

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No. 597 of 2011

Against the judgment of conviction dated 22.02.2011 and order of sentence dated 26.02.2011 passed by Sri Ujwal Kumar Dubey, learned Additional Sessions Judge-III, Barh, Patna in S. Tr. No. 761 of 2009 arising out of Goshwari P.S. Case No. 30 of 2007

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Dinesh Yadav, Son of Late Bishundhari Yadav, Resident of Village – Malpur, P.S. – Ghoshwari, District – Patna

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant : None

For the Respondent : Mr. Sujit Kumar Singh, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

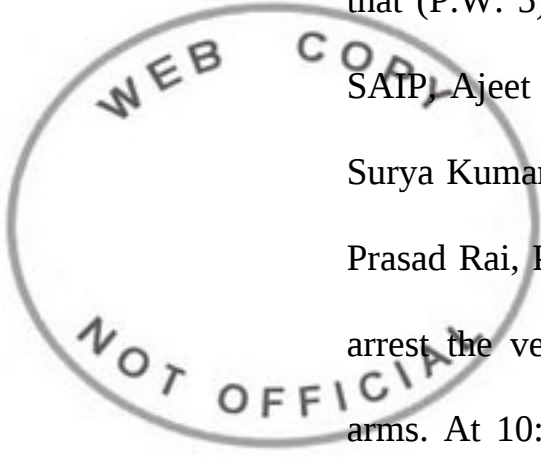
Date: 15-09-2015

The appeal called out but none appeared on behalf of the appellant. However, the State has assisted and on perusal of the record and assistance rendered by the State, the appeal is being disposed of.

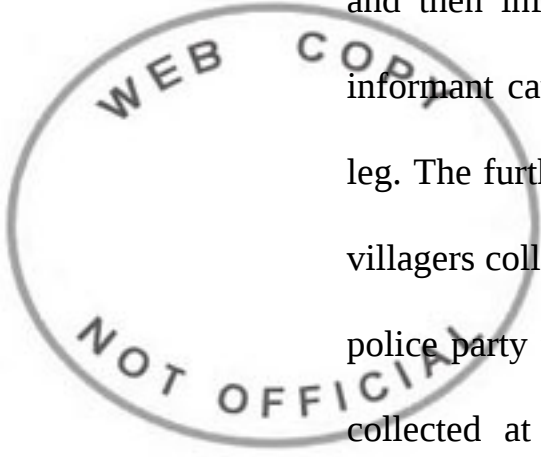
2. The appellant has been convicted for the offence under Section 25(1-B) (a) of the Arms Act and sentenced to undergo rigorous imprisonment for three years and six months and to pay a fine of Rs.3,000/- and in default of payment of fine to undergo imprisonment for three months. He has further been convicted and sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs.1,000/- and in default of payment of fine to undergo imprisonment for one month for the offence under Section 26 of the Arms Act.

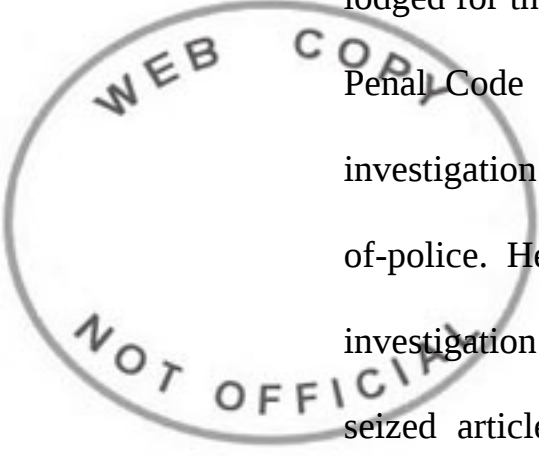
3. The prosecution case, as alleged in the self written statement of the informant Vijay Kumar Singh, recorded on 13.04.2007

