

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.762 of 2017

Arising Out of PS.Case No. -30 Year- 2014 Thana -KASIMBAZAR District- MUNGER

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Md. Hasan Imam, Son of Late Md. Faiz Ali, Resident of Hazrat
Ganj Bara, Gali No.11, P.S.- Kasim Bazar, District- Munger.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

with

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Criminal Appeal (SJ) No. 949 of 2017

Arising Out of PS.Case No. -30 Year- 2014 Thana -KASIMBAZAR District- MUNGER

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Md. Sarfaraz @ Mister, Son of Md. Hasan Imam, Resident of
Hazrat Ganj Bara, Gali No. 11, P.S.- Kasim Bazar, District-
Munger.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

with

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Criminal Appeal (SJ) No. 1277 of 2017

Arising Out of PS.Case No. -30 Year- 2014 Thana -KASIMBAZAR District- MUNGER

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Md. Imtiyaz @ Sonu, Son of Md. Hasan Imam, Resident of Hazrat
Ganj Bara, Gali No.11, P.S.- Kasim Bazar, District- Munger.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s



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Appearance :

(In CR. APP (SJ) No.762 of 2017)

For the Appellant/s : Mr. Ashok Kr. Choudhary, Adv.
Mr. Raj Kumar Choudhary, Adv.
Mr. Akshansh Ankit, Adv.

For the State : Mrs. Abha Singh, APP

(In CR. APP (SJ) No.949 of 2017)

For the Appellant/s : Mr. Ashok Kr. Choudhary, Adv.
Mr. Raj Kumar Choudhary, Adv.
Mr. Akshansh Ankit, Adv.

For the State : Mrs. Abha Singh, APP

(In CR. APP (SJ) No.1277 of 2017)

For the Appellant/s : Mr. Ashok Kr. Choudhary, Adv.
Mr. Raj Kumar Choudhary, Adv.
Mr. Akshansh Ankit, Adv.

For the State : Mr. Zeyaul Hoda, APP

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

C.A.V. JUDGMENT & ORDER

Date: 07-03-2018

All the above appeals have been preferred against the common judgment and order of conviction and hence they have been heard together and are being disposed of by this common judgment.

2. The appellants have been convicted by judgment dated 17.01.2017 passed by the learned 1st Additional Sessions Judge, Munger in Sessions Trial No. 906 of



2014, arising out of Kasim Bazar P.S. Case No. 30 of 2014, whereby they have been convicted under Sections 25(1)(a); 25(1-b)a and 26(ii) read with Section 35 of the Arms Act. By order of sentence dated 23.01.2017, the appellants have been directed to undergo rigorous imprisonment for 7 years, to pay a fine of Rs. 5,000/- and in default of payment of fine, to further suffer imprisonment for 6 months for the offence under Section 25(1)(a) of the Arms Act; rigorous imprisonment for 3 years, fine of Rs. 2,000/- and in default of payment of fine, to further suffer imprisonment for 3 months for the offence punishable under Section 25(1-b)a of the Arms Act; and rigorous imprisonment for 7 years, fine of Rs. 5,000/- and in default of payment of fine, to further suffer imprisonment for 6 months for the offence under Section 26(ii) read with Section 35 of the Arms Act; the sentences having been ordered to run concurrently.

3. Four accused persons including the appellants were put on trial for having violated various provisions of the Arms Act, but only the appellants were convicted and sentenced by the impugned judgment, whereas another co-accused, namely, Md. Azhar Sabri was acquitted of the charges.

