

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.2497 of 2017

Arising Out of PS.Case No. -119

Year- 2012 Thana -KHARAGPUR District- MUNGER

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Birbal Murmu @ Panchu Murmu @ Panchu Da Son of Late Phagu Murmu, R/o Village- Matiya Kor, P.S.- Belhar, District- Banka.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Ajit Kumar Singh, Advocate

For the Respondent/s : Mr. Shyed Ashfaque Ahmad, APP

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

ORAL JUDGMENT

Date: 27-07-2018

The sole appellant has been convicted under Section 5 of the Explosive Substances Act, 1884 by judgment dated 19.06.2017 passed by the learned 2nd Additional Sessions Judge, Munger in Sessions Trial No. 778 of 2014, arising out of Kharagpur P.S. Case No. 119 of 2012 and by order dated 22.06.2017, he has been sentenced to undergo rigorous imprisonment for seven years.

2. On the confession of the appellant, explosive substances in the nature of 93 gelatin boxes were recovered from Kandani forest of Kharagpur and Birma Forest which are situated near the house of the appellant.

3. The prosecution case is based on the self statement of Vishwa Bandhu/P.W. 1, Officer-in-charge of Kharagpur Police



Station. He, in the aforesaid self statement has alleged that Manoranjan Bharti, the then Officer-in-charge of Belhar Police Station (P.W. 6) telephonically informed him that he had recorded the confession of the appellant who has disclosed that explosives are concealed in Kandani forest.

4. Vishwa Bandhu/P.W. 1 was asked by Manoranjan Bharti/P.W. 6 to come to Dariyapur Chawk. After recording the aforesaid fact in the station diary, P.W. 1 proceeded for Dariyapur Chawk and thereafter the entire team proceeded towards Kandani forest. On the pointing of the appellant, 93 gelatin boxes were recovered. A seizure list was prepared in presence of Rajesh Kumar, who has not been examined and Anil Kumar, who has been examined as P.W. 2.

5. It has been alleged in the self statement that the appellant confessed that he along with his associates were contemplating to use the explosive substances for commission of some offence in the Districts of Jamalpur, Munger, Banka and Lakhisarai. It was, therefore asserted by the informant that the appellant belonged to a banned outfit of Communist Party and at the relevant time, he was operating as Area Commander of Sangrampur and Kharagpur area. It was also alleged in the aforesaid statement that the appellant and others were in the process of forming a parallel Government, opposed to the authority of the Union of India.



6. On the basis of the aforesaid self statement, a case vide Kharagpur P.S. Case No. 119 of 2012 was registered for investigation on 11.06.2012 for the offences under Sections 121, 121(A), 122 read with Section 120(B) of the Indian Penal Code, Sections 3, 4, 5 of the Explosive Substances Act, 1884, Sections 38, 39, 40 of the Unlawful Activities (Prevention) Act, 1967 and Section 17 of the Criminal Law Amendment Act, 1932.

7. The police, after investigation submitted charge-sheet, whereupon cognizance was taken and the case was committed to the Court of Sessions for trial.

8. The Trial Court, after examining seven witnesses on behalf of the prosecution, convicted and sentenced the appellant as aforesaid.

9. Mr. Ajit Kumar Singh, learned advocate for the appellant, while assailing the judgment and order of conviction, has argued that the conviction is solely based on the so called confession of the appellant and even that part of the confession has been taken into account and has been admitted which is specifically barred under the provisions of Section 27 of the Evidence Act.

10. Expatiating on the aforesaid ground, it has been argued by Mr. Singh that assuming for the sake of argument that on the disclosure made by the appellant, there had been a recovery of 93 gelatin boxes, only that part of the recovery was



admissible and no other part viz. the knowledge of the appellant about the presence of such explosive substance in a place which is unknown to the Police. If that part is not taken into account, it has been argued, it would be difficult for any Court to hold the appellant guilty of Section 5 of the Explosive Substances Act, 1884 which makes a person liable for being punished on mere possession of the explosive substances. But for the recovery of the galantine boxes, no other part of the disclosure of the appellant could have been used for convicting him.

