

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.638 of 2015

Arising Out of PS.Case No. -184 Year- 2013 Thana -NAYA RAM NAGAR District- MUNGER

MESHO CHOUDHARY SON OF LATE DASHRATH CHOUDHARY,
RESIDENT OF VILLAGE - GARHI RAMPUR, POLICE STATION - NAYA
RAM NAGAR, DISTRICT -MUNGER.

.... APPELLANT/S

VERSUS

THE STATE OF BIHAR

.... RESPONDENT/S

WITH

Criminal Appeal (SJ) No. 560 of 2015

Arising Out of PS.Case No. -184 Year- 2013 Thana -NAYA RAM NAGAR District- MUNGER

REKHA DEVI WIFE OF MESHO CHOUDHARY RESIDENT OF VILLAGE -
GARHI RAMPUR, POLICE STATION - NAYA RAM NAGAR, DISTRICT -
MUNGER

.... APPELLANT/S

VERSUS

THE STATE OF BIHAR

.... RESPONDENT/S

Appearance :

(In CR. APP (SJ) No.638 of 2015)

For the Appellant/s : Mr. Ashok Kumar Choudhary, Adv.
Mr. Raj Kumar Choudhary, Adv.
Mr. Akshansh Ankit, Adv.
For the State : Mr. Sujit Kumar Singh, APP

(In CR. APP (SJ) No.560 of 2015)

For the Appellant/s : Mr. Ashok Kumar Choudhary, Adv.
Mr. Raj Kumar Choudhary, Adv.
Mr. Akshansh Ankit, Adv.
For the State : Mr. Sujit Kumar Singh, APP

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT

Date: 2-11-2017

Criminal Appeal (SJ) No. 560 of 2015 wherein Rekha
Devi is the appellant and Criminal Appeal (SJ) No.638 of 2015
wherein Mesho Choudhary is the appellant been heard analogously
as, originate from common judgment of conviction and sentence dated
20.08.2015 as well as 22.08.2015 respectively, passed by Additional
Sessions Judge, Vth, Munger in Sessions Trial No.990 of 2013
whereby and whereunder both the appellants have been found guilty



for an offence punishable under Section 25(1-A) of the Arms Act and each one has been sentenced to undergo R.I. for five years as well as to pay fine appertaining to rupees five thousand, under Section 25(1-AA) of the Arms Act wherein each one has been sentenced to undergo R.I. for ten years as well as fined of rupees ten thousand, under Section 25(1-B) of the Arms Act and sentenced to undergo R.I. for three years, fined of rupees five thousand, under Section 26(1) of the Arms Act and sentenced to undergo R.I. for five years as well as to pay fine appertaining to rupees five thousand, under Section 26(2) of the Arms Act and sentenced to undergo R.I. for ten years, fined of rupees ten thousand and in default of payment of fine (consolidated) to undergo S.I. for seven months additionally, with a direction to run the sentences concurrently with a further direction of set off with regard to the period as already undergone during course of trial.

2. PW.3, Avinash Chand, S.I. recorded his self statement on 25.09.2013 disclosing therein that after getting confidential information with regard to running of illegal arms factory by Mesho Choudhary, a raiding party was constituted and then, conducted raid at the house of Mesho Choudhary lying at village-Garhi Rampur. Considering activity of the accused, none of the villagers came forward to stand as a seizure list witness and that being so, the members of the raiding party namely lady constable no.225, Bina Kumari (PW.1), ASI Balmukund Sah (PW.6), ASI Akhilesh Kumar (PW.5) were nominated as seizure list witnesses and then thereafter, they gone inside the house of Mesho Choudhary. As soon as they entered, one person escaped by scaling the wall, while a lady was found standing



having small Jhola in her hand which she had concealed beneath her Sari. Furthermore, they have seen a ditch excavated and filled up recently whereupon, they became suspicious and after digging the court yard they have found the items which he had incorporated in the seizure list (detailed) and for that, Balmukund Sah as well as Akhilesh Kumar stood as seizure list witnesses. Furthermore, with the help of lady constable no.225, Bina Kumari, lady was searched out and from the Jhola, a regular pistol along with three live cartridges were recovered and for that, Veena Devi as well as Balmukund singh stood as seizure list witnesses. The lady was interrogated who disclosed her identity as Rekha Devi and further disclosed that the person who escaped therefrom happens to be her husband Mesho Choudhary. After preparing arrest memo, she was taken into custody and brought to P.S. along with seized articles.

