

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.82 of 2003

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

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Mukesh Kumar Singh @ Mukesh Singh son of Ram Nandan Sigh, resident of village Bihat (Tola Ibrahimpur) P.S.-Barauni, District Begusarai.

.... Appellant

Versus

State of Bihar

.... Respondent

with

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Criminal Appeal (SJ) No. 528 of 2005

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

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Mani Kumar Singh @ Mania son of Raj Kishore Singh resident of village- Bihat, P.S. Barauni, District Begusarai.

.... Appellant

Versus

State of Bihar

.... Respondent

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Appearance :

(In CR. APP (SJ) No.82 of 2003)

For the Appellant : Mr. Arun Kumar Arun, Adv.

For the Respondent : Mr. Bipin Kumar, A.P.)P.

(In CR. APP (SJ) No.528 of 2005)

For the Appellant : Mr. Ajay Kumar Thakur, Adv.

Mr. Ritwaj Raman, Adv.

For the Respondent : A.P.P.

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 17-01-2018

Appellant Mukesh Kumar Singh @ Mukesh Singh of Cr.

Appeal No.82 of 2003 has been convicted vide judgment and order dated 4.1.2003 passed in Sessions Trial No.343 of 1999 and convicted under Sections 307, 353 and 386/34 of the Indian Penal Code (hereinafter to be referred as 'the IPC') as well as under Sections 25(1-A) and 27(2) of the Arms Act and sentenced to undergo R.I. for



five years under Section 25 (1-A) and seven years under Section 27(2) of the Arms Act, 3 years under Section 307 of the IPC, R.I. for three years under Section 386 of the IPC and R.I. for one year under Section 353 of the IPC.

2. Whereas appellant Mani Kumar Singh @ Mania has been convicted, vide order dated 25.8.2005 passed in Sessions Trial No.343(s) of 1999, by which he has convicted under Sections 307, 386 & 353/34 of the IPC as well as under Section 27 of the Arms Act and he has been sentenced to undergo R.I. for 05 years, 03 years and 01 year respectively under Section 307, 386, 353/34 of the IPC respectively.

3. Sessions Trial No.343 (S) of 1999 is the separate record of the original Sessions Trial No.343 of 1999, as appellant Mani Kumar Singh absconded after the case was posted for defence, as such his case was separated and after his arrest, the trial proceeded culminating into the judgment dated 25.8.2005. As such both the cases are being taken up together and are being disposed of by a common judgment.

4. The prosecution case in short is that the informant P.W.6 Lalan Kumar, S.I. received a telephonic information that some persons are extorting passengers and on that information after entering the Station Diary Entry, he went to the place of occurrence near



Sanjay Petrol Pump at National Highway 31 and on way; he also sought assistance from the Zero Mile Police Station and they also reached there and on reaching there, they saw that three persons, one armed with Rifle and two others armed with country-made Pistol are collecting *rangdari* from the Driver and Khalasi of Shiv Shakti Bus and on seeing the police party, they started fleeing and firing on the Police Party, one of the fire crossed by the side of P.W.6 though it did not hit him. It has also come that thereafter the informant and Police Party also started firing, one of the bullets fired by the informant hit one of the accused and on which accused persons started running away, out of them, accused Mukeh Kumar Singh was arrested at the spot while another co-accused Mani Kumar Singh, armed with rifle, succeeded in fleeing away. Further prosecution case is that on search, one loaded country-made pistol and one cartridge and Rs.500 were recovered from the possession of the injured accused and one loaded country-made pistol and one cartridge and Rs.500/- were recovered from the apprehended accused Mukesh Kumar Singh, however, on firing Driver and Khalasi fled away from the place of occurrence. On the basis of the aforesaid self statement of the I.O., Barauni Thana P.S. Case no.356 of 1998 has been instituted.

