Gurbachan Singh (PW-5) has stated that the police persons were divided in two parties at the police station itself. R.S. Chaudhary (PW-6) has stated that when the police force reached near the Sai Baba temple at that time the police force was divided into two parties. Shivraj Singh Bhadoriya (PW-7) has stated that the police force was divided into two

parties at Phoolbagh and were informed to leave for the place of incident. Atmaram Sharma (PW-10) has stated that the police force was divided into two parties at the police station itself. Thus, there is a material contradiction in the evidence of the police witnesses as to where the police force was divided into two parties. Atmaram Sharma (PW-10) has stated that the police force which was available at the police station itself was divided into two parties whereas Shivraj Singh Bhadoriya (PW-7) has stated that he was at the relevant time in Gandhinagar Beet from where he and the police force was called. Thus, it is also not clear that how the two parties were constituted. Further, it has been admitted by the witnesses that the weapons and ammunition are kept in the Malkhana and whenever they are issued the corresponding entry is made in the Malkhana register. The prosecution did not produce the Malkhana register to prove the issuance of arms and ammunition to the police personnels before leaving from the police station for the spot. Atmaram Sharma (PW-10) had admitted that he had made entries in the rojnamcha with regard to leaving for the spot. However, no rojnamchasana has been produced. Further, no rojnamchasanha has been produced by the prosecution to show the receipt of an information from the informer, constitution of two different police parties, issuance of weapons and ammunition, leaving from police station, coming back to the police station which shows that the prosecution has suppressed the material fact. It is well established principle of law that where a person is in possession of best evidence and if he chooses not to produce the same, then an adverse inference has to be drawn against the person. Here the police could have filed the copies of the rojnamcha to prove the above-

mentioned facts but as the same have been withheld by the prosecution, therefore, the non-existence of the same can be presumed.

20. Further, there is a material contradictions with regard to the distance of the stop from the police station. According to Atmaram Sharma (PW-10) the spot from where the accused persons were arrested is at a distance of 1 Km. from the police station whereas according to R.S. Chaudhary (PW-6) the spot is situated at a distance of about 2-2.25 Kms. from the police station. An important aspect of the matter is that the spot map has not been prepared. Thus, there is nothing on record to show that where the police party was standing and from which distance they had heard the conversations and at which place the accused persons were arrested. Even there is a material discrepancy with regard to the fact that where the police personnels had gathered together. According to S.R. Barua (PW-3), Gambhir Singh (PW-4), Gurbachan Singh (PW-5), R.S. Chaudhary (PW-6), Atmaram Sharma (PW-10) all the police personnels were available in the police station and from there they had jointly left for the spot whereas Shivraj Singh Bhadoriya (PW-7) has stated that the police party had gathered at Phoolbagh. There is also a material contradiction with regard to the fact that from where the independent witnesses have accompanied the police personnels. According to Shivraj Singh Bhadoriya (PW-7) the independent witnesses had also met at Phoolbagh whereas according to the other witnesses the independent witnesses were accompanying them from the police station itself. According to Shivraj Singh Bhadoriya (PW-7) after gathering at Phoolbagh they directly left for the spot and did not come back to the police station. If the evidence of

Shivraj Singh Bhadoriya (PW-7) is considered then it appears that the police force and this witness who were at Gandhinagar Beet were called in the police station but they met with the remaining police personnels at Phoolbagh from where they directly left for the spot. Under these circumstances the non-production of the rojnamchasana assumes additional importance. If Shivraj Singh Bhadoriya (PW-7) and other police personnels had met with the T.I. Atmaram Sharma (PW-10) at Phoolbagh then there was no occasion for Atmaram Sharma (PW-10) to record the departure of police party from the police station in the rojnamchasana. Even the weapons which were seized from the possession of the accused persons have not been produced. None of the witnesses has stated that he had apprehended any of the accused. Some of the witnesses have stated that after the accused persons were challenged and while they were trying to run away from the spot they were arrested but some witnesses have not stated that any attempt was made by the accused persons to run away from the spot. Even the witness could not narrate the name of driver who was driving the vehicle at the relevant time. According to Gurbachan Singh (PW-5) an information was given to him by Atmaram Sharma (PW-10) at 11:30 that he has received an information from the informant and they left the police station at 11:50 that means within 20 minutes. If some of the police personnels were called from different place, weapons and the ammunition were issued to them, they were told about the incident and the police force was divided into two parts then the entire proceedings cannot be done within a short span of 20 minutes. Further, according to Atmaram Sharma (PW-10) the informer was in the police station itself and he had not gone along with the

police party but none of the other witnesses have said about the presence of informer or any unknown persons in the police station. Thus, it is highly doubtful that whether any information was ever received by Atmaram Sharma (PW-10) with regard to the gathering of the accused persons in the graveyard situated near Khwaja Kanoon Dargah. Under these circumstances, it would be highly unsafe to rely on the evidence of police personnels to hold that that the appellants had gathered in the graveyard situated near Khwaja Kanoon Dargah and were armed with weapons and were making preparations for committing dacoity. According to Lal Singh (PW-8) the country made pistol seized from the possession of Harishchandra was not in working condition and the firing pin point of the country made pistol was bent and, therefore, no gunshot could have been fired from the said pistol. It is a matter of a common intelligence that nobody if he is making preparation for committing dacoity would keep a firearm which is not in working condition. Thus, considering the totality of the facts and circumstances of the case, this Court is of the view that the prosecution has miserably failed to prove the guilt of the appellants. Accordingly, it is held that the appellants are not guilty of committing any of the offence for which they were charged. The judgment and sentence passed by the court below is set aside.

21. The appellant Chandra Shekhar Jatav is on bail. His bail bond and surety bond are discharged.

22. From the record of Criminal Appeal No.254/2009 it is apparent that the appellant Harishchandra was granted bail by order dated 13.4.2009. However, because he did not appear before the Court during the pendency of the trial, therefore, arrest warrants were issued and from order dated

8.8.2014 it appears that the appellant Harishchandra is in Etawah jail in connection with another case. As the present appeal of appellant Harishchandra has been allowed, therefore, he may be released if not required in any other case.

23. The appeals are accordingly **Allowed**.

24. A copy of this judgment be send to the Trial Court for necessary information and compliance.

(G.S. AHLUWALIA)
Judge
(12.01.2017)

(alok)