

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.419 of 2019**

Arising Out of PS. Case No.-420 Year-2016 Thana- MUZAFFARPUR SADAR District-
Muzaffarpur

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Md. Sajid@ Lambu @ Sajid Lamboo, Son of Late Md. Chand, Resident of
Mohalla-Manjhaulia, Police Station - Muzaffarpur Sadar, District-
Muzaffarpur

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr. A. K. Thakur, Advocate. Mr. Nilesch Kumar, Advocate. Ms. Swati Sinha, Advocate.
For the Respondent/s	:	Mr. Malay Kumar Choudhary, Advocate. Mr. Bipin Kumar, APP.

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**CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA
JAISWAL**

ORAL JUDGMENT

Date : 21-08-2019

Heard learned counsel for the appellant and learned

APP for the State on this criminal appeal.

2. This criminal appeal has been preferred against the Judgment and Order of conviction dated 10.12.2018 and Order of sentence dated 13.12.2018 passed by 11th Addl. Sessions Judge, Muzaffarpur in Sessions Trial No. 17 of 2017 arising out of Muzaffarpur Sadar P.S. Case No. 420 of 2016 whereby the learned trial court convicted the appellant Md. Sajid @ Lambu for the offence punishable under Sections 25(1-B)A and 25(1-A) of the Arms Act and sentenced him to undergo imprisonment for three years under Section 25(1-B)A of the Arms Act and further



sentenced him to undergo imprisonment for five years under Section 25(1-A) of the Arms Act. However both the sentences were directed to run concurrently.

3. Factual matrix of the case is that Muzaffarpur Sadar P.S. Case No. 420 of 2016 was instituted under Sections 414, 401 and 120(B)/34 of the Indian Penal Code and Sections 25(1-B)A, 25(1-A), 25 (1-AA), 25(1-AAA), 26(2) and 27(2) of the Arms Act against the accused Md. Sajid @ Lambu, Md. Javed @ Chauwa, Nanhki and Md. Munna on the basis of the self-statement of Manju Singh S.I cum S.H.O. of P.S. Muzaffarpur Sadar recorded on 01.08.2016 at 08:30 PM near M. P. Science College, Majhauria with the allegation in succinct that on tip off about presence of arms peddler namely Md. Sajid @ Lambu along with 3-4 suspected persons behind the Science College, informant along with other police personnel arrived near Majhauria Science College at 8 PM. Seeing the police personnel miscreants started escaping but police anyhow managed to apprehend one of them while others managed to escape taking benefit of murk. On quizzing, the apprehended accused disclosed his identification as Md. Sajid @ Lambu and also disclosed the name of his fleeing accomplices in the occurrence as Md. Javed @ Chauwa, Nanhki and Md. Munna.



On search of the person of the apprehended accused, she recovered one loaded pistol from the left side of his full pant, four live cartridges in the magazine and a mobile phone. She seized the aforesaid articles in presence of the independent witnesses and prepared seizure list.

4. Aforesaid case was investigated by the police and on conclusion of the investigation, I.O. submitted charge-sheet against the accused Md. Sajid @ Lambu under Sections 414, 401 and 120(B)/34 of the Indian Penal Code and Sections 25(1-B)A, 25(1-A), 25 (1-AA), 25(1-AAA), 26(2) and 27(2) of the Arms Act.

5. On receiving the chargesheet and the case diary and perusing the same, the learned Magistrate took cognizance of the offence and committed the case to the court of sessions and after commitment and on transfer finally the case came in the seisin of 11th Addl. Sessions Judge, Muzaffarpur for trial.

6. Charge against the accused was framed under Sections 25(1-B)A, 25(1-A), 25 (1-AA), 25(1-AAA), 26(2) and 27(2) of the Arms Act and Sections 414, 401 and 120(B)/34 of the Indian Penal Code. Charges were read over and explained to him by the Court to which he pleaded not guilty and claimed to be tried.



