

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.1027 of 2008

Arising Out of PS.Case No. -0 Year- null Thana -null District- SIWAN

=====

Md. Shahabuddin, son of S.M.Hasibullah, resident of village Pratappur,
P.S.Hussainganj, District Siwan

.... Appellant

Versus

The State of Bihar

.... Respondent

=====

Appearance :

For the Appellant/s : Mr.Y.V.Giri, Sr.Advocate with
M/S Fauzia Shakil, Humanyu Ahmad Khan,
Advocates

For the Respondent/s : Mr. Abhimanyu Sharma, APP

=====

CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

CAV JUDGMENT

Date: 18-07-2017

This appeal is directed against the judgment and order dated 26.9.2008 passed by Sri Gyaneshwar Srivastava, 1st Additional Sessions Judge-cum-Presiding Officer, Special Court, Siwan Jail, Siwan in Sessions Trial 18 of 2007 by which he has convicted the sole appellant under Sections 25(1-B)(a)/35 and 25(1)(1A)/35 of the Arms Act and acquitted the appellant from the charges under Sections 122, 123 of the Indian Penal Code and Sections 26/35 of the Arms Act and sentenced him to undergo rigorous imprisonment for three years under Sections 25(1-B)(a)/35 of the Arms Act and a fine of Rs.5,000/- and in case of default in payment of fine he has to undergo simple imprisonment for six months and further sentenced him to 10 years rigorous imprisonment under Sections 25(1)(1A)/35 of the Arms Act



and a fine of Rs.10,000/- and in default of payment of fine he has to undergo simple imprisonment for one year.

2. Prosecution case, in brief, is that a written report has been filed by Sri Ran Vijay Singh (P.W.7), the then Officer-in-Charge, Hussainganj Police Station stating, inter alia, therein that on 24.4.2005 at 12.15 hours on the basis of previous information he along with S.I. Ayodhya Prasad, Arvind Kumar Khan of Hussainganj Police Station, Ved Prakash Mehta of Siwan Town Police Station, Gauri Kumar, STF Police Personnel, B.K.Jha, Executive Magistrate, Mirza Aarif Raza, D.T.O., Siwan and local witnesses, namely, Sk. Hatim and Nashim Ahmed raided the house of the appellant and on search being made in a room situated on the ground floor facing towards south, and from the beneath of Divan bed 11 cartridges Winchester 30.06 S.P.R.G. (Hollow Tips), 16 cartridges of 30.06 S.P.R.G., four cartridges of 30.06 golden colour P.O.F. embedded on it, 46 cartridges of golden colour of 30.06, one cartridge of AYNCH 7.5, three cartridges of S & B 6.35, 24 cartridges of 8 mm, one automatic German made pistol with magazine fitted with laser device, 23 cartridges of S.A.B. 30.06, three cartridges, 25 cartridges of 7.62 mm with five chargers, 15 cartridges of 9 mm K.F. and 25 cartridges of F.C.3.75 were recovered. All the cartridges were kept in a bag and seizure list was prepared in presence of the witnesses and their



signatures were taken over it and copy of the seizure list was handed over to the father of the appellant. He has also alleged that that brother of the appellant, namely, Shamsuddin, disclosed that the recovered arms and ammunitions belong to the appellant. Thereafter the informant got self-statement recorded at the place of occurrence and took over the investigation of the case.

3. On the basis of the aforesaid report, Hussainganj P.S.Case No. 44 of 2005 was instituted under Sections 25(1-B)(a)/26 of the Arms Act and investigation commenced. The Investigating Agency, after completion of investigation, submitted charge-sheet under Sections 121, 121(A), 122, 123 of the Indian Penal Code read with Sections 25(1-B)(a)/26 of the Arms Act.

4. Cognizance of the offence was taken and the case was committed to the court of sessions, which ultimately came to the file of Sri Gyaneshwar Srivastava, 1st Additional Sessions Judge-cum-Presiding Officer, Special Court, Siwan Jail, Siwan for trial and disposal. Defence of the appellant as per the statement made under Section 313 Cr.P.C. is that of simply denial of the occurrence and also defence is that he was not present there and the District Magistrate, Siwan ordered for internment for the district and further that the house from where firearms were recovered, is not the house of the appellant and further defence is of false implication.



5. It is relevant to mention here that the State Government in consultation with the Hon'ble High Court constituted Special Court for trial of the appellant inside Siwan jail.

6. Earlier charges were framed against the appellant under Section 25(1 b)(a)/35 of the Arms Act as well as 26 of the Arms Act and Sections 122 and 123 IPC in which appellant has been pleaded not guilty and agreed to face trial. It further appears that later on charges were framed under Section 25(1)(1a) of the Arms Act and 35 of the Arms Act has been added on 5.5.2008 to which also appellant has pleaded not guilty.

7. Learned trial court on completion of trial has convicted the appellant, as stated above and sentenced him, as stated above.

8. Being aggrieved by the conviction and sentence this appeal has been preferred by the appellant.

9. During trial altogether eight witnesses have been examined on behalf of prosecution, they are P.W.1 Gauri Kumari, S.I., P.W.2 Mirza Arif Raza, Executive Magistrate, P.W.3 Arvind Kumar Khan, ASI of Police, P.W.4 Binod Kumar Jha, seizure and search witness, P.W.5 Sheikh Hatim, seizure list witness, P.W.6 Ved Prakash Mehta, Inspector of Police, P.W.7 Ran Vijay Singh, I.O.-cum-Informant and P.W.8 Peter Bagla, Sergeant Major.



10. Apart from the above, the following documents have been admitted as exhibits in this case, they are Ext.1- signature of Mirza Arif Raza on the seizure list, Ext.1/1- Signature of B.K.Jha on the seizure list, Ext.1/2- signature of Sheikh Hatim on the seizure list, Ext 2- seizure list, Ext.3- self statement of Ran Vijay Singh, Ext. 4- Formal FIR, Ext.5- sanction of prosecution, Ext. 1/3- signature of Peter Bagla on the report and Ext.6- typed report, submitted by Peter Bagla.

