

R-44

IN THE SUPREME COURT OF INDIA  
CRIMINAL APPELLATE JURISDICTION

Certified to the true copy  
*K. G. Balakrishnan*  
Assistant Registrar (Judl.)  
29/11/99  
Supreme Court of India

CRIMINAL APPEAL NO. 98 OF 1999

840901

State of Madhya Pradesh through C.B.I., etc. ... Appellants

vs.

Paltan Mallah, etc. ... Respondents

WITH

CRIMINAL APPEAL NOS. 99/1999, 100-102/1999, 103-108/1999, 109-114/1999

JUDGMENT

K.G. BALAKRISHNAN, J

Criminal Appeal Nos. 98-102 of 1999 and Criminal Appeal Nos. 109-114 of 1999 are filed by the State of Madhya Pradesh through CBI and the Criminal

Appeal Nos. 103-108 of 1999 are filed by the Chattisgarh Mukti Morcha. All these appeals arise out of the common Judgment passed by the High Court of Madhya Pradesh on 26.6.1998. Nine accused persons were tried by the Second Addl. Sessions Judge, Durg, M.P. Accused nos. 1 to 8 were charged for the offence under Section 302 read with Section 120B IPC. The 9<sup>th</sup> accused was charged under Section 302 read with Section 120B, and in the alternative, Section 302 read with Section 34 IPC and Section 25(1)(A) and Section 27 of the Arms Act. The Sessions Judge acquitted A-6 Naveen Shah, A-7 Chandrabaksh Singh and A-8 Baldev Singh Sandhu. A-1 Chandrakant Shah, A-2 Gyan Prakash Mishra, A-3 Avdhesh Rai, A-4 Abhay Kumar Singh, A-5 Moolchand Shah and A-9 Paltan Mallah @ Ravi were convicted by the Sessions Judge for the offence under Section 302 read with Section 120B. A-9 Paltan Mallah was found guilty of the offence punishable under Section 302 IPC and sentenced to capital punishment whereas other accused were sentenced to life imprisonment. The High Court by the impugned Judgment acquitted all the accused of the charges framed against them.

etc. According to the prosecution, the management of these industrial units started opposing the labour movement and there was even physical attack on some of the leaders of CMM. One Uma Shankar Rai, a leader of CMM was fatally assaulted by the agents of the industrialists. Deceased Niyogi apprehended serious threat to his life from the industrialists, especially from Simplex and Kedia Group of Industries. He made notes in his diary regarding the apprehension of danger from the management of these industrial units. On 27.9.1991, he had gone to Raipur and there he met one Rajendra Sail, Secretary General of PUCL and reporter N.K. Singh of "India Today". He expressed an apprehension of danger to his life from Kedia and also from A-5 Moolchand Shah and A-1 Chandrakant Shah of Simplex Group. On 27.9.1991 at about midnight, he left Raipur for Bhillai and reached his quarter no. MIC 1/55 of HUDCO and went to bed. His servant Bahal Ram was occupying the neighbouring room. In the night, Bahal Ram heard a noise like bursting of crackers and he rushed to the room of Niyogi and found Niyogi writhing in pain on his bed. The window was found open. Bahal Ram called for help of the neighbour Sripad Mategaonkar. Few workers from the CMM came to the place and it was found that Niyogi had been shot. He was immediately taken to the Sector 9 Hospital of Bhillai. Before reaching the hospital, Niyogi succumbed to

the gun shot injuries. Post-mortem examination was conducted by a team of doctors and they opined that death was due to bullet injuries.

Preliminary investigation was carried out by PW-182 Deputy Superintendent of Police Shri M.G. Agarwal. There was agitation by the workers that investigation shall be conducted by the Central Bureau of Investigation and the Government of Madhya Pradesh requested the Union of India seeking help of the Central Bureau of Investigation. As part of police investigation, PW-182 visited the scene of occurrence and got prepared map of the site and he took steps to see that viscera of the victim was sent for laboratory tests. He took into custody the pellets recovered from the body of Niyogi. He took statements from Bahal Ram, the servant and also from the widow and daughter of deceased. He got prepared photograph Exh. P-180 to P-196. He got report from Serum Science and Chemical Analysis which are marked as Exh. P-430 to P-432. He recorded statements of various other witnesses. Accused A-3 Avdhesh Rai was taken into custody on 13.10.1991. On 1.11.1991, he seized diary of deceased Niyogi and on 9.11.1991 he handed over the investigation to CBI officials.