7. To substantiate its case, in ocular evidence, the prosecution has examined altogether seven prosecution witnesses namely, informant Manju Singh, S.H.O of P.S. Muzaffarpur Sadar as PW-1, S.I. Pramod Kumar Singh as PW-2, S.I. Rajesh Kumar as PW-3, S.I. Dhananjay Sharma, I.O. of the case as PW-4, Driver of the Police Jeep namely Chandan Kumar as PW-5, Sergeant Major Ramakant Prasad as PW-6 and Manoj Kumar as PW-7. Out of the aforesaid witnesses, PW-7 happens to be formal witness who has proved the sanction letter marked as Exhibit-6. Prosecution has also filed and proved some documents by way of documentary evidence in the case and proved seized arms and ammunition and mobile phone as material exhibits.

8. Statement of the accused was recorded under Section 313 of the Code of Criminal procedure. The case of the defence is complete denial of the occurrence claiming himself to be quite innocent. Defence has neither adduced any ocular nor documentary evidence in buttress of its case.

9. After hearing the parties and perusing the record, the learned trial court passed the aforesaid Judgment and Order of conviction and sentence as detailed in the earlier paragraph.

10. Being aggrieved and dissatisfied with the aforesaid



Judgment and Order of conviction and sentence, convict Md. Sajid @ Lambu has preferred this Criminal Appeal.

11. The point for consideration in this case is, as to whether the prosecution has been able to bring home the charges levelled against the appellant beyond all reasonable doubts or not.

12. It is submitted by learned counsel for the appellant that only pistol and live cartridges were allegedly recovered from the possession of the appellant and not any prohibited arms and ammunition. Hence the appellant ought not have been convicted under Section 25(1-A) of the Arms Act which is applicable only in the case of recovery of prohibited arms and ammunition. It is further submitted that seized pistol and cartridges were not sealed by the I.O. at the time of its seizure. Hence possibility of tampering with the aforesaid seized article cannot be ruled out. It is further submitted that there is quite differences and contradiction between the description of the arms seized by the police and examined by ballistic expert i.e. sergeant major as adumbrated in the ballistic examination report which creates serious doubt about the seizure of the aforesaid alleged pistol from the possession of the appellant. It is further submitted that seizure list witnesses have not been examined by



the prosecution. They have even not been made chargesheet witness. Non-examination of the seizure list witnesses creates serious doubt about the prosecution case. It is further submitted that it is not established by the prosecution as to whether alleged pistol and live cartridges were kept in safe custody after its seizure and preceding to sending for its ballistic examination which also creates serious doubt about the prosecution case. Hence in view of the aforesaid insurmountable infirmities, prosecution has utterly and miserably failed to prove the charges levelled against the appellant beyond all reasonable doubts. Hence, aforesaid judgment and order of conviction and sentence passed against the appellant is liable to be set aside and the appellant is entitled to be acquitted.

13. Per contra, learned APP for the State advocating the correctness and validity of the impugned Judgment and Order of conviction and sentence submitted that prosecution has succeeded to establish search, recovery and seizure of the pistol and live cartridges from the possession of the appellant which was found to be in working condition on its ballistic examination by sergeant major and learned trial court correctly appreciating the facts and evidence available on record has rightly passed the impugned Judgment and Order of conviction



and sentence which is liable to be upheld and this criminal appeal is devoid of merit and is liable to be dismissed.

14. From perusal of the record, it appears that to substantiate its case, in ocular evidence prosecution has examined altogether seven prosecution witnesses in the case. Out of them, PW-1 Manju Singh, S.H.O. of P.S. Muzaffarpur Sadar happens to be the informant, PW-2 S.I. Pramod Kumar Singh & PW-3 S.I. Rajesh Kumar happen to be member of the raiding party, PW-4 S.I. Dhananjay Sharma is I.O. of the case, PW-5 Chandan Kumar driver of the police vehicle, PW-6 Ramakant Prasad happens to be sergeant major who has examined seized pistol and cartridges and PW-7 Manoj Kumar is an advocate clerk who happens to be formal witness as he has proved only the sanction letter of the DM marked as Exhibit-6.

