

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.183 of 2015

Arising Out of PS.Case No. -551 Year- 2013 Thana -KHAGARIA District- KHAGARIA

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1. Bharat Bhushan Prasad Son of Ramshray Prasad, Resident of Krishna Nagar,
P.S. - Chitragupta Nagar, District - Khagaria.

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Viram Deo Singh, Advocate
Mr. Sada Nand Roy, Advocate
Mr. Ashok Kumar, Advocate
For the Respondent/s : Mr. S.A.Ahmad, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 18-09-2017

The sole appellant, Bharat Bhushan Prasad, has been found guilty for an offence punishable under Section 25 (1-AA) of the Arms Act and sentenced to undergo Rigorous Imprisonment for 7 years as well as to pay fine appertaining to Rs. 5000/- as also to undergo Rigorous Imprisonment for 5 years along with fine of Rs. 5,000/- for the offence under Section 26 (2) of the Arms Act with a further direction to run the sentences concurrently vide Judgment of conviction dated 16.02.2015 and order of



sentence dated 20.02.2015 passed by the learned Ad hoc Additional Sessions Judge- III, Khagaria in Sessions Case No. 73 of 2014.

P.W.-4, Rajesh Kumar Yadav, Sub Inspector recorded his own fardbeyan on 08.9.2013 at about 4.30.P.M. by the side of N.H.-31 near Sangam Transport, Baluahi, Khagaria alleging therein that he got a secret information on telephone regarding a person carrying some prohibited articles whereupon, began to search of vehicle and during course thereof, one Commander Jeep reached near Sangam Transport wherefrom one person got down having Jhola in his hand who seeing the police Officials, began to proceed in reverse direction and on being suspected, was apprehended. In the presence of two persons, namely, Sunil Yadav and Manish Kumar(who have been examined as D.Ws.) the aforesaid apprehended person was interrogated, who disclosed his identity as Bharat Bhushan Prasad (Appellant). On personal search, a loaded revolver with two live cartridges was recovered while from Jhola, two carbine, two separate magazines along with 60 live cartridges having 7.65



kf embossed, two mobiles and identity card of the name of the accused were recovered for which seizure list was prepared.

Accordingly, Khagaria P. S. Case No. 551 of 2013 was registered followed with an investigation as well as submission of charge sheet, the basis of conduction of trial, which ultimately concluded by way of identifying the appellant, guilty for the offences, as indicated above and sentenced, therefore, the subject matter of the instant appeal.

The defence, as pleaded on behalf of the appellant, is of complete denial. Further ground, which has also been pleaded that the police was checking the vehivle relating to over loading and during course thereof, was brandishing sticks and on account of protest, Sunil Yadav and this appellant were apprehended. Sunil Yadav was left out, while the appellant has been remanded in this case, falsely alleging recovery of arms and ammunities from his conscious possession as well as from the Jhola. In support thereof, four D.Ws. have been examined.

In order to substantiate its case, prosecution had



examined altogether 7 P.Ws, out of whom P.W.1, Radharam Singh, P.W.-2 Manoj Kumar, P.W.-3 Pravin Kumar Pankaj, P.W.-4 Rakesh Kumar Yadav (informant), P.W.-5 Arbind Kumar Suman, P.W.-6 Sergeant Major and P.W.-7, Manoj Kumar as well as had also produced materials Exhibit 1 to 6 series two carbine with magazine, two magazines, one revolver with 60 cartridges and two mobile sets, Identity card, respectively.

Exhibit -1 to 1/2 signature of the informant as well as witnesses over seizer list, Exhibit 2- Identity card of the accused, Exhibit 3- Self statement of the informant, Exhibit-4- Sanction order, Exhibit-5- Ballistic report, Exhibit 6- Extra Judicial Confessional statement of the accused and Exhibit-7 Formal F.I.R.

Side by side, Defence had also examined the D.W.-1 Manish Kumar, D.W.-2 Sunil Yadav, D.W-3 Sunni Kumar and D.W.-4 Rajiv Yadav. However, no document has been adduced on behalf of defence.

Learned counsel for the appellant assailing the Judgment of conviction and sentence has submitted that



learned lower Court failed to appreciate the illegal and floppy evidence produced by the prosecution in its right perspective, which completely over throw its genesis as well as manner of occurrence.