PW-187 R.S. Dhankad took over the investigation along with PW 192 R.S. Prasad. PW-187 held search of Oswal Industry. He recorded the statements of Zakkiruddin on 21.11.1991. This witness identified the photographs of A-2 Gyan Prakash Mishra and A-3 Abhay Kumar Singh. PW-192 conducted further investigation of the case along with other officers. On 10.11.1991, he seized the window curtains from the house of Niyogi. On 15.11.1991, he conducted searches of the business premises of Jain and Shah and Company, 108 A.Khan Goga Complex and recovered articles under Exh. P-297.

After the arrest of accused Paltan Mallah on 25.8.1993, he got recovered 12 bore country made weapon, 13 live cartridges of 12 bore, a foreign made revolver, 6 live cartridges of .38 bore and a red colour Suzuki motorcycle. He sent Exh. P-403 and 404 to Central Forensic Laboratory (CBI), New Delhi. He conducted various other searches and recovered incriminating articles from the other accused. After investigation, final report was filed.

On the side of prosecution, PW 1 to PW-192 were examined by the trial court.

The High Court by the impugned judgment acquitted all the accused and that is challenged before us.

We elaborately heard the counsel for the State, counsel for the Chattisgarh Mukti Morcha and also various other counsel who appeared for the accused persons. The accused A-1, A-3, A-4, A-5 and A-7 were found guilty by the Sessions Court on the basis of the circumstantial evidence adduced by the prosecution. The Division Bench held that these circumstances were not sufficient to prove the guilt of the accused. This being an appeal against acquittal, this Court would be slow in interfering with the findings of the High Court, unless there is perverse appreciation of the evidence which resulted in serious miscarriage of justice and if the High Court has taken a plausible view this Court would not be justified in interfering with the acquittal passed in favour of the accused and if two views are possible and the High Court had chosen one view which is just and reasonable, then also this Court would be reluctant

to interfere with the judgment of the High Court. With these principles in mind, we have carefully considered the evidence of the prosecution.

The Sessions Judge relied on various items of evidence to prove that there was a deep-rooted conspiracy among the accused to murder the deceased Shankar Guha Niyogi. In order to prove the conspiracy, the Sessions Judge relied on certain circumstances. One of the circumstance relied is that A-1, A-4, A-5 and A-7 had a strong motive to do away with deceased Shankar Guha Niyogi. Motive by itself is not sufficient to prove the guilt of the accused. However, the prosecution adduced extensive evidence to show that A-1, A-4, A-5 and A-7, were owners of certain industries at Durg and the trade union activities of deceased Niyogi created a lot of problems in running their business and caused loss to these industries. M/s Simplex is one of the factories referred to by the witnesses for the prosecution. Several witnesses were examined to prove that Simplex and Kedia Distilleries were acting against the interests of the workers and there were series of agitations by the workers against the factory owners. Evidence was also adduced to show that some workers were retrenched from Simplex and the agitating workers wanted the reinstatement of the retrenched workers. Some of the

witnesses examined by the prosecution turned hostile and did not support this version. The overall evidence given by the prosecution would only show that some agitation had been going on against the management of these industries and the deceased Niyogi was spearheading many of these agitations.

Another item of evidence is the recovery of a diary allegedly maintained by deceased Niyogi. The diary of Niyogi was marked Exh. P-93. In the diary, Niyogi had written that industrialists like Simplex/Kedia along with higher officials of Durg district had formed a fascist gang and that the sad thing was that the judiciary of Durg and Rajnandagaon districts had also joined this gang. On page 172 of the diary, he had written the names of A-2, A-3. In a micro cassette produced as Article 'C', deceased Shankar Guha Niyogi had recorded a speech wherein he mentioned that he apprehended a danger at the hands of some persons and he also said that people of Simplex were indulging in mischief and in particular the fifth respondent Moolchand Shah. The name of A-2 was also mentioned in the diary. That apart, deceased Shankar Guha Niyogi submitted a memorandum to the President of India. In this memorandum he has stated elaborately the grievances of the workers and



emphasized that the industrialists had been doing their utmost to break the workers organization and they had even resorted to physical violence on workers. He alleged that police personnel were helping the industrialists and he appealed to the President to bring a check on these acts of violence by industrialists.