at about 11:45 A.M. at State Boring south of Malpur Bigha village, is that (P.W. 5) Sub-Inspector of Police, Vijay Kumar Singh along with SAIP, Ajeet Prasad Singh (P.W. 4), Gopal Prasad, Tapeshwar Kumar, Surya Kumar, Vijay Narayan Kumar, Kamleshwari Yadav, Raghunath Prasad Rai, Prabhu Prasad Yadav proceeded from the police station to arrest the veteran and absconding criminals and in search of illegal arms. At 10:30 A.M. they reached village Bajna where he got secret information that towards south of Malpur Bigha at the State Boring, the veteran criminal Dinesh Yadav (the appellant), along with his 4-5 associates was planning to commit crime. On this information, the informant along with the police party proceeded for village Malpur and reached Malpur Bigha village at 11:00 A.M. He found some persons sitting at the State Boring. At his instance, the police party proceeded clandestinely from Paijna Samiyagarh road through a ditch to the State Boring in the village to surround them. On seeing the police party surrounding the criminals, 5-6 persons started firing upon the police party with intention to kill them. Then the police party warned that they are police party and they have surrounded them but in spite of this warning they concealed themselves around the four pillars of the tanki of the State Boring and continued the firing. The police also resorted to firing to defend themselves in defence and the informant also fired two rounds. It is further alleged that on the firing by the informant one fired hit at the leg of a criminal and he fell down. When one of the criminals



fell down other criminals fled away towards south resorting to firing and then informant ordered the police party to chase them and the informant caught hold of the criminal who had received injury on his leg. The further case is that on seeing the firing and counter firing, the villagers collected at the place of occurrence and it was disclosed by the police party that the other criminals fled away. Thereafter the persons collected at the place of occurrence. Before the two independent witnesses Ravindra Mahto and Bilash Yadav of the village, the person apprehended disclosed his name as the appellant (Dinesh Yadav) and thereafter they conducted the search of the person of the appellant and from his right hand one double barrel pistol was recovered with a live cartridge of .315 bore in one barrel and empty cartridge of .315 bore from another barrel. The further case is that on search of his person, from the fetta of the lungi in a wrapped condition three live cartridges of .315 bore were recovered. However, the said Dinesh Yadav neither showed any paper with regard to the arms and ammunitions seized nor produced nor gave any satisfactory reply and so the seizure list was prepared with regard to the double barrel pistol and four cartridges as well as one fired cartridge. The seizure list was prepared before the two witnesses on which both of them gave their left thumb impression and on query appellant disclosed one of his associates as Sudhir Yadav and other were persons of Sudhir Yadav. He further disclosed that they were planning to commit dacoity on the vehicle passing through





Shermara Mokama road and hence, the First Information Report was lodged for the offences under Sections 399, 402, 353, 307 of the Indian Penal Code and Section 25(1-B)(a)/26/27/35 of the Arms Act. The investigation was handed over to P.W. 6 Lalit Kumar Singh, Inspector-of-police. He took up the charge of investigation and in course of investigation he recorded the statements of the witnesses, took the seized articles to the Sergeant Major and got the same examined, received his report and sent the articles seized to the Malkhana. However, after taking report of the Sergeant Major and completing the investigation he submitted charge-sheet for the offences under Sections 399, 402, 353, 307 of the Indian Penal Code and Section 25(1-B)(a)/26/35 of the Arms Act. Thereafter cognizance was taken, case was committed to the Court of Sessions and after commitment charge was framed under the aforesaid Sections and thereafter trial proceeded.

4. During trial seven witnesses were examined by the prosecution. P.W. 1 Bilash Yadav is the seizure list witness and he has stated that he does not know about the occurrence and the Officer-in-Charge of the police station got his thumb impression on the plain paper. Neither the police seized any articles nor was any seizure list prepared, hence, he has not supported the seizure. P.W. 2 Laro Yadav has also not supported the prosecution case and has stated that he saw police taking the appellant from the village. P.W. 3 Lalo Yadav has been tendered and he has stated in cross-examination that on the date of occurrence

police caught the appellant from his house and has stated that after catching hold, the Officer-In-Charge fired at his leg. P.W. 4 Ajeet Prasad Singh, Assistant Sub-Inspector, the member of the raiding party and has stated that on 13.04.2007 at the time of raid in village Bajna they got information that some criminals sitting on State Boring were planning and then the Officer-in-Charge along with the SAIP Jawans raided and then the accused persons fired and in retaliation to self defence the police also fired causing injury to one of the accused on his leg. The appellant was apprehended but others managed to flee away and on his search a double barrel gun and one live cartridge of .315 and one fired cartridge of .315 were recovered and from the fetta of lungi three cartridges of .315 were recovered.

