

IN THE HIGH COURT OF JUDICATURE AT PATNA**Criminal Appeal (SJ) No.485 of 2015**

Arising Out of PS.Case No. -36 Year- 2001 Thana -WARSALIGANJ District- NAWADA

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Arvind Kumar Singh @ Arvind Singh, son of Rajendra Singh @ Rajo Singh,
resident of Village Dariyapur, P.S. Warsaliganj, District Nawada.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

Appearance :

For the Appellant/s : Mr. Ajay Kumar Thakur-Advocate
Mr. Md. Imteyaz Ahmad-Advocate
Mr. Ritwaj Raman-Advocate
For the Respondent/s : Mr. Sujit Kumar Singh-A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 16-05-2018

Appellant Arvind Kumar Singh @ Arvind Singh has been found guilty for an offence punishable under Section 25(1-A)b of the Arms Act and sentenced to undergo R.I. for three years as well as to pay fine appertaining to Rs.5,000/- and in default thereof, to undergo S.I. for four months, additionally, under Section 26(1) of the Arms Act and sentenced to undergo R.I. for two years as well as to pay fine appertaining to Rs.4,000/- and in default thereof, to undergo S.I. for three months, additionally, under Section 414 of the I.P.C. and for that, has been sentenced to undergo R.I. for two and half years as well as to pay fine appertaining to Rs.4,000/- and in default thereof, to undergo S.I. for three months, additionally with a further direction to



run the sentences concurrently vide judgment of conviction and order of sentence dated 30.04.2015 passed by the 3rd Additional Sessions Judge, Nawada in Sessions Trial No.97 of 2004/ 266 of 2014.

2. Informant Raj Kishore Singh recorded his self-statement on 21.03.2001 at about 5.45 a.m. near village-Vasichak over Warsaliganj Dariapur Road disclosing therein that on the preceding night, they have proceeded on special drive to apprehend the absconding accused along with Officer-in-Charge Anil Kumar Gupta, A.S.I. Kumar Kalika Singh, Special Force Hawaldar Ram Narayan Yadav, Constables Satyendra Singh, Ram Bahadur Singh, Binay Kumar, Suryadeo Mahto over police jeep and during course of returning, today at about 5.00 p.m., they have seen one motorcycle being ridden by two persons coming through canal, whereupon they were signaled to stop. The driver of the motorcycle, seeing the police personnel turn around, but were chased and apprehended while the pillion rider managed to escape. On interrogation, apprehended person disclosed his identity as Arvind Kumar Singh and on search, having conducted in presence of seizure list witnesses Ramashish Singh and Shiv Kumar Pandey, one loaded pistol .315 bore along with a cartridge was recovered from his physical possession. Furthermore, he had also been directed to produce the relevant document relating to the motorcycle as well as arms, but failed to produce. On account



thereof, seizure list was prepared, self-statement was recorded and then, brought the accused along with seized arm, ammunitions and motorcycle to the police station where Warsaliganj P.S. Case No.36 of 2001 was registered, investigation was taken up and after completing the same, chargesheet was submitted, whereupon trial commenced and concluded by way of recording finding of guilt against appellant, subject matter of instant appeal.

3. Defence case, as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. However, neither ocular nor documentary evidence has been adduced in defence.

4. In order to substantiate its case, prosecution had examined altogether eight PWs, who are PW-1, Raj Kishore Singh, PW-2, Vinay Kumar Jha, PW-3, Surajdeo Mahto, PW-4, Kumar Kalika Singh, PW-5, Anil Kumar Gupta, PW-6, Ram Bahadur Singh, PW-7, Md. Jabbrullaha and PW-8, Vijay Bahadur Singh as well as had also exhibited as Exhibit-1, seizure list, Exhibit-2, report submitted by the I.O. (PW-5) to the Chief Judicial Magistrate relating to motorcycle, Exhibit-3, application filed by the I.O. before the Chief Judicial Magistrate for grant of permission, Exhibit-4, ballistic report. Side by side, had also exhibited material exhibit as Exhibit-I, countrymade pistol, Exhibit-II series, .315 bore cartridge. Nothing has



been adduced on behalf of defence as indicated hereinabove.