The entries in the diary and certain statements of the deceased recorded on a micro cassette were sought to be made admissible as evidence under Section 32 of the Evidence Act. Section 32 of the Evidence Act says that the statement, written or oral, of relevant facts made by a person who is dead, are themselves relevant facts, but this statement should have been made as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death when such question comes up for consideration by the court. It is true that when such statements were made, the maker of the statement need not be under the expectation of death. But nevertheless, these statements should give either the cause of his death or any of the circumstance which led to his death.

The entries in the diary and the representation Niyogi had submitted to the President of India were in general terms. He apprehended some danger at the hands of some industrialists as the agitation of the workers had been going on and in some instances the henchmen of the industrialists had unleashed physical violence on the workers. Even though he had mentioned the names of some of the accused persons in the diary and in the cassette, that by itself may not be of any assistance to the prosecution to prove the case as the entries in the diary and cassette do not refer to any event which ultimately was the cause of his death.

Another item of evidence strongly relied on by the prosecution to prove the case of conspiracy is that some of the accused persons had visited Nepal, which, according to the prosecution, was to procure some illegal weapons to carry out the common object of the conspiracy. PW-91 Ravinder Kumar Mende @ Ravi deposed that the first accused Chander Kant Shah made the programme of going to Nepal in a tempo truck and the first accused along with A-4 Abhay Kumar Singh and A-3 Avdhesh Rai went to Nepal via Banaras. On the way, they stayed at Khalispur and reached Nepal on the next day and stayed at Hotel Kailash. The second accused Gyan Prakash Misra reached

there after two days. The second accused when questioned under Section 313 Cr.P.C. admitted that they had gone to Nepal on a pilgrimage. The prosecution, when conducted a search at the residence of A-1 Chandrakant Shan recovered certain articles. Some of the old bills were recovered and on the reverse side of a bill marked as Exh. P-393 (8) issued on 12.11.91 by a provision store in Nepal, certain entries have been made in respect of some foreign-made firearms. These entries were in the hand writing of the second accused Gyan Prakash Misra. The price of the weapons also is mentioned. The Sessions court assumed that these accused must have procured some weapons during their visit to Nepal. These entries in Exh. P393(8) by itself do not prove that fact. No bills proving purchase of foreign-made weapons were recovered from any of these accused persons. The visit to Nepal was in March, 1991. This, according to the Sessions Judge was part of the conspiracy and not a pilgrimage as the first accused had not gone with the members of his family. The visit to Nepal by these accused persons and the recovery of a bill do not advance the prosecution case to prove criminal conspiracy alleged against them.

The other items relied on by the prosecution to prove the case against the accused are the various recoveries effected by the investigating agency, but none of these items would prove the involvement of these accused in the conspiracy. These items would include Exh. P-239 recovered from the office of the first accused. In Exh. P-239 slip, the registration number of the car which was being used by deceased Niyogi and also the registration number of a jeep registered in the name of Chattishgarh Mukti Morcha were written. This according to the prosecution would show that the accused were watching the movements of deceased Niyogi. We are not able to attach any further importance to these documents.

Another document is Ex-P-298, which is a letter alleged to have been written by the second accused to the sixth accused indicating that he had received Rs.20,000/- for the work he had done. The recovery of this letter by the investigating officer is surrounded in mystery. It is alleged that it was found in torn pieces and this letter is alleged to have been recovered on 15.12.1991 by the investigating officer when a search was conducted in the office of the first accused. The case of the prosecution is that the money transaction indicated in Exh. P-298 is the consideration given to the second accused for having

caused the death of deceased Niyogi. PW-158 Devendra Jain was alleged to be the person who delivered this letter to the first accused, but he turned hostile and did not support the prosecution. Even if the letter is assumed to be true, it would only show that there was some money transaction between the second accused and the sixth accused and in no way it is proved that the amount of Rs.20,000/- alleged to have passed between the parties was in consideration of the illegal act carried out at the instance of the second accused. The High Court was justified in not relying on this document.

The prosecution relied on the arrangement of granting the contract for a cycle stand in the cinema theatre, by name Maurya Talkies. PW-102 Kamaluddin was examined to prove this fact. He deposed that the contract was taken in the name of A-3 Avdhesh Rai and the income from the cycle stand was deposited in the Syndicate Bank in the account of the second accused Gyan Prakash Mishra. This, according to the prosecution, was an arrangement made at the instance of A-8 Baldev Singh Sandhu. PW-102 does not know anything about the nature of this transaction and there is no other evidence, oral or documentary, to show that the contract of the cycle stand at

Maurya Talkies has got anything to do with the murder of the deceased Shankar Guha Niyogi.