3. After registration of the case as Naya Ram Nagar P.S. Case No.184/2013, investigation was entrusted to Lalan Paswan who during course of investigation got the seized article examined by the ballistic expert, obtained sanction order, examined the witnesses, followed with submission of charge sheet facilitating the trial which concluded in a manner, subject matter of instant appeal.

4. Defence case, as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. Furthermore, it has also been pleaded that police officials were carrying grudge and on account thereof, took Rekha Devi in custody and then thereafter, to justify detention, involved in this false and concocted case showing false



recovery. To justify the same examined four DWs.

5. In order to substantiate its case, altogether seven PWs have been examined on behalf of prosecution, PW.1-Veena Devi, PW.2-Awadh Kishore Prasad, PW.3-Awinash Chandra, PW.4-Lalan Paswan, PW.5-Akhilesh Kumar, PW.6-Balmukund Sah, PW.7-Arvind Kumar. Side-by-side had also exhibited Ext.1-Signature upon the seizure list, Ext.2-Signature upon the memo of arrest, Ext.3-Signature upon the prosecution report, Ext.1/1-writing on seizure list, Ext.4-Writing and signature of seizure list, Ext.2/1-Memo of Arrest, Ext.5-Writing of Registration, Ext.5/1-Endorsement, Ext.6-FIR, Ext.7-Charge sheet, Ext.7/1-Forensic Science Report, Ext.8-Arms Inspection Report, Ext.8-Arms Inspection Report, Ext.9-The report of FSL, Besides it, the following are materials exhibits.

Material Ext.1 to 1/23, Pistols(24), Material Ext.2 to 2/34, Semi Made Magazine (35), Material Ext.3 to 3/21, Barrel (22), Material Ext.4, Country made pistol, Material Ext.5 to 5/6, Frame of Pistol magazine, Material Ext.7, base Material Ext.8 to 8/1 Old Drill Machines, Material Ext.9 to 9/14, Old Cartridges (14), Material ext.10, the bundle of Sares paper, Material Ext.11,1. Country made Butt, Material ext.12 to 12/9, Reti (10 base), material ext.13 Hexa(1), Material Ext.14 to 14/4, frame of making barrel. Material Ext.15 to 15/1 Carbine magazine Material ext.17 Manufactured arms, 9/15, 1 cartridge.

On the other hand, the defence had also produced four witnesses in their defence: They are namely-DW 1 Mantu Chaudhary, DW.2 Ramvilash Chaudhary, DW.3-Babulal Mandal and DW.4



Triveni Chaudhary.

6. Learned counsel for the appellant while assailing the judgment of conviction and sentence has submitted that the revengeful activity of the police officials is manifest even at a glance over the prosecution case and on that very score, the judgment of conviction and sentence recorded by the learned lower court did not justify its sanctity.

7. In order to substantiate the same, it has been submitted that from the prosecution evidences it is apparent that they have not taken any sincere effort to pursue the villagers in order to become seizure list witness and the aforesaid exercise, an obligatory in accordance with Section 100 of the Cr.P.C. has been given a go-bye in one stroke by saying that none of the villagers became ready to be seizure list witness. That means to say none presence of independent witness happens to be contrary to the spirit of law whereupon, the story of search and seizure found completely demolished.

