

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.3282 of 2018

(Arising out of P. S. Case No. -34 Year- 2017 Thana -Chand District-
Kaimur at Bhabhua)

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Ritesh Singh son of Mahanand Singh, resident of village- Biuri, P.O. Goin, P.S.
Chand, District- Kaimur (Bhabua).

.... Appellant

Versus

The State of Bihar.

.... Respondent

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Appearance :

For the Appellant : Mr. Vikramdeo Singh, Advocate
Mr. Pawan Kumar Singh, Advocate
For the Respondent : Mr. Sujit Kumar Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 20-11-2018

Heard learned counsel for the appellant and learned
counsel for the State.

2. The appellant herein faced trial for offence covered by
Section 37(a) of the Bihar Prohibition and Excise Act, 2016 (for short
'the Excise Act, 2016') and Section 25(1-B)(a) and 26 of the Arms
Act in the Court of Special Judge (Excise)-cum-Additional Sessions
Judge-VI, Kaimur at Bhabhua in connection with Excise Case No.193
of 2017. On completion of trial, the trial court vide judgment dated
25.07.2018 convicted him for committing offences under Section
37(a) of the Excise Act, 2016 and Section 25(1)(a) of the Arms Act.
As a consequence, order of sentence was passed on 31.07.2018
whereby he has been inflicted with punishments of rigorous



imprisonment for a period of five years and a fine of rupees ten thousand under Section 37(a) of the Excise Act, 2016 and in default simple imprisonment for nine months and rigorous imprisonment for three years and a fine of rupees five thousand for the offence under Section 25(1-B)(a) of the Arms Act and in default simple imprisonment for three months. However, both the sentences were directed to run concurrently.

3. Being aggrieved by the aforestated judgment of conviction and order of sentence, the instant appeal has been filed by the appellant.

4. Heard learned counsel for the appellant and the State.

5. Before examining the issues raised, it would be apposite to take note of the prosecution case against the appellant.

6. One Rajeev Ranjan, S.H.O. of Chand police station recorded his self statement on 08.02.2017 at 06.45 p.m. stating therein that on 08.02.2017 while he was on patrolling duty and when he reached at village Biuri, he saw a black motorbike coming from river side and when the police tried to stop motor bike rider, he tried to flee away but was apprehended on chase. He disclosed his name as Ritesh Singh. Smell of alcohol was coming out from his mouth and on search in presence of two independent witnesses namely Jivnath Pal and Jitendra Kumar, one 9 mm automatic pistol made in Italy was



recovered from his full-pant. On enquiry, he could not give any satisfactory reply for possession of the automatic pistol. He also failed to produce any document in respect of the pistol recovered from his possession. He revealed that he had consumed liquor and taken possession of the pistol in question at Syed Raja, Uttar Pradesh. The motorbike on which he was traveling and the pistol were seized in presence of the witnesses and the witnesses put their signature over the seizure list. The seized pistol was sealed on the spot.

7. On the basis of aforesaid self statement Chand P.S. Case No. 34 of 2017 dated 08.02.2017 was registered under Sections 25(1-B)(a), 26 of the Arms Act and Section 37(a) of the Excise Act, 2016 .

8. After institution of First Information Report (for short 'FIR'), P.W. 6 Surya Bansh Kumar was handed over investigation of the case by the S.H.O. of the police station. On completion of investigation, charge sheet was submitted on 06.04.2017 against the appellant under Sections 25(1-B)(a), 26 of the Arms Act and Section 37(a) of the Excise Act, 2016.

9. After taking cognizance of the offences and consideration of the record of the case and the documents submitted therewith and after hearing the submission of the accused and the prosecution in this behalf, the trial court considered that there is



sufficient ground for proceeding against the accused and, thus, charges were framed against the appellant under sections 25(1-B)(a) and 26 of the Arms Act and Section 37(a) of the Excise Act, 2016. In course of trial, P.W.1, Rajiv Ranjan (Informant), P.W.2, A.S.I. Ram Kumar Singh (member of raiding party), P.W. 3, S.I. Surendra Kumar Singh (member of raiding party), P.W.4, Dr. Birendra Prasad, P.W.5, Bipin Narayan Sharma (Sergeant Major), P.W.6, Surya Bansh Kumar (investigating officer) and P.W.7, Rajesh Kumar Singh (A.S.I. of Police) were examined by the prosecution in order to prove the charges.

10. Apart from the oral evidence, the prosecution also proved fardbeyan (Ext.1), seizure list (Ext.2), medical report (Ext.3), inspection report of pistol by Sergeant Major (Ext.4) and attested copy of the sanction order issued by the District Magistrate, Kaimur (Ext.5). Besides the above documentary evidences, the prosecution has also produced the cloth in which the pistol was wrapped and sealed, which was marked as material Ext. No.1 and the seized automatic pistol, which was marked as material Ext. No.2.

11. After the prosecution evidence was closed, the appellant was examined under Section 313 of the Code of Criminal Procedure (for short 'Cr.P.C.') in which he pleaded his innocence.

12. The defence did not lead any oral or documentary



evidence in course of trial.