11. It also appears from perusal of record that seized articles have been produced in court and they have been marked material exhibits as follows :

“Material Ext.1 - One automatic pistol with laser,
Material Exts II to II/24- 25 cartridges of 0.375,
Material Exts. III to III/23- 24 cartridges of 8 mm
Material Exts. IV to IV/23 – 23 cartridges of 30.06 (SPRG),
Material Exts. V to V/2 – 3 chargers,
Material Exts. VI to VI/24 – 25 cartridges of 7.62
Material Exts. VII to VII/4 – 5 chargers
Material Exts. VIII to VIII/14 – 15 cartridges of 8 mm
Material Exts. IX to IX/15 – 16 cartridges of 30.06,
Material Exts. X to X/3 – 4 cartridges of 7.65 & 6.35
Material Exts. XI to XI/10 – 11 cartridges of 30.6 (Winchester)
Material Exts. XII to XII/3 – 4 cartridges of 30 KPOF
Material Exts. XIII to XIII/15 – 16 cartridges of 30.6
Material Exts. XIV to XIV/4 – 5 cartridges of 8 mm
Material Exts. XV to XV/24 – 25 cartridges of 8 mm
Material Exts. XVI to XVI/1 – 2 Rixin bags”

12. On behalf of defence no oral evidence has been adduced but the following documents have been brought on record as Exhibits : Ext.A- report of Superintendent, District jail, Siwan (letter no. 65 dated 22.1.2008), Ext.B- order-sheet dated 13.8.2005 in Siwan



Mufassil P.S.Case No. 8 of 2001, Ext.B/1- certified copy of order passed on 18.2.2005 by Hon'ble High Court, Patna in Misc.Case No. 8435 of 2004, Ext.B/2- certified copy of order dated 18.2.2005 in C.C. Act case No. 4 of 2005, Ext.B/3- certified copy of order dated 14.12.2005 of Commissioner, Saran, Chapra in Crime Control Appeal No. 95 of 2005-06, Ext.B/4- certified copy of order of Commissioner, Saran, Chapra in BCCA Appeal Case No. 35 of 2005, Md. Shahabuddin (accused) vs. State of Bihar, Ext.B/5- certified copy of order dated 25.4.2005 in Misc.Case No. 47 of 2005, Ext.B/6- certified copy of order passed in Sessions Trial No. 63 of 2004, Ext.B/7- certified copy of order of Collector, Siwan Ext.C- paragraph-69 of case diary with original case diary, Ext.D- certified true copy of the petition in Cr.Misc.No. 47 of 2005, and Ext.E- certified copy of bail bond of accused Md. Shahabuddin in Sessions Trial No. 63 of 2004.

13. On perusal of oral evidence adduced on behalf of prosecution it appears that P.W.7 is the Informant as well as Investigating Officer of the case and his evidence in chief discloses that on 24.4.2005 he was posted as Officer-in-Charge of Hussainganj Police Station and at about 11.40 A.M. he had gone to the house of the appellant for raid along with S.I. Arbind Khan, Ayodha Prasad and armed force. From before Ved Prakash Mehta, Inspector of Police, Siwan Town Police Station, Gauri Kumari. STF Police



Personnel, B.K.Jha, Executive Magistrate and Mirza Aarif Raza, DTO, Siwan were present there. This witness has also stated that during search from the room situated on the ground floor facing towards south a Diwan was there and from the beneath of Diwan he has found 11 cartridges of 30.06 on which SPRG was written, 16 cartridges of 30.06 on which SPRG was written, 4 golden colour cartridges of 30.06 on which POF was written, one German made automatic pistol fitted with laser and charger, 24 cartridges of 8 mm, one cartridge of 7.65 on which KYNOCH was written, three cartridges of 6.35, 23 cartridges of 30.06 along with three chargers, 25 cartridges of 7.62 mm along with five chargers, 15 cartridges of 8 mm KF and 25 cartridges of 0.375 were recovered. His evidence further shows that he prepared seizure list of the seized articles and taken signatures of the local witnesses as well as B.K.Jha and Mirza Aarif Raza. His evidence further disclosed that father of the appellant has informed that all these articles belong to the appellant and a copy of seizure list has been handed over to the father of appellant. This witness has further proved the articles, which have been seized by him and kept in a bag after seizure. Evidence of this witness further shows that the seized articles were kept in a bag and deposited in Malkhana and on the direction of court the same was sent to the Sergeant Major for examination and after examination the Sergeant Major has sealed



the articles and sent to me.

14. Evidence of P.W.7 in his examination in chief also discloses that the place of occurrence was the house of the appellant and in the ground floor there were six rooms and kitchen and from this floor, from a room facing south the seized articles were recovered beneath the Diwan. He has also stated that he obtained report from Sergeant Major about the examination of the seized articles and after obtaining the sanction submitted charge-sheet. Evidence of this witness in cross examination in paragraphs 28 & 29 further shows that he has produced the seized articles before the Chief Judicial Magistrate and after obtaining permission from court he sent the articles to the Sergeant Major, Siwan for examination, who returned the same in sealed envelop with cloths and obtained sanction order also. His evidence in paragraph-31 further shows that he has not recorded the evidence of Hasabuallah and neither he has arrested the persons present there nor made them accused in this case.

15. P.W.1, Gauri Kumari, discloses that on 24.4.2005 she was posted in Town Police Station as S.I. and on that day, on the order of S.P. she went along with Ved Prakash Mehta, Officer-in-Charge of Police Station to the house of the appellant at Pratappur, Ran Vijay Singh(P.W.7), Officer-in-Charge, Hussainganj Police Station was present along with his companions and Mirza Aarif Raza,



B.K.Jha, Satish Charan Jha and Mukhiya of village Md. Ashfak Sheikh Hatim, Nashir and others were present. Her evidence further shows that at 11.30 A.M. house of the appellant was raided and from the south facing room of the ground floor, from inside Diwan, riffle, a large number of cartridges of pistol, one German made pistol and charger were recovered. Thereafter seizure list was prepared by Officer-in-Charge of Hussainganj Police Station.