5. P.W. 5 is the informant and supported the prosecution case regarding the raid, apprehension of the appellant and proved the seizure list prepared and marked as Ext. 1 as well as the formal FIR Ext. 3, self statement of the informant as Ext. 2. P.W. 6 is the Investigating Officer of the case. He took up the charge of investigation at the place of occurrence itself and took the seized articles i.e. double barrel gun and cartridges and produced the same before the Sergeant Major. P.W. 7 has come to depose that he examined the articles produced before him and proved his report as Ext. 5 and found to be effective firearms.

6. The defence of the accused, as appears from the trend of the cross-examination and the suggestion given by the defence is that

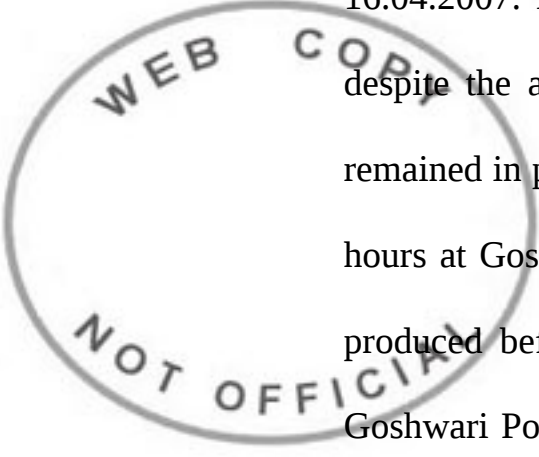
there were two groups in the village Malpur Bigha; one is Dhanuk and another is Yadav and the tension between the two groups has been prevailing since long and it is stated that the informant belonged to backward class and under the influence of Dhanuk and the informant has taken the side of Dhanuk and arrested the appellant from his house and fired on his leg and set up a false case.

7. The learned trial Court taking into consideration the evidence of the witnesses convicted the appellant for the offence under Sections 25(1-B)(a) and 26 of the Arms Act as mentioned above, but acquitted the appellant for the offences under Sections 399, 402, 353 and 307 of the Indian Penal Code on the grounds that there was no evidence regarding the fact that the accused persons collected there for preparation of committing dacoity and the trial Court neither found that even though there is allegation of firing but no police force got injured nor any evidence regarding the empty cartridges was found at the place of occurrence and hence, held that the prosecution has not been able to prove the charges under Sections 399, 402, 353 and 307 of the Indian Penal Code against the appellant. However, the trial Court convicted the appellant under Sections 25(1-B)(a) and 26 of the Arms Act and sentenced as mentioned above. However, the trial Court did not take into consideration the evidence of the defence taken by the accused persons.

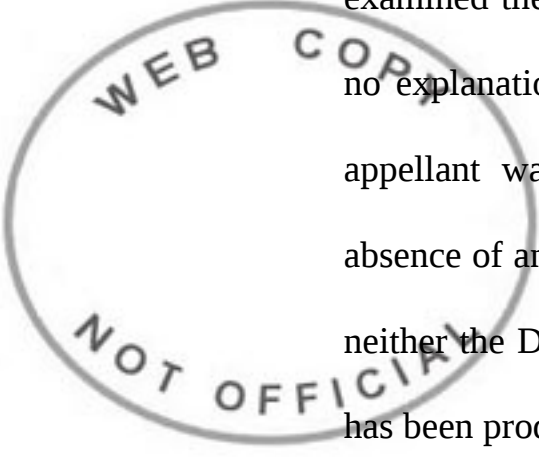
8. The judgment of conviction and order of sentence have

been challenged by the learned counsel for the appellant.

