

IN THE HIGH COURT OF JUDICATURE AT PATNA**Criminal Appeal (SJ) No.373 of 2015**

Arising Out of PS.Case No. -62 Year- 2012 Thana -KHAIRA District- SARAN

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1. Uday Giri son of Late Basudeo Giri Resident of Mohalla / Village - Katharibag,
P.S. Chapra Town, District Chapra (Saran).

.... Appellant/s

Versus

1. The State of Bihar.

.... Respondent/s

Appearance :

For the Appellant/s : Mr. Baban Roy, Amicus Curiae

For the Respondent/s : Mr. Sujit Kr Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 06-11-2017

None appears on behalf of appellant. On previous occasion also, there was absence whereupon Sri Baban Rai has been requested to assist the court as an Amicus Curiae. Heard learned Amicus Curiae as well as learned APP

2. Appellant, Uday Giri has been found guilty for an offence punishable under Section 25(1-b) a of Arms Act and sentenced to undergo RI for 3 years as well as to pay fine of Rs. 10,000/- in default thereof, to undergo SI for six months, under Section 26 of the Arms Act whereunder also directed to undergo RI for 5 years as well as to pay fine appertaining to Rs. 10,000/- in default thereof, to undergo SI for six months, additionally, with a further direction to run the sentences concurrently vide judgment of conviction dated 22.05.2015 and order of sentence dated 25.05.2015 passed by 2nd Additional Sessions Judge, Saran at Chapra in Sessions



Trial No. 07/2013.

3. Shardendu Sharan (PW 4), O/C Khaira PS recorded his self statement on 21.05.2012 at about 1.55 PM at village, Kakariya Mathiya disclosing therein that today at about 9.30 AM Officer-in-charge of Town PS has informed that two undertrial prisoners, namely, Uday Giri and Dharmendra Rai escaped from court Hajat. It has also been disclosed that Sasural of Uday Giri lies at village, Kakariya Mathiya in the house of Prabhu Giri and so, there happens to be probability of his presence there whereupon, after making SD entry, he along with other police officials, armed constable proceeded. At about 12.20 PM, he was confidentially informed that two persons have come at the place of Prabhu Giri on tempo whereupon they came at the house of Prabhu Giri. Just after seeing the police, one person tried to escape who was apprehended by ASI, Khalid Akhtar, Constable, Mahesh Bek, Chaukidar, Dharmendra Rai and during course thereof, that person brick batted upon them. Even after apprehension he gave bite. Seeing no scope of escape, he shouted Dharmendra to shot, whereupon one person came out and shot at Khalid Akhtar but missed. Thereafter, he scaled wall and escaped therefrom. Thereafter, the apprehended accused was interrogated who disclosed his identity as Uday Giri son of Late Basudeo Giri Resident of Mohalla / Village - Katharibag, P.S. Chapra



Town, District Chapra (Saran).

4. On hearing sound of firing so many villagers assembled and in presence Rajendra Giri, Dilip Rai he was searched and during course thereof, one country made loaded pistol, one cartridge of .315 Bore along with mobile set were recovered for which seizure list was prepared. He had further disclosed name of his accomplice as Dharmendra Rai. Furthermore, he failed to show the relevant document with regard to possession of fire arm. He further confessed that today, he along with Dharmendra managed to escape from the court Hajat.

5. On the basis of the aforesaid self statement, Khaira PS Case No. 62/2012 was registered whereupon, investigation commenced and concluded by way of submission of charge-sheet facilitating the trial which concluded in a manner as indicated above, subject matter of the instant appeal.

6. The defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 of the CrPC is that of complete denial. Furthermore, it has also been submitted that the police officials callously implicated the appellant by way of implanting the theory of recovery of illegal fire arms, cartridge. However, neither oral nor documentary evidence has been adduced on behalf of appellant.



7. In order to substantiate its case, prosecution had examined altogether seven PWs who are, PW-1, Khalid Akhtar, PW-2, Sunil Kumar Sah , PW-3, Mahesh Bek, PW-4, Shardendu Sharan, PW-5, Parshu Ram Singh, PW-6, Prabhunath Misra and PW-7, Janardan Manjhi. Side by side had also exhibited Ext-1, Seizure List, Ext-2, Self Statement, Ext-3, Formal FIR, Ext-4, Inculpatory extra-judicial confessional statement, Ext-5, Ballistic Report, Ext-6, Sanction order. Side by side had also done material exhibit of seized arms and ammunition. As stated above, nothing has been adduced in defence by the appellant.