16. P.W.2, Mirza Aarif Raza has stated in his evidence that on 24.4.2005 he was posted at Siwan and on that day he along with Magistrate B.K.Jha and police officers had gone to the house of the appellant where search was going on and during search some cartridges and pistol were recovered from the ground floor of the house of the appellant and seizure list was prepared and he has identified his signature as Ext.1. This witness has been cross examined to show that on 24.4.2005 an order was issued for conducting fair examination of Bihar Public Service Commission and as per the order he has to remain in the control room from 10 A.M. till the examination is over. This witness has denied the suggestion that nothing was seized in his presence and he has not gone to Pratappur.

17. P.W.3, Arvind Kumar Khan, has stated in his evidence that on 24.4.2005 at 11.30 A.M. he along with Officer-in-Charge of Hussainganj Police Station Ran Vijay Singh and S.I.



Ayodha Prasad had gone to the house of the appellant there from before S.I. Gauri Kumari, Ved Prasad Mehta, Executive Magistrate, B.K. Jha and others were present and from the ground floor of the house of the appellant from a room facing south seized articles were recovered from inside Diwan. Thereafter seizure list was prepared by Officer-in-Charge. His attention was drawn towards the evidence made by him before Sri B.B. Gupta, Judicial Magistrate, in connection with Hussainganj P.S. Case No. 43 of 2005 in which he has stated that he has not gone inside the Bhawan and he could not say as to how many rooms were there. He has again made it clear in paragraph-9 of his deposition that the house from which recovery was made is of ancestral house of the appellant. A suggestion has also been given to this witness that he has deposed falsely and no seizure was made in his presence.

18. P.W.4, Binod Kumar Jha has stated in his evidence that on the day of occurrence, i.e., 24.4.2005, he had gone to village Pratappur at 11 A.M. and at that time he was posted as Deputy Collector Nazarat and as per order of District Magistrate he had to arrange refreshment for the officers who had gone to Pratappur and he had taken his refreshment. His evidence shows that from before Mirza Aarif Khan, D.M., Siwan, S.P. and other police officers were there at the house of the appellant. This witness has stated that in his presence



from the house of appellant one pistol and cartridges were recovered. He has further stated that when he arrived there recovery had already been made and seizure list was prepared by Darogaji and he had identified his signature on the seizure list. This witness has also been cross examined about his duty in the BPSC examination on 24.4.2005 and he further disclosed that on the order of D.M. he made signature on the seizure list and after delivering the refreshment he returned from Pratappur.

19. P.W.5, Sheikh Hatim, has stated in his evidence that in his presence nothing was recovered from the house of the appellant. However, he had identified his signature on the seizure list and also has stated that below his signature he had written 24.4.2005. Thereafter this witness had been declared hostile. This witness had admitted in his cross examination in paragraph-11 that appellant was his patidar and he has again cross examined by defence. He has stated that on 24.4.2005 he was not present in the village and on 26.4.2005 Darogaji called him and Hasibullah and taken their signature on the paper on the plea that articles of the appellant had to be returned. This witness has further stated in paragraph-16 that Darogaji told about returning of articles like foreign currency, mobile, jewellery recovered from the house of the appellant, his father and patidars. He has also stated in his cross examination in paragraph-16 that foreign currency,



cash, mobile, watches and ornaments were recovered from the house of appellant and his patidars. Evidence of this witness in cross examination by defence also shows that last four elections appellant was M.P. and earlier to that he was M.L.A.

20. P.W.6, Ved Prakash Mehta, has stated in his evidence that on 24.4.2005 at 11.40 A.M. he had gone to house of the appellant and there from before Ran Vijay Singh, Gauri Kumari, B.K.Jha and other ASI were present and from the house of the appellant seized articles were recovered and seizure list was prepared. In paragraph-8 of his cross examination he has stated that in the house of the appellant his patidars were residing but he could not say as to how many patidars were there and also admitted in paragraph-14 that male and female present there were not arrested.

21 P.W.8, Peter Bagla, has stated that on 15.7.2005 he was posted as Sergeant Major at Siwan Police Line and on the very day Officer-in-Charge of Hussainganj Police Station had brought arms and ammunitions before him in connection with Hussainganj P.S.Case No. 44 of 2005 for examination and after examination he submitted typed report and he had proved the report (Ext.6) and his evidence in chief further shows that he found material exhibit No.1 a Laser automatic pistol which was found in working condition and also found the seized cartridges and chargers live. Evidence of this witness



in cross examination also shows that repairing of Government arms and ammunitions was made under the supervision of Sergeant Major. This evidence shows that he could not open the materials Ext.1 in spite of his effort and also stated that without opening it nothing can be stated about the firing pin and spring. In his cross examination this witness has further stated in paragraph-15 that capacity of materials Ext.1 is of 14 round. He has also been cross examined at length about the function and specification of seized articles but there is nothing to discredit his report. He has also stated that material exhibit-1 at the time of first cock and hammer is single action weapon and after firing it becomes double action weapon. He has also stated that examination of articles was made in police line but in the report it is written at Camp Hussainganj. He has also stated that in the material exhibits he puts some number in pen. Evidence of this witness in paragraph-37 that he was given training in the year 1988 and he has denied a suggestion that he is an untrained expert.

22. From the discussions made above, it appears that the prosecution has brought consistent evidence that the house of the appellant was raided on 24.4.2005 by the informant and other police personnel in presence of Executive Magistrate B.K.Jha (P.W.4) and Mirza Aarif Raja (P.W.2) and during search several articles, including German made pistol, rifle and cartridges were recovered from the



house of the appellant and evidence is also there that those articles were seized and kept in a bag, seizure list was prepared signed by P.Ws. 2 & 4 as well as by P.W.5 and thereafter produced before the Chief Judicial Magistrate on 7.7.2005 and by permission of court the articles were sent to Sergeant Major Peter Bagla (P.W.8) who has found them as live cartridges. Report further shows that once cocked, it starts firing without cock and capacity of firing of 1M round at a time.