11. While pointing out further fallacy in the judgment, Mr. Singh has argued that the Officer-in-charge of Belhar Police Station who has been examined as PW. 6 did not state clearly as to in connection of which case, he had proceeded from the Police Station to arrest the appellant. In what case was the appellant wanted is not known. It was only when the appellant was arrested, he was made to give a disclosure statement pursuant to which the recovery has been made and the appellant has been convicted and sentenced for the offences charged.

12. Additionally, it has been argued that the charges in this case were framed only under Sections 3 and 4 of the Explosive Substances Act, 1884 and the Trial Court, on a mistaken notion, by taking resort to the provisions of Section 222 of the Code of Criminal Procedure has convicted and sentenced the appellant under Section 5 of the Explosive



Substances Act, 1884, even though the offence under Section 5 of the Act referred to above is not a minor offence in relation to the offences under Sections 3 and 4 of the Explosive Substances Act, 1884.

13. Apart from all the above grounds, what has been submitted on behalf of the appellant is that his implication in the present case is only on the basis of suspicion and no other material.

14. In order to appreciate the contention raised on behalf of the appellant, it would be necessary to first refer to the deposition of the witnesses.

15. The most important witness, in the opinion of this Court to be discussed, is P.W. 1 who is the informant of this case. He has deposed that on 11.06.2012, while he was posed as S.H.O of Kharagpur Police Station, he was informed by the S.H.O of Belhar Police Station, Banka that the appellant had made a disclosure and recovery could be made on such disclosure. On such information, a team comprising the aforesaid witness, P.W. 6 and others went to Kandani forest and on the pointing of the appellant, recovered 93 gelatin boxes kept inside the earth. In his cross-examination, he has admitted that he did not arrest anybody at the place of recovery and that he had only received Xerox copy of the confessional statement which led to the recovery of gelatin boxes. When questioned specifically, P.W.



1 stated that in the absence of any independent witness, a *Chaukidar* who was asked to accompany the raiding team was made a witness to the seizure.

16. The learned counsel for the appellant has submitted that the evidence of P.W. 1, therefore cannot be used for convicting the appellant for the reason that he clearly stated before the Trial Court that he did not find the confessional statement of the appellant enclosed with the F.I.R. The confessional statement was not recorded by him and it appears that what was recovered was known to P.W. 6 from before and only in order to frame the appellant, the appellant was made to record a disclosure. In his deposition, P.W. 1 has not referred to the presence of the appellant at the time of raid.

17. Anil Kumar (P.W. 2), a *Chaukidar* as stated above, was part of the raiding team. In his cross-examination, he has admitted that the recovery was made in deep forest by the side of a river. But he signed the seizure list only at the instance of the S.H.O. of the Police Station. He has not witnessed the recording of the disclosure statement of the appellant. The manner in which he has deposed before the Trial Court, it has been argued, it becomes manifest that he was only a stock witness of the police who has not seen the occurrence.

18. Another Police Officer who accompanied the raiding team viz. Prashant Kumar has been examined as P.W. 3.



He has however deposed that on the pointing of the appellant, recovery was made in his presence. The seizure list was prepared by P.W. 1 and was signed by one Rajesh Kumar (not examined) and P.W. 2, both *Chaukidars*. A copy of the seizure list was given to the appellant. He identified the appellant in the dock. The suggestion given to him that he has falsely deposed against the appellant on the insistence of his superiors, has been denied.