5. On completion of the investigation, charge-sheet was submitted and cognizance was taken against the appellants. It further



appears that the injured had died on reaching hospital. After commitment, the case came to the file of Sri Subhash Kumar Singh, 5th Addl. Sessions Judge, Begusarai for trial and disposal. Charges were framed against the appellants in both the cases under Sections 307/34 of the IPC and 386/34 & 353/34 of the IPC against Mukesh Kumar Singh under Sections 25 (1-A) of the Arms Act and Section 26 & 35 of the Arms Act also.

6. During the trial, the prosecution, in support of his case, has got examined six witnesses, they are P.W.1, Daya Nand Yadav, P.W.2 Akhileshwar Yadav, P.W.3 Ram Pravesh Yadav, P.W.4 Sunil Kumar, P.W.5 Gupeshwar Singh S.I. and Investigating Officer of the case and P.W.6 Lalan Kumar. Besides that following documents have been admitted into exhibits as Ext.1 and 1/A recovery of Seizure list of articles of injured accused who died during the pendency, Ext.2 self-statement of the informant, Ext. 3 Forwarding of the self-statement and Ext.4 Ballistic report.

7. It appears from perusal of the record that when the case was posted for defence, accused Mani Kumar Singh of Criminal Appeal No.528 of 2005 absconded, as such his trial was separated and the learned trial court considering the evidence on the record and other materials, has convicted the appellant Mukesh Kumar Singh under Section 307, 353 and 386 of the IPC as well as under Sections



25 (1-A) and 27(2) of the Arms Act and sentenced them as stated above and the trial of Mani Kumar Singh was separated vide Sessions Trial No.343(s) of 1999.

8. It further appears, on appearance of appellant Mani Kumar Singh, the learned trial court considering his evidence available on the record also convicted Mani Kumar Singh @ Mania under Section 307, 386, 353/34 of the IPC and sentenced as stated above.

9. Mr. Arun Kumar Arun learned counsel for the appellants Mukesh Kumar Singh has assailed the judgment on the ground that the Hon'ble Apex Court in a large number of decisions has already held that the same Officer, who has prepared the seizure list or is the informant of the case, should not be made Investigating Officer as it shall cause serious prejudice in the investigation as he will try to justify the case and in the present case also P.W.5, who is I.O. in the case, has prepared the seizure list and he was also member of the raiding party. Further submission of the learned counsel for the appellants is that all the witnesses are official witnesses and even the witnesses of seizure list who are independent witnesses have not been examined in this case and furthermore, though the facts show that large number of people assembled there but not a single witness has been examined in this case during the trial and that creates a serious



doubt about the prosecution case. Further submission of the learned counsel for the appellants is that though the appellants have been charged under Sections 386 and 307 of the IPC but there is nothing available on the record, neither Driver nor Khalasi nor any passenger has been examined to show that the appellants were demanding extortion from them. It further appears that none of the police personnel has received injury nor there is any damage to the police vehicle or any person even there is nothing available on the record that the I.O. has found any empty cartridges from the place of occurrence, as such these facts clearly falsify the charges under Sections 307, 386 and 353 of the IPC.

10. It has also been submitted on behalf of the appellants that appellants have also been charged under Section 25 (1-B)a of the Arms Act and Section 26 as well as Section 35 of the Arms Act and convicted under Sections 25 (1-A) & 27 (2) of the Arms Act and the prosecution claims to have recovered loaded country-made Pistol, cartridges and Rs.700/- from them but neither the witnesses to the seizure list has been examined nor there is anything to show that those articles were seized and kept under sealed cover as provided under the Bihar Police Manual and further they have not been brought on the record as material exhibits in this case hence, their conviction under Sections 25(1-A) and 27(2) of the Arms Act does not appear to



be sustainable in the eye of law.