23. Learned counsel for the appellant has challenged the prosecution story of search and seizure on the ground that no such search was made at the house of the appellant on the day of occurrence, which will appear from the fact that P.W.4 B.K.Jha and P.W.2 Mirza Aarif Raja, who claim to be present at the place of occurrence and having signed the seizure list also as Ext. 1/1 but the Notification issued by the District Magistrate (Ext.B/7) shows that both have been assigned duty of 14th Competitive Examination of BPSC and evidence of P.W.2 paragraph 5 and P.W.4 paragraph-8 also discloses that they were deputed in BPSC examination and evidence of P.W.4 paragraph-2 also discloses that he was directed to arrange for refreshment for officers gone to Pratappur and he has come with the refreshment at Pratappur and stayed there for half an hour and left. It has also been argued that the above evidence coupled with the fact



that there is no independent witness of the locality in support of seizure and P.W.5 Sheikh Hatim and Md. Nasim Ahmad who were also seizure list witnesses, out of whom one Sheikh Hatim was only examined and P.W.5 has also not supported the prosecution case and stated that his signature was obtained later on at the police station. This makes the whole search and seizure doubtful and manufactured story.

24. It has also been submitted that from the prosecution case as well as the prosecution evidence apparently it appears that appellant was not present at the house and evidence of P.W.7 paragraph-42 also shows that it ancestral house of the appellant in which several patidars were living and, as such, even if the search and seizure is admitted, it cannot be said that seizure was made from the possession of the appellant and prosecution has also not brought any evidence to show that the house belongs to the appellant.

25. On the other hand, learned counsel for the State argued that prosecution evidence is consistent that clearly shows that police party raided the ancestral house of the appellant, in presence of District Magistrate and Superintendent of Police and material exhibits were recovered from the room, situated in ground floor and it was told by father of appellant that the same belongs to the appellant and the aforesaid articles were recovered in presence of one Executive



Magistrate and one Government Officer B.K.Jha (P.W.4) and Md. Aarif Raja (P.W.2), and seizure list was prepared and signed by P.W.5 Mukhiya of Pratappur village. Further argument is that there is nothing in their cross examination to discredit their evidence of search and seizure or to show that they are not trustworthy. So far non-examination of independent witness is concerned, it has been submitted that Hon'ble Supreme Court in catena of decisions held that prosecution case cannot be brushed aside on the ground of non-examination of independent witness, when the evidence of prosecution witnesses is consistent, reliable and trustworthy.

26. In the present case, there is prosecution story that ancestral house of Md. Shahabuddin was raided on 24.4.2005 along with the police personnel and Magistrate B.K.Jha and Mirza Arif Raja, D.T.O., Siwan and prosecution story is that all the material exhibits have been recovered from a room and seizure list was prepared and copy of the same has been given to the father of the appellant, who disclosed that the seized articles are of the appellant. Seizure list (Ext.2) shows that seizure was made at 11.30 A.M. and B.K.Jha, Magistrate (P.W.4) and Mirza Arif Raja, D.T.O. (P.W.2), Sheikh Hatim (P.W.5) and Nasir Ahmad put their signatures. P.W. 2, P.W.4 and P.W.5 all proved their signatures over seizure list, no doubt P.W.5 has not supported the prosecution case, but he has admitted his



signature. Informant, P.W.7 and all police witnesses, namely, P.W.1, P.W.3, P.W.6 have supported the prosecution case with respect to search and seizure of the articles from the house of the appellant and P.W.4 B.K.Jha, Executive Magistrate has also stated in his evidence that in his presence a pistol and cartridges were recovered from the house of Shahabuddin though he has again stated that those articles were already seized and perhaps from almirah and a seizure list was prepared and he has put his signature on the seizure list. Similarly, P.W.2 Mirza Arif Raja, another Government Officer has stated that he along with B.K.Jha had gone to Pratappur and search was going on and during search pistol and cartridges were recovered from the ground floor of the house of the appellant and thereafter seizure list was prepared and he has identified his signature as Ext.1. The evidence of P.W.4 paragraph-2 shows that he was directed by District Magistrate to arrange refreshment for the officials who had gone to Pratappur. Learned counsel for the appellant has drawn my attention towards the Notification (Ext. B/7) issued by District Magistrate also shows that both P.W.2 and P.W.3 were deputed in examination of BPSC held on 24.4.2005, i.e., date of occurrence. However, there is categorical evidence of both the witnesses that they had gone to Pratappur and pistol, cartridges were seized, seizure list was prepared and they put their signatures over this and the same has been



corroborated by evidence of P.Ws. 1, 3, 5 and 7 and there is nothing in their evidence to discredit their evidence or to show that they are deposing falsely. Rather their evidence shows that District magistrate and Superintendent of Police were also present there, as such, the presence of P.W.2 and P.W.4 cannot be doubted at the place of occurrence at the time of occurrence.

27. Contention of learned counsel for the appellant is that prosecution evidence shows that large number of persons had assembled at the place of occurrence, which will appear from evidence of P.W.6 in paragraph-14 but no independent witness was examined. In the present case, it appears that no independent witness has been examined. However, the evidence of P.Ws. clearly shows that appellant was M.P. for last four elections and earlier to that he was MLA and in such a situation when the accused is so powerful, generally no one is ready to become a witness against him. Hence, on that ground the prosecution story cannot be doubted.