9. However, from going through the prosecution case itself and the fardbeyan recorded on the self statement of the informant, on the basis of which First Information Report was lodged, the case of the prosecution is that on 13.04.2007 at about 10:00 A.M. while the police party proceeded to arrest the absconding criminals and seize the illegal arms, and reached village Bajna, they got a secret information that at the State Boring to the south of village Malpur Bigha, some criminals were sitting and planning to commit crime and then in firing and counter firing the appellant got injury on his leg and was caught hold by the police on 13.04.2007 itself and self statement recorded at 11:45 A.M. and First Information Report drawn on 13.04.2007 at 4:00 P.M. though the occurrence alleged to be at 11:30 A.M. However, the Investigating Officer in his evidence in paragraph 19 stated that since the appellant had received injury on his leg and he got his treatment, but he did not inform regarding the injury of the appellant and his treatment to his family. However, it is pertinent to mention that the moment the appellant is arrested, it is the bounden duty of the State or person who arrests to inform the family member as it amounts to a violation of the Human Rights and the protection given to the accused. The Investigating Officer in his evidence has also stated that he did not inform in this regard either to the Human Rights Commission or to the State or the Central Government. However, the appellant has been



arrested on 13.04.2007 but the said appellant was produced on 16.04.2007. Though time has not been mentioned but it is apparent that despite the appellant was arrested on 13.04.2007 at 11:00 A.M. and remained in police custody from 13.04.2007 to 16.04.2007 for about 72 hours at Goshwari Police Station under Barh Division, but he was not produced before the Judicial Magistrate though the occurrence is of Goshwari Police Station which is at a distance of seven kms. from the place of occurrence under Barh Division when the Court is in Barh. Hence, the appellant was kept in wrongful confinement but no explanation for the same was given. However, from perusal of the record, it is apparent that the appellant was not only produced before the Magistrate for 72 hours and remained in wrongful confinement in the police custody for about 72 hours, but even the First Information Report was not sent to the Magistrate. From perusal of the First Information Report itself it is apparent that though the First Information Report was drawn on 13.04.2007, but it was sent to the Additional Chief Judicial Magistrate on 16.04.2007. The order-sheet of the Court also indicates that the accused-appellant was produced in the Court on 16.04.2007. Form going through the evidence, it is apparent that the appellant was taken to hospital for his treatment. However, neither the injury report nor any document regarding his treatment in the hospital has been produced by the prosecution nor the Doctor, who examined the appellant, has been produced or examined in the case. Even in the



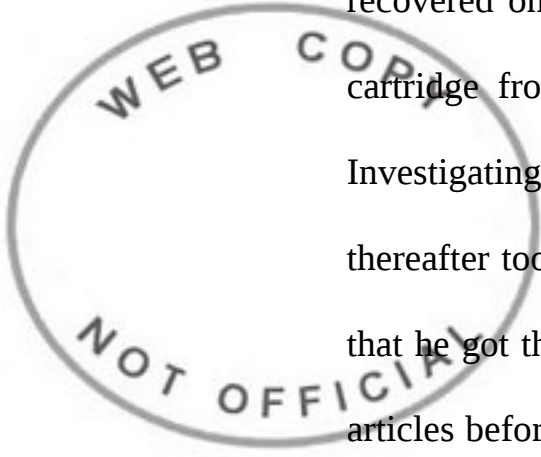
charge-sheet submitted by the police, the name of the Doctor, who examined the appellant, has not been mentioned as a witness. There is no explanation for the prosecution and the explanation given that the appellant was taken to hospital for treatment is not acceptable in absence of any evidence that he was injured or treated at the hospital as neither the Doctor nor the injury report nor the evidence of the Doctor has been produced nor is there any material to suggest that the victim or the appellant was ever treated at the hospital and this casts a serious doubt about the act of the Investigating Agency or the police as the delay has not been explained.

