

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.20 of 2007

(Against the Judgment of conviction and order of sentence passed by Sri Gangotri Ram Tripathi, dated 16.12.2006 in Sessions Trial No. 203 of 2006 arising out of Kurtha(Manikpur) P.S. Case No.06 of 2005.) 68 of 2006

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1. Ranjan Kumar @ Raju, S/o Parmanand Prasad R/o village-Tilai Bigha, P.S.- Paras Bigha, District- Jehanabad.
 2. Anuj Kumar @ Ram Niwas Sharma @ Guddu Sharma, S/o Late Nand Sharma, R/o village- Pandui, P.S.- Paras Bigha, District- Jehanabad.
 3. Gopal Kumar @ Rajesh Kumar, S/o Ram Sewak Yadav, R/o village- Kanchanpur, P.S. – Fatuhan, District- Nalanda.

.... Appellant/s

Versus

1. State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Vijay Kumar, Mr. Kapil Deo Singh,
Advocate

For the Respondent/s : Mr. Balmukund Pd. Sinha, APP

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CORAM: HONOURABLE MR. JUSTICE SANJAY PRIYA

ORAL JUDGMENT

Date: 30-11-2017

Heard learned counsel for the appellants and the counsel appearing on behalf of the State.

2. This Cr. Appeal has been directed against the judgment of conviction dated 16.12.2006 and order of sentence dated 18.12.2006 passed by the Fast Track Court-III, Jehanabad, in Sessions Trial No. 203 of 2006/68 of 2006, whereby appellants have been convicted for the offence under Section 25(1-A), 26/35 of the Arms Act and sentenced to undergo R.I. for seven years for offence under Section 25(1-A) of Arms Act and to undergo R.I. for five years for the offence under Section 26/35 of Arms Act. Both the sentences shall



run concurrently.

3. Counsel for the appellants has submitted that in the instant case no any independent witness has been examined. The seizure list witnesses did not appear to support the seizure list. It has further been submitted that all the witnesses examined, are member of the raiding party. The alleged motorcycle on which the appellants were said to be travelling was never produced during trial.

4. Learned counsel for the appellant has submitted that the Hero Honda motorcycle, which is alleged to be seized, was never produced in the court during trial. It has also been submitted that conviction has been made under Section 25(1-A), 26 and Section 35 of the Arms Act. But no offence under aforesaid Section is made out in this case.

5. Learned APP has submitted that the informant and other members of the raiding party have been examined and they all have supported the case.

6. As per written report of the informant, three person boarding on one motorcycle, were apprehended, and on search one pistol made in China, two magazine and ten round of live cartridges were recovered from possession of appellant no. 2, one country made pistol along with three round of live cartridges were recovered from possession of Gopal Kumar @ Rajesh Kumar (appellant no. 3) and



one country made pistol along with four round of live cartridges were recovered from Ranjan Kumar @ Raju (appellant no. 1). The seizure list was prepared and signatures of two independent witnesses were taken. The police after investigation submitted charge-sheet for the offence under Section 25(1-B) A, 26 and 35 of the Arms Act and Section 411 of the IPC.

7. During trial, total eight witnesses have been examined on behalf of the prosecution. The defence of the accused was total denial of the occurrence and false implication in the case. During trial the material exhibits (seized fire arms were produced) have been marked as Ext. A to A/1, Ext. B to B/1 , Ext. C to C/6, Ext. D to D/9 and Ext. E.

8. Main argument made on behalf of the appellant is that entire search and seizure as alleged against these appellants, becomes doubtful, since, independent seizure list witnesses never appeared in court to support the seizure There is no recovery of any prohibited firearms from possession of appellants. Therefore, no offence under Section 25(1-A) of the Arms Act will be made out. Similarly, no offence under Section 26/35 of Arms Act will be made out as none of ingredients of aforesaid Section was found in the case.

9. The counsel for the appellants has relied upon the decision reported in **1996 (1) PLJR, Supreme Court,**



page 17, (Daulat Ram vs. State of Haryana) in which the Apex Court has held that the accused pleaded that he was already in police custody at the time when “Pistol” was allegedly recovered from accused and no independent witness examined by prosecution for proving seizure and recovery of pistol from possession of accused, the Supreme Court came to a finding that accused had been falsely implicated, directing that accused be released and also directing State Government to pay Rs. 5,000/- as compensation for being kept in custody on foisted charges.”

The counsel for the appellants has also relied upon a decision reported in **1997 (2) PLJR, page 171 (Chandan Sonkar vs. State of Bihar)** in which the Hon’ble court has held that “mere possession of firearms is not enough to make out an offence under Section 26(1) but the possession of firearms must be in such a manner which would indicate the intention of the person to conceal the same so that the public servant may not know that concealment of the firearms and in absence of such evidence conviction under Section 26(1) is not justified and liable to be set aside.”

10. For the brevity, all the three Sections of Arms Act are quoted below:



“25(1-A), Punishment for certain offences-(1)

Whoever-

(a) manufactures, sells, transfers, converts, repairs, tests or proves, or has in his possession for sale, transfer, conversion, repair, test or proof, any arms of ammunition in contravention of section 5;

“26. Secret contraventions- (1) Whoever does any act in contravention of any of the provisions of section 3,4,10 or 12 in such manner as to indicate an intention that such act may not be known to any public servant or to any person employed or working upon a railway, aircraft, vessel, vehicle or any other means of conveyance, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to seven years and also with fine.