4. The prosecution case is based on the written report of Md. Sabih-Ul-Haque, S.H.O., Kasim Bazar Police



Station, who has been examined as P.W. 8 at the trial. In his written report, he has alleged that he received a secret information on 01.03.2014 that machines have been installed for manufacturing of illegal arms in the house of appellant Md. Hasan Imam (Cr. Appeal (SJ) No. 762 of 2017), which information was communicated to a superior police officer. A raiding team was constituted accordingly, comprising Shivjee Singh (A.S.I.; P.W. 1), Arbind Paswan (S.I.; P.W. 3), Abdul Halim (A.S.I.; P.W. 4) and Ankur Prasad (S.I.; P.W. 5) and others including Constables Rajiv Kumar Gupta, Kishore Kumar Srivastava, Madan Singh and Ramdeo Singh, who have not been examined. The raiding team proceeded to the destination and reached the house of appellant/Md. Hasan Imam, situated near Hazrat Ganj Bara Street No. 11, Munger. In the meantime, it was averred that one Sanjay Kumar Singh, A.S.P. along with the police force/special force also reached there. The house of appellant/Md. Hasan Imam was surrounded. In the absence of any independent witness to the search, A.S.I. Shivjee Singh (P.W. 1) and Constable Rajiv Kumar Gupta (not examined) were made witnesses to the seizure and seizure. The raiding team opened the door and entered the house of the appellant/Md. Hasan Imam. In the north-western corner of the house, welding machine, drill machine, grinding machine, base plate, semi finished pistols



and other parts of yet to be assembled fire arms were found stored in a vault. Appellant/Md. Hasan Imam and his son, namely, Md. Imtiyaz @ Sonu (appellant in Cr. Appeal (SJ) No. 1277 of 2017) were found present and therefore the search was conducted in their presence. A seizure list was prepared and a copy of the same was served upon the aforementioned appellants. Apart from the aforesaid recovery, the police also recovered one laptop computer 7 sets of mobile phones 12 round of live cartridges 3 motorcycles and a generator set. These articles were also seized.

5. During the course of search, appellant/Md. Imtiyaz @ Sonu disclosed that his brother, appellant/Md. Sarfaraz @ Mister (Cr. Appeal (SJ) No. 949 of 2017) and his friend Md. Azhar Sabri (since acquitted) were also involved in the manufacturing and supply of arms. It was further revealed by appellant/Md. Imtiyaz @ Sonu that the laptop was used for conveying/receiving information, motorcycles were used for carrying fire arms and the generator was used for running the machines for finishing of semi finished fire arms weapons. He also disclosed that appellant/Md. Sarfaraz @ Mister would be found at the residence of his friend co-accused/Md. Azhar Sabri at village-Churamba or at Bardah or at the residence of other co-accused persons, namely, Md. Naushad @ Koko, Md. Shabbir or Md. Rabbani. The reason for the appellant/Md.



Sarfaraz @ Mister to have gone to the house of Md. Azhar Sabri was that a huge consignment of semi finished fire arms was likely to arrive from the shop of one Utpal Choudhary, situated at Kolkata, through a transport agency, namely, Vijay Transport of Bhagalpur.

6. The written report further reveals that two teams were constituted to conduct raid at the aforesaid disclosed locations. One team proceeded with appellant/Md. Imtiyaz @ Sonu, whereas the other team arrested appellant/Md. Sarfaraz @ Mister and co-accused/Md. Azhar Sabri. They were handed over to the first team. The second team went to Kolkata with appellant/Md. Sarfaraz @ Mister and raids were conducted there also.

7. Against the appellants and co-accused/Md. Azhar Sabri, Utpal Choudhary, proprietor of Vijay Transport, Md. Naushad @ Koko, Md. Shabbir and Md. Rabbani, First Information Report was registered *vide* Kasim Bazar P.S. Case No. 30 of 2014, dated 02.03.2014, for the offences under Sections 25(1-a)a, 25(1-b)a, 25(1-c)a, 26(i) (ii) (iii) and 35 of the Arms Act and Sections 17/20 of U.A.P. Act. The police after investigation, however, submitted charge-sheet against the appellants and one Md. Azhar Sabri.

8. The learned Magistrate, on seeing the sanction report and the charge-sheet, took cognizance against the



appellants on 05.06.2014 and the case was committed to the Court of *Sessions* for trial.