Learned counsel for the appellant has further submitted that from the evidence of respective witnesses, it is apparent that the place wherefrom the appellant is said to have been arrested, happens to be the busy place, so many passengers were present since before and that being so, there was every possibility of presence of an independent person, whereupon, at least some of them, would have been listed as an independent witness but the prosecution had not cared nor assigned any reason on that very score why not they were cited, cast doubt over genuineness of prosecution version.

It has also been submitted that learned lower Court should have considered that had there been genuinity in the assertion of the prosecution case, then in that event, both the seizure list witnesses would not have changed their status. Their deposition on behalf of defence, is indicative of the fact that appellant has been falsely implicated in this case.



Consequent there upon, the learned lower Court should have considered that manner of search, seizure happens to be farce suspicious one whereupon, it should not have been relied upon. On the other hand, should have doubted over genuineness of the prosecution version.

It has further been submitted that it is not the settle principle of law, that the raiding party should not be the Investigating Officer, the evidence of the police officials should not be accepted but, their evidences are to be looked into cautiously, minutely and analytically as they are bound to support their case and so, any flaw persisting in their evidence should be considered adverse to the prosecution version, leading to its out right rejection. Moreover, when the story of search and seizure is found controverted by the seizure list witness having been produced from defense side, then, in that event, it happens to be an additional ground to desert the prosecution version.

It has also been submitted that the sanction order granted by the District Magistrate happens to be without any proper consideration of material rather has been issued in



mechanical manner, on account thereof, is legally not entertainable.

So, it has been submitted that taking into account the whole case in its entirety, it is crystal clear that Appellant has been victimized, whereupon the prosecution version is fit to be brushed aside. Consequent thereupon, Appeal is fit to be allowed setting aside the judgment of conviction and sentence recorded by the learned lower Court.

On the other hand, the learned Additional P.P. while repelling the submission has submitted that evidences should not be considered in piecemeal manner, rather it should be taken into consideration as a whole wherefrom, it is apparent that prosecution case is found duly proved. Mere coming of seizure list witness on behalf of defence would not axe upon prosecution case, as they shown their presence over seizure list which was prepared on account of recovery of prohibited arms and ammunition from conscious possession of the appellant. As such, the judgement of conviction and sentence is fit to be confirmed.

First of all, the legal point, having raised on



behalf of the appellant, is to be taken up. The learned counsel for the appellant has submitted that the sanction granted in terms of Section 39 of the Arms act is not at all found satisfying the mandatory requirement. It has been submitted that for the purpose of grant of sanction, the prosecution is under obligation to place all the relevant materials having collected during the course of investigation, before the Sanctioning Authority and in like wise manner, the sanction authority should go through the same which, the sanction order should divulge. In absence thereof, sanction order would not be considered valid, accorded in terms of Section 39 of the Act. That being so, prosecution would not have been allowed to sail.

Learned Additional P.P. opposes and controvert the same and submit that in each and every case, whenever sanction is being granted, that happens to be on the basis of proper consideration of materials having collected during course of investigation as well as its placement before the sanctioning authority for appraisal, which the sanction order does divulge.



Because of the fact that instant prosecution happens to be related with possession of prohibited arms and ammunition, on account thereof, there happens to be no requirement of sanction for better appreciation, it looks desirable to incorporate Section 39 of the Arms Act, which reads as follows:-

“Previous sanction of the district magistrate necessary in certain cases.- No prosecution shall be instituted against any person in respect of any offence under Section 3 without the previous sanction of the district magistrate.”

From perusal of Section 39, it is apparent that sanction is only required where there happens to be violation of Section 3 of the Arms Act, that means to say, possession of fire Arms or ammunition without license that too not a prohibited arms and ammunition. Whenever there happens to be the application of Section 25 (1) (AA) of the Arms Act, it relates with prohibited Arm and ammunition, which ever may be. Prohibited arms and ammunition has been defined under Section 2(h), (i) respectively. After parallel scrutiny of



respective Sections, in consonance with Section 39 of the Arms Act, it is apparent that the same did not deal with prohibited Arm and ammunition. That being so, sanction in terms of Section-39 would not be required for prosecution of an accused relating to possession of prohibited Arms and Ammunition. As a result of which the point having been raised on behalf of the appellant with regard to propriety of sanction is not at all found entertainable in the eye of law.