11. Contention of the learned counsel Mr. Ajay Kumar Thakur for the appellant Mani Kumar Singh is that the evidence of the informant P.W.6 itself shows that Mani Kumar Singh was known from before to the informant as he was accused in earlier case also and as such he has been falsely implicated in this case and he has also submitted that as no injury has been caused to any of the police personnel nor recovery of empty cartridges nor there is any evidence to show that they were demanding extortion from the Driver, passenger or Khalasi nor the evidence shows that they have fired on the Police Party rather it appears to be a case of encounter; in which one of the accused has been killed by the prosecution and in order to save their skin, the prosecution has falsely implicated them in the present case. It has also been submitted that the I.O. is the informant in this case and that has been depicted by the Hon'ble Supreme Court in a large number of decisions and in support of his contention, he has cited a decision in a case of *Bhagwan Singh-Vrs.- The state of Rajasthan* reported in (1976) 1 SCC 15.

12. The learned counsel for the appellants has further submitted that there is no independent witness to the occurrence and seizure list witnesses have not been examined, in such a situation, it is not proper to make conviction only on the basis of police witnesses



and hence in totality conviction of appellant Mukesh Kumar Singh under Section 307, 386 and 353 of the IPC does not appear to be sustainable in the eye of law.

13. In this case, P.W.6. is the informant in this case and his evidence discloses that on 7th December, 1998 he was posted as Incharge of F.C.I. O.P. and at 02:00 P.M. he received telephonic information that at Bihet Tola Maksaspur near Sanjay Petrol Pump some miscreants were extorting *rangdari* tax from the Tata 407 Bus and other buses, on which he entered information in the Station Diary Entry and took the police personnel and armed forces and proceeded towards the place of occurrence and also informed the Incharge S.I. Sunil Singh of Zero Mile Police Station about the same and when he reached near the Sanjay Petrol Pump, he saw that *rangdari* was being realized from the Bus and the bus personnel were protesting the same and on same when the police party moved towards the Bus to catch the miscreants, they started fleeing away and hid themselves behind a tree and started firing on the Police Party and on asking them to stop the firing and surrender, one miscreant fired twice on him with an intention to kill him but the firing crossed from the side of him and in the self-defence, he fired from his Service Revolver and shot the miscreants, who was firing and the another miscreants started fleeing away, one of the miscreants was arrested and the person who



succeeded in fleeing away, was named Mani @ Maniya, who was accused in Barauni Thana Case No.121 of 1998 and the another accused was arrested, who disclosed his name Mukesh Kumar Singh and on his search some articles were recovered and a seizure list was prepared under his direction by Gupteshwar Singh, on which he has signed.

14. The seizure list is Ext.1/A, which shows that from the injured accused, one country-made pistol, two empty cartridges of 303 and 2 live cartridges of 303 as well as 500 rupees were recovered and the seizure list was prepared in presence of witness Manoj Singh and Dinesh Kumar.

15. P.W.5 (Gupeshwar Singh) is the Investigating Officer in this case and he has also supported the prosecution case, however, in para 2, he has stated that he does not know as to what were recovered from the injured. He has proved that the seizure list was prepared by him, which bears signature of Lalan Kumar (P.W.6) and also bears signature of independent witnesses Manoj Singh and Dinesh Kumar. He has also proved the Ext.1/A, the seizure list of the articles recovered from Mukesh Kumar Singh and proved the signature of appellant Mukesh Kumar Singh there. His evidence does not show that he has investigated on the point of extortion and there is any witness either the Bus Malik or the Conductor of the Bus in this



regard. His evidence also shows that the injured was brought to the hospital but in the cross examination he has stated that he had arrested Mukesh Kumar Singh on chase.

16. P.W.4 is the then Officer Incharge of the Zero Mile Police Station and he has also supported the prosecution case *in toto* and stated that from the injured accused one country made pistol with empty cartridges were recovered and also some live cartridges were recovered and from the other accused, one loaded country-made pistol and Rs.500/- was recovered and some live cartridges were also recovered.

17. P.Ws.1 to 3 are police personnel who were members of the raiding party and though they have supported the prosecution case and P.W.1 has stated about the recovery of one loaded pistol from the arrested person and also Rs.500/- and from the injured accused one pistol and empty cartridges were recovered and P.W.2 has stated that from the arrested accused persons one loaded pistol and Rs.500/- has been recovered and P.W.3 has also stated that from the injured accused one country made pistol and cartridges and Rs.700/- were recovered and from the arrested persons Rs.500/- and country-made pistol and cartridges were recovered.