5. Learned counsel for the appellant has raised manifold argument in order to challenge the judgment of conviction and sentence. The first and foremost ground happens to be with regard to non-examination of both the seizure list witnesses namely Ramashish Singh as well as Shiv Kumar Pandey. It has been submitted that neither these witnesses have been produced in Court nor there happens to be any kind of explanation at the end of the prosecution with regard to their non-examination. Consequent thereupon, search and seizure is found suspicious one. Their non-examination happens to be vital in the background of the fact that whoever been examined, are of police officials and further, though during course of evidence, it has been kept duly wrapped, but at an initial stage, the informant (PW-1) had incorporated that so many cases have been pending against the accused/ appellant in his police station wherein he happens to be an absconder and that happens to be reason behind false implication of the appellant in this case after hatching the false story.

6. Then, it has been submitted that when the evidence of respective witnesses are being taken up for consideration on merit, it is apparent that during course of parallel scrutiny thereof, happen to be inconsistent on each and every aspect nullifying the allegation.

7. It has also been submitted that in *Sahib Singh vs.*



State of Punjab reported in A.I.R. 1997 SC 2417, State of M.P. vs. Ghudan reported in (2003) 12 SCC 485, Salim Akhtar @ Mota vs. State of U.P. reported in A.I.R. 2003 SC 4076, it has been held that when there happens to be failure at the part of the prosecution to seal the so alleged recovered arm and ammunition at the place of occurrence, then in that circumstance, not only the factum of recovery will be doubtful. The ballistic expert report relating thereto, would not be taken into consideration. It has also been submitted that the production of material exhibit before the Court will not improve the situation as during intervening period, the evidences might have been tampered. In the aforesaid background, it has been submitted that though pistol and two live cartridges have been made an exhibit by way of production during course of trial, but on account of presence of consistent evidence at the end of the prosecution that it was not sealed at the time of recovery and further, no special identification mark was put over by the raiding party including that of informant with suggesting paucity of the evidence to connect. Apart from this, it is also evident from Exhibit-3 that irrespective of alleged recovery on 21.03.2001, no step was taken at the end of the PW-5 (I.O.) during the intervening period and lastly, on 09.04.2001, a prayer was made before the C.J.M. There happens to be no evidence where those arm and ammunition were kept, because of the fact that no Malkhana



register has been made an exhibit to substantiate that so alleged seized arms and ammunitions were deposited in the Malkhana on 21.03.2001. Moreover, the ballistic report (Exhibit-4) happens to be dated 03.05.2001 and in likewise manner, material exhibit has been produced on 31.07.2013 through PW-8.

8. With regard to conviction and sentence relating to Section 414 of the I.P.C., it has been submitted that prosecution apart from suffering from malice and grudge, on account of non-examination of both the seizure list witnesses, appellant is entitled for benefit of doubt. So, the judgment of conviction and sentence recorded by the learned lower Court is fit to be set aside.

9. On the other hand, learned Additional Public Prosecutor while supporting the finding recorded by the learned lower Court has submitted that prosecution has proved its case beyond all reasonable doubt. Furthermore, it has also been submitted that non-examination of both the seizure list witnesses is not going to hamper the case of the prosecution in the background of the fact that copy of the seizure list has been tendered to the appellant at the spot itself and even during course of cross-examination of PW-1, the informant as well as PW-5, the I.O., its genuineness has not been challenged. That being so, factum of recovery has gone out of controversy and in the aforesaid background, the principles having laid down by the Hon'ble



Apex Court as referred on behalf of appellant is not at all applicable in the facts and circumstances of the case. Furthermore, it has also been submitted that there happens to be conclusive evidence by way of Exhibit-2, concerning the seized motorcycle to be subject matter of of loot relating to Barbigha P.S. Case No.30 of 2001 and from the record, it is evident that aforesaid motorcycle was released in favour of informant of Barbigha P.S. Case No.30 of 2001. So, the finding recorded by the learned lower Court on that very score also happens to be in accordance with law. Consequent thereupon, appeal sans merit and is fit to be dismissed.