9. Charges were framed against the appellants and the appellants pleaded not guilty and claimed to be tried.

10. The Trial Court, after examining 10 witnesses on behalf of the prosecution and 1 on behalf of the defense, convicted and sentenced the appellants as aforesaid; but acquitted co-accused/Md. Azhar Sabri.

11. Mr. Ashok Kumar Choudhary, learned Advocate appearing for the appellants, while assailing the judgment of conviction and order of sentence, has submitted that the recovery of the fire arms from the house of appellant/Md. Hasan Imam could not be established beyond all reasonable doubts. The reason for his saying so was that no independent person was made a witness to the seizure and one amongst the official witnesses to the seizure was not examined at the trial and no explanation also has been offered for his non-examination. Apart from this, it was that the seized items were not sealed and marked with any specification and at the trial, some of the important items of recovery were not ever produced before the Court. Thus, the recovered items at three places, not having been sealed and marked, lost all relevance so far as the appellants were concerned. The premises of appellant/Md. Hasan Imam,



according to the learned counsel for the appellants, was not properly searched as the requirements of Section 100 of the Code of Criminal Procedure, 1973 (*in short* "**the Cr.P.C.**") were willfully breached/bypassed, making the entire search process and consequent recovery inadmissible in the eyes of law. It was also contended on behalf of the appellants that the original sanction order was not produced in the Court and only the copy of the same was proved and hence there was a violation of Section 39 of the Arms Act also.

12. In order to test the contentions of the appellants as well as the case of the prosecution, it would be necessary to first see the deposition of the informant of this case, namely, P.W. 8.

13. P.W. 8, at the trial, has deposed that on 01.03.2014, while he was posted as Officer-In-Charge of Kasim Bazar Police Station, he received a secret information regarding manufacture of arms at the house of the appellant/Md. Hasan Imam. Such information was communicated to the superior police officer and after constituting a team of police officials, the house of the appellant Md. Hasan Imam was raided. Efforts were made to find out local witnesses, but because of the raid being conducted somewhere around midnight, no person was found to be available or agreeable for becoming a witness to the



seizure. As a result, Shivjee Singh, A.S.I. and one Constable Rajiv Kumar Gupta, who were part of the raiding team, were made witnesses to the seizure. The entire team offered themselves for their personal search before the aforesaid two witnesses. Thereafter, raid was effected. From a vault made in the left hand side of the house of the appellant/Md. Hasan Imam, milling, drilling as well as grinding machines were found. During the course of search, appellant/Md. Hasan Imam and his son appellant/Md. Imtiyaz @ Sonu were found to be present. They were brought near the vault and the raid was conducted in their presence. Because of large number of items which were recovered, it took a long time to complete the recovery process. The Articles so recovered were seized and a seizure list was prepared. The seizure list was proved by P.W. 8, which was under his signature. He also identified the signature of the other witnesses.

14. Apart from the aforesaid recovery, P.W. 8 has testified to the recovery of a laptop, 7 mobile phones, 12 cartridges, 3 motorcycles and a generator set. These articles were also seized and consequently a separate seizure list was prepared (Exhibit-6/1). The aforesaid seizure also has been proved by P.W. 8. It was further deposed that during the course of raid, the Superintendent of Police, Munger as well as A.S.P. (Operations) came to the house of the appellant/Md.



Hasan Imam. During the course of investigation, appellant/Md. Imtiyaz @ Sonu disclosed that his bother appellant/Md. Sarfaraz @ Mister and his friend Md. Azhar Sabri of village-Churamba as well as others were also involved in manufacture and sale of fire arms. It was also disclosed by appellant/Md. Imtiyaz @ Sonu that one Utpal Choudhary of Kolkata is also actively involved in the aforesaid trade along with the appellants and there was every likelihood of aforesaid Utpal Choudhary sending a consignment of arms through Vijay Transport of Bhagalpur.