28. In this case there is consistent evidence that ancestral house of the appellant was raided and P.W.7 has stated that the articles were recovered from south facing room of the ancestral house of the appellant and he has stated in paragraph-4 that father of the appellant disclosed that the same belongs to the appellant. No doubt, it is an admitted prosecution case that appellant was not present at the



time of search and seizure and the defence has brought a document to show that appellant was ordered internment from the district at that time and he was at Delhi. However, consistent evidence is that ancestral house of the appellant was raided and P.W.5, who is seizure list witness, though has been declared hostile by prosecution, has admitted in his cross examination that he was Mukhiya of Pratappur village since 1990 and this witness has admitted his signature on the seizure list but has stated that nothing was recovered in his presence. Thereafter he was confronted to the statement before police in paragraph-10 of cross examination by the prosecution in which he has stated before police that on 24.4.2005 police has raided the ground floor of the house of the appellant and from one room pistols and cartridges were recovered from inside the diwan and seizure list was prepared and he has put his signature on the seizure list and a copy of the same has been given to father of the appellant. Though he has denied to have made such statement, however it appears from comparison of paragraph-10, which is statement before court, that he has resiled from his earlier statement made before police, as such, he has not deposed the true fact. His evidence paragraph-11 of his cross examination by prosecution shows that appellant is his patidar. In his cross examination by defence, this witness has stated in paragraph-14 that he was not in his house on 14.4.2005 and when on 24.4.2005 he



returned, Darogaji called him on the plea that articles have to be returned and they have taken his signature as well as father of the appellant on 12-15 papers. His evidence in paragraph-16 further shows that foreign exchange, cash, mobile, watches and jewellery were forcible taken by the police from the house of MP and his father and patidars. This piece of evidence of P.W.5 clearly shows that search was conducted in the house of the appellant and his family members on 24.4.2005. Apart from that learned trial court has relied on Ext.D brought on the record by defence, which is a Misc.Petition, filed by father of appellant before the court and in that petition in paragraph-5 father of appellant has admitted that certain valuables belongs to his son, who is MP which were taken away by raiding party. The above admission of father of appellant also disclosed that search was conducted in the house of appellant. As stated above, though P.W.5 has deposed in his evidence that his signature and signature of Md.Habibullah were taken at police station on blank papers but nothing is available on record that any complaint was made to any authority against the same nor Md. Habibullah father of appellant has come forward as defence witness, in support of the above contention of P.W.5.

29. It is well settled principle that prosecution case cannot be discarded only on the point of non-examination of



independent witness specially where there is enough consistent and reliable evidence available on record as there is growing tendency among the people to be indifferent from happening in he society and they are not ready to come forward to become witness. This was also held by Hon'ble Apex Court in the case of **Appabhai vs. State of Gujarat : AIR 1988 SC 696**. At the same time, the evidence of the police officials is also reliable as of the other witnesses. The only precaution has to be taken that their evidence needs close scrutiny and should be corroborated in material particulars. The above view is found favour in the judgment of Hon'ble Apex Court in the case of **Pradeep Narain Madgovkar and others vs. State of Maharashtra : (1995) 4 SCC 255**.

30. In the present case, the evidence of police officials is consistent on the point of search and seizure and they have also stated about the seizure of material exhibits from the house of the appellant and the aforesaid evidence of the police officials has been corroborated by the evidence of P.W.2 Mirza Aarif Raja and P.W.4 B.K.Jha, who are Government officials in whose presence and in presence of DM and SP the seizure was made.

31. In his statement under Section 313 Cr.P.C. though appellant has denied all the questions put by the court and also denied the same that seized fire arms were not of the appellant but his



statements under Section 313 Cr.P.C. either taken on 4.1.2008 nor on 26.8.2008, it appears that he has not denied that the house in which raid was conducted was not of the appellant.

32. In view of the discussions made above, it clearly established that raid was conducted in the house of the appellant.

33. Learned counsel for the appellant has also assailed the judgment on the ground that evidence of P.W.7 itself shows that he is the informant of the case and he has made the seizure and he is also investigating officer himself which has been deprecated by Hon'ble Apex Court in several cases, i.e., in the case of **Megha Singh vs. State of Haryana : 1996(11) SCC 709** has held that I.O. being the informant of the case, naturally he will be interested in justifying the seizure and he will be working with prejudice mind and fair trial cannot be expected from him and the aforesaid view has again been affirmed by Hon'ble Supreme Court in the case of **State by Inspector General of Police, Narcotic Intelligence Bureau, Madurai, Tamilnadu vs. Rajangham : 2010(15) SCC 364**. Further submission of learned counsel for the appellant is that in the present case the articles were not sealed properly nor kept in malkhana with an entry in the register and that cannot rule out a possibility of tampering with the seized articles and also create doubt about the genuineness of the recovery and in this connection also referred decisions of Apex Court



in the case of **Baldev Singh vs. State of Punjab (1990) 4 SCC 692**, **Sahib Singh vs. State of Punjab : (1996) 11 SCC 685**, **Amarjit Singh vs. State of Punjab (1995) Supp (3) SCC 217** and in the case of **Chitwant Singh vs. State of Punjab : (1998) 9 SCC 549** and further referred Clause 165 of Police Manual which provides for the mode of seizure and seal of the articles and which created serious doubt about the genuineness of the seized articles.

34. It has also been argued that admittedly Material Exhibits were sealed on 24.5.2005 and the articles were sent for examination on 14.7.2005 and no explanation has been given for such inordinate delay and evidence of P.W.7 also shows that seized articles were kept in police station for one month. Hence inordinate delay clearly creates a doubt about genuineness of recovery of seized articles and the possibility of tampering with the articles cannot be ruled out.

35. Referring the decisions of Hon'ble Apex Court, as stated above, learned counsel for the appellant has also submitted that in the present case there is delay of about two months in sending the seized articles for examination and there is no explanation for that though in various decisions of the Hon'ble Supreme Court, as cited above, the Hon'ble Court has held that creates a doubt about genuineness of recovery and also cannot rule out the possibility of



tampering with the seized articles. Further argument of learned counsel is that the aforesaid circumstances, i.e., I.O. being the Investigating Officer, articles not being sealed properly and delay in sending the articles for examination have caused a serious doubt about search, seizure and genuineness of the seized articles as well as the report of the Sergeant Major regarding the seized articles.

36. It has also been submitted that in the present case the Sergeant Major is not a competent person to examine the seized articles and the prosecution evidence clearly shows that the seized articles were not sent to the FSL and this also creates a serious aspersion against the prosecution so as to show that intentionally those articles were not sent to the FSL.. had it would have been sent to FSL it would have been clear that Ext.1 is nothing but a toy. Further submission is that P.W.8, the Sergeant Major is not competent to examine the seized articles as not being an expert, hence the report of Sergeant Major does not inspire confidence.