15. From perusal of the testimony of PW-5 Chandan Kumar driver of the police vehicle, it appears that he has stated in Para-2 & 3 of his cross-examination that at the time of raid he was present on his jeep. He did not take part in giving chase to the accused. None was apprehended before him rather accused was brought before him after apprehension. From perusal of the aforesaid testimony of PW-5, it appears that he has not supported the search, recovery and seizure of the pistol and



cartridges from the possession of the appellant as at the time of occurrence he was sitting in his jeep and did not take part in aforesaid process of arrest, search and seizure. Though PW-1, PW-2 and PW-3 who happens to be member of the raiding party have unanimously stated about arrest of the appellant, recovery of the pistol and four live cartridges from his possession, seizure of the same before the witnesses namely Md. Bablu and Tinku Kumar and preparation of the seizure list before the said witnesses, but from perusal of the testimony of the aforesaid witnesses and self statement of the informant, it appears that seized pistol and cartridges were not sealed at the place of occurrence after its seizure as their statement is reticent about aforesaid aspect of the case and aforesaid witnesses have not even whispered about sealing of the seized pistol and cartridges by the police personnel at the place of occurrence at the time of seizure. Moreover PW-2 who happens to be member of the raiding part in Para-3 of his cross-examination has candidly denied the sealing of the seized articles at the place of occurrence. Aforesaid aspect of the case and account of the witnesses eloquently indicates that the pistol and cartridges allegedly seized from the possession of the appellant were not sealed by the informant or any police personnel at the place of



occurrence at the time of its seizure. Non-sealing of the pistol and cartridges at the spot, in my considered opinion, is a serious infirmity, as the possibility of tampering with the aforesaid pistol and cartridges cannot be ruled out due to not sealing the same at the time of its seizure. Hon'ble Apex Court in **Amarjit Singh @ Babbu Vs. State of Punjab** reported in **1995 Supp (3) SCC 217** has been pleased to rule that non-sealing of the revolver on the spot was a serious infirmity as the possibility of tampering with the weapon cannot be ruled out.

16. From perusal of the seizure list marked as exhibit-1, it appears that the loaded pistol having barrel of the length of 16.5 cm, butt of the length of 10.5 cm and body of the length of 21 cm was seized from the possession of the appellant, but from perusal of the report of the Sergeant Major marked as Exhibit-5, it appears that pistol sent for its ballistic examination and examined by Sergeant Major was having barrel of the length of 11.1 cm, slide of the length of 16.4 cm, Grip of the length of 10.6 cm and carnic length of 21.7 cm. On addition of the length of barrel, slide and Grip, it comes to 38.1 cm. Thus there appears to be vast differences and contradiction between the description of the size of the alleged seized pistol from the possession of the appellant and the pistol sent for its ballistic



examination and examined by the sergeant major. Aforesaid aspect of the case eloquently indicates that the seized pistol was not sent for its ballistic examination and was not examined by the sergeant major and was not found in working condition.

17. From perusal of the self statement of the informant, seizure list and account of the witnesses, it appears that aforesaid pistol and cartridges were seized in presence of the witnesses namely Md. Bablu and Tinku Kumar. From perusal of the seizure list it appears that aforesaid Md. Bablu is resident of Village -Maripur PWD, P.S.-Kajimohammadpur and Tinku Kumar is resident of Village – Gobarsahi Dumri, P.S.-Muzaffarpur Sadar, but the place of occurrence is village Majhauliya meaning thereby that the aforesaid witnesses are not local witnesses. Hence the aforesaid search and seizure appears to have been made in utter violation of procedure of the search and seizure as enshrined in Section 100 Cr.P.C. As as per the Section 100 Cr.P.C. before making a search, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may



issue an order in writing to them or any of them to do so. From perusal of the self statement of the informant and account of the witnesses it appears that no effort by the informant or other police personnel was made to ask any of the inhabitant of the locality to be witness of the said search and seizure and it is also not the prosecution case that no such inhabitant of the said locality was available or was willing to be witness of the search despite their request. Moreover aforesaid independent witnesses have neither been made as chargesheet witnesses nor have been examined by the prosecution. Prosecution has not even taken any pain to summon the aforesaid witnesses though their name, address and description are available on the record. In view of the aforesaid facts and circumstances of the case, I find and hold that the prosecution has utterly and miserably failed to prove the search, seizure and sealing of the alleged pistol and cartridges, said to have been recovered from the possession of the appellant.