(2). Whoever does any act in contravention of any of the provisions of section 5,6, 7 or 11 in such manner as to indicate an intention that such act may not be known to any public servant or to any person employed or working upon a railway, aircraft, vessel, vehicle or any other means of conveyance, shall be punishable with imprisonment for a term which shall not be less than five years but which may



extend to ten years and also with fine.

(3) Whoever on any search being made under section 22 conceals or attempts to conceal any arms or ammunition, shall be punishable with imprisonment for a term which may extend to ten years and also with fine.”

“35 of the Arms Act, Criminal responsibility of persons in occupation of premises in certain cases.—

Where any arms or ammunition in respect of which any offence under this Act has been or is being committed are or is found in any premises, vehicle or other place in the joint occupation or under the joint control of several persons, each of such persons in respect of whom there is reason to believe that he was aware of the existence of the arms or ammunition in the premises, vehicle or other place shall, unless the contrary is proved, be liable for that offence in the same manner as if it has been or is being committed by him alone.”

11. The L.C.R. has been received. From the evidence of the witnesses, it appears that P.W. 1, P.W. 2 are member of raiding party. P.W. 7 is informant of this case. P.W. 1, 2 and 7 have stated about seizure of the alleged fire arms from possession of the appellants. P.W. 5 and 6 were also members of the raiding party. But



they have not supported about the seizure of fire arms from possession of appellants in their presence. P.W. 5 has stated that he was at a distance of about 50 yards from the place of occurrence at the time of raid. No recovery was made in his presence. P.W. 6 has stated that no seizure list was prepared in his presence. P.W. 8 is a formal witness who has proved the sanction order of the District Magistrate. P.W. 4 is I.O. of the case and P.W. 3 is the Sergeant Major who has proved Ext. 2, to show that the seized fire arms were effective.

12. The learned Sessions Judge in the impugned judgment has on the basis of conjecture and surmises held that as per ext. 4 all the accused persons were arrested on one motorcycle along with fire arms. Then it was their duty to surrender before the informant, who was Assistant Commandant. Similarly, the learned Sessions Judge observed in the order that non-examination of seizure list witnesses has not affected the prosecution case because there is no presumption that the police officers are liars. The conviction can be recorded on the basis of evidence of police officers.

13. This court after looking into evidence of all the witnesses, find that search and seizure was held at the public place. All these three appellants have been apprehended on the motorcycle and in presence of two independent witnesses (seizure witnesses) the fire arms were recovered from their possession. But seizure list



witnesses never appeared in court to support the seizure. It further appears that two of the members of the raiding party P.W. 5 and 6 have also not supported the seizure of fire arms from possession of the appellants.

14. There is specific mention in the seizure list that China made pistol with cartridges and country made pistol with cartridges were recovered from possession of the appellants. None of these fire arms come in the category of prohibited arms. Similarly, there is no any allegation that secret contravention was done by the appellants in terms of the Section 26 of the Arms Act. It further appears from the allegation as well as evidence that the arms has been recovered from joint possession of these appellants, on one motorcycle. But during trial there is no evidence that aforesaid motorcycle belonged to these appellants or the motorcycle was under joint possession of all the appellants or the motorcycle was stolen property. The court below has held that prosecution is unable to prove the offence under Section 411 of the IPC because the Hero Honda motorcycle was not produced before the court and marked as exhibit. It further appear that non-examination of the seizure list witnesses creates doubt with regard to recovery of firearms from possession of the appellants. The evidence of seizure list witnesses is very crucial for prosecution to prove the genuineness of search and seizure. Moreover, the non-examination of



the seizure list witnesses definitely creates doubt over the prosecution case as is required under Section 100 (4) of the Cr.P.C.

15. As per provisions of the Section (100)(4) of Cr.P.C. before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.

16. In the instant case, from the evidence available on record, it appears that seizure list witnesses named in the seizure list did not appear in court to support the seizure of the fire arms alleged to be recovered from the appellants. The two member of raiding party P.W. 5 and 6 have also not supported seizure of firearms from possession of the appellants.

17. Therefore, the judgment of conviction and order of sentence dated 16.12.2006 passed by the learned Additional Sessions Judge, Fast Track Court-III, Jehanabad, in Sessions Trial No. 203 of 2006/68 of 2006 arising out of Kurtha (Manikpur) P.S. Case No. 6 of 2005 in G.R. No. 126 of 2005 for the offence under Section 25(1-A), 26, and 35 of the Arms Act, is not in accordance with law. The



prosecution has failed to substantiate the charge against the accused persons beyond all reasonable doubt.

18. Accordingly, the impugned judgment of conviction and sentence is hereby set aside.

19. All the accused persons (appellants) are acquitted of the charges levelled against them. They are discharged from the liability of their bail bonds.

20. This Criminal Appeal is accordingly, allowed.

(Sanjay Priya, J)

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AFR/AFR	AFR
CAV DATE	N/A
Uploading Date	18.12.2017
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