8. It has also been submitted that the alleged recovery could not be accepted because of the fact that during course of inspection of P.O. as recorded by PW.4 Lalan Paswan had not supported the same. Manufacturing of arms and ammunition is to be carried out by installing a lathe machine as well as furnace is also required for melting the raw material in order to prepare barrel and other parts which neither been seized nor found by the I.O. during course of inspection of P.O. Therefore, allegation of running of an unauthorized gun factory happens to be an illusion of the prosecution



to justify the malicious prosecution.

9. Furthermore, it has also been submitted that alleged seized articles, as is evident from the deposition of PW.3, informant PW.4 the Investigating Officer and PW.7 the Sergeant Major were not carrying specific mark whereupon, the prosecution is found not at all justifiable as held by the Apex Court as well as by our own High Court and for that referred *Pabitar Singh v. The State of Bihar* reported in AIR 1972 SC 1899, *Jasbir Singh v. State of Punjab* reported in (1998)8 SCC 525, *Faujdari Mistry Ors. V. The State of Bihar* reported in 2002(2) PLJR 545. So, submitted that the judgment of conviction and sentence is found unsustainable in the eye of law, whereupon is fit to be set aside.

10. Learned Additional Public Prosecutor while refuting the submission advanced on behalf of appellant has submitted that prosecution case had itself been admitted at the end of the appellant by examining four DWs who have had categorically stated, admitted presence of police official on the alleged date and time of occurrence at the house of the appellant. They have also admitted going the police officials inside the house, arresting appellant Rekha Devi at the other hand, absence of Mesho Choudhary. They have simply denied the recovery, and to that extent prosecution case is to be seen which, after going through the evidences of the respective PWs is found duly substantiated. It has also been submitted that all the articles did not possess proper identification mark but, some of them were carrying identification mark which has not been controverted at the end of the defence and furthermore, all the articles were sent to Sergeant Major,



PW.7 for ballistic examination as well as FSL examination and the report is on the record. Apart from this, it has also been submitted that all the articles whichever been seized, have been detailed under the seizure list, having presence of appellant Rekha Devi and for that there happens to be no explanation coupled with objective finding of the Investigating Officer and so, cumulative effect thereof, support the finding recorded by the learned lower court. It has further been submitted that production of material exhibit in court is an additional ground for putting reliance upon the version of the prosecution.

11. PW.7 is the Sergeant Major who had examined the seized material on 25.09.2013 itself (Date of occurrence) on being produced by the Investigating Officer, Lalan Paswan in sealed condition. Accordingly, he gave his finding after examination of materials so produced viz a pistol of 7.65 bore to be effective, 25 numbers of semi manufactured pistol of different length, properly identified, 35 numbers of semi manufactured grasping, 25 numbers of barrel of pistol, six slide, 12 proforma of pistol magazine, other kinds of tools, cartridges, .315 bore country-made katta to be effective and then submitted his report (Ext.8). He had also exhibited the report of FSL as Ext.9. He, after sealing materials, handed over to the Investigating Officer. In para-3, he had stated that he is not remembering the category of seal having affixed. He had not mentioned the same in his report. He had thrown away the seal which was affixed since before after breaking it opened for examination of material exhibits. He had further stated in para-7 that he, after sealing the material exhibits, kept the same in the same bag wherein



it was taken to him but he is unable to disclose its colour. He is unable to disclose the identification mark having put over bag and in likewise manner, over the material exhibits. He had affixed separate identification mark over the material exhibit. He had not mentioned length and breadth of countrymade katta. He had fired to test the barrel. He had further stated in para-23 that he had not mentioned the fact that countrymade katta was affixed with butt or not. Whether spring was there or not, he has also not written. He is unable to say the seal mark having over the material exhibit since before his examination.