37. In the present case, the evidence of P.W.7 shows that he is the person who has seized the articles and he has taken over investigation of the case also. However, his evidence in paragraph 40 clearly disclosed that on the day of occurrence he was the only Sub Inspector posted at Husainganj Police Station, as such, he has taken over the investigation of the case. As such, it appears that this witness



has given an explanation as to why he has taken over investigation of the case being an informant of the case also. Apart from that in this case, it is not a case that only police witnesses were present at the time of seizure, rather P.W.2 and P.W.4, who were the Executive Magistrate and Government Official and not the police officers, were also present and they are the witnesses of seizure and in their presence articles were seized and the evidence of all the prosecution witnesses are consistent on the search and seizure. On the other hand, on perusal of the judgment in the case of Megha Singh (supra), cited above, it appears that Hon'ble Apex Court in paragraph-4 has observed as follows :

“4. After considering the facts and circumstances of the case, it appears to us that there is discrepancy in the depositions of the P.Ws. 2 and 3 and in the absence of any independent corroboration such discrepancy does not inspire confidence about the reliability of the prosecution case. We have also noted another disturbing feature in this case. P.W.-3, Siri Chand, head Constable arrested the accused and on search being conducted by him a pistol and the cartridges were recovered from the accused. It was on his complaint a formal first information report was lodged and the case was initiated. He being complainant should not have proceeded with the investigation of the case. But it appears to us that he was not only the complainant in the case but he carried on with the investigation and examined witnesses under Section 161, Cr.P.C. Such practice, to say the least, should not be resorted to so that there may not be any occasion to suspect fair and impartial investigation.”



38. In the judgment of State by Inspector General of Police, Narcotic Intelligence Bureau (supra), Hon'ble Apex Court has followed the ratio of decision in the Megha Singh's case.

39. On a perusal of the judgment it appears that in both the cases seizure was made in presence of police officers, who were only present when the seizure was made, whereas in the present case other Government Officers, including Executive Magistrate were present at the time of seizure and P.W.7, who is the Investigating Officer, has also given an explanation that no Sub Inspector other than him was present in Hussainganj Police Station at that time, as such, he has taken over the investigation of the case. In such view of the matter, the fact of the present case is different from the cases cited above by learned counsel for the appellant.

40. Another contention of learned counsel for the appellant about not following the procedure in search and seizure, he has referred a decision, as cited above, as well as Clause 165 of Bihar Police Manual. Clause 165 of Bihar Police Manual deals with mode of search and seizure and sub-clause (f) of Clause 165 provides as follows :

“The investigating officer or the officer conducting a search shall prepare a list of the articles seized and give a copy of the list to the owner of the house. An identification slip shall be pasted on each article seized which shall be signed by the investigating officer and the witnesses.



These articles shall be kept safely in malkhana and no sign or mark shall be given on these articles.”

41. In the present case, on perusal of evidence of P.W.7 it appears that he has stated in paragraph-3 that he has seized all the articles after preparation of seizure list and taken signatures of the local witnesses as well as the witnesses B.K.Jha and Mirza Arif Raza, handed over a copy of the same to father of the appellant and in paragraph-10 he has also stated that he has kept the seized articles in a bag and kept them in malkhana and thereafter they were sent to the Sergeant Major for examination and after examination it was again sealed and sent back to him and his evidence further shows in paragraphs 11 to 17 that he produced all the seized articles kept in sealed cotton envelop after removing the seal and opening the envelop. Hence, the above evidence shows that the articles were kept in a bag and it was sealed also. This witness has also proved material exhibits in this case and his evidence shows that at the time of production of seized articles, they were sealed.

42. On perusal of the judgments cited by learned counsel for the appellant, as stated above, it appears that Hon’ble Supreme Court in the Baldev Singh’s case (supra) has considered the point of delay in sending articles as well as articles not sealed and considering the fact that Ext.P-5 though seized on 15.1.1975 was sent



to the Forensic Science Laboratory only on 27.1.1975 and also after considering other circumstances, came to conclusion that these create doubt about the connection of this cartridge “Exhibit C1 with the crime and in **Kartar Singh’s** case (supra) Hon’ble Apex Court has held in paragraph-8 of the judgment as follows :

“Having regard to the above material contradictions seen in the light of the delay in sending the arm for mechanical test coupled with failure to send the cartridges to P.W.2 armourer we are disinclined to accept the version of the prosecution. We cannot merely rest our conclusion on the statement suffered by the accused during investigation as is done by the learned Judge of the designated court. Under these circumstances, we are obliged to reject the case of the prosecution, which means the appellant is entitled for acquittal.”

Similar view was taken by the Hon’ble Apex Court in **Surender alias Babli vs. State (NCT of Delhi) : (2011) 15 SCC 546** in paragraph-6 of the judgment as follows :

“The weapon was allegedly recovered at the instance of the appellant on 28.2.2001 as per the prosecution story, but curiously enough the bullet as well as the weapon were dispatched to the laboratory together on 3.4.2001. We are unable to fathom as to why the investigating agency did not deem it proper to send the bullet to the laboratory soon after its recovery and the fact that they chose to wait for the weapon of offence to be recovered, casts a clear doubt as the sanctity of the recovery.”

The aforesaid view was affirmed in the other judgments, as referred to above by learned counsel for the appellant in the case of



Saheb Singh (supra), Amarjit Singh (supra) Chitwant Singh (supra).

43. On perusal of the above decisions it also appears that Hon'ble Supreme Court has consistently held that delay in sending articles makes the document suspicious and on the basis of the same it has been held that it is highly unsafe to convict the appellant when the seizing authority has not followed the minimum precaution of the articles being packeted and sealed properly. In the present case, as stated above, there is evidence that the seized articles were kept in a bag and with permission of the court, sent to P.W.8, Sergeant Major for examination and after examination, it was again sealed. Hence, evidences show that the articles were properly kept in a bag after seizure and it was sealed and after removing the seal the same was produced in court.