13. After closing the prosecution and defence evidence and hearing the arguments, the trial court convicted the appellant and sentenced him in the manner stated above.

14. Learned counsel appearing for the appellant submitted that the trial court has failed to correctly appreciate the evidences led before it. He contended that the witnesses examined in course of trial are not consistent. They did not corroborate the prosecution case as narrated in the F.I.R. He argued that only because smell of alcohol coming out from the mouth of the appellant was noticed by the investigating officer and the doctor, the appellant could not have been held guilty for the offence punishable under Section 37(a) of the Excise Act, 2016. He pleaded that the seizure list witnesses were not even cited as charge-sheet witnesses. They have been deliberately withheld by the prosecution. He contended that the sanction order of the District Magistrate in original was not brought on record and even the attested copy was not properly proved and, thus, the appellant could not have been held guilty for the offence punishable under Section 25(1-B)(a) of the Arms Act. He argued that the appellant was not confronted with the incriminating material brought against him in course of trial by the trial court while examining him under Section 313 of the Cr.P.C.



15. Per contra, learned counsel appearing for the State contended that the witnesses examined in course of trial on behalf of the prosecution are consistent and the trial court has rightly appreciated the evidence on record and convicted the appellant. He pleaded that the odour coming from the mouth of the appellant was rightly perceived by the S.H.O. The perception of the S.H.O. that the appellant was drunk was duly corroborated by P.W.4, Dr. Birendra Prasad, a qualified medical practitioner. As far as the conviction of the appellant under Section 25(1-B)(a) of the Arms Act is concerned, He contended that recovery of pistol from possession of the appellant has been duly proved by almost all the witnesses examined in course of trial. There is nothing on the basis of which their evidence can be disbelieved. He pleaded that merely because the seizure list witnesses were not cited as witness to the charge-sheet, the prosecution case cannot be doubted. As far as the sanction order is concerned, he pleaded that the same was proved by P.W. 7 Rajesh Kumar Singh, an Assistant Sub Inspector of Police. According to him, the conviction of the appellant under the Excise Act, 2016 and the Arms Act was recorded by the trial court on the basis of cogent evidence produced before it.

16. I have given thoughtful consideration to the submissions made by the learned counsel appearing for the parties and



carefully examined the record.

17. At this juncture, I would like to reproduce the provisions under which the appellant has been found guilty.

18. Section 37(a) of the Excise Act reads as under:

“Section 37. Penalty for consumption of liquor.-Whoever, in contravention of this Act or the rules, notification or order made there under-

(a) consumes liquor or intoxicant in any place; or

(b) xxx xxx xxx

(c) xxx xxx xxx

(d) xxx xxx xxx

(1) xxx xxx xxx

(2) xxx xxx xxx

Explanation-1.-“Consuming intoxicant” includes consumption of any medicine or any ingredients of a medicine or medicinal preparation that may have an intoxicant effect.

Explanation 2.- “drunkenness” includes drunkenness due to any medicine or medicinal preparation.

19. Section 25(1-B)(a) of the Arms Act reads as under:

“Section (1-B). whoever—

(a) acquires, has in his possession or carries any fire-arm or ammunition in contravention of section 3; or



- (b) xxx xxx xxx
- (c) xxx xxx xxx
- (d) xxx xxx xxx
- (e) xxx xxx xxx
- (f) xxx xxx xxx
- (g) xxx xxx xxx
- (h) xxx xxx xxx
- (i) xxx xxx xxx

Shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and shall also be liable to fine.

Provided that the Court may for any adequate and special reasons to be recorded in the judgment impose a sentence of imprisonment for a term of less than one year.”

20. It would also be apt to reproduce hereunder Section 39 of the Arms Act, which mandates for previous sanction of the District Magistrate.

“Section 39. Previous sanction of the district magistrate necessary in certain cases.- No prosecution shall be instituted against any person in respect of any offence under Section 3 without the previous sanction of the district magistrate.”



21. Coming back to the evidences laid before the court, I find that P.W. 2, Ram Kumar Singh, Assistant Sub Inspector of Police (a member of raiding party) stated in his cross examination that there was no breath analyzer available with him and further P.W. 5, Bipin Narayan Sharma, who issued medical report marked as Ext. 3, has stated in his cross examination that he could not examine the appellant with any scientific equipment nor he got his blood tested by any pathologist as there was no such facility available in the hospital nor he referred the appellant to Bhabhua Sadar Hospital where the facility of pathological examination test was available. In cross examination, he admitted that the smell of alcohol from mouth may come after consuming of homeopathic medicine.

22. Thus, from the evidence on record, it is crystal clear that the conviction of the appellant under Section 37(a) of the Excise Act, 2016, which required proof that the appellant had consumed liquor or intoxicant was based on smell of alcohol emanating from the mouth of the appellant. Except this, there was no proof that the appellant had consumed liquor or intoxicant. In my opinion, in absence of any scientific or pathological test report, it would be extremely unsafe to convict a person under Section 37(a) of the Excise Act, 2016 merely on perception of the investigating officer or the doctor that the accused was drunk as odour or smell of alcohol



was emanating from his mouth.