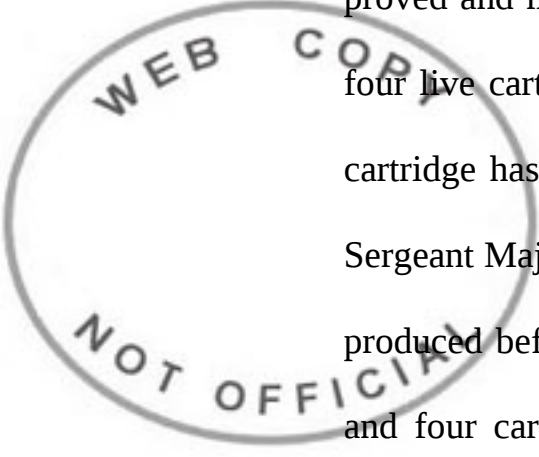
10. P.Ws. 1, 2 and 3 have also not supported the prosecution case who are the private persons or the co-villagers rather they embarked upon the evidence supporting the case of the defence that the appellant was arrested from his house and was shot on his leg. However, the witnesses who have supported the prosecution case as P.Ws. 4, 5, 6 and 7. P.W. 4 is the member of the raiding party. P.W. 5 is the informant. A suggestion has been given to P.W. 5 that he arrested the appellant from his house and with an intention to kill he fired at him. He has also denied the suggestion that they did not get the appellant treated and it is admitted in paragraph 18 that the appellant was in police custody for four days and though a plea has been taken that he was kept for treatment in the police custody, but no evidence has been produced regarding his treatment as discussed above. He has

further stated that on 13.04.2007 while coming to Bajna village, he has recorded the station entry diary in Goshwari police station though showing the time as 10:00 A.M. However he stated that he does not remember its number and he can not produce the same. He has further stated that he has not mentioned the said number in his fardbeyan or self statement.

11. Hence, taking into consideration these facts, it is apparent that the case of the prosecution that the police proceeded for village Bajna for raiding the criminals who were absconding and the firearms but neither the station diary entry regarding that has been proved nor the same was brought on record though a case has been made out though on secret information they came and they arrested the appellant on 13.04.2007 but the accused was not produced in jail before the Court on 16.04.2007 nor the First Information Report was sent to the Court till 16.04.2007 and neither the accused was produced before the Court and remained in custody of the police from 13.04.2007 to 16.04.2007 and this casts a serious doubt on the prosecution case and there is no explanation for the delay nor even the Doctor, who treated the appellant was examined to prove that the Investigating Officer produced the appellant before the doctor. The statement of the doctor has not been recorded and that doctor has not been made witness of the charge much less brought on record and this is the serious lacking on behalf of the prosecution for which there is no acceptable explanation.

12. P.W. 5 has stated that he made a search of the person and recovered one double barrel pistol and four cartridges and one empty cartridge from the barrel of the gun and prepared seizure list. The Investigating Officer stated that he reached the spot on 13.04.2007 and thereafter took the charge of the articles seized and thereafter he stated that he got the order of the Chief Judicial Magistrate and produced the articles before the Sergeant Major on 23.04.2007. However, there is no evidence as to whether the articles seized were given in sealed cover. There is no evidence as to where the articles were kept from 13.04.2007 to 22.04.2007. However, P.W. 6 in his evidence has stated that the said double barrel pistol and four cartridges and one empty cartridge were handed over to the Malkhana-in-Charge but neither the Malkhana-in-Charge has been examined nor has the Malkhana register been produced. Though P.W. 5 stated that he got the articles seized examined by the Sergeant Major and he had proved and produced the articles in Court, but in his evidence he has stated that he has produced the material exhibits in sealed pack. However, he has stated that he received the said articles from the Malkhana of Goshwari Police Station. He has further stated that he received the said articles from Choukidar No. 3/1 Kapildeo Ram of Goshwari Police Station, but the said Choukidar has not been examined to depose as to from where he received the articles and who gave the articles to him. The Malkhana register has also not been proved nor produced though the articles,

