

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.100 of 1994

Against the judgment of conviction dated 18.02.1994 and order of sentence dated 19.02.1994 passed in Sessions Trial No.142 of 1990 by 2nd Additional Sessions Judge, Bhagalpur.

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1. Mohd. Abbas Ansari @ Md. Abbas son of Abdul Majeed
 2. Mohd. Imdad @ Md. Imdad Ansari, son of Hafiz Ilyas.
 3. Mohd. Tanweer son of Mohd. Abbas
 4. Mohd. Mohsim @ Mohd. Mohtasim son of Mohd Yakub
 5. Mohd. Irfan, son of Hafiz Ilyas

All residents of Champanagar, P.S. Nath Nagar, District Bhagalpur.

6. Abdul Quadir son of late Mohd. Nayeem
7. Mohd. Rustam @ Rustam son of Idris.
8. Mohd. Akram son of Mohd. Ismail
9. Mohd. Talib @ Talib son of Late Tunna Mian.

All residents of Tola Qasba Champa Nagar P.S. Nathnagar, District-Bhagalpur.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Bharat Lal, Advocate

For the Respondent/s : Mr. Dr. Mayanand Jha, A.P.P.

CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY

ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 07-11-2017

Appellants herein, who have been convicted for offence under Section 148 of the Indian Penal Code (for short, 'the Code') to undergo one year rigorous imprisonment, six years rigorous imprisonment for offence under Section 307 read with Section 149 of the Code, one year rigorous imprisonment for offence under Section 353 of the Code, two years rigorous imprisonment for



offence under Section 153B of the Code and rigorous imprisonment for ten years for offence under Section 3 of the Explosive Substance Act, 1908 (for short, 'the Act'), 15 years rigorous imprisonment for offence under Section 4 of the Act and 10 years rigorous imprisonment for offence under Section 5 of the Act vide judgment dated 18.02.1994 passed by the 2nd Additional Sessions Judge, Bhagalpur in Sessions Trial No.142 of 1990, have filed this appeal under Section 374 (2) of the Code of Criminal Procedure.

It is a case of the prosecution that on 15.11.1989 at about 12 in the afternoon, the informant Achuta Prasad, Inspector of Police and who has been examined as P.W.1, gave a report that while he and other members of the force, who were on patrolling duty along with Jawans belonging to the Bihar Military Police and when they reached Mohalla Murgia Chak under Nathnagar police station, they heard sounds of bomb explosion. The sound was coming from the direction of Tanti Bazar. They immediately went to the spot and found that from the roof top of the house of appellant no.1 Md. Abbas Ansari, bombs were being thrown and slogans were being shouted. The patrolling party warned them, but they did not stop and, therefore, a raid was conducted into the house of Md. Abbas Ansari. 28 number of live bombs were recovered and all the



appellants were apprehended from the house. It was said that because of the above, they were prosecuted and having been convicted, as indicated hereinabove, this appeal.

We may take note of the fact that when the incident took place and when the judgment was pronounced in the year 1994, appellant no.1 Md. Abbas Ansari was more than 60 years of age and now his whereabouts are not known and nobody is aware as to whether he is alive or not.

Be that as it may be, the appellants are convicted based on the aforesaid facts and the witnesses to the prosecution, more than 12 in number, are mostly officers of the police party, who speak about the story, as narrated by the prosecution. However, we find from the material available on record that not a single police personnel or individual has been injured, no medical evidence is available with regard to injury sustained and only because an attempt was made to cause injury by throwing of bombs, offences under Section 307 have been formulated. However, the main offences for which action has been taken against the appellants are the provisions of Sections 3, 4 and 5 of the Explosive Substances Act, 1908.