The fact that some of these accused had absconded from the place of their business at the relevant time is also pointed out by the counsel for the appellant as an incriminating circumstance. When the murder of a trade union leader took place, there were strong allegations that the industrialists in the area had been instrumental in causing his death. Under those circumstances, if any of these accused had absconded from the place, it could not be said to be a factor to prove their guilt.

Another incriminating circumstance sought to be proved against the accused is the extra-judicial confession alleged to have been made by the ninth accused Paltan Mallah wherein he named A-1, A-2, A-5 and A-6. It is alleged that he made the confession to PW-105 Satyaprakash Nishad and A-9 is alleged to have disclosed to PW-105 that these accused persons had given him money and he murdered Shankar Guha Niyogi for the sake of money. Under Section 30 of the Evidence Act, the extra-judicial confession made by a co-accused could be admitted in evidence only as a corroborative piece of

evidence. In the absence of any substantive evidence against these accused persons, the extra-judicial confession allegedly made by the ninth accused loses its significance and there cannot be any conviction based on such extra-judicial confession. The High Court, in our view, has given cogent and satisfying reasons for the acquittal of the accused A-1 to A-8. We do not find any reason to interfere with such a finding, especially when this being an appeal against acquittal and this Court would be slow in reversing such a finding unless the High Court had made a perverse or erroneous appreciation of the evidence resulting in grave miscarriage of justice. The evidence adduced by the prosecution can only throw some serious suspicion against these accused which cannot be used as a substitute for evidence.

Now we come to the question of the complicity of the ninth accused Paltan Mallah. His case stands on a entirely different footing. There is evidence against this accused and the High Court brushed aside the prosecution evidence against him on flimsy reasons. There are several items of evidence to show that the ninth **accused and none else** caused the death of Shankar Guha Niyogi. This accused is a person hailing from Gorakhpur in the State of Uttar Pradesh. He had come to Bhillai and was engaged in petty

jobs. He had been involved in a series of criminal cases and happened to be in custody for some period.

PW-63 who was the sub-jailor at Durg jail for the period 1988 to 1992 deposed that the ninth accused Paltan Mallah was lodged as an under-trial prisoner at Durg jail from 1995 to 1998. The second accused Gyan Prakash Mishra and the third accused Avdhesh Rai were also under-trial prisoners in Durg jail during this period. Accused Paltan Mallah had involved himself in several criminal cases registered for offences punishable under Section 457, 380, 370, 394 IPC and Section 25 of the Arms Act. He was also involved in another case registered under Section 353, 307, 397, 341, 294, 506-B, 323 IPC and Section 25 of the Arms Act and he was lodged as a prisoner from 1.3.1988 to 10.8.1988 in Durg jail. PW-121 is a photographer who deposed that in the beginning of 1991, he had taken photograph of a prisoner and he identified the Exh. P-318 photograph. This photograph is admittedly that of the ninth accused Paltan Mallah.

The High Court in the impugned judgment stated that there is absolutely no evidence to show that Paltan Mallah could have been at Bhilai during the



relevant period. In a murder that took place during night, there would not be any direct evidence to prove the fact, but various circumstances would show that the ninth accused was in Bhilai during 1991. This accused was staying with PW-51 Reshami Bai. She deposed that accused Paltan Mallah had gone to Bombay and this evidence was erroneously taken into consideration by the High Court. It is common knowledge that the wife of an accused, leave aside the exceptional cases, would always give evidence only to support the husband.

There is also evidence of PW-66 Nuruuddin. PW-66 is running an arms shop at Sadar Bazar in Raipur. He deposed that on 14.9.1991 one Birendra Kumar came to his shop along with a boy to purchase certain material. He showed his licence and expressed his intention to purchase a gun. He told him that he was acquainted with a person who was an expert in firearms. He then left the boy in the shop to fetch that armourer. After 15-20 minutes, Birendra Kumar came with PW-59 Rajbahadur who selected a twelve bore gun of single barrel and entries were made in the register. He deposed that Birendra Kumar purchased five cartridges along with the gun and few L.G. cartridges by using the licence of a person, by name, Satya Narayan Singh. PW-66

deposed that all along the boy was sitting in his shop and he identified the boy as the ninth accused Paltan Mallah. He further stated that the CBI officials came and questioned him and showed him the photograph of that boy. This witness identified the ninth accused Paltan Mallah in the court.