15. On such disclosure by one of the appellants, two teams were constituted. One team was led by P.W. 8 himself, whereas the other team was put under the control of one Gautam Kumar Singh, a police officer. On showing of appellant/Md. Imtiyaz @ Sonu, P.W. 8 proceeded along with his team to village-Bardah and the house which was pointed out by the appellant/Md. Imtiyaz @ Sonu was raided. However, nothing was recovered from there. Thereafter, while on way to village-Churamba, his team met the team of Gautam Kumar Singh and he was informed that by the other team that Md. Sarfaraz @ Mister and Md. Azhar Sabri have been arrested. There only, he learnt that appellant/Md. Sarfarz @ Mister had disclosed vital information regarding lathe machine having been set up by Utpal Choudhary of



Kolkata. Co-accused/Md. Azhar Sabri was given to the charge of P.W. 8, whereas the other team proceeded for Kolkata for raiding relevant places along with appellant/Md. Sarfaraz @ Mister.

16. P.W. 8 has proved the formal F.I.R. (Exhibit-8). His written report was also proved by him (Exhibit-9). P.W. 8 has proved the recovered items, namely, Exhibit-1 to 1/XV.

17. During his cross-examination, P.W. 8 however stated that he had got the list prepared in accordance with the recovery at the house of appellant/Md. Hasan Imam, but he did not know as to in which block/ward the house of the appellant/Md. Hasan Imam was situated. On being questioned, P.W. 8 admitted that he had the knowledge that any person, not helping the police party, makes himself liable for prosecution, but he did not initiate any proceeding against any one of the persons who had refused to become a witness to the seizure. He has also admitted that there was no individual search memo of the witnesses to the seizure, even though they were members of the police team. Nothing was seized at Kolkata in his presence. He only came to learn later about the recoveries at other places. The seizure list was prepared at the same place where recovery was made.

18. P.W. 8 has, therefore, plainly refused to



accept the suggestion of the appellants that the seizure list was prepared at some other place.

19. The seized articles were brought to the police station and were kept stored in the *Malkhana*. Necessary entries were made in the register of the *Malkhana*. The seized articles were never handled in between the time that those were stored in the *Malkhana* and when brought to the Court at the time of the trial. The aforesaid witness has also stated that inadvertently, a wrong entry was made about the arrest of accused/Md. Azhar Sabri from the house of the appellant/Md. Hasan Imam. He has deposed that the appellant/Md. Sarfaraz @ Mister was arrested from near the house of the accused/Md. Azhar Sabri in village-Churamba. He has denied the suggestion that Md. Sarfaraz @ Mister was asked to come to the police station on 03.03.2014 and there only he was arrested. In fact, P.W. 8 has categorically deposed that Md. Sarfaraz @ Mister was arrested on 02.03.2014 from village-Churamba. All the seized items were recovered from house of appellant Md. Hasan Imam.

20. From the deposition of P.W. 8, what is clearly established is that the raid was conducted in the house of appellant/Md. Hasan Imam, where the appellants/Md. Hasan Imam and his sons, namely, Md. Imtiyaz @ Sonu were present. The seizure list contains the signature of the



aforesaid two persons. The further arrests were made only on the disclosure of appellant/Md. Imtiyaz @ Sonu. What strikes this Court is that there is no evidence with respect to the appellant/Md. Sarfaraz @ Mister also residing in the same house as that of appellants/Md. Hasan Imam and Md. Imtiyaz @ Sonu, who were found to be present at the time of raid in the concerned house. No question, however, was put to P.W. 8 regarding the aforesaid aspect.

21. Thus, in this connection, it would only be profitable to look at the deposition of appellant/Md. Sarfaraz @ Mister, who got himself examined as D.W. 1.

22. Appellant/Md. Sarfaraz @ Mister (D.W. 1), in his deposition, has stated that he is M.A. B.Ed. and stays at Dilawarpur along with his grandmother in the ancestral house. In 2012, he had purchased a land from his uncle/Md. Aashique Imam and his co-sharers. The land so purchased by Md. Sarfaraz @ Mister was mutated in his name. It was contended by him that he did not have any idea about the other appellants, namely, his father and the brother being in trade of sale and purchase of fire arms in an unauthorized manner and for a long time, he had no connection with them. Only because he was named by one of his brothers, he was arrested from his Dilawarpur house and was taken into custody.