19. Abdul Halim is the Investigating Officer of this case, who has been examined as P.W. 4. He took up the charge of investigation of the subject F.I.R and recorded the statement of the witnesses including the informant and others. On 14.08.2012, it was deposed by P.W. 4, the appellant was produced before the Chief Judicial Magistrate for remand. On the same day, P.W. 4 sought permission from the Superintendent of Police, Munger for destruction of gelatin boxes which were recovered and appointment of Destruction Specialist. On 30.08.2012, a team of specialist from B.M.P. 9, Jamalpur came to destroy the seized gelatin boxes. He has proved the destruction report which bears the signature of Vinay Kumar Singh (Ext-4). The destruction report has also been signed by P.W. 1(Ext-5). One piece of gelatin was sealed and sent to the F.S.L., Patna on 24.09.2012. He has deposed that he initiated the process for obtaining sanction for prosecuting the appellant.



20. Hari Prasad/P.W. 5 is the second Investigating Officer of this case who has submitted the charge-sheet against the appellant under various Sections of the Indian Penal Code, Explosive Substances Act, 1984, Section 17 of the Criminal Law Amendment Act, 1932 and Sections 38, 39, 40 of the Unlawful Activities (Prevention) Act, 1967. He had received the sanction report and has proved the final report (Ext-6).

21. Now, it would be relevant to refer to the deposition of P.W. 6/Manoranjan Bharti, who had recorded the so called confession of the appellant. He has deposed that the confession of the appellant was recorded at Sultanganj Railway Station. He had arrested the appellant on 10.06.2012 at Pakur with the help of Pakur Police as he was wanted in many cases registered in the Belhar Police Station of which he was the Officer-in-charge. The confessional statement was recorded on 11.06.2012 pursuant to which the recovery was made on the same day. In his cross-examination, he has stated that the confessional statement of the appellant was not recorded at Pakur where he was arrested. He was not in a position to tell the Court as to for which case, the appellant was wanted and for arresting whom, he had taken the help of Pakur Police.

22. The learned counsel appearing for the appellant has submitted that the entire story of recording of confession at Sultanganj Police Station does not appear to be trustworthy. The



appellant was arrested on 10.06.2012. In which case was he arrested is also not known. Why was the confession of the appellant not recorded in Pakur on 10.06.2012, is also not clear. It is only on 11.06.2012 that he is said to have recorded the statement (confession) of the appellant. There is nothing on record to infer that there was any transit memo received from any authority or Court. Why was the appellant brought to the Sultanganj Railway Station is also not known. Which of the Police Officers were accompanying P.W. 6 for arresting the appellant has also not been stated by him. With such deficient materials of the trial, it has been argued, the appellant has been convicted and sentenced as aforesaid.

23. The F.S.L. report (Ext-8) disclosed that the sample which was sent to the F.S.L. corresponded to an explosive mixture of ammonium nitrate and sodium nitrate along with other materials, rendering the same to be an industrial explosive which is normally used in blasting operations.

24. What has been argued on behalf of the appellant is that only a colour of confession/disclosure and recovery has been given in order to frame the appellant who is not in the good books of the local Police.

25. From the perusal of the evidence on record, what is evident is that P.W. 1 was informed about the confession of the appellant by P.W. 6. He joined the Police Party of P.W. 6 on



the asking of P.W. 6. In his presence, recovery was effected in Kandani forest and such recovery was on the pointing of the appellant.

26. Sections 25 to 27 of the Indian Evidence Act, 1872 deal with confession to a Police Officer. Section 25 of the Evidence Act declares that no confession made to a Police Officer shall be proved as against a person accused of any offence. Section 26 further delineates that no confession made by any person while he is in the custody of a Police Officer unless it be made in the immediate presence of a Magistrate shall be proved as against such person. The departure from the aforesaid ban with respect to use and admissibility of a confession of an accused before the Police is to be found in Section 27 of the Evidence Act.

27. Section 27 of the Evidence Act, 1872 reads as hereunder:-

"27.How much of information received from accused may be proved.-Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police offer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

28. The object of Section 27 is to provide for admission of evidence which but for the existence of the section



would not, in consequence of the preceding sections, be admitted in evidence. Under Section 27, what is admissible is the information from an accused in custody leading to the recovery and only that part of the recovery is admissible.