The counsel for the accused vehemently attacked the evidence of PW-66. It was submitted that going by the evidence of PW-75, P-61 Jakruddin and PW-72 Jainarayan Tripathi, the accused Paltan Mallah could not have been present in the shop and that those who were in the shop were Birendra Kumar, PW-59 Rajbahadur and the father of PW-59. According to PW-61, he had sold 13 cartridges to Satyanarayan Singh and Birendra Kumar had signed in the register. PW-59 Rajbahadur deposed that he is an armourer in the police department. He deposed that Ram Bahadur, a police constable told him that his son had taken a licence and he wanted to purchase a gun. Rajbahadur and his son went to the shop of PW-61 for purchasing a gun. Based on the evidence of PW-59, PW-61 and PW-72 it was stated that the ninth accused Paltan Mallah could not have been in the shop of PW-61, but in the face of the evidence of PW-66, we do not think that there was any mistake as to the identity of Paltan Mallah. Of course, the fact that the

prosecution wanted to prove further that the L.G. cartridges were passed on to these accused and the same were used in the commission of the crime is not proved by any direct evidence. PW-66 appears to be an independent reliable witness and from his evidence, it is clear that the accused was at Bhilai during the relevant period. It is also proved by satisfactory evidence that the accused Paltan Mallah had been involved in cases relating to illegal use of arms.

The next evidence against the ninth accused came to surface in 1993 at the time of his arrest by an air-force officer alleging that he was in illegal possession of certain firearms. The air-force officer handed over the ninth accused to PW-125, who was a sub-inspector at the Rudrapur police station. On questioning Paltan Mallah, PW-125 came to know that he had been involved in the murder of Shankar Guha Niyogi. He informed the CBI officials and recorded the confession made by Paltan Mallah. Based on the confession given by accused Paltan Mallah, certain recoveries were effected.

**Based on the information furnished by him, PW-125 along with PW-104 Dinesh Baloni left for the village Nibahi and reached the place which**

according to the prosecution was the house of the accused Paltan Mallah. Another witness Farukh Mirza Baig accompanied them. This witness is a resident of Nibahi. The accused pointed out that near the northern wall of the house he had buried certain articles. The accused Paltan Mallah removed the earth, took out a bundle wrapped in a plastic sheet. The bundle contained a country-made pistol with 13 cartridges, 2 L.G. cartridges and others were .38 bore cartridges. PW-125 recovered these articles and in the seizure memo, Dinesh Baloni, one Ram Bahadur and Farukh Mirza Baig and the accused had signed. From there, they left and reached the house of PW-105, Satyaprakash Nishad, in village Chainpur, where the accused had hidden his TVS Suzuki motorcycle. The motorcycle was recovered and there was no number plate on the motorcycle.

The recovery of the country-made pistol at the instance of the accused Paltan Mallah was seriously challenged on various grounds. It was contended by the counsel that the recovery of the weapon was not effected in accordance with law and the witness PW-104 Dinesh Baloni was not a resident of the village Nibahi and that he was brought from a different place only for the purpose. It was argued that as recovery was not effected in accordance with

law, the entire evidence is inadmissible as the search itself is illegal. The counsel further contended that the recovery of weapons at the instance of the accused Paltan Mallah is not admissible in evidence as the disclosure statement marked Exh. P-285 would only show that the accused had the knowledge of the concealment of the weapon and that he was not the author of that concealment. Counsel for the accused Paltan Mallah placed reliance on two decisions, namely, (1976) 1 SCC 828 Mohmed Inayatullah vs. State of Maharashtra and (1980) 1 SCC 530 Pohalya Motya Valvi vs. State of Maharashtra. The above two decisions are not relevant in this case as in the Exp. P-285 the accused specifically says that he concealed the weapon himself. As the alleged confession clearly states that the accused himself has concealed it, the recovery of the weapon assumes importance in this case.