23. In his cross-examination by the prosecution,



he has stated that he has six other brothers including one of the appellants in the present case. His father owned a house at Hazrat Ganj Bara, Munger with whom he used to reside earlier. One of his brothers had purchased a plot of land near to the plot of land which he had earlier purchased from his uncle. In his 313 Cr.P.C. statement, however, he has only refused to accept any one of the circumstances put to him.

24. Thus, from the conspectus of the aforesaid discussion, it becomes very clear that appellant/Md. Sarfaraz @ Mister was not arrested at the place where the recoveries were made and the only material against him is the statement of his brother/Md. Imtiyaz @ Sonu that he is also involved in the aforesaid trade by the other accused persons. The recoveries which were made at the instance of appellant/Md. Sarfaraz @ Mister though forms part of the record, but the persons who were made accused on the disclosure of appellant Md. Imtiyaz @ Sonu, at Kolkata and Bhagalpur, were not charge-sheeted in the present case.

25. Thus, this Court finds that the recoveries which were made on the indication of appellant/Md. Sarfaraz @ Mister, cannot be linked to him as only that part of the recovery is admissible in evidence. The prosecution has not been able to establish that the appellant/Md. Sarfaraz @ Mister either stayed in the same house that of his father and brother



or that he had knowledge of the presence of such fire arms in the ancestral house from where the recoveries were made.

26. Shivjee Singh (A.S.I.), one of the witnesses to the seizure and one of the signatories of the seizure list, has been examined as P.W. 1. He has supported the prosecution version and has deposed that the raid was conducted at about 4:00 to 4:30 in the morning, from where huge cache of fire arms was recovered. He has proved the seizure list (Exhibit-1). He has also deposed that he had signed on the arrest memo of the appellants/Md. Hasan Imam and Md. Imtiyaz @ Sonu. He admitted before the Trial Court that the S.H.O. of the police station had received information regarding presence of unfinished fire arms at the house of the appellants on 02.03.2014. The police team of which he was one of the members, proceeded towards the house of the appellants at 12 O'clock in the night and reached the destination only in around 15 minutes. In his cross-examination however, he has stated that he did not enter the house of the appellants and remained standing in the street situated in eastern direction. The recovered articles were not sealed in his presence. However, he has admitted his signature on the seizure list and has also identified the signature of Constable Rajiv Kumar Gupta (not examined).

27. Dinesh Kumar Singh, Sergeant Major, has



been examined as P.W. 2. He has deposed that he had examined the seized articles of the case which was brought before him. He found one pistol of 7.65 bore to be effective (Exhibit-1). He has given the details of the length of the body and barrel of the pistol and other ammunitions that he had examined. He had examined the hammer, trigger and the firing pin of the other weapons and found them to be absolutely effective and worthy of firing by .3 bore cartridge. However, in his cross-examination, he has stated that he did not mention in the examination report as to at what time, P.W. 10 (Polendra Singh), one of the Investigating Officers in the case, had brought the seized articles for their examination. It was also not mentioned in his report that the seized articles were sealed or that they were kept in any specific packets with identifiable marks. Two of the material exhibits were finished products, whereas twelve others were unfinished. He has denied the suggestion that he had not examined the exhibits and without their examination, he had submitted the report. Only with respect to the two pieces of a double barrel gun, he had not stated the details of its length and width.

28. From the deposition of P.W. 2, therefore, it stands established that even the unfinished part of the fire arm weapons, which was seized in the case, were worthy of being used for manufacturing fire arm weapons and those were parts



which could have been assembled for making fire arm weapons.