29. In the **State (N.C.T of Delhi) v. Navjot Sandhu AIR 2005 SC 3820**, the Supreme Court noticed the divergence of judicial opinion with respect to how much of information received from an accused could be proved. It was observed by the Supreme Court in Navjot Sandhu (*supra*) that the divergence was mainly on the aspect whether the facts contemplated by Section 27 would include only physical, material objects or the mental facts of which the accused giving the information could be said to be aware of and with respect to the extent of admissibility of a disclosure statement. Some of the judgments declared that the discovery of concrete facts that is to say material objects alone are covered under Section 27 of the Evidence Act; while in some judgments, a view has been taken that any information which served to connect the object with the offence charged was admissible under Section 27 of the Evidence Act. In that context, the Supreme Court quoted with approval the decision of the Privy Council in **Pulukuri Kottaya and others v. Emperor AIR (34) 1947 Privy Council 67** which is till date regarded as *locus classicus* over the issue.

30. The Supreme Court in Navjot Sandhu (*supra*) held



that Pulukuri Kottaya case (*supra*) is the authority for the proposition that "discovery of fact" cannot be equated to the object produced or found. It is more than that. The discovery of fact arises by reason of the fact and the information given by the accused exhibited the knowledge or the mental awareness of the informant as to its existence at a particular case.

31. In the **State of Maharashtra versus Damu AIR 2000 SC 1691**, the Supreme Court observed that the decision of the Privy Council in Pulukuri Kottaya (*Supra*) is the most quoted authority for supporting the interpretation that the fact discovered envisaged in Section 27 embraces the place from which the object is produced, the knowledge of the accused as to it but subject to the condition that the information given must relate distinctly to that effect.

32. In **Mohmed Inayatullah versus The State of Maharashtra AIR 1976 SC 483**, the Supreme Court again clarified that the expression "fact discovered" in Section 27 is not restricted to a physical or material fact which can be perceived by the senses but it also includes a mental fact.

33. In this context, it would be with some profit that the disclosure made by the appellant is seen. It was clearly stated by the appellant that he can show to the Police Officer the place where the explosives have been kept. The recovery was effected thence. This part of the recovery consequent to the



disclosure made by the appellant is admissible along with the place where it was recovered as also the mental components of the appellant of the knowledge of the existence of the explosives kept concealed in the deep forest. With the admission of the aforesaid facts which is distinctly relatable to the recovery of the explosives, the offence under Section 5 of the Explosive Substances Act is squarely made out as against the appellant. The evidences of P.W.s 1, 2 and 6 definitely put a seal of admissibility of the factum of recovery and the knowledge of the appellant. There is no gainsaying that the aforesaid witnesses viz. P.W.s 1, 2 and 6 have consistently stated that the raid was conducted only on the disclosure of the appellant and on the pointing of the appellant, the recovery was made.

34. True it is that the Trial Court did not have any clue as to how and in what case, the appellant was arrested and why was his statement not recorded immediately after his arrest at Pakur. Be that as it may, such a missing link does not affect the correctness of the prosecution version at all.

35. What stands proved is that in connection with a case, P.W. 6, with the help of the Police at Pakur, arrested the appellant and the appellant on the next day at Sultanganj Police Station gave his confessional statement giving disclosure about the presence of explosives in the forest. It is only on the basis of the aforesaid disclosure that the information was transmitted by



P.W. 6 to P.W. 1, whereupon a joint raid was conducted.

36. So far with respect to the evidence regarding the recovery made on the disclosure of the appellant.

37. The other submission made on behalf of the appellant which needs to be discussed is whether the Trial Court could have convicted the appellant under Section 5 of the Explosive Substances Act, 1884 in the absence of any charge having been framed under the aforesaid section. The answer to the question is absolutely clear in view of Section 222 of the Code of Criminal Procedure. Section 222 of the Code of Criminal Procedure reads as hereunder.

"222. When offence proved included in offence charged."

-(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is provided, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

(3) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.