44. The evidence also shows that there is delay in production of the articles for examination by Sergeant Major, as per prosecution story material exhibits were seized on 24.4.2005, whereas the evidence of P.W.6 shows that the articles were sent for examination on 15.7.2005, i.e., about three months after the occurrence. As discussed above, the Hon'ble Apex Court in the above decisions has found it a circumstance for creating genuineness of recovery of articles. However, in the present case all the seized articles were kept in a sealed condition, produced in court and no



objection was raised with regard to the genuineness of the articles nor any suggestion was given that those articles produced in court are not those articles which were seized at the time of occurrence. In such a situation, a question arises as to whether the consistent evidence available on record as discussed above can be disbelieved only on the ground of this illegality and irregularity of the investigating agency.

Hon'ble Apex Court in the case of **Leela Ram vs. State of Haryana :**

AIR 1999 SC 3717 held in paragraph-8 as follows :

“Before however, proceeding with the matter on two counts as above, it would be convenient to note another aspect of the matter, namely, the observations pertaining to the investigation by the Investigating Agency. It is now a well settled principle that nay irregularity or even an illegality during investigation ought not to be treated as a ground to reject the prosecution case and we need not dilate on the issue excepting referring a decision of this Court [vide State of Rajasthan v. Kishore, AIR 1996 SC 3035 : (1996 AIR SCW 1392 : 1996 Cri, L.J. 2003)].”

45. Considering the above judgments and considering the fact that it appears that there is consistent evidence available on record about the search and seizure and seized articles were kept properly in a bag and produced in court in sealed condition. In such a situation, disbelieving the entire prosecution case on the ground of delay does not appear to be proper to this Court as it will a failure of justice.

46. Learned counsel for the appellant has submitted that material exhibits have not been sent to the FSL for examination and



they were examined by P.W.8, Sergeant Major, who was not expert and competent to examine those articles. It has also been argued that if articles were sent to the FS fact would have been otherwise that Ext.1 is nothing but a toy and this caused a serious prejudice to the defence of the appellant.

47. In this case P.W.8 has examined the seized articles and prepared the report and proved his signature, which is Ext. 1/3 and evidence of this witness clearly shows in paragraph-2 that he has submitted report material Ext.1 that it is an automatic pistol with laser which was found in working condition and in paragraph-3 he has also found that all the cartridges and chargers were in live condition. This witness has been cross examined also at length and he has stated in his evidence in paragraph-8 that repairing of Government arms was made under his supervision and further he has stated that he got training in the year 1988 and he has also denied a suggestion that he is an untrained expert. Learned counsel for appellant raised his argument on the point that he could not open his pistol in spite of his best efforts in paragraph 3 of his deposition and further barrel was fixed and not moving. However, this witness deposed after two years of seizure of articles and during the period two years if it was fixed and he could not open, on that ground it cannot be said that he has not conducted the examination of the exhibits, whereas in paragraph-15 of his



evidence he has stated capacity of Ext.1 is of 14 round and further stated in paragraph-16 that action is of three types, bold action, semi automatic action and automatic action and his evidence also disclosed that the weapon, which works as automatic system is double action. In paragraph-24 he has stated that once Ext.1 was cocked and hammer cocked and at the time of hammer it was a single action weapon and after fixing it becomes double action weapon. His evidence in paragraph-35 further shows that prior to firing it has to be cocked.

48. Considering the entire evidence of P.W.8 it does not appear that he is not a competent witness to examine the seized articles. No doubt there are some discrepancies in his evidence but as he was deposing after two years of occurrence some discrepancy is bound to happen.

49. In this case judgment of the trial court has also been assailed on the ground that admittedly appellant was not present on the day of occurrence and at the place of occurrence and there is nothing available on record to show that any prohibited article was seized. On the other hand, evidence is available on record that appellant, his father, his brother and his wife have arm licences in their names and as they were carrying the licences the seizure of cartridges from the house of appellant does not make out any offence against him. So far Ext.1 is concerned, it has been submitted that there



is nothing available on record to show that it is a prohibited arm. Hence the conviction of the appellant under Sections 25 (1 b) a read with 35 and 25(1)(1A) of the Arms Act is not sustainable in the eye of law.

50. As discussed above, there are consistent, cogent and reliable evidences available on record to show that ancestral house of the appellant has been searched on the day of occurrence and after search one automatic pistol with laser, 25 cartridges of 0.375 mm, 24 cartridges of 8 mm, 23 cartridges of 30.06 (SPRG), three chargers, 25 cartridges of 7.62 mm, five chargers, 15 cartridges of 8 mm, 16 cartridges of 7.65 and 6.35 mm, 11 cartridges of 30.6 (Winchester), 4 cartridges of 30 KPOF, 16 cartridges of 30.6 mm, five cartridges of 8 mm, 25 cartridges of 8 mm and 2 Rexin bags were recovered. Those articles were seized and after preparation of seizure list kept in a bag. Evidence is also there that those articles were sent to P.W.8 and after examination he has submitted his report, which is Ext.6 which shows that Ext.1 is an automatic pistol with laser made of German and it was working condition and cartridges and chargers are live. Apart from that the evidence of P.W.7, who is Investigating Officer, shows that in his cross examination in paragraphs-32, 33 & 34 he has stated that Magazine of Ext.1 is of iron and before fixing it has to be cocked and once it is cocked it starts firing without cock. He has also denied a



suggestion that Ext.1 is a toy. The evidence of P.W.7 also shows that Ext.1 was a prohibited arm as after one cock it starts working without any cock and further those articles after examination were kept in sealed condition and produced before court and in court after removing the seal it was produced and marked as material exhibit. No objection was raised when material exhibits were produced in court after removing the seal that they were not the seized articles. Apart from that as discussed above, the evidence of P.W.5, who is Mukhiya of Pratappur village and also a seizure list witness, also disclosed that the house of the appellant was raised on the day of occurrence and a Miscellaneous Petition was filed by father of the appellant as Ext.D which also suggests that the seizure was made in the house of the appellant and further appellant was examined under Section 313 Cr.P.C. and though he has denied the occurrence but nowhere he has stated that the house does not belong to him. No doubt, evidence has come that appellant and his family members were carrying fire arm licence and they are Exts. A to A/6. All these facts clearly show that house belongs to the appellant and his family members and those articles were recovered from that house of the appellant.