The counsel for the respondent-accused further contended that PW-125 was not investigating the case of accused Paltan Mallah and that the custody of the accused Paltan Mallah was entrusted to him alleging that he had unlawfully trespassed into the prohibited area belonging to Air Force and PW-125 could have conducted investigation of that case only and if at all he had come to know of the involvement of the accused in other cases, he should

have contacted the CBI and informed them of the alleged concealment of weapon. It was pointed out that the CBI officers had reached that place and met PW-125 even before he went with the accused Paltan Mallah for the alleged search and seizure. The counsel submitted that the search and seizure was completely illegal and therefore the evidence obtained under such illegal search is to be completely excluded. The plea of the appellant cannot be accepted.

In India, the evidence obtained under illegal search is not completely excluded unless it has caused serious prejudice to the accused. The discretion has always been given to the court to decide whether such evidence is to be accepted or not. In Radha Krishan vs. State of U.P. AIR 1963 SC 822, speaking for a three Judge Bench, Justice Mudholkar held :

**"So far as the alleged illegality of the search is concerned, it is sufficient to say that even assuming that the search was illegal and the seizure of the articles is not vitiated. It may be that where the provisions of Sections 103 and 165 of the Code of Criminal Procedure are contravened the search could be resisted by the person whose premises are being searched. It may also be that because of the illegality of the search the Court may be inclined to examine carefully the evidence regarding the seizure.**

But beyond these two consequences, no further consequence ensues."

In a subsequent decision reported in Pooran Mal vs. Director of Inspection (1974) 1 SCC 354, this Court held :

"So far as India is concerned its law of evidence is modeled on the rules of evidence which prevailed in English Law, and Courts in India and in England have consistently refused to exclude relevant evidence merely on the ground that it is obtained by illegal search or seizure.... It would thus be seen that in India, as in England, where the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law, evidence obtained as a result of illegal search or seizure is not liable to shut out."

This decision was later followed in Dr. Pratap Singh vs. Director of Enforcement (1985) 3 SCC 72.

The provisions contained in the Criminal Procedure Code relating to search and seizure are safeguards to prevent the clandestine use of powers conferred on the law enforcing authorities. They are powers incidental to the conduct of investigation and the legislature has imposed certain conditions for carrying out search and seizure in the Code. The courts have interpreted

these provisions in different ways. One view is that disregard to the provisions of the Code of Criminal Procedure relating to the powers of search and seizures amounts to a default in doing what is enjoined by law and in order to prevent default in compliance with the provisions of the Code, the courts should take strict view of the matter and reject the evidence adduced on the basis of such illegal search. But often this creates a serious difficulty in the matter of proof. Though different High Courts have taken different views, the decisions of this Court quoted above have settled the position and we have followed the English decisions in this regard. In the Privy Council decision in Kuruma v. The Queen (1955) A.C. 197, Lord Goddard, C.J. was of the firm view that in a criminal case the Judge always has a discretion to disallow evidence if the strict rule of admissibility would operate unfairly against an accused. The trend of judicial pronouncements is to the effect that evidence illegally or improperly obtained is not *per se* inadmissible. If the violation committed by the investigating authority is of serious nature and causes serious prejudice to the accused, such evidence may be excluded.

It may also be noticed that the Law Commission of India in the 94<sup>th</sup> Report suggested the incorporation of a provision in Chapter 10 of the Indian



Evidence Act, 1872. The suggestion was to the effect that in a criminal proceeding, where it is shown that anything in evidence was obtained by illegal or improper means, the court, after considering the nature of the illegality or impropriety and all the circumstances under which the thing tendered was obtained, may refuse to admit it in evidence, if the court is of the opinion that because of the nature of the illegal or improper means by which it was obtained, its admission would tend to bring the administration of justice into disrepute. The Commission also quoted the various circumstances surrounding the proceedings that may entail the exclusion of such evidence but the suggestion of the Law Commission was not accepted and no legislation was effected in line with the recommendations of the 94<sup>th</sup> Report of the Law Commission and the position continues to be that the evidence obtained under illegal search could still be admitted in evidence provided there is no express statutory violation or violation of the constitutional provisions. For example, if certain specific enactments are made and the search or seizure is to be effected in accordance with the provisions of such enactment, the authorities shall comply with such provisions. The general provisions given in the Criminal Procedure Code are to be treated as guidelines and if at all there is

any minor violation, still the court can accept the evidence and the courts have got discretionary power to either accept it or reject it.

In the instant case, we do not think that the court has violated any such provision merely because the witness was not from the same locality and his evidence cannot be rejected.