12. PW.4 is the Investigating Officer who had deposed that on 25.09.2013 he was posted at Naya Ram Nagar P.S. On that day, Officer-in-charge, Avinash Chandra (PW.3) entrusted him with the investigation of instant case. He had taken further statement of the informant. He had taken statement of accused Rekha Devi. Visited the place of occurrence which happens to be the house of Rekha Devi as well as Mesho Choudhary having boundary East-Mohan Choudhary, West-Mesho Choudhary, South-Nageshar Choudbary, North-Sriniwas's barren land. He took statement of Veena Devi, Balmukund, Akhilesh Kumar. He had conducted raid to apprehend Mesho Choudhary, as he was absconding, could not apprehended. Got the material exhibits examined by Sergeant Major. Received sanction order. Sent the pistol and cartridges to the FSL laboratory and the report is available on the record. Then thereafter, submitted charge sheet. He had produced the material exhibits in court and all have been exhibited. Then had exhibited the seizure list. During cross-



examination, he had stated that material exhibits have been brought up in a bag tied by a rope having no sealed over it. There happens to be no sealed mark over the bag. There are two bags inside the main bag which also did not contain sealed mark. Then had disclosed that out of seizure of semi manufactured pistol, the P.S. Case number is scribe over only one. Save and except one, others did not contain the specific mark and in likewise manner, there happens to be connectivity relating to magazine, barrel, slide, pharma of slide, pharma of carbine. In likewise manner over file, Heksa Grappling Machine there happens to be no P.S. case number. In para-18, he had stated that there happens to be absence of independent witness over the seizure list. In para-19 he had stated that he had examined independent witness under para-49, 50 of the case diary. In para-21, he had stated that he had not mentioned in the case diary with regard to length, breath and depth of the ditch and in likewise manner dimension of the hole having in the wall. In para-24 he had admitted that he had prepared sketch map of the P.O. Thereafter, the witness was recalled for exhibiting the material exhibits, pistol and live cartridges allegedly recovered from possession of Rekha Devi and was sent to FSL, seal was broken in the court itself and was accordingly exhibited. On that very score he had stated that no specific mark has been put over the same.

13. PW.3 is the informant. During his examination-in-chief, he had stated that after receiving confidential information regarding running of illegal gun factory by the Mesho Choudhary, a raiding party was constituted and then raid was conducted. The articles so



enumerated in the seizure list were recovered from the ditch having in the courtyard, while from a hole having in the wall of the house (detailed) and for that, in presence of seizure list witnesses, search cum Seizure List was prepared. One lady was standing at one side who was searched with the held of lady constable Veena Kumari and from the Jhola, which she was carrying one pistol along with three magazine were found for that seizure list was prepared. The aforesaid lady was apprehended. Then they returned back from the place along with accused as well as seized article. After registration of the case, investigation was entrusted to Lalan Paswan. During cross-examination in para-3 he had disclosed that he had put identification mark over each of the seized article. Then corrected as he had put his initial over each item. He had further stated that aforesaid activity has not been mentioned in his self statement nor in the seizure list. Articles were carried on police jeep. Seized articles were deposited in the Malkhana. Articles are being deposited in the Malkhana under Malkhana register. Then had submitted that till his further statement, articles were not deposited in the Malkhana. After the further statement, same was deposited. In para-9, he had further stated that he had not put proper identification mark over the articles recovered from a ditch. In paras-22,23,24 there happens to be detailed description with regard to articles having been kept in a ditch. In para-26, he had further mentioned that there happens to be no description in his self-statement as well as seizure list with regard to sealing of the articles. In para-38, he had stated that house of the accused was identified by the chowkidar. In para-40, there happens to be suggestion that the house where articles were seized does not



belong to the accused.

14. PW.5 is Akhilesh Kumar and PW.6 is the Balmukund Sah, both seizure list witnesses as well as ASI who have participated during course of conduction of raid and further, corroborated the recovery, preparation of search cum seizure list. Apprehension of Rekha Devi and recovery of firearms from a Jhola possessed by her. During cross-examination PW.5 had stated in para-2 that articles were seized from three places and for that two, seizure list were prepared. He stood witness relating to one seizure list. In para-4 he had stated that there was no specific mark affixed over each item at the place of occurrence. All the items were kept in a bag and then taken to police station. In para-17 he had denied suggestion that nothing was recovered from the house of the accused. PW.6 during his cross-examination had stated at para-9 that none of the villagers came during course of raid. In para-10, he had stated that he is unable to say whether mukhiya, surpanch were called on. However, the persons having their houses in the vicinity were called upon. Search cum seizure list was prepared. In para-13 he had stated that no specific mark was put over the seized articles at the place of occurrence. All the items were kept in a bag and then taken to the police station. He had also been suggested that nothing was recovered from the house of the accused.