8. It has been submitted on behalf of learned Amicus Curiae that case of the prosecution happens to be palpably false which is apparent from bare perusal of the circumstance visualizing from the record. In order to substantiate such plea, it has been submitted that right from initiation of the prosecution it has been disclosed that appellant managed to escape from judicial custody but, during course of conduction of trial no paper has been produced on behalf of prosecution to substantiate the same. Had there been such kind of activity, then in that event, there should have been proper information at the end of the prosecution much less, the relevant order-sheets, institution of the FIR relating to abscondance of the appellant from the judicial custody. Lapses having at the end of prosecution was not



bona fide rather intentional so that, the court should see the appellant with pre-occupied mind being an absconder.

9. It has also been submitted that falsity of the case is itself apparent from the fact that while prosecution witnesses including PW-1, ASI tried to apprehend the appellant, at that very moment, in order to frustrate their attempt, appellant had hurled brick particles over them. Even after his apprehension, he gave a bite and further called Dharmendra in his rescue asking for to shoot. If the appellant was himself in possession of loaded fire arm which has been shown as a recovery, then in that event, the appellant instead of asking for Dharmendra, himself might have taken out the loaded arm and would have shot at the prosecution party. That means to say, the aforesaid eventuality probabilizes the recovery as an after thought in order to penalize the appellant. It has also been submitted that seizure is said to have effected in presence of one Rajendra Giri as well as Dilip Rai but none of them had been examined on behalf of prosecution nor there happens to be any kind of cogent explanation in the aforesaid context.

10. It has further been submitted that from the evidence of PW-5, it is evident that he had produced alleged seized arm and ammunition in sealed condition bearing signature of sergeant major. The aforesaid sergeant major has been examined as PW-6 who had not corroborated the same. Nor he had spoken that the seized articles



were produced before him in sealed condition nor PW-5 the Investigating Officer had stated that he received the seized arms and ammunition in sealed condition. Nor it bore PS Case No. or signature of the informant, seizure list witnesses. Therefore, mere production of material exhibit will not serve purpose in order to justify the finding recorded by the learned lower court.

11. Apart from this, it has also been submitted that Section 26 is bifurcated in three parts i.e. under sub-sections (1) (2) (3) and each subsection require different kind of legal requirement to be substantiated during trial as well as different kind of punishment. The learned lower court blatantly convicted and sentenced the appellant under Section 26 without specifying which of the three subsections and so, it shows non application of judicial mind.

12. Learned APP while supporting the finding recorded by the learned lower court has submitted that the court should not flow with the minor infirmity persisting on the record which are bound to occur due to lapse of time. It has also been submitted that considering the nature of the activity, the obligation was upon the accused/appellant to prove that he was not an absconder and further, would have controverted his arrest coupled with arms and ammunition as prosecution had properly discharged its obligation substantiating the status of the appellant to be absconder as well as his apprehension



coupled with the fact that during course of search, loaded fire arm along with cartridges were recovered from the possession of the appellant. That being so, the judgment of conviction and order of sentence is found legal, just and proper. As such the same be affirmed.

13. From the evidence available on the record, it is evident that PW-1, ASI, Khalid Akhtar as well as PW-4, informant, O/C of Khaira PS have categorically stated with regard to receiving of an information at the end of O/C Town PS regarding abscondance of Uday Giri as well as Dharmendra Rai from the court Hajat and the same has not been challenged at the end of appellant. It is also evident that apprehension of appellant is from his Sasural, Kakariya Mathiya which also not been challenged and for that, he is not being prosecuted under the present prosecution rather is confined to on account of recovery of loaded fire arm with cartridges from the possession of the appellant and further, during course of exercising the public duty, he put hurdle, obstructed during course of his apprehension as well as ordered Dharmendra, co-accused to fire upon the prosecution party so that they be deterred to exercise their official duty. It is also evident that all the witnesses have categorically stated with regard to recovery of loaded arm and ammunitions on being searched in presence of seizure list witnesses along with other police officials who have gone to conduct raid for apprehension of absconder



accused/appellant as well as Dharmendra. During cross-examination, PW-1 at para-10 had stated that the house of Prabhu was shown by the Chaukidar which happens to be single storey pucca. In para-11, he had stated that he had not gone inside the house. Uday Giri was apprehended 10 Feet away from the house of Prabhu over road. While he was fleeing. In para-13, he had stated that an attempt was also made to apprehend Dharmendra but he succeeded to escape. In para-15, he had stated that both the seizure list witnesses came at their own. So many persons including seizure list witnesses were present at the spot. In para-16, he had stated that he is not remembering whether anything was ascribed over the seized arms and ammunition. In para-17, he had further stated that he is not remembering whether even after arriving at the police station, anything was written over the seized arms and ammunition. He is also not knowing where the recovered arm and ammunitions were kept.