The next important evidence against the respondent-accused Paltan Mallah are the two extra-judicial confessions allegedly made by him to two witnesses. The first is the confession the appellant is alleged to have made to PW-105 Satyaprakash Nishad and the second to PW-124 Bishambhar Prasad Sahni. PW-105 Satyaprakash Nishad is related to Paltan Mallah. He deposed that in 1991 Paltan Mallah came to Chainpur village which is about 35-40 kms. away from his village at Nibahi. PW-105 deposed that Paltan Mallah told him that he is involved in the murder of a leader and the CBI was in search of him and on further questioning he told the entire details. He gave the names of other accused also and informed the witness that CBI had announced Rupees one lakh as reward for his capture and therefore he wanted to go to Nepal. The witness agreed to take him to Pohari Bazar where his

sister was married to one Keshnath Nishad. The witness further deposed that he took Paltan Mallah to his brother-in-law who was working in the Railways, but his brother-in-law said he could not hide Paltan Mallah. He had also given evidence to the effect that Paltan Mallah left his motorcycle at his residence and he later came to know that in August, 1993 Paltan Mallah was caught by the police. The evidence of this witness was seriously challenged in cross-examination. He was extensively cross-examined and a perusal of his cross-examination would show that the witness could withstand the cross-examination successfully. His evidence is to be appreciated in the light of the evidence of PW-124 and also the recovery of the motorcycle from the premises of the witness. The evidence of PW-124 fully supports the evidence of PW-105. PW-124 Bishambhar Prasad Sahni was the headmaster of a school during the relevant time and he was working in the Higher Secondary School of Navalparasi since 1976. He is a post-graduate from Tribhuvan University and his relatives are in village Kusha (U.P.). PW-124 deposed that accused Paltan Mallah came to his house along with Keshnath, the brother-in-law of PW-105. They came in the evening and on the next morning he asked Paltan Mallah about the purpose of his visit. Then Keshnath told that Paltan Mallah was a distant relative of his brother-in-law and that he should get some safe place for him in

Nepal. The witness asked why he wanted to stay in Nepal and Paltan Mallah had a detailed discussion and he revealed that he had murdered Shankar Guha Niyogi in complicity with Gyan Prakash Mishra. The witness deposed that he got agitated and angry and scolded his brother-in-law Keshnath and asked them to leave the place immediately. The statement of PW-124 was recorded in 1993, but in the cross-examination, he mistakenly stated that CBI officers had come there fifteen days after the departure of Paltan Mallah. This evidently is a mistake and for this sole reason the evidence of this witness was discarded. The extra-judicial confession made by the accused Paltan Mallah to PW-124 is unimpeachable. PW-124 is a headmaster of a school who had no axe to grind against the accused and he was working at a far distant place and the CBI must have come to know of the alleged extra-judicial confession made on the basis of questioning the accused. The questioning of PW-124 by police was in 1993. The extra-judicial confession implicating the second accused Gyan Prakash Mishra is not strictly admissible as it is a confession made by a co-accused and could be used only as a supporting evidence. Though the evidence as such cannot be used against Gyan Prakash Mishra, the extra-judicial confession revealed by PW-124 Bishambhar Prasad Sahni is

reliable and trustworthy and fully supported by the evidence of PW-125 and we find no reason to discard the same.

Then the most important item of evidence against the accused, Paltan Mallah, is the report of the ballistic expert. PW-192, the Deputy Superintendent of Police of the CBI deposed that after the arrest of the appellant Paltan Mallah on 25.8.1993, he recovered one 12 bore country-made pistol, 13 live cartridges 12 bore, one foreign made pistol, 6 live cartridges of .38 bore and a motorcycle. The country-made pistol, the foreign made pistol and the cartridges were sent for examination by the ballistic expert to the Central Forensic & Science Laboratory, New Delhi. During the post-mortem of the deceased Shankar Guha Niyogi, three pellets were extricated from his body. These pellets were sent to Forensic Laboratory at Sagar and thereafter they were deposited in the court by PW-192 and these pellets were also later on obtained from the court and sent for examination by the CFSL. PW-159, the ballistic expert conducted detailed laboratory test-fires and microscopic examination and he gave Exh.P-398 report wherein he opined that three lead pellets marked P-1 to P-3 must have been fired from a 12 bore country-made pistol. He deposed that he had prepared the report on the basis of the

microscopic examination and he had also taken photographs of the pellets and Exh. P-398 are the work-sheets of the report prepared by him.