29. Arvind Paswan (A.S.I.); P.W. 3 and Abdul Halim (A.S.I.); P.W. 4, who were the members of the raiding team have also supported the prosecution version. Both the aforesaid witnesses have testified to the fact that the appellants/Md. Hasan Imam and Md. Imtiyaz @ Sonu were present at the place of occurrence and that another police team had proceeded to village-Churamba along with the appellant/Md. Imtiyaz @ Sonu to raid the house of accused Md. Azhar Sabri. Both the aforesaid witnesses have testified to the recovery of the articles which were seized by the police.

30. There is nothing in their deposition which could discredit the prosecution version of the recovery of the seized articles from the house of the appellant/Md. Hasan Imam in his as well as in one of his sons' presence.

31. Shanker Prasad Tudu, who has been examined as P.W. 5, has supported the recovery of arms from the house of appellant/Md. Hasan Imam. He has deposed that Shivejee Singh (P.W. 1) and Constable Rajiv Kumar Gupta were made witnesses to the seizure on account of non-availability of any independent witnesses at the time and place of the raid. In his presence, all the articles recovered were seized. Two police teams were constituted and appellant/Md. Sarfaraz @ Mister



was found at the house of accused/Md. Azhar Sabri. However, in his cross-examination, he could not specify the items which were sealed and packaged as well as those which were not sealed and packaged.

32. Awadhesh Kishore Prasad, a Clerk in the Legal Section, Collectorate, Munger, has been examined as P.W. 6. He has identified the signature of the then District Magistrate, Mr. Narendra Kumar Singh, on the sanction report (Exhibit-4). He has testified to the fact that he had occasion to work with the aforesaid District Magistrate and hence he identified his signature.

33. In this connection, it is relevant here to state that one of the major grounds raised by the learned counsel for the appellants is that in the absence of the original sanction report, the conviction of the appellants under anyone of the provisions of the Arms Act is vitiated and cannot withstand the scrutiny of law. This is because in the absence of the original sanction report, the provisions contained in Section 39 of the Arms Act, namely, that no prosecution can be launched without prior sanction of the District Magistrate, would stand breached/violated.

34. Section 61 of the Indian Evidence Act, 1872 (*in short "the Act"*) provides that the contents of a document may be proved either by primary or by secondary evidence.



The primary evidence of a document would be the document itself which is capable of being produced for the inspection of the Court. The secondary evidence of that document would be the certified copies of such documents or copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy and copies compared with such copies or copies made from or compared with the original or oral accounts of the contents of a document given by some person who has himself seen it.

35. According to Section 64 of the Act, the documents must be proved by primary evidence, but exceptions have been provided in Section 65 of the Act. Sub-Clauses (e) and (f) of Section 65 of the Act provide that when the original is a public document within the meaning of Section 74 of the Act and when the original is a document of which a certified copies is permitted by this Act or by any other law in force, such document could be proved by secondary evidence.

36. Sub-Clauses (e) and (f) of Section 65 of the Act read thus:-

"65. Cases in which secondary evidence relating to documents may be given.—Secondary evidence may be given of the existence, condition, or contents of a document in the following cases: -

(a) x x x x x;

(b) x x x x x;

(c) x x x x x;



(d) x x x x x;

(e) when the original is a public document within the meaning of Section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in [India] to be given in evidence;

(g) x x x x x”

37. Section 74 of the Act defines what are public documents. Section 74 of the Act reads as hereunder: -

“74. Public documents.—The following documents are public documents :-

(1) Documents forming the acts, or records of the acts—

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial and executive, [of any part of India or of the Commonwealth], or of a foreign country;

(2) Public records kept [in any State] of private documents.”

38. Sections 77 and 78 of the Act provide for the proof of documents by production of certified copies and proof of other official documents. A certified copy may be produced in proof of the contents of the public documents or parts of public documents of which they purport to be the copies.

39. In the case in hand, a duplicate copy of the sanction report has been proved by P.W. 6.

40. Similarly Deepak Kumar, another member of



the raiding team, has been examined as P.W. 7 and he too has supported the prosecution version. However, from his deposition it becomes very clear that he was not part of the team which had raided the house of appellant/Md. Hasan Imam. Aforesaid prosecution witness was in the team of Gautam Kumar Singh (not examined), which had gone to Howrah to conduct raid in the shop of Utpal Choudhary along with appellant/Md. Sarfaraz @ Mister. The shop of aforesaid Utpal Choudhary was situated in Jaliya Para from where; 500 barrels, 500 slides, 110 grips and 55 bodies of pistol and lathe machine were recovered.