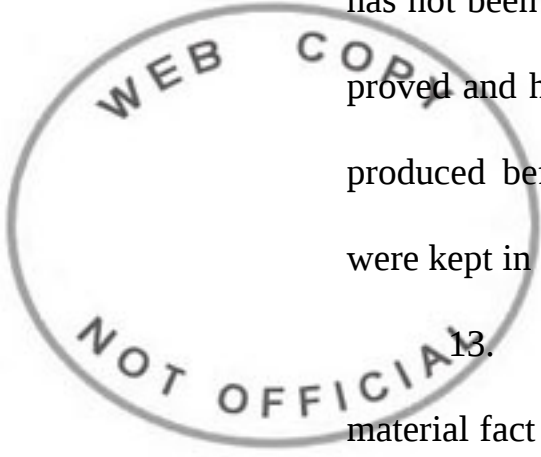




received by him from the said Kapildeo Ram Choukidar, have been proved and marked as material Ext. 1, the double barrel pistol and the four live cartridges marked as material Exts. 2 and 2/1 and the empty cartridge has been marked as material Ext. 3. However, P.W. 7 is the Sergeant Major. Though he has stated in his evidence that articles were produced before him in sealed cover, which were a double barrel gun and four cartridges and one empty cartridge and he examined those articles and found to be effective and after examining the same he returned back the articles to the Investigating Officer in sealed cover with his report that he has proved the exhibit, marked as Ext. 5. However, at the time of his examination, the articles were not before him to say or prove that the articles, produced in Court, were the same articles, which he examined and sealed and this casts a serious doubt and hence, there is missing link whether P.W. 7 has examined the articles which were seized and it has not been proved that those were the articles examined or sealed by him or it may be said that it has not been proved that the articles which he examined, were the articles seized in the case as he has not stated in Court as it appears from the evidence that the articles seized and examined were not produced before him during his deposition nor he has stated that these are the articles which he examined. Moreover, in regard to the articles produced by P.W. 6, it has been stated that it was produced by handing over to him by one Kapildeo Ram and it was stated that it was called

for from the Malkhana but there is one missing link that Kapildeo Ram has not been examined in the case nor the Malkhana Register has been proved and hence, it casts a serious doubt that the seized articles were produced before this witness from Malkhana or whether the articles were kept in Malkhana in safe custody.

13. Hence, taking into consideration the evidence and the material fact that the occurrence took place on 13.04.2007 and the First Information Report recorded on 13.04.2007 but neither the fardbeyan was sent to the Court on 13.04.2007 or 14.07.2007 nor the accused who was apprehended was produced before the Court till 16.04.2007 nor the First Information Report drawn was sent to the Court till 16.04.2007 and this casts a serious doubt and the delay has not been explained though a lame excuse has been taken that the appellant was being treated but even then neither the document from hospital regarding the appellant having been admitted in hospital or treated at hospital nor the injury report nor the evidence of the doctor were brought on record and further there is laches that the fact as to where the articles has kept not been mentioned or proved. Whether non-mentioning of the fact the articles were kept in Malkhana or whether they were kept in safe custody and non-examination of Kapildeo Ram through whom P.W. 6 has stated to have received the Malkhana and non-proving of the Malkhana Register, casts a serious doubt about the articles seized as to whether the articles were kept in Malkhana or whether the articles



examined by the Sergeant Major and hence, the appellant is entitled to benefit of doubt as the prosecution has not been able to prove the charges against him beyond reasonable doubt and hence, the judgment of conviction dated 22.02.2011 and order of sentence dated 26.02.2011 passed by Sri Ujwal Kumar Dubey, the learned Additional Sessions Judge-III, Barh, Patna in S.Tr. No. 761 of 2009 arising out of Goshwari P.S. Case No. 30 of 2007 are hereby set aside and the appeal is allowed. The appellant is discharged from the liability of the bail bonds.

(Gopal Prasad, J.)

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