15. PW.1 is lady constable who was requested to participate in a raiding party and accordingly, she came from east colony P.S. and joined the raiding party who conducted raid at the house of Mesho Chaudhary. She had further disclosed that Mesho



Choudhary and one female were arrested. Female was searched out and during course thereof, firearm, magazine were recovered from a bag (Jhola) which she was carrying. She had identified both the accused persons. During cross-examination at para-9 she had stated that Officer-in-charge had affixed chit over which, she had signed. One ASI had also put signature over the same. She stood seizure witness relating to seizure of arms and magazine from possession of the female over which, she had put her signature. In para-15 she had further stated that all the persons having their adjacent house fled away seeing the police. She had also denied the suggestion that nothing was recovered from the house of the appellant.

16. PW.2 is formal in nature in the background of perceiving his status wherein he had exhibited sanction order granted by the District Magistrate. Nothing substantial is found in his cross-examination.

17. The judicial pronouncement having placed on behalf of appellants substantiated the argument having on behalf of appellant that non sealing of the material exhibit at the place of occurrence would cast a doubt over genuineness of the prosecution version. On the other hand there happens to be settled proposition of law that the principle so decided is to be seen with the facts of the case to trace out its applicability. So far facts of the present case is concerned, it is apparent that no independent person has been shown as seizure list witness but, there happens to be no denial at the end of the appellant that police had not visited their place as well as had not arrested lady accused, Rekha Devi. It is also found from the record that four



witnesses have been examined on behalf of appellants/accused and all have categorically admitted that police had conducted raid at the house of Mesho Choudhary and during course thereof, they have gone inside the house of Mesho Choudhary. They deposed that nothing was recovered therefrom but, none of them had claimed to have gone inside the house of Mesho Choudhary along with police or, during the stay of the police. In the aforesaid background none presence of independent witness is not going to give any adverse impact.

18. It is also evident from the cross-examination of all the police officials that neither they were cross-examined on the score of personal grudge, vendetta nor it was so suggested. In the aforesaid background there was no occasion for the police officials to depose out of grudge. Therefore, their evidences are to be adjudged like ordinary witness and that has repeatedly been held by the Apex Court more recently in *Baldev Singh vs. State of Haryana* reported in *2016 Cr.L.J. 154*.

“10. There is no legal proposition that evidence of police officials unless supported by independent evidence is unworthy of acceptance. Evidence of police witnesses cannot be discarded merely on the ground that they belong to police force and interested in the investigation and their desire to see the success of the case. Prudence however requires that the evidence of police officials who are interested in the outcome of the result of the case needs to be carefully scrutinized and independently appreciated. Mere fact that they are police officials does not by itself give rise to any doubt about their creditworthiness.

11. Observing that no infirmity is attached to the testimony of police officials merely because they belong to police force and that conviction can be based on the testimony of police officials in *Girja Prasad (dead) by LRs. vs. State of M.P.*, AIR 2007 SCW 5589 = (2007) 7 SCC 625, it was held as under:-

“[24] In our judgment, the above proposition does



not lay down correct law on the point. It is well-settled that credibility of witness has to be tested on the touchstone of truthfulness and trustworthiness. It is quite possible that in a given case, a Court of Law may not base conviction solely on the evidence of Complainant or a Police Official but it is not the law that police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption that every person acts honestly applies as much in favour of a Police Official as any other person. No infirmity attaches to the testimony of Police Officials merely because they belong to Police Force. There is no rule of law which lays down that no conviction can be recorded on the testimony of Police Officials even if such evidence is otherwise reliable and trustworthy. The rule of prudence may require more careful scrutiny of their evidence. But, if the Court is convinced that what was stated by a witness has a ring of truth, conviction can be based on such evidence.

