

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.255 of 2003

Arising Out of PS.Case No. -null Year- null Thana -null District- NALANDA (BIHARSHARIFF)

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Ramashish Malakar, son of Late Gauri Bhagat Malakar, resident of village Eksara,
P.S. Nalanda, District Nalanda

.... Appellant

Versus

The State of Bihar

.... Respondent

with

=====

Criminal Appeal (SJ) No. 289 of 2003

Arising Out of PS.Case No. -null Year- null Thana -null District- NALANDA (BIHARSHARIFF)

=====

Jai Prakash Vishwakarma @ Pragas Mistri, son of Jag Mohan Vishwakarma,
resident of village Kksara, P.S. Nalanda, District Nalanda

.... Appellant

Versus

The State of Bihar

.... Respondent

=====

Appearance :

(In CR. APP (SJ) No.289 of 2003)

For the Appellant : Mr. Arun Kumar Tripathi, Advocate (amicus curiae)

For the Respondent :Mr. Bipin Bihari Sinha, APP

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 16-03-2018

Pursuant to the order dated 23.2.2018 a report dated 10.3.2018 at Flag 'X' has been received from the Superintendent of Police, Nalanda from which it appears that appellant Ramashish Malakar in Cr.Appeal(SJ) No. 255 of 2003 has died nine years prior.

2. In such view of the matter, Cr.Appeal (SJ) No. 255 of 2003 stands abated.

3. No one appears for the appellant Jai Prakash Vishwakarma @ Pragas Mistri on repeated calls, as such, Mr. Arun Kumar Tripathi, Advocate, who is present in Court, has been appointed to assist this



Court as amicus curiae.

4. Appellant Ramashish Malakar (since died) and appellant Jai Prakash Vishwakarma @ Pragas Mistri have been convicted under Sections 25(A), 25(C) and 26(II) of the Arms Act and sentenced to undergo rigorous imprisonment for five years under Section 26(II) of the Arms Act each and they have been further sentenced to undergo rigorous imprisonment for three years under Sections 25(A) and 25(C) of the Arms Act on both counts and all the sentences were directed to run concurrently vide judgment and order dated 3.4.2003 passed by Sri Awadhesh Kishor Prasad Singh, the then Presiding Officer, Additional Court No.1, Nalanda in Sessions Trial No. 422 of 1990/11 of 2002.

5. Prosecution case as per written statement of A.S.I. of Nalanda P.S., in short, is that on 17.4.1990 he got confidential information that accused Pragas Mistri had set up a mini gun factory at his residence for manufacturing country made pistols and rifles and for selling the arms to the criminals, he rushed to the Eksara village along with police party and at about 4.30 A.M. he went to the house of Pragas Mistri with two independent witnesses, namely, Md. Nizamuddin Ansari and Rabindra Prasad and he knocked the door and on opening of door it was found that one person was coming out of the house with a bag in his possession and he was apprehended by him and on search two country made pistols were recovered from the



bag. On being asked the said apprehended person disclosed his name as Ramashish Malakar. Thereafter a thorough search was made of the house of accused Pragas Mistri and in course of search it was found that earth of the room of the house was recently dug and after removing the earth in presence of independent witnesses it was detected that beneath the earth five “reties”, one dying, five “khillis”, big and small, two “Ghora-pins” and one two barrel unfinished pistols were kept concealed and on being interrogated, accused Pragas Mistri and Ramashish Malakar did not give any explanation for retaining the said arms manufacturing articles and in presence of two independent witnesses the said incriminating articles were seized and seizure list was prepared.

6. On the basis of aforesaid written report Silao (Nalanda) P.S.Case No.142 of 1990 dated 18.4.1990 was registered. Police after investigation has submitted charge sheet and cognizance for the offence has been taken and after commitment the case traveled to the file of the learned trial judge for trial and disposal.

7. During trial, charges have been framed under Sections 25(A), 25(C) and 26(II) of the Arms Act against the appellants.

8. Prosecution in support of its case has examined altogether four witnesses, they are PW 1 Ramesh Sharma, Constable, PW 2 Rajendra Prasad, who has not supported the prosecution case, PW 3 Barnvas Kujur, A.S.I. of Police and informant of this case and PW 4



Ajay Kumar Singh, Constable.

9. On behalf of defence neither ocular nor documentary evidence has been adduced and the defence of the appellants in terms of trend of cross examination and statement under Section 313 Cr.P.C. is of innocence and of false implication.

10. Learned trial court on conclusion of trial has convicted the appellants under Sections 25(A), 25(C) and 26(II) of the Arms Act and sentenced them as stated above.

11. Learned amicus curiae has assailed the impugned judgment on the ground that out of four witnesses, PW 2 has been declared hostile and PW 1 is a Constable and hearsay witness and those witnesses have not stated against the appellant. Further submission is that in the FIR it is stated that one semi-manufactured pistol was recovered, whereas in the evidence of PWs 3 and 4 have stated that semi-manufactured double barrel gun was recovered and, as such, there is contradiction in the evidence of witnesses and no independent witness has been examined, including seizure list witnesses and, as such, conviction of the appellant only on the basis of evidence of police witnesses is contradictory, does not inspire confidence and sustainable in the eye of law. It has also been submitted that there is infirmity in the framing of charge as no such section as 25A, 25C and 26(ii) are there under Arms Act and in such view of the matter, appellants had been prejudiced in their defence.