(4) Nothing in this section shall be deemed to authorize a conviction of any minor offence where the conditions requisite for the initiation of proceedings in respect of that minor offence have



not been satisfied."

38. The aforesaid Section of the Code clothes the Trial Court with power to charge and convict an accused for a different minor offence in the sequence of the offences even if no specific charge with respect to such minor offence has been framed. If several particulars constitute an offence, a confession regarding some of them would constitute a complete minor offence and in the absence of any specific charge for the aforesaid minor offence, a person/accused could be convicted. The apt example for such a case would be found in the two illustrations provided to the Section. If a person is charged under Section 407 of the I.P.C for criminal breach of trust as a carrier and if during trial it is not proved that such criminal breach of trust was committed as a carrier, he could well be convicted under Section 406 of the I.P.C which is one of the minor shades of the offence of criminal breach of trust. Similarly, if a person is charged for the offence under Section 325 of the I.P.C for causing grievous injury and during the trial, it is proved that the action was committed on sudden and grave provocation then, on the same set of evidence, such person could be convicted under Section 335 of the I.P.C.

39. Thus, even if the charges against the appellant were framed only under Sections 3 and 4 of the Explosive Substances Act, Section 5 of the Explosive Substances Act which is in the nature of a sequence and of a minor nature compared



to Sections 3 and 4 of the Explosive Substances Act, the appellant could have been convicted for the said offence.

40. Thus, from the conspectus of evidence collected against the appellant, which is primarily the confession of the appellant leading to recovery of Explosive Substances Act, it stands completely proved that the appellant is guilty of the offence charged under Section 5 of the Explosive Substances Act.

41. For paucity of any evidence with respect to waging war against the Government or any offence having been committed under Criminal Law Amendment Act, the Trial Court has justifiably acquitted the appellant of the aforesaid charges.

42. This Court, therefore, is of the view that no interference is required with respect to the conviction of the appellant under Section 5 of the Explosive Substances Act.

43. Accordingly, the judgment of conviction is upheld and affirmed.

44. Mr. Ajit Kumar Singh, learned advocate for the appellant thereafter addressed this Court on the issue of sentence. It has been urged on behalf of the appellant that he had been facing trial since 11.06.2012 and in the present case has remained in jail since 13.08.2014. It has further been brought to the notice of this Court that the appellant belongs to the poor strata of society and is a scheduled tribe, illiterate and



a daily wage earner. With the incarceration of the appellant since 2012, his family is almost on the brink of starvation. On the aforesaid ground, it has been urged on behalf of the appellant that the sentence imposed upon the appellant be reduced.

45. Sentencing an accused in a criminal case is one of the most important functions of the Court. Times without number, it has been held that a fine balance has to be struck between the rights of the victim of crime and society as also of the accused and while imposing sentence, the nature and gravity of crime is to be seen. Along with it, the considerations with respect to the execution of the crime would also be an important input for the purposes of sentencing a convict. Undue sympathy may not be appropriate in some cases but imposition of extreme sentence could prove to be an anathema for the corrective dispensation of justice delivery system.

46. Regard being had to the continued period of incarceration of appellant, his social and financial status in life and his conviction being based solely on his confession and recovery of explosives substances without any consequential link for commission of any other separate/distinct offence, this Court is of the view that interest of justice would sufficiently be met if the sentence of the appellant is reduced to the period of custody which he has already undergone. Though the appellant may have been remanded in this case in the year 2014 but has been



in jail since 2012.

47. The sentence imposed upon the appellant is therefore modified to the period which he has already undergone.

48. The appeal is thus partially allowed with the affirmation of the conviction but modification in the sentence as indicated above.

49. The appellant is in custody.

50. He is directed to be released from jail forthwith, if not wanted in any other case.

51. A copy of the judgment be transmitted to the Superintendent of the concerned Jail for information, compliance and record.

(Ashutosh Kumar, J)

Shageer/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	01/08/2018
Transmission Date	01/08/2018