[25] It is not necessary to refer to various decisions on the point. We may, however, state that before more than half-a-century, in the leading case of *Aher Raja Khima v. State of Saurashtra*, AIR 1956 SC 217, Venkatarama Ayyar, J. stated:

“The presumption that a person acts honestly applies as much in favour of a police officer as of other persons, and it is not judicial approach to distrust and suspect him without good grounds therefor. Such an attitude could do neither credit to the magistracy nor good to the public. It can only run down the prestige of the police administration”.

(emphasis supplied)

[26] In *Tahir v. State (Delhi)*, (1996) 3 SCC 338, dealing with a similar question, Dr. A.S. Anand, J. (as His Lordship then was) stated:

“Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case.”

19. From the evidence of PW.7, Sergeant Major, it is apparent that all the material articles except the pistol and three magazine recovered from Rekha Kumari were placed for proper



examination and report on the date of occurrence itself by the Investigating Officer whereupon he submitted his report which the appellants failed to demolish. In the aforesaid background, as well as considering the seized material in bulk and having signature of the officials concerned over one of the item of each category, supports the recovery. In likewise manner whether sealing of the articles so recovered was possible at the site itself, whereupon no cross-examination was made. At least, there should be feasibility on that very score. Furthermore, had there been any sort of doubt or grievances it was open for the appellant to have called for the malkhana register in order to challenge veracity of the evidence. Apart from this, Ext.9 the FSL report regarding seized pistol with magazine should also be taken note of which was duly marked, sealed and the same was removed in the court itself. There happens to be no cross-examination of Investigating Officer on that very score. Furthermore material exhibits have been brought up before the court and is in consonance with the details made in the search cum seizure list, and with regard thereto, defence had not challenged. Recovery of arms and ammunition being manufactured in such huge quantity completely rules out false implication, more so, when the defence failed to substantiate. At the present moment, the evidence of PW.1 looks desirable to be referred, as she during her examination-in-chief had deposed that Mesho Choudhary as well as Rekha Devi both were apprehended which is not actual fact as, Mesho Choudhary succeeded in his escape by scaling the wall.

20. Now coming to propriety of the conviction, appellant



Rekha Devi has not been charged with the aid of Section 35 of the Arms Act rather, she has been conjointly charged along with her husband. There happens to be no evidence on the score that she happens to be involved in such activity along with her husband save and except having in possession of a bag wherefrom a pistol and three magazine were recovered, seized. It is also not happens to be case of prosecution that seized arms and ammunition belongs to prohibited one, satisfying the ingredients prescribed under Section 2(h),(i) of the Arms Act. Apart from this, the country side still suffers from patriarchal mode of governance and in the aforesaid background, it looks appropriate to set aside the conviction and sentence recorded by the learned lower court against her with regard to remaining sections of the Arms Act save and except 25(1-B)(a) of the Arms Act inflicted by the learned lower court, reducing the sentence as already undergone in the background of the fact that she remained under custody for approximately three years. She is on bail hence discharged from its liability.

21. So far appellant Mesho Choudhary is concerned, he is found guilty for an offence punishable under Section 25(1)(a), 25(1-B),(a)(c), as well as 26(2) of the Arms Act, and for that is sentenced to undergo R.I. for five years as well as fine of Rs.5000/-, R.I. for three years, R.I. for five years as well as fine of Rs.5000/- respectively and in default of payment of fine, to undergo R.I. for one month under each head, with a further direction to run the sentences concurrently. The conviction and sentence under Section 26(1) of the Arms Act is not found duly substantiated, hence set aside. With the aforesaid



modification, both the Appeals are partly allowed. Appellant is under custody which he will remain till saturation of the sentences.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

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