Even though, during the course of the hearing, learned counsel for the appellants by placing reliance on a judgment of the



Hon'ble Supreme Court in the Case of **Madan Mohan Singh versus State of Uttar Pradesh, AIR 1954 SC 637**, tried to argue that sanction under Section 7 of the Act has not been accorded properly and the sanctioning authority without application of mind and even without assessing the fact, based on which the sanction was sought for has proceeded in the matter, but on a perusal of Ext.-6, the sanction order, we find that based on a detailed report and the copy of the FIR placed along with the documents sanction has been accorded by the District Magistrate, the competent authority, and there is no illegality or lacunae in grant of sanction.

However, we find that the appellants have been convicted under Sections 3, 4 and 5 of the Explosive Substance Act and, therefore, for convicting them under these provisions, it has to be established that the appellants were using explosive substance as an explosive endangering the life and was attempting to cause injury to property and persons. The precondition for making out an offence under Sections 3, 4 and 5 of the Act is possessing and use of explosive for the purpose of endangering human life, property and possessing the explosive. Explosive substance is defined in Section 2(a) of the Act to include all materials that may be used for making any explosive substance which includes apparatus, machine, implement or material used etc. In the Explosive



Substance Act of 1884, an explosive is defined as a gunpowder, nitroglycerine, nitroglycol, gun cotton etc. and it is a chemical compound or a mixture of substances, whether solid or liquid or gaseous which is used as an explosive substance. Accordingly, the precondition for convicting and prosecuting a person under the Act that the material seized is an explosive or an explosive substance and is capable of being used so as an explosive material or substance. Except for the fact that the witnesses for the prosecution say that they had seized 28 bombs from the house of appellant no.1 and all the appellants were apprehended from the house, there is no cogent evidence adduced to show that what was seized from the house of appellant no.1 was a substance which can be termed as an explosive substance or which was capable of being used as an explosive. To prove that the explosive was used as an explosive substance, an expert, who had examined the substance, namely P.W.12 Subrat Gupta, a Scientific Officer, has been examined and his expert report, Ext.-7, has been produced by the prosecution. From the statement of P.W.12, the Scientific Officer, and the report, Ext.-7, submitted by him, it is seen that his report is based only on physical examination of the substance and he records a finding that he found yellow colour powder which look like explosive and certain powder which look like aluminum



colour and certain chips. He says that on physical examination, he gave his opinion that the articles seized look like country-made bomb. He specifically admits in his cross-examination that he has not conducted any chemical examination of the seized article and he is unable to give any opinion as to what are the chemical substance which form part of the so-called seized bombs which were termed as explosive substance.

On a close scrutiny of this witness, P.W.12, it is clear that it is based on the physical examination of the material seized that he had given his opinion and the same has not been proved by scientific chemical examination of the material. It is only his opinion on physical analysis and seeing the material that it may be country-made bombs. Even the chemical used are not detailed by him in the report. He only says that he found yellow colour powder and certain powder having colour of aluminum. He is unable to say that as to what were the chemical used in the substance and says that it can be done only by chemical examination and he has not undertaken any chemical examination.

That being the nature of the evidence that has come on record, it is a case where the fact about the seizure of the material being an explosive substance is not at all established and once the prosecution has failed to establish that the material seized comes in



the category of an explosive or explosive substance as defined under the Explosive Act or the Explosive Substance Act, the entire case of the prosecution becomes doubtful and any conviction based on such an evidence, in our considered view, is unsustainable. For convicting the appellants for offence under Sections 3, 4 and 5 of the Explosive Substance Act, the precondition necessary is that substance seized is an explosive substance and when the expert evidence available on record does not prove that the substance seized is an explosive substance, conviction based on the evidence is unsustainable.

Accordingly, finding the prosecution to have miserably failed to establish their case and the conviction being based on material which does not prove the case of the prosecution, we allow this appeal, quash the order of the trial Court convicting the appellants, acquit them of all the charges levelled against them. Their bail bonds be discharged and they be set free.

(Rajendra Menon, CJ)

(Anil Kumar Upadhyay, J)

Sunil/-

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