23. So far as conviction of the appellant under Section 25(1-B)(a) of the Arms Act is concerned, the witnesses examined on behalf of the prosecution have stated that when the search and seizure was made several other persons were present there. However, no independent witness has been examined on behalf of the prosecution in this case. It is also surprising that the two seizure list witnesses namely Jivnath Pal and Jitendra Kumar, in whose presence search was made, have not been cited as witness to the charge-sheet. Their withholdment by the prosecution without assigning any explanation creates suspicion about the recovery of pistol from possession of the appellant.

24. There is also vital contradiction between the statement of P.W. 1 and P.W.7. P.W.1, Rajiv Ranjan, the S.H.O.-cum-informant has specifically stated in his evidence that he had put his signature and mentioned the date after putting the seal over the seized pistol whereas P.W.7, Rajesh Kumar Singh, the Assistant Sub Inspector of Police, who had brought the pistol in the court has stated in his evidence that there was neither signature of the police officer nor signature of the seizure list witnesses on the sealed pistol.

25. Besides this, the case of the prosecution right from the beginning is that one 9 MM automatic pistol made in Italy was



recovered from possession of the appellant, but P.W.2, Ram Kumar Singh, stated in cross examination that the pistol recovered from the appellant was country made. The other witnesses examined during trial have also not stated that the pistol so recovered was made in Italy. P.W.5, Bipin Narayan Sharma, who examined the arm and submitted the test report, has categorically stated in his examination-in-chief that the pistol sent for test was country made. The material contradiction made in deposition of witnesses regarding the make of the arm recovered from the appellant and sent for test to an expert makes the prosecution case unreliable.

26. That apart, P.W.5, Bipin Narayan Sharma, the Sergeant Major, who had examined the pistol and given his report that the same was effective, has clearly stated that the pistol sent to him was a country-made pistol and not an automatic pistol made in Italy. His evidence creates serious doubt about the *bona fide* of the prosecution case in respect of seizure of arms from possession of the appellant.

27. Besides that, the sanction order of the District Magistrate in original was never produced on behalf of the prosecution. There is also no explanation as to what happened to the original sanction order. The sanction order, which has been proved by the investigating officer and marked as Ext.5 is an attested copy.



The investigating officer has admitted in his cross examination that he had not received the sanction order himself. He has also admitted that he does not know as to who obtained the sanction order of the District Magistrate.

28. As seen above, in view of the provisions prescribed under Section 39 of the Arms Act, a person cannot be prosecuted in respect of any offence under Section 3 of the Arms Act without the previous sanction of the District Magistrate. Section 3 of the Arms Act inter alia prescribes that no person shall acquire, possess or carry arms unless he holds licence.

29. Thus, for holding the appellant guilty under Section 25(1-B)(a) of the Arms Act for possessing an illegal arm, it was a pre-requisite that there should have been a valid sanction order.

30. Section 64 of the Indian Evidence Act, 1872 (for short 'the Act') provides that documents must be proved by primary evidence. It is true that where the document cannot be proved by primary evidence, secondary evidence to prove the same is permissible.

31. It would be apt to reproduce here Section 63 of the Act.

“63. Secondary evidence. - Secondary evidence means and includes-

(1) certified copies given under the



provisions hereinafter contained;

(2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

(3) copies made from or compared with the original;

(4) counterparts of documents as against the parties who did not execute them;

(5) oral accounts of the contents of a document given by some person who has himself seen.”

Illustrations

(a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.



(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original.

32. Section 65 of the Act enumerates the circumstances in which secondary evidence relating to documents may be given. It reads as under:

“Section 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) When the original is shown or appears to be in the possession or power -
of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;



(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(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; India to be given in evidence;

(g) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any



person who has examined them, and who is skilled in the examination of such documents.”

33. In the present case, the original sanction order was not produced for inspection of the court. The attested copy has not been proved by the authority, who has attested it. The correctness of the contents of the attested copy of the sanction order has also not been proved by investigating officer, who got the sanctioned order exhibited. The onus to prove the contents of the sanction order was on the prosecution. The prosecution has completely failed to prove that the original sanction order was out of reach or the same was lost or destroyed or was not easily movable. The attested copy of the sanction order has been marked as an exhibit without laying down foundational facts for producing secondary evidence. The prosecution has also failed to prove the genuineness or truthfulness of the contents of the attested copy of the sanction order. Thus, the sanction order, taken in evidence, itself is a suspicious document.

34. In view of such glaring deficiencies in the prosecution case, the impugned judgment of conviction by the trial court cannot be sustained. Accordingly, the judgment of conviction dated 25.07.2018 and the consequential order of sentence dated 31.07.2018 passed by the learned Special Judge (Excise)-cum-



Additional Sessions Judge-VI, Kaimur at Bhabhua in Excise Case No. 193 of 2017 is set side. The appellant is directed to be set at liberty in case he is not wanted in any other case.

35. The appeal stands allowed.

(Ashwani Kumar Singh, J.)

Md.S./-Sanjeev

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