18. Though PW-1 Manju Singh has stated in Para-12 of his cross-examination that after seizure of articles it was kept in the Malkhana of the P.S. and on the following day it was produced before the Court of CJM, thereafter with the permission of the Court it was got examined by the sergeant major and thereafter it was kept in the Malkhana. But PW-4



Dhananjay Sharma who happens to be I.O. of the case has stated in Para-1 of his cross-examination that on the material exhibit, Malkhana number was not mentioned and he has not taken any receipt of its deposit in the Malkhana. From perusal of the report of the Sergeant Major, it appears that the aforesaid pistol and cartridges which were allegedly seized from the possession of the appellant on 01.08.2016 were sent to him for its ballistic examination on 05.08.2016, but neither any Malkhana register has been brought before the Court nor the Malkhana incharge has been examined by the prosecution to establish as to whether seized pistol and cartridges were kept in the Malkhana after making its due entry in the register before sending it for its ballistic examination which indicates that seized pistol and cartridges were not kept in the safe custody after its seizure and preceding to sending for its ballistic examination. Aforesaid aspect of the case creates serious doubt as to whether same pistol and cartridges allegedly seized from the possession of the appellant was sent to the sergeant major for its examination and the same was examined by him and found to be in working condition and live.

19. I.O. PW-4 Dhananjay Sharma in Para-1 of his cross-examination has stated that he has not mentioned in the



case diary as to whether mark of identification was put on the material exhibit and the same was mentioned on the paper pasted on the same at the time of its receiving by him. He has further stated that nothing was written on it before pasting paper on it by him. He has further stated that when he received the Arms at the time of investigation of the case, he pasted paper on it and mentioned P.S. case number and sealed the same under his signature. Aforesaid statement of the I.O. candidly indicates that no mark of identification was mentioned on the seized articles at the time of receiving the same by him for investigation of the case. Moreover no P.S. case number etc. was mentioned on the paper pasted on the same rather he had mentioned P.S. case number after pasting paper on it and sealed the same. There is no evidence on record about handing over of the seized pistol and cartridges after its seizure to the I.O. directly which creates serious doubt as to whether that very pistol and cartridges allegedly seized from the possession of the appellant were handed over to the I.O. and the same was marked and P.S. case number was mentioned on it by pasting paper by I.O., then sent for its ballistic examination and same was found to be in working condition and live after its examination.

20. PW-3 A.S.I. Rajesh Kumar has stated in Para-2 of



his cross-examination that the magazine which was recovered from the possession of the appellant was not containing any cartridge. Aforesaid evidence of PW-3 goes to rule out recovery of the cartridges from the magazine as per the prosecution case and account of the informant.

21. From perusal of the record, it appears that only pistol and four cartridges were allegedly seized from the possession of the appellant and no any prohibited arms and ammunition was seized from his possession. As no prohibited Arms and Ammunition has been seized from the possession of the appellant, no offence under Section 25(1-A) is made out against him and appellant cannot be convicted under aforesaid Section.

22. In the facts and circumstances of the case, I find and hold that the prosecution case is suffering from insurmountable infirmity and prosecution has utterly and miserably failed to substantiate the prosecution case and bring home the charges levelled against the appellant beyond all reasonable doubts by adducing convincing, cogent and reliable evidence. Hence, the impugned judgment and order of conviction and sentence passed by the learned trial court against the appellant is set aside and the appellant is acquitted of the



charges levelled against him giving him benefit of doubt. As the appellant is in custody, he is directed to be released forthwith from the jail custody if not wanted in any other case.

23. Accordingly, this criminal appeal is allowed.

(Prakash Chandra Jaiswal, J)

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AFR/NAFR	A.F.R.
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