14. PW-2, a Police Constable during course of cross-examination at para-9 had stated that the accused was chased and then apprehended. It took five minutes time. ASI, Khalid Akhtar (PW 1) had apprehended Uday Giri. He was searched by the Officer Incharge. Seizure list was prepared at the spot. In para-11, he had stated that seized arms and ammunitions were sealed at the spot but he is unable to say what was ascribed over the same.



15. PW-3 in para-10 had stated that seizure list was prepared by the officer incharge. Apprehended accused was searched by the Officer Incharge. In para-11 he had stated that O/C had scribed something over the seized articles. PW-4, the informant at para-11 had said that he is not remembering whether separate case has been instituted for abscondance of accused from the judicial custody. At para-15, had stated that he himself searched apprehended accused, Uday Giri. He had prepared seizure list with regard to recovery. In para-16, he had stated that seized articles were kept at Maalkhana. Seized article was not sealed but case number was put over the same.

16. PW-5 is the I.O. who after having been entrusted with the investigation, proceeded therewith. Recorded statement of the witnesses, recorded inculpatory extra-judicial confessional statement of the accused, took possession of seized arms and ammunition and sealed it, produced as material exhibit. Visited the place of occurrence which happens to be road lying east to the house of Prabhu Misra and then had identified place as North-house of Mukhtar, South-Prabhu Misra, East-West, Road. Got the seized article examined by the sergeant major, received report, obtained the sanction order and then submitted the charge-sheet. During cross-examination, he had admitted that he was not the member of raiding party. He had further stated that he had recorded inculpatory extra-judicial confessional statement of



the accused at the spot where he arrived after some time. Then thereafter, the cross-examination as referred hereinabove happens to be relating to seized arms and ammunition and he stood the test.

17. PW-6 is sergeant major who had examined the country made pistol along with live cartridges and found it effective and then submitted his report. Nothing has been elicited from his cross-examination and in likewise manner, PW-7 happens to be who had simply exhibited the sanction order.

18. Considering the nature of the evidence available on the record, it is apparent that the recovery of fire-arm is found out of controversy coupled with having been produced before the court as material exhibit. That being so, non examination of seizure list witnesses could not have an adverse impact in the background of the fact that there happens to be consistency in the prosecution evidence with regard to search and seizure. Furthermore, being a police officials, constable, their evidence is not liable to be rejected rather is to be accepted like an ordinary witness unless and until there happens to be some sort of cogent ground to disbelieve which the appellant failed to bring on record. That being so, conviction and sentence relating to Section 25(1-B) a of Arms Act is found properly substantiated. Whereupon, to that extent is affirmed. So far Section 26 of the Arms Act is concerned, its application happens to be only on



the score when there happens to be conclusive evidence with regard to an attempt having at the end of the accused to conceal the arms and ammunition in such a way that it should not be known to the public servant. Same has been categorized under three sub-sections relating to contravention of Sections, 3, 4, 10 or 12 under Section 26(1), 5, 6, 7 or 11 under 26(2) or violation of Section 22 under subsection 3 of Section 26 of the Arms Act.

19. There happens to be no evidence on the record that accused had tried to conceal the arms and ammunition that it should not be known to the public servant rather the evidence is that he had kept it beneath his apparel, even in that circumstance, he would be guilty for an offence punishable under Section 26(1) of the Arms Act and for that, minimum sentence happens to be that of six months which may extend up to 7 years and also with fine.

20. It is further evident from the record that appellant is under custody since 22.05.2012 and has been released on bail vide order dated 10.07.2015, that means to say, he approximately remained under custody for more than three years.

21. Accordingly, modifying the sentence so far Section 26 of the Arms Act is concerned, as 26(1) of the Arms Act as well as 55 (1 B) a of the Arms Act, the substantial sentence is directed to be as already undergone retaining the fine as well as default clause. Fine



should be deposited within eight weeks failing which, the learned lower court will proceed in accordance with law against the appellant.

22. With the aforesaid observation, this appeal is dismissed.

23. The first and last pages of this judgment be handed over to the learned Amicus Curiae for the needful.

(Aditya Kumar Trivedi, J)

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