The evidence of PW-159 and his report are seriously challenged by the counsel for the respondent accused. He extensively referred to the text books written by foreign ballistic experts such as Burrad, Hatcher and Taylor. It was argued that in the instant case, the weapon was a country-made pistol and the barrel was not grooved and there was absolutely no question of any identifiable marking coming on the pellets to enable the expert to give any opinion whatsoever. Reliance was placed by him on the observations of this Court in Ram Avtar and Others Vs. Ram Dhani and Others (1997) 2 SCC 263 wherein this Court relied on the opinion of J.S. Hatcher in his text book of Fire Arms & Investigation to the effect that "unless there were rifling marks in the bullets which were not defaced by the entry in the bodies of the victims, no expert can ordinarily and generally give an opinion." It was also pointed out that in the case of country-made pistol, it was difficult to assume that the ballistic expert could have found identifying marks on the pellets. The evidence given by the ballistic expert was questioned in great detail. He was cross-examined extensively by counsel for all the accused. He deposed in

the cross-examination that when these pellets are fired, then they among themselves would press each other inside the barrel [on inside parts] their effect could be on one side of inner side of barrel, they will take special individual mark on them and these marks will be in the form of a line on the pellets and if the barrel is tight then pellets will be more rubbed, and on more parts, lines will come. If barrel is tight then half part of the pellets are pressed and the barrel was nicely tight and the witness himself said that in the test-fire which he did on all of the six pellets good marks of barrel had come. He had also stated that he had taken micro-photograph of only one pellet and had compared all pellets but he had not made any separate comparative record or photograph.

It was argued that micro-photographs were not produced and mere observation by the expert - was not sufficient and that he should have produced these photographs. We do not think that there was any such necessity to produce the micro photographs when the expert has given convincing reasons to support his opinion. This Court in Ramanathan vs. State of Tamil Nadu [1978] 3 SCC 86 held that the production of such

photographs is not necessary and such a plea was rejected. In paragraph 26, it was held as under :

"It is true that there has been considerable difference of opinion amongst investigators regarding the use of photographs in a court for the purpose of illustrating the matching of the markings, and while it may be that microscopic photographs, when taken with due care and in the best of conditions, may enable the evidence to be placed on the record in a visible form, it cannot be denied that a court would not be justified in rejecting the opinion of an expert who has examined the markings under the comparison microscope simply for the reason that he has not thought it necessary to take the photographs. It is therefore not possible for us to reject the evidence of Ramiah (PW 23) who has categorically stated that he had compared the land and groove markings on the bullets under a comparison microscope, simply because he did not think it necessary to take the photographs."

In the case of the respondent-accused Paltan Mallah, there is overwhelming evidence to prove his complicity in the crime. The recovery of the country-made pistol at his instance, which is proved to have been used for causing the death of Shankar Guha Niyogi, and the evidence of the ballistic expert coupled with two extra-judicial confessions made to PW-105 and PW-124 support the prosecution case fully. There is also prosecution evidence to the effect that the accused had got accessibility to the weapons and that he was staying at the place of occurrence and doing various jobs. It is also



established that accused Paltan Mallah is involved in other offences relating to fire-arms. Though there is no direct and convincing evidence against other accused, the case against Paltan Mallah is proved beyond reasonable doubt. He was acquitted by the High Court on fanciful reasons. The evidence of extra-judicial confessions was rejected without any valid reasons. The report of the ballistic expert also was not appreciated in the correct perspective by the High Court. In our view, the Division Bench seriously erred in acquitting the respondent-accused Paltan Mallah.

In the result, we reverse the acquittal of the respondent-accused Paltan Mallah. The incident leading to these appeals had taken place as early as 1991. As there is a long lapse of time, we do not think that the sentence of death imposed upon him by the Sessions Court is justified in the circumstances. We set aside the acquittal of respondent-accused Paltan Mallah and find him guilty of the offence punishable under Section 302 IPC and sentence him to undergo imprisonment for life.

The appeals preferred by the State and also by the Chhatishgarh Muk Morcha are allowed to the extent indicated above. All other appeals sha

stand dismissed. The acquittal of other accused by the High Court is confirmed.

.....J  
[ K.G. Balakrishnan ]

.....J  
[ Dr. AR. Lakshmanan ]

New Delhi  
January 20, 2005.