51. Learned counsel for the appellant has submitted that in this case there is nothing available on record to show that Ext.1 is a prohibited arm. On perusal of those licences it appears that those



licences relate to DBBL gun in favour of S.M. Hasibullah, father of the appellant (Ext.A), DBBL gun in the name of appellant (Ext.A1), NP Bore rifle in the name of appellant (Ext.A/2), NP Bore rifle in the name of Hina Sheikh, wife of appellant, NP Bore pistol/rifle in the name of Hamiullah (Ext.A/4), NP Bore rifle in the name of Ekram Ali (Ext.A/5) and DBBL gun in the name of Md. Safique (Ext. A/6). None of the above licences show that those belong to automatic Laser guarded German made pistol and even nowhere appellant has claimed that German made automatic pistol (Ext.1) is a licensee pistol, which can fire 14 round. Rather cross examination has been made on the line that it was a toy.

52. Section **2(i)** of Arms Act provides that fire-arms so designed or adapted that, if pressure is applied to the trigger, missiles continue to be discharged until pressure is removed from the trigger or the magazine containing the missiles is empty. . So far Section **25(1-B)(a)** is concerned, which provides that whoever acquires, has in his possession or carries any fire-arm or ammunition in contravention of section 3, and Section **25(1-A)** provides for punishment that whoever acquires, has in his possession or carries any prohibited arms or prohibited ammunition in contravention of section 7 shall be punishable with imprisonment for a term which shall not be less than five years, but which may extend to ten years and shall also be liable



to fine.

53. In the present case, as discussed above, I find that prosecution has been able to establish that the house from which material exhibits were recovered, is the ancestral house of the appellant and patidars of appellant were also living there. Further material Ext.1 is a German made automatic pistol with laser, which was recovered and as per Section 2(i) of the Arms Act the aforesaid pistol is a prohibited arm and huge number of cartridges were recovered from the ancestral house. There is nothing available on record nor any material has been brought on record by defence that those cartridges were of the licensee gun, rifle and pistol of the appellant and his family members. Once cartridges have been recovered from the house of the appellant, to my opinion, onus is upon the appellant to prove that those cartridges are of licensee guns, rifles and pistols of the appellant and his family members. However, there is no suggestion that cartridges were of licensee gun nor any evidence was adduced by defence to show that they are of licensee firearms. It also appears that order of sanction is also available on record. In such view of the matter, the conviction of the appellant under Section under Section 25(1-B)(a) read with Section 25(1)(1A)/35 of the Arms Act appears to be just and proper and does not require any interference by this Court.



54. Learned counsel for the appellant has also submitted as an alternative argument that appellant was in jail earlier during trial, as such, he is entitled to computation as provided under Section 428 Cr.P.C., which reads as follows :

“S.428- Period of detention undergone by the accused to be set off against the sentence of imprisonment.- Where an accused person has, on conviction, been sentenced to imprisonment for a term, not being imprisonment in default of payment of fine, the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him.”

55. So far application of Section 428 Cr.P.C. is concerned, the same has been considered in what was under consideration in several times before the Hon’ble Apex Court and before this Court also and this Court in the case of Prabhu Sah vs. The State of Bihar & Ors. has dismissed the point of setting off of Section 428 Cr.P.C. and after considering all the judgments of Hon’ble Apex Court has held in paragraphs-28, 29 & 30 of the judgment as follows :

“28.From the aforesaid judgments what we find the true interpretation of S.428 of the Code of Criminal Procedure is that the period of set off as contemplated under Section 428, Cr.P.C. would be the period when in that case a person is first under remand custody as an under-trial and then he is sentenced. If there be more than one case, then, the remand period of each case would be set



off against sentence in that case alone separately for each case even though the remand period may overlap, but the period spent as serving out sentence as a convict in one case cannot be taken into account as a remand period as an under-trial in another case.”

29. In our view, taking any other view would be contrary to the legislative policy. The legislative policy of Section 428 is not to reduce sentence or obliterate the period of punishment but to restrict the sentence effectually to the period awarded by giving benefit of pre-sentence detention in the case where he is ultimately sentenced otherwise as noticed in Atul Manubhai Parekh’s case (AIR 2010 SC (Supp) 429) (supra) it would lead to absurd and unintended results. A person on different dates would commit different and distinct offences but if multiple benefits were to be given on pre-sentence detention of one case to another then if he was ultimately sentenced on different dates for different offences for different periods which we may say to be 3 years, 4 years or 7 years, he will get away with only singular punishment of 7 years even though he has committed many more offences and was punished several times, he would go escort free unpunished so far as the other crime is concerned. That surely is not the legislative intent. The set off would ultimately be on a case to cases basis excluding period during which he is serving out sentence as substantively he is not then an under-trial. The distinction as repeatedly drawn by the Apex Court between the nature and status of detention has to be kept in mind.

30. If we apply this principle then the contention of the State in the present case has to be upheld. The remand period in the third case when he was already undergoing life imprisonment consequent to his conviction in the second case cannot enure to his benefit in terms of Section 428, Cr.P.C. That is the latest dictum of the Apex Court after noticing all the earlier case in the case of Atul



**Manubhai Parekh (AIR 2010 SC (Supp) 429)
(supra).”**

55. Accordingly, this appeal is dismissed. Conviction and sentence of the appellant is affirmed.

56. So far question of entitlement of commutation under Section 428 Cr.P.C. is concerned, the same shall be governed by law laid down by a Division Bench of this Court, as stated above.

57. As the appellant is on bail in connection with this case, his bail bonds are cancelled and he is directed to surrender before the trial or the successor court.

(Vinod Kumar Sinha, J)

spal/-

AFR/NAFR	
CAV DATE	16.5.2017
Uploading Date	18.07.2017
Transmission Date	19.07.2017

