

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.127 of 2003

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

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Sadhu Sharan Prasad, Son of Sita Sharan Prasad, Resident of Village – Fatehpur,
P.S. –Rajgir, District – Nalanda.

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Avinash Kumar Singh, Amicus Curiae

For the Respondent/s : Mr. Binod Bihari Singh, APP

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 18-01-2018

Since nobody has appeared on behalf of the appellants and this case appears to be of the year 2003, I deem it appropriate to appoint Mr. Avinash Kumar Singh as *Amicus Curiae* to assist the Court.

2. By way of present appeal, sole appellant seeks to challenge the Judgment of conviction and order of sentence dated 27.02.2003, passed by Shri Awadhesh Kishor Pd. Singh, Presiding Officer, Additional Court No. I, Nalanda, in Sessions Trial No. 282/91 69/2002, by which the sole appellant stood convicted under Sections 25(1)(a), 25 (1B)(a) and 26(2) of the Arms Act and was sentenced to undergo R.I. for 05 years under Section 25(1)(a) of the Arms Act, R.I. for 03 years under Section 25 (1B)(a) and R.I. for 05 years under Section 26(2) of the Arms Act. All the sentences were directed to run concurrently.



3. Prosecution case as per the self statement of A.S.I. Shivnandan Chourdary recorded on 6.6.1989, in short is that in the night of 6.5.1989, he was patrolling along with Ram Pujan Thakur, A.S.I., Havindar Ram Ekwil Sharma and some constables and reached near Rajgir Kund at about 9.25 P.M., he got confidential information that unlicensed arms and ammunitions were kept inside Punjab Hotel, situated on Rajgir – Gaya Road, Rajgir, on the basis of the said information, he along with his companions went to the said hotel and searched the said hotel in presence of two independent witnesses, of that area namely, Durga Prasad and Birendra Prasad Gupta and the appellant being the proprietor of the said hotel was present there and in course of search, one small bag of racksin was found kept in side a big wooden box, the said box contained four live cartridges of .315 bore, five cartridges of 12 bores, one cartridge of revolver, one bullet cartridge, some other cartridges and a wrist watch, was recovered, on the basis of the said statement, F.I.R was registered against the appellant.

4. Police after investigation submitted charge-sheet against the appellant, cognizance of the offence was taken and the case was committed to the court of sessions, which ultimately came to the file of Shri Awadhesh Kishor Pd. Singh, Presiding Officer, Additional Court No. I, Nalanda, for trial and disposal.



5. To prove its case, prosecution has examined altogether six witnesses. They are, P.W. 1 – Durga Sharan Pd, one of the independent witnesses of the seizure list, P.W. 2- Birendra Pd., another seizure list witness, P.W. 3 – Raja Ram Prasad, an Advocate Clerk, who proved formal F.I.R, P.W. 4, 5 and 6 are constables and are members of raiding party, who conducted search with Shibnandan Choudhary, A.S.I. at the time of search.

6. Apart from above, following documents have been brought on record and marked as Ext. 1 – endorsement and signature of Durga Sharan Pd. on seizure list, Ext. 1/1 to 1/5 – Signature of Birendra Pd. on the seizure list. Ext. 1/6 - Signature of Birendra Pd. on statement under Section 164 Cr.P.C and Ext. 2 - F.I.R

7. It appears neither oral nor documentary evidence has been brought on record from the side of defence and defence of the appellant is complete denial of occurrence no recovery of alleged article from the hotel.

8. Post trial, the learned trial court after considering the evidence available on record, convicted the appellant under Sections 25(1)(a), 25 (1B)(a) and 26(2) of the Arms Act and sentenced him in the manner as stated above.

9. Contention of learned *Amicus Curiae* is that appellant has falsely been made accused in this case and there is nothing to show



that the seized articles were kept in sealed packet as provided for search and seizure under Clause 165 of Bihar Police Manual. It has also been submitted that there is nothing available to show that the seized articles were sent for examination to F.S.L., or any ballistic expert or to armourer to verify that recovered cartridges were live or not and the tools are the tools of manufacturing arms and ammunition and further they have also not been produced before the Court as material exhibits. It has also been submitted that all the alleged recovery was from the Hotel and there is nothing available on record to show that knowing the search by the police, articles were confined in box and other places, hence conviction of appellant under Section 25 (1)(a) and 26(2) of the Arms Act is not sustainable in the eye of law. It has also been submitted that in this case sanction has not been brought on record as provided under Section 39 of the Arms Act and hence the conviction of appellant under Section 25(1B)(a) of the arms Act is also not sustainable and the trial court without considering all these infirmities has convicted the appellant under Section 25(1)(a), 25 (1B)(a) and 26(2) of the Arms Act, which is erroneous and perverse and not sustainable in the eye of law.

10. On the other hand, learned counsel for the respondent – State supported the finding of guilt recorded by learned Trial Court and submitted that there are consistent evidence of witnesses that the



aforesaid articles were seized from the hotel of the appellant and P.W. 1 and P.W. 2, have also supported their signature over the seizure list and further the statement of the accused recorded under Section 313 Cr.P.C, shows that the hotel from which the alleged recovery was made, belonged to him and, therefore, there is no infirmity in the impugned judgment and conviction of appellant under Section 25(1)(a), 25 (1B)(a) and 26(2) of the Arms Act, is just and proper and does not require any interference.

11. Heard the rival contention of the parties.

12. On close scrutiny of evidence available on record, it discloses that P.W. 4 to P.W. 6, who are the constables and member of raiding party supported the recovery of cartridges and articles and tools of manufacturing arms and ammunition, though they could not disclose the details of articles seized. However, Investigation Officer/Police Officer, who made search and seizure was examined in this case and even seizure list witnesses have also turned hostile and not supported seizure of articles in their presence. Moreover, there is nothing available on record to show that the seized articles were properly sealed and packeted, nor evidence shows that those articles had safely been kept in *Malkhana* even those articles were not produced before the Court, though seized articles are Court's properties. Further it is also worth to note that in this case, there is nothing available on



record to show that proper sanction as prescribed under Section 39 of the Arms Act was obtained, which is required for prosecution under Section 25 (1B)(a) of Arms Act. A **Bench of M.P. High Court** in the case of **Sukhlal and another v. State of M.P. reported in 1998 CRI. L. J. 1366**, has also considered the importance of prior sanction and held as under:-

“7. I have already shown above that the requirements of the law regarding recovery of weapons have not been fulfilled and the evidence is also not worth reliance. The accused persons have been prosecuted under Section 25 Arms Act as well. Section 39 of the Arms Act provides that previous sanction of the District Magistrate is necessary for the prosecution against any person in respect of any offence under Section 3. Section 3 provides for licence for acquisition and possession of firearms and ammunition. Thus, unless there is a previous sanction of the District Magistrate a person cannot be prosecuted in respect of any offence under Section 3. Section 25 provides for an offence relating to possession on carrying any prohibited arms or prohibited ammunition in contravention of Section 3. There are other provisions as well to which we are not concerned as in the present case the prosecution has claimed that the accused persons were in possession of arms and ammunition without any licence. Thus, sanction was necessary and in the absence of sanction the accused persons could not be prosecuted at all in spite of the fact that they were in possession of any unlicensed arm though that fact has not been proved in the case in hand. Learned presiding officer, ought to have known the provisions of Section 39 Arms Act. It is unfortunate that without looking to this provision and without caring to marshall the evidence properly and going to the fact that requirements of law have not been fulfilled, he held the accused guilty of the offence punishable under Section 25, Arms Act. In the present case nothing has been said by any witness whatsoever that sanction was obtained for the prosecution u/S. 25. I may point out here that sanction is not a mere formality. It has to be proved that it was granted by the authority after applying his mind. It must be shown that the firearm or weapon with respect to which sanction was prayed was actually taken to the authority



concerned and after looking to if the relevant papers, understanding and after applying his mind sanction was granted. In this case, there is complete absence of the sanction. The accused could not, therefore, be convicted at all."

13. Said view was also affirmed in several other decisions of various High Courts. Further, it appears that in this case after recovery, proper procedure was not followed as prescribed under Clause 165 of Bihar Police Manual as there is no evidence available on record to show that such articles were sealed and kept properly in *malkhana*. Seized articles had even not been produced before the court. For conviction under Section 26 of the Arms Act, what is important is to consider that mere possession of firearms is not enough to make out an offence under Section 26 of the Arms Act 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 sustainable, as held by a Bench of this Court in the case of **Chandan Sonkar v. State of Bihar** reported in **1997 (2) PLJR, 171**, relevant part of the said judgment is reproduced herein below:-

"7. From bare perusal of the aforesaid section, it is manifest that mere holding or possessing firearms is not enough but he 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 the concealment of the firearms.



10. The learned Sessions Judge has not referred any evidence or material in his judgment which was available on record for coming to this finding that the concealment was with the intention that such concealment may not come to the knowledge of any public servant, I myself analysed the evidence of the prosecution witnesses and found that it has not come in the evidence that the appellant was aware of the fact that a raid was to be conducted by the police and in order to conceal the firearms from the raiding party the appellant concealed the said arms. In absence of such evidence the conviction of the appellant under Section 26(1) of the Arms Act is not justified. As stated above, the only allegation is that firearms were found in possession of the appellant which was wrapped in a cloth and was kept beneath the cot and the sofa. This itself is not sufficient to come to an inference that the concealment of the arms was with the intention that it may not be known to the public servant. The conviction of the appellant under Section 26(1) of the Arms Act, in my opinion, cannot be sustained in law and is liable to be set aside.”

14. In the case in hand also, there is nothing available to show that seized articles were so kept to conceal it from public glare or to conceal from raiding party, rather the same were kept in box of “Chowki” and in other boxes. Considering the same as well as the fact that in this case no proper procedure was followed as prescribed under Clause 165 of the Bihar Police Manual, 1978, seized articles were not brought before the court and sanction for prosecution under Section 25(1-b)(a) and 26(2) of the Arms Act as provided under Section 39 of the Arms Act has not been obtained, which shakes the credibility of evidence of prosecution witnesses and casts a serious doubt on the prosecution story. Moreover, non examination of investigating officer has certainly caused prejudice to the defence as defence has been



denied the opportunity for cross – examination of Investigating Officer or the officer, who seized articles, on the point of manner of seizure, the procedure for search and seizure followed and as to whether seized articles were kept in safe custody.

15. Considering the discussions made above, there are several loopholes in prosecution story and the same has not been considered by the trial court. As such appellant is entitled for benefit of doubt.

16. Resultantly, this appeal is allowed. Judgment of conviction and order of sentence dated 27.02.2003, passed by Shri Awadhesh Kishor Pd. Singh, Presiding Officer, Additional Court No. I, Nalanda, in Sessions Trial No. 282/91 69/2002, is set aside.

(Vinod Kumar Sinha, J)

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AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	30.01.2018
Transmission Date	30.01.2018