10. Admittedly, both the seizure list witnesses have not been examined. No explanation has been offered at the end of the prosecution over non-examination of both the seizure list witnesses. It is further evident from the evidence of PW-1, Raj Kishore Singh at Para-4 of his cross-examination, he was suggested that the fake seizure list was prepared at the police station. However, the witness had volunteered that the seizure list was prepared at the spot. PW-4 is the police official, who had prepared the seizure list at the instance of PW-1 and during course of cross-examination at Para-4, he had stated that he had prepared seizure list at the instruction of the Officer-in-Charge. He is not remembering whether seized arm and ammunition were sealed or not. He denied the suggestion that no such type of



occurrence had ever taken place. Nothing was recovered from the possession of Arvind Kumar Singh. Then, he was suggested that accused was taken to Police Station where getting a pistol and cartridge, seizure list was prepared. PW-5 is the I.O., who during cross-examination at Para-4, had stated that he is not remembering whether seized arm and ammunition was sealed or not. Then had denied the suggestion that investigation happens to be perfunctory. Rest witnesses happens to be the police constable, being member of the raiding party, who also substantiated the factum of search-cum-seizure and on that very score, PW-2 at Para-3 had stated that Arvind Kumar Singh had not disclosed the identity of the person, who succeeded in his escape. Seizure list was prepared at the spot itself. Then had denied the suggestion that he had deposed falsely. PW-3 was suggested at Para-7 that nothing was recovered from the possession of the accused, but being a member of the raiding party had deposed falsely. PW-6 at Para-6 was suggested that no such type of occurrence had ever taken place, but he in order to help the prosecution, deposed falsely. PW-7 is the ballistic expert while PW-8 is formal in nature, who had produced the material exhibit.

11. From the evidence available on the record, it is evident that during course of giving suggestion to the respective witnesses, the appellant had denied the search-cum-seizure, more



particularly relating to recovery of loaded pistol along with a cartridge of .315 bore, but while suggesting PW-4, the accused had admitted that by procuring a pistol and cartridge, he has been implicated in this case. In the aforesaid background, one has to see that non-sealing of seized arm and ammunition has caused prejudice to the interest of the appellant and further, the ratio having laid down by the Hon'ble Apex Court in the above referred decisions would be found applicable.

12. Though, there happens to be admission at the end of the appellant by way of suggesting PW-4 that recovery has been planted at the end of the prosecution and by such activity, there happens to be admission by way of suggestion. However, in absence of any specific mark, non-sealing and further, from the activity as is evident from the record itself that for a recovery dated 21.03.2001, PW-5 had taken up step for obtaining order from the Chief Judicial Magistrate and for that, filed petition on 09.04.2001 and as per evidence of PW-7, he examined on 03.05.2001, is a circumstance, more particularly in absence of missing link that irrespective of admission by way of suggestion at the end of the appellant, the arms and ammunitions produced before the Court and being examined by PW-7 was the same arm and ammunition having been recovered by the PW-1 as well as PW-4. Furthermore, prosecution also failed to so connected by way of exhibiting Malkhana register.