18. Apart from that the report submitted by the Sergeant Major has been marked as Ext. 4 and sanctioned order has been



marked as Ext.5 and it appears that a country-made pistol and the cartridges of 303 bore and one fired cartridges of 303 bore was also recovered and the arms were found effective, however, it appears that those seized articles have not been produced in the court nor there is any material to show as to how they have been sealed and packeted and as to where they have been kept. It is well settled law that in the Arms Act, articles are supposed to be kept in the court properly and they have to be produced before the court and their non-production has certainly creates a serious lacuna in the present case.

19. The Hon'ble Apex Court in the case of *Amarjit Singh – Vrs. – State of Punjab* reported in *1995 Supp. (3) SCC 217*, while dealing the similar matter and held in Para 7 as follows :-

“The entire prosecution case, thus, is clouded with number of infirmities which compel this Court not to accept such an unworthy evidence. These infirmities have been brushed aside by the Designated Court by observing that since the model number of the revolver was noted down, the non-sealing of the revolver or the handing over of the same to some other police official or a private person, who has not been examined are of no consequence. We are unable to agree and subscribe to this view in a case of this nature. The non-sealing of the revolver at the spot is a serious infirmity because the possibility of tampering with the weapon cannot be ruled out. The report of PW 4 that the weapon is capable of being fired is insignificant since it cannot be said with certainty as to what was the condition of the weapon at the time of the recovery, apart from the evidence of PW 4 that he did not test-fire the revolver.”



20. As such, non-sealing of seized articles and their non-production in court are serious infirmities as possibility of tampering can not be ruled out and it can not be said with certainty that the revolver or cartridges examined by the Sergeant Major are the same revolver or cartridges which have been seized from the appellants and the other accused persons.

21. So far submission of the learned counsel for the defence, no independent witness has been examined in the present case and the case is only based on the official witness is concerned the Hon'ble Supreme Court in a case reported in the case of ***Pradeep Narayan Madgaonkar and Ors.- Vrs. State of Maharashtra*** reported in (1995) 4 SCC 255 has considered this aspect of the matter and has come to the conclusion that the evidence of official witness (police witnesses) can not be discarded merely on the ground that they are in police force but the prudence dictates that their evidence needs to be subjected to strict scrutiny and as far as possible corroboration of their evidence in material particulars should be sought. Their desire to see the success of the case based on their investigation requires greater care to appreciate their testimony.

22. In the above background, the evidence of the witnesses, who are police witnesses can not be thrown on the ground of non-examination of the independent witnesses and their evidences



appear to be consistent on the point of occurrence and also on the point of arrest of the accused Mukesh Kumar Singh and fleeing away of another appellant Mani @ Mania.

23. In the present case, both the appellants have been charged under Section 307/34 of the IPC.

24. Submission of the learned counsel for the appellants relying on the judgment of *Hazara Singh and Ors.- Vrs.- State of Punjab* reported in *1971 (1) SCC 529* is that on the basis of materials available on the record, it can not be said that the appellants had an intention to cause such injury to the police party that if anyone was killed, they would have been convicted for the murder, rather the evidence clearly shows that in order to flee away, from the clutches of the police party, they fired in order to find the way to escape from the place of occurrence and no injury was sustained by any one or no any damage was caused to the property and the empty cartridges were also recovered from the possession of the injured accused and not from the appellants. In such a situation no case is made out under Section 307/34 of the IPC. In the present case there is allegation against the accused persons that on seeing the police party they started firing, further evidence of the informant categorically shows that the firing was made by accused and furthermore the evidence also shows that the accused persons were trying to flee away from the place of



occurrence and also one of the accused succeeded in fleeing away.