41. Ravi Ranjan Kumar, who has been examined as P.W. 9, at the relevant time was posted as Deputy Superintendent of Police, Munger. He has deposed that he had recorded the further statement of the informant and on the basis of the confessional statement of appellant/Md. Imtiyaz @ Sonu, a raid was conducted in the house of co-accused Md. Azhar Sabri. He had recorded the statement of other members of the raiding team and has testified to the fact that the investigation was later entrusted to P.W. 10/Polendra Singh, a Deputy Superintendent of Police, under the orders of the Superintendent of Police, Munger. He has further testified to the fact that he had seen the seized articles at the police station. At the time of comparison of the seized articles, those



were not found to be sealed or marked specifically.

42. Polendra Singh, P.W. 10, had conducted the investigation. He had recorded the further statement of the informant again and other witnesses. However, in his deposition, he has stated that the District Magistrate had issued the sanction order without seeing/perusing the seized articles.

43. From the deposition of P.W. 9 and P.W. 10, the Investigating Officers, it is established/proved that the seized articles were recovered from the house of appellant/Md. Hasan Imam.

44. The argument of the learned Advocate appearing for the appellants that the recovery stands vitiated by non-compliance of Section 100 Cr.P.C., is not sustainable in the eyes of law. When huge quantities of fire arms are recovered from a particular place, it is not possible to seal all of it in separate packets. It is also not possible to find out independent witnesses at the time of search/raid in unearthly hours. The raid appears to have been conducted in the midnight on secret information. It also stands established from the deposition of the witnesses that the secret information was communicated to the superior officer. The A.S.P. and the Superintendent of Police, Munger also arrived at the house of appellant/Md. Hasan Imam during the course of



raid. In such an event, merely because the seized articles, which were huge in numbers, were not sealed and marked separately, the prosecution case cannot be rendered doubtful. The deposition of the two Investigating Officers and Shivjee Singh (P.W. 1) fully established the factum of recovery of weapons from the house of appellant/Md. Hasan Imam when he and his son appellant/Md. Imtiyaz @ Sonu were present in that house. The unfinished as well as the finished parts having been found to be effective if assembled as a fire arms, further confirms the guilt of the appellant Md. Hasan Imam (*Cr. Appeal (SJ) No. 762 of 2017*) and his son appellant Md. Imtiyaz @ Sonu (*Cr. Appeal (SJ) No. 1277 of 2017*).

45. Though another witness to the seizure ought to have been examined by the prosecution, but non-examination of one of the seizure list witnesses also does not affect the credibility of the prosecution version. The informant of this case/P.W. 8 as well as the two Investigating Officers have proved the fact that the recovered articles were seized, sealed and kept in the *Malkhana* of the police station. There is no evidence of the fact that in the interregnum, the seized articles were handled by any person. Some of the articles were not produced before the Court during trial, but that alone cannot be a ground for doubting the recovery of such finished and unfinished items, in violation of various provisions of the



Arms Act.

46. In the dead of the night when raid was being conducted, it was not possible to have obtained a search warrant. The fact that two of the superior police officers had joined the search, even though they have not been examined at the trial, testifies to the fact that the raid and recovery were not only on paper, but was actually was carried out by the prosecution witnesses.

47. Times without number, this Court as well as the Apex Court has held that only because the case has been sought to be proved through the mouth of witnesses who are officials of the police department, the case cannot be rendered doubtful. In a case of this kind where wholesale manufacture or assemblage of fire arms was being carried out at the house of appellant/Md. Hasan Imam, it would be rather an onerous task to be put on the prosecution to arrange for local witnesses at such and unearthly hour.