13. Now, coming to other aspect that relates with recovery of Bajaj Boxer Motorcycle and for that, appellant has been found guilty for an offence punishable under Section 414 of the I.P.C. From the initial version of the prosecution, it is evident that appellant Arvind Kumar Singh along with a pillion rider while was on a move over a Boxer motorcycle seeing the police unsuccessfully attempted to escape, whereupon was apprehended though one of his accomplice managed to escape, search out followed with recovery of .315 bore loaded pistol, cartridge as well as Boxer motorcycle. No paper was shown thereto. Therefore, with regard to Boxer motorcycle, it has been presumed by the prosecution to be the stolen property. At that very moment, there happens to be evidence of PW-1 (Informant), PW-2, PW-3, PW-4 and PW-6. It is evident from their cross-examination that it is not at all happily performed. However, coming to the evidence of PW-5, I.O., he had deposed that after having been entrusted with the investigation of the case, which has been registered on account of recovery of loaded firearm, ammunition, stolen motorcycle, he had copied the seizure list in the case diary, visited the place of occurrence, which happens to be a road and then, specified the same with the boundary, recorded statement of the witnesses, received supervision note, got the arms and ammunitions examined after obtaining permission from the Chief Judicial Magistrate,



procured sanction order and then, submitted chargesheet. It has further been disclosed that he had submitted report before the Chief Judicial Magistrate relating to the seized motorcycle and which was prepared in carbon process and the same has been exhibited as Exhibit-2, on an order of Court. Furthermore, the requisition for getting the arms and ammunitions examined by the ballistic expert has been made as Exhibit-3. During cross-examination, it is evident that he was not at all cross-examined on the score of Exhibit-2.

14. It happens to be a settled principle of law, more particularly observed in *Gian Chand & others vs. State of Haryana reported in 2013(4) P.L.J.R. 7 (S.C.)*, that in order to test the veracity of the evidence of the witness, one has to cross-examine the witness on that very score. If there happens to be slackness at the end of the accused to cross-examine that witness on that particular point, then in that circumstance, it will be presumed that he has admitted the fact. So, the non-cross-examination of PW-5, I.O. with regard to Exhibit-2 is a circumstance which ought to have been as the same was produced before the Chief Judicial Magistrate in pursuance of order, which was passed on a prayer made by the informant of Barbigha P.S. Case No.30 of 2001, which was instituted on account of snatching of his motorcycle on 24.02.2000. The learned counsel for the appellant on this score has submitted that F.I.R. of the aforesaid case has not been



filed nor the informant of aforesaid case has been examined in this case. It has also been submitted that the aforesaid report could not be taken into consideration as the same happens to be the part and parcel of the investigation having no independent identity in the eye of law. The aforesaid activity was during course of investigation and is found legally entertainable in the background of Section 452 of the Cr.P.C. relating to release of the subject matter as the same was placed on the basis of collection of material in course of investigation. Furthermore, it is also evident that vide order dated 19.04.2001, the aforesaid motorcycle was released in favour of informant Bhimsen Prasad of Barbigha P.S. Case No.30 of 2001 wherein there happens to be reference of the report submitted by the I.O. on a requisition made by the Court. Even accepting that the aforesaid Exhibit-2 has got so independent identity relating to Section 452 of the Cr.P.C., but that was during course of investigation. Even excluding to that extent, there happens to be disclosure with regard to recovery of motorcycle being the subject matter of Barbigha P.S. Case No.30 of 2001 and that has been taken into consideration by the Court while releasing the vehicle vide order dated 19.04.2001 in favour of Bhimsen Prasad, informant of Barbigha P.S. Case No.30 of 2001. In the aforesaid facts and circumstances of the case, non-examination of independent seizure list witnesses is not going to axe upon the prosecution case.



Apart from the fact that it has not been controverted by the appellant.

15. Giving anxious consideration to the facts and circumstances of the case, it is found and held that the conviction recorded against the appellant for an offence punishable under Section 25(1-A)b of the Arms Act as well as Section 26(1) of the Arms Act would not survive, whereupon the same is set aside. However, finding recorded by the learned lower Court relating to Section 414 of the I.P.C. is found properly substantiated and that being so, the judgment of conviction and sentence to that extent is hereby affirmed. Appellant is on bail, hence his bail bond is hereby cancelled directing him to surrender before the learned lower Court within a fortnight to serve out the remaining part of sentence, failing which the learned lower Court will be at liberty to proceed against the appellant in accordance with law.

(Aditya Kumar Trivedi, J)

Vikash/-

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