Before coming to the facts of the case, it is needless to say that each and every case, the prosecution is under an obligation to prove its case beyond all reasonable doubt but when the accused has also entered into defence, examined the witnesses, then in that event what ever has deposed at the end of D.Ws. its repercussion has to be shared by the accused as has held by the **Hon'ble Apex Court in AIR 2010 SC 2839 (Ashok Kumar V. State of Haryana)** wherein the Principle has been laid down as:-

26. The accused had led defence and examined as many as six witnesses. Dr. Bhushan Aggarwal, Incharge Swami Salagram Ashram Charitable Hospital, Jind (DW-1) was examined to primarily show that a child was born on 30th



August, 1987. Vijay Laxmi (DW-3) and Lekh Raj (DW-4) were examined to show that there were no dowry demands and Harbans Lal, the father of the deceased had not complained to them about the same at any point of time. But, the most important witness examine by the accused was Vijay Laxmi (DW-3), who is the daughter of Harbans Lal, aged about 14 years. She mentioned that the letter (Ex. DJ) was written by her and she stated that sometimes Ashok Kumar, the accused used to take the deceased to her father's house. She admitted that two days prior to writing of the letter (Ex. DJ), her sister and sister's son had come to her house and she stated that whatever is written in the letter is correct. But, in her cross-examination, she stated as under:

"Whenever my sister visited our home after marriage, she would complain that her husband and in-laws demanded dowry and also they used to give her beating. She came to our home 20 days prior to her death. At that time she told that her in-laws etc. were demanded a T.V. and Rs.5,000/-. My father took her to her husband's home. My sister was not suffering from my disease. She was having good health."

27. The above statement of this witness (DW-3) in cross- examination, in fact, is clinching evidence and the accused can hardly get out of this statement. The defence



would be bound by the statement of the witness, who has been produced by the accused, whatever be its worth. In the present case, DW-3 has clearly stated that there was cruelty and harassment inflicted upon the deceased by her husband and in-laws and also that a sum of Rs. 5,000/- was demanded. The statement of this witness has to be read in conjunction with the statement of PW-1 to PW-3 to establish the case of the prosecution. There are certain variations or improvements in the statements of PWs but all of them are of minor nature. Even if, for the sake of argument, they are taken to be as some contradictions or variations in substance, they are so insignificant and mild that they would no way be fatal to the case of the prosecution.

From the nature of the witnesses, it is apparent that P.W. 1 and P.W.- 3 are sepoy and were members of the raiding party, while P.W.-2, P.W.-4 and P.W.-7 are the police officials, P.W.-5 is the witness, who had exhibited the sanction order while P.W-6 is ballistic expert.

In the aforesaid back ground first of all, evidence of P.W.-4 the informant is taken up. He had reiterated the prosecution version is here with his earlier version that after getting confidential information, that incriminating articles



were to be carried by a person he, including other police officials, sepoy engaged in checking of the vehicles and during course thereof, had seen one person getting down from a Jeep who, after seeing the police, began to proceed in opposite direction whereupon they became suspicious, and apprehended him. In the presence of two seizure list witnesses namely, Sunil Yadav and Manish Singh, accused was searched and during course thereof, one loaded revolver with two cartridges were seized from his physical possession while two carbines, two magazines and 60 live cartridges along with other cartridges of different bores were seized from his bag and, for that, seizure list was prepared. He also disclosed the proper identities of Arms and ammunitions in terms of seizure list. Recorded self statement and then, had entrusted the investigation to P. W.-7. He had produced the material Exhibits in Court identified. He was cross-examined vigorously on this score. In para-10 he had disclosed that there happens to be signature of an official over the materials exhibits. He had also narrated that though bag is sealed but there happens to be no proper visibility of



seal of particular official. He had further stated that there happens to be signature of the official but the bag is not sealed wherefrom cartridges have been produced. He had shown dated 7.10.2013 but without any designation as well as seal affixed thereupon. In like wise manner, there happens to be contradiction with regard to mobile and voter ID at para-11.

In para-12 his attention was drawn towards non presence of special mark over carbine, however he had shown the signature of the learned Chief Judicial Magistrate over the same including over revolver and magazine. He had further at para-13, shown special mark put over the same by the Sergeant Major after examination of those materials exhibits as NH-31KH- 61.

From the deposition of P.W.-4, it is apparent that he was not at all cross-examined over the factum of search and seizure rather, he was cross-examined with regard to material exhibits and, the possibility of getting the same as case property of other case is found completely ruled out in the back ground of presence of the signature of the learned



Chief Judicial Magistrate, over all the material before placing the aforesaid items to Ballistic expert for examination so, from aforesaid eventualities, it is apparent that whatever been produced before the court, is the subject matter of instant case.

P.W.-6 is the Ballistic Expert, who had examined the material exhibits on 07.10.2013. After examining the same, he had submitted his report. On the basis of the report, he had deposed that weapons were effective and in like wise manner cartridges were alive. During cross examination, he had stated that he had examined the arms and ammunitions on an order of learned Chief Judicial Magistrate. He found carbine effective but he had not mentioned containing 2.5 Kg pressure. He had further stated that carbine will be effective only having 2.5 kg. pressure. He had not fired two cartridges of 7.65 kf bore. These facts will not go in favour of the appellant because of the fact that once he found carbine to be effective, then will be presumed that it was carrying pressure of 2.5 Kg. Had there been, proper cross examination, even by way of suggestion that the arms were not showing pressure of



2.5 Kg. and so was ineffective, then in that circumstance it would have a bearing.

P.W.-7 is the Investigating Officer, who after being entrusted with the investigation, recorded statement of witnesses, inspected the place of occurrence, which he had incorporated, examined the accused, who made inculpatory extra Judicial confessional statement, produced sealed arms and ammunition before the learned C.J.M. and getting an order therefrom produced the same before the Ballistic expert for examination at Begusarai, obtained a report, procured sanction order and then, handed over investigate to the O/C on account of having been transferred. During cross examination at para-11, he had stated that during course of investigation till the date when he handed over charge, he had not examined independent witnesses.

Remaining witnesses supported search and seizure having made by P.W. 4 and during course of cross examination nothing substantial has been procured.

Now coming to the evidence of D.W.-1, it is evident that they deposed on the score of non-recovery of fire



arms, ammunition of prohibited bore. One of the member of seizure list had stated that while police was checking the vehicle, arrested him as well as appellant, took them to Police station, where he was released after having a signature over a blank paper while Bharat Bhushan Prasad was detained.

During cross examination he had admitted in para-4 that Bharat Bhushan Prasad was carrying a bag and something was inside the same. Police had taken away Bharat Bhushan Prasad with the aforesaid articles. D.W.-2 Sunil Yadav, other seizure list witness had deposed that he along with Bharat Bhushan Prasad was taken away to Police Station where his signature was taken on a blank paper and then he was released while Bharat Bhushan Prasad was taken to custody. During Cross-examination, he had stated that first of all, Bharat Bhushan Prasad was apprehended. He was empty hand.

D.W.-3 had deposed that on the alleged date and time of occurrence, the Police Officials were brandishing sticks on account of over loading and during course there of, apprehended Bharat Bhushan Prasad and took him in



custody. D.W.-4, had deposed that on the alleged date and time of occurrence, police began to assault whereupon public scattered heither and neither and during course thereof, 2-4 persons were apprehended. Police also taken out one Jhola from the Jeep. During cross examination, he had stated that police had apprehended one person, whom he identified to be appellatant, Bharat Bhushan Prasad. He had further stated that he happens to be Khalasi and one Jhola was taken out by the police from his Jeep. Bharat Bhushan Prasad was one of the Passengers of the Jeep.

From the evidence of D.Ws , as disclosed here in above, it is apparent that connectivity of the appellatant is found additionally linked. Taking into account, the totality of the expert, it is clear that apprehension of appeallant alongwith Jhola is found admitted and in likewise manner, carrying a jhola in his hand. Presence of signature of search & seizure list witnesses over the search list is found, duly admitted. Furthermore, during course of cross-examining the prosecution witnesses, it is apparent that recovery of prohibited bore fire arms and ammunitons also not been



denied. Apart from this, presence of signature over the seized Arms and ammunition, which happens to be material exhibits of the record, conclusively proves its recovery in terms of prosecution version that means to say from the Appellant. That being so, this Appeal lacks merit and is accordingly, dismissed.

The appellant is in custody, which he will remain till saturation of the sentence.

(Aditya Kumar Trivedi, J)

Sudha/-

AFR/NAFR	
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