48. Thus, for all practical purposes, the evidence with respect to the charges levelled against the appellants/Md. Hasan Imam and his son Md. Imtiyaz @ Sonu is complete. There could be no other explanation of the recovery of such items in huge numbers without both the appellants, namely, Md. Hasan Imam and Md. Imtiyaz @ Sonu having knowledge about the nature of such articles seized and their utility in the



assemblage of finished fire arms.

49. However, from the deposition of all the prosecution witnesses what has come to light is that appellant/Md. Sarfaraz @ Mister was not caught or found at the place where the raid was made. At the house of accused/Md. Azhar Sabri from where appellant/Md. Sarfaraz @ Mister is said to have been arrested, nothing incriminating was recovered. Though no effort has been made by the prosecution to establish/prove the fact that the appellant/Md. Sarfaraz @ Mister stayed in same house with his father and brother, but this Court, on a close scrutiny of the evidence of other witnesses, has not be able to find any material indicating towards appellant/Md. Sarfaraz @ Mister using the same house as his residence. The aforesaid appellant has also stated in his deposition, as the lone defense witness, that for sometime, he had stayed with his father, but later he started residing with his grandmother in the ancestral house at Dilawarpur.

50. By the judgment impugned, co-accused/Md. Azhar Sabri has been acquitted of the charges because nothing was recovered from his house and his implication was only on the basis of the confession recorded of one of the co-accused/appellants, namely, Md. Imtiyaz @ Sonu. If the relationship of appellants/Md. Hasan Imam and Md. Imtiyaz @ Sonu with appellant/Md. Sarfarz @ Mister is forgotten for a



moment, there would be no other material against him also which could be garnered from the deposition of the witnesses.

51. This Court does not have any material before it to know as to what happened to the cases of Utapal Choudhary and others, who were named by the co-accused persons. Thus, even if it is assumed that there were some recoveries at Howrah, only that part of the recovery would be admissible in evidence, but it cannot be linked with the complicity of appellant/Md. Sarfaraz @ Mister.

52. Thus, this Court finds that the conviction and sentence of the appellants, namely, Md. Hasan Imam (*Cr. Appeal (SJ) No. 762 of 2017*) and Md. Imtiyaz @ Sonu (*Cr. Appeal (SJ) No. 1277 of 2017*) are justified. No good reason has been found by this Court to differ with the impugned judgment in that regard.

53. Thus, the Cr. Appeal (SJ) No. 762 of 2017 (*Md. Hasan Imam Vs. The State of Bihar*) and Cr. Appeal (SJ) No. 1277 of 2017 (*Md. Imtiyaz @ Sonu Vs. The State of Bihar*) are dismissed.

54. So far as appellant/Md. Sarfaraz @ Mister (*Cr. Appeal No. 949 of 2017*) is concerned, his case, for all practical purposes, is similar to the case of co-accused/Md. Azhar Sabri who has since been acquitted and there is no material on record to suggest that appellant/Md. Sarfaraz @ Mister stayed



in the same house from where recoveries were made on search.

48. Section 35 of the Arms Act reads as follows:

"35. 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."

55. Thus, the appellant/Md. Sarfaraz @ Mister cannot be prosecuted for any one of the offences under the Arms Act, namely, Section 25(1-b)a and 26(ii) read with Section 35 of the Arms Act.

56. Finding no cogent material/evidence against the appellant/Md. Sarfaraz @ Mister and the prosecution not proving the case against him beyond all reasonable doubts, this Court is left with no option but to set-aside his conviction and sentence.

57. Accordingly, Cr. Appeal (SJ) No. 949 of 2017 (*Md. Sarfaraz @ Mister Vs. The State of Bihar*) is allowed.

58. The appellant/Md. Sarfaraz @ Mister is in



custody. He is directed to be released forthwith, if not wanted in any criminal case.

59. A copy of the judgment be transmitted to the Superintendent of concerned Jail for necessary compliance.

(Ashutosh Kumar, J)

Praveen-II/-

AFR/NAFR	NAFR
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