25. In such a situation, it can not be said that the appellants had intention to kill anyone rather the possibility can not be rejected that the firing was made with an intention to create confusion and succeeded in fleeing away. The Hon'ble Apex Court in the case of *Hazara Singh and Ors.- Vrs. State of Punjab (Supra)* has also considered this aspect of the matter in para 6 and held as follows : -

“..... The real question is whether it had been proved beyond doubt that the shots were fired at the police party. There could be two possibilities in such a situation; one could be of the shots being fired in the direction of the police party or taking aim at them and the other could be of the shots being fired in the air or in some other direction and not in the direction of the police party merely to create confusion for the purpose of running away.”

26. The appellants have also been charged under Section 386 of the IPC for confusion under Section 386/34 of the IPC, however, the basic ingredients of Section 386 IPC is that ***1. the extortioner put the complainant or an other person in fear of death or of grievous hurt: 2. The extortioner did so intentionally.***

27. In the present case though there is evidence that the accused persons were extorting money from the Bus Driver or conductor or the Passengers but neither the Bus Driver nor the Passenger nor the Conductor has come forward to depose that the accused persons put them on fear or fear of death or extorted money



from them and learned trial court only on the evidence of the police witnesses, from whom admittedly no extortion was demanded, have convicted the appellants under Section 386/34 of the IPC. When the prosecution failed to adduce any evidence disclosing the name of the witnesses that they had given any amount to the appellant either by way of levy or *rangdari*, the conviction under Section 386/34 of the IPC does not appear to be sustainable in the eye of law.

28. Appellants have also been convicted under Section 353 of the IPC for assault or using criminal forces to danger to the life or obstruction in discharge of the official duty and in the present case, there appears sufficient materials that when the police party raided the place of occurrence, the accused persons fired on them, may be just in order to flee away. There is sufficient cogent evidence to that regard.

29. In such a situation, it appears that there are sufficient cogent materials available on the record to show that the appellants have used criminal forces to deter the police personnel from discharge of their duties.

30. Appellant Mukesh Kumar Singh has also been convicted under Section 25 (1-A) and 27 (2) of the Arms Act and it is alleged that the country-made pistol and 303 bullets were recovered from his possession and the learned trial court has also convicted the appellnat Mukesh Kumar Singh under Section 25 (1-A) and 27 (2) fo



the Arms Act also, considering the fact that the recovered bullets of 303 comes under the schedule 'A' and it is prohibited ammunition but the learned trial court has failed to consider this aspect of the matter that the seized articles were not produced in the court nor there is anything available on the record to show that they were kept under the sealed cover and packeted and there is also nothing available on the record to show as to where it was kept before sending it to the Sergeant Major for examination, further there is nothing available on the record to show as to when the articles were sent for examination to the Sergeant Major and also report of the Sergeant Major shows that the report was submitted on 17.12.1998 and in such a situation manipulation in the seized articles can not be ruled out. In such a situation, non-examination of the independent witnesses has also created doubt about the prosecution case of the recovery.

31. The learned trial court ought to have considered the aforesaid discrepancies, infirmities and discrepancies in the prosecution case, but it appears that the learned trial court failed to appreciate the same and convicted the appellants under Section 307, 386, 353/34 of the IPC. He has also convicted Mukesh Kumar Singh under Section 25(1-A) and 27 (2) of the Arms Act. Considering the discussion made above and finding the conviction of both the appellants under Section 307, 386 of the IPC as well as conviction of



the appellant Mukesh Kumar Singh under Section 25(1-A) and 27 92) of the Arms Act suffers from infirmities and is not sustainable in the eye of law, hence their conviction and sentence are set aside, however, in view of the discussions made above, conviction of both the appellants under Section 353 of the IPC is affirmed. They are sentenced to undergo R.I. for one year under Section 353 of the IPC.

32. Submission of the learned counsel for the appellants is that they have remained in custody for more than 2 ½ years, the learned trial court will examine this aspect of the matter and if it is true, he will pass appropriate order regarding their release.

33. With the aforesaid direction, this appeal is disposed of.

(Vinod Kumar Sinha, J)

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