12. On the other hand, learned counsel for the State has justified the findings of guilt of the accused persons, including the appellants on the ground that semi-manufactured gun and other incriminating articles for manufacturing arms and ammunitions were seized and those articles have been produced in court also and, as such, even in absence of the seizure list witnesses the conviction of the appellant is sustainable in the eye of law and there is no infirmity in the impugned judgment.

13. On perusal of prosecution evidence in the background of rival submissions of both sides it appears that PW 3 is the informant in this case and an A.S.I. of police and his evidence disclosed that on the day of occurrence, on confidential information he had gone to the village Eksara along with police party and further stating that he reached at the village at 4.30 A.M. and in presence of independent witnesses Nizamuddin and Rabindra Prasad, door of house of Pragas Mistri was knocked and on opening of the door one man was found coming from the house with a bag containing two country made pistols. He has further stated that on search of the house of appellant Pragas Mistri one two barrel unfinished gun, five “reties”, one iron machine, two “Ghoras” (trigger), five “killis” were seized and seizure list was prepared and he has prepared self written report. PW 1 has also supported the evidence of PW 3 in his evidence in court and his evidence has further been corroborated by the evidence of PW 4



regarding recovery of incriminating articles from the house of Pragas Mistri. It further appears that in this case seized articles were produced in the court and marked as material Exts. I to I/10. As such, prosecution evidence appears to be consistent on the point of recovery. However, learned amicus curiae submits that there is no complianc of Section 313 Cr.P.C. in the present case as no specific question was asked that he is running gun factory and manufactured arms and no question was asked on the point seizure list was prepared, rather that general question was asked to him.

14. On perusal of the statement under Section 313 Cr.P.C. it appears that appellant was asked a question that his house was searched and during search from the beneath of earth five reties, one dying, five khillis, small and big, two Ghora-pins and one two barrel unfinished pistols were recovered, however no question was asked from appellant Pragas Mistri regarding prosecution case of manufacturing pistols in his house. Hon'ble Apex Court in the case of **Sukhjit Singh vs. State of Punjab : (2014) 10 SCC 270** relying upon the decision in the case of **Ajay Singh vs. State of Haharashtra : (2007) 12 SCC 341** has laid down the principle that the requirement of Section 313 of the Code of Criminal Procedure is to draw the attention of the accused to the specific points, materials and evidences available against him, put to these to him and seek explanation for the same.



In the case of Ajay Singh (supra), the Hon'ble Supreme Court in paragraph-14, has laid down the principles to be followed for complying with the provisions of Section 313 Cr.P.C. in the following manner:-

“14. The word “generally” in Sub-section (1)(b) does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the question should relate to the whole case generally and should also be limited to any particular part or parts of it. The question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. A conviction based on the accused's failure to explain what he was never asked to explain is bad in law. The whole object of enacting Section 313 of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give.”

In the background of above principle laid down by Hon'ble Apex Court, it appears, the evidence on which appellant Pragas Mistri has been convicted for manufacturing guns, has not been put to him, hence there is no proper compliance of Section 313 of the Code of



Criminal Procedure.

15. Further prosecution evidence discloses that from the house of appellant Pragas Mistri, one semi-finished country made gun was covered along with other articles, whereas the FIR discloses that pistol has been recovered and further seizure list shows that it was a half finished pistol, as such there is contradiction in between the evidence in court and earliest prosecution version. It further appears that there is nothing available on record as to whether those seized articles had been sent for chemical examination or not, as no such report is on the record. It further appears that independent witness has not been examined and even Chaukidar of the village has not been examined to show that the house from which articles were recovered was of Pragas Mistry, as such, identification of the house of the appellant is concerned, there is no material available on record except the police witnesses who are not the residents of the same village.

16. Submission of learned amicus curiae is also that there is no evidence available on record to show that the seized articles were sealed and protected and there is also no evidence available on record to show that they were kept safely in sealed cover in Malkhana and brought from Malkhana under sealed cover and produced before the court. Hence, tampering of seized articles cannot be ruled out and it can also not be said that articles produced in court were the seized articles.



17. It further appears that appellant has been convicted under Sections 25(A), 25(C) and 26(II) of the Arms Act but there are no such sections in the Arms Act, however it may be a mere irregularity and wording of charges leveled against them so the accusation against appellant and whole trial cannot be vitiated on that ground.

18. Considering the infirmities and inconsistencies in the prosecution case, as discussed above, which shows reasonable doubt about the prosecution story, the appellant is at least entitled to the benefit of doubt.

19. Accordingly, this appeal is allowed. The impugned judgment and order are set aside. As the appellant is on bail, he is directed to be discharged from the liabilities of his bail bond.

(Vinod Kumar Sinha, J)

spa/-